

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



***Executive Council Meeting***

**AGENDA**

**The Breakers, Palm Beach,  
Florida**

**Saturday, August 2, 2014  
10:00 a.m. - 1:30 p.m.**

**BRING THIS AGENDA TO THE MEETING**

Real Property, Probate and Trust Law Section  
Executive Council Meeting  
August 2, 2014  
The Breakers, Palm Beach, Florida

## AGENDA

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I. [Presiding](#) — *Michael A. Dribin, Chair*

II. [Attendance](#) — *Debra Boje, Secretary*

III. [Minutes of Previous Meeting](#) — *Debra Boje, Secretary*

Motion to approve minutes of May 31, 2014 meeting of Executive Council held at South Seas Plantation, Captiva Island, **pp. 12 - 39**

IV. [Chair's Report](#) — *Michael A. Dribin*

1. Recognition of guests
2. Introduction and comments from sponsor of Executive Council lunch (The Florida Bar Foundation)
3. Acknowledgment of Section sponsors **pp. 40 - 42**
4. Remaining 2014 – 2015 RPPTL Section Executive Council Meeting Schedule **p. 43**
5. Tentative Committee meeting schedule for November 13-16, 2014 Executive Council meeting, Waldorf Astoria Hotel, Naples, Florida **pp. 44 - 45**
6. Moment of recognition of death of Executive Council member, Cynthia Fallon

V. [Chair-Elect's Report](#) — *Michael J. Gelfand, Chair-Elect*

VI. [Liaison with Board of Governors' Report](#) — *Andrew B. Sasso*

VII. [Treasurer's Report](#) — *S. Katherine Frazier*

Statement of Current Financial Conditions, **p. 46**

VIII. [Director of At-Large Members' Report](#) — *Shane Kelley*

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

X. [Kids Committee Report](#) – Steven Goodall, Chair; Laura Sundberg, Advisor

**XI. [Probate and Trust Law Division](#) — Deborah P. Goodall, Director**

**Action Items:**

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

- A. Committee motion to adopt as legislative positions of the Section the support of amendments to existing statutes to provide that a lawyer, or certain people related to, or affiliated with, the lawyer will not be entitled to receive compensation for serving as a fiduciary if the lawyer prepares the instrument making the appointment unless: (a) the lawyer or person appointed is related to the client, or (b) certain disclosures are made to the client before the instrument is signed and confirmed in a writing signed by the client, including amendments to F.S. §733.617 and to find that such legislative positions are within the purview of the RPPTL Section\*. **pp. 47 - 58**
- B. Committee motion to support (a) an amendment to Rule 4-1.8 (c) of the Rules Regulating the Florida Bar and the comment to the Rule concerning client gifts to attorneys and (b) amending the comment to Rule 4-1.8(c) to clarify the steps which an attorney should take when preparing a written instruments which names the attorney to a fiduciary position for a client. **p. 59**

**2. Digital Assets and Information Study Committee – Eric Virgil, Chair**

Committee motion to adopt as legislative positions of the Section the support of the creation of a new chapter of the Florida Statutes allowing certain fiduciaries, namely personal representatives, trustees, guardians of the property of minors or incapacitated persons, and agents under Powers of Attorney, access to digital assets belonging to the decedent, settlor, ward or principal and to find that such legislative positions are within the purview of the RPPTL Section\*. **pp. 60 - 84**

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

Committee motion to adopt as legislative positions of the Section the support of amendments to existing statutes to permit a donor or a holder of a power of appointment to provide in the instrument creating the custodianship that the custodianship does not terminate until the minor's attainment of age 25, including amendments to F.S. §§710.105, 710.111 and 710.123; and to find that such legislative positions are within the purview of the RPPTL Section\* **pp. 85 - 102**

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

Committee motion to adopt as a legislative position of the Section the support of amendments to the existing statute relating to estate tax apportionment, dealing generally with the allocation of estate taxes among beneficiaries, including amendments to F.S. §733.817 to update and clarify existing law and finding that such legislative position is within the purview of the RPPTL Section\* **pp. 103 - 134**

**\*If the proposed legislative positions are approved by the Executive Council, an additional committee motion will be presented seeking authorization for the RPPTL Section to expend Section funds in support of the proposed legislative positions.**

## Information Items:

### 1. **IRA, Insurance and Employee Benefits** – Lester Law and Howard Payne Co-Chairs

Report on the June 12, 2014 decision by the United States Supreme Court in the case of Clark v. Rameker, 573 U.S. \_\_\_\_ (2014) where the Court held that under the Federal Bankruptcy Code, a debtor's inherited IRA is not exempt, thus becoming subject to the claims of creditors. A summary of the case is attached. **pp. 135 - 136** A copy of the Supreme Court's decision can be found at: [http://www.supremecourt.gov/opinions/13pdf/13-299\\_mjn0.pdf](http://www.supremecourt.gov/opinions/13pdf/13-299_mjn0.pdf)

### 2. **Trust Law Committee** - Angela Adams, Chair

Report on the Committee's recommendations regarding non-judicial modifications to a trust. **pp. 137 - 138**

## **XII. Real Property Law Division** — *Andrew M. O'Malley, Real Property Law Division Director*

### Action Items:

#### 1. **Real Property Litigation Committee** – *Susan Spurgeon, Co-Chair*

Committee motion to adopt as a legislative position of the Section an amendment to F.S. § 48.23 (Lis Pendens) to include persons acquiring a lien on real property as parties protected from litigation against the property, where no lis pendens has been recorded, a lis pendens has been dissolved or withdrawn, or a lis pendens has expired and to find that such legislative position is within the purview of the Section. \* **pp. 139 - 143**

**\*If the proposed legislative positions are approved by the Executive Council, an additional committee motion will be presented seeking authorization for the RPPTL Section to expend Section funds in support of the proposed legislative positions.**

#### 2. **Residential Real Estate and Industry Liaison Committee** – *Salome Zikakas, Chair*

Committee motion to approve two amendments to the Residential Contract For Sale and Purchase regarding Title Evidence and Insurance and Flood Zone, and amendments to the Comprehensive Rider to the Residential Contract For Sale and Purchase: C. Seller Financing (Purchase Money Mortgage; Security Agreement to Seller); E. Federal Housing Administration (FHA)/U.S. Department of Veterans Affairs (VA); and, H. Homeowner's/Flood Insurance] (Materials to be provided in separate posting)

## Information Items:

### 1. **Title Issues and Standards Committee** – *Brian Hoffman, Co-Vice Chair*

Report on the release of the Uniform Title Standards in electronic format (the "E-Standards") that compiles the Title Standards in an updated user friendly PDF format with internal and

external links. Specific details on the update features of the E-Standards are included in the materials. The materials also include the Introduction summary that will be included with the E-Standards that provides an overview of the E-Standards that includes tips for the practitioner to maximize the features available. **pp. 144 - 147**

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

**Action Items:**

1. **Sponsor Coordination Committee** --- *Wilhelmena F.Kightlinger, Chair.*

Committee motion to approve, in accordance with past Section practice, the waiver of general sponsorship fees for fiscal year 2014-2015, and allowing The Florida Bar Foundation to have exhibitor space at the Convention and Legislative Update without paying an exhibitor fee if space is available after registration of paying exhibitors, and to ratify the waiver of the general sponsorship fees for The Florida Bar Foundation for fiscal year 2013-2014.

2. **Strategic Planning Committee** --- *Michael A. Dribin, Co-Chair, Michael J. Gelfand, Co-Chair*

Committee motion to approve the following resolution adopted by the Strategic Planning Committee:

Motion to accept the reports of the task forces of the Strategic Planning Committee as the collective 2014 Strategic Plan of the Section (“the Plan”); providing that acceptance is not to be construed as constituting a mandatory undertaking to implement each recommendation, but, rather, acceptance is of aspirational considerations; further providing that the current and future leadership of the Section is authorized, in leadership’s sound judgment, to decide which portions of the Plan to implement, when, and to what extent; further providing that acceptance does not supplant any obligation to seek a vote of the Executive Council where necessary, or to seek a vote when advisable, to implement a proposal, for example, a proposed By-Laws change; and, further providing that the Section’s officers shall, from time to time, report to the Executive Council as to the status of implementing the Plan. The Plan will supersede and replace all prior Section strategic plans. **pp. 148 - 183**

**Information Items:**

1. **Legislation Committee** — *William T. Hennessey III, Co-Chair (Probate & Trust) and Robert Freedman, Co-Chair (Real Property)*

Report of interim action taken by the Executive Committee on June 24, 2014, to approve motion to renew the RPPTL Section official legislative positions previously adopted, except for those marked “Drop” on the attached list. **pp. 184 - 194**

2. **Formation of Ad Hoc Study Committee to Consider Same Sex Marriage Issues** -*Jeffrey Ross Dollinger, Co-Chair (Real Property); George Daniel Karibjanian, Co-Chair (Probate & Trust)*

Announcement of the creation, by Chair Margaret A. Rolando, of an *Ad Hoc* Study Committee Regarding Same Sex Marriage Issues, the appointment of the co-chairs and members thereof, with a charge to study the following issues and submit an initial report by November 1, 2014:

- 1) Assuming there is no change in current Florida law concerning non-recognition of same-sex marriages, consider and make recommendations regarding traditional document drafting assumptions that should be reconsidered under Florida's statutory non-recognition of single sex marriages environment, particularly as such assumptions may relate to same sex couples who were married in another jurisdiction;
- 2) Consider how document drafting assumptions are likely to be changed by a judicial determination that Florida's statutory non-recognition of single sex marriages is unconstitutional; and,
- 3) Identify statutes within the purview of the Real Property, Probate and Trust Law Section which would need to be considered for amendment should same sex marriages be recognized in the State of Florida and to recommend changes to said statutes.

The *ad hoc* Committee is to be composed of:

Real Property Law Division: Jeffrey Ross Dollinger, Co-Chair, and members Patricia J. Hancock, Wilhelmina Fettrow Kightlinger and, Christopher William Smart

Probate and Trust Law Division: George Daniel Karibjanian, Co-Chair, and members W. Fletcher Belcher, Sarah Butters and Benjamin Diamond.

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

Report on case of Golden v. Jones: Golden v. Jones 4D12-2094. (corrected opinion), **pp. 195-201**; RPPTL Notice of Intent to Seek Leave to File Amicus Brief, **pp. 202 -203**; and, Order of the Supreme Court of Florida accepting jurisdiction to review Golden v. Jones, **pp. 204-205**.

4. **Ad Hoc Trust Account** – *John B. Neukamm and Jerry E. Aron, Co-Chairs*

Written report on adoption by the Supreme Court of Florida of amendments to the Rules Regulating the Florida Bar, Rule 5-1.2, concerning trust account administration, and penalty for non-compliance. **pp. 206 - 216**

**XIV. Probate and Trust Law Division Committee Reports** — *Deborah P. Goodall, Director*

1. **Ad Hoc Guardianship Law Revision Committee** – David Brennan, Chair; Sancha Brennan Whynot, Hung Nguyen and Charles F. Robinson, Co-Vice Chairs

2. **Ad Hoc Study Committee on Estate Planning Conflict of Interest** - William T. Hennessey III, Chair; Paul Roman, Vice Chair
3. **Ad Hoc Study Committee on Jurisdiction and Service of Process** – Barry F. Spivey, Chair; Sean W. Kelley and Christopher Q. Wintter, Co-Vice Chairs
4. **Ad Hoc Study Committee on Personal Representative Issues** – Jack A. Falk, Jr., Chair
5. **Ad Hoc Study Committee on Spendthrift Trust Issues** – Lauren Detzel and Jon Scuderi, Co-Chairs
6. **Asset Protection** – Brian C. Sparks, Chair; George Karibjanian, Vice-Chair
7. **Attorney/Trust Officer Liaison Conference** – Laura K. Sundberg, Chair; Stacey Cole, Co-Vice Chair (Corporate Fiduciary) and Deborah Russell Co-Vice Chair
8. **Digital Assets and Information Study Committee** – Eric Virgil, Chair; Travis Hayes and S. Dresden Brunner, Co-Vice Chairs
9. **Elective Share Review Committee** – Lauren Detzel and Charles I. Nash, Co-Chairs; Robert Lee McElroy IV, Vice-Chair
10. **Estate and Trust Tax Planning** – Elaine M. Bucher, Chair; David Akins, Tasha Pepper-Dickinson and William Lane, Co-Vice Chairs
11. **Guardianship, Power of Attorney and Advanced Directives** – Hung Nguyen, Chair, Tattiana Brenes-Stahl, David Brennan and Eric Virgil, Co-Vice Chairs
12. **IRA, Insurance and Employee Benefits** – L. Howard Payne and Lester Law, Co-Chairs
13. **Liaisons with ACTEC** – Michael Simon, Bruce Stone, and Diana S.C. Zeydel
14. **Liaisons with Elder Law Section** – Charles F. Robinson and Marjorie Wolasky
15. **Liaisons with Tax Section** – Harris L. Bonnette, Jr., Lauren Y. Detzel, William R. Lane, Jr., Brian C. Sparks and Donald R. Tescher
16. **Principal and Income** – Edward F. Koren, Chair; Pamela Price, Vice Chair
17. **Probate and Trust Litigation** – Thomas M. Karr, Chair; John Richard Caskey, James George, Jon Scuderi and Jerry Wells, Co-Vice Chairs
18. **Probate Law and Procedure** – John C. Moran, Chair; Sarah S. Butters, Michael Travis Hayes and Sean Kelley, Co-Vice Chairs
19. **Trust Law** – Angela M. Adams, Chair; Tami F. Conetta, Jack A. Falk and Deborah Russell, Co-Vice Chairs
20. **Wills, Trusts and Estates Certification Review Course** – Richard R. Gans, Chair; Jeffrey S. Goethe, Linda S. Griffin, Seth Marmor and Jerome L. Wolf, Co-Vice Chairs

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

1. **Commercial Real Estate** – Art Menor, Chair; Burt Bruton and Adele Stone, Co- Vice Chairs.
2. **Condominium and Planned Development** – Steven H. Mezer, Chair; Christopher Davies and Alex Dobrev, Co-Vice Chairs.
3. **Construction Law** – Hardy Roberts, Chair; Scott Pence and Lee Weintraub, Co-Vice Chairs.
4. **Construction Law Certification Review Course** – Deborah Mastin and Bryan Rendzio, Co-Chairs; Melinda Gentile, Vice Chair.
5. **Construction Law Institute** – Reese Henderson, Chair; Sanjay Kurian, Diane Perera and Jason Quintero, Co-Vice Chairs.
6. **Development & Land Use Planning** – Vinette Godelia, Chair; Mike Bedke and Neil Shoter, Co-Vice Chairs.
7. **Foreclosure Reform (Ad Hoc)** - Jeffrey Sauer, Chair; Mark Brown, Burt Bruton and Alan Fields, Co-Vice Chairs.
8. **Landlord and Tenant** – Lloyd Granet, Chair; Rick Eckhard and Brenda Ezell, Co-Vice Chairs.
9. **Legal Opinions** – Kip Thornton, Chair; Robert Stern, Vice-Chair.
10. **Liaisons with FLTA** – Norwood Gay and Alan McCall, Co-Chairs; Alexandra Overhoff and James C. Russick, Co-Vice Chairs.
11. **Insurance & Surety** – W. Cary Wright and Fred Dudley, Co-Chairs; Scott Pence and Michael Meyer, Co-Vice Chairs.
12. **Real Estate Certification Review Course** – Jennifer Tobin, Chair; Manual Farach and Martin Awerbach, Co-Vice Chairs.
13. **Real Estate Structures and Taxation** – Cristin C. Keane, Chair; Michael Bedke and Deborah Boyd, Co-Vice Chairs.
14. **Real Property Finance & Lending** – Jim Robbins, Chair; Homer Duval, III, Richard S. McIver and Bill Sklar, Co-Vice Chairs.
15. **Real Property Litigation** – Susan Spurgeon, Chair; Manny Farach, Vice Chair.
16. **Real Property Problems Study** – W. Theodore “Ted” Conner, Chair; Mark A. Brown, Jeff Dollinger, Stacy Kalmanson and Patricia J. Hancock, Co-Vice Chairs.
17. **Residential Real Estate and Industry Liaison** – Salome Zikakas, Chair; Trey Goldman and Nishad Khan, Co-Vice Chairs.

18. **Title Insurance and Title Insurance Liaison** – Raul Ballaga, Chair; Alan Fields and Brian Hoffman, Co-Vice Chairs.
19. **Title Issues and Standards** – Christopher W. Smart, Chair; Robert M. Graham, Brian Hoffman and Karla J. Staker, Co-Vice Chairs.

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

1. **Ad Hoc Leadership Academy** – Tae Kelley Bronner and Kris Fernandez, Co-Chairs
2. **Ad Hoc Study Committee on Same Sex Marriage Issues**— Jeffrey Ross Dollinger and George Daniel Karibjanian, Co-Chairs
3. **Ad Hoc Trust Account** – John B. Neukamm and Jerry E. Aron, Co-Chairs
4. **Amicus Coordination** – Robert W. Goldman, John W. Little, III, Kenneth B. Bell and Gerald B. Cope, Jr., Co-Chairs
5. **Budget** – S. Katherine Frazier, Chair; Andrew M. O'Malley, Pamela O. Price, Daniel L. DeCubellis, Lee Weintraub and W. Cary Wright, Co-Vice Chairs
6. **CLE Seminar Coordination** – Robert S. Swaine and Tae Kelley Bronner, Co-Chairs; Laura K. Sundberg (Probate & Trust), Sarah S. Butters (Probate & Trust), Lawrence J. Miller (Ethics), Jennifer S. Tobin (Real Property) and Hardy L. Roberts, III (General E-CLE), Co-Vice Chairs **p. 217**
7. **Convention Coordination** – Laura K. Sundberg and Stuart Altman, Co-Chairs; Marsha G. Madorsky, Raul Ballaga and Jennifer Jones, Co-Vice Chairs
8. **Fellows** – Brenda B. Ezell and Hung V. Nguyen, Co-Chairs; Benjamin Diamond and Ashley McCrae, Co-Vice Chairs
9. **Florida Electronic Filing & Service** – Rohan Kelley, Chair
10. **Homestead Issues Study** – Shane Kelley (Probate & Trust) and Patricia P. Jones (Real Property), Co-Chairs; J. Michael Swaine and Charles Nash, Co-Vice Chairs
11. **Legislation** – William T. Hennessey, III (Probate & Trust) and Robert S. Freedman (Real Property), Co-Chairs; Sarah S. Butters (Probate & Trust), and Alan B. Fields and Steven Mezer (Real Property), Co-Vice Chairs
12. **Legislative Update (2014)** – Stuart H. Altman, Chair; Charles I. Nash, R. James Robbins, Barry F. Spivey, Stacy O. Kalmanson, and Jennifer S. Tobin, Co-Vice Chairs
13. **Legislative Update (2015)** – R. James Robbins, Chair; Charles I. Nash, Barry F. Spivey, Stacy O. Kalmanson and Jennifer S. Tobin, Co-Vice Chairs
14. **Liaison with:**
  - a. **American Bar Association (ABA)** – Edward F. Koren and Julius J. Zschau

- b. **Board of Legal Specialization and Education (BLSE)** – Raul P. Ballaga, Jennifer S. Tobin, William Cary Wright, and Richard Gans
  - c. **Clerks of Circuit Court** – Laird A. Lile and William Theodore (Ted) Conner
  - d. **FLEA / FLSSI** – David C. Brennan, John Arthur Jones and Roland “Chip” Waller  
Co-Vice Chairs
  - e. **Florida Bankers Association** – Mark T. Middlebrook
  - f. **Judiciary** – Judge Linda R. Allan, Judge Jack St. Arnold, Judge Herbert J. Baumann, Judge Melvin B. Grossman, Judge Hugh D. Hayes, Judge Claudia Rickert Isom, Judge Maria M. Korvick, Judge Lauren Laughlin, Judge Norma S. Lindsey, Judge Celeste H. Muir, Judge Robert Pleus, Jr., Judge Walter L. Schafer, Jr., Judge Morris Silberman, Judge Richard J. Suarez, and Judge Patricia V. Thomas
  - g. **Out of State Members** – Michael P. Stafford, John E. Fitzgerald, Jr., and Nicole Kibert
  - h. **TFB Board of Governors** – Andrew Sasso
  - i. **TFB Business Law Section** – Gwynne A. Young
  - j. **TFB CLE Committee** – Robert S. Freedman and Tae Kelley Bronner
  - k. **TFB Council of Sections** – Michael A. Dribin and Michael J. Gelfand
  - l. **TFB Pro Bono Committee** – Tasha K. Pepper-Dickinson
15. **Long-Range Planning** – Michael J. Gelfand, Chair
  16. **Meetings Planning** – George J. Meyer, Chair
  17. **Member Communications and Information Technology** – William A. Parady, Chair; S. Dresden Brunner, Michael Travis Hayes, and Tattiana Brenes-Stahl, Co-Vice Chairs
  18. **Membership and Inclusion** – Lynwood F. Arnold, Jr. and Jason M. Ellison, Co-Chairs, Phillip A. Baumann - (Career Coaching), Navin R. Pasem (Diversity), and Guy S. Emerich (Career Coaching an Liaison to TFB’s Scope Program), Co-Vice Chairs
  19. **Model and Uniform Acts** – Bruce M. Stone and S. Katherine Frazier, Co-Chairs
  20. **Professionalism and Ethics--General** – Lawrence J. Miller, Chair; Tasha K. Pepper-Dickinson, Vice Chair
  21. **Professionalism and Ethics—Special Subcommittee on Integrity Awareness and Coordination** – Jerry Aron and Sandra Diamond, Co-Chairs
  22. **Publications (ActionLine)** – Silvia B. Rojas, Chair (Editor in Chief); Shari Ben Moussa (Advertising Coordinator), Navin R. Pasem (Real Property Case Review), Jane L. Cornett, (Features Editor), Brian M. Malec (Probate & Trust), George D. Karibjanian (Editor, National Reports), Lawrence J. Miller (Editor, Professionalism & Ethics), Arlene Udick and Lee Weintraub, Co-Vice Chairs
  23. **Publications (Florida Bar Journal)** – Kristen M. Lynch (Probate & Trust), and David R. Brittain (Real Property), Co-Chairs; Jeffrey S. Goethe (Editorial Board – Probate & Trust), Linda Griffin (Editorial Board – Probate & Trust), Michael A. Bedke (Editorial Board – Real Property) and William T. Conner (Editorial Board – Real Property), Co-Vice Chairs

24. **Sponsor Coordination** –Wilhelmena F. Kightlinger, Chair; J. Michael Swaine, Deborah L. Russell, W. Cary Wright, Benjamin F. Diamond, John Cole, Co-Vice Chairs
25. **Strategic Planning** –Michael A. Dribin and Michael J. Gelfand, Co-Chairs

**XVII. Adjourn**

# Minutes of the Florida Bar's Real Property, Probate and Trust Law Section

## EXECUTIVE COUNCIL MEETING

May 31, 2014

South Seas Island Resort - Captiva Island, Florida

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I. **Call to Order** – *Margaret Ann Rolando, Chair*

The meeting was held in the Sea Pearl room at the South Seas Island Resort in Captiva Island, Florida. Ms. Margaret A. Rolando called the meeting to order at 10:10am.

II. **Attendance** – *Andrew M. O'Malley, Secretary*

Andrew O'Malley reminded members that the attendance roster was circulating to be initialed by council members in attendance at the meeting.

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

III. **Minutes of Previous Meeting** – *Andrew M. O'Malley, Secretary*

Mr. O'Malley Moved: To approve Minutes of Saturday, February 8, 2014, The Ritz-Carlton, Amelia Island, Florida on page 1 of the Agenda Materials.<sup>1</sup>

IV. **Chair's Report** – *Margaret Ann Rolando*

1. Recognition of guests

Ms. Rolando noted that council member Arlene Uddick's husband, Ralph, who serves as a non-attorney member of a Florida Bar grievance committee was in attendance and she thanked him for his service.

2. Introduction and comments from sponsors of Executive Council lunch (The Florida Bar Foundation and U.S. Trust)

Ms. Rolando introduced the two sponsors of the Executive Council lunch – The Florida Bar Foundation and U.S. Trust. There was no representative present from the Florida Bar Foundation. Ms. Rolando introduced Stacy Cobb from U.S. Trust who described how U.S. Trust can provide guidance to its clients in many circumstances, including philanthropic donations.

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<sup>1</sup> References in these minutes to Agenda pages are to the Executive Council meeting Agenda and Supplemental Agenda posted at [www. RPPTL.org](http://www.RPPTL.org).

3. Acknowledgment of General Section sponsors

The following additional sponsors were recognized and thanked for their support.

**GENERAL SPONSORS**

**Attorneys' Title Fund Services, LLC** - *Ted Conner*  
*Overall Sponsors - Legislative Update & Convention & Spouse Breakfast*

**BMO Private Bank** - *Joan Kayser*  
*Probate Roundtable*

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

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

**JP Morgan** - *Carlos Batlle / Alyssa Feder*  
*Thursday Night Reception*

**Management Planning, Inc.** - *Roy Meyers / Joe Gitto*  
*Thursday Lunch*

**Old Republic National Title Insurance Company** - *Jim Russick*  
*Thursday Night Reception*

**Regions Private Wealth Management** - *Margaret Palmer*  
*Friday Night Dinner*

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

**SunTrust Bank** - *Debbie Smith Johnson*  
*Saturday Night Reception and Dinner*

**The Florida Bar Foundation** – *Bruce Blackwell*  
*Saturday Lunch*

**U.S. Trust** - *Stacey Cole*  
*Saturday Lunch*

**Wells Fargo Private Bank** - *Mark Middlebrook / George Lange / Alex Hamrick*  
*Friday Night Reception*

**FRIENDS OF THE SECTION**

**BB&T Bank** - *Rob Frye*

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

**Guardian Trust** - *Ashley Gonnelli*

**Wright Private Asset Management, LLC - Diane Timpany**

**COMMITTEE SPONSORS**

**Attorneys' Title Fund Services, LLC – Ted Conner**  
*Commercial Real Estate Committee*

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

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

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

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

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

**Guardian Trust – Ashley Gonnelli**  
*Guardianship, Power of Attorney & Advance Directives Committee*

**Iberia Wealth Advisors – Jessica Urloanski**  
*Estate & Trust Tax Planning Committee*

**Key Private Bank – Kathleen A. Saigh**  
*Asset Protection Committee*

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

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

**Northern Trust – Brett Rees**  
*Trust Law Committee*

**Nuview IRA, Inc. – Glen Mathers**  
*IRA, Insurance & Employee Benefits Committee*

Ms. Rolando introduced Pat Jones of Attorneys' Title Fund Services, LLC who noted the long history of the Fund in providing services to Section members, she also acknowledged the Fund's ongoing joint venture with Old Republic National Title Insurance Company.

Ms. Rolando then introduced the new RPPTL Section Administrator, Mary Ann Obos, welcomed her to the meeting and noted that those who have met her have been very impressed by her. Ms. Rolando also welcomed the Section's interim administrator, Dixey Teal, and thanked her for working with Section in difficult circumstances. She presented both Ms. Obos and Ms. Teal with tokens of appreciation from the Section. Ms. Rolando then introduced and thanked Stephen Goodall, son of council member Deborah Goodall, who for years has provided volunteer services to the Section, particularly in the areas of technology and cost saving measures.

Ms. Rolando then introduced former Section chair George Meyer who announced the winners of the awards from the "Glow Golf" tournament held on Wednesday night of the council meeting:

- i) Closest to the Pin/Women – Pat Meyer
- ii) Closest to the Pin/Men – David Brennan
- iii) Heckling and Moral Support – Bill Hennessey
- iv) Highest Score – Stafford/Swain
- v) Second Place Winner – Brennan / Whynot / Dunbar / Gelfand
- vi) First Place Winner – Goodall / Meyer

Former Section chair Sandra Diamond raised a point of order and welcomed Ms. Rolando to "The Back Row" of former Section chairs.

**V. Chair-Elect's Report – Michael A. Dribin**

Mr. Michael Dribin reported on the upcoming Council meetings and requested that all committee chairs review as published in the Supplemental Agenda the tentative committee meeting schedule for the meeting at the Breakers and notify him by June 4, of any changes so the schedule could be finalized and circulated. Mr. Dribin reviewed the schedule of events for the Breakers meeting.

Mr. Dribin asked that all council members who are going to the Chicago out of state meeting notify him so they can be put on the list serve. The Executive Council meeting, including a CLE presentation, will be held at Loyola University Law School. The room block at Sofitel Water Tower Hotel has been sold out but there are numerous local hotels.

*[Secretary's Note: The next item was presented later in the Agenda but is reported in these minutes in connection with the report on Meeting Schedules]*

Mr. Dribin then called upon incoming Section Chair-Elect Michael Gelfand who announced that the out of state meeting during his term will be held in Berlin Germany, September 30-October 4, 2015.

**VI. Liaison with Board of Governors' Report – Andrew B. Sasso**

Mr. Andrew Sasso, who Mr. Dribin announced has been reappointed as the RPPTL Section's Board of Governor's liaison, presented the report and encouraged Council members to apply for positions on the Judicial Nominating Commissions. Mr. Sasso noted that two

council members are currently serving on JNCs and there are currently 76 vacancies. The Board of Governors will be encouraging the Governor to make appointments from the slate submitted by the Board of Governors with particular emphasis on diversity.

Mr. Sasso also encouraged council members to serve on Florida Bar grievance committees and to recommend non-lawyer with whom they are familiar for the non-lawyer positions on grievance committees.

Mr. Sasso noted that the Board of Governors approved in concept a proposal to lend the Florida Bar Foundation six million dollars to cover the budget short falls the Foundation has experienced due to a precipitous drop in IOTA revenues. The Board is seeking comments from Members about that proposal. The Board of Governors did not support the petition filed with the Supreme Court to raise Bar dues to fund the delivery of low income legal services.

**VII. Treasurer's Report – *S. Katherine Frazier***

Ms. Katherine Frazier reported that the expenses and revenues as reflected on the updated financial materials included on page S13 of the supplemental agenda are in line with the approved budget. Ms. Frazier thanked Section sponsors for their financial and other contributions to the Section. Ms. Frazier noted that preparations for the 2015-2016 budget process were already underway.

Mr. Dribin thanked Ms. Frazier for her outstanding work during her first year as treasurer and noted that she will be serving a second term.

**VIII. Director of At-Large Members' Report – *Debra L. Boje***

Ms. Deborah Boje noted that it was her last year as At Large Members director and thanked deputy directors Arlene Uddick and Jon Scuderi for their assistance during the year and then wished her successor, Shane Kelly well. Ms. Boje stated that the At Large Members projects include compiling a list of out of state members by division categories and by State of practice, sending personalized letters to judges prior to Section meetings and assisting Section committees publicizing their CLE programs.

Mr. Dribin thanked Ms. Boje for her very effective term as director and noted that she is the incoming Section Secretary.

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

Mr. Goodall said another survey would be sent to Council Members concerning activities for the Breakers meeting and a Kids Committee meeting would be convened at the Breakers.

**X. Probate and Trust Law Division – *Deborah P. Goodall, Director***

## Action Items

### 1. **Ad Hoc Committee on Personal Representative Issues** – Jack A. Falk, Chair

Mr. Jack Falk reported on the background of the Committee's proposed legislative position which arose out of issues created by the Hill vs. Davis 70 So2d 572 (Fla. 2011), decision concerning the time period for filing objections to the qualification of a personal representative after the Notice of Administration. The Court held that the statutory 3 month period applied absent fraud, mistake or misconduct. The decision and committee's proposed amendments are reviewed in detail in the legislative white paper and related materials on page 39 of the Agenda.

Mr. Falk moved on behalf of the Committee:

To adopt as legislative positions of the Section the support of amendments to existing statutes to ensure prompt objections to various aspects of probate administration and to clarify the rights and duties of parties when a personal representative of an estate is unqualified to act or is no longer qualified to act in that capacity including amendments to F.S. §§733.212, 733.2123, 733.3101, and 733.504; and finding that such legislative positions are within the purview of the RPPTL Section and to expend funds in support of the position.

The Motion was approved unanimously.

### 2. **Estate and Trust Tax Planning** – Elaine M. Bucher, Chair

Ms. Goodall reported that the power of appointment action item had been withdrawn by the Committee based on pertinent comments raised at the Committee's meeting at Captiva Island and that the proposal would be presented at The Breakers' meeting.

## Information Items

### 1 & 2. **Guardianship, Power of Attorney and Advanced Directives** – Sean W. Kelley, Chair

Mr. Sean Kelley reported on the recent Florida Supreme Court order quashing the Ninth Circuit administrative order relating to Professional Guardians. The Section had opposed the initial adoption of an administrative order in the Ninth Circuit. The local rules advisory committee submitted a petition to the Supreme Court stating that the administrative order was more in the nature of a local rule and therefore was inappropriate. The Ninth Circuit then adopted a narrower, less objectionable local rule, but the Committee remained concerned that the issues addressed by the local rule should more appropriately be handled on a statewide basis and not with a patchwork of local rules.

Mr. Kelley then reported on the Executive Committee's interim meeting action to approve the Section's sending a letter to the Clerk of the Supreme Court expressing the Section's continued interest in opposing the Ninth Circuit's proposed Local Rule 9 relating to Professional Guardians and requesting a hearing if the Florida Supreme Court will be considering Local Rule 9.

3. **Guardianship, Power of Attorney and Advanced Directives** – Sean W. Kelley, Chair

Mr. Kelley reported on the status of a declaratory action arising out of the Thirteenth Circuit challenging the constitutionality of the provision in the Power of Attorney Act that states that only a "qualified agent" is entitled to compensation for services rendered as an agent. The Attorney General's office intervened in that suit and moved to dismiss based on the fact that there is no actual controversy in the case since both plaintiff and defendant are aligned and in agreement that the statute is unconstitutional. The motion was denied and the Attorney General is considering appealing. The committee will continue to monitor the case and report on it at future meetings.

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

Mr. William T. Hennessey III reported on the Committee's recommendations regarding compensation for serving as a fiduciary when a lawyer drafted or supervised the execution of the document that names the lawyer - or someone related to the lawyer - as a fiduciary. Mr. Hennessey noted that there is no disagreement that a lawyer may ethically draft a document naming him or herself as a fiduciary. The Committee's recommendations do not alter that in any way, but rather address the written disclosures a lawyer must make to a client when such documents are being executed so the client understands that the lawyer will be compensated both as a lawyer and a fiduciary. Such disclosure serves not only the client's interest but also protects the lawyer against charges that such roles and compensation were never explained. Florida Bar grievance counsel has advised the Committee that the issue of appointment as a fiduciary without disclosure of both the compensation and the attorney's multiple roles is a "hot button" item for the Bar. Often the lawyer has nothing in his or her file demonstrating disclosure. The committee's proposal supplements existing Bar Rule 4-1.8(c) that currently does not explicitly require disclosures of such roles and compensation. The committee's proposal would "add teeth" to the disclosure requirements by amending FS. 733.617 and FS. 736.0708 to provide that an attorney that fails to provide the disclosures will not be entitled to compensation as a personal representative or trustee, nor will any person related to or employed by the attorney be compensated as personal representative or trustee. Mr. Hennessey noted that the disclosures were similar to those required by the New York State Bar.

Mr. Goodall then asked for comments from council members. Concerns were expressed that the proposed legislative amendments constituted an encroachment by the legislative branch on the Bar's authority to regulate the practice of law and thus be unconstitutional as a violation of Constitutional separation of powers. A concern was also expressed that the amendment might be perceived as a legislative endorsement of lawyer's ability to "double dip" this compensation as both a lawyer and fiduciary. Several members indicated their support for the legislation noting that amending the Bar's rules would not adequately protect clients and recalled an instance in which the lawyer's potential compensation as a fiduciary was so great that Bar sanctions were insufficient to discourage bad behavior. Others noted that the Bar grievance progress is slow and many clients may not be aware of that option and that the statute regulated fiduciaries fees, not lawyer's fees.

Mr. Hennessey stated that the Committee would communicate with the Florida Bar to determine if it has concerns about the proposed statutory amendments from a lawyer regulation perspective and will report back at the Breakers' meeting.

5. **Digital Assets and Information Study Committee** – J. Eric Virgil, Chair  
[Secretary's Note: This information item was presented out of order but is reported in these minutes in the sequence stated in the Supplemental Agenda]

Mr. J. Eric Virgil reported on status of Committee's review of the issues involved in giving authority to fiduciaries to have access, control or copies of digital assets and accounts and removing barriers to fiduciary's access to electronic records and scope of legislation. Mr. Virgil also discussed the proposed "Florida Uniform Fiduciary Access to Digital Assets Act". Mr. Virgil noted that the committee anticipates that the proposed act will be presented as an action item at The Breakers meeting.

There is currently a great deal of uncertainty as to how fiduciaries obtain access to digital assets (i.e. electronic records including email and accounts such as E-bay, Amazon, Google, social media, etc.) upon the death of the owner. The proposed Act will have no effect on the property rights relating to those assets, it will only clarify how fiduciaries access these assets. The proposed Act is based largely on the work product of the Uniform Laws Commission with adaptations and references to existing Florida laws. Mr. Virgil asked that all interested council members submit comments to him and also noted that if the Act is approved and enacted into law Florida will be the first State to enact such a law.

**XI. Real Property Law Division** — *Michael J. Gelfand, Director*

**Action Item:**

**Residential Real Estate Industry Liaison Committee** – *Frederick W. Jones, Chair*

Mr. Frederick W. Jones reported that as a result of comments and suggestion made at the Real Estate Division Roundtable, the Committee has elected to withdraw consideration of two amendments to the Residential Contract For Sale And Purchase regarding Title Evidence and Insurance and Flood Zone, and amendments to the Comprehensive Rider to the Residential Contract For Sale And Purchase: C. Seller Financing (Purchase Money Mortgage; Security Agreement To Seller); E. Federal Housing Administration (FHA)/U.S. Department Of Veterans Affairs (VA); and, H. Homeowner's/Flood Insurance]. Mr. Jones noted that due to concerns about the effect of the Dodd-Frank bill on seller financing, the Committee would send an email to Section members advising them to beware of its implications for seller financing. The Committee anticipates presenting the amendments as an Action Item at The Breakers' meeting.

**Information Item:**

**Condominium & Planned Development Committee** – *Steven H. Mezer, Chair*

Mr. Steven H. Mezer reported on the Executive Committee's interim meeting action to adopt as a Section position to oppose legislation that changes the definition of the practice of law to exclude from the definition a community association manager's interpretation of documents or statutes which govern a community association, determination of title to real

property, or completion of documents which require interpretation of statutes or the documents which govern a community association, including opposition to SB 1466, SB1496, HB 7037, and CS/HB 7039., to find that the position is in the Section's purview; and to expend funds in support of the position. The legislation was adopted, but the Section is seeking a veto from the Governor.

Mr. Gelfand thanked the Real Property Division for their dedicated efforts which have led to the last two years of successes, and he enjoyment working with all.

## **XII. General Standing Committees – Michael A. Dribin, Director and Chair-Elect**

### **Information Items:**

#### **1. Ad Hoc Leadership Academy Committee – Tae Kelley Bronner, Chair**

Ms. Tae Kelley Bronner reported on acceptance of two RPPTL Section nominees for admission in the second year of The Florida Bar Leadership Academy: Steven Liverpool and Jenna Rubin. Ms. Bronner noted that both of them had attended the Captiva Island meetings. Mr. Dribin also recognized the current Section Fellows present at the meeting.

#### **2. Ad Hoc Trust Account Committee – Jerry Aron and John Neukamm, Co-Chairs**

Mr. Ted Conner reported on behalf of the Committee concerning the March 27, 2014 order of Supreme Court of Florida amending Rule 5-12 (Trust Accounting Records and Procedures), Rules Regulating the Florida Bar, requiring, generally, multi-lawyer firms to maintain a written plan for each trust account maintained by the firm, effective June 1, 2014. An internet link to Supreme Court's Order is <http://www.floridasupremecourt.org/decisions/2014/sc12-2234.pdf>. Mr. Connor noted that the plans must be given to each lawyer in the firm practicing in the State of Florida, and designate the lawyer in the firm responsible for answering any questions concerning the firm's trust accounts. Mr. Connor noted that LOMAS has template plan forms and that they were also included in the article in the May 1<sup>st</sup> issue of the Florida Bar News reporting on the amended Rule.

#### **3. Amicus Coordination Committee – Kenneth B. Bell and Robert W. Goldman, Co-Chairs**

Mr. Robert W. Goldman reported on the decision *Aldrich v. Basile, et.al.*, No. SC11-2147, Supreme Court of Florida, March 27, 2014, in which the RPPTL Section filed an amicus brief, pertaining to the following certified question:

Whether Section 732.6005, Florida Statutes (2004) requires construing a will as disposing of property not named or in any way described in the will, despite the absence of any residuary clause, or any other clause disposing of the property, where the decedent acquired the property in question after the will was executed?

The Court approved the decision of the First District and answered the question in the negative. Mr. Goldman noted it was a very tough case.

Mr. Goldman also reported on the status of the *Golden v. Jones* case and noted that briefs have been submitted and the Supreme Court will decide whether to accept jurisdiction.

4. **CLE Seminar Coordination Committee** – Tae Kelley Bronner and Robert S. Freedman, Co-Chairs

Ms. Tae Kelley Bronner reported on the schedule of upcoming programs and stated that attendance at CLE programs had increased significantly. Ms. Bronner noted that e-seminars are increasing in number and have been well received. She gave thanks to the At Large Members for their assistance in publicizing programs and reminding Chairs to be certain that speakers adhere to deadlines for submission of materials.

Mr. Robert S. Freedman stated that the “When is It Too Late to Foreclose a Mortgage” webcast seminar was a great success with over 1150 signups for a program that could only accommodate 1000 attendees. The program is now available on the RPPTL website. The Committee also presented a program “Drafting Better Real Estate Contracts” as a webcast that was very well attended. Mr. Freedman then reviewed upcoming programs.

Mr. Dribin then thanked Mr. Freedman for his excellent service as co-chair, particularly in working to demystify the Bar financial materials associated with seminars.

5. **Legislation Committee** – Robert Swaine (Real Property) and William T. Hennessey, III (Probate and Trust), Co-Chairs

Mr. Peter Dunbar, the Section’s legislative consultant, noted that the bills passed in the 2014 legislative session will be discussed in detail at the Legislative Update Seminar at the Breakers but recommended also reviewing the list of bills that did not pass as many will be back in the 2015 legislative session. Mr. Dunbar then discussed the process and timing for the transmittal to the Governor of bills approved by the legislature.

Mr. Dunbar noted that the Section has asked the Governor to veto HB 7037, discussed as an information item during the Condominium & Planned Development Committee Report. He also noted the “Information Protection Act”, which was motivated by the Target Stores data breach, will affect how law firms protect and dispose of records and client related data.

6. **Strategic Planning Committee** – Michael A. Dribin and Margaret A. Rolando, Co-Chairs

Mr. Dribin noted that the final report of the Committee from the Strategic Planning meeting held in Tampa on April 25-26, 2014 is included in the supplemental agenda on page 40 together with the results of the RPPTL Section Executive Council Survey. The Strategic Plan will be presented to the Executive Council for approval as an Action Item at the Breakers meeting. Mr. Dribin noted that the Section adopts a Strategic Plan every five years and that a vote in favor of adoption is a vote for the Strategic Plan’s aspirations and goals even though there may be lack of consensus on individual recommendations. A vote in favor will authorize the Executive Committee to use its judgment in implementing the goals with the expectation that Executive Council approval will be sought when required by the Section by-laws.

Mr. Dribin then asked for and received brief reports from each of the five task forces.

7. **Fellow Committee** – Brenda E. Ezell and Marsha G. Madorsky, Co-chairs

Ms. Tae Kelley Bronner reported on the selection of the new Fellows for 2014-2016. Ms. Julia Jennison and Ms. Melissa VanSickle were selected on the Real Estate side, Mr. John Costello and Mr. Michael Sneeringer were selected on the Probate Trust side. Ms. Bronner noted that they were chosen from a pool of many applicants.

**XIII. Probate and Trust Law Division Committee Reports** – *Deborah P. Goodall, Director*

1. **Ad Hoc Guardianship Law Revision Committee** - David Brennan, Chair; Sean W. Kelley, Charles F. Robinson and Sancha Brennan Whynot, Co-Vice Chairs
2. **Ad Hoc Study Committee on Creditors' Rights to Non-Exempt, Non-Probate Assets** – Angela M. Adams, Chair
3. **Ad Hoc Study Committee on Estate Planning Conflict of Interest** - William T. Hennessey III, Chair; Paul Roman, Vice Chair
4. **Ad Hoc Study Committee on Jurisdiction and Service of Process** – Barry F. Spivey, Chair; Sean W. Kelley and Christopher Q. Wintter, Co-Vice Chairs
5. **Ad Hoc Study Committee on Personal Representative Issues** – Jack A. Falk, Jr., Chair
6. **Ad Hoc Study Committee on Treatment of Life Insurance Payable to Revocable Trust** – Richard R. Gans, Chair
7. **Asset Protection** – Brian C. Sparks, Chair; George Karibjanian, Vice-Chair
8. **Attorney/Trust Officer Liaison Conference** – Jack A. Falk, Jr., Chair; Sharon DaBrusco, Corporate Fiduciary Chair; Patrick Lannon, Deborah Russell and Laura Sundberg, Co-Vice Chairs
9. **Digital Assets and Information Study Committee** – Eric Virgil, Chair; S. Dresden Brunner and Travis Hayes, Co-Vice Chairs
10. **Elective Share Review Committee** – Lauren Detzel and Charles I. Nash, Co-Chairs; Robert Lee McElroy IV, Vice Chair
11. **Estate and Trust Tax Planning** – Elaine M. Bucher, Chair; David Akins, Tasha Pepper-Dickinson and William Lane, Co-Vice Chairs
12. **Guardianship, Power of Attorney and Advanced Directives** – Sean W. Kelley, Chair; Seth A. Marmor, Tattiana Brenes-Stahl, Cynthia Fallon and David Brennan, Co-Vice Chairs
13. **IRA, Insurance and Employee Benefits** – L. Howard Payne and Lester Law, Co-Chairs
14. **Liaisons with ACTEC** – Michael Simon, Bruce Stone, and Diana S.C. Zeydel
15. **Liaisons with Elder Law Section** – Charles F. Robinson and Marjorie Wolasky
16. **Liaisons with Tax Section** – Harris L. Bonnette, Jr., Lauren Y. Detzel, William R. Lane, Jr., David Pratt, Brian C. Sparks and Donald R. Tescher
17. **Principal and Income** – Edward F. Koren, Chair; Pamela Price, Vice Chair
18. **Probate and Trust Litigation** – Thomas M. Karr, Chair; Jon Scuderi, James George, John Richard Caskey, Jerry Wells, Co-Vice Chairs
19. **Probate Law and Procedure** – John C. Moran, Chair; Sarah S. Butters, Michael Travis Hayes and Marsha G. Madorsky, Co-Vice Chairs

20. **Trust Law** – Shane Kelley, Chair; Angela M. Adams, Tami F. Conetta and Deborah L. Russell, Co-Vice Chairs
21. **Wills, Trusts and Estates Certification Review Course** – Richard R. Gans, Chair; Jeffrey S. Goethe, Linda S. Griffin, Laura Sundberg and Jerome L. Wolf, Co-Vice Chairs

**XIV. Real Property Law Division Reports** – *Michael J. Gelfand, Director*

1. **Ad Hoc Foreclosure Reform** – Jeffrey Sauer, Chair; Mark Brown, Burt Bruton and Alan Fields, Co-Vice Chairs
2. **Commercial Real Estate** – Art Menor, Chair; Burt Bruton and Adele Stone, Co-Vice Chairs
3. **Condominium and Planned Development** – Steven H. Mezer, Chair; Jane Cornett, Christopher Davies and Lisa Van Dien, Co-Vice Chairs
4. **Construction Law** – Hardy Roberts, Chair; Lisa Colon Heron, Scott Pence and Lee Weintraub, Co-Vice Chairs
5. **Construction Law Certification Review Course** – Lee Weintraub, Chair; Bruce Alexander, Deborah Mastin and Bryan Rendzio, Co-Vice Chairs
6. **Construction Law Institute** – Reese Henderson, Chair; Sanjay Kurian, Diane Perera and Jason Quintero, Co-Vice Chairs
7. **Development & Green Building** – Anne Pollack, Chair; Mike Bedke, Vinette Godelia, and Neil Shoter, Co-Vice Chairs
8. **Insurance and Surety** – W. Cary Wright, Chair; Fred Dudley and Michael Meyer, Co-Vice Chairs
9. **Landlord and Tenant** – Lloyd Granet, Chair; Rick Eckhard, Vice Chair
10. **Legal Opinions** – Kip Thornton, Chair; Robert Stern, Vice-Chair
11. **Liaisons with FLTA** – Norwood Gay and Alan McCall, Co-Chairs; Alan Fields and James C. Russick, Co-Vice Chairs
12. **Real Estate Certification Review Course** – Raul Ballaga, Chair; Kip Thornton and Jennifer Tobin, Co-Vice Chairs
13. **Real Estate Structures and Taxation** – Wilhelmina Kightlinger, Chair; Cristin C. Keane and Salome Zikakis, Co-Vice Chairs
14. **Real Property Finance & Lending** – Jim Robbins, Chair; Homer Duval, III, Brenda Ezell and Bill Sklar, Co-Vice Chairs
15. **Real Property Litigation** – Marty Awerbach, Chair; Manny Farach and Susan Spurgeon, Co-Vice Chairs
16. **Real Property Problems Study** – W. Theodore “Ted” Conner, Chair; Mark A. Brown and Patricia J. Hancock, Co-Vice Chairs
17. **Residential Real Estate and Industry Liaison** – Frederick W. Jones, Chair; Deborah Boyd and E. Ralph Tirabassi, Co-Vice Chairs
18. **Title Insurance and Title Insurance Liaison** – Kristopher Fernandez, Chair; Raul Ballaga and Julie Horstkamp, Co-Vice Chairs
19. **Title Issues and Standards** – Christopher W. Smart, Chair; Robert M. Graham, Patricia P. Jones and Karla J. Staker, Co-Vice Chairs

**XV. General Standing Committee Reports** – *Michael A. Dribin, Director and Chair-Elect*

1. **Ad Hoc Leadership Academy** – Tae Kelley Bronner, Chair

No additional report

2. **Ad Hoc LLC Monitoring** – Lauren Y. Detzel and Ed Burt Bruton, Jr., Co-Chairs
3. **Ad Hoc Trust Account** – John B. Neukamm and Jerry E. Aron, Co-Chairs  
No additional report
4. **Alternative Dispute Resolution (ADR)** – Deborah Bovarnick Mastin and David R. Carlisle, Co-Chairs
5. **Amicus Coordination** – Robert W. Goldman, John W. Little, III, Kenneth B. Bell and Gerald B. Cope, Jr., Co-Chairs  
No additional report
6. **Budget** – S. Katherine Frazier, Chair; Andrew M. O’Malley, Pamela O. Price, Daniel L. DeCubellis, Lee Weintraub, and W. Cary Wright, Co-Vice Chairs  
No additional report
7. **CLE Seminar Coordination** – Robert Freedman, Co-Chair (Real Property), Tae K. Bronner, Co-Chair (Probate & Trust); Laura K. Sundberg (Probate & Trust), Sarah S. Butters (Probate & Trust), Lawrence J. Miller (Ethics), Jennifer S. Tobin (Real Property) and Hardy L. Roberts, III (General E-CLE), Co-Vice Chairs  
No additional report
8. **Convention Coordination** – Laura K. Sundberg, Chair; Marsha G. Madorsky, S. Dresden Brunner and Chris N. Davies, Co-Vice Chairs
9. **Fellows** – Marsha G. Madorsky, Chair; Brenda B. Ezell, Hung V. Nguyen and Benjamin B. Bush, Co-Vice Chairs  
No additional report
10. **Florida Electronic Filing & Service** – Patricia P. Jones and Rohan Kelley, Co-Chairs
11. **Homestead Issues Study** – Shane Kelley (Probate & Trust) and Patricia P. Jones (Real Property), Co-Chairs
12. **Legislation** – William T. Hennessey, III, Co-Chair (Probate & Trust), Robert S. Swaine, Co-Chair (Real Property); Sara S. Butters (Probate & Trust) and Alan B. Fields (Real Property), Co-Vice Chairs  
No additional report

13. **Legislative Update (2014)** – Stuart H. Altman, Chair; Charles I. Nash, R. James Robbins, Brian F. Spivey, Stacy Kalmanson and Jennifer S. Tobin, Co-Vice Chairs
  
14. **Liaison with:**
  - a. **American Bar Association (ABA)** – Edward F. Koren and Julius J. Zschau
  
  - b. **Board of Legal Specialization and Education (BLSE)** – Raul P. Ballaga, David M. Silberstein and Deborah L. Russell
  
  - c. **Clerks of Circuit Court** – Laird A. Lile and William Theodore (Ted) Conner
  
  - d. **FLEA / FLSSI** – David C. Brennan, John Arthur Jones and Roland “Chip” Waller
  
  - e. **Florida Bankers Association** – Mark T. Middlebrook
  
  - f. **Judiciary** – Judge Linda R. Allan, Judge Herbert J. Baumann, Jr., Judge Melvin B. Grossman, Judge Hugh D. Hayes, Judge Claudia Rickert Isom, Judge Maria M. Korvick, Judge Lauren Laughlin, Judge Celeste H. Muir, Judge Robert Pleus, Jr., Judge Richard J. Suarez, Judge Morris Silberman, Judge Patricia V. Thomas and Judge Walter L. Schafer, Jr.
  
  - g. **Out of State Members** – Michael P. Stafford and John E. Fitzgerald, Jr.
  
  - h. **TFB Board of Governors** – Andrew Sasso  
  
No additional report
  
  - i. **TFB Business Law Section** – Gwynne A. Young
  
  - j. **TFB CLE Committee** – Robert S. Freedman  
  
No additional report
  
  - k. **TFB Council of Sections** – Margaret A. Rolando and Michael Dribin
  
  - l. **TFB Pro Bono Committee** – Tasha K. Pepper-Dickinson
  
15. **Long-Range Planning** – Michael Dribin, Chair
  
16. **Meetings Planning** – George Meyer, Chair
  
17. **Member Communications and Information Technology** – Nicole C. Kibert, Chair; S. Dresden Brunner, William A. Parady and Michael Travis Hayes, Co-Vice Chairs

18. **Membership and Inclusion** – Michael A. Bedke, Chair; Lynwood F. Arnold, Jr., (Diversity); Stacy O. Kalmanson, (Law Schools), Phillip A. Baumann, (Career Coaching) Navin R. Pasem (Diversity), Co-Vice Chairs

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

20. **Professionalism and Ethics--General** – Lawrence J. Miller, Chair and Tasha K. Pepper-Dickinson, Vice Chair

21. **Professionalism and Ethics—Special Subcommittee on Integrity Awareness and Coordination** – Jerry Aron, Co-Chair, Sandra F. Diamond, Co-Chair

22. **Publications (ActionLine)** – Silvia B. Rojas, Chair; Shari Ben Moussa (Real Property) , Navin R. Pasem (Real Property), Jane L. Cornett, (At Large), Brian M. Malec (Probate & Trust), George D. Karibjanian (Probate & Trust), Hung V. Nguyen (Probate & Trust), Lawrence J. Miller (Professionalism & Ethics), Co-Vice Chairs

23. **Publications (Florida Bar Journal)** – Kristen M. Lynch, Co-Chair (Probate & Trust), David R. Brittain Co-Chair (Real Property); Jeffrey S. Goethe, Co-Vice Chair (Editorial Board – Probate & Trust), Linda Griffin, Co- Vice Chair (Editorial Board – Probate & Trust), Michael A. Bedke, Co-Vice Chair (Editorial Board – Real Property) and William T. Conner, Co-Vice Chair (Editorial Board – Real Property)

Ms. Kristin M. Lynch reported that the Committee is actively soliciting articles. It currently has articles through this August. Mr. David R. Brittain noted that the articles for the July and August issues were both from the Real Estate Division so articles from the Probate and Trust Division would be welcome.

24. **Sponsor Coordination** – Kristen M. Lynch, Co-Chair, Wilhelmena F. Kightlinger, Co-Chair; J. Michael Swaine, Adele I. Stone, Deborah L. Russell, W. Cary Wright and Benjamin F. Diamond, Co-Vice Chairs

Ms. Kristin M. Lynch stated that North American Title Insurance Company has become a general sponsor of the Section. Ms. Lynch also noted that at the Captiva meeting the At Large Members heard from the sponsors and the reception for the sponsors was very well attended.

Mr. Dribin thanked Ms. Lynch for her hard work and determination with the sponsor coordination committee over the course of several years.

25. **Strategic Planning** – Margaret A. Rolando, Co-Chair, Michael A. Dribin, Co-Chair

No additional report

**XVI. [Adjourn](#)**

There being no further business to come before the Executive Council, Mr. Dribin thanked those in attendance and a motion to adjourn was unanimously approved at 1:17 a.m.

Respectfully submitted,

Andrew M. O'Malley, Secretary

**ATTENDANCE ROSTER**  
**REAL PROPERTY PROBATE & TRUST LAW SECTION**  
**EXECUTIVE COUNCIL MEETINGS**  
**2013-2014**

Executive Committee	Division		Jul. 27 Palm Beach	Sept. 21 Lisbon, Portugal	Nov. 23 Sarasota	Feb. 8 Amelia Island	May 31 Captiva
	RP	P&T					
Rolando, Margaret A., Chair	√		X	X	X	X	X
Dribin, Michael A., Chair-Elect		√	X		X	X	X
Gelfand, Michael J., Real Property Law Div. Director	√		X	X	X	X	X
Goodall, Deborah P., Probate and Trust Law Div. Director		√	X		X	X	X
O'Malley, Andrew M., Secretary	√		X		X	X	X
Frazier, S. Katherine, Treasurer	√		X		X	X	X
Hennessey, William M., Legislation Co-Chair (P&T)		√	X		X	X	X
Swaine, Robert S., Legislation Co-Chair (RP)	√		X		X	X	X
Bronner, Tae K. Seminar Coordinator (P&T)		√	X		X	X	X
Freedman, Robert S., Seminar Coordinator (RP)	√		X	X	X	X	X
Boje, Debra L., Director of At-Large Members		√	X		X	X	X
Belcher, William F., Immediate Past Chair		√	X		X	X	

Executive Council Members	Division		Jul. 27 Palm Beach	Sept. 21 Lisbon, Portugal	Nov. 23 Sarasota	Feb. 8 Amelia Island	May 31 Captiva
	RP	P&T					
Adams, Angela M.		√	X		X		X
Adcock, Jr., Louie N., <b>Past Chair</b>		√					
Akins, David J.		√	X	X	X		
Alexander, Bruce G.	√						
Altman, Stuart H.		√	X		X	X	X
Arnold, Jr., Lynwood F.	√	√	X		X	X	

Executive Council Members	Division		Jul. 27 Palm Beach	Sept. 21 Lisbon, Portugal	Nov. 23 Sarasota	Feb. 8 Amelia Island	May 31 Captiva
	RP	P&T					
Aron Jerry E. <b>Past Chair</b>	√		X		X	X	
Awerbach, Martin S.	√				X		X
Bald, Kimberly A.	√		X		X	X	X
Ballaga, Raul P.	√		X			X	
Banister, John R.	√						
Battle, Carlos A.		√	X		X	X	X
Baumann, Honorable Herbert J.		√					
Baumann, Phillip A.		√	X	X	X	X	X
Beales, III, Walter R. <b>Past Chair</b>	√						
Bedke, Michael A.	√		X		X		X
Bell, Kenneth B.	√						
Bellew, Brandon D.		√	X		X	X	X
Ben Moussa, Shari D.	√		X				
Bonnette, Jr., Harris L.		√	X		X		
Boyd, Deborah	√					X	X
Bowser, Robert Wade	√						
Brenes-Stahl, Tattiana P.		√	X		X	X	
Brennan, David C. <b>Past Chair</b>		√	X			X	X
Brittain, David R.	√				X		X
Brown, Mark A.	√		X			X	X
Brunner, S. Dresden		√	X		X	X	X
Bruton, Jr., Ed Burt	√		X			X	
Bucher, Elaine M.		√	X		X	X	X
Bush, Benjamin B.	√						

Executive Council Members	Division		Jul. 27 Palm Beach	Sept. 21 Lisbon, Portugal	Nov. 23 Sarasota	Feb. 8 Amelia Island	May 31 Captiva
	RP	P&T					
Butters, Sarah S.		√	X		X	X	X
Buzby-Walt, Anne		√	X				
Carlisle, David R.		√	X		X	X	X
Caskey, John R.		√	X		X		
Christiansen, Patrick T. <b>Past Chair</b>	√		X	X		X	
Cole, John P.		√	X		X	X	X
Conetta, Tami F.		√	X			X	
Conner, W. Theodore	√		X		X	X	X
Cope, Jr., Gerald B.	√		X				X
Cornett, Jane L.	√		X		X	X	X
Davies, Christopher	√		X		X	X	X
DeCubellis, Daniel L.	√			X			
Detzel, Lauren Y.		√	X	X	X	X	X
Diamond, Benjamin F.		√	X		X	X	X
Diamond, Sandra F. <b>Past Chair</b>		√	X	X	X	X	X
Dollinger, Jeffrey	√		X		X	X	
Dudley, Frederick R.	√		X		X	X	
Duvall, III, Homer	√		X		X	X	X
Eckhard, Rick	√		X		X	X	X
Ellison, Jason M.	√		X		X	X	X
Emerich, Guy S.		√	X		X	X	X
Ezell, Brenda B.	√		X		X	X	X
Falk, Jr., Jack A.		√	X		X	X	X
Fallon, Cynthia		√					

Executive Council Members	Division		Jul. 27 Palm Beach	Sept. 21 Lisbon, Portugal	Nov. 23 Sarasota	Feb. 8 Amelia Island	May 31 Captiva
	RP	P&T					
Farach, Manuel	√		X		X	X	
Felcoski, Brian J., <b>Past Chair</b>		√	X		X	X	X
Fernandez, Kristopher E.	√		X		X	X	X
Fields, Alan B.	√				X	X	X
Fitzgerald, Jr., John E.		√	X		X	X	X
Fleece, III, Joseph W.		√	X		X		X
Flood, Gerard J.		√	X		X		X
Foreman, Michael L.		√	X		X	X	X
Galler, Jonathan		√	X			X	X
Gans, Richard R.		√	X		X	X	
Gay, III, Robert Norwood	√		X	X	X	X	X
George, James		√	X		X	X	
Godelia, Vinette D.	√		X		X		X
Goethe, Jeffrey S.		√	X		X	X	X
Goldman, Louise "Tray"	√				X	X	X
Goldman, Robert W. <b>Past Chair</b>		√	X		X	X	X
Graham, Robert M.	√		X		X		X
Granet, Lloyd	√		X		X	X	
Griffin, Linda S.		√	X			X	X
Grimsley, John G. <b>Past Chair</b>		√					
Grossman, Honorable Melvin B.		√	X				
Guttmann, III, Louis B. <b>Past Chair</b>	√		X		X	X	X

Executive Council Members	Division		Jul. 27 Palm Beach	Sept. 21 Lisbon, Portugal	Nov. 23 Sarasota	Feb. 8 Amelia Island	May 31 Captiva
	RP	P&T					
Hamrick, Alexander H.		√	X		X	X	X
Hancock, Patricia J.	√		X		X		X
Hart, W.C.	√					X	X
Hayes, Honorable Hugh D.		√	X		X		
Hayes, Michael Travis		√	X		X	X	X
Hearn, Steven L. <b>Past Chair</b>		√	X		X		
Henderson, Jr., Reese J.	√		X		X	X	
Henderson, III, Thomas N.	√		X		X	X	
Heron, Lisa Colon	√		X			X	
Heuston, Stephen P.		√	X		X	X	X
Horstkamp, Julie	√						X
Isom, Honorable Claudia R.		√					
Isphording, Roger O. <b>Past Chair</b>		√	X	X	X	X	X
Johnson, Amber Jade F.		√	X		X	X	X
Jones, Darby		√	X		X	X	X
Jones, Frederick W.	√		X	X	X	X	X
Jones, Jennifer W.		√	X				X
Jones, John Arthur <b>Past Chair</b>		√			X		
Jones, Patricia P.H.	√		X	X	X	X	X
Judd, Robert B.		√	X		X		X
Kalmanson, Stacy O.	√		X		X	X	
Karibjanian, George		√	X			X	
Karr, Thomas M.		√	X		X	X	X
Kayser, Joan B. <b>Past Chair</b>		√			X		X

Executive Council Members	Division		Jul. 27 Palm Beach	Sept. 21 Lisbon, Portugal	Nov. 23 Sarasota	Feb. 8 Amelia Island	May 31 Captiva
	RP	P&T					
Keane, Cristin C.	√		X		X		X
Kelley, Rohan <b>Past Chair</b>		√	X		X		X
Kelley, Sean W.		√	X			X	X
Kelley, Shane		√	X		X	X	X
Kibert, Nicole C.	√		X		X		
Kightlinger, Wilhelmina F.	√		X		X	X	
Kinsolving, Ruth Barnes <b>Past Chair</b>	√					X	
Koren, Edward F. <b>Past Chair</b>		√			X	X	X
Korvick, Honorable Maria M.		√	X	X	X		X
Kotler, Alan Stephen		√	X			X	X
Kromash, Keith S.		√	X		X	X	X
Kurian, Sanjay	√		X		X	X	X
Kypreos, Theodore S.		√	X			X	X
Lancaster, Robert L.		√	X		X	X	X
Lane, Jr., William R.		√			X	X	X
Lange, George		√	X	X	X		X
Lannon, Patrick J.		√				X	X
Larson, Roger A.	√		X			X	X
Laughlin, Honorable Lauren C.		√					
Law, Lester		√			X	X	X
Leebrick, Brian D.	√		X		X	X	
Lile, Laird A. <b>Past Chair</b>		√	X		X		
Little, III, John W.	√		X			X	
Lynch, Kristen M.		√	X				X

Executive Council Members	Division		Jul. 27 Palm Beach	Sept. 21 Lisbon, Portugal	Nov. 23 Sarasota	Feb. 8 Amelia Island	May 31 Captiva
	RP	P&T					
Madorsky, Marsha G.		√	X	X	X	X	
Malec, Brian		√	X	X	X	X	X
Marger, Bruce <b>Past Chair</b>		√	X		X	X	
Marmor, Seth A.		√	X		X	X	X
Marshall, III, Stewart A.		√	X		X		X
Mastin, Deborah Bovarnick	√		X		X	X	X
McCall, Alan K.	√		X		X	X	X
McElroy, IV, Robert Lee		√	X		X	X	X
McRae, Ashley E.	√		X		X	X	X
Menor, Arthur J.	√				X		X
Meyer, George F. <b>Past Chair</b>	√		X	X	X	X	X
Meyer, Michael	√		X		X		
Mezer, Steven H.	√		X		X	X	X
Middlebrook, Mark T.		√	X		X	X	X
Miller, Lawrence J.		√	X		X		X
Moran, John C.		√	X		X	X	X
Moule, Jr., Rex E.		√	X			X	X
Muir, Honorable Celeste H.		√	X				X
Murphy, Melissa J. <b>Past Chair</b>	√		X			X	
Nash, Charles I.		√	X	X	X	X	X
Neukamm, John B. <b>Past Chair</b>	√		X		X	X	
Nice, Marina		√	X	X	X	X	X
Nguyen, Hung V.		√	X		X	X	X
Palmer, Margaret		√			X	X	X

Executive Council Members	Division		Jul. 27 Palm Beach	Sept. 21 Lisbon, Portugal	Nov. 23 Sarasota	Feb. 8 Amelia Island	May 31 Captiva
	RP	P&T					
Parady, William A.		√	X	X	X	X	X
Pasem, Navin	√						
Payne, L. Howard		√	X		X	X	X
Pence, Scott P.	√		X		X		X
Pepper-Dickinson, Tasha K.		√	X		X		X
Perera, Diane	√						
Platt, William R.		√	X		X		X
Pleus, Jr., Honorable Robert J.							
Pollack, Anne Q.	√		X	X	X		X
Polson, Marilyn M.		√	X		X	X	X
Pratt, David		√			X		
Price, Pamela O.		√			X	X	X
Prince-Troutman, Stacey A.		√					
Pyle, Michael A.		√	X		X	X	X
Quintero, Jason	√				X	X	X
Rao, Tara		√		X		X	
Renzio, Bryan	√		X		X	X	
Reynolds, Stephen H.	√				X	X	X
Rieman, Alexandra V.		√			X	X	X
Robbins, Jr., R.J.	√		X		X	X	X
Roberts, III, Hardy L.	√		X	X	X	X	X
Robinson, Charles F.		√			X	X	X
Rojas, Silvia B.	√		X	X	X	X	X
Roman, Paul E.		√	X	X		X	X

Executive Council Members	Division		Jul. 27 Palm Beach	Sept. 21 Lisbon, Portugal	Nov. 23 Sarasota	Feb. 8 Amelia Island	May 31 Captiva
	RP	P&T					
Russell, Deborah L.		√	X		X		X
Russick, James C.	√		X	X	X	X	
Rydberg, Marsha G.	√		X		X	X	X
Sachs, Colleen C.	√		X			X	
Sasso, Andrew		√			X	X	X
Sauer, Jeffrey T.	√		X		X	X	
Schafer, Jr., Honorable Walter L.		√					
Schnitker, Clay A.	√						
Schofield, Percy A.	√		X		X		X
Schwartz, Robert M.	√				X		X
Scuderi, Jon		√			X	X	
Sheets, Sandra G.		√	X		X		
Shoter, Neil B.	√		X		X		X
Sibblies, Sharaine A.		√					
Silberman, Honorable Morris							
Silberstein, David M.		√	X		X		X
Simon, Michael		√	X				
Sklar, William P.	√		X		X	X	X
Smart, Christopher W.	√		X			X	X
Smith, G. Thomas <b>Past Chair</b>	√		X	X		X	X
Smith, Wilson <b>Past Chair</b>		√					
Sobien, Wayne J.	√						
Sparks, Brian C.		√	X		X	X	X
Spivey, Barry F.		√	X		X	X	

Executive Council Members	Division		Jul. 27 Palm Beach	Sept. 21 Lisbon, Portugal	Nov. 23 Sarasota	Feb. 8 Amelia Island	May 31 Captiva
	RP	P&T					
Spurgeon, Susan K.	√		X		X	X	X
Stafford, Michael P.		√	X	X	X	X	X
Staker, Karla J.	√		X		X	X	X
Stern, Robert G.	√		X		X	X	X
Stone, Adele I.	√		X			X	X
Stone, Bruce M. <b>Past Chair</b>		√			X		
Suarez, Honorable Richard J.							
Sundberg, Laura K.		√	X	X	X	X	
Swaine, Jack Michael <b>Past Chair</b>	√					X	X
Taft, Eleanor W.	√		X		X	X	X
Taylor, Richard W.	√		X		X	X	X
Tescher, Donald R.		√	X		X		
Thomas, Honorable Patricia V.		√		X	X	X	X
Thornton, Kenneth E.	√		X			X	X
Tirabassi, Ralph	√						
Tobin, Jennifer S.	√		X		X		
Triggs, Matthew H.		√	X			X	X
Udick, Arlene C.	√		X	X		X	X
Van Dien, Lisa	√		X		X	X	
Virgil, Eric		√	X				X
Waller, Roland D. <b>Past Chair</b>	√		X	X	X	X	X
Walters, Hanton H.	√		X		X		
Weintraub, Lee A.	√		X		X	X	X
Wells, Jerry B.		√	X		X	X	X

Executive Council Members	Division		Jul. 27 Palm Beach	Sept. 21 Lisbon, Portugal	Nov. 23 Sarasota	Feb. 8 Amelia Island	May 31 Captiva
	RP	P&T					
White, Jr., Richard M.		√			X	X	X
Whynot, Sancha B.		√	X		X	X	X
Wilder, Charles D.		√		X		X	X
Williamson, Julie Ann S. <b>Past Chair</b>	√		X	X			
Winter, Christopher Q.		√	X		X	X	X
Wohlust, Gary Charles		√	X	X	X	X	X
Wolasky, Marjorie E.		√	X	X	X	X	
Wolf, Jerome L.		√	X			X	X
Wright, William Cary	√		X	X	X	X	X
Wright, Thomas D.	√		X		X		
Young, Gwynne A.		√	X	X	X		
Zeydel, Diana S.C.		√	X			X	X
Zikakis, Salome J.	√		X	X	X	X	X
Zschau, Julius J. <b>Past Chair</b>	√		X		X		

RPPTL Fellows	Division		Jul. 27 Palm Beach	Sept. 21 Lisbon, Portugal	Nov. 23 Sarasota	Feb. 8 Amelia Island	May 31 Captiva
	RP	P&T					
Christy, Doug					X	X	X
Hoffman, Brian W.	√		X		X	X	
Khan, Nishad	√		X		X	X	X
Lebowitz, Sean					X	X	X
Melanson, Noelle M.		√	X	X	X	X	X

Rao, Tara		√	X	X		X	X
Rosenberg, Josh					X	X	X
Smith, Kym					X		X

Legislative Consultants	Division		Jul. 27 Palm Beach	Sept. 21 Lisbon, Portugal	Nov. 23 Sarasota	Feb. 8 Amelia Island	May 31 Captiva
	RP	P&T					
Adams, Howard Eugene		√	X				
DiNunzio, Ashely	√		X		X	X	
Dunbar, Peter M.				X	X	X	
Edenfield, Martha				X	X	X	



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

**Special Thanks to the**

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Thursday Lunch  
**Management Planning, Inc. - Roy Meyers / Joe Gitto**

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

Friday Night Reception  
**Wells Fargo Private Bank - Mark Middlebrook / George Lange / Alex Hamrick**

Friday Night Dinner  
**First American Title Insurance Company - Alan McCall**  
**Regions Private Wealth Management - Margaret Palmer**

Probate Roundtable  
**BMO Private Bank - Joan Kayser**  
**SRR (Stout Risius Ross Inc.) - Garry Marshall**

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

Saturday Lunch  
**The Florida Bar Foundation - Jane Curran**

Saturday Night Reception and Dinner  
**SunTrust Bank – Erin Wood**



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

**Special Thanks to the**

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**Guardian Trust - *Ashley Gonnelli***

**Kravit, The Estate Department – *Van Stillman***

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

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

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*Condominium & Planned Development Committee*

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

**Guardian Trust** – *Ashley Gonnelli*  
*Guardianship, Power of Attorney & Advance Directives Committee*

**Iberia Wealth Advisors** – *Jessica Urbanski*  
*Estate & Trust Tax Planning Committee*

**Key Private Bank** – *Scott J. Altschul*  
*Asset Protection Committee*

**Life Audit Professionals** – *Nicole Newman*  
*IRA, Insurance & Employee Benefits Committee*

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

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

**Nuview IRA, Inc.** – *Glen Mathers*  
*IRA, Insurance & Employee Benefits Committee*

# **RPPTL 2014 – 2015**

## **Remaining Executive Council Meeting Schedule**

### **Mike Dribin's YEAR**

<b><u>Date</u></b>	<b><u>Location</u></b>
September 18 – 21, 2014	<b>Executive Council Meeting/Out of State</b> Sofitel Chicago Water Tower Chicago, Illinois Reservation Phone # 877-813-7700 www.sofitel.com <b>Room block is sold out—waiting list available with Mary Ann Obos, <a href="mailto:mobos@flabar.org">mobos@flabar.org</a></b>
November 13 – 16, 2014	<b>Executive Council Meeting</b> Waldorf Astoria Naples Naples, Florida Reservation Phone # 800-548-8690 <a href="http://www.hilton.com">http://www.hilton.com</a> Room Rate: \$179 Cut-off Date: October 23, 2014
March 19 - 22, 2015	<b>Executive Council Meeting</b> Ritz Carlton Grande Lakes Orlando, Florida Reservation Phone # 800-241-3333 <a href="http://www.ritzcalton.com">http://www.ritzcalton.com</a> Room Rate: \$269 Cut-off Date: February 27, 2015
June 4 - 7, 2015	<b>Executive Council Meeting / RPPTL Convention</b> Fontainebleau Florida Hotel Miami Beach, Florida Reservation Phone # 800-548-8886 Room Rate \$239 Cut-off Date: May 13, 2015

**REAL PROPERTY, PROBATE & TRUST LAW SECTION**  
**TENTATIVE COMMITTEE MEETING SCHEDULE**  
**WALDORF ASTORIA, NAPLES, FLORIDA**  
**NOVEMBER 13-16, 2014**

<i>Thursday</i> <i>November 13, 2014</i>	<u><i>Committee / Event</i></u>
9:00 pm – 10:30 pm	Executive Committee **
10:30 pm – 12:00 pm	Homestead Problem Study *
12:00 pm – 1:30 pm	Digital Assets and Information Study Committee
12:00 pm – 1:30 pm	Ad Hoc Berlinger Committee
12:00 pm – 1:30 pm	Ad Hoc Study on Same Sex Marriage Issues *
1:00 pm – 2:30 pm	Title Issues & Standards
1:00 pm – 3:00 pm	Real Property Finance & Lending
1:00 pm – 3:30 pm	Condominium and Planned Development
1:30 pm – 3:30 pm	Trust Law
3:30 pm – 5:00 pm	Construction Law Institute
3:30 pm – 5:00 pm	Landlord & Tenant
3:30 pm – 5:00 pm	Title Insurance & Title Insurance Liaison
3:30 pm - 5:00 pm	Guardianship, Power of Attorney & Advanced Directives
3:30 pm – 5:00 pm	Asset Protection
5:00 pm – 6:00 pm	At Large Members
5:00 pm – 6:30 pm	Elective Share Review Committee *
6:30 pm – 8:00 pm	Welcome Reception
8:00 pm – 11:30 pm	Hospitality Suite

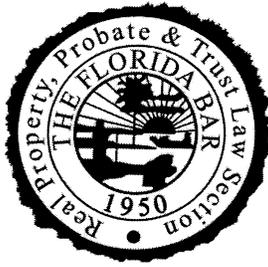
<i>Friday</i> <i>November 14, 2014</i>	<u><i>Committee / Event</i></u>
7:30 am – 9:00 am	Continental Breakfast (Must register and prepay)
8:00 am – 9:30 am	Estate & Trust Tax Planning
8:30 am – 9:30 am	Attorney Trust Officer
8:30 am – 11:00 am	Joint Meeting--Property & Liability Insurance/Suretyship and Residential Real Estate & Industry Liaison Committee
9:30 am – 11:00 am	Development & Land Use Planning
9:00 am – 11:00 am	Membership and Inclusion

9:00 am – 11:00 am	Real Estate Structures and Taxation
9:30 am – 11:30 am	Probate Law & Procedure
9:30 am – 11:00 am	Sponsorship Committee
11:00 am – 12:30 pm	Construction Law
11:00 am – 12:30 pm	Real Property Litigation
11:00 am – 12:30 pm	Member Communication and Information Technology
11:30 pm – 1:30 pm	Buffet Lunch (Must register and prepay)
11:30 pm – 1:00 pm	IRA, Insurance & Employee Benefits
1:00 pm – 3:00 pm	Probate & Trust Litigation
1:30 pm – 3:00 pm	Commercial Real Estate
1:30 pm – 3:00 pm	Real Property Problem Study
1:30 pm – 3:00 pm	Fellows and Mentoring
3:00 pm – 5:00 pm	Real Property Law Division Roundtable
3:00 pm – 5:00 pm	Probate and Trust Law Division Roundtable
5:00 pm – 6:00 pm	PAC
6:30 pm – 9:30 pm	Reception and Dinner (Must register and prepay)
9:30 pm – 11:30 pm	Hospitality Suite

<i>Saturday November 15, 2014</i>	<i><u>Committee / Event</u></i>
7:30 am – 10:00 am	Spouse/Guest Breakfast (Must register and prepay)
7:30 am - 9:00 am	Executive Council Breakfast
9:00 am – 12:00 pm	Executive Council Meeting & Box Lunch for Executive Council Members
2:00 pm – 4:00 pm	Career Coaching Session
7:00 pm – 9:30 pm	Dinner off premises (Must register and prepay)
9:30 pm – 11:00 pm	Hospitality Suite

**\*Participation in deliberations and voting is limited to committee members only**

**\*\* Attendance by invitation only**



**RPPTL Financial Summary from Separate Budgets**  
**2013 – 2014 [July 1 - June 30<sup>1</sup>]**  
**YEAR TO DATE REPORT**

**General Budget**

Revenue:	\$ 1,200,460
Expenses:	\$ 899,229
<b>Net:</b>	<b>\$ 301,231</b>

**Trust Officer Conf**

Revenue:	\$ 233,097
Expenses:	\$ 260,723
<b>Net:</b>	<b>\$ (27,626)</b>

**Legislative Update**

Revenue:	\$ 64,217
Expenses:	\$ 84,287
<b>Net:</b>	<b>\$ (20,070)</b>

**Convention**

Revenue:	\$ 5,875
Expenses:	\$ 139,396
<b>Net:</b>	<b>\$ (133,521)</b>

**Roll-up Summary (Total)**

Revenue:	\$ 1,503,649
Expenses:	\$ 1,383,634
<b>Net Operations:</b>	<b>\$ 120,015</b>

Fund Balance (Reserve):	\$ 705,581
Current Fund Balance (YTD):	\$ 825,596

<sup>1</sup> This report is based on the tentative unaudited detail statement of operations dated 06/30/2014.

# LEGISLATIVE POSITION REQUEST FORM

GOVERNMENTAL AFFAIRS OFFICE

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

## GENERAL INFORMATION

**Submitted By** William T. Hennessey, Chair, Ad Hoc Estate Planning Conflicts of Interest Committee of the Real Property Probate and Trust Section

**Address** 777 S. Flagler Dr., Ste. 500 East, West Palm Beach, FL 33401 –  
Telephone: (561) 650-0663

**Position Type** Ad Hoc Estate Planning Conflicts of Interest Committee of the Real Property Probate and Trust Section

## CONTACTS

**Board & Legislation  
Committee Appearance**

**William T. Hennessey**, Gunster, Yoakley & Stewart P.A., 777 South Flagler Drive, Suite 500 East, West Palm Beach, FL, Telephone: (561) 650-0663, Email: [whennessey@gunster.com](mailto:whennessey@gunster.com)  
**Peter M. Dunbar**, Pennington, Moore, Wilkinson, Bell & Dunbar, P.O. Box 10095, Tallahassee, FL 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

**Appearances  
before Legislators**

\_\_\_\_\_  
(List name and phone # of those appearing before House/Senate

Committees)

**Meetings with  
Legislators/staff**

\_\_\_\_\_  
(List name and phone # of those having face to face contact with

Legislators)

## PROPOSED ADVOCACY

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

**If Applicable,**

**List The Following**

N/A

(Bill or PCB #)

(Bill or PCB Sponsor)

**Indicate Position**

Support

Oppose

Technical

Other

Assistance

**Proposed Wording of Position for Official Publication:**

Support legislation which provides that a lawyer, or certain people related to, or affiliated with, the lawyer will not be entitled to receive compensation for serving as a fiduciary if the lawyer prepares the instrument making the appointment unless: (a) the lawyer or person appointed is related to the

client, or (b) certain disclosures are made to the client before the instrument is signed and confirmed in a writing signed by the client.

**Reasons For Proposed Advocacy:**

A lawyer may prepare a document for a client which nominates the attorney to a fiduciary position wherein the lawyer may earn an additional fee for serving as a fiduciary. The proposed legislation will protect the public from potential overreaching and impropriety by providing that a lawyer will not be entitled to receive compensation for serving as fiduciary in such instances unless: (a) the lawyer or person appointed is related to the client, or (b) certain disclosures are made to the client before the instrument is signed and confirmed in a writing signed by the client.

**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**

Professional Ethics Committee of the Florida Bar  
(Name of Group or Organization) (Support, Oppose or No Position)  
\_\_\_\_\_  
(Name of Group or Organization) (Support, Oppose or No Position)  
\_\_\_\_\_  
(Name of Group or Organization) (Support, Oppose or No Position)  
\_\_\_\_\_

**Please submit completed Legislative Position Request Form, along with attachments, to the Governmental Affairs Office of The Florida Bar. Upon receipt, staff will further coordinate the scheduling for final Bar action of your request which usually involves separate appearances before the Legislation Committee and the Board of Governors unless otherwise advised. For information or assistance, please telephone (850) 561-5662 or 800-342-8060, extension 5662.**

1 A bill to be entitled

2 An act relating to fiduciary compensation; amending s. 733.617, F.S.; providing for  
3 limitations on compensation for serving as personal representative to attorneys and certain  
4 related persons; amending s. 736.0708, F.S. providing for limitations on compensation for  
5 serving as trustee to attorneys and certain related persons; providing for an effective date.

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

7 Section 1. Paragraph of Section 733.617, Florida Statutes are amended to read:

8 (6) Except as otherwise provided in this section, if the personal representative is a  
9 member of The Florida Bar and has rendered legal services in connection with the administration  
10 of the estate, then in addition to a fee as personal representative, there also shall be allowed a fee  
11 for the legal services rendered.

12 Section 2. Paragraph 8 of Section 733.617, Florida Statutes is hereby created to read:

13 (8)(a) An attorney, or a person related to the attorney, shall not be entitled to  
14 compensation for serving as personal representative, if the attorney prepared or supervised the  
15 execution of the will which nominated the attorney or person related to the attorney as personal  
16 representative, unless the attorney or person nominated is related to the testator, or the attorney  
17 makes the following disclosures to the testator in writing before the will is executed:

18 1. Subject to certain statutory limitations, most family members regardless of their  
19 residence, any other persons who are residents of Florida, including friends, and corporate  
20 fiduciaries are all eligible to serve as a personal representative;

21 2. Any person, including an attorney, who serves as a personal representative is  
22 entitled to receive reasonable compensation for serving as personal representative, and

23 3. Compensation payable to the personal representative is in addition to any attorneys'  
24 fees payable to the attorney or the attorney's firm for legal services rendered to the personal  
25 representative.

26 (b) The testator must execute a written statement acknowledging that the disclosures  
27 required by this subsection were made prior to the execution of the will. The written

28 acknowledgment must be in a separate writing from the will, but it may be annexed to the will.  
29 The written acknowledgment may be executed before or after the execution of the will in which  
30 the attorney or related person is nominated as the personal representative.

31 (c) For purposes of this subsection:

32 1. An attorney shall be deemed to have prepared, or supervised the execution of, a will if  
33 the preparation, or supervision of the execution, of the will was performed by an employee or  
34 attorney employed by the same firm as the attorney at the time the will was executed.

35 2. A person is "related" to an individual if, at the time the attorney prepared or supervised  
36 the execution of the will, the person is:

37 a. A spouse of the individual;

38 b. A lineal ascendant or descendant of the individual;

39 c. A sibling of the individual;

40 d. A relative of the individual or of the individual's spouse with whom the lawyer  
41 maintains a close, familial relationship;

42 e. A spouse of a person described in subparagraph (a)-(d); or

43 f. A person who cohabitates with the individual.

44 An employee or attorney employed by the same firm as the attorney at the time the will is  
45 executed shall be deemed related to the attorney.

46 3. An attorney or person related to the attorney shall be deemed nominated in the will if  
47 the will provided the attorney or any person related to the attorney with the power to nominate the  
48 personal representative and the attorney or person related to attorney was nominated using that  
49 power.

50 (d) This subsection shall apply to provisions nominating an attorney or person related  
51 to the attorney as personal representative, co-personal representative, or as successor or alternate  
52 personal representative in the event the person nominated is unable or unwilling to serve.

53 (e) Other than compensation payable to the personal representative, this subsection  
54 does not limit any rights or remedies that any interested person may have at law or equity.

55 (f) The failure to obtain an acknowledgment from the testator under this subsection

56 shall not disqualify a personal representative from serving and shall not affect the validity of a  
57 will.

58 (g) A written acknowledgment signed by the testator that is in substantially the  
59 following form shall be deemed to comply with the disclosure requirements of this subsection:

60 \_\_\_\_\_ I, (Name) \_\_\_\_\_, declare that:

61 I have designated [my attorney, an attorney employed in the same law firm as my  
62 attorney, or a person related to my attorney] as a nominated personal representative in my will (or  
63 codicil) dated \_\_\_\_\_ (Date)\_\_\_\_\_.

64 Before executing the will (or codicil), I was informed that:

65 (1) Subject to certain statutory limitations, most family members regardless of  
66 their residence, any other individuals who are residents of Florida, including friends, and corporate  
67 fiduciaries are all eligible to serve as a personal representative;

68 (2) Any person, including an attorney, who serves as a personal  
69 representative is entitled to receive reasonable compensation for serving as personal  
70 representative, and

71 (3) Compensation payable to the personal representative is in addition to any  
72 attorneys' fees payable to the attorney or the attorney's firm for legal services rendered to the  
73 personal representative.

74 \_\_\_\_\_  
75 (Testator)

76 Dated: \_\_\_\_\_

77 (h) This subsection shall apply to appointments made pursuant to a will executed or  
78 republished after October 1, 2015 by a resident of the State of Florida.

79 Section 3. Paragraph 4 of Section 733.617, Florida Statutes is hereby created to read:

80 (4)(a) An attorney, or a person related to the attorney, shall not be entitled to  
81 compensation for serving as trustee, if the attorney prepared or supervised the execution of the  
82 trust instrument which appointed the attorney or person related to the attorney as trustee, unless  
83 the attorney or person appointed is related to the settlor, or the attorney makes the following

84 disclosures to the settlor in writing before the trust instrument is executed:

85 1. Any persons, regardless of state of residence, including family members or friends,  
86 as well as corporate fiduciaries are eligible to serve as a trustee;

87 2. Any person, including an attorney, who serves as a trustee is entitled to receive  
88 reasonable compensation for serving as trustee, and

89 3. Compensation payable to the trustee is in addition to any attorneys' fees payable to  
90 the attorney or the attorney's firm for legal services rendered to the trustee.

91 (b) The settlor must execute a written statement acknowledging that the disclosures  
92 required by this subsection were made prior to the execution of the trust instrument. The written  
93 acknowledgment must be in a separate writing from the trust instrument, but it may be annexed to  
94 the trust instrument. The written acknowledgment may be executed before or after the execution  
95 of the trust in which the attorney or related person is appointed as the trustee.

96 (c) For purposes of this subsection:

97 1. An attorney shall be deemed to have prepared, or supervised the execution of, a trust  
98 instrument if the preparation, or supervision of the execution, of the trust instrument was  
99 performed by an employee or attorney employed by the same firm as the attorney at the time the  
100 trust instrument was executed.

101 2. A person is "related" to an individual if, at the time the attorney prepared or supervised  
102 the execution of the trust instrument, the person is:

103 a. A spouse of the individual;

104 b. A lineal ascendant or descendant of the individual;

105 c. A sibling of the individual;

106 d. A relative of the individual or of the individual's spouse with whom the lawyer  
107 maintains a close, familial relationship;

108 e. A spouse of a person described in subparagraph (a)-(d); or

109 f. A person who cohabitates with the individual.

110 An employee or attorney employed by the same firm as the attorney at the time the trust  
111 instrument is executed shall be deemed related to the attorney.

112 3. An attorney or person related to the attorney shall be deemed appointed in the trust  
113 instrument if the trust instrument provided the attorney or any person related to the attorney with  
114 the power to appoint the trustee and the attorney or person related to attorney was appointed using  
115 that power.

116 (d) This subsection shall apply to provisions appointing an attorney or person related to  
117 the attorney as trustee, co-trustee, or as successor or alternate trustee in the event the person  
118 nominated is unable or unwilling to serve.

119 (e) Other than compensation payable to the trustee, this subsection does not limit any  
120 rights or remedies that any interested person may have at law or equity.

121 (f) The failure to obtain an acknowledgment from the settlor under this subsection  
122 shall not disqualify a trustee from serving and shall not affect the validity of a trust instrument.

123 (g) A written acknowledgment signed by the settlor that is in substantially the  
124 following form shall be deemed to comply with the disclosure requirements of this subsection:

125 I, (Name) \_\_\_\_\_, declare that:

126 I have designated [my attorney, an attorney employed in the same law firm as my attorney,  
127 or a person related to my attorney] as a trustee in my trust instrument dated

128 (Date) \_\_\_\_\_.

129 Before executing the trust, I was informed that:

130 (1) Any persons, regardless of state of residence, including family members or friends, as  
131 well as corporate fiduciaries are eligible to serve as a trustee;

132 (2) Any person, including an attorney, who serves as a trustee is entitled to receive  
133 reasonable compensation for serving as trustee, and

134 (3) Compensation payable to the trustee is in addition to any attorneys' fees payable to  
135 the attorney or the attorney's firm for legal services rendered to the trustee.

136 \_\_\_\_\_

137 \_\_\_\_\_ (Settlor)

138 \_\_\_\_\_ Dated: \_\_\_\_\_

139 (h) This subsection shall apply to appointments made pursuant to a trust instrument

140 executed or amended after October 1, 2015 by a resident of the State of Florida.

141 Section 4. This act shall take effect on October 1, 2015.

142

143 WPB\_ACTIVE 5968983.1

## WHITE PAPER

### PROPOSED LEGISLATION REGARDING LAWYERS SERVING AS FIDUCIARIES

#### I. SUMMARY

There are many good reasons why a client may wish to appoint their lawyer as a fiduciary. Many commentators have pointed out that often the lawyer who drafts the will or trust is the one best-suited to serve as personal representative or trustee because of their training in issue spotting and analysis, substantive law, communication, conflict resolution, and legal ethics. *See generally* ABA Formal Op. 02-426 (May 31, 2002); Edward D. Spurgeon & Mary Jane Ciccarello, *The Lawyer in Other Fiduciary Roles: Policy and Ethical Considerations*, 62 *Fordham L. Rev.* 1357, 1378-79 (1994). The Comments to Rule 4-1.8(c) of the Florida Rules of Professional Conduct specifically recognize that:

**“This rule does not prohibit a lawyer from seeking to have the lawyer or a partner or associate of the lawyer named as personal representative of the client’s estate or to another potentially lucrative position.”**

However, this does not mean that a lawyer may solicit such appointments with impunity. The comments to Rule 4-1.8 caution that a lawyer who prepares a document appointing the lawyer or another lawyer in the firm as a fiduciary is subject to the general conflict of interest provisions in Rule 4-1.7 “when there is a significant risk that the lawyer’s interest in obtaining the appointment will materially limit the lawyers independent professional judgment in advising the client concerning the choice of a personal representative or other fiduciary.” *Id.* The comment provides that in “obtaining the client’s informed consent to the conflict, the lawyer should advise the client concerning the nature and extent of the lawyer’s financial interest in the appointment, as well as the availability of alternative candidates for the position.”

Because of the potential for overreaching, some states have enacted statutory safeguards to ensure that the decision by the client to select the lawyer as fiduciary is an informed one. In California, a drafting lawyer who is unrelated to the client is subject to removal unless (1) an independent attorney certifies on a statutory form that the appointment was not the product of fraud or undue influence before the document is executed, or (2) the court finds that it is consistent with the settlor's intent that the trustee continue to serve and that the appointment was not the product of fraud or undue influence. Cal. Prob. Code § 15642(b)(6). The California statutes also limit the amount of compensation that the attorney can receive. California Probate Code § 10804 specifically provides that “a personal representative who is an attorney shall be entitled to receive the personal representative's compensation as provided in this part, but shall not receive compensation for services as the attorney for the personal representative unless the court specifically approves the right to the compensation in advance and finds that the arrangement is to the advantage, benefit, and best interests of the decedent's estate.”

New York has followed a similar approach requiring the client sign an affidavit acknowledging the alternatives for the appointment of an executor and the nature and extent of the compensation that the lawyer may be entitled to receive. The failure to obtain the affidavit

reduces the amount of the executor commissions payable to the lawyer by one-half. *See* NY Surr. Ct. P. R. § 2307-a.

The Ad Hoc Estate Planning Conflicts of Interest Committee has proposed legislation to address this issue in Florida. The proposed legislation provides that a lawyer, or certain people related to, or affiliate with, the lawyer will not be entitled to receive compensation for serving as a fiduciary if the lawyer prepares the instrument making the appointment unless: (a) the lawyer or person appointed is related to the client, or (b) certain disclosures are made to the client before the instrument is signed and confirmed in a writing signed by the client. The proposal does not void the appointment or affect the validity of the instrument. It simply prevents the disqualified person from receiving compensation as a fiduciary. A lawyer can still receive compensation for serving as the attorney for the fiduciary.

## II. CURRENT LAW

There is no, per se, statutory or ethical prohibition in Florida on lawyers preparing documents appointing themselves as fiduciaries. However, it is important to document the nature of the disclosure which was made to the client to avoid allegations of overreaching and improper conduct. Former EC 5-6 of The Florida Bar Code of Professional Responsibility provided: "A lawyer should not consciously influence a client to name him as executor, trustee, or lawyer in an instrument. In those cases, where a client wishes to name his lawyer as such, care should be taken by the lawyer to avoid even the appearance of impropriety".

In the case of Rand v. Giller, 489 So. 2d 796 (Fla. 3d DCA 1986), the court grappled with the difficulties involved when a lawyer fails to confirm the nature of the discussion concerning the selection of a fiduciary in writing. In Rand v. Giller, a beneficiary and co-personal representative of an estate filed an action to remove a lawyer, Mr. Giller, who had prepared a will which nominated himself as personal representative. Mr. Giller had only know the decedent for a "few hours" at the time the will was prepared. Judge Nesbitt, writing for the court, noted that:

Giller testified that he attempted to discourage Mrs. Rosen from appointing him and his law firm as co-personal representative and trustee, but that she indicated a desire that they serve in those capacities. There was no documentary or testimonial evidence to corroborate that fact. *For the benefit of the bar, we strongly suggest that attorneys establish procedures for such cases which allow for evidence, other than the self-serving testimony of the attorney involved, of the care taken to avoid the appearance of impropriety.*

Rand v. Giller, 489 So. 2d at 797, n. 2.

Some have argued that our Florida Statutes already permit the lack of disclosures made to the client to be considered in setting a fee for a lawyer who serves in the dual roles of personal representative and attorney for the personal representative. *See* John Arthur Jones and Rohan Kelley, Fees and Other Expenses of Administration, PRACTICE UNDER FLORIDA PROBATE CODE §15.52 (Fla. Bar CLE 2012). The Florida Statutes allow the Court to consider the fees paid to the personal representative in other capacities in setting a reasonable

fee. “Any fees and compensation paid to a person who is the same as, associated with, or employed by, the personal representative shall be taken into consideration in determining the personal representative’s compensation.” Fla. Stat. § 733.612(19).

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

The proposed statutes provides that an attorney, or person related to the attorney, will not be entitled to receive compensation for serving as a fiduciary if the attorney prepared or supervised the execution of the will or trust: (a) unless the attorney or person appointed is related to the client, or (b) the attorney makes the following disclosures to the client in writing before the will or trust is signed:

1. Subject to certain statutory limitations, most family members regardless of their residence, any other persons who are residents of Florida, including friends, and corporate fiduciaries are all eligible to serve as a personal representative; 2. Any person, including an attorney, who serves as a fiduciary is entitled to receive reasonable compensation, and

3. Compensation payable to the fiduciary is in addition to any attorneys’ fees payable to the attorney or the attorney’s firm for legal services.

The client must execute a written statement acknowledging that the disclosures were made prior to the execution of the will or trust. The written acknowledgment must be in a separate writing from the will or trust, but it may be annexed to the will or trust. The written acknowledgment may be executed before or after the execution of the will or trust.

The imputed disqualification rules apply. As a consequence, an attorney is deemed to have prepared, or supervised the execution of, a will or trust if the preparation, or supervision of the execution, of the will or trust was performed by an employee or attorney employed by the same firm as the attorney at the time the document was executed.

The term “related” is a defined term in the statute and borrows from the new gifts to lawyers statute in Florida Statutes §732.806. An employee or attorney employed by the same firm as the attorney at the time the will is executed shall be deemed related to the attorney.

The statute applies to all appointments, including nominations as successor or alternate fiduciary, and all powers to appoint exercisable by the attorney if they are used to appoint the attorney.

The statutes do not affect the validity of the instrument and do not disqualify the named fiduciary from serving. Thus, the attorney can serve without a signed acknowledgment. However, the service will be without compensation to the fiduciary.

A form “safe harbor” acknowledgement for the client to sign is provided.

The legislation would take effect on October 1, 2015 and apply to appointments made pursuant to a will or trust executed after its effective date by a resident of the State of Florida.

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

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

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

The proposal will prevent financial benefits from passing to a lawyer in favor of the innocent beneficiaries. Therefore, no net impact on the private sector is expected.

**VI. CONSTITUTIONAL ISSUES**

There do not appear to be any constitutional issues that arise as a result of this proposal.

**VII. OTHER INTERESTED PARTIES**

Florida Banker's Association

Professional Ethics Committee of the Florida Bar

WPB\_ACTIVE 5907393.1

## Amendment to Rule 4-1.8(c) of the Rules Regulating the Florida Bar and Comment

(c) Gifts to Lawyer or Lawyer's Family. A lawyer shall not solicit any ~~substantial~~ gift from a client, including a testamentary gift, or prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any ~~substantial~~ gift unless the lawyer or other recipient of the gift is related to the client. For purposes of this subdivision, related persons include a spouse, child, grandchild, parent, grandparent, or other relative with whom the lawyer or the client maintains a close, familial relationship.

### **Gifts to lawyers**

A lawyer may accept a gift from a client, if the transaction meets general standards of fairness and if the lawyer does not prepare the instrument bestowing the gift. For example, a simple gift such as a present given at a holiday or as a token of appreciation is permitted. If a client offers the lawyer a more substantial gift, subdivision (c) does not prohibit the lawyer from accepting it, although such a gift may be voidable by the client under the doctrine of undue influence, which treats client gifts as presumptively fraudulent. In any event, due to concerns about overreaching and imposition on clients, a lawyer may not suggest that a ~~substantial~~ gift be made to the lawyer or for the lawyer's benefit, except where the lawyer is related to the client as set forth in subdivision (c). If effectuation of a ~~substantial~~ gift requires preparing a legal instrument such as a will or conveyance, however, the client should have the detached advice that another lawyer can provide and the lawyer should advise the client to seek advice of independent counsel. Subdivision (c) recognizes an exception where the client is related by blood or marriage to the donee.

~~This rule does not prohibit a lawyer from seeking to have the lawyer or a partner or associate of the lawyer named from serving as personal representative of the client's estate or to in another potentially lucrative fiduciary position in connection with a client's estate planning. A lawyer may prepare a document that appoints the lawyer or person related to the lawyer to a fiduciary office so long as the client is properly informed, the appointment does not violate rule 4-1.7, the appointment is not the product of undue influence or improper solicitation by the lawyer, and the client gives informed consent, confirmed in writing. Nevertheless, such appointments will be subject to the general conflict of interest provision in rule 4-1.7 when there is a significant risk that the lawyer's interest in obtaining the appointment will materially limit the lawyer's independent professional judgment in advising the client concerning the choice of a personal representative or other fiduciary. In obtaining the client's informed consent to the conflict, the lawyer should advise the client in writing concerning ~~the nature and extent of the lawyer's financial interest in the appointment, as well as the availability of alternative candidates for the position~~ who is eligible to serve as a fiduciary, that a person who serves as a fiduciary is entitled to compensation, and that the lawyer may be eligible to receive compensation for serving as a fiduciary in addition to any attorneys' fees that the lawyer or the lawyer's firm may earn for serving as a lawyer for the fiduciary.~~

# LEGISLATIVE POSITION REQUEST FORM

GOVERNMENTAL AFFAIRS OFFICE

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

## GENERAL INFORMATION

**Submitted By** J. Eric Virgil, Chairman, Digital Assets and Information Study Committee of the Real Property Probate & Trust Law Section

**Address** J. Eric Virgil, The Virgil Law Firm, 328 Minorca Avenue, Coral Gables, FL 33134  
Telephone: (305) 448-6333

**Position Type** Real Property, Probate and Trust Law Section, The Florida Bar  
(Florida Bar, section, division, committee or both)

## CONTACTS

### Board & Legislation Committee Appearance

**J. Eric Virgil**, The Virgil Law Firm, 328 Minorca Avenue, Coral Gables, FL 33134, Telephone: (305) 448-6333  
**William T. Hennessey**, Gunster, 777 South Flagler Drive, Suite 500E, West Palm Beach, Florida 33401, Telephone (561) 650-0663  
**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 Florida Fiduciary Access to Digital Assets Act, including proposed F.S. Ch. 740, to remove barriers to a fiduciary's access to electronic records.

### Reasons For Proposed Advocacy:

Under current law, a fiduciary's authority to access, control or copy digital assets and accounts is unclear and is subject to both federal and state privacy and computer "hacking" laws as well as state law relating to fiduciaries. The goal of the proposed act is to remove barriers to a fiduciary's access to electronic records. The substantive application of fiduciary, probate, trust, guardianship, banking, security, and agency law remain unaffected by the proposed act. The proposed act is based in large part on the draft Uniform Fiduciary Access to Digital Assets Act. The proposed act addresses four different types of fiduciaries: personal representatives of decedents' estates, guardians of the property of minors or incapacitated persons, agents acting pursuant to a power of attorney, and trustees. Florida's adoption of the proposed uniform act would provide certainty and predictability for courts, account holders, fiduciaries, and Internet service providers and would make Florida a trend-setter for this area of law.

**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)

Elder Law Section, The Florida Bar                      unknown at this time, expect support  
(Name of Group or Organization)                      (Support, Oppose or No Position)

Business Law Section, The Florida Bar                      unknown at this time, expect support  
(Name of Group or Organization)                      (Support, Oppose or No Position)

Criminal Law Section, The Florida Bar                      unknown at this time, expect support  
(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 a fiduciary's access to digital assets; creating a new Chapter 740, entitled "Florida Fiduciary Access to Digital Assets Act"; defining terms used in the act; providing for the authority of the personal representative over digital assets of a decedent; providing for the authority of a guardian over the digital assets of a ward; providing for authority of an agent over digital assets of a principal pursuant to a power of attorney; providing for authority of a trustee over digital assets of a trust; providing for fiduciary's rights of access to digital assets; providing for custodian's duties as it relates to access; providing for immunity of the custodian for complying with this act; providing for applicability to existing relationships; and providing an effective date.

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

Section 1. Section 740.101, Florida Statutes, is created to read:

740.101. Short Title-- This chapter may be cited as the "Florida Fiduciary Access to Digital Assets Act."

Section 2. Section 740.201, Florida Statutes, is created to read:

740.201. Definitions-- As used in this chapter, the term:

(1) "Account holder" means:

(a) a person that has entered into a terms-of-service agreement; and

(b) a fiduciary for a person described in 1(a).

The term includes a deceased individual who entered into the agreement during the individual's lifetime.

(2) "Agent" means a person granted authority to act for a principal under a durable or nondurable power of attorney, whether denominated an agent, attorney in fact, or otherwise. The term includes an original agent, co-agent, and successor agent.

(3) "Catalogue of electronic communications" means information that identifies each person with which an account holder has had an electronic communication, the time and date of

30 the communication, and the electronic address of the person.

31 (4) “Content of an electronic communication” means information not readily accessible  
32 to the public concerning the substance or meaning of an electronic communication.

33 (5) “Court” means the circuit court.

34 (6) “Custodian” means a person that carries, maintains, or stores a digital asset of an  
35 account holder.

36 (7) “Digital asset” means an electronic record. The term does not include an underlying  
37 asset or liability to which an electronic record refers, unless the asset or liability is itself an  
38 electronic record.

39 (8) “Electronic” means technology having electrical, digital, magnetic, wireless, optical,  
40 electromagnetic, or similar capabilities.

41 (9) “Electronic communication” means a digital asset stored by an  
42 electronic-communication service or carried or maintained by a remote-computing service. The  
43 term includes the catalogue of electronic communications and the content of an electronic  
44 communication.

45 (10) “Electronic-communication service” means a custodian that provides to the public  
46 the ability to send or receive an electronic communication.

47 (11) “Fiduciary” means each person who is an original, additional, or successor personal  
48 representative, guardian, agent, or trustee.

49 (12) “Governing instrument” means a will, trust, instrument creating a power of attorney,  
50 or other dispositive, appointive, or nominative instrument.

51 (13) “Guardian” means a person who has been appointed by the court as guardian of the  
52 property of a minor or incapacitated person.

53 (14) “Information” means data, text, images, videos, sounds, codes, computer programs,  
54 software, databases, or similar intelligence of any nature.

55 (15) “Person” means an individual, estate, trust, business or nonprofit entity, public  
56 corporation, government or governmental subdivision, agency, or instrumentality, or other legal  
57 entity.

58 (16) “Personal representative” means the fiduciary appointed by the court to administer  
59 the estate of a deceased individual pursuant to letters of administration or an order appointing a  
60 curator or administrator ad litem for the estate.

61 (17) “Power of attorney” means a record that grants an agent authority to act in the place  
62 of a principal pursuant to Chapter 709.

63 (18) “Principal” means an individual who grants authority to an agent in a power of  
64 attorney.

65 (19) “Record” means information that is inscribed on a tangible medium or that is stored  
66 in an electronic or other medium and is retrievable in perceivable form.

67 (20) “Remote-computing service” means a custodian that provides to the public computer  
68 processing services or the storage of digital assets by means of an electronic communication  
69 system, as defined 18 U.S.C. 2510(14).

70 (21) “Terms-of-service agreement” means an agreement that controls the relationship  
71 between an account holder and a custodian.

72 (22) “Trustee” means a fiduciary that holds legal title to an asset pursuant to a trust  
73 instrument that creates a beneficial interest in the settlor or others.

74 (23) “Ward” means a person for whom a guardian has been appointed.

75 (24) “Will” means an instrument admitted to probate, including a codicil, executed by a  
76 person in the manner prescribed by the Florida Probate Code, which disposes of the person’s  
77 property on or after his or her death and includes an instrument which merely appoints a personal  
78 representative or revokes or revises another will.

79 Section 3. Section 740.301, Florida Statutes, is created to read:

80 740.301. Authority of Personal Representative over Digital Assets of a Decedent--  
81 Unless otherwise provided by the court or the will of a decedent, a personal representative of the  
82 decedent may access:

83 (1) the content of an electronic communication sent or received by the decedent only if  
84 the electronic-communication service or remote computing service is permitted to disclose the  
85 content under the Electronic Communications Privacy Act, 18 U.S.C. Section 2702(b) [as  
86 amended];

87 (2) the catalogue of electronic communications sent or received by the decedent; and

88 (3) any other digital asset in which the decedent at death had a right or interest.

89 Section 4. Section 740.401, Florida Statutes, is created to read:

90 740.401. Authority of Guardian over Digital Assets of a Ward--The court, after an  
91 opportunity for hearing, may authorize a guardian to access:

92 (1) the content of an electronic communication sent or received by the ward only if the  
93 electronic-communication service or remote computing service is permitted to disclose the  
94 content under the Electronic Communications Privacy Act, 18 U.S.C. Section 2702(b) [as  
95 amended];

96 (2) the catalogue of electronic communications sent or received by the ward; and

97 (3) any other digital asset in which the ward has a right or interest.

98 Section 5. Section 740.501, Florida Statutes, is created to read:

99 740.501. Control By Agent of Digital Assets—

100 (1) To the extent a power of attorney expressly grants authority to an agent over the  
101 content of an electronic communication of the principal, the agent may access the content of an  
102 electronic communication sent or received by the principal if the electronic-communication  
103 service or remote computing service is permitted to disclose the content under the Electronic  
104 Communications Privacy Act, 18 U.S.C. Section 2702(b) [as amended], and

105 (2) Unless otherwise provided by a power of attorney or a court, an agent may access:

106 (a) the catalogue of electronic communications sent or received by the principal;

107 and

108 (b) any other digital asset in which the principal has a right or interest.

109 Section 6. Section 740.601, Florida Statutes, is created to read:

110 740.601. Control By Trustee of Digital Assets--Unless otherwise provided by the court  
111 or the terms of a trust, a trustee or a successor of the trustee:

112 (1) that is an original account holder may access each digital asset held in trust, including  
113 the catalogue of electronic communications sent or received and the content of an electronic  
114 communication; and

115 (2) that is not an original account holder may access each digital asset held in trust as  
116 follows:

117 (a) the catalogue of electronic communications sent or received by the account  
118 holder; and

119 (b) the content of an electronic communication sent or received by the account  
120 holder only if the electronic-communication service or remote computing service is permitted to  
121 disclose the content under the Electronic Communications Privacy Act, 18 U.S.C. Section  
122 2702(b) [as amended];

123 (c) any other digital asset of the account holder or any successor account holder.

124 Section 7. Section 740.701, Florida Statutes, is created to read:

125 740.701. Fiduciary Access and Authority--

126 (1) A fiduciary that is an account holder or has the right to access a digital asset of an  
127 account holder:

128 (a) subject to the terms-of-service agreement and copyright or other applicable  
129 law, may take any action concerning the asset to the extent of the account holder's authority and  
130 the fiduciary's powers under the laws of this state;

131 (b) has, under applicable electronic privacy laws, the lawful consent of the  
132 account holder for the custodian to divulge the content of an electronic communication to the  
133 fiduciary; and

134 (c) is, under applicable computer fraud and unauthorized access laws, an  
135 authorized user.

136 (2) If a provision in a terms-of-service agreement limits a fiduciary's access to the digital  
137 assets of the account holder, the provision is void as against the strong public policy of this state,  
138 unless the account holder, after the effective date of this chapter, agreed to the provision by an  
139 affirmative act separate from the account holder's assent to other provisions of the terms-of-  
140 service agreement.

141 (3) A choice-of-law provision in a terms-of-service agreement is unenforceable against a  
142 fiduciary acting under this chapter to the extent the provision designates law that enforces a  
143 limitation on a fiduciary's access to digital assets which is void under subsection (2).

144 (4) A fiduciary's access under this chapter to a digital asset does not violate a terms-of-  
145 service agreement, notwithstanding a provision of the agreement, which limits third-party access  
146 or requires notice of change in the account holder's status.

147 (5) If tangible personal property of a decedent, ward, principal, or settlor can receive,  
 148 store, process, or send a digital asset, a fiduciary with authority over the property may access the  
 149 property and any digital asset stored in it. The fiduciary is an authorized user for purposes of any  
 150 applicable computer fraud and unauthorized access laws.

151 Section 8. Section 740.801, Florida Statutes, is created to read:

152 740.801. Compliance--

153 (1) If a fiduciary with a right under this chapter to access a digital asset of an account  
 154 holder complies with subsection (2), the custodian shall comply with the fiduciary's request in a  
 155 record for:

156 (a) access to the asset;

157 (b) control of the asset; and

158 (c) a copy of the asset to the extent permitted by copyright law.

159 (2) If a request under subsection (1) is made by:

160 (a) a personal representative with the right of access under s. 740.301, the request  
 161 must be accompanied by a certified copy of the letters of administration of the personal  
 162 representative, an order authorizing a curator or administrator ad litem, an order of summary  
 163 administration, or other court order;

164 (b) a guardian with the right of access under s. 740.401, the request must be  
 165 accompanied by a certified copy of letters of plenary guardianship of the property or a court  
 166 order that gives the guardian authority over the digital asset;

167 (c) an agent with the right of access under s. 740.501, the request must be  
 168 accompanied by a an original or a copy of the power of attorney that authorizes the agent to  
 169 exercise authority over the digital asset and a certification of the agent, under penalty of perjury,  
 170 that the power of attorney is in effect; and

171 (d) a trustee with the right of access under s. 740.601, the request must be  
 172 accompanied by a certified copy of the trust instrument, or a certification of the trust under s.  
 173 736.1017, that authorizes the trustee to exercise authority over the digital asset.

174 (3) A custodian shall comply with a request made under subsection (1) not later than  
 175 60 days after receipt. If the custodian fails to comply, the fiduciary may apply to the court for an  
 176 order directing compliance.

177 (4) A custodian that receives a certification of trust may require the trustee to provide  
178 copies of excerpts from the original trust instrument and later amendments which designate the  
179 trustee and confer on the trustee the power to act in the pending transaction.

180 (5) A custodian that acts in reliance on a certification of trust without knowledge that the  
181 representations contained in it are incorrect is not liable to any person for so acting and may  
182 assume without inquiry the existence of facts stated in the certification.

183 (6) A person that in good faith enters into a transaction in reliance on a certification of  
184 trust may enforce the transaction against the trust property as if the representations contained in  
185 the certification were correct.

186 (7) A person that demands the trust instrument in addition to a certification of trust or  
187 excerpts under subsection (4) is liable for damages if the court determines that the person did not  
188 act in good faith in demanding the trust instrument.

189 (8) This section does not limit the right of a person to obtain a copy of a trust instrument  
190 in a judicial proceeding concerning the trust.

191 Section 9. Section 740.901, Florida Statutes, is created to read:

192 Section 740.901. Custodian Immunity--A custodian and its officers, employees, and  
193 agents are immune from liability for any action done in good faith in compliance with this  
194 chapter.

195 Section 10. Section 740.1001, Florida Statutes, is created to read:

196 Section 740.1001. Relation to Electronic Signatures in Global and National Commerce  
197 Act--This chapter modifies, limits, or supersedes the Electronic Signatures in Global and  
198 National Commerce Act, 15 U.S.C. Section 7001 et seq., but does not modify, limit, or supersede  
199 Section 101(c) of that act, 15 U.S.C. Section 7001(c), or authorize electronic delivery of any of  
200 the notices described in Section 103(b) of that act, 15 U.S.C. Section 7003(b).

201 Section 11. Section 740.1101, Florida Statutes, is created to read:

202 Section 740.1101. Applicability-- This chapter applies to:

203 (1) a fiduciary or agent acting under a will, intestate appointment, trust or power of  
204 attorney executed before, on or after the effective date of this chapter, except as otherwise  
205 provided in this chapter; and

206 (2) a guardian appointed through a guardianship proceeding, whether pending in a court  
207 or commenced before, on or after the effective date of this chapter, except as otherwise provided  
208 in this chapter.

209 Section 12. This act shall take effect July 1, 2015.

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## WHITE PAPER

### PROPOSED ENACTMENT OF CHAPTER 740, FLORIDA STATUTES

#### I. SUMMARY

The proposed legislation is a result of a study by the Digital Assets Committee of The Real Property, Probate and Trust Law Section of The Florida Bar of recent work on a Uniform Fiduciary Access to Digital Assets Act. The proposal would add a new Chapter to the Florida Statutes that follows the proposed uniform act.

Under present Florida law, there is no legislation on fiduciary access to digital assets, only criminal laws regarding access to stored communications. The purpose of this act is to vest fiduciaries with the authority to access, control, or copy digital assets and accounts. The Florida Fiduciary Access to Digital Assets Act (“FFADAA”) addresses four different types of fiduciaries: personal representatives of decedents’ estates, guardians of the property of minors or incapacitated persons, agents acting pursuant to a power of attorney, and trustees.

#### II. CURRENT SITUATION

As the number of digital assets held by the average person increases, questions surrounding the disposition of these assets upon the individual’s death or incapacity are becoming more common. These assets range from online gaming items to photos, to digital music, to client lists. And these assets have real value: according to a 2011 survey from McAfee, Intel’s security-technology unit, American consumers valued their digital assets, on average, at almost \$55,000.<sup>1</sup> Few holders of digital assets and accounts consider the fate of their online presences once they are no longer able to manage their assets. There are millions of Internet accounts that belong to decedents. Some Internet service providers have explicit policies on what will happen when an individual dies, others do not; even where these policies are included in the terms of service, most consumers click through these agreements. Few laws exist on the rights of fiduciaries over digital assets.

The **current federal legislation** that dictates access to digital assets is buried in the Stored Communications Act (“SCA”) and the Computer Fraud and Abuse Act (“CFAA”), both passed in 1986, with only minor revisions since. The CFAA and similar state laws impose criminal penalties and perhaps civil liability too for the unauthorized access of computer hardware, devices, and stored data. These laws are explained in more detail below.

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<sup>1</sup> Kelly Greene, *Passing Down Digital Assets*, WALL STREET JOURNAL (Aug. 31, 2012), <http://goo.gl/7KAaOm>.

Under **current Florida law**, Florida has enacted statutory counterparts to the provisions of the SCA and located them in Chapter 934, entitled "Security of Communications"<sup>2</sup> and in Chapter 815, entitled "Florida Computer Crimes Act". There is no legislation on fiduciary access to digital assets.

A minority of **other states** has enacted legislation on fiduciary access to digital assets, including Connecticut, Idaho, Indiana, Oklahoma, Rhode Island, Nevada, and Virginia, and the existing statutes grant varying degrees of access to different types of digital assets. In addition, numerous other states have considered, or are considering, legislation. Existing legislation differs with respect to the types of digital assets covered, the rights of the fiduciary, the category of fiduciary included, and whether the principal's death or incapacity is covered.

The **Uniform Law Commission Drafting Committee on Fiduciary Access to Digital Assets** ("ULC") proposed an act covering how a fiduciary addresses digital assets. The commissioners on the drafting committee could receive input from estate attorneys, educators, and lawyers with expertise in various areas of the law affected by digital assets, advisors from the American Bar Association, representatives from service providers, such as Facebook and Yahoo, policy counsel from NetChoice (a trade association of eCommerce businesses and on-line consumers), and General Counsel from the State Privacy and Security Coalition, Inc. (which is comprised of 20 communications, technology, and media companies).<sup>3</sup>

The ULC took into account the **Supremacy Clause of the U.S. Constitution**. According to the Supremacy Clause, "This Constitution, and the laws of the United States which shall be made in pursuance thereof.... *shall be the supreme law of the land*, and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary, notwithstanding."<sup>4</sup> The Supreme Court has ruled that a federal law that conflicts with a state law "preempts" the state law and that state laws that conflict with federal law are "without effect."<sup>5</sup> Due to the Supremacy Clause and the Supreme Court's interpretation, one major challenge in drafting the uniform act was that it does not directly conflict with existing federal law and could survive a constitutional challenge.<sup>6</sup>

It is what the **SCA does not specifically address** that gives the ULC an opening to write a proposed state law that it believes can be legally interpreted as filling in the gaps of the SCA, as opposed to conflicting with it. The SCA was originally written to provide Fourth Amendment-like<sup>7</sup> privacy protection for certain types of email communications, social networking accounts, and other digital assets stored on a remote server. "The SCA attempts to modernize the reasonable expectation of privacy provided by the Fourth

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<sup>2</sup> *Tracey v. State*, 69 So.3d 992 (Fla. 4<sup>th</sup> DCA 2011).

<sup>3</sup> "Surf the Evolving Web of Laws Affecting Digital Assets" Bissett, W. and Kauffman, D. 41 Estate Planning No. 4 April 2014.

<sup>4</sup> U.S. Const. Art. VI (Emphasis added.)

<sup>5</sup> *Maryland v. Louisiana*, 451 U.S. 725 (1981).

<sup>6</sup> "Surf the Evolving Web" at 34.

<sup>7</sup> The Fourth Amendment to the U.S. Constitution protects the "people's rights to be secure in their houses, papers, and effects, against unreasonable searches and seizures." (Emphasis added.)

Amendment and later the Supreme Court to include two types of online services, "electronic communication services" and "remote computing services". To provide this privacy protection, the SCA limits the ability of the government to *compel disclosure* of both "non-content" information (i.e., logs of email communications including addresses of recipient/senders (analogous to the envelope of a letter)) as well as the "content" (what is inside the letter). The SCA also limits the ability of those internet service providers ("ISPs") that are "subject to" the SCA to reveal "content" information to non-government entities.<sup>8</sup> In general, the SCA states that certain service providers are permitted to disclose "non-content" information of electronic communications and files to anyone except the government without the consent of the user. However, a service provider *may* divulge the "content" of an electronic communication to a non-government entity *only* when the account holder lawfully consents.<sup>9</sup>

Like the SCA, the CFAA similarly protects against anyone who "intentionally accesses a computer without authorization or exceeds authorized access." Neither the SCA nor the CFAA specifically provides for or denies a fiduciary access to electronic and stored communications. In essence, even if consent was granted to a fiduciary, current federal law does not acknowledge the potential for such a vested right.<sup>10</sup>

The ULC uses well-established, existing law for non-digital probate assets in order to provide a **fiduciary the right to "step into the shoes"** of a decedent to manage digital assets. Because the interest to properly administer both non-digital and digital estate assets are similar, a fiduciary should be granted the same authority over both types of property. Because the fiduciary has the same authority as the deceased account holder (no more and no less), the fiduciary is "authorized" by the deceased account holder as required under the two federal statutes (the SCA and CFAA) that prohibit unauthorized access.

The ULC was also cognizant of the fact that deceased account holders likely registered with on-line services for email, on-line purchases, photo sharing, on-line banking, and a long list of other items now done on-line by first consenting to a terms-of service agreement ("TOSA"). The ULC recognized that in most situations the account holder likely consented to the TOSA by clicking "I agree" without ever reading it. These TOSAs generally describe the account holder's rights in using the service, how personal information will be protected, the conditions on information sharing, and account holder's rights (if any) upon death. The ULC has taken into account a service provider's possible refusal to grant fiduciary access simply because the deceased account holder consented to (a likely unread) blanket TOSA by writing the uniform act such that fiduciary access, by itself, will not be deemed a violation of a TOSA or deemed an unauthorized transfer of an account.<sup>11</sup>

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<sup>8</sup> "Surf the Evolving Web" at 34 (citations omitted).

<sup>9</sup> 18 U.S.C. section 2702(b)(3).

<sup>10</sup> "Surf the Evolving Web" at 34 (citations omitted).

<sup>11</sup> "Surf the Evolving Web" at 34 (citations omitted).

Because of issues like the federal Supremacy Clause and the interest of ISPs in differing jurisdictions, the Florida drafting committee closely adhered to the careful analysis and drafting of those on the ULC, deviating from the proposed uniform law minimally, only where necessary to comport with Florida law.

### III. EFFECT OF PROPOSED CHANGES

A. **Effect of the Proposed Changes.** It is important to understand that the goal of the FFADAA is to remove barriers to a fiduciary's access to electronic records and that the federal and state substantive rules of fiduciary, probate, trust, banking, security, and agency law remain unaffected by FFADAA. The act applies only to fiduciaries that act in compliance with their fiduciary powers. It distinguishes the authority of fiduciaries—which exercise authority subject to this act only on behalf of the account holder—from any other efforts to access the digital assets. Family members or friends may seek such access, but, unless they are fiduciaries, their efforts are subject to other laws and are not covered by this act.

This Act follows closely the proposed act of the ULC because a uniform approach among states will provide certainty and predictability for courts, account holders, fiduciaries, and ISPs. The uniform act gives states precise, comprehensive, and easily accessible guidance on questions concerning fiduciaries' ability to access the electronic records of a decedent, protected person, principal, or a trust. Additionally, ISPs have participated in the ULC's work and, presumably, find the proposed act to be acceptable.

The general goal of the FFADAA is to facilitate fiduciary access while respecting the privacy and intent of the account holder. It adheres to the traditional approach of trusts and estates law, which respects the intent of the account holder and promotes the fiduciary's ability to administer the account holder's property. With regard to the general scope of the act, the act's coverage is inherently limited by the definition of "digital assets." The act applies only to electronic records. The term does not include the underlying asset or liability unless it is itself an electronic record.

B. The act is divided into **twelve sections**.

1. **Section 740.101** contains the short title of the Act.
2. **Section 740.201** contains general provisions and definitions, including those relating to the scope of the fiduciary's authority.

The definitions of "agent", "guardian", "court", "electronic", "fiduciary", "governing instrument", "person", "personal representative", "power of attorney", "principal", "record", "trustee", "ward", and "will" are based on those found in applicable Florida law, such as the Florida Probate Code and Florida Powers of Attorney Act.

ULC Uniform Act	Florida Statutes
<b>Section .201 Definitions</b>	
(2) Agent	709.2102(1)
(5) Court	731.201(7)
(9) Electronic	709.2102(5)
(11) Fiduciary	739.102(6), 738.102 (4), 733.817, 518.10
(12) Governing Instrument	732.2025(4)
(13) Guardian	744.604(6)
(15) Person	1.01(3)
(16) Personal Representative	731.201(28)
(17) Power of Attorney	709.2102(7)
(18) Principal	709.2102(9)
(19) Record	709.2102(13)
(22) Trustee	731.201(39)
(24) Ward	744.102(22)
(25) Will	731.201(40)

The other definitions are new for this Act, although the definition of digital service comes from the White House Digital Government Strategy: <http://www.whitehouse.gov/sites/default/files/omb/egov/digital-government/digital-government-strategy.pdf>. The definition of “contents” is adapted from 18 U.S.C. § 2510(8); the definition of “electronic communication” is adapted from the language of 18 U.S.C. §§ 2510(12) and 2702(a)(1) and (2); the definition of “electronic communication service” is drawn from 18 U.S.C. 2510(15); and the definition of “remote computing service” is adapted from 18 U.S.C. § 2711(2), to help ensure the Act’s compliance with federal law.

The Act includes a definition for “catalogue of electronic communications.” This is designed to cover log-type information about an electronic communication. The term “content of an electronic communication” is adapted from 18 U.S.C. § 2510(8), but it refers only to information that is not readily accessible to the public because, if the information were readily accessible to the public, it would not be subject to the privacy protections of federal law under the Electronic Communications Privacy Act (“ECPA”), 18 U.S.C. §§ 2510 et seq. See S. Rep. No. 99-541, at 36 (1986). When the privacy protections of federal law under ECPA apply to the content of an electronic communication, the ECPA’s legislative history notes the requirements for disclosure: “Either the sender or the receiver can directly or through authorized agents authorize further disclosures of the contents of their electronic communication.” S. Rep. No. 99-541, at 37 (1986).

ECPA does not apply to private e-mail service providers, such as employers and educational institutions.<sup>12</sup>

<sup>12</sup> See 18 U.S.C. §2702(a)(2); James D. Lamm, Christina L. Kunz, Damien A. Riehl, & Peter John Rademacher, *The Digital Death Conundrum: How Federal and State Laws Prevent Fiduciaries from Managing Digital Property*, 68 U. Miami L. Rev. 385, 404 (2014) (available at: <http://goo.gl/T9jX1d>).

A “custodian” includes any internet service provider as well as any other entity that provides or stores electronic data of an account holder. The term “carries” means engaging in the transmission or switching of electronic communications. See 47 U.S.C. § 1001(8). A custodian does not include most employers because an employer typically does not have a terms-of-service agreement with an employee. Any digital assets created through employment generally belong to the employer.

*Example -- Fiduciary access to an employee email account.* D dies, employed by Company Y. Company Y has an internal email communication system, available only to Y's employees. D's personal representative, R, believes that D used Company Y's email system for some financial transactions that R cannot find through other means. R requests access from Company Y to the emails.

Company Y is not a custodian subject to the act. Under Section .201(6), a custodian must carry, maintain or store an account holder's digital assets. An account holder, in turn, is defined under Section .201(1) as someone who has entered into a terms-of-service agreement. Company Y, like most employers, did not enter into a terms-of-service agreement with D, so D was not an account holder.

“Digital assets” include products currently in existence and yet to be invented that are available only electronically. Digital assets include electronically-stored information, such as: 1) any information stored on a computer and other digital devices; 2) content uploaded onto websites, ranging from photos to documents; and 3) rights in digital property, such as domain names or digital entitlements associated with online games.<sup>13</sup> Both the catalogue and content of an electronic communication are covered by the term “digital assets.”

*The fiduciary's access to a record defined as a “digital asset” does not mean that the fiduciary is entitled to “own” the asset or otherwise engage in transactions with the asset.* Consider, for example, funds in a bank account or securities held with a broker or other custodian, regardless of whether the bank, broker, or custodian has a brick-and-mortar presence. This Act affects records concerning the bank account or securities, but does not affect the authority to engage in transfers of title or other commercial transactions in the funds or securities, even though such transfers or other transactions might occur electronically. The Act reinforces the right of the fiduciary to access all relevant electronic communications and the online account that provides evidence of ownership. Thus, an entity may not refuse to provide access to online records any more than the entity can refuse to provide the fiduciary with access to hard copy records.

The definition of “electronic communication” is adapted from the language of 18 U.S.C. §§ 2510(12) and 2702(a)(1) and (2); the definition of “electronic-communication service” is drawn from 18 U.S.C. § 2510(15); and the definition of “remote-computing service” is adapted from 18 U.S.C. § 2711(2), to help ensure the

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<sup>13</sup> See Lamm, et al, supra, at 388.

Act's compliance with federal law. Electronic communication is a subset of digital assets and covers only the category of digital assets subject to the privacy protections of the ECPA. For example, material stored on a computer's hard drive is a digital asset but not an electronic communication.

A "fiduciary" under this chapter occupies a status recognized by Florida law, and fiduciaries' powers under the chapter are subject to the relevant limits established by other state laws.

The "terms-of-service agreement" ("TOSA") definition relies on the definition of "agreement" found in UCC § 1-201(3) and that found in UCC § 1-201(b) (3) ("the bargain of the parties in fact, as found in their language or inferred from other circumstances, including course of performance, course of dealing, or usage of trade"). It refers to any agreement that controls the relationship between an account holder and a custodian, even though it might be called a terms-of-use agreement, a click-wrap agreement, a click-through license, or a similar term. State and federal law determine capacity to enter into a binding terms-of-service agreement.

3. **Section 740.301** establishes the rights of personal representatives. A personal representative is presumed to have access to all of the decedent's digital assets unless that is contrary to the decedent's will or to other applicable law.

This section establishes the default rule that the personal representative is authorized to access all of the decedent's digital assets other than material covered by the ECPA. The subsection clarifies the difference between fiduciary authority over digital assets other than electronic communications protected by ECPA, and authority over ECPA-covered electronic communications. For electronic communications, subsections (1) and (2) establish procedures that cover: first, the ECPA-covered content of communications and, second, the catalogue (logs and records) that electronic communications service providers may release without consent under the ECPA. Federal law distinguishes between the permissible disclosure of the "contents" of a communication, covered in 18 U.S.C. § 2702(b), and of "a record or other information pertaining to a" subscriber or customer, covered in 18 U.S.C. § 2702(c).<sup>14</sup>

Content-based material can, in turn, be divided into two types of communications: those received by the account holder and those sent. Material when the account holder is the "addressee or intended recipient" can be disclosed either to that individual or to an agent for that person, 18 U.S.C. § 2702(b)(1), and it can also be disclosed to third parties with the "lawful consent" of the addressee or intended recipient. 18 U.S.C. § 2702(b)(3). Material for which the account holder is the "originator" can only be disclosed to third parties with the account holder's "lawful consent." 18 U.S.C. § 2702(b)(3). (Note that, when the account holder is the addressee or intended recipient, material can be disclosed under either § 2702(b)(1) or (b)(3), but that when the account holder is the originator, lawful consent is required.) By contrast to content-based material, non-content material

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<sup>14</sup> See Matthew J. Tokson, *The Content/Envelope Distinction in Internet Law*, 50 Wm. & Mary L. Rev. 2105 (2009).

can be disclosed not only with the lawful consent of the account holder but also to any person other than a governmental entity (which would presumably include fiduciaries). This information includes material about any communication sent, such as the addressee, sender, date/time, and other subscriber data, what this Act defines as the “catalogue of electronic communication”. (Further discussion of this issue and examples are set out in the comments to Section .701, *infra*.)

4. **Section 740.401** establishes the rights of guardians. A guardian may access the assets pursuant to letters of guardianship or a court order.

This section establishes that the guardian must be specifically authorized by the court to access the ward’s digital assets and electronic communications. Each of the different levels of access must be specifically granted by court order. The requirement for express authority over digital assets does not limit the fiduciary’s authority over the underlying “bricks and mortar” assets, such as a bank account. As a legislative enacting matter, the meaning of the term “hearing” will vary, depending on a state’s procedures.

Section .401 is comparable to Section .301. It responds to the concerns of ISPs who believe that the Act should be structured to clarify the difference between fiduciary authority over digital assets other than electronic communications protected by federal law (the ECPA) and fiduciary authority over ECPA-protected electronic communications. Consequently, this Act sets out procedures that cover all digital assets as well as the catalogue of electronic communications (logs and records) that providers may release without consent under ECPA, and then addresses ECPA-covered communications.

Under Section .401, the guardian has the same power over digital assets as the account holder. The guardian must exercise authority in the best interests of the ward pursuant to Chapter 744.

5. **Section 740.501** establishes the rights of agents acting pursuant to a power of attorney. An agent acting pursuant to a power of attorney is presumed to have access to all of a principal’s digital assets not subject to the protections of other applicable law; if another law protects the asset, then the power of attorney must explicitly grant access.

This section establishes that the agent has default authority over the principal’s digital assets and the records, other than the contents, of the principal’s electronic communications. When the principal does not want the agent to exercise this authority, then the power of attorney must explicitly prevent an agent from doing so.

With respect to the contents of electronic communications, the agent must be specifically authorized by the principal to access the contents of the principal’s electronic communications. Because a power of attorney contains the consent of the account holder, ECPA should not prevent the agent from exercising authority over the content of electronic communications. There should be no question that an explicit delegation of authority in a power of attorney constitutes authorization from the account holder to access digital assets, and provides “lawful consent” to allow disclosure of electronic

communications from an electronic communication service or a remote computing service pursuant to applicable law. Both authorization and lawful consent are important because 18 U.S.C. § 2701 deals with intentional access without authorization and 18 U.S.C. § 2702 allows a provider to disclose with lawful consent.

The ULC considered whether the authority over digital assets and electronic communications should be a default power. The ULC decided that the power to access the contents of electronic communications must be expressly granted, because when expressed and not default, it satisfies the lawful consent requirement of ECPA. The agent has default authority over other digital assets under the Act.

6. **Section 740.601** establishes the rights of trustees. A trustee may access any digital asset held by the trust unless that is contrary to the terms of the trust or to other applicable law

Access to digital assets, including the contents of the electronic communications, is presumed with respect to assets for which the trustee is the initial account holder. A trustee may have title to digital assets and electronic communications when the trust itself becomes the account holder of a digital asset held by the trust, and when the trustee becomes an account holder for trustee business, situations addressed in subsection (1).

Subsection (2) addresses situations involving either an inter vivos transfer of a digital asset into a trust or transfer via a pour-over will of a digital asset into a trust. There should be no question that holding property in trust form constitutes authorization from the account holder for the trustee to access digital assets, including both the catalogue and contents of the electronic communications, and this provides “lawful consent” to allow disclosure of electronic communications from an electronic communication service or a remote computing service pursuant to applicable law. Nonetheless, subsection (2) distinguishes between the catalogue and contents of electronic communications in case there are any questions about whether the form in which property – transferred into a trust - is held constitutes lawful consent. Both authorization and lawful consent are important because 18 U.S.C. § 2701 deals with intentional access without authorization, and 18 U.S.C. § 2702 allows a provider to disclose with lawful consent.

The underlying trust documents and the Florida Trust Code will supply the allocation of responsibilities between and among trustees.

7. **Section 740.701** contains provisions relating to the rights of the fiduciary to access digital assets.

This section clarifies that the fiduciary has the same authority as the account holder if the account holder were the one exercising the authority (note that, where the account holder has died, this means that the fiduciary has access as of the hour before the account holder’s death). This means that the fiduciary’s authority to access the digital asset is the same as the account holder except where, pursuant to subsection (2), the account holder has explicitly opted out of fiduciary access. Of course, in exercising its

responsibilities, the fiduciary is subject to the duties and obligations established pursuant to Florida law and is liable for breach of those duties.

This issue concerning the parameters of the fiduciary's authority potentially arises in two situations: 1) the fiduciary obtains access to a password directly from the account holder, as would be true in various circumstances such as for the trustee of an inter vivos trust or someone who has stored passwords with a digital locker and those passwords are then transmitted to the fiduciary; and 2) the fiduciary has obtained access pursuant to this Act.

The fiduciary does not, however, obtain power over any digital assets if that property was illegally obtained by the account holder. Note that even if the digital asset were illegally obtained by the account holder, the fiduciary would still need access in order to handle that asset appropriately. There may, for example, be tax consequences that the fiduciary would be obligated to report.

The section also provides that control by a fiduciary should not be considered a transfer that would violate the anti-transfer terms of a terms-of-service agreement. Finally, the fiduciary has the same responsibilities as the account holder more generally. For example, a fiduciary cannot delete an account if this would be fraudulent. Similarly, if the account holder could challenge provisions in a terms-of-service agreement, then the fiduciary is similarly able to do so.<sup>15</sup>

Subsection (1) is designed to establish that the fiduciary is authorized to exercise control over digital assets in accordance with other applicable laws. The language mirrors that used in Title II of the ECPA, known as the Stored Communications Act (SCA), 18 U.S.C. § 2701 *et seq.* The subsection clarifies that the fiduciary is "authorized" under the two federal statutes that prohibit unauthorized access to computers and computer data, the SCA and the CFAA,<sup>16</sup> as well as pursuant to any comparable state laws criminalizing unauthorized access.<sup>17</sup>

The Stored Communications Act contains two potentially relevant prohibitions.

(a) 18 U.S.C. § 2701(a), which concerns access to the digital assets, makes it a crime for anyone to "intentionally access without authorization a facility through which

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<sup>15</sup> See *Ajemian v. Yahoo!, Inc.*, 987 N.E.2d 604 (Mass. 2013).

<sup>16</sup> Stored Communications Act, 18 U.S.C. § 2701 *et seq.* (2006); Computer Fraud and Abuse Act, 18 U.S.C. § 1030 *et seq.* (2006); see, e.g., Orin S. Kerr, *A User's Guide to the Stored Communications Act, and a Legislator's Guide to Amending It*, 72 GEO. WASH. L. REV. 1208 (2004); Allan D. Hankins, Note, *Compelling Disclosure of Facebook Content Under the Stored Communications Act*, 17 SUFFOLK J. TRIAL & APP. ADVOC. 295 (2012).

<sup>17</sup> See *Computerized Hacking and Unauthorized Access States Laws*, NATIONAL CONFERENCE OF STATE LEGISLATURES (May 21, 2009), <http://www.ncsl.org/issues-research/telecom/computer-hacking-and-unauthorized-access-laws.aspx>; Christina Kunz, Peter Rademacher & Lucie O'Neill, 50 State Survey of Unauthorized Access (2012) (on file with the Committee and available on the Google Drive); James D. Lamm, et al., *The Digital Death Conundrum: How Federal and State Laws Prevent Fiduciaries from Managing Digital Property*, 68 U. Miami L. Rev. \_\_\_ (2013), <http://lawreview.law.miami.edu/wp-content/uploads/2011/12/The-Digital-Death-Conundrum-How-Federal-and-State-Laws-Prevent-Fiduciaries-from-Managing-Digital-Property.pdf>.

an electronic communication service is provided” as well as to “intentionally exceed an authorization to access that facility.” Thus, someone who has authorization to access the facility is not engaging in criminal behavior. Moreover, this section does not apply to “conduct authorized . . . by a user of that service with respect to a communication of or intended for that user.”<sup>18</sup>

(b) 18 U.S.C. § 2702, “Voluntary disclosure of customer communications or records,” concerns actions by the service provider. It prohibits an electronic communication service or a remote computing service from knowingly divulging the contents of a communication that is stored by or carried or maintained on that service unless disclosure is made (among other exceptions) “to an addressee or intended recipient of such communication or an agent of such addressee or intended recipient” or “with the *lawful consent* of the originator or an addressee or intended recipient of such communication, or the subscriber in the case of remote computing service.”<sup>19</sup> The statute permits disclosure of “customer records” that do not include content, either with lawful consent from the customer or “to any person other than a governmental entity.”<sup>20</sup> Thus, unlike the contents, the provider is permitted to disclose the non-content “records” of the electronic communications to anyone except the government, and may disclose to the government with the customer’s lawful consent or in certain emergencies.

The Computer Fraud and Abuse Act prohibits unauthorized access to computers. 18 U.S.C. § 1030. Like the SCA, the CFAA similarly protects against anyone who “intentionally accesses a computer without authorization or exceeds authorized access.” 18 U.S.C. § 1030(a).

Florida laws prohibit unauthorized access. See Chapters 815 and 934, Florida Statutes.

By defining the fiduciary as an authorized user: 1) the fiduciary has authorization to access the files under the *first* section of the SCA, 18 U.S.C. § 2701, as well as under the CFAA; and 2) the fiduciary has “the lawful consent” of the originator/subscriber so that the provider can voluntarily disclose the files pursuant to the *second* relevant provision of the SCA, 18 U.S.C. § 2702. Moreover, this language should be adequate to avoid liability under the Florida unauthorized access laws.

Subsection (4) reinforces the concept that the fiduciary “steps into the shoes” of the account holder, with no more – and no fewer – rights. For example, the TOSA controls the rights of the account holder (settlor, principal, incapacitated person, decedent). The Act does not permit the account holder’s fiduciary to override the TOSA in order to make a digital asset or collection of digital assets “descendible,” although it does preserve the rights of the fiduciary to make the same claims as the account holder.<sup>21</sup>

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<sup>18</sup> 18 U.S.C. §§ 2701(a), (c)(2).

<sup>19</sup> 18 U.S.C. § 2702(b)(1), (3) (emphasis added).

<sup>20</sup> 18 U.S.C. § 2702(c)(2) and (6).

<sup>21</sup> See *Ajemian v. Yahoo!, Inc.*, 987 N.E.2d 604 (Mass. 2013); David Horton, *Indescendibility*, 102 Calif. L. Rev. \_\_\_ (forthcoming 2014), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2311506](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2311506).

Subsection (5) is designed to clarify that the fiduciary is authorized to access digital assets stored on equipment of the decedent, ward, principal, or settlor, thereby superseding Florida laws on unauthorized access to the equipment.

*Example 1 – Access to digital assets by personal representative.* D dies with a will that is silent with respect to digital assets. D has a bank account for which D received only electronic statements, D has stored photos in a cloud-based Internet account, and D has an e-mail account with a company that provides electronic-communication services to the public. The personal representative of D's estate needs access to the electronic bank account statements, the photo account, and e-mails.

The personal representative of D's estate has the authority to access D's electronic banking statements and D's photo account, which both fall under the act's definition of a "digital asset." This means that, if these accounts are password-protected or otherwise unavailable to the personal representative, then the bank and the photo account service must give access to the personal representative when the request is made in accordance with Section .801. If the TOSA permits D to transfer the accounts electronically, then the personal representative of D's estate can use that procedure for transfer as well.

The personal representative of D's estate is also able to request that the e-mail account service provider grant access to e-mails sent or received by D; ECPA permits the service provider to release the catalogue to the personal representative. The service provider also must provide the personal representative access to the content of an electronic communication sent or received by D if the service provider is permitted under 18 U.S.C. Section 2702(b) to disclose the content. The bank may release the catalogue of electronic communications or content of an electronic communication for which it is the originator or the addressee because the bank is not subject to the ECPA.

*Example 2 – Access to digital assets by guardian.* C is seeking appointment as the guardian for P. P has a bank account for which P received only electronic statements, P has stored photos in a cloud-based Internet account, and P has an e-mail account with a company that provides electronic communication services to the public. C needs access to the electronic bank account statements, the photo account, and e-mails.

Without a court order that explicitly grants access to P's digital assets, including electronic communications, C has no authority pursuant to this Act to access the electronic bank account statements, the photo account, or the e-mails. Based on law outside of this Act, the bank may release the catalogue of electronic communications or content of an electronic communication for which it is the originator or the addressee because the bank is not subject to the ECPA.

*Example 3 – Access to digital assets by agent.* X creates a power of attorney designating A as X's agent. The power of attorney expressly grants A authority over X's digital assets, including the content of an electronic communication. X has a bank

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account for which X receives only electronic statements, X has stored photos in a cloud-based Internet account, and X has a game character and in-game property associated with an online game. X also has an e-mail account with a company that provides electronic-communication services to the public.

A has the authority to access X's electronic bank statements, the photo account, the game character and in-game property associated with the online game, all of which fall under the act's definition of a "digital asset." This means that, if these accounts are password-protected or otherwise unavailable to A as X's agent, then the bank, the photo account service provider, and the online game service provider must give access to A when the request is made in accordance with Section .801. If the TOSA permits X to transfer the accounts electronically, then A as X's agent can use that procedure for transfer as well.

As X's agent, A is also able to request that the e-mail account service provider grant access to e-mails sent or received by X; ECPA permits the service provider to release the catalogue. The service provider also must provide A access to the content of an electronic communication sent or received by X if the service provider is permitted under 18 U.S.C. Section 2702(b) to disclose the content. The bank may release the catalogue of electronic communications or content of an electronic communication for which it is the originator or the addressee because the bank is not subject to the ECPA.

*Example 4 – Access to digital assets by trustee.* T is the trustee of a trust established by S. As trustee of the trust, T opens a bank account for which T receives only electronic statements. S transfers into the trust to T as trustee (in compliance with a TOSA) a game character and in-game property associated with an online game and a cloud-based Internet account in which S has stored photos. S also transfers to T as trustee (in compliance with the TOSA) an e-mail account with a company that provides electronic-communication services to the public.

T is an original account holder with respect to the bank account that T opened, and T has the ability to access the electronic banking statements. T, as successor account holder to S, may access the game character and in-game property associated with the online game and the photo account, which both fall under the act's definition of a "digital asset." This means that, if these accounts are password-protected or otherwise unavailable to T as trustee, then the bank, the photo account service provider, and the online game service provider must give access to T when the request is made in accordance with Section .801. If the TOSA permits the account holder to transfer the accounts electronically, then T as trustee can use that procedure for transfer as well.

T as successor account holder of the e-mail account for which S was previously the account holder is also able to request that the e-mail account service provider grant access to e-mails sent or received by S; the ECPA permits the service provider to release the catalogue. The service provider also must provide T access to the content of an electronic communication sent or received by S if the service provider is permitted under 18 U.S.C. Section 2702(b) to disclose the content. The bank may release the catalogue of electronic communications or content of an electronic communication for which it is the

originator or the addressee because the bank is not subject to the ECPA.

*Example 5 – Access notwithstanding terms in a TOSA.* D, who is domiciled in Florida, dies. D was a professional photographer who stored valuable digital photos in an online storage account provided by C. P is appointed by a court in Florida to administer D’s estate. P needs access to D’s online storage account to inventory and appraise D’s estate assets and to file D’s estate tax return. During D’s lifetime, D entered into a TOSA with C for the online storage account. The choice-of-law provision selects the law of state Y to govern the contractual rights and duties under the TOSA. A provision of the TOSA prohibits fiduciary access to the digital assets of an account holder, but D did not agree to that provision by an affirmative act separate from D’s assent to other provisions of the TOSA. FFADAA has been enacted but no similar law has been enacted by state Y. Because P’s access to D’s assets is fundamental to carrying out P’s fiduciary duties, a court should apply subsections (b) and (c) of this Act to void the TOSA provision prohibiting P’s access to D’s online account, even though the TOSA selected the law of state Y to govern the contractual rights and duties under the TOSA.

8. **Section 740.801** addresses compliance.

Subsection (1) allows a fiduciary to request access, control, or a copy of the digital asset. The term “control” means only the ability to move (unless prohibited by copyright law) or delete that particular asset. A fiduciary’s control over a digital asset is not equivalent to a transfer of ownership or a laundering of illegally obtained material. Thus, this subsection grants the fiduciary the ability to access electronic records, and the disposition of those records is subject to other laws. For example, where the account holder has an online securities account or has a game character and in-game property associated with an online game, then the fiduciary’s ability to sell the securities, the game character, or the in-game property is controlled by traditional probate law. The act is only granting access and “control” in the sense of enabling the fiduciary to do electronically what the account holder could have done electronically. Thus, if a TOSA precludes online transfers, then the fiduciary is unable to make those transfers electronically as well.

*Example – Fiduciary control over a digital asset.* D dies with a will disposing of all D’s assets to D’s spouse, S. E is the personal representative for D’s estate. D left a bank account, for which D only received online statements, and a blog.

E as personal representative of D’s estate has access to both of D’s accounts and can request the passwords from the custodians of both accounts. If D’s agreement with the bank requires that transferring the underlying title to the account be done in person, through a hard copy signed by the account holder and the bank manager, then E must comply with those procedures (signing as the account holder) and cannot transfer the funds in the account electronically. If the TOSA for the blog permitted D to transfer the blog electronically, then E can make the transfer electronically as well.

Subsection (3) establishes 60 days as the appropriate time for compliance. If applicable law other than this act does not prohibit the custodian from complying, then

the custodian must grant access to comply.

9. **Section 740.901** grants immunity to custodians.

This section establishes that custodians are protected from liability when they act in accordance with the procedures of this Act and in good faith. The types of actions covered include disclosure as well as transfer of copies.

10. **Section 740.1001** establishes the relation with the Electronic Signatures in Global and National Commerce Act.

11. **Section 740.1101** establishes the applicability of this Act. This Act applies in situations in which a decedent dies testate or intestate, as well as a guardianship.

This Act does not change the substantive rules of other law, such as agency, banking, guardianship, contract, copyright, criminal, fiduciary, privacy, probate, property, security, trust, or other applicable law except to vest fiduciaries with authority, according to the provisions of this Act, to access, control, or copy digital assets of a decedent, ward, principal, settlor, or trustee.

12. **Section 12** establishes the effective date.

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

The proposal does not have a fiscal impact on state or local governments. In fact, it should decrease the risk of unauthorized access to digital assets from the fiduciaries appointed by account holders and would provide certainty and predictability for courts, account holders, fiduciaries, and Internet service providers.

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

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

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

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

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

Criminal Law Section, State law enforcement and state attorney offices who track and enforce privacy and cyber crimes.

Florida Bankers Association

Business Law Section

Trial Lawyers Association

# LEGISLATIVE POSITION REQUEST FORM

GOVERNMENTAL AFFAIRS OFFICE

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

## GENERAL INFORMATION

**Submitted By** Elaine M. Bucher, Chair, Estate and Trust Tax Planning Committee of the Real Property Probate and Trust Section  
(List name of the section, division, committee, bar group or individual)

**Address** 777 S. Flagler Dr., Ste. 500 East, West Palm Beach, FL 33401 –  
Telephone: (561) 650-0693

**Position Type** The Estate and Trust Tax Planning Committee of the Real Property, Probate and Trust Law Section of The Florida Bar  
(Florida Bar, section, division, committee or both)

## CONTACTS

**Board & Legislation  
Committee Appearance**

**Elaine Bucher**, Gunster, Yoakley & Stewart, P.A., 777 S. Flagler Dr., Ste. 500 East, West Palm Beach, FL 33401  
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**Martha J. Edenfield**, Dean Mead, 215 S. Monroe Street, Suite 815, Tallahassee, FL 32301 Telephone 850-999-4100

**Appearances  
before Legislators**

\_\_\_\_\_  
(List name and phone # of those appearing before House/Senate Committees)

**Meetings with  
Legislators/staff**

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

## PROPOSED ADVOCACY

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

**If Applicable,  
List The Following**

N/A \_\_\_\_\_  
(Bill or PCB #) (Bill or PCB Sponsor)

**Indicate Position** Support  Oppose  Technical Assistance  Other

**Proposed Wording of Position for Official Publication:**

Support amending the Florida Uniform Transfer to Minors Act, Chapter 710, Florida Statutes, to allow for certain custodianships to terminate when the minor attains age 25, and to provide for a procedure to qualify transfers to certain custodianships that terminate when the minor attains age 25 for the federal gift tax annual exclusion.

**Reasons For Proposed Advocacy:**

The proposed amendments to the Florida Uniform Transfers to Minors Act will give Floridians the option, in certain circumstances, to use custodianships that do not terminate until the minor's attainment of age 25, rather than the current age 21. Floridians will thus benefit from the advantages of the statutory protections of UTMA for college-aged beneficiaries without the expense and complexity of formal trust arrangements.

**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**

Tax Section, TFB

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

Florida Bankers Association

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

Elder Law Section, TFB

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

Please submit completed Legislative Position Request Form, along with attachments, to the Governmental Affairs Office of The Florida Bar. Upon receipt, staff will further coordinate the scheduling for final Bar action of your request which usually involves separate appearances before the Legislation Committee and the Board of Governors unless otherwise advised. For information or assistance, please telephone (850) 561-5662 or 800-342-8060, extension 5662.

1 A bill to be entitled

2 An act amending s. 710.102 to define the term “general power of appointment;”  
3 amending s. 710.105 to treat a certain transfer from a trust as having been made  
4 directly by the grantor of the trust; amending s. 710.123 to permit custodianships  
5 established by irrevocable gift and by irrevocable exercise of power of appointment  
6 to terminate when the minor attains age 25, subject to the minor’s right in certain  
7 such custodianships to compel immediate distribution of the custodial property upon  
8 attaining age 21; and further amending s. 710.123 to limit liability of financial  
9 institutions for certain distributions of custodial property .

10 Section 1. Section 710.102, Florida Statutes, is amended to read:

11 710.102 Definitions.—As used in this act, the term:

12 (1) “Adult” means an individual who has attained the age of 21 years.

13 (2) “Benefit plan” means a retirement plan and may include, but is not limited  
14 to, any pension, profit-sharing, stock-bonus, or stock-ownership plan or individual  
15 retirement account.

16 (3) “Broker” means a person lawfully engaged in the business of effecting  
17 transactions in securities or commodities for the person’s own account or for the  
18 account of others.

19 (4) “Conservator” means a person appointed or qualified by a court to act as  
20 general, limited, or temporary guardian of a minor’s property or a person legally  
21 authorized to perform substantially the same functions.

22 (5) “Court” means the circuit court.

23 (6) "Custodial property" means any interest in property transferred to a  
24 custodian under this act and the income from and proceeds of that interest in  
25 property.

26 (7) "Custodian" means a person so designated under s. 710.111 or a successor  
27 or substitute custodian designated under s. 710.121.

28 (8) "Financial institution" means a bank, trust company, savings institution, or  
29 credit union, chartered and supervised under state or federal law.

30 (9) "General power of appointment" means a power of appointment described  
31 in s. 732.2025(3).

32 (910) "Legal representative" means an individual's personal representative or  
33 conservator.

34 (4011) "Member of the minor's family" means the minor's parent, stepparent,  
35 spouse, grandparent, brother, sister, uncle, or aunt, whether of the whole or half  
36 blood or by adoption.

37 (4412) "Minor" means an individual who has not attained the age of 21 years.

38 (4213) "Person" means an individual, corporation, organization, or other legal  
39 entity.

40 (4314) "Personal representative" means an executor, administrator, successor  
41 personal representative, or special administrator of a decedent's estate or a person  
42 legally authorized to perform substantially the same functions.

43 (4415) "Qualified minor's trust" means a trust that meets the requirements of  
44 s. 2503(c) of the Internal Revenue Code of 1986, as amended.

45 (4516) "State" includes any state of the United States, the District of  
46 Columbia, the Commonwealth of Puerto Rico, and any territory or possession subject  
47 to the legislative authority of the United States.

48 (4617) "Transfer" means a transaction that creates custodial property under s.  
49 710.111.

50 (4718) "Transferor" means a person who makes a transfer under this act.

51 (4819) "Trust company" means a financial institution, corporation, or other  
52 legal entity, authorized to exercise general trust powers.

53 Section 2. Section 710.105, Florida Statutes, is amended to read:

54 **710.105 Transfer by gift or exercise of power of appointment**

55 A person may make a transfer by irrevocable gift to, or the irrevocable exercise  
56 of a power of appointment in favor of, a custodian for the benefit of a minor pursuant  
57 to s. 710.111. Notwithstanding s. 710.106, a transfer by irrevocable gift from a trust  
58 over which the grantor has at the time of transfer a "right of revocation" as defined  
59 in s. 733.707(3)(e) shall be treated for all purposes of this act as a transfer made  
60 directly by the grantor of the trust.

61 Section 3. Section 710.123, Florida Statutes, is amended to read:

62 **710.123 Termination of custodianship.**

63 (1) The custodian shall transfer in an appropriate manner the custodial  
64 property to the minor or to the minor's estate upon the earlier of:

65 ~~(1) The minor's attainment of 21 years of age with respect to custodial~~  
66 ~~property transferred under s. 710.105 or s. 710.106;~~

67 ~~(2) The minor's attainment of age 18 with respect to custodial property~~  
68 ~~transferred under s. 710.107 or s. 710.108; or~~

69 ~~(3) The minor's death.~~

70 (a) The minor's attainment of 21 years of age with respect to custodial  
71 property transferred under s. 710.105 or s. 710.106, but a transferor can, with  
72 respect to such custodial property, create the custodianship so that it terminates on  
73 the minor's attainment of 25 years of age;

74 (b) The minor's attainment of age 18 with respect to custodial property  
75 transferred under s. 710.107 or s. 710.108; or

76 (c) The minor's death.

77 (2) If the transferor of a custodianship described in subsection(1)(a) created  
78 the custodianship to terminate upon the minor's attainment of 25 years of age, in the  
79 case of a custodianship created by irrevocable gift or by irrevocable inter vivos  
80 exercise of a general power of appointment, the minor nevertheless has the absolute  
81 right to compel immediate distribution of the entire custodial property when the  
82 minor attains the age of 21 years.

83 (3) A transferor may provide, upon the creation of a custodianship described in  
84 subsection (2), that the minor's right to compel immediate distribution of the entire  
85 custodial property will terminate upon the expiration of a fixed period that begins  
86 with the custodian's delivery of written notice to the minor of the existence of such  
87 right. To be effective to terminate the minor's right to compel an immediate  
88 distribution of the entire custodial property when the minor attains 21 years of age,  
89 the custodian's written notice must be delivered not more than 30 days before the

90 date upon which the minor attains age 21, and the fixed period specified in the notice  
91 for the termination of such right cannot expire before the later of 30 days after the  
92 minor attains age 21 or 30 days after the custodian delivers such notice.

93 (4) Notwithstanding s. 710.102(11), if the transferor created the custodianship  
94 to terminate at age 25, , then solely for purposes of the application of the  
95 termination provisions of this section, "minor" means an individual who has not  
96 attained the age of 25 years.

97 (5) No financial institution has any liability to any custodian or minor for  
98 distribution of custodial property in a custodianship created by irrevocable gift or by  
99 irrevocable exercise of a general power of appointment when the minor attains the  
100 age of 21 years.

101 Section 4. This act shall take effect upon becoming law.

102 5113936.00012

**Real Property, Probate and Trust Law Section of The Florida Bar**  
**White Paper**  
**Proposed Amendments to**  
**Florida Uniform Transfers to Minors Act, Ch. 710, Florida Statutes**

I. SUMMARY

The proposed legislation would modify Florida's Uniform Transfers to Minors Act, Chapter 710, Florida Statutes (the "Act"), to allow transferors to create custodianships that terminate when the minor attains age 25, and not age 21, in certain circumstances.

II. CURRENT SITUATION

Currently, the Act provides that assets transferred:

- (1) by gift or exercise of power of appointment or a fiduciary pursuant to an authorizing provision in a will or a trust may be held by the custodian until the minor attains age 21; and
- (2) by an obligor (including a pension plan or a person who owes the minor a liquidated debt), or by a fiduciary pursuant to a will or a trust without an authorizing provision, may be held by the custodian until the minor attains age 18.

III. EFFECT OF PROPOSED CHANGES GENERALLY

The proposed changes would, generally, amend the Act to permit a donor, a holder of a power of appointment or a fiduciary acting pursuant to an authorization in a will or a trust to provide that the custodianship will not terminate until the minor's attainment of age 25 (assuming that the minor does not die prior to that age).

In the case of custodianships created by lifetime gift or by lifetime exercise of a general power of appointment, the creation of a custodianship that terminates at age 25 would not qualify for the gift tax annual exclusion (currently \$14,000 per donee, per year) because the transfer would be of a future interest. The legislative proposal addresses this issue in a way to make the annual exclusion available if certain notice procedures are followed.

No change are made to the provisions of the Act that apply to the termination age for custodianships created by an obligor or a conservator, or to those created by a fiduciary acting under a will or trust that lacks an authorizing provision.

Financial institutions may not be aware that a custodianship will not terminate until the minor attains age 25. The proposed statute protects them from liability for distribution of funds in all custodianships created by inter vivos gift or inter vivos exercise of a general power of appointment at age 21.

#### IV. ANALYSIS

At least seven states – Alaska, California, Nevada, Oregon, Pennsylvania, Tennessee, and Washington – have amended their versions of the Uniform Transfer to Minors Act to permit a custodian to hold assets until age 25 under certain circumstances. With the proposed modifications to the Act, Florida would join these states in providing its citizens the option of creating a custodianship for a minor that lasts until the minor attains age 25 (in certain circumstances). As a result, Floridians would be allowed to continue the advantages of the statutory protections of UTMA for beneficiaries until age 25, rather than being forced to bear the expense and complexity of establishing formal trust arrangements in order to protect such beneficiaries.

The proposed legislation would not authorize the creation of a custodianship for a person who has attained the age of 21 at the time for creation of the custodianship. Under the Act, a custodianship can only be created for a person who is a “minor,” defined in existing Section 710.102(11), Florida Statutes, as a person who has not attained age 21.

To qualify the creation of custodianships created by lifetime gift or by lifetime exercise of a general power of appointment for the gift tax annual exclusion, the minor for whose benefit such a custodianship was created has an absolute right to withdraw the custodial funds at age 21. The person who created the custodianship can, however, limit the minor’s withdrawal rights to exercise during a limited period of time after the minor attains the age of 21. To effectively do so, the custodian must provide the minor with written notice of his or her withdrawal rights, and require that the minor exercise those rights not later than 30 days after the minor’s 21<sup>st</sup> birthday, or 30 days after the custodian’s delivery of the notice, whichever occurs last.

The proposed change would be effective for custodianships created on or after the effective date of the statute.

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

VI. DIRECT IMPACT ON PRIVATE SECTOR - None.

VII. CONSTITUTIONAL ISSUES - None apparent.

VIII. OTHER INTERESTED PARTIES - The Tax and Elder Law Sections of The Florida Bar and the Florida Bankers Association.

# LEGISLATIVE POSITION REQUEST FORM

GOVERNMENTAL AFFAIRS OFFICE

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

## GENERAL INFORMATION

**Submitted By** Elaine M. Bucher, Chair, Estate and Trust Tax Planning Committee of the Real Property Probate and Trust Section  
(List name of the section, division, committee, bar group or individual)

**Address** 777 S. Flagler Dr., Ste. 500 East, West Palm Beach, FL 33401 –  
Telephone: (561) 650-0693

**Position Type** The Estate and Trust Tax Planning Committee of the Real Property, Probate and Trust Law Section of The Florida Bar  
(Florida Bar, section, division, committee or both)

## CONTACTS

**Board & Legislation Committee Appearance**

**Elaine Bucher**, Gunster, Yoakley & Stewart, P.A., 777 S. Flagler Dr., Ste. 500 East, West Palm Beach, FL 33401  
Telephone: (561) 650-0693

**William T. Hennessey**, Gunster, Yoakley & Stewart, P.A., 777 S. Flagler Dr., Ste. 500 East, West Palm Beach, FL 33401  
Telephone: (561) 650-0693

**Peter M. Dunbar**, Dean Mead, 215 S. Monroe Street, Suite 815, Tallahassee, FL 32301 Telephone 850-999-4100

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

**Appearances before Legislators** \_\_\_\_\_  
(List name and phone # of those appearing before House/Senate Committees)

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

## PROPOSED ADVOCACY

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

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

**Indicate Position** Support  Oppose  Technical Assistance  Other

**Proposed Wording of Position for Official Publication:**

Support amending the Florida Uniform Transfer to Minors Act, Chapter 710, Florida Statutes, to allow for certain custodianships to terminate when the minor attains age 25, and to provide for a procedure to qualify transfers to certain custodianships that terminate when the minor attains age 25 for the federal gift tax annual exclusion.

**Reasons For Proposed Advocacy:**

The proposed amendments to the Florida Uniform Transfers to Minors Act will give Floridians the option, in certain circumstances, to use custodianships that do not terminate until the minor's attainment of age 25, rather than the current age 21. Floridians will thus benefit from the advantages of the statutory protections of UTMA for college-aged beneficiaries without the expense and complexity of formal trust arrangements.

**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**

Tax Section, TFB

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

Florida Bankers Association

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

Elder Law Section, TFB

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

Please submit completed Legislative Position Request Form, along with attachments, to the Governmental Affairs Office of The Florida Bar. Upon receipt, staff will further coordinate the scheduling for final Bar action of your request which usually involves separate appearances before the Legislation Committee and the Board of Governors unless otherwise advised. For information or assistance, please telephone (850) 561-5662 or 800-342-8060, extension 5662.

1 A bill to be entitled

2 An act amending s. 710.102 to define the term “general power of appointment;”  
3 amending s. 710.105 to treat a certain transfer from a trust as having been made  
4 directly by the grantor of the trust; amending s. 710.123 to permit custodianships  
5 established by irrevocable gift and by irrevocable exercise of power of appointment  
6 to terminate when the minor attains age 25, subject to the minor’s right in certain  
7 such custodianships to compel immediate distribution of the custodial property upon  
8 attaining age 21; and further amending s. 710.123 to limit liability of financial  
9 institutions for certain distributions of custodial property .

10 Section 1. Section 710.102, Florida Statutes, is amended to read:

11 710.102 Definitions.—As used in this act, the term:

12 (1) “Adult” means an individual who has attained the age of 21 years.

13 (2) “Benefit plan” means a retirement plan and may include, but is not limited  
14 to, any pension, profit-sharing, stock-bonus, or stock-ownership plan or individual  
15 retirement account.

16 (3) “Broker” means a person lawfully engaged in the business of effecting  
17 transactions in securities or commodities for the person’s own account or for the  
18 account of others.

19 (4) “Conservator” means a person appointed or qualified by a court to act as  
20 general, limited, or temporary guardian of a minor’s property or a person legally  
21 authorized to perform substantially the same functions.

22 (5) “Court” means the circuit court.

23 (6) "Custodial property" means any interest in property transferred to a  
24 custodian under this act and the income from and proceeds of that interest in  
25 property.

26 (7) "Custodian" means a person so designated under s. 710.111 or a successor  
27 or substitute custodian designated under s. 710.121.

28 (8) "Financial institution" means a bank, trust company, savings institution, or  
29 credit union, chartered and supervised under state or federal law.

30 (9) "General power of appointment" means a power of appointment described  
31 in s. 732.2025(3).

32 (~~9~~10) "Legal representative" means an individual's personal representative or  
33 conservator.

34 (~~40~~11) "Member of the minor's family" means the minor's parent, stepparent,  
35 spouse, grandparent, brother, sister, uncle, or aunt, whether of the whole or half  
36 blood or by adoption.

37 (~~44~~12) "Minor" means an individual who has not attained the age of 21 years.

38 (~~42~~13) "Person" means an individual, corporation, organization, or other legal  
39 entity.

40 (~~43~~14) "Personal representative" means an executor, administrator, successor  
41 personal representative, or special administrator of a decedent's estate or a person  
42 legally authorized to perform substantially the same functions.

43 (~~44~~15) "Qualified minor's trust" means a trust that meets the requirements of  
44 s. 2503(c) of the Internal Revenue Code of 1986, as amended.

45 (4516) "State" includes any state of the United States, the District of  
46 Columbia, the Commonwealth of Puerto Rico, and any territory or possession subject  
47 to the legislative authority of the United States.

48 (4617) "Transfer" means a transaction that creates custodial property under s.  
49 710.111.

50 (4718) "Transferor" means a person who makes a transfer under this act.

51 (4819) "Trust company" means a financial institution, corporation, or other  
52 legal entity, authorized to exercise general trust powers.

53 Section 2. Section 710.105, Florida Statutes, is amended to read:

54 **710.105 Transfer by gift or exercise of power of appointment**

55 A person may make a transfer by irrevocable gift to, or the irrevocable exercise  
56 of a power of appointment in favor of, a custodian for the benefit of a minor pursuant  
57 to s. 710.111. Notwithstanding s. 710.106, a transfer by irrevocable gift from a trust  
58 over which the grantor has at the time of transfer a "right of revocation" as defined  
59 in s. 733.707(3)(e) shall be treated for all purposes of this act as a transfer made  
60 directly by the grantor of the trust.

61 Section 3. Section 710.123, Florida Statutes, is amended to read:

62 **710.123 Termination of custodianship.**

63 (1) The custodian shall transfer in an appropriate manner the custodial  
64 property to the minor or to the minor's estate upon the earlier of:

65 ~~(1) The minor's attainment of 21 years of age with respect to custodial~~  
66 ~~property transferred under s. 710.105 or s. 710.106;~~

67 ~~(2) The minor's attainment of age 18 with respect to custodial property~~  
68 ~~transferred under s. 710.107 or s. 710.108; or~~

69 ~~(3) The minor's death.~~

70 (a) The minor's attainment of 21 years of age with respect to custodial  
71 property transferred under s. 710.105 or s. 710.106, but a transferor can, with  
72 respect to such custodial property, create the custodianship so that it terminates on  
73 the minor's attainment of 25 years of age;

74 (b) The minor's attainment of age 18 with respect to custodial property  
75 transferred under s. 710.107 or s. 710.108; or

76 (c) The minor's death.

77 (2) If the transferor of a custodianship described in subsection(1)(a) created  
78 the custodianship to terminate upon the minor's attainment of 25 years of age, in the  
79 case of a custodianship created by irrevocable gift or by irrevocable inter vivos  
80 exercise of a general power of appointment, the minor nevertheless has the absolute  
81 right to compel immediate distribution of the entire custodial property when the  
82 minor attains the age of 21 years.

83 (3) A transferor may provide, upon the creation of a custodianship described in  
84 subsection (2), that the minor's right to compel immediate distribution of the entire  
85 custodial property will terminate upon the expiration of a fixed period that begins  
86 with the custodian's delivery of written notice to the minor of the existence of such  
87 right. To be effective to terminate the minor's right to compel an immediate  
88 distribution of the entire custodial property when the minor attains 21 years of age,  
89 the custodian's written notice must be delivered not more than 30 days before the

90 date upon which the minor attains age 21, and the fixed period specified in the notice  
91 for the termination of such right cannot expire before the later of 30 days after the  
92 minor attains age 21 or 30 days after the custodian delivers such notice.

93 (4) Notwithstanding s. 710.102(11), if the transferor created the custodianship  
94 to terminate at age 25, , then solely for purposes of the application of the  
95 termination provisions of this section, "minor" means an individual who has not  
96 attained the age of 25 years.

97 (5) No financial institution has any liability to any custodian or minor for  
98 distribution of custodial property in a custodianship created by irrevocable gift or by  
99 irrevocable exercise of a general power of appointment when the minor attains the  
100 age of 21 years.

101 Section 4. This act shall take effect upon becoming law.

102 5113936.00012

**Real Property, Probate and Trust Law Section of The Florida Bar**  
**White Paper**  
**Proposed Amendments to**  
**Florida Uniform Transfers to Minors Act, Ch. 710, Florida Statutes**

I. SUMMARY

The proposed legislation would modify Florida's Uniform Transfers to Minors Act, Chapter 710, Florida Statutes (the "Act"), to allow transferors to create custodianships that terminate when the minor attains age 25, and not age 21, in certain circumstances.

II. CURRENT SITUATION

Currently, the Act provides that assets transferred:

- (1) by gift or exercise of power of appointment or a fiduciary pursuant to an authorizing provision in a will or a trust may be held by the custodian until the minor attains age 21; and
- (2) by an obligor (including a pension plan or a person who owes the minor a liquidated debt), or by a fiduciary pursuant to a will or a trust without an authorizing provision, may be held by the custodian until the minor attains age 18.

III. EFFECT OF PROPOSED CHANGES GENERALLY

The proposed changes would, generally, amend the Act to permit a donor, a holder of a power of appointment or a fiduciary acting pursuant to an authorization in a will or a trust to provide that the custodianship will not terminate until the minor's attainment of age 25 (assuming that the minor does not die prior to that age).

In the case of custodianships created by lifetime gift or by lifetime exercise of a general power of appointment, the creation of a custodianship that terminates at age 25 would not qualify for the gift tax annual exclusion (currently \$14,000 per donee, per year) because the transfer would be of a future interest. The legislative proposal addresses this issue in a way to make the annual exclusion available if certain notice procedures are followed.

No change are made to the provisions of the Act that apply to the termination age for custodianships created by an obligor or a conservator, or to those created by a fiduciary acting under a will or trust that lacks an authorizing provision.

Financial institutions may not be aware that a custodianship will not terminate until the minor attains age 25. The proposed statute protects them from liability for distribution of funds in all custodianships created by inter vivos gift or inter vivos exercise of a general power of appointment at age 21.

#### IV. ANALYSIS

At least seven states – Alaska, California, Nevada, Oregon, Pennsylvania, Tennessee, and Washington – have amended their versions of the Uniform Transfer to Minors Act to permit a custodian to hold assets until age 25 under certain circumstances. With the proposed modifications to the Act, Florida would join these states in providing its citizens the option of creating a custodianship for a minor that lasts until the minor attains age 25 (in certain circumstances). As a result, Floridians would be allowed to continue the advantages of the statutory protections of UTMA for beneficiaries until age 25, rather than being forced to bear the expense and complexity of establishing formal trust arrangements in order to protect such beneficiaries.

The proposed legislation would not authorize the creation of a custodianship for a person who has attained the age of 21 at the time for creation of the custodianship. Under the Act, a custodianship can only be created for a person who is a “minor,” defined in existing Section 710.102(11), Florida Statutes, as a person who has not attained age 21.

To qualify the creation of custodianships created by lifetime gift or by lifetime exercise of a general power of appointment for the gift tax annual exclusion, the minor for whose benefit such a custodianship was created has an absolute right to withdraw the custodial funds at age 21. The person who created the custodianship can, however, limit the minor’s withdrawal rights to exercise during a limited period of time after the minor attains the age of 21. To effectively do so, the custodian must provide the minor with written notice of his or her withdrawal rights, and require that the minor exercise those rights not later than 30 days after the minor’s 21<sup>st</sup> birthday, or 30 days after the custodian’s delivery of the notice, whichever occurs last.

The proposed change would be effective for custodianships created on or after the effective date of the statute.

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

VI. DIRECT IMPACT ON PRIVATE SECTOR - None.

VII. CONSTITUTIONAL ISSUES - None apparent.

VIII. OTHER INTERESTED PARTIES - The Tax and Elder Law Sections of The Florida Bar and the Florida Bankers Association.

# LEGISLATIVE POSITION REQUEST FORM

GOVERNMENTAL AFFAIRS OFFICE

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

## GENERAL INFORMATION

**Submitted By** Elaine M. Bucher, Chair, Estate and Trust Tax Planning Committee of the Real Property Probate and Trust Section  
(List name of the section, division, committee, bar group or individual)

**Address** 777 S. Flagler Dr., Ste. 500 East, West Palm Beach, FL 33401 –  
Telephone: (561) 650-0693

**Position Type** The Estate and Trust Tax Planning Committee of the Real Property, Probate and Trust Law Section of The Florida Bar  
(Florida Bar, section, division, committee or both)

## CONTACTS

### Board & Legislation

#### Committee Appearance

**Elaine Bucher**, Gunster, Yoakley & Stewart, P.A., 777 S. Flagler Dr., Ste. 500 East, West Palm Beach, FL 33401

Telephone: (561) 650-0693

**William T. Hennessey**, Gunster, Yoakley & Stewart, P.A., 777 S. Flagler Dr., Ste. 500 East, West Palm Beach, FL 33401

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**Peter M. Dunbar**, Dean Mead, 215 S. Monroe Street, Suite 815, Tallahassee, FL 32301 Telephone 850-999-4100

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

### Appearances

#### before Legislators

\_\_\_\_\_  
(List name and phone # of those appearing before House/Senate Committees)

#### Meetings with

#### Legislators/staff

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

## PROPOSED ADVOCACY

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

### If Applicable,

#### List The Following

N/A

(Bill or PCB #)

(Bill or PCB Sponsor)

#### Indicate Position

Support

Oppose

Technical Assistance

Other

### Proposed Wording of Position for Official Publication:

Support amendments to the estate tax apportionment statutes, including Florida Statutes § 733.817, to update and clarify existing law

**Reasons For Proposed Advocacy:**

Florida's estate tax apportionment is in need of updating and clarification to address federal estate tax laws enacted after the statute was last amended and tax issues which are not currently covered in the existing statute. The proposed legislation will substantially improve and clarify the existing statutory framework for the apportionment of estate taxes.

**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**

Tax Section, TFB \_\_\_\_\_ No Position  
(Name of Group or Organization) (Support, Oppose or No Position)

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

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

**Please submit completed Legislative Position Request Form, along with attachments, to the Governmental Affairs Office of The Florida Bar. Upon receipt, staff will further coordinate the scheduling for final Bar action of your request which usually involves separate appearances before the Legislation Committee and the Board of Governors unless otherwise advised. For information or assistance, please telephone (850) 561-5662 or 800-342-8060, extension 5662.**

1 A bill to be entitled

2 An act relating to estates: amending s. 733.817, F.S.; revising provisions of law  
3 regarding the apportionment of estate taxes; providing an effective date.  
4

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

6  
7 Section 1. Section 733.817, Florida Statutes is amended to read:  
8 (Substantial rewording of section. See s. 733.817, F.S. for present text.)  
9

10 733.817. Apportionment of Estate Taxes.--

11 (1) DEFINITIONS.--For purposes of this section:

12 (a) "Fiduciary" means a person other than the personal representative in  
13 possession of property included in the measure of the tax who is liable to the applicable  
14 taxing authority for payment of the entire tax to the extent of the value of the property in  
15 possession.

16 (b) "Generation-skipping transfer tax" means the generation-skipping transfer tax  
17 on direct skips at death and excludes the generation-skipping transfer tax on taxable  
18 distributions or taxable terminations. The terms direct skip, taxable distribution and  
19 taxable termination have the same meanings given them in the Internal Revenue Code.

20 (c) "Governing instrument" means a will, trust agreement, or any other document  
21 that controls the transfer of property on the occurrence of the event with respect to which  
22 the tax is being levied.

23 (d) "Gross estate" means the gross estate, as determined by the Internal Revenue  
24 Code with respect to the federal estate tax and the Florida estate tax, and as that concept  
25 is otherwise determined by the estate, inheritance, or death tax laws of the particular  
26 state, country, or political subdivision whose tax is being apportioned.

27 (e) "Included in the measure of the tax" means for each separate tax that an

28 interest may incur, only interests included in the measure of that particular tax are  
29 considered. For purposes of this section, the term “included in the measure of the tax”  
30 does not include:

31 1. Any interest, whether passing under the will or not, to the extent the interest is  
32 initially deductible from the gross estate, without regard to any subsequent reduction of  
33 the deduction by reason of the charge of any part of the applicable tax to the interest. If  
34 an election is required for deductibility, an interest is not “initially deductible” unless the  
35 election for deductibility is allowed.

36 2. Interests or amounts that are not included in the gross estate but are included  
37 in the amount upon which the applicable tax is computed, such as adjusted taxable gifts  
38 pursuant to s. 2001 of the Internal Revenue Code.

39 3. Gift taxes included in the gross estate pursuant to s. 2035 of the Internal  
40 Revenue Code and the portion of any intervivos transfer included in the gross estate  
41 pursuant to s. 529 of the Internal Revenue Code, notwithstanding inclusion in the federal  
42 gross estate.

43 (f) “Internal Revenue Code” means the Internal Revenue Code of 1986, as  
44 amended from time to time.

45 (g) “Net tax” means the net tax payable to the particular state, country, or political  
46 subdivision whose tax is being apportioned, after taking into account all credits against  
47 the applicable tax except as provided in this section. With respect to the federal estate  
48 tax, “net tax” is determined after taking into account all credits against the tax except for  
49 the credit for foreign death taxes and except for the credit or deduction for state tax taxes  
50 imposed by states other than this state.

51 (h) “Nonresiduary devise” means any devise that is not a residuary devise.

52 (i) “Nonresiduary interest” in connection with a trust means any interest in a trust  
53 which is not a residuary interest.

54 (j) “Recipient” means, with respect to property or an interest in property included  
55 in the gross estate, an heir at law in an intestate estate, devisee in a testate estate,

56 beneficiary of a trust, beneficiary of a life insurance policy, annuity, or other contractual  
57 right, surviving tenant, taker as a result of the exercise or in default of the exercise of a  
58 general power of appointment, person who receives or is to receive the property or an  
59 interest in the property, or person in possession of the property, other than a creditor.

60 (k) “Residuary devise” has the meaning set forth in s. 731.201.

61 (l) “Residuary interest,” in connection with a trust, means an interest in the assets  
62 of a trust which remain after provision for any distribution that is to be satisfied by  
63 reference to a specific property or type of property, fund, sum, or statutory amount.

64 (m) “Revocable trust” means a trust as described in s. 733.707(3).

65 (n) “Section 2044 interest” means an interest included in the measure of the tax  
66 by reason of s. 2044 of the Internal Revenue Code.

67 (o) “State” means any state, territory, or possession of the United States, the  
68 District of Columbia, and the Commonwealth of Puerto Rico.

69 (p) “Tax” means any estate tax, inheritance tax, generation-skipping transfer tax,  
70 or other tax levied or assessed under the laws of this or any other state, the United  
71 States, any other country, or any political subdivision of the foregoing, as finally  
72 determined, which is imposed as a result of the death of the decedent. The term also  
73 includes any interest or penalties imposed in addition to the tax. Unless the context  
74 indicates otherwise, the term “tax” means each separate tax. The term “tax” does not  
75 include any additional estate tax imposed by ss. 2032A(c) or 2057(f) of the Internal  
76 Revenue Code (and any corresponding state estate, inheritance or death tax); the  
77 additional estate tax so imposed shall be apportioned as provided in s. 2032A or s. 2057  
78 of the Internal Revenue Code.

79 (q) “Temporary interest” means an interest in income or an estate for a specific  
80 period of time or for life or for some other period controlled by reference to extrinsic  
81 events, whether or not in trust.

82 (r) “Tentative Florida tax” with respect to any property means the net Florida  
83 estate tax that would have been attributable to that property if no tax were payable to any

84 other state in respect of that property.

85 (s) “Value” means the pecuniary worth of the interest involved as finally  
86 determined for purposes of the applicable tax after deducting any debt, expense, or other  
87 deduction chargeable to it for which a deduction was allowed in determining the amount  
88 of the applicable tax. A lien or other encumbrance is not regarded as chargeable to a  
89 particular interest to the extent that it will be paid from other interests. The value of an  
90 interest shall not be reduced by reason of the charge against it of any part of the tax,  
91 except as provided in subsection (3)(a).

92 (2) ALLOCATION OF TAX.-- Except as effectively directed in the governing  
93 instrument, the net tax attributable to the interests included in the measure of each tax  
94 shall be determined by the proportion that the value of each interest included in the  
95 measure of the tax bears to the total value of all interests included in the measure of the  
96 tax. Notwithstanding the foregoing:

97 (a) The net tax attributable to Section 2044 interests shall be determined in the  
98 manner provided for the federal estate tax in s. 2207A of the Internal Revenue Code, and  
99 the amount so determined shall be deducted from the tax to determine the net tax  
100 attributable to all other interests included in the measure of the tax.

101 (b) The foreign tax credit allowed with respect to the federal estate tax shall be  
102 allocated among the recipients of interests finally charged with the payment of the foreign  
103 tax in reduction of any federal estate tax chargeable to the recipients of the foreign  
104 interests, whether or not any federal estate tax is attributable to the foreign interests. Any  
105 excess of the foreign tax credit shall be applied to reduce proportionately the net amount  
106 of federal estate tax chargeable to the remaining recipients of the interests included in the  
107 measure of the federal estate tax.

108 (c) The reduction in the net tax attributable to the deduction for state death taxes  
109 allowed by s. 2058 of the Internal Revenue Code shall be allocated to the recipients of  
110 the interests that produced the deduction. For this purpose, the reduction in the net tax  
111 shall be calculated in the manner provided for interests other than those described in

112 paragraph (a).

113 (d) The reduction in the Florida tax (if one is imposed) on the estate of a Florida  
114 resident for tax paid to other states shall be allocated as follows:

115 1. If the net tax paid to another state is greater than or equal to the tentative  
116 Florida tax attributable to the property subject to tax in the other state, none of the Florida  
117 tax shall be attributable to that property.

118 2. If the net tax paid to another state is less than the tentative Florida tax  
119 attributable to the property subject to tax in the other state, the net Florida tax attributable  
120 to the property subject to tax in the other state shall be the excess of the amount of the  
121 tentative Florida tax attributable to the property over the net tax payable to the other state  
122 with respect to the property.

123 3. Any remaining net Florida tax shall be attributable to property included in the  
124 measure of the Florida tax exclusive of property subject to tax in other states.

125 4. The net federal tax attributable to the property subject to tax in the other state  
126 shall be determined as if it were located in that state.

127 (e) The net tax attributable to a temporary interest, if any, is regarded as  
128 attributable to the principal that supports the temporary interest.

129 (3) APPORTIONMENT OF TAX.-- Except as otherwise effectively directed by the  
130 governing instrument, the net tax attributable to each interest shall be apportioned as  
131 follows:

132 (a) Generation-Skipping Transfer Tax.--Any federal or state generation-skipping  
133 transfer tax shall be apportioned in the manner provided in s. 2603 of the Internal  
134 Revenue Code after the application of the remaining provisions of this subsection to  
135 taxes other than the generation-skipping transfer tax.

136 (b) Section 2044 interests.-- The net tax attributable to Section 2044 interests  
137 shall be apportioned among the recipients of the Section 2044 interests in the proportion  
138 that the value of each Section 2044 interest bears to the total of all Section 2044  
139 interests. The net tax apportioned by this paragraph to Section 2044 interests that pass

140 in the manner described in subsection (3)(c) or (3)(d) shall be apportioned to the Section  
141 2044 interests in the manner described in those subsections prior to the apportionment of  
142 the net tax attributable to the other interests passing as provided in those subsections.  
143 The net tax attributable to the interests other than the Section 2044 interests which pass  
144 in the manner described in subsection (3)(c) or (3)(d) shall be apportioned only to the  
145 other interests pursuant to those subsections.

146 (c) Wills.--For property passing under the decedent's will, in the following order of  
147 priority:

148 1. The net tax attributable to nonresiduary devises shall be charged to and paid  
149 from the residuary estate whether or not all interests in the residuary estate are included  
150 in the measure of the tax. If the residuary estate is insufficient to pay the net tax  
151 attributable to all nonresiduary devises, the balance of the net tax attributable to  
152 nonresiduary devises shall be apportioned among the recipients of the nonresiduary  
153 devises in the proportion that the value of each nonresiduary devise included in the  
154 measure of the tax bears to the total of all nonresiduary devises included in the measure  
155 of the tax.

156 2. The net tax attributable to residuary devises shall be apportioned among the  
157 recipients of the residuary devises included in the measure of tax in the proportion that  
158 the value of each residuary devise included in the measure of the tax bears to the total of  
159 all residuary devises included in the measure of the tax. If the residuary estate is  
160 insufficient to pay the net tax attributable to all residuary devises, the balance of the net  
161 tax attributable to residuary devises shall be apportioned among the recipients of the  
162 nonresiduary devises in the proportion that the value of each nonresiduary devise  
163 included in the measure of the tax bears to the total of all nonresiduary devises included  
164 in the measure of the tax.

165 (d) Trusts.--For property passing under the terms of any trust other than a trust  
166 created in the decedent's will in the following order of priority:

167 1. The net tax attributable to nonresiduary interests of the trust shall be charged to

168 and paid from the residuary portion of the trust, whether or not all interests in the  
169 residuary portion are included in the measure of the tax. If the residuary portion is  
170 insufficient to pay the net tax attributable to all nonresiduary interests, the balance of the  
171 net tax attributable to nonresiduary interests shall be apportioned among the recipients of  
172 the nonresiduary interests in the proportion that the value of each nonresiduary interest  
173 included in the measure of the tax bears to the total of all nonresiduary interests included  
174 in the measure of the tax.

175 2. The net tax attributable to residuary interests of the trust shall be apportioned  
176 among the recipients of the residuary interests of the trust included in the measure of the  
177 tax in the proportion that the value of each residuary interest included in the measure of  
178 the tax bears to the total of all residuary interests of the trust included in the measure of  
179 the tax. If the residuary portion is insufficient to pay the net tax attributable to all  
180 residuary interests, the balance of the net tax attributable to residuary interests shall be  
181 apportioned among the recipients of the nonresiduary interests in the proportion that the  
182 value of each nonresiduary interest included in the measure of the tax bears to the total  
183 of all nonresiduary interests included in the measure of the tax.

184 Except as provided in paragraph (g), this paragraph applies separately for each  
185 trust.

186 (e) Protected homestead, exempt property and family allowance.--The net tax  
187 attributable to an interest in protected homestead, exempt property and the allowance  
188 determined under s. 732.403 shall be apportioned against the recipients of other interests  
189 in the estate or passing under any revocable trust in the following order of priority:

190 1. Class I: Recipients of interests passing by intestacy that are included in the  
191 measure of the federal estate tax.

192 2. Class II: Recipients of residuary devises, residuary interests, and pretermitted  
193 shares pursuant to s. 732.301 and s. 732.302 that are included in the measure of the  
194 federal estate tax.

195 3. Class III: Recipients of nonresiduary devises and nonresiduary interests that

196 are included in the measure of the federal estate tax.

197 Any net tax apportioned to a class pursuant to this paragraph shall be apportioned  
198 among each recipient in the class in the proportion that the value of the interest of each  
199 bears to the total value of all interests included in that class. No tax shall be apportioned  
200 under this paragraph to the portion of any interest applied in satisfaction of the elective  
201 share whether or not included in the measure of tax. For purposes of this paragraph, if  
202 the interests described in s. 732.2075(1) exceed the amount of the elective share, the  
203 elective share shall be treated as satisfied first from interests other than those described  
204 in Classes I, II and III, and to the extent those interests are insufficient to satisfy the  
205 elective share, from the interests passing to or for the benefit of the surviving spouse  
206 described in Classes I, II and III (beginning with those described in Class I) until the  
207 elective share is satisfied. This paragraph has priority over paragraphs (a) and (h) of this  
208 subsection.

209 The balance of the net tax attributable to any interest in protected homestead, exempt  
210 property and the allowance determined under s. 732.403 not apportioned under the  
211 preceding provisions of this paragraph shall be apportioned to the recipients of those  
212 interests included in the measure of the tax in the proportion that the value of each bears  
213 to the total value of those interests included in the measure of the tax.

214 (f) Construction.—For purposes of this subsection:

215 1. If the decedent's estate is the beneficiary of a life insurance policy, annuity or  
216 contractual right included in the decedent's gross estate, or is the taker as a result of the  
217 exercise or default in exercise of a general power of appointment held by the decedent,  
218 that interest shall be regarded as passing under the terms of the decedent's will for the  
219 purposes of subsection (3)(c) or by intestacy if not disposed of by will. Additionally, any  
220 interest included in the measure of the tax by reason of s. 2041 of the Internal Revenue  
221 Code passing to the decedent's creditors or the creditors of the decedent's estate shall  
222 be regarded as passing to the decedent's estate for the purpose of this subparagraph.

223 2. If a trust is the beneficiary of a life insurance policy, annuity or contractual right

224 included in the decedent's gross estate, or is the taker as a result of the exercise or  
225 default in exercise of a general power of appointment held by the decedent, that interest  
226 shall be regarded as passing under the trust for purposes of subsection (3)(d).

227 (g) Common Instrument Construction.--In the application of this subsection,  
228 paragraphs (b) - (f) shall be applied to apportion the net tax to the recipients under certain  
229 governing instruments as if all recipients under those instruments (other than the estate  
230 or revocable trust itself) were taking under a common instrument. This construction  
231 applies to the following:

232 1. The decedent's will and revocable trust if either the estate or the revocable trust  
233 is a beneficiary of the other.

234 2. The decedent's revocable trust and another revocable trust of the decedent if  
235 the revocable trust is a beneficiary of the other.

236 (h) Other interests. The net tax that is not apportioned to interests under  
237 paragraphs (b) – (g), including, but not limited to, the net tax attributable to interests  
238 passing by intestacy, interests applied in satisfaction of the elective share pursuant to s.  
239 732.2075(2), interests passing by reason of the exercise or non-exercise of a general  
240 power of appointment, jointly held interests passing by survivorship, life insurance,  
241 properties in which the decedent held a reversionary or revocable interest, annuities and  
242 contractual rights, shall be apportioned among the recipients of the remaining interests  
243 included in the measure of the tax in the proportion that the value of each such interest  
244 bears to the total value of all remaining interests included in the measure of the tax.

245 (i) If the court finds that it is inequitable to apportion interest, penalties, or both, in  
246 the manner provided in paragraphs (a)-(h), the court may assess liability for the payment  
247 thereof in the manner it finds equitable.

248 (j) If the court finds that this section does not apportion any tax that was not  
249 effectively directed by the governing instrument, the court may assess liability for the  
250 payment of the tax in the manner it finds equitable.

251 (4) DIRECTION AGAINST APPORTIONMENT.

252 (a) Except as provided in this subsection, a governing instrument may not direct  
253 that taxes be paid from property other than that passing under the governing instrument.

254 (b) For a direction in a governing instrument to be effective to direct payment of  
255 taxes attributable to property passing under the governing instrument in a manner  
256 different from that provided in this section, the direction must be express.

257 (c) For a direction in a governing instrument to be effective to direct payment of  
258 taxes attributable to property not passing under the governing instrument from property  
259 passing under the governing instrument, the governing instrument must expressly direct  
260 that the property passing under the governing instrument is to bear the burden of taxation  
261 for property not passing under the governing instrument. Except as provided in paragraph  
262 (d), a direction in the governing instrument to the effect that all taxes are to be paid from  
263 property passing under the governing instrument whether attributable to property passing  
264 under the governing instrument or otherwise shall be effective to direct the payment from  
265 property passing under the governing instrument of taxes attributable to property not  
266 passing under the governing instrument.

267 (d) In addition to satisfying the other provisions of this subsection:

268 1. For a direction in the decedent's will or revocable trust to be effective to waive  
269 the right of recovery provided in s. 2207A of the Internal Revenue Code for tax imposed  
270 by reason of s. 2044 of the Internal Revenue Code (and any tax imposed by this state  
271 based upon that provision of the Internal Revenue Code), the direction must expressly  
272 wave that right of recovery. An express direction that property passing under the will or  
273 revocable trust bear the tax imposed by s. 2044 of the Internal Revenue Code is an  
274 express waiver of the right of recovery provided in s. 2207A of the Internal Revenue  
275 Code. A reference to "qualified terminable interest property," "QTIP," or property in which  
276 the decedent had a "qualifying income interest for life" is deemed to be a reference to  
277 property upon which tax is imposed by s. 2044 of the Internal Revenue Code which is  
278 subject to the right of recovery provided in s. 2207A of the Internal Revenue Code. If  
279 property is included in the gross estate pursuant to both ss. 2044 and 2041 of the Internal

280 Revenue Code, the property will be deemed included under s. 2044 and not s. 2041 for  
281 purposes of allocation and apportionment of the tax.

282 2. For a direction in the decedent's will or revocable trust to be effective to waive  
283 the right of recovery provided in s. 2207B of the Internal Revenue Code for tax imposed  
284 by reason of s. 2036 of the Internal Revenue Code (and any tax imposed by this state  
285 based upon that provision of the Internal Revenue Code), the direction must expressly  
286 wave that right of recovery. An express direction that property passing under the will or  
287 revocable trust bear the tax imposed by s. 2036 of the Internal Revenue Code is deemed  
288 to be an express waiver of the right of recovery provided in s. 2207B. If property is  
289 included in the gross estate pursuant to both ss. 2038 and 2036 of the Internal Revenue  
290 Code, the property will be deemed included under s. 2038 and not s. 2036 for purposes  
291 of allocation and apportionment of the tax, and there is no right of recovery under s.  
292 2207B of the Internal Revenue Code.

293 3. A general statement in the decedent's will or revocable trust waiving all rights of  
294 reimbursement or recovery under the Internal Revenue Code is not an express waiver of  
295 the rights of recovery provided in s. 2207A or 2207B of the Internal Revenue Code.

296 4. For a direction in a governing instrument to be effective to direct the payment of  
297 generation-skipping transfer tax in a manner other than as provided in s. 2603 of the  
298 Internal Revenue Code (and any tax imposed by this state based on that provision of the  
299 Internal Revenue Code), the direction must specifically reference the tax imposed by s.  
300 2601 of the Internal Revenue Code. A reference to the "generation-skipping transfer tax"  
301 or s. 2603 of the Internal Revenue Code is deemed to be a reference to property upon  
302 which tax is imposed by reason of s. 2601 of the Internal Revenue Code.

303 (e) If the decedent expressly directs by will, the net tax attributable to property  
304 over which the decedent held a general power of appointment may be determined in a  
305 manner other than as provided in subsection (2), provided the net tax attributable to that  
306 property may not exceed the difference between the total net tax determined pursuant to  
307 subsection (2) (determined without regard to this paragraph) and the total net tax which

308 would have been payable if the value of the property subject to such power of  
309 appointment had not been included in the decedent's gross estate. If tax is attributable to  
310 one or more Section 2044 interests pursuant to subsection (2), the net tax attributable to  
311 the Section 2044 interests will be calculated prior to the application of this paragraph  
312 unless the decedent expressly directs otherwise by will.

313 (f) If the decedent's will expressly provides that the tax is to be apportioned as  
314 provided in the decedent's revocable trust by specific reference to the revocable trust, an  
315 express direction in the revocable trust is deemed to be a direction contained in the will  
316 as well as the revocable trust.

317 (g) An express direction in the decedent's will to pay tax from the decedent's  
318 revocable trust by specific reference to the revocable trust is effective unless a contrary  
319 express direction is contained in the revocable trust.

320 (h) If governing instruments contain effective directions that conflict as to payment  
321 of taxes, the most recently executed tax apportionment provision controls to the extent of  
322 the conflict. For the purpose of this subsection, if a will or other governing instrument is  
323 amended, the date of the codicil to the will or amendment to the governing instrument is  
324 regarded as the date of the will or other governing instrument only if the codicil or  
325 amendment contains an express tax apportionment provision or an express modification  
326 of the tax apportionment provision. A general statement ratifying or republishing all  
327 provisions not otherwise amended does not meet this condition. If the decedent's will  
328 and another governing instrument were executed on the same date, the will shall be  
329 deemed executed after the other governing instrument. The earlier conflicting governing  
330 instrument will control as to any tax remaining unpaid after the application of the later  
331 conflicting governing instrument.

332 (i) A grant of permission or authority in a governing instrument to request payment  
333 of tax from property passing under another governing instrument is not a direction  
334 apportioning the tax to the property passing under the other governing instrument.  
335 A grant of permission or authority in a governing instrument to pay tax attributable to

336 property not passing under the governing instrument is not a direction apportioning the  
337 tax to property passing under the governing instrument.

338 (j) The provisions of this section apply to any tax remaining to be paid after the  
339 application of any effective express directions. An effective express direction for the  
340 payment of tax on certain interests in a manner different from that provided in this section  
341 is not effective as an express direction for payment of tax on other interests included in  
342 the measure of the tax.

343 (5) TRANSFER OF PROPERTY.-- The personal representative or fiduciary shall  
344 not be required to transfer to a recipient any property reasonably anticipated to be  
345 necessary for the payment of taxes. Further, the personal representative or fiduciary shall  
346 not be required to transfer any property to the recipient until the amount of the tax due  
347 from the recipient is paid by the recipient. If property is transferred before final  
348 apportionment of the tax, the recipient shall provide a bond or other security for his or her  
349 apportioned liability in the amount and form prescribed by the personal representative or  
350 fiduciary.

351 (6) ORDER OF APPORTIONMENT.--

352 (a) The personal representative may petition at any time for an order of  
353 apportionment. If no administration has been commenced at any time after 90 days from  
354 the decedent's death, any fiduciary may petition for an order of apportionment in the court  
355 in which venue would be proper for administration of the decedent's estate. Notice of the  
356 petition for order of apportionment must be served on all interested persons in the  
357 manner provided for service of formal notice. At any time after 6 months from the  
358 decedent's death, any recipient may petition the court for an order of apportionment.

359 (b) The court shall determine all issues concerning apportionment. If the tax to be  
360 apportioned has not been finally determined, the court shall determine the probable tax  
361 due or to become due from all interested persons, apportion the probable tax, and retain  
362 jurisdiction over the parties and issues to modify the order of apportionment as  
363 appropriate until after the tax is finally determined.

364 (7) DEFICIENCY.--

365 (a) If the personal representative or fiduciary does not have possession of  
366 sufficient property otherwise distributable to the recipient to pay the tax apportioned to the  
367 recipient, whether under this section, the Internal Revenue Code, or the governing  
368 instrument, if applicable, the personal representative or fiduciary shall recover the  
369 deficiency in tax so apportioned to the recipient:

370 1. From the fiduciary in possession of the property to which the tax is apportioned,  
371 if any; and

372 2. To the extent of any deficiency in collection from the fiduciary, or to the extent  
373 collection from the fiduciary is excused pursuant to subsection (8) and in all other cases,  
374 from the recipient of the property to which the tax is apportioned, unless relieved of this  
375 duty as provided in subsection (8).

376 (b) In any action to recover the tax apportioned, the order of apportionment shall  
377 be prima facie correct.

378 (c) In any action for the enforcement of an order of apportionment, the court shall  
379 award taxable costs as in chancery actions, including reasonable attorney's fees, and  
380 may award penalties and interest on the unpaid tax in accordance with equitable  
381 principles.

382 (d) This subsection shall not authorize the recovery of any tax from any company  
383 issuing life insurance included in the gross estate, or from any bank, trust company,  
384 savings and loan association, or similar institution with respect to any account in the  
385 name of the decedent and any other person which passed by operation of law on the  
386 decedent's death.

387 (8) RELIEF FROM DUTY.—

388 (a) A personal representative or fiduciary who has the duty under this section of  
389 collecting the apportioned tax from recipients may be relieved of the duty to collect the  
390 tax by an order of the court finding:

391 1. That the estimated court costs and attorney's fees in collecting the apportioned

392 tax from a person against whom the tax has been apportioned will approximate or exceed  
393 the amount of the recovery;

394 2. That the person against whom the tax has been apportioned is a resident of a  
395 foreign country other than Canada and refuses to pay the apportioned tax on demand; or

396 3. That it is impracticable to enforce contribution of the apportioned tax against a  
397 person against whom the tax has been apportioned in view of the improbability of  
398 obtaining a judgment or the improbability of collection under any judgment that might be  
399 obtained, or otherwise.

400 (b) A personal representative or fiduciary shall not be liable for failure to attempt  
401 to enforce collection if the personal representative or fiduciary reasonably believes it  
402 would have been economically impracticable.

403 (9) UNCOLLECTED TAX.-- Any apportioned tax that is not collected shall be  
404 reapportioned in accordance with this section as if the portion of the property to which the  
405 uncollected tax had been apportioned had been exempt.

406 (10) CONTRIBUTION.-- Nothing in this section shall limit the right of any person  
407 who has paid more than the amount of the tax apportionable to that person, calculated as  
408 if all apportioned amounts would be collected, to obtain contribution from those who have  
409 not paid the full amount of the tax apportionable to them, calculated as if all apportioned  
410 amounts would be collected, and that right is hereby conferred. In any action to enforce  
411 contribution, the court shall award taxable costs as in chancery actions, including  
412 reasonable attorney's fees.

413 (11) FOREIGN TAX.-- Nothing herein contained shall be construed to require the  
414 personal representative or fiduciary to pay any tax levied or assessed by any foreign  
415 country, unless specific directions to that effect are contained in the will or other  
416 instrument under which the personal representative or fiduciary is acting.

417 Section 2. (1) The changes made to this act by paragraphs (1)(g) and (2)(c) are  
418 intended to clarify existing law and apply retroactively to all proceedings pending or  
419 commenced after the effective date of this act in which the apportionment of taxes has

420 not been finally determined or agreed for the estates of decedents' dying after December  
421 31, 2004.

422 (2) The changes made to this act in subparagraph (1)(e)3., paragraphs (3)(e),  
423 (3)(g), (4)(b) and (4)(c), the last sentence of subparagraph (4)(d)1., and paragraphs(4)(e),  
424 (4)(h) and (6) of s. 733.817, Florida Statutes, apply to the estates of decedent's dying on  
425 or after October 1, 2015.

426 (3) Except as otherwise provided in this act, the changes made by this act to s.  
427 733.817, Florida Statutes, are intended to clarify existing law and apply retroactively to all  
428 proceedings pending on or after July 1, 2015 in which the apportionment of taxes has not  
429 been finally determined or agreed.

430 Section 3. This act shall take effect on July 1, 2015.

## **WHITE PAPER**

### **PROPOSED AMENDMENT TO SECTION 733.817, FLORIDA STATUTES**

#### **APPORTIONMENT OF ESTATE TAXES**

##### **I. SUMMARY**

The purpose of the proposed changes is to clarify and improve the provisions of Sections 733.817, Apportionment of Estate Taxes. The proposed legislation is a product of study and analysis by the Estate and Trust Tax Planning Committee of the Real Property, Probate and Trust Law Section of the Florida Bar. Section 733.817 governs (a) the apportionment of estate taxes if a decedent has not effectively provided for the apportionment of those taxes and (b) the collection of the tax. The proposal updates the statute for changes in the estate tax law under the Internal Revenue Code, addresses tax issues that are not covered in the current statute, codifies some provisions of law and recommends changes reflecting what the Committee believes most decedents intend.

##### **II. OVERVIEW OF THE STATUTE**

The purpose of the statute is to provide default rules for determining the portion of the estate tax apportioned to the various interests passing as a result of the decedent's death and to provide for the collection of the tax. The apportionment statute has not been substantially revised since 1998. Generally the statute provides for a modified equitable apportionment regime. Property interests generally bear their share of the taxes except there are special provisions for property passing under a will or trust and for protected homestead. Residuary interests passing under a will (or trust) are first charged with taxes on non-residuary interests, then with taxes on residuary interests themselves, with the non-residuary interests bearing their pro rata share of any remaining taxes. Property qualifying for the marital and charitable deduction does not bear any part of the tax unless the property is a part of the residuary under the will (or trust). The default apportionment provisions apply only if the decedent does not direct otherwise. The statute provides rules for determining whether a decedent has overridden the default rules. There have been a few changes in the tax law since the statute was last substantially revised, and there are a few tax issues that were not covered.

##### **III. POINT BY POINT ANALYSIS**

The proposal rearranges the statute, adds titles for clarity and makes other clarifying changes. Following the definitions are rules for determining the tax attributable to various interests in property, rules for determining who is charged (apportioned) with the tax attributable to an interest, rules for what is required in order to direct against statutory apportionment and rules for resolving conflicts between governing instruments. The remaining provisions of the statute are substantially unchanged and deal with the collection of the estate tax by the personal

representative. Changes in the statute, codifications of existing law and some of the clarifications in the proposal are described below.

A. **733.817(1) Definitions.** The proposal adds two definitions and modifies several others.

1. Two new definitions.

“Generation-skipping transfer tax” and “Section 2044 property” are added for clarity in paragraphs (1)(b) and (1)(n) since they are used in a number of places. These definitions do not change the law. See Section 2612 of the Internal Revenue Code. Section 2044 interest is discussed below.

2. Paragraph (1)(e) defines “Included in the measure of the tax”.

Current Law. In determining the amount of tax attributable to an interest in property, only interests included in the measure of the particular tax are considered. Interests that initially qualify for deduction from the estate tax, such as the marital and charitable deduction, are excluded from the measure of the tax since those interests do not generate any of the tax. There are two items included in the measure of the tax that are not apportioned under the remaining provisions of this statute.

Effect of Proposed Changes. The proposal reorganizes this definition for clarity. Subparagraphs (1)(e)1 and 2 are existing law. Subparagraph (1)(e)3 is a change in the law and its effect is explained below.

A decedent’s gross estate for estate tax purposes includes gift taxes paid within three years of death under Section 2035(b) of the Internal Revenue Code. The federal government received the gift taxes, not the recipients of the gifts. The present statute does not apportion the estate tax on those gift taxes. Under the proposal, gift taxes paid within three years of death are excluded from the definition of “included in the measure of the tax”. The effect of that provision is that recipients of the gifts are not allocated the estate tax upon the gift taxes even though the gift taxes are a part of the amount upon which the estate tax is calculated. The effect is to increase the rate of tax on all other interests being taxed at death.

Section 529 of the Internal Revenue Code permits a donor of a gift to a qualified tuition program (commonly known as a 529 Plan) to treat a gift exceeding the gift tax annual exclusion as being made over five years. If the donor dies before the end of the five year period, his taxable estate includes a portion of the gift. The present statute does not apportion the estate tax on those gifts. Under the proposal, those gifts are excluded from the definition of “included in the measure of the tax”. The effect of that provision is the recipients of those gifts are not allocated the estate tax on those gifts. The effect is to increase the rate of tax on all other interests being taxed at death.

The Committee believes that the majority of decedents do not intend that the recipients of their gifts bear the burden of the estate tax. Decedents may provide otherwise by governing instrument.

3. Paragraph (1)(g) defines “Net tax.”

Current Law. Currently, the definition of net tax includes the reduction in the federal estate tax for the credit for death taxes paid to the states under Section 2011 of the Internal Revenue Code. The state death tax credit has been phased out and replaced by a deduction for state death taxes under Section 2058 of the Internal Revenue Code.

Effect of Proposed Changes. The proposal amends the statute to take into account the deduction for state death taxes that replaced the credit for state death taxes. The effect of the deduction for state death taxes is allocated in proposed paragraph (2)(c). This is a curative provision.

4. Paragraph (1)(p) defines “Tax.”

Currently “tax” is defined as any tax which is imposed as a result of the death of the decedent and includes estate taxes, inheritance taxes and taxes imposed under Section 4980A of the Internal Revenue Code, among other taxes.

The proposal deletes the reference to Section 4980A of the Internal Revenue Code as that tax has been repealed. The proposal clarifies that the “additional estate tax” that may be imposed later on beneficiaries if the conditions of Sections 2032A and 2057 of the Internal Revenue Code cease to be met is not part of the tax being apportioned under this section. (For estate tax purposes, those provisions of the Internal Revenue Code permit the reduced valuation of a family owned farm or business or other qualified business under certain conditions and provide for the payment of additional estate tax by the heirs of those businesses if the conditions cease to be met subsequent to the decedent’s death.)

**B. 733.817(2) Allocation of Tax.** This subsection provides rules for determining how much tax is attributable to each interest included in the measure of the tax. The general rule is to allocate tax among the interests included in the measure of the tax in proportion to their relative values. However, there is an exception to the general rule.

1. Paragraph (2)(a). The net tax attributable to Section 2044 interests.

The proposal is not a change from current law. This is substantially the current provision except for the use of the definition. The definition does not change the law. Certain income interests passing to the surviving spouse for life with the remainder over to others qualify for the marital deduction in computing the estate tax of the first spouse to die under Section 2056 of the Internal Revenue Code. Those qualified income interests are called “qualified terminable interest property” and are referred to here as “QTIP”. When the surviving

spouse dies, the value of the remainder of the QTIP is included in the surviving spouse's taxable estate under Section 2044 of the Internal Revenue Code; the QTIP remainder is thus the Section 2044 interest. The estate tax attributable to the Section 2044 interests (the QTIP remainder) is the additional tax caused by the Section 2044 interests, determined by calculating the difference between the estate tax calculated with the Section 2044 interests included in the surviving spouse's taxable estate and the tax calculated without the Section 2044 interests included. This tax must be calculated first and then subtracted from the total estate tax to determine the net tax attributable to all other interests. This is not a change from current law. The calculation of tax on the Section 2044 interests is determined under Section 2207A of the Internal Revenue Code.

2. Paragraph (2)(b).

The proposal is not a change from current law. The Internal Revenue Code allows a credit against the decedent's estate tax liability for estate and inheritance tax paid to any foreign country. The current apportionment statute allocates the foreign death tax credit to the interests charged with the payment of the foreign tax, with any excess applied to reduce the estate tax chargeable to the remaining interests. The proposal makes no change. The foreign death tax credit is in Section 2014 of the Internal Revenue Code.

3. Paragraph (2)(c).

Current Law. The current apportionment statute refers to the state death tax credit. The Internal Revenue Code formerly permitted a credit against a decedent's federal estate taxes for state death taxes. That credit has been phased out and replaced by a deduction for state death taxes.

Effect of Proposed Changes. The proposal deletes the state death tax credit provision and allocates the state death tax deduction to the interests producing the deduction for the purpose of determining the tax attributable to the interest. The former credit is in Section 2011 of the Internal Revenue Code and the present deduction is in Section 2058 of the Internal Revenue Code.

4. Paragraph (2)(d).

Current Law. Currently, there is no Florida estate tax. The Florida estate tax was based on the federal credit for state death taxes which has been phased out. Chapter 198 dealing with Florida estate taxes has not been repealed. The proposal retains the provisions of the present apportionment statute dealing with the Florida estate tax since Chapter 198 has not been repealed. The former credit is in Section 2011 of the Internal Revenue Code.

C. **733.817(3) Apportionment of Tax.** This subsection provides rules for determining who is charged with payment of the tax attributable to various interests included in the measure of the tax.

1. Paragraph (3)(a). Generation-skipping transfer tax.

The proposal clarifies current law. A generation-skipping transfer tax is imposed in addition to estate tax on certain transfers to persons at least two generations below the decedent (*e.g.*, the decedent's grandchildren). The generation-skipping transfer tax is based on the value of property received by the beneficiary; *i.e.*, net of the estate tax charged against that property. This means the estate tax apportionment provisions are determined first. See Sections 2613 and 2623 of the Internal Revenue Code.

2. Paragraph (3)(b). Section 2044 interests.

The proposal clarifies current law. Section 2044 interests (the QTIP remainder) may pass under a trust or the decedent's will, or pass outside of the will or a trust. The net tax attributable to Section 2044 interests is apportioned under the remaining provisions of paragraph (3) as may be applicable. However, the net tax attributable to the Section 2044 interests is apportioned only to the Section 2044 interests and the net tax attributable to other property is apportioned only to the other property. The net tax apportioned to recipients of the Section 2044 interests is determined first. The purpose of this provision is to insure that the net tax attributable to the Section 2044 interests, which may be at a higher effective rate than the tax attributable to other interests, is charged to the Section 2044 interests, and that the Section 2044 interests are not charged with the tax on other property and *vice versa*.

3. Paragraph (3)(c) Wills.

The proposal clarifies current law. For property passing under the decedent's will, the residuary is charged first with the tax on non-residuary devises and then with tax on the residuary. If the residuary portion is insufficient, the balance of the tax is charged against the non-residuary interests. Devises qualifying for the marital or charitable deduction are not charged with any of the tax on property passing under the will except that residuary devises qualifying for the marital or charitable deduction are not exonerated from the payment of tax on non-residuary devises.

4. Paragraph (3)(d) Trusts.

The proposal clarifies current law. It is parallel to the provisions applicable to wills described above. Paragraph (3)(d) applies separately to each trust, except as explained in Paragraph (3)(g) below.

5. Paragraph (3)(e) Protected homestead, exempt property and family allowance.

Current Law. Under the current statute, the recipients of the assets of the decedent's estate and revocable trust included in the measure of the tax bear the burden of payment of the tax on protected homestead. The first group (Class I) bearing the tax on protected homestead are recipients of property not disposed of under the will or revocable trust. This

literally means that recipients of exempt property, family allowance, elective share, pretermitted shares and property passing by intestacy would be responsible for the payment of the tax on protected homestead. The second group (Class II) bearing the tax is the residuary beneficiaries. The third group (Class III) is the non-residuary beneficiaries (*i.e.*, recipients who are to receive a specific property or specific type of property, fund or sum). The purposes of the provisions for exempt property, family allowance and elective share would be defeated if the recipients of those interests are charged with the estate tax on protected homestead. Property that is not included in the measure of tax, such as property qualifying for the marital or charitable deduction, does not bear the burden of payment of tax on protected homestead.

Effect of Proposed Changes. The proposal provides that the tax on exempt property and the family allowance is also to be apportioned against other estate and revocable trust property in the same manner as the tax on protected homestead. Exempt property and family allowance are no longer charged with payment of estate tax on the protected homestead. The purpose for exempt property and family allowance is defeated if the recipients of those interests are required to pay the tax attributable to protected homestead or on themselves. See ss.732.402 and 732.403.

The proposal continues the existing limitation that only property included in the measure of the tax is included in the Class interests charged with payment of the tax. Thus property qualifying for the marital or charitable deduction is not responsible for paying the tax on protected homestead, family allowance and exempt property.

The proposal modifies Class I property charged with the payment of tax on protected homestead (and under the proposal, family allowance and exempt property) to include only property that passes by intestacy

The proposal modifies Class II to include pretermitted shares along with residuary interests for the purpose of apportioning the tax on protected homestead, exempt property and family allowance. Pretermitted shares of a spouse or child do not pass under the will or revocable trust but do not pass by intestacy either. The pretermitted shares the spouse and child receive (if included in the measure of the tax) should not be free of the burden of taxes on protected homestead, exempt property and family allowance, nor should their shares be the first interests to pay the tax. The pretermitted share statutes basically award an intestate share to a spouse or child omitted from a will executed before the marriage (or birth) under the circumstances described in s. 732.301 (as to a spouse) and s. 732.302 (as to a child). (If the decedent died intestate, there are no pretermitted shares.)

Under the proposal, Class III remains the same.

Under the proposal, property necessary to satisfy the elective share will not bear any part of the tax on protected homestead, exempt property or the family allowance. If the surviving spouse elects the elective share, and the interests passing to the surviving spouse under s. 732.2075(1)

exceed the elective share, the excess interests will not be exempt from payment of tax on the protected homestead, exempt property and family allowance to the extent they are included in Class I, II or III. The proposal determines an order of priority for the funding of the elective share for the purpose of determining the excess under this provision. Funding is deemed first from interests that pass to the surviving spouse which qualify for the marital deduction (and thus are not included in the measure of the tax) and then from interests described in Classes I, II, and III (which are included in the measure of the tax). The interests passing to the surviving spouse under s. 732.2075(1) are interests the surviving spouse receives whether or not the spouse elects the elective share. The order of priority for purposes of the proposal does not affect the priority in raising assets to satisfy the elective share under s. 732.2075(2) if the amount the spouse receives under 732.2075(1) is insufficient. Interests qualifying for the marital deduction and, therefore, not included in the measure of the tax, do not bear any part of the tax on the protected homestead, family allowance or exempt property.

This proposal makes it clear that the apportionment of the tax on protected homestead, exempt property and the family allowance occurs after the application of the apportionment provisions for property passing under the will and revocable trust, but prior to the apportionment of tax to assets passing outside the will and revocable trust and prior to the apportionment of the generation-skipping transfer tax. If the assets in Classes I, II and III are exhausted, the remaining tax is apportioned proportionately to the protected homestead, exempt property and family allowance.

#### 6. Paragraph (3)(f) Construction.

The proposal clarifies current law. The beneficiary of an annuity or insurance policy or recipient of property subject to a power of appointment is the "recipient" as defined in (1)(j). If those interests are paid to the estate or a trust, and subsequently disposed of pursuant to the will or trust, the tax on them is to be apportioned in the manner provided for interests passing from the estate or the trust. Property subject to a power of appointment does not pass under the will simply because the power is exercised by will unless the property passes to the estate. *In re Estate of Wylie*, 342 So.2d 996 (Fla. 4<sup>th</sup> DCA 1977); *Smith v. Bank of Clearwater*, 479 So.2d 755 (Fla. 2<sup>nd</sup> DCA 1985).

#### 7. Paragraph (3)(g) Common Instrument Construction.

Current Law. Under current law, a decedent's will and revocable trust are construed together to apportion the tax as if all recipients of the estate and trust (other than the estate and trust themselves) were taking under one common instrument for the purpose apportioning tax to recipients of residuary and non-residuary interests under the provisions regarding wills, trust and protected homestead. The statute does not apply if one revocable trust pours into another. It applies to a will and revocable trust in which one does not pour into the other, an application that serves no purpose.

Effect of Proposed Changes. The proposal modifies existing law to require that a decedent's will and revocable trust (or two revocable trusts, if applicable) must pour into one another for the common instrument construction to apply. A will may pour over to a revocable trust, or a revocable trust may pour over to the estate or to another revocable trust. A decedent may have a will and revocable trust that are stand-alone instruments and one does not pour into the other. The purpose of this provision is to determine which interests are in effect pre-residuary interests and which are residuary interests where a will or trust (or another trust) pours into the other so that the tax attributable to those interests may be apportioned accordingly. For example, assume that stock in a closely held company passes from the decedent's estate to his revocable trust through the residuary clause of his will, yet is the subject of a pre-residuary devise under his trust. The devise of the closely held stock should be regarded as a pre-residuary devise under the trust when the will and trust are construed together as a common instrument. In that case, the provisions of paragraph (3)(c) would govern the apportionment of tax on the combined will and trust property.

The proposal applies to the application of the provisions in paragraphs (3)(b) through (3)(f) of the proposal (provisions dealing with wills and trusts). The proposal does not apply if the will or trusts stand alone from one another.

8. Paragraph (3)(h) Other interests.

The proposal clarifies current law. This paragraph apportions the tax to interests not apportioned under the prior provisions of subsection (3) of the proposal. The list of those interests is not exclusive. The proposal clarifies that this paragraph (h) applies to the part of the elective share that is raised pursuant to s. 732.2075(2) (to the extent it does not qualify for the marital deduction).

If any part of the elective share passing to a spouse under s. 732.2075(1) is included in the measure of the tax, the tax attributable to those interests is apportioned pursuant to the generic provisions of 733.817. For example, if the spouse receives a devise under a will that is taxable, the provisions dealing with the apportionment of tax attributable to property passing under the will apply, and if the spouse receives proceeds of life insurance that are taxable, the provisions of Paragraph (3)(h) applying to life insurance would apply. An interest passing to a spouse could be a non-deductible interest for a number of reasons. On the other hand, an interest passing to the spouse may be in a form that qualifies for the marital deduction, in which case the interest is not included in the measure of the tax. (Generally, s. 732.2075(1) describes property that passes to the spouse regardless of the election of the elective share.)

9. Paragraph (3)(j).

Current Law. The current statute does not provide how estate taxes are apportioned if the statute does not cover a particular situation. That could happen for any number

of reasons, including the inability to determine the recipient of the interest included in the measure of the tax.

Effect of Proposed Change. Under the proposal, if the apportionment statute does not apportion part of the tax that was not effectively directed by the governing instrument, the court may assess liability for payment of the tax in the manner it finds equitable. This is not strict equitable apportionment.

**D. 733.817(4) Direction Against Apportionment.** This subsection provides rules for determining whether a decedent has effectively directed against statutory apportionment and rules for resolving conflicts between governing instruments.

1. Paragraph (4)(a).

The proposal clarifies current law. A governing instrument may not direct that taxes be paid from property other than property passing under that governing instrument except as permitted in s. 733.817. Paragraph (4)(g) permits the decedent's will to direct the payment of taxes from the decedent's revocable trust if there is no contrary direction contained in the trust.

2. Paragraph (4)(b).

Current Law. The current statute is silent on whether the direction required to direct against statutory apportionment for interests passing under the governing instrument must be express.

Effect of Proposed Change. Under the proposal, the direction in the governing instrument against statutory apportionment for interests passing under the governing instrument must be express. Paragraph (4)(c) applies for property not passing under the governing instrument.

3. Paragraph (4)(c).

Current Law -1. Under current law, a decedent may direct that property passing under the governing instrument pay tax on property not passing under the governing instrument by expressly referring to "this section". This was intended to require the reference to s. 733.817(5)(h)4, but "this section" technically refers to s. 733.817. The current statute not only contains default apportionment provisions, but also contains provisions for obtaining an order of apportionment and the collection of the tax. Those latter provisions apply whether the default apportionment rules of the statute apply or whether the apportionment provisions of the will or other governing instrument apply. There is concern that the waiver of the default apportionment provisions by reference to the statute could be construed as also waiving the provisions for obtaining an order of apportionment and collecting the tax. Those provisions are intended to apply even if statutory apportionment is waived.

Effect of Proposed Changes – 1. The proposal deletes the provision for directing against default apportionment by reference to the s. 733.817.

Current Law - 2. Under current law, a decedent may not direct that property passing under the governing instrument bears the tax for property not passing under the governing instrument unless the direction is express. A direction in the governing instrument to the effect that all taxes are to be paid from property passing under the governing instrument whether attributable to property passing under the governing instrument or otherwise is effective for this purpose. However, this direction is not effective for a direction waiving rights of recovery provided in Sections 2207A, 2207B and 2603 of the Internal Revenue Code, all of which require greater specificity. This is contemplated under current s. 733.817(4)(a).

Effect of Proposed Changes - 2. The proposal clarifies this requirement for greater specificity to waive the federal rights of recovery by referencing a provision dealing with the specificity required under those provisions of the Internal Revenue Code. This is a clarification of the law. See paragraph (4)(d) of the proposal.

4. Paragraph (4)(d).

Current Law. Sections 2207A and 2207B of the Internal Revenue Code provide the decedent's estate with the right to recover the taxes described in those sections from the recipients of the property causing the tax. Those statutes provide that the decedent may direct otherwise, but they require the decedent to specifically indicate an intent to waive the right of recovery under those statutes. Section 2603 of the Internal Revenue Code provides that the generation-skipping transfer tax is imposed on the property constituting the transfer unless otherwise directed by the governing instrument but requires a specific direction to do so. The purpose of the Internal Revenue Code provisions requiring specificity in directing against a right of recovery is not to raise revenue but to guard against the decedent's inadvertent waiver of those rights for the benefit of the estate. Current law requires that to direct otherwise, the decedent must meet both the express direction requirements of s. 733.817 and the specificity required by those Internal Revenue Code provisions when they apply.

Some property interests are included in the gross estate for estate tax purposes under more than one provision of the Internal Revenue Code even though the interests are taxed only once. Sections 2041 (general power of appointment) and 2044 (QTIP) of the Internal Revenue Code could both apply in some situations. Sections 2038 and 2036 of the Internal Revenue Code overlap in part so that most revocable trusts includible under the decedent's gross estate are also includible under Section 2036. The provisions of Section 2207A of the Internal Revenue Code apply to property included in the decedent's gross estate by Section 2044 and the provision of Section 2207B of the Internal Revenue Code apply to property included in the decedent's gross estate by Section 2036. The overlapping application could affect the apportionment of taxes. The current statute is silent on these issues. Revocable trusts existed long before the enactment

of Section 2207B. Section 2207B was enacted specifically to grant a right of recovery over certain irrevocable trusts. Section 2207B was not intended to apply to revocable trusts. In fact, Section 2207B provides that the decedent may waive the right of recovery granted under Section 2207B under his *revocable trust*, a provision that makes no sense if Section 2207B granted a right of recovery *for* revocable trusts.

Effect of Proposed Changes. Under the proposal, in addition to meeting the other requirements of the section, the requirements of paragraph (d)(1) must be met as well to the extent they apply.

Subparagraph (4)(d)1 describes what is sufficient to comply with the specificity requirement of Section 2207A of the Internal Revenue Code. A reference to “qualified terminable interest property, “QTIP” or property in which the decedent had a qualifying income interest for life would suffice. This is not intended to be exhaustive. This is a clarification of existing law.

Subparagraph (4)(d)1. The last sentence of this subparagraph provides that if property is included in the gross estate for estate tax purposes under both Section 2041 and Section 2044 of the Internal Revenue Code, the property is deemed included under Section 2044 for purposes of the allocation and apportionment of tax under s. 733.817. To direct otherwise, the decedent will need to comply with the provisions of Subparagraph (4)(d)1. For both Section 2041 and Section 2044 to apply, the property must have first been a Section 2044 interest. Most would expect taxation under Section 2044 to continue and the specificity required under Section 2207A to waive the right of recovery.

Subparagraph (4)(d)2 describes what is sufficient to comply with the specificity requirement of Section 2207B of the Internal Revenue Code. It is not intended to be exhaustive. This is a clarification of existing law.

Subparagraph (4)(d)2. The last sentence of this subparagraph provides that if property is included in the gross estate under both Section 2038 and Section 2036 of the Internal Revenue Code, the property will be deemed included under Section 2038 and not Section 2036 for purposes of allocation and apportionment of the tax and there is no right of recovery under Section 2207B of the Internal Revenue Code. This proposal does not attempt to change federal law. Rather, it provides that where property is included in the gross estate inclusion under two Internal Revenue Code Sections (i.e., Section 2036 and Section 2038), the decedent’s direction against apportionment in a manner that satisfies the requirements applicable to Section 2038 is sufficient. Florida law has long governed the apportionment of the estate tax attributable to revocable trusts and continues to do so under the proposal without imposing any additional requirements imposed by the right of recovery granted for the estate tax on certain irrevocable trusts. The proposal is a clarification of existing law.

The Comments to the Uniform Apportionment Act take the position that the rights granted to the

decedent's estate by the federal law for the collection of assets do not conflict with the apportionment of taxes by state law or with other rights of collection granted by state law. See, Comment to Section 3 of the Uniform Apportionment Act. The proposal does not challenge those federal provisions but works with them so that meeting the requirements of the apportionment act will meet the requirements of the federal provisions as well, when applicable.

State law may impose greater restrictions than the federal provisions. See, *In re Estate of Gordon*, 134 Misc. 2d 247, 510 N.Y.S. 2d 815 (N.Y. Sur. Ct. 1986); *Estate of Vahlteich v. Commissioner*, 1995 U.S. App. Lexis 34710 (6<sup>th</sup> Cir. 1995), 95-2 U.S. Tax Cas. (CCH) P 60,218.

Subparagraph (4)(d)3 provides that a general statement in the decedent's will or revocable trust waiving all rights of recovery under the Internal Revenue Code is not an express waiver of the rights of recovery provided in Sections 2207A or 2207B of the Internal Revenue Code. This is a clarification of existing law.

Subparagraph (4)(d)4 describes what is sufficient to comply with the specificity requirement of Section 2603 of the Internal Revenue Code. It is not intended to be exhaustive. This is a clarification of existing law.

5. Paragraph (4)(e). Under current law, the net tax attributable to property over which the decedent held a general power of appointment is calculated in the same manner as other property included in the measure of the tax (with the exception of the tax on Section 2044 interests). A general power of appointment may be given to a person in a limited form that will not as a practical matter be exercised. For example, a power to appoint property to the creditors of the power holder's estate is a general power of appointment but is not likely to be exercised. The purpose of such a limited general power is to cause estate tax inclusion in the power holder's estate (generally to avoid the imposition of the generation-skipping transfer tax) while assuring that the power holder would not exercise the power in a manner that results in the property subject to the power passing to someone other than the donor's intended beneficiaries.

The proposal permits the power holder to direct that the property subject to the general power of appointment bear the additional tax incurred by reason of the inclusion of the property subject to the general power of appointment in the power holder's gross estate. This would be calculated in the same manner as the tax attributable to Section 2044 interests. If the decedent's taxable estate includes Section 2044 interests, the tax on those is calculated first. See, *In re Will of King*, 239 N.E. 2d 875, 22 N.Y.2d 456 (N.Y. 1968).

6. Paragraph (4)(f). The proposal clarifies current law. The Internal Revenue Code enables the personal representative of the estate to recover the estate tax attributable to life insurance or property subject to a general power of appointment from the beneficiaries of those interests, but provides that the decedent may direct otherwise by will. Many decedents put their tax apportionment provisions in their revocable trusts. To avoid any issues with the federal provisions, the statute provides that an effective direction of apportionment in the revocable trust

is deemed to be a direction in the will as well as the revocable trust. See Sections 2206 and 2207 of the Internal Revenue Code.

7. Paragraph (4)(g). The proposal clarifies current law. It permits the decedent's will to direct that estate taxes be paid from the decedent's revocable trust unless the trust contains a contrary provision. The revocable trust that is to pay the tax must be specifically identified.

8. Paragraph (4)(h). The current statute governs conflicts between the decedent's will and another governing instrument, but does not cover conflicts between two or more governing instruments if one is not a will. Further, the existing statute gives priority to the will even if the conflicting non-will governing instrument was executed later. With the prevalence of tax clauses in revocable trusts, the later executed instrument should control in the event of a conflict. The proposal modifies the statute to apply to conflicts between all governing instruments (whether a conflicting instrument is a will or other instrument) and provides that the last executed governing instrument containing an effective tax apportionment clause controls to the extent of the conflict. If a will or trust is amended, the date of the amendment is the controlling date only if the amendment contains an express tax apportionment provision. Only tax apportionment provisions that would be effective but for the conflict create a conflict.

9. Paragraph (4)(i). This provision codifies existing law. A grant of permission or authority to pay or collect taxes is not a direction against statutory apportionment. For example, a provision in a will authorizing the personal representative to request the payment of estate taxes by the revocable trust is not a direction by the decedent against statutory apportionment. See *NationsBank v. Brenner*, 756 So. 2d 203 (Fla. 3d DCA 2000); *In re Estate of McClaran*, 811 So. 2d 799 (Fla. 2d DCA 2002).

10. Paragraph (4)(j). This provision codifies existing law. The general provisions of Section 733.817 apply to any tax remaining unpaid after the application of effective directions against statutory apportionment. An effective direction for payment of tax on a type of interest in a manner different from that provided in this section is not effective as an express direction for payment of tax on other types of interests. See, *In re Estate of McClaran*, 811 So2d. 799 (Fla. 2d DCA 2002).

**E. 733.817 (5) - (11)**. These provisions of the proposal are contained in subsections (6) through (12) respectively of the existing statute and are unchanged with one exception. The requirement in present subsection (6) that the personal representative give formal notice of the petition for an order of apportionment has been modified to require notice in the manner of formal notice. Titles to the subsections have been added. It is anticipated that the Rules Committee will address the notice issue in this manner.

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

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

**V. DIRECT FISCAL IMPACT ON PRIVATE SECTOR**

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

**VI. CONSTITUTIONAL ISSUES**

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

**V. OTHER INTERESTED PARTIES.**

Other groups that may have an interest in the legislative proposal include the Tax Section of The Florida Bar and the Florida Bankers Association.

## Case Summary - Inherited IRA's not Protected under § 522 of the Federal Bankruptcy Code – Supreme Court Rules

In the case of *Clark v. Rameker*, 573 U.S. \_\_\_\_ (2014), the U.S. Supreme Court held that under the Federal bankruptcy code a debtor's inherited IRA is not exempt, thus, becoming subject to the claims of creditors.

### FACTS:

In 2001, Heidi Heffron-Clark ("Ms. Clark") inherited an IRA from her deceased mother. In 2010, Ms. Clark and her husband (collectively, "the Clark's") filed for Chapter 7 bankruptcy protection. The Clark's excluded Ms. Clark's inherited IRA (then worth about \$300,000) from her bankrupt estate, reasoning that the IRA is a retirement account exempted under 11 USC 522(b)(3)(C). The trustee of the bankruptcy estate and a creditor objected to the exclusion.

### JUDICIAL HISTORY:

In 2011, the Bankruptcy Court held that the inherited IRA was not exempt, reasoning that an inherited IRA is not a debtor's retirement account. In 2012, the District Court reversed the Bankruptcy's Court's decision, holding the inherited IRAs are exempt, following the rationale of other cases (e.g., *Chilton*). The creditor and trustee appealed to the Seventh Circuit Court of Appeals. The Appeals Court overturned the District Court's decision and held that inherited IRAs are not exempt. Interestingly, Judge Easterbrook (writing the opinion), understanding that his decision conflicted with the Fifth Circuit's decision of *In Re Chilton*, 674 F.3d 486 (5th Cir 2012), circulated his opinion to "all judges in active service" in the Seventh Circuit. None of the judges in the Seventh Circuit requested an en banc hearing.

As a result of the conflict, the Supreme Court agreed to hear the case. On behalf of U.S. Supreme Court, Justice Sotomayor rendered the unanimous opinion holding that inherited IRAs are not considered exempt retirement funds under 11 USC 522(b)(3)(C).

### WHAT MIGHT THAT MEAN FOR FLORIDA DEBTORS?

It's important to understand the impact of the Clark decision. The Supreme Court held that under 11 USC 522(b)(3)(C), inherited IRAs will now not be exempted from a bankrupt's estate; thus, subject to creditors. So, if one is seeking the exemption under 11 USC 522(b)(3)(C), inherited IRAs are not considered retirement accounts.

It should be noted for Florida residents who are debtors, Clark would have no impact, because such debtors would not avail themselves of 11 USC 522 to exempt assets from their bankrupt estate. Rather because Florida opted out of using Federal exemptions, debtors would instead rely on the exemptions provided under F.S. Chapter 222. And, as it applies to inherited IRAs, F.S. 222.21(2)(c) was recently changed to make it clear that inherited IRAs are exempt, and have always been exempt under Florida law.

It should be noted that a few other states like Missouri, Alaska, Texas, North Carolina and Ohio have statutes similar to Florida.

## HOW DOES IT IMPACT PLANNING FOR IRAs?

Presumably, a surviving spouse who rolls a deceased spouse's IRA into his or her own IRA would still be able to exempt such an IRA from bankruptcy creditors under 11 USC 522(b)(3)(C). Conversely, it would seem that a surviving spouse who does not roll such an IRA over into his or her own, but elects to treat it as inherited IRA would not be able to exempt such an IRA under 11 USC 522(b)(3)(C).

From a planning perspective, Florida planners should not be complacent and believe in the planning process that they don't need to worry about planning to protect the client's IRAs. Remember, Florida's exemptions only apply to Florida residents who are debtors. So, only if the client can assure his advisor that those who will inherit the IRA will always be a Florida resident, then there is no worry. However, with the mobile society we live in, one cannot be assured that a beneficiary will always be in a state that opts out of the federal exemptions and protects inherited IRAs. Thus, planners should consider other ways to protect the IRA, such as leaving the IRAs in trust that qualify as designated beneficiaries.

A copy of the Supreme Court's decision can be found at:  
[http://www.supremecourt.gov/opinions/13pdf/13-299\\_mjn0.pdf](http://www.supremecourt.gov/opinions/13pdf/13-299_mjn0.pdf)

## **Report of Trust Law Committee on Changes to Nonjudicial Modification of Trusts**

At the Captiva Island meeting, the Trust Law Committee voted to amend the provisions of the Florida Trust Code dealing with nonjudicial modification of trusts. The amendments are contained in F.S. 736.0412(4)(b) and (c) as well as an amendment to F.S. 736.0105(2)(k). The effect of the proposed amendments will be to treat all irrevocable trusts the same during the first 90 years with regard to whether nonjudicial modification will be available.

Presently, if an irrevocable trust allows for a longer rule against perpetuities period (360 years), as opposed to the previous shorter rule against perpetuities period (90 years), it may be nonjudicially modified immediately upon becoming irrevocable. If the trust provides for the shorter rule against perpetuities, nonjudicial modification is not available. There really is no logical reason to treat irrevocable trusts differently during the first 90 years. Based on perceived abuses of the nonjudicial modification statutes, the committee voted to restrict nonjudicial modification during the first 90 years for all irrevocable trusts unless the grantor of the trust specifically opted to have nonjudicial modification available to the beneficiaries. In order to alleviate concerns of the committee members about retroactive application of the statute for trusts that are already irrevocable, the changes in the statute will only apply to trusts that become irrevocable after the effective date of the legislation.

### **Proposed legislation:**

736.0412 Nonjudicial modification of irrevocable trust.—

(1) After the settlor's death, a trust may be modified at any time as provided in s. 736.04113(2) upon the unanimous agreement of the trustee and all qualified beneficiaries.

(2) Modification of a trust as authorized in this section is not prohibited by a spendthrift clause or by a provision in the trust instrument that prohibits amendment or revocation of the trust.

(3) An agreement to modify a trust under this section is binding on a beneficiary whose interest is represented by another person under part III of this code.

(4) This section shall not apply to any trust:

(a) Created prior to January 1, 2001;

(b) Created after December 31, 2000 and prior to [the effective date of this legislation], if, under the terms of the trust, all beneficial interests in the trust must vest or terminate

within the period prescribed by the rule against perpetuities in s. 689.225(2), notwithstanding s. 689.225(2)(f), unless the terms of the trust expressly authorize nonjudicial modification;

- (c) Created after [effective date of this legislation], during the first 90 years after it is created, unless the terms of the trust expressly authorize nonjudicial modification under this section; or,
- (d) For which a charitable deduction is allowed or allowable under the Internal Revenue Code until the termination of all charitable interests in the trust.

(5) For purposes of subsection (4), a revocable trust shall be treated as created when the right of revocation terminates.

(6) The provisions of this section are in addition to, and not in derogation of, rights under the common law to modify, amend, terminate, or revoke trusts.

736.0105 Default and mandatory rules.

. . . .

(2) The terms of a trust prevail over any provisions of this code except:

. . . .

(k) The ability to modify a trust under s. 736.0412, except as provided in s. 736.0412(4)(b) and (c)."

# LEGISLATIVE POSITION REQUEST FORM

GOVERNMENTAL AFFAIRS OFFICE

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

## GENERAL INFORMATION

**Submitted By** Susan K. Spurgeon, Chair, Real Property Litigation Committee of the Real Property Probate & Trust Law Section (RPPTL Approval Date August \_\_\_\_\_, 2014)

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

**Position Type** Real Property Litigation Committee, Real Property Division, RPPTL Section, The Florida Bar  
(Florida Bar, section, division, committee or both)

## CONTACTS

### Board & Legislation Committee Appearance

**Susan K. Spurgeon**, Pennington, P.A., 2701 N. Rocky Point Dr. Suite 900, Tampa, FL 33607, Telephone (813) 639-9599.  
susan@penningtonlaw.com; sue@penningtonlaw.com

**Robert S. Freedman**, Carlton Fields Jordan Burt, P.A., Corporate Center Three at International Plaza, 4221 W. Boy Scout Boulevard, Suite 1000, Tampa, Florida 33607-5780 Telephone (813) 229-4149  
rfreedman@cfjblaw.com

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

**Martha J. Edenfield**, Dean Mead, 215 S. Monroe St. Suite 815 Tallahassee, Florida 32301, Telephone (850) 577-0095  
(List name, address and phone number)

### Appearances

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

**Meetings with  
Legislators/staff** (SAME)  
(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** Amendment to Fla. Stat. § 48.23(1)  
(Bill or PCB #) (Bill or PCB Sponsor)

**Indicate Position** Support  Oppose \_\_\_\_\_ Tech Asst. \_\_\_\_\_ Other \_\_\_\_\_

### Proposed Wording of Position for Official Publication:

"Support the amendment of Florida Statutes § 48.23(1) so as to include those receiving a mortgage or other lien on property in the protection provided by this Statute.

### Reasons for Proposed Advocacy:

When construing a similar statute (§716.16 regarding notice of commencement), the Court in *Southern Colonial Mort. Co., Inc. v. Medeiros*, 347 So. 2d 736, 738 (Fla. 4th DCA 1977) ruled that while it appeared that the Legislature intended to include lienholders in the class protected by such statute, the Court could not so rule given the plain language of the statute. As stated in *Medeiros*, a mortgage does not create an "interest" in real property. The proposed amendment would extend the protection of the lis pendens statute to those acquiring a mortgage or other lien on real property.



1 A bill to be entitled

2 An act relating to the provision for liens upon real property where no lis  
3 pendens has been recorded; amending Section 48.23(1)(b)2 and providing for  
4 an effective date.

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

7  
8 Section 1. Section 48.23(1)(b)2. is amended as follows:

9  
10 2. Any person acquiring for value an interest in, or lien upon, the real or personal property  
11 during the pendency of an action described in subparagraph 1., other than a party to the  
12 proceeding or the legal successor by operation of law, or personal representative, heir, or devisee  
13 of a deceased party to the proceeding, shall take such interest or lien exempt from all claims  
14 against the property that were filed in such action by the party who failed to record a notice of lis  
15 pendens or whose notice expired or was withdrawn or discharged, and from any judgment  
16 entered in the proceeding, notwithstanding the provisions of s. 695.01, as if such person had no  
17 actual or constructive notice of the proceeding or of the claims made therein or the documents  
18 forming the causes of action against the property in the proceeding.

19  
20 Section 2. This act shall become effective upon becoming law.

## WHITE PAPER

### PROPOSED REVISION TO THE LIS PENDENS STATUTE

#### F.S. §48.23(1)

##### I. SUMMARY

The purpose of the proposed change to Section 48.23(1) of the Florida Statutes is to include persons acquiring a lien on real property as parties protected from litigation against the property, where no lis pendens has been recorded, a lis pendens has been dissolved or withdrawn, or a lis pendens has expired.

##### II. CURRENT SITUATION AND PROPOSED CHANGE

Under existing Florida law, “[a]ny person acquiring for value an interest in the real or personal property during the pendency of an action [affecting such property] ... shall take such interest exempt from all claims against the property that were filed in such action by the party who failed to record a notice of lis pendens or whose notice expired or was withdrawn or discharged ....” §48.23(1)(b)2, Fla. Stat.

While it is likely that the Legislature intended to include within the protection of this Statute those receiving a mortgage or other lien on the property among the persons protected by the statute, such parties are technically not covered since “[u]nder Florida law a mortgage does not convey title or create ‘any interest in real property.’” Southern Colonial Mort. Co., Inc. v. Medeiros, 347 So. 2d 736, 738 (Fla. 4<sup>th</sup> DCA 1977).

In Medeiros, the court was asked to construe a statute similar to the Lis Pendens Statute - §713.13(6), Fla. Stat. – which involves the recording of a notice of commencement. The Court was asked whether that statute included lienholders within its scope. While the Court stated the Legislature appeared to have intended to include lienholders within the statute, the Court found that lienholders were outside its scope since, like with regard to the lis pendens statute, the notice of commencement statute was limited only to parties who had acquired an interest in the property. Id.

The Legislature promptly corrected the notice of commencement statute in response to Medeiros in 1979, amending it to add a “mortgage ... or lien on” the real property.

A like amendment is needed here.

The purpose of the Lis Pendens Statute is to protect those who record a lis pendens from having the property sold or mortgaged during the pendency of their action. However, if the party who filed the litigation fails to record a lis pendens,

or the lis pendens expires, is withdrawn or is discharged, then, pursuant to amendments added in 2009, the Statute protects the owner of the property and allows the owner to sell the property to third parties free of any claim in the litigation.

Just as an owner is not shackled from selling the property when no lis pendens exists, the owner should likewise be permitted to mortgage the property when no lis pendens exists.

The proposed change merely adds lienholders to those who are protected from litigation where a lis pendens is not recorded, has expired, has been withdrawn, or has been discharged.

III. FISCAL IMPACT ON STATE AND LOCAL GOVERNMENTS

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

IV. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR

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

V. CONSTITUTIONAL ISSUES

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

VI. OTHER INTERESTED PARTIES

No other interested parties are known at this time.

**THE UNIFORM TITLE STANDARDS REVISED IN NEW UPDATED ELECTRONIC  
FORMAT**  
**(the “E-STANDARDS”)**

Beginning in 2012, the Title Issues and Standards Committee undertook a significant effort to update the electronic PDF version of the Title Standards. The objective of that revision was to encourage use of the Title Standards by presenting the Title Standards in a more user friendly format. In the process of preparing that update, the Committee also undertook the effort to revise the citation references throughout the Standards to eliminate any inconsistency in citations for new Standards and others that have been periodically updated since the Title Standards were first introduced. The final result is a professional quality production worthy of the invaluable information contained within the Title Standards that has been the culmination of decades of work by many in the Section. The revised E-Standards now include helpful links to cited case law and Florida Statutes. In addition, The Fund has permitted inclusion of cited Fund Title Notes for inclusion in the Title Standards, which will greatly enhance the practitioner’s ability to quickly and easily access those cited secondary sources. The Introduction to the E-Standards included in that publication have been reproduced in this Agenda to provide executive council members a first look at the new features now available. The Title Issues and Standards Committee website page includes the download link for downloading and accessing the E-Standards.

Christopher W. Smart  
Chair, Title Issues and Standards Committee  
Robert M. Graham, Co-Vice Chair  
Karla J. Staker, Co-Vice Chair  
Brian W. Hoffman, Co-Vice Chair

## INTRODUCTION TO THE ELECTRONIC VERSION OF THE UNIFORM TITLE STANDARDS

In 2012, the Title Issues and Standards Committee undertook the arduous task of updating the formatting of the Uniform Title Standards. While the Standards have always been an excellent resource for Florida lawyers, the distribution of those Standards had become more limited since the Standards were no longer published in print format. The goal of this endeavor was to format the Standards as a research tool for Florida real estate lawyers, as well as Florida lawyers that do not regularly practice in real estate. The updated format allows easy maneuvering throughout the Standards, as well as provides instant access to the extensive citations to Florida Statutes, case law, and secondary sources.

This Introduction will highlight many of the key features and updates included in the electronic PDF version of the Standards. In addition, this Introduction will address some basic functions of the PDF file to assist lawyers in utilizing all the newly added features.

### The Format

The Standards have been compiled into one PDF file that includes a table of contents as well as internal links. The internal links (which are identified by a blue underline) allow the user to immediately access both internal and external citations contained in the Standards with a simple click. Each external citation included as a link, is embedded in the PDF file as a separate PDF document. This allows the user immediate access to the cited external source.

### Key Features

*The Table of Contents:* The Standards contain two Tables of Content. The first Table of Contents is included as a bookmark feature of the PDF file, which can be accessed on the left hand side of the document. Within those bookmarks, each individual standard is included as a sub-bookmark that can be accessed by clicking on the + sign located to the left of each Chapter. The second Table of Contents is the print version, which is included on Page 10 of the Standards. Each Chapter and Standard included in the second table of contents includes an internal document link (represented by a blue underline). By clicking, the PDF document immediately links to the cited Chapter or Standard. *Note – if the user would like to immediately move back to the portion of the document prior to clicking the link, then a short cut for doing so is to simultaneously hold the ALT and LEFT ARROW keys.*

*Internal Links:* Throughout the Standards, there are cross references to other Standards. Links have been created on each of those references to move to that section. *ie. In the comment section of Standard 1.3 there is reference to Standard 18.4. If you click on that link it will move you to Standard 18.4. Note – if the user would like to immediately move back to the portion of the document prior to clicking the link, then a short cut for doing so is to simultaneously hold the ALT and LEFT ARROW keys.*

*External Links:* Throughout the Standards, there are citations to other sources including, Florida Statutes, the Florida Constitution, the U.S. Code, Florida and Federal case law, as well as secondary sources. Links have been created on many of those citations that allow immediate

access to the cited material; however, some references cannot be linked if the cited source is copyrighted. The external sources are saved as separate document files within the PDF. Those external source documents can be viewed and accessed by clicking on the “paperclip symbol tab” on the left hand side of the PDF document.

Once an external document link is clicked, the PDF will open that external document. The external document will either be opened with the same screen as the Standards, or a separate screen will active to open the external document. The instructions for setting up same screen viewing of external documents or separate screen viewing of external documents is provided below. If the user utilizes same screen access, then simultaneously hold the ALT and LEFT ARROW keys of the keyboard will return the PDF to the screen prior to clicking the external link. The separate screen access is particularly helpful if the user has access to two monitors since it will allow view of the Standards and the external document on a separate screen

*Instructions for Setting Single Screen or Separate Screen Access to External Documents*

*– The setting for external documents can be access in the “Edit” Tab in the top left of the screen, and selecting the “Preferences” tab in the drop down menu below. Within the “Preferences” screen, there is a “Categories” menu on the left hand side. Below those “Categories” is an option for “Documents”. Once the “Document” tab is clicked, a screen with “Open Settings” appears on the right hand side of the screen that includes multiple box that can be “checked” or “unchecked”. One of those boxes is for “Open cross-document links in the same window”. For single screen access that box should be checked. For separate screen access that box should not be checked. Once the appropriate setting is made, the “OK” tab should be clicked in the bottom right hand corner of the screen.*

Specific information as to each category of external document included as links within the Standards is provided below:

Florida Statutes: The Standards include multiple citations to the Florida Statutes. Please note each Standard cites to the statute year applicable at the time the Standard was drafted or updated. Accordingly, the external document link is to that Florida Statute for the cited year. Please note that Florida Statutes citations prior to 1997 are not included as external links. *ie. Standard 2.1 includes multiple citations to § 222.20, Fla. Stat. (2001) both in the Authorities & References section and in the Comments section of that Standard. If you click on any of those external links then that statue will open in either the same screen or separate screen depending on the user setting.*

Florida Constitution: Chapter 18 of the Standards includes multiple citations to different revisions of the Florida Constitution. *ie. Standard 18.0 includes citations to Art. X, § 4(a), Fla. Const. (1968) (as amended) both in the Authorities & References section and in the Comments section of that Standard. If you click on any of those external links then that cited constitution provision will open in either the same screen or separate screen depending on the user setting.*

Case Law: The Standards include multiple citations to the Florida and Federal Case Law that can be accessed by clicking the external link. Please note that Florida cases prior to 1940 are not included as external links. *ie. Standard 1.3 includes an external link to Johnson*

*v. Fraccacreta*, 348 So. 2d 570 (Fla. 3d DCA 1977) in the *Authorities & References* section of that Standard. If you click on any of that external links then that case will open in either the same screen or separate screen depending on the user setting.

Archived and Deleted Standards: The Standards include access to the original Standards published in 1959, as well as updated versions thereto, that are accessible as external links immediately after the table of contents. In addition, the Standards includes external links to Standards that have been subsequently deleted in revisions. *ie. Standard 18.2 has been deleted; however, an external link is provided to the archived version of that Standard. If you click on that external link then archived Standard will open in either the same screen or separate screen depending on the user setting.*

The Fund Title Notes: The Standards include multiple citations to The Fund Title Notes. The Fund Title Notes are underwriting guidelines prepared by Attorneys' Title Fund Services, LLC and Attorneys' Title Insurance Fund, Inc. The cited Fund Title Notes can be accessed by clicking the external link. *ie. Standard 1.1 includes an external link to FUND TN 4.02.01 in the Authorities & References section and Comment section of that Standard. If you click on any of those external links then that Title Note will open in either the same screen or separate screen depending on the user setting.*

**The Fund Title Notes are the copyrighted materials owned by Attorneys' Title Fund Services, LLC and Attorneys' Title Insurance Fund, Inc. Republication of the cited Fund Title Notes has been authorized for inclusion in these Standards; however, any reproduction or distribution of those copyrighted materials is strictly prohibited pursuant to applicable law.**

Statutory Index: An index of cited Florida Statutes is included at the end of the Standards. The Index includes external links to the cited Florida Statute, as well as an internal references to each Standard that cited to each statute. The cited Standards include internal document links to that Standard. Note – *if the user would like to return to the Index after clicking an internal document link to a cited Standard, then a short cut for doing so is to simultaneously hold the ALT and LEFT ARROW keys.*

Case Index: An index of cited Florida and Federal case law is included at the end of the Standards. The Index includes external links to the cited case law, as well as an internal references to each Standard that cited to each case. The cited Standards include internal document links to that Standard. Note – *if the user would like to return to the Index after clicking an internal document link to a cited Standard, then a short cut for doing so is to simultaneously hold the ALT and LEFT ARROW keys.*

Christopher W. Smart  
Chair, Title Issues and Standards Committee  
Robert M. Graham, Co-Vice Chair  
Karla J. Staker, Co-Vice Chair  
Brian W. Hoffman, Co-Vice Chair

**Names of task forces and facilitators for each:**

1. **Technology and Membership Communication** –Mike Bedke; Nicole Kibert; Silvia Rojas
2. **Meeting, Finances, Facilities and Logistics**—Debra Boje, Katherine Frazier; George Meyer
3. **Section Structure, Management, Leadership and Succession Planning** –Deborah Goodall; Drew O’Malley; Sandy Diamond
4. **Committee Structure, Leadership and Succession Planning and Training**—Tae Bronner; Art Menor; Steve Mezer
5. **Legislation and Section Official Positions**—Bill Hennessey; Bob Swaine

The roster below shows the assignments made to each of the five task forces. The numbers in the Task Force column corresponds to the numbers above and the names in **bold** are the facilitators.

## 2014 RPPTL STRATEGIC PLANNING MEETING

	Task Force	Probate & Trust	Real Property
Ballaga, Raul	1		X
<b>Bedke, Mike</b>	<b>1*</b>		X
Belcher, Fletch	5	X	
<b>Boje, Debra</b>	<b>2*</b>	X	
<b>Bronner, Tae</b>	<b>4*</b>	X	
Brunner, Dresden	1	X	
Bruton, Burt	5		X
Bucher, Elaine	4	X	
Butters, Sarah	5	X	
Conner, Ted	5		X
<b>Diamond, Sandy</b>	<b>3*</b>	<del>X</del>	
Dribin, Mike	3	X	
<b>Frazier, Katherine</b>	<b>2*</b>		X
Freedman, Rob	4		X
Gelfand, Michael	3		X
Godelia, Vinette	1		X
<b>Goodall, Deborah</b>	<b>3*</b>	X	
Hayes, Travis	1	X	
<b>Hennessey, Bill</b>	<b>5*</b>	X	
Kelley, Shane	4	X	
<b>Kibert, Nicole</b>	<b>1*</b>		X
Kightlinger, Willie	2		X
Lynch, Kristen	2	X	
Madorsky, Marsha	1	X	
<b>Menor, Art</b>	<b>4*</b>		X
<b>Meyer, George</b>	<b>2*</b>		<del>X</del>
<b>Mezer, Steve</b>	<b>4*</b>		X
<b>O'Malley, Drew</b>	<b>3*</b>		X
Price, Pam	2	X	
Robbins, Jim	3		X
<b>Rojas, Silvia</b>	<b>1*</b>		X
Rolando Peggy	3		X
Russell, Deborah	4	X	
Scuderi, Jon	3		X
Shoter, Neil	4	X	
<b>Swaine, Bob</b>	<b>5*</b>		X
Sundberg, Laura	2		X
Weintraub, Lee	3		X
Wright, Cary	1	X	
Whynot, Sancha	2	X	

**TECHNOLOGY AND MEMBERSHIP COMMUNICATIONS**  
**Strategic Planning Meetings Goals and Solutions**  
**April 25-26, 2014**

**1. Membership - Increase the membership of the RPPTL Section including a focus on diversity**

**a. Goal #1: Reach individuals who are not now members or have dropped off membership**

(1) **Active Solicitation of 4 groups.** There are attorneys in other areas of practice that would benefit from membership in the RPPTL Section ("Section") and the existing members of the RPPTL Section would benefit from an influx of new members becoming active members of the Section. Also, as members retire the vitality and strength of the Section weakens without active recruiting and retention procedures in place. Members in practice between 5-15 years should be prime targets for soliciting for membership in the Section. The Membership and Inclusion Committee ("M&I") along with the At-Large Members ("ALMs") and other members of the Executive Committee and Council can set up procedures for maximum growth and retention of active members. There are 4 groups that the Section should focus on for recruitment and retention:

- **Attorneys who are not now members of the Section.** To accomplish the goal, the following procedures should be instituted with regards to attorneys who are not now members of the Section, especially those 5-15 years in practice:
  - Make a list of all attorneys in the applicable areas of practice of the Section who are not now members. The Florida Bar, given the applicable parameters, can supply a spreadsheet that can be reviewed to check whether an attorney practices in an area covered by the Section, but is not a member of the RPPTL Section. The list can be further organized by Fellows or Law Students working with the M&I. Specific fields such as construction, probate, real estate, etc., can be targeted as well as years of practice.
  - Supply the list to the ALMs for dissemination to each of the ALMs judicial circuits per location.
  - In circuits included in the list where the attorneys have not joined the Section despite being in the RPPTL areas of practice, the ALMs for that circuit can set up meet & greet events using a CLE inducement or other networking inducement such as a realtor/attorney seminar.
  - Form letters of recommendation to join the Section are to be sent to the non-members. M&I will draft the form letters. For non-members that are being solicited, the 5 points contact rule shall apply and the non-member shall receive

*T / (1)*

the following during a one year period until he/she joins, letters are exhausted, or contacts the sender with the reason for non-joinder: (1) letter from Chair of Section (2) Letter from Division Director (3) Letter from M&I Chair (4) Letter from ALMs Committee Chair for the particular circuit (5) Letter from a substantive committee Chair [when known what the non-member's interests are).

- The form letters will be sent by M&I to the current Executive Committee Secretary or designee each year no later than the end of August for approval as to form. The form letters are to be approved as is or edited within 30 days from receipt. If not approved or edited within 30 days, they will be deemed approved.

➤ **Attorneys who are not now members of the Section and belong to minority bar associations.** In order to accomplish greater diversity within the Section, additional procedures should be set in place for recruiting minority group attorneys who practice in the areas covered by the Section but are not members of the Section:

- The ALMs in each circuit can set up a committee or designate a ALM or ALMs for purposes of determining the MBA's in their circuit – each ALM can also give a list to the ALM's Director indicating which local bar organizations they belong to as those could be targeted for recruitment by that particular ALM or several ALMs in that circuit.
- The ALMs as chosen in each circuit can contact the MBA, and set up a speaking/networking engagement(s) to recommend the Section to members of that MBA whether at a regularly scheduled MBA meeting or otherwise.
- Feedback: The ALM must give a brief report of the size of the attendance, flyers passed out, speaking engagement focused on the benefits of the Section, or networking opportunity to the ALM's Director who should further run it up to the Executive Committee to determine any follow ups with the organization or any interested MBA members

➤ **Attorneys who were members of the Section but who have dropped out.** Some members drop out intentionally and some others simply by forgetting to send in their dues. There should be a procedure in place to reinstate their memberships if at all possible.

- M&I will draft letters of recommendation to use during the 3 contact periods with the dropped off members. The form letters will be sent to the Executive Committee Secretary or designee each year no later than the beginning of August. The form letters are to be approved as is or edited within 30 days from receipt. If not approved or edited within 30 days, they will be deemed approved and the M&I will continue with the procedures below. Time is of the essence.

T1 (2)

- M&I will obtain the information regarding dropped off members from the Bar Administrator by September of each year and supply the form letters for each dropped off member to the Chair of the Section for signature and mailing by September or October of each year.
  - M&I will obtain the information regarding remaining dropped off members who have not reinstated from the Bar Administrator by November, prepare the 2<sup>nd</sup> batch of form letters and the M&I Chair will sign and mail the letters to the dropped off members remaining.
  - M&I will obtain the information regarding remaining dropped off members who have not reinstated from the Bar Administrator by January of the ensuing year, prepare the 3<sup>rd</sup> batch of form letters and the M&I Chair will sign and mail the letters to the dropped off members remaining.
  - M&I will obtain a final list from the Section Administrator of the dropped off members who have not reinstated in order to evaluate the re-application ratio to see if the letters are sufficient inducement and report the information to the Chair of the Section the ALM's Director to determine any further actions to be taken, if any.
- **Law students who are interested in the practice areas covered by the Section.** In order to bring new vitality to the Section, soliciting law students to become affiliate members of the Section before they graduate will assist them in making an informed decision to become active members of the Section after they pass the Bar.
- M&I through its law student liaison members shall prepare a form recommendation flyer (RFlyer events below) setting forth simple bullet points of why join the Section as a law student. Flyer should indicate Section benefits such as the ability to attend mock interviews (with a required resume to enter the mock interview), placements, educational opportunities, adding affiliate Section membership to the resume and availability of Section members for speaking engagements at the law school. The form will be sent by M&I to the current Chair-Elect of the Section in charge of the General Standing committees each year no later than the end of August. The Chair-Elect is to approve or edit the form within 30 days from receipt. If not approved or edited within 30 days, it will be deemed approved and the M&I will continue with the procedures below
  - The form shall be sent to all law schools where there is a RPPTL society formed so that each law student member can be requested by their society president to join the Section at their scheduled meetings or networking events.
  - M&I through its law school liaison members shall contact the Placement Director of each law school with a RPPTL student organization for organizing speaking engagements with the law students.

*Ti (3)*

- Executive Committee should consider proactively sponsoring events at the law schools for networking and recommending the Section.

(2) **Revitalization of ALMs as the local arm of the Section.** The ALMs are tasked to provide a number of the services above mentioned. ALMs can play a vital role in gaining local support for the Section but only if they are active in growing and providing a benefit to the Section membership: In that regard, the following is necessary: (1) accountability (2) motivation to work on projects and feedback for their work from ALMS chair (3) part of their function should be communication to members as may be requested (4) an ambassador function to non-members by personal appearance at local bar functions to represent the Section and give a short talk on the Section (5) yearly reports from each ALM regarding their activities. If inactivity is indicated in the report, the ALM should not be re-appointed from the ensuing year and it may be an indication that there are too many ALMS and the particular circuit group should be lessened.

**Goal #1 Conclusion:** With procedures set in place as above, recruiting and retaining members should be easier and more effective attracting not just members but active members of the Section. The M&I and ALMs can play important roles in achieving this goal.

**b. Goal #2 - Use Form letters and other templates to recommend Section membership, becoming an active member, and other management of the Section**

(1) In order to expedite use of forms on re-occurring matters, and assisting the new Executive Council Committee and members in efficiently performing their services to the Section, there should be a repository of forms available to use as necessary.

- The Executive Committee Secretary or designee is to keep a repository of forms available for use in a number of different situations easily accessible on a password protected webpage on the Section website.
  - The forms are to be drafted by the committees designated below (or as thereafter designated by the Executive Committee Secretary or Division Directors) and be available in the repository no later than December 31<sup>st</sup>, 2014. Each new Executive Committee voted in each year shall review and re-assign drafting of the forms, if necessary, each year thereafter so that the forms are current as of December 31<sup>st</sup> of each ensuing year and available in the repository. It is the Executive Committee Secretaries responsibility to confirm current status of the forms as of December 31<sup>st</sup> of each year.
  - Any form drafted or modified and submitted to the Executive Committee Secretary, designee or other officer for approval shall be approved within 30 days or the form shall be deemed approved and placed in the repository.

TI (4)

(2) Each of the following forms/templates should be prepared and/or reviewed and modified by December 31<sup>st</sup> of each year. The list also recommends the committee to work on the list but that can be re-designated by the Executive Committee Secretary, designee or other officer as applicable.

- LR\*/non-member (5 contact form letters) [M&I]
- LR/dropped member [3 contact form letters] {M&I}
- RF\*/non-members: to pass out to non-members at CLE or networking functions. Include website address and/or QR Code to link to "how you join" in Section website to obtain application and additional public side information regarding the Section & its committees [M&I]
- LR/Welcome letter: for first time member. This can be a separate link on the website below the log in "if you are a new member, click here". The link can describe the Section activities, benefits of joining the section, a short mission statement for each committee, where to find list of upcoming events & CLE and/or whatever else you can place on the linked page on our website. ---- OR if the website can achieve the functionality for it, an introductory letter like Rohan Kelley's old introduction letter can pop up when first entering the website with a password in addition to the link above [M&I]
- LR/new attorneys: for those who just passed the Bar to be added to the Section website under a separate public link so it is available for those seeking information (to send a letter without knowing their intended area of practice would not be cost effective) [M&I]
- FR/law students: to pass out at law student society events recommending joining the Section as a law student along with form application and a linked website and QR Code for linking to a public side informational message on the Section website about the Section and its committees (LR/law students) for first time member who is a law student [M&I]
- LR/law students: separate link for law students on the Section website describing the benefits of the Section specifically for law students [M&I]
- Application for membership (form already exists) – no need to password protect
- Application for law student membership (form already exists) – no need to password protect
- Annual Committee Report Form [Division Directors and Chair Elect]
- Annual ALMs members report [ALMs Director]
- Executive Committee Officers' Handbook [Executive Committee Secretary]
- Evaluation of Fellow Program form for Fellows to complete [Fellows committee]
- Executive Committee Meeting Planning Form [Executive Committee Secretary]
- Focus group invitation letters/emails [M&I]

T, (5)

- All Section CLE forms [CLE Coordination Committee]
- White paper forms [Legislation committee]
- Template for committee charters or handbook. Each committee Chair should have a specific charter or handbook geared to that committee to provide as a guide to the committee members and for the incoming chair and vice-chair(s) of the committee. For example, number of vice-chairs and size of committee recommendation, technology officer, secretary, legislation, enrichment, case law, keeper of project log, voting procedures and requirements, attendance requirements, preparer of minutes and agendas, sponsors, snacks, speaker solicitations, and CLE. The template can be provided to the committee chair to select the portions applicable to the particular committee and reviewed each year for any necessary modifications. [TBD]
- Other templates or forms as required

\*(letter of recommendation) \*\* (recommendation flyer)

**Goal #2 Conclusion:** With the forms or templates available online but password protected, each designated user can efficiently and effectively access and use them as is or personalize them further. Each new set of officers and committee chairs will have written guides to assist in a smoother turnover of management each year.

## 2. **Membership & Technology – Determine the activities, technology and methods of communication best preferred or not preferred by members by use of focus groups**

### a. **Goal #1 – The focus group activity should be handled by a professional facilitator.**

It was determined at the Strategic Planning Meeting that a professional facilitator would be the proper party to handle a focus group activity. The M&I will review and solicit information from a number of professional facilitators and report to the Executive Committee the recommendations. The following is a brief description of the procedure to be followed

- (1) Determine the professional to do the focus group: e.g. skills, knowledge, cost, and availability.
- (2) Determine the information that we are trying to obtain by thorough discussions with the Executive Committee and M&I.
- (3) The Executive Committee can review, revise and vote on the event and forward the recommendation back to the M&I that can carry out the event alongside the facilitator
- (4) Set up focus group – the participants should be a broad cross section and should include non-members. Focus should be on the 5-15 years as attorney group.
- (5) Incentivize attorneys for coming to focus group experience.
- (6) Should be done no more than once every three years in a central location

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- (7) Membership Committee should follow up and evaluate the answers for the Executive Committee.

**Goal #1 Conclusion:** With the information gleaned from a focus group, the Section will be in a better position to service their members.

### 3. Membership – Outreach to other Sections

- a. **Goal #1 – Determine which Section Executive Council members regularly attend other Section meetings and choose a liaison from those.**

Recruiting active members from other Sections *who are also RPPTL Section members* can provide a greater opportunity for a personalized method of recruiting members from other Sections *who are not also RPPTL members*. These new recruits can then provide a broader expertise important when making decisions within some of the committees regarding case law, new legislation and general enrichment. A personalized recruitment process may be more effective in assuring that this type of new member becomes an active member of the Section.

- (1) The Bar administrator can provide a spreadsheet to M&I to indicate which RPPTL members are also members of other Sections and a survey of those members can be prepared by M&I using Survey Monkey or similar program to determine how active those members are in the Sections they belong to.
- (2) The Executive Committee can then choose from the most multi-Section active members and request their approval of an appointment as a liaison.
- (3) Add those liaisons to the general standing committee list.
- (4) The same procedure can be carried out every 3 years and a new liaison appointed.

- b. **Goal #2 - Each liaison is to seek ways to induce the members of the other Section(s) to join the RPPTL Section if they also practice in the RPPTL Section areas.**

A personalized recruitment process may be more effective in assuring that the new member becomes an active member of the Section.

- (1) The ALMs, on an annual basis, working with M&I (see “Membership” 1.a.(1) above) are to obtain a spreadsheet of non-members of the Section who practice in the areas covered by our Section.
- (2) The ALMs in the particular circuit of the prospective member, working together with the liaison with the other Section, can set up networking opportunities with the prospective member at the other section events.

**Conclusion Goal #1 & #2:** By identifying active multi-Section members, recruiting the best to be liaisons and providing them with information plus guidance and assistance from M&I

T1 (7)

and ALMs for further recruitment, the Section can add to the knowledge and talent of its membership.

#### 4. Membership - Number of Section members

- a. **Goal #1 – Determine with certainty and on a quarterly basis, the number of members of the Section including the number of new members, members who have re-applied after being dropped off and total member count – this should be coordinated with the Bar Administrator for the Section, the M&I and the ALMs by the Executive Committee secretary or treasurer.**

It is necessary to know the number of Section members and when members have dropped off as such dropped off members should not be receiving the benefits of Section membership and should be encouraged to re-apply.

- Once determined, the Executive Committee can then decide on the course of action to further enhance the membership.
- There should be a quarterly list of dropped off members indicated on the ALMs page beginning one quarter after the annual Bar dues dates so that the other committees of the Section can re-check their membership to make sure all are Section members and personally contact the ones that are no longer Section members to let the x-member know that until they re-apply they will be removed from the committee directories, recommend he/she re-apply & to determine why they have dropped off. Any rationale for drop off that is related directly to the Section should be forwarded to the Executive Committee secretary with a copy to the chair of the M&I.
- The LR/dropped members letter should also indicate that the x-member has lost their access to the Section website & other benefits.
- All members who have dropped off should be banned from the use of the private side of the Section website and magazine until they are reinstated. The Section Administrator or M&I should coordinate the information with the ALMs regarding the dropped off members and the ALMs should keep an online list of the dropped off members not re-applying after the 3<sup>rd</sup> contact letter so that the committee chairs can check the names online against their directory of members.
- All members who have dropped off should be banned from participating in or joining a Section committee until they are reinstated.

**Conclusion – Goal #1:** By determining with certainty the number of members, the Executive Committee and Executive Council in general can better arrange planned events and publications, evaluate costs associated with Section activities, and non-members can be dropped from using Section resources without contributing at least the dues

T1 (8)

## 5. Membership & Technology – use of infomercials

a. **Goal #1 - All sponsoring committees are to use infomercials during breaks in CLE seminars.** Many non-members attend our RPPTL sponsored CLE seminars. These attorneys are a captive audience and opportunity to inform them of the benefits of the Section should not be wasted.

- CLE Chair or Vice-Chair is to remind the sponsoring committee of the use of the infomercial and who to contact regarding the equipment (e.g. Bar's Administrator or contractor)
- Sponsoring committee by use of the Bar's contractor is to make sure that the videos and other equipment is available on site for using the infomercial – whether downloaded on PC or thru internet (latter preferred as it also have the front of the Section website).
- The infomercial is to be used continually during the breaks to allow for both restroom time and time to watch the video(s).
- After the last infomercial break, the chair of the seminar is to advise the attendees that a flyer and applications are available at the registration desk and the website of the Section.

**Conclusion Goal #1:** By using free time during Section sponsored CLE seminars to play videos recommending the Section, the Section maximizes the reach to non-members by use of the spoken word and visual aids which aids in retention of information.

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Revision 5-3-2014

Notes: Regarding the format used: Each goal is set forth, the issue is described below the goal, the discussion on how to resolve the issue is described below the issue, and the conclusion regarding the goal or goals finalizes each section.

T1 (9)

I. Goal: Meeting Logistics

A. Issue: Meeting Locations and time.

Proposals:

1. Legislative Update remains at The Breakers as is and Convention at another family friendly resort sometime in May. Other meetings at a business type hotel and related facilities which should reduce the costs.
2. Consideration should be given to time between the meetings and legislative session when scheduling the meeting.
3. Section Leadership should be involved in negotiations from beginning as to ensure and maximizes - getting the best bargains with the Bar negotiations.
4. Meetings should be located in Central Florida in a city or area with easy access by air or rail to maximize attendance. Due consideration should be given to occasional geographic diversification but should not be an annual requirement.

B. Issue: Roundtables Timing.

Discussion:

Survey responses indicated that they liked having the roundtables on Friday afternoon instead of Saturday morning. Note that this cannot be done at Legislative Update and Convention. In most cases, this means that we have to move the committee meetings up to Thursday morning which means coming in Wednesday night or Thursday morning. More travel time and possible more expense to Section (ie: providing a lunch on Thursday.) This may open up more opportunities for sponsorship such as getting sponsors for a more formal Thursday lunch (which is currently only a boxed lunch).

Proposal:

Consider and "test" roundtables on Friday afternoon when possible.

C. Issue: Committee meetings. Need committee meetings schedule more in advance so members can make travel arrangements, etc.

Proposals:

1. Rooms - Section Administrator provides to Chair a binder with the information from the hotel regarding rooms and space available for meetings and a historical record of committee meetings that are held so that we know the space needed and size. The Chair should consider the number and availability of meeting rooms when selecting the venue for the meeting. A template should be prepared for standard committee meetings and sizes. Committees should rotate slots.

T2(1) ↘

2. Equipment - Chair should be provided information regarding cost of the equipment required at committee meetings. Section purchased equipment should be used for the Section and kept apart and secure for Section use so that it is available for the Section meetings and kept in a trunk and sent to each meeting location.
  3. Speaker phones at committee meetings - Availability at the discretion of the Division Director if requested by committee chair. Division Director should determine equipment to be provided at each committee meeting.
- D. Issue: Executive Council Meetings. "Bleed off" at the EC meetings - Probate does not stay for real estate and real estate does not stay for probate.

Discussion:

Are people burned out? At the EC meeting we have now heard the arguments and debates at the committee meetings and the roundtable.

Proposal:

Committee chairs report to the Division Directors important matters or issues that the other side of the aisle should know about and consider and these can be presented to the whole group at the Executive Council meeting.

- E. Issue: Out of State meetings. Do we keep the meetings in the country and how do we handle costs?

Discussion:

1. Location - Survey did not indicate that members preferred out of country over staying within the USA.
2. Costs - Suggestion that the out of state meeting should support itself so that the Section is not subsidizing the out of state meeting. Discussed the separate sponsorship for the out of state meeting. Selling additional sponsorships to our existing sponsors and potential sponsors at the location of the out of state meeting.

Proposal:

Suggest that the out of state meeting should support itself and not be subsidized by general revenue of the Section. Additional sponsors should be obtained to cover the expense of the out of state meeting.

- F. Issue: Bar Service and Hospitality Suite. Survey response wanted to keep the suite.

Discussion:

T2 (2)

At receptions and the Suite - full bar vs. beer, wine, and soda. What is the cost of having a full bar? Liquor does not seem to be an overriding concern for most people. Consider a wine sponsor for hospitality suite? Provide the wine; Pay a corkage fee.

Reception - beer, wine, and soda - full bar for Thursday night? Drink tickets vs. open bar?

Proposal:

Full Bar for Thursday night. Wine, Beer, and soda at other dinners/receptions and the hospitality suite. Try to find a wine sponsor for the hospitality suite.

- G. Issue: Off site functions. Do we hit our minimums at the hotels? It is usually more economical to go off site - survey results indicate that members want more events off site. Survey respondents were willing to pay more for the room and have more events off-site.

Discussion:

Off site functions put a greater burden on the chair and the Section administrator. Will you draw more people for Friday night if you move the dinner off site? Will you draw more people for Friday night if you move the dinner off site? Saturday night dinner - smaller, more intimate group - unique event off site. Is this a cost to the Section? If we move Friday night off site, make Saturday a casual reception followed by a "dine around."

Proposal:

Suggest that the Chair consider that if not needed to meet minimum, take the Friday night dinner off site and for Saturday night have the dinner at a smaller interesting location or a reception with a "dine around." For Breakers and Legislative Update, may be more appropriate to have a Saturday dinner at an interesting location and at the other meetings at business locations make Saturday a reception with a dine around.

- H. Issue: Sunday morning breakfast - Do we need it?

Discussion:

Brunch at the hotel on your own may be cheaper. Have the hotel set aside tables for their Sunday brunch?

Proposal:

Consider eliminating the Sunday breakfast or having the hotel set aside tables for its Sunday brunch.

- I. Issue: Meeting Costs.

T<sub>2</sub> (3)

Costs associated with Section members who are not EC members who attend committee meetings and then take boxed lunches, etc. The Survey results indicated that the Section should provide lunches for all attendees.

Discussion:

How do we charge non-EC members who attend committee meetings?

Proposal:

Separate registration and sign up sheet for non-EC members who attend committee meetings. They can sign up for lunch and pay for it and obtain a lunch ticket at registration. Lunch will then need to be set up in a way to monitor.

T2 (4)

## 2014 RPPTL STRATEGIC PLANNING

### MEETING BUDGETS

Goal/Topic: Accurate Financial Reporting and Budgeting.

Proposals:

- We request a ledger (and corresponding timesheets) from the Bar of all disbursements out of our RPPTL account to the Florida Bar for 2014 year to date, including but not limited to those billed by timekeeper, flat fee, piece rate, expense reimbursement, expense reimbursement with override, or whether a result of a Florida Bar mandated charge. Please send us the Florida Bar's policy on billing the RPPTL Section for the foregoing charges, including the explanation and method of calculation and the backup behind the calculation of TFB administrative charge, line item 31433 for the year ending 2014 year to date. By way of example, please see the attached which is our "guess" of the applicable Florida Bar line items for the above requested information. Some of these charges relate to direct reimbursements (like express mail) and may or may not have an override, and others relate to time. We will need the background behind how these charges are calculated of course as well.
- The Florida Bar needs to provide a written budget primer that describes the basic concepts that apply to the RPPTL Section budget (for example, the Florida Bar – mandated charges, CLE vs. Section service, course number sub accounts for Section service, Bar caps on income and charges), together with the line item-by-item text explanation/definitions for each line item budget code to help better educate us and improve consistency of allocations of monies to codes to facilitate the budget process. Need commitment from Florida Bar and protocol for educating the Florida Bar staff about allocation rules as protocol to ensure timely and accurate posting of items.
- The Section Administrator needs to provide to the RPPTL Section Treasurer monthly copies of the Florida Bar financial statements showing the comparison of year to date versus budget by the 10<sup>th</sup> of each month.
- The Section Administrator needs to provide to the RPPTL Section Treasurer 10 days before each Executive Council meeting a RPPTL Section financial summary for review and approval by the RPPTL Section treasurer as well as certain other designated officers in a form of financial summary as approved by the RPPTL Section treasurer. Please see the attached currently approved form of financial summary to be prepared by the Florida Bar and submitted to RPPTL Section treasurer for approval. Once approved, this financial summary will be part of the agenda as Treasurer's Report for most meetings. Please also note that this financial summary shall include an attachment behind it of the most current roll up budget only with a comparison of year to date versus budget.
- The RPPTL Section has to publish and approve our RPPTL budget in order to submit the same to Florida Bar for their publication and year end approval deadline. The RPPTL

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Section has to start the next budget approval process ( 2015-16) no later than July of each year. The Section Administrator participates with the Budget Committee and the Budget Committee meets at the Breakers meeting which usually occurs at the end of July. The Section Administrator is responsible for generating the information that is to be circulated to the Budget Committee in advance of the Breakers meeting-which includes year to date actuals compared against the current budget, as well as a comparison of actuals against budget for the preceding 3 years in excel format with a notes column and labeled budget pages and page numbers. The Section Administrator then has to provide the audited Bar actuals compared against budget for the preceding 3 years in excel format with a notes column and labeled budget pages and page numbers in advance of the next Budget Committee meeting which needs to occur no later than mid August each year. The Section Administrator also needs to provide a projected draft budget for that mid-August meeting as well. We need to pin down this exact process, timeline, and deadlines with set details and required information for each year to streamline the process. We usually have to have a second Budget Committee meeting as part of this process. The Budget Committee is expected to submit and publish the draft budget for review and approval at the Fall executive council meeting as we just did this year in order to meet the Bar's yearend deadline. We need to keep in mind that the proposed budget covers not just the roll up budget but also the RPPTL general, the legislative update budget, as well as the convention budget. All of that information is critical to our planning process. Please note that we will also need up to date CLE information and backup as well so that we can estimate our revenue.

- Within 30 days after each Executive Council meeting, the Section Administrator needs to obtain and deliver to the RPPTL Section Treasurer a hotel costs summary sheet after each Executive Council meeting with defined categories (i.e. room, food, equipment and committees).
- We need to confirm and document with the Section Administrator and post the reimbursement process and required information to submit and the timeline for posting and processing of such reimbursements.
- The Florida Bar shall provide a spreadsheet from the Florida Bar of historical annual meeting expenses and meal/event charges for the past six years and work with the Florida Bar to prepare an annual estimated meeting budget based upon estimated budgets with defined categories (i.e. room, food and equipment) with suggested estimated totals for a typical in state meeting and reflecting typical attendance at certain events and suggested rates for event charges. Note Chair needs to know costs before charging for event.
- On a general basis we know that Jamie was undertaking certain cost-saving measures such as purchasing equipment in order to transport the same to meetings. We need to confirm what the process will be for that equipment that was purchased in order to help save us money. We have previously saved a significant amount of sales tax at the last Amelia Island meeting that the hotel inadvertently charged us. We want to verify and determine if we were previously charged for sales tax by any other hotel during 2013. The thought was that even though it is after the fact, if we were charged sales tax by the

T-2 (6)

hotel, we may be able to recoup some of those amounts. We would still like someone to investigate that matter.

- Within 30 days after each CLE, and every six months and one year thereafter, the Section Administrator needs to obtain and deliver to the RPPTL Section CLE Chair/Co-Chairs a CLE accounting of income and expenses for each such CLE.

## 2014 RPPTL STRATEGIC PLANNING

### SPONSORSHIP PROGRAM

- I. Goal: Increase general sponsorship revenue for the Section.
  - A. Topic: Sponsorship revenues have dropped in the last 5-6 years as a result of loss of sponsors and consolidation in the title insurance and banking industry.
  - B. Discussion: Since we do not allow competitors to sponsor the same event, we do not have general sponsorship slots available for some industries, such as private wealth management. Moving the roundtables to Friday afternoon may require providing a more formal lunch or a breakfast on Thursday morning which we do not provide at this time, which may open up more sponsorship opportunities. However, the costs of new events will be more than the sponsorship revenue. Thus, we need to be creative and offer more opportunities for sponsorship and market to companies and service providers outside of our typical targets of title insurance companies and banks. Note, some of these proposals have the added benefit of saving the Section money.
  - C. Proposals:
    - Create new categories for general sponsorship to allow for companies who are interested in general sponsorship but cannot participate because their category is full. (ie: wireless sponsor, electronics, apps, parking sponsor, break/snack sponsor)
    - Create a task force of sponsorship committee members to target companies outside of the typical sponsors such as technology and other service providers.
    - Assign committee members to target real estate industry providers for sponsorship (ie: surveyors, environmental, due diligence services).

T2(8)

- Recruit sponsors to supply lanyards with their corporate information at the EC meetings and CLEs.
- Recruit sponsors to supply bottled water with their logo at EC meetings and CLEs if allowed by the hotel/location.
- Recruit a winery to provide wine for the hospitality suite at the EC meetings.

II. Goal: Centralize coordination and communication between the Section and all sponsors.

- A. Topic: The Section has a Sponsorship Coordination Committee which handles annual sponsorship. However, there are several CLEs and “one time events” such as the ATO conference and the Construction Law Institute that obtain sponsors as well.
- B. Discussion: There is much confusion in the Section and with Bar administration regarding the responsibility of the Sponsorship Coordination Committee and sponsors for CLEs and other events that currently do not fall under the purview of the Sponsorship Coordination Committee. This creates problems where more than one person may be contacting potential sponsors on behalf of the Section. This is confusing for the sponsors as well. There is a lack of continuity and institutional knowledge since the Section members who are in charge of obtaining the CLE and “one time event” sponsors change every year. This is an untapped source; we may be able to convince CLE and “one time event” sponsors to become Friends of the Section, committee sponsors, or general sponsors.
- C. Proposals:
- Bring exhibitors at the Convention and Legislative Update under the purview of the Sponsorship Committee. A designated Sponsorship Committee member would work with assigned Convention and Legislative Update committee members to coordinate efforts. This could lead to bringing exhibitors into sponsorship.

T<sub>2</sub>(9)

- Assign a Sponsorship Committee member to work as a liaison with the ATO Conference, Construction Law Certification Course, Real Estate and Probate Certification courses, and other Section courses or events that have sponsors that do not currently work with or through the Sponsorship Committee.

III. Goal: Encourage communication between sponsors and Council members.

- A. Topic: One of the benefits of sponsorship is the access that sponsors have to Section and Council members.
- B. Discussion: Sponsors have complained that they do not receive notices of the meetings or the opportunity to sign up for the events unless they are Executive Council members. We should allow for more opportunities for sponsors to communicate with and market to Section members at no cost to Section so that sponsors see more benefit for their sponsorship dollars.

The most loyal sponsors are those who have members on the Executive Council. We should encourage all sponsors who have Florida attorneys on staff to get those attorneys involved in committees and other Section activities.

C. Proposals:

- Reinstigate the "buddy system" and assign ALMs to each sponsor to introduce the sponsor to other Council members and attendees at the sponsor's event (or the event the sponsor is attending if sponsored event is not conducive such as an EC box lunch sponsor).
- Establish a list serve for each category of sponsors to send sponsors information on upcoming meetings and Section event.
- Allow boxed lunch sponsors to provide materials with the lunches (since they cannot address the attendees).

T2 (10)

**III. Topics for Section Structure, Management, Leadership and Succession Planning**  
(Team members: **Sandy Diamond**, Mike Dribin, Michael Gelfand, **Deborah Goodall**, **Drew O'Malley**, Jim Robbins, Peggy Rolando, Jon Scuderi and Lee Weintraub)

**A. Structure**

**1. What is our purpose – Legislation, education, Advocacy, Professionalism?**

Goal: To promote the enrichment of lawyers in the Section (Enrichment in all areas, not just legislation)

The Section's purpose is all four. Legislative activity has increased and it seems legislation drives the Section. While different committees serve different purposes (some more legislation, some education), there needs to be a renewed focus on our other purposes, including creating "take home value" for our members. We should work harder to limit or screen legislation and take the time to properly prepare it before we submit it to the Executive Council. The division directors should educate the committee chairs on our renewed focus on take home value and evaluate the chairs based on their accomplishment of all of the Section's purposes.

**2. Optimal Size of EC/Making most of Saturdays/Staying to end**

Goals: Streamline the EC meeting and develop take home material

The Executive Council consists of approximately 250 people. While the size may limit hotel options and limit expression of viewpoints, the EC is able to get its work done. There should not be any arbitrary limitations on the size of the Council. We should remain flexible; the functions of the Council will dictate its size. We should strive to maintain Council members who are active and productive.

The Saturday Council meetings have grown stale and take too long. Other than the matters to vote on, it seems the same people present the same reports at every meeting. We should strive to streamline the meeting including limiting the presentation of reports. The Council could require general standing committee to submit written reports in lieu of oral reports, abbreviate officer reports, focus on the action and information items, add a brief educational moment for take home value, and eliminate lunch when necessary. The Chair should have flexibility to conduct the meeting in an efficient manner.

Attendance at the Council meeting is important and Section leadership should remind Council members of their responsibilities as Council members.

T3 (1)

### **3. At Large members**

Goals: Support the ALMs and integrate into the Executive Council

ALM responsibilities are trending up and include outreach to law schools and voluntary bars, assisting general standing committees, assisting publications, appointing liaisons to standing committees, assisting with Section projects, and communicating to the Section members. We should continue to support the ALM's and provide them with meaningful assignments.

## **B. Management**

### **1. Relationship with Florida Bar/Administrative support**

Goals: Improve support from the Florida Bar and improve financial reporting (accuracy, timeliness for planning and evaluation) by the Florida Bar.

There has been significant Section Administrator turnover. The compensation for that position is inadequate for the responsibilities assumed. The Section also does not have any input concerning the hiring, firing or evaluation of the Section Administrator.

There is also a profound lack of Florida Bar financial reporting to the Section. The flow of financial information is not predictable and is often untimely. The information provided is insufficient to properly run the Section. The Section must receive timely, transparent and detailed financial reporting including actual bills with charts of accounts information and coding. We should also evaluate alternative support possibilities including outsourcing administrative functions and develop methods so the Section can participate in evaluation of the section administrator (hiring, firing, compensation, etc.)

### **2. Recurring Correspondence Procedures Templates**

Goals: Institutionalize Section's standard forms and correspondence templates

The Section should designate a person to maintain and pass onto the successor officer or chair the standard Section forms and correspondence templates. Due to turnover in the Section administrator position, the Chair or secretary ought to handle this responsibility.

### **3. Remote voting**

This topic has been taken under consideration by the Integrity and Awareness Committee. We have deferred taking action on this issue at this time. Cost may be an issue. The concern is not only counting votes, but verifying the presence of a quorum for each vote.

T 3 (2)

**C. Leadership/Succession Planning**

**1. Responsibility for Updating/Delivery of Officer's Handbook**

See B2 above.

**2. Attracting new talent to EC**

See C3 below.

**3. Review Fellowship Program/Leadership Academy**

The Fellowship program has successfully met its initial objectives. The Section should continue its strong support for this program.

The Bar Leadership Academy is geared towards younger Section members. There is no requirement that a participant be an Executive Council member but he or she should be active in the committees. The Section's continued participation is warranted.

**4. List serves – who should be able to use?**

The Section list serves should be used for Section sponsored events only.

**5. Social-Senior/Affiliate memberships**

Removed from agenda

T3(3)

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## RPPTL 2014-2019 STRATEGIC PLANNING

### COMMITTEE STRUCTURE, LEADERSHIP AND SUCCESSION PLANNING, AND TRAINING

**(Task Force Members: Tae Bronner, Facilitator, Art Menor, Facilitator, Steve Mezer, Facilitator, Shane Kelley, Deborah Russell, and Neil Shoter)**

- I. Goal: Improve Committee Leadership Structure
- A. Topic or Issue: What is the optimum Committee officer structure and organizational chart?
  - B. Discussion: Current leadership structure of many Committees lacks clear definition of roles. Some Committees have too many Vice Chairs with undefined roles. Vice Chair positions are often used as “parking spots” for people wanted on the Executive Council. We are under utilizing the Vice Chairs. Probate side is not using secretaries but should start to use this position. At least some Probate Committees are underutilizing Vice Chairs. Some Chairs do not effectively delegate in part because of a lack of definition of the Vice Chair role. Other Committee Chairs more actively involve and delegate to Vice Chairs.
  - C. Conclusion or Proposal:
    - 1. Where feasible, Committees should have a Chairperson, Vice-Chair(s), a Secretary, and a Technology Officer. Define the role of each position.
    - 2. Large Committees: use subcommittees and task forces.
- II. Goal: Optimize the Size of Committees
- A. Topic or Issue: When do Committees become too large? To limit size, should we strictly enforce attendance policies? Should Committees be “open” or “closed” or have different classes of voting members?
  - B. Discussion: Is being on a Committee or at least being able to attend Committee meetings to listen in a benefit of being a member of this Section that should not be taken away? Less than 10% of RPPTL members are members of a Committee. Anyone can attend a Committee meeting as a guest or a non-voting member, but to accomplish the Committee’s purpose you have to limit membership of larger Committees. We should allow the committees to be as large as we have people who want to be involved, but we need to impose rules to make the Committee productive and accomplish the purpose of the Committee. For the large Committees, especially on the probate side, we should strictly enforce an attendance policy. limit the number of voting members, and create an application to be completed to become a voting member. The attendance policy

T4(1)

and distinction between voting and non-voting members permits involvement of all members but at the same time encourages educated voting members. Minimum attendance for a voting member should be three meetings per year. People can still attend as a guest or non-voting member, just can't vote. This is really a large Committee problem. Three categories of meeting attendees were discussed: Voting members, non-voting members and guests. To become a voting member, an individual must apply and Committee leadership has the authority to decide who can and cannot be a voting member. A Committee membership application should be developed and used as a universal form. It should be in the discretion of the Committee chair if the limitations on members should be implemented, but continuity should be encouraged. Current members of the Committees should be grandfathered in to prevent everyone from having to file an application each year.

C. Conclusion or Proposal:

1. In general, we should have a policy of inclusion and should foster and promote membership in Committees. This greatly enhances the value proposition of Section membership and promotes involvement in Section activities by new and younger members.
2. This may not work as well with the large probate Committees who have serious issues with voting by members who are not well informed or have voting conflicts. These Committees should consider a three tiered approach as to persons attending meetings: 1) full voting members; 2) non-voting members; and 3) interested guests. These Committees should adopt criteria for voting membership that could include attendance requirements and other criteria to insure well informed decision making on Committee business.
3. Committees should be encouraged to adopt charters spelling out membership requirements, Committee leadership roles, and meeting and voting protocols including whether Roberts Rules of Order should apply, quorum requirements, and the voting requirements (simple majority, super majority) for various Committee actions.

III. Goal: Continue to Use Ad Hoc Committees, but Judiciously.

- A. Topic or issue: Are there benefits to ad hoc and sub-committees? Do we over use these tools?
- B. Discussion: This is a large Committee issue, especially on the probate side. The benefit of these Committees is that they are a better vehicle than a large, diverse Committee for studying a difficult problem or issue and proposing a balanced, well reasoned solution. The problem is that they can engender feelings that issues are not being dealt with transparently and democratically and have been usurped from the Committee that should have addressed them.

C. Conclusion or proposal: Ad hoc Committees should continue to be used where appropriate but their use should be carefully considered and limited. When an issue falls within the purview of a particular Committee the preference should be to allow that Committee to handle it. The Section should adopt clearer policies on when ad hoc Committees are to be used.

IV. Goal: Mitigate Conflict of Interest Issues in Committee Actions and Establish Clear Practices for Committee Votes.

A. Topic or Issue: Conflicts of interest in Committee constituencies. Also, different committees follow different rules on how committee action items are passed. Some use 2/3 majority for an item to pass, some use simple majority.

B. Discussion: There is often among our members, a tug between objectives of greater good of Section and individual interests. This seems to be more apparent in some issues with corporate attorneys who are being asked by their employers to champion a certain issue. We want input from all professionals and want our committees be to inclusive of all attorneys who are section members, but we need to make sure our committee work remains focused on the greater good of the Section.

C. Discussion: As to voting practices, the bylaws provide that an action item from a committee must pass by a 2/3 vote in the Executive Council to become a section position. This seems inconsistent for items that have passed through committees by a mere majority. Some members felt that committees should be required to pass all votes by a 2/3 vote, but others felt that was not a good idea. The committee membership is determined different than the executive council and even if the item passed by 51/49 in a committee it is thoroughly debated (or the opportunity to be thoroughly debated is given) in the Executive Council. The members felt it might be dangerous to institutionalize something that is not now in our bylaws and it should be handled on a committee by committee basis dependent on the nature of the committee. In addition, there is always the back stop of the Division Director and Executive Committee for any committee action item that is inappropriate.

D. Conclusion or Proposal:

1. Sometimes sponsors feel that the sponsorship makes them entitled to a voting membership for a number of employees on one or more committees. Selection of voting members is separate from sponsorship status. Committee felt that it might be helpful to make clear to sponsors what they will receive in exchange for their sponsorship dollars. If expectations are clear at the onset, we will eliminate problems on the back end.
2. Limit the number of voting members from identified constituencies to prevent voting blocks.

3. Committee voting practices should be clearly laid out in the committee manual so the practice is consistent but it is up to the committee whether the action items must have a 2/3 or simple majority vote to pass the committee.

V. Goal: Improve the in Person Committee Meeting Experience.

- A. Topic or Issue: Optimal room configuration and methods of participation for Committee meetings.
- B. Discussion: Room configuration (hollow square, diamond shape, separate seating for visitors). Committee felt strongly about the need with larger Committees for seating for non-voting and guest members that is separated from the voting members. General sense was that the hollow square works well. Classroom set up does not work as well. It is too difficult to see people behind you. For the larger Committees microphones are needed to help everyone hear the discussion.
- C. Conclusion or Proposal: The hollow square configuration should continue to be used with separate seating along the walls for non-voting members and guests. Multiple microphones should be available within the room to ensure that all present in person and by telephone can be heard. Committees should consider using name plates for voting members to help everyone relate names to faces and to easily allow the chair to distinguish a voting from a non-voting member.

VI. Goal: Use Technology Effectively to Increase Participation in Committee Meetings.

- A. Topic or Issue: Participation in meetings by conference phone or video conferencing or webcasting of meetings.
- B. Discussion: With larger Committees, attendance must be in person. Again, smaller Committees have different rules and can allow telephone attendance. Not knowing who is on the phone is an issue. Committee members tend to limit discussion because you do not know who is listening. Keep in mind disabled and special needs members. Video conferencing and web casting should be explored but are probably not feasible yet in most situations because of cost and availability. There are problems with hold music and back ground sounds interfering with call quality.
- C. Conclusion or Proposal: Like many issues there is a split between the circumstances of the large Committees, particularly on the Probate side, and the smaller Committees. Generally, use of conference calling should be permitted in smaller committees but not larger committees. Utilization of a conference calling system that maximized the experience for all callers by allowing automatically muting all callers or otherwise addressing the hold music issue should be explored

VII. Goal: Optimize Dissemination of Materials to Committee Members.

- A. Topic or Issue: Should we set a deadline to email and post agendas to allow educated participation by Committee members? Inspirationally this is a good idea but sometimes just is not possible.
- B. Discussion: Committee chairs run into problems with subcommittees not timely submitting reports and then having to do multiple addendums to the agenda. Ideally, all chairs would have the agenda out a week in advance, but in reality sometimes does not happen. Main issue is having the agenda completed in time to post on website before the meeting so guests may access the meeting materials to make their committee experience more valuable.
- C. Conclusion or Proposal: With new website, look into chairs posting their own agendas to make sure they are posted before the meeting. Try to have agendas out at least the Friday before the week of the meetings.

VIII. Goal: Improve the Transition Process of New Committee Chairs.

- A. Topic or Issue: Orientation of new Committee Chairs.
- B. Discussion: Often new Chairs do not receive orientation or other assistance in learning Committee protocols. Sometimes the environment is not conducive to a transfer of power from an outgoing to an incoming chair and the institutional knowledge of the Committee workings is not effectively passed on.
- C. Conclusion or Proposal: Consider creating a **Committee chair manual** on such things as how to run a meeting, create an agenda, and deal with legislation. This manual should include Roberts Rules of Order, passwords to google attendance records, list serves, rosters, and procedures for updating web pages, editing Committee rosters, and coordinating with Section officers and staff. Something to transmit knowledge from one chair to the next chair. The big bar has this that they give to their standing Committee chairs.

IX. Goal: Promote Better Leadership and Succession Planning.

- A. Topic or Issue: Should there be "term limits" for Committee Chairs? How do we promote good succession planning to ensure a pipeline of Committee leaders?
- B. Discussion: Should be methods for identifying future leaders and grooming them by involving them in the Committee's agenda. Should provide a path for progression of interested members through the Committee leadership ranks: chair of subcommittee or task force, Technology Officer, Secretary, Vice Chair. Maintain attendance roster to identify commitment and consistency. Consider using Google attendance, a supported Google document system, more for telephone meetings.

C. Conclusion or Proposal:

1. At least aspirationally, there should be term limits 3 to 5 years for Committee Chairs, probably shorter in larger Committees and longer in smaller Committees. (Larger committees have a deeper pool of candidates for leadership so committee leadership terms might be shorter in those committees.)
2. Obtain the names of people who apply for fellow, ALM, and leadership programs as each must express Committee interest and most have leadership aspirations.
3. Use the committee members below the Chair as a succession planning tool. Identify the Secretary and Technology positions as stepping stones to the Committee Chair position. Include detailed descriptions in the new committee manual.
4. Consider requiring serving as Secretary of Committee as prerequisite to Vice Chair or Chair position. Consider having one Vice-Chair to serve as **Vice Chair of Enrichment** and one as **Vice Chair of CLE** and allow them to run that part of the agenda.
5. Place continued emphasis on end of year reports by committee chairs on performance of vice-chairs. Executive Committee relies heavily on those reports in making appointments for Vice-Chairs or Chairs of committees. Executive committee looks to Chair for feedback of performance of those under them. Also, realize the placement of a new Vice-Chair may be a signal by the Executive Committee that the committee needs to take a new direction.

X. Goal: Improve the Training of Future Committee Leaders.

- A. Topic or Issue: How can we better train the future leaders of our Committees to make them more effective?
- B. Discussion: Every contact can be a training experience. Encourage attendance and participation. Delegate, delegate, delegate.
- C. Conclusion or Proposal:

1. Use the positions of CLE Chair, Legislative Chair, and Technology Officer as training opportunities.
2. Encourage subcommittee participation. This should include non-voting members as a step to become a voting member. This will encourage

younger members to become involved and established Committee members.

3. Consider Section-wide mandatory training. We feel the material presented in website training, legislative drafting training, and CLE training has been extremely valuable to Committees.
4. Chairs should delegate more to Vice Chairs and utilize them more effectively.

XI. Goal: Balance the Agendas for Committee Meetings:

- A. Topic or Issue: Should Committee agendas be focused on legislation proposals, CLE for members, or other topics.
- B. Discussion: What is purpose of Committee meeting? Public Service (Legislation) vs Membership Service (CLE).
  1. CLE – Tool to be used by Committees. Smaller Committees offer CLE as a way to build membership but does this would work for a larger Committee? Larger Committee's CLE focus becomes CLE program creation. Time is too much of an issue to get through the agenda of issues that need to be addressed.
  2. Legislation – This should be looked at more of a service to the Section. Need to be responsive to the problems with statutes and proactive but not just for the sake of creating legislation.
  3. New term the committees should look at is **Thought Leadership**. Keep material on cutting edge. One selling point for our committee membership is that members are always working on the cutting edge; they are focusing on issues that place them at the front line of their specialties. Important for committees not to lose sight of this.
- C. Conclusion or Proposal:
  1. Each meeting should include relevant topics of interest to existing members and to attract new members (especially in the case of smaller Committees.)
  2. Have list serve for people to ask questions.
  3. Provide **Thought Leadership**.

XII. Goal: Optimize Committee Meeting Frequency and Locations.

- A. Topic or Issue: When, how often, and where should meetings be held?

B. Discussion: Should meetings only be held in conjunction with Executive Council meetings or is it more productive to meet “off schedule”? This should be left to the individual Committees. Ad hoc Committees may function better off schedule but established Committees may find it better to meet with EC. Should we do a better job of rotating schedules of meeting times at Executive Council Meetings? The conflict chart so meetings don’t overlap has been working well. Rotation of times has been working well. We should continue present practice.

C. Conclusion or Proposal:

1. There is no “one size fits all” answer for Committee meeting schedules. Each Committee should determine for itself the optimal schedule of meetings.
2. The conflict chart currently being utilized to coordinate meeting schedules at Executive Council meeting venues to minimize overlaps of related Committees has been working well. Rotation of times has been working well. We should continue present practice.

## Legislation and Official Section Positions

(Team Members: Bill Hennessey and Bob Swaine, Facilitators, Rob Freedman, Sarah Butters, Fletch Belcher, and Ted Conner)

### **Goal #1: Improve the quality of the Sections' legislative initiatives and work product through better education, better internal communication, and deliberative process**

A. The RPPTL Section should endeavor to improve the work product produced and submitted by our subcommittees, reduce the number of corrective "glitch" bills, avoid legislative redrafting that inadvertently changes a proposal's effect, and to encourage collaboration among the Divisions of the RPPTL Section on legislative initiatives.

B. This goal can best be accomplished through the following steps:

(1) Vice Chairs for Legislation: Each RPPTL substantive committee Chair should be encouraged to select one or more of the appointed Vice Chairs of the substantive committee as "Vice Chair(s) of Legislation". The Vice Chair of Legislation will assist with all bill drafting by their respective committees and will regularly update the Legislation Committee on the status of each committee's legislative projects.

(2) Annual Education to Committee Leadership: The Legislation Committee should hold an annual seminar for the new substantive Committee Chairs and Vice Chairs of Legislation for each substantive committee focusing on the: (a) applicable elements of the current bill drafting guides for the text and format of legislation; (b) time deadlines to have proposed legislation approved by the committee and ultimately the Executive Council; and (c) the necessity for clear and concise legislation, white papers and legislation position request forms. Further, the Legislative Committee should educate the Chairs and Vice Chairs on effective approaches for facilitating discussion on legislation and best practices for structuring debate on legislative initiatives.

(3) Vetting of Legislation: Absent extenuating circumstances, all legislation should follow a standard vetting process. That process includes:

(A) When a substantive committee has determined that new legislation is needed and has fully vetted the policy rationale underlying the proposed legislation, the Chair and Vice Chair of Legislation for the substantive committee will prepare the legislative proposal consisting of a white paper and proposed bill text so that each document is technically sound and internally consistent. Once these documents are prepared, the Chair of the proponent committee will refer the proposal to the Legislation Committee and the applicable Division Director for editorial review *before the proposal is approved by final vote of the substantive committee*. The purpose of this referral is to allow the Legislative Committee and Division Directors to vet the legislation with other committees and persons who may have an interest in the legislation to solicit comments on the proposal *before a final vote is taken within the substantive committee*.

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(B) Deadlines should be set and published for providing proposed legislation to the Division Directors and Legislative Committee to provide adequate time to solicit comments and provide input. We recommend that the proposal be referred to the Legislation Committee no later than 45 days before the substantive committee is scheduled to vote on the proposal unless the appropriate Division Director determines that circumstances otherwise warrant expedited consideration.

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

(D) The applicable Division Directors should endeavor to include legislative initiatives as an information item to be vetted and discussion at the roundtable, or, in the discretion of the Chair of the Section at the Executive Council, one full meeting before they are presented to the Executive Council for a vote. For example, if a substantive committee votes to support a legislative position at the Convention in May, the Division Director should (ideally) have that item on the agenda to be discussed and vetted at the roundtable at the Convention, or the next meeting (presumably the Legislative Update Meeting), before it is listed as an action item in the Executive Council Agenda. This goal would be similar to a "publication" rule wherein comments are solicited well in advance of a final vote.

(E) The process undoubtedly needs some flexibility. Thus, the Division Director and Chair should always have discretion as it relates to timing and the ultimate deliberative process.

**Goal #2: Improve communication of Section positions and work product through Legislative Committee communication on the Section website and through email to Section Membership.**

A. Organize and make available records of Section's historic legislative activity. A great deal of work goes into the preparation of white papers in connection with Section legislative proposals. These are important tools for explaining the issues underlying a legislative proposal and, in many cases, are one of the best (if not only) sources of legislative history. To the extent issues come up in subsequent years as a result of proposals to amend a Section initiative, the historic background again becomes important. The study team recommends the establishment of an online, indexed database of white papers, legislative proposals and related final bills, as follows:

(1) Scan existing Position Requests, Proposed Bills and White Papers for 2014 into electronic format (Swaine and Hennessey)

(2) Design database fields (Rob Freedman) - Preliminary thoughts on database fields:  
Short name  
Summary of proposal  
Legislative year introduced

TJ (2)

Contact person/committee

"White paper" (notation should be made as to portions of bill which were changed during the legislative process)

Legislative Position Request

Proposed bill

Final bill

(3) Prepare indexes and summaries (Section Fellows/ALMs)

(4) Include links to final bills (Section Fellows/ALMs)

B. Improve communication with and between substantive committees. The Legislative Chairs should send out reminder notices of the deadlines to circulate proposed legislation to other committees and facilitate communication among the impacted committees.

**Goal #3: Improve the functioning of the Legislative Committee through identification of key Section leaders who are able to assist in reviewing and responding to Section and Non-Section Legislative initiatives.**

A. The Composition of Legislative Committee. The Committee should be revised in order to achieve the following three goals:

1. To have subject matter experts on tap to address legislative proposals and avoid delays in gathering feedback and advising the Section's legislative consultants.

2. To provide greater exposure to the legislative process within the Section, thereby demystifying the process.

3. To provide additional leadership and training opportunities and exposure to how the Section works to younger members with leadership potential. This committee should be viewed as a training and leadership conduit.

B. Legislative Committee Work Flow. The workload of the Legislative Committee breaks down into three categories.

(1) Coordinating the movement of Section proposed legislation.

(2) Identifying and evaluating legislative proposals by others, coordinating the evaluation of those by the appropriate experts, and determining and coordinating appropriate responses to those positions.

(3) Providing technical guidance to legislators, staff and others sometimes in the context of fine-tuning other legislative proposals.

The Committee needs to better utilize its members and reporters to address each of the above categories. Too much of the workload is being carried by too few individuals. The Section's legislative success has led to a dramatic increase in legislative proposals, and our own initiatives are the only area in which the Legislative Committee can meaningfully control its

TJ (3)

work load. The bulk of the Committee's work in recent years has been "playing defense" - responding to non-RPPTL legislative proposals and to requests from legislators and staff. Training other talented members to leaders assist in responding to legislative requests will allow for more timely responses and continue leadership development.

**Goal #4: The RPPTL Section should endeavor to place Section members in positions of leadership within the Florida Bar, including on the Board of Governors and on Florida Bar Committees which impact our areas of practice.**

In particular, Section leadership should seek to place persons on the following committees:

(a) Probate Rules (The RPPTL Section should provide active input in the selection of the Chair and Vice Chairs for this Committee. We have been successful in doing so for the past few cycles. It is critical that this continue.)

(b) Other committees of interest were we should try to have our membership represented because Section Positions touch on these areas and advocacy is sometimes required:

- Appellate Rules
- Professional Ethics Committee
- Appellate Court Rules
- Civil Procedure Rules
- Code & Rules Of Evidence
- Rules Of Judicial Administration
- Unlicensed Practice Of Law

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**Real Property, Probate and Trust Law Section**

***Probate, Trust & Guardianship / Estate Planning***

July 27, 2012

1. Supports limitation of creditor remedies against partner interest in general and limited liability partnerships and member interests in limited liability companies to charging liens and to prohibit foreclosure against such interests.

Keep

2. Opposes the expansion of classes that are to serve as agents under a power of attorney beyond the current class of individuals and financial institutions with trust powers.

Keep

October, 5 2012

~~3. Supports legislation that would render any part of a written instrument that makes a gift to a lawyer or a person related to the lawyer void if the lawyer prepared or supervised the execution of the written instrument, or solicited the gift, unless the lawyer or other recipient of the gift is related to the person making the gift.~~

Drop

~~4. Supports correction of the statute reference, from §736.1005 to §736.1105, in F.S. §732.703(4)(c) to properly reflect that the statute does not apply to revocable trusts, and supports the correction to F.S. §732.703(4)(g) to include the defined term "governing instrument" instead of the language "instrument directing the disposition of the asset at death" because the statute defines the term "governing instrument" and the sentence should refer to the defined term.~~

Drop

October 4, 2013

5. Supports legislation which provides that a waiver of the statutory exemption from creditors' claims afforded to certain death benefits payable to trusts must be clear and specific, including amendments to F.S. §§733.808(4) and F.S. 736.05053(1)

Keep

***Probate, Trust & Guardianship / Guardianship & Advance Directives***

July 27, 2012

1. Supports legislation to amend the Baker Act to include a provision under which a guardian may request that the court grant the guardian the authority to involuntarily hospitalize a ward pursuant to the Baker Act.

Keep

~~2. Supports legislation to amend F.S. §744.444(16) to allow a guardian, without court approval, to pay from the assets of the guardianship estate the costs and fees of persons -- including attorneys, auditors, investment advisers or agents -- employed by the guardian to advise or assist the guardian in the performance of his or her duties.~~

Drop

3. Supports legislation to amend F.S. §394.467 to add as criteria for involuntary placement the substantial and imminent likelihood of inflicting serious emotional or psychological harm on another person, and the causation of significant damage to property in the recent past with substantial and imminent likelihood of doing so again.

Keep

4. Supports amending 29.007 F. S. to provide authority to appoint and compensate attorneys and professional guardians to serve as guardian advocates and guardian

Keep

ad litem for indigents in civil commitment and treatment proceedings in proceedings under the mental retardation statutes (ch. 393), Baker Act (ch. 394) and Marchman Act (ch. 397).

5. Supports legislation to amend Chapter 765, Florida Statutes, to improve the law concerning advance directives and to integrate federal HIPPA privacy laws with Florida law.

Keep

6. Opposes the adoption of summary guardianship proceedings outside the protections of Chapter 744, Florida Statutes.

Keep

7. Opposes amendments to F.S. §393.12 that would (i) remove the existing requirement that a guardian advocate for a developmentally disabled adult must be represented by an attorney if the guardian advocate is delegated authority to manage property, (ii) remove the existing requirement that the petition to appoint a guardian advocate must disclose the identity of the proposed guardian advocate, and (iii) expand the list of individuals entitled to receive notice of the guardian advocate proceedings.

Keep

8. Supports clarification of the definition of "income" for calculating Veterans guardianship fees, including an amendment to §744.604, Fla. Stat.

Keep

9. Opposes the adoption of the Uniform Adult Guardianship and Protective Proceedings Act.

Keep

10. Supports legislation to allow a parent, legal guardian or legal custodian of a minor child to designate a health care surrogate to make health care decisions for the minor if the parent, legal guardian or legal custodian is not reasonably available.

Keep

October, 5 2012

11. Supports proposed amendment to Florida Guardianship Law to clarify payment of attorney's fees from the ward's assets and to provide that the court may determine the reasonableness of compensation to the guardian, the guardian's attorney, any person employed by the guardian, any attorney rendering services to the ward and any court appointed attorney without the necessity of receiving expert testimony.

Keep

12. Supports proposed amendment to the Florida Guardianship Law to allow members of the guardianship examining committee to be paid by the state as court appointed experts pursuant to F.S. §29.004(3) in those circumstances in which the petition for incapacity is dismissed by the court and no guardian is appointed.

Keep

13. Supports amendments to the Florida Guardianship Law to protect the interest of incapacitated persons, especially minor wards, by making settlements on their behalf confidential.

Keep

February 1, 2013

14. Supports adoption of clarifications to F.S. Ch. 709, the Florida Power of Attorney Act.

Keep

January 31, 2014

15. Opposes amendments to guardianship statutes that (a) would change the criteria and limit the discretion of the court in awarding fees in guardianship proceedings for services that benefit the ward, (b) seek to significantly change established guardianship laws and procedures concerning the qualification of examining committee members and the content and requirements of their reports, and (c) would criminalize certain conduct in guardianship proceedings, including proposed amendments to F.S. §§744.108, 744.331, and 744.4461.

Keep  
↓

***Probate, Trust & Guardianship / Probate***

July 27, 2012

1. Opposes any efforts to enact a statutory will.
2. Supports legislation to repeal §734.1025, Florida Statutes, because the dollar amount for summary administrations found in § 735.201-2063, Florida Statutes, has been increased thus, making §734.102, Florida Statutes, duplicative.
3. Opposes amendment to §733.302, F. S., to expand the class of non-residents which may serve as personal representative because of a concern that any addition to the class may subject the entire statute to a renewed constitutional challenge.
4. Opposes changes to Florida Statute 732.103 that would extend the intestate distribution scheme to the level of the decedent's great-grandparents.
5. Supports clarification of a person's rights to direct disposition of his or her remains, providing guidance to courts and family members, especially when disputes arise, and absent specific directions, clarifying who is authorized to decide the place and manner of the disposition of a decedent's remains, including an amendment replacing F.S. § 732.804.

October, 5 2012

- ~~6. Supports amendment of F.S. §731.110 to clarify that a probate caveator need not serve itself with its own petition for administration and providing effective date.~~
- ~~7. Supports amendment to F.S. §732.901 clarifying that an original will deposited with the court must be maintained in its original form for a period of not less than 20 years.~~

Drop  
Drop

February 1, 2013

- ~~8. Support amendment of F.S. § 198.13 to strike the last sentence of Subsection 198.13(4) that currently states: "The provisions of this subsection do not apply to estates of decedents dying after December 31, 2012."~~

Drop

***Probate, Trust & Guardianship / Trust***

July 27, 2012



1. Opposes proposed <sup>legislation</sup> §518.117, Florida Statutes, and related amendments abrogating a trustee's duties of loyalty and duties of full and fair disclosure in connection with affiliated investments by a corporate trustee.

Keep w/ change

2. Supports amendment of F.S. §736.0813 to clarify the meaning of the requirement that a trustee furnish qualified beneficiaries with a "complete copy" of a trust document.

Keep

October, 5 2012

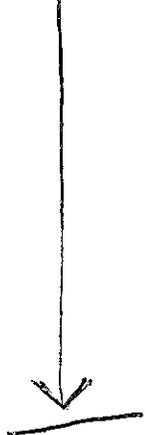
~~3. Supports revision of Trust Code provisions governing jurisdiction over nonresidential trustees and beneficiaries in trust cases, the addition of a long-arm statute specifying acts subjecting nonresidents to personal jurisdiction in cases involving trusts, and providing for service of process in both in rem and quasi rem cases involving trusts.~~

Drop

~~4. Supports legislation to shorten the holding period, from five years to two years, for unclaimed property held in trust by a trustee under a trust instrument, and to continue application of the existing five-year holding period to all fiduciaries other than those governed by the new proposed section and by an existing statute that governs personal representatives.~~

~~5. Supports adding definitions of "distribute" and "permissible distribute" to the Florida Trust Code.~~

~~6. Supports ending F.S. §736.0813(1)(d) to clarify the duty of a trustee to account and provide that a trustee may account more often than annually and satisfy the requirements to the statute.~~



October 4, 2013

7. Supports legislation that would (i) amend F.S. §736.0207 to clarify that in an action to contest the validity or revocation of all or part of a trust, the contestant has the burden of proof to establish grounds for invalidity, and (ii) amend F.S. §733.107(2) to clarify and confirm its applicability in all circumstances in which the presumption of undue influence is established, including trust contests as well as challenges to inter vivos gifts.

Keep

8. Supports legislation that would create legislation that authorizes families to form and operate licensed and unlicensed family trust companies and to authorize out of state licensed family trust companies to operate in Florida, including the creation of proposed F.S. Ch. 659, Family Trust Companies.

Keep

~~9. Supports legislation to make the Trust Code's antilapse statute consistent with the Probate Code's antilapse statute regarding the treatment of devisees to certain persons who do not survive the settlor of a revocable trust or the testator of a testamentary trust, including amendments to F.S. § 736.1106.~~

Drop

***Real Property / Condominiums and Planned Developments***

July 27, 2012

1. Supports amendments to Chapter 718, Florida Statutes, Condominiums, and Chapter 719 Florida Statutes, Cooperatives, to require that engineers, architects and other design professionals and manufacturers warrant the fitness of the work they perform on condominiums or cooperatives.

Keep

2. Opposes amendments to §718.1255, Florida Statutes, or targeted budget

Keep

reductions or other governmental action having the purpose or effect of diminishing or eliminating the jurisdiction of the Arbitration Division of the Department of Business and Professional Regulation's Division of Land Sales.

3. Supports condominium unit owner's ability to exercise self-government and undertake fair and efficient community administration, including the exercise of basic contract and investment decisions.

*Keep*

4. Supports legislation to permit condominium unit owners to further subdivide or partition their interest in the condominium and common elements appurtenant thereto pursuant to a sub-declaration of condominium, which subdivided units shall remain subject and subordinate to the existing declaration of condominium, provided such existing declaration of condominium allows for the subdivision.

*Keep*

5. Opposes amendments to Chapter 720, F.S., that would require both pre-suit mediation and pre-suit arbitration before filing a civil action over homeowners' association disputes.

*Keep*

→ 6. Supports <sup>legislation providing for</sup> ~~amendment of F.S. §718.203, Florida Statutes, amending to add~~ electrical elements to three-year warranty, extend subcontractor and supplier warranties to the contractor and to clarify start date for five-year warranty deadline set forth in F.S. §718.203(1)(e).

*Keep w/ change*

7. Supports amendment of F.S. §718.403 to permit the addition of proposed phases to a condominium beyond 7 years from the recording of the declaration of condominium upon association membership approval and recorded amendment to the declaration of condominium.

*Keep*

8. Supports additional guidance and regulation respecting the creation of a condominium within a condominium unit, through creation of Section 718.406, F.S.; to provide an effective date.

9. Supports clarification of Ch 718, F.S.: to confirm that certain operational provisions do not apply to nonresidential condominium associations; to define "nonresidential condominiums;" to clarify that the Division's arbitration program only pertains to residential condominiums; to provide an effective date.

October, 5 2012

10. Supports amendments to F.S. Chapter 718: to replace the date triggering certain obligations; to clarify when a condominium unit is created; to permit extending the period for adding phases to a condominium; and, to provide an effective date.

July 26, 2013

11. Supports legislation to standardize procedures and to clarify the timing, content and preparation fees relating to estoppel letters issued by condominium and homeowners' associations, including amendments to F.S. §§718.116 & 720.30851.

12. Supports legislation to remove the requirement that statutory late fees must be set forth in a condominium or homeowners' association declaration or bylaws in order for those charges to be imposed, to allow for the collection of such fees by all

*Keep*

condominium and homeowner associations, including amendments to F.S. §§718.116 & 718.3085.

13. Supports legislation to differentiate the administration of nonresidential condominiums from residential condominiums and to eliminate for nonresidential condominium associations certain provisions not appropriate in a commercial setting, including amendments to F.S. Ch. 718.

Keep

December 13, 2013

14. Supports an amendment to F.S. §712.05 of the Marketable Record Title Action to correct an error created by an inadvertent requirement imposed by the 2010 amendment to F.S. §712.06, clarifying existing law, removing the costly, time consuming, and unnecessary requirement to mail a copy of the notice of preservation to each owner in a homeowners' association, who would have already been notified of the preservation.

15. Supports an amendment to the Florida Condominium Act for a one-year extension of the expiration date to July 1, 2016, for Part VII of the Act and F.S. §718.707, dealing with distressed condominiums.

March 28, 2014

16. Supports amendments to the Florida Condominium Act which set forth the rights and obligations of purchasers and lenders that acquire multiple units, but who are not creating developers of the condominium, including creating a Part VIII, and eliminating application of Part VII, of the Condominium Act to transactions recorded after the effective date July 1, 2016.

April 7, 2014

17. Opposes legislation that changes the definition of the practice of law to exclude from the definition a community association manager's interpretation of documents or statutes that govern a community association, determination of title to real property, or completion of documents that require interpretation of statutes or the documents that govern a community association, including opposition to SB1466, SB1496, HB7037 and CS/HB7039 (2014).



***Real Property / Contracts and Disclosures***

July 27, 2012

~~1. Supports legislation to amend F.S. §725.06 to make contracts for indemnity for acts of omissions of an indemnitee unenforceable except in certain limited situations and/or to the extent of insurance coverage.~~

Drop

2. Opposes legislation requiring multiple disclosures by sellers of real property, creating contract rescission rights for buyers and seller liability for damages.

Keep

3. Opposes legislation requiring parties to record notices, warnings or reports regarding the physical condition of land or improvements in the public records regarding the title to real property.

Keep

**Real Property / Corporations and LLCs**

July 27, 2012



1. Oppose <sup>legislation</sup> amendment of F.S. §607.1202 and §608.4262 to require a Florida corporation or limited liability company to publish notice of its proposed sale of assets other than in regular course of business, or to publish notice of dissolution, *including changes to ←*

*Keep w/ changes*

**Real Property / Courts**

July 27, 2012

1. Oppose the creation of "pilot" court divisions without funding, evaluation criteria, rules of procedure, and competency criteria for magistrates without consideration for current alternate dispute resolution processes.

*Keep*

December 13, 2013

2. Supports procedures to preserve due process by providing courts with authority to appoint attorney, administrator and guardian ad litem to serve on behalf of known persons, or unknown persons, having claims by, though, under or against a person who is deceased or whose status is unknown, and confirming the sufficiency of prior proceedings in which ad litem have been appointed, including amendment of F.S. §49.021.

*Keep*

**Real Property / Environmental**

July 27, 2012

1. Supports continuation and improvement of the Florida brownfield redevelopment program, including the voluntary cleanup tax credit (VCTC) program pursuant to F.S. §376.30781.

*Keep*

**Real Property / Foreclosures and Judicial Sales**

July 27, 2012



1. Oppose <sup>legislation</sup> HB 1437/SB1460, which would require a foreclosing creditor to notify the debtor that filing a bankruptcy petition before the foreclosure sale may permit the debtor to retain the property and reorganize the indebtedness.

*Keep w/ change*

~~2. Supports amendment to F.S. §501.1377 to exclude lawyers, law firms, pro bono and legal aid programs, title agents and the servicing, restructuring and workout companies employed by the holders of mortgages from the definition of "foreclosure rescue consultant."~~

*Drop.*

3. Opposes any amendment to existing Florida law governing real property foreclosures unless those amendments carefully preserve and protect the property rights and due process rights of the holders of interests in or affecting Florida real property.

*Keep*

4. Supports expanded publication of notices of judicial sales, permitting notices to be posted on the Internet, including amendments to F.S. Chapters 45, 50 and 702.

*Keep*

October, 5 2012

5. Supports foreclosure reform which expedites and streamlines the judicial foreclosure process while preserving and protecting fundamental fairness and the

*Keep*

property rights and due process rights of the holders of interests in or affecting Florida real property. [Revised 4/18/13]

6. Supports requirements for electronic publication of legal notices that address due process concerns, including amendments to F.S. §50.0211, 50.041, and 50.061.

February, 1 2013

7. Supports correction of procedural issues relating to trustee foreclosures of timeshares, including amendments to sections 721.82, 721.855, and 721.856 of the Florida Statutes.

***Real Property / Liens and Encumbrances***

July 27, 2012

1. Supports amendment to §162.09(3), Florida Statutes, to clarify the relative priority of recorded municipal code enforcement liens created pursuant to the Local Government Code Enforcement Boards Act.

2. Opposes efforts to create a lien on real property for work that does not add value to the property, and would permit liens against the property of a person other than the party owing a debt.

~~3. Supports amendment of §55.141, Florida Statutes, to also allow the clerk of court to issue a satisfaction of judgment, rather than only the judgment holder~~

4. Supports amendment to F.S. §695.01 and ch 162 to reduce problems regarding hidden liens by: (i) requiring all governmental liens (other than taxes, special assessments and those for utility services) to be recorded in the official records and to state their priority; (ii) clarifying the priority of liens asserted by local governments; and (iii) expanding the homestead determination mechanisms of F.S. §222.01 to apply to other types of lien.

5. Supports amendments: to s. 95.11(2) and (5), F.S., as to the statute of limitations for actions on payment bonds; to s. 713.08(3) (the statutory form for a claim of lien) to include the separate statement required by F.S. 713.08(1)(c); to s. 713.13, F.S. to delete the requirement that the notice of commencement be verified and to clarify the timing of the expiration date of the notice of commencement; to s. 713.18, F.S. as to electronic confirmation of delivery through the U.S. Postal Service.

6. Supports amendment of: F.S. §713.10(2)(b) to provide that a blanket notice recorded by a landlord remains valid and the landlord's property interest will not be liable for liens arising from tenant improvements even if the leases contain different versions of the lien prohibition language or no lien prohibition language at all, under certain circumstances; and F.S. §713.10(3) to require inclusion of specific language in any claim of lien premised on a landlord's failure to comply so as to provide record notice of the basis of such a claim by a lienor, and to provide that any lien will not take effect as to third parties without notice until 30 days after the recording of the claim of lien.

Keep



Drop

Keep



March 28, 2014

7. Opposes selective increase of recording expense to only construction claims of lien, adding additional filing requirements, and concluding that filing a lien beyond the statutory 90-day period is an act of fraud, including opposing amendments to F.S. §§28.24 & 713.08.

Keep

**Real Property / Mobile Homes**

July 27, 2012

1. Supports amendment to Chapter 723, Florida Statutes, specifying that each mobile home owner/owners shall have only one vote at elections or meetings, and to allow association bylaws to specify less than a majority for a quorum.

Keep

**Real Property / Miscellaneous**

July 27, 2012

1. Supports amendment to §673.3121, Florida Statutes, to provide a cross reference in it to §673.4111, Florida Statutes, stating that if an official check is not paid, then the person entitled to enforce the official check is entitled to compensation from the obligated bank for refusing to pay.

Keep



2. Supports legislation to provide for alienation of plan benefits under the Florida Retirement System (§121.131 and §121.091 Florida Statutes) Municipal Police Pensions (§185.25 Florida Statutes) and Firefighter Pensions (§175.241 Florida Statutes) in a dissolution proceeding and authorizing such alienation of benefits in a dissolution of marriage under §61.076 Florida Statutes.

Keep, but please move under Probate... / Estate Planning



3. Supports legislation to (1) change the titles of §222.11 Florida Statutes to clearly reflect that this statute applies to earnings and is not limited to "wages" (2) provide an expanded definition of "earnings" because the term "wages" is not the exclusive method of compensation and (3) add deferred compensation to the exemption statute.

4. Opposes abolishment of causes of action for architect, engineer, surveyor and mapper professional negligence and other professional breaches of duty.

Keep

October, 5 2012

~~5. Supports amending F.S. §689.02(2), F.S. to remove inclusion of social security numbers on warranty deeds of conveyance.~~

Drop

6. Supports expanding execution curative provisions to cover instruments, other than deeds or wills that convey a fee simple interest in real estate, including an amendment to F.S. §95.231.

Keep w/ change

~~7. Supports amendments to Florida Land Trust Act and Florida Trust Code to define and distinguish land trusts more clearly from other express trusts, to revise and relocate statutory title estoppels provisions separately from the land trust statute, and to codify other Florida land trust principles and practices.~~

Drop

December 13, 2013

8. Supports clarification that an otherwise valid power of attorney executed in compliance with the laws of the state of execution to convey or encumber Florida real property, applies to all Florida real property including homestead property, including amended F.S. §709.2106.

Keep  
all on  
this  
page

March 28, 2014

9. Supports issuance of separate property tax folio numbers for separately described portions of a multiple parcel building and providing for allocation of underlying land value among the separate building parcels, including amendment of F.S. Chapter 193.

***Real Property / Notary***

July 27, 2012

1. Opposes Section 2 of Senate Bill 298 creating §117.055, which requires that notaries keep a detailed journal of all notarial acts including: the date, time and type of notarial act; the date, type and description of each document; the name of the signer; and description of the evidence of identity.

***Real Property / Property Rights***

July 27, 2012

1. Opposes any legislation limiting property owners' rights or limiting attorneys' fees in condemnation proceedings.

2. Opposes legislation expanding the definition of sovereign beaches, public beaches or beach access rights over privately owned property without due process of law or compensation for taking of private property rights.

***Real Property / Recording***

July 27, 2012

1. Supports legislation to maintain the integrity of the recording system in the State of Florida.

***Real Property / Title Insurance***

July 27, 2012

1. Opposes any portion of the National Association of Insurance Commissioners Title Insurers Model Act and Title Insurance Agent Model Act that may adversely affect Florida attorneys' ability to participate in real estate closing and the issuance of title insurance.

2. Supports the regulatory approval of a proposed ALTA Junior Loan Policy Form, but opposes legislation that would exclude from the statutory definition of title insurance the insuring of mortgage liens covering second mortgages and home equity line mortgages.

3. Opposes adoption of a "file and use" system for the determination of title insurance rates in the State of Florida, supplanting a promulgated rate system in



which the state regulatory agency determines rates based on actuarial analysis of statutorily determined criteria.

4. Supports recommendations to the Title Insurance Study Advisory Council concerning the providing and regulation of title insurance.

*Keep*

5. Opposes elimination of the requirement that title insurance agencies deposit securities having a value of \$35,000 or a bond in that amount for the benefit of any title insurer damaged by an agency's violation of its contract with the insurer.

*Keep*

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA  
FOURTH DISTRICT  
*July Term 2013*

**EDWARD I. GOLDEN** as Curator of the Estate of Katherine Jones,  
Appellant,

v.

**CAROL ANN JONES**, as Personal Representative of the Estate of Harry  
Bruce Jones,  
Appellee.

No. 4D12-2094

[ October 30, 2013 ]

**CORRECTED OPINION**

TAYLOR, J.

Appellant Edward Golden, the curator of the Estate of Katherine Jones, appeals a final order striking a claim filed against the Estate of Harry Bruce Jones. We reverse, because the trial court erred in determining that the claim was untimely without first determining whether the claimant was a known or reasonably ascertainable creditor. We hold that if a known or reasonably ascertainable creditor is never served with a copy of the notice to creditors, the statute of limitations set forth in section 733.702(1), Florida Statutes, never begins to run and the creditor's claim is timely if it is filed within two years of the decedent's death.

By way of background, Harry Jones died in February 2007 and his estate was opened in April 2007. In June 2007, a notice to creditors was first published.

In 2008, a court appointed a guardian for Harry's former wife, Katherine Jones, because she had been adjudicated to lack capacity. It is undisputed that neither Katherine, nor her guardian, was ever served with a copy of the notice to creditors.

In January 2009, less than two years after Harry's death, Katherine's guardian filed a Statement of Claim in the probate court. The basis for

the claim was that Harry's estate owed Katherine money pursuant to a Marital Settlement Agreement that Harry and Katherine executed in 2002.

Katherine died in 2010. Following Katherine's death, appellant Edward Golden was appointed as the curator of Katherine's estate.

In March 2012, more than five years after Harry's death, appellant filed a Petition for Order Declaring Statement of Claim Timely Filed and/or for Enlargement of Time to File Statement of Claim, Nunc Pro Tunc. Appellant alleged that the guardianship was a known or reasonably ascertainable creditor of Harry's estate and sought a determination to that effect.

The personal representative of Harry's estate filed a response to appellant's petition, asserting in relevant part that the claim was time-barred under sections 733.702 and 733.710, Florida Statutes. The personal representative of Harry's estate also asserted as an affirmative defense that Katherine was not a reasonably ascertainable creditor.

The personal representative later filed an amended motion to strike the statement of claim. After a hearing on the motion, the trial court entered its Order Striking Untimely Filed Claim, ruling that the statement of claim was untimely under sections 733.702 and 733.710, Florida Statutes, and established case law. In support of its decision, the trial court cited, among other cases, *Lubee v. Adams*, 77 So. 3d 882 (Fla. 2d DCA 2012), and *Morgenthau v. Estate of Andzel*, 26 So. 3d 628 (Fla. 1st DCA 2009). This appeal followed.

On appeal, appellant argues that if the notice to creditors is not served on a known or reasonably ascertainable creditor, then the applicable limitations period of section 733.702(1) never begins to run and the known or reasonably ascertainable creditor is bound only by section 733.710's two-year statute of repose. We agree.

Generally, a probate court's decision on whether to strike a claim is reviewed for an abuse of discretion. *Strulowitz v. The Cadle Co., II, Inc.*, 839 So. 2d 876, 879 (Fla. 4th DCA 2003). However, to the extent this issue turns on a question of statutory interpretation, the standard of review is de novo. *W. Fla. Reg'l Med. Ctr., Inc. v. See*, 79 So. 3d 1, 8 (Fla. 2012).

Under section 733.2121(3)(a), Florida Statutes (2006), the personal representative of an estate "shall promptly make a diligent search to

determine the names and addresses of creditors of the decedent who are reasonably ascertainable . . . and shall promptly serve a copy of the notice on those creditors.”

To preserve a claim against a decedent’s estate in Florida, a creditor must file a written statement of the claim within the statutorily prescribed time periods. See §§ 733.702, 733.710, Fla. Stat. (2006). Section 733.702 is a statute of limitations that cannot be waived in a probate proceeding by failure to object to a claim on timeliness grounds, while section 733.710 is a jurisdictional statute of nonclaim that is not subject to waiver or extension in a probate proceeding. See *May v. Illinois Nat’l Ins. Co.*, 771 So. 2d 1143, 1145 (Fla. 2000).

Section 733.702, Florida Statutes (2006),<sup>1</sup> provides in relevant part:

(1) If not barred by s. 733.710, no claim or demand against the decedent’s estate that arose before the death of the decedent . . . is binding on the estate, on the personal representative, or on any beneficiary *unless filed in the probate proceeding on or before the **later** of the date that is 3 months after the time of the first publication of the notice to creditors or, as to any creditor required to be served with a copy of the notice to creditors, 30 days after the date of service on the creditor*, even though the personal representative has recognized the claim or demand by paying a part of it or interest on it or otherwise. . . .

\* \* \*

(3) Any claim not timely filed as provided in this section is barred even though no objection to the claim is filed unless the court extends the time in which the claim may be filed. An extension may be granted only upon grounds of fraud, estoppel, or insufficient notice of the claims period. . . .

\* \* \*

(6) Nothing in this section shall extend the limitations period set forth in s. 733.710.

---

<sup>1</sup> The 2006 versions of sections 733.702 and 733.710 are applicable in this case because they were in effect at the time of Harry’s death on February 16, 2007. See *May*, 771 So. 2d at 1150 n.7 (using decedent’s date of death to determine applicable version of the statute).

(emphasis added).

Section 733.710, Florida Statutes (2006), provides in relevant part:

(1) Notwithstanding any other provision of the code, 2 years after the death of a person, neither the decedent's estate, the personal representative, if any, nor the beneficiaries shall be liable for any claim or cause of action against the decedent, whether or not letters of administration have been issued, except as provided in this section.

(2) This section shall not apply to a creditor who has filed a claim pursuant to s. 733.702 within 2 years after the person's death, and whose claim has not been paid or otherwise disposed of pursuant to s. 733.705.

This court has held that under sections 733.702 and 733.710, any claims of known or reasonably ascertainable creditors, though filed after the three-month period following publication of notice of administration, should not be stricken as untimely if filed prior to the earlier of 30 days after service of notice of administration or two years after the decedent's death. *See In re Estate of Puzzo*, 637 So. 2d 26, 27 (Fla. 4th DCA 1994).

In *Puzzo*, the creditors appealed an order denying a petition to extend the time for filing a claim against the estate and granting the estate's motion to strike the creditors' claims as untimely. Explaining that the personal representative was on notice of at least one of the claims and that there was no proof that the creditors had been served with notice of administration, we reversed the order on appeal. We stated:

Due process considerations require that Appellants be furnished notice so that they can determine that the time for filing claims has commenced. However, regardless of whether or not the claimants had actual notice, section 733.702(1), Florida Statutes, does not bar the claim of a creditor required to be served with a copy of the notice of administration, unless barred by section 733.710, until the *later* of the 3-month period following publication or *30 days after service of notice on the creditor*. The latter period had not begun to run at the time Appellants' claims were filed.

We remand for the trial court to determine as to which of Appellant[s'] claims they were known or ascertainable

creditors. Any such claims, though filed after the 3-month period, should not have been stricken as untimely if filed prior to the earlier of 30 days after service of notice of administration or 2 years after the decedent's death.

*Id.* at 27 (citation omitted).

Our decision in *Puzzo* is consistent with the plain language of sections 733.702 and 733.710. Under *Puzzo*, if Katherine or the guardian was a known or reasonably ascertainable creditor, appellant's claim was timely if it was filed prior to the earlier of 30 days after service of notice to creditors or two years after the decedent's death. This is true regardless of whether the claim was filed after the three-month period following publication of the notice to creditors. Although the creditors in *Puzzo* did file a motion for extension of time, that is a distinction without a difference. The holding of *Puzzo* makes clear that a claim of a reasonably ascertainable creditor, who was never served with notice to creditors, is timely if it is filed within two years of the decedent's death. Because such a claim is timely under section 733.702(1), it would be unnecessary for a reasonably ascertainable creditor to file a motion for extension of time under section 733.702(3).

Here, it is undisputed that the personal representative never served Katherine or Katherine's guardian with a notice to creditors. Furthermore, less than two years after the decedent's death, Katherine's guardian filed a statement of claim in the probate court. Finally, appellant alleged that the guardianship was a known or reasonably ascertainable creditor of Harry's estate. Under these circumstances, the trial court erred in determining that the claim was untimely without first determining whether Katherine was a known or reasonably ascertainable creditor. If the trial court determines that the claimant was a known or reasonably ascertainable creditor, then appellant's claim was timely, as it was filed prior to the earlier of 30 days after service of notice to creditors (which never occurred) or two years after the decedent's death.

The First and Second Districts have reached a contrary conclusion, ruling that even a reasonably ascertainable creditor who was not served with a notice to creditors is required to file a claim within the publication period of three months unless the creditor files a motion for an extension of time under section 733.702(3) within the two-year repose period of section 733.710. See *Lubee*, 77 So. 3d at 884; *Morgenthau*, 26 So. 3d at 632-33. For example, in *Lubee*, the creditor, Mr. Lubee, filed a claim outside the three-month publication period, but prior to the expiration of the two-year statute of repose provided in section 733.710. The Second

District held that his claim was untimely and that the issue of whether Mr. Lubee was a reasonably ascertainable creditor was immaterial:

*Because he was not served with a copy of the notice to creditors, Mr. Lubee was required to file his claim in the probate proceeding within the three-month window following publication. Alternatively, Mr. Lubee could seek an extension from the probate court pursuant to section 733.702(3) within the two-year window of section 733.710. It is undisputed that he did neither. . . . Mr. Lubee’s claim in the probate proceeding was untimely and therefore barred. As a result, the issue of whether or not Mr. Lubee was a readily ascertainable creditor was immaterial.*

77 So. 3d at 884 (citations omitted) (emphasis added).

Unlike *Puzzo*, *Lubee* and *Morgenthau* are inconsistent with the plain language of section 733.702(1). As one commentator has noted, the Second District’s analysis in *Lubee* “misses the point of the statute, because it is not the fact of *service* that makes the publication date inapplicable to the beginning of the period to bar claims, it is the *entitlement* to service that is relevant.” See Rohan Kelley, *Probate Litigation, Practice Under Florida Probate Code § 21.40* (Fla. Bar CLE 7th ed. 2012). Similarly, the flaw in the court’s reasoning in *Morgenthau* “is that the court *begins* with the conclusion that the claim, filed after three months from the first publication by a known creditor who was not noticed, was untimely.” *Id.*

We reverse and remand for the trial court to determine whether Katherine or the guardianship was a known or reasonably ascertainable creditor. If so, then appellant’s claim “though filed after the 3-month period, should not have been stricken as untimely if filed prior to the earlier of 30 days after service of notice of administration or 2 years after the decedent’s death.” *Puzzo*, 637 So. 2d at 27. We certify conflict with *Lubee* and *Morgenthau*.

*Reversed and Remanded; conflict certified.*

DAMOORGIAN, C.J., and KLINGENSMITH, J., concur.

\* \* \*

Appeal from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; Mel Grossman, Judge; L.T. Case No. 07-1771 60.

William H. Glasko, of Golden & Cowan, P.A., Miami, for appellant.

Michael E. Jones of Michael Edward Jones, P.A., Fort Lauderdale, and  
Robin F. Hazel of the Hazel Law, P.A., Pembroke Pines, for appellee.

***Not final until disposition of timely filed motion for rehearing.***

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC13-2536  
L.T. CASE NO. 4D12-2094

CAROL ANN JONES,  
petitioner,

v.

EDWARD I. GOLDEN,  
respondent.

THE REAL PROPERTY PROBATE & TRUST LAW SECTION  
OF THE FLORIDA BAR'S NOTICE OF INTENT TO SEEK LEAVE TO FILE  
AMICUS BRIEF

NOTICE IS GIVEN of The Real Property, Probate & Trust Law Section of The Florida Bar's ("RPPTL Section") intent to seek leave to file an amicus brief in this case. The petitioner has invoked the discretionary jurisdiction of this Court. This case is of interest to the RPPTL Section because it involves the claims process in estate proceedings, which impacts the 10,000+ membership of RPPTL Section and its clients, the citizens of Florida and their creditors. RPPTL Section regularly educates the public, judges, and lawyers on probate issues and assists this Court and the Legislature in drafting court rules and legislation involving the claims of creditors. RPPTL Section has no interest in the specific dispute between the litigants, but RPPTL Section has a significant interest in the policy issues before the Court in what appear to be conflicting decisions of the district courts of appeal. RPPTL Section believes it can assist the Court in analyzing those policy considerations and clarifying this area of the law.

CASE NO. SC13-2536  
L.T. CASE NO. 4D12-2094

I CERTIFY that a true copy of this document was served on Robin F. Hazel, Espinosa Jomarron, counsel to petitioner, [rhazel@ejtrial.com](mailto:rhazel@ejtrial.com); and Edward I. Golden, Golden & Cowan, P.A., [egolden@gcprobatelaw.com](mailto:egolden@gcprobatelaw.com) this 22nd day of January, 2014.

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

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# Supreme Court of Florida

TUESDAY, JULY 1, 2014

CASE NO.: SC13-2536  
Lower Tribunal No(s): 4D12-2094;  
07-1771 60

CAROL ANN JONES, ETC. vs. EDWARD I. GOLDEN, ETC.

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Petitioner(s)

Respondent(s)

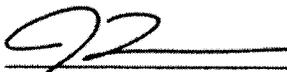
The Court accepts jurisdiction of this case. Oral argument will be set by separate order. Counsel for the parties will be notified of the oral argument date approximately sixty days prior to oral argument.

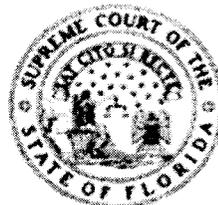
Petitioner's initial brief on the merits shall be served on or before July 28, 2014; respondent's answer brief on the merits shall be served twenty days after service of petitioner's initial brief on the merits; and petitioner's reply brief on the merits shall be served twenty days after service of respondent's answer brief on the merits.

The Clerk of the Fourth District Court of Appeal shall file the record which shall be properly indexed and paginated on or before September 2, 2014. The record shall include the briefs filed in the district court separately indexed. The Clerk may provide the record in the format as currently maintained at the district court, either paper or electronic. If an electronic record, the Clerk of the Fourth District Court of Appeal should contact the Clerk of this Court for instructions on transmittal of the electronic record.

LABARGA, C.J., and PARIENTE, LEWIS, POLSTON, and PERRY, JJ., concur.

A True Copy  
Test:

  
\_\_\_\_\_  
John A. Tomasino  
Clerk, Supreme Court



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## **Report of the RPPTL Section's Ad Hoc Committee Regarding Trust Account Issues**

**Trust Account Shortages:** Handling of trust account shortfalls has been significantly affected by the Florida Supreme Court's decision in *The Florida Bar vs. Roth and Rousso*, 117 So.3<sup>rd</sup> 756 (Fla. 2013). In that case, Leonardo Roth and Mark Rousso, Florida attorneys whose bookkeeper had embezzled \$4,380,000 from their law firm, were disbarred by the Florida Supreme Court despite the fact that the trust account deficits were covered by the firm's malpractice carrier, the attorneys' personal funds and borrowed funds. The referee found that the embezzlement occurred over a long period of time and, had the attorneys adhered to the minimum standards required by Florida Bar rules, the embezzlement would not have occurred or would have been discovered within a month of the initial embezzlement attempt.

In its decision, the Court cited Rule 5-1.1(a)(1) of the Florida Bar's Rules of Professional Conduct for the proposition that trust accounts are reserved for client funds related to lawyer representation and should not be used as a repository for a lawyer's own property. Thus, it held that the commingling of the lawyers' personal funds, malpractice claim proceeds and borrowed funds constituted commingling, in violation of the rule. While the referee noted that the funding of the trust account with personal funds "did not offend the basic principles underlying the commingling proscription" because the decision "was founded on a sense of personal honor to make right the wrong wrought by the bookkeeper", the Court disagreed, disregarded the referee's suspension recommendations and, instead, disbarred Messrs. Roth and Rousso.

Prior to the *Roth and Rousso* decision, The Florida Bar's Ethics Hotline had advised attorneys seeking advice with respect to shortages in their law firm's trust account to immediately and completely fund any shortage from the law firm's operating account or from the attorney's personal funds. However, after that decision, the advice became much more onerous. In light of that decision, the Bar suggested that an attorney would be required to: (1) disclose to all affected clients that there has been a theft or other shortage in the trust account, (2) report the theft/shortage to the Bar, (3) close the affected trust account, (4) return all trust moneys in the closed account to the clients entitled to it, (5) reimburse any missing funds directly to the clients from the attorney's operating or personal funds (and not to reimburse the trust account with the attorney's own funds), and (6) open a new trust account and request the clients to return the funds that had previously been held in trust into the new account if they were willing to trust the law firm with their funds again.

Due to legitimate issues regarding who would be “entitled” to trust funds (for example, in a real estate transaction, would the funds belong to the seller or buyer?), the logistical issues involved in closing and re-opening trust accounts and the potential damage to attorney/client relations that might arise from a minor discrepancy that could easily be rectified, many attorneys, including the RPPTL Section leadership, expressed their concerns about the Hotline advice to The Florida Bar’s Board of Governors and the PEC, and, in response to those concerns, suggested revisions to Rule 5-1.1(a)(1) of the Florida Bar’s Rules of Professional Conduct have been proposed. The proposed modifications would permit an attorney to deposit sufficient funds into their law firm’s trust account to make up a shortfall caused by misappropriation, bank error, bank charges or a bounced check. The revised Rule would provide that any such deposit must be less than the amount of the shortfall but may not exceed the shortfall, and would require that The Florida Bar’s Lawyer Regulation Department be immediately notified of the amount and cause of the shortfall and the replenishment amount. The Florida Bar’s Board of Governors approved the proposed Rule change on March 28, 2014, and it is anticipated that the proposed revision will be submitted to the Florida Supreme Court for consideration in October.

***RULE 5-1.1 TRUST ACCOUNTS  
(Proposed Modifications)***

**(a) Nature of Money or Property Entrusted to Attorney.**

(1) *Trust Account Required; Location of Trust Account; Commingling Prohibited.* A lawyer must hold in trust, separate from the lawyer's own property, funds and property of clients or third persons that are in a lawyer's possession in connection with a representation. All funds, including advances for fees, costs, and expenses, must be kept in a separate bank or savings and loan association account maintained in the state where the lawyer's office is situated or elsewhere with the consent of the client or third person and clearly labeled and designated as a trust account except:

(A) A lawyer may maintain funds belonging to the lawyer in the lawyer's trust account in an amount no more than is reasonably sufficient to pay bank charges relating to the trust account; and

(B) A lawyer may deposit the lawyer's own funds into trust to replenish a shortage in the lawyer's trust account. Any deposits by the lawyer to cover trust account shortages must be no more than the amount of the trust account shortage, but may be less than the amount of the shortage. The lawyer must notify the bar's lawyer regulation department immediately of the shortage in the lawyer's trust account, the cause of the shortage, and the amount of the replenishment of the trust account by the lawyer.

**Trust Account Plans:** Modifications to Rule 5-1.2(c) of the Florida Bar's Rules of Professional Conduct were adopted by the Florida Supreme Court on May 29, 2014, which require all law firms with more than one attorney to maintain written trust account plans for each of a law firm's trust accounts and to disseminate those plans to each lawyer within the firm (the Bar Rules amendments were originally adopted on March 27, 2014, but that opinion was withdrawn and revised on May 29, 2014). The amended rule became effective as of June 1, 2014.

Pursuant to the amended rule, the written plan must include the names of all persons who sign and review trust account checks, the persons who are responsible for the oversight and reconciliation of the trust account and the lawyers who are responsible for answering any questions lawyers in the firm may have regarding the trust account. Examples of plans have been promulgated by The Florida Bar and are included with these materials.

In addition to mandating the preparation and dissemination of trust account plans, the amended rule also provides that every lawyer is responsible for their own actions regarding trust account funds. Thus, any lawyer who has actual knowledge that the firm's trust account or trust accounting procedures are not in compliance with the rules may report the noncompliance to the managing partner or shareholder of the lawyer's firm, and, if the noncompliance is not corrected within a reasonable time, the lawyer must report the noncompliance to staff counsel for The Florida Bar.

## ***RULE 5-1.2 TRUST ACCOUNTING RECORDS AND PROCEDURES***

**(a) Applicability.** The provisions of these rules apply to all trust funds received or disbursed by members of The Florida Bar in the course of their professional practice of law as members of The Florida Bar except special trust funds received or disbursed by a lawyer as guardian, personal representative, receiver, or in a similar capacity such as trustee under a specific trust document where the trust funds are maintained in a segregated special trust account and not the general trust account and wherein this special trust position has been created, approved, or sanctioned by law or an order of a court that has authority or duty to issue orders pertaining to maintenance of such special trust account. These rules apply to matters in which a choice of laws analysis indicates that such matters are governed by the laws of Florida.

As set forth in this rule, “lawyer” denotes a person who is a member of The Florida Bar or otherwise authorized to practice in any court of the state of Florida. “Law firm” denotes a lawyer or lawyers in a private firm who handle client trust funds.

**(b) Minimum Trust Accounting Records.** Records may be maintained in their original format or stored in digital media as long as the copies include all data contained in the original documents and may be produced when required. The following are the minimum trust accounting records that must be maintained:

- (1) a separate bank or savings and loan association account or accounts in the name of the lawyer or law firm and clearly labeled and designated as a "trust account";
- (2) original or clearly legible copies of deposit slips if the copies include all data on the originals and, in the case of currency or coin, an additional cash receipts book, clearly identifying the date and source of all trust funds received and the client or matter for which the funds were received;
- (3) original canceled checks or clearly legible copies of original canceled checks for all funds disbursed from the trust account, all of which must:
  - (A) be numbered consecutively;
  - (B) include all endorsements and all other data and tracking information; and
  - (C) clearly identify the client or case by number or name in the memo area of the check;

(4) other documentary support for all disbursements and transfers from the trust account including records of all electronic transfers from client trust accounts, including:

(A) the name of the person authorizing the transfer;

(B) the name of the recipient;

(C) confirmation from the banking institution confirming the number of the trust account from which money is withdrawn; and

(D) the date and time the transfer was completed;

(5) original or clearly legible digital copies of all records regarding all wire transfers into or out of the trust account, which at a minimum must include the receiving and sending financial institutions' ABA routing numbers and names, and the receiving and sending account holder's name, address and account number. If the receiving financial institution processes through a correspondent or intermediary bank, then the records must include the ABA routing number and name for the intermediary bank. The wire transfer information must also include the name of the client or matter for which the funds were transferred or received, and the purpose of the wire transfer, (e.g., "payment on invoice 1234" or "John Doe closing").

(6) a separate cash receipts and disbursements journal, including columns for receipts, disbursements, transfers, and the account balance, and containing at least:

(A) the identification of the client or matter for which the funds were received, disbursed, or transferred;

(B) the date on which all trust funds were received, disbursed, or transferred;

(C) the check number for all disbursements; and

(D) the reason for which all trust funds were received, disbursed, or transferred;

(7) a separate file or ledger with an individual card or page for each client or matter, showing all individual receipts, disbursements, or transfers and any unexpended balance, and containing:

(A) the identification of the client or matter for which trust funds were received, disbursed, or transferred;

(B) the date on which all trust funds were received, disbursed, or transferred;

(C) the check number for all disbursements; and

(D) the reason for which all trust funds were received, disbursed, or transferred; and

(8) all bank or savings and loan association statements for all trust accounts.

**(c) Responsibility of Lawyers for Firm Trust Accounts and Reporting.**

(1) Every law firm with more than 1 lawyer must have a written plan in place for supervision and compliance with this rule for each of the firm's trust account(s), which plan must be disseminated to each lawyer in the firm. The written plan must include the name(s) of the lawyer(s) who sign trust account checks for the law firm, the name(s) of the lawyer(s) who are responsible for reconciliation of the law firm's trust account(s) monthly and annually and the name(s) of the lawyer(s) who are responsible for answering any questions that lawyers in the firm may have about the firm's trust account(s). This written plan must be updated and re-issued to each lawyer in the firm whenever there are material changes to the plan, such as a change in the lawyer(s) signing trust account checks and/or reconciliation of the firm's trust account(s).

(2) Every lawyer is responsible for that lawyer's own actions regarding trust account funds subject to the requirements of chapter 4 of these rules. Any lawyer who has actual knowledge that the firm's trust account(s) or trust accounting procedures are not in compliance with chapter 5 may report the noncompliance to the managing partner or shareholder of the lawyer's firm. If the noncompliance is not corrected within a reasonable time, the lawyer must report the noncompliance to staff counsel for the bar if required to do so pursuant to the reporting requirements of chapter 4.

**Sample Trust Account Plan  
Two-Lawyer Firms or Other Small Firms  
With Only One Office Location**

[The blanks should be filled in with the position titles of the non-lawyer staff or outside agents responsible for the functions described and the names of the lawyers responsible. This is an example only. Each firm's circumstances may differ.]

**SAMPLE LAW FIRM TRUST ACCOUNT PLAN FOR CALENDAR/FISCAL  
YEAR 20\_\_\_\_\_**

In compliance with Rule 5-1.2, Rules Regulating The Florida Bar, the (name of law firm)\_\_\_\_\_ law firm presents its trust account plan setting forth those persons responsible for maintaining and monitoring the firm's trust account(s).

**Checks:** Prepared by [for example] (name of bookkeeper, office manager or Partner A's assistant) and signed by (name of Partner B)\_\_\_\_\_ for checks up to \$XX,XXX (e.g., \$10,000). As a firm policy, checks for and over \$XX,XXX (e.g., \$10,000) must be signed by both (names of Partners A and B)\_\_\_\_\_. [*Limits on check amounts requiring an additional signature is not a requirement under the RRTFB, but is a best practice.*]

**Deposit Slips:** Prepared by [for example] (name of bookkeeper, office manager or Partner A's assistant) and reviewed by (name of Partner A or B)\_\_\_\_\_. (The names of the individual staff and partners [or members or shareholders] responsible for the various functions must be filled in the blanks).

**Electronic transfers:** Prepared by [for example] (name of bookkeeper or office manager or Partner A's assistant) and authorized by both (name of Partner A or B)\_\_\_\_\_ for electronic transfers up to \$XX,XXX (e.g., \$10,000). As a firm policy, electronic transfers for and over \$XX,XXX (e.g., \$10,000) must be authorized by both (names of Partners A and B)\_\_\_\_\_. [*Limits on wire transfer amounts requiring additional authorization is not a requirement under the RRTFB, but is a best practice.*]

**Monthly reconciliations:** Completed by [for example] (name of bookkeeper, office manager, CPA or Partner A's assistant)\_\_\_\_\_ and reviewed and approved by (name of Partner A)\_\_\_\_\_, who is a [full partner/shareholder/member] of the firm.

**Monthly client ledger card listing (The Monthly Comparison):** Completed by [for example] (name of bookkeeper, office manager or Partner A's assistant)\_\_\_\_\_ and reviewed and approved by (name of Partner A)\_\_\_\_\_, who is a [full partner/shareholder/member] of the firm.

**Annual client ledger card listing (The Annual Comparison):** Completed by (name of bookkeeper, office manager or Partner A's assistant) and reviewed by the independent CPA firm of (name of CPA Firm), which audits the firm's trust account annually. The annual client ledger card listing is reviewed and approved by both (names of Partners A and B). *(The external review by a CPA is not required under the RRTFB, but is a best practice.)*

**Annual review of the trust account(s):** The firm's trust account records and monthly reconciliations are reviewed by the independent CPA firm of (name of CPA firm), which audits the firm's trust account annually. The report of the annual review of the trust account is reviewed and approved by both (names of Partners A and B). *(Note: This step is not required under the RRTFB, but is considered a best practice.)*

**Questions relating to trust accounts:** Questions regarding the firm's trust account(s) should be addressed to (name of Partner A). If (name of Partner A) cannot answer the question(s), such question(s) will be answered by both (names of Partners A and B).

**Sample Trust Account Plan  
Multi-Office Firms With Branch Offices in Florida  
or Large Firms With Single Offices**

[The blanks should be filled in with the position titles of the non-lawyer staff or outside agents responsible for the functions described and the names of the lawyers responsible. This is an example only. Each firm's circumstances may differ.]

**SAMPLE LAW FIRM TRUST ACCOUNT PLAN FOR CALENDAR/FISCAL  
YEAR 20\_\_\_\_\_**

In compliance with Rule 5-1.2, Rules Regulating The Florida Bar, the (name of the law firm)\_\_\_\_\_ law firm presents its trust account plan setting forth those lawyers responsible for maintaining and monitoring the firm's trust account(s) in the (city)\_\_\_\_\_, Florida, branch office of the firm.

[Describe the trust account reconciliation process and trust account records storage protocol for the firm.] [For example] The firm is set up so that each office is responsible for its own trust accounting review and responsibility. However, a true copy of all trust account reconciliation records and supporting documentation materials are forwarded to the firm's main office in (location of the main office of the firm)\_\_\_\_\_.

**Checks:** Prepared by [for example] (name of office manager, controller, CPA or business manager)\_\_\_\_\_, and signed by (name of Partner A)\_\_\_\_\_, who is the firm or office managing partner, for checks up to \$XX,XXX (e.g., \$10,000). Pursuant to firm policy, checks for and over \$XX,XXX (e.g., \$10,000) must be signed by both (names of Partners A and B)\_\_\_\_\_, of the firm's board of directors. [The name of the individual partner(s) or owner(s) responsible for the various functions must be filled in the blanks]. [*Limits on check amounts requiring an additional signature is not a requirement under the RRTFB, but is a best practice.*]

**Deposit Slips:** Prepared by [for example] (name of office manager, controller, CPA or business manager) and reviewed by (name of Partner A)\_\_\_\_\_, who is the firm or office managing partner.

**Electronic transfers:** Prepared by (name of office manager, controller, CPA, business manager or Partner A's assistant)\_\_\_\_ and authorized by (name of Partner A)\_\_\_\_, who is the firm or office managing partner, for electronic transfers up to \$XX,XXX (e.g., \$10,000). Pursuant to firm policy, electronic transfers for and over \$XX,XXX (e.g., \$10,000) must be authorized by (names of Partners A and B)\_\_\_\_\_, of the firm's board of

directors. *[Limits on wire transfer amounts requiring an additional authorization is not a requirement under the RRTFB, but is a best practice.]*

**Monthly reconciliations:** Completed by [for example] (name of office manager, controller, CPA or business manager) and reviewed and approved by (name of Partner A), who is the firm or office managing partner.

**Monthly client ledger card listing (The Monthly Comparison):** Prepared by [for example] (name of office manager, controller, CPA, business manager or bookkeeper) and reviewed and approved by (name of Partner A), who is the firm or office managing partner.

**Annual client ledger card listing (The Annual Comparison):** Prepared by [for example] (name of office manager, controller, CPA, business manager or bookkeeper) and is reviewed by the independent CPA firm of (name of CPA firm), which audits the trust account client ledger cards annually. The annual client ledger card listing (The Annual Comparison) is reviewed and approved by the firm's board of directors, composed of (names of Partners A, B and C). *(Note: The step in this procedure requiring external review by a CPA firm is not required under the RRTFB, but is a best practice.)*

**Annual review of the trust account(s):** Prepared by [for example] (name of office manager, controller, CPA, business manager or bookkeeper) and reviewed by the independent CPA firm of (name of CPA firm), which audits the trust account(s) annually. The reconciliation is then reviewed and approved by the firm's board of directors, composed of (names of Partners A, B and C). *(Note: This step is not required under the RRTFB, but is considered a best practice.)*

**Questions relating to trust accounts:** Questions regarding the firm's trust account(s) should be addressed to (name of Partner A), who is the firm or office managing partner. If partner A cannot answer the question(s), such question(s) will be addressed to and answered by the firm's board of directors, composed of (names of Partners A, B and C).

\*\*\*\*\*

The foregoing sample trust account management plans are guides only, and should be adapted to suit the operating environment, style and staffing of each firm. However, the trust account plans must contain the information called for in the forms, except where otherwise noted.

If you have specific questions regarding this rule requirement, please call the Ethics Hotline at 800-235-8619 or 850-561-5780, or the Law Office Management Assistance Service (LOMAS) at 866-730-2020 or 850-561-5616.

## UPCOMING CLE PROGRAMS FOR 2014 -- 2015

### 34<sup>th</sup> Annual RPPTL Legislative and Case Law Update

August 1, 2014 Palm Beach  
August 1, 2014 Webcast (Manexa/InReach #317)

### Out of State Seminar – RPPTL Out of State Meeting

September 19, 2014 Chicago

### Real Property Litigation (DMT) (1784)

October 10 Tampa\*\*\*  
October 10 Webcast\*\*\* (Manexa/InReach, #317)

### Estate Tax & Asset Protection (DMT) (1796)

October 24 Ft. Lauderdale\*\*\*  
October 24 Webcast\*\*\* (Manexa/InReach, #317)

### RPPTL Probate Law (DMT) (1814)

December 05 Tampa\*\*\*  
December 05 Webcast\*\*\* (Manexa/InReach, #317)

### Real Property Certification Review Course (DMT) (1839)

February 6-7 Orlando\*\*\*  
February 6-7 Webcast\*\*\* (Manexa/InReach, #317)

### 8th Annual Construction Law Institute/ Construction Law Certification Review Course (DMT) (1849 & 1850)

March 12-14 Orlando \*\*\*

### Wills, Trusts & Estate Certification Review Course (DMT) (1855)

April 10-11 Orlando\*\*\*  
April 10-11 Webcasts\*\*\* (Manexa/InReach, 317)

### Condo & Planned Development Law (DMT) (1856)

April 10 Tampa\*\*\*  
April 10 Webcast\*\*\* (Manexa/InReach, #317)

### RPPTL Convention Seminar

June 5 Miami