BRING TO MEETING

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

Executive Council Meeting

AGENDA

The Ritz Carlton Grande Lakes
4040 Central Florida Parkway
Orlando, FL 32837
Phone: (407) 206-2400

Saturday, September 25, 2010
10:00 a.m.

BRING TO THE MEETING

Real Property, Probate and Trust Law Section
Executive Council Meeting
The Ritz Carlton Grande Lakes – Orlando, FL

AGENDA

I. **Presiding** — *Brian J. Felcoski, Chair*

II. **Attendance** — *Debra L. Boje, Secretary*

III. **Minutes of Previous Meeting** — *Debra L. Boje, Secretary*
1. Approval of 8/7/2010 Executive Council Meeting Minutes and Roster **pp. 12-54**

IV. **Chair's Report** — *Brian J. Felcoski*
1. 2010 – 2011 RPPTL Executive Council Schedule **pp. 55**

V. **Chair-Elect's Report** — *George J. Meyer*
1. 2011 – 2012 RPPTL Executive Council Schedule **pp. 56**

VI. **Liaison with Board of Governors Report** — *Daniel L. DeCubellis*
1. BOG Summary – July 23, 2010 **pp. 57-58**

VII. **Treasurer's Report** — *Michael A. Dribin*
1. 2009 – 2010 Year End Report Summary **pp. 59**

VIII. **Circuit Representative's Report** — *Andrew O'Malley, Director*

1. First Circuit – W. Christopher Hart; Colleen Coffield Sachs
2. Second Circuit – J. Breck Brannen; Sarah S. Butters; John T. Lajoie
3. Third Circuit – John J. Kendron; Guy W. Norris; Michael S. Smith; Clay Alan Schnitker
4. Fourth Circuit – Roger W. Cruce; Brenda Ezell
5. Fifth Circuit – Del G. Potter; Arlene C. Udick
6. Sixth Circuit – Robert N. Altman; Gary L. Davis; Joseph W. Fleece, III; George W. Lange, Jr.; Sherri M. Stinson; Kenneth E. Thornton; Hugh C. Umstead; Richard Williams, Jr.
7. Seventh Circuit – Sean W. Kelley; Michael A. Pyle; Richard W. Taylor; Jerry B. Wells
8. Eighth Circuit – John Frederick Roscow, IV; Richard M. White Jr.
9. Ninth Circuit – David J. Akins; Amber J. Johnson; Stacy A. Prince; Joel H. Sharp Jr.; Charles D. Wilder; G. Charles Wohlust
10. Tenth Circuit – Sandra Graham Sheets; Robert S. Swaine; Craig A. Mundy
11. Eleventh Circuit – Carlos A. Batlle; Raul Ballaga; Aniella Gonzalez; Thomas M. Karr; Patrick J. Lannon; Marsha G. Madorsky; William T. Muir; Hung Nguyen; Adrienne Frischberg Promoff; Eric Virgil
12. Twelfth Circuit – Kimberly A. Bald; Michael L. Foreman; P. Allen Schofield
13. Thirteenth Circuit – Lynwood F. Arnold, Jr.; Michael A. Bedke; Thomas N. Henderson; Wilhelmina F. Kightlinger; Christian F. O'Ryan; William R. Platt; R. James Robbins; Stephen H. Reynolds; Susan K. Spurgeon
14. Fourteenth Circuit – Brian Leebrick
15. Fifteenth Circuit – Elaine M. Bucher; Glen M. Mednick; Robert M. Schwartz
16. Sixteenth Circuit – Julie A. Garber

17. Seventeenth Circuit –Robert B. Judd; Shane Kelley; Alexandra V. Rieman
18. Eighteenth Circuit – Jerry W. Allender; Steven C. Allender; Stephen P. Heuston
19. Nineteenth Circuit – Jane L. Cornett
20. Twentieth Circuit – Sam W. Boone; John T. Cardillo; Michael T. Hayes; Alan S. Kotler; Jon Scuderi; D. Keith Wickenden

IX. Real Property Division — *Margaret A. Rolando , Real Property Division Director*

Action Item

1. **Title Issues and Standards Committee** – *Patricia P. Jones, Chair*

Requests approval of Chapter 5 of the Uniform Title Standards – Decedents' Estates **pp. 60-120**

2. **Title Insurance Committee** – *Melissa J. Murphy, Chair*

Requests approval of a change in the Section's legislative position adopted at the May 29, 2010 meeting to depart from the Florida Title Insurance Study Advisory Council (TISAC) Final Report on 2 of its recommendations so that the Section would support (i) a prohibition on rebating title insurance premiums (consistent with the Section's recommendations adopted on September 26, 2009) and (ii) a post-funded Guarantee Fund **pp. 121-123**

3. **Real Property Litigation Committee** -- *Mark A. Brown, Chair*

Requests approval of proposed legislation to revise Sections 45.031(2), 50.011 and 702.035 to permit electronic notice of foreclosure sales through a clerk of the courts' website as an alternative to publication in a newspaper **pp. 123-129**

4. **Landlord Tenant Committee** – *Arthur J. Menor, Chair,* and **Construction Law Committee** – *Brian A. Wolf, Chair*

Request approval of proposed legislation to modify section 713.10 in light of *Everglades Electric Supply, Inc. v. Paraiso Granite, LLC* case **pp. 130-141**

5. **Condominium and Planned Development Committee** – *Robert S. Freedman, Chair*

Requests approval of the following proposed legislation:

A. Amendment to Section 720.309 to allow bulk cable and bulk internet service contracts with Homeowners Associations if provided in declaration or approved by the board **pp. 142-148**

B. Amendments to Sections 718.110, 718.1045 and 718.503 to permit creation of timeshares in hotel condominiums when timesharing was not permitted in the declaration of condominium as originally recorded, thereby setting a standard for approval at less than the 100% unit owner approval presently mandated by statute **pp. 149-156**

C. Glitch bill to correct provisions in Distressed Condominium Relief Act (Part VII of Chapter 718) **pp.157-171**

Information Item:

Title Insurance Committee – *Melissa J. Murphy, Chair*

The Florida Department of Financial Services, Division of Insurance Agents and Agency Services, has released its latest draft of the unlawful inducement rule. The Title Insurance Committee indicates that this rule impacts attorney-agents with corporate agencies and that the attorney exemption in 626.8417(4) applies narrowly only to license and appointment, making this type of rule applicable to attorney-agents in law firms. The Executive Committee has approved the Title Insurance Committee's recommendation that the Section take a position opposing this draft and offering technical assistance. The Executive Committee also authorized Melissa Murphy, the Committee Chair, to appoint a representative from the Section to testify at a hearing on the draft rule on September **pp. 172-176**

X. **Probate and Trust Law Division** – *Wm. Fletcher Belcher, Probate and Trust Law Division Director*

Action Items

1. **Estate & Trust Tax Planning Committee** – *Richard R. Gans, Chair*

Liaison with Tax Section – *Lauren Y. Detzel*

Liaison with Tax Section – *William R. Lane, Jr.*

Support specific statutory amendments clarifying that a charging order is the sole and exclusive remedy which a judgment creditor of a member of a multiple member limited liability company may use to satisfy the judgment from that member's interests in the multiple member limited liability company. Proposed statutory amendments are to F.S. 608.433 (Right of assignee to become member). **pp. 177-188**

Note: The proposed amendments to F.S. 608.433 are within the scope of an existing approved Section legislative position which "supports the limitation of creditor remedies against partner interests in general and limited liability partnerships and member interests in limited liability companies to charging liens and to prohibit foreclosure against such interests."

2. **Power of Attorney Committee** – *Tami F. Conetta, Chair*

Support a legislative position to adopt the Uniform Power of Attorney Act, with significant Florida modifications. Position would be implemented by enactment of a new Part I (Powers of Attorney) of F.S. Chapter 709. **pp. 189-239**

3. **Probate & Trust Litigation Committee** – *William T. Hennessey III, Chair*

Support a position that Florida Rule of Civil Procedure 1.525 (Motions for Costs and Attorneys' Fees - "Any party seeking a judgment taxing costs, attorneys' fees, or both shall serve a motion no later than 30 days after filing of the judgment, including a judgment of dismissal, or the service of a notice of voluntary dismissal") should not apply in probate proceedings, including

adversary proceedings. Position would be implemented by the adoption of a new Florida Probate Rule 5.525 (Motions for Costs and Attorneys' Fees) and the amendment of existing Florida Probate Rule 5.025 (Adversary Proceedings). **pp. 240-245**

Note: Because this position supports a court rule change and not a legislative change, there is no Legislative Position Request Form.

4. **Probate & Trust Litigation Committee** – *William T. Hennessey III, Chair*

Support a legislative position that the application of Florida Rule of Civil Procedure 1.525 (Motions for Costs and Attorneys' Fees - "Any party seeking a judgment taxing costs, attorneys' fees, or both shall serve a motion no later than 30 days after filing of the judgment, including a judgment of dismissal, or the service of a notice of voluntary dismissal") to judicial proceedings concerning trusts should be clarified by providing that certain specified actions do not constitute taxation of costs or attorneys' fees. Position would be implemented by enactment of amendments to s. 736.0201 (Role of court in trust proceedings) of the Florida Trust Code. **pp. 246-254**

5. **Probate & Trust Litigation Committee** – *William T. Hennessey III, Chair*

Support a legislative position clarifying that the revocation of a will or a revocable trust can be challenged on the grounds of fraud, duress, mistake or undue influence after the death of the testator or settlor. Position would be implemented by the enactment of amendments to ss. 732.5165 (Effect of fraud, duress, mistake, and undue influence) and 732.518 (Will contests) of the Florida Probate Code, and ss. 736.0207 (Trust contests) and 736.0406 (Effect of fraud, duress, mistake, or undue influence) of the Florida Trust Code. **pp. 255-264**

6. **Probate Law & Procedure Committee** – *Tae Bronner Kelley, Chair*

Support a legislative position that the a decedent's surviving spouse shall receive 100% of the intestate estate in those cases where all of the decedent's descendants are also descendants of the surviving spouse and the surviving spouse does not have any other descendants. Position would be implemented by amending s. 732.102 (Spouse's share of intestate estate) of the Florida Probate Code. **pp. 265-270**

Information Items

1. **Trust Law Committee** – *Shane Kelley, Chair; and Robert M. Arlen, liaison to Land Trust Committee*

Issues created by *Brigham v. Brigham*, 11 So.3d 374 (Fla. 3d DCA 2009), concerning real estate titles and the applicability of the Florida Trust Code to trusts.

2. **Pending**

XI. General Standing Committee — *George J. Meyer, Director and Chair-Elect*

XII. General Standing Committee Reports – *George J. Meyer, Director and Chair-Elect*

1. **Actionline** – J. Richard Caskey, Chair; Scott P. Pence and Rose M. LaFemina, Co-Vice Chairs

2. **Amicus Coordination** – Robert W. Goldman, John W. Little, III and Kenneth B. Bell Co-Chairs

3. **Budget** – Michael A. Dribin, Chair; Pamela O. Price, Vice Chair

4. **Bylaws** – W. Fletcher Belcher, Chair

5. **CLE Seminar Coordination** – Deborah P. Goodall, Chair; Sancha B. Whynot, Laura Sundberg and Sylvia B. Rojas, Co-Vice Chairs

   A. 2010 – 2011 CLE Schedule **pp. 271**

6. **2011 Convention Coordinator** – S. Katherine Frazier and Jon Scuderi, Co Chairs Michael A. Dribin, Vice Chair

7. **Fellowship** – Michael A. Bedke, Chair; Tae Kelley Bronner and Phillip Baumann, Co-Vice Chairs

8. **Florida Bar Journal** – Kristen M. Lynch, Chair Probate Division; William P. Sklar, Chair Real Property Division

9. **Legislative Review** – Michael J. Gelfand, Chair; Alan B. Fields and Barry F. Spivey, Co-Vice Chairs

10. **Legislative Update 2011** – Robert S. Swaine, Chair; Stuart H. Altman, Charles I. Nash, and R. James Robbins, Co-Vice Chairs

11. **Liaison Committees:**
    - A. **ABA:** Edward F. Koren; Julius J. Zschau
    - B. **BLSE:** Michael C. Sasso, W. Theodore Conner, David M. Silberstein, Anne K. Buzby.
    - C. **Business Law Section:** Marsha G. Rydberg
    - D. **BOG:** Daniel L. DeCubellis
    - E. **CLE Committee:** Deborah P. Goodall
    - F. **Clerks of the Circuit Court:** Laird A. Lile
    - G. **Council of Sections:** Brian J. Felcoski and George J. Meyer
    - H. **FLEA / FLSSI:** David C. Brennan; John Arthur Jones; Roland Chip Waller
    - I. **Florida Bankers:** Stewart Andrew Marshall, III; Mark T. Middlebrook
    - J. **Judiciary:** Judge Jack St. Arnold, Judge Gerald B. Cope, Jr., Judge George W. Greer; Judge Melvin B. Grossman; Judge Hugh D. Hayes; Judge Claudia Rickert Isom, Judge Maria M. Korvick; Judge Beth Krier, Judge Lauren Laughlin; Judge Celeste H. Muir; Judge Robert Pleus; Judge Richard Suarez; Judge Morris Silberman; Judge Patricia V. Thomas; Judge Walter L. Schafer, Jr.
    - K. **Law Schools:** Frederick R. Dudley, Stacy O. Kalmanson, and Professor James J. Brown
    - L. **Out of State:** Michael P. Stafford; John E. Fitzgerald, Jr., Gerard J. Flood

12. **Long Range Planning Committee** – George J. Meyer, Chair

13. **Member Communications and Information Technology** – Alfred A. Colby, Chair; S. Dresden Brunner and Nicole C. Kibert, Co – Vice Chair

14. **Membership Services** – Phillip A. Baumann, Chair; Mary E. Karr, Vice Chair

15. **Membership Diversity Committee** – Lynwood T. Arnold, Jr., and Fabienne E. Fahnestock, Co-Chairs; Karen Gabbadon, Vice-Chair

16. **Mentoring** – Guy S. Emerich, Chair; Jerry E. Aron and Keith S. Kromash, Co-Vice Chairs

17. **Meeting Planning Committee** – Sandra F. Diamond, Chair

18. **Model and Uniform Acts** – Bruce M. Stone and S. Katherine Frazier, Co-Chairs

19. **Professionalism & Ethics** – Lee A. Weintraub, Chair; Paul E. Roman and Lawrence J. Miler, Co-Vice Chairs

20. **Pro Bono** – Gwynne A. Young and Adele I. Stone, Co Chair; Tasha K. Pepper-Dickinson, Vice Chair

21. **Sponsor Coordinators** – Kristen M. Lynch, Chair; Wilhelmina Kightlinger, Jon Scuderi, J. Michael Swaine, Adele I. Stone, Marilyn M. Polsen, Co-Vice Chairs

22. **Strategic Planning** – George J. Meyer, Chair

XIII. Probate and Trust Law Division Committee Reports - *Wm. Fletcher Belcher - Director*

1. **Ad Hoc Committee on Creditors' Rights to Non-Exempt, Non-Probate Assets** – Angela M. Adams, Chair

2. **Ad Hoc Committee on Jurisdiction and Service of Process** – Barry F. Spivey, Chair; Sean W. Kelley, Vice Chair

3.

4. **Ad Hoc Study Committee on Estate Planning Attorney Conflict of Interest -** William T. Hennessey III, Chair

5. **Asset Preservation** – Jerome L. Wolf and Brian C. Sparks, Co-Chairs

5. **Attorney/Trust Officer Liaison Conference** – Robin J. King, Chair; Jack A. Falk, Jr., Vice Chair; Mark T. Middlebrook, Corporate Fiduciary Chair

6. **Estate and Trust Tax Planning** – Richard R. Gans, Chair; Harris L. Bonnette, Jr., and Elaine M. Bucher, Co-Vice Chairs

7. **Florida Electronic Court Filing** – Rohan Kelley, Chair; Laird A. Lile, Vice Chair

8. **Guardianship and Advance Directives** – Sean W. Kelley and Alexandra V. Rieman,

Co-Chairs; Seth A. Marmor and Sherri M. Stinson, Co-Vice Chairs

9. **IRA, Insurance and Employee Benefits** – Linda Suzanne Griffin and L. Howard Payne, Co-Chairs; Rex E. Moule, Jr., Vice Chair

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

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

12. **Power of Attorney** – Tami F. Conetta, Chair; David R. Carlisle, Vice Chair

13. **Principal and Income** – Edward F. Koren, Chair

14. **Probate and Trust Litigation** – William T. Hennessey, III, Chair; Thomas M. Karr and Jon Scuderi, Co-Vice Chairs

15. **Probate Law and Procedure** – Tae Kelley Bronner, Chair; S. Dresden Brunner, Anne K. Buzby and Jeffrey S. Goethe, Co-Vice Chairs

16. **Trust Law** – Shane Kelley, Chair; Angela M. Adams, John C. Moran and Laura P. Stephenson, Co-Vice Chairs

17. **Wills, Trusts and Estates Certification Review Course** – Anne K. Buzby, Chair; Deborah L. Russell, Vice Chair

XIV. Real Property Division Committee Reports

1. **Condominium and Planned Development** – Robert S. Freedman, Co-Chair; Steven Mezer, Co-Chair; Jane Cornett, Vice-Chair

2. **Construction Law** – Brian Wolf, Chair; Hardy Roberts and Arnold Tritt, Co Vice-Chairs

3. **Construction Law Institute** – Wm. Cary Wright, Chair; Michelle Reddin and Reese Henderson, Co-Vice Chairs

4. **Construction Law Certification Review Course** – Kim Ashby, Chair; Bruce Alexander and Melinda Gentile, Co Vice-Chair

5. **Governmental Regulation of Real Estate** – Eleanor Taft, Chair; Nicole Kibert, Kristen Brundage and Frank L. Hearne, Co Vice-Chairs

6. **Residential Real Estate Committee and Industry Liaison** – Frederick Jones, Chair; William J. Haley, Vice Chair

7. **Land Trusts** – S. Katherine Frazier, Chair; Wilhelmena Kightlinger, Vice Chair

8. **Landlord and Tenant** – Neil Shoter, Chair; Scott Frank, Vice Chair

9. **Legal Opinions** – David R. Brittain and Roger A. Larson, Co Chairs; Burt Bruton, Vice Chair

10. **Liaisons with FLTA** – Norwood Gay and Alan McCall Co-Chairs; Barry Scholnik, John S. Elzeer, Joe Reinhardt, James C. Russick, Lee Huzagh, Co-Vice Chairs

11. **Mortgages and Other Encumbrances** – Salome Zikakis, Chair; Robert Stern, Co-Vice Chair

12. **Real Estate Certification Review Course** – Ted Conner, Chair; Guy W. Norris and Raul Ballaga, Co-Vice Chairs

13. **Real Property Forms** – Homer Duval, III, Chair; Jeffrey T. Sauer and Arthur Menor, Vice Chairs

14. **Real Property Insurance** – Jay D. Mussman, Chair; Andrea Northrop and Wm. Cary Wright, Co-Vice Chairs

15. **Real Property Litigation** – Mark A. Brown, Chair; Eugene E. Shuey and Martin Awerbach, Co-Vice Chairs

16. **Real Property Problems Study** – Wayne Sobien, Chair; Jeanne Murphy and Pat J. Hancock, Co-Vice Chair

17. **Title Insurance & Title Insurance Liaison** – Melissa Murphy, Chair; Homer Duvall and Kristopher Fernandez, Co-Vice Chairs

18. **Title Issues and Standards** – Patricia Jones, Chair; Robert Graham, Karla Gray and Christopher Smart, Co-Vice Chairs

XV. Adjourn

The Florida Bar
Real Property, Probate & Trust Law Section

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Real Property, Probate & Trust Law Section

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Estate & Trust Tax Planning Committee

Northern Trust, N.A.
Trust Law Committee

Business Valuation Analysts
Probate and Trust Litigation

Draft

Minutes, Real Property, Probate and Trust Law Section
Executive Council Meeting

August 7, 2010

Breakers Hotel – Palm Beach, FL

References in these minutes to specified pages of "agenda materials" are to the agenda of the August 7, 2010 meeting of the Executive Council posted at RPPTL website

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AGENDA

I. **Call to Order** - Brian J. Felcoksi, Chair

Brian called the meeting to order at 10:00 a.m.

II. **Attendance** - Debra L. Boje, Secretary

The attendance roster was circulated to be initialed by Council members in attendance at the meeting. Attendance is shown cumulatively on circulated attendance rosters. Debbie reminded the Council members that it is the responsibility of each member to record his or her own attendance on the roster and to promptly bring any corrections to the attention of the Secretary.

III. **Minutes of Previous Meeting** - Debra L. Boje, Secretary

The Minutes of the Executive Council Meeting held in Tampa, Florida on May 29, 2010, included at pages 10 – 20 of the agenda material were corrected to reflect the attendance of Dan DeCubellis. In all other respects, the minutes were approved without change.

IV. **Chair's Report** - Brian J. Felcoksi, Chair

1. Brian reviewed the 2010-2011 RPPTL Executive Council Schedule, appearing on page 38 of the agenda materials. Brian strongly encouraged those who planned on attending the out of state meeting in Santa Barbara to make their reservations, as the blocked rooms are filling up fast. Brian passed around a written poll for members to complete indicating whether they plan to attend the out of state meeting in Santa Barbara. Brian introduced Bob Goldman to announce a special side trip he is planning.

2. Brian thanked Bob Swaine and his committee for the great job they did in putting on yet another successful Legislative and Case Law Update seminar. Brian asked Bob and his co-chairs to come forward to the podium to be officially recognized and thanked.

3. Brian welcomed and introduced the new Section fellows in attendance.

4. Brian welcomed and introduced new members of the council in attendance.

5. Brian recognized law students in attendance.

6. Brian thanked all the sponsors whose names appeared in the agenda materials for their support of the Section.

7. Brian thanked the Florida Bar Foundation, US Trust and Stewart Title for their co-sponsorship of the Executive Council luncheon. Representatives from each company where invited to the podium to provide brief remarks.

8. Brian thanked JP Morgan Chase for its co-sponsorship of the chair suite.

9. Brian advised that Gwynne Young, one of our own, is exploring support for her candidacy for President elect of The Florida Bar. She will be seeking nomination in November. Brian asked Gwynne to stand up to be recognized by those who may not know her.

10. Brian then called upon immediate past chair of the Section, John B. Neukamm, who awarded Melissa Murphy with the Robert C. Scott Memorial Award for the countless hours she has devoted to the Section. Her extensive service to the Section has been invaluable.

V. **Chair-Elect's Report** – George J. Meyer, Chair-Elect

1. George reviewed the schedule of Executive Council meetings for 2011-2012, appearing on page 39 of the agenda materials. George noted that there were various errors in the dates. The correct schedule is posted on the website. A copy of the corrected schedule is attached to these minutes as Exhibit A.

VI. **Liaison with Board of Governors Report** - Daniel L. DeCubellis

Dan reviewed the report concerning the activities of the Board of Governors, appearing on pages 40-41 of the agenda materials. Dan specifically noted that the Florida Bar was removing the Martindale Hubbell ratings from its website. Dan advised that The Florida Bar was forming a committee to study regulations and registration of paralegals. Sandy Diamond is seeking appointment on that committee. Dan welcomed members to call him anytime with questions they may have.

VII. **Treasurer's Report** – Michael A. Dribin, Treasurer

1. Mike reviewed the monthly report summary appearing on pages 42-53 of the agenda materials. The report is through May 31, 2010. Mike noted a correction to the Roll-up Summary totals on page 43 of the report. Expenses should be $829,633 and net operations should be $187,770. A correct copy of the report is attached as Exhibit B to these minutes.

VIII. **Circuit Representative's Report** - Andrew O'Malley, Director

Drew reported on the Circuit Representatives' meeting which had taken place on August 6, 2010. Drew reported that the committee continues to collect the various foreclosure administrative orders throughout the State which are listed on the website.

1. First Circuit – W. Christopher Hart; Colleen Coffield Sachs
2. Second Circuit – J. Breck Brannen; Sarah S. Butters; John T. Lajoie
3. Third Circuit – John J. Kendron; Guy W. Norris; Michael S. Smith; Clay Alan Schnitker
4. Fourth Circuit – Roger W. Cruce; Brenda Ezell
5. Fifth Circuit – Del G. Potter; Arlene C. Udick
6. Sixth Circuit – Robert N. Altman; Gary L. Davis; Joseph W. Fleece, III; George W. Lange, Jr.; Sherri M. Stinson; Kenneth E. Thornton; Hugh C. Umstead; Richard Williams, Jr.
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20. Twentieth Circuit – Sam W. Boone; John T. Cardillo; Michael T. Hayes; Alan S. Kotler; Jon Scuderi; D. Keith Wickenden

RM:7550423:1

IX. **Probate and Trust Law Division** - Wm. Fletcher Belcher, Probate and Trust Law Division Director

Action Item

1. Asset Preservation Committee – *Jerome L. Wolfe and Brian C. Sparks, Co-Chairs*

Fletcher Belcher advised that if the proposed action item passes, that the Executive Committee had voted to engage the services of David Powell to review the proposed legislation to make any necessary style changes.

Jerry Wolfe and Brian Sparks reported on behalf of the Committee the proposed legislation amending §736.0505 of the Florida Trust Code to extend spendthrift creditor protection to settlors of irrevocable trusts created under Florida law even though the settlors have retained interests as beneficiaries of their trusts. The proposed statutory language, White Paper and Legislative Request appear on pages 54-134 of the agenda materials.

Fletch asked Jerry if the trust would be included in the elective estate for purposes of determining the elective share and satisfying the elective share. Jerry represented on behalf of the committee that the trust would be included and would be subject to contribution.

The matter was open to the floor for discussion. Chip Waller made a motion from the floor to amend the proposed legislation to remove the requirement that the fiduciary of the trust must be a corporate trustee and simply require an independent trustee, who is a resident of the State of Florida and not related to or subordinate to the settlor. The amendment was accepted by the committee.

A lively discussion took place as to the pros and cons of the proposed legislation. The motion was called to question. Fletch reminded visitors that only executive council members are allowed to vote.

The motion did not receive the two-thirds vote of members present and thus failed.

Information Item:

1. Liaison to the Florida Bar Tax Section – *Bill Lane*

Bill provided a brief summary of the recent Florida Supreme Court's decision in Olmstead. He advised that the Tax Section resolved at its Organizational meeting in July to draft and offer to the Florida Bar's Chapter 608 drafting committee (which is presently in the middle of re-writing the LLC Act) a statutory "patch" that would have the effect of clarifying the Court's holding in Olmstead to confirm that the effect of its holding (allowing a judgment creditor of the member of a single member Florida LLC to gain control of the company rather than be limited to a charging lien) is

limited to single member LLCs organized under Chapter 608 and does not apply to multiple member LLCs organized under Chapter 608, and that charging liens are the sole and exclusive remedy for a judgment creditor of a member of an LLC having multiple members.

Bill advised that the Tax Section wishes to move this patch legislation this year if the LLC Task Force is unable to finish its work to complete the rewrite of Chapter 608 in time for the 2011 legislative session. Bill reminded members that roughly 4 years ago the Section adopted a position and crafted similar legislation that was broader in scope than the Tax Section's position, essentially clarifying the law to make it clear that a charging lien is the sole and exclusive remedy for single member LLCs as well, following Delaware law. That legislation was not passed.

Bill advised that the LLC Task Force intends to make its policy decision on the scope of the "sole and exclusive remedy" concept for purposes of its comprehensive re-write efforts during its meeting over the Labor Day weekend and to determine whether it is likely to have its job completed in time for the next legislative session. If the LLC Tax Force concludes that it is unlikely it will have the comprehensive re-write ready to go, then LLC Tax Force and the Tax Section may be asking the RPPTL Section at its September meeting to assist them in moving the Tax Section's more limited patch along the legislative process for the upcoming session.

X. **Real Property Division** – Margret A. Rolando, Real Property Division Director

Information Items

1. Real Estate Problem Study Committee – *Wayne Sobien, Chair*

Peggy advised that as an emergency item the Executive Committee had approved the Real Estate Problem Study Committee's proposal to support repeal of s. 689.262 (which was the subject of HB 545 that was vetoed by the Governor). Peggy noted that support of the repeal was necessary because transactional practitioners could not comply with the disclosure provisions because the required data had not been compiled by the Financial Service Commission (note: the agenda incorrectly stated the entity as the OIR) and was not going to be available to the real estate market when the law was to take effect on January 1, 2011. Peggy advised that the Executive Committee also authorized the Section's legislative consultants to work with the Florida Association of Realtors lobbyists on the repeal.

RM:7550423:1

XI. **General Standing Committee** – George J. Meyer, Director and Chair-Elect

Action Item:

1. Bylaws Committee - *W. Fletcher Belcher, Chair*

George called upon Fletch to discuss the proposed bylaw revisions. Fletch provided a brief background of the history of the Bylaws committee and how the proposed revisions to the Bylaws came about. On behalf of the committee, Fletch presented the proposed Bylaw revisions appearing on pages 135 - 172 of the agenda materials. Fletch thanked all members who provided comments to the draft of the Bylaws prior to the meeting. Fletch advised that as a result of the comments, modifications were made to the proposed revisions and were provided to members by separate e-mail a few days ago. The proposed revisions are attached to these minutes as Exhibit C. Fletch announced that an additional amendment was proposed this morning that was accepted by the committee to clarify that the term real property law as used in the By-laws includes construction. Fletch highlighted the major proposed revisions. Fletch spent considerable time reviewing and explaining the reason behind eliminating circuit representatives and replacing them with "members-at-large". Fletch asked Drew to speak on this proposed change and to express the comments of his committee as to the change.

Fletch on behalf the By-laws Committee made a motion to approve the proposed By-laws as amended. Fletch opened the floor to discussion. A motion to amend to only approve the By-law changes other than those pertaining to the changes to the circuit representatives provisions (with appropriate wordsmithing if the changes to the circuit representative provision are approved) was made. The motion was seconded. The motion to amend passed. The underlying motion was then voted upon and passed unanimously.

The floor was then opened back up to discussion as to the proposed revision to eliminate circuit representatives and replace them with "members-at-large". The motion was eventually called to question. The motion was approved by a majority of members present. The final By-laws as approved are attached to these minutes as Exhibit D.

Information Items:

1. Budget Committee - *Michael A. Dribin, Chair; Pamela O. Price, Vice Chair*

Mike advised the Council that in order to comply with the Bar's June 30th deadline for Budget amendments, the Executive Committee approved amending the Section's Budget to move $8,000 from the Hospitality Account into the Council Recreation Account, to cover an expenditure overrun in the Council Recreation Account. No net increase to the Section's Budget was required.

2. Legislative Review Committee - Michael Gelfand, Chair; Alan Fields and Barry Spivey, Co-Vice Chairs

Michael advised that the updated list of the Section's legislative positions to be retained, that was approved by the Executive Committee and sent to the Board of Governors, appear on pages 173 – 185 of the agenda materials. Michael reminded members that the website now contains legislative positions for the past 6-7 years.

XII. **General Standing Committee Reports** - Brian J. Felcoski, Director and Chair-Elect

1. **Actionline** - Rich Caskey, Chair; Scott Pence and Rose LaFemina, Co-Vice Chairs
Rich reported that the Actionline is in need of articles. Please consider writing an article.

2. **Amicus Coordination** - Bob Goldman, John W. Little, III and Kenneth B. Bell Co-Chairs

3. **Budget** - Michael A. Dribin, Chair; Pamela O. Price, Vice Chair
No further report

4. **Bylaws** - W. Fletcher Belcher, Chair
No further report

5. **CLE Seminar Coordination** - Deborah P. Goodall, Chair; Sancha B. Whynot, Laura Sundberg and Sylvia B. Rojas, Co-Vice Chairs

On behalf of the committee, Debbie reviewed the 2010-2011 CLE Schedule appearing on page 186 of the agenda materials. Deb thanked all those who have contributed to the various seminars. Revenues continue to be strong. Deb announced the first webinar only seminar was a great success.

6. **2011 Convention Coordinator** - S. Katherine Frazier and Jon Scuderi, Co Chairs Michael A. Dribin, Vice Chair

On behalf of the committee, Katherine reported that progress is being made on the plans for the Convention which will be held in conjunction with the Executive Council meeting at the Eden Roc Hotel in Miami in May.

7. **Fellowship** - Michael A. Bedke, Chair; Tae Kelley Bronner and Phillip Baumann, Co-Vice Chairs

On behalf of the committee Michael reported that the new Fellows were selected and are present at today's meeting. The new Fellows were again asked to stand and be recognized.

8. **Florida Bar Journal** - Kristen M. Lynch, Chair Probate Division; William P. Sklar, Chair Real Property Division

9. **Legislative Review** - Michael J. Gelfand, Chair; Alan B. Fields and Barry F. Spivey, Co-Vice Chairs

No further report other than previous comments. The Final Post Session Report appears at pages 187 – 195 of the agenda materials.

10. **Legislative Update 2010** – Robert S. Swaine, Chair; Stuart H. Altman, Charles I. Nash, and R. James Robbins, Co-Vice Chairs

11. **Liaison Committees:**

A. **ABA:** Edward F. Koren; Julius J. Zschau
B. **BLSE:** Michael C. Sasso, W. Theodore Conner, David M. Silberstein, Anne K. Buzby David advised those that receive peer review requests to promptly respond.
C. **Business Law Section:** Marsha G. Rydberg
D. **BOG:** Daniel L. DeCubellis
E. **CLE Committee:** Deborah P. Goodall
F. **Clerks of the Circuit Court:** Laird A. Lile
G. **Council of Sections:** Brian J. Felcoski and George J. Meyer
H. **FLEA / FLSSI:** David C. Brennan; John Arthur Jones; Roland Chip Waller
I. **Florida Bankers:** Stewart Andrew Marshall, III; Mark T. Middlebrook
J. **Judiciary:** Judge Jack St. Arnold, Judge Gerald B. Cope, Jr., Judge George W. Greer; Judge Melvin B. Grossman; Judge Hugh D. Hayes; Judge Claudia Rickert Isom, Judge Maria M. Korvick; Judge Beth Krier, Judge Lauren Laughlin; Judge Celeste H. Muir; Judge Robert Pleus; Judge Richard Suarez; Judge Morris Silberman; Judge Patricia V. Thomas; Judge Walter L. Schafer, Jr.
K. **Law Schools:** Frederick R. Dudley, Stacy O. Kalmanson, and Professor James J. Brown
L. **Out of State:** Michael P. Stafford; John E. Fitzgerald, Jr., Gerard J. Flood
M. **Young Lawyers Division**: TBD.

12. **Long Range Planning Committee** – George J. Meyer, Chair.

13. **Member Communications and Information Technology** - Alfred A. Colby, Chair; S. Dresden Brunner and Nicole C. Kibert, Co – Vice Chair

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14. **Membership Development & Communication** - Phillip A. Baumann, Chair; Mary E. Karr, Vice Chair

Phil reported on behalf of the Committee. He advised that letters were sent out to over 350 people who attended seminars throughout the year but were not members. He advised that letters are being prepared to send to those members who do not renew their membership in September.

15. **Membership Diversity Committee** - Lynwood T. Arnold, Jr., and Fabienne E. Fahnestock, Co-Chairs; Karen Gabbadon, Vice-Chair

Fabienne reported on behalf of the Committee. She advised that the committee will be hosting a seminar in Tampa on short sales and foreclosures.

16. **Mentoring** - Guy Emerich, Chair; Jerry Aron and Keith Kromash, Co-Vice Chairs

Guy reported on behalf of the Committee. The Committee continues to look for mentors and mentees. Those interested in being a mentor should advise Guy. Also, those knowing some one wanting to be a mentee should let him know.

17. **Meeting Planning Committee** – Sandra F. Diamond, Chair

18. **Model and Uniform Acts** - Bruce M. Stone and S. Katherine Frazier, Co-Chairs

19. **Professionalism & Ethics** – Lee Weintraub, Chair; Paul E. Roman and Lawrence J. Miller, Co-Vice Chairs

Lee advised that an advisory opinion is about to be issued on disclosure of attorney client privilege once a person dies. The committee will be providing comments. Lee asked that comments be sent to the Committee at tc@rpptlethics.org.

20. **Pro Bono** - Gwynne A. Young and Adele I. Stone, Co-Chair; Tasha K. Pepper-Dickinson, Vice Chair

Gwynne advised that an administrative order has been issued by the Florida Supreme Court mandating mediation in residential foreclosures. Volunteers will be needed to represent homeowners.

21. **Sponsor Coordinators** - Kristen M. Lynch, Chair; Wilhelmina Kightlinger, Jon Scuderi, J. Michael Swaine, Adele I. Stone, Marilyn M. Polsen, Co-Vice Chairs

On behalf of the committee, Kristin reported that the Section has been able to secure new sponsors. Sponsorship is strong. The Committee is looking to create a new class of sponsorship.

22. **Strategic Planning** – George J. Meyer, Chair

XIII. **Probate and Trust Law Division Committee Reports**- W. Fletcher Belcher, Director

1. **Ad Hoc Committee on Creditors' Rights to Non-Exempt, Non-Probate Assets** - Angela M. Adams, Chair

2. **Ad Hoc Committee on Homestead Life Estates** – Barry F. Spivey, Chair; Sean W. Kelley, Vice Chair

3. **Asset Preservation** - Jerome L. Wolf and Brian C. Sparks, Co-Chairs

4. **Attorney/Trust Officer Liaison Conference** – Robin J. King, Chair; Jack A. Falk, Jr., Vice Chair; Mark T. Middlebrook, Corporate Fiduciary Chair

5. **Estate and Trust Tax Planning** - Richard Gans, Chair; Harris L. Bonette Jr. and Elaine M. Bucher, Co-Vice Chairs

6. **Florida Electronic Court Filing** - Rohan Kelley, Chair; Laird A. Lile, Vice Chair

7. **Guardianship and Advance Directives** – Sean W. Kelley and Alexandra V. Rieman, Co-Chairs; Seth A. Marmor and Sherri M. Stinson, Co-Vice Chairs

8. **IRA's and Employee Benefits** - Linda Suzanne Griffin and L. Howard Payne, Co-Chairs; Rex E. Moule, Jr., Vice Chair

9. **Liaisons with Elder Law Section** - Charles F. Robinson and Marjorie Wolasky

10. **Liaisons with Tax Section** - Lauren Y. Detzel, William R. Loane, Jr., David Pratt; Brian C. Sparks and Donald R. Tescher

11. **Power of Attorney** - Tami F. Conetta, Chair; David R. Carlisle, Vice Chair

12. **Principal and Income** - Edward F. Koren, Chair

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13. **Probate and Trust Litigation** - William T. Hennessey, III, Chair; Thomas M. Karr and Jon Scuderi, Co-Vice Chairs

14. **Probate Law and Procedure** - Tae Kelley Bronner, Chair, S. Dresden Brunner, Anne K. Buzby and Jeffrey S. Goethe, Co-Vice Chairs

15. **Trust Law** - Shane Kelley, Chair; Angela M. Adams, John C. Moran and Laura P. Stephenson, Co-Vice Chairs

16. **Wills, Trusts and Estates Certification Review Course** - Anne K. Buzby, Chair; Deborah Russell, Vice Chair

XIV. Real Property Division Committee Reports

1. **Condominium and Planned Development** - Robert S. Freedman, Co-Chair; Steven Mezer, Vice-Chair; Jane Cornett, Vice Chair

2. **Construction Law** - Brian Wolf, Chair; April Atkins and Arnold Tritt, Co Vice-Chairs

3. **Construction Law Institute** - Wm. Cary Wright, Chair; Michelle Reddin and Reese Henderson, Co-Vice Chairs

4. **Construction Law Certification Review Course** - Kim Ashby, Chair; Bruce Alexander and Melinda Gentile, Co Vice-Chair

5. **Governmental Regulation of Real Estate** - Eleanor Taft, Chair Nicole Kibert, Kristen Brundage and Frank L. Hearne, Co Vice-Chairs

6. **Residential Real Estate Committee and Industry Liaison** – Frederick Jones, Chair; William J. Haley, Vice Chair

7. **Land Trusts** - S. Katherine Frazier, Chair; Wilhelmena Kightlinger, Vice Chair

8. **Landlord and Tenant** – Neil Shoter, Chair; Scott Frank, Vice Chair

9. **Legal Opinions** - David R. Brittain and Roger A. Larson, Co-Chairs; Burt Bruton, Vice Chair

10. **Liaisons with FLTA** - Norwood Gay and Alan McCall Co-Chairs; Barry Scholnik, John S. Elzeer, Joe Reinhardt, James C. Russick, Lee Huzagh, Co-Vice Chairs

11. **Mortgages and Other Encumbrances** - Salome Zikakis, Chair; Robert Stern, Co-Vice Chair

12. **Real Estate Certification Review Course** - Ted Conner, Chair; Guy W. Norris and Raul Ballaga, Co-Vice Chairs

13. **Real Property Forms** – Homer Duval, III, Chair; Jeffrey T. Sauer and Arthur Menor, Vice Chair

14. **Real Property Insurance** - Jay D. Mussman, Chair; Andrea Northrop and Wm. Cary Wright, Co-Vice Chair

15. **Real Property Litigation** - Mark A. Brown, Chair; Eugene E. Shuey and Martin Awerbach, Co-Vice Chairs

16. **Real Property Problems Study** - Wayne Sobien, Chair; Jeanne Murphy and Pat J. Hancock, Co-Vice Chair

17. **Title Insurance & Title Insurance Liaison** - Melissa Murphy, Chair; Homer Duvall and Kristopher Fernandez, Co-Vice Chairs

18. **Title Issues and Standards** - Patricia Jones, Chair; Robert Graham, Karla Gray and Christopher Smart, Co-Vice Chairs

XV. Adjourn—There being no further business to come before the Executive Council, the meeting was adjourned at 1:30 p.m.

Respectfully submitted,

Debra L. Boje, Secretary

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ATTENDANCE ROSTER

REAL PROPERTY PROBATE & TRUST LAW SECTION
EXECUTIVE COUNCIL MEETINGS
2010 – 2011

Executive Committee	Aug. 7 Palm Beach	Sept. 25 Orlando	Nov. 6 Clearwater	Feb. 26 Santa Barbara	May 28 Miami Beach
Felcoski, Brian J,, Chair	X				
Meyer, George J., Chair-Elect	X				
Belcher, Wm. Fletcher, Probate & Trust Law Div. Director	X				
Rolando, Margaret A., Real Property Law Div. Director	X				
Boje, Debra L., Secretary	X				
Dribin, Michael A., Treasurer	X				
Gelfand, Michael J., Legislation Chair	X				
Goodall, Deborah, Seminar Coordinator	X				
O'Malley, Andrew M., Director of Circuit Representatives	X				
Neukamm, John B., Immediate Past Chair	X				

Executive Council Members	Aug. 7 Palm Beach	Sept. 25 Orlando	Nov. 6 Clearwater	Feb. 26 Santa Barbara	May 28 Miami Beach
Adams, Angela M.	X				
Adcock, Jr., Louie N., **Past Chair**					
Akins, David James	X				
Alexander, Bruce					
Allender, Jerry W.	X				
Allender, Steven C.	X				
Altman, Robert N.	X				
Altman, Stuart H.	X				

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Executive Council Members	Aug. 7 Palm Beach	Sept. 25 Orlando	Nov. 6 Clearwater	Feb. 26 Santa Barbara	May 28 Miami Beach
Arnold, Jr. , Lynwood F.	X				
Aron, Jerry E., **Past Chair**	X				
Ashby, Kimberly					
Atkins, April					
Awerbach, Martin	X				
Bald, Kimberly	X				
Ballaga, Raul P.	X				
Banister, John R.	X				
Batlle, Carlos Alberto	X				
Baumann, Phillip A.	X				
Beales III, Walter Randolph, **Past Chair**	X				
Bedke, Michael	X				
Bell, Honorable Kenneth					
Boje, Debra Lynn	X				
Bonnette, Jr., Harris L.	X				
Boone, Jr., Sam Wood	X				
Brannen, J. Brecken					
Brennan, David Clark, **Past Chair**	X				
Brittain, David Ross	X				
Bronner, Tae Kelley	X				
Brown, J.J.					
Brown, Mark A.	X				
Brundage, Kristen Blaine Parker					
Brunner, S. Dresden	X				
Bruton, Jr., Burt	X				
Bucher, Elaine M.	X				
Butters, Sarah					
Buzby, Anne K.					
Cardillo, John T.					

Executive Council Members	Aug. 7 Palm Beach	Sept. 25 Orlando	Nov. 6 Clearwater	Feb. 26 Santa Barbara	May 28 Miami Beach
Carlisle, David Russell	X				
Caskey, J. Richard	X				
Christiansen, Pat, **Past Chair**	X				
Colby, Alfred					
Conetta, Tami Foley	X				
Conner, William Theodore					
Cope, Honorable Gerald B., Jr.	X				
Cornett, Jane L.					
Cruce, Roger W.	X				
Davis, Gary	X				
DeCubellis, Dan L.	X				
Detzel, Lauren Y.	X				
Diamond, Sandra F., **Past Chair**	X				
Dickinson, Tasha	X				
Dudley, Frederick Raymond	X				
Duvall III, Homer					
Elzeer, John S.	X				
Emerich, Guy Storms	X				
Ezell, Brenda B.	X				
Falk, Jack A.	X				
Fahnestock, Fabienne E.	X				
Fernandez, Kristopher	X				
Fields, Alan Beaumont	X				
Fitzgerald, Jr., John Edward	X				
Fleece III, Joseph W.	X				
Flood, Gerard J.	X				
Foreman, Michael Loren	X				
Frazier, Susan Katherine	X				
Freedman, Robert Scott	X				
Gabbadon, Karen					

Executive Council Members	Aug. 7 Palm Beach	Sept. 25 Orlando	Nov. 6 Clearwater	Feb. 26 Santa Barbara	May 28 Miami Beach
Gans, Richard Roy	X				
Garber, Julie Ann					
Gay III, Robert Norwood	X				
Gentile, Melinda					
Goethe, Jeffrey	X				
Goldman, Robert W., **Past Chair**	X				
Gonzalez, Aniella	X				
Graham, Robert Manuel	X				
Gray, Karla S.	X				
Greer, Honorable George W.					
Griffin, Linda S.	X				
Grimsley, John Gall, **Past Chair**					
Grossman, Honorable Melvin B.	X				
Guttmann III, Louis B., **Past Chair**					
Haley, William James					
Hancock, Patricia J.	X				
Hart, W. Christopher	X				
Hayes, Honorable Hugh D.	X				
Hayes, M. Travis	X				
Hearn, Steven Lee, **Past Chair**					
Hearne, Frank L.	X				
Henderson, Reese					
Henderson, Thomas	X				
Hennessey III, William Thomas	X				
Heuston, Stephen Paul	X				
Huszagh, Victor Lee					
Isom, Honorable Claudia Rickert					
Isphording, Roger O., **Past Chair**	X				
Johnson, Amber Jade F.	X				

Executive Council Members	Aug. 7 Palm Beach	Sept. 25 Orlando	Nov. 6 Clearwater	Feb. 26 Santa Barbara	May 28 Miami Beach
Jones, Frederick Wayne	X				
Jones, John Arthur, **Past Chair**					
Jones, Patricia P. Hendricks	X				
Judd, Robert Brian	X				
Kalmanson, Stacy O.	X				
Karr, Mary					
Karr, Thomas M.					
Kayser, Joan Bradbury, **Past Chair**					
Kelley, Rohan, **Past Chair**	X				
Kelley, Sean	X				
Kelley, Shane	X				
Kendon, John					
Kibert, Nicole C.	X				
Kightlinger, Wilhelmina F.	X				
King, Robin	X				
Kinsolving, Ruth Barnes, **Past Chair**					
Koren, Edward F., **Past Chair**					
Korvick, Honorable Maria Marinello	X				
Kotler, A. Stephen	X				
Krier, Honorable Beth					
Kromash, Keith Stuart	X				
LaFemina, Rose	X				
Lajoie, John Thomas					
Lane, William	X				
Lange, Jr., George W.	X				
Lannon, Patrick	X				
Larson, Roger Allen	X				
Laughlin, Honorable Lauren					
Leebrick, Brian	X				
Lile, Laird, **Past Chair**					

Executive Council Members	Aug. 7 Palm Beach	Sept. 25 Orlando	Nov. 6 Clearwater	Feb. 26 Santa Barbara	May 28 Miami Beach
Little III, John Wesley	X				
Lynch, Kristen M.	X				
Madorsky, Marsha G.	X				
Marger, Bruce, **Past Chair**	X				
Marmor, Seth					
Marshall III, Stewart Andrew					
McCall, Alan K.	X				
Mednick, Glenn M.	X				
Menor, Arthur James	X				
Mezer, Steven H.	X				
Middlebrook, Mark Thomas	X				
Miller, Lawrence Jay					
Moran, John	X				
Moule, Rex E.	X				
Muir, Honorable Celeste	X				
Muir, William T.	X				
Mundy, Craig A.	X				
Murphy, Melissa, **Past Chair**	X				
Murphy, Jeanne					
Mussman, Jay D.	X				
Nash, Charles Ian	X				
Nguyen, Hung V.					
Norris, Guy W.	X				
Northrop, Andrea	X				
Norris, John E., **Past Chair**					
O'Ryan, Christian Felix	X				
Payne, L. Howard					
Pence, Scott	X				
Platt, William R.	X				
Pleus, Jr., Honorable Robert James					

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Executive Council Members	Aug. 7 Palm Beach	Sept. 25 Orlando	Nov. 6 Clearwater	Feb. 26 Santa Barbara	May 28 Miami Beach
Polson, Marilyn Mewha	X				
Potter, Del G.					
Pratt, David					
Promoff, Adrienne F.	X				
Price, Pamela O.	X				
Prince-Troutman, Stacy A.	X				
Pyle, Michael A.	X				
Reddin, Michelle A.					
Reinhardt, Joe					
Reynolds, Stephen					
Rieman, Alexandra V.	X				
Robbins, James, Jr.	X				
Roberts, Hardy					
Robinson, Charles F.	X				
Rojas, Silvia B.	X				
Roman, Paul	X				
Roscow IV, John Frederick	X				
Russell, Deborah L.	X				
Russick, James C.	X				
Rydberg, Marsha G.	X				
Sachs, Colleen Coffield	X				
Sasso, Michael Cornelius					
Sauer, Jeffrey Thomas	X				
Schaefer, Jr. , Honorable Walter L.					
Schnitker, Clay	X				
Schofield, Percy Allen	X				
Scholnik, Barry	X				
Schwartz, Robert M.					
Scuderi, Jon	X				
Sheets, Sandra Graham	X				

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Executive Council Members	Aug. 7 Palm Beach	Sept. 25 Orlando	Nov. 6 Clearwater	Feb. 26 Santa Barbara	May 28 Miami Beach
Shoter, Neil	X				
Shuey, Eugene Earl	X				
Silberman, Honorable Morris					
Silberstein, David Mark	X				
Sklar, William Paul	X				
Smart, Christopher	X				
Smith, G. Thomas, **Past Chair**	X				
Smith, Michael S.					
Smith, Wilson, **Past Chair**					
Sobien, Wayne	X				
Sparks, Brian Curtis	X				
Spivey, Barry F.	X				
Spurgeon, Susan K.	X				
St. Arnold, Honorable Jack					
Stafford, Michael P.	X				
Stephenson, Laura P.	X				
Stern, Robert Gary	X				
Stinson, Sherri M.	X				
Stone, Adele Ilene	X				
Stone, Bruce M., **Past Chair**					
Suarez, Honorable Richard					
Sundberg, Laura K.	X				
Swaine, Jack Michael, **Past Chair**	X				
Swaine, Robert S.	X				
Taft, Eleanor W.					
Taylor, Richard W.	X				
Tescher, Donald Robert					
Thomas, Honorable Patricia Vitter	X				
Thornton, Kenneth E.	X				
Tritt, Arnold	X				

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Executive Council Members	Aug. 7 Palm Beach	Sept. 25 Orlando	Nov. 6 Clearwater	Feb. 26 Santa Barbara	May 28 Miami Beach
Udick, Arlene	X				
Umsted, Hugh Charles	X				
Virgil, Eric	X				
Waller, Roland D., **Past Chair**	X				
Weintraub, Lee A.	X				
Wells, Jerry	X				
White, Jr.; Richard M.	X				
Whynot, Sancha Brennan	X				
Wickenden, D. Keith	X				
Wilder, Charles D.	X				
Williams, Jr., Richard	X				
Williamson, Julie Ann Stulce, **Past Chair**	X				
Wohlust, G. Charles	X				
Wolasky, Marjorie Ellen	X				
Wolf, Brian	X				
Wolf, Jerome Lee	X				
Wright, Wm. Cary	X				
Young, Gwynne Alice	X				
Zikakis, Salome	X				
Zschau, Julius Jay, **Past Chair**					
Legislative Consultants					
Adams, Gene	X				
Aubuchon, Joshua D.	X				
Dunbar, Peter M.	X				
Edenfield, Martha					
Guests and Fellows					
Armstrong, David G.	X				
Boyd, Deborah	X				

Executive Council Members	Aug. 7 Palm Beach	Sept. 25 Orlando	Nov. 6 Clearwater	Feb. 26 Santa Barbara	May 28 Miami Beach
Bush, Ben	X				
Callahan, Chad	X				
Fallon, Cynthia	X				
George, Joseph P.	X				
Hailey, Phyllis	X				
Hale, Russ	X				
Kypreos, Theo	X				
Lucchi, Elisa	X				
Marx, James	X				
Pasem, Narvin	X				
Stuart, Pam	X				
Thurlow, Thomas, III	X				
Topor, Thomas K.	X				

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Executive Council Meeting
September 22 – 26, 2010

The Ritz-Carlton Orlando, Grande Lakes
4012 Central Florida Parkway
Orlando, Florida 32837
(407) 206-2400

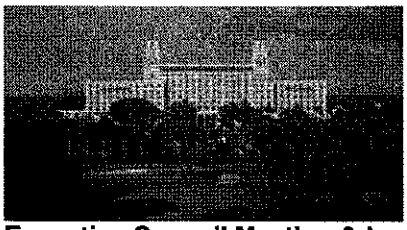
Registration Form

Future Meetings

The Real Property Probate and Trust Law Section of The Florida Bar

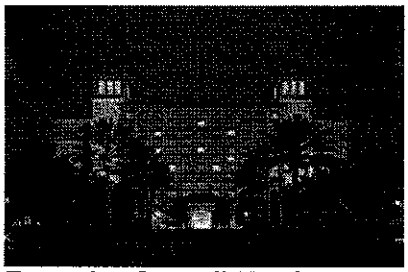
651 East Jefferson Street
Tallahassee, Florida
32399-2300

Future Meetings



Executive Council Meeting & Legislative Update

August 5 – August 8, 2010
The Breakers
One South County Road
Palm Beach, Florida 33480
(561) 655-6611



Executive Council Meeting

September 23 – September 26, 2010
Ritz-Carlton Orlando, Grande Lakes
4040 Central Florida Parkway
Orlando, Florida 32837
(800) 682-3665

Executive Council Meeting

November 4 – November 7, 2010
Sandpearl Resort
500 Mandalay Avenue
Clearwater Beach, Florida 33767

EXHIBIT
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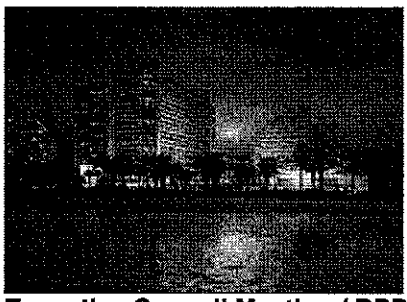
A

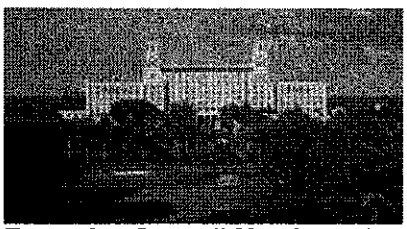
Executive Council Meeting / Out-of-State Meeting

February 24 – February 27, 2011
Four Seasons Resort
1260 Channel Drive
Santa Barbara, California 93108
(805) 969-2261



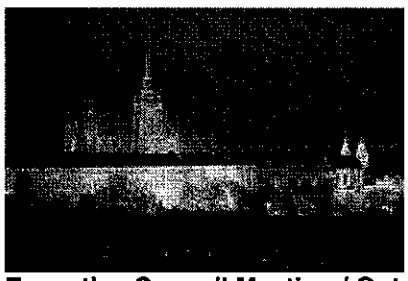
Executive Council Meeting / RPPTL Convention

May 26 – May 29, 2011
Eden Roc Renaissance Miami Beach
4525 Collins Avenue
Miami Beach, Florida 33140
(305) 531-0000



Executive Council Meeting & Legislative Update

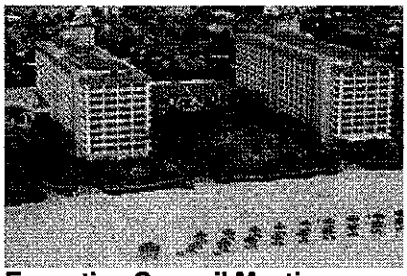
August 4 – August 7, 2011
The Breakers
Palm Beach, Florida
(561) 655-6611



ncil Meeting / Out-of-State Meeting

- September 25, 2011
Four Seasons – Prague

Prague, Czech Republic
420-221-427-000

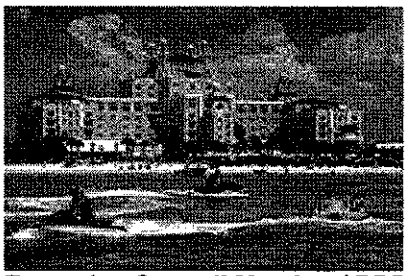


Executive Council Meeting

December 1 – December 4, 2011
Marco Island Marriott
Marco Island, Florida
(239) 394-2511

Executive Council Meeting

March 1 – March 4, 2012
Sawgrass Marriott Ponte Vedra
Ponte Vedra, Florid
(800) 457-4653



Executive Council Meeting / RPPTL Convention

May 31 – June 3, 2012
Don CeSar Beach Resort
St. Petersburg, Florida
(800) 282-1116

RPPTL Financial Summary from Separate Budgets

2009 – 2010 [July 1, 2009 – May 31, 2010[1]]
YEAR TO DATE REPORT

General Budget

Revenue:	**$ 947,855**
Expenses:	**$ 681,987**
,Net:	**$ 265,868**

Attorney / Trust Officer Liaison Conference

Revenue:	**$ 12,517**
Expenses:	**$ 7,726**
Net:	**$ 4,791**

Legislative Update

Revenue:	**$ 48,566**
Expenses:	**$ 96,038**
Net:	**($47,472)**

Convention

Revenue:	**$ 8,465**
Expenses:	**$ 41,337**
Net:	**($32,872)**

Roll-up Summary (Total)

Revenue:	**$ 1,017,403**	
Expenses:	**$ ~~1,293,664~~**	829,633
Net Operations:	**$ ~~(150,160)~~**	187,770

Reserve (Fund Balance):	**$ 908,659**
GRAND TOTAL	**$1,096,429**

[1] **This report is based on the tentative unaudited detail statement of operations dated 5/31/2010**

EXHIBIT
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B

Boje, Debra

From: excouncil-bounces@lists.flabarrpptl.org on behalf of Fletch Belcher [wfbelcher@gmail.com]

Sent: Tuesday, August 03, 2010 4:10 PM

To: excouncil@lists.flabarrpptl.org

Subject: [RPPTL-excouncil] SUPPLEMENT TO AGENDA FOR BREAKERS RPPTL SECTIONEXECUTIVE COUNCIL MEETING (Minor Amendments to ProposedRevised RPPTL Section Bylaws)

Attachments: ATT1195165.txt

TO: EXECUTIVE COUNCIL

FRIOM: BYLAWS COMMITTEE

As a result of thoughful comments submitted by members of the Executive Council in response to the proposed revised Section Bylaws included as an action item in the Agenda package for the August 7 Executive Council meeting at the Breakers, the Bylaws Committee has made the following amendments to those proposed revised Bylaws:

ARTICLE II, SECTION 1(d): "All members of the section shall be required to observe the standards of professionalism and ethical conduct expected of members of The Florida Bar, and legal assistants who are affiliate section members shall also be required to observe and adhere to the Code of Ethics and Professional Responsibility established by the National Association of Legal Assistants, Inc. The executive council, by 2/3 vote of the members present at a meeting, may terminate section membership for misconduct involving moral turpitude or the failure to observe the standards of conduct established by these bylaws. Any proposed termination of section memberhip by the executive council shall be an agenda item at an in-state meeting, and the affected member shall be given reasonable notice of the basis for the proposed termination and an opportunity to be heard at that meeting."

ARTICLE IV, SECTION 3:

"The executive committee shall also have the full power and authority to exercise the function of the executive council when and to the extent authorized by the executive council with respect to a specific matter, and on any other matter which ~~necessarily must be determined~~ the executive committee reasonably determines requires action between meetings of the executive council."

ARTICLE IV, SECTION 4(b):

"No nominations for any elected office or position other than those made by the long-range planning committee will be permitted, except that nominations may be made by a written nominating petition signed by ~~10~~ 25 or more active section members and submitted to the section chair not less than 30 days prior to the election meeting."

ARTICLE IX, SECTION 1:

"A member of the executive council or any section committee ~~should~~ shall not

EXHIBIT tabbies C

participate in a section matter if circumstances exist that may ~~tend~~ reasonably be expected to cause that participation to undermine confidence in the integrity of the section, executive council, or section committee. Where any fact or circumstance exists that may reasonably bring into question an accusation of bias, prejudice, or conflict of interest on the part of a member while participating in a section matter, it is the duty and responsibility of any member having knowledge of such fact or circumstance to make full disclosure of such fact or circumstance to the executive council or section committee. A bias, prejudice, or conflict of interest may arise from a member's personal interests, employment, or client relationships. When such an issue arises, the chair or other person presiding over the proceeding may request the member to voluntarily refrain from participation and voting with respect to the matter. In addition, recusal may be ordered by 2/3 of the members present of the executive council or section committee ~~present~~. Upon recusal, the member may not vote or otherwise participate in proceedings concerning the matter. ~~Nevertheless, the integrity of section proceedings or the validity of its actions shall never be brought into question because of the participation of members who should have recused themselves.~~ If recusal should have occurred but did not, the integrity of section proceedings and the validity of its actions shall not be adversely affected."

ARTICLE V, SECTION 4:

" . . . if any past section chair ~~fails to attend~~ is absent from 10 consecutive in-state executive council meetings, or if any other member of the executive council ~~fails to attend~~ is absent from 3 consecutive in-state executive council meetings in any membership year, such member shall be deemed to have resigned from the executive council . . . ."

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

(APPROVED BY EXECUTIVE COUNCIL ON AUGUST 7, 2010)

Article I
NAME AND PURPOSES

Section 1. Name. The name of this organization is "The Real Property, Probate and Trust Law Section of The Florida Bar" ("section").

Section 2. Purposes. The purposes of the section are:

(a) To provide an organization within The Florida Bar open to persons having an interest in real property (including construction), probate, trust, or related fields of law, that furthers the knowledge and practices of members in those areas;

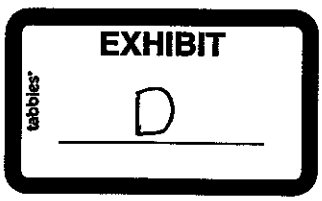
(b) To inculcate in its members the principles of duty and service to the public; and

(c) To serve the public and its members by improving the administration of justice and advancing jurisprudence in the fields of real property (including construction), probate, trust, and related fields of law, through all appropriate means, including the development and implementation of legislative, administrative, and judicial positions; continuing legal education programs; standards for ethical and competent practice by lawyers; and professional relationships between real property (including construction), probate, and trust lawyers, and other lawyer and non-lawyer groups.

Article II
SECTION MEMBERSHIP

Section 1. Membership Types. The membership of the section shall be the active members ("active section member"), affiliate members ("affiliate section member"), and honorary members ("honorary section member") hereafter described:

(a) Active section member: Any member of The Florida Bar in good



standing may become an active section member by applying for such membership and paying the section's annual dues. Any person who is an active section member who ceases to be a member of The Florida Bar in good standing also ceases to be a member of the section. Reinstatement as a member of The Florida Bar in good standing shall automatically reinstate the person as an active section member, provided that the member is current in the payment of section dues.

(b) Affiliate section member: The Executive Council of the section ("executive council") may, in its discretion (after review and approval of the applicant's qualifications for membership), enroll as an affiliate section member, any person who has shown the dual capacity of interest in and contribution to the section's activities and who is either a law student enrolled in an accredited Florida law school, a graduate of any law school, or a legal assistant, as defined below. Affiliate section members shall pay the annual dues prescribed by the executive council and shall have all the privileges of active section members, except that they may not vote or hold any office or position in the section. The number of affiliate section members shall not exceed 1/3 of the number of active section members.

For purposes of this Article, a legal assistant is a person who assists a member of The Florida Bar in the delivery of legal services in the area of real property (including construction), probate, trust, and related fields of law and who has satisfied the following minimum requirements:

1. Successful completion of the certified legal assistant (CLA) examination of the National Association of Legal Assistants, Inc.;

2. Graduation from an ABA-approved program of study for legal assistants or graduation from any accredited law school;

3. Graduation from a course of study for legal assistants which is institutionally accredited, but not ABA-approved, and which requires not less than the equivalent of 60 semester hours of classroom study;

4. Graduation from a course of study for legal assistants, other than those set forth in 2 and 3, above, plus not less than 6 months of in-house training as a legal assistant;

5. A bachelor degree in any field, plus not less than 1year of in-house training as a legal assistant; or

6. Five years of in-house training as a legal assistant.

(c) Honorary section member: Any person whom the executive council shall find to have made outstanding contributions in the fields of real property (including construction), probate, trust, or related fields of law, may be made an honorary section member by the executive council. An honorary section member shall have no vote at section meetings, shall not be entitled to hold any office or position in the section, and shall not be required to pay dues.

(d) All members of the section shall be required to observe the standards of professionalism and ethical conduct expected of members of The Florida Bar, and legal assistants who are affiliate section members shall also be required to observe and adhere to the Code of Ethics and Professional Responsibility established by the National Association of Legal Assistants, Inc. The executive council, by 2/3 vote of the members present at a meeting, may terminate section membership for misconduct involving moral turpitude or the failure to observe the standards of conduct established by these bylaws. Any proposed termination of section membership by the executive council shall be an agenda item at an in-state meeting, and the affected member shall be given reasonable notice of the basis for the proposed termination and an opportunity to be heard at that meeting.

Section 2. Membership Year. The membership year of the section runs concurrently with the membership year of The Florida Bar.

Section 3. Dues. The executive council shall establish annual dues payable from time to time by the members of the section. The dues so established will be effective when approved by the Board of Governors of The Florida Bar ("board of governors"). There will be no proration of annual section dues except for first-year members of The Florida Bar. After becoming a section member, dues are payable in advance of each membership year; provided, however, each person who is admitted to The Florida Bar shall be extended an invitation to become a member of the section, and upon acceptance, such member shall be entitled to a waiver of the dues for the first year of membership in the section, according to the following formula:

(a) If a person is admitted to membership in The Florida Bar after June 30, but prior to December 31, of any calendar year, then that member will not be required to pay section dues until the June 30th following such member's admission to The Florida Bar.

(b) If a person is admitted to membership in The Florida Bar after January 1, but prior to June 30, of any calendar year, that member will not be required to pay section dues until June 30 of the calendar year next succeeding the calendar year of the member's admission to The Florida Bar (e.g. if admitted to The Florida Bar on March 1, no section dues will be payable until the fiscal year beginning July 1.)

The Florida Bar shall bill section dues simultaneously with the billing(s) for regular dues of The Florida Bar. Any member of the section whose section dues are not paid by the date that The Florida Bar dues become delinquent thereupon ceases to be a member of the section.

Article III
ORGANIZATION

The section is divided into 2 divisions, "the real property law division" and "the probate and trust law division." The section and its real property law division shall be served by committees and section liaisons that operate under the supervision of the real property law division director. The section and its probate and trust law division shall be served by committees and section liaisons that operate under the supervision of the probate and trust law division director. The section shall also be served by general standing committees and section liaisons that operate under the supervision of the chair-elect.

Article IV
OFFICERS, ELECTED POSITIONS, AND EXECUTIVE COMMITTEE

Section 1. Officers. The officers of the section are the section chair, the chair-elect, the secretary, the treasurer, the real property law division director, the probate and trust law division director, the immediate past section chair, and the members-at-large director ("section officers"). The section officers, the representatives for out-of-state members of the section, and the members-at-large, shall be selected in the manner set forth in this Article IV.

Section 2. Qualifications. No person may serve as a section officer or in a position as representative for out-of-state members or member-at-large unless they are an active section member, and the loss of that status shall cause the office or position to be vacant. If status as an active section member ceases because of a loss of status as a member of The Florida Bar in good standing that is solely attributable

to a delinquency in (i) the payment of membership fees or dues; or (ii) completing continuing legal education requirements, reinstatement as a member of The Florida Bar in good standing and as an active section member shall automatically reinstate the member to the vacant office or position if it has not been filled.

Section 3. Executive Committee. The section officers, together with the chairs of the section CLE seminar coordination committee and legislation committee, shall serve as the executive committee of the section ("executive committee"), which shall be the planning agency for the executive council. The executive committee shall also have the full power and authority to exercise the function of the executive council when and to the extent authorized by the executive council with respect to a specific matter, and on any other matter which the executive committee reasonably determines requires action between meetings of the executive council. All action taken by the executive committee on behalf of the executive council shall be reported to the executive council at its next meeting. The executive committee shall not take any action that conflicts with the policies and expressed wishes of the executive council. The executive committee shall also (i) make recommendations for consideration by the chair-elect in appointing chairs and vice chairs of section committees and section liaisons; (ii) make recommendations for consideration by the section's long-range planning committee ("long-range planning committee") in submitting nominees for members-at-large; and (iii) perform such other duties as may be directed by the executive council or prescribed in these bylaws.

Section 4. Nominating Procedure.

(a) The long-range planning committee, which shall consist of all past section chairs who are members of the executive council and be chaired by the chair-elect, shall submit nominees to the section for election to the offices of chair-elect, secretary, real property law division director, probate and trust law division director, treasurer, members-at-large director, and to the positions of representatives for out-of-state members and members-at-large. If the office of chair-elect becomes vacant during the year, the nominations submitted by the long-range planning committee for the following year shall include a nominee for the office of section chair. The long-range planning committee shall notify the members of the section of the names of the nominees no later than 60 days prior to the section's annual meeting ("election meeting"). In submitting nominations for members-at-large and, the long-range planning committee shall consider recommendations from the members-at-large director and the executive committee.

(b) No nominations for any elected office or position other than those made by the long-range planning committee will be permitted, except that nominations may be made by a written nominating petition signed by 25 or more active section members and submitted to the section chair not less than 30 days prior to the election meeting. If more than one person is nominated for any elected office or position, the section chair, assisted by such special committees as the section chair may appoint, will announce the procedures to be followed for that election.

(c) Each nominee will be permitted to prepare a statement of no more than 500 words, containing such information about the nominee as the nominee may choose, to be reproduced and distributed by the section to its members, either as an article in the section's publication, Action Line, or separately. Any such statement shall also be distributed at the election meeting.

Section 5. Election and Term of Offices and Positions.

(a) The section officers, the representatives for out-of-state members, and the members-at-large, shall be elected by majority vote of the active section members in physical attendance at the election meeting, which shall be held prior to July 1 of each year. Voting by proxy shall not be permitted. At the election meeting (i) the section chair, chair-elect, and secretary shall determine the number of active section members in physical attendance and entitled to vote; (ii) voting will be by written, secret ballot prepared in advance; (iii) if no nominee receives a majority vote for an office or position, additional balloting will take place between the 2 nominees receiving the greatest number of votes until the required majority is obtained; and (iv) the results of the election will be immediately announced by the section chair.

(b) The nominees so elected shall serve for a period of 1 year, beginning on July 1. The chair-elect shall automatically become section chair upon expiration of the term as chair-elect or upon the death, resignation, or removal of the section chair.

Section 6. Duties of Officers.

(a) Section Chair: The section chair shall be the chief executive officer and principal representative of the section, and shall preside at all meetings of the section, the executive council, and the executive committee. The section chair shall also be responsible for reports to The Florida Bar or the board of governors and for

performing such other duties as may be prescribed in these bylaws or which customarily pertain to the office of section chair. The section chair is an ex-officio member of all section committees.

(b) Chair-elect: The chair-elect shall be responsible (i) for the general standing committees and any projects assigned to them, including the preparation and submission of any required reports; (ii) for such duties as the section chair, the executive council, or the executive committee may designate; and (iii) for performing such other duties as may be prescribed in these bylaws or customarily pertain to the office of chair-elect. In addition, in the case of the temporary disability or absence of the section chair, the chair-elect shall serve as acting section chair, but only for the duration of the section chair's disability or absence. Any issue concerning the disability or absence of the section chair shall be determined by the executive committee, subject to review by the executive council.

(c) Secretary: The secretary shall record (i) minutes of meetings of the executive council (including record of attendance); (ii) significant actions taken by the executive committee, including all actions which exercise any function of the executive council; and (iii) the election results at the election meeting, and shall file all of those records with the permanent records of the section at The Florida Bar headquarters in Tallahassee. The secretary shall also report and keep a record of all policies adopted by the section as a separate record.

(d) Division Directors: The real property law division director and the probate and trust law division director shall be responsible for the section committees within their respective divisions, and for the projects assigned to them, including the preparation and submission of reports of such section committees as may be required.

(e) Treasurer: The treasurer and the appropriate staff of The Florida Bar shall make certain that the financial affairs of the section are administered in a manner authorized by the section's budget and in accordance with the standing policies of the board of governors. The treasurer shall monitor and review for correctness all accounts, reports, and other documents pertaining to section funds, revenues, and expenditures that are furnished by the staff of The Florida Bar. No reimbursement may be made to any member of the section without approval of the treasurer, and any reimbursement to the treasurer must be approved by the section chair or chair-elect. The treasurer shall (i) work with the chair-elect to prepare and submit a projected budget to the executive council; (ii) report from time to time on the section's present and projected financial condition, advising the executive committee and the executive council as to the financial impact of any proposed action

that might have a significant impact on the financial condition of the section; and (iii) prepare such other recommendations and special reports of financial affairs of the section as may be requested by the section chair.

(f) Members-At-Large Director: The members-at-large director shall (i) in consultation with the executive committee, define any responsibilities of the members-at-large; (ii) be responsible to the section for the members-at-large; (iii) evaluate the performance of the members-at-large on an annual basis; and (iv) provide recommendations for consideration by the long-range planning committee in submitting nominees for members-at-large.

(g) Immediate Past Section Chair: The immediate past section chair shall provide counsel, guidance and advice to the executive committee.

Section 7. Vacancies.

(a) If the office of section chair becomes vacant, the chair-elect shall immediately assume the office of section chair, and shall serve as section chair for the remainder of the unexpired term, as well as for the following term for which the chair-elect was elected to serve as section chair.

(b) If the office of chair-elect becomes vacant, the section chair shall assume the duties of the office of chair-elect for the remainder of the unexpired term. In that event, at the next election meeting, a section chair shall be nominated and elected in the manner provided in these bylaws.

(c) If the offices of section chair and chair-elect both become vacant, the long-range planning committee shall convene an emergency meeting and select a qualified person to serve as section chair for the remainder of the unexpired term. In that event, the person selected as section chair shall also assume the duties of the office of chair-elect for the remainder of the unexpired term and, at the next election meeting, a section chair shall be nominated and elected in the manner provided in these bylaws.

(d) If any office other than section chair or chair-elect becomes vacant within 6 weeks of the next scheduled in-state meeting of the executive council, the vacancy shall be filled for the remainder of the unexpired term by the executive council at that meeting. If no in-state meeting is scheduled within 6 weeks following the creation of such a vacancy, it shall be filled for the remainder of the unexpired

term by the executive committee.

(e) Vacancies in the positions of representative for out-of-state members and member-at-large shall be filled by the section chair.

Article V
EXECUTIVE COUNCIL

Section 1. Powers and Duties. The executive council is the governing body of the section and shall have the power and duty to fully administer these bylaws, including the power to exercise all authority expressed or implied in these bylaws and to employ necessary personnel on behalf of the section.

Section 2. Membership. The executive council shall consist of the section chair, the chair-elect, the real property law division director, the probate and trust law division director, the treasurer, the secretary, the members-at-large director, the chairs and vice chairs of section committees, the section liaisons, the member of the board of governors appointed as its liaison representative to the section, the members-at-large, the past section chairs, and the representatives for out-of-state members of the section.

Section 3. Members-at-Large and Regional Representation. The existence of the members-at-large category is intended to help the section achieve the goal of maintaining active, productive members on the executive council, while preserving regional representation. To be considered for such a position, a prospective member-at-large must demonstrate the willingness and ability, through previous committee leadership or otherwise, to assist the section with its needs. To the extent that the section officers, chairs and vice chairs of section committees, section liaisons, and representatives for out-of-state members of the section serving on the executive council do not include geographical representation from each judicial circuit and outside of Florida, the members-at-large should include such representation when reasonably practicable.

Section 4. Attendance. Regular attendance by executive council members at executive council meetings is requisite to the proper performance of their duties and responsibilities. Accordingly, if any past section chair is absent from 10 consecutive in-state executive council meetings, or if any other member of the executive council is absent from 3 consecutive in-state executive council meetings in any membership year, such member shall be deemed to have resigned from the executive council, and any section office or position held by that person shall be

deemed vacant. In such event, the resigned member shall not be eligible for election to or membership on the executive council for the next succeeding membership year unless (i) the executive committee, upon a showing of good cause for the absences, waives the attendance requirement for the membership year involved; and (ii) the waiver is announced at a formal meeting of the executive council and duly recorded in the minutes of the meeting. Any vacancy created by the absence of a member as herein provided shall be filled as provided in these bylaws.

Article VI
SECTION COMMITTEES AND LIAISONS

Section 1. Committees. The section chair shall have the authority to establish and dissolve such section committees and liaison positions as the section chair deems necessary or advisable, except that the section chair may not dissolve the section legislation committee or the CLE seminar coordination committee. The section chair shall promptly report such changes to the executive council, and they shall be effective until and unless disapproved by the executive council.

Section 2. Section Committee Chairs and Liaisons. Prior to July 1 of each year, after considering the recommendations of the executive committee, the chair-elect shall make the following appointments for the coming year: (i) chairs of the section's real property law division committees, and such vice chairs of those committees as the chair-elect deems necessary; (ii) chairs of the section's probate and trust law division committees, and such vice chairs of those committees as the chair-elect deems necessary; (iii) chairs of the section's general standing committees, and such vice chairs of those committees and as the chair-elect deems necessary; (iv) and section liaisons to other sections and groups. The section chair shall have the power to remove chairs and vice chairs of section committees and section liaisons if the section chair believes that it is in the best interest of the section to do so, and to fill vacancies in those positions (including vacancies resulting from the section chair's creation of new section committees or liaison positions).

Section 3. Committee Members. The chair of each section committee may appoint and remove members to and from that committee, except that a committee chair may not remove a vice chair of the committee.

Section 4. Section Membership Requirement. No person may serve as a member of any section committee unless they are a member of the section. No person may serve as a (i) chair, vice chair, or voting member of any section committee; or (ii) section liaison, unless they are an active section member, and the

loss of that status shall cause the position to be vacant. If status as an active section member ceases because of a loss of status as a member of The Florida Bar in good standing that is solely attributable to a delinquency in (i) the payment of membership fees or dues; or (ii) completing continuing legal education requirements, reinstatement as a member of The Florida Bar in good standing and as an active section member shall automatically reinstate the member to the vacant position if it has not been filled.

Section 5. Committee Reports. The chair of each section committee shall submit a written annual report of the committee's activities during the year to the executive committee by the date requested by the section chair. All recommendations contained in such reports are confidential and shall not be disclosed outside the executive committee without approval of the section chair.

Article VII
MEETINGS

Section 1. Annual/Election Meeting of the Section. The section chair shall designate the annual meeting of the section each year, which shall be the election meeting and be held prior to July 1. The executive council may call special meetings of the section provided at least 30 days notice thereof shall be given. The active section members in physical attendance at any meeting of the section shall constitute a quorum for the transaction of business, and a majority vote of those in physical attendance will be binding. Voting by proxy shall not be permitted.

Section 2. Executive Council Meetings. There shall be no fewer than 3 in-state meetings of the executive council each year. The executive council may act or transact business herein authorized, without meeting, by written or electronic approval of the majority its members. The section chair may call meetings of the executive council by giving no less than 15 days notice to its members. Those present at a meeting of the executive council duly called will constitute a quorum, and a majority vote of those present will be binding unless a greater majority is required by these bylaws for a particular matter. Voting by proxy shall not be permitted.

Section 3. Executive Committee Meetings. The executive committee shall meet as directed by the section chair, and shall hold an organizational meeting prior to each membership year at a time, date, and place selected by the section chair. The section chair shall fix the date and location of each meeting and shall give written, electronic, or oral notice of such date and location to each executive committee member at least 7 days prior to the meeting. A majority of the executive committee

may exercise its powers unless a greater majority is required by these bylaws for a particular matter, and it is not necessary that a formal meeting be held for action, action by mail, e-mail, or telephone being sufficient. Voting by proxy shall not be permitted.

Article VIII
LEGISLATIVE, ADMINISTRATIVE, AND JUDICIAL POSITIONS

Section 1. Authority. The section may be involved in legislative, administrative, and judicial (including amicus curiae and court rule) activities that are within the purview of the section. Activities are within the purview of the section if they are significant to the judiciary, the administration of justice, the fundamental legal rights of the public, or the interests of the section, provided they are consistent with the purposes of the section and the policies promulgated by the board of governors, including the requirements that:

(a) the issue involved is within the substantive areas of real property (including construction), probate, trust, or related fields of law;

(b) the issue is beyond the scope of permissible legislative activity of The Florida Bar, or is within the permissible scope of legislative activity of The Florida Bar, but the proposed section position is not inconsistent with an official position of The Florida Bar on that issue; and

(c) the issue is not one that carries the potential of deep philosophical or emotional division among a substantial segment of the membership of The Florida Bar.

Section 2. Section Positions. A "section position" is a legislative, administrative, or judicial (including amicus curiae and court rule) position that complies with Section 1 of this Article and has been adopted by the section in accordance with this Article. A section position, which may be expressed as a concept, may either support or oppose a matter. Any advocacy by the section shall be based upon a section position and comply with the requirements of this Article.

Section 3. Legislation Committee. The section legislation committee shall consist of a chair, a vice chair for real property, a vice chair for probate and trust, the section chair, the chair-elect, the director of the real property law division, the director of the probate and trust law division, and such other members of the executive council as are appointed by the chair of the section legislation committee

with the approval of the section chair. The section legislation committee shall coordinate the legislative activities of the section and act as a liaison between (i) the executive council (or its executive committee); and (ii) the section lobbyist and legislative and administrative bodies.

Section 4. Procedures for Adopting and Reporting Section Positions.

(a) A proposed section position shall be an agenda item and supporting documentation shall be distributed to the executive council at least one week prior to the executive council meeting unless those requirements are waived by 2/3 of the members of the executive council present at that meeting.

(b) A section position may be proposed by a section committee.

(c) To adopt a section position, the executive council must, by a 2/3 vote of the members present (i) find that the proposal is within the purview of the section, as defined in Section 1 of this Article; and (ii) approve the proposal. Voting by proxy shall not be permitted. Whenever, because of time constraints, the executive council cannot meet to adopt a section position prior to the time when legislative, administrative, or judicial action is required, the executive committee may, by a 2/3 vote of its members, adopt a section position. Any section position adopted by the executive committee must be reported to the executive council at its next meeting.

(d) Written notice of the adoption of a section position shall be promptly given to The Florida Bar, and it shall be circulated for comment to all divisions, sections, and committees of The Florida Bar that are believed to be interested in the matter.

(e) A section position may not be advanced by the section unless it has been submitted to, and not disapproved by, the board of governors. A section position shall remain in force for the current biennial legislative session unless rescinded by the board of governors.

(f) In even-numbered years, the section legislation committee shall recommend those section positions to be renewed at the executive council meeting held in conjunction with the election meeting of the section.

(g) The section shall not participate as an amicus curiae without the consent of the board of governors.

(h) Section positions shall be clearly identified as positions of the section, and not those of The Florida Bar.

Section 5. Expenses Incurred in Advancing Section Positions. If the section lobbyist or section chair requests the appearance of a section member to advance a section position, the member's reasonable expenses shall be paid by the section in accordance with its budgetary policies.

Section 6. Section Lobbyist. Subject to the approval of the board of governors, the section may retain a lobbyist to assist the section in its legislative activities or matters.

Article IX
MISCELLANEOUS

Section 1. Integrity of Section Proceedings - Disclosure of Conflict and Recusal. A member of the executive council or any section committee shall not participate in a section matter if circumstances exist that may reasonably be expected to cause that participation to undermine confidence in the integrity of the section, executive council, or section committee. Where any fact or circumstance exists that may reasonably bring into question an accusation of bias, prejudice, or conflict of interest on the part of a member while participating in a section matter, it is the duty and responsibility of any member having knowledge of such fact or circumstance to make full disclosure of such fact or circumstance to the executive council or section committee. A bias, prejudice, or conflict of interest may arise from a member's personal interests, employment, or client relationships. When such an issue arises, the chair or other person presiding over the proceeding may request the member to voluntarily refrain from participation and voting with respect to the matter. In addition, recusal may be ordered by 2/3 of the members present of the executive council or section committee. Upon recusal, the member may not vote or otherwise participate in proceedings concerning the matter. If recusal should have occurred but did not, the integrity of section proceedings and the validity of its actions shall not be adversely affected.

Section 2. Action of The Florida Bar. No action of the section shall be represented or construed as the action of The Florida Bar until it has been approved by The Florida Bar.

Section 3. Compensation and Expenses. No salary or other compensation may be paid to any member of the section for performance of services to the section, but members of the section may be reimbursed for such reasonable and

necessary telephone expenses, reproduction expenses and other similar out-of-pocket expenses that such member incurs in the performance of services for the section.

Section 4. Policies of the Section. Policies adopted by the executive council, including section policies, shall be maintained in a separate journal at The Florida Bar Headquarters in Tallahassee, Florida together with the other official records of the section.

Section 5. Amendments. These bylaws may be amended only with the consent of the board of governors upon recommendation made by the executive council.

Section 6. Conduct of Meetings. The current edition of Robert's Rules of Order shall govern the conduct of all meetings of the section and its subdivisions, except that provisions contained in these bylaws shall prevail over any conflicting provision in those Rules. The section chair may appoint a parliamentarian to advise and assist the section chair or any other person presiding over a meeting of the section or any of its subdivisions in connection with any procedural issues that may arise. Non-members of the executive council may address the executive council with the permission of the section chair or upon 2/3 vote of the members of the executive council present (without debate).

Section 7. Notice. Any requirement in these bylaws that notice (whether written or otherwise), information, or materials be furnished may be satisfied by (i) any method of delivery specified in the requirement; (ii) transmitting the notice, information or materials by e-mail to any email address provided by the recipient to The Florida Bar; or (iii) posting the notice, information, or materials to the section's website and notifying the member of the posting by e-mail to any e-mail address provided by the recipient to The Florida Bar.

Section 8. Effective Date. These bylaws shall be effective as of July 1, 2010, or upon their adoption by the executive council, or upon their approval by the board of governors, whichever occurs later. Upon the effective date of these bylaws and for the remainder of the term for which they were elected, each existing circuit representative shall automatically become a member-at-large, and the existing circuit representatives director shall automatically become the members-at-large director.

RPPTL 2010 - 2011
Executive Council Meeting Schedule
BRIAN FELCOSKI'S YEAR

Date	Location
August 5 – August 8, 2010	**Executive Council Meeting & Legislative Update** The Breakers Palm Beach, Florida Reservation Phone # 561-655-6611 www.thebreakers.com Room Rate: $185.00 Cut-off Date: July 4, 2010
September 23 – September 26, 2010	**Executive Council Meeting** Ritz-Carlton Orlando, Grand Lakes Orlando, Florida Reservation Phone # 1-800-576-5760 http://www.grandelakes.com Room Rate: $219.00 Cut-off Date: August 25, 2010
November 4 – November 7, 2010	**Executive Council Meeting** Sandpearl Resort Clearwater, Florida Reservation Phone #1-877-726-3111 http://www.sandpearl.com Room Rate: $199.00 Cut-off Date: October 1, 2010
February 24 – February 27, 2011	**Executive Council Meeting / Out-of-State Meeting** Four Season Resort Santa Barbara, CA Reservation Phone #805-565-8299 www.fourseasons.com/santabarbara Room Rate: $350.00 Cut-off Date: January 25, 2011
May 26 – May 29, 2011	**Executive Council Meeting / RPPTL Convention** Eden Roc Hotel Miami Beach, Florida Reservation Phone # 1-800-319-5354 http://boldnewedenroc.com/ Room Rate $199.00 Cut-off Date: May 3, 2011

RPPTL 2011 - 2012
Executive Council Meeting Schedule
George Meyer's YEAR

Date	Location
August 4 – August 7, 2011	**Executive Council Meeting & Legislative Update** The Breakers Palm Beach, Florida Reservation Phone # 561-655-6611 www.thebreakers.com Room Rate: $190.00 Cut-off Date: July 3, 2011
September 21 – September 25, 2011	**Executive Council Meeting / Out-of-State Meeting** Four Seasons – Prague Prague, Czech Republic Reservation Phone # 420-221-427-000 http://www.fourseasons.com/prague/ Room Rate: $362.00 Cut-off Date: August 31, 2011
December 1 – December 4, 2011	**Executive Council Meeting** Marco Island Marriott Marco Island, Florida Reservation Phone #1-800-438-4373 http://www.marcoislandmarriott.com/ Room Rate: $189.00 Cut-off Date: November 9, 2011
March 1 – March 4, 2011	**Executive Council Meeting** Sawgrass Marriott Ponte Vedra Ponte Vedra, Florida Reservation Phone #1-800-457-4653 http://www.sawgrassmarriott.com/ Room Rate: $149.00 Cut-off Date: February 8, 2012
May 31 – June 3, 2012	**Executive Council Meeting / RPPTL Convention** Don CeSar Beach Resort St. Petersburg, Florida Reservation Phone # 1-800-282-1116 http://www.loewshotels.com/en/Hotels/St-Pete-Beach-Resort/Overview.aspx Room Rate $160.00 Cut-off Date: May 9, 2012

BOARD OF GOVERNORS REPORT

Dan DeCubellis, Board Liaison

At its July 23, 2010, meeting in Sarasota, The Florida Bar Board of Governors:

RPPTL SECTION ITEMS:

LEGISLATIVE POSITIONS

1. On June 18, 2010, The Executive Committee approved the following position of the RPPTLS on an emergency basis:

123. Supports repeal F.S. §689.262 (2008), providing for disclosure of windstorm mitigation rating, including supporting an override of the veto of HB 545.

2. The board approved the sunsetting of the 2008-10 legislative positions of The Florida Bar and its committees and the rollover of selected 2008-10 positions requested by several sections for the 2010-12 biennium. Rollover of the legislative positions of the RPPTLS designated as 1-123 were approved as requested.

OTHER ITEMS:

REMOVAL OF MARTINDALE RATINGS FROM TFB WEBSITE

Approved a recommendation from the Communications Committee to not list any ratings, including Martindale-Hubbell, on the expanded Bar member profile page on the Bar's website. The Communications Committee reported that there are now over 100 lawyer rating services and that The Florida Bar was the only state bar that permitted lawyer ratings on their website. The sense of the board was that The Florida Bar should not be giving the imprimatur of The Florida Bar to any rating agency.

NEW BAR SECTION ON ALTERNATIVE DISPUTE RESOLUTION

Approved the recommendation of the Program Evaluation Committee to create a new section on alternative dispute resolution.

COMMITTEE TO STUDY MANDATORY REGULATION OF PARALEGALS

Approved the recommendation of the Program Evaluation Committee to create a nine-member committee to study mandatory regulation of paralegals. PEC Chair Greg Coleman said paralegals have come to the Bar requesting that they be regulated by the Bar or the Supreme Court.

ETHICS OPINION ON CONFIDENCES OF DECEASED CLIENT

Approved a recommendation from the Board Review Committee on Professional Ethics to allow the Professional Ethics Committee to prepare an advisory opinion on the ethical obligations of a lawyer who is asked to disclose confidential information of a decedent by the personal representative of the decedent's estate.

ADVERTISING RULES REVIEW
Heard Board Review Committee on Professional Ethics Chair Carl Schwait report that the committee will attempt to complete the Supreme Court mandated review of Bar advertising and marketing rules and policies by the May 2011 meeting. On a related issue, he noted the U.S. 11th Circuit Court of Appeals had ruled in *Harrell & Harrell v. The Florida Bar*. The firm had claimed that five Bar advertising rules were unconstitutional. A district court judge ruled in favor of the Bar, but the circuit court found that four of the issues should have further proceedings at the district court.

JUDICIAL FUNDING
Heard President Mayanne Downs announce that immediate Past President Jesse Diner will head up a Bar effort to prevent the Legislature from adjusting pension benefits for judges. Twelfth Circuit Chief Judge Lee Haworth, appearing earlier in the meeting, asked for the Bar's help on the issue saying reducing benefits would make it harder to attract qualified lawyers, especially civil practitioners, to the bench.

ETHICS OPINION ON CONTACTING GOVERNMENTAL OFFICIALS
Heard that Proposed Advisory Opinion 09-1, addressing when lawyers may contact government officials who are represented by counsel, will be postponed until the board's December meeting to allow attorneys representing government entities more time to make suggestions.

INVESTMENTS
Approved the Investment Committee's recommendation to hire five fund managers for expanded investments in the Bar's long-term investment portfolio and to reallocate investment targets for the new and existing investment categories.

ATTORNEYS LICENSED IN FOREIGN COUNTRIES
Voted to approve a recommendation from the Standing Committee on the Unlicensed Practice of Law to oppose suggested amendments to the ABA Model Rules that would allow attorneys licensed in foreign countries to register as authorized house counsel in Florida or to appear pro hac vice in the state. The committee said it would be hard to verify licensing standards in foreign jurisdictions.

E-FILING
Discussed e-filing and e-service and related rules that will soon come to the board for its review and comment.

MEDICAL LIENS
Approved an addition to Rule 4-1.5 governing the hiring of an outside law firm to negotiate the resolution of medical lien issues in a personal injury case.

FINANCIAL REPORT

A HAND OUT WILL BE PROVIDED AT THE MEETING

CHAPTER 5

ESTATES OF DECEDENTS

STANDARD 5.1

TITLE DERIVED THROUGH INTESTATE DECEDENT

STANDARD: TITLE TO REAL ESTATE OF AN INTESTATE DECEDENT (EXCLUDING SURVIVORSHIP ESTATES) PASSES AS OF THE DATE OF DEATH TO THE HEIRS, SUBJECT TO: (1) THE PERSONAL REPRESENTATIVE'S POSSESSION AND CONTROL OVER REAL ESTATE, OTHER THAN PROTECTED HOMESTEAD, FOR THE PAYMENT OF EXPENSES OF ADMINISTRATION, DEBTS AND TAXES, OR FOR DISTRIBUTION ; AND (2) THE LIEN OF ESTATE TAXES, IF ANY.

Problem 1: John Doe died intestate and, although his estate was fully administered in Florida probate proceedings and the personal representative discharged, Blackacre was omitted from the personal representative's certificate of distribution. All heirs conveyed Blackacre to Richard Roe. Is Roe's title marketable?

Answer: Yes, provided federal and Florida estate taxes have been paid or the appropriate statutes of limitation have run on the state and federal estate tax liens.

Problem 2: John Doe died and, although an Order of Summary Administration was entered, both the petition for summary administration and the order omitted Blackacre. Later, all heirs conveyed Blackacre to Richard Roe, a bona fide purchaser for value. Is Roe's title marketable?

Answer: Yes, provided federal and Florida estate taxes, if any, have been paid or the appropriate statutes of limitation have run on the state and federal estate tax liens. The Order of Summary Administration can be relied upon to establish the identity of the heirs.

Authorities & References: *F.S.* 732.101(2); F.S. 733.607(1); F.S. 733.608(1),(2); *Jones v. Federal Farm Mortg. Corp.*, 132 Fla. 807, 182 So. 226 (1938); *Spitzer v. Branning*, 135 Fla. 49, 184 So. 770 (Fla. 1938); *Public Health Trust of Dade County v. Lopez*, 531 So. 2d 946 (Fla. 1988);; PRACTICE UNDER FLORIDA PROBATE CODE §4.18 (CLE 5th ed. 2007); FUND TN 2.09.03.

Comment: *F.S.* 732.101(2) provides that the decedent's death is the event that vests the heirs' right to the decedent's intestate property. However, for title to be marketable, Florida probate proceedings are necessary to establish the identity of the heirs. In addition, in order to preserve a permanent record of the probate proceedings for *future* marketability purposes, it is strongly recommended that certified copies of the pertinent excerpts be recorded in the official records of the county where the real property is located. Rule 2.075 of the Rules of Judicial Administration permit the destruction of probate proceedings after the lapse of ten years from a final

judgment. At a minimum, the documents to be recorded in an intestate estate are the petition for administration, letters of administration, and order closing the estate and discharging the personal representative if the estate has been closed, as well as the order authorizing the sale by the personal representative if there has been a sale of estate lands.

Under *F.S.* 733.607(1) and 733.608, the decedent's real property, except protected homestead, is subject to the possession and control of the personal representative for such purposes as the payment of devises, estate and inheritance taxes, claims, charges, and expenses of the administration and obligations of the decedent's estate.

Protected homestead does not become an asset within the possession and control of the personal representative. *Spitzer v. Branning*, 135 Fla. 49, 184 So. 770 (Fla. 1938); *Public Health Trust of Dade County v. Lopez*, 531 So. 2d 946 (Fla. 1988). Therefore, during the administration of the estate, a conveyance from the heirs would not create a marketable title unless: (1) a final order determining the property to be protected homestead had been entered, or (2) the personal representative relinquishes control, or potential control over the asset by quitclaim deed, certificate of distribution or other similar instrument and all creditors' claims have been administered and estate taxes cleared.

STANDARD 5.2

TITLE DERIVED THROUGH TESTATE DECEDENT

STANDARD: A WILL IS INEFFECTIVE TO CONVEY TITLE TO REAL PROPERTY UNTIL THE WILL IS ADMITTED TO PROBATE IN FLORIDA, BUT UPON ADMISSION TO PROBATE THE WILL RELATES BACK TO THE DEATH OF THE TESTATOR AND TAKES EFFECT AS OF THAT DATE AS AN INSTRUMENT OF TITLE.

Problem: John Doe owned Blackacre at the time he died testate. His will was duly admitted to probate in Florida, the estate was properly and fully administered and the personal representative was duly discharged. The will contained a devise of Blackacre (non-homestead) to the testator's widow, but the legal description in the petition for discharge and distribution was incorrect. Subsequent to the close of the estate Doe's widow conveyed Blackacre by proper description to Richard Roe. Is Roe's title marketable?

Answer: Yes. Title passed to the widow under the will as of the date of Doe's death.

Authorities & References: *F.S.* 732.6005, 732.514, 733.103; *Sorrells v. McNally*, 105 So 106 (Fla. 1925); *Murphy v. Murphy*, 170 So. 856 (Fla. 1936); *Palmquist v. Johnson*, 155 Fla. 628, 21 So. 2d 353 (1945); *U.S. v. 936.71 Acres of Land, More or Less, in Brevard County, Fla.*, 418 F.2d 551 (5th Cir. 1969). See *F.S.* 732.4015 concerning homestead property; FUND TN 2.08.02.

Comment: Concerning the devise of homestead property, see Title Standard 18.8.

As to nonresident decedents, see Title Standard 5.15.

The Standard is to be construed subject to the intention of the testator as expressed in his will. *F.S.* 732.6005.

This Title Standard does not address the factors to be reviewed in determining whether a property has homestead status or whether a judicial determination of homestead status is required.

STANDARD 5.3

SALE OF NONHOMESTEAD REAL PROPERTY BY PERSONAL REPRESENTATIVES WITHOUT COURT AUTHORIZATION OR CONFIRMATION

STANDARD: A CONVEYANCE OF NONHOMESTEAD REAL PROPERTY BY A FLORIDA PERSONAL REPRESENTATIVE OF AN ESTATE WITH POWER OF SALE IN THE WILL, BUT WITHOUT A COURT ORDER AUTHORIZING OR CONFIRMING THE CONVEYANCE, CONFERS MARKETABLE TITLE.

Problem: John Doe was the record owner of Blackacre, (nonhomestead) when he died in 2001. Richard Roe was appointed the personal representative of John Doe's estate by a Florida court. The will contained the following provision: "I confer upon my personal representative full authority to sell and convey any part or all of my estate, real or personal." In 2001 Richard Roe, as personal representative, conveyed Blackacre to Simon Grant, who recorded the deed. No authorization or confirmation of the court appears of record. Does Simon Grant have marketable title?

Answer: Yes.

Authorities & References: *F.S.* 733.613(2); In *re Granger*, 318 So. 2d 509 (Fla. 1st DCA 1975); FUND TN 2.07.05.

Comment: With respect to a limited power of sale, see Title Standard 5.7 (Limitation on Power of Sale).

This Title Standard assumes the power of sale was not personal to the personal representative named in the will. For further discussion, see Title Standard 5.9 (Powers of Successor Personal Representatives).

As to the sale of homestead property by the personal representative, see Title Standard 18.10. For discussion on clearance of estate tax liens, see Chapter 12.

This Title Standard does not address the factors to be reviewed in determining whether a property has homestead status or whether a judicial determination of homestead status is required.

STANDARD 5.4

SALE OF NONHOMESTEAD REAL PROPERTY BY PERSONAL REPRESENTATIVES WITH COURT AUTHORIZATION OR CONFIRMATION

STANDARD: WHERE THERE IS NO WILL, OR THE WILL DOES NOT GIVE THE PERSONAL REPRESENTATIVE POWER TO SELL NONHOMESTEAD REAL PROPERTY, PRIOR AUTHORIZATION OR SUBSEQUENT CONFIRMATION BY THE COURT IS REQUIRED FOR VALID TITLE.

Problem 1: John Doe appointed Richard Roe as the personal representative in his will. The will did not confer a power of sale on the personal representative. During the course of the administration of the estate, Richard Roe, as personal representative, sold Blackacre to Simon Grant with authorization of the court. Blackacre was not the decedent's homestead. Is the title marketable?

Answer: Yes. (The result would be the same if the court confirmed the sale after it had occurred.)

Authorities & References: *F.S.* 733.613(1); *In re Estate of Smith*, 200 So.2d 547 (2d D.C.A. Fla. 1967); *In re Estate of Gamble*, 183 So.2d 849 (1st D.C.A. Fla. 1966); *In re Granger*, 318 So.2d 509 (1st D.C.A. Fla. 1975); *Anderson v. Johnson*, 732 So.2d 423 (Fla. 5th DCA 1999).

Comment: For conveyances made without court authorization but under a power of sale in the will, see Title Standard 5.3 (Sale of Nonhomestead Real Property By Personal Representatives Without Court Authorization or Confirmation).

If the personal representative is the purchaser, see Title Standard 5.5 (Acquisition of Estate Lands by Fiduciaries).

As to the sale of homestead property by the personal representative, see Title Standard 18.10. For discussion on clearance of estate tax liens, see Chapter 12.

This Title Standard does not address the factors to be reviewed in determining whether a property has homestead status or whether a judicial determination of homestead status is required.

STANDARD 5.5

ACQUISITION OF ESTATE LANDS BY FIDUCIARIES PRIOR TO JANUARY 1, 1979

{Title Standard deleted. See archived version for text.)

STANDARD 5.5-1

PERSONAL REPRESENTATIVES – CONFLICTS OF INTEREST

STANDARD: ON OR AFTER JANUARY 1, 1976 THE PERSONAL REPRESENTATIVE CANNOT CONVEY MARKETABLE TITLE IN ANY TRANSACTION IN WHICH THE PERSONAL REPRESENTATIVE HAS A CONFLICT OF INTEREST, SUCH AS A TRANSACTION IN WHICH THE PERSONAL REPRESENTATIVE, THE SPOUSE, AGENT OR ATTORNEY OF THE PERSONAL REPRESENTATIVE OR ANY ENTITY OR TRUST IN WHICH THE PERSONAL REPRESENTATIVE HAS A SUBSTANTIAL BENEFICIAL INTEREST PURCHASES REAL PROPERTY OF THE ESTATE, UNLESS (1) THE WILL OR A CONTRACT ENTERED INTO BY THE DECEDENT EXPRESSLY AUTHORIZED THE TRANSACTION; OR (2) THE TRANSACTION WAS APPROVED BY THE COURT AFTER NOTICE TO INTERESTED PERSONS.

Problem 1: In the estate of John Doe, deceased, a Florida court issued letters testamentary to Richard Roe. The will, which was duly admitted to probate, authorized Richard Roe to sell real property of the estate. In 2002, Richard Roe, as personal representative, conveyed Blackacre to his wife, Mary Roe. Does Mary have marketable title?

Answer: No, unless (1) the will empowered Richard Roe to so dispose of the property, or (2) John Doe executed a contract of sale to Mary before his death, or (3) there was a court authorization or confirmation of the sale.

Problem 2: Richard Roe was duly appointed personal representative by a Florida court. Prior to his death, John Doe contracted to sell Blackacre to Richard Roe. In 2002, John Doe died and Richard Roe as personal representative, completed the conveyance of Blackacre to himself according to the terms of the contract. There was no court authorization or confirmation of the sale. Does Richard Roe have marketable title?

Answer: Yes.

Authorities & References: *F.S.* 733.610; *Taylor v. Hopkins*, 472 So.2d 1355 (Fla. 5th DCA 1985); *Iandoli v. Iandoli*, 547 So.2d 666 (Fla. 4th DCA 1989); FUND TN 2.08.05.

Comment: The cited statute provides that any sale involving a conflict of interest on the part of the personal representative is voidable by any interested party, unless one of the specific conditions described by the Standard is met.

Where the record does not reveal that the transaction was affected by a possible conflict of interest, either through similarity of names or otherwise, a bona fide purchaser subsequently dealing with the real property would appear to be protected. *F.S.* 733.611 and .613.

STANDARD 5.6

DEED UNDER POWER OF SALE GRANTED TO
TWO OR MORE PERSONAL REPRESENTATIVES

STANDARD: IF TWO OR MORE PERSONS ARE APPOINTED JOINT PERSONAL REPRESENTATIVES, AND UNLESS THE WILL PROVIDES OTHERWISE, (1) THE CONCURRENCE OF ALL JOINT PERSONAL REPRESENTATIVES APPOINTED PURSUANT TO A WILL OR CODICIL EXECUTED PRIOR TO OCTOBER 1, 1987, OR APPOINTED TO ADMINISTER AN INTESTATE ESTATE OF A DECEDENT WHO DIED PRIOR TO OCTOBER 1, 1987 IS REQUIRED TO CONVEY PROPERTY OF THE ESTATE; (2) A MAJORITY OF JOINT PERSONAL REPRESENTATIVES APPPOINTED PURSUANT TO A WILL OR CODICIL EXECUTED ON OR AFTER OCTOBER 1, 1987, OR APPOINTED TO ADMINISTER AN INTESTATE ESTATE OF A DECEDENT DYING ON OR AFTER OCTOBER 1, 1987, IS REQUIRED TO CONVEY PROPERTY OF THE ESTATE. THIS RESTRICTION DOES NOT APPLY WHEN THE CONCURRENCE REQUIRED CANNOT BE OBTAINED IN TIME FOR EMERGENCY ACTION TO PRESERVE THE ESTATE, OR WHEN A JOINT PERSONAL REPRESENTATIVE IS DELEGATED TO ACT FOR THE OTHERS.

Problem 1: John Doe's will, admitted to probate in 1973, contained a power of sale and named Richard Roe, John James and Henry Smith as executors. It did not provide for any action to be taken by less than all of them. All three qualified. Richard Roe and Henry Smith executed a deed conveying estate property to Simon Grant later that year. ~~Is~~ Was Grant's title marketable?

Answer: No, unless the court authorized the conveyance by Roe and Smith alone.

Problem 2: Same as above, but John Doe's will was executed in 1980 and offered for probate in 1986.

Answer: No, unless this was an emergency action taken to preserve the estate while John James' concurrence could not be obtained or James had delegated his fellow representatives to act in his absence.

Authorities & References: *F.S.* 733.615; *F.S.* 732.50 (1973); PRACTICE UNDER FLORIDA PROBATE CODE §§4.39, 4.42, 13.25 (Fla. Bar CLE 5th ed. 2007).

Comment: Title Standards 5.3 (Sale of Real Property By Personal Representatives Without Court Authorization or Confirmation) and 5.4 (Sale of Real Property By Personal Representatives With Court Authorization or Confirmation) should be considered in applying this Standard.

The surviving qualified personal representatives may exercise a power of sale even though more personal representatives are named in the will. See Title Standard 5.11 (Powers of Surviving Personal Representatives).

The Standard takes no position as to what constitutes emergency or delegation nor the means by which that is documented, short of a court order.

STANDARD 5.7

LIMITATION ON POWER OF SALE

STANDARD: A LIMITED POWER OF SALE CONTAINED IN A WILL MAY BE EXERCISED ONLY FOR THE PURPOSES STATED IN THE WILL UNLESS PRIOR AUTHORIZATION OR SUBSEQUENT CONFIRMATION IS OBTAINED FROM THE COURT.

Problem: The will of John Doe gave his personal representative power of sale for purpose of paying debts of John Doe to L. Shark. At the time of probate, there was no indebtedness to L. Shark. The personal representative, for full consideration, but without an order of the court, sold real property of the estate to Richard Roe. Is Roe's title marketable?

Answer: No.

Authorities & References: *F.S.* 733.613(1); *Standard Oil Co. v. Mehrtens*, 96 Fla. 455, 118 So. 216 (1928); *In re Estate of Smith*, 200 So.2d 547 (Fla. 2d DCA 1967); *In re Estate of Gamble*, 183 So.2d 849 (Fla. 1st DCA 1966); PRACTICE UNDER FLORIDA PROBATE CODE §10.5 (CLE 5th ed. 2007); FLORIDA REAL PROPERTY SALES TRANSACTIONS §6.8 (CLE 4th ed. 2004).

Comment: With respect to a sale without court authorization or confirmation, see Title Standard 5.3 (Sale of Real Property By Personal Representatives Without Court Authorization or Confirmation).

STANDARD 5.8

POWER OF PERSONAL REPRESENTATIVE
TO MORTGAGE REAL ESTATE

STANDARD: THE PERSONAL REPRESENTATIVE OF THE ESTATE OF A DECEDENT DYING AFTER DECEMBER 31, 1975 MAY MORTGAGE REAL ESTATE, EXCEPT PROTECTED HOMESTEAD, WITHOUT COURT AUTHORIZATION OR CONFIRMATION PROVIDED THE WILL CONTAINS A SPECIFIC POWER TO SELL REAL PROPERTY OR A GENERAL POWER TO SELL ANY ASSET OF THE ESTATE.

Problem 1: The will of John Doe, who died prior to January 1, 1976, named Richard Roe as executor and contained a general power of sale. Roe, as executor, borrowed $1,000, which he used for proper estate purposes. To secure this loan, Roe, without an order of the court, executed and delivered a mortgage on real property of the estate. Is the mortgage valid?

Answer: No.

Problem 2: Same as problem 1 except that John Doe died after December 31, 1975.

Answer: Yes.

Authorities & References: *F.S.* 733.613(2), *Standard Oil Co. v. Mehrtens*, 96 Fla. 455, 118 So. 216 (1928), *Wilson v. Fridenburg*, 21 Fla. 386 (1885); *In re Estate of Gamble*, 183 So.2d 849 (Fla. 1st DCA Fla. 1966); I*n re Estate of Smith*, 200 So.2d 547 (Fla. 2d DCA 1967); PRACTICE UNDER FLORIDA PROBATE CODE §4.20 (Fla. Bar CLE 5th ed. 2007); FLORIDA REAL PROPERTY SALES TRANSACTIONS §6.8 (Fla. Bar CLE 4th ed. 2004).

Comment: It should be noted that *F.S.* 733.613(2) expressly states that a specific power to mortgage real property will authorize such action by a personal representative. Under the former Probate Code there was no mention of a specific power to mortgage. See *F.S.* 733.22-.25 (1973).

Standard 5.9

RELEASE OF DOWER BY SURVIVING SPOUSE

[Title Standard deleted. See archived version for original text.]

STANDARD 5.10

POWERS OF PERSONAL REPRESENTATIVES

STANDARD: FOR DECEDENTS DYING AFTER DECEMBER 31, 1975, A POWER OF SALE CONTAINED IN A WILL AND CONFERRED ON A NAMED PERSONAL REPRESENTATIVE MAY BE EXERCISED BY A SUCCESSOR PERSONAL REPRESENTATIVE WITHOUT COURT APPROVAL UNLESS THE POWER OF SALE WAS EXPRESSLY MADE PERSONAL TO THE NAMED INDIVIDUAL.

Problem 1: John Doe died leaving a will that named Richard Roe as personal representative. The will empowered "Richard Roe, and no other, to convey all or part of my real estate." Richard Roe did not qualify as personal representative; instead, Simon Grant was appointed personal representative and as such conveyed part of the estate to Frank Thomas without a court order. Is Frank Thomas' title marketable?

Answer: No.

Problem 2: John Doe's will named Richard Roe and conferred on Richard Roe a power of sale. It did not mention successor personal representatives and contained no further language concerning the power of sale or why it was conferred upon Roe. Richard Roe refused to act as personal representative and Simon Grant was personal representative. In 2006, Simon Grant, without court approval, conveyed part of the estate to Frank Thomas. Is Frank Thomas' title marketable?

Answer: Yes. It does not appear that John Doe intended to limit the power of sale to Richard Roe.

Authorities *F.S.* 733.614; PRACTICE UNDER FLORIDA PROBATE CODE §10.12 (Fla. Bar CLE 5th ed. 2007); FLORIDA REAL PROPERTY SALES TRANSACTIONS §6.8 (Fla. Bar CLE 4th ed. 2004); FUND TN 2.08.01.

Comment: Under former *F.S.* 733.22 (1975), a successor personal representative could only exercise a power to sell real estate if the will specifically provided that the power extended to successors, while *F.S.* 733.614 (2009) provides for a successor's exercise of the power to sell real estate unless the power is made personal to the named personal representative.

Caution is advised whenever a will contains language expressing faith in the judgment or knowledge of a personal representative in connection with a power of sale.

A power of sale may be exercised by a successor personal representative with court authorization or confirmation. See Title Standard 5.4 (Sale of Real Property by Personal Representatives with Court Authorization or Confirmation).

STANDARD 5.11

POWERS OF SURVIVING PERSONAL REPRESENTATIVES

STANDARD: IF THE APPOINTMENT OF ONE OR MORE JOINT PERSONAL REPRESENTATIVES IS TERMINATED, OR IF ONE OR MORE NOMINATED JOINT PERSONAL REPRESENTATIVES IS NOT APPOINTED, THE REMAINING PERSONAL REPRESENTATIVE(S) MAY EXERCISE A POWER OF SALE CONTAINED IN THE WILL, UNLESS THE WILL PROVIDES OTHERWISE.

Problem: The will of John Doe contained a power of sale and named John Smith, Richard Roe and Henry James as personal representatives. Smith did not qualify. May Roe and James exercise the power?

Answer: Yes, unless the will prohibited such action.

Authorities & References: *F.S.* 733.616 ; *Stewart v. Mathews*, 19 Fla. 752 (1883); FLORIDA REAL PROPERTY SALES TRANSACTIONS §6.8 (Fla. Bar CLE 4th ed. 2004); PRACTICE UNDER FLORIDA PROBATE CODE §4.42 (Fla. Bar CLE 5th ed. 2007).

Comment: Title Standards 5.3 (Sale of Real Property By Personal Representatives Without Court Authorization or Confirmation) and 5.4 (Sale of Real Property By Personal Representatives With Court Authorization or Confirmation) should be considered when applying this Standard.

With respect to who must join in a deed executed pursuant to a power of sale, see Title Standard 5.6 (Deed Under Power of Sale Granted To Two or More Personal Representatives).

STANDARD 5.12

TITLE DERIVED FROM PERSONAL REPRESENTATIVE
NOT HAVING STATUTORY PREFERENCE IN APPOINTMENT

STANDARD: WITH RESPECT TO ALL INTESTATE OR TESTATE PROCEEDINGS ON OR AFTER JANUARY 1, 1976, TITLE CONVEYED TO A BONA FIDE PURCHASER FROM A PERSONAL REPRESENTATIVE APPOINTED BY THE COURT IS MARKETABLE EVEN THOUGH THE PERSONAL REPRESENTATIVE IS NOT ONE OF THE PARTIES ENTITLED TO PREFERENCE UNDER *F.S.* 733.301.

Problem 1: Mary Roe died intestate leaving a son, Richard Roe, as her only heir at law. The son was stationed overseas with the Navy. Formal notice was not served on Richard Roe that Bessie Doe, Mary Roe's neighbor and closest friend, had applied for letters of administration. Bessie Doe was appointed personal representative by the court. May Bessie Doe convey marketable title to a bona fide purchaser?

Answer: Yes, provided that Bessie Doe also had authority to sell the real property.

Problem 2: John Doe died in 2005, leaving a will which named Richard Roe personal representative and which gave the personal representative the power to sell. The will devised all John Doe's property to his friend, Frank Thomas, who was stationed overseas with the Navy. Richard Roe refused the appointment and the court named Simon Grant personal representative. No notice was sent to Frank Thomas, who had not waived his preference. With or without a court order, may Simon Grant convey marketable title to John Doe's real property to a bona fide purchaser?

Answer: Yes. Even though a devisee has statutory preference, a bona fide purchaser may rely on the propriety of the appointment. See *F.S.* 733.301.

Authorities *F.S.* 733.301, .611 AND .613; *In re Estate of Bush*, 80 So.2d 673 (Fla. 1955); *In re Estate of Williamson*, 95 So.2d 244 (Fla. 1957); *Anderson v. Johnson*, 732 So.2d 423 (Fla. 5th DCA 1999); *In re Estate of Cunningham*, 104 so.2d 748 (Fla. 3rd DCA 1958); PRACTICE UNDER FLORIDA PROBATE CODE §§4.54, 5.5 and 5.6 (Fla. Bar CLE 5th ed. 2007).

Comment: As to whether the personal representative had authority to convey the property, see Title Standards 5.3 (Sale of Real Property By Personal Representatives Without Court Authorization or Confirmation), 5.4 (Sale of Nonhomestead Real Property By Personal Representatives With Court Authorization or Confirmation), 5.6 (Deed Under Power of Sale Granted to Two or More Personal Representatives) and 5.10 (Powers of Successor Personal Representatives).

STANDARD 5.13

PROBATE NON-CLAIM ACT —
UNITED STATES AND FLORIDA

STANDARD: THE PROBATE NON-CLAIM ACT, *F.S.* 733.702, IS NOT BINDING AS TO CLAIMS OF THE UNITED STATES, BUT IS BINDING AS TO THE CLAIMS OF THE STATE OF FLORIDA AND ITS AGENCIES.

Problem 1:	United States asserted a claim against the estate of John Doe, deceased, after the expiration of the notice to creditors' period. Is the claim of the United States barred?
Answer:	No.
Problem 2:	The State of Florida, or one of its agencies, filed a claim against the estate of John Doe, deceased, after the expiration of the notice to creditors period. Is the claim barred?
Answer:	Yes.
Authorities & References:	31 U.S.C., §3713 (2004); *F.S.* 733.702 (2004); *United States v. Summerlin*, 310 U.S. 414 (1940); *State v. Moore's Estate*, 153 So. 2d 819 (Fla. 1963); *In re Smith's Estate*, 132 So. 2d 426 (Fla. 2d DCA 1961); PRACTICE UNDER PROBATE CODE §8.1 (CLE 5th ed. 2007); FUND TN 2.02.04.

STANDARD 5.14

EFFECT OF ORDER OF FINAL DISCHARGE

STANDARD: AN ORDER OF FINAL DISCHARGE DIVESTS THE PERSONAL REPRESENTATIVE OF CONTROL OVER ESTATE PROPERTY.

Problem: John Doe died devising Blackacre by his will to his son, Richard Doe. The estate was administered and a final discharge of the personal representative entered. Richard Doe sold Blackacre to Simon Grant. Was Simon Grant's title marketable?

Answer: Yes.

Authorities & References: *F.S.* 733.901; PRACTICE UNDER FLORIDA PROBATE CODE , §14.9 (CLE 5TH ed. 2007).

STANDARD 5.15

RECITAL OF HEIRSHIP IN DEED

STANDARD: WHERE A DEED, WHICH CONTAINS A RECITAL THAT THE GRANTORS ARE THE SOLE AND ONLY HEIRS OF A NAMED DECEDENT, HAS BEEN OF RECORD FOR MORE THAN SEVEN YEARS, SUCH RECITAL MAY BE ACCEPTED AS SUFFICIENT TO ESTABLISH THE TRUTH OF THE RECITAL IN THE ABSENCE OF EVIDENCE OR INFORMATION TO THE CONTRARY.

Problem: John Doe acquired title to Blackacre in 1999. By deed recorded more than seven years ago, Mary Doe, unmarried, Albert Doe, unmarried, and Sarah Doe, unmarried, conveyed Blackacre to Richard Roe. In the deed there is a recital that the grantors are the sole heirs of John Doe. In the absence of evidence or information to the contrary, may such recital be accepted as sufficient to establish its truth?

Answer: Yes.

Authorities & References: *F.S.* 95.22 FUND TN 10.01.01.

STANDARD 5.16

FOREIGN WILL AS MUNIMENT OF TITLE

STANDARD: A FOREIGN WILL DULY ADMITTED TO RECORD IN FLORIDA WILL PERMIT A VALID CONVEYANCE OF FLORIDA REAL ESTATE BY THE DEVISEES NAMED IN SUCH WILL.

Problem 1: Blackacre was devised to John Doe under the last will of Richard Roe, who died a resident of New York in 1995. Roe's will was admitted to probate in New York in 1995 and a duly authenticated copy thereof was admitted to record in Florida in 1999 pursuant to *F.S.* 734.104. Thereafter John Doe conveyed the property to Simon Grant. Is Simon Grant's title marketable?

Answer: Yes.

Problem 2: Same facts as Problem 1 except that an authenticated copy of Roe's will was recorded in 1999 in the Official Records of the county where the land is located. Is Simon Grant's title marketable?

Answer: No.

Authorities & References: *F.S.* 734.104; PRACTICE UNDER FLORIDA PROBATE CODE §17.5 (CLE 5th ed. 2007); FUND TN 2.05.04.

Comment: The examiner must also be satisfied that: (1) the estate is cleared as to estate taxes and (2) all specific bequests under the will have been paid if Doe acquired title under the residuary clause of Roe's will rather than by means of a specific devise. If the will is not entitled to be admitted to record in Florida, or if the domiciliary proceedings have not been closed and it is impossible to determine whether or not the specific bequests have been paid, in a situation where the Florida real estate passes under the residuary clause of the will, ancillary administration pursuant to *F.S.* 734.102 should be resorted to in order to convey marketable title. It is also possible to proceed under *F.S.*, Chapter 735, Part I, provided the value of the estate does not exceed the jurisdictional limits applicable under the statute in force at the date of decedent's death. Claims of creditors should be cleared or otherwise addressed for conveyances made within two years of a decedent's death.

STANDARD 5.17

SATISFACTION OF MORTGAGE HELD
BY ESTATE OF NON-RESIDENT DECEDENT

STANDARD: THE SATISFACTION OF MORTGAGE MADE BY A FOREIGN PERSONAL REPRESENTATIVE OR GUARDIAN TO WHICH IS ATTACHED AN AUTHENTICATED COPY OF LETTERS OR OTHER EVIDENCE SHOWING APPOINTMENT FOR MORE THAN THE STATUTORY PERIOD AND WHERE NO ANCILLARY PROCEDURE HAD BEEN FILED IN THIS STATE MAY BE ACCEPTED AS A SATISFACTION OF MORTGAGE ENCUMBERING LANDS IN THIS STATE.

Problem 1: John Doe, the owner of Blackacre, had mortgaged his property to Richard Roe, a resident of Georgia. Richard Roe died and no ancillary proceedings were taken out in Florida for a period of ninety days. John Doe obtained a satisfaction of mortgage from the foreign personal representative to which was attached a duly authenticated copy of the letters of authority showing appointment more than ninety days prior to the date of the satisfaction of mortgage. Is such satisfaction of mortgage valid in this state without ancillary administration?

Answer: Yes, the statutory period is ninety (90) days for a foreign personal representative.

Problem 2: John Doe, the owner of Blackacre, had mortgaged his property to Richard Roe, a resident Georgia. Richard Roe was declared incompetent and no ancillary proceedings were taken out in Florida for a period of sixty days. John Doe obtained a satisfaction of mortgage from the foreign guardian to which was attached a duly authenticated copy of the letters of authority showing appointment more than sixty days prior to the date of the satisfaction of mortgage. Is such satisfaction of mortgage valid in this state without ancillary proceedings?

Answer: Yes, the statutory period is sixty (60) days for a foreign guardian, curator, or conservator.

Authorities
& References: *F.S.* 734.101(3), 744.306(3); *F.S.* 734.30(3). See also, former 744.15(3) (1973); PRACTICE UNDER FLORIDA PROBATE CODE §17.3 (CLE 5th ed. 2007); FUND TN 2.08.04.

Comment: The authenticated copies of letters or other evidence showing appointment should show that the authority was in full force and effect on the date of the execution of the satisfaction. See *F.S.* 731.201(1) for discussion of "authenticated" copies.

CHAPTER 5

ESTATES OF DECEDENTS

STANDARD 5.1

TITLE DERIVED THROUGH INTESTATE DECEDENT

STANDARD: TITLE TO REAL ESTATE~~, EXCEPT HOMESTEAD,~~ OF AN INTESTATE DECEDENT (EXCLUDING SURVIVORSHIP ESTATES) PASSES AS OF THE DATE OF DEATH TO THE HEIRS, SUBJECT TO: (1) ~~THE SPOUSE'S FILING FOR ELECTIVE SHARE; (2) THE RIGHT AND DUTY OF~~ THE PERSONAL ~~REPRESENTATIVE TO POSSESS SAID~~REPRESENTATIVE'S POSSESSION AND CONTROL OVER REAL ESTATE ~~AND TO RECEIVE THE INCOME THEREFROM; (3) THE POSSIBILITY OF SALE FOR THE PURPOSE OF~~ , OTHER THAN PROTECTED HOMESTEAD, FOR THE PAYMENT OF EXPENSES OF ADMINISTRATION, DEBTS AND TAXES, OR FOR DISTRIBUTION ; AND (42) THE LIEN OF ESTATE TAXES, IF ANY.

Problem 1: John Doe~~, a Florida resident,~~ died intestate and, although his estate was fully administered ~~but~~in Florida probate proceedings and the personal representative discharged, Blackacre was omitted from the ~~inventory and the order assigning residue.~~personal representative's certificate of distribution. All heirs conveyed Blackacre to Richard Roe. Is ~~Roe's~~Roe's title marketable?

Answer: Yes, provided ~~(1) the surviving spouse has waived her elective share or failed to make her election within the statutory period, (2) all expenses of administration and debts and taxes have been paid, and the personal representative discharged and (3)~~ federal and Florida estate taxes have been paid or ~~more than ten years has elapsed since the date of decedent's death. (Twenty years in the case of non-resident decedents.)~~the appropriate statutes of limitation have run on the state and federal estate tax liens.

~~Authorities & References:~~Problem 2: John Doe died and, although an Order of Summary Administration was entered both the petition for summary administration and the order omitted Blackacre. Later, all heirs conveyed Blackacre to Richard Roe, a bona fide purchaser for value. Is Roe's title marketable?

~~*F.S.* 732.101(2) (1979); *Jones v. Federal Farm Mortg. Corp.*, 132 Fla. 807, 182 So. 226 (1938); *Brickell v. McCaskill*, 90 Fla. 441, 106 So. 470 (1925); 1 FLORIDA REAL PROPERTY PRACTICE §§8.45-.48, 10.3, 10.19 (CLE 2d ed. 1971); FLORIDA PROBATE PRACTICE §§16.29, 16.33 (CLE 1973).~~

~~Comment:~~

Answer: ~~An elective share of a spouse would be relinquished by joinder in the conveyance or barred by the running of the statutory period for election. *F.S.* 732.212 (1979). With respect to the issue of the existence of a dower claim, see Title Standards, Ch. 20 (Marital Property).~~

~~Discharge of the personal representative, if the estate has been administered, or the passage of three years from the date of death if the estate has not been administered,~~

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~~is necessary for the heirs to convey marketable title. *F.S.* 733.710 (1979).~~

~~Although "dower" was abolished in Florida as of January 1, 1976, the Standard should not be construed as precluding a dower interest which vested prior to that date. See *F.S.* 732.111 (1979).~~

~~With respect to estate tax liens, see Title Standards, Ch. 12 (Tax Liens).~~

~~After October 1, 1976, where the husband died prior to October 1, 1973, inchoate dower in real property is barred unless the widow has filed an instrument in compliance with *F.S.* 732.213 (1979). See *Creary v. Estate of Creary*, 338 So. 2d 26 (1st D.C.A. Fla. 1976) as to retroactive application of *F.S.* 732.213.~~

Yes, provided federal and Florida estate taxes, if any, have been paid or the appropriate statutes of limitation have run on the state and federal estate tax liens. The Order of Summary Administration can be relied upon to establish the identity of the heirs.

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Authorities & References: *F.S.* 732.101(2); F.S. 733.607(1); F.S. 733.608(1),(2); *Jones v. Federal Farm Mortg. Corp.*, 132 Fla. 807, 182 So. 226 (1938); *Spitzer v. Branning*, 135 Fla. 49, 184 So. 770 (Fla. 1938); *Public Health Trust of Dade County v. Lopez*, 531 So. 2d 946 (Fla. 1988);; PRACTICE UNDER FLORIDA PROBATE CODE §4.18 (CLE 5th ed. 2007); FUND TN 2.09.03.

Comment: *F.S.* 732.101(2) provides that the decedent's death is the event that vests the heirs' right to the decedent's intestate property. However, for title to be marketable, Florida probate proceedings are necessary to establish the identity of the heirs. In addition, in order to preserve a permanent record of the probate proceedings for *future* marketability purposes, it is strongly recommended that certified copies of the pertinent excerpts be recorded in the official records of the county where the real property is located. Rule 2.075 of the Rules of Judicial Administration permit the destruction of probate proceedings after the lapse of ten years from a final judgment. At a minimum, the documents to be recorded in an intestate estate are the petition for administration, letters of administration, and order closing the estate and discharging the personal representative if the estate has been closed, as well as the order authorizing the sale by the personal representative if there has been a sale of estate lands.

Under *F.S.* 733.607(1) and 733.608, the decedent's real property, except protected homestead, is subject to the possession and control of the personal representative for such purposes as the payment of devises, estate and inheritance taxes, claims, charges, and expenses of the administration and obligations of the decedent's estate.

Protected homestead does not become an asset within the possession and control of the personal representative. *Spitzer v. Branning*, 135 Fla. 49, 184 So. 770 (Fla. 1938); *Public Health Trust of Dade County v. Lopez*, 531 So. 2d 946 (Fla. 1988). Therefore, during the administration of the estate, a conveyance from the heirs would not create a marketable title unless: (1) a final order determining the property to be protected homestead had been entered, or (2) the personal representative relinquishes control, or potential control over the asset by quitclaim deed, certificate of distribution or other similar instrument and all creditors' claims have been administered and estate taxes cleared.

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STANDARD 5.2

TITLE DERIVED THROUGH TESTATE DECEDENT

STANDARD: A WILL IS INEFFECTIVE TO CONVEY TITLE TO REAL PROPERTY UNTIL THE WILL IS ADMITTED TO PROBATE IN FLORIDA, BUT UPON ADMISSION TO PROBATE THE WILL RELATES BACK TO THE DEATH OF THE TESTATOR AND TAKES EFFECT AS OF THAT DATE AS AN INSTRUMENT OF TITLE.

Problem: John Doe, ~~a Florida resident,~~ owned Blackacre at the time he died testate. His will was duly admitted to probate in Florida ~~and~~, the estate was properly and fully administered and the personal representative was duly discharged. The will contained a devise of Blackacre (non-homestead) to the testator's widow, but the legal description in the petition for discharge and distribution was incorrect. Subsequent to the close of the estate Doe's widow conveyed Blackacre by proper description to Richard Roe. Is Roe's title marketable?

Answer: Yes. Title passed to the widow under the will as of the date of Doe's death.

Authorities & References: *F.S.* 732.6005, 732.514, 733.103 ~~(1979)~~; *Sorrells v. McNally*, 105 So 106 (Fla. 1925); *Murphy v. Murphy*, 170 So. 856 (Fla. 1936); *Palmquist v. Johnson*, 155 Fla. 628, 21 So. 2d 353 (1945); ~~1 FLORIDA REAL PROPERTY PRACTICE §§10.3, 10.19 (CLE 2d ed. 1971); FLORIDA PROBATE PRACTICE §§16.29, 16.33 (CLE 1973). But see~~*U.S. v. 936.71 Acres of Land, More or Less, in Brevard County, Fla.*, 418 F.2d 551 (5th Cir. 1969). See *F.S.* 732.4015 ~~(1979)~~ concerning homestead property; FUND TN 2.08.02.

Comment: ~~Prior to 1976, real property of non-resident decedents apparently passed to the devisees on the date of death of the testator, subject to the same conditions as in the case of intestacy. See Title Standard 5.1 (Title Derived Through Intestate Decedent).~~

~~As of January 1, 1976, title passes in accordance with this Standard regardless of the decedent's domicile. *F.S.* 733.103 (1979).~~

Concerning the devise of homestead property, see Title Standard 18.8.

As to nonresident decedents, see Title Standard 5.15.

The Standard is to be construed subject to the intention of the testator as expressed in his will. *F.S.* 732.6005 ~~(1979).~~

This Title Standard does not address the factors to be reviewed in determining whether a property has homestead status or whether a judicial determination of homestead status is required.

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STANDARD 5.3

SALE OF NONHOMESTEAD REAL PROPERTY BY PERSONAL REPRESENTATIVES WITHOUT COURT AUTHORIZATION OR CONFIRMATION

STANDARD: ~~MARKETABLE TITLE EXISTS WHEN TITLE DEPENDS UPON~~ A CONVEYANCE OF NONHOMESTEAD REAL PROPERTY BY A FLORIDA PERSONAL REPRESENTATIVE OF AN ESTATE WITH POWER OF SALE IN THE WILL, BUT WITHOUT A~~N ORDER OF THE~~ COURT ORDER AUTHORIZING OR CONFIRMING THE CONVEYANCE ~~IF: (1) THE DEED WAS EXECUTED ON OR AFTER OCTOBER 1, 1973 OR (2) THE DEED WAS EXECUTED PRIOR TO OCTOBER 1, 1973, THE DEED HAS BEEN OF RECORD FOR 3 YEARS, THE ESTATE HAS BEEN CLOSED, AND THE PROBATE FILE CONTAINS RECEIPTS EXECUTED BY THE DEVISEES FOR THEIR SHARE OF THE DISTRIBUTION OF THE ESTATE.~~ , CONFERS MARKETABLE TITLE.

Problem: ~~In 1960~~ John Doe was the record owner of Blackacre. ~~John Doe~~, (nonhomestead) when he die in ~~1962~~2001, Richard Roe was appointed the personal representative of John Doe's estate ~~in his will~~ by a Florida court. The will contained the following provision: "I confer upon m ~~executor~~personal representative full authority to sell and convey any part or all of my estate, rea or personal." In ~~1962~~2001, Richard Roe, as personal representative, conveyed Blackacre t Simon Grant, who recorded the deed. No authorization or confirmation of the court appears o record. ~~In 1966~~ Does Simon Grant ~~conveyed Blackacre to Frank Thomas. In 1970 does Fran Thomas~~ have marketable title ~~to Blackacre~~?

Answer: Yes~~, if it appears of record that the estate of John Doe was closed and the devisees execute receipts for their share of the distribution of the estate~~.

Authorities & References: *F.S.* 733.613(2~~) (1979); *F.S.* 733.225, 733.42 (1973) (repealed 1974)~~; In *re Granger*, 316 So. 2 509 (Fla. 1st D~~.C.A. Fla.~~CA 1975); ~~1 FLORIDA REAL PROPERTY PRACTICE §105 (CL 2d ed. 1971); FLORIDA PROBATE PRACTICE §§10.1-10.5 (CLE 1973).~~FUND TN 2007-05.

Comment: ~~*F.S.* 733.225(1) (1973), effective October 1, 1973, provided that no court order was required t authorize or confirm a sale pursuant to a power of sale contained in a will. The statute als eliminated the requirement of a showing of necessity. Although *F.S.* 733.225 was repealed b 1974, similar provisions are found in *F.S.* 733.613(2) (1979). See *In re Granger*.~~

~~It should be noted that although *F.S.* 733.225(2) (1973) purported to give the statute retroactiv effect, it should not be relied on for purposes of determining marketability. The provision w not re-enacted in the 1975 Florida Probate Code.~~

~~*In re Estate of Smith*, 200 So.2d 547 (2d D.C.A. Fla. 1967), held that court approval of a sale showing of necessity, even when a general power of sale was involved, was required by Sectio 733.22 *F.S.* (1973). Hence, executor's deeds executed prior to October 1, 1973, must b authorized or confirmed by the court to insure marketability, unless the deed has been of recor for 3 years, the estate has been closed, and the probate file contains receipts executed by th devisees for their share of the distribution of the estate.~~

~~The Standard, *F.S.* 733.613(2) (1979) and *F.S.* 733.225 (1973) do not address the issue of a apparent general power being construed to be a special or limited power requiring cou authorization or confirmation of the sale. See *In re Estate of Gamble*, 183 So. 2d 489 (1 D.C.A. Fla. 1966); *In re Granger*.~~

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With respect to a limited power of sale, see Title Standard 5.7 (Limitation ~~On~~ on Power ~~Of~~ of Sale).

~~It appears that neither *F.S.* 733.613(2) (1979) nor *F.S.* 733.225 (1973) require a court to approv a sale of real property where a personal representative chooses to seek court authorization. Th court may not, however, consider necessity as a factor for denying its approval. *In r Granger*.~~This Title Standard assumes the power of sale was not personal to the personal representative named in the will. For further discussion, see Title Standard 5.9 (Powers of Successor Personal Representatives).

As to the sale of homestead property by the personal representative, see Title Standard 18.10. For discussion on clearance of estate tax liens, see Chapter 12.

This Title Standard does not address the factors to be reviewed in determining whether a property has homestead status or whether a judicial determination of homestead status is required.

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STANDARD 5.4

SALE OF NONHOMESTEAD REAL PROPERTY BY PERSONAL REPRESENTATIVES WITH COURT AUTHORIZATION OR CONFIRMATION

STANDARD: ~~WHETHER OR NOT THE WILL, IF ANY, GIVES TO~~ WHERE THERE IS NO WILL, OR THE WILL DOES NOT GIVE THE PERSONAL REPRESENTATIVE POWER TO SELL NONHOMESTEAD REAL PROPERTY, ~~VALID TITLE WILL PASS WHERE~~ PRIOR AUTHORIZATION OR SUBSEQUENT CONFIRMATION ~~IS OBTAINED FROM~~BY THE COURT~~.~~ IS REQUIRED FOR VALID TITLE.

Problem 1: John Doe appointed Richard Roe as ~~his~~ the personal representative in his will ~~which contained the following provision: "I~~. The will did not confer ~~upon my~~ a power of sale on the personal representative ~~full authority to sell and convey any part or all of my estate, real or personal."~~. During the course of the administration of the estate, Richard Roe, as personal representative, sold Blackacre to Simon Grant with authorization of the court. Blackacre was not the decedent's homestead. Is the title marketable?

Answer: Yes. (The result would be the same if the court confirmed the sale after it had occurred.)

~~Problem 2:~~Authorities & References: ~~Same as above, but with the will silent as to sales by the personal representative.~~ *F.S.* 733.613(1); *In re Estate of Smith*, 200 So.2d 547 (2d D.C.A. Fla. 1967); *In re Estate of Gamble*, 183 So.2d 849 (1st D.C.A. Fla. 1966); *In re Granger*, 318 So.2d 509 (1st D.C.A. Fla. 1975); *Anderson v. Johnson*, 732 So.2d 423 (Fla. 5th DCA 1999).

~~Answer:~~Comment: ~~Yes.~~For conveyances made without court authorization but under a power of sale in the will, see Title Standard 5.3 (Sale of Nonhomestead Real Property By Personal Representatives Without Court Authorization or Confirmation).

If the personal representative is the purchaser, see Title Standard 5.5 (Acquisition of Estate Lands by Fiduciaries).

As to the sale of homestead property by the personal representative, see Title Standard 18.10. For discussion on clearance of estate tax liens, see Chapter 12.

This Title Standard does not address the factors to be reviewed in determining whether a property has homestead status or whether a judicial determination of homestead status is required.

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STANDARD 5.5

ACQUISITION OF ESTATE LANDS BY FIDUCIARIES PRIOR TO JANUARY 1, 1979

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STANDARD 5.5-1

PERSONAL REPRESENTATIVES – CONFLICTS OF INTEREST

STANDARD: ON OR AFTER JANUARY 1, 1976 THE PERSONAL REPRESENTATIVE CANNOT CONVEY MARKETABLE TITLE IN ANY TRANSACTION IN WHICH THE PERSONAL REPRESENTATIVE HAS A CONFLICT OF INTEREST, SUCH AS A TRANSACTION IN WHICH THE PERSONAL REPRESENTATIVE, THE SPOUSE, AGENT OR ATTORNEY OF THE PERSONAL REPRESENTATIVE OR ANY ENTITY OR TRUST IN WHICH THE PERSONAL REPRESENTATIVE HAS A SUBSTANTIAL BENEFICIAL INTEREST PURCHASES REAL PROPERTY OF THE ESTATE, UNLESS (1) THE WILL OR A CONTRACT ENTERED INTO BY THE DECEDENT EXPRESSLY AUTHORIZED THE TRANSACTION; OR (2) THE TRANSACTION WAS APPROVED BY THE COURT AFTER NOTICE TO INTERESTED PERSONS.

Problem 1: In the estate of John Doe, deceased, a Florida court issued letters testamentary to Richard Roe. The will, which was duly admitted to probate, authorized Richard Roe to sell real property of the estate. In 2002, Richard Roe, as personal representative, conveyed Blackacre to his wife, Mary Roe. Does Mary have marketable title?

Answer: No, unless (1) the will empowered Richard Roe to so dispose of the property, or (2) John Doe executed a contract of sale to Mary before his death, or (3) there was a court authorization or confirmation of the sale.

Problem 2: Richard Roe was duly appointed personal representative by a Florida court. Prior to his death, John Doe contracted to sell Blackacre to Richard Roe. In 2002, John Doe died and Richard Roe as personal representative, completed the conveyance of Blackacre to himself according to the terms of the contract. There was no court authorization or confirmation of the sale. Does Richard Roe have marketable title?

Answer: Yes.

Authorities & References: ~~*In re Estate of Smith*, 200 So.2d 547 (2d D.C.A. Fla. 1967); *In re Estate of Gamble*, 183 So.2d 849 (1st D.C.A. Fla. 1966); *In re Granger*, 318 So.2d 509 (1st D.C.A. Fla. 1975); I FLORIDA REAL PROPERTY PRACTICE §10.5 (CLE 2d ed. 1971); FLORIDA PROBATE PRACTICE §§10.1-10.5 (CLE 1973); *F.S.* 733.613(1) (1979).~~610; *Taylor v. Hopkins*, 472 So.2d 1355 (Fla. 5th DCA 1985); *Iandoli v. Iandoli*, 547 So.2d 666 (Fla. 4th DCA 1989); FUND TN 2.08.05.

Comment: ~~This standard does not purport to imply that sale without court authorization or confirmation would necessarily make title unmarketable. For conveyances made without court authorization, see Title Standard 5.3 (Sale of Real Property By Personal Representatives Without Court Authorization or Confirmation).~~

~~If the personal representative is the purchaser, see Title Standard 5.5 (Acquisition Of Estate Lands By Fiduciaries prior to January 1, 1976) and Title Standard 5.5-1 (Acquisition of Estate Lands by Personal Representatives on or After January 1, 1976).~~

~~While *F.S.* 733.613(1) (1979) expressly provides for notice to interested persons of a personal representative's petition for court authorization or confirmation, the last sentence of the subsection reads: "No bona fide purchaser shall be required to examine any proceedings before the order of sale." The full effect of this provision when no notice appears of record is unclear.~~The cited statute provides that any sale involving a

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conflict of interest on the part of the personal representative is voidable by any interested party, unless one of the specific conditions described by the Standard is met.

Where the record does not reveal that the transaction was affected by a possible conflict of interest, either through similarity of names or otherwise, a bona fide purchaser subsequently dealing with the real property would appear to be protected. *F.S.* 733.611 and .613.

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STANDARD 5.5

ACQUISITION OF ESTATE LANDS BY FIDUCIARIES PRIOR TO JANUARY 1, 1976

STANDARD: PRIOR TO JANUARY 1, 1976 WHEN THE PERSONAL REPRESENTATIVE, IN AN INDIVIDUAL CAPACITY, PURCHASED REAL PROPERTY OF AN ESTATE, SUCH TITLE WILL BE MARKETABLE PROVIDED THE PERSONAL REPRESENTATIVE WAS INTERESTED IN THE ESTATE IN HIS OWN RIGHT, OR IN THE RIGHT OF HIS SPOUSE OR INFANT CHILD, AS A CREDITOR, DEVISEE, LEGATEE, OR HEIR AT LAW, THE PURCHASE WAS AT A PUBLIC SALE, AND THE COURT CONFIRMED THE SALE.

Problem: The will of John Doe, which was duly probated, empowered Richard Roe, personal representative, to sell real property of the estate. Roe conveyed Blackacre to himself for full consideration. Is Roe's title marketable?

Answer: No, unless it can be shown that Roe had an interest in the estate in his own right or in the right of his wife or infant child, as creditor, devisee, legatee, or heir, Roe purchased at a public sale and the court subsequently confirmed the sale.

Authorities & References: *F.S.* 733.31 (1973); *Griffin v. Bolen*, 149 Fla. 377, 5 So.2d 690 (1942); FLORIDA PROBATE PRACTICE §10.3 (CLE 1973).

Comment: The Standard is designed to set forth the requirements of *F.S.* 733.31 (1973). It is not clear whether a sale not complying with the statute, although approved by the court, would necessarily render the title unmarketable, and no implication to this effect is intended.

Title Standard 5.4 (Sale Of Real Property By Personal Representatives With Court Authorization Or Confirmation) should not be relied on when the personal representative purchases from the estate.

See Title Standard 5.5-1 for acquisition by personal representatives after January 1, 1976.

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STANDARD 5.5-1

ACQUISITION OF ESTATE LANDS BY PERSONAL REPRESENTATIVES ON OR AFTER JANUARY 1, 1976

STANDARD: ON OR AFTER JANUARY 1, 1976, WHEN THE PERSONAL REPRESENTATIVE, HIS SPOUSE, AGENT OR ATTORNEY OR ANY CORPORATION OR TRUST IN WHICH HE HAS A SUBSTANTIAL BENEFICIAL INTEREST PURCHASES REAL PROPERTY OF THE ESTATE, SUCH TITLE WILL BE MARKETABLE ONLY IF (1) THE WILL OR A CONTRACT ENTERED INTO BY THE DECEDENT EXPRESSLY AUTHORIZED THE TRANSACTION; OR (2) THE TRANSACTION WAS APPROVED BY THE COURT AFTER NOTICE TO INTERESTED PERSONS.

Problem 1: The will of John Doe, which was duly probated, named his creditor, Richard Roe, personal representative. The will also empowered Roe to sell real property of the estate. In 1976, Richard Roe, as personal representative, conveyed Blackacre to his wife, Mary Roe. Does Mary have marketable title?

Answer: No, unless (1) the will empowered Richard Roe to so dispose of the property, or (2) John Doe executed a contract of sale to Mary before his death, or (3) there was a court authorization or confirmation of the sale.

Problem 2: John Doe's will named Richard Roe as personal representative. Prior to his death, John Doe contracted to sell Blackacre to Richard Roe. In 1976, John Doe died and Richard Roe as personal representative, completed the conveyance of Blackacre to himself according to the terms of the contract. There was no court authorization or confirmation of the sale. Does Richard Roe have marketable title?

Answer: Yes.

Authorities & References: *F.S.* 733.610 (1979).

Comment: The cited statute provides that any sale involving a "conflict of interest" on the part of the personal representative is voidable by any interested party, unless one of the specific conditions described by the Standard is met.

It should be noted that court approval is no longer required where either the will or a separate contract expressly authorizes the transaction, and a public sale is no longer required by the statute. The new statute applies regardless of the independent interest of the personal representative, his spouse, or children.

Where the record does not reveal that the transaction was affected by a possible conflict of interest, either through similarity of names or otherwise, a bona fide purchaser subsequently dealing with the real property would appear to be protected. *F.S.* 733.611; *F.S.* 733.613 (1979).

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STANDARD 5.6

DEED UNDER POWER OF SALE GRANTED TO
TWO OR MORE PERSONAL REPRESENTATIVES

STANDARD: ~~(1) PRIOR TO JANUARY 1, 1976, ALL QUALIFIED~~IF TWO OR MORE PERSONS ARE APPOINTED JOINT PERSONAL REPRESENTATIVES, AND ~~SURVIVING PERSONAL REPRESENTATIVES WERE REQUIRED TO UNITE IN EXECUTING A DEED PURSUANT TO A POWER OF SALE UNDER THE TERMS OF A WILL~~ UNLESS THE WILL ~~AUTHORIZED LESS THAN ALL OF THEM TO CONVEY OR THE COURT HAD AUTHORIZED LESS THAN ALL TO EXECUTE THE DEED. (2) ON OR AFTER JANUARY~~ PROVIDES OTHERWISE, (1~~, 1976,~~) THE CONCURRENCE OF ALL JOINT PERSONAL REPRESENTATIVES APPOINTED PURSUANT TO A WILL OR CODICIL EXECUTED PRIOR TO OCTOBER 1, 1987, OR APPOINTED TO ADMINISTER AN INTESTATE ESTATE OF A DECEDENT WHO DIED PRIOR TO OCTOBER 1, 1987 IS REQUIRED ~~UNLESS THE WILL PROVIDES OTHERWISE OR~~ TO CONVEY PROPERTY OF THE ESTATE; (2) A MAJORITY OF JOINT PERSONAL REPRESENTATIVES APPPOINTED PURSUANT TO A WILL OR CODICIL EXECUTED ON OR AFTER OCTOBER 1, 1987, OR APPOINTED TO ADMINISTER AN INTESTATE ESTATE OF A DECEDENT DYING ON OR AFTER OCTOBER 1, 1987, IS REQUIRED TO CONVEY PROPERTY OF THE ESTATE. THIS RESTRICTION DOES NOT APPLY WHEN THE CONCURRENCE ~~OF ALL~~REQUIRED CANNOT BE OBTAINED IN TIME FOR EMERGENCY ACTION TO PRESERVE THE ESTATE, OR WHEN A JOINT PERSONAL REPRESENTATIVE IS DELEGATED TO ACT FOR THE OTHERS.

Problem 1:	John Doe's will, admitted to probate in ~~1969~~1973, contained a power of sale and named Richar Roe, John James and Henry Smith as executors. It did not provide for any action to be taken by less than all of them. All three qualified. Richard Roe and Henry Smith executed a deed conveying estate property to Simon Grant later that year. ~~Is~~ Was Grant's title marketable?
Answer:	No, unless the court authorized the conveyance by Roe and Smith alone.
Problem 2:	Same as above, but ~~with~~ John ~~Doe dying after 1976.~~Doe's will was executed in 1980 an offered for probate in 1986.
Answer:	No, unless this was an emergency action taken to preserve the estate while John James concurrence could not be obtained or James had delegated his fellow representatives to act in his absence.
Authorities & References:	*F.S.* 733.615 ~~(1979)~~; *F.S.* 732.50 (1973); ~~*Williams v. Howard Cole & Co., Inc.*, 159 Fla. 151, 31 So.2d 914 (1947);~~ PRACTICE UNDER FLORIDA PROBATE ~~PRACTICE §10.21 (CLE 1973); ATIF TN 2.08.03.~~CODE §§4.39, 4.42, 13.25 (Fla. Bar CLE 5th ed. 2007).
Comment:	Title Standards 5.3 (Sale ~~Of~~ of Real Property By Personal Representatives Without Court Authorization ~~Or~~ or Confirmation) and 5.4 (Sale ~~Of~~ of Real Property By Personal Representatives With Court Authorization ~~Or~~ or Confirmation) should be considered in applying this Standard. The surviving qualified personal representatives may exercise a power of sale even though more personal representatives are named in the will. See Title Standard 5.11 (Powers ~~Of~~ of Surviving Personal Representatives).

~~Prior to January 1, 1976, the Standard may be applied to administrators with the will annexed and administrators de bonis non if there is court authorization.~~

~~Prior to June 8, 1965, the Standard may be applied to situations involving administrators with the will annexed and administrators de bonis non exercising a power of sale. *F.S.* 733.22 (1973). After such date but before January 1, 1976 it must appear in the will that the testator intended to confer the power of sale to representatives other than the named executor(s). On or after January 1, 1976, the power may be exercised unless it was made personal to the named representative. See Title Standard 5.10 (Powers Of Successor Personal Representatives).~~

~~Although it would appear from *F.S.* 733.611 (1979) that a court order, without a showing of emergency action or delegation, would be sufficient to convey marketable title, this Standard takes no position on such a situation.~~

~~The Standard also takes no position on the sufficiency of a recital purporting to establish emergency or delegation, nor on the precise definition of those terms.~~The Standard takes no position as to what constitutes emergency or delegation nor the means by which that is documented, short of a court order.

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STANDARD 5.7

LIMITATION ON POWER OF SALE

STANDARD: A LIMITED POWER OF SALE CONTAINED IN A WILL MAY BE EXERCISED ONLY FOR THE PURPOSES STATED IN THE WILL UNLESS PRIOR AUTHORIZATION OR SUBSEQUENT CONFIRMATION IS OBTAINED FROM THE COURT.

Problem: The will of John Doe gave his personal representative power of sale for purpose of paying debts of John Doe to L. Shark. At the time of probate, there was no indebtedness to L. Shark. The personal representative, for full consideration, but without ~~a~~an order of the court, sold real property of the estate to Richard Roe. Is Roe's title marketable?

Answer: No.

Authorities & References: *F.S.* 733.613(1); *Standard Oil Co. v. Mehrtens*, 96 Fla. 455, 118 So. 216 (1928); *In re Estate of Smith*, 200 So.2d 547 (Fla. 2d D.~~C.A. Fla.~~CA 1967); *In re Estate of Gamble*, 183 So.2d 849 (Fla. 1st D.~~C.A. Fla.~~CA 1966); ~~1 FLORIDA REAL PROPERTY~~ PRACTICE UNDER FLORIDA PROBATE CODE §10.5 (CLE ~~2d~~5th ed. ~~1971); FLORIDA PROBATE PRACTICE §10.4 (CLE 1973). See also *F.S.* 733.613(1) (1979).~~2007); FLORIDA REAL PROPERTY SALES TRANSACTIONS §6.8 (CLE 4th ed. 2004).

Comment: With respect to a sale without court authorization or confirmation, see Title Standard ~~5~~5.3 (Sal~~Of~~of Real Property By Personal Representatives Without Court Authorization ~~Or~~or Confirmation).

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STANDARD 5.8

POWER OF PERSONAL REPRESENTATIVE
TO MORTGAGE REAL ESTATE

STANDARD: A GENERAL POWER OF SALE CONTAINED IN A WILL OF A DECEDENT WHO DIED PRIOR TO JANUARY 1, 1976 DID NOT AUTHORIZE THE EXECUTOR TO MORTGAGE REAL ESTATE. A SPECIFIC POWER TO SELL REAL PROPERTY OR A GENERAL POWER TO SELL ANY ASSET OF THE ESTATE CONTAINED IN THE WILL OF DECEDENT DYING AFTER DECEMBER 31, 1975 DOES AUTHORIZE THE PERSONAL REPRESENTATIVE TO MORTGAGE REAL ESTATE.

Problem 1: The will of John Doe, who died prior to January 1, 1976, named Richard Roe as executor and contained a general power of sale. Roe, as executor, borrowed $1,000 which he used for proper estate purposes. To secure this loan, Roe, without an order of court, executed and delivered a mortgage on real property of the estate. Is the mortgage valid?

Answer: No.

Problem 2: Same as problem 1 except that John Doe died after December 31, 1975.

Answer: Yes.

Authorities & References: *F.S.* 733.613(2), 733.611 (1979), 733.22 .25 (1973); *Standard Oil Co. v. Mehrtens*, 96 Fla. 455, 118 So. 216 (1928), *Wilson v. Fridenburg*, 21 Fla. 386 (1885); *In re Estate of Gamble*, 183 So.2d 849 (1st D.C.A. Fla. 1966); 1 FLORIDA REAL PROPERTY PRACTICE §10.5 (CLE 2d ed. 1971).

Comment: It should be noted that *F.S.* 733.613(2) (1979) expressly states that a specific power to mortgage real property will authorize such action by a personal representative. Under the former Probate Code there was no mention of a specific power to mortgage. See *F.S.* 733.22 .25 (1973).

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~~STANDARD 5.9~~

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STANDARD 5.8

POWER OF PERSONAL REPRESENTATIVE
TO MORTGAGE REAL ESTATE

STANDARD: THE PERSONAL REPRESENTATIVE OF THE ESTATE OF A DECEDENT DYING AFTER DECEMBER 31, 1975 MAY MORTGAGE REAL ESTATE, EXCEPT PROTECTED HOMESTEAD, WITHOUT COURT AUTHORIZATION OR CONFIRMATION PROVIDED THE WILL CONTAINS A SPECIFIC POWER TO SELL REAL PROPERTY OR A GENERAL POWER TO SELL ANY ASSET OF THE ESTATE.

Problem 1: The will of John Doe, who died prior to January 1, 1976, named Richard Roe as executor and contained a general power of sale. Roe, as executor, borrowed $1,000, which he used for proper estate purposes. To secure this loan, Roe, without an order of the court, executed and delivered a mortgage on real property of the estate. Is the mortgage valid?

Answer: No.

Problem 2: Same as problem 1 except that John Doe died after December 31, 1975.

Answer: Yes.

Authorities & References: *F.S.* 733.613(2), *Standard Oil Co. v. Mehrtens*, 96 Fla. 455, 118 So. 216 (1928), *Wilson v. Fridenburg*, 21 Fla. 386 (1885); *In re Estate of Gamble*, 183 So.2d 849 (Fla. 1st DCA Fla. 1966); I*n re Estate of Smith*, 200 So.2d 547 (Fla. 2d DCA 1967); PRACTICE UNDER FLORIDA PROBATE CODE §4.20 (Fla. Bar CLE 5th ed. 2007); FLORIDA REAL PROPERTY SALES TRANSACTIONS §6.8 (Fla. Bar CLE 4th ed. 2004).

Comment: It should be noted that *F.S.* 733.613(2) expressly states that a specific power to mortgage real property will authorize such action by a personal representative. Under the former Probate Code there was no mention of a specific power to mortgage. See *F.S.* 733.22-.25 (1973).

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Standard 5.9

RELEASE OF DOWER BY SURVIVING SPOUSE

~~STANDARD: WHEN A SURVIVING SPOUSE HAS A RIGHT TO CLAIM DOWER, THE SPOUSE SHOULD JOIN IN A SALE OR DISPOSITION OF REAL PROPERTY BY THE PERSONAL REPRESENTATIVE.~~

~~Problem:~~ ~~John Doe was survived by his widow, Mary Doe. Richard Roe, the executor of the estate conveyed certain real property to Simon Grant. Mary Doe had made no election to take dowe but her dower had not been relinquished or barred by law. Did Simon Grant acquire marketable title?~~

~~Answer:~~ ~~No. Mary Doe must consent to the conveyance and join with the personal representative in the execution of the deed.~~

~~Authorities & References:~~ ~~*F.S.* 733.25 (1973); *In Re Estate of Collin*, 279 So.2d 48 (4th D.C.A. Fla. 1973); FLORIDA PROBATE PRACTICE §§10.16, 20.18 (1973); 1 FLORIDA REAL PROPERTY PRACTICE §10.14 (2d ed. 1971).~~

~~Comment:~~ ~~With respect to the issue of the existence of dower, see Title Standards, Ch. 20 (Marital Property).~~

~~It should be remembered that the Standard deals with dower rights and not with the elective share as provided by the 1975 Probate Code.~~

~~The Standard applies where the spouse has elected to take dower but dower has not been assigned.~~

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STANDARD 5.10

POWERS OF SUCCESSOR PERSONAL REPRESENTATIVES

STANDARD: A POWER OF SALE CONTAINED IN A WILL AND CONFERRED ON A NAMED PERSONAL REPRESENTATIVE MAY BE EXERCISED BY A SUCCESSOR PERSONAL REPRESENTATIVE WITHOUT COURT APPROVAL: (1) PRIOR TO JUNE 8, 1965: UNLESS THE POWER OF SALE WAS EXPRESSLY LIMITED TO THE NAMED INDIVIDUAL, OR IT CLEARLY APPEARED THAT THE TESTATOR INTENDED TO LIMIT THE POWER OF SALE TO THAT INDIVIDUAL. (2) AFTER JUNE 8, 1965, BUT PRIOR TO JANUARY 1, 1976: ONLY IF IT APPEARS FROM THE WILL THAT THE TESTATOR INTENDED TO CONFER THE POWER OF SALE ON THE SUCCESSOR FIDUCIARY. (3) ON OR AFTER JANUARY 1, 1976, UNLESS THE POWER OF SALE WAS MADE PERSONAL TO THE INDIVIDUAL NAMED IN THE WILL.

Problem 1: John Doe died leaving a will that named Richard Roe executor. The will empowered "Richard Roe, and no other to convey all or part of my real estate." Richard Roe did not qualify as executor. Simon Grant was appointed administrator with the will annexed and as such conveyed part of the estate to Frank Thomas without a court order. Is Frank Thomas' title marketable?

Answer: No, regardless of when the sale was made.

Problem 2: John Doe's will named Richard Roe executor and conferred on Richard Roe a power of sale. It did not mention successor personal representatives and contained no further language concerning the power of sale or why it was conferred on Roe. Richard Roe refused to act as executor and Simon Grant was appointed administrator with the will annexed. In 1964, Simon Grant, without court approval, conveyed part of the estate to Frank Thomas. Is Frank Thomas' title marketable?

Answer: Yes. It does not appear that John Doe intended to limit the power of sale to Richard Roe.

Problem 3: Same as Problem 2, but with the sale in 1968.

Answer: No. It does not appear that John Doe intended to confer the power of sale on a successor personal representative.

Problem 4: Same as Problem 2, but with the sale in 1976.

Answer: Yes. It does not appear that the power of sale was made personal to Richard Roe.

Authorities & References: *F.S.* 733.614 (1979); *F.S.* 733.22 as amended by Fla. Laws 1965, ch. 65-284, §1, effective June 8, 1965 (repealed 1974); FLORIDA PROBATE PRACTICE §10.2 (CLE 1973); 1 FLORIDA REAL PROPERTY PRACTICE §§10.5 .6 (CLE 2d ed. 1971); ATIF TN 2.08.01. See *Standard Oil Co. v. Mehrtens*, 96 Fla. 455, 118 So. 216 (1928).

Comment: The problems are not to be construed as implying that *F.S.* 733.614 (1979) re-enacts the rule under 733.22 before the 1965 amendment (Problem 2). Caution is advised whenever there is language in a will expressing faith in the judgment or knowledge of a personal representative in connection with a power of sale.

A power of sale may be exercised by a successor personal representative with court authorization or confirmation. See Title Standard 5.4 (Sale Of Real Property By Personal Representatives With Court Authorization Or Confirmation).

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~~STANDARD 5.11~~

~~POWERS OF SURVIVING PERSONAL REPRESENTATIVES~~

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STANDARD 5.10

POWERS OF PERSONAL REPRESENTATIVES

STANDARD: FOR DECEDENTS DYING AFTER DECEMBER 31, 1975, A POWER OF SALE CONTAINED IN A WILL AND CONFERRED ON A NAMED PERSONAL REPRESENTATIVE MAY BE EXERCISED BY A SUCCESSOR PERSONAL REPRESENTATIVE WITHOUT COURT APPROVAL UNLESS THE POWER OF SALE WAS EXPRESSLY MADE PERSONAL TO THE NAMED INDIVIDUAL.

Problem 1: John Doe died leaving a will that named Richard Roe as personal representative. The will empowered "Richard Roe, and no other, to convey all or part of my real estate." Richard Roe did not qualify as personal representative; instead, Simon Grant was appointed personal representative and as such conveyed part of the estate to Frank Thomas without a court order. Is Frank Thomas' title marketable?

Answer: No.

Problem 2: John Doe's will named Richard Roe and conferred on Richard Roe a power of sale. It did not mention successor personal representatives and contained no further language concerning the power of sale or why it was conferred upon Roe. Richard Roe refused to act as personal representative and Simon Grant was personal representative. In 2006, Simon Grant, without court approval, conveyed part of the estate to Frank Thomas. Is Frank Thomas' title marketable?

Answer: Yes. It does not appear that John Doe intended to limit the power of sale to Richard Roe.

Authorities *F.S.* 733.614; PRACTICE UNDER FLORIDA PROBATE CODE §10.12 (Fla. Bar CLE 5th ed. 2007); FLORIDA REAL PROPERTY SALES TRANSACTIONS §6.8 (Fla. Bar CLE 4th ed. 2004); FUND TN 2.08.01.

Comment: Under former *F.S.* 733.22 (1975), a successor personal representative could only exercise a power to sell real estate if the will specifically provided that the power extended to successors, while *F.S.* 733.614 (2009) provides for a successor's exercise of the power to sell real estate unless the power is made personal to the named personal representative.

Caution is advised whenever a will contains language expressing faith in the judgment or knowledge of a personal representative in connection with a power of sale.

A power of sale may be exercised by a successor personal representative with court authorization or confirmation. See Title Standard 5.4 (Sale of Real Property by Personal Representatives with Court Authorization or Confirmation).

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STANDARD 5.11

POWERS OF SURVIVING PERSONAL REPRESENTATIVES

STANDARD: IF THE APPOINTMENT OF ONE OR MORE JOINT PERSONAL REPRESENTATIVES IS TERMINATED, OR IF ONE OR MORE NOMINATED JOINT PERSONAL REPRESENTATIVES IS NOT APPOINTED, THE REMAINING PERSONAL REPRESENTATIVE(S) MAY EXERCISE A POWER OF SALE CONTAINED IN THE WILL, UNLESS THE WILL PROVIDES OTHERWISE.

Problem:	The will of John Doe contained a power of sale and named John Smith, Richard Roe and Henry James as personal representatives. Smith did not qualify. May Roe and James exercise the power?
Answer:	Yes, unless the will prohibited such action.
Authorities & References:	*F.S.* 733.616 ~~(1979)~~; *Stewart v. Mathews*, 19 Fla. 752 (1883); ~~1~~ FLORIDA REAL PROPERTY ~~PRACTICE §§10.4 10.6 (CLE 2d ed. 1971~~SALES TRANSACTIONS §6.8 (Fla. Bar CLE 4th ed. 2004); PRACTICE UNDER FLORIDA PROBATE CODE §4.42 (Fla. Bar CLE 5th ed. 2007).
Comment:	Title ~~Standard~~Standards 5.3 (Sale of Real Property By Personal Representatives Without Court Authorization ~~O~~or Confirmation) and 5.4 (Sale of Real Property By Personal Representatives With Court Authorization ~~O~~or Confirmation) should be considered ~~in~~when applying this Standard. With respect to who must join in a deed executed pursuant to a power of sale, see Title Standard 5.6 (Deed Under Power ~~O~~of Sale Granted To Two ~~O~~or More Personal Representatives).

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STANDARD 5.12

APPOINTMENT OF PERSONAL REPRESENTATIVE
NOT HAVING STATUTORY PREFERENCE

STANDARD: WITH RESPECT TO ALL INTESTATE PROCEEDINGS OR TESTATE PROCEEDINGS ON OR AFTER JANUARY 1, 1976, TITLE DERIVED FROM A PERSONAL REPRESENTATIVE APPOINTED BY THE COURT IS MARKETABLE PROVIDED NO APPLICATION WAS MADE BY ANY PERSON HAVING STATUTORY PREFERENCE TO APPOINTMENT AND FORMAL NOTICE WAS SERVED ON ALL PERSONS QUALIFIED TO ACT AS PERSONAL REPRESENTATIVES AND ENTITLED TO PREFERENCE EQUAL TO OR GREATER THAN THE PERSON APPOINTED, OR SUCH PERSONS WAIVED THEIR PREFERENCE IN WRITING, AND PROVIDED THE PERSONAL REPRESENTATIVE HAD AUTHORITY TO CONVEY THE PROPERTY.

Problem 1: Mary Roe died intestate leaving a son, Richard Roe, as her only heir at law. The son was stationed overseas with the Navy. Formal notice was served on Richard Roe that Bessie Doe, Mary Roe's neighbor and closest friend, had applied for letters of administration. Bessie Doe was appointed personal representative by the court. May Bessie Doe convey marketable title to Frank Thomas?

Answer: Yes, provided that Bessie Doe also had authority to sell the real property.

Problem 2: John Doe died in 1976, leaving a will which named Richard Roe personal representative. The will devised all John Doe's property to his friend Frank Thomas, who was stationed overseas with the Navy. Richard Roe refused the appointment and the court named Simon Grant personal representative. No notice was sent to Frank Thomas, who had not waived his preference. With or without a court order, may Simon Grant convey marketable title to John Doe's real property?

Answer: No. As of January 1, 1976, a devisee has statutory preference, and the Standard applied. See *F.S.* 733.301 (1979).

Authorities & References: *F.S.* 733.203, 733.301 (1979); *In re Estate of Bush*, 80 So. 2d 673 (Fla. 1955); *In re Estate of Raymond*, 237 So. 2d 84 (1st D.C.A. Fla. 1970).

Comment: Prior to January 1, 1976, this Standard applied only to intestate succession.

Prior to the effective date of the new Probate Code, it appeared that any conveyance made by a personal representative without statutory preference was valid if made pursuant to a court order after the estate proceedings were closed and the time for appeal had expired. See *Goldtrap v. Mancini*, 86 So.2d 141 (Fla. 1956); ATIF TN 2.07.01. A literal reading of *F.S.* 733.401 (1979), however, indicates the appointment of a person not entitled to preference is jurisdictional. Until further clarification is obtained it would appear advisable to require that procedural requirements have been met.

As to whether the personal representative had authority to convey the property see Title Standards 5.3 (Sale Of Real Property By Personal Representatives Without Court Authorization Or Confirmation), 5.4 (Sale Of Real Property By Personal Representatives With Court Authorization Or Confirmation), 5.6 (Deed Under Power Of Sale Granted To Two Or More Personal Representatives) and 5.10 (Powers of Successor Personal Representatives).

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~~STANDARD 5.13~~

TITLE DERIVED FROM PERSONAL REPRESENTATIVE
NOT HAVING STATUTORY PREFERENCE IN APPOINTMENT

STANDARD: WITH RESPECT TO ALL INTESTATE OR TESTATE PROCEEDINGS ON OR AFTER JANUARY 1, 1976, TITLE CONVEYED TO A BONA FIDE PURCHASER FROM A PERSONAL REPRESENTATIVE APPOINTED BY THE COURT IS MARKETABLE EVEN THOUGH THE PERSONAL REPRESENTATIVE IS NOT ONE OF THE PARTIES ENTITLED TO PREFERENCE UNDER *F.S.* 733.301.

Problem 1: Mary Roe died intestate leaving a son, Richard Roe, as her only heir at law. The son was stationed overseas with the Navy. Formal notice was not served on Richard Roe that Bessie Doe, Mary Roe's neighbor and closest friend, had applied for letters of administration. Bessie Doe was appointed personal representative by the court. May Bessie Doe convey marketable title to a bona fide purchaser?

Answer: Yes, provided that Bessie Doe also had authority to sell the real property.

Problem 2: John Doe died in 2005, leaving a will which named Richard Roe personal representative and which gave the personal representative the power to sell. The will devised all John Doe's property to his friend, Frank Thomas, who was stationed overseas with the Navy. Richard Roe refused the appointment and the court named Simon Grant personal representative. No notice was sent to Frank Thomas, who had not waived his preference. With or without a court order, may Simon Grant convey marketable title to John Doe's real property to a bona fide purchaser?

Answer: Yes. Even though a devisee has statutory preference, a bona fide purchaser may rely on the propriety of the appointment. See *F.S.* 733.301.

Authorities *F.S.* 733.301, .611 AND .613; *In re Estate of Bush*, 80 So.2d 673 (Fla. 1955); *In re Estate of Williamson*, 95 So.2d 244 (Fla. 1957); *Anderson v. Johnson*, 732 So.2d 423 (Fla. 5th DCA 1999); *In re Estate of Cunningham*, 104 so.2d 748 (Fla. 3rd DCA 1958); PRACTICE UNDER FLORIDA PROBATE CODE §§4.54, 5.5 and 5.6 (Fla. Bar CLE 5th ed. 2007).

Comment: As to whether the personal representative had authority to convey the property, see Title Standards 5.3 (Sale of Real Property By Personal Representatives Without Court Authorization or Confirmation), 5.4 (Sale of Nonhomestead Real Property By Personal Representatives With Court Authorization or Confirmation), 5.6 (Deed Under Power of Sale Granted to Two or More Personal Representatives) and 5.10 (Powers of Successor Personal Representatives).

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STANDARD 5.13

PROBATE NON-CLAIM ACT —
UNITED STATES AND FLORIDA

STANDARD: THE PROBATE NON-CLAIM ACT, *F~~LORIDA STATUTES, SECTION~~S.* 733.702, IS NOT BINDING AS TO CLAIMS OF THE UNITED STATES, BUT IS BINDING AS TO THE CLAIMS OF THE STATE OF FLORIDA AND ITS AGENCIES.

Problem 1:	United States asserted a claim against the estate of John Doe, deceased, after the expiration of the notice to ~~creditors~~creditors' period. Is the claim of the United States barred?
Answer:	No.
Problem 2:	The State of Florida, or one of its agencies, filed a claim against the estate of John Doe, deceased, after the expiration of the notice to creditors period. Is the claim barred?
Answer:	Yes.
Authorities & References:	31 U.S.C~~. §§ 191-192 (1976.~~, §3713 (2004); *F.S.* 733.702 (~~1980 Supp.~~2004); *United States v. Summerlin*, 310 U.S. 414 (1940); *State v. Moore's Estate*, 153 So. 2d 819 (Fla. 1963); *In re Smith's Estate*, 132 So. 2d 426 (Fla. 2d D~~.C.A. Fla.~~CA 1961); ~~Florida Probate Practice §~~PRACTICE UNDER PROBATE CODE §8.~~36, 8.44~~1 (CLE ~~1973)~~5th ed. 2007); FUND TN 2.02.04.

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STANDARD 5.14

EFFECT OF ORDER OF FINAL DISCHARGE

STANDARD: AN ORDER OF FINAL DISCHARGE DIVESTS THE PERSONAL REPRESENTATIVE OF CONTROL OVER ESTATE PROPERTY.

Problem:	John Doe died devising Blackacre by his will to his son, Richard Doe. The estate was administered and a final discharge of the personal representative entered. Richard Doe sold Blackacre to Simon Grant. Was Simon Grant's title marketable?
Answer:	Yes.
Authorities & References:	*F.S.* 733.901~~ (1979);~~; PRACTICE UNDER FLORIDA PROBATE ~~PRACTICE §§16.16~~ ~~16.2~~CODE , §14.9 (CLE ~~1973~~5TH ed. 2007).

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STANDARD 5.15

RECITAL OF HEIRSHIP IN DEED

STANDARD: WHERE A DEED, WHICH CONTAINS A RECITAL THAT THE GRANTORS ARE THE SOLE AND ONLY HEIRS OF A NAMED DECEDENT, HAS BEEN OF RECORD FOR MORE THAN SEVEN YEARS, SUCH RECITAL MAY BE ACCEPTED AS SUFFICIENT TO ESTABLISH THE TRUTH OF THE RECITAL IN THE ABSENCE OF EVIDENCE OR INFORMATION TO THE CONTRARY.

Problem: John Doe acquired title to Blackacre in ~~1960.~~1999. By deed recorded more than seven years ago, Mary Doe, unmarried, Albert Doe, unmarried, and Sarah Doe, unmarried, conveyed Blackacre to Richard Roe. In the deed there is a recital that the grantors are the sole heirs of John Doe. In the absence of evidence or information to the contrary, may such recital be accepted as sufficient to establish its truth?

Answer: Yes.

Authorities & References: *F.S.* 95.22 ~~(1979).~~FUND TN 10.01.01.

~~Comment:~~ ~~The advantage of the Standard is that it provides that the recitations contained in the deed are sufficient to meet the requirements of *F.S.* 95.22 without requiring evidence outside of such instrument.~~

~~Prior to January 1, 1975, the limitations period could have been as much as twenty four years, due to a minority proviso in the statute. Actions not barred under prior law could have been brought until January 1, 1976. As no case has construed the rights of minors with respect to the seven year period, caution should be exercised by the examiner when the possibility of minor heirs exists.~~

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STANDARD 5.16

FOREIGN WILL AS MUNIMENT OF TITLE

STANDARD: A FOREIGN WILL DULY ADMITTED TO ~~PROBATE~~RECORD IN FLORIDA ~~PURSUANT TO FLORIDA STATUTES, SECTIONS 734.103 OR 734.104 (1979) OR 734.29 OR 736.06 (1973)~~ WILL PERMIT A VALID CONVEYANCE OF FLORIDA REAL ESTATE BY THE DEVISEES NAMED IN SUCH WILL.

Problem 1:	Blackacre was devised to John Doe under the last will of Richard Roe, who died a resident of New York in ~~1964.~~1995. Roe's will was admitted to probate in New York in ~~1964~~1995 and a duly authenticated copy thereof was ~~then recorded in the Official Records of the circuit court of the county~~admitted to record in Florida ~~where the land is located~~in 1999 pursuant to *F.S.* 734.104. Thereafter John Doe conveyed the property to Simon Grant. Is Simon Grant's title marketable?
Answer:	~~No.~~Yes.
Problem 2:	Same facts as Problem 1 except that an authenticated copy of Roe's will was ~~admitted to record~~recorded in ~~Florida~~1999 in ~~1968 pursuant to *F.S.* 736.06.~~the Official Records of the county where the land is located. Is Simon Grant's title ~~then~~ marketable?
Answer:	~~Yes, and after January 1, 1976, the same is true pursuant to *F.S.* 734.104 (1979).~~No.
~~Problem 3:~~Authorities & References:	~~Same facts as Problem 1 except that a certified or exemplified copy of the transcript of the domiciliary proceedings of the probate of Roe's estate was admitted to record in Florida in 1965 pursuant to *F.S.* 734.29. Is Simon Grant's title then marketable?~~*F.S.* 734.104; PRACTICE UNDER FLORIDA PROBATE CODE §17.5 (CLE 5th ed. 2007); FUND TN 2.05.04.
~~Answer:~~Comment:	~~Yes. When a non-resident decedent has died within three years from the date of admitting his will to record in Florida, the procedure set forth in 734.29 applies instead of the provisions of 736.06. Notice to creditors should also be published pursuant to 734.29(3) and an order entered after the expiration of six months, pursuant to 734.29(5). (After January 1, 1976, the period is three months and *F.S.* 734.103, 734.104 and 733.301 bring a similar result).~~The examiner must also be satisfied that: (1) the estate is cleared as to estate taxes and (2) all specific bequests under the will have been paid if Doe acquired title under the residuary clause of Roe's will rather than by means of a specific devise. If the will is not entitled to be admitted to record in Florida, or if the domiciliary proceedings have not been closed and it is impossible to determine whether or not the specific bequests have been paid, in a situation where the Florida real estate passes under the residuary clause of the will, ancillary administration pursuant to *F.S.* 734.102 should be resorted to in order to convey marketable title. It is also possible to proceed under *F.S.*, Chapter 735, Part I, provided the value of the estate does not exceed the jurisdictional limits applicable under the statute in force at the date of decedent's death. Claims of creditors should be cleared or otherwise addressed for conveyances made within two years of a decedent's death.
~~Authorities & References:~~	~~*F.S.* 734.103, 734.104, 733.301 (1979); *F.S.* 734.29, 736.06 (1973); 1 FLORIDA REAL PROPERTY PRACTICE §§9.51, 10.23-.26 (CLE 2d ed. 1971); FLORIDA PROBATE PRACTICE §§10.31-.32, 20.5-.6 (CLE 1973).~~
~~Comment:~~	~~The examiner must also be satisfied that: (1) the estate is cleared as to estate taxes and (2) all specific bequests under the will have been paid if Doe acquired title under the residuary clause~~

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~~of Roe's will rather than by means of a specific devise. If the will is not entitled to be admitted to record in Florida, or if the domiciliary proceedings have not been closed and it is impossible to determine whether or not the specific bequests have been paid, in a situation where the Florida real estate passes under the residuary clause of the will, ancillary administration pursuant to *F.S.* 734.102 (1979) or *F.S.* 734.31 (1973) should be resorted to in order to convey marketable title. If the non-resident's entire estate in Florida is valued less than $5,000.00 ($10,000.00 after January 1, 1972) it is also possible to proceed under *F.S.*, Chapter 735, Part II, (1979) whereupon the devisees can convey marketable title, unless it subsequently appears that the court lacked jurisdiction to enter the order declaring administration unnecessary as a result of improper property valuation, or otherwise.~~

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STANDARD 5.17

SATISFACTION OF MORTGAGE HELD BY ESTATE OF NON-RESIDENT DECEDENT

STANDARD: THE SATISFACTION OF MORTGAGE MADE BY A FOREIGN PERSONAL REPRESENTATIVE OR GUARDIAN TO WHICH IS ATTACHED AN AUTHENTICATED COPY OF LETTERS OR OTHER EVIDENCE SHOWING APPOINTMENT FOR MORE THAN THE STATUTORY PERIOD AND WHERE NO ANCILLARY PROCEDURE HAD BEEN FILED IN THIS STATE MAY BE ACCEPTED AS A SATISFACTION OF MORTGAGE ENCUMBERING LANDS IN THIS STATE.

~~Problem:~~ ~~John Doe, the owner of Blackacre, had mortgaged his property to Richard Roe, a resident of Georgia. Richard Roe died and no ancillary proceedings were taken out in Florida for a period of sixty days. John Doe obtained a satisfaction of mortgage from the foreign personal representative to which was attached a duly authenticated copy of the letters of administration showing appointment more than sixty days prior to the date of the satisfaction of mortgage. Is such satisfaction of mortgage valid in this state without ancillary administration?~~

~~Answer:~~ ~~If prior to January 1, 1976, no. The statutory period is 3 months. If after that date, yes. The statutory period is 60 days.~~

~~Authorities & References:~~ ~~*F.S.* 734.101(3), 744.306(3) (1979); *F.S.* 734.30(3), 744.15(3) (1973); 1 FLORIDA REAL PROPERTY PRACTICE §8.17 (CLE 2d ed. 1971).~~

~~Comment:~~ ~~Effective January 1, 1976, the statutory period was reduced from three months to sixty days.~~

~~The authenticated copy of letters or other evidence showing appointment should show that the authority was in full force and effect on the date of the execution of the satisfaction.~~

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Problem 1: John Doe, the owner of Blackacre, had mortgaged his property to Richard Roe, a resident of Georgia. Richard Roe died and no ancillary proceedings were taken out in Florida for a period of ninety days. John Doe obtained a satisfaction of mortgage from the foreign personal representative to which was attached a duly authenticated copy of the letters of authority showing appointment more than ninety days prior to the date of the satisfaction of mortgage. Is such satisfaction of mortgage valid in this state without ancillary administration?

Answer: Yes, the statutory period is ninety (90) days for a foreign personal representative.

Problem 2: John Doe, the owner of Blackacre, had mortgaged his property to Richard Roe, a resident Georgia. Richard Roe was declared incompetent and no ancillary proceedings were taken out in Florida for a period of sixty days. John Doe obtained a satisfaction of mortgage from the foreign guardian to which was attached a duly authenticated copy of the letters of authority showing appointment more than sixty days prior to the date of the satisfaction of mortgage. Is such satisfaction of mortgage valid in this state without ancillary proceedings?

Answer: Yes, the statutory period is sixty (60) days for a foreign guardian, curator, or conservator.

Authorities & References: *F.S.* 734.101(3), 744.306(3); *F.S.* 734.30(3). See also, former 744.15(3) (1973); PRACTICE UNDER FLORIDA PROBATE CODE §17.3 (CLE 5th ed. 2007); FUND TN 2.08.04.

Comment: The authenticated copies of letters or other evidence showing appointment should show that the authority was in full force and effect on the date of the execution of the satisfaction. See *F.S.* 731.201(1) for discussion of "authenticated" copies.

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Title Insurance Committee's Request to Amend Legislative Position
Regarding Title Insurance Legislation

In 2008 the Florida Legislature created the Title Insurance Study Advisory Council (TISAC). TISAC was charged with making recommendations to the Florida Legislature regarding the regulation of title insurance in Florida. In recognition of the substantial and important role Florida real estate attorneys play in transactional real estate, and the role of title insurance as a tool real estate attorneys use to protect their clients, the Legislature reserved two seats on TISAC for real estate attorneys recommended by the Real Property and Trust Law Section (RPPTL) of the Florida Bar.

On September 26, 2009 the Executive Council of RPPTL passed a resolution containing twelve recommendations to TISAC. The resolution found consumers in the State of Florida would benefit from positions identified in the resolution.

On December 31, 2009 TISAC published its Final Report to the Florida Legislature. The Final Report contained 22 specific recommendations. The Final Report was closely correlated with the Section's recommendations of September 26, 2009. The Final Report recommends substantive changes to title insurance regulation and the creation of a new statutory chapter dedicated to the administration of title insurance.

On May 29, 2010, the Executive Council of RPPTL passed a resolution to adopt a legislative position supporting the recommendations of the TISAC Final Report.

The Title Insurance Committee of RPPTL has engaged in review of statutory drafts and contributed to ongoing efforts to create legislation to effect the recommendations of TISAC and protect the interests of consumers in Florida. These efforts have identified two subjects in which it is necessary to depart from the recommendations of TISAC to protect Florida consumers and avoid a potentially discriminatory effect in the charges for title insurance.

1. Rebates of title insurance premium. The Section's September 26, 2009 resolution included the following recommendation: "No rebates of title premium should be permitted. Since the rationale underlying a regulated rate system is to preserve an appropriate balance between the solvency of the industry and consumer pricing, any deviation from a properly established rate is antithetical to that goal."
In one of the few areas of departure from the Section's recommendations, TISAC recommended adopting section 626.572, Florida Statutes, for the title insurance industry. This section requires an agent to apply rebates of a title insurance premium equally to all of the agent's customers.
TISAC's recommendation is not responsive to the concerns of the Section's September 26, 2009 recommendation and may result in rebates being applied in a discriminatory fashion to the detriment of those with the least economic power.

2. Funding a Guarantee Fund to ensure consumer protection. TISAC recommended the creation of a Guarantee Fund to avoid cancelation of policies in the event of the insolvency of a title insurer. The TISAC recommendation included pre-funding the Guarantee Fund with assessments from consumers. A model is being suggested that will permit post-funding the Guarantee Fund in the event it is needed. Such post-funding will substantially reduce the size of the necessary Guarantee Fund and reduce the assessment burden on consumers.

Request for action:
The Title Insurance Committee requests the Section to amend the legislative position adopted at the May 29, 2010 meeting to depart from the TISAC Final Report on two of the twenty-two recommendations and support a prohibition on rebating title insurance premiums (consistent with the Section's recommendations adopted on September 26, 2009) and support a post-funded Guarantee Fund.

A bill to be entitled

An act relating to judicial sale procedures; amending s. 45.031, Florida Statutes; providing for methods and manner of publication; amending s. 50.011 Florida Statutes; providing requirements for electronic publications of sale under s. 45.031 Florida Statutes; amending s. 702.035 Florida Statutes to be consistent with s. 50.011 as amended hereby; providing for an effective date.

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

Section 1. Subsections (3), (4), (5), (6), (7), (8), (9) and (10) of Section 45.031 are renumbered as subsections (4), (5), (6), (7), (8), (9), (10) and (11), respectfully, subsection (2) is amended, and a new subsection (3) is added to that Section to read:

(2) PUBLICATION OF SALE.— Notice of sale shall be published:

a) in a newspaper of general circulation, as defined in chapter 50, published in the county where the sale is to be held once a week for 2 consecutive weeks, ~~. The~~ the second publication shall be at least 5 days before the sale; or,

b) on the clerk of the court's internet website accessible without charge by a clear and conspicuous hyperlink from the website's home page for twenty consecutive days before the sale; or,

c) on an alternative internet website accessible without charge by a clear and conspicuous hyperlink from the clerk of court's website's home page, and the alternative website's home page, for twenty consecutive days before the sale.

(3) NOTICE OF SALE. - The ~~notice~~ Notice of Sale shall contain:

(a) A description of the property to be sold.
(b) The time and place of sale.
(c) A statement that the sale will be made pursuant to the order or final judgment.
(d) The caption of the action.
(e) The name of the clerk making the sale.
(f) A statement of the name of the newspaper, or the website home page address, in or on which the notice will be published.

CODING: Words ~~stricken~~ are deletions; words underlined are additions.

(g) ~~(f)~~ A statement that any person claiming an interest in the surplus from the sale, if any, other than the property owner as of the date of the lis pendens must file a claim within 60 days after the sale.

The court, in its discretion, may enlarge the time of the sale. Notice of the changed time of sale shall be published as provided herein.

Section 2. Section 50.011 Florida Statutes is amended as follows: Existing section 50.011 is renumbered as 50.011(1) and subsection 50.011(2) is added to that section to read:

(2) Electronic publication of Notice of Sale.- As allowed by section 45.031(2) as amended, the requirements of section 50.011(1) do not apply to any electronic publication of a Notice of Sale. Provided, however, that the electronic publication shall be on a website having at least 25% of its words in the English language, and provided further that the website shall be available for viewing by the general public without registration processes of any sort, and during all hours of each day on which the Notice of Sale is posted. The Proof of Publication affidavit shall contain in its heading the common name and the Uniform Resource Locator of the website where posting occurred; shall contain a copy of the Notice of Sale; and shall include the dates on which posting occurred.

Section 3. Section 702.035 Florida Statutes is amended to read as follows:

702.035 **Legal notice concerning foreclosure proceedings**. – Whenever a legal advertisement, publication, or notice relating to a foreclosure proceeding is required to be placed in a newspaper or posted in a website online, it is the responsibility of the petitioner or petitioner's attorney to place such advertisement, publication, or notice. For counties with more than 1 million total population as reflected in the 2000 Official Decennial Census of the United States Census Bureau as shown on the official website of the United States Census Bureau, any notice of publication required by this section shall be deemed to have been published in accordance with the law if the notice is published in a newspaper that has been entered as a periodical matter at a post office in the county in which the newspaper is published, is published a minimum of 5 days a week, exclusive of legal holidays, and has been in existence and published a minimum of 5 days a week, exclusive of legal holidays, for 1 year or is a direct successor to a newspaper that has been in existence for 1 year that has been published a minimum of 5 days a week, exclusive of legal holidays. If the advertisement,

publication or notice is effected by an electronic publication, it shall be deemed to have been published in accordance with the law if the requirements of s. 50.011(2) have been met. The advertisement, publication, or notice shall be placed directly by the attorney for the petitioner, by the petitioner if acting pro se, or by the clerk of the court. Only the actual costs charged by the newspaper or by the host of the internet website for the advertisement, publication or notice may be charged as costs in the action.

Section 4. This act shall take effect July 1, 2011.

CODING: Words ~~stricken~~ are deletions; words underlined are additions.

WHITE PAPER

PROPOSED REVISIONS TO THE NOTICE OF JUDICIAL SALE STATUTES

I. SUMMARY

The proposed changes provide for publication of Notices of Judicial Sales on the internet, as an alternative to newspaper publication, in order to (a) provide greater notice of such sales to the public, including potential sale bidders and other interested parties, and (b) reduce the publication costs associated with the Notice of Sale.

II. CURRENT SITUATION AND PROPOSED CHANGES

A. Publication of Notice of Sale - Real property is the subject of a variety of judicially-directed sales. The most frequent are mortgage foreclosure actions. A mortgage foreclosure action concludes with a judgment determining the amount owed to the lender and scheduling a judicial sale of the property pursuant to § 45.031 *Fla. Stat.* Usually the sale is scheduled for about five weeks after entry of the judgment.

The current Notice of Judicial Sale Statutes require that the Notice be published in a newspaper, and do not permit internet publication. Under the present form of § 45.031 *Fla. Stat.*, the Notice of Sale ("the Notice") must be published two times, once each in two consecutive weeks, in a newspaper "of general circulation" published in the county where the sale will occur.

While newspapers were the primary source of information for many people in the past, that is no longer the case today. Now the internet is a common source of the public's access to information. The internet is not only being used with greater frequency, it permits the public access to its information around the clock, it is easily viewed and shared, and the clerk of court's website is a logical place for people to check if they are looking for legal notices that could affect title to property. Permitting Notices of Sales to be published on the clerks of courts' websites as an alternative to newspaper publication increases the likelihood that people interested in learning about judicial sales will be able to locate them.

The Statutes require, among other things, that the Notice contain "a description of the property to be sold." In a fair number of residential foreclosures and in a greater number of commercial foreclosures, that description is a lengthy metes and bounds description. In those cases, the Notice can be quite lengthy. Since §50.061 establishes a formula for determining the amount which a newspaper must charge for publication depending on the number of lines in the Notice, the Notice can be expensive to publish. Also, because the name of the case is included, the length of the publication can be greatly increased if there are numerous defendants who are identified in the case name. In a fair number of cases homeowners file bankruptcy proceedings which delay the foreclosure process, and if the filing occurs after a Notice is published, a new sale date eventually must be obtained and a new Notice published. Repeated bankruptcy filings, or other delays in judicial sales, require repeated re-publications of the Notice, and increase the cost even in the case of a property description that is not lengthy.

The proposed changes to the statutes allowing for publication of the Notice via the Internet would both increase the exposure of the sale to possible bidders and other interested parties, and reduce the cost of publication.

B. Due process concerns – The owner of the property which is the subject of the foreclosure action has been notified of the action by some form of service of process at the commencement of the case. Even if the owner has not attempted to defend, a copy of the foreclosure judgment is mailed to the owner so that he or she has notice of (a) the amount owed to the lender, and (b) the date and time of the foreclosure (judicial) sale. It is believed that newspaper publication of the Notice does little to further inform a property owner of the pendency of the sale because there is no requirement that the print media publication be provided to the owner. It is further believed that allowing alternate publication via the clerk of court's internet website would not make it less likely that a property owner would be informed of a sale date for the property than if the Notice is published in the newspaper.

III. FISCAL IMPACT ON STATE AND LOCAL GOVERNMENTS

The proposal may have a small fiscal impact on county government because of the requirement that the electronic publication be accomplished by establishing a Uniform Resource Locator (URL) link on the web pages of the Clerks of Circuit Court. This could be offset by a relatively minor fee being charged by the Clerks of Court to the party seeking the publication to cover the cost of placing and maintaining the link on the web page. There should be no fiscal impact on state government.

IV. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR

The proposal will have a positive economic impact on lenders and borrowers who otherwise pay a higher cost for newspaper publication of judicial sale notices. It will also have a positive impact on firms who establish the mechanisms for Internet publication and who will be able to charge for such publication, albeit at costs below those presently charged by the print media. The proposal will have a negative economic impact on newspapers deriving revenue from print publication of Notices.

V. CONSTITUTIONAL ISSUES

No constitutional issues are raised by this proposal.

VI. OTHER INTERESTED PARTIES

None are known at this time.

LEGISLATIVE POSITION REQUEST FORM

GOVERNMENTAL AFFAIRS OFFICE

Date Form Received _____

GENERAL INFORMATION

Submitted By Mark A. Brown, Chair, Real Property Litigation Committee of the Real Property Probate & Trust Law Section (RPPTL Approval Date_____, 2010)

Address 4221 W. Boy Scout Blvd., Suite 1000, Tampa, FL 33607
Telephone: (813) 229-4142

Position Type RPPTL Section, The Florida Bar
(Florida Bar, section, division, committee or both)

CONTACTS

Board & Legislation Committee Appearance

Mark A. Brown, 4221 W. Boy Scout Blvd., Suite 1000, Tampa, FL 33607
Telephone (813) 229-4142
William Nussbaum, 334 East Duval Street, Jacksonville FL 3220
Telephone (904) 353-0033
Michael J. Gelfand, Gelfand & Arpe, P.A., Regions Financial Tower, Suite 1220, 1555 Palm Beach Lakes Blvd., West Palm Beach, FL 33401
Telephone (561) 655-6224
Peter M. Dunbar, Pennington, Moore, Wilkinson, Bell & Dunbar, P.O. Box 10095, Tallahassee, Florida 32302-2095, Telephone (850) 222-3533
Martha J. Edenfield, Pennington, Moore, Wilkinson, Bell & Dunbar, P.O. Box 10095, Tallahassee FL 32302-2095, Telephone (850) 222-3533
(List name, address and phone number)

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

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

PROPOSED ADVOCACY

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

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

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

Proposed Wording of Position for Official Publication:

The Florida Bar supports the proposed changes since they broaden the accessibility to Notices of Judicial Sales and save on the costs of publication by permitting notices to be placed on the clerks of courts' websites as an alternative to just having the Notices appear in a newspaper publication.

Reasons For Proposed Advocacy:

The proposed changes will broaden the accessibility to Notices of Judicial Sales and save on the costs of publication by permitting notices to be placed on the clerks of courts' websites as an alternative to just having the Notices appear in a newspaper publication.

PRIOR POSITIONS TAKEN ON THIS ISSUE

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

Most Recent Position NONE

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

Others
(May attach list if more than one)

NONE

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

REFERRALS TO OTHER SECTIONS, COMMITTEES OR LEGAL ORGANIZATIONS

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

Referrals

[List here other Bar sections, committees or attorney organizations]

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

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

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

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

Section 1. Section 713.10, Florida Statutes, is amended to read:

713.10 Extent of liens.—

(1) Except as provided in s. 713.12, a lien under this part shall extend to, and only to, the right, title, and interest of the person who contracts for the improvement as such right, title, and interest exists at the commencement of the improvement or is thereafter acquired in the real property.

(2) When an improvement is made by a lessee in accordance with an agreement between such lessee and her or his lessor, the lien shall extend also to the interest of such lessor. When the lease expressly provides that the interest of the lessor shall not be subject to liens for improvements made by the lessee, the lessee shall notify the contractor making any such improvements of such provision or provisions in the lease, and the knowing or willful failure of the lessee to provide such notice to the contractor shall render the contract between the lessee and the contractor voidable at the option of the contractor. The interest of the lessor shall not be subject to liens for improvements made by the lessee when:

(1a) The lease or a short form thereof is recorded in the clerk's officeor a memorandum of the lease which contains the specific language set forth in the lease prohibiting such liability is recorded in the official records of the county in which the premises are located prior to the recording of a notice of commencement for improvements to the premises that are the subject of the lease and the terms of the lease expressly prohibit such liability; or

(2) All of the leases entered into by a lessorb) The terms of the lease expressly prohibit such liability and a notice advising that leases for the rental of premises on a parcel of land prohibit such liability and a notice whichhas been recorded in the official records of the county in which the parcel of land is located prior to the recording of a notice of commencement for improvements to the premises that are the subject of the lease and the notice sets forth the following is recorded by the lessor in the public records of the county in which the parcel of land is located:

(a1) The name of the lessor.

(b2) The legal description of the parcel of land to which the notice applies.

(c) The specific language contained in the various leases prohibiting such liability. (d3) A statement that all leases entered into for premises on the parcel of land expressly prohibit such liability or, if some leases do not prohibit such liability, an identification of the specific leases that do not prohibit such liability. The notice shall still be effective and the lessor's interest in a premises on the parcel of land shall not be subject to liens for improvements made by the lessee of such premises even if all of the leases for all of the premises on the parcel of land do not contain the language prohibiting such liability or the language prohibiting such liability varies in the various leases so long as:

(i) the lease for the specific premises as to which a lien could otherwise be claimed against the lessor's interest expresses the intention that the interest of the lessor shall not be subject to liens for improvements made by the lessee; and

(ii) the leases that do not prohibit such liability are identified in ~~paragraph (c).~~the notice.

The lessor may amend the notice from time to time to revise the list of leases that do not prohibit such liability. Any such amendment will be effective as of the date it is recorded and shall not be effective as to any improvements performed under a notice of commencement that is recorded before the amendment.

Creditors secured by or subsequent purchasers of an interest in the affected parcel, for a valuable consideration and without notice, may rely on the accuracy and correctness of the recorded notice as of the time they acquired the affected interest. No person shall have a duty to inquire into the terms of any lease affecting the parcel as a condition to relying on the recorded notice. If a lessor willfully misstates the facts in any notice, any lienor who is materially prejudiced by the misstatement in perfecting lien rights against the lessor has a cause of action against the lessor for his or her damages sustained thereby in the amount that the lienor would have been otherwise able to establish as a construction lien against the lessor's interest provided such lienor is otherwise entitled to a lien under this Part I.

A reference in the recorded notice to specific leases which do not prohibit such liability, shall not be construed to constitute actual or constructive notice of such leases or the interests of the named lessees in the parcel, nor place any party on a duty of further inquiry as to the status of such leases or the interests of such lessees. This paragraph shall not be construed to affect the rights of lienors against the interests of the lessors or lessees referred to in the recorded notice.

(~~3~~c) The lessee is a mobile home owner who is leasing a mobile home lot in a mobile home park from the lessor.

(3) Any contractor or lienor under contract to furnish improvements being made by a lessee may serve written demand on the lessor for a verified copy of the provision in the lease between such lessee and the lessor prohibiting liability for improvements made by the lessee. The demand must identify the lessee and the premises being improved and must be in a document that is separate from the notice to the owner as provided in Section 713.06(2). The interest of any lessor who does not serve a verified copy of the lease provision within 30 days after demand, or who serves a false or fraudulent copy, shall be subject to a lien under this Part I by the party demanding the verified copy provided such party is (i) otherwise entitled to a lien under this Part I; and (ii) did not otherwise have actual or constructive notice that the interest of the lessor is not subject to liens for improvements made by the lessee. The written demand must include the following warning in conspicuous type in substantially the following form:

WARNING: YOUR FAILURE TO SERVE THE REQUESTED VERIFIED COPY WITHIN 30 DAYS OR THE SERVICE OF A FALSE COPY MAY RESULT IN YOUR PROPERTY BEING SUBJECT TO THE CLAIM OF LIEN OF THE PERSON REQUESTING THE VERIFIED COPY.

Section 2. Paragraph (d) of Subsection (1) of Section 713.10, Florida Statutes, is amended to read:

713.13
Notice of commencement. —
(1)

(d) A notice of commencement must be in substantially the following form:

Permit No. _____ Tax Folio No. _____

NOTICE OF COMMENCEMENT

State of _____
County of _____

The undersigned hereby gives notice that improvement will be made to certain real property, and in accordance with Chapter 713, Florida Statutes, the following information is provided in this Notice of Commencement.
1. Description of property: (legal description of the property, and street address if available) .
2. General description of improvement: .
3. Owner information (per Section 713.01(23), where a tenant contracts for the work the tenant should be listed as the Owner): .
a. Name and address: .
b. Interest in property: .
c. Name and address of fee simple titleholder (if other than Owner): .
4. a. Contractor: (name and address) .
b. Contractor's phone number: .
5. Surety
a. Name and address: .
b. Phone number: .
c. Amount of bond: $.
6. a. Lender: (name and address) .
b. Lender's phone number: .
7. a. Persons within the State of Florida designated by Owner upon whom notices or other documents may be served as provided by Section 713.13(1)(a)7., Florida Statutes: (name and address) .
b. Phone numbers of designated persons: .
8. a. In addition to himself or herself, Owner designates of to receive a copy of the Lienor's Notice as provided in Section 713.13(1)(b), Florida Statutes.
b. Phone number of person or entity designated by owner: .
9. Expiration date of notice of commencement (the expiration date is 1 year from the date of recording unless a different date is specified) .

WARNING TO OWNER: ANY PAYMENTS MADE BY THE OWNER AFTER THE EXPIRATION OF THE NOTICE OF COMMENCEMENT ARE CONSIDERED IMPROPER PAYMENTS UNDER CHAPTER 713, PART I, SECTION 713.13, FLORIDA STATUTES, AND CAN RESULT IN YOUR PAYING TWICE FOR IMPROVEMENTS TO YOUR PROPERTY. A NOTICE OF COMMENCEMENT MUST BE RECORDED AND POSTED ON THE JOB SITE BEFORE THE FIRST INSPECTION. IF YOU INTEND TO OBTAIN FINANCING, CONSULT WITH YOUR LENDER OR AN ATTORNEY BEFORE COMMENCING WORK OR RECORDING YOUR NOTICE OF COMMENCEMENT.

(Signature of Owner or Owner's Authorized Officer/Director/Partner/Manager)

(Signatory's Title/Office)

The foregoing instrument was acknowledged before me this day of , (year) , by (name of person) as e.g. officer, trustee, attorney . . . (type of authority, in fact) for (name of party on behalf of whom instrument was executed) .

(Signature of Notary Public - State of Florida)

Personally Known OR Produced Identification
Type of Identification Produced

Verification pursuant to Section 92.525, Florida Statutes.

Under penalties of perjury, I declare that I have read the foregoing and that the facts stated in it are true to the best of my knowledge and belief.

(Signature of Natural Person Signing Above)

I. SUMMARY

This legislation is intended to create greater certainty in extending the protection intended by Section 713.10 of the Florida Construction Lien Law to landlords[1] of property on which tenants make improvements by addressing the holding in *Everglades Electric Supply, Inc. v. Paraiso Granite, LLC*, 28 So.3d 235 (Fla. 4th DCA 2010) that a landlord's blanket notice recorded under Section 713.10, Florida Statutes that all leases contained language prohibiting construction liens against the landlord's property was defective because the language in the notice was not identical in every lease. The bill does not have a fiscal impact on state funds.

II. CURRENT SITUATION

Section 713.10 of the Construction Lien Law is entitled "Extent of Liens" and provides that a lien "shall extend to, and only to, the right, title, and interest of the person who contracts for the improvements as such right, title, and interest exists at the commencement of the improvement..." If, however, "an improvement is made by a lessee in accordance with an agreement between such lessee and her or his lessor, the lien shall extend also to the interest of such lessor."

Prior to 1985, Section 713.10 provided that a landlord's interest would not be subject to liens for improvements on its property "when the lease is recorded in the clerk's office and the terms of the lease expressly prohibit such liability." *See* §713. 10, Fla. Stat. (1983). In 1985, the statute was amended to provide alternatives to recording the entire lease. Specifically, the landlord could record either the lease or a short form of the lease or, if all of the leases entered into by the landlord prohibited such liability, the landlord could record a blanket notice setting forth the specific language contained in the various leases prohibiting such liability together with a statement that all of the leases contain such language. *See* §713.10(2), Fla. Stat. (1985).

"In amending this statute, the Legislature obviously sought to provide a simplified and less costly manner in which lessors may provide notice to prospective contractors of their disclaimer of liability for improvements made by a lessee." *14th & Heinberg, L.L.C. v. Henricksen & Co., Inc.*, 877 So.2d 34, 38 (Fla. 1st DCA 2004).

Unfortunately, there are some practical problems for landlords in using the two alternatives provided by the 1985 amendments. These problems were highlighted in the case of *Everglades Electric Supply, Inc. v. Paraiso Granite, LLC*, 28 So.3d 235 (Fla. 4th DCA, 2010) which was decided on March 3, 2010.

[1] The statute uses the terms "lessor" and "lessee". Most practitioners use the terms "landlord" and "tenant" since they are less likely to be mistakenly used for the wrong party. The proposed statutory amendments continue to use the terms lessor and lessee but in this paper the terms landlord and tenant are used for greater clarity.

The first alternative – recording the lease or a short form of it -- poses title problems for landlords. The lease or short form[2] remains of record forever unless terminated while leases expire or are terminated with regularity and the termination is generally not a matter of record. The title search obtained in connection with a sale or mortgage by a landlord will reflect all recorded leases or memoranda of leases even as to leases that have expired or have been terminated. The buyer or mortgagee is then on notice of any interest in the property claimed by the tenant which would include not only the tenant's leasehold interest but also other possible rights such as to lease additional space or to purchase the property. In order to pass clear title, the landlord will need to eliminate of record all recorded leases or memoranda of them which are no longer in effect. This process can be time consuming and expensive. For this reason, it is not common, except in the case of major leases, for leases or notices of them to be recorded in Florida.

The second alternative – recording a blanket notice setting forth the specific language contained in the various leases prohibiting such liability together with a statement that all of the leases contain such language – poses a different practical problem for landlords. Often when a landlord purchases a property he inherits leases that do not contain lien prohibition language which, under the holding in the *Everglades Electric* case, would mean the landlord could not record an effective blanket notice. Additionally, the lien prohibition language contained in the leases may vary or be changed in some of the leases. Under the holding in the *Everglades Electric* case, even where the landlord has substantially complied with the statute, a small, technical variation in the language of a single lease can lead to the blanket notice being found ineffective thus defeating the lien prohibition effect generally intended by the statute even where lienors were not prejudiced by the technical non-compliance.

Another practical problem with the use of the blanket notice option under Section 713.10 is that many municipal building departments and City Attorneys have taken the erroneous position that the landlord must be listed as the owner in, and must sign, the Notice of Commencement for work being performed by a tenant. When this happens the safe harbor of Section 713.10 may be compromised as lienors can claim that they were misled by the Notice of Commencement into believing that the landlord was performing the work.

Section 713.01(23), Florida Statutes, defines "Owner" as "a person who is the owner of any legal or equitable interest in real property, which interest can be sold by legal process, and who enters into a contract for the improvement of the real property." A leasehold interest can be sold by legal process. Therefore, if a tenant enters into a contract for the improvement of its premises, it is the "Owner" as to that project and should be listed as such in, and should sign, the Notice of Commencement.

Further bolstering this interpretation is the language of Section 713.10 itself that a lien "shall extend to, and only to, the right, title, and interest of the person who contracts for the improvements as such right, title, and interest exists at the commencement of the improvement."

[2] The term "short form of lease" is not commonly used as the name of the document that is recorded in lieu of recording the entire lease. The term "memorandum of lease" is more prevalent.

Notwithstanding the seemingly universal interpretation of the current law by practitioners in this area, municipalities, who are charged with certain responsibilities regarding Notices of Commencement,[3] frequently take the position that the landlord be listed as the owner in any Notice of Commencement for tenant improvements even if the tenant is the party who enters into the contract for improvements.

III. EFFECT OF PROPOSED CHANGES

A. Section 713.10

1. The opening, currently unnumbered paragraph, is split into two new subsections numbered as (1) and (2) respectively to aid in the comprehension of the section as a whole especially because of the addition of new Subsection (3).

2. Former Subsection (1), now renumbered as Subsection (2)(a), is revised as follows:

(a) An option to record a memorandum of the lease is added to the existing options of recording the entire lease itself or a short form of it. In practice, the term "memorandum of lease" is much more common than the term "short form of lease". *See* Footnote 2. This is a non-substantive change.

(b) A requirement that the memorandum of lease or short form of lease contain the specific language from the lease exculpating the landlord's interest from liens for improvements made by the tenant is added. This is intuitively inferred from, but not expressly stated in, the current statutory language and was the subject of the court's opinion in *14th & Heinberg, L.L.C. v. Henricksen & Co., Inc.*, 877 So.2d 34, 38 (Fla. 1st DCA 2004). This is a clarification and not a substantive change.

(c) The reference to recording in the clerk's office is changed to recording in the official records of the county. The current statute refers to recording in the clerk's office in Section (1) and in the public records of the county in Section (2). The references should be consistent and the correct reference is the official records of the county. The statutory definition of "public records" in chapter 28, defines them by reference to Section 119.011 to be any governmental records wherever kept. Official records are defined as those which are kept by the clerk in the Official Records Books, which is where documents affecting title to real estate are recorded. *See* §28.001, Florida Statutes. This is also a non-substantive change.

(d) A requirement is added that in order for the landlord's interest not to be subject to liens for improvements made by the tenant that the lease or short form or memorandum be recorded before the recording of a notice of commencement for the improvements being made by the tenant. This ensures that lienors will have constructive, recorded notice of the lien prohibition before work is commenced.

[3] See Section 713.135, Florida Statutes

3. Former Subsection (2), now renumbered as Subsection (2)(b), is revised as follows:

(a) The blanket notice option can now be used even if all of the leases for the property do not contain lien prohibition language or if the prohibition language in the individual leases vary so long as the lease under which work is being performed by a tenant contains the prohibition language and a blanket notice for the entire property is recorded and advises that all leases for the property contain the prohibition language or lists the leases which do not contain it. This is a substantive change directly addressing the problems highlighted by the *Everglades Electric* case.

(b) As in renumbered Subsection (2)(a) of the statute, the reference to recording in the public records is changed to recording in the official records for the reasons described above.

(c) As in renumbered Subsection (2)(a) of the statute, a requirement is added that in order to be effective as to lienors relative to a specific tenant improvement project, the blanket notice must be recorded before the recording of a notice of commencement for that tenant improvement project so as to ensure that lienors will have constructive, recorded notice of the lien prohibition before work is commenced.

(d) Former Subsection (1)(c), now renumbered as Subsection (2)(b)(3), will now provide that the blanket notice will still be effective even if all of the leases do not contain lien prohibition language or if the lien prohibition language in the various leases differs so long as: (i) the lease under which the work is being performed contains the prohibition language; and (ii) any leases that do not contain prohibition language are identified in the blanket notice. Again, this is a substantive change directly addressing the problems highlighted by the *Everglades Electric* case.

(e) Language is added permitting the landlord to amend the blanket notice from time to time to revise the list of leases that do not contain exculpatory language. The amendment will be effective when recorded without relation back. The intent is to provide for a method of preserving the lien prohibition effect of a blanket notice should new leases that do not contain the prohibition language be entered into after the date the original notice was recorded.

(f) To address concerns of the title insurance industry created by the *Everglades Electric* case, a new paragraph is added to prevent the retroactive loss of the lien protection afforded by a blanket notice to purchasers or mortgagees of the landlord's interest should the notice be later found to be defective. If a landlord willfully misstates the facts in a notice, any lienor who is materially prejudiced by the misstatement can sue the landlord for damages. This remedy is similar to that provided in Section 713.16, Florida Statutes for failure to serve a copy of a contract or making a false statement in a sworn statement of account in response to the statutory demand.

(g) To address another concern of the title insurance industry, that listing in the blanket lien prohibition notice the leases that do not contain lien prohibition provisions will create title problems similar to those of recording memoranda of leases (see the discussion in Section II above), another new paragraph has been added. This paragraph provides that a reference in the recorded blanket notice to specific leases which do not contain prohibition language shall not be construed to constitute actual or constructive notice of such leases or the interests of the named tenants in the property, nor place any party on a duty of further inquiry as to the status of such leases or the interests of such tenants. A clarification is included to the effect that this provision shall not be construed to affect the rights of lienors against the interests of the landlords or tenants referred to in the recorded notice. It is the intent of this paragraph that title examiners may ignore references to leases in blanket notices.

3. A new Subsection (3) has been added to grant lienors the right to obtain from landlords a verified copy of the provision in the lease between the landlord and the tenant prohibiting liability for improvements made by the tenant. If the landlord does not serve a verified copy of the lease provision within 30 days after demand or serves a false or fraudulent copy, her or his interest shall be subject to a lien by the party demanding the verified copy provided such party is (i) otherwise entitled to a lien under the statute; and (ii) did not otherwise have actual or constructive notice that the interest of the landlord is not subject to liens for improvements made by the tenant. The written demand must include a specified form of warning in conspicuous type.

B. Section 713.13.

A parenthetical is added after the Owner blank in the form of Notice of Commencement provided in this section to clarify that the tenant should be listed as the Owner if the tenant is the party who has contracted for the improvements that are the subject of the Notice of Commencement. This is not a substantive change but is made to given guidance to local governments that get involved with the preparation of Notices of Commencement.

IV. FISCAL IMPACT ON STATE AND LOCAL GOVERNMENTS

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

V. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR

The passage of this proposal should result in economic benefits to commercial property owner members of the private sector in the form of greater certainty in protecting against costs of construction liens resulting from construction projects undertaken by tenants.

VI. CONSTITUTIONAL ISSUES

This proposal should not raise any constitutional issues.

V. OTHER INTERESTED PARTIES

The Construction Law Committee of the RPPTL Section worked closely with the Landlord/Tenant Committee on this proposal. The Title Insurance, Mortgages and Other Encumbrances, and Problems Study Committees of the RPPTL were also consulted. All of these committees support this proposal.

The contacts for the Construction Law Committee are:

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Chair of the Legislative Subcommittee
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LEGISLATIVE POSITION REQUEST FORM

GOVERNMENTAL AFFAIRS OFFICE

Date Form Received _____

GENERAL INFORMATION

Submitted By Neil B. Shoter, Chair, Landlord/Tenant Committee of the Real Property Probate & Trust Law Section

Address Shutts & Bowen LLP
525 Okeechobee Boulevard, Suite 1100
West Palm Beach, Florida 33401
Telephone: (561) 835-8500

Position Type Landlord/Tenant Committee, RPPTL Section, The Florida Bar
(Florida Bar, section, division, committee or both)

CONTACTS

Board & Legislation Committee Appearance **[Arthur J. Menor]**, [Shutts & Bowen LLP], [525 Okeechobee Boulevard, Suite 1100
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], Telephone (561) 650-8510.

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(List name, address and phone number)

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

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

PROPOSED ADVOCACY

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

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

Indicate Position **X** **Support** Oppose Technical Assistance Other _____

Proposed Wording of Position for Official Publication:

"Support amendment of Sections 713.10 and 713.13 of the Florida Construction Lien Law to create greater certainty as to the protections afforded to the interests of landlords against construction liens arising from work performed by tenants."

Reasons For Proposed Advocacy:

See attached White Paper.

PRIOR POSITIONS TAKEN ON THIS ISSUE

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

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

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

REFERRALS TO OTHER SECTIONS, COMMITTEES OR LEGAL ORGANIZATIONS

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

Referrals

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

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

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

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

A bill to be entitled An act relating to homeowners associations; amending s. 720.309, F.S., to authorize homeowners associations to enter into bulk rate communications and internet services contracts; providing an effective date.

Section 1. The existing text of section 720.309 is renumbered to be subsection (1) and subsection (2) of section 720.309 is created to read as follows:

(1) Any grant or reservation made by any document, and any contract with a term in excess of 10 years made by an association before control of the association is turned over to the members other than the developer, which provide for operation, maintenance, or management of the association or common areas must be fair and reasonable.

(2) If so provided in the declaration, the cost of a bulk contract for bulk communication services and bulk internet services obtained pursuant to a bulk contract shall be deemed an operating expense. The term communication service includes voice, data, audio, video or any other information or signals including cable services. If the declaration does not provide for the cost of a bulk contract for bulk communication services and bulk internet services obtained under a bulk contract as an operating expense, the board may enter into such a contract, and the cost of the service will be an operating expense but allocated on a per-unit basis rather than a percentage basis if the declaration provides for other than an equal sharing of operating expenses, and any contract entered into before July 1, 2011, in which the cost of the service is not equally divided among all unit owners, may be changed by vote of a majority of the voting

interests present at a regular or special meeting of the association, to allocate the cost equally among all units.

(a) Any contract made by the board after the effective date hereof for a bulk contract for bulk communication services and bulk internet services with the fees being an operating expense may be canceled by a majority of the voting interests present at the next regular or special meeting of the association. Any member may make a motion to cancel said contract, but if no motion is made or if such motion fails to obtain the required majority at the next regular or special meeting, whichever is sooner, following the making of the contract, then such contract shall be deemed ratified for the term therein expressed.

(b) Any such contract shall provide, and shall be deemed to provide if not expressly set forth, that any hearing-impaired or legally blind unit owner who does not occupy the unit with a non-hearing-impaired or sighted person, or any unit owner receiving supplemental security income under Title XVI of the Social Security Act or food stamps as administered by the Department of Children and Family Services pursuant to s. 414.31, may discontinue the service without incurring disconnect fees, penalties, or subsequent service charges, and, as to such units, the owners shall not be required to pay any operating expenses charge related to such service. If less than all members of an association share the expenses of communication services, the expense shall be shared equally by all participating unit owners. The association may use the provisions of s. 720.3085 to enforce payment of the shares of such costs by the unit owners receiving communication services.

Section 2. This Act shall take effect July 1, 2011.

WHITE PAPER

HOMEOWNERS ASSOCIATION BULK COMMUNICATIONS AND INTERNET SERVICES CONTRACTS - PROPOSED REVISIONS TO SECTION 720.309, FLORIDA STATUTES

I. SUMMARY

The purpose of the proposed changes to Section 720.309 is to clarify that homeowners associations have the authority to contract for communications and internet services on a bulk rate basis, and to provide clear, defined procedures and provisions for entering into such bulk contracts. These changes will provide similar provisions to those contained in Section 718.115, Florida Statutes, pertaining to condominium associations, and will make the laws consistent.

II. SITUATION

At present, Florida homeowners associations do not have a statutorily-authorized basis for entering into bulk rate communications and internet services contracts. Although there have been court decisions that give a homeowners association's board of directors broad authority to exercise its business judgment to enter into bulk cable television service agreements, this authority has not yet been included in Chapter 720, as it has been in Chapter 718 (the Florida Condominium Act) for many years. As a result, homeowners associations and their members have not been able to fully avail themselves of the substantial savings that result from such bulk contracts. As previously stated, Florida condominium associations have had the authority to enter into bulk communications contracts, and there is no reason for homeowners associations and their members not to be afforded the same authority.

III. EFFECT OF PROPOSED CHANGE

The proposed amendments contract will grant authority for homeowners associations to enter into bulk rate contracts for communications and internet services. The proposed amendments also provide added protection to homeowners in that the proposal authorizes homeowners to vote to cancel any bulk rate communications or internet services contract if they disagree with the board of directors' decision in the matter. Currently, this owner right is not provided by the court decisions governing the matter.

IV. ANALYSIS

The proposed amendments would clarify these important issues and be beneficial both for consumers and business interests.

Section 720.309 would be amended to create a new subsection (2). The statute would provide that if the declaration of covenants and restrictions so provides, the cost

of a bulk contract for communications (defined to include voice, data, audio, video or any other information or signals including cable services) and internet services will be deemed an operating expense of the homeowners association. Further, if the authorizing provisions are not contained in the declaration of covenants and restrictions, the homeowners association's board of directors is authorized to enter into such a contract, and the cost of the service will be an operating expense but allocated on a per-unit basis rather than a percentage basis if the declaration provides for other than an equal sharing of operating expenses. Further, any contract entered into before July 1, 2011, in which the cost of the service is not equally divided among all homeowners, may be changed by the vote of a majority of the voting interests present at a regular or special meeting of the association, to allocate the cost equally among all homes. Provisions are created to permit the homeowners to vote to terminate a bulk rate contract entered into by the board of directors. Finally, certain defined homeowners are entitled to elect not to receive bulk services and will not be required to pay for the costs allocated to their property.

V. FISCAL IMPACT ON STATE AND LOCAL GOVERNMENTS

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

VI. DIRECT IMPACT ON PRIVATE SECTOR

The proposal will allow homeowners associations and their members to avail themselves of bulk rate communications and internet services contracts, thereby enabling a cost savings and having a positive impact on the private sector.

VII. CONSTITUTIONAL ISSUES

There are no constitutional issues raised by this proposal.

VIII. OTHER INTERESTED PARTIES

None are known at this time.

LEGISLATIVE POSITION REQUEST FORM

GOVERNMENTAL AFFAIRS OFFICE

Date Form Received _____

GENERAL INFORMATION

Submitted By Robert S. Freedman, Co-Chair, Condominium and Planned Development Committee of the Real Property Probate & Trust Law Section

Address c/o Carlton Fields, P.A., 4221 W. Boy Scout Blvd., Suite 1000, Tampa, FL 33607
Telephone: (813) 223-7000

Position Type Condominium and Planned Development Committee, RPPTL Section, The Florida Bar

CONTACTS

Board & Legislation Committee Appearance

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Michael J. Gelfand, Gelfand & Arpe, P.A. 1555 Palm Beach Lakes Blvd., Suite 1220, West Palm Beach, FL 33401-2323, Telephone (561) 655-6224
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Martha J. Edenfield, Pennington, Moore, Wilkinson, Bell & Dunbar, P.O. Box 10095, Tallahassee FL 32302-2095, Telephone (850) 222-3533

(List name, address and phone number)

Appearances Before Legislators (SAME)
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Meetings with Legislators/staff (SAME)
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PROPOSED ADVOCACY

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

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

Indicate Position **X** **Support** Oppose Technical Assistance Other _____

Proposed Wording of Position for Official Publication:

"Support clarification to the Homeowners' Association Act, to authorize and provide procedures for homeowners associations to enter into communications and internet services contracts on a bulk rate

basis; to provide the ability for homeowners to cancel the bulk rate contract upon a proper vote; to permit certain defined homeowners to opt out of communications or internet services contracts and not have to pay for the portion of the contract price allocated to such homeowner's property; to provide an effective date."

Reasons For Proposed Advocacy:

Florida homeowners associations do not have a statutorily-authorized basis for entering into bulk rate communications and internet services contracts. Court decisions give a homeowners association's board of directors broad authority to exercise its business judgment, but the lack of statutory authority has resulted in homeowners associations and their members not fully availing themselves of the substantial savings that result from such bulk contracts. Florida condominium associations have had the statutory authority to enter into bulk communications contracts for many years, and there is no reason for homeowners associations and their members not to be afforded the same authority.

PRIOR POSITIONS TAKEN ON THIS ISSUE

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

Most Recent Position None
(Indicate Bar or Name Section) (Support or Oppose)
(Date)

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

REFERRALS TO OTHER SECTIONS, COMMITTEES OR LEGAL ORGANIZATIONS

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Referrals

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

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

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A bill to be entitled

An act relating to condominiums; amending ss. 718.104 and 718.1045, F.S., to permit amendments to a declaration of condominium to permit timesharing with less than one hundred percent, under limited and specified circumstances; amending s. 718.110, F.S., to provide legislative intent and to permit amendments to condominiums in existence in this state on or after July 1, 2011, which involve specified hotel operations to permit timesharing with less than one hundred percent approval; amending s. 718.503, F.S., to modify the disclosure concerning the potential for timesharing to be employed in a condominium; providing an effective date.

Section 1. Paragraph (o) of subsection (4) of Section 718.104 is amended to read as follows:

(o) If timeshare estates will or may be created with respect to any unit in the condominium, a statement in conspicuous type shall be included in the declaration or any subsequent amendment to the declaration, as permitted by s. 718.110(8)(b), declaring that timeshare estates will or may be created with respect to units in the condominium. In addition, the degree, quantity, nature, and extent of the timeshare estates that will or may be created shall be defined and described in detail in the declaration or any subsequent amendment to the declaration, as permitted by s. 718.110(8)(b), with a specific statement as to the minimum duration of the recurring periods of rights of use, possession, or occupancy that may be created with respect to any unit.

Section 2. Section 718.1045 is amended to read as follows:

No timeshare estates shall be created with respect to any condominium unit except pursuant to provisions in the declaration or any subsequent amendment to the declaration as permitted by s. 718.110(8)(b), expressly permitting the creation of such estates.

Section 3. The existing language of subsection (8) of section 718.110 is renumbered to be subparagraph (a) and subparagraph (b) of section 718.110(8) is created, to read as follows:

(a) Unless otherwise provided in the declaration as originally recorded, or as permitted by subparagraph (b), no amendment to the declaration may permit timeshare estates to be created in any unit of the condominium, unless the record owner of each unit of the condominium and the record owners of liens on each unit of the condominium join in the execution of the amendment.

(b) The Legislature finds that the procurement of consent from all record owners of units and liens on a condominium unit in order to amend the declaration to permit timeshare in certain classes of condominiums is an unreasonable and substantial logistical and financial burden on developers, and consequently creates adverse repercussions for owners, lenders and owners' associations and that there is a compelling state interest in enabling amendments to the condominium documents of certain classes of condominiums to permit timeshare estates through reasonable, yet attainable means. This section applies to any condominium that is in existence in this state on or after July 1, 2011 which: (a) is located within a zoning district or subject to a local development order that permits the use of the property as a hotel or is located within a zoning district for transient, non-residential or other use that permits use of the

property as a hotel; (b) contains a registration area, such as a front desk, for occupants, guests and unit owners to check-in prior to being permitted occupancy of a unit; (c) contains units to be occupied by guests which are regulated and subject to jurisdiction of the divisions of hotels and restaurants of the department of business and professional regulation pursuant to ch. 509 F.S.; and (d) does not contain more than 20 percent of its units that are occupied by the owners thereof for more than 180 days in any calendar year. Accordingly, and notwithstanding any provision to the contrary contained in s. 718.403(2) or this section:

(1) If the declaration does not permit timeshare estates, then an amendment to the declaration may permit timeshare estates to be created in any unit of the condominium, provided that 75 percent of the record owners of units in the condominium and the holders of 75 percent of the original principal amount of outstanding recorded mortgage liens of units in the condominium join in the execution of the amendment, and not more than 10 percent of the total voting interests of the condominium have rejected the plan to permit timeshare estates by negative vote or by providing written objections thereto. This subsection does not apply to condominiums in which the declaration provides for a lower voting percentage necessary to permit the creation of timeshare estates.

(2) The notice for the meeting at which the vote to permit timeshare estates will occur shall be given to all unit owners and holders of mortgage liens on units in the condominium, in the same manner as for notice of an annual meeting, at least 14 days prior to the meeting at which the amendment to permit timeshare estates is to voted upon. A unit owner or mortgage lien holder may document assent to the amendment to

permit timeshare estates by executing a joinder to the proposed amendment in the manner of a deed. An amendment permitting timeshare estates must contain the joinders of those unit owners and mortgage lien holders who have consented to the amendment in accordance with this subsection.

Section 4. Section (8) of Paragraph (a) of Subsection (1) of Section 718.503 is amended to read as follows:

(8) If the contract is for the sale or transfer of a unit in a condominium in which the developer has reserved the right in the original declaration to create timeshare estates without a vote of the owners as set forth in s. 718.110(8)(b) ~~have been or may be created~~, contain within the text in conspicuous type: UNITS IN THIS CONDOMINIUM ARE OR MAY BE SUBJECT TO TIMESHARE ESTATES. The contract for the sale of a fee interest in a timeshare estate shall also contain, in conspicuous type, the following: FOR THE PURPOSE OF AD VALOREM TAXES OR SPECIAL ASSESSMENTS LEVIED BY TAXING AUTHORITIES AGAINST A FEE INTEREST IN A TIMESHARE ESTATE, THE MANAGING ENTITY IS GENERALLY CONSIDERED THE TAXPAYER UNDER FLORIDA LAW. YOU HAVE THE RIGHT TO CHALLENGE AN ASSESSMENT BY A TAXING AUTHORITY RELATING TO YOUR TIMESHARE ESTATE PURSUANT TO THE PROVISIONS OF CHAPTER 194, FLORIDA STATUTES.

Section 5. This Act shall take effect July 1, 2011.

WHITE PAPER

AMENDMENT TO ALLOW TIMESHARE – PROPOSED REVISIONS TO SECTIONS 718.104(4)(o), 718.1045, 718.110(8) AND 718.503(1)(a)(8), FLORIDA STATUTES

I. SUMMARY

The purpose of the proposed changes to Sections 718.104(4)(o), 718.1045, 718.110(8) and 718.503(1)(a)(8) is to create a reasonable and attainable means by which unit owners and records owners of liens on condominium units may amend the declaration of condominium for certain types of condominiums to allow for the creation of timeshare estates. The proposed changes reflect the ability of the unit owners and record owners of liens ability to create timeshare estates within a specific form of condominium without the currently-required affirmative vote of 100% of all interested parties, a virtually impossible threshold.

II. SITUATION

One of the effects of the downturn in the housing market is the large number of troubled condominium developments which hold an excess of unsold units. A troubled condominium is not only problematic for a developer, but also for owners, lenders, homeowners' associations and counties. In many cases, timeshare and/or fractional ownership plans offer the only viable solution for the continued operation of the condominium and the viability of the homeowners' association. Current law requires a 100% affirmative vote of all unit owners and record owners of liens on each unit in order to amend the condominium declaration to allow for timeshare estates, a virtually impossible vote threshold which effectively allows one holdout owner or lien holder to prevent the creation of timeshare estates. This impediment to a developer or successor developer's flexibility to create a timeshare plan has left many troubled developers and associations with no immediate solutions. The proposed amendments to Sections 718.104(4)(o), 718.1045, 718.110(8) and 718.503(1)(a)(8) create a reasonable and attainable vote threshold whereby the best interests of all those affected by a troubled hotel condominium can be served.

III. EFFECT OF PROPOSED CHANGE

The proposed amendments would make it easier for certain types of condominiums to allow for the creation of timeshare estates within the condominium. By limiting the applicability of the proposed changes to "Condominium-Hotels", the proposed amendments limit the possible negative repercussions a timeshare plan could have on a condominium. "Condominium-Hotels" are by nature transient, and therefore less likely to be impacted by the creation of a timeshare plan within the condominium.

IV. ANALYSIS

The proposed amendments would make it easier to amend the declaration of condominium for Condominium-Hotels to allow for the creation of timeshare estates.

First, Section 718.104(4)(o) would be amended to reflect that subsequent amendments may be made to the declaration to allow for the creation of timeshare estates within certain types of condominiums.

Second, Section 718.1045 would be amended to reflect that subsequent amendments may be made to the declaration to allow for the creation of timeshare estates within certain types of condominiums.

Third, Section 718.110(8)(b) would be created to include language which specifically limits the proposed changes to Condominium-Hotels - a specific class of condominiums more particularly amenable to the creation of timeshare estates. This subsection would also include language which would provide the mechanism by which owners and record owners of liens within the condominium may amend the declaration to allow for the creation of timeshare estates within the condominium.

Fourth, Section 718.503 would be would be amended to reflect that subsequent amendments may be made to the declaration to allow for the creation of timeshare estates within certain types of condominiums.

V. FISCAL IMPACT ON STATE AND LOCAL GOVERNMENTS

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

VI. DIRECT IMPACT ON PRIVATE SECTOR

The proposal will provide troubled hotel condominiums (including the developer, owners, lenders, homeowners' associations and counties) a viable solution for the continued operation of the condominium by permitting the creation of timeshare estates within the condominium.

VII. CONSTITUTIONAL ISSUES

There are no constitutional issues raised by this proposal.

VIII. OTHER INTERESTED PARTIES

None are known at this time.

LEGISLATIVE POSITION REQUEST FORM

GOVERNMENTAL AFFAIRS OFFICE

Date Form Received _____

GENERAL INFORMATION

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(List name, address and phone number)

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

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

PROPOSED ADVOCACY

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

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

Indicate Position **X** **Support** Oppose Technical Assistance Other _____

Proposed Wording of Position for Official Publication:

"Support amendments to the Florida Condominium Act; to authorize amendments to a declaration of condominium pertaining to a defined hotel condominium to permit timesharing even where the original declaration of condominium did not permit timesharing; to provide threshold levels of approval to permit timesharing in such circumstances; to modify required disclosures pertaining to timesharing; to provide an effective date."

Reasons For Proposed Advocacy:

Timeshare and/or fractional ownership plans offer a viable solution for the continued operation of distressed condominiums which involve a hotel operation. Current law requires a 100% affirmative vote of all unit owners and record owners of liens on each unit in order to amend the condominium declaration to allow for timeshare estates, which requirement is impossible to achieve. The proposed amendments create a reasonable and attainable vote threshold whereby the best interests of all those affected by a troubled hotel condominium can be served, as the character of timesharing/fractional uses is virtually identical to those of a hotel operation.

PRIOR POSITIONS TAKEN ON THIS ISSUE

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

Most Recent Position None

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

(Date)

Others
(May attach list if more than one)

None

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

(Date)

REFERRALS TO OTHER SECTIONS, COMMITTEES OR LEGAL ORGANIZATIONS

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

Referrals

American Resort Development Association – Florida Chapter Support

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

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

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

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

A bill to be entitled

An act related to condominiums; amending s. 718.703 to clarify the definitions of bulk assignee and bulk buyer; amending s. 718.704 to clarify the liabilities of a bulk assignee and bulk buyer; amending s. 718.705 to clarify provisions pertaining to appointment of directors and transition of control; amending s. 718.706 to clarify bulk assignee responsibilities for financial information and disclosures to be provided to purchasers and to create an exemption from disclosures if all units are being conveyed in bulk to a single purchaser; amending s. 718.707 to clarify the application of the part to acquisitions occurring on or after July 1, 2010; providing an effective date.

Section 1. Subsections (1) and (2) of section 718.703, F.S., are amended to read as follows:

(1) "Bulk assignee" means a person who is not a bulk buyer and who:

(a) Acquires more than seven condominium parcels in any one condominium as set forth in s.718.707; and

(b) Receives an assignment of ~~some or all of the~~ any rights of the developer as set forth in the declaration of condominium or this chapter, other than, or in addition to, those rights of a developer described in subsection (2) below, by:

1. a written instrument recorded as part of or as an exhibit to the deed ~~or as,~~

2. a separate instrument in the public records of the county in which the condominium is located; or

3. pursuant to the final judgment or certificate of title issued in favor of any purchaser at a foreclosure sale.

A mortgagee or its assignee shall not be deemed a bulk assignee or a developer by reason of its acquisition of condominium units and receipt of an assignment of some or all of a developer's rights unless such mortgagee or its assignee exercises any rights of a developer other than those described in s. 718.703(2).

(2) "Bulk buyer" means a person who acquires more than seven condominium parcels in any one condominium as set forth in s. 718.707, but who does not receive an assignment of any developer rights ~~other than~~ or receives only some or all of the following rights:

(a) the right to conduct sales, leasing, and marketing activities within the condominium;

(b) the right to be exempt from the payment of working capital contributions to the condominium association arising out of, or in connection with, the bulk buyer's acquisition of ~~a bulk number of~~ the units; and

(c) the right to be exempt from any rights of first refusal which may be held by the condominium association and would otherwise be applicable to subsequent transfers of title from the bulk buyer to a third party purchaser concerning one or more units.

Section 2. Section 718.704, F.S., are amended to read as follows:

(1) A bulk assignee ~~assumes~~ is deemed to have assumed and is liable for all duties and responsibilities of the developer under the declaration and this chapter for the period following its acquisition of title to its units, except:

(a) Warranties of the developer under s. 718.203(1) or s. 718.618, except:

1. as expressly provided by the bulk assignee in any prospectus or offering circular, or the contract for purchase and sale executed with a purchaser; or

2. for any design, construction, development, or repair work performed by or on behalf of such bulk assignee;

(b) The obligation to:

1. Fund converter reserves under s. 718.618 for a unit that was not acquired by the bulk assignee; or

2. Provide ~~converter~~ implied warranties on any portion of the condominium property except:

a. as expressly provided by the bulk assignee in any prospectus or offering circular, or the contract for purchase and sale executed with a purchaser ~~and pertaining to~~, or

b. for any design, construction, development, or repair work performed by or on behalf of the bulk assignee;

(c) The requirement to provide the association with a cumulative audit of the association's finances from the date of formation of the condominium association as required by s. 718.301(4)(c). However, the bulk assignee must provide an audit for the period during which the bulk assignee elects or appoints a majority of the members of the board of administration;

(d) Any liability arising out of or in connection with actions taken by the board of administration or the developer-appointed directors before the bulk assignee elects or appoints a majority of the members of the board of administration; and

(e) Any liability for or arising out of the developer's failure to fund previous assessments or to resolve budgetary deficits in relation to a developer's right to guarantee assessments, except as otherwise provided in subsection (2).

The bulk assignee is ~~also~~ only responsible for delivering documents and materials in accordance with s. 718.705(3). A bulk assignee may, at its option, expressly assume some or all of the obligations of the developer described in paragraphs (a)-(e).

(2) A bulk assignee receiving the assignment of the ~~rights~~ right of the developer to guarantee the level of assessments and fund budgetary deficits pursuant to s. 718.116 assumes and is liable for all obligations of the developer with respect to such guarantee, applicable to the period following its acquisition of title to its units, including any applicable funding of reserves to the extent required by law, for as long as the guarantee remains in effect. A bulk assignee not receiving such assignment, or a bulk buyer, does not assume and is not liable for the obligations of the developer with respect to such guarantee, but is responsible for payment of assessments following its acquisition of its units in the same manner as all other owners of condominium parcels.

(3) A bulk buyer is liable for the duties and responsibilities of ~~the~~ a developer under the declaration and this chapter only to the extent ~~provided in this part, together with~~ if any, ~~other~~ that such duties or responsibilities of ~~the~~ a developer are expressly assumed in writing by the bulk buyer.

(4) An acquirer of condominium parcels is not a bulk assignee or a bulk buyer if the transfer to such acquirer was made:

(a) before the effective date of this part;

(b) ~~was made~~ with the intent to hinder, delay, or defraud any purchaser, unit owner, or the association~~,~~; or

(c) ~~if the acquirer is~~ by a person who would be considered an insider under s. 726.102(7).

(5) An assignment of developer rights to a bulk assignee may be made by ~~the~~ a developer, a previous bulk assignee, a ~~first~~ mortgagee or its assignee having acquired title to the units, or a court acting on behalf of the developer or the previous bulk assignee, provided that such developer rights are held by the predecessor in title to such bulk assignee. At any particular time, there may be no more than one bulk assignee within a condominium~~, but~~; however, there may be more than one bulk buyer. If more than one acquirer of condominium parcels in the same condominium receives an assignment of developer rights ~~from the same person,~~ in addition to those rights described in s. 718.703(2), then the bulk assignee is the acquirer whose instrument of assignment is recorded first in the public records of the county in which the condominium is located, and any subsequent purported bulk assignee may still qualify as a bulk buyer.

Section 3. Subsections (1) and (3) of section 718.705, F.S., are amended to read as follows:

(1) ~~For~~ If, at the time the bulk assignee acquires title to its units and receives an assignment of developer's rights, the association has not yet been transitioned to unit owners other than the developer pursuant to s. 718.301(1), then for purposes of determining the timing for transfer of control of the board of administration of the

association ~~to unit owners other than the developer under s. 718.301(1)(a) and (b), if a bulk assignee is entitled to elect a majority of the members of the board~~, a condominium parcel acquired by the bulk assignee ~~is~~ shall not be deemed to be conveyed to a purchaser, or owned by an owner other than the developer, until the condominium parcel is conveyed to an owner who is not a bulk assignee.

(3) ~~If~~ When a bulk assignee relinquishes control of the board of administration as set forth in s. 718.301, the bulk assignee must deliver all of those items required by s. 718.301(4). However, the bulk assignee is not required to deliver items and documents not in the possession of the bulk assignee ~~during the period during which the bulk assignee was entitled to elect a majority of the members of the board of administration~~ if some were or should have been in existence or created with respect to the time period before the bulk assignee's acquisition of the units. In conjunction with its acquisition of ~~condominium parcels~~ units, a bulk assignee shall undertake a good faith effort to obtain the documents and materials that must be provided to the association pursuant to s. 718.301(4). ~~If~~ To the extent the bulk assignee is not able to obtain any or all of such documents and materials, the bulk assignee must certify in writing to the association the names or descriptions of the documents and materials that were not obtainable by the bulk assignee. Delivery of the certificate relieves the bulk assignee of responsibility for delivering the documents and materials referenced in the certificate as otherwise required under ss. 718.112 and 718.301 and this part. The responsibility of the bulk assignee for the audit required by s. 718.301(4) commences as of the date on which the bulk assignee elected or appointed a majority of the members of the board of administration.

Section 3. Subsections (1), (2) and (4) of section 718.706, F.S., are amended, and subsection (5) of section 718.706, F.S., is created to read as follows:

(1) Before offering ~~any~~ more than 7 units in any one condominium for sale or for lease for a term exceeding 5 years, a bulk assignee or a bulk buyer must file the following documents with the division and provide such documents to a prospective purchaser or tenant:

(a) An updated prospectus or offering circular, or a supplement to the prospectus or offering circular, filed by the original developer prepared in accordance with s. 718.504, which must include the form of contract for sale and for lease in compliance with s. 718.503(2);

(b) ~~The~~ An updated Frequently Asked Questions and Answers sheet;

(c) An executed escrow agreement if required under s. 718.202; and

(d) The financial information required by s. 718.111(13). However, if a financial information report does not exist for the ~~fiscal year~~ time period before acquisition of title by the bulk assignee or bulk buyer, ~~or~~ and accounting records ~~cannot be obtained in good faith by the bulk assignee or the bulk buyer~~, which would permit preparation of the required financial information report for such period, cannot be obtained despite good faith efforts by the bulk assignee or the bulk buyer, the bulk assignee or bulk buyer is excused from the requirement of this paragraph. However, the bulk assignee or bulk buyer must include in the purchase contract the following statement in conspicuous type:

ALL OR A PORTION OF THE FINANCIAL INFORMATION REPORT REQUIRED UNDER S. 718.111(13) FOR THE ~~IMMEDIATELY PRECEDING FISCAL YEAR OF~~

~~THE~~ ASSOCIATION FOR THE TIME PERIOD PRIOR TO THE SELLER'S ACQUISITION OF THE UNIT IS NOT AVAILABLE OR CANNOT BE ~~CREATED~~ OBTAINED DESPITE GOOD FAITH EFFORTS BY THE SELLER ~~DUE TO THE INSUFFICIENT ACCOUNTING RECORDS OF THE ASSOCIATION~~.

(2) Before offering ~~any~~ more than 7 units in any one condominium for sale or for lease for a term exceeding 5 years, a bulk assignee or bulk buyer must file with the division and provide to ~~a~~ any prospective purchaser, or tenant under a lease for a term exceeding 5 years, a disclosure statement that includes, but is not limited to:

(a) A description of any rights of the developer which have been assigned to the bulk assignee or bulk buyer;

(b) The following statement in conspicuous type:

THE SELLER IS NOT OBLIGATED FOR ANY WARRANTIES OF THE DEVELOPER UNDER S. 718.203(1) OR S. 718.618, AS APPLICABLE, EXCEPT FOR ANY DESIGN, CONSTRUCTION, DEVELOPMENT, OR REPAIR WORK PERFORMED BY OR ON BEHALF OF SELLER; and

(c) If the condominium is a conversion subject to part VI, the following statement in conspicuous type:

THE SELLER HAS NO OBLIGATION TO FUND CONVERTER RESERVES OR TO PROVIDE CONVERTER WARRANTIES UNDER S. 718.618 ON ANY PORTION OF THE CONDOMINIUM PROPERTY EXCEPT AS MAY BE EXPRESSLY REQUIRED OF THE SELLER IN THE CONTRACT FOR PURCHASE AND SALE EXECUTED BY THE SELLER AND THE PREVIOUS DEVELOPER AND PERTAINING TO ANY DESIGN,

CONSTRUCTION, DEVELOPMENT, OR REPAIR WORK PERFORMED BY OR ON BEHALF OF THE SELLER.

(4) A bulk assignee or a bulk buyer must comply with all the requirements of s. 718.302 regarding any contracts entered into by the association during the period the bulk assignee or bulk buyer maintains control of the board of administration. Unit owners shall be afforded all of the rights and protections contained in s. 718.302 regarding agreements entered into by the association ~~before unit owners other than~~ under control of the developer, bulk assignee, or bulk buyer ~~elected a majority of the board of administration~~.

(5) Notwithstanding anything to the contrary in this part, neither a bulk buyer nor a bulk assignee need comply with the filing or disclosure obligations of subsections (1) or (2) of this section, to the extent otherwise applicable, where all of the units owned by the bulk assignee or bulk buyer are offered and conveyed to a single purchaser in a single transaction.

Section 4. Section 718.707, F.S., is amended to read as follows:

718.707 Time limitation for classification as bulk assignee or bulk buyer. A person acquiring condominium parcels may not be classified as a bulk assignee or bulk buyer under this part unless the condominium parcels were acquired on or after July 1, 2010 and before July 1, 2012. The date of such acquisition shall be determined by the date of recording of a deed or other instrument of conveyance for such parcels in the public records of the county in which the condominium is located, or by the date of issuance of a certificate of title in a foreclosure proceeding with respect to such condominium parcels.

Section 5. This Act shall take effect upon becoming a law.

WHITE PAPER

PROPOSED REVISIONS TO PART VII OF CHAPTER 718

I. SUMMARY

The purpose of the proposed changes to Part VII of Chapter 718, the Distressed Condominium Relief Act ("Relief Act"), is to clarify existing ambiguities and inconsistencies in the Relief Act. The proposed changes would clarify the distinction between the two classes of bulk purchasers created by the Relief Act, more fully protect foreclosing lenders, and more clearly address association-related obligations.

II. SITUATION

Effective July 1, 2010, Part VII, the Relief Act, was added to the Florida Condominium Act. The expressed purpose of the Relief Act was to encourage absorption of the large inventory of unsold condominium units resulting from the collapse of the real estate market.

The Relief Act is, in essence, a shield law to protect bulk purchasers or other acquirers of large numbers of condominium units against potential liability for warranty claims and other financial exposure which might be incurred by being denominated a "developer" under the Condominium Act.

The Relief Act creates two protected classes of buyers: a "bulk assignee," one acquiring an assignment of "some or all" of the developer rights in a condominium project and a "bulk buyer," one who may acquire only certain specified rights. In either case, the purchaser must obtain more than 7 units. Such acquirers may be bulk purchasers of unsold units or lenders acquiring units through foreclosure or by deed in lieu of foreclosure. As part of the legislation establishing the Relief Act, both bulk assignees and bulk buyers were specifically exempted from the definition of "developer' under the Condominium Act.

A bulk assignee will incur certain limited developer obligations but the bulk buyer is treated as any other purchaser of condominium units in almost all respects. In both cases, these acquirers are generally insulated from warranty claims and other liability of the original developer, including obligations owing to the condominium association.

Neither the bulk assignee, nor bulk buyer is exempted from the requirements to file offering materials with the state agency responsible for administering the sale of residential condominiums, the Division of Florida Condominiums, Timeshares and Mobile Homes, in the event they market their units for sale. The offering materials must contain certain specified disclosures indicating the lack of warranties and financial information otherwise available in the sale by the original developer.

The Relief Act contains a sunset provision requiring a bulk assignee or bulk buyer to record its deed for acquired condominium units on or before July 1, 2012 in order to be entitled to its benefits.

III. EFFECT OF PROPOSED CHANGES

The proposed amendments would better distinguish and define the attributes, rights and obligations of a bulk assignee and a bulk buyer and clarify that the Distressed Act is prospective only, applying to acquisition of condominium units occurring only after its effective date. The effect will render more certainty to the application and operation of the Relief Act.

IV. ANALYSIS

The proposed amendments would clarify important issues and be beneficial both for condominium unit owners and business interests by more effectively promoting absorption of the large inventory of unsold condominium units.

SPECIFIC COMMENTS:

1. Changes to the definitions of bulk assignee and bulk buyer in 718.703 clarify that the units being acquired have to be included within the same condominium. In addition, the ambiguity between a bulk assignee being an acquirer of "some" developer rights and the bulk buyer having the right to acquire "some" developer rights has been resolved. The redrafted language clarifies that a bulk buyer need not acquire any developer rights, aside from certain statutory rights which are automatically conferred with such status. Furthermore a foreclosing lender's status as a bulk assignee or bulk buyer has been added, and ensures that lender's rights obtained in collateral assignment of developer rights are available to lenders to the extent that such benefits are expressed in a final judgment of foreclosure or within the certificate of title issued thereafter.

2. In 718.704, clarification has been added indicating that a bulk assignee assumes obligations of a developer only on a prospective basis and needs to specify these obligations in any offering materials. A bulk buyer need not assume any obligations of a developer but if it chooses to do so it must do so in writing.

3. 718.704(4) is intended to clarify that the Relief Act does not apply to transactions before its effective date or to transfers after its effective date to certain related parties.

4. Changes in 718.705 clarifies the triggering event for when turnover occurs when a bulk assignee acquires its units in associations not turned over at the time of the bulk acquisition.

5. In 718.706 changes have been made to clarify the offering materials apply to sales of more than 7 units in a single condominium and that the sales by a bulk assignee or bulk purchaser are not sales by the initial developer. In addition, disclosures are clarified to account for information that may not be available to the bulk assignee or bulk purchaser. In 718.706(5) language inconsistent with certain rights granted to bulk buyers has been removed and replaced with a provision to exempt a subsequent bulk sale from the disclosure requirements.

V. FISCAL IMPACT ON STATE AND LOCAL GOVERNMENTS

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

VI. DIRECT IMPACT ON PRIVATE SECTOR

The proposal will provide better clarity for bulk assignees and bulk buyers in connection with the acquisition of distressed condominium units, thereby enabling the distressed projects and property values to stabilize and eventually increase.

VII. CONSTITUTIONAL ISSUES

There are no constitutional issues raised by this proposal.

VIII. OTHER INTERESTED PARTIES

None are known at this time.

LEGISLATIVE POSITION REQUEST FORM

GOVERNMENTAL AFFAIRS OFFICE

Date Form Received _____

GENERAL INFORMATION

Submitted By Robert S. Freedman, Co-Chair, Condominium and Planned Development Committee of the Real Property Probate & Trust Law Section

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Martha J. Edenfield, Pennington, Moore, Wilkinson, Bell & Dunbar, P.O. Box 10095, Tallahassee FL 32302-2095, Telephone (850) 222-3533
(List name, address and phone number)

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

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

PROPOSED ADVOCACY

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

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

Indicate Position **X** **Support** Oppose Technical Assistance Other _____

Proposed Wording of Position for Official Publication:

"Support amendments to the Florida Condominium Act; to clarify the definitions of bulk assignee and bulk buyer; to clarify the liabilities of a bulk assignee and bulk buyer; to clarify provisions pertaining to appointment of directors and transition of control; to clarify bulk assignee responsibilities for financial information and disclosures to be provided to purchasers; to create an exemption from disclosures if all units are being conveyed in bulk to a single purchaser; to clarify the application of the part to acquisitions occurring on or after July 1, 2010; to provide an effective date."

Reasons For Proposed Advocacy:

The Distressed Condominium Relief Act became law on July 1, 2010, and certain revisions are needed to its various provisions to clarify the intent of the statutes and the liabilities of and obligations imposed upon bulk assignees and bulk buyers..

PRIOR POSITIONS TAKEN ON THIS ISSUE

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

Most Recent Position None

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

Others
(May attach list if more than one) None

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

REFERRALS TO OTHER SECTIONS, COMMITTEES OR LEGAL ORGANIZATIONS

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

Referrals

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

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

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

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

NOTICE OF PROPOSED RULE

DEPARTMENT OF FINANCIAL SERVICES

Division of Insurance Agents and Agency Services

RULE NO.:	RULE TITLE:
69B-210.010	Unlawful Inducements, Title Insurance

PURPOSE AND EFFECT: Section 626.9521(1), F.S., provides that no person shall engage in any trade practice which is defined in this part as an unfair method of competition or an unfair or deceptive act or practice involving the business of insurance. Section 626.9611(1), F.S., authorizes the Department to adopt reasonable rules as are necessary or proper to identify specific unfair methods of competition or unfair or deceptive acts or practices which are prohibited by Section 626.9541, F.S.

SUMMARY: The proposed rule defines the term "unlawful inducement" and also provides examples of acts and practices that are unlawful inducements to purchase title insurance prohibited by Section 626.9541(1)(h), F.S.

SUMMARY OF STATEMENT OF ESTIMATED REGULATORY COST: The agency has determined that this rule will not have an impact on small business.

Any person who wishes to provide information regarding the statement of estimated regulatory costs, or to provide a proposal for a lower cost regulatory alternative must do so in writing within 21 days of this notice.

RULEMAKING AUTHORITY: 624.308(1), 626.9611 FS

LAW IMPLEMENTED: 626.112(8), 626.572, 626.611(11), 626.621(6), 626.8411, 626.8437(8), 626.844(5), 626.9521, 626.9541(1)(h), (m), 626.9611 FS

IF REQUESTED WITHIN 21 DAYS OF THE DATE OF THIS NOTICE, A HEARING

WILL BE HELD AT THE DATE, TIME AND PLACE SHOWN BELOW (IF NOT REQUESTED, THIS HEARING WILL NOT BE HELD):

DATE AND TIME: September 20, 2010 @ 2:30 P.M.

PLACE: Room 116, Larson Building, 200 E. Gaines Street, Tallahassee, Florida

Pursuant to the provisions of the Americans with Disabilities Act, any person requiring special accommodations to participate in this workshop/meeting is asked to advise the agency at least 5 days before the workshop/meeting by contacting Lorna Noren at (850) 413-5634 or Lorna.Noren@MyFloridaCFO.com. If you are hearing or speech impaired, please contact the agency using the Florida Relay Service 1(800)955-8771 (TDD) or 1(800)955-8770 (Voice).

THE PERSON TO BE CONTACTED REGARDING THE PROPOSED RULE IS: Lorna Noren, Special Investigator, Division of Insurance Agents and Agency Services, Bureau of Investigation, 200 E. Gaines Street, Tallahassee, FL 32399-0320 (850) 413-5634 or Lorna.Noren@MyFloridaCFO.com.

THE FULL TEXT OF THE PROPOSED RULE IS:

69B-210.010 Unlawful Inducements, Title Insurance.

(1) The term "unlawful inducement" as used in this rule means, except as otherwise provided by law or by any filed or approved rates or rating manuals:

(a) Permitting, or offering to make, or making, any contract or agreement concerning a contract other than that which is plainly expressed in the title insurance contract issued thereon; or

(b) Paying, allowing, or giving, or offering to pay, allow, or give, directly or indirectly, as an inducement to the title insurance contract, any unlawful rebate of

premiums payable on the title insurance contract, any special favor or advantage in the dividends or other benefits thereon, or any valuable consideration or inducement whatsoever which is not specified in the title insurance contract.

(2) All lists contained within this rule are intended as examples and are not exhaustive.

(3) For purposes of this rule, the term "interested party" means a real estate professional, real estate salesperson, mortgage broker, lender, real estate developer, builder, property appraiser, surveyor, escrow agent, closing agent, or any other person or entity involved in a real estate transaction for which title insurance could be issued; or any representative of such a person or entity.

(4) As they relate to the transaction of title insurance, except as otherwise expressly provided by law, by Section 626.572, F.S., and Section 626.9541(1)(m), F.S., or by any filed and approved rates or rating manuals, the following inducements, when not specified by the title insurance contract, are unlawful inducements and constitute unfair insurance trade practices under Sections 626.9521 and 626.9541, F.S.:

(a) Facilitating any discount, reduction, credit, or paying any fee or portion of the cost of an inspection, inspection report, appraisal, or survey, including wind inspection.

(b) Providing membership in any organization, society, association, guild, union, alliance or club at a discount, reduced rate, or at no cost.

(c) Making or offering to make a charitable or other tax-deductible contribution on behalf of the purchaser.

(d) Offering or providing any service or incentive in conjunction with the sale of title insurance not specified in the policy or contract.

(e) Providing or offering stocks, bonds, securities, property, or any dividend or profit accruing or to accrue thereon.

(f) Providing or offering employment in exchange for the purchase of title insurance.

(g) Printing or paying for the printing of bulletins, flyers, post cards, labels, etc. for an interested party.

(h) Furnishing or paying for the furnishing of office equipment (fax machines, telephones, copy machines, etc.) to an interested party.

(i) Providing or paying for cellular telephone contracts for an interested party.

(j) Providing simulated panoramic home and property tours to real estate salespersons or real estate professionals which they in turn utilize in order to promote their listings.

(k) Providing or paying for giftcards or gift certificates to or for an interested party.

(l) Sponsoring and hosting, or paying for the sponsoring and hosting, of open houses for real estate salespersons or real estate professionals to promote their listings.

(m) Providing or paying for food or beverages at events designed to promote an interested party's businesses.

(n) Paying advertising costs to advertise and promote the listings of real estate salespersons or real estate professionals in periodicals or publications.

(o) Paying an interested party to fill out processing (order) forms in exchange for title insurance contracts.

(p) Providing "leads" or mailing lists to an interested party at no cost or a reduced cost.

(q) Entering into affiliated business arrangements in an attempt to provide kickbacks to an interested party.

(r) Providing, or offering to provide, any other payment, award, special favor, advantage, or incentive, tangible or intangible, direct or indirect, that encourages or is reasonably calculated to encourage an interested party to refer business to a title insurance agent or agency, regardless of whether a written or verbal agreement exists regarding the referral.

Rulemaking Authority 624.308(1), 626.9611 FS. Law Implemented 626.112(8), 626.572, 626.611(11), 626.621(6), 626.8411, 626.8437(8), 626.844(5), 626.9521, 626.9541(1)(h), (m), 626.9611 FS. History - New _____.

NAME OF PERSON ORIGINATING PROPOSED RULE: Lorna Noren, Division of Insurance Agents and Agency Services

NAME OF AGENCY HEAD WHO APPROVED THE PROPOSED RULE: Alex Sink, Chief Financial Officer

DATE PROPOSED RULE APPROVED BY AGENCY HEAD: July 22, 2010

DATE NOTICE OF PROPOSED RULE DEVELOPMENT PUBLISHED IN FAW: March 5, 2010

A bill to be entitled

An act relating to limited liability companies, amending § 608.433, Florida Statutes, to provide that a charging order is the sole and exclusive remedy available to a judgment creditor of a member of a limited liability company having more than one member; providing an effective date.

WHEREAS, the Florida Supreme Court in *Olmstead v. Federal Trade Comm'n*, Case No. SC08-1009 (June 24, 2010), held that with respect to a Florida single member limited liability company ("LLC"), a "charging order" is not the exclusive remedy available to a debtor holding a judgment against the sole member; and

WHEREAS, a charging order represents a lien entitling a judgment creditor to receive distributions from the LLC or the partnership that otherwise would be payable to the member or partner who is the judgment debtor; and,

WHEREAS, the dissenting members of the Court in *Olmstead* expressed concern that the holding of the majority is not limited in effect to single member LLCs, and expressed a desire for the Legislature to clarify the law in this area; and,

WHEREAS, the Legislature finds that due to the perceived uncertainty of the breadth of the Court's holding in *Olmstead*, businesses and investors situated in Florida may be persuaded to form LLCs in jurisdictions in which charging orders are the exclusive remedy available to judgment creditors of members of multiple member LLCs; and,

WHEREAS, the resulting revision of s. 608.433, Florida Statutes, clarifies existing law so that the holding in *Olmstead* does not extend to members of multiple member LLCs organized under Florida law; and,

WHEREAS, the resulting clarification is remedial and will extend to all multiple member LLCs created before, on, or after the date this Bill becomes law.

NOW, THERFORE,

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

Section 1. Subsection (4) of Section 608.433, Florida Statutes, is amended, and Subsection (5) is added to that Section.

608.433 Right of assignee to become member

(1) Unless otherwise provided in the articles of organization or operating agreement, an assignee of a limited liability company interest may become a member only if all members other than the member assigning the interest consent.

(2) An assignee who has become a member has, to the extent assigned, the rights and powers, and is subject to the restrictions and liabilities, of the assigning member under the articles of organization, the operating agreement, and this chapter. An assignee who becomes a member also is liable for the obligations of the assignee's assignor to make and return contributions as provided in s. 608.4211 and wrongful distributions as provided in s. 608.428. However, the assignee is not obligated for liabilities which are unknown to the assignee at the time the assignee became a member and which could not be ascertained from the articles of organization or the operating agreement.

(3) If an assignee of a limited liability company interest becomes a member, the assignor is not released from liability to the limited liability company under ss. 608.4211, 608.4228, and 608.426.

(4) (a) On application to a court of competent jurisdiction by any judgment creditor of a member or a member's transferee, the court may enter a

Coding: Words ~~stricken~~ are deletions; words underlined are additions.

charging order against the transferable interest of the judgment debtor for the unsatisfied amount of the judgment.~~charge the limited liability company membership interest of the member with payment of the unsatisfied amount of the judgment with interest. To the extent so charged, the judgment creditor has only the rights of an assignee of such interest. This chapter does not deprive any member of the benefit of any exemption laws applicable to the member's interest.~~

(b) To the extent so charged, the judgment creditor has only the rights of an assignee of the transferable interest.

(c) This chapter does not deprive any member of the benefit of any exemption laws applicable to the member's interest.

(5) With respect to a limited liability company having more than one member, this section provides the sole and exclusive remedy by which a person seeking to enforce a judgment against a member or member's transferee may, in the capacity of a judgment creditor, satisfy the judgment from the judgment debtor's transferable interest in the limited liability company. Foreclosure on the judgment debtor's interest, and all other remedies to give effect to the charging order, including but not limited to, the appointment of a receiver or a court order for directions, accounts, and inquiries that the judgment debtor might have made, are not available to the judgment creditor attempting to satisfy the judgment out of the judgment debtor's transferable interest, and may not be ordered by a court.

Section 2. This Act is a clarification of existing law, and shall take effect upon becoming law.

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Coding: Words ~~stricken~~ are deletions; words underlined are additions.

.docLEGISLATIVE POSITION REQUEST FORM

GOVERNMENTAL AFFAIRS OFFICE

Date Form Received _____

GENERAL INFORMATION

Submitted By Richard R. Gans, Chair, Estate & Trust Tax Committee of the Real Property Probate & Trust Law Section (RPPTL Approval Date_____, 2010)

Address Fergeson, Skipper, Shaw, Keyser, Baron & Tirabassi, P.A., 1515 Ringling Boulevard, Suite 1000, Sarasota, FL 34236
Telephone: (941) 957-1900

Position Type Estate & Trust Tax Committee, RPPTL Section, The Florida Bar
(Florida Bar, section, division, committee or both)

CONTACTS

Board & Legislation Committee Appearance

William R. Lane, Jr., Holland & Knight LLP, 100 North Tampa Street Suite 4100, Tampa, FL 33602, Telephone (813) 227-6470.
Lauren Y. Detzel, Dean, Mead, 800 North Magnolia Avenue, Suite 1500, Orlando, FL 32803, Telephone (407) 428-5114
Richard R. Gans, Fergeson, Skipper, Shaw, Keyser, Baron & Tirabassi, P.A., 1515 Ringling Boulevard, Suite 1000, Sarasota, FL 34236, Telephone (941) 957-1900
Michael J. Gelfand, Gelfand & Arpe, P.A., Regions Financial Tower, Suite 1220, 1555 Palm Beach Lakes Blvd., West Palm Beach, FL 33401, Telephone (561) 655-6224
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Martha J. Edenfield, Pennington, Moore, Wilkinson, Bell & Dunbar, P.O. Box 10095, Tallahassee, Florida 32302-2095, Telephone (850) 222-3533

(List name, address and phone number)

Appearances Before Legislators

William R. Lane, Jr., Holland & Knight LLP, 100 North Tampa Street Suite 4100, Tampa, FL 33602, Telephone (813) 227-6470.
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(List name and phone # of those having face to face contact with Legislators)

Meetings with Legislators/staff

William R. Lane, Jr., Holland & Knight LLP, 100 North Tampa Street Suite 4100, Tampa, FL 33602, Telephone (813) 227-6470.
Lauren Y. Detzel, Dean, Mead, 800 North Magnolia Avenue, Suite 1500, Orlando, FL 32803, Telephone (407) 428-5114
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(List name and phone # of those having face to face contact with Legislators)

PROPOSED ADVOCACY

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

If Applicable, List The Following N/A

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

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

Proposed Wording of Position for Official Publication:

"Support clarification that the charging order lien is the sole and exclusive remedy which judgment creditors of a member use to satisfy a judgment from a judgment debtor's membership interests in a multi-member LLC, including an amendment to F.S. §608.433."

Reasons For Proposed Advocacy:

The Florida Supreme Court Case of Olmstead v. Federal Trade Commission, Case No. SC08-1009 (June 24, 2010) concluded that a charging order was not the sole remedy for judgment creditor seeking to satisfy claims against the owner of an interest in a single member Florida LLC. The rationale of the result reached in *Olmstead* has created substantial uncertainties about the scope of remedies available to a judgment creditor of an owner of an interest in a multi-member Florida LLC. Clarification that the charging order is the exclusive remedy available to a judgment creditor of an owner of an interest in a multi-member LLC interests is imperative. If uncertainty on this point remains, the use of multi-member LLCs in Florida will decline substantially because owners of businesses will choose to create their business entities in jurisdictions in which the charging order is the sole remedy.

PRIOR POSITIONS TAKEN ON THIS ISSUE

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

Most Recent Position RPPTL- Legislation Position #43 "Supports limitation of creditor remedies against partner interests in general and limited liability partnerships and member interests in limited liability companies to charging liens and to prohibit foreclosure against such interests."

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

Others (May attach list if more than one) NONE

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

REFERRALS TO OTHER SECTIONS, COMMITTEES OR LEGAL ORGANIZATIONS

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

Referrals

RPPTL Executive Council	Support
(Name of Group or Organization)	(Support, Oppose or No Position)
RPPTL Estate and Trust Tax Planning Committee	Support
(Name of Group or Organization)	(Support, Oppose or No Position)
Florida Bar Tax Section	Support
(Name of Group or Organization)	(Support, Oppose or No Position)
Florida Bar Business Law Section	Unknown at this time
(Name of Group or Organization)	(Support, Oppose or No Position)
Florida Bankers Association	Unknown at this time
(Name of Group or Organization)	(Support, Oppose or No Position)

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

White Paper on Proposed Enactment of Revisions to Section 608.433, Florida Statutes

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I. SUMMARY

The proposed legislation will restore certainty to an important aspect of the law of limited liability companies that has become murky by the reasoning (but not necessarily the holding) of the Florida Supreme Court in *Olmstead v. Federal Trade Commission*. Case No. SC08-1009 (June 24, 2010) (hereafter, "*Olmstead*"). By bring clarification and predictability to the rights of a judgment creditor in the membership interest owned by a member of a multiple-member limited liability company (LLC), the legislative proposal will ensure that the LLC will continue to be a viable choice as a business entity in Florida.

The proposed statutory revision is the product of study and analysis by The Estate and Trust Tax Planning Committee of the Real Property, Probate and Trust Section of The Florida Bar, and by a specially-formed subcommittee of the Tax Section of The Florida Bar.

The legislative proposal would make clear, by an amendment to the Florida Limited Liability Company Act, F. S. §§608.401 – 608.705, that a charging order lien is the exclusive remedy available to a judgment creditor seeking to attach the membership interest of a member in a multiple-member LLC.

Statutory clarification is needed in the wake of the Florida Supreme Court's decision in *Olmstead.* In that case, the Court concluded that the remedy of a judgment creditor of a single-member LLC is not limited to a charging order and that, instead, a court may order a judgment debtor to surrender all right, title and interest in the debtor's membership interest in the LLC to satisfy an outstanding judgment.

The Court's reasoning in *Olmstead* has created uncertainty as to the remedies available to a judgment creditor of a member of a multiple-member LLC. Legislation is needed to clarify that the exclusive remedy available to a judgment creditor of a member of a multiple-member LLC remains a charging order.

II. CURRENT SITUATION

A. Background: Creditors' Rights in LLC Membership Interests in General.

(1) Increasingly Widespread Use of LLCs.

LLCs first became available in Florida in 1982, but were rarely used primarily because LLCs were subject to Florida corporate income tax. By contrast, partnerships and S corporations were not subject to Florida corporate income tax.

In 1999 LLCs were exempted from the Florida corporate income tax. This change in the law caused LLCs to become popular and, according to statistics published by the Secretary of State

on Sunbiz.org, by 2007 there were more LLCs created than any other form of business organization, including corporations. Although the number of new corporations created in Florida has declined slightly since 2000 (from 119,282 in 2000 to 103,113 in 2009, a decrease of 16,169), the number of new LLCs has exploded (from 19,186 in 2000 to 128,548 in 2009, an increase of 109,362).

(2) Assignee of Membership Interest Must Receive Consent of Other Members to Become Member.

Florida Statutes Section 608.433(1) provides as follows:

> Unless otherwise provided in the articles of organization or operating agreement, an assignee of a limited liability company interest may become a member only if all members other than the member assigning the interest consent.

Accordingly, at least in the context of a multiple-member LLC, an assignee of a membership interest would not become a member of the LLC without the consent of the other members. This concept is derived from partnership law, where it is often referred to as the "know your partner" rule.

(3) Charging Order Remedy for LLCs.

Florida Statutes Section 608.433(4) (which has essentially been unchanged since its enactment in 1993) provides as follows:

> On application to a court of competent jurisdiction by any judgment creditor of a member, the court may charge the limited liability company membership interest of the member with payment of the unsatisfied amount of the judgment with interest. To the extent so charged, the judgment creditor has only the rights of an assignee of such interest. This chapter does not deprive any member of the benefit of any exemption laws applicable to the member's interest.

Florida Statutes Section 608.433(4) provides that a court may grant a judgment creditor of an LLC member a charging order. If a judgment creditor of an LLC member does obtain a charging order, then to the extent that distributions are made from the LLC, the creditor would be entitled to distributions allocable to the membership interest in which it has obtained the charging order. However, a charging order does not grant management rights to the creditor or cause the creditor to be admitted as a member.

(4) Florida Cases Interpreting Partnership Charging Order Remedy Prior to *Olmstead.*

In *Myrick v. Second National Bank*, 335 So.2d 343 (Fla. 2d DCA 1976), a creditor attempted to levy upon the debtor's interest in a partnership. The court considered whether the charging order statute in effect at that time, which was substantially similar to current Florida Statutes Section Florida 608.433(4), merely furnished the creditor with an additional remedy or whether it limited the remedy to a charging order. The court concluded that the judgment debtor's rights in the partnership were not subject to levy but could only be reached by the judgment creditor through a charging order.

The courts in *Atlantic Mobile Homes, Inc. v. LeFever*, 481 So.2d 1002 (Fla 4th DCA 1986) and *Givens v. National Loan Investors L.P.*, 724 So.2d 610 (Fla 5th DCA 1999) reached similar results, concluding that the charging order remedy was the sole remedy available to a judgment creditor.

(5) Statutory Charging Order Provision for Limited Partnerships Revised in 2005: Florida Makes a Charging Order the Exclusive Remedy.

In 2005, Florida Statutes Section 620.1703, which provides for a charging order remedy in connection with partnership interests of a limited partnership, was revised to indicate that the charging order remedy "was the exclusive remedy which a judgment creditor of a partner or transferee may use to satisfy a judgment out of the judgment debtor's interest in the limited partnership or transferable interest." The statutory change codified the results of the decisions discussed in the preceding subsection (4).

(6) Other States Make the Charging Order the Exclusive Remedy Available to Judgment Creditors of LLC Members.

A number of states prohibit foreclosure of LLC interests, including Alabama, Alaska, Arizona (but see *Ehmann*, discussed below), Delaware, Minnesota, Mississippi, New Jersey, North Carolina, North Dakota, Oklahoma, South Dakota, Tennessee, Texas, Virginia and Wyoming.

(7) Bankruptcy Cases Addressing Charging Orders are Instructive

Florida is a so-called “opt out” state, meaning that a Florida debtor in bankruptcy can only use state law exemptions. For bankruptcies in other states, depending on applicable state and federal law, a debtor might be able to choose between state and federal exemptions, or might be required to use the federal exemptions. Regardless of what law the Bankruptcy Courts apply in a particular case, the analysis of the exclusivity of the charging order remedy by those Courts is instructive to state legislatures and courts addressing the question.

In *Albright*, 291 B.R. 538 (Bankr. D. Colorado, 2003), the debtor was the sole member and manager of a Colorado LLC. The bankruptcy trustee argued that because the debtor was the sole member and manager of the LLC at the time she filed bankruptcy, the trustee controlled the LLC and could cause the LLC to sell the assets owned by the LLC and distribute the sale proceeds to the bankruptcy estate. The debtor argued that the bankruptcy trustee was only entitled to a charging order and could not assume management of the LLC or cause the LLC to sell the assets of the LLC. The court concluded that, where the debtor, on the date her Chapter 7 petition was filed, was the only member of the LLC, the debtor's bankruptcy filing effectively assigned her entire membership interest in the LLC to the bankruptcy estate, and the trustee obtained all of her rights, including the right to control management of the LLC.

On the other hand, the court in *Albright* stated that if the debtor’s interest were in a multiple-member LLC, and if other members had not consented to substitute member status for the Chapter 7 trustee, the bankruptcy estate would have been entitled only to receive a share of the profits or other compensation from the LLC, and would not have had the right to participate in the management of the LLC.

In *Ehmann*, 319 B.R. 200 (Bankr. D. Arizona, 2005), the debtor owned an interest in an Arizona multiple-member LLC that held two investments, one of which was converted to cash shortly after the bankruptcy case was filed. Distributions were made from the LLC to other members but

not to the bankruptcy trustee. The court concluded that the operating agreement was not an "executory contract" because the members had no material obligations. The court held that where the operating agreement of the LLC was not an "executory contract," the bankrupt member's interest in the LLC became property of the bankruptcy estate, notwithstanding any language in the operating agreement otherwise restricting or conditioning the transfer of the bankrupt member's interest. Accordingly, the bankruptcy trustee had all the rights and powers with respect to the LLC that the debtor held as of the commencement of the bankruptcy.

In *Modanlo*, 412 B.R. 715 (Bankr. D. Maryland, 2006), the bankruptcy trustee moved for leave to cause the debtor's single-member LLC to call a meeting of the shareholders of a corporation in which it was the largest shareholder and held control. The court held that the trustee was authorized to exercise management and governance rights in the LLC.

In *A-Z Electronics, LLC*, 350 B.R. 886 (Bankr. D. Idaho, 2006), the court held that the bankruptcy trustee exercised the sole and exclusive management of the debtor's single-member LLC.

B. The *Olmstead* Case.

(1) Facts.

The Federal Trade Commission sued Mr. Olmstead and others for unfair and deceptive trade practices. Assets of the defendants were frozen and placed in receivership. Among the assets were several single-member LLCs.

The United States Court of Appeals for the Eleventh Circuit certified the following question to the Florida Supreme Court: "Whether, pursuant to Fla. Stat. Section 608.433(4), a court may order a judgment-debtor to surrender all 'right, title, and interest' in the debtor's single-member limited liability company to satisfy an outstanding judgment." *Fed. Trade Comm'n v. Olmstead*, 528 F.3d 1310, 1314 (11th Cir. 2008).

(2) Majority Opinion.

The Florida Supreme Court, in an opinion written by Justice Canady, concluded that Florida law permits a court to order a judgment debtor to surrender all right, title, and interest in the debtor's membership interest in a single-member LLC to satisfy an outstanding judgment. The Court stated that it based its conclusion on (i) the uncontested right of the owner of the single-member LLC to transfer the owner's full interest in the LLC; and (ii) the absence of any basis in the Florida LLC Act for not allowing the long-standing creditor's remedy of levy and sale under execution.

The Court reasoned that (i) the limitation on assignee rights set forth in Florida Statutes Section 608.433(1) has no application to the transfer of rights in a single-member LLC; (ii) an assignee of the membership interest of the sole member in a single-member LLC becomes a member and takes the full right, title, and interest of the transferor without the consent of anyone other than the transferor; and (iii) the charging order provision of the Florida LLC Act does not give a judgment creditor of the sole owner of an LLC less extensive rights than the rights that are freely assignable by the judgment debtor.

The Court noted that the statutory charging order provision applicable to limited partnerships is explicitly stated to be a creditor's "exclusive remedy," and that such a provision is absent from

the Florida Limited Liability Company Act. Thus, the Court reasoned that the Florida legislature must have intended to not make the charging order remedy the exclusive remedy for LLCs when it failed to amend the Florida Limited Liability Company Act when changes to the Florida Revised Uniform Limited Partnership Act of 2005 wee made.

(3) Dissenting Opinion.

The dissenting opinion in *Olmstead* was written by Justice Lewis, who was joined by Justice Polston.

Justice Lewis concluded Florida law does not permit a court to order a judicial foreclosure of an LLC membership interest without first proceeding through the statutory requirements created by the Florida Limited Liability Company Act. Justice Lewis pointed out that, based on *Givens* and *Myrick*, Florida courts have determined in the partnership context that a charging order is the exclusive remedy for judgment creditors based on the "straightforward language of the statute."

Justice Lewis also observed that the Court's rationale applies equally to multiple-member LLCs. He argued that "the actual language of the statute does not distinguish between the number of members in the LLC" and that the holding of the Court" is premised on a limited application of a charging order without express language in the statutory scheme to support this assertion."

Justice Lewis concluded that the restraint on transferability provided for in Florida Statutes Section 608.433(1) has applicability to single-member LLCs, and that a member of a single-member LLC continues to be a member unless all of the member's economic interest is transferred to the judgment creditor by the charging order. He continued by noting that alternative remedies are available to judgment creditors of an LLC member, including (i) dissolution of the LLC if the charging order requires the surrender of all of the member's economic interest; (ii) an order of insolvency against the judgment debtor, in which case that member's interest would become part of judgment debtor's bankruptcy estate; or (iii) "reverse piercing" of the LLC veil by a court to allow a judgment creditor to reach the assets of the LLC.

C. The Practical Consequences of *Olmstead*: Prompt Action is Required.

The rationale for the result reached by the Florida Supreme Court in *Olmstead* – that Florida law permits a court to order a judgment debtor to surrender all right, title, and interest in the debtor's single-member LLC to satisfy an outstanding judgment against the member – could apply with equal force to membership interests in multiple-member LLCs. Although *Olmstead* dealt only with a single-member LLC, the Court's reasoning will create substantial uncertainty as to the remedies available to a judgment creditor of a member of a multi-member LLC.

The continued general use of LLCs organized in Florida will decline if the uncertainty created by *Olmstead* is allowed to continue. Businesses will have an incentive to create an LLC in another jurisdiction where certainty exists, such as Delaware, or to re-locate existing Florida LLCs to those jurisdictions.

The Florida Limited Liability Company Act should be amended as soon as possible to provide that, consistent with the law applicable to limited partnerships, as to multiple-member LLCs, a charging order is the exclusive remedy which a judgment creditor of a member may use to satisfy a judgment out of the judgment debtor's membership interest in the multiple-member LLC.

III. EFFECT OF PROPOSED CHANGES

Through a modification of Section 608.433, Florida Statutes, the proposed legislative changes will make clear that the sole remedy of a creditor seeking to enforce a judgment against the interest owned by a member of a multiple-member LLC is a charging order against the member's transferable interest in the LLC. Foreclosure on the judgment debtor's interest and all other remedies a creditor could have are not available and may not be ordered by a court.

The proposed statute is intended to clarify existing law. The Court's decision in *Olmstead* applies only to single-member LLCs. The proposed legislative changes do not attempt to supersede *Olmstead* and will not apply to single-member LLCs. Instead, these changes are only to make clear that the law in Florida is now and continues to be that a charging order is the exclusive remedy of a judgment creditor as against a member's transferable interest in a multiple-member LLC.

IV. FISCAL IMPACT ON STATE AND LOCAL GOVERNMENTS

Adoption of this legislative proposal by the Florida Legislature should not have a negative fiscal impact on state and local government. Indeed, clarifying the uncertainty caused by the Court's reasoning in *Olmstead* will tend to increase revenue as existing LLCs will continue to pay the fees required to remain in good standing in Florida, and additional LLCs will be formed here.

V. DIRECT IMPACT ON PRIVATE SECTOR

The proposed statute will benefit the private sector by providing certainty and predictability to those establishing and maintaining multiple-member LLCs under Florida law. Without the proposed statutory revision, LLCs will no longer be a viable option for doing business in Florida and business formation and operation will be removed to other states that provide the protection that the revision is designed to achieve.

VI. CONSTITUTIONAL ISSUES

The legislative proposal is not believed to violate any of the provisions of the Constitution of the State of Florida or of the United States Constitution.

VII. OTHER INTERESTED PARTIES

Other groups that may have an interest in the legislative proposal include the Tax and Business Law Sections of The Florida Bar, and the Florida Bankers Association. It should be noted that the Tax Section is a co-sponsor of this legislative proposal.

A bill to be entitled

An act relating to powers of attorney and powers of appointment; providing for repeal of existing ch. 709 in its entirety and creation of new ch. 709, to include Part I, “Powers of Attorney” and Part II, “Powers of Appointment”.

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

Section 1. Chapter 709, Florida Statutes, is created to read:

PART I

POWERS OF ATTORNEY

709.101 Short title.--Sections 709.101-709.403 may be cited as the Florida Power of Attorney Act.

709.102 Definitions.—In this act, the term:

(1) "Agent” means a person granted authority to act for a principal under a power of attorney, whether denominated an agent, attorney-in-fact, or otherwise. The term includes an original agent, co-agent, and successor agent. The agent must be a natural person who is 18 years of age or older, or a financial institution as defined in chapter 655 with trust powers having a place of business in this state and authorized to conduct trust business in this state.

(2) “Durable,” with respect to a power of attorney, means not terminated by the principal’s incapacity.

(3) “Electronic” means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

(4) “Incapacity” means inability of an individual to take those actions necessary to obtain, administer, and dispose of real and personal property, intangible property, business property, benefits, and income.

(5) “Knowledge” means a person (a) has actual knowledge of the fact, (b) has received a notice or notification of the fact, or (c) has reason to know the fact from all other facts and circumstances known to the person at the time in question. An organization that conducts activities through employees has notice or knowledge of a fact involving a power of attorney only from the time information was received by an employee having responsibility to act on matters involving the power of attorney, or would have been if brought to the

employee’s attention if the organization had exercised reasonable diligence. An organization exercises reasonable diligence if the organization maintains reasonable routines for communicating significant information to the employee having responsibility to act on matters involving the power of attorney and there is reasonable compliance with the routines. Reasonable diligence does not require an employee of the organization to communicate information unless the communication is part of the individual’s regular duties or the individual knows a matter involving the power of attorney would be materially affected by the information.

(6) “Power of attorney” means a writing that grants authority to an agent to act in the place of the principal, whether or not the term power of attorney is used.

(7) “Presently exercisable general power of appointment,” with respect to property or a property interest subject to a power of appointment, means power exercisable at the time in question to vest absolute ownership in the principal individually, the principal’s estate, the principal’s creditors, or the creditors of the principal’s estate. The term includes a power of appointment not exercisable until the occurrence of a specified event, the satisfaction of an ascertainable standard, or the passage of a specified period only after the occurrence of the specified event, the satisfaction of the ascertainable standard, or the passage of the specified period. The term does not include a power exercisable in a fiduciary capacity or only by will.

(8) “Principal” means an individual who grants authority to an agent in a power of attorney.

(9) “Property” means anything that may be the subject of ownership, whether real or personal, or legal or equitable, or any interest or right therein.

(10) “Record” means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(11) “Sign” means, with present intent to authenticate or adopt a record:

(a) To execute or adopt a tangible symbol; or

(b) To attach to or logically associate with the record an electronic sound, symbol, or process.

(12) “Third person” means any person other than the principal or the agent in its capacity as agent.

Section 709.103 Applicability.--This act applies to all powers of attorney except:

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

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

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

(4) A power created by a person other than an individual.

709.104 When power of attorney is durable.--A power of attorney created under this act is durable if it contains the words: “This durable power of attorney is not terminated by subsequent incapacity of the principal except as provided in chapter 709, Florida Statutes”; or similar words that show the principal’s intent that the authority conferred is exercisable notwithstanding the principal’s subsequent incapacity, except as otherwise provided by this act.

709.105 Execution of power of attorney.--A power of attorney must be signed by the principal and by two subscribing witnesses and be acknowledged by the principal before a notary public or as otherwise provided in s. 695.03.

709.106 Validity of power of attorney.--

(1) A power of attorney executed on or after the effective date of this act is valid if its execution complies with s. 709.105.

(2) A power of attorney executed before the effective date of this act is valid if its execution complied with the law of this state as it existed at the time of execution.

(3) A power of attorney executed in a state of the United States other than Florida that does not comply with the execution requirements of this act is valid in this state if, when the power of attorney was executed, the power of attorney and its execution complied with the law of the state of execution. A third person that

is asked to accept a power of attorney that is valid in this state solely because of this subsection may in good faith request, and rely upon, without further investigation, an opinion of counsel as to any matter of law concerning the power of attorney, including the due execution and validity of the power of attorney. An opinion of counsel requested under this section must be provided at the principal’s expense. A third person may, but is not required to, accept a power of attorney that is valid in this state solely because of this subsection if the agent does not provide the requested opinion of counsel and a third person shall have no liability for refusing to accept the power of attorney. This subsection does not affect any other rights of a third person asked to accept the power of attorney under this act, or any other provisions of applicable law.

(3) Except as otherwise provided in the power of attorney or by law other than this act, a photocopy or electronically transmitted copy of an original power of attorney has the same effect as the original.

709.1065 Military powers of attorney.--Notwithstanding anything in this act to the contrary:

(1) A military power of attorney is valid if it is executed in accordance with the requirements for a military power of attorney pursuant to 10 U.S.C. sec. 1044b, as amended.

(2) A deployment-contingent power of attorney, which may be signed in advance and go into effect upon the deployment of the principal, shall be afforded full force and effect by the courts of the State of Florida.

709.107 Meaning and effectiveness of power of attorney.-- The meaning and effectiveness of a power of attorney is determined by this act if:

(1) The power of attorney is used in this state; or

(2) The power of attorney states that it is to be governed by the laws of this state.

709.108 When power of attorney effective.--

(1) Except as provided in this section, a power of attorney is exercisable when executed.

(2) If a power of attorney executed before the effective date of this act is conditioned on the principal's lack of capacity to manage

property as defined in s. 744.102(12)(a), and the power of attorney has not become exercisable prior to the effective date of this act, the power of attorney is exercisable upon the delivery of the affidavit of a physician who has primary responsibility for the treatment and care of the principal and who is licensed to practice medicine pursuant to chapter 458 and 459 as of the date of the affidavit. The affidavit executed by a physician must state where the physician is licensed to practice medicine, that the physician is the primary physician who has responsibility for the treatment and care of the principal, and that the physician believes that the principal lacks the capacity to manage property as defined in s. 744.102(12)(a).

(3) Except as provided in subsection (2) and section 709.1065, a power of attorney is ineffective in this state if the power of attorney provides that it is to become effective at a future date or upon the occurrence of a future event or contingency.

709.109 Termination or suspension of power of attorney or agent’s authority.--

(1) A power of attorney terminates when:

(a) The principal dies;

(b) The principal becomes incapacitated, if the power of attorney is not durable.

(c) The principal is adjudicated totally or partially incapacitated by a court, unless the court determines that certain authority granted by the power of attorney is to be exercisable by the agent;

(d) The principal revokes the power of attorney;

(e) The power of attorney provides that it terminates;

(f) The purpose of the power of attorney is accomplished; or

(g) The agent’s authority terminates and the power of attorney does not provide for another agent to act under the power of attorney.

(2) An agent’s authority is exercisable until the authority terminates under this subsection. An agent’s authority terminates when:

(a) The agent dies, becomes incapacitated, resigns or is removed by a court;

(b) An action is filed for the dissolution or annulment of the agent's marriage to the principal or their legal separation, unless the power of attorney otherwise provides; or

(c) The power of attorney terminates.

(3) If any person initiates proceedings in any court of competent jurisdiction to determine the principal's incapacity or for the appointment of a guardian advocate, the authority granted under the power of attorney is suspended until the petition is dismissed or withdrawn or the court enters an order authorizing the agent to exercise one or more powers granted under the power of attorney.

(a) If an emergency arises after initiation of proceedings to determine incapacity and before adjudication regarding the principal's capacity, the agent may petition the court in which the proceeding is pending for authorization to exercise a power granted under the power of attorney. The petition must set forth the nature of the emergency, the property or matter involved, and the power to be exercised by the agent.

(b) Notwithstanding the provisions of this section, a proceeding to determine incapacity shall not affect any authority of the agent to make health care decisions for the principal, including, but not limited to, those defined in chapter 765, unless otherwise ordered by the court. If the principal has executed a health care advance directive designating a health care surrogate pursuant to chapter 765, the terms of the directive will control if the directive and the power of attorney are in conflict unless the power of attorney is later executed and expressly states otherwise.

(4) Termination or suspension of an agent's authority or of a power of attorney is not effective as to an agent that, without knowledge of the termination or suspension, acts in good faith under the power of attorney. An act so performed, unless otherwise invalid or unenforceable, binds the principal and the principal's successors in interest.

709.110 Revocation of power of attorney.--

(1) A principal may revoke a power of attorney by expressing the revocation in a subsequently executed power of attorney or other writing signed by the principal. The principal may, but is not

required to, give notice of the revocation to any agent that has accepted authority under the revoked power of attorney.

(2) Except as provided in subsection (1), the execution of a power of attorney does not revoke a power of attorney previously executed by the principal.

709.111 Co-agents and successor agents.--

(1) A principal may designate two or more persons to act as co-agents. Unless the power of attorney otherwise provides, each co-agent may exercise its authority independently.

(2) A principal may designate one or more successor agents to act if an agent resigns, dies, becomes incapacitated, is not qualified to serve, or declines to serve. Unless the power of attorney otherwise provides, a successor agent:

(a) Has the same authority as that granted to the original agent; and

(b) May not act until the predecessor agent (or agents) have resigned, died, become incapacitated, are no longer qualified to serve, or have declined to serve.

(3) Except as otherwise provided in the power of attorney and subsection (4), an agent that does not participate in or conceal a breach of fiduciary duty committed by another agent, including a predecessor agent, is not liable for the actions or omissions of the other agent.

(4) An agent that has actual knowledge of a breach or imminent breach of fiduciary duty by another agent, including a predecessor agent, shall take any action reasonably appropriate in the circumstances to safeguard the principal’s best interest. If the agent in good faith believes that the principal is not incapacitated, giving notice to the principal is a sufficient action in the circumstances. An agent that fails to take action as required by this subsection is liable for the reasonably foreseeable damages that could have been avoided if the agent had taken such action.

(5) A successor agent does not have a duty to review the conduct or decisions of a predecessor agent. Except as provided in subsection (4), a successor agent does not have a duty to institute any proceeding against a predecessor agent or to file any claim against

any predecessor agent’s estate, for any of the predecessor agent’s actions or omissions as agent.

(6) If a power of attorney requires two or more persons must act together as co-agents, then notwithstanding the requirement that they act together, one or more of the agents may delegate to any co-agent the authority to conduct banking transactions as provided in section 709.208(1), whether the authority to conduct banking transactions is specifically enumerated or incorporated by reference to section 709.208(1) in the power of attorney.

709.112 Reimbursement and compensation of agent.--

(1) Unless the power of attorney otherwise provides, an agent is entitled to reimbursement of expenses reasonably incurred on behalf of the principal.

(2) Unless the power of attorney otherwise provides, a qualified agent is entitled to compensation that is reasonable under the circumstances.

(3) Notwithstanding any provision in the power of attorney to the contrary, an agent shall not be paid compensation unless the agent is a qualified agent.

For purposes of this section, “qualified agent” means an agent who is the spouse of the principal, an heir of the principal within the meaning of s. 732.103, a financial institution as defined in Chapter 655 with trust powers having a place of business in this state, an attorney or certified public accountant, licensed in this state, or a natural person who is a resident of this state and who has never been an agent for more than three principals at the same time.

709.113 Agent’s acceptance.--Except as otherwise provided in the power of attorney, a person accepts appointment as an agent by exercising authority or performing duties as an agent or by any other assertion or conduct indicating acceptance. The scope of an agent’s acceptance is limited to those aspects of the power of attorney for which the agent’s assertions or conduct reasonably manifests acceptance.

709.114 Agent’s duties.--

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

(a) Shall act only within the scope of authority granted in the power of attorney. In exercising that authority, the agent:

1. Shall not act contrary to the principal's reasonable expectations actually known by the agent;

2. Shall act in good faith;

3. Shall not act in a manner that is contrary to the principal's best interest, except as provided in ss. 709.114(2)(d) and 709.202; and

4. Shall attempt to preserve the principal's estate plan, to the extent actually known by the agent, if preserving the plan is consistent with the principal's best interest based on all relevant factors, including:

(I) The value and nature of the principal's property;

(II) The principal's foreseeable obligations and need for maintenance;

(III) Minimization of taxes, including income, estate, inheritance, generation-skipping transfer, and gift taxes.

(IV) Eligibility for a benefit, a program, or assistance under a statute or regulation; and

(V) The principal's personal history of making or joining in making gifts.

(b) Shall not delegate authority to a third person except as provided in s. 518.112.

(c) Shall keep a record of all receipts, disbursements, and transactions made on behalf of the principal; and

(d) Shall create and then maintain an accurate inventory each time the agent accesses the principal's safe deposit box, if the power of attorney authorizes the agent to access the box.

(2) Except as otherwise provided in the power of attorney, an agent that has accepted appointment shall:

(a) Act loyally for the sole benefit of the principal;

(b) Act so as not to create a conflict of interest that impairs the agent's ability to act impartially in the principal's best interest;

(c) Act with the care, competence, and diligence ordinarily exercised by agents in similar circumstances; and

(d) Cooperate with a person that has authority to make health-care decisions for the principal to carry out the principal's reasonable expectations to the extent actually known by the agent and, otherwise, act in the principal's best interest.

(3) An agent that acts in good faith is not liable to any beneficiary of the principal's estate plan for failure to preserve the plan.

(4) If an agent is selected by the principal because of special skills or expertise possessed by the agent or in reliance on the agent's representation that the agent has special skills or expertise, the special skills or expertise must be considered in determining whether the agent has acted with care, competence, and diligence under the circumstances.

(5) Absent a breach of duty to the principal, an agent is not liable if the value of the principal's property declines.

(6) Except as otherwise provided in the power of attorney, an agent is not required to disclose receipts, disbursements, transactions conducted on behalf of the principal, or safe deposit box inventories, unless ordered by a court or requested by the principal, a court-appointed guardian, another fiduciary acting for the principal, a governmental agency having authority to protect the welfare of the principal, or, upon the death of the principal, by the personal representative or successor in interest of the principal's estate. If so requested, within 60 days the agent shall comply with the request or provide a writing or other record substantiating why additional time is needed and shall comply with the request within an additional 60 days.

709.1145 Actions involving an alleged conflict of interest.--

(1) If an agent's exercise of a power is challenged in any judicial proceeding brought by or on behalf of the principal on the grounds that it was affected by a conflict of interest and evidence is presented that the agent or an affiliate of the agent had a personal interest in the exercise of the power, the agent or affiliate shall have the burden of proving, by clear and convincing evidence that:

(a) The agent acted solely in the interest of the principal, or that:

(b) 1. The agent acted in good faith in the principal's best interest; and

2. The conflict of interest was expressly authorized in the power of attorney.

(2) For purposes of this section:

(a) A provision authorizing an agent to engage in a transaction affected by conflict of interest that is inserted into a power of attorney as the result of the abuse of a fiduciary or confidential relationship with the principal by the agent or the agent's affiliate is invalid.

(b) Affiliates of an agent include:

1. The agent's spouse;

2. The agent's descendants, siblings, parents, or their spouses;

3. A corporation or other entity in which the agent, or a person that owns a significant interest in the agent, has an interest that might affect the agent's best judgment;

4. A person or entity that owns a significant interest in the agent; or

5. The agent when acting in a fiduciary capacity for someone other than the principal.

709.115 Exoneration of agent.--A power of attorney may provide that the agent is not liable for any acts or decisions made by the agent in good faith and under the power of attorney, except to the extent the provision:

(1) Relieves the agent of liability for breach of a duty committed dishonestly, with improper motive, or with reckless indifference to the purposes of the power of attorney or the best interest of the principal; or

(2) Was inserted as a result of an abuse of a confidential or fiduciary relationship with the principal.

709.116 Judicial relief.--

(1) A court may construe or enforce a power of attorney, review the agent's conduct, terminate the agent's authority, remove the agent, and grant other appropriate relief.

(2) The following persons may petition the court:

(a) The principal or the agent, including any nominated successor agent;

(b) A guardian, conservator, trustee, or other fiduciary acting for the principal or the principal's estate;

(c) A person authorized to make health-care decisions for the principal to the extent that the health care of the principal is affected by the actions of the agent;

(d) Any other interested person as long as the person demonstrated to the court's satisfaction that the person is interested in the welfare of the principal and has a good faith belief that the court's intervention is necessary;

(e) A governmental agency having regulatory authority to protect the welfare of the principal; and

(f) A person asked to honor the power of attorney.

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

709.117 Agent's liability.--An agent that violates this act is liable to the principal or the principal's successors in interest for the amount required to:

(1) Restore the value of the principal's property to what it would have been had the violation not occurred; and

(2) Reimburse the principal or the principal's successors in interest for the attorney's fees and costs paid from the principal's funds on the agent's behalf in defense of the agent's actions.

709.118 Agent's resignation.--Unless the power of attorney provides a different method for an agent's resignation, an agent may resign by giving notice to the principal, if the principal is incapacitated to the court-appointed guardian, if one has been appointed for the principal, and to any co-agent, or if none, the next successor agent.

709.119 Acceptance of and reliance upon power of attorney.--

(1)(a) A third person that in good faith accepts a power of attorney which appears to be executed in accordance with this act may

rely upon the power of attorney and may enforce an authorized transaction against the principal's property, as if

1. The power of attorney were genuine, valid, and still in effect;

2. The agent's authority were genuine, valid, and still in effect; and

3. The authority of the officer executing for or on behalf of a financial institution with trust powers acting as agent was genuine, valid and still in effect.

(b) For purposes of this subsection, and without limiting what constitutes good faith, a third person does not accept a power of attorney in good faith if the third person has notice that

1. The power of attorney is void, invalid, or terminated; or

2. The purported agent's authority is void, invalid, suspended, or terminated.

(2) A third person may but need not require the agent to execute an affidavit stating where the principal is domiciled; that the principal is not deceased that there has been no revocation, partial or complete termination by adjudication of incapacity or by the occurrence of an event referenced in the power of attorney, or suspension by initiation of proceedings to determine incapacity or to appoint a guardian of the principal; and if the affiant is a successor agent, the reasons for the unavailability of the predecessor agents, if any, at the time the authority is exercised. A third person may also require an officer of a financial institution acting as agent to execute a separate affidavit, or include in the form of the affidavit, the officer's title and a statement that the officer has full authority to perform all acts and enter into all transactions authorized by the power of attorney for and on behalf of the financial institution in its capacity as agent. A written affidavit executed by the agent under this subsection may, but need not, be in the following form:

STATE OF _____

COUNTY OF _____

Before me, the undersigned authority, personally appeared (agent) ("Affiant"), who swore or affirmed that:

1. Affiant is the agent named in the Power of Attorney executed by (principal) (“Principal”) on (date).

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

3. To the best of the Affiant’s knowledge after diligent search and inquiry:

a. The Principal is not deceased;

b. Affiant’s authority has not been suspended by initiation of proceedings to determine incapacity or to appoint a guardian or a guardian advocate; and

c. There has been no revocation, partial or complete termination of the power of attorney or of the Affiant’s authority.

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

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

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

_____

(Affiant)

Sworn to (or affirmed) and subscribed before me this ____ day of (month) , (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);

(3) A third person that is asked to accept a power of attorney that appears to be executed in accordance with s.709.105 may in good faith request, and rely upon, without further investigation:

(a) An English translation of the power of attorney if the power of attorney contains, in whole or in part, language other than English;

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

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

(4) An English translation or an opinion of counsel requested under this section must be provided at the principal's expense unless the request is made after the time specified in s. 709.120(1) for acceptance or rejection of the power of attorney.

(5) Third persons that act in reliance upon the authority granted to an agent and in accordance with the instructions of the agent must be held harmless by the principal from any loss suffered or liability incurred as a result of actions taken prior to receipt of written notice as provided in s. 709.121. A third person that acts in good faith upon any representation, direction, decision, or act of the agent is not liable to the principal or the principal's estate, beneficiaries, or joint owners for those acts.

709.120 Liability for refusal to accept power of attorney.—

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

(a) A third person shall either accept or reject a power of attorney within a reasonable time. A third person that rejects a power of attorney must state in writing the reason for the rejection.

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

1. With respect to banking transactions, if the power of attorney contains authority to conduct banking transactions pursuant to s. 709.208(1); or

2. With respect to security transactions, if the power of attorney contains authority to conduct security transactions pursuant to s. 709.208(2).

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

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

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

(b) The third person has knowledge of the termination of the agent’s authority or of the power of attorney before exercise of the power;

(c) A timely request by the third person for an affidavit, English translation, or opinion of counsel under s. 709.119(4) is refused by the agent;

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

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

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

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

(b) Liability for damages, including reasonable attorney’s fees and costs, incurred in any action or proceeding that confirms the validity of the power of attorney or mandates acceptance of the power of attorney.

709.121 Notice.--

(1) A notice, including, but not limited to, a notice of revocation, notice of partial or complete termination by adjudication of incapacity or by the occurrence of an event referenced in the power of attorney, notice of death of the principal, notice of suspension by initiation of proceedings to determine incapacity or to appoint a guardian, or other notice, is not effective until written notice is served upon the agent or any third persons relying upon a power of attorney.

(2) Notice must be in writing and must be accomplished in a manner reasonably suitable under the circumstances and likely to result in receipt of the notice or document. Permissible methods of notice or for sending a document include first-class mail, personal delivery, delivery to the person's last known place of residence or

place of business, or a properly directed facsimile or other electronic message.

(3) Notice to a financial institution shall contain the name, address, and the last four digits of the taxpayer identification number of the principal and shall be directed to an officer or a manager of the financial institution in Florida.

(4) Notice shall be effective when it is given, except that notice upon a financial institution, brokerage company, or title insurance company is not effective until five (5) days, excluding Saturdays, Sundays, and legal holidays, after it is received.

709.201 Construction of authority generally.--Except as otherwise limited by this section or other applicable law, the agent has full authority to perform, without prior court approval, every act authorized and specifically enumerated in the power of attorney.

(1) As a confirmation of the law in effect in this state when this act became effective, such authorization may include, without limitation, the authority to:

(a) Execute stock powers or similar documents on behalf of the principal and delegate to a transfer agent or similar person the authority to register any stocks, bonds, or other securities either into or out of the principal’s or nominee’s name; or

(b) Convey or mortgage homestead property, provided that if the principal is married, the agent may not mortgage or convey homestead property without joinder of the spouse of the principal or the spouse’s legal guardian. Joinder by a spouse may be accomplished by the exercise of authority in a power of attorney executed by the joining spouse, and either spouse may appoint the other as his or her agent.

(c) If such authority is specifically granted in a durable power of attorney, the agent may make all health care decisions on behalf of the principal, including, but not limited to, those set forth in chapter 765.

(2) Notwithstanding the provisions of this section, an agent may not:

(a) Perform duties under a contract that requires the exercise of personal services of the principal;

(b) Make any affidavit as to the personal knowledge of the principal;

(c) Vote in any public election on behalf of the principal;

(d) Execute or revoke any will or codicil for the principal; or

(e) Exercise powers and authority granted to the principal as trustee or as court-appointed fiduciary.

(3) Subject to s. 709.202, if the subjects over which authority is granted in a power of attorney are similar or overlap, the broadest authority controls.

(4) Authority granted in a power of attorney is exercisable with respect to property that the principal has when the power of attorney is executed or acquires later, whether or not the property is located in this state and whether or not the authority is exercised or the power of attorney is executed in this state.

(5) An act performed by an agent pursuant to a power of attorney has the same effect and inures to the benefit of and binds the principal and the principal's successors in interest as if the principal had performed the act.

709.202 Authorities that require separate signed enumeration.--

(1) Notwithstanding s. 709.201, an agent may exercise the following authority only if the principal signed or initialed next to each specific enumeration of the authority and exercise of the authority is consistent with the agent's duties under s. 709.114 and is not otherwise prohibited by another agreement or instrument:

(a) Create an inter vivos trust;

(b) With respect to a trust created by or on behalf of the principal, amend, modify, revoke or terminate the trust, but only if the trust instrument explicitly provides for amendment, modification, revocation or termination by the settlor's agent;

(c) Make a gift, subject to subsection (3);

(d) Create or change rights of survivorship;

(e) Create or change a beneficiary designation;

(f) Waive the principal's right to be a beneficiary of a joint and survivor annuity, including a survivor benefit under a retirement plan; or

(g) Disclaim property and powers of appointment.

(2) Notwithstanding a grant of authority to do an act described in subsection (1), unless the power of attorney otherwise provides, an agent that is not an ancestor, spouse, or descendant of the principal, may not exercise authority to create in the agent, or in an individual to whom the agent owes a legal obligation of support, an interest in the principal's property, whether by gift, right of survivorship, beneficiary designation, disclaimer, or otherwise.

(3) Unless the power of attorney otherwise provides, language in a power of attorney granting general authority with respect to gifts authorizes the agent only to:

(a) Make outright to, or for the benefit of, a person, a gift of any of the principal's property, including by the exercise of a presently exercisable general power of appointment held by the principal, in an amount per donee not to exceed the annual dollar limits of the federal gift tax exclusion under Internal Revenue Code section 2503(b), 26 U.S.C. §2503(b), as amended, without regard to whether the federal gift tax exclusion applies to the gift, or if the principal's spouse agrees to consent to a split gift pursuant to Internal Revenue Code section 2513, 26 U.S.C. 2513, as amended, in an amount per donee not to exceed twice the annual federal gift tax exclusion limit; and

(b) Consent, pursuant to Internal Revenue Code section 2513, 26 U.S.C. §2513, as amended, to the splitting of a gift made by the principal's spouse in an amount per donee not to exceed the aggregate annual gift tax exclusions for both spouses.

(4) Notwithstanding anything in subsection (1) to the contrary, if a power of attorney is otherwise sufficient to grant an agent authorization to conduct banking transactions as provided in s. 709.208(1), to conduct investment transactions as provided in s. 709.208(2), or otherwise to make additions to or withdrawals from an account of the principal, then making a deposit to or withdrawal from an insurance policy, retirement account, individual retirement account, benefit plan, bank account or any other account held jointly or otherwise held in survivorship or payable on death form, shall not be considered to be a change to the survivorship feature or beneficiary designation, and no further specific authority is required for the agent to exercise such authorization. A bank or other

financial institution has no duty to inquire as to the appropriateness of the agent's exercise of that authority and shall not be liable to the principal or any other person for actions taken in good faith reliance on the appropriateness of the agent's actions. Nothing in this paragraph shall be construed as eliminating the agent's fiduciary duties to the principal with respect to any exercise of the power of attorney.

(5) This section does not apply to a power of attorney executed prior to the effective date of this act.

709.208 Banks and other financial institutions.--

(1) A power of attorney that provides the agent with “authority to conduct banking transactions as provided in section 709.208(1), Florida Statutes” grants general authority to the agent to engage in the following transactions with financial institutions without specific enumeration in the power of attorney:

(a) Establish, continue, modify, or terminate an account or other banking arrangement with a financial institution;

(b) Contract for services available from a financial institution, including renting a safe deposit box or space in a vault;

(c) Withdraw, by check, order, electronic funds transfer, or otherwise, money or property of the principal deposited with or left in the custody of a financial institution;

(d) Receive statements of account, vouchers, notices, and similar documents from a financial institution and act with respect to them;

(e) Purchase cashiers checks, official checks, counter checks, bank drafts, money orders and similar instruments;

(f) Endorse and negotiate checks, cashiers checks, official checks, drafts, and other negotiable paper of the principal or payable to the principal or the principal’s order, transfer money, receive the cash or other proceeds of those transactions, and accept a draft drawn by a person upon the principal and pay it when due;

(g) Apply for, receive, and use debit cards, electronic transaction authorizations, and traveler’s checks from a financial institution;

(h) Use, charge, or draw upon any line of credit, credit card, or other credit established by the principal with a financial institution; and

(i) Consent to an extension of the time of payment with respect to commercial paper or a financial transaction with a financial institution.

(2) A power of attorney that provides the agent with "authority to conduct investment transactions as provided in section 709.208(2), Florida Statutes" grants general authority to the agent with respect to securities held by financial institutions to take the following actions without specific enumeration in the power of attorney:

(a) Buy, sell, and exchange investment instruments;

(b) Establish, continue, modify, or terminate an account with respect to investment instruments;

(c) Pledge investment instruments as security to borrow, pay, renew, or extend the time of payment of a debt of the principal;

(d) Receive certificates and other evidences of ownership with respect to investment instruments;

(e) Exercise voting rights with respect to investment instruments in person or by proxy, enter into voting trusts, and consent to limitations on the right to vote; and

(f) Sell commodity futures contracts and call and put options on stocks and stock indexes.

For purposes of this subsection, "investment instruments" means stocks, bonds, mutual funds, and all other types of securities and financial instruments, whether held directly, indirectly, or in any other manner, including, but not limited to, shares or interests in a private investment fund, including, but not limited to, a private investment fund organized as a limited partnership, a limited liability company, a statutory or common law business trust, a statutory trust, or a real estate investment trust, a joint venture, or any other general or limited partnership; derivatives or other interests of any nature in securities such as options, options on futures, and variable forward contracts; mutual funds; common trust funds; money market funds; hedge funds; private equity or venture capital funds; insurance contracts; and other entities or vehicles investing in securities or interests in securities whether registered

or otherwise, except commodity futures contracts and call and put options on stocks and stock indexes.

709.301 Principles of law and equity.-- The common law of agency and principles of equity supplement this act, except to the extent modified by this act or another statute of this state.

709.302 Laws applicable to financial institutions and entities.--This act does not supersede any other law applicable to financial institutions or other entities, and the other law controls if inconsistent with this act.

709.303 Remedies under other law.--The remedies under this act are not exclusive and do not abrogate any right or remedy under the law of this state other than this act.

709.401 Relation to electronic signatures in global and national commerce act.--This act modifies, limits, and supersedes the federal Electronic Signatures in Global and National Commerce Act,15 U.S.C. §7001 et seq., but does not modify, limit, or supersede s. 101(c) of that act, 15 U.S.C. §7001(c), or authorize electronic delivery of any of the notices described in s. 103(b) of that act, 15 U.S.C. §7003(b).

709.402 Effect on existing powers of attorney.--Except as otherwise provided in this act, on the effective date of this act:

(1) This act applies to a power of attorney created before, on, or after the effective date of this act and to acts of the agent done on or after the effective date of this act;

(2) An act of the agent done before the effective date of this act is not affected by this act.

PART II

POWERS OF APPOINTMENT

709.502 Power of appointment; method of release.-- Powers of appointment over any property, real, personal, intangible or mixed, may be released, in whole or in part, by a written instrument signed by the donee or donees of such powers. Such written releases shall be signed in the presence of two witnesses but need not be sealed, acknowledged or recorded in order to be valid, nor shall it be necessary to the validity of such releases for spouses of married donees to join such donees in the execution of releases, in whole or part, of powers of appointment.

709.503 Power of appointment; property held in trust.-- If property subject to a power of appointment is held in trust by a person, firm or corporation other than the donee or donees of the power, a written release, in whole or in part, of a power to appoint the same shall be delivered to such trustee or trustees before the written release becomes legally effective. In no other instance shall a delivery of a release, in whole or in part, of a power of appointment be necessary to the validity of such release.

709.504 Power of appointment; effect of release.--Any power of appointment wholly released by a written instrument signed by the donee or donees of such power shall be, in legal effect, completely revoked, and shall not, after such release, be subject to being exercised in any manner whatsoever. Any power of appointment partially released by a written instrument signed by the donee or donees of such power shall be, in legal effect, as to such released part, completely revoked, and shall not after such release be subject to being exercised in any manner whatsoever as to such released part.

709.505 Powers of appointment; validation of prior releases.-- All releases, in whole or in part, of powers of appointment heretofore executed in a manner that conforms with the provisions of this law be and they are hereby validated and shall be given the same force and effect as if executed subsequently to the effective date of this law.

709.506 Powers of appointment included in law.--Powers of appointment referred to in this law shall include not only those recognized as such by general law but also those designated as such under the tax law of the United States.

709.507 Power of appointment; effect of release on title to property.--No such release, in whole or in part, of a power of appointment shall affect the title to property of any bona fide purchaser for value who does not have notice or knowledge of such release.

Section 2. Chapter 709, Florida Statutes, as it exists prior to the effective date of this act, is repealed.

Section 3. This act shall take effect October 1, 2011.

LEGISLATIVE POSITION REQUEST FORM

GOVERNMENTAL AFFAIRS OFFICE

Date Form Received _____

GENERAL INFORMATION

Submitted By Real Property, Probate & Trust Law Section

Address

Position Type Section
(Florida Bar, section, division, committee or both)

CONTACTS

Board & Legislation Committee Appearance

Tami Foley Conetta, Northern Trust, NA, 1515 Ringling Blvd., Third Floor, Sarasota, Florida 34236, Telephone (941) 329-2717.
Michael J. Gelfand, Gelfand & Arpe, P.A., Regions Financial Tower, Suite 1220, 1555 Palm Beach Lakes Blvd., West Palm Beach, FL 33401 Telephone (561) 655-6224
Peter M. Dunbar, Pennington, Moore, Wilkinson, Bell & Dunbar, P.O. Box 10095, Tallahassee, Florida 32302-2095, Telephone (850) 222-3533
Martha J. Edenfield, Pennington, Moore, Wilkinson, Bell & Dunbar, P.O. Box 10095, Tallahassee FL 32302-2095, Telephone (850) 222-3533
(List name, address and phone number)

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

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

PROPOSED ADVOCACY

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

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

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

Proposed Wording of Position for Official Publication:

"Support revision of Chapter 709, Florida Statutes, Powers of Attorney and Similar Instruments, to effect adoption of Uniform Power of Attorney Act with Florida modifications."

Reasons For Proposed Advocacy:

The Uniform Power of Attorney Act was approved by the Uniform Law Commissioners in 2006. This legislation proposes adoption of the Act, with modifications, to update Florida's power of attorney law to reflect changes in the general law of agency, support portability of powers of attorney and provide additional protections for Florida citizens, as further detailed in the attached White Paper.

PRIOR POSITIONS TAKEN ON THIS ISSUE

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

Most Recent Position

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

Others
(May attach list if more than one)

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

REFERRALS TO OTHER SECTIONS, COMMITTEES OR LEGAL ORGANIZATIONS

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

Referrals

Elder Law Section	Support
(Name of Group or Organization)	(Support, Oppose or No Position)
Business Law Section	Review Pending
(Name of Group or Organization)	(Support, Oppose or No Position)
(Name of Group or Organization)	(Support, Oppose or No Position)

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

Chapter 709 White Paper

I. SUMMARY

This legislation conforms Florida's power of attorney law to the Uniform Power of Attorney Act, with certain modifications, in order to achieve greater consistency among state laws. This bill does not have a fiscal impact on state funds.

II. BACKGROUND

The Power of Attorney Committee [the Committee] was created by the Real Property, Probate and Trust Law Section of the Bar. The Committee is comprised of attorneys with practices in several disciplines including estate planning, estate and trust litigation, elder law, and family law, as well as those who work for financial institutions, those who represent the Florida Bankers Association and those whose practice relates to real estate title insurance.

The Committee was charged with the task of evaluating the recently promulgated Uniform Power of Attorney Act[1] for possible enactment in Florida. As with other Uniform Acts in the estates and trusts area, the Committee found merit in many of the Uniform Act provisions but rejected numerous others for reasons that will be explained in this white paper. With its work largely completed, the Committee recommendations include significant revisions to Chapter 709 of the Florida Statutes. Part II of the revised Chapter 709 will carry forward without substantive change those provisions of current Chapter 709 that relate to powers of *appointment*.[2] Part I will contain a new Power of Attorney Act [the Act]. This white paper explains the key provisions of the final Committee draft. To avoid confusion, references to sections in Chapter 709 without further qualification (e.g., 709.102) are to sections in the proposed new Act. References to sections in existing Chapter 709 and to sections of the Uniform Act will be identified by a precedent *FS* and Uniform Act, respectively.

III. CURRENT SITUATION

Before turning to a detailed examination of the proposed Act, it is useful to explore some of the policy concerns that shaped it. The proposed legislation addresses both durable powers of attorney and non-durable powers of attorney. A power of attorney is a legal document used by individuals to designate an agent to act on their behalf. A durable power of attorney continues to be legally effective if the principal becomes incapacitated. A non-durable power of attorney is terminated upon the incapacity of the principal. Durable powers of attorney are frequently used in the estate planning context as a viable alternative to guardianship should the individual become incapacitated. The Legislature has recognized that it is desirable to make available to the citizens of Florida a system that provides incapacitated persons the least restrictive alternatives to ensure their physical health and safety, protect their rights and manage their financial resources.[3] Comprehensive legislation is necessary to ensure that durable powers of attorney continue to be an effective

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1 The Uniform Act was completed by the Uniform Law Commissioners in 2006. As of the end of 2009, the Uniform Act has been adopted in four states (Colorado, Idaho, Nevada, and New Mexico) and has been introduced in eight more (Illinois, Indiana, Maine, Maryland, Minnesota, Montana, Oregon, and Virginia).

2 Part II of revised Chapter 709 consists of sections 709.502 through .507 which are identical to current *FS* sections 709.02 through .07, respectively.

3 *FS* section 744.1012.

alternative to guardianship, while providing protection to the principal and clear guidance to the agent under any power of attorney as to their respective rights and responsibilities as well as a mechanism for detection and remedies of abuses.

Various interest groups represented on the Committee held specific opinions about the use and potential abuse of powers of attorney. These opinions can be summarized as follows:

1. Estate planning practitioners

Estate planning practitioners, particularly those with high net worth clients, view the power of attorney as an important tool for engaging in tax saving estate planning techniques such as the making of annual exclusion gifts and the creation of Grantor Retained Annuity and Qualified Personal Residence Trusts. Each of these techniques, and others as well, are dependent on the ability of an agent to make donative transfers of a principal's property. Some also involve the creation of trusts. And, when a family member serves as agent, these transactions can involve a conflict of interest as well. Hence, estate planning practitioners want the Act to permit an agent to be authorized to engage in all of these transactions.

2. Estate litigators and elder law practitioners

Estate litigators and some elder law practitioners share a different perspective. They focus on the abuses that powers of attorney enable when agents prove to be dishonest or duplicitous. From this perspective, the ability to authorize an agent to make donative transfers is particularly troublesome. Thus, some on the Committee favored prohibiting the use of powers to make gifts or to create trusts or to engage in transactions involving a conflict of interest between the agent and the principal.

3. Real estate practitioners

Committee members involved in the real estate practice voiced yet another concern. They worry that an insured real property transaction would be dismantled by a court where the power of attorney is invalid or the agent acted outside of the scope of the power. Even when a court ordered a return of the consideration, there could be liability for lost increases in value, which in some situations could be significant. Those who shared this concern favored a rule which would allow them to enforce a sale or mortgage transaction against the principal's real property, even if the power of attorney was not valid for some reason and even if the agent was acting outside of the scope of its authority, so long as they relied on the power of attorney in good faith and without actual knowledge.

4. Financial institutions

Then there are the myriad concerns voiced by Committee members involved with banks and other financial institutions. The concerns may be divided into three categories: protection of existing business, efficiency in the handling of powers, and concern for liability (and its attendant costs and potential for loss of goodwill). The first category – protection of existing business – manifested itself in a preference for a rule prohibiting compensation for agents because financial institutions see powers being used as a poor substitute for a living trust. The efficiency concern led to a preference for a central registration or recording of powers. Bankers also favored statutory approaches which promote the uniformity of language in powers such as check-the-box statutory form powers, a detailed set of default powers, and the ability to incorporate others by reference to a statutory list, each of which is an approach embraced by the Uniform Act. Lastly, the Bankers' concern about liability manifested itself in support for the view that donative transfers by agents should not be allowed, a hostility to contingent powers as well as springing powers, a bias against allowing the designation of successor agents, a strong desire for definitive rules for honoring or not honoring a power of attorney, and an insistence on immunity for acting on a presumptively valid power.

5. The Committee's response

A good part of the work of the Committee was to assess and reconcile these various views and concerns. Briefly tracking back through the list, the Act does not prohibit donative transfers by agents but it does include provisions intended to insure that a principal's decision to authorize them is a knowing and informed one. The Act also clarifies an agent's duty to maintain a principal's estate plan and the liability an agent incurs for not doing so.

Some of the concerns of real estate practitioners were addressed with a provision providing additional protections for third persons who rely on powers of attorney.[4] And financial institutions achieved much of what they were looking for as well. Although the Act does not create a central registry for powers, it does offer financial institutions a means to the uniformity of language they desire and more specific and comprehensive protection against liability for relying on powers without notice of any defects that might exist. In addition, the Act prohibits springing and other conditional powers but not successor agents or compensation for qualified agents.

IV. DEFINITIONS

Section 709.102 of the Act includes definitions of terms found in more than a single section of the Act. Consideration of most of these can wait until the terms become relevant. A few terms, however, require clarification at the outset.

Power of attorney: The Act defines a power of attorney to be "a writing that grants authority to an agent to act in the place of the principal, whether or not the term power of attorney is used."[5] An act performed by an agent pursuant to a power of attorney has the same effect and inures to the benefit of and binds the principal and the principal's successors in interest as if the principal had performed the act.[6]

Legacy power of attorney: Actually, this term does not appear in the Act. But it is used in this white paper. As used, it refers to a power of attorney that is executed before the effective date of the Act.

Principal and agent: From the definition of power of attorney it may be seen that the Act uses the term "principal" to refer to an individual who creates a power of attorney[7] and the term "agent" to refer to a person who is granted authority to act for a principal under a power of attorney. Agent is synonymous with attorney-in-fact and includes co-agents and successor agents.[8]

Third person: This term is used in the Act to refer to any person who is neither the principal nor the agent.[9]

Knowledge: Many of the Act's provisions depend on whether an agent or a third person has knowledge of a fact. The Act's definition of the term "knowledge" is based on and is substantively identical to the definition of the term in the Florida Trust Code.[10] In summary, knowledge means that a person has actual knowledge of the fact, has received a notice or notification of the fact, or has reason to know the fact from all other facts and circumstances known to the person at the time in

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4 See § 709.119.

5 § 709.102(6). Except as otherwise provided in the power of attorney, a photocopy or electronically transmitted copy of an original power of attorney has the same effect as the original. § 709.106(4).

6 § 709.201(5).

7 §709.102(8).

8 § 709.102(1).

9 § 709.102(12). An agent is excluded from the term "third person" only when the agent acts in its capacity as agent.

10 See *FS* § 736.0104.

question. With respect to an organization operating through employees, the organization has notice or knowledge of a fact involving a power of attorney only from the earlier of the time the information was received by an employee having responsibility to act on matters involving the power of attorney or the time the information would have been brought to the employee's attention if the organization had exercised reasonable diligence.[11]

Notice: Notice also plays an important role in the Act. Giving an agent or third person notice is critical in some contexts and advisable in numerous others. This includes when a power of attorney is revoked or terminated or suspended. Notice is not a defined term in section 709.102. Instead, it is covered comprehensively in section 709.121. Although this section appears in the middle of the Act, an appreciation of the requirements for an effective notice is useful at the outset as notice and its requirements are referred to extensively throughout the Act. One should also note that *notice* is different from *knowledge* (a defined term) which also appears throughout the Act.

Under section 709.102, a notice is legally effective only if it is in writing and is served on the agent or affected third person, as the case may be. In general, notice must be accomplished in a manner that is reasonably suitable under the circumstances and is likely to result in receipt of the document. Permissible methods include first-class mail, personal delivery, delivery to the person's last known place of residence or place of business, or a properly directed facsimile or other electronic message.

Notice to a financial institution is subject to additional requirements. The notice must contain the name, address, and the last four digits of the taxpayer identification number of the principal and it must be directed to an officer or a manager of the financial institution in Florida. As it is not always obvious where notice should be directed, the following web site may be helpful. The site — either directly or by link to other sites — provides the official address for every national bank (not state banks), including the online banks like "Bank of Internet" based in San Diego. The web site is:

http://www.ffiec.gov/nicpubweb/nicweb/searchform.aspx

In general, notice is effective when given. Notice on a financial institution, brokerage company, or title insurance company, however, is not effective until five business days after it is received.

V. THE ACT IN DETAIL

For convenience, the various sections of the Act may be divided to eight categories. In the order they are discussed in this white paper, the categories include sections relating to:

- The scope of the Act;
- The instrument itself (including execution, amendment, revocation, suspension and termination);
- The office of agent (including designation, acceptance, compensation, and resignation);
- The duties of an agent;
- The authority of an agent;
- The liabilities of agents

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[11] § 709.102(5). An organization exercises reasonable diligence if the organization maintains reasonable routines for communicating significant information to the employee having responsibility to act on matters involving the power of attorney and there is reasonable compliance with the routines. Reasonable diligence does not require an employee of the organization to communicate information unless the communication is part of the individual's regular duties or the individual knows a matter involving the power of attorney would be materially affected by the information. Id.

- Acceptance, rejection, liability and reliance of third persons; and
- Judicial proceedings

A. Scope of the new Act

The Act will apply only to powers of attorney created by an individual.[12] With respect to such powers, section 709.107 provides that the meaning and effectiveness of the power will be determined by the Act to the extent the power of attorney is used in Florida or the power states that it is to be governed by the laws of Florida. This includes powers of attorney executed in other jurisdictions.[13] It also includes instruments executed before the Act becomes effective.[14] That is, except as otherwise provided in a particular section, the Act applies retroactively.

1. Relationship of the Act to other law

Although it is much more comprehensive than current section 709.08, there will be issues that the Act does not address. As to these, except to the extent modified by the Act or another Florida law, the Act is supplemented by the common law of agency and principles of equity.[15] Likewise, the remedies under the Act are not exclusive and do not abrogate any right or remedy under Florida law.[16] Moreover, in the event of a conflict between the Act and any other law applicable to financial institutions, the other law controls.[17]

2. Powers to which the Act does not apply

In addition to powers created by persons other than an individual, section 709.103 provides that the Act does not apply to any of the following:

- A proxy or other delegation to exercise voting or management rights;
- A power created on a form prescribed by a government or governmental subdivision, agency, or instrumentality for a governmental purpose; or
- Powers coupled with an interest (such as powers given to a creditor to perfect or protect title in or to sell, pledged collateral).

3. Effect on existing powers of attorney

Except as might otherwise be provided in an individual section, the Act applies to all powers of attorney, regardless of the date the powers were created. The Act also applies to judicial proceedings concerning a power of attorney commenced on, after, or before the effective date of the Act unless, in the last case, the court finds that application of a provision of the Act would substantially interfere with the effective conduct of the judicial proceeding or that it would prejudice

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12 This follows indirectly from the definition of principal as being an individual in section 709.102(8) and directly from section 709.103(4) which states that the Act does not apply to a power created by a person other than an individual. This limitation means that the Act does not apply to powers created by corporations or other non-natural persons.

13 A power executed in another state in a manner that complies with § 709.106 (see "*Execution requirements*", infra p. 6) will be construed as provided in the Act when used in Florida. So, for example, if the power contains an impermissible delegation (see § 709.114(1)(b)) or incorporation by reference (see "*General rule: No incorporation by reference*", infra p. 18), the delegation provision or the impermissible incorporation will not be given effect.

14 See § 709.402(1).

15 § 709.301.

16 § 709.303.

17 § 709.302.

the rights of a party to the judicial proceeding. The Act has no effect on any act done before the effective date of the Act.

B. The power of attorney instrument

1. Execution requirements

A legacy power of attorney will remain valid under the Act provided its execution complied with the law of Florida at the time of its execution.[18] If the legacy power is a durable (or springing) one, it will remain durable (or springing) under the new Act.

Durable and nondurable powers executed after the effective date of the Act must be signed by the principal[19] and by two subscribing witnesses, and be acknowledged by the principal before a notary public.[20] An exception applies to military powers. A military power is valid if it is executed in accordance with the requirements for a military power pursuant to 10 U.S.C. sec. 1004(b).[21] An exception also applies to powers of attorney created and executed under the laws of a state other than Florida, provided the execution complied with the law of the state of execution. [22] This is a significant change from existing law and embraces the concept of making powers of attorney "portable" between states, as encouraged by the Uniform Act.

a) Durable powers

The Act embraces both durable and nondurable powers. A durable power of attorney is one which is not terminated by the principal's incapacity.[23] Unlike the Uniform Act, however, the Act does not make powers durable by default. Consistent with current law,[24] a power of attorney is durable only if it contains appropriate language to that effect. The language mentioned in the Act[25] — "[t]his durable power of attorney is not terminated by subsequent incapacity of the principal except as provided in chapter 709, Florida Statutes" — is not exclusive. A power may be made durable by any language expressing the principal's intent that the agent's authority is to be exercisable notwithstanding the principal's subsequent incapacity, except as provided in chapter 709.

> **Example 1**: P executes a power of attorney one of the provisions of which states: "This durable power of attorney is not affected by

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18 § 709.106(2). The Act does not change the execution requirements for a durable power. See *FS* § 709.08. So the significance of section 709.106(2) occurs with respect to legacy nondurable powers.

19 The Act defines the term "sign" to mean the execution or adoption of a tangible symbol or the attachment or logical association of an electronic sound, symbol, or process, in each case with a present intent to authenticate or adopt the record. "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form. See § 709.102(10) and (11).

20 See §§ 709.105 and 709.106(1). Florida law does not currently address the acceptance of power of attorney documents executed in accordance with the laws of other jurisdictions. The Uniform Act contains provisions providing for the portability of such documents. See Uniform Act § 106(c). The portability concept was rejected by the Committee.

21 § 709.1065(1). Military powers must be notarized but need not otherwise have witnesses. See 10 U.S.C § 1044(b).

22 § 709.106(3). Non-Florida powers of attorney must meet the requirements of the state of execution. As third persons in Florida cannot be expected to know the execution requirements of the 49 other states, third persons may request an opinion of counsel as to validity before they accept the agent's authority.

23 § 706.102(3). Section 709.102(4) defines incapacity to be the "inability of an individual to take those actions necessary to obtain, administer, and dispose of real and personal property, tangible property, business property, benefits, and income." This is similar to the definition found in the Florida Guardianship Law. See *FS §* 744.102(12)(a).

24 As to which, see *FS §* 709.08(1).

25 See § 709.104.

subsequent incapacity of the principal except as provided in s. 709.104, Florida Statutes." The words used by P are similar to those included in section 709.104 and are sufficient to indicate an intent to create a durable power.

b) No springing or other contingent powers

The Uniform Act permits the creation of contingent powers.[26] A contingent power is one which does not become effective until the happening of a condition stated in the power of attorney. The springing power is a common example. A springing power takes effect only when the principal loses capacity.

Springing powers (but probably not other types of contingent powers) are valid under current Florida law.[27] And legacy springing powers remain valid (and springing) under the Act.[28] But to be effective in Florida, powers created on or after the effective date of the Act, must be exercisable as of the time they are executed.[29] Accordingly, post-Act contingent powers, including springing powers, are not effective under the Act.[30] Here again, an exception is made for military powers. Under section 709.1065(2), a deployment-contingent power of attorney is to be afforded full force and effect by Florida courts.[31]

2. Amendment and revocation of powers

a) Amendment

A principal who wishes to amend a power of attorney may do so by revoking the old power and by executing a new one in amended form. As explained below, this can be accomplished in a single document. But direct amendments — codicils for lack of a better term — are not permitted. This restriction helps insulate agents and third persons from concerns that an instrument they are asked to rely on has been amended without their knowledge. Of course, the protection is not perfect. A power of attorney can be revoked without an agent or a third person knowing it (see below). And forgeries are also a possibility. Here, however, other provisions of the Act protect the unknowing agent and third persons who rely on a revoked or forged power without notice of the defect.[32]

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26 See Uniform Act § 109.

27 See *FS*. § 709.08(1).

28 A legacy springing power becomes exercisable upon delivery of an affidavit by the principal's licensed primary physician stating (among other things) that the physician believes that the principal lacks the capacity to manage property as defined in s. 744.102(12)(a). See § 709.108(2).

29 See § 709.108(1).

30 See § 709.108(3). The Committee rationale for this change rests with its collective experience that springing powers are fine in theory, but bad in practice. In theory, they address the reluctance principals have to an instrument that authorizes an agent to act on the principal's behalf while the principal still has capacity to act for his or her own self. In practice, uncertainty about whether and when principals lose capacity has made springing powers problematic both for agents who seek to exercise them and for financial institutions and other third persons who are asked to honor them. On balance, the Committee believes that the reluctance of principals described above is better addressed by other means. An approach used by many practitioners is to escrow the power of attorney with some trusted third person for release to the agent only upon satisfactory proof that the principal has lost capacity. A similar approach can be used to obviate the need for successor agents.

31 Section 709.1065(2) is identical to current *FS* § 709.11.

32 See §§ 709.109(4) and 709.119.

b) Revocation

With respect to revocation, neither the mere lapse of time nor the mere execution of a subsequent power of attorney is sufficient to revoke a prior power. Instead, to revoke a power of attorney the principal must express the revocation in either a new power of attorney or in some other writing signed by the principal.[33] In this latter case, there is no requirement that the other writing be witnessed or notarized. Hence, the formalities required to revoke a power are less stringent than those required to execute one. This reflects the Committee view that revocations present a smaller potential for fraud than do executions. That said, best practice would suggest that a written revocation be notarized so that it can be recorded in any county where the principal owns real estate. In addition, best practice would suggest that a notice of revocation be sent to the agent. Indeed, as a hint, section 709.110(1) states that the principal "may, but is not required to," give the agent notice of the revocation. Although not mentioned in the section, notice of the revocation should likewise be given to all financial institutions where the principal has accounts. Otherwise, the financial institutions are not responsible if they honor a revoked power of attorney.[34]

3. Suspension and termination of powers

Section 709.109 of the Act specifies the events which result in a suspension or termination of a power of attorney or of an agent's authority. In all cases, the termination or suspension is not effective as to an agent who acts in good faith and without knowledge of the termination or suspension. Moreover, acts performed by the unknowing agent, unless invalid or unenforceable for other reasons, bind the principal and the principal's successors in interest.[35]

a) Suspension of a power

As with current law,[36] section 709.109(4) provides for the suspension of an agent's authorities upon initiation of a proceeding to determine the principal's capacity.[37] The suspension takes effect when the agent has knowledge of the filing of the petition and lasts until the petition is dismissed or withdrawn. In the event of an emergency, an agent may petition the court for continued authority.[38]

b) Termination of a power

If a power specifies when it is to terminate, it will terminate at the specified time.[39] In addition, a power terminates:

- When the purposes for the power are accomplished;
- If the principal revokes it or dies;

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33 See § 709.110(1).

34 See § 709.119(1).

35 § 709.109(4).

36 See *FS* § 709.08(3)(c).

37 Unless otherwise ordered by the court, a proceeding to determine the capacity of the principal does not affect any authority of the agent to make health care decisions for the principal, including those defined in chapter 765. If the principal has designated a health care advance directive designating a health care surrogate pursuant to chapter 765, the terms of the directive control any conflicting provisions in the power of attorney, unless the power of attorney is executed after the advance directive and the power expressly states that it is to control in the event of any conflict. § 709.109(3)(b). Accord, *FS* § 709.08(3)(a)3.

38 § 709.109(3)(a).

39 The provisions of the Act covering terminations of a power of attorney appear in section 709.109(1).

- If a power is not durable, when the principal loses capacity;
- If a power is durable, upon an adjudication of incapacity (unless the court determines otherwise); or
- When the agent's authority terminates (see below) and the power of attorney does not provide for an alternate agent.

c) Termination of an agent's authority

Section 709.109(2) addresses when an agent's authority terminates. That happens:

- When the agent dies, becomes incapacitated, or is removed by a court of competent jurisdiction;
- Upon the filing of an action for the dissolution, legal separation, or annulment of the marriage of the agent to the principal;
- When the power itself terminates; or
- Except as provided by the court, if the principal is adjudicated totally or partially incapacitated and a guardian of the property is appointed for the principal.

4. The office of agent

a) Qualifications

The qualification requirements to serve as an agent appear in the definition of "agent" in section 709.102(1). Under that definition, only natural persons (i.e., individuals) who are 18 years of age or older and certain financial institutions may be named as an agent. To qualify, a financial institution must have a place of business in Florida and be authorized to conduct trust business in this state.

b) Designation

Subject to the above qualification requirements, a principal may designate a single agent or, if desired, a principal may designate two or more persons to act as co-agents. Unless the power of attorney provides otherwise, each co-agent may exercise its authority independently.[40] This is a change in Florida law.[41] Even where the power of attorney requires two or more agents to act jointly, there is a special exception for banking transactions to allow any one of the agents to sign checks and otherwise handle banking matters with a single signature.[42]

Also, in what may be another change in current law,[43] a principal may designate one or more successor agents to act if the primary agent's authority terminates or the agent declines to

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40 § 709.111(1). The liabilities of co-agents are discussed in "*Liability for actions of co-agents and successor agents*", infra p. 22.

41 Compare § 709.08(9) which requires a majority of named agents (or both if there are only two) to concur unless otherwise provided in the document.

42 § 709.111(6). This recognizes modern banking practices and the inability of a financial institution to enforce dual-signature requirements in many transactions.

43 It is unclear whether current law permits designation of successor agents as it is not specifically authorized in *FS* § 709.08.

serve, dies, or resigns.[44] Unless the power of attorney provides otherwise, a successor agent has the same authority as that given to the primary agent.[45] The successor agent may not act until the predecessor agent or agents have resigned, died, become incapacitated, are no longer qualified to serve, or have declined to do so.[46]

c) Acceptance

It goes without saying that a person may not be made the agent of another against his or her will. Thus, agents must accept the power. According to section 709.113, if a power specifies a method for acceptance, an agent accepts the power by complying with that method. Otherwise, an agent accepts a power by exercising authority or performing duties as an agent or by any other assertion or conduct indicating acceptance. This is not an all or nothing thing. The scope of acceptance is limited to those aspects of the power for which the agent's assertions or conduct reasonably manifest acceptance.[47] This can be a point of considerable significance. As is explained later, an agent can incur liability for a failure to act.[48] But the duty an agent may have to act is circumscribed by the scope of the agent's acceptance of the power.

d) Compensation

Among the factors to be considered in determining whether to accept a designation as an agent are the duties and liabilities the Act imposes on agents. These matters are discussed at length later.[49] Another relevant factor is whether the agent is entitled to compensation. For the most part, this is a question that can be addressed in the terms of the power itself. Except as provided in the power of attorney, section 709.112(1) states that an agent is entitled to reimbursement of expenses reasonably incurred on behalf of the principal. Qualified agents (but not others) are also entitled to compensation that is reasonable under the circumstances.[50] Qualified agents include financial institutions,[51] an attorney or certified public accountant licensed in Florida, the principal's spouse, and relatives of either the principal or the principal's spouse.[52] The term also includes any other natural person provided the person is a resident of Florida and (in effect) the person is not in the business of serving as an agent. More precisely, the person must never have served as an agent for more than three principals at the same time.

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44 The authority to designate co-agents and successor agents is limited to the principal. This authority may not be delegated by the principal to others. Thus, the Act does not allow a principal to authorize an agent to designate his or her own successor or co-agent. Nor may these authorities reside with a committee or protector. Compare Uniform Act § 111(b).

45 § 709.111(2)(a). The liabilities of successor agents are discussed in "*Liability for actions of co-agents and successor agents*", infra p. 22.

46 § 709.111(2)(b). Recall that financial institutions dislike powers with designated successor agents because of the uncertainties involved in ascertaining when the successor is authorized to act. Although other provisions of the Act provide protections for agents and third persons, careful consideration should be given to using other approaches such as the escrow approach mentioned previously. See note 30 in "*No springing or other contingent powers"*, supra p. 7.

47 § 709.113.

48 See "*Liability of agents*", beginning infra p. 21 .

49 As to an agent's duties, see "*Duties of agents*", infra p. 11. Agent liability is discussed in "*Liability of agents*", infra p. 21.

50 § 709.112(2) and (3).

51 The financial institution must have trust powers and a place of business in Florida.

52 Section 709.112(3) speaks of the principal's spouse or "an heir of the principal within the meaning of s. 732.103." Since relatives of the last deceased spouse of the principal can qualify as an heir of the principal under *FS* § 732.103(5), qualified agents include relatives of both the agent and the agent's spouse.

Before leaving the topic of compensation, it is informative to consider why the Act distinguishes between qualified and nonqualified agents. The distinction addresses the concern previously mentioned that financial institutions have with a blanket provision permitting the compensation of agents. The concern is that such a provision would encourage and facilitate an industry in which unlicensed and unregulated individuals would serve as agents for profit. By permitting compensation for qualified agents and prohibiting compensation for others, the Act seeks to strike a balance between that concern and the wishes some principals might have with respect to the compensation of their agents.

e) Resignation

An agent may resign as provided in the power of attorney. In the absence of a provision covering resignation, an agent may resign by giving notice[53] to the principal, any court-appointed guardian, and any co-agent, or if none, to the next successor agent.[54]

5. Duties of agents

An important feature of the Act is the clarity it provides with respect to the duties of an agent. The relevant provision is section 709.114 which is based in some measure on the corresponding provision of the Uniform Act. Under section 709.114, the duties of an agent are divided into two categories: mandatory and default. Mandatory duties apply notwithstanding a contrary provision in the power. Default duties apply in the absence of a contrary provision. Thus, a principal is free to expand, curtail, or eliminate a default duty.

a) Mandatory duties

An agent's mandatory duties are enumerated in section 709.114(1). The list is an expanded and modified version of Uniform Act section 114(a). The mandatory duties include the duty to act within the scope of the authority granted in the power[55] and, to the extent actually known, in a manner that is not contrary to the principal's reasonable expectations;[56] to act in good faith[57] and (except as authorized by other statutory provisions), in a manner that is not contrary to the principal's best interest;[58] to attempt in good faith to preserve the principal's estate plan;[59] to perform personally,[60] to keep adequate records;[61] and, if the power of attorney effectively authorizes the agent to access the principal's safe deposit box, to create and maintain an accurate and current inventory of the box.[62] Some of these duties merit further discussion.

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53 On the requirements for an effective notice, see § 709.121.

54 § 709.118.

55 § 709.114(1)(a).

56 § 709.114(1)(a)1.

57 § 709.114(1)(a)2

58 § 709.114(1)(a)3.

59 § 709.114(1)(a)4.

60 § 709.114((1)(b).

61 § 709.114(1)(c).

62 § 709.114(1)(d). The Uniform Act does not include this duty. For the requirements for an effective authorization of an agent to enter a principal's safe deposit box, see *F.S.* § 655.933.

1) *The duty not to act in a manner that is contrary to the principal's actually known reasonable expectations*

Section 709.114(1)(a)1 provides that an agent has a mandatory duty not to act in a manner that is contrary to the principal's reasonable expectations actually known by the agent. A somewhat similar duty appears in the Uniform Act. But the Uniform Act differs from the Florida formulation. The Uniform Act states that an agent has a duty TO ACT in accordance with the principal's reasonable and actually known expectations. The Florida formulation is phrased as a duty NOT TO ACT in a manner CONTRARY to those expectations.

The Committee believes that the Florida formulation is preferable because it reduces the risk that section 709.114(1)(a)1 could be construed as authorizing an agent to do something. It is important to recognize that it does not. It simply means, that with respect to authorities the agent does have, the agent must not exercise those authorizes in a manner that is contrary to the principal's actually known expectations. "Known" in this context means known by the agent. Stated somewhat differently, section 709.114(1)(a)1 restrains an agent from acting. It does not authorize or require an agent to act.

2) *The duty not to act in a manner that is contrary to the principal's best interest*

The mandatory duty to refrain from acting in a manner that is contrary to the principal's best interest appears in section 709.114(1)(a)3. Here again, the formulation differs from the corresponding provision of the Uniform Act. The duty under the Uniform Act is phrased as an affirmative duty to act in the principal's best interest. More importantly, the duty under the Uniform Act is explicitly subservient to the agent's duty (discussed above) to act in accordance with the principal's known reasonable expectations.[63] No such hierarchy appears in the Florida Act. To the contrary, these dual duties are co-equal under the Florida Act. As mandatory duties, this co-equal status may not be modified in the power of attorney. However, the duty not to act in a manner that is contrary to the principal's best interest in section 709.114(1)(a)3 is subject to qualification by other provisions of the Act. That is, section 709.114(1)(a)3 states that the duty applies "except in those circumstances authorized by statute." This is an important qualification. As is discussed later, within limits, section 709.202 allows a principal to authorize an agent to make gifts of the principal's property. Without the qualification, it is arguable that no exercise of a gift making authority would be consistent with the agent's duty to act in the best interest of the principal. With the qualification, gifts are not impermissible, per se. Nor are they appropriate, per se. As is illustrated in the following examples, there is a balancing to be done here.

> **Example 2**: Assume a divorced principal (P) who has three children, C1, C2, and C3. P's will leaves all of his substantial estate per stirpes to his descendants. As part of his estate planning, P executes a power of attorney naming his sister S as agent. The power effectively authorizes S to make gifts of P's property to any descendant of P.[64] C1 and C2 each marry at a point when P still has capacity. At the time of C1's marriage, P makes a $20,000 cash gift to him to facilitate his purchase of a home. A similar gift to

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63 See Uniform Act § 114(a)(1). The comments to the Uniform Act provision explain this approach as follows:

> Establishing the principal's reasonable expectations as the primary guideline for agent conduct is consistent with a policy preference for 'substituted judgment' over 'best interest' as the surrogate decision making standard that better protects an incapacitated person's self-determination interests.

64 On what must be done to authorize an agent to make gifts of a principal's property, see the discussion of section 709.202 in "*Authorities that can impact a principal's existing estate plan*", beginning on p. 19, infra.

C2 is made at the time of her marriage. P and S discuss making a similar gift to C3 upon his marriage. Such a gift would not jeopardize P's own welfare. But P loses capacity shortly before C3 marries. On these facts, an exercise of S's authority to make a gift to C3 would not be contrary to P's known expectations and would not be precluded by S's duty to act in P's best interest. Accordingly, S may (but is not required to) exercise her authority to make a gift to C3.

Example 3: Same as the previous example except that prior to his loss of capacity P suffers a substantial financial setback. Although S reasonably believes that, were P competent, he would still make the gift to C3, P also believes that any gift at this time could potentially jeopardize P's own financial welfare. As an initial matter, even with these additional facts, it is not necessarily the case that a gift to C3 would not be in P's best interest. This is true because the "best interest" standard in the Act is not restricted to "financial interest." The standard permits consideration of other factors, including, for example, a principal's desire to treat children equally and to promote harmony in the family. In any case, even if a gift to C3 in this example is inconsistent with P's best interest, S may, in her discretion, make the gift because the gift is consistent with P's known expectations.

3) *The duty to preserve the principal's estate plan*

The mandatory duty to preserve the principal's estate plan is new to Florida law. It appears in section 709.114(1)(a)4[65] and is subject to a number of qualifications. First the duty applies only to the extent the principal's estate plan is actually known by the agent. Hence, an agent has no duty to ascertain the principal's plan. And, even if the plan is known to the agent, the agent incurs no liability for failing to preserve it as long as the agent acts in good faith.[66] Finally, the duty to preserve the principal's estate plan applies only when preservation of the plan is in the principal's best interest based on all relevant factors, including:

- The value and nature of the principal's property;
- The principal's foreseeable obligations and need for maintenance;
- Minimization of taxes;[67]
- Eligibility for a statutory or regulatory benefit, program, or assistance;
- The principal's personal history of making or joining in the making of gifts.

The following examples have been considered and approved by the Committee.

Example 4: As the designated agent of P, A wants to exercise an otherwise effective authority under P's power of attorney to create and fund a revocable living trust. The objective is to facilitate investment of P's assets and to reduce administration costs at P's death. The distribution terms of the trust at P's death will mirror those in P's current will. On these facts, the creation of the trust by

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65 Section 114(b)(6) of the Uniform Act is similar although the duty detailed there is a default duty, not a mandatory one.

66 See § 709.114(3).

67 Including income, estate, inheritance, generation-skipping transfer, and gift taxes.

A would be consistent with A's duty to preserve the principal's actually known estate plan.

Example 5: Same as the preceding example except P has no will. The terms of the revocable trust will mirror Florida's intestacy statute with the exception of a share that is to pass to P's oldest child. Because the child is disabled, his share will be held in a continuing trust after P's death. The answer is the same.

Example 6: Same as Example 5 except that in addition to the authority to create a trust, A also has authority to conduct banking transactions on P's behalf. To pay an attorney to draft the trust, A withdraws money from a bank account held jointly by P and one of his children. Because the creation of the trust is in P's best interest, the withdrawal from P's joint account is consistent with A's duty to preserve P's actually known estate plan.

Example 7: After consulting his attorney, P executes a will and a durable power of attorney. The will leaves all of P's stock holdings at Smith Barney to P's adult son, S and the residue of P's estate to his second wife, W. P's brother, B is named agent. The originals of both the will and the power of attorney are left with P's attorney for safe keeping. A year later, P loses capacity and pursuant to an escrow agreement P made with his attorney, the original of the power of attorney is sent via registered mail to B. No mention is made of P's will and B makes no inquiry about whether P had a will. In the exercise of B's authority to conduct banking transactions. B retitles P's brokerage account to "P TOD to S and W." B's intent is to minimize probate at P's death. However, because of B's actions, at P's subsequent death, S does not take all of the securities in the Smith Barney account as P's will directs. Although B's actions in retititling the brokerage account fundamentally alter P's estate plan, B's actions are proper because the terms of P's will were not actually known to B and B has no duty under the Act to ascertain whether P had a will.

Example 8: Same as Example 7 except when P's attorney sent the original of the durable power of attorney to B, the attorney also included a copy of P's will. The copy was contained in a sealed envelope on which was written" "Copy of the Will of P." The transmittal letter indicated that the will was being sent to B in accordance with P's instructions. Although B read the transmittal letter, he did not open the envelope and read P's will. On these facts, B acted improperly when he retitled the brokerage account. Although B has no duty to ascertain whether P had a will, when the existence of the will is known to B and B has unrestricted access to the terms of the will, B's duty to act in good faith and in a manner that is not inconsistent with P's actually known reasonable expectations requires him to read the will. Thus, in this example, B will be treated as having actual knowledge of the terms of P's will.

4) *The duty to perform personally*

Current *FS* section 709.08(3)(a) states as a general principle that a power of attorney is nondelegable. Section 709.114(1)(b) of the Act expresses a similar rule. An exception applies to delegations permitted under Florida's Prudent Investor Rule. [68]

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[68] See § 709.114(1)(b). See also *FS* § 518.112.

5) *The duty to keep adequate records*

Under the Uniform Act, an agent's duty to keep adequate records is a default duty. It is elevated to a mandatory one in the Florida Act. As expressed in section 709.114(1)(c), the duty requires an agent to keep a record of all receipts, disbursements, and transactions made on behalf of the principal.

The duty imposed by section 709.114(1)(c) should be considered in conjunction with subsection (6) of the same section. Subsection (6) restricts the persons to whom an agent has an obligation to disclose receipts, disbursements, safe deposit box inventories, and transactions. Except as provided in the power of attorney or by order of the court, disclosure is required only at the request of the principal, a court-appointed guardian, another fiduciary acting for the principal, a governmental agency having authority to protect the welfare of the principal, or, upon the principal's death, by the personal representative or successor in interest of the principal's estate. Upon receiving a valid request, the agent has 60 days to comply with the request. Provision is made for an additional 60 day extension if the agent substantiates the need for one in a writing or other record within the initial 60 day period.[69]

b) Default duties

Default duties apply unless the power of attorney provides to the contrary. These duties appear in section 709.114(2) and include, in the order discussed below, the duty of competency, the duties of impartiality and loyalty, and the duty to cooperate with health-care decision makers.

1) *The duty to act with care, competence, and diligence*

An agent owes fiduciary duties to its principal. Among these duties is the default duty to act with care, competence, and diligence.[70] The precise requirements of this standard will vary with the circumstances. For an agent who has accepted authority to make investment decisions for the principal,[71] the standard requires compliance with Florida's Prudent Investor Rule.[72] As provided there, and more generally in section 709.114(4), if an agent is selected because the agent possesses special skills or expertise, or in reliance on the agent's representations that it has special skills or expertise, the special skills or expertise must be considered in determining compliance with this standard.

2) *The duties to act loyally and to avoid conflicts*

Section 709.114(2)(a) provides that an agent has a default duty to act loyally for the *sole* benefit of the principal. Closely related section 709.114(2)(b) imposes on agents a default duty to act so as to avoid conflicts of interest that impair the agent's ability to act impartially in the principal's best interest. Both of these duties are in accord with the traditional common law duty of

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69 Section 709.114(6) is substantially identical to a section 114(h) of the Uniform Act. The only difference is that the Uniform Act gives an agent 30 days to comply. In its consideration and ultimate adoption of the provision, the Committee unanimously adopted the following resolution as guide to their intent: "We approve in principle subsection (7) with the understanding that we interpret it to not require the appointment of a guardian or conservator, solely for the purpose of receiving or demanding an accounting. The Power of Attorney can expand this list of people who can request disclosure."

70 § 709.114(2)(c).

71 As to which, see the discussion of § 709.208 in "*Special rules for banks and other financial institutions*," beginning at p. 18, infra.

72 See *FS* § 518.11. See also the definition of "fiduciary" in *FS* § 518.10.

loyalty[73] and with the similar duty of trustees under the Florida Trust Code.[74] Under these standards, even if an agent acts competently and in the best interest of the principal, the agent can incur liability for actions that also benefit the agent or that otherwise involve a conflict of interest.

Because an agent's duties of loyalty and impartiality, as expressed above, are default duties, a principal is free to modify or eliminate them in the terms of the power of attorney. Caution is advised here. Under section 709.1145(2), a provision that authorizes an agent to engage in a conflicted transaction is invalid if it was inserted into the power of attorney as a result of an abuse of a fiduciary or confidential relationship with the principal by the agent or the agent's affiliate.[75] For this purpose, affiliates of an agent include:

- The agent's spouse, descendants, siblings, parents and the spouses of any of them;
- A corporation or other entity in which the agent or a person that owns a significant interest in the agent, has an interest that might affect the agent's best judgment;
- A person or entity that owns a significant interest in the agent; and
- The agent when acting in a fiduciary capacity for someone other than the principal.[76]

Even assuming that a provision granting an agent the authority to engage in a conflicted transaction passes muster under section 709.1145(2), an exercise of the authority may prompt a judicial challenge by or on behalf of the principal. If so, upon presentation of evidence that the agent or an affiliate had a personal interest in the exercise of the power, the agent or affiliate will have the burden of proving by clear and convincing evidence either:

- That the agent acted *solely* in the interest of the principal; or
- That the agent acted in good faith in the principal's best interest and that the conflict was expressly authorized in the power of attorney.[77]

3) *The duty to cooperate with health-care providers*

Under Section 709.114(2)(d), an agent has a default duty to cooperate with a person that has authority to make health-care decisions for the principal to carry out the principal's reasonable expectations if actually known by the agent. If the expectations are not actually known, the agent must act consistently with the principal's best interest.

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73 See Restatement (Second) of Agency § 387 (1958).

74 See *FS* § 732.0802(1). The formulation of an agent's duty of loyalty in the Florida Act should be contrasted with the corresponding provision of the Uniform Act. Section 114(b)(1) of the Uniform Act states that an agent has a duty to act for the principal's benefit, rather than the principal's *sole* benefit. Under this standard and as explicitly stated in Uniform Act § 114(d), "an agent that acts with care, competence, and diligence for the principal's best interest incurs no liability solely because the agent also benefits from the act or has an individual or conflicting interest in relation to the property or affairs of the principal."

75 The Committee emphasizes that section 709.1145(2)(a) relates to judicial actions against the agent by or on behalf of the principal. The section is therefore subject to third person reliance provisions found elsewhere in the Act. See § 709.119.

76 § 709.1145(2)(b)1 - 5.

77 § 709.1145(1).

6. Authorities of agents

Except as otherwise limited by section 709.201 of the Act or by other applicable law, an agent "has full authority to perform, without prior court approval, every act authorized and specifically enumerated in the power of attorney." These authorities extend to property[78] acquired both before and after the execution of the power and whether or not the property is located or the power is executed in Florida.[79]

a) Prohibited personal authorities

The statement of an agent's authority in section 709.201 – in effect, that agents may perform those acts specifically enumerated in the power of attorney – is subject to a number of qualifications and exceptions. The initial exception is found in section 709.201(2) which includes a list of personal authorities that the Act does not permit a principal to delegate to an agent. These should be familiar territory to many practitioners because similar prohibitions exist under current law.[80] Whether or not authorized in a power of attorney instrument, an agent may not:

- Perform duties under a contract that requires personal services of the principal;
- Make an affidavit as to the principal's personal knowledge;
- Vote on behalf of the principal in a public election;
- Execute or revoke the principal's will or codicil; or
- Exercise powers or authority held by the principal in a fiduciary capacity.

b) No blanket or default powers

The general statement in section 709.201 has other more subtle implications. One is that a blanket grant of authority (*i.e.*, "to do all acts that the principal could do"), is not sufficient to grant *any* authority to the agent.[81] Another is that agents have no default authorities under the Act. That is, agents may perform those acts *and only those acts* specifically enumerated in the power of attorney.[82]

In early drafts of the Act, section 709.201 included a laundry list of powers that principals and their advisers could consider in crafting a power of attorney. The list was a somewhat expanded version of section 203 of the Uniform Act and those wanting to see the list should refer to that section.[83] But most of the list was removed in the final product for reasons explained more fully in the discussion of incorporation by reference (below). There are three exceptions. Section 709.201(1) includes without substantive change three provisions found in current *FS* section 709.08. These are not default authorities. They merely continue current law which authorizes their inclusion

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78 Property means any right or interest in anything that may be the subject of ownership, whether real or personal, legal or equitable. § 709.102(9).

79 § 709.201(4).

80 See *FS* § 709.08(7)(b).

81 Contrast Uniform Act § 201(c) which provides that this type of blanket provision gives an agent a broad array of authority as provided in sections 204 through 216 of the Uniform Act.

82 If two or more enumerated authorities overlap, the broadest authority controls. § 709.201(3).

83 See also the more targeted powers found in Uniform Act sections 204 (real property), 205 (tangible personal property), 209 (operation of an entity or business), 210 (insurance and annuities), 211 (estates, trusts, and other beneficial interests), 212 (claims and litigation), 213 (personal and family maintenance), 214 (benefits from governmental programs or civil or military service), 215 (retirement plans), and 216 (taxes).

in a power of attorney. The Committee's objective was to avoid any negative implication that might have arisen had they been omitted. The provisions referred to here are:

- Section 709.201(1)(a) relating to the execution of stock powers or similar documents and the delegation of authority to register securities into or out of nominee form. This provision is identical to current section 709.08(7)(a)1;
- Section 709.201(1)(b) relating the authority to convey or mortgage homestead property. This provision is identical to current section 709.08(7)(a)2; and
- Section 709.201(1)(c) which permits a principal to empower an agent under a durable power of attorney to make health care decisions on the part of the principal. This provision is substantively identical to current section 709.08(7)(c).

c) General rule: No incorporation by reference

As mentioned above, the final version of section 709.201 omits the laundry list of powers that appeared in earlier drafts. The list was removed because of the Committee's concern that its presence would invite attorneys and others to try to incorporate the list by reference. The general statement of an agent's authority in the introductory sentence of section 709.201 refers only to acts "authorized and specifically enumerated in the power of attorney." Thus, with two exceptions discussed below, the Act does not permit incorporation of an agent's powers by reference. Here is why.

Although never strictly necessary, an ability to incorporate by reference the terms authorizing an agent to act can be a useful convenience. The Committee's reason for prohibiting it rests with the competing concern that incorporation creates an undesirable risk that principals will execute instruments containing less than obvious terms which they either do not intend or that they do not fully appreciate and understand. The Act cannot guarantee that all principals will carefully consider the terms of the instruments they execute. It can, however, facilitate awareness and understanding for those who do.

d) Special rules for banks and other financial institutions

Too much of a good thing can be bad. And in this context, a universal prohibition against incorporation could impede a desirable uniformity of language in powers. Uniformity is desirable because it reduces ambiguity and increases efficiency, particularly when third persons are asked to honor an agent's authority. These concerns are greatest when agents deal with financial institutions. For that reason, section 709.208 allows incorporation in two areas, both of which apply to financial institutions.

1) *Banking transactions*

Without the need for individual enumeration in the power, an agent may be authorized to conduct an array of actions with respect to accounts at banks and other financial institutions by stating that the agent has "*authority to conduct banking transactions as provided in section 709.208(1), Florida Statutes*." (emphasis added)

Among others, the authorized actions include the authority to establish, continue, modify, terminate, or make withdrawals from a principal's account; to contract for financial services, including renting a safe deposit box; to receive statements, vouchers, notices, and similar documents from a financial institution; to apply for and use debit cards, electronic transaction authorizations, and travelers checks; to draw upon any line or credit, credit card, or other credit established by the principal; and to purchase or to endorse and negotiate personal, cashiers, counter, etc. checks.

2) *Investment transactions*

Without the need for individual enumeration in the power, an agent may be granted general authority to engage in an array of actions with respect to investment instruments[84] held by financial institutions by stating that the agent has "*authority to conduct investment transactions as provided in section 709.208(2), Florida Statutes.*" (emphasis added)

Among others, the authorized actions include the authority to buy, sell or exchange investment instruments; to establish, continue, modify or terminate an investment account; to exercise voting rights and to pledge investment instruments as security to borrow, pay, renew, or extend the time for payment of a principal's debt; to receive certificates and other evidences of investment instrument ownership; and to exercise voting rights with respect to investment instruments.

e) Authorities that can impact a principal's existing estate plan

Because of the potential for abuse, section 709.202 singles out certain authorities for special treatment. A common thread to these authorities is that their exercise can impact a principal's existing estate plan. Section 709.202 applies to an authority to:

- Create an inter vivos trust;
- Amend, modify, revoke or terminate a trust created by or on behalf of the principal;
- Make a gift;
- Create or change rights of survivorship;
- Create or change a beneficiary designation;
- Waive the principal's right to be a beneficiary of a joint and survivor annuity, including a survivor benefit under a retirement plan; or
- Disclaim property and powers of appointment.

As to these authorities, section 709.202 provides both additional formalities and limitations on their authorization and exercise. We begin with the additional formalities.

1) *Additional formalities*

As an initial matter, section 709.202(1) specifies additional formalities that a principal must comply with in order to authorize an agent to do any of the actions listed above. Notwithstanding section 709.201, an agent may not exercise any of the above authorities on behalf of the principal or with the principal's property unless the principal places his or her signature or initials next to the paragraph containing the enumeration of the agent's authority in the power of attorney. Note that it is not enough for the principal to sign or initial the page on which these powers appear.

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84 The term "investment instruments" is broadly defined to mean:

> [S]tocks, bonds, mutual funds, and all other types of securities and financial instruments, whether held directly, indirectly, or in any other manner, including, but not limited to, shares or interests in a private investment fund, including, but not limited to, a private investment fund organized as a limited partnership, a limited liability company, a statutory or common law business trust, a statutory trust, or a real estate investment trust, a joint venture, or any other general or limited partnership; derivatives or other interests of any nature in securities such as options, options on futures, and variable forward contracts; mutual funds; common trust funds; money market funds; hedge funds; private equity or venture capital funds; insurance contracts; and other entities or vehicles investing in securities or interests in securities whether registered or otherwise, except commodity futures contracts and call and put options on stocks and stock indexes.

§ 709.208(2).

The Act requires a separate signing or initialing of each individual authority. To facilitate this and to insure compliance with section 709.202(1), each individual authority should appear in a separate paragraph and a place should be provided for the principal to sign or initial next to each paragraph. Authority specified in a paragraph the principal signs or initials will be authorized; authority specified in a paragraph that the principal declines to sign or initial will not.

2) *Other restrictions and limitations*

In addition to increased formalities, section 702.202 places new restrictions and limitations on these authorities. Three of these apply across the board. As a somewhat redundant but useful reminder to agents, all of these authorities are explicitly made subject to the agent's duties under section 709.114, including the duty to preserve the principal's actually known estate plan.[85] All are also subject to the proviso that the authorities must not be otherwise prohibited by another agreement or instrument to which the authority or property is subject.[86] Less obviously, the authorities listed in section 709.202(1) apply only with respect to an agent's exercise of authority on or after the effective date of the Act. This follows directly from section 709.402(4) which states that an act done before the effective date of the Act is not affected by the Act.[87] Additional restrictions and limitations are discussed below.

(a) Authority to amend, modify, revoke, or terminate the principal's trust

Even assuming full compliance with the additional formalities imposed in section 709.202, an agent may amend, modify, revoke, or terminate a trust for which the principal is the settlor only if the trust instrument explicitly provides for amendment, modification, revocation, or termination by the settlor's agent.[88]

(b) Special limitation on general authority to make gifts

Assuming compliance with the formalities required by section 709.202, an agent may be authorized to make gifts of the principal's property by transfer or exercise of a principal's presently exercisable general power of appointment.[89] The authority may relate to gifts of specific property or it may be phrased as a general authority to make gifts. In this latter case,

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85 See § 709.202(1).

86 See id.

87 Note that the relevant issue here relates to when an agent exercises authority not to when the instrument itself was executed. Indeed, the Act applies to a power of attorney whether the power was executed before or after the effective date of the Act. See § 709.402(1). However, since the Act has no effect on actions taken prior to the effective date of the Act, the Act has nothing to say with respect to pre-Act actions of agents of legacy powers. To further clarify, the Committee is aware of a difference of opinion on the effectiveness under current law of an authorization in a power of attorney for the agent to create a trust of the principal's property. Because the Act applies only to exercises on or after its effective date, the Act avoids taking a position on the issue as it relates to pre-Act exercises of the agent's purported authority. However, even if Florida courts conclude that an authority to create a trust is not permissible under current law, if the authority is included in a legacy power of attorney, it will become effective for exercises on or after the effective date of the Act.

For additional discussion of how section 709.202 relates to legacy powers of appointment, see "*Inapplicability of section 709.202 to legacy powers* ", infra p. 21.

88 § 709.202(1)(b).

89 A presently exercisable general power of appointment is a power of appointment exercisable at the time in question in favor of the principal, the principal's estate, the principal's creditors, or the creditors of the principal's estate. The term does not include a power exercisable in a fiduciary capacity or only by will. It includes a power that in not exercisable until the occurrence of a specified event, the satisfaction of an ascertainable standard, or the passage of a specified period only after the contingency associated with the power has occurred. § 709.102(7).

however, unless the authorization provides otherwise, gifts by the agent may not exceed the annual exclusion amount specified in IRC s. 2503 (or twice that amount in the case of a split gift).[90] An agent's authority to consent to gift splitting for gifts made by the principal's spouse is similarly limited.[91]

> **Example 9:** P's power of attorney effectively authorizes her agent to create revocable and irrevocable trusts on P's behalf. The power does not, however, specifically authorize the agent to make gifts in excess of the gift tax annual exclusion. Although the agent may create an irrevocable trust, the initial funding of the trust and all subsequent transfers of property to the trust are subject to the restrictions imposed by section 709.202(3)(a). The restrictions do not apply to a revocable trust.

(c) Special restriction for actions that benefit unrelated agents

Notwithstanding an expressed general enumeration of authority to do an act, unless a power expressly provides otherwise, an agent who is not an ancestor, spouse, or descendant of the principal, may not exercise authority to create in the agent or in someone the agent is legally obligated to support, any interest in the principal's property whether by gift, right of survivorship, beneficiary designation, disclaimer, or otherwise.[92]

3) *Inapplicability of section 709.202(1) to certain banking and investment transactions*

Section 709.202(4) addresses a concern that financial institutions have when an agent makes a deposit to or a withdrawal from accounts held in survivorship or beneficiary form. Without more, the authority to take these actions could be seen as an authority to create or modify rights of survivorship or beneficiary designations to which the more stringent formality provisions of section 709.202(1) apply. Section 709.202(4) provides to the contrary. The section provides that, if a power of attorney is otherwise sufficient to grant an agent authorization to conduct banking or investment transactions, either using the incorporation methodology allowed by section 709.208(1) and (2), or otherwise, then making a deposit to or a withdrawal from an insurance policy, retirement account, IRA, benefit plan, bank account, or any other joint or payable on death account is not a power to create or modify rights of survivorship or beneficiary designations and no further specific authority is required for the agent to exercise such authorization.[93]

4) *Inapplicability of section 709.202 to legacy powers*

Legacy powers of attorney present a special problem with respect to the additional formalities imposed by section 709.202(1). Because the sign-or-initial requirement is new under the Act, it is unlikely that any legacy power will comply with it. Section 709.202(5) addresses this concern. Under it, notwithstanding anything to the contrary in section 709.202, if a legacy power is otherwise sufficient to authorize an agent to exercise any of the authorities described in section 709.202(1), then the power of attorney is sufficient to the same extent under the Act. As a

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90 See § 709.202(3)(a).

91 See § 709.202(3)(b).

92 § 709.202(2).

93 Section 709.202(4) also provides that banks and other financial institutions have no duty to inquire as to the appropriateness of the agent's actions and no liability to the principal or to other persons for actions taken in good faith reliance on the appropriateness of the agent's actions. The section does not eliminate the agent's duties and liability to the principal.

consequence of this provision, legacy powers are not subject to the sign-or-initial requirement of section 709.202(1). Nor are they subject to the limitations imposed by sections 709.202(2) and (3).

7. Liability of agents

a) In general

An agent is a fiduciary[94] and as such is liable for improper acts or omissions. However, the extent of liability is affected by several other Act sections. For one, an agent's liability assumes that the agent has accepted the power. Since acceptance may be limited, so too may be the agent's liability.

> **Example 10:** Prior to losing capacity, P executed a power of attorney designating A as agent and authorizing A to conduct banking and investment transactions in conformity with the requirements of section 709.208. The power of attorney had no provision dealing with acceptance of the power. After P lost capacity, A deposited checks in P's savings account and drew checks on P"'s checking account to pay for P's support and other needs. A received and saved the statements from P's brokerage account, but did not take any other actions with respect to that account. On these facts, A's actions manifest acceptance of the authority to conduct banking transactions but not the authority to conduct investment transactions.
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> **Example 11**: Same as Example 10, except A communicated regularly with P's securities broker. He followed the broker's recommendations on some securities purchases and he directed the broker to sell some stock when A needed cash for P's support. On these facts, A's actions manifest acceptance of the authority to conduct investment transactions. Accordingly, A can be held liable if his acts or omissions do not meet his duties under Florida's Prudent Investor Rule.

In addition, many of the duties imposed on an agent apply only when the agent has actual knowledge of some fact or circumstance. This includes the duties to:

- Take action to safeguard the principal's interests when the agent knows of a breach or imminent breach by another agent;[95]
- Act in an a manner not contrary to the principal's expectations;[96]
- Preserve the principal's estate plan;[97] and
- Cooperate with the principal's health care decision-maker.[98]

Obviously, there can be no liability with respect to these duties in the absence of the required actual knowledge. Moreover, an agent that acts in good faith is not liable for any failure to preserve the principal's estate plan even when that plan is actually known by the agent.[99] Likewise, good faith will insolate an agent from responsibility for actions taken without knowledge that the agent's authority has terminated or been suspended;[100]

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94 See § 709.114(1), initial sentence.

95 See § 709.111(4) discussed in "*Liability for actions of co-agents and successor agents*", infra p. 22.

96 See § 709.114(1)(a)1 discussed in "*The duty not to act in a manner that is contrary to the principal's actually known reasonable expectations*", supra p. 12.

97 See § 709.114(1)(a)4 discussed in "*The duty to preserve the principal's estate plan*", supra p. 13.

98 See § 709.114(2)(d) discussed in "*The duty to cooperate with health-care providers*", supra p. 16.

99 See § 709.114(3).

100 See §§ 709.109(4).

b) Liability for actions of co-agents and successor agents

An agent that has actual knowledge of a breach or imminent breach by another agent has a duty to take reasonably appropriate actions to safeguard the principal's best interests. If the agent has a good faith belief that the principal is not incapacitated, this duty is satisfied if the agent gives notice of the breach or pending breach to the principal.[101]

Otherwise:

- Except as provided in the power of attorney, a co-agent or successor agent who neither participates in nor conceals another agent's breach is not liable for the other agent's actions or omissions;[102]
- A successor agent has no duty to review the conduct or decisions of a predecessor agent;[103] and
- A successor agent has no duty to institute any proceeding against a predecessor agent or to file any claim against any predecessor agent's estate, for any of the predecessor agent's actions or omissions as agent.[104]

c) Liability for actions of others

In very limited situations, the Act permits an agent to delegate authority to other persons.[105] In the case of a proper delegation pursuant to the Florida Prudent Investor Rule, the delegating agent is not liable for an act, error of judgment, or default of the delegee, provided the agent exercises reasonable care, judgment, and caution in selecting the delegee, establishing the scope and terms of the delegation, and in periodically reviewing the delegee's actions.[106]

d) Exoneration

A power of attorney may include a provision exonerating the agent for liability for acts, omissions, or decisions made in good faith. The provision is effective except to the extent it:

- Relieves the agent for liability for breaches committed dishonestly, with improper motive, or with reckless indifference to the purposes of the power of attorney or the principal's best interest; or
- Was inserted as a result of an abuse of a confidential or fiduciary relationship with the principal.[107]

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101 § 709.111(4).

102 § 709.111(3).

103 § 709.111(5).

104 Id.

105 On the situations where the Act permits an agent to delegate authority, see § 709.114(1)(b) relating to delegation under the Florida Prudent Investor Rule and § 709.201(1)(a) relating to the delegation of authority to register securities into or out of nominee form.

106 See § 518.112(1) and (4).

107 § 709.115.

e) Damages and costs

An agent that violates its duties under the Act is liable to the principal or the principal's successors for the amount required to restore the principal's property to what it would have been had the violation not occurred and for reimbursement for fees and costs paid from the principals funds on the agent's behalf in defense of the agent's actions.[108]

8. Acceptance, rejection, liability, and reliance of third persons

a) Acceptance of a power of attorney

Subject to the exceptions discussed here, section 709.120(1)(a) requires a third person to accept or reject a power of attorney within a reasonable time. For financial institutions, four business days is presumed to be a reasonable time to accept or reject an agent's authority to conduct banking or investment transactions pursuant to section 709.208.[109] What constitutes a reasonable time for acceptance or rejection in other situations will depend on the circumstances and the terms of the power of attorney instrument. With respect to that instrument, a third person may not require an additional or different form of the power of attorney; the instrument must be accepted or rejected, as is.[110] A third person may, however, require the agent to execute an affidavit stating where the principal is domiciled, that the principal is not deceased, and that there has been no revocation, partial or complete termination by adjudication of incapacity or by the occurrence of an event referenced in the power of attorney, or suspension by initiation of proceedings to determine the principal's incapacity or to appoint a guardian of the principal.[111] In addition, if the power appears to be properly executed, a third person may make a good faith request for:

- An English translation, if the power is not wholly in English; or
- An opinion of counsel as to any matter of law, if the third person provides the reason for the request in a writing or other record. [112]

b) Rejection of a power of attorney

A third person that rejects a power of attorney must state the reasons for the rejection in writing.[113] In this regard, section 709.120(2) states that a third person is not required to accept a power of attorney if:

- The third person is not otherwise required to engage in a transaction with the principal in the same circumstances;
- The third person has knowledge of the termination of the agent's authority or of the power of attorney;
- A timely request by the third person for an affidavit, English translation, or opinion of counsel is refused by the agent;

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108 § 709.117.

109 § 709.120(1)(b). Section 709.208 is discussed in "*Special rules for banks and other financial institutions*", supra p. 18.

110 See § 709.120(1)(c).

111 See §§ 709.119(2) and (3)(c). The Act includes a suggested form for the affidavit. See § 709.119(2)

112 See § 709.119(3)(a) and (b). The English translation or opinion of counsel must be provided at the principal's expense unless the request is made after the time allowed for acceptance or rejection of the power of attorney. § 709.119(4).

113 § 709.120(1)(a).

- The person in good faith believes that the power is invalid or that the agent lacks the authority to perform the act requested; or
- The third person makes, or has knowledge that another person has made, a report to the local adult protective services office stating a good faith belief that the principal may be subject to physical or financial abuse, neglect, exploitation, or abandonment by the agent or by a person acting for or with the agent.

c) Liability for an improper failure to accept a power of attorney

A third person that improperly refuses to accept a power of attorney is subject to a court order mandating acceptance and to liability for damages, including reasonable attorney's fees and costs, incurred in any action or proceeding that confirms the validity of the power of attorney or mandates acceptance of it.[114]

d) Protection of third persons that act in reliance on a power of attorney

The Act includes several provisions that afford protection from liability to third persons. These include:

- Section 709.202(4), which applies to financial institutions that honor an agent's authorized authority to conduct banking or investment transactions. The section relieves financial institutions from any duty to inquire as to the appropriateness of an agent's exercise of the authority and protects the institutions from liability to the principal or to any other person for actions the institution takes in good faith reliance on the appropriateness of the agent's actions. The section does not eliminate the agent's duties or potential liability to the principal;
- Section 709.119(5), which applies to third persons who rely in good faith on an English translation; opinion of counsel, or affidavit of an agent; and
- Section 709.119(1)(a), which provides that third persons that accept in good faith a power of attorney that appears to be properly executed may rely upon the power and may enforce an authorized transaction against the principal's property as if the power of attorney and the agent's authority under it were genuine, valid, and still in effect. For purposes of this provision (and without limitation) the requisite good faith does not exist if the third person has notice that the power of attorney or the agent's authority is void, invalid, suspended or terminated.

9. Judicial relief

Section 709.116 deals with judicial relief. Under the section, a court may construe or enforce a power of attorney, review the agent's conduct, terminate the agent's authority, remove the agent, and grant appropriate relief. A petition for judicial relief may be made by the principal or his agent (including any nominated successor agent); a guardian, conservator, trustee or other fiduciary acting for the principal or the principal's estate; a health care decision-maker (with respect to relevant agent authority or conduct); a governmental agency having regulatory authority to protect the principal's welfare; a person who is asked to honor the power of attorney; or any other interested

[114] § 709.120(3).

person (such as the principal's spouse, parent or descendant) who demonstrates that they are interested in the principal's welfare and have a good faith belief that intervention by the court is necessary. In all actions for judicial relief under the Act, the court shall award taxable costs (including reasonable attorney's fees) as in chancery actions. [115]

VI. FISCAL IMPACT ON STATE AND LOCAL GOVERNMENTS

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

VII. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR

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

VIII. CONSTITUTIONAL ISSUES

There are no Constitutional issues.

V. OTHER INTERESTED PARTIES

Elder Law Section of The Florida Bar – supports
Florida Bankers Association – supports
Business Law Section of The Florida Bar – review pending

[115] § 709.116.

RULE 5.525 MOTIONS FOR COSTS AND ATTORNEYS' FEES

Florida Rule of Civil Procedure 1.525 shall not apply in proceedings governed by these rules.

Rule 5.025 Adversary Proceedings

(a) Specific Adversary Proceedings. The following shall be adversary proceedings unless otherwise ordered by the court: proceedings to remove a personal representative, surcharge a personal representative, remove a guardian, surcharge a guardian, probate a lost or destroyed will or later-discovered will, determine beneficiaries, construe a will, cancel a devise, partition property for the purposes of distribution, determine pretermitted share, determine amount of elective share and contribution, and for revocation of probate of a will.

(b) Declared Adversary Proceedings. Other proceedings may be declared adversary by service on interested persons of a separate declaration that the proceeding is adversary.

(1) If served by the petitioner, the declaration shall be served with the petition to which it relates.

(2) If served by the respondent, the declaration and a written response to the petition shall be served at the earlier of:

(A) within 20 days after service of the petition, or

(B) prior to the hearing date on the petition.

(3) When the declaration is served by a respondent, the petitioner shall promptly serve formal notice on all other interested persons.

(c) Adversary Status by Order. The court may determine any proceeding to be an adversary proceeding at any time.

(d) Notice and Procedure in Adversary Proceedings.

(1) Petitioner shall serve formal notice.

(2) After service of formal notice, the proceedings as nearly as practicable, shall be conducted similar to suits of a civil nature and, except for Rule 1.525, the Florida Rules of Civil Procedure shall govern, including entry of defaults.

(3) The court on its motion or motion of any interested person may enter orders to avoid undue delay in the main administration.

(4) If a proceeding is already commenced when an ordered is entered determining the proceeding to be adversary, it shall thereafter be conducted as an adversary proceeding. The order shall require interested persons to serve written defenses, if any, within 20 days from the date of the order. It shall not be necessary to re-serve the petition except as ordered by the court.

(5) When the proceedings are adversary, the caption of subsequent pleadings, as an extension of the probate caption, shall include the name of the first petitioner and the name of the first respondent.

RPPTL WHITE PAPER

PROPOSED AMENDMENT TO PROBATE RULES ADDRESSING APPLICATION OF FLORIDA RULE OF CIVIL PROCEDURE 1.525

I. SUMMARY

The Probate and Trust Litigation Committee proposes a rule change to the Florida Probate Rules which provide that Florida Rule of Civil of Procedure 1.525 does not apply in estate proceedings.

II. CURRENT SITUATION

There are a number of Florida Statutes in the Probate Code which, under various circumstances, allow personal representatives, beneficiaries, and attorneys who have "rendered services to an estate" to have their attorneys' fees and costs paid from estate assets. Some of these statutes are in the nature of fee-shifting provisions, such as F.S. 733.609 which provides that "[i]n all actions for breach of fiduciary duty or challenging the exercise of or failure to exercise a personal representative's powers … the court shall award taxable costs as in chancery actions, including attorneys fees." Other statutes, such as F.S. 733.106(3), allow an attorney who has "rendered services to an estate" to apply directly to the court for reasonable compensation. F.S. 733.6171 provides that a personal representative may pay attorneys' fees without court order. When attorneys' fees and costs are paid from the assets of an estate, a court has discretion to direct from what part of the estate the fees are to be paid. *See* F.S. 733.106(4)("When costs and attorney's fees are to be paid from the estate, the court may direct from what part of the estate they shall be paid"); *See also* F.S. 733.609(2); *F.S.* 733.6175(2). Although F.S. 733.6175 provides for a procedure to review compensation paid or to be paid to attorneys, neither the Florida Probate Code nor the Florida Probate Rules address the procedure for applying for fees and costs from estate assets or the timing of making such a request.

Florida Probate Rule 5.025 provides that certain proceedings are adversary proceedings unless order by the court. Those proceedings include removal and surcharge actions, actions to probate a lost or destroyed will, construction actions, and petitions to revoke probate. Rule 5.025(b) allows any proceeding to be declared adversary by an interested person. Once a proceeding is adversary under Rule 5.025, "the proceedings, as nearly as practicable, shall be conducted similar to suits of a civil nature and the Florida Rules of Civil Procedure shall govern, including the entry of defaults." As a consequence, Florida Rule of Civil Procedure 1.525, dealing with the time for filing motions for attorneys' fees and costs has been held to be applicable to adversary proceedings concerning estates. *See* Hays v. Lawrence, 1 So.3d 1176, (Fla.5th DCA 2009). Rule 1.525 provides as follows:

Rule 1.525. Motions for Costs and Attorneys' Fees

> Any party seeking a judgment taxing costs, attorneys' fees, or both shall serve a motion no later than 30 days after filing of the judgment, including a judgment of dismissal, or the service of a notice of voluntary dismissal.

Rule 1.525 was created "to cure the evil" of uncertainty created by tardy motions for fees and costs; and second, to eliminate the prejudice that tardy motions cause to both the opposing party and the trial court. Barco v. School Board of Pinellas County, 975 So. 2d 1116, 1123 (Fla. 2008). Rule 1.525 works well in a standard civil litigation case where there are traditional plaintiffs and defendants. However, attorney fee proceedings in the estate arena present unique circumstances not addressed by the rule. Specifically, in estate cases, a personal representative is entitled to pay its attorneys' fees and costs from trust assets without court approval. Additionally, an interested person who may bear the ultimate responsibility for payment of the fees may not have been a party to the underlying adversary proceeding. Further, in civil litigation the method of taxing attorneys' fees and costs is based on prevailing party considerations. That is not necessarily the case in estate attorney fee proceedings. The uncertainty concerning whether and under what circumstances Rule 1.525 applies to various types of fee awards under the Florida Trust Code has created considerable confusion and unnecessary litigation. See Jon Scuderi and Rebecca Y. Zung-Clough, *Does Florida Rule of Civil Procedure 1.525 Apply to Probate and Trust Proceedings?,* ActionLine (Fla. Bar RPPTL Section Winter 2009).

The Probate and Trust Litigation Committee proposes that the Florida Probate Rules be amended to provide that Florida Rule of Civil of Procedure 1.525 does not apply in estate proceedings. The Florida Supreme Court has already approved a similar rule change as it relates to family law proceedings. On March 3, 2005, the Florida Supreme Court adopted Family Law Rule 12.525 which simply provides "Florida Rule of Civil Procedure 1.525 shall not apply in proceedings governed by these rules". The rationale of Florida Supreme Court in eliminating the application of Rule 1.525 to family law proceedings is equally persuasive in the estate context:

> **"We agree that rule 1.525 should not apply in family law proceedings. The method of taxation of attorneys' fees and costs in family law cases is quite different from that in civil litigation. Whereas the former is based on need and ability of the parties to pay, the latter is based on prevailing party considerations. Moreover, section 61.16, Florida Statutes (2004), already governs the award of attorneys' fees and costs in family law cases. See also Rosen v. Rosen, 696 So.2d 697, 699 (Fla. 1997) (noting that "[a]ny determination regarding an appropriate award of attorney's fees in proceedings for dissolution of marriage, support, or child custody begins with section 61.16, Florida Statutes").**

> **Because the application of rule 1.525 in family law cases could be creating confusion among the courts, and because there already is a well-established body of statutory and case law authority regarding the award of attorneys' fees and costs in family law matters, we agree with the committee's proposal."**

Amendments to the Florida Family Law Rules of Procedure (Rule 12.525), 897 So. 2d 467 (Fla. 2005).

Similar to family law, there are multiple reasons why Rule 1.525 is "ill-fitted" for probate matters:

1. There already is a well-established body of statutory and case law authority regarding the award of attorneys' fees and costs in probate matters.

2. Many probate fee awards are based on providing a benefit to the estate rather than using a prevailing party rationale.

3. There is a great deal of uncertainty as to whether an order in probate is a "final order" or judgment which would subject to Rule 1.525. This uncertainty leads to the service of multiple fee motions to protect against the risk of missing the deadline imposed by Rule 1.525.

4. Multiple companion proceedings can exist in probate, both adversary and non-adversary. The application of Rule 1.525 will encourage multiple fee motions which will strain judicial resources, increase costs to the estate, and potentially delay the orderly administration of estates.

5. Probate proceedings have a court-supervised final accounting process with disclosure of proposed fee payment provisions and opportunity for the affected parties to object under specific deadlines.

III. EFFECT OF PROPOSED CHANGES

The proposed amendments to the Florida Probate Rules provide that Florida Rule of Civil Procedure 1.525 does not apply in probate proceedings.

Proposed Amendments:

New Probate Rule 5.525 – Motions for Costs and Attorneys' Fees

Florida Rule of Civil Procedure 1.525 shall not apply in proceedings governed by these rules.

Addition to Rule 5.025(d) Adversary Proceedings

(2) After service of formal notice, the proceedings, as nearly as practicable, shall be conducted similar to suits of a civil nature and, except for Rule 1.525, the Florida Rules of Civil Procedure shall govern, including entry of defaults.

IV. FISCAL IMPACT ON STATE AND LOCAL GOVERNMENTS

The proposal potentially saves judicial resources by avoiding the necessity of filing multiple fee motions during the course of probate proceedings.

V. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR

The proposal will not have a direct economic impact on the private sector, other than the savings created by eliminating certain unnecessary litigated proceedings in estate administration.

VI. CONSTITUTIONAL ISSUES

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

V. OTHER INTERESTED PARTIES

None are known at this time.

WPB 1089229.4

A bill to be entitled

An act relating to trust proceedings; amending s. 736.0201; clarifying that certain payments by a trustee from trust assets are not taxation of attorney's fees and costs in subject to the application of Florida Rule of Civil Procedure 1.525; and providing for an effective date.

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

Section 1. Subsection (1) is modified and a new subsection (6) is added to amend Section 736.0201 to read as follows:

736.0201 (1) Except as provided in subsections (5) and (6) and s. 736.0206, judicial proceedings concerning trusts shall be commenced by filing a complaint and shall be governed by the Florida Rules of Civil Procedure.

(2) The court may intervene in the administration of a trust to the extent the court's jurisdiction is invoked by an interested person or as provided by law.

(3) A trust is not subject to continuing judicial supervision unless ordered by the court.

(4) A judicial proceeding involving a trust may relate to the validity, administration, or distribution of a trust, including proceedings to:

(a) Determine the validity of all or part of a trust;

(b) Appoint or remove a trustee;

(c) Review trustees' fees;

(d) Review and settle interim or final accounts;

(e) Ascertain beneficiaries; determine any question arising in the administration or distribution of any trust, including questions of construction of trust instruments; instruct trustees; and determine the existence or nonexistence of any immunity, power, privilege, duty, or right;

(f) Obtain a declaration of rights; or

(g) Determine any other matters involving trustees and beneficiaries.

(5) A proceeding for the construction of a testamentary trust may be filed in the probate proceeding for the testator's estate. The proceeding shall be governed by the Florida Probate Rules.

(6) Rule 1.525 shall apply to judicial proceedings concerning trusts, except that the following do not constitute taxation of costs or attorneys' fees even if the payment is for services rendered or costs incurred in a judicial proceeding:

(a) a trustee's payment of compensation or reimbursement of costs to persons employed by the trustee from assets of the trust, or

(b) a determination by the court directing from what part of the trust fees or costs shall be paid, unless the determination is made under s.736.1004 in an action for breach of fiduciary duty or challenging the exercise of, or failure to exercise, a trustee’s powers,

Section 2. This act shall take effect upon becoming law.

LEGISLATIVE POSITION REQUEST FORM

GOVERNMENTAL AFFAIRS OFFICE

Date Form Received _____

GENERAL INFORMATION

Submitted By William T. Hennessey, Chair, Probate & Trust Litigation Committee of the Real Property Probate & Trust Law Section

Address Gunster, Yoakley & Stewart, P.A., 777 South Flagler Drive, Suite 500 East, West Palm Beach, FL 33401-6194
Telephone: (561) 650-0663

Position Type Real Property, Probate and Trust Law Section, The Florida Bar
(Florida Bar, section, division, committee or both)

CONTACTS

Board & Legislation Committee Appearance

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Peter M. Dunbar, Pennington, Moore, Wilkinson, Bell & Dunbar, P.O. Box 10095, Tallahassee, Florida 32302-2095, Telephone (850) 222-3533
Martha J. Edenfield, Pennington, Moore, Wilkinson, Bell & Dunbar, P.O. Box 10095, Tallahassee FL 32302-2095, Telephone (850) 222-3533
(List name, address and phone number)

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

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

PROPOSED ADVOCACY

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

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

Indicate Position Support _X___ Oppose _____ Tech Asst. ____ Other _____

Proposed Wording of Position for Official Publication:

Support proposed amendment to F.S. 736.0201 which clarifies the application of Florida Rule of Civil Procedure 1.525 in trust proceedings.

Reasons For Proposed Advocacy:

Under current law, it is unclear when and under what circumstances a trustee, beneficiary, or attorney must file a motion for attorneys' fees and costs incurred in a judicial proceeding concerning a trust. That uncertainty leads to unnecessary litigation and confusion. The proposed amendment confirms that Florida Rule of Civil Procedure 1.525 applies to judicial proceedings concerning trusts but seeks to clarify the definition of taxation of attorneys' fees and costs in trust proceedings.

PRIOR POSITIONS TAKEN ON THIS ISSUE

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

Most Recent Position [NONE]

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

Others
(May attach list if more than one)

[NONE]

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

REFERRALS TO OTHER SECTIONS, COMMITTEES OR LEGAL ORGANIZATIONS

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

Referrals

Florida Bankers Association — unknown at this time, expect support

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

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

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

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

RPPTL WHITE PAPER

PROPOSED AMENDMENT OF F.S. SECTION 736.0201 TO CLARIFY DEFINITION OF TAXATION OF ATTORNEYS' FEES AND COSTS IN TRUST PROCEEDINGS

I. SUMMARY

This legislation clarifies the definition of taxation of attorneys' fees and costs in trust proceedings to make it clear that the payment of a trustees' attorneys' fees and costs from trust assets generally do not constitution taxation of costs and attorney fees that would be subject to the application of Florida Rule of Civil Procedure 1.525. The proposed amendment confirms that Rule 1.525 applies to judicial proceedings concerning trusts but provides that the following do not constitute taxation of attorneys' fees and costs even if the payment is for services rendered or costs incurred in a judicial proceeding: (a) a trustee's payment of compensation or reimbursement of costs to persons employed by the trustee from assets of the trust, or (b) a determination by the court directing from what part of the trust fees or costs shall be paid, unless the determination is made under F.S. 736.1004 in an action for breach of fiduciary duty or challenging the exercise of, or failure to exercise, a trustee's powers. This bill does not have a fiscal impact on state funds.

II. CURRENT SITUATION

There are a number of Florida Statutes in the Florida Trust Code which, under various circumstances, allow trustees, beneficiaries, and attorneys who have "rendered services to a trust" to have their attorneys' fees and costs paid from trust assets. Some of these statutes are in the nature of fee-shifting provisions, such as F.S. 736.1004 which provides that "[i]n all actions for breach of fiduciary duty or challenging the exercise of, or failure to exercise, a trustee's powers … the court shall award taxable costs as in chancery actions, including attorneys fees and guardian ad litem fees." Other statutes, such as F.S. 736.1005, allow an attorney who has "rendered services to a trust" to apply directly to the court for reasonable compensation. F.S. 736.0802 provides that a trustee may pay attorneys' fees and costs incurred by the trustee in a trust proceeding from the assets of trusts *without the approval of any person and without court authorization*. When attorneys' fees and costs are paid from the assets of a trust, a court has discretion to direct from what part of the trust the fees are to be paid. *See* F.S. 736.1005(2)("Whenever attorney's fees are paid out of the trust, the court, in its discretion, may direct from what part of the trust the fees shall be paid"); *See also* F.S. 736.1004(2); *F.S.* 736.1006; 736.1007(9). None of these statutes address the procedure for applying for fees and costs from trust assets in a trust proceeding or the timing of making such a request.

Under F.S. Section 736.0201, the Florida Rules of Civil Procedure are made applicable to trust proceedings. As a consequence, Florida Rule of Civil Procedure 1.525, dealing with the time for filing motions for attorneys' fees and costs has been held to be applicable to proceedings concerning trusts. *See* Donkersloot v. Donkersloot, 993 So.2d 126, (Fla. 2d DCA 2008). Rule 1.525 provides as follows:

> Rule 1.525. Motions for Costs and Attorneys' Fees
>
> Any party seeking a judgment taxing costs, attorneys' fees, or both shall serve a motion no later than 30 days after filing of the judgment, including a judgment of dismissal, or the service of a notice of voluntary dismissal.

Rule 1.525 was created "to cure the evil" of uncertainty created by tardy motions for fees and costs; and second, to eliminate the prejudice that tardy motions cause to both the opposing party and the trial court. Barco v. School Board of Pinellas County, 975 So. 2d 1116, 1123 (Fla. 2008). Rule 1.525 works well in a standard civil litigation case where there are traditional plaintiffs and defendants. However, attorney fee proceedings in the trust arena present some unique circumstances not addressed by the rule. Specifically, in trust cases, a trustee is entitled to pay its attorneys' fees and costs from trust assets without court approval. Additionally, an interested person who may bear the ultimate responsibility for payment of the fees may not have been a party to the underlying proceeding. Further, in civil litigation the method of taxing attorneys' fees and costs is based on prevailing party considerations. That is not necessarily the case in trust attorney fee proceedings. The uncertainty concerning whether and under what circumstances Rule 1.525 applies to various types of fee awards under the Florida Trust Code has created considerable confusion and unnecessary litigation. See Jon Scuderi and Rebecca Y. Zung-Clough, *Does Florida Rule of Civil Procedure 1.525 Apply to Probate and Trust Proceedings?,* ActionLine (Fla. Bar RPPTL Section Winter 2009). The proposed amendment to 736.0201 is intended to clarify the law in this area.

III. EFFECT OF PROPOSED CHANGES

The proposed statutory amendment confirms that Rule 1.525 is applicable to judicial proceedings concerning trusts but provides that the following do not constitute taxation of attorneys' fees and costs even if the payment is for services rendered or costs incurred in a judicial proceeding: (a) a trustee's payment of compensation or reimbursement of costs to persons employed by the trustee from assets of the trust, or (b) a determination by the court directing from what part of the trust fees or costs shall be paid, unless the determination is made under F.S. 736.1004 in an action for breach of fiduciary duty or challenging the exercise of, or failure to exercise, a trustee's powers.

Current Statute:

736.0201 Role of court in trust proceedings.--

(1) Except as provided in subsection (5) and s. 736.0206, proceedings concerning trusts shall be commenced by filing a complaint and shall be governed by the Florida Rules of Civil Procedure.

(2) The court may intervene in the administration of a trust to the extent the court's jurisdiction is invoked by an interested person or as provided by law.

(3) A trust is not subject to continuing judicial supervision unless ordered by the court.

(4) A judicial proceeding involving a trust may relate to the validity, administration, or distribution of a trust, including proceedings to:

(a) Determine the validity of all or part of a trust;

(b) Appoint or remove a trustee;

(c) Review trustees' fees;

(d) Review and settle interim or final accounts;

(e) Ascertain beneficiaries; determine any question arising in the administration or distribution of any trust, including questions of construction of trust instruments; instruct trustees; and determine the existence or nonexistence of any immunity, power, privilege, duty, or right;

(f) Obtain a declaration of rights; or

(g) Determine any other matters involving trustees and beneficiaries.

(5) A proceeding for the construction of a testamentary trust may be filed in the probate proceeding for the testator's estate. The proceeding shall be governed by the Florida Probate Rules.

Proposed Statute:

736.0201 Role of court in trust proceedings.—

(1) Except as provided in subsections (5) and (6) and s. 736.0206, judicial proceedings concerning trusts shall be commenced by filing a complaint and shall be governed by the Florida Rules of Civil Procedure.

(2) The court may intervene in the administration of a trust to the extent the court's jurisdiction is invoked by an interested person or as provided by law.

(3) A trust is not subject to continuing judicial supervision unless ordered by the court.

(4) A judicial proceeding involving a trust may relate to the validity, administration, or distribution of a trust, including proceedings to:

(a) Determine the validity of all or part of a trust;

(b) Appoint or remove a trustee;

(c) Review trustees' fees;

(d) Review and settle interim or final accounts;

(e) Ascertain beneficiaries; determine any question arising in the administration or distribution of any trust, including questions of construction of trust instruments; instruct trustees; and determine the existence or nonexistence of any immunity, power, privilege, duty, or right;

(f) Obtain a declaration of rights; or

(g) Determine any other matters involving trustees and beneficiaries.

(5) A proceeding for the construction of a testamentary trust may be filed in the probate proceeding for the testator's estate. The proceeding shall be governed by the Florida Probate Rules.

(6) Rule 1.525 shall apply to judicial proceedings concerning trusts, except that the following do not constitute taxation of costs or attorneys' fees even if the payment is for services rendered or costs incurred in a judicial proceeding:

(a) a trustee's payment of compensation or reimbursement of costs to persons employed by the trustee from assets of the trust, or

(b) a determination by the court directing from what part of the trust fees or costs shall be paid, unless the determination is made under s.736.1004 in an action for breach of fiduciary duty or challenging the exercise of, or failure to exercise, a trustee’s powers.

IV. FISCAL IMPACT ON STATE AND LOCAL GOVERNMENTS

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

V. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR

The proposal will not have a direct economic impact on the private sector, other than the savings created by eliminating certain unnecessary litigated proceedings in trust administration.

VI. CONSTITUTIONAL ISSUES

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

V. OTHER INTERESTED PARTIES

None are known at this time.

A bill to be entitled

An act relating to trust and probate proceedings; amending s. 732.5165 to clarify that a revocation of a will is subject to challenge on the grounds of fraud, duress, mistake or undue influence; amending s. 732.518 to specify that a challenge to the revocation of a will may not be commenced before the testator's death; amending s. 736.0207 to specify when a challenge to the revocation of a revocable trust may be brought; amending s. 736.0406 to clarify that the creation of a trust amendment or trust restatement is subject to challenge and to clarify that the revocation of a trust is subject to challenge on the grounds of fraud, duress, mistake or undue influence; and providing for an effective date.

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

Section 1. To amend Section 732.5165 to read as follows:

732.5165 A will is void if the execution is procured by fraud, duress, mistake, or undue influence. Any part of the will is void if so procured, but the remainder of the will not so procured shall be valid if it is not invalid for other reasons. If the revocation of a will, or any part thereof, is procured by fraud, duress, mistake, or undue influence, such revocation is void.

Section 2. To amend Section 732.518 to read as follows:

732.518 An action to contest the validity of a will or the revocation of a will may not be commenced before the death of the testator.

Section 3. To amend Section 736.0207 to read as follows:

736.0207 An action to contest the validity of all or part of a revocable trust, or the revocation of part of a revocable trust, may not be commenced until the trust becomes irrevocable by its terms or by the settlor's death. If all of a revocable trust has been revoked, an action to contest the revocation may not be commenced until after the settlor's death. ~~, except t~~~~, except t~~This section does not prohibit such actions by the guardian of the property of an incapacitated settlor.

Section 4. To amend Section 736.0406 to read as follows:

736.0406 ~~A trust is void i~~A trust is void ~~i~~If the creation, amendment, or restatement ~~-~~of ~~the~~~~the~~ a trust, or any part thereof, is procured by fraud, duress, mistake, or undue influence~~.~~, the trust, or ~~-A~~any part so procured ~~of the trust~~is void. ~~Any part of the trust is void if procured by such means, but t~~ ~~if procured by such means, but t~~The remainder of the trust not procured by such means is valid if the remainder is not invalid for other reasons. If the revocation of a trust, or any part thereof, is procured by fraud, duress, mistake, or undue influence, such revocation is void.

Section 5. This act shall take effect upon becoming law and shall apply to all proceedings pending before such date and all cases commenced on or after the effective date.

LEGISLATIVE POSITION REQUEST FORM

GOVERNMENTAL AFFAIRS OFFICE

Date Form Received _____

GENERAL INFORMATION

Submitted By William T. Hennessey, Chair, Probate & Trust Litigation Committee of the Real Property Probate & Trust Law Section

Address Gunster, Yoakley & Stewart, P.A., 777 South Flagler Drive, Suite 500 East, West Palm Beach, FL 33401-6194
Telephone: (561) 650-0663

Position Type Real Property, Probate and Trust Law Section, The Florida Bar
(Florida Bar, section, division, committee or both)

CONTACTS

Board & Legislation Committee Appearance

William T. Hennessey, Gunster, Yoakley & Stewart, P.A., 777 South Flagler Drive, Suite 500 East, West Palm Beach, FL 33401-6194, Telephone: (561) 650-0663.
Michael J. Gelfand, Gelfand & Arpe, P.A., Regions Financial Tower, Suite 1220, 1555 Palm Beach Lakes Blvd., West Palm Beach, FL 33401 Telephone (561) 655-6224
Peter M. Dunbar, Pennington, Moore, Wilkinson, Bell & Dunbar, P.O. Box 10095, Tallahassee, Florida 32302-2095, Telephone (850) 222-3533
Martha J. Edenfield, Pennington, Moore, Wilkinson, Bell & Dunbar, P.O. Box 10095, Tallahassee FL 32302-2095, Telephone (850) 222-3533
(List name, address and phone number)

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

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

PROPOSED ADVOCACY

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

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

Indicate Position Support _X___ Oppose _____ Tech Asst. ____ Other _____

Proposed Wording of Position for Official Publication:

Support proposed amendments to F.S. 732.5165, 732.518, 736.0207 and 736.0406 to clarify that the revocation of a will or a revocable trust can be challenged on the grounds of fraud, duress, mistake or undue influence after the death of the testator or settlor.

Reasons For Proposed Advocacy:

The Florida Trust Code and the Florida Probate Code permit the execution of a will and the creation of a trust to be challenged on the grounds of fraud, duress, mistake and undue influence. However, the Florida Statutes are silent on whether the revocation of a will by physical act or the revocation of a trust may be challenged on those same grounds. The absence of statutory language regarding revocation has led courts to conclude that the revocation of a trust may not be challenged on the grounds of undue influence. It is inconsistent to allow challenges to the creation of a trust on the grounds of undue influence but to not allow a challenge to the revocation of a trust on those same grounds. This result leaves a settlor's intended beneficiaries with no remedy to correct the wrongdoing on an undue influencer when a trust is improperly revoked. The proposed amendments make clear that challenges to the revocation of a revocable trust or a will on the grounds of fraud, duress, mistake or undue influence are permitted upon the death of the testator/settlor.

PRIOR POSITIONS TAKEN ON THIS ISSUE

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

Most Recent Position [NONE]

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

Others
(May attach list if more than one)

[NONE]

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

REFERRALS TO OTHER SECTIONS, COMMITTEES OR LEGAL ORGANIZATIONS

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

Referrals

Florida Bankers Association — unknown at this time, expect support

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

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

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

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

RPPTL WHITE PAPER

PROPOSED AMENDMENTS OF F.S. SECTIONS 732.5165, 732.518, 736.0207 AND 736.0406 TO CLARIFY THAT REVOCATION OF A WILL OR REVOCABLE TRUST IS SUBJECT TO CHALLENGE ON THE GROUNDS OF FRAUD, DURESS, MISTAKE OR UNDUE INFLUENCE AFTER THE TESTATOR'S OR SETTLOR'S DEATH

I. SUMMARY

This legislation seeks to clarify that a revocation of a will or revocable trust procured by fraud, duress, mistake or undue influence is subject to challenge upon the testator or settlor's death. The amendment clarifies the law as a result of the decision in MacIntyre v. Wedell, 12 So. 3d 273 (Fla. 4th DCA 2009). The amendments also specify when the challenge to the will or revocable trust revocation may be brought. Further, the amendment clarifies that the creation of a trust amendment or restatement is also subject to challenge on the grounds of fraud, duress, mistake or undue influence.

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

II. CURRENT SITUATION

A. Post-Death Challenges to the Revocation of a Revocable Trust

Currently, it appears that Florida law does not permit an undue influence challenge to a settlor's revocation of a revocable trust even if that action is brought after the settlor's death.

F.S. Section 736.0406 discusses the effect of fraud, duress, mistake, and undue influence on the creation of a revocable trust. It provides:

> A trust is void if the creation of the trust is procured by fraud, duress, mistake, or undue influence. Any part of the trust is void if procured by such means, but the remainder of the trust not procured by such means is valid if the remainder is not invalid for other reasons.

Thus, under F.S. Section 736.0406, the creation of a trust can clearly be challenged on the grounds of fraud, duress, mistake, or undue influence in post-death proceedings. However. nothing in that statute, or anywhere else in the Florida Trust Code, addresses whether a *revocation or amendment* of a revocable trust may be challenged on those same grounds. This has led courts to conclude that a revocation of a revocable trust cannot be challenged on the grounds of undue influence.

The District Court of Appeal, Second District first addressed this issue in *Hoffman v. Kohns*, 385 So. 2d 1064 (Fla. 2d DCA 1980). In *Hoffman*, the Court allowed a challenged to a revocation of a revocable trust in post-death proceedings. The settlor in *Hoffman* executed a one-paragraph revocation of his revocable trust. After the settlor's death, a trust beneficiary sued claiming the revocation of the trust was procured by undue influence. The court, while finding no case in Florida directly permitting a challenge to the revocation of a trust, set aside the revocation. The court relied on the Supreme Court of Florida's decision in *Rich v. Hallman*, 143 So. 292 (1932), which recognized that a lifetime transfer in the nature of a gift could be set aside on the grounds of undue influence.

Almost three years later, the District Court of Appeal, Fourth District decided *Genova v. Florida National Bank of Palm Beach County*, 433 So. 2d 1211 (Fla. 4th DCA 1983). In *Genova*, the settlor attempted to revoke her revocable trust. The trustee challenged the attempted revocation on the grounds of undue influence during the settlor's lifetime. The trial court found that the attempted revocation of the trust was the product of undue influence and invalidated the attempted revocation. On appeal, the 4th DCA reversed and held that the settler could not be deprived of her right to revoke the trust in the absence of a judicial or medical determination that she was incapacitated. The court determined that since the settlor was not incapacitated, she was free to revoke her trust during her lifetime, regardless of whether or not the settlor had been unduly influenced.

The Supreme Court of Florida accepted jurisdiction of the *Genova* decision by certifying conflict with the *Hoffman* decision. *Florida National Bank of Palm Beach County v. Genova*, 460 So. 2d 895 (Fla. 1984). The Supreme Court of Florida approved the *Genova* decision and found that undue influence cannot be asserted as a basis for preventing a competent settlor from revoking a revocable trust. The Court noted that the settlor's retention of control over the property differentiates a revocable trust from the other types of transfers where undue influence can apply, including gifts, deeds, wills, contracts, etc. The Court disapproved the *Hoffman* decision (action brought after settlor's death).

Recently, in *MacIntyre v. Wedell*, 12 So. 3d 273 (Fla. 4th DCA 2009), the 4th DCA considered whether *Genova*'s apparent pre-death prohibition on proceedings to challenge a revocation of a revocable trust on the grounds of undue influence applied in proceedings after the settlor's death. In *MacIntyre*, the alleged undue influencer caused the settlor to withdraw funds from her revocable trust and place them in joint name with the alleged undue influencer. The trustee filed suit alleging the transfers were procured by undue influence. The 4th DCA, relying on the Supreme Court of Florida's decision in *Genova*, affirmed the lower court's dismissal with prejudice. The court stated the *Genova* decision plainly suggests that the availability of an undue influence challenge to a settlor's revocation of a revocable trust should not turn upon whether the action is brought when the settlor is alive or dead. The court noted that the

Supreme Court accepted jurisdiction of *Genova* based on the conflict with the *Hoffman* decision. *Hoffman* involved a challenge after the settlor's death. Since the Supreme Court of Florida had expressly disapproved the result in *Hoffman*, the court affirmed the dismissal with prejudice.

Thus, under current law, although the creation or amendment of a trust may be challenged on the grounds of undue influence post-death, a revocation of that same document is not subject to challenge on those same grounds.

B. Post-Death Challenges to the Revocation of a Will or Codicil

Although there are no cases directly on point, it appears that, under current law, the revocation of a will by written instrument may be challenged on grounds of fraud, duress or undue influence. Restatement (Third) of Property (Wills & Don. Trans.) § 4.1 (1999). This Restatement provision is consistent with our current Florida Probate Code. Section 731.201(40), Florida Statutes, defines a "will" as follows:

> "Will" means an instrument, including a codicil, executed by a person in the manner prescribed by this code, which disposes of the person's property on or after his or her death and includes an instrument which merely appoints a personal representative or revokes or revises another will.

Under that definition, an instrument revoking a will is a "will".

Section 732.5165 discusses the effect of fraud, duress and undue influence on the creation of a will. It provides:

> A will is void if the execution is procured by fraud, duress, mistake, or undue influence. Any part of the will is void if so procured, but the remainder of the will not so procured shall be valid if it is not invalid for other reasons.

Section 732.5165 coupled with the definition of a "will" in F.S. 731.201(40) would seem to permit a challenge to a written instrument revoking a will on the grounds of fraud, duress, mistake or undue influence. However, there are no current Florida Statutes addressing whether an interested person could challenge the revocation of a will by act (e.g. destroying a will through undue influence) on those same grounds. Further, there are no Florida cases addressing a challenge to the revocation of a will on the grounds of fraud, duress, or undue influence.

Under a prior version of the probate code, section 731.09, Florida Statutes (repealed), stated:

> If the revocation of a will, or any part thereof, is procured by fraud, duress, menace or undue influence, such revocation shall be void.

That statute was repealed in 1974.

III. ANALYSIS

Due to *MacIntyre,* it appears that an interested person cannot successfully bring a post-death proceeding contesting revocation of a revocable trust on undue influence grounds where the trust revocation was executed by a competent settlor. Presumably, *MacIntyre* may be extended to bar a post-death challenge to the revocation of revocable trust based on fraud, duress, or mistake, leaving lack of testamentary capacity as the sole grounds for such a challenge.

If Florida courts do not permit a post death challenge to a settlor's revocation of her revocable trust, the problems appear evident. First, intended trust beneficiaries can be deprived of their inheritance, but yet have no remedy to correct the wrongdoing. If a sole intestate heir unduly influences the settlor to revoke her revocable trust, which left everything to her favorite charity, thereby causing the will pour over clause to fail, then the property would pass by intestacy. See § 732.513(4), Fla. Stat. The favorite charity would be denied a remedy.

Additionally, revocations of a trust or a part of a trust are challenged all the time. Any time a party brings a trust contest challenging an amendment or a restatement of trust, the contest challenges not only the validity of the challenged part, but also the revocation of the prior part. It would seem inconsistent to be able to challenge the revocation of a prior amendment by challenging the subsequent amendment but be unable to solely challenge a revocation of the trust or a part of the trust. It also seems inconsistent to allow a post death challenge to an amendment to a revocable trust, but not permit a challenge to the revocation of the trust itself.

Further, it also seems that once the settlor has died, the ability to challenge a trust revocation ought to be consistent with the ability to challenge a revocation of a will, especially since revocable trusts serve as will substitutes. A revocation of a will is subject to a post death challenge on the grounds that the revocation was procured by fraud, duress or undue influence. Restatement (Third) of Property (Wills & Don. Trans.) § 4.1 (1999).

Finally, the dissents' reasoning in both *Genova* opinions is persuasive. If a settlor is unduly influenced to revoke her revocable trust, then the revocation is not a free act of the settlor, but the will of another.

IV. EFFECT OF PROPOSED CHANGES

The proposed change would amend F.S. Sections 732.5165, 732.518, 736.0207 and 736.0406 to make clear that revocation of a will or revocable trust on the grounds of fraud, duress, mistake or undue influence is subject to challenge on the death of the testator/settlor. The amendment to F.S. Section 736.0406 clarifies that the creation of a trust amendment or a restatement of the trust is subject to challenge.

Current Statute:

732.5165. Effect of fraud, duress, mistake, and undue influence

A will is void if the execution is procured by fraud, duress, mistake, or undue influence. Any part of the will is void if so procured, but the remainder of the will not so procured shall be valid if it is not invalid for other reasons.

Proposed Statute:

732.5165. Effect of fraud, duress, mistake, and undue influence

A will is void if the execution is procured by fraud, duress, mistake, or undue influence. Any part of the will is void if so procured, but the remainder of the will not so procured shall be valid if it is not invalid for other reasons. If the revocation of a will, or any part thereof, is procured by fraud, duress, mistake or undue influence, such revocation is void.

Current Statute:

732.518. Will contests

An action to contest the validity of a will may not be commenced before the death of the testator.

Proposed Statute:

732.518. Will contests

An action to contest the validity of a will or the revocation of a will may not be commenced before the death of the testator.

Current Statute:

736.0207. Trust contests

An action to contest the validity of all or part of a trust may not be commenced until the trust becomes irrevocable, except this section does not prohibit such action by the guardian of the property of an incapacitated settlor.

Proposed Statute:

736.0207. Trust contests

An action to contest the validity of all or part of a revocable trust, or the revocation of part of a revocable trust, may not be commenced until the trust becomes irrevocable by its terms or by the settlor's death. If all of a revocable trust has been revoked, an action to contest the revocation may not be commenced until after the settlor's death. This section does not prohibit such actions by the guardian of the property of an incapacitated settlor.

Current Statute:

736.0406. Effect of fraud, duress, mistake, or undue influence

A trust is void if the creation of the trust is procured by fraud, duress, mistake, or undue influence. Any part of the trust is void if procured by such means, but the remainder of the trust not procured by such means is valid if the remainder is not invalid for other reasons.

Proposed Statute:

736.0406. Effect of fraud, duress, mistake, or undue influence

If the creation, amendment, or restatement of a trust, or any part thereof, is procured by fraud, duress, mistake, or undue influence, the trust, or any part so procured, is void. The remainder of the trust not procured by such means is valid if the remainder is not invalid for other reasons. If the revocation of a trust, or any part thereof, is procured by fraud, duress, mistake or undue influence, such revocation is void.

V. FISCAL IMPACT ON STATE AND LOCAL GOVERNMENTS

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

VI. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR

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

VII. CONSTITUTIONAL ISSUES

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

VIII. OTHER INTERESTED PARTIES

None are known at this time.

A bill to entitled

An act relating to probate, amending s. 732.102, relating to the intestate share of the surviving spouse, providing an effective date.

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

Section 1. Subsections (2) and (3) of section 732.102, Florida Statutes are amended and a new subsection (4) is added to read:

732.102. Spouse's share of intestate estate.—

The intestate share of the surviving spouse is:

(1) If there is no surviving descendant of the decedent, the entire intestate estate.

(2) If the decedent is survived by one or more descendants ~~there are surviving descendants of the decedent~~, all of whom are also ~~lineal~~ descendants of the surviving spouse, and the surviving spouse has no other descendant, the entire intestate estate. ~~the first $60,000 of the intestate estate, plus one-half of the balance of the intestate estate. Property allocated to the surviving spouse to satisfy the $60,000 shall be valued at the fair market value on the date of distribution.~~

(3) If there are one or more surviving descendants of the decedent~~, one or more of whom~~ who are not ~~lineal~~ descendant~~s~~ of the surviving spouse, one-half the intestate estate.

(4) If there are one or more surviving descendants of the decedent, all of whom are also descendants of the surviving spouse, and the surviving spouse has one or more descendants that are not descendants of the decedent, one-half of the intestate estate.

Section 2. This act shall take effect on October 1, 2011.

RM:6724080:1

CODING: Words ~~stricken~~ are deletions; words underlined are additions.

LEGISLATIVE POSITION REQUEST FORM

GOVERNMENTAL AFFAIRS OFFICE

Date Form Received _____

GENERAL INFORMATION

Submitted By Probate Law and Procedure Committee of the Real Property Probate & Trust Law Section

Address Tae Kelley Bronner, Chair, Tae Kelley Bronner, PL, 10006 Cross Creek Blvd., PMB #428 Tampa, FL 33647;
Telephone: (813) 907-6643

Position Type Real Property Probate & Trust Law Section and its Probate Law Committee

CONTACTS

Board & Legislation Committee Appearance Tae Kelley Bronner, Tae Kelley Bronner, PL, 10006 Cross Creek Blvd., PMB #428 Tampa, FL 33647, (813) 907-6643
Michael J. Gelfand, Gelfand & Arpe, P.A., Regions Financial Tower, Suite 1220, 1555 Palm Beach Lakes Blvd., West Palm Beach, FL 33401 (561) 655-6224
Peter M. Dunbar, Pennington, Moore, Wilkinson, Bell & Dunbar, P.O. Box 10095, Tallahassee, FL 32302-2095, (850) 222-3533
Martha J. Edenfield, Pennington, Moore, Wilkinson, Bell & Dunbar, P.O. Box 10095, Tallahassee, FL 32302-2095, (850) 222-3533

Appearances before Legislators Same

Meetings with Legislators/staff Same

PROPOSED ADVOCACY

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

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

Indicate Position **XX** Support Oppose Technical Assistance Other

Proposed Wording of Position for Official Publication Amends Section 732.102 to provide that a decedent's surviving spouse shall receive 100% of the intestate estate provided all of the decedent's descendants are also descendants of the surviving spouse and the surviving spouse does not have any other descendants. In all other situations, the surviving spouse shall receive 50% of the intestate estate.

Reasons For Proposed Advocacy The intestate code is designed to be a default will for those who die without a will. The proposed changes to the statute are more consistent with what most testators would want had he or she created a will prior to death. Further, the proposed changes are consistent with the public policy of ensuring that a surviving spouse and the decedent's lineal descendants are sufficiently provided for at the death of a decedent.

PRIOR POSITIONS TAKEN ON THIS ISSUE

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

Most Recent Position None

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

Others

(May attach list if more than one) None

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

REFERRALS TO OTHER SECTIONS, COMMITTEES OR LEGAL ORGANIZATIONS

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

Referrals

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

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

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

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

WHITE PAPER
Proposed Legislation Change to §732.102 Florida Statute

I. SUMMARY

The purpose of the proposed amendment to §732.102 of the Florida Statutes is to increase the share a decedent's surviving spouse will receive in an intestate estate where all of the decedent's descendants are also descendants of the surviving spouse provided the surviving spouse does not have any other descendants. Specifically, the intestate estate would be divided as follows:

1) 100% to surviving spouse if:
    a. The decedent has no surviving descendants; or
    b. All of the decedent's surviving descendants are also descendants of the surviving spouse, provided the surviving spouse has no other descendants from another relationship;
2) Otherwise, 50% to surviving spouse and 50% to decedent's lineal descendants.

The proposed amendment is also part of a comprehensive review of recent revisions to the Uniform Probate Code.

II. CURRENT SITUATION:

The Florida Probate Code generally implements certain public policies that preclude the total disinheritance of a spouse or minor child. For example, the Florida Probate Code restricts the devise of a decedent's homestead, provides for a minimum share of an estate for the surviving spouse (the "elective share") and affords the decedent's family with some temporary support while the estate is being administered.

The intestate provisions of Florida's Probate Code generally provide a "default will" for those who die without having prepared a last will and testament expressing their specific testamentary intent. Accordingly, the intestate provisions are designed to distribute estates in the manner in which most decedents would have wanted had they prepared their own will.

Currently, if a decedent dies with lineal descendants that are also descendants of the surviving spouse, Florida Statute §732.102 gives the surviving spouse the first $60,000, and one-

half of the remaining intestate estate. If the decedent's descendants are not descendants of the surviving spouse, the estate is divided 50% to the surviving spouse, and 50% to the descendants. Whether the surviving spouse has descendants from another relationship is not relevant under Florida's current statute.

III. EFFECT OF THE PROPOSED CHANGE GENERALLY:

The proposed change would bring Florida intestate law in line with the expectations of the public at large as to how their estate should be distributed if they die without a will. The proposed change would accomplish this goal by increasing the intestate share received by a surviving spouse in situations where the decedent's descendants are also the descendants of the surviving spouse, and the surviving spouse does not have any other descendants. In such cases, the surviving spouse would receive the entire intestate estate.

If the decedent's descendants were not descendants of the surviving spouse, then the intestate estate would continue to be divided 50% to the surviving spouse, and 50% to the decedent's descendants. Similarly, in situations where the surviving spouse has descendants that are not the descendants of the decedent, the surviving spouse would receive 50% of the estate, and remaining 50% would pass to the decedent's descendants.

IV. ANALYSIS:

Many practitioners report that more often than not, their clients disagree with and are surprised by Florida's intestate succession or “default will.” This is especially true in situations where you have a traditional first marriage, or where the decedent's descendants are also the descendants of the surviving spouse and the surviving spouse has no other children. In such situations, practitioners report that their clients prefer to leave their surviving spouse the entire estate and trust that their surviving spouse will provide for their children appropriately.

Where there are children from outside the current marriage, practitioners report that their clients more frequently desire to make separate provisions for their spouse and their own children to ensure that both are appropriately provided for. Often, the children from outside the current marriage have another parent who provides support or from whom those children will inherit. Treating the intestate share of the spouse who has children outside the marriage the same as in situations where all children are from the current marriage tends to unfairly favor the child

outside the marriage. In such situations, the surviving spouse is also often the subject undue influence by her children from the prior marriage to divert the decedent's assets away from his descendants during the surviving spouse's lifetime or after his or her death. Accordingly, the proposed revision would make Florida's intestate code more consistent with what most testators prefer while continuing to implement Florida's public policy of ensuring adequate provisions are made for a decedent's surviving spouse and minor children.

If the proposed changes to §732.102 were adopted, the share for a pretermitted spouse or child would be affected. The proposed change would not, however, affect Florida's current elective share, homestead, exempt property or family allowance provisions, and would not have any impact on the current Probate Rules.

VI. FISCAL IMPACT ON STATE AND LOCAL GOVERNMENT - None.

VII. FISCAL IMPACT ON PRIVATE SECTOR - None.

VIII. CONSTITUTIONAL ISSUES - None apparent.

IX. OTHER INTERESTED PARTIES - None.

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RPPTL 2010-2011 CLE Calendar				
DATE	*SEMINAR*	*COURSE #*	*CITY*	*HOTEL*
August 6, 2010	* 31st Annual Legislative & Case Law Update	1216	Palm Beach	The Breakers
August 26, 2010	* Oil Spill Impacts in Real Property Practice	1225	Tampa	Marriott
September 14, 2010	* FAR/BAR	1134	Orlando	FAR Office
November 12, 2010	* Mortgage Law & Problem Studies	1159	Tampa	Airport Marriott
November 19, 2010	* Estate Planning & Asset Preservation	1147	Orlando	Hilton
January 14, 2011	* Real Property Litigation	1155	Tampa	Airport Marriott
Mar. 17 - 18, 2011	* Probate Law	1177	Ft. Lauderdale/Tampa	TBD/ Airport Marriott
Mar. 31 - April 02, 2011	4th Annual Construction Law Institute	1179	Orlando	TBD
Mar. 31 - April 02, 2011	Construction Law Certification Review Course	1180	Orlando	TBD
April 8 - 9, 2011	* Wills, Trusts & Estates Certification Review Course	1186	Orlando	Hyatt Regency Airport
April 8 - 9, 2011	* Real Estate Certification review Course	1185	Orlando	Hyatt Regency Airport
April 15, 2011	* Condominium Law & Condominium Association Law	1191	Tampa	Airport Marriott
May 6, 2011	* Development & Government Regulation	1197	Tampa	Airport Marriott
May 12-13, 2011	* Trust & Estate Symposium	1167	Tampa/Ft. Lauderdale	Airport Marriott/TBD
May 27, 2011	* Real Property, Probate and Trusts Law Convention Seminar	1205	Miami	Eden Roc
June 15 - 19, 2011	30th Annual Attorney Trust Officer Liaison Conference	1210	Palm Beach	The Breakers

* Webcast Program