Real Property, Probate and Trust Law Section
Executive Council Meeting
Disney Yacht and Beach Club & Zoom

Pursuant to Article VII, Section 4 of the Bylaws of the Section, Executive Council members may participate electronically and vote using polling feature on Zoom.

Saturday, December 5, 2020
8:30 am

Agenda

I. **Presiding** — *William T. Hennessey, III, Chair*

II. **Minutes of Previous Meeting** — *Jon Scuderi, Secretary*

1. Motion to approve the minutes of the October 3, 2020 meeting of the Executive Council held in Jackson Hole **pp. 4 - 10**

IV. **Chair's Report** — *William T. Hennessey, III, Chair*

1. Thank you to our Sponsors! **pp. 11 - 13**

2. Introduction and comments from Sponsors.

3. Milestones

4. Bylaw Amendments **pp**.**15 - 27**

5. Interim Actions Taken by the Executive Committee.

a. On August 25, 2020, the Executive Committee approved and ratified all votes taken at the Breakers' Executive Council meeting to the extent necessary to comply with the Bylaws.

b. On November 6, 2020, the Executive Committee approved recommendations to the Florida Bar for the Florida Realtor/Attorney Joint Committee. **pp. 28 - 29**

c. On November 16, 2020, the Executive Committee approved the following motions concerning the *Kearney* fix: (a) adopt as a Section legislative position support for proposed legislation protecting Florida residents from unintentionally assigning, pledging or waiving rights to, assets that otherwise are exempt legal process under Chapter 222 of the Florida Statutes by implementing clearly defined requirements for waiving the protection of such exemptions;

(b) find that such legislative position is within the purview of the RPPTL Section; and (c) expend funds in support of the proposed legislative position**. pp. 30 - 50**

6. 2020-2021 Executive Council meetings. **p. 51**

7. General Comments of the Chair.

V. **Liaison with Board of Governors Report** — *Steven W. Davis*

VI. **Chair-Elect's Report** — *Robert S. Swaine, Chair-Elect*

1. 2021-2022 Executive Council meetings.

VII. **Treasurer's Report** — Steven H. Mezer*, Treasurer*

1. Statement of Current Financial Conditions. **p. 52**

2. Motion of the Budget Committee to approve the proposed Real Property, Probate and Trust Law Section Budget for the fiscal year 2021–2022. **pp. 53 - 63**

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

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

1. Upcoming CLE programs and opportunities **p. 64**

X. **Legislation Committee –** *Wm. Cary Wright and John C. Moran, Co-Chairs*

XI. **General Standing Division Report** — Robert S. Swaine*, General Standing Division Director and Chair-Elect*

Action Items:

1. **Amicus Coordination** – Robert W. Goldman, *Co-Chair*

Motion to approve proposed amicus brief on behalf of the Section in the *Hayslip v. U.S. Home Corp.* case currently pending in the Florida Supreme Court **p. 65 - 79**.

Information Items:

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

Updates on matters of interest.

2. **Professionalism and Ethics** – Andrew B. Sasso, *Chair*

The Standing Committee on the Unlicensed Practice of Law submitted its proposed Formal Advisory Opinion 2019-4 to the Florida Supreme Court regarding an Out-of-State Attorney's Remote Practice from a Florida Home. The Section unanimously approved a motion supporting the proposal. The attached materials detail the timeline for the submission of additional comments to the Florida Supreme Court. **p. 80 - 86**

3. **Professionalism and Ethics** – Andrew B. Sasso, *Chair*

The Florida Bar's Professional Ethics Committee referred a matter regarding the denial of a staff opinion in Ethics Inquiry 41229 - the review requested by the inquirer, involving inquirer's ethical obligations as the court-appointed lawyer representing alleged incapacitated persons in guardianship proceedings when Florida statutes require proceedings without notice to the respondent, who is the inquirer's client. A motion was approved to refer the issue to the Section to review and report recommendations by December 20, 2020, including consulting with the Elder Law Section and the Probate Rules Committee. The attached materials include the correspondence from the committee to Chair Hennessey, regarding the referral. **p. 87 - 90**

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

Report on application process and deadlines for 2021-2022 Wm. Reece Smith, Jr. Leadership Academy **p. 91**

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

Action Item:

1. **Title Issues and Standards** – *Rebecca Wood, Chair*

Motion to approve the new Chapter 22 - Easements of the Uniform Title Standards. **pp. 92 - 106**

Information Item:

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

Consideration of legislation proposing to expand the 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. **pp. 107 - 127**

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

XIV. **Probate and Trust Law Division Committee Reports** — *Sarah Butters, 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 Florida Business Corporation Act Task Force** — Travis Hayes and Brian C. Sparks, Co-Chairs
4. **Ad Hoc Guardianship Law Revision Committee** — Nicklaus J. Curley, Stacey B. Rubel and David C. Brennan, Co-Chairs; Sancha Brennan, Vice Chair
5. **Ad Hoc Study Committee on Estate Planning Conflict of Interest —** William T. Hennessey, III, Chair; Paul Edward Roman, Vice-Chair
6. **Ad Hoc Study Committee on Due Process, Jurisdiction & Service of Process —** Barry F. Spivey, Chair; Sean W. Kelley and Christopher Q. Wintter, Co-Vice Chairs
7. **Ad Hoc Study Committee on Professional Fiduciary Licensing —** Angela McClendon Adams, Chair; Yoshimi Smith, Vice Chair
8. **Asset Protection** — Brian M. Malec, Chair; Richard R. Gans and Michael A. Sneeringer, Co-Vice-Chairs
9. **Attorney/Trust Officer Liaison Conference** — Tattiana Patricia Brenes-Stahl and Cady L. Huss, Co-Chairs; Tae Kelley Bronner, Stacey L. Cole (Corporate Fiduciary), Patrick C. Emans, Gail G. Fagan, Mitchell A. Hipsman and Eammon W. Gunther, Co-Vice Chairs
10. **Charitable Planning and Exempt Organizations Committee** — Seth Kaplan, Chair and Jason E. Havens and Denise S. Cazobon, Co-Vice-Chairs
11. **Elective Share Review Committee** — Lauren Y. Detzel, Chair; Cristina Papanikos and Jenna G. Rubin, Co-Vice-Chairs
12. **Estate and Trust Tax Planning** — Robert L. Lancaster, Chair; Richard N. Sherrill and Yoshimi O. Smith, Co-Vice Chairs
13. **Guardianship, Power of Attorney and Advanced Directives** — Nicklaus Joseph Curley, Chair; Brandon D. Bellew, Elizabeth M. Hughes, and Stacy B, Rubel, Co-Vice Chairs
14. **IRA, Insurance and Employee Benefits** — L. Howard Payne and Alfred J. Stashis, Co-Chairs; Charles W. Callahan, III and Rachel B. Oliver, Co-Vice-Chairs
15. **Liaisons with ACTEC** — Elaine M. Bucher, Tami F. Conetta, Thomas M. Karr, Shane Kelley, Charles I. Nash, Bruce M. Stone, and Diana S.C. Zeydel

16. **Liaisons with Elder Law Section** — Travis Finchum and Marjorie E. Wolasky
17. **Liaisons with Tax Section** — Lauren Y. Detzel, William R. Lane, Jr., and Brian C. Sparks
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, Robert Lee McElroy IV, Christina 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** — Jeffrey S. Goethe, Chair; J. Allison Archbold, Rachel A. Lunsford, and Jerome L. Wolf, Co-Vice Chairs

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

1. **Attorney Banker Conference** – E. Ashley McRae, Chair; Kristopher E. Fernandez, Salome J. Zikakis, and R. James Robbins, Jr., Co-Vice Chairs
2. **Commercial Real Estate** – Jennifer J. Bloodworth, Chair; Eleanor W. Taft, E. Ashley McRae, and Martin A. Schwartz, Co-Vice Chairs
3. **Condominium and Planned Development** – William P. Sklar and Joseph E. Adams, Co-Chairs; Shawn G. Brown and Sandra E. Krumbein, Co-Vice Chairs
4. **Condominium and Planned Development Law Certification Review Course** – Jane L. Cornett, Chair; Christene M. Ertl, Vice Chair
5. **Construction Law** – Reese J. Henderson, Jr., Chair; Sanjay Kurian and Bruce B. Partington, Co-Vice Chairs
6. **Construction Law Certification Review Course** – Melinda S. Gentile and Elizabeth B. Ferguson Co-Chairs; Gregg E. Hutt and Scott P. Pence, Co-Vice Chairs
7. **Construction Law Institute** – Jason J. Quintero, Chair; Deborah B. Mastin and Brad R. Weiss, Co-Vice Chairs
8. **Development & Land Use Planning** – Julia L. Jennison and Colleen C. Sachs, Co-Chairs; Jin Liu and Lisa B. Van Dien, Co-Vice Chairs
9. **Insurance & Surety** – Michael G. Meyer, Chair; Katherine L. Heckert and Mariela M. Malfeld, Co-Vice Chairs
10. **Liaisons with FLTA** – Alan K. McCall and Melissa Jay Murphy, Co-Chairs; Alan B. Fields and James C. Russick, Co-Vice Chairs
11. **Real Estate Certification Review Course** – Manuel Farach, Chair; Lynwood F. Arnold, Jr., Martin S. Awerbach, Lloyd Granet, Brian W. Hoffman and Laura M. Licastro, Co-Vice Chairs
12. **Real Estate Leasing** – Brenda B. Ezell, Chair; Kristen K. Jaiven and Christopher A. Sajdera, Co-Vice Chairs

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 Christopher W. Smart, Co-Vice Chairs
15. **Real Property Problems Study** – Lee A. Weintraub, Chair; Anne Q. Pollack Susan K. Spurgeon and Adele I. Stone, Co-Vice Chairs
16. **Residential Real Estate and Industry Liaison** – Nicole M. Villarroel, Chair; Louis E. "Trey" Goldman, and James A. Marx, Co-Vice Chairs
17. **Title Insurance and Title Insurance Liaison** – Brian W. Hoffman, Chair; Mark A. Brown, Jeremy T. Cranford, Leonard F. Prescott, IV and Cynthia A. Riddell, Co-Vice Chairs
18. **Title Issues and Standards** – Rebecca L.A. Wood, Chair; Robert M. Graham, Brian W. Hoffman and Karla J. Staker, Co-Vice Chairs

XVI. **General Standing Division Committee Reports** — *Robert S. Swaine, General Standing Division Director and Chair-Elect*

1. **Ad Hoc Florida Bar Leadership Academy** — Kristopher E. Fernandez and J. Allison Archbold, Co-Chairs; Bridget Friedman, Vice Chair
2. **Ad Hoc Remote Notarization** – E. Burt Bruton, Jr., Chair
3. **Amicus Coordination —** Kenneth B. Bell, Gerald B. Cope, Jr., Robert W. Goldman and John W. Little, III, Co-Chairs
4. **Budget** — Steven H. Mezer, Chair; Tae Kelley Bronner. Linda S. Griffin, and Pamela O. Price, Co-Vice Chairs
5. **CLE Seminar Coordination** — Wilhelmina F. Kightlinger 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** — Laura K. Sundberg, Chair; S. Dresden Brunner, Marsha G. Madorsky, and Alexander H. Hamrick, Co-Vice Chairs
7. **Disaster and Emergency Preparedness and Response** – Brian C. Sparks, Chair; Jerry E. Aron, Benjamin Frank Diamond and Colleen Coffield Sachs, Co-Vice Chairs
8. **Fellows** — Christopher A. Sajdera, Chair; J, Christopher Barr, Joshua Rosenberg 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 Charles Nash, Co-Vice Chairs
11. **Information Technology & Communication** — Neil Barry Shoter, Chair; Erin H. Christy, Alexander B. Dobrev, Jesse B. Friedman, Hardy L. Roberts, III, and Michael A. Sneeringer, Co-Vice Chairs
12. **Law School Mentoring & Programing** —Johnathan Butler, Chair; Phillip A. Baumann, Guy Storms Emerich, Kymberlee Curry Smith and Kristine L. Tucker, Co-Vice Chairs
13. **Legislation** — John C. Moran (Probate & Trust) and Wm. Cary Wright (Real Property), Co-Chairs; Theodore S. Kypreos and Robert Lee McElroy, IV (Probate & Trust), Manuel Farach and Arthur J. Menor (Real Property), Co-Vice Chairs

14. **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
15. **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
16. **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 Celeste Hardee Muir, Judge Bryan Rendzio, Judge Mark A. Speiser, Judge Jessica Jacqueline Ticktin; 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** — Steven W. Davis
    - **h.** **TFB Business Law Section** — Gwynne A. Young and Manuel Farach
    - **i.** **TFB CLE Committee** — Wilhelmina F. Kightlinger
    - **j.** **TFB Council of Sections** — William T. Hennessey, III and Robert S. Swaine
    - **k.** **TFB Diversity & Inclusion** – Erin H. Christy
    - **l.** **TFB Pro Bono Legal Services**- Lorna E. Brown-Burton

17. **Long-Range Planning** — Robert S. Swaine, Chair
18. **Meetings Planning** — George J. Meyer, Chair
19. **Membership and Inclusion** — Annabella Barboza and S. Dresden Brunner, Co-Chairs; Erin H. Christy, Vinette D. Godelia, Jennifer L. Grosso and Roger A. Larson, Co-Vice Chairs
20. **Model and Uniform Acts** — Patrick J. Duffey and Richard W. Taylor, Co-Chairs; Adele I. Stone and Benjamin Diamond, Co-Vice Chair
21. **Professionalism and Ethics** — Andrew B. Sasso, Chair; Elizabeth A. Bowers, Alexander B. Dobrev, and Laura Sundberg, Co-Vice Chairs
22. **Publications (ActionLine)** — Jeffrey Alan Baskies and Michael A. Bedke, Co-Chairs (Editors in Chief); Richard D. Eckhard, Jason M. Ellison, George D. Karibjanian, Keith S. Kromash, Daniel L. McDermott, Jeanette Moffa, Paul E. Roman, Daniel Siegel, Lee Weintraub, Co-Vice Chairs
23. **Publications (Florida Bar Journal)** — Jeffrey S. Goethe (Probate & Trust) and Douglas G. Christy (Real Property), Co-Chairs; J. Allison Archbold (Editorial Board – Probate & Trust), Homer Duvall, III (Editorial Board — Real Property), Marty J. Solomon (Editorial Board — Real Property), and Brian Sparks (Editorial Board – Probate & Trust),Co-Vice Chairs

24. **Sponsor Coordination** — J. Eric Virgil, Chair; Patrick C. Emans, Marsha G. Madorsky, Jason J. Quintero, J. Michael Swaine, and Arlene C. Udick, Co-Vice Chairs
25. **Strategic Planning** —William T. Hennessey, III and Robert Swaine, Co-Chairs
26. **Strategic Planning Implementation** - Michael J. Gelfand, Chair; Michael A. Dribin, Deborah Packer Goodall, Andrew M. O'Malley and Margaret A. “Peggy” Rolando, Co-Vice Chairs

XVII. Adjourn: Motion to Adjourn.

Real Property, Probate and Trust Law Section
Executive Council Meeting
Four Seasons Teton Village
Saturday, October 3, 2020
8:30 am

Minutes

I. **Presiding** — William T. Hennessey, III, Chair

Mr. Hennessey called the meeting to order at 8:45 a.m., welcomed everyone to Jackson Hole, Wyoming for the out of state Executive Council Meeting and thanked everyone for being present.

Rich Caskey - made a motion to adjourn the meeting, which was seconded by several unidentified members, but was not recognized for a vote.

II. **Minutes of Previous Meeting** — William T. Hennessey, III, for Jon Scuderi, Secretary (in absentia)

Mr. Hennessey reported that the minutes had been amended to reflect that the two general standing items passed by unanimous consent. Laird Lile made a motion to approve the minutes as amended (of the August 22, 2020 meeting of the Executive Council held via Zoom pp. 7 - 17); after hearing a second, the motion was approved.

III. **Chair's Report** — William T. Hennessey, III, Chair
Mr. Hennessey thanked our sponsors p. 18 - 20, recognizing Cumberland Trust, Attorney's Title Fund, Guardian Trust and Stewart Title for their continuing support and sponsorship of particular events at the out of state meeting.

IV. **General Comments of the Chair** - William T. Hennessey, III, Chair
Mr. Hennessey announced the unanticipated changes to the arrangements for those participating in the Jenny Lake hike. The boat transportation services had been cancelled by the service provider and more time considerations should be made if intending to make the hike to Hidden Falls or Inspiration Point.
Mr. Hennessey commended the Section's continuing success with CLE, despite the change to more online production of events

V. **Liaison with Board of Governors Report** — Steven W. Davis, in absentia - no report

VI. **Chair-Elect's Report** — Robert S. Swaine, Chair-Elect, no report

VII. **Treasurer's Report** — Steven H. Mezer, Treasurer, in absentia -
Statement of Current Financial Conditions. p. 22

Mr. Hennessey gave a brief report on the current financial conditions of the Section stating that we are

currently at 3.6-million-dollar fund balance for the year. He reminded everyone that this is due to the cancellation of the in-person meetings and the tremendous success of our webcast programs this year.

VIII. **Director of At-Large Members Report** — Lawrence Jay Miller, Director, in absentia - no report

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

Upcoming CLE programs and opportunities **p. 23**

Co-Chair Ms. Brennan echoed the Chair's commentary about the success of CLE, noting that [as of August 31st] the Section had already reached 50% of its CLE goals for the year. Ms. Brennan encouraged continuing attendance at Section CLEs in support of the Section and announced several of the upcoming CLE programs and opportunities for program submissions for the spring.

X. **Legislation Committee** – Wm. Cary Wright, Co-Chair, no report

XI. **General Standing Division Report** — Robert S. Swaine, General Standing Division Director and Chair-Elect, no report

XII. **Real Property Law Division Report** — S. Katherine Frazier, Division Director, in absentia, no report

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

Information item:
Asset Protection Committee – Sarah Butters, Division Director, for Brian Malec, Chair, in absentia
Ms. Butters briefly explained the impact of the Kearney case and the reasoning behind the legislative fix to and consideration of proposed changes to Chapter 222 to clarify the impact of an assignment or pledge on certain exempt assets. **pp. 24-38**. Charlie Nash spoke in support of the importance of a legislative fix.

XIV. **Probate and Trust Law Division Committee Reports** — Sarah Butters, Division Director, No Reports

XV. **Real Property Law Division Committee Reports** — S. Katherine Frazier, Division Director, No Reports

XVI. **General Standing Division Committee Reports** — Robert S. Swaine, General Division Director, No Reports

XVII. **Adjourn.**

A motion to Adjourn carried unanimously.

The meeting was adjourned at 8:56 a.m.

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	**The Florida Bar Foundation**	Michelle Fonseca	mfonseca@flabarfndn.org
Executive Council Meeting Sponsor	**Stewart Title**	David Shanks	laura.licastro@stewart.com
Overall Sponsor/Leg. Update	**Attorneys Title Fund Services, LLC**	Melissa Murphy	mmurphy@thefund.com
Overall Sponsor/Leg. Update	**Attorneys Title Fund Services, LLC**	Melissa Murphy	mmurphy@thefund.com

Thank you to Our Friends of the Section

Sponsor	Contact	Email
Business Valuation Analysts, LLC	Tim Bronza	tbronza@bvanalysts.com
CATIC	Christopher J. Condie	ccondie@catic.com
Cumberland Trust	Eleanor Claiborne	eclaiborne@cumberlandtrust.com
Fiduciary Trust International of the South	Vaughn Yeager	vaughn.yeager@ftci.com
Heritage Investment	Joe Gitto	jgitto@heritageinvestment.com
North American Title Insurance Company	Jessica Hew	jhew@natic.com
Smart Marketing	Lesley Blaine	lesley@smartmarketingnow.com
Valuation Services, Inc.	Jeff Bae	Jeff@valuationservice.com
Wells Fargo Private Bank	Johnathan Butler	johnathan.l.butler@wellsfargo.com

Thank you to our Committee Sponsors

Sponsor	Contact	Email	Committee
Real Property Division			
AmTrust Financial Services	Anuska Amparo	Anuska.Amparo@amtrustgroup.com	Residential Real Estate and Industry Liaison
Attorneys Title Fund Services, LLC	Melissa Murphy	mmurphy@thefund.com	Commercial Real Estate
Attorneys Title Fund Services, LLC	Melissa Murphy	mmurphy@thefund.com	Real Estate Leasing
Attorneys' Real Estate Councils of Florida, Inc	Rene Rutan	RRutan@thefund.com	Residential Real Estate and Industry Liaison
CATIC	Deborah Boyd	dboyd@catic.com	Real Property Finance and Lending
First American Title	Alan McCall	Amccall@firstam.com	Condominium and Planned Development
First American Title	Wayne Sobian	wsobien@firstam.com	Real Property Problems Study
Probate Law Division			
BNY Mellon Wealth Management	Joan Crain	joan.crain@bnymellon.com	Estate and Trust Tax Planning
BNY Mellon Wealth Management	Joan Crain	joan.crain@bnymellon.com	IRA, Insurance and Employee Benefits
Business Valuation Analysts, LLC	Tim Bronza	tbronza@bvanalysts.com	Trust Law
Coral Gables Trust	John Harris	jharris@cgtrust.com	Probate and Trust Litigation
Coral Gables Trust	John Harris	jharris@cgtrust.com	Probate Law Committee
Grove Bank and Trust	Marta Goldberg	mgoldberg@grovebankandtrust.com	Guardianship and Advanced Directives
Kravit Estate Appraisal	Bianca Morabito	bianca@kravitestate.com	Estate and Trust Tax Planning
Management Planning Inc.	Roy Meyers	rmeyers@mpival.com	Estate and Trust Tax Planning
Northern Trust	Tami Conetta	tfc1@ntrs.com	Trust Law

THE LYNWOOD F. ARNOLD JR. MEMORIAL AWARD

THE LYNWOOD F. ARNOLD, JR MEMORIAL AWARD was established in 2020 by the Section to memorialize the memory and extraordinary contributions of Lynwood Arnold to numerous general standing committees of the Section. Over many years of dedicated service, Lynwood was a champion for diversity initiatives and inclusivity in the Section. He worked tirelessly on Section mentoring projects for new lawyers and was instrumental in the establishment and success of the Section's Law School Programming and Mentoring Committee. Further, he was incredibly generous with his time and provided leadership at the ground level on many pro bono projects throughout the state. Lynwood's passion for service to his profession and community was contagious and served as model for others. This award will be granted from time to time to recognize one or more of our members who give greatly of their time and knowledge to one or more of the following areas: the enhancement of diversity within the Section, including increasing minority membership and participation; mentoring of law students or new lawyers; or providing of pro bono legal services.

BYLAWS OF THE REAL PROPERTY, PROBATE AND TRUST LAW SECTION

ARTICLE I
NAME AND PURPOSE

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

Section 2. Purpose. The purposes of the section are to:

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

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

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

ARTICLE II
SECTION MEMBERSHIP

Section 1. Membership Types. The membership of the section is the active members ("active section member"), affiliate members ("affiliate section member"), and honorary members ("honorary section member").

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

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

the section. The number of affiliate section members may not exceed 1/3 of the number of active section members.

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

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

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

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

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

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

(6) five years of in-house training as a legal assistant.

(c) Honorary Section Member. The executive council may only make an honorary section member of any person whom the executive council finds to have made outstanding contributions in the fields of real property (including construction), probate, trust, or related fields of law. An honorary section member has no vote at section meetings, is not be entitled to hold any office or position in the section, and is not required to pay dues.

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

Section 3. Dues. The executive council establishes the amount of annual section dues for each type of section membership, subject to approval by the Board of Governors of The Florida Bar ("board of governors"). Annual section dues are payable in advance of each year of section membership. There is no proration of annual section dues.

(a) The Florida Bar bills active members of the section for annual section dues simultaneously with billing for regular membership dues of The Florida Bar. Members of The Florida Bar who become active section members are not be required to pay annual section dues for the first fiscal year following their admission to The Florida Bar.

(b) Annual section dues for affiliate members of the section shall initially accompany applications for affiliate section membership and must be paid by the date that membership dues for The Florida Bar become due.

(c) Any member of the section whose annual section dues are not paid by the date Florida Bar membership dues become delinquent ceases to be a member of the section.

Section 4. Membership Standards. All members of the section are required to observe the standards of professionalism and ethical conduct expected of members of The Florida Bar, and legal assistants who are affiliate section members are also required to observe and adhere to the Code of Ethics and Professional Responsibility established by the National Association of Legal Assistants, Inc. The executive council, by 2/3 vote of the members present and voting at a meeting, may terminate section membership for misconduct involving moral turpitude or the failure to observe the standards of conduct established by these bylaws. Any proposed termination of section membership by the executive council is an agenda item at an in-state meeting, and the affected member must be given reasonable notice of the basis for the proposed termination and an opportunity to be heard at that meeting.

ARTICLE III
ORGANIZATION

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

ARTICLE IV
OFFICERS, ELECTED POSITIONS, AND EXECUTIVE COMMITTEE

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

Section 2. Qualifications. No person may serve as a section officer or in a position as representative for out-of-state members or at-large members unless the person is an active section member. Loss of active section member status causes that office or position to be vacant. Status as an active section member may cease because of a loss of status as a member of The Florida Bar in good standing that is solely attributable to a delinquency in:

(a) the payment of membership fees or dues; or

(b) completing continuing legal education requirements,

Reinstatement as a member of The Florida Bar in good standing and as an active section member automatically reinstates the member to the vacant office or position if it has not been filled if the person's status as an active section member ceases solely because of a Florida Bar member's delinquency in payment of Florida Bar membership fees or violation of continuing legal education requirements.

Section 3. Executive Committee. The section officers, together with the chairs of the section CLE seminar coordination committee and legislation committee, will serve as the executive committee of the section ("executive committee"), which is the planning agency for the executive council. In the event that the section CLE seminar coordination committee and/or the section legislation committee have a co-chair for the real property law division and a co-chair for the probate and trust law division, each co-chair is a member of the executive committee and entitled to one vote. The executive committee also has the full power and authority to exercise the function of the executive council when and to the extent authorized by the executive council with respect to a specific matter, and on any other matter which the executive committee reasonably determines requires action between meetings of the executive council. All action taken by the executive committee on behalf of the executive council must be reported to the executive council at its next meeting. The executive committee must not take any action that conflicts with the policies and expressed wishes of the executive council. The executive committee also:

(a) recommends to the chair-elect appointments for chairs and vice chairs of section committees and section liaisons;

(b) recommends to the section's long-range planning committee ("long-range planning committee") nominees for at-large members; and

(c) performs such other duties as directed by the executive council or prescribed in these bylaws.

Section 4. Nominating Procedure.

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

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

more than one person is nominated for any elected office or position, the section chair, assisted by any special committees appointed by the section chair, will determine the procedures to be followed for that election.

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

Section 5. Election and Term of Offices and Positions.

(a) The section officers, the representatives for out-of-state members, and the at-large members, are elected by majority vote of the active section members in attendance and voting at the election meeting held prior to July 1 of each year. Voting by proxy is not permitted. At the election meeting the section chair, chair-elect, and secretary determine the number of active section members in attendance and voting. Voting is by written, secret ballot prepared in advance, except when a governmental state of emergency has been declared for that meeting's location or declared for any location that significantly impacts a substantial number of section members' ability to attend the meeting in person, or if the meeting's venue is no longer reasonably available. If no nominee receives a majority vote for an office or position, additional balloting will take place between the 2 nominees receiving the greatest number of votes until the required majority is obtained. Results of the election will be immediately announced by the section chair.

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

Section 6. Duties of Officers.

(a) Section Chair. The section chair is the chief executive officer and principal representative of the section, and presides at all meetings of the section, the executive council, and the executive committee. The section chair also is responsible for reports to The Florida Bar or the board of governors and for performing other duties prescribed in these bylaws or which customarily pertain to the office of section chair. The section chair is an ex-officio member of all section committees.

(b) Chair-elect. The chair-elect is be responsible for:

(1) the general standing committees and any projects assigned to them, including the preparation and submission of any required reports;

(2) duties designated by the section chair, the executive council, or the executive committee; and

(3) other duties as prescribed in these bylaws or that customarily pertain to the office of chair-elect. The chair-elect shall serve as acting section chair in case of temporary disability or absence of the section chair, but only for the duration of

the section chair's disability or absence. Any issue concerning the disability or absence of the section chair is determined by the executive committee, subject to review by the executive council.

(c) Secretary. The secretary takes and records:

(1) minutes of meetings of the executive council (including record of attendance);

(2) significant actions taken by the executive committee, including all actions which exercise any function of the executive council; and

(3) the election results at the election meeting. The secretary files all of those records with the permanent records of the section at The Florida Bar headquarters in Tallahassee. The secretary also reports and keeps a record of all policies adopted by the section as a separate record.

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

(e) Treasurer. The treasurer and the appropriate staff of The Florida Bar makes certain that the financial affairs of the section are administered in a manner authorized by the section's budget and in accordance with the standing policies of the board of governors. The treasurer monitors and reviews for correctness all accounts, reports and other documents pertaining to section funds, revenues and expenditures that are furnished by the staff of The Florida Bar. No reimbursement may be made to any member of the section without approval of the treasurer, and any reimbursement to the treasurer must be approved by the section chair or chair-elect. The treasurer:

(1) works with the chair-elect to prepare and submit a projected budget to the executive council;

(2) reports from time to time on the section's present and projected financial condition, advising the executive committee and the executive council as to the financial impact of any proposed action that might have a significant impact on the financial condition of the section; and

(3) prepares other recommendations and special reports of financial affairs of the section as requested by the section chair.

(f) At-large members Director. The at-large members director:

(1) defines any responsibilities of the at-large members in consultation with the executive committee;

(2) is responsible to the section for the at-large members;

(3) evaluates the performance of the at-large members on an annual basis; and

(4) recommends nominees to the long-range planning committee for at-large members.

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

Section 7. Vacancies.

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

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

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

(d) If any office other than section chair or chair-elect becomes vacant within 6 weeks of the next scheduled in-state meeting of the executive council, the executive council at that meeting selects a section member to fill the vacancy for the remainder of the unexpired term. If no in-state meeting is scheduled within 6 weeks following the creation of a vacancy, the executive committee selects a section member to fill the vacancy.

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

ARTICLE V
EXECUTIVE COUNCIL

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

Section 2. Membership. The executive council consists of the section chair, the chair-elect, the real property law division director, the probate and trust law division director, the treasurer, the secretary, the at-large members director, the chairs and vice chairs of section

committees, the section liaisons, the member of the board of governors appointed as its liaison representative to the section, the at-large members, the past section chairs, and the representatives for out-of-state members of the section.

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

Section 4. Attendance. Regular attendance by executive council members at executive council meetings is requisite to the proper performance of their duties and responsibilities. Accordingly, if any past section chair is absent from 10 consecutive in-state executive council meetings, or if any other member of the executive council is absent from 3 consecutive in-state executive council meetings in any membership year, the member is deemed to have resigned from the executive council, and any section office or position held by that person is deemed vacant. The resigned member is not be eligible for election to or membership on the executive council for the next succeeding membership year unless: (i) the executive committee, on a showing of good cause for the absences, waives the attendance requirement for the membership year involved; and (ii) the waiver is announced at a formal meeting of the executive council and duly recorded in the minutes of the meeting. Any vacancy created by the absence of a member as provided here is filled as provided in these bylaws.

ARTICLE VI
SECTION COMMITTEES AND LIAISONS

Section 1. Committees. The section chair has the authority to establish and dissolve committees and liaison positions as the section chair deems necessary or advisable, except for the section legislation committee and the CLE seminar coordination committee. The section chair promptly reports such changes to the executive council, and they are effective until and unless disapproved by the executive council.

Section 2. Section Committee Chairs and Liaisons. Prior to July 1 of each year, after considering the recommendations of the executive committee, the chair-elect makes the following appointments for the coming year:

(a) chairs and vice chairs of the section's real property law division committees;

(b) chairs and vice chairs of the section's probate and trust law division committees;

(c) chairs and vice chairs of the section's general standing committees; and,

(d) section liaisons to other sections and groups.

The section chair has the power to remove chairs and vice chairs of section committees and section liaisons if the section chair believes that it is in the best interest of the section to do so and to fill vacancies in those positions (including vacancies resulting from the section chair's creation of new section committees or liaison positions). As used in these bylaws in reference to section committees, the term "chair" includes co-chairs.

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

Section 4. Section Membership Requirement. No person except an active section member may serve as a:

(a) member of any section committee;

(b) chair, vice chair, or voting member of any section committee; or

(c) section liaison.

Reinstatement as a member of The Florida Bar in good standing and as an active section member automatically reinstates the member to the vacant position if the person's status as an active section member ceases solely because of a Florida Bar member's delinquency in payment of Florida Bar membership fees or violation of continuing legal education requirements, but only if the term of the position has not ended, and if the position has not been filled.

Section 5. Committee Reports. The chair of each section committee must submit a written annual report of the committee's activities during the year to the executive committee by the date requested by the section chair.

ARTICLE VII
MEETINGS

Section 1. Annual/Election Meeting of the Section. The section chair designates the time, date and location in Florida of the annual meeting of the section at which the elections provided by Article IV will occur before July 1 each year.

Section 2. Special Meeting of the Section. The executive council may call special meetings of the section only after 30 days' notice is given to all section members which must include the meeting's purpose.

Section 3. Quorum and Voting by the Section. The active section members in physical attendance at any meeting of the section constitutes a quorum for the transaction of business and a majority vote of those in physical attendance and voting is binding. Voting by proxy is not permitted. However, if a governmental state of emergency has been declared for the section meeting's location or declared for any location that significantly impacts a substantial number of section members' ability to attend the meeting in person, or

if the meeting's venue is no longer reasonably available, then the chair in the chairs' full and complete discretion may issue protocols permitting section members to be present and vote electronically.

Section 4. Executive Council Meetings. There are no fewer than 3 in-state meetings of the executive council each year.

(a) The executive council may act or transact business authorized by these bylaws, without meeting, by written or electronic approval of the majority of its members.

(b) The section chair must give at least 15 days notice to all executive council members to call executive council meetings.

(c) Those present at a meeting of the executive council duly called will constitute a quorum and a majority vote of those present and voting is binding, unless a greater majority is required by these bylaws for a particular matter. Voting by proxy is not permitted.

(d) However, if a governmental state of emergency has been declared for an executive council meeting location or declared for any location that significantly impacts a substantial number of executive council members' ability to attend the meeting in person, or if the meeting's venue is no longer reasonably available, then the chair in the chairs' full and complete discretion may issue protocols permitting executive council members to be present and vote electronically.

Section 5. Executive Committee Meetings. The executive committee meets as directed by the section chair, and holds an organizational meeting prior to each membership year at a time, date, and place selected by the section chair. The section chair fixes the date and location of each meeting and must give written, electronic, or oral notice of its date and location to each executive committee member at least 7 days prior to the meeting. A majority of the executive committee may exercise its powers unless a greater majority is required by these bylaws for a particular matter. The executive committee may take action by mail, e-mail, telephone or other means without a formal meeting. Voting by proxy is not be permitted.

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

ARTICLE VIII
LEGISLATIVE, ADMINISTRATIVE, AND JUDICIAL POSITIONS

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

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

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

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

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

Section 3. Legislation Committee. The section legislation committee consists of a co-chair for real property and a co-chair for probate and trust; a vice chair for real property; a vice chair for probate and trust; the section chair; the chair-elect; the director of the real property law division; the director of the probate and trust law division; and other members of the executive council appointed by the chair of the section legislation committee with the approval of the section chair. The section legislation committee coordinates the legislative activities of the section and acts as a liaison between: (i) the executive council or its executive committee; and (ii) the section lobbyist and legislative and administrative bodies.

Section 4. Procedures for Adopting and Reporting Section Positions.

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

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

(c) To adopt a section position, the executive council must, by a 2/3 vote of the members present and voting: (i) find that the proposal is within the purview of the section, as defined in Section 1 of this article; and (ii) approve the proposal. Voting by

proxy is not permitted. If the executive council cannot meet to adopt a section position prior to the time when legislative, administrative, or judicial action is required, the executive committee may by a 2/3 vote of its members present and voting adopt a section position. Any section position adopted by the executive committee must be reported to the executive council at its next meeting.

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

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

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

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

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

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

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

ARTICLE IX
MISCELLANEOUS

Section 1. Integrity of Section Proceedings - Disclosure of Conflict and Recusal. The section's ability to effectively discharge its mission requires that the procedures it uses and the positions that it adopts are principled and not motivated by personal or professional gain. The section seeks to encourage the input of a wide range of views in order to understand the actual and potential consequences of each of its decisions. All members are welcome to present their views within the debates of the executive council and its committees. However, a member of the executive council or any section committee may not vote on a section matter if circumstances exist that may reasonably be expected to cause that vote to undermine confidence in the integrity of the section, executive council, or section committee. Where any fact or circumstance exists that may reasonably bring an accusation of bias, prejudice, or conflict of interest on the part of a member while participating in a section matter, it is the duty and responsibility of any member having knowledge of the fact or circumstance to make full disclosure of the fact or circumstance to the executive council or section committee. A bias, prejudice, or conflict of interest may

arise from a member's personal interests, employment, or client relationships. When such an issue arises, the chair or other person presiding over the proceeding may request the member to voluntarily refrain from voting with respect to the matter. In addition, recusal may be ordered by 2/3 of the members of the executive council or section committee who are present and voting. On recusal, the member may not vote in proceedings concerning the matter. If recusal should have occurred but did not, the validity of its actions will not be adversely affected.

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

Section 3. Compensation and Expenses. No salary or other compensation may be paid to any member of the section for performance of services to the section, but members of the section may be reimbursed for reasonable and necessary telephone expenses, reproduction expenses and other similar out-of-pocket expenses that the member incurs in the performance of services for the section.

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

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

Section 6. Notice. Any requirement in these bylaws that notice (whether written or otherwise), information, or materials be furnished may be satisfied by:

(a) any method of delivery specified in the requirement;

(b) transmitting the notice, information or materials by e-mail to any e-mail address provided by the recipient to The Florida Bar; or

(c) posting the notice, information, or materials to the section's website and notifying the member of the posting by e-mail to any e-mail address provided by the recipient to The Florida Bar.

Section 7. Effective Date. These bylaws are effective on their adoption by the executive council, or upon their approval by the board of governors, whichever occurs later.

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REAL PROPERTY, PROBATE & TRUST LAW SECTION

THE FLORIDA BAR

www.RPPTL.org

November 9, 2020

Terry L. Hill
Division Director, Programs
The Florida Bar
651 East Jefferson Street
Tallahassee, Florida 32399-2300

Re: Florida Realtor Attorney Joint Committee

Dear Terry:

Thank you for allowing the RPPTL Section to review the applicants for the Florida Realtor Attorney Joint Committee and provide recommendations for the Board of Governors' consideration. The RPPTL Executive Committee's recommendations are as follows:

1st DCA

Colleen C. Sachs. Ms. Sachs has been a member of The Florida Bar since 1992, is an active At-Large Member and Committee Co-Chair of the RPPTL Section. Ms. Sachs serves as a title insurance underwriter and brings that perspective to the Committee. She also serves on the board of directors of the Emerald Coast Real Estate Council. She is an incumbent active member of the Joint Committee and is seeking reappointment.

2nd DCA

John N. Redding. Mr. Redding has been a member of The Florida Bar since 2003, and is an active At-Large Member of the RPPTL Section. Mr. Redding is an experienced real estate attorney in the area of sales, development of commercial real estate, including due diligence prior to purchase, land use, environmental review, as well as title, escrow and closing services for residential transactions. Prior to becoming a lawyer, Mr. Redding was a commercial title examiner. He brings both a transactional and litigation perspective to the committee. He is an incumbent active member on the Joint Committee and is seeking reappointment.

3rd DCA

Roberto F. Fleitas, III. Mr. Fleitas has been a member of The Florida Bar since 2004, is a Board Certified Real Estate Committee member, and is a member of the RPPTL Section. He has an active real estate practice. Mr. Fleitas has served on The Florida Bar's Real Estate Board

Certification committee for the past five years as well as serving as Chair and Vice Chair of that Committee. Mr. Fleitas wants to promote professionalism and develop tools for the realtors to use in their business.

4th DCA

Kristen King Jaiven. Ms. Jaiven has been a member of The Florida Bar since 2013. She is an active Committee Co-Vice Chair of the RPPTL Section. She was previously a staff attorney specializing in commercial real estate transactions and is now General Counsel for the Signature Real Estate Companies. In her role as General Counsel, she supports its real estate brokerage and ancillary businesses, including providing training and support to over 850 real estate agents in the State of Florida. She has experience with completing training programs and developing compliance documents used by real estate trainers.

5th DCA

Patrick T. Christiansen. Mr. Christiansen has been a member of The Florida Bar since 1972, and is an active member and a past Chairman of the RPPTL Section. Mr. Christiansen has served in multiple other Florida Bar committees and has a history of public service. Mr. Christiansen works closely with realtors as a developer and investor and will bring that perspective to the Committee. As a past Chairman of the RPPTL Section and a significant developer of real property throughout central Florida, Mr. Christiansen can work with realtors and understand the issues involved in regard to realtors and attorneys.

We thank you and the Board of Governors for allowing the RPPTL Section the opportunity to provide these recommendations.

Sincerely yours,

William T. Hennessey, III
Chair

The Florida Bar

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Tallahassee, FL 32399-2300

Joshua E. Doyle
Executive Director

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SECTION LEGISLATIVE OR POLITICAL ACTIVITY REQUEST FORM

- This form is for committees, divisions and sections to seek approval for section legislative or political activities.
- Requests for legislative and political activity must be made on this form.
- Political activity is defined in SBP 9.11(c) 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."
- Voluntary bar groups must advise TFB of proposed legislative or political activity and must identify all groups the proposal has been submitted to; if comments have been received, they should be attached. 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: *(list name of section, division, committee, TFB group, or individual name)*

Asset Protection Committee of the RPPTL Section (RPPTL Approval Date: , 2020)

Address: *(address and phone #)* c/o Brian M. Malec - 407-428-5177

420 S. Orange Avenue, Suite 700, Orlando, FL 32801

Position Level: *(TFB section / division / committee)* Real Property, Probate and Trust Law Section

Proposed Advocacy

Complete Section 1 below if the issue is legislative, 2 if the issue is political. Section 3 must be completed.

1. Proposed Wording of Legislative Position for Official Publication

Supports proposed legislation protecting Florida residents from unintentionally assigning, pledging or waiving rights to, assets that otherwise are exempt from legal process under Chapter 222 of the Florida Statutes by implementing clearly defined requirements for waiving the protection of such exemptions.

2. Political Proposal

N/A

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 I - Ensure the Judicial System is Fair, Impartial, Adequately Funded and Open to All
Objective II - Enhance the Legal Profession and the Public's Trust and Confidence in Attorneys and the Justice System

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

_____ Regulation and discipline of attorneys
__X__ Improvement of the functioning of the courts, judicial efficacy, and efficiency
_____ Increasing the availability of legal services to the public
_____ Regulation of lawyer client trust accounts
_____ Education, ethics, competency, integrity and regulation of the legal profession

d. Additional Information: _____

Referrals to Other Committees, Divisions & Sections

The section must provide copies of its proposed legislative or political action to all bar divisions, sections, and committees that may be interested in the issue. SBP 9.50(d). List all divisions, sections, and committees to which the proposal has been provided pursuant to this requirement. Please include with your submission any comments received. **The section may submit its proposal before receiving comments but only after the proposal has been provided to the bar divisions, sections, or committees**. Please feel free to use this form for circulation among the other sections, divisions and committees.

The Business Law Section and Tax Section of The Florida Bar have both reviewed and approved this proposal.

Contacts

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

John C. Moran, Legislative Co-Chair of the RPPTL Section; Gunster Yoakley & Stewart, P.A.,
777 South Flagler Drive Ste 500 East, West Palm Beach, FL 33401
T: (561) 650-0515

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

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

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

Same

Submit this form and attachments to the OGC, jhooks@floridabar.org, (850) 561-5662.

WHITE PAPER

PROTECTION OF FLORIDA RESIDENTS FROM UNINTENTIONALLY ASSIGNING, PLEDGING, OR WAIVING RIGHTS TO ASSETS THAT OTHERWISE ARE EXEMPT FROM LEGAL PROCESS UNDER CHAPTER 222 OF THE FLORIDA STATUTES BY IMPLEMENTING CLEARLY DEFINED REQUIREMENTS FOR WAIVING THE PROTECTION OF SUCH EXEMPTIONS

I. SUMMARY

This legislation protects Florida residents from unintentionally assigning, pledging, or waiving rights to, retirement accounts, annuities, certain life insurance policies and other assets that are exempt from legal process under Chapter 222 of the Florida Statutes by imposing clearly defined requirements for a written agreement to constitute a valid and intentional assignment, pledge, or waiver of such exemptions. Because of the adverse economic impact of Covid-19, it is imperative to protect citizens from unknowing forfeiture of assets and potentially disastrous tax consequences. The bill does not have a fiscal impact on state funds.

II. CURRENT SITUATION

A. Current Florida Statutes

Chapter 222 of the Florida Statutes contains most of the statutory exemptions that protect certain assets from legal process under Florida law. Florida Statutes Section 222.21(2)(a) allows Florida Consumers to claim an exemption from creditors for funds held in individual retirement accounts ("**IRAs**"), 401(k) retirement accounts, and other tax-exempt accounts. Florida Statutes Section 222.14 provides that the cash surrender values of life insurance policies and the proceeds of annuity contracts issued to citizens or residents of the State of Florida are exempt from creditor attachment. Florida Statutes Section 222.22 and Fla. Stat. § 222.25 state that funds held in qualified tuition programs and other qualifying accounts and certain individual property are also protected from creditors.

Under Fla. Stat. § 222.11, wages are exempt from attachment or garnishment unless the Florida Consumer agrees to waive the protection from wage garnishment in a writing complying with the requirements set forth in Fla. Stat. § 222.11(2)(b). Florida Statutes Section 222.11(2)(b) provides that the agreement to waive the protection from wage garnishment must be in writing and be written in the same language as the contract to which the waiver relates, be contained in a separate document attached to the contract, and contain the mandatory waiver language specified in Fla. Stat. § 222.11(2)(b) in at least 14-point type. This writing ensures the Consumer understands they are waiving a statutory exemption.

It has been standard result for any asset which is exempt under Chapter 222 of the Florida Statutes to remain exempt from the reach of creditors, if the exempt asset is not specifically pledged. Long standing public policy of the Florida legislature promotes the financial independence of the retired and elderly by protecting their IRAs and pensions plans with an exemption, thus reducing the need for public financial assistance. This consumer protection built

into the framework of the existing law protecting Florida Consumers from overreaching creditors, unfair transactions, and retirement poverty was recently cast aside in the decision of *Kearney Constr. Co., LLC v. Travelers Cas. & Sur. Co. of Am.*, 2019 WL 5957361 at *3 (11th Cir. 2019). The *Kearney* result flies in the face of the intent of the Florida legislature and the current statutory framework which requires a Florida Consumer to understand and acknowledge any waiver of a statutory exemption under Florida law.

B. Kearney Holding

On October 27, 2011, the United States District Court Middle District of Florida, Tampa Division granted a motion for entry of final judgment in favor of Travelers Casualty & Surety Company of America and against Bing Charles W. Kearney ("**Kearney**") and others in the amount of $3,750,000. Magistrate Judge's Report and Recommendation, Case 8:09-cv-01850-JSM-TBM, Docket 711, at 1-2 (March 17, 2016). On March 1, 2012, Kearney executed a Revolving Line of Credit Promissory Note (the "**Promissory Note**") in favor of Moose Investments of Tampa, LLC ("**Moose Investments**"), which was an entity owned by Kearney's son. Magistrate Judge's Report and Recommendation, Case 8:09-cv-01850-JSM-TBM, Docket 865, at 9 (August 16, 2017). The Promissory Note was collateralized by a security agreement (the "**Security Agreement**"), in which Kearney pledged a security interest in

> **all assets and rights of the Pledgor,** wherever located, whether now owned or hereafter acquired or arising, and all proceeds and products thereof, all good (including inventory, equipment and any accessories thereto), instruments (including promissory notes), documents, accounts, chattel paper, **deposit accounts**, letters of credit, rights, securities and all other **investment property**, supporting obligation, any contract or contract rights or rights to the payment of money, insurance claims, and proceeds, and **general intangibles** (the "Collateral"). *Id.* at 9-10 (emphasis added).

On October 25, 2012, Kearney deposited funds into an IRA at USAmeriBank. *Id.* at 10. On July 23, 2015, the Magistrate Judge granted Travelers' motion for a writ of garnishment directed to USAmeriBank. Magistrate Judge's Report and Recommendation, Docket 711, at 2.

Magistrate Judge McCoun III submitted a Report and Recommendation on March 17, 2016 (Docket 711) and a Report and Recommendation on August 16, 2017 (Docket 865) addressing the numerous summary judgment motions related to the writ of garnishment directed to USAmeriBank. In the Report and Recommendation submitted on August 16, 2017, Magistrate Judge McCoun III issued a recommendation on three summary judgment motions related to determining whether the funds deposited into Kearney's IRA at USAmeriBank lost the exempt status because of Kearney's pledge of collateral in the Security Agreement with Moose Investments. Docket 865, at 7. Kearney argued the funds held in his IRA were exempt from garnishment under Fla. Stat. § 221.21(2). *Id.* at 8. Travelers countered that Kearney pledged the IRA as security to Moose Investments pursuant to the Promissory Note and Security Agreement, and such pledge of the IRA as collateral caused the funds in the IRA to both lose its tax-exempt status and its exempt status from garnishment. *Id.* at 8-9. Kearney responded that the Promissory

Note and Security Agreement did not specify the IRA was intended to be pledged as a "deposit account" as part of the collateral under the Security Agreement. *Id.* at 22- 23.

The Magistrate Judge determined that Kearney pledged all of his assets and rights in the Security Agreement securing the Promissory Note. *Id.* at 22. Thus, the funds held in Kearney's IRA lost their tax-exempt status and were not protected by Fla. Stat. § 221.21(2) or any other statutory exemption. *Id.* at 29. In arriving at this conclusion, the Magistrate Judge determined the language of the Security Agreement was "clear, unambiguous, and without exception." *Id.* at 26. Although Kearney's IRA was not specifically identified as part of the collateral, the Magistrate Judge noted that the broad language of the Security Agreement "encompassed potential retirement accounts or funds, such as the [IRA] at issue here." *Id.* at 28. The Magistrate Judge did not identify the collateral category in the Security Agreement that purportedly covered the IRA. The Magistrate Judge did not explain whether the IRA was a "deposit account," "investment property," a "general intangible," or something else. Furthermore, the Magistrate Judge did not reference Fla. Stat. § 679.1081(3), which provides that a description of collateral as "all the debtor's assets" or "all the debtor's personal property" or using words of similar import does not reasonably identify the collateral for purposes of the security agreement. Such general descriptions are legally inadequate to create a lien. The Magistrate Judge did not cite any Florida case law or the Florida Statutes in support of the Magistrate Judge's position that a pledge of IRA funds causes such funds to lose their creditor exempt status in Florida. In fact, the Magistrate Judge only cited cases from the United States Bankruptcy Court for the Southern District of Ohio and the Eastern District Court of Virginia to support the conclusion. *Id.* at 21-22 (citing *In re Roberts*, 326 B.R. 424, 426 (Bankr. S.D. Ohio 2004), and *XL Specialty Ins. Co. v. Truland*, 2015 WL 2195181, at *11–13 (E.D. Va., May 11, 2015)).

The United States District Court Middle District of Florida, Tampa Division adopted, confirmed, and approved in all respects the Reports and Recommendations submitted by Magistrate Judge McCoun III in Docket 711 and Docket 865. *Kearney Construction Company, LLC v. Travelers Casualty & Surety Company of America*, 2016 WL 1394372 at *1; *Kearney Construction Company, LLC v. Travelers Casualty & Surety Company of America*, 2017 WL 4244390 at *1. In 2019, the United States Court of Appeals for the Eleventh Circuit reexamined whether Kearney pledged his IRA as collateral under the Security Agreement. *Kearney Constr. Co., LLC v. Travelers Cas. & Sur. Co. of Am.*, 2019 WL 5957361 at *1 (11th Cir. 2019). The Eleventh Circuit agreed with the United States District Court Middle District of Florida, Tampa Division, and determined the language in the Security Agreement "constitutes an unambiguous pledge of 'all assets and rights of the Pledgor,' including his IRA Account . . . ." *Id.* at *2. The Eleventh Circuit concluded the District Court properly held the IRA was pledged as security for Kearney's loan with Moose Investments and "therefore was not exempt under § 222.21." *Id.* at *3. As with the Magistrate Judge, the Eleventh Circuit did not identify the collateral category in the Security Agreement that purportedly covered the IRA and did not reference how Fla. Stat. § 679.1081(3) provides that general descriptions of collateral are legally inadequate to create a valid lien.

As discussed in Footnote 7, the Eleventh Circuit rejected Kearney's argument that the IRA was protected by Fla. Stat. §§ 222.21(2)(a) 1 and 2 even if it was determined that the IRA was pledged under the Security Agreement. *Id.* at *2, n.7. The Eleventh Circuit asserted Fla. Stat. §

222.21(2)(a)(1) can be applied only if the Internal Revenue Service ("**IRS**") "pre-approved" the IRA as exempt from taxation. *Id.* The Eleventh Circuit also stated Fla. Stat. § 222.21(2)(a)(2) can be applied only if the IRS has "determined" an IRA is exempt from taxation. *Id.* The Eleventh Circuit concluded Kearney provided no evidence the IRS "pre-approved" Kearney's IRA as exempt from taxation, or that the IRS made a "determination" that Kearney's IRA was exempt from taxation. *Id.* Since Kearney had the burden of proving such "pre-approval" or "determination," the Eleventh Circuit concluded the funds held in Kearney's IRA lost their tax-exempt status and were not protected by Fla. Stat. § 221.21(2) or any other statutory exemption. *Id.* Although there is a procedure for obtaining a determination letter from the IRS for a qualified plan, employers who sponsor retirement plans are generally not required to apply for a determination letter from the IRS. Furthermore, effective January 1, 2017, Revenue Procedure 2016-37 provides the limited circumstances under which plan sponsors may submit determination letter applications to the IRS. In general, a sponsor of an individually designed plan may submit a determination letter application only for initial plan qualification and for qualification upon plan termination. Thus, the custodians of IRAs rarely seek determination of tax-exempt status from the IRS. Furthermore, it is both absurd and impossible to require all Florida Consumers owning IRAs to obtain the IRS's approval regarding the status of their IRAs as exempt in order to be protected by Florida's statutory exemption.

C. Issues Resulting from Kearney Holding

Chapter 222 of the Florida Statutes contains most of the statutory exemptions that protect certain assets from legal process under Florida law. The Magistrate Judge, the District Court, and the Eleventh Circuit concluded that Kearney forfeited the exempt status of the funds held in the IRA by pledging the funds as collateral because the Security Agreement provided Kearney pledged all of his "assets and rights." In arriving at this conclusion, the three courts ignored Fla. Stat. § 679.1081(3), which provides that a description of collateral as "all the debtor's assets" or words of similar import does not reasonably identify the collateral for purposes of the security agreement. Such general descriptions are legally inadequate to create a lien. Historically, when an individual signs a general pledge of "all assets" in a security agreement, a creditor can only recover those assets specifically pledged to the creditor in such agreement. The Security Agreement did not specifically identify the IRA as part of the collateral. It has been standard practice for any asset which is exempt under Chapter 222 of the Florida Statutes to remain exempt from the reach of creditors, if the exempt asset is not specifically pledged. The three courts did not identify the collateral category in the Security Agreement that purportedly covered the IRA, and never explained whether the IRA was a "deposit account," "investment property," a "general intangible," or something else.

The three Florida courts did not cite any Florida case law or relevant statute in the Florida Statutes to support the conclusion that Kearney waived his exemption from creditors for funds held in the IRA by signing the Security Agreement containing a broadly worded security interest provision. The Magistrate Judge cited cases from the United States Bankruptcy Court for the Southern District of Ohio and the Eastern District Court of Virginia to support the conclusion that a pledge of IRA funds causes such funds to lose their creditor exempt status. However, those cases were not decided under Florida law, are not binding on a Florida court, and rest in jurisdictions that do not necessarily have state law creditor exemptions similar to Florida for IRAs.

The Eleventh Circuit, in the *Kearney* decision, without citing any Florida case law supporting its conclusion:

- blind-sides millions of Florida Consumers by rendering moot numerous statutory exemptions from creditors under Florida law for anyone who has signed a contract containing a blanket security interest provision that includes deposit accounts, general intangibles, and/or investment property;
- causes citizens to unintentionally remove the exempt protection they have from their IRAs and qualified retirement plans which may cause them to become so destitute they must become wards of the state;
- creates a toxic environment for business because all business loans requiring a general pledge of assets would force business owners to give their creditors total access to their retirement savings, children's college funds, life insurance cash surrender values and coin collections as collateral; and
- potentially triggers a ruinous immediate financial result for Florida Consumers by causing the loss of the pledged amount of a Consumer's IRAs and qualified retirement plans, plus up to 40% of the full value to taxes and penalties upon making a general pledge of assets.

1. Forfeiture of Exempt Status for Pledged Assets: Chapter 222 of the Florida Statutes contains most of the statutory exemptions that protect certain assets from legal process under Florida law. For example, Fla. Stat. § 222.21(2)(a) allows Florida Consumers to claim an exemption from creditors for funds held in IRAs, 401(k) retirement accounts, and other tax-exempt accounts. Florida Consumers have long operated under the belief any asset which is exempt under Chapter 222 of the Florida Statutes is exempt from the reach of creditors unless such exempt asset is specifically pledged in a security agreement. The Magistrate Judge, the District Court, and the Eleventh Circuit cast aside this widely held belief in concluding that Kearney forfeited the exempt status of the funds held in the IRA by pledging the funds as collateral because the Security Agreement provided Kearney pledged all of his "assets and rights." In arriving at this conclusion, the three courts ignored Fla. Stat. § 679.1081(3), which provides that a description of collateral as "all the debtor's assets" or words of similar import does not reasonably identify the collateral for purposes of the security agreement. Such general descriptions are legally inadequate to create a lien. Furthermore, the Security Agreement at issue in *Kearney* did not specifically identify Kearney's IRA as part of the collateral. The three courts did not identify the collateral category in the Security Agreement that purportedly covered the IRA, and never explained whether the IRA was a "deposit account," "investment property," a "general intangible," or something else. A long standing public policy of the Florida legislature is the promotion of the financial independence of the retired and elderly through the protection of their IRAs and pensions plans with an exemption, thus reducing the need for public financial assistance. However, the *Kearney* decision may result in Florida Consumers unintentionally removing the exempt protection they have from their IRAs and qualified retirement plans, which could then cause them to become so destitute they must become wards of the state.

2. Application of *Kearney* Decision Beyond IRAs: The *Kearney* decision creates a dangerous precedent by permitting funds held in an IRA or other qualified plans to be garnished by creditors without a Consumer making an express and knowing waiver of the Fla. Stat. §

222.21(2)(a) exemption. The holding in *Kearney* appears to be in contravention with the intent of the Florida legislature to protect the assets of IRAs and pension plans from creditors. *See Dunn v. Doskocz*, 590 So. 2d 521, 522, n.2 (Fla. Dist. Ct. App. 1991) ("It appears the legislature has made the policy decision that it should protect the assets of IRA's and pension plans, thereby promoting the financial independence of IRA and pension plan beneficiaries in their retirement years—in turn reducing the incidence and amount of requests for public financial assistance"). The ripple effects of the *Kearney* decision go beyond the loss of the statutory exemption for funds held in IRAs or other qualified retirement plans. In *Kearney*, the Eleventh Circuit only examined whether Kearney waived the statutory exemption for his IRA. However, the *Kearney* holding is not necessarily limited to the waiver of the statutory exemption for IRAs. The *Kearney* decision can be used by creditors to pursue other purportedly exempt assets. *Kearney* potentially renders moot numerous statutory exemptions from creditors under Florida law for anyone who has signed a contract containing a broadly worded security interest provision that includes a general reference to deposit accounts, general intangibles, and/or investment property. For example, funds in other tax-exempt accounts protected under Fla. Stat. § 222.21(2)(a), such as 401(k) retirement accounts, are potentially vulnerable to creditors. Since the Eleventh Circuit did not identify which collateral category in the Security Agreement covered the IRA in *Kearney*, it is not unreasonable to believe that the cash surrender values of life insurance policies and the proceeds of annuity contracts protected under Fla. Stat. § 222.14 could be classified as "deposit accounts" or "investment property" in a different security agreement, and thus, potentially accessible to creditors. A similar analysis applies to other assets exempt under Chapter 222, such as funds held in qualified tuition programs and other qualifying accounts and certain individual property currently protected by Fla. Stat. § 222.22 and Fla. Stat. § 222.25, respectively.

3. Creates a toxic environment for new business: Mortgages, credit card applications, home equity line of credit agreements, security agreements, financing statements, and personal guarantees on business loans are only a few examples of documents that typically include a general pledge of assets as collateral similar to the provision at issue in *Kearney*. Millions of Florida Consumers are parties to at least one (if not more) of these contracts secured by their assets, which may now, unbeknownst to them, include a pledge of their exempt assets. The *Kearney* holding creates a toxic environment for business because almost all business loans require a general pledge of assets, which forces business owners to unknowingly give their creditors total access to their retirement savings, children's college funds, life insurance cash surrender values, and coin collections as collateral.

4. Triggers early distribution taxes and penalties of up to 40%: The tax result of the *Kearney* decision makes it even worse. Under federal law, if an IRA owner uses the account or any portion of such account as security for a loan, the portion used as security is deemed distributed to the owner. IRC § 408(e)(4). The IRA owner is required to include any amount paid or distributed out of the IRA in gross income and to pay federal income taxes on such gross income. IRC § 408(d)(1). The same federal income tax results will occur if a Consumer pledges an interest in a qualified employer plan. Pursuant to § 72(p)(1)(B) of the Code, if a Consumer "pledges (or agrees to pledge) any portion of his interest in a qualified employer plan, such portion shall be treated as having been received by such individual as a loan from such plan." IRC § 72(p)(1)(B). A loan from a qualified employer plan is treated as being received as a deemed distribution for purposes of § 72. IRC § 72(p)(1). Additionally, the Code imposes penalties depending on when the deemed

distribution from an IRA or qualified employer plan is made. Like an actual distribution, a deemed distribution is subject to the 10% additional tax on certain early distributions under § 72(t). Treas. Reg. § 1.72(p)-1, Q&A 11(b). For example, if a Consumer is under the age of 59 ½ and not disabled, the deemed distribution under § 408(e)(4) is also subject to the 10% penalty tax under § 72(t). IRC § 72(t).

The *Kearney* holding generates a calamitous financial result for Florida Consumers. If a Consumer signs a document containing a broadly worded security interest provision that includes a general reference to deposit accounts, general intangibles, and/or investment property, that Consumer, under *Kearney*, has arguably pledged the entirety of all such funds owned in an IRA, as well as their other exempt assets, such as cash surrender values of life insurance policies and the proceeds of annuity contracts. If a Consumer pledges an IRA, potentially the entirety of the pledged funds held in the IRA will be treated as a loan to the Consumer and thus taxable as a deemed distribution. If a creditor can garnish the funds held in an IRA, the debtor Consumer would, in addition to losing the pledged funds, be required to pay federal income taxes on all of the funds along with possibly the additional tax penalty for making an early distribution of the IRA!

D. Legislative Fix Needed

The Eleventh Circuit, without citing any Florida case law supporting its conclusion, potentially rendered moot numerous statutory exemptions from creditors contained in Chapter 222 of the Florida Statutes for any Florida Consumer who has signed any contract containing a blanket security interest provision that includes deposit accounts, general intangibles, and/or investment property. The *Kearney* result flies in the face of the current statutory framework requiring a Consumer to be made aware of, understand, and acknowledge that such Consumer is waiving a statutory exemption under Florida law. In light of the serious issues resulting from the *Kearney* holding, Chapter 222 requires a legislative fix. In the absence of legislative action, a Consumer, by signing a document containing a broadly worded security interest provision, unknowingly places their IRA, pension plan, annuity, life insurance contract, or personal property at risk of forfeiture and confiscatory taxation. Because of the protection afforded to the ownership of homestead property under Article X Section 4 of the Florida Constitution as well as the Florida Supreme Court's holding in *Havoco of America, Ltd. V. Hill, 790 So. 2d 1018 (Fla. 2001)* and its prodigy, no change is necessary with respect to the exemption related to homestead property. The proposed legislative changes described in Section III below therefore are not intended to apply to, or alter the existing protections afforded to, homestead property in any manner.

III. EFFECT OF PROPOSED CHANGES

Florida Statutes Section 222.105

Current Situation: In Fla. Stat. § 222.11(2)(b), for a Consumer to waive protection from wage garnishment, the Consumer must consent to garnishment of such Consumer's wages in writing. This written waiver document must be written in the same language as the contract to which the waiver relates, be contained in a separate document attached to the contract, and contain the mandatory waiver language specified in Fla. Stat. § 222.11(2)(b) in at least 14-point type. Pursuant

to Fla. Stat. § 732.702, a surviving spouse can waive his or her homestead rights by a written contract, agreement, or waiver, signed by two subscribing witnesses, that contains a waiver of "all rights," or equivalent language in the homestead property. There is currently no law in the Florida Statutes that discusses when and how a Consumer can waive the statutory exemptions from garnishment set forth in Fla. Stat. § 222.13, Fla. Stat. § 222.14, Fla. Stat. § 222.18, Fla. Stat. § 222.21, Fla. Stat. § 222.22, and Fla. Stat. § 222.25.

Effect of Proposed Changes: The Committee proposes the insertion of proposed Fla. Stat. § 222.105, which will clarify a Consumer can only waive the exemption from garnishment for funds held in an IRA or other qualified retirement account (Fla. Stat. § 222.21), funds held in qualified tuition programs and other qualified accounts (Fla. Stat. § 222.22), proceeds from an annuity or life insurance contract (Fla. Stat. § 222.14), proceeds of life insurance (Fla. Stat. § 222.13), benefits under disability insurance (Fla. Stat. § 222.18), and individual property exempt from the legal process (Fla. Stat. § 222.25) by making an express and knowing waiver in a writing containing similar terms to those set forth in Fla. Stat. § 222.11(2)(b). The proposed legislation protects Florida residents from unintentionally assigning, pledging, or waiving rights to, assets that otherwise are exempt from legal process under Chapter 222 of the Florida Statutes by imposing clearly defined requirements for a written agreement to constitute a valid and intentional assignment, pledge, or waiver of such exemptions. A general pledge of assets should not allow a creditor to attach to those assets otherwise exempt under Florida law without a waiver in writing specifying the specific exempt asset being pledged. This writing ensures the Consumer understands they are waiving the exemptions from garnishment.

The written waiver in proposed Fla. Stat. § 222.105 must specifically reference the accounts or contracts in which the Consumer is waiving the exemption. In the case of an individual retirement or other qualified retirement identified in Fla. Stat. § 222.21 or a qualified tuition program or other qualified account specified in Fla. Stat. § 222.22, the waiver should identify the custodian of the account as well as the last four digits of the corresponding account number. In the case of an annuity or life insurance contract as identified under Fla. Stat. § 222.14 or Fla. Stat. §222.13, the waiver should identify the name of the issuer or insurer and the last four digits of the annuity or policy number. In the case of other individual property specified in Fla. Stat. § 222.25, the waiver should make a specific reference to the individual property. The proposed Fla. Stat. § 222.105 includes Fla. Stat. § 222.25 within its purview because the general pledge language in *Kearney* included "goods" as part of the collateral.

The written waiver must also contain language in at least 14-point type in capital letters notifying the Consumer that pledging an exempt asset causes the Consumer to forfeit their statutory rights and may cause adverse income tax consequences. The Consumer must initial two paragraphs, fill in the requested information for an exempt asset, and sign the waiver in order to effectively waive the protection for such exemptions included in the waiver. The proposed Fla. Stat. § 222.105 ensures a Consumer has sufficient notice and understanding regarding the decision to waive their right to the statutory exemptions from garnishment under Florida law.

Florida Statutes Section 222.11

Current Situation. As described in great detail above, Fla. Stat. § 222.11 sets forth explicit detail

both protecting Florida residents from uninformed garnishment of their wages and the process for waiving such exemption. Although Fla. Stat. 222.105 generally applies to all exempt assets under Chapter 222, it is not intended to change the specific disclosures that must be contained in a separate agreement waiving the protection for wages under Fla. Stat. 222.11(2)(b). Slight technical adjustments have been proposed to the separate agreement disclosures under section 222.11(2)(b) however in order to make it more consistent with the disclosures in Fla. Stat. 222.105.

As it is currently proposed, new Fla. Stat. § 222.105 would be effective prospectively upon becoming law.

IV. FISCAL IMPACT ON STATE AND LOCAL GOVERNMENTS

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

V. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR

Millions of Florida Consumers are parties to at least one (if not more) contracts secured by their assets, which may now, unbeknownst to them, include a pledge of their exempt assets. Today, especially given the devastating economic hardships caused by Covid-19, citizens of the state of Florida have but few assets which they can rely upon for a modicum of financial security. The proposed Fla. Stat. § 222.105 protects Florida residents from unintentionally assigning, pledging, or waiving rights to, assets that otherwise are exempt from legal process under Chapter 222 of the Florida Statutes by imposing clearly defined requirements for a written agreement to constitute a valid and intentional assignment, pledge, or waiver of such exemptions. Without having a Consumer sign a written waiver waiving their statutory exemptions, the *Kearney* decision unknowingly places a Consumer's IRA, pension plan, annuity, life insurance contract, or personal property at risk of forfeiture and confiscatory taxation. For example, if a Consumer pledges the funds held in an IRA, the portion used as security is deemed distributed to the Consumer. The Consumer must pay federal income taxes on this deemed distribution. The Consumer may also be required to pay a 10% additional tax for making an early distribution of the IRA. This proposal saves Florida Consumers from unknowingly losing the pledged funds and incurring federal income taxes on the total balance of the pledged funds.

VI. CONSTITUTIONAL ISSUES

There are no constitutional issues that may arise as a result of the proposal.

VII. OTHER INTERESTED PARTIES

Tax Section of The Florida Bar
Name: D' Michael O'Leary, Chair
Contact Information: 101 E. Kennedy Boulevard, Ste. 2700, Tampa, FL 33602; (813) 227-7454; MOLeary@trenam.com
Support, Oppose or No Position: Support

Business Law Section of The Florida Bar
Name: Aimee Diaz Lyon
Contact Information: 119 S. Monroe Street, Ste. 200, Tallahassee, FL 32301; (850) 205-9000; ADL@mhdfirm.com
Support, Oppose or No Position: Support

Florida Bankers Association
Name: Kenneth D. Pratt
Contact Information: 1001 Thomasville Road, Ste. 201, Tallahassee, FL 32303; (850) 701-3517; kpratt@floridabankers.com
Support, Oppose or No Position: Oppose

A bill to be entitled

An act relating to protection of Florida residents from unintentionally assigning, pledging, or waiving rights to assets that are otherwise exempt from legal process; creating s. 222.105, Florida Statutes to provide requirement for specific waivers of exemptions; amending s. 222.11, Florida Statutes to make the warning consistent with s. 222.105; providing an effective date.

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

Section 1. Section 222.105, Florida Statutes, is created to read:

222.105 – Requirement for specific waivers of exemptions.

(1) The exemptions set forth in Florida Statutes Chapter 222 cannot be waived unless the person who is entitled to such exemption has specifically agreed otherwise in a writing described in this section or, with respect to exemption of earnings, in Section 222.11. References in a writing purporting to pledge or encumber all of a person's "assets and rights, wherever located, whether now owned or after acquired, and all proceeds thereof", or words of similar import, are insufficient to pledge or encumber assets which are exempt under Chapter 222 or to waive the protections afforded to such person by Chapter 222.

(2) Any agreement to pledge assets which are exempt under Chapter 222 or to waive protections provided by Chapter 222 must:

(a) Be written in the same language as the contract or agreement to which the waiver relates;

(b) Be a separate document from the contract or agreement to which the waiver relates;

(c) In the case of an account described in Sections 222.21 or 222.22, refer to the name of the custodian of the account and the last four digits of the account number;

(d) In the case of an annuity contract or life insurance policy described in Section 222.14, or the proceeds of life insurance described in Section 222.13, or benefits under disability insurance described in Section 222.18, refer to the name of the issuer or insurer and the last four digits of the annuity or policy number;

(e) In the case of other property described in Section 222.25, refer specifically to the property; and

(f) Contain the following language in at least 14-point type in capital letters stating:

WARNING – BY SIGNING THIS DOCUMENT YOU ARE PLEDGING YOUR EXEMPT ASSETS OR WAIVING YOUR RIGHT TO PROTECT YOUR EXEMPT ASSETS FROM ATTACHMENT, GARNISHMENT OR OTHER LEGAL PROCESS IN FAVOR OF YOUR CREDITOR. THIS WILL CAUSE YOU TO FORFEIT YOUR STATUTORY RIGHTS AND MAY CAUSE ADVERSE INCOME TAX CONSEQUENCES – PLEASE CONSULT YOUR ATTORNEY OR TAX ADVISOR BEFORE SIGNING THIS FORM.

FLORIDA LAW PROVIDES THAT YOUR RETIREMENT AND OTHER ACCOUNTS DESCRIBED IN FLORIDA STATUTES SECTIONS 222.21 AND 222.22, ANNUITY CONTRACTS AND THE CASH SURRENDER VALUE OF LIFE INSURANCE POLICIES DESCRIBED IN FLORIDA STATUTES SECTION 222.14, THE PROCEEDS OF LIFE INSURANCE DESCRIBED IN SECTION 222.13, THE BENEFITS UNDER DISABILITY INSURANCE DESCRIBED IN SECTION 222.18, AND CERTAIN PERSONAL PROPERTY DESCRIBED IN FLORIDA STATUTES SECTION 222.25 ARE EXEMPT FROM ATTACHMENT, GARNISHMENT OR OTHER LEGAL PROCESS IN FAVOR OF YOUR CREDITORS. Initial _____

ADDITIONALLY, THE PLEDGE OF YOUR RETIREMENT AND OTHER ACCOUNTS DESCRIBED IN FLORIDA STATUTES SECTIONS 222.21 AND 222.22, ANNUITY CONTRACTS AND THE CASH SURRENDER VALUE OF LIFE INSURANCE POLICIES DESCRIBED IN FLORIDA STATUTES SECTION 222.14 MAY CAUSE IMMEDIATE FEDERAL (AND STATE, IF APPLICABLE) INCOME TAX CONSEQUENCES AND PENALTIES IN ADDITION TO SURRENDER CHARGES UNDER CERTAIN LIFE INSURANCE POLICIES AND ANNUITY CONTRACTS. **YOU ARE ADVISED TO SEEK THE ADVICE OF YOUR ATTORNEY OR TAX ADVISOR PRIOR TO SIGNING BELOW.** Initial _____

YOU CAN WAIVE THIS PROTECTION ONLY BY SIGNING THIS DOCUMENT. DO NOT SIGN A BLANK DOCUMENT. BY IDENTIFYING AN

EXEMPT ASSET AND SIGNING BELOW, YOU AGREE TO WAIVE THE PROTECTION AS TO THAT EXEMPT ASSET (CIRCLE ALL APPLICABLE AND COMPLETE ALL REQUIRED INFORMATION, OR WRITE "NOT APPLICABLE"):

RETIREMENT AND OTHER ACCOUNTS DESCRIBED IN SECTION 222.21 OR SECTION 222.22

NAME OF CUSTODIAN: _____

LAST FOUR DIGITS OF ACCOUNT NUMBER(S): _____

OBLIGOR'S SIGNATURE: _____ DATE: _____

ANNUITY CONTRACT DESCRIBED IN SECTION 222.14

NAME OF ISSUER OF ANNUITY CONTRACT: _____

LAST FOUR DIGITS OF CONTRACT NUMBER(S): _____

OBLIGOR'S SIGNATURE: _____ DATE: _____

LIFE INSURANCE POLICY DESCRIBED IN SECTION 222.14 (OR PROCEEDS DESCRIBED IN SECTION 222.13)

NAME OF LIFE INSURANCE COMPANY: _____

LAST FOUR DIGITS OF POLICY NUMBER(S): _____

OBLIGOR'S SIGNATURE: _____ DATE: _____

DISABILITY INSURANCE BENEFITS DESCRIBED IN SECTION 222.18

NAME OF INSURANCE COMPANY: _____

LAST FOUR DIGITS OF POLICY NUMBER(S): _____

OBLIGOR'S SIGNATURE: _____ DATE: _____

PERSONAL PROPERTY DESCRIBED IN SECTION 222.25

LIST OF PROPERTY: _____

OBLIGOR'S SIGNATURE: _____ DATE: _____

(obligor's Signature) (Date Signed)

I have given a copy of this signed document to the obligor, and have requested that the obligor review it before signing it. The document was completed with the requisite information for every exempt asset category above, or the words "not applicable" written in the blank for the exempt asset category before the obligor signed the document.

(Creditor's Signature) (Date Signed)

(3) Notwithstanding anything in this Section 222.105 to the contrary, an exemption of earnings may only be waived pursuant to the requirements of Section 222.11.

Section 2. Section 222.11, Florida Statutes, is amended to read:

222.11 Exemption of wages from garnishment.—

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

(a) "Earnings" includes compensation paid or payable, in money of a sum certain, for personal services or labor whether denominated as wages, salary, commission, or bonus.

(b) "Disposable earnings" means that part of the earnings of any head of family remaining after the

deduction from those earnings of any amounts required by law to be withheld.

(c) "Head of family" includes any natural person who is providing more than one-half of the support for a child or other dependent.

(2)(a) All of the disposable earnings of a head of family whose disposable earnings are less than or equal to $750 a week are exempt from attachment or garnishment.

(b) Disposable earnings of a head of a family, which are greater than $750 a week, may not be attached or garnished unless such person has agreed otherwise in writing. The agreement to waive the protection provided by this paragraph must:

1. Be written in the same language as the contract or agreement to which the waiver relates;

2. Be contained in a separate document attached to the contract or agreement; and

3. Be in substantially the following form in at least 14-point type:

WARNING – BY SIGNING THIS DOCUMENT YOU ARE WAIVING YOUR RIGHT TO PROTECT YOUR EXEMPT EARNINGS FROM GARNISHMENT - SIGNING THIS DOCUMENT WILL CAUSE YOU TO

FORFEIT YOUR STATUTORY RIGHTS. PLEASE CONSULT YOUR ATTORNEY BEFORE SIGNING THIS FORM.

IF YOU PROVIDE MORE THAN ONE-HALF OF THE SUPPORT FOR A CHILD OR OTHER DEPENDENT ALL OR PART OF YOUR ~~INCOME~~ EARNINGS IS EXEMPT FROM GARNISHMENT UNDER FLORIDA LAW. YOU CAN WAIVE THIS PROTECTION ONLY BY SIGNING THIS DOCUMENT. WAIVING YOUR PROTECTION FROM GARNISHMENT MEANS THAT YOUR CREDITORS CAN TAKE YOUR EARNINGS AND APPLY YOUR EARNINGS TO PAY YOUR DEBT. BY SIGNING BELOW, YOU AGREE TO WAIVE THE PROTECTION FROM GARNISHMENT.

(~~Consumer~~Obligor's Signature) (Date Signed)

I have ~~fully explained this document to the consumer obligor~~ have given a copy of this signed document to the obligor, and have requested that the obligor review it before signing it.

(Creditor's Signature) (Date Signed)

The amount attached or garnished may not exceed the amount allowed under the Consumer Credit Protection Act, 15 U.S.C. s. 1673.

(c) Disposable earnings of a person other than a head of family may not be attached or garnished in excess of the

amount allowed under the Consumer Credit Protection Act, 15 U.S.C. s. 1673.

(3) Earnings that are exempt under subsection (2) and are credited or deposited in any financial institution are exempt from attachment or garnishment for 6 months after the earnings are received by the financial institution if the funds can be traced and properly identified as earnings. Commingling of earnings with other funds does not by itself defeat the ability of a head of family to trace earnings.

Section 3. This act shall take effect upon becoming law.

RPPTL 2020-2021
Executive Council Meeting Schedule
Bill Hennessey's Year

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

Date	Location
~~**July 23 – July 26, 2020 –**~~ ~~**Now – August 17 – 23, 2020**~~	**Executive Council Meeting & Legislative Update – NOW VIRTUAL MEETING** ~~The Breakers~~ ~~Palm Beach, Florida~~ ~~Room Rate (Deluxe Room – King): $239~~ ~~Premium Room Rate: $290~~
~~**September 30 – October 4, 2020**~~	~~**Out of State Executive Council Meeting**~~ ~~Four Seasons Resort~~ ~~Jackson Hole, WY~~ ~~Standard Guest Room Rate: $395 (single/double)~~
December 3 – December 6, 2020	**Executive Council & Committee Meetings** Disney's Yacht Club Orlando, FL Standard Guest Room Rate: $289 ($25 pp for each person over 18 years old)
February 4 – February 7, 2021	**Executive Council & Committee Meetings** Hammock Beach Resort Palm Coast, FL Standard Guest Room Rate: $289 (single/double)
June 3 – June 6, 2021	**Executive Council Meeting & Convention** JW Marriott Marco Island, FL Standard Guest Room Rate: $245 (single/double)

*Subject to availability

RPPTL Budget Summary

TO DATE REPORT

General Budget	YTD
Revenue	$ 1,338,795
Expenses	$ 582,607
Net:	$ 756,188

Attorney Bankers Conf.	YTD
Revenue	$ (600)
Expenses	$ 109
Net:	$ (709)

CLI	YTD
Revenue	$ 11,800
Expenses	$ 1,920
Net:	$ 9,880

Trust Officer Conference	
Revenue	$ 26,000
Expenses	$ (295)
Net:	$ 26,295

Legislative Update	
Revenue	$ 12,996
Expenses	$ 4,529
Net:	$ 8,467

Convention	
Revenue	$ (2,714)
Expenses	$ (178)
Net:	$ (2,536)

Roll-up Summary (Total)		
Revenue:		$ 1,386,277
Expenses		$ 588,692
Net Operations		$ 797,585

Beginning Fund Balance:	$ 2,339,334
Current Fund Balance (YTD):	$ 3,136,919
Projected June 2021 Fund Balance	$ 2,123,769

1 This report is based on the tentative unaudited detail statement of operations dated 9/30/20 (prepared 10/19/20)

Proposed Budget 21- 22
Real Property Probate Trust Law Section

Account	17-18 Actuals	18-19 Actuals	19-20 Actuals	20-21 Budget	21-22 Budget
SUMMARY					
Beginning Fund Balance	$1,684,323	$ 1,823,263	$ 2,136,908	$ 2,339,334	2,118,383
Net Operations *	(4,779)	203,254	(9,239)	(222,876)	(301,654)
Legislative Update	(23,622)	(42,185)	(24,263)	(71,250)	(71,250)
Convention	(81,136)	(35,940)	2,726	(121,900)	(148,900)
Attorney Trust Officer	135,203	110,402	94,657	83,500	83,500
CLI**	125,911	110,992	136,540	114,525	114,525
Attorney Loan Officer	(11,935)	(28,400)	2,006	(2,950)	(2,950)
Ending Fund Balance #	$1,823,965	2,141,386	$ 2,339,335	$ 2,118,383	$1,791,654
Net Operations *	139,642	318,123	$ 202,427	$ (220,951)	$ (326,729)

Roll Up

General	Budget
Revenue	$ 1,333,200
Expenses	$ (1,634,854)
Net	$ (301,654)

ALO	Budget
Revenue	$ 24,000
Expenses	$ (26,950)
Net	$ (2,950)

CLI	Budget
Revenue	$ 298,300
Expenses	$ (183,775)
Net	$ 114,525

Legislative Update	Budget
Revenue	$ 14,000
Expenses	$ (85,250)
Net	$ (71,250)

ATO	Budget
Revenue	$ 296,000
Expenses	$ (212,500)
Net	$ 83,500

Convention	Budget
Revenue	$ 70,000
Expenses	$ (218,900)
Net	$ (148,900)

Rollup Summary	Budget
Revenue	$ 2,035,500
Expenses	$ (2,362,229)
Net Operations	$ (326,729)
Budgeted 2020-21 Fund Balance	$ 2,118,383
Estimated Ending Fund Balance for 2021-22 based on Current Budget	$ 1,791,654

THE FLORIDA BAR
Real Property, Probate and Trust Law General
Budget 2021-2022

	2017-18 Actual	2018-19 Actual	2019-20 Actual	2020-21 Budget	2021-22 Budget
3001-Annual Fees	$616,160	$626,460	633,200	600,000	625,200
3002-Affiliate Fees	7,440	8,680	9,760	5,000	5,000
Total Fee Revenue	**623,600**	**635,140**	**642,960**	**605,000**	**630,200**
3301-Registration-Live	169,726	180,582	171,961	220,000	180,000
3331-Registration-Ticket					
Total Registration Revenue	**169,726**	**180,582**	**171,961**	**220,000**	**180,000**
3351-Sponsorships	211,750	237,476	225,875	180,000	180,000
3391 Section Profit Split	226,705	276,501	336,907	286,924	250,000
3392-Section Differential	27,480	25,440	15,463	25,000	25,000
Other Event Revenue	**465,935**	**539,417**	**578,245**	**491,924**	**455,000**
3561-Advertising	16,560	18,117	20,466	12,000	18,000
Advertising & Subscription Revenue	**16,560**	**18,117**	**20,466**	**12,000**	**18,000**
3899-Investment Allocation	112,048	100,919	-29,830	50,000	50,000
Non-Operating Income	**112,048**	**100,919**	**-29,830**	**50,000**	**50,000**
Total Revenue	**1,387,869**	**1,474,175**	**1,383,802**	**1,378,924**	**1,333,200**
4131-Telephone Expense	535	1,321	1,539	2,000	0
4134-Web Services	35,811	45,372	36,099	75,000	75,000
4301-Photocopying		65		300	0
4311-Office Supplies	1,684	2,021	1489	5000	5000
Total Staff & Office Expense	**38,030**	**48,779**	**39,127**	**82,300**	**80,000**
5051-Credit Card Fees	12,274	11,178	12,762	12,000	12,000
5101-Consultants	120,000	120,000	110,000	120,000	120,000
5581-Legislative Consultant Travel**	NEW	NEW	8,123	15,000	15,000
5121-Actionline (Printing-Outside)	49,796	103,658	99,276	120,000	120,000
5199-Other Contract Services	46,279	15,125	8,640	45,000	45,000
Total Contract Services	**228,349**	**249,961**	**238,801**	**312,000**	**312,000**
5501-Employee Travel	13,799	18,438	8,703	20,000	20,000
5531-Board/Off/Memb Travel	22,977	32,741	14,804	20,000	20,000
Total Travel	**36,776**	**51,179**	**23,507**	**40,000**	**40,000**
6001-Post 1st Class/Bulk	26,671	1,046	28,362	2,000	10,000
6101-Products Purch for Sale			0	0	0
6251-Promotion Sponsorship			1000	0	0
6311-Mtgs General Meeting	649,814	559,586	637,324	650,000	650,000
6321- Mtgs Meals		250			
6325-Mtgs Hospitality	49,654	20,938	36,242	35,000	35,000
6361-Mtgs Entertainment					
6399-Mtgs Other	6,543	10,306	8,538	15,000	15,000
6401-Speaker Expense		328	2,719	7,500	7,500
6451-Committee Expense	93,897	67,348	122,124	110,000	125,000
6531-Brd/Off Special Project	4,994	491	1,275	50,000	50,000
6599-Brd/Off Other	5,772	6,632	8,081	15,000	15,000
7001-Grant/Award/Donation	16,414	18,099	5,883	8,000	8,000
5521-Law School Programming*	NEW	NEW	1,622	5,500	5,500
5522-Professional Outreach*	NEW	NEW	0	3,000	3,000
5520-Diversity Initiatives*	NEW	590	572	12,000	12,000
7011-Scholarship/Fellowship	22,669	14,091	11,301	27,000	27,000
7999-Other Operating Exp	(1,000)	1,475	230	5,000	5,000
8901-Eliminated IntFund Exp	3,250		3000	0	3000
Total Other Expense	**878,678**	**701,180**	**868,273**	**945,000**	**971,000**
8021-Section Admin Fee	209,770	217,024	222,046	220,000	229,354
8101-Printing In-House	1,687	86	485	2,000	2,000
8111-Meetings Services	50	3,000	0	0	0
Total Admin & Internal Expense	**211,507**	**220,110**	**222,531**	**222,000**	**231,354**

	2017-18 Actual	2018-19 Actual	2019-20 Actual	2020-21 Budget	2021-22 Budget
9692-Transfer Out-Council of Sections	300	300	300	500	500
Total InterFund Transfers Out	**300**	**300**	**300**	**500**	**500**
Total Expense	**1,393,640**	**1,271,509**	**1,392,539**	**1,601,800**	**1,634,854**
Net Income	**(5,771)**	**202,666**	**(8,737)**	**(222,876)**	**(301,654)**

*The Grant/Award-Donation Line item has been split out to three new line items including Law School Programming, Professional Outreach, and Divesity Initiatives.
** The Legislative Consultant Travel Line Item has been added in 2019-20

THE FLORIDA BAR
RPPTL Attorney Bankers Conference
Budget 2021 -2022

	2017-18 Actual	2018-19 Actual	2019-20 Actual	2020-21 Budget	2021-22 Budget
3301-Registration-Live	$8,075	$5,875	8,662	12,500	12,500
Total Registration Revenue	**8,075**	**5,875**	**8,662**	**12,500**	**12,500**
3341-Exhibit Fees	(1,375)	750	0	1,500	1,500
3351-Sponsorships	7,500	8,500	14,000	8,000	8,000
Other Event Revenue	**6,125**	**9,250**	**14,000**	**9,500**	**9,500**
3401-Sales-CD/DVD		0	900	2,000	2,000
Total Revenue	**14,200**	**15,125**	**23,562**	**24,000**	**24,000**
5051-Credit Card Fees	377	223	326	500	500
Total Contract Services	**377**	**223**	**326**	**500**	**500**
5501-Employee Travel	1,203	0	274	1,250	1,250
5571-Speaker Travel	712	4,990	2,187	4,000	4,000
Total Travel	**1,915**	**4,990**	**2,461**	**5,250**	**5,250**
6321-Mtgs Meals	5,380	30,443	6,194	5,000	5,000
6325-Mtgs Hospitality	8,087	0	0	5,000	5,000
6341-Mtgs Equip Rental	4,826	1,563	0	3,000	3,000
6401-Speaker Expense	535	5	0	0	0
7999-Other Operating Exp			1,425	300	300
Total Other Expense	**18,828**	**32,011**	**7,619**	**13,300**	**13,300**
8011-Administration CLE	5,000	5,722	10,000	6,000	6,000
8101-Printing In-House	15	5	0	200	200
8131-A/V Services		0	0	550	550
8141-Journal/News Service		425	850	1,000	1,000
8171-Course Approval Fee		150	300	150	150
Total Admin & Internal Expense	**5,015**	**6,302**	**11,150**	**7,900**	**7,900**
Total Expense	**26,135**	**43,526**	**21,556**	**26,950**	**26,950**
Net Income	**(11,935)**	**(28,401)**	**2,006**	**(2,950)**	**(2,950)**

THE FLORIDA BAR
Real Property Construction Law Institute
2021-2022 Budget

	2017-18 Actual	2018-19 Actual	2019-20 Actual	2020-21 Budget	2021-22 Budget
3301-Registration-Live	$96,185	$93,580	122,045	90,000	90,000
3331-Registration-Ticket	2,730	1,097	2,806	2,000	2,000
Total Registration Revenue	**98,915**	**94,677**	**124,851**	**92,000**	**92,000**
3351-Sponsorships	183,575	208,276	207,340	190,000	190,000
3392-Section Differential		0	0	0	0
Other Event Revenue	**183,575**	**208,276**	**207,340**	**190,000**	**190,000**
3401-Sales-CD/DVD	16,243	13,160	24,295	15,000	15,000
3411-Sales-Published Materials	1,260	900	840	500	500
Sales, Rents & Royalties Revenue	**17,503**	**14,060**	**25,135**	**15,500**	**15,500**
3699-Other Operating Revenue			0	800	800
Other Revenue Sources			**0**	**800**	**800**
Total Revenue	**299,993**	**317,013**	**357,326**	**298,300**	**298,300**
5051-Credit Card Fees	2,147	6,719	8,249	4,000	4,000
5181-Speaker Honorarium	1,500	0	2,000	5,000	5,000
Total Contract Services	**3,647**	**6,719**	**10,249**	**9,000**	**9,000**
5501-Employee Travel	2,034	1,923	2,470	2,000	2,000
5571-Speaker Travel	2,083	7,199	15,849	9,000	9,000
Total Travel	**4,117**	**9,122**	**18,319**	**11,000**	**11,000**
6001-Post 1st Class/Bulk	5	6	11	25	25
6021-Post Express Mail	161	172	178	200	200
6319-Mtgs Other Functions	19,020	20,017	22,082	15,000	15,000
6321-Mtgs Meals	50,596	62,278	77,501	50,000	50,000
6325-Mtgs Hospitality	37,496	45,508	42,840	40,000	40,000
6341-Mtgs Equip Rental	21,666	25,833	24,032	25,000	25,000
6399-Mtgs Other		163	0	0	0
6401-Speaker Expense	6,004	5,141	2,214	0	0
7999-Other Operating Exp	1,556	2,484	3,277	1,500	1,500
Total Other Expense	**136,504**	**161,602**	**172,135**	**131,725**	**131,725**
8011-Administration CLE	25,000	25,000	15,400	25,000	25,000
8101-Printing In-House	1,292	264	903	2,000	2,000
8131-A/V Services	2,947	2,738	2,780	3,250	3,250
8141-Journal/News Service	425	425	850	1,650	1,650
8171-Course Approval Fee	150	150	150	150	150
Total Admin & Internal Expense	**29,814**	**28,577**	**20,083**	**32,050**	**32,050**

	2017-18 Actual	2018-19 Actual	2019-20 Actual	2020-21 Budget	2021-22 Budget
Total Expense	**174,082**	**206,020**	**220,786**	**183,775**	**183,775**
Net Income	**125,911**	**110,993**	**136,540**	**114,525**	**114,525**

THE FLORIDA BAR
RPPTL Legislative Update
Budget 2021 -2022

	2017-18 Actual	2018-19 Actual	2019-20 Actual	2020-21 Budget	2021-22 Budget
3321-Registration-Webcast	$7,007	$8,509	9,078	0	0
Total Registration Revenue	**7,007**	**8,509**	**9,078**	**0**	**0**
3341-Exhibit Fees	15,000	18,250	27,175	14,000	14,000
3351-Sponsorships	700	0	0	0	0
Other Event Revenue	**15,700**	**18,250**	**27,175**	**14,000**	**14,000**
3401-Sales-CD/DVD	34,526	24,535	27,045	0	0
3411-Sales-Published Materials	950	630	-60	0	0
Sales, Rents & Royalties Revenue	**35,476**	**25,165**	**26,985**	**0**	**0**
Total Revenue	**58,183**	**51,924**	**63,238**	**14,000**	**14,000**
4111-Rent Equipment	10,653		0		
4301-Photocopying		127	0	100	100
4311-Office Supplies		71	0	150	150
Total Staff & Office Expense	**10,653**	**198**	**0**	**250**	**250**
5031-A/V Services		1,495	1,495	0	0
5051-Credit Card Fees	1,288	1,043	906	500	500
5121-Printing-Outside	3,341	2,846	33	5,000	5,000
5199-Other Contract Services	2,318	0	0	0	0
Total Contract Services	**6,947**	**5,384**	**2,434**	**5,500**	**5,500**
5501-Employee Travel	1,204	450	2,315	3,000	3,000
5571-Speaker Travel	342	227	6,034	6,500	6,500
Total Travel	**1,546**	**677**	**8,349**	**9,500**	**9,500**
6001-Post 1st Class/Bulk	31	49	403	50	50
6021-Post Express Mail	364	283	860	500	500
6311 - Mtgs General Meeting		81	64		
6321-Mtgs Meals		48,321	52,525	45,000	45,000
6325-Mtgs Hospitality	819	707	455	1,500	1,500
6341-Mtgs Equip Rental	52,556	30,162	14,193	15,000	15,000
6401-Speaker Expense	2,651	1,258	993	0	0
6451-Committee Expense			977		
7001-Grant/Award/Donation	220		0	5,000	5,000
7999-Other Operating Exp	55	84	302	500	500
Total Other Expense	**56,696**	**80,945**	**70,772**	**67,550**	**67,550**
8011-Administration CLE	2,000	3,200	1,000	500	500
8101-Printing In-House	7	0	102	350	350
8131-A/V Services	3,806	3,703	4,544	0	0
8141-Journal/News Service		0	0	1,600	1,600
8171-Course Approval Fee	150	0	300	0	0
Total Admin & Internal Expense	**5,963**	**6,903**	**5,946**	**2,450**	**2,450**
Total Expense	**81,805**	**94,107**	**87,501**	**85,250**	**85,250**
Net Income	**(23,622)**	**(42,183)**	**(24,263)**	**(71,250)**	**(71,250)**

* Please note: The 2017-18 Legislative Update Meals expense line item was incorrectly added to the 6341 Equipment Rental Line item.

THE FLORIDA BAR

RPPTL Attorney Trust Officer Liaison Conference

2021 -2022 Budget

	2017-18 Actual	2018-19 Actual	2019-20 Actual	2020-21 Budget	2021-22 Budget
3301-Registration-Live	$163,336	$160,924	154,870	160,000	160,000
3331-Registration-Ticket	3,154	12,085	4,270	10,000	10,000
Total Registration Revenue	**166,490**	**173,009**	**159,140**	**170,000**	**170,000**
3341-Exhibit Fees	77,300	20,700	51,200	40,000	40,000
3351-Sponsorships	69,000	81,900	66,750	80,000	80,000
Other Event Revenue	**146,300**	**102,600**	**117,950**	**120,000**	**120,000**
3401-Sales-CD/DVD	8,140	11,290	10,820	5,000	5,000
3411-Sales-Published Materials	480	1,740	1,680	1,000	1,000
Sales, Rents & Royalties Revenue	**8,620**	**13,030**	**12,500**	**6,000**	**6,000**
Total Revenue	**321,410**	**288,639**	**289,590**	**296,000**	**296,000**
4111-Rent Equipment	33,115	0	0	0	0
Total Staff & Office Expense	**33,115**			**0**	**0**
5051-Credit Card Fees	7,115	3,340	2,821	8,000	8,000
5121-Printing-Outside	5	1,154	1,469	2,500	2,500
Total Contract Services	**7,120**	**4,494**	**4,290**	**10,500**	**10,500**
5501-Employee Travel	2,108	2,652	3,649	2,000	2,000
5571-Speaker Travel	1,248	1,056	6,093	8,100	8,100
Total Travel	**3,356**	**3,708**	**9,742**	**10,100**	**10,100**
6001-Post 1st Class/Bulk	9	173	2	1,000	1,000
6021-Post Express Mail	81	166	122	150	150
6319-Mtgs Other Functions	9,881	7,844	6,201	10,000	10,000
6321-Mtgs Meals	43,182	43,044	43,464	57,000	57,000
6325-Mtgs Hospitality	64,445	62,353	72,994	70,000	70,000
6341-Mtgs Equip Rental	(12,626)	18,391	33,259	17,000	17,000
6399-Mtgs Other		750			
6401-Speaker Expense	2,862	3,799	-259	0	0
7999-Other Operating Exp	1,475	300	1,360	1,000	1,000
Total Other Expense	**109,309**	**136,820**	**157,143**	**156,150**	**156,150**
8011-Administration CLE	25,000	25,000	17,050	25,000	25,000
8101-Printing In-House	1,386	2,563	3,165	2,000	2,000
8131-A/V Services	5,621	5,503	2,968	7,000	7,000
8141-Journal/News Service	850	0	425	1,600	1,600
8171-Course Approval Fee	450	150	150	150	150
Total Admin & Internal Expense	**33,307**	**33,216**	**23,758**	**35,750**	**35,750**

	2017-18 Actual	2018-19 Actual	2019-20 Actual	2020-21 Budget	2021-22 Budget
Total Expense	**186,207**	**178,238**	**194,933**	**212,500**	**212,500**
Net Income	**135,203**	**110,401**	**94,657**	**83,500**	**83,500**

THE FLORIDA BAR
RPPTL Convention
2021-2022 Budget

	2017-18 Actual	2018-19 Actual	2019-20 Actual	2020-21 Budget	2021-22 Budget
3301-Registration-Live	$57,838	$66,035	-125	50,000	50,000
Total Registration Revenue	**57,838**	**66,035**	**-125**	**50,000**	**50,000**
3341-Exhibit Fees	8,000	20,582	4,145	10,000	10,000
3351-Sponsorships		25,000	0	10,000	10,000
Other Event Revenue	**8,000**	**45,582**	**4,145**	**20,000**	**20,000**
Total Revenue	**65,838**	**111,617**	**4,020**	**70,000**	**70,000**
4111-Rent Equipment	20,523	3,874	450	0	0
4311-Office Supplies	11	19	0		
Total Staff & Office Expense	**20,534**	**3,893**	**450**	**0**	**0**
5051-Credit Card Fees	1,757	1,375	294	3,000	3,000
Total Contract Services	**1,757**	**1,375**	**294**	**3,000**	**3,000**
5501-Employee Travel	2,786	3,994	0	5,000	5,000
Total Travel	**2,786**	**3,994**	**0**	**5,000**	**5,000**
6001-Post 1st Class/Bulk	200	9	0	500	500
6021- Post Express Mail		4	0		
6321-Mtgs Meals	111,107	121,486	550	150,000	150,000
6341-Mtgs Equip Rental	NEW	8,530	0	20,000	20,000
6361-Mtgs Entertainment	10,605	8,256	0	13,000	40,000
7001 - Grant Donation		10	0		
Total Other Expense	**121,912**	**138,285**	**550**	**183,500**	**210,500**
8101-Printing In-House			0	400	400
Total Admin & Internal Expense			**0**	**400**	**400**
Total Expense	**146,989**	**147,547**	**1,294**	**191,900**	**218,900**
Net Income	**(81,151)**	**(35,930)**	**2,726**	**(121,900)**	**(148,900)**

2020 – 2021 CLE Calendar
(as of 11/20/20)

Date of Presentation	Crs. #	*Title*	Location
1/13/2021	4022	*RPPTL Audio Webcast: Part I of the Survey of Florida Land Use Law for the Real Estate Practitioner*	Audio Webcast
1/27/2021	4024	*RPPTL Audio Webcast: Reverse Mortgages: Good v. Evil?*	Audio Webcast
2/5/2021		*Trust & Estate Symposium*	TBD
2/12/2021		*Condo Law Certification Review*	Virtual Recording
03/17-20/2021		*Construction Law Certification Review*	JW Marriott Grande Lakes
03/17-20/2021		*Construction Law Institute*	JW Marriott Grande Lakes
3/18/2021	4027	*RPPTL Audio Webcast - Condo Webcast Series (1)*	Audio Webcast
3/31/2021	4028	*RPPTL Audio Webcast - 15*	Audio Webcast
4/14/2021	4029	*RPPTL Audio Webcast - 16*	Audio Webcast
4/15/2021	4023	*RPPTL Audio Webcast - Condo Webcast Series (2)*	Audio Webcast
4/9-10/2021	4073	*Real Property Certification Review*	TBD
4/9-10/2021	4074	*Wills Trusts and Estates Certification Review*	TBD

IN THE SUPREME COURT OF FLORIDA

Case No. SC19-1371

SHANE R. HAYSLIP, et al.,

petitioners,

v.

U.S. HOME CORPORATION,

respondent.

ON DISCRETIONARY REVIEW FROM
THE DISTRICT COURT OF APPEAL OF FLORIDA, SECOND DISTRICT,
CASE NO. 2D17-4372

AMICUS CURIAE BRIEF OF THE REAL PROPERTY PROBATE & TRUST LAW SECTION OF THE FLORIDA BAR

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IDENTITY AND INTEREST

The Real Property Probate & Trust Law Section of The Florida Bar ("Section") is a group of Florida lawyers who practice in the areas of real estate, trust and estate law. The Section is dedicated to serving all Florida lawyers and the public in these fields of practice. We produce educational materials and seminars, assist the public *pro bono*, draft legislation, draft rules of procedure, and occasionally serve as a friend of the court to assist on issues related to our fields of practice.[1] Our Section has over 10,000 members.

Pursuant to Section bylaws, the Executive Council of the Section voted unanimously to appear in this case if permitted by the Court. The Florida Bar approved the Section's involvement in this case. [2]

---

[1] For example, see *North Carillon, LLC, v. CRC 603, LLC*, 135 So. 3d 274 (Fla. 2014; *Aldrich v. Basile*, 136 So. 3d 530 (Fla. 2014); *Chames v. DeMayo*, 972 So. 2d 850, 854-55 (Fla. 2007); *McKean v. Warburton*, 919 So. 2d 341 (Fla. 2005); *May v. Illinois Nat. Ins. Co.*, 771 So. 2d 1143 (Fla. 2000); *Friedberg v. SunBank/Miami*, 648 So. 2d 204 (Fla. 3d DCA 1994).

[2] The Executive committee of the Section approved the filing of this brief, which was subsequently approved by the Section's Executive Council. Pursuant to Standing Board Policy 8.10, the Board of Governors of The Florida Bar (typically through its Executive Committee) must review a Section's amicus brief and grant approval before the brief can be filed with the Court. Although reviewed by the Board of Governors, the amicus brief will be submitted solely by the Section and supported by the separate resources of this voluntary organization---not in the name of The Florida Bar, and without implicating the mandatory membership dues paid by Florida Bar licensees. The Florida Bar approved our filing of this brief.

Kenneth B. Bell, Gerald B. Cope, Jr., Robert W. Goldman, and John W. Little III, are the four co-chairs of the amicus committee of the Section, which is charged with preparing *amicus* briefs for the Section. Gerald Cope is conflicted out of working on this brief.[3]

The Section's interest in this case stems from the Section's expertise and experience with real estate law, the construction of deeds, and the impact this case will have on Florida citizens and their real estate holdings.

SUMMARY OF ARGUMENT

The question certified by the district court of appeal is too broad and does not capture the issue in the case or the issue of great public importance. As modified by the Section, the certified question should be answered in the affirmative.

Whether the arbitration clause in this case is a real covenant running with the land or a personal covenant that does not run with the land, or a hybrid of the two, is a fact-based issue for the litigants to argue and for the courts to resolve. In resolving that issue, the Court should construe that arbitration restriction narrowly and strictly in favor of the unrestricted use of the property.

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[3] We acknowledge the tremendous assistance of Brian W. Hoffman, Esquire, in researching and helping the Section develop this brief.

ARGUMENT

I. MODIFY QUESTION OF GREAT PUBLIC IMPORTANCE

The question raised by the District Court of Appeal, Second District, is as follows:

> DOES A MANDATORY ARBITRATION PROVISION CONTAINED WITHIN A RESIDENTIAL WARRANTY DEED CONVEYING RESIDENTIAL PROPERTY FROM HOME BUILDER TO ORIGINAL PURCHASER RUN WITH THE LAND SUCH THAT IT IS BINDING ON SUBSEQUENT PURCHASERS WHERE THE INTENDED NATURE OF THE PROVISION IS CLEAR AND THE PARTY AGAINST WHOM ENFORCEMENT IS SOUGHT WAS ON NOTICE OF THE PROVISION?

Hayslip v. U.S. Home Corp., 276 So. 3d 109, 118 (Fla. 2d DCA 2019).

For the reasons explained below, the question is too broad and seems to cover any arbitration clause regardless of the disputes to which the clause might apply. For example, the arbitration clause might apply to personal injury disputes or investment disputes, which would not run with the land. In order to avoid confusion, the important and more precise question before the Court could be better stated as follows (with the proposed additional language underlined):

> DOES A MANDATORY ARBITRATION PROVISION CONTAINED WITHIN A RESIDENTIAL WARRANTY DEED CONVEYING RESIDENTIAL PROPERTY FROM HOME BUILDER TO ORIGINAL PURCHASER <u>THAT TOUCHES AND CONCERNS THE LAND AND IS INTENDED TO ADDRESS AND</u>

RESOLVE DISPUTES OVER THE BENEFICIAL INTEREST IN AND ENJOYMENT OF THE LAND RUN WITH THE LAND SUCH THAT IT IS BINDING ON SUBSEQUENT PURCHASERS WHERE THE INTENDED NATURE OF THE PROVISION IS CLEAR AND THE PARTY AGAINST WHOM ENFORCEMENT IS SOUGHT WAS ON NOTICE OF THE PROVISION?

II. REAL COVENANTS V. PERSONAL COVENANTS

Covenants are divisible into two major classes: (1) real covenants which run with the land and typically bind the heirs and assigns of the covenanting parties, and (2) personal covenants which bind only the covenanting parties personally. 19 Fla. Jur. 2d Deeds § 181; *Caulk v. Orange County,* 661 So. 2d 932, 933 (Fla. 3d DCA 1995). The most thorough explanation of the distinction between real covenants and personal covenants was articulated by the district court of appeal in *Maule Industries, Inc. v. Sheffield Steel Products, Inc.*, 105 So. 2d 798 (Fla. 3d DCA 1958), which summarized the distinction as follows:

> Real Covenants: A real covenant running with the land differs from a merely personal covenant because a real covenant concerns the property conveyed and the occupation and enjoyment thereof. If the performance of the covenant must touch and involve the land or some right or easement annexed and appurtenant thereto, and tends necessarily to enhance the value of the property or renders it more convenient and beneficial to the owner, it is a covenant running with the land.
> Personal Covenants: a personal covenant is collateral or is not immediately concerned with the property granted.[4]

[4] This Court further elaborated that a personal covenant creates a personal obligation or right enforceable at law only between the original covenanting parties. *Palm Beach County v. Cove Club Inv'rs Ltd.*, 734 So. 2d 379, 382, n.4 (Fla. 1999).

108 So. 2d at 801.

The *Maule Industries* Court explained that the primary test as to whether the covenant runs with the land or is personal is whether it concerns the property granted and the occupation or enjoyment of that property, or is a collateral or a personal covenant not immediately concerning the property granted. 105 So. 2d at 801. In order that a covenant may run with the land it must have relation to the land or the interest or estate conveyed, and the thing required to be done must be something which touches such land, interest, or estate and the occupation, use, or enjoyment of the property. *Id.* The question whether a covenant runs with the land does not depend upon its being performed upon the land itself; its performance must touch and concern the land or some right or easement annexed or appurtenant to the land and tend necessarily to enhance its value or render it more convenient and beneficial to the owner or occupant. *Id.*

The explanation contained in *Maule Industries* was specifically cited and restated by this Court in *Palm Beach County v. Cove Club Inv'rs Ltd.*, 734 So. 2d at 382, n.4.

III. APPLICATION OF DEFINITIONS BY THE COURTS

The *Maule Industries* court and other Florida courts have articulated three criteria related to the enforcement of real covenants: (1) the existence of a covenant that touches and involves the land, (2) an intention that the covenant run with the

land, and (3) notice of the covenant given to the party against whom enforcement is sought. *See Winn-Dixie Stores, Inc. v. Dolgencorp, Inc.* v. 964 So. 2d 261, 265 (Fla. 4th DCA 2007). While some courts have applied the definition and explanation contained in *Maule Industries*, other courts have relied on older case law that is much broader in defining and applying the meaning of a real covenant. For example, In *Hagan v. Sabal Palms, Inc*., 186 So. 2d 302 (Fla. 2d DCA 1966), the court cites and discusses *Maule Industries*, but then references an early case, *Burdine v. Sewell*, 92 Fla. 375 (Fla. 1926) that contains a simpler and broader definition of real covenants. In *Burdine*, this Court explained that: "[a] covenant is said to run with the land when either the liability to perform it or the right to take advantage of it passes to the vendee or the assignee of the land." Ultimately, the *Hagan* Court applied the *Burdine* definition. 186 So. 2d at 311.

Whether a covenant is a real covenant is fact-driven in each case.[5] Therefore, it may be helpful to the Court to analyze the facts used by other courts to conclude a covenant was (or was not) a real covenant. See below:

A. "Touch and Involve the Land"

[5] In some cases, the fact evidence may simply involve the deed and its clear terms (if they exist). In other cases, there may be multiple interpretations of deed language, which would mandate evidence beyond the terms of the deed. *See AT&T Wireless Services of Florida, Inc., v/ WCI Communities, Inc.*, 932 So. 2d 251, 255 (Fla. 4th DCA 2005); *Evergreen Communities, Inc., v. Palafox Preserve Homeowners Assn*, 213 So. 3d 1127, 1128 (Fla. 1st DCA 2017).

Real Covenants:

1) In *Maule Industries, Inc.* - the grantor of the deed made certain covenants relating to maintenance by the grantor, its successors and assigns, of the railroad facilities used by the grantee. The Court determined that was a real covenant running with the land.

2) In *Hagan v. Sabal Palms, Inc.* – the original deed contained covenants against erection of any building except a dwelling in an unplatted subdivision. The Court determined this covenant was a real covenant and ran with the land.

Not Real Covenants:

1) *Caulk v. Orange County*, 661 So. 2d 932, 933(Fla. 5th DCA 1995) - the grantor of the deed reserved all rights, title and interest in any proceeds arising out of eminent domain or condemnation proceedings. The court noted the covenant "concerns" the land, but it does so only tangentially. Unlike covenants for mineral rights and crops, which impact the land, the only thing this covenant "touches" and "concerns" is intangible personal property – specifically cash. In addition to not satisfying the touch and concern criteria, the Court determined that the second criteria that there be an intention that the covenant run with the land was also not satisfied because the covenant was specific to the grantee. *Id.*

IV. ANALYSIS AND MODEL ARBITRATION CLAUSE THAT RUNS WITH THE LAND

The district court of appeal in this case adopted the view that courts need not construe an arbitration covenant as real or personal using an overtechnical analysis. 276 So. 3d at 118 ("'[T]here would seem to be no reason for applying the rules of touching and concerning in an overtechnical manner, which is unreal from the standpoint of the parties themselves.' " Quoting from *Kelly v. Tri-Cities Broadcasting, Inc.*, 147 Cal.App.3d 666, 195 Cal. Rptr. 303, 304 (1983). Still, the rules of construction of real covenants seem to require a finding of some specificity and direct link to the beneficial interest and enjoyment of the land.

Further, restraints on the use of real property are not favored. *Evergreen Communities, Inc., v. Palafox Preserve Homeowners Assn*, 213 So. 3d at 1128. Consequently, any restriction on a property owner's use of the property must be very strictly and narrowly construed in favor of the unrestricted use of real property. *Id.; see Beach Towing, Inc. v. Sunset Land Associates, LLC*, 278 So. 3d 857, 863 (Fla. 3d 2019). This rule applies to covenants that run with the land. *Bendo v. Silverwood Community Community Assn., Inc.*, 159 So. 3d 179, 180 (Fla. 5th DCA 2015).

Ideally, an arbitration clause in a deed that is intended to run with the land would specifically address potential land-based disputes or claims involving beneficial interests and enjoyment of the land and might look something like the following:

> The Grantor, its successors and assigns, shall provide maintenance for railroad facilities over the real property owned by the Grantor, its successor and assigns, that are used by the Grantee, its successors and assigns, for railroad operations. Any dispute regarding maintenance or use of the railroad facilities between the Grantor, its successors and assigns, and the Grantee, its successors and assigns, shall be subject to binding arbitration as provided by Florida Statute, Chapter 682 (2019), or otherwise applicable Florida law.

The cases from other jurisdictions cited by the district court of appeal, like the model clause above, appear to be quite specific as to the direct land-based disputes or claims covered by the arbitration clause. See *Hayslip v. U.S. Home Corp.*, 276 So. 3d at 116-18 (Fla. 2d DCA 2019), where the court discusses *J&JB Timberlands, LLC v. Woolsey Energy II, LLC*, No. 14-cv-1318-SMY-RJD, 2017 WL 396174, at 1-2 (S.D. Ill. Jan. 30, 2017) (arbitration of damages from mineral extraction); *Baker v. Conoco Pipeline Co.*, 280 F. Supp. 2d 1285, 1292, 1294 (N.D. Okla. 2003) (arbitration of damage to fences, crops, and timber resulting from laying, maintaining, and removing pipeline); *Kelly v. Tri-Cities Broadcasting, Inc.*, 147 Cal.App.3d 666, 195 Cal. Rptr. 303, 304 (1983) (arbitration of land lease disputes).

The arbitration clause in this case appears to be quite broad, covering any possible claim by either covenanting party, and may include aspects of both personal and real covenants. That is a factual determination for the litigants to argue and the courts resolve. Whether such a hybrid covenant (if that is what it is), or some aspects of the covenant, can run with the land and bind subsequent

purchasers like the Hayslips regarding certain disputes appears to have no answer in our jurisprudence (or none that we could locate). But, as already noted above, in evaluating the covenant and deciding the case, the Court should narrowly and strictly construe the covenant in favor of the property's unrestricted use. *See Beach Towing, Inc., LLC*, 278 So. 3d at 863.

CONCLUSION

The certified question, as modified by the Section, should be answered in the affirmative. Whether the arbitration clause in this case qualifies as a real covenant binding on the Hayslips is a factual determination based on the record before the Court.

Respectfully Submitted,

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/s/ Robert W. Goldman

CERTIFICATE OF SERVICE

I CERTIFY that a true copy of the foregoing was served this day of December, 2020, via electronic mail to DAVID M. GREENE, ESQ., designated email: dgreene@burnettlaw.com, C. DAVID HARPER, ESQ., designated email: charper@foley.com, LAWRENCE J. DOUGHERTY, ESQ., designated email: ldougherty@foley.com, MANUEL FARACH, ESQ., designated email: mfarach@mcglinchey.com and DAVID GERSTEN, ESQ., designated email: dgersten@grsm.com.

/s/ Robert W. Goldman

CERTIFICATE OF FONT COMPLIANCE

I certify that this brief complies with the font requirement of rule 9.210 (a) (2), Florida Rules of Appellate Procedure.

/s/ Robert W. Goldman, FBN339180

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September 14, 2020

VIA EMAIL ONLY tomasino@flcourts.org
John A. Tomasino, Clerk
Florida Supreme Court

Re: Case No. 20-1212/Standing Committee on the Unlicensed Practice of Law
Proposed Formal Advisory Opinion 2019-4
(Out-of-State Attorney's Remote Practice from Florida Home)

Dear Clerk Tomasino:

The Real Property, Probate and Trust Law Section of The Florida Bar requests the Supreme Court of Florida to approve The Florida Bar's proposed Formal Advisory Opinion 2019-4 (August 17, 2020) Out-of-State Attorney's Remote Practice from Florida Home ("FOA"). This letter is provided as a memorandum in response to the FOA pursuant to R. Regulating Fla. Bar 10-9.1(g)(3).

1. **POSITION**.

Unanimously, the Executive Council of the Real Property Probate and Trust Law Section approved a motion of the Section's Professionalism and Ethics Committee supporting the FOA.

Motion to support Proposed Advisory Opinion dated August 17, 2020 in FAO #2019-4, providing "that it would not be the unlicensed practice of law for Petitioner, a Florida domiciliary employed by a New Jersey law firm (having no place of business or office in Florida), to work remotely from his Florida home solely on matters that concern federal intellectual property rights (and not Florida law) and without having or creating a public presence or profile in Florida as an attorney."

The approval occurred at the Section's Executive Council meeting occurring on August 22, 2020.

2. **IDENTITY**.

The Real Property, Probate and Trust Law Section ("Section") is The Florida Bar's largest substantive law section, composed of over 10,000 voluntary dues paying members. The Section is a group of Florida lawyers who practice in the areas of real estate, guardianship, probate, trust and estate law, dedicated to serving all Florida lawyers and the public in these fields of practice. We produce educational materials and seminars, assist the public *pro bono*, draft legislation, draft rules of procedure, and occasionally serve as a friend of the Court to assist on issues related to our fields of practice.

3. **RATIONALE**.

The FOA provides needed positive guidance for Florida and non-Florida attorneys, protecting Florida citizens and those doing business in Florida from the significant problems that result from the unauthorized practice of law in Florida. Sources of these problems include the lack of a firm knowledge of Florida law and procedures, and the lack of disciplinary supervision. Problems become very significant, expensive in terms of money and resources not the least being time and emotions, and then frequently involving the resources of the Florida courts to resolve the disputes that flow thereafter.

The FOA not only provides a well-defined threshold for out of state lawyers; but, just as importantly provides a positive precedent upon which other jurisdictions can rely. Other jurisdictions can follow Florida's precedent, allowing a Florida attorney to practice Florida law while physically located in another jurisdiction.

a. Irreversible Trend of Remote Working.

The COVID-19 pandemic illuminated rapidly changing trends in the practice law. The concept of "remote working" is now not just a well-known phrase, and not just meaning working from home down a few miles from the office. Remote working is a concept well incorporated, including in the practice of law, and embracing work occurring far from the office, frequently across state lines.

Lawyers now know "the future is now." Lawyers literally had to adapt overnight to the pandemic. Just as with other professions, unanticipated physical issues required changes in the traditional physically law office. Interestingly, the concept of being "chained to the desk" no longer rings true as lawyers can physically practice literally from anywhere in the world, including in conveyances including, planes, trains and automobiles.

Astute lawyers rely upon technological tools, not resisting change. The discovery of the ease of instant communications to anywhere and everywhere, whether by a writing, voice or video, has upended traditional expectations.[1] Even the courts have not been immune from this new wave, from filings to hearings.[2]

An advantage of remote working for lawyers is not just in a lawyer's so-called finished product, communicating advice or filing pleadings. Increasingly, remote working brings collateral benefits, the seemingly elusive goals of peace of mind and emotional well-being.

[1] For example, "Why work from home when you can work from Barbados, Bermuda or…. Estonia?, New York Times (August 19, 2020). https://www.nytimes.com/2020/08/19/travel/remote-worker-visa.html?

[2] "Some Changes Will Stay After The Pandemic Passes." The Florida Bar News. April 29, 2020. https://www.floridabar.org/the-florida-bar-news/some-changes-will-stay-after-the-pandemic-passes/

Michael Higer emphasized mental health and wellness of attorneys during his Bar presidency, and the concept has become a foundation of Bar Programs[3] and a matter of continuing importance.[4]

b. Florida Lawyers.

Remote working will become a significant employment and practice benefit to attorneys generally, and specifically for Florida Bar members. Florida lawyers have and will be physically located out of state, working from their "second homes" telecommuting for clients and advising on Florida law. Because of telecommuting, these Florida lawyers do not have a financial need to practice the law of the out-of-state jurisdiction in which they are physically located, and have no intent to do so. They simply want to advise their Florida clients from a space outside of Florida for many reasons, including a space that provides a sense of health and well-being.

c. Out-of-State Lawyers.

Of course, remote working is not a phenomenon limited to Florida lawyers. It is anticipated that many non-Florida attorneys will utilize vacation or second homes in Florida to remotely practice law in their admitted jurisdiction. Anecdotally, it certainly appears as if this has started, many non-Florida attorneys having made snap decisions to telecommute from second homes physically within Florida, serving their clients in their home states regarding non-Florida law issues.

As time progresses and the pandemic recedes, Florida's advantages combined with technological advances, and the professions embracing of new technologies, will entice more non-Florida attorneys to spend significant time in Florida.

4. **CONCLUSION**.

The FOA provides guidance for non-Florida attorneys physically located in Florida allowing those attorneys to continue their non-Florida practices, creating objective boundaries that protect Florida citizens and those doing business in Florida. The FOA's conditions provide a regulatory framework to deter conduct harmful to Florida citizens. Though not a justification for the FOA, collateral positive economic impacts cannot be ignored, including non-Florida attorneys buying and maintaining real property in Florida, and expending significant funds in Florida.

Quintessential lawyers of the past, whether trial lawyer Abraham Lincoln, or fictional lawyer Atticus Finch[5], would not have recognized the physical law office of the 21st Century, before or after the pandemic. They would recognize the dedication to the profession that continues, understanding that the location of an office is not essential to the goals of the practice, especially in the 21st Century.

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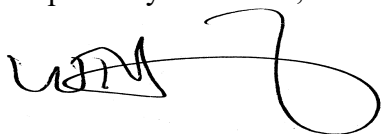
[3] https://www.floridabar.org/member/healthandwellnesscenter/

[4] "Bar Launches Free Mental Health Hotline" The Florida Bar News. May 1, 2020 https://www.floridabar.org/the-florida-bar-news/helpline-launch/

[5] Lee, Harper. To Kill a Mockingbird. Harper & Row 1960

Thus, the Real Property, Probate and Trust Law Section of The Florida Bar requests the Court to approve the FOA.

Respectfully submitted,



William Hennessey, Chair
For the Section

MJG/
cc: Jeffrey T. Picker, Esq. Primary Email: jpicker@flabar.org
Susanne McCabe, Chair Standing Committee on Unlicensed Practice of Law: upl@floridabar.org, sdm@mccabelawyers.com
Stephen W. Davis, Esq. via email: 'sdavis@bsfllp.com'
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Supreme Court of Florida

TUESDAY, SEPTEMBER 15, 2020

CASE NO.: SC20-1220

THE FLORIDA BAR RE: ADVISORY OPINION - OUT-OF-STATE ATTORNEY WORKING REMOTELY FROM FLORIDA HOME

The Court has received a proposed advisory opinion from the Standing Committee on the Unlicensed Practice of Law regarding out-of-state attorney working remotely from Florida home. As petitioner to the Standing Committee, Thomas A. Restaino may file on or before October 15, 2020, a brief in response to the proposed advisory opinion. Any interested parties may file a response to the proposed advisory opinion on or before October 15, 2020. If filed by an attorney in good standing with The Florida Bar, the response must be electronically filed via the Florida Courts E-Filing Portal (Portal) in accordance with *In re Electronic Filing in the Supreme Court of Florida via the Florida Courts E-Filing Portal*, Fla. Admin. Order No. AOSC13-7 (Feb. 18, 2013). If filed by a nonlawyer or a lawyer not licensed to practice in Florida, the response may be, but is not required to be, filed via the Portal. *See In re Electronic Filing in the Florida Supreme Court*, Fla. Admin. Order No. AOSC17-27 (May 9, 2017). Any person unable to submit a response electronically must mail or hand-deliver the originally signed response to the Florida Supreme Court, Office of the Clerk, 500 South Duval Street, Tallahassee, Florida 32399-1927; no additional copies are required or will be accepted.

The Standing Committee on the Unlicensed Practice of Law may file a responsive brief within twenty days of service of Mr. Restaino's initial brief. Mr.

Restaino, as well as any interested party that filed a response, may file a reply brief within ten days of service of the committee's brief.

A True Copy
Test:

John A. Tomasino
Clerk, Supreme Court

so
Served:

WILLIAM A. SPILLIAS
SUSANNE D. MCCABE
JEFFREY TODD PICKER
THOMAS A. RESTAINO
WILLIAM THOMAS HENNESSEY III

Supreme Court of Florida

THURSDAY, OCTOBER 22, 2020

CASE NO.: SC20-1220

THE FLORIDA BAR RE: ADVISORY OPINION - OUT-OF-STATE ATTORNEY WORKING REMOTELY FROM FLORIDA HOME

The above case has been submitted to the Court without oral argument.

A True Copy
Test:

John A. Tomasino
Clerk, Supreme Court

so
Served:

WILLIAM A. SPILLIAS
SUSANNE D. MCCABE
WILLIAM THOMAS HENNESSEY III
JEFFREY TODD PICKER
THOMAS A. RESTAINO

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OF COUNSEL

*BOARD CERTIFIED IN REAL ESTATE LAW
& CONDOMINIUM AND PLANNED DEVELOPMENT LAW

October 16, 2020

VIA EMAIL ONLY WHennessey@gunster.com
William Hennessey, Esq.
Real Property Probate and Trust Law Section Chair

Re: Professional Ethics Committee
/Guardianships (Alleged Incapacitated Ward's Counsel)

Dear Mr. Hennessey:

On behalf of the Bar's Professional Ethics Committee, thank you to the Real Property Probate and Trust Law Section and to you for the Section volunteering to assist the Professional Ethics Committee. On Friday the Committee accepted the offer as follows:

> Agenda Item 6, Alleged Incapacitated Ward: Ethics Counsel presented the denial of a staff opinion in Ethics Inquiry 41229, and the review requested by the inquirer, involving inquirer's ethical obligations as the court-appointed lawyer representing alleged incapacitated persons in guardianship proceedings when Florida statutes require proceedings without notice to the respondent, who is the inquirer's client. The Chair requested Mr. Dribin to provide a brief status of the law and impact on practitioners. Guest Steven K. Schwartz presented different scenarios in which a lawyer might be appointed and creating ethical dilemmas. **A motion was approved to refer the issue to the Real Property Probate and Trust Law Section to review and report recommendations by December 20, 2020, including consulting with the Elder Law Section and the Probate Rules Committee**.

(Emphasis added.) Attached is Agenda Item 6's back up materials extracted from the Meeting's Agenda, including the August 13, 2020 inquiry to the Bar assigned No. 41229 and the staff's August 25, 2020 response.

The Committee's clear consensus was that the issue deserved the expertise of the Section. It must be noted that Committee member Michael Dribin provided an invaluable introductory statement placing the inquiry in context. In addition to Mr. Dribin, Section member Stephanie Villavicencio of Miami is also a Committee member who indicated her willingness to assist the Section's evaluation. Please also note the request that the Section's evaluation include consulting with the Elder Law Section and the Probate Rules Committee.

At your earliest opportunity, please advise me to whom this issue has been assigned and if there is any information that the Committee can provide that would be of assistance. Please also advise me if there is any concern with the Section providing me a status report by November 20, 2020. This issue will be on the Professional Ethics Committee's January 2020 agenda as part of the Bar's "Mid-Year Meeting," though it is anticipated that the Committee will be meeting by video conference.

Again, thank you and the Section for stepping up and assisting.

Very truly yours,

Michael J. Gelfand

cc: Gary Steven Betensky, Esq. via email: gbetensky@daypitney.com
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Sarah Butters, Esq. via email: sbutters@ausley.com
Nicklaus Curley, Esq. via email: NCurley@gunster.com
Andrew Blaise Sasso, Esq. via email: abs@macfar.com

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AGENDA ITEM 6 SUMMARY

The Professional Ethics Committee is asked to review the denial of a staff opinion in Ethics Inquiry 41229. The inquiring lawyer called the Ethics Hotline on August 12, 2020 and asked about the lawyer's ethical obligations in light of Florida Statutes 744.3031. The lawyer was appointed to represent an alleged incapacitated person in an emergency hearing in which the petitioner requested an ex parte hearing. The inquirer is concerned about how to proceed when the inquirer cannot speak to the client, the alleged incapacitated person. Rules of Professional Conduct 4-1.14 (Client Under a Disability), 4-1.2 (Scope of Representation) and 4-1.4 (Communication) were discussed, and the inquirer was advised to seek guidance from the court on the seeming conflict between the statute and the Rules of Professional Conduct.

On August 13, 2020, the inquiring lawyer made a written inquiry expressing concerns on how to handle appointments to represent alleged incapacitated persons who have not been served or notified of pending emergency temporary guardianship cases and whether the cases can proceed ex parte. The inquirer stated that a recent case, *Erlandsson v. Erlandsson*, 296 So.3d 431 (Fla. 4th DCA 2020) (attached to this item) held that:

- The court must appoint counsel for the AIP [alleged incapacitated person].
- Counsel must represent the expressed wishes of the AIP [alleged incapacitated person].
- Counsel's representation must comply with Bar Rules.
- Counsel must advocate (zealously) for the client's expressed wishes even if counsel believes those wishes are not in the client's best interests.
- "An attorney proceeds without well defined standards by forsaking the client's instructions and proceeds on the attorney's perception."

The inquirer then asked whether and how the Rules of Professional Conduct may be followed in an emergency temporary guardianship hearing, whether or not held ex parte.

The inquirer was denied a staff opinion on the basis that there is no bar policy or precedent on which to base an opinion if the statute conflicts with the Rules of Professional Conduct under Procedure 2(a)(2)(B), which permits staff to decline to provide an opinion "if the inquiry. . . asks a question for which there is no previous precedent or underlying bar policy on which to base an opinion." The denial cited the inquirer to Florida Ethics Opinion 85-4, which states:

> The inquiring attorney does not have to abandon her client by withdrawing. The attorney should do what she can to safeguard the interests of her client, including making prudent decisions in behalf of the client. ...
>
> If the attorney believes that W cannot adequately act in her own interest, and that a guardian may be necessary to safeguard W's interests, the attorney may seek appointment of a legal guardian for W, even over W's objection if absolutely necessary. **The inquiring attorney is in the best position to decide the proper course of action from the suggestions above. In proceeding, the attorney should be careful to respect the rights of her client, to act in the client's best interests, and to avoid overreaching.** [Emphasis added.]

The Professional Ethics Committee may affirm the denial of a staff opinion, may direct staff to provide an opinion and direct the contents of the opinion, or may issue a formal proposed advisory opinion on the issue.

$3,500.00 IS AVAILABLE TO 2 RPPTL SECTION MEMBERS!

The Florida Bar will begin accepting applications for **2021-2022 Wm. Reece Smith, Jr. Leadership Academy Class IX** on December 1, 2020. In support of the Leadership Academy, the RPPTL Section will select up to two active, contributing members of a RPPTL Section Committee, to apply to the Leadership Academy as the Section's scholarship nominee.

If a RPPTL Section nominee is chosen as an Academy Fellow, the RPPTL Section will reimburse the participant up to $3,500.00 for out of pocket travel and hotel expenses incurred in attending the Leadership Academy. To receive the scholarship, the nominee(s) if chosen by The Florida Bar for the Leadership Academy must agree to remain actively involved in the RPPTL Section after the conclusion of the Leadership Academy.

A full explanation of The Florida Bar Leadership Academy is available on the Florida Bar's website at http://www.floridabar.org/leadershipacademy. The Leadership Academy Class IX application form will be available **December 1, 2020** on The Florida Bar's website**.**

For questions regarding the Leadership Academy application or the RPPTL Section scholarships for the Leadership Academy, contact Kristopher E. Fernandez, (813) 832-6340, kfernandez@kfernandezlaw.com; Allison Archbold**,** (941) 960-8825, jaa@archbold.law; or Bridget Friedman, (407) 830-6331, bfriedman@ff-attorneys.com.

To be considered for one of the RPPTL Section scholarships, you must submit your application to Kristopher E. Fernandez or to Allison Archbold by 5:30 p.m. on **December 18, 2020.**

CHAPTER 22

EASEMENTS

STANDARD 22.1

EASEMENTS BY EXPRESS GRANT

STANDARD: AN EASEMENT MAY BE CREATED BY EXPRESS GRANT.

Problem: Blackacre, owned by Simon Grant, abutted the west line of a public road. Grant conveyed the back half of Blackacre to John Doe, together with an easement for ingress and egress across the south 20 feet of the front half of Blackacre for the benefit of the back half of Blackacre. Did Doe acquire an easement across the south 20 feet of the front half of Blackacre?

Answer: Yes.

Authorities: *Jonita, Inc. v. Lewis*, 368 So. 2d 114 (Fla. 1st DCA 1979).

STANDARD 22.2

EASEMENTS BY RESERVATION

STANDARD: AN EASEMENT MAY BE CREATED BY RESERVATION.

Problem 1: Blackacre, owned by Simon Grant, lies west of a public road. Grant conveyed the east half of Blackacre to John Doe. The deed stated, "reserving an easement for ingress to and egress from the west half of Blackacre across the south 20 feet of the east half of Blackacre." Did Grant retain an easement across the south 20 feet of the east half of Blackacre?

Answer: Yes.

Problem 2: Simon Grant conveyed Blackacre to John Doe, "except an easement over the south 20 feet." The circumstances surrounding the deed demonstrated the parties intended to create an easement. Is the easement valid?

Answer: Yes.

Problem 3: Simon Grant conveyed Blackacre to John Doe, "subject to an easement over the south 20 feet." There was no existing easement over the south 20 feet and no circumstances demonstrating that the parties intended to create an easement. Is the easement valid?

Answer: No.

Problem 4: Simon Grant conveyed Blackacre to John Doe, "subject to an easement over the south 20 feet." There was no existing easement over the south 20 feet and but there were circumstances demonstrating that the parties intended to create an easement. Is the easement valid?

Answer: Maybe, as discussed in the comments, the courts look to the intent of the parties and consider the circumstances surrounding the deed.

Problem 5: The City of Good Hope conveyed Greenacre to Janet Jones. The deed reserved to the State of Florida an easement for a state road right-of-way over a portion of Greenacre. Did the reservation create an easement for the State of Florida?

Answer: Yes.

Authorities: *City of Jacksonville v. Shaffer,* 144 So. 888 (Fla. 1932); *City of Miami v. St. Joe Paper Co.*, 364 So. 2d 439 (Fla. 1978); *Procacci v. Zacco*, 324 So. 2d 180 (Fla. 4th DCA 1975); *Robertia v. Pine Tree Water Control Dist.*, 516 So. 2d 1012 (Fla. 4th DCA 1987); *Marchman v. Perdue*, 543 So. 2d 1286 (Fla. 1st DCA 1989); *Merriam v. First Nat'l Bank on Akron, Ohio*, 587 So. 2d 584 (Fla. 1st DCA 1991); *Behm v. Saeli*, 560 So. 2d 431 (Fla. 5th DCA 1990); *Walters v. McCall*, 450 So. 2d 1139 (Fla. 1st DCA 1984); *Cartish v. Soper*, 157 So. 2d 150 (Fla. 2d DCA 1963); *Leffler v. Smith*, 388 So. 2d 261 (Fla. 5th DCA 1980); *Dade County v. Little*, 115 So. 2d 19 (Fla. 3d DCA 1959); *Furlong v. Fuller & Johnson, PA*, 492 So. 2d 421 (Fla. 1st DCA 1986); *Estate of Johnson v. TPE Hotels, Inc.*, 719 So. 2d 22 (Fla. 5th DCA 1998); F.S. § 95.361.

Comment: In drafting an easement reservation, the language used should be precise, expressing the type of easement, its extent, location and any other pertinent terms as clearly as possible. Language in a deed merely stating a conveyance is "subject to" an easement is generally insufficient in itself to reserve

an easement for the grantor's property. *Procacci v. Zacco, supra*; *Robertia v. Pine Tree Water Control Dist., supra*; *Marchman v. Perdue, supra.* Terms such as "subject to" or "except" are ambiguous and require parole evidence to determine intent to create an easement, so the prudent practitioner should not rely on instruments containing such language without a judicial determination. *See, e.g., Procacci v. Zacco*; *Merriam v. First Nat'l Bank, supra* ("use of the words 'subject to' in an attempt to create an easement led to unclear and ambiguous results, requiring recourse to surrounding facts and circumstances to determine the intention of the parties."); *Behm v. Saeli, supra* (all evidence including contract providing for easement, survey showing easement, and existence of road along access easement pointed to agreement to create and reserve easement). *See, also,* TN 03.02.03 of The Fund Title Notes.

The common law held that an easement cannot be created by exception, because an exception implies that the grantor is removing from the conveyance some pre-existing right, which would not be the case for a newly created easement. *City of Jacksonville v. Shaffer, supra.* However, the modern approach is to interpret the conveyance consistent with the intention of the parties. *See, Shafer* (language interpreted as a reservation); *City of Miami v. St. Joe Paper Co., supra* (language interpreted as a restriction rather than an improper exception).

While common law held that a reservation to a stranger to the title was invalid, the modern approach is to use estoppel by deed against the grantee and grantee's successors to overcome the common law prohibition. *Dade County v. Little, supra*; *Leffler v. Smith, supra*; *Furlong v. Fuller & Johnson, PA, supra.*

An easement created by a reservation in a deed may be extinguished by the act of platting the lands without reserving or showing the easement on the plat. *Estate of Johnson v. TPE Hotels, Inc., supra.*

Dedications on recorded plats should likewise be drafted with precision; imprecise drafting can present evidentiary and intent issues. It is not uncommon to find plats stating that certain lands are "subject to" an easement for ingress and egress, access to a lake or park or other specified uses, or simply designating certain parcels on the map as "easement," "park," or "access" without being referenced in express dedication language. Although the concepts are similar to those described in this title standard, the determination of rights based on a recorded plat are modified under F.S. Chapter 177, including the possibility that parcels and uses shown on the plat, and not expressly referenced in the dedication language, may nonetheless be "deemed to have been dedicated to the public" under F.S. § 177.081(3).

STANDARD 22.3

EASEMENTS BY IMPLICATION FROM PLAT

STANDARD: AN EASEMENT MAY BE IMPLIED FROM A PLAT.

Problem 1: Julie Developer recorded a plat for a residential subdivision which included an area labeled "Sunnyside Park." The plat did not dedicate the "Sunnyside Park," and reserved the land surrounding the park to the developer. Julie Developer then conveyed lots in the subdivision to new lot owners by reference to the plat. Did the lot owners acquire an implied easement to access and use Sunnyside Park?

Answer: Yes.

Problem 2: Alfred Developer recorded a plat for a residential subdivision which included open spaces marked "Reserved – See Margin." The marginal notation stated "The owner contemplates that the blocks, marked 'Reserved – See Margin' may become a part of the golf course, but the owner expressly reserves the absolute right to prescribe the term of any dedication hereafter made or to subdivide or dispose of the same in such manner as it may determine." In advertising materials for the lots, the developer drew attention to the assets of the subdivision, including the golf course. Do the lot owners have an implied easement over the golf course property?

Answer: No.

Problem 3: Alfred Developer's promotional materials and a large map in his sales office both displayed an "Entrance Road" as the main access into the subdivision. However, the subdivision plat depicted a less attractive alternate access road into the subdivision. Did the lot owners acquire an implied easement for the use of the "Entrance Road"?

Answer: No.

Authorities: *McCorquodale v. Keyton*, 63 So. 2d 906 (Fla. 1953); *Boothby v. Gulf Properties of Alabama, Inc.*, 40 So. 2d 117 (Fla. 1948); *Powers v. Scobie*, 60 So. 2d 738 (Fla. 1952); *Estate of Johnson v. TPE Hotels, Inc.*, 719 So. 2d 22 (Fla. 5th DCA 1998); *Jonita, Inc. v. Lewis*, 368 So. 2d 114 (Fla. 1st DCA 1979); *Powers v. Scobie*, 60 So. 2d 738 (Fla. 1952); *Servando Bldg Co. v. Zimmerman*, 91 So. 2d 289 (Fla. 1956); *Flowers v. Seagrove Beach, Inc.*, 479 So. 2d 841 (Fla. 1st DCA 1985); *Miami-Dade County v. Torbert*, 69 So. 3d 970 (Fla. 3d DCA 2011); *Tallahassee Inv. Corp. v. Andrews*, 185 So. 2d 705 (Fla. 1st DCA 1966).

Comment: Property owners receiving title to subdivision lots by reference to a recorded plat acquire an implied easement over any areas designated on the plat for the lot owners' use or as common areas, such as streets, alleys, parks or beach areas. *See, e.g.*, *McCorquodale v. Key*; *Powers v. Scobie*; *Boothby v. Gulf Properties of Alabama, Inc.*, 40 So. 2d 117 (Fla. 1948). However, the lot owners do not receive an implied easement over areas on the plat reserved by the developer or not designated for the lot owners' use. *Burnham v. Davis Islands, Inc.*, 87 So. 2d 97 (Fla. 1956) (developer reserved the right to subdivide open area on the plat). *See also, Bishop v. Courtney*, 22 So. 3d 117 (Fla. 2d DCA 2009) (lot owners hold no easement over areas on a plat marked "Parking Area" and "Boat Slips" without any indication of an intention to dedicate such areas to the lot owners or the public).

This doctrine creating an implied easement over designated areas applies to rights of way and other uses shown on the recorded plat. *Wilson v. Dunlap*, 101 So. 2d 801 (Fla. 1958). The implied easement is a private property right, separate and distinct from the public's right to use platted roads arising from acceptance of

a dedication of such rights of way by the county. Florida applies an "intermediate" or "beneficial" rule for implied easements over roads, holding that lot owners only have such implied easement rights to the extent they are reasonably and materially beneficial to the lot owner and loss of such rights would reduce the lot's value. *Powers v. Scobie*, 60 So. 2d 738 (Fla. 1952). *See also, White Sands v. Sea Club V Condominium*, 581 So. 2d 589 (Fla. 2d DCA 1990) (intermediate rule does not apply to express easement grants). An implied easement cannot be impressed solely by a developer's unrecorded advertising materials or by representations made in conversations. *Jonita, Inc. v. Lewis*, 368 So. 2d 114 (Fla. 1st DCA 1979). Note that an implied easement is distinct from, but related to, the concept that, unless the developer expressly reserves title to a right-of-way depicted on a plat, the conveyance of a platted lot also conveys title to the centerline of the right-of-way adjacent to that lot. *See* Standards 11.3 and 11.5.

A conveyance without reference to a plat does not create an implied easement for matters reflected on the plat. *Tallahassee Inv. Corp. v. Andrews*, 185 So. 2d 705 (Fla. 1st DCA 1966); *Miami-Dade County v. Torbert*, 69 So. 3d 970 (Fla. 3d DCA 2011). *See also, Flowers v. Seagrove Beach, Inc.*, 479 So. 2d 841 (Fla. 1st DCA 1985) (deed referenced a new plat, not the older plat that included a park).

STANDARD 22.4

EASEMENTS BY IMPLICATION FROM NECESSITY

STANDARD: IF A PARCEL OF LAND IS DIVIDED SO THAT ONE OF THE RESULTING PARCELS IS LANDLOCKED EXCEPT FOR ACCESS ACROSS THE REMAINDER, AN EASEMENT BY NECESSITY MAY BE IMPLIED.

Problem 1: Jane Smith owned a 20-acre parcel of land abutting a road. Smith conveyed 10 landlocked acres of the parcel to Richard Brown. Will a grant of an easement by necessity be implied across Smith's land for access to Brown's landlocked parcel?

Answer: Yes.

Problem 2: John Black owned 40 acres of land abutting a road. Black conveyed 30 acres to Jane Green, including the entire road frontage, retaining 10 landlocked acres. Will a reservation of an easement by necessity be implied across Green's land for access to Black's retained parcel?

Answer: Yes.

Authorities: F.S. § 704.01(1); 20 Fla. Jur. 2d Easements, Sections. 26, 27, 32 and 33; *Palm Beach Polo Holdings, Inc., v. Equestrian Club Estates Property Owners Association, Inc.*, 949 So. 2d 347 (Fla 4th DCA 2007), *PGA North II of Florida, LLC v. Division of Admin., State of Florida Dept. of Transp.*, 126 So. 3d 1150 (Fla 4th DCA 2012).

Comment**:** Unlike an easement based upon an express agreement between owners of affected parcels of property, an easement by necessity may be implied or arise pursuant to applicable facts and circumstances despite the absence of an express easement agreement. The implied easement exists where a grantor conveys lands to which there is no accessible right-of-way except over his or her land, or where a grantor retains land which is inaccessible except over land which the person conveys. Such easements previously existed only in common-law but are now codified into two Florida statutes. F.S. § 704.01(1) states that in Florida "the common-law rule of an implied grant of way of necessity is hereby recognized, specifically adopted, and clarified." Such an easement comes about only where title to the separate parcels is derived from a common source other than the original grant by Florida or the United States. F.S. § 704.01(2) creates a statutory way of necessity for landowners who do not qualify for the common-law way of necessity created in F.S. 704.01 (1).

As noted in *Matthews v. Quarles*, 504 So. 2d 1246 (Fla. 1st DCA 1986), a party seeking a common law way of necessity under F.S. § 704.01(1) must establish the following elements: (1) that, at one time, both properties were once owned by the same party; (2) that a common grantor conveyed the landlocked parcel, thereby causing the need for an easement; and (3) that, at the time the landlocked parcel was conveyed, the grantor's remaining land had access to a public road. F. S. § 704.01(1) states that such an implied easement exists where there is no other reasonable and practicable way of ingress or egress and is reasonably necessary for the beneficial use or enjoyment of the part granted or reserved. If the common source of title requirement has been met, the right of the dominant tenement is not terminated if the title to either the dominant or servient tenement has been transferred for nonpayment of taxes.

F.S. § 704.01(2) provides for a statutory way of necessity, exclusive of any common-law right, when land is hemmed in by lands, fencing, or other improvements by other persons so that no practicable route of ingress or egress is available to the nearest public road, or a private road in which the landlocked owner has vested easement rights. In contrast to a way of necessity codified in F.S. § 704.01(1), a way of necessity

under F. S. § 704.01(2) does not require a common source of title. However, the "landlocked" parcel must be used or desired to be used for dwelling, agricultural, timber raising or cutting, or stock raising purposes. Additionally, the owner of the lands across which a way of necessity under F.S. § 704.01(2) is created may be entitled to compensation under F.S. § 704.04.

Although F.S. § 704.01 states that an implied grant of a way of necessity is presumed or that a statutory way of necessity exists under certain circumstances, the prudent practitioner will not rely on such implied easement or statutory way of necessity for access or other purposes absent a court order establishing the easement. In addition to completing a sufficiently comprehensive title search, the prudent practitioner will also obtain a survey that includes an inspection of easements, rights or claims of parties not recorded in the official records, and ask appropriate follow up questions in order to determine whether there are facts indicating that an implied grant of a way of necessity or a statutory way of necessity may be established through appropriate court proceedings.

STANDARD 22.5

EASEMENTS BY PRESCRIPTION

STANDARD: AN EASEMENT BY PRESCRIPTION MAY BE ACQUIRED BY ACTUAL, CONTINUOUS, AND UNINTERRUPTED USE, ADVERSE TO THE CLAIM OF THE OWNER FOR A PERIOD OF 20 YEARS.

Problem 1: Simon Grant, owner and developer of a parcel consisting largely of mangrove swamp, dammed an outfall ditch the county had built and continuously maintained for 45 years. The dam prevented drainage from John Doe's adjacent uplands parcel. Does Doe have a prescriptive easement?

Answer: Yes.

Problem 2: Simon Grant, owner of Greenacre, and John Doe, owner of the adjacent Blackacre, entered into a reciprocal agreement allowing Doe permissive use of a 10-foot alley on Greenacre for ingress and egress so long as Doe allowed Grant similar permissive use of a like alley over the South 10 feet of Blackacre. Both Greenacre and Blackacre have separate legal access to a public road without use of the alley. After more than 20 years of continuous permissive reciprocal use, Grant conveyed Greenacre to a new purchaser whose tenant blocked the alley on Greenacre. Does Doe have a prescriptive easement?

Answer: No.

Authorities: *Burdine v. Sewell*, 109 So. 648 (Fla. 1926); *J.C. Vereen & Sons, Inc. v. Houser*, 167 So. 45 (Fla. 1936); *Downing v. Bird*, 100 So. 2d 57 (Fla. 1958); *Hunt Land Holding Co. v. Schramm*, 121 So. 2d 697 (Fla. 2d DCA 1960); *Florida Power Corp. v. McNeely*, 125 So. 2d 311 (Fla. 2d DCA 1961); *Florida Power Corp. v. Scudder*, 350 So. 2d 106 (Fla. 2d DCA 1977); *Gibson v. Buice*, 394 So. 2d 451 (Fla. 5th DCA 1981); *Crigger v. Florida Power Corp.*, 436 So. 2d 937 (Fla. 5th DCA 1983); *Phelps v. Griffith*, 629 So. 2d 304 (Fla. 2d DCA 1993); *Dan v. BSJ Realty*, 953 So. 2d 640 (Fla. 3d DCA 2007).

Comment: Prescriptive easements are creations of common law. Florida law does not favor acquisition of prescriptive rights and another's use of property is presumed to be permissive rather than adverse, unless the use is exclusive or inconsistent with the rights of the owner. *Dan v. BSJ Realty*, 953 So. 2d 640 (Fla. 3d DCA 2007). The burden is on the claimant to prove the elements of prescription by clear and positive proof. *Id.*

The prudent practitioner will not rely on an easement by prescription for access or other purposes absent a court order establishing the easement. The prudent practitioner will obtain a survey that includes an inspection of easements, rights or claims of parties not recorded in the official records and will ask appropriate follow up questions in order to determine whether there are any claims of prescriptive easements that might burden the property.

STANDARD 22.6

EASEMENTS APPURTENANT

STANDARD: AN EASEMENT APPURTENANT IS INCLUDED IN A CONVEYANCE OF THE DOMINANT ESTATE IN THE ABSENCE OF EXPRESS LANGUAGE TO THE CONTRARY.

Problem: The owner of Blackacre and Greenacre conveyed Blackacre to Joan Doe together with an easement over the east 12 feet of Greenacre as a driveway for access to Blackacre. Later, Doe conveyed Blackacre to Simon Grant. The deed to Grant did not refer to the easement. Did Grant acquire an easement over the driveway?

Answer: Yes.

Authorities: *Behm v. Saeli*, 560 So. 2d 431, 432 (Fla. 5th DCA 1990); *see Burdine v. Sewell*, 92 Fla. 375, 384, 109 So. 648, 653-54 (1926); *Merriam v. First Nat'l Bank*, 587 So.2d 584 (Fla. 1st DCA 1991); *see also* Powell on Real Property § 34.15 (Michael Allan Wolf, ed., Matthew Bender); 4-110 Florida Real Estate Transactions § 110.15.

Comments: An easement created to benefit the dominant estate is presumed to be appurtenant to the dominant estate if there is nothing indicating the parties intended it to be a mere personal right. *Merriam v. First Nat'l Bank, supra*. An easement appurtenant typically may contain a granting clause that includes the grantee's heirs or successors but such designation is not essential. *Burdine v. Sewell, supra*. Once an easement appurtenant has been created, any subsequent conveyance of the dominant parcel will include the easement even if not mentioned in the conveyance. *Behm v. Saeli, supra* ("Unless prevented by the terms of its creation, an easement appurtenant is transferred with the dominant property even if this is not mentioned in the instrument of transfer.").

STANDARD 22.7

TERMINATION OF EASEMENTS CREATED BY RESERVATION OR GRANT

STANDARD: AN EASEMENT CREATED BY RESERVATION OR GRANT MAY NOT BE TERMINATED BY NON-USE ALONE; IT MAY, HOWEVER, BE TERMINATED BY (A) NON-USE COUPLED WITH ACTION SHOWING AN INTENT TO ABANDON; (B) ADVERSE POSSESSION; OR (C) BY THE OPERATION OF THE MARKETABLE RECORD TITLE ACT.

Problem 1: In 1939, the City received a sidewalk easement, and constructed a sidewalk. In 1948, the City removed the sidewalk as part of a construction project but never replaced it even after many years. Was the sidewalk easement terminated?

Answer: No.

Problem 2: In 1975, ABC Land Company conveyed Blackacre to Simon Grant but reserved an easement for grazing rights for its cattle. Despite having the easement, ABC Land Company leased the same grazing rights from subsequent fee owners of Blackacre until 2000. Was the grazing rights easement terminated?

Answer: No.

Problem 3: In 2000, John Doe granted Steve Smith an access easement. However, in 2005, Doe blocked the access easement so that Smith was unable to use it. Was the easement terminated after 7 years?

Answer: Yes.

Problem 4: In 1975, John Doe's house encroached 18 feet into a 100 foot wide power easement held by XYZ Power Co. but did not interfere with XYZ's present or anticipated future use of the easement. Was the portion of the easement where the house is located terminated after 7 years?

Answer: No.

Authorities: *Wiggins v. Lykes Brothers, Inc.*, 97 So. 2d 273 (Fla. 1957); *Leibowitz v. City of Miami Beach*, 592 So. 2d 1213 (Fla. 3d DCA 1992); *Martin County v. Johnson*, 570 So. 2d 1378 (Fla. 4th DCA 1990); *Kitzinger v. Gulf Power Co.*, 432 So. 2d 188 (Fla 1st DCA 1983); *Mumaw v. Roberson*, 60 So. 2d 741 (Fla. 1952); *Bentz v. McDaniel*, 872 So. 2d 978 (Fla. 5th DCA 2004).

Comment: Abandonment of an easement is a question of intent and the burden of proof is on the person asserting abandonment. The person asserting abandonment must demonstrate that there was a "clear affirmative intent to abandon" the easement. *Leibowitz, supra.*

Fences or other such minor encroachments into power or utility easements are unlikely to result in a wellfounded adverse possession claim. *See, e.g., Bentz, supra* (servient owner must show he or she continuously excluded or prevented the easement's use for 7 years).

The Marketable Record Title Act, Chapter 712, Florida Statutes, will eliminate an easement which has not been used, in whole or in part for a 30-year period after a root of title. The statutory language of the exception for easements in use contained in F.S. § 712.03(5) reads: "[r]ecorded or unrecorded easements or rights, interest or servitude in the nature of easements . . . so long as the same are used and the use of any

part thereof shall except from the operation [of the Marketable Record Title Act] the right to the entire use thereof."

STANDARD 22.8

EXTINGUISHMENT OF EASEMENTS BY MERGER OF DOMINANT AND SERVIENT ESTATES

STANDARD: AN EASEMENT MAY BE EXISTINGUISHED BY MERGER WHEN TITLE TO BOTH THE DOMINANT AND SERVIENT ESTATES BECOME VESTED IN THE SAME OWNER, IN THE ABSENCE OF CONTRARY INTENT.

Problem 1: John Doe owns Blackacre and Greenacre. Subsequently, John Doe conveys Greenacre to Ronald Roe, reserving an easement over the west 20 feet for the benefit of Blackacre. Later, Ronald Roe acquires Blackacre. There is no evidence of intent to preserve the easement. Does the easement continue to exist?

Answer: No

Problem 2: Same facts as Problem 1 above, except that the deed conveying Blackacre to Ronald Roe states the property is conveyed together with the easement. Ronald Roe then sells Greenacre to Jane Smith and the deed to Smith recites an intent to reimpose the easement. Does the easement continue to exist?

Answer: Yes.

Problem 3:
John Doe owns Blackacre and Greenacre. Subsequently, John Doe conveys Greenacre to Ronald Roe, reserving an easement over the west 20 feet for pedestrian access to a lake. Later, Ronald Roe acquires Blackacre with no recorded evidence of intent to preserve the easement. Ronald Roe subsequently conveys Blackacre to Mary Smith. While the purchase contract included the lake access, the deed did not describe the easement. Does Ronald Roe have marketable title to Greenacre without exception for the easement?

Answer: No.

Problem 4: John Doe owns Blackacre and Blueacre. Subsequently, John Doe conveys Blackacre to Ronald Roe, and John Doe reserves an access easement over a portion of Blackacre for the benefit of Blueacre. Blueacre is then divided into 8 parcels without recording a plat, and Ronald Roe acquires 7 of the 8 parcels. Is the easement terminated with respect to the 7 parcels held by Ronald Roe?

Answer: No.

Problem 5: In addition to the easement created across Blackacre in Problem 4, an easement is created across parts of Blueacre to provide access to each of the 8 parcels. Ronald Roe acquires 7 of the 8 parcels. Is the easement terminated across those portions of Roe's 7 parcels not necessary to provide access to the remaining 1 lot not owned by Roe?

Answer: No.

Problem 6: Mary Smith owns Blackacre, which is subject to an easement in favor of Greenacre. Mary Smith and her husband then acquire title to Greenacre as tenants by the entirety. Does the easement continue to exist?

Answer: Yes.

Authority: *Lacy v. Seegers*, 445 So. 2d 400 (Fla. 5th DCA 1984); *Tyler v. Price*, 821 So. 2d 1121 (Fla. 4th DCA 2002); *Jackson v. Relf*, 26 Fla. 465, 8 So. 184 (1890); *Lassiter v. Kaufman*, 581 So. 2d 147 (Fla. 1991); *Contos v. Lipsky*, 433 So. 2d 1242, 1244 (Fla. 3d DCA 1983). *See also Phelan v. Rosener*, 511 S.W.3d 431 (Mo. App. 2017); *Hamilton Court, LLC v. East Olympic, L.P.*, 154 Cal. Rptr. 3d 924 (Cal. App. 2013); *Shah v. Smith*, 908 N.E.2d 983 (Oh. App. 2009).

Comment: Under the doctrine of merger, an easement is generally eliminated if a single party receives title to both the dominant and servient parcels. *Lacy v. Seegers*, *supra*. However, courts appear to be moving away from a mechanical application of this rule and may not apply it when the parties appear to have intended for the easement to continue. The practitioner should use caution where there is evidence of intent to preserve an easement from such merger, especially inasmuch as such intent may not be apparent from the public record. While Florida courts have not specifically held that the intent to preserve an easement prevents it from being eliminated by a merger of the underlying parcels' ownership, Florida law makes clear in other contexts that merger is not mechanically applied without considering the intent of the parties. *See*, e.g., *Jackson v. Relf*, *supra* (mortgage survives lender's purchase of property at tax deed sale); *Lassiter v. Kaufman*, *supra (*option price based on property value unencumbered by long-term lease absent evidence of intent to merge); *Contos v. Lipsky*, *supra* (no evidence of intent to merge leasehold into underlying fee).

Additionally, other states' courts have directly held that an easement survives such merger when so intended by the parties. *See, e.g., Phelan v. Rosener*, supra (roadway easement retained where road maintenance agreement executed contemporaneously with deed merging dominant and servient estates); *Hamilton Court, LLC v. East Olympic, L.P. supra* (easement not extinguished by merger of dominant and servient parcels where extinguishment would affect deed of trust's priority); *Shah v. Smith*, *supra* (driveway easement identified in sales contract and deed exists despite merger of dominant and servient parcels). These courts have not consistently indicated what evidence of intent may be considered and have not limited such evidence to the public record. Thus, a transactional practitioner may wish to specifically recite an intention to preserve or reimpose an easement if there is a question of extinguishment by merger.

For merger to occur, there must also be unity of ownership between the servient estate and every dominant estate. *Tyler v. Price*, *supra* ("The legal and equitable titles were separate and of different quality. As a consequence, no merger of titles occurred, and the easement on Parcel B was not extinguished."). Moreover, there must also be unity of title in the same name. *Lacy v. Seegers, supra (*"because title to both tenants was never in the same name . . . there was no unity of title and no merger"*)*.

STANDARD 22.9

ASSIGNABILITY OF COMMERCIAL EASEMENTS IN GROSS

STANDARD: AN EASEMENT IN GROSS USED FOR COMMERCIAL PURPOSES IS ASSIGNABLE AND MAY BE ENFORCED BY THE ASSIGNEE AGAINST A SUBSEQUENT OWNER OF THE BURDENED REAL PROPERTY, IF IT IS RECORDED AND DOES NOT SHOW ON ITS FACE THAT IT IS INTENDED TO BE PERSONAL OR EXCLUSIVE.

Problem 1: John Doe conveyed all of his land (Blackacre) to Simon Grant but reserved a permanent right to use the land for cattle grazing purposes so long as Blackacre was not under actual cultivation. The reservation did not show on its face that it was intended to be personal or exclusive. John Doe later executed a quitclaim deed conveying the easement reservation to ABC Company. Blackacre was never used for farming purposes. May ABC Company enforce the easement?

Answer: Yes.

Problem 2: Before building a beachfront condominium development on Blackacre, ABC Company entered into a "beach service easement" with John Doe, granting Doe an easement over and across the beach for the purpose of providing beach services. After completion of the development and the recording of a declaration of condominium, Doe assigned the easement to XYZ Company. May XYZ Company enforce the easement?

Answer: Yes.

Problem 3: A&P Railroad held title to and then conveyed portions of land used as a railroad to First State Bank while reserving to itself, its successors and assigns, the right to construct, use, maintain, repair and replace electric power lines thereon. A year after the conveyance to the bank, the railroad assigned that easement to ABC Power Co. May ABC Power Co enforce the easement?

Answer: Yes.

Problem 4: In a deed to John Doe, the Trustees of the Internal Improvement Fund reserved an easement permitting them to drain swampland. Later, the trustees assigned this easement to ABC Flood Control District. May ABC Flood Control District enforce the easement?

Answer: Yes.

Authorities: *Wiggins v. Lykes Brothers, Inc.*, 97 So. 2d 273 (Fla. 1957); *Dunes of Seagrove Owners Ass'n v. Dunes of Seagrove Dev., Inc.*, 180 So. 3d 1209 (Fla. 1st DCA 2015); *Dance v. Tatum*, 629 So. 2d 127 (Fla. 1993); *Miller v. Lutheran Conference & Camp Ass'n*, 200 A. 646 (Pa. 1938); Powell on Real Property § 34.16 (Michael Allan Wolf, ed., Matthew Bender). Jon W. Bruce & James W. Ely, Jr., *The Law of Easements and Licenses in Land* (West Group 2001). *Central and Southern Fla. Flood Control Dist. v. Dupuis*, 123 So. 2d 34 (Fla. 3d DCA 1960), *cert. denied*, 127 So. 2d 679 (Fla. 1961); *Albury v. Central and Southern Fla. Flood Control Dist.*, 99 So. 2d 248, 252 (Fla. 3d DCA 1957).

Comment: Easements in gross are mere personal interests in land that are not supported by a dominant estate. *Platt v. Pietras*, 382 So. 2d 414, 417 (Fla. 5th DCA 1980) (defining an easement in gross as "an easement unconnected with nor for the benefit of any dominant estate"). "[A]n easement will never be presumed [to be in gross] when it may fairly be construed as appurtenant to some other estate." *Palm Beach County v. Cove Club Investors LTD*, 734 So. 2d 379, fn. 13 (Fla. 1999).

The traditional view in many states was that easements in gross are not assignable. Bruce & Ely, *supra*, § 9:4. This view has given way to a modern view that commercial easements in gross are freely alienable as a matter of law while noncommercial easements in gross are not. *See, e.g., Miller v. Lutheran Conference & Camp Ass'n*, 200 A. 646 (Pa. 1938) ("there is an obvious difference in this respect between easements for personal enjoyment and those designed for commercial exploitation; while there may be little justification for permitting assignments in the former case, there is every reason for upholding them in the latter.")

While Florida has long recognized the assignability of public utility easements and other like easements, authority on the assignability of other easements in gross has been limited. *See, e.g., Wiggins v. Lykes Brothers, Inc.*, 97 So. 2d 273 (Fla. 1957) (assignment of cattle grazing rights); *Dunes of Seagrove Owners Ass'n v. Dunes of Seagrove Dev., Inc.*, 180 So. 3d 1209 (Fla. 1st DCA 2015) (assignment of right to provide beach services). The view represented by these two isolated cases represents a departure from the traditional view mentioned above, conforming more to the modern view concerning the distinction between commercial and noncommercial easements in gross.

A commercial easement in gross, a written instrument, is assignable as long as it does not show on its face that it is intended to be personal or exclusive to the recipient. In contrast, an oral license, even when rendered irrevocable by the licensee's substantial monetary expenditure in reliance upon its continuation, is not an easement. *See, Dance v. Tatum, supra*. Note, however, that a subsequent purchaser who receives title with notice of such license may be burdened with it. *Dance, supra*, at 129.

Florida courts have held that the personal nature of easements in gross make them unavailable for compensation under eminent domain. *See, e.g., Palm Beach County v. Cove Club Invs.*, 734 So. 2d 379, 388-90 (Fla. 1999); *Div. of Admin., Dep't of Transp. v. Ely*, 351 So. 2d 66, 68-69 (Fla. 3d DCA 1977).

An easement in gross for construction and maintenance of public utilities is also assignable if it does not disclose an intention to be personal or exclusive. *See, e.g., Champaign National Bank v. Illinois Power Co.*, 465 N.E.2d 1016, (Ill. 4th Dist. 1984) ("The weight of modern authority supports the position that commercial easements in gross are alienable, especially when the easements are for utility purposes"); *Johnston v. Michigan Consol. Gas Co.*, 60 N.W.2d 464 (Mich. 1953) ("easements for pipe lines, telephone and telegraph lines and railroads are generally held to be assignable even though in gross."); Danaya C. Wright, *Doing a Double Take: Rail-Trail Takings Litigation in The Post-Brandt Trust Era*, 39 Vt. L. Rev. 703 (2015), *available at* https://scholarship.law.ufl.edu/facultypub/682/ ("Public commercial easements in gross were held to be especially valuable and deserving of protection through presumptions of free alienability, divisibility, and apportionability").

Easements in gross have typically been recognized in Florida in situations involving utilities. *See, City of Orlando v. MSD-Mattie, L.L.C.,* 895 So. 2d 1127, 1128 (Fla. 5th DCA 2005) (easement in gross for overhead electric transmission lines); *Div. of Admin., Dep't Transp. v. Ely,* 351 So. 2d 66 (Fla. 3d DCA 1977) (easement in gross to supply liquefied petroleum gas); *N. Dade Water Co. v. Florida State Tpk. Auth.,* 114 So. 2d 458, 459 (easement in gross to furnish water and sewer services).

The Florida Bar

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SECTION LEGISLATIVE OR POLITICAL ACTIVITY REQUEST FORM

- This form is for committees, divisions and sections to seek approval for section legislative or political activities.
- Requests for legislative and political activity must be made on this form.
- Political activity is defined in SBP 9.11(c) 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."
- Voluntary bar groups must advise TFB of proposed legislative or political activity and must identify all groups the proposal has been submitted to; if comments have been received, they should be attached. 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: *(list name of section, division, committee, TFB group, or individual name)*
Finance and Lending Committee, Real Property, Probate and Trust Law Section

Address: *(address and phone #)* c/o Chair, Richard S. McIver - 813-405-2750
1505 N. Florida Avenue, Tampa, FL 33602

Position Level: *(TFB section / division / committee)* RPPTL Section, Finance and Lending Committee

Proposed Advocacy

Complete Section 1 below if the issue is legislative, 2 if the issue is political. Section 3 must be completed.

1. Proposed Wording of Legislative Position for Official Publication

Proposal to expand the 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.

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 I - Ensure the Judicial System, a Coequal Branch of Government, is Fair, Impartial, Adequately Funded and Open to All
Objective II - Enhance the Legal Profession and the Public's Trust and Confidence in Attorneys and the Justice System.

c. Does the proposal relate to: *(check all that apply)*
____ Regulation and discipline of attorneys
__X__ Improvement of the functioning of the courts, judicial efficacy, and efficiency
____ Increasing the availability of legal services to the public
____ Regulation of lawyer client trust accounts
__X__ Education, ethics, competency, integrity and regulation of the legal profession

d. Additional Information:

Referrals to Other Committees, Divisions & Sections

The section must provide copies of its proposed legislative or political action to all bar divisions, sections, and committees that may be interested in the issue. SBP 9.50(d). List all divisions, sections, and committees to which the proposal has been provided pursuant to this requirement. Please include with your submission any comments received. **The section may submit its proposal before receiving comments but only after the proposal has been provided to the bar divisions, sections, or committees**. Please feel free to use this form for circulation among the other sections, divisions and committees.

Business Law Section

Contacts

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

Wm. Cary Wright, Legislative Co-Chair of the RPPTL Section, 4221 West Boy Scout Blvd, Suite 1000, Tampa, FL 33607

813-229-4135

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

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

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

Same

Submit this form and attachments to the OGC, jhooks@floridabar.org, (850) 561-5662.

A bill to be entitled

An act relating to the amendment of Sections 697.07 and 702.10, Florida Statutes; providing an effective date.

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

Section 1. 697.07 Assignment of rents.—

(1) A mortgage or separate instrument may provide for an assignment of rents of real property or any interest therein as security for repayment of an indebtedness.

(2) If such an assignment is made, the mortgagee shall hold a lien on the rents, and the lien created by the assignment shall be perfected and effective against the mortgagor and third parties upon recordation of the mortgage or separate instrument in the public records of the county in which the real property is located, according to law. For purposes of this section, the term "mortgagor" is defined as the original mortgagor and all parties who have subsequently acquired title to the property subject to the assignment. The term "mortgagee" includes any party entitled to enforce the mortgage or assignment of rents under applicable law.

(3) Unless otherwise agreed to in writing by the mortgagee and mortgagor, the lien created by the assignment of rents shall be enforceable upon the mortgagor's default and written demand for the rents made by the mortgagee to the mortgagor, whereupon the mortgagor shall turn over all rents in the possession or control of the mortgagor at the time of the written demand or collected thereafter (the "collected rents") to the mortgagee less payment of any expenses authorized by the mortgagee in writing.

(4) Upon application by the mortgagee or mortgagor, in a foreclosure action, and notwithstanding any asserted defenses or counterclaims of the mortgagor, a court of competent jurisdiction, pending final adjudication of any action, may require the mortgagor to deposit the collected rents into the registry of the court, or in such other depository as the court may designate. However, the court may authorize the use of the collected rents, before deposit into the registry of the court or other depository, to:

(a) Pay the reasonable expenses solely to protect, preserve, and operate the real property, including, without limitation, real estate taxes, ~~and~~ insurance and assessments which come due after entry of the court's order to a community association as defined in s. 720.301, or a corporation regulated under chapter 718 or chapter 719;

(b) Escrow sums required by the mortgagee or separate assignment of rents instrument; and

(c) Make payments to the mortgagee.

The court shall require the mortgagor to account to the court and the mortgagee for the receipt and use of the collected rents and may also impose other conditions on the mortgagor's use of the collected rents.

(5) Nothing herein shall preclude the court from granting any other appropriate relief regarding the collected rents pending final adjudication of the action. The undisbursed collected rents remaining in the possession of the mortgagor or in the registry of the court, or in such other depository as ordered by the court, shall be disbursed at the conclusion of the action in accordance with the court's final judgment or decree.

(6) The court shall expedite the hearing on the application by the mortgagee or mortgagor to enforce the assignment of rents. The procedures authorized by this statute are in addition to any other rights or remedies of the mortgagee or mortgagor under the mortgage, separate assignment of rents instrument, promissory note, at law, or in equity.

(7) Nothing herein shall alter the lien priorities, rights, or interests among mortgagees or other lienholders or alter the rights of the mortgagee under the mortgage, separate assignment of rents instrument, at law or in equity, concerning rents collected before the written demand by the mortgagee. A mortgagee's enforcement of its assignment of rents under this statute shall not operate to transfer title to any rents not received by the mortgagee.

(8) Any moneys received by the mortgagee pursuant to this statute shall be applied by the mortgagee in accordance with the mortgage, separate assignment of rents instrument, or promissory note, and the mortgagee shall account to the mortgagor for such application.

(9) This section does not apply to any corporation that is an association, as defined in s.720.301, or a corporation regulated under chapter 718 or chapter 719 that acquires title to a parcel or unit through the foreclosure of its claim of lien, provided title remains vested in the association and the rents collected are applied to assessments that are then due.

Section 2. 702.10 Order to show cause; entry of final judgment of foreclosure; payment during foreclosure.—

(1) A lienholder may request an order to show cause for the entry of final judgment in a foreclosure action. For purposes of

this section, the term "lienholder" includes the plaintiff and a defendant to the action who holds a lien encumbering the property or a defendant who, by virtue of its status as a condominium association, cooperative association, or property owners' association, may file a lien against the real property subject to foreclosure. Upon filing, the court shall immediately review the request and the court file in chambers and without a hearing. If, upon examination of the court file, the court finds that the complaint is verified, complies with s.702.015, and alleges a cause of action to foreclose on real property, the court shall promptly issue an order directed to the other parties named in the action to show cause why a final judgment of foreclosure should not be entered.

(a) The order shall:

1. Set the date and time for a hearing to show cause. The date for the hearing may not occur sooner than the later of 20 days after service of the order to show cause or 45 days after service of the initial complaint. When service is obtained by publication, the date for the hearing may not be set sooner than 30 days after the first publication.

2. Direct the time within which service of the order to show

cause and the complaint must be made upon the defendant.

3. State that the filing of defenses by a motion, a responsive pleading, an affidavit, or other papers before the hearing to show cause that raise a genuine issue of material fact which would preclude the entry of summary judgment or otherwise constitute a legal defense to foreclosure shall constitute cause for the court not to enter final judgment.

4. State that a defendant has the right to file affidavits or other papers before the time of the hearing to show cause and may appear personally or by way of an attorney at the hearing.

5. State that, if a defendant files defenses by a motion, a verified or sworn answer, affidavits, or other papers or appears personally or by way of an attorney at the time of the hearing, the hearing time will be used to hear and consider whether the defendant's motion, answer, affidavits, other papers, and other evidence and argument as may be presented by the defendant or the defendant's attorney raise a genuine issue of material fact which would preclude the entry of summary judgment or otherwise constitute a legal defense to foreclosure. The order shall also state that the court may enter an order of final judgment of foreclosure at the hearing and order the clerk of the court to

conduct a foreclosure sale.

6. State that, if a defendant fails to appear at the hearing to show cause or fails to file defenses by a motion or by a verified or sworn answer or files an answer not contesting the foreclosure, such defendant may be considered to have waived the right to a hearing, and in such case, the court may enter a default against such defendant and, if appropriate, a final judgment of foreclosure ordering the clerk of the court to conduct a foreclosure sale.

7. State that if the mortgage provides for reasonable attorney fees and the requested attorney fees do not exceed 3 percent of the principal amount owed at the time of filing the complaint, it is unnecessary for the court to hold a hearing or adjudge the requested attorney fees to be reasonable.

8. Attach the form of the proposed final judgment of foreclosure which the movant requests the court to enter at the hearing on the order to show cause.

9. Require the party seeking final judgment to serve a copy of the order to show cause on the other parties in the following manner:

a. If a party has been served pursuant to chapter 48 with the

complaint and original process, or the other party is the plaintiff in the action, service of the order to show cause on that party may be made in the manner provided in the Florida Rules of Civil Procedure.

b. If a defendant has not been served pursuant to chapter 48 with the complaint and original process, the order to show cause, together with the summons and a copy of the complaint, shall be served on the party in the same manner as provided by law for original process.

Any final judgment of foreclosure entered under this subsection is for in rem relief only. This subsection does not preclude the entry of a deficiency judgment where otherwise allowed by law. The Legislature intends that this alternative procedure may run simultaneously with other court procedures.

(b) The right to be heard at the hearing to show cause is waived if a defendant, after being served as provided by law with an order to show cause, engages in conduct that clearly shows that the defendant has relinquished the right to be heard on that order. The defendant's failure to file defenses by a motion or by a sworn or verified answer, affidavits, or other papers or to appear personally or by way of an attorney at the hearing duly scheduled

on the order to show cause presumptively constitutes conduct that clearly shows that the defendant has relinquished the right to be heard. If a defendant files defenses by a motion, a verified answer, affidavits, or other papers or presents evidence at or before the hearing which raise a genuine issue of material fact which would preclude entry of summary judgment or otherwise constitute a legal defense to foreclosure, such action constitutes cause and precludes the entry of a final judgment at the hearing to show cause.

(c) In a mortgage foreclosure proceeding, when a final judgment of foreclosure has been entered against the mortgagor and the note or mortgage provides for the award of reasonable attorney fees, it is unnecessary for the court to hold a hearing or adjudge the requested attorney fees to be reasonable if the fees do not exceed 3 percent of the principal amount owed on the note or mortgage at the time of filing, even if the note or mortgage does not specify the percentage of the original amount that would be paid as liquidated damages.

(d) If the court finds that all defendants have waived the right to be heard as provided in paragraph (b), the court shall promptly enter a final judgment of foreclosure without the need for

further hearing if the plaintiff has shown entitlement to a final judgment and upon the filing with the court of the original note, satisfaction of the conditions for establishment of a lost note, or upon a showing to the court that the obligation to be foreclosed is not evidenced by a promissory note or other negotiable instrument. If the court finds that a defendant has not waived the right to be heard on the order to show cause, the court shall determine whether there is cause not to enter a final judgment of foreclosure. If the court finds that the defendant has not shown cause, the court shall promptly enter a judgment of foreclosure. If the time allotted for the hearing is insufficient, the court may announce at the hearing a date and time for the continued hearing. Only the parties who appear, individually or through an attorney, at the initial hearing must be notified of the date and time of the continued hearing.

(2) Except as provided in paragraph (i)<u>below</u>, in any action for foreclosure, other than owner-occupied residential real estate, in addition to any other relief that the court may award, the plaintiff may request that the court enter an order directing the mortgagor defendant to show cause why an order to make payments during the pendency of the foreclosure proceedings or an order to vacate the premises should not be entered. <u>For purposes of this</u>

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subsection, "mortgagor" is defined as the original mortgagor, or any subsequent owner or party in possession of the property. This subsection shall not apply to an association as defined in s.720.301 or a corporation regulated under chapter 718 or chapter 719, provided title remains vested in the association and any rents collected are applied to assessments that are then due.

(a) The order shall:

1. Set the date and time for hearing on the order to show cause. However, the date for the hearing may not be set sooner than 20 days after the service of the order. If service is obtained by publication, the date for the hearing may not be set sooner than 30 days after the first publication.

2. Direct the time within which service of the order to show cause and the complaint shall be made upon each defendant.

3. State that a defendant has the right to file affidavits or other papers at the time of the hearing and may appear personally or by way of an attorney at the hearing.

4. State that, if a defendant fails to appear at the hearing to show cause and fails to file defenses by a motion or by a verified or sworn answer, the defendant is deemed to have waived the right to a hearing and in such case the court may enter an

order to make payment or vacate the premises.

5. Require the movant to serve a copy of the order to show cause on the defendant in the following manner:

a. If a defendant has been served with the complaint and original process, service of the order may be made in the manner provided in the Florida Rules of Civil Procedure.

b. If a defendant has not been served with the complaint and original process, the order to show cause, together with the summons and a copy of the complaint, shall be served on the defendant in the same manner as provided by law for original process.

(b) The right of a defendant to be heard at the hearing to show cause is waived if the defendant, after being served as provided by law with an order to show cause, engages in conduct that clearly shows that the defendant has relinquished the right to be heard on that order. A defendant's failure to file defenses by a motion or by a sworn or verified answer or to appear at the hearing duly scheduled on the order to show cause presumptively constitutes conduct that clearly shows that the defendant has relinquished the right to be heard.

(c) If the court finds that a defendant has waived the right

to be heard as provided in paragraph (b), the court may promptly enter an order requiring payment in the amount provided in paragraph (f) or an order to vacate.

(d) If the court finds that the mortgagor has not waived the right to be heard on the order to show cause, the court shall, at the hearing on the order to show cause, consider the affidavits and other showings made by the parties appearing and make a determination of the probable validity of the underlying claim alleged against the mortgagor and the mortgagor's defenses. If the court determines that the plaintiff is likely to prevail in the foreclosure action, the court shall enter an order requiring the mortgagor to make the payment described in paragraph (e) to the plaintiff and provide for a remedy as described in paragraph (f). However, the order shall be stayed pending final adjudication of the claims of the parties if the mortgagor files with the court a written undertaking executed by a surety approved by the court in an amount equal to the unpaid balance of the lien being foreclosed, including all principal, interest, unpaid taxes, and insurance premiums paid by the plaintiff.

(e) If the court enters an order requiring the mortgagor to make payments to the plaintiff, payments shall be payable at such

intervals and in such amounts provided for in the mortgage instrument before acceleration or maturity. The obligation to make payments pursuant to any order entered under this subsection shall commence from the date of the motion filed under this section. The order shall be served upon the person ordered to make payments no later than 20 days before the date specified for the first payment. The order may permit, but may not require, the plaintiff to take all appropriate steps to secure the premises during the pendency of the foreclosure action.

(f) If the court enters an order requiring payments, the order shall also provide that the plaintiff is entitled to possession of the premises upon the failure of the mortgagor to make the payment required in the order unless at the hearing on the order to show cause the court finds good cause to order some other method of enforcement of its order.

(g) All amounts paid pursuant to this section shall be credited against the mortgage obligation in accordance with the terms of the loan documents; however, payments made under this section do not constitute a cure of any default or a waiver or any other defense to the mortgage foreclosure action.

(h) Upon the filing of an affidavit with the clerk that the

premises have not been vacated pursuant to the court order, the clerk shall issue to the sheriff a writ for possession which shall be governed by s. 83.62.

(i) This subsection does not apply to foreclosure of an owner-occupied residence. For purposes of this paragraph, there is a rebuttable presumption that a residential property for which a homestead exemption for taxation was granted according to the certified rolls of the latest assessment by the county property appraiser, before the filing of the foreclosure action, is an owner-occupied residential property.

Section 3. This act shall take effect upon becoming law.

REAL PROPERTY, PROBATE & TRUST LAW SECTION
OF THE FLORIDA BAR

WHITE PAPER

PROPOSAL TO EXPAND APPLICABILITY OF § 697.07 AND
§ 702.10 TO THIRD PARTIES WHO ACQUIRE PROPERTIES
SUBJECT TO A MORTGAGE

I. SUMMARY

Florida Statute §697.07 was enacted in 1987 to provide that a borrower's assignment of rents as collateral for a loan becomes effective upon default of the borrower. §702.10 was enacted in 1993 and provides that the court may order the borrower to make payments during the pendency of the foreclosure for non-owner occupied properties. Both statutes have been amended several times, but each statute has been held by various courts to be unenforceable against third parties who acquire such properties without assuming the obligations under an existing mortgage loan.

It is typical for borrowers who are not paying their mortgages to also default in payment of their homeowners' association or condominium association assessments, resulting in a foreclosure by the association. Some delinquent borrowers also file bankruptcy, resulting in a sale of the property by the bankruptcy trustee. Investors may buy such properties from the association's foreclosure sale or the bankruptcy trustee for "pennies on the dollar", subject to the delinquent mortgage loan. However, many of those investors have no intention of paying off the superior mortgage, and vigorously fight the foreclosure for the sole purpose of delaying the transfer of title, in order to maximize any rental income that may be received during the foreclosure. Meanwhile, unpaid interest continues to accrue on the debt, and lenders continue to advance money to pay taxes and insurance for the property, but receive no payments from the new property owner to offset those expenditures.

The proposal would expand a foreclosing lender's ability to obtain rental income derived from the mortgaged property during the foreclosure action from third parties who acquire the property but don't assume the mortgage. It would also provide a limited exception for community associations that own units in their communities by reason of their own lien foreclosure actions and rent them out but do not oppose the mortgage foreclosure action. The change is necessary to avoid the intentional delays caused by third parties using the judicial system as part of their business model to increase profits. The legislation does not have a fiscal impact on state funds.

II. CURRENT SITUATION

Since the financial crisis, investors have been purchasing condo and HOA properties at the associations' foreclosure sales for just a few thousand dollars, renting out the units, and opposing the mortgage foreclosure actions to prolong the lucrative flow of rental income. Since the investor

is not a party to the mortgage, it has no obligation to make the monthly mortgage payments and almost never does. In some cases, community associations have pursued a similar course, including opposing the mortgage foreclosure.

Remedies for the foreclosing lender are found in section 697.07 and section 702.10. These sections provide foreclosing mortgagees the ability in some cases to obtain the income derived from rental of the mortgaged properties. However, language in both sections restricts the lenders' ability to do so where the property owner is a third-party investor, not the original mortgagor.

Appellate decisions such as Green Emerald Homes, LLC v. Residential Credit Opportunities Trust, 256 So.3d 211 (Fla. 2d DCA 2018) and Green Emerald Homes, LLC v. 21st Century Mtg. Corp., 2019 WL 2398015 (Fla. 2d DCA 2019) have limited the ability of foreclosing lenders to utilize the existing statutes to address the inequitable conduct of third parties in the mortgage foreclosure action. This has enabled investors to continue to collect rental income and delay foreclosure cases for their own benefit with impunity. As the courts have made clear, the only way to address the inequitable conduct of investors using the court system as part of their business model to generate additional rental revenue is through a change to the applicable statutes.

III. EFFECT OF PROPOSED CHANGE

The proposed changes serve to recognize the inequitable conduct of investors using the court system as part of their business model to maximize the amount of rental revenue they receive of a property. The draft proposal expands the application of Section 697.07 and 702.10 to cover all instances where the mortgaged property is acquired by any person or entity that is not the mortgagor, with a limited exception for community associations. This will allow foreclosing lenders and the trial courts to address the intentional efforts of third parties to delay mortgage foreclosure actions so that they can receive additional rental income.

Community associations that foreclose on their liens and take title would be able to rent the property and keep the rents as long as they apply the rents to the assessments that are due. This limited exception recognizes the unique nature of community association foreclosure actions and that such associations are not set up to own property within its community. The limited exception allows for those instances where the community association does take title to rent the property and apply the rental income to the delinquent balance owed to the community association so that the common expenses of the community association, such as taxes and insurance and maintenance, are fully funded.

The draft proposal also expands the court's authority under Section 697.07(4)(a)-(c). Presently, this section permits a court, pending final adjudication, to require the payment of rent into the court registry or other appropriate depository. However, the court may, in its discretion, authorize use of collected rents, before deposit, to pay taxes, insurance, escrow sums required by the mortgagee or separate assignment of rents instrument and make payments to the mortgagee. As amended, in addition to the foregoing items, the court may also consider authorizing the use of collected rents, before deposit, to reimburse community associations for regular periodic assessments coming due after the date of the order and through the final adjudication of the action.

IV. ANALYSIS

The following describes the changes being proposed:

A. Section 697.07(2) is amended to clarify that the statute is enforceable against the mortgagor and all third parties who may have acquired title to the property. The definition of "mortgagor" is added to include such parties. The definition of "mortgagee" is added to clarify that the assignment of rents is enforceable by any party entitled to enforce the mortgage. There is a large body of case law on who is entitled to enforce a mortgage under Section 673.3011 and related statutes.

B. Section 697.07(3) provides that that the statutory lien created by the assignment of rents is enforceable against the mortgagor, as now defined in subsection (2).

C. Section 697.07(4) is amended to provide that a court has discretion to order the mortgagor or third party to deposit rental revenue into the court registry pending the resolution of the foreclosure, and also allows for the payment of regular assessments to a community association that come due after the court's order to be paid out of the rental revenue.

D. Section 697.07(9) is created to exempt community associations from the provisions of Section 697.07, provided the community association holds title to the property that is the subject of the foreclosure action and applies the rents towards the assessments that are then due.

E. Section 702.10(2) is amended to specify this subsection applies to the mortgagor and subsequent owners by adding a definition of "mortgagor", and that this subsection does not apply to a community association provided it holds title and any rents collected are applied to assessments that are then due.

V. FISCAL IMPACT ON STATE AND LOCAL GOVERNMENTS

The proposal does not have a direct fiscal impact on local governments. There may be a potential impact on the judicial system as mortgage foreclosure cases move quicker due to the disincentive for investors to delay the mortgage foreclosure to increase the amount of rental revenue received. The proposal will also allow for the judiciary to focus its resources on contested foreclosure actions that involve homestead properties as third parties will be less likely to litigate

foreclosure actions due to the inability to receive rental income during the pendency of the foreclosure.

VI. DIRECT IMPACT ON PRIVATE SECTOR

This proposal will likely reduce the bidding at community association foreclosures since third parties will no longer be able to rent the property and collect the rental revenue without having to worry about the foreclosing lender obtaining the funds. This will likely increase the amount of properties that community associations acquire in their foreclosure actions. The carve-out for associations to keep rental income from units they own through foreclosure balances the anticipated chilling effect on association foreclosure sales. This proposal will also allow for properties that are in foreclosure to be moved quickly through the system and returned to the market faster by reducing the frivolous and unmeritorious filings by third parties that are filed for the primary purpose of delaying the mortgage foreclosure action for the sole purpose of generating additional rental revenue .

VII. CONSTITUTIONAL ISSUES

There are no constitutional issues.

VIII. OTHER INTERESTED PARTIES

The Condominium and Planned Development Committee, the Real Property Litigation Committee, the Florida Banker's Association and the Florida judiciary.