GRAND HYATT TAMPA BAY
Tampa, Florida
Saturday, February 1, 2020
9:45 am

BRING THIS AGENDA TO THE MEETING

NOTE: The Agenda will be posted to the meeting APP.
Real Property, Probate and Trust Law Section  
Executive Council Meeting  
Grand Hyatt Tampa Bay  
Tampa, Florida  
Saturday, February 1, 2020

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**Agenda**

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

I. **Presiding** — Robert S. Freedman, Chair

II. **Attendance** — Steven H. Mezer, Secretary

   1. Attendance roster for Bar year to date. p. 9

III. **Minutes of Previous Meeting** — Steven H. Mezer, Secretary

   1. Motion to approve the minutes of the November 9, 2019, meeting of the Executive Council held at the JW Marriott Marquis, Miami, Florida. p. 24

IV. **Chair's Report** — Robert S. Freedman, Chair

   1. Recognition of Guests.

   2. Introduction and comments from sponsors of Executive Council meeting. p. 38

   3. Milestones.

   4. Report of Interim Actions by the Executive Committee. p. 41

      a. December 31, 2019: Approval of candidates for Florida Bar Leadership Academy

      b. January 6, 2020: Approval of a letter to Daniel E. Norby, Chair of the Florida Supreme Court Judicial Nominating Commission, regarding Supreme Court nominations, emphasizing the importance of a Judge having knowledge of both real property law and probate, trust and estate law issues. p. 42

      c. January 9, 2020: Approval of a legislative position regarding revisions to Section 736.08145, Florida Statutes, to grant a trustee discretionary authority to reimburse the deemed owner of a grantor trust for income taxes attributable to the deemed owner. p. 44

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5. 2019-2020 Executive Council meetings. p. 54
6. Tampa and Amsterdam updates.

V. **Liaison with Board of Governors Report** — Michael G. Tanner

VI. **Chair-Elect’s Report** — William T. Hennessey, III, Chair-Elect
1. 2020-2021 Executive Council meetings. p. 55

VII. **Treasurer's Report** — Wm. Cary Wright, Treasurer
1. Statement of Current Financial Conditions. p. 56

VIII. **Director of At-Large Members Report** — Lawrence Jay Miller, Director

IX. **CLE Seminar Coordination Report** — Wilhelmina F. Kightlinger (Real Property) and John C. Moran (Probate & Trust), Co-Chairs
1. Report on pending CLE programs and opportunities. p. 57

X. **Legislation Committee** – S. Katherine Frazier and Jon Scuderi, Co-Chairs
1. Update on legislative issues, including new Florida Bar Legislative Position Request Form. p. 58
2. Discussion regarding procedures and requirements of the RPPTL Section Strategic Plan. p. 61
2. Discussion on Senate Bill 1428. p. 67

XI. **General Standing Division Report** — William T. Hennessey, III, General Standing Division Director and Chair-Elect

Information Items:
1. **Professionalism and Ethics** - Gwynne A. Young, Chair
   a. Ethics Vignette - The Underlying Work Conflict? p. 69
2. **Fellows** - Benjamin Frank Diamond and Christopher A. Sajderia, Co-Chairs
   a. Motion to adopt the proposed mission statement and scholarship selection criteria for the Fellows Program. p. 71
3. **Ad Hoc Remote Notarization** – E. Burt Bruton, Chair
a. Report of items of interest pertaining to changes in notarization statutes. p. 72

4. **Ad Hoc Florida Bar Leadership Academy** - Kristopher E. Fernandez and Allison Archbold, Co-Chairs

5. **Liaison with Clerks of the Court** – Laird A. Lile
   a. Update on matters of interest.

6. **Law School Mentoring & Programming** – Lynwood F. Arnold, Jr., Chair
   a. Report on committee activities.

7. **Information and Technology** – Neil Barry Shoter, Chair
   a. Report on committee activities.

8. **Membership and Inclusion** - Annabella Barboza and Brenda Ezell, Co-Chairs
   a. Report on committee activities.

9. **Liaison With Business Law Section**- Manuel Farach and Gwynne Young
   a. Report on items of potential interest.

XII. **Probate and Trust Law Division Report** — Sarah Butters, Division Director

**Information Items:**

1. **Probate and Trust Litigation Committee** - John Richard Caskey, Chair
   a. Consideration of proposed changes to Florida Statutes § 736.1008 so that the same statute of limitations for breach of trust against a trustee applies to directors, officers, and employees acting for the trustee. p. 80

2. **Ad Hoc Guardianship Law Revision Committee** - Nicklaus J. Curley and Sancha Brennan Whynot, Co-Chairs
   a. Update on current version of potential changes to the Guardianship Code. p. 89
XIII. **Real Property Law Division Report** — Robert S. Swaine, Division Director

**Action Items:**

1. **Real Property Finance and Lending Committee** — Richard S. McIver, Chair
   
   a. Motion to approve First Supplement to the Report on Third Party Legal Opinion Customary Practice in Florida.  pp. 132

2. **Residential Real Estate and Industry Liaison** — Nicole M. Villarroel and Salome J. Zikakis, Co-Chairs
   
   b. Motion to approve rider to FR/Bar contract that includes the statutorily required notice that must be included in a contract for the sale of real property that has a PACE assessment.  pp. 186

XIV. **Probate and Trust Law Division Committee Reports** — Sarah Butters, Division Director

1. **Ad Hoc Guardianship Law Revision Committee** — Nicklaus J. Curley, and Sancha Brennan Whynot, Co-Chairs; David C. Brennan and Stacey B. Rubel, Co-Vice Chairs

2. **Ad Hoc Committee on Electronic Wills** — Angela McClendon Adams, Chair; Frederick “Ricky” Hearn and Jenna G. Rubin, Co-Vice Chairs

3. **Ad Hoc Study Committee on Professional Fiduciary Licensing** — Angela McClendon Adams, Chair; Yoshimi Smith, Vice Chair

4. **Ad Hoc Study Committee on Estate Planning Conflict of Interest** — William T. Hennessey, Ill, Chair; Paul Edward Roman, Vice-Chair

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

6. **Asset Protection** — Brian M. Malec, Chair; Richard R. Gans and Michael A. Sneeringer, Co-Vice-Chairs

7. **Attorney/Trust Officer Liaison Conference** — Tattiana Patricia Brenes-Stahl and Cady Huss, Co-Chairs; Tae Kelley Bronner, Stacey L. Cole (Corporate Fiduciary), Patrick C. Emans, Gail G. Fagan and Mitchell A. Hipsman, Co-Vice Chairs

8. **Charitable Planning and Exempt Organizations Committee** — Seth Kaplan, Chair and Jason Havens, Vice-Chair

9. **Elective Share Review Committee** — Lauren Young Detzel, Chair; Cristina Papanikos and Jenna G. Rubin, Co-Vice-Chairs

10. **Estate and Trust Tax Planning** — Robert L. Lancaster, Chair; Richard Sherrill and Yoshimi O. Smith, Co-Vice Chairs
11. **Guardianship, Power of Attorney and Advanced Directives** — Nicklaus Joseph Curley, Chair; Brandon D. Bellew, Stacey Beth Rubel, and Jamie Schwinghammer, Co-Vice Chairs

12. **IRA, Insurance and Employee Benefits** — L. Howard Payne and Alfred J. Stashis, Co-Chairs; Charles W. Callahan, III, Vice Chair

13. **Liaisons with ACTEC** — Elaine M. Bucher, Shane Kelley, Charles I. Nash, Tasha K. Pepper-Dickinson, and Diana S.C. Zeydel

14. **Liaisons with Elder Law Section** — Travis Finchum and Marjorie Ellen Wolasky

15. **Liaisons with Tax Section** — Lauren Young Detzel, William R. Lane, Jr., and Brian C. Sparks

16. **Principal and Income** — Edward F. Koren and Pamela O. Price, Co-Chairs; Joloyon D. Acosta and Keith Braun, Co-Vice Chairs

17. **Probate and Trust Litigation** — John Richard Caskey, Chair; Angela McClendon Adams, James R. George and R. Lee McElroy, IV, Co-Vice Chairs

18. **Probate Law and Procedure** — M. Travis Hayes, Chair; Amy B. Beller, Jeffrey S. Goethe, Christina Papanikos and Theodore S. Kypreos, Co-Vice Chairs

19. **Trust Law** — Matthew H. Triggs, Chair; Tami Foley Conetta, Jack A. Falk, Jenna G. Rubin, and Mary E. Karr, Co-Vice Chairs

20. **Wills, Trusts and Estates Certification Review Course** — Jeffrey S. Goethe, Chair; J. Allison Archbold, Rachel A. Lunsford, and Jerome L. Wolf, Co-Vice Chairs

**XV. Real Property Law Division Committee Reports** — Robert S. Swaine, Division Director

1. **Attorney-Loan Officer Conference** — Robert G. Stern, Chair; Kristopher E. Fernandez, Wilhelmina F. Kightlinger, and Ashley McRae, Co-Vice Chairs

2. **Commercial Real Estate** — Jennifer J. Bloodworth, Chair; E. Burt Bruton, E. Ashley McRae, R. James Robbins, Jr. and Martin A. Schwartz, Co-Vice Chairs

3. **Condominium and Planned Development** — William P. Sklar and Joseph E. Adams, Co-Chairs; Alexander B. Dobrev, Vice Chair

4. **Condominium and Planned Development Law Certification Review Course** — Sandra Krumbein, Chair; Jane L. Cornett and Christene M. Ertl, Co-Vice Chairs

5. **Construction Law** — Reese J. Henderson, Jr., Chair; Sanjay Kurian, Vice Chair

6. **Construction Law Certification Review Course** — Melinda S. Gentile and Elizabeth B. Ferguson Co-Chairs; Gregg E. Hutt and Scott P. Pence, Co-Vice Chairs

7. **Construction Law Institute** — Jason J. Quintero, Chair; Deborah B. Mastin and Brad R. Weiss, Co-Vice Chairs
8. **Development & Land Use Planning** – Julia L. Jennison, Chair; Jin Liu and Colleen C. Sachs, Co-Vice Chairs

9. **Insurance & Surety** – Michael G. Meyer, Chair; Katherine L. Heckert and Mariela M. Malfeld, Co-Vice Chairs

10. **Liaisons with FLTA** – Alan K. McCall and Melissa Jay Murphy, Co-Chairs; Alan B. Fields and James C. Russick, Co-Vice Chairs

11. **Real Estate Certification Review Course** – Manuel Farach, Chair; Lynwood F. Arnold, Jr., Martin S. Awerbach, Lloyd Granet and Brian W. Hoffman, Co-Vice Chairs

12. **Real Estate Leasing** – Brenda B. Ezell, Chair; Richard D. Eckhard and Christopher A. Sajdera, Co-Vice Chairs

13. **Real Property Finance & Lending** – Richard S. McIver, Chair; Deborah Boyd and Jason M. Ellison, Co-Vice Chair

14. **Real Property Litigation** – Michael V. Hargett, Chair; Amber E. Ashton, Manuel Farach and Christopher W. Smart, Co-Vice Chairs

15. **Real Property Problems Study** – Lee A. Weintraub, Chair; Stacy O. Kalmanson, Susan K. Spurgeon and Adele Ilene Stone, Co-Vice Chairs

16. **Residential Real Estate and Industry Liaison** – Nicole M. Villarroel and Salome J. Zikakis, Co-Chairs; Raul Ballaga, Louis E. “Trey” Goldman, and James A. Marx, Co-Vice Chairs

17. **Title Insurance and Title Insurance Liaison** – Brian W. Hoffman, Chair; Mark A. Brown, Alan B. Fields, Leonard Prescott and Cynthia A. Riddell, Co-Vice Chairs

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

XVI. **General Standing Division Committee Reports** — William T. Hennessey, III, General Standing Division Director and Chair-Elect

1. **Ad Hoc Florida Bar Leadership Academy** — Kristopher E. Fernandez and J. Allison Archbold, Co-Chairs; Bridget Friedman, Vice Chair

2. **Ad Hoc Remote Notarization** – E. Burt Bruton, Jr., Chair

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

4. **Budget** — Wm. Cary Wright, Chair; Tae Kelley Bronner. Linda S. Griffin, and Pamela O. Price, Co-Vice Chairs

5. **CLE Seminar Coordination** — Wilhelmina F. Kightlinger and John C. Moran, Co-Chairs; Alexander H. Hamrick, Hardy L. Roberts, III, Paul E. Roman (Ethics), Silvia B. Rojas, and Yoshimi O. Smith, Co-Vice Chairs

6. **Convention Coordination** — Sancha Brennan, Chair; Bridget Friedman, Nishad Khan and Alexander H. Hamrick, Co-Vice Chairs

7. **Disaster and Emergency Preparedness and Response** – Brian C. Sparks, Chair; Jerry E. Aron, Benjamin Frank Diamond and Colleen Coffield Sachs, Co-Vice Chairs

8. **Fellows** — Benjamin Frank Diamond and Christopher A. Sajdera, Co-Chairs; Joshua Rosenberg and Angel Santos, Co-Vice Chairs
9. **Florida Electronic Filing & Service** — Rohan Kelley, Chair
10. **Homestead Issues Study** — Jeffrey S. Goethe (Probate & Trust) and J. Michael Swaine (Real Property), Co-Chairs; Michael J. Gelfand, Melissa Murphy and Charles Nash, Co-Vice Chairs
11. **Information Technology & Communication** — Neil Barry Shoter, Chair; Erin H. Christy, Alexander B. Dobrev, Jesse B. Friedman, Keith S. Kromash, Patrick F. Mize, Hardy L. Roberts, III, and Michael A. Sneeringer, Co-Vice Chairs
12. **Law School Mentoring & Programming** — Lynwood F. Arnold, Jr., Chair; Phillip A. Baumann, Guy Storms Emerich, Elizabeth Hughes and Kymberlee Curry Smith, Co-Vice Chairs
13. **Legislation** — Jon Scuderi (Probate & Trust) and S. Katherine Frazier (Real Property), Co-Chairs; Theodore S. Kypreos and Robert Lee McElroy, IV (Probate & Trust), Manuel Farach and Arthur J. Menor (Real Property), Co-Vice Chairs
15. **Legislative Update (2020-2021)** — Thomas M. Karr, Chair; Brenda Ezell, Theodore Stanley Kypreos, Gutman Skrande, Jennifer S. Tobin, Kit van Pelt and Salome J. Zikakis, Co-Vice Chairs
16. **Liaison with:**
   a. **American Bar Association (ABA)** — Robert S. Freedman, Edward F. Koren and Julius J. Zschau
   b. **Clerks of Circuit Court** — Laird A. Lile
   c. **FLEA / FLSSI** — David C. Brennan and Roland D. “Chip” Waller
   d. **Florida Bankers Association** — Mark T. Middlebrook
   e. **Judiciary** — Judge Catherine Catlan, Judge Jaimie Goodman, Judge Mary Hatcher, Judge Hugh D. Hayes, Judge Margaret Hudson, Judge Celeste Hardee Muir, Judge Bryan Rendzio, Judge Janet C. Thorpe and Judge Jessica Jacqueline Ticktin
   f. **Out of State Members** — Nicole Klbert Basler, John E. Fitzgerald, Jr., and Michael P. Stafford
   g. **TFB Board of Governors** — Michael G. Tanner
   h. **TFB Business Law Section** — Gwynne A. Young and Manuel Farach
   i. **TFB CLE Committee** — John C. Moran (alt: Wilhelmina F. Kightlinger)
   j. **TFB Council of Sections** — Robert S. Freedman and William T. Hennessey, III
   k. **TFB Diversity & Inclusion** — Erin H. Christy
   l. **TFB Pro Bono Committee** — Melisa Van Sickle
17. **Long-Range Planning** — William T. Hennessey, III, Chair
18. **Meetings Planning** — George J. Meyer, Chair
19. **Membership and Inclusion** — Annabella Barboza and Brenda Ezell, Co-Chairs; S. Dresden Brunner, Vinette Dawn Godelia, and Roger A. Larson, Co-Vice Chairs
20. **Model and Uniform Acts** — Bruce M. Stone and Richard W. Taylor, Co-Chairs; Patrick J. Duffey and Adele Irene Stone, Co-Vice Chairs

21. **Professionalism and Ethics** — Gwynne A. Young, Chair; Alexander B. Dobrev, Andrew B. Sasso, Hon. Mark Alan Speiser and Laura Sundberg, Co-Vice Chairs

22. **Publications (ActionLine)** — Jeffrey Alan Baskies and Michael A. Bedke, Co-Chairs (Editors in Chief); Richard D. Eckhard, Jason M. Ellison, George D. Karibianian, Sean M. Lebowitz, Daniel L. McDermott, Jeanette Moffa and Paul E. Roman, Co-Vice Chairs

23. **Publications (Florida Bar Journal)** — Jeffrey S. Goethe (Probate & Trust) and Douglas G. Christy (Real Property), Co-Chairs; J. Allison Archbold (Editorial Board — Probate & Trust), Homer Duvall, III (Editorial Board — Real Property), Marty J. Solomon (Editorial Board — Real Property), and Brian Sparks (Editorial Board — Probate & Trust), Co-Vice Chairs

24. **Sponsor Coordination** — J. Eric Virgil, Chair; Patrick C. Emans, Marsha G. Madorsky, Jason J. Quintero, J. Michael Swaine, and Arlene C. Udick, Co-Vice Chairs

25. **Strategic Planning** — Robert S. Freedman and William T. Hennessey, III, Co-Chairs

26. **Strategic Planning Implementation** — Michael J. Gelfand, Chair; Michael A. Dribin, Deborah Packer Goodall, Andrew M. O’Malley and Margaret A. “Peggy” Rolando, Co-Vice Chairs

**XVII. Adjourn:** Motion to Adjourn.
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<td>Ciselle Leonardo – Nov. 7th &amp; 8th</td>
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I. **Presiding** — Robert S. Freedman, Chair

9:45 A.M. The Meeting was called to order by Robert S. Freedman.

II. **Attendance** — Steven H. Mezer, Secretary

The light blue attendance sheet was passed by Mr. Mezer.

Approval of resolution to honor Past Chair Lewis Kanner on his passing. The resolution was read by Mr. Mezer and unanimously approved by the Members. A plaque was presented to Mr. Kanner’s daughter, Ellen Kanner. Ms. Kanner thanked The Section.

III. **Minutes of Previous Meeting** — Steven H. Mezer, Secretary

Mr. Mezer presented the Minutes of the July 27, 2019 meeting of Executive Council held at The Breakers, Palm Beach, Florida. A motion to waive the reading of the minutes and to approve the minutes was made, seconded and passed unanimously.

IV. **Chair’s Report** — Robert S. Freedman, Chair

1. **Recognition of Guests:** Brandon Moser Relationship manager for The Fund and Chase Early of The Florida Bar and special recognition of Section Administrator, Mary Ann Obos

2. **Introduction and comments from sponsors of Executive Council meeting.**

Mr. Freedman recognized the Section Sponsors:

General Section Sponsor: The Fund

The Friends of the Section

Amtrust Title, Business Valuation Analysts, LLC, CATIC, Cumberland Trust, Fiduciary Trust International of the South, Heritage Investment Group, North American Title Insurance, Practice 42, Valuation Services, Inc. and Wilmington Trust.

The General Sponsors
Overall Sponsor/Legislative Update: Attorney’s Title Fund Services, LLC
Event App Sponsor: WFG National Title Insurance Company
Thursday Grab N’ Go Lunch: Management Planning Inc.
Thursday night’s reception: J.P. Morgan Private Bank and Old Republic National Title Insurance
Friday reception: Wells Fargo Private Banking and Westcor Land Title Insurance Company
Thursday and Friday Night Hospitality Suite: First American Title Insurance Company, and Phillips
Spouse Breakfast: Attorney’s Title Fund Services, LLC
Real Property Roundtable: Fidelity National Title Group
Probate Roundtable: Stout Risius Ross, Inc. and Guardian Trust
Executive Council Meeting: The Florida Bar Foundation and Stewart Title

Mr. Freedman recognized David Shanks from Stewart Title who expressed appreciation to the Section as a general sponsor and he spoke briefly about the future of Stewart Title. Mr. Freedman also thanked Melissa Murphy who was unable to attend and Attorney’s Title Insurance Fund, a Section General Sponsor as well as the sponsor of the Spouse Breakfast for their continued support of The Section. Len Prescott addressed the members on behalf of First American Title.

3. Milestones:
Mr. Freedman recognized the following milestones:

   New ACTEC Fellows: Hung Nguyen, Robert Lancaster and Richard Caskey.
   Elizabeth Ferguson and husband Steve adopted a baby girl 9/26/2019.
   Ted Connor was appointed by Governor DeSantis to Port Tampa Bay.
   Frederick “Ricky” Hearn’s mother passed away. The funeral is today.

4. Report of Interim Actions by the Executive Committee:

Mr. Freedman reported on the additional interim action items:

a. Authorization given to the Ad Hoc E-Wills Committee to appoint ambassadors to consult with the Florida Court Clerks and Comptrollers on matters pertaining to electronic wills.

b. Appointment of Erin Christy to serve as the RPPTL Section’s representative to the Diversity & Inclusion Committee of The Florida Bar.

c. Approval of the contract with Dean Mead to serve as the Section’s Legislative Consultant for the period September 1, 2019 - August 31, 2021. Mr. Freedman thanked Pete Dunbar for his twenty years of service as the Sections Legislative Consultant.
d. Approval of the Section position to approve proposed changes to Rules 6-30.2, 6-30.3 and 6-30.4, Rules Regulating The Florida Bar, pertaining to composition of the membership of the Condominium and Planned Development Law Certification Committee and standards for peer review for certification and recertification of candidates.

e. Approval of the Section position to oppose proposed amendments by the ADR Committee to Rules 5.181, 5.182, 5.183, 5.184 and 5.185, Florida Probate Rules, pertaining to mediation/arbitration provisions. Mr. Freedman asked Greer Preston to comment. Mr. Preston explained the reasons for the opposition, including issues relating to mediator training and the ability of the parties to select mediation.

f. Approval of the Section position to oppose the Florida Commission on Access to Civil Justice’s proposal to expand the Florida Registered Paralegal Program (Chapter 20, Rules Regulating The Florida Bar) through amendments. Mr. Freedman asked Mr. Mezer to comment further. Mr. Mezer thanked the members of the task force, Debra Boje, Kristopher Fernandez, Jason Ellison, Hung Nguyen, Alexandra Rieman and Lynwood Arnold and he explained the basis for the Section’s opposition; UPL, conflict with prior decisions of The Florida Supreme Court harm to the public, the potential for fraud, the lack of standards for eligibility, inadequate training, and the lack of supervision.

g. Authorization of the Section Chair to vote at the upcoming Council of Sections videoconference meeting to increase the Section’s annual dues from $300.00 to $500.00.

Mr. Freedman asked for a vote to approve all interim actions. Motion was made, seconded and passed unanimously.

5. **2019-2020 Executive Council meetings.**

Mr. Freedman reported that the Schedule for the 2019-2020 Executive Council meetings appears at page 52 of the agenda.

6. **Tampa and Amsterdam updates**

Mr. Freedman reported:

**Tampa, Winter Meeting** - January 29 - February 2, 2020 will be held at the Grand Hyatt Tampa Bay Hotel, Tampa. Meetings will begin Thursday morning; Thursday night dinner will be at Oyster Catchers and Friday night dinner will be at Armani’s, in time for sunset. Round table meetings will be Saturday morning. Saturday evening will include an “escape room” and dinner at Besitos. Registration should open in early December.

**Amsterdam** – April 1 – April 5, 2020 – Hotel Okura Amsterdam. There are currently 100 people registered, so it is likely that the event will not be open to non-Executive Council members. Mr. Freedman presented a video of
Amsterdam. Registration fee includes Thursday evening reception and dinner at Dutch West Indies House. Executive Council meeting at The Hague and museums – The flat fee includes: Thursday trip to Keukenhof – Tulip gardens and Saturday evening dinner and reception. Breakfast included with room registration. Optional Tours: April 1 Excursions – optional tour of windmills, but will be offered other days, if you miss it.

April 2: Executive Council meeting at The Hague with CLE in the afternoon, 3 different museums with lunch included.

April 3: Saturday optional excursions. Saturday Night will be a reception and dinner at the National Maritime Museum.

As for the Anne Frank House – they are now booking tours – individual tickets may be purchased 90 days in advance – there will be a refund of the cost of afternoon excursion, if you are able to purchase Anne Frank tickets.

Please do not forward e-mails regarding Amsterdam outside of Executive Council members as reservations of Non-Executive Council Members will be cancelled and may not later be available. Additional information will be in e-mails.

Prior to December 1, 2019 changes may be made without cost.

7. **Convention update**

Sancha Brennan will chair the Convention – Ms. Brenna reported that the Convention will be at Loews’ Sapphire Falls Resort in Orlando May 28-31, 2020.

V. **Liaison with Board of Governors Report** — Michael G. Tanner

Mr. Freedman recognized Michael G. Tanner.

Mr. Tanner reported on five items from the BoG meeting in Destin:

1. Legislative positions from The Section Florida Uniform Trust Act, construction lien law, and Ad Valorem tax Amendment were approved at the last meeting of the Board of Governors.

2. The Section’s contract with Dean Mead was approved at the last meeting of the Board of Governors.

3. The constitutionality of mandatory Bar associations continues to be a major concern in light of the JANUS v AFSCME ruling.

4. Florida Advanced Registered Paralegals will be considered at the Board of Governors meeting in January.

5. New Chapter 23 - Rules governing Florida Bar – voluntary registration of online legal service providers and minimum requirements for registrants ways of getting along with traditional providers of legal services will be considered at the December meeting.
VI. **Chair-Elect's Report** — *William T. Hennessey, III, Chair-Elect*

Mr. Freedman recognized William T. Hennessey, III.

Mr. Hennessey reported:

1. **2020-2021 Executive Council meetings**

   The schedule of the 2020-2021 Executive Council meetings appears at page 53 of the agenda.

   **Executive Council and Legislative Update** – July 23-26, 2020, The Breakers, Palm Beach

   **Out of state – Jackson Hole** – (September 29 – October 4, 2020): Mr. Hennessey presented a Power Point of Jackson Hole. The out of state meeting will take place at the Four Season in Teton Village/Jackson Hole. The meeting will include National Park tours, wild life safaris, scenic rafting trips, as well as much more. Friday night dinner will be at the Diamond Cross Ranch which overlooks Grand Teton National Park. There will be a demonstration of breaking horses, which can be applied to management practices. Mr. Hennessey noted there are two out of state meetings in 2020. Registration for Jackson Hole should open in the fall. Amsterdam in the spring.

   **Disney's Yacht Club, Orlando (December 3-6, 2020):** The meeting includes events on Disney properties, including a reception on the beach, as well as a safari in the Animal Kingdom theme park, Friday night.

   **Hammock Beach Resort – Palm Coast (February 2-6, 2021).** Daytona/St. Augustine with two golf courses, Family friendly. All rooms 1, 2, 3B/R suites with full kitchens overlooking the ocean.

   **Convention JW Marriot – Marco Island May 28-31, 2021.** Daytona – St. Augustine on ocean and golf courses.

   Mr. Hennessey reminded all Committee Chairs that Committee reports due on December 1 – Chairs' and Vice Chairs' input on Rising Stars and succession plans are requested.

VII. **Treasurer's Report** — *Wm. Cary Wright, Treasurer*

Mr. Freedman recognized Cary Wright.

Mr. Wright reported:

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

   Mr. Wright reported that the current fund balance is tentatively shown as $2,715,383 and projected June, 2019 fund balance is $2,052,489. Fiscal year began July 1. Through August 31, 2019 we are about $578,000 posted but not all revenue charges are booked yet. We will have more accurate numbers at next meeting.
VIII. **Director of At-Large Members Report** — Lawrence Jay Miller, Director

Mr. Freedman recognized Lawrence “Larry” Miller.

Mr. Miller reported that ALMS met Thursday afternoon - welcomed new At Large Members – formed a committee to address sunsetting of funding for No Place Like Home project and the need to find state-wide funding and spread the program statewide. Mr. Miller thanked Christine Tucker and Lynwood Arnold for meet and greet new attendees. ALMs will reach out to local Section members for brainstorming on resources.

Mobilized ALMs for local outreaches – Kudos to the ALMs for picking up increased programming.

Subcommittee was formed to fund alternative funding for No Place Like Home. Anyone with ideas on alternative funding is asked to please contact Mr. Miller or Erin Christy. Committee Reports are due and ALMs applications are due. 2 sets: 1 for existing ALMs and 1 for new ALMs. If you have questions, please contact Mr. Miller.

Mr. Freedman restated that existing ALMs must apply again. He reinforced a reminder to use the correct form.

IX. **CLE Seminar Coordination Report** — Wilhelmina F. Kightlinger (Real Property) and John C. Moran (Probate & Trust), Co-Chairs

Mr. Freedman recognized Wilhelmina F. Kightlinger.

1. **Report on pending CLE programs and opportunities**

Ms. Kightlinger thanked Chairs and Speakers for the work on CLEs. She reported that the Electronic Promissory Notes Webinar held October 16, 2019 had 100 attendees – Congratulations to the Real Estate and Finance Lending Committee.

Ms. Kightlinger reported on up-coming CLEs:

- 11/15 – Probate Law Seminar – Live and webcast
- 11/20 – Sharing Physical Space in a Digital World – Includes a Technology CLE Credit.
- 12/17 – Correct Notarization

Ms. Knightlinger reported that the RPPTL Section recognized $190,000 revenue for CLEs in 2019-2019.

The tentative CLE Schedule is on page 55 of the Agenda.
X. **Legislation Committee** – *S. Katherine Frazier and Jon Scuderi, Co-Chairs*

Mr. Freedman indicated that Ms. Frazier and Mr. Scuderi had each reported at Roundtable. No other report.

Mr. Freedman reminded those in attendance that if you are going to attend the Roundtable meetings, please tell us, so the count can be had as to amount of food. Please do not attend events without letting us know.

**Items:**

1. **General Standing Action Item: 2020-2021 Budget** — *Wm. Cary Wright, Treasurer and Chair, Budget Committee*

Mr. Freedman recognized Mr. Wright.

Mr. Wright introduced the budget which appears at pages 56-63 of the agenda and stated that he had budgeted conservatively. He also noted that Debra Boje’s year produced a $300,000+ profit to the Section.

Mr. Wright suggested two amendments to the budget:

1. $300/year Council of Sections – new amount is $500/year, a $200 increase.
2. Legislative update – move webcast to CLE to provide 24/7 demand availability as opposite to only CD sales.

Mr. Freedman asked for a motion to waive the rules to allow consideration of the two amendments. That motion was made, seconded and approved unanimously. The two amendments to the budget were approved unanimously.

Committee motion to approve the proposed Real Property, Probate and Trust Law Section Budget for the fiscal year 2020–2021 as amended was made, seconded and was unanimously approved.

2. **General Standing Action Item: Strategic Planning Committee** - *Debra L. Boje and Robert S. Freedman, Co-Chairs*

Finalization of 2019 Strategic Plan (update after Breakers). The strategic plan appears at page 64-105. The plan was tabled to allow for minor changes.

Mr. Freedman recognized Michael Gelfand.

Mr. Gelfand reported that as a result of comments received, issues regarding size of Executive Council were revised. Typographical errors were corrected.

Committee Motion made to approve the strategic plan was offered, seconded and unanimously approved.
Mr. Gelfand commented that all should remember that this date is the anniversary of fall of Berlin wall.

Mr. Freedman thanked Veterans and family members in activity duty for their service.

3. **Ethics Vignette Presented:** When Does a Current Client Become a Former Client?

4. **General Standing Information Item:** Liaison with Clerks of the Court – Laird A. Lile

   Mr. Freedman recognized Laird A. Lile.

   Mr. Lile reported:

   Update on matters of interest: Clerks have invited us to participate in discussion as to fees for depository of electronic wills. E-filing began about a month ago, however, a problem has arisen regarding the handling of Orders inconsistently.

   Florida Supreme Court – requires judges have knowledge of appropriate technology.

   Florida Supreme Court is considering rules regarding remote appearances.

5. **General Standing Information Item:** Law School Mentoring & Programming – Lynwood F. Arnold, Jr., Chair

   Update on committee activities and RPPTL Law School Liaisons.

   Phillip Baumann reported that there have been events at 8 of the 12 law schools in the last year. The Committee has continued with mock interviews at the law school. There is grid about law school engagement at page 162 of the agenda. The Committee is looking for additional contacts as turnover at schools requires constant communication and updating.

6. **RP Action Item:** Construction Law Committee – Reese J. Henderson, Jr., Chair

   Mr. Freedman recognized Mr. Swaine. Mr. Swaine called upon Reese Henderson.

   Mr. Henderson introduced the Committee motion to:

   (A) adopt as a Section legislative position support for amendments to Ch. 255 and 713, Florida Statutes to (1) expand the definition of contractor under Section 713.01, F.S. to include construction managers; (2) correct ambiguity in improper payments made by an owner prior to abandonment of a project by contractor; (3) requiring a tenant’s information on a notice of commencement where a tenant is contracting for leasehold improvements; (4) statutorily bringing attorney fees under Chapter 713 back to the net judgment rule as opposed to the prevailing party standard set forth in *Trytek v. Gale Industries*; (5) clearing up ambiguity in Section 337.18, F.S. as it relates to waiver and release of payment bond claims in public transportation projects; (6) repealing Section 255.05(7), F.S., which allows for cash to serve as an alternative.
form of security on public projects as opposed to payment bonds; and (7) repealing Section 713.245, F.S., which created conditional payment bonds; (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.

Motion amended by the Committee to strike lines 259-271 – no discussion. Motion was approved unanimously.

The Committee’s motion, as amended, was approved unanimously.

7. **General Standing Information Item: Liaison With Business Law Section**
   
   **Manuel Farach and Gwynne Young**

   a. Report on items of potential interest, p. 184-186 attached to the agenda. Business Law Section has created a task force that has met with Real Property Litigation and Finance and Lending Committees.

8. **General Standing Information Item: Ad Hoc Florida Bar Leadership Academy**
   
   **Kristopher E. Fernandez and J. Allison Archbold, Co-Chairs**

   Mr. Fernandez spoke as Co-Chair of the Committee.

   Mr. Fernandez indicated that The Florida Bar Leadership Academy was a one-year program designed to identify a diverse group of lawyers to better their leadership skills and in becoming leaders within our profession, both at the Bar level and in RPPTL. He announced that applications will be available on The Florida Bar website beginning December 2, 2019. He further said that applicants could apply to the Committee by December 16, 2019, requesting the $3,500.00 RPPTL scholarship. Jenna Rubin, a committee member and a Leadership Academy graduate, then spoke for a few minutes about her experience and the benefits of the program.

9. **General Standing Information Item: Information and Technology**
   
   **Neil Barry Shoter, Chair**

   Mr. Freedman recognized Neil Barry Shoter.

   Mr. Shoter presented an update on committee activities:

   He hoped that all were engaged by the luncheon presentation on cyber security. Mr. Shoter gave a reminder to change passwords and thanked JP Morgan for the presentation. Mr. Shoter indicated that FBI and DOJ may make cyber security presentations in the future.

   Mr. Shoter reminded all Committees to be working on web pages and e-mail addresses. Committee web pages should include Committee’s mission statement and meeting schedules.

   The Information and Technology Committee is working on adding the ability to recognize events and photos to drive members to the Section.
10. **PT Action Item: Trust Law Committee** - Matthew Triggs, Chair


Ms. Butters recognized Matthew Triggs.

Mr. Triggs initiated a discussion on a potential Section legislative position to support adoption of the “Florida Uniform Directed Trust Act”, which is a modified version of the Uniform Directed Trust Act. The proposed Act would clarify and change various aspects of the Florida Statutes relating to directed trusts.

The motion currently reads:

(A) adopt as a Section legislative position support of the “Florida Directed Trust Act”, a modified version of the Uniform Directed Trust Act, which clarifies and changes various aspects of the Florida Statutes relating to directed trusts. (B) find that such legislative position is within the purview of the RPPTL Section; and (c) expend Section funds in support of the proposed legislative position.

The Committee received a number of comments since its last publication as an Information Item, so they are taking the time to incorporate those changes. The Committee expects the current draft to be available as an Action Item at the next meeting.


Mr. Hennessey recognized Adele Stone.

a. **Discussion concerning study of the Uniform Partition of Heirs Property Act and Proposed HB349**.

Mr. Stone indicated that this bill was discussed extensively at their meeting Friday morning. It was the consensus that the bill will pass. Preference in federal funding of certain agricultural loans will be given to states that adopt it per the Federal Agricultural Improvement Act of 2018. Pete and Martha were present at the meeting and will endeavor to provide input to the House bill to the extent that modifications to the Act can still qualify as the Model Act by the National Conference of Commissioners on Uniform State Laws. No vote was taken at the Executive Council meeting and the Executive Committee will work with our lobbyists Pete and Martha, during the legislative session.

12. **General Standing Information Item: Membership and Inclusion** - Annabella Barboza and Brenda Ezell, Co-Chairs
Mr. Freedman recognized Brenda Ezell.

a. **Report on committee activities**

Ms. Ezell reported that in the coming year will work more closely with Fellows and outreach to applicants to the Fellows program who were not selected. Annabella Barboza introduced Dresden Brunner who reported that most of the discussion/comments focused three events in need of ambassadors – Tampa, Miami and Tampa. Seek out under-represented constituencies – minority bar, young lawyers, sponsor, and attendees increasing membership. Last year, the Membership and Inclusion Committee spent $4,000 supporting its objectives and updated mission statement on committee page.


Mr. Freedman recognized Sancha Brennan.

Ms. Brennan reported that the committee had completed its review and consideration of all comments that had been submitted, including the technical edits from the Legislative Committee, and thanked all of those individuals and organizations who commented and contributed to the effort. She reported that a revised final draft would be available for EC consideration as an information item in coming agendas and reported that the committee addressed the recent concerns regarding a guardian’s ability to consent to a DNR without a court order in the current draft of c.745.

Stacy Rubel, Brandon Bellew, Jamie Schwinghammer and Nick Curley are currently drafting the White Paper for the Guardianship Code Rewrite Bill.

Nick Curley presented on recent work relating to the “Passidomo Proposal” which is Florida SB 994 relating to guardian usage of DNRs, disclosure of third-party compensation paid to a guardian, and the ability of professional guardians to petition for appointment of themselves. Much of this was being done in the wake of the Rebecca Fierle fallout in Orlando. Judge Speiser and Nick Curley participated in a workgroup called for by Senator Passidomo, including multiple meetings in Tallahassee. Where they were called upon to consider potential changes to the Guardianship Code that would (1) require court approval of a guardian’s consent to a DNR unless a pre-existing DNR was signed prior to incapacity; (2) broaden a guardian’s duty to disclose conflicts of interest; and (3) prohibit a professional guardian from petitioning for his/her own appointment absent extraordinary circumstance.

Mr. Freedman recognized Mr. Swaine.

Mr. Swaine thanked the Real Property Division Committee Sponsors: AmTrust Financial Services, Attorney’s Title Fund Services, LLC, Attorney’s Real Estate Councils of Florida, Inc., BNY Mellon Wealth Management, First American Title, and Hopping Green & Sams.
14. **RP Action Item: Condominium and Planned Development Committee – William P. Sklar and Joseph E. Adams, Co-Chairs**

Mr. Swaine recognized Mr. Sklar.

Mr. Sklar presented the Committee motion to:

a. (A) adopt as a Section legislative position support for amendment to §718.111, Florida Statutes, to clarify that a condominium association has the right to represent its unit owner members in a group; (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.

Mr. Sklar reported that this was Information Item at the Clearwater meeting. For 42 years associations have presented member class actions brought by and through the Association The 3rd District Court of Appeal in the case of Central Carrillon Beach Condominium Association, Inc. v. Garcia 245 So.3d 869 (Fla 3 DCA 2018) eroded that concept. The Committee is proposing amending the – FR Civil Procedure (1.221) and Florida Statute section (718.111.(3)) recognize right to sue and be sued. The holding of the Carrillon case is that the Association can represent members, but not appeal.

Miami-Dade strategy is to divide and conquer and an erosion of right of Association to represent owners in matters of common interest. This could be an issue with 558 claims.

The discussion narrowed 718.111(3) to not apply tax appeals. The Committee’s bill clarifies existing law and provides that Condominium Associations represent its members including defending appeals.

Mr. Swaine called for a vote on the Committee’s motion and it passed unanimously.

15. **General Standing Action Item: Professionalism and Ethics Committee - Gwynne A. Young, Chair**

Mr. Freedman recognized Mr. Andrew Sasso.

Mr. Sasso introduced the Committee motion to (A) adopt as a Section position support for proposed changes to Rule 4-1.14 (sc. Client Under a Disability) of the Rules Regulating The Florida Bar; (B) find that such position is within the purview of the RPPTL Section; and (c) expend Section funds in support of the proposed position.

Mr. Sasso indicated that the purpose of the Committee motion is to adopt ABA model rule. Substantial changes are discussed in detail in comments. The current Florida Rule was adopted -1980. In early 2000’s ABA Model Rule was created, but not entirely adopted in Florida. The Florida Rule 4-1.14 uses the term “disability” while the ABA Model Rule uses the term “diminished capacity.”
Mr. Sasso discussed the elements under current provision, lawyer must act as a de facto guardian. The proposal removes that obligation. The ABA Model Rule provides superior guidance to the lawyer than the existing rule.

Power of Attorney Committee approved the proposal and Elder Law Section approved it at last meeting and sent it back to Guardianship Committee.

Committee motion passed unanimously.


17. **General Standing Information Item: Council of Sections** – Robert S. Freedman and William T. Hennessey, III

Mr. Freedman recognized Michael Dribin.

Mr. Dribin reported that the Board of Governors’ approval of streamlined process for amending Section Bylaws. Copy of a power point is attached at page 111 of the agenda.

18. **General Standing Information Item: Homestead Issues Study Committee**, Jeffrey S. Goethe and J. Michael Swaine, Co-Chairs

Mr. Freedman recognized Jeffery S. Goethe.

Mr. Goethe provided a report on status of current RPPTL Section Position on legislation concerning homestead held subject to revocable trust and a proposed compromise which will be submitted in the current legislative session. The proposal was originally passed by the Executive Council in 2015, but the section has not been able to secure a sponsor for the legislation. The objection to the proposal seems to be a sentence that provides that when homestead is devised through a trust to persons who would qualify as heirs under the Snyder v. Davis decision, title to the homestead vests in those beneficiaries. This sentence has been removed, and, as a result, much of the language in the proposal that was dependent upon that sentence has also been removed. The committee also voted to remove the provision that would confirm protection for heirs inheriting an interest in protected homestead through a continuing trust. The Homestead Issues Committee approved the revised statutory provisions during the July meeting at The Breakers. The proposed bill and white paper, as revised, appear at page 135 of the agenda. Since this was a position approved by the Executive Council, the item was presented as an information item.

19. **General Standing Information Item: Amicus Committee** - Kenneth B. Bell, Gerald B. Cope, Jr., Robert W. Goldman and John W. Little, III, Co-Chairs

Mr. Swaine recognized Robert Goldman. Mr. Goldman reported on Johnson v. Townsend surviving spouse of community property rights.
Mr. Goldman indicated that there were discussions on whether the Section should take an amicus position on *Hayslip v. U.S. Home Corporation* at each of the Round Table meetings. Condition in warranty deed runs with land – healthy discussion in real property – dramatic range – issue is too broad. Needs to be narrowed. – Real/personal covenants.

Mr. Swaine summarized the case as developer claimed arbitration requirement in original deed from developer bond– second owner only one entity. Decision conflict with Chapter 558 procedures. The question was posed: “If these covenants are allowed what additional comments would be added to deeds in the future.” What’s next?

Title insurance policy WFG – if can put in covenants.

Mr. Swaine asserted that a restriction should ‘touch and concern’ land or it is a personal covenant should not apply only to a covenant running with the land. Mr. Goldman reminded us that the role of an amicus is to educate the Court, not to be for or against a litigant.

Motion approved to file amicus brief, if invited by the Court. One dissent, Mr. Belcher.

Mr. Freedman asked for a motion to adjourn. Several motions to adjourn were offered with numerous seconds. The motion to adjourn was unanimously approved at 12:40 P.M.

Respectfully submitted,

Steven H. Mezer
Secretary
Thank you to Our General Sponsors

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<td>Real Property Roundtable</td>
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<td>Karla Staker</td>
<td><a href="mailto:Karla.Staker@fnf.com">Karla.Staker@fnf.com</a></td>
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<td>Probate Roundtable</td>
<td>Stout Risius Ross Inc.</td>
<td>Kym Kerin</td>
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Executive Committee Interim Action

December 31, 2019 – via E-Mail – Attendees: Robert S. Freedman, Wm. Cary Wright, Jon Scuderi, Debra L. Boje, Steven H. Mezer, S. Katherine Frazier, Robert S. Swaine, William T. Hennessey, John C. Moran, Wilhelmina F. Kightlinger and Sara S. Butters. Consideration and approval of candidates for Florida Bar Leadership Academy: The Executive Committee received the report from the Leadership Academy Committee, recommending Ashley Zohar and Jacobeli Behar for RPPTL Scholarships. Resolution that Ashley Zohar and Jacobeli Behar to receive the RPPTL Scholarships for the Leadership Academy was approved unanimously.

January 6, 2020- via E-Mail – Attendees: Robert S. Freedman, Wm. Cary Wright, Jon Scuderi, Debra L. Boje, Steven H. Mezer, S. Katherine Frazier, Robert S. Swaine, William T. Hennessey, John C. Moran, Wilhelmina F. Kightlinger and Sara S. Butters. The Executive Committee considered and unanimously approved a letter from Mr. Freedman as Chair of the RPPTL Section to Daniel E. Norby, Chair Florida Supreme Court Judicial Nominating Commission regarding Supreme Court nominations, emphasizing the importance of a Judge having knowledge of both real property law and probate, trust and estate law issues.

January 9, 2020 – In Person – Attendees: Robert S. Freedman, Jon Scuderi, Debra L. Boje, Steven H. Mezer, S. Katherine Frazier, Robert S. Swaine, William T. Hennessey, John C. Moran, Wilhelmina F. Kightlinger and Sara S. Butters. The Executive Committee considered the request of Rob Lancaster, Chair, Estate and Trust Tax Planning Committee, of the RPPTL Section to approve a legislative position regarding revisions to Section 736.08145, Florida Statutes, to grant a trustee discretionary authority to reimburse the deemed owner of a grantor trust for income taxes attributable to the deemed owner. The Committee considered the draft bill, the RPPTL white paper and legislative position form. The motion was approved by the ten (10) Executive Committee members present, Mr. Wright was absent.

By: Steven H. Mezer
Steven H. Mezer, Secretary
January 6, 2020

Sent via U.S. Mail and email to dnordby@shutts.com

Daniel E. Nordby, Chair
Florida Supreme Court Judicial Nominating Commission
215 South Monroe Street, Suite 804
Tallahassee, FL 32301

Re: Supreme Court Nominations

Dear Chair Nordby:

Thank you for accepting this correspondence from the Real Property, Probate and Trust Law Section (“RPPTL Section”) of The Florida Bar. This correspondence is being sent to encourage the Supreme Court Judicial Nominating Commission (“JNC”) to recommend to Governor DeSantis nominees for the two vacant Supreme Court positions who are skilled and knowledgeable in the areas of real property, probate, trusts and estates law. The RPPTL Section strongly believes that it is important to have diversity of experience and practice on the Florida Supreme Court.

As an introduction, the RPPTL Section historically has been, and continues to be, the largest substantive law section of The Florida Bar. The RPPTL Section assists, represents, and involves 10,000+ members practicing in the areas of real estate, probate, trusts, estates, and guardianship law. RPPTL Section members’ dedication to serving the public in these fields of practice is reflected in just a few of their continuing efforts, including producing educational materials and seminars for attorneys and the public, assisting the public pro bono, drafting proposed legislation, rules of procedure and regulation, and, upon request, providing advice to the judicial, legislative and executive branches on issues related to our fields of practice.

With regard to real property law, Florida remains a hotbed for development, as evidenced by the residential and commercial real estate growth that has been in force since the end of the Great Depression. Real estate law has many nuances and varied aspects and areas, and having one or more Justices on the Court with significant real estate experience will ensure that case law in
the real property arena continues to evolve in an appropriate and fair manner.

Similarly, it is very important that there be experience in probate, trusts and estates law issues. Florida has a large and steadily growing population of seniors and retirees. By 2020, people over 60 years of age will make up close to 30% of Florida's population. With the aging of baby boomers, this population surge will only continue. The tax-friendly environment in Florida makes it a haven for retirement. Our Florida court system plays a key role in the orderly and timely administration of decedent's estates and trusts. It is imperative that Florida has Supreme Court Justices with knowledge and experience in trust and estates law matters, as this area of practice continues to be central to Florida's future and economy.

Again, we appreciate the opportunity to express the RPPTL Section’s thoughts on these very important nominations. The RPPTL Section greatly appreciates the amount of time and work that the JNC performs in service to the legal profession and the citizens of the state of Florida.

Respectfully submitted,

Robert S. Freedman
Chair, Real Property, Probate and Trust Law Section
A bill to be entitled
An act relating to trusts; creating s. 736.08145, F.S.; authorizing trustees of certain trusts to reimburse persons being treated as the owner of the trust for specified amounts and in a specified manner; prohibiting certain policies, values, and proceeds from being used for such reimbursement; providing applicability; prohibiting certain trustees from taking specified actions relating to trusts; requiring that specified powers be granted to certain persons if the terms of the trust require a trustee to act at the direction or with the consent of such persons; providing construction; providing an effective date.

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

Section 1. Section 736.08145, Florida Statutes, is created to read:

736.08145 Grantor trust reimbursement.—
(1)(a) Except as otherwise provided under the terms of a trust, if all or any portion of the trust is treated as being owned by a person under s. 671 of the Internal Revenue Code or any similar federal, state, or other tax law, the trustee may, in the trustee’s sole discretion, reimburse the person being treated as the owner for any amount of the person’s personal federal, state, or other income tax liability which is attributable to the inclusion of the trust’s income, capital gains, deductions, or credits in the calculation of the person’s taxable income. In the trustee’s sole discretion, the trustee
may pay such tax reimbursement amount, determined without regard to any other distribution or payment made from trust assets, to the person directly or to the appropriate taxing authority.

(b) A life insurance policy held in the trust, the cash value of any such policy, or the proceeds of any loan secured by an interest in the policy may not be used for such reimbursement or such payment if the person is an insured.

(2) This section applies to all trusts, whether created on, before, or after July 1, 2020, unless:

(a) The trustee provides written notification that the trustee intends to irrevocably elect out of the application of this section, at least 60 days before the effective date of such election, to the person treated as the owner of all or a portion of the trust under s. 671 of the Internal Revenue Code or any similar federal, state, or other tax law and to all persons who have the ability to remove and replace the trustee.

(b) Applying this section would prevent a contribution to the trust from qualifying for, or would reduce, a federal tax benefit, including a federal tax exclusion or deduction, which was originally claimed or could have been claimed for the contribution, including:

1. An exclusion under s. 2503(b) or s. 2503(c) of the Internal Revenue Code;

2. A marital deduction under s. 2056, s. 2056A, or s. 2523 of the Internal Revenue Code;

3. A charitable deduction under s. 170(a), s. 642(c), s. 2055(a), or s. 2522(a) of the Internal Revenue Code; or

4. Direct skip treatment under s. 2642(c) of the Internal Revenue Code.
(3) A trustee may not exercise, or participate in the exercise of, the powers granted by this section with respect to any trust if any of the following applies:

(a) The trustee is treated as the owner of all or part of such trust under s. 671 of the Internal Revenue Code or any similar federal, state, or other tax law.

(b) The trustee is a qualified beneficiary of such trust.

(c) The trustee is a related or subordinate party, as defined in s. 672(c) of the Internal Revenue Code, with respect to a person treated as the owner of all or part of such trust under s. 671 of the Internal Revenue Code or any similar federal, state, or other tax law or with respect to a qualified beneficiary of such trust.

(4) If the terms of a trust require the trustee to act at the direction or with the consent of a trust advisor, a protector, or any other person, the powers granted by this section to the trustee must instead or also be granted, as applicable under the terms of the trust, to the advisor, protector, or other person subject to the limitations set forth in subsection (3), which must be applied as if the advisor, protector, or other person were a trustee.

(5) A person may not be considered a qualified beneficiary of a trust solely by reason of the application of this section.

Section 2. This act shall take effect July 1, 2020.
I. SUMMARY

The proposed legislation would enact Section 736.08145, Florida Statutes, to grant a trustee discretionary authority to reimburse the deemed owner of a grantor trust for income taxes attributable to the deemed owner.

II. CURRENT SITUATION

Sections 671-678 of the Internal Revenue Code (“IRC”), known as the grantor trust rules, provide that, if certain conditions are met, property held in a trust will be treated as owned by the settlor of the trust for federal income tax purposes. When the grantor trust rules apply, the deemed owner or “grantor” – and not the trust or its beneficiaries – is required to report all items of income, loss, deduction and credit realized by the grantor trust on his or her individual income tax return, and to pay any resulting income tax.

This is true even if the grantor has no beneficial interest in the trust and cannot access its income. Such an arrangement can significantly benefit the trust and its beneficiaries because the growth of the trust corpus is not diminished by the obligation to pay income taxes.

A well-drafted grantor trust will always include the ability to turn off grantor trust status if the grantor desires to stop paying the trust’s taxes (or is financially unable to do so). In some cases, however, such a conversion to non-grantor trust may be undesirable. For example, the conversion may cause the grantor to realize “phantom” income not attributable to an economic gain, or it may cause the trust to cease being eligible to own S-corporation stock or to fail to qualify for a $250,000 capital gains exclusion from sale of the grantor’s primary residence. In those cases, it would be preferable for the trust to contain a power granting the trustee discretion to reimburse the grantor for income taxes paid in lieu of turning off grantor trust status.

Until 2004, the federal gift and estate tax consequences of granting such a power were uncertain. Practitioners were concerned that granting a power to a trustee to make such a tax reimbursement could cause the trust property to be includable in the grantor’s estate for federal estate tax purposes. Practitioners were also concerned that such a reimbursement made by the trustee could constitute a gift from the trust beneficiaries to the grantor. In the absence of definitive guidance from the IRS, few practitioners drafted trust documents authorizing trustees to reimburse grantors for income taxes paid. In fact, due to this concern many practitioners drafted trust documents explicitly forbidding such reimbursements.

The Internal Revenue Service resolved these uncertainties with Revenue Ruling 2004-64. That ruling holds that when an independent trustee holds a discretionary power under a trust to reimburse the grantor for taxes paid attributable to trust income, (a) the exercise of such power does not result in a taxable gift from the trust beneficiaries to the grantor, and (b) the existence of
such power does not by itself cause the value of the trust assets to be includable in the grantor’s
gross estate for federal estate tax purposes. The Ruling suggests that its holding might differ in
cases where (a) there is a pre-arranged understanding between the grantor and trustee regarding
how the trustee would exercise the trustee’s discretion to reimburse the grantor for income taxes,
(b) the grantor could remove the trustee and name himself or herself as trustee, or (c) local law
would cause the trust assets to be subject to claims of the grantor’s creditors.

Following Revenue Ruling 2004-64, several states, including Florida, amended their laws to
provide that the existence of a power in a trust document authorizing the trustee to reimburse the
grantor for income taxes attributable to trust income does not subject the assets of the trust to
claims of the grantor’s creditors.1 The applicable Florida Statute is Section 736.0505(1)(c), which
became effective July 1, 2007 and provides as follows:

“…the assets of an irrevocable trust may not be subject to the claims
of an existing or subsequent creditor or assignee of the settlor, in
whole or in part, solely because of the existence of a discretionary
power granted to the trustee by the terms of the trust, or any other
provision of law, to pay directly to the taxing authorities or to
reimburse the settlor for any tax on trust income or principal which
is payable by the settlor under the law imposing such tax.”

In enacting that statute, the Legislature recognized the significant benefits associated with
affording trustees flexibility to reimburse grantors for income taxes paid on trust income
attributable to them.

III. EFFECT OF PROPOSED CHANGES GENERALLY

The proposal would grant a trustee discretion to reimburse a deemed grantor for income taxes on
trust income attributable to the grantor.

IV. ANALYSIS

Under current Florida law, the flexibility to reimburse a grantor for taxes is available only to those
trusts which include provisions specifically authorizing such reimbursements. Such provisions are
unlikely to appear in any Florida trusts executed prior to July 1, 2007 (the effective date of Section
736.0505(1)(c)), given the uncertain state of the law prior to Revenue Ruling 2004-64. Trusts
created in jurisdictions other than Florida which have not enacted statutes like Section
736.0505(1)(c), even those created after 2007, would likewise be unlikely to include such tax
reimbursement provisions.

In the absence of such a specific reimbursement power under the trust, a difficult dilemma can
arise for many grantors and trustees: Whether the grantor should be forced to continue to bear an
income tax burden he or she no longer wishes to bear (or is unable to bear), or whether the grantor

trust should be converted to non-grantor trust status such that the trust bears its own income tax burden going forward (notwithstanding any other negative consequences which may follow from that conversion).

Several states have determined it unnecessary to place trust parties in this dilemma. Four states have to date enacted statutes which grant trustees discretion to reimburse trust grantors for income taxes on trust income attributable to them. These statutes create valuable flexibility for parties to existing grantor trusts as well as to practitioners and grantors of new trusts, who now are free either to opt out of the statute or to rely on the statute where having such reimbursement authority optimizes the trust benefits to all parties. Florida should join those jurisdictions.

The proposed legislation would permit (but not require) an independent trustee of a grantor trust to reimburse the grantor for all or part of the income taxes paid by the grantor as a result of the grantor trust income. The proposed legislation would also permit (but not require) an independent trustee to pay all or part of such taxes directly to the appropriate taxing authority on behalf of the grantor (rather than to reimburse the grantor after the fact). If enacted, the statute would confer this authority on trustees of grantor trusts created before or after the effective date, unless the trust provides to the contrary or the trustee opts out in writing.

The proposed legislation has been drafted to fit squarely within the principles of Revenue Ruling 2004-64. First, the reimbursement authority granted to trustees would be discretionary, not mandatory. Second, the “other facts” identified by the Revenue Ruling as having the potential to cause estate tax inclusion if combined with a discretionary reimbursement power are addressed either by existing Florida law or by the proposed statute itself. Section 736.0505(1)(c), Florida Statutes, already provides that a trustee’s power to reimburse the grantor for income taxes paid in respect of trust income will not cause the trust assets to be subject to claims of the grantor’s creditors. Further, the proposal vests tax reimbursement authority only in a disinterested trustee, which ensures that the tax reimbursement authority will not be held by or imputed to the grantor even if he or she otherwise has the power to remove the trustee and name himself or herself as a successor trustee.

The proposed legislation incorporates additional safeguards designed to prevent any adverse federal gift or estate tax consequences under current law. Specifically, insurance policies on the grantor’s life cannot be used to satisfy the grantor’s tax liability. Further, the reimbursement power cannot be exercised in a manner inconsistent with the marital or charitable deductions or the annual exclusion so as to cause inclusion of the trust’s assets in the grantor’s gross estate for federal estate tax purposes.

Finally, if the parties do not wish to avail of the proposed legislation, or are concerned about the financial or tax impact, the trust document may expressly prohibit reimbursement or the independent trustee may elect to opt out of the application of the proposed statute.

V. FISCAL IMPACT ON STATE AND LOCAL GOVERNMENTS - None.

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VI. DIRECT IMPACT ON PRIVATE SECTOR - None.

VII. CONSTITUTIONAL ISSUES - None apparent.

VIII. OTHER INTERESTED PARTIES - The Tax and Business Law Sections of The Florida Bar, and the Florida Bankers Association.
LEGISLATIVE OR POLITICAL POSITION REQUEST FORM

GENERAL INFORMATION

Submitted by: (list name of section, division, committee, TFB group, or individual name)
Rob Lancaster, Chair, Estate and Trust Tax Planning Committee, RPPTL

Address: (address and phone #)
3001 Tamiami Trail North, Suite 400, Naples, FL 34103
239-649-3178

Position Level: (TFB section/division/committee)
TFB RPPTL/Probate/Estate and Trust Tax Planning

PROPOSED ADVOCACY

- All requests for legislative and political positions must be presented to the Board of Governors by completing this form and attaching a copy of any existing or proposed legislation or a detailed presentation of the issue.
- Select Section I below if the issue is legislative, II is the issue is political. Regardless, Section III must be completed.

If Applicable, List the Following:

(Bill or PCB #) (Sponsor)

SB 1366 Gruters

Indicate Position: ✔ Support ☐ Oppose ☐ Technical or Other Non-Partisan Assistance

I. Proposed Wording of Legislative Position for Official Publication

Support revisions to section 736.08145, Florida Statutes, to grant a trustee discretionary authority to reimburse the deemed owner of a grantor trust for income taxes attributable to the deemed owner.
II. Political Proposals:

III. Reasons For Proposed Advocacy:
   A. Is the proposal consistent with Keller vs. State Bar of California, 110 S. Ct. 2228 (1990), and The Florida Bar v. Schwarz, 552 So. 2d 1094 (Fla. 1981)?
      Yes
   
   B. Which goal or objective of the Bar’s strategic plan is advanced by the proposal?
      N/A
   
   C. Does the proposal relate to: (check all that apply)
      _____ Regulating the profession
      _____ Improving the quality of legal services
      X   Improving the functioning of the system of justice
      _____ Increasing the availability of legal services to the public
      _____ Regulation of trust accounts
      _____ Education, ethics, competency, and integrity of the legal profession
   
   D. Additional Information:

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**Others (attach list if more than one)**

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REFERRALS TO OTHER SECTIONS, COMMITTEES OR LEGAL ORGANIZATIONS

A request for action on a position must be circulated to sections and committees that might be interested in the issue. The Legislation Committee and Board of Governors may delay final action on a request if the below section is not completed. Please attach referrals and responses to this form. If you do not believe other sections and committees are affected and you did not circulate this form to them, please provide details below.

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<td>Elder Law Section of the Florida Bar</td>
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</tr>
<tr>
<td>Florida Bankers Association</td>
<td></td>
</tr>
</tbody>
</table>

Reasons for Non-Referrals:

CONTACTS

Board & Legislation Committee Appearance (list name, address and phone #)
Jon Scuderi, Legislative Co-Chair of the RPPTL Section, 850 Park Shore Drive, Suite 203, Naples, FL 34102, 239-436-1988

Appearances before Legislators (list name and phone # of those having direct contact before House/Senate committees)
Peter M. Dunbar and Martha Edenfield, Dean, Mead & Dunbar, P.A., 215 South Monroe Street, Suite 815, Tallahassee, Florida 32301, Telephone: (850) 999-4100

Meetings with Legislators/staff (list name and phone # of those having direct contact with legislators)
Same

Submit this form and attachments to the Office of General Counsel of The Florida Bar — mailto:jhooks@floridabar.org, (850) 561-5662. Upon receipt, staff will schedule your request for final Bar action; this may involve a separate appearance before the Legislation Committee unless otherwise advised.
<table>
<thead>
<tr>
<th>Date</th>
<th>Location</th>
</tr>
</thead>
</table>
| July 24 – July 28, 2019  | Executive Council Meeting & Legislative Update  
The Breakers  
Palm Beach, Florida  
Room Rate (Deluxe Room – King): $225  
Premium Room Rate: $280 |
| November 6 – November 10, 2019 | Executive Council & Committee Meetings  
JW Marriott Marquis Miami  
Miami, FL  
Standard Guest Room Rate: $269 (single/double) |
| January 29 – February 2, 2020 | Executive Council & Committee Meetings  
Grand Hyatt Tampa Bay  
Tampa, FL  
Standard Guest Room Rate: $225 (single/double) |
| April 1 – April 5, 2020   | Out of State Executive Council Meeting  
Hotel Okura Amsterdam  
Amsterdam, The Netherlands  
Room Rates:  
Superior Guest Room (2 twins/1 king): €295 single, €320 double (inclusive of breakfast)  
Executive Junior Suite: €385 single, €420 double (inclusive of breakfast) |
| May 28 – May 31, 2020     | Executive Council Meeting & Convention  
Loews Sapphire Falls  
Orlando, FL  
Standard Guest Room Rate (two queens): $209 (single/double), $234 (triple), $259 (quad) |
### Executive Council Meeting Schedule

#### Bill Hennessey’s Year

Limit 1 reservation per registrant, additional rooms will be approved upon special request.

<table>
<thead>
<tr>
<th>Date</th>
<th>Location</th>
<th>Details</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>July 23 – July 26, 2020</strong></td>
<td><strong>Executive Council Meeting &amp; Legislative Update</strong>&lt;br&gt;The Breakers&lt;br&gt;Palm Beach, Florida&lt;br&gt;Room Rate (Deluxe Room – King): $239&lt;br&gt;Premium Room Rate: $290</td>
<td></td>
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<tr>
<td><strong>September 30 – October 4, 2020</strong></td>
<td><strong>Out of State Executive Council Meeting</strong>&lt;br&gt;Four Seasons Resort&lt;br&gt;Jackson Hole, WY&lt;br&gt;Standard Guest Room Rate: $395 (single/double)</td>
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<tr>
<td><strong>December 3 – December 6, 2020</strong></td>
<td><strong>Executive Council &amp; Committee Meetings</strong>&lt;br&gt;Disney’s Yacht Club&lt;br&gt;Orlando, FL&lt;br&gt;Standard Guest Room Rate: $289 (single/double)</td>
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<tr>
<td><strong>February 4 – February 7, 2021</strong></td>
<td><strong>Executive Council &amp; Committee Meetings</strong>&lt;br&gt;Hammock Beach Resort&lt;br&gt;Palm Coast, FL&lt;br&gt;Standard Guest Room Rate: $289 (single/double)</td>
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<td><strong>June 3 – June 6, 2021</strong></td>
<td><strong>Executive Council Meeting &amp; Convention</strong>&lt;br&gt;JW Marriott&lt;br&gt;Marco Island, FL&lt;br&gt;Standard Guest Room Rate: $245 (single/double)</td>
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### General Budget

<table>
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<tr>
<td>Revenue</td>
<td>$1,345,521</td>
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<tr>
<td>Expenses</td>
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<td>Net</td>
<td>$620,299</td>
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### Attorney Loan Officer

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<tr>
<td>Revenue</td>
<td>$9,250</td>
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<td>Expenses</td>
<td>$292</td>
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### CLI

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<td>Revenue</td>
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<td>Expenses</td>
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### Trust Officer Conference*

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<td>Revenue</td>
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<td>Expenses</td>
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### Legislative Update*

<table>
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<tr>
<td>Revenue</td>
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<tr>
<td>Expenses</td>
<td>$86,611</td>
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<td>Net</td>
<td>$(32,828)</td>
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### Convention

<table>
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<th></th>
<th>YTD</th>
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<tbody>
<tr>
<td>Revenue</td>
<td>$(125)</td>
</tr>
<tr>
<td>Expenses</td>
<td>$1,000</td>
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<tr>
<td>Net</td>
<td>$(1,125)</td>
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### Roll-up Summary (Total)

<table>
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<tr>
<th></th>
<th>YTD</th>
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</thead>
<tbody>
<tr>
<td>Revenue:</td>
<td>$1,825,924</td>
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<tr>
<td>Expenses</td>
<td>$1,010,802</td>
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<tr>
<td>Net Operations</td>
<td>$815,122</td>
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</table>

### Financial Summary from Separate Budgets

- **Beginning Fund Balance:** $2,136,908
- **Current Fund Balance (YTD):** $2,952,030
- **Projected June 2020 Fund Balance:** $2,052,489

---

*This report is based on the tentative unaudited statement of operations dated 12/31/19 (prepared 1/16/20).*

*expenses and revenue have not been finalized*
<table>
<thead>
<tr>
<th>Date of Presentation</th>
<th>Crs. #</th>
<th>Title</th>
<th>Location</th>
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<tbody>
<tr>
<td>2/21/2020</td>
<td>3500</td>
<td>Condominium Law Certification Review</td>
<td>Nova Law School, Ft. Lauderdale</td>
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<tr>
<td>2/28/2020</td>
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<td>Attorney-Banker Conference</td>
<td>Stetson Law School, Tampa</td>
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<tr>
<td>3/4-6/2020</td>
<td>3502</td>
<td>14th Annual Construction Law Institute</td>
<td>JW Marriott Grande Lakes</td>
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<td>3/11/2020</td>
<td>TBD</td>
<td>RPPTL Audio Webcast: Condo Law Ins and Outs, Part 1</td>
<td>Audio Webcast</td>
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<tr>
<td>3/13/2020</td>
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<td>Trust &amp; Estate Symposium</td>
<td>Bahia Mar, Fort Lauderdale</td>
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<tr>
<td>3/18/2020</td>
<td>3403</td>
<td>RPPTL Audio Webcast: Professional and Ethics Series - Conflicts Letters and Waivers</td>
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<tr>
<td>4/15/2020</td>
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<td>RPPTL Audio Webcast: Homestead Series - 2</td>
<td>Audio Webcast</td>
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<tr>
<td>4/17-18/20</td>
<td>3588</td>
<td>Wills Trusts and Estates Certification Review</td>
<td>Orlando Airport Hyatt</td>
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<tr>
<td>4/17-18/20</td>
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<td>Real Property Cert Review</td>
<td>Orlando Airport Hyatt</td>
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<td>4/23/2020</td>
<td>TBD</td>
<td>RPPTL Audio Webcast: Condo Law Ins and Outs, Part 2</td>
<td>Audio Webcast</td>
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<tr>
<td>4/24/2020</td>
<td>3585</td>
<td>Guardianship CLE</td>
<td>CAMLS, Tampa</td>
</tr>
<tr>
<td>5/13/2020</td>
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<td>RPPTL Audio Webcast: Condo Law Ins and Outs, Part 3</td>
<td>Audio Webcast</td>
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<tr>
<td>5/20/2020</td>
<td>3722</td>
<td>RPPTL Audio Webcast: Professionalism &amp; Ethics Series - Ethics Potpourri</td>
<td>Audio Webcast</td>
</tr>
<tr>
<td>5/30/2020</td>
<td>3587</td>
<td>RPPTL Convention Seminar: Notarizations – The Definitive Guide</td>
<td>Loews Sapphire Falls , Orlando</td>
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<tr>
<td>6/10/2020</td>
<td>TBD</td>
<td>RPPTL Audio Webcast: Condo Law Ins and Outs, Part 4</td>
<td>Audio Webcast</td>
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<tr>
<td>6/24/2020</td>
<td>3808</td>
<td>RPPTL Audio Webcast: Homestead Series - 4</td>
<td>Audio Webcast</td>
</tr>
</tbody>
</table>
GENERAL INFORMATION

Submitted by: (list name of section, division, committee, TFB group, or individual name)
Rob Lancaster, Chair, Estate and Trust Tax Planning Committee, RPPTL

Address: (address and phone #) 3001 Tamiami Trail North, Suite 400, Naples, FL 34103
239-649-3178

Position Level: (TFB section/division/committee) TFB RPPTL/Probate/Estate and Trust Tax Planning

PROPOSED ADVOCACY

- All requests for legislative and political positions must be presented to the Board of Governors by completing this form and attaching a copy of any existing or proposed legislation or a detailed presentation of the issue.
- Select Section I below if the issue is legislative, II is the issue is political. Regardless, Section III must be completed.

If Applicable, List the Following:

(Bill or PCB #) (Sponsor)

SB 1366 Gruters

Indicate Position: [ ] Support [ ] Oppose [ ] Technical or Other Non-Partisan Assistance

I. Proposed Wording of Legislative Position for Official Publication

Support revisions to section 736.08145, Florida Statutes, to grant a trustee discretionary authority to reimburse the deemed owner of a grantor trust for income taxes attributable to the deemed owner.
II. Political Proposals:

III. Reasons For Proposed Advocacy:
   A. Is the proposal consistent with Keller vs. State Bar of California, 110 S. Ct. 2228 (1990), and The Florida Bar v. Schwarz, 552 So. 2d 1094 (Fla. 1981)?
      Yes

   B. Which goal or objective of the Bar’s strategic plan is advanced by the proposal?
      N/A

   C. Does the proposal relate to: (check all that apply)
      _____ Regulating the profession
      _____ Improving the quality of legal services
      x     Improving the functioning of the system of justice
      _____ Increasing the availability of legal services to the public
      _____ Regulation of trust accounts
      _____ Education, ethics, competency, and integrity of the legal profession

   D. Additional Information:

PRIOR POSITIONS TAKEN ON THIS ISSUE
Please indicate any prior Bar or section/divisions/committee 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

________________________________________  ____________________________  ____________
TFB Section/Division/Committee                Support/Oppose               Date

Others (attach list if more than one)

________________________________________  ____________________________  ____________
TFB Section/Division/Committee                Support/Oppose               Date
REFERRALS TO OTHER SECTIONS, COMMITTEES OR LEGAL ORGANIZATIONS

A request for action on a position must be circulated to sections and committees that might be interested in the issue. The Legislation Committee and Board of Governors may delay final action on a request if the below section is not completed. Please attach referrals and responses to this form. If you do not believe other sections and committees are affected and you did not circulate this form to them, please provide details below.

Referrals

<table>
<thead>
<tr>
<th>Name of Group or Organization</th>
<th>Support, Oppose or No-Position</th>
</tr>
</thead>
<tbody>
<tr>
<td>Elder Law Section of the Florida Bar</td>
<td></td>
</tr>
<tr>
<td>Florida Bankers Association</td>
<td></td>
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</tbody>
</table>

Reasons for Non-Referrals:

CONTACTS

Board & Legislation Committee Appearance (list name, address and phone #)
Jon Scuderi, Legislative Co-Chair of the RPPTL Section, 850 Park Shore Drive, Suite 203, Naples, FL 34102, 239-436-1988

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Peter M. Dunbar and Martha Edenfield, Dean, Mead & Dunbar, P.A., 215 South Monroe Street, Suite 815, Tallahassee, Florida 32301, Telephone: (850) 999-4100

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REPORT OF THE
LEGISLATIVE SUB-COMMITTEE OF THE
RPPTL STRATEGIC PLANNING COMMITTEE

General Recommendations:

- Institute Standards for Legislative Proposals, including the threshold standard of “Is the proposal worthy based upon compelling public policy?”
- Reduce the need for Glitch bills.
- React to third-party legislative proposals, but do not redraft.
- Always respect the Section brand.
- Empower the Executive Committee and Legislative Co-Chairs to consult and advise Committee Chairs before legislation is drafted.
- Annual mandatory Committee Chair training as to process and standards.
- Update, archive and make accessible legislative positions and white papers.
- Encourage continuity from year to year on Legislative Committee to assure historical knowledge base.
Discussion:

I. Legislative Role of the Section – Proactive vs. Reactive –

A. Institute quality controls vs. quantity of legislative proposals. Resist the impulse to address every issue with a legislative proposal.

B. Improve drafting to reduce the number of “Glitch” bills that are proposed to conserve Section resources and avoid overstraining legislative resources.

C. Involve the Section more in big picture policy work than case-specific/isolated problem solving, unless the case involves a significant long term broad public policy warranting a Section-sponsored legislative proposal.

D. Dispel the notion that Section substantive committees are pressured to produce legislation to justify their existence. The existence of committee-mandated legislative liaisons or legislative vice-chairs does not compel, or imply the need to produce legislative proposals before discussing and debating policy. The focus should be on long term broad policy goals, not on a short term fix to an isolated situation.

E. Legislative committee and staff proposals driven by non-Section constituencies require the time and attention of the Legislation Committee, but Section responses should be contained within the scope of long-term public policy necessities consistent with the Section’s legislative positions and referred to appropriate substantive Section committees for rapid review and recommendations. Substantive committees in coordination with their Division Directors should prospectively team with outside trade groups or other stakeholders to preempt legislative proposals inconsistent with good public policy. If the Section fundamentally disagrees with another group’s statement of public policy to advance a proposal, the Section should communicate its position and its rationale, but not redraft the proposal. The Section shall work with other stakeholders to achieve favorable public policy.

II. Identifying Criteria or Determinants of What is “Worthy” of Legislative Response and the Expenditure of Section Time and Funds –

A. Is there a “Compelling Public Policy Reason” to justify the expenditure of Section resources concerning another’s proposal?

B. Determine before proposing a position whether the position is worthy of risking the Section’s reputation, the RPPTL brand.

C. Should the Section have legislative proposals advocated and adopted as a “tag along” to other Section(s) and trade group policies?
D. Be reminded that the Section’s reputation and importance comes from the fact that we are active participants in the legislative process, any scale-back of participation must not diminish the Section’s importance and reputation since that could invite challenges to our positions and reputation; thus, we should seek more collaborative effort with stakeholders to reduce the Section’s role as the front-runner. As the Probate and Trust Division continues to pursue policy partnering with bankers, the Elder Law Section, and the Family Law Section, among others, to both preempt opposition and be a co-leader in joint proposals, policy partnering should be developed in the Real Property Division with the bankers, among others.

The Section must be more flexible. Following The Florida Bar Board of Governors’ requirement to affirmatively disclose in our legislative position requests with whom we have consulted, including other stakeholders and Sections of the Bar and their positions, and noting we are one of the few Sections that does actively consults others on a continuing regular basis, the Section and its representatives on the Board of Governors should remind other Sections of their obligation and encourage collaboration and consultation.

More vigorous early consultation with stakeholders should reduce the number of glitch bills and help prioritize proposals. Also, we must continue to be cognizant of the legislative process of “horse trading” bills to assure that our important initiatives are advanced.

E. Adopt a Legislative Committee Policy Statement and Procedures to Ensure Continuity.

To provide guidance and appropriate expectations to those seeking support for legislative positions, the Section should adopt a policy statement concerning adopting legislative positions. The Section’s Amicus Committee’s policy may serve as a template:

“The Section’s appearance as a friend of the court is the rare exception, not the rule. Indeed, the strength of the Section’s appearance as an amicus stems in large part from the Section’s unwillingness to yield to the siren songs of our members every time they sense an injustice is upon us. Our ability to befriend a court is a privilege. To the extent we abuse it, our words, now carefully considered, will lose their significance. When we draw near, we will not be heard. We purposefully address every amicus request with skepticism, as we must in order to protect the Section’s credibility with the courts. But, know that every request is carefully considered.”

F. The Legislative Committee should have the authority to make a substantive recommendation to the Executive Committee as well as advise Committee Chairs as to whether a proposal is needed and consistent with the Section’s current policies.
G. The Section's Executive Committee should evaluate whether legislative proposals are consistent with current Section policies, and recommend to Committee Chairs as to whether a legislative proposal is worthy of Section adoption.

H. Standardize and make available prior legislative tracking charts, including hyperlinks to the referenced documents to assure continuity of information. The Fellows should complete this project, and update on a regular and timely basis.

I. Legislative Committee terms should continue with two-year staggered terms to ensure continuity and transfer of historical knowledge. Legislative Committee vice chairs should be selected with greater protocol to reduce the handicap resulting from transitions when significant substantive knowledge is lost with each transition. Actively and continually recruit new legislative committee members from the substantive committee legislative liaisons and legislative vice-chairs because they have some degree of experience, although perhaps limited to their particular committee’s area. Selection should be cognizant of the Section's legislative consultants' expression of desire that the Legislation Committee be staffed with individuals having legislative experience and historical knowledge, analogous to the Amicus Committee, noting the Legislation Committee has a much heavier lift on a continuing basis than the sporadic amicus proposal of the Section undertaking an amicus position from time-to-time. Outgoing Legislative Committee chairs should continue for some time as ex-officio members as a resource to their successors.

III. Educating Committees and Their Leadership as to both the Process and Role of the Section —

An annual educational program for all designated legislative liaisons and legislative vice-chairs with mandatory attendance should be provided at a designated EC meeting to address the inconsistency of the level of activities of the legislative liaisons, many not having current experience on how to move an action item/proposal through the process. The program should be led by the Legislation Committee and our legislative consultants. All substantive committee chairs should also be required to attend.

IV. The Role of and Relationship with Legislative Consultants —

A. Tracking Charts and Tracking Memos. Tracking Memos should be expanded to include the succeeding week's committee meetings, if the agenda has been posted by the time of publication of the Tracking Memo, noting that Committee agenda notices become abbreviated late in the session. More emphasis on the review of weekly listed bills following the Tracking Memos should be communicated to committee chairs, legislative
liaisons and vice-chairs, with prompt communication if there are bills of interest to be moved to the Tracking Memo.

B. **Positions.** No Section legislative position should be stated on any matter unless consistent with the established positions enumerated by the Section. If the Section is neutral on an issue, such neutrality should be expressed by our legislative consultant. The Section's legislative positions should be continually tagged and updated.

The Legislative Co-Chairs and the legislative consultants should discuss in advance of any Legislative Committee meeting where a bill containing a Section initiative will be on the agenda for the meeting to avoid any misunderstandings as to the Section's position and plan. The discussion should include a decision as to whether the Section will be in support/opposition or making a statement at the meeting.

Legislative white papers and positions should be categorized and archived to make them easily accessible to the Section.

C. **Succession and Conflict Planning –**

The Executive Committee, in conjunction with the Legislative Committee, should consult with our current legislative consultant to obtain a realistic timeline relative to succession planning. It is understood that such timeline may be extended or otherwise modified. As to conflicts, the Legislative Subcommittee of the Strategic Planning Committee recommends that the Executive Committee consider whether it would be worthwhile to engage a second legislative consulting firm for conflict purposes, whom is known to and respected by our current legislative consultants, but available to step in as determined by the Executive Committee when perceived conflicts exist.

D. **Management of Legislative Consultant –**

1. The Legislative Subcommittee recommends a discussion among the Executive Committee as to the broader issue of whether, and to what extent, if any, the Section's legislative consultants should be managed vs. trusting the judgment and discretion of the legislative consultants.

   If a more managed approach is adopted, procedures for dealing with the legislative consultants should be adopted.

2. **Legislative Bill Sponsors –** The legislative consultant and the Legislative Co-Chairs should discuss specific bill sponsors with the Real Property and Probate Division Directors before a potential sponsor is approached, so that all Section efforts can be coordinated and the Section can make an informed decision on its options.
Similarly, the sponsor's understanding and support of the substantive positions of the bill for which they are being solicited to sponsor should be confirmed prior to their sponsorship, to avoid confusion or lackluster promotion of a Section position because of lack of understanding or support for such position by the sponsor.

3. **Communications** - Clear communication of expectations of our legislative consultants from Legislative Co-Chairs and Committee Chairs is necessary to assure timely and effective participation in the legislative process. When legislation bill drafting is requested from our legislative consultant, a clear statement of scope and deadlines must occur. All communications should be conducted with respect and dignity, recognizing the Section's members are volunteering their time and expertise.
A bill to be entitled
An act relating to attorney compensation; amending s. 733.6171, F.S.; authorizing certain compensation for services of attorneys in formal estate administration to be based on the compensable value of the estate; deleting a presumption that such compensation is reasonable if it is based on the compensable value of the estate; providing an effective date.

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

Section 1. Subsection (3) of section 733.6171, Florida Statutes, is amended to read:

733.6171 Compensation of attorney for the personal representative.—
(3) Compensation for ordinary services of attorneys in formal estate administration may be presumed to be reasonable if based on the compensable value of the estate, which is the inventory value of the probate estate assets and the income earned by the estate during the administration as provided in the following schedule:
(a) One thousand five hundred dollars for estates having a value of $40,000 or less.
(b) An additional $750 for estates having a value of more than $40,000 and not exceeding $70,000.
(c) An additional $750 for estates having a value of more than $70,000 and not exceeding $100,000.
(d) For estates having a value in excess of $100,000, at the rate of 3 percent on the next $900,000.
(e) At the rate of 2.5 percent for all above $1 million and not exceeding $3 million.

(f) At the rate of 2 percent for all above $3 million and not exceeding $5 million.

(g) At the rate of 1.5 percent for all above $5 million and not exceeding $10 million.

(h) At the rate of 1 percent for all above $10 million.

Section 2. This act shall take effect July 1, 2020.
How to Navigate Through a Prior Work Conflict

By: Peter J. Winders and Jin Liu

Conflicts arising out of prior work of the same lawyer or the same law firm present an ethics issue that is often overlooked, but can be very costly to firms. Rule 1.7 of the Model Rules of Professional Conduct provides some guidance on how to navigate through a prior work conflict.

When does a prior work conflict arise? It arises when the same lawyer interprets or takes other action on his or her own prior work whereupon the lawyer’s personal interest may be at odds with the client’s best interest. For instance, a real estate lawyer drafts a lease, which is meant to disclaim all environmental claims. Two years later, after environmental issues are discovered on the property, the opposite party interprets the lease to mean that not all environmental issues are disclaimed in the lease. Client naturally approaches his lawyer. “What to do?” Lawyer does not find any ambiguity in the lease, or even if there is one, is sure that the rules of interpretation favor the client and so advises her client. Client instructs his lawyer to file suit, which the lawyer does.

In the example provided above, many a lawyer will not recognize that she has a conflict. Under that circumstance, the lawyer is motivated not solely by her client’s best interest. She has her personal reputation to uphold; therefore, she may be inclined to interpret the document in a way that avoids blame on her contract drafting. Alternatively, she may be afraid that she did in fact make a mistake and will be tempted to encourage settlement “I know we are absolutely correct, but we ought to compromise to save you time and money,” and incidentally to prevent any finding that she made a mistake in drafting the contract or not foreseeing this situation. Either way, there is a conflict between the lawyer’s personal interest and the client’s interest. An objective lawyer not influenced by any of that may advise against a premature settlement (and even suing the original lawyer for malpractice) or in favor of settlement, as the better part of valor given the time and expense, but that independent lawyer will not be influenced by either personal fear, or a desire for personal vindication.
How should lawyers navigate through prior work conflicts? Does it mean that the same lawyer and the same law firm can never interpret or take other action on its own prior work? Rule 1.7 of the Model Rules of Professional Conduct provides that “(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if … (2) there is a significant risk that the representation of one or more clients will be materially limited by … a personal interest of the lawyer. (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if: (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client; (2) the representation is not prohibited by law; (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and (4) each affected client gives informed consent, confirmed in writing.”

Based on Model Rule 1.7, a prior work conflict can be waived, if the lawyer first determines that she (or the firm) will not be influenced by considerations in the self interest of the lawyer or the law firm (maybe because the opposing case is very weak or maybe because other people will be handling it) and if the lawyer explains all of the considerations to the client and the client provides a knowing, written consent. Ultimately, it is the client’s decision whether such a conflict can be waived after the lawyer’s explanation.

Prior work conflicts potentially present a bigger problem in a small firm because it is less likely for a lawyer in a small firm to turn to his or her colleague for an independent evaluation of the prior work. Therefore, it is more likely for a lawyer in a small firm to interpret his or her own prior work. In a bigger firm, however, if the transactional lawyer who drafted the document turns the matter over to a trial lawyer, the trial lawyer is more likely to recognize the problem and provide an unbiased assessment.

How can a law firm proactively protect itself against the risk associated with prior work conflicts? Some large firms have a checklist item on their business intake form that asks “Does this matter arise out of prior work of the firm?” This question serves to remind the matter-originating attorney to think through the considerations and consequences of handling a matter that arises out of prior work of the firm. If the response to this checklist item is yes, a big firm typically requires a different practice group, usually the litigation practice group, to approve the matter originated from prior work of the transactional attorney. Lastly, the lawsuit should be treated as a separate client matter than the underlying transaction, so the intake safeguards will apply.

In addition to the above, one way to ameliorate the problem of prior work conflicts, and one some firms have frequently used, is to refuse to advise on settlement. In many of these scenarios, after the explanation and if the client wants the prior firm still to handle the litigation, the law firm can take on this work but only if the client relies on another lawyer (often in-house counsel) to evaluate settlement. Often the influences described above would really impact only settlement decisions, and if an independent lawyer is where the client is going for that advice, leaving the law firm out of it, it will provide a way for the law firm to comply with Rule 1.7 and remove any question whether the firm’s advice is infected with self-interest.
Proposed Mission Statement and Scholarship Selection Criteria for Fellows Program

The RPPTL Section of the Florida Bar encourages involvement of attorneys from diverse backgrounds, including geographic, racial and ethnic backgrounds, that are traditionally underrepresented in the law and the Section.

The mission of the RPPTL Fellows program is to recruit attorneys who have a demonstrated interest in practicing in the area of wills, trusts, estates, and/or real estate, and who are interested in greater involvement in the RPPTL Section and its committees, but who would not otherwise be able to participate due to financial constraints or needs. Our goal is to provide opportunities for deserving attorneys to achieve their career goals through leadership training and working closely with leading attorneys in their field, while at the same time fostering diversity within the Section.

The Fellowship Program is open to all lawyers who are members of the RPPTL Section and who have been admitted to the Bar for fewer than 12 years. Scholarships will be considered for applicants who best meet the following criteria:

• Demonstrated interest in wills, trusts, estates, and/or real estate as a part of the applicant’s practice;

• Demonstrated interest in the activities of the RPPTL Section, and is likely to be dedicated and excel in such activities;

• Diversity, including a geographic, racial or ethnic background that is traditionally underrepresented in the RPPTL Executive Council and Section;

• Demonstrated need for financial assistance in order to attend Section meetings;

• Service to the profession or community.
117.05 Use of notary commission; unlawful use; notary fee; seal; duties; employer liability; name change; advertising; photocopies; penalties.—

(1) A person may not obtain or use a notary public commission in other than his or her legal name, and it is unlawful for a notary public to notarize his or her own signature. Any person applying for a notary public commission must submit proof of identity to the Department of State. Any person who violates this subsection commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(2)(a) The fee of a notary public may not exceed $10 for any one notarial act, except as provided in s. 117.045 or s. 117.275.

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

(3)(a) A notary public seal shall be affixed to all notarized paper documents and shall be of the rubber stamp type and shall include the words “Notary Public-State of Florida.” The seal shall also include the name of the notary public, the date of expiration of the commission of the notary public, and the commission number. The rubber stamp seal must be affixed to the notarized paper document in photographically reproducible black ink. Every notary public shall print, type, or stamp below his or her signature on a paper document his or her name exactly as commissioned. An impression-type seal may be used in addition to the rubber stamp seal, but the rubber stamp seal shall be the official seal for use on a paper document, and the impression-type seal may not be substituted therefor.

(b) The notary public official seal and the certificate of notary public commission are the exclusive property of the notary public and must be kept under the direct and exclusive control of the notary public. The seal and certificate of commission must not be surrendered to an employer upon termination of employment, regardless of whether the employer paid for the seal or for the commission.

(c) A notary public whose official seal is lost, stolen, or believed to be in the possession of another person shall immediately notify the Department of State or the Governor in writing.

(d) Any person who unlawfully possesses a notary public official seal or any papers or copies relating to notarial acts is guilty of a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083.

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

(a) The venue stating the location of the notary public at the time of the notarization in the format, “State of Florida, County of .”
(b) The type of notarial act performed, an oath or an acknowledgment, evidenced by the words “sworn” or “acknowledged.”

(c) Whether the signer personally appeared before the notary public at the time of the notarization by physical presence or by means of audio-video communication technology as authorized under part II of this chapter.

(d) The exact date of the notarial act.

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

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

(g) The notary public’s official signature.

(h) The notary public’s name, which must be typed, printed, or stamped below the signature.

(i) The notary public’s official seal affixed below or to either side of the notary public’s signature.

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

(a) For purposes of this subsection, the term “personally knows” means having an acquaintance, derived from association with the individual, which establishes the individual’s identity with at least a reasonable certainty.

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

1. The sworn written statement of one credible witness personally known to the notary public or the sworn written statement of two credible witnesses whose identities are proven to the notary public upon the presentation of satisfactory evidence that each of the following is true:
   a. That the person whose signature is to be notarized is the person named in the document;
   b. That the person whose signature is to be notarized is personally known to the witnesses;
   c. That it is the reasonable belief of the witnesses that the circumstances of the person whose signature is to be notarized are such that it would be very difficult or impossible for that person to obtain another acceptable form of identification;
   d. That it is the reasonable belief of the witnesses that the person whose signature is to be notarized does not possess any of the identification documents specified in subparagraph 2.; and
e. That the witnesses do not have a financial interest in nor are parties to the underlying transaction; or

2. Reasonable reliance on the presentation to the notary public of any one of the following forms of identification, if the document is current or has been issued within the past 5 years and bears a serial or other identifying number:
   a. A Florida identification card or driver license issued by the public agency authorized to issue driver licenses;
   b. A passport issued by the Department of State of the United States;
   c. A passport issued by a foreign government if the document is stamped by the United States Bureau of Citizenship and Immigration Services;
   d. A driver license or an identification card issued by a public agency authorized to issue driver licenses in a state other than Florida or in a territory of the United States, or Canada or Mexico;
   e. An identification card issued by any branch of the armed forces of the United States;
   f. A veteran health identification card issued by the United States Department of Veterans Affairs;
   g. An inmate identification card issued on or after January 1, 1991, by the Florida Department of Corrections for an inmate who is in the custody of the department;
   h. An inmate identification card issued by the United States Department of Justice, Bureau of Prisons, for an inmate who is in the custody of the department;
   i. A sworn, written statement from a sworn law enforcement officer that the forms of identification for an inmate in an institution of confinement were confiscated upon confinement and that the person named in the document is the person whose signature is to be notarized; or

(6) The employer of a notary public shall be liable to the persons involved for all damages proximately caused by the notary's official misconduct, if the notary public was acting within the scope of his or her employment at the time the notary engaged in the official misconduct.

(7) Any person who acts as or otherwise willfully impersonates a notary public while not lawfully appointed and commissioned to perform notarial acts is guilty of a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083.

(8) Any notary public who knowingly acts as a notary public after his or her commission has expired is guilty of a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083.

(9) Any notary public who lawfully changes his or her name shall, within 60 days after such change, request an amended commission from the Secretary of State and shall send $25, his or her current commission, and a notice of change form, obtained from the Secretary of State, which shall include the new name and contain a specimen of his or her official signature. The Secretary of State shall issue an amended commission to the notary public in the new name. A rider to the notary public's bond must accompany the notice of change form. After submitting the required notice of change form and rider to
the Secretary of State, the notary public may continue to perform notarial acts in his or her former
name for 60 days or until receipt of the amended commission, whichever date is earlier.

(10) A notary public who is not an attorney who advertises the services of a notary public in a
language other than English, whether by radio, television, signs, pamphlets, newspapers, or other
written communication, with the exception of a single desk plaque, shall post or otherwise include
with the advertisement a notice in English and in the language used for the advertisement. The notice
shall be of a conspicuous size, if in writing, and shall state: “I AM NOT AN ATTORNEY LICENSED TO
PRACTICE LAW IN THE STATE OF FLORIDA, AND I MAY NOT GIVE LEGAL ADVICE OR ACCEPT FEES FOR
LEGAL ADVICE.” If the advertisement is by radio or television, the statement may be modified but must
include substantially the same message.

(11) Literal translation of the phrase “Notary Public” into a language other than English is
prohibited in an advertisement for notarial services.

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

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

STATE OF FLORIDA
COUNTY OF
On this   day of   ,   (year)  , I attest that the preceding or attached document is a true, exact, complete,
and unaltered photocopy made by me of   (description of document)   presented to me by the document’s
custodian,     , and, to the best of my knowledge, that the photocopied document is neither a vital
record nor a public record, certified copies of which are available from an official source other than a
notary public.

(Official Notary Signature and Notary Seal)
(Name of Notary Typed, Printed or Stamped)

(c) A notary public must use a certificate in substantially the following form in notarizing a copy of
a tangible or an electronic record or a printout of an electronic record:

STATE OF FLORIDA
COUNTY OF
On this   day of   ,   (year)  , I attest that the preceding or attached document is a true, exact, complete,
and unaltered   (copy of a tangible or an electronic record presented to me by the document’s custodian)   or a   (printout made by
me from such record). If a printout, I further attest that, at the time of printing, no security features, if any, present on the electronic record, indicated that the record had been altered since execution.

(Signature of Notary Public - State of Florida)
(Print, Type, or Stamp Commissioned Name of Notary Public)

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

(a) For an oath or affirmation:

STATE OF FLORIDA
COUNTY OF
Sworn to (or affirmed) and subscribed before me by means of ☐ physical presence or ☐ online notarization, this _ day of _, (year), by (name of person making statement).

(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

(b) For an acknowledgment in an individual capacity:

STATE OF FLORIDA
COUNTY OF
The foregoing instrument was acknowledged before me by means of ☐ physical presence or ☐ online notarization, this _ day of _, (year), by (name of person acknowledging).

(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

(c) For an acknowledgment in a representative capacity:

STATE OF FLORIDA
COUNTY OF
The foregoing instrument was acknowledged before me by means of ☐ physical presence or ☐ online notarization, this _ day of _, (year), by (name of person) as (type of authority, . . . e.g. officer, trustee, attorney in fact) for (name of party on behalf of whom instrument was executed).

(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 public 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 public 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

2. For an acknowledgment in an individual capacity:

   
   (First Name)     (Last Name)

   His (or Her) Mark

STATE OF FLORIDA
COUNTY OF

Sworn to and subscribed before me by means of ☐ physical presence or ☐ online notarization, this   day of   ,   (year)  , by   (name of person making statement)  , who signed with a mark in the presence of these witnesses:

   
   (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

2. For an acknowledgment in an individual capacity:

   
   (First Name)     (Last Name)

   His (or Her) Mark

STATE OF FLORIDA
COUNTY OF

The foregoing instrument was acknowledged before me by means of ☐ physical presence or ☐ online notarization, this   day of   ,   (year)  , by   (name of person acknowledging)  , who signed with a mark in the presence of these witnesses:

   
   (Signature of Notary Public - State of Florida)

   (Print, Type, or Stamp Commissioned Name of Notary Public)
A notary public may sign the name of a person whose signature is to be notarized when that person is physically unable to sign or make a signature mark on a document if:

1. The person with a disability directs the notary public to sign in his or her presence by verbal, written, or other means;
2. The document signing is witnessed by two disinterested persons; and
3. The notary public writes below the signature the following statement: “Signature affixed by notary, pursuant to s. 117.05(14), Florida Statutes,” and states the circumstances and the means by which the notary public was directed to sign the notarial certificate.

The notary public must maintain the proof of direction and authorization to sign on behalf of the person with a disability for 10 years from the date of the notarial act.

The following notarial certificates are sufficient for the purpose of notarizing for a person with a disability who directs the notary public to sign his or her name:

1. For an oath or affirmation:

   STATE OF FLORIDA
   COUNTY OF
   Sworn to (or affirmed) before me by means of □ physical presence or □ online notarization, this day of , (year), by (name of person making statement), and subscribed by (name of notary) at the direction of (name of person making statement) by (written, verbal, or other means), and in the presence of these witnesses:

   (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

   2. For an acknowledgment in an individual capacity:

   STATE OF FLORIDA
   COUNTY OF
   The foregoing instrument was acknowledged before me by means of □ physical presence or □ online notarization, this day of , (year), by (name of person acknowledging), and subscribed by (name of notary) at the direction of (name of person acknowledging), and in the presence of these witnesses:

   (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
History.—ch. 3874, 1889; RS 221; GS 306; RGS 417; CGL 483; s. 8, ch. 81-260; s. 4, ch. 91-291; s. 3, ch. 92-209; s. 4, ch. 93-62; s. 747, ch. 95-147; s. 1, ch. 97-241; s. 33, ch. 98-129; s. 5, ch. 98-246; s. 46, ch. 99-2; s. 7, ch. 2004-5; s. 19, ch. 2014-17; s. 40, ch. 2016-37; s. 1, ch. 2017-17; s. 4, ch. 2019-71.
Limitations on proceedings against trustees.—

(1) Except as provided in subsection (2), all claims by a beneficiary against a trustee for breach of trust are barred as provided in chapter 95 as to:

(a) All matters adequately disclosed in a trust disclosure document issued by the trustee, with the limitations period beginning on the date of receipt of adequate disclosure.

(b) All matters not adequately disclosed in a trust disclosure document if the trustee has issued a final trust accounting and has given written notice to the beneficiary of the availability of the trust records for examination and that any claims with respect to matters not adequately disclosed may be barred unless an action is commenced within the applicable limitations period provided in chapter 95. The limitations period begins on the date of receipt of the final trust accounting and notice.

(2) Unless sooner barred by adjudication, consent, or limitations, a beneficiary is barred from bringing an action against a trustee for breach of trust with respect to a matter that was adequately disclosed in a trust disclosure document unless a proceeding to assert the claim is commenced within 6 months after receipt from the trustee of the trust disclosure document or a limitation notice that applies to that disclosure document, whichever is received later.

(3) When a trustee has not issued a final trust accounting or has not given written notice to the beneficiary of the availability of the trust records for examination and that claims with respect to matters not adequately disclosed may be barred, a claim against the trustee for breach of trust based on a matter not adequately disclosed in a trust disclosure document is barred as provided in chapter 95 and accrues when the beneficiary has actual knowledge of:

(a) The facts upon which the claim is based, if such actual knowledge is established by clear and convincing evidence; or
(b) The trustee’s repudiation of the trust or adverse possession of trust assets.

Paragraph (a) applies to claims based upon acts or omissions occurring on or after July 1, 2008.

A beneficiary’s actual knowledge that he or she has not received a trust accounting does not cause a claim to accrue against the trustee for breach of trust based upon the failure to provide a trust accounting required by s. 736.0813 or former s. 737.303 and does not commence the running of any period of limitations or laches for such a claim, and paragraph (a) and chapter 95 do not bar any such claim.

(4) As used in this section, the term:

(a) “Trust disclosure document” means a trust accounting or any other written report of the trustee. A trust disclosure document adequately discloses a matter if the document provides sufficient information so that a beneficiary knows of a claim or reasonably should have inquired into the existence of a claim with respect to that matter.

(b) “Trust accounting” means an accounting that adequately discloses the information required by and that substantially complies with the standards set forth in s. 736.08135.

(c) “Limitation notice” means a written statement of the trustee that an action by a beneficiary against the trustee for breach of trust based on any matter adequately disclosed in a trust disclosure document may be barred unless the action is commenced within 6 months after receipt of the trust disclosure document or receipt of a limitation notice that applies to that trust disclosure document, whichever is later. A limitation notice may but is not required to be in the following form: “An action for breach of trust based on matters disclosed in a trust accounting or other written report of the trustee may be subject to a 6-month statute of limitations from the receipt of the trust accounting or other written report. If you have questions, please consult your attorney.”
(5) For purposes of this section, a limitation notice applies to a trust disclosure document when the limitation notice is:

(a) Contained as a part of the trust disclosure document or as a part of another trust disclosure document received within 1 year prior to the receipt of the latter trust disclosure document;

(b) Accompanied concurrently by the trust disclosure document or by another trust disclosure document that was received within 1 year prior to the receipt of the latter trust disclosure document;

(c) Delivered separately within 10 days after the delivery of the trust disclosure document or of another trust disclosure document that was received within 1 year prior to the receipt of the latter trust disclosure document. For purposes of this paragraph, a limitation notice is not delivered separately if the notice is accompanied by another written communication, other than a written communication that refers only to the limitation notice; or

(d) Received more than 10 days after the delivery of the trust disclosure document, but only if the limitation notice references that trust disclosure document and:

1. Offers to provide to the beneficiary on request another copy of that trust disclosure document if the document was received by the beneficiary within 1 year prior to receipt of the limitation notice; or

2. Is accompanied by another copy of that trust disclosure document if the trust disclosure document was received by the beneficiary 1 year or more prior to the receipt of the limitation notice.

(6)(a) Notwithstanding subsections (1), (2), and (3), all claims by a beneficiary against a trustee are barred:

1. Upon the later of:
a. Ten years after the date the trust terminates, the trustee resigns, or the fiduciary relationship between the trustee and the beneficiary otherwise ends if the beneficiary had actual knowledge of the existence of the trust and the beneficiary’s status as a beneficiary throughout the 10-year period; or

b. Twenty years after the date of the act or omission of the trustee that is complained of if the beneficiary had actual knowledge of the existence of the trust and the beneficiary’s status as a beneficiary throughout the 20-year period; or

2. Forty years after the date the trust terminates, the trustee resigns, or the fiduciary relationship between the trustee and the beneficiary otherwise ends.

(b) When a beneficiary shows by clear and convincing evidence that a trustee actively concealed facts supporting a cause of action, any existing applicable statute of repose shall be extended by 30 years.

(c) For purposes of sub-subparagraph (a)1.b., the failure of the trustee to take corrective action is not a separate act or omission and does not extend the period of repose established by this subsection.

(d) This subsection applies to claims based upon acts or omissions occurring on or after July 1, 2008.

Any claim barred against a trustee under this section, is also barred against the directors, officers, and employees acting for that trustee.

This section applies to trust accountings for accounting periods beginning on or after July 1, 2007, and to written reports, other than trust accountings, received by a beneficiary on or after July 1, 2007.
PROPOSED AMENDMENT OF F.S. SECTION 736.1008

A. SUMMARY

The proposed amendment adds language to Florida Statutes § 736.1008 so that the same statute of limitations for breach of trust against a trustee applies to directors, officers, and employees acting for the trustee.

B. CURRENT SITUATION

Section 736.1008 includes the statute of limitations for a beneficiary’s claims against a trustee for a breach of trust. The trustee has the authority to adequately disclose matters in a trust disclosure document and include a limitations notice to utilize a six-month statute of limitations. “Trustee” is defined in the Florida Trust Code as “the original trustee and includes any additional trustee, any successor trustee, and any cotrustee.” Fla. Stat. § 736.0103(23) (2018). Local and national banking associations and corporations with trust powers are authorized to engage in trust business and serve as trustees in Florida. Fla. Stat. §§ 658.12(20) and 660.41 (2018). Local and national banking associations employ trust officers, directors, and other personnel that work with and provide information to beneficiaries. Currently, it is unclear whether the statute of limitations periods identified in Section 736.1008 extend to the employees and officers of corporations serving as trustee.

In Beaubien v. Cambridge Consolidated, LTD, 652 So. 2d 936 (Fla. 5th DCA 1995), trust beneficiaries sued an individual allegedly serving as director and manager of a corporate trustee. The Fifth District noted, “It is well settled that an individual acting for a corporate trustee may be personally liable to third persons injured by his actions even if the individual was acting as agent for the corporation. Such corporate agents owe duties not only to the corporation, but also to the beneficiaries of a trust administered by the corporation.” The Court required the individual director to account for the funds held and disposed of while he was in control of the trust account.

Other cases and statutes stand for the same position – that an individual, acting on behalf of a corporate trustee, can be separately liable to the trust beneficiaries. Those cases and statutes include Raimi v. Furlong, 702 So. 2d 1273 (Fla. 3d DCA 1997)(bank officers were personally liable for breach of fiduciary duty); Sun First Nat’l Bank of Melbourne v. Batchelor, 321 So. 2d 73 (Fla. 1975)(release of bank did not operate to discharge former trust officer/employee); and Fla. Stat. § 736.1002(5)(“The beneficiary’s recovery of a judgment for breach of trust against one liable person does not of itself discharge other liable persons from liability for the breach of trust unless the judgment is satisfied. The satisfaction of the judgment does not impair any right of contribution.”).
The same statute of limitations for claims of breach of trust against a trustee should apply to the trustee’s employees, officers, and directors. Accordingly, the proposed changes extend the six-month statute of limitations protections of Section 736.1008 to the employees, officers, and directors of trustees who make adequate disclosures in a trust information document.

C. EFFECT OF PROPOSED CHANGES

The proposed amendment adds a new subsection to Section 736.1008 and clarifies that the same statutes of limitations apply to the trustee as to the directors, officers, and employees of that trustee. If claims are barred against the trustee, they are also barred against the trustee’s officers, directors, and employees.

D. FISCAL IMPACT ON STATE AND LOCAL GOVERNMENTS

None

E. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR

None

F. CONSTITUTIONAL ISSUES

None

G. OTHER INTERESTED PARTIES

Florida Elder Law Section.
Florida Bankers Association.
LEGAL INFORMATION

Submitted by: (list name of section, division, committee, TFB group, or individual name)
Rob Lancaster, Chair, Estate and Trust Tax Planning Committee, RPPTL

Address: (address and phone #)
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239-649-3178

Position Level: (TFB section/division/committee)
TFB, RPPTL/Probate/Estate and Trust Tax Planning

PROPOSED ADVOCACY

- All requests for legislative and political positions must be presented to the Board of Governors by completing this form and attaching a copy of any existing or proposed legislation or a detailed presentation of the issue.
- Select Section I below if the issue is legislative, II is the issue is political. Regardless, Section III must be completed.

If Applicable, List the Following:

(Bill or PCB #) (Sponsor)
SB 1366 N/A Gruters

Indicate Position: ☐ Support ☐ Oppose ☐ Technical or Other Non-Partisan Assistance

I. Proposed Wording of Legislative Position for Official Publication

Support revisions to section 736.08145, Florida Statutes, to grant a trustee discretionary authority to reimburse the deemed owner of a grantor trust for income taxes attributable to the deemed owner.
II. Political Proposals:

III. Reasons For Proposed Advocacy:

A. Is the proposal consistent with Keller vs. State Bar of California, 110 S. Ct. 2228 (1990), and The Florida Bar v. Schwarz, 552 So. 2d 1094 (Fla. 1981)?

Yes

B. Which goal or objective of the Bar’s strategic plan is advanced by the proposal?

N/A

C. Does the proposal relate to: (check all that apply)

- Regulating the profession
- Improving the quality of legal services
- Improving the functioning of the system of justice
- Increasing the availability of legal services to the public
- Regulation of trust accounts
- Education, ethics, competency, and integrity of the legal profession

D. Additional Information:

Fla. Stat. 736.1008 allows a trustee to utilize a six-month statute of limitations when a matter is adequately disclosed in a trust disclosure document. Local and national banking associations are authorized to engage in trust business and serve as trustees in Florida. See Fla. Stat. §§ 658.12(20) and 660.41. The same statute of limitations for claims of breach of trust against a trustee should apply to the trustee’s employees, officers, and directors.

PRIOR POSITIONS TAKEN ON THIS ISSUE

Please indicate any prior Bar or section/divisions/committee 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

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<tr>
<th>TFB Section/Division/Committee</th>
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Others (attach list if more than one)

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## Referrals to Other Sections, Committees or Legal Organizations

A request for action on a position must be circulated to sections and committees that might be interested in the issue. The Legislation Committee and Board of Governors may delay final action on a request if the below section is not completed. Please attach referrals and responses to this form. If you do not believe other sections and committees are affected and you did not circulate this form to them, please provide details below.

### Referrals

<table>
<thead>
<tr>
<th>Name of Group or Organization</th>
<th>Support, Oppose or No-Position</th>
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<tr>
<td>Elder Law Section of the Florida Bar</td>
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<tr>
<td>Florida Bankers’ Association</td>
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### Reasons for Non-Referrals:

### Contacts

**Board & Legislation Committee Appearance** *(list name, address and phone #)*

Jon Scuderi, Legislative Co-Chair of the RPPTL Section, 850 Park Shore Drive, Suite 203, Naples, FL 34102, 239-436-1988

Peter M. Dunbar and Martha Edenfield, Dean, Mead & Dunbar, P.A., 215 South Monroe Street, Suite 815, Tallahassee, Florida 32301, Telephone: (850) 999-4100

**Appearances before Legislators** *(list name and phone # of those having direct contact before House/Senate committees)*

Peter M. Dunbar and Martha Edenfield, Dean, Mead & Dunbar, P.A., 215 South Monroe Street, Suite 815, Tallahassee, Florida 32301, Telephone: (850) 999-4100

**Meetings with Legislators/staff** *(list name and phone # of those having direct contact with legislators)*

Same as above.

Submit this form and attachments to the Office of General Counsel of The Florida Bar—mailto:jhooks@floridabar.org, (850) 561-5662. Upon receipt, staff will schedule your request for final Bar action; this may involve a separate appearance before the Legislation Committee unless otherwise advised.
A bill to be entitled

An act relating to the Florida Guardianship Code;
providing a short title; providing general provisions and definitions; providing for venue;
providing for proceedings to determine incapacity;
providing for proceeding to restore the rights of an individual no longer incapacitated; providing for
the qualifications of a guardian; providing for the appointment of a guardian; providing provisions
relating to different types of guardians; providing provisions relating to the duties of guardians;
providing provisions relating to the powers of guardians; providing oversight and monitoring of
wards and guardians; providing provisions relating to the resignation and discharge of guardians;
providing for the removal of guardians; providing for miscellaneous provisions relating to a
guardian's authorities; the authority of multiple guardians; the effect of a guardianship proceeding
on a power of attorney or trust, and prohibitions on abuse by a guardian; provisions relating to the
Office of Public and Professional Guardians; regulations relating to Veteran Guardianships;
repealing ch 744; providing an effective date.

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

Section 1. Part I of chapter 745, Florida Statutes, consisting

of sections 745.101, 745.102, 745.103, 745.104, 745.105, 745.106,
745.107, 745.108, 745.109, 745.110, 745.111, 745.112, 745.113, and
745.114, is created to read:

PART I

GENERAL PROVISIONS

745.101 Short title.
This chapter may be cited as the "Florida Guardianship Code" and
for purposes of this chapter is referred to as the "code".

745.102 Legislative intent.
The Legislature recognizes the importance of protecting adults and
minors in the state of Florida; and finds that:
(1) Adjudicating an adult partially or totally incapacitated
deprees such person of important legal rights.
(2) By recognizing that every person has unique needs and
differing abilities, it is the purpose of this code to promote the
public welfare by establishing a legal system that permits
incapacitated persons to participate as fully as possible in
decisions affecting them; assists them in meeting the essential
requirements for their physical health and safety, protects their
rights and dignity, manages their assets and financial resources,
provides a mechanism for them to regain their rights and abilities
to the maximum extent possible, and provides personal and financial
care and protection while preserving their right to privacy of
their personal, financial, medical and mental health information to
the same extent as persons who are not incapacitated.
(3) It is the intent of this code to recognize appropriate lesser
restrictive means of assistance to incapacitated persons and
alternatives to guardianship and to utilize the least restrictive
means of assistance.

(4) This code shall be liberally construed to accomplish these
purposes.

745.103 Applicability.
This code shall take effect on the ______ day of ______ . The procedures
for enforcement of substantive rights and the administration of
this Code shall be as provided in the Florida Probate Rules.

745.104 Rules of evidence.
The Florida Evidence Code is applicable in incapacity and
guardianship proceedings unless otherwise provided by this code.

745.105 Construction against implied repeal.
This code is intended as unified coverage of its subject matter. No
part of it shall be impliedly repealed by subsequent legislation if
that construction can reasonably be avoided.

745.106 Definitions.
As used in this code, the term:
(1) "Accounting" means that verified document filed by a guardian
of property pursuant to s. 745.805 or 745.806.
(2) "Attorney for the alleged incapacitated person" means an
attorney authorized by court order to represent a person in
proceedings for determination of the person's incapacity, the
existence of less restrictive alternatives, the appointment of a
guardian, and as otherwise authorized in this code . The attorney
advocates the preferences expressed by the alleged incapacitated
person, to the extent consistent with the rules regulating The
Florida Bar.
(a) "Limited guardian" means a guardian of person, property, or both who has been appointed by the court to exercise some, but not all, delegable rights and powers of a ward.

(b) "Plenary guardian" means a guardian of person, property, or both who has been appointed by the court to exercise all delegable legal rights and powers of a ward.

(13) "Guardian ad litem" means a person who is appointed by the court having jurisdiction of the guardianship, or a court in which a particular legal matter is pending, to represent a ward in a particular proceeding.

(14) "Guardian advocate" means a person appointed by the court to represent a person with developmental disabilities under s. 393.12.

(15) "Guardianship monitor" means a person appointed by the court under s. 745.1008 or s. 745.1009 to provide the court with information concerning a ward.

(16) "Guardianship Plan" means the document filed by a guardian of a person within 60 days after letters of guardianship are issued that provides for the initial plan of care to meet the medical, mental health, social, residential, personal care and other needs of the ward, in accordance with ss. 745.810.

(17) "Guardianship Report" means the document filed annually by a guardian of person that provides information regarding the treatment, services and care provided to the ward during the reporting period and the plan for addressing the ongoing or anticipated needs of the ward, in accordance with s. 745.811, 745.812, and 745.813.

(18) "Incapacitated person" means a person who has been judicially determined to lack the capacity to manage at least some of the person's property as defined in subsection (23) or to meet at least some of the requirements for the person's health or safety as defined in subsection (24).

(19) "Information Statement" means the verified document filed by a proposed guardian pursuant to s. 745.601.

(20) "Interested person" means any person who may reasonably be expected to be affected by the outcome of a guardianship or incapacity proceeding. A person is not deemed an interested person in proceedings that affect the ward. A person is not deemed interested solely because of an anticipated expectancy of personal benefit. A person is not deemed interested solely because of having filed a request for copies and notices of proceedings. The meaning may vary from time to time and must be determined according to the particular purpose of, and matter involved in, any proceedings.

(21) "Inventory" means the verified document filed by a guardian of property pursuant to s. 745.803.

(22) "Letters" means authority granted by the court to a guardian to act on behalf of the ward.

(23) "Manage property" means to make lucid decisions necessary to secure, safeguard, administer, and dispose of real and personal property, contractual rights, benefits, and income of a ward.

(24) "Requirements for health or safety" means to make lucid decisions necessary to provide for a person's health care, food, shelter, clothing, personal hygiene, or other care needs of a ward.

(25) "Minor" means a person under 18 years of age whose disability due to age has not been removed by marriage or otherwise.

(26) "Natural guardian." The persons designated under §§ 745.7121(1) are the natural guardians of a minor.

(27) "Next of kin" means those persons who would be heirs at law of the ward or alleged incapacitated person if that person was deceased, and the lineal descendants, per stirpes, of the ward or alleged incapacitated person.

(28) "Nonprofit corporate guardian" means a not for profit corporation organized under the laws of this state for religious or charitable purposes and authorized to exercise the powers of a professional guardian.

(29) "Preneed guardian" means a guardian designated by a competent adult or by the natural guardian of a minor, to serve as guardian of the ward or alleged incapacitated person.

(30) "Professional guardian" means a person who is serving as guardian for a non-relative and who has met the requirements of the Office of Public and Professional Guardians to qualify to serve as a guardian for unrelated wards, as specified in this code.

(31) "Property" means both real and personal property or any interest in it, and anything that may be the subject of ownership.

(32) "Public guardian" means a guardian who has been appointed, or has a contract with, the Office of the Public and Professional Guardians to provide guardianship services.

(33) "Relative" of a ward means, for purposes related to professional guardians, a spouse, adopted child, anyone related by

lineal or collateral consanguinity or a spouse of any such relative.

(34) "Standby guardian" means a guardian designated by a currently serving guardian and appointed by the court to assume the position of guardian if the current guardian ceases to act. The appointment of a standby guardian shall be as specified in s. 745.702 and 745.703.

(35) "Surrogate guardian" means a guardian appointed for temporary service in accordance with s. 745.131.

(36) "Totally incapacitated" means judicially determined to be incapable of exercising any of the rights enumerated in s. 745.303(2) and 745.303(3).

(37) "Voluntary guardian" in a guardian of property appointed by the court pursuant to s. 745.707.

(38) "Ward" means a person for whom a guardian has been appointed.

745.107 Additional definitions.

The definitions contained in the Florida Probate Code and the Florida Probate Rules shall be applicable to actions under this code, unless the context requires otherwise, insofar as such definitions do not conflict with definitions contained in this code.

745.108 Verification of documents.

When verification of a document is required in this code or by rule, the document filed shall include an oath or affirmation or the following statement: "Under penalties of perjury, I declare that I have read the foregoing and the facts alleged are true to the best of my knowledge and belief." Any person who shall willfully include a false statement in the document shall be guilty
of perjury and upon conviction shall be punished as provided by law.

745.109 Costs.
In all guardianship proceedings, costs may be awarded. When the costs are to be paid out of the property of the ward, the court may direct from what part of the property the costs shall be paid.

745.110 Notice and service.
The methods of providing notice of proceedings under this code are those specified in the Florida Probate Rules set out as provided in s. 745.302. When the ward or alleged incapacitated person has an attorney of record in the guardianship or incapacity proceeding, service on the ward or alleged incapacitated person shall be completed by service on the attorney in compliance with the Rules of Judicial Administration. When a totally incapacitated ward has no attorney of record in the guardianship proceeding, service on the guardian shall be deemed service on the ward.

745.111 Recording of hearings.
(1) All hearings related to appointment or removal of a guardian, adjudication of incapacity, or restoration of capacity must be electronically or stenographically recorded by the court.
(2) If an appeal is taken from any of these proceedings, a transcript must be furnished to an indigent ward at public expense.

745.112 Confidentiality of guardianship records.
(1) Unless otherwise ordered by the court, all records relating to incapacity, guardianship, or the settlement of a minor’s claim if a guardianship has not yet been established, are confidential and specified in subsection (9). For other professional services, the accounting must include statements demonstrating the fee arrangement and method of charging for the services rendered.
(3) On audit of the guardian’s accounting pursuant to s. 745.1001, the court may require the guardian to justify the fees paid.
(4) The court may, on a case by case basis, require a petition for approval of guardian’s and professional’s fees in advance of payment. The court may not unreasonably limit the frequency of such petitions and must hear such petitions on an expedited basis.
(5) When fees for a guardian or attorney are submitted to the court for determination, the court may consider the following criteria:
(a) The time and labor required;
(b) The novelty and difficulty of the questions involved and the skill required to perform the services properly;
(c) The likelihood that the acceptance of the particular employment will preclude other employment of the person;
(d) The fee customarily charged in the locality for similar services;
(e) The nature and value of the incapacitated person’s property, the amount of income earned by the estate, and the responsibilities and potential liabilities assumed by the person;
(f) The results obtained;
(g) The time limits imposed by the circumstances;
(h) The nature and length of the relationship with the incapacitated person; and
(i) The experience, reputation, diligence, and ability of the person performing the service.
(6) In awarding fees to attorney guardians, the court must clearly distinguish between fees, costs, and expenses for legal services and fees, costs, and expenses for guardian services and must determine that no conflict of interest exists.
(7) Fees for legal services may include customary and reasonable charges for work performed by paralegals and legal assistants employed by and working under the direction of the attorney. Fees may not include general clerical and office administrative services and services that are unrelated to the guardianship. A petition for fees may not be approved without prior notice to the guardian and to the ward, unless the ward is a minor or is totally incapacitated.
(8) Fees for a professional guardian’s services may include customary and reasonable charges for work performed by employees of a guardian for the benefit of the ward. A petition for fees may not be approved without prior notice to the ward, unless the ward is a minor or is totally incapacitated.
(9) Unless otherwise ordered by the court, all petitions for guardian’s and attorney’s fees must be accompanied by an itemized statement of the services performed for the fees sought to be recovered. The itemized statement must specify the name and title of the person providing the service, the nature of services, date of performance, time spent on each task and the fees for each entry.
(10) When court proceedings are instituted to review or determine a guardian’s or an attorney’s fees, such proceedings are part of the guardianship administration process and the costs, including fees and costs for the guardian and guardian’s attorney, an attorney appointed under s. 745.305, or an attorney who has rendered services to the ward, must be determined by the court and paid from the assets of the guardianship unless the court finds the requested compensation to be substantially unreasonable.
(1) The court may determine that a request for compensation by the guardian, the guardian’s attorney, an attorney appointed under s. 745.305, an attorney who has rendered services to the ward or other professional employed by the guardian is reasonable without receiving expert testimony. An interested person or party may offer expert testimony for or against a request for compensation after giving notice to interested persons. Reasonable expert witness fees must be awarded by the court and paid from the assets of the guardianship estate using the standards established in subsection (5).

745.114 Jurisdiction of the court.

The circuit court has jurisdiction to adjudicate all matters in incapacity and guardianship proceedings.

Section 2. Part II of chapter 745, Florida Statutes, consisting of sections 745.201, 745.202, 745.203, and 745.204, is created to read:

PART II

VENUE

745.201 Venue.
(1) Venue in proceedings for determination of incapacity must be the county in which the alleged incapacitated person resides or is located.

(2) Venue in proceedings for appointment of a guardian must be:
(a) If the incapacitated person or minor is a resident of this state, the county in which the incapacitated person or minor resides provided, however, that if the adjudication of incapacity occurs in a county other than the county of residence pursuant to such change, in considering the petition, the court shall determine that such relocation serves the best interest of the ward.
(b) A guardian who changes the residence of a ward from the ward’s current county of residence to another county adjacent to the ward’s county of residence shall notify the court having jurisdiction of the guardianship and next of kin whose addresses are known to the guardian within 15 days after relocation of the ward. Such notice shall state the reasons for the change of the ward’s residence. Venue need not be changed unless otherwise ordered by the court.
(c) When the residence of a resident ward has changed to another state, in accordance with this section, and the foreign court having jurisdiction over the ward at the ward’s new residence has appointed a guardian and that guardian has qualified and posted a bond in an amount required by the foreign court, the guardian in this state may file the final report and close the guardianship in this state, pursuant to s. 745.311.

Section 3. Part III of chapter 745, Florida Statutes, consisting of sections 745.301, 745.302, 745.303, 745.304, 745.305, 745.306, 745.307, 745.308, 745.309, 745.310, 745.311, and 745.312, is created to read:

PART III

INCAPACITY

745.301 Petition to determine incapacity.
(1) A petition to determine incapacity of a person may be executed by an adult with personal knowledge of the information specified in the petition.
(2) The petition must be verified and must, to the best of the petitioner’s knowledge and belief:
notice must state the time and place of the hearing on the petition; that an attorney has been appointed to represent the alleged incapacitated person; and that, if the person is determined to be incapable of exercising certain rights, a guardian may be appointed to exercise those rights on the person’s behalf.

(2) The attorney for the alleged incapacitated person shall serve the notice and petition on the alleged incapacitated person within 5 days of the attorney’s appointment.

745.303 Rights of persons determined incapacitated. (1) A person who has been determined to be incapacitated retains the right:

(a) To have an annual review of guardianship accounting and plans;
(b) To have continuing review of the need for restriction of his or her rights;
(c) To be restored to capacity at the earliest possible time;
(d) To be treated humanely, with dignity and respect, and to be protected against abuse, neglect, and exploitation;
(e) To have a qualified guardian;
(f) To remain as independent as possible, including having his or her preference as to place and standard of living honored, either as expressed or demonstrated prior to the determination of incapacity or as he or she currently expresses such preference, insofar as such request is reasonable and financially feasible;
(g) To be properly educated;
(h) To receive prudent financial management for his or her property and to be informed how his or her property is being managed to the extent feasible, if he or she has lost the right to manage property;
(i) To make any gift or disposition of property;
(j) To determine his or her residence;
(k) To consent to medical and mental health treatment and rehabilitation services;
(l) To make decisions about his or her social environment or other social aspects of his or her life; and
(m) To make decisions about travel and visitation.

(2) A person who has been found to be totally incapacitated shall be deemed to have lost all rights other that those specified in subsection (1) and the guardian shall be deemed to have succeeded to all delegable rights, unless otherwise limited by this code or determined by the court.

745.304 Conduct of Hearing. At any hearing under this code, the alleged incapacitated person or the ward has the right to:

(1) Testify;
(2) Remain silent and refuse to testify. The person may not be held in contempt of court or otherwise penalized for refusing to testify. Refusal to testify may not be used as evidence of incapacity;
(3) Present evidence;
(4) Call witnesses;
(5) Confront and cross-examine all witnesses; and
(6) Keep the hearing open to the public or closed to the public as the alleged incapacitated person or ward may choose. After a person has been determined to be incapacitated, this decision shall be made by the person’s guardian, unless otherwise determined by the court.

(1) To receive services and rehabilitation necessary to maximize his or her quality of life;
(2) To be free from discrimination because of his or her incapacity;
(3) To have access to the courts;
(4) To counsel;
(5) To receive visitors and communicate with others;
(6) To notice of all proceedings related to determination of incapacity and appointment of a guardian; and
(7) To privacy, including privacy of incapacity and guardianship proceedings.

(2) Rights that may be removed from a person by an order determining incapacity but not delegated to a guardian include the right:

(a) To marry. If the right to enter into a contract has been removed, the right to marry is subject to court approval;
(b) To vote;
(c) To have a driver’s license and operate motor vehicles;
(d) To travel; and
(e) To seek or retain employment.

(3) Rights that may be removed from a person by an order determining incapacity and which may be delegated to a guardian include the right:

(a) To contract;
(b) To sue and defend lawsuits;
(c) To apply for government benefits and deal with all government entities, including taxing authorities;
(d) To exercise all rights with regard to ownership and management of property, including among others, firearm rights under chapter 790.

745.305 Attorney for the alleged incapacitated person. (1) The court shall appoint a qualified attorney to represent each alleged incapacitated person in all proceedings on petitions for determination of incapacity and appointment of guardian within 5 days of filing the petitions. The alleged incapacitated person may substitute an attorney of his or her choice for the court appointed counsel with court approval. At any time prior to entry of an order allowing substitution, the court may hold a hearing to determine if the proposed attorney is qualified under this code and if such attorney is the choice of the alleged incapacitated person. The court may allow the court appointed counsel and private counsel chosen by the alleged incapacitated person to serve as co-counsel.

(2) When a court appoints an attorney for an alleged incapacitated person, the court shall appoint the office of criminal conflict and civil regional counsel or a private attorney as prescribed in s. 27.511(6). A private attorney must be one who is included in the attorney registry compiled pursuant to s. 27.40. Appointments of private attorneys must be made on a rotating basis, taking into consideration conflicts arising under this code.

(3) An attorney representing an alleged incapacitated person may not serve as guardian of the alleged incapacitated person or as counsel for the guardian of the alleged incapacitated person or the petitioner.

(4) An attorney representing an alleged incapacitated person under this section must have completed a minimum of 8 hours of education in guardianship. A court may waive the initial training requirement.

(5) An attorney for the alleged incapacitated person must be entitled to examine all medical and mental health records of the
alleged incapacitated person and consult with the alleged incapacitated person’s physician.

(6) Unless extended by the court, the attorney for the alleged incapacitated person’s duties end upon: (a) the court’s determination that there is no need for appointment of a guardian or (b) issuance of letters of guardianship, other than letters of emergency temporary guardianship. The attorney shall be deemed discharged without further proceedings.

745.306 Appointment and qualification of examiners.

(1) Within 5 days after a petition for determination of incapacity has been filed, the court must appoint three (3) qualified persons to examine the alleged incapacitated person. One must be a psychiatrist or other physician. The remaining examiners must be either a psychologist, another psychiatrist or other physician, a registered nurse, nurse practitioner, licensed social worker, attorney, a person with an advanced degree in gerontology from an accredited institution of higher education, or other person in the court’s discretion. Examiners must have knowledge, skill, experience, training, or education which, in the court’s discretion, qualify them to render an opinion in an incapacity proceeding. Unless good cause is shown, the alleged incapacitated person’s attending or primary care physician may not be appointed as an examiner. Any physician for the alleged incapacitated person must provide records and information, verbal and written, to an examiner upon the examiner’s written request.

(2) Examiners may not be related to or associated with one another, with the petitioner, with counsel for the petitioner or the proposed guardian, or with the alleged incapacitated person to be totally or partially incapacitated. A petitioner may not serve as an examiner.

Each year, the chief judge of the circuit must prepare a list of persons qualified to be examiners.

(8) The circuit clerk shall serve notice of the appointment to each examiner no later than 3 days after appointment.

745.307 Examination of alleged incapacitated person.

(1) Each examiner, independent of the other examiners, must interview the alleged incapacitated person and must determine the alleged incapacitated person’s ability to exercise those rights specified in s. 745.303. In addition to the examination, each examiner must have access to and may consider, previous medical and mental health examinations of the person, including, but not limited to, habilitation plans, school records, psychological and neuropsychological reports and other related information voluntarily offered for use by the alleged incapacitated person or the petitioner. The examiners may communicate among themselves as well as with the attorney for the alleged incapacitated person and the petitioner’s counsel. In addition, the examiners shall be provided a copy of the petition to determine incapacity.

(2) The examiner may exclude all persons, other than the alleged incapacitated person and the alleged incapacitated person’s attorney, from being present at the time of the examination, unless otherwise ordered by the court.

(3) Each examiner must, within 15 days after appointment, prepare and file with the clerk a report which describes the manner of conducting the examination and the methodology employed by the examiner. The examination must include:

(a) If deemed relevant to the examinations and allowed by the alleged incapacitated person, a physical examination which shall only be conducted by an examiner who is a registered nurse, nurse practitioner, or physician. An examiner who is not a physician may perform a visual examination of the alleged incapacitated person’s physical appearance to determine if there are any visible signs of abuse, injury or illness;

(b) A mental health examination, which may consist of, but not be limited to, questions related to orientation, current events and personal identification; and

(c) A functional assessment to evaluate the alleged incapacitated person’s ability to perform activities of daily living which include: preparing food, eating, bathing, dressing, ambulation, toileting and mobility.

If any of these aspects of the examination is not reported or cannot be accomplished for any reason, the written report must explain the reasons for its omission.

745.308 Examination reports.

(1) Each examiner’s written report must be verified and include, to the extent of the examinee’s skill and experience:

(a) A diagnosis, prognosis, and recommended level of care.

(b) An evaluation of the ward or alleged incapacitated person’s ability to retain her or his rights, including, without limitation, the right to marry; vote; contract; manage or dispose of property; have a driver’s license; determine her or his residence; consent to medical treatment; and make decisions affecting her or his social environment.

(c) The results of the examination and the examiner’s assessment of information provided by the attending or primary care physician, if any, and of any other reports or written material provided to the examiner. The examiner must consult the alleged incapacitated person, if any, before appointment or within 10 days after appointment.
person’s primary care physician or explain the reason why such consultation was not held.

(d) A description of any functional areas in which the person lacks the capacity to exercise rights, the extent of that incapacity, and the factual basis for the determination that the person lacks that capacity.

(e) The names of all persons present during the time the examiner conducted his or her examination. If a person other than the person who is the subject of the examination supplies answers posed to the alleged incapacitated person, the report must include the response and the name of the person supplying the answer.

(f) The date, place and the time the examiner conducted his or her examination.

(2) The clerk must serve each examiner’s report on the petitioner and on the attorney for the alleged incapacitated person within 3 days after the report is filed and at least 10 days before the hearing on the petition, and shall file a certificate of service in the incapacity proceeding.

(3) If any examiners’ reports are not completed and served timely, the petitioner and attorney for the alleged incapacitated person may waive the 10-day service requirement and consent to the consideration of the report by the court at the adjudicatory hearing or may seek a continuance of the hearing.

745.310 Consideration of examination reports.

(1) Unless there is objection by the alleged incapacitated person or petitioner, the court must consider the written examination reports without requiring testimony of the examiners.

(2) The petitioner and the alleged incapacitated person may object to the introduction into evidence of all or any portion of the examination reports by filing and serving a written objection on the other party no later than 5 days before the adjudicatory hearing. The objection must state the basis upon which the challenge to admissibility is made. If an objection is timely filed and served, the court must apply the rules of evidence in determining the reports’ admissibility. For good cause shown, the court may extend the time to file and serve the written objection.

(3) If all examiners conclude that the alleged incapacitated person is not incapacitated in any respect, the court must dismiss the petition unless a verified motion challenging the examiners’ conclusions is filed by petitioner within 10 days after the last examination report is served. The verified motion must make a reasonable showing by evidence in the record or proffered, that a hearing on the petition to determine incapacity is necessary. The court must rule on the verified motion as soon as practicable. The court may hold a hearing to consider evidence concerning the propriety of dismissal or the need for further examination of the alleged incapacitated person. If the court finds that the verified motion is filed in bad faith, the court may impose sanctions under s. 745.312(3).

745.310 Adjudicatory hearing.

(1) Upon appointment of the examiners, the court must set the date for hearing on the petition and the clerk must serve notice of hearing on the petitioner, the alleged incapacitated person, and next of kin identified in the petition for determination of incapacity. The date for the adjudicatory hearing must be set no more than 20 days after the required date for filing the reports of the examiners, unless good cause is shown. The adjudicatory hearing must be conducted in a manner consistent with due process and the requirements of part III of this code.

(2) The alleged incapacitated person has the right to be present at the adjudicatory hearing and may waive that right.

(3) In the adjudicatory hearing on a petition to determine incapacity, a finding of limited or total incapacity of the person must be established by clear and convincing evidence.

745.311 Order determining incapacity.

(1) If the court finds that a person is incapacitated, the court must enter an order specifying the extent of incapacity. The order must specify the rights described in s. 745.303 (2) and (3) that the person is incapable of exercising.

(2) In determining that a person is totally incapacitated, the order must contain findings of fact demonstrating that the individual is totally without capacity to meet essential requirements for the person’s health and safety and manage property.

(3) An order adjudicating a person to be incapacitated constitutes proof of such incapacity until further order of the court. To the extent the order finds that a person is incapacitated to make any gift or disposition of property, it shall constitute a rebuttable presumption that the person is incapacitated to execute documents having testamentary aspects. For purposes of this subsection, the term "testamentary aspects" means those provisions of a document that dispose of property on or after the death of the incapacitated person other than to the incapacitated person’s estate.

(4) After the order determining incapacity has been filed, the clerk must serve the order on the incapacitated person.
(1) If the examination report concludes that the ward should be restored to capacity, there are no objections timely filed, and the court is satisfied that the examination report establishes by a preponderance of the evidence that restoration of all of the ward’s rights is appropriate, the court must enter an order restoring all of the rights which were removed from the ward without hearing. The order must be entered within 10 days after expiration of the time for objection.

(2) At the conclusion of any hearing to consider restoration of capacity, the court shall make specific findings of fact and based on a preponderance of the evidence enter an order denying the suggestion of capacity or to restoration of the ward’s rights must be filed with the court within 15 days after appointment. The examination must be conducted and the report prepared in the manner specified under s. 745.307.

(2) If an objection is timely filed, or if the examination report suggests that full restoration is not appropriate, the court shall set the matter to be heard within 30 days after the examination report is filed, unless good cause is shown.

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(3) If the ward does not have an attorney, the court shall appoint one to represent the ward.

(2) If an objection is timely filed, or if the examination report suggests that full restoration is not appropriate, the court shall set the matter to be heard within 30 days after the examination report is filed, unless good cause is shown.

(3) If the ward does not have an attorney, the court shall appoint one to represent the ward.

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Guardians shall adopt a rule detailing the acceptable methods for history record checks. The Office of Public and Professional may use any electronic fingerprinting equipment used for criminal requirements of this section by undergoing an electronic described in this subsection. A professional guardian satisfies the completion of a criminal history record check by any method described in this subsection. A nonprofessional guardian satisfies the satisfactory completion of a criminal history record check as described in this subsection. A nonprofessional guardian required to submit fingerprints shall have fingerprints taken and forwarded, along with the necessary fee, to the Department of Law Enforcement for processing. The results of the fingerprint criminal history record check shall be transmitted to the clerk, who shall maintain the results in the court file of the nonprofessional guardian's case. A creditor or provider of health care services to the ward, whether direct or indirect, may not be appointed the guardian of the ward, unless the court finds that there is no conflict of interest with the ward.

(4) A person may not be appointed a guardian if he or she is in the employ of any person, agency, government, or corporation that provides services to the proposed ward in a professional or business capacity, except that a person so employed may be appointed if he or she is the spouse, adult child, parent, or sibling of the proposed ward or the court determines that any potential conflict of interest is insubstantial and that the appointment would be in the proposed ward's best interest.

(5) The court may not appoint a guardian in any other circumstance in which the proposed guardian has a conflict of interest with the ward.

(6) A nonprofessional guardian, the proposed guardian shall submit to an investigation of the guardian's credit history and a level 2 background screening as required under s. 435.04. The court must consider the credit and background screening reports before appointing a guardian.

(2) Except as provided in subsection (3) or subsection (4), a person providing substantial services or products to the proposed ward in a professional or business capacity may not be appointed guardian and retain that previous professional or business relationship.

(3) A creditor or provider of health care services to the ward, whether direct or indirect, may not be appointed the guardian of the ward, unless the court finds that there is no conflict of interest with the ward.

(4) A person may not be appointed a guardian if he or she is in the employ of any person, agency, government, or corporation that provides services to the proposed ward in a professional or business capacity, except that a person so employed may be appointed if he or she is the spouse, adult child, parent, or sibling of the proposed ward or the court determines that any potential conflict of interest is insubstantial and that the appointment would be in the proposed ward's best interest.

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A nonprofessional guardian required to submit fingerprints shall have fingerprints taken and forwarded, along with the necessary fee, to the Department of Law Enforcement for processing. The results of the fingerprint criminal history record check shall be transmitted to the clerk, who shall maintain the results in the court file of the nonprofessional guardian's case.

(4)(a) A professional guardian, and each employee of a professional guardian, must complete, at the professional guardian's expense, a level 2 background screening as set forth in s. 435.04 before and at least once every 5 years after the date the guardian is registered with the Office of Public and Professional Guardians. The clerk shall maintain the results in the court file of the professional guardian's case.

(4)(b) All fingerprints electronically submitted to the Department of Law Enforcement under this section shall be retained by the Department of Law Enforcement for the criminal history record check. The entity completing the record check must immediately transmit the results of the criminal history record check to the clerk and the Office of Public and Professional Guardians. The clerk shall maintain the results in the court file of the professional guardian's case.

FLORIDA HOUSE OF REPRESENTATIVES

BILL ORIGINAL YEAR

745.502 Nonprofit corporate guardian.

A nonprofit corporation organized for religious or charitable purposes and existing under the laws of this state may be appointed guardian for a ward. The corporation must employ at least one professional guardian.

745.503 Disqualified persons.

(1) No person who has been convicted of a felony or who, due to incapacity or illness, is incapable of discharging guardianship duties shall be appointed to act as guardian. Further, no person who has been judicially determined to have committed abuse, abandonment, or neglect against a child as defined in s. 39.01 or s. 860.03(1), (2), and (37), or who has been found guilty of, or entered a plea of nolo contendere or guilty to, any offense prohibited under s. 435.03, chapter 825 or under any similar statutes of another jurisdiction, shall be appointed to act as a guardian.

(2) Except as provided in subsection (3) or subsection (4), a person providing substantial services or products to the proposed ward in a professional or business capacity may not be appointed guardian and retain that previous professional or business relationship.

(3) A creditor or provider of health care services to the ward, whether direct or indirect, may not be appointed the guardian of the ward, unless the court finds that there is no conflict of interest with the ward.

(4) A person may not be appointed a guardian if he or she is in the employ of any person, agency, government, or corporation that provides services to the proposed ward in a professional or business capacity, except that a person so employed may be appointed if he or she is the spouse, adult child, parent, or sibling of the proposed ward or the court determines that any potential conflict of interest is insubstantial and that the appointment would be in the proposed ward's best interest.

(5) The court may not appoint a guardian in any other circumstance in which the proposed guardian has a conflict of interest with the ward.

(6) A nonprofessional guardian, the proposed guardian shall submit to an investigation of the guardian's credit history and a level 2 background screening as required under s. 435.04. The court must consider the credit and background screening reports before appointing a guardian.

A nonprofessional guardian required to submit fingerprints shall have fingerprints taken and forwarded, along with the necessary fee, to the Department of Law Enforcement for processing. The results of the fingerprint criminal history record check shall be transmitted to the clerk, who shall maintain the results in the court file of the nonprofessional guardians case.

(4)(a) A professional guardian, and each employee of a professional guardian, must complete, at the professional guardian's expense, a level 2 background screening as set forth in s. 435.04 before and at least once every 5 years after the date the guardian is registered with the Office of Public and Professional Guardians. The clerk shall maintain the results in the court file of the professional guardian's case.

(4)(b) All fingerprints electronically submitted to the Department of Law Enforcement under this section shall be retained by the Department of Law Enforcement for the criminal history record check. The entity completing the record check must immediately transmit the results of the criminal history record check to the clerk and the Office of Public and Professional Guardians. The clerk shall maintain the results in the court file of the professional guardian's case.

(4)(b) All fingerprints electronically submitted to the Department of Law Enforcement under this section shall be retained by the Department of Law Enforcement for the criminal history record check. The entity completing the record check must immediately transmit the results of the criminal history record check to the clerk and the Office of Public and Professional Guardians. The clerk shall maintain the results in the court file of the professional guardian's case.

(4)(b) All fingerprints electronically submitted to the Department of Law Enforcement under this section shall be retained by the Department of Law Enforcement for the criminal history record check. The entity completing the record check must immediately transmit the results of the criminal history record check to the clerk and the Office of Public and Professional Guardians. The clerk shall maintain the results in the court file of the professional guardian's case.

745.504 Credit and criminal investigation.

(1) Within 3 days of filing a petition for appointment of a nonprofessional guardian, the proposed guardian shall submit to an investigation of the guardian's credit history and a level 2 background screening as required under s. 435.04. The court must consider the credit and background screening reports before appointing a guardian.

(2) For nonprofessional guardians, the court may require the satisfactory completion of a criminal history record check as described in this subsection. A nonprofessional guardian satisfies the requirements of this section by undergoing a state and national criminal history record check using fingerprints. A nonprofessional guardian required to submit fingerprints shall have fingerprints taken and forwarded, along with the necessary fee, to the Department of Law Enforcement for processing. The results of the fingerprint criminal history record check shall be transmitted to the clerk, who shall maintain the results in the court file of the nonprofessional guardian's case.

(3) For professional and public guardians, the court and Office of Public and Professional Guardians shall accept the satisfactory completion of a criminal history record check by any method described in this subsection. A professional guardian satisfies the requirements of this section by undergoing an electronic fingerprint criminal history record check. A professional guardian may use any electronic fingerprinting equipment used for criminal history record checks. The Office of Public and Professional Guardians shall adopt a rule detailing the acceptable methods for completing an electronic fingerprint criminal history record check under this section. The professional guardian shall pay the actual costs incurred by the Federal Bureau of Investigation and the Department of Law Enforcement for the criminal history record check. The entity completing the record check must immediately transmit the results of the criminal history record check to the clerk and the Office of Public and Professional Guardians. The clerk shall maintain the results in the court file of the professional guardian's case.

(4)(a) A professional guardian, and each employee of a professional guardian, must complete, at the professional guardian's expense, a level 2 background screening as set forth in s. 435.04 before and at least once every 5 years after the date the guardian is registered with the Office of Public and Professional Guardians. A professional guardian, and each employee of a professional guardian who has direct contact with the ward, or access to the ward's assets, must complete, at his or her own expense, a level 1 background screening as set forth in s. 435.03 at least once every 2 years after the date the guardian is registered. However, a professional guardian is not required to resubmit fingerprints for a criminal history record check if the professional guardian has been screened using electronic fingerprinting equipment and the fingerprints are retained by the Department of Law Enforcement in order to notify the clerk of any crime charged against the person in this state or elsewhere. Each employee required to submit to a level 2 background check must submit to the background check within 30 days of initial employment. Each employee required to submit to a level 2 background check must submit to the background check within 30 days of meeting the requirement for a level 1 background check.

(4)(b) All fingerprints electronically submitted to the Department of Law Enforcement under this section shall be retained by the Department of Law Enforcement for the criminal history record check. The entity completing the record check must immediately transmit the results of the criminal history record check to the clerk and the Office of Public and Professional Guardians. The clerk shall maintain the results in the court file of the professional guardian's case.
Department in a manner provided by rule and entered in the statewide automated biometric identification system authorized by s. 943.05(2)(b). The fingerprints shall thereafter be available for all purposes and uses authorized for arrest fingerprints entered in the Criminal Justice Information Program under s. 943.051.

(c) The Department of Law Enforcement shall search all arrest fingerprints received under s. 943.051 against the fingerprints retained in the statewide automated biometric identification system under paragraph (b). Any arrest record that is identified with the fingerprints of a person described in this paragraph must be reported to the clerk. The clerk must forward any arrest record received for a professional guardian to the Office of Public and Professional Guardians within 5 days of receipt. Each professional guardian who elects to submit fingerprint information electronically shall participate in this search process by paying an annual fee to the Office of the Public and Professional Guardians. The amount of the annual fee to be imposed for performing these searches and the procedures for the retention of professional guardian fingerprints and the dissemination of search results shall be established by rule of the Department of Law Enforcement. At least once every 5 years, the Office of Public and Professional Guardians must request that the Department of Law Enforcement forward the fingerprints maintained under this section to the Federal Bureau of Investigation.

(5) (a) A professional guardian, and each employee of a professional guardian who has direct contact with the ward or access to the ward’s assets, must allow, at his or her own expense, an investigation of his or her credit history before and at least once every 2 years after the date of the guardian’s registration with the Office of Public and Professional Guardians.

result of any investigation conducted under this section. A professional guardian must pay the clerk of the court a fee of up to $7.50 for handling and processing professional guardian files. Such documentation for a nonprofessional guardian shall be maintained as a confidential record in the case file for such guardianship.

745.505 Education requirements for nonprofessional guardians.

(1) Each ward is entitled to a guardian competent to perform the duties of a guardian necessary to protect the interests of the ward.

(2) Each person appointed by the court to be a guardian, other than a parent who is the guardian of the property of a minor child, must receive a minimum of 8 hours of instruction and training which covers:

(a) The legal duties and responsibilities of the guardian;

(b) The rights of the ward;

(c) The use of guardianship assets;

(d) The availability of local resources to aid the ward; and

(e) The preparation of guardianship plans, reports, inventories, and accountings.

(3) Each person appointed by the court to be the guardian of the property of a minor or her minor child must receive a minimum of 4 hours of instruction and training that covers:

(a) The legal duties and responsibilities of a guardian of property;

(b) The preparation of an initial inventory and guardianship accounting; and

(c) Use of guardianship assets.

(4) Each person appointed by the court to be a guardian must complete the required number of hours of instruction and education within 4 months after appointment. The instruction and education must be completed through a course approved by the chief judge of the circuit court and taught by a court-approved person or organization. Court-approved organizations may include, but are not limited to, community or junior colleges, guardianship organizations, and local bar associations or The Florida Bar.

(5) Expenses incurred by the guardian to satisfy the education requirement may be paid from the ward’s estate, unless the court directs that such expenses be paid by the guardian individually.

(6) The court may waive any or all of the requirements of this section or impose additional requirements. The court shall make its decision on a case-by-case basis and, in making its decision, shall consider the experience and education of the guardian, the duties assigned to the guardian, and the needs of the ward.

(7) The provisions of this section do not apply to professional guardians.

Section 6. Part VI of chapter 745, Florida Statutes, consisting of sections 745.601, 745.602, 745.603, 745.604, 745.605, 745.606, 745.607, 745.608, 745.609, 745.610, and 745.611, is created to read:

PART VI

APPOINTMENT OF GUARDIANS

745.601 Proposed guardian’s information statement.

(1) At the time of filing a petition for appointment of guardian, every proposed guardian must file a verified information statement which provides the following:
(a) details sufficient to demonstrate that the person is qualified to be guardian pursuant to s. 745.501;
(b) the names of all wards for whom the person is currently acting as guardian or has acted as guardian in the previous five years, identifying each ward by court file number and circuit court in which the case is or was pending, and stating whether the person is or was acting as limited or plenary guardian of person or property or both;
(c) any special experience, education or other skills that would be of benefit in serving as guardian;
(d) the proposed guardian’s relation to the ward, including whether the person is providing any services to the ward, holds any joint assets with the ward, or, if known, is beneficiary of any part of the ward’s estate.
(2) Subsection (1) does not apply to nonprofit corporate guardians and public guardians.
(3) Nonprofit corporate guardians and public guardians must file quarterly with the clerk that statements that contain the information required under subsection (1), rather than filing an information statement with each petition to be appointed guardian.
745.602 Considerations in appointment of guardian.
(1) If the person designated is qualified to serve pursuant to s. 745.501, the court shall appoint any standby guardian or plenary guardian, unless the court determines that appointing such person is contrary to the best interest of the ward.
(2) If a guardian cannot be appointed under subsection (1), the court may appoint any person who is fit and proper and qualified to act as guardian, whether related to the ward or not. The court shall give preference to the appointment of a person who:
(a) is related by blood or marriage to the ward;
(b) has educational, professional, or business experience relevant to the nature of the services sought to be provided;
(c) has the capacity to manage the assets involved; or
(d) has the ability to meet the requirements of the law and the unique needs of the ward.
(3) The court shall also:
(a) consider the wishes expressed by an incapacitated person as to who shall be appointed guardian.
(b) consider the preference of a minor who is age 14 or over as to who should be appointed guardian.
(c) consider any person designated as guardian in any will in which the ward is a beneficiary.
(d) consider the wishes of the ward’s next of kin, when the ward cannot express a preference.
(4) When a guardian is appointed, the court must make findings of fact to support why the person was selected as guardian. Except when a guardian is appointed under subsection (1), the court must consider the factors specified in subsections (2) and (3).
(5) The court may hear testimony on the question of who is qualified and entitled to preference in the appointment of a guardian.
(6) The court may not give preference to the appointment of a person under subsection (2) based solely on the fact that such person was appointed to serve as an emergency temporary guardian.
745.603 Petition for appointment of guardian; contents.
(1) A petition to appoint a guardian must be verified by an adult with personal knowledge of the information in the petition alleging:
heaing must be served on the incapacitated person, any guardian then serving, the person’s next of kin, and such other interested persons as the court may direct.
(2) When a petition for appointment of guardian of a minor is filed, formal notice must be served on the minor’s parents. When parent petitions for appointment as guardian for the parent’s minor child, formal notice shall be served on the other parent, unless the other parent consents to the appointment. If the proposed guardian has custody of the minor and the petition alleges that, after diligent search, a parent cannot be found, the parent may be served by informal notice, delivered to the parent’s last known address.
745.604 Notice of petition for appointment of guardian and hearing.
(1) When a petition for appointment of guardian for an incapacitated person is heard at the conclusion of the hearing in which the person is determined to be incapacitated, the court shall hear the petition without further notice provided that notice of hearing of the petition to appoint guardian was timely served. If the petition is heard on a later date, reasonable notice of the
(4) A ward for whom a limited guardian has been appointed retains all legal rights except those that have been specifically delegated to the guardian in the court’s written order.

(5) The order appointing a guardian must contain a finding that guardianship is the least restrictive alternative that is appropriate for the ward, and must reserve to the incapacitated person the right to make decisions in all matters commensurate with the person’s ability to do so.

(6) If a petition for appointment of guardian has been filed, the court shall rule on the petition contemporaneously with the order adjudicating a person to be incapacitated unless good cause is shown to defer ruling. If a guardian is not appointed contemporaneously with the order adjudicating the person to be incapacitated, the court may appoint an emergency temporary guardian in the manner and for the purposes specified in s. 745.701.

(7) The order appointing a guardian must specify the amount of bond to be given by the guardian and must state whether the guardian must place all, or part, of the property of the ward in a restricted account in a financial institution designated pursuant to s. 69.031.

745.606 Oath of guardian.

Before exercising authority as guardian, every guardian shall take an oath that he or she will faithfully perform the duties as guardian. This oath is not jurisdictional.

745.607 Bond of guardian.

(1) Before exercising authority as guardian, a guardian of property of a ward shall file a bond with surety as prescribed in s. 45.011 designated financial institution shall also include a dealer, as

defined in s. 517.021(6), if the dealer is a member of the Security Investment Protection Corporation and is doing business in the state.

745.608 Validity of bond.

No bond executed by any guardian shall be invalid because of an informalism in it or because of an informalism or illegality in the appointment of the guardian. The bond shall have the same force and effect as if the bond had been executed in proper form and the appointment had been legally made.

745.609 Liability of surety.

No surety for a guardian shall be charged beyond the property of the ward.

745.610 Alternatives to guardianship.

(1) In each proceeding in which a guardian is appointed under this chapter, the court shall make a finding whether the ward, prior to adjudication of incapacity, has executed an advance directive under chapter 765 or durable power of attorney under chapter 709. If any advance directive or durable power of attorney is identified, the court must consider and find whether there is an alternative to guardianship that will sufficiently address the needs of the incapacitated person and specify in the order appointing guardian and designate what authority, if any, the guardian shall exercise over the ward or the ward’s assets and what authority, if any, the surrogate or agent shall exercise over the ward or the ward’s assets.

(2) Upon verified petition by an interested person or if requested in a petition for appointment of guardian with notice to the surrogate, agent, and interested persons, the court may suspend, modify, or revoke the authority of the surrogate or agent to make health care or financial decisions for the ward. Any order suspending, modifying, or revoking the authority of an agent or surrogate must be supported by written findings of fact.

(3) If a durable power of attorney, health care surrogate designation, trust or other relevant financial or personal care document is discovered after issuance of letters of guardianship, any interested person may file a petition seeking a determination of the effect of any such document and what, if any, changes should be made to the powers of the guardian.

745.611 Letters of guardianship.

(1) Letters of guardianship must be issued to the guardian and must specify whether the guardianship pertains to the ward’s person, property, or both.

(2) The letters must state whether the guardianship is plenary or limited. If limited, the letters must specify the powers and duties of the guardian.

(3) The letters must state whether or not, and to what extent, the guardian is authorized to act on behalf of the ward with regard to any advance directive under chapter 765 or durable power of attorney under chapter 709 previously executed by the ward.

(4) The duties and powers of the guardian accrue on the date letters are issued and not the date the order appointing guardian is entered.
the ward's estate.

(c) A copy of the final accounting or report of the emergency temporary guardian shall be served on the succeeding guardian, the personal representative of the ward if no guardian is appointed, or the personal representative of the emergency temporary guardian consistent with s. 745.605(2).

(12)(a) An emergency temporary guardian of property shall file a petition for distribution and discharge and final accounting no later than 45 days after the issuance of letters to the succeeding guardian, death of the ward, or entry of an order denying the petition for distribution and discharge and final accounting no later than 45 days after the issuance of letters to the succeeding guardian, death of the ward, or entry of an order denying the petition for distribution and discharge and final accounting no later than 45 days after the issuance of letters to the succeeding guardian, death of the ward, or entry of an order denying the petition for distribution and discharge and final accounting no later than 45 days after the issuance of letters to the succeeding guardian, death of the ward, or entry of an order denying the petition for distribution and discharge and final accounting no later than 45 days after the issuance of letters to the succeeding guardian, death of the ward, or 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in 745.607 and shall submit to a credit and a criminal history
record check as set forth in s. 745.504. If the court finds the
standby guardian to be qualified to serve as guardian under s.
745.501, the standby guardian shall be entitled to confirmation of
appointment as guardian. Letters must then be issued in the name
provided in s. 745.611.

(3) After the assumption of duties by a standby guardian, the court
shall have jurisdiction over the guardian and the ward.

745.705 Preneed guardian for adult.

(1) A competent adult may name a preneed guardian by executing a
written declaration that names a guardian to serve in the event of
the declarant’s incapacity.

(2) The declaration must be signed by the declarant in the presence
of two subscribing witnesses as defined in s. 732.504. A declarant
unable to sign the instrument may, in the presence of witnesses,
direct that another person sign the declarant’s name as required
herein. The person designated as preneed guardian shall not act as
witness to the execution of the declaration. At least one person
who acts as a witness shall be neither the declarant’s spouse nor
blood relative.

(3) The declarant may file the declaration with the clerk in
the declarant’s county of residence at any time. When a petition for
appointment of guardian is filed, the clerk shall produce the
declaration and serve a copy on the proposed ward and the
petitioner.

(4) Production of the declaration in a proceeding for appointment
of guardian shall constitute a rebuttable presumption that the
preneed guardian is entitled to serve as guardian. The court shall

least one person who acts as a witness shall be neither of the
natural guardians’ spouse nor blood relative.

(4) The declarant may file the declaration with the clerk in
the county of the child’s residence, at any time. When a petition for
appointment of guardian for the minor is filed, the clerk shall
produce the declaration and serve a copy on the minor and
petitioner.

(5) The declaration constitutes a rebuttable presumption that the
designated preneed guardian is entitled to serve as guardian. The
court is not bound to appoint the designated preneed guardian
if the person is found to be disqualified to serve as guardian.

(6) If the preneed guardian is unwilling or unable to serve, a
written declaration appointing an alternate preneed guardian
constitutes a rebuttable presumption that the alternate is entitled
to serve as guardian. The court is not bound to appoint the
alternate preneed guardian if the person is found to be
disqualified to serve as guardian.

745.706 Preneed guardian for minor.

(1) Natural guardians may nominate a preneed guardian or
a property or both of their minor child by executing a written
declaration that names such guardian to serve if the minor’s
natural guardians become incapacitated or dies or if the
natural guardian is disqualified. The declarant may also name an
alternate to the guardian to act if the designated preneed guardian
is unwilling or unable to serve.

(2) The declaration must specify the child’s full legal name and
date of birth, the relationship of the declarant to the child, and
the proposed preneed guardian.

(3) The declaration must be signed at the end by all of the natural
guardians or the name of the natural guardians must be subscribed
at the end by another person in the natural guardians’ presence
and at the natural guardians’ direction. The natural guardians’
signature, or acknowledgement that another person has subscribed his
or her name to the declaration, must be in the presence of all
natural guardians and in the presence of two subscribing witnesses
as defined in s. 732.504. The person designated as preneed guardian
shall not act as witness to the execution of the declaration. At
745.709 Foreign guardian of nonresident ward.

(1) A guardian of property of a nonresident ward, is not required to file a petition under this section in order to manage or secure intangible personal property.

(2) A guardian of property of a nonresident ward, duly appointed by a court of another state, territory, or country, who desires to manage or serve any part or all of the real or tangible personal property of the ward located in this state, may file a petition showing his or her appointment, describing the property, stating its estimated value, and showing the indebtedness, if any, existing against the ward in this state, to the best of the guardian's knowledge and belief.

(3) A guardian required to petition under subsection (2) shall designate a resident agent, as required by the Florida Probate Rules, file certified copies of letters of guardianship or other authority and the guardian's bond or other security, if any. The court shall determine if the foreign bond or other security is sufficient to guarantee the faithful management of the ward's property in this state. The court may require a guardian's bond in this state in the amount it deems necessary and conditioned on the proper management of the property of the ward coming into the custody of the guardian in this state.

(4) The authority of the guardian of a nonresident ward shall be recognized and given full faith and credit in the courts of this state. A foreign guardian who fails to comply with the requirements of this section shall have no authority to act on behalf of the ward in this state.

(4) This section does not foreclose the filing of a petition for determination of incapacity or petition for appointment of guardian by persons other than a foreign guardian.

Guardian’s authority shall be recognized and given full faith and credit in the courts of this state in the amount it deems necessary and conditioned on the proper management of the property of the ward coming into the custody of the guardian in this state.

(4) The authority of the guardian of a nonresident ward shall be recognized and given full faith and credit in the courts of this state.
of the child, neither shall act as natural guardian of the child.

The mother of a child born out of wedlock is the natural guardian of the child and is entitled to primary residential care and parental responsibility of the child unless the parents marry and until an order determining paternity is entered by a court of competent jurisdiction. In such event, the father shall also be deemed a natural guardian.

(2) Natural guardians are authorized, on behalf of their minor child if the total net amounts received do not exceed $25,000.00, to:

(a) Settle and consummate a settlement of any claim or cause of action accruing to the minor child for damages to the person or property of the minor child;

(b) Collect, receive, manage, and dispose of the proceeds of any such settlement;

(c) Collect, receive, manage, and dispose of any real or personal property distributed from an estate or trust;

(d) Collect, receive, manage, dispose of and make elections regarding the proceeds from a life insurance policy or annuity contract payable to, or otherwise accruing to the benefit of, the child;

(e) Collect, receive, manage, dispose of and make elections regarding the proceeds of any benefit plan as defined by s. 718.102, of which the minor is a beneficiary, participant, or owner, without appointment, authority, or bond.

(3) A guardianship shall be required when the total net amounts received by, or on behalf of, the minor exceed $50,000.00. When the total net amounts received by, or on behalf of, the minor exceed $25,000.00 but do not exceed $50,000.00, the court has the discretion to determine whether the natural guardians are authorized to take any actions enumerated in subsection (2) of this statute or whether a guardianship is required.

(4) All instruments executed by a natural guardian for the benefit of the ward under the powers specified in subsection (2) shall be binding on the ward. The natural guardian may not, without court order, use the property of the ward for the guardian's benefit or to satisfy the guardian's support obligation to the ward.

(5) Prior to taking possession of any funds or other property as authorized by subsection (2), a natural guardian must file with the clerk in the county of the ward's residence a verified statement identifying the child, nature and value of the property, and the name, relationship, and current residency address of the natural guardian.

(6) Any funds or other property collected by or put into the possession of a natural guardian on behalf of a minor, remain the property of the minor and, unless otherwise authorized by the court, are not to be used by a natural guardian to fulfill the natural guardian's parental obligations.

745.713 Guardians of minors.

(1) Upon petition of a parent, brother, sister, next of kin, or other person interested in the welfare of a minor, a guardian for a minor may be appointed by the court without the necessity of adjudication of incapacity pursuant to chapter 745 Part III.

(2) Upon petition, the court may determine if the appointment of a guardian of property of a minor is necessary as provided in s. 745.712(3).

(3) A minor is not required to attend the hearing on the petition for appointment of a guardian, unless otherwise directed by the court.

DUTIES OF GUARDIAN

745.801 Liability of guardian.

A guardian is not personally liable for the debts, contracts or torts of the ward. A guardian may be personally liable to the ward for failure to protect the ward within the scope of the guardian's authority.

745.802 Duties of guardian.

(1) A guardian of property is a fiduciary and may exercise only those rights that have been removed from the ward and delegated to the guardian. The guardian of a minor's property must exercise the power of a plenary guardian of property.

(2) A guardian of property of the ward must:

(a) Protect and preserve the property and invest it prudently as provided in chapter 518.

(b) Apply the property as provided in s. 745.1304.

(3) A minor who is at least 17 years and 6 months of age at the time of filing. The alleged incapacitated minor under this section is subject to the confidentiality provisions of s. 745.112.

Section 8. Part VIII of chapter 745, Florida Statutes, consisting of sections 745.801, 745.802, 745.803, 745.804, 745.805, 745.806, 745.807, 745.808, 745.809, 745.810, 745.811, 745.812, 745.813, and 745.814, is created to read:

PART VIII

DUTIES OF GUARDIAN

745.801 Liability of guardian.

A guardian is not personally liable for the debts, contracts or torts of the ward. A guardian may be personally liable to the ward for failure to protect the ward within the scope of the guardian's authority.

745.802 Duties of guardian.

(1) A guardian of property is a fiduciary and may exercise only those rights that have been removed from the ward and delegated to the guardian. The guardian of a minor's property must exercise the power of a plenary guardian of property.

(2) A guardian of property of the ward must:

(a) Protect and preserve the property and invest it prudently as provided in chapter 518.

(b) Apply the property as provided in s. 745.1304.
(c) Keep clear, distinct, and accurate records of the administration of the ward's property.
(d) Perform all other duties required of a guardian of property by law.
(e) At the termination of the guardianship, deliver the property of the ward to the person lawfully entitled to it.

(3) A guardian is a fiduciary who must observe the standards in dealing with guardianship property that would be observed by a prudent person dealing with the property of another, and, if the guardian has special skills or is appointed guardian on the basis of representations of special skills or expertise, the guardian is under a duty to use those skills.

(4) A guardian of property, if authorized by the court, must secure the ward's property and of the income from it, whether accruing before or after the guardian's appointment, and of the proceeds arising from the sale, lease, or mortgage of the property. All of the property and the income from it are assets in the hands of the guardian for the payment of debts, taxes, claims, charges, and expenses of the guardianship and for the care, support, maintenance, and education of the ward or the ward's dependents, as provided by law.

(5) A guardian of property must file a verified inventory of the ward's property as required by s. 745.803 and annual accountings in accordance with s. 745.803. This requirement also applies to a guardian who previously served as emergency temporary guardian for the ward.

(6) A guardian must act within the scope of the authority granted by the court and as provided by law.

(7) A guardian must act in good faith.

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(c) A full and correct itemization of the receipts and disbursements of all of the ward's property in the guardian's control or knowledge at the end of the accounting period and a statement of the ward's property in the guardian's control or knowledge at the end of the accounting period. If the guardian does not have control of an asset, the accounting must describe the asset and the reason it is not in the guardian's control. If the ward is a beneficiary of a trust, the accounting must identify the trust and the trustee, but they need not list the receipts and disbursements of the trust.

(b) A copy of statements demonstrating all receipts and disbursements for each of the ward's cash accounts from each of the institutions in which cash is deposited.

(3) A guardian must obtain a receipt, canceled check, or other proof of payment for all expenditures and disbursements made on behalf of the ward. A guardian must preserve all evidence of payment, along with other substantiating papers, for a period of 7 years after the end of the accounting year. The receipts, proofs of payment, and substantiating papers need not be filed with the court but shall be made available for inspection at such time and place and before such person as the court may order for cause, after hearing with notice to the guardian.

(4) Unless otherwise directed by the court, a guardian of property may file the first annual accounting on either a fiscal year or calendar year basis. The guardian must notify the court as to the guardian's filing intention on the guardian's inventory. All subsequent annual accountings must be filed for the same accounting period as the first annual accounting. The first accounting period must end within 1 year after the end of the month in which the letters were issued to the guardian of property.

(5) The verified inventory must specify and describe the following:
(a) All property of the ward, real and personal, that has come into the guardian's control or knowledge, including a statement of all encumbrances, liens, and other claims on any item, including any cause of action accruing to the ward, and any trusts of which the ward is a beneficiary.
(b) The location of the real and personal property in sufficient detail so that it may be identified and located.
(c) A description of all sources of income, including, without limitation, social security benefits and pensions.
(d) The location of any safe-deposit boxes held by the ward individually or jointly with any other person.
(e) Identification by name, address, and occupation, of witnesses present, if any, during the initial examination of the ward's tangible personal property.

(6) The verified inventory must specify and describe the following:
(a) All property of the ward, real and personal, that has come into the guardian's control or knowledge, including a statement of all encumbrances, liens, and other claims on any item, including any cause of action accruing to the ward, and any trusts of which the ward is a beneficiary.
(b) The location of the real and personal property in sufficient detail so that it may be identified and located.
(c) A description of all sources of income, including, without limitation, social security benefits and pensions.
(d) The location of any safe-deposit boxes held by the ward individually or jointly with any other person.
(e) Identification by name, address, and occupation, of witnesses present, if any, during the initial examination of the ward's tangible personal property.
(6) Unless the guardian is a plenary guardian of property or the requirement is otherwise waived by the court, the annual accounting must be served on the ward. The guardian shall serve a copy of the annual accounting on interested persons as the court may authorize or require.

(7) The court may waive the filing of an accounting if it determines the ward receives income only from social security benefits and the guardian is the ward's representative payee for the benefits.

745.806 Simplified accounting.

(1) In a guardianship of property, when all assets of the estate are in designated depositories under s. 745.81 and the only transactions that occur in that account are interest accrual, deposits from a settlement, financial institution service charges and court authorized expenditures, the guardian may elect to file an accounting consisting of:

(a) Statements demonstrating all receipts and disbursements of the ward's account from the financial institution; and

(b) A statement made by the guardian under penalty of perjury that the guardian has custody and control of the ward's property as shown in the year-end statement.

(2) The accounting allowed by subsection (1) is in lieu of the accounting and auditing procedures under s. 745.805. However, any interested party may seek judicial review as provided in s. 745.807.

745.807 Audit fee for accounting.

(1) In a guardianship of property, when all assets of the estate are in designated depositories under s. 745.81 and the only transactions that occur in that account are interest accrual, deposits from a settlement, financial institution service charges and court authorized expenditures, the guardian may elect to file an accounting consisting of:

(a) Statements demonstrating all receipts and disbursements of the ward's account from the financial institution; and

(b) A statement made by the guardian under penalty of perjury that the guardian has custody and control of the ward's property as shown in the year-end statement.

(2) The accounting allowed by subsection (1) is in lieu of the accounting and auditing procedures under s. 745.805. However, any interested party may seek judicial review as provided in s. 745.807.
1. A summary of the minor’s educational progress report.

2. A report from the physician who examined the minor no more than 180 days before the beginning of the applicable reporting period.

3. A description of any professional medical treatment given to the minor during the preceding year, including names of health care providers, types of care, and dates of service.

4. A report from the physician who examined the minor no more than 180 days before the beginning of the applicable reporting period, that contains an evaluation of the minor’s physical and medical conditions.

5. Anticipated medical care needs and the plan for providing medical services in the coming year.

6. Anticipated medical care needs and the plan for providing medical services in the coming year.

7. The ward’s residence at the time of issuance of the letters of guardianship, any anticipated change of residence and the reason therefor.

8. The health and accident insurance and any other private or governmental benefits to which the ward may be entitled to meet any part of the costs of medical, mental health, or other services provided to the ward; and

9. Any physical and mental examinations necessary to determine the ward’s medical and mental health treatment needs.

10. The guardianship plan for an incapacitated person must consider any recommendations specified in the court appointed examiner’s written reports or testimony.

11. The guardianship plan may not contain requirements which restrict the physical liberty of the ward more than reasonably necessary to protect the ward from decline in medical and mental health, physical injury, illness, or disease and to protect others from injury, illness or disease.

12. A guardianship plan continues in effect until it is amended or replaced by an annual guardianship report, until the restoration of capacity or death of the ward, or until the ward, if a minor, reaches the age of 18 years whichever first occurs. If there are significant changes in the capacity of the ward to meet the essential requirements for the ward’s health or safety, the guardian may modify the guardianship plan and shall serve the amended plan on all persons who served with the plan.

13. Advocate on behalf of the ward in institutional and other residential settings and regarding access to home and community-based services.

14. To the extent applicable, acquire a clear understanding of the ward’s needs and treatment and rehabilitation needs of the ward, including:

- The needed medical, mental health, rehabilitative and personal care services for the ward;
- The social and personal services to be provided for the ward;
- The kind of residential setting best suited for the needs of the ward;
- Plans for ensuring that the ward is in the best residential setting to meet the ward’s needs.

15. The guardianship plan shall include the following:

- The guardian’s name and address at the time of filing the plan, name and address of the ward’s address at the time of issuance of the letters of guardianship are issued.
- The social and personal services to be provided for the ward;
- The kind of residential setting best suited for the needs of the ward;
- The needed medical, mental health, rehabilitative and personal care services for the ward;
- Plans for ensuring that the ward is in the best residential setting to meet the ward’s needs.

16. Each report filed by the guardian of a minor includes:

- Information concerning the condition, mental health treatment needs, the ward’s residence at the time of issuance of the letters of guardianship; and
- Information concerning the ward’s medical and mental health treatment needs.

17. Each report filed by the guardian of a minor must include:

- Information concerning the condition, mental health treatment needs, the ward’s residence at the time of issuance of the letters of guardianship; and
- Information concerning the ward’s medical and mental health treatment needs.

18. The ward’s residence at the time of issuance of the letters of guardianship, any anticipated change of residence and the reason therefor.

19. The health and accident insurance and any other private or governmental benefits to which the ward may be entitled to meet any part of the costs of medical, mental health, or other services provided to the ward; and

20. Any physical and mental examinations necessary to determine the ward’s medical and mental health treatment needs.

21. The guardianship plan for an incapacitated person must consider any recommendations specified in the court appointed examiner’s written reports or testimony.

22. The guardianship plan may not contain requirements which restrict the physical liberty of the ward more than reasonably necessary to protect the ward from decline in medical and mental health, physical injury, illness, or disease and to protect others from injury, illness or disease.

23. A guardianship plan continues in effect until it is amended or replaced by an annual guardianship report, until the restoration of capacity or death of the ward, or until the ward, if a minor, reaches the age of 18 years whichever first occurs. If there are significant changes in the capacity of the ward to meet the essential requirements for the ward’s health or safety, the guardian may modify the guardianship plan and shall serve the amended plan on all persons who served with the plan.

24. Advocate on behalf of the ward in institutional and other residential settings and regarding access to home and community-based services.

25. To the extent applicable, acquire a clear understanding of the ward’s needs and treatment and rehabilitation needs of the ward, including:

- The needed medical, mental health, rehabilitative and personal care services for the ward;
- The social and personal services to be provided for the ward;
- The kind of residential setting best suited for the needs of the ward;
- Plans for ensuring that the ward is in the best residential setting to meet the ward’s needs.

26. The guardianship plan shall include the following:

- The guardian’s name and address at the time of filing the plan, name and address of the ward’s address at the time of issuance of the letters of guardianship are issued.
- The social and personal services to be provided for the ward;
- The kind of residential setting best suited for the needs of the ward;
- The needed medical, mental health, rehabilitative and personal care services for the ward;

27. Each report filed by the guardian of a minor includes:

- Information concerning the condition, mental health treatment needs, the ward’s residence at the time of issuance of the letters of guardianship; and
- Information concerning the ward’s medical and mental health treatment needs.

28. Each report filed by the guardian of a minor must include:

- Information concerning the condition, mental health treatment needs, the ward’s residence at the time of issuance of the letters of guardianship; and
- Information concerning the ward’s medical and mental health treatment needs.

29. The ward’s residence at the time of issuance of the letters of guardianship, any anticipated change of residence and the reason therefor.

30. The health and accident insurance and any other private or governmental benefits to which the ward may be entitled to meet any part of the costs of medical, mental health, or other services provided to the ward; and

31. Any physical and mental examinations necessary to determine the ward’s medical and mental health treatment needs.

32. The guardianship plan for an incapacitated person must consider any recommendations specified in the court appointed examiner’s written reports or testimony.

33. The guardianship plan may not contain requirements which restrict the physical liberty of the ward more than reasonably necessary to protect the ward from decline in medical and mental health, physical injury, illness, or disease and to protect others from injury, illness or disease.

34. A guardianship plan continues in effect until it is amended or replaced by an annual guardianship report, until the restoration of capacity or death of the ward, or until the ward, if a minor, reaches the age of 18 years whichever first occurs. If there are significant changes in the capacity of the ward to meet the essential requirements for the ward’s health or safety, the guardian may modify the guardianship plan and shall serve the amended plan on all persons who served with the plan.
performed by and the report may be prepared and signed by a
physician’s assistant acting pursuant to s. 458.347(4) or s.
459.022(4) or an advanced practice registered nurse acting pursuant
to s. 464.012(3).
(a) The plan for providing medical, mental health, and
rehabilitative services for the ward in the coming year.
(f) Information concerning the social activities of the ward,
including:
1. The social and personal services currently used by the ward.
2. The social skills of the ward, including a statement of the
ward’s ability to communicate and maintain interpersonal
relationships.
(g) Each report for an adult ward must address the issue of
restoration of rights to the ward and include:
1. A summary of activities during the preceding year that were
designed to improve the abilities of the ward.
2. A statement of whether the ward can have any rights restored.
3. A statement of whether restoration of any rights will be sought.
(h) The court, in its discretion, may require reexamination of the
ward by an appointed examiner at any time.

745.813 Annual guardianship report - filing.
Unless the court requires filing on a calendar-year basis, each
guardian of person shall file an annual guardianship report on or
before the first day of the fourth month after the last day of the
anniversary month the letters of guardianship were issued, and the
report must cover the coming plan year, ending on the last day in
such anniversary month. If the court requires calendar-year filing,
the guardianship report must be filed on or before April 1 of each
year.

Section 9. Part IX of chapter 745, Florida Statutes,
consisting of sections 745.001, 745.902, 745.903, 745.904, 745.905,
745.906, 745.907, and 745.908, is created to read:

PART IX
GUARDIAN POWERS

745.901 Powers and duties of guardian.
The guardian of an incapacitated person may exercise only those
rights that have been removed from the ward and delegated to the
guardian. A guardian of a minor shall exercise the powers of a
plenary guardian.

745.902 Power of guardian of property without court approval.
Without obtaining court approval, a plenary guardian of property,
or a limited guardian of property within the powers granted by the
letters of guardianship, may:

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(1) Take possession or control of property owned by the ward;
(2) Obtain the ward’s legal and financial documents and tax records
from persons, financial institutions and other entities;
(3) Obtain a copy of any trust or any other instrument in which the
ward has a beneficial interest, obtain benefits due the ward as a
beneficiary of any trust or other instrument, and bind the ward
with regard to any trust consistent with Florida Statutes chapter
736.0303;
(4) Vote stocks or other securities in person or by general or
limited proxy or not vote stocks or other securities;
(5) Insure the assets of the estate against damage, loss, and
liability and insure himself or herself against liability as to
third persons;
(6) Execute and deliver in the guardian’s name, as guardian, any
instrument necessary or proper to carry out and give effect to this
section;
(7) Pay taxes and assessments on the ward’s property;
(8) Pay valid encumbrances against the ward’s property in
accordance with their terms, but no prepayment may be made without
prior court approval;
(9) Pay reasonable living expenses for the ward, taking into
consideration the accustomed standard of living, age, health, and
financial resources of the ward. This subsection does not authorize
the guardian of a minor to expend funds for the ward’s living
expenses if one or both of the ward’s parents are alive;
(10) Exercise the ward’s right to an elective share. The guardian
must comply with the requirements of s. 732.2125(2). The guardian
may assert any other right or choice available to a surviving
spouse in the administration of a decedent’s estate;
(11) Deposit or invest liquid assets of the estate, including money
received from the sale of other assets, in federally insured
interest-bearing accounts, readily marketable secured loan
arrangements, money market mutual funds, or other prudent
investments. The guardian may redeem or sell such deposits or
investments to pay the reasonable living expenses of the ward as
provided herein;
(12) When reasonably necessary, employ attorneys, accountants,
property managers, auditors, investment advisers, care managers,
agents, and other persons and entities to advise or assist the
guardian in the performance of guardianship duties;
(13) Sell or exercise stock subscription, or conversion rights and
consent, directly or through a committee or other agent, to the
reorganization, consolidation, merger, dissolution, or liquidation
of a corporation or other business enterprise;
(14) Execute and deliver any instrument that is necessary or proper
to carry out the orders of the court;
(15) Hold a security in the name of a nominee or in other form
without disclosure of the interest of the ward, but the guardian is
liable for any act of the nominee in connection with the security
so held;
(16) Pay and reimburse incidental expenses in the administration of
the guardianship and for provision of services to the ward
including reasonable compensation to persons employed by the
guardian pursuant to subsection (12) from the assets of the ward.
Three payments shall be reported on the guardian’s annual
accounting, accompanied by itemized statements describing services
rendered and the method of charging for such services;
(17) Provide confidential information about a ward that is related
to an investigation arising under s. 745.1001 to the clerk, part

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whole or in part, execute a codicil on the ward’s behalf amending
the trust (as that term is defined in s. 736.1201), but the maximum
States estate tax charitable deduction by use of a split interest

(18) When the ward’s will evinces an objective to obtain a United

(15) Exercise any option contained in any policy of insurance

(12) Continue any unincorporated business or venture in which the

ward was engaged;

(13) Purchase, in the name of the ward, real property in this state

which the guardian may determine under the circumstances;

(10) Prosecute or defend claims or proceedings in any jurisdiction

for the protection of the ward and of a guardian in the performance

of guardianship duties, including the filing of a petition for
dissolution of marriage. Before authorizing a guardian to bring an
action described in s. 736.0207, the court shall first find that
the action appears to be in the ward’s best interest during the
ward’s probable lifetime. There shall be a rebuttable presumption
that an action challenging the ward’s revocation of all or part of
a trust is not in the ward’s best interests if the revocation

(11) Sell, mortgage, or lease any real or personal property of the

ward, including homestead property, or any interest therein for
cash or credit, or for part cash and part credit, and with or
without security for unpaid balances;

(12) Continue any unincorporated business or venture in which the

ward was engaged;

(13) Purchase, in the name of the ward, real property in this state

in which the guardian has no interest;

(14) If the ward is married with property owned by the ward and
spouse as an estate by the entitiles and the property is sold, the
proceeds shall retain the same entitiles character as the original
asset, unless otherwise determined by the court;

(15) Exercise any option contained in any policy of insurance
payable to, or inuring to the benefit of, the ward;

(16) Prepay reasonable funeral, interment, and grave marker
expenses for the ward from the ward’s property;

(17) Make gifts of the ward’s property to members of the ward’s
family for estate and income tax planning purposes or to continue
the ward’s prior pattern of giving;

(18) When the ward’s will evinces an objective to obtain a United
States estate tax charitable deduction by use of a split interest
trust (as that term is defined in s. 736.1201), but the maximum
charitable deduction otherwise allowable will not be achieved in
whole or in part, execute a codicil on the ward’s behalf amending
the will to obtain the maximum charitable deduction allowable

(3) Make extraordinary repairs or alterations in buildings or other
structures; demolish any improvements; raze existing walls or erect
new, party walls or buildings;

(4) Subdivide, develop, or dedicate land to public use; make or
obtain the vacation of plats and adjust boundaries; adjust
differences in valuation on exchange or partition by giving or
receiving consideration; or dedicate easements to public use
without consideration;

(5) Enter into a lease as lessor of the ward’s property for any
purpose, with or without option to purchase or renew, for a term
within, or extending beyond, the period of guardianship;

(6) Enter into a lease or arrangement for exploration and removal
of minerals or other natural resources or water into a pooling or
unitization agreement;

(7) Abandon property when it is valueless or is so encumbered or in
such condition that it is of no benefit to the ward;

(8) Borrow money, with or without security, and advance money for
the protection of the ward;

(9) Effect a fair and reasonable compromise or settlement with any
debtor or obligor or extend, renew, or in any manner modify the
terms of any obligation owing to the ward;

(10) Proceeds or defend claims or proceedings in any jurisdiction
for the protection of the ward and of a guardian in the performance
of guardianship duties, including the filing of a petition for
dissolution of marriage. Before authorizing a guardian to bring an
action described in s. 736.0207, the court shall first find that
the action appears to be in the ward’s best interest during the
ward’s probable lifetime. There shall be a rebuttable presumption
that an action challenging the ward’s revocation of all or part of
a trust is not in the ward’s best interests if the revocation

relates solely to a post-death distribution. This subsection does
not preclude a challenge after the ward’s death. Any judicial
proceeding specified in 736.0201 must be brought as an independent
proceeding and is not a part of the guardianship action;

(11) Sell, mortgage, or lease any real or personal property of the
ward, including homestead property, or any interest therein for
cash or credit, or for part cash and part credit, and with or
without security for unpaid balances;

(12) Continue any unincorporated business or venture in which the
ward was engaged;

(13) Purchase, in the name of the ward, real property in this state
in which the guardian has no interest;

(14) If the ward is married with property owned by the ward and
spouse as an estate by the entitiles and the property is sold, the
proceeds shall retain the same entitiles character as the original
asset, unless otherwise determined by the court;

(15) Exercise any option contained in any policy of insurance
payable to, or inuring to the benefit of, the ward;

(16) Prepay reasonable funeral, interment, and grave marker
expenses for the ward from the ward’s property;

(17) Make gifts of the ward’s property to members of the ward’s
family for estate and income tax planning purposes or to continue
the ward’s prior pattern of giving;

(18) When the ward’s will evinces an objective to obtain a United
States estate tax charitable deduction by use of a split interest
trust (as that term is defined in s. 736.1201), but the maximum
charitable deduction otherwise allowable will not be achieved in
whole or in part, execute a codicil on the ward’s behalf amending
the will to obtain the maximum charitable deduction allowable

without diminishing the aggregate value of the benefits of any
beneficiary under the will;

(19) Create or amend revocable trusts or create irrevocable trusts
of property of the ward that may extend beyond the disability or
life of the ward in connection with estate, gift, income, or other
tax planning or to carry out other estate planning purposes. The
court shall retain oversight of the assets transferred to a trust,
unless otherwise ordered by the court. Before entering an order
authorizing creation or amendment of a trust, the court shall
appoint counsel to represent the ward in that proceeding. To the
test of this provision conflicts with provisions of Chapter 736,
Chapter 736 shall prevail;

(20) Renounce or disclaim any interest of the ward received by
testate or intestate succession, insurance benefit, annuity,
survivorship, or inter vivos transfer;

(21) Enter into contracts that are appropriate for, and in the best
interest of, the ward and

(22) Pay for a minor ward’s support, health, maintenance, and
education, if the ward’s parents, or either of them, are alive.

745.903 Powers of guardian of property requiring court approval.

After obtaining approval of the court pursuant to a petition for
authorization to act, a plenary guardian of property, or a limited
guardian of property within the powers granted by the letters of
guardianship, may:

(1) Comply, or refuse performance of a ward’s contracts that
prevade the guardianship, as the guardian may determine under the
circumstances;

(2) Execute, exercise, or release any non-fiduciary powers that the
ward might have lawfully exercised, consummated, or executed if not
incapacitated, if the best interest of the ward requires such
execution, exercise, or release;
petition to perform any other acts under s. 745.903 or s. 745.1309
must be given to the ward, to the next of kin, if any, and to those
interested persons whom the court has found to be entitled to
notice, as provided in the Florida Probate Rules, unless waived by
the court for good cause. Notice need not be given to a ward who is
a minor or who has been determined to be totally incapacitated.

475.905 Order authorizing action.
(1) If a sale or mortgage is authorized, the order shall:
(a) Describe the property;
(b) If the property is authorized for sale at private sale, the
price and the terms of sale; and
(c) If the sale is to be by public auction, the order shall state
that the sale shall be made to the highest bidder but that the
 guardian reserves the right to reject all bids.
(2) An order for any other act permitted under s. 745.903 or s.
745.1309 shall describe the permitted act and authorize the
guardian to perform it.

475.906 Conveyance of various property rights by guardians of
property.
(1)(a) All legal or equitable interests in property owned as an
estate by the entirety by an incapacitated person for whom a
guardian of the property has been appointed may be sold,
transferred, conveyed, or mortgaged in accordance with s. 745.903,
if the spouse who is not incapacitated joins in the sale, transfer,
conveyance, or mortgage. When both spouses are incapacitated, the
sale, transfer, conveyance, or mortgage shall be by the guardians
only. The sale, transfer, conveyance, or mortgage may be
accomplished by one instrument or by separate instruments.

475.907 Settlement of claims
(1) When a settlement of any claim by or against an adult ward,
whether arising as a result of personal injury or otherwise, and
whether arising before or after appointment of a guardian, is
proposed, but before an action to enforce it is begun, on petition
by the guardian of property stating the facts of the claim or
dispute and the proposed settlement, and on evidence that is
introduced, the court may enter an order authorizing the settlement
if satisfied that the settlement will be in the best interest of
the ward. The order shall relieve the guardian from any further
responsibility in connection with the claim or dispute when
settlement has been made in accordance with the order. The order
authorizing the settlement may also determine whether an additional
bond is required and, if so, shall fix the amount of it.
(2) In the same manner as provided in subsection (1) or as
authorized by s. 745.713, the natural guardians or guardian of a
minor may settle any claim by or on behalf of a minor that does not
exceed $25,000.00 without bond. A guardianship shall be required
when the amount of the net settlement to the ward exceeds
$50,000.00. When the amount of the net settlement to the ward
exceeds $25,000.00 but does not exceed $50,000.00, the court has
the discretion to determine whether the natural guardians may
settle the claim or whether a guardianship shall be required. No
guardianship of the minor is required when the amount of the net
settlement is less than $25,000.00.
(3) No settlement after an action has been commenced by or on
behalf of a ward shall be effective unless approved by the court
having jurisdiction of the guardianship.
(4) In making a settlement under court order as provided in this
section, the guardian is authorized to examine any instrument that
may be necessary to effect the settlement. When executed, the
instrument shall be a complete release of the guardian.

745.908 Authority for extraordinary actions.
(1) Without first obtaining authority from the court, as described
in this section, a guardian shall not:
(a) Commit a ward with developmental disabilities to a facility,
institution, or licensed service provider without formal placement
proceeding, pursuant to chapters 393.
(b) Consent on behalf of the ward to the performance on the ward
of any experimental biomedical or behavioral procedure or to the
participation by the ward in any biomedical or behavioral
experiment. The court may permit such performance or participation
only if:
1. It is of direct benefit to, and is intended to preserve the life
of or prevent serious impairment to the mental or physical health,
of the ward; or
audits and may cause the plan and annual guardianship report and limited to, the beginning inventory balance and any fees charged to that reasonably impact guardianship assets, including, but not timely filed.

guardian when an inventory, accounting, plan or report is not audit report of the clerk's findings.

within such time, the clerk shall provide a written statement of the clerk's findings.

whether it provides information required by this code and the Florida Probate Rules. Within such time, the clerk shall provide the court and the guardian a written statement of the clerk's findings.

whether the ward is a minor or totally incapacitated, of the intent to serve subpoenas to nonparties.

audits without requiring testimony. Any objection to such consideration must be filed and served on interested persons at least 3 days prior to the hearing;

find by clear and convincing evidence that the ward lacks the capacity to make a decision about the issues before the court and that the ward's capacity is not likely to change in the foreseeable future; and

find by clear and convincing evidence that the authority being requested is consistent with the ward's intentions expressed prior to incapacity or, in the absence of evidence of the ward's intentions, is in the best interests of the ward.

745.909 Do Not Resuscitate Order.

consisting of sections 745.1001, 745.1002, 745.1003, 745.1004, 745.1005, 745.1006, 745.1007, 745.1008, and 745.1009, is created to read:

PART X

OVERSIGHT AND MONITORING

745.1001 Duties of the clerk - General.

In addition to the duty to serve as custodian of guardianship files, the clerk shall have the duties specified below:

(1) Within 30 days after the date of filing an initial guardianship plan or annual report of a guardian of person, the clerk shall examine the initial guardianship plan or annual report to assess whether it provides information required by this code and the Florida Probate Rules. Within such time, the clerk shall provide the court and the guardian a written audit report of the clerk's findings.

(2) Within 60 days after the filing of an inventory or annual accounting by a guardian of property, the clerk shall audit the inventory or accounting to assess whether it provides information required by this code and the Florida Probate Rules. Within such time, the clerk shall provide the court and the guardian a written audit report of the clerk's findings.

(3) The clerk shall provide written notice to the court and guardian when an inventory, accounting, plan or report is not timely filed.

(4) If the clerk has reason to believe further review is appropriate, the clerk may request and review records and documents that reasonably impact guardianship assets, including, but not limited to, the beginning inventory balance and any fees charged to the guardianship. As a part of this review, the clerk may conduct audits and may cause the plan and annual guardianship report and accounting to be audited. The clerk shall notify in writing the court and the guardian of the results of any such audit, any fee or cost incurred by the guardian in responding to the review or audit may not be paid or reimbursed by the ward's assets if there is a finding of wrongdoing by the guardian.

(5) If a guardian fails to produce records and documents to the clerk upon request, the clerk may request that the court enter an order pursuant to s. 745.1004 by filing an affidavit that identifies the records and documents requested and shows good cause as to why the documents and records requested are needed to complete the audit.

(6) Upon application to the court pursuant to subsection (5), the clerk may issue subpoenas to nonparties to compel production of books, papers, and other documentary evidence. Before issuance of a subpoena, the clerk must serve notice on the guardian and the ward, unless the ward is a minor or totally incapacitated, of the intent to serve subpoenas to nonparties.

(a) The clerk must attach the affidavit and the proposed subpoena to the notice, and the subpoena must:

1. State the time, place, and method for production of the documents or items, and the name and address of the person who is to produce the documents or items, if known, or, if not known, a general description sufficient to identify the person or the particular class or group to which the person belongs;

2. Indicate a description of the items to be produced;

3. State that the person who will be asked to produce the documents or items has the right to object to the production under this section and that if an objection is filed the person is not required to surrender the documents or items.

(1) After obtaining approval of the court that a Do Not Resuscitate Order is appropriate under s. 745.809(7) pursuant to a petition for authorization to act, a plenary guardian of person, or a limited guardian of person within the powers granted by the letters of guardianship may authorize a Do Not Resuscitate Order for the ward under Florida Statutes s. 401.45. A guardian may not authorize a Do Not Resuscitate Order without prior court approval except as provided in subsection 3 below.

(2) A preliminary hearing on the petition for court approval must be held within 72 hours after the filing of the petition. At that time the court must review the petition and supporting documentation. In its discretion the court shall either:

(a) rule on the relief requested immediately after the preliminary hearing; or

(b) conduct an evidentiary hearing not later than 4 days after the preliminary hearing and rule on the relief requested immediately after the evidentiary hearing.

(3) Court approval is not required prior to the authorization of a Do Not Resuscitate Order by the guardian of person when:

(a) the Ward authorized a Do Not Resuscitate Order prior to the Ward’s incapacity and the Do Not Resuscitate Order was entered in the Ward’s medical records; or

(b) the Ward has explicitly requested a Do Not Resuscitate Order be entered in the Ward’s living will, designation of healthcare surrogate, or other valid written advance directive.

When a Do Not Resuscitate Order is signed without court approval, the guardian of person must file a copy of the Do Not Resuscitate Order with the Court within 10 days of execution.

Section 10. Part X of chapter 745, Florida Statutes,
(b) A copy of the notice and proposed subpoena may not be furnished to the person upon whom the subpoena is to be served.

c) If the guardian or ward serves an objection to production under this subsection within 10 days after service of the notice, the subpoena may not be served on the nonparty until resolution of the objection. If an objection is not made within 10 days after service of the notice, the clerk may issue the subpoena to the nonparty.

The court may shorten the period within which a guardian or ward is required to file an objection upon a showing by the clerk by affidavit that the ward’s property is in imminent danger of being wasted, misappropriated, or lost unless immediate action is taken.

2754.1002 Judicial review of guardianship inventories and accountings.

(1) Within 45 days after the filing of the clerk’s audit report, the court shall review guardianship inventories and accountings to ensure that they comply with the requirements of law. The court may appoint a general or special magistrate to assist the court in its review function. Upon examining a guardianship inventory or accounting, the court shall enter an order approving or disapproving such document or requiring the guardian to provide more information or cure deficiencies found in the inventory or accounting.

(2) If the court finds, upon review of the inventory or accounting and the clerk’s audit report, that the document complies with the requirements of law, the court must approve the inventory or accounting. If the audit report indicates that there are deficiencies in the inventory or accounting, the court shall notify the guardian, in writing, of the deficiencies determined by the clerk and provide a reasonable time within which the guardian must correct such deficiencies or otherwise respond by written response to the court.

If the guardian does not respond within the time specified by the court, or if the guardian’s response indicates a need for further action, the court may conduct a hearing, with notice to the guardian, to determine if a revised inventory or accounting must be approved. If the guardian fails to file the document within the time specified by the order without good cause, the court shall order the guardian to show cause why the guardian should not be held in contempt of court. At the conclusion of the hearing, the court may sanction the guardian, if good cause is not demonstrated.

No fine may be paid from property of the ward.

(3) When a guardian fails to file a plan, report, inventory or accounting, the court shall order the guardian to file such document within 15 days after the service of the order on the guardian or show cause, in writing, why the guardian should not be compelled to do so. A copy of the order shall be served on the guardian. If the guardian fails to file the document within the time specified by the order without good cause, the court shall order the guardian to show cause why the guardian should not be held in contempt of court. At the conclusion of the hearing, the court may sanction the guardian, if good cause is not demonstrated.

(4) Petition for interim judicial review

If it appears from the annual guardianship report that:

(1) The condition or maintenance of the ward requires the appointment of a general or special magistrate to assist the court in its review function. Upon examining a guardianship plan or report, the court must enter an order either approving or disapproving such document or requiring the guardian to provide more information or cure deficiencies found in the plan or report.

2754.1005 Action on review of guardianship report.

If it appears from the annual guardianship report that:

(1) The condition of the ward requires further examination;

(2) Any change in the proposed care, maintenance, or treatment of the ward is needed;

(3) The ward is qualified for restoration of some or all rights;

(4) Any change in the care, maintenance, or treatment of the ward is needed;

(5) There is any other action necessary to protect the interests of the ward.

The court may direct the guardian to appear at a hearing with appropriate notice to the guardian, to address such issues. The court may enter such order as it finds appropriate to protect the ward.

2754.1006 Petition for interim judicial review

(1) At any time, any interested person may petition the court for review alleging that the guardian is not complying with a guardianship plan or report, is exceeding the guardian’s authority under such document, or is acting in a manner contrary to s. 745.1006. Petition for interim judicial review

If it appears from the annual guardianship report that:

(1) The condition of the ward requires further examination;

(2) Any change in the proposed care, maintenance, or treatment of the ward is needed;

(3) The ward is qualified for restoration of some or all rights;

(4) Any change in the care, maintenance, or treatment of the ward is needed;

(5) There is any other action necessary to protect the interests of the ward.

The court may direct the guardian to appear at a hearing with appropriate notice to the guardian, to address such issues. The court may enter such order as it finds appropriate to protect the ward.
(5)(a) If it appears from the monitor’s report that further action to protect the person or property of the ward is necessary, the court shall, after a hearing with notice, enter any order necessary to protect the ward or the ward’s property, including requiring the guardian to amend a plan or report, requiring an accounting or amended accounting, ordering production of assets, freezing assets, suspending a guardian, or initiating proceedings to remove a guardian.

(6) If it appears from the monitor’s report that further action to protect the interests of the ward is necessary, the court shall, after a hearing with notice, enter any order necessary to protect the ward or the ward’s property, including requiring the guardian to amend a plan or report, requiring an accounting or amended accounting, ordering production of assets, freezing assets, suspending a guardian, or initiating proceedings to remove a guardian.

(7) Unless otherwise prohibited by law, a monitor may be allowed a reasonable fee as determined by the court and paid from the property of the ward. No full-time state, county, or municipal employee or officer shall be paid a fee for such investigation and report. If the court finds a petition to appoint a monitor or a written communication by a third party which results in appointment of a monitor to have been filed in bad faith, the costs of the proceeding and attorney’s fees shall be awarded after hearing with notice to the petitioner or third party.

745.1009 Emergency guardianship monitor.

(1) The court may, upon petition by an interested person or upon its own motion, appoint a monitor after hearing with notice to the petitioner, guardian, and the ward. The court must appoint a monitor an employee of the court, the clerk, a family member of the ward, or any person with a personal interest in the proceedings.

(2) The court may either appoint the monitor or appoint a court monitor after hearing with notice to the petitioner or third party.

(3) The court may appoint a monitor after hearing with notice to the petitioner, guardian, and the ward, and such interested persons as the court may direct.

(4) The monitor shall file a report of the monitor’s findings and recommendations. The report shall be verified and may be supported by documents or other evidence.

(5)(a) If it appears from the monitor’s report that further action to protect the interests of the ward is necessary, the court shall, after a hearing with notice, enter any order necessary to protect the ward or the ward’s property, including requiring the guardian to amend a plan or report, requiring an accounting or amended accounting, ordering production of assets, freezing assets, suspending a guardian, or initiating proceedings to remove a guardian.

(6) If it appears from the monitor’s report that further action to protect the person or property of the ward is necessary, the court shall, after a hearing with notice, enter any order necessary to protect the ward or the ward’s property, including requiring the guardian to amend a plan or report, requiring an accounting or amended accounting, ordering production of assets, freezing assets, suspending a guardian, or initiating proceedings to remove a guardian.

(7) Unless otherwise prohibited by law, a monitor may be allowed a reasonable fee as determined by the court and paid from the property of the ward. No full-time state, county, or municipal employee or officer shall be paid a fee for such investigation and report. If the court finds a petition to appoint a monitor or a written communication by a third party which results in appointment of a monitor to have been filed in bad faith, the costs of the proceeding and attorney’s fees shall be awarded after hearing with notice to the petitioner or third party.

745.1009 Emergency guardianship monitor.

(1) The court may, upon petition by an interested person or upon its own motion, appoint a monitor after hearing with notice to the petitioner, guardian, and the ward. The court must appoint a monitor an employee of the court, the clerk, a family member of the ward, or any person with a personal interest in the proceedings.

(2) The court may either appoint the monitor or appoint a court monitor after hearing with notice to the petitioner or third party.

(3) The court may appoint a monitor after hearing with notice to the petitioner, guardian, and the ward, and such interested persons as the court may direct.

(4) The monitor shall file a report of the monitor’s findings and recommendations. The report shall be verified and may be supported by documents or other evidence.
(1) A guardian may resign at any time.

(2) A resigning guardian shall retain the duties and responsibilities of a guardian until discharged by the court as specified in this part.

(3) A resigning guardian shall file a resignation with the court and, unless waived, serve a notice of resignation on:

(a) next of kin of the ward;
(b) the ward, unless the ward has been found to be totally incapacitated or is a minor; and
(c) a successor or proposed successor guardian, if any.

(4) The petition for distribution and discharge must include a schedule of unpaid expenses of the ward and administration expenses to be paid prior to discharge.

FLORIDA HOUSE OF REPRESENTATIVES

745.1101 Resignation of guardian.

(1) A guardian of property who is subsequently appointed sole representative.

(2) A resigning guardian who is subsequently appointed sole representative must file:

(a) a petition for distribution and discharge,
(b) final accounting, and
(c) notice of filing petition for distribution and discharge and final accounting must specify that interested persons have 30 days from the date of receipt of the notice to file any objections with the court. If no objections are timely filed, the court may enter an order authorizing distribution of assets without further notice or hearing. If objections are timely filed, the objections must be resolved as provided in the Florida Probate Rules.

(6) Upon approval of a resigned guardian's final accounting and petition for distribution and discharge, the guardian is entitled to distribute assets and, upon proof of distribution, to be discharged regardless of whether a successor guardian has been appointed.

(7) If no successor guardian is appointed at the time the petition for distribution and discharge is filed, the court may appoint an emergency temporary guardian.

(8) Prior to discharge, a resigning guardian shall deliver all assets of the ward and copies of all asset records to a successor guardian, an emergency temporary guardian, or as otherwise directed by the court.

(9) Upon petition by an interested person or by the court, the personal representative or curator may waive preparation or audit of the final accounting and final accounting must specify that interested persons have 30 days from the date of receipt of the notice to file any objections with the court. If no objections are timely filed, the court may enter an order authorizing distribution of assets without further notice or hearing. If objections are timely filed, the objections must be resolved as provided in the Florida Probate Rules.

(10) A successor guardian may be appointed and have letters issued after a guardian has resigned and before an order of discharge of the resigned guardian has been entered. The successor guardian succeeds to the powers specified in the letters of guardianship and such guardian's authority shall inure as of the date of issuance of letters.

745.1102 Resignation and discharge of guardian of property.

(2) When the ward's property has been exhausted except for clothing and minimal personal effects and the guardian receives no income on behalf of the ward, the guardian may file a final accounting and petition for discharge. The final accounting and petition for discharge, together with a notice of the final accounting and petition for discharge, must be served on the ward and such interested persons as the court may direct.

(3) When a ward dies, the guardian must file a final accounting and petition for distribution and discharge within 45 days after the guardian has been served with letters of administration or letters of curatorship of the ward's estate. The petition for distribution and discharge and final accounting and notice of filing shall be served on the personal representative or curator. The personal representative or curator may waive preparation or audit of the guardian's final accounting subject to the provisions of s. 745.1104.
under s. 745.1103. Any amount not needed for the guardian's expenses or to support the ward may be waivered by the person entitled to receive the money or the court. A guardian may file a final accounting and petition for discharge of the guardian at any time after completion of the guardianship or if the guardian is discharged by the court.

(c) Upon depositing the funds with the clerk, a guardian of property shall be considered an interested person pursuant to s. 733.202 and may, after a reasonable time, petition for appointment of a personal representative or curator. In the alternative, the guardian may follow the procedures set forth in subsection (3).

(2) When a guardian is unable to locate the ward after diligent search, the guardian may file a petition pursuant to s. 731.103(3) and, upon a determination of death, may proceed under subsections (1) or (3). In the alternative, the guardian may follow the procedures set forth in section 740.103, subdivision (d)

(4) Pursuant to subsection (3), after the expiration of 6 months from the posting or first publication, the clerk shall deposit the funds with the Chief Financial Officer after deducting the clerk's fees and the costs of publication. If an objection is timely filed, any interested person may set the objection for hearing. If no hearing is held within 60 days after filing the objection, the objection is deemed abandoned.

(5) If the value of the funds is over $500, the clerk shall publish the notice once a month for 2 consecutive months in a newspaper of general circulation in the county. If the value of the funds is $500 or less, the clerk shall post the notice in the registry of the court, to be disposed of as follows:

(a) If the value of the funds is $500 or less, the clerk shall post a notice for 30 days at the courthouse specifying the amount, the name of the ward, the guardianship court file number, the name and mailing address of the guardian, and other pertinent information. Any surplus funds so retained must be deposited with the clerk prior to discharge of the guardian of property.

(b) If the value of the funds is over $500, the clerk shall publish the notice once a month for 2 consecutive months in a newspaper of general circulation in the county. From the posting or first publication, the clerk shall deposit the funds with the Chief Financial Officer after deducting the clerk's fees and the costs of publication. If an objection is timely filed, any interested person may set the objection for hearing. If no hearing is held within 60 days after filing the objection, the objection is deemed abandoned.

(2) The guardian shall serve the petition for discharge and final accounting on the new guardian, the ward's next of kin and all known creditors of the ward with a notice directing that any objections must be filed within 30 days. If an objection is timely filed, any interested person may set the objection for hearing. If no hearing is held within 60 days after filing the objection, the objection is deemed abandoned.

(3) Upon disposition of all objections, or if no objection is filed, distribution shall be made by the Florida guardian. On proof that the remaining property in the guardianship has been received by the foreign guardian, the Florida guardian of property shall be discharged.

(4) The Florida guardian's final accounting shall not be subject to audit.
(4) A successor guardian of person may be appointed and have letters issued after a guardian has resigned and before an order of discharge of the resigned guardian has been entered. The successor guardian shall exercise the powers specified in the letters of guardianship and such guardian’s authority imposes as of the date of issuance of letters.

(5) If no successor guardian is appointed at the time the petition for discharge is filed, the court may appoint an emergency temporary guardian.

745.1108 Termination of guardianship of person.

(1) When a ward becomes sui juris, has been restored to capacity as to all rights related to the ward’s person, the guardianship has terminated as a result of the relocation of the ward’s residence to an out-of-state jurisdiction, or the guardianship is otherwise terminated, except as provided in subsection (5), a guardian of person must file a petition for discharge, specifying the grounds therefor. The petition for discharge must be served on the ward.

(2) When the guardian has been unable to locate the ward after diligent search, a guardian of person may file a petition for discharge, specifying the guardian’s attempts to locate the ward.

(3) In the case of a ward who has become sui juris or has been restored to capacity, a copy of the petition for discharge and a notice of hearing on said petition shall be served on the ward, unless waived.

(4) If a guardian has been unable to locate the ward, the guardian shall serve the petition for discharge and a notice of hearing on the ward’s next of kin and such other persons as the court may, in its discretion, direct.

(5) A guardian of person is discharged without further proceedings upon filing a certified copy of the ward’s death certificate, together with a notice of discharge.

(6) The court retains jurisdiction over the guardian until the guardian is discharged.

745.1109 Termination of guardianship of person on change of residence of ward to foreign jurisdiction.

(1) When the residence of a ward has changed to another state or country and the foreign court having jurisdiction of the ward at the ward’s new place of residence has issued letters or the equivalent, the guardian of person in this state may file a petition for discharge and serve it on the new foreign guardian and the ward’s next of kin with a notice directing that any objections must be filed within 30 days.

(2) If an objection is timely filed, any interested person may set the objection for hearing. If no notice of hearing is served within 60 days after filing the objection, the objection is deemed abandoned.

(3) Upon disposition of all objections, or if no objection is filed, the guardian of person shall be discharged.

745.1110 Order of discharge.

(1) If the court is satisfied that the guardian has faithfully discharged the guardian’s duties and, in the case of a guardian of property, has delivered the property of the ward to the person entitled, and that the interests of the ward are protected, the court must enter an order discharging the guardian from any further duties and liabilities as guardian. The discharge shall also act as a bar to any action against the guardian, as such and individually,

or the guardian’s surety, as to matters adequately disclosed to interested persons.

(2) As to matters not adequately disclosed to interested persons, any action against the guardian, as such and individually, shall be barred unless commenced within 2 years of entry of the order of discharge.

Section 12. Part XII of chapter 745, Florida Statutes, consisting of sections 745.1201, 745.1202, 745.1203, 745.1204, 745.1205, and 745.1206, is created to read:

PART XII

REMOVAL OF GUARDIAN

745.1201 Reasons for removal of guardian.

A guardian may be removed for any of the following reasons, and the removal shall be in addition to any other penalties prescribed by law:

(1) Fraud in obtaining appointment.

(2) Failure to discharge guardianship duties.

(3) Abuse of guardianship powers.

(4) An incapacity or illness, including substance abuse, which renders the guardian incapable of discharging the guardian’s duties.

(5) Willful failure to comply with any order of the court.

(6) Failure to account for property sold or to produce the ward’s property when so required.

(7) Waste, embezzlement, or other mismanagement of the ward’s property.

(8) Failure to give bond or security when required by the court or failure to file with the annual guardianship plan the evidence required by s. 745.607 that the sureties on the guardian’s bond are alive and solvent.

(9) Conviction of a felony.

(10) Appointment of a receiver, trustee in bankruptcy, or liquidator for any corporate guardian.

(11) Development of a conflict of interest between the ward and the guardian.

(12) Having been found guilty of, regardless of adjudication, or entered a plea of nolo contendere or guilty to, any offense described in s. 435.04(2), s. 741.28 or under any similar statute of another jurisdiction.

(13) A failure to fulfill the guardianship education requirements.

(14) A material change in the ward’s financial circumstances so that the guardian is no longer qualified to manage the finances of the ward, or the previous degree of management is no longer required.

(15) After appointment, the guardian becomes a disqualified person as specified in s. 745.503.

(16) Upon a showing that removal of the current guardian is in the best interest of the ward.

745.1202 Proceedings for removal of a guardian.

A petition to remove a guardian may be filed by any surety, interested person, or by the ward. Formal notice shall be served on the guardian. After hearing, the court may enter an order that is proper considering the pleadings and the evidence.

745.1203 Accounting upon removal.

A removed guardian of property shall file with the court a true, complete, and final accounting of the ward’s property within 30 days after removal and shall serve a copy on the successor.
to comply with this or any subsequent order, the removed guardian
may be held in contempt. Proceedings for contempt may be instituted
by the court, by any interested person, including the ward, or by a
successor or emergency temporary guardian.

Section 13. Part XIII of chapter 745, Florida Statutes,
consisting of sections 745.1301, 745.1302, 745.1303, 745.1304,
745.1305, 745.1306, 745.1307, 745.1308, 745.1309, 745.1310,
745.1311, 745.1312, 745.1313, 745.1314, and 745.1315, is created to
read:

PART XIII

MISCELLANEOUS

745.1301 Suspension of statutes of limitations in favor of guardian.
If a person entitled to bring an action is declared incapacitated
before expiration of the time limits for the commencement of the
action and the cause of the action survives, the action may be
commenced by a guardian of property after such expiration and
within 1 year from the date of the issuance of letters or the time
otherwise limited by law, whichever is longer.

745.1302 Appraisals.
On petition by an interested person, the court may appoint
appraisers to appraise property of the ward that is subject to the
guardianship. This section does not limit the power of a guardian
of property to employ appraisers without court order pursuant to s.
745.302(12).

745.1303 Determination regarding alternatives to guardianship.

(1) Any judicial determination concerning the validity or effect of
the ward’s power of attorney, durable power of attorney, trust or
trust amendment shall be promptly reported in the guardianship
proceeding by the guardian of property.

(2) Any judicial determination concerning the validity or effect of
the ward’s health care surrogate designation shall be promptly
reported in the guardianship proceeding by the guardian of person.

(3) During the guardianship, an interested person may file a
petition alleging that, due to a change in circumstances or the
discovery of an alternative not previously considered by the court,
there is an alternative to guardianship which will sufficiently
address the problems of the ward and the court shall consider the
continued need for a guardian and the extent of the continued need
for delegation of the ward’s rights, if any.

745.1304 Support of ward’s dependents.

(1) A guardian of property shall first apply the ward’s income to
the ward’s care, support, education, maintenance, health care and
cost of funeral and burial or cremation. The guardian shall not use
the ward’s property for support of the ward’s dependents unless
approved by the court. The court may approve the guardian to use
the ward’s income for the care, support, education, maintenance,
and final disposition expenses of any dependents. The guardian may
use the ward’s property to pay expenses of the court and the court
cost of funeral and burial. The guardian shall not use the
ward’s property to pay expenses of the court or the court’s
cost of funeral and burial.

(2) The word "dependents," as used in subsection (1) means, in
addition to those persons who are legal dependents of a ward under
existing law, the ward’s spouse, the ward’s parents, and persons to
whom the ward was providing support prior to the ward’s incapacity.

745.1305 Petition for support of ward’s dependents.

(1) A spouse or dependent of the ward, as defined in s. 745.1304,
may petition for an order directing the guardian of property to
contribute to the support of the person from the income or property
of the ward. The court may enter an order for support of the spouse
or dependent out of the ward’s income and property that is subject
to the guardianship. The grant or denial of an order for support
shall not preclude a further petition for support or for increase,
decrease, modification, or termination of allowance for support by
either the petitioner or the guardian. Delivery of the recipient
shall be a release of the guardian for payments made pursuant to
the order.

(2) If the property of the ward is derived wholly or in part from
payments of compensation, adjusted compensation, pension,
insurance, or other benefits made directly to the guardian by the
United States Department of Veterans Affairs, notice of the
petition for support shall be given to the United States Department of Veterans Affairs having
jurisdiction over the area in which the court is located and the
chief attorney for the Department of Veterans Affairs in this
state at least 15 days before the hearing on the petition.

(3) The court may not authorize payments from an incapacitated
ward’s income or property unless the ward has been adjudicated
incapacitated to manage such income or property in accordance with s. 745.131.

(4) In a voluntary guardianship, a petition for support may be
granted only upon the written consent of the ward.

745.1306 Payments to guardian of person.
If there is more than one guardian, either guardian may petition for an order directing the guardian of property to pay to the guardian of person periodic amounts for the support, care, maintenance, education, and other needs of the ward. The amount may be increased or decreased from time to time. If an order is entered, proof of delivery to the guardian of person for payments made shall be a sufficient release of the guardian who makes the payments pursuant to the order. The guardian of property shall not be bound to see to the application of the payments and the guardian of person shall not be required to file an accounting for the funds received, unless otherwise ordered to do so by the court.

745.1307 Actions by and against guardian or ward.

If an action is brought by a guardian against the ward, by a ward against the guardian, or in which the interest of the guardian is adverse to that of the ward, a guardian ad litem shall be appointed to represent the ward in that proceeding. In any litigation between the guardian and the ward, the guardian ad litem may petition the court for removal of the guardian.

745.1308 Guardian forbidden to borrow or purchase; exceptions.

(1) A professional guardian may not purchase property or borrow money from the ward.

(2) A guardian who is not a professional guardian may purchase property from the ward if the property is to be purchased at fair market value and the court gives prior authorization for the transaction.

(3) A guardian who is not a professional guardian may borrow money from the ward if the loan is to be made at the prevailing interest rate, with adequate security, and the court gives prior authorization for the transaction.

745.1311 Temporary delegation of authority to surrogate.

(1) A guardian may designate a surrogate guardian to exercise the powers of the guardian if the guardian is unavailable to act. A person designated as a surrogate guardian under this section must be a professional guardian or a member of the Florida Bar qualified to act under s. 745.501.

(2)(a) A guardian must file a petition with the court requesting permission to designate a surrogate guardian.

(b) If the court approves the designation, the order must specify the name and business address of the surrogate guardian and the duration of appointment, which may not exceed 30 days. The court may extend the appointment for good cause shown. The surrogate guardian may exercise all powers of the guardian unless limited by court order. The surrogate guardian must file with the court an oath swearing or affirming that the surrogate guardian will faithfully perform the duties delegated. The court may require the surrogate guardian to post a bond.

(3) This section does not limit the responsibility of the guardian to the ward and to the court. The guardian is liable for the acts of the surrogate guardian. The guardian may terminate the authority of the surrogate guardian by filing a written notice of termination with the court.

(4) The surrogate guardian is subject to the jurisdiction of the court as if appointed to serve as guardian.

745.1312 Multiple guardians.

(1) When separate guardians of person and property have been appointed, the guardians must consult with each other when the decision of one may affect the duties and responsibilities of the other. If there is disagreement as to a proposed action, the decision of the guardian within whose authority the decision lies shall prevail. The other guardian may petition for judicial review pursuant to s. 745.1006.

(2) If there are two guardians of person or two guardians of property and there are disagreements between the co-guardians as to a proposed action, neither may act as to such proposed action without court order.

(3) If there are three or more guardians of person or property, a majority of them may act. A guardian who serves on all other guardians a written objection to a proposed action shall not be liable for the action taken. Any guardian may petition the court for direction as to such matter.

745.1313 Effect of power of attorney and trust.

(1) An interested person may file a verified petition in a guardianship proceeding seeking authority for the guardian to file an action to have a ward’s trust, trust amendment or power of attorney determined to be invalid pursuant to s. 745.903(10). The petitioner must allege that the petition has a good faith belief in the correctness of the petition.

(2) If the court finds that the power of attorney and trust is invalid, the court shall make findings and conclusions in writing, which may be final. If the court finds that the power of attorney and trust is valid, the court shall make findings and conclusions in writing.

(3) The court may require the guardian to deliver the trust instrument to the court or an attorney for the ward and shall order the guardian to deliver a copy of the trust instrument to the ward and any persons who have claim to the trust. The court may provide that no trust instrument or part thereof shall be used without the approval of the court.

(4) If the court finds that the power of attorney and trust is invalid, the court shall order the guardian to deliver the trust instrument to the court or an attorney for the ward and shall order the guardian to deliver a copy of the trust instrument to the ward and any persons who have claim to the trust. The court may provide that no trust instrument or part thereof shall be used without the approval of the court.

(5) If the court finds that the power of attorney and trust is valid, the court shall order the guardian to deliver the trust instrument to the court or an attorney for the ward and shall order the guardian to deliver a copy of the trust instrument to the ward and any persons who have claim to the trust. The court may provide that no trust instrument or part thereof shall be used without the approval of the court.

(6) If the court finds that the power of attorney and trust is invalid, the court shall order the guardian to deliver the trust instrument to the court or an attorney for the ward and shall order the guardian to deliver a copy of the trust instrument to the ward and any persons who have claim to the trust. The court may provide that no trust instrument or part thereof shall be used without the approval of the court.

(7) If the court finds that the power of attorney and trust is valid, the court shall order the guardian to deliver the trust instrument to the court or an attorney for the ward and shall order the guardian to deliver a copy of the trust instrument to the ward and any persons who have claim to the trust. The court may provide that no trust instrument or part thereof shall be used without the approval of the court.

(8) If the court finds that the power of attorney and trust is invalid, the court shall order the guardian to deliver the trust instrument to the court or an attorney for the ward and shall order the guardian to deliver a copy of the trust instrument to the ward and any persons who have claim to the trust. The court may provide that no trust instrument or part thereof shall be used without the approval of the court.

(9) If the court finds that the power of attorney and trust is valid, the court shall order the guardian to deliver the trust instrument to the court or an attorney for the ward and shall order the guardian to deliver a copy of the trust instrument to the ward and any persons who have claim to the trust. The court may provide that no trust instrument or part thereof shall be used without the approval of the court.

(10) If the court finds that the power of attorney and trust is invalid, the court shall order the guardian to deliver the trust instrument to the court or an attorney for the ward and shall order the guardian to deliver a copy of the trust instrument to the ward and any persons who have claim to the trust. The court may provide that no trust instrument or part thereof shall be used without the approval of the court.
that the ward’s trust, trust amendment, or durable power of attorney is invalid, and state a reasonable factual basis for that belief.

3665 (2) The petition shall be served on all interested persons by the petitioner.

3666 (3) The court shall consider such petition at a hearing with notice to all interested persons and may, for cause, find that such trust, trust amendment or durable power of attorney is not an appropriate alternative to guardianship of property.

3667 (4) The appointment of a guardian does not limit the court’s power to determine that certain authority granted under a durable power of attorney is to remain exercisable by the agent.

3668 Section 14. Part XIV of chapter 745, Florida Statutes, is created to read:

3669 745.1314 Suspension of power of attorney before incapacity determination.

3670 (1) At any time during proceedings to determine incapacity but before the entry of an order determining incapacity, the authority granted under an alleged incapacitated person’s power of attorney to a parent, spouse, child, or grandchild is suspended when an interested person files a verified petition stating that a specific power of attorney should be suspended for any of the following grounds:

3671 (a) The agent’s decisions are not in accord with the alleged incapacitated person’s known desires;

3672 (b) The power of attorney is invalid;

3673 (c) The agent has failed to discharge the agent’s duties or incapacity or illness renders the agent incapable of discharging the agent’s duties;

3674 (d) The agent has abused the agent’s powers; or

3675 (e) There is a danger that the property of the alleged incapacitated person may be wasted, misappropriated, or lost unless the authority under the power of attorney is suspended.

3676 Grounds for suspending a power of attorney do not include the existence of a dispute between the agent and the petitioner which is more appropriate for resolution in some other forum or a legal proceeding other than a guardianship proceeding.

3677 (2) The verified petition must:

3678 (a) Identify one or more of the grounds in subsection (1);

3679 (b) Include specific statements of fact showing that grounds exist to justify the relief sought; and

3680 (3) Upon the earlier of (a) the filing of a response to the petition by the agent under the power of attorney, or (b) 10 days after the service of the petition on the agent under the power of attorney, the court shall schedule the petition for an expedited hearing. Unless an emergency arises and the agent’s response sets forth the nature of the emergency, the property or matter involved, and the power to be exercised by the agent, notice must be given to all interested persons, the alleged incapacitated person, and the alleged incapacitated person’s attorney. The court order following the hearing must set forth what powers the agent is permitted to exercise, if any, pending the outcome of the petition to determine incapacity.

3681 (4) In addition to any other remedy authorized by law, a court may award reasonable attorney fees and costs to an agent who successfully challenges the suspension of the power of attorney if the petitioner’s petition was made in bad faith.

3682 (5) The suspension of authority granted to persons other than a parent, spouse, child, or grandchild shall be as provided in s. 709.2109.

3683 Section 14. Part XIV of chapter 745, Florida Statutes, consisting of sections 745.1401, 745.1402, 745.1403, 745.1404, 745.1405, 745.1406, 745.1407, 745.1408, 745.1409, 745.1410, 745.1411, 745.1412, 745.1413, 745.1414, 745.1415, 745.1416, 745.1417, 745.1418, 745.1419, and 745.1420, is created to read:

3684 (a) Develop standards of practice for public and professional guardians by rule, in consultation with professional guardianship associations and other interested stakeholders, no later than October 1, 2016. The executive director shall provide a draft of the standards to the Governor, the Legislature, and the secretary for review by August 1, 2016.

3685 (b) Review and approve the standards and criteria for the education, registration, and certification of public and professional guardians in Florida.

3686 (3) The executive director’s oversight responsibilities of professional guardians must be finalized by October 1, 2016, and shall include, but are not limited to:

3687 (a) Developing and implementing a monitoring tool to ensure compliance of professional guardians with the standards of practice established by the Office of Public and Professional Guardians.

3688 This monitoring tool may not include a financial audit as required by the clerk of the circuit court under s. 745.1001.

3689 (b) Developing procedures, in consultation with professional guardianship associations and other interested stakeholders, for the review of an allegation that a professional guardian has violated the standards of practice established by the Office of Public and Professional Guardians governing the conduct of professional guardians.
3761 (c) Establishing disciplinary proceedings, conducting hearings, and
3762 taking administrative action pursuant to chapter 120,
3763 (4) The executive director’s oversight responsibilities of public
3764 guardians shall include, but are not limited to:
3765 (a) Reviewing the current public guardian programs in Florida and
3766 other states.
3767 (b) Developing, in consultation with local guardianship offices and
3768 other interested stakeholders, statewide performance measures.
3769 (c) Reviewing various methods of funding public guardianship
3770 programs, the kinds of services being provided by such programs,
3771 and the demographics of the wards. In addition, the executive
3772 director shall review and make recommendations regarding the
3773 feasibility of recovering a portion or all of the costs of
3774 providing public guardianship services from the assets or income of
3775 the wards.
3776 (d) By January 1 of each year, providing a status report and
3777 recommendations to the secretary which address the need for public
3778 guardianship services and related issues.
3779 (e) Developing a guardianship training program curriculum that may
3780 be offered to all guardians, whether public or private.
3781 (5) The executive director may provide assistance to local
3782 governments or entities in pursuing grant opportunities. The
3783 executive director shall review and make recommendations in the
3784 annual report on the availability and efficacy of seeking Medicaid
3785 matching funds. The executive director shall diligently seek ways
3786 to use existing programs and services to meet the needs of public
3787 wards.
3788 (6) The executive director may conduct or contract for
3789 demonstration projects authorized by the Department of Elderly
3790 Affairs, within funds appropriated or through gifts, grants, or
3791 contributions for such purposes, to determine the feasibility or
3792 desirability of new concepts of organization, administration, 
3793 financing, or service delivery designed to preserve the civil and
3794 constitutional rights of persons of marginal or diminished
3795 capacity. Any gifts, grants, or contributions for such purposes
3796 shall be deposited in the Department of Elderly Affairs
3797 Administrative Trust Fund.
3798
3799
3800 745.1402 Professional guardian registration.
3801 (1) A professional guardian must register with the Office of Public
3802 and Professional Guardians established in part 16 of this chapter.
3803 (2) Annual registration shall be made on forms furnished by the
3804 Office of Public and Professional Guardians and accompanied by the
3805 applicable registration fee as determined by rule. The fee may not
3806 exceed $100.
3807 (3) Registration must include the following:
3808 (a) Sufficient information to identify the professional guardian,
3809 as follows:
3810 1. If the professional guardian is a natural person, the name, 
3811 address, date of birth, and employer identification or social
3812 security number of the person.
3813 2. If the professional guardian is a partnership or association,
3814 the name, address, and employer identification number of the
3815 entity.
3816 (b) Documentation that the bonding and educational requirements of
3817 s. 745.1403 have been met.
3818 (c) Sufficient information to distinguish a guardian providing
3819 guardianship services as a public guardian, individually, through
3820 partnership, corporation, or any other business organization.
3821 3822
3823 (4) Prior to registering a professional guardian, the Office of
3824 Public and Professional Guardians must receive and review copies of
3825 the credit and criminal investigations conducted under s. 745.504.
3826 The credit and criminal investigations must have been completed
3827 within the previous 2 years.
3828 (5) The executive director of the Office of Public and Professional
3829 Guardians may deny registration to a professional guardian if the
3830 executive director determines that the guardian’s proposed
3831 registration, including the guardian’s credit or criminal
3832 investigations, indicates that registering the professional
3833 guardian would violate any provision of this chapter. If a
3834 guardian’s proposed registration is denied, the guardian has
3835 standing to seek judicial review of the denial pursuant to chapter
3836 120.
3837 (6) The Department of Elderly Affairs may adopt rules necessary to
3838 administer this section.
3839 (7) A trust company, a state banking corporation or state savings
3840 association authorized and qualified to exercise fiduciary powers
3841 in this state, or a national banking association or federal savings
3842 and loan association authorized and qualified to exercise fiduciary
3843 powers in this state, may, but is not required to, register as a 
3844 professional guardian under this section. If a trust company, state
3845 banking corporation, state savings association, national banking
3846 association, or federal savings and loan association described in
3847 this subsection elects to register as a professional guardian under
3848 this subsection, the requirements of subsections (3) and (4) do not
3849 apply and the registration must include only the name, address, and
3850 employer identification number of the registrant, the name and
3851 address of its registered agent, if any, and the documentation
3852 described in paragraph (3)(b).
3853 3854 3855
3856 (8) The Department of Elderly Affairs may contract with the Florida
3857 Guardianship Foundation or other not-for-profit entity to register
3858 professional guardians.
3859 (9) The department or its contractor shall ensure that the clerks
3860 of the court and the chief judge of each judicial circuit receive
3861 information about each registered professional guardian.
3862 (10) A state college or university or an independent college or
3863 university that is located and chartered in Florida, that is
3864 accredited by the Commission on Colleges of the Southern
3865 Association of Colleges and Schools or the Accrediting Council for
3866 Independent Colleges and Schools, and that offers degrees as
3867 defined in s. 1005.02(7) may, but is not required to, register as a
3868 professional guardian under this section. If a state college or
3869 university or independent college or university elects to register
3870 as a professional guardian under this subsection, the requirements
3871 of subsections (3) and (4) do not apply and the registration must
3872 include only the name, address, and employer identification number
3873 of the registrant.
3874
3875 745.1403 Regulation of professional guardians; application; bond
3876 required; educational requirements.
3877 (1) The provisions of this section are in addition to and
3878 supplemental to any other provision of this code, except s. 
3879 745.105.
3880 (2) Each professional guardian who files a petition for appointment
3881 after October 1, 1957, shall post a blanket fidelity bond with the
3882 clerk of the circuit court in the county in which the guardian’s
3883 primary place of business is located. The guardian shall provide
3884 proof of the fidelity bond to the clerks of each additional
3885 circuit court in which the guardian is serving as a professional
3886 guardianship.
guardian. The bond shall be maintained by the guardian in an amount
not less than $50,000. The bond must cover all wards for whom the
 guardian has been appointed at any given time. The liability of the
 provider of the bond is limited to the face amount of the bond,
 regardless of the number of wards for whom the professional
 guardian has been appointed. The act or omissions of each employee
 of a professional guardian who has direct contact with the ward or
 access to the ward’s assets is covered by the terms of such bond.
 The bond must be payable to the Governor of the State of Florida
 and the Governor’s successors in office and conditioned on the
 faithful performance of all duties by the guardian. In form the
 bond must be joint and several. The bond is in addition to any
 bonds required under s. 745.607. This subsection does not apply to
 any attorney who is licensed to practice law in this state and who
 is in good standing, to any financial institution as defined in s.
 745.106, or a public guardian. The expenses incurred to satisfy the
 bonding requirements prescribed in this section may not be paid
 with the assets of any ward.
 (3) Each professional guardian defined in s. 745.106(30) and public
 guardian must receive a minimum of 40 hours of instruction and
 training. Each professional guardian must receive a minimum of 16
 hours of continuing education every 2 calendar years after the year
 in which the initial 40-hour educational requirement is met. The
 instruction and education must be completed through a course
 approved or offered by the Office of Public and Professional
 Guardians. The expenses incurred to satisfy the educational
 requirements prescribed in this section may not be paid with the
 assets of any ward. This subsection does not apply to any attorney
 who is licensed to practice law in this state or an institution
 acting as guardian under s. 745.1402(7).

(a) A written explanation of how an administrative complaint is
participate in the disciplinary process.
(b) A letter from a circuit judge before whom the professional
guardian and the person who filed the complaint:
(c) The Department of Elderly Affairs shall review and, if
determined legally sufficient, investigate any
complaint that a professional guardian has violated the standards
of practice established by the Office of Public and Professional
Guardians governing the conduct of professional guardians.
A complaint is legally sufficient if it contains ultimate facts that
show a violation of a standard of practice by a professional
guardian has occurred.
(b) Initiate an investigation no later than 10 business days after
the Office of Public and Professional Guardians receives a
complaint.

4324 (4) Each professional guardian must allow, at the guardian’s
expense, an investigation of the guardian’s credit history, and the
credit history of employees of the guardian, in a manner prescribed
by the Department of Elderly Affairs.
(5) As required in s. 745.504, each professional guardian shall
allow a 2 background screening of the guardian and employees
of the guardian in accordance with the provisions of s. 458.04,
(6) Each professional guardian is required to demonstrate
competency to act as a professional guardian by taking an
examination approved by the Department of Elderly Affairs.
(a) The Department of Elderly Affairs shall determine the minimum
examination score necessary for passage of guardianship
examinations.
(b) The Department of Elderly Affairs shall determine the procedure
for administration of the examination.
(c) The Department of Elderly Affairs or its contractor shall
charge an examination fee for the actual costs of the development
and the administration of the examination. The examination fee for
a guardian may not exceed $500.
(d) The Department of Elderly Affairs may recognize passage of a
national guardianship examination in lieu of all or part of the
examination approved by the Department of Elderly Affairs, except
that all professional guardians must take and pass an approved
examination section related to Florida law and procedure.
(7) The Department of Elderly Affairs shall set the minimum score
necessary to demonstrate professional guardianship competency.
(8) The Department of Elderly Affairs shall waive the examination
requirement in subsection (6) if a professional guardian can
provide:
(c) A written notice of any hearing before the Division of Administrative Hearings at which final agency action may be taken.

(4) If the office makes a final determination to suspend or revoke the professional guardian’s registration, it must provide such determination to the court of competent jurisdiction for any guardianship case to which the professional guardian is currently appointed.

(5) If the office determines or has reasonable cause to suspect that a vulnerable adult has been or is being abused, neglected, or exploited as a result of a filed complaint or during the course of an investigation of a complaint, it shall immediately report such determination or suspicion to the central abuse hotline established and maintained by the Department of Children and Families pursuant to s. 415.103.

(6) By October 1, 2016, the Department of Elderly Affairs shall adopt rules to implement the provisions of this section.

475.1405 Grounds for discipline; penalties; enforcement.

(1) The following acts by a professional guardian shall constitute grounds for which the disciplinary actions specified in subsection (2) may be taken:

(a) Making misleading, deceptive, or fraudulent representations in or related to the practice of guardianship.

(b) Violating any rule governing guardians or guardianships adopted by the Office of Public and Professional Guardians.

(c) Being convicted or found guilty of, or entering a plea of guilty or nolo contendere to, regardless of adjudication, a crime in any jurisdiction which relates to the practice of or the ability to practice as a professional guardian.

willfully impeding or obstructing another person’s attempt to do so. Such reports or records shall include only those that are signed in the guardian’s capacity as a professional guardian.

(k) Using the position of guardian for the purpose of financial gain by a professional guardian or a third party, other than the funds awarded to the professional guardian by the court pursuant to s. 745.113.

(l) Violating a lawful order of the Office of Public and Professional Guardians or failing to comply with a lawfully issued subpoena of the Office of Public and Professional Guardians.

(m) Improperly interfering with an investigation or inspection authorized by statute or rule or with any disciplinary proceeding.

(n) Using the guardian relationship to engage or attempt to engage the ward, or an immediate family member or a representative of the ward, in verbal, written, electronic, or physical sexual activity.

(o) Failing to report to the Office of Public and Professional Guardians in writing within 30 days after being convicted or found guilty of, or entered a plea of nolo contendere to, regardless of adjudication, a crime in any jurisdiction.

(p) Being unable to perform the functions of a professional guardian with reasonable skill by reason of illness or use of alcohol, drugs, narcotics, chemicals, or any other type of substance, or as a result of any mental or physical condition.

(q) Failing to post and maintain a blanket fiduciary bond pursuant to s. 745.1403.

(r) Failing to maintain all records pertaining to a guardianship for a reasonable time after the court has closed the guardianship matter.

(s) Violating any provision of this chapter or any rule adopted pursuant thereto.

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(d) Failing to comply with the educational course requirements contained in s. 745.1403.

(e) Having a registration, a license, or the authority to practice a regulated profession revoked, suspended, or otherwise acted against, including the denial of registration or licensure, by the licensing or licensing authority of any jurisdiction, including its agencies or subdivisions, for a violation under Florida law or similar law under a foreign jurisdiction. The registering or licensing authority's acceptance of a relinquishment of registration or licensure, stipulation, consent order, or other settlement offered in response to or in anticipation of the filing of charges against the registration or licensure shall be construed as an action against the registration or license.

(f) Knowingly filing a false report or complaint with the Office of Public and Professional Guardians against another guardian.

(g) Attempting to obtain, obtaining, or renewing a registration or license to practice a profession by bribery, by fraudulent misrepresentation, or as a result of an error by the Office of Public and Professional Guardians which is known by the professional guardian and not disclosed to the Office of Public and Professional Guardians.

(h) Failing to report to the Office of Public and Professional Guardians any person who the professional guardian knows is in violation of this chapter or the rules of the Office of Public and Professional Guardians.

(i) Failing to perform any statutory or legal obligation placed upon a professional guardian.

(j) Making or filing a report or record that the professional guardian knows to be false, intentionally or negligently failing to file a report or record required by state or federal law, or

(f) Requirement that the professional guardian undergo remedial education.

(2) When the Office of Public and Professional Guardians finds a professional guardian guilty of violating subsection (1), it may enter an order imposing one or more of the following penalties:

(a) Refusal to register an applicant as a professional guardian.

(b) Suspension or permanent revocation of a professional guardian’s registration.

(c) Issuance of a reprimand or letter of concern.

(d) Requirement that the professional guardian undergo treatment, attends continuing education courses, submits to reexamination, or satisfies any terms that are reasonably tailored to the violations found.

(e) Requirement that the professional guardian pay restitution to a ward or the ward’s estate, if applicable, or any funds obtained or disbursed through a violation of any statute, rule, or other legal authority.

(f) Requirement that the professional guardian undergo remedial education.

(3) In determining what action is appropriate, the Office of Public and Professional Guardians must first consider what sanctions are necessary to safeguard wards and to protect the public. Only after those sanctions have been imposed may the Office of Public and Professional Guardians consider and include in the order requirements designed to mitigate the circumstances and rehabilitate the professional guardian.

(4) The Office of Public and Professional Guardians shall adopt by rule and periodically review the disciplinary guidelines applicable to each ground for disciplinary action that may be imposed by the Office of Public and Professional Guardians pursuant to this chapter.
(5) It is the intent of the Legislature that the disciplinary guidelines specify a meaningful range of designated penalties based upon the severity and repetition of specific offenses and that minor violations be distinguished from those which endanger the health, safety, or welfare of a ward or the public; that such guidelines provide reasonable and meaningful notice to the public of likely penalties that may be imposed for proscribed conduct, and that such penalties be consistently applied by the Office of Public and Professional Guardians.

(6) The Office of Public and Professional Guardians shall by rule designate possible mitigating and aggravating circumstances and the variation and range of penalties permitted for such circumstances. An administrative law judge, in recommending penalties in any recommended order, must follow the disciplinary guidelines established by the Office of Public and Professional Guardians and must state in writing any mitigating or aggravating circumstance upon which a recommended penalty is based if such circumstance causes the administrative law judge to recommend a penalty other than that provided in the disciplinary guidelines.

(b) The Office of Public and Professional Guardians may impose a penalty other than those provided for in the disciplinary guidelines upon a specific finding in the final order of mitigating or aggravating circumstances.

(7) In addition to, or in lieu of, any other remedy or criminal prosecution, the Office of Public and Professional Guardians may file a proceeding in the name of the state seeking issuance of an injunction or a writ of mandamus against any person who violations any provision of this chapter or any provision of law with respect to professional guardians or the rules adopted pursuant thereto.

(8) Notwithstanding chapter 120, if the Office of Public and Professional Guardians determines that revocation of a professional guardian's registration is the appropriate penalty, the revocation is permanent.

(9) If the Office of Public and Professional Guardians makes a final determination to suspend or revoke the professional guardian's registration, the office must provide the determination to the court of competent jurisdiction for any guardianship case to which the professional guardian is currently appointed.

(10) The purpose of this section is to facilitate uniform discipline for those actions made punishable under this section and, to this end, a reference to this section constitutes a general reference under the doctrine of incorporation by reference.

(1) The Office of Public and Professional Guardians shall adopt rules to administer this section.

745.1406 Office of Public and Professional Guardians; appointment, notification.

(1) The executive director of the Office of Public and Professional Guardians, after consultation with the chief judge and other circuit judges within the judicial circuit and with appropriate advocacy groups and individuals and organizations who are knowledgeable about the needs of incapacitated persons, may establish, within a county in the judicial circuit or within the judicial circuit, one or more offices of public guardian and, if so established, shall create a list of persons best qualified to serve as the public guardian, who have been investigated pursuant to s. 745.504. The public guardian must have knowledge of the legal process and knowledge of social services available to meet the needs of incapacitated persons. The public guardian shall maintain a staff or contract with professionally qualified individuals to carry out the guardianship functions, including an attorney who has experience in probate areas and another person who has a master’s degree in social work, or a gerontologist, psychologist, registered nurse, or nurse practitioner. A public guardian that is a corporate guardian under s. 745.502 must receive tax-exempt status from the United States Internal Revenue Service.

(2) The executive director shall appoint or contract with a public guardian from the list of candidates described in subsection (1). A public guardian must meet the qualifications for a guardian as prescribed in s. 745.501(1)(a). Upon appointment of the public guardian, the executive director shall notify the chief judge of the judicial circuit and the Chief Justice of the Supreme Court of Florida, in writing, of the appointment.

(3) If the needs of the county or circuit do not require a full-time public guardian, a part-time public guardian may be appointed at reduced compensation.

(4) A public guardian, whether full-time or part-time, may not hold any position that would create a conflict of interest.

(5) The public guardian is to be appointed for a term of 4 years, after which the public guardian’s appointment must be reviewed by the executive director, and may be reappointed for a term of up to 4 years. The executive director may suspend a public guardian with or without the request of the chief judge. If a public guardian is suspended, the executive director shall appoint an acting public guardian as soon as possible to serve until such time as a permanent replacement is selected. A public guardian may be removed from office during the term of office only by the executive director who must consult with the chief judge prior to said removal. A recommendation of removal made by the chief judge must be considered by the executive director.

(6) Public guardians who have been previously appointed by a chief judge prior to the effective date of this act pursuant to this section may continue in their positions until the expiration of their term pursuant to their agreement. However, oversight of all public guardians shall transfer to the Office of Public and Professional Guardians upon the effective date of this act. The executive director of the Office of Public and Professional Guardians shall be responsible for all future appointments of public guardians pursuant to this act.

745.1407 Powers and duties.

(1) A public guardian may serve as a guardian of a person adjudicated incapacitated under this chapter if there is no family member or friend, other person, bank, or corporation willing and qualified to serve as guardian.

(2) The public guardian shall be vested with all the powers and duties of a guardian under this chapter, except as otherwise provided by law.

(3) The public guardian shall primarily serve incapacitated persons who are of limited financial means, as defined by contract or rule of the Department of Elderly Affairs. The public guardian may serve incapacitated persons of greater financial means to the extent the Department of Elderly Affairs determines to be appropriate.

(4) The public guardian shall be authorized to employ sufficient staff to carry out the duties of the public guardian’s office.

(5) The public guardian may delegate to assistants and other members of the public guardian’s staff the powers and duties of the office of public guardian, except as otherwise limited by law. The
public guardian shall retain ultimate responsibility for the 
discharge of the public guardian's duties and responsibilities.

(6) Upon appointment as guardian of an incapacitated person, a 
public guardian shall endeavor to locate a family member or friend, 
other person, bank, or corporation who is qualified and willing to 
serve as guardian. Upon determining that there is someone qualified 
and willing to serve as guardian, either the public guardian or the 
qualified person shall petition the court for appointment of a 
successor guardian.

(7) A public guardian may not commit a ward to a treatment 
facility, as defined in s. 394.455(47), without an involuntary 
placement proceeding as provided by law.

(8) When a person is appointed successor public guardian, the 
successor public guardian immediately succeeds to all rights, 
duties, responsibilities, and powers of the preceding public 
guardian.

(9) When the position of public guardian is vacant, subordinate 
personnel employed under subsection (4) shall continue to act as if 
the position of public guardian were filled.

745.1408 Costs of public guardian.

(1) All costs of administration, including filing fees, shall be 
paid from the budget of the office of public guardian. No costs of 
administration, including filing fees, shall be recovered from the 
income of the ward.

(2) In any proceeding for appointment of a public guardian, or in 
any proceeding involving the estate of a ward for whom a public 
guardian has been appointed guardian, the court shall waive any 
court costs or filing fees.

745.1410 Procedures and rules.

The public guardian, subject to the oversight of the Office of 
Public and Professional Guardians, shall provide reimbursement for proper and necessary expenses.

(3) Accept the services of volunteer persons or organizations and 
provide reimbursement for proper and necessary expenses.

745.1411 Surety bond.

Upon taking office, a public guardian shall file a bond with surety 
as prescribed in s. 45.011 to be approved by the clerk. The bond 
shall be payable to the Governor and the Governor’s successors in 
office, in the penal sum of not less than $5,000 nor more than 
$25,000, conditioned on the faithful performance of all duties by 
the guardian. The amount of the bond shall be fixed by the majority 
of the judges within the judicial circuit. In form the bond shall 
be joint and several. The bond shall be purchased from the funds of 
the local office of public guardian.

745.1412 Reports and standards.

(1) The public guardian shall keep and maintain proper financial, 
case control, and statistical records on all matters in which the 
public guardian serves as guardian.

(2) No report or disclosure of the ward’s personal and medical 
records shall be made, except as authorized by law.

(3) A public guardian shall file an annual report on the operations 
of the office of public guardian, in writing, by September 1 for 
the preceding fiscal year with the Office of Public and 
Professional Guardians, which shall have responsibility for 
management of the operations of the office of public guardian.

(4) Within 6 months of appointment as guardian of a ward, the 
public guardian shall submit to the clerk of the court for 
placement in the ward’s guardianship file and to the executive 
director of the Office of Public and Professional Guardians a 
report on the public guardian’s efforts to locate a family member or 
friend, other person, bank, or corporation to act as guardian of 
the ward and a report on the ward’s potential to be restored to 
capacity.

(5)(a) Each office of public guardian shall undergo an independent 
audit by a qualified certified public accountant at least once 
every 2 years. A copy of the audit report shall be submitted to the 
Office of Public and Professional Guardians.

(b) In addition to regular monitoring activities, the Office of 
Public and Professional Guardians shall conduct an investigation 
into the practices of each office of public guardian related to the 
management of each ward’s personal affairs and property. If feasible, 
the investigation shall be conducted in conjunction with the 
financial audit of each office of public guardian under paragraph 
(4).

(6) A public guardian shall ensure that each of the guardian’s 
wards is personally visited by the public guardian or by one of the 
guardian’s professional staff at least once each calendar quarter.

During this personal visit, the public guardian or the professional 
staff person shall assess:

(a) The ward’s physical appearance and condition;

(b) The appropriateness of the ward’s current living situation; and

(c) The need for any additional services and the necessity for 
continuation of existing services, taking into consideration all 
aspects of social, psychological, educational, direct service, 
health, and personal care needs.

(7) The ratio of professional staff to wards shall be 1 
professional to 40 wards. The Office of Public and Professional 
Guardians may increase or decrease the ratio after consultation 
with the local public guardian and the chief judge of the circuit 
court. The basis for the decision to increase or decrease the
exist.

3. To the Department of Elderly Affairs if the Office of Public and
professional guardians ceases to exist;

2. To the Office of Public and Professional Guardians if the
direct-support organization:

(b) The reversion of monies and property held in trust by the
officer or the direct-support organization; the terms of the contract and is doing so consistent with the goals
and mission of the Department of Elderly Affairs and the Office of
Public and Professional Guardians. The written contract must provide for:

(a) A not-for-profit corporation incorporated under chapter 617 and
approved by the Department of State;

(b) Organized and operated to conduct programs and activities; to
raise funds; to request and receive grants, gifts, and bequests of

moneys; to acquire, receive, hold, invest, and administer, in its
own name, securities, funds, objects of value, or other property,
real or personal; and to make expenditures to or for the direct or
indirect benefit of the Office of Public and Professional
Guardians; and
c) Determined by the Office of Public and Professional Guardians to be consistent with the goals of the office, in the best
interests of the state, and in accordance with the adopted goals
and mission of the Department of Elderly Affairs and the Office of
Public and Professional Guardians.

(2) CONTRACT.— The direct-support organization shall operate under
a written contract with the Office of Public and Professional
Guardians. The written contract must provide for:

(a) Certification by the Office of Public and Professional Guardians that the direct-support organization is complying with
the terms of the contract and is doing so consistent with the goals
and purposes of the office and in the best interests of the state.
This certification must be made annually and reported in the
official minutes of a meeting of the direct-support organization.
(b) The reversion of monies and property held in trust by the
direct-support organization:

1. To the Office of Public and Professional Guardians if the
direct-support organization is no longer approved to operate for
the office;

2. To the Office of Public and Professional Guardians if the
direct-support organization ceases to exist;

3. To the Department of Elderly Affairs if the Office of Public and
Professional Guardians ceases to exist; or

4. To the state if the Department of Elderly Affairs ceases to
exist.

(1) Notwithstanding any other provision of law to the contrary, any
medical, financial, or mental health records held by an agency, or
the court and its agencies, or financial audits prepared by the
clerk of the court pursuant to s. 745.1001 and held by the court,
which are necessary as part of an investigation of a guardian as a
result of a complaint filed with the Office of Public and
Professional Guardians to evaluate the public guardianship system,
to assess the need for additional public guardianship, or to
develop required reports, shall be provided to the Office of Public
and Professional Guardians or its designee upon that office’s
request. Any confidential or exempt information provided to the
Office of Public and Professional Guardians shall continue to be
held confidential or exempt as otherwise provided by law.

(2) All records held by the Office of Public and Professional
Guardians relating to the medical, financial, or mental health of
vulnerable adults as defined in chapter 415, persons with a
developmental disability as defined in chapter 393, or persons with
a mental illness as defined in chapter 394, shall be confidential
and exempt from s. 119.07(1) and s. 24(a), Art. I of the State
Constitution.

745.1415 Direct-support organization; definition; use of property;
board of directors; audit; dissolution.

(1) DEFINITION.— As used in this section, the term "direct-support
organization" means an organization whose sole purpose is to
support the Office of Public and Professional Guardians and is:

(a) Organized and operated to conduct programs and activities; to
raise funds; to request and receive grants, gifts, and bequests of

745.1416 Joining Forces for Public Guardianship grant program; purpose.

The Legislature establishes the Joining Forces for Public Guardianship matching grant program for the purpose of assisting counties to establish and fund community-supported public guardianship programs. The Joining Forces for Public Guardianship matching grant program shall be established and administered by the Office of Public and Professional Guardians within the Department of Elderly Affairs. The purpose of the program is to provide startup funding to encourage communities to develop and administer locally funded and supported public guardianship programs to address the needs of indigent and incapacitated residents.

(a) The Office of Public and Professional Guardians may distribute the grant funds as follows:

(i) As initial startup funding to encourage counties that have no office of public guardian to establish an office, or as initial

(b) The applicant must have already been appointed by, or is pending appointment by, the Office of Public and Professional Guardians to become an office of public guardian.

(c) The applicant must meet or directly employ staff that meet the minimum qualifications for a public guardian under this chapter.

(d) The applicant must have already been appointed by, or is pending appointment by, the Office of Public and Professional Guardians to perform the duties of a public guardian in this state.

(e) The applicant must submit a grant proposal.

(f) The applicant must meet all of the following conditions to be eligible to receive a grant:

(i) Publicize the availability of grant funds to entities that may receive grant funds more than once, the Office of Public and Professional Guardians shall award funds to prior awardees in the following manner:

(ii) The Office of Public and Professional Guardians shall award funds to prior awardees in the following manner:

(a) In the second year that grant funds are awarded, the cumulative sum of the award provided to one or more applicants within the same

(b) As support funding to operational offices of public guardian that demonstrate a necessity for funds to meet the public guardianship needs of a particular geographic area in the state which the office serves.

(c) To assist counties that have an operating public guardianship program but that propose to expand the geographic area or population of persons they serve, or to develop and administer innovative programs to increase access to public guardianship in this state.

Notwithstanding this subsection, the executive director of the Office of Public and Professional Guardians shall make emergency grants if the executive director determines that the award is in the best interests of public guardianship in this state. Before making an emergency grant, the executive director must obtain the written approval of the Secretary of Elderly Affairs. Subsections (2), (3), and (4) do not apply to the distribution of emergency grants.

(2) One or more grants may be awarded within a county. However, a county may not receive an award that equals, or multiple awards that cumulatively equal, more than 20 percent of the total amount of grant funds appropriated during any fiscal year.

(3) If an applicant is eligible and meets the requirements to receive grant funds more than once, the Office of Public and Professional Guardians shall award funds to prior awardees in the following manner:

(a) In the second year that grant funds are awarded, the cumulative sum of the award provided to one or more applicants within the same

(b) The applicant must meet or directly employ staff that meet the minimum qualifications for a public guardian under this chapter.

(c) The applicant must meet or directly employ staff that meet the minimum qualifications for a public guardian under this chapter.

(d) The applicant must meet or directly employ staff that meet the minimum qualifications for a public guardian under this chapter.
(b) The applicant must have been appointed by, or is pending reappointment by, the Office of Public and Professional Guardians to be an office of public guardian in this state.

(c) The applicant must have achieved a satisfactory monitoring score during the applicant’s most recent evaluation.

745.1419 Grant application requirements; review criteria; awards process.

Grant applications must be submitted to the Office of Public and Professional Guardians for review and approval.

(1) A grant application must contain:

(a) The specific amount of funds being requested.

(b) The proposed annual budget for the office of public guardian for which the applicant is applying on behalf of, including all sources of funding, and a detailed report of proposed expenditures, including administrative costs.

(c) The total number of wards the applicant intends to serve during the grant period.

(d) Evidence that the applicant has:

1. Attempted to procure funds and has exhausted all possible other sources of funding;

2. Procured funds from local sources, but the total amount of the funds collected or pledged is not sufficient to meet the need for public guardianship in the geographic area that the applicant intends to serve.

(e) An agreement or confirmation from a local funding source, such as a county, municipality, or any other public or private organization, that the local funding source will contribute matching funds to the public guardianship program totaling not less than $1 for every $1 of grant funds awarded. For purposes of this section, an applicant may provide evidence of agreements or confirmations from multiple local funding sources showing that the local funding sources will pool their contributed matching funds to the public guardianship program for a combined total of not less than $1 for every $1 of grant funds awarded. In-kind contributions, such as materials, commodities, office space, or other types of facilities, personnel services, or other items as determined by rule shall be considered by the office and may be counted as part or all of the local matching funds.

(f) A detailed plan describing how the office of public guardian for which the applicant is applying on behalf of will be funded in future years.

(g) Any other information determined by rule as necessary to assist in evaluating grant applicants.

(2) If the Office of Public and Professional Guardians determines that an applicant meets the requirements for an award of grant funds, the office may award the applicant any amount of grant funds the executive director deems appropriate, if the amount awarded meets the requirements of this act. The office may adopt a rule allocating the maximum allowable amount of grant funds which may be expended on any ward.

(3) A grant awardee must submit a new grant application for each year of additional funding.

(4)(a) In the first year of the Joining Forces for Public Guardianship program’s existence, the Office of Public and Professional Guardians shall give priority in awarding grant funds to those entities that:

1. Are operating as appointed offices of public guardians in this state;

2. Meet all of the requirements for being awarded a grant under this act; and

3. Demonstrate a need for grant funds during the current fiscal year due to a loss of local funding formerly raised through court filing fees.

(b) In each fiscal year after the first year that grant funds are distributed, the Office of Public and Professional Guardians may give priority to awarding grant funds to those entities that:

1. Meet all of the requirements of this section and ss. 745.1416, 745.1417, and 745.1418 for being awarded grant funds; and

2. Submit with their application an agreement or confirmation from a local funding source, such as a county, municipality, or any other public or private organization, that the local funding source will contribute matching funds to the public guardianship program totaling not less than $1 for every $1 of grant funds awarded. For purposes of this section, an applicant may provide evidence of agreements or confirmations from multiple local funding sources showing that the local funding sources will pool their contributed matching funds to the public guardianship program for a combined total of not less than $1 for every $1 of grant funds awarded. In-kind contributions, such as materials, commodities, office space, or other types of facilities, personnel services, or other items as determined by rule shall be considered by the office and may be counted as part or all of the local matching funds.

(c) The total number of wards the applicant intends to serve during the grant period.

(d) Evidence that the applicant has:

1. Attempted to procure funds and has exhausted all possible other sources of funding;

2. Procured funds from local sources, but the total amount of the funds collected or pledged is not sufficient to meet the need for public guardianship in the geographic area that the applicant intends to serve.

(e) An agreement or confirmation from a local funding source, such as a county, municipality, or any other public or private organization, that the local funding source will contribute matching funds to the public guardianship program totaling not less than $1 for every $1 of grant funds awarded. For purposes of this section, an applicant may provide evidence of agreements or confirmations from multiple local funding sources showing that the local funding sources will pool their contributed matching funds to the public guardianship program for a combined total of not less than $1 for every $1 of grant funds awarded. In-kind contributions, such as materials, commodities, office space, or other types of facilities, personnel services, or other items as determined by rule shall be considered by the office and may be counted as part or all of the local matching funds.

(f) A detailed plan describing how the office of public guardian for which the applicant is applying on behalf of will be funded in future years.

(g) Any other information determined by rule as necessary to assist in evaluating grant applicants.

(2) If the Office of Public and Professional Guardians determines that an applicant meets the requirements for an award of grant funds, the office may award the applicant any amount of grant funds the executive director deems appropriate, if the amount awarded meets the requirements of this act. The office may adopt a rule allocating the maximum allowable amount of grant funds which may be expended on any ward.

(3) A grant awardee must submit a new grant application for each year of additional funding.

(4)(a) In the first year of the Joining Forces for Public Guardianship program’s existence, the Office of Public and Professional Guardians shall give priority in awarding grant funds to those entities that:

1. Are operating as appointed offices of public guardians in this state;}
4745.1502 Definitions. As used in this part, the terms:

1. "Adjudication by the United States Department of Veterans Affairs" means a determination or finding that a person is competent or incompetent on examination in accordance with the laws and regulations governing the United States Department of Veterans Affairs.

2. "Secretary" means the Secretary of Veterans Affairs as head of the United States Department of Veterans Affairs.

3. "Secretary's authorized representative" means the person designated by the Secretary to act in the Secretary's place for purposes of this part.

4. "Benefits" means arrears of pay, bonus, pension, compensation, insurance, and all other moneys paid or payable by the United States Department of Veterans Affairs to a minor ward, a certificate of the secretary or the secretary's authorized representative setting forth the age of such minor, as shown by the records of the United States Department of Veterans Affairs, is prima facie evidence of the necessity for such appointment.

5. "Estate" means income on hand and assets acquired in whole or in part with income.

6. "Guardian" means any person acting as a fiduciary for a ward's person or the ward's estate, or both.

7. "Income" means moneys received from the United States Department of Veterans Affairs as benefits, and revenue or profit from any property acquired in whole or in part with such moneys.

8. "Person" means an individual, a partnership, a corporation, or an association.

9. "Secretary's authorized representative setting forth the fact that a minor ward is mentally incompetent" means the person designated by the Secretary to act in the Secretary's place for purposes of this part.

10. "Ward" means a beneficiary of the United States Department of Veterans Affairs, is prima facie evidence of the necessity for such appointment.

745.1505 Procedure for commitment of veteran to United States Department of Veterans Affairs hospital.

The procedure for the placement into a United States Department of Veterans Affairs hospital of a ward hereunder shall be the procedure prescribed in s. 394.4672.

745.1505 Appointment of guardian for ward authorized.

(1) Whenever, pursuant to any law of the United States or regulation of the United States Department of Veterans Affairs, the secretary requires, prior to the payment of benefits, that a guardian be appointed for a ward, the appointment may be made in the manner hereinafter provided.

(2) When a petition is filed for the appointment of a guardian of a minor ward, a certificate of the secretary or the secretary's authorized representative setting forth the age of such minor, as shown by the records of the United States Department of Veterans Affairs, and a statement that the appointment of a guardian is a condition precedent to the payment of any moneys due to the minor by the United States Department of Veterans Affairs are prima facie evidence of the necessity for such appointment.

(3) When a petition is filed for the appointment of a guardian of a mentally incompetent ward, a certificate of the secretary or the secretary's authorized representative, setting forth the fact that the person has been found incompetent and has been rated incompetent by the United States Department of Veterans Affairs, on examination in accordance with the laws and regulations governing the United States Department of Veterans Affairs, and that the appointment of a guardian is a condition precedent to the payment of any moneys due to such person by the United States Department of Veterans Affairs, is prima facie evidence of the necessity for such appointment.

745.1506 Petition for appointment of guardian.

(1) A petition for the appointment of a guardian may be filed in any court of competent jurisdiction by, or on behalf of, any person who under existing law is entitled to prioritize of appointment. If no person is so entitled, or if the person so entitled neglects or refuses to file such a petition within 30 days of the mailing of notice by the United States Department of Veterans Affairs to the last known address of such person, indicating the necessity for filing the petition, a petition for such appointment may be filed in any court of competent jurisdiction by, or on behalf of, any responsible person residing in this state.

(2) (a) The petition for appointment shall set forth:

1. The name, age, and place of residence of the ward;

2. The names and places of residence of the nearest relative, if known;

3. The fact that the ward is entitled to receive moneys payable by or through the United States Department of Veterans Affairs;

4. The amount of moneys then due and the amount of probable future payments;

5. The name and address of the person or institution, if any, having actual custody of the ward; and

6. The name, age, relationship, if any, occupation, and address of the proposed guardian.

(b) In the case of a mentally incompetent ward, the petition shall show that the ward has been found incompetent and has been rated incompetent on examination by the United States Department of Veterans Affairs.
any person entitled to receipt of any payment of any kind due under this section.

(2) A guardian should not accept any portion of such personal property or personal services of a ward for the guardian's personal use because the

(3) A guardian shall not accept any portion of such personal property or personal services of a ward for the guardian's personal use because the

right to receive for the account of the ward any moneys due from the United States Government in the way of arrears of pay, bonus, compensation or insurance, or other sums due by reason of his or her service (or the service of the person through whom the ward claims) in the Armed Forces of the United States and any other moneys due from the United States Government, payable through its agencies or entities, together with the income derived from investments of these moneys.

745.1512 Guardian's application of estate funds for support and maintenance of person other than ward.

A guardian shall not apply any portion of the estate of a ward for the support and maintenance of any person other than the ward or his or her service (or the service of the person through whom the ward claims) in the Armed Forces of the United States and any other moneys due from the United States Government, payable through its agencies or entities, together with the income derived from investments of these moneys.

745.1511 Guardian empowered to receive moneys due ward from the United States Department of Veterans Affairs.

When the appointment of a guardian is made, the guardian shall execute and file a bond to be approved by the court in an amount not less than the sum of the amount of moneys then due to the ward and the amount of moneys estimated to become payable during the ensuing year. The bond shall be in the form, and shall be conditioned, as required of guardians appointed under the general guardianship laws of this state. The court has the power to require, from time to time, the guardian to file an additional bond.

745.1510 Inventory of ward's property; guardian's failure to file inventory; discharge; forfeiture of commissions.

Every guardian shall, within 30 days after his or her qualification and whenever subsequently required by the circuit judge, file in the circuit court a complete inventory of all the ward's personal property in his or her hands and, also, a schedule of all real estate in the state belonging to the ward or his or her ward, describing it and its quality, whether it is improved or not, and, if it is improved, in what manner, and the appraised value of same. The failure on the part of the guardian to conform to the requirements of this section is a ground for the discharge of the guardian, in which case the guardian shall forfeit all commissions.

745.1509 Bond of guardian.

745.1508 Persons who may be appointed guardian.

(1) Notwithstanding any law with respect to priority of persons entitled to appointment, or nomination in the petition, the court may appoint some other individual or a bank or trust company as guardian if the court determines that the appointment of the other individual or bank or trust company would be in the best interest of the ward.

(2) It is unlawful for a circuit judge to appoint either himself or himself, or a member of her or his family, as guardian for any person entitled to the benefits provided for in 38 U.S.C., as amended, except in a case when the person entitled to such benefits is a member of the family of the circuit judge involved.

745.1507 Notice by court of petition filed for appointment of guardian.

(1) When a petition for the appointment of a guardian has been filed pursuant to s. 745.1506, the court shall cause such notice to be given as provided by the general guardianship law. In addition, notice of the petition shall be given to the office of the United States Department of Veterans Affairs having jurisdiction over the area in which the court is located.

(2) A copy of the petition provided for in s. 745.1506 shall be mailed by the clerk of the court to the person or persons for whom a guardian is to be appointed, the clerk of court mailing the copy of the petition to the last known address of such person or persons not less than 5 days prior to the date set for the hearing of the petition by the court.

745.1506 Notice of proceeding to be given.

When an elder abuse proceeding is commenced, the court shall cause such notice to be given as provided by the general guardianship laws of this state. The court has the power to require, from time to time, the guardian to file an additional bond.

745.1505 Guardian's application of estate funds for support and education, does not preclude a further petition for an increase, decrease, modification, or termination of the allowance for such support, or support and education, by either the petitioner or the guardian.

745.1504 Guardian appointed under the provisions of s. 745.1506 may receive income and benefits payable by the United States through the United States Department of Veterans Affairs and also has the
Every guardian shall invest the funds of the estate in such manner
or in such securities, in which the guardian has no interest, as
allowed by chapter 518.

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of the bond approved by the court, without charge or expense to the
estate involved. The clerk of the circuit court shall also send a
certified copy of such letters to the property appraiser and to the
tax collector in each county in which the ward owns real property.

745.1520 Attorney’s fee.
The fee for the attorney filing the petition and conducting the
proceedings shall be fixed by the court in an amount as shall be
reasonably possible, not to exceed $250. However, this section is
not to be interpreted to exclude a petition for extraordinary
attorney’s fees, properly filed, and if approved by the United
States Department of Veterans Affairs, does not necessitate a
hearing before the court for approval, but the court shall enter
its order for withdrawal of said attorney’s fees from the ward’s
guardianship account accordingly.

745.1521 Guardian’s compensation; bond premiums.
The amount of compensation payable to a guardian shall not exceed 5
percent of the income of the ward during any year and may be taken,
by the guardian, on a monthly basis. In the event of extraordinary
services rendered by such guardian, the court may, upon petition
and after hearing on the petition, authorize additional
compensation for the extraordinary services, payable from the
estate of the ward. Provided that extraordinary services approved
by the United States Department of Veterans Affairs do not require
a court hearing for approval of the fees, but shall require an
order authorizing the guardian to withdraw the amount from the
guardianship account. No compensation shall be allowed on the
corpus of an estate received from a preceding guardian. The

745.1522 Discharge of guardian of minor or incompetent ward.
When a minor ward, for whom a guardian has been appointed under the
provisions of this part or other laws of this state, attains his or
her majority and, if such minor ward has been incompetent, is
declared competent by the United States Department of Veterans
Affairs and the court, or when an incompetent ward who is not a
minor is declared competent by the United States Department of
Veterans Affairs and the court, the guardian, upon making a
satisfactory accounting, be discharged upon a petition filed for
that purpose.

745.1523 Final settlement of guardianship; notice required;
styles ad litem fee; papers required by United States Department
of Veterans Affairs.
On the final settlement of the guardianship, the notice provided
herein for partial settlement must be given and the other
proceedings conducted as in the case of partial settlement, except
that a guardian ad litem may be appointed to represent the ward,
the fee of which guardian ad litem shall in no case exceed $150.
However, if the ward has been pronounced competent, is shown to be
mentally sound, appears in court, and is 18 years of age, the
settlement may be had between the guardian and the ward under the
direction of the court without notice to the next of kin, or the
appointment of a guardian ad litem. A certified copy of the final
settlement so made in every case must be filed with the United
States Department of Veterans Affairs by the clerk of the court.

745.1524 Notice of appointment of general guardian; closing of
vetuer’s guardianship; transfer of responsibilities and penalties
to general guardian.
When the appointment of a general guardian has been made in the
proper court and such guardian has qualified and taken charge of
the other property of the ward, the general guardian shall give
notice of such appointment in the court in which the veteran’s
guardianship is pending and have the veteran’s guardianship settled
up and closed so that the general guardian may take charge of the
moneys referred to and described in ss. 745.1505(1) and (3) and
745.1511. When the appointment of a general guardian, whether for
an incompetent or minor child or another, beneficiarily entitled to
the benefits provided in 38 U.S.C., as amended, has been confirmed
by the court having jurisdiction, such general guardian is
responsible and is subject to the provisions and penalties
contained in 38 U.S.C., as amended, as well as the requirements
pertaining to guardians as set forth in this part.

745.1525 Construction and application of part.
This part shall be construed liberally to secure the beneficial
intents and purposes of this part and applies only to beneficiaries
of the United States Department of Veterans Affairs. It shall be so
interpreted and construed as to effectuate its general purpose of
making the welfare of such beneficiaries the primary concern of
their guardians and of the court.

745.1526 Annual guardianship report.
Guardians appointed under the Veterans’ Guardianship Law shall not
be required to comply with the provisions of ss. 745.805 or a.

745.813.
FIRST SUPPLEMENT TO THE REPORT ON THIRD-PARTY LEGAL OPINION CUSTOMARY PRACTICE IN FLORIDA

Opinion Standards Committee of The Florida Bar
Business Law Section

And

Legal Opinions Committee of The Florida Bar
Real Property, Probate and Trust Law Section

July __, 2019
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OVERVIEW OF THE FIRST SUPPLEMENT TO THE REPORT

On December 11, 2011, the Legal Opinion Standards Committee of The Florida Bar Business Law Section (the "Business Section Committee") and the Legal Opinions Committee of The Florida Bar Real Property Probate and Trust Section (the "Real Property Section Committee", and, together with the Business Section Committee, the "Committees") promulgated their "Report on Third-Party Legal Opinion Customary Practice in Florida" dated December 3, 2011 (the "Report"). This First Supplement to the Report (the "First Supplement") updates several sections of the Report to reflect the adoption in 2013 of the Florida Revised Limited Liability Company Act and revisions to the Florida land trust statute (Section 689.071, Florida Statutes). This First Supplement also adds several new sections to the Report on the topics of (a) issuances of preferred shares by a Florida corporation, and (b) issuances of membership interests by a Florida limited liability company. Finally, this First Supplement discusses several important issues of customary opinion practice that have arisen since the Report was published in 2011.

This First Supplement should be read in conjunction with the Report, and words defined in the Report are so defined in the First Supplement unless the context otherwise requires. For ease of reference, sections and subsections of the Report that are changed by this First Supplement are referenced in this First Supplement by the section and subsection name and by the page number where the modified section or subsection can be found in the Report. In all cases, this First Supplement restates in its entirety the subsection of the Report that has been modified.

This First Supplement was approved by the Executive Council of the Business Law Section of The Florida Bar on January 17, 2019 and by the Executive Council of the Real Property, Probate and Trust Section of The Florida Bar on July ___, 2019. Following publication of this First Supplement, a composite PDF version of the Report, including the First Supplement, will be made available for download at www.flabizlaw.org (the website of the Business Law Section) on the Business Section Committee's webpage, and www.rpptl.org (the website of the RPPTL Section), on the Real Property Section Committee’s webpage.

The Members of the Committees who participated in the preparation of this First Supplement are listed below. This First Supplement reflects the consensus views of the members of the Committees. It does not necessarily reflect the views of the individual members of each of the Committees or their respective law firms, nor does it mean that each member of each of the Committees agrees with every position taken in this First Supplement.

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REVISIONS TO "ENTITY STATUS AND ORGANIZATION OF A FLORIDA ENTITY"

A. Modifications to Subsection E – "Limited Liability Company"

In 2013, the Florida legislature adopted Chapter 605 of the Florida Statutes, which is called the Florida Revised Limited Liability Company Act ("FRLLCA"). FRLLCA became effective for Florida limited liability companies organized after December 31, 2013 on January 1, 2014, and became effective for all Florida limited liability companies whenever organized on January 1, 2015. At the time that FRLLCA became effective with respect to all Florida limited liability companies, whenever formed, Chapter 608 of the Florida Statutes, which previously was the chapter in the Florida Statutes governing Florida limited liability companies, was repealed.

The following section replaces in its entirety subsection E. of the Report entitled: "Entity Status and Organization of a Florida Entity – Limited Liability Company" that is contained on pages 50-52 of the Report. In large measure, the changes made to this subsection relate to updating the statutory references for the adoption of FRLLCA. There is also a change dealing with the recommended filing of a Statement of Authority in circumstances where the transaction involves the acquisition or financing of Florida real estate. Finally, the Supplement reflects a decision by the Committees that in the context of a single-member limited liability company, the LLC does not have to have an operating agreement in order for Florida counsel to render legal opinions on an LLC if there is a record sufficient to reflect the ownership and management of the LLC. This change is a recognition of the informality often followed by Florida lawyers in the context of single member LLCs.

* * * * * * * * * * * * * * * * * * * * * * * * * * * * * * * * * * * * * * * * * * * *

E. Limited Liability Company

Recommended opinion:

The Client is a [limited liability company] organized under Florida law, and its [limited liability company] status is active.

(1) Basic Meaning of this Opinion. A Florida limited liability company ("LLC") is governed by Chapter 605 of the Florida Statutes, which is generally referred to as FRLLCA. The opinion that a company "is a limited liability company organized under Florida law, and its limited liability company status is active" (or "its status is active") means that: (i) the company has complied in all material respects with the requirements for the formation of an LLC under FRLLCA, (ii) governmental officials have taken all steps required by law to form the company as an LLC, (iii) the company’s existence began prior to the effective date and time of the opinion letter, (iv) the company is currently in existence and its status is active, and (v) the company has not been converted into a different form of entity. Under Sections 605.0201(4) and 605.0207 of FRLLCA, a Florida LLC is formed upon the later of (i) the date and time when the articles of organization are filed with the Department (or on such earlier date as specified in the articles of organization), if such date is within five business days prior to the date of filing, or at any later date (up to 90 days) specified in the articles of organization) and (ii) when at least one person has become a member. In order to file such articles of organization, the person filing is confirming that at least one person is or becomes a member of the LLC at the time the articles of organization become effective. Section 605.0211(3) of FRLLCA provides that, subject to any qualification stated in the certificate of status, a certificate of status issued by the Department is conclusive evidence that the Florida limited liability company is in existence.
(2) **Organized.** An opinion that an LLC is properly organized is often part of the LLC status opinion. This opinion means that Opining Counsel has verified that: (i) the LLC has articles of organization executed by at least one member (or an authorized representative of the member), (ii) the articles of organization comply with the requirements set forth in Section 605.0201 of FRLCA, (iii) the articles of organization have been filed with the Department, (iv) if the LLC has more than one member, an operating agreement has been adopted by the member(s) of the LLC, (v) if the LLC has only one member, a written operating agreement has been adopted by the member of the LLC or a record exists sufficient to confirm the identity of the member, to establish whether the LLC is member-managed or manager-managed, and to establish who is authorized to act on behalf of the LLC, (vi) if the articles of organization or operating agreement provide that the LLC is a manager-managed company, then one or more managers have been appointed by the members, and (vii) the LLC has active status.

Sometimes the word "duly" is added before the word "organized." However, the addition of the word "duly" to the opinion does not change the meaning of the opinion or change the diligence recommended in order to render this opinion.

Generally speaking, the articles of organization for a Florida LLC rarely contain more than the minimum information required under FRLCA, although its filing constitutes notice of all facts that are set forth in the articles of organization. The operating agreement of the LLC is generally more substantive and by definition sets forth the provisions adopted for the management and regulation of the affairs of the LLC and the relationships of the members, the managers (if the LLC is manager-managed), and the LLC. The statute provides that an operating agreement may be oral, but, as in the case of an oral partnership agreement, in the view of the Committees, Opining Counsel should generally not opine that an LLC is "organized" if the LLC has not adopted a written operating agreement. However, in the context of a single-member LLC, a written operating agreement may not be necessary if there is a record sufficient to confirm the identity of the member, to establish whether the LLC is member-managed or manager-managed, and to establish who is authorized to act on behalf of the LLC. This might be accomplished, for example, by identifying the member in the articles of organization and stating in the articles of organization that the LLC is member-managed.

(3) **Active Status vs. Good Standing.** The opinion that an LLC’s status is "active" means that as of the date of the opinion letter the company is a limited liability company and is current with all filings and fees then due to the State of Florida. This opinion should be based on a certificate of status issued by the Department. In addition to the provisions of Section 605.0211 of FRLCA, Section 605.0215 of FRLCA provides that "all certificates issued by the department in accordance with this chapter shall be taken and received in all courts, public offices, and official bodies as prima facie evidence of the facts stated. A certificate from the department delivered with a copy of a document filed by the department is conclusive evidence that the original document is on file with the department."

This opinion uses the term "its status is active" or "its limited liability company status is active" since the "active status" language is used in the certificate provided by the Department. However, Opining Counsel in Florida are often asked to render an opinion that an LLC is in "good standing," particularly if the Opinion Recipient is represented by out-of-state counsel. Under customary practice in Florida, the use of the phrase "good standing" in an opinion as to the active status of an LLC has the same meaning as "its limited liability company status is active" or "its status is active."

(4) **General Exclusions for Opinion.** Unless otherwise expressly stated in the opinion letter, an opinion that an LLC’s status is "active" does not mean that: (i) the LLC has established any tax, accounting or other records required to commence operating its business, (ii) the LLC maintains at its registered office any of the information required to be maintained under Section 605.0410 of FRLCA, (iii) the members of the LLC will not have personal liability, or (iv) the LLC will be treated as a partnership for tax purposes.
Involuntary Dissolution. An opinion that an LLC’s "status is active" merely indicates that the LLC exists and has not been dissolved as of the date of the certificate of status issued by the Department. Because it would be impossible or extremely difficult for Opining Counsel to establish that no grounds exist under the statute for involuntary dissolution of the LLC, this opinion does not mean or imply that no grounds exist under the statute for involuntary dissolution of the LLC. The circumstances under which an LLC may be administratively dissolved by the Department are set forth in Section 605.0714 of FRLLC and the grounds for judicial dissolution are specified in Section 605.0702 of FRLLC. Opining Counsel may opine that the LLC exists on the date of the opinion in reliance on a certificate of status from the Department, even if circumstances exist that could result in involuntary dissolution with the passage of time. Opining Counsel is not obligated to conduct any investigation regarding this issue. However, if Opining Counsel knows (or ought to reasonably know based on the facts (red flags) in such counsel’s possession) that such circumstances for dissolution exist, Opining Counsel should advise the Client to take the necessary actions to cure those circumstances promptly, since dissolution of the LLC will generally constitute a violation of the Transaction Documents. For example, the Department may administratively dissolve an LLC under Section 605.0714(1)(c) of FRLLC if the company is without a registered agent as required by Section 605.0113, and, under Section 605.0115(3)(a) of FRLLC, the resignation of a registered agent becomes effective 31 days after the registered agent files a statement of resignation with the Department.

Real Estate Transaction – Statement of Authority. If the transaction in question involves the transfer or financing of real estate, then, it is recommended that Opining Counsel obtain from the Department a copy of any Statement of Authority (preferably a certified copy) with respect to the LLC filed with the Department (or if one is not on file with the Department, require that a Statement of Authority be executed in accordance with Section 605.0302 and have it filed with the Department). Further, if the transaction involves a purchase or financing of real property, it is recommended that a certified copy of the Statement of Authority be recorded in the public records of the County in which the real property is located for opinions on all real estate related transactions.

Foreign Entity. If Opining Counsel determines that Opining Counsel is competent to render an opinion regarding the organization, existence and status of an LLC organized under the laws of a jurisdiction other than Florida, and agrees to render such opinion, then with respect to that opinion, Opining Counsel likely will be held to the standard of care of a competent lawyer in the jurisdiction of organization of the entity that is the subject of the opinion. See "Common Elements of Opinions – Opinions under Florida or Federal Law; Opinions under the Laws of Another Jurisdiction." The diligence involved in giving an opinion regarding the organization, existence and status of a foreign LLC, and the form of such opinion, are beyond the scope of this Report.

**Diligence Checklist – Limited Liability Company.** To render an entity status and organization opinion with respect to a Florida LLC, Opining Counsel should take the following actions:

- Obtain a copy of the LLC’s articles of organization (preferably a certified copy obtained from the Department) and review them to confirm that they substantially comply with the requirements of Section 605.0201 of FRLLC.

- Obtain a "certificate of status" for the LLC from the Department. If the certificate of status indicates that the LLC has not filed its annual report or paid its annual fee for the current year, then the recommended (but not mandatory) practice is to require the Client to make satisfactory arrangements for filing the report and paying the fee before Opining Counsel renders an "active status" opinion regarding the LLC.
Obtain and examine a copy of the LLC’s operating agreement, certified by a manager of the LLC (if manager-managed), by a member of the LLC (if member-managed), or by an officer of the LLC (if officers have been appointed by the members or the managers, as applicable, under the LLC’s operating agreement), as being a true and complete copy, including all amendments. In the view of the Committees, if the LLC has more than one member and does not have a written LLC operating agreement, Opining Counsel should generally not render an opinion with respect to the LLC and should counsel the Client to reduce its operating agreement to writing. However, in the context of a single member LLC, Opining Counsel should not generally render an opinion with respect to the LLC unless the LLC has a written operating agreement or the LLC has a record sufficient to confirm the identity of the member, to establish whether the LLC is member-managed or manager-managed, and to establish who is authorized to act for the LLC.

Determine from reviewing the operating agreement and the articles of organization whether the LLC is a member-managed company or a manager-managed company; if the latter, confirm that a manager (or managers) has been appointed in accordance with the requirements of those documents (generally through obtaining a written certificate from the Client).

Obtain a current factual certificate from either (i) a manager of the LLC (if manager-managed), (ii) a member of the LLC (if member-managed), or (iii) an officer (if officers have been appointed) certifying that the LLC has at least one member, that no circumstances exist which would trigger dissolution under the articles of organization or operating agreement, and that no proceedings have commenced for dissolution of the LLC.

If the transaction in question involves the transfer or financing of real estate, then it is recommended that Opining Counsel obtain a Statement of Authority (preferably certified) from the Department (or if one is not on file with the Department, require that a Statement of Authority be executed in accordance with Section 605.0302 and have it filed with the Department). The Committees recommend that Opining Counsel require the recordation of a certified copy of the Statement of Authority in the public records of the County in which the real property is located for opinions on all real estate related transactions.

B. Modifications to Subsection F – "Trusts"

In 2013, the Florida legislature adopted a new version of the Florida Land Trust Act (the "FLTA"), Section 689.071, Florida Statutes. A Florida trust organized under the FLTA is referred to herein as a "Florida Land Trust".

The following sections replace in their entirety subsection F. of the Report entitled: "Entity Status and Organization of a Florida Entity – Trusts" that is contained on pages 52-57 of the Report.

F. Trusts

(1) In General.

Opining Counsel may be asked for an opinion on the status of a Florida trust. Unlike Florida corporations, partnerships or LLCs, a Florida trust is not a separate statutory entity under Florida law. Rather, a Florida trust is a fiduciary relationship with respect to property (whether real property, personal property or both) subjecting the person or persons by whom the title to the property is held (known as the "trustee" or "trustees") to equitable duties to deal with the property for the benefit of another person or
persons (known as the beneficiary or beneficiaries), all of which arises as a result of a manifestation of an intention to create a trust arrangement. Thus, for purposes of giving an opinion regarding a Florida trust, the Client is really not the trust itself, but rather the person or persons serving as the trustee or trustees of the trust for the benefit of the beneficiaries. As such, the proper status inquiry in the context of a trust should be based on whether the trustee or trustees is or are properly organized and existing and has or have active status. Thus, if Florida counsel is asked for an opinion concerning the status of a Florida trust, the Opinion Recipient should want to know whether the Client(s) is or are the trustee(s) of the trust. For this reason, the recommended forms of opinion state that the Client(s) is or are the trustee(s) of the trust and go on to specify the legal basis for such designation.

(2) **Trusts Other than Florida Land Trusts.**

(a) **Trusts with Written Trust Agreements.**

In the context of most Florida trusts, with the possible exception of Florida land trusts arising strictly by operation of Section 689.071, Florida Statutes (referred to as a "Florida Land Trust"), the designation of the trustee occurs pursuant to the provisions of a written trust agreement. In this context, the recommended opinion is as follows:

| The Client(s) [is/are] the trustee(s) of a trust pursuant to the provisions of that certain trust agreement dated ______, 20__.

When the foregoing recommended form of opinion is to be rendered, Opining Counsel should obtain a copy of the current trust agreement governing the trust. The trust agreement needs to be reviewed by Opining Counsel for Opining Counsel to render any opinions with respect to the trust and, in particular, to determine who is designated as the trustee(s) of the trust.

(b) **Trusts Without Written Trust Agreements.**

If the Transaction is large enough or important enough to require a third-party legal opinion, then the trust’s affairs are sufficiently complex to require a written trust agreement. Accordingly, in this context, the Committees believe that Opining Counsel should not opine with respect to a trust if there is no written trust agreement, other than in the limited circumstances described below with respect to a Florida Land Trust.

(c) **Trustees that are Entities.**

If the trustee or one of the trustees is an entity, then in connection with giving this opinion Opining Counsel should obtain a certificate of status from the Department with respect to such entity and complete the diligence required with respect to such entity’s organization and entity status (see discussions above with respect to Florida corporations, Florida partnerships and Florida LLCs).

(3) **Trusts Owning Real Estate.**

(a) **Generally**

In Florida, trusts whose trustee(s) hold title to Florida real estate under the trust arrangement generally fall into one of two general categories. The first category are trustees of Florida Land Trusts. These trusts must satisfy the statutory requirements of Section 689.071, Florida Statutes, to qualify as a Florida Land Trust. The second category are trustees who hold title to Florida real estate under a trust
arrangement that does not qualify as a Florida Land Trust. Opinions concerning this second category of trusts are governed by the same customary practice that is applicable with respect to other trusts in Florida.

(b) **Florida Land Trusts Without a Written Trust Agreement.**

A Florida Land Trust that falls into the first category described above arises pursuant to Section 689.071, Florida Statutes.

- For Land Trusts created prior to July 1, 2013, a trust is a land trust under Section 689.071, Florida Statutes, if a deed or other recorded instrument naming the trustee as grantee or transferee sets forth the trustee's powers and the recorded instrument or trust agreement expresses the intent to create a land trust (see Section 689.071(12)(b), Florida Statutes).

- For Land Trusts created on or after July 1, 2013, a trust is a land trust under Section 689.071, Florida Statutes, if (1) a deed or other recorded instrument naming the trustee as grantee or transferee sets forth the trustee’s powers, and (2) the trustee has limited duties that do not exceed the duties set forth in Section 689.071(2)(c), Florida Statutes.

The recommended form of opinion with respect to a Florida Land Trust that meets the requirements of Section 689.071, Florida Statutes, is as follows:

<table>
<thead>
<tr>
<th>The Client(s) [is/are] the trustee(s) of a Florida land trust pursuant to Section 689.071, Florida Statutes.</th>
</tr>
</thead>
</table>

If the trust satisfies the requirements of Section 689.071, Florida Statutes, Opining Counsel can render the trust status opinion even if there is no separate trust agreement governing the trust relationship. However, because the customary practice in dealing with most opinions involving trusts is not to render an opinion unless a written trust agreement exists, the exception from this general rule should be applied only in very limited circumstances. For the limited exception to apply, the following three requirements must all be satisfied:

(i) The property that is the subject of the Transaction Documents must be limited to an interest in real property;

(ii) The trust must satisfy the requirements of Section 689.071, Florida Statutes, and particularly, the trustee must be designated as trustee in the recorded instrument and the recorded instrument must expressly confer on the trustee any one or more of the following powers: the power and authority to protect, to conserve, to sell, to lease, to encumber, or otherwise to manage and dispose of the real property or interest in real property described in the recorded instrument; and

(iii) Opining Counsel must be satisfied that no separate trust agreement or other agreement governing the trust relationship exists. To be satisfied in this regard, Opining Counsel should secure a written certificate or affidavit signed by at least the trustee, and preferably also by all of the beneficiaries of the trust, confirming that no separate trust agreement or other agreement governing the trust relationship exists. This certificate or affidavit should not be recorded in the public records if the benefits of Section 689.071, Florida Statutes, are to be retained because any
such recordation might be deemed to constitute an addendum to the declaration of trust for purposes of the Florida Land Trust statute.

(c)  *Florida Land Trusts with Written Trust Agreements.*

In the case of a Florida Land Trust, if Opining Counsel is unable to confirm that there is no separate trust agreement governing the trust relationship or if Opining Counsel has knowledge that a written trust agreement exists, Opining Counsel should not render the status opinion with respect to the trust unless Opining Counsel, in addition to addressing the requirements set forth in the recorded instrument, obtains a copy of the trust agreement and performs the diligence required with respect to other trusts in Florida as set forth above in subsection (2) ("Trusts Other than Florida Land Trusts") above.

Notwithstanding the recommendations set forth herein that Opining Counsel review any underlying trust agreement that may exist, such recommendation is not intended to modify or affect the protections afforded to third parties by Section 689.073, Florida Statutes.

(4)  *Successor Trustee.*

Because an opinion concerning a Florida trust focuses on the trustee, and in particular may address the entity status of the trustee, the power of the trustee, and whether the trustee has properly authorized the Transaction, Opining Counsel first needs to determine that the party purporting to be the trustee of the trust is the current trustee. This determination can be complicated where the party purporting to be the trustee is a successor trustee and can be further complicated where the Transaction involves the ownership of and/or a mortgage against real estate (and particularly where the real estate is held in a Florida Land Trust).

If the named trustee of the trust is no longer serving (whether because of, for example, death, incapacity, termination or resignation), then Opining Counsel’s diligence must focus on the entity status of the successor trustee, the power of the successor trustee, and whether the successor trustee properly authorized the Transaction. In the real estate context, it is not uncommon for the real estate records to continue to reflect the original trustee as the named owner or the named mortgagor, as the case may be. Thus, where real estate is involved, Opining Counsel’s diligence must first establish that the real estate records have been properly updated to reflect the change in the designated trustee.

(a)  *Trusts Other than Florida Land Trusts.*

In the context of trusts other than Florida Land Trusts and presumably where a written trust agreement is in existence, the trust agreement hopefully names either the successor trustee, or if not, then sets forth a method for determining the successor trustee (in which case the trust agreement will be determinative of the procedure for establishing a successor trustee). Opining Counsel should review the trust agreement from this perspective, addressing the appropriate situation, as follows:

(i) If the trustee has resigned, or has become incapable of serving due to death or incapacity, then in circumstances where real estate is not involved, Opining Counsel should, at a minimum, obtain a certificate from the successor trustee certifying that the prior trustee resigned or is incapable of serving due to death or incapacity, as the case may be, and that such successor trustee is the then current trustee of the trust.

(ii) In the real estate context, the parties must have taken additional actions. In particular, if the trustee has resigned, then a trustee’s declaration of appointment of successor trustee reciting such trustee’s name, address and its resignation, the appointment of the successor trustee by name and address and the successor’s acceptance of appointment should be signed by
the successor trustee (and preferably by the prior trustee), should be witnessed and acknowledged in the manner provided for acknowledgment of deeds, and should be recorded in the office of the recorder in the county where the trust's property is located. The declaration should have attached to it each of the following: (a) the first page of the trust agreement, (b) the successor trustee page of the trust agreement, (c) the powers page(s) of the trust agreement, (d) the signature page of the trust agreement, and (e) the legal description of the trust property.

(iii) In the real estate context, if the trustee has become incapable of serving due to death or incapacity, then a declaration of appointment of successor trustee reciting such trustee’s name, address and the reason for the failure to serve (attach a death certificate if due to death), the appointment of the successor trustee by name and address, and the successor’s acceptance of appointment should be signed by the successor trustee, should be witnessed and acknowledged in the manner provided for acknowledgment of deeds and should be recorded in the office of the recorder in the county where the trust's property is located. The declaration should have attached to it each of the following: (a) the first page of the trust agreement, (b) the successor trustee page of the trust agreement, (c) the powers page(s) of the trust agreement, (d) the signature page of the trust agreement, and (e) the legal description of the trust property.

(b) Florida Land Trusts. In the case of a Florida Land Trust, where no successor trustee is named in the recorded instrument and a trust agreement exists, Section 689.071(9), Florida Statutes, should be followed as the procedure whereby one or more persons or entities having the power of direction of the land trust agreement may appoint a successor trustee or trustees of the land trust by filing a declaration of appointment of a successor trustee or trustees in the office of the recorder of deeds in the county in which the trust's property is located. The declaration must be signed by a beneficiary or beneficiaries of the trust and by each successor trustee, must be acknowledged in the manner provided for acknowledgment of deeds, and must contain: (a) the legal description of the trust property, (b) the name and address of the former trustee, (c) the name and address of the successor trustee, and (d) a statement that each successor trustee has been appointed by one or more persons or entities having the power of direction of the land trust, together with an acceptance of appointment by each successor trustee.

(5) Diligence Concerning Beneficiaries. Although Opining Counsel may need to consider whether the beneficiaries of the trust have approved the Transaction to render an opinion that the Transaction has been approved by all requisite formality, Opining Counsel does not need to do so to render a status opinion on the trust (see "Authorization of the Transaction by a Florida Entity"), since the status opinion relating to a Florida trust focuses solely on the status of the trustee.

(6) Use of Different Language. Notwithstanding the lack of statutory entity status for the trust itself and the need to focus on the proper designation of the trustee(s) to render the opinion, the Committees recognize that some Florida practitioners include language in their opinions that appears to assume that the Florida trust to which the opinion relates is a separate statutory entity under Florida law. Thus, it is not uncommon for Florida practitioners to render a status opinion involving a trust to the effect that "The Client is a trust formed under Florida law," that "The Client is a trust duly formed under Florida law," or words to similar effect. Under customary practice in Florida, an Opining Counsel who renders the opinion in one of these alternative forms is effectively giving an opinion that has the same meaning (and is subject to the same recommended diligence) as the recommended opinion, and is confirming that a trustee or trustees has/have been designated for the trust either pursuant to the provisions of a trust agreement or, in the case of a statutory Florida Land Trust, pursuant to Section 689.071, Florida Statutes.

(7) Effect of Presumption Arising Under Section 689.07, Florida Statutes. Section 689.07, Florida Statutes, is separate and apart from Section 689.071, Florida Statutes, and the two should not be confused. Under Section 689.07, Florida Statutes, a deed by which real property is conveyed to a person or
entity simply "as trustee," without setting forth any of the powers required to avail the trustee of the benefit
of the Florida land trust presumption arising under Section 698.071, Florida Statutes, grants an absolute fee
simple estate in the real property to the "trustee," individually, including both legal and equitable title,
provided the other requirements of Section 689.07, Florida Statutes, are met. In such case, a Florida Land
Trust is not created, the recital of trust status is disregarded as a matter of law, and Opining Counsel should
not render the recommended trust opinion. Indeed, in such case, the owner of the real property is not the
trustee of a trust and no special form of opinion on trust status is pertinent. In such case, the entity opinion
should be an opinion concerning the direct entity status of the entity designated as the trustee.

Nevertheless, before proceeding in this fashion, because the subject deed indicated that the putative
"trustee" was acquiring title in a trust capacity, Opining Counsel should ask for and obtain a certificate from
the "trustee" regarding whether the "trustee" has made a declaration of trust and, if so, whether any written
trust instrument or instruments relating to such declaration exists. If a trust agreement actually exists, then
Opining Counsel should review the trust agreement and determine whether further inquiries need to be
made and/or whether any corrective instruments are required before any entity opinions can be rendered.

**Diligence Checklist - Trusts, including Florida Land Trusts**

- If the trustee is a corporation, partnership, or limited liability company, Opining Counsel should
  confirm that the trustee is properly organized and/or exists, and has active status (or in good
  standing in the state of its incorporation) and, if it is a foreign entity required to obtain a certificate
  of authority to transact business in Florida, that it has obtained such a certificate of authority from
  the Department.

- If the deed or other instrument of conveyance is dated prior to July 3, 1992 and the trustee is a
  corporation, Opining Counsel should confirm that the corporation has trust powers. As of July 2,
  1992, those portions of Section 660.41, Florida Statutes, which mandated that corporate trustees
  have trust powers were repealed. Thus, if the deed or other instrument of conveyance is dated after
  July 2, 1992 and the trustee is a corporation, Opining Counsel does not need to confirm the
  existence of trust powers. See Fund Title Note 31.02.06 (2001). The existence of trust powers for
  state chartered institutions may be confirmed by obtaining a Certificate from the Department of
  Financial Institutions, and the existence of such powers for federally chartered institutions may be
  obtained from the Comptroller of the Currency, at the following respective addresses:

  Director, Division of Financial Institutions        Assistant Comptroller of the Currency
  Florida Office of Financial Institutions          Southeastern District
  200 E. Gaines Street                               3 Ravinia Drive, Suite 1950
  Tallahassee, Florida 32399                         Atlanta, Georgia 30346

- To opine that the Client is the trustee of a Florida land trust that is in compliance with the provisions
  of Section 689.071, Florida Statutes, Opining Counsel should examine the deed or other instrument
  of conveyance naming the trustee as grantee or transferee and any written trust agreement for
  compliance with the requirements set forth in Section 689.071, Florida Statutes.
• If the trust satisfies the requirements set forth in Section 689.071, Florida Statutes, Opining Counsel should obtain a written certificate or affidavit signed by at least the trustee, and preferably also by all of the beneficiaries of the trust, confirming that no separate trust agreement or other agreement governing the trust relationship exists. If the trust satisfies the requirements set forth in Section 689.071, Florida Statutes, but Opining Counsel has knowledge that a trust agreement governing the trust relationship exists, Opining Counsel should obtain and review a copy of the written trust agreement governing the trust, in particular, to determine who is designated as the trustee(s) of the trust.

• If the trust does not satisfy the requirements of Section 689.071, Florida Statutes, Opining Counsel should obtain and review a copy of the written trust agreement governing the trust, in particular, to determine who is designated as the trustee(s) of the trust.
REVISIONS TO "ENTITY POWER OF A FLORIDA ENTITY"

A. Modifications to Subsection E – "Limited Liability Company"

The following section replaces in its entirety subsection E of the Report entitled "Entity Power of a Florida Entity – Limited Liability Company" that is contained on page 71 of the Report. The principal changes made to this section relate to updating the statutory references under Chapter 605, Florida Statutes (FRLLCA).

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E. Limited Liability Company

Recommended opinion:

The Client has the limited liability company power to execute and deliver the [Transaction Documents] and to perform its obligations thereunder.

A Florida limited liability company derives its entity power from FRLLCA, from its articles of organization, and from the operating agreement adopted by the members of the LLC. Opining Counsel should obtain copies of the LLC’s Organizational Documents together with a certificate confirming that such documents are true and correct by a manager of the LLC (if the LLC has elected to be manager-managed), by a member of the LLC (if member-managed), or by an officer of the LLC (if officers have been appointed by the LLC pursuant to the LLC’s operating agreement). Section 605.0107 of FRLLCA provides that any company that is member-managed grants all members apparent authority to bind the company, and any company that is manager-managed grants all managers apparent authority to bind the company (its members having no apparent authority to bind the company). Section 605.0212 provides that the company must identify the name, title or capacity and address of at least one person who has the authority to manage the company on the Annual Report that the company files with the Department.

In the context of an LLC with more than one member, if the Client does not have a written operating agreement, the Committees believe that Opining Counsel should not render an entity power opinion with respect to the Client. In the context of an LLC with only one member, Opining Counsel should not render an entity power opinion with respect to the Client unless the Client has either (i) a written operating agreement, or (ii) a record sufficient to confirm the identity of the member, to establish whether the LLC is member-managed or manager-managed, and to establish who is authorized to act on behalf of the LLC.

Unless the Client’s articles of organization or operating agreement provide otherwise, each Florida limited liability company has the requisite entity power to engage in any lawful activity, and Section 605.0109 of FRLLCA provides that an LLC has the same powers as an individual to do all things necessary or convenient to carry out its business and affairs, including a non-exclusive list of permitted actions enumerated in that section.

Under Section 605.0709 of FRLLCA, an LLC that is dissolved only has the power to wind up its affairs. As a result, before rendering a power opinion with respect to the LLC, Opining Counsel should determine whether the LLC has filed Articles of Dissolution with the Department or has been administratively dissolved, and if Articles of Dissolution have been filed or the LLC has been administratively dissolved, Opining Counsel should confirm that the transaction as to which the opinion is
being rendered is solely for the purpose of winding up the affairs of the LLC or, if the LLC has been administratively dissolved, should arrange for the LLC to be reinstated before completing the transaction.\footnote{The discussion in this paragraph regarding matters to be considered if a Florida entity has filed Articles of Dissolution or if a Florida entity has been administratively dissolved applies equally to opinions regarding Florida corporations, Florida limited partnerships, and other types of Florida entities. Future versions of this Report will include this same analysis with respect to opinions on “entity power” for other types of Florida entities.}

In most cases, an LLC’s operating agreement (and sometimes the LLC’s articles of organization) empowers the LLC to engage in any legal activity. However, Opining Counsel should carefully examine the LLC’s Organizational Documents to determine whether they contain provisions limiting the power of the LLC to engage in certain types of transactions or include any SPE provisions. If any such limitations are included in the LLC’s Organizational Documents, Opining Counsel will need to determine whether any such provisions preclude or otherwise limit the LLC from having the power to enter into the Transaction or perform its obligations under the Transaction Documents. See "Limitations on Power and Special Purpose Entities" below.

B. Modifications to Subsection F – "Trusts"

The following section replaces in its entirety subsection F. of the Report entitled: "Entity Power of a Florida Entity – Trusts" that is contained on pages 72-75 of the Report.

* * * * * * * * * * * * * * * *

F. Trusts

**Recommended opinion:**

| The Client(s), as trustee(s) of the trust, has/have the trust power to execute and deliver the [Transaction Documents] and to perform the Client(s)’ obligations thereunder. |

(1) General

Because a trust is not a separate statutory entity under Florida law (see "Entity Status and Organization of a Florida Entity – Trusts"), the trust power is not derived from the trust itself. Rather, the trust power is derived from the power of the trustee(s) to act on behalf of the trust. Accordingly, in addressing trust power, Opining Counsel must make two key inquiries: (i) first, whether a trustee that is an entity rather than an individual has the power to engage in the Transaction based on the trustee’s Organizational Documents and the Florida law governing such entity’s organization and existence, and (ii) second, whether the trustee has the power to engage in the Transaction under the trust agreement, and for a Florida Land Trust without a written trust agreement, whether the trustee has the power to engage in the Transaction pursuant to a recorded instrument that qualifies the arrangement as a Florida Land Trust under Section 689.071, Florida Statutes.

(a) Trustee as Business Entity. If the trustee is a Florida corporation, partnership or LLC, Opining Counsel should first inquire as to the entity power of that particular entity. Generally, this inquiry will be the same as the inquiry set forth above relative to the steps to be taken to determine whether that business entity, in its own capacity, has the power to engage in the Transaction and deal with trust property, and therefore has the power to execute and deliver the Transaction Documents and perform its obligations under such documents on behalf of the trust beneficiaries.
(b) Trustee Power. The extent of the second inquiry is dependent upon: (i) whether the trust relationship satisfies the requirements of Section 689.071, Florida Statutes and therefore qualifies as a Florida Land Trust, (ii) whether, in the context of a Transaction involving real property, the provisions of Section 689.07, Florida Statutes, are applicable because the real property has been conveyed to a person or entity simply "as trustee," without setting forth any of the powers required to avail the trustee of the benefit of the presumption arising under Section 689.071, Florida Statutes, (iii) whether a separate written trust document or other agreement governing the trust relationship exists, and (iv) whether the beneficiaries of the trust need to consent to the execution, delivery and performance of the Transaction Documents for the trustee to have the power to take the required actions. If a written trust document or other agreement governing the trust relationship exists, then, even if the trust relationship is a Florida Land Trust created pursuant to Section 689.071, Florida Statutes, or the real property has been conveyed to a person or entity simply "as trustee," a review of the trust document or other agreement governing the trust relationship must be made by Opining Counsel to render the opinion.

(2) Florida Trusts Other than Florida Land Trusts

(a) Trusts with Written Trust Agreements.

In most cases, each trustee of a Florida trust derives the power to own and deal with trust property and to transact business, and thus to execute and deliver the Transaction Documents and to perform his, her or its obligations under such documents, from the terms of the trust agreement or other agreement governing the trust. Except in the limited situations described below, Opining Counsel should not render an opinion regarding the trust unless Opining Counsel obtains a copy of the trust agreement or other agreement governing the trust relationship and performs the following further diligence. In this regard, Opining Counsel should: (i) review the trust agreement or other agreement governing the trust relationship to determine whether any trust beneficiaries and/or other parties hold the power of direction over the actions of the trustee and, if so, to determine which trust beneficiaries and/or other parties hold such power of direction; (ii) review any other agreement that may have been made among the trust beneficiaries regarding their direction of the trustee to determine compliance with any approval requirements in any such other agreement; and (iii) determine that the appropriate trust beneficiaries and/or other parties (or any required majority, if not required to be unanimous) have executed a written direction to the trustee with respect to the action to be taken.

(b) Trusts without Written Trust Agreements

If the Transaction is large enough or important enough to require a third-party legal opinion, then the trust’s affairs are sufficiently complex to require a written trust agreement. Accordingly, in this context, Opining Counsel should not opine with respect to any trust (other than possibly with respect to a Florida Land Trust) unless the trust is subject to or has a written trust agreement.

(c) Passive Trusts – Powers of Beneficiaries

If Opining Counsel determines that the trust is "passive," that is, that the trustee has no active managerial or decision-making authority, then the beneficiaries, as well as the trustee, should execute all necessary Transaction Documents. The beneficiaries also need to execute all necessary Transaction Documents or provide a written consent or similar written instrument in circumstances where the trust agreement requires such execution or fails to extend clear express power to the trustee(s).
(d) **Trusts Where Title to Real Property is Held by Trustee**

This analysis is particularly true in the case of a trust in which title to real property is held by a trustee, whether or not the trustee has the benefit of any statutory presumption concerning the organization of the trust and his, her or its authority to deal with the real property. See Fund Title Note 31.03.03 (2001). Furthermore, in the case of a trust in which title to real property is held by a trustee, Opining Counsel should cause to be recorded in the public real estate records either: (i) the unrecorded trust instrument (to which the Client may object), or (ii) an affidavit, certificate, or other instrument by the trustee or the trustee’s counsel establishing the identity of the trustee, the execution of the trust instrument, the power of the trustee to act under the trust instrument and confirming that the trustee’s power has not been revoked and remains in full force and effect.

(e) **Consents from Trustee and Beneficiaries**

Additionally, to render the foregoing opinion, Opining Counsel must obtain properly executed certificates of consent or similar written instruments from the trustee and each beneficiary of the trust who has a power to direct the activities of the trust under the trust agreement, confirming the trust’s power to enter into and perform the Transaction Documents and the trustee’s power to execute and deliver the Transaction Documents on behalf of the trust. In such certificates: (i) all such beneficiaries, as well as the holders of any security interests in their beneficial interests, should be identified and (ii) the trustee should be directed to consummate the Transaction and execute and deliver the Transaction Documents. If any holders of security interests are identified, Opining Counsel should confirm that all such holders have consented to the Transaction.

(3) **Effect of Presumption Arising Under Section 689.071, Florida Statutes**

(a) **Generally**

For trusts created prior to July 1, 2013, a trust is a Florida Land Trust under Section 689.071, Florida Statutes, if a deed or other recorded instrument naming the trustee as grantee or transferee sets forth the trustee’s powers and the recorded instrument or trust agreement expresses the intention to create a land trust (see Section 689.071(12), Florida Statutes).

For land trusts created on or after July 1, 2013, a trust is a land trust under Section 689.071 if: (i) a deed or other recorded instrument naming the trustee as grantee of transferee sets forth the trustee's powers; and, (ii) the trustee has limited duties that do not exceed the duties set forth in Section 689.071(2)(c), Florida Statutes.

The trustee of a Florida Land Trust derives his, her, or its power or capacity to transact business on behalf of the trustee from Section 689.071, Florida Statutes, and the deed or other instrument of conveyance naming the trustee as grantee or transferee. In such case, third parties dealing with the trustee who do not have actual or constructive notice of the terms of a trust agreement may be entitled to the benefit of Section 689.073, Florida Statutes, if the conveyance into the trust qualifies under such statute. In that case, trust powers exist to the extent specified in the deed or other instrument of conveyance into the trustee.

(b) **Florida Land Trusts Without Written Trust Agreements**

If the trust satisfies the requirements of Section 689.071, Florida Statutes, Opining Counsel can render the trust power opinion even if there is no separate written trust agreement governing the trust relationship. However, because the customary practice in dealing with most opinions involving trusts is not to render an opinion unless a written trust agreement exists, the exception from this rule should only be
applied in limited circumstances. For the exception to apply, the three requirements set forth in "Entity Status and Organization of a Florida Entry – Trusts – Trusts Owning Real Estate – Florida Land Trust without Written Trust Agreements" must all be satisfied.

If all three requirements are satisfied, then Opining Counsel must review the recorded instrument and determine whether the express language in the recorded instrument confers on the trustee the power to execute, deliver and perform the Transaction Documents without any power of direction by the trust beneficiaries or any other parties.

In the case of a Florida Land Trust, if there is no trust agreement or other agreement governing the trust relationship, but the express language in the recorded instrument creating the Florida Land Trust establishes that there are trust beneficiaries or other parties who hold a power of direction over the actions of the trustee, then Opining Counsel must also: (i) review any documents that may have been executed by the designated trust beneficiaries or other parties regarding their direction of the trustee, (ii) confirm compliance with any approval requirements in any such recorded instrument, and (iii) confirm that such trust beneficiaries or other parties (or any required majority, if not required to be unanimous) have executed a written direction to the trustee with respect to the action to be taken.

(c) Florida Land Trusts with Written Trust Agreements.

In the case of a Florida Land Trust, if a separate written trust agreement or other agreement governing the trust relationship also exists, Opining Counsel should not render the opinion unless Opining Counsel, in addition to addressing the requirements in the recorded instrument, performs the following further diligence: (i) Opining Counsel should review whatever documents are available that govern the trust relationship to determine whether any trust beneficiaries and/or other parties hold the power of direction over the actions of the trustee and, if so, which trust beneficiaries and/or other parties hold such power of direction; (ii) Opining Counsel should review any other agreement that may have been made among the trust beneficiaries regarding their direction of the trustee to determine compliance with any approval requirements in any such other agreement; and (iii) Opining Counsel should determine that the appropriate trust beneficiaries and/or other parties (or any required majority, if not required to be unanimous) have executed a written direction to the trustee with respect to the action to be taken. Moreover, if the terms of the trust agreement or other agreement governing the trust relationship are inconsistent with the powers set forth in the recorded instrument, the terms in the trust agreement or other agreement governing the trust relationship will generally prevail over the powers set forth in the recorded instrument.

Notwithstanding the requirement set forth herein that Opining Counsel review any underlying trust agreement that may exist, such requirement is not intended to modify or affect the protection of third parties set forth in Section 689.073, Florida Statutes.

(4) Effect of Presumption Arising Under Section 689.07, Florida Statutes.

Under Section 689.07, Florida Statutes, a deed by which real property is conveyed to a person or entity simply "as trustee," without setting forth any of the powers required to avail the trustee of the benefit of the presumption arising under Section 689.071, Florida Statutes, grants an absolute fee simple estate in the real property to the "trustee," individually, including both legal and equitable title, provided the other requirements of Section 689.07, Florida Statutes, are met. In such case, a Florida land trust is not created, the recital of trust status is disregarded as a matter of law, and Opining Counsel should ensure that the "trustee" executes the Transaction Documents in his, her or its individual capacity. In such case, the owner of the real property is not the trustee of a trust and no special form of opinion is necessary. In addition, if the "trustee" is an entity, Opining Counsel must determine whether such entity has the entity power, in its
own right, to own and deal with such property and to execute and deliver the Transaction Documents and perform its obligations thereunder.

Nevertheless, because the deed indicated that the putative "trustee" was acquiring title in a trust capacity, Opining Counsel should obtain a certificate from the "trustee" regarding whether he, she or it has made a declaration of trust and, if so, whether any written trust instrument or instruments exist. If a trust instrument exists, then Opining Counsel should obtain a copy and perform the diligence described above in "Florida Trusts Other than Florida Land Trusts."
REVISIONS TO "AUTHORIZATION OF THE TRANSACTION 
BY A FLORIDA ENTITY"

B. Modifications to Subsection D – "Limited Liability Company"

The following section replaces in its entirety subsection D. of the Report entitled "Authorization of the Transaction by a Florida Entity – Limited Liability Company" that is contained on pages 82-85 of the Report. The principal changes made to this section relate to updating the statutory references under FRLLCA.

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D. Limited Liability Company

Recommended opinion:

The Client has authorized the execution, delivery and performance of the [Transaction Documents] by all necessary limited liability company action.

To render an authorization opinion, Opining Counsel must determine whether its LLC Client has authorized the Transaction in accordance with Chapter 605, Florida Revised Limited Liability Company Act (effective January 1, 2015) (FRLLCA), the LLC’s articles of organization and the LLC’s operating agreement, and whether the member, manager or officer authorized to execute and deliver the Transaction Documents on behalf of the LLC has been authorized to bind the LLC to the Transaction Documents.

The Committees believe that a third-party legal opinion with respect to the authorization of a transaction by a Florida LLC should not be rendered with respect to an LLC unless (i) if the LLC that has more than one member, the LLC has a written operating agreement, or (ii) if the LLC has only one member, the LLC has a written operating agreement or the LLC has a record sufficient to confirm the identity of the member, to establish whether the LLC is member-managed or manager-managed, and to establish who is authorized to act on behalf of the LLC.

In most cases, the operating agreement of an LLC authorizes it to engage in any lawful activity. Sometimes, however, the operating agreement will include provisions that expressly limit the LLC’s power and capacity to authorize a particular transaction or a particular type of transaction or will include SPE provisions. See "Limitations on Power and Special Purpose Entities" below.

The threshold question for Opining Counsel in determining which persons have authority to bind the LLC is whether the LLC is member-managed company or manager-managed. Section 605.0407 of FRLLCA provides that a Florida LLC is a member-managed company by default unless the articles of organization or the operating agreement provide that it is a manager-managed company. The distinction between the two management models with respect to the authority of members and managers of an LLC is discussed below. However, in both cases, Opining Counsel must review the articles of organization and operating agreement of the LLC to opine on the authorization of actions to be taken by the LLC.

Section 605.0201(3)(a) of FRLLCA permits the articles of organization to include an optional statement that the LLC is to be a manager-managed company, and Section 605.0201(3)(d) of FRLLCA permits the articles of organization to include a notice of any limitations on the authority of a manager or member. If either of these provisions are added or changed by an amendment or restatement of the articles of organization, Section 605.0103(4)(b)5. of FRLLCA provides that the amended and restated articles of organization do not constitute notice of the addition or change until 90 days after the effective date of the
amendment or restatement. Further, Section 605.0103(4)(b)5. of FRLA provides that a provision in an LLC’s articles of organization limiting the authority of a manager or a member to transfer real property held in the name of the LLC is not notice of the limitation to any person (except to a member or manager) unless such limitation appears in an affidavit, certificate or other instrument that bears the name of the LLC and is recorded in the public records in the county where the real property is located.

Section 605.04074 of FRLA provides that an LLC that is member-managed grants all members apparent authority to bind the LLC, and that while an LLC that is manager-managed grants all managers apparent authority to bind the LLC, its members have no apparent authority to bind the company. Section 605.0212 of FRLA provides that the LLC must identify the name, title or capacity and address of at least one person who has the authority to manage the LLC on the Annual Report that the LLC files with the Department.

Under Section 605.0301 of FRLA, a person has the power to bind an LLC: (1) as an agent by virtue of Section 605.0407 of FRLA; (2) by grant of authority under the LLC’s articles of organization or operating agreement; (3) by authority pursuant to a filed Statement of Authority under Section 605.0302 of FRLA; or (4) by having status as an agent of the LLC, authority or power to bind the LLC under laws other than Chapter 605.

Under Section 605.0302 of FRLA, an LLC may file a Statement of Authority (SOA) with the Department (or in the case of transferring real property, recording a certified copy of the SOA in the proper recording office) to put third parties on notice of specific individuals who have the power and authority to bind the LLC. The individuals named in the SOA do not have to be members or managers of the LLC. A certified copy of a SOA recorded in the public records of a particular county applies to all real property owned by the LLC in that county and can be relied upon by bona fide purchasers and mortgagees. The SOA permits reliance on behalf of third parties for those named individuals of the LLC to execute documents on behalf of the LLC or to limit the authority of certain managers or members. Where a proper SOA is recorded, the deed or mortgage must come from the individual(s) authorized under the SOA. A recorded SOA is valid for 5 years after the statement is effective unless a statement of cancellation, limitation, or denial is recorded. The recorded SOA does not eliminate the need to confirm the active status of the LLC; if an LLC has been dissolved, no reliance can be placed on any SOA recorded prior to the dissolution. A dissolved LLC may file a post-dissolution SOA that identifies individuals who can execute documents on behalf of the dissolved LLC. The SOA can be cancelled, limited, or denied, so it is important to check the public records of the county in which the real property is located in order to confirm that a statement of cancellation, limitation, or denial has not been recorded.

In considering authorization of a transaction by an LLC, it is important to keep in mind that under Section 605.0709 of FRLA, an LLC that is dissolved only has the power to wind up its affairs. As a result, before rendering an authorization opinion with respect to an LLC, Opining Counsel should determine whether the LLC has filed Articles of Dissolution with the Department or has been administratively dissolved, and if Articles of Dissolution have been filed or the LLC has been administratively dissolved, Opining Counsel should confirm that the transaction as to which the opinion is being rendered is solely for the purpose of winding up the affairs of the LLC, of, if the LLC has been administratively dissolved, should arrange for the LLC to be reinstated before completing the transaction.  

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2 The discussion in this paragraph regarding matters to be considered if a Florida entity has filed Articles of Dissolution or if a Florida entity has been administratively dissolved applies equally to opinions regarding Florida corporations, Florida limited partnerships, and other types of Florida entities. Future versions of this Report will include this same analysis with respect to opinions on the “authorization of the transaction” for other types of Florida entities.
If neither a Statement of Authority has been filed nor a grant of authority has been provided for in the articles of organization (or with respect to a transfer of real estate, neither a certified copy of a Statement of Authority nor an affidavit, certificate or other instrument indicating such authority, has been recorded), under Section 605.0474(3) of FRLCA a third party can rely upon a deed, mortgage, or other instrument executed by any member of a member-managed LLC or any manager of a manager-managed LLC listed on the Florida Division of Corporation's website, without reviewing the operating agreement of the LLC. Under Florida Statutes Section 605.0201 of FRLCA, the articles of organization may, but are not required to, contain the names and addresses of the members or managers of the LLC. Accordingly, if the articles of organization of a newly formed LLC filed with the Department do not identify the members or managers of the LLC, or the member or manager who is executing the documents is not listed in the filed articles of organization of the LLC as a member or manager, Opining Counsel should obtain and review a copy of the operating agreement of the LLC (or in the context of a single member LLC, an operating agreement or a record sufficient to confirm the identity of the member, to establish whether the LLC is member-managed or manager-managed, and to establish who is authorized to act on behalf of the LLC) to confirm the authority of the executing member or manager.

Nevertheless, in giving an opinion on the approval of the Transaction and the Transaction Documents, Opining Counsel should base the opinion on the affirmative act of the LLC, its members and/or managers, as applicable, and not on principles of estoppel, apparent authority, waiver and the like. In particular, although certificates and affidavits of authority are estoppel devices upon which third parties without contrary knowledge may rely, they are generally not sufficient support (standing alone), under Florida customary practice, for an opinion regarding authorization of a Transaction or Transaction Documents.

The following sections discuss matters for Opining Counsel to consider in determining whether an LLC has properly authorized a Transaction.

(1) Member-Managed. Under Sections 605.0407(2) and 605.04073(1)(b) of FRLCA, unless otherwise provided in the articles of organization or operating agreement, the management of a member-managed LLC is vested in its members in proportion to the then-current percentage or other interest of members in the profits of the LLC owned by all of the members. Except as otherwise provided in the articles of organization or operating agreement or FRLCA, in a member-managed LLC the decision of a majority-in-interest of the members is controlling.

Because there is no prohibition in FRLCA, the articles of organization or operating agreement may provide for classes or groups of members having such relative rights, powers, and duties as the articles of organization or operating agreement may provide. The articles of organization or operating agreement may also provide for the taking of an action, including the amendment of the articles of organization or operating agreement, without the vote or approval of any member or class or group of members. Further, the articles of organization or operating agreement may provide that any member or class or group of members shall have no voting rights, may grant to all or certain identified members or a specified class or group of the members the right to vote separately or with all or any class or group of the members or manager on any matter. Similarly, the articles of organization or operating agreement of the LLC may provide that voting by members will be on a per capita, number, financial interest, class, group, or any other basis.

Section 605.04073(4) of FRLCA states that unless otherwise provided in the articles of organization or operating agreement, on any matter that is to be voted on by members, the members may take such action without a meeting, without prior notice, and without a vote if a consent or consents in writing, setting forth the action so taken, are signed by members having not less than the minimum number of votes that would be necessary to authorize or take such action at a meeting, but in no event by a vote of
less than a majority-in-interest of the members that would be necessary to authorize or take such action at a meeting. However, within 10 days after obtaining such authorization by written consent, notice is to be given to those members who have not consented in writing or who are not entitled to vote on the action.

With respect to the agency authority of members of an LLC, Section 605.04074 of FRLCA provides, unless properly limited, that, in a member-managed LLC, each member is an agent of the LLC for the purpose of its business, and an act of a member, including the signing of an instrument in the LLC’s name, for apparently carrying on in the ordinary course the LLC’s business or business of the kind carried on by the LLC, binds the LLC unless the member had no authority to act for the LLC in the particular matter and the person with whom the member was dealing knew or had notice that the member lacked authority. An act of a member that is not apparently for carrying on in the ordinary course the LLC’s business or business of the kind carried on by the LLC binds the LLC only if the act was authorized by appropriate vote of the other members of the LLC. As noted in (3) below, however, the real estate rule set forth in Section 605.04074(3) of FRLCA overrides these agency and authority rules for member-managed companies.

To render an opinion that a member-managed LLC has approved a Transaction and the Transaction Documents by all necessary action, Opining Counsel should review the articles of organization and operating agreement of the LLC (which documents should be certified to the Opining Counsel as being a true and correct copy by a member or an officer (if officers have been appointed) of the LLC). Opining Counsel should then obtain evidence as to the approval by the requisite members required to approve the Transaction and the Transaction Documents (which approval should be documented in writing). Opining Counsel should also review FRLCA to determine whether authorization of the members is required with respect to the particular Transaction even if not otherwise required by the LLC’s articles of organization or operating agreement. Alternatively, if a SOA has been filed with the Department (or, in the case of a transfer of real estate, a certified copy of the SOA has been recorded in the public records of the County of the transaction), Opining Counsel can rely on the acts of the named individuals of the LLC to execute documents on behalf of the LLC.

(2) Manager-Managed. Under Sections 605.0407(3) and 605.04074(2) of FRLCA, in a manager-managed LLC, the management of the company is vested in a manager or managers, and each manager has equal rights in the management and conduct of the LLC’s business. Except as otherwise provided in FRLCA, in a manager-managed LLC, any matter relating to the business of the LLC may be exclusively decided by the manager or, if the LLC has more than one manager, by a majority of the managers. Similarly, Section 605.04073(2)(b) of FRLCA provides that, except as otherwise provided in the articles of organization or the operating agreement of the LLC, if the members have appointed more than one manager to manage the business of the LLC, then decisions of the managers shall be made by majority vote of the managers at a meeting or by unanimous written consent. Section 605.04072(2) of FRLCA provides that, in a manager-managed LLC, a manager: (i) must be designated, appointed, elected, removed, or replaced by a vote, approval, or consent of a majority-in-interest of the members; and (ii) holds office until a successor has been elected and qualified, unless the manager sooner resigns or is removed. The manager or managers also may hold the offices and have such other responsibilities accorded to them by the members and set out in the articles of organization or the operating agreement of the LLC.

With respect to the agency authority of members in a manager-managed LLC, Section 605.04074(2) of FRLCA provides that in a manager-managed LLC, a member is not an agent of the LLC for the purpose of its business solely by reason of being a member. In a manager-managed LLC, each manager is an agent of the LLC for the purpose of its business, and an act of a manager, including the signing of an instrument in the LLC’s name, for apparently carrying on in the ordinary course the LLC’s business or business of the kind carried on by the LLC binds the LLC, unless the manager had no authority to act for the LLC in the particular matter and the person with whom the manager was dealing knew or had
notice that the manager lacked authority. An act of a manager that is not apparently for carrying on in the ordinary course the LLC’s business or business of the kind carried on by the LLC binds the LLC only if the act was authorized under Section 605.04074(2)(c) of FRLCA. As noted in (3) below, however, the real estate rule set forth in Section 605.04074(3) of FRLCA overrides these agency and authority rules.

To render an opinion that a manager-managed LLC has approved a Transaction, Opining Counsel should review the articles of organization and the operating agreement of the LLC, determine the requisite vote of managers (and, if applicable, the requisite vote of members) to approve the Transaction and then obtain evidence as to the approval by such requisite vote of managers (and, if applicable, members). Each requisite vote should be documented in writing. Additionally, Opining Counsel should review FRLCA to determine whether the action to be taken by the manager-managed LLC nevertheless requires the LLC to obtain member approval for the particular Transaction even if not otherwise required by the operating agreement. Alternatively, if a SOA has been filed with the Department (or, in the case of a transfer of real estate, a certified copy of the SOA has been recorded in the public records of the county of the transaction), Opining Counsel can rely on the acts of the named individuals of the LLC to execute documents on behalf of the LLC.

(3) **General Real Estate Rule.** As an overriding rule applicable to real property held by an LLC, Section 605.04074(3) of FRLCA provides that, unless a certified statement of authority recorded in the applicable real estate records limits the authority of a member or manager, any member of a member-managed LLC, or any manager of a manager-managed LLC may sign and deliver any instrument transferring or affecting the LLC’s interest in its real property. The transfer instrument is conclusive in favor of a person who renders value without knowledge of the lack of the authority of the person signing and delivering the instrument. Nevertheless, the Committees recommend that, for opinion purposes, Opining Counsel should obtain and review the documents set forth in (1) above (for a member-managed LLC) or in (2) above (for a manager-managed LLC) before giving an opinion regarding authorization of the Transaction by an LLC.

(4) **Authority.** An opinion with respect to the authorization of a Transaction by an LLC reflects Opining Counsel’s judgment that the persons or entities signing for the LLC have authority to execute the Transaction Documents. Although apparent authority may protect third parties who rely on the signature of a member or manager of the LLC, the Committees believe that Opining Counsel should not base an opinion on the authorization of a Transaction solely on the basis of apparent authority. The Committees also recommend that for opinions on all real estate related transactions, Opining Counsel should require the execution and recordation of a certified copy of the SOA in the public records of the County in which the real property is located.

(5) **Other Entities.** An opinion on an LLC may require Opining Counsel to look at the authorization of the Transaction by entities other than the LLC that is a party to the Transaction and the Transaction Documents. Opining Counsel should examine the structure of the LLC to determine what members or managers who have to approve the Transaction are entities. In reviewing authorization by the LLC, Opining Counsel should also review the authorization by these other entities to a level where such Opining Counsel is comfortable, based on the particular facts and circumstances, that the requisite approval of the LLC entering into the Transaction and the Transaction Documents has, in fact, been obtained.

Opining Counsel should recognize that Opining Counsel has the responsibility to become comfortable, based on the particular facts and circumstances, that the requisite approval of the other entities that are members and/or managers of the LLC entering into the Transaction and the Transaction Documents has been obtained. If Opining Counsel cannot satisfy themselves in that regard, Opining Counsel should expressly set forth in the opinion letter any limitations on the scope of Opining Counsel’s
opinion (or make assumptions on those topics) as a result of not having been able to satisfy themselves regarding necessary approvals by other entities that are members and/or managers of the LLC.

(6) **Fiduciary Duties.** The authorization opinion does not mean that the LLC's managers or the managing members who are managing the LLC, as applicable, complied with their fiduciary duties in approving the Transaction and the Transaction Documents.
NEW SECTION OF THE REPORT – OPINIONS WITH RESPECT TO ISSUANCES OF PREFERRED STOCK BY A FLORIDA CORPORATION

This First Supplement addresses opinions regarding issuances of preferred shares by Florida corporations. It is largely based on the guidance contained in the 2008 report by the TriBar Opinion Committee ("TriBar") on the topic of "Duly Authorized Opinions on Preferred Stock" (the "TriBar Preferred Stock Report"). The TriBar Preferred Stock Report is available at 63 The Business Lawyer, 921. Additionally, this First Supplement discusses principles contained in the report of the Legal Opinions Committee of the Business Law Section of the State Bar of California (the "California Committee") in their 2009 report entitled: "Report on Selected Legal Opinion Issues in Venture Capital Financing Transactions" (the "California VC Report"). The California VC Report is available at 65, The Business Lawyer, 161.

While these reports do not necessarily reflect customary practice in Florida, the guidance contained in these reports may be helpful to Florida lawyers who are called upon to deliver opinions regarding issuances of preferred stock covered by this section.

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OPINIONS WITH RESPECT TO ISSUANCES OF PREFERRED STOCK BY A FLORIDA CORPORATION

In Transactions in which a Florida corporation is issuing equity securities, Opining Counsel may be asked to render opinions regarding the Client’s preferred equity securities ("preferred shares" or "preferred stock"). Below are examples of those opinions, together with a discussion of the opinion language and the diligence recommended with respect to each opinion.

A. Corporations – Authorized Capitalization – Preferred Stock

Recommended opinion:

The Client’s authorized capitalization includes ____ shares of preferred stock, $____ par value per share.

The authorized capitalization opinion for preferred stock means that, as of the date of the opinion, the Client is authorized to issue the number of shares of preferred stock set forth in its articles of incorporation filed with the Department, as amended to the date of the opinion letter. Pursuant to Section 607.01401(25) of the FBCA, the term "shares" means the units into which the proprietary interests in a corporation are divided.

Section 607.0202(1)(c) of the FBCA requires a corporation organized in Florida to set forth in its articles of incorporation the number of shares that it is authorized to issue. A Florida corporation does not have the legal authority to issue more shares than the number of shares set forth in its articles of incorporation. Section 607.0601 of the FBCA also requires the corporation to set forth in its articles of incorporation the classes of shares and the number of shares of each class of shares that it is authorized to issue. If more than one class of shares is authorized, the articles of incorporation must set forth a distinguishing designation for each class and, prior to the issuance of shares of a class, the preferences, limitations and relative rights of that class.

A corporation organized in Florida may increase or decrease its authorized capitalization by amending its articles of incorporation pursuant to Section 607.1006 of the FBCA. As a result, if a
corporation has amended its articles of incorporation, Opining Counsel should review all articles of amendment to and restatements of the corporation’s articles of incorporation in order to determine the current authorized capitalization.

Under Section 607.0702, the articles of incorporation may provide for "blank check" authority allowing the board of directors, without further shareholder action, to create the preferences, rights and limitations of a particular class or series of shares. In such circumstances, Opining Counsel should (i) review the articles of incorporation to confirm that "blank check" shares have been created, and (ii) review the amendment to the articles filed with the Department that establishes the rights, preferences and limitations of the particular class or series of preferred shares.

The authorized capitalization opinion does not mean that Opining Counsel has reviewed the organization of the corporation, which is a matter covered by the "entity status and organization" opinion. See "Entity Status and Organization of a Florida Entity." However, because a corporation must have been organized and be active to authorize the issuance of shares, Opining Counsel should not render the authorized capitalization opinion, or any other opinion regarding issuances of the corporation’s securities, unless Opining Counsel has confirmed (or expressly assumed in the opinion letter) that the corporation has been organized and is active. Because opinions regarding securities of Florida corporations are usually given at the same time as opinions on the entity status and organization of Florida corporations, this should rarely be an issue. Further, the authorized capitalization opinion does not mean that Opining Counsel has reviewed the documents with respect to the actions taken to approve a previous amendment to the articles of incorporation (or previously adopted amended and restated articles of incorporation). For purposes of rendering the authorized capitalization opinion, absent knowledge to the contrary (or knowledge of facts (red flags) that ought to cause a reasonable Opining Counsel to call the underlying assumptions into question), Opining Counsel may assume that each previous amendment to the Client's articles of incorporation was properly proposed and adopted based on the acceptance of such filings by the Department.

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<th>Diligence Checklist – Corporation – Preferred Stock. To render the &quot;authorized capitalization&quot; opinion with respect to preferred stock of a Florida corporation, Opining Counsel should take the following actions:</th>
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<tr>
<td>• Obtain a copy of the corporation’s articles of incorporation, as amended (preferably a certified copy obtained from the Department).</td>
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<td>• If applicable, obtain a copy of any certificate of designation, rights, preferences and limitations related to the preferred stock.</td>
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<td>• Review the articles of incorporation (or the most recent restated articles of incorporation) and, if applicable, any certificates of designation, rights, preferences, and limitations to determine the classes of shares and the number of shares authorized for each class as set forth therein.</td>
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<tr>
<td>• If the articles of incorporation have been amended and/or any certificates of designation, rights, preferences, and limitations have been filed since the date of the initially filed articles of incorporation (or, if applicable, since the date of the most recent restated articles of incorporation), review all such amendments and certificates to determine the current classes of shares and the current number of shares authorized for each class as set forth therein.</td>
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B. Corporations – Number of Shares Outstanding – Preferred Stock

An opinion regarding the number of outstanding shares of preferred stock of a corporation is a factual confirmation. Often, a corporation will make a representation and warranty in the Transaction Documents regarding the number of its outstanding preferred shares. However, Opinion Recipients often request an opinion on this issue in an effort to obtain further assurance.

The recommended form of opinion is as follows:

Based solely on a certificate of ______________, the Client has __________ shares of its ______________ preferred stock outstanding.

The Committees believe that this opinion should generally be rendered based solely on a certificate from the Client’s transfer agent and/or on a certificate from the Client. Although some Opining Counsel may elect to review the corporation’s stock register and any other stock records contained in the corporation’s minute book, such diligence is not necessary under Florida customary practice in order to render the opinion in its recommended form.

Notwithstanding the foregoing, if Opining Counsel engages in further diligence to support this opinion, the limitation contained in the recommended opinion above should be expanded to describe whatever further diligence has been conducted. Further, Opining Counsel should be aware that, if contrary to the position stated above, this opinion is rendered without the "based solely on" qualifying language, the Opinion Recipient may reasonably expect that the opinion rendered was based on a complete review by Opining Counsel of the corporation's stock register and the corporation's other stock records.

C. Corporations – Reservation of Shares – Preferred Stock

The "reserved shares" preferred stock opinion addresses the fact that certain securities of the corporation have been reserved for future issuance upon some future event, such as the conversion of convertible securities or the exercise of derivative securities (e.g., options or warrants to purchase shares of preferred stock). This opinion means that the corporation has taken the necessary corporate actions to reserve a portion of its authorized shares of preferred stock for future issuance.

The FBCA does not specifically address reservation of shares or provide any legal effect to this "reservation" by the board of directors of the corporation. If the "reserved shares" preferred stock opinion is rendered, it means that: (i) sufficient additional shares of preferred stock have been authorized for issuance in the future on the exercise of the convertible or derivative securities, but are not yet issued, (ii) the board of directors has adopted a resolution to designate and reserve such authorized, but unissued, preferred shares for future issuance, and (iii) such resolution of the board of directors has not been revoked as of the date of the opinion letter. After confirming the number of authorized shares of the corporation from a review of the corporation’s articles of incorporation as amended to date, Opining Counsel may rely upon an officer’s certificate confirming the factual issues described in clauses (i), (ii) and (iii) above as the basis for this opinion.

The recommended form of opinion is as follows:

The Client has reserved ________ shares of its [preferred stock] for issuance upon [describe the triggering event with specificity, such as the conversion of convertible securities or the exercise of derivative securities].
The "reserved shares" preferred stock opinion does not confirm the absence of anti-dilution provisions in any convertible securities, options or warrants issued by the corporation that in the future could cause the number of shares of preferred stock reserved to be inadequate. In addition, the "reserved shares" preferred stock opinion does not provide absolute assurance that such preferred shares will be available for issuance at the time the preferred shares are to be issued or converted, because the corporation’s board of directors has the legal ability to revoke the reservation of preferred shares and authorize the issuance of those preferred shares in the future for an entirely different purpose. Accordingly, as with each of the other opinions that are being rendered, the "reserved shares" preferred stock opinion speaks only as of the date of the opinion letter.

To provide greater assurance to the Opinion Recipient that the preferred shares reserved will continue to be available for issuance in the future upon the designated triggering event, the Opinion Recipient should consider obtaining a contractual covenant from the corporation in a Transaction Document or in some other document that obliges the corporation to continue to reserve the appropriate number of authorized but unissued preferred shares.

D. Corporations – Issuances of Preferred Shares

The following opinions relate to the validity of the particular issuances of preferred shares that are contemplated by the Transaction Documents.

**Recommended opinion:**

The [preferred shares] have been duly authorized and [the preferred shares], when delivered and paid for in accordance with the [Transaction Documents], will be validly issued, fully paid and nonassessable.

1. **Duly Authorized.**

Under Florida customary practice, this opinion means that: (a) the issuance of the preferred shares has been authorized by all necessary corporate action in compliance with the FBCA and the articles of incorporation and bylaws of the corporation, (b) the number of preferred shares that have been issued (together with any additional preferred shares proposed to be issued) are not in excess of the number of preferred shares of the particular class or classes authorized by the articles of incorporation, as amended to date, and (c) the corporation has the power under the FBCA, the articles of incorporation and the bylaws of the corporation to create the preferred shares having the rights, powers and preferences of the preferred shares in question. This opinion does not mean that any previously issued and outstanding preferred shares were properly issued and, in rendering this opinion, Opining Counsel is not expected to take any steps to confirm whether any previously issued and outstanding preferred shares were properly issued. See "Outstanding Preferred Equity Securities" below.

In determining the number of preferred shares available for issuance, Opining Counsel may rely on the information contained in the corporation’s financial statements, on a statement from the corporation’s transfer agent or on a statement from the Client, unless Opining Counsel has knowledge that the information being relied upon is not correct or unless Opining Counsel is aware of other facts (red flags) that call into question the reliability of such information. See "Common Elements of Opinions—Knowledge."

The board of directors (or the shareholders, if such power is reserved to the shareholders in the articles of incorporation) may approve the issuance of preferred shares of stock for consideration consisting of any tangible or intangible property or benefit to the corporation, including cash, promissory notes, services performed, promises to perform services evidenced by a written contract, or other securities of the
corporation. Before the corporation issues any preferred shares, the board of directors of the corporation (or its shareholders, if such power is reserved to them) must determine that the consideration received or to be received for the preferred shares to be issued satisfies statutory requirements (which, under the FBCA, is a determination that the consideration being paid for the shares is adequate).

Under Section 607.0825(1)(e) of the FBCA, although the board of directors of a Florida corporation cannot delegate authority to authorize or approve the issuance or sale or contract for the sale of preferred shares, it can give a committee (or a senior executive officer of the corporation) the power to authorize or approve the issuance or sale or contract for the sale of the preferred shares so long as such issuance, sale or contract for sale is within limits specifically prescribed by the board of directors in the authorizing resolutions. However, Florida law is unclear on whether a committee (or a senior officer of a corporation) can currently be given the power to set or establish the rights, powers and preferences of a particular series of "blank check" preferred stock even if the board of directors appears to have set limits in authorizing resolutions.³

Opinion recipients sometimes request that the opinion state that the terms of the preferred shares do not violate the FBCA or the articles of incorporation of the corporation. One form of this requested opinion is set forth below:

\[
\text{The rights, powers and preferences of the preferred stock set forth in [the articles of incorporation of the corporation] do not violate [the FBCA] or [the articles of incorporation of the corporation].}
\]

The Committees believe that this statement of opinion is implicit in the duly authorized opinion and is therefore unnecessary.

An opinion that preferred shares have been "duly authorized" does not address whether the creation of such shares violates or breaches any agreement to which the corporation is a party, such as a shareholders' agreement. In addition, the "duly authorized" opinion does not address whether any fiduciary duty has been violated in connection with the creation or authorization of such preferred shares.

2. **Enforceability of Outstanding Preferred Stock**

The duly authorized opinion does not cover a shareholder’s ability to enforce the provisions of the preferred shares. The opinion addresses only the corporation’s power under the FBCA and the corporation’s articles of incorporation to create the class or series of preferred shares in question. Accordingly, the duly authorized opinion does not address the question whether, assuming that the corporation has the power to create such preferred shares, the terms of the preferred shares will be given effect by the courts in a particular situation.

Opinion recipients will sometimes request that the opinion state that the provisions of the preferred shares (or certain provisions of such preferred shares) are "enforceable in accordance with their terms." At least two bar reports have addressed this issue, and both reports state that it is inappropriate for an opinion recipient to request an enforceability opinion with respect to the issuance of preferred shares.

³ The FBCA was modified in 2019, effective January 1, 2020. Among the amendments made to the FBCA, the provision that imposed limits on the ability of the board to delegate to a board committee the issuance or sale of shares, or the designation of relative rights, preferences and limitations of a voting group, has been eliminated. The elimination of this limitation also eliminates the limitation on the board's ability to delegate such issuance to a senior executive of the company.
In discussing this enforceability request, the TriBar Preferred Stock Report noted that "the enforceability of an agreement addresses contract law concepts (and includes the standard exceptions) and preferred stock provisions are not governed by contract law but rather are governed by corporation law." Because the enforceability opinion addresses the remedies available to a party to a contract, the TriBar Preferred Stock Report noted that the "concepts underlying an enforceability opinion do not easily fit" a preferred stock opinion.

In 2009, the California Committee adopted the position of the TriBar Preferred Stock Report that "a duly authorized" opinion confirms that the corporation has the power to create stock with the rights, powers and preferences of the shares in question. The California VC Report noted that an opinion giver is sometimes asked to provide an opinion that "the rights, preferences and privileges of the stock being purchased in the transaction are as set forth in the Company’s Articles" and, occasionally, the opinion is formulated as a request for an enforceability opinion, such as the Company’s Articles "are enforceable against the Company in accordance with their terms." The California Committee stated in the California VC Report that both requested opinions were "technically incorrect" and "inappropriate" because (i) the attributes of the preferred shares are set forth not only in the corporation’s articles of incorporation, but also in the applicable corporation statute and case law, and (ii) the corporation’s articles of incorporation are not, in fact, a contract as to which a remedies opinion can be given because the provisions of the articles of incorporation relating to the rights of the preferred shares are governed by the relevant corporate law.

Although both the TriBar Preferred Stock Report and the California VC Report have adopted the position that preferred shares are governed by (or at least primarily governed by) corporate law and not contract law, several more recent Delaware cases have held that the rights of preferred shareholders are "primarily contractual in nature." See Fletcher International, Ltd. v. ION Geophysical Corporation, Del. Ch. LEXIS 125 (2010) (holding that a corporation that caused its subsidiary to issue a convertible note without obtaining the required consent of a preferred shareholder of such corporation violated the terms of such preferred shares). As noted by another Delaware court, "[a] preferred shareholder's rights are defined in either the corporation's articles of incorporation or in the certificate of designation, which acts as an amendment to a certificate of incorporation. Thus, rights of preferred shareholders are contractual in nature and the ‘construction of preferred stock provisions are matters of contract interpretation for the courts.’" In re Appraisal of Metromedia International Group, Inc., 971 A.2d 893, 899 (Del.Ch. 2009). The Metromedia court noted that former Delaware "Chancellor Allen analyzed the rights conferred upon preferred shareholders by the certificate of designation because, ‘[t]o the extent it possesses any special rights or powers and to the extent it is restricted or limited in any way, the relation between the holder of the preferred shares and the corporation is contractual.'"

Notwithstanding these Delaware court decisions, the Committees believe that, under Florida customary practice, it is inappropriate for recipient counsel to request that Opining Counsel opine as to the enforceability of the preferred shares or the certificate of designation for such preferred shares, regardless of the formulation of such opinion.

3. **Potential Exceptions to Duly Authorized Opinion.**

   In some complex issuances of preferred shares, Opining Counsel may not be able to provide an unqualified "due authorization" opinion. Instead, Opining Counsel, if able to render any opinion, may need to include one or more exceptions addressing specific terms of the articles of incorporation of the corporation that conflict with the applicable provisions of the FBCA, the articles of incorporation or applicable case law. Examples of these special exceptions include, without limitation:

   (i) the articles of incorporation establish a procedure for declaring dividends that conflict with the FBCA;
(ii) the articles of incorporation provide for "drag along" rights that arguably conflict with the FBCA’s appraisal rights;

(iii) the articles of incorporation provide for a lower percentage vote for approval of certain matters than permitted by the FBCA;

(iv) the articles of incorporation render holders of a class of stock the right to designate members of a committee of the board of directors but the FBCA limits that right to the members of the board of directors; and

(v) the board of directors pursuant to its blank check authority creates a non-voting class of stock but the articles of incorporation only permit voting stock.

No exception to the "due authorization" opinion is required if the articles of incorporation require redemption of the preferred shares and the preferred shares are callable; however, the Committees believe that an exception would be required if the holder of the preferred shares has a "put right" with respect to such preferred shares. In any event, the FBCA only permits redemption when the corporation has sufficient legal funds available to effect such redemption. Although many opinions include the phrase "to the extent funds are lawfully available therefor", the Committees believe that including that phrase in the opinion is unnecessary. However, the Committees suggest that Opining Counsel consider informing recipient's counsel of this limitation.

Finally, the TriBar Preferred Stock Report notes that the corporation’s lack of corporate power to create a certain provision of the preferred shares "might" give rise to a question regarding the validity of the preferred shares itself. In this situation, if the offending provision in the articles of incorporation is not removed or adequately modified to cure the issue to the satisfaction of Opining Counsel, Opining Counsel may not be able to render the duly authorized opinion without expressly addressing in the opinion the possible effect of the provision on the validity of the preferred shares in its entirety.

**Diligence Checklist – Corporation – Preferred Stock.** To render the "duly authorized" portion of this opinion, Opining Counsel should take the following actions:

- Assuming that Opining Counsel is also opining on the authorized capital of the corporation and has performed the diligence necessary to render that opinion (see "Corporations-Authorized Capitalization – Preferred Stock" above), Opining Counsel should review the articles of incorporation, as amended (preferably a certified copy obtained from the Department) to determine whether the right to authorize the issuance of preferred shares is reserved to the shareholders.

- Opining Counsel should confirm that the issuance of the preferred shares has been approved by the board of directors of the corporation (or the shareholders, if the articles of incorporation reserve this power to the shareholders) in accordance with the FBCA and the corporation’s articles of incorporation and bylaws.

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4 A number of the actions to be taken that are recommended in this diligence checklist on the duly authorized portion of this opinion technically relate to the “valid issuance” of the shares rather than the “authorization of the shares.” However, because these two concepts are most often considered together by Opining Counsel, the recommended diligence steps described in this “authorization” diligence checklist also include those items that relate to the “valid issuance” opinion.
If any aspects of the issuance of the preferred shares was delegated to a committee of the board of directors (or to a senior executive officer), Opining Counsel should confirm that the authority delegated to the committee (or to a senior executive officer) was permitted under the FBCA and that the committee (or such senior executive officer) properly acted within that authority. In this regard, Section 607.0825 of the FBCA provides that no committee of the board of directors of a corporation shall have the authority to authorize or approve the issuance or sale or contract for the sale of preferred shares, or determine the designation and relative rights, preferences, and limitations of a voting group, except that the board of directors may authorize a committee (or a senior executive officer) to do so within limits specifically prescribed by the board of directors. Opining Counsel should also verify that any actions taken by the committee (or such senior executive officer) with respect to the issuance of the preferred shares were taken in accordance with the FBCA and the corporation’s articles of incorporation and bylaws.5

Opining Counsel should obtain a factual certificate from the Client providing Opining Counsel with copies of the resolutions (or written consents) adopted with respect to the preferred share issuance, certified by an appropriate officer of the Client. Unless Opining Counsel has notice that such facts are inaccurate (or is aware of other facts (red flags) that reasonably call into question the reliability of such facts), Opining Counsel may assume under Florida customary practice that: (i) in authorizing the issuance of the preferred shares, the board of directors (or shareholders, committee or a senior executive officer) acted at a properly called and held meeting (or by written consent, provided that taking such action by written consent is not prohibited by the articles of incorporation or bylaws), and (ii) the authorizing resolution received the requisite votes in accordance with the FBCA, the articles of incorporation and the bylaws.

Opining Counsel should examine the authorizing resolution(s) to confirm that the board of directors (or shareholders and/or committee): (a) approved the issuance of the preferred shares, (b) recited the consideration for which the preferred shares were to be issued, and (c) determined in such resolution that the consideration received or to be received for the preferred shares satisfied statutory requirements (which includes, under the FBCA, a determination that the consideration being paid for the shares is adequate).

Opining Counsel should confirm that the terms of the preferred shares do not conflict with or violate the FBCA, the articles of incorporation of the corporation or applicable case law.

Opining Counsel should determine whether a "put right" has been granted in connection with such preferred shares and, if so, whether an exception should be included in the opinion.

Opining Counsel should examine the authorizing resolution(s) to confirm that the board of directors (or shareholders and/or committee and/or a senior executive officer): (a) approved the issuance of the shares, (b) recited the consideration for which the shares were to be issued, and (c) determined in such resolution that the consideration received or to be received for the shares satisfied statutory requirements (which includes, under the FBCA, a determination that the consideration being paid for the shares is adequate).

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5 See Footnote 3 above.
4. **Validly Issued – Preferred Stock.**

This opinion means that the preferred shares have been issued in accordance with the FBCA, the corporation’s articles of incorporation and bylaws and any resolution of the board of directors or shareholders (or committee or a senior executive officer) of the corporation which authorized such issuance. The "validly issued" opinion should not be rendered by Opining Counsel unless the preferred shares are: (i) included within the authorized capitalization of the corporation, (ii) have been duly authorized, (iii) are fully paid and are nonassessable (see below), and (iv) comply with any applicable statutory preemptive rights or any applicable preemptive rights contained in the corporation’s articles of incorporation.

The corporation may issue the number of preferred shares of each class or series authorized by its articles of incorporation pursuant to Section 607.0603 of the FBCA. A corporation may also issue fractional preferred shares pursuant to Section 607.0604 of the FBCA. Before a corporation issues preferred shares, the board of directors (or shareholders, if the power to issue preferred shares has been reserved to the shareholders in the articles of incorporation) must determine that the consideration received or to be received for the preferred shares to be issued is adequate pursuant to Section 607.0621(3) of the FBCA, which defines broadly the consideration for which shares may be issued. If the preferred shares are to be issued pursuant to a written subscription agreement approved by the board of directors in the authorizing resolutions (which subscription agreement sets forth the terms of the preferred share purchase), the preferred shares will not be deemed to have been validly issued until the consideration for the issuance of such preferred shares has been paid as required by such subscription agreement. Opining Counsel should confirm that payment was received by the corporation by obtaining an officer’s certificate confirming such payment or by some other method reasonably acceptable to Opining Counsel.

Pursuant to Section 607.0625(1) of the FBCA, preferred shares may, but need not be, represented by certificates. However, if preferred shares are represented by a certificate or certificates, then, at a minimum, each preferred share certificate must state on its face the following information:

(a) the name of the corporation and that the corporation is organized under the laws of the State of Florida;

(b) the name of the person to whom the preferred shares are issued; and

(c) the number and class of preferred shares and the designation of the series, if any, the certificate represents.

In addition, as required by Section 607.0625(3) of the FBCA, if the corporation is authorized to issue one or more classes of preferred shares or one or more series within a class of preferred shares, the designations, relative rights, preferences, and limitations applicable to each class and the variations in rights, preferences and limitations determined for each series (and the authority of the board of directors to determine variations for future series) must be summarized on the front or back of each certificate. Alternatively, each certificate may state conspicuously on its front or back that the corporation will furnish the shareholder with a full statement of this information on request and without charge.

Finally, pursuant to Section 607.0625(4)(a) of the FBCA, each preferred share certificate must be signed (either manually or in facsimile) by an officer or officers designated in the bylaws or designated by the board of directors.

An opinion that preferred shares are validly issued subsumes within it an opinion that the certificates issued representing the preferred shares are in proper form (or if uncertificated securities (see below), that such securities have been properly issued). A separate opinion as to whether the certificates
representing the preferred shares being issued are in proper form is sometimes requested and given. See "Corporations – Stock Certificates in Proper Form – Preferred Stock" below.

Pursuant to Section 607.0626 of the FBCA, unless the articles of incorporation or the bylaws provide otherwise, the board of directors of the corporation may authorize the issuance of some or all of the preferred shares without certificates. If the preferred shares are not evidenced by certificates, then, within a reasonable time after the issue or transfer of the preferred shares without certificates, the corporation shall send the shareholder a written statement of the information required by Section 607.0625(2) and (3) of the FBCA (if applicable) and Section 607.0627 of the FBCA regarding restrictions on transfer of preferred shares (if applicable). However, the failure of the corporation to deliver the written statement described in Section 607.0626 of the FBCA after the preferred shares without certificates are issued does not affect an opinion regarding whether the preferred shares were validly issued. It is recommended (but not required) that Opining Counsel obtain a certificate from the Client confirming that the Client has complied with such requirement or an undertaking from the Client that it will in the future comply with the Client’s obligations under this statute.

In rendering the "valid issuance" opinion, Opining Counsel should also consider whether the contemplated issuance of preferred shares violates a preemptive right contained in the FBCA or in the corporation’s articles of incorporation. See "Corporations – No Preemptive Rights – Preferred Stock" below. If such preemptive rights exist, Opining Counsel should make certain that such rights have been properly extended and addressed, or waived, before issuing an opinion that such preferred shares are validly issued.

An opinion that preferred shares have been "validly issued" does not address whether the issuance of such preferred shares violates or breaches any agreement to which the corporation is a party, such as a shareholders’ agreement. In addition, the "validly issued" opinion does not address whether any fiduciary duty has been violated in connection with the issuance of the preferred shares. However, if Opining Counsel is aware that a particular issuance of preferred shares violates a shareholders’ agreement, Opining Counsel should consider advising the Opinion Recipient of such fact so as to avoid a potential claim that the opinion is misleading.

### Diligence Checklist – Corporation – Preferred Stock

To render the "validly issued" portion of this opinion, Opining Counsel should take the following actions:

- Confirm that the preferred shares to be issued are duly authorized (by following the steps recommended above regarding opinions on authorization).
- Obtain a copy of the corporation’s articles of incorporation, as amended, (preferably a certified copy obtained from the Department), and review such articles and bylaws to verify compliance with any specified minimum amount or form of consideration.
- Review the corporation's bylaws (a copy certified as true and correct by an officer) to verify compliance with any specified minimum amount or form of consideration.
- Obtain all subscription agreements, if any, whether pre-incorporation or post-incorporation, if applicable, referred to in the authorizing resolutions, confirming the consideration to be received by the corporation.
• Review resolutions of the board of directors, committee and/or a senior executive officer (a copy certified as true and correct by an officer) confirming the consideration to be received for the issuance of the shares and the adequacy thereof under the FBCA and the articles of incorporation and bylaws.

• Confirm that the preferred share certificates are in proper form or, if the preferred shares are to be uncertificated, that the statutory requirements with respect to uncertificated securities have been (or are being) followed.

5. **Fully Paid and Nonassessable – Preferred Stock.**

This opinion means that the corporation has received the required consideration (except in the case of stock dividends, where no consideration is required) for the preferred shares being issued and that the corporation cannot call for any additional consideration to be paid by the holder of such shares.

(a) **Fully Paid.** This opinion means that the consideration, as specified in the authorizing resolutions or in a subscription agreement, has been received in full and the requirements, if any, in the corporation’s articles of incorporation and bylaws, have been satisfied. Pursuant to Section 607.0621(2) of the FBCA, such consideration may consist of any tangible or intangible property or benefit to the corporation, including cash, promissory notes, services performed, promises to perform services evidenced by a written contract, or other securities of the corporation. Opining Counsel may rely on a certificate from the Client regarding the receipt of such consideration unless Opining Counsel is aware of facts that would make such reliance unreasonable or unreliable under the circumstances.

The determination by the corporation’s board of directors (or shareholders, if such power is reserved to the shareholders) is conclusive insofar as the adequacy of consideration for the issuance of the preferred shares, and this opinion is based on an unstated assumption regarding compliance by the directors with their fiduciary obligations in determining the adequacy of consideration. Although Florida eliminated par value in 1990 as it relates to share issuances, some companies continue to use par value in order to minimize out-of-state taxes or fees. Unless the corporation’s articles of incorporation provide otherwise, preferred shares with par value may be issued for less than their stated value. Further, under Section 607.0623(1) of the FBCA, preferred shares of a corporation’s stock issued as a dividend may be issued without consideration unless the articles of incorporation otherwise provide.

(b) **Nonassessable.** Nonassessable means that, once the corporation has received the specified consideration, it cannot call for any additional consideration. Under Section 607.0621(4) of the FBCA, consideration in the form of a promise to pay money or perform services is deemed received by the corporation at the time of the making of the promise, unless the agreement otherwise provides.

Since this opinion is rendered under the FBCA, it does not address whether preferred shares might be assessable under another statute or under an agreement. This is important because, for example, in contrast to corporations organized under the FBCA, shares of a Florida banking corporation organized under Chapter 658 of the Florida Statutes must have a specified par value and shares cannot be issued at a price less than par value.

Similarly, this opinion does not mean that shareholders will not be subject to liability for receipt of an unlawful dividend or, as to a controlling shareholder, if the corporate veil is pierced.
Diligence Checklist – Corporation – Preferred Stock. To render the "fully paid and non-assessable" portion of this opinion, Opining Counsel should take the following actions:

- Confirm that the preferred shares are duly authorized and validly issued (by following the steps recommended above regarding opinions on authorization and opinions on valid issuance).
- Obtain an officer’s certificate confirming receipt of the consideration required by the authorizing resolutions and/or confirming that no consideration for the preferred shares remains unpaid.

E. Corporations – No Preemptive Rights – Preferred Stock

Recommended opinion:

The issuance of the [preferred shares] will not give rise to any preemptive rights under the Florida Business Corporation Act or the Client’s Articles of Incorporation.

This opinion means that existing shareholders of a corporation do not have a right under the FBCA or the corporation’s articles of incorporation to maintain their percentage ownership of the corporation by buying a proportional number of shares of any future issuance of preferred shares. Existing shareholders with preemptive rights have the right, but not the obligation, to purchase as many shares of the newly issued preferred stock as are necessary to maintain their proportional ownership interest in the corporation before the corporation sells the preferred shares to persons outside the shareholder group that holds the preemptive rights.

Prior to 1976, Florida’s general business corporation statute mandated preemptive rights unless the articles of incorporation provided otherwise. For corporations formed on or after January 1, 1976, no statutory preemptive rights exist unless they are expressly provided for in the articles of incorporation. Thus, in 1976, Florida changed from a statutory "opt-out" state to a statutory "opt-in" state. The opt-in approach recognizes that preemptive rights may be inconvenient and severely impair a corporation’s ability to raise capital through future equity issuances. Therefore, Florida corporations formed on or after January 1, 1976 do not have statutory preemptive rights unless specifically stated in their articles of incorporation, but Florida corporations formed prior to January 1, 1976 continue to have preemptive rights unless their articles of incorporation expressly provide that the corporation’s shareholders do not have preemptive rights.

Regardless of whether a corporation grants or denies preemptive rights in its articles of incorporation, a corporation may, by contract or otherwise, grant a shareholder the equivalent of preemptive rights or some other right to purchase preferred shares from the corporation. The recommended form of opinion regarding preemptive rights does not cover contractual preemptive rights. However, although such confirmation is discouraged, a factual confirmation that Opining Counsel is not aware of any contractual preemptive rights that have been granted to other shareholders of the corporation is sometimes requested and given. See "No Violation and No Breach or Default – No Breach of or Default under Agreements" for a discussion of opinions regarding contractual preemptive rights. Further, if Opining Counsel is aware that a particular issuance of preferred shares violates a contractual preemptive right contained in a particular agreement under circumstances where Opining Counsel is not rendering an opinion regarding "no breach of or default under agreements" with respect to that particular agreement, Opining Counsel should consider advising the Opinion Recipient of such fact so as to avoid a potential claim that the opinion is misleading.
Diligence Checklist – Corporation Incorporated On or After January 1, 1976.

- When issuing this opinion for a corporation formed on or after January 1, 1976, Opining Counsel should review the corporation’s articles of incorporation, as amended (preferably a certified copy obtained from the Department), to ascertain if such articles of incorporation grant preemptive rights to shareholders.

- If the articles of incorporation grant preemptive rights to shareholders, Opining Counsel should ascertain whether the preferred share issuance in question triggers the granting of preemptive rights as described in the articles of incorporation.

- If the preferred share issuance in question triggers the grant of preemptive rights under the articles of incorporation, Opining Counsel should determine if shareholders have waived their preemptive rights or whether the shareholders holding preemptive rights have already been properly given the opportunity to exercise their preemptive rights. Pursuant to Section 607.0630(2)(b) of the FBCA, "[a] shareholder may waive his or her preemptive right," and a waiver "evidenced by a writing is irrevocable even though it is not supported by consideration." If all shareholders with preemptive rights have not waived them, or if such preemptive rights have not been provided in accordance with the FBCA, this opinion should not be rendered.

Diligence Checklist – Corporation Incorporated Prior to 1976.

- When issuing this opinion for a corporation formed prior to 1976, Opining Counsel should review the corporation’s articles of incorporation to determine if they expressly deny preemptive rights to shareholders. If such articles of incorporation do not specifically provide that they deny preemptive rights, Opining Counsel should determine if shareholders have waived their preemptive rights. Because current Section 607.0630(2)(b) of the FBCA, which statutorily provides for the waiver of preemptive rights, does not apply to corporations incorporated prior to January 1, 1976, a waiver must be noted on the shareholders’ stock certificates to be effective. This opinion should not be rendered unless all shareholders have expressly waived their preemptive rights.

F. Corporations – Stock Certificates in Proper Form – Preferred Stock

Recommended opinion:

The stock certificate(s) representing the [preferred shares] comply in all material respects with the Florida Business Corporation Act and the Client’s Articles of Incorporation and bylaws.

This opinion means that, as of the date of the opinion, each preferred stock certificate: (i) includes on its face the name of the issuing corporation, a statement that the corporation is organized under the laws of the State of Florida, the name of a person designated as the person to whom the preferred shares are issued, the number and class of preferred shares the preferred stock certificate represents and the designation of the series, if any, the stock certificate represents, and (ii) is signed, either manually or by facsimile, by an officer or officers designated in the bylaws or designated in resolutions of the board (whether or not such person is still an officer when the certificate is issued) or by a person or persons who purport to be an officer or officers of the corporation. In addition, this opinion means that, as of the date of the opinion, each stock certificate either: (i) includes on its face or back language relating to: (a) any designations, relative rights,
preferences, and limitations applicable to each class, and (b) any variations in rights, preferences, and limitations for each series (and the authority of the board to determine variations for future series), or (ii) if any such designations, relative rights, preferences, and/or limitations are applicable and/or any such variations in rights, preferences and/or limitations are applicable, states conspicuously on its face or back that the corporation will furnish the shareholder with a full statement of the information required by Section 607.0625(3) of the FBCA upon request and without charge. Although a stock certificate may bear an actual or facsimile corporate seal, this opinion means that the preferred stock certificate bears a corporate seal only if the corporation’s articles of incorporation and/or bylaws requires that the corporation’s stock certificates bear a corporate seal.

This opinion does not address whether the preferred stock certificates contain legends that may be required by contract or may be required or advisable under applicable federal or state securities laws (such as customary private placement legends). If the Transaction Documents require the preferred stock certificates to contain legends and Opining Counsel is asked for an opinion that the preferred stock certificates also comply with the specific requirements as set forth in the Transaction Documents, Opining Counsel may give that opinion if such information is correct. However, any such coverage should be expressly set forth in the opinion letter.

F. Outstanding Preferred Equity Securities.

Sometimes, an Opinion Recipient will request an opinion that all outstanding preferred equity securities (and, in some cases, all outstanding common equity securities) that have previously been issued by the corporation were duly authorized and that all such securities were validly issued and are fully paid and nonassessable. The Committees believe that such an opinion should be resisted because such an opinion would require Opining Counsel to look at each historic issuance of preferred shares (and possibly common shares) by the corporation to determine if each such issuance was proper at the time of each such issuance. As a result, except in very limited circumstances, such as in connection with a public sale of such securities, the Committees believe that the value of this opinion will almost never justify the cost of providing it. See "Introductory Matters – Reasonableness; Inappropriate Subjects for Opinions."
**NEW SECTION OF THE REPORT – OPINIONS WITH RESPECT TO ISSUANCES OF MEMBERSHIP INTERESTS OF A FLORIDA LIMITED LIABILITY COMPANY**

In Transactions in which a Florida limited liability company is issuing membership interests in a Florida limited liability company, Opining Counsel may be asked for opinions regarding the Client’s membership interests and/or the enforceability of the company’s operating agreement. This First Supplement addresses opinions regarding issuances of membership interests by Florida limited liability companies and opinions as to the enforceability of a Florida limited liability company’s operating agreement. It is largely based on the guidance contained in two TriBar Reports: (i) the "Supplemental TriBar LLC Opinion Report: Opinions on LLC Membership Interests" issued in 2011 (the "TriBar LLC Membership Interest Report"), which is available at 66 The Business Lawyer 1065, and (ii) the report entitled: "Third Party Closing Opinions: Limited Liability Companies" (the "2006 TriBar LLC Report"), which was issued in 2006 and is available at 61 The Business Lawyer 679.

The TriBar Membership Interest Report and the 2006 TriBar LLC Report address opinions regarding the issuance of LLC membership interests by Delaware LLCs, including the enforceability of LLC operating agreements. Although these reports do not necessarily reflect customary practice in Florida, they may provide helpful guidance to Florida lawyers who are called upon to deliver opinions regarding the matters covered by this section.

**OPINIONS WITH RESPECT TO ISSUANCES OF MEMBERSHIP INTERESTS OF A FLORIDA LIMITED LIABILITY COMPANY**

A. Limited Liability Company – Issuance of Membership Interests

The following opinions relate to the validity of the particular issuances of membership interests (the "LLC Interests") in a Florida limited liability company (the "LLC") that are contemplated by the Transaction Documents.

**Recommended opinion:**

|The [LLC Interests] are validly issued.|

This opinion means that the LLC Interests have been issued in accordance with the Florida Revised Limited Liability Company Act ("FRLLCA"), the LLC’s articles of organization, operating agreement and any written consent or resolution of the manager(s) and/or members of the LLC that may be required by such articles of organization or operating agreement. The “validly issued” opinion should not be rendered by Opining Counsel unless the LLC Interests: (i) have been duly authorized in the articles of organization or operating agreement of the LLC, (ii) comply with any applicable terms of the articles of organization and operating agreement of the LLC, and (iii) comply with FRLLCA.

An LLC may issue LLC Interests as set forth in Section 605.0401 of FRLLCA. The "validly issued" opinion confirms that the issuance of the LLC Interests complied with any conditions to such issuance in the operating agreement or resolution authorizing such issuance, if any, including the receipt of the required kind and amount of consideration for the LLC Interests. Opining counsel may rely upon an express assumption or upon a certificate of an appropriate officer or representative of the LLC that the LLC has received the required consideration.
Unlike corporations, typically an LLC operating agreement (or an amendment) does not create "authorized" LLC Interests for future issuance, but rather creates the particular LLC Interests that are to be issued in the Transaction. As such, if LLC Interests were not validly issued to a transferor prior to the transfer of such LLC Interests to a transferee, then Opining Counsel may render the "validly issued" opinion with respect to such LLC Interests if all necessary limited liability company action has been taken by the LLC and its members to ratify the valid issuance of such LLC Interests to the transferor or the managers are given the right in the operating agreement to create and approve the issuance of additional LLC interests without consent of the members.

In addition, a person may be a member of the LLC without making a financial contribution to the LLC. Section 605.0401(4) of FRLLCA states that "[a] person may become a member without acquiring a transferable interest and without making or being obligated to make a contribution to the limited liability company."

Pursuant to Section 605.0502(4) of FRLLCA, an LLC Interest may, but need not be, evidenced by a certificate and, subject to such section, the LLC Interest that is evidenced by a certificate may be transferred by the transfer of the certificate. An opinion that LLC Interests are validly issued subsumes an opinion that the certificates issued representing the LLC Interests are in proper form (or if uncertificated securities (see below), that such securities have been properly issued).

An opinion that LLC Interests have been "validly issued" does not address (i) whether their issuance violates or breaches any agreement to which the LLC is a party (other than the operating agreement), (ii) the enforceability of the terms of the operating agreement of the issuing LLC or the enforceability of the terms of the LLC Interests, (iii) compliance with securities or antitrust laws, or (iv) the status of the LLC Interests as general intangibles or securities under the Uniform Commercial Code, even if the operating agreement of the LLC states that the LLC Interests are securities under Article 8 of the Uniform Commercial Code. In addition, the "validly issued" opinion does not address whether any fiduciary duty has been violated in connection with the issuance of the LLC Interests. However, if Opining Counsel is aware that a particular issuance of LLC Interests violates any agreement (other than the operating agreement) in which a member is a party, Opining Counsel should consider advising the Opinion Recipient of such fact so as to avoid a potential claim that the opinion is misleading.

Since Series LLCs are not authorized under FRLLCA, no opinion should be rendered on a Florida LLC that contemplates the creation of one or more series of LLCs under the umbrella of a single LLC.

**Diligence Checklist – Limited Liability Company.** To render the "validly issued" portion of this opinion, Opining Counsel should take the following actions:

- Confirm that the LLC Interests to be issued are duly authorized (see discussion above).
- Obtain a copy of the LLC’s articles of organization, as amended, (preferably a certified copy obtained from the Department) and review them to confirm compliance with any specified minimum amount or form of consideration.
- Review the LLC’s operating agreement (a copy certified as true and correct by a manager, member or an officer) to confirm compliance with any specified minimum amount or form of consideration.
- Review compliance with Sections 605.0401-605.0402 of FRLLCA.
• Obtain all subscription agreements, if any, whether pre-formation or post-formation, if applicable, referred to in the authorizing resolutions, confirming the consideration to be received by the LLC.

• Review resolutions of the manager(s) or member(s) (a copy of same certified as true and correct by a manager, member or officer) confirming that they have taken the action(s) required by FRLCA, the LLC’s articles of organization and the LLC’s operating agreement, and that the consideration to be received for the issuance of the LLC Interests satisfies the requirements of FRLCA and the articles of organization and the operating agreement.

• Include an express assumption in the opinion letter or obtain a certificate from an appropriate officer or representative of the LLC that any required consideration for the issuance of the LLC Interests has been received by the LLC.

B. Duly Authorized Opinion Not Necessary. It is customary for opinions rendered in connection with the issuance of corporate stock to state that the shares have been "duly authorized." Opinions regarding the issuance of LLC Interests sometimes state that the LLC Interests have been "duly authorized." However, FLLCA does not provide for authorized capital or specify any requirement for authorized capital for an LLC. In addition, unlike the articles of incorporation of a corporation, operating agreements do not typically create a "pool of authorized LLC Interests" from which the LLC Interests may be issued from time to time in the future. Since the issues that are required to be addressed in providing the "validly issued" opinion are the same issues that would need to be addressed in providing a "duly authorized" opinion, it is the view of the Committees that the "duly authorized" opinion does not add anything of value if the validly issued opinion already is being rendered with the respect to the LLC Interests.

C. Admission of Purchasers of LLC Interests as Members of the LLC.

Recommended opinion:

Each of the [Purchasers] has been duly admitted to the LLC as a member of the LLC.

Unless otherwise permitted by the articles of organization or the operating agreement of the LLC, only members are permitted to exercise membership rights in the LLC. Section 605.0401(3)(a) of FRLCA provides that, after formation of an LLC, a person becomes a member of the LLC as provided in the operating agreement or as otherwise provided in such section. Section 605.0502(1(c) of FRLCA provides that a transfer of an LLC Interest does not entitle the transferee to participate in the management or conduct of the LLC’s activities or affairs. Accordingly, any purchaser of an LLC Interest is required to comply with the operating agreement for such purchaser to become a "member" of the LLC and have the right to participate in the management and conduct of the LLC’s activities and affairs.

Section 605.0102(40) of FRLCA defines a "member" as a person who: (i) is a member of an LLC under Section 605.401 of FRLCA or was a member in a LLC when the LLC became subject to FRLCA and (ii) has not dissociated from the LLC under Section 605.602 of FRLCA. Person is defined very broadly under Section 605.0102(48) of FRLCA, and care should be taken to review the operating agreement to determine whether it contains any limitations on who may become a member of the LLC under the operating agreement.

An opinion that the purchaser of an LLC Interest has been "duly admitted" as a member of the LLC means that the purchaser (A) has been admitted as a "member" of the LLC in compliance with the requirements, if any, of (i) FRLCA, (ii) the LLC’s operating agreement, (iii) the LLC's articles of
organization, and (iv) any subscription agreement applicable to the issuance of such LLC Interest, if any, and (B) has not dissociated from the LLC under or pursuant to the terms of: (i) Section 605.602 of FRLLC, (ii) the LLC's operating agreement, or (iii) the LLC's articles of organization.

Opining Counsel may rely on an express assumption or a certificate of an appropriate officer or representative of the LLC that the transferee of an LLC Interest has satisfied each condition to admission as a "member" of the LLC that is set forth in (i) FRLLC, (ii) the LLC's operating agreement, (iii) the LLC's articles of organization, and (iv) any subscription agreement applicable to the issuance of the LLC Interest.

An opinion that the purchaser of an LLC Interest has been duly admitted as a member of the LLC subsumes the opinion that such LLC Interests have been validly issued to such transferee or that all necessary limited liability company action has been taken by the LLC and its members to ratify the valid issuance of the LLC Interest to the transferee. We note that Section 605.0502(6) of FRLLC provides that a transfer of an LLC Interest in violation of a restriction on transfer contained in the operating agreement is ineffective as to a person who has knowledge or notice of the restriction at the time of transfer.

An opinion that a purchaser or transferee of an LLC Interest is a member of the LLC does not address (i) whether the LLC or its members can enforce the member’s obligations under the LLC’s operating agreement, or (ii) if the member is a legal entity rather than an individual, that the member has the power to be a member under the law under which it was formed.

**Diligence Checklist – Limited Liability Company.** To render the "duly admitted to the LLC as a member" portion of this opinion, Opining Counsel should take the following actions:

- Confirm that the LLC Interests to be issued are validly issued (see discussion above).
- Obtain a copy of the LLC’s articles of organization, as amended, (preferably a certified copy obtained from the Department) and review them to confirm compliance with any specified conditions to admission as a member of the LLC, if any.
- Review the LLC’s operating agreement (a copy certified as true and correct by a manager, member or an officer) to confirm compliance with any specified conditions on admission as a member of the LLC.
- If the Purchaser is a transferee of an LLC Interest, review Section 605.0401 of FRLLC to confirm that such new transferee has complied with such statute.
- Review Section 605.0602 of FRLLC to confirm that such Purchaser has not dissociated from the LLC and, if the Purchaser is a transferee of an LLC interest that the Transferor has not dissociated from the LLC.
- Obtain all subscription agreements, if any, whether pre-formation or post-formation, if applicable, referred to in the authorizing resolutions, to confirm compliance with any specified conditions on admission as a member of the LLC.
- Review resolutions of the manager(s) or member(s) (a copy certified as true and correct by a manager, member or officer) to confirm compliance with any specified conditions to the issuance or transfer, as the case may be, of an LLC Interest and admission as a member of the LLC.
D. Obligations of Purchaser of LLC Interest for Payments and Contributions.

Recommended opinion:

Under the Florida Revised Limited Liability Company Act, as amended ("FRLLCA"), purchasers of LLC Interests have no obligation to make further payments for their purchase of LLC Interests or contributions to the LLC solely by reason of their ownership of LLC Interests or their status as members of the LLC, except as provided in [the Subscription Agreement or the Operating Agreement] and [except for their obligation to repay any funds wrongfully distributed to them as set forth in Section 605.0406 of FRLLCA].

When LLC Interests are initially issued, purchasers often request an opinion on their obligation to make payments and contributions to the LLC in connection with their purchase and ownership of the LLC Interests. Some purchasers request that the opinion use the "fully paid and nonassessable" terminology that is commonly used in opinions on the issuance of capital stock by a corporation.

Often the subscription agreement executed in connection with the issuance of the LLC Interests or the operating agreement of the LLC require members of the LLC to make additional capital contributions and to make additional payments to the LLC under specified circumstances. Including the reference to these two agreements as exceptions to this opinion is based upon the understanding that Opining Counsel should not be required to provide an opinion regarding factual matters that can be readily determined by a review of those agreements by the opinion recipient or its counsel. Accordingly, this opinion requires Opining Counsel to determine whether under the law covered by the opinion (and apart from the operating agreement and the subscription agreement), purchasers of LLC Interests will be subject to any obligation following the closing to make payments for their LLC Interests or contributions solely by reason of their ownership of LLC Interests. The purchaser remains responsible to understand its obligations to make payments and contributions under the operating agreement and the subscription agreement, if any. Numerous exceptions and assumptions to the opinion would typically be required by the Opining Counsel if this opinion did not exclude the operating agreement and the subscription agreement.

Opinion Recipients sometimes ask Opining Counsel to identify any sections of the operating agreement and the subscription agreement that require payments or contributions after the closing. If willing to address this request, Opining Counsel would delete the exception for the two agreements from the opinion and substitute references to the sections of the operating agreement and the subscription agreement that impose obligations to make further payments or contributions (such as, "except as provided in Sections ____ of the Operating Agreement and in Section ____ of the Subscription Agreement").

Opining Counsel may address the possibility that a member may have agreed, apart from the subscription agreement and the operating agreement, to be liable personally to make payments and
contributions to or for the benefit of the LLC by including an express assumption in the opinion or relying upon a certificate from an appropriate representative of the LLC.

The Committees suggest that the form of opinion set forth above be used rather than an opinion worded like an opinion on corporate stock that the LLC Interests are "fully paid and nonassessable." Since these terms are not defined in FRLCA, and their meaning is not generally understood in the context of the issuance of LLC Interests, the Committees believe that the use of these terms is not appropriate with respect to the issuance of LLC Interests.

However, if the Opinion Recipient inappropriately insists that Opining Counsel use the "fully paid and nonassessable" terminology, the Committees believe that "fully paid and nonassessable" should be understood to mean that "purchasers of LLC Interests have no obligation to make further payments for their purchase of LLC Interests or contributions to the LLC solely by reason of their ownership of LLC Interests or their status as members of the LLC, except for their obligation to repay any funds wrongfully distributed to them as set forth in Section 605.0406 of FRLCA."

If the operating agreement or the subscription agreement require additional payments or contributions by a purchaser of an LLC Interest after the closing, or if those documents are not being reviewed by Opining Counsel, then such "fully paid and nonassessable" terminology should be limited by expressly excluding the terms of the operating agreement and subscription agreement, if any, from the opinion (i.e. "and except as may be required by the Subscription Agreement and the Operating Agreement").

**Diligence Checklist – Limited Liability Company.** To render the "no obligation to make payments or contributions" portion of this opinion, Opining Counsel should take the following actions:

- Confirm that under FRLCA, the purchaser has no obligation to make additional payments or contributions to or for the benefit of the LLC.

- Consider excluding from the opinion the subscription agreement or the operating agreement of the LLC.

- Consider including an express assumption in the opinion letter or obtain a certificate from an appropriate officer or representative of the LLC that the purchaser has not agreed to make additional payments or contributions to or for the benefit of the LLC, except as forth in the subscription agreement or the operating agreement of the LLC.
E. Liability of Purchaser of LLC Interest to Third Parties.

Recommended opinion:

Under the Florida Revised Limited Liability Company Act, as amended ("FRLLCA"), purchasers of LLC Interests have no obligation to make further payments for their purchase of LLC Interests or contributions to the LLC solely by reason of their ownership of LLC Interests or their status as members of the LLC and have no personal liability for the debts, obligations and liabilities of the LLC, whether arising in contract, tort or otherwise, solely by reason of being or acting as a member or manager of the LLC, except as provided in [the Subscription Agreement or the Operating Agreement and except for their obligation to repay any funds wrongfully distributed to them as set forth in Section 605.0406 of FRLLCA and [provided that such member does not engage in conduct that may impose personal liability upon such member as set forth in Section 605.04093 of FRLLCA].

When LLC Interests are initially issued, purchasers may request a supplement to the opinion described in subsection (D) above on their obligation to make payments and contributions to the LLC in connection with their purchase and ownership of the LLC Interests that, as members of the LLC, they will have no personal liability to third parties for debts, obligations and liabilities of the LLC.

This opinion addresses a subject that is not typically addressed in opinions rendered in connection with the issuance of capital stock by corporations. The Committees are hopeful that this supplemental opinion will not be requested in the future as practitioners become more familiar with FRLLCA and the appropriate nomenclature for dealing with opinions on LLC Interests.

Section 605.0304 of FRLLCA provides that a member or manager of a LLC is not personally liable, directly or indirectly, by way of contribution or otherwise, for a debt, obligation or other liability of the LLC solely by reason of being or acting as a member or a manager, except as set forth in Section 605.04043 of FRLLCA which provides certain exceptions to the limitation of liability for managers (in a manager-managed LLC) and members (in a member-managed LLC) in the event that they engage in certain egregious conduct.

An opinion that addresses the personal liability of a purchaser of an LLC Interest for the debts, obligations and liabilities of the LLC that is limited to liability "solely by reason of being or acting as a member or manager" does not address: (i) a purchaser’s status as a controlling person under the securities laws, the environmental laws or other applicable laws, (ii) a purchaser’s execution of any guaranty agreement, indemnity agreement or other agreement in his, her or its personal capacity and not on behalf of the LLC, such as a financial guaranty and/or an environmental indemnification agreement in connection with a loan provided to the LLC, (iii) a purchaser’s service in another capacity for the LLC, for example, as a manager of a manager-managed LLC or as a member of a member-managed LLC or as an officer of the LLC, (iv) a purchaser’s own tortious or wrongful conduct or (v) application of "piercing the veil legal theory," alter ego, or similar equitable doctrines with respect to the purchaser and the LLC.

The Committees believe that the foregoing opinion, by being limited to "solely by reason of being or acting as a member or manager;" automatically incorporates and includes each of the exclusions listed in the prior paragraph. However, Opining Counsel may wish to include those exceptions in Opining Counsel's opinion letter using the following paragraph:
The phrase "solely by reason of being or acting as a member or manager" in opinion paragraph ____ is taken from Section 605.0304(1) of FRLCA and, together with the reference in the opinion to FRLCA, has been included to make clear that such opinion does not cover personal liability that a purchaser may have that is not attributable solely to the purchaser’s status as a member or manager, such as the personal liability a purchaser may have as a result of: (i) a purchaser’s status as a controlling person under the securities laws, the environmental laws or other applicable laws, (ii) a purchaser’s execution of any guaranty agreement, indemnity agreement or other agreement in his, her or its personal capacity and not on behalf of the LLC, such as a financial guaranty and/or an environmental indemnification agreement in connection with a loan provided to the LLC, (iii) a purchaser’s service in another capacity for the LLC, for example, as a manager of a manager-managed LLC or as a member of a member-managed LLC or as an officer of the LLC, (iv) a purchaser’s own tortious or wrongful conduct or (v) application of “piercing the veil legal theory,” alter ego, or similar equitable doctrines with respect to the purchaser and the LLC.

Diligence Checklist – Limited Liability Company. To render the "no personal liability of member, solely by reason of being or acting as a member or manager" portion of this opinion, Opining Counsel should take the following actions:

- Consider excluding from the opinion the subscription agreement, if any, and the LLC’s operating agreement.
- Consider including the recommended exception set forth above in the opinion letter.
- Consider including an express assumption in the opinion letter that, if the purchaser is acting as a manager in a manager-managed LLC or a member in a member-managed LLC, the purchaser does not engage in any conduct that may impose personal liability upon a manager or member as described in Section 605.04093 of FRLCA.
- Include an express assumption in the opinion letter or obtain a certificate from an appropriate officer or representative of the LLC that the purchaser has not agreed to be personally liable for any debts, obligations or liabilities of the LLC, except as forth in the subscription agreement, if any, and the operating agreement of the LLC.

F. Enforceability of an Operating Agreement

An opinion that an operating agreement is valid, binding and enforceable may be requested when the Opinion Recipient is acquiring a membership interest in a Florida LLC or when investment banking firms, lenders or rating agencies in structured finance transactions are concerned about the enforceability of covenants, restrictions and internal governance provisions in an operating agreement. This opinion is often more difficult to render than the entity status, entity power, and authorization of the transaction opinions because it requires Opining Counsel to consider issues of state contract law that are not necessarily straightforward and because it covers all the provisions in the operating agreement rather than simply those applicable to status, power and approval. Whenever Opining Counsel renders such a remedies opinion, Opining Counsel must satisfy itself that the Client has taken the steps required to enter into the agreement or Opining Counsel must assume expressly in the opinion that it took those steps. Often, these opinions are provided along with this opinion.

"The Remedies Opinion" section of the Report discusses generally the delivery of a "remedies" opinion, and the discussion in that section also apply to opinions on the enforceability of an operating agreement.
agreement. As indicated in that section, the opinion addresses the legal effect of the contractual undertakings of Opining Counsel’s Client, subject to various assumptions and qualifications, express and implied.

When giving a remedies opinion on an LLC’s operating agreement, Opining Counsel will need to review an executed copy of that agreement (and this particular opinion should not be rendered, even in the context of a single-member LLC, unless the LLC has a written operating agreement). Further, it is best practice for Opining Counsel to require that all of the LLC’s members have executed the operating agreement.

Additionally, if the LLC is manager-managed, it is best practice to have all of the managers execute the operating agreement, even though under Section 605.0106(4) of FRLLCA, the managers of an LLC are bound to the operating agreement even if they don’t sign the agreement. When a member or manager is a legal entity and not a natural person, Opining Counsel should confirm that the entity has authorized the execution and delivery of the operating agreement and has authorized the persons signing the operating agreement to execute the operating agreement on the entity's behalf.

The recommended form of the opinion is as follows:

The Operating Agreement is a valid and binding agreement, enforceable against the LLC members [and managers] in accordance with its terms.

In some cases, the Opinion Recipient may request that the opinion also provide that the LLC is bound by the operating agreement. Under Section 605.0106(1) of FRLLCA, a Florida limited liability company is bound by and may enforce the operating agreement, regardless of whether the LLC has itself manifested assent to the operating agreement. As such, this opinion is believed to be unnecessary.

A remedies opinion regarding an operating agreement means that (i) the rights and obligations of the LLC and its members and managers (or other equity holders or decision makers) set forth in the operating agreement, (ii) the provisions specifying a remedy in the event of a breach, and (iii) the provisions relating to governance and administration, will be given legal effect, subject to the qualifications, exclusions and assumptions, express or implied. Thus, for provisions in an operating agreement that obligate members or managers to perform an affirmative act, such as making a capital contribution upon the occurrence of a specified event, but that do not specify a remedy for a failure to perform, the opinion is understood to mean that in the event of a breach, a court applying applicable law either will require the member to perform that act (subject to qualifications, exclusions and assumptions, express or implied) or will grant money damages or some other remedy. For a provision that does specify a remedy, such as a reduction of a member’s interest in the LLC if the member fails to make a contribution, the opinion is understood to mean that a court (again subject to qualifications, exclusions and assumptions, express or implied) will render effect to the specified remedy as written.

Operating agreements often contain detailed provisions on how the LLC is to be governed, how the operating agreement is to be amended, and how disputes, including interpretive questions, are to be resolved. The opinion on these provisions means that a court will require the LLC and its members and managers to abide by their terms as written (again subject to qualifications, exclusions and assumptions, express or implied).

In a structured finance transaction, the operating agreement will often include provisions that require a lender’s or an independent manager’s consent to dissolve, amend the operating agreement or engage in material transactions, such as a merger; and a remedies opinion on an operating agreement
provides comfort that these provisions are enforceable against the members. It may also include one or more separateness covenants that are necessary to support a nonconsolidation opinion. As a result, Opining Counsel will need to consider whether to add qualifications to the remedies opinion with respect to the enforceability of these types of provisions. Because Florida has little case law on the enforceability of these types of provisions and Delaware has considerably more case law on this topic, in many cases in structured finance transactions the Opinion Recipient will require the use of a Delaware LLC.

Another problematic area, which may be open to question under Section 605.0105 of FRLLCA, relates to provisions that seek to limit or restrict fiduciary duties. As a result, Opining Counsel may wish to add a qualification to its remedies opinion regarding this subject.

**Diligence Checklist – Enforceability of an Operating Agreement.** To render the "enforceability" opinion on an operating agreement, Opining Counsel should take the following actions:

- Obtain a fully executed copy of the LLC’s operating agreement, preferably signed by all of the LLC’s members (and, if manager-managed, also by all of the managers).

- Confirm that the operating agreement has been approved by all members (and, if manager-managed, by all managers) that are entities, and that the persons who have executed the operating agreement were authorized to do so.

- Consider adding qualifications regarding various provisions in the operating agreement that may not be enforceable under Florida law or as to which Florida law is unclear because there is no case law in Florida supporting the enforceability of such provisions.
ADDITIONS TO THE REPORT – EXCLUDED LAWS

In Section M of the Report (pages 30-33), a list of "Excluded Laws" is provided. These excluded laws are understood to be excluded from coverage in the opinions provided in the opinion letter under customary practice, although the Report recommends that these excluded laws be expressly set forth in the opinion letter as being expressly excluded from coverage in the opinion letter. Any other laws sought to be excluded must be expressly identified as being excluded from the opinion letter.

In addition to the excluded laws already discussed in the Report, consideration should be given to including in the Opining Counsel's opinion letter the following additional excluded laws:

A. The Dodd-Frank Wall Street Reform and Consumer Protection Act.

The Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd Frank Act") contains many laws that potentially affect financial institutions and other types of entities. In some cases, Opining Counsel may be familiar with those laws and how they may affect Opining Counsel’s client, and therefore does not need to exclude these laws from the scope of its opinion letter. However, in many situations, because of the complexities of the Dodd-Frank Act, Opining Counsel may wish to exclude the scope of the Dodd-Frank Act from the opinion letter. In such circumstances, the following additional excluded laws may be added to the opinion letter:

… any law, rule, or regulation relating to the Dodd-Frank Wall Street Reform and Consumer Protection Act, as amended (including any and all requests, guidelines, or directives thereunder or issued in connection therewith).

B. Laws, Rules, and Regulations Affecting the Client’s Business

The Report states (at pages 30-32) that "Applicable Laws" includes regulatory laws that affect the Client and its business, unless expressly excluded in the opinion letter. In many cases, Opining Counsel has little or no knowledge about the business activities of the Client. In such cases, Opining Counsel may wish to consider including the following qualification in the opinion letter:

… any law, rule or regulation applicable to any of the Client or the Transaction Documents solely because such law, rule or regulation is part of a regulatory regime applicable to any party to any of the Transaction Documents or any of its affiliates due to the specific assets owned, leased or operated by, or the business of, or the goods or services produced by, such party or such affiliate;

This qualification puts the Opinion Recipient on notice that Opining Counsel is not familiar with the business of the Client and allows the Opinion Recipient to request opinion coverage of such regulatory laws that affect the Client's business if relevant to the Transaction or the Transaction Documents.

C. EU Bail-In Rules

On January 1, 2016, the European Union Bank Recovery and Resolution Directive (the "BRRD") became effective. The BRRD establishes a framework for the recovery and resolution of European credit institutions and investment firms and has been adopted into the national law of most member states of the European Economic Area ("EEA"), which includes the following countries - Austria, Belgium, Bulgaria, Croatia, Republic of Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Netherlands, Norway, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden and, at least for the time being, the
United Kingdom. Among the broad resolution powers conferred on bank regulators under the BRRD and the implementing legislation of EEA member countries (the "Bail-In Legislation") are the powers to write down, reform the terms of, cancel and convert into equity the liabilities of failing EEA Financial Institutions (the "Writedown and Conversion Powers").

Under Article 55 of the BRRD, financial institutions in the EEA are required to ensure that all contracts governed by non-EEA law include contractual recognition of, and agreement to be subject to, the Bail-In Legislation ("Contractual Recognition Provisions"). These Contractual Recognition Provisions must provide that: (A) the liabilities may be subject to the Writedown and Conversion Powers; (B) the parties to the contract agree to accept those provisions being applied; and (C) the terms of the contract may be amended as necessary to render effect to the exercise of the Writedown and Conversion Powers (a "Bail-In Action"). These rules are often collectively referred to as the "E.U. Bail-In Rules."

When Opining Counsel represents a borrower, Opining Counsel may need to consider the impact of the E.U. Bail-In Rules on the enforceability of a credit agreement (and, by extension, the collateral and other documentation of the credit facility) against the borrower. The E.U. Bail-In Rules are complex and often are outside the general knowledge of Opining Counsel. At the same time, counsel for the Opinion Recipient (when the Opinion Recipient is a financial institution) is much more likely to have an understanding of these rules.

As a result, in most cases, Opining Counsel should to expressly exclude the E.U. Bail-In Rules from the scope of a remedies opinion on a credit agreement containing Contractual Recognition Provisions. The recommended form of exclusion is as follows:

We express no opinion on the enforceability of any provision of any Credit and Security Document incorporating the Bail-In Legislation or authorizing any Bail-In Action.

Under this approach, Opining Counsel declines to render an opinion on whether a U.S. court would enforce the E.U. Bail-In Rules. Because this exception only applies to the Contractual Recognition Provisions, it does not excuse Opining Counsel from having to conclude that all the other provisions of the agreement are enforceable under the law governing the agreement. This approach leaves it to Recipient's Counsel, rather than borrower’s counsel, to advise the lenders or agents on the enforceability under U.S. law of the Contractual Recognition Provisions, the BRRD and the Bail-In Legislation. That advice may take the form of a legal opinion if, as permitted by Article 55 of the BRRD, an EU regulator asks for it.

Some commentators take the position that this qualification is unnecessary because these EU Bail-In Rules are already excluded from the opinion letter under either the bankruptcy exception or the equitable principles limitation. Others believe that the qualification should be narrower or more targeted. An alternative form of qualification is often expressed as follows:

We express no opinion as to the enforceability of the Loan Parties’ obligations under the Credit and Security Documents owed to, or for the benefit of, a Lender that becomes the subject of a Bail-In Action.

The EU Bail-In Rules are complex and should only be dealt with by counsel knowledgeable on this topic. An excellent article on the EU Bail-In Rules by Ettore Santucci of Goodwin Procter LLP is contained in the Spring 2016 edition of “In Our Opinion”, the publication of the ABA Business Law Section Legal Opinions Committee, starting at page 11.
D. Hague Securities Convention

The Hague Securities Convention became effective as a matter of U.S. law on April 1, 2017. It provides choice-of-law rules for many commercial law issues affecting intermediated securities and thereby preempts portions of the corresponding choice-of-law rules provided or mandated by the common law, Articles 1, 8 and 9 of the UCC and by related federal book-entry regulations.

The Hague Securities Convention rules are complex and a full description of these rules is beyond the scope of this Report, although a brief overview is provided below in "Additions to the Report – Opinions With Respect to Collateral Under the Uniform Commercial Code."

Opinions on this topic should only be rendered by a knowledgeable Opining Counsel. As a result, Opining Counsel should consider excluding the application of the Hague Securities Convention from the scope of an opinion letter covering enforceability of the Transaction Documents, choice of law, or matters arising under the UCC (such as perfection of a security interest). The recommended form of exception is as follows:

We express no opinion as to the applicability or effect of the choice-of-law rules of the Hague Securities Convention for matters governed by Article 2(1) of that Convention.
ADDITIONS TO THE REPORT – OPINIONS WITH RESPECT TO COLLATERAL UNDER THE UNIFORM COMMERCIAL CODE

A. Perfection Opinions – Location of Debtor for Limited Liability Partnership.

The Report, in discussing the location of various types of debtors for purpose of analysis in regard to perfection opinions on collateral under the UCC, inadvertently left off the location of a limited liability partnership. To remedy that oversight, the following paragraph should be added to Section 7, entitled "Location of Debtor" contained on pages 140-141 of the Report, as the last paragraph of such Section:

A partnership may become a limited liability partnership pursuant to Section 620.9001 of the Florida Revised Uniform Partnership Act. Because a limited liability partnership is not "formed or organized" by the filing of a "public organic record" as defined in Section 679.1021(1)(ooo) of the Florida UCC, a limited liability partnership is not a "registered organization" under Section 679.1021(1)(qqq) of the Florida UCC. Thus, the location of a limited liability partnership under the Florida UCC would be determined in the same manner as the location of a general partnership is determined under the Florida UCC. Accordingly, the Opinion Recipient should be willing to accept the opinion regarding the location of the limited liability partnership based solely on Opining Counsel’s reliance upon a certificate from the debtor as to the sole place of business or chief executive office, as the case may be.

B. Hague Securities Convention.

The Hague Securities Convention became effective as a matter of U.S. law on April 1, 2017. It provides choice-of-law rules for many commercial law issues affecting intermediated securities and thereby preempt portions of the corresponding choice-of-law rules provided or mandated by the common law, Articles 1, 8 and 9 of the UCC and by related federal book-entry regulations. In most cases, the choice-of-law results under the Convention will be the same as those under the UCC, but there are some differences.

The Convention’s choice-of-law rules apply to a wide range of commercial law issues affecting the ownership or transfer of interests in "securities held with an intermediary," which generally tracks what U.S. lawyers know as UCC Article 8’s indirect holding system. The Convention defines "securities" as "any shares, bonds or other financial instruments or financial assets (other than cash), or any interest therein," a definition broader in some respects than the corresponding one in UCC Article 8. However, the Convention’s scope is fixed, in contrast to the scope of UCC Article 8, which is subject to expansion beyond securities by agreement between the intermediary and its customer or account holder. The Convention’s exclusion of "cash" (i.e., credit balances) from the definition of "securities" also contrasts with the UCC Article 8 system. Nonetheless, the Convention is designed like the UCC to be flexible in scope overall, with fluid, broad coverage that will meet the demands of market practices.

The Convention applies to any transaction or dispute "involving a choice" between the laws of two or more nations — a circumstance that may arise in any intermediated securities transaction, either at the transaction’s outset or later in its life. Without limitation, the "choice" will be involved whenever any of the issuer, the underlying certificates or the issuer’s books, or a wide range of parties (including account holder, intermediary, clearing corporation, secured party, adverse claimant, creditor of account holder, and creditor of intermediary) have connecting factors to different nations, regardless of whether the nations in question are parties to the Convention. Many of these elements, while having been acknowledged by U.S. lawyers for general transaction planning purposes, are immaterial to a choice-of-law analysis under UCC §§ 8-110 and 9-305 alone.
Given the very broad range of facts that can cause the Convention’s "choice" to arise, virtually every intermediated securities transaction should be planned with both the Convention and the UCC in mind. For purposes of opinion giving, at the most basic level, Opining Counsel will need to assume expressly or confirm (a) that the account in question is a "securities account" as defined in both the Convention and the UCC and (b) that every broker, custodian bank, clearing corporation or similar party is an "intermediary" as defined in the Convention and a "securities intermediary" as defined in the UCC.

The commercial law issues to which the Convention applies are those (and only those) enumerated in Convention Article 2(1). The issues are expressed in broad and sometimes overlapping terms, but for purposes of this discussion, the issues clearly include perfection of a security interest and the exercise of remedies against collateral. A number of other important issues also are covered by the Convention, including priority, whether a purchaser takes free of adverse claims (also not discussed here because opinions on secondary sales transactions are a separate subject), and the characterization of a transaction as being a collateral transfer to secure an obligation or an outright disposition as against third parties.

For reference, an excellent article on the Hague Securities Convention by Steven O. Weise of Proskauer Rose LLP is contained in the Spring 2017 edition of "In Our Opinion", the publication of the ABA Business Law Section Legal Opinions Committee, starting at page 11.
If initialed by all parties, the clauses below will be incorporated into the Florida Realtors®/Florida Bar Residential Contract For Sale And Purchase between ________________________________ (SELLER) and ________________________________ (BUYER) concerning the Property described as ________________________________

Buyer’s Initials _________ _________  Seller’s Initials _________ _________

PROPERTY ASSESSED CLEAN ENERGY (PACE)

QUALIFYING IMPROVEMENTS FOR ENERGY EFFICIENCY, RENEWABLE ENERGY, OR WIND RESISTANCE.—The property being purchased is located within the jurisdiction of a local government that has placed an assessment on the property pursuant to s. 163.08, Florida Statutes. The assessment is for a qualifying improvement to the property relating to energy efficiency, renewable energy, or wind resistance, and is not based on the value of property. You are encouraged to contact the county property appraiser’s office to learn more about this and other assessments that may be provided by law.