

# BRING TO MEETING

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



## *Executive Council Meeting*

# AGENDA

Ritz-Carlton, Key Biscayne

Saturday, September 15, 2012  
10:00 a.m.

# BRING THIS AGENDA TO THE MEETING

Real Property, Probate and Trust Law Section  
Executive Council Meeting  
September 15, 2012  
Ritz-Carlton, Key Biscayne

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## AGENDA

- I. [Presiding](#) — *Wm. Fletcher Belcher, Chair*
- II. [Attendance](#) — *Deborah Packer Goodall, Secretary*
- III. [Minutes of Previous Meetings](#) — *Deborah Packer Goodall, Secretary*  
Motion to Approve the July 28, 2012 Executive Council Minutes. **pp. 1**
- IV. [Chair's Report](#) — *Wm. Fletcher Belcher*
  1. Motion of Fred Jones to adopt a Memorial Resolution honoring the dedicated service and accomplishments of William James Haley, who passed away on August 6, 2012. **pp. 31**
  2. 2012–13 RPPTL Executive Council Meeting Schedule. **pp. 33**
- V. [Chair-Elect's Report](#) — *Margaret Ann Rolando*  
2013 – 2014 RPPTL Executive Council Meeting Schedule. **pp. 34**
- VI. [Liaison with Board of Governors' Report](#) — *Andrew B. Sasso, Jr.*
- VII. [Treasurer's Report](#) — *Andrew M. O'Malley*  
2012-13 Monthly (July) Report Summary. **pp. 35**
- VIII. [At-Large Director's Report](#) — *Debra L. Boje, Director*
- IX. [Real Property Law Division](#) — *Michael J. Gelfand, Real Property Law Division Director*

### Action Items:

1. Real Estate Entities and Land Trusts Committee — *Wilhelmina Kightlinger, Chair*  
  
Motion to adopt as a proposed legislative position amendments to the 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 estoppel provisions separately from the land trust statute; to codify other Florida land trust principles and practices; to find that the position is in the Section's purview; and to expend funds in support of the position. Land Trust Leg Form. **pp. 37**. Land Trust Bill Text. **pp. 39**. Land Trust White Paper. **pp. 57**. Land Trust Bill Text Redline. **pp. 67**

2. Condominium & Planned Development Committee — *Steven H. Mezer, Chair*  
 Motion to support the establishment of a Condominium and Planned Development Law Sub-Specialty Certification under the auspices of the Real Estate Law Certification and amendments to the Rules Regulating the Florida Bar relating to Certification, and to find that the position is in the Section's purview. Cdm. Cert. Rules. **pp. 84.** Cdm. Cert. App. **pp. 88.** Cdm. Cert. App. Ans. **pp. 89.**
  
3. Condominium & Planned Development Committee — *Steven H. Mezer, Chair*  
 Motion to adopt as a proposed legislative position supporting the replacement of dates triggering certain developer obligations relating to the creation of a condominium; to clarify when a condominium unit is created; to extend the period for adding phases to a condominium; to amend the Condominium Act; to find that the position is in the Section's purview; and to expend funds in support of the position. Cdm. Act Leg. Form. **pp. 92.** Cdm. Act Bill Text. **pp. 95.** Cdm. Act White Paper. **pp. 104.**
  
4. Real Property Litigation Committee — *Martin S. Awerbach, Chair*  
 Motion to adopt as a proposed legislative position supporting the creation of requirements for electronic publication and addressing due process concerns, including amendment to F.S. s. 50.0211, s. 50.041 and s. 50.061; to find that the position is in the Section's purview; and to expend funds in support of the position. Elect. Pub. Leg. Form. **pp. 110.** Elect. Pub. Bill Text. **pp. 112.** Elect. Pub. White Paper. **pp. 115.**
  
5. Real Property Litigation Committee — *Martin S. Awerbach, Chair*  
 Motion to adopt as a proposed legislative position supporting procedures to preserve due process by providing courts with authority to appoint attorney, administrator and guardian ad litem to serve on behalf of known or unknown persons having claims by, though, under or against a person who is deceased or whose status is unknown; to confirm the sufficiency of prior proceedings in which ad litem have been appointed, including amendment of F.S. s. 49.021; to find that the position is in the Section's purview; and to expend funds in support of the position. Ad Litem Leg. Form. **pp. 117.** Ad Litem Bill Text. **pp. 119.** Ad Litem White Paper. **pp. 121.**
  
6. *Ad Hoc* Foreclosure Reform Committee — *Jerry Aron, Chair*  
 Motion to adopt as a proposed legislative position supporting foreclosure reform to expedite and streamline the judicial foreclosure process (especially as to unopposed or abandoned properties) while preserving and protecting fundamental fairness and the property rights and due process rights of the holders of interests in or affecting Florida real property; to find that the position is in the Section's purview; and to expend funds in support of the position. Fclr. Leg. Form. **pp. 123.** Fclr. Bill Text. **pp. 126.** Fclr. White Paper. **pp. 143.**

**Information Item:**

1. Residential Real Estate and Industry Liaison — *Frederick W. Jones, Chair*  
 Report on revisions to the FAR/BAR Residential Real Estate Contract, Condominium Rider to include non-developer seller disclosure (in conspicuous text per F.S. s. 718.103(14)) that "condominium documents" are available as required by s. 718.503(2)(c). FAR BAR Cdm. Rider. **pp. 152.**

**X. Probate and Trust Law Division** — *Michael A. Dribin, Probate & Trust Law Division Director*

**Action Items:**

1. Guardianship and Power of Attorney Committee – *Sean W. Kelley, Chair*

To adopt as proposed legislative positions the following: (a) amending F.S. §744.3025(1), dealing generally with the process of approval by the court of a settlement in favor of a minor and the appointment of a guardian ad litem to represent the interests of the minor, to provide that the court may appoint a guardian ad litem if the court believes a guardian ad litem is necessary to protect the interests of the minor; (b) creating new F.S. §744.387(5), dealing generally with settlement of claims by or against the guardian of either a minor or adult incapacitated person, to provide that all court records which relate to the settlement of a claim, including any report of the guardian ad litem, shall generally be confidential; and, (c) to amend F.S. §744.3701, dealing generally with inspection of reports, to provide that pleadings seeking court approval of a settlement on behalf of a ward or minor may only be inspected under limited circumstances; and finding that such legislative positions are within the purview of the RPPTL Section.\* **pp. 155.**
2. Guardianship and Power of Attorney Committee – *Sean W. Kelley, Chair*

To adopt as proposed legislative positions the following: (a) amending F.S. §744.108(8) to make it clear that the determination of reasonable fees for any attorney who has rendered services to the ward or for any attorney for the alleged incapacitated person appointed by the Court is part of the guardianship administration process; and, (b) to create F.S. §744.108(9) to provide that, in the process of determining reasonable compensation for a guardian or reasonable compensation for an attorney who has rendered services to the ward or who was appointed by the Court to represent the alleged incapacitated person, any party may provide expert testimony after notice to the other parties and, if expert testimony is offered, a reasonable expert witness fee shall be awarded by the court and paid from the assets of the guardianship estate; and finding that the proposed legislative positions are within the purview of the RPPTL Section.\* **pp. 163.**
3. Guardianship and Power of Attorney Committee – *Sean W. Kelley, Chair*

To adopt as a proposed legislative position amending F.S. §744.331(7) to allow members of the examining committee appointed by the Court in an incapacity proceeding to be paid by the state as court appointed experts pursuant to F.S. § 29.004(3), under those circumstances where the petition for incapacity is dismissed by the court and no guardian is appointed and, finding that the proposed legislative position is within the purview of the RPPTL Section.\* **pp. 168.**
4. IRA, Employee Benefits and Insurance Committee – *Linda S. Griffin and L. Howard Payne, Co-Chairs*

To adopt as a proposed legislative position amending F.S. §732.703 to correct a statutory reference contained therein and to include the defined term “governing instrument” rather than the language “instrument directing the disposition of the asset at death”, in order to be consistent with other language of the statute and, finding that the proposed legislative position is within the purview of the RPPTL Section.\* **pp. 174.**

5. Trust Law Committee – *Shane Kelley, Chair*

To adopt as a proposed legislative position amending F.S. §736.0103 by adding new definitional subsections (22) (“distributee”) and (23) (“permissible distributee”), so as to eliminate any confusion, particularly in the context of trust accountings, with similar definitions appearing in the Probate Code and, finding that the proposed legislative positions are within the purview of the RPPTL Section.\* **pp. 179.**

**\*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 Item:**

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

Report on input sought from Florida Bar regarding legislative position approved by the Executive Council providing that certain gifts by clients to their lawyers are void.

**XI. General Standing Committees** — *Margaret “Peggy” Rolando, Director and Chair-Elect*

**Action Items:**

1. Ad Hoc Trust Account Committee – *Roland “Chip” Waller, Chair*

Motion to consider whether the Section shall submit recommendations to The Florida Bar and Florida Supreme Court for safeguards when non-lawyers sign trust account checks.

2. Ad Hoc Trust Account Committee – *Roland “Chip” Waller, Chair*

In the event the Executive Council determines to submit Section recommendations for safeguards when non-lawyers sign trust account checks to The Florida Bar and Florida Supreme Court, the Committee moves for the approval of the Committee recommendations set forth in its attached Report. **pp. 184.**

3. Budget Committee – *Andrew M. O’Malley, Chair*

Motion to approve RPPTL Section 2013-14 Budget. **pp. 195.**

**Information Items:**

1. Ad Hoc Trust Account Committee – *Roland “Chip” Waller, Chair (Jerry Aron, Alan Fields and Bill Sklar, Subcommittee members)*

The Section submitted a letter to The Florida Bar’s Professional Ethics Committee requesting an Ethics Opinion regarding the requirements of F.S. s. 626.8473(8) for a separate trust account for transactions when an attorney serves as a title or real estate settlement agent, discussing the issues raised by the legislation and suggesting solutions. **pp. 200.**

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

A. On August 22, 2012, the Florida Supreme Court granted the Section’s motion for leave to file an amicus brief in the case of *James Michael Aldrich v. Laurie Basile, et al.* (SC11-2147).

B. The Amicus Coordination Committee previously filed an amicus brief on behalf of the Section in the Florida Supreme Court in *North Carillon, LLC v. CRC 603, LLC, et al.* (Case No. SC 12-75). On August 14, 2012, the Court granted the Section’s motion to strike the answer brief filed by Appellee, CRC 603, LLC, attacking the Section’s amicus brief. The Section’s position in the amicus brief is that the Legislature should not be precluded from giving retrospective application to legislation clarifying earlier legislation simply because time has passed between the enactment of the earlier enactment and the clarifying legislation.

3. CLE Seminar Coordination Committee – *Robert Freedman, Chair*, and Florida Electronic Filing & Service Committee – *Patricia P. Jones, Rohan Kelley and Laird A. Lile, Co-Chairs*

On August 28, 2012, the Section presented a free webinar entitled “What RPPTL Lawyers Need To Know About E-Filing and E-Service.” The webinar, presented by Rohan Kelley and Laird Lile (past chairs of the RPPTL Section), primarily focused on the new e-mail service requirements which became effective on September 1st. The webinar was an overwhelming success – in fact, two live webinars had to be presented, because over 1,600(!) separate individuals registered for the program and the GoToWebinar software would only permit 1,000 attendees. There were 1,307 separate attendees who connected to the webinar – the number of attendees is actually higher, as numerous law firms and court clerks had multiple individuals attending although only one person actually registered. The RPPTL Section followed the webinar by posting the slide presentation as well as a replay of the webinar for on-demand viewing to the Section website ([www.rpptl.org](http://www.rpptl.org)). This is a great example of providing valuable services to Section members in a timely fashion, with approximately 15% of Section members having availed themselves of these important materials.

5. Representatives of Out-of-State Members – *Michael P. Stafford and John E. Fitzgerald, Jr.*

Letter from Donald Workman, President of the Out-of-State Division of The Florida Bar, seeking to establish a network of out of state members of The Florida Bar and to develop and maintain professional relationships between in-state members and out-of-state members. **pp. 204.**

## **XII. General Standing Committee Reports** – *Margaret “Peggy” Rolando, Director and Chair-Elect*

1. **Ad Hoc LLC Monitoring** – Lauren Y. Detzel and Ed Burt Bruton, Co-Chairs
2. **Ad Hoc Trust Account** – Roland “Chip” Waller, Chair
3. **Alternative Dispute Resolution (ADR)** – Deborah Bovarnick Mastin and David R. Carlisle, Co-Chairs
4. **Amicus Coordination** – Robert W. Goldman, John W. Little, III, Kenneth B. Bell and Gerald B. Cope, Jr., Co-Chairs

5. **Budget** – Andrew M. O'Malley, Chair; Pamela O. Price and Daniel L. DeCubellis, Co-Vice Chairs
6. **CLE Seminar Coordination** – Robert Freedman, Chair; Laura Sundberg and Sarah Butters, Co-Vice Chairs (Probate & Trust); Brian Leebrick and Jennifer Tobin, Co-Vice Chairs (Real Property) **pp. 206.**
7. **Convention Coordination (2013)** – S. Katherine Frazier, Chair; Angela Adams, Tae Bronner and Debra Boje, Co-Vice Chairs
8. **Fellows and Mentoring** – Marsha G. Madorsky, Co-Chair (Fellowship), Guy Emerich, Co-Chair (Mentoring); Brenda Ezell and Sharaine Sibblies, Co-Vice Chairs.
9. **Florida Electronic Filing & Service** – Patricia P. Jones, Rohan Kelley and Laird A. Lile, Co-Chairs
10. **Homestead Issues Study** – Shane Kelley, Co-Chair (Probate & Trust); Deborah Boyd, Co-Chair (Real Property)
11. **Legislation** – Barry F. Spivey, Co-Chair (Probate & Trust), Robert Swaine, Co-Chair (Real Property); William T. Hennessey, III, Co-Vice Chair (Probate & Trust), Alan Fields, Co-Vice Chair (Real Property); Susan K. Spurgeon and Michael A. Bedke, Legislative Reporters
12. **Legislative Update (2013)** – Stuart H. Altman, Chair; Charles I. Nash, R. James Robbins, Sharaine Sibblies and Stacy Kalmanson, Co-Vice Chairs
13. **Liaison with:**
  - A. **American Bar Association (ABA)** – Edward F. Koren and Julius J. Zschau
  - B. **Board of Legal Specialization and Education (BLSE)** – Michael C. Sasso, W. Theodore Conner, David M. Silberstein and Deborah L. Russell
  - C. **Clerks of Circuit Court** – Laird A. Lile
  - D. **FLEA / FLSSI** – David C. Brennan, John Arthur Jones and Roland Chip Waller
  - E. **Florida Bankers Association** – Stewart Andrew Marshall, III, and Mark Thomas Middlebrook
  - F. **Judiciary** – Judge Jack St. Arnold, 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, Judge Lawrence A. Schwartz, Judge Richard 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. **The Florida Bar** – Gwynne A. Young
  - I. **TFB Board of Governors** – Andrew Sasso
  - J. **TFB Business Law Section** – Marsha G. Rydberg
  - K. **TFB CLE Committee** – Robert Freedman
  - L. **TFB Council of Sections** – Wm. Fletcher Belcher and Margaret A. Rolando
14. **Long-Range Planning** – Margaret A. Rolando, Chair
15. **Meetings Planning** – George Meyer, Chair
16. **Member Communications and Information Technology** – Nicole C. Kibert, Chair; S. Dresden Brunner and William Parady, Co-Vice Chairs

17. **Membership, Diversity and Law School Liaison** – Michael A. Bedke, Chair; Lynwood T. Arnold, Jr., Co-Vice Chair (Diversity); Stacy Kalmanson, Co-Vice Chair (Law Schools), Phillip A. Baumann, Co-Vice Chair (Special Projects), Navin Pasem, Co-Vice Chair (Diversity); Benjamin B. Bush, Frederick R. Dudley, Jason M. Ellison, Brenda B. Ezell, Jennifer Jones and Mary Karr, Law School Liaisons.
18. **Model and Uniform Acts** – Bruce M. Stone and S. Katherine Frazier, Co-Chairs
19. **Pro Bono** – Adele Stone and Tasha K. Pepper-Dickinson, Co-Chairs
20. **Professionalism and Ethics** – Lee A. Weintraub, Chair; Paul E. Roman and Lawrence J. Miller, Co-Vice Chairs
21. **Publications:**
  - A. **ActionLine** – Silvia Rojas, Chair; Scott P. Pence, Shari Ben Moussa and Navin Pasem, Co-Vice Chairs (Real Property); Amber Jade Johnson, George Karibjanian and Hung V. Nguyen, Co-Vice Chairs (Probate & Trust)
  - B. **Florida Bar Journal** - Kristen M. Lynch, Co-Chair (Probate & Trust); David Brittain, Co-Chair (Real Property)
22. **Sponsor Coordination** – Kristen M. Lynch, Chair; Wilhelmina Kightlinger, Aniella Gonzalez, J. Michael Swaine, Adele I. Stone, Marilyn M. Polson, and W. Cary Wright, Co-Vice Chairs
23. **Strategic Planning** – Margaret A. Rolando, Chair

**XIII. [Real Property Law Division Reports](#)** — *Michael J. Gelfand, Director*

1. **Ad Hoc Foreclosure Reform** – Jerry Aron, Chair; Mark Brown, Burt Bruton, Alan Fields, and Jeffrey Sauer, Co-Vice Chairs.
2. **Commercial Real Estate** – Art Menor, Chair; Burt Bruton and Jim Robbins, Co-Vice Chairs.
3. **Condominium and Planned Development** – Steven H. Mezer, Chair; Jane Cornett and Christopher Davies, Co-Vice-Chairs.
4. **Construction Law** – Arnold D. Tritt, Chair; Lisa Colon Heron, Scott Pence and Hardy Roberts, Co-Vice Chairs.
5. **Construction Law Certification Review Course** – Lee Weintraub, Chair; Bruce Alexander, Deborah Mastin and Bryan Rendzio, and Co-Vice Chairs.
6. **Construction Law Institute** – W. Cary Wright, Chair; Reese Henderson and Sanjay Kurian, Co-Vice Chairs.
7. **Governmental Regulation** – Anne Pollack, Chair; Arlene Udick and Vinette Godelia, Co-Vice Chairs.
8. **Landlord and Tenant** – Neil Shoter, Chair; Rick Eckhard and Lloyd Granet, Co-Vice Chairs.

9. **Legal Opinions** – Kip Thornton, Chair; Dan DeCubellis, Vice-Chair.
10. **Liaisons with FLTA** – Norwood Gay and Alan McCall, Co-Chairs; Alan Fields, James C. Russick and Barry Scholnick, Co-Vice Chairs.
11. **Property & Liability Insurance/Suretyship** – W. Cary Wright and Fred Dudley, Co-Chairs.
12. **Real Estate Certification Review Course** – Ted Conner, Chair; Raul Ballaga and Jennifer Tobin, Co-Vice Chairs.
13. **Real Estate Entities and Land Trusts** – Wilhelmina Kightlinger, Chair; Burt Bruton, Vice-Chair.
14. **Real Property Finance & Lending** – Dave R. Brittain, Chair; Deborah Boyd, Brenda Ezell and Bill Sklar, Co-Vice Chairs.
15. **Real Property Forms** – Homer Duval, III, Chair; Arthur J. Menor and Silvia Rojas, Co-Vice Chairs.
16. **Real Property Litigation** – Marty Awerbach, Chair; Manny Farach and Susan Spurgeon, Co-Vice Chairs.
17. **Real Property Problems Study** – S. Katherine Frazier, Chair; Mark A. Brown, Patricia J. Hancock and Salome Zikakis, Co-Vice Chairs.
18. **Residential Real Estate and Industry Liaison** – Frederick W. Jones, Chair; Denise Hutson, Vice Chair.
19. **Title Insurance and Title Insurance Liaison** – Kristopher Fernandez, Chair; Raul Ballaga and Dan DeCubellis, Co-Vice Chairs.
20. **Title Issues and Standards** – Christopher W. Smart, Chair; Robert M. Graham, Patricia P. Jones and Karla J. Staker, Co-Vice Chairs.

**XIV. Probate and Trust Law Division Committee Reports** – *Michael A. Dribin, Director*

1. **Ad Hoc Study Committee on Creditors' Rights to Non-Exempt, Non-Probate Assets** – Angela M. Adams, Chair
2. **Ad Hoc Guardianship Law Revision Committee** – David Brennan, Chair; Sancha Brennan Whynot, Sean W. Kelley and Charles F. Robinson, Co-Vice Chairs
3. **Ad Hoc Study Committee on Jurisdiction and Service of Process** – Barry F. Spivey, Chair; Sean W. Kelley, Vice Chair
4. **Ad Hoc Study Committee on Estate Planning Conflict of Interest** - William T. Hennessey III, Chair
5. **Ad Hoc Committee on Personal Representative Issues** – Jack A. Falk, Jr., Chair
6. **Asset Protection** – Brian C. Sparks, Chair; Marsha G. Madorsky, Vice-Chair

7. **Attorney/Trust Officer Liaison Conference** – Jack A. Falk, Jr., Chair; Mary Biggs Knauer, Corporate Fiduciary Chair; Patrick Lannon, Deborah Russell and Laura Sundberg, Co-Vice Chairs
8. **Digital Assets and Information Study Committee** – Eric Virgil, Chair; Travis Hayes and S. Dresden Brunner, Co-Vice Chairs
9. **Estate and Trust Tax Planning** – Elaine M. Bucher, Chair; David Akins, Tasha Pepper-Dickinson and William Lane, Co-Vice Chairs
10. **Guardianship and Power of Attorney** – Sean W. Kelley, Chair; Seth A. Marmor, Tattiana Brenes-Stahl, Cynthia Fallon and David Brennan, Co-Vice Chairs
11. **IRA, Insurance and Employee Benefits** – Linda Suzzanne Griffin and L. Howard Payne, Co-Chairs; Anne Buzby-Walt and Lester Law, Co-Vice Chairs
12. **Liaisons with Elder Law Section** – Charles F. Robinson, Marjorie Wolasky and Sam W. Boone, Jr.
13. **Liaisons with Tax Section** – Lauren Y. Detzel, William R. Lane, Jr., David Pratt, Brian C. Sparks, Donald R. Tescher and Harris L. Bonnette, Jr.
14. **Principal and Income** – Edward F. Koren, Chair; Pamela Price, Vice Chair
15. **Probate and Trust Litigation** – Thomas M. Karr, Chair; Jon Scuderi, J. Richard Caskey and Jerry Wells, Co-Vice Chairs
16. **Probate Law and Procedure** – Tae Kelley Bronner, Chair; John C. Moran, Paul Roman and James George, Co-Vice Chairs
17. **Trust Law** – Shane Kelley, Chair; Angela M. Adams and Tami F. Conetta, Co-Vice Chairs
18. **Wills, Trusts and Estates Certification Review Course** – Richard R. Gans, Chair; Jeffrey S. Goethe, Laura Sundberg and Jerome L. Wolf, Co-Vice Chairs

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



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

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*Probate and Trust Litigation Committee*

**MINUTES OF THE FLORIDA BAR'S  
REAL PROPERTY, PROBATE AND TRUST LAW SECTION**

**EXECUTIVE COUNCIL MEETING**

**Saturday July 28, 2012  
The Breakers Hotel, Palm Beach, Florida**

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**I. Call to Order – *William Fletcher Belcher, Chair.***

Mr. William Fletcher Belcher called the meeting to order at 10:07 a.m., Saturday July 28, 2012, in the Venetian Ballroom of The Breakers Hotel, Palm Beach, Florida.

**II. Attendance – *Deborah Packer Goodall, Secretary.***

Deborah Goodall 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 – *Deborah Packer Goodall, Secretary.***

Ms. Goodall moved:

**To approve the Minutes of the Annual Members' and Election Meeting occurring on June 1, 2012 and the Executive Council Meeting occurring on June 2, 2012, both in St. Pete Beach, with the correction to change any references to the date of the meeting from May to June.**

The Motion was approved unanimously.

**IV. Chair's Report – *William Fletcher Belcher, Chair***

Mr. Belcher welcomed Council members and Section members. He asked Marsha Madorsky to introduce the four new fellows. [*Secretary's note - the contact information for the four new fellows are listed in the Agenda Materials<sup>1</sup> and reproduced below along with each Fellow's substantive law designation.*] Mr. Belcher also asked the twenty new Executive Council members to come forward to be recognized.

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<sup>1</sup> References in these minutes to Agenda pages are to the Executive Council Meeting Agenda, including the supplemental materials, posted at [www.RPPTL.org](http://www.RPPTL.org)

<p>Noelle M. Melanson 1412 Royal Palm Sq., Blvd, # 103 Ft. Myers, FL 33919 Tel: 239-689-8588 Email: <a href="mailto:Noelle@melansonlaw.com">Noelle@melansonlaw.com</a></p> <p>Probate Fellow</p>	<p>Brian W. Hoffman, Esq. Carver, Darden, Koretzky, Tessier, Finn, Blossman &amp; Areaux, LLC 801 West Romana Street, Suite A Pensacola, FL 32502 Tel: 850-266-2312 Email: <a href="mailto:bhoffman@carverdarden.com">bhoffman@carverdarden.com</a></p> <p>Real Estate Fellow</p>
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Mr. Belcher reported on a letter received from the Florida Association of Court Clerks and Comptrollers advising that Ken Burke has been appointed as a Liaison to our Section and he will be invited to attend our meetings for the rest of the year with what will hopefully yield a mutual benefit to the Clerks of Court and to our Section as we work through the issues with e filing.

Mr. Belcher recognized and thanked all of our Sponsors including our General Sponsor, Attorney's Title Fund Services, as well as all of our other Sponsors, Friends of the Section and Committee Sponsors. Mr. Belcher acknowledged our Executive Council Lunch sponsors, US Trust and the Florida Bar Foundation.

Mr. Belcher thanked Deborah Russell for her efforts as Chair of the CLE Seminar on Power of Attorney Drafting held Wednesday, July 25<sup>th</sup>, 2012. Mr. Belcher recognized the Legislative Update Committee and especially thanked Bob Swaine for his hard work in the role as Committee Chair, along with the other committee members, Stuart Altman, Charlie Nash, Jim Robbins, and Sharaine Sibbles, for their efforts in producing the very well attended 32<sup>nd</sup> Annual Legislative Update held on Friday, July 27<sup>th</sup>, 2012.

Mr. Belcher introduced Greg Coleman, a member of the Board of Governors, and a guest at our meeting. Mr. Coleman is exploring the possibility of seeking the nomination for President of the Florida Bar. Mr. Coleman spoke briefly and congratulated the Section for its strong, structured and cohesive nature.

Mr. Belcher advised the Council of the need for the Executive Committee to act in between Executive Council meetings with regard to the Section's Amicus Committee. The Executive Committee voted to to authorize the Amicus Committee to file the normal motions to proceed with the filing of an Amicus brief with regard to the Basile v. Aldrich case. Mr. Belcher advised that more will be heard regarding this matter in subsequent reports today.

V. **Chair-Elect's Report** – *Margaret Rolando, Chair-Elect.*

Ms. Rolando announced that the Executive Council meetings for the following year are listed in the Agenda, page 31, and she thanked Steven Goodall for agreeing to assist her. Ms. Rolando also recognized Dresden Brunner for her assistance with the new directory and with gathering recent photos. Ms. Rolando asked Executive Council members to please provide updated photos and information for the directory.

VI. **Liaison with Board of Governors Report** – *Andy Sasso, Board of Governors Liaison.*

Mr. Belcher introduced our new Liaison from the Board of Governors, Andy Sasso. Mr. Sasso reported on a committee chaired by Greg Coleman to review a proposal by the Florida Supreme Court Commission on Professionalism that would dramatically change the manner in which issues concerning professionalism are addressed in Florida. Currently, each circuit has a procedure in place to deal with issues of professionalism that is typically confidential and more informal. The new proposal would be to change the procedures dramatically and have complaints of professionalism matters treated more in the nature of a grievance that could possibly be reported directly to the Florida Bar and referred to a grievance committee.

Mr. Sasso also reported that the Board of Governors approved the Section's request to file an amicus brief regarding whether the mere passage of time should automatically disqualify clarifying legislation from having its intended retrospective effect.

The Board of Governors also approved changes to the Florida Probate Rules Committee's 3-year cycle amendments, including several corrections and a change to Rule 5.681 - Restoration of Rights of Persons with Developmental Disabilities.

The Board of Governors has also approved the procedural aspects of the changes to Florida Statute Section 90.5021 concerning the attorney-client privilege of a fiduciary. Mr. Sasso reported that there was very little debate or controversy on this issue.

VII. **President's Report** – *Gwynne Young, President of the Florida Bar*

President Gwynne Young reported that she was pleased to join us for our meeting having just concluded a meeting of the Board of Governors in Miami Beach. Ms. Young reported on The Florida Bar Legislative positions that sunset every two years including three Bar positions that garnered much discussion at the recent meeting. The first relates to a longstanding position to oppose any changes to the Supreme Court Rulemaking authority. The second relates to a Bar position that does not oppose the Senate confirmation of Judges but limits the time that the process can take. The third relates to a compromise position addressing confidentiality of JQC

hearings. Although the decision on renewing these provisions does not usually occur until December, these issues came up at the recent meeting because of proposed Constitutional amendment #5. The proposed Constitutional amendment broadens the access of the House of Representatives to Judicial Qualification Commission records, provides for Senate confirmation of Supreme Court justices within a specific time frame of gubernatorial appointment, and allows the Legislature to revoke a Supreme Court-approved procedural rule by simple majority vote of both chambers instead of the current two-thirds vote. The Board of Governors referred the matter to the Legislation Committee chaired by Mr. Laird Lile for consideration. Ms. Young reported on the difficult balance involved and asked members to convey thoughts regarding these still open issues to her or to Mr. Lile or to Sandra Diamond who is also a member of the Legislation Committee. Ms. Young asked Legislative Consultant, Peter Dunbar, to briefly comment. Mr. Dunbar discussed the history of the Legislative positions and invited anyone with questions to speak to him. Ms. Young expressed thanks to the Section for stepping up to help The Florida Bar Foundation funding efforts.

Ms. Young remarked on the Merit Retention Education program and asked for volunteers to become trained speakers and for recommendations of groups of people that would benefit from inviting a speaker on the topic.

**VIII. Treasurer's Report** – *Andrew O'Malley, Treasurer.*

Mr. Andrew O'Malley noted that the Treasurer's report is set forth in the Agenda, starting at page 32. He advised council members to check the hotel bills carefully to ensure the proper Florida Bar Rate was charged. Mr. O'Malley commented that the figures in the Agenda are tentative unaudited figures and do not include figures for the Attorney Trust Officer Liaison Conference. Mr. O'Malley thanked Yvonne Sherron for pulling together the figures from the Florida Bar so quickly. Mr. O'Malley reported that the budget corresponds roughly to what was anticipated although the deficit is slightly more than was projected and the Budget committee will be meeting to review these figures immediately after the conclusion of the Executive Council Meeting. He suggested that each member thank the Section's sponsors for their contributions to the Section. Mr. O'Malley asked any Committee Chairs to alert him or the appropriate Division Director if there are any unusual or extraordinary expenses or revenues that are anticipated for the 2013 - 2014 year.

**IX. At Large Members' Report** - *Debra Boje, At Large Members' Director.*

Ms. Debra Boje reported on the continued efforts of the At Large Members (ALMs) to reach out to all of our Section members by circulating the Minutes of the Round Table Meetings to all of the members. Ms. Boje thanked those individuals who are taking the minutes at the Round Table. Ms. Boje reported that the ALMs are working closely with the Membership and Diversity Committee and they are seeking input on ideas or articles from Section Members to assist the Publications Committee. Ms. Boje asked that if anyone has any ideas for the ALMs, to please let her know.

**X. Probate and Trust Law Division** – *Michael A. Dribin, Probate and Trust Law Division Director.*

Mr. Michael A. Dribin introduced the following items:

**Action Items.**

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

Mr. Dribin introduced William Hennessey who gave the report for Barry Spivey who was unable to remain at the meeting. The materials came through after the original Agenda materials and are reported in the Supplemental Agenda Materials numbered 1-S through 7-S.

Mr. Hennessey reported on the history of the committee's task to review the various statutes that include issues regarding jurisdiction, venue and service of process.

Mr. Hennessey then moved:

**To adopt as proposed a legislative position providing for the substantial rewording of F.S.§736.0202, creating new F.S.§736.02023 and new F.S.§736.02025 and repealing F.S.§736.0205 and F.S.§736.0807(4), to revise provisions of the Florida Trust Code governing jurisdiction over nonresident trustees and beneficiaries in trust cases, to add a long-arm statute specifying acts subjecting nonresidents to personal jurisdiction in cases involving trusts, and to provide for service of process in both *in rem* and *quasi in rem* cases involving trusts. See pages 1-S through 7-S.**

The motion passed unanimously.

There was a motion: **To find that the position is within the purview of the section.**  
The motion passed unanimously.

There was a motion: **For the Section to expend funds in support of the position.**  
The motion passed unanimously.

2. Guardianship and Power of Attorney Committee, *Sean W. Kelley, Chair*

Mr. Dribin explained that this is an action item from the former Power of Attorney Committee that has now been rolled into the newly named Guardianship and Power of Attorney Committee. Mr. Dribin introduced Angela Adams who agreed to give the report for Ms. Conetta who was unable to be at the meeting because of an illness. Ms. Adams reviewed the specific provisions of the bill found in the Agenda on pages 36 - 45 and in the Supplemental Materials on page 8-S through 23-S. Discussion was had regarding a question on when a Power of Attorney could be required to be recorded and whether a revocation of a power of attorney also would need to be recorded. There was also a question regarding execution requirements for out of state powers of attorney. After discussion, Mr. Dribin asked the interested parties to step outside and see if a solution could be crafted. (*Secretary's note - Mr. Dribin later reported that the Proposal*

*has been withdrawn from consideration today and will likely be presented in a revised form in Key Biscayne.)*

**Information Item.**

Mr. Dribin asked Sean W. Kelley on behalf of the Guardianship and Power of Attorney Committee to report on the status of the application filed on behalf of the Section with the Supreme Court of Florida to determine whether Administrative Order No. **2011-02**, issued by the Chief Judge of the Ninth Judicial Circuit of Florida regarding Professional Guardians, is a court rule or a local rule, rather than an administrative order. Mr. Kelley gave a brief history of the process and reported that on July 9, 2012, the Florida Supreme Court Local Rules Advisory Committee chaired by Judge J. Preston Silvernail sent a letter to the Clerk of the Supreme Court. A copy of the Letter is included in the Agenda at pages 46 - 47. The Florida Supreme Court Local Rules Advisory Committee commended the court for attempting to address these issues but ultimately concluded that the Administrative Order was more in the nature of a court rule or a local rule and not in the nature of an administrative order. Although Mr. Kelley is unsure about what the next step will be, he expects that the Supreme Court will issue a ruling and he advised that he will continue to provide updates. Mr. Dribin thanked Mr. Kelley and Sancha Brennan Whynot and Robert Goldman for their efforts on this project.

**XI. Real Property Law Division – *Michael J. Gelfand, Real Property Law Division***

Mr. Gelfand introduced the following:

**Action Items.**

1. Real Property Problems Study Committee -- *S. Katherine Frazier, Chair*

Ms. Frazier introduced this matter found on page 49 of the Agenda. She moved:

**To adopt as a proposed legislative position supporting the expansion of execution curative provisions to cover instruments, other than deeds or wills which convey a fee simple interest in real estate, including an amendment to F.S.§ 95.231 to find that the position is in the Section’s purview, and to expend funds in support of the position.**

The motion was approved unanimously.

**Information Item.**

1. Real Estate Entities and Land Trusts Committee, *Wilhelmina Kightlinger, Chair*

Mr. Gelfand introduced Ms. Kightlinger who gave a detailed report on the proposed amendments to the Florida Land Trust Act to define land trusts more clearly from other express trusts, to revise and relocate statutory title estoppel provisions separately from the land trust statute, and to codify other Florida land trust principles and practices, including amendments to

§§689.071, 689.073, 689.071, and 736.0102, to be effective upon becoming law. Ms. Kightlinger reported that this has been a multi faceted process with representatives from a wide array of committees on both the Trust Law side and the Real Property Side. See Agenda pages 54 - 103. Ms. Kightlinger stated that the proposed statutes are in the materials. Mr. Gelfand encouraged everyone to read the materials and to provide comments and questions to Ms. Kightlinger in advance of the Key Biscayne meeting.

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

Mr. Gelfand introduced Mr. Mezer who reported on the status of a proposal to establish Condominium and Planned Development Law as either a sub-specialty of the Real Estate Board Certification or as a freestanding Board Certification. Mr. Mezer asked for comments before the Key Biscayne meetings. See Agenda pages 108 - 112.

3. Property & Liability Insurance/Suretyship Committee, *W. Cary Wright, Chair*

Mr. Fred Dudley reported that the National Flood Insurance Program (NFIP) has now been extended through September 30, 2017. Beware of the possibility that the rates may rise significantly over this time. There is additional information that will be posted on the website for the Property & Liability Insurance/Suretyship Committee.

**XII. General Standing Division – *Margaret "Peggy" Rolando, Director and Chair-Elect.***

Ms. Rolando introduced the following:

**Action Items.**

1. Ad Hoc Trust Account Issues, Roland "Chip" Waller, Chair

A. Motion of the Ad Hoc Trust Account Issues Committee to approve its report and recommendations to the Board of Governors regarding The Florida Bar model rules relating to signatories on trust account checks and electronic transfers. See Agenda pages 113 - 144. Ms. Rolando noted that there are also supplemental materials on the separate trust account issue.

Ms. Rolando introduced Mr. Waller who reported that his mission was to make a recommendation to the Board of Governors regarding who should be authorized to sign checks and make distributions from attorney's trust accounts. Originally, the Board of Governors had advocated that only lawyers can sign trust account checks. Mr. Waller explained that the Committee's creation followed from the Supreme Court's consideration, and rejection, of proposed rules for trust account check signing. The Supreme Court and the Bar received comments regarding hardships on solo practitioners and small firms and asked for an alternative that does not require only lawyers to sign trust account checks. Therefore, the Ad Hoc Trust Account Issues Committee has drafted recommendations including safeguards as adopted by the American Bar Association that maintain ultimate responsibility with the lawyer even if a non lawyer signs the trust account checks.

Extensive discussion was had regarding a lawyer's ultimate duty to protect a client's funds in a trust account even if a non-lawyer is authorized to sign and possible issues of non insurance if an employee wrongfully takes funds from a trust account. After significant consideration, it was decided to table this discussion until the September meeting.

*[Secretary's note - there was a short break for obtaining lunches followed by a quick update by Barry Spivey on the condition of Tami Conetta.]*

## 2. Ad Hoc Trust Account Issues, Roland "Chip" Waller, Chair

Ms. Rolando announced that the Ad Hoc Trust Account Issues Committee also addressed an issue regarding the Separate Trust Account rules and that Jerry Aron was prepared to make a presentation to the Executive Committee but that first a motion would be required to waive the rules to allow consideration of the proposed position because the materials were not included in the Agenda package.

There was a motion:

**To waive the rules to allow consideration of the proposed position regarding separate trust accounts.**

The motion was seconded and approved unanimously.

Ms. Rolando introduced Mr. Aron who reported that the committee had reviewed F.S. § 626.8473(8), which became effective on July 1, 2012, as well as the Florida Bar Ethics Opinion 93-5. The statute requires attorneys to deposit all funds received in connection with transactions in which the attorney is serving as a title or real estate settlement agent into a separate trust account that is maintained exclusively for funds received in such transactions and permitting the account to be audited by its title insurers, unless maintaining the funds in the separate account for a particular client would violate the applicable rules of the Florida Bar. The committee is attempting to clarify the issues as to whether separate trust accounts must be maintained for each client or transaction, or if not, a separate trust account for each title insurer, or whether allowing an audit of this special trust account would be deemed a breach of a lawyer's attorney client privilege or duty of confidentiality, is there a duty to include attorney fees on a closing statement, and is there a duty to inform your client that you are establishing a trust account that is subject to audit by the title insurer.

The current ethics opinion states that the attorney acting as a title or real estate settlement agent may not permit the title insurer to audit the attorney's *general* trust account without the consent of the affected clients but the attorney need not obtain the client consent before permitting the title insurer to audit the *special* trust account used exclusively for transactions in which the attorney acts as a title or real estate settlement agent. Despite the fact that Ethics Opinion 93-5 does answer certain questions raised by the new statute, the Committee believes it will be in the best interests of the practitioners is the Committee could work with the Professional Ethics Committee to see if perhaps the

existing opinion could be revised or a new opinion issued to answer and clarify all of the questions that had been raised.

There was a motion:

**To approve as a Section position the concepts proposed by the ad hoc committee on trust account issues concerning the requirements of F.S. § 626.8473(8) Florida Statutes on law firm and attorney trust account practices, and to find that the position is within the Section's purview.**

The motion was approved unanimously.

### **Information Items.**

Ms. Rolando noted on the following Information Items listed in the Agenda:

1. **Amicus Coordination** - Ms. Rolando reported that Mr. Belcher had given an update in his Chair's report on the Executive Committee action relating to the Basile case.
2. **Budget Committee** - Ms. Rolando stated that the item speaks for itself.
3. **Fellows and Mentoring** - Ms. Rolando noted that the four Fellows have been previously introduced and welcomed.
4. **Homestead Issues** - Ms. Rolando reported that Shane Kelley will address the Geraci issue during his ad hoc homestead committee report.

### **XIII. General Standing Committee Reports** – Margaret “Peggy” Rolando, Director and Chair-Elect

1. **Ad Hoc LLC Monitoring** – Lauren Y. Detzel and Ed Burt Bruton, Co-Chairs

Ms. Detzel reported that after 9 hours of meetings at this meeting, Ms. Detzel believes that there will be a proposed statute before Labor Day and will be addressed by the Business Law Section at their meeting over Labor Day. Ms. Detzel hopes that it will come before the Executive Council at the Key Biscayne meeting and then on to the Tax Law Section.

2. **Ad Hoc Trust Account** – Roland “Chip” Waller, Chair

No further report.

3. **Alternative Dispute Resolution (ADR)** – Deborah Bovarnick Mastin and David R. Carlisle, Co-Chairs

Ms. Mastin reported on the all star line up for the CLE to be held in conjunction with the Florida Bar Annual Meeting in September. Ms. Mastin is also planning

to update the section website to include RPPTL Members experienced in RPPTL type ADR. Mr. Carlisle spoke to thank his co chair, Deborah Mastin, for her tireless efforts in organizing the CLE.

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

Mr. Goldman reported on the previously mentioned Aldrich v. Basile case. Mr. Goldman also reported that the amicus brief has been filed with the Florida Supreme Court in the North Carillon, LLC case.

5. **Budget** – Andrew M. O'Malley, Chair; Pamela O. Price and Daniel L. DeCubellis, Co-Vice Chairs

Mr. O'Malley reported on the Executive Committee approval to move expenses from the 2011-2012 Budget Diversity Initiative to 2012 - 2013 for the videographer. The Budget Committee will be meeting immediately after this meeting concludes.

6. **CLE Seminar Coordination** – Robert Freedman, Chair; Laura Sundberg and Sarah Butters, Co-Vice Chairs (Probate & Trust); Brian Leebrick and Jennifer Tobin, Co-Vice Chairs (Real Property).

Mr. Freedman announced that the CLE schedule is on page 153 of the Agenda. There are a few revisions including an April 26<sup>th</sup> program in Tampa produced by the newly renamed Real Property Finance & Lending (formerly Mortgage Law Committee). Mr. Freedman announced a free webinar on E-filing to be held on August 28<sup>th</sup>. The first 500 attendees can watch live. The materials and video will be posted on the website after the live program. The CLE Committee is planning other 1 hour seminars on the topics of bankruptcy, decedent's property rights, corporate entities, homestead rights. The schedule will be updated regularly on the CLE Seminar Coordination Committee web page along with other helpful information and seminar timelines for program chairs. Mr. Freedman announced that there will be a seminar training session in Key Biscayne for about an hour to an hour and a half that will be mandatory for all committee chairs and vice chairs. Mr. Freedman also introduced his committee co-chairs who will be acting as liaisons for each program.

7. **Convention Coordination (2013)** – S. Katherine Frazier, Chair; Angela Adams, Tae Bronner and Debra Boje, Co-Vice Chairs

No report.

8. **Fellows and Mentoring** – Marsha G. Madorsky, Co-Chair (Fellowship), Guy Emerich, Co-Chair (Mentoring); Brenda Ezell and Sharaine Sibblies, Co-Vice Chairs.

No additional report.

9. **Florida Electronic Filing & Service** – Patricia P. Jones, Rohan Kelley and Laird A. Lile, Co-Chairs

Mr. Kelley reported that electronic e-mail service is coming on September 1<sup>st</sup> and electronic filing is coming April 1, 2013.

10. **Homestead Issues Study** – Shane Kelley, Co-Chair (Probate & Trust); Deborah Boyd, Co-Chair (Real Property)

Mr. Rohan Kelley reported on behalf of Mr. Shane Kelley that the committee would be reviewing the issue of leasehold issues with homestead raised in the Geraci case from the Second District about a month ago. He reviewed the findings in the case and reported that the Committee would be studying this case as well as issues with regard to homestead held in revocable trusts.

11. **Legislation** – Barry F. Spivey, Co-Chair (Probate & Trust), Robert Swaine, Co-Chair (Real Property); William T. Hennessey, III, Co-Vice Chair (Probate & Trust), Alan Fields, Co-Vice Chair (Real Property); Susan K. Spurgeon and Michael A. Bedke, Legislative Reporters

Mr. Swaine reported that we have a backlog of legislation from last year (about 6 or 7 pieces of legislation) and about 6 or 7 new committee or Section sponsored initiatives. Mr. Swaine observed that given the issues with this year and the late start because redistricting, there may be unusual challenges facing the Legislation Committee this year.

12. **Legislative Update (2013)** –Stuart H. Altman, Chair; Charles I. Nash, R. James Robbins, Sharaine Sibblies and Stacy Kalmanson, Co-Vice Chairs

Regarding the 2012 program, Mr. Swaine reported that we had 499 total Registrations for the seminar yesterday and he commended the efforts of the Legislative Update team for all of their hard work. Approximately \$8,000 was raised for each of the 2 Section PACs. He also thanked Yvonne Sherron and the FLSSI Team lead by Erin Brennan Chambers and Sheila Brennan. Ms. Rolando recognized and thanked Mr. Swaine for his service to the Legislative Update Committee as he leaves his role as chair and undertakes his new role as co-Chair of the Legislation Committee. Ms. Rolando also thanked Mr. Gelfand and Mr. Brennan for their work on the Case Law Updates. Mr. Altman reported that the program next year is scheduled for July 26<sup>th</sup>, 2013 and that registrations are now open.

13. **Liaison with:**

- A. **American Bar Association (ABA)** – Edward F. Koren and Julius J. Zschau

Mr. Koren reported that there will be a meeting next week in Chicago. Since the last meeting, a report on transfer taxes has been submitted to Congress. Mr. Koren also reported on the status of various estate tax proposals with the Senate passage of a bill that excluded estate tax so we may end up with the House and the Senate passing totally different bills.

- B. **Board of Legal Specialization and Education (BLSE)** – Michael C. Sasso, W. Theodore Conner, David M. Silberstein and Deborah L. Russell

Mr. Silberstein thanked those that attended the certification reception at the Florida Bar Meeting. BLSE is working with an exam consultant and the results are being shared with the committees to modify certain exams for better standardization across all specialties. Mr. Silberstein reported that deadlines are fast approaching for applications to take the certification exams.

- C. **Clerks of Circuit Court** – Laird A. Lile

On behalf of Mr. Lile, and as previously reported in the Chair's report, Ms. Rolando reported that Ken Burke has been appointed as a Liaison to our section.

- D. **FLEA / FLSSI** – David C. Brennan, John Arthur Jones and Roland Chip Waller

FLSSI - Mr. Brennan reported that they are gearing up to edit, draft review, and organize the probate and guardianship forms. A disc of all of the forms is being provided to the probate judges at their Marco Island meeting.

FLEA - Mr. Brennan announced that the Annual Probate Team will be held October 5<sup>th</sup> and 6<sup>th</sup> in Orlando.

- E. **Florida Bankers Association** – Stewart Andrew Marshall, III, and Mark Thomas Middlebrook

No report.

- F. **Judiciary** – Judge Jack St. Arnold, 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, Judge Lawrence A. Schwartz, Judge Richard Suarez, Judge Morris Silberman, Judge Patricia V. Thomas and Judge Walter L. Schafer, Jr.

No report.

- G. **Out of State Members** – Michael P. Stafford and John E. Fitzgerald, Jr.

Ms. Rolando announced that the Out of State Members had drafted a warm and welcoming letter to all Florida Bar out of state members living in the New York and DC area inviting them to become members of our Section. After the letter was sent, we had an increase in membership. We are attempting to analyze the results to see if this bump was attributable to the letter. Further analysis will be done to see if additional letters should be sent to other out of state Florida Bar members in other locations. Ms. Rolando commended the efforts of Mike Stafford, Mike Bedke and Yvonne Sherron.

- H. **The Florida Bar** – Gwynne A. Young

No further report.

- I. **TFB Board of Governors** – Andrew Sasso

No further report.

- J. **TFB Business Law Section** – Marsha G. Rydberg

No report.

- K. **TFB CLE Committee** – Robert Freedman

No further report.

- L. **TFB Council of Sections** – Wm. Fletcher Belcher and Margaret A. Rolando

No report.

14. **Long-Range Planning** – Margaret A. Rolando, Chair

No report.

15. **Meetings Planning** – George Meyer, Chair

No report.

16. **Member Communications and Information Technology** – Nicole C. Kibert, Chair; S. Dresden Brunner and William Parady, Co-Vice Chairs

Ms. Kibert reported that our webmaster has been able to respond much more quickly. The Committee is looking at proposals for a new website provider. The Committee has been working with the CLE committee on GoToWebinar and will be happy to work with other committees to train on GoToMeeting. Ms. Kibert introduced her co vice chairs and invited questions to be posed to any of them.

17. **Membership, Diversity and Law School Liaison** – Michael A. Bedke, Chair; Lynwood T. Arnold, Jr., Co-Vice Chair (Diversity); Stacy Kalmanson, Co-Vice Chair (Law Schools), Phillip A. Baumann, Co-Vice Chair (Special Projects), Navin Pasem, Co-Vice Chair (Diversity); Benjamin B. Bush, Frederick R. Dudley, Jason M. Ellison, Brenda B. Ezell, Jennifer Jones and Mary Karr, Law School Liaisons.

Mr. Bedke reported on the restructuring of the committee this year and he introduced the co-vice chairs. Mr. Bedke announced that there is a plan to reach out to all 12 Florida Law Schools. Mr. Bedke commented on the enthusiasm of the committee. Mr. Bedke commended the hard work of the committees and the ability to spread the word about that good work through our publications. There will be an effort to welcome all new members of the Florida Bar to have one of the 3 free sections be the RPPTL Section and then to reach out to them again as their free year comes to an end to ask them to rejoin. Mr. Bedke also plans to work with the CLE Committee to reach out to those non section members who attend our CLE programs to invite them to join the Section. Finally, when the section receives notice of those that have dropped membership of the section, the committee plans to send a letter to seek renewal. Mr. Bedke thanked everyone for the welcoming attitude for new Bar members in attendance and set a goal to reach 12,000 members.

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

No report.

19. **Pro Bono** – Adele Stone and Tasha K. Pepper-Dickinson, Co-Chairs.

No report.

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

Mr. Weintraub reported on the monitoring of the Supreme Court Committee on Professionalism as previously reported by Mr. Sasso. Due to the late hour, the skit scheduled for today will be postponed until the next meeting.

21. **Publications:**

- A. **ActionLine** – Silvia Rojas, Chair; Scott P. Pence, Shari Ben Moussa and Navin Pasem, Co-Vice Chairs (Real Property); Amber Jade Johnson, George Karibjanian and Hung V. Nguyen, Co-Vice Chairs (Probate & Trust)

Ms. Rojas introduced the new staff and committee and sought ideas for new articles and encouraged people to review the website for information and guidelines on articles. Ms. Rojas solicited photographs for anyone that is taking pictures over the weekend. Ms. Rojas informed that the Publications Committee website has been updated and includes a form cover sheet for transmitting articles. Ms. Rojas stressed the importance of keeping committee websites up to date for many reasons but one important reason is to allow the ActionLine staff to keep current on what the substantive committees are doing for the purpose of seeking articles. ActionLine currently has about 10,000 subscribers and the Committee is looking for ways to direct readers to our Section website through ActionLine. Ms. Rojas encouraged people to learn how to add the short cut for the Section website on their mobile devices.

- B. **Florida Bar Journal** - Kristen M. Lynch, Co-Chair (Probate & Trust); David Brittain, Co-Chair (Real Property)

Ms. Lynch announced her co-chair for Real Estate articles, David Brittain, and she thanked Bill Sklar for his long tenure and helpful and continuing advice.

22. **Sponsor Coordination** – Kristen M. Lynch, Chair; Wilhelmina Kightlinger, Aniella Gonzalez, J. Michael Swaine, Adele I. Stone, Marilyn M. Polson, and W. Cary Wright, Co-Vice Chairs

Ms. Lynch thanked the sponsors. She introduced and welcomed her new co-vice chair, Aniella Gonzalez, and appealed for more Committee Members to assist with the hard work of the Sponsor Coordination committee. She indicated that she is looking especially for some good "People People" and someone with technological experience. Going forward, the Sponsor Coordination Committee will be meeting telephonically off cycle from the Executive Council meetings

given the difficulty in scheduling because of the various committee obligations of the members. Ms. Lynch encouraged the Real Estate Committees to seek some ideas for Committee Sponsorship opportunities as almost every Probate and Trust Committee has at least one and in some instances two sponsors.

23. **Strategic Planning** – Margaret A. Rolando, Chair

No report.

**XIV. Probate and Trust Law Division Committee Reports**– *Michael A. Dribin – Director*

1. **Ad Hoc Committee on Creditors’ Rights to Non-Exempt, Non-Probate Assets** – Angela M. Adams, Chair
2. **Ad Hoc Committee on Personal Representative Issues** – Jack A. Falk, Jr., Chair
3. **Ad Hoc Guardianship Law Revision Committee** – David Brennan, Chair; Sancha Brennan Whynot, Sean W. Kelley and Charles F. Robinson, Co-Vice Chairs
4. **Ad Hoc Study Committee on Estate Planning Conflict of Interest** - William T. Hennessey III, Chair
5. **Ad Hoc Study Committee on Jurisdiction and Service of Process** – Barry F. Spivey, Chair; Sean W. Kelley, Vice Chair
6. **Asset Protection** – Brian C. Sparks, Chair; Marsha G. Madorsky, Vice-Chair
7. **Attorney/Trust Officer Liaison Conference** – Jack A. Falk, Jr., Chair; Mary Biggs Knauer, Corporate Fiduciary Chair; Patrick Lannon, Deborah Russell and Laura Sundberg, Co-Vice Chairs
8. **Digital Assets and Information Study Committee** – Eric Virgil, Chair; Travis Hayes and S. Dresden Brunner, Co-Vice Chairs
9. **Estate and Trust Tax Planning** – Elaine M. Bucher, Chair; David Akins, Tasha Pepper-Dickinson and William Lane, Co-Vice Chairs
10. **Guardianship and Power of Attorney** – Sean W. Kelley, Chair; Seth A. Marmor, Tattiana Brenes-Stahl, Cynthia Fallon and David Brennan, Co-Vice Chairs
11. **IRA, Insurance and Employee Benefits** – Linda Suzanne Griffin and L. Howard Payne, Co-Chairs; Anne Buzby-Walt and Lester Law, Co-Vice Chairs

12. **Liaisons with Elder Law Section** – Charles F. Robinson, Marjorie Wolasky and Sam W. Boone, Jr.
13. **Liaisons with Tax Section** – Lauren Y. Detzel, William R. Lane, Jr., David Pratt, Brian C. Sparks, Donald R. Tescher and Harris L. Bonnette, Jr.
14. **Principal and Income** – Edward F. Koren, Chair; Pamela Price, Vice Chair
15. **Probate and Trust Litigation** – Thomas M. Karr, Chair; Jon Scuderi , J. Richard Caskey and Jerry Wells, Co-Vice Chairs
16. **Probate Law and Procedure** – Tae Kelley Bronner, Chair; John C. Moran, Paul Roman and James George, Co-Vice Chairs
17. **Trust Law** – Shane Kelley, Chair; Angela M. Adams and Tami F. Conetta, Co-Vice Chairs
18. **Wills, Trusts and Estates Certification Review Course** – Richard R. Gans, Chair; Jeffrey S. Goethe, Laura Sundberg and Jerome L. Wolf, Co-Vice Chairs

**XV. Real Property Division Committee Reports** - *Michael J. Gelfand, Director.*

1. **Ad Hoc Foreclosure Reform** – Jerry Aron, Chair; Mark Brown, Burt Bruton, Alan Fields, and Jeffrey Sauer, Co-Vice Chairs.
2. **Commercial Real Estate** – Art Menor, Chair; Burt Bruton and Jim Robbins, Co-Vice Chairs.
3. **Condominium and Planned Development** – Steven H. Mezer, Chair; Jane Cornett and Christopher Davies, Co-Vice-Chairs.
4. **Construction Law** – Arnold D. Tritt, Chair; Lisa Colon Heron, Scott Pence and Hardy Roberts, Co-Vice Chairs.
5. **Construction Law Certification Review Course** – Lee Weintraub, Chair; Bruce Alexander, Deborah Mastin and Bryan Rendzio, and Co-Vice Chairs.
6. **Construction Law Institute** – W. Cary Wright, Chair; Reese Henderson, Sanjay Kurian and Rachel Peterkin, Co-Vice Chairs.
7. **Governmental Regulation** – Anne Pollack, Chair; Arlene Udick and Vinette Godelia, Co-Vice Chairs.
8. **Landlord and Tenant** – Neil Shoter, Chair; Rick Eckhard and Lloyd Granet, Co-Vice Chairs.

9. **Legal Opinions** – Kip Thornton, Chair; Dan DeCubellis, Vice-Chair.
10. **Liaisons with FLTA** – Norwood Gay and Alan McCall, Co-Chairs; Alan Fields, James C. Russick and Barry Scholnick, Co-Vice Chairs.
11. **Property & Liability Insurance/Suretyship** – W. Cary Wright and Fred Dudley, Co-Chairs.
12. **Real Estate Certification Review Course** – Ted Conner, Chair; Raul Ballaga and Jennifer Tobin, Co-Vice Chairs.
13. **Real Estate Entities and Land Trusts** – Wilhelmina Kightlinger, Chair; Burt Bruton, Vice-Chair.
14. **Real Property Finance & Lending** – Dave R. Brittain, Chair; Deborah Boyd, Brenda Ezell and Bill Sklar, Co-Vice Chairs.
15. **Real Property Forms** – Homer Duval, III, Chair; Arthur J. Menor and Silvia Rojas, Co-Vice Chairs.
16. **Real Property Litigation** – Marty Awerbach, Chair; Manny Farach and Susan Spurgeon, Co-Vice Chairs.
17. **Real Property Problems Study** – S. Katherine Frazier, Chair; Mark A. Brown, Patricia J. Hancock and Salome Zikakis, Co-Vice Chairs.
18. **Residential Real Estate and Industry Liaison** – Frederick W. Jones, Chair; William J. Haley and Denise Hutson, Co-Vice Chairs.
19. **Title Insurance and Title Insurance Liaison** – Kristopher Fernandez, Chair; Raul Ballaga and Dan DeCubellis, Co-Vice Chairs.
20. **Title Issues and Standards** – Christopher W. Smart, Chair; Robert M. Graham, Patricia P. Jones and Karla J. Staker, Co-Vice Chairs.

**XVI. Adjournment** -- There being no further business to come before the Executive Council, the meeting was unanimously adjourned at 1:10 p.m.

Respectfully submitted,

Deborah P. Goodall, Secretary

**ADDENDUM A**

**ATTENDANCE ROSTER**

**JULY 28, 2012**

**ATTENDANCE ROSTER**

**REAL PROPERTY PROBATE & TRUST LAW SECTION  
EXECUTIVE COUNCIL MEETINGS  
2012-2013**

<b>Executive Committee</b>	<b>Jul. 28 Palm Beach</b>	<b>Sept. 15 Key Biscayne</b>	<b>Nov. 17 Ashville, NC</b>	<b>Feb. 9 Tallahassee</b>	<b>May 25 St. Petersburg</b>
Belcher, William F., Chair	X				
Rolando, Margaret A., Chair-Elect	X				
Gelfand, Michael J., Real Property Law Div. Director	X				
Dribin, Michael A., Probate and Trust Law Div. Director	X				
Goodall, Deborah P., Secretary	X				
O'Malley, Andrew M., Treasurer	X				
Spivey, Barry F., Legislation Co-Chair	X				
Swaine, Robert S., Legislation Co-Chair	X				
Freedman, Robert S., Seminar Coordinator	X				
Boje, Debra L., Director of At-Large Members	X				
Meyer, George F., Immediate Past Chair	X				

<b>Executive Council Members</b>	<b>Jul. 28 Palm Beach</b>	<b>Sept. 15 Key Biscayne</b>	<b>Nov. 17 Ashville, NC</b>	<b>Feb. 9 Tallahassee</b>	<b>May 25 St. Petersburg</b>
Adams, Angela M.	X				
Adcock, Jr., Louie N., <b>Past Chair</b>					
Akins, David J.	X				
Alexander, Bruce G.					
Altman, Robert N.					
Altman, Stuart H.	X				
Arnold, Jr., Lynwood F.					

<b>Executive Council Members</b>	<b>Jul. 28 Palm Beach</b>	<b>Sept. 15 Key Biscayne</b>	<b>Nov. 17 Ashville, NC</b>	<b>Feb. 9 Tallahassee</b>	<b>May 25 St. Petersburg</b>
Aron Jerry E. <b>Past Chair</b>	X				
Awerbach, Martin S.	X				
Bald, Kimberly A.	X				
Ballaga, Raul P.	X				
Banister, John R.					
Battle, Carlos A.	X				
Baumann, Phillip A.					
Beales, III, Walter R. <b>Past Chair</b>					
Bedke, Michael A.	X				
Bell, Kenneth B.					
Ben Moussa, Shari D.	X				
Bonnette, Jr., Harris L.	X				
Boone, Jr., Sam W.					
Boyd, Deborah	X				
Brenes-Stahl, Tattiana P.	X				
Brennan, David C. <b>Past Chair</b>	X				
Brittain, David R.	X				
Bronner, Tae K.	X				
Brown, Mark A.	X				
Brunner, S.D.	X				
Bruton, Jr., Ed B.	X				
Bucher, Elaine M.	X				
Bush, Benjamin B.					
Butters, Sarah S.	X				

<b>Executive Council Members</b>	<b>Jul. 28 Palm Beach</b>	<b>Sept. 15 Key Biscayne</b>	<b>Nov. 17 Ashville, NC</b>	<b>Feb. 9 Tallahassee</b>	<b>May 25 St. Petersburg</b>
Buzby-Walt, Anne	X				
Carlisle, David R.	X				
Caskey, John R.	X				
Christiansen, Patrick T. <b>Past Chair</b>	X				
Conetta, Tami F.					
Conner, William T.	X				
Cope, Jr., Gerald B.	X				
Cornett, Jane L.	X				
Davies, Christopher	X				
DeCubellis, Daniel L.	X				
Detzel, Lauren Y.	X				
Diamond, Benjamin F.	X				
Diamond, Sandra F. <b>Past Chair</b>	X				
Dollinger, Jeffrey	X				
Dudley, Frederick R.	X				
Duvall, III, Homer	X				
Eckhard, Rick	X				
Ellison, Jason M.	X				
Emerich, Guy S.	X				
Ezell, Brenda B.	X				
Falk, Jr., Jack A.	X				
Fallon, Cynthia	X				
Farach, Manuel					
Felcoski, Brian J., <b>Past Chair</b>	X				

<b>Executive Council Members</b>	<b>Jul. 28 Palm Beach</b>	<b>Sept. 15 Key Biscayne</b>	<b>Nov. 17 Ashville, NC</b>	<b>Feb. 9 Tallahassee</b>	<b>May 25 St. Petersburg</b>
Fernandez, Kristopher E.	X				
Fields, Alan B.	X				
Fitzgerald, Jr., John E.					
Fleece, III, Joseph W.	X				
Flood, Gerard J.	X				
Foreman, Michael L.	X				
Frazier, S. Katherine	X				
Gans, Richard R.	X				
Gay, III, Robert Norwood	X				
George, James	X				
Godelia, Vinette D.	X				
Goethe, Jeffrey S.	X				
Goldman, Robert W. <b>Past Chair</b>	X				
Gonzalez, Aniella	X				
Graham, Robert M.	X				
Granet, Lloyd	X				
Griffin, Linda S.	X				
Grimsley, John G. <b>Past Chair</b>					
Grossman, Honorable Melvin B.	X				
Guttmann, III, Louis B. <b>Past Chair</b>	X				
Haley, William J.					
Hamrick, Alexander H.	X				
Hancock, Patricia J.					
Hart, W.C.	X				

<b>Executive Council Members</b>	<b>Jul. 28 Palm Beach</b>	<b>Sept. 15 Key Biscayne</b>	<b>Nov. 17 Ashville, NC</b>	<b>Feb. 9 Tallahassee</b>	<b>May 25 St. Petersburg</b>
Hayes, Honorable Hugh D.	X				
Hayes, Michael Travis	X				
Hearn, Steven L. <b>Past Chair</b>	X				
Hearne, Frank L.					
Henderson, Jr., Reese J.					
Henderson, III, Thomas N.	X				
Hennessey, III, William T.	X				
Heron, Lisa Colon	X				
Heuston, Stephen P.	X				
Hutson, Denise L.	X				
Isom, Honorable Claudia R.					
Isphording, Roger O. <b>Past Chair</b>	X				
Johnson, Amber Jade F.	X				
Jones, Darby	X				
Jones, Frederick W.	X				
Jones, Jennifer W.	X				
Jones, John Arthur <b>Past Chair</b>	X				
Jones, Patricia P.H.	X				
Judd, Robert B.	X				
Kalmanson, Stacy O.	X				
Karibjanian, George	X				
Karr, Mary	X				
Karr, Thomas M.	X				
Kayser, Joan B. <b>Past Chair</b>					

<b>Executive Council Members</b>	<b>Jul. 28 Palm Beach</b>	<b>Sept. 15 Key Biscayne</b>	<b>Nov. 17 Ashville, NC</b>	<b>Feb. 9 Tallahassee</b>	<b>May 25 St. Petersburg</b>
Kelley, Rohan <b>Past Chair</b>	X				
Kelley, Sean W.	X				
Kelley, Shane	X				
Kibert, Nicole C.	X				
Kightlinger, Wilhelmina F.	X				
King, Robin J.	X				
Kinsolving, Ruth Barnes <b>Past Chair</b>					
Koren, Edward F. <b>Past Chair</b>	X				
Korvick, Honorable Maria M.	X				
Kotler, Alan Stephen					
Kromash, Keith S.	X				
Kurian, Sanjay					
Kypreos, Theodore S.	X				
LaFemina, Rose					
Lane, Jr., William R.	X				
Lange, George	X				
Lannon, Patrick J.	X				
Larson, Roger A.	X				
Laughlin, Honorable Lauren C.					
Law, Lester	X				
Leebrick, Brian D.	X				
Lile, Laird A. <b>Past Chair</b>					
Little, III, John W.	X				
Lucchi, Elisa F.					

<b>Executive Council Members</b>	<b>Jul. 28 Palm Beach</b>	<b>Sept. 15 Key Biscayne</b>	<b>Nov. 17 Asheville, NC</b>	<b>Feb. 9 Tallahassee</b>	<b>May 25 St. Petersburg</b>
Lynch, Kristen M.	X				
Madorsky, Marsha G.	X				
Marger, Bruce <b>Past Chair</b>					
Marmor, Seth A.					
Marshall, III, Stewart A.					
Mastin, Deborah Bovarnick	X				
McCall, Alan K.					
McElroy, IV, Robert L.	X				
Menor, Arthur J.	X				
Mezer, Steven H.	X				
Middlebrook, Mark T.	X				
Miller, Lawrence J.	X				
Moran, John C.	X				
Moule, Jr., Rex E.	X				
Muir, Honorable Celeste H.	X				
Murphy, Melissa J. <b>Past Chair</b>	X				
Nash, Charles I.	X				
Neukamm, John B. <b>Past Chair</b>	X				
Nguyen, Hung V.	X				
Norris, John E.					
Parady, William A.	X				
Pasem, Navin					
Payne, L.H.	X				
Pence, Scott P.	X				

<b>Executive Council Members</b>	<b>Jul. 28 Palm Beach</b>	<b>Sept. 15 Key Biscayne</b>	<b>Nov. 17 Ashville, NC</b>	<b>Feb. 9 Tallahassee</b>	<b>May 25 St. Petersburg</b>
Pepper-Dickinson, Tasha K.	X				
Peterkin, Rachel					
Platt, William R.	X				
Pleus, Jr., Honorable Robert J.					
Pollack, Anne Q.	X				
Polson, Marilyn M.	X				
Pratt, David					
Price, Pamela O.	X				
Prince-Troutman, Stacey A.					
Pyle, Michael A.	X				
Reddin, Michelle A.					
Renzio, Bryan					
Reynolds, Stephen H.	X				
Rieman, Alexandra V.	X				
Robbins, Jr., R.J.	X				
Roberts, III, Hardy L.	X				
Robinson, Charles F.	X				
Rojas, Silvia B.	X				
Roman, Paul E.					
Russell, Deborah L.	X				
Russick, James C.	X				
Rydberg, Marsha G.	X				
Sachs, Colleen C.					
Sasso, Andrew	X				

<b>Executive Council Members</b>	<b>Jul. 28 Palm Beach</b>	<b>Sept. 15 Key Biscayne</b>	<b>Nov. 17 Ashville, NC</b>	<b>Feb. 9 Tallahassee</b>	<b>May 25 St. Petersburg</b>
Sasso, Michael C.					
Sauer, Jeffrey T.	X				
Schafer, Jr., Honorable Walter L.					
Schnitker, Clay A.	X				
Schofield, Percy A.	X				
Scholnik, Barry A.					
Schwartz, Honorable Lawrence A.					
Schwartz, Robert M.	X				
Scuderi, Jon	X				
Sheets, Sandra G.	X				
Shoter, Neil B.	X				
Sibblies, Sharaine A.					
Silberman, Honorable Morris					
Silberstein, David M.	X				
Sklar, William P.					
Smart, Christopher W.	X				
Smith, G. Thomas <b>Past Chair</b>	X				
Smith, Wilson <b>Past Chair</b>					
Sobien, Wayne J.	X				
Sparks, Brian C.	X				
Spurgeon, Susan K.	X				
St. Arnold, Honorable Jack R.					
Stafford, Michael P.	X				
Staker, Karla J.	X				

<b>Executive Council Members</b>	<b>Jul. 28 Palm Beach</b>	<b>Sept. 15 Key Biscayne</b>	<b>Nov. 17 Ashville, NC</b>	<b>Feb. 9 Tallahassee</b>	<b>May 25 St. Petersburg</b>
Stern, Robert G.	X				
Stone, Adele I.	X				
Stone, Bruce M. <b>Past Chair</b>					
Suarez, Honorable Richard J.					
Sundberg, Laura K.	X				
Swaine, Jack Michael <b>Past Chair</b>	X				
Taft, Eleanor W.	X				
Taylor, Richard W.	X				
Tescher, Donald R.	X				
Thomas, Honorable Patricia V.	X				
Thornton, Kenneth E.	X				
Tobin, Jennifer S.	X				
Tritt, Jr., Arnold D.	X				
Udick, Arlene C.	X				
Virgil, Eric					
Waller, Roland D. <b>Past Chair</b>	X				
Weintraub, Lee A.	X				
Wells, Jerry B.	X				
White, Jr., Richard M.	X				
Whynot, Sancha B.	X				
Wilder, Charles D.	X				
Williamson, Julie Ann S. <b>Past Chair</b>					
Wohlust, Gary Charles	X				
Wolasky, Marjorie E.	X				

<b>Executive Council Members</b>	<b>Jul. 28 Palm Beach</b>	<b>Sept. 15 Key Biscayne</b>	<b>Nov. 17 Ashville, NC</b>	<b>Feb. 9 Tallahassee</b>	<b>May 25 St. Petersburg</b>
Wolf, Jerome L.	X				
Wright, William C.	X				
Wright, Thomas D.					
Young, Gwynne A.	X				
Zikakis, Salome J.	X				
Zschau, Julius J. <b>Past Chair</b>					

<b>RPPTL Fellows</b>	<b>Jul. 28 Palm Beach</b>	<b>Sept. 15 Key Biscayne</b>	<b>Nov. 17 Ashville, NC</b>	<b>Feb. 9 Tallahassee</b>	<b>May 25 St. Petersburg</b>
Hoffman, Brian W.	X				
Khan, Nishad	X				
Melanson, Noelle M.	X				
Rao, Tara	X				

<b>Legislative Consultants</b>	<b>Jul. 28 Palm Beach</b>	<b>Sept. 15 Key Biscayne</b>	<b>Nov. 17 Ashville, NC</b>	<b>Feb. 9 Tallahassee</b>	<b>May 25 St. Petersburg</b>
Adams, Howard Eugene	X				
Aubuchon, Josh	X				
Dunbar, Peter M.	X				
Edenfield, Martha	X				

# *Resolution*

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

**Recognizing the Service and Contributions of**

## *William James Haley*

**Whereas**, WILLIAM JAMES HALEY of Lake City, Florida, was a respected and deeply loved member of the Real Property, Probate & Trust Law Section of The Florida Bar who passed away on August 6, 2012, survived by his wife of 51 years, Jo; three daughters, Mary Nell Haley, Meg Haley, and PJ Haley Hottenstein; a son, Dr. Jimbo Haley; a son-in-law, David; a daughter-in-law, Heni; three grandchildren, Annabella, Sebastian, and Christian; and a step-granddaughter, Chelsea; and

**Whereas**, Bill received his undergraduate degree from the University of Wisconsin, his JD degree from Washington & Lee University in Lexington, Virginia, and was admitted to The Florida Bar in 1960; and

**Whereas**, Bill served his country with distinction as a Captain and Judge Advocate General in the United States Air Force from 1960 to 1963; and

**Whereas**, after coming to Lake City in 1963, Bill had a long and distinguished career as a real estate attorney with the law firm of Brannon, Brown, Norris & Vocell (later named Brannon, Brown, Haley & Bullock, P.A.), which included private practice; extensive involvement with Attorneys' Title Insurance Fund ("The Fund") and the Florida Association of Realtors ("FAR"); and dedicated service to the Real Property, Probate & Trust Law Section of The Florida Bar; and

**Whereas**, Bill served as a Municipal Judge in Lake City during 1965 and 1966 and was elected County Attorney for Columbia County, Florida, and served in that capacity from 1969 - 1977; and

**Whereas**, Bill's extensive relationship with The Fund began when he became a Fund Member Agent in 1977 and progressed to him becoming a Trustee, a Director, and Chairman of the Board; and

**Whereas**, Bill was a distinguished Board Certified real estate attorney and a Florida Supreme Court Certified Mediator; and

**Whereas**, Bill gave unselfishly of his time and devoted his legal acumen not only to his profession, but also to the real estate industry throughout the State of Florida, which he served during his more than 50 years as a member of The Florida Bar through his service as an attorney member on the Florida Realtor-Attorney Joint Committee from 1977 to 2011, to which he was appointed by the Board of Governors of The Florida Bar; through his service as Chair of the FAR/BAR Contract Committee for many years; and through his service as Counsel for the Lake City Board of Realtors for more than 40 years, which he also chaired for several terms; and

**Whereas**, Bill's long-standing and dedicated service to the Real Property, Probate & Trust Law Section of The Florida Bar was recognized in 2008 when he was chosen as the recipient of the Robert C. Scott Memorial Award, an honor reserved for those Real Property, Probate & Trust Law Section members who best exemplify devotion and service to the Section; and he will best be remembered for long-standing membership and active participation on its Executive Council, his tireless efforts to develop and improve the FAR/BAR contract, and his service in educating others through his participation in numerous continuing legal education programs; and

**Whereas**, Bill also had a history of dedicated involvement with his community through his memberships with the Lions Club, the Elks Lodge, the Moose Lodge, the Lake City Chamber of Commerce Club, and the Epiphany Catholic Church; and

**Whereas**, notwithstanding his Minnesota roots and the universities he attended, upon moving to Lake City, Bill became a true "Floridian," an avid Florida Gator fan who supported the University of Florida as a Gator Booster, and as the "Captain" of his houseboat upon which he spent many hours with family, friends, and colleagues in Crystal River; and

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

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

**Unanimously Adopted** by the Executive Council of the Real Property, Probate & Trust Law Section of The Florida Bar at Key Biscayne, Florida, this 15<sup>th</sup> day of September, 2012.

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William Fletcher Belcher, Chair  
Real Property, Probate & Trust Law Section  
The Florida Bar

RPPTL 2012 - 2013  
Executive Council Meeting Schedule  
W. Fletcher Belcher's YEAR

<b>Date</b>	<b>Location</b>
September 13 – September 15, 2012	<b>Executive Council Meeting</b> Ritz Carlton Key Biscayne Key Biscayne, Florida Reservation Phone # 1-800-241-3333 <a href="http://www.ritzcarlton.com/keybiscayne">http://www.ritzcarlton.com/keybiscayne</a> Room Rate: \$169.00 Cut-off Date: August 22, 2012
November 15 – November 18, 2012	<b>Executive Council Meeting/Out of State</b> The Inn on Biltmore Estates Asheville, North Carolina Reservation Phone #1-866-779-6277 <a href="http://www.biltmore.com/stay/rates">www.biltmore.com/stay/rates</a> Room Rate: \$219.00 Cut-off Date: October 15, 2012
February 7 – February 10, 2013	<b>Executive Council Meeting</b> Hotel Duval Tallahassee, Florida Reservation Phone #1-888-236-2427 <a href="http://www.hotelduval.com">http://www.hotelduval.com</a> Room Rate: \$149.00 Cut-off Date: January 16, 2013
May 23 – May 26, 2013	<b>Executive Council Meeting / RPPTL Convention</b> The Vinoy St. Petersburg, Florida <a href="http://www.marriott.com/hotels/travel/tpasr-renaissance-vinoy-resort-and-golf-club">http://www.marriott.com/hotels/travel/tpasr-renaissance-vinoy-resort-and-golf-club</a> Reservation Phone # 1-888-303-4430 Room Rate \$149.00 Cut-off Date: May 5, 2013

**Note:** It is expected that the room blocks will fill up early. However, if members holding group rate rooms contact Yvonne Sherron (by e-mail [ysherron@flabar.org](mailto:ysherron@flabar.org)) BEFORE canceling rooms, it can be given to members on the wait list. Calling the hotel directly will result in losing the group room to the general public; it cannot be recaptured for member use. There are typically many rooms canceled as each meeting draws near.

RPPTL 2013 - 2014  
Executive Council Meeting Schedule

Peggy Rolando's YEAR

<b>Date</b>	<b>Location</b>
July 24 – 28, 2013	<b>Executive Council Meeting &amp; Legislative Update</b> The Breakers Palm Beach, Florida Reservation Phone # 561-655-6611 <a href="http://www.thebreakers.com">www.thebreakers.com</a> Room Rate: \$206.00 Cut-off Date: June 24, 2013
September 18 – 22, 2013	<b>Executive Council Meeting/Out of State</b> Four Seasons Hotel Ritz Lisbon Lisbon, Portugal Phone # 351 (21)381-1400 <a href="http://www.fourseasons.com/lisbon/">www.fourseasons.com/lisbon/</a> Room Rate: 245 Euros Cut-off Date: August 28, 2013
November 20 – 24, 2013	<b>Executive Council Meeting</b> Ritz Carlton Sarasota Sarasota, Florida Reservation Phone # 800-241-3333 <a href="http://www.ritzcarlton.com/sarasota">http://www.ritzcarlton.com/sarasota</a> Room Rate: \$205.00 Cut-off Date: October 21, 2013
February 6 – 9, 2014	<b>Executive Council Meeting</b> Ritz Carlton Amelia Island Amelia Island, Florida Reservation Phone # 800-241-3333 <a href="http://www.ritzcalton.com/amelia">http://www.ritzcalton.com/amelia</a> Room Rate: \$199.00 Cut-off Date: January 6, 2014
May 29 – June 1, 2014	<b>Executive Council Meeting / RPPTL Convention</b> South Seas Island Resort Captive, Florida <a href="http://www.southseas.com">http://www.southseas.com</a> Reservation Phone # 877-597-9696 Room Rate \$165.00 Cut-off Date: May 7, 2014



## RPPTL FINANCIAL SUMMARY

2012 – 2013 (July 1 - June 30<sup>1</sup>)

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Revenue: \$259,542

Expenses: \$ 22,466

Net:	\$237,076
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Beginning Fund Balance (7-1-12)

\$ 843,909

YTD Fund Balance (7-30-12)

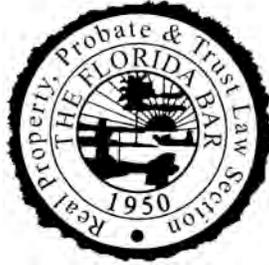
\$ 1,077,417

**RPPTL CLE**

RPPTL YTD Actual CLE Revenue  
\$1,825

RPPTL Budgeted CLE Revenue  
\$244,500

<sup>1</sup> This report is based on the **tentative unaudited** detail statement of operations dated 6/30/2012.



**RPPTL Financial Summary from Separate Budgets**  
2012 – 2013 [July 1 - June 30<sup>1</sup>]  
YEAR TO DATE REPORT

**General Budget**

Revenue:	\$ 259,542
Expenses:	\$ 22,466
<b>Net:</b>	<b>\$ 237,076</b>

**Legislative Update**

Revenue:	\$ 335
Expenses:	\$ 4,043
<b>Net:</b>	<b>(\$3,708)</b>

**Convention**

Revenue:	\$ 140
Expenses:	\$ 0
<b>Net:</b>	<b>\$ 140</b>

**Miscellaneous Section Service Courses**

Revenue:	\$ 0
Expenses:	\$ 0
<b>Net:</b>	<b>\$ 0</b>

**Roll-up Summary (Total)**

Revenue:	\$ 260,017
Expenses:	\$ 26,500
<b>Net Operations:</b>	<b>\$ 233,508</b>

Reserve (Fund Balance):	\$ 843,909
<b>GRAND TOTAL</b>	<b>\$1,077,417</b>

<sup>1</sup> This report is based on the tentative unaudited detail statement of operations dated 7/31/2012.

# LEGISLATIVE POSITION REQUEST FORM

GOVERNMENTAL AFFAIRS OFFICE

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

## GENERAL INFORMATION

**Submitted By** Wilhemina F. Kightlinger, Chair, Land Trusts and Real Estate Entities Committee of the Real Property Probate & Trust Law Section (RPPTL Approval Date \_\_\_\_\_, 2012)

**Address** Old Republic National Title Insurance Company, 1410 N. Westshore Blvd., Suite 800, Tampa, FL 33607-4547  
Telephone: (800) 342-5957 Ext 14863

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

## CONTACTS

### Board & Legislation Committee Appearance

**Wilhemina F. Kightlinger**, Old Republic National Title Insurance Company, 1410 N. Westshore Blvd., Suite 800, Tampa, FL 33607-4547, Telephone: (800) 342-5957 Ext 14863  
**Burt Bruton**, Greenberg Traurig, PA, 333 SE 2nd Avenue, Miami, FL 33131, Telephone (305) 579-0593.  
**Pamela O. Price**, Gray Robinson, PA, 301 East Pine Street, Suite 1400, Orlando, FL 32801, Telephone (407) 244-5607  
**Bob Swaine**, Swaine & Harris, PA, 425 S. Commerce Avenue, Sebring, FL 33870-3702 Telephone 863-385-1549  
**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

\_\_\_\_\_  
(Bill or PCB #)

\_\_\_\_\_  
(Bill or PCB Sponsor)

**Indicate Position** Support  Oppose \_\_\_\_\_ Tech Asst. \_\_\_\_\_ Other \_\_\_\_\_

### Proposed Wording of Position for Official Publication:

“Support 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 estoppel provisions separately from the land trust statute, and to codify other Florida land trust principles and practices.”

**Reasons For Proposed Advocacy:**

Existing F.S. 689.071 contains both (1) provisions defining and governing land trusts, and (2) title estoppel provisions validating the powers of a trustee to deal with real property conveyed to the trustee by an instrument meeting certain formal requirements. This proposal will clarify the definition of "land trust" (as distinguished from other express trusts) and will continue to apply the title estoppel provisions to any recorded instrument meeting the existing required formalities, regardless of whether the trust is a land trust. A conforming amendment to F.S. 736.0102 confirms the exclusion of land trusts from most provisions of the Florida Trust Code. The proposal will also modernize language in the Land Trust Act and codify a number of land trust principles and practices presently accessible only by reference to case law or to land trust treatises, thereby enhancing the utility of land trusts as a vehicle for real estate investment and development in this state.

**PRIOR POSITIONS TAKEN ON THIS ISSUE**

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

**Most Recent Position**      RPPTL Section      Supported previous amendments      2006 & 2007  
\_\_\_\_\_  
(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**

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

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

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

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

1 A bill to be entitled

2 An Act relating to conveyances of real property to  
3 trustees; amending and renumbering portions of s.  
4 689.071 as s. 689.073 regarding recorded instruments  
5 conveying real property and conferring power and  
6 authority on a trustee; amending other portions of s.  
7 689.071, the Florida Land Trust Act; amending s.  
8 736.0102 regarding exclusions from the Florida Trust  
9 Code; providing an effective date.

10  
11 Section 1. Subsections 689.071(3), (4), (5) and (12),  
12 Florida Statutes, are amended and renumbered as Subsections  
13 689.073(1), (2), (3) and (4), and new Subsection 689.073(5) is  
14 created to read:

15 689.073 Powers conferred on trustee in recorded  
16 instrument.--

17 (1)(3) OWNERSHIP VESTS IN TRUSTEE.--Every conveyance,  
18 deed, mortgage, lease assignment, or other instrument heretofore  
19 or hereafter made, hereinafter referred to as the "recorded  
20 instrument," transferring any interest in real property ~~in this~~  
21 ~~state,~~ including, but not limited to, a leasehold or mortgagee  
22 interest, to any person or any corporation, bank, trust company,  
23 or other entity duly formed under the laws of its state of  
24 qualification, ~~in~~ which recorded instrument designates the  
25 person, corporation, bank, trust company, or other entity ~~is~~  
26 ~~designated~~ "trustee," or "as trustee," ~~whether or not reference~~  
27 ~~is made in the recorded instrument to the beneficiaries of such~~  
28 ~~trust or to any separate collateral unrecorded declarations or~~  
29 ~~agreements, is effective to vest, and is hereby declared to have~~  
30 ~~vested, in such trustee both legal and equitable title, and full~~  
31 ~~rights of ownership, over the real property or interest therein,~~  
32 ~~with full power and authority as granted and provided in the~~  
33 ~~recorded instrument to deal in and with the property or interest~~  
34 ~~therein or any part thereof; provided, the recorded instrument~~

35 and confers on the trustee the power and authority to protect,  
36 to conserve, to sell, to lease, to encumber, or otherwise to  
37 manage and dispose of the real property described in the  
38 recorded instrument, is effective to vest, and is hereby  
39 declared to have vested, in such trustee full power and  
40 authority as granted and provided in the recorded instrument to  
41 deal in and with such property, or interest therein or any part  
42 thereof, held in trust under the recorded instrument.

43 (2)(4) NO DUTY TO INQUIRE.--Any grantee, mortgagee,  
44 lessee, transferee, assignee, or person obtaining satisfactions  
45 or releases or otherwise in any way dealing with the trustee  
46 with respect to the real property or any interest in such  
47 property held in trust under the recorded instrument, as  
48 hereinabove provided for, is not obligated to inquire into the  
49 identification or status of any named or unnamed beneficiaries,  
50 or their heirs or assigns to whom a trustee may be accountable  
51 under the terms of the recorded instrument, or under any  
52 unrecorded separate declarations or agreements collateral to the  
53 recorded instrument, whether or not such declarations or  
54 agreements are referred to therein; or to inquire into or  
55 ascertain the authority of such trustee to act within and  
56 exercise the powers granted under the recorded instrument; or to  
57 inquire into the adequacy or disposition of any consideration,  
58 if any is paid or delivered to such trustee in connection with  
59 any interest so acquired from such trustee; or to inquire into  
60 any of the provisions of any such unrecorded declarations or  
61 agreements.

62 (3)(5) BENEFICIARY CLAIMS.--All persons dealing with the  
63 trustee under the recorded instrument as hereinabove provided  
64 take any interest transferred by the trustee thereunder, within  
65 the power and authority as granted and provided therein, free  
66 and clear of the claims of all the named or unnamed  
67 beneficiaries of such trust, and of any unrecorded declarations  
68 or agreements collateral thereto whether referred to in the

69 recorded instrument or not, and of anyone claiming by, through,  
70 or under such beneficiaries. However, this section does not  
71 prevent a beneficiary of any such unrecorded collateral  
72 declarations or agreements from enforcing the terms thereof  
73 against the trustee.

74 ~~(4)(12)~~ EXCLUSION.--This section ~~act~~ does not apply to  
75 any deed, mortgage, or other instrument to which s. 689.07  
76 applies.

77 (5) APPLICABILITY.--The applicability of this section  
78 shall be determined without regard to whether any reference is  
79 made in the recorded instrument to the beneficiaries of such  
80 trust or to any separate collateral unrecorded declarations or  
81 agreements, without regard to the provisions of any unrecorded  
82 trust agreement or declaration of trust, and without regard to  
83 whether the trust is governed by the provisions of s. 689.071 or  
84 chapter 736. This section applies both to recorded instruments  
85 that are recorded after the effective date of this act and to  
86 recorded instruments that were previously recorded and governed  
87 by similar provisions formerly contained in s. 689.071(3), and  
88 any such recorded instrument purporting to confer power and  
89 authority on a trustee under such formerly effective provisions  
90 of 689.071(3) is hereby validated and confirmed and shall have  
91 the effect of vesting full power and authority in such trustee  
92 as set forth in this section.

93 Section 2. Subsection 689.071, Florida Statutes, is  
94 amended to read:

95 689.071 Florida Land Trust Act.--

96 (1) SHORT TITLE.--This section may be cited as the  
97 "Florida Land Trust Act."

98 (2) DEFINITIONS.--As used in this section, the term:

99 (a) "Beneficial interest" means any interest, vested or  
100 contingent and regardless of how small or minimal such interest  
101 may be, in a land trust which is held by a beneficiary.

102 (b) "Beneficiary" means any person ~~or entity~~ having a

103 beneficial interest in a land trust. A trustee may be a  
104 beneficiary of the land trust for which such trustee serves as  
105 trustee.

106 ~~(c) "Holder of the power of direction" means any person~~  
107 ~~or entity having the authority to direct the trustee to convey~~  
108 ~~property or interests, execute a mortgage, distribute proceeds~~  
109 ~~of a sale or financing, and execute documents incidental to the~~  
110 ~~administration of a land trust.~~

111 (c)(d) "Land trust" means any express written agreement  
112 or arrangement by which a use, confidence, or trust is declared  
113 of any land, or of any charge upon land, under which the title  
114 to real property including, but not limited to, a leasehold or  
115 mortgagee interest, both legal and equitable, is vested in a  
116 trustee by a recorded instrument that confers on the trustee the  
117 power and authority prescribed in subsection (3). s. 689.073(1),  
118 and under which the trustee has no duties other than the  
119 following:

120 1. The duty to convey, sell, lease, mortgage or deal with  
121 the trust property, or to exercise such other powers concerning  
122 the trust property as may be set forth in the recorded  
123 instrument, in each case as directed by the beneficiaries or by  
124 the holder of the power of direction, or

125 2. The duty to sell or dispose of the trust property at  
126 the termination of the trust, or

127 3. The duty to perform ministerial and administrative  
128 functions delegated to the trustee in the trust agreement or by  
129 the beneficiaries or the holder of the power of direction, or

130 4. The duties required of a trustee under chapter 721, if  
131 the trust is a timeshare estate trust complying with the  
132 provisions of s. 721.08(2)(c)4. or a vacation club trust  
133 complying with the provisions of s. 721.53(1)(e);

134  
135 provided, however, that the duties of the trustee of a land  
136 trust created before the effective date of this act may exceed

137 the foregoing limited duties to the extent set forth in s.  
138 689.071(14).

139 ~~The recorded instrument shall not itself be deemed to create an~~  
140 ~~entity, regardless of whether the relationship among the~~  
141 ~~beneficiaries and the trustee is deemed to be an entity under~~  
142 ~~other applicable law.~~

143 (d) "Power of direction" means the authority of a person,  
144 as set forth in the trust agreement, to direct the trustee of a  
145 land trust to convey property or interests, execute a lease or  
146 mortgage, distribute proceeds of a sale or financing, and  
147 execute documents incidental to the administration of a land  
148 trust.

149 (e) "Recorded instrument" has the meaning set forth in s.  
150 689.073(1).

151 (f) "Trust agreement" means the written agreement  
152 governing a land trust or other trust, including any amendments.

153 ~~(e)~~(g) "Trustee" means the person or entity designated in  
154 ~~a trust instrument~~ recorded instrument or trust agreement to  
155 ~~hold legal and equitable title to the trust property of a land~~  
156 ~~trust or other trust.~~

157 (h) "Trust property" means any interest in real property  
158 including, but not limited to, a leasehold or mortgagee  
159 interest, conveyed by a recorded instrument to a trustee of a  
160 land trust or other trust.

161 (3) OWNERSHIP VESTS IN TRUSTEE.--~~Every conveyance, deed,~~  
162 ~~mortgage, lease assignment, or other instrument heretofore or~~  
163 ~~hereafter made, hereinafter referred to as the "recorded~~  
164 ~~instrument,"~~ recorded instrument transferring any interest in  
165 real property ~~in this state, including, but not limited to, a~~  
166 ~~leasehold or mortgagee interest, to any person or any~~  
167 ~~corporation, bank, trust company, or other entity duly formed~~  
168 ~~under the laws of its state of qualification, in which recorded~~  
169 ~~instrument the person, corporation, bank, trust company, or~~  
170 ~~other entity is designated "trustee," or "as trustee,"~~ to the

171 trustee of a land trust and conferring upon the trustee the  
172 power and authority prescribed in s 689.073(1), whether or not  
173 reference is made in the recorded instrument to the  
174 beneficiaries of such land trust or to the trust agreement or  
175 any separate collateral unrecorded declarations or agreements,  
176 is effective to vest, and is hereby declared to have vested, in  
177 such trustee both legal and equitable title, and full rights of  
178 ownership, over the ~~real~~ trust property or interest therein,  
179 with full power and authority as granted and provided in the  
180 recorded instrument to deal in and with the trust property or  
181 interest therein or any part thereof; ~~provided, the recorded~~  
182 ~~instrument confers on the trustee the power and authority to~~  
183 ~~protect, to conserve, to sell, to lease, to encumber, or~~  
184 ~~otherwise to manage and dispose of the real property described~~  
185 ~~in the recorded instrument.~~ The recorded instrument shall not  
186 itself be deemed to create an entity, regardless of whether the  
187 relationship among the beneficiaries and the trustee is deemed  
188 to be an entity under other applicable law.

189 ~~— (4) NO DUTY TO INQUIRE. Any grantee, mortgagee, lessee,~~  
190 ~~transferee, assignee, or person obtaining satisfactions or~~  
191 ~~releases or otherwise in any way dealing with the trustee with~~  
192 ~~respect to the real property or any interest in such property~~  
193 ~~held in trust under the recorded instrument, as hereinabove~~  
194 ~~provided for, is not obligated to inquire into the~~  
195 ~~identification or status of any named or unnamed beneficiaries,~~  
196 ~~or their heirs or assigns to whom a trustee may be accountable~~  
197 ~~under the terms of the recorded instrument, or under any~~  
198 ~~unrecorded separate declarations or agreements collateral to the~~  
199 ~~recorded instrument, whether or not such declarations or~~  
200 ~~agreements are referred to therein; or to inquire into or~~  
201 ~~ascertain the authority of such trustee to act within and~~  
202 ~~exercise the powers granted under the recorded instrument; or to~~  
203 ~~inquire into the adequacy or disposition of any consideration,~~  
204 ~~if any is paid or delivered to such trustee in connection with~~

205 ~~any interest so acquired from such trustee; or to inquire into~~  
206 ~~any of the provisions of any such unrecorded declarations or~~  
207 ~~agreements.~~

208 ~~———— (5) BENEFICIARY CLAIMS. All persons dealing with the~~  
209 ~~trustee under the recorded instrument as hereinabove provided~~  
210 ~~take any interest transferred by the trustee thereunder, within~~  
211 ~~the power and authority as granted and provided therein, free~~  
212 ~~and clear of the claims of all the named or unnamed~~  
213 ~~beneficiaries of such trust, and of any unrecorded declarations~~  
214 ~~or agreements collateral thereto whether referred to in the~~  
215 ~~recorded instrument or not, and of anyone claiming by, through,~~  
216 ~~or under such beneficiaries. However, this section does not~~  
217 ~~prevent a beneficiary of any such unrecorded collateral~~  
218 ~~declarations or agreements from enforcing the terms thereof~~  
219 ~~against the trustee.~~

220 (4) STATUTE OF USES INAPPLICABLE.--Neither s. 689.09 nor  
221 the common law statute of uses shall operate to execute a land  
222 trust or to vest the trust property in the beneficiary or  
223 beneficiaries of the land trust, notwithstanding any lack of  
224 duties on the part of the trustee or the otherwise passive  
225 nature of the land trust.

226 ———— (5) DOCTRINE OF MERGER INAPPLICABLE.--The doctrine of  
227 merger shall not operate to extinguish a land trust or to vest  
228 the trust property in the beneficiary or beneficiaries of the  
229 land trust, notwithstanding that the trustee may be the sole  
230 beneficiary of the land trust.

231 (6) PERSONAL PROPERTY.--In all cases in which the  
232 recorded instrument or the trust agreement, as hereinabove  
233 provided, contains a provision defining and declaring the  
234 interests of beneficiaries of a land trust ~~thereunder~~ to be  
235 personal property only, such provision shall be controlling for  
236 all purposes when such determination becomes an issue under the  
237 laws or in the courts of this state. If no such personal  
238 property designation appears in the recorded instrument or in

239 the trust agreement, then the interests of the land trust  
240 beneficiaries shall be real property.

241 (7) TRUSTEE LIABILITY.--In addition to any other  
242 limitation on personal liability existing pursuant to statute or  
243 otherwise, the provisions of s. 736.08125 and s. 736.1013 apply  
244 to the trustee of a land trust created pursuant to this section.

245 (8) LAND TRUST BENEFICIARIES.--

246 (a) Except as provided in this section, the beneficiaries  
247 of a land trust are not liable, solely by being beneficiaries,  
248 under a judgment, decree, or order of court or in any other  
249 manner for a debt, obligation, or liability of the land trust.

250 ~~—(b)~~ Any beneficiary acting under the trust agreement of a  
251 land trust is not liable to the ~~land trust's~~ trustee or to any  
252 other beneficiary for the beneficiary's good faith reliance on  
253 the provisions of the trust agreement. A beneficiary's duties  
254 and liabilities under a land trust may be expanded or restricted  
255 in a trust agreement or beneficiary agreement.

256 (b) If so provided in the recorded instrument, in the  
257 trust agreement or in a beneficiary agreement: (i) a particular  
258 beneficiary may own the beneficial interest in a particular  
259 portion or parcel of the trust property of a land trust; (ii) a  
260 particular person may be the holder of the power of direction  
261 with respect to the trustee's actions concerning a particular  
262 portion or parcel of the trust property of a land trust; and  
263 (iii) the beneficiaries may own specified proportions or  
264 percentages of the beneficial interest in the trust property or  
265 in particular portions or parcels of the trust property of a  
266 land trust. Multiple beneficiaries may own a beneficial  
267 interest in a land trust as tenants in common, joint tenants  
268 with right of survivorship or tenants by the entireties.

269 (c) If a beneficial interest in a land trust is  
270 determined to be personal property as provided in subsection  
271 (6), then chapter ~~Chapter~~ 679 applies to the perfection of any  
272 security interest in that a beneficial interest ~~in a land trust.~~

273 If a beneficial interest in a land trust is determined to be  
274 real property as provided in subsection (6), then to perfect a  
275 lien or security interest against that beneficial interest, the  
276 mortgage, deed of trust, security agreement or other similar  
277 security document must be recorded in the public records of the  
278 county that is specified for such security documents in the  
279 recorded instrument or in a declaration of trust or memorandum  
280 thereof recorded in the public records of the same county as the  
281 recorded instrument; if no county is so specified for recording  
282 such security documents, then the proper county for recording  
283 such a security document against a beneficiary's interest in any  
284 trust property is the county where the trust property is  
285 located. The perfection of a lien or security interest in a  
286 beneficial interest in a land trust does not affect, attach to  
287 or encumber the legal or equitable title of the trustee in the  
288 trust property, nor impair or diminish the authority of the  
289 trustee under the recorded instrument, and parties dealing with  
290 the trustee are not required to inquire into the terms of the  
291 unrecorded trust agreement or any lien or security interest  
292 against a beneficial interest in the land trust.

293 (d) The trustee's legal and equitable title to the trust  
294 property of a land trust is separate and distinct from the  
295 beneficial interest of a beneficiary in the land trust and in  
296 the trust property. A lien, judgment, mortgage, security  
297 interest or other encumbrance attaching to the trustee's legal  
298 and equitable title to the trust property of a land trust shall  
299 not attach to the beneficial interest of any beneficiary, nor  
300 shall any lien, judgment, mortgage, security interest or other  
301 encumbrance against a beneficiary or beneficial interest attach  
302 to the legal or equitable title of the trustee to the trust  
303 property held under a land trust, unless the lien, judgment,  
304 mortgage, security interest or other encumbrance by its terms or  
305 by operation of other law attaches to both the interest of the  
306 trustee and the interest of such beneficiary. A beneficiary's

307 ~~duties and liabilities may be expanded or restricted in a trust~~  
308 ~~agreement or beneficiary agreement.~~

309 (e) Any subsequent document appearing of record in which  
310 a beneficiary of a land trust transfers or encumbers any the  
311 beneficial interest in the land trust does not transfer or  
312 encumber the legal or equitable title of the trustee to the  
313 trust property and does not diminish or impair the authority of  
314 the trustee under the terms of the recorded instrument. Parties  
315 dealing with the trustee of a land trust are not required to  
316 inquire into the terms of the unrecorded trust agreement.

317 (f) ~~The An unrecorded~~ trust agreement ~~giving rise to a~~  
318 ~~recorded instrument~~ for a land trust may provide that one or  
319 more persons ~~or entities~~ have the power to direct the trustee to  
320 convey property or interests, execute a mortgage, distribute  
321 proceeds of a sale or financing, and execute documents  
322 incidental to administration of the land trust. The power of  
323 direction, unless provided otherwise in the ~~land~~ trust agreement  
324 of the land trust, is conferred upon the holders of the power  
325 for the use and benefit of all holders of any beneficial  
326 interest in the land trust. In the absence of a provision in the  
327 ~~land~~ trust agreement of a land trust to the contrary, the power  
328 of direction shall be in accordance with the percentage of  
329 individual ownership. In exercising the power of direction, the  
330 holders of the power of direction are presumed to act in a  
331 fiduciary capacity for the benefit of all holders of any  
332 beneficial interest in the land trust, unless otherwise provided  
333 in the ~~land~~ trust agreement. A beneficial interest in a land  
334 trust is indefeasible, and the power of direction may not be  
335 exercised so as to alter, amend, revoke, terminate, defeat, or  
336 otherwise affect or change the enjoyment of any beneficial  
337 interest in a land trust.

338 (g) A land trust ~~relating to real estate~~ does not fail,  
339 and any use relating to the trust property ~~real estate~~ may not  
340 be defeated, because beneficiaries are not specified by name in

341 the recorded instrument deed of conveyance to the trustee or  
342 because duties are not imposed upon the trustee. The power  
343 conferred by any recorded instrument deed of conveyance on a  
344 trustee of a land trust to sell, lease, encumber, or otherwise  
345 dispose of property described in the recorded instrument deed is  
346 effective, and a person dealing with the trustee of a land trust  
347 is not required to inquire any further into the right of the  
348 trustee to act or the disposition of any proceeds.

349 (h) The principal residence of a beneficiary shall be  
350 entitled to the homestead tax exemption even if the homestead is  
351 held by a trustee in a land trust, provided the beneficiary  
352 qualifies for the homestead exemption under chapter 196.

353 (i) In a foreclosure against trust property or other  
354 litigation affecting the title to trust property of a land  
355 trust, the appointment of a guardian ad litem is not necessary  
356 to represent the interest of any beneficiary.

357 (9) SUCCESSOR TRUSTEE.--

358 ~~(a) The provisions of s. 736.0705 regarding resignation~~  
359 ~~of trustees shall not apply regarding the appointment of a~~  
360 ~~successor trustee under this section.~~

361 (a)(b) If the recorded instrument and the unrecorded ~~land~~  
362 trust agreement are silent as to the appointment of a successor  
363 trustee of a land trust in the event of the death, incapacity,  
364 resignation, or termination due to dissolution of a ~~land~~ trustee  
365 or if a ~~land~~ trustee is unable to serve as trustee of a land  
366 trust, one or more persons ~~or entities~~ having the power of  
367 direction ~~of the land trust agreement~~ may appoint a successor  
368 trustee or trustees of the land trust by filing a declaration of  
369 appointment of a successor trustee or trustees in the public  
370 records of office of the recorder of deeds in the county in  
371 which the trust property is located. The declaration must be  
372 signed by a beneficiary or beneficiaries of the land trust and  
373 by the each successor trustee or trustees, must be acknowledged  
374 in the manner provided for acknowledgment of deeds, and must

375 contain:

- 376 1. The legal description of the trust property.
- 377 2. The name and address of the former trustee.
- 378 3. The name and address of the each successor trustee or
- 379 trustees.
- 380 4. A statement that ~~each successor trustee has been~~
- 381 ~~appointed by~~ one or more persons ~~or entities~~ having the power of
- 382 direction of the land trust appointed the successor trustee or
- 383 trustees, together with an acceptance of appointment by the each
- 384 successor trustee or trustees.

385 (b)(e) If the recorded instrument is silent as to the

386 appointment of a successor trustee or trustees of a land trust

387 but an unrecorded ~~land~~ trust agreement provides for the

388 appointment of a successor trustee or trustees in the event of

389 the death, incapacity, resignation, or termination due to

390 dissolution of the ~~land~~ trustee, of a land trust, then upon the

391 appointment of any successor trustee pursuant to the terms of

392 the unrecorded ~~land~~ trust agreement, the each successor trustee

393 or trustees shall file a declaration of appointment of a

394 successor trustee in the public records of ~~office of the~~

395 ~~recorder of deeds~~ in the county in which the trust property is

396 located. The declaration must be signed by both the former

397 trustee and the each successor trustee or trustees, must be

398 acknowledged in the manner provided for acknowledgment of deeds,

399 and must contain:

- 400 1. The legal description of the trust property.
- 401 2. The name and address of the former trustee.
- 402 3. The name and address of the successor trustee or
- 403 trustees.
- 404 4. A statement of resignation by the former trustee and a
- 405 statement of acceptance of appointment by the each successor
- 406 trustee or trustees.
- 407 5. A statement that the each successor trustee or
- 408 trustees were ~~was~~ duly appointed under the terms of the

409 unrecorded ~~land~~ trust agreement.

410  
411 If the appointment of any successor trustee of a land trust is  
412 due to the death or incapacity of the former trustee, the  
413 declaration need not be signed by the former trustee and a copy  
414 of the death certificate or a statement that the former trustee  
415 is incapacitated or unable to serve must be attached to or  
416 included in the declaration, as applicable.

417 ~~(c)(d)~~ If the recorded instrument provides for the  
418 appointment of any successor trustee of a land trust and any  
419 successor trustee is appointed in accordance with the recorded  
420 instrument, no additional declarations of appointment of any  
421 successor trustee are required under this section.

422 ~~(d)(e)~~ Each successor ~~land~~ trustee appointed with respect  
423 to a land trust is fully vested with all the estate, properties,  
424 rights, powers, trusts, duties, and obligations of the  
425 predecessor ~~land~~ trustee, except that any successor ~~land~~ trustee  
426 of a land trust is not under any duty to inquire into the acts  
427 or omissions of a predecessor trustee and is not liable for any  
428 act or failure to act of a predecessor trustee. A person dealing  
429 with any successor trustee of a land trust pursuant to a  
430 declaration filed under this section is not obligated to inquire  
431 into or ascertain the authority of the successor trustee to act  
432 within or exercise the powers granted under the recorded  
433 instruments or any unrecorded trust agreement ~~declarations or~~  
434 ~~agreements~~.

435 ~~(e)(f)~~ A ~~land~~ trust agreement may provide that the  
436 trustee of a land trust, when directed to do so by the holder of  
437 the power of direction, or by the beneficiaries of the land  
438 trust or legal representatives of the beneficiaries, may convey  
439 the trust property directly to another trustee on behalf of the  
440 beneficiaries or to another representative named in such  
441 directive ~~others named by the beneficiaries~~.

442 (10) TRUSTEE AS CREDITOR.--

443 (a) If a debt is secured by a security interest or  
444 mortgage against ~~in~~ a beneficial interest in a land trust or by  
445 a mortgage on ~~land~~ trust property of a land trust, the validity  
446 or enforceability of the debt, security interest, or mortgage  
447 and the rights, remedies, powers, and duties of the creditor  
448 with respect to the debt or the security are not affected by the  
449 fact that the creditor and the trustee are the same person ~~or~~  
450 ~~entity~~, and the creditor may extend credit, obtain any necessary  
451 security interest or mortgage, and acquire and deal with the  
452 property comprising the security as though the creditor were not  
453 the trustee of the land trust.

454 (b) A trustee of a land trust does not breach a fiduciary  
455 duty to the beneficiaries, and it is not evidence of a breach of  
456 any fiduciary duty owed by the trustee to the beneficiaries for  
457 a trustee to be or become a secured or unsecured creditor of the  
458 land trust, the beneficiary of the land trust, or a third party  
459 whose debt to such creditor is guaranteed by a beneficiary of  
460 the land trust.

461 (11) REMEDIAL ACT.--This act is remedial in nature and  
462 shall be given a liberal interpretation to effectuate the intent  
463 and purposes hereinabove expressed.

464 (12) EXCLUSION.--This act does not apply to any deed,  
465 mortgage, or other instrument to which s. 689.07 applies.

466 (13) NOTICES TO TRUSTEE.--Any notice required to be given  
467 to a trustee of a land trust regarding trust property, by a  
468 person who is not a party to the trust agreement, shall identify  
469 the trust property to which the notice pertains or shall include  
470 the name and date of the land trust to which the notice  
471 pertains, if such information is shown on the recorded  
472 instrument for such trust property.

473 (14) DETERMINATION OF APPLICABLE LAW.--Except as  
474 otherwise provided in this section, the provisions of chapter  
475 736 do not apply to a land trust governed under this section.

476 (a) A trust is not a land trust governed under this

477 section if there is no recorded instrument that confers on the  
478 trustee the power and authority prescribed in s 689.073(1).

479 (b) For a trust created before the effective date of this  
480 act:

481 1. The trust is a land trust governed under this section  
482 if a recorded instrument confers on the trustee the power and  
483 authority described in s 689.073(1) and if:

484 a. The recorded instrument or the trust agreement  
485 expressly provides that the trust is a land trust; or

486 b. The intent of the parties that the trust be a land  
487 trust is discerned from the trust agreement or the recorded  
488 instrument;

489 in either case without regard to whether the trustee's duties  
490 under the trust agreement are greater than those limited duties  
491 described in s. 689.071(2)(c).

492 2. The trust is not a land trust governed under this  
493 section if:

494 a. The recorded instrument or the trust agreement  
495 expressly provides that the trust is to be governed by chapter  
496 736, or by any predecessor trust code or trust statute of this  
497 state other than this section; or

498 b. The intent of the parties that the trust be governed  
499 by chapter 736, or by any predecessor trust code or trust  
500 statute of this state other than this section, is discerned from  
501 the trust agreement or the recorded instrument;

502 in either case, without regard to whether the trustee's duties  
503 under the trust agreement are greater than those limited duties  
504 described in s. 689.071(2)(c), and without consideration of any  
505 references in the trust agreement to provisions of chapter 736  
506 made applicable to the trust by chapter 721, if the trust is a  
507 timeshare estate trust complying with the provisions of s.  
508 721.08(2)(c)4. or a vacation club trust complying with the  
509 provisions of s. 721.08(2)(c)4.  
510 or a vacation club trust complying with the

511 provisions of s. 721.53(1)(e).

512 3. Solely for the purpose of determining the law  
513 governing a trust under subparagraph 1 or subparagraph 2 of this  
514 paragraph (b), the determination shall be made without  
515 consideration of any amendment to the trust agreement made on or  
516 after the effective date of this act, except as provided in  
517 paragraph (d).

518 4. If the determination of whether a trust is a land  
519 trust governed by this section cannot be made under either  
520 subparagraph 1 or subparagraph 2 of this paragraph (b), then the  
521 determination shall be made under paragraph (c) as if the trust  
522 was created on or after the effective date of this act.

523 (c) If a recorded instrument confers on the trustee the  
524 power and authority described in s 689.073(1) and the trust was  
525 created on or after the effective date of this act, then the  
526 trust shall be determined to be a land trust governed under this  
527 section only if the trustee's duties under the trust agreement,  
528 including any amendment made on or after the effective date of  
529 this act, are no greater than those limited duties described in  
530 s. 689.071(2)(c).

531 (d) If the trust agreement for a land trust created  
532 before the effective date of this act is amended on or after the  
533 effective date of this act to add to or increase the duties of  
534 the trustee beyond the duties set forth in the trust agreement  
535 as of the effective date of this act, then the trust shall  
536 remain a land trust governed under this section only if the  
537 additional or increased duties of the trustee implemented by the  
538 amendment are no greater than those limited duties described in  
539 s. 689.071(2)(c).

540 (15) UCC TRANSITION RULE.--This act does not render  
541 ineffective any effective Uniform Commercial Code financing  
542 statement filed before the effective date of this act to perfect  
543 a security interest in a beneficial interest in a land trust  
544 that is determined to be real property as provided in subsection

545 (6), but such a financing statement ceases to be effective at  
546 the earlier of five years after the effective date of this act  
547 or the time the financing statement would have ceased to be  
548 effective under the law of the jurisdiction in which it is  
549 filed, and the filing of a Uniform Commercial Code continuation  
550 statement after this act takes effect does not continue the  
551 effectiveness of such a financing statement. The recording of a  
552 mortgage, deed of trust, security agreement or other similar  
553 security document against such a beneficial interest that is  
554 real property in the public records specified in subsection  
555 (8)(c) continues the effectiveness and priority of a financing  
556 statement filed against such a beneficial interest before this  
557 act takes effect if:

558 (a) the recording of the security document in that county  
559 is effective to perfect a lien on such beneficial interest under  
560 subsection (8)(c);

561 (b) the recorded security document identifies the pre-  
562 effective date financing statement by indicating the office in  
563 which the financing statement was filed and providing the dates  
564 of filing and the file numbers, if any, of the financing  
565 statement and of the most recent continuation statement filed  
566 with respect to the financing statement; and

567 (c) the recorded security document indicates that the  
568 pre-effective date financing statement remains effective.

569  
570 If no original security document bearing the debtor's signature  
571 is readily available for recording in the public records, a  
572 secured party may continue the pre-effective date financing  
573 statement under this subsection by recording a copy of a  
574 security document verified by the secured party as being a true  
575 and correct copy of an original authenticated by the debtor.  
576 This subsection (15) does not apply to the perfection of a  
577 security interest in any beneficial interest in a land trust  
578 that is determined to be personal property under subsection (6).

579           Section 3. Subsection 736.0102, Florida Statutes, is  
580 amended to read:

581           736.0102. Scope.—

582           (1) Except as otherwise provided in this section, this  
583 ~~This~~ code applies to express trusts, charitable or  
584 noncharitable, and trusts created pursuant to a law, judgment,  
585 or decree that requires the trust to be administered in the  
586 manner of an express trust.

587           (2) This code does not apply to constructive or resulting  
588 trusts; conservatorships; custodial arrangements pursuant to the  
589 Florida Uniform Transfers to Minors Act; business trusts  
590 providing for certificates to be issued to beneficiaries; common  
591 trust funds; ~~land trusts under 689.701, except to the extent~~  
592 ~~provided in s. 689.071(7);~~ trusts created by the form of the  
593 account or by the deposit agreement at a financial institution;  
594 voting trusts; security arrangements; liquidation trusts; trusts  
595 for the primary purpose of paying debts, dividends, interest,  
596 salaries, wages, profits, pensions, or employee benefits of any  
597 kind; and any arrangement under which a person is nominee or  
598 escrowee for another.

599           (3) This code does not apply to any land trust under s.  
600 689.071, except to the extent provided in s. 689.071(7), s.  
601 721.08(2)(c)4. or s. 721.53(1)(e). A trust governed at its  
602 creation by chapter 736, former chapter 737, or any prior trust  
603 statute superseded or replaced by any provision of former  
604 chapter 737, is not a land trust regardless of any amendment or  
605 modification of the trust, any change in the assets held in the  
606 trust, or any continuing trust resulting from the distribution  
607 or retention in further trust of assets from the trust.

608           Section 4. This act shall take effect upon becoming a  
609 law.

## WHITE PAPER

### AMENDMENTS TO LAND TRUST ACT

#### I. SUMMARY

This legislation harmonizes provisions of the Florida Land Trust Act, FS 689.071, with certain provisions of the Florida Trust Code, FS Chapter 736. This legislation also codifies in the Florida Land Trust Act a number of land trust practices commonly used in Florida and Illinois and derived from judicial precedents or land trust treatises, but not presently appearing in the statute. This legislation also includes improvements based on the experience of Florida land trust practitioners that are intended to facilitate and encourage the use of land trusts in Florida real property transactions. The bill does not have any fiscal impact on state funds.

#### II. CURRENT SITUATION

Section 689.071 of the Florida Statutes was first enacted in 1963 to validate the use of Illinois land trusts in the State of Florida and to confirm the marketability of real property titles derived through a land trustee. Accordingly, this statute has always focused primarily on the authority of the land trustee to convey good title to third parties if the prior deed to the land trustee granted to the trustee certain powers to deal with and dispose of the property, commonly referred to as “deed powers.” Acting primarily as a “title estoppel” statute, Section 689.071 protected third party grantees, mortgagees and lessees who relied on the statutory authority of the trustee based on those recorded deed powers, without requiring them to inquire into the identity of the beneficiaries or the terms of the unrecorded trust agreement. Although the words “land trust” appeared in the section caption, the operation and effect of the deed powers provisions were not expressly limited to trusts based on the Illinois land trust model. Rather, the title provisions of the statute operated with respect to any recorded instrument to a trustee containing deed powers. As a result, it became a common practice in Florida to include section 689.071 deed powers in conveyances to trustees even if the trust was not intended to be a land trust, in order to obtain the title estoppel benefits of the statute.

Over the years, section 689.071 was amended to include other provisions pertaining to land trusts, such as expanding former section 737.306 (limitation on personal liability of trustees) to cover land trustees in response to a case holding that those protections were not available to land trustees. In 2006 and 2007, section 689.071 was expanded to add rudimentary governance provisions for land trusts and a procedure for appointing successor land trustees, and the expanded section was renamed the “Florida Land Trust Act.” The definition of the term “land trust” by reference to inclusion of deed powers in the conveyance deed to the trustee appeared in the statute for the first time in 2007. One of the primary purposes of this proposed legislation is to provide greater clarity in the manner in which the Florida Land Trust Act and the Florida Trust Code (FS chapter 736) are intended to relate to each other by articulating a more comprehensive statutory definition of “land trust.”

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

#### **A. General Overview**

This legislation is intended to clarify the distinction between a land trust governed by section 689.071 and other express trusts governed by the Florida Trust Code, yet preserve the title estoppel benefits of the existing statute for any conveyance to a trustee containing deed powers. To accomplish this objective, this legislation would (1) define land trusts based on the functional scope of the land trustee's duties, although deed powers would remain an essential element of a Florida land trust, and (2) relocate all the title estoppel provisions of section 689.071 to a newly created section 689.073, which will remain equally applicable to any conveyance containing deed powers to a trustee of any trust.

A transitional provision makes the new functional land trust definition apply only to trusts created on or after the effective date of the legislation, and a trust existing before the effective date is classified as a land trust (or not) based on the intentions of the parties as expressed in or discerned from the existing trust agreement. The relocated title estoppel provisions in new section 689.073 will apply to any real property conveyed to a trustee at any time by an instrument containing deed powers, regardless of whether the trust is a land trust or not. By separating the title estoppel statute from the land trust statute in this way, this legislation does not change the results intended by the parties to any trust agreement existing on the date that the legislation becomes effective.

In addition to extracting the title estoppel provisions from section 689.071 and relocating them to section 689.073, this legislation also codifies in amended section 689.071 a number of land trust practices and principles commonly used in Florida and Illinois and derived from judicial precedents or land trust treatises. The concept here is to make the utility and flexibility of land trusts more available to practitioners who are unfamiliar with these less accessible sources of land trust law, by including such provisions directly in the Florida Land Trust Act and thereby facilitating and encouraging the use of land trusts in Florida real property transactions.

#### **B. Point by Point Analysis**

##### **1. Title estoppel provisions-- same old wine, new universal bottle.**

Section 1 of the bill relocates and slightly revises subsections 689.071(3), (4) and (5), moving them to a new §689.073. Subsections (4) and (5) are simply relocated as-is and renumbered 689.073(2) and (3). Relocated subsection 689.071(3) is changed slightly: (i) to remove language regarding the vesting of both “legal and equitable title” in the trustee (usually a concept applicable to a land trusts only, which continues in revised 689.071); (ii) to remove the reference to real property “in this state” (thereby confirming that out-of-state lands may be held in Florida land trust regimes); (iii) to relocate to subsection 689.073(5) certain existing criteria for applicability; and (iv) to make the remaining language easier to understand. As revised, subsection 689.071(3) becomes subsection 689.073(1) and continues to vest in a trustee full power and authority to deal with the property as provided in the deed powers granted in the deed. The exclusion for instruments governed by section 689.07 (existing subsection 689.071(12)) is relocated to Subsection 689.073(4), changing only the words “this act” to “this section.”

New subsection 689.073(5) carries forward the provision, now found in §689.071(3), that makes the title estoppel provisions operative whether or not the conveyance deed refers to the beneficiaries or any unrecorded trust agreement. New subsection 689.073(5) also expressly provides that the title estoppel provisions work regardless of the provisions of any unrecorded trust agreement and regardless of whether the trust is a land trust or a Ch. 736 trust.

The last sentence of new subsection 689.073(5) also clarifies that the relocated title estoppel section applies BOTH to deeds recorded after the effective date of the proposed amendments AND to deeds recorded under the present statute in 689.071(3). This is not a retroactive provision, but rather confirms that the relocation of the title estoppel section is not intended to change the legal effect of any previous conveyances under the present statute, and for good measure all such previous conveyances are validated as vesting the trustee with the requisite deed powers.

The continuity of the effectiveness of the relocated title estoppel provisions is a vital element of this legislative proposal. For that reason, some archaic language in the existing statute is carried forward into the relocated sections, to reduce the risk of someone later arguing that the modernized language was intended to have a substantive effect on previous conveyances. Modernizing language appears elsewhere in other provisions of revised section 689.071, but not in the title estoppel provisions, which are intended to operate prospectively exactly the same way as they do now, without regard to whether the trust agreement also qualifies as a land trust under revised section 689.071.

## 2. Revisions to §689.071(2)-- Definition of “land trust.”

Section 2 of this bill revises the remaining provisions of §689.071 that were not moved to new §689.073. This revised definition of “land trust” in subsection 689.071(2)(c) still requires a conveyance to a trustee by a recorded instrument containing deed powers, but beginning with the effective date of the amendment this definition focuses on the key functional distinction between a land trust and other express trusts. The distinction is that a land trustee functions almost entirely as the agent of the beneficiaries or the person holding the power of direction under the trust agreement, whereas a trustee who is subject to the Trust Code in chapter 736 has more extensive fiduciary duties and responsibilities to the trust beneficiaries, along with more extensive potential liability if the trustee fails to perform the trustee’s discretionary duties prudently.

To be sure, a land trustee has a fiduciary relationship to the land trust beneficiaries and the persons holding the “power of direction” over the actions of the land trustee, just as any agent is bound as a fiduciary to the principal for whom the agent acts. But in practice, land trustees are rarely delegated discretionary duties under a land trust agreement, beyond ministerial and administrative matters. This lack of land trustee duties is a logical parallel to the exemption that land trustees enjoy from chapter 736 responsibilities and liabilities.

This practical distinction will appear in the revised definition of a land trust in §689.071(2)(c). For trusts created on or after the effective date of the amendments, the revised definition will limit the duties of a trustee of a “land trust” to the following: (i) the duty to exercise the trustee’s deed powers AS DIRECTED by the beneficiary or by the holder of the power of direction (i.e., this is the

agent's fiduciary duty to follow the principal's directions); (ii) the duty to dispose of the trust property at the termination of the trust (i.e., the classic "active" duty that historically saved Illinois land trusts from the statute of uses); (iii) the duty to perform ministerial and administrative functions delegated to the trustee; and (iv) the duties required of certain timeshare trustees by chapter 721 (more on this point appears below). If the trustee's duties exceed the foregoing limited duties and the trust is created after the effective date of the proposed amendment, then the trust will NOT be treated as a land trust and will not be excluded from the operation of chapter 736. Because the title estoppel provisions of the statute (being relocated to new §689.073) operate on ANY conveyance containing deed powers, the classification of the trust as a "land trust" (or not) will have no effect on the title to any real property held by the trustee.

It is important to distinguish the familiar "deed powers" from the "limited duties" described in this amendment. By including broad deed powers in a conveyance to a trustee, a grantor authorizes the world to rely on actions taken by the trustee-- essentially the grantor is estopped from later claiming against a third party that the trustee's actions were unauthorized (i.e., this is the "title estoppel" feature of present §689.071). In practice, however, a land trustee rarely has actual authority under the trust agreement to take ANY action without instructions from the beneficiaries or the person holding the power of direction. Students of legal history know that this lack of independent trustee duties imperils land trusts under the statute of uses in many jurisdictions-- if the trustee has no active duties, the trust is said to be a "passive trust" or "dry trust" and the statute of uses may "execute" the trust and vest the property title in the beneficiaries. Based on Illinois judicial precedents, land trust agreements usually direct the trustee to sell the property at the termination of the trust and distribute the proceeds-- voila, an "active" duty that saves the otherwise passive land trust from execution by the statute of uses.

The codification of "limited duties" in the definition is based on this real-world description of land trusts. It presumes that the land trustee has extremely limited duties under the trust agreement as noted above, regardless of the breadth of the deed powers contained in the recorded conveyance deed.

The revised "land trust" definition contains a cross-reference to a transition rule that appears in subsection 689.071(14), sometimes referred to below as the "switchbox" provision. This transition rule exempts existing land trusts from the new duties-based test in 689.071(2)(c); rather, an existing trust is a land trust (or not) based on the intentions expressed in (or discernable from) the existing trust agreement. As a practical matter, the overwhelming majority of existing land trusts sharply curtail the discretionary duties of the land trustee, such that those existing trusts would meet the new duties-based "land trust" definition even if it were applied to them retroactively. But because there are some land trust agreements that vest the land trustee with greater discretion, the switchbox provision does not apply the duties-based test to any existing land trust agreement that says the trust is a "land trust" or clearly was intended to be a land trust. In this way, existing obvious land trusts are "grandfathered" into the land trust statute.

There are two necessary exceptions to the switchbox provision: (1) if it is not obvious from reading the existing trust agreement that the parties intended to create a land trust, then the duties-based test applies; and (2) if an existing land trust agreement is amended to add or expand duties of the trustee, then the duties-based test is applied ONLY to the added or expanded duties that were not

found in the trust agreement before the effective date of the amended act. In either case, if the trustee has or adds too many duties beyond those in the land trust definition, the result is that the trustee becomes subject to the tougher trustee standards of chapter 736, but there is no effect on the title to the trust property. It is anticipated that such a case will be extremely rare, but the result (greater trustee accountability for trustees with greater duties) is good public policy.

3. Other definitional changes in §689.071(2).

Besides revising the definition of “land trust,” section 2 of the bill adds and clarifies some other definitions of lesser significance in subsection 689.071(2):

- The definition for “holder of the power of direction” was revised and shortened to “power of direction” because “holder of” was not used consistently in the statute.
- The phrase “person or entity” was shortened to “person” in numerous places (beginning with the definition of “beneficiary”) because the statutory definition of “person” includes entities.
- New definitions were created for some basic trust concepts, such as “trust agreement,” “trust property” and “recorded instrument” (the latter being a cross-reference to the relocated deed powers provision now found in §689.073(1)).
- “Trustee” is being redefined so that the term will work in the switchbox provision to mean the trustee of a land trust OR the trustee of another trust. For this reason, numerous references to “trustee” in revised §689.071 will be changed to “trustee of a land trust” where that meaning is intended.

4. Vesting of “legal and equitable title” in §689.071(3).

Although the title estoppel provisions of existing subsection 689.071(3) are being relocated to new subsection 689.073(1), modified portions will remain in revised 689.071(3) to continue the existing statutory statement that a land trustee is vested with both legal and equitable title to the trust property. This vesting of “legal and equitable title” provision is a land trust characteristic imported from Illinois, and therefore it does NOT appear in the relocated title estoppel provisions in §689.073 that universally apply to any type of trust with deed powers. Although the “legal and equitable” language has been excised from a number of other subsections of §689.071 to avoid potential circularity, subsection 689.071(3) will continue to contain the operative language regarding vesting of legal and equitable title in the land trustee.

The two main changes in revised §689.071(3) are merely mechanical: (1) because new §689.073 now defines the requirements for a “recorded instrument” containing deed powers, revised §689.071(3) relies on that definition without repeating it; and (2) the statement that the recorded instrument does not by itself create an entity has been relocated to the end of §689.071(3) instead of appearing in the definition of “land trust.” Other housekeeping edits to §689.071(3) concern the consistent use of defined terms such as “land trust,” “trust agreement” and “trust property.”

5. Statute of Uses and Doctrine of Merger in new §689.071(4) & (5).

When §689.071 was first enacted for the purpose of validating the use of Illinois land trusts in Florida, one commonly assumed result was that land trusts would not be executed as “passive trusts” or “dry trusts” by the statute of uses, which is codified in Florida in §689.09. This proposed legislation makes that result explicit with respect to a land trust, overriding not only §689.09 but also the common-law statute of uses.

New subsection 689.071(5) overrides the doctrine of merger with respect to a land trust, so that a land trust will not be extinguished if the trustee is the sole beneficiary. Former subsection 689.071(5) is one of the title estoppel provisions relocated verbatim to §689.073.

6. Personal Property Option-- revised §689.071(6).

Section 689.071 has long provided an option whereby the recorded instrument could define and declare the interests of the land trust beneficiaries to be personal property for all purposes under Florida law (except of course for the stamp tax provision in §201.02(4)). As amended by this proposed legislation, the obvious negative implication in the statute is made explicit: if the beneficial interest in a land trust is not declared to be personal property, then the beneficial interest is real property. This clarified provision will remain in the Land Trust Act but is not replicated in the relocated title estoppel provisions in §689.073 that apply to all trustees receiving recorded instruments containing deed powers.

Subsection 689.071(6) is changed in one regard: the optional personal property declaration can be made in the recorded instrument OR in the trust agreement. This change is consistent with the relocation of the title estoppel provisions to new §689.073, which governs title matters that depend on the contents of the recorded instrument. Whether the beneficial interests are real property or personal property does not affect the nature of the title vested in the trustee or the ability of third parties to acquire good title to the trust property from the trustee in accordance with the powers contained in the recorded instrument.

As noted above, revised subsection 689.071(6) contains edits for the consistent usage of defined terms such as “land trust” and “trust agreement.”

7. Beneficiary Provisions-- revised §689.071(8).

Subsection 689.071(8) is revised in a number of respects to codify certain land trust practices in this state that are based on customary practices or on treatises by Illinois land trust authorities, particularly *Kenoe on Land Trusts*.

Revised paragraph 689.071(8)(a) is a non-substantive combination of former paragraphs (a), (b) and (d), intended to consolidate similar provisions and make paragraph numbers (b) and (d) available for other new provisions. New paragraph 689.071(8)(b) is a statutory endorsement of flexible beneficial ownership techniques described in the *Kenoe* treatise. The purpose of including these provisions directly in the Land Trust Act is to increase public awareness that such techniques

are available without making reference to the treatise, thereby promoting the usage of land trusts in Florida generally.

The proposed revisions to paragraph 689.071(8)(c) are intended to reconcile the Land Trust Act with the UCC Article 9 exclusion of interests in real property, found in FS §679.1091(4)(k). The case of *In re Cowsert*, 14 B.R. 335 (Bankr.S.D.Fla. 1981), holds that a beneficial interest in a land trust is a general intangible within the scope of the Florida Uniform Commercial Code, and this result is codified in the present version of paragraph 689.071(8)(c), which provides that UCC Article 9 governs the perfection of a security interest in a beneficial interest in a land trust. However, if the beneficial interest is defined as real property under subsection 689.071(6), then there is a possible contradiction between the Land Trust Act (which says Article 9 applies to beneficial interests) and the UCC (which says Article 9 excludes real property interests).

Chapter 721 of the Florida Statutes (the Florida Vacation Plan and Timeshare Act) authorizes the creation and marketing of timeshare estates through trusts complying with §721.08(2)(c)4. Because timeshare estates are defined as real property in §721.05(34), the purchasers of Florida timeshare estates typically finance their purchase with a mortgage recorded against the timeshare estate. But if the timeshare estate is created as a beneficial interest in a timeshare trust under Chapter 721 that is a land trust, then two different statutes (UCC Article 9 and the Land Trust Act) prescribe two different methods of perfection: should the timeshare lender use a mortgage or UCC security interest?

As proposed in this bill, revised paragraph 689.071(8)(c) resolves this apparent contradiction by clarifying that the UCC governs perfection if the beneficial interest in a land trust is declared to be personal property (as was the case in *Cowsert*), but that a mortgage instrument recorded in the real estate records is the proper method of perfection if the beneficial interest in a land trust is declared to be real property. In the latter case, the proper county for recording the mortgage may be specified in the recorded instrument or in a declaration of trust or memorandum that is recorded in the same county as the recorded instrument; otherwise the location of the trust property determines the proper county for recording the mortgage. A transition rule appears in new subsection 689.071(15) to provide for the continuation of perfection for any UCC financing statement that may have been filed, before the effective date of this clarification, against a land trust beneficial interest that is real property; it is an abbreviated version of the transition rules that were included in Revised UCC Article 9 in 2001.

The existing last sentence of §689.071(8)(c) is revised to state more clearly that a lien or security interest perfected against a beneficial interest in a land trust does not affect in any way the legal or equitable title of the land trustee to the trust property. New paragraph 689.071(8)(d) makes explicit a concept that is inherent in a beneficiary's ability to encumber a beneficial interest as described in existing paragraph 689.071(8)(c): the trustee's legal and equitable title to the trust property is separate and distinct from the beneficiary's beneficial interest in the land trust and the trust property. A lien, judgment, mortgage, security interest or other encumbrance against one interest does not automatically attach to the other interest. Paragraph 689.071(8)(e) is also revised to clarify this same point: documents recorded by a beneficiary to transfer or encumber a beneficial interest do not affect the legal and equitable title of the trustee or the deed powers granted to the trustee in the recorded instrument.

Paragraphs 689.071(8)(f) and (g), as well as other parts of subsection 689.071(8), have been edited for consistent usage of the defined terms “land trust,” “recorded instrument,” “trust agreement,” and “trust property.”

New paragraph 689.071(8)(i) is intended to end the reported occasional practice by some judges of appointing a guardian ad litem to represent the interests of land trust beneficiaries in a foreclosure or other litigation affecting title to the trust property. Because a land trustee is vested with both legal and equitable title to the trust property, joinder of the land trustee in the action is sufficient without incurring the additional expense of a guardian ad litem.

8. Successor Trustee Provisions-- revised §689.071(9).

Most of the revisions to subsection 689.071(9) are non-substantive edits for consistent usage of defined terms (as described above) and modernization of language (e.g., replacing “office of the recorder of deeds” with “public records”). Subparagraph 689.071(9)(a) is deleted because the switchbox provision in subsection 689.071(14) globally addresses the inapplicability of chapter 736 to land trusts.

The existing text of §689.071(9) uses the expression “each successor trustee” to avoid the longer phrase “the successor trustee or trustees.” Unfortunately, it is possible to misread the shorter phrase to mean “each AND EVERY successor trustee” in a series of successors (e.g., existing paragraph 689.071(9)(c) requires that “each successor trustee shall file a declaration of appointment”). The longer expression is clearer and replaces the shorter one.

Existing paragraph 689.071(9)(f) (renumbered here as (e)) provides that the beneficiaries may direct the land trustee to convey the trust property to another trustee. As amended, the paragraph will provide that this direction to convey could also come from the person holding the power of direction.

9. Trustee as Creditor-- revised §689.071(10).

Paragraph 689.071(10)(a) is revised to include a conforming reference to a mortgage (as well as a security interest) against a beneficial interest in a land trust (see discussion of paragraph 689.071(8)(c) above). Other non-substantive edits include consistent usage of defined terms and the deletion of “or entity” after “person.”

10. Notices to Trustee Provisions-- new §689.071(13).

This new subsection is an attempt to assure that the right parties receive any third-party notices concerning property held in a land trust, by requiring that notice to a land trustee must include certain identifying information if it appears in the recorded instrument.

11. “Switchbox” Provision; Timeshare Trusts-- new §689.071(14).

The transition rules contained in subsection 689.071(14) are discussed above in connection with the revised definition of “land trust” contained in paragraph 689.071(2)(c).

As noted above in the discussion of timeshare interests, Chapter 721 of the Florida Statutes authorizes the use of trusts complying with §721.08(2)(c)4 for the creation and marketing of timeshare estates; and §721.53(1)(e) specifies similar requirements for using trusts for multi-site vacation clubs. Both provisions of Chapter 721 specify that certain provisions of the Florida Trust Code (Chapter 736) govern the liability of the trustees of such qualifying trusts (specifically, §§736.08125, 736.08163, 736.1013 and 736.1015), and these provisions are usually recited in the Chapter 721 trust agreements. If such an existing timeshare trust were created as a land trust, however, then the trust agreement would contain provisions stating that the trust is a land trust (making it a land trust under §689.071(14)(b)1.) but would also refer to governance by these specific provisions of Chapter 736. Accordingly, the switchbox provision in §689.071(14)(b) expressly ignores these references to Chapter 736 in the trust agreement of a trust qualifying as a timeshare estate trust under §721.08(2)(c)4 or a vacation club trust under §721.53(1)(e).

Similar considerations under Chapter 721 led to the inclusion of clause 4 in the revised §689.071(2)(c) list of limited duties for land trustees. Most of the recited Ch. 736 provisions that apply to timeshare trusts under Ch. 721 pertain to limitations on the liability of the trustee, but one of them (§736.08163, concerning environmental matters) also imposes duties on a trustee. In addition, Chapter 721 also directly (i.e., without reference to Ch. 736) imposes certain duties on the trustee of a timeshare estate trust or a vacation club trust, although arguably those duties fall into the ministerial and administrative category. Further, it is conceivable that Chapter 721 might be amended in the future to impose other duties on timeshare trustees. To preserve the utility of land trusts as a structure for organizing timeshare estate trusts and vacation club trusts qualifying under Chapter 721, clause 4 of revised §689.071(2)(c) simply includes in the list of limited land trustee duties ANY duties that are imposed on the trustee under Chapter 721. Timeshare trusts are subject to substantial state regulation under Chapter 721.

12. Florida Trust Code - Scope Provision-- revised §736.0102.

Section 3 of the proposed bill includes a conforming amendment to §736.0102 of the Florida Trust Code. This section is being subdivided into two logical subsections, and a third subsection is added to address the exclusion of land trusts from the Florida Trust Code. New subsection 736.0102(3) provides that the Trust Code does not apply to land trusts under §689.071, except to the extent provided in subsection 689.071(7) of the Land Trust Act and in the two provisions of Chapter 721 that apply parts of Chapter 736 to timeshare trusts.

In addition, new subsection 736.0102(3) provides that a Trust Code trust remains a Trust Code trust (and does not become a land trust) regardless of any amendment or change in asset composition or utilization of a subtrust.

13. Effective Date Provision.

Section 4 of the proposed bill makes the amendments take effect immediately upon becoming a law. The reason for the early effective date is to minimize the opportunity for trust agreement drafters to amend the trust agreement before the switchbox provisions take effect and attempt to change a Trust Code trust into a land trust to avoid trustee duties and obligations, where the trust is not really a land trust at all.

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

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

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

Initially, this legislation will avert adverse private sector consequences to individual parties whose express trusts might otherwise be treated as land trusts not governed by the Florida Trust Code. In the longer run, the other provisions of this legislation that codify existing land trust practices and techniques will benefit the private sector by supporting and popularizing the land trust as a flexible vehicle for the development of real property in this state.

**VI. CONSTITUTIONAL ISSUES**

It is anticipated that this legislation will not raise constitutional issues, as the transition provisions are intended to preserve the rights and benefits of all parties to trust agreements existing on the date that the legislation becomes effective.

**V. OTHER INTERESTED PARTIES**

Other groups that will be interested in or affected by the proposed legislation include the title insurance industry, the timeshare industry, and banks and trust companies who serve as trustees.

1 A bill to be entitled

2 An Act relating to conveyances of real property to  
3 trustees; amending and renumbering portions of s.  
4 689.071 as s. 689.073 regarding recorded instruments  
5 conveying real property and conferring power and  
6 authority on a trustee; amending other portions of s.  
7 689.071, the Florida Land Trust Act; amending s.  
8 736.0102 regarding exclusions from the Florida Trust  
9 Code; providing an effective date.

10  
11 Section 1. Subsections 689.071(3), (4), (5) and (12),  
12 Florida Statutes, are amended and renumbered as Subsections  
13 689.073(1), (2), (3) and (4), and new Subsection 689.073(5) is  
14 created to read:

15 689.073 Powers conferred on trustee in recorded  
16 instrument.--

17 (1) OWNERSHIP VESTS IN TRUSTEE.--Every conveyance, deed,  
18 mortgage, lease assignment, or other instrument heretofore or  
19 hereafter made, hereinafter referred to as the "recorded  
20 instrument," transferring any interest in real property  
21 including, but not limited to, a leasehold or mortgagee  
22 interest, to any person or any corporation, bank, trust company,  
23 or other entity duly formed under the laws of its state of  
24 qualification, which recorded instrument designates the person,  
25 corporation, bank, trust company, or other entity "trustee" or  
26 "as trustee" and confers on the trustee the power and authority  
27 to protect, to conserve, to sell, to lease, to encumber, or  
28 otherwise to manage and dispose of the real property described  
29 in the recorded instrument, is effective to vest, and is hereby  
30 declared to have vested, in such trustee full power and  
31 authority as granted and provided in the recorded instrument to  
32 deal in and with such property, or interest therein or any part  
33 thereof, held in trust under the recorded instrument.

34 (2) NO DUTY TO INQUIRE.--Any grantee, mortgagee, lessee,  
35 transferee, assignee, or person obtaining satisfactions or  
36 releases or otherwise in any way dealing with the trustee with  
37 respect to the real property or any interest in such property  
38 held in trust under the recorded instrument, as hereinabove  
39 provided for, is not obligated to inquire into the  
40 identification or status of any named or unnamed beneficiaries,  
41 or their heirs or assigns to whom a trustee may be accountable  
42 under the terms of the recorded instrument, or under any  
43 unrecorded separate declarations or agreements collateral to the  
44 recorded instrument, whether or not such declarations or  
45 agreements are referred to therein; or to inquire into or  
46 ascertain the authority of such trustee to act within and  
47 exercise the powers granted under the recorded instrument; or to  
48 inquire into the adequacy or disposition of any consideration,  
49 if any is paid or delivered to such trustee in connection with  
50 any interest so acquired from such trustee; or to inquire into  
51 any of the provisions of any such unrecorded declarations or  
52 agreements.

53 (3) BENEFICIARY CLAIMS.--All persons dealing with the  
54 trustee under the recorded instrument as hereinabove provided  
55 take any interest transferred by the trustee thereunder, within  
56 the power and authority as granted and provided therein, free  
57 and clear of the claims of all the named or unnamed  
58 beneficiaries of such trust, and of any unrecorded declarations  
59 or agreements collateral thereto whether referred to in the  
60 recorded instrument or not, and of anyone claiming by, through,  
61 or under such beneficiaries. However, this section does not  
62 prevent a beneficiary of any such unrecorded collateral  
63 declarations or agreements from enforcing the terms thereof  
64 against the trustee.

65 (4) EXCLUSION.--This section does not apply to any deed,  
66 mortgage, or other instrument to which s. 689.07 applies.

67 (5) APPLICABILITY.--The applicability of this section  
68 shall be determined without regard to whether any reference is  
69 made in the recorded instrument to the beneficiaries of such  
70 trust or to any separate collateral unrecorded declarations or  
71 agreements, without regard to the provisions of any unrecorded  
72 trust agreement or declaration of trust, and without regard to  
73 whether the trust is governed by the provisions of s. 689.071 or  
74 chapter 736. This section applies both to recorded instruments  
75 that are recorded after the effective date of this act and to  
76 recorded instruments that were previously recorded and governed  
77 by similar provisions formerly contained in s. 689.071(3), and  
78 any such recorded instrument purporting to confer power and  
79 authority on a trustee under such formerly effective provisions  
80 of 689.071(3) is hereby validated and confirmed and shall have  
81 the effect of vesting full power and authority in such trustee  
82 as set forth in this section.

83 Section 2. Subsection 689.071, Florida Statutes, is  
84 amended to read:

85 689.071 Florida Land Trust Act.--

86 (1) SHORT TITLE.--This section may be cited as the  
87 "Florida Land Trust Act."

88 (2) DEFINITIONS.--As used in this section, the term:

89 (a) "Beneficial interest" means any interest, vested or  
90 contingent and regardless of how small or minimal such interest  
91 may be, in a land trust which is held by a beneficiary.

92 (b) "Beneficiary" means any person having a beneficial  
93 interest in a land trust. A trustee may be a beneficiary of the  
94 land trust for which such trustee serves as trustee.

95 (c) "Land trust" means any express written agreement or  
96 arrangement by which a use, confidence, or trust is declared of  
97 any land, or of any charge upon land, under which the title to  
98 real property including, but not limited to, a leasehold or  
99 mortgagee interest, is vested in a trustee by a recorded  
100 instrument that confers on the trustee the power and authority

101 prescribed in s 689.073(1), and under which the trustee has no  
102 duties other than the following:

103 1. The duty to convey, sell, lease, mortgage or deal with  
104 the trust property, or to exercise such other powers concerning  
105 the trust property as may be set forth in the recorded  
106 instrument, in each case as directed by the beneficiaries or by  
107 the holder of the power of direction, or

108 2. The duty to sell or dispose of the trust property at  
109 the termination of the trust, or

110 3. The duty to perform ministerial and administrative  
111 functions delegated to the trustee in the trust agreement or by  
112 the beneficiaries or the holder of the power of direction, or

113 4. The duties required of a trustee under chapter 721, if  
114 the trust is a timeshare estate trust complying with the  
115 provisions of s. 721.08(2)(c)4. or a vacation club trust  
116 complying with the provisions of s. 721.53(1)(e);

117  
118 provided, however, that the duties of the trustee of a land  
119 trust created before the effective date of this act may exceed  
120 the foregoing limited duties to the extent set forth in s.  
121 689.071(14).

122 (d) "Power of direction" means the authority of a person,  
123 as set forth in the trust agreement, to direct the trustee of a  
124 land trust to convey property or interests, execute a lease or  
125 mortgage, distribute proceeds of a sale or financing, and  
126 execute documents incidental to the administration of a land  
127 trust.

128 (e) "Recorded instrument" has the meaning set forth in s.  
129 689.073(1).

130 (f) "Trust agreement" means the written agreement  
131 governing a land trust or other trust, including any amendments.

132 (g) "Trustee" means the person designated in a recorded  
133 instrument or trust agreement to hold title to the trust  
134 property of a land trust or other trust.

135 (h) "Trust property" means any interest in real property  
136 including, but not limited to, a leasehold or mortgagee  
137 interest, conveyed by a recorded instrument to a trustee of a  
138 land trust or other trust.

139 (3) OWNERSHIP VESTS IN TRUSTEE.--Every recorded  
140 instrument transferring any interest in real property to the  
141 trustee of a land trust and conferring upon the trustee the  
142 power and authority prescribed in s. 689.073(1), whether or not  
143 reference is made in the recorded instrument to the  
144 beneficiaries of such land trust or to the trust agreement or  
145 any separate collateral unrecorded declarations or agreements,  
146 is effective to vest, and is hereby declared to have vested, in  
147 such trustee both legal and equitable title, and full rights of  
148 ownership, over the trust property or interest therein, with  
149 full power and authority as granted and provided in the recorded  
150 instrument to deal in and with the trust property or interest  
151 therein or any part thereof. The recorded instrument shall not  
152 itself be deemed to create an entity, regardless of whether the  
153 relationship among the beneficiaries and the trustee is deemed  
154 to be an entity under other applicable law.

155 (4) STATUTE OF USES INAPPLICABLE.--Neither s. 689.09 nor  
156 the common law statute of uses shall operate to execute a land  
157 trust or to vest the trust property in the beneficiary or  
158 beneficiaries of the land trust, notwithstanding any lack of  
159 duties on the part of the trustee or the otherwise passive  
160 nature of the land trust.

161 (5) DOCTRINE OF MERGER INAPPLICABLE.--The doctrine of  
162 merger shall not operate to extinguish a land trust or to vest  
163 the trust property in the beneficiary or beneficiaries of the  
164 land trust, notwithstanding that the trustee may be the sole  
165 beneficiary of the land trust.

166 (6) PERSONAL PROPERTY.--In all cases in which the  
167 recorded instrument or the trust agreement, as hereinabove  
168 provided, contains a provision defining and declaring the

169 interests of beneficiaries of a land trust to be personal  
170 property only, such provision shall be controlling for all  
171 purposes when such determination becomes an issue under the laws  
172 or in the courts of this state. If no such personal property  
173 designation appears in the recorded instrument or in the trust  
174 agreement, then the interests of the land trust beneficiaries  
175 shall be real property.

176 (7) TRUSTEE LIABILITY.--In addition to any other  
177 limitation on personal liability existing pursuant to statute or  
178 otherwise, the provisions of s. 736.08125 and s. 736.1013 apply  
179 to the trustee of a land trust created pursuant to this section.

180 (8) LAND TRUST BENEFICIARIES.--

181 (a) Except as provided in this section, the beneficiaries  
182 of a land trust are not liable, solely by being beneficiaries,  
183 under a judgment, decree, or order of court or in any other  
184 manner for a debt, obligation, or liability of the land trust.  
185 Any beneficiary acting under the trust agreement of a land trust  
186 is not liable to the trustee or to any other beneficiary for the  
187 beneficiary's good faith reliance on the provisions of the trust  
188 agreement. A beneficiary's duties and liabilities under a land  
189 trust may be expanded or restricted in a trust agreement or  
190 beneficiary agreement.

191 (b) If so provided in the recorded instrument, in the  
192 trust agreement or in a beneficiary agreement: (i) a particular  
193 beneficiary may own the beneficial interest in a particular  
194 portion or parcel of the trust property of a land trust; (ii) a  
195 particular person may be the holder of the power of direction  
196 with respect to the trustee's actions concerning a particular  
197 portion or parcel of the trust property of a land trust; and  
198 (iii) the beneficiaries may own specified proportions or  
199 percentages of the beneficial interest in the trust property or  
200 in particular portions or parcels of the trust property of a  
201 land trust. Multiple beneficiaries may own a beneficial

202 interest in a land trust as tenants in common, joint tenants  
203 with right of survivorship or tenants by the entireties.

204 (c) If a beneficial interest in a land trust is  
205 determined to be personal property as provided in subsection  
206 (6), then Chapter 679 applies to the perfection of any security  
207 interest in ~~at that~~ beneficial interest ~~in a land trust. In~~  
208 ~~addition, if.~~ If a beneficial interest in a land trust is  
209 determined to be real property as provided in subsection (6),  
210 then to perfect a lien or security interest against ~~such that~~  
211 beneficial interest ~~may also be perfected by the recordation of~~  
212 ~~a, the~~ mortgage, deed of trust, security agreement or other  
213 similar security document must be recorded in the public records  
214 of the county that is specified for such ~~mortgages~~ security  
215 documents in the recorded instrument or in a declaration of  
216 trust or memorandum thereof recorded in the ~~same~~ public records  
217 of the same county as the recorded instrument; if no county is  
218 so specified for recording such security documents, then the  
219 proper county for recording such a security document against a  
220 beneficiary's interest in any trust property is the county where  
221 the trust property is located. The perfection of a lien or  
222 security interest in a beneficial interest in a land trust does  
223 not affect, attach to or encumber the legal or equitable title  
224 of the trustee in the trust property, nor impair or diminish the  
225 authority of the trustee under the recorded instrument, and  
226 parties dealing with the trustee are not required to inquire  
227 into the terms of the unrecorded trust agreement or any lien or  
228 security interest against a beneficial interest in the land  
229 trust.

230 (d) The trustee's legal and equitable title to the trust  
231 property of a land trust is separate and distinct from the  
232 beneficial interest of a beneficiary in the land trust and in  
233 the trust property. A lien, judgment, mortgage, security  
234 interest or other encumbrance attaching to the trustee's legal  
235 and equitable title to the trust property of a land trust shall

236 not attach to the beneficial interest of any beneficiary, nor  
237 shall any lien, judgment, mortgage, security interest or other  
238 encumbrance against a beneficiary or beneficial interest attach  
239 to the legal or equitable title of the trustee to the trust  
240 property held under a land trust, unless the lien, judgment,  
241 mortgage, security interest or other encumbrance by its terms or  
242 by operation of other law attaches to both the interest of the  
243 trustee and the interest of such beneficiary.

244 (e) Any subsequent document appearing of record in which  
245 a beneficiary of a land trust transfers or encumbers any  
246 beneficial interest in the land trust does not transfer or  
247 encumber the legal or equitable title of the trustee to the  
248 trust property and does not diminish or impair the authority of  
249 the trustee under the terms of the recorded instrument. Parties  
250 dealing with the trustee of a land trust are not required to  
251 inquire into the terms of the unrecorded trust agreement.

252 (f) The trust agreement for a land trust may provide that  
253 one or more persons have the power to direct the trustee to  
254 convey property or interests, execute a mortgage, distribute  
255 proceeds of a sale or financing, and execute documents  
256 incidental to administration of the land trust. The power of  
257 direction, unless provided otherwise in the trust agreement of  
258 the land trust, is conferred upon the holders of the power for  
259 the use and benefit of all holders of any beneficial interest in  
260 the land trust. In the absence of a provision in the trust  
261 agreement of a land trust to the contrary, the power of  
262 direction shall be in accordance with the percentage of  
263 individual ownership. In exercising the power of direction, the  
264 holders of the power of direction are presumed to act in a  
265 fiduciary capacity for the benefit of all holders of any  
266 beneficial interest in the land trust, unless otherwise provided  
267 in the trust agreement. A beneficial interest in a land trust is  
268 indefeasible, and the power of direction may not be exercised so  
269 as to alter, amend, revoke, terminate, defeat, or otherwise

270 affect or change the enjoyment of any beneficial interest in a  
271 land trust.

272 (g) A land trust does not fail, and any use relating to  
273 the trust property may not be defeated, because beneficiaries  
274 are not specified by name in the recorded instrument to the  
275 trustee or because duties are not imposed upon the trustee. The  
276 power conferred by any recorded instrument on a trustee of a  
277 land trust to sell, lease, encumber, or otherwise dispose of  
278 property described in the recorded instrument is effective, and  
279 a person dealing with the trustee of a land trust is not  
280 required to inquire any further into the right of the trustee to  
281 act or the disposition of any proceeds.

282 (h) The principal residence of a beneficiary shall be  
283 entitled to the homestead tax exemption even if the homestead is  
284 held by a trustee in a land trust, provided the beneficiary  
285 qualifies for the homestead exemption under chapter 196.

286 (i) In a foreclosure against trust property or other  
287 litigation affecting the title to trust property of a land  
288 trust, the appointment of a guardian ad litem is not necessary  
289 to represent the interest of any beneficiary.

290 (9) SUCCESSOR TRUSTEE.--

291 (a) If the recorded instrument and the unrecorded trust  
292 agreement are silent as to the appointment of a successor  
293 trustee of a land trust in the event of the death, incapacity,  
294 resignation, or termination due to dissolution of a trustee or  
295 if a trustee is unable to serve as trustee of a land trust, one  
296 or more persons having the power of direction may appoint a  
297 successor trustee or trustees of the land trust by filing a  
298 declaration of appointment of a successor trustee or trustees in  
299 the public records of the county in which the trust property is  
300 located. The declaration must be signed by a beneficiary or  
301 beneficiaries of the land trust and by the successor trustee or  
302 trustees, must be acknowledged in the manner provided for  
303 acknowledgment of deeds, and must contain:

- 304           1. The legal description of the trust property.  
305           2. The name and address of the former trustee.  
306           3. The name and address of the successor trustee or  
307 trustees.  
308           4. A statement that one or more persons having the power  
309 of direction of the land trust appointed the successor trustee  
310 or trustees, together with an acceptance of appointment by the  
311 successor trustee or trustees.

312           (b) If the recorded instrument is silent as to the  
313 appointment of a successor trustee or trustees of a land trust  
314 but an unrecorded trust agreement provides for the appointment  
315 of a successor trustee or trustees in the event of the death,  
316 incapacity, resignation, or termination due to dissolution of  
317 the trustee of a land trust, then upon the appointment of any  
318 successor trustee pursuant to the terms of the unrecorded trust  
319 agreement, the successor trustee or trustees shall file a  
320 declaration of appointment of a successor trustee in the public  
321 records of the county in which the trust property is located.  
322 The declaration must be signed by both the former trustee and  
323 the successor trustee or trustees, must be acknowledged in the  
324 manner provided for acknowledgment of deeds, and must contain:

- 325           1. The legal description of the trust property.  
326           2. The name and address of the former trustee.  
327           3. The name and address of the successor trustee or  
328 trustees.  
329           4. A statement of resignation by the former trustee and a  
330 statement of acceptance of appointment by the successor trustee  
331 or trustees.  
332           5. A statement that the successor trustee or trustees  
333 were duly appointed under the terms of the unrecorded trust  
334 agreement.

335  
336 If the appointment of any successor trustee of a land trust is  
337 due to the death or incapacity of the former trustee, the

338 declaration need not be signed by the former trustee and a copy  
339 of the death certificate or a statement that the former trustee  
340 is incapacitated or unable to serve must be attached to or  
341 included in the declaration, as applicable.

342 (c) If the recorded instrument provides for the  
343 appointment of any successor trustee of a land trust and any  
344 successor trustee is appointed in accordance with the recorded  
345 instrument, no additional declarations of appointment of any  
346 successor trustee are required under this section.

347 (d) Each successor trustee appointed with respect to a  
348 land trust is fully vested with all the estate, properties,  
349 rights, powers, trusts, duties, and obligations of the  
350 predecessor trustee, except that any successor trustee of a land  
351 trust is not under any duty to inquire into the acts or  
352 omissions of a predecessor trustee and is not liable for any act  
353 or failure to act of a predecessor trustee. A person dealing  
354 with any successor trustee of a land trust pursuant to a  
355 declaration filed under this section is not obligated to inquire  
356 into or ascertain the authority of the successor trustee to act  
357 within or exercise the powers granted under the recorded  
358 instruments or any unrecorded trust agreement.

359 (e) A trust agreement may provide that the trustee of a  
360 land trust, when directed to do so by the holder of the power of  
361 direction, or by the beneficiaries of the land trust or legal  
362 representatives of the beneficiaries, may convey the trust  
363 property directly to another trustee on behalf of the  
364 beneficiaries or to another representative named in such  
365 directive.

366 (10) TRUSTEE AS CREDITOR.--

367 (a) If a debt is secured by a security interest or  
368 mortgage against a beneficial interest in a land trust or by a  
369 mortgage on trust property of a land trust, the validity or  
370 enforceability of the debt, security interest, or mortgage and  
371 the rights, remedies, powers, and duties of the creditor with

372 respect to the debt or the security are not affected by the fact  
373 that the creditor and the trustee are the same person, and the  
374 creditor may extend credit, obtain any necessary security  
375 interest or mortgage, and acquire and deal with the property  
376 comprising the security as though the creditor were not the  
377 trustee of the land trust.

378 (b) A trustee of a land trust does not breach a fiduciary  
379 duty to the beneficiaries, and it is not evidence of a breach of  
380 any fiduciary duty owed by the trustee to the beneficiaries for  
381 a trustee to be or become a secured or unsecured creditor of the  
382 land trust, the beneficiary of the land trust, or a third party  
383 whose debt to such creditor is guaranteed by a beneficiary of  
384 the land trust.

385 (11) REMEDIAL ACT.--This act is remedial in nature and  
386 shall be given a liberal interpretation to effectuate the intent  
387 and purposes hereinabove expressed.

388 (12) EXCLUSION.--This act does not apply to any deed,  
389 mortgage, or other instrument to which s. 689.07 applies.

390 (13) NOTICES TO TRUSTEE.--Any notice required to be given  
391 to a trustee of a land trust regarding trust property, by a  
392 person who is not a party to the trust agreement, shall identify  
393 the trust property to which the notice pertains or shall include  
394 the name and date of the land trust to which the notice  
395 pertains, if such information is shown on the recorded  
396 instrument for such trust property.

397 (14) DETERMINATION OF APPLICABLE LAW.--Except as  
398 otherwise provided in this section, the provisions of chapter  
399 736 do not apply to a land trust governed under this section.

400 (a) A trust is not a land trust governed under this  
401 section if there is no recorded instrument that confers on the  
402 trustee the power and authority prescribed in s 689.073(1).

403 (b) For a trust created before the effective date of this  
404 act:

405 1. The trust is a land trust governed under this section  
406 if a recorded instrument confers on the trustee the power and  
407 authority described in s 689.073(1) and if:

408 a. The recorded instrument or the trust agreement  
409 expressly provides that the trust is a land trust; or

410 b. The intent of the parties that the trust be a land  
411 trust is discerned from the trust agreement or the recorded  
412 instrument;

413  
414 in either case without regard to whether the trustee's duties  
415 under the trust agreement are greater than those limited duties  
416 described in s. 689.071(2)(c).

417 2. The trust is not a land trust governed under this  
418 section if:

419 a. The recorded instrument or the trust agreement  
420 expressly provides that the trust is to be governed by chapter  
421 736, or by any predecessor trust code or trust statute of this  
422 state other than this section; or

423 b. The intent of the parties that the trust be governed  
424 by chapter 736, or by any predecessor trust code or trust  
425 statute of this state other than this section, is discerned from  
426 the trust agreement or the recorded instrument;

427  
428 in either case, without regard to whether the trustee's duties  
429 under the trust agreement are greater than those limited duties  
430 described in s. 689.071(2)(c), and without consideration of any  
431 references in the trust agreement to provisions of chapter 736  
432 made applicable to the trust by chapter 721, if the trust is a  
433 timeshare estate trust complying with the provisions of s.  
434 721.08(2)(c)4. or a vacation club trust complying with the  
435 provisions of s. 721.53(1)(e).

436 3. Solely for the purpose of determining the law  
437 governing a trust under subparagraph 1 or subparagraph 2 of this  
438 paragraph (b), the determination shall be made without

439 consideration of any amendment to the trust agreement made on or  
440 after the effective date of this act, except as provided in  
441 paragraph (d).

442 4. If the determination of whether a trust is a land  
443 trust governed by this section cannot be made under either  
444 subparagraph 1 or subparagraph 2 of this paragraph (b), then the  
445 determination shall be made under paragraph (c) as if the trust  
446 was created on or after the effective date of this act.

447 (c) If a recorded instrument confers on the trustee the  
448 power and authority described in s 689.073(1) and the trust was  
449 created on or after the effective date of this act, then the  
450 trust shall be determined to be a land trust governed under this  
451 section only if the trustee's duties under the trust agreement,  
452 including any amendment made on or after the effective date of  
453 this act, are no greater than those limited duties described in  
454 s. 689.071(2)(c).

455 (d) If the trust agreement for a land trust created  
456 before the effective date of this act is amended on or after the  
457 effective date of this act to add to or increase the duties of  
458 the trustee beyond the duties set forth in the trust agreement  
459 as of the effective date of this act, then the trust shall  
460 remain a land trust governed under this section only if the  
461 additional or increased duties of the trustee implemented by the  
462 amendment are no greater than those limited duties described in  
463 s. 689.071(2)(c).

464 (15) UCC TRANSITION RULE.--This act does not render  
465 ineffective any effective Uniform Commercial Code financing  
466 statement filed before the effective date of this act to perfect  
467 a security interest in a beneficial interest in a land trust  
468 that is determined to be real property as provided in subsection  
469 (6), but such a financing statement ceases to be effective at  
470 the earlier of five years after the effective date of this act  
471 or the time the financing statement would have ceased to be  
472 effective under the law of the jurisdiction in which it is

473 filed, and the filing of a Uniform Commercial Code continuation  
474 statement after this act takes effect does not continue the  
475 effectiveness of such a financing statement. The recording of a  
476 mortgage, deed of trust, security agreement or other similar  
477 security document against such a beneficial interest that is  
478 real property in the public records specified in subsection  
479 (8)(c) continues the effectiveness and priority of a financing  
480 statement filed against such a beneficial interest before this  
481 act takes effect if:

482 (a) the recording of the security document in that county  
483 is effective to perfect a lien on such beneficial interest under  
484 subsection (8)(c);

485 (b) the recorded security document identifies the pre-  
486 effective date financing statement by indicating the office in  
487 which the financing statement was filed and providing the dates  
488 of filing and the file numbers, if any, of the financing  
489 statement and of the most recent continuation statement filed  
490 with respect to the financing statement; and

491 (c) the recorded security document indicates that the  
492 pre-effective date financing statement remains effective.

493  
494 If no original security document bearing the debtor's signature  
495 is readily available for recording in the public records, a  
496 secured party may continue the pre-effective date financing  
497 statement under this subsection by recording a copy of a  
498 security document verified by the secured party as being a true  
499 and correct copy of an original authenticated by the debtor.  
500 This subsection (15) does not apply to the perfection of a  
501 security interest in any beneficial interest in a land trust  
502 that is determined to be personal property under subsection (6).

503 Section 3. Subsection 736.0102, Florida Statutes, is  
504 amended to read:

505 736.0102. Scope.—

506 (1) Except as otherwise provided in this section, this  
507 code applies to express trusts, charitable or noncharitable, and  
508 trusts created pursuant to a law, judgment, or decree that  
509 requires the trust to be administered in the manner of an  
510 express trust.

511 (2) This code does not apply to constructive or resulting  
512 trusts; conservatorships; custodial arrangements pursuant to the  
513 Florida Uniform Transfers to Minors Act; business trusts  
514 providing for certificates to be issued to beneficiaries; common  
515 trust funds; trusts created by the form of the account or by the  
516 deposit agreement at a financial institution; voting trusts;  
517 security arrangements; liquidation trusts; trusts for the  
518 primary purpose of paying debts, dividends, interest, salaries,  
519 wages, profits, pensions, or employee benefits of any kind; and  
520 any arrangement under which a person is nominee or escrowee for  
521 another.

522 (3) This code does not apply to any land trust under s.  
523 689.071, except to the extent provided in s. 689.071(7), s.  
524 721.08(2)(c)4. or s. 721.53(1)(e). A trust governed at its  
525 creation by chapter 736, former chapter 737, or any prior trust  
526 statute superseded or replaced by any provision of former  
527 chapter 737, is not a land trust regardless of any amendment or  
528 modification of the trust, any change in the assets held in the  
529 trust, or any continuing trust resulting from the distribution  
530 or retention in further trust of assets from the trust.

531 Section 4. This act shall take effect upon becoming a  
532 law.  
533

Document comparison by Workshare Professional on Friday, August 24, 2012  
1:00:26 PM

<b>Input:</b>	
Document 1 ID	file://C:/My Documents/FlaBar/Land Trust/LTA-2013 Clean 15.doc
Description	LTA-2013 Clean 15
Document 2 ID	file://C:/My Documents/FlaBar/Land Trust/LTA-2013 Clean 19.doc
Description	LTA-2013 Clean 19
Rendering set	standard

<b>Legend:</b>	
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<del>Deletion</del>	
<del>Moved from</del>	
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Style change	
Format change	
<del>Moved deletion</del>	
Inserted cell	
Deleted cell	
Moved cell	
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Padding cell	

<b>Statistics:</b>	
	Count
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Deletions	8
Moved from	0
Moved to	0
Style change	0
Format changed	0
Total changes	25

**CONDOMINIUM & PLANNED DEVELOPMENT LAW**  
**PROPOSAL FOR**  
**THE FLORIDA BAR CERTIFICATION PROGRAM**

**6-ZZ.1      GENERALLY**

A lawyer who is a member in good standing of The Florida Bar and who meets the standards prescribed below may be issued an appropriate certificate identifying the lawyer as certified in Condominium & Planned Development Law. The purpose of the standards is to identify those lawyers who practice law in the development, representation and regulation of condominium and homeowner associations and have the special knowledge, skills and proficiency as well as the character, ethics and reputation for professionalism to be properly identified to the public as certified lawyers in Condominium & Planned Development Law.

**6-ZZ.2      DEFINITIONS**

**Associations:**

An association is a corporation for profit or not-for-profit which is engaged in the management and operation of Common Interest Realty Associations, which typically include a condominium association, homeowner association, property owner association, cooperative, mobile home association, groups or communities and a recreational organization such as a golf club and tennis club and utility cooperatives. Also included are voluntary organizations which are incorporated or not incorporated. The association may be related to residential communities, commercial, non-residential communities or combinations of both residential and commercial

**Condominium & Planned Development Law:**

The practice of Condominium & Planned Development Law is serving as counsel to associations, property owners, association members, developers, lenders and investors related to work with associations; drafting governing documents or their amendments and preparing filings with the Division of Florida Condominiums, Timeshares and Mobile Homes; government service (regulation and arbitration); construction defect claims and litigation; involvement in planning, development construction and financing of condominium or planned development communities are also components of Condominium & Planned Development Law. Collection actions, owner, member, developer and association representation in litigation and document enforcement are all components of Condominium & Planned Development Law.

Note: This proposal was prepared by a committee of attorneys who are members of the Condominium and Planned Development Committee of the Real Property, Probate and Trust Law Section of The Florida Bar, Steve Mezer, Chair. This subcommittee is chaired by Joe Adams, and its members are Karl Scheuerman, Jane Cornett, David St. John, Bill Sklar, Margaret Rolando, Rob Freedman, and Steve Mezer, ex-officio member. This proposal is a draft submitted for further discussion.

### **Certification Committee:**

The certification functions shall be administered by the Certification Committee for Real Estate with assistance from the members of the Condominium & Planned Development Law Committee as requested.

#### **6-ZZ.3 MINIMUM STANDARDS**

(a) **Minimum Period of Practice.** Every applicant must have substantial involvement in Condominium & Planned Development Law for at least ten (10) years immediately preceding the date of application.

(b) **Substantial Involvement.**

The applicant must demonstrate substantial involvement in Condominium & Planned Development representation on behalf of developers, associations, owners, lenders, investor or governmental entities. Substantial involvement shall require an attorney to demonstrate that a minimum of 50% of his or her practice, in the ten (10) years prior to filing of the application, is dedicated to Condominium & Planned Development Law.

(c) **Practical Experience.**

(1) The applicant must demonstrate substantial experience in Condominium & Planned Development Law practice by providing details and explanation of at least twenty (20) occurrences of tasks or services performed on behalf of or in connection with Condominium & Planned Developments such as the following:

- a. drafting or redrafting of development documents
- b. assisting with financing for community associations
- c. planning and drafting project legal structures
- d. dealing with development funds and associated development documents
- e. drafting or redrafting of loan or other project related documents
- f. serving as an arbitrator or counsel for a party in an arbitration relative to Condominium & Planned Developments
- g. serving as a mediator or counsel for a party in a mediation relative to Condominium & Planned Developments
- h. drafting opinion letters involving Condominium & Planned Development Law
- i. serving as legal counsel at a trial of any issue involving Condominium & Planned Developments
- j. serving as legal counsel at an administrative hearing involving Condominium & Planned Developments
- k. representing governmental agencies or political subdivisions
- l. other activities as deemed appropriate by the review committee

(2) The applicant must also demonstrate examples or narrative, the number of associations, developers, lenders, investors or owners which have been clients during the applicant's relevant period of practice. Due consideration will be provided for those applicants who have served as in-house counsel or worked for governmental agencies.

#### **6-ZZ.4 SPECIAL QUALIFICATIONS.**

(a) **Peer Review.** The applicant shall submit the names and addresses of five (5) individuals, at least four (4) of whom are attorneys or judges, who have knowledge of the applicant's qualifications, and none of whom are members of the applicant's firm. A minimum of three (3) of the attorney references must be members of The Florida Bar. Individuals serving as references shall be sufficiently familiar with the applicant to attest to the applicant's special competence and substantial involvement in the field.

(b) **Education.** The applicant must demonstrate that during the three (3) year period immediately preceding the date of application, the applicant has met the continuing legal education requirements in Condominium & Planned Development Law. The required number of hours shall be established by the board of legal specialization and education and shall in no event be less than fifty (50) hours for the three (3) years preceding the application for certification. Credit for attendance or speaking appearances at continuing legal application shall be given only for programs that are directly related to Condominium & Planned Development Law. In the alternative, the Certification Committee may conclude that the education requirement is satisfied by one or more of the following:

- (1) lecturing at, and/or serving on the steering committee of, such continuing legal education seminars;
- (2) authoring articles or books published in professional periodicals or other professional publications;
- (3) teaching courses directed related to Condominium & Planned Development Law at an approved law school or other graduate level program presented by a recognized professional education association;
- (4) completing such home study programs as may be approved by the Board of Legal Specialization and Education or the Condominium & Planned Development Law Certification Committee, subject to the limitation that no more than fifty percent (50%) of the required number of hours of education may be satisfied through home study programs; or
- (5) such other methods as may be approved by the board of legal specialization and education or the Condominium & Planned Development Law Certification Committee.

The Board of Legal Specialization and Education or the Condominium & Planned Development Law shall, by rule or regulation, establish standards applicable to this rule, including, but not limited to, the method of establishment of the number of hours allocable to any of the above-listed paragraphs. Such rules or regulations shall provide that hours shall be allocable to each separate but substantially different lecture, article, or other activity described in subdivisions (1), (2), (3), and (4) above.

(c) **Examination.** The applicant must pass an examination, applied uniformly, to demonstrate sufficient knowledge, proficiency, and experience in Condominium & Planned Development Law to justify the representation of special competence to the legal profession and the public.

(d) **Exemption from examination.** An applicant who has been substantially involved in Condominium & Planned Development Law for a minimum of twenty (20) years, and who otherwise fulfills the standards set forth in rule 6-ZZ.3, shall be exempt from the examination. This exemption is only applicable to those applicants who apply within the first two (2) application filing periods from the effective date of these standards, and who meet all other requirements for certification.

#### **6-ZZ.5 RECERTIFICATION.**

(a) **Substantial Involvement.** Recertification, which shall be required every five (5) years after initial certification, will require a satisfactory showing, as determined by the Board of Legal Specialization and Education or the Condominium & Planned Development Law Certification Committee, of continuous and substantial involvement in Condominium & Planned Development practice throughout the period since the last date of certification or recertification. The demonstration of substantial involvement after certification or prior to recertification shall be made in accordance with the standards set for the in rule 6-ZZ.3 above.

(b) **Practical Experience** The applicant must demonstrate continued compliance with the requirements of rule 6-ZZ.3 (c).

(c) **Education.** Completion of at least seventy-five (75) hours of continuing legal education (CLE) since the last application for certification or recertification. The CLE must be logically anticipated to enhance the proficiency of a Board Certified attorney in the field of Condominium & Planned Development Law.

(d) **Peer Review.** The applicant will submit the names and addresses of at least three (3) individuals, at least two (2) of which are attorneys or judges, who have knowledge of the applicant's continued practice in the field of Condominium & Planned Development Law. The references shall be sufficiently familiar with the applicant to attest to the applicant's competence and involvement in the field of Condominium & Planned Development Law, as well as the applicant's character, ethics and reputation for professionalism.

**Board of Legal Specialization & Education  
Application for New Certification Area**

**Proposed Area** \_\_\_\_\_ Condominium & Planned Development Law

**Lawyer(s) and/or Organization seeking new certification area:**

Condominium & Planned Development Committee of the Real Property, Probate & Trust Law  
Section of the Florida Bar

***Please respond to the following by separate attachment(s):***

1. Define the proposed specialty area and any relevant subspecialties it may encompass.
2. Does the proposed specialty area conflict or overlap with any existing certification area(s)?  
If no, please skip to Question 5.
3. If yes, please provide a statement identifying the area(s) of conflict or overlap and explain why the proposed specialty should be established as a separate area.
4. If yes, could the proposed specialty, in your opinion, be incorporated within an existing certification area as a subspecialty, and if so, how would you propose that be accomplished?
5. How will certification standards for the proposed specialty benefit consumers of legal services?
6. How will certification standards for the proposed specialty benefit lawyers who practice in the area and the Bar overall?

***Please check all that you have provided to support this proposal:***

- Letters of endorsement or Petitions from a minimum of 100 members of The Florida Bar, who support the establishment of the area, would qualify under the proposed standards, and who agree to seek certification when the area is available for certification.
- Petition of recognized Section of The Florida Bar (if applicable).
- Petition of substantive law standing committee of The Florida Bar (if applicable).
- Demonstration that the proposed specialty is an established practice area by providing documentation or information as to:
  - Other states or accredited national organizations that offer certification in this area.
  - Listing as a practice area in Martindale-Hubbell.
  - Referral service listings (The Florida Bar or other services).
  - CLE availability options in proposed area.
  - Proposed Draft of Certification Standards.
  - Other ( \_\_\_\_\_ )

1. Define the proposed specialty area and any relevant subspecialties it may encompass.

Answer The practice of Condominium & Planned Development Law is serving as counsel to associations, individual property owners or groups of owners, developers, lenders and investors related to work with associations; drafting governing documents or their amendments and preparing filings with the Division of Florida Condominiums, Timeshares and Mobile Homes; government service (regulation and arbitration); construction defect claims and litigation; involvement in planning, development construction and financing of condominium or planned development communities are also components of Condominium & Planned Development Law. Collection actions, developer, owner, member and association representation in litigation and document enforcement are all components of Condominium & Planned Development Law. "Associations" are Common Interest Realty Associations which include condominium associations, homeowner associations, cooperatives, mobile home associations and recreational organizations such as golf clubs and tennis clubs. Associates may be related to residential and/or commercial properties.

At this time the Committee does not propose any relevant subspecialties.

2. Does the proposed specialty area conflict or overlap with any existing certification area(s)? If no, please skip to Question 5.

Answer Yes, this section overlaps and complements Real Property Certification, and to a lesser degree, Construction Law Certification.

3. If yes, please provide a statement identifying the area(s) of conflict or overlap and explain why the proposed specialty should be established as a separate area.

Answer There is some overlap between Real Property Law and Condominium & Planned Development Law however, the overlaps are complementary. Condominium & Planned Development Law could logically be created as a subspecialty of Real Property Law or could be a separate standalone certification. Condominium & Planned Development Law involves concepts with which the typical real estate lawyer would not be familiar including statutory requirements for the relevant associations, covenant enforcement issues, association document drafting, interpretation and enforcement, discrimination law, housing law, and premises liability. These are all areas which would not typically be involved with a standard real estate type transaction. A transactional attorney may not ever have the need to be involved with any of the issues encompassed by the practice described in the response to question #1. The primary overlap with Construction Law is that some attorneys who focus their practice in construction law represent (in some cases primarily or exclusively) community associations. While a construction lawyer must know basic community association law, and a community association lawyer must know basic construction law, the two fields of practice are quite different.

4. If yes, could the proposed specialty, in your opinion, be incorporated within an existing certification area as a subspecialty, and if so, how would you propose that be accomplished?

Answer See answer to #3.

5. How will certification standards for the proposed specialty benefit consumers of legal services?

Answer While exact statistics are not available, it is estimated there are more than 40,000 community associations in Florida and virtually all new residential development includes a community association in one form or another. Over one (1) resident in five (5) in the state of Florida lives in a condominium. This has become a very specialized area of the law because a large number of Florida residents reside in these kinds of communities governed by these associations. There is a large body of specialized case law relative to community associations which has developed over 40 years. It will be highly beneficial for the consumer to be able to identify practitioners who are proficient in this field and there is a very large segment of the consumer population that will benefit.

6. How will certification standards for the proposed specialty benefit lawyers who practice in the area and the Bar overall?

Answer The certification standards for Condominium & Planned Development Law will benefit lawyers who practice in the area by creating goals and objectives for them to reach in order to attain the certification. It will enhance and increase the amount of continuing legal education programs available in this field. It will benefit the Bar overall in that lawyers who may not be familiar with this field will know with whom they can consult when these problems arise on a daily basis in all sections of the state.

***Please check all that you have provided to support this proposal:***

- Letters of endorsement or Petitions from a minimum of 100 members of The Florida Bar, who support the establishment of the area, would qualify under the proposed standards, and who agree to seek certification when the area is available for certification.
- Petition of recognized Section of The Florida Bar (if applicable).
- Petition of substantive law standing committee of The Florida Bar (if applicable).
- Demonstration that the proposed specialty is an established practice area by providing documentation or information as to:
  - Other states or accredited national organizations that offer certification in this area.
  - Listing as a practice area in Martindale-Hubbell.
  - Referral service listings (The Florida Bar or other services).
  - CLE availability options in proposed area.
  - Proposed Draft of Certification Standards.
  - Other –

To support this proposal, we provide the following information for the proposition that Condominium & Planned Development Law is, in fact, an established practice area. The Condominium & Planned Development Committee of the Real Property, Probate and Trust Law Section of the Florida Bar is one of the Section's largest committees and has been very active. For many years this Committee has annually conducted its CLE seminar addressing pertinent areas in the Condominium & Planned Development Law practice area. Because this practice area is substantially micromanaged by State Legislation, most notably Chapter 718 the Condominium Act and Chapter 720 governing homeowner associations, the Condominium & Planned Development Law Committee of the Real Property Section has been very active in the Legislative process over the years. The Committee has been recognized by many Legislators as a resource in crafting legislation.

The Florida Bar CLE Committee Publication, Florida Condominium and Community Association Law, has been in publication for many years.

The University of Miami School of Law for thirty-seven (37) consecutive years has presented an annual Institute on Condominium and Planned Developments which regularly attracts more than five hundred (500) attorneys to its live day and one half presentation.

# LEGISLATIVE POSITION REQUEST FORM

GOVERNMENTAL AFFAIRS OFFICE

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

**GENERAL INFORMATION**

**Submitted By** Steven H. Mezer, Chair, Condominium and Planned Development Committee of the Real Property Probate & Trust Law Section

**Address** c/o Bush Ross, P.A., 1801 North Highland Avenue., Tampa, FL 33602-2656 - Telephone: (813) 204-6492

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

**PROPOSED ADVOCACY**

All types of partisan advocacy or nonpartisan technical assistance should be presented to the Board of Governors via this request form. Every request should be accompanied by a copy of any existing or proposed legislation, or a detailed presentation of the matter at issue. 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:**

“Amendments to Chapter 718, Florida Statutes, 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.”

**Reasons For Proposed Advocacy:**

1. Recent Federal court decisions based upon the Federal Interstate Land Sales Full Disclosure Act (“ILSFDA”) have held that a pre-construction sales contract must contain a recordable legal description which is not practicable pursuant to Chapter 718, Florida Statutes (the “Act”). These court decisions, because they draw into question the contract enforcement, have prevented lenders from financing projects, undermining the ability to complete condominium projects and Florida’s economic recovery. The only way to satisfy the court decisions under ILSA is to record the declaration of condominium before actual construction. Practical necessity prevents recording of declarations until a building is nearly complete because accurate dimensions of the building and the units cannot be determined until construction is complete. To meet the newly stated requirements of the Federal court decisions under ILSA requiring reference to a recorded declaration, and to ensure that declarations accurately reflect what is built, the proposed amendments adjust various timing provisions in the Act to accommodate the recording of the declaration of condominium before completion of the building.
  
2. A conflict exists between the Second District Court of Appeals and the Fourth District Court of Appeals, and even within the Fourth District itself, as to when a condominium unit is created, applying Section 718.104, Florida Statutes. The proposed amendments serve to clarify existing law by resolving the conflict in favor of the statute’s apparent plain meaning. Specifically, that a condominium unit is created upon recording of the declaration of condominium or a phase

amendment to a declaration, and that the description of a unit in a declaration does not supersede Section 718.104.

3. Florida law presently states that a proposed phase cannot be added to a condominium later than 7 years after the date of recordation of the declaration of condominium. In the present economy, numerous distressed condominiums could have additional units added to their scope (either built or to-be-built), which will provide additional monies to pay their expense and provide financial stability to the association and the unit owners, but for the existence of the strict 7 year time period. The proposed amendments will modify the 7 year time period to commence from the date of the first occurring date of (i) the recording of a surveyor's affidavit of substantial completion or (ii) recording of an instrument which transfers title to a unit in the initial phase of the condominium and further will enable the 7 year period to be extended for up to 3 additional years, upon a vote of the association membership, thereby enabling the submission of additional units to a condominium regime (most likely through the workout of distressed unsubmitted properties to successor purchasers) and providing increased economic stability for the association because there will be more owners paying for the common expenses (thereby benefitting the original condominium constituents).

**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** Real Property Probate and Trust Law Section Support  
(Indicate Bar or Name Section) (Support or Oppose)  
(Date) 2011: 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.

**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**

A request for action on a legislative position must be circulated to all divisions, sections and committees that might be interested in the issue. The Legislation Committee and Board of Governors may delay final action on a request in the absence of any responses from such groups. Please include all responses with this form.

**Referrals**

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

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

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

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<b>CONTACTS</b>
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**Board & Legislation  
Committee Appearance**

**Robert S. Swaine**, Swaine & Harris, P.A., 425 Commerce Avenue, Sebring, FL 33870, Telephone (863) 385-1549

**Steven H. Mezer**, Bush Ross, P.A., 1801 North Highland Avenue Tampa, Florida 33602-2656, Telephone (813) 204-6492

**Michael J. Gelfand**, Gelfand & Arpe, P.A. 1555 Palm Beach Lakes Blvd., Suite 1220, West Palm Beach, FL 33401-2323, Telephone (561) 655-6224

**Peter M. Dunbar**, Pennington, Moore, Wilkinson, Bell & Dunbar, P.O. Box 10095, Tallahassee, Florida 32302-2095, Telephone (850) 222-3533

**Martha J. Edenfield**, Pennington, Moore, Wilkinson, Bell & Dunbar, P.O. Box 10095, Tallahassee FL 32302-2095, Telephone (850) 222-3533

**Appearances**

**Before Legislators** SAME

**Meetings with**

**Legislators/staff** SAME

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

1 An act relating to the creation of condominium units and phase condominiums;  
2 amending s. 718.104(2), F.S.; clarifying when a unit is created; amending s.  
3 718.105(4)(c), F.S.; extending the time money may be held by the clerk prior to  
4 disbursement; amending s. 718.110(10), F.S.; clarifying when an action may be  
5 filed to determine whether a condominium declaration or condominium document  
6 complies with mandatory requirements; amending s. 718.111(13)(d), F.S.;  
7 clarifying when a developer may vote on issues related to the preparation of  
8 financial reports; amending s. 718.112(2)(f)(2), F.S.; clarifying when a developer  
9 may vote to waive or reduce the funding of reserves; amending s. 718.114, F.S.;  
10 clarifying when a developer may acquire leaseholds, memberships or other  
11 possessory interests; amending s. 718.301(1), F.S.; clarifying when Unit owners  
12 other than the developer are entitled to elect at least a majority of the members of  
13 the board of administration; amending s. 718.301(4), F.S.; adding a copy of the  
14 recorded instrument which transfers title if it is the first event described in s.  
15 718.110(10), F. S.; amending s. 718.403(1), F. S. clarifying when phases must be  
16 added and allowing an amendment adding phases upon approval of the owners;  
17 and providing an effective date.  
18

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

20 **Section 1.** Section 718.104(2) is amended as follows:

21 718.104(2). A condominium is created by recording a declaration in the public records of  
22 the county where the land is located, executed and acknowledged with the requirements for a  
23 deed. All persons who have record title to the interest in the land being submitted to  
24 condominium ownership, or their lawfully authorized agents, must join in the execution of the  
25 declaration. Upon the recording of the declaration, or an amendment adding a phase to the  
26 condominium under s. 718.403(6), all units described in the declaration or phase amendment as  
27 being located in or on the land then being submitted to condominium ownership shall come into  
28 existence, regardless of the state of completion of planned improvements in which the units may  
29 be located and regardless of any other requirement or description that a declaration may provide.

30 Upon recording the declaration of condominium pursuant to this section, the developer shall file

31 the recording information with the division within 120 days on a form prescribed by the division.  
32 It is the intent of this subsection to clarify existing law.

33 **Section 2.** Section 718.105(4)(c) is amended as follows:

34 718.105(4)(c). If the sum of money held by the clerk has not been paid to the developer  
35 or association as provided in paragraph (b) within 35 years after the date the declaration was  
36 originally recorded, the clerk may notify, in writing, the registered agent of the association that  
37 the sum is still available and the purpose for which it was deposited. If the association does not  
38 record the certificate within 90 days after the clerk has given the notice, the clerk may disburse  
39 the money to the developer. If the developer cannot be located, the clerk shall disburse the  
40 money to the Division of Florida Condominiums, Timeshares, and Mobile Homes for deposit in  
41 the Division of Florida Condominiums, Timeshares, and Mobile Homes Trust Fund.

42 **Section 3.** Section 718.110(10) is amended as follows:

43 718.110(10). If there is an omission or error in a declaration of condominium, or any  
44 other document required to establish the condominium, which omission or error would affect the  
45 valid existence of the condominium, the circuit court has jurisdiction to entertain a petition of  
46 one or more of the unit owners in the condominium, or of the association, to correct the error or  
47 omission, and the action may be a class action. The court may require that one or more methods  
48 of correcting the error or omission be submitted to the unit owners to determine the most  
49 acceptable correction. All unit owners, the association, and the mortgagees of a first mortgage of  
50 record must be joined as parties to the action. Service of process on unit owners may be by  
51 publication, but the plaintiff must furnish every unit owner not personally served with process  
52 with a copy of the petition and final decree of the court by certified mail, return receipt  
53 requested, at the unit owner's last known residence address. If an action to determine whether the

54 declaration or another condominium document complies with the mandatory requirements for  
55 the formation of a condominium is not brought within 3 years of the date which is the earlier to  
56 occur of (i) the recording of the certificate of a surveyor as required by s. 718.104(e), or (ii) the  
57 recording of an instrument which transfers title to a unit in the condominium which is not  
58 accompanied by a recorded assignment of developer rights in favor of the grantee of such unit,  
59 ~~recording of the declaration~~, the declaration and other documents shall be effective under this  
60 chapter to create a condominium, as of the date the declaration was recorded, whether or not the  
61 documents substantially comply with the mandatory requirements of law. However, both before  
62 and after the expiration of this 3-year period, the circuit court has jurisdiction to entertain a  
63 petition permitted under this subsection for the correction of the documentation, and other  
64 methods of amendment may be utilized to correct the errors or omissions at any time.

65 **Section 4.** Section 718.111(13)(d) is amended as follows:

66 718.111(13)(d). If approved by a majority of the voting interests present at a properly  
67 called meeting of the association, an association may prepare:

68 (1) A report of cash receipts and expenditures in lieu of a compiled, reviewed, or audited  
69 financial statement;

70 (2) A report of cash receipts and expenditures or a compiled financial statement in lieu of  
71 a reviewed or audited financial statement; or

72 (3) A report of cash receipts and expenditures, a compiled financial statement, or a  
73 reviewed financial statement in lieu of an audited financial statement.

74 Such meeting and approval must occur before the end of the fiscal year and is effective only for  
75 the fiscal year in which the vote is taken, except that the approval may also be effective for the  
76 following fiscal year. With respect to an association to which the developer has not turned over

77 control of the association, all unit owners, including the developer, may vote on issues related to  
78 the preparation of financial reports ~~for the first 2 fiscal years~~ of the association's operation,  
79 beginning with the incorporation of the association through the period expiring at the end of the  
80 second fiscal year following the fiscal year in which the earlier of the following events occurs:  
81 (i) the recording of the certificate of a surveyor as required by s. 718.104(e), or (ii) the recording  
82 of an instrument which transfers title to a unit in the condominium which is not accompanied by  
83 a recorded assignment of developer rights in favor of the grantee of such unit declaration is  
84 ~~recorded~~. Thereafter, all unit owners except the developer may vote on such issues until control  
85 is turned over to the association by the developer. Any audit or review prepared under this  
86 section shall be paid for by the developer if done before turnover of control of the association.  
87 An association may not waive the financial reporting requirements of this section for more than 3  
88 consecutive years.

89 **Section 5.** Section 718.112(2)(f)2 is amended as follows:

90 718.112(2)(f)2. In addition to annual operating expenses, the budget shall include  
91 reserve accounts for capital expenditures and deferred maintenance. These accounts shall  
92 include, but are not limited to, roof replacement, building painting, and pavement resurfacing,  
93 regardless of the amount of deferred maintenance expense or replacement cost, and for any other  
94 item for which the deferred maintenance expense or replacement cost exceeds \$10,000. The  
95 amount to be reserved shall be computed by means of a formula which is based upon estimated  
96 remaining useful life and estimated replacement cost or deferred maintenance expense of each  
97 reserve item. The association may adjust replacement reserve assessments annually to take into  
98 account any changes in estimates or extension of the useful life of a reserve item caused by  
99 deferred maintenance. This subsection does not apply to an adopted budget in which the

100 members of an association have determined, by a majority vote at a duly called meeting of the  
101 association, to provide no reserves or less reserves than required by this subsection. However,  
102 prior to turnover of control of an association by a developer to unit owners other than a  
103 developer pursuant to s. 718.301, the developer may vote to waive the reserves or reduce the  
104 funding of reserves through the period expiring at the end of the fiscal year next following the  
105 fiscal year in which ~~for the first 2 fiscal years of the association's operation, beginning with the~~  
106 ~~fiscal year in which the~~ earlier of the following events occurs: (i) the recording of the certificate  
107 of a surveyor as required by s. 718.104(e), or (ii) the recording of an instrument which transfers  
108 title to a unit in the condominium which is not accompanied by a recorded assignment of  
109 developer rights in favor of the grantee of such unit,~~initial declaration is recorded~~ after which  
110 time reserves may be waived or reduced only upon the vote of a majority of all nondeveloper  
111 voting interests voting in person or by limited proxy at a duly called meeting of the association.  
112 If a meeting of the unit owners has been called to determine whether to waive or reduce the  
113 funding of reserves, and no such result is achieved or a quorum is not attained, the reserves as  
114 included in the budget shall go into effect. After the turnover, the developer may vote its voting  
115 interest to waive or reduce the funding of reserves.

116 **Section 6.** Section 718.114 is amended as follows:

117 718.114. An association may enter into agreements to acquire leaseholds, memberships,  
118 and other possessory or use interests in lands or facilities such as country clubs, golf courses,  
119 marinas, and other recreational facilities, whether or not the lands or facilities are contiguous to  
120 the lands of the condominium, if such lands and facilities are intended to provide enjoyment,  
121 recreation, or other use or benefit to the unit owners. All of these leaseholds, memberships, and  
122 other possessory or use interests existing or created at the time of recording the declaration must

123 be stated and fully described in the declaration. Subsequent to the recording of the declaration,  
124 agreements acquiring these leaseholds, memberships, or other possessory or use interests which  
125 are not entered into within 12 months of the date which is earlier to occur of (i) the recording of  
126 the certificate of a surveyor as required by s. 718.104(e), or (ii) the recording of an instrument  
127 which transfers title to a unit in the condominium which is not accompanied by a recorded  
128 assignment of developer rights in favor of the grantee of such unit, following the recording of the  
129 ~~declaration~~ are a material alteration or substantial addition to the real property that is association  
130 property, and the association may not acquire or enter into such agreements except upon a vote  
131 of, or written consent by, a majority of the total voting interests or as authorized by the  
132 declaration as provided in s. 718.113. The declaration may provide that the rental, membership  
133 fees, operations, replacements, and other expenses are common expenses and may impose  
134 covenants and restrictions concerning their use and may contain other provisions not inconsistent  
135 with this chapter. A condominium association may conduct bingo games as provided in s.  
136 849.0931.

137 **Section 7.** Section 718.301(1) is amended as follows:

138 718.301(1) Transfer of association control; claims of defect by association.

139 (1) If unit owners other than the developer own 15 percent or more of the units in a  
140 condominium that will be operated ultimately by an association, the unit owners other than the  
141 developer are entitled to elect at least one-third of the members of the board of administration of  
142 the association. Unit owners other than the developer are entitled to elect at least a majority of  
143 the members of the board of administration of an association upon the first to occur of the  
144 following:

145 (a) Three years after 50 percent of the units that will be operated ultimately by the  
146 association have been conveyed to purchasers;

147 (b) Three months after 90 percent of the units that will be operated ultimately by the  
148 association have been conveyed to purchasers;

149 (c) When all the units that will be operated ultimately by the association have been  
150 completed, some of them have been conveyed to purchasers, and none of the others are being  
151 offered for sale by the developer in the ordinary course of business;

152 (d) When some of the units have been conveyed to purchasers and none of the others are  
153 being constructed or offered for sale by the developer in the ordinary course of business;

154 (e) When the developer files a petition seeking protection in bankruptcy;

155 (f) When a receiver for the developer is appointed by a circuit court and is not discharged  
156 within 30 days after such appointment, unless the court determines within 30 days after  
157 appointment of the receiver that transfer of control would be detrimental to the association or its  
158 members; or

159 (g) Seven years after the date which is the earlier to occur of (i) the recording of the  
160 certificate of a surveyor as required by s. 718.104(e), or (ii) the recording of an instrument which  
161 transfers title to a unit in the condominium which is not accompanied by a recorded assignment  
162 of developer rights in favor of the grantee of such unit,~~recording of the declaration of~~  
163 ~~condominium~~; or, in the case of an association that may ultimately operate more than one  
164 condominium, 7 years after the date which is the earlier to occur of (i) the recording of the  
165 certificate of a surveyor as required by s. 718.104(e), or (ii) the recording of an instrument which  
166 transfers title to a unit which is not accompanied by a recorded assignment of developer rights in  
167 favor of the grantee of such unit, ~~recording of the declaration~~ for the first condominium it

168 operates; or, in the case of an association operating a phase condominium created pursuant to s.  
169 718.403, 7 years after the date which is the earlier to occur of (i) the recording of the certificate  
170 of a surveyor as required by s. 718.104(e) for the initial phase of the condominium, or (ii) the  
171 recording of an instrument which transfers title to a unit in the initial phase of the condominium  
172 which is not accompanied by a recorded assignment of developer rights in favor of the grantee of  
173 such unit.~~recording of the declaration creating the initial phase~~ The developer is entitled to  
174 elect at least one member of the board of administration of an association as long as the  
175 developer holds for sale in the ordinary course of business at least 5 percent, in condominiums  
176 with fewer than 500 units, and 2 percent, in condominiums with more than 500 units, of the units  
177 in a condominium operated by the association. After the developer relinquishes control of the  
178 association, the developer may exercise the right to vote any developer-owned units in the same  
179 manner as any other unit owner except for purposes of reacquiring control of the association or  
180 selecting the majority members of the board of administration.

181 **Section 8.** Section 718.301(4) is amended as follows:  
182 718.301(4). Section 718.301(4)(q) A copy of the recorded instrument which transfers  
183 title to a unit in the condominium if such instrument is the first occurring of the events described  
184 in s.718.110(10).

185 **Section 9.** Section 718.403(1) is amended as follows:  
186 718.403(1). Notwithstanding the provisions of s. 718.110, a developer may develop a  
187 condominium in phases, if the original declaration of condominium submitting the initial phase  
188 to condominium ownership or an amendment to the declaration which has been approved by all  
189 of the unit owners and unit mortgagees provides for and describes in detail all anticipated phases;  
190 the impact, if any, which the completion of subsequent phases would have upon the initial phase;

191 and the time period (~~which may not exceed 7 years from the date of recording the declaration of~~  
192 ~~condominium~~) within which all phases must be added to the condominium and comply with the  
193 requirements of this section and at the end of which the right to add additional phases expires.

194 (a) All phases must be added to the condominium within 7 years after the date which is  
195 the earlier to occur of (i) the recording of the certificate of a surveyor as required by s.  
196 718.104(e), or (ii) the recording of an instrument which transfers title to a unit in the  
197 condominium which is not accompanied by a recorded assignment of developer rights in favor of  
198 the grantee of such unit, unless an amendment extending the 7-year period is approved by the  
199 unit owners.

200 (b) An amendment to extend the 7-year period shall require the approval of the owners  
201 necessary to amend the declaration of condominium consistent with s. 718.110(1)(a). An  
202 extension of the 7-year period may only be submitted for approval during the last 3 years of the  
203 7-year period.

204 (c) An amendment must describe the time period within which all phases must be added  
205 to the condominium and such time period may not exceed 10 years from the date which is the  
206 earlier to occur of (i) the recording of the certificate of a surveyor as required by s. 718.104(e), or  
207 (ii) the recording of an instrument which transfers title to a unit in the condominium which is not  
208 accompanied by a recorded assignment of developer rights in favor of the grantee of such unit.

209 (d) Notwithstanding the provisions of s. 718.110, an amendment extending the 7-year  
210 period is not an amendment subject to s. 718.110(4).

211 This Act shall be effective upon becoming law.

212

## WHITE PAPER

### RE: PROPOSAL TO REPLACE THE DATE TRIGGERING CERTAIN OBLIGATIONS; TO CLARIFY WHEN A CONDOMINIUM UNIT IS CREATED; AND, TO PERMIT EXTENDING THE PERIOD FOR ADDING PHASES TO A CONDOMINIUM

#### I. SUMMARY

A. Timing of Obligations: With respect to the proposed amendments to Sections 718.105, 718.110, 718.111, 718.112, 718.114, 718.301 and 718.403:

Recent Federal Court decisions have drawn into question the validity of contracts to sell new condominium units, contracts upon which Florida's economic recovery relies in large part. These Federal Court decisions are based upon the Federal Interstate Land Sales Full Disclosure Act ("ILSFDA") 15 U.S.C. 1701 *et seq.* ILSFDA governs the sale of many condominiums in Florida in addition to Chapter 718, Florida Statutes, Florida's Condominium Act ("Act"). These decisions have held that an enforceable pre-construction sales contract must contain a legal description of the condominium unit in recordable form which is not practicable pursuant to the Act. These decisions, because they draw into question the contract enforcement, have prevented lenders from financing projects, further undermining the ability to complete condominium projects and undermining economic recovery.

The only way to satisfy the requirement of a recordable legal description is to record the declaration of condominium before actual construction. Practical necessity prevents the recording of declarations until a building is nearly complete because accurate dimensions of the building and the units cannot be determined until construction is complete. Historically, what is being sold was clearly identified in a contract by a unit identification linked to an accompanied sketch in the sales contract and offering prospectus.

To meet the newly stated requirements of the Federal Court decisions requiring reference to a declaration, and to ensure that declarations accurately reflect what is built, this proposal simply adjusts various provisions in the Act to accommodate the recording of the declaration of condominium before completion of the building. The current statutory regimen that start upon the date of recording of the declaration of condominium is modified to the first occurring date of (i) the recording of a surveyor's affidavit of substantial completion or (ii) recording of the first deed which transfers title to a unit in the condominium to a non-developer unit owner. The modified threshold should be at such time the condominium building will be at least substantially complete.

B. Unit Creation: With respect to the proposed amendment to Section 718.104:

A conflict exists between the Second District Court of Appeal and the Fourth District Court of Appeal, and even within the Fourth District itself, as to when a condominium unit is created, applying Section 718.104. The decisions in the Second District hold that a condominium unit is created by recording of either a declaration of condominium or a phase amendment to the declaration. In contrast, the Fourth District has given the scrivener the option to indicate in the declaration when a unit is created.

This proposal serves to clarify existing law by resolving the conflict in favor of the statute's apparent plain meaning. Specifically, that a condominium unit is created upon recording of the declaration of condominium or a phase amendment to a declaration, and that the description of a unit in a declaration does not supersede s. 718.104.

C. Adding Phases: With respect to the proposed amendment to Section 718.403(1):

Section 718.403(1) presently requires that a proposed phase in a phased condominium must be submitted to an existing condominium regime within 7 years from the date of recordation of the declaration of condominium. There are no exceptions to this hard time frame. The current economic climate has led to numerous partially-developed condominium projects falling into distress or to otherwise fail, thereby creating problems for the existing unit owners, condominium associations, municipalities and developers. A once-viable condominium project may now be facing the expiration of phasing time periods due to decreased demand for units in the phases that have not yet been added to the condominium or limited financial ability of the original developer to complete the project. A troubled condominium project may require more time to add additional phases than is currently permitted by Section 718.403(1). The proposed amendments to Section 718.403(1) provide the necessary modifications to permit proposed phases to be added to a condominium beyond the 7-year time period and provide the necessary procedures for doing so through association membership vote.

## II. SECTION-BY-SECTION ANALYSIS

A. The following describes the change being proposed to Sections 718.105, 718.110, 718.111, 718.112, 718.114, 718.301 and 718.403:

1. Section 718.105

Current Situation: Subsection 718.105(4)(c) currently provides that:

If the sum of money held by the Clerk has not been paid to the developer or association as provided in Paragraph (b) within 3 years after the date the declaration was originally recorded, the clerk may notify, in writing, the registered agent

of the association that the sum is still available and the purpose for which it was deposited.

Effect of Proposed Changes: This proposal would change the 3 year time period to 5 years.

2. Section 718.110

Current Situation: Subsection 718.110(10) currently provides that if an action to determine whether the declaration or another condominium document complies with the mandatory requirements for the formation of a condominium is not brought within 3 years of the date of recording of the declaration, the declaration and other documents shall be effective under this chapter to create a condominium, as of the date the declaration was recorded, whether or not the documents substantially comply with the mandatory requirements of law.

Effect of Proposed Changes: This proposal would change the 3 year time period to begin with the first occurring date of (i) the recording of a surveyor's affidavit of substantial completion or (ii) recording of the declaration to the date of first recording an instrument which transfers title to a unit in the condominium.

3. Section 718.111

Current Situation: Subsection 718.111(13)(d) currently provides that with respect to an association to which the developer has not turned over control of the association, all unit owners, including the developer, may vote on issues relating to the preparation of financial reports for the first two years of the association's operation, beginning with the fiscal year in which the declaration is recorded.

Effect of Proposed Changes: This proposal would change the 2 year time period to begin with the fiscal year in which the date of the first occurring date of (i) the recording of a surveyor's affidavit of substantial completion or (ii) recording an instrument which transfers title to a unit in the condominium.

4. Section 718.112

Current Situation: Subsection 718.112(2)(f)2 currently provides that prior to turnover of control of an association by a developer to unit owners other than a developer pursuant to Section 718.301, a developer may vote to waive the reserves or reduce the funding of reserves for the first two fiscal years of the association's operation, beginning with the fiscal year in which the initial declaration is recorded.

Effect of Proposed Changes: This proposal would change the calculation of the first two fiscal years of the association's operation to begin with the fiscal year of the first occurring date of (i) the recording of a surveyor's affidavit of

substantial completion or (ii) date of recording an instrument which transfers title to a unit in the condominium.

5. Section 718.114

Current Situation: Section 718.114 currently provides that subsequent to the recording of the declaration, agreements acquiring these leaseholds, memberships, or other possessory or use interests which are not entered into within 12 months following the date of recording of the declaration are a material alteration or substantial addition to the real property that is association property and the association may not acquire or enter into such agreements except upon a vote of, or written consent by, a majority of the total voting interests or as authorized by the declaration as provided in 718.113.

Effect of Proposed Changes: This proposal would change the time period to the date which begins with the first occurring date of (i) the recording of a surveyor's affidavit of substantial completion or (ii) recording an instrument which transfers title to a unit in the condominium.

6. Section 718.301

Current Situation: Subsection 718.301(1)(g) currently provides that one of the time periods within which unit owners other than the developer are entitled to elect at least a majority of the members of the board of administration of an association is 7 years after recording of the declaration of condominium; or in the case of an association that may ultimately operate more than one condominium, 7 years after recordation of the declaration for the first condominium it operates; or in the case of an association operating a phase condominium created pursuant to 718.403, 7 years after recordation of the declaration creating the initial phase.

Effect of Proposed Changes: This proposal would change the 7 year time period to begin on the date of the first occurring date of (i) the recording of a surveyor's affidavit of substantial completion or (ii) recording an instrument which transfers title to a unit in the condominium; or in the case of an association that ultimately operates more than one condominium; 7 years after the date of recording an instrument which transfers title to a unit in the first condominium it operates; or in the case of an association operating a phase condominium created pursuant to 718.403, 7 years after the date of recording an instrument which transfers title to a unit in the initial phase of the condominium

7. Section 718.403

Current Situation: Subsection 718.403(1) currently limits the time within which a developer may add a phase to the condominium to 7 years from the date of recording the declaration of condominium.

Effect of Proposed Changes: This proposal would (A) change the time period to begin with 7 years from the date of the first occurring date of (i) the recording of a surveyor's affidavit of substantial completion or (ii) recording an instrument which transfers title to a unit in the initial phase of the condominium; and, (B) create a mechanism to extend the 7-year time period for adding proposed phases to an existing phased condominium an additional 3 years through association membership vote.

B. The following describes the change being proposed to Subsection 718.104(2):

1. Current Situation: Subsection 718.104(2) currently provides that:

A condominium is created by recording a declaration in the public records of the county where the land is located, executed and acknowledged with the requirements for a deed. All persons who have record title to the interest in the land being submitted to condominium ownership, or their lawfully authorized agents, must join in the execution of the declaration. Upon the recording of the declaration, or an amendment adding a phase to the condominium under Subsection 718.403(6), all units described in the declaration or phase amendment as being located in or on the land then being submitted to condominium ownership shall come into existence, regardless of the state of completion of planned improvements in which the units may be located. Upon recording the declaration of condominium pursuant to this section, the developer shall file the recording information with the division within 120 days on a form prescribed by the division.

Effect of Proposed Changes: This proposal would clarify that regardless of any other requirement or description that a declaration may provide, that a condominium unit, built or unbuilt, is created and therefore subject to assessments upon the recording of the declaration submitting the condominium property to condominium ownership or phase amendment and that the statute does not allow the scrivener to define a condominium unit in such a manner as to determine what condominium property is subject to assessment upon the recording of the declaration.

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

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

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

This proposal does not have an economic impact on the private sector.

### **V. CONSTITUTIONAL ISSUES**

There are no constitutional issues raised by this proposal.

## **VI. OTHER INTERESTED PARTIES**

The only other group or individuals who may have an interest in this proposal and who were contacted regarding this proposal or are believed to be interested in this proposal is the Florida Bar's Condominium and Planned Unit Development Committee which voted in favor of this proposal. No other groups or individuals assisted in the development of this proposal, were contacted regarding this proposal, or are believed to be interested in this proposal.

# LEGISLATIVE POSITION REQUEST FORM

GOVERNMENTAL AFFAIRS OFFICE

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

## GENERAL INFORMATION

**Submitted By** Martin S. Awerbach, Chair, Real Property Litigation, Committee of the Real Property Probate & Trust Law Section (RPPTL Approval Date August \_\_\_\_ 2012)

**Address** 2600 McCormick Drive, Suite 100, Clearwater, FL 33759  
Telephone: (727) 725-3227

**Position Type** Real Property Litigation Committee, RPPTL Section, The Florida Bar (Florida Bar, section, division, committee or both)

## CONTACTS

### Board & Legislation Committee Appearance

**Martin S. Awerbach**, 2600 McCormick Drive, Suite 100, Clearwater, FL 33759  
Telephone: (727) 725-3227  
**Robert S. Swaine**, Swaine & Harris, PA, 425 South Commerce Ave., Sebring, FL 33870, Telephone 863-385-1549  
**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** Amendment to Fla. Stat. §§ 50.0211, 50.041 and 50.061  
(Bill or PCB #) (Bill or PCB Sponsor)

**Indicate Position** Support  Oppose \_\_\_\_\_ Tech Asst. \_\_\_\_\_ Other \_\_\_\_\_

### Proposed Wording of Position for Official Publication:

"Support requirements for electronic publication and addressing due process concerns, including amendment to F.S. s. 50.0211, s. 50.041 and s. 50.061."

### Reasons For Proposed Advocacy:

The requirements of electronic publication should be clearly defined and due process should be satisfied by reaching the most people.

## PRIOR POSITIONS TAKEN ON THIS ISSUE

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



1 A bill to be entitled

2 An act relating to legal notices; amending s. 50.0211, F.S. by amending the duration legal  
3 notices are required to be published, requiring that published legal notices be archived for  
4 a period of five (5) years and requiring that legal notices placed on a website must be  
5 accurate; amending s. 50.041 by requiring the proof of publication to include a printout of  
6 the internet publication; amending s. 50.061 by clarifying payment language and  
7 providing for an effective date.

8  
9 Be It Enacted by the Legislature of the State of Florida:

10  
11 Section 1. Subsections (1) and (2) of section 50.0211, Florida Statutes, are  
12 amended; subsections (3) and (4) are renumbered as subsections (5) and (6) respectively;  
13 new subsections (3) and (4) are added; and subsection (5) is deleted, to read:

14 (1) This section applies to legal notices that must be published in  
15 accordance with this Florida Statute chapter unless otherwise specified.

16 (2) Each legal notice must be placed on the newspaper's website on  
17 the same day the notice appears in the newspaper, at no additional charge, in a  
18 separate page titled "Legal Notices". A link to Legal Notices shall be provided  
19 on the front page of the newspaper's website that provides access to the legal  
20 notices ~~without charge~~. Each Clerk of the Court may provide a link to the Legal  
21 Notices webpage of any newspaper, but is not required to do so. Furthermore, a  
22 Clerk of the Court shall not be required to provide a link to any or all newspapers  
23 which may publish legal notices, provided that the Clerk of the Court's webpage  
24 where such links are located identifies the link (s) provided as a non-exhaustive  
25 list of publication sources. If there is a specified size and placement required for a  
26 printed legal notice, the size and placement of the notice on the newspaper's  
27 website should optimize its online visibility in keeping with the print  
28 requirements. The newspaper's web pages that contain legal notices shall present  
29 the legal notices as the only dominant subject matter of those pages. The  
30 newspaper's website shall contain a search function to facilitate searching the  
31 legal notices. No fee shall be charged and no registration shall be required for

32 viewing or search legal notices. This subsection shall take effect July 1, 2013.

33 (3) For purposes of this section, a legal notice placed on a newspaper  
34 website must:

35 (a) Be accessible and searchable by party name(s) and case  
36 number; and

37 (b) Be posted for a period of at least 90 consecutive days  
38 following the first day of posting publication.

39 (4) The newspaper website which publishes the legal notice shall maintain  
40 a searchable archive of all legal notices previously posted on the publicly accessible  
41 website for 5 years following the first day of posting. The searchable archive shall be  
42 provided and accessible to the general public without charge.

43 ~~(5) An error in the notice placed on the newspaper or statewide website~~  
44 ~~shall be considered a harmless error and proper legal notice requirements shall be~~  
45 ~~considered a harmless error and proper legal notice requirements shall be considered~~  
46 ~~met if the notice published in the newspaper is correct.~~

47 ~~(5)~~ (3) If a legal notice is published in a newspaper, the newspaper publishing  
48 the notice shall place the notice on the website established and maintained as an  
49 initiative of the Florida Press Association as a repository for such notices located at the  
50 following address: [www.floridapublicnotices.com](http://www.floridapublicnotices.com).

51 ~~(6)~~ (4) Newspapers that publish legal notices shall, upon request, provide e-  
52 mail notification of new legal notices when they are printed in the newspaper and  
53 added to the newspaper's website. Such e-mail notification shall be provided without  
54 charge and notification for such an e-mail registry shall be available on the front page  
55 of the legal notices section of the newspaper's website. This subsection shall take effect  
56 July 1, 2013.

57  
58 Section 2. Subsection (2) of section 50.041, Florida Statutes, is amended to read:

59 (2) Each such affidavit shall be printed upon white paper and shall be 8 1/2  
60 inches in width and of convenient length, not less than 5 1/2 inches. A white  
61 margin of not less than 2 1/2 inches shall be left at the right side of each affidavit  
62 form and upon or in this space shall be substantially pasted a clipping which shall  
63 be a true copy of the public notice or legal advertisement for which proof is

64 executed and shall also be attached a printout of the internet publication, pursuant  
65 to s. 50.0211(2), which printout shall include the specific web address of the  
66 internet publication. ~~of the public notice or legal advertisement for which proof is~~  
67 ~~executed. Alternatively, the affidavit may be provided in electronic rather than~~  
68 ~~paper form, provided the notarization of the affidavit complies with the~~  
69 ~~requirements of s. 117.021.~~

70  
71 Section 3. Subsections (2) and (3) of section 50.061, Florida Statutes, are  
72 amended to read:

73 (2) The charge for publishing each such official public notice or legal  
74 advertisement shall be 70 cents per square inch for the first insertion and 40 cents  
75 per square inch for each subsequent insertion, except that government notices  
76 required to be published more than once the cost of which ~~whose cost~~ is paid for  
77 by the government and not paid in advance by or allowed to be recouped from  
78 private parties may not be charged for the second and successive insertions at a  
79 rate greater than 85 percent of the original rate.

80 (3) Where the regular established minimum commercial rate per square  
81 inch of the newspaper publishing such official public notices or legal  
82 advertisements is in excess of the rate herein stipulated, said minimum  
83 commercial rate per square inch may be charged for all such legal advertisements  
84 or official public notices for each insertion, except that government notices  
85 required to be published more than once the cost of which ~~whose cost~~ is paid for  
86 by the government and not paid in advance by or allowed to be recouped from  
87 private parties may not be charged for the second and successive insertions at a  
88 rate greater than 85 percent of the original rate.

89  
90 Section 4. This act shall take effect upon becoming a law.

## **Real Property, Probate, and Trust Law Section of the Florida Bar**

### **White Paper**

#### **Proposed changes to Fla. Stat. 50.0211 and 50.041, concerning electronic publication**

##### **I. SUMMARY**

The proposed changes to Fla. Stat. § 50.0211 seeks to eliminate the due process problem associated with the “harmless error” language in paragraph (5) of the current statute and to create clear requirements for electronic publication which allow the greatest amount of information to be easily accessed by the greatest number of people. The proposed changes to Fla. Stat. § 50.041 conforms the proof of publication requirement to require not only a true copy of the newspaper clipping as proof of the legal publication, but also to attach a printout of the internet publication, including the specific web address of the internet publication.

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

Fla. Stat. § 50.0211 was passed at the end of the last legislative session in response to several bills circulating the House and Senate that required electronic publication as an alternative or replacement to newspaper publication. The legislation enacted continues to require newspaper publication, but provides that newspapers are required to publish the same information electronically, on the newspaper’s website. The bill failed to adequately address how electronic publication would work and also contained a “harmless error” clause which provided that any notice contained in the electronic publication would be harmless error as long as the newspaper publication was correct.

One of the many reasons alternate legislation was being contemplated at the time this statute was passed involved concerns of due process. Historically, newspaper publication was the best way available to provide notice to the most persons possible. The advent of electronic communication via community computer websites provides instantaneous transmission of information. It is without question that a majority of adult Americans use the Internet while print newspaper circulation reached only 31% of the population at the end of 2010.

Due process requires that service of process, including constructive service by publication, reach the most persons possible. At present, this requires internet publication. More than just “sideshow” publication, the internet publication must be full, accurate, and complete publication, not publication which is construed as “harmless error” if it is inaccurate or fails to provide the requisite notice it purports to provide.

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

The proposed changes will have the effect of adequately satisfying due process concerns, eliminating the “harmless error” clause contained in paragraph 5 of the current Statute. The changes will provide more structure to the electronic publication by imposing specific requirements for the electronic publication, namely that the electronic publication (i) be

accessible and searchable by party name(s) and case number, (ii) be posted for a period of at least 90 consecutive days following the first day of posting publication, and (iii) maintain a searchable archive of all legal notices posted on the website for a period of 5 years. The proposed changes will also clarify the statute with regard to electronic publication being free to view, free to search, and not requiring registration for use. Lastly, the proposed changes will alter the Proof of Publication and require both the newspaper clipping *and* a printout which shows the publication electronically published as well as the web address of the internet publication.

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

The proposed changes would not have a fiscal impact on State or Local Governments unless the Clerk of Courts elected to post web links on the Clerk of Court's website, and in such instance, only minimal impact would be anticipated.

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

The proposed changes would impact the newspaper industry by requiring additional publication (electronic), at no cost to the public and at no additional cost to those parties who seek the legal publications. Advertising revenue and "website traffic" should offset any cost and possibly even increase a newspaper's revenue.

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

The constitutional issue of affording due process to litigants should be served by the amendment sought.

#### **V. OTHER INTERESTED PARTIES**

The newspapers will be highly interested in this legislation.

# LEGISLATIVE POSITION REQUEST FORM

GOVERNMENTAL AFFAIRS OFFICE

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

## GENERAL INFORMATION

**Submitted By** Martin Awerbach, Chair, Real Property Litigation Committee of the Real Property Probate & Trust Law Section (RPPTL Approval Date August \_\_\_\_\_, 2012)

**Address** Awerbach & Cohn, P.A., 2600 McCormick Dr., Suite 100, Clearwater, FL 33759  
Telephone: (727) 725-3227

**Position Type** Real Property Litigation Committee, RPPTL Section, The Florida Bar (Florida Bar, section, division, committee or both)

## CONTACTS

### Board & Legislation Committee Appearance

**Martin S. Awerbach**, Awerbach & Cohn, P.A., 2600 McCormick Dr., Ste 100, Clearwater, FL 33759, Telephone (727) 725-3227.  
**Robert S. Swaine**, Swaine & Harris, P.A., 425 South Commerce Avenue, Sebring, FL 33870, Telephone (863) 385-1549.  
**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 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."

### Reasons For Proposed Advocacy:

Improve the marketability of real estate titles by expressly providing statutory authority for courts to appoint ad litem on behalf of persons who have been constructively served.

## PRIOR POSITIONS TAKEN ON THIS ISSUE

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



1 A bill to be entitled

2  
3 An act relating to the appointment of ad litem; amending s. 49.021, F.S. by providing for  
4 the appointment for the ad litem to represent named persons or unknown persons  
5 claiming by, through or under or against a person who is deceased or unknown;  
6 confirming the validity of previously appointed ad litem for such purposes; and  
7 providing for an effective date.

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

9 Section 1. Subsections (6) and (7) of section 49.021, Florida Statutes, are created;  
10 previously unnumbered text is numbered as subsection (5), and the title is amended to read:

11 49.021 Service of process by publication, upon whom; appointment of ad litem.

12 Where personal service of process or, if appropriate, service of process under s. 48.194  
13 cannot be had, service of process by publication may be had upon any party, natural or corporate,  
14 known or unknown, including:

15 (1) Any known or unknown natural person, and, when described as such, the unknown  
16 spouse, heirs, devisees, grantees, creditors, or other parties claiming by, through, under, or  
17 against any known or unknown person who is known to be dead or is not known to be either  
18 dead or alive;

19 (2) Any corporation or other legal entity, whether its domicile be foreign, domestic, or  
20 unknown, and whether dissolved or existing, including corporations or other legal entities not  
21 known to be dissolved or existing, and, when described as such, the unknown assigns, successors  
22 in interest, trustees, or any other party claiming by, through, under, or against any named  
23 corporation or legal entity;

24 (3) Any group, firm, entity, or persons who operate or do business, or have operated or  
25 done business, in this state, under a name or title which includes the word "corporation,"  
26 "company," "incorporated," "inc.," or any combination thereof, or under a name or title which  
27 indicates, tends to indicate or leads one to think that the same may be a corporation or other legal  
28 entity; and

29 (4) All claimants under any of such parties.

30 (5) Unknown parties may be proceeded against exclusively or together with other  
31 parties.

32 (6) After constructive service of process is lawfully made, the court may appoint a  
33 person or persons as attorney, administrator and guardian ad litem, hereinafter all referred to as  
34 “ad litem,” to represent known persons, or unknown persons claiming by, through, under or  
35 against a person who is deceased, or against a person whose status is unknown. The ad litem  
36 shall not be required to post a bond or designate a resident agent in order to serve in the capacity  
37 as an ad litem. Service on the ad litem shall be made in the same manner as any other party who  
38 has appeared in the proceeding.

39 a. The ad litem shall be deemed discharged when the final judgment is  
40 entered or as otherwise ordered by the court.

41 b. The ad litem shall be entitled to an award of a reasonable fee for services  
42 rendered and be assessed against the party requesting the appointment of the ad litem or as  
43 otherwise ordered by the court.

44 (7) In all cases heretofore adjudicated in which the court appointed an ad litem for  
45 known persons, but upon which service of process could not be had, or unknown persons  
46 claiming through, or under a person who is deceased, or whose status was unknown, to represent  
47 such parties after constructive service was lawfully made, no proceeding shall be declared  
48 irregular or illegal solely due to lack of statutory authority to have appointed an ad litem.

49 Section 2. This act shall take effect upon becoming a law.

## White Paper

### Proposed Revisions to § 49.021, Fla. Stats., Concerning Appointment of Ad Litem

#### **I. SUMMARY**

The purposes of the proposed changes to section 49.021, Florida Statutes, are to improve the marketability of title to real property by:

A. providing courts with specific authority for the appointment of an attorney, administrator and guardian ad litem (collectively defined in the proposed amendment as “ad litem”), to serve on behalf of known persons, or unknown persons, such as heirs, spouses and creditors, having claims by, through, under or against a person who is deceased or whose status is unknown; and,

B. confirming the sufficiency of prior proceedings in which ad litem have been appointed.

The proposed changes, consistent with the existing version of the statute, are only applicable to persons who have been constructively served because personal service cannot be had.

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

A. Providing Courts with Authority for the Appointment of Ad Litem – Under the present law, there is no statute that specifically authorizes a court to appoint an ad litem to serve on behalf of persons who have been constructively served. As a result of the lack of such specific authority, there has been inconsistency among the courts, in that some courts have nevertheless appointed ad litem, while other courts have refused to do so. The inability to obtain the appointment of an ad litem may affect the sufficiency of certain legal proceedings, particularly those involving real property, such as quiet title actions and foreclosures. Accordingly, lack of an ad litem may impair the marketability of real estate titles at the conclusion of such litigation. *Shada v. Title & Trust Co. of Fla.*, 457 So. 2d 553 (Fla 4th DCA 1984).

B. Confirming the Sufficiency of Prior Proceedings – Due to the lack of existing statutory authority for the appointment of ad litem, the proposed subsection (7) is intended to eliminate any question as to the sufficiency of prior legal proceedings in which courts have nevertheless appointed ad litem.

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

The revision to the statute’s title is intended to reflect the proposed addition of the ad litem authorization provisions. Subparagraph (5) is changed simply to add a number to the prior existing language that is unnumbered. Subparagraph (6) provides the courts with the specific

authority to appoint ad litem. Subparagraph (7) confirms the sufficiency of prior proceedings in which ad litem have been appointed.

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

The proposal will assist the Courts in resolving disputes faster and more efficiently.

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

The proposal will have a positive and direct economic impact on the private sector by facilitating and providing additional clarity to the judicial process.

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

There are no perceived constitutional issues. In fact, the proposal improves due process by providing persons whose identities are not readily ascertainable with ad litem representation.

#### **V. OTHER INTERESTED PARTIES**

Potential interested parties are the Florida Bankers Association and the Conference of Circuit Court Judges.

**LEGISLATIVE POSITION  
REQUEST FORM**

GOVERNMENTAL AFFAIRS OFFICE  
Date Form Received \_\_\_\_\_

**GENERAL INFORMATION**

**Submitted By** (List name of the section, division, committee, bar group or individual)

Jerry Aron, Chair, ad hoc Foreclosure Committee of the Real Property, Probate and Trust Law Section

**Address** (List street address and phone number)

2505 Metrocentre Blvd., Suite 301, West Palm Beach, Fl. 33407

Telephone: (561) 478-0511

**Position Level** Florida Bar or Section / Division / Committee – or both, if requested)

Section

**PROPOSED ADVOCACY**

All types of partisan advocacy or nonpartisan technical assistance should be presented to the Board of Governors via this request form. Every request should be accompanied by a copy of any existing or proposed legislation, or a detailed presentation of the matter at issue. Contact the Governmental Affairs office with questions.

**If Applicable, List The Following:**

(Bill or PCB #)                      (Sponsor)

\_\_\_\_\_

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

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

Supports foreclosure reform which expedites and streamlines the judicial foreclosure process – especially as to unopposed or abandoned properties -- while preserving and protecting fundamental fairness, the property rights and due process rights of the holders of interests in or affecting Florida real property.

**Reasons For Proposed Advocacy:**

The RPPTL Section has been involved at multiple levels in attempts to address Florida’s “foreclosure crisis” and two years ago appointed a special committee to consider legislative changes which might expedite the foreclosure process. The proposed legislation includes the following key elements:

1. Shortening of the current 5 year statute of limitations for filing deficiency claims in hopes of allowing foreclosed homeowners to clean up credit more quickly without the continuing threat of deficiency

2. Requires the foreclosing party to certify possession of original note or provide lost note documentation and provide other information at time of filing complaint. This is in contrast to the current practice of pleading in the alternative, often without first gathering and examining relevant documentation.
3. Prohibiting collateral attack on final foreclosure judgment after property conveyed to an unaffiliated purchaser for value, converting such claims into claim for money damages. In light of allegations of “robo-signing” falsified ownership and assignment documents and of photo-shopped “original” notes, there is concern that courts could call into question the finality of completed foreclosures after the property had been sold to a party not affiliated with the lender. Such rulings could lead to significant problems as to the marketability of any previously foreclosed properties and further declines in Florida’s critical real estate markets.
4. Reforming the existing show cause order mechanisms in foreclosure to eliminate the need for two court hearings, and allowing condominiums, homeowners’ associations and other lienholders to use show cause mechanism to move case forward.
5. The uniform commercial code at §673.3091 requires the court to condition the re-establishment of a lost, destroyed or stolen note on the provision of adequate protections. While legally required, this requirement has not always been honored in foreclosures so is reiterated as part of the foreclosure chapter and includes examples.

While there is no panacea for the problems we are facing, it is believed that the proposed legislation will help expedite various aspects of the foreclosure process.

### PRIOR POSITIONS TAKEN ON THIS ISSUE

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

#### Most Recent Position

(Bar / Section / Division / Committee)	(Support or Oppose)	(Date)
<u>RPPTL</u>	<u>Oppose Non-Judicial Foreclosure</u>	<u>Renewed 2012</u>

#### Others (Attach list if more than one)

(Bar / Section / Division / Committee)	(Support or Oppose)	(Date)
<u>Consumer Protection Section</u>	<u>sent letter opposing elements of last year’s similar HB 213</u>	

### REFERRALS TO OTHER SECTIONS, COMMITTEES OR LEGAL ORGANIZATIONS

A request for action on a legislative position must be circulated to all divisions, sections and committees that might be interested in the issue. The Legislation Committee and Board of Governors may delay final action on a request in the absence of any responses from such groups. Please include all responses with this form.

**Referrals**

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

Business Law Section \_\_\_\_\_

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

Consumer Protection Section \_\_\_\_\_

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

\_\_\_\_\_

**CONTACTS**

**Board & Legislation Committee Appearance**

(List name, address and phone number)

Jerry E. Aron, 2505 Metrocentre Blvd Ste 301, West Palm Beach, FL (561) 478-0511 \_\_\_\_\_

Alan B. Fields, 249 E. Virginia St. Tallahassee, FL (727) 773-6664 \_\_\_\_\_

Burt Bruton, 1221 Brickell Avenue, Miami, FL 33131 (305) 579-0593 \_\_\_\_\_

Mark Brown, 4221 W. Boy Scout Boulevard, Suite 1000, Tampa, FL 33607-5780 (813) 223.7000 \_\_\_\_\_

Jeff Sauer, 510 E. Zaragoza St. Pensacola, FL 32502 (850) 434-2761 \_\_\_\_\_

Robert Swaine, 425 South Commerce Avenue, Sebring, FL 33870 (863) 385-1549 \_\_\_\_\_

Pete Dunbar, Martha Edenfield, 215 South Monroe Street, Suite 200, Tallahassee, FL 32301 \_\_\_\_\_  
(850)-222-3533 \_\_\_\_\_

**Appearances Before Legislators**

(List name and phone number of those appearing before House/Senate Committees)

Same \_\_\_\_\_

**Meetings With Legislators/Staff**

(List name and phone number of those having direct contact with legislators)

Same \_\_\_\_\_

**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 may involve a separate appearance before the Legislation Committee unless otherwise advised.**

**For information or assistance, please contact the Governmental Affairs Office of The Florida Bar at 800-342-8060, extension 5662.**

1 Draft of 8-21-12

2

3

A bill to be entitled

4 An act relating to mortgage foreclosures; amending s. 95.11,  
5 F.S.; reducing the limitations period for commencing an action  
6 to enforce a claim of a deficiency judgment subsequent to a  
7 foreclosure action; providing for application to existing causes  
8 of action; creating s. 702.015, F.S.; providing legislative  
9 intent; specifying required contents of a complaint seeking to  
10 foreclose on certain types of residential properties with  
11 respect to the authority of the plaintiff to foreclose on the  
12 note and the location of the note; providing that failure to  
13 file such documents does not affect title to property subsequent  
14 to a foreclosure sale; providing an exception; creating s.  
15 702.036 F.S.; prohibiting collateral attack on validity or  
16 effectiveness of final judgment of foreclosure after defendant  
17 has been properly served, final judgment of foreclosure entered,  
18 any appeals resolved or appeals periods expired, and property  
19 has been conveyed to a purchaser for value unaffiliated with  
20 lender or servicer; converting claims asserted after that point  
21 to claims for money damages; providing that certain persons be  
22 considered persons affiliated with the foreclosing lender for  
23 specified purposes; prohibiting claims against the real property  
24 by persons claiming to have actual promissory notes following  
25 foreclosure of a mortgage based upon the enforcement of a lost,  
26 destroyed, or stolen note; and permitting such persons to claim  
27 against adequate protections provided pursuant to s. 673.3091 or  
28 directly against foreclosing party; amending s. 702.06, F.S.;  
29 clarifying the computation of the amount of a deficiency  
30 judgment; restricting separate deficiency suit where deficiency  
31 previously addressed in foreclosure action; amending s. 702.10,  
32 F.S.; expanding the class of persons authorized to move for

33 expedited foreclosure; defining the term "lienholder"; providing  
34 requirements and procedures with respect to an order directed to  
35 defendants to show cause why a final judgment of foreclosure  
36 should not be entered; providing that certain failures by a  
37 defendant to make certain filings or to make certain appearances  
38 may have specified legal consequences; requiring the court to  
39 enter a final judgment of foreclosure and order a foreclosure  
40 sale under certain circumstances; revising a restriction on a  
41 mortgagee to request a court to order a mortgagor defendant to  
42 make payments or to vacate the premises during an action to  
43 foreclose on residential real estate to provide that the  
44 restriction applies to all but owner-occupied residential  
45 property; providing a presumption regarding owner-occupied  
46 residential property; requesting the Supreme Court to adopt  
47 rules and forms for use in expedited foreclosure proceedings;  
48 creating s. 702.11, F.S.; providing requirements for reasonable  
49 means of providing adequate protection under s. 673.3091, F.S.,  
50 in mortgage foreclosures; providing for liability of persons who  
51 wrongly claim to be holders of or entitled to enforce a lost,  
52 stolen, or destroyed note and caused the mortgage secured  
53 thereby to be foreclosed in certain circumstances; providing for  
54 application of the act; providing an effective date.

55

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

57 Section 1. Paragraph (b) of subsection (2) of section  
58 95.11, Florida Statutes, is amended, and paragraph (h) is added  
59 to subsection (5) of that section, to read:

60 95.11 Limitations other than for the recovery of real  
61 property.—Actions other than for recovery of real property shall  
62 be commenced as follows:

63 (2) WITHIN FIVE YEARS.—

64 (b) A legal or equitable action on a contract, obligation,  
65 or liability founded on a written instrument, except for an  
66 action to enforce a claim against a payment bond, which shall be  
67 governed by the applicable provisions of ss. 255.05(10) and  
68 713.23(1)(e), and except for actions for a deficiency judgment  
69 governed by paragraph (5)(h).

70 (5) WITHIN ONE YEAR.—

71 (h) An action to enforce a claim of a deficiency related to  
72 a note secured by a mortgage against a residential property that  
73 is a one-family to four-family dwelling unit. The limitations  
74 period shall commence on the 11th day after the foreclosure sale  
75 or the day after the mortgagee accepts a deed in lieu of  
76 foreclosure.

77 Section 2. The amendment to s. 95.11, Florida Statutes,  
78 made by this act shall apply to any action commenced on or after  
79 July 1, 2013, regardless of when the cause of action accrued,  
80 except that any action that would not have been barred under s.  
81 95.11(2)(b), Florida Statutes, prior to the amendments made by  
82 this act may be commenced no later than 5 years after the action  
83 accrued and in no event later than July 1, 2014, and if the  
84 action is not commenced by that date, it is barred by the  
85 amendments made by this act.

86 Section 3. Section 702.015, Florida Statutes, is created to  
87 read:

88 702.015 Elements of complaint; lost, destroyed, or stolen  
89 note affidavit.—

90 (1) The Legislature intends that the requirements of this  
91 section are to expedite the foreclosure process by ensuring  
92 initial disclosure of a plaintiff's status and the facts  
93 supporting that status and thereby ensuring the availability of  
94 documents necessary to the prosecution of the case.

95 (2) A complaint that seeks to foreclose a mortgage or other  
96 lien on residential real property, including individual units of  
97 condominiums and cooperatives, designed principally for  
98 occupation by from one to four families which secures a  
99 promissory note must:

100 (a) Contain affirmative allegations expressly made by the  
101 plaintiff at the time the proceeding is commenced that the  
102 plaintiff is the holder of the original note secured by the  
103 mortgage; or

104 (b) Allege with specificity the factual basis by which the  
105 plaintiff is a person entitled to enforce the note under s.  
106 673.3011.

107 (3) If a party has been delegated the authority to  
108 institute a mortgage foreclosure action on behalf of the holder  
109 of the note, the complaint shall describe the authority of the  
110 plaintiff and identify, with specificity, the document that  
111 grants the plaintiff the authority to act on behalf of the  
112 holder of the note. This subsection is intended to require  
113 initial disclosure of status and pertinent facts and not to  
114 modify law regarding standing or real parties in interest.

115 (4) If the plaintiff is in physical possession of the  
116 original promissory note, the plaintiff must file with the  
117 court, contemporaneously with and as a condition precedent to  
118 the filing of the complaint for foreclosure, certification,  
119 under penalty of perjury, that the plaintiff is in physical  
120 possession of the original promissory note. The certification  
121 must set forth the physical location of the note, the name and  
122 title of the individual giving the certification, the name of  
123 the person who personally verified such physical possession, and  
124 the time and date on which the possession was verified. Correct  
125 copies of the note and all allonges to the note must be attached  
126 to the certification. The original note and the allonges must be

127 filed with the court before the entry of any judgment of  
128 foreclosure or judgment on the note.

129 (5) If the plaintiff seeks to enforce a lost, destroyed, or  
130 stolen instrument, an affidavit executed under penalty of  
131 perjury must be attached to the complaint. The affidavit must:

132 (a) Detail a clear chain of all endorsements or assignments  
133 of the promissory note that is the subject of the action.

134 (b) Set forth facts showing that the plaintiff is entitled  
135 to enforce a lost, destroyed, or stolen instrument pursuant to  
136 s. 673.3091. Adequate protection as required under s.  
137 673.3091(2) shall be provided prior to the entry of final  
138 judgment.

139 (c) Include as exhibits to the affidavit such copies of the  
140 note and the allonges to the note, audit reports showing  
141 physical receipt of the original note, or other evidence of the  
142 acquisition, ownership, and possession of the note as may be  
143 available to the plaintiff.

144 (6) The court may sanction the plaintiff for failure to  
145 comply with this section.

146 (7) This section does not apply to any foreclosure  
147 proceeding involving timeshare interests under part III of  
148 chapter 721.

149 Section 4. Section 702.036, Florida Statutes, is created to  
150 read:

151 702.036 Finality of mortgage foreclosure judgment.—

152 (1)(a) In any action or proceeding in which a party seeks  
153 to set aside, invalidate, or challenge the validity of a final  
154 judgment of foreclosure of a mortgage or to establish or  
155 reestablish a lien or encumbrance on the property in abrogation  
156 of the final judgment of foreclosure of a mortgage, the court  
157 shall treat such request solely as a claim for monetary damages

158 and may not grant relief that adversely affects the quality or  
159 character of the title to the property, if:

160 1. The party seeking relief from the final judgment of  
161 foreclosure of a mortgage was properly served in the foreclosure  
162 lawsuit as provided in chapter 48 or chapter 49; and

163 2. A final judgment of foreclosure of a mortgage was  
164 entered as to a property;

165 3. All applicable appeals periods have run as to the final  
166 judgment of foreclosure of a mortgage with no appeals having  
167 been taken, or any appeals having been finally resolved;and

168 4. The property has been acquired for value, by a person  
169 not affiliated with the foreclosing lender or the foreclosed  
170 owner, at a time in which no lis pendens regarding the suit to  
171 set aside, invalidate, or challenge the foreclosure appears in  
172 the official records of the county where the property was  
173 located.

174 (b) This subsection does not limit the right to pursue any  
175 other relief to which a person may be entitled, including, but  
176 not limited to, compensatory damages, punitive damages,  
177 statutory damages, consequential damages, injunctive relief, or  
178 fees and costs, which does not adversely affect the ownership of  
179 the title to the property as vested in the unaffiliated  
180 purchaser for value.

181 (2) For purposes of this section, the following, without  
182 limitation, shall be considered persons affiliated with the  
183 foreclosing lender:

184 (a) The foreclosing lender or any loan servicer for the  
185 loan being foreclosed;

186 (b) Any past or present owner or holder of the loan being  
187 foreclosed;

188 (c) Any maintenance company, holding company, foreclosure  
189 services company, or law firm under contract to any entity

190 listed in paragraph (a), paragraph (b), or this paragraph, with  
191 regard to the loan being foreclosed; or

192 (d) Any parent entity, subsidiary, or other person who  
193 directly, or indirectly through one or more intermediaries,  
194 controls or is controlled by, or is under common control with,  
195 any entity listed in paragraph (a), paragraph (b), or paragraph  
196 (c).

197 (3) After foreclosure of a mortgage based upon the  
198 enforcement of a lost, destroyed, or stolen note, a person who  
199 is not a party to the underlying foreclosure action but who  
200 claims to be the actual holder of the promissory note secured by  
201 the foreclosed mortgage shall have no claim against the  
202 foreclosed property after it has been conveyed for valuable  
203 consideration to a person not affiliated with the foreclosing  
204 lender or the foreclosed owner. This section does not preclude  
205 the actual holder of the note from pursuing recovery from any  
206 adequate protection given pursuant to s. 673.3091 or from the  
207 party who wrongfully claimed to be the owner or holder of the  
208 promissory note under s. 702.11(2) or otherwise, from the maker  
209 of the note, or from any other person against whom it may have a  
210 claim relating to the note.

211 Section 5. Section 702.06, Florida Statutes, is amended to  
212 read: 702.06 Deficiency decree; common-law suit to recover  
213 deficiency.—In all suits for the foreclosure of mortgages  
214 heretofore or hereafter executed the entry of a deficiency  
215 decree for any portion of a deficiency, should one exist, may  
216 not exceed the difference between the judgment amount or, in the  
217 case of a short sale, the outstanding debt, and the fair market  
218 value of the property on the date of sale., ~~shall be within the~~  
219 ~~sound judicial discretion of the court, but~~ The complainant  
220 shall also have the right to sue at common law to recover such  
221 deficiency, unless the court in the foreclosure action has

222 ~~granted or denied a claim for a deficiency judgment—provided no~~  
223 ~~suit at law to recover such deficiency shall be maintained~~  
224 ~~against the original mortgagor in cases where the mortgage is~~  
225 ~~for the purchase price of the property involved and where the~~  
226 ~~original mortgagee becomes the purchaser thereof at foreclosure~~  
227 ~~sale and also is granted a deficiency decree against the~~  
228 ~~original mortgagor.~~

229 Section 6. Section 702.10, Florida Statutes, is amended to  
230 read:

231 702.10 Order to show cause; entry of final judgment of  
232 foreclosure; payment during foreclosure.—

233 (1) A lienholder ~~After a complaint in a foreclosure~~  
234 ~~proceeding has been filed, the mortgagee~~ may request an order to  
235 show cause for the entry of final judgment in a foreclosure  
236 action. For purposes of this section, the term "lienholder"  
237 includes the plaintiff and a defendant to the action who holds a  
238 lien encumbering the property or a defendant who, by virtue of  
239 its status as a condominium association, cooperative  
240 association, or homeowners' association, may file a lien against  
241 the real property subject to foreclosure. Upon filing, and the  
242 court shall immediately review the request and the court file in  
243 chambers and without a hearing—complaint. If, upon examination  
244 of the court file ~~complaint~~, the court finds that the complaint  
245 is verified, complies with s. 702.015, and alleges a cause of  
246 action to foreclose on real property, the court shall promptly  
247 issue an order directed to the other parties named in the action  
248 ~~defendant~~ to show cause why a final judgment of foreclosure  
249 should not be entered.

250 (a) The order shall:

251 1. Set the date and time for a hearing ~~on the order~~ to show  
252 cause. ~~However,~~ The date for the hearing may not occur ~~be set~~  
253 sooner than the later of 20 days after the service of the order

254 to show cause or 45 days after the service of the initial  
255 complaint. When service is obtained by publication, the date for  
256 the hearing may not be set sooner than 30 days after the first  
257 publication. ~~The hearing must be held within 60 days after the~~  
258 ~~date of service. Failure to hold the hearing within such time~~  
259 ~~does not affect the validity of the order to show cause or the~~  
260 ~~jurisdiction of the court to issue subsequent orders.~~

261 2. Direct the time within which service of the order to  
262 show cause and the complaint must be made upon the defendant.

263 3. State that the filing of defenses by a motion,  
264 responsive pleading, affidavits, or other papers ~~or by a~~  
265 ~~verified or sworn answer at or before the hearing to show cause~~  
266 may constitute ~~constitutes~~ cause for the court not to enter ~~the~~  
267 ~~attached~~ final judgment.

268 4. State that a ~~the~~ defendant has the right to file  
269 affidavits or other papers before ~~at~~ the time of the hearing to  
270 show cause and may appear personally or by way of an attorney at  
271 the hearing.

272 5. State that, if a ~~the~~ defendant files defenses by a  
273 motion, a verified answer, affidavits, or other papers ~~or~~  
274 appears personally or by way of an attorney at the time of the  
275 hearing, the hearing time will ~~may~~ be used to hear and consider  
276 the defendant's motion, answer, affidavits, other papers, and  
277 other evidence and argument as may be presented by the defendant  
278 or the defendant's attorney. The order shall also state that the  
279 court may enter an order of final judgment of foreclosure at the  
280 hearing and order the clerk of the court to conduct a  
281 foreclosure sale.

282 6. State that, if a ~~the~~ defendant fails to appear at the  
283 hearing to show cause or fails to file defenses by a motion or  
284 by a verified or sworn answer or files an answer not contesting  
285 the foreclosure, such ~~the~~ defendant may be considered to have

286 waived the right to a hearing, and in such case, the court may  
287 enter a default against such defendant and, if appropriate, a  
288 final judgment of foreclosure ordering the clerk of the court to  
289 conduct a foreclosure sale.

290 7. State that if the mortgage provides for reasonable  
291 attorney ~~attorney's~~ fees and the requested attorney ~~attorney's~~  
292 fees do not exceed 3 percent of the principal amount owed at the  
293 time of filing the complaint, it is unnecessary for the court to  
294 hold a hearing or adjudge the requested attorney ~~attorney's~~ fees  
295 to be reasonable.

296 8. Attach the form of the proposed final judgment of  
297 foreclosure which the movant requests the court to will enter,  
298 ~~if the defendant waives the right to be heard~~ at the hearing on  
299 the order to show cause. The form may contain blanks for the  
300 court to enter the amounts due.

301 9. Require the party seeking final judgment ~~mortgagee~~ to  
302 serve a copy of the order to show cause on the other parties the  
303 ~~mortgager~~ in the following manner:

304 a. If a party the mortgager has been served pursuant to  
305 chapter 48 with the complaint and original process, or the other  
306 party is the plaintiff in the action, service of the order to  
307 show cause on that party ~~order~~ may be made in the manner  
308 provided in the Florida Rules of Civil Procedure.

309 b. If a defendant the mortgager has not been served  
310 pursuant to chapter 48 with the complaint and original process,  
311 the order to show cause, together with the summons and a copy of  
312 the complaint, shall be served on the party mortgager in the  
313 same manner as provided by law for original process.

314  
315 Any final judgment of foreclosure entered under this subsection  
316 is for in rem relief only. ~~Nothing in~~ This subsection does not  
317 ~~shall~~ preclude the entry of a deficiency judgment where

318 otherwise allowed by law. It is the intent of the Legislature  
319 that this alternative procedure may run simultaneously with  
320 other court procedures.

321 (b) The right to be heard at the hearing to show cause is  
322 waived if a ~~the~~ defendant, after being served as provided by law  
323 with an order to show cause, engages in conduct that clearly  
324 shows that the defendant has relinquished the right to be heard  
325 on that order. The defendant's failure to file defenses by a  
326 motion or by a sworn or verified answer, affidavits, or other  
327 papers or to appear personally or by way of an attorney at the  
328 hearing duly scheduled on the order to show cause presumptively  
329 constitutes conduct that clearly shows that the defendant has  
330 relinquished the right to be heard. If a defendant files  
331 defenses by a motion, ~~or by~~ a verified answer, affidavits, or  
332 other papers or presents evidence at or before the hearing,  
333 which would be sufficient to preclude the entry of a summary  
334 judgment, such action constitutes cause and precludes the entry  
335 of a final judgment at the hearing to show cause.

336 (c) In a mortgage foreclosure proceeding, when a final  
337 ~~default judgment~~ of foreclosure has been entered against the  
338 mortgagor and the note or mortgage provides for the award of  
339 reasonable attorney ~~attorney's~~ fees, it is unnecessary for the  
340 court to hold a hearing or adjudge the requested attorney  
341 ~~attorney's~~ fees to be reasonable if the fees do not exceed 3  
342 percent of the principal amount owed on the note or mortgage at  
343 the time of filing, even if the note or mortgage does not  
344 specify the percentage of the original amount that would be paid  
345 as liquidated damages.

346 (d) If the court finds that all defendants have the  
347 ~~defendant has~~ waived the right to be heard as provided in  
348 paragraph (b), the court shall promptly enter a final judgment  
349 of foreclosure without the need for further hearing if the

350 plaintiff has shown entitlement to a final judgment and upon the  
351 filing with the court of the original note, satisfaction of the  
352 conditions for establishment of a lost note, or upon a showing  
353 to the court that the obligation to be foreclosed is not  
354 evidenced by a promissory note or other negotiable instrument.  
355 If the court finds that a ~~the~~ defendant has not waived the right  
356 to be heard on the order to show cause, the court shall ~~then~~  
357 determine whether there is cause not to enter a final judgment  
358 of foreclosure. If the court finds that the defendant has not  
359 shown cause, the court shall promptly enter a judgment of  
360 foreclosure. If the time allotted for the hearing is  
361 insufficient, the court may announce at the hearing a date and  
362 time for the continued hearing. Only the parties who appear,  
363 individually or through an attorney, at the initial hearing must  
364 be notified of the date and time of the continued hearing.

365 (2) This subsection does not apply to foreclosure of an  
366 owner-occupied residence. As part of any other ~~In an~~ action for  
367 foreclosure, and in addition to any other relief that the court  
368 may award ~~other than residential real estate, the plaintiff the~~  
369 ~~mortgagee~~ may request that the court enter an order directing  
370 the mortgagor defendant to show cause why an order to make  
371 payments during the pendency of the foreclosure proceedings or  
372 an order to vacate the premises should not be entered.

373 (a) The order shall:

374 1. Set the date and time for hearing on the order to show  
375 cause. However, the date for the hearing may ~~shall~~ not be set  
376 sooner than 20 days after the service of the order. If ~~Where~~  
377 service is obtained by publication, the date for the hearing may  
378 ~~shall~~ not be set sooner than 30 days after the first  
379 publication.

380           2. Direct the time within which service of the order to  
381 show cause and the complaint shall be made upon each ~~the~~  
382 defendant.

383           3. State that a ~~the~~ defendant has the right to file  
384 affidavits or other papers at the time of the hearing and may  
385 appear personally or by way of an attorney at the hearing.

386           4. State that, if a ~~the~~ defendant fails to appear at the  
387 hearing to show cause and fails to file defenses by a motion or  
388 by a verified or sworn answer, the defendant is ~~may be~~ deemed to  
389 have waived the right to a hearing and in such case the court  
390 may enter an order to make payment or vacate the premises.

391           5. Require the movant ~~mortgagee~~ to serve a copy of the  
392 order to show cause on the defendant ~~mortgager~~ in the following  
393 manner:

394           a. If a defendant ~~the mortgager~~ has been served with the  
395 complaint and original process, service of the order may be made  
396 in the manner provided in the Florida Rules of Civil Procedure.

397           b. If a defendant ~~the mortgager~~ has not been served with  
398 the complaint and original process, the order to show cause,  
399 together with the summons and a copy of the complaint, shall be  
400 served on the defendant ~~mortgager~~ in the same manner as provided  
401 by law for original process.

402           (b) The right of a defendant to be heard at the hearing to  
403 show cause is waived if the defendant, after being served as  
404 provided by law with an order to show cause, engages in conduct  
405 that clearly shows that the defendant has relinquished the right  
406 to be heard on that order. A ~~The~~ defendant's failure to file  
407 defenses by a motion or by a sworn or verified answer or to  
408 appear at the hearing duly scheduled on the order to show cause  
409 presumptively constitutes conduct that clearly shows that the  
410 defendant has relinquished the right to be heard.

411 (c) If the court finds that a ~~the~~ defendant has waived the  
412 right to be heard as provided in paragraph (b), the court may  
413 promptly enter an order requiring payment in the amount provided  
414 in paragraph (f) or an order to vacate.

415 (d) If the court finds that the mortgagor has not waived  
416 the right to be heard on the order to show cause, the court  
417 shall, at the hearing on the order to show cause, consider the  
418 affidavits and other showings made by the parties appearing and  
419 make a determination of the probable validity of the underlying  
420 claim alleged against the mortgagor and the mortgagor's  
421 defenses. If the court determines that the plaintiff mortgagee  
422 is likely to prevail in the foreclosure action, the court shall  
423 enter an order requiring the mortgagor to make the payment  
424 described in paragraph (e) to the plaintiff mortgagee and  
425 provide for a remedy as described in paragraph (f). However, the  
426 order shall be stayed pending final adjudication of the claims  
427 of the parties if the mortgagor files with the court a written  
428 undertaking executed by a surety approved by the court in an  
429 amount equal to the unpaid balance of the lien being foreclosed  
430 ~~the mortgage on the property~~, including all principal, interest,  
431 unpaid taxes, and insurance premiums paid by the plaintiff ~~the~~  
432 ~~mortgagee~~.

433 (e) If ~~In the event~~ the court enters an order requiring the  
434 mortgagor to make payments to the plaintiff mortgagee, payments  
435 shall be payable at such intervals and in such amounts provided  
436 for in the mortgage instrument before acceleration or maturity.  
437 The obligation to make payments pursuant to any order entered  
438 under this subsection shall commence from the date of the motion  
439 filed under this section ~~hereunder~~. The order shall be served  
440 upon the mortgagor no later than 20 days before the date  
441 specified for the first payment. The order may permit, but may  
442 ~~shall~~ not require, the plaintiff mortgagee to take all

443 appropriate steps to secure the premises during the pendency of  
444 the foreclosure action.

445 (f) ~~If In the event~~ the court enters an order requiring  
446 payments, the order shall also provide that the plaintiff is  
447 ~~mortgagee shall be~~ entitled to possession of the premises upon  
448 the failure of the mortgagor to make the payment required in the  
449 order unless at the hearing on the order to show cause the court  
450 finds good cause to order some other method of enforcement of  
451 its order.

452 (g) All amounts paid pursuant to this section shall be  
453 credited against the mortgage obligation in accordance with the  
454 terms of the loan documents; ~~provided, however, that any~~  
455 payments made under this section do shall not constitute a cure  
456 of any default or a waiver or any other defense to the mortgage  
457 foreclosure action.

458 (h) Upon the filing of an affidavit with the clerk that the  
459 premises have not been vacated pursuant to the court order, the  
460 clerk shall issue to the sheriff a writ for possession which  
461 shall be governed by the provisions of s. 83.62.

462 (i) For purposes of this subsection, there is a rebuttable  
463 presumption that a residential property for which a homestead  
464 exemption for taxation was granted according to the certified  
465 rolls of the latest assessment by the county property appraiser,  
466 before the filing of the foreclosure action, is an owner-  
467 occupied residential property.

468 (3) The Supreme Court is requested to amend the Florida  
469 Rules of Civil Procedure to provide for expedited foreclosure  
470 proceedings in conformity with this section and is requested to  
471 develop and publish forms for use under this section.

472 Section 7. Section 702.11, Florida Statutes, is created to  
473 read:

474 702.11 Adequate protections for lost, destroyed, or stolen  
475 notes in mortgage foreclosure.—

476 (1) In connection with a mortgage foreclosure the  
477 following constitute reasonable means of providing adequate  
478 protection under s. 673.3091 if so found by the court:

479 (a) A written indemnification agreement by a person  
480 reasonably believed sufficiently solvent to honor such an  
481 obligation;

482 (b) A surety bond;

483 (c) A letter of credit issued by a financial institution;

484 (d) A deposit of cash collateral with the clerk of the  
485 court; or

486 (e) Such other security as the court may deem appropriate  
487 under the circumstances.

488

489 Any security given shall be on terms and in amounts set by the  
490 court, for a time period through the running of the statute of  
491 limitations for enforcement of the underlying note, and  
492 conditioned to indemnify and hold harmless the maker of the note  
493 against any loss or damage, including principal, interest, and  
494 attorney fees and costs, that might occur by reason of a claim  
495 by another person to enforce the note.

496 (2) Any person who wrongly claimed to be the holder of or  
497 pursuant to s. 673.3011 to be entitled to enforce a lost,  
498 stolen, or destroyed note and caused the mortgage secured  
499 thereby to be foreclosed shall be liable to the actual holder of  
500 the note, without limitation to any adequate protections given,  
501 for actual damages suffered together with attorney fees and  
502 costs of the actual holder of the note in enforcing rights under  
503 this subsection. In addition, the actual holder of the note may  
504 pursue recovery directly against any adequate protections given.

505           (a) The actual holder of the note is not required to  
506 pursue recovery against the maker of the note or any guarantor  
507 thereof as a condition precedent to pursuing remedies under this  
508 section.

509           (b) This section does not limit or restrict the ability of  
510 the actual holder of the note to pursue any other claims or  
511 remedies it may have against the maker, the person who wrongly  
512 claimed to be the holder, or any person who facilitated or  
513 participated in the claim to the note or enforcement thereof.

514           Section 8. The Legislature finds that this act is remedial  
515 in nature and shall apply to all mortgages encumbering real  
516 property and all promissory notes secured by a mortgage, whether  
517 executed before, on, or after the effective date of this act.

518 Section 702.015, Florida Statutes, as created by this act,  
519 applies to cases filed on or after July 1, 2013, however the  
520 amendments to s. 702.10, Florida Statutes, and the creation of  
521 s. 702.11, Florida Statutes by this act, shall apply to causes  
522 of action pending on the effective date of this act.

523           Section 9. This act shall take effect upon becoming a law.

**WHITE PAPER**  
**Foreclosure Reform**

**I. SUMMARY**

The public interest is served by maintaining the strong tradition of judicial due process in mortgage foreclosure cases while moving mortgage foreclosure cases to final resolution expeditiously in order to get real property back into the stream of commerce. This must be accomplished in a manner consistent with due process and fundamental fairness and without impairing the ability of the courts to manage their dockets and schedules and provide certainty for the next purchaser of the foreclosed property. This act is an effort to provide additional tools to the courts to assist in achieving such a balance and to establish new and modified procedures to solve problems which have arisen in light of current foreclosure procedures.

The bill addresses the foreclosure process in several different interacting provisions:

1. It shortens the statute of limitations for filing a claim for deficiency to one year after completion of the foreclosure or delivery of a deed-in-lieu for a 1 family to 4 family dwelling unit.
2. The bill attempts to expedite the foreclosure process by:
  - A. Requiring the foreclosing lender to file certification that they have confirmed physical possession of the original promissory note or lost note affidavits and exhibits at the time of filing the foreclosure. The actual note must be filed with the court prior to the entry of final judgment, and requires that the complaint describe any delegation of authority, with specificity, at the outset. If nothing else, providing this information up front will force lenders to do their homework before filing suit and hopefully reduce the need for at least one round of discovery to determine which theory the lender is pursuing.
  - B. The bill cleans up the existing “order to show cause” procedure under §702.10 to eliminate the need for a preliminary hearing to issue the order, the clean up the mechanical process and to clarify that the standard for granting a foreclosure judgment at the hearing is comparable to that for denying a motion for summary judgment. It also clarifies that the order for payment during the pendency of the foreclosure is available for non-homestead properties.
3. The bill provides that after a party has been properly served, a final judgment of foreclosure entered, any appeals periods have run or appeals been resolved and the property has been conveyed to a party not affiliated with the lender, any subsequent attack on the validity or finality of the foreclosure shall be treated solely as a claim for money damages.

4. The law has long required the court to require adequate protections of a party seeking to re-establish a lost, destroyed or stolen note. As this requirement has not always been adequately complied with, the bill provides various examples of acceptable means of providing those adequate protections in a foreclosure case, but leaves the authority in the court to require “such other security as the court may deem appropriate under the circumstances.” The bill also allows the “rightful” holder of the note to make claim directly against the adequate protections without the need to first pursue recovery against the maker/debtor, but as is current law, does not prohibit pursuing the maker/debtor.
5. The bill clarifies the computation of the amount of any deficiency decree and eliminates an ambiguity (and poor drafting) in current statute regarding deficiency decrees in foreclosure that traces back to a period before courts of equity and courts of law were consolidated. It provides simply that the complainant has the right to sue at law to recover a deficiency unless the court in the foreclosure action has already addressed the issue.

## **II. CURRENT SITUATION**

The proposed legislation attempts to resolve various issues and concerns relating to the current foreclosure processes and practices. Various problems have been identified in lender foreclosure practices which unnecessarily burden the court system and defendants. These include documentation problems identified during the “robo-signing” scandal and resulting settlement with Florida’s Attorney General (among others); the practice of pleading in the alternative that the plaintiff is the owner and holder of the note, and that the note has been lost, destroyed or stolen; and the failure of courts to consistently require the posting of “adequate protections” as a condition for reestablishing a lost, stolen or destroyed promissory note as required by Fla. Stat. §673.3091.

Under current Florida law, a foreclosing party has up to five years in which to pursue a deficiency judgment. Given the significant drop in the values of many Florida properties, this creates a five year “cloud” on the ability of a foreclosed homeowner to get on with their lives. So long as the potential for a major deficiency remains, whether or not pursued, the credit status of the potentially affected homeowner remains in doubt. This can significantly burden their ability to re-enter the consumer market or, after cleaning up their credit, to purchase another home.

Foreclosures in Florida are currently taking many months. While it is the ultimate responsibility of the judiciary to assure compliance with applicable laws and protection of individual rights, the legislature can play a role providing tools to streamline the process – without losing the protections of individual rights – and hasten the return of foreclosed properties to the stream of commerce.

### III. SECTION-BY-SECTION ANALYSIS

1. Statute of Limitations for pursuing a deficiency set at One Year.
  - A. Section 95.11(2)(b) is a cross reference to the newly created one year limitations for pursuing residential deficiencies.
  - B. Section 95.11 (5)(h) applies a one year statute of limitations to any action to enforce a deficiency relating to a mortgage secured by a one- to four-family residential property. It also applies the one year limitation to pursuing a deficiency after a deed-in-lieu, although as part of the deed-in-lieu negotiations, the parties would be free to create a new note obligation having a longer payment period or to waive the deficiency entirely.
  - C. Section 2 of the bill includes the constitutional savings clause allowing those holding potential deficiency claims a period of one year after the effective date – prior to July 1, 2014, in which to pursue a deficiency even if the 1 year statute of limitations would otherwise have run. We would note that this “savings” language will not appear as a numbered section in the official statutes, but anticipate that a footnote reference to this will be included to minimize the risk of malpractice and mis-interpretations.
2. Expediting the Foreclosure Process by filing documents earlier and eliminating the need for certain “routine” discovery.
  - A. Proposed §702.015 is an attempt to reschedule the timing of certain aspects of the foreclosure process. The customary practice had been to plead in the alternative – both that the plaintiff was the owner and holder of the note, and that the note had been lost and seeking to re-establish the note. At some point later in the process, the plaintiff would locate and file the original note, or proceed to show its entitlement to enforce a lost note. In the meantime, the defendants were devoting resources to defending and conducting discovery as to potentially irrelevant issues. Section 702.015 attempts to address these problems by requiring the foreclosing party of a one- to four-family residential structure to include more detail in the initial complaint. Specifically:
    - i. In 702.015(2), the plaintiff must allege either that they are the “holder” of the original note; or to specifically allege the factual basis by which the plaintiff is a “person entitled to enforce” the note under s. 673.3011.” Both of these are terms of art under the Uniform Commercial Code, and those facts should be known (or researched) by the plaintiff prior to bringing suit.
    - ii. If the plaintiff is operating pursuant to a delegation of authority, 702.015(3) would require the document(s) granting the plaintiff authority to be identified with specificity. As this will sometimes be part of a several hundred page securitization or servicing agreement, the drafters felt it was not necessary to require copies of the document to be attached to the complaint in every case, although such could be

requested in discovery. The subsection also makes clear that the requirement to identify is not intended to modify the law regarding standing or real parties in interest.

- iii. Section 702.015(4) provides that if the plaintiff is in physical possession of the original note, they must file with the complaint, certification of that fact, the location of the note, the name and title of the person who verified possession and the time and date. Copies of the note and all allonges must be attached, and filed with the court prior to the entry of any judgment of foreclosure or on the note. Prior drafts of this language required the filing of the original note at the time of filing the complaint. This was dropped out of concern that the original note might be lost while in the possession of the clerk and of the burden on the clerk's office of tracking and properly securing a substantial number of original negotiable instruments.
- iv. If the complaint seeks to enforce a lost, destroyed or stolen note, the complaint must attach an affidavit of lost note setting forth the facts necessary to reestablish the lost instrument and copies of pertinent documents.
- v. Section 702.015(7) makes clear that these requirements are not applicable to the foreclosure of a timeshare interest, as such interests are governed by other specific and sometimes inconsistent requirements contained in §721.80-86.
- vi. Section 702.015 should be read in conjunction with the finality provisions of 702.036. House Bill 213 (approved by the House during the 2012 session) contained a provision validating the sale notwithstanding failure to strictly comply with the new requirements of §702.015. Section 702.036 expands this coverage. If for any reason, §702.036 is dropped from the bill, it is important that last year's savings language be added back. Otherwise technical defects in compliance with §702.015's requirements might become jurisdictional and fatal to the foreclosure process.

### 3. Finality after the Foreclosure.

- A. No one would want to buy a previously foreclosed home, invest significant amounts on clean-up and improvements and have the foreclosure reversed long after their purchase. Nor will title insurers be willing to assume this risk, if they can't determine the exposure through an examination of the official records and sound underwriting.
- B. Longstanding common law grants a degree of certainty of title to a bona fide purchaser following the foreclosure sale. It is critical to Florida's real estate economy that foreclosed properties be freely marketable and its title insurable after a foreclosure, notwithstanding technical or even substantive defects in the underlying proceeding.
- C. Yet the nature of certain allegations made regarding "robo-signing," fabrication of assignments of notes and mortgages, and photo-shopped "original" notes create a significant risk that foreclosures tainted by such alleged practices might be set aside even

after the property has been conveyed to an arms' length purchaser. The mere prospect of this has created some hesitation to insure properties coming out of a foreclosure. A case or two expressly reaching the conclusion that a sale could be set aside would freeze up the market in previously foreclosed properties because of the unknowability of which properties might have been tainted by bad practices.

- D. Proposed Section 702.036 recognizes that the real estate economy does require some finality in the foreclosure process. It thus backstops the common law with an express statutory, limited scope, marketable record title act. This provision legislatively converts any attempt to “unwind” a completed foreclosure (other than based on the failure of service – as such would be a constitutional defect) into a claim for money damages, and prohibits granting any relief which adversely impacts the ownership or title to the property.

In the interest of fairness, this protection of the title only becomes effective after:

- i. The party seeking relief from the judgment was properly served;
- ii. A final judgment of foreclosure has been entered;
- iii. Any appeals periods have run without an appeal, or the appeal has been finally resolved; and
- iv. There was no lis pendens providing notice of the subsequent challenge and the property was acquired, for value, by a person not affiliated with the foreclosing lender.

The statutory finality of the process in the proposed law, in some ways, provides greater protection for the wronged homeowner than current law, by preserving the right to recover money damages.

- E. Proposed §702.036(3) provides the same finality where the foreclosure was based on a lost, destroyed or stolen note in those rare circumstances in which the “real” note holder later attempts to enforce the note. Under that fact pattern, the “real” note holder must pursue the judicially determined adequate protections given under §673.3091 (which requires the court to provide adequate protection) and new §702.11, the party who wrongly claimed to be the owner of the note, or the maker, rather than the property in the hands of the unaffiliated bona fide purchaser for value.
4. Current §702.06 includes language best understood by reference to distinctions before Florida consolidated legal and equitable jurisdiction of its courts. While eliminating the archaic language, the proposed section achieves substantively the same result of a single “Bite at the Apple” by providing the complainant has the right to sue a law to recover a deficiency unless the court in the foreclosure action has already addressed the issue. The proposed section also codifies the computation of the amount of any deficiency decree.

5. Section 702.10 of the current statutes is the “order to show case” procedure. Practitioners have complained that the statutory procedure does not achieve its goal of expediting foreclosure actions in foreclosures, in part owing to the need for two hearings.
  - A. The proposed revisions of §702.10 includes the following concepts:
    - i. Lienholders other than the foreclosing lender may move for a show cause hearing. The proposed language of §702.10(1) defines “lienholder” to include the plaintiff, named parties defendant holding a lien, and any condominium association, cooperative association or homeowners’ association which “may file a lien” against the property.
    - ii. No hearing is required for the judge to issue the order to “show cause.” Pursuant to proposed §702.10(1), the court may review the verified complaint and other materials in chambers, find that they comply with new §702.015 and issue the order to “show cause” ex parte.
    - iii. The hearing on the order to show cause may not be scheduled for at least 20 days after the order to show cause has been served, or less than 45 days after the service of the initial complaint. §702.10(1)(a)1.
    - iv. Pursuant to §702.10(1)(a)5, the notice of the order to show cause will advise the other parties that the hearing shall be used to rule on motions, and the merits of other matters raised, and may be used to enter a final judgment of foreclosure. Section 702.10(1)(b) clarifies that the standard for entering a final judgment at the order to show cause stage is the same as for entering summary judgment. All members of the ad hoc committee felt that had always been the standard under 702.10, but were unable to locate an express ruling to that effect. Given some of the criticisms raised during last session – in part based on a misinterpretation of the stern warnings of the show cause order – the proposed language expressly describes the standard for entry of a final judgment.
    - v. The proposed language adds the express requirement for filing the original note, satisfaction of conditions for establishing a lost note, or (since not all foreclosures are based on a negotiable instrument) a showing that there is no note or negotiable instrument, before final judgment may be entered under the show cause proceeding.
    - vi. The proposed language allows the court to continue the show cause hearing without the need to re-notice and re-serve absent parties.
    - vii. Section 702.10(2) deals with a separate show cause hearing to require the debtor to make payments during the pendency of a foreclosure or vacate. The current statute makes this remedy unavailable on any “residential real estate.” The proposed language incorporates language recommended by the Problem Studies committee to limit the exclusion to an “owner-occupied residence.” In this manner, the lender to

an apartment complex, a condominium in development, or of rental residential property could avail themselves of §702.10(2). Section 702.10(2)(i) creates a rebuttable presumption that any property for which a homestead tax exemption has been claimed is owner-occupied. Subsection (3) requests the Florida Supreme Court to amend the rules of civil procedure and develop forms for use under this section.

6. Adequate Protections for Lost, Stolen or Destroyed Notes.

- A. A new section 702.11(1) sets forth a list of reasonable means for providing “adequate protections” for lost notes. Although the drafters recognized that §673.3091 has long included a provision requiring adequate protection, many judges were not enforcing it in a mortgage foreclosure context. Therefore, it was felt appropriate to also include the requirement in the mortgage foreclosure statutes. However, the drafters did not intend to interfere with the discretion of the court to determine what adequate protections were appropriate under any particular fact situation, and the final example listed is “such other security as the court may deem appropriate under the circumstances.”
- B. Section 702.11(2) creates a direct liability from a person who wrongly claimed to be the holder of the lost note and caused a mortgage to be foreclosed to the rightful owner of the note.
  - i. The proposed statute allows the “rightful owner” to recover, without limitation to any adequate protections given, for actual damages, to recover attorneys fees and costs, and to pursue recovery directly against the adequate protections.
  - ii. The “rightful owner” is not required to pursue the maker of the note as a precondition to recovery against the “wrongful owner”, but may do so – just as they may under current law.

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

The fiscal impact on state and local governments is difficult to quantify. On the one hand reducing the total time during which a case is held open – for example by researching facts in advance of filing, eliminating certain delays and application of a cleaner show cause mechanism, is expected to reduce judicial and clerk time and costs. On the other hand, requiring stricter compliance with existing law regarding proof that one is a person entitled to enforce a note could increase the time and judicial resources devoted to contested cases.

The indirect impact of facilitating commerce in foreclosed properties is expected to have a positive fiscal impact on state and local governments in the form of increased documentary stamp tax collections and hopefully rising real estate prices.

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

There are economic benefits to lenders, borrowers, homeowners and condominium associations, and subsequent purchasers of foreclosed property in the proposed bill. Lenders have more certainty as to the foreclosure process avoiding lengthy additional litigation and providing a workable process to expedite certain foreclosures. Borrowers have the benefit of knowing the lender foreclosing is the correct party, if a note is lost adequate security, is provided, and the time to seek a deficiency is reduced.

## **VI. CONSTITUTIONAL ISSUES**

The following constitutional issues are addressed in the bill:

1. The shortening of the statute of limitations for pursuing a deficiency decree from five years to one year would amount to a taking for those foreclosures which were more than one year old on the effective date. To address this constitutional taking issue, Section 2 of the proposed law includes a one year period to allow persons with otherwise time barred deficiency claims time in which to pursue them.
2. Current §702.10(1) could be read as requiring a “mini-trial” on the merits at the time of the show cause hearing, as could language from HB 213 filed in 2012. To the extent a “mini-trial” was held before a defendant had an adequate time to conduct discovery or prepare, it might fail tests of due process and fundamental fairness. This impression arose from the stern warning language mandated for the notice to be given in the Order to Show Cause. The bill addresses this concern, and solves the arguable constitutional infirmity, by expressly providing at 702.10(1)(b) that the standard for denying judgment at the show cause hearing is the same as for denying a motion for summary judgment.
3. There was extended discussion as to the constitutionality of §702.036(2) applying finality of a foreclosure to the “rightful holder” of a note which had been foreclosed by another party wrongly claiming to be the owner of a lost note. The drafters felt that it met the constitutional standards based on the following analysis:
  - A. The “rightful holder” does not have an interest in property, but only a lien to secure payment of money.
  - B. The “rightful holder” is given a statutory right at 702.11(2) to recover from the “wrongful holder,” including fees and costs.
  - C. The court is required to determine and require the placement of “adequate protections” under §673.3091 as a condition of enforcing a lost note, and the “rightful owner” is permitted to pursue recovery directly against the adequate protections, indirectly through the maker of the note, or as noted above against the “wrongful holder.”

The drafters felt that this provided an adequate remedy to survive a takings challenge.

**VII. OTHER INTERESTED PARTIES.**

It is not clear what other sections, if any, may have interest in real estate foreclosures.

**Comprehensive Rider to the Residential Contract For Sale And Purchase**



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

If initialed by all parties, the clauses below will be incorporated into the Florida Realtors®/Florida Bar Residential Contract For Sale And Purchase between \_\_\_\_\_ (SELLER) and \_\_\_\_\_ (BUYER) concerning the Property described as \_\_\_\_\_

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

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

**A. CONDOMINIUM ASSOCIATION DISCLOSURE**

**1. CONDOMINIUM ASSOCIATION APPROVAL:**

The Association's approval of Buyer (CHECK ONE)  is  is not required. If approval is required, this Contract is contingent upon Buyer being approved by the Association no later than \_\_\_\_\_ days prior to Closing. Within \_\_\_\_\_ days after Effective Date Seller shall initiate the approval process with the Association and Buyer shall apply for such approval. Buyer and Seller shall sign and deliver any documents required by the Association in order to complete the transfer of the Property and each shall use diligent effort to obtain such approval, including making personal appearances if required. If Buyer is not approved within the stated time period, this Contract will terminate and Buyer shall be refunded the Deposit, thereby releasing Buyer and Seller from all further obligations under this Contract.

**2. RIGHT OF FIRST REFUSAL:**

- (a) The Association (CHECK ONE)  has  does not have a right of first refusal ("Right"). If the Association has a Right, this Contract is contingent upon the Association, within the time permitted for the exercise of such Right, either providing written confirmation to Buyer that the Association is not exercising that Right, or failing to timely exercise such Right pursuant to the terms of the Declaration of Condominium ("Declaration", which reference includes all amendments thereto).
- (b) The members of the Association (CHECK ONE)  have  do not have a Right. If the members do have a Right, this Contract is contingent upon the members, within the time permitted for the exercise of such Right, either providing written confirmation to Buyer that the members are not exercising that Right, or failing to timely exercise such Right pursuant to the terms of the Declaration.
- (c) Buyer and Seller shall, within \_\_\_\_\_ days after Effective Date, sign and deliver any documents required as a condition precedent to the exercise of the Right, and shall use diligent effort to submit and process the matter with the Association and members, including personal appearances, if required.
- (d) If, within the stated time period, the Association, the members of the Association, or both, fail to provide the written confirmation or the Right has not otherwise expired, then this Contract will terminate and the Deposit will be refunded to the Buyer, thereby releasing Buyer and Seller from all further obligations under this Contract.
- (e) If the Association or a member timely exercises its or their Right, this Contract will terminate and the Deposit will be refunded to Buyer (unless this Contract provides otherwise), thereby releasing Buyer and Seller from all further obligations under this Contract, and Seller will pay to Broker the full commission at Closing in recognition that Broker procured the sale.

**3. FEES; ASSESSMENTS; PRORATIONS; LITIGATION:**

- (a) Assessments and Rents: Seller represents that the current annual assessment installments are \$\_\_\_\_\_ per month and the current rent on recreation areas is \$\_\_\_\_\_ per month. All annual assessments levied by the Association and rent on recreational areas, if any, shall be made current by Seller at Closing, and Buyer shall reimburse Seller for prepayments.
- (b) Fees: Seller will pay all fines imposed against the Unit as of Closing Date and any fees the Association charges to provide information about its fees on the Property, and will bring annual assessment installments and similar periodic fees and rents on any recreational areas current as of Closing Date.

(SEE CONTINUATION)

**A. CONDOMINIUM ASSOCIATION DISCLOSURE (CONTINUED)**

(c) Special Assessments and Prorations:

(i) Seller represents that Seller is not aware of any special or other assessment that has been levied by the Association or that has been an item on the agenda, or reported in the minutes, of the Association within twelve (12) months prior to Effective Date, ("pending") except as follows: \_\_\_\_\_

(ii) If special assessments levied or pending exist as of the Effective Date are disclosed above by Seller and may be paid in installments (**CHECK ONE**):  Buyer  Seller (if left blank, Buyer) shall pay installments due after Closing Date. **If Seller is checked, Seller will pay the assessment in full prior to or at the time of Closing.**

(iii) If special assessments levied or pending exist as of the Effective Date and have not been disclosed above by Seller, then Seller shall pay such assessments in full at the time of Closing.

(iv) If, after Effective Date, the Association imposes a special assessment for improvements, work or services, which was not pending as of the Effective Date, then Seller will pay all amounts due before Closing Date and Buyer will pay all amounts due after Closing Date.

(v) A special assessment shall be deemed levied for purposes of this paragraph on the date when the assessment has been approved as required for enforcement pursuant to Florida law and the condominium documents listed in Paragraph 5.

(vi) Association assets and liabilities, including Association reserve accounts, shall not be prorated.

(d) Litigation: Seller represents that Seller is not aware of pending or anticipated litigation affecting the Property or the common elements, if any, except as follows: \_\_\_\_\_

**4. SPRINKLER SYSTEM RETROFIT:**

If, pursuant to Sections 718.112(2)(l), F. S., the Association has voted to forego retrofitting its fire sprinkler system or handrails and guardrails for the condominium units, then prior to Closing Seller shall furnish to Buyer the written notice of Association's vote to forego such retrofitting.

**5. NON-DEVELOPER DISCLOSURE:**

(CHECK ONE)

(a) THE BUYER HEREBY ACKNOWLEDGES THAT BUYER HAS BEEN PROVIDED A CURRENT COPY OF THE DECLARATION OF CONDOMINIUM, ARTICLES OF INCORPORATION OF THE ASSOCIATION, BYLAWS AND RULES OF THE ASSOCIATION, AND A COPY OF THE MOST RECENT YEAR-END FINANCIAL INFORMATION AND FREQUENTLY ASKED QUESTIONS AND ANSWERS DOCUMENT MORE THAN 3 DAYS, EXCLUDING SATURDAYS, SUNDAYS, AND LEGAL HOLIDAYS, PRIOR TO EXECUTION OF THIS CONTRACT.

(b) THIS AGREEMENT IS VOIDABLE BY BUYER BY DELIVERING WRITTEN NOTICE OF THE BUYER'S INTENTION TO CANCEL WITHIN 3 DAYS, EXCLUDING SATURDAYS, SUNDAYS, AND LEGAL HOLIDAYS, AFTER THE DATE OF EXECUTION OF THIS AGREEMENT BY THE BUYER AND RECEIPT BY BUYER OF A CURRENT COPY OF THE DECLARATION OF CONDOMINIUM, ARTICLES OF INCORPORATION, BYLAWS AND RULES OF THE ASSOCIATION, AND A COPY OF THE MOST RECENT YEAR-END FINANCIAL INFORMATION AND FREQUENTLY ASKED QUESTIONS AND ANSWERS DOCUMENT IF SO REQUESTED IN WRITING. ANY PURPORTED WAIVER OF THESE VOIDABILITY RIGHTS SHALL BE OF NO EFFECT. BUYER MAY EXTEND THE TIME FOR CLOSING FOR A PERIOD OF NOT MORE THAN 3 DAYS, EXCLUDING SATURDAYS, SUNDAYS, AND LEGAL HOLIDAYS, AFTER THE BUYER RECEIVES THE DECLARATION, ARTICLES OF INCORPORATION, BYLAWS AND RULES OF THE ASSOCIATION, AND A COPY OF THE MOST RECENT YEAR-END FINANCIAL INFORMATION AND FREQUENTLY ASKED QUESTIONS AND ANSWERS DOCUMENT IF REQUESTED IN WRITING. BUYER'S RIGHT TO VOID THIS AGREEMENT SHALL TERMINATE AT CLOSING.

**6. BUYER'S REQUEST FOR DOCUMENTS:**

Buyer is entitled, at Seller's expense, to current copies of the condominium documents specified in Paragraph 5, above. Buyer (**CHECK ONE**)  requests  does not request a current copy of the documents specified in Paragraph 5, above. If this Contract does not close, Buyer shall immediately return the documents to Seller or reimburse Seller for the cost of the documents.

(SEE CONTINUATION)

**A. CONDOMINIUM ASSOCIATION DISCLOSURE (CONTINUED)**

**7. BUYER'S RECEIPT OF DOCUMENTS:**  
**(COMPLETE AND CHECK ONLY IF CORRECT)**  Buyer received the documents described in Paragraph 5, above, on \_\_\_\_\_.

**8. COMMON ELEMENTS; PARKING:**  
The Property includes the unit being purchased and an undivided interest in the common elements and an appurtenant limited common elements of the condominium, as specified in the Declaration. Seller's right and interest in or to the use of the following parking space(s), garage, and other areas are included in the sale of the Property and shall be assigned to Buyer at Closing, subject to the Declaration:  
Parking Space(s) # \_\_\_\_\_ Garage # \_\_\_\_\_ Other: \_\_\_\_\_

**9. INSPECTIONS AND REPAIRS:**  
The rights and obligations arising under Paragraphs 11 and 12 of this Contract to maintain, repair, replace or treat are limited to Seller's individual condominium unit and unless Seller is otherwise responsible do not extend to common elements, limited common elements, or any other part of the condominium property.

**10. GOVERNANCE FORM:**  
PURSUANT TO CHAPTER 718, FLORIDA STATUTES, BUYER IS ENTITLED TO RECEIVE FROM SELLER A COPY OF THE GOVERNANCE FORM IN THE FORMAT PROVIDED BY THE DIVISION OF FLORIDA CONDOMINIUMS, TIMESHARES AND MOBILE HOMES OF THE DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION, SUMMARIZING THE GOVERNANCE OF THE CONDOMINIUM ASSOCIATION.

# LEGISLATIVE POSITION REQUEST FORM

GOVERNMENTAL AFFAIRS OFFICE

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

## GENERAL INFORMATION

**Submitted By** Sean W. Kelley, Chairman, Guardianship and Power of Attorney Committee of the Real Property Probate & Trust Law Section

**Address** Sean W. Kelley, Kelley & Kelley, P.L., 904 Anastasia Blvd., St. Augustine, FL 32080  
Telephone: (904) 819-9706

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

## CONTACTS

### Board & Legislation Committee Appearance

**Sean W. Kelley**, Kelley & Kelley, P.L., 904 Anastasia Blvd., St. Augustine, FL 32080, Telephone: (904) 819-9706.  
**Barry Spivey**, Spivey & Fallon, P.A., 1515 Ringling Blvd., Suite 885, Sarasota, FL 34236 Telephone (941) 840-1991  
**Peter M. Dunbar**, Pennington, Moore, Wilkinson, Bell & Dunbar, P.O. Box 10095, Tallahassee, Florida 32302-2095, Telephone (850) 222-3533  
**Martha J. Edenfield**, Pennington, Moore, Wilkinson, Bell & Dunbar, P.O. Box 10095, Tallahassee FL 32302-2095, Telephone (850) 222-3533  
(List name, address and phone number)

### Appearances

#### Before Legislators

(SAME)

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

#### Meetings with Legislators/staff

(SAME)

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

## PROPOSED ADVOCACY

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

### If Applicable,

#### List The Following

N/A

(Bill or PCB #)

(Bill or PCB Sponsor)

#### Indicate Position

Support

Oppose \_\_\_\_\_

Tech Asst. \_\_\_\_\_

Other \_\_\_\_\_

### Proposed Wording of Position for Official Publication:

Support amendments to the Florida Guardianship Law to protect the interest of incapacitated persons, especially minor wards, by making settlements on their behalf confidential.

### Reasons For Proposed Advocacy:

Under current law, an adult with capacity, or entity, can settle a lawsuit and keep the terms confidential. That ability to make confidential settlements advances public policy and encourages settlement of disputes. Unfortunately, a settlement on behalf of an incapacitated person or a minor child cannot be kept confidential. This puts wards of guardianships, especially minors, at risk and violates their privacy rights. The privacy rights of minors in other legal contexts are zealously protected. The proposed amendments to F.S. Secs. 744.3025, 744.3701, and 744.387 would extend the ability to make confidential settlements to incapacitated and minor persons to protect their interests and privacy in the same fashion that non-incapacitated adult persons can be protected.

**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)

Trial Lawyers Section of the Florida Bar           unknown at this time, expect support            
(Name of Group or Organization) (Support, Oppose or No Position)

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

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

1 A bill to be entitled

2 An act relating to the confidentiality of settlements on behalf of minors or incapacitated  
3 persons; amending s. 744.3025, F.S.; s. 744.387, F.S.; and s. 744.3701, F.S. ; giving  
4 incapacitated persons and minors the same privacy protections available to non-  
5 incapacitated adults; and providing for an effective date.

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

7 Section 1. Subsection (1) of section 744.3025, Florida Statutes, is amended, and  
8 subsection (3) is added to that section, to read:

9 744.3025 Claims of minors.--

10 (1)(a) The court may appoint a guardian ad litem to represent the minor's interest  
11 before approving a settlement of the minor's portion of the claim in any case in which a  
12 minor has a claim for personal injury, property damage, wrongful death, or other cause  
13 of action in which the gross settlement of the claim exceeds \$15,000 if the court  
14 believes a guardian ad litem is necessary to protect the interests of the minor.

15 (b) Except as otherwise provided in (1)(e) below, the court must shall appoint a  
16 guardian ad litem to represent the minor's interest before approving a settlement of the  
17 minor's claim in any case in which the gross settlement involving a minor equals or  
18 exceeds \$50,000.

19 (c) The appointment of the guardian ad litem must be without the necessity of bond or  
20 notice.

21 (d) The duty of the guardian ad litem is to protect the minor's interests as described in  
22 the Florida Probate Rules.

23 (e) A court need not appoint a guardian ad litem for the minor if a guardian of the  
24 minor has previously been appointed and that guardian has no potential adverse  
25 interest to the minor. ~~A court may appoint a guardian ad litem if the court believes a~~  
26 ~~guardian ad litem is necessary to protect the interests of the minor.~~

27 (2) Unless waived, the court shall award reasonable fees and costs to the guardian ad  
28 litem to be paid out of the gross proceeds of the settlement.

29 (3) Any settlement of a claim pursuant to this section is subject to the confidentiality  
30 provisions of this Chapter.

31 Section 2. Subsection (5) is added to section 744.387, Florida Statutes, to read:

32 744.387 Settlement of claims.--

33 (5) In order to protect the rights of a minor and the minor's parents or other persons  
34 responsible for the minor's welfare, and incapacitated persons, all court records related  
35 to the settlement of a claim of a minor or incapacitated person, including any report of  
36 the guardian ad litem, shall be confidential and exempt from the provisions of s.  
37 119.07(1) and s. 24(a), Art. I of the State Constitution and shall not be disclosed except  
38 as specifically authorized by this chapter or as may be required under s. 69.081(9) or as  
39 provided by rules of court and procedure. Such exemption applies to information in the  
40 possession of those entities granted access as set forth in this section.

41 (a) Access to such records shall be granted only as follows:

42 (1) To the court, the clerk or the clerk's representative, the guardian and the  
43 guardian's attorney, the guardian ad litem, and the ward, unless he or she is a under the  
44 age of 14 years or has been determined to be totally incapacitated, and the ward's  
45 attorney.

46 (2) To the minor upon reaching the age of 14 years and any attorney representing  
47 the minor with regard to a minor's claim;

48 (3) Pursuant to the Florida Rules of Judicial Administration;

49 (4) By court order upon a showing of good cause;

50 Section 3. Subsections (1) and (2) of section 744.3701, Florida Statutes, are amended to  
51 read::

52 744.3701 Inspection of reports or settlement records.--

53 (1) Unless otherwise ordered by the court, any initial, annual, or final guardianship  
54 report, and all court records related to settlement of a claim, including but not limited  
55 to any petition for approval of a settlement on behalf of a ward or minor, report of  
56 guardian ad litem related to any pending settlement, and any order approving a  
57 settlement on behalf of a ward or minor, or amendment thereto, is subject to inspection  
58 only by the court, the clerk or the clerk's representative, the guardian and the guardian's  
59 attorney, the guardian ad litem with regard to settlement of a claim, and the ward,  
60 unless he or she is a minor under the age of 14 years or has been determined to be  
61 totally incapacitated, and the ward's attorney, and as otherwise provided in this  
62 Chapter.

63 (2) The court may direct disclosure and recording of parts of an initial, annual, or final  
64 report, and all court records related to settlement of a claim, including but not limited  
65 to any petition for approval of a settlement on behalf of a ward or minor, report of

66 guardian ad litem related to any pending settlement, and any order approving a  
67 settlement on behalf of a ward or minor, or amendment thereto, in connection with any  
68 real property transaction or for such other purpose as the court allows, in its discretion.

69 Section 4. This section is subject to the Open Government Sunset Review Act in  
70 accordance with s. 119.15 and shall stand repealed on \_\_\_\_\_, unless  
71 reviewed and saved from repeal through reenactment by the Legislature.

72 Section 5. This act shall take effect upon becoming law.

## RPPTL WHITE PAPER

### CONFIDENTIALITY OF SETTLEMENTS IN GUARDIANSHIP PROCEEDINGS

#### PROPOSED AMENDMENTS TO FLORIDA STATUTES, SECTIONS 744.3025, 744.387, AND 744.3701

##### **I. Summary**

Under current law, an adult can settle a lawsuit and keep the terms confidential. That ability to make confidential settlements advances public policy to encourage settlement of disputes. A settlement on behalf of an incapacitated person or a minor child cannot be kept confidential because its terms must be approved by a court and are therefore available for public viewing. This puts wards who are under guardianship, especially minors, at risk and violates their privacy rights. The proposed amendments would extend the ability to make confidential settlements to incapacitated and minor persons to protect their interests and privacy in the same fashion that non-incapacitated adult persons can protect their rights.

The suggested statutory amendments will make settlement agreements in guardianship proceedings confidential, in keeping with the current guardianship law which makes guardianship inventories and accountings confidential. These changes will operate to protect incapacitated persons, both minors and adults, who cannot give informed consent to disclosure of private information as well as to protect those individuals from potential physical harm such as kidnapping.

##### **II. Present Situation**

Sections 744.3025, Fla. Stat. (Claims of Minors), and §119.07(1), Fla. Stat, regarding Access to Public Records do not have provisions providing confidentiality of settlements for minors or exempting those records from disclosure and, therefore, there is a failure to protect minors from potential harm. Akin to the foster care system, a child maintains a right to privacy even though the child does not have the legal capacity to protect that right. Pursuant to F.S. Section 744.3025, the

guardian of a child receiving a settlement of more than \$15,000 must appear before the court to have the settlement approved. That ensures the settlement is made in the child's best interest, but making the terms of the settlement available to the public ignores the child's privacy rights. The public disclosure of the settlement terms, along with name and address information also found in guardianship files, puts an incapacitated or minor recipient of a large settlement at risk for certain targeted crimes.

### **III. Effect of Proposed Changes**

The proposed changes would make all court filings related to settlements for minors or incapacitated persons confidential, including any report of the guardian ad litem, by making such filings exempt from the disclosure provisions of the Public Access to Records statute, with the exception of the court, the clerk of court, the guardian, guardian's attorney, the ward, minor or minor's counsel, the guardian ad litem, or any other person designated by the court or as required by other state or federal law.<sup>1</sup> The goal of these changes is to protect the minor or incapacitated individual's right to privacy and protection from harm, while at the same time permitting access to records where there is a specific public need.

The proposed statutory changes amend Section 744.387 (Settlement of Claims) to provide for confidentiality of settlements for the benefit of minors and incapacitated persons, amend Section 744.3025 to refer to the change in 744.387 and make related changes, and amend Section 744.3701 to ensure confidentiality for all settlement documents in the same fashion as guardianship inventories and accountings.

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<sup>1</sup> An example of one of the exemptions falls under the Right to Financial Privacy Act, 12 U.S.C. Section 3403 et. seq. where the Federal Law specifically allows disclosure of private information to law enforcement where there is a state statute that mandates disclosure of private financial information. See also, the Financial Services Modernization Act of 1999 (Also Known as the Gramm-Leach-Bliley Act) 15 U.S.C. Subchapter 1, Section 6802 (e) et. seq. In Florida, under F.S. Section 415.1034, there is mandated reporting for any person that reasonably suspects abuse, neglect or exploitation of a vulnerable adult.

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

None.

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

None.

#### **VI. Constitutional Issues**

The Florida Constitution, Article I, section 24 guarantees every person a right to inspect or copy any public record of the legislative, executive or judicial branches of government. However if an exemption is provided under F.S. Chapter 119 for public necessity, the confidentiality is justified. The proposed amendments are in keeping with existing exemptions for guardianship inventories and accountings.

#### **VI. Other Interested Parties**

Elder Law Section of the Florida Bar

Legal Needs of Children Committee

Family Law Section of the Florida Bar

# LEGISLATIVE POSITION REQUEST FORM

GOVERNMENTAL AFFAIRS OFFICE

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

## GENERAL INFORMATION

**Submitted By** Sean W. Kelley, Chairman, Guardianship and Power of Attorney Committee of the Real Property Probate & Trust Law Section

**Address** Sean W. Kelley, Kelley & Kelley, P.L., 904 Anastasia Blvd., St. Augustine, FL 32080  
Telephone: (904) 819-9706

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

## CONTACTS

### Board & Legislation Committee Appearance

**Sean W. Kelley**, Kelley & Kelley, P.L., 904 Anastasia Blvd., St. Augustine, FL 32080, Telephone: (904) 819-9706.  
**Barry Spivey**, Spivey & Fallon, P.A., 1515 Ringling Blvd., Suite 885, Sarasota, FL 34236 Telephone (941) 840-1991  
**Peter M. Dunbar**, Pennington, Moore, Wilkinson, Bell & Dunbar, P.O. Box 10095, Tallahassee, Florida 32302-2095, Telephone (850) 222-3533  
**Martha J. Edenfield**, Pennington, Moore, Wilkinson, Bell & Dunbar, P.O. Box 10095, Tallahassee FL 32302-2095, Telephone (850) 222-3533  
(List name, address and phone number)

### Appearances

#### Before Legislators

(SAME)

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

#### Meetings with

#### Legislators/staff

(SAME)

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

## PROPOSED ADVOCACY

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

### If Applicable,

#### List The Following

N/A

(Bill or PCB #)

(Bill or PCB Sponsor)

#### Indicate Position

Support

Oppose \_\_\_\_\_

Tech Asst. \_\_\_\_\_

Other \_\_\_\_\_

### Proposed Wording of Position for Official Publication:

Support 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.

### Reasons For Proposed Advocacy:

Under current law, there is uncertainty whether the current statute applies only to the attorney for the guardian or all attorneys who have rendered services in a guardianship. This amendment clarifies that the statute applies to all attorneys who have rendered services in a guardianship. The amendment also provides that reasonable fees for the guardian, the guardian's attorney, any person employed by the guardian, any attorney who has rendered services to the ward, or any attorney for the alleged incapacitated person may be determined by the court without the necessity of expert testimony. Any party may, however, provide expert testimony after notice to the other parties. If expert testimony is offered, a reasonable expert witness fee shall be awarded by the court and paid from the assets of the guardianship estate.

**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**

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

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

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

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

1 A bill to be entitled

2 An act relating to guardianships; amending s. 744.108; providing that fees and  
3 costs incurred by attorney who has rendered services to a ward in compensation  
4 proceedings are awardable from guardianship assets; providing that expert  
5 testimony is unnecessary in proceedings to determine compensation of attorney or  
6 guardian; providing an effective date.

7  
8 Be It Enacted by the Legislature of the State of Florida:  
9

10 Section 1. Subsection (8) of section 744.108, Florida Statutes, is amended, and  
11 subsection (9) is added to that section, to read:

12 (8) When court proceedings are instituted to review or determine a guardian's or an  
13 attorney's fees under subsection (2), such proceedings are part of the guardianship  
14 administration process and the costs, including costs and attorneys' fees, for the guardian's  
15 attorney, any attorney who has rendered services to the ward, or any attorney for the alleged  
16 incapacitated person appointed under subsection (2) of s. 744.331, shall be determined by the  
17 court and paid from the assets of the guardianship estate unless the court finds the requested  
18 compensation under subsection (2) to be substantially unreasonable.

19 (9) The court may determine reasonable compensation for the guardian, the guardian's  
20 attorney, any person employed by the guardian, any attorney who has rendered services to the  
21 ward, or any attorney for the alleged incapacitated person appointed under subsection (2) of s.  
22 744.331 without receiving expert testimony. Any person or party may offer expert testimony  
23 after notice to interested persons. If expert testimony is offered, a reasonable expert witness fee  
24 shall be awarded by the court and paid from the assets of the guardianship estate.

25 Section 2. This act shall take effect upon becoming law and shall apply to all  
26 proceedings pending on or before such date.

## PROPOSED REVISIONS TO § 744.108 FLORIDA STATUTES RELATING TO EXPERT TESTIMONY IN DETERMINING ATTORNEYS FEES AND GUARDIANS FEES

### I. SUMMARY

This proposal seeks to clarify the law relating to the award of attorneys' fees and costs in guardianship proceedings. The proposed amends § 744.108(8) to make it clear that attorneys' fees and costs associated with proceedings to determine the fees of a guardian or an attorney who has rendered services to a guardian or ward, including court-appointed counsel, are payable from guardianship assets unless the court finds the requested compensation substantially unreasonable. Further, the proposal adds a new subsection to § 744.108 to provide that the court can determine the reasonableness of compensation without the necessity of receiving expert testimony. This proposal does not have an impact on state funds.

### II. THE CURRENT SITUATION

Section 744.108 generally sets forth the procedure for awarding compensation to a guardian or attorney in connection with a guardianship. Section 744.108(1) provides that "a guardian, or an attorney who has rendered services to the ward or to the guardian on the ward's behalf, is entitled to a reasonable fee for services rendered and reimbursement of costs incurred on behalf of the ward." Similarly, § 744.311(7) provides that any attorney appointed under § 744.311(2) is entitled to a reasonable fee to be determined by the court.

Florida Statutes § 744.108(8) provides that fees and costs in determining reasonable compensation are part of the guardianship administration and are generally awardable from the guardianship unless the court finds the requested compensation substantially unreasonable. It is unclear whether the scope of subsection (8) covers all requests for attorney's fees or is limited to only fees for the guardian's attorney. Specifically, the statute does not address whether an attorney who has rendered services to a ward, such court-appointed counsel for the ward, is entitled to recover attorneys' fees and costs associated with proceedings to review and determine compensation.

Further, it is unclear whether expert testimony is required to establish a reasonable fee for a guardian or an attorney. Section 744.108 is silent on the subject. This has led to inconsistent results. Cases in other areas have also struggled with the issue. For example, in *Shwartz, Gold & Cohen, P.A. v. Streicher*, 549 So. 2d 1044 (Fla. 4<sup>th</sup> DCA 1989) the court suggested that expert testimony was necessary to determine a reasonable attorney's fees in quantum meruit proceeding against a former client. In *Estate of Cordiner v. Evans*, 497 So. 2d 920 (Fla. 2d DCA 1986) the court held that while expert testimony was not required for an interim award of *partial* fees to attorney for the estate, but suggested that expert testimony would be required in determining final compensation to the attorney at the conclusion of the estate. The court reasoned that to require expert testimony at every juncture of the estate administration "would have the effect of unnecessarily taxing estates with costs of services of an expert witness at each hearing on partial fees." Many attorneys and judges interpret the law as requiring testimony from an expert witness to establish a reasonable attorney's fee unless a statute dispenses with that requirement. See *Shwartz and Estate of Cordiner supra*; also see *Clark v. Squire, Sanders & Dempsey*, 495 So.2d

264 (Fla. 3d DCA 1986). If this is a correct interpretation of existing law, then expert testimony is presently required in all guardianship proceedings for an award of attorney's fees.

Cost considerations are a significant factor in many guardianships. Requiring expert testimony at every hearing for determination of interim guardian's fees or attorney's fees adds an unnecessary layer of costs that deplete the ward's estate. Most routine guardianships do not need expert testimony to support a petition for fees and the judiciary is capable of determining a reasonable fee without expert testimony in the vast majority of cases. In those where expert testimony would be necessary, the court or the interested party may present such testimony.

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

The proposed amendment to §744.108(8) will clarify that the court may award attorney's fees and costs incurred in compensation proceedings to an attorney who has rendered services to the ward, including the ward's court-appointed counsel.

The proposed amendment will add subsection (9) to § 744.108 dispensing with any requirement of expert testimony. Expert testimony *may* be offered at the option of either party upon written notice. If expert testimony is offered, a reasonable expert witness fee shall be awarded by the court and paid from the assets of the ward. This provision is derived from and similar to section 733.6175(4) of the Florida Probate Code.

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

There should be no fiscal impact on state or local governments.

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

There should be positive impact on the private sector. It is anticipated that in the majority of guardianship cases the cost of presenting expert testimony will be avoided and the situations where expert testimony is used will be minimized.

### **VI. CONSTITUTIONAL ISSUES**

None.

### **VII. OTHER INTERESTED PERSONS**

1. Elder Law Section of the Florida Bar.

# LEGISLATIVE POSITION REQUEST FORM

GOVERNMENTAL AFFAIRS OFFICE

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

## GENERAL INFORMATION

**Submitted By** Sean W. Kelley, Chairman, Guardianship and Power of Attorney Committee of the Real Property Probate & Trust Law Section

**Address** Sean W. Kelley, Kelley & Kelley, P.L., 904 Anastasia Blvd., St. Augustine, FL 32080; Telephone: (904) 819-9706

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

## CONTACTS

**Board & Legislation Committee Appearance**

**Sean W. Kelley**, Kelley & Kelley, P.L., 904 Anastasia Blvd., St. Augustine, FL 32080, Telephone: (904) 819-9706.  
**Barry Spivey**, Spivey & Fallon, P.A., 1515 Ringling Blvd., Suite 885, Sarasota, FL 34236 Telephone (941) 840-1991  
**Peter M. Dunbar**, Pennington, Moore, Wilkinson, Bell & Dunbar, P.O. Box 10095, Tallahassee, Florida 32302-2095, Telephone (850) 222-3533  
**Martha J. Edenfield**, Pennington, Moore, Wilkinson, Bell & Dunbar, P.O. Box 10095, Tallahassee FL 32302-2095, Telephone (850) 222-3533  
(List name, address and phone number)

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

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

## PROPOSED ADVOCACY

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

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

**Indicate Position** Support X Oppose \_\_\_\_\_ Tech Asst. \_\_\_\_\_ Other \_\_\_\_\_

### Proposed Wording of Position for Official Publication:

Support 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 § 29.004(3), Fla. Stat. in those circumstances in which the petition for incapacity is dismissed by the court and no guardian is appointed.

### Reasons For Proposed Advocacy:

Under current law, there is a gap in the existing statute regarding the payment of examining committee members in guardianship proceedings when a Petition to Determine Incapacity is dismissed and no bad faith is involved in the filing of the Petition. In this instance, there is no guardianship estate to pay the fees from and the Petitioner is not responsible due to a lack of bad faith. In this limited circumstance, the change to the



## 1 A bill to be entitled

2 An act relating to the payment of guardianship examining committee members  
3 when a petition for incapacity is dismissed; amending s. 744.331, F.S.; directing  
4 that examining committee members be paid from state funds as court appointed  
5 expert witnesses in the limited circumstance when a petition is dismissed and no  
6 bad faith is involved; providing an effective date.

7  
8 Be It Enacted by the Legislature of the State of Florida:

9  
10 Section 1. Paragraph (c) of subsection (7) of section 744.331, Florida Statutes, is  
11 redesignated as paragraph (d) and a new paragraph (c) is added to that subsection, to read:

12 744.331 Procedure to Determine Incapacity.

13 (7) FEES.—

14 (c) If the petition is dismissed, the fees of the examining committee shall be paid upon court  
15 order as “expert witness” fees under s. 29.004(6). If fees of the examining committee are  
16 assessed against the petitioner under paragraph (d), such amounts paid by the state courts  
17 system shall be reimbursed by the petitioner to the state courts system.

18 Section 2. This act shall take effect upon becoming law and shall apply to all  
19 proceedings pending on or before such date.

**PROPOSED REVISIONS TO § 744.331(7) FLORIDA STATUTES  
RELATING TO COMPENSATION OF THE EXAMINING COMMITTEE  
IN INCAPACITY PROCEEDINGS**

**I. SUMMARY**

This proposal would amend §744.331(7), Fla. Stat., to permit members of the examining committee in an incapacity proceeding to be paid from state funds as court appointed experts pursuant to § 29.004(3), Fla. Stat., in circumstances in which the petition for incapacity is dismissed by the court and no guardian is appointed.

**II. THE CURRENT SITUATION**

Under current law, when the petition for incapacity is filed, the court is required to appoint an examining committee consisting of three members, at least one of which must be a psychiatrist or other physician. § 744.331(3)(a), Fla. Stat. The remaining members must be either a psychologist or gerontologist, another psychiatrist or physician, a registered nurse, nurse practitioner, licensed social worker with an advanced degree in gerontology from an accredited institution of higher education, or other person who by knowledge, skill experience, training of education may, in the court's discretion, "advise the court in the form of an expert opinion." *Id.*

Each member of the examining committee is charged with examining the alleged incapacitated person, making a functional assessment, physical assessment and a mental health examination, if possible. Each committee member must render a report to the court with his or her professional opinion as to: a diagnosis, prognosis and recommended course of treatment; an evaluation of the person's ability to retain his or her rights; the results of the comprehensive examination; and a description of any matters with respect to which the person lacks the capacity to exercise rights, the extent of that incapacity and the factual basis for the determination that a person lacks capacity.

Compensation of examining committee members is governed by §744.331(7), Florida Statutes, which provides generally that the examining committee and any attorney appointed to represent the alleged incapacitated person are entitled to reasonable fees to be determined by the court. Under current law, the fees awarded are to be paid by the guardian from the property of the ward or if the ward is indigent, by the state. § 744.331(7)(b), Fla. Stat. The statute is silent, however, with respect to how the examining committee members are to be

compensated in the event the petition is dismissed and the court finds no bad faith in the filing of the petition to determine incapacity. Under such circumstances, no guardian is appointed and no property ever comes into the hands of a guardian or under the authority of the court. Likewise, there is no authority for assessing such fees against the petitioner or against the alleged incapacitated person.

This “gap” in § 744.331(7), Florida Statutes as to who is or might be responsible for the payment of such fees has been recognized in several reported decisions, all of which have recognized the need for remedy by the legislature. See, *Ehrlich v. Severinson*, 985 So. 2d 639 (Fla. 4<sup>th</sup> DCA 2008), *Levine v. Levine*, 4 So. 3d 730 (Fla. 5<sup>th</sup> DCA 2009), and *Faulkner v. Faulkner*, 65 So. 3d 1167 (Fla. 1<sup>st</sup> DCA 2011).

The court in *Faulkner*, explained the “gap” problem as follows:

Section 744.331(7)(b) provides that the examining committee fees are to be paid from the property of the ward, but this seems to presume that the petition for incapacity is granted and a guardian is appointed. And section 744.331(7)(c) provides that the costs of the proceeding – which, presumably, includes the examining committee fees – are to be paid by the petitioner if and only if the court finds that the petition was filed in bad faith. The “gap” in the state is that it does not specify who pays the examining committee fees when the petition is dismissed or denied and there is no finding that the petition was filed in bad faith or, as here, there is an express finding that the petition was filed in good faith. Requiring the petitioner to pay the fees in these circumstances would be inconsistent with section 744.311(7)(c) and requiring the guardian to pay the fee from the ward’s property under section 744.331(7)(b) would not be possible if a guardian is never appointed; however, someone has to pay the fees because section 744.331(7)(a) states that the examining committee is “*entitled* to reasonable fees” and moreover, it is unlikely that the professionals required for the examining committee would serve if there was a risk of non-payment or if the payment was contingent on the outcome of the proceeding.

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

This proposal amends § 744.331(7) by creating a new subsection (c), which provides that if the petition is dismissed, the fees of the examining committee shall be paid upon court order as “expert witness” fees under s. 29.004(6). This change

implements expressly the provisions of § 29.004(6) which awards fees to court appointed experts generally and provides a secure source of funding to insure that the members of the examining committee are reasonably compensated as contemplated by § 744.331.

Allowing the examining committee to be paid from court funds in the event a petition is dismissed also helps to maintain the integrity of the examination process. Under no circumstances should an examining committee member's fee in a guardianship matter be dependent on the petition moving forward.

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

There will be a fiscal impact at the state level because § 29.004 draws its funding from the "state revenues appropriated by general law." The fiscal impact should be slight for two important reasons: (1) collective experience is that there are relatively few incapacity cases which are dismissed under circumstances described in the statute, and (2) the compensation awarded to the examining committee is modest: generally \$600 or less per appointment.

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

There should be no economic impact on the private sector.

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

None.

#### **VII. OTHER INTERESTED PERSONS**

1. Elder Law Section of the Florida Bar
2. Clerk of Court

# LEGISLATIVE POSITION REQUEST FORM

GOVERNMENTAL AFFAIRS OFFICE

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

## GENERAL INFORMATION

**Submitted By** Linda S. Griffin and L.Howard Payne, Co-Chairs of the IRA, Employee Benefits and Insurance Committee of the Real Property Probate & Trust Law Section (RPPTL Approval Date \_\_\_\_\_, 2012)

**Address** Linda S. Griffin, 1455 Court Street, Clearwater, Florida 33756  
Telephone: (727) 449-9800

L.Howard Payne, 240 S. Pineapple Avenue, Suite 401, Sarasota, FL 34236  
Telephone: (941)487-2800

**Position Type** IRA, Employee Benefits and Insurance Committee, RPPTL Section, The Florida Bar  
(Florida Bar, section, division, committee or both)

## CONTACTS

### Board & Legislation Committee Appearance

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**L.Howard Payne, The Payne Law Group, 240 S. Pineapple Avenue, Suite 401, Sarasota, FL 34236**  
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**Barry F. Spivey, Spivey & Fallon, PA, 1515 Ringling Blvd., Suite 885, Sarasota, FL 34236 Telephone 941-840-1991**

**Peter M. Dunbar, Pennington, Moore, Wilkinson, Bell & Dunbar, P.O. Box 10095, Tallahassee, Florida 32302-2095, Telephone (850) 222-3533**

**Martha J. Edenfield, Pennington, Moore, Wilkinson, Bell & Dunbar, P.O. Box 10095, Tallahassee FL 32302-2095, Telephone (850) 222-3533**  
(List name, address and phone number)

### Appearances

#### Before Legislators

(SAME)

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

#### Meetings with

#### Legislators/staff

(SAME)

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

## PROPOSED ADVOCACY

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

### If Applicable,

#### List The Following

N/A

(Bill or PCB #)

(Bill or PCB Sponsor)

### Indicate Position

Support \_\_\_\_\_

Oppose \_\_\_\_\_

Tech Asst. \_\_\_\_\_

Other \_\_\_\_\_

### Proposed Wording of Position for Official Publication:

Support correction of the statute reference from 736.1005 to 736.1105 in 732.703(4)(c) to properly reflect that the statute does not apply to revocable trusts. Support the correction to 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.

**Reasons For Proposed Advocacy:**

This proposal is intended to correct a mistake in a statute reference and to clarify that the statute does not apply to revocable trusts as referenced in 736.1105 instead of the incorrect reference of 736.1005. This proposal also makes a correction to 732.703 (4)(g) as the language currently in the statute " instrument directing the disposition of the asset at death" should be referred to as the "governing instrument" as that term is defined in the statute 732.703(1)(e).

**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**

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

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

          N/A            
(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.**

3700818.00012

1 A bill to be entitled

2 An act relating to the effect of divorce, dissolution, or invalidity of marriage on  
3 disposition of certain assets at death; amending s. 732.703, F.S.; providing an  
4 effective date.

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

7  
8 Section 1. Paragraphs (c) and (g) of subsection (4) of section 732.703, Florida Statutes,  
9 are amended to read:

10 732.703 Effect of divorce, dissolution, or invalidity of marriage on disposition of certain  
11 assets at death. --

12 (4) Subsection (2) does not apply:

13 (c) To the extent a will or trust governs the disposition of the assets and s. 732.507(2) or  
14 s. ~~732.1005~~ 732.1105 applies;

15 (g) If the governing instrument ~~instrument directing the disposition of the asset at death~~ is  
16 governed by the laws of a state other than this state;

17 Section 2. This Act shall take effect upon becoming law.

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

### White Paper on Proposed Amendments to Florida Statutes Section 732.703(4)

#### I. SUMMARY

Florida Statutes Section 732.703 generally provides that a designation of a decedent's spouse to receive certain individual retirement accounts, annuities, life insurance, pay-on-death accounts and similar assets becomes null and void if the decedent's marriage to his or her spouse was judicially dissolved or declared invalid before the decedent's death.

After enactment, a scrivener's error was discovered in one of the statutory cross-references, and practitioners have noted that the wording in one of the provisions of the statute may cause confusion. The purpose of the proposed amendments is to correct these items.

#### II. CURRENT SITUATION

As enacted, s. 732.703(4)(c) provides that the nullification of the beneficiary designation in the event of divorce does not apply "to the extent a will or trust governs the disposition of the assets and s. 732.507(2) or 736.1005 applies...." The reference to s. 736.1005, "Attorney's fees for services to the trust," is a typographical error and an incorrect cross-reference. The conditions and procedures for awarding attorneys fees for services to a trust are irrelevant here.

As enacted, s. 732.703(4)(g) makes the statute inapplicable "if the instrument directing the disposition of the asset at death is governed by the laws of a state other than this state." The phrase "instrument governing the disposition of the asset at death" is not defined anywhere in the statute. The intent of s. 732.703(4)(g) is to reference the written instrument constituting the beneficiary designation, and the statute gives a definition for that instrument in s. 732.703(1)(e) (a "governing instrument"). Use of a different term in s. 732.703(4)(g) could be interpreted as a reference to something other than the beneficiary designation instrument. Such an interpretation is not consistent with the intent of the statute.

#### III. EFFECT OF PROPOSED CHANGES GENERALLY

The proposed legislation would change the cross-reference in s. 732.703(4)(c) from s. 736.1005 to s. 736.1105, "Dissolution of marriage; effect on revocable trust." Florida Statutes s. 736.1105 is the proper provision for s. 732.703(4)(c) to cross-reference in this instance, and was always the intended cross-reference in the statute.

Florida Statutes Section 732.703(1)(e) defines "governing instrument" as "any writing or contract governing the disposition of all or any part of an asset upon the death of the

decident.” The proposed legislation would revise s. 732.703(4)(g) to reference the already-defined term, “governing instrument”

#### IV. ANALYSIS

The amendments to s. 732.703(4) will (1) correct an improper cross-reference in s. 732.703(4)(c) that resulted from a typographical error; and (2) tie the carve-out from the application of the statute set forth in s. 732.703(4)(g) to the definition of “governing instrument” given in s. 732.703(1)(e). As to the latter purpose, by modifying s. 732.703(4)(g) to refer to the term “governing instrument” in place of a term that is not defined elsewhere in the statute, the language of the statute is more internally consistent and the scope and application of the statute is clearer and consistent with legislative intent.

#### V. FISCAL IMPACT ON STATE AND LOCAL GOVERNMENTS

Adoption of the proposed legislation by the Florida legislature will be revenue-neutral, with no fiscal impact on state and local governments.

#### VI. DIRECT IMPACT ON PRIVATE SECTOR

The proposed legislation will benefit the private sector by clarifying s. 732.703, thereby lending certainty and predictability to the legislative provision.

#### VII. CONSTITUTIONAL ISSUES

No constitutional issues are apparent.

#### VIII. OTHER INTERESTED PARTIES

Other interested parties are the Florida Bankers Association and the Family Law Section of The Florida Bar.

3461627.00012

# LEGISLATIVE POSITION REQUEST FORM

GOVERNMENTAL AFFAIRS OFFICE

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

## GENERAL INFORMATION

**Submitted By** Shane Kelly, Chair, Trust Law Committee of the Real Property Probate & Trust Law Section (RPPTL Approval Date July 26, 2012)

**Address** 3365 Galt Ocean Drive  
Fort Lauderdale, Florida 33308  
Telephone: (954) 563-1400

**Position Type** Prepared by Trust Law Subcommittee on the Definition of Qualified Beneficiary, RPPTL Section, The Florida Bar, Mary Karr and Patrick Lannon as Subcommittee Chairs

## CONTACTS

### Board & Legislation Committee Appearance

**Shane Kelly, The Kelley Law Firm, PL**, 3365 Galt Ocean Drive  
Fort Lauderdale, Florida 33308, Telephone: 954-563-1400  
**Barry F. Spivey**, Spivey & Fallon, PA, 1515 Ringling Blvd., Suite 885,  
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**Peter M. Dunbar**, Pennington, Moore, Wilkinson, Bell & Dunbar, P.O. Box  
10095, Tallahassee, Florida 32302-2095, Telephone: (850) 222-3533  
**Martha J. Edenfield**, Pennington, Moore, Wilkinson, Bell & Dunbar, P.O.  
Box 10095, Tallahassee, Florida 32302-2095, Telephone: (850) 222-3533

### Appearances

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

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

## PROPOSED ADVOCACY

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

### If Applicable,

**List The Following** N/A  
\_\_\_\_\_  
(Bill or PCB #) (Bill or PCB Sponsor)

**Indicate Position** Support  Oppose \_\_\_\_\_ Tech Asst. \_\_\_\_\_ Other \_\_\_\_\_

### Proposed Wording of Position for Official Publication:

Support adding definitions of "distributee" and "permissible distributee" to the Florida Trust Code.

### Reasons For Proposed Advocacy:

At present, the term "distributee" is not a defined term in the Florida Trust Code although it is used in the Florida Trust Code when defining a beneficiary for purposes of accounting. The general definitions in the Florida Probate Code apply to the Florida Trust Code subject to additional definitions and unless the context requires otherwise. Applying the definition of "distributee" that is in the Florida Probate Code to the Florida Trust Code results in an unintended result which is in conflict with the intention of the Florida



1 A bill to be entitled

2 An act relating to the administration of trusts; amending s. 736.0103, F.S.; adding  
3 a definition of “distributee” and “permissible distributee”; providing an effective  
4 date.

5  
6 Be it Enacted by the Legislature of the State of Florida:

7  
8 Section 1. Subsections (22) and (23) are added to section 736.0103, Florida Statutes, to  
9 read:

10 736.0103. Definitions – Unless the context otherwise requires, in this code:

11 (22) “Distributee” means a beneficiary who is currently entitled to receive a distribution.

12 (23) “Permissible distributee” means a beneficiary who is currently eligible to receive a  
13 distribution.

14 Section 3. This act shall take effect upon becoming law.

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

## WHITE PAPER

### REVISION TO SECTION 736.0103 TO ADD DEFINITIONS OF “DISTRIBUTE” AND “PERMISSIBLE DISTRIBUTE”

#### I. SUMMARY

The proposed legislation is intended to clarify that the definition of “distribute” in section 731.201(12) of the Florida Probate Code does not apply for purposes of the Florida Trust Code. The proposed legislation adds new definitions of “distribute” and “permissible distribute” that will apply for purposes of Chapter 736, the Florida Trust Code. The bill does not have a fiscal impact on state funds.

#### II. CURRENT SITUATION

In Chapter 736, the Florida Trust Code, the word “distribute” is used in its plain and ordinary meaning. Section 736.0103(14) defines the term “qualified beneficiary” as a living beneficiary who is a “distribute or a permissible distribute” on the date the qualification is being determined. In this statute the word “distribute” is used in its plain and ordinary meaning – a person who is entitled to a distribution.

In the Florida Probate Code, however, the term “distribute” means a person who has *already* received estate property from a personal representative or other fiduciary, per the definition in section 731.201(12). The Florida Probate Code uses the word “distribute” in the context of defining the rights and liabilities of a person who already received a distribution (and defining the rights of third parties dealing with those persons).

In section 731.201(12), a person who has not yet received a distribution (but who is entitled to or eligible to receive a distribution) is not yet a “distribute”. Comparatively, in Chapter 736, a person who has not yet received a distribution but who is entitled to or eligible to receive a distribution needs to be a “distribute”. Further, a person who received a complete distribution is a “distribute” under 731.201(12).

Applying the section 731.201 definition of “distribute” to Chapter 736 creates an absurd result. For example, if qualified beneficiaries are limited to persons who are “distributes” as defined in section 731.201(12), then only persons who have *already* received distributions could be qualified beneficiaries; any beneficiary who has not yet received a distribution would not be a qualified beneficiary. This is not the logical or intended result. In Chapter 736, a person who has received a complete distribution would no longer be a “beneficiary”, as defined in section 736.0103(4), and therefore would not be a “qualified beneficiary” as defined in section 736.0103(14). In short, in the trust context, those persons who have received their complete distributions should no longer be qualified beneficiaries, and those persons yet to receive their distribution should be qualified beneficiaries. The definitional sections should not impede this result.

Even though section 731.201 provides that the definitions apply to Chapter 736 subject to additional definitions and unless the context requires otherwise, the usage of the word “distributee” in Chapter 736, without having a definition other than the one in section 731.201, creates unnecessary and easily avoided confusion.

The inconsistent usage of the word “distributee” carries over from the Uniform Probate Code (“UPC”) and Uniform Trust Code (“UTC”), both of which have been adopted in part by Florida. The inconsistency also exists in the laws of other states that have adopted the UPC and UTC. Some of those states have adopted additional legislation to remedy the inconsistency.

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

The proposal amends section 736.0103 by adding new paragraphs (22) and (23) to create new definitions for “distributee” and “permissible distributee.” The proposed changes eliminate the uncertainty as to whether the definition of “distributee” in section 731.201(12) applies to Chapter 736.

“Distributee” means a beneficiary who is currently entitled to receive a distribution, thereby excluding those persons who have already received their distributions.

“Permissible distributee” means a beneficiary who is currently eligible to receive a distribution but who has not yet received a distribution.

The word “distributee” appears in section 736.0103(14) (qualified beneficiary), section 736.0110 (others treated as qualified beneficiaries), and the title of section 736.1018 (liability of distributee). The new definition of “distributee” will not create an unintended result when applied to any of these sections. Note that the word “distributee” as used in the title of section 736.1018 is not inconsistent with the definition of the word “distributee” in section 731.201(12) or the new proposed definition in section 736.0103.

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

The proposal will reduce demands on the judiciary to resolve disputes or requests for declaratory relief arising from the current inconsistency. Otherwise, the proposal does not have a fiscal impact on state or local governments.

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

The proposal will eliminate the need for litigation to resolve disputes arising from the current inconsistency. Otherwise, the proposal does not have a direct economic impact on the private sector.

### **VI. CONSTITUTIONAL ISSUES**

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

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

Florida Bankers Association.

## **REPORT**

From: Roland D. Waller, Chairman of the Ad Hoc Committee on Trust Accounts  
To: The Executive Council of the Real Property Probate and Trust Law Section  
Re: Whether non-lawyers should be permitted to sign trust account checks  
Date: August 23, 2012

### **BACKGROUND INFORMATION**

The Florida Bar Real Property, Probate and Trust Law Section has voted previously to support the Board of Governor's position that only attorneys may sign trust account checks. The Board of Governor's argued this proposed change to the Supreme Court. The Supreme Court declined to adopt the Florida Bar's position which was approved by the Section by approximately two-third majority vote (see exhibit A). The Supreme Court declined to adopt Bar's position to revise its proposal to accommodate the issues raised by solo practitioners and lawyers in small firms.

### **RECOMMENDATIONS**

In the event that the Section's Executive Council votes to submit any recommendations to the Florida Bar and Florida Supreme Court, the Ad Hoc Committee on Trust Accounts proposes:

- The adoption by the Florida Bar of the ABA Model Rules for Client's Trust Account Records which was adopted on August 9, 2010 which addresses the signatories of non-lawyers being authorized as signatories on the trust account. See Rule 2 Client Trust Account Safe guard (see exhibit B).
- Require non-lawyers to be bonded.
- Require lawyers and non-lawyers to be certified to sign trust accounts by passing the test as to client's trust account accounting and rules regulating the attorney's trust account.

## **EXHIBIT A**

\*\*\*\*\*

The Bar proposes a number of changes to rule 5-1.2 (Trust Accounting Records and Procedures). The most controversial of its proposals is new subdivision (d) (Signing Trust Account Checks), which would require that a lawyer sign every trust account check with his or her actual signature, and would prohibit lawyers from using a signature stamp or signing a trust account check in blank. Both the Bar and the Court received comments addressed to this proposal. In general, the comments assert that the proposed rule imposes a significant and disproportionate burden on lawyers who practice solo or in very small firms. We believe the commenters have raised some legitimate concerns. Accordingly, we decline to adopt subdivision (d) at this time, and instead refer the matter back to the Bar for additional study. In particular, the Bar should revise its proposal so as to accommodate the issues raised by solo practitioners and lawyers in small firms. The other amendments to rule 5-1.2 are adopted as proposed. The Bar's proposed new subdivision (e) (Electronic Wire Transfer) will be labeled subdivision (d); the subsequent subdivisions in the rule are relettered accordingly.

## EXHIBIT B

### MODEL RULES FOR CLIENT TRUST ACCOUNT RECORDS

*Adopted by the American Bar Association  
House of Delegates on August 9, 2010*

#### **RULE 1: RECORDKEEPING GENERALLY**

A lawyer who practices in this jurisdiction shall maintain current financial records as provided in these Rules and required by [Rule 1.15 of the Model Rules of Professional Conduct, and shall retain the following records for a period of [five years] after termination of the representation:

- (a) receipt and disbursement journals containing a record of deposits to and withdrawals from client trust accounts, specifically identifying the date, source, and description of each item deposited, as well as the date, payee and purpose of each disbursement;
- (b) ledger records for all client trust accounts showing, for each separate trust client or beneficiary, the source of all funds deposited, the names of all persons for whom the funds are or were held, the amount of such funds, the descriptions and amounts of charges or withdrawals, and the names of all persons or entities to whom such funds were disbursed;
- (c) copies of retainer and compensation agreements with clients [as required by Rule 1.5 of the Model Rules of Professional Conduct];
- (d) copies of accountings to clients or third persons showing the disbursement of funds to them or on their behalf;
- (e) copies of bills for legal fees and expenses rendered to clients;
- (f) copies of records showing disbursements on behalf of clients;
- (g) the physical or electronic equivalents of all checkbook registers, bank statements, records of deposit, pre-numbered canceled checks, and substitute checks provided by a financial institution;
- (h) records of all electronic transfers from client trust accounts, including the name of the person authorizing transfer, the date of transfer, the name of the recipient and confirmation from the financial institution of the trust account number from which money was withdrawn and the date and the time the transfer was completed;

- (i) copies of [monthly] trial balances and [quarterly] reconciliations of the client trust accounts maintained by the lawyer; and
- (j) copies of those portions of client files that are reasonably related to client trust account transactions.

## **Comment**

[1] Rule 1 enumerates the basic financial records that a lawyer must maintain with regard to all trust accounts of a law firm. These include the standard books of account, and the supporting records that are necessary to safeguard and account for the receipt and disbursement of client or third person funds as required by Rule 1.15 of the Model Rules of Professional Conduct or its equivalent. Consistent with Rule 1.15, this Rule proposes that lawyers maintain client trust account records for a period of five years after termination of each particular legal engagement or representation. Although these Model Rules address the accepted use of a client trust account by a lawyer when holding client or third person funds, some jurisdictions may permit a lawyer to deposit certain advance fees for legal services into the lawyer's business or operating account. In those situations, the lawyer should still be guided by the standards contained in these Model Rules.

[2] Rule 1(g) requires that the physical or electronic equivalents of all checkbook registers, bank statements, records of deposit, pre-numbered canceled checks, and substitute checks be maintained for a period of five years after termination of each legal engagement or representation. The "Check Clearing for the 21<sup>st</sup> Century Act" or "Check 21 Act", codified at 12 U.S.C. §5001 et. seq., recognizes "substitute checks" as the legal equivalent of an original check. A "substitute check" is defined at 12 U.S.C. §5002(16) as "paper reproduction of the original check that contains an image of the front and back of the original check; bears a magnetic ink character recognition ("MICR") line containing all the information appearing on the MICR line of the original check; conforms with generally applicable industry standards for substitute checks; and is suitable for automated processing in the same manner as the original check. Banks, as defined in 12 U.S.C. §5002(2), are not required to return to customers the original canceled checks. Most banks now provide electronic images of checks to customers who have access to their accounts on internet-based websites. It is the lawyer's responsibility to download electronic images. Electronic images shall be maintained for the requisite number of years and shall be readily available for printing upon request or shall be printed and maintained for the requisite number of years.

[3] The ACH (Automated Clearing House) Network is an electronic funds transfer or payment system that primarily provides for the inter-bank clearing of electronic payments between originating and receiving participating financial institutions. ACH transactions are payment instructions to either debit or credit a deposit account. ACH payments are used in a variety of payment environments including bill payments, business-to-business payments, and government payments (e.g. tax refunds.) In addition to the primary use of ACH transactions, retailers and third parties use the ACH system for other types of transactions including electronic check conversion (ECC). ECC is the process of transmitting MICR information from the bottom of a check, converting check payments to ACH transactions depending upon the authorization

given by the account holder at the point-of-purchase. In this type of transaction, the lawyer should be careful to comply with the requirements of Rule 1(h).

[4] There are five types of check conversions where a lawyer should be careful to comply with the requirements of Rule 1(h). First, in a "point-of-purchase conversion," a paper check is converted into a debit at the point of purchase and the paper check is returned to the issuer. Second, in a "back-office conversion," a paper check is presented at the point of purchase and is later converted into a debit and the paper check is destroyed. Third, in an "account-receivable conversion," a paper check is converted into a debit and the paper check is destroyed. Fourth, in a "telephone-initiated debit" or "check-by-phone" conversion, bank account information is provided via the telephone and the information is converted to a debit. Fifth, in a "web-initiated debit," an electronic payment is initiated through a secure web environment. Rule 1(h) applies to each of the type of electronic funds transfers described. All electronic funds transfers shall be recorded and a lawyer should not re-use a check number which has been previously used in an electronic transfer transaction.

[5] The potential of these records to serve as safeguards is realized only if the procedures set forth in Rule 1(i) are regularly performed. The trial balance is the sum of balances of each client's ledger card (or the electronic equivalent). Its value lies in comparing it on a monthly basis to a control balance. The control balance starts with the previous month's balance, then adds receipt; from the Trust Receipts Journal and subtracts disbursements from the Trust Disbursements Journal. Once the total matches the trial balance, the reconciliation readily follows by adding amounts of any outstanding checks and subtracting any deposits not credited by the bank at month's end. This balance should agree with the bank statement. Quarterly reconciliation is recommended only as a minimum requirement; monthly reconciliation is the preferred practice given the difficulty of identifying an error (whether by the lawyer or the bank) among three months' transactions.

[6] In some situations, documentation in addition to that listed in paragraphs (a) through (i) of Rule 1 is necessary for a complete understanding of a trust account transaction. The type of document that a lawyer must retain under paragraph (j) because it is "reasonably related" to a client trust transaction will vary depending on the nature of the transaction and the significance of the document in shedding light on the transaction. Examples of documents that typically must be retained under this paragraph include correspondence between the client and lawyer relating to a disagreement over fees or costs or the distribution of proceeds, settlement agreements contemplating payment of funds, settlement statements issued to the client, documentation relating to sharing litigation costs and attorney fees for subrogated claims, agreements for division of fees, between lawyers, guarantees of payment to third parties out of proceeds recovered on behalf of a client, and copies of bills, receipts or correspondence related to any payments to third parties on behalf of a client (whether made from the client's funds or from lawyer's funds advanced for the benefit of the client).

## **RULE 2: CLIENT TRUST ACCOUNT SAFEGUARDS**

With respect to client trust accounts required by [Rule 1.15 of the Model Rules of Professional Conduct]:

- (a) only a lawyer admitted to practice law in this jurisdiction or a person under the direct supervision of the lawyer shall be an authorized signatory or authorize transfers from a client trust account;
- (b) receipts shall be deposited intact and records of deposit should be sufficiently detailed to identify each item; and
- (c) withdrawals shall be made only by check payable to a named payee and not to cash, or by authorized electronic transfer.

### **Comment**

[1] Rule 2 enumerates minimal accounting controls for client trust accounts. It also enunciates the requirement that only a lawyer admitted to the practice of law in the jurisdiction or a person who is under the direct supervision of the lawyer shall be the authorized signatory or authorize electronic transfers from a client trust account. While it is permissible to grant limited nonlawyer access to a client trust account, such access should be limited and closely monitored by the lawyer. The lawyer has a non-delegable duty to protect and preserve the funds in a client trust account and can be disciplined for failure to supervise subordinates who misappropriate client funds. See, Rules 5.1 and 5.3 of the Model Rules of Professional Conduct.

[2] Authorized electronic transfers shall be limited to (1) money required for payment to a client or third person on behalf of a client; (2) expenses properly incurred on behalf of a client, such as filing fees or payment to third persons for services rendered in connection with the representation; or (3) money transferred to the lawyer for fees that are earned in connection with the representation and are not in dispute; or (4) money transferred from one client trust account to another client trust account.

[3] The requirements in paragraph (b) that receipts shall be deposited intact mean that a lawyer cannot deposit one check or negotiable instrument into two or more accounts at the same time, a practice commonly known as a split deposit.

### **RULE 3: AVAILABILITY OF RECORDS**

**Records required by Rule 1 may be maintained by electronic, photographic, or other media provided that they otherwise comply with these Rules and that printed copies can be produced. These records shall be readily accessible to the lawyer.**

### **Comment**

[1] Rule 3 allows the use of alternative media or tie main records if printed copies of necessary reports can be produced. If trust records are computerized, a system of regular and frequent (preferably daily) back-up procedures is essential. If a lawyer uses third-party electronic or Internet based file storage, the lawyer must make reasonable efforts to ensure that the company has in place, or will establish reasonable procedures to protect the confidentiality of client information. See, ABA Formal Ethics Opinion 398 (1995). Records required by Rule 1 shall be readily accessible and shall be readily available to be produced upon request by the client or third person who has an interest as provided in Model Rule 1.15, or by the official

request of a disciplinary authority, including but not limited to, a subpoena *duces tecum*. Personally identifying information in records produced upon request by the client or third person or by disciplinary authority shall remain confidential and shall be disclosed only in a manner to ensure client confidentiality as otherwise required by law or court rule.

[2] Rule 28 of the Model Rules for Lawyer Disciplinary Enforcement provides for the preservation of a lawyer's client trust account records in the event that the lawyer is transferred to disability inactive status, suspended, disbarred, disappears, or dies.

#### **RULE 4: DISSOLUTION OF LAW FIRM**

**Upon dissolution of a law firm or of any legal professional corporation, the partners shall make reasonable arrangements for the maintenance of client trust account records specified in Rule 1.**

#### **Comment**

[1] Rules 4 and 5 provide for the preservation of a lawyer's client trust account records in the event of dissolution or sale of a law practice. Regardless of the arrangements the partners or shareholders make among themselves for maintenance of the client trust records, each partner may be held responsible for ensuring the availability of these records. For the purposes of these Rules, the terms "law firm," "partner," and "reasonable" are defined in accordance with Rules 1.0(c),(g), and (h) of the Model Rules of Professional Conduct.

#### **RULE 5: SALE OF LAW PRACTICE**

**Upon the sale of a law practice, the seller shall make reasonable arrangements for the maintenance of records specified in Rule 1.**

## REPORT

### **Overview**

The Model Rule on Financial Recordkeeping, adopted in February 1993, delineates the types of records that lawyers must maintain to satisfy the requirements in Rule 1.15 of the Model Rules of Professional Conduct. Specifically, Model Rule 1.15 requires a lawyer to preserve "complete records" with respect to a lawyer's client trust accounts and to "render a full accounting" for the receipt and distribution of trust property, but it does not include practical guidance to the lawyer on the maintenance of these records. The Model Rule on Financial Recordkeeping provided uniform and minimal standards for compliance with these fiduciary obligations and for establishing basic accounting control systems. See, Appendix A, attached.

Every United States jurisdiction has adopted the requirement of Model Rule 1.15 that a lawyer maintain "complete records." Twenty-eight jurisdictions have additional rules or comments outlining the types of records that must be maintained; an additional five jurisdictions direct lawyers to the ABA Model Rule on Financial Recordkeeping as a guide for recordkeeping requirements.

There have been many changes in banking laws and practices since the adoption of the Model Rule on Financial Recordkeeping. The Check Clearing for the 21<sup>st</sup> Century Act ("Check 21"), 12 U.S.C. §5001 et. seq., was adopted in 2003 and allows banks to use electronic images of checks as a substitute for canceled checks. In addition, many merchants now convert paper checks into electronic images and the original checks are often destroyed. Most jurisdictional rules, and the current ABA Model Rule on Financial Recordkeeping, require lawyers to maintain the original canceled checks. Accordingly, lawyers are inadvertently running afoul of their jurisdiction's rules of professional conduct. This resolution eliminates this danger for lawyers by defining what records a lawyer must maintain to satisfy the "complete records" requirement of Rule 1.15 and how those records must be maintained.

Along with changes to banking practices through "Check 21," methods of banking have kin and s conically, wire transfers or electronic transfers of funds have become more prevalent. This form o an mg presents a special set of problems for lawyers with trust accounts because there is often no discernible paper trail to the transaction. Records of these transactions can be found as part of the lawyer's monthly statement or through the lawyer's online banking system, but banks do not provide specific confirmation of electronic transactions as a matter of course. Lawyers must be proactive in securing the necessary records for these transactions.

This resolution addresses a lawyer's recordkeeping requirements following the electronic transfer of funds from client trust accounts and clarifies who can authorize transactions from client trust accounts. The resolution also addresses issues related to record maintenance and outlines necessary safeguards that a lawyer must have in place when using electronic record storage systems. Finally, the scope of the Model Rules for Client Trust Account Records has been clearly defined and the structure simplified.

## **Title and Structure**

A goal of any ABA Model Rule is to serve as a guide to individual jurisdictions in attaining the highest standards in the practice of law. Model Rules should be clearly structured, focused, and provide easy to follow instructions to lawyers. The Model Rules are now organized into five separate Rules. This new organization increases the readability of the Model Rules and the associated comments.

The Model Rule on Financial Recordkeeping was adopted as a guideline for lawyers to follow in satisfying the "complete records" requirement of Model Rule 1.15 when the lawyer is handling the "property of clients or third persons." The requirements contained within the Model Rule were meant to primarily address the lawyer's handling of client trust accounts or money held in trust by the lawyer. The new Model Rules for Client Trust Account Records more accurately reflect the intended scope.

### **Rule 1: Recordkeeping Generally**

New Rule 1 and its supporting comments address general recordkeeping requirements for all lawyers holding client funds. Many of the provisions remain unchanged from what was formerly Section A of the Model Rule on Financial Recordkeeping. The substantive changes to this section focus on advances in banking practices that have occurred since the Model Rule on Financial Recordkeeping was adopted.

"Check 21" was adopted to enable banks to process more checks electronically by allowing them to capture a picture of the front and back of a check along with the associated payment information and transmit that information electronically. This process eliminates the need for banks to move the actual paper check from bank to bank for processing because the captured image of the check becomes a "substitute check" and can be processed electronically. As a result of these electronic images, banks are now allowed to provide either the original canceled check or the "substitute check" to the account holder. Accordingly, the lawyer will either receive a canceled check, a "substitute check," or have access to an electronic image of the check through the bank's on-line system.

New Rule 1 specifically includes substitute checks as an alternative to pre-numbered canceled checks. The current Model Rule requires a lawyer to maintain the canceled check or its equivalent. Although a substitute check is legally the same as a canceled check, the addition of specific language eliminates the risk of disciplinary agencies finding a lawyer maintaining substitute checks in violation of the jurisdiction's rules.

The current Model Rule lacks any specific provisions for the maintenance of records following the electronic transfer of funds. While many individual jurisdictions have adopted provisions to cover the increase in electronic banking mechanisms, most jurisdictions still mirror the ABA Model Rule. New Rule 1 and its supporting comments seek to provide specific guidelines for securing the authorization for electronic transfers and for maintaining the necessary accounting information to satisfy the requirements of Model Rule 1.15.

New Rule 1 outlines the specific recordkeeping requirements for any electronic transfer of funds from a client trust account. Comments 3 and 4 delineate the many environments in

which an electronic funds transfer or electronic check conversion can occur (e.g. wire transfers, electronic transfers of funds, and automatic clearing house (ACH) transactions). Electronic fund transfers are assumed to carry a greater risk of abuse than paper check withdrawals. Therefore, lawyers should maintain detailed information regarding each electronic transfer and be especially vigilant in complying with Rule 1(h).

## **Rule 2: Client Trust Account Safeguards**

Rule 2 (formerly Section B) and its supporting comments address the minimum safeguards that must be in place with respect to client trust accounts. The vast majority of jurisdictions allow a nonlawyer employee to have access to and authorize transactions from a client trust account. While a lawyer should limit client trust account access and authorization, new Rule 2(a) allows an employee under the direct supervision of a lawyer to authorize transactions on a client trust account. Such authorization should be limited and the lawyer should closely monitor all transactions from client trust accounts. If a lawyer grants authorization privileges to nonlawyer employees, the lawyer remains personally and professionally liable for all transactions. See, Rule 5.1 (Responsibility of Partners, Managers, and Supervisory Lawyers) and Rule 5.3 (Responsibilities Regarding Non-lawyer Assistants) of the Model Rules of Professional Conduct.

## **Rule 3: Availability of Records**

The lawyer's client trust account records may be maintained by electronic, photographic, computer or other media or in paper format at the lawyer's office or at an off-site storage facility. Regardless of which record storage option is chosen, the records must be readily accessible to the lawyer and the lawyer must be able to produce and print them upon request.

Many lawyers are now using third-party storage systems to store their files. Prior to using third-party or, internet based file storage, the lawyer must ensure that the company has established reasonable procedures to protect client confidentiality and ensure that the files can be accessed by a disciplinary authority, client, or interested third-party, following issuance of a subpoena or other demand for production by a court.

Rule 28, of the Model Rules for Lawyer Disciplinary Enforcement provides for the preservation of a lawyer's client trust account records in the event that the lawyer is transferred to disability inactive status, suspended, disbarred, disappears, or dies.

## **Rule 4: Dissolution of Partnership and Rule 5: Sale of a Law Practice**

It is the responsibility of all partners in a law firm to ensure the proper storage and accessibility of client trust account records. If a proper system is not established prior to the dissolution or sale of a law firm, each partner may be held personally and professionally responsible.

## **Conclusion**

The Model Rules for Client Trust Account Records provide guidelines to lawyers for compliance with the "complete records" requirement of Rule 1.15 of the Model Rules of

Professional Conduct by establishing minimum standards for maintaining a lawyer's financial records. The new Model Rules do not increase the regulatory obligation for lawyers. They seek to eliminate the risk of noncompliance by lawyers with client trust accounts in banks using "substitute checks" or electronic imaging of checks; to clarify the recordkeeping requirements for lawyers making electronic fund transfers; and to clarify record storage requirements. The new Model Rules accommodate current standards of practice while continuing to protect the interests of clients.

Respectfully submitted,  
Hon. Daniel J. Crothers, Chair  
Standing Committee on Client Protection  
August 2010

	10-11 Actual	11-12 Actual	12-13 Budget	12-13 Projected Actual	13-14 Proposed Budget
<b>Real Prop Probate &amp; Trust Revenue</b>	1,014,914	807,995	887,246	883,567	972,467
31431 Dues	460,550	464,700	450,000	460,000	560,040 *
31432 Affiliate Dues	2,750	2,350	2,000	2,250	3,000
31433 Dues-Retained TFB Ge	(160,690)	(163,642)	(161,975)	(161,000)	(163,345)
32191 CLE Courses	205,449	133,629	214,500	180,000	175,000
32293 Section Differential	30,115	35,582	30,000	30,000	30,000
34704 Actionline Advertisi	21,550	19,740	15,000	15,000	15,000
35003 Ticket Events	72,914	0	0	0	0
35201 Sponsorships	197,724	168,517	175,000	175,000	170,000
35603 Bd/Council Mtg Regis	59,907	159,492	132,000	157,000	160,000
38499 Investment Allocatio	124,645	(12,373)	30,721	25,317	22,772
<b>Real Prop Probate &amp; Trust Expense</b>	831,045	923,953	978,206	833,210	1,068,412
71001 Telephone/Direct	1,150	1,346	1,375	1,150	1,944
71005 Internet Charges	760	579	850	0	660
51101 Employee Travel	4,927	7,400	7,200	5,950	6,480
36998 Credit Card Fees	2,886	3,686	3,800	3,800	3,800
81411 Promotional Printing	1	60	0	0	0
84001 Postage	2,759	1,270	3,000	1,700	1,500
84002 Printing	377	192	1,500	260	250
84006 Newsletter	42,654	34,578	43,000	43,000	43,000
84009 Supplies	54	136	300	170	200
84010 Photocopying	405	192	500	180	150
84015 Officers Conference	610	327	5,000	800	700
84016 Scrivener	0	0	5,000	0	10,000
84051 Officers Travel Expe	2,362	1,838	3,000	1,500	3,000
84054 CLE Speaker Expense	2,216	4,785	4,500	3,600	4,000
84101 Committee Expenses	67,392	66,784	80,000	80,000	85,000
84102 Public Info & Websit	0	500	0	0	30,000
84106 Realtor Relations	3,150	4,000	5,000	4,000	4,000
84107 Diversity Initiative	2,234	2,550	25,000	15,000	15,000
84111 At Large Member Prog	0	0	5,500	0	5,500
84115 Entertainment	18,275	0	0	0	0
84201 Board Or Council Mee	411,126	501,289	440,000	440,000	475,000
84216 Strategic Planning M	5,320	0	1,000	0	5,000
84238 Council Mtg Recreati	49,384	8,112	0	0	0
84239 Hospitality Suite	14,967	14,841	25,000	16,000	20,000
84279 Council Members Hand	2,055	1,975	3,500	2,800	2,000
84310 Law School Liaison	138	0	7,500	3,000	5,000
84322 Fellowships-Exc Cou	8,207	9,630	10,000	10,000	10,000

	10-11 Actual	11-12 Actual	12-13 Budget	12-13 Projected Actual	13-14 Proposed Budget
84422 Website	46,898	45,038	50,000	46,000	85,000
84501 Legislative Consulta	100,000	110,000	110,000	110,000	110,000
84503 Legislative Travel	14,424	14,116	20,000	15,000	20,000
84524 Memorial Tributes	0	0	500	400	500
84701 Council Of Sections	300	0	300	300	300
84991 Special Projects	0	4,156	0	0	0
84998 Operating Reserve	0	0	88,019	0	97,128 **
84999 Miscellaneous	0	178	500	100	300
85037 Rfd Sponsorship	0	50,470	0	0	0
85064 Service Recognition	5,230	1,949	6,800	6,000	5,000
85085 Comp Book Expense	0	13,457	0	0	0
88241 Outline Prt-Inhouse	0	27	0	0	0
86431 Meetings Administrat	10,777	9,267	10,277	12,500	9,000
86543 Graphics & Art	10,007	9,225	10,285	10,000	9,000
Beginning Fund Balance	1,024,000	1,070,640	1,034,020	843,909	796,432
21001 Fund Balance	1,024,000	1,070,640	1,034,020	843,909	796,432

\* Budget line item 31431 assumes an increase of \$10 which is subject to consideration and approval by the Executive Council at a later meeting.

\*\* The Florida Bar (per Standing Board Policy) requires each Section to budget an "Operating Reserve" for use during budget amendments or shortfalls, in accordance with their annual expenses.

	10-11 Actual	11-12 Actual	12-13 Budget	12-13 Projected Actual	13-14 Proposed Budget
<b>Legislative Update Revenue</b>	50,867	66,542	54,250	54,500	55,000
32001 Registrations	0	0	0	0	0
32006 Live Web Cast	11,500	13,250	12,500	12,500	12,000
32010 Legal Span On-line	2,177	9,002	2,500	4,500	4,500
32205 Compact Disc	16,215	20,680	16,250	16,250	16,000
32207 DVD	5,875	8,460	7,500	7,500	7,500
32301 Course Materials	2,600	2,200	3,000	2,500	2,500
35101 Exhibit Fees	12,500	12,950	12,500	11,250	12,500
<b>Legislative Update Expense</b>	83,106	74,032	93,758	96,144	86,039
61201 Equipment Rental	9,200	9,556	10,000	15,295	12,000
51101 Employee Travel	993	621	2,472	800	1,084
36998 Credit Card Fees	669	778	720	720	780
75102 1st Class & Misc Mai	34	26	42	25	25
75401 Express Mail	728	558	802	500	300
81411 Promotional Printing	0	249	500	0	50
81412 Promotional Mailing	620	0	650	0	0
84001 Postage	49	275	320	47	50
84002 Printing	0	26	89	0	0
84012 Registration Support	5,079	5,108	5,500	5,265	5,200
84061 Reception	494	659	1,250	3,132	2,100
84062 Luncheons	23,333	22,221	25,000	24,507	22,000
84254 Speaker Gifts	1,591	885	1,800	2,562	1,600
84258 Web Services	5,025	4,685	5,000	5,000	5,000
84999 Miscellaneous	0	0	50	0	0
88230 Speakers Expense	1,319	1,168	1,500	0	0
88231 Speakers Travel	0	328	0	0	0
88233 Speakers Hotel	4,062	3,745	4,500	4,000	4,200
88239 Speakers Other Exp	24	12	150	280	200
88241 Outline Prt-Inhouse	92	871	1,000	556	400
88242 Outline Prt-Contract	11,403	8,809	10,000	8,500	8,600
88252 Course Credit Fee	150	150	150	150	150
88265 Refreshment Breaks	4,309	1,071	5,000	6,840	5,200
88269 Breakfast	7,328	10,824	9,500	11,060	10,500
88281 A/V Ctr Dup/Prod	0	0	50	0	0
86432 Time Taping Editing	4,487	0	4,500	4,400	4,500
86532 Advertising News	1,614	0	1,736	1,250	1,500
86543 Graphics & Art	503	1,292	1,477	144	350
86623 Registrars	0	115	0	1,111	250

	10-11 Actual	11-12 Actual	12-13 Budget	12-13 Projected Actual	13-14 Proposed Budget
<b>RPPTL Convention Revenue</b>	41,071	54,032	91,000	54,500	57,500
32001 Registrations	30,896	41,132	33,000	42,000	45,000
35101 Exhibit Fees	0	0	13,000	12,500	12,500
35201 Sponsorships	10,175	12,900	45,000	0	0
<b>RPPTL Convention Expense</b>	145,289	158,244	120,421	110,690	113,774
61201 Equipment Rental	17,617	8,629	15,000	10,000	11,000
51101 Employee Travel	1,944	1,100	2,092	1,860	2,744
36998 Credit Card Fees	598	772	980	780	800
84001 Postage	0	0	180	0	0
84002 Printing	68	57	230	50	30
84061 Reception	0	0	10,000	10,000	10,000
84062 Luncheons	0	0	12,000	12,000	12,000
84069 Dinners	0	0	50,000	50,000	50,000
84110 Exhibitor Fees	0	0	1,800	0	0
84115 Entertainment	22,284	10,484	5,000	7,500	8,000
84201 Board Or Council Mee	0	17,676	0	0	0
84253 Sleeping Rooms	0	504	1,800	0	0
84999 Miscellaneous	0	310	500	0	0
88231 Speakers Travel	0	188	0	0	0
88233 Speakers Hotel	0	179	0	0	0
88239 Speakers Other Exp	0	194	0	0	0
88252 Course Credit Fee	0	150	0	0	0
88262 Meeting Meals	102,684	113,660	0	0	0
88263 Meeting Hospitality	0	0	8,000	4,200	3,700
88265 Refreshment Breaks	0	0	6,000	5,200	6,000
88269 Breakfast	0	0	6,500	6,500	6,500
86532 Advertising News	0	1,213	0	0	0
86543 Graphics & Art	94	846	339	300	500
86623 Registrars	0	2,282	0	2,300	2,500

**Section Budget Summary  
13-14**

**Section:**        Real Prop, Probate & Trust Law

**Date Approved by  
Executive Council:**

**Date Budget  
Published to  
Members:**

**Date of  
Audit/Actuals Info:**

**Center:**        RPGNRL

**Staff Liaison:**    Yvonne Sherron

	<u>10-11 Actual</u>	<u>11-12 Actual</u>	<u>12-13 Budget</u>	<u>12-13 Projected Actual</u>	<u>13-14 Proposed Budget</u>
<b>Beginning Fund Balance</b>	1,024,000	1,070,640	1,034,020	843,909	796,432
<b>Net Operations</b>	183,869	-115,958	-90,960	50,357	-94,824
<b>Net Operations (from other centers)</b>	<u>-137,228</u>	<u>-110,784</u>	<u>-68,929</u>	<u>-97,834</u>	<u>-87,313</u>
<b>Ending Fund Balance</b>	1,070,641	843,898	874,131	796,432	614,295

**REAL PROPERTY,  
PROBATE &  
TRUST LAW  
SECTION**



**THE  
FLORIDA  
BAR**

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August 23, 2012

**VIA ELECTRONIC MAIL**

Professional Ethics Committee  
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Attn: Elizabeth Clark Tarbert  
Ethics Counsel  
[eto@flabar.org](mailto:eto@flabar.org)

Attn: Loretta C. O'Keeffe, Esquire  
Subcommittee Chair  
[lokeeffe@gibblaw.com](mailto:lokeeffe@gibblaw.com)

Re: Request for Ethics Opinion Regarding Requirements of  
Section 626.8473(8), Florida Statutes, for a Separate Trust  
Account for Transactions when an Attorney Serves as a  
Title or Real Estate Settlement Agent

Dear Members of the Professional Ethics Committee:

In response to various inquiries from members of the Real Property, Probate and Trust Law Section of The Florida Bar ("Section"), the Section has considered whether s. 626.8473(8), Florida Statutes, adopted by the 2012 Legislature, requires legislative clarification or guidance from The Florida Bar. The legislation, which was adopted in response to the recommendations of the 2009 Title Insurance Study Advisory Council, added the following provision which became effective July 1, 2012:

An attorney shall deposit and maintain all funds received in connection with transactions in which the attorney is serving as a title or real estate settlement agent into a separate trust account that is maintained exclusively for funds received in connection with such transactions and permit the account to be audited by its title insurers, unless maintaining funds in the separate account for a particular client would violate applicable rules of The Florida Bar.

Some Section members have inquired as to whether this statutory provision requires a law firm to establish a "separate trust account" for each real estate transaction and are concerned about the practical implications of doing so. Other practitioners read the provision to require one separate trust account for *all* real estate transactions, but see the title insurers' ability to audit the account as an ethical violation. Others construed the language, "unless maintaining funds in the separate account for a particular client would violate applicable rules of The Florida Bar," as acquiescing in whatever position The Florida Bar takes on the ethical issue. Several have suggested that the Section request an Ethics Opinion on this issue from The Florida Bar.

As you know, The Florida Bar's Professional Ethics Committee issued Ethics Opinion 93-5 in 1994, in which it concluded that "[a]n attorney who is an agent for a title insurance company may not permit the title insurer to audit the attorney's general trust account without consent of the affected clients. The attorney, however, need not obtain client consent before permitting the insurer to audit a special trust account used exclusively for transactions in which the attorney acts as the title or real estate settlement agent."

The issue posed is whether an audit of a separate trust account by a title insurer under s. 626.8473(8) violates Rule 4-1.6, Rules Regulating The Florida Bar. Rule 4-1.6, which imposes the duty of confidentiality, ordinarily obligates an attorney to refrain from voluntarily revealing any "information relating to representation of a client" unless: (1) the client has given informed consent; or (2) the disclosure falls into one of the exceptions articulated in Rule 4-1.6. The Professional Ethics Committee has previously determined that trust account records are confidential under Rule 4-1.6 (Florida Ethics Opinion 72-3) and that a client's identity may be confidential (Florida Ethics Opinions 77-25 and 62-24).

Although an audit of an attorney's *general* trust account is permitted only if the affected clients have consented, Ethics Opinion 93-5 allows audit of a *special* trust account pursuant to an exception in Rule 4-1.6(c)(1) that authorizes an attorney to disclose confidential information "to serve the client's interest unless it is information the client specifically requires not to be disclosed." In that Opinion, the Professional Ethics Committee concluded that:

. . . audits by title insurer insurance underwriters are necessary to ensure the safety of the funds deposited in the special trust account and thus facilitate a satisfactory conclusion for those whose funds are placed in the account. Consequently, if a special trust account is used exclusively for transactions in which the attorney is acting as the title or real estate settlement agent, the attorney ethically may permit the proposed audits unless the attorney has been specifically directed otherwise by the client.

After due consideration, the Section's Executive Council unanimously approved requesting the Professional Ethics Committee to issue an Ethics Opinion reaffirming opinion 93-5 and specifically clarifying the following matters:

1. That s. 626.8473(8), Florida Statutes (2012), which requires attorneys to "deposit and maintain all funds received in connection with transactions in which the attorney is serving as a title or real estate settlement agent into a separate trust account and permit the account to be audited by its title insurers," is consistent with Ethics Opinion 93-5 and the exemption in Rule 4-1.6(c)(1). If a separate or special trust account is used exclusively for transactions in which the attorney is acting as the title or real estate settlement agent for clients, the attorney may ethically permit the proposed audits by the title insurers with whom he or she has a relationship unless the attorney has been specifically directed otherwise by the client; and clarifying that the attorney has no obligation to affirmatively disclose such right to the client.

2. That the attorney's obligation to maintain a separate or special trust account under s. 626.8473(8), Florida Statutes (2012), does not require each individual attorney to maintain his or her own trust account, but that the obligation may be satisfied through the maintenance of one or more law firm trust accounts. While each individual attorney has a statutory duty to assure compliance, compliance may be achieved through maintenance of a firm special trust account that is subject to title insurer audit.

3. That the Committee does not interpret s. 626.8473(8), Florida Statutes (2012), to require the maintenance of a separate or special trust account for each client, for each transaction, or for each title insurer, although there is no prohibition on maintaining such multiple trust accounts should the attorney or law firm choose to do so.

4. That where the attorney is serving as a title or real estate settlement agent, escrow funds from multiple clients may properly be deposited into a single special trust account, if not contrary to other statutory or regulatory requirements, with the account being subject to audit by any or all of title insurers with whom the attorney or law firm maintains a relationship.

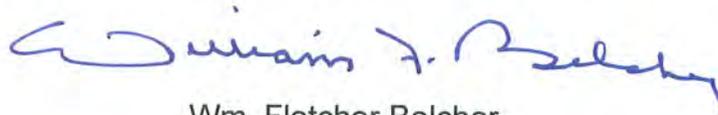
5. That to the extent that funds received in connection with a title or real estate transaction are shown on the closing statement for the transaction, such funds must be deposited and maintained in a special trust account in accordance with s. 626.8473(8). In most real estate transactions, all parties, opposing counsel, and real estate brokers are privy to the closing statement and receive a copy of it. As a result, neither the information on a closing statement, nor the receipts and disbursements from a special trust account in accordance with a closing statement, are confidential. In such cases, permitting an audit to confirm that disbursements were made in accordance with the approved closing statement does not violate the duty of confidentiality, and there should be no affirmative duty to advise clients of the option to insist on the use of an

Professional Ethics Committee  
August 23, 2012  
Page 4

unaudited account. Where other facts or considerations suggest the potential advisability of a different course of action, the attorney should advise his or her client in accordance with the attorney's best professional judgment. Furthermore, the attorney should not be required to disclose the attorney's fees on the closing statement unless expressly required by law.

If you have any questions regarding any of our recommendations, comments or requests, please contact the RPPTL Section's Chair-Elect, Peggy Rolando, at (305) 379-9144. Thank you for your consideration of this matter.

Sincerely yours,



Wm. Fletcher Belcher  
RPPTL Section Chair

Cc: Lynwood Arnold, Esq.  
Gwynne A. Young, Esq.  
Laird A. Lile, Esq.  
Sandra F. Diamond, Esq.  
Adele I. Stone, Esq.  
Roland "Chip" Waller, Esq.  
Margaret A. Rolando, Esq.  
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August 15, 2012

### VIA EMAIL

TO: Margaret Ann Rolando  
Chair-Elect  
Real Property, Probate and Trust Law

Re: *Out of State Division – Multi-Jurisdictional Effort*

Dear Margaret:

Congratulations on your recent election as Chair-Elect of the Real Property, Probate and Trust Law Section of The Florida Bar. On behalf of The Florida Bar's Out-of-State Division, we look forward to working with you during your upcoming term. The objectives of the Out-of-State Division ("OOSD") include, among other initiatives: (i) establishing a network of out-of-state members; and, (ii) developing and maintaining proper professional relationships between in-state and out-of-state members.

Our Division has recently commenced an effort to provide *out-of-state* contacts for our *in-state* Florida Bar colleagues. Many of our members are Florida attorneys, who reside outside of Florida. As Florida Bar licensees, we are familiar with the laws of both Florida and the state or states where our practices are domesticated. Therefore, our members are uniquely positioned to assist Florida lawyers with information about local practices, customs, legal questions, and referrals in other jurisdictions.

The OOSD can be a powerful resource for the various Sections of the Bar. In the past, members of our Executive Council have informally, but effectively, responded to requests from Florida lawyers requesting assistance in foreign jurisdictions. This current program is intended to better formalize the OOSD's efforts to collaborate with in-state Florida lawyers, and to develop more constructive professional relationships with our in-state colleagues. However, this program is not a "lawyer referral

service” administered by the Bar or other local bar associations, as set forth in Rule 8-1.1, *et seq.* of the Rules Regulating The Florida Bar.

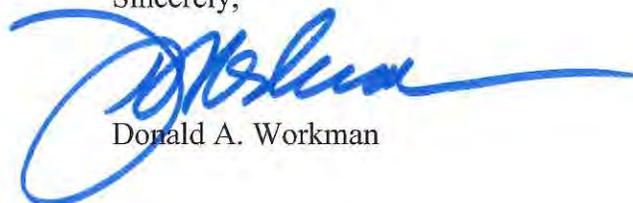
Our Division’s current list of members is available in an electronic format at the following link, which can be found at The Florida Bar’s Homepage: <http://www.floridabar.org/names.nsf/SECT?openview&Restrict ToCategory=OS>. Our members are listed by name alphabetically, and by their city of residence. We hope to upgrade access to our membership information to include the state and practiced areas for each member listed. In the event that you need to locate an out-of-state member, and cannot do so on The Florida Bar website, please feel free to call any of the following OOSD Executive Council members, who can assist you further.

E. Duffy Myrtetus, Esq. Kaufman & Canoles, PC Three James Center, S-1206 1051 E. Cary Street Richmond, VA 23219 (804) 771-5750 <a href="mailto:edmyrtetus@kaufman.com">edmyrtetus@kaufman.com</a>	Donald A. Workman, Esq. Baker & Hostetler LLP 1050 Connecticut Ave., N.W. Suite 1100 Washington, D.C. 20036 (202) 861-1602 <a href="mailto:dworkman@bakerlaw.com">dworkman@bakerlaw.com</a>	Mindi L. Wells, Esq. Supreme Court of Ohio 65 South Front Street 7 <sup>th</sup> Floor Columbus, OH 43215 (614) 387-9500 <a href="mailto:mindl.wells@sc.ohio.gov">mindl.wells@sc.ohio.gov</a>
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Our members, who participate in this program, will respond to requests for information submitted. Our members will attempt, on an inquiry-by-inquiry basis, to discuss and/or respond to your request. You and the participating OOSD member are under no obligation to go beyond the initial contact. In the event that the OOSD member undertakes any engagement or legal services, it must in all instances be done pursuant to a written engagement agreement, and shall in all respects be completely independent of the Division or this program. All responses shall be made by the individual participating OOSD members, without any direction, oversight or participation by the Division. We also hope that this program will provide the impetus for developing better reciprocal professional relationships and contacts between our in-state Florida colleagues and our Division’s members.

If our Division can be of assistance to your Section’s/Division’s members in any other way, please don’t hesitate to contact me.

Sincerely,



Donald A. Workman

cc: Mindi Wells, Esq., *President-elect*

## RPPTL 2012-2013 CLE Calendar

Date	Seminar	#	Location	Program Chair	CLE Committee Liaison
July 25, 2012	Power of Attorney	1536	Breakers*		
July 26-28, 2012	Legislative Update	1425	Breakers*		
August 28, 2012	What RPPTL Lawyers Need to Know About E-Service and E-Filing		12:00-1:00 webinar	Rohan Kelley and Laird Lile	Rob Freedman
September 13-16, 2012	EC Meeting		Key Biscayne		
September 21, 2012	Alternate Dispute Resolution Considerations for Real Property, Construction, Probate and Trust Law Practices	1507	Buena Vista Palace, ORL*	Deborah Bovarnick Mastin and David Carlisle	Laura Sundberg
October 5-6, 2012	FLEA Probate Team		Orlando		
November 15 - 18, 2012	EC Meeting		Asheville, NC		
November 30, 2012	Joint Estate Tax/Asset Protection	1509	Tampa*	Elaine Bucher and Brian Sparks	Sarah Butters
January 25, 2013	RPPTL/Environmental Land Use	1455	Tampa*	Anne Pollack	Brian Leebrick
February 7-10, 2013	EC Meeting		Tallahassee		
February 15-16, 2013	Real Property Certification Review Course	1450	Orlando*	Ted Connor	Jennifer Tobin
February 21, 2013	Probate Law	1510	Tampa*	Tae Kelley Bronner	Rob Freedman
March 7-9, 2013	Construction Law Certification Review Course	1452	Orlando	Lee Weintraub	Brian Leebrick
March 7-9, 2013	6th Annual Construction Law Institute	1453	Orlando	Cary Wright	Brian Leebrick
April 5, 2013	Condo Law	1456	Orlando*	Jane Cornett	Rob Freedman
April 5-6, 2013	Wills, Trust & Estate Certification Review Course	1451	Orlando*	Richard Gans	Laura Sundberg
April 12, 2013	Real Property Litigation	1506	Tampa*	Marty Awerbach	Jennifer Tobin
April 26, 2013	Real Property Finance and Lending		Tampa*	Bill Sklar	
May 9-11, 2013	Fund Assembly				
May 10, 2013	Trust & Estate Symposium	1460	Tampa*	Shane Kelley	Sarah Butters
May 23-26, 2013	EC Meeting		St. Petersburg		
May 24, 2013	Convention Seminar	1511	St. Pete	Katherine Frazier	Jennifer Tobin
June 14-15, 2013	Attorney/Trust Officer Liaison Conference	1462	Breakers	Jack Falk	Sarah Butters

\*Webcast & Live

→ non-RPPTL program

→ Executive Council meeting