Real Property, Probate and Trust Law Section
Executive Council Meeting
Hawks Cay Resort
Duck Key, Florida
June 4, 2022
10:30 am

Agenda

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

II. **Secretary's Report** — *W. Cary Wright, Secretary*

1. Motion to approve the minutes of the April 2, 2022 meeting of the Executive Council held at the AC Marriott Hotel in Tallahassee, FL. **p. 8**

2. Meeting Attendance.

III. **Chair's Report** — *Robert S. Swaine, Chair*

1. Thank you to our Sponsors!

2. Introduction and comments from Sponsors. **p. 17**

3. Milestones.

4. Interim Actions Taken by the Executive Committee. **p. 20**

5. General Comments of the Chair.

IV. **Liaison with Board of Governors Report** — *Scott Westheimer*
President Elect Designate

V. **Chair-Elect's Report** — *Sarah S. Butters, Chair-Elect*

1. 2022-2023 Executive Council meetings. **p. 48**
2. 2022-2023 Leadership Appointments **p. 49**

VI. **Treasurer's Report** — *Jon Scuderi, Treasurer*

1. Statement of Current Financial Conditions. **p. 59**

VII. **Director of At-Large Members Report** — *Steven H. Mezer, Director*

VIII. **CLE Seminar Coordination Report** — *Sancha Brennan (Probate & Trust) &*

Lee Weintraub (Real Property), Co-Chairs

1. Upcoming CLE programs and opportunities. **p. 60**

IX. Legislation Committee – *Wilhelmina Kightlinger and Larry Miller, Co-Chairs*

Action Item:

1. **Renewal of Legislative Positions. p. 61**

   The Legislation Committee moves that the following be approved by vote of the Section's Executive Council:

   The recommendations of the Legislation Committee of the RPPTL Section regarding the renewal of the Section's standing legislative positions, as submitted to the Section's Executive Council at its meeting on June 4, 2022, be and are hereby approved.

X. General Standing Division Report — *Sarah S. Butters, Chair-Elect*

Information Items:

1. **Liaison with TFB Pro Bono committee** – *Lorna Brown-Burton*
2. **Ad Hoc Communications Committee** – *Mike Hargett, Chair*
3. **Ad Hoc Revocable Termination on Death Committee** – *Steve Kotler and Chris Smart, Co-Chairs*
4. **Fellows –** *Chris Sajdera, Chair*
5. **Professionalism and Ethics Committee –** *Andrew B. Sasso, Chair*

   Ethics Podcast.

XI. Real Property Law Division Report — *S. Katherine Frazier, Division Director*

General Comments and Recognition of Division Sponsors.

Action Item:

1. **Title Issues and Standards Committee** - *Rebecca L.A. Wood, Chair*

   Motion to approve revisions to Chapter 17 – Marketable Record Title Act (MRTA) of the Uniform Title Standards. **p. 88**

Information Item:

1. **Real Property Finance and Lending Committee** – *Richard S. McIver, Chair*

   Consideration of legislation revising Section 714.16, *Florida Statutes,* to address several practical issues with the Uniform Commercial Receivership Act including providing for right of redemption, customary closing costs, and other changes which will cause receivership sales to be marketable and insurable. **p. 119**

2. **Real Estate Leasing Committee** - *Brenda B. Ezell and Christopher A. Sajdera, Co-Chairs*

   Consideration of opposition legislation authorizing the use of security deposit replacement products (a/k/a fees in lieu of security deposits) unless such legislation includes consumer protection provisions that safeguard tenants from predatory practices. **p. 153**

3. **Real Property Litigation Committee** – *Michael V. Hargett, Chair*

   Consideration of legislation expanding the finality of foreclosure judgments provided by Section 702.036, *Florida Statutes (2021),* to include liens other than mortgage foreclosures, such as community association liens and construction liens. Additionally, it will provide prevailing party attorneys' fees in post-foreclosure litigation for redress of wrongful foreclosure judgments brought by junior lienholders improperly foreclosing senior liens. This legislation restores the legitimate business expectations of the citizens of the State of Florida that were upset by Wells Fargo Bank, N.A. v. Tan., 320 So. 3d 782 (Fla. 4th DCA 2021). **p. 161**

XII. Probate and Trust Law Division Report — *John Moran, Division Director*

General Comments and Recognition of Division Sponsors.

Information Item:

1. **Probate Law and Procedure Committee** – *Travis Hayes, Chair*

   The Johnson vs. Townsend Fix: Proposed legislation clarifies existing Florida law by making targeted modifications to certain provisions of the Florida Probate Code governing creditors' claims, and the related definition of the term "claim," to conform with the existing provisions of the Florida Uniform Disposition of Community Property Rights at Death Act. **p.172**

2. **Joint Proposal - Estate and Trust Planning Committee** *(Robert Lancaster, Chair)* **& Probate Law and Procedure Committee** *(Travis Hayes, Chair)*

Proposed legislation amending Fla. Stat. § 198.41 to suspend those provisions which govern the imposition, reporting, and collection of the Florida Estate Tax. **p. 184**

XIII. **Probate and Trust Law Division Committee Reports** — *John Moran, Division Director*

1. **Ad Hoc ART Committee** — Alyse Reiser Comiter, Chair; Jack A. Falk and Sean M. Lebowitz, Co-Vice Chairs
2. **Ad Hoc Committee on Electronic Wills** — Angela McClendon Adams, Chair; Frederick "Ricky" Hearn and Jenna G. Rubin, Co-Vice Chairs
3. **Ad Hoc Guardianship Law Revision Committee** — Nicklaus J. Curley, Stacey B. Rubel and David C. Brennan, Co-Chairs; Sancha Brennan, Vice Chair
4. **Ad Hoc Study Committee on Due Process, Jurisdiction & Service of Process** — Barry F. Spivey, Chair; Sean W. Kelley and Shelly Wald Harris, Co-Vice Chairs
5. **Ad Hoc Study Committee on Professional Fiduciary Licensing** — Angela McClendon Adams, Chair; Yoshimi Smith, Vice Chair
6. **Asset Protection** — Michael Sneeringer, Chair; Richard R. Gans and Justin Savioli, Co-Vice-Chairs
7. **Attorney/Trust Officer Liaison Conference** — Cady L. Huss, Chair; Tae Kelley Bronner, Stacey L. Cole (Corporate Fiduciary), Michael Rubenstein, Gail G. Fagan, Mitchell A. Hipsman and Eammon W. Gunther, Co-Vice Chairs
8. **Charitable Planning and Exempt Organizations Committee** — Seth Kaplan, Chair; Kelly Hellmuth and Denise S. Cazobon, Co-Vice-Chairs
9. **Elective Share Review Committee** — Jenna G. Rubin, Chair; Cristina Papanikos and Lauren Y. Detzel, Co-Vice-Chairs
10. **Estate and Trust Tax Planning** — Robert L. Lancaster, Chair; Richard N. Sherrill and Sasha Klein, Co-Vice Chairs
11. **Guardianship, Power of Attorney and Advanced Directives** — Stacy B. Rubel, Chair; Elizabeth M. Hughes, Caitlin Powell and Jacobeli Behar, Co-Vice Chairs
12. **IRA, Insurance and Employee Benefits** — Alfred J. Stashis, Co-Chairs; Charles W. Callahan, III and Rachel B. Oliver, Co-Vice-Chairs
13. **Liaisons with ACTEC** — Elaine M. Bucher, Tami F. Conetta, Thomas M. Karr, Shane Kelley, Charles I. Nash, L. Howard Payne and Diana S.C. Zeydel
14. **Liaisons with Elder Law Section** — Travis Finchum and Marjorie E. Wolasky
15. **Liaisons with Tax Section** — William R. Lane, Jr., Brian Malec and Brian C. Sparks
16. **Liaison with Professional Fiduciary Council** — Darby Jones
17. **OPPG Delegate** — Nick Curley
18. **Principal and Income** — Edward F. Koren and Pamela O. Price, Co-Chairs, Joloyon D. Acosta and Keith B. Braun, Co-Vice Chairs

19. **Probate and Trust Litigation** — J. Richard Caskey, Chair; Angela M. — Adams, James R. George and R. Lee McElroy, IV, Co-Vice Chairs
20. **Probate Law and Procedure** — M. Travis Hayes, Chair; Benjamin F. Diamond, Cady Huss, Cristina Papanikos and Theodore S. Kypreos, Co-Vice Chairs
21. **Trust Law** — Matthew H. Triggs, Chair; Jennifer J. Robinson, David J. Akins, Jenna G. Rubin, and Mary E. Karr, Co-Vice Chairs
22. **Wills, Trusts and Estates Certification Review Course** — Rachel Lunsford, Chair; J. Allison Archbold, Eric Virgil, and Jerome L. Wolf, Co-Vice Chairs

XIV. **Real Property Law Division Committee Reports** — *S. Katherine Frazier, Division Director*

1. **Attorney Banker Conference** — E. Ashley McRae, Chair; Kristopher E. Fernandez, R. James Robbins, Jr. and Salome J. Zikakis, Co-Vice Chairs
2. **Commercial Real Estate** — Jennifer J. Bloodworth, Chair; E. Ashley McRae, Eleanor W. Taft and Alexandra D. Gabel, Co-Vice Chairs
3. **Condominium and Planned Development** — Joseph E. Adams and Margaret "Peggy" A. Rolando, Co-Chairs; Alexander B. Dobrev and Allison L. Hertz, Co-Vice Chairs
4. **Condominium and Planned Development Law Certification Review Course** — Jane L. Cornett and Christine M. Ertl, Co-Chairs; Allison L. Hertz, Vice Chair
5. **Construction Law** — Reese J. Henderson, Jr., Chair; Sanjay Kurian, Bruce D. Partington and Elizabeth B. Ferguson, Co-Vice Chairs
6. **Construction Law Certification Review Course** — Elizabeth B. Ferguson, Chair; Gregg E. Hutt and Scott P. Pence, Co-Vice Chairs
7. **Construction Law Institute** — Jason J. Quintero, Chair; Deborah B. Mastin and Brad R. Weiss, Co-Vice Chairs
8. **Development & Land Use Planning** — Colleen C. Sachs, Chair; Jin Liu and Lisa B. Van Dien, Co-Vice Chairs
9. **Insurance & Surety** — Michael G. Meyer and Katherine L. Heckert, Co-Chairs; Mariela M. Malfeld, Vice Chair
10. **Liaisons with FLTA** — Alan K. McCall and Melissa Jay Murphy, Co-Chairs; Alan B. Fields and James C. Russick, Co-Vice Chairs
11. **Real Estate Certification Review Course** — Manuel Farach, Chair; Martin S. Awerbach, Lloyd Granet, Laura M. Licastro and Jason M. Ellison, Co-Vice Chairs
12. **Real Estate Leasing** — Brenda B. Ezell and Christopher A. Sajdera, Co-Chairs; Kristen K. Jaiven, Co-Vice Chair
13. **Real Property Finance & Lending** — Richard S. McIver, Chair; Deborah B. Boyd and Jason M. Ellison, Co-Vice Chairs
14. **Real Property Litigation** — Michael V. Hargett, Chair; Amber E. Ashton, Manuel Farach and Shawn G. Brown, Co-Vice Chairs
15. **Real Property Problems Study** — Anne Q. Pollack, Chair; Susan K. Spurgeon, Adele I. Stone and Brian W. Hoffman, Co-Vice Chairs
16. **Residential Real Estate and Industry Liaison** — Nicole M. Villarroel,

Chair; Louis E. "Trey" Goldman, James A. Marx and Kristen K. Jaiven, Co-Vice Chairs

17. **Title Insurance and Title Insurance Liaison** — Brian W. Hoffman, Chair; Leonard F. Prescott, IV, Jeremy T. Cranford, Christopher W. Smart and Michelle G. Hinden, Co-Vice Chairs
18. **Title Issues and Standards** — Rebecca L.A. Wood, Chair; Robert M. Graham, Karla J. Staker and Amanda K. Hersem, Co-Vice Chairs
19. **American College of Real Estate Lawyers (ACREL) Liaison** — Martin A. Schwartz and William P. Sklar, Co-Chairs
20. **American College of Construction Lawyers (ACCL) Liaison** — George J. Meyer, Chair

XV. General Standing Division Committee Reports — *Sarah S. Butters, General Standing Division Director and Chair-Elect*

1. **Ad Hoc RTOD** — Steve Kotler and Chris Smart, Co-Chairs
2. **Ad Hoc Remote Notarization** — E. Burt Bruton, Jr., Chair
3. **Amicus Coordination** — Kenneth B. Bell, Gerald B. Cope, Jr., Robert W. Goldman and John W. Little, III, Co-Chairs
4. **Budget** — Jon Scuderi, Chair; Tae Kelley Bronner. Linda S. Griffin, and Pamela O. Price, Co-Vice Chairs
5. **CLE Seminar Coordination** — Lee Weintraub and Sancha Brennan, Co-Chairs; Alexander H. Hamrick, Hardy L. Roberts, III, Paul E. Roman (Ethics), Silvia B. Rojas, and Stacy O. Kalmanson, Co-Vice Chairs
6. **Convention Coordination** — Tae Kelley Bronner and Stacy O. Kalmanson, Co-Chairs
7. **Disaster and Emergency Preparedness and Response** — Brian C. Sparks, Chair; Colleen Coffield Sachs and Michael Bedke, Co-Vice Chairs
8. **Fellows** — Christopher A. Sajdera, Chair; Christopher Barr, Bridget Friedman and Angela K. Santos, Co-Vice Chairs
9. **Florida Electronic Filing & Service** — Rohan Kelley, Chair
10. **Homestead Issues Study** — Jeffrey S. Goethe, Chair; Amy B. Beller, Michael J. Gelfand, Melissa Murphy and Jeff Baskies, Co-Vice Chairs
11. **Information Technology & Communication** — Hardy L. Roberts III,Chair; Erin H. Christy, Alexander B. Dobrev, Jesse B. Friedman, Michael A. Sneeringer, Sean Lebowitz, Terrance Harvey and Jordan Haines, Co-Vice Chairs
    A. **Law School Programing** — Johnathan Butler, Chair; Phillip Baumann, Guy Storms Emerich, Kymberlee Curry Smith and Kristine L. Tucker, Co-Vice Chairs
12. **Legislation** — Larry Miller (Probate & Trust) and Wilhemina Kightlinger (Real Property), Co-Chairs; Grier Pressley and Nick Curley (Probate & Trust), Chris Smart, Manuel Farach and Arthur J. Menor (Real Property), Co-Vice Chairs
13. **Legislative Update (2020-2021)** — Brenda Ezell, Chair; Theodore Stanley Kypreos, Gutman Skrande, Jennifer S. Tobin, Kit van Pelt and Salome J. Zikakis, Co-Vice Chairs
14. **Legislative Update (2021-2022)** — Brenda Ezell, Chair; Theodore Stanley

Kypreos, Gutman Skrande, Jennifer S. Tobin, Kit van Pelt and Salome J. Zikakis, Co-Vice Chairs

15. **Liaison with**:
    a. **American Bar Association (ABA)** — Robert S. Freedman, Edward F. Koren, George J. Meyer and Julius J. Zschau
    b. **Clerks of Circuit Court** — Laird A. Lile
    c. **FLEA / FLSSI** — David C. Brennan and Roland D. "Chip" Waller
    d. **Florida Bankers Association** — Mark T. Middlebrook and Robert Stern
    e. **Judiciary** —Judge Mary Hatcher, Judge Hugh D. Hayes, Judge Margaret Hudson, Judge Bryan Rendzio, Judge Mark A. Speiser,; and Judge Michael Rudisill
    f. **Out of State Members** — Nicole Kibert Basler, John E. Fitzgerald, Jr., and Michael P. Stafford
    g. **TFB Board of Governors** — Scott Westheimer
    h. **TFB Business Law Section** — Gwynne A. Young and Manuel Farach
    i. **TFB CLE Committee** — Sancha Brennan
    j. **TFB Council of Sections** — Robert S. Swaine and Sarah Butters
    k. **TFB Pro Bono Legal Services** — Lorna E. Brown-Burton
16. **Long-Range Planning** — Sarah Butters, Chair
17. **Meetings Planning** — George J. Meyer, Chair
18. **Membership and Inclusion** — Annabella Barboza and S. Dresden Brunner, Co-Chairs; Erin H. Christy, Vinette D. Godelia, Jennifer L. Grosso, Tattiana Stahl, and Roger A. Larson, Co-Vice Chairs
19. **Model and Uniform Acts** — Patrick J. Duffey and Richard W. Taylor, Co-Chairs; Adele I. Stone, Chris Wintter, and Benjamin Diamond, Co-Vice Chair
20. **Professionalism and Ethics** — Andrew B. Sasso, Chair; Elizabeth A. Bowers, Alexander B. Dobrev, Rt. Judge Celeste Hardee Muir, and Laura Sundberg, Co-Vice Chairs
21. **Publications (ActionLine)** — Jeffrey Baskies and Michael A. Bedke, Co-Chairs (Editors in Chief); Richard D. Eckhard, Jason M. Ellison, George D. Karibjanian, Keith S. Kromash, Daniel L. McDermott, Jeanette Moffa Wagener, Paul E. Roman, Daniel Siegel, Co-Vice Chairs
22. **Publications (Florida Bar Journal)** — J. Allison Archbold (Probate & Trust) and Homer Duvall, III (Real Property), Co-Chairs; Marty J. Solomon and Mark Brown (Editorial Board — Real Property), Brandon Bellew,Jonathan Galler and Brian Sparks (Editorial Board – Probate & Trust),Co- Vice Chairs
23. **Sponsor Coordination** — Bill Sklar, Chair; Patrick C. Emans, Marsha G. Madorsky, Jason J. Quintero, J. Michael Swaine, Alex Hamrick, Rebecca Bell, and Arlene C. Udick, Co-Vice Chairs
24. **Strategic Planning** —Sarah Butters and Robert Swaine, Co-Chairs
25. **Strategic Planning Implementation** — Robert Freedman, Michael J. Gelfand Michael A. Dribin, Deborah Goodall, Andrew M. O'Malley and Margaret A. "Peggy" Rolando, Co-Chairs

XVI. Adjourn: Motion to Adjourn.

Real Property, Probate and Trust Law Section
Executive Council Meeting
AC Marriott Hotel
Tallahassee, FL
April 2, 2022
9:00 am

Meeting Minutes

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

1. The Chair called the meeting to order at 9:03 a.m. and thanked the General Sponsors and Friends of the Section. He then called David Shanks from Stewart Title to the podium. David thanked everyone for allowing Stewart Title to sponsor the Section. David noted that the sales in his area doubled last year.

II. **Secretary's Report** — *Wm. Cary Wright, Secretary*

1. Meeting Attendance.

Cary Wright presented the minutes of the March 5, 2022 out-of-state meeting in Charleston for approval. A motion was made to approve the minutes, which was seconded. The motion passed unanimously.

III. **Chair's Report** — *Robert S. Swaine, Chair*

1. The Chair recognized and thanked the Section's General sponsors and the Friends of the Section.

General Sponsors

WFG National Title Insurance Co.

Management Planning, Inc.

JP Morgan

Old Republic National Title Insurance Company

Westcor Land Title Insurance

First American Title Insurance Company

Attorneys' Title Fund Services, LLC

Fidelity National Title Group

Stout Risius Ross, Inc.

Guardian Trust

The Florida Bar Foundation

Stewart Title

The Friends of the Section

Business Valuation Analysts, LLC

CATIC

Cumberland Trust

Fiduciary Trust International of the South

Heritage Investment

North American Title Insurance Company

Probate Cash

Title Resources Guaranty Company

Valuation Services, Inc.

Wells Fargo Private Bank

2. Milestones.

Chair Swaine introduced Diana Kellogg and Hilary Stephens and thanked them for their service.

He then congratulated Brenda Ezell on the birth of her grandchild, Maverick Million Norman, Patrick Duffey on the birth of his daughter Lily James, aka "Bean" Duffey, and Amber Ashton on the birth of her grandchild.

Bob Goldman, a long-time Section member and former Chair of the Section was congratulated on being elected Chair of the American College of Trust and Estate Counsel ("ACTEC"). Richard Sherrill, Sancha Brennan, Kelly Hellmuth, and Nick Curley were also welcomed as new ACTEC fellows.

Chair Swaine noted that Adele Stone was recognized at the March Florida Bar Board of Governors' meeting for her time and expertise creating the structure for a Florida Bar Foundation's special fund memorializing past Bar President and past RPPTL Section member Alan Bookman.

Mike Dribin's was wished a Happy Birthday.

Chair Swaine then recognized Jim Russick of Old Republic Title. Jim thanked the Section for its service to the profession and for allowing Old Republic Title to sponsor the Section.

Mary Ann Obos was recognized for her long service to the Section. She was then presented with flowers, a plant and a scrap book by Sarah Butters and Sancha Brennan. Mary Ann came to the front, wearing an awesome Seminole shirt. Mary Ann then addressed the Executive Council and received a very warm and heartfelt welcome. Mary Ann then presented Bob Swaine with a State of Florida flag that flew over the State Capital.

Chair Swaine then had a moment of silence for Kristen Lynch, a long-time and dedicated Section member, who recently passed.

3. Interim actions taken by Executive Committee.

There were no interim actions taken by the Section since the last Executive Council meeting.

4. 2021-2022 Executive Council Meetings.

June 2 – June 4, 2022 Executive Council Meeting & Annual Convention
Hawks Cay Resort
Duck Key, Florida

5. General Comments of the Chair.

Bob then recognized Jen Bloodworth and thanked First American Title for its sponsorship. Jen Bloodworth thanked the Section, and with great courage and, in defiance, ended her comments with "**GO GATORS!**" receiving a rousing round of applause.

IV. Florida's Prime Meridian – *Secretary of State, Laurel M. Lee*

1. Florida's Own Prime Meridian

Bob then introduced Secretary of State, Laura Lee, who is the 36th Secretary of State of Florida. She spoke about Florida's Prime Meridian. She explained that the Secretary of State's purview includes preserving historical records. She encouraged everyone to see the bronze monument, which is the exact center of the State of Florida for surveying. All land boundaries are based on this center-point of the state. The surveying project was first undertaken in 1824.

At the end of her presentation, Secretary Lee introduced Matthew Story, who is a Reference Archivists for the State of Florida. Mr. Story then conveyed that his job is to provide access to and answer questions regarding records of the state.

V. Liaison with Board of Governors Report — *Scott Westheimer*

1. Scott was recently elected as President-Elect of the Florida Bar. He thanked the Section for welcoming him to the Section.

2. The BOG met on March 25 (virtually) and voted unanimously to approve an approximately $45 million Bar general fund budget proposal, which requires Supreme Court approval, and maintains a 22-year trend of avoiding member dues increases. Based on the sound fiscal policies of the Board, there will be no dues increase in the foreseeable future.

3. The Supreme Court, in a March 3, 2022 letter, announced that it would not adopt most recommendations from its Special Committee to Improve the Delivery of Legal Services, including proposals to allow non-lawyer ownership of law firms, fee splitting with non-lawyers, and expanded paralegal legal work in certain situations. The BOG had strongly opposed these recommendations.

4. The Supreme Court directed the Bar to provide alternative proposals to "improve the delivery of legal services to Florida consumers and … assure Florida lawyers play a proper and prominent role in the provision of these services," and gave it until December 31, 2022, to provide its recommendations to the Court. The BOG voted to establish the Special Committee for Greater Public Access to Legal Services for this purpose.

5. Finally, the Supreme Court extended the deadline until May 2, 2022, for comments on the report and recommendations of the Supreme Court's Workgroup on Improved Resolution of Civil Cases ("workgroup proposal"). The workgroup's proposals would change the way state civil litigation is practiced in Florida and it is recommended that all civil litigation practitioners review these proposed changes and provide comments (including the RPPTL Section).

VI. Chair-Elect's Report — *Sarah S. Butters, Chair-Elect*

Sarah Butters recognized Carlos Batlle of JP Morgan. He thanked the Section for allowing JP Morgan to sponsor.

Sarah then noted the upcoming 2022-2023 Executive Council meetings:

July 21 – 24, 2022	Executive Meeting & Legislative Update The Breakers Palm Beach, Florida
September 28 – October 2, 2022	Out-of-State Executive Council Meeting

	Opal Sands Harborside Bar Harbor, Maine
December 8 – 12, 2022	Executive Council Meeting Four Seasons Orlando, Florida
February 22 – 26, 2023	Executive Council Meeting Sandestin Golf and Beach Resort Destin, Florida
June 1 – 4, 2023	Executive Council Meeting & Annual Convention Opal Sands Delray (contract pending) Delray Beach, Florida

VII. **Treasurer's Report** — *Jon Scuderi, Treasurer*

1. Jon Scuderi provided the financial summary through February, 2022. He recognized Sancha Brennan and Lee Weintraub for their fine work as CLE Co-Chairs.

VIII. **Director of At-Large Members Report** — *Steven H. Mezer, Director*

1. Steve Mezer provided the ALMs report. They met on Thursday, March 31, 2022, with about 20 or so in person, and 50 or so virtually. At the ALMs meeting there was a presentation given by Sean Brown and others. There was also a speaker from Bay Area Legal Services.

Steve recognized Jeremiah Cronin as a sponsor for ALMs.

IX. **CLE Seminar Coordination Report** — *Sancha Brennan (Probate & Trust) & Lee A. Weintraub (Real Property), Co-Chairs*

Sancha gave the report. She noted that since the last time the Executive Council met in person, the CLE committee had delivered 11 programs.

She thanked the Vice Chairs, Silvia Rojas, Stacy Kalmanson, Alex Hamrick, Hardy Roberts and Paul Roman. She noted that CLEs can be accessed online by using a QR Code.

Sancha identified the postcard that was mailed to all Section members with the QR code, directing members to the 24-hour online catalog of CLEs (and explained that any apple iPhone will capture the QR code via the basic camera, not a special scanning app.

An advance preview was played of the new CLE marketing roll-out – the video "pre-roll" advertising Section CLEs to be played before all CLEs.

Sancha notified the Section that they are working with Bar staff to ensure there will be easy access to RPPTL CLEs by all members, including those with disabilities (closed-captioning, etc.)

They have (and will have more) new CLE programming checklists available on the Section's website to help guide program chairs when planning programs.

Upcoming programs include topics such as the Surfside Collapse.

X. **Legislation Committee –** *Wilhelmina Kightlinger and Larry Miller, Co-Chairs*

Larry Miller gave the report. He thanked everyone for their hard work. He recognized the Legislation Committee Vice Chairs for their hard work, and the Section Committee Chairs and subject matter experts for their prompt responses to questions for assistance during the session. Larry also thanked the Section's lobbyists for their fine work.

For next steps, the Legislation Committee is reviewing legislative positions and beginning to plan for next year's legislative session.

XI. **General Standing Division Report** — *Sarah S. Butters, Chair-Elect* – no report

Sarah recognized Laura Licastro of Westcore Land Title Insurance as a sponsor. Laura thanked the Section for the opportunity to sponsor.

Action Item:

1. Ad Hoc Civil Rules Committee - *Mike Hargett, Secretary/Scribe*

Mike gave the Ad Hoc Committee's report on the Florida Supreme Court's Judicial Management Council Workgroup on Improved Resolution of Civil Cases. The proposed comments from the Section were contained at pages 356-367 of the Agenda Packet.

Mike noted the unintended consequences of the workgroup's proposals as follows:

- Reduced access to court
- Increases the frequency of trial
- Plaintiff's Strategic Advantage because they know the facts in advance
- Big impact on solo and small firm Practitioner impact
- Use for Harassment Purposes
- Possible mandatory sanctions
- Pro Bono Services less likely due to the increased possibility of sanctions

Significant questions, comments and discussion ensued, which included the need to strike a balance between achieving the Workgroup's noble objectives and concerns about its impact on litigants. Significant time was spent on RPPTL specific areas of practice and desirable carve outs for non-adversarial matters.

Motion to approve the substance of the proposed Comments to the Report and Recommendation of the Judicial Management Council Workgroup on Improved Resolution of Civil Cases raised during the discussion of the issues and to request the Executive Committee to approve the final version of the response to be filed with the Florida Supreme Court.

In light of the considerable comments and discussion, Mike Hargett, on behalf of the Ad Hoc Committee, requested that comments with specific language to be considered or submitted to him no later than April 8, 2022, so they can be reviewed and considered for a possible Interim Action Item by the Executive Committee before the Florida Supreme Court deadline of May 2, 2022.

Mike Hargett moved that the motion be tabled. The motion to table was seconded, and approved unanimously.

Information Items:

1. **Liaison with Clerks of the Court –** *Laird A. Lile*

   No Report.

2. **Liaison with TFB Pro Bono Committee -** *Lorna Brown-Burton*

   Lorna Brown-Burton thanked everyone for her support in running for Florida Bar President. She then provided the report on behalf of the Florida Bar Pro Bono Committee.

3. **Fellows –** *Chris Sajdera, Chair*

   Chris introduced the fellows that were in attendance in person – Amanda Cummins, Taniquea Reid and Shayla Mount. Erin Miller-Myers, Lilleth Bailey, Melissa Hernandez attended virtually, and introduced themselves.

4. **Professionalism & Ethics Committee –** *Andrew B. Sasso, Chair*

   Andy Sasso provided the report regarding that the Florida Supreme Court approved the proposed revisions to Rule 4-1.14 (Client Under a Disability) now Rule 4-1.14 (Client with Diminished Capacity). The revisions add new subdivisions, extensive new comment, and bring the rule more in line with ABA Model Rule 4.14. A significant clarification is that now “a lawyer is not required to seek a determination of incapacity or the appointment of a guardian or take other protective action with respect to a client.” Andy encouraged those practicing in this area to familiarize themselves with the new Rule.

5. **Florida Bar Foundation –** *Hon. Suzanne Van Wyk*

   Judge Van Wyk is the new President of the Florida Bar Foundation and is also an Administrative Law Judge in Tallahassee Florida. She thanked the

Section for the invitation to present and reminded the Section that she was a land use attorney prior to her appointment to the bench. Judge Van Wky provided the update on behalf of the Florida Bar Foundation. She thanked the Section for its support of the Florida Bar Foundation. She encouraged everyone to take pro bono cases from its website. She also encouraged everyone to mentor law students.

6. Additional Items of Interest

Chair-Elect Sarah Butters encouraged those attending to submit names to be considered for Section fellows. Nominations are due July 1, 2022.

XII. Real Property Law Division Report — *S. Katherine Frazier, Division Director*

General comments and recognition of Division Sponsors.

Action Item:

1. Title Issues and Standards Committee – Rebecca L.A. Wood, Chair

Motion to approve correction of citation error in the Uniform Title Standards 1.1 Changing 709.1 to 709.2

The Motion was approved unanimously.

Information Items:

1. Title Issues and Standards Committee – Rebecca L.A. Wood, Chair

Consideration of revisions to Chapter 17 – Marketable Record Title Act (MRTA) of the Uniform Title Standards

Katherine recognized Melissa Scaletta of The Fund. Melissa thanked the Section for allowing The Fund to sponsor.

2. Real Property Finance and Lending Committee – Richard S. McIver, Chair

Consideration of the UCRERA Glitch Bill, section 714.16, *Florida Statutes*, was deferred to the next Executive Council Meeting.

XIII. Probate and Trust Law Division Report: - *John Moran, Division Director*

General comments and recognition of Division Sponsors.

John thanked WFG National Title Insurance Company, the app sponsor for this meeting. He recognized Joe Chitta who thanked the Section for allowing WFG to sponsor the Section. John also noted that Joe was also instrumental in securing the

FSU Practice Facility for the Friday night reception and dinner. The Practice Facility is an audacious display of FSU sports.

Action Items:

1. Ad Hoc Committee on Electronic Wills – *Angela M. Adams, Chair*

Proposed Amendments to amend §117.201 Fla. Stat., to create a definition of "witness"

Committee motion to:

A. Support proposed legislation which would amend §117.201, Fla. Stat., to create a definition of "witness" (when used as a noun) for purposes of remote online notarization and witnessing electronic documents.

B. Find that such legislation position is within the purview of the RPPTL Section; and

C. Expend Section funds in support of the proposed legislative position.

The Motion passed unanimously.

XIV. Probate and Trust Law Division Committee Reports - *John Moran, Division Director*

The Probate and Trust Law Division Reports were given at the Round Table on Friday, April 1, 2022.

XV. Real Property Law Division Committee Reports – *S. Katherine Frazier, Division Director*

The Real Property Law Division Committee Reports were given at the Roundtable on Friday, April 1, 2022.

XVI. General Standing Division Committee Reports – *Sarah S. Butters, General Standing Division Director and Chair-Elect*

XVII. Adjourn -

There was a motion for the meeting to adjourn, which was seconded. The motion passed unanimously.

/s/ Wm. Cary Wright
Wm. Cary Wright
Secretary

Thank you to Our General Sponsors

Event Name	Sponsor	Contact Name	Email
App Sponsor	**WFG National Title Insurance Co.**	Joseph J. Tschida	jtschida@wfgnationaltitle.com
Thursday Grab and Go Lunch	**Management Planning, Inc.**	Roy Meyers	rmeyers@mpival.com
Thursday Night Reception	**JP Morgan**	Carlos Batlle	carlos.a.batlle@jpmorgan.com
Thursday Night Reception	**Old Republic Title**	Jim Russick	jrussick@oldrepublictitle.com
Friday Reception	**Westcor Land Title Insurance Company**	Sabine Seidel	sseidel@wltic.com
Friday Night Dinner	**First American Title Insurance Company**	Alan McCall	Amccall@firstam.com
Spouse Breakfast	**Attorneys Title Fund Services, LLC**	Melissa Murphy	mmurphy@thefund.com
Real Property Roundtable	**Fidelity National Title Group**	Karla Staker	Karla.Staker@fnf.com
Probate Roundtable	**Stout Risius Ross Inc.**	Kym Kerin	kkerin@srr.com
Probate Roundtable	**Guardian Trust**	Ashley Gonnelli	ashley@guardiantrusts.org
Executive Council Meeting Sponsor	**Stewart Title**	David Shanks	laura.licastro@stewart.com
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Thank you to Our Friends of the Section

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BNY Mellon Wealth Management	Joan Crain	joan.crain@bnymellon.com	IRA, Insurance and Employee Benefits
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Coral Gables Trust	John Harris	jharris@cgtrust.com	Probate Law Committee
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Northern Trust	Tami Conetta	tfc1@ntrs.com	Trust Law

IN THE SUPREME COURT OF THE STATE OF FLORIDA
Case No.: SC22-122

IN RE: REPORT AND RECOMMENDATIONS
OF THE WORKGROUP ON IMPROVED
RESOLUTION OF CIVIL CASES

_____/

COMMENT AND REQUEST FOR ORAL ARGUMENT BY THE REAL PROPERTY, PROBATE, AND TRUST LAW SECTION OF THE FLORIDA BAR

Robert S. Swaine, as Chair and on behalf of the Executive Council of the Real Property, Probate and Trust Law Section of the Florida Bar[1] respectfully provides these comments to the Court regarding proposed revisions to the Florida Rules of Civil Procedure and states as follows:

I. Introduction

The Real Property, Probate and Trust Law Section of the Florida Bar ("RPPTL" or the "Section") appreciates and acknowledges the efforts of the Judicial Management Council Workgroup (the "Workgroup") on Improved Resolution of Civil Cases and, in response,

[1] These comments are provided solely on behalf of the Real Property, Probate and Trust Law Section of the Florida Bar and not on behalf of the Florida Bar itself.

commissioned an Ad Hoc committee comprised of members of its real property litigation committee, probate litigation committee and construction law committee to study the Final Report, dated November 15, 2021 (the "Report"). The Section's Comment will first address our general comments to the Rule Revisions[2], recommend certain key specific edits to the Rule Revisions to address those general comments, and finally analyze the impact of the Rule Revisions on probate, guardianship, and trust matters.

II. General Comments to Rule Revisions

1. Disclosure Rule

The "Initial Disclosures" set forth in Fla. R. Civ. P. 1.280(a) (the "Disclosure Rule") are more extensive in comparison to those utilized in the Federal Court system. Specifically, the Disclosure Rule requires the immediate production of all documents, electronically stored information and tangible things in a compressed time period at the very beginning of a lawsuit and prohibits the parties from

[2] The Workgroup's recommended amendments to the Florida Rules of Civil Procedure, Florida Rules of General Practice, and Judicial Administration, and other rules chapters will sometimes be referred to collectively as the "Rule Revisions".

independently stipulating to any revision to the disclosure deadlines that are more appropriate for a given action.

In contrast, Rule 26 of the Federal Rules of Civil Procedure only requires the parties to provide a "description by category and location" allowing each party to request the production of specific categories at the appropriate time. Additionally, the parties are free to stipulate to modifications to the Federal rule and tailor the rule to the specific action.

Implementation of the Disclosure Rule may unnecessarily increase litigation costs for certain proceedings. Many cases are resolved without significant expense or use of judicial resources. It is not uncommon in probate and trust matters for the case to settle or be adjudicated before discovery has been initiated. Requiring work that may not be required to conclude a case seems unnecessary. The Section recommends an option for parties to consent to early mediation and stay the initial disclosures or, in the alternative, adopt a system like that utilized in Federal Court that requires the disclosure of categories but not the actual production of documents.

2. Timing of the Initial Disclosures

Under the Disclosure Rule, plaintiffs effectively have an unlimited amount of time to prepare their Initial Disclosures because they choose when to file the lawsuit. In contrast, the Defendant must use a significant portion of their 45-day window to engage competent legal counsel, who must first gain an understanding of the lawsuit, claims, mandatory counterclaims and affirmative defenses, then prepare an appropriate response to the complaint, deal with incoming production from opposing counsel and then timely make the mandatory Initial Disclosures.

In addition, if the complaint is vague, indefinite, or does not state proper causes of action, the defense is entitled to no relief from the Initial Disclosures under the Rules Revisions unless the defense is able to obtain a court order entered in the short period between responding to the complaint and the disclosure deadline.

If the Court does not change the rule to require the disclosure of categories of documents instead of the actual production of documents, the Section believes Defendants should be provided additional time to provide their Initial Disclosure without the necessity of obtaining a court order.

3. Case Management Rule

The procedures established under the proposed Case Management Rule, 1.200(e)(3), may be difficult to implement in the proposed time-period. Specifically, the provisions found in Subsection (e) require the parties to meet and confer within 30 days after service of the *first* defendant. This deadline may not be reasonable in multiple defendant cases, which are typical in many probate and trust cases, or those involving counterclaims or crossclaims. It would seem the meet and confer would be more useful after all defendants have been served. Additionally, it may be premature to hold the meet and confer before the pleadings have been finalized.

4. Sanctions

The sanctions set forth in Section 1.380 of the Rule Revisions appear to be mandatory unless the motion or opposition to the motion was substantially justified. Further, the sanctions are not limited to fees and reasonable costs. They can include travel expenses and "any other financial loss reasonably arising as a result

of the sanctioned conduct".[3] It is not clear what "any other financial loss" means and presumably could include lost profits, special damages or other damages caused by unintended consequences. The financial loss language is also contained in Rule 1.275(d). To prevent sanctions motions from creating unnecessary and additional hearings which could detract from the ultimate progress of the case, the Court should consider removing the financial loss language and limit sanctions to fees and reasonable costs.

In addition, the standard to avoid sanctions in Rule 1.275 appears to be inconsistent. Part (b) of the Rule prohibits the Court from ordering the payment of reasonable expenses as a sanction if the party or attorney shows "good cause and the exercise of diligence." Part (e) provides the court may not order payment of reasonable expenses if the court finds the party or attorney's noncompliance was "substantially justified." The standard should be consistent. The Section recommends "good cause" as that standard is fairly well-defined in existing case law.

[3] Revised Rules, § 1.380(a)(5)(D)

The Section understands the desire for sanctions to discourage unnecessary objections and hearings, but sanctions should not be designed to discourage legitimate disputes. Sometimes there is legitimate dispute as to the scope of discovery and sometimes a party may push the bounds of discovery. Counsel should be free to seek court relief, when necessary, without having to be concerned about the imposition of sanctions.

5. Access to Justice and Pro-Bono Services

The impact of the Rule Revisions on litigation in Florida is unclear. Many of our members have expressed concern that the Initial Disclosures will unnecessarily increase litigation expenses. This could result in lawyers being reluctant to take on pro bono cases, especially with the added risk of sanctions. Our members also raised concern that the Initial Disclosures may cause lawyers to charge higher retainers due to the front-end loaded nature of the new requirements which could limit access of our citizens to competent counsel. The added complexity would also make it difficult for pro se parties to comply, compounding this issue of access to justice. Although pro se litigants may appear in any matter, the Section is

concerned about the impact on residential landlord-tenant and residential mortgage foreclosures.

III. Proposed General Amendments to the Rule Revisions

Given the foregoing concerns, the Section submits the following proposed general amendments to the Rule Revisions for the Court's consideration:

a. Rule 1.200 should be revised to transfer part "(a) Objectives" to the Rules of General Practice and Judicial Administration, in Rule 2.545. The provisions of this part are general and of broader application than Rule 1.200.

b. Rule 1.271 should be revised to clarify the jurisdictional parameters of the rule. It is unclear whether the rule would apply only to cases in a single county or circuit, or whether it might also apply to cases that might span multiple counties or circuits. The rule seems to be modeled after the concepts in the federal Multi-District Litigation Rules, which have nationwide breadth, but the specific Rule Revision provides no jurisdictional parameters.

c. Rule 1.279 should be deleted in its entirety. This revision codifies ethical obligations as a rule of civil procedure. While the goal of this rule is laudable and the goals and aspirations stated therein are how every attorney should practice, allowing this to become a rule of civil procedure may only invite abuse and allow attorneys to weaponize aspirational goals and subjective terms during the discovery process. This Rule should be limited to a comment for Rule 1.280 or Rule 1.275 and be amended to exclude Rule 1.279 from being subject to sanctions.

d. The first sentence of Rule 1.280(a)(1) should be revised as follows:

> **In General**. Except as exempted by subdivision (2), as otherwise stipulated, or as ordered by the court, a party must . . .

e. The first sentence of Rule 1.280(a)(1)(B) should be revised as follows:

> a copy of – or a description by category and location – of all documents, electronically stored information and tangible . . .

f. Rule 1.200(e)(2) should be revised to account for counterclaims as follows:

> (2) Streamlined Cases. In streamlined cases the court shall issue a case management order no later than ~~120 days after the case is filed or~~ 30 days after ~~service on the first defendant~~ the case is at issue~~, whichever comes first~~. No case management conference is required to be set by the court prior to issuance. Parties seeking to amend the deadlines set forth in the case management order shall follow the procedures set forth in subdivision (f). Parties may request a case management conference as set forth in subdivision (h); however, they must comply with the case management order in place. In streamlined cases the court issues a case management order without the preliminary procedures required for cases on the general track as described in subdivision (3).

g. Rule 1.200(e)(3)(A) should be revised as follows:

(3) General Cases.

(A) Meet and Confer. Parties shall meet and confer within 30 days after ~~service after initial service of the complaint on the first defendant served~~ [Alternative 1: responsive pleadings have been filed by each non-defaulted defendant served, Alternative 2: the case is at issue,] unless extended by order of the court. The parties should discuss and identify deadlines for:

h. Rule 1.200(e)(3)(B)(iii) should be revised as follows:

(B)(iii) Failure to File. If the parties fail to file the joint case management report and proposed case management order ~~by 120 days after filing or~~ within 30 days after ~~service on last defendant, whichever occurs first,~~ [Alternative 1: responsive pleadings have been filed by each non-defaulted defendant served, Alternative 2: the case is at issue,] the court shall issue its own case management order without input from the parties.

IV. Impact on Probate, Guardianship, and Trust Proceedings

In addition to the general comments above, the Section is very concerned about the application of the Rule Revisions to probate, guardianship, and trust proceedings (the "PGT Proceedings").

Probate and guardianship proceedings are governed by the Florida Probate Rules[4], and one could reasonably assume, would be unaffected by the Rule Revisions. However, certain Rules of Civil Procedure apply universally in all probate and guardianship proceedings. See, e.g., Rule 1.280.[5] Additionally, the Rules of Civil Procedure govern (i) all probate and guardianship proceedings that are "adversary proceedings" under the Florida Probate Rules[6], and (ii) all trust proceedings initiated pursuant to Chapter 736.[7]

The Section recognizes that some PGT Proceedings – specifically the ones that most closely mirror civil cases, such as will and trust contests or claims for breach of fiduciary duty -- may benefit from the Rule Revisions and a streamlined case management process. These truly contested matters very often operate like traditional civil

[4] Fla. Prob. R. 5.010.
[5] Fla. Prob. R. 5.080.
[6] Fla. Prob. R. 5.025(d)(2).
[7] Fla. Stat. § 736.0201(1).

cases. However, not all PGT Proceedings are actually contested or are even adversarial. In fact, a great number of PGT Proceedings are uncontested and bear very little resemblance to civil litigation. The Section believes that a significant number, perhaps even a majority, of PGT Proceedings (i.e. the ones that do not resemble traditional civil cases) will not fit well within the proposed framework of the Rule Revisions.

The Section is particularly concerned about the implementation of the proposed case-management track system in connection with certain (often uncontested) PGT Proceedings. Specifically, proceedings to construe a will or trust, to appoint a successor trustee, to probate a lost or destroyed will, to approve a non-judicial settlement agreement, or to terminate or modify a trust are a few everyday examples of proceedings that, despite currently being governed by the Florida Rules of Civil Procedure, are regularly resolved without a case management order, discovery, or trial. These PGT Proceedings, as well as many others, are filed because the statutes and applicable rules require court approval of a transaction or course of conduct but all parties (which frequently involve multiple interested persons such as fiduciaries, next of kin, and beneficiaries),

who are entitled to notice, are in agreement and will ultimately join in the result. In many instances, the interested persons are entitled to notice but take no active position in the matter. These interested persons are also very frequently not represented by counsel; nevertheless, they often stay involved solely to receive notice and to have the opportunity to be heard, as needed.

The Section worries that the application of the Rule Revisions to these types of PGT Proceedings will have the unintended effect of increasing costs and expenses associated with Florida estates, trusts, and guardianships, particularly with respect to interested persons who may not resemble civil "litigants," such as elderly or incapacitated adults, minors, surviving spouses, other estate and trust beneficiaries, and other interested third parties, such as estate creditors.

More specifically, as set forth below, the Section is especially concerned that despite their laudable goals, the Rule Revisions may actually (a) create conflicts with the Florida Probate Rules, Probate, Guardianship and Trust Codes and Florida Constitution, (b) negatively impact the flow of "adversary proceedings," causing an unnecessary delay in the administration of estates and trusts in

contravention of the public policy of Florida which requires estates and trusts to be expeditiously administered, (c) add unnecessary expense to estate and trust proceedings, and (d) apply unnecessary and cumbersome meet and confer requirements in instances where there is likely no dispute at all.

1. Conflicts with the Rules, Codes and Florida Constitution

The Probate Rules, Probate Code, and Guardianship Code are designed to require disclosure of estate and guardianship assets, set deadlines, and ensure the expeditious administration of estates and guardianships in Florida. Probate and guardianship administrations are governed by the Florida Probate Rules, which, *inter alia,* provide their own deadlines for case management and set forth specific provisions defining who, among many interested parties, are entitled to notices[8]. They are also defined to protect the privacy of

[8] Fla. R. Civ. P. 1.010, Fla. Prob. R. 5.010 and 5.080; Fla. Prob. R. 5.340 (probate inventory is required to be filed within 60 days after issuance of letters); Fla. Prob. R. 5.620 and 5.690 (a personal representative is required to file proof of publication of notice to creditors within 45 days of publication).

incapacitated wards and deceased persons and limit the notices and disclosures provided to particular parties.

Given this backdrop, the Section is concerned that several provisions of the Rule Revisions, and in particular the proposed case management framework of Rule 1.200, appear to conflict with existing and well-defined statutory and case law that has developed in connection with notices and timeframes in PGT Proceedings. For example, in the probate context, the Florida Probate Rules proscribe specific time periods for an interested person to object to a petition for discharge or final accounting, as well as the timing of service for objections and a notice of hearing on such objections.[9] Considering this existing procedure, if implemented, the Rules Revisions are very

[9] Fla. Prob. R. 5.401(a) requires that an interested person object to a petition for discharge or final accounting within 30 days after service. Fla. Prob. R. 5.401(c) provides that copies of the objections shall be served by the objector on the personal representative not later than 30 days after the last date on which the petition for discharge or final accounting was served on the objector. Finally, Fla. Prob. R. 5.401(d) provides that if a notice of hearing on the objections is not served within 90 days of filing the objections, the objections shall be deemed abandoned.

likely to result in confusion about these notices and time frames for attorneys and interested parties.

Similarly, the Section is concerned about conflicts and potential confusion arising from mandating the new initial disclosures in Rule 1.280, as well as the meet and confer requirements of Rules 1.160 and 1.161 whenever any party decides to declare a proceeding "adversary." For example, guardians must request authority from the court for particular actions[10] but the Rule Revisions require that all "parties" meet and confer prior to filing any motion. Guardianship proceedings involve "interested persons"[11], not parties, and those persons change depending on the relief requested in a pleading. A guardian seeking the court's authority to sign a lease, repair a home, or otherwise manage a ward's estate affairs will be required to meet and confer with all interested persons, in person or via audio/visual communication technology, prior to filing the motion according to

[10] Fla. Stat. § 744.441 identifies many instances in which a guardian must request court approval via a petition for authorization to act.
[11] Fla. Stat. § 731.201(23) "Interested person" means any person who may reasonably be expected to be affected by the outcome of the particular proceeding involved.

Rule 1.160(c). This process may cause delays in a time-sensitive proceeding and increase the ward's expenses.

Additionally, the existing procedures and notice requirements under section 744.331 incapacity cases are designed to protect the alleged incapacitated person's constitutional privacy rights and rights to self-determination while also advancing the State of Florida's interests in protecting minors and vulnerable adults. That framework balancing these important public policy goals may be unintentionally undone if the Rule Revisions are adopted with respect to guardianship proceedings. For example, Section 744.331(3) requires the appointment of an examining committee within five days after filing a petition for determination of incapacity. An adjudicatory hearing is required at least 10 days, but no more than 30 days after the filing of the last report of the examining committee members. Rule 1.280 requires initial disclosures within 45 days after service of the complaint. The Rule Revisions could result in disclosure of an alleged incapacitated person's private

personal and financial information prior to an adjudication of incapacity.

2. "Adversary Proceedings"

The phrase "adversary proceeding," when used in probate, and guardianship, is a term of art and does not necessarily correspond to a proceeding that is actually contested. Any party, for one of many reasons, may simply serve a "declaration that the proceeding is adversary"[12] and invoke the Rules of Civil Procedure. Such declared adversary proceedings may be any number of simple or complex issues, many of which are already before the court's administration.

The majority of adversary proceedings do not appear to be a good fit for the proposed case management framework of Rule 1.200, the initial disclosures in Rule 1.280, or the meet and confer requirements of Rules 1.160 and 1.161. Many of these "adversary" matters have multiple "notice" parties (heirs, beneficiaries, interested persons, potential creditors, etc.) who are not active litigants and rarely hire counsel. Moreover, despite being labeled as "adversary," many of these proceedings are actually uncontested, but are legally

[12] Fla. Prob. R. 5.025(b).

framed so that interested parties can participate without necessity of counsel. The Section is concerned that the proposed initial disclosures and meet and confer requirements for all parties, which may make great sense for traditional contested civil disputes, would have the unintended consequence of actually increasing costs and creating delays in a large number of these "uncontested" PGT Proceedings.

Additionally, regardless of whether there is actually any dispute, certain probate and guardianship proceedings are automatically "adversary proceedings" by Rule.[13] Again, under the current Florida Probate Rules, all "adversary proceedings" are governed by the Rules of Civil Procedure. However, many of these automatic adversary proceedings are uncontested or do not develop into matters litigated in the traditional sense. For example, proceedings to probate a lost or destroyed will[14] or to determine beneficiaries of an estate[15] require service by formal notice and an evidentiary hearing, but are often uncontested. Further, it is not unusual to have multiple "adversary proceedings" concurrently

[13] Fla. Prob. R. 5.025(a).
[14] Id.
[15] Id.

during a probate or guardianship case. Again, the Section is concerned that the imposition of the Rule Revisions will actually increase costs and create delays in these matters.

3. Effect of the Rule Revisions on Trust Proceedings

Under existing Florida law, trust proceedings are not addressed in the Florida Probate Rules.[16] Instead, all Florida trust proceedings are governed by the Rules of Civil Procedure.[17] Much like probate and guardianship proceedings, however, many common trust proceedings initiated pursuant to Chapter 736 are non-adversarial, involve many inactive or unrepresented parties, and require little to no case management. For example, claims for judicial approval of a final accounting[18], claims for judicial modification[19], claims to construe a trust document[20], and claims to appoint a successor

[16] The precursor to the Florida Probate Rules, then known as the "Rules of Probate and Guardianship Procedure," were promulgated by the Florida Supreme Court on July 26, 1967. *In re Rules of Probate and Guardianship Procedure*, 201 So. 2d 409 (Fla. 1967). Those Rules became effective on January 1, 1968. During that period of time, the idea of trusts and other vehicles as a potential substitute for wills aimed at avoiding the probate process was just gaining steam. *See, e.g.* Langbein, John H., *The Nonprobate Revolution and the Future of the Law of Succession*, 97 Harv. L. Rev. 1108 (1983-84).

[17] Fla. Stat. § 736.0201

[18] Fla. Stat. § 736.0201(4)(d).

[19] Fla. Stat. §§ 736.04113 and 736.04115.

[20] Fla. Stat. § 736.0201(4)(a).

trustee when a vacancy exists[21] are all examples of simple proceedings that may require only one uncontested hearing for resolution. All of these trust matters currently proceed efficiently under, and are ruled by, the existing Rules of Civil Procedure.[22]

The Section is concerned that the Rule Revisions would require a superfluous case management order and track assignment for trust proceedings that are typically resolved through stipulation or bench hearing. Presumably, these cases would be considered "streamlined." However, even "streamlined" cases require a case management order, pre-trial conference, and trial. The Section believes that the imposition of the Rule Revisions on these types of trust matters could unnecessarily increase the court's involvement in each case, increase legal fees and costs, and unintentionally delay resolution of these matters.

4. The Meet and Confer Requirement

PGT Proceedings frequently include "interested persons,"[23] and/or "parties" who do not necessarily correspond to "plaintiffs" and "defendants" in civil litigation. These interested persons may include

[21] Fla. Stat. § 736.0704(3)(c).
[22] Fla. Stat. § 736.0201(1).
[23] Fla. Stat. § 731.201(23)

heirs, beneficiaries, contingent beneficiaries, trustees, non-profit organizations, corporate fiduciaries, business entities, other interested parties, non-residents of Florida or even the United States. The Rule Revisions, as drafted, do not appear to contemplate "interested persons" and require all named parties to meet and confer, in person or via phone/video conference, prior to the filing of each and every motion in a PGT Proceeding.

Similarly, section 744.331 incapacity proceedings provide an example of proceedings that would benefit from a clear definition of a "party" in the Rule Revisions. Section 744.331 incapacity proceedings contain defined procedures, timelines, and a body of law regarding who is an "interested person" on any particular issue. A meet and confer requirement with undefined "parties," is likely to be interpreted more broadly than "interested person," and may conflict with current guardianship law and the alleged incapacitated person's constitutional privacy rights.

On a broader level, the Section is also concerned that it will be impractical, if not impossible, to meet and confer with every interested person that is notified or listed in a case caption solely because they are a beneficiary of an estate or trust. If the parties are

unable to satisfy the meet and confer requirements, they face the threat of sanctions pursuant to Rule 1.275. Importantly, the cost increase associated with the Rule Revisions will be paid for by the estate or trust and be borne by the beneficiaries, such as surviving spouses, minors, and charities, to their financial detriment.

5. Potential Approaches to Address the Section's Concerns

As noted above, the Section understands and appreciates the efforts and intentions of the Workgroup in connection with improving the resolution of civil cases in Florida. Nevertheless, many PGT Proceedings are quite different from traditional civil cases. Given these differences, the Section has considered numerous potential alternatives aimed at mitigating its concerns about the Rule Revisions as applied to certain PGT Proceedings. While we would like to offer very specific proposed solutions, we have concluded that doing so will require a comprehensive and extensive analysis of all existing probate, trust, and guardianship statutes and rules. Unfortunately, absent some type of general exclusion for probate, trust, and guardianship matters from the Rule Revisions, which we understand may not be tenable, there does not appear to be a "one size fits all" solution. Nevertheless, the Section notes the following

potential approaches for both the Workgroup and the Supreme Court's consideration.

As a threshold issue, if the Supreme Court is inclined to adopt the Rule Revisions, as drafted, to PGT Proceedings, the Section respectfully requests a two-year delay in their implementation as to PGT Proceedings. A delayed effective date for PGT Proceedings would give the Section and Florida Probate Rules Committee an opportunity to expeditiously work together on potential revisions to the Florida Statutes and Florida Probate Rules to tailor the current procedures to any Rule Revisions adopted by the Court, with a specific focus on solutions addressing the issues, including the treatment of uncontested cases, discussed in this Comment. A delayed implementation would also afford the Section and Probate Rules Committee time to consider a proposed expansion of the Florida Probate Rules to include the types of uncontested trust proceedings discussed in this Comment.

Although not ideal, the Section also considered the following immediate approaches if the Supreme Court is unwilling to permit an exemption or delayed effective date of the Rule Revisions for PGT Proceedings. The following ideas, which may assist in mitigating

some of the issues arising from immediate implementation of the Rule Revisions as drafted, admittedly do not address all of the Section's concerns:

(a) Create an exemption for PGT Proceedings from specific rules. Specifically, the Rule Revisions could be amended to provide exemptions from: (i) Rule 1.200(b) of all proceedings initiated pursuant to Chapters 731-735, 744, and governed by the Florida Probate Rules; (ii) Rule 1.200(b) for all proceedings initiated pursuant to Chapter 736; and (iii) Rule 1.200(b) for all *in rem* or *quasi in rem* proceedings.

(b) Include claims initiated pursuant to Chapters 731-736 and 744 within the definition of "streamlined" cases under the Rule Revisions.

(c) Provide an opt-out provision from the requirements of the Rule 1.200 case management requirements, the Rule 1.280 initial disclosures, and potentially the meet and confer requirements of Rules 1.160 and 1.161. One possible approach would be to allow a petitioner or plaintiff to designate an anticipated "uncontested" petition, complaint, or other matter as exempt from these procedural rules. Upon such designation, the relevant rules would not apply

unless another party or interested person objects, or, alternatively, the court directs otherwise.

Finally, in addition to the foregoing, for the reasons discussed above, the Section specifically suggests that the Workgroup consider defining the term "party" in the Rule Revisions. As it stands now, the term could cause confusion in PGT Proceeding, especially considering the number of people or entities discussed above that could be included as "parties." Additionally, the Section suggests that Rule 1.160(c)(3) authorize the use of electronic and regular mail as a method to comply with the meet and confer requirement.

V. Conclusion

The Real Property, Probate and Trust Law Section supports the goals of this Court and respectfully requests the Court consider the recommendations set forth above.

Dated: May 27, 2022

Respectfully submitted,

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

/s/ Robert S. Swaine

CERTIFICATE OF COMPLIANCE

I hereby certify that document was prepared in Bookman Old Style, 14-point font, in compliance with Rule 9.045(b) of the Florida Rules of Appellate Procedure, and does not exceed 13,000 words, in compliance with Rule 9.210(a)(2)(B).

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CERTIFICATE OF SERVICE

I certify that the foregoing was furnished by email to all counsel of record on May 27, 2022 to:

Chief Judge Robert Morris
Chair, Judicial Management Council's
Workgroup on Improved Resolution of Civil Cases
Second District Court of Appeal
P.O. Box 327
Lakeland, FL 33802
morrisr@flcourts.org

Tina White
OSCA Staff Liaison to the Workgroup
500 South Duval Street
Tallahassee, Florida 32399
whitet@flcourts.org

RPPTL 2022-2023
Executive Council Meeting Schedule
Sarah Butters' Year

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

NOTE- Committee meetings may be conducted virtually via Zoom prior to the Executive Council meeting weekend.

Date	Location
July 21 – July 24, 2022	**Executive Council Meeting & Legislative Update** The Breakers Palm Beach, Florida Room Rate (Deluxe Room – King): $250 Premium Room Rate: $305
September 28 – October 2, 2022	**Executive Council Meeting** Opal Sands Harborside Bar Harbor, Maine Standard Guest Room Rate (King): $318 Premium King: $376
December 8 – 12, 2022	**Executive Council Meeting** Four Seasons Orlando, FL Standard Guest Room Rate: $299
February 22 – 26, 2023	**Executive Council Meeting** Sandestin Golf and Beach Resort Destin, Florida Grand Complex 1 Bedroom: $195 Hotel Effie Standard Guest Room Rate: $244
June 1 – June 4, 2023	**Executive Council Meeting & Annual Convention** Opal Sands Delray (Contract Pending) Delray Beach, FL Standard Guest Room Rate: $189

2022-2023 RPPTL Leadership Chart

General Standing

Committee	Name	Title
Ad Hoc Civil Rules Revisions	Mike Hargett	Co-Chair
	Shawn Brown	Co-Chair
Ad Hoc RTOD	Chris Smart (RP)	Co-Chair
	Steve Kotler (PT)	Co-Chair
	Jeff Goethe	Vice Chair
Amicus Coordination	Kenneth Bell	Co-Chair
	Gerald Cope, Jr.	Co-Chair
	Robert W. Goldman	Co-Chair
	John Little, III	Co-Chair
Budget	Jon Scuderi	Chair
	Tae Kelley Bronner	Co-Vice Chair
	Linda S. Griffin	Co-Vice Chair
	Pamela O. Price	Co-Vice Chair
Communications		
	Michael Hargett	Chair
	Laura Sundberg	Vice Chair
CLE Coordination	Angela Adams	Co-Chair (P+T)
	Lee Weintraub	Co-Chair (RP)
	Alexander Hamilton Hamrick	Co-Vice Chair (P+T)
	Tattiana Brenes-Stahl	Co-Vice Chair (P+T)
	Hardy L. Roberts, III	Co-Vice Chair (RP)
	Stacy Kalmanson	Co-Vice Chair (RP)
	Silvia B. Rojas	Co-Vice Chair (RP)
Convention Coordination	Deb Boje	Chair
	Yoshi Smith	Co-Vice Chair
	Tae Kelley Bronner	Co-Vice Chair

Disaster and Emergency Preparedness and Response Committee	Colleen Sachs	Chair
	Amy Beller	Co-Vice Chair
	Mike Bedke	Co-Vice Chair
Fellows	Chris Sajdera	Co-Chair
	Angela Santos	Co-Chair
	Terrance Harvey	Co-Vice Chair
	Bridget Friedman	Co-Vice Chair
Homestead Issues Study	Jeff Baskies	Chair
	Jeremy Cranford	Co-Vice Chair
	Burt Bruton	Co-Vice Chair
	Shane Kelley	Co-Vice Chair
Information Technology and Communication	Hardy L. Roberts, III	Chair
	Alexander Dobrev	Co-Vice Chair
	Jesse B. Friedman	Co-Vice Chair
	Sean Lebowitz	Co-Vice Chair
	Jourdan Haynes	Co-Vice Chair
Law School Mentoring & Programing	Johnathan Butler	Co-Chair
	Kymberlee Curry Smith	Co-Chair
	Lilleth Bailey	Co-Vice Chair
	Kristine Tucker	Co-Vice Chair
	Guy Emerich	Co-Vice Chair
Legislation	Larry Miller (PT)	Co-Chair
	Wilhelmina Kightlinger(RP)	Co-Chair
	Manuel Farach	Co-Vice Chair
	Arthur Menor	Co-Vice Chair
	Chris Smart	Co-Vice Chair
	Travis Hayes	Co-Vice Chair
	Nick Curley	Co-Vice Chair

Legislative Update	Brenda B. Ezell	Co-Chair
	Salome J. Zikakis	Co-Chair
	Kit van Pelt	Co-Vice Chair
	Gutman Skrande	Co-Vice Chair
	Jennifer Tobin	Co-Vice Chair

Liaison with:

ABA
Edward F. Koren
Robert Freedman
George Meyer
Julius Zschau

Business Law Section
Manuel Farach
Gwynne Young

Clerks of Circuit Court
Laird Lile

FLEA/FLSSI
David Brennan
Roland D. Waller

Florida Bankers Association
Robert Stern
Mark Middlebrook

Judiciary
Judge Mary Hatcher
Judge Hugh D. Hayes
Judge Margaret Hudson
Judge Mark Speiser
Judge Michael Rudisill

Out-of-State Members
John Fitzgerald, Jr.
Nicole Kibert Basler
Michael P. Stafford

	TFB Board of Governors	
	Roland Sanchez Medina	
	TFB CLE Committee	
	Angela Adams	
	Lee Weintrab	
	TFB Council of Sections	
	Sarah Butters	
	Katherine Frazier	
	TFB Pro Bono	
	TBD	
Long-Range Planning	Katherine Frazier	Chair
Meetings Planning	George Meyer	Chair
Membership and Inclusion	S. Dresden Brunner	Chair
	Vinette Godelia	Co-Vice Chair
	Roger Larson	Co-Vice Chair
	TBD	Co-Vice Chair
	Annabella Barboza	Co-Vice Chair
Model and Uniform Acts	Patrick Duffey	Co-Chair (P&T)
	Adele Stone	Co- Chair (RP)
	Chris Wintter	Co-Vice Chair (PT)
	Amber Ashton	Co-Vice-Chair (RP)
Professionalism and Ethics	Andrew Sasso	Chair
	Alexander Dobrev	Co- Vice Chair
	Elizabeth Bowers	Co- Vice Chair
	Laura Sundberg	Co- Vice Chair
	Judge Celeste Muir	Co-Vice Chair

Publications ActionLine	Erin Finlen	Co-Chair (PT)
	Michael Bedke	Co-Chair (RP)
	Alexander Douglas	Co-Vice Chair (PT)
	Paul Roman	Co-Vice Chair (Ethics)
	Seth Kaplan	Co-Vice Chair (PT)
	Daniel McDermott	Co-Vice Chair (PT)
	Michelle Hinden	Co-Vice Chair (RP)
	Jeanette Moffa	Co-Vice Chair (RP)
Publications Florida Bar Journal	Homer Duvall, III	Co-Chair (RP)
	J. Allison Archbold	Co-Chair (P+ T)
	Brandon Bellew	Co-Vice Chair (PT)
	Marty Solomon	Co-Vice Chair (RP)
	Mark Brown	Co-Vice Chair (RP)
	Brian Sparks	Co-Vice Chair (PT)
	Jonathan Galler	Co-Vice Chair (PT)
Sponsor Coordination	Bill Sklar	Chair
	Jason Quintero	Co-Vice Chair
	Patrick Emans	Co-Vice Chair
	Marsha Madorsky	Co-Vice Chair
	J. Michael Swaine	Co-Vice Chair
	Arlene Udick	Co-Vice Chair
	Alex Hamrick	Co-Vice Chair
	Rebecca Bell	Co-Vice Chair
Strategic Planning	Katherine Frazier	Chair
Strategic Planning Implementation	Michael J. Gelfand	Chair
	Deborah Goodall	Co-Vice Chair
	Andrew O'Malley	Co-Vice Chair
	Mike Dribin	Co-Vice Chair
	Peggy Rolando	Co-Vice Chair

Probate and Trust Law Division

Ad Hoc Guardianship Law Revision Committee	Nicklaus J. Curley	Co-Chair
	Stacey Rubel	Co-Chair
	David Brennan	Co-Chair
	Sancha Brennan	Vice Chair
Ad Hoc Committee on Electronic Wills	Frederick "Ricky" Hearn	Chair
	Jenna Rubin	Vice Chair
Ad Hoc Study Committee on Jurisdiction and Due Process	Barry F. Spivey	Chair
	Sean Kelley	Co-Vice Chair
	Shelly Wald Harris	Co-Vice Chair
Ad Hoc ART Committee	Alyse Comiter	Chair
	Sean Lebowitz	Co-Vice Chair
	Jack Falk	Co-Vice Chair
Asset Protection	Michael Sneeringer	Chair
	Richard Gans	Co-Vice Chair
	Justin Savioli	Co-Vice Chair
Attorney/Trust Officer Liaison Conference	Mitchell Hipsman	Chair
	Stacey L. Cole	Co-Vice Chair
	Tae Kelley Bronner	Co-Vice Chair
	Gail Fagan	Co-Vice Chair
	Eammon Gunther	Co-Vice Chair
	Michael Rubenstein	Co-Vice Chair
Charitable Planning and Exempt Organizations Committee	Denise Cazobon	Chair
	Kelly Hellmuth	Co-Vice Chair
	Alyssa Razook Wan	Co-Vice Chair
Elective Share Review Committee	Jenna Rubin	Chair
	Lauren Detzel	Co-Vice Chair
	Cristina Papanikos	Co-Vice Chair

Estate & Trust Tax Planning	Richard Sherrill	Chair
	Sasha Klein	Co-Vice Chair
	Al Stashis	Co-Vice Chair
	Andrew Thompson	Co-Vice Chair
Guardianship, Power of Attorney & Advance Directives	Stacy Rubel	Chair
	Elizabeth Hughes	Co-Vice Chair
	Jacobeli Behar	Co-Vice Chair
	Caitlin Powell	Co-Vice Chair
	Stephanie Cook	Co-Vice Chair
IRA, Insurance & Employee Benefits	Chad Callahan	Chair
	Rebecca Bell	Co-Vice Chair
	Rachel Oliver	Co-Vice Chair
Liaisons with ACTEC	Elaine M. Bucher	Liaison
	Tom Karr	Liaison
	Diana S.C. Zeydel	Liaison
	Charlie Nash	Liaison
	Tami Conetta	Liaison
	L. Howard Payne	Liaison
Liaisons with Elder Law Section	Travis Finchum	Liaison
	Marjorie Wolasky	Liaison
Liaisons with Tax Law Section	Brian Malec	Liaison
	William Lane, Jr.	Liaison
	Brian Sparks	Liaison
Liaison with Professional Fiduciary Council	Darby Jones	Liaison
OPPG Delegate	Nick Curley	Delegate
Principal and Income	Edward F. Koren	Co-Chair
	Pamela O. Price	Co-Chair
	Keith Braun	Co-Vice Chair
	Jolyon Acosta	Co-Vice Chair

Probate and Trust Litigation	Rich Caskey	Chair
	Lee McElroy	Co-Vice Chair
	Cady Huss	Co-Vice Chair
Probate Law & Procedure	Theodore Kypreos	Chair
	Ben Diamond	Co-Vice Chair
	Stacey Prince Troutman	Co-Vice Chair
	Grier Pressley	Co-Vice Chair
Trust Law	Matthew Triggs	Chair
	Mary E. Karr	Co-Vice Chair
	Jenna Rubin	Co-Vice Chair
	Jennifer Robinson	Co-Vice Chair
	David Akins	Co-Vice Chair
Wills, Trusts & Estates Certification Review Course	Rachel Lunsford	Chair
	Jerome Wolf	Co-Vice Chair
	Eric Virgil	Co-Vice Chair
	Allison Archbold	Co-Vice Chair

Real Property Division

Ad Hoc Hayslip	Brian Hoffman	Chair
	Mike Hargett	Co-Vice Chair
	Jim Russick	Co-Vice Chair
Attorney Banker Conference	Salome Zikakis	Chair
	Jim Robbins	Co-Vice Chair
	Kris Fernandez	Co-Vice Chair
Commercial Real Estate	Ashley McRae	Chair
	Alexandra Gabel	Co-Vice Chair
	Brian Hoffman	Co-Vice Chair
Condominium and Planned Development Law Certification Review Course	Jane Cornett	Co-Chair
	Christine Ertl	Co-Chair
	Allison Hertz	Vice Chair

Condominium and Planned Development	Alex Dobrev	Co-Chair
	Allison Hertz	Co-Chair
	Russell Robbins	Vice Chair
Construction Law	Sanjay Kurian	Chair
	Elizabeth Ferguson	Co-Vice Chair
	Bruce Partington	Co-Vice Chair
Construction Law Certification Review Course	Gregg Hutt	Chair
	Jason Quintero	Co-Vice Chair
	Scott Pence	Co-Vice Chair
Construction Law Institute	Brad Weiss	Chair
	Deb Mastin	Co-Vice Chair
	Trevor Arnold	Co-Vice Chair
Development and Land Use	Lisa Van Dien	Co-Chair
	Colleen Sachs	Co-Chair
	Jin Liu	Vice Chair
Insurance and Surety	Katie Heckert	Chair
	Debbie Crockett	Vice Chair
Liaison with FLTA	Melissa Murphy	Liaison
	Alan McCall	Liaison
	Alan Fields	Liaison
	Jim Russick	Liaison
Liaison with American College of Real Estate Lawyers (ACREL)	Martin Schwartz	Liaison
	Bill Sklar	Liaison
Liaison with American College of Construction Lawyers (ACCL)	George Meyer	Liaison
Liaison with Florida Realtors	Trey Goldman	Liaison

Real Estate Certification Review Course	Lloyd Granet	Chair
	Marty Awerbach	Co-Vice Chair
	Laura Licastro	Co-Vice Chair
	Jason Ellison	Co-Vice Chair
Real Estate Leasing	Chris Sajdera	Chair
	Kristen Jaiven	Co-Vice Chair
	Ryan McConnell	Co-Vice Chair
Real Property Finance and Lending	Jason Ellison	Chair
	Deb Boyd	Co-Vice Chair
	Jin Liu	Co-Vice Chair
Real Property Litigation	Manny Farach	Chair
	Amber Ashton	Co-Vice Chair
	Shawn Brown	Co-Vice Chair
	Amanda Kison	Co-Vice Chair
Real Property Problems Study	Anne Pollack	Chair
	Brian Hoffman	Co-Vice Chair
	Susan Spurgeon	Co-Vice Chair
	Reese Henderson	Co-Vice Chair
Residential Real Estate and Industry Liaison	Nicole Villarroel	Co-Chair
	Kristen Javien	Co-Chair
	Jamie Marx	Co-Vice Chair
	Rich McIver	Co-Vice Chair
Title Insurance and Title Insurance Liaison	Chris Smart	Chair
	Jeremy Cranford	Co-Vice Chair
	Len Prescott	Co-Vice Chair
	Michelle Hinden	Co-Vice Chair
Title Issues and Standards	Rebecca Wood	Chair
	Amanda Hersem	Chair
	Karla Staker	Co-Vice Chair
	Bob Graham	Co-Vice Chair
	Melissa Scaletta	Co-Vice Chair

RPPTL Budget Summary

TO DATE REPORT

General Budget	YTD
Revenue	$ 1,313,448
Expenses	$ 1,236,093
Net:	$ 77,355

Attorney Bankers Conf.	YTD
Revenue	$ 150
Expenses	$ 5
Net:	$ 145

CLI	YTD
Revenue	$ 366,625
Expenses	$ 263,468
Net:	$ 103,157

Trust Officer Conference	
Revenue	$ 311,160
Expenses	$ 176,833
Net:	$ 134,327

Legislative Update	
Revenue	$ 9,400
Expenses	$ 47,971
Net:	$ (38,571)

Convention	
Revenue	$ -
Expenses	$ 39,245
Net:	$ (39,245)

Roll-up Summary (Total)	
Revenue:	$ 2,000,783
Expenses	$ 1,765,526
Net Operations	$ 235,257

Beginning Fund Balance:	$ 3,030,620
Current Fund Balance (YTD):	$ 3,265,877
Projected June 2022 Fund Balance	$ 2,774,360

1 This report is based on the tentative unaudited detail statement of operations dated 04/30/22 (prepared 05/22/22)

CLE Calendar
(as of 05/25/22)

Date of Presentation	Crs. #	*Title*	Location
05-14-2022	5717	*Minority Lawyers Seminar - NUTS AND BOLTS OF A PROBATE PRACTICE*	Zoom
05-19-2022	5195	*RPPTL Audio Webcast - Condo 3, Hoarders and other mental health issues*	Audio Webcast
05-27-2022	*5513*	*Trust and Estate Symposium*	Pre-Recorded (Release Date)
TBD	*5718*	*Advanced Leasing Symposium*	Pre-Recorded
06-22-2022	*5702*	*RPPTL Audio Webcast - Seminar on Foreign Persons (CRE)*	Audio Webcast

Real Property, Probate & Trust Law Section of the Florida Bar
("RPPTL" or "Section")
Motion and Memorandum
Regarding Renewal of Section Standing Legislative Positions
(To Be Effective as of July 2, 2022)

From: RPPTL Executive Committee and RPPTL Legislation Committee

To: RPPTL Executive Council Members

Date: May 23rd, 2022

1. Section Motion to Recommend Renewal of Certain Standing Legislative Positions

In keeping with its biennial review of standing legislative positions, and as required under Article VIII, Section 4, Paragraphs (e) (f) of its bylaws, the Real Property, Probate and Trust Law Section of the Florida Bar hereby recommends the renewal of those legislative positions set forth on the attached list of Legislative Position Renewals, with such renewed positions to take effect on July 2, 2022.

2. Memorandum Regarding Section's Renewal of Standing Legislative Positions

A. **Standing Legislative Position Review and Purpose**: Review and approval of the Section's standing legislative positions is done every other year and is undertaken pursuant to the requirements of both Article VIII, Section 4, paragraphs (e) and (f) of the Section's by laws and at the direction of the Florida Bar's Board of Governors. The purpose of the review and the Section's approval is to assure that Section legislative positions remain relevant, accurate and properly framed for discharging the Section's purpose as stated in its bylaws including "to serve the public and its members by improving the administration of justice and advancing jurisprudence in the fields of real property, probate, trust and related fields of law, including the development and implementation of legislative positions." Generally speaking, if a position does not fulfill that purpose, has been withdrawn, or has already been passed, it is allowed to expire (i.e., it is not renewed or confirmed as a continuing Section legislative position). Renewal allows the position to continue to be supported and also provide guidance to the Section's committees as they proceed with their work. Such review and confirmation also guide the Section's lobbyists in supporting the Section's legislative positions and focuses Section resources on those legislative positions and initiatives that are to be continued.

B. **The Standing Position Review Process**: The current review of the Section's standing legislative positions was undertaken at the direction and with the supervision of the Section's Executive Committee and coordinated by its Legislation Committee. The process was begun by the Florida Bar's circulation of the Section's standing legislative positions. Those positions were then reviewed by the Section's Legislation Committee and disseminated to all Section

substantive law committees for review, comment, and direction as to whether such positions should be allowed to "sunset" or be retained. Input was sought and obtained from members of the Legislation Committee as well as those substantive law committee chairs and those they designated as experts in the subject matter of each legislative position. In addition, historical information as to the background and history of each position was reviewed along with existing White Paper submissions. The Section's lobbyists also provided in-depth analysis as to the positions that have been made part of legislation and those that have been withdrawn or support of legislators withdrawn. The responses of all review process participants were then combined and reviewed, and differences of opinion as to position retention or expiration/sunsetting were aired and resolution sought. In reviewing the standing position list and in considering the various positions taken by participants, the Executive Committee has remained cognizant that standing legislative positions provide guidance and comfort and allow coordinated Section responses when legislative proposals are submitted by stakeholders and legislative participants other than the Section. Former Section Chair, present member of the Bar's Board of Governors and its present Legislative Committee Chair, Sandy Diamond has been and continues to be instrumental in providing input as to the review process.

C. **The Attached Legislative Position Lists**: To facilitate review and discussion, we have included both a clean final version of those standing legislative positions for which renewal is recommended and a track change version showing those prior standing positions which should be allowed to sunset or expire (crossed through).

Real Property, Probate and Trust Law Section
Legislative Position Renewals Effective July 1, 2022

1. Probate, Trust & Guardianship / Estate Planning

a. Opposes the expansion of classes that are to serve as agents under a power of attorney beyond the current class of individuals and financial institutions with trust powers.

b. Supports legislation to provide for alienation of plan benefits under the Florida Retirement System (§121.131 and §121.091 Florida Statutes) Municipal Police Pensions (§185.25 Florida Statutes) and Firefighter Pensions (§175.241 Florida Statutes) in a dissolution proceeding and authorizing such alienation of benefits in a dissolution of marriage under §61.076 Florida Statutes.

c. Supports legislation to (1) change the titles of §222.11 Florida Statutes to clearly reflect that this statute applies to earnings and is not limited to "wages" (2) provide an expanded definition of "earnings" because the term "wages" is not the exclusive method of compensation and (3) add deferred compensation to the exemption statute.

d. Supports enactment of new Section 689.151 to the Florida Statutes to: (1) permit an owner of personal property to create a tenancy by the entireties by a direct transfer to the owner and owner's spouse, or a joint tenancy with right of survivorship by a direct transfer to the owner and another person or persons, without requiring an intermediate transfer through a strawman, (2) permit joint tenants to hold unequal shares or interests in personal property in a joint tenancy with right of survivorship while retaining the right of survivorship, (3) and facilitate proving the existence of tenancies by the entireties and joint tenancies with right of survivorship in personal property by codifying and clarifying existing common law evidentiary presumptions.

2. Probate, Trust & Guardianship / Guardianship & Advance Directives

a. Supports legislation to amend the Baker Act to include a provision under which a guardian may request that the court grant the guardian the authority to involuntarily hospitalize a ward pursuant to the Baker Act.

b. Opposes the adoption of summary guardianship proceedings outside the protections of Chapter 744, Florida Statutes.

c. Opposes amendments to F.S. §393.12 that would (i) remove the existing requirement that a guardian advocate for a developmentally disabled adult must be represented by an attorney if the guardian advocate is delegated authority to manage property, (ii) remove the existing requirement that the petition to appoint a guardian advocate must disclose the identity of the proposed guardian advocate, and (iii) expand the list of individuals entitled to receive notice of the guardian advocate proceedings.

d. Supports clarification of the definition of "income" for calculating Veterans guardianship fees, including an amendment to §744.604, Fla. Stat.

e. Supports amendments to the Florida Guardianship Law to protect the interest of incapacitated persons, especially minor wards, by making settlements on their behalf confidential.f. Opposes the expansion of chapter 709 to include the authority of a parent to assign the custody and control of a minor child through a power of attorney unless proper procedural safeguards are included to assure the proper care and welfare of the minor children.

g. Supports creation of new statutory procedures for the service of examining committee reports and deadlines for the service and filing of objections to such reports in incapacity proceedings, including revision to s. 744.331, F.S.

h. Supports proposed legislation to recognize Physician Orders for Life Sustaining Treatment (POLST) under Florida law with appropriate protections to prevent violations of due process for the benefit of the citizens of Florida and the protection of medical professionals and emergency responders who withhold or withdraw treatment based upon POLST, including the amendment of ss. 395.1041, 400.142, 400.487, 400.605, 400.6095, 401.35, 401.45, 429.255, 429.73, 765.205, 456.072, and the creation of s. 401.46, F.S; and opposes efforts to adopt POLST (Physician Ordered Life Sustaining Treatment) in Florida without appropriate procedural safeguards to protect the wishes of patients and prior advance directives made by the patient.

i. Opposes amendment to the Florida Constitution, including Commission Proposal 30, which would prevent removal of rights of a person based upon mental disability or mental incapacity unless appropriate safeguards to protect existing guardianship and mental health statutes and which would allow the legislature to establish laws which are intended to protect the welfare of the person and which comply with due process.

j. Supports amendment to Florida Statues §744.3701 to clarify existing law on the standard for the court's ordering the production of confidential documents in guardianship proceedings and the parties who have the right to access confidential documents without court order.

k. Supports amendment to Florida Statutes, including Florida Statutes § 744.331, amending the current statutory procedure for dismissal of a petition to determine incapacity to require a unanimous finding by the examining committee that a person is not incapacitated and creating a new statutory procedure which would allow for the presentation of additional evidence before a petition to determine incapacity is dismissed in the event that there is a unanimous finding of the examining committee that a person is not incapacitated.

l. Supports amendment to Florida Statutes, including Florida Statutes § 744.1097, to specifically address venue for the appointment of a guardian in minor guardianships proceedings.

m. Opposes Florida's adoption of the Uniform Guardianship and Protective Proceedings Jurisdiction Act (including the Florida Guardianship and Protective Proceedings Jurisdiction Act) unless the act is substantially revised to provide for better due process protections for incapacitated individuals more consistent with Florida's laws and rewritten with vocabulary consistent with Florida's guardianship laws.

3. Probate, Trust & Guardianship / Probate

a. Opposes any efforts to enact a statutory will.

b. Opposes amendment to §733.302, F. S., to expand the class of non-residents which may serve as personal representative because of a concern that any addition to the class may subject the entire statute to a renewed constitutional challenge.

c. Supports clarification of a person's rights to direct disposition of his or her remains, providing guidance to courts and family members, especially when disputes arise, and absent specific directions, clarifying who is authorized to decide the place and manner of the disposition of a decedent's remains, including an amendment replacing F.S. § 732.804.

d. Supports proposed legislation allowing a testator to deposit their original will with the clerk's office for safekeeping during their lifetime, and for other custodians to deposit original wills with the clerk for safekeeping when the testator cannot be located.

e. Opposes legislation, including 2019 Florida Senate Bill 548 and House Bill 409, that would permit remote notarization or remote witnessing of all estate and incapacity planning instruments and related spousal waivers (including electronic wills, powers of attorney, living wills, advance directives, and trust instruments having testamentary aspects), unless such legislation is amended:

(a) to safeguard the citizens of Florida from fraud and exploitation;

(b) to include protections to ensure the integrity, security, and authenticity of a remotely notarized or remotely witnessed instrument; and

(c) to require witnesses be physically present when such documents are executed or other procedures to protect the citizens of Florida, particularly vulnerable adults and the elderly who may have diminished mental capacity or be susceptible to fraud, undue influence, coercion, or duress.

f. Opposes proposed legislation that would allow banks or other financial institutions in Florida to distribute funds from any account in the name of the decedent (with no pay-on-death or survivor designation) in the absence of an appropriate probate proceeding or other court proceeding, unless safeguards are put in place to protect the rights and interests of persons rightfully entitled to the proceeds, the constitutional rights of the decedent to direct the disposition of his or her property, and the rights of creditors to recover debts through a probate proceeding.

g. Supports proposed legislation amending Section 733.610, Florida Statues, by expanding the categories of entities and persons related to the personal representative for purposes of determining whether the personal representative, or someone sufficiently related to the personal representative for conflict purposes, hold a substantial beneficial or ownership interest that could create a conflict of interest when engaging in a sale, encumbrance, or other transaction.

h. Supports proposed legislation relating to electronic wills and to the testamentary aspects of electronic revocable trusts, that retains the requirement that two subscribing witnesses sign in the physical presence of the testator and provides for protections to ensure the integrity, security, and authenticity of an electronically signed will or trust.

i. Opposes amendments to the personal representative and trustee attorney fee compensation statutes contained in the Florida Probate Code and the Florida Trust Code unless the amendments preserve the policies currently reflected in each of those codes**.**

4. Probate, Trust & Guardianship / Trust

a. Opposes legislation abrogating a trustee's duties of loyalty and duties of full and fair disclosure in connection with affiliated investments by a corporate trustee.

b. Supports proposed amendments to F.S. Chapter 736, which provide much needed clarification and guidance regarding the applicability of constitutional devise restrictions and exemption from creditors' claims provisions, as well as the timing and method of passage of title to homestead real property, when that homestead real property is devised through a revocable trust at the time of a settlor's death, including amendment to F.S. §736.0103, the creation of F.S. §736.0508, and the creation of F.S. §736.08115.

c. Supports proposed legislation which would amend s. 736.0708(1), F.S., to provide that when multiple trustees serve together as cotrustees, each cotrustee is entitled to reasonable compensation and that the aggregate compensation charged by all the trustees may be greater than reasonable compensation for a single trustee.

d. Supports proposed amendments to ss. 736.08135(3) and 736.1008(3), F.S., to clarify the duty of a Trustee to account to the qualified beneficiaries of a trust and the form and content of a trust accounting prepared on or after July 1, 2017, and to clarify that the period for which qualified beneficiaries can seek trust accountings.

5. Probate, Trust & Guardianship / Miscellaneous

a. Opposes the amendment of Ch. 726, F.S., by replacing the Uniform Fraudulent Transfer Act with the Uniform Voidable Transactions Act (the "UVTA") unless changes are made to protect the rights of Florida citizens to engage in certain sound and legitimate business, estate, and tax planning techniques and transactions which are currently permitted under Florida law; which do not hinder, delay or defraud creditors; and which do not enhance or diminish the utilization of self-settled spendthrift trusts or single-member limited liability companies by Florida citizens.

6. Real Property / Condominiums and Planned Developments

a. Supports amendments to Chapter 718, Florida Statutes, Condominiums, and Chapter 719 Florida Statutes, Cooperatives, to require that engineers, architects and other design professionals and manufacturers warrant the fitness of the work they perform on condominiums or cooperatives.

b. Opposes amendments to Chapter 720, F.S., that would require both pre-suit mediation and pre-suit arbitration before filing a civil action over homeowners' association disputes.

c. Supports legislation providing for electrical elements to three-year warranty, extend subcontractor and supplier warranties to the contractor and to clarify start date for five-year warranty deadline set forth in F.S. §718.203(1)(e).

d. Supports clarification of Ch 718, F.S.: to confirm that certain operational provisions do not apply to nonresidential condominium associations; to define "nonresidential condominiums;" to clarify that the Division's arbitration program only pertains to residential condominiums; to provide an effective date.

e. Supports legislation to remove the requirement that statutory late fees must be set forth in a condominium or homeowners' association declaration or bylaws in order for those charges to be imposed, to allow for the collection of such fees by all condominium and homeowner associations, including amendments to F.S. §§718.116 & 718.3085.

f. Supports legislation to differentiate the administration of nonresidential condominiums from residential condominiums and to eliminate for nonresidential condominium associations certain provisions not appropriate in a commercial setting, including amendments to F.S. Ch. 718.

g. Opposes legislation that changes the definition of the practice of law to exclude from the definition a community association manager's interpretation of documents or statutes that govern a community association, determination of title to real property, or completion of documents that require interpretation of statutes or the documents that govern a community association, including opposition to SB1466, SB1496, HB7037 and CS/HB7039 (2014).

h. Supports amending Florida Condominium law pertaining to the termination of condominiums to protect unit owners and provide certainty and predictability to the process.

i. Opposes creation of criminal penalties for violations of statutes pertaining to condominium association official records and condominium association elections, as well as any change to create criminal penalties for any violation of the Florida Condominium Act for which a criminal penalty does not already exist, including changes to §718.111(12) F.S., and creation of new statutory provisions within Ch. 718 F.S., or otherwise.

j. Supports replacing mandatory presuit arbitration with the Division of Condominiums for certain disputes between a condominium association and unit owner with mandatory presuit private mediation, including a change to Fla. Stat. 34.01, 718.013, 718.112, 718.117, 718.1255, 718.303, 720.303, 720.306 and 720.311.

k. Opposes continuing to allow fines in excess of $1,000 in homeowner associations to become liens for non-monetary damages against the parcel that can be foreclosed, including a change to Fla. Stat. 720.305(2).

l. Supports legislation to clarify that a condominium association has the right to represent its unit owner members in a class action defense, including when an association challenges ad valorem assessments on behalf of its unit owner members to the value adjustment board, and the property appraiser subsequently appeals the VAB's decision to increase owners' taxes. In such instance, the association may represent its unit owner members as a group pursuant to F.R.C.P. 1.221 and Florida Statutes §718.111(3).

m. Supports legislation amending Section 718.113 and Section 718.115 to clarify and enhance the ability of condominium associations and condominium unit owners to use hurricane shutters and other types of hurricane protection to protect condominium property, association property and the personal property of unit owners, and reduce insurance costs for condominium associations and unit owners.

7. Real Property / Contracts and Disclosures

a. Opposes legislation requiring multiple disclosures by sellers of real property, creating contract rescission rights for buyers and seller liability for damages.

b. Opposes legislation requiring parties to record notices, warnings or reports regarding the physical condition of land or improvements in the public records regarding the title to real property.

8. Real Property / Corporations and LLCs

a. Opposes legislation requiring a Florida corporation or limited liability company to publish notice of its proposed sale of assets other than in regular course of business, or to publish notice of dissolution, including changes to F.S. §607.1202 and §608.4262.

9. Real Property / Courts

a. Oppose the creation of "pilot" court divisions without funding, evaluation criteria, rules of procedure, and competency criteria for magistrates without consideration for current alternate dispute resolution processes.

b. Supports procedures to preserve due process by providing courts with authority to appoint attorney, administrator and guardian ad litems 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 litems have been appointed, including amendment of F.S. §49.021.

10. Real Property / Foreclosures and Judicial Sales

a. Oppose legislation which would require a foreclosing creditor to notify the debtor that filing a bankruptcy petition before the foreclosure sale may permit the debtor to retain the property and reorganize the indebtedness.

b. Opposes any amendment to existing Florida law governing real property foreclosures unless those amendments carefully preserve and protect the property rights and due process rights of the holders of interests in or affecting Florida real property.

12. Real Property / Liens and Encumbrances

a. Opposes efforts to create a lien on real property for work that does not add value to the property and would permit liens against the property of a person other than the party owing a debt.

b. Supports amendment to F.S. §695.01 and ch 162 to reduce problems regarding hidden liens by: (i) requiring all governmental liens (other than taxes, special assessments and those for utility services) to be recorded in the official records and to state their priority; (ii) clarifying the priority of liens asserted by local governments; and (iii) expanding the homestead determination mechanisms of F.S. §222.01 to apply to other types of liens.

c. Supports amendments: to s. 95.11(2) and (5), F.S., as to the statute of limitations for actions on payment bonds; to s. 713.08(3) (the statutory form for a claim of lien) to include the separate statement required by F.S. 713.08(1)(c); to s. s. 713.13, F.S. to delete the requirement that the notice of commencement be verified and to clarify the timing of the expiration date of the notice of commencement; to s. 713.18, F.S. as to electronic confirmation of delivery through the U.S. Postal Service.

d. Supports amendment of: F.S. §713.10(2)(b) to provide that a blanket notice recorded by a landlord remains valid and the landlord's property interest will not be liable for liens arising from tenant improvements even if the leases contain different versions of the lien prohibition language or no lien prohibition language at all, under certain circumstances; and F.S. §713.10(3) to require inclusion of specific language in any claim of lien premised on a landlord's failure to comply so as to provide record notice of the basis of such a claim by a lienor, and to provide that any lien will not take effect as to third parties without notice until 30 days after the recording of the claim of lien.

e. Opposes selective increase of recording expense to only construction claims of lien, adding additional filing requirements, and concluding that filing a lien beyond the statutory 90-day period is an act of fraud, including opposing amendments to F.S. §§28.24 & 713.08.

f. Supports the passage of an amendment to existing s. 713.132(3), F.S. to allow termination of a notice of commencement, provided for under s. 713.135, F.S., at any time whether or not construction has ceased as required under existing law.

g. Supports proposed legislation to: (1) clarify that the interest of a lessor is not subject to improvements made by the lessee of a mobile home lot in s. 713.10, F.S.; and (2) eliminate ambiguity regarding whether the expiration date on a notice of commencement may be less than one year from the date of recording, including an amendment to s.713.13, F.S.

h. Supports legislative changes to construction lien law in the state of Florida, including changes to Fla. Stat. Ch. 255 and 713.

11. Real Property / Miscellaneous

a. Opposes abolishment of causes of action for architect, engineer, surveyor and mapper professional negligence and other professional breaches of duty.

12. Real Property / Property Rights

a. Opposes any legislation limiting property owners' rights or limiting attorneys' fees in condemnation proceedings.

b. Opposes legislation expanding the definition of sovereign beaches, public beaches or beach access rights over privately owned property without due process of law or compensation for taking of private property rights.

c. Supports legislation to provide a statutory definition for Ejectment actions, provide for jurisdiction in the circuit courts for such actions, eliminate any ambiguity over whether pre-suit notice is required in such actions, and update the language in the existing Ejectment statute.

d. Supports legislation expanding applicability of §697.07 (Assignment of Rents) and §702.10 (Order to Make Payments During Foreclosure) to third parties who acquire properties subject to a mortgage.

13. Real Property / Recording

a. Opposes legislation that impairs the integrity of the recording system in the State of Florida.

14. Real Property / Title Insurance

a. Opposes any portion of the National Association of Insurance Commissioners Title Insurers Model Act and Title Insurance Agent Model Act that may adversely affect Florida attorneys' ability to participate in real estate closing and the issuance of title insurance.

b. Opposes adoption of a “file and use” system for the determination of title insurance rates in the State of Florida, supplanting a promulgated rate system in which the state regulatory agency determines rates based on actuarial analysis of statutorily determined criteria.

c. Opposes elimination of the requirement that title insurance agencies deposit securities having a value of $35,000 or a bond in that amount for the benefit of any title insurer damaged by an agency's violation of its contract with the insurer.

Real Property, Probate and Trust Law Section – Position Renewals Effective July 1, 2022

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1. **Probate, Trust & Guardianship / Estate Planning**

~~a. Supports limitation of creditor remedies against partner interest in general and limited liability partnerships and member interests in limited liability companies to charging liens and to prohibit foreclosure against such interests.~~

~~b.~~a. Opposes the expansion of classes that are to serve as agents under a power of attorney beyond the current class of individuals and financial institutions with trust powers.

~~c.~~b. Supports legislation to provide for alienation of plan benefits under the Florida Retirement System (§121.131 and §121.091 Florida Statutes) Municipal Police Pensions (§185.25 Florida Statutes) and Firefighter Pensions (§175.241 Florida Statutes) in a dissolution proceeding and authorizing such alienation of benefits in a dissolution of marriage under §61.076 Florida Statutes.

~~d.~~c. Supports legislation to (1) change the titles of §222.11 Florida Statutes to clearly reflect that this statute applies to earnings and is not limited to "wages" (2) provide an expanded definition of "earnings" because the term "wages" is not the exclusive method of compensation and (3) add deferred compensation to the exemption statute.

~~e. Supports legislation which provides that a lawyer, or certain people related to, or affiliated with, the lawyer will not be entitled to receive compensation for serving as a fiduciary if the lawyer prepared the instrument making the appointment unless: (a) the lawyer or person appointed is related to the client, or (b) certain disclosures are made to the client before the instrument is signed and confirmed in a writing signed by the client.~~

~~f.~~d. Supports enactment of new Section 689.151 to the Florida Statutes to: (1) permit an owner of personal property to create a tenancy by the entireties by a direct transfer to the owner and owner's spouse, or a joint tenancy with right of survivorship by a direct transfer to the owner and another person or persons, without requiring an intermediate transfer through a strawman, (2) permit joint tenants to hold unequal shares or interests in personal property in a joint tenancy with right of survivorship while retaining the right of survivorship, (3) and facilitate proving the existence of tenancies by the entireties and joint tenancies with right of survivorship in personal property by codifying and clarifying existing common law evidentiary presumptions.

~~g. Supports revisions to section 736.0$145, Florida Statutes, to grant a trustee discretionary authority to reimburse the deemed owner of a grantor trust for income taxes attributable to the deemed owner.~~

~~h. Supports the enactment of a new Part XV of the Florida Trust Code, entitled the "Florida Community Property Trust Act of 2021," to permit married couples to create community property in Florida by transferring assets to a Florida Community Property Trust and take advantage of significant income tax benefit.~~

2. Probate, Trust & Guardianship / Guardianship & Advance Directives

a. Supports legislation to amend the Baker Act to include a provision under which a guardian may request that the court grant the guardian the authority to involuntarily hospitalize a ward pursuant to the Baker Act.

b. Supports legislation to amend F.S. §394.467 to add as criteria for involuntary placement the substantial and imminent likelihood of inflicting serious emotional or psychological harm on another person, and the causation of significant damage to property in the recent past with substantial and imminent likelihood of doing so again.

c. Supports amending 29.007 F.S. to provide authority to appoint and compensate attorneys and professional guardians to serve as guardian advocates and guardian ad litem for indigents in civil commitment and treatment proceedings in proceedings under the mental retardation statutes (ch. 393), Baker Act (ch. 394) and Marchman Act (ch. 397).

d. Supports legislation to amend Chapter 765, Florida Statutes, to improve the law concerning advance directives and to integrate federal HIPPA privacy laws with Florida law.

e. Opposes the adoption of summary guardianship proceedings outside the protections of Chapter 744, Florida Statutes.

f. Opposes amendments to F.S. §393.12 that would (i) remove the existing requirement that a guardian advocate for a developmentally disabled adult must be represented by an attorney if the guardian advocate is delegated authority to manage property, (ii) remove the existing requirement that the petition to appoint a guardian advocate must disclose the identity of the proposed guardian advocate, and (iii) expand the list of individuals entitled to receive notice of the guardian advocate proceedings.

g. Supports clarification of the definition of "income" for calculating Veterans guardianship fees, including an amendment to §744.604, Fla. Stat.

h. Opposes the adoption of the Uniform Adult Guardianship and Protective Proceedings Act.

i. Supports amendments to the Florida Guardianship Law to protect the interest of incapacitated persons, especially minor wards, by making settlements on their behalf confidential.

j. Supports adoption of clarifications to F.S. Ch. 709, the Florida Power of Attorney Act.

k. Opposes amendments to guardianship statutes that (a) would change the criteria and limit the discretion of the court in awarding fees in guardianship proceedings for services that benefit the ward, (b) seek to significantly change established guardianship laws and procedures concerning the qualification of examining committee members and the content and requirements of their reports, and (c) would criminalize certain conduct in guardianship proceedings, including proposed amendments to F.S. §§744.108, 744.331, and 744.4461.

l. COMBINED WITH "q" BELOW: Opposes efforts to adopt POLST (Physician Ordered Life Sustaining Treatment) in Florida without appropriate procedural safeguards to protect the wishes of patients and prior advance directives made by the patient, including current Senate Bill 1052.

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m. Opposes the expansion of chapter 709 to include the authority of a parent to assign the custody and control of a minor child through a power of attorney unless proper procedural safeguards are included to assure the proper care and welfare of the minor children.

~~n. Supports changes to Florida law to permit a court to approve a guardian's request to initiate a petition for dissolution of marriage of a ward without the requirement that the ward's spouse consent to the dissolution, including amendments to s. 744.3725, F.S.~~

~~o. Supports proposed legislation removing the statutory cap on amounts which guardians, with prior court approval, may expend for funeral related expenses, including a change to s. 744.441(16), F.S.~~

~~p.~~n. Supports creation of new statutory procedures for the service of examining committee reports and deadlines for the service and filing of objections to such reports in incapacity proceedings, including revision to s. 744.331, F.S.

~~q.~~o. Supports proposed legislation to recognize Physician Orders for Life Sustaining Treatment (POLST) under Florida law with appropriate protections to prevent violations of due process for the benefit of the citizens of Florida and the protection of medical professionals and emergency responders who withhold or withdraw treatment based upon POLST, including the amendment of ss. 395.1041, 400.142, 400.487, 400.605, 400.6095, 401.35, 401.45, 429.255, 429.73, 765.205, 456.072, and the creation of s. 401.46, F.S; and opposes efforts to adopt POLST (Physician Ordered Life Sustaining Treatment) in Florida without appropriate procedural safeguards to protect the wishes of patients and prior advance directives made by the patient.

~~r.~~p. Opposes amendment to the Florida Constitution, including Commission Proposal 30, which would prevent removal of rights of a person based upon mental disability or mental incapacity unless appropriate safeguards to protect existing guardianship and mental health statutes and which would allow the legislature to establish laws which are intended to protect the welfare of the person and which comply with due process.

~~s.~~q. Supports amendment to Florida Statues §744.3701 to clarify existingting law on the standard for the court's ordering the production of confidential documents in guardianship proceedings and the parties who have the right to access confidential documents without court order.

~~t.~~r. Supports amendment to Florida Statutes, including Florida Statutes § 744.331, amending the current statutory procedure for dismissal of a petition to determine incapacity to require a unanimous finding by the examining committee that a person is not incapacitated and creating a new statutory procedure which would allow for the presentation of additional evidence before a petition to determine incapacity is dismissed in the event that there is a unanimous finding of the examining committee that a person is not incapacitated.

~~u.~~s. Supports amendment to Florida Statutes, including Florida Statutes § 744.1097, to specifically address venue for the appointment of a guardian in minor guardianships proceedings.

~~v.~~t. Opposes Florida's adoption of the Uniform Guardianship and Protective Proceedings Jurisdiction Act (including the Florida Guardianship and Protective Proceedings Jurisdiction Act) unless the act is

substantially revised to provide for better due process protections for incapacitated individuals more consistent with Florida's laws and rewritten with vocabulary consistent with Florida's guardianship laws.

3. Probate, Trust & Guardianship / Probate

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a. Opposes any efforts to enact a statutory will.

~~b. Need language and White Paper: Supports legislation to repeal §734.1025, Florida Statutes, because the dollar amount for summary administrations found in § 735.201-2063, Florida Statutes, has been increased thus, making §734.102, Florida Statutes, duplicative.~~

~~c.~~b. Opposes amendment to §733.302, F. S., to expand the class of non-residents which may serve as personal representative because of a concern that any addition to the class may subject the entire statute to a renewed constitutional challenge.

~~d. Opposes changes to Florida Statute 732.103 that would extend the intestate distribution scheme to the level of the decedent's great-grandparents.~~

~~e.~~c. Supports clarification of a person's rights to direct disposition of his or her remains, providing guidance to courts and family members, especially when disputes arise, and absent specific directions, clarifying who is authorized to decide the place and manner of the disposition of a decedent's remains, including an amendment replacing F.S. § 732.804.

~~f. Supports proposed legislation to remove barriers to a fiduciary's access to electronic records, including the Florida Fiduciary Access to Digital Assets Act, F.S. Ch. 740.~~

~~g. Supports proposed legislation confirming that Florida law governs the validity and effect of the disposition of Florida real property, whether owned by a resident or a nonresident, including a change to F.S. §731.106(2).~~

~~h. Opposes legislation to expand the potential plaintiffs who can file an action on behalf of a vulnerable adult who has been abused, neglected, or exploited as specified in Chapter 415 without the consent of the vulnerable adult and without clear requirements that any recovery from successful litigation be paid to the vulnerable adult or their estate.~~

~~i.~~d. Supports proposed legislation allowing a testator to deposit their original will with the clerk's office for safekeeping during their lifetime, and for other custodians to deposit original wills with the clerk for safekeeping when the testator cannot be located.

~~j. Supports revisions to Florida Elective Share Statute, s.732.201 – 732.2155, F.S., that after careful review are believed to be warranted, including changes to the manner in which protected homestead is included in the elective estate and how it is valued for purposes of satisfying the elective share; quantify the amount of the elective share which the surviving spouse is entitled with reference to the length of the marriage, enlarge the time for filing the election; add a provision ot assess interest on persons who are very delinquent in fulfilling their statutory obligations to pay or contribute towards satisfaction of the elective share, add a new section that specifically addresses awards of attorney's fees and costs from elective share proceedings; and make changes to Ch. 738, F.S., to assure qualification for certain elective share trusts that contain so called unproductive property.~~

k. Opposes legislation, including 2019 Florida Senate Bill 548 and House Bill 409, that would permit remote notarization or remote witnessing of all estate and incapacity planning instruments and related spousal waivers (including electronic wills, powers of attorney, living wills, advance directives, and trust instruments having testamentary aspects), unless such legislation is amended:

(a) to safeguard the citizens of Florida from fraud and exploitation;
(b) to include protections to ensure the integrity, security, and authenticity of a remotely notarized or remotely witnessed instrument; and
(c) to require witnesses be physically present when such documents are executed or other procedures to protect the citizens of Florida, particularly vulnerable adults and the elderly who may have diminished mental capacity or be susceptible to fraud, undue influence, coercion, or duress.

l. Opposes proposed legislation that would allow banks or other financial institutions in Florida to distribute funds from any account in the name of the decedent (with no pay-on-death or survivor designation) in the absence of an appropriate probate proceeding or other court proceeding, unless safeguards are put in place to protect the rights and interests of persons rightfully entitled to the proceeds, the constitutional rights of the decedent to direct the disposition of his or her property, and the rights of creditors to recover debts through a probate proceeding.

m. ~~Supports proposed legislation defining "tangible personal property" in the Florida Probate Code to make it clear that tangible personal property includes, but is not limited to, precious metals in any tangible form, such as bullion and coins.~~

~~n. Supports the proposed amendment to F.S. Chapter 731 to provide that formal notice as provided in the Florida Probate Rules does not confer in personam jurisdiction over persons receiving formal notice.~~

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o. Supports proposed legislation amending Section 733.610, Florida Statues, by expanding the categories of entities and persons related to the personal representative for purposes of determining whether the personal representative, or someone sufficiently related to the personal representative for conflict purposes, hold a substantial beneficial or ownership interest that could create a conflict of interest when engaging in a sale, encumbrance, or other transaction.

p. Supports proposed legislation relating to electronic wills and to the testamentary aspects of electronic revocable trusts, that retains the requirement that two subscribing witnesses sign in the physical presence of the testator and provides for protections to ensure the integrity, security, and authenticity of an electronically signed will or trust.

q. Opposes amendments to the personal representative and trustee attorney fee compensation statutes contained in the Florida Probate Code and the Florida Trust Code unless the amendments preserve the policies currently reflected in each of those codes.

~~r. Supports the proposed amendments clarifying the personal representative's exclusive authority to pursue causes of action on behalf of the estate, including but not limited to claims for the return of probate assets wrongfully transferred prior to the decedent's death, including changes to Fla. Stat. §§731.201(32), 733.607(1), and 733.612(20).~~

s. Supports a shortened time period, not less than 25 months, for the presumption of unclaimed property for smaller financial accounts if proof of death is established (for the 2019 Legislative Session).

t. Supports proposed legislation to improve the notice of administration to the surviving spouse to include notice that an extension of the deadline for taking an elective share may be requested prior to the expiration of the deadline for making the election, including changes to F.S. §733.212(2)(c).

u. Supports amending Section 733.212, Florida Statutes, which governs the contents of a notice of administration, to require additional language to provide adequate notice that a party may be waiving their right to contest a trust if they fail to timely contest the will.

v. Support legislation resolving technical inconsistencies and errors within Chapters 718 and 720, Florida Statutes, that have arisen due to multiple revisions of the Chapters and to provide additional clarification as to how Chapters 718 and 720 are to be applied.

w. Supports amendments to:

s. 117.201(9) clarifying that "online notarization" includes the appearance of witnesses by means of audio-video communication technology;
s. 117.285 (introductory paragraph) clarifying that supervising the witnessing of an electronic record is a notarial act and that the procedures for online notarization apply when an online notary public supervises the witnessing of an electronic record;
s. 117.285(2) clarifying that the identity of the principal must be verified when an online notary public supervises the witnessing of an electronic record;
s. 117.285(5) clarifying that this subsection is only applicable to the testamentary aspects of revocable trusts and when fewer than two witnesses are physically present with the principal at the time of execution; and revising the description of documents to be consistent with s. 732.701 and s. 732.702;
s. 117.285(6)(b) and s. 732.521(7) correcting erroneous cross-references contained therein; and ss. 709.2119(2)(c), 732.401(2)(c), 732.503(1), 732.703(5)(b)3. and 4., and 747.051(1), revising the forms contained in those statutes so that the jurats or notarial certificates in those statutory forms comply with the new requirements of s. 117.05(4)(c) which became effective January 1, 2020; and to support making the amendments described herein retroactive to January 1, 2020 and making the proposed legislation effective upon becoming law.

x. Supports revisions to Sections 732.507 and 736.1105, Florida Statutes, to clarify uncertainty contained within the Florida Probate Code and the Florida Trust Code, dealing with devises through will or trust to the former spouse of a decedent.

y. Supports revisions Section 69.031, Florida Statutes, permitting personal representatives to post a fiduciary bond in lieu of the imposition of a restricted depository account.

z.t. (PENDING Gov's action) Supports proposed amendments to section 733.705(5) (Payment of and objection to claims) to codify existing case law such that the requirement to bring an independent action is satisfied if, within 30 days of the filing of an objection to the claim: a motion to substitute the fiduciary is filed in the pending action; an order substituting the fiduciary is entered in the pending action; such other procedure as may exist is initiated to substitute the fiduciary in the pending action; or the timely filing of an arbitration is made when the decedent has entered into an agreement during lifetime which provides for mandatory arbitration relating to the claim, or arbitration is required by the decedent's will or trust.

4. Probate, Trust & Guardianship / Trust

a. Opposes legislation abrogating a trustee's duties of loyalty and duties of full and fair disclosure in connection with affiliated investments by a corporate trustee.

~~b. Supports amendment of F.S. §736.0813 to clarify the meaning of the requirement that a trustee furnish qualified beneficiaries with a "complete copy" of a trust document.~~

~~c. Supports legislation that would create legislation that authorizes families to form and operate licensed and unlicensed family trust companies and to authorize out of state licensed family trust companies to operate in Florida, including the creation of proposed F.S. Ch. 659, Family Trust Companies.~~

~~d. Supports proposed legislation that would amend F.S. §§736.0412(4) and 736.0105(2)(k), so that all irrevocable trusts are treated the same with regard to whether non-judicial modification is available during the first 90 years after the trust is created – more specifically, all irrevocable trusts will be restricted to judicial modification during the first 90 years after creation, unless the trust expressly permits non-judicial modification within the first 90 years.~~

~~e.~~b. Supports proposed amendments to F.S. Chapter 736, which provide much needed clarification and guidance regarding the applicability of constitutional devise restrictions and exemption from creditors' claims provisions, as well as the timing and method of passage of title to homestead real property, when that homestead real property is devised through a revocable trust at the time of a settlor's death, including amendment to F.S. §736.0103, ~~amendment to F.S. §736.0201,~~ the creation of F.S. §736.0508, and the creation of F.S. §736.08115.

~~f. Supports proposed legislation to revise Florida law to provide that the Attorney General is the proper party to receive notice for matters concerning charitable trusts and further define the manner in which the Attorney General will receive such notices, including changes to ss. 736.0110(3), 736.1201, 736.10205, 736.1206(2), 736.1207, 736.1208(4)(b), and 736.1209, F.S.~~

~~g. Supports proposed legislation to expand and modernize the statutory authority for trustees to "decant" by distributing trust principal from one trust into a second trust and expand the notice requirements for the transaction including changes to s. 736.04117, F.S.~~

~~h.~~c. Supports proposed legislation which would amend s. 736.0708(1), F.S., to provide that when multiple trustees serve together as cotrustees, each cotrustee is entitled to reasonable compensation and that the aggregate compensation charged by all the trustees may be greater than reasonable compensation for a single trustee.

~~i. Supports proposed legislation to reaffirm Florida's well established jurisprudence in favor of donative freedom so that the settlor's intent is paramount when applying and interpreting both Florida trust law and the terms of a trust, including changes to ss. 736.0103(11), 736.0105(2)(c), and 736.0404, F.S.~~

~~j.~~d. Supports proposed amendments to ss. 736.08135(3) and 736.1008(3), F.S., to clarify the duty of a Trustee to account to the qualified beneficiaries of a trust and the form and content of a trust accounting prepared on or after July 1, 2017, and to clarify that the period for which qualified beneficiaries can seek trust accountings.

a. Support proposed legislation removing the scheduled repeal of the public records exemption for certain information held by the Office of Financial Regulation relating to a family trust company, licensed family trust company, or foreign licensed family trust company.

b. Support proposed legislation creating Florida Statutes 662.149 to establish an exemption for the publication of applications of a family trust company (1) seeking to operate as a licensed family trust company under s. 662.121 or (2) seeking to register and operate in the State of Florida s. 662.122.

c. Supports proposed legislation creating the "Florida Uniform Directed Trust Act" (a modified version of the Uniform Directed Trust Act), which clarifies and changes various aspects of the Florida Statutes relating to directed trusts.

d. Supports revisions Section 69.031, Florida Statutes, permitting personal representatives to post a fiduciary bond in lieu of the imposition of a restricted depository account.

e.a. Support legislation to change Fla. Stat. § 736.1008 so that the same statute of limitations for breach of trust against a trustee applies to directors, officers, and employees acting for the trustee.

5. Probate, Trust & Guardianship / Miscellaneous

a. Opposes the amendment of Ch. 726, F.S., by replacing the Uniform Fraudulent Transfer Act with the Uniform Voidable Transactions Act (the "UVTA") unless changes are made to protect the rights of Florida citizens to engage in certain sound and legitimate business, estate, and tax planning techniques and transactions which are currently permitted under Florida law; which do not hinder, delay or defraud creditors; and which do not enhance or diminish the utilization of self-settled spendthrift trusts or single-member limited liability companies by Florida citizens.

b. To support a proposed amendment to Section 719.103(25), Florida Statutes, to provide much needed clarification and guidance regarding the inurement of the constitutional exemption from creditors' claims upon the death of a Florida resident who owns a leasehold cooperative unit.

c. Supports proposed amendment to section 201.02(4) (Tax on deeds and other instruments relating to real property or interests in real property) to create express statutory authority for existing Florida Administrative Code Rule 12B-4.013(28) by adding a sentence to Section 201.02(4) to apply the general principle expressed in Section 201.02(1) to transfers of real property interests to or from trustees of written trusts under Chapter 689. Consistent with decades of practice by the Department and taxpayers alike, this general principle requires that there be a transfer of beneficial ownership and consideration for the transfer in order for the documentary stamp tax to apply to the transfer.

6. Real Property / Condominiums and Planned Developments

a. Supports amendments to Chapter 718, Florida Statutes, Condominiums, and Chapter 719 Florida Statutes, Cooperatives, to require that engineers, architects and other design professionals and manufacturers warrant the fitness of the work they perform on condominiums or cooperatives.

b. Opposes amendments to §718.1255, Florida Statutes, or targeted budget reductions or other governmental action having the purpose or effect or diminishing or eliminating the jurisdiction of the Arbitration Division of the Department of Business and Professional Regulation's Division of Land Sales.

k. Supports condominium unit owner's ability to exercise self-government and undertake fair and efficient community administration, including the exercise of basic contract and investment decisions.

l. Supports legislation to permit condominium unit owners to further subdivide or partition their interest in the condominium and common elements appurtenant thereto pursuant to a sub-declaration of condominium, which subdivided units shall remain subject and subordinate to the existing declaration of condominium, provided such existing declaration of condominium allows for the subdivision.

m.e. Opposes amendments to Chapter 720, F.S., that would require both pre-suit mediation and pre-suit arbitration before filing a civil action over homeowners' association disputes.

n.f. Supports legislation providing for electrical elements to three-year warranty, extend subcontractor and supplier warranties to the contractor and to clarify start date for five-year warranty deadline set forth in F.S. §718.203(1)(e).

o. 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.

p. Supports additional guidance and regulation respecting the creation of a condominium within a condominium unit, through creation of Section 718.406, F.S.; to provide an effective date.

q.g. Supports clarification of Ch 718, F.S.: to confirm that certain operational provisions do not apply to nonresidential condominium associations; to define "nonresidential condominiums;" to clarify that the Division's arbitration program only pertains to residential condominiums; to provide an effective date.

r. Supports amendments to F.S. Chapter 718: to replace the date triggering certain obligations; to clarify when a condominium unit is created; to permit extending the period for adding phases to a condominium; and, to provide an effective date.

s. Supports legislation to standardize procedures and to clarify the timing, content and preparation fees relating to estoppel letters issued by condominium and homeowners' associations, including amendments to F.S. §§718.116 & 720.30851.

t.h. Supports legislation to remove the requirement that statutory late fees must be set forth in a condominium or homeowners' association declaration or bylaws in order for those charges to be imposed, to allow for the collection of such fees by all condominium and homeowner associations, including amendments to F.S. §§718.116 & 718.3085.

~~u.~~ i. Supports legislation to differentiate the administration of nonresidential condominiums from residential condominiums and to eliminate for nonresidential condominium associations certain provisions not appropriate in a commercial setting, including amendments to F.S. Ch. 718.

~~v. Supports an amendment to F.S. §712.05 of the Marketable Record Title Action to correct an error created by an inadvertent requirement imposed by the 2010 amendment to F.S. §712.06, clarifying existing law, removing the costly, time consuming, and unnecessary requirement to mail a copy of the notice of preservation to each owner in a homeowners' association, who would have already been notified of the preservation.~~

~~w. Supports an amendment to the Florida Condominium Act for a one-year extension of the expiration date to July 1, 2016, for Part VII of the Act and F.S. §718.707, dealing with distressed condominiums.~~

~~x. Supports amendments to the Florida Condominium Act which set forth the rights and obligations of purchasers and lenders that acquire multiple units, but who are not creating developers of the condominium, including creating a Part VIII, and eliminating application of Part VII, of the Condominium Act to transactions recorded after the effective date July 1, 2016.~~

~~y.~~ j. Opposes legislation that changes the definition of the practice of law to exclude from the definition a community association manager's interpretation of documents or statutes that govern a community association, determination of title to real property, or completion of documents that require interpretation of statutes or the documents that govern a community association, including opposition to SB1466, SB1496, HB7037 and CS/HB7039 (2014).

~~z.~~ k. Supports amending Florida Condominium law pertaining to the termination of condominiums to protect unit owners and provide certainty and predictability to the process.

~~aa.~~ l. Opposes creation of criminal penalties for violations of statutes pertaining to condominium association official records and condominium association elections, as well as any change to create criminal penalties for any violation of the Florida Condominium Act for which a criminal penalty does not already exist, including changes to §718.111(12) F.S., and creation of new statutory provisions within Ch. 718 F.S., or otherwise.

~~bb.~~ m. Supports replacing mandatory presuit arbitration with the Division of Condominiums for certain disputes between a condominium association and unit owner with mandatory presuit private mediation, including a change to Fla. Stat. 34.01, 718.013, 718.112, 718.117, 718.1255, 718.303, 720.303, 720.306 and 720.311.

~~cc. Opposes requiring any insurance policy issued to an individual condominium unit owner to prohibit the right of subrogation against the condominium association, including a change to Fla. State. 627.714(4).~~

~~dd.~~ n. Opposes continuing to allow fines in excess of $1,000 in homeowner associations to become liens for non-monetary damages against the parcel that can be foreclosed, including a change to Fla. Stat. 720.305(2).

~~ee. Opposes HB 1075 in its entirety for requiring any insurance policy issued to an individual condominium unit owner to prohibit the right of subrogation against the condominium association and continuing to allow fines in excess of $1,000 in homeowner associations to become liens for non-monetary damages against the parcel that can be foreclosed, including changes to Fla. Stat. 627.714(4) and 720.305(2).~~

~~ff.~~ o. Supports legislation to clarify that a condominium association has the right to represent its unit owner members in a class action defense, including when an association challenges ad valorem assessments on behalf of its unit owner members to the value adjustment board, and the property appraiser subsequently appeals the VAB's decision to increase owners' taxes. In such instance, the association may represent its unit owner members as a group pursuant to F.R.C.P. 1.221 and Florida Statutes §718.111(3).

y. Supports legislation amending Section 718.113 and Section 718.115 to clarify and enhance the ability of condominium associations and condominium unit owners to use hurricane shutters and other types of hurricane protection to protect condominium property, association property and the personal property of unit owners, and reduce insurance costs for condominium associations and unit owners.

7. Real Property / Contracts and Disclosures

a. Opposes legislation requiring multiple disclosures by sellers of real property, creating contract rescission rights for buyers and seller liability for damages.

b. Opposes legislation requiring parties to record notices, warnings or reports regarding the physical condition of land or improvements in the public records regarding the title to real property.

8. Real Property / Corporations and LLCs

a. Opposes legislation requiring a Florida corporation or limited liability company to publish notice of its proposed sale of assets other than in regular course of business, or to publish notice of dissolution, including changes to F.S. §607.1202 and §608.4262.

9. Real Property / Courts

a. Oppose the creation of "pilot" court divisions without funding, evaluation criteria, rules of procedure, and competency criteria for magistrates without consideration for current alternate dispute resolution processes.

b. Supports procedures to preserve due process by providing courts with authority to appoint attorney, administrator and guardian ad litems 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 litems have been appointed, including amendment of F.S. §49.021.

c. (PENDING Gov's action) Supports proposal to create Florida Statutes 49.072 establishing a process to serve unknown parties in possession of real property.

10. Real Property / Environmental

a. Supports continuation and improvement of the Florida brownfield redevelopment program, including the voluntary cleanup tax credit (VCTC) program pursuant to F.S. §376.30781.

11. Real Property / Foreclosures and Judicial Sales

a. Oppose legislation which would require a foreclosing creditor to notify the debtor that filing a bankruptcy petition before the foreclosure sale may permit the debtor to retain the property and reorganize the indebtedness.

b. Opposes any amendment to existing Florida law governing real property foreclosures unless those amendments carefully preserve and protect the property rights and due process rights of the holders of interests in or affecting Florida real property.

c. Supports expanded publication of notices of judicial sales, permitting notices to be posted on the Internet, including amendments to F.S. Chapters 45, 50 and 702.

d. Supports foreclosure reform which expedites and streamlines the judicial foreclosure process 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. [Revised 4/18/13]

e. Supports requirements for electronic publication of legal notices that address due process concerns, including amendments to F.S. §50.0211, 50.041, and 50.061.

f. Supports correction of procedural issues relating to trustee foreclosures of timeshares, including amendments to sections 721.82, 721.855, and 721.856 of the Florida Statutes.

Supports legislation to permit the electronic filing of certified copies of documents and permit the self-authentication of documents other than by obtaining a certified copy, including an amendment of F.S. §90.902.

g. Supports a clarification and simplification of the statute of repose applicable to mortgage liens and restoration of subrogation rights for property tax advances through changes to F.S. §95.281.

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h. Need language and White Paper: Supports a clarification that the one-year statute of limitations on a mortgage foreclosure deficiency action begins on issuance of the certificate of title.

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12. Real Property / Liens and Encumbrances

a. Need language and White Paper: Supports amendment to §162.09(3), Florida Statutes, to clarify the relative priority of recorded municipal code enforcement liens created pursuant to the Local Government Code Enforcement Boards Act.

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b. a. Opposes efforts to create a lien on real property for work that does not add value to the property, and would permit liens against the property of a person other than the party owing a debt.

c. b. Supports amendment to F.S. §695.01 and ch 162 to reduce problems regarding hidden liens by: (i) requiring all governmental liens (other than taxes, special assessments and those for utility services) to be recorded in the official records and to state their priority; (ii) clarifying the priority of liens asserted by local governments; and (iii) expanding the homestead determination mechanisms of F.S. §222.01 to apply to other types of lienliens.

d. c. Supports amendments: to s. 95.11(2) and (5), F.S., as to the statute of limitations for actions on payment bonds; to s. 713.08(3) (the statutory form for a claim of lien) to include the separate statement required by F.S. 713.08(1)(c); to s. s. 713.13, F.S. to delete the requirement that the notice of commencement be verified and to clarify the timing of the expiration date of the notice of commencement; to s. 713.18, F.S. as to electronic confirmation of delivery through the U.S. Postal Service.

e. d. Supports amendment of: F.S. §713.10(2)(b) to provide that a blanket notice recorded by a landlord remains valid and the landlord's property interest will not be liable for liens arising from tenant improvements even if the leases contain different versions of the lien prohibition language or no lien prohibition language at all, under certain circumstances; and F.S. §713.10(3) to require inclusion of specific language in any claim of lien premised on a landlord's failure to comply so as to provide record notice of the basis of such a claim by a lienor, and to provide that any lien will not take effect as to third parties without notice until 30 days after the recording of the claim of lien.

f. e. Opposes selective increase of recording expense to only construction claims of lien, adding additional filing requirements, and concluding that filing a lien beyond the statutory 90-day period is an act of fraud, including opposing amendments to F.S. §§28.24 & 713.08.

g. f. Supports the passage of an amendment to existing s. 713.132(3), F.S. to allow termination of a notice of commencement, provided for under s. 713.135, F.S., at any time whether or not construction has ceased as required under existing law.

h. g. Supports proposed legislation to: (1) clarify that the interest of a lessor is not subject to improvements made by the lessee of a mobile home lot in s. 713.10, F.S.; and (2) eliminate ambiguity regarding whether the expiration date on a notice of commencement may be less than one year from the date of recording, including an amendment to s.713.13, F.S.

i. (PENDING Gov's action) Supports legislation which will clarify s.48.23(1)(d) F.S. to preserve the widely understood interpretation of the lis pendens statute that, in proceedings involving a judicial sale, a valid recorded notice lis pendens remains in effect through the recording of an instrument transferring title pursuant to the judicial sale, in order to eliminate intervening subordinate interests or liens; and will incorporate the revision to s.48.23(1)(b)2 F.S. previously approved by the RPPTL Section, which extends certain protections to lienholders (as well as those having an interest in the real property).

~~j.~~h. Supports legislative changes to construction lien law in the state of Florida, including changes to Fla. Stat. Ch. 255 and 713.

13. Real Property / Mobile Homes

~~a. Supports amendment to Chapter 723, Florida Statutes, specifying that each mobile home owner/owners shall have only one vote at elections or meetings, and to allow association bylaws to specify less than a majority for a quorum.~~

14. Real Property / Miscellaneous

~~a.~~ Need language and White Paper: ~~Supports amendment to §673.3121, Florida Statutes, to provide a cross-reference in it to §673.4111, Florida Statutes, stating that if an official check is not paid, then the person entitled to enforce the official check is entitled to compensation from the obligated bank for refusing to pay.~~

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~~b.~~a. Opposes abolishment of causes of action for architect, engineer, surveyor and mapper professional negligence and other professional breaches of duty.

~~c.~~ Need language and White Paper: ~~Supports execution curative provisions to cover instruments, other than deeds or wills that convey a fee simple interest in real estate, including an amendment to F.S. §95.231.~~

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~~d. Supports issuance of separate property tax folio numbers for separately described portions of a multiple parcel building and providing for allocation of underlying land value among the separate building parcels, including amendment of F.S. Chapter 193.~~

~~e. Supports legislation eliminating documentary stamp tax on deeds and mortgage assumptions between persons who are married.~~

~~f. Supports the establishment of a procedure by which property owners may close open or expired permits, the protection from liability of bona fide purchasers of property with open or expired permits, and the establishment of procedures to reduce the number of future open or expired permits.~~

~~g. Supports legislation to change Fla. Stat. 222.21(2)(c) to clarify that an ex-spouse's interest in an IRA which is received in a transfer incident to divorce is exempt from the claims of the transferee ex-spouse's creditors.~~

~~h. Supports proposed legislation that amends the current s 825.1035 (civil injunctions against exploitation of vulnerable adults) to broaden those who have standing to bring an injunction petition to include an agent under a durable power of attorney and provides the Judges with the ability to extend the initial temporary injunction period for good cause.~~

15. Real Property / Notary

a. Opposes Section 2 of Senate Bill 298 creating §117.055, which requires that notaries keep a detailed journal of all notarial acts including: the date, time and type of notarial act; the date, type and description of each document; the name of the signer; and description of the evidence of identity.

b. Supports proposed legislation in the 2018 Legislative session pertaining to the creation of online remote notary statutes, provided that the legislation contains a delayed effective date (July 1, 2020) for the use of an online notary in connection with the execution of wills, codicils and revocable trusts to the extent subject to the execution formalities of s. 736.0403(2).

c a. Supports legislation authorizing remote online notarization of certain documents, using audio-video technology meeting specified standards, including limitations on the effectiveness of certain powers of attorney executed online.
d. Support legislation resolving technical inconsistencies and errors within Chapters 718 and 720, Florida Statutes, that have arisen due to multiple revisions of the Chapters and to provide additional clarification as to how Chapters 718 and 720 are to be applied.

e. Supports amendments to:

s. 117.201(9) clarifying that "online notarization" includes the appearance of witnesses by means of audio-video communication technology;
s. 117.285 (introductory paragraph) clarifying that supervising the witnessing of an electronic record is a notarial act and that the procedures for online notarization apply when an online notary public supervises the witnessing of an electronic record;
s. 117.285(2) clarifying that the identity of the principal must be verified when an online notary public supervises the witnessing of an electronic record;
s. 117.285(5) clarifying that this subsection is only applicable to the testamentary aspects of revocable trusts and when fewer than two witnesses are physically present with the principal at the time of execution, and revising the description of documents to be consistent with s. 732.701 and s. 732.702;
s. 117.285(6)(b) and s. 732.521(7) correcting erroneous cross-references contained therein; and ss. 709.2119(2)(c), 732.401(2)(c), 732.503(1), 732.703(5)(b)3. and 4., and 747.051(1), revising the forms contained in those statutes so that the jurats or notarial certificates in those statutory forms comply with the new requirements of s. 117.05(4)(c) which became effective January 1, 2020; and to support making the amendments described herein retroactive to January 1, 2020 and making the proposed legislation effective upon becoming law

16. Real Property / Property Rights

a. Opposes any legislation limiting property owners' rights or limiting attorneys' fees in condemnation proceedings.

b. Opposes legislation expanding the definition of sovereign beaches, public beaches or beach access rights over privately owned property without due process of law or compensation for taking of private property rights.

c. Supports amendment to F.S.§ 48.23(1) re lis pendens to include those receiving a mortgage or other lien on property in the protections provided by this statute.

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d. c. Supports proposed legislation to provide a statutory definition for Ejectment actions, provide for jurisdiction in the circuit courts for such actions, eliminate any ambiguity over whether pre-suit notice is required in such actions, and update the language in the existing Ejectment statute.

e. Supports legislation that provides for an automatic release of the right of entry for local government, water management districts, or other agencies of the state by amending Section F.S. 270.11(2)(b).

f. Supports a repeal of § 83.561, Florida Statutes to: (i) eliminate inconsistencies between it and the more protective federal Protecting Tenants at Foreclosure Act; and, (iii) clarify the rights and obligations of tenants and purchasers of property upon foreclosure sale.

g. Supports proposed legislation expanding applicability of §697.07 (Assignment of Rents) and §702.10 (Order to Make Payments During Foreclosure) to third parties who acquire properties subject to a mortgage.

17. Real Property / Recording

a. Supports Opposes legislation to maintain that impairs the integrity of the recording system in the State of Florida.

b. Supports proposed legislation to amend Section 712.03, which would clarify the operation of the statute in light of a common real estate practice that may inadvertently re-inscribe restrictions and Section 712.04 and 712.12, which would address the judicial exception created by Save Calusa Trust v. St. Andrews Holdings, Ltd., 193 So. 3d 910 (Fla. 3d DCA 2016) for restrictions imposed in connection with governmental zoning, development, or building approvals.

c. Supports proposed legislation to create Section 95.2311, which would establish a method of correcting obvious typographical errors in legal descriptions contained in real property deeds.

18. Real Property / Title Insurance

a. Opposes any portion of the National Association of Insurance Commissioners Title Insurers Model Act and Title Insurance Agent Model Act that may adversely affect Florida attorneys' ability to participate in real estate closing and the issuance of title insurance.

b. Supports the regulatory approval of a proposed ALTA Junior Loan Policy Form, but opposes legislation that would exclude from the statutory definition of title insurance the insuring of mortgage liens covering second mortgages and home equity line mortgages.

c. h. Opposes adoption of a "file and use" system for the determination of title insurance rates in the State of Florida, supplanting a promulgated rate system in which the state regulatory agency determines rates based on actuarial analysis of statutorily determined criteria.

d. Supports recommendations to the Title Insurance Study Advisory Council concerning the providing and regulation of title insurance.

~~c.~~ c. Opposes elimination of the requirement that title insurance agencies deposit securities having a value of $35,000 or a bond in that amount for the benefit of any title insurer damaged by an agency's violation of its contract with the insurer.

~~19. Real Property, Probate and Trust / Judiciary~~

~~a. Opposes term limits for judges at any level of Florida's state court system.~~

~~b~~ a. ~~Opposes current draft of proposed rule changes to Fla. R. Vic. P. 1.720 and Fla. Family Law Rule 12.741 relating to mediation and provide technical comment.~~

Chapter 17
MARKETABLE RECORD TITLE ACT

Standard 17.1

PURPOSE OF THE MARKETABLE RECORD TITLE ACT

STANDARD: THE ACT SHOULD BE RELIED UPON TO ELIMINATE ALL ESTATES, INTERESTS, CLAIMS, COVENANTS, RESTRICTIONS, OR CHARGES THAT FALL WITHIN ITS SCOPE IN ORDER TO RENDER TITLE MARKETABLE.

Problem 1: In 1919, the State of Florida conveyed to the City of Miami certain submerged lands including the mouth of the Miami River. In 1944, the Florida East Coast Hotel Corporation deeded 14 acres on the north side of the Miami River, including a yacht basin at its mouth, to the St. Joe Paper Company. The Florida East Coast Hotel Corporation did not have title to the land described in the deed at the time, but the face of the deed did not refer to the City's ownership. Thereafter, the St. Joe Paper Company filled in and bulkheaded the yacht basin. In 1974, did the St. Joe Paper Company have marketable title to the 14 acres including the filled in yacht basin?

Answer: Yes.

Authorities & References: F.S. 712.01, et seq. (2020); *City of Miami v. St. Joe Paper Co.*, 364 So. 2d 439, 449 (Fla. 1978) (holding that the Act is constitutional and designed to simplify conveyances, stabilize titles, and give certainty to land ownership; it operates as a curative act, a statute of limitations, and a recording act, is applied retroactively and may even create marketable title in one who claims from a wild or interloping deed as its root of title); *ITT Rayonier, Inc. v. Wadsworth*, 346 So. 2d 1004, 1010 (Fla. 1977) (mother's life estate holder's deed served as root of title to eliminate the remainder interests of her children); *Marshall v. Hollywood, Inc.*, 236 So. 2d 114, 120 (Fla. 1970), *cert. denied*, 400 U.S. 964 (1970) (the Act operates to make title based on a wild deed marketable); *Sawyer v. Modrall*, 286 So. 2d 610, 613 (Fla. 4th DCA 1973); *cert. denied*, 297 So. 2d 562 (Fla. 1974) (the Act operates to eliminate interest created by deed from the Trustees of the Internal Improvement Trust Fund); *Wilson v. Kelley*, 226 So. 2d 123, 128 (Fla. 2d DCA 1969) (quit claim deed may serve as root of title only if it evidences an intent to convey an identifiable interest); *Whaley v. Wotring*, 225 So. 2d 177 (Fla. 1st DCA 1969); 1 BOYER, FLORIDA REAL ESTATE TRANSACTIONS §§14.20 to 14.22 (2020).

Comment: Purpose. The chief purpose of the Act is to extinguish – by operation of law – all stale claims to and ancient defects in title to real property and to limit the period of the search. *Marshall*, 236 So. 2d at 119 (quoting, Catsman, The Marketable Record Title Act and Uniform Title Standards, III Florida Real Property Practice (1965), § 6.2). To effect its purpose, the Act is to be "liberally construed to effect the legislative purpose of simplifying and facilitating land title transactions by allowing persons to rely on a record title as described in s. 712.02 subject only to such limitations as appear in s. 712.03." F.S. 712.10 (2020).

Operation. The Act works by operation of law vesting marketable title free and clear of all claims except for the matters set forth in the limited statutory exceptions in those who – together with their predecessors in title – have held record title to property for thirty years or more. F.S. 712.02 (2020). In determining the effect of the Act, the practitioner should first identify a root of title vesting title in the claimant or its predecessors and confirm it has been of record for 30 years or more. F.S. 712.01(6) (2020). If so, the claimant has marketable record title free and clear of all claims. The practitioner should then consider each of the statutory exceptions in F.S. 712.03 (2020), to determine what matters are not affected by the Act.

STANDARD 17.2

MARKETABLE RECORD TITLE AND ROOT OF TITLE

STANDARD: A PERSON WHO, ALONE, OR TOGETHER WITH PREDECESSORS IN TITLE, HAS BEEN VESTED WITH AN ESTATE OF LAND OF RECORD FOR 30 YEARS OR MORE, HAS MARKETABLE RECORD TITLE TO THAT LAND FREE AND CLEAR OF ALL CLAIMS EXCEPT THE MATTERS SET FORTH AS EXCEPTIONS TO MARKETABLITY IN THE ACT.

Problem 1: The following chain of title appears of record. In 1955, John Doe deeded Blackacre to Richard Roe "for so long as the premises are used for residential purposes." In 1965, Richard Roe conveyed Blackacre to Simon Grant, without reference to the restriction to residential use. In 2005, is title to Blackacre free and clear of the restriction to residential use contained in the 1955 deed?

Answer: Yes. The 1965 deed constitutes a root of title and the use restrictions contained in the 1955 deed were extinguished by operation of law in 1995.

Problem 2: Same facts as Problem 1 except that in 1994 Simon Grant conveyed Blackacre to Jane Roe "subject to" the 1955 deed, identifying the 1955 deed by official recording book and page. In 2005, is title to Blackacre free and clear of the restriction to residential use contained in the 1955 deed?

Answer: No. The 1965 deed constitutes a root of title and the use restrictions contained in the 1955 deed would only be extinguished by operation of law in 1995. However, restrictions created prior to the root of title shall not be extinguished by law if those restrictions are specifically referenced by book and page of record, instrument number, plat name or there is otherwise an affirmative statement in a muniment of title to preserve such estates recorded subsequent to the root of title but prior to the expiration of the 30 year statutory time period.

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Problem 3: Same facts as Problem 1 except that in 1997 Simon Grant deeds Blackacre to Jane Roe "subject to" the 1955 deed, identifying the 1955 deed by official recording book and page. In 2005, is title to Blackacre free and clear of the restriction to residential use contained in the 1955 deed?

Answer: Yes. The 1965 deed constitutes a root of title and the use restrictions contained in the 1955 deed were extinguished by operation of law in 1995, notwithstanding the subsequent specific reference to the 1955 deed in the 1997 deed, a muniment of title.

Problem 4: Same facts as Problem 1 except that the 1965 deed to Simon Grant was not recorded until 1980. In 2005, is title to Blackacre free and clear of the restriction to residential use contained in the 1955 deed?

Answer: No. A root of title must be of record for at least 30 years. Therefore, there is no qualifying root of title that may operate to eliminate the restriction contained in the 1955 deed.

Problem 5: In 1970, Richard Roe owned Blackacre. In 1975, Simon Grant, although he never had title to Blackacre, purported to convey the North half of Blackacre to Thomas Frank. In 2006, does Richard Roe have marketable title to all of Blackacre?

Answer: No. Although the 1975 deed to the North half of Blackacre was a wild deed, it nevertheless ripened into a viable root of title after being of record for 30 years in 2005 and created marketable record title in Thomas Frank free and clear of the claims of Richard Roe.

Problem 6: Same facts as Problem 54. In 2006, does Thomas Frank have marketable record title to the North half of Blackacre?

Answer: Yes. Although the 1975 deed is a wild deed, it purports to create a fee simple estate in Frank in the North half of Blackacre, which sufficiently identifies the land's location and boundaries and has been of record for at least 30 years.

Problem 7: Richard Green is the last grantee in the chain of title to Blackacre by a deed recorded in 1960. John Doe, a stranger to title of Blackacre, died in 1969. John Doe's probate proceedings recorded in 1970 establish that title to Blackacre was transferred to John's sole heir, Ralph Doe. In 2001 is title to Blackacre free and clear of any interest of Richard Green??

Answer: Yes. The court proceedings are a muniment of title to the land and were recorded 30 years prior to the time of determination of marketability. Hence, they qualify as the root of title and Ralph Doe's ownership in Blackacre is free of Richard Green's interest.

Authorities & References: F.S. 712.01, et seq. (2020); FLORIDA REAL PROPERTY TITLE EXAMINATION AND INSURANCE §§ 2.1-.2 (Fla. Bar CLE 9th ed. 2019); 1 BOYER, FLORIDA REAL ESTATE TRANSACTIONS §§ 14.21-.22 (2020); FUND TN 10.01.02.

Comment: A marketable record title is free and clear of all claims except the matters set forth in the limited statutory exceptions. Nevertheless, the careful practitioner may also want to keep in mind the small handful of exceptions based upon judicial interpretations. *See, e.g., Clipper Bay Investments LLC v. State Department of Transportation*, 160 So. 3d 858 (Fla. 2015) (exception for easements in use applies to land owned in fee by the FDOT); *Blanton v. City of Pinellas Park*, 887 So. 2d 1224 (Fla. 2004) (holding that statutory ways of necessity are not subject to the Act because they are not dependent on a review of the historical record but, instead, on the current status of the property); ~~*Save Calusa Trust v. St. Andrews Holdings, Ltd.*, 193 So. 3d 910 (Fla. 3d DCA 2016) (judicially created exception for restrictive covenants recorded in compliance with government-imposed condition of land use approval); *Barney v. Silver Lakes Acres Property*, 159 So. 3d 181 (Fla. 5th DCA 2015) (a deed stating it was "subject to" the obligations of the lot owners to a specifically named owners association was not a "general reference" to the association's restrictive covenants, notwithstanding the absence of the specific book and page of record of the restrictions, thereby bringing the restrictions within the exception of F.S. 712.03(1));~~ and *Village Carver Phase I, LLC v. Fidelity Nat'l Title Ins.*, 128 So. 3d 107 (Fla. 3d DCA 2013) (rights pursuant to F.S. 704.08 providing relatives and descendants an easement for visitation to a cemetery does not create an interest in real property and therefore such rights are not extinguished by the Act).

Pursuant to the 2022 amendment to the Act, covenants and restrictions that depend upon a zoning requirement, or building or development permit may be extinguished by the Act ~~provided~~as long as there is not a statement on the face of the first page of the recorded instrument that it was accepted by a governmental entity as part of, or as a condition of, any such comprehensive plan or plan amendment; zoning ordinance; land development regulation; building code; development permit; development order; or other law, regulation, or regulatory approval. This amendment was adopted to overrule the decision in *Save Calusa Trust v. St. Andrews Holdings, Ltd.*, 193 So. 3d 910 (Fla. 3d DCA 2016) (judicially created exception for restrictive covenants recorded in compliance with government-imposed condition of land use approval). Parties holding an interest not extinguished before July 1, 2022, must file a notice pursuant to s. 712.06, F.S., by July 1, 2023, to preserve such interest. Any county as

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defined in s. 125.011(1), F.S., must file a notice pursuant to s. 712.06, F.S., by July 1, 2025, to preserve such interest.

The 2022 amendment to the Act also closes the judicial loophole created by *Barney v. Silver Lakes Acres Property*, 159 So. 3d 181 (Fla. 5th DCA 2015). In *Barney*, the court found that a deed stating it was "subject to" the obligations of the lot owners to a specifically named owners association was not a "general reference" to the association's restrictive covenants, notwithstanding the absence of the specific book and page of record of the restrictions, thereby bringing the restrictions within the exception of F.S. 712.03(1). The 2022 amendment to the Act removes reference to the concept of a "general reference" and, in its place, provides for the only two specific instances in which a muniment of title will serve to preserve an estate, interest, easement, use restriction, or defect. Those two instances are (i) where the interest is referred to in the legal description of the muniment itself by official records book and page number, instrument number, or plat name or (ii) the muniment contains an affirmative statement that it is intended to preserve the interest. This amendment makes clear the deed in the *Barney* case would not have been sufficient to bring the association's restrictive covenants within the scope of the exception contained in F.S. 712.03(1).

Once a marketable record title has been established, the Act eliminates, by operation of law, all estates, interests, claims, covenants, restrictions, or charges, however denominated, and whoever holds them, the existence of which depends upon any act, title transaction, event, or omission that occurred before the effective date of the root of title and declares all such interests to be "null and void." The amendments to ss. 712.03 and 712.04, F.S., are intended to clarify existing law, are remedial in nature, and apply to all estates, interests, claims, covenants, restrictions, and charges, whether imposed or accepted before, on, or after the 2022 amendment. F.S. 712.04 (2020). A judicial determination is not required to establish or confirm the operation of the Act. Once an interest has been eliminated by operation of the Act, that interest cannot be "revived" by a specific reference to the interest in the subsequent muniments in the chain of title or by filing a preservation notice, either of which might have created exceptions to marketability had they been recorded within the initial 30-year period. F.S. 712.03(1) & (2) (2020). However, community covenants, conditions and restrictions may be revived by a property owner's association after the 30-year period if the covenant revitalization procedures are correctly followed. F.S. 712.11-12 (2020) & F.S. 720.403-407 (2020).

The "root of title" concept is a key component in the statutory analysis, and its definition is hard and worthy of attention. A root of title is defined as "any title transaction purporting to create or transfer the estate claimed by any person which is the last title transaction to have been recorded at least 30 years before the time when marketability is being determined. The effective date of the root of title is the date on which it was recorded." F.S. 712.01(6) (2020). In turn, a title transaction is defined as "any recorded instrument or court proceeding that affects title to any estate or interest in land that describes the land sufficiently to identify its location and boundaries." F.S. 712.01(7) (2020).

The phrase "the time marketability is being determined" is what requires some explication. Because the Act operates as a matter of law, without need for any judicial determination, and is to be liberally construed to effect the legislative purpose of simplifying and facilitating land title transactions, this phrase must be construed to mean 30 years after the date of the recording of any given root of title. Note that there may be many roots of title in any given chain of title, which may overlap and serve to cut off different interests or claims. In other words, the Act is continually at work, clearing up ancient and stale claims. Any other construction of this phrase – such as one requiring a judicial determination – would actually serve to preserve older, more ancient claims while eliminating more recent claims. Such other constructions are plainly contrary to the legislative intent of simplifying and facilitating land title transactions expressed in the statute.

STANDARD 17.3

INTERESTS EXTINGUISHED

STANDARD: ALL ESTATES, INTERESTS, CLAIMS, COVENANTS, RESTRICTIONS, OR CHARGES, THE EXISTENCE OF WHICH DEPENDS UPON ANY ACT, TITLE TRANSACTION, EVENT, OR OMISSION THAT OCCURRED BEFORE THE EFFECTIVE DATE OF A ROOT OF TITLE, ARE EXTINGUISHED BY OPERATION OF THE ACT, EXCEPT THOSE RIGHTS SPECIFICALLY EXCEPTED FROM THE ACT.

Problem 1: A deed to Blackacre executed by John Doe and recorded in 1965 contained: (1) a condition subsequent that the grantor or his heirs could re-enter in the event of a breach of certain specified conditions and (2) a special limitation that the land was conveyed "so long as" it was used for a specified purpose. A warranty deed to Blackacre recorded in 1975 does not mention any conditions or limitations. No notice of a claim based on the conditions or limitations has been filed. In 2006, is title to Blackacre free and clear of the condition subsequent and the possibility of reverter by operation of the Act?

Answer: Yes. The existence of the claims depended upon the 1965 deed, a title transaction occurring prior to 1975 effective date of the root of title, and no exception applies.

Problem 2: Same facts as Problem 1 except that the 1975 deed, or a subsequent warranty deed, contained a provision that the conveyance was "subject to conditions and limitations of record." In 2006, is title to Blackacre free and clear of the condition subsequent and the possibility of reverter by operation of the Act?

Answer: Yes. An interest disclosed by the muniments of title, beginning with the root of title, may be preserved from operation of the Act but only if the title transaction imposing, transferring, or continuing such interest is specifically identified by reference to the book and page of record or by the name of the recorded plat. F.S. 712.03(1) (2020).

Problem 3: The plat for Blackacre Subdivision, filed in 1925, contained a setback restriction. A deed to Lot 1 in Blackacre Subdivision recorded in 1953 contained a reference to the name of the recorded plat, as did subsequent deeds, but none specifically referenced the setback restriction. In 1984, is title to Blackacre free and clear of the setback restriction by operation of the Act?

Answer: No. A restriction is preserved if the root of title or any subsequent muniments of title recorded within the 30 years immediately following the recording of the root of title refer to the recorded plat that imposed the restriction by name. F.S. 712.03(1) (2020).

Problem 4: A deed to Blackacre recorded in 1955 contains a condition subsequent and the possibility of reverter described in Problem 1. A subsequent root of title is recorded in 1960, without reference to the restriction. In 1991, a deed within the chain of title specifically identifies the condition subsequent and the possibility of reverter by reference to the book and page of record for the 1955 deed. In 1992, is title to Blackacre free and clear of the restriction by operation of the Act?

Answer: Yes. The restriction had been extinguished by operation of the Act in 1990, and the subsequent reference to the book and page of record of the 1955 deed in the 1991 muniment could have no effect on the already-extinguished restriction. F.S. 712.03(1) (2020).

Problem 5: A deed to Blackacre executed by John Doe and recorded in 1965 reserved an easement. A deed to Blackacre recorded in 1975 does not mention the easement. John Doe and his successors in interest have used the easement, or a part of it, since 1965. No notice of a claim based on the easement has been filed. In 2006, was title to Blackacre free and clear of the easement by operation of the Act?

Answer: No. Easements or rights, interests, or servitudes in the nature of easements, rights of way and terminal facilities and mortgages on such rights are preserved by F.S. 712.03(5) (2020) so long as they, or any part thereof, are used.

Problem 6: A deed to Blackacre executed by John Doe and recorded in 1965 reserved all of the subsurface minerals to Blackacre and the right of entry to explore and extract those minerals. A deed to Blackacre in fee simple is recorded in 1975, and it does not mention the 1965 deed, the mineral reservation, or the right of access. No notice of a claim based on the reservation has been filed. In 2006, was title to Blackacre free and clear of the right of entry to explore and extract mineral rights by operation of the Act?

Answer: Yes. Note that this would be the same result even if the 1965 deed had not expressly reserved the right of entry as such right is implicit with the reservation of the subsurface minerals. *See, P & N Investment Corp. v. Florida Ranchettes, Inc.*, 220 So. 2d 451, 453 (Fla. 1st DCA 1969).

Authorities & References: F.S. 712.03-.04 (2020); F.S. 704.05(1) (2020); 1 BOYER, FLORIDA REAL ESTATE TRANSACTIONS §14.22 (2020).

Comment: A "root of title" is any title transaction that purports to create or transfer the estate claimed, describes the land sufficiently to identify its location and boundaries, and has been of record for more than 30 years. F.S. 712.01 (2020); *Marshall v. Hollywood, Inc*., 224 So. 2d 743, 750 (Fla. 4th DCA 1969), *aff'd* 236 So. 2d 114 (Fla. 1970) (a void deed may be a root of title); *City of Miami v. St. Joe Paper Co.*, 364 So. 2d 439, 446 (Fla. 1978) (wild deed); *Kittrell v. Clark*, 363 So. 2d 373, 374 (Fla. 1st DCA 1978) (probate); *Mayo v. Owens*, 367 So. 2d 1054, 1057 (Fla. 1st DCA 1979) (judgment determining heirs).

The careful practitioner will be be vigilant for defects inherent in a root of title. *See, e.g., Marshall v. Hollywood, Inc*., *supra*, at 751 ("'defects in the muniments of title' do not refer to defects or failures in the transmission of title . . . but refer to defects in the make up or constitution of the deed or other muniments of title on which such transmission depends"). *See* Title Standard 17.10 for discussion of defects inherent in the muniments of title.

A restriction arising prior to the date of a root of title is preserved if the root of title or a subsequent muniment of title within the 30 year period immediately following the recording of a root of title contains a specific identification by reference to the name of the recorded plat or book and page of record of the instrument that imposed the restriction. *Sunshine Vistas Homeowners Association v. Caruana*, 623 So. 2d 490, 492 (Fla. 1993). However, a specific identification by reference to the name of the recorded plat ~~or~~ book and page of record, instrument number of the instrument that imposed the restriction or an affirmative statement intent to preserve the restriction in a ~~muniment~~ of title recorded after that restriction has already been extinguished by operation of the Act, has no effect on the already-extinguished restriction. *See*, problem 4 above and comment to Title Standard 17.2.

The Act may operate to extinguish a county's claim of ownership. *Florida DOT v. Dardashti Properties*, 605 So. 2d 120, 122 (Fla. 4th DCA 1992) (County's interest in a strip of land held for right of way was extinguished by the Act).

STANDARD 17.4

RECORDING A NOTICE TO PRESERVE INTERESTS

STANDARD: RECORDING A PROPER NOTICE PRESERVES ESTATES, INTERESTS, CLAIMS, COVENANTS, RESTRICTIONS, OR CHARGES FROM THE OPERATION OF THE ACT.

Problem 1: John Doe, the record owner of Blackacre, gave and recorded a mortgage to Richard Roe encumbering Blackacre, which was recorded in January 1975. The last payment was not due until 2010. On June 15, 1975 a deed to Blackacre, which qualified as a root of title, was recorded but it contained no mention of the mortgage. On June 16, 2005, is Roe's mortgage lien extinguished?

Answer: Yes.

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Problem 2: John Doe gave and recorded a 99-year lease to Richard Roe on July 1, 1975, at which time the lease was recorded, and Roe went into possession of the land. On July 2, 2006, is John Doe's ownership extinguished?

Answer: No. The 1975 transaction created a leasehold interest only. John Doe's fee simple interest would not be extinguished. Filing of notice is necessary only when there is a subsequent title transaction that purports to divest the interest claimed.

Problem 3: The owner of Blackacre Subdivision as developer, joined by Blackacre Homeowners' Association, Inc., filed a Declaration of Covenants and Restrictions for Blackacre Subdivision in 1975. John Doe conveyed Lot 1 in Blackacre Subdivision to Richard Roe in 1978. That deed did not mention the covenants or restrictions, and there is no subsequent amendment to the Declaration of Covenants and Restrictions and no specific reference to the recording information of the Declaration of Covenants and Restrictions in muniments of title in the public record. In 2009, were the CCRs extinguished by operation of the Act as to Lot 1?

Answer: Yes, unless the Blackacre Homeowners' Association either timely preserved the CCRs by filing the statutory notice pursuant to F.S. 712.05(2) or thereafter accomplishes covenant revitalization.

Problem 4: The owner of Whiteacre Business Park as developer filed a Declaration of Covenants, Conditions and Restrictions (CCRs) for Whiteacre Business Park in January 1989. John Doe conveyed Parcel 3 in Whiteacre Business Park to Richard Roe in March 1989. That deed did not mention the CCRs, and there is no subsequent amendment to the CCRs and no specific reference to the recording information of the CCRs in muniments of title in the public record. In 2020, were the CCRs extinguished by operation of the Act as to Parcel 3?

Answer: Yes, unless the Whiteacre Business Park Property Owners' Association either timely preserved the CCRs by filing the statutory notice pursuant to F.S. 712.05(2) or thereafter accomplishes covenant revitalization.

Problem 5: Same facts as Problem 4, except a notice to preserve the CCRs was recorded in December 2018. In 2020, were the CCRs extinguished by operation of the Act as to Parcel 3?

were extinguished by MRTA. The holding in *Matissek* has continuing application outside of the context of the 2018 revision.

For covenants, conditions and restrictions that have lapsed, property owners may avail themselves of covenant revitalization through the Department of Economic Opportunity pursuant to sections 720.403 - .407. Once MRTA has extinguished a Declaration of Covenants, Conditions and Restrictions, title is marketable free of that Declaration. If the Declaration is later revived, then title is again subject to the Declaration. In no event is the Declaration enforceable for the period of time the Declaration was extinguished. Thus, even if the HOA revives the Declaration, it may not retroactively enforce that Declaration retroactively during the time it was previously extinguished.

Effective October 1, 2018, revitalization of covenants or restrictions is available to all types of communities and property owners' associations and is not limited to residential property. F.S. 712.11 & 720.403(3) (2020). Chapter 720, Part III is the sole means of revitalizing covenants, conditions or restrictions that have been extinguished by operation of the Act.

Effective September 4, 2020, section 712.065(1) defines discriminatory restriction as one that restricts ownership, occupancy or use of real property based upon a natural person's characteristic that is protected by the laws of the United States or the State of Florida. These discriminatory restrictions are thus unenforceable and severed from any recorded title transaction. Recording of any notice to preserve such restrictions does not reimpose any discriminatory restriction. F.S. 712.065(2) (2020). A recorded amendment to covenants or restrictions that removes a discriminatory restriction but changes no other provision does not constitute a title transaction occurring after the root of title. F.S. 712.065(3) (2020).

If a false or fictitious claim is asserted by the filing of notice pursuant to the Act, the prevailing party may be entitled to costs and attorney's fees arising out of any action related thereto and damages sustained as a result of the filing of such notice. F.S. 712.08 (2020). The attorney's fees provision of MRTA "does not require deliberate untruthfulness" but includes "mistaken ideas" and claims that are not "real or genuine claims." An award of attorney's fees against a voluntary homeowners' association that was found to be without authority to file a 2004 MRTA preservation notice was upheld absent a finding of a deliberate untruthful intention. *Sand Hill Homeowners Ass'n v. Busch*, 210 So. 3d 706 (Fla. 5th DCA 2017).

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STANDARD 17.6

INSTRUMENTS RECORDED SUBSEQUENT TO A ROOT TITLE

STANDARD: THE ACT DOES NOT ELIMINATE ESTATES, INTERESTS, CLAIMS, COVENANTS, RESTRICTIONS, OR CHARGES ARISING OUT OF A TITLE TRANSACTION RECORDED SUBSEQUENT TO THE RECORDING OF A ROOT OF TITLE

Problem 1: John Doe took record title to Blackacre in 1970 by deed which would qualify as a root of title. A deed to Blackacre from Richard Roe to Jane Nokes subsequently recorded in 1980 recites that John Doe died intestate and that Richard Roe was his sole heir at law. No additional instruments have been recorded after the 1980 deed that would qualify as a root of title. In 2007, was title to Blackacre free and clear of Nokes' interest by operation of the Act?

Answer: No. Even if the facts recited in the 1980 deed were not correct – i.e., Doe did not die intestate and Roe was not Doe's sole heir – it is a title transaction (a recorded instrument that affects title to an estate or interest in land, and sufficiently describes the land to identify its location and boundaries). Jane Nokes' interest arose out of and was created by the 1980 deed and is thus not an interest that is extinguished by operation of the Act because it did not arise before or depend upon any act, title transaction, event or omission that occurred before the 1970 root of title.

Problem 2: John Doe took record title to Blackacre in 1970 by a deed which would qualify as a root of title. In 1980, a stranger to title to Blackacre executed and recorded a deed in favor of Jane Nokes. In 2007, was title to Blackacre free and clear of Nokes' interest by operation of the Act?

Answer: No.

Authorities & References: F.S. 712.01, 712.03(4), 712.04 (2020); 1 BOYER, FLORIDA REAL ESTATE TRANSACTIONS §14.23[5] (2020).

Comment: The fact that the Act does not eliminate estates, interests, claims, or charges arising out of a title transaction recorded subsequent to the effective date of a root of title underscores the limits of the Act. The Act ***only*** eliminates estates, interests, claims, covenants, restrictions, or charges the existence of which depends upon any act, title transaction, event or omission that occurred ***before*** the effective date of a root of title. F.S. 712.04 (2020). Thus, if an estate, interest, claim, or charge truly "arises out of," i.e., is created by, a title transaction subsequent to the root of title, its existence could not, by definition, depend upon an act, title transaction, event or omission that occurred ***before*** the effective date of a root of title. *See, e.g.*, *Holland v. Hattaway*, 438 So. 2d 456, 467 (Fla. 5th DCA 1983) ("it is clear that MRTA was not intended to and does not make marketable a title as against adverse record claims that first appear, or that are created, or 'arise' during, or subsequent to the commencement of, the operative 30 year period."). In other words, interests that arise out of title transactions recorded after the effective date of a root of title do not come within the scope of the operation of the Act.

However, the exception is limited to estates, interests, claims, or charges that arise out of title transactions recorded after the effective date of a root of title and will not preserve interests that depend upon any act, title transaction, event or omission that occurred before the effective

STANDARD 17.10

DEFECTS INHERENT IN MUNIMENTS OF TITLE

STANDARD: THE ACT DOES NOT ELIMINATE ANY DEFECTS INHERENT IN THE MUNIMENTS OF TITLE ON WHICH THE ESTATE IS BASED BEGINNING WITH A ROOT OF TITLE AND FOR THIRTY YEARS FROM THE RECORDING OF A ROOT OF TITLE.

Problem 1: In 1975, ABC Corp. purports to convey Blackacre to John Doe. The deed is signed by "Richard Roe as Secretary of ABC Corp." No corporate resolution was recorded authorizing Richard Roe to execute deeds on behalf of ABC Corp. There is thus a defect on the face of the 1975 deed as it was not signed by a person authorized to do so. Nothing affecting Blackacre has been recorded since then. In 2006, was title to Blackacre free and clear of ABC Corp.'s interest by operation of the Act?

Answer: No. Although the deed may constitute a root of title, it contains a defect inherent on its face because it was signed by an officer who did not have statutory authority to convey ABC Corp.'s real property. Hence, the potential ownership claim of ABC Corp. is not extinguished. F.S. 712.03(1) (2020).

Problem 2: John Doe as the sole owner of Blackacre resided on the property as his homestead with his wife and two children. In 1960 John Doe conveyed Blackacre to Richard Roe for valuable consideration, but without the joinder of his wife. John Doe died in 1969~~7~~, survived by his wife and children. Blackacre was conveyed by Roe to Sam Smith in 1972. No notice of the homestead claim had ever been filed. In 2021, is Smith's title free and clear of the interests of Doe's wife and children?

Answer: Yes. The 1972 deed was a root of title and there is no defect inherent on the face of that 1972 deed to indicate that John Doe's wife and children may have an outstanding interest.

Problem 3: Same facts as Problem 2 except that Richard Roe did not convey to Sam Smith until 2015. In 2021, is Smith's title free and clear of the interests of Doe's wife and children?

Answer: No. The 2015 does not qualify as a root of title. The homestead claim renders the 1960 deed void and the 2015 deed does not yet qualify as a root of title because it has not been of record for 30 years.

Authorities & References: F.S. 712.01-.04 (2020); *ITT Rayonier, Inc. v. Wadsworth*, 386 F. Supp. 940, 942-43 (M.D. Fla. 1975), *accord*, *ITT Rayonier, Inc. v. Wadsworth*, 346 So. 2d 1004, 1009 (Fla. 1977); *see also, Reid v. Bradshaw*, 302 So. 2d 180, 181 (Fla. 1st DCA 1974) (homestead rights are not eliminated by the mere passage of time).

Comment: The answer to Problem 2 would probably be the same without regard to whether the homestead owner died before or after the effective date of the root of title since no notice of homestead claim was ever filed. *See* F.S. 712.04 (2020). However, the *Reid* opinion casts some doubt in the latter instance, and caution should be exercised in such a situation. *See also Conservatory-City of Refuge, Inc. v. Kinney*, 514 So. 2d 377, 378 (Fla. 2d DCA 1987) (holding that the Act did not apply to eliminate homestead claims where the children's remainder interests did not vest until the homestead owner died, which was after the asserted root of title).

The term "muniments of title" is not defined in the Act. The Fifth District Court of Appeal has defined muniments of title in the context of the Act as "any documentary evidence upon

Chapter 17
MARKETABLE RECORD TITLE ACT

Standard 17.1

PURPOSE OF THE MARKETABLE RECORD TITLE ACT

STANDARD: THE ACT SHOULD BE RELIED UPON TO ELIMINATE ALL ESTATES, INTERESTS, CLAIMS, COVENANTS, RESTRICTIONS, OR CHARGES THAT FALL WITHIN ITS SCOPE IN ORDER TO RENDER TITLE MARKETABLE.

Problem 1: In 1919, the State of Florida conveyed to the City of Miami certain submerged lands including the mouth of the Miami River. In 1944, the Florida East Coast Hotel Corporation deeded 14 acres on the north side of the Miami River, including a yacht basin at its mouth, to the St. Joe Paper Company. The Florida East Coast Hotel Corporation did not have title to the land described in the deed at the time, but the face of the deed did not refer to the City's ownership. Thereafter, the St. Joe Paper Company filled in and bulkheaded the yacht basin. In 1974, did the St. Joe Paper Company have marketable title to the 14 acres including the filled in yacht basin?

Answer: Yes.

Authorities & References: F.S. 712.01, et seq. (2020); *City of Miami v. St. Joe Paper Co.*, 364 So. 2d 439, 449 (Fla. 1978) (holding that the Act is constitutional and designed to simplify conveyances, stabilize titles, and give certainty to land ownership; it operates as a curative act, a statute of limitations, and a recording act, is applied retroactively and may even create marketable title in one who claims from a wild or interloping deed as its root of title); *ITT Rayonier, Inc. v. Wadsworth*, 346 So. 2d 1004, 1010 (Fla. 1977) (mother's life estate holder's deed served as root of title to eliminate the remainder interests of her children); *Marshall v. Hollywood, Inc.*, 236 So. 2d 114, 120 (Fla. 1970), *cert. denied*, 400 U.S. 964 (1970) (the Act operates to make title based on a wild deed marketable); *Sawyer v. Modrall*, 286 So. 2d 610, 613 (Fla. 4th DCA 1973); *cert. denied*, 297 So. 2d 562 (Fla. 1974) (the Act operates to eliminate interest created by deed from the Trustees of the Internal Improvement Trust Fund); *Wilson v. Kelley*, 226 So. 2d 123, 128 (Fla. 2d DCA 1969) (quit claim deed may serve as root of title only if it evidences an intent to convey an identifiable interest); *Whaley v. Wotring*, 225 So. 2d 177 (Fla. 1st DCA 1969); 1 BOYER, FLORIDA REAL ESTATE TRANSACTIONS §§14.20 to 14.22 (2020).

Comment: Purpose. The chief purpose of the Act is to extinguish – by operation of law – all stale claims to and ancient defects in title to real property and to limit the period of the search. *Marshall*, 236 So. 2d at 119 (quoting, Catsman, The Marketable Record Title Act and Uniform Title Standards, III Florida Real Property Practice (1965), § 6.2). To effect its purpose, the Act is to be "liberally construed to effect the legislative purpose of simplifying and facilitating land title transactions by allowing persons to rely on a record title as described in s. 712.02 subject only to such limitations as appear in s. 712.03." F.S. 712.10 (2020).

Operation. The Act works by operation of law vesting marketable title free and clear of all claims except for the matters set forth in the limited statutory exceptions in those who – together with their predecessors in title – have held record title to property for thirty years or more. F.S. 712.02 (2020). In determining the effect of the Act, the practitioner should first identify a root of title vesting title in the claimant or its predecessors and confirm it has been of record for 30 years or more. F.S. 712.01(6) (2020). If so, the claimant has marketable record title free and clear of all claims. The practitioner should then consider each of the statutory exceptions in F.S. 712.03 (2020), to determine what matters are not affected by the Act.

Constitutionality. For a discussion of the constitutionality of the Act, see FLORIDA REAL PROPERTY TITLE EXAMINATION AND INSURANCE §2.1(D)(3) (Fla. Bar CLE 9th ed. 2019). *See also*, *City of Miami v. St. Joe Paper Co.*, 364 So. 2d 439, 449 (Fla. 1978) (holding that the Act is constitutional); *Wichelman v. Messner*, 83 N.W. 2d 800 (Minn. 1957); 71 A.L.R. 2d 816 (1960); Boyer & Shapo, *Florida's Marketable Title Act: Prospects and Problems*, 18 MIAMI L. REV. 103 (1963).

STANDARD 17.2

MARKETABLE RECORD TITLE AND ROOT OF TITLE

STANDARD: A PERSON WHO, ALONE, OR TOGETHER WITH PREDECESSORS IN TITLE, HAS BEEN VESTED WITH AN ESTATE OF LAND OF RECORD FOR 30 YEARS OR MORE, HAS MARKETABLE RECORD TITLE TO THAT LAND FREE AND CLEAR OF ALL CLAIMS EXCEPT THE MATTERS SET FORTH AS EXCEPTIONS TO MARKETABLITY IN THE ACT.

Problem 1: The following chain of title appears of record. In 1955, John Doe deeded Blackacre to Richard Roe "for so long as the premises are used for residential purposes." In 1965, Richard Roe conveyed Blackacre to Simon Grant, without reference to the restriction to residential use. In 2005, is title to Blackacre free and clear of the restriction to residential use contained in the 1955 deed?

Answer: Yes. The 1965 deed constitutes a root of title and the use restrictions contained in the 1955 deed were extinguished by operation of law in 1995.

Problem 2: Same facts as Problem 1 except that in 1994 Simon Grant conveyed Blackacre to Jane Roe "subject to" the 1955 deed, identifying the 1955 deed by official recording book and page. In 2005, is title to Blackacre free and clear of the restriction to residential use contained in the 1955 deed?

Answer: No. The 1965 deed constitutes a root of title and the use restrictions contained in the 1955 deed would only be extinguished by operation of law in 1995. However, restrictions created prior to the root of title shall not be extinguished by law if those restrictions are specifically referenced by book and page of record, instrument number, plat name or there is otherwise an affirmative statement in a muniment of title to preserve such estates recorded subsequent to the root of title but prior to the expiration of the 30 year statutory time period.

Problem 3: Same facts as Problem 1 except that in 1997 Simon Grant deeds Blackacre to Jane Roe "subject to" the 1955 deed, identifying the 1955 deed by official recording book and page. In 2005, is title to Blackacre free and clear of the restriction to residential use contained in the 1955 deed?

Answer: Yes. The 1965 deed constitutes a root of title and the use restrictions contained in the 1955 deed were extinguished by operation of law in 1995, notwithstanding the subsequent specific reference to the 1955 deed in the 1997 deed, a muniment of title.

Problem 4: Same facts as Problem 1 except that the 1965 deed to Simon Grant was not recorded until 1980. In 2005, is title to Blackacre free and clear of the restriction to residential use contained in the 1955 deed?

Answer: No. A root of title must be of record for at least 30 years. Therefore, there is no qualifying root of title that may operate to eliminate the restriction contained in the 1955 deed.

Problem 5: In 1970, Richard Roe owned Blackacre. In 1975, Simon Grant, although he never had title to Blackacre, purported to convey the North half of Blackacre to Thomas Frank. In 2006, does Richard Roe have marketable title to all of Blackacre?

Answer: No. Although the 1975 deed to the North half of Blackacre was a wild deed, it nevertheless ripened into a viable root of title after being of record for 30 years in 2005 and created marketable record title in Thomas Frank free and clear of the claims of Richard Roe.

Problem 6: Same facts as Problem 5. In 2006, does Thomas Frank have marketable record title to the North half of Blackacre?

Answer: Yes. Although the 1975 deed is a wild deed, it purports to create a fee simple estate in Frank in the North half of Blackacre, which sufficiently identifies the land's location and boundaries and has been of record for at least 30 years.

Problem 7: Richard Green is the last grantee in the chain of title to Blackacre by a deed recorded in 1960. John Doe, a stranger to title of Blackacre, died in 1969. John Doe's probate proceedings recorded in 1970 establish that title to Blackacre was transferred to John's sole heir, Ralph Doe. In 2001 is title to Blackacre free and clear of any interest of Richard Green??

Answer: Yes. The court proceedings are a muniment of title to the land and were recorded 30 years prior to the time of determination of marketability. Hence, they qualify as the root of title and Ralph Doe's ownership in Blackacre is free of Richard Green's interest.

Authorities & References: F.S. 712.01, et seq. (2020); FLORIDA REAL PROPERTY TITLE EXAMINATION AND INSURANCE §§ 2.1-.2 (Fla. Bar CLE 9th ed. 2019); 1 BOYER, FLORIDA REAL ESTATE TRANSACTIONS §§ 14.21-.22 (2020); FUND TN 10.01.02.

Comment: A marketable record title is free and clear of all claims except the matters set forth in the limited statutory exceptions. Nevertheless, the careful practitioner may also want to keep in mind the small handful of exceptions based upon judicial interpretations. *See, e.g., Clipper Bay Investments LLC v. State Department of Transportation*, 160 So. 3d 858 (Fla. 2015) (exception for easements in use applies to land owned in fee by the FDOT); *Blanton v. City of Pinellas Park*, 887 So. 2d 1224 (Fla. 2004) (holding that statutory ways of necessity are not subject to the Act because they are not dependent on a review of the historical record but, instead, on the current status of the property); and *Village Carver Phase I, LLC v. Fidelity Nat'l Title Ins.*, 128 So. 3d 107 (Fla. 3d DCA 2013) (rights pursuant to F.S. 704.08 providing relatives and descendants an easement for visitation to a cemetery does not create an interest in real property and therefore such rights are not extinguished by the Act).

Pursuant to the 2022 amendment to the Act, covenants and restrictions that depend upon a zoning requirement, or building or development permit may be extinguished by the Act as long as there is not a statement on the face of the first page of the recorded instrument that it was accepted by a governmental entity as part of, or as a condition of, any such comprehensive plan or plan amendment; zoning ordinance; land development regulation; building code; development permit; development order; or other law, regulation, or regulatory approval. This amendment was adopted to overrule the decision in *Save Calusa Trust v. St. Andrews Holdings, Ltd.*, 193 So. 3d 910 (Fla. 3d DCA 2016) (judicially created exception for restrictive covenants recorded in compliance with government-imposed condition of land use approval). Parties holding an interest not extinguished before July 1, 2022, must file a notice pursuant to s. 712.06, F.S., by July 1, 2023, to preserve such interest. Any county as defined in s. 125.011(1), F.S., must file a notice pursuant to s. 712.06, F.S., by July 1, 2025, to preserve such interest.

The 2022 amendment to the Act also closes the judicial loophole created by *Barney v. Silver Lakes Acres Property*, 159 So. 3d 181 (Fla. 5th DCA 2015). In *Barney*, the court found that a deed stating it was "subject to" the obligations of the lot owners to a specifically named owners association was not a "general reference" to the association's restrictive covenants, notwithstanding the absence of the specific book and page of record of the restrictions, thereby

bringing the restrictions within the exception of F.S. 712.03(1). The 2022 amendment to the Act removes reference to the concept of a "general reference" and, in its place, provides for the only two specific instances in which a muniment of title will serve to preserve an estate, interest, easement, use restriction, or defect. Those two instances are (i) where the interest is referred to in the legal description of the muniment itself by official records book and page number, instrument number, or plat name or (ii) the muniment contains an affirmative statement that it is intended to preserve the interest. This amendment makes clear the deed in the *Barney* case would not have been sufficient to bring the association's restrictive covenants within the scope of the exception contained in F.S. 712.03(1).

Once a marketable record title has been established, the Act eliminates, by operation of law, all estates, interests, claims, covenants, restrictions, or charges, however denominated, and whoever holds them, the existence of which depends upon any act, title transaction, event, or omission that occurred before the effective date of the root of title and declares all such interests to be "null and void." The amendments to ss. 712.03 and 712.04, F.S., are intended to clarify existing law, are remedial in nature, and apply to all estates, interests, claims, covenants, restrictions, and charges, whether imposed or accepted before, on, or after the 2022 amendment. F.S. 712.04 (2020). A judicial determination is not required to establish or confirm the operation of the Act. Once an interest has been eliminated by operation of the Act, that interest cannot be "revived" by a specific reference to the interest in the subsequent muniments in the chain of title or by filing a preservation notice, either of which might have created exceptions to marketability had they been recorded within the initial 30-year period. F.S. 712.03(1) & (2) (2020). However, community covenants, conditions and restrictions may be revived by a property owner's association after the 30-year period if the covenant revitalization procedures are correctly followed. F.S. 712.11-12 (2020) & F.S. 720.403-407 (2020).

The "root of title" concept is a key component in the statutory analysis, and its definition is hard and worthy of attention. A root of title is defined as "any title transaction purporting to create or transfer the estate claimed by any person which is the last title transaction to have been recorded at least 30 years before the time when marketability is being determined. The effective date of the root of title is the date on which it was recorded." F.S. 712.01(6) (2020). In turn, a title transaction is defined as "any recorded instrument or court proceeding that affects title to any estate or interest in land that describes the land sufficiently to identify its location and boundaries." F.S. 712.01(7) (2020).

The phrase "the time marketability is being determined" is what requires some explication. Because the Act operates as a matter of law, without need for any judicial determination, and is to be liberally construed to effect the legislative purpose of simplifying and facilitating land title transactions, this phrase must be construed to mean 30 years after the date of the recording of any given root of title. Note that there may be many roots of title in any given chain of title, which may overlap and serve to cut off different interests or claims. In other words, the Act is continually at work, clearing up ancient and stale claims. Any other construction of this phrase – such as one requiring a judicial determination – would actually serve to preserve older, more ancient claims while eliminating more recent claims. Such other constructions are plainly contrary to the legislative intent of simplifying and facilitating land title transactions expressed in the statute.

Note that the definition of a root of title requires that it must describe the property interest being conveyed. The interest may be adequately described by warranty covenants within a warranty deed or a special warranty deed, although the absence of warranty covenants does not necessarily prevent an instrument from serving as a root of title. For the same reason, a quit claim deed can serve as a root of title only if the deed quitclaims an identifiable property interest. On the other hand, a quit claim deed that provides only that the grantors remise, release and quitclaim all the right, title, interest, claim, and demand which the grantors have in the land

cannot serve as a root of title because it is unknown what specific right, title, interest, claim, or demand the grantors intended to quitclaim. *Wilson v Kelley*, 226 So. 2d 123, 128 (Fla. 2d DCA 1969). In the *Wilson* case, the court found that a quit claim deed from one co-tenant to another purporting to generically remise, release and quitclaim all right, title, claim, interest, and demand did not qualify as a root of title for purposes of the Act. The court observed that, had the grantors quitclaimed *their* undivided one-half interest in the property, that would have been a sufficient description to qualify as a root of title. The point being that the instrument must describe the land sufficiently to identify the interest that is conveyed.

A wild or interloping deed may constitute a root of title. *City of Miami v. St. Joe Paper Co.*, 364 So. 2d 439, 446 (Fla. 1978).

Statutory exceptions to the operation of the Act are contained in F.S. 712.03 (2020) and are specifically treated in other Standards in this Chapter.

The Act does not eliminate an interest or claim arising out of a title transaction recorded after a root of title, even if the subsequent interest or claim is outside the chain of title, such as a wild deed. *See, Holland v. Hattaway*, 438 So. 2d 456, 468-470 (Fla. 5th DCA 1983) (the Act did not extinguish an easement purportedly created by a wild deed recorded several years after the root of title, although the court held that the easement was extinguished on other grounds). This exception appears to be less an *exception* to the operation of the Act than a reference to interests that are *created after* a root of title which are not, therefore, affected by the Act in the first place.

STANDARD 17.3

INTERESTS EXTINGUISHED

STANDARD: ALL ESTATES, INTERESTS, CLAIMS, COVENANTS, RESTRICTIONS, OR CHARGES, THE EXISTENCE OF WHICH DEPENDS UPON ANY ACT, TITLE TRANSACTION, EVENT, OR OMISSION THAT OCCURRED BEFORE THE EFFECTIVE DATE OF A ROOT OF TITLE, ARE EXTINGUISHED BY OPERATION OF THE ACT, EXCEPT THOSE RIGHTS SPECIFICALLY EXCEPTED FROM THE ACT.

Problem 1: A deed to Blackacre executed by John Doe and recorded in 1965 contained: (1) a condition subsequent that the grantor or his heirs could re-enter in the event of a breach of certain specified conditions and (2) a special limitation that the land was conveyed "so long as" it was used for a specified purpose. A warranty deed to Blackacre recorded in 1975 does not mention any conditions or limitations. No notice of a claim based on the conditions or limitations has been filed. In 2006, is title to Blackacre free and clear of the condition subsequent and the possibility of reverter by operation of the Act?

Answer: Yes. The existence of the claims depended upon the 1965 deed, a title transaction occurring prior to 1975 effective date of the root of title, and no exception applies.

Problem 2: Same facts as Problem 1 except that the 1975 deed, or a subsequent warranty deed, contained a provision that the conveyance was "subject to conditions and limitations of record." In 2006, is title to Blackacre free and clear of the condition subsequent and the possibility of reverter by operation of the Act?

Answer: Yes. An interest disclosed by the muniments of title, beginning with the root of title, may be preserved from operation of the Act but only if the title transaction imposing, transferring, or continuing such interest is specifically identified by reference to the book and page of record or by the name of the recorded plat. F.S. 712.03(1) (2020).

Problem 3: The plat for Blackacre Subdivision, filed in 1925, contained a setback restriction. A deed to Lot 1 in Blackacre Subdivision recorded in 1953 contained a reference to the name of the recorded plat, as did subsequent deeds, but none specifically referenced the setback restriction. In 1984, is title to Blackacre free and clear of the setback restriction by operation of the Act?

Answer: No. A restriction is preserved if the root of title or any subsequent muniments of title recorded within the 30 years immediately following the recording of the root of title refer to the recorded plat that imposed the restriction by name. F.S. 712.03(1) (2020).

Problem 4: A deed to Blackacre recorded in 1955 contains a condition subsequent and the possibility of reverter described in Problem 1. A subsequent root of title is recorded in 1960, without reference to the restriction. In 1991, a deed within the chain of title specifically identifies the condition subsequent and the possibility of reverter by reference to the book and page of record for the 1955 deed. In 1992, is title to Blackacre free and clear of the restriction by operation of the Act?

Answer: Yes. The restriction had been extinguished by operation of the Act in 1990, and the subsequent reference to the book and page of record of the 1955 deed in the 1991 muniment could have no effect on the already-extinguished restriction. F.S. 712.03(1) (2020).

Problem 5: A deed to Blackacre executed by John Doe and recorded in 1965 reserved an easement. A deed to Blackacre recorded in 1975 does not mention the easement. John Doe and his successors in interest have used the easement, or a part of it, since 1965. No notice of a claim based on the easement has been filed. In 2006, was title to Blackacre free and clear of the easement by operation of the Act?

Answer: No. Easements or rights, interests, or servitudes in the nature of easements, rights of way and terminal facilities and mortgages on such rights are preserved by F.S. 712.03(5) (2020) so long as they, or any part thereof, are used.

Problem 6: A deed to Blackacre executed by John Doe and recorded in 1965 reserved all of the subsurface minerals to Blackacre and the right of entry to explore and extract those minerals. A deed to Blackacre in fee simple is recorded in 1975, and it does not mention the 1965 deed, the mineral reservation, or the right of access. No notice of a claim based on the reservation has been filed. In 2006, was title to Blackacre free and clear of the right of entry to explore and extract mineral rights by operation of the Act?

Answer: Yes. Note that this would be the same result even if the 1965 deed had not expressly reserved the right of entry as such right is implicit with the reservation of the subsurface minerals. *See, P & N Investment Corp. v. Florida Ranchettes, Inc.*, 220 So. 2d 451, 453 (Fla. 1st DCA 1969).

Authorities & References: F.S. 712.03-.04 (2020); F.S. 704.05(1) (2020); 1 BOYER, FLORIDA REAL ESTATE TRANSACTIONS §14.22 (2020).

Comment: A "root of title" is any title transaction that purports to create or transfer the estate claimed, describes the land sufficiently to identify its location and boundaries, and has been of record for more than 30 years. F.S. 712.01 (2020); *Marshall v. Hollywood, Inc*., 224 So. 2d 743, 750 (Fla. 4th DCA 1969), *aff'd* 236 So. 2d 114 (Fla. 1970) (a void deed may be a root of title); *City of Miami v. St. Joe Paper Co.*, 364 So. 2d 439, 446 (Fla. 1978) (wild deed); *Kittrell v. Clark*, 363 So. 2d 373, 374 (Fla. 1st DCA 1978) (probate); *Mayo v. Owens*, 367 So. 2d 1054, 1057 (Fla. 1st DCA 1979) (judgment determining heirs).

The careful practitioner will be be vigilant for defects inherent in a root of title. *See, e.g., Marshall v. Hollywood, Inc*., *supra*, at 751 ("'defects in the muniments of title' do not refer to defects or failures in the transmission of title . . . but refer to defects in the make up or constitution of the deed or other muniments of title on which such transmission depends"). *See* Title Standard 17.10 for discussion of defects inherent in the muniments of title.

A restriction arising prior to the date of a root of title is preserved if the root of title or a subsequent muniment of title within the 30 year period immediately following the recording of a root of title contains a specific identification by reference to the name of the recorded plat or book and page of record of the instrument that imposed the restriction. *Sunshine Vistas Homeowners Association v. Caruana*, 623 So. 2d 490, 492 (Fla. 1993). However, a specific identification by reference to the name of the recorded plat book and page of record, instrument number of the instrument that imposed the restriction or an affirmative statement intent to preserve the restriction in a muniment of title recorded after that restriction has already been extinguished by operation of the Act, has no effect on the already-extinguished restriction. *See*, problem 4 above and comment to Title Standard 17.2.

The Act may operate to extinguish a county's claim of ownership. *Florida DOT v. Dardashti Properties*, 605 So. 2d 120, 122 (Fla. 4th DCA 1992) (County's interest in a strip of land held for right of way was extinguished by the Act).

The Act operates to extinguish an otherwise valid claim of common law way of necessity when such claim is not asserted within 30 years of the recording of a root of title. *H & F Land, Inc. v. Panama City-Bay County Airport and Development District*, 736 So. 2d 1167 (Fla. 1999). The Act does not, however, operate to extinguish statutory ways of necessity. *Blanton v. City of Pinellas Park*, 887 So. 2d 1224, 1233 (Fla. 2004) (receding from *H & F Land, Inc.* to the extent its dicta indicated that the Act applies to statutory ways of necessity).

The Act, subject to its exceptions, serves to eliminate rights of entry to explore and extract mineral rights, whether expressly reserved or implied. *See, Noblin v. Harbor Hills Development, L.P.*, 896 So. 2d 781, 785 (Fla. 5th DCA 1981) (the Act serves to extinguish rights of entry for exploring or mining oil, gas, minerals, or fissionable materials) and F.S. 704.05(1) (2020):

> The rights and interests in land which are subject to being extinguished by marketable record title pursuant to the provisions of s. 712.04 shall include rights of entry or of an easement, given or reserved in any conveyance or devise of realty, when given or reserved for the purpose of mining, drilling, exploring, or developing for oil, gas, minerals, or fissionable materials, unless those rights of entry or easement are excepted or not affected by the provisions of s. 712.03 or s.712.04.

but see, F.S. 704.05 (2020) (excluding the rights of entry held by the state or any of its agencies, boards or departments from operation of the Act).

A mineral estate itself may be subject to being extinguished by operation of the Act, but the prudent practitioner will obtain a determination to that effect from a court of competent jurisdiction before deciding that title is free and clear of the mineral estate. F.S. 712.02 & .04 (extinguishing "all ***estates,*** interests, claims, or charges" (2020, emphasis added)); *see also, Kittrell*, 363 So. 2d at 373 (determining that a mineral estate, which otherwise would have been extinguished by the Act, was preserved by one of the statutory exceptions).

STANDARD 17.4

RECORDING A NOTICE TO PRESERVE INTERESTS

STANDARD: RECORDING A PROPER NOTICE PRESERVES ESTATES, INTERESTS, CLAIMS, COVENANTS, RESTRICTIONS, OR CHARGES FROM THE OPERATION OF THE ACT.

Problem 1: John Doe, the record owner of Blackacre, gave and recorded a mortgage to Richard Roe encumbering Blackacre, which was recorded in January 1975. The last payment was not due until 2010. On June 15, 1975 a deed to Blackacre, which qualified as a root of title, was recorded but it contained no mention of the mortgage. On June 16, 2005, is Roe's mortgage lien extinguished?

Answer: Yes.

Problem 2: John Doe gave and recorded a 99-year lease to Richard Roe on July 1, 1975, at which time the lease was recorded, and Roe went into possession of the land. On July 2, 2006, is John Doe's ownership extinguished?

Answer: No. The 1975 transaction created a leasehold interest only. John Doe's fee simple interest would not be extinguished. Filing of notice is necessary only when there is a subsequent title transaction that purports to divest the interest claimed.

Problem 3: The owner of Blackacre Subdivision as developer, joined by Blackacre Homeowners' Association, Inc., filed a Declaration of Covenants and Restrictions for Blackacre Subdivision in 1975. John Doe conveyed Lot 1 in Blackacre Subdivision to Richard Roe in 1978. That deed did not mention the covenants or restrictions, and there is no subsequent amendment to the Declaration of Covenants and Restrictions and no specific reference to the recording information of the Declaration of Covenants and Restrictions in muniments of title in the public record. In 2009, were the CCRs extinguished by operation of the Act as to Lot 1?

Answer: Yes, unless the Blackacre Homeowners' Association either timely preserved the CCRs by filing the statutory notice pursuant to F.S. 712.05(2) or thereafter accomplishes covenant revitalization.

Problem 4: The owner of Whiteacre Business Park as developer filed a Declaration of Covenants, Conditions and Restrictions (CCRs) for Whiteacre Business Park in January 1989. John Doe conveyed Parcel 3 in Whiteacre Business Park to Richard Roe in March 1989. That deed did not mention the CCRs, and there is no subsequent amendment to the CCRs and no specific reference to the recording information of the CCRs in muniments of title in the public record. In 2020, were the CCRs extinguished by operation of the Act as to Parcel 3?

Answer: Yes, unless the Whiteacre Business Park Property Owners' Association either timely preserved the CCRs by filing the statutory notice pursuant to F.S. 712.05(2) or thereafter accomplishes covenant revitalization.

Problem 5: Same facts as Problem 4, except a notice to preserve the CCRs was recorded in December 2018. In 2020, were the CCRs extinguished by operation of the Act as to Parcel 3?

Answer: No. A property owners' association may preserve its CCRs by recording a notice to preserve and protect CCRs pursuant to F.S. 712.05, 712.06 and 720.3032 (2020).

Problem 6: Same facts as Problem 4, except the Whiteacre Business Park Property Owners' Association filed an amendment to the CCRs in December 2018. In 2020, were the CCRs extinguished by operation of the Act as to Parcel 3?

Answer: No. A property owners' association may preserve CCRs by an amendment to the CCRs that is indexed under the legal name of the property owners' association and references the recording information of the CCRs to be preserved pursuant to F.S. 712.05(2)(b) (2020).

Problem 7: Same facts as Problem 4, except the Whiteacre Business Park Property Owners' Association does not file any notice pursuant to F.S. 712.05(2) to preserve and protect covenants and restrictions or amendment to the Declaration of Covenants and Restrictions prior to the expiration of 30 years from the March 1989 deed from John Doe to Richard Roe. In 2020, the Association recorded a revived Declaration of Covenants and other statutorily required documents evidencing covenant revitalization. Are the covenants and restrictions still valid as to Parcel 3?

Answer: Yes. After an interest has been extinguished by operation of the Act, property owners in the Association may revitalize a covenant pursuant to F.S. 720.403 - .407 (2020).

Authorities & References: F.S. 712.03(2), 712.05, 712.06, 712.11, 720.3032(2), 720.403-.407 (2020), 1 BOYER, FLORIDA REAL ESTATE TRANSACTIONS §14.23[3] (2020).

Comment: The statutory notices merely protect claims, estates, or interests if they otherwise exist and cannot validate or create a new claim, estate or interest. F.S. 712.05(2), 712.06(1)(b) and 720.3032(2) (2020) outline the mechanism for preserving claims from extinguishment, and what must be included in the notice. Chapter 712 was amended effective October 1, 1997, to allow homeowner associations to file a notice under MRTA to preserve covenants and restrictions. F.S. 712.05(2) (2020).

Chapter 712 was further amended effective October 1, 2018, to allow a property owners' association to preserve an interest by filing notice in the official records in the county where the property is located. Property owners' associations are defined as entities operating a property in which the voting membership is comprised of property owners or their agents, or a combination thereof, and for which membership is mandatory, as well as associations of parcel owners authorized to enforce community covenants or restrictions. F.S. 712.01(5) (2020).

Also, effective October 1, 2018, section 712.05(2) provides options for achieving preservation of community covenants and restrictions as follows: by recording in the official records a written notice in accordance with section 712.06 or 720.3032(2); or an amendment to community covenant or restriction referencing the recording information for the covenant or restriction to be preserved. The 2018 revision to section 712.05(2) is contrary to previous case law. The 2018 statutory revision breaks from the precedent set forth in *Matissek v. Waller*, 51 So. 3d 625 (Fla. 2d DCA 2011). In that case the appellate court held that a post-root of title amendment to restrictions was not a muniment of title and since the amended restrictions could not stand alone, both the pre-root restrictions and the post-root amendment

were extinguished by MRTA. The holding in *Matissek* has continuing application outside of the context of the 2018 revision.

For covenants, conditions and restrictions that have lapsed, property owners may avail themselves of covenant revitalization through the Department of Economic Opportunity pursuant to sections 720.403 - .407. Once MRTA has extinguished a Declaration of Covenants, Conditions and Restrictions, title is marketable free of that Declaration. If the Declaration is later revived, then title is again subject to the Declaration. In no event is the Declaration enforceable for the period of time the Declaration was extinguished. Thus, even if the HOA revives the Declaration, it may not retroactively enforce that Declaration retroactively during the time it was previously extinguished.

Effective October 1, 2018, revitalization of covenants or restrictions is available to all types of communities and property owners' associations and is not limited to residential property. F.S. 712.11 & 720.403(3) (2020). Chapter 720, Part III is the sole means of revitalizing covenants, conditions or restrictions that have been extinguished by operation of the Act.

Effective September 4, 2020, section 712.065(1) defines discriminatory restriction as one that restricts ownership, occupancy or use of real property based upon a natural person's characteristic that is protected by the laws of the United States or the State of Florida. These discriminatory restrictions are thus unenforceable and severed from any recorded title transaction. Recording of any notice to preserve such restrictions does not reimpose any discriminatory restriction. F.S. 712.065(2) (2020). A recorded amendment to covenants or restrictions that removes a discriminatory restriction but changes no other provision does not constitute a title transaction occurring after the root of title. F.S. 712.065(3) (2020).

If a false or fictitious claim is asserted by the filing of notice pursuant to the Act, the prevailing party may be entitled to costs and attorney's fees arising out of any action related thereto and damages sustained as a result of the filing of such notice. F.S. 712.08 (2020). The attorney's fees provision of MRTA "does not require deliberate untruthfulness" but includes "mistaken ideas" and claims that are not "real or genuine claims." An award of attorney's fees against a voluntary homeowners' association that was found to be without authority to file a 2004 MRTA preservation notice was upheld absent a finding of a deliberate untruthful intention. *Sand Hill Homeowners Ass'n v. Busch*, 210 So. 3d 706 (Fla. 5th DCA 2017).

STANDARD 17.5

RIGHTS OF PERSONS IN POSSESSION

STANDARD: THE ACT DOES NOT ELIMINATE THE RIGHTS OF PERSONS IN POSSESSION OF LAND.

Problem 1: John Doe was grantee in a deed to Blackacre recorded in 1970, which constitutes a root of title. Nothing further appears of record, but investigation in 2002 disclosed that Richard Roe was in actual open possession of Blackacre. In 2002 is John Doe's title to Blackacre free of the claims of Roe?

Answer: No. Roe's possession was inconsistent with John Doe's record title and was therefore prima facie hostile. Possession by a party with an interest that is subordinate to John Doe, such as a tenant, licensee, or employee, would not divest Doe of title.

Problem 2: Same facts as problem 1, except that Richard Roe only placed a mobile home on the land but never actually resided on it. Is John Doe's interest free from the claims of Richard Roe?

Answer: Yes. F.S. 712.03(3) (2020) requires "possession of the lands" for the exception to apply. Here, Richard Roe was not occupying the lands and was not living in the mobile home that had been placed on the lands.

Problem 3: Mary Smith conveyed Whiteacre to James Johnson in 1971. In 1974, Mary Smith deeded Whiteacre to Becky Buyer by warranty deed. In 2004 Becky Buyer deeded Whiteacre to Joe Brown. Over the years, James Johnson continued to occasionally cross over Whiteacre to get to a parcel of property he owned which was adjacent to Whiteacre. In 2005, is Joe Brown's interest in Whiteacre free and clear of the claims of James Johnson?

Answer: Yes. The term "possession" is not defined in the Act, so the ordinary definition of that term applies. Possession is demonstrated by power and control over the land, as opposed to periodic use or minimal maintenance. James Johnson's occasional use of the property without evidence of visible control over it does not meet the ordinary definition of "possession."

Authorities & References: F.S. 712.03(3) (2020); 1 BOYER, FLORIDA REAL ESTATE TRANSACTIONS §14.23[4] (2020); *Dorsey v. Robinson*, 270 So. 3d 462 (Fla. 1st DCA 2019); *Dept. of Transp. v. Mid-Peninsula Realty Inv. Grp., LLC*, 171 So. 3d 771 (Fla. 2d DCA 2015).

Comment: No person can have a marketable record title within the meaning of the Act if the land is in the hostile possession of another person. The 712.03(3) exception to the Act for parties in possession limits the application of the Act to establish marketable record title. This exception to the Act does not create new interests.

In the *Mid-Peninsula* case, the Department of Transportation ("DOT") had obtained an Order of Taking which gave it "full and complete ownership." Mid-Peninsula acquired title through a wild deed recorded three years after the Order of Taking and sought to quiet title against DOT. The trial court determined DOT's use of the land did not qualify as possession and the appellate court agreed. The appellate court also held that the section 712.03(5) exception may be applied to rights of way held in fee. *See* Title Standard 17.3.

STANDARD 17.6

INSTRUMENTS RECORDED SUBSEQUENT TO A ROOT TITLE

STANDARD: THE ACT DOES NOT ELIMINATE ESTATES, INTERESTS, CLAIMS, COVENANTS, RESTRICTIONS, OR CHARGES ARISING OUT OF A TITLE TRANSACTION RECORDED SUBSEQUENT TO THE RECORDING OF A ROOT OF TITLE

Problem 1: John Doe took record title to Blackacre in 1970 by deed which would qualify as a root of title. A deed to Blackacre from Richard Roe to Jane Nokes subsequently recorded in 1980 recites that John Doe died intestate and that Richard Roe was his sole heir at law. No additional instruments have been recorded after the 1980 deed that would qualify as a root of title. In 2007, was title to Blackacre free and clear of Nokes' interest by operation of the Act?

Answer: No. Even if the facts recited in the 1980 deed were not correct – i.e., Doe did not die intestate and Roe was not Doe's sole heir – it is a title transaction (a recorded instrument that affects title to an estate or interest in land, and sufficiently describes the land to identify its location and boundaries). Jane Nokes' interest arose out of and was created by the 1980 deed and is thus not an interest that is extinguished by operation of the Act because it did not arise before or depend upon any act, title transaction, event or omission that occurred before the 1970 root of title.

Problem 2: John Doe took record title to Blackacre in 1970 by a deed which would qualify as a root of title. In 1980, a stranger to title to Blackacre executed and recorded a deed in favor of Jane Nokes. In 2007, was title to Blackacre free and clear of Nokes' interest by operation of the Act?

Answer: No.

Authorities & References: F.S. 712.01, 712.03(4), 712.04 (2020); 1 BOYER, FLORIDA REAL ESTATE TRANSACTIONS §14.23[5] (2020).

Comment: The fact that the Act does not eliminate estates, interests, claims, or charges arising out of a title transaction recorded subsequent to the effective date of a root of title underscores the limits of the Act. The Act ***only*** eliminates estates, interests, claims, covenants, restrictions, or charges the existence of which depends upon any act, title transaction, event or omission that occurred ***before*** the effective date of a root of title. F.S. 712.04 (2020). Thus, if an estate, interest, claim, or charge truly "arises out of," i.e., is created by, a title transaction subsequent to the root of title, its existence could not, by definition, depend upon an act, title transaction, event or omission that occurred ***before*** the effective date of a root of title. *See, e.g.*, *Holland v. Hattaway*, 438 So. 2d 456, 467 (Fla. 5th DCA 1983) ("it is clear that MRTA was not intended to and does not make marketable a title as against adverse record claims that first appear, or that are created, or 'arise' during, or subsequent to the commencement of, the operative 30 year period."). In other words, interests that arise out of title transactions recorded after the effective date of a root of title do not come within the scope of the operation of the Act.

However, the exception is limited to estates, interests, claims, or charges that arise out of title transactions recorded after the effective date of a root of title and will not preserve interests that depend upon any act, title transaction, event or omission that occurred before the effective

date of a root of title. For example, in the matter of *Matissek v. Waller*, 51 So. 3d 625, 629 (Fla. 2d DCA 2011), the court found that restrictions recorded in 1971 were eliminated by operation of the Act after the recording of a 1974 root of title, notwithstanding the recording of amended restrictions in 1977 because "the 1977 amendments could not exist independently of the original 1971 restrictions…."

The practitioner should keep in mind that, while F.S. 712.05 was amended after the *Matissek* opinion in order to allow an amendment to a community covenant or restriction to preserve the covenant or restriction, the *Matissek* opinion is still good law and its well-reasoned analysis of how the Act operates may apply in circumstances other than amendments to a community covenant or restriction.

While the Act may not eliminate an estate, interest, claim, or charge arising out of a title transaction recorded subsequent to the effective date of a root of title, it does not affect the validity or invalidity of such estate, interest, claim, or charge.

A wild deed may constitute a root of title. *City of Miami v. St. Joe Paper Co*., 364 So. 2d 439, 446 (Fla. 1978). With respect to wild deeds, *see* Title Standard 16.5.

STANDARD 17.7

RIGHTS OF PERSONS TO WHOM
TAXES ARE ASSESSED

STANDARD: THE ACT DOES NOT ELIMINATE THE RIGHTS OF A PERSON IN WHOSE NAME THE LAND IS ASSESSED FOR THE PERIOD OF TIME THE LAND IS ASSESSED IN THAT PERSON'S NAME AND FOR THREE YEARS THEREAFTER.

Problem 1: John Doe received title to Blackacre by a warranty deed in 1984. In 2019, John Doe conveyed Blackacre to Mary Jones. It was later discovered that Blackacre had been assessed on the county tax rolls in the name of Richard Roe since 2015. In 2020, is Mary Jones's title free and clear of Richard Roe's interest, if any, in the property by operation of the Act?

Answer: No. However, what rights, if any, Roe had in and to the property would need to be ascertained. This exception to the Act only prevents destruction of existing rights and does not create any new rights. Roe would have to establish his purported interest based on something more than the mere payment of property taxes.

Problem 2: Same facts as Problem 1 except that 2016 is the last year that Blackacre is assessed in the name of Richard Roe. During 2017 through 2019 Blackacre was assessed in the name of John Doe. In 2020, is Mary Jones's title free and clear of Richard Roe's interest, if any, in the property by operation of the Act?

Answer: Yes. Jones's title is subject to the rights of Roe, if any, for only three years after Blackacre was last assessed in Roe's name. This assumes that no other exception is applicable to preserve any rights of Roe.

Authorities & References: F.S. 712.03(6) (2020); 1 BOYER, FLORIDA REAL ESTATE TRANSACTIONS §14.23[6](2020).

Comment: This exception creates a need to review the county tax rolls for the three years prior to the date that title is being examined. However, it is important to note that the Act does not operate to establish any rights to the property in the party to whom taxes are assessed. Any such rights would have to be established in an appropriate judicial proceeding.

STANDARD 17.8

APPLICATION OF THE ACT TO RIGHTS OF THE UNITED STATES, FLORIDA, TRUSTEES OF THE INTERNAL IMPROVEMENT TRUST FUND AND WATER MANAGEMENT DISTRICTS IS LIMITED

STANDARD: THE ACT DOES NOT ELIMINATE ANY RIGHT, TITLE, OR INTEREST RESERVED BY THE STATE OF FLORIDA OR THE UNITED STATES IN A PATENT OR DEED AND DOES NOT ELIMINATE ANY INTEREST HELD BY THE BOARD OF TRUSTEES OF THE INTERNAL IMPROVEMENT TRUST FUND, WATER MANAGEMENT DISTRICTS CREATED UNDER CHAPTER 373, OR THE UNITED STATES.

Problem 1: John Doe conveyed Blackacre to Richard Roe by warranty deed recorded in 1988. Blackacre lies on a navigable river and is improved with an estate home, seawall and dock that were built on land that was formerly partially submerged. The previous conveyance of Blackacre into private ownership was without express reservation of those portions of the land underlying navigable waters. In 2020, is Richard Roe's interest free and clear of the State of Florida's interest as sovereign in any submerged or formerly submerged lands by operation of the Act?

Answer: No. The Act does not operate to divest the State of Florida of title to sovereignty lands waterward of the ordinary high-water mark of navigable rivers.

Problem 2: The Southwest Florida Water Management District acquired title to Whiteacre in 1983. In 1985, Richard Roe conveyed Whiteacre to Simon Grant by a special warranty deed. In 2020, was Simon Grant's interest free and clear of any interest of the District by operation of the Act?

Answer: No. The Act does not operate to extinguish any right, title or interest held by any water management district created under chapter 373.

Authorities & References: F.S. 712.03(9) & 712.04 (2020).

Comment: With respect to submerged sovereignty land, *see* F.S. 712.03(7) (2020) (effective June 15, 1978); *Coastal Petroleum Co. v. American Cyanamid Co.*, 492 So. 2d 167 (Fla. 1986), cert. den. 479 U.S. 1065 (1987) (holding that the Act as originally enacted and as subsequently amended did not operate to divest the state of title to sovereignty lands, even though conveyances of state lands to private interests encompassed sovereignty lands within the lands being conveyed); 1 BOYER, FLORIDA REAL ESTATE TRANSACTIONS § 14.23[7] (2020); FLORIDA REAL PROPERTY TITLE EXAMINATION AND INSURANCE § 2.7 (Fla. Bar CLE 9th ed. 2019).

The Act does not affect any right, title, or interest of the United States, Florida, or any of its officers, boards, commissions, or other agencies reserved in the patent or deed by which the United States, Florida, or any of its agencies parted with title. F.S 712.04 (2020). Effective July 1, 2010, section 712.03(9) F.S., created an exception to the Act for any right, title or interest held by the Trustees of the Internal Improvement Trust Fund, any water management district created under chapter 373, or the United States. As amended, the Act does not apply to eliminate those governmental interests whether created by reservation or otherwise. F.S 712.04 (2020).

STANDARD 17.9

Elimination of Dower

[Intentionally Deleted; see archived version for text]

STANDARD 17.10

DEFECTS INHERENT IN MUNIMENTS OF TITLE

STANDARD: THE ACT DOES NOT ELIMINATE ANY DEFECTS INHERENT IN THE MUNIMENTS OF TITLE ON WHICH THE ESTATE IS BASED BEGINNING WITH A ROOT OF TITLE AND FOR THIRTY YEARS FROM THE RECORDING OF A ROOT OF TITLE.

Problem 1: In 1975, ABC Corp. purports to convey Blackacre to John Doe. The deed is signed by "Richard Roe as Secretary of ABC Corp." No corporate resolution was recorded authorizing Richard Roe to execute deeds on behalf of ABC Corp. There is thus a defect on the face of the 1975 deed as it was not signed by a person authorized to do so. Nothing affecting Blackacre has been recorded since then. In 2006, was title to Blackacre free and clear of ABC Corp.'s interest by operation of the Act?

Answer: No. Although the deed may constitute a root of title, it contains a defect inherent on its face because it was signed by an officer who did not have statutory authority to convey ABC Corp.'s real property. Hence, the potential ownership claim of ABC Corp. is not extinguished. F.S. 712.03(1) (2020).

Problem 2: John Doe as the sole owner of Blackacre resided on the property as his homestead with his wife and two children. In 1960 John Doe conveyed Blackacre to Richard Roe for valuable consideration, but without the joinder of his wife. John Doe died in 1969, survived by his wife and children. Blackacre was conveyed by Roe to Sam Smith in 1972. No notice of the homestead claim had ever been filed. In 2021, is Smith's title free and clear of the interests of Doe's wife and children?

Answer: Yes. The 1972 deed was a root of title and there is no defect inherent on the face of that 1972 deed to indicate that John Doe's wife and children may have an outstanding interest.

Problem 3: Same facts as Problem 2 except that Richard Roe did not convey to Sam Smith until 2015. In 2021, is Smith's title free and clear of the interests of Doe's wife and children?

Answer: No. The 2015 does not qualify as a root of title. The homestead claim renders the 1960 deed void and the 2015 deed does not yet qualify as a root of title because it has not been of record for 30 years.

Authorities & References: F.S. 712.01-.04 (2020); *ITT Rayonier, Inc. v. Wadsworth*, 386 F. Supp. 940, 942-43 (M.D. Fla. 1975), *accord*, *ITT Rayonier, Inc. v. Wadsworth*, 346 So. 2d 1004, 1009 (Fla. 1977); *see also, Reid v. Bradshaw*, 302 So. 2d 180, 181 (Fla. 1st DCA 1974) (homestead rights are not eliminated by the mere passage of time).

Comment: The answer to Problem 2 would probably be the same without regard to whether the homestead owner died before or after the effective date of the root of title since no notice of homestead claim was ever filed. *See* F.S. 712.04 (2020). However, the *Reid* opinion casts some doubt in the latter instance, and caution should be exercised in such a situation. *See also Conservatory-City of Refuge, Inc. v. Kinney*, 514 So. 2d 377, 378 (Fla. 2d DCA 1987) (holding that the Act did not apply to eliminate homestead claims where the children's remainder interests did not vest until the homestead owner died, which was after the asserted root of title).

The term "muniments of title" is not defined in the Act. The Fifth District Court of Appeal has defined muniments of title in the context of the Act as "any documentary evidence upon

which title is based… [such as] deeds, wills, and court judgments through which a particular land title passes and upon which its validity is based." *Cunningham v. Haley*, 501 So. 2d 649, 652 (Fla. 5th DCA 1986, *reh'g den.* 1987). The court went on to state that "[m]uniments of title do more than merely 'affect' title; they must carry title and be a vital link in the chain of title." *Id.*

The Florida Bar

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VOLUNTARY BAR GROUP
LEGISLATIVE OR POLITICAL ACTIVITY WORKSHEET

- This worksheet is for voluntary bar groups (VBGs) to gather and share information before submitting an official request for approval of legislative or political activity, whether new or rollover.
- SBP 9.11 definitions:
    - Legislative or political activity is "activity by The Florida Bar or a bar group including, but not limited to, filing a comment in a federal administrative law case, taking a position on an action by an elected or appointed governmental official, appearing before a government entity, submitting comments to a regulatory entity on a regulatory matter, or any type of public commentary on an issue of significant public interest or debate."
    - A VBG is "a group within The Florida Bar funded by voluntary member dues in the current and immediate prior bar fiscal years."
- VBGs must advise TFB of proposed legislative or political activity and identify all groups the proposal has been submitted to. If comments have been received, they should be attached; if they have not been received, the proposal may still be submitted to the Legislation Committee. *See* SBP 9.50(d).
    - The Legislation Committee and Board will review the proposal unless an expedited decision is required.
    - If expedited review is requested, the Executive Committee may review the proposal.
    - The Bar President, President-Elect, and chair of the Legislation Committee may review the proposal if the legislature is in session or the Executive Committee cannot act because of an emergency.

General Information

Submitted by: *(name of VBG or individual)* Real Property, Probate and Trust Law Section, Finance and Lending Committee

Address: *(address and phone #)* c/o Vice Chair, Jason M. Ellison – 727-362-6151, 150 Second Avenue N., Suite 1770, St. Petersburg, FL 33701

Position Level: *(name of VBG)* Real Property, Probate and Trust Law Section, Finance and Lending Committee _

Proposed Advocacy

Complete #1 below if the issue is legislative or #2 if the issue is political; #3 must be completed.

1. **Proposed Wording of Legislative Position for Official Publication:**

Proposal to revise Section 714.16, *Florida Statutes,* to address several practical issues with the Uniform Commercial Receivership Act including providing for right of redemption, customary closing costs, and other changes which will cause receivership sales to be marketable and insurable.

2. **Political Proposal**

_____
_____
_____
_____
_____

3. **Reasons For Proposed Advocacy**

a. Per SBP 9.50(a), does the proposal meet the following requirements? *(select one)* _xx__ Yes _____ No

- It is within the group's subject matter jurisdiction as described in the VBG's bylaws;
- It is beyond the scope of the bar's permissible legislative or political activity, **or** within the bar's permissible scope of legislative or political activity **and** consistent with an official bar position on that issue; **and**
- It does not have the potential for deep philosophical or emotional division among a substantial segment of the bar's membership.

b. Additional Information: _____
_____

Referrals to Other Voluntary Bar Groups

VBGs must provide copies of the proposed legislative or political activity to all bar divisions, sections, and committees that may be interested in the issue. *See* SBP 9.50(d). List all divisions, sections, and committees to which the proposal has been provided pursuant to this requirement. Include all comments received as part of your submission. The online form may be submitted before receiving comments but only after the proposal has been provided to other bar divisions, sections, or committees.

Business Law Section, Florida Land Title Association

Contacts

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

Wilhelmina Kightlinger, Co-Chair of the Legislative Committee

1408 N. West Shore Blvd, Ste 900, Tampa, FL 33607-4535; 813-777-6706

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

Peter M. Dunbar, French Brown, and Martha Edenfield, Dean, Mead & Dunbar, P.A. 215 South Monroe St., Suite 815, Tallahassee, FL 32301 (850) 999-4100

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

Peter M. Dunbar, French Brown, & Martha Edenfield, Dean, Mead & Dunbar, P.A. 215 South Monroe St., Suite 815, Tallahassee, FL 32301 (850) 999-4100

A bill to be entitled

714.01 Short title.—This chapter may be cited as the “Uniform Commercial Real Estate Receivership Act.”

714.02 Definitions.—For the purposes of this chapter, the term:

(1) “Affiliate” means:

(a) With respect to an individual:

1. A companion of the individual;

2. A lineal ancestor or descendant, whether by blood or adoption, of:

a. The individual; or

b. A companion of the individual;

3. A companion of an ancestor or descendant as described in subparagraph 2.;

4. A sibling, aunt, uncle, great aunt, great uncle, first cousin, niece, nephew, grandniece, or grandnephew of the individual, whether related by the whole or the half blood or adoption, or a companion of any of them; or

5. Any other person occupying the residence of the individual; and

(b) With respect to a person other than an individual:

1. Another person who directly or indirectly controls, is controlled by, or is under common control with the person;

2. An officer, director, manager, member, partner, employee, or trustee or other fiduciary of the person; or

3. A companion of an individual or an individual occupying the residence of an individual.

(2) “Companion” means:

(a) The spouse of an individual;

(b) The registered domestic partner of an individual; or

(c) Another individual in a civil union with an individual.

(3) “Court” means the court of general equity jurisdiction in

this state.

(4) “Executory contract” means a contract, including a lease, under which each party has an unperformed obligation and the failure of a party to complete performance would constitute a material breach.

(5) “Governmental unit” means an office, department, division, bureau, board, commission, or other agency of this state or a subdivision of this state.

(6) “Lien” means an interest in property which secures payment or performance of an obligation.

(7) “Mortgage” means a record, however denominated, that creates or provides for a consensual lien on real property or rents, even if the record also creates or provides for a lien on personal property.

(8) “Mortgagee” means a person entitled to enforce an obligation secured by a mortgage.

(9) “Mortgagor” means a person who grants a mortgage or a successor in ownership of the real property described in the mortgage.

(10) “Owner” means the person for whose property a receiver is appointed.

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

(12) “Proceeds” means any of the following property:

(a) Whatever is acquired on the sale, lease, license, exchange, or other disposition of receivership property.

(b) Whatever is collected on, or distributed on account of, receivership property.

(c) Rights arising out of receivership property.

(d) To the extent of the value of receivership property, claims arising out of the loss, nonconformity, or interference with the

use of, defects or infringement of rights in, or damage to the property.

(e) To the extent of the value of receivership property and to the extent payable to the owner or mortgagee, insurance payable by reason of the loss or nonconformity of, defects or infringement of rights in, or damage to the property.

(13) "Property" means all of a person's right, title, and interest, both legal and equitable, in real and personal property, tangible and intangible, wherever located and however acquired. The term includes proceeds, products, offspring, rents, or profits of or from the property.

(14) "Receiver" means a person appointed by the court as the court's agent, and subject to the court's direction, to take possession of, manage, and, if authorized by this chapter or court order, transfer, sell, lease, license, exchange, collect, or otherwise dispose of receivership property.

(15) "Receivership" means a proceeding in which a receiver is appointed.

(16) "Receivership property" means the property of an owner which is described in the order appointing a receiver or a subsequent order. The term includes any proceeds, products, offspring, rents, or profits of or from the property.

(17) "Record," if used as a noun, means information that is inscribed on a tangible medium or that is stored on an electronic or other medium and is retrievable in perceivable form.

(18) "Rents" means:

(a) Sums payable for the right to possess or occupy, or for the actual possession or occupation of, real property of another person;

(b) Sums payable to a mortgagor under a policy of rental-interruption insurance covering real property;

(c) Claims arising out of a default in the payment of sums payable

for the right to possess or occupy real property of another person;
(d) Sums payable to terminate an agreement to possess or occupy real property of another person;
(e) Sums payable to a mortgagor for payment or reimbursement of expenses incurred in owning, operating, and maintaining real property or constructing or installing improvements on real property; or
(f) Other sums payable under an agreement relating to the real property of another person which constitute rents under the laws of this state other than this act.
(19) “Secured obligation” means an obligation the payment or performance of which is secured by a security agreement.
(20) “Security agreement” means an agreement that creates or provides for a lien.
(21) “Sign” means, with present intent to authenticate or adopt a record:
(a) To execute or adopt a tangible symbol; or
(b) To attach to or logically associate with the record an electronic sound, symbol, or process.
(22) “State” means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States.
714.03 Notice and opportunity for hearing.—
(1) Except as otherwise provided in subsection (2), the court may issue an order under this chapter only after notice and opportunity for a hearing appropriate under the circumstances.
(2) The court may issue an order under this chapter without written or oral notice to the adverse party only if:
(a) It appears from the specific facts shown by affidavit or verified pleading or motion that immediate and irreparable injury, loss, or damage will result to the movant or that waste,

dissipation, impairment, or substantial diminution in value will result to the subject real estate before any adverse party can be heard in opposition; and

(b) The movant's attorney certifies in writing all efforts that have been made to give notice to all known adverse parties, or the reasons why such notice should not be required.

(3) Only an affidavit, a declaration or a verified pleading, or a motion may be used to support the application for the appointment of a receiver, unless the adverse party appears at the hearing or has received reasonable prior notice of the hearing. Every order appointing a receiver without notice must be endorsed with the date and hour of entry, must be filed forthwith in the clerk's office, must define the injury, must state findings by the court as to why the injury may be irreparable, and must give the reasons why the order was granted without notice if notice was not given. The order appointing a receiver shall remain in effect until the further order of the court.

(4) This chapter does not displace any existing rule of procedural or judicial administration of this state governing service or notice, including, without limitation, Rule 1.070, Florida Rules of Civil Procedure, and Rule 2.525, Florida Rules of Judicial Administration, which shall remain in full force and effect.

714.04 Scope; exclusions.—

(1) This chapter applies to a receivership initiated in a court of this state for an interest in real property and any incidental personal property related to or used in operating the real property.

(2) This chapter does not apply to:

(a) Actions in which a state agency or officer is expressly authorized by statute to seek or obtain the appointment of a receiver;

(b) Actions authorized by or commenced under federal law;
(c) Real property improved by one or two dwelling units which includes the homestead of an individual owner or an affiliate of an individual owner;
(d) Property of an individual exempt from forced sale, execution, or seizure under the laws of this state; or
(e) Personal property of an individual which is used primarily for personal, family, or household purposes.
(3) This chapter does not limit the authority of a court to appoint a receiver under the laws of this state other than this chapter.
(4) This chapter does not limit an individual's homestead rights under the laws of this state or federal law.
(5) Unless displaced by a particular provision of this chapter, the principles of law and equity, including the law relative to capacity to contract, principal and agent, estoppel, laches, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, or other validating or invalidating cause, supplement this chapter.
714.05 Power of the court.—The court that appoints a receiver under this chapter has exclusive jurisdiction to direct the receiver and determine any controversy related to the receivership or receivership property.
714.06 Appointment of receiver.—
(1) The court may appoint a receiver:
(a) Before judgment, to protect a party that demonstrates an apparent right, title, or interest in real property that is the subject of the action, if the property or its revenue-producing potential:
1. Is being subjected to or is in danger of waste, loss, substantial diminution in value, dissipation, or impairment; or
2. Has been or is about to be the subject of a voidable

transaction;
(b) After judgment:
1. To carry the judgment into effect; or
2. To preserve nonexempt real property pending appeal or when an execution has been returned unsatisfied and the owner refuses to apply the property in satisfaction of the judgment;
(c) In an action in which a receiver for real property may be appointed on equitable grounds, subject to the requirements of paragraphs (a) and (b); or
(d) During the time allowed for redemption, to preserve real property sold in an execution or foreclosure sale and secure its rents to the person entitled to the rents.
(2) In connection with the foreclosure or other enforcement of a mortgage, the court shall consider the following facts and circumstances, together with any other relevant facts, in deciding whether to appoint a receiver for the mortgaged property:
(a) Appointment is necessary to protect the property from waste, loss, substantial diminution in value, transfer, dissipation, or impairment;
(b) The mortgagor agreed in a signed record to the appointment of a receiver on default;
(c) The owner agreed, after default and in a signed record, to appointment of a receiver;
(d) The property and any other collateral held by the mortgagee are not sufficient to satisfy the secured obligation;
(e) The owner fails to turn over to the mortgagee proceeds or rents the mortgagee was entitled to collect; or
(f) The holder of a subordinate lien obtains appointment of a receiver for the property.
(3) The court may condition the appointment of a receiver without prior notice or hearing under s. 714.03 on the giving of security by the person seeking the appointment for the payment of damages,

reasonable attorney fees, and costs incurred or suffered by any person if the court later concludes that the appointment was not justified. If the court later concludes that the appointment was justified and the order of appointment of the receiver becomes final and no longer subject to appeal, the court shall release the bond or other security. When any order appointing a receiver or providing for injunctive relief is issued on the pleading of a municipality or the state, or any officer, agency, or political subdivision thereof, the court may require or dispense with a bond, with or without surety, and conditioned in the same manner, having due regard for public interest.

(4) A party adversely affected by an order appointing a receiver may move to dissolve or modify the order at any time. If a party moves to dissolve or modify the order, the motion must be heard within 5 days after the movant applies for a hearing on the motion or at such time as the court determines is reasonable and appropriate under the circumstances after the movant applies for a hearing on the motion. After notice and a hearing, the court may grant relief for cause shown.

714.07 Disqualification from appointment as receiver; disclosure of interest.—

(1) The court may not appoint a person as receiver unless the person submits to the court a statement under penalty of perjury that the person is not disqualified.

(2) Except as otherwise provided in subsection (3), a person is disqualified from appointment as receiver if the person:

(a) Is an affiliate of a party;

(b) Has an interest materially adverse to an interest of a party;

(c) Has a material financial interest in the outcome of the action, other than compensation the court may allow the receiver;

(d) Has a debtor-creditor relationship with a party; or

(e) Holds an equity interest in a party, other than a

noncontrolling interest in a publicly traded company.

(3) A person is not disqualified from appointment as receiver solely because the person:

(a) Was appointed receiver or is owed compensation in an unrelated matter involving a party or was engaged by a party in a matter unrelated to the receivership;

(b) Is an individual obligated to a party on a debt that is not in default and was incurred primarily for personal, family, or household purposes; or

(c) Maintains with a party a deposit account, as defined in s. 679.1021.

(4) A person seeking appointment of a receiver may nominate a person to serve as receiver, but the court is not bound by the nomination.

714.08 Receiver's bond; alternative security.—

(1) Except as otherwise provided in subsection (2), a receiver shall post with the court a bond that:

(a) Is conditioned on the faithful discharge of the receiver's duties;

(b) Has one or more sureties approved by the court;

(c) Is in an amount the court specifies; and

(d) Is effective as of the date of the receiver's appointment.

(2) The court may approve the receiver posting an alternative security with the court, such as a letter of credit or deposit of funds. The receiver may not use receivership property as alternative security. Interest that accrues on deposited funds must be paid to the receiver upon the receiver's discharge.

(3) The court may authorize a receiver to act before the receiver posts the bond or alternative security required by this section if the action is necessary to prevent or mitigate immediate injury, loss, or damage to the party who sought the appointment of the receiver, or immediate waste, dissipation, impairment, or

substantial diminution in value to the receivership property.

(4) A claim against a receiver's bond or alternative security must be made not later than 1 year after the date the receiver is discharged.

714.09 Status of receiver as lien creditor.—Upon appointment of a receiver, the receiver has the status of a lien creditor under:

(1) Chapter 679 as to receivership property or fixtures; and

(2) Chapter 695 as to receivership property that is real property.

714.10 Security agreement covering after-acquired property.—Except as otherwise provided by law other than this chapter, property that a receiver or an owner acquires after appointment of the receiver is subject to a security agreement entered into before the appointment to the same extent as if the court had not appointed the receiver.

714.11 Collection and turnover of receivership property.—

(1) Unless the court orders otherwise, on demand by a receiver:

(a) A person that owes a debt that is receivership property and is matured or payable on demand or on order shall pay the debt to or on the order of the receiver, except to the extent the debt is subject to setoff or recoupment; and

(b) Subject to subsection (3), a person that has possession, custody, or control of receivership property shall turn the property over to the receiver.

(2) A person that has notice of the appointment of a receiver and owes a debt that is receivership property may not satisfy the debt by payment to the owner.

(3) If a creditor has possession, custody, or control of receivership property and the validity, perfection, or priority of the creditor's lien on the property depends on the creditor's possession, custody, or control, the creditor may retain possession, custody, or control until the court orders adequate

protection of the creditor's lien.

(4) Unless a bona fide dispute exists about a receiver's right to possession, custody, or control of receivership property, the court may sanction as civil contempt a person's failure to turn the property over when required by this section.

714.12 Powers and duties of receiver.—

(1) Except as limited by court order or the laws of this state other than this chapter, a receiver may:

(a) Collect, control, manage, conserve, and protect receivership property;

(b) Operate a business constituting receivership property, including preservation, use, sale, lease, license, exchange, collection, or disposition of the property in the ordinary course of business;

(c) In the ordinary course of business, incur unsecured debt and pay expenses incidental to the receiver's preservation, use, sale, lease, license, exchange, collection, or disposition of receivership property;

(d) Assert a right, claim, cause of action, or defense of the owner which relates to receivership property;

(e) Seek and obtain instruction from the court concerning receivership property, exercise of the receiver's powers, and performance of the receiver's duties;

(f) Upon subpoena, compel a person to submit to examination under oath, or to produce and permit inspection and copying of designated records or tangible things, with respect to receivership property or any other matter that may affect administration of the receivership;

(g) Engage a professional pursuant to s. 714.15;

(h) Apply to a court of another state for appointment as ancillary receiver with respect to receivership property located in that state; and

(i) Exercise any power conferred by court order, this chapter, or the laws of this state other than this chapter.

(2) With court approval, a receiver may:

(a) Incur debt for the use or benefit of receivership property other than in the ordinary course of business;

(b) Make improvements to receivership property;

(c) Use or transfer receivership property other than in the ordinary course of business pursuant to s. 714.16;

(d) Adopt or reject an executory contract of the owner pursuant to s. 714.17;

(e) Pay compensation to the receiver pursuant to s. 714.21, and to each professional engaged by the receiver under s. 714.15;

(f) Recommend allowance or disallowance of a claim of a creditor pursuant to s. 714.20; and

(g) Make a distribution of receivership property pursuant to s. 714.20.

(3) A receiver shall:

(a) Prepare and retain appropriate business records, including a record of each receipt, disbursement, and disposition of receivership property;

(b) Account for receivership property, including the proceeds of a sale, lease, license, exchange, collection, or other disposition of the property;

(c) File with the recording office of the county in which the real property is located a copy of the order appointing the receiver and, if a legal description of the real property is not included in the order, the legal description;

(d) Disclose to the court any fact arising during the receivership which would disqualify the receiver under s. 714.07; and

(e) Perform any duty imposed by court order, this chapter, or the laws of this state other than this chapter.

(4) The powers and duties of a receiver may be expanded, modified, or limited by court order.

714.13 Duties of owner.—

(1) An owner shall:

(a) Assist and cooperate with the receiver in the administration of the receivership and the discharge of the receiver's duties;

(b) Preserve and turn over to the receiver all receivership property in the owner's possession, custody, or control;

(c) Identify all records and other information relating to the receivership property, including a password, authorization, or other information needed to obtain or maintain access to or control of the receivership property, and make available to the receiver the records and information in the owner's possession, custody, or control;

(d) Upon subpoena, submit to examination under oath by the receiver concerning the acts, conduct, property, liabilities, and financial condition of the owner or any matter relating to the receivership property or the receivership; and

(e) Perform any duty imposed by court order, this chapter, or the laws of this state other than this chapter.

(2) If an owner is a person other than an individual, this section applies to each officer, director, manager, member, partner, trustee, or other person exercising or having the power to exercise control over the affairs of the owner.

(3) If a person knowingly fails to perform a duty imposed by this section, the court may:

(a) Award the receiver actual damages caused by the person's failure, reasonable attorney fees, and costs; and

(b) Sanction the failure as civil contempt.

714.14 Stay; injunction.—

(1) Except as otherwise provided in subsection (5), after notice and opportunity for a hearing, the court may enter an order

providing for a stay, applicable to all persons, of any act, action, or proceeding:

(a) To obtain possession of, exercise control over, or enforce a judgment against all or a portion of the receivership property as defined in the order creating the stay; and

(b) To enforce a lien against all or a portion of the receivership property to the extent the lien secures a claim against the owner which arose before entry of the order.

The court shall include in its order a specific description of the receivership property subject to the stay, and shall include the following language in the title of the order: “Order Staying Certain Actions to Enforce Claims against Receivership Property.”

(2) Except as otherwise provided in subsection (5), the court may enjoin an act, action, or proceeding against or relating to receivership property if the injunction is necessary to protect against misappropriation of, or waste relating directly to, the receivership property.

(3) If the court grants injunctive relief, the injunction must specify the reasons for entry and must describe in reasonable detail the act or acts restrained without reference to a pleading or other document. The injunction is binding on the parties to the action; on the parties’ officers, agents, servants, employees, and attorneys; and on any person who receives actual notice of the injunction and is in active concert or participation with the parties.

(4) A person whose act, action, or proceeding is stayed or enjoined under this section, or who is otherwise adversely affected by such stay or injunction, may apply to the court for relief from the stay or injunction. If a person moves for such relief, the motion must be heard within 5 days after the movant applies for a hearing on the motion or at such time as the court

determines is reasonable and appropriate under the circumstances after the movant applies for a hearing on the motion. After notice and a hearing, the court may grant relief for cause shown.

(5) An order under subsection (1) or subsection (2) does not operate as a stay or injunction of:

(a) Any act, action, or proceeding to foreclose or otherwise enforce a mortgage by the person seeking appointment of the receiver;

(b) Any act, action, or proceeding to perfect, or maintain or continue the perfection of, an interest in receivership property;

(c) Commencement or continuation of a criminal proceeding;

(d) Commencement or continuation of an action or proceeding, or enforcement of a judgment other than a money judgment, in an action or proceeding by a governmental unit to enforce its police or regulatory power; or

(e) Establishment by a governmental unit of a tax liability against the receivership property or the owner of such receivership property, or an appeal of any such liability.

(6) The court may void an act that violates a stay or injunction under this section.

(7) The scope of the receivership property subject to the stay under subsection (1) may be modified upon request of the receiver or other person, after notice and an opportunity for a hearing.

(8) In connection with the entry of an order under subsection (1) or subsection (2), the court shall determine whether an additional bond or alternative security will be required as a condition to entry of the stay or injunction and, if required, direct the party requesting the stay or injunction to post a bond or alternative security as a condition for the stay or injunction to become effective.

714.15 Engagement and compensation of professional.—

(1) With court approval, a receiver may engage an attorney, an

accountant, an appraiser, an auctioneer, a broker, or another professional to assist the receiver in performing a duty or exercising a power of the receiver. The receiver shall disclose to the court:

(a) The identity and qualifications of the professional;

(b) The scope and nature of the proposed engagement;

(c) Any potential conflict of interest; and

(d) The proposed compensation.

(2) A person is not disqualified from engagement under this section solely because of the person's engagement by, representation of, or other relationship with the receiver, a creditor, or a party. This chapter does not prevent the receiver from serving in the receivership as an attorney, an accountant, an auctioneer, or a broker when authorized by law.

(3) A receiver or professional engaged under subsection (1) shall file with the court an itemized statement of the time spent, work performed, and billing rate of each person that performed the work and an itemized list of expenses. The receiver shall pay the amount approved by the court.

714.16 Use or transfer of receivership property not in ordinary course of business.—

(1) For the purposes of this section, the term "good faith" means honesty in fact and the observance of reasonable commercial standards of fair dealing.

(2) Before judgment is entered with respect to the receivership property in the action in which the receiver is appointed, with court approval after notice to all parties with an interest in the property, including all lienholders, and a hearing, a receiver may use or transfer by sale, lease, license, exchange, or other disposition receivership property other than in the ordinary course of business only if the owner of the property:

(a) After the commencement of the action in which the receiver

is appointed, expressly consents in writing to the receiver's proposed use or transfer of the receivership property, and the receiver notes the property owner's express consent in the motion to approve the proposed use or transfer; or

(b) Before or at the hearing on the receiver's motion to approve the use or transfer of the receivership property, fails to object thereto after the receiver in good faith has provided reasonable advance written notice to the property owner of the proposed use or transfer, and the receiver demonstrates in the motion that the proposed use or transfer is necessary to prevent waste, loss, substantial diminution in value, dissipation, or impairment of the property or its revenue-producing potential or to prevent a voidable transaction involving the property.

Service of notice to lienholders who are not parties to the action must be made as provided in chapter 48 for service of original process or, in the case of a financial institution lienholder, as provided in s. 655.0201. If service cannot be effectuated in such manner, upon authorization by court order, the receiver may effect service of notice on the nonparty lienholder pursuant to chapter 49 or as otherwise ordered by the court. A Motion to Sell Property under this subpart filed after the initial complaint may be recorded in the official records and such recording shall provide constructive notice to any person holding an unrecorded interest or lien against the property to be sold, whether arising before or after such recording. The recording of such Motion to Sell Property, provided the same remains pending and is not denied, constitutes a bar to the enforcement against the property described in the Motion to Sell of all interests and liens, whenever acquired, which are unrecorded at the time of recording the Motion to Sell or recorded after the initial complaint unless the holder of any such interest or lien moves to intervene in such proceedings within 30 days after the recording of the Motion to

Sell and the Court grants intervention. If the holder of any such interest or lien does not intervene in the proceedings and if the Motion to Sell is granted, the property shall be forever discharged from all such interests and liens as of the date of the sale. Any lis pendens, in any proceeding, filed against the property ordered sold under this part shall be deemed discharged, as to the property sold, upon recording a certified copy of the order approving sale and the receiver's deed.

(3) After judgment is entered against the property owner and with court approval in the action in which the receiver is appointed, a receiver may use or transfer receivership property other than in the ordinary course of business to carry the judgment into effect or to preserve nonexempt real property pending appeal or when an execution has been returned unsatisfied and the owner refuses to apply the property in satisfaction of the judgment.

(4) The court may order that a transfer of receivership property under this section is free and clear of any liens on the property at the time of the transfer and are extinguished upon recording a certified copy of the order approving sale and the receiver's deed. The sale order may further provide that the court may approve reasonable and customary expenses relating to the sale to be deducted from the sales proceeds. In such case, any interests or liens on the property, which were valid at the time of the transfer but extinguished by the transfer, attach to the proceeds of the transfer with the same validity, perfection, and priority that such interest and liens had on the property immediately before the transfer, even if the proceeds are not sufficient to satisfy all interests or obligations secured by the liens.

(5) A transfer under subsection (2) and (3) may occur by means other than a public auction sale. A creditor holding a valid lien on the property to be transferred may purchase the property and

offset against the purchase price part or all of the allowed amount secured by the lien if the creditor tenders funds sufficient to satisfy in full the reasonable expenses of transfer and the obligation secured by any senior lien extinguished by the transfer. The owner of the property and any lienholder shall have a right of redemption with respect to the property, which shall be no less than thirty (30) days from the date of entry of the Order authorizing the sale, the amount of which shall be the purchase price approved by the Court on the same terms as those approved in the Order authorizing the sale, and any such redemption shall not prejudice the rights of any owner, lienholder, mortgagor or party to assert rights to such proceeds which shall be paid to the Receiver, nor any determination of remaining indebtedness or deficiency, if any.

(6) Unless the court stays such order authorizing sale, a reversal or modification of an order approving a sale under subsection (2) or (3) by the court does not affect the validity of the transfer to a person that acquired the property in good faith or revive any interest or lien extinguished by the sale which sale took place prior to such reversal or modification , whether the person knew before the sale of the request or motion for reversal, reconsideration or modification.

Any order authorizing a sale under Subsection (2) or (3) shall state in the title of the order that it is a Final Order Authorizing Sale since, upon the sale of the property, the legal issues surrounding title to the property are fully resolved between the parties. Such sale, whether public or private and whether before judgment or after judgment, shall constitute a judicial sale under Sec. 48.23.

714.17 Executory contract.—

(1) For the purposes of this section, the term “timeshare interest” has the same meaning as in s. 721.05(36).

(2) Except as otherwise provided in subsection (8), with court approval, a receiver may adopt or reject an executory contract of the owner relating to receivership property. The court may condition the receiver's adoption and continued performance of the contract on terms appropriate under the circumstances. If the receiver does not request court approval to adopt or reject the contract within a reasonable time after the receiver's appointment, the receiver is deemed to have rejected the contract.

(3) A receiver's performance of an executory contract before court approval under subsection (2) of its adoption or rejection is not an adoption of the contract and does not preclude the receiver from seeking approval to reject the contract.

(4) A provision in an executory contract which requires or permits a forfeiture, modification, or termination of the contract because of the appointment of a receiver or the financial condition of the owner does not affect a receiver's power under subsection (2) to adopt the contract.

(5) A receiver's right to possess or use receivership property pursuant to an executory contract terminates on rejection of the contract under subsection (2). Rejection is a breach of the contract effective immediately before appointment of the receiver. A claim for damages for rejection of the contract must be submitted by the later of:

(a) The time set for submitting a claim in the receivership; or

(b) Thirty days after the court approves the rejection.

(6) If at the time a receiver is appointed, the owner has the right to assign an executory contract relating to receivership property under the laws of this state other than this chapter, the receiver may assign the contract with court approval.

(7) If a receiver rejects an executory contract for the sale of receivership property that is real property in possession of the purchaser or a real-property timeshare interest pursuant to

subsection (2), the purchaser may:

(a) Treat the rejection as a termination of the contract, and in that case the purchaser has a lien on the property for the recovery of any part of the purchase price the purchaser paid; or

(b) Retain the purchaser's right to possession under the contract. If the purchaser retains his or her right to possession pursuant to this paragraph, the purchaser must continue to perform all obligations arising under the contract and may offset any damages caused by nonperformance of an obligation of the owner after the date of the rejection, but the purchaser does not have a right or claim against other receivership property or the receiver on account of the damages.

(8) A receiver may not reject an unexpired lease of real property under which the owner is the landlord if:

(a) The tenant occupies the leased premises as the tenant's primary residence;

(b) The receiver was appointed at the request of a person other than a mortgagee; or

(c) The receiver was appointed at the request of a mortgagee and:

1. The lease is superior to the lien of the mortgage;

2. The tenant has an enforceable agreement with the mortgagee or the holder of a senior lien under which the tenant's occupancy will not be disturbed as long as the tenant performs its obligations under the lease;

3. The mortgagee has consented to the lease, either in a signed record or by its failure to timely object that the lease violated the mortgage; or

4. The terms of the lease were commercially reasonable at the time the lease was agreed to and the tenant did not know or have reason to know that the lease violated the mortgage.

714.18 Defenses and immunities of receiver.—

(1) A receiver is entitled to all defenses and immunities

provided by the laws of this state other than this chapter for an act or omission within the scope of the receiver's appointment.

(2) A receiver may be sued personally for an act or omission in administering receivership property only with approval of the court that appointed the receiver.

714.19 Interim report of receiver.—A receiver may file or, if ordered by the court, shall file an interim report that includes:

(1) The activities of the receiver since appointment or a previous report;

(2) Receipts and disbursements, including a payment made or proposed to be made to a professional engaged by the receiver;

(3) Receipts and dispositions of receivership property;

(4) Fees and expenses of the receiver and, if not filed separately, a request for approval of payment of the fees and expenses; and

(5) Any other information required by the court.

714.20 Notice of appointment; claim against receivership; distribution to creditors.—

(1) Except as otherwise provided in subsection (6), a receiver shall give notice of appointment of the receiver to creditors of the owner by:

(a) Deposit for delivery through first-class mail or other commercially reasonable delivery method to the last known address of each creditor; and

(b) Publication as directed by the court.

(2) Except as otherwise provided in subsection (6), the notice required under subsection (1) must specify the date by which each creditor holding a claim against the owner which arose before appointment of the receiver must submit the claim to the receiver. The date specified must be at least 90 days after the later of notice under paragraph (1)(a) or last publication under paragraph (1)(b). The court may extend the period for submitting the claim.

Unless the court orders otherwise, a claim that is not timely submitted is not entitled to a distribution from the receivership.

(3) A claim submitted by a creditor under this section must:

(a) State the name and address of the creditor;

(b) State the amount and basis of the claim;

(c) Identify any property securing the claim;

(d) Be signed by the creditor under penalty of perjury; and

(e) Include a copy of any record on which the claim is based.

(4) An assignment by a creditor of a claim against the owner is effective against the receiver only if the assignee gives timely notice of the assignment to the receiver in a signed record.

(5) At any time before entry of an order approving a receiver's final report, the receiver may file with the court an objection to a claim of a creditor, stating the basis for the objection. The court shall allow or disallow the claim according to the laws of this state other than this chapter.

(6) If the court concludes that receivership property is likely to be insufficient to satisfy claims of each creditor holding a perfected lien on the property, the court may order that:

(a) The receiver need not give notice under subsection (1) of the appointment to all creditors of the owner, but only such creditors as the court directs; and

(b) Unsecured creditors need not submit claims under this section.

(7) Subject to s. 714.21:

(a) A distribution of receivership property to a creditor holding a perfected lien on the property must be made in accordance with the creditor's priority under the laws of this state other than this chapter; and

(b) A distribution of receivership property to a creditor with an allowed unsecured claim must be made as the court directs according to the laws of this state other than this chapter.

714.21 Fees and expenses.—

(1) The court may award a receiver from receivership property the reasonable and necessary fees and expenses of performing the duties of the receiver and exercising the powers of the receiver.

(2) The court may order one or more of the following to pay the reasonable and necessary fees and expenses of the receivership, including reasonable attorney fees and costs:

(a) A person that requested the appointment of the receiver, if the receivership does not produce sufficient funds to pay the fees and expenses; or

(b) A person whose conduct justified or would have justified the appointment of the receiver under s. 714.06(1)(a).

714.22 Removal of receiver; replacement; termination of receivership.—

(1) The court may remove a receiver for cause.

(2) The court shall replace a receiver that dies, resigns, or is removed.

(3) If the court finds that a receiver that resigns or is removed, or the representative of a receiver that is deceased, has accounted fully for and turned over to the successor receiver all receivership property and has filed a report of all receipts and disbursements during the service of the replaced receiver, the replaced receiver is discharged.

(4) The court may discharge a receiver and terminate the court's administration of the receivership property if the court finds that appointment of the receiver was improvident or that the circumstances no longer warrant continuation of the receivership. If the court finds that the appointment was sought wrongfully or in bad faith, the court may assess against the person that sought the appointment:

(a) The fees and expenses of the receivership, including reasonable attorney fees and costs; and

(b) Actual damages caused by the appointment, including reasonable attorney fees and costs.

714.23 Final report of receiver; discharge.—

(1) Upon completion of a receiver's duties, the receiver shall file a final report including:

(a) A description of the activities of the receiver in the conduct of the receivership;

(b) A list of receivership property at the commencement of the receivership and any receivership property received during the receivership;

(c) A list of disbursements, including payments to professionals engaged by the receiver;

(d) A list of dispositions of receivership property;

(e) A list of distributions made or proposed to be made from the receivership for creditor claims;

(f) If not filed separately, a request for approval of the payment of fees and expenses of the receiver; and

(g) Any other information required by the court.

(2) If the court approves a final report filed under subsection (1) and the receiver distributes all receivership property, the receiver is discharged.

714.24 Receivership in another state; ancillary proceeding.—

(1) The court may appoint a receiver appointed in another state, or that person's nominee, as an ancillary receiver with respect to property located in this state or subject to the jurisdiction of the court for which a receiver could be appointed under this chapter, if:

(a) The person or nominee would be eligible to serve as receiver under s. 714.07; and

(b) The appointment furthers the person's possession, custody, control, or disposition of property subject to the receivership in the other state.

(2) The court may issue an order that gives effect to an order entered in another state appointing or directing a receiver.

(3) Unless the court orders otherwise, an ancillary receiver appointed under subsection (1) has the rights, powers, and duties of a receiver appointed under this chapter.

714.25 Effect of enforcement by mortgagee.—A request by a mortgagee for the appointment of a receiver, the appointment of a receiver, or the application by a mortgagee of receivership property or proceeds to the secured obligation does not:

(1) Make the mortgagee a mortgagee in possession of the real property;

(2) Make the mortgagee an agent of the owner;

(3) Constitute an election of remedies which precludes a later action to enforce the secured obligation;

(4) Make the secured obligation unenforceable;

(5) Limit any right available to the mortgagee with respect to the secured obligation; or

(6) Constitute an action under chapter 702.

714.26 Uniformity of application and construction.—In applying and construing this chapter, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that have enacted a similar law.

714.27 Relation to Electronic Signatures in Global and National Commerce Act.—This act modifies, limits, or supersedes the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. ss. 7001 et seq., but does not modify, limit, or supersede s. 101(c) of that act, 15 U.S.C. s. 7001(c), or authorize electronic delivery of any of the notices described in s. 103(b) of that act, 15 U.S.C. s. 7003(b).

714.28 Transition.—This chapter does not apply to a receivership for which the receiver was appointed before July 1, 2020.

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

White Paper

Proposed changes to Fla. Stat. 714.16, concerning transfer of receivership property pre-judgment

I. SUMMARY

The proposal seeks to fix technical glitches in Section 714.16 as a result of the practical issues that have arisen since the adoption of the statute. The proposed changes will address these practical problems, result in marketable and insurable title being able to be offered by receivers, provide for the finality of such sales, and ensure the orderly transfer of receivership property to bona fide purchasers and their subsequent devisees.

II. CURRENT SITUATION

Fla. Stat. § 714.16 was passed during 2019 legislative session and became effective on July 1, 2020. The "uniform" act sought to bring uniformity to commercial receiverships and provide a mechanism for the sale of receivership property before and after judgment.

In practice, the act realized certain practical issues in obtaining title insurance and otherwise providing insurable title to real property sold under the act. Such practical problem resulted in receivers being unable to find willing buyers, and decreasing the value realized for the receivership estate. Other practical concerns arose regarding the rights of parties to redeem an interest in the property being sold, the ability of a Court to approve customary expenses of a sale, the finality of the sale as to bona fide purchasers, and other practical problems faced by practitioners.

III. EFFECT OF PROPOSED CHANGES

The proposed changes to Fla. Stat. § 714.16:

- Add the ability to record a Motion to Sell Property in the official records, providing constructive notice to any person holding an unrecorded interest or lien against the property to be sold, and constituting a bar to the enforcement of such unrecorded lien or interest in the property, whenever acquired.

- Provide that the holder of an intervening lien or unrecorded interest in property can intervene in the proceeding within thirty (30) days after the recording of the Motion to Sell Property. If the holder of such interest or lien does not intervene in the proceedings, and the Motion to Sell is granted, the property shall be forever discharged from all such interests and liens as of the date of the sale.

- Provide that any *lis pendens*, in any proceeding, filed against the property ordered sold under this part shall be deemed discharged, as to the property sold, upon recorded a certified copy of the order approving sale and the receiver's deed.

- Provide that any liens against receivership property ordered sold shall be extinguished upon the recording of a certified copy of the order approving sale and the receiver's deed.

- Provide that an Order on Motion to Sell Property may allow for the approval and payment of customary expenses relating to the sale of real property to be deducted from the sales proceeds.

- Provide that any interests on the property, which were valid at the time of transfer, but extinguished by the transfer, attach to the proceeds of the transfer with the same validity, perfection, and priority that such interest had on the property immediately before such transfer.

- Provide a right of redemption to the owner and any lienholder with respect to the receivership property to be sold, which shall be no less than thirty (30) days from the date of entry of the Order authorizing sale, and the amount of which shall be the purchase price approved by the Court on the same terms as those approved in the Order authorizing the sale.

- Provide for a prejudgment sale of receivership property by means other than a public auction sale.

- Provide that, unless the Court stays an order authorizing a sale, a reversal or modification of an order approving the sale of receivership property prejudgment does not affect the validity of the transfer to a person that acquired the property in good faith or revive any interest or lien otherwise extinguished by the sale which took place prior to such appellate reversal or modification.

- Provide that an order authorizing a sale of real property under this Act shall state in the title of the order that it is a "Final Order Authorizing Sale."

- Provide that a sale under this part, whether public or private and whether before judgment or after judgment, shall constitute a judicial sale as that term is used in Fla. Stat. § 48.23.

IV. FISCAL IMPACT ON STATE AND LOCAL GOVERNMENTS

The proposed changes to Fla. Stat. § 714.16 would not have a direct fiscal impact on State or Local Governments. In fact, the proposed changes could increase revenue for local governments which collect documentary stamp taxes on receivership sales.

V. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR

The proposed changes to Fla. Stat. § 714.16 would impact Florida's real estate economy by providing additional inventory of available properties for sale, increased number of sales, and revenue for persons involved in buying and selling real property.

VI. CONSTITUTIONAL ISSUES

There are no known constitutional issues.

V. OTHER INTERESTED PARTIES

Business Law Section of The Florida Bar.

The Florida Bar

651 East Jefferson Street
Tallahassee, FL 32399-2300

Joshua E. Doyle
Executive Director

850/561-5600
www.FLORIDABAR.org

To: Leadership of the Business Law Section
Section/Division/Committee

From: Real Property, Probate, and Trust Law Section

Re: Proposed Legislative Position re: UCRERA glitch bill

As you are aware, Standing Board Policy 9.50(d) requires voluntary bar groups to contact all divisions, sections and committees that might be interested in proposed legislative or political activity. The policy also requires sections to identify all groups to which proposals have been submitted for comment and to include comments when submitting the proposal.

We thought your section might be interested in the above issue and have attached a copy of our proposal for your review and comment. Our proposal is in line to be considered a legislative initiative for the 2023 session.

Thanks for your consideration of this request. Please let us know if your section will provide comments.

The Florida Bar

651 East Jefferson Street
Tallahassee, FL 32399-2300

Joshua E. Doyle
Executive Director

850/561-5600
www.FLORIDABAR.org

To: Leadership of the Florida Land Title Association Section/Division/Committee

From: Real Property, Probate, and Trust Law Section

Re: Proposed Legislative Position re: UCRERA glitch bill

As you are aware, Standing Board Policy 9.50(d) requires voluntary bar groups to contact all divisions, sections and committees that might be interested in proposed legislative or political activity. The policy also requires sections to identify all groups to which proposals have been submitted for comment and to include comments when submitting the proposal.

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Thanks for your consideration of this request. Please let us know if your section will provide comments.

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Executive Director

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VOLUNTARY BAR GROUP
LEGISLATIVE OR POLITICAL ACTIVITY WORKSHEET

- This worksheet is for voluntary bar groups (VBGs) to gather and share information before submitting an official request for approval of legislative or political activity, whether new or rollover.
- SBP 9.11 definitions:
    - Legislative or political activity is "activity by The Florida Bar or a bar group including, but not limited to, filing a comment in a federal administrative law case, taking a position on an action by an elected or appointed governmental official, appearing before a government entity, submitting comments to a regulatory entity on a regulatory matter, or any type of public commentary on an issue of significant public interest or debate."
    - A VBG is "a group within The Florida Bar funded by voluntary member dues in the current and immediate prior bar fiscal years."
- VBGs must advise TFB of proposed legislative or political activity and identify all groups the proposal has been submitted to. If comments have been received, they should be attached; if they have not been received, the proposal may still be submitted to the Legislation Committee. *See* SBP 9.50(d).
    - The Legislation Committee and Board will review the proposal unless an expedited decision is required.
    - If expedited review is requested, the Executive Committee may review the proposal.
    - The Bar President, President-Elect, and chair of the Legislation Committee may review the proposal if the legislature is in session or the Executive Committee cannot act because of an emergency.

General Information

Submitted by: *(name of VBG or individual)* Real Estate Leasing Committee of the Real Property, Probate, and Trust Law Section

Address: *(address and phone #)* C/O Chris Sajdera, Chair: 200 East Palmetto Park Road, Suite 103, Boca Raton, Florida 33432 (561-910-3082)

Position Level: *(name of VBG)* Real Property, Probate, and Trust Law Section of the Florida Bar

Proposed Advocacy

Complete #1 below if the issue is legislative or #2 if the issue is political; #3 must be completed.

1. Proposed Wording of Legislative Position for Official Publication

Oppose legislation authorizing the use of security deposit replacement products (a/k/a fees in lieu of security deposits) unless such legislation includes consumer protection provisions that safeguard tenants from predatory practices.

2. Political Proposal

_____
_____
_____
_____
_____

3. Reasons For Proposed Advocacy

a. Per SBP 9.50(a), does the proposal meets the following requirements? *(select one)* X Yes _____ No

- It is within the group's subject matter jurisdiction as described in the VBG's bylaws;
- It is beyond the scope of the bar's permissible legislative or political activity, **or** within the bar's permissible scope of legislative or political activity **and** consistent with an official bar position on that issue; **and**
- It does not have the potential for deep philosophical or emotional division among a substantial segment of the bar's membership.

b. Additional Information: Security deposit replacement products can cause unintended financial implications on unknowing consumers and present ambiguity regarding the applicability of the Landlord Tenant Act.

Referrals to Other Voluntary Bar Groups

VBGs must provide copies of the proposed legislative or political activity to all bar divisions, sections, and committees that may be interested in the issue. *See* SBP 9.50(d). List all divisions, sections, and committees to which the proposal has been provided pursuant to this requirement. Include all comments received as part of your submission. The online form may be submitted before receiving comments but only after the proposal has been provided to other bar divisions, sections, or committees.

Public Interest Law Section
Business Law Section

Contacts

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

Wilhelmina F. Kightlinger, Legislation Co-Chair of the RPPTL Section.

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

Pete M. Dunbar, French Brown, and Martha Edenfield, Dean, Mead & Dunbar, P.A., 215 South Monroe Street, Suite 815, Tallahassee, FL 32301, Telephone (850) 999-4100

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

Pete M. Dunbar, French Brown, and Martha Edenfield, Dean, Mead & Dunbar, P.A., 215 South Monroe Street, Suite 815, Tallahassee, FL 32301, Telephone (850) 999-4100

WHITE PAPER

FEES IN LIEU OF SECURITY DEPOSITS

I. SUMMARY

This White Paper discusses the impact of offering security deposit replacement products (a/k/a fees in lieu of security deposits) to tenants in residential real estate transactions in lieu of placing a traditional security deposit - explaining both the consumer interests and technical issues to be considered if such products are to be authorized and regulated in the state of Florida.

II. CURRENT SITUATION

The practice of offering tenants in residential real estate lease transactions the option to pay a recurring, nonrefundable fee in lieu of placing a traditional security deposit presents numerous consumer protection issues and concerns as to how such fees are treated under the Florida Residential Landlord and Tenant Act (Chapter 83, *Florida Statutes*). Leading security deposit replacement companies (for example: LeaseLock, Rhino, and Jetty) ("SDR Companies") offer a mix of insurance-type products, including bonds, that are marketed either to landlords (or property management companies) or directly to tenants (collectively, "SDR Products"). While these products appear to alleviate the high up-front costs tenants face when entering a new rental agreement, the sale of such products could lead to predatory practices on consumers given the absence of regulatory oversight, nonexistence of a cap on fees, and the lack of coverage such products offer tenants against landlord claims for damages and repair costs – costs that would typically be covered by a security deposit.

III. EFFECT OF PROPOSED CHANGES

SDR Companies operate under strict, one-sided agreements that seek to strip away tenant's rights under the Florida Residential Landlord and Tenant Act (Chapter 83, *Florida Statutes*), including the rights tenants have to respond to damage claims made by landlords and the rights tenants have in security deposit funds held in connection with a rental agreement.

F. S. 83.49(3) establishes the process landlords must follow to make a claim against a security deposit and the rights tenants have to respond to such claims. Security deposits both ensure a tenant's performance under a rental agreement and protects the landlord against damage caused to the property (collectively "Security Deposit Claims"). SDR Products provide an alternative to this process whereby fees are paid by the tenant to the landlord (or the landlord's insurer) in lieu of the security deposit. The tenant, however, often remains liable to the landlord (or the landlord's insurer) for any damage to the property beyond ordinary wear and tear as a result of the insurer's subrogation rights and the ambiguity as to whether such fees fall under the definition of "Security Deposit" under the Florida Residential Landlord and Tenant Act. The result is that a tenant could unknowingly be billed for Security Deposit Claims (after paying recurring fees throughout the term of the rental agreement) that would usually be covered by a security deposit under protection of the Florida Residential Landlord and Tenant Act.

IV. ANALYSIS

SDR Products and the agreements used by, and practices of, SDR Companies in connection with such products present numerous consumer protection concerns, including but not limited to:

a. Caps on Fees and Regulatory Oversight. A tenant who purchases a SDR Product will be faced with the requirement to pay nonrefundable fees throughout the original term of the rental agreement and all renewal terms compared to a traditional security deposit that is placed at the commencement of a rental agreement and transfers over to any renewal term(s) (and has the potential to be fully or partially refunded at the conclusion of the rental agreement). SDR Products are insurance products, since the tenant is paying for coverage instead of depositing funds. Accordingly, the Florida Office of Insurance Regulation should ensure tenants are not paying exorbitant amounts to obtain such coverage, including a cap on fees for initial policies and bonds and a lower cap on renewals, and should otherwise regulate this form of insurance just like it does other insurance products.

b. Failure to Purchase Insurance. Funds should be used to purchase insurance for the protection of tenant. If a fee is collected by a landlord but insurance coverage is not provided, the funds should be designated as a Security Deposit under the Florida Residential Landlord and Tenant Act**.**

c. Coverage for Claims. SDR Products could leave tenants in a situation in which they have paid recurring, nonrefundable fees throughout the term of the rental agreement (and renewals) but are still obligated to pay Security Deposit Claims due to the insurer's subrogation rights. This practice is misleading to tenants who believe they are paying into a security deposit or for an insurance policy and could lead to unexpected and inequitable costs imposed on tenants. If an SDR product is obtained, the tenant should be protected against claims by the landlord to the same extent as would have applied had a security deposit been posted.

d. Non-Discrimination. Tenants should not be discriminated against for using an SDR Product instead of placing a traditional security deposit. Specifically, if a tenant presents an offer to lease property to a landlord that includes the use of an SDR Product, the landlord should not consider the tenant's decision to use an SDR Product as a factor in deciding whether to accept or decline the offer.

e. Credit Protection. Credit reporting on tenant defaults under the terms of SDR Product agreements should be limited to situations in which both the tenant did default on the agreement and was unable to work out an alternative solution with the landlord.

f. Disclosures. Proper guidelines should be established to ensure tenants receive adequate disclosures prior to purchasing SDR Products that clearly outline the risks associated with using such products.

V. FISCAL IMPACT ON STATE AND LOCAL GOVERNMENTS

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

VI. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR

SDR Products have a direct positive economic impact on the SDR Companies and possibly landlords who choose to charge a fee in lieu of a security deposit but not purchase insurance coverage (or landlords who profit from increasing the fee beyond the insurance premium). Property management companies could also see a positive economic impact, as such fees could create a new revenue stream especially if they are paid anything of value in connection with the sale of the product. SDR Products could be a benefit to tenants who cannot come up with an upfront security deposit but can afford to pay an additional monthly fee for an SDR Product but could also negatively impact tenants if the fee amounts do not bear a reasonable proportion to the amount of the security deposit that would have otherwise been required and do not provide the tenant with coverage for Security Deposit Claims. The SDR Companies use of credit reporting in connection with their standard contracts could also have long-term negative financial implications for tenants.

VII. CONSTITUTIONAL ISSUES

The agreements used by SDR Companies often have one-sided provisions that strip tenants of their rights to due process. At least two leading SDR Companies require tenants to submit to arbitration or small claims courts in which a jury trial is waived. This practice divests tenants of their rights under the Florida Residential Landlord and Tenant Act and puts them in a vulnerable position when they have to ultimately respond to the insurer for Security Deposit Claims made by their landlord.

VIII. OTHER INTERESTED PARTIES

The Public Interest Law Section
Business Law Section

The Florida Bar

651 East Jefferson Street
Tallahassee, FL 32399-2300

Joshua E. Doyle
Executive Director

850/561-5600
www.FLORIDABAR.org

To: Leadership of the Business Law Section

From: Real Property, Probate and Trust Law Section, RP Leasing Committee

Re: Proposed Legislative Position re: Opposition to Fees in Lieu of Security Deposits

---

As you are aware, Standing Board Policy 9.50(d) requires voluntary bar groups to contact all divisions, sections and committees that might be interested in proposed legislative or political activity. The policy also requires sections to identify all groups to which proposals have been submitted for comment and to include comments when submitting the proposal.

We thought your section might be interested in the above issue and have attached a copy of our proposal for your review and comment. Our proposal is to :

Oppose legislation authorizing the use of security deposit replacement products (a/k/a fees in lieu of security deposits) unless such legislation includes consumer protection provisions that safeguard tenants from predatory practices.

Thanks for your consideration of this request. Please let us know if your section will provide comments.

The Florida Bar

651 East Jefferson Street
Tallahassee, FL 32399-2300

Joshua E. Doyle
Executive Director

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www.FLORIDABAR.org

To: Leadership of the Public Interest Law Section

From: Real Property, Probate and Trust Law Section, RP Leasing Committee

Re: Proposed Legislative Position re: Opposition to Fees in Lieu of Security Deposits

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Thanks for your consideration of this request. Please let us know if your section will provide comments.

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Executive Director

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VOLUNTARY BAR GROUP
LEGISLATIVE OR POLITICAL ACTIVITY WORKSHEET

- **This worksheet is for voluntary bar groups (VBGs) to gather and share information before submitting an official request for approval of legislative or political activity, whether new or rollover.**
- **SBP 9.11 definitions:**
  - **Legislative or political activity is "activity by The Florida Bar or a bar group including, but not limited to, filing a comment in a federal administrative law case, taking a position on an action by an elected or appointed governmental official, appearing before a government entity, submitting comments to a regulatory entity on a regulatory matter, or any type of public commentary on an issue of significant public interest or debate."**
  - **A VBG is "a group within The Florida Bar funded by voluntary member dues in the current and immediate prior bar fiscal years."**
- **VBGs must advise TFB of proposed legislative or political activity and identify all groups the proposal has been submitted to. If comments have been received, they should be attached; if they have not been received, the proposal may still be submitted to the Legislation Committee. *See* SBP 9.50(d).**
  - **The Legislation Committee and Board will review the proposal unless an expedited decision is required.**
  - **If expedited review is requested, the Executive Committee may review the proposal.**
  - **The Bar President, President-Elect, and chair of the Legislation Committee may review the proposal if the legislature is in session or the Executive Committee cannot act because of an emergency.**

General Information

Submitted by: ***Real Property Litigation Committee of the Real Property, Probate, and Trust Law Section***

Address: ***c/o Michael Hargett, Chair, 601 Bayshore Blvd., Suite 700, Tampa, Florida, 33609 (813) 253-2020.***

Position Level: ***Real Property, Probate and Trust Law Section of the Florida Bar***

Proposed Advocacy

Complete #1 below if the issue is legislative or #2 if the issue is political; #3 must be completed.

1. **Proposed Wording of Legislative Position for Official Publication**

This legislation will expand the finality of foreclosure judgments provided by § 702.036 Fla. Stat. (2021) to include liens other than mortgage foreclosures, such as community association liens and construction liens. Additionally, it will provide prevailing party attorneys' fees in post-foreclosure litigation for redress of wrongful foreclosure judgments brought by junior lienholders improperly foreclosing senior liens. This legislation restores the legitimate business expectations of the citizens of the State of Florida that were upset by Wells Fargo Bank, N.A. v. Tan., 320 So. 3d 782 (Fla. 4th DCA 2021).

2. **Political Proposal – Not Applicable**

3. **Reasons for Proposed Advocacy**

   a. **Per SBP 9.50(a), does the proposal meets the following requirements?** ***(select one)*** **__X__ Yes _____ No**

   - **It is within the group's subject matter jurisdiction as described in the VBG's bylaws;**
   - **It is beyond the scope of the bar's permissible legislative or political activity, or within the bar's permissible scope of legislative or political activity and consistent with an official bar position on that issue; and**
   - **It does not have the potential for deep philosophical or emotional division among a substantial segment of the bar's membership.**

   b. **Additional Information: _____**
   _____
   _____

Referrals to Other Voluntary Bar Groups

VBGs must provide copies of the proposed legislative or political activity to all bar divisions, sections, and committees that may be interested in the issue. *See* SBP 9.50(d). List all divisions, sections, and committees to which the proposal has been provided pursuant to this requirement. Include all comments received as part of your submission. The online form may be submitted before receiving comments but only after the proposal has been provided to other bar divisions, sections, or committees.

Business Law Section of the Florida Bar
Florida Banker's Association

Contacts

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

***Wilhelmina F. Kightlinger, RP Legislative Co-Chair,* 1408 N. Westshore Blvd., Suite 900, Tampa, FL 33607 (612) 371-1123**

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

Peter Dunbar, French Brown, and Martha Edenfield , Dean Mead & Dunbar, 215 S. Monroe, Suite 815, Tallahassee, FL 32301 *850) 999-4100

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

Peter Dunbar, French Brown, and Martha Edenfield , Dean Mead & Dunbar, 215 S. Monroe, Suite 815, Tallahassee, FL 32301 *850) 999-4100

The Florida Bar

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Joshua E. Doyle
Executive Director

850/561-5600
www.FLORIDABAR.org

April 20, 2022

To: Leadership of the Business Law Section, via Liaison:

Manuel Farach mfarach@mrachek-law.com

Fr: Michael Hargett, RPPTL Real Property Litigation Committee, Chair

Re: Proposed Legislative Position re: Proposal to Clarify the Finality of Foreclosure Judgments – Revising § 702.036

As you are aware, Standing Board Policy 9.50(d) requires voluntary bar groups to contact all divisions, sections and committees that might be interested in proposed legislative or political activity. The policy also requires sections to identify all groups to which proposals have been submitted for comment and to include comments when submitting the proposal.

We thought your section might be interested in the referenced issue and I have attached a copy of our (a) White Paper and (b) Legislative Proposal to the transmittal e-mail.

Thanks for your consideration of this request. Please let us know if your section will provide comments.

Sincerely,

Michael V. Hargett

The Florida Bar

651 East Jefferson Street
Tallahassee, FL 32399-2300

Joshua E. Doyle
Executive Director

850/561-5600
www.FLORIDABAR.org

April 20, 2022

To: Leadership of the Florida Banker's Association, via Liaisons:

Mark Thomas Middlebrook middlebrookmark0523@gmail.com
Robert Gary Stern rstern@trenam.com

Fr: Michael Hargett, RPPTL Real Property Litigation Committee, Chair

Re: Proposed Legislative Position re: Proposal to Clarify the Finality of Foreclosure Judgments – Revising § 702.036

As you are aware, Standing Board Policy 9.50(d) requires voluntary bar groups to contact all divisions, sections and committees that might be interested in proposed legislative or political activity. The policy also requires sections to identify all groups to which proposals have been submitted for comment and to include comments when submitting the proposal.

We thought your section might be interested in the referenced issue and I have attached a copy of our (a) White Paper and (b) Legislative Proposal to the transmittal e-mail.

Thanks for your consideration of this request. Please let us know if your section will provide comments.

Sincerely,

Michael V. Hargett

A bill to be entitled

An act amending s. 702.036, F.S. and providing an effective date.

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

Section 1. Section 702.036, Florida Statutes, is amended to read:

702.036 Finality of ~~mortgage~~ foreclosure judgment.—

(1)

(a) In any action or proceeding in which a party seeks to set aside, invalidate, or challenge the validity of a final judgment of foreclosure of a mortgage or other lien or to establish or reestablish a lien or encumbrance on ~~the~~ real property in abrogation of the final judgment of foreclosure of a mortgage or other lien, the court shall treat such request solely as a claim for monetary damages and may not grant relief that adversely affects the quality or character of the title to the property, if:

1. The party seeking relief from the final judgment of foreclosure of the mortgage or lien was properly served in the foreclosure lawsuit as provided in chapter 48 or chapter 49.

2. The final judgment of foreclosure of the mortgage or lien was entered as to the property.

3. All applicable appeals periods have run as to the final judgment of foreclosure of the mortgage or lien with no appeals having been taken or any appeals having been finally resolved.

4. The property has been acquired for value, by a person not affiliated with the foreclosing ~~lender~~ mortgage holder, the foreclosing lien holder or the foreclosed owner, at a time in which no lis pendens regarding the suit to set aside, invalidate, or challenge the foreclosure appears in the official records of the county where the property was located.

(b) This subsection does not limit the right to pursue any other relief to which a person may be entitled, including, but not limited to, compensatory damages, punitive damages, statutory damages, consequential damages, injunctive relief, or fees and costs, which does not adversely affect the ownership of the title to the property as vested in the unaffiliated purchaser for value.

(2) For purposes of this section, the following, without limitation, shall be considered persons affiliated with the foreclosing lender:

(a) The foreclosing ~~lender~~ mortgage holder, the foreclosing lien holder or any loan servicer for the loan being foreclosed;

(b) Any past or present owner or holder of the ~~loan~~ mortgage or lien being foreclosed;

(c) Any maintenance company, holding company, foreclosure services company, or law firm under contract to any entity listed in paragraph (a), paragraph (b), or this paragraph, with regard to the ~~loan~~ mortgage or lien being foreclosed; or

(d) Any parent entity, subsidiary, or other person who directly, or indirectly through one or more intermediaries, controls or is controlled by, or is under common control with, any entity listed in paragraph (a), paragraph (b), or paragraph (c).

(3) After foreclosure of a mortgage based upon the enforcement of a lost, destroyed, or stolen note, a person who is not a party to the underlying foreclosure action but who claims to be the person entitled to enforce the promissory note secured by the foreclosed mortgage has no claim against the foreclosed property after it is conveyed for valuable consideration to a person not affiliated with the foreclosing lender or the foreclosed owner. This section does not preclude the person entitled to enforce the promissory note from pursuing recovery from any adequate protection given pursuant to s. 673.3091 or from the party who wrongfully claimed to be the person entitled to enforce the promissory note under s. 702.11(2) or otherwise, from the maker of the note, or from any other person against whom it may have a claim relating to the note.

(4) When a party seeks relief from a final judgment foreclosing a mortgage or lien, or files a separate action attacking such a final judgment, and claims that it holds or held a lien superior in right, priority or dignity to the mortgage or the lien foreclosed in the judgment, then the court shall award the party prevailing on that claim its reasonable attorney's fees incurred in such litigation. This subsection applies whether the litigation seeking relief from the final judgment occurs in the case in which the judgment was entered or in any separate case or proceeding.

(5) As used in this section, the word "property" refers exclusively to real property.

Section 2. This act shall take effect July 1, 2022.

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

WHITE PAPER

PROPOSAL TO CLARIFY THE FINALITY OF
FORECLOSURE JUDGMENTS – REVISING § 702.036

I. SUMMARY

This proposal would expand the finality of foreclosure judgments provided by § 702.036 beyond mortgages to include other types of liens, such as the liens of community associations and materialmen. The proposal would also make the losing party liable for the prevailing party attorney's fees in post-foreclosure litigation where a foreclosed party claims that its lien was superior to that of the foreclosing party. The legislation does not have a fiscal impact on state funds.

II. CURRENT SITUATION

The current situation, created by Fla. Stat. § 702.036 and *Wells Fargo Bank, N.A. v. Tan, infra*, is that the holder of junior mortgage can foreclose a senior lien with impunity if can manage to serve the senior lienholder with process and obtain a default against the senior lienholder. This is a dramatic departure from long-standing Florida Supreme Court law, as described below, and creates an incentive for junior lienors to improperly attempt to foreclose senior liens.

For over 80 years prior to *Tan*, Florida law allowed a senior lienholder to ignore, without risk, foreclosure lawsuits initiated by junior lienholders. *Cone Bros. Const., Co., v. Moore*, 141 Fla. 420 (1940). The *Cone Bros.* decision allowed senior lienholders to avoid the expense of foreclosure actions improperly brought against them by, for example, junior home equity lenders, homeowner's associations and materialmen. If a junior lienholder were to improperly include a senior lienholder as a party to a foreclosure lawsuit and obtain a judgment purporting to extinguish the senior interest, *Cone Bros.* held that such foreclosure would be "wrongful" and void ab initio as to such senior lienholder.

In *Wells Fargo Bank, N.A. v. Tan,* 320 So. 3d 782, (Fla. 4th DCA 2021), the Fourth DCA acknowledged the inability of a junior lienholder to require a senior lienholder to participate in a foreclosure action—consistent with *Cone Bros*. However, the *Tan* Court was the first to apply Fla. Stat. § 702.36 (the "Mortgage Finality Statute") is such a situation. The *Tan* Court held that under the Mortgage Finality Statute Wells Fargo's senior mortgage was indeed extinguished, leaving Wells Fargo with only a claim for monetary damages.

Tan's application of § 702.036 dramatically changed the business expectations of the citizens and lenders in the State of Florida, created a significant risk of senior lienholders being foreclosed in actions improperly brought by junior lienholders, and added unnecessary expense and litigation to Florida's overburdened court system.

III. EFFECT OF PROPOSED CHANGE

To vindicate legitimate business expectations and reduce litigation, the proposal adds new subsection (4) in § 702.036, which to shift the attorney's fees incurred by an improperly foreclosed senior lienholder onto the junior lienholder who wrongfully foreclosed. The attorney's fee provision is reciprocal, requiring that a party who erroneously claims its foreclosed lien was senior must pay the attorney's fees incurred by an innocent plaintiff responding to the claim.

Proposed changes to subsections (1) and (2) remedy shortfalls in § 702.036 that limit its scope to mortgages alone. Improper foreclosure actions instituted by other junior lienholders are equally harmful and should be included both parts of the statute: (a) the existing finality provisions; and (b) the proposed new fee-shifting provision.

IV. ANALYSIS

The following describes the changes being proposed:

1. Sections 702.036(1)(a)is amended to provide that the statute applies to final judgments of foreclosures of mortgages and other liens, such as community association liens and construction liens.

2. Sections 702.036(2)(a)-(c) are likewise amended to provide that the statute applies to final judgments of foreclosure of mortgages and other liens, such as community association liens and construction liens.

3. Section 702.036(4) is added to provide for attorneys' fees for the prevailing party in litigation over an allegedly improper foreclosure of a senior lien.

V. FISCAL IMPACT ON STATE AND LOCAL GOVERNMENTS

The proposal is likely to reduce burdens on the court system arising from litigation over lien priorities occasioned by junior lienholders improperly attempting to foreclose senior lienholders, which they can presently attempt with impunity

VI. DIRECT IMPACT ON PRIVATE SECTOR

The proposal does not have a direct fiscal impact on the private sector, but it may have the indirect impact of avoiding increased borrowing costs by reducing lenders' litigation expenses.

VII. CONSTITUTIONAL ISSUES

The proposal does not have any constitutional issues

VIII. OTHER INTERESTED PARTIES

The Business Law Section of The Florida Bar, the Florida Bankers Association.

The Florida Bar

651 East Jefferson Street
Tallahassee, FL 32399-2300

Joshua E. Doyle
Executive Director

(850) 561-5600
www.FLORIDABAR.org

VOLUNTARY BAR GROUP
LEGISLATIVE OR POLITICAL ACTIVITY WORKSHEET

- This worksheet is for voluntary bar groups (VBGs) to gather and share information before submitting an official request for approval of legislative or political activity, whether new or rollover.
- SBP 9.11 definitions:
    - Legislative or political activity is "activity by The Florida Bar or a bar group including, but not limited to, filing a comment in a federal administrative law case, taking a position on an action by an elected or appointed governmental official, appearing before a government entity, submitting comments to a regulatory entity on a regulatory matter, or any type of public commentary on an issue of significant public interest or debate."
    - A VBG is "a group within The Florida Bar funded by voluntary member dues in the current and immediate prior bar fiscal years."
- VBGs must advise TFB of proposed legislative or political activity and identify all groups the proposal has been submitted to. If comments have been received, they should be attached; if they have not been received, the proposal may still be submitted to the Legislation Committee. *See* SBP 9.50(d).
    - The Legislation Committee and Board will review the proposal unless an expedited decision is required.
    - If expedited review is requested, the Executive Committee may review the proposal.
    - The Bar President, President-Elect, and chair of the Legislation Committee may review the proposal if the legislature is in session or the Executive Committee cannot act because of an emergency.

General Information

Submitted by: *(name of VBG or individual)*

Real Property, Probate & Trust Law Section of the Florida Bar – Probate Law and Procedure Committee

Address: *(address and phone #)*

c/o M. Travis Hayes, Chair, 5551 Ridgewood Drive, Suite 501, Naples, FL 34108

Position Level: *(name of VBG)*

Real Property, Probate & Trust Law Section of the Florida Bar – Probate Law and Procedure Committee

Proposed Advocacy

Complete #1 below if the issue is legislative or #2 if the issue is political; #3 must be completed.

1. **Proposed Wording of Legislative Position for Official Publication**

An amendment clarifying that deadlines generally applicable to probate creditor claims are not applicable to the assertion by a surviving spouse of an ownership interest in property alleged to be subject to ss. 732.216-732.228, Florida Statutes.

2. **Political Proposal**

_____
_____
_____
_____
_____

3. **Reasons For Proposed Advocacy**

   a. Per SBP 9.50(a), does the proposal meets the following requirements? *(select one)* __x___ Yes _____ No

   - It is within the group's subject matter jurisdiction as described in the VBG's bylaws;
   - It is beyond the scope of the bar's permissible legislative or political activity, **or** within the bar's permissible scope of legislative or political activity **and** consistent with an official bar position on that issue; **and**
   - It does not have the potential for deep philosophical or emotional division among a substantial segment of the bar's membership.

b. Additional Information: _____
_____
_____
_____

Referrals to Other Voluntary Bar Groups

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Presented to the Real Property, Probate & Trust Law Section of the Florida Bar – Estate and Trust Tax Planning Committee. No Comments received.

Contacts

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

_____
_____
_____
_____
_____
_____

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

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_____
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_____

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

_____
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WHITE PAPER

The *Johnson v. Townsend* Fix
Florida Uniform Disposition of Community Property Rights at Death Act

I. SUMMARY

In light of the holding in *Johnson v. Townsend*, 259 So.3d 851 (Fla. 4th DCA 2018), this legislation clarifies existing Florida law by making targeted modifications to certain provisions of the Florida Probate Code governing creditors' claims,[1] and the related definition of the term "claim,"[2] to conform with the existing provisions of the Florida Uniform Disposition of Community Property Rights at Death Act. The legislation does not have a fiscal impact on state funds.

II. CURRENT SITUATION

Although Florida is not a community property state, in 1992 it adopted the Florida Uniform Disposition of Community Property Rights at Death Act ("Act").[3] "The purpose of the Act is to preserve the rights of each spouse in property which was community property prior to change of domicile, as well as in property substituted therefor where the spouses have not indicated an intention to sever or alter their 'community' rights. It thus follows the typical pattern of community property which permits the deceased spouse to dispose of 'his half' of the community property, while confirming the title of the surviving spouse in 'her half.'"[4]

Section 732.219, F.S., states that a surviving spouse's property rights under the Act are "the property of the surviving spouse and is not subject to testamentary disposition by the decedent or distribution under the laws of succession of this state." The holding in *Johnson v. Townsend*, 259 So.3d 851 (Fla. 4th DCA 2018), runs counter to the text of s. 732.219, F.S., by subjecting a surviving spouse's pre-existing and "vested"[5] property rights under the Act to both "testamentary disposition by the decedent" and "distribution under the laws of succession of this state," unless the surviving spouse files a claim against the deceased spouse's estate in accordance with the statutory filing deadlines for probate creditor claims under Florida law. The holding in *Johnson v. Townsend* also runs counter to Florida's long-held common-law rule, predating its codification in the Act, which exempted a surviving

---

[1] *See* Chapter 733, F.S., PROBATE CODE: ADMINISTRATION OF ESTATES, PART VII, CREDITORS' CLAIMS, ss 733.701 – 733.710, F.S.

[2] *See* s. 731.201(4), F.S. ("Claim").

[3] *See*, ss 732.216 – 732.228, F.S. The community property jurisdictions in the United States are Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington, Wisconsin, and Puerto Rico.

[4] *See* Uniform Disposition of Community Property Rights at Death Act (UDCPRDA), *Prefatory Note*, at: https://www.uniformlaws.org/viewdocument/act-1971.

[5] *See Quintana v. Ordono*, 195 So.2d 577 (Fla. 3d DCA 1967) (Wife's vested interest in property acquired while domiciled in Cuba, under community property law was not affected by subsequent change of domicile to Florida, a noncommunity property state.)

spouse's assertion of an ownership interest in vested, pre-existing community property rights from Florida's statutory filing deadlines for probate creditor claims.[6]

III. EFFECT OF PROPOSED CHANGES

This legislation clarifies existing law by: (a) amending the definition of the term "claim" under s. 731.201(4), F.S., (b) creating new subsection (6) under s. 733.702, F.S., to expressly exclude a surviving spouse's property rights under the Act from this statue, and (c) creating new subsection (4) under s. 733.710, F.S., to expressly exclude a surviving spouse's property rights under the Act from this statue. These changes clarify the meaning of existing s. 732.219, F.S., which excludes a surviving spouse's vested, pre-existing property rights under the Act from a deceased spouse's estate for all purposes. A surviving spouse's vested, pre-existing property rights under the Act are not exempt from "testamentary disposition by the decedent or distribution under the laws of succession of this state," if such property is subject to automatic after-the-fact forfeiture if not claimed in accordance with the statutory filing deadlines for probate creditor claims under Florida law.

IV. SECTION-BY-SECTION ANALYSIS

A. Section 731.201(4).

Current Situation: The term "claim" is currently defined in s. 731.201(4), F.S., as follows:

> "Claim" means a liability of the decedent, whether arising in contract, tort, or otherwise, and funeral expense. The term does not include an expense of administration or estate, inheritance, succession, or other death taxes.

Effect of Proposed Changes: The legislation clarifies Florida law by amending this statutory definition to conform with existing s. 732.219, F.S., which excludes a surviving spouse's vested property rights under the Act from a deceased spouse's estate for all purposes. A surviving spouse's vested, pre-existing property rights under the Act are not exempt from "testamentary disposition by the decedent or distribution under the laws of succession of this state," if such property is subject to automatic after-the-fact forfeiture if not claimed in accordance with the statutory filing deadlines for probate creditor claims under Florida law. The clarifying amendment is made by adding the new underlined text below:

> "Claim" means a liability of the decedent, whether arising in contract, tort, or otherwise, and funeral expense. The term does not include an expense of administration or estate, inheritance, succession, or other death taxes, or the assertion by a surviving spouse of an ownership interest in property alleged to be subject to ss. 732.216-732.228, including, but not limited to, via a civil action or probate petition filed by a surviving spouse or any person acting on behalf

[6] *See Quintana v. Ordono*, 195 So.2d at 580 ("It is well settled that the Florida nonclaim statute … does not apply so as to require the cestui to file a claim against the estate of the trustee.")

of a surviving spouse, including, but not limited to, an attorney in fact, agent, guardian of the property, or personal representative of the surviving spouse.

B. Section 733.702.

Current Situation: If not otherwise barred by Florida's non-claim statute (s. 733.710, F.S.), a "claim" against a decedent's estate is time-barred if not asserted within the statutory filing deadlines for probate creditor claims under s. 733.702, F.S.

Effect of Proposed Changes: The legislation clarifies Florida law by amending s. 733.702, F.S., to conform with the existing text of s. 732.219, F.S., which excludes a surviving spouse's vested property rights under the Act from a deceased spouse's estate for all purposes. A surviving spouse's vested, pre-existing property rights under the Act are not exempt from "testamentary disposition by the decedent or distribution under the laws of succession of this state," if such property is subject to automatic after-the-fact forfeiture if not claimed in accordance with the statutory filing deadlines for probate creditor claims under Florida law. The clarifying amendment is made by creating new subsection (6) under s. 733.702, F.S., containing the new underlined text below:

Nothing in this section shall require the filing of a statement of claim in the estate of a decedent as a condition precedent to a surviving spouse's assertion of an ownership interest in property alleged to be subject to ss. 732.216-732.228, including, but not limited to, via a civil action or probate petition filed by a surviving spouse or any person acting on behalf of a surviving spouse, including, but not limited to, an attorney in fact, agent, guardian of the property, or personal representative of the surviving spouse.

C. Section 733.710.

Current Situation: Under s. 733.710, F.S., Florida's non-claim statute, a "claim" against a decedent's estate is time-barred 2 years after the decedent's death, whether or not letters of administration have been issued, except as otherwise provided in this section.

Effect of Proposed Changes: The legislation clarifies Florida law by amending s. 733.710, F.S., to conform with the existing text of s. 732.219, F.S., which excludes a surviving spouse's vested property rights under the Act from a deceased spouse's estate for all purposes. A surviving spouse's vested, pre-existing property rights under the Act are not exempt from "testamentary disposition by the decedent or distribution under the laws of succession of this state," if such property is subject to automatic after-the-fact forfeiture if not claimed in accordance with the statutory filing deadlines for probate creditor claims under Florida law. The clarifying amendment is made by creating new subsection (4) under s. 733.710, F.S., containing the new underlined text below:

This section shall not apply to the assertion by a surviving spouse of an ownership interest in property alleged to be subject to ss. 732.216-732.228, including, but not limited to, via a civil action or probate petition filed by a surviving spouse or any person acting on behalf of a surviving spouse,

including, but not limited to, an attorney in fact, agent, guardian of the property, or personal representative of the surviving spouse.

V. FISCAL IMPACT ON STATE AND LOCAL GOVERNMENTS

None.

VI. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR

None.

VII. CONSTITUTIONAL ISSUES

This legislation clarifies existing law. Consequently, in accordance with constitutional principles, it should apply retroactively.

The Florida Supreme Court has promulgated a two-pronged test for determining whether newly enacted statutory amendments should be applied retroactively: (1) whether the legislation clearly expresses an intent that it should apply retroactively; and (2) whether retroactive application would violate any constitutional principles. *See Metro. Dade Cty. v. Chase Fed. Hous. Corp.*, 737 So. 2d 494, 499 (Fla. 1999).

This legislation satisfies the first prong of the *Chase* test by including the following expression of legislative intent in the body of the bill.

> This act is remedial in nature and applies retroactively. The Legislature finds that the retroactive application of this act does not unconstitutionally impair vested rights. Rather, this act clarifies existing law as codified in s. 732.219, Florida Statutes. …

See Bill, Section 5. *See, also* Forrest L. Andrews, *Retroactive Application of Law to Cases Pending on Appeal*, The Record (Jul 2, 2018):[7]

> The first prong involves a question of statutory construction which requires that legislative intent be determined from the plain language of the statute. *Id*. A statute that clearly and unambiguously states that it applies retroactively will be given such effect. *Id.; see, e.g.,* § 406.135(8), Fla. Stat. (2016) ("This exemption shall be given retroactive application."); *State, Dep't of Revenue v. Zuckerman-Vernon Corp*., 354 So. 2d 353, 358 (Fla. 1977) ("The 1977 Legislature's inclusion of an effective date of July 1, 1977, in Ch. 77-281 effectively rebuts any argument that retroactive application of the law was intended.").

[7] Available at https://therecord.flabarappellate.org/2018/07/retroactive-application-of-law-to-cases-pending-on-appeal/

This legislation also satisfies the second prong of the *Chase* test because it does not impair vested rights,[8] create new obligations, or impose new penalties. As it currently exists the Act excludes a surviving spouse's vested property rights under the Act from a deceased spouse's estate for all purposes. This legislation clarifies that point of statutory interpretation, thus retroactive application will not impair vested rights, create new obligations, or impose new penalties. And for the avoidance of doubt the legislation ensures that the clarifying statutory amendments will not impact the due process rights of *existing* litigants.

> … This act does not apply in a civil action commenced against a particular named defendant which is commenced before _____, 2023. In all cases, the Legislature intends that this act be construed consistent with the due process provisions of the State Constitution and the Constitution of the United States.

See Bill, Section 5.

Finally, Florida courts apply a different and less stringent standard when, as in the case of this legislation, the Legislature enacts *clarifying* legislation in reaction to a recent case or controversy involving principles of statutory interpretation.

> Finally, the Legislature's clarification of a statute following a recent controversy involves principles of statutory interpretation, not retroactive analysis. *See Leftwich v. Fla. Dept. of Corr*., 148 So. 3d 79, 83-84 (Fla. 2014) (treating the recent controversy rule as distinct from retroactive application of a criminal statute under the Ex Post Facto Clause); *Chase Fed. Hous. Corp*., 737 So. 2d at 502-503 (treating the recent controversy rule as distinct from the retroactive application of an amended statute); *Madison at SOHO II Condo. Ass'n, Inc. v. DEVO Acquisition Enters., LLC*, 198 So. 3d 1111, 1116-17 (Fla. 2d DCA 2016) ("Because we are applying the legislature's amendment, which clarified the legislature's intent in a prior version of a statute after a recent controversy, we do not apply retroactivity principles here."). That is, "[w]hen the legislature amends a statute shortly after controversy has arisen over its interpretation, the amendment can be considered an interpretation of the original law, not a substantive change." *Essex Ins. Co. v. Integrated Drainage Sols., Inc.*, 124 So. 3d 947, 952 (Fla. 2d DCA 2013) (citing *Chase Fed. Hous. Corp*., 737 So. 2d at 503)); *see also Lowry v. Parole and Probation Com'n*, 473 So. 2d 1248, 1250 (Fla. 1985).

See Forrest L. Andrews, *supra*.

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[8] "To be vested a right must be *more than a mere expectation based on an anticipation of the continuance of an existing law*; it must have become a title, legal or equitable, to the present or future enforcement of a demand." *Clausell v. Hobart Corp*., 515 So.2d 1275, 1276 (Fla. 1987) (quoting *Lamb v. Volkswagenwerk Aktiengesellschaft*, 631 F. Supp. 1144, 1149 (S.D. Fla. 1986)) (emphasis in original). *See* Forrest L. Andrews, *supra* at FN2.

The following expression of legislative intent is included in the body of the bill confirming that the Legislature is enacting this clarifying legislation in reaction to a recent case or controversy involving principles of statutory interpretation:

> The Legislature intends to overrule *Johnson v. Townsend*, 259 So.3d 851 (Fla. 4th DCA 2018), which held that filing deadlines generally applicable to probate creditor claims are applicable to the assertion by a surviving spouse of an ownership interest in property alleged to be subject to ss. 732.216-732.228, Florida Statutes. This view is contrary to s. 732.219, Florida Statutes, and runs counter to previous common law regarding community property rights in Florida.

See Bill, Section 4.

VIII. OTHER INTERESTED PARTIES

None.

A bill to be entitled

An act modifying ss. 731.201, 733.702, and 733.710, Florida Statutes, to clarify that filing deadlines generally applicable to probate creditor claims are not applicable to the assertion by a surviving spouse of an ownership interest in property alleged to be subject to ss. 732.216-732.228, Florida Statutes; providing legislative intent to overrule a judicial opinion; providing for retroactive application of the act and a legislative finding that such application does not unconstitutionally impair vested rights; providing an effective date.

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

Section 1. Section 731.201(4), Florida Statutes, is revised to read:

(4) "Claim" means a liability of the decedent, whether arising in contract, tort, or otherwise, and funeral expense. The term does not include an expense of administration or estate, inheritance, succession, or other death taxes, or the assertion by a surviving spouse of an ownership interest in property alleged to be subject to ss. 732.216-732.228, including, but not limited to, via a civil action or probate petition filed by a surviving spouse or any person acting on behalf of a surviving spouse, including, but not limited to, an attorney in fact, agent,

guardian of the property, or personal representative of the surviving spouse.

Section 2. Section 733.702(6), Florida Statutes, is created to read:

(6) Nothing in this section shall require the filing of a statement of claim in the estate of a decedent as a condition precedent to a surviving spouse's assertion of an ownership interest in property alleged to be subject to ss. 732.216-732.228, including, but not limited to, via a civil action or probate petition filed by a surviving spouse or any person acting on behalf of a surviving spouse, including, but not limited to, an attorney in fact, agent, guardian of the property, or personal representative of the surviving spouse.

Section 3. Section 733.710(4), Florida Statutes, is created to read:

(4) This section shall not apply to the assertion by a surviving spouse of an ownership interest in property alleged to be subject to ss. 732.216-732.228, including, but not limited to, via a civil action or probate petition filed by a surviving spouse or any person acting on behalf of a surviving spouse, including, but not limited to, an attorney in fact, agent, guardian of the property, or personal representative of the surviving spouse.

Section 4. The Legislature intends to overrule *Johnson v. Townsend*, 259 So.3d 851 (Fla. 4th DCA 2018), which held that filing deadlines generally applicable to probate creditor claims are applicable to the assertion by a surviving spouse of an ownership interest in property alleged to be subject to ss. 732.216-732.228, Florida Statutes. This view is contrary to s. 732.219, Florida Statutes, and runs counter to previous common law regarding community property rights in Florida.

Section 5. This act is remedial in nature and applies retroactively. The Legislature finds that the retroactive application of this act does not unconstitutionally impair vested rights. Rather, this act clarifies existing law as codified in s. 732.219, Florida Statutes. This act does not apply in a civil action commenced against a particular named defendant which is commenced before ____, 2023. In all cases, the Legislature intends that this act be construed consistent with the due process provisions of the State Constitution and the Constitution of the United States.

Section 6. The act shall take effect upon becoming law.

The Florida Bar

651 East Jefferson Street
Tallahassee, FL 32399-2300

Joshua E. Doyle
Executive Director

(850) 561-5600
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VOLUNTARY BAR GROUP
LEGISLATIVE OR POLITICAL ACTIVITY WORKSHEET

- This worksheet is for voluntary bar groups (VBGs) to gather and share information before submitting an official request for approval of legislative or political activity, whether new or rollover.
- Political activity is defined in SBP 9.11 as "activity by The Florida Bar or a bar group including, but not limited to, filing a comment in a federal administrative law case, taking a position on an action by an elected or appointed governmental official, appearing before a government entity, submitting comments to a regulatory entity on a regulatory matter, or any type of public commentary on an issue of significant public interest or debate."
- VBGs must advise TFB of proposed legislative or political activity and identify all groups the proposal has been submitted to. If comments have been received, they should be attached; if they have not been received, the proposal may still be submitted to the Legislation Committee. *See* SBP 9.50(d).
    - The Legislation Committee and Board will review the proposal unless an expedited decision is required.
    - If expedited review is requested, the Executive Committee may review the proposal.
    - The Bar President, President-Elect, and chair of the Legislation Committee may review the proposal if the legislature is in session or the Executive Committee cannot act because of an emergency.

General Information

Submitted by: *(name of VBG or individual)* Estate & Trust Tax Planning Committee and Probate Law & Procedure Committee, RPPTL

Address: *(address and phone #)* c/o 3001 Tamiami Trail No, Suite 400, Naples, FL 34103, (239) 649-3178 and c/o 5551 Ridgewood Drive, Suite 501, Naples, FL 34108, (239) 514-1000 ext. 2015

Position Level: *(name of VBG)* RPPTL Committee

Proposed Advocacy

Complete #1 below if the issue is legislative, #2 if the issue is political; #3 must be completed.

1. **Proposed Wording of Legislative Position for Official Publication**

Support of legislation to amend Fla. Stat. Sec. 198.41 to render Chapter 198 (which imposes the Florida estate tax) ineffective for as long as there is no federal state death tax credit or no federal generation-skipping transfer tax credit allowable under the Internal Revenue Code of 1986, as amended.

2. **Political Proposal**

_____
_____
_____
_____
_____

3. **Reasons For Proposed Advocacy**

a. Is the proposal consistent with *Keller v. State Bar of California*, 496 US 1 (1990), and *The Florida Bar v. Schwarz*, 552 So. 2d 1094 (Fla. 1989)? Yes

b. Which goal or objective of the Bar's strategic plan is advanced by the proposal?
Objective II - Enhance the legal profession and the public's trust and confidence in attorneys and the justice system
_____

c. The proposal: *(see SBP 9.50(a) - check all that apply)*

X is within the group's subject matter jurisdiction as described in the group's bylaws;

_____ is beyond the scope of the bar's permissible legislative or political activity, or within the bar's permissible scope of legislative or political activity and consistent with an official bar position on that issue; and

_____ does not have the potential for deep philosophical or emotional division among a substantial segment of the bar's membership.

d. Additional Information: _____
_____
_____
_____

Referrals to Other Voluntary Bar Groups

The VBG must provide copies of the proposed legislative or political action to all bar divisions, sections, and committees that may be interested in the issue. *See* SBP 9.50(d). List all divisions, sections, and committees to which the proposal has been provided pursuant to this requirement. Include all comments received as part of your submission. The submission may be made before receiving comments but only after the proposal has been provided to other bar divisions, sections, or committees.

Tax Law Section; Title Issues & Standards Committee, RPPTL

Contacts

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

Lawrence J. Miller, Co-Chair, Legislation Committee
Gutter, Chaves, Josepher et al.
2101 NW Corporate Boulevard, Suite 107
Boca Raton, FL 33431-7343
(561) 998-7847

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

Peter M. Dunbar & Martha J. Edenfield
Dean, Mead & Dunbar
106 East College Avenue, Suite 1200
Tallahassee, FL 32301
(850) 999-4100

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

Peter M. Dunbar & Martha J. Edenfield
Dean, Mead & Dunbar
106 East College Avenue, Suite 1200
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The Florida Bar

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To: Leadership of the Tax Law Section
Section/Division/Committee

From: Estate & Trust Tax Planning Committee and the Probate Law and Procedure Committee, Real Property Probate and Trust Law Section

Re: Proposed Legislative Position re: Suspension of Chapter 198, Florida Statutes

As you are aware, Standing Board Policy 9.50(d) requires voluntary bar groups to contact all divisions, sections and committees that might be interested in proposed legislative or political activity. The policy also requires sections to identify all groups to which proposals have been submitted for comment and to include comments when submitting the proposal.

We thought your section might be interested in the above issue and have attached a copy of our proposal for your review and comment. Our proposal is in support of :

Legislation amending Sec. 198.41 regarding Florida estate tax

Thanks for your consideration of this request. Please let us know if your section will provide comments.

651 East Jefferson Street • Tallahassee, FL 32399-2300 • (850) 561-5600 • FAX: (850) 561-9405 • www.floridabar.org

The Florida Bar

651 East Jefferson Street
Tallahassee, FL 32399-2300

Joshua E. Doyle
Executive Director

850/561-5600
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To: Leadership of the Title Issues & Standards Committee, Real Property Probate and Trust Law Section
Section/Division/Committee

From: Estate & Trust Tax Planning Committee and the Probate Law and Procedure Committee, Real Property Probate and Trust Law Section

Re: Proposed Legislative Position re: Suspension of Chapter 198, Florida Statutes

As you are aware, Standing Board Policy 9.50(d) requires voluntary bar groups to contact all divisions, sections and committees that might be interested in proposed legislative or political activity. The policy also requires sections to identify all groups to which proposals have been submitted for comment and to include comments when submitting the proposal.

We thought your section might be interested in the above issue and have attached a copy of our proposal for your review and comment. Our proposal is in support of :

Legislation amending Sec. 198.41 regarding Florida estate tax

Thanks for your consideration of this request. Please let us know if your section will provide comments.

651 East Jefferson Street • Tallahassee, FL 32399-2300 • (850) 561-5600 • FAX: (850) 561-9405 • www.floridabar.org

A bill to be entitled

An act to render Chapter 198, Florida Statutes, which imposes the Florida estate tax, ineffective for as long as there is no federal state death tax cred tor federal generation-skipping transfer tax credit.

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

Section 1. Section 198.41, Florida Statutes, is amended to read:

198.41 Effectiveness of this chapter, etc.

(1) Except as provided in this section, ~~T~~this chapter shall remain in force and effect so long as the Government of the United States retains in full force and effect as a part of the Revenue Laws of the United States a Federal Estate Tax, and this chapter shall cease to be operative as and when the Government of the United States ceases to impose any Estate Tax of the United States.

(2) This chapter shall not apply with respect to the estate of a decedent who dies after December 31,

2004, if, upon the death of the decedent, a state death tax credit or state generation-skipping transfer tax credit is not allowable pursuant to the provisions of the Internal Revenue Code of 1986, as amended.

WHITE PAPER

PROPOSED AMENDMENT OF F.S. SECTION 198.41 TO RENDER CHAPTER 198, FLORIDA STATUTES, WHICH IMPOSES THE FLORIDA ESTATE TAX INEFFECTIVE FOR AS LONG AS THERE IS NO FEDERAL STATE DEATH TAX CREDIT OR NO FEDERAL GENERATION-SKIPPING TRANSFER TAX CREDIT

I. SUMMARY

The Estate and Trust Tax Planning Committee and the Probate Law and Procedure Committee of the Real Property Probate and Trust Law Section of the Florida Bar jointly recommend that the Section support legislation to suspend those Florida Statutes which govern the imposition, reporting and collection of the Florida estate tax. Specifically, the Committees recommend that Fla. Stat. §198.41, which already proscribes the effectiveness of Chapter 198, be amended to provide that all of Chapter 198 be ineffective for as long as there is no federal state death tax credit or no federal generation-skipping transfer tax credit allowable under the Internal Revenue Code of 1986, as amended. By suspending the effectiveness all of Chapter 198, the requirement thereunder that a personal representative provide the probate court with proof of the payment of Florida estate tax or non-liability for the tax would also be suspended for estates of decedents dying after December 31, 2004. The suspension of this requirement will improve judicial efficiency and permit probate courts to close probate estates and discharge personal representatives more promptly.

II. CURRENT SITUATION

Chapter 198 of the Florida Statutes imposes an estate tax on the estate of a Florida decedent, limited to the amount allowable as a credit against the decedent's federal estate tax for state death tax paid. Essentially, Chapter 198 codifies a "revenue sharing" arrangement between the state and the federal government. However, the federal Economic Growth and Tax Relief Reconciliation Act of 2001 ("EGTRRA") phased out the allowable state death tax credit beginning 2001, and eliminated that credit with respect to decedents dying after December 31, 2004 and before January 1, 2011. The American Taxpayer Relief Act of 2012 ("ATRA") has since made the elimination of the state death tax credit permanent. Inasmuch as the levy of Florida estate tax was statutorily tied to the amount of the allowable federal state death tax credit, the phase out and eventual elimination of that credit resulted in the phase out and ultimate "zeroing out" of Florida estate tax liability for the estates of those decedents passing away on or after January 1, 2005.

Nevertheless, Chapter 198 still imposed upon the personal representatives of such estates a requirement to file a Florida state death tax return even if that return simply reported no Florida estate tax being due. In response, Fla. Stat. §198.13 was amended in 2007 to remove the filing requirement.[1] Now, no Florida estate tax return need be filed by the personal representative of the estate of a decedent who dies after December 31, 2004, if the estate will not be allowed a state death tax credit or a generation-skipping transfer tax credit under the Internal Revenue Code of 1986, as amended.[2] Further, a copy of a federal estate tax return reporting a generation-skipping

[1] See CS/SB 2482
[2] Fla. Stat. 198.13(4)(a)

transfer in connection with a decedent who dies after December 31, 2004, is not required to be filed with the Florida Department of Revenue (the "DOR").[3] Although EGTRRA, ATRA and the 2007 addition of Fla. Stat. §198.13(4) practically nullified the imposition, reporting and collection of the Florida estate tax for after 2004, Chapter 198 continues to remain in effect.

In particular, Fla. Stat. §198.26 continues to impose upon the personal representative of a decedent's estate the obligation to prove the payment of or non-liability for the Florida estate tax, despite the fact that such tax is no longer collected by the DOR with respect to the estates of decedents who die after December 31, 2004. For decedents who died prior to January 1, 2005, personal representatives would commonly file a non-taxable certificate or a receipt of payment issued by the DOR as conclusive proof.[4] However, now that Fla. Stat. §198.13 has dispensed with the filing of Florida estate tax returns in most cases,[5] the DOR no longer issues such certificates or receipts for estates of decedents dying on or after January 1, 2005. Under Fla. Stat. §198.26, courts can consider as such proof an affidavit of non-liability for the tax made by the personal representative of a "nontaxable estate".[6] Form DR-312 and Form DR-313 developed by the DOR serves that purpose.

However, the term "nontaxable estate" is not defined within Chapter 198. The term could be construed to refer to an estate that is not required to file a Florida estate tax return, which would then encompass the estates of all decedents dying after December 31, 2004. However, at least one court has more narrowly construed the term to refer to an estate that that is not required to file a *federal* estate tax return. Under that more narrow reading, the court would be unable to consider the personal representative's affidavit of non-liability for Florida estate tax if the decedent's estate is subject to federal estate tax liability pursuant to the Internal Revenue Code. If prevented from using Form DR-313 or a similar affidavit as proof of non-liability for the Florida estate tax, the personal representative of a federally taxable estate would otherwise have no conclusive proof that the estate is not subject to Florida estate tax. In such cases, Fla. Stat. §198.26 is an impediment to the timely and efficient discharge of a personal representative.

III. EFFECT OF PROPOSED CHANGES

To address the serious administrative inefficiency resulting from such narrow interpretations of Fla. Stat. §198.26, the Estate and Trust Tax Planning Committee and the Probate Law and Procedure Committee jointly propose that the Real Property Probate and Trust Law Section of the Florida Bar support legislation to amend Fla. Stat. §198.41, which currently ties the effectiveness of Chapter 198 to the federal government's continued imposition of a federal estate tax. That statute would already render all of Chapter 198 ineffective if federal legislation eliminates the federal estate tax. The Committees' proposal seeks to amend Fla. Stat. §198.41 to add a new subsection that would also suspend the application of Chapter 198 to the current situation where federal estate tax continues to be imposed while Florida estate tax has been effectively nullified.

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[3] Fla. Stat. 198.13(4)(b)
[4] Fla. Stat. 198.26
[5] Fla. Stat. 198.13(4)
[6] Fla. Stat. 198.26

The proposed amendment of Fla. Stat. §198.41 borrows language from Fla. Stat §198.13(4) and would render all of Chapter 198, Florida Statutes, ineffective as to the estates of all decedents dying after December 31, 2004. If enacted, for such estates, Fla. Stat. §198.26 will not be applicable and will no longer serve to block the timely closure of probate proceedings. Florida probate courts would no longer need to require the personal representative of such an estate to submit proof of the payment of the Florida estate tax as a prerequisite to the discharge of that personal representative. As a result, probate courts will be able to close probate estates and discharge personal representatives more promptly and efficiently.

Collaterally, title insurance underwriters may no longer find it necessary to seek recordation of such proof as a prerequisite to the issuance of title insurance. Currently, where the chain of title for real property at issue includes a conveyance from a decedent, Forms DR-312 or DR-313 are often recorded as proof that there is no Florida estate tax lien with respect to such property, particularly when an owner or purchaser of real property seeks to secure title insurance. If all of Chapter 198 is rendered ineffective with respect to decedents who die after December 31, 2004, as a matter of law there would no Florida estate tax upon their estates and therefore no need to prove the non-existence of a Florida estate tax lien.

IV. FISCAL IMPACT ON STATE AND LOCAL GOVERNMENTS

None. Since no Florida estate tax is currently collected with respect to decedents dying on or after December 31, 2004, the suspension of Chapter 198 will have no fiscal effect.

V. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR

None.

VI. CONSTITUTIONAL ISSUES

None.

V. OTHER INTERESTED PARTIES

Tax Law Section of the Florida Bar

Title Issues & Standards Committee, Real Property Probate and Trust Law Section of the Florida Bar