



EXECUTIVE COUNCIL MEETING

AGENDA

The Breakers

Palm Beach, Florida

Saturday, July 30, 2016

9:45 a.m.

BRING THIS AGENDA TO THE MEETING

Real Property, Probate and Trust Law Section
Executive Council Meeting

**The Breakers
Palm Beach, Florida
July 30, 2016**

Agenda

Note: Agenda Items May Be Considered on a Random Basis

- I. [Presiding](#) — *Deborah P. Goodall, Chair*
- II. [Attendance](#) — *William T. Hennessey, III. Secretary*
- III. [Minutes of Previous Meeting](#) — *William T. Hennessey, III. Secretary*
- Motion to approve the minutes of June 4, 2016 meeting of Executive Council held at the Portofino Hotel, Orlando, Florida. **pp. 11 – 46**
- IV. [Chair's Report](#) — *Deborah P. Goodall*
1. Recognition of Guests.
 2. Recognition of General Sponsors and Friends of the Section. **pp. 47 – 49**
 3. Recognition of Award Recipients from the Convention.
 4. Upcoming Executive Council Meetings **pp. 50 – 55**
- V. [Liaison with Board of Governors Report](#) — *Lansing C. Scriven*
- VI. [Chair-Elect's Report](#) — *Andrew M. O'Malley p. 56*
- VII. [Treasurer's Report](#) — *Tae Kelley Bronner*
- Statement of Current Financial Conditions. **p. 57**
- VIII. [Director of At-Large Members Report](#) — *S. Katherine Frazier*
- IX. [CLE Seminar Coordination Report](#) — *Robert S. Swaine (Real Property) and Shane Kelley (Probate & Trust), Co-Chairs p. 58*

X. [General Standing Division](#) — *Andrew M. O'Malley, General Standing Division Director and Chair-Elect*

Information Items:

1. **Amicus Coordination** – *Kenneth Bell, Gerald Cope, Robert Goldman and John Little, Co-Chairs*

Report on amicus developments

2. **Fellows** – *Benjamin Diamond, Chair*

Introduction of New Fellows **p. 59**

3. **Liaison with FLEA/FLSSI** – *David Brennan and Roland “Chip” Waller, Liaisons*

Report on current activities of FLEA/FLSSI

4. **Liaison with The Florida Bar CLE** – *Robert S. Freedman, Liaison*

Report on Florida Bar CLE

5. **Publications** –

- A. **ActionLine** – *Jeffrey A. Baskies and W. Cary Wright, Co-Chairs*

Report on ActionLine

- B. **Florida Bar Journal** – *Douglas G. Christy, III and Jeffrey S. Goethe, Co-Chairs*

Report on Florida Bar Journal

6. **Sponsorship Coordination** – *Wilhelmina Kightlinger, Chair*

Report on Sponsorship and Opportunities

7. **Professionalism and Ethics** – *Paul Roman, Chair*

Update on status of the “No Place Like Home” project

XI. [Real Property Law Division Report](#)—*Robert S. Freedman, Director*

Action Items:

1. **Real Estate Structures and Taxation Committee** – *Michael E. Bedke, Chair*

Motion to (A) adopt as a Section position changes to F.S. 193.1554(5) and 193.1555(5) in support of uniform assessment of real property held in Florida land trusts; (B) find that such legislative position is within the purview of the

RPPTL Section; and (C) to expend Section funds in support of the proposed legislative position **pp. 60 – 67.**

2. **Title Insurance and Title Insurance Liaison Committee – Raul Perez Ballaga, Chair**

Motion to adopt as a Section position opposition to the adoption of Rule 69B-186.01069(4)(a), Florida Administrative Code, based upon the Florida Department of Financial Services' lack of statutory or rulemaking authority to regulate closing services **pp. 68 – 71.**

Information Item:

1. **Construction Law Committee – Scott Pence, Chair**

Consideration of proposed legislation regarding the impact of open construction permits and potential remedies **pp. 72 – 79.**

XII. Probate and Trust Law Division Report— Debra L. Boje, Director

Action Items:

1. **Estate and Trust Tax Planning Committee --- David J. Akins, Chair**

Motion to: (A) adopt as a Section position legislation to amend the Florida Statutes to permit the creation of joint tenancies with rights of survivorship and tenancies by the entirety in certain kinds of personal property without regard to the common law unities of time and title, including the creation of a new s. 689.151, Florida Statutes; (B) find that such legislative position is within the purview of the RPPTL Section; and (C) expend Section funds in support of the proposed legislative position **pp. 80 – 88.**

2. **Guardianship, Power of Attorney and Advanced Directives Committee --- Hung V. Nguyen, Chair**

Motion to: (A) adopt as a Section position legislation to permit a court to approve a guardian's request to initiate a petition for dissolution of marriage of a ward without the requirement that the ward's spouse consent to the dissolution, including amendments to s. 744.3725, Florida Statutes; (B) find that such legislative position is within the purview of the RPPTL Section; and (C) expend Section funds in support of the proposed legislative position **pp. 89 – 94.**

3. **Trust Law Committee --- Angela Adams, Chair**

Motion to: (A) adopt as a Section position legislation to revise Florida law to provide that the Attorney General is the proper party to receive notice for matters concerning charitable trusts and further define the manner in which the Attorney General will receive such notices, including changes to §§736.0110(3),

736.1201, 736.1205, 736.1206(2), 736.1207, 736.1208(4)(b), and 736.1209, Florida Statutes; (B) find that such legislative position is within the purview of the RPPTL Section; and (C) expend Section funds in support of the proposed legislative position **pp. 95 – 102.**

4. **Trust Law Committee** --- *Angela Adams, Chair*

Motion to: (A) adopt as a Section position legislation revising §736.04117, Florida Statutes: (1) allowing a trustee to distribute principal in further trust pursuant to a power of distribution that is limited by an ascertainable standard (currently such distributions are only permitted pursuant to a trustee's power to distribute principal pursuant to an absolute power to make distributions); (2) adding a provision to allow a trustee to distribute trust principal to a supplemental needs trust when a beneficiary is disabled; and (3) expanding the notice requirements to require the trustee to provide a copy of the proposed distributee trust instrument prior to the distribution **pp. 103 – 119.**

Informational Items:

1. **Ad Hoc Committee on Spendthrift Trust Issues** --- Lauren Detzel and Jon Scuderi, Co-Chairs

Proposed support of legislation that (1) clarifies that “attach” or “otherwise reach” includes the term garnish; (2) prevents a former spouse, including a former spouse who has a judgment or court order against the beneficiary for support or maintenance, from garnishing discretionary distributions from a trust created by a third person; and (3) clarifies that regardless of whether there is an unsatisfied judgment against a beneficiary, the trustee may nonetheless continue to make discretionary distributions to other beneficiaries included in the permissible class of beneficiaries, including amendments to s. 736.0504, Florida Statutes **pp. 120 – 158.**

2. **Elective Share Review Committee** --- Lauren Detzel and Charles Ian Nash, Co-Chairs

Proposed support of legislation that revises Florida's Elective Share Statute, Sections 732.201-732.2155, including changes to the manner in which protected homestead is included in the elective estate and how it is valued for purposes of satisfying the elective share; quantify the amount of the elective share which the surviving spouse is entitled with reference to the length of the marriage; add a provision to assess interest on persons who are very delinquent in fulfilling their statutory obligations to pay or contribute towards satisfaction of the elective share; add a new section that specifically addresses awards of attorney's fees and costs from elective share proceedings; and make changes to Chapter 738 to assure qualification for certain elective share trusts that contain so called unproductive property **pp. 159 – 187.**

3. **Probate Law and Procedure** --- John Moran, Chair

Proposed support of legislation allowing a testator to deposit their original will with the clerk's office for safekeeping during their lifetime, and for the other custodians to deposit original wills with the clerk for safekeeping when the testator cannot be located **pp. 188 – 196**.

4. **Trust Law Committee** --- *Angela Adams, Chair*

Proposed support of legislation to reaffirm Florida's well established jurisprudence in favor of donative freedom so that the settlor's intent is paramount when applying and interpreting both Florida trust law and the terms of a trust, including changes to §§736.0103(11), 736.0105(2)(c), and 736.0404, Florida Statutes **pp. 197 – 205**.

XIII. Real Property Law Division Reports — *Robert S. Freedman, Director*

1. **Commercial Real Estate** – Adele Ilene Stone, Chair; E. Burt Bruton, R. James Robbins, Jr. and Martin D. Schwartz, Co-Vice Chairs.
2. **Condominium and Planned Development** – William P. Sklar, Chair; Alexander B. Dobrev and Kenneth S. Direktor, Co-Vice Chairs.
3. **Construction Law** – Scott Pence, Chair; Reese J. Henderson, Jr. and Neal A. Sivyer, Co-Vice Chairs.
4. **Construction Law Certification Review Course** – Deborah B. Mastin and Bryan R. Rendzio, Co-Chairs; Melinda S. Gentile, Vice Chair.
5. **Construction Law Institute** – Reese J. Henderson, Jr., Chair; Sanjay Kurian, Diane S. Perera and Jason J. Quintero, Co-Vice Chairs.
6. **Development & Land Use Planning** – Vinette D. Godelia, Chair; Julia L. Jennison, Co-Vice Chair.
7. **Insurance & Surety** – W. Cary Wright and Scott Pence, Co-Chairs; Frederick R. Dudley and Michael G. Meyer, Co-Vice Chairs.
8. **Liaisons with FLTA** – Alan K. McCall and Melissa Jay Murphy, Co-Chairs; Alexandra J. Overhoff and James C. Russick, Co-Vice Chairs.
9. **Real Estate Certification Review Course** – Jennifer Slone Tobin, Chair; Manual Farach, Martin S. Awerbach and Brian W. Hoffman, Co-Vice Chairs.
10. **Real Estate Leasing** – Richard D. Eckhard Chair; Brenda B. Ezell, Vice Chair.
11. **Real Estate Structures and Taxation** – Michael Bedke, Chair; Cristin C. Keane, Lloyd Granet and Deborah Boyd, Co-Vice Chairs.
12. **Real Property Finance & Lending** – David R. Brittan, Chair; E. Ashley McRae, Richard S. McIver and Robert G. Stern, Co-Vice Chairs.

13. **Real Property Litigation** – Susan K. Spurgeon, Chair; Manuel Farach and Marty J. Solomon, Co-Vice Chairs.
14. **Real Property Problems Study** – Arthur J. Menor, Chair; Mark A. Brown, Robert S. Swaine, Stacy O. Kalmanson, Lee A. Weintraub and Patricia J. Hancock, Co-Vice Chairs.
15. **Residential Real Estate and Industry Liaison** – Salome J. Zikakas, Chair; Louis E. “Trey” Goldman, Nicole M. Villarreal and James Marx, Co-Vice Chairs.
16. **Title Insurance and Title Insurance Liaison** – Raul P. Ballaga, Chair; Alan B. Fields, Brian J. Hoffman and Melissa N. VanSickle, Co-Vice Chairs.
17. **Title Issues and Standards** – Christopher W. Smart, Chair; Robert M. Graham, Brian J. Hoffman and Karla J. Staker, Co-Vice Chairs.

XIV. Probate and Trust Law Division Committee Reports — *Debra Lynn. Boje, Director*

1. **Ad Hoc Guardianship Law Revision Committee** – David Clark Brennan, Chair; Sancha Brennan Whynot, Tattiana Patricia Brenes-Stahl, Nicklaus Joseph Curley, Co-Vice Chairs
2. **Ad Hoc Study Committee on Estate Planning Conflict of Interest -** William Thomas Hennessey III, Chair; Paul Edward Roman, Vice Chair
3. **Ad Hoc Study Committee on Jurisdiction and Service of Process** – Barry F. Spivey, Chair; Sean William Kelley and Christopher Quinn Wintter, Co-Vice Chairs
4. **Ad Hoc Committee on Physicians Orders for Life Sustaining Treatment (POLST)** – Jeffrey Alan Baskies and Thomas M. Karr, Co-Chairs
5. **Ad Hoc Study Committee on Spendthrift Trust Issues** – Lauren Young Detzel and Jon Scuderi, Co-Chairs
6. **Asset Protection** – George Daniel Karibjanian, Chair; Rick Roy Gans and Brian Michael Malec, Co-Vice-Chairs
7. **Attorney/Trust Officer Liaison Conference** – Laura Kristin Sundberg, Chair; Stacey L. Cole, Co-Vice Chair (Corporate Fiduciary), Tattiana Patricia Brenes-Stahl and Patrick Christopher Emans, Co-Vice Chair
8. **Digital Assets and Information Study Committee** – J. Eric Virgil, Chair; M. Travis Hayes and S. Dresden Brunner, Co-Vice Chairs

9. **Elective Share Review Committee** – Lauren Young Detzel and Charles Ian Nash, Co-Chairs; Jenna Rubin, Vice-Chair
10. **Estate and Trust Tax Planning** – David James Akins, Chair; Tasha K. Pepper-Dickinson and Robert Logan Lancaster, Co-Vice Chairs
11. **Guardianship, Power of Attorney and Advanced Directives** – Hung Viet Nguyen, Chair, Nicklaus Joseph Curley, Lawrence Jay Miller and J. Eric Virgil, Co-Vice Chairs
12. **IRA, Insurance and Employee Benefits** – L. Howard Payne and Kristen M. Lynch, Co-Chairs; Carlos Alberto Rodriguez and Richard Amari, Co-Vice Chairs
13. **Liaisons with ACTEC** – Elaine M. Bucher, Michael David Simon, Bruce Michael Stone, and Diana S.C. Zeydel
14. **Liaisons with Elder Law Section** – Charles F. Robinson and Marjorie Ellen Wolasky
15. **Liaisons with Tax Section** – Lauren Young Detzel, Cristin Keane, William Roy Lane, Jr., Brian Curtis Sparks and Donald Robert Tescher
16. **Principal and Income** – Edward F. Koren and Pamela O. Price, Co-Chairs, Keith Braun, Vice Chair
17. **Probate and Trust Litigation** – Jon Scuderi, Chair; John Richard Caskey, Robert Lee McElroy, IV and James Raymond George Co-Vice Chairs
18. **Probate Law and Procedure** – John Christopher Moran, Chair; Michael Travis Hayes and Matthew Henry Triggs, Co-Vice Chairs
19. **Trust Law** – Angela McClendon Adams, Chair; Tami Foley Conetta, Jack A. Falk and Mary E. Karr, Co-Vice Chairs
20. **Wills, Trusts and Estates Certification Review Course** – Laura Kristin Sundberg, Chair, Jeffrey Goethe, Linda S. Griffin, Seth Andrew Marmor and Jerome L. Wolf, Co-Vice Chairs

XV. General Standing Committee Reports — *Andrew M. O'Malley, Director and Chair-Elect*

1. **Ad Hoc Leadership Academy** – Brian Sparks and Kris Fernandez, Co-Chairs

2. **Ad Hoc Study Committee on Same Sex Marriage Issues**— Jeffrey Ross Dollinger and George Daniel Karibjanian, Co-Chairs
3. **Amicus Coordination** – Robert W. Goldman, John W. Little, III, Kenneth B. Bell and Gerald B. Cope, Jr., Co-Chairs
4. **Budget** – Tae Kelley Bronner, , Chair; Robert S. Freedman and Pamela O. Price, Co-Vice Chairs
5. **CLE Seminar Coordination** – Robert S. Swaine and Shane Kelley, Co-Chairs; Thomas Karr, Silvia Rojas Alex Hamrick Theo Kypreos Hardy L. Roberts, III (General E-CLE) and Paul Roman (Ethics), Co-Vice Chairs
6. **Convention Coordination** – Dresden Brunner, Chair, Sancha Brennan Whynot and Jon Scuderi, Co-Vice Chairs
7. **Fellows** – Benjamin Diamond, Chair; and Joshua Rosenberg, John Costello and Jennifer Bloodworth, Co-Vice Chairs
8. **Florida Electronic Filing & Service** – Rohan Kelley, Chair
9. **Homestead Issues Study** – Jeffrey S. Goethe (Probate & Trust) and Patricia P. Jones (Real Property), Co-Chairs; J. Michael Swaine, Melissa Murphy and Charles Nash, Co-Vice Chairs
10. **Legislation** – Sarah Butters (Probate & Trust) and Steven Mezer (Real Property), Co-Chairs; Travis Hayes and Ben Diamond (Probate & Trust), and Alan B. Fields and Art Menor (Real Property), Co-Vice Chairs
11. **Legislative Update (2016)** – R. James Robbins, Chair; Stacy O. Kalmanson, Thomas Karr, Kymberlee Smith, Barry F. Spivey, Jennifer S. Tobin, Co-Vice Chairs
12. **Legislative Update (2017)** –Stacy O. Kalmanson, Chair; Brenda Ezell, Travis Hayes, Thomas Karr, Joshua Rosenberg, Kymberlee Curry Smith, Jennifer S. Tobin and Salome Zikakis, Co-Vice Chairs
13. **Liaison with:**
 - a. **American Bar Association (ABA)** – Edward F. Koren,Julius J. Zschau, George Meyer and Robert S. Freedman
 - b. **Clerks of Circuit Court** – Laird A. Lile and William Theodore Conner
 - c. **FLEA / FLSSI** – David C. Brennan and Roland “Chip” Waller
 - d. **Florida Bankers Association** – Mark T. Middlebrook
 - e. **Judiciary** – Judge Linda R. Allan, Judge Herbert J. Baumann, Judge Melvin B. Grossman, Judge Hugh D. Hayes, Judge Maria M. Korvick, Judge Norma S. Lindsey, Judge Celeste H. Muir, Judge Robert Pleus, Jr., Judge Walter L. Schafer, Jr., Judge Morris Silberman, Judge Mark Speiser, Judge Richard J. Suarez,, and Judge Patricia V. Thomas
 - f. **Out of State Members** – Michael P. Stafford, John E. Fitzgerald, Jr., and

Nicole Kibert

- g. **TFB Board of Governors** – Lansing C. Scriven
 - h. **TFB Business Law Section** – Gwynne A. Young and Manuel Farach
 - i. **TFB CLE Committee** – Robert S. Freedman
 - j. **TFB Council of Sections** –Deborah P. Goodall and Andrew M. O'Malley
 - k. **TFB Pro Bono Committee** – Tasha K. Pepper-Dickinson
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- 14. **Long-Range Planning** – Andrew M. O'Malley, Chair
 - 15. **Meetings Planning** – George J. Meyer, Chair
 - 16. **Member Communications and Information Technology** – William A. Parady, Chair; Michael Travis Hayes, Neil Shoter, Hardy Roberts, Jesse Friedman, and Erin Christy, Co-Vice Chairs
 - 17. **Membership and Inclusion** –Lynwood F. Arnold, Jr. and Jason M. Ellison, Co-Chairs, Annabella Barboza, Phillip A. Baumann, Guy S. Emerich, Brenda Ezell Theodore S. Kypreos, and Kymberlee Curry Smith, Co-Vice Chairs
 - 18. **Model and Uniform Acts** – Bruce M. Stone and Richard W. Taylor, Co-Chairs
 - 19. **Professionalism and Ethics--General** – Paul Roman, Chair; Tasha K. Pepper-Dickinson, Alex Dobrev, and Andrew B. Sasso, Vice Chairs
 - 20. **Publications (ActionLine)** – Jeffrey Alan Baskies and W. Cary Wright, Co Chairs (Editors in Chief); Shari Ben Moussa, George D. Karibjanian, Sean M. Lebowitz, Paul Roman and Lee Weintraub, Co-Vice Chairs.
 - 21. **Publications (Florida Bar Journal)** – Jeffrey S. Goethe (Probate & Trust) and Douglas G. Christy (Real Property), Co-Chairs; Brian Sparks (Editorial Board – Probate & Trust), Cindy Basham (Editorial Board – Probate & Trust), Michael A. Bedke (Editorial Board – Real Property), Homer Duvall (Editorial Board – Real Property) and Allison Archbold (Editorial Board), Co-Vice Chairs
 - 22. **Sponsor Coordination** – Wilhelmina F. Kightlinger, Chair; J. Michael Swaine, Deborah L. Russell, Benjamin F. Diamond, John Cole, Jason Quintero, Co-Vice Chairs
 - 23. **Strategic Planning** –Deborah P. Goodall and Andrew M. O'Malley, Co-Chairs

XVI. [Adjourn](#) Motion to Adjourn.

**MINUTES
OF THE
REAL PROPERTY, PROBATE AND TRUST LAW SECTION
EXECUTIVE COUNCIL MEETING¹**

**Saturday, June 4, 2016
Loews Portofino Bay Hotel, Orlando, Florida**

I. Call to Order – Michael J. Gelfand, Chair

The meeting was held at the Portofino Bay Hotel, Orlando, Florida. Mr. Gelfand called the meeting to order at 10:15 a.m. on Saturday, June 4, 2016, noting how proud he has been to lead and serve the Section as its Chair.

II. Attendance – S. Katherine Frazier, Secretary

Ms. Frazier reminded members that the attendance roster was circulating to be initialed by Council members in attendance at the meeting.

[*Secretary's Note:* This matter was heard out of the order of the Agenda during the Chair's Report. The roster showing members in attendance is attached as Addendum "A".]

III. Minutes of Previous Meeting – S. Katherine Frazier, Secretary

Ms. Frazier moved:

**To approve the Minutes of the February 27, 2016 meeting of
the Executive Council held at Tampa Waterside Marriott,
Tampa, Florida. (See Agenda pages 12-41.)**

The Motion was unanimously **approved**.

[*Secretary's Note:* This motion was made out of the order of the Agenda during the Chair's Report.]

IV. Chair's Report – Michael J. Gelfand

1. Mr. Gelfand reported the passing of John E. Norris on May 6, 2016 and announced that there would be a presentation to his family at a subsequent Council meeting. Mr. Gelfand commented that Mr. Norris is remembered as a great supporter of the Section who enhanced the Section with his sense of humor and leadership.

¹ References in these minutes to Agenda pages are to the Executive Council Meeting Agenda posted at www.RPPTL.org.

2. Mr. Gelfand announced the passing of Carlos Batlle's mother, Rosa Sanchez. Mr. Gelfand congratulated Sandra Diamond on her new granddaughter. Mr. Gelfand welcomed back Susan Spurgeon after her surgery and Salome Zikakis after her ski injury. Mr. Gelfand commended Steven Goodall on being elected as Student Government Secretary for Boca Raton Community High School. Mr. Gelfand congratulated Michael Bedke and Martin Schwartz for their appointments as new ACREL Fellows. Mr. Gelfand also congratulated Lynwood Arnold on his daughter, Amanda Sansone, being named as a U.S. Magistrate in Tampa and for his front cover photograph in *The Florida Bar News*.

3. Mr. Gelfand announced that Executive Council member Ben Diamond is a candidate for State House District 68, remarking that Ben took up the call to action, challenging Section members who seek better representation to run for office. He also announced that Council member Dresden Brunner's husband, John Brunner, is a candidate for the Collier County School Board.

4. Mr. Gelfand reminded the Council that Board of Governor Lanse Scriven attended the Council meeting in Tampa in February and that Lance provided comments to the Council as a candidate for The Florida Bar Presidency. Introducing Michelle Suskauer who is also a candidate for The Florida Bar Presidency to provide comments to the Council, Mr. Gelfand informed us that he has known Ms. Suskauer as a highly-regarded attorney for over 20 years, specializing in criminal defense representation in state and federal courts since 1991 and has served as an elected member of the Board of Governors since 2010 for the 15th Judicial Circuit.

Ms. Suskauer remarked on Mr. Gelfand's exceptional year and that he is a strong advocate of the Section in the Council of Sections. She noted that she has extensively worked with Gwynne Young, Andrew Sasso, Laird Lile and Adele Stone on the Board of Governors. She attended our Section meetings to understand the significant issues and initiatives that the Council is addressing. She has served and led on the Executive Committee, Long Term Planning Committee, Communications Committee, Annual Convention Committee and Disciplinary Review Committees of the Board of Governors. She commented that The Florida Bar has faced and continues to face challenging issues such as reciprocity, Daubert and Frye, on-line service providers, oversaturation of lawyers, mental health issues and the Constitution Revision Commission. She remarked that Florida lawyers need to be branded better. She emphasized that she believes in compassion, collaboration, responsiveness and communication and that she is a friend of the Section.

5. Mr. Gelfand thanked The Florida Bar Foundation for its sponsorship of the Saturday luncheon.

6. Mr. Gelfand reported on the following interim actions taken by the Executive Committee since the last Council meeting:

A. The Florida Bar's proposed Condominium and Planned Development Law Board Certification Committee, recommended nominees proposed to the President-Elect of The Florida Bar. (See Agenda pages 45- 47.)

B. Approved waiver of Executive Council meeting attendance requirements for Martin Awerbach.

7. Mr. Gelfand commended the Section seminar initiative by Rick Eckhard and Bob Swaine "Law for Lawyers' Own Businesses" for lawyers about office leasing which recognizes that lawyers have the same concerns as many of their clients and is intended to help lawyers address issues that impact them. Additional initiatives for lawyers on probate and trust issues and construction issues are being considered. Mr. Gelfand commended the ALMs for the mediator listing initiative on the website and the Professionalism and Ethics Committee for its ethics opinions data base.

8. Michael Gelfand thanked some of his key Section mentors, including Julie Williamson, Laird Lile, Michael Dribin, Jerry Aron, Melissa Murphy, Margaret Rolando, George Meyer and Chip Waller, all who have made great contributions to the Section even after serving as Section Chairs. Mr. Gelfand emphasized that Mr. Waller by example taught him to always consider issues thoroughly and in a deliberative manner, to ask questions, and not to remain silent in the face of doubt, qualities that he urges new Council members to emulate. Mr. Gelfand expressed his appreciation for the Council's attentiveness to the convention speaker, Gilbert King, and that it has been his pleasure to serve and lead the Section.

Immediate Past Chair, Michael Dribin, then raised a point of order, congratulating the Chair for a year well done, and inviting the Chair to proceed to the "back row." Mr. Gelfand thanked the Executive Committee and the Chair-Elect and turned over the gavel to Ms. Goodall as successor Chair. Ms. Goodall commented on what an incredible year Mr. Gelfand has had and that she is looking forward to serving the Section.

V. Liaison with Board of Governors Report – Andrew B. Sasso. Ms. Goodall introduced Mr. Sasso who gave his last report as Section liaison to the Board of Governors. He will continue service as the Parliamentarian for the Board of Governors. Mr. Sasso read an inspirational excerpt from the 1949 Florida Supreme Court opinion forming The Florida Bar and creating the mandatory integrated Florida Bar to better serve the State of Florida. Mr. Sasso observed that the Section is one of the hardest-working Florida Bar Sections and thanked the Council for the opportunity to serve as the Section Liaison.

Mr. Sasso reported on a proposed rule change approved by the Board of Governors allowing certified legal interns to be qualified without going through the full Florida Bar investigation, as well as a proposed rule change for experts and specialists allowing advertising as experts and specialists even if they are not board certified as

long as they can objectively verify similar qualifications and, if there is board certification available, a disclaimer must be added.

Mr. Sasso then reported on another pending rule change on new terminology referring to lawyer referral services as qualified providers and their requirements for qualification. He commented on the report from the Florida Courts Technology Commission and Clerks regarding the website that allows access to court records through a single portal and should be accessible by the end of the year. Lastly, he reported on a pending rule change allowing lawyers to open IOTA accounts at credit unions. Initially, this rule change was not a controversial issue but, since there was Florida Bankers Association opposition, Mr. Sasso reported that the rule change is being tabled for further evaluation.

VI. Chair-Elect's Report – *Deborah P. Goodall.*

1. Ms. Goodall reported on several housekeeping administrative matters relating to the Council meeting.

2. Ms. Goodall discussed her final venues for 2016-17 and proposed activities for the meetings listed on page 48 of the Agenda. She described that The Breakers Council meeting will include an Uptown Art and Dine-Around activity. She hopes to soon post a summary schedule of activities. Ms. Goodall announced that there is a waitlist for rooms at The Breakers and to please contact Whitney Kirk (not Mary Ann Obos) if you would like to be put on the list. (See Agenda pages 48- 50.)

3. Ms. Goodall also announced that the Executive Council Directory was being updated and she was considering adding children's names and ages to the directory and took a straw vote which reflected interest in that addition to the Directory.

4. Mr. Goodall reminded everyone to let the sponsors know if you utilize their services to help them be aware of the value of their sponsorship.

VII. Treasurer's Report – *Robert S. Freedman.* Mr. Freedman reported on the statement of financial condition set forth on page 51 of the Agenda. Mr. Freedman reported that the Section was in very good financial condition noting that there were still some expenses to be posted. Mr. Freedman pointed out that CLE Seminars are a significant source of Section revenue, particularly the two Attorney Trust Officer Conferences, and the Construction Law Institute. Mr. Freedman congratulated the chairs of those programs, including Laura Sundberg and Cary Wright. (See Agenda page 51.)

VIII. Director of At-Large Members Report – *Shane Kelley.* Mr. Kelley reported that the ALMs held their annual sponsorship appreciation presentations and thanked the sponsors again for all of their support. Mr. Kelley also thanked all of the ALMs for their efforts. He noted that Section membership was increased as a result of the efforts of the ALMs and that the ALMs are a great outreach for membership.

Ms. Goodall then reminded the Council to be respectful of our Sponsors and to let them know that we value their participation.

IX. CLE Seminar Coordination Report – *Robert Swaine (Real Property) and William Hennessey, III (Probate & Trust), Co-Chairs.* Mr. Swaine congratulated Mr. Hennessey and welcomed Shane Kelley to the CLE committee. Mr. Swaine then recognized all of the speakers and program chairs for CLEs and the Attorney Trust Officer conferences as well as the Legislative Update and reminded the Council about those upcoming conferences. Mr. Swaine announced that there are many real estate seminars in the pipeline and thanked Mary Ann Obos for all of her support. (See Agenda page 53.)

X. Kids Committee Report – *TBA, Chair; Laura Sundberg, Advisor.* – No Report.

XI. General Standing Division – *Deborah P. Goodall, General Standing Division Director and Chair-Elect.*

Action Items:

1. **Legislation Committee** – *Tae Kelley Bronner (Probate & Trust) and Steven Mezer (Real Property), Co-Chairs.*

Mr. Mezer briefly explained the regular review process for the Section's official legislative positions which includes review of all legislative positions by all Committee chairs to confirm that the positions are still accurate and viable. He noted that there are no new positions being proposed and that all were previously adopted positions.

Mr. Mezer moved on behalf of the Committee:

To approve the renewal of the RPPTL Section official legislative positions previously adopted except for those marked "Delete" on the attached list.

The Motion was unanimously **approved.** (See Agenda pages 54 – 63.)

[*Secretary's Note:* The motion was made out of the order of the Agenda after the Real Property Law Division Report.]

2. **Sponsor Coordination** – *Wilhelmina F. Kightlinger, Chair*

Ms. Kightlinger moved on behalf of the Committee:

To approve, in accordance with past Section practice, the waiver of general sponsorship fees for The Florida Bar Foundation for fiscal year 2016-2017, and allowing The Florida Bar Foundation to have exhibitor space at the 2016 Legislative Update and at the 2017

Convention without paying an exhibitor fee if space is available after registration of paying exhibitors, and to ratify the waiver of the general sponsorship fees for The Florida Bar Foundation for fiscal year 2015-2016.

The Motion was unanimously **approved**.

[Secretary's Note: Ms. Kightlinger then proceeded with her Sponsorship Committee report.]

Ms. Kightlinger thanked the Council for being respectful of the sponsors at the events. Ms. Kightlinger gave special thanks to Deb Russell, Ben Diamond, Arlene Udick, and the rest of the Sponsorship Committee for their hard work with the Sponsorship Appreciation festivities this weekend. She reported that the General Sponsors had the opportunity to present to the ALMs at their meeting on Thursday afternoon followed by a reception with Section leadership to thank our sponsors for their support.

Ms. Kightlinger welcomed back BNY/Mellon to the RPPTL family. BNY/Mellon will sponsor the IRA, Insurance and Employee Benefits committee and the Estate and Trust Tax Planning committee. Hopping Green & Sams is sponsoring the Development & Land Use committee which will offset the costs of a Section video CLE project.

Ms. Kightlinger reported that the Council is close to signing up several new sponsors and has some existing Friends of the Section investigating moving up into general sponsorship. She noted that we now have a sponsorship available for our new meeting App. The App sponsorship is \$5000 for each meeting. The App sponsor will have its name and logo featured prominently on the App and other benefits with the sponsorship. Current sponsors are recognized on our App as well. She reported that she hopes to have links on the App to each sponsors' webpage in the App for future meetings.

Ms. Kightlinger asked Council members to let her or any member of the Sponsorship Committee know if anyone has any leads for potential sponsors.

Following the Sponsorship Committee report, Ms. Goodall then proceeded to recognize the following General Sponsors and Friends of the Section:

General Sponsors

Overall Sponsors – Legislative Update & Convention & Spouse Breakfast
Attorneys' Title Fund Services, LLC – Melissa Murphy

Thursday Lunch
Management Planning, Inc. – Roy Meyers

Thursday Night Reception

JP Morgan – Carlos Batlle/Alyssa Feder
Old Republic National Title Insurance Company – Jim Russick

Friday Night Reception

Wells Fargo Private Bank – Mark Middlebrook/George Lange/Alex Hamrick

Friday Night Dinner

First American Title Insurance Company – Alan McCall
Regions Private Wealth Management – Margaret Palmer

Probate Roundtable

SRR (Stout Risius Ross Inc.) – Garry Marshall

Real Property Roundtable

Fidelity National Title Group – Pat Hancock

Saturday Lunch

The Florida Bar Foundation – Bruce Blackwell

Friends of the Section

Business Valuation Analysts, LLC – Tim Bronza
Corporation Services Company – Beth Stryzs
Corporate Valuation Services, Inc. – Tony Garvy
Guardian Trust – Ashley Gonnelli
North American Title Insurance Company – Andres San Jorge
Valuation Services, Inc. – Jeff Bae, JD, CVA
Wilmington Trust – David Fritz

(See Agenda pages 42- 44.)

Information Items:

1. **Amicus Coordination** – *Robert W. Goldman, John W. Little, III, Kenneth B. Bell and Gerald B. Cope, Jr., Co-Chairs.* Mr. Goldman reported on the *en banc* decision from the Third District Court of Appeal in *Deutsche Bank v. Beauvais*. He noted that the Committee was asked by the Court to participate and thanked his committee members, John Little, Ken Bell and Gerald Cope for their extraordinary efforts. Mr. Goldman reported that the issued opinion is essentially the Section brief. The *Beauvais* is currently stayed with the Florida Supreme Court because of other pending cases.

Mr. Goldman also reported on *Billington v. Ginn-LA Pine Island*, 41 Fla. L. Weekly D 1204 (Fla. 5th DCA, May 20, 2016), remarking that there are many questions certified by the Fifth District Court of Appeal to the Florida

Supreme Court regarding merger and non-reliance clauses in leases and other contracts. (See Agenda pages 64 - 131.)

2. **Fellows** – *E. Ashley McRae, Chair*. Ms. McRae reported on the work of the current classes of Fellows, congratulating the graduating Fellows and welcoming our newest Fellows for 2016-2018. She thanked all of her outgoing Fellows for their involvement. She reported that she will be introducing the new Fellows at the Breakers. She also reported that the Fellows will be updating legislation summaries and are adding practice pointers to the ActionLine.

Ms. Goodall congratulated Melissa VanSickle who was elected to the Board of Governors. (See Agenda pages 132 – 133.)

3. **Legislation** – *Tae Kelley Bronner (Probate & Trust) and Steven Mezer (Real Property), Co-Chairs*. There was no oral report but the Final Report from the 2016 Legislative Session is contained in pages 134 – 140 of the Agenda.
4. **Legislative Update 2016** – *Jim Robbins, Chair*. Mr. Robbins reported that the agenda for Legislative Update on Friday July 29, 2016 was forthcoming.
5. **Liaison with Clerks of Circuit Court** – *Laird A. Lile and William Theodore Conner*. Mr. Lile referred to Mr. Sasso's update on the Florida Courts Technology Commission report and the upcoming availability of one portal for access to court records. Mr. Lile noted that the Florida Courts Technology Commission is also working to have Judges accept their orders through this portal.
6. **Membership and Inclusion** – *Lynwood F. Arnold, Jr. and Jason M. Ellison, Co-Chairs*. Mr. Arnold reported that the Committee is continuing to increase Section membership. The Committee participated in nine events out of twelve law schools and needs assistance to have new students and attorneys welcomed at Council meetings and get them involved on committees. The Committee needs help with mentoring and identifying law students at the Council meetings and he recommended that Council members introduce themselves to the law students.

Ms. Goodall emphasized the need to welcome new members and noted that the Section is working on ways to identify new Council members and law students at Council meetings to facilitate the process.

7. **Model and Uniform Acts** – *Bruce M. Stone and Richard W. Taylor, Co-Chairs*. Mr. Taylor reported that there is a list of Model and Uniform Acts for consideration as proposed by the Uniform Law Commission on pages 141 through 150 of the Agenda. He asked that Council members look at

the list and let him know of any concerns. (See Agenda pages 141 – 150.)

Ms. Goodall reminded Council members that acts being considered by the Uniform Law Commission are often a source for legislators. She also reported that Mr. Gelfand was circulating the Council agenda to other Florida Bar Sections to encourage dialogue on pending issues among the Council of Sections.

8. **Professionalism and Ethics** – *Lawrence J. Miller, Chair*

A. **Introduction of “Safe at Home”**

Mr. Miller introduced Ms. Joan Boles who is affiliated with Bay Area Legal Services. Mr. Miller reported on the No Place Like Home project (formerly referred to as the Safe at Home project) which seeks attorney volunteer assistance to clear title to real property for vulnerable low income Florida residents, thereby allowing such residents to receive disaster-related relief, access to community development funds, and available real property tax exemptions. He noted that this is a wonderful opportunity for involvement for both the Real Property and Probate and Trust Divisions and that the Committee is considering all funding opportunities. (See Agenda pages 151 - 152.)

B. **RPPTL Ethics Players**

The RPPTL Ethics players (Jerry Wolf, Bob Swaine and Chris Sajdera) performed a skit demonstrating that an attorney client relationship may be established even during cocktail chatter at a reception and the advice given, if such a relationship has arisen, needs to be as accurate as any other that is given during such a relationship. In the skit, off the cuff discussion which could be relied upon by the “client” included attorney’s fees, violations of Dodd-Frank and FinCen issues. “Idle” chatter may not be idle at all.

Mr. Miller thanked Mr. O’Malley and Mr. Bedke for their work on the No Place Like Home project.

[Secretary’s Note: This skit was performed out of order of the Agenda.]

9. **Publications**

A. **ActionLine** – *Silvia Rojas, Chair*. No Report.

B. **Florida Bar Journal** – *Jeffrey Goethe (Probate & Trust) and Douglas Christy (Real Estate) Co-Chairs*. No Report.

10. **Sponsor Coordination** – *Wilhelmina F. Kightlinger, Chair* – No Further Report.

XII. **Real Property Law Division Report** – *Andrew M. O'Malley, Director*. Mr. O'Malley recognized the following Real Property Law Division sponsors:

Committee Sponsors

Attorneys' Title Fund Services, LLC – Melissa Murphy
Commercial Real Estate Committee

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

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

Action Item:

Real Estate Structures and Taxation Committee – *Cristin Keane, Chair*.

Ms. Keane summarized the documentary stamp proposal to exempt transfers of real property between a spouse regardless if there is a divorce or a mortgage encumbering the property. There was discussion on the policy behind the proposal.

Ms. Keane moved on behalf of the Committee:

To (A) adopt as a Section position a total exemption for documentary stamp taxes for transfers of property between spouses including an amendment to FS 201.02 (B) to find that such legislative position is within the purview of the RPPTL Section; and (C) to expend Section funds in support of the proposed legislative position.

The Motion was unanimously **approved**. (See Agenda pages 153 – 158.)

Information Item:

Real Estate Structures and Taxation Committee – *Cristin Keane, Chair*

Ms. Keane summarized the uniform assessment of property held in Florida land trusts proposal, reporting that some county property appraisers reassess property conveyed by an owner beneficiary to a land trustee without regard to the statutorily imposed ten percent (10%) limitation even though the beneficial ownership of the property did not change. This proposed legislation will clarify provisions that have been interpreted by some county property appraisers to assess properties conveyed to Florida land trustees differently from properties conveyed to other trustees. (See Agenda pages 159 – 166.)

XIII. Probate and Trust Law Division Report – Debra L. Boje, Director

Ms. Boje recognized the following Probate and Trust Law Division Committee sponsors:

Committee Sponsors

Business Valuation Analysts – Tim Bronza
Trust Law Committee

Coral Gables Trust – John Harris
Probate and Trust Litigation Committee

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

Kravit Estate Appraisal – Bianca Morabito
Estate and Tax Planning Committee

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

Life Audit Professionals – Joe Gitto
Estate and Tax Planning Committee

Management Planning, Inc. – Roy Meyers
Estate & Trust Tax Planning Committee

Northern Trust – Tami Conetta
Trust Law Committee

Action Items:

1. Guardianship, Power of Attorney and Advanced Directives Committee – *Hung V. Nguyen, Chair*

Mr. Nguyen reported that the purpose of the proposed amendment to F.S. §744.441(16) is to remove the \$6,000 limit on funeral-related expenses that a guardian can expend for a ward with court approval, in lieu of placing a cap on the amount that may be expended the proposed amendment permits the court to make an appropriate determination on a case-by-case basis.

Mr. Nguyen moved on behalf of the Committee:

To: (A) adopt a Section position to provide that funeral-related expenses a guardian can expend with court approval is not limited to \$6,000.00, including amending F.S. 744.441(16); (B) find that such legislative position is within the purview of the RPPTL Section; and (C) expend Section funds in support of the proposed legislative position

The Motion was unanimously **approved**. (See Agenda pages 167-170.)

2. Guardianship, Power of Attorney and Advanced Directives Committee – Hung V. Nguyen, Chair

Mr. Nguyen gave a brief overview of the proposed amendments to F.S. §744.331 to address the decision of *Shen v. Parkes* by creating a notice-and-demand procedure for hearsay and other objections to the examining committee reports in guardianship/incapacity proceedings to help alleviate an undue burden on the court process. Mr. Nguyen explained that this proposal adopts changes to F.S. §744.331 that institute a new pre-hearing procedure for notice of objections, including hearsay, to examining committee reports, and clarifies and amends the process for the transmittal of the reports to the court and the parties.

Mr. Nguyen moved on behalf of the Committee:

To (A) adopt a Section position concerning a Chapter 744, examining committee member’s report, including an amendment to F.S. §744.331, requiring: the Clerk of Court to timely serve the report; requiring parties to an incapacity proceeding to notice an objection to an examining committee member’s report at least 5 days prior to the adjudicatory hearing or have the objection waived; and, address the timing for an adjudicatory hearing, (B) find that such legislative position is within the purview of the RPPTL Section; and (C) expend Section funds in support of the proposed legislative position.

The Motion was unanimously **approved**. (See Agenda pages 171-183.). Ms. Boje further announced that the white paper would be amended to reflect that the revised procedures in this legislation will reduce unnecessary court costs and have a positive financial impact.

Information Items:

1. Ad Hoc POLST Committee – Jeff Baskies, Chair

Mr. Baskies explained the proposal to recognize Physician Orders for Life Sustaining Treatment (“POLST”) under Florida law with appropriate protections to prevent violations of due process for the benefit of the citizens of Florida, including the creation of F.S. §406.46. Mr. Baskies reported that the Committee has been in a defensive mode with legislation in response to two statutes previously proposed. Mr. Baskies explained that a POLST is a physician order that is entered into a patient’s medical records and can follow a patient throughout treatment. Mr. Baskies further explained that POLSTs are being used by some facilities but are unregulated, the Committee proposal incorporates procedural safeguards such as patient consent and signature. (See Agenda pages 184 – 204.)

Ms. Boje commented that this legislation is an example of the State of Florida taking a leading role in adding protections that may be considered in other states.

2. Estate and Trust Tax Planning Committee – David J. Akins, Chair

Mr. Akins presented a proposal to permit the creation of joint tenancies with rights of survivorship and tenancies by the entireties without regard to common law unities of time and title in certain kinds of personal property. Mr. Akins explained that this is intended to permit a married owner of personal property to establish a tenancy by the entireties with his or her spouse without the use of a “straw man.” Further, if one spouse adds the name of the other spouse as an owner of personal property, a presumption is created that both spouses own such personal property as tenants by the entireties. The presumption may only be overcome by clear and convincing evidence of a contrary intent. The proposal also seeks to allow for the creation of joint tenancies with rights of survivorship in certain types of personal property. (See Agenda pages 205 – 214.)

3. Guardianship, Power of Attorney and Advanced Directives Committee – Hung V. Nguyen, Chair

Mr. Nguyen presented a proposal permitting a court to approve a guardian’s request to initiate a petition for dissolution of marriage of a ward without the requirement that the ward’s spouse consent. He noted that a petition for dissolution is an extraordinary remedy and that there are still safeguards available in the statutes. (See Agenda pages 215 – 220.)

[Secretary’s Note: This matter was heard out of the order of the Agenda after the Committee’s Action Items.]

4. Trust Law Committee – Angela Adams, Chair

Ms. Adams presented a proposal providing that the Attorney General is the proper party to receive notice for matters concerning charitable trusts, deleting the state attorney from the process, and further define the manner in which the Attorney General will receive such notices. Ms. Adams reported that there was a change to line 89 in the materials on page 225 of the Agenda providing an effective date of July 1, 2017. (See Agenda pages 221 – 228.)

5. Trust Law Committee – Angela Adams, Chair

Mr. Tescher reported on a decanting proposal to revise F.S. §736.04117: (1) allowing a trustee to distribute principal in further trust pursuant to a power of distribution that is limited by an ascertainable standard (currently such distributions are only permitted pursuant to a trustee’s power to distribute

principal pursuant to an absolute power to make distributions); (2) adding a provision to allow a trustee to distribute trust principal to a supplemental needs trust when a beneficiary is disabled; and (3) expanding the notice requirements to require the trustee to provide a copy of the proposed distributee trust instrument prior to the distribution, instead of notice being discretionary.

Mr. Tescher explained that the current decanting statute has become outdated in light of the Uniform Decanting Act approved in July 2015. The Committee reviewed the Uniform Decanting Act, decanting statutes in other states, and Florida's common law before drafting and recommending the proposed amendments.

Mr. Tescher explained the concept of trust decanting, identified the changes that will occur as a result of the proposed amendments, and reviewed the tax-related provision of the proposed, revised decanting statute.

Mr. Tescher also advised that the proposed amendments have been circulated to the Florida Bankers Association, no comments have yet been received, and the Elder Law Section which expressed concern that one provision could create a trap for the less experienced planner and requested that lines 235 - 240 of the proposed Bill, on page 235 of the EC Agenda, be deleted and that the "2." at the beginning of line 241 be changed to "(b)." Neither the Decanting subcommittee nor the Trust Law Committee had any objection to the requested revision, and those revisions will be made to the materials before they are submitted as an Action Item.

Angela Adams announced that the PowerPoint presentation prepared by Don Tescher, as well as the Uniform Decanting Act (with comments), are posted on the Section website, Trust Law Committee webpage, under the "Items of Interest" tab. (See Agenda pages 229 – 245.)

Ms. Boje thanked the Committee members and noted that their efforts are a great example of the Sections working together to resolve multiple issues.

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

1. **Commercial Real Estate** – Adele Stone, Chair; Burt Bruton and Martin Schwartz, Co- Vice Chairs.
2. **Condominium and Planned Development** – Bill Sklar, Chair; Alex Dobrev and Steve Daniels, Co-Vice Chairs.
3. **Construction Law** – Hardy Roberts, Chair; Scott Pence and Reese Henderson, Co-Vice Chairs.
4. **Construction Law Certification Review Course** – Deborah Mastin and Bryan Rendzio, Co-Chairs; Melinda Gentile, Vice Chair.

5. **Construction Law Institute** – *Reese Henderson, Chair; Sanjay Kurian, Diane Perera and Jason Quintero, Co-Vice Chairs.*
6. **Development & Land Use Planning** – *Vinette Godelia, Chair; Mike Bedke, Co-Vice Chair.*
7. **Insurance & Surety** – *W. Cary Wright and Scott Pence, Co-Chairs; Fred Dudley and Michael Meyer, Co-Vice Chairs.*
8. **Liaisons with FLTA** – *Norwood Gay and Alan McCall, Co-Chairs; Alexandra Overhoff and James C. Russick, Co-Vice Chairs.*
9. **Real Estate Certification Review Course** – *Jennifer Tobin, Chair; Manual Farach and Martin Awerbach, Co-Vice Chairs.*
10. **Real Estate Leasing** – *Rick Eckhard Chair; Brenda Ezell, Vice Chair.*
11. **Real Estate Structures and Taxation** – *Cristin C. Keane, Chair; Michael Bedke, Lloyd Granet and Deborah Boyd, Co-Vice Chairs.*
12. **Real Property Finance & Lending** – *David Brittain, Chair; E. Ashley McRae, Richard S. McIver and Robert Stern, Co-Vice Chairs.*
13. **Real Property Litigation** – *Susan Spurgeon, Chair; Manny Farach and Martin Solomon, Co-Vice Chairs.*
14. **Real Property Problems Study** – *Art Menor, Chair; Mark A. Brown, Robert Swaine, Stacy Kalmanson, Lee Weintraub and Patricia J. Hancock, Co-Vice Chairs.*
15. **Residential Real Estate and Industry Liaison** – *Salome Zikakas, Chair; Trey Goldman and Nishad Khan, Co-Vice Chairs.*
16. **Title Insurance and Title Insurance Liaison** – *Raul Ballaga, Chair; Alan Fields and Brian Hoffman, Co-Vice Chairs.*
17. **Title Issues and Standards** – *Christopher W. Smart, Chair; Robert M. Graham, Brian Hoffman and Karla J. Staker, Co-Vice Chairs.*

XVI. Probate and Trust Law Division Committee Reports – *Debra L. Boje, Director*

1. **Ad Hoc Guardianship Law Revision Committee** – *David Brennan, Chair; Sancha Brennan Whynot, Hung Nguyen and Charles F. Robinson, Co-Vice Chairs*
2. **Ad Hoc Study Committee on Estate Planning Conflict of Interest** – *William T. Hennessey III, Chair; Paul Roman, Vice Chair*
3. **Ad Hoc Study Committee on Jurisdiction and Service of Process** – *Barry F. Spivey, Chair; Sean W. Kelley and Christopher Q. Wintter, Co-*

Vice Chairs

4. **Ad Hoc Committee on Physicians Orders for Life Sustaining Treatment (POLST)** – *Jeffrey Baskies and Thomas Karr, Co-Chairs*
 5. **Ad Hoc Study Committee on Spendthrift Trust Issues** – *Lauren Detzel and Jon Scuderi, Co-Chairs*
 6. **Asset Protection** – *George Karibjanian, Chair; Rick Gans and Brian Malec, Co-Vice-Chairs*
 7. **Attorney/Trust Officer Liaison Conference** – *Laura K. Sundberg, Chair; Stacey Cole, Co-Vice Chair (Corporate Fiduciary), Tattiana Stahl and Patrick Emans, Co-Vice Chair*
 8. **Digital Assets and Information Study Committee** – *Eric Virgil, Chair; Travis Hayes and S. Dresden Brunner, Co-Vice Chairs*
 9. **Elective Share Review Committee** – *Lauren Detzel and Charles I. Nash, Co-Chairs; Jenna Rubin, Vice-Chair*
 10. **Estate and Trust Tax Planning** – *David Akins, Chair; Tasha Pepper-Dickinson and Rob Lancaster, Co-Vice Chairs*
 11. **Guardianship, Power of Attorney and Advanced Directives** – *Hung Nguyen, Chair, Tattiana Brenes-Stahl, David Brennan, Eric Virgil, and Nicklaus Curley, Co-Vice Chairs*
 12. **IRA, Insurance and Employee Benefits** – *L. Howard Payne and Kristen Lynch, Co-Chairs; Carlos Rodriguez, Vice Chair*
 13. **Liaisons with ACTEC** – *Michael Simon, Bruce Stone, Elaine Bucher, and Diana S.C. Zeydel*
 14. **Liaisons with Elder Law Section** – *Charles F. Robinson and Marjorie Wolasky*
 15. **Liaisons with Tax Section** – *Lauren Y. Detzel, William R. Lane, Jr., Brian C. Sparks and Donald R. Tescher*
- Mr. Lane noted that he is the incoming Chair of the Tax Section and reported on upcoming Tax Section seminars that might be of interest to Council members and encouraged their attendance.
16. **Principal and Income** – *Edward F. Koren, Chair; Pamela Price, Vice Chair*

17. **Probate and Trust Litigation** – *Jon Scuderi, Chair; James George, John Richard Caskey, and Lee McElroy, Co-Vice Chairs*
18. **Probate Law and Procedure** – *John C. Moran, Chair; Sarah S. Butters, Michael Travis Hayes and Matt Triggs, Co-Vice Chairs*
19. **Trust Law** – *Angela M. Adams, Chair; Tami F. Conetta, Jack A. Falk and Mary Karr, Co-Vice Chairs*
20. **Wills, Trusts and Estates Certification Review Course** – *Jeffrey Goethe, Chair; Linda S. Griffin, Seth Marmor and Jerome L. Wolf, Co-Vice Chairs*

XVII. General Standing Committee Reports – *Deborah P. Goodall, Director and Chair-Elect*

1. **Ad Hoc Leadership Academy** – *Brian Sparks and Kris Fernandez, Co-Chairs*
2. **Ad Hoc Study Committee on Same Sex Marriage Issues** – *Jeffrey Ross Dollinger and George Daniel Karibjanian, Co-Chairs*
3. **Amicus Coordination** – *Robert W. Goldman, John W. Little, III, Kenneth B. Bell and Gerald B. Cope, Jr., Co-Chairs*
4. **Budget** – *Robert S. Freedman, Chair; S. Kathrine Price, Pamela O. Price, Co-Vice Chairs*
5. **CLE Seminar Coordination** – *Robert S. Swaine and William T. Hennessey, Co-Chairs; Laura K. Sundberg (Probate & Trust), Sarah S. Butters (Probate & Trust), Lawrence J. Miller (Ethics), Cary Wright (Real Property) and Hardy L. Roberts, III (General E-CLE), Theo Kypreos, Co-Vice Chairs.*
6. **Convention Coordination** – *Laura K. Sundberg Chair; Alex Hamrick and Alex Dobrev, Co-Vice Chairs*
7. **Fellows** – *Ashley McRae, Chair; Benjamin Diamond and Joshua Rosenberg, Co-Vice Chairs*
8. **Florida Electronic Filing & Service** – *Rohan Kelley, Chair*
9. **Homestead Issues Study** – *Shane Kelley (Probate & Trust) and Patricia P. Jones (Real Property), Co-Chairs; J. Michael Swaine, Melissa Murphy and Charles Nash, Co-Vice Chairs*

10. **Legislation** – *Tae Kelley Bronner (Probate & Trust) and Steven Mezer (Real Property), Co-Chairs; Thomas Karr (Probate & Trust), and Alan B. Fields (Real Property), Co-Vice Chairs*
11. **Legislative Update (2015)** – *R. James Robbins, Chair; Charles I. Nash, Barry F. Spivey, Stacy O. Kalmanson and Jennifer S. Tobin, Co-Vice Chairs*
12. **Legislative Update (2016)** – *Barry F. Spivey and Stacy O. Kalmanson, Co-Chairs; Thomas Karr, Joshua Rosenberg, and Kymberlee Curry Smith, Co-Vice Chairs*
13. **Liaison with:**
 - a. **American Bar Association (ABA)** – *Edward F. Koren and Julius J. Zschau*
 - b. **Clerks of Circuit Court** – *Laird A. Lile and William Theodore Conner*
 - c. **FLEA / FLSSI** – *David C. Brennan and Roland “Chip” Waller*
 - d. **Florida Bankers Association** – *Mark T. Middlebrook*
 - e. **Judiciary** – *Judge Linda R. Allan, Judge Herbert J. Baumann, Judge Melvin B. Grossman, Judge Hugh D. Hayes, Judge Maria M. Korvick, Judge Norma S. Lindsey, Judge Celeste H. Muir, Judge Robert Pleus, Jr., Judge Walter L. Schafer, Jr., Judge Morris Silberman, Judge Mark Speiser, Judge Richard J. Suarez,., and Judge Patricia V. Thomas*
 - f. **Out of State Members** – *Michael P. Stafford, John E. Fitzgerald, Jr., and Nicole Kibert*
 - g. **TFB Board of Governors** – *Andrew Sasso*
 - h. **TFB Business Law Section** – *Gwynne A. Young*
 - i. **TFB CLE Committee** – *Robert S. Freedman and Tae Kelley Bronner*
 - j. **TFB Council of Sections** – *Michael J. Gelfand and Deborah P. Goodall*
 - k. **TFB Pro Bono Committee** – *Tasha K. Pepper-Dickinson*
14. **Long-Range Planning** – *Deborah P. Goodall, Chair*
15. **Meetings Planning** – *George J. Meyer, Chair*
16. **Member Communications and Information Technology** – *William A. Parady, Chair; S. Dresden Brunner, Michael Travis Hayes, and Neil Shoter, Co-Vice Chairs*
17. **Membership and Inclusion** – *Lynwood F. Arnold, Jr. and Jason M.*

Ellison, Co-Chairs, Phillip A. Baumann, Kathrine S. Lupo, Guy S. Emerich, Theodore S. Kypreos, Tara Rao, and Kymberlee Curry Smith, Co-Vice Chairs

18. **Model and Uniform Acts** – *Bruce M. Stone and Richard W. Taylor, Co-Chairs*
19. **Professionalism and Ethics--General** – *Lawrence J. Miller, Chair; Tasha K. Pepper-Dickinson, Vice Chair*
20. **Publications (ActionLine)** – *Silvia B. Rojas, Chair (Editor in Chief); Jeffrey Baskies (Vice Chair – Editor Probate & Trust Division), Cary Wright (Vice Chair – Editor Real Property Division), Lawrence J. Miller (Vice Chair – Editor Professionalism & Ethics); George D. Karibjanian (Editor, National Reports), Lee Weintraub (Vice Chair - Reporters Coordinator), Benjamin Diamond (Vice Chair – Features Editor), Kathrine S. Lupo (Vice Chair - Advertising Coordinator), Navin R. Pasem (Vice Chair – Practice Corner Editor), Sean M. Lebowitz (Vice Chair – Probate & Trust Case Summaries), Shari Ben Moussa (Vice Chair – Real Property Case Summaries)*
21. **Publications (Florida Bar Journal)** – *Jeffrey S. Goethe (Probate & Trust) and Douglas G. Christy (Real Property), Co-Chairs; Brian Sparks (Editorial Board – Probate & Trust), Cindy Basham (Editorial Board – Probate & Trust), Michael A. Bedke (Editorial Board – Real Property), Homer Duvall (Editorial Board – Real Property) and Allison Archbold (Editorial Board), Co-Vice Chairs*
22. **Sponsor Coordination** – *Wilhelmina F. Kightlinger, Chair; J. Michael Swaine, Deborah L. Russell, W. Cary Wright, Benjamin F. Diamond, John Cole, Co-Vice Chairs*
23. **Strategic Planning** – *Michael J. Gelfand and Deborah P. Goodall, Co-Chairs*
24. **Professionalism and Ethics--General** – *Lawrence J. Miller, Chair; Tasha K. Pepper-Dickinson, Vice Chair*
25. **Publications (ActionLine)** – *Silvia B. Rojas, Chair (Editor in Chief); Shari Ben Moussa (Advertising Coordinator), Navin R. Pasem (Real Property Case Review), Jeffrey Baskies (Probate & Trust), Ben Diamond (Probate & Trust), George D. Karibjanian (Editor, National Reports), Lawrence J. Miller (Editor, Professionalism & Ethics), and Lee Weintraub (Real Property), Co-Vice Chairs*
26. **Publications (Florida Bar Journal)** – *Jeffrey S. Goethe (Probate &*

Trust), and Douglas G. Christie (Real Property), Co-Chairs; Brian Sparks (Editorial Board – Probate & Trust), Cindy Basham (Editorial Board – Probate & Trust), Michael A. Bedke (Editorial Board – Real Property) and Homer Duvall (Editorial Board – Real Property) and Alison Archbold (Editorial Board), Co-Vice Chairs

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

XVIII. Adjourn Motion to Adjourn.

There being no further business to come before the Executive Council, Ms. Goodall thanked those in attendance and a motion to adjourn was unanimously approved at approximately 12:20 p.m.

Respectfully submitted,

S. Katherine Frazier, Secretary

ADDENDUM "A"

**ATTENDANCE ROSTER
REAL PROPERTY PROBATE & TRUST LAW SECTION
EXECUTIVE COUNCIL MEETINGS
2015-2016**

Executive Committee	Division		Aug. 1 Palm Beach	Oct. 3 Berlin, Germany	Nov. 14 Boca Raton	Feb. 27 Tampa	June 4 Orlando
	RP	P&T					
Gelfand, Michael J., Chair	√		√	√	√	√	√
Goodall, Deborah P. Chair-Elect		√	√		√	√	√
Boje, Debra L., Probate & Trust Law Div. Director		√	√		√	√	√
O'Malley, Andrew M., Real Property Law Div. Director	√		√		√	√	√
Kelley, Shane, Director of At-Large Members		√	√		√	√	√
Frazier, S. Katherine, Secretary	√		√		√	√	√
Freedman, Robert S., Treasurer	√		√		√	√	√
Bronner, Tae K., Legislation Co-Chair (P&T)		√	√		√	√	
Mezer, Steven H., Legislation Co-Chair (RP)	√		√		√	√	√
Hennessey, William M., Legislation CLE Seminar Coordination Co-Chair (P&T)		√	√		√	√	√
Swaine, Robert S., CLE Seminar Coordination Co-Chair (RP)	√		√		√		√
Dribin, Michael A., Immediate Past Chair		√	√		√	√	√

Executive Council Members	Division		Aug. 1 Palm Beach	Oct. 3 Berlin, Germany	Nov. 14 Boca Raton	Feb. 27 Tampa	June 4 Orlando
	RP	P&T					
Adams, Angela M.		√	√		√	√	√
Adcock, Jr., Louie N., Past Chair		√					
Akins, David J.		√	√	√	√	√	√
Allan, Honorable Linda		√					
Altman, Stuart H.		√	√		√	√	
Amari, Richard		√	√		√	√	

Executive Council Members	Division		Aug. 1 Palm Beach	Oct. 3 Berlin, Germany	Nov. 14 Boca Raton	Feb. 27 Tampa	June 4 Orlando
	RP	P&T					
Archbold, J. Allison		√	√	√	√	√	√
Arnold, Jr., Lynwood F.	√	√			√	√	√
Aron Jerry E. Past Chair	√		√			√	√
Awerbach, Martin S.	√						√
Bald, Kimberly A.	√	√	√		√	√	√
Ballaga, Raul P.	√		√			√	√
Basham, Cindy		√			√	√	√
Baskies, Jeffrey		√	√		√	√	√
Battle, Carlos A.		√			√	√	
Baumann, Honorable Herbert J.		√				√	
Baumann, Phillip A.		√	√	√	√		
Beales, III, Walter R. Past Chair	√		√				
Bedke, Michael A.	√					√	√
Belcher, William F. Past Chair		√					√
Bell, Kenneth B.	√						√
Beller, Amy		√	√		√	√	√
Bellew, Brandon D.		√	√		√	√	√
Ben Moussa, Shari D.	√						
Bloodworth, Jennifer	√		√		√	√	
Bonevac, Judy B.		√	√	√	√	√	√
Boyd, Deborah	√		√			√	
Brenes-Stahl, Tattiana P.		√	√		√		√
Brennan, David C. Past Chair		√	√			√	√
Brittain, David R.	√		√		√	√	√

Executive Council Members	Division		Aug. 1 Palm Beach	Oct. 3 Berlin, Germany	Nov. 14 Boca Raton	Feb. 27 Tampa	June 4 Orlando
	RP	P&T					
Brown, Mark A.	√		√	√	√		
Brown, Shawn	√		√			√	√
Brunner, S. Dresden		√	√		√	√	√
Bruton, Jr., Ed Burt	√		√		√	√	
Bucher, Elaine M.		√	√				√
Butters, Sarah S.		√	√		√	√	√
Callahan, Charles III		√	√		√	√	
Carlisle, David R.		√	√		√		√
Caskey, John R.		√	√		√		
Christiansen, Patrick T. Past Chair	√		√	√			√
Christy, Douglas G. III	√		√		√	√	
Cohen, Howard Allen	√		√		√	√	√
Cole, John P.		√	√		√		
Cole, Stacey L.		√	√			√	√
Comiter, Alyse R.		√	√		√	√	
Conetta, Tami F.		√	√		√	√	
Conner, W. Theodore	√				√	√	√
Cope, Jr., Gerald B.	√		√	√	√		√
Curley, Nick		√	√		√	√	√
Daniels, Steve	√						
Detzel, Lauren Y.		√	√		√	√	√
Diamond, Benjamin F.		√	√		√		√
Diamond, Sandra F. Past Chair		√	√			√	
Dobrev, Alex	√		√			√	√

Executive Council Members	Division		Aug. 1 Palm Beach	Oct. 3 Berlin, Germany	Nov. 14 Boca Raton	Feb. 27 Tampa	June 4 Orlando
	RP	P&T					
Dollinger, Jeffrey	√		√			√	√
Dudley, Frederick R.	√		√				
Duval, III, Homer	√		√		√	√	√
Eckhard, Rick	√		√			√	√
Ellison, Jason M.	√		√		√	√	√
Emans, Patrick C		√	√		√	√	
Emerich, Guy S.		√	√			√	√
Ertl, Christene M.	√		√			√	√
Ezell, Brenda B.	√		√	√	√	√	√
Fagan, Gail		√	√	√	√	√	√
Falk, Jr., Jack A.		√	√		√	√	√
Farach, Manuel	√		√		√	√	√
Felcoski, Brian J., Past Chair		√	√		√		√
Fernandez, Kristopher E.	√		√		√	√	√
Fields, Alan B.	√		√		√		√
Fitzgerald, Jr., John E.		√	√		√	√	√
Flood, Gerard J.		√	√		√	√	√
Foreman, Michael L.		√	√		√	√	√
Galler, Jonathan		√	√		√	√	√
Gans, Richard R.		√	√			√	√
Gay, III, Robert Norwood	√						
Gentile, Melinda S.	√		√		√	√	
George, James		√	√		√	√	
Godelia, Vinette D.	√		√		√	√	√

Executive Council Members	Division		Aug. 1 Palm Beach	Oct. 3 Berlin, Germany	Nov. 14 Boca Raton	Feb. 27 Tampa	June 4 Orlando
	RP	P&T					
Goethe, Jeffrey S.		√	√		√	√	√
Goldman, Louis "Trey"	√		√	√		√	√
Goldman, Robert W. Past Chair		√	√		√	√	√
Graham, Robert M.	√		√		√	√	√
Granet, Lloyd	√		√		√	√	√
Griffin, Linda S.		√	√		√	√	√
Grimsley, John G. Past Chair		√					
Grossman, Honorable Melvin B.		√					
Gunther, Eamon W.		√	√		√		√
Guttman, III, Louis B. Past Chair	√		√	√			
Hamrick, Alexander H.		√	√	√	√	√	√
Hancock, Patricia J.	√		√		√	√	√
Hart, W.C.	√		√				
Hayes, Honorable Hugh D.		√					
Hayes, Michael Travis		√	√		√	√	√
Hearn, Steven L. Past Chair		√	√		√	√	
Henderson, Jr., Reese J.	√						
Henderson, III, Thomas N.	√		√		√	√	√
Heuston, Stephen P.		√	√		√	√	√
Hoffman, Brian W.	√		√		√	√	√
Ishording, Roger O. Past Chair		√	√	√	√	√	√
Johnson, Amber Jade F.		√	√		√	√	√
Jones, Darby		√	√		√	√	√
Jones, Frederick W.	√		√		√	√	

Executive Council Members	Division		Aug. 1 Palm Beach	Oct. 3 Berlin, Germany	Nov. 14 Boca Raton	Feb. 27 Tampa	June 4 Orlando
	RP	P&T					
Jones, Patricia P.H.	√		√		√	√	
Judd, Robert B.		√	√		√		√
Kalmanson, Stacy O.	√		√			√	√
Karibjantian, George		√	√		√		√
Karr, Mary		√	√		√		
Karr, Thomas M.		√	√		√	√	√
Kayser, Joan B. Past Chair		√					
Keane, Cristin C.	√		√			√	√
Kelley, Rohan Past Chair		√	√	√	√	√	√
Kelley, Sean W.		√			√	√	√
Khan, Nishad	√					√	√
Kibert, Nicole C.	√		√	√		√	√
Kightlinger, Wilhelmina F.	√		√	√			√
Kinsolving, Ruth Barnes Past Chair	√					√	
Koren, Edward F. Past Chair		√	√		√	√	
Korvick, Honorable Maria M.		√	√	√	√		
Kotler, Alan Stephen		√	√		√		
Kromash, Keith S.		√	√		√		√
Kurian, Sanjay	√		√			√	
Kypreos, Theodore S.		√	√		√	√	√
Lancaster, Robert L.		√	√			√	√
Lane, Jr., William R.		√	√			√	√
Lange, George		√	√	√	√	√	√
Larson, Roger A.	√		√		√	√	√

Executive Council Members	Division		Aug. 1 Palm Beach	Oct. 3 Berlin, Germany	Nov. 14 Boca Raton	Feb. 27 Tampa	June 4 Orlando
	RP	P&T					
Lebowitz, Sean M.		√	√		√		√
Leebrick, Brian D.	√		√			√	√
Lile, Laird A. Past Chair		√	√	√		√	√
Lindsey, Honorable Norma S.	√					√	
Little, III, John W.	√		√		√		
Lopez, Sophia A.		√	√		√	√	√
Lupo, Kathrine S.	√		√		√	√	
Lynch, Kristen M.		√	√				
Madorsky, Marsha G.		√	√		√	√	√
Malec, Brian		√	√		√	√	√
Marger, Bruce Past Chair		√			√	√	
Marmor, Seth A.		√	√		√		
Marshall, III, Stewart A.		√			√	√	√
Marx, James A.	√		√		√	√	√
Mastin, Deborah Bovarnick	√		√		√		
McCall, Alan K.	√		√		√	√	√
McElroy, IV, Robert Lee		√	√		√	√	
Meliver, Richard	√		√	√		√	√
McRae, Ashley E.	√		√			√	
Melanson, Noelle		√	√		√	√	√
Menor, Arthur J.	√		√		√	√	√
Meyer, George F. Past Chair	√		√	√		√	√
Meyer, Michael	√		√			√	√
Middlebrook, Mark T.		√	√			√	√

Executive Council Members	Division		Aug. 1 Palm Beach	Oct. 3 Berlin, Germany	Nov. 14 Boca Raton	Feb. 27 Tampa	June 4 Orlando
	RP	P&T					
Miller, Lawrence J.		√	√		√	√	√
Mize, Patrick		√	√		√	√	√
Moran, John C.		√	√		√	√	√
Moule, Rex E.		√			√	√	√
Muir, Honorable Celeste H.		√	√		√	√	
Murphy, Melissa J. Past Chair	√		√	√	√	√	√
Nash, Charles I.		√	√				√
Neukamm, John B. Past Chair	√		√		√	√	√
Nguyen, Hung V.		√	√	√	√	√	√
Nice, Marina		√	√				
Overhoff, Alex	√		√	√	√	√	√
Palmer, Margaret		√				√	√
Parady, William A.		√	√	√	√	√	√
Pasem, Navin	√						
Payne, L. Howard		√	√		√	√	√
Pence, Scott P.	√		√		√	√	√
Pepper-Dickinson, Tasha K.		√	√		√	√	√
Perera, Diane	√		√				√
Petrino, Bradford	√		√			√	√
Pilote, Frank		√	√		√	√	
Platt, William R.		√					
Pletus, Jr., Honorable Robert J.							
Pollack, Anne Q.	√		√		√		√
Price, Pamela O.		√	√				

Executive Council Members	Division		Aug. 1 Palm Beach	Oct. 3 Berlin, Germany	Nov. 14 Boca Raton	Feb. 27 Tampa	June 4 Orlando
	RP	P&T					
Pyle, Michael A.		√	√		√	√	√
Quintero, Jason	√		√			√	√
Rao, Tara		√	√			√	
Redding, John N.	√		√	√	√	√	√
Renzio, Bryan	√				√		√
Reynolds, Stephen H.	√		√		√	√	
Rieman, Alexandra V.		√	√		√		√
Robbins, Jr., R.J.	√		√		√	√	√
Roberts, III, Hardy L.	√		√		√	√	√
Robinson, Charles F.		√	√			√	√
Rodriguez, Carlos A.		√	√		√		√
Rojas, Silvia B.	√		√		√	√	√
Rolando, Margaret A. Past Chair	√		√	√	√	√	√
Roman, Paul E.		√	√	√	√	√	√
Rosenberg, Joshua		√	√		√	√	√
Rubin, Jenna		√	√		√		
Russell, Deborah L.		√	√				√
Russick, James C.	√		√	√	√	√	√
Rydberg, Marsha G.	√		√		√		√
Sachs, Colleen C.	√		√		√		√
Sasso, Andrew		√	√			√	√
Schafer, Jr., Honorable Walter L.		√					
Schofield, Percy A.	√						
Schwartz, Martin	√					√	√

Executive Council Members	Division		Aug. 1 Palm Beach	Oct. 3 Berlin, Germany	Nov. 14 Boca Raton	Feb. 27 Tampa	June 4 Orlando
	RP	P&T					
Schwartz, Robert M.	√		√		√	√	√
Scuderi, Jon		√	√		√	√	√
Seaford, Susan	√		√			√	√
Sheets, Sandra G.		√	√			√	
Shoter, Neil B.	√		√		√	√	√
Silberman, Honorable Morris						√	
Silberstein, David M.		√	√		√	√	
Simon, Michael		√					√
Sklar, William P.	√		√		√	√	√
Smart, Christopher W.	√		√		√	√	√
Smith, G. Thomas Past Chair	√		√	√			
Smith, Kymberlee	√		√				√
Smith, Wilson Past Chair		√					
Solomon, Marty James	√		√		√	√	
Spalding, Ann		√	√		√		√
Sparks, Brian C.		√	√			√	√
Speiser, Honorable Mark A.							
Spivey, Barry F.		√	√		√	√	
Spurgeon, Susan K.	√		√	√		√	√
Stafford, Michael P.		√	√		√		√
Staker, Karla J.	√				√	√	√
Stern, Robert G.	√				√	√	√
Stone, Adele I.	√				√	√	√
Stone, Bruce M. Past Chair		√	√				

Executive Council Members	Division		Aug. 1 Palm Beach	Oct. 3 Berlin, Germany	Nov. 14 Boca Raton	Feb. 27 Tampa	June 4 Orlando
	RP	P&T					
Suarez, Honorable Richard J.							
Sundberg, Laura K.		√	√		√	√	√
Swaine, Jack Michael Past Chair	√		√			√	√
Taylor, Richard W.	√		√	√		√	√
Tescher, Donald R.		√			√	√	√
Thomas, Honorable Patricia V.		√	√	√		√	√
Tobin, Jennifer S.	√		√			√	√
Triggs, Matthew H.		√	√		√	√	√
Udick, Arlene C.	√		√	√	√	√	√
Virgil, Eric		√	√			√	
Waller, Roland D. Past Chair	√		√	√	√	√	√
Wartenberg, Stephanie Harriet		√	√			√	√
Weintraub, Lee A.	√		√	√	√	√	
Wells, Jerry B.		√	√		√	√	√
White, Jr., Richard M.		√			√	√	√
Whynot, Sancha B.		√	√		√		√
Wilder, Charles D.		√	√		√	√	√
Williamson, Julie Ann S. Past Chair	√		√				
Wintter, Christopher Q.		√	√	√	√	√	√
Wohlust, Gary Charles		√	√	√	√	√	√
Wolasky, Marjorie E.		√	√			√	√
Wolf, Jerome L.		√	√		√	√	√
Wright, William Cary	√		√	√	√	√	√
Young, Gwynne A.		√				√	√

Executive Council Members	Division		Aug. 1 Palm Beach	Oct. 3 Berlin, Germany	Nov. 14 Boca Raton	Feb. 27 Tampa	June 4 Orlando
	RP	P&T					
Zeydel, Diana S.C.		√	√			√	√
Zikakis, Salome J.	√		√	√	√	√	√
Zschau, Julius J. Past Chair	√		√	√			

RPPTL Fellows	Division		Aug. 1 Palm Beach	Oct. 3 Berlin, Germany	Nov. 14 Boca Raton	Feb. 27 Tampa	June 4 Orlando
	RP	P&T					
Costello, T. John, Jr.		√	√			√	√
Friedman, Bridget	√		√	√		√	√
Grosso, Jennifer Lodge		√	√		√		
Jennison, Julia Lee	√		√	√	√	√	√
Rubel, Stacy Beth		√	√		√	√	√
Sajdera, Christopher Anthony	√		√		√	√	√
Sneeringer, Michael Alan		√	√		√	√	√
VanSickle, Melissa	√		√				√

Legislative Consultants	Division		Aug. 1 Palm Beach	Oct. 3 Berlin, Germany	Nov. 14 Boca Raton	Feb. 27 Tampa	June 4 Orlando
	RP	P&T					
Dunbar, Peter M.	√		√	√	√	√	√
Edenfield, Martha Jane	√		√	√	√	√	√
Finkbeiner, Brittany	√				√		
Roth, Cari L.	√				√		

Guests	Division		Aug. 1 Palm Beach	Oct. 3 Berlin, Germany	Nov. 14 Boca Raton	Feb. 27 Tampa	June 4 Orlando
	RP	P&T					
Duz, Ashley		√	√			√	√
Prince, Stacy							√
Friedman, Jesse		√					√
Barboza, Annabella	√				√		√
Ahearn, Matt		√					√
Griffin, Kyle		√					√
Bruan, Keith		√					√
Munoz, Gisela		√					√
Leathe, Jeremy							√
Butler, Johnathan L.					√	√	√
McDermott, Daniel L.		√			√	√	√
Trushrn, Bradley		√					√
Faulkner, Debbie							√

**ANNUAL MEMBERSHIP ELECTION MEETING
OF THE
THE FLORIDA BAR'S
REAL PROPERTY, PROBATE AND TRUST LAW SECTION**

**Friday, June 3, 2016
Loews Portofino Bay Hotel, Orlando, Florida**

I. Call to Order.

Mr. Michael J. Gelfand called the Annual Membership Election Meeting of The Florida Bar's Real Property, Probate and Trust Law Section to order at 11:30 a.m. on Friday, June 3, 2016, in the Venetian IV and V Rooms of the Loews Portofino Bay Hotel, Orlando, Florida.

Mr. Gelfand thanked Convention Committee Chair, Laura Sundberg, and Convention Committee Vice-Chairs, Alex Dobrev, Alex Hamrick and Marina Nice, for their efforts to ensure that the Convention, including the Annual Meeting, was successful.

Mr. Gelfand announced the following awards and recognitions:

ActionLine Recognition	Silvia B. Rojas
Rising Star Award	Vinette D. Godelia Nicklaus J. Curley
At-Large Member of the Year Award	Robert M. Schwartz
John Arthur Jones Annual Service Award	Jeffrey S. Goethe John W. Little, III
Robert C. Scott Memorial Award	M. George Meyer
William S. Belcher Lifetime Professionalism Award	E. Burt Bruton, Jr.

II. Election.

Ballots were distributed for the Officers and the At Large Members election [Attachment A"]. There was a motion:

To unanimously approve the candidates for election.

The motion was approved unanimously.

III. Presentation.

The Chair introduced Mr. Gilbert King, the 2014 Pulitzer Prize winning author of *Devil in the Grove*. Mr. King provided an overview of his book which details the racial injustice in the Florida town of Groveland in 1949, involving four black men falsely accused of rape and drawing a civil rights crusader and eventual Supreme Court Justice into the legal battle.

IV. Adjournment. There being no further business to come before the Section's Membership, the meeting was unanimously adjourned at 1:25 p.m.

Respectfully submitted,

S. Katherine Frazier, Secretary

ADDENDUM A

RPPTL 2016-17 ELECTION BALLOT

Friday, June 3, 2016

Chair-Elect – Andrew M. O'Malley

Director of Probate & Trust Law Division – Debra Lynn Boje

Director of Real Property Law Division – Robert S. Freedman

Secretary – William T. Hennessey

Treasurer – Tae Kelley Bronner

Director of At-Large Members – S. Katherine Frazier

Representatives for Out-of-State Members John E. Fitzgerald, Jr.; Nicole C. Kibert; Michael P.

Stafford

Stuart H. Altman
Richard S. Amari
J. Allison Archbold
Lynwood F. Arnold
Kimberly A. Bald
Carlos A. Battle
Rebecca C. Bell
Amy B. Beller
Brandon D. Bellew
Jennifer J. Bloodworth
Judy B. Bonevac
Elizabeth A. Bowers
Keith B. Braun
Shawn G. Brown
Jonathan B. Butler
Charles W. Callahan, III
David R. Carlisle
Howard A. Cohen
John P. Cole
T. John Costello, Jr.
Benjamin F. Diamond
Jeffrey R. Dollinger
Christene M. Ertl
Gail G. Fagan
Debra A. Faulkner
Gerard J. Flood
Michael L. Foreman
Nathan A. Frazier
Jonathon A. Galler

Eamonn W. Gunther
Eric Gurgold
Alex H. Hamrick
Stephanie
Harriett-Wartenberg
Thomas N. Henderson, III
Stephen P. Heuston
Mitchell A. Hipsman
Amber Jade F. Johnson
Darby Jones
Frederick W. Jones
Patricia P. Hendricks Jones
Robert B. Judd
Nishad Khan
A. Stephen Kotler
Keith S. Kromash
Theodore S. Kypreos
Robert L. Lancaster
Roger A. Larson
Jeremy P. Leathe
Sean M. Lebowitz
Brian D. Leebrick
Sophia A. Lopez
Marsha G. Madorsky
Stewart A. Marshall, III
James A. Marx
Noelle M. Melanson
Patrick F. Mize
Rex E. Moule, Jr.

Frank T. Pilotte
William R. Platt
Anne Q. Pollack
Michael A. Pyle
John N. Redding
Stephen H. Reynolds
Alexandra V. Rieman
Silvia B. Rojas
Marsha G. Rydberg
Colleen C. Sachs
Jamie B. Schwinghamer
Robert M. Schwartz
Susan R. Seaford
Sandra G. Sheets
Richard N. Sherrill
David M. Silberstein
Michael A. Sneeringer
Ann B. Spalding
Robert G. Stern
Arlene C. Udick
Jason P. Van Lenten
Melissa VanSickle
Jerry B. Wells
Richard M. White
Charles D. Wilder
Margaret Williams
G. Charles Wohlust



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

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Thursday Night Reception
JP Morgan - Carlos Batlle / Alyssa Feder

Old Republic National Title Insurance Company - Jim Russick

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

Friday Night Dinner
First American Title Insurance Company - Alan McCall

Probate Roundtable
SRR (Stout Risius Ross Inc.) - Garry Marshall
Guardian Trust – Ashley Gonnelli

Real Property Roundtable
Fidelity National Title Group - Pat Hancock

Saturday Lunch
The Florida Bar Foundation – Bruce Blackwell

Saturday Dinner
Wright Investors' Service – Stephen Soper



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&
Estate and Trust Tax Planning Committee

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

Northern Trust – *Tami Conetta*
Trust Law Committee

RPPTL 2016 - 2017
Executive Council Meeting Schedule
Deborah P Goodall's Year

Date	Location
July 28 – 31, 2016	Executive Council Meeting & Legislative Update The Breakers Palm Beach, Florida Room Rate: \$218 – SOLD OUT – email Ria Eck at the Breakers to be added to the waitlist for this event @ Ria.Eck@thebreakers.com.
October 5 – 9, 2016	Executive Council Meeting The Walt Disney World BoardWalk Inn Lake Buena Vista, FL Room Rate: \$249 (single/double occupancy) – SOLD OUT*
December 7 – 11, 2016	Executive Council Meeting The Westin Resort and Marina Key West, FL Reservation Link: https://www.starwoodmeeting.com/events/start.action?id=1510057567&key=1AFAC12C Room Rate: \$279 (single/double occupancy) – SOLD OUT*
February 22 – 25, 2017	Out of State Executive Council Meeting Four Seasons Hotel Austin, TX Reservation Link: http://www.fourseasons.com/austin/ Room Rate: \$299 (single/double occupancy) – SOLD OUT*
May 31 – June 4 , 2017	Executive Council Meeting & Convention Hyatt Regency Coconut Point Resort & Spa Bonita Springs, FL Reservation Link: https://resweb.passkey.com/go/flbar2017 Room Rate: \$209 (single/double occupancy)

* To be added to the waitlist for this event, please email Whitney Kirk @ wkirk@floridabar.org Be sure to include the nights needing a reservation and your full contact information in the email.

Date/Time	Committee / Event:	Set	# at Table	# perimeter chairs	Equipment
Thursday	October 6, 2016				
8:00 am - 5:00 pm	Registration Desk Hours				
8:30 am - 11:00 am	Executive Committee **	Conf	12	0	
12:00 pm - 1:30 pm	ActionLine	H/S	40	10	
12:00 pm - 1:30 pm	Homestead Issues Study*	H/S	20	10	
1:00 pm - 2:30 pm	Title Issues & Standards	Conf	10		speakerphone
1:00 pm - 3:00 pm	Real Property Finance & Lending	H/S	40	20	microphones on each side of h/s, podium (make part of h/s, speaker phone)
1:00 pm - 3:30 pm	Condominium and Planned Development	H/S	60	60	microphones on each side of h/s, podium (make part of h/s)
1:30 pm - 3:30 pm	Trust Law	H/S	80	60	microphones on each side of h/s, podium (make part of h/s)
3:30 pm - 5:00 pm	Fiduciary Practice Group	H/S	20		speakerphone
3:30 pm - 5:00 pm	Construction Law Institute	Conf	10		speakerphone
3:30 pm - 5:00 pm	Landlord & Tenant	Conf	10		speakerphone
3:30 pm - 5:00 pm	Title Insurance & Title Insurance Liaison	H/S	45	15	speakerphone microphones podium
3:30 pm - 5:00 pm	Guardianship & Advanced Directives	H/S	40	20	microphones on each side of h/s, podium (make part of h/s)
3:30 pm - 5:00 pm	Asset Protection	H/S	60	20	microphones on each side of h/s, podium (make part of h/s)
5:00 pm - 6:00 pm	At Large Members	Rounds	80		microphone on podium
5:00 pm - 6:00 pm	Elective Share Review Committee *	Conf	15		
7:00 pm - 9:30 pm	Welcome Reception, Firework Display and Dessert Reception @ Epcot	Pre-Registration and Ticket Required			
9:30 pm - 11:30 pm	Hospitality Suite		120		
Friday	October 7, 2016				
6:30 AM	Reptiles Run				
7:30 am - 5:00 pm	Registration Desk Hours				
7:30 am - 9:00 am	Continental Breakfast (GRAB AND GO) \$	Pre-Registration and Ticket Required			
8:00 am - 9:30 am	Estate & Trust Tax Planning	H/S	60	20	microphones on each side of h/s, podium (make part of h/s)
8:00 am - 9:00 am	Insurance & Surety	H/S	20	10	speakerphone
8:30 am - 9:30 am	Attorney Trust Officer	Conf	14	10	speakerphone
9:00 am - 11:00 am	Residential Real Estate & Industry Liaison Committee	H/S	40	20	microphones, podium, speakerphone
9:00 am - 11:00 am	Membership & Inclusion	H/S	25	5	
9:00 am - 11:00 am	Real Estate Structures and Taxation	H/S	30	15	microphones, podium
9:30 am - 11:30 am	Probate Law & Procedure	H/S	80	40	microphones on each side of h/s, podium (make part of h/s)

9:30 am – 11:00 am	Development and Land Use	Conf	14	none	speakerphone
9:30 am – 11:00 am	Sponsorship Committee	Conf	10	none	none
11:00 am – 12:30 pm	Construction Law	H/S	20	10	microphones, podium
11:00 am – 12:30 pm	Real Property Litigation	H/S	30	10	speakerphone, microphones, podium
11:30 am – 1:00 pm	Member Communication and Information Technology	Conf	10	5	
11:30 pm – 1:30 pm	Buffet Lunch (GRAB AND GO)	Pre-Registration and Ticket Required			
11:30 pm – 1:00 pm	Ad Hoc Decanting	Conf	10	5	
11:30 pm – 1:00 pm	Ad Hoc Study on Spendthrift Trust Issues Committee	H/S	20	10	
11:30 pm – 1:00 pm	Ad Hoc Same Sex Marriage Implication *	H/S	20	10	
11:30 pm – 1:00 pm	IRA, Insurance & Employee Benefits	H/S	30	15	microphones on each side of h/s, podium (make part of h/s)
1:00 pm – 3:00 pm	Probate & Trust Litigation	H/S	80	40	microphones on each side of h/s, podium (make part of h/s)
1:30 pm – 3:00 pm	Commercial Real Estate	H/S	25	15	speakerphone
1:30 pm – 3:00 pm	Real Property Problem Study	H/S	20	25	speakerphone
1:30 pm – 3:00 pm	Fellows and Mentoring	H/S	20	25	
3:00 pm – 5:00 pm	Real Property Law Division Roundtable	Rounds	100		microphone on podium , two standing Q & A microphones
3:00 pm – 5:00 pm	Probate and Trust Law Division Roundtable	Rounds	140		microphone on podium , two standing Q & A microphones
5:00 pm – 6:00 pm	PAC	Rounds	100		microphones, podium
5:00 pm – 6:00 pm	Ad Hoc Jurisdiction/Service Process	Conf	15		none
6:30 pm – 9:30 pm	Reception and Dinner at the Atlantic Dance Hall \$	Pre-Registration and Ticket Required			
9:30 pm – 11:30 pm	Hospitality Suite		80		none
Saturday		October 8, 2016			
6:00 AM	Reptiles Run				
7:30 am - 8:30 am	Executive Council Breakfast	Pre-Registration and Ticket Required- Breakfast is complimentary for EC members			
8:30 am – 12:00 pm	Executive Council Meeting	class w/ riser WITH HEADTABLE FOR 12	250	50	two screens WITH LCD PROJECTOR KIT (CLIENT TO BRING OWN EQUIPMENT),podiu m WITH microphones two standing microphones down each aisle
2:00 pm – 4:00 pm	Career Coaching Session	special Set			
5:30					
6:00 pm – 8:00 pm	Dinner at The Boathouse\$	Pre-Registration and Ticket Required			
8:00 pm – 10:00 pm	Bowling at Splitsville \$	Pre-Registration and Ticket Required			

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

** Attendance by invitation only

RPPQL Disney Meeting 2016

The guide to our Disney events and adventures.

Thursday Night:

On Thursday night we will be taking an adventure around the world in a matter of minutes. The reception will be held in the Rotunda at the American Adventure in the Epcot World Showcase. A bus will be available to transport us through the back entrance of Epcot to the reception site – or - for those of you that have tickets to Epcot, it is a fairly easy walk from the hotel to Epcot through the back entrance. You should allow about 20 – 25 minutes from the Boardwalk Hotel to the American Adventure Rotunda.



After our reception, we will have the opportunity to take a short walk to a private viewing area to watch IllumiNations: Reflections of Earth- the spectacular fireworks show.



Friday Night:

On Friday, we will be a little closer to “home” for dinner and dancing! Our Friday night reception and dinner will be at the Atlantic Dance venue located right on the Boardwalk. A little fun fact: when this venue is not rented out to a private group, it is one of Disney’s very few “adult only” night life attractions. Of course, children of all ages are invited to attend our event! We will have food, drink and music as well as a few surprises!



Saturday Night:

Saturday is our farewell dinner at the upscale waterfront restaurant The Boathouse located in the newly renovated Disney Springs. Formerly known as Downtown Disney (or Pleasure Island for those of us that go WAY back), Disney Springs is the “hopping” place to be.-offering many fine dining establishments, high end retail shops, and plenty of live music and family friendly activities. In addition to wonderful food and beverages, the Boathouse has a multimillion-dollar fleet of 19 rare boats on display.



After dinner, to burn off some calories, we have reserved a private space at Splitsville Luxury Bowling Lanes. This event is going to be great for all ages and skill levels! However, if bowling is not your style, you can explore Disney Springs on your own or return to the hotel. For those that want to spend the day at the theme parks and skip dinner, you can meet us at the bowling alley. There will be a separate registration for each part of our Saturday night activities.



I am looking forward to seeing you all in Orlando!

Debbie

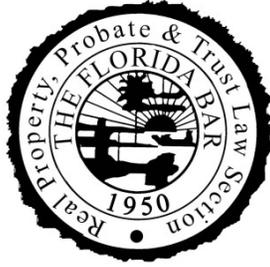
Meeting Schedule for Bar Year 2017 – 2018

RPPTL 2017 - 2018

Executive Council Meeting Schedule Andrew O'Malley's Year

Date	Location
July 27 – July 30, 2017	Executive Council Meeting & Legislative Update The Breakers Palm Beach, Florida Room Rate: \$225 Room Block Link: TBA
October 11 – 15, 2017	Out of State Meeting/ Executive Council/ Boston, MA Fairmont Copley Plaza Boston, MA Standard Signature Room Rate: \$455 Fairmont Gold Rooms: \$500* Fairmont Gold Signature Rooms & Junior Suites: \$525* Fairmont Gold One Bedroom Suite: \$775* Room Block Link: TBA
December 7 – 11, 2017	Executive Council & Committee Meetings The Ritz-Carlton Naples, FL Room Rate: \$285 Room Block Link: TBA
February 21 – 24, 2018	Executive Council & Committee Meetings Casa Monica Hotel St. Augustine, FL Room Rate: \$269 Reservation Link: TBA
May 30 – June 3, 2018	Executive Council Meeting & Convention Tradewinds Island Resort on St. Pete Beach St. Pete Beach, FL Room Rate: \$249 Tropical View Hotel Room Rate: \$269* Tropical View One Bedroom Suite: \$319* Reservation Link: TBA

*Subject to availability



RPPTL Financial Summary from Separate Budgets
2015 – 2016 [July 1 – May 31¹]
YEAR TO DATE REPORT

General Budget

YTD

Revenue: \$1,230,505
Expenses: \$1,081,554

Net: \$ 148,951

CLI

YTD

Revenue: \$ 242,916
Expenses: \$ 184,492

Net: \$ 58,424

Trust Officer Conference

Revenue: \$ 333,545
Expenses: \$ 202,121

Net: \$ 131,424

Legislative Update

Revenue: \$ 80,903
Expenses: \$ 60,897

Net: \$ 20,006

Convention

Revenue: \$ 0
Expenses: \$ (21,006)

Net: \$ (21,006)

Roll-up Summary (Total)

Revenue: \$ 1,887,869
Expenses: \$ 1,550,070

Net Operations: \$ 337,799

Beginning Fund Balance: \$ 1,066,946
Current Fund Balance (YTD): \$ 1,404,745
Projected June 2016 Fund Balance \$ 961,141

¹ This report is based on the tentative unaudited detail statement of operations dated 5/31/16 (prepared on 6/10/16).

Date	Course Title	Course No.	Location
July 29, 2016	Legislative Update	2218	The Breakers
August 10, 2016	Audio Webcast: Law for a Lawyer's Own Business: Key Lease Issues Part 3 (Part 4 of 4)	2345	Audio Webcast
August 31, 2016	Audio Webcast: As the World Turns: Everyone Has An Opinion, But Which One is Right?	2223	Audio Webcast
September 21, 2016	Representing a Buyer of a Parcel or Unit in a Mixed Used Project: Is Your Client Buying Air? Or, Oh My, What did I buy? (Part 1 of 2)	2233	Audio Webcast
September 28, 2016	Representing a Buyer of a Parcel or Unit in a Mixed Used Project: Is Your Client Buying Air? Or, Oh My, What did I buy? (Part 2 of 2)	2217	Audio Webcast
October 19, 2016	Construction Stop-Start	TBA	Audio Webcast
October 26, 2016	Receiverships	TBA	Audio Webcast
November 2, 2016	Professionalism in Real Estate Litigation	TBA	Audio Webcast
November 9, 2016	Community Development Districts	TBA	Audio Webcast
November 18, 2016	RPPTL Probate Law 2016	2263	Tampa
December 1, 2016	Estate & Trust Planning/Asset Protection	2247	Fort Lauderdale
February 17-18, 2017	Advanced Real Property Certification Review Course 2017	2284	Orlando
March 3, 2017	Trust and Estate Symposium	2288	Fort Lauderdale
March 9-11, 2017	Construction Law Institute	2290	JW Orlando, Grand Lakes
March 9-11, 2017	Construction Law Certification Review	2291	JW Orlando, Grand Lakes
March 31-April 1, 2017	Wills, Trusts and Estates Certification Review Course	2299	Orlando – TBD
April 7, 2017	Guardianship Law	2300	Orlando – TBD
May 12, 2017	Condo & Planned Development Law & Certification Review Course	2312	Tampa- TBD
June 2, 2017	RPPTL Convention Seminar	2317	Hyatt Coconut Point
TBD	ATO 2017	2322	The Breakers

Welcome to our 2016-2018 Class of Fellows

Stephanie Villavicencio is a partner at the firm of Zamora, Hillman & Villavicencio located in Miami, Florida. She completed her undergraduate studies at the University of Miami in 2007 and earned her law degree with St. Thomas University School of Law in 2010. Upon graduation, she was offered an associate position at Zamora & Hillman and in 2015 they welcomed her as partner. Her practice is dedicated to probate and guardianship administration and related litigation, as well as, estate planning. She has been a member of RPPTL for five years, is an active member of the Dade County Bar Association, Cuban American Bar Association and served as Editor for the section magazine of the Elder Law Section of The Florida Bar from 2011 through 2015. Ms. Villavicencio co-authored an article titled “Standards and Basic Principles of Examining and Evaluating Capacity in Guardianship Proceedings” published by St. Thomas Law Review in Fall 2013.

Angela Santos is an Associate with Duane Morris LLP located in Boca Raton, Florida. She completed her undergraduate studies at Ohio State University, earned her law degree in 2009 at Syracuse University College of Law and obtained an L.L.M. in taxation in 2010 from Georgetown University Law Center. Ms. Santos is admitted in Florida, New York and Connecticut. Her practice areas include private wealth planning and representing personal representatives/executors and trustees on complex estate and trust administration. Ms. Santos has been a member of RPPTL for four years. She is a Fellow of the 2015-2016 inaugural class of the American College of Trust and Estate Counsel. She has authored and co-authored several articles, including an article titled “Offshore Trusts and Reporting Obligations” published by the Palm Beach Daily News, Estate Planning Supplement in January of 2014 and an article titled “Foreign Reporting for Estate Planners” published by the ABA Section of Taxation and Section of Real Property, Trust and Estate Law, Joint Fall CLE Meeting, October 2011.

Amber Ashton is a Senior Associate at de Beaubien, Knight, Simmons, Mantzaris & Neal, LLP located in Tampa, Florida. She completed her undergraduate studies at Vanderbilt University and earned her law degree at Stetson University College of Law in 2006. Ms. Ashton is admitted in the Middle and Southern Districts of Florida and is AV rated by Martindale Hubbell. Her practice includes all areas of real estate litigation including eminent domain proceedings, inverse condemnation, code enforcement matters, title claims and HOA and condominium association litigation. She also serves as the Special Magistrate for the City of St. Pete Beach. Ms. Ashton is an active member of RPPTL, currently serving as secretary for the Real Property Litigation Committee. She has also authored and co-authored several articles including an article titled “E-Recording: The Next Step in Legal Technology” published by ActionLine, Winter of 2015.

Scott Work is an Associate at Clark, Partington, Hart, Larry, Bond & Stackhouse located in Destin, Florida. He completed his undergraduate studies at University of Florida, earned his law degree in 2004 at the Florida Coastal School of Law and received his L.L.M. in real property development at University of Miami in 2015. His practice includes real estate transactions and development, landlord tenant matters, condominium development law, community association law and real estate litigation. Mr. Work has been very involved in the Okaloosa Bar Association, serving as past secretary, treasurer, vice-president and now president. He also served as a member of the Okaloosa County Value Adjustment Board for 2015.

LEGISLATIVE POSITION REQUEST FORM

GOVERNMENTAL AFFAIRS OFFICE

Date Form Received _____

GENERAL INFORMATION

Submitted By Michael E. Bedke, Chair, Real Estate Structures and Taxation Committee of the Real Property Probate & Trust Law Section (RPPTL Approval Date _____, 2016)

Address DLA Piper LLP (us), 100 N. Tampa Street, Suite 2200, Tampa, FL 33602-5809
Telephone: 813-222-5924 Email: michael.bedke@dlapiper.com

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

CONTACTS

Board & Legislation Committee Appearance

Michael E. Bedke, Piper LLP (us), 100 N. Tampa Street, Suite 2200, Tampa, FL 33602-5809 Telephone: 813-222-5924 Email: michael.bedke@dlapiper.com

Steven H. Mezer, Becker & Poliakoff, P.A., 1511 N. West Shore Blvd, Suite 1000, Tampa, FL 33607-4591 Telephone: 813-527-3900 x3390
Email: smezer@bplegal.com

Peter M. Dunbar, Dean, Mead, Egerton, Bloodworth, Capouano & Bozarth, P.A., 215 S. Monroe Street, Suite 815, Tallahassee, FL 32301, Telephone: (850) 999-4100 Email: pdunbar@deanmead.com

Martha J. Edenfield, Dean, Mead, Egerton, Bloodworth, Capouano & Bozarth, P.A., 215 S. Monroe Street, Suite 815, Tallahassee, FL 32301, Telephone: (850) 999-4100 Email: medenfield@deanmead.com

Appearances

Before Legislators (SAME)

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

**Meetings with
Legislators/staff** (SAME)

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

PROPOSED ADVOCACY

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

If Applicable,

List The Following N/A

(Bill or PCB #) (Bill or PCB Sponsor)

Indicate Position Support Oppose _____ Tech Asst. _____ Other _____

Proposed Wording of Position for Official Publication:

"Support uniform assessment of property held in Florida land trusts, including changes to Fla. Stat. 193.1554(5) and 193.1555(5)."

WHITE PAPER

UNIFORM ASSESSMENT OF PROPERTIES HELD IN LAND TRUSTS

I. SUMMARY

This proposed legislation will clarify provisions in Chapter 193 of the Florida Statutes that have been interpreted by some county property appraisers to assess properties conveyed to Florida land trustees differently from properties conveyed to other trustees.

II. CURRENT SITUATION

Sections 193.1554 and 193.1555 of the Florida Statutes limit annual increases in the assessed value of certain non-homestead properties to ten percent of the assessed value of the property for the prior year. Subsection (5) of each statute provides that this 10% limitation does not apply to the assessment of property in a tax year following a “change of ownership or control.” A change in ownership or control is defined identically in each section as follows: “any sale, foreclosure, *transfer of legal title or beneficial title in equity to any person*, or the cumulative transfer of control or of more than 50 percent of the ownership of the legal entity that owned the property when it was most recently assessed at just value, except as provided in this subsection.” Each of these sections provides that there is no change of ownership if “[t]he transfer is *between legal and equitable title*.” (emphasis added)

When the owner of real property conveys it to the trustee of an express trust in which the grantor is also the beneficiary of the trust, there is a change in legal title but no change in beneficial or equitable title. With no change in beneficial ownership of the property, such a conveyance does not remove the property from the 10% assessment cap statute, as it is a transfer between legal title (the title conveyed to the trustee) and equitable title (the ownership interest retained by the owner as trust beneficiary).

Subsection 689.071(3) of the Florida Land Trust Statute provides that a conveyance to a land trustee in compliance with that statute vests in the land trustee *both legal and equitable title* to the real property. The beneficiary(ies) of the land trust own the beneficial interest in the property, which may be an interest in personal property or real property, depending on the provisions of the documents. Accordingly, a deed from an owner-beneficiary to a land trustee is not a transfer between legal and equitable title, as both titles vest in the land trustee. Such a deed is, however, a transfer between legal title (the title conveyed to the land trustee) and beneficial title (the ownership interest retained by the owner as land trust beneficiary).

In certain counties in Florida, county property appraisers have seized upon this distinction between land trusts and other trusts and have re-assessed Florida properties without regard to the 10% limitation, following a conveyance of property to a Florida land trustee, even if the grantor is the beneficiary of the land trust and there is no change in the beneficial title to the property. This practice is unfair to property owners who choose to hold their real property in a Florida land trust rather than other trusts, and it is a misapplication of a statute that was intended to limit assessment increases when the ownership of the property was unchanged.

III. EFFECT OF PROPOSED CHANGES

This proposed legislation will treat transfers into and out of land trusts the same as other trusts that do not vest equitable title in the trustee. In each section, the following phrase will be added to the specific exemption for transfers between legal and equitable title, as follows:

There is no change of ownership if ... the transfer is between legal and equitable title, or between a land trustee under s. 689.071 and the owner of the beneficial interest in the land trust.

As a result of this additional phrase, a transfer between a land trustee and a beneficiary of the land trust will not be considered a change in ownership that removes the property from the 10% assessment increase cap under either Section 193.1554 or Section 193.1555. This result treats land trusts the same as any other express trust and preserves the 10% assessment limitation in both cases, since there is no change in beneficial ownership in either case. This additional phrase harmonizes the specific list of exempt transfers with the general language preceding that list, which evidences a clear legislative intention to retain the assessment cap when there is no transfer of beneficial ownership.

The proposed additional phrase specifically refers to land trusts under Fla. Stat. §689.071 to discourage an over-broad reading of the exemption. Other conveyances between beneficiaries and trustees are already treated as exempt because they are transfers between legal and equitable title. The additional phrase is intended to exempt both kinds of transfers with land trustees: (1) conveyances to a land trustee by a property owner that is also the beneficiary of the land trust, and (2) conveyances by a land trustee to the beneficiary of the land trust.

IV. FISCAL IMPACT ON STATE AND LOCAL GOVERNMENTS

To the extent that county property appraisers have previously succeeded in re-assessing properties following a conveyance to a land trustee, this legislation will prospectively end that practice and uniformly limit annual assessment increases for all transfers into and out of trusts in which the beneficial owner remains unchanged. The annual 10% limitation temporarily reduces the taxes collectible from such a property until the following years, when the assessment may increase up to 10% annually even if market values do not rise as quickly.

V. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR

Members of the private sector who hold real property in land trusts will receive the same uniform treatment as other trusts, limiting annual increases in assessed property values in a nondiscriminatory manner regardless of the type of trust they choose. Uniformly limiting assessment increases will postpone increases in tax revenues derived from land trust properties to the same extent as other properties held by trustees.

VI. CONSTITUTIONAL ISSUES

This legislation will end a practice by certain county property appraisers that is arguably an unconstitutional denial of equal protection of the laws, by arbitrarily taxing property held in one type of trust differently from another type of trust, even when the beneficial ownership of the property has not changed in either case.

V. OTHER INTERESTED PARTIES

This legislation will be opposed by the county property appraisers who have interpreted Sections 193.1554(5) and 193.1555(5) as described above to re-assess properties conveyed to land trustees.

1 A bill to be entitled

2 An Act relating to assessment of real property
3 following a transfer with a land trustee; amending s.
4 193.1554(5); amending s. 193.1555(5); providing an
5 effective date.

6
7 Section 1. Subsection 193.1554(5), Florida Statutes, is
8 amended to read:

9 193.1554. Assessment of nonhomestead residential
10 property.—

11 (5) Except as provided in this subsection, property
12 assessed under this section shall be assessed at just value as
13 of January 1 of the year following a change of ownership or
14 control. Thereafter, the annual changes in the assessed value of
15 the property are subject to the limitations in subsections (3)
16 and (4). For purpose of this section, a change of ownership or
17 control means any sale, foreclosure, transfer of legal title or
18 beneficial title in equity to any person, or the cumulative
19 transfer of control or of more than 50 percent of the ownership
20 of the legal entity that owned the property when it was most
21 recently assessed at just value, except as provided in this
22 subsection. There is no change of ownership if:

23 (a) The transfer of title is to correct an error.

24 (b) The transfer is between legal and equitable title, or
25 between a land trustee under s. 689.071 and the owner of the
26 beneficial interest in the land trust.

27 (c) The transfer is between husband and wife, including a
28 transfer to a surviving spouse or a transfer due to a
29 dissolution of marriage.

30 (d) For a publicly traded company, the cumulative transfer
31 of more than 50 percent of the ownership of the entity that owns
32 the property occurs through the buying and selling of shares of
33 the company on a public exchange. This exception does not apply
34 to a transfer made through a merger with or an acquisition by

35 another company, including an acquisition by acquiring
36 outstanding shares of the company.

37 Section 2. Subsection 193.1555(5), Florida Statutes, is
38 amended to read:

39 193.1555. Assessment of certain residential and
40 nonresidential real property.—

41 (5) Except as provided in this subsection, property
42 assessed under this section shall be assessed at just value as
43 of January 1 of the year following a qualifying improvement or
44 change of ownership or control. Thereafter, the annual changes
45 in the assessed value of the property are subject to the
46 limitations in subsections (3) and (4). For purpose of this
47 section:

48 (a) A qualifying improvement means any substantially
49 completed improvement that increases the just value of the
50 property by at least 25 percent.

51 (b) A change of ownership or control means any sale,
52 foreclosure, transfer of legal title or beneficial title in
53 equity to any person, or the cumulative transfer of control or
54 of more than 50 percent of the ownership of the legal entity
55 that owned the property when it was most recently assessed at
56 just value, except as provided in this subsection. There is no
57 change of ownership if:

58 1. The transfer of title is to correct an error.

59 2. The transfer is between legal and equitable title, or
60 between a land trustee under s. 689.071 and the owner of the
61 beneficial interest in the land trust.

62 3. For a publicly traded company, the cumulative transfer
63 of more than 50 percent of the ownership of the entity that owns
64 the property occurs through the buying and selling of shares of
65 the company on a public exchange. This exception does not apply
66 to a transfer made through a merger with or acquisition by
67 another company, including acquisition by acquiring outstanding
68 shares of the company.

Section 3. This act shall take effect January 1, 2018.

RPPTL POSITION STATEMENT

Rule 69B-186.010(4)(a), F.A.C., Was Erroneously Adopted Without Proper Authority

SUMMARY

Section (4)(a) of Rule 69B-186.010, Florida Administrative Code, regulating closing services charges, was adopted by the Department of Financial Services (DFS) without statutory or rule-making authority and should be stricken. The Florida Statutes do not authorize the DFS to adopt a rule regulating closing services charges. This rule section regulates costs which must be charged and paid by a consumer, and the failure to do so would be deemed an unlawful rebate or unlawful inducement.

BACKGROUND: RULE MAKING

In order to provide a foundation for this position statement one must begin with Chapter 120 Florida Statutes, titled ADMINISTRATIVE PROCEDURE ACT. Section 120.52(8), Florida Statutes, provides:

“Invalid exercise of delegated legislative authority” means action that goes beyond the powers, functions, and duties delegated by the Legislature. A proposed or existing rule is an invalid exercise of delegated legislative authority if any one of the following applies:

(b) The agency has exceeded its grant of rulemaking authority, citation to which is required by s. 120.54(3)(a)1.;

(c) The rule enlarges, modifies, or contravenes the specific provisions of law implemented, citation to which is required by s. 120.54(3)(a)1.”

A grant of rulemaking authority is necessary but not the only requirement to allow an agency to adopt a rule. In addition to a grant of rulemaking authority, a specific law to be implemented is also required. An agency may only adopt rules that implement or interpret the specific powers and duties granted by the enabling statute. No agency has authority to adopt a rule only because it is reasonably related to the purpose of the enabling legislation and is not arbitrary and capricious or is within the agency’s class of powers and duties, nor does an agency have the authority to implement statutory provisions setting forth general legislative intent or policy. Statutory language granting rulemaking authority or generally describing the powers and functions of an agency shall be construed to extend no further than implementing or interpreting the specific powers and duties conferred by the enabling statute.

Section 120.52, Florida Statutes, also sets forth the following instructive definitions:

“(9) “Law implemented” means the language of the enabling statute being carried out or interpreted by an agency through rulemaking.

...

(16) "Rule" means each agency statement of general applicability that implements, interprets, or prescribes law or policy or describes the procedure or practice requirements of an agency and includes any form which imposes any requirement or solicits any information not specifically required by statute or by an existing rule.

...

(17) "Rulemaking authority" means statutory language that explicitly authorizes or requires an agency to adopt, develop, establish, or otherwise create any statement coming within the definition of the term "rule."

According to Section 120.52(8)(b), a rule that exceeds an agency's grant of rulemaking authority is an invalid exercise of delegated legislative authority.

BACKGROUND: CLOSING RULE

Section 627.7711(1)(a), Florida Statutes, defines closing services as:

"Closing services" means services performed by a licensed title insurer, title insurance agent or agency, or attorney agent in the agent's or agency's capacity as such, including, but not limited to, preparing documents necessary to close the transaction, conducting the closing, or handling the disbursing of funds related to the closing in a real estate closing transaction in which a title insurance commitment or policy is to be issued. F.S. §627.7711(1)(a).

Section 627.7711, Florida Statutes, states that closing services performed by a title agent include handling the disbursement of funds related to the closing. This statute further provides that an agent may charge for closing services separately from the charge for title insurance premium. §627.7711(1)(b), Fla. Stat. The title agent is also required to determine and clear any underwriting objections or requirements to eliminate risk and close the transaction according to the contract between buyer and seller.

By way of example, information regarding the status of condominium or homeowners' association dues/assessments is critical to the sale of real property, and that information must be provided prior to the closing to enable the title agent to close the transaction in accordance with the contract between the buyer and seller. Obtaining association estoppel information is a necessary part of the statutory closing functions of a title agent. Obtaining inspection reports or a survey may also be required under the contract between the buyer and seller. There is much information that is necessary to a real estate closing which must be obtained and garnered by the title agent well in advance of the closing date. This information is essential to clearing underwriting objections and must be obtained early on in the process.

Section 627.782(2), Florida Statutes, provides:

(2) *“Premium” means the charge, as specified by rule of the commission, which is made by a title insurer for a title insurance policy, including the charge for performance of primary title services by a title insurer or title insurance agent or agency, and incurring the risks incident to such policy, under the several classifications of title insurance contracts and forms. As used in this part or in any other law, with respect to title insurance, the word “premium” does not include a commission.*

The “commission” known as the “Financial Services Commission”¹ in the statute must adopt rules specifying the premium to be charged for title insurance. Neither Section 627.7711 nor Section 627.782(2) authorizes regulation of closing charges. Therefore, applying the plain language of Section 627.7711, Florida Statutes, and taking into account the different phrasing within the statute and the fact that the phrase **“as specified by rule of the commission,”** does not appear in any other part of Section 627.7711, Florida Statutes, the legislature intentionally and purposely excluded said language. Further, applying principles of statutory construction, a negative inference may be drawn from the exclusion of language from one statutory provision that is included in other provisions of the same statute. As such, Section 627.7711 and Section 627.782 do not authorize the Department of Financial Affairs (DFS) to adopt rules regulating closing services charges.

Section 626.9541(1)(h), Florida Statutes, also does not authorize the DFS to adopt a rule regulating charges by a title agent. This statute narrowly regulates title agent charges and fees by providing that a rebate or abatement of a title agent’s charge or fee is not an unlawful inducement or unlawful rebate. §626.9541(1)(h)(3)(b), Fla. Stat. The statute does not include any provision authorizing the DFS to adopt rules regulating title agent “charges or fees.”

SUMMARY

Of paramount importance is the protection of the consumer. It is not in the consumers’ best interests to suffer a delay in a real estate closing due to a DFS rule hampering the ability of the title agent to obtain information necessary to the closing and completion of the contract for sale between a buyer and seller. Consumers in residential transactions are subject to strict timelines mandated by contractual obligations, loan requirements and rules established by the CFPB. The closing statement, with correct amounts and figures, must be delivered to the buyer at least three days prior to the closing. If the estoppel certification from the association is not timely received, then the closing will be delayed and the lender must re-disclose to the buyer once the estoppel information is received, requiring another three-day advance disclosure of the proposed closing statement. By the title agent advancing the cost of an estoppel fee certificate, the transaction is better positioned to close on time with accurate figures.

¹ Section 624.05, Florida Statutes, provides as follows:

“Department,” “commission,” and “office” defined.—As used in the Insurance Code:

(1) *“Department” means the Department of Financial Services. The term does not mean the Financial Services Commission or any office of the Financial Services Commission.*

(2) *“Commission” means the Financial Services Commission.*

(3) *“Office” means the Office of Insurance Regulation of the Financial Services Commission.”*

The erroneous adoption of Section 69B-186.010(4)(a), Florida Administrative Code, without rule-making or statutory authority is detrimental to the best interests of the consumer and should be stricken.

1 A Bill To Be Entitled

2 An Act relating to open and expired permits;
3 creating s. 553.7905 to provide procedures for
4 closing open and expired building permits;
5 amending s. 489.129 to clarify that failure to
6 obtain inspections and close permits is a
7 violation of a contractor's license; providing an
8 effective date.

9
10 Section 1. Section 553.7905, Florida Statutes,
11 is created to read:

12 553.7905 Open and expired permits; procedures
13 for closing; notices to owners applying for permits

14 (1) Any building permit issued for construction
15 of any commercial or residential project, other than
16 those exempted by this section, that has not been
17 properly closed by passing all necessary final
18 inspections and complying with other permit
19 requirements within one year from the expiration of
20 the notice of commencement or last amendment thereto,
21 or in the absence of a notice of commencement within
22 one year from the last inspection conducted under the
23 permit or, if no inspections have been performed on a
24 project without a notice of commencement, within two
25 years from the date of issuance of the permit, may be
26 closed by or on behalf of the current property owner,
27 regardless of whether the property owner is the same
28 owner who originally applied for the permit or is a
29 subsequent owner, by complying with the following
30 procedures:

31 (a) The property owner may hire a Florida
32 licensed contractor bearing the same scope of license
33 as the permit holder of the open or expired permit, to
34 reopen the permit if it is expired, perform any
35 necessary work to fulfill all requirements of the open
36 or expired permit, and call for any necessary

37 inspections and perform any other actions required for
38 a proper closure of the permit. The Florida license
39 of the contractor performing these functions shall be
40 current and active. Said contractor shall not be
41 liable for any defects or work failing to comply with
42 any applicable code, regulation, ordinance, permit
43 requirement or law other than as to work actually
44 performed by the contractor. The permit holder under
45 the original open or expired permit shall remain
46 liable for any defects in its work or failure to
47 comply with any applicable code, regulation,
48 ordinance, permit requirement or law. If any of the
49 permitted work includes construction outside the
50 contractor's license, the owner or contractor may hire
51 licensed subcontractors in the scope of the permitted
52 work who may perform the functions of the contractor
53 as outlined in this subsection to the extent of work
54 covered by its license. All work required to properly
55 close an open or expired permit under this section
56 shall be performed in accordance with the building
57 code in effect on the date of issuance of the open or
58 expired permit.

59 (b) As an alternative to the procedure in
60 subsection 1(a) above, the property owner may hire a
61 licensed engineer or architect, possessing a current
62 and active Florida license, experienced in designing,
63 supervising or inspecting work of the nature of the
64 work covered by the open or expired permit at issue
65 and having at least three years' experience in
66 performing field inspections as to such work, to
67 inspect the construction work subject to the open or
68 expired building permit, direct any repairs necessary
69 to comply with all permit requirements, then confirm
70 compliance therewith by submitting an affidavit
71 bearing the seal of the engineer or architect to the
72 issuing building department. If any of the permitted

73 work includes construction outside the engineer's or
74 architect's area of expertise, the owner, engineer or
75 architect may hire engineers or architects licensed in
76 the scope of the permitted work, who may direct any
77 necessary repairs to comply with all permit
78 requirements, then confirm compliance by submitting to
79 the issuing building department a signed and sealed
80 affidavit attesting to same. The building department
81 issuing the permit shall be deemed to have accepted
82 the affidavit or affidavits referenced in this
83 subsection, as satisfaction of all permit requirements
84 and shall thereafter close the building permit, unless
85 they conduct their own final inspections within five
86 business days of receipt of the affidavit or
87 affidavits.

88 (c) The procedures in subsections 1(a) and (b)
89 above shall apply regardless of whether the building
90 permit is still open or has expired.

91 (2) A failure to properly close a building
92 permit within five years after expiration of the date
93 of recordation of the notice of commencement or last
94 amendment thereto or, if no notice of commencement was
95 recorded, then within seven years after the building
96 permit was issued, shall not itself authorize the
97 permitting authority to deny issuance of permits,
98 issue notices of violation, or fine, penalize,
99 sanction, or assess fees against a subsequent bona
100 fide purchaser of the subject property for value. The
101 permitting authority shall continue to have all rights
102 and remedies against the original property owner and
103 contractor who obtained and subsequently failed to
104 close the permit. The Florida Building Commission
105 shall adopt rules and amend the applicable Florida
106 Building Code to enact procedures designed to
107 encourage owners to ensure permits are properly
108 closed.

109 (3) When issuing any building permit, the
110 building department shall provide to the property
111 owner a mandatory written notice in the following
112 form:

113 IMPORTANT NOTICE REGARDING PERMIT CLOSE-OUTS

114 "You are receiving with this package a building
115 permit authorizing the construction referenced in the
116 application that was submitted to this building
117 department by you or on your behalf. The permit is
118 issued with conditions, including required building
119 inspections and assurances that the construction
120 complies with the design submitted with the permit
121 application and any other conditions referenced in the
122 permit. It is critical that you ensure that all
123 necessary building inspections are obtained and passed
124 before the expiration of any notice of commencement or
125 amendment thereto, as these inspections are important
126 to ensure construction has been performed in a safe
127 and proper manner. If you have any questions regarding
128 these procedures, please call the building department.
129 Your failure to comply may not only lead to the
130 forfeiture of your deposit, but may also result in
131 unsafe conditions arising from your construction."

132 (4) Municipalities, counties and building
133 departments may not charge separate search fees for
134 open or unexpired building permits for any units or
135 subunits assigned by any municipality or county to a
136 particular tax parcel identification number. Only one
137 search fee per tax parcel identification number may be
138 charged, in an amount not to exceed \$150.00.

139 (5) The building department shall send a written
140 notice to permit holders on 1-4 family residences one
141 year after issuance of any permit that has not been
142 properly closed out within that time advising the

143 permit holder of the need to properly close out the
144 permit upon completion of the work covered by same.

145 Section 2. Section 489.129, Florida Statutes,
146 is amended to read:

147 489.129 Disciplinary proceedings.-

148 (1) The board may take any of the following
149 actions against any certificateholder or registrant:
150 place on probation or reprimand the licensee, revoke,
151 suspend, or deny the issuance or renewal of the
152 certificate or registration, require financial
153 restitution to a consumer for financial harm directly
154 related to a violation of a provision of this part,
155 impose an administrative fine not to exceed \$10,000
156 per violation, require continuing education, or assess
157 costs associated with investigation and prosecution,
158 if the contractor, financially responsible officer, or
159 business organization for which the contractor is a
160 primary qualifying agent, a financially responsible
161 officer, or a secondary qualifying agent responsible
162 under s. 489.1195 is found guilty of any of the
163 following acts:

164 (a) Obtaining a certificate or registration by
165 fraud or misrepresentation.

166 (b) Being convicted or found guilty of, or
167 entering a plea of nolo contendere to, regardless of
168 adjudication, a crime in any jurisdiction which
169 directly relates to the practice of contracting or the
170 ability to practice contracting.

171 (c) Violating any provision of chapter 455.

172 (d) Performing any act which assists a person or
173 entity in engaging in the prohibited uncertified and
174 unregistered practice of contracting, if the
175 certificateholder or registrant knows or has
176 reasonable grounds to know that the person or entity
177 was uncertified and unregistered.

178 (e) Knowingly combining or conspiring with an
179 uncertified or unregistered person by allowing his or
180 her certificate or registration to be used by the
181 uncertified or unregistered person with intent to
182 evade the provisions of this part. When a
183 certificateholder or registrant allows his or her
184 certificate or registration to be used by one or more
185 business organizations without having any active
186 participation in the operations, management, or
187 control of such business organizations, such act
188 constitutes prima facie evidence of an intent to evade
189 the provisions of this part.

190 (f) Acting in the capacity of a contractor under
191 any certificate or registration issued hereunder
192 except in the name of the certificateholder or
193 registrant as set forth on the issued certificate or
194 registration, or in accordance with the personnel of
195 the certificateholder or registrant as set forth in
196 the application for the certificate or registration,
197 or as later changed as provided in this part.

198 (g) Committing mismanagement or misconduct in
199 the practice of contracting that causes financial harm
200 to a customer. Financial mismanagement or misconduct
201 occurs when:

202 1. Valid liens have been recorded against the
203 property of a contractor's customer for supplies or
204 services ordered by the contractor for the customer's
205 job; the contractor has received funds from the
206 customer to pay for the supplies or services; and the
207 contractor has not had the liens removed from the
208 property, by payment or by bond, within 75 days after
209 the date of such liens;

210 2. The contractor has abandoned a customer's
211 job and the percentage of completion is less than the
212 percentage of the total contract price paid to the
213 contractor as of the time of abandonment, unless the

214 contractor is entitled to retain such funds under the
215 terms of the contract or refunds the excess funds
216 within 30 days after the date the job is abandoned; or

217 3. The contractor's job has been completed, and
218 it is shown that the customer has had to pay more for
219 the contracted job than the original contract price,
220 as adjusted for subsequent change orders, unless such
221 increase in cost was the result of circumstances
222 beyond the control of the contractor, was the result
223 of circumstances caused by the customer, or was
224 otherwise permitted by the terms of the contract
225 between the contractor and the customer.

226 (h) Being disciplined by any municipality or
227 county for an act or violation of this part.

228 (i) Failing in any material respect to comply
229 with the provisions of this part or violating a rule
230 or lawful order of the board.

231 (j) Abandoning a construction project in which
232 the contractor is engaged or under contract as a
233 contractor. A project may be presumed abandoned after
234 90 days if the contractor terminates the project
235 without just cause or without proper notification to
236 the owner, including the reason for termination, or
237 fails to perform work without just cause for 90
238 consecutive days.

239 (k) Signing a statement with respect to a
240 project or contract falsely indicating that the work
241 is bonded; falsely indicating that payment has been
242 made for all subcontracted work, labor, and materials
243 which results in a financial loss to the owner,
244 purchaser, or contractor; or falsely indicating that
245 workers' compensation and public liability insurance
246 are provided.

247 (l) Committing fraud or deceit in the practice
248 of contracting.

249 (m) Committing incompetency or misconduct in the
250 practice of contracting.

251 (n) Committing gross negligence, repeated
252 negligence, or negligence resulting in a significant
253 danger to life or property.

254 (o) Proceeding on any job without obtaining
255 applicable local building department permits and
256 inspections or failing to properly close out any
257 permits or satisfy any applicable permit requirements.

258 (5) This act shall take effect July 1, 2017.

LEGISLATIVE POSITION REQUEST FORM

GOVERNMENTAL AFFAIRS OFFICE

Date Form Received _____

GENERAL INFORMATION

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

Address 800 North Magnolia Avenue, Suite 1500 Orlando, FL 32803
Telephone: (407) 841-1200

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

CONTACTS

Board & Legislation

Committee Appearance

David J. Akins, Dean Mead, 800 North Magnolia Avenue, Suite 1500 Orlando, FL 32803 Telephone: (407) 841-1200
Sarah Swaim Butters, Holland & Knight, LLP, 315 S. Calhoun St., Sue. 600, Tallahassee, FL 32301, Telephone: (850) 224-7000
Peter M. Dunbar, Dean Mead, 215 S. Monroe Street, Suite 815, Tallahassee, FL 32301 Telephone 850-999-4100
Martha J. Edenfield, Dean Mead, 215 S. Monroe Street, Suite 815, Tallahassee, FL 32301 Telephone 850-999-4100

Appearances before Legislators

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

Meetings with Legislators/staff

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

PROPOSED ADVOCACY

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

If Applicable,

List The Following

N/A

(Bill or PCB #)

(Bill or PCB Sponsor)

Indicate Position

Support

Oppose

Technical

Other

Assistance

Proposed Wording of Position for Official Publication:

Support adding new Section 689.151 to the Florida Statutes to allow for the creation of joint tenancies with rights of survivorship and tenancies by the entireties in certain kinds of personal (e.g., not real) property without regard to the common law unities of time and title.

Reasons For Proposed Advocacy:

The proposed addition to the Florida Statutes will bring clarity and certainty to an area of Florida law in which there is now considerable confusion, apprehension and misconception. New s. 689.151 does for personal property within the scope of the statute what s. 689.11 now does for real property: after the enactment of the new statute, a married owner of personal property may establish a tenancy by the entireties with his or her spouse without the use of a "straw man." Further, if one spouse adds the name of the other spouse as an owner of personal property, a presumption is created that both spouses own such personal property as tenants by the entireties. The presumption may only be overcome by clear and convincing evidence of a contrary intent. The statute also allows for the creation of joint tenancies with rights of survivorship without regard for the common law unities of time and title, just as it dispenses with those unities in the creation of tenancies by the entireties.

PRIOR POSITIONS TAKEN ON THIS ISSUE

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

Most Recent Position

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

Others

(May attach list if more than one)

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

REFERRALS TO OTHER SECTIONS, COMMITTEES OR LEGAL ORGANIZATIONS

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

Referrals

Family Law Section, TFB
(Name of Group or Organization) (Support, Oppose or No Position)

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

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

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

1 A bill to be entitled

2 An act relating to conveyance of personal property, creating s. 689.151, Florida
3 Statutes, to permit the creation of tenancies by the entireties and joint tenancies
4 with right of survivorship in personal property without regard to the unities of
5 time and title, and creating a rebuttable presumption that certain personal property
6 is owned by spouses as tenant by the entireties.

7
8 Be It Enacted by the Legislature of the State of Florida:

9 Section 1. Section 689.151, F.S., is created to read:

10 **689.151. Tenancy by the Entireties and Joint Tenancy with Right of Survivorship in**
11 **Personal Property.**

12 (1) An owner of personal property may create a joint tenancy with right of
13 survivorship in such property by designating one or more additional persons as joint tenants with
14 right of survivorship in an instrument or record of transfer, or in an instrument or record
15 evidencing ownership of property, without the necessity of a transfer to or through a third
16 person.

17 (2) A spouse owning personal property may create a tenancy by the entireties in such
18 property by designating his or her spouse as a co-owner of the property in an instrument or
19 record of transfer, or in an instrument or record evidencing ownership of the property, without
20 the necessity of a transfer to or through a third person.

21 (3) If a spouse owning personal property adds the name of his or her spouse to an
22 instrument or record evidencing ownership of personal property, there exists a presumption that
23 the spouses own the property as tenants by entireties. This presumption may be overcome by
24 clear and convincing evidence of a contrary intent.

25 (4) This section shall not apply to a motor vehicle or mobile home to which s. 319.22
26 applies, to a deposit or account to which s. 655.78 or s. 655.79 applies, or to a mortgage and the
27 obligation it secures to which s. 689.115 applies.

28 (5) As used in this section:

29 (a) The term "personal property" means all property other than "real property," as
30 that latter term is defined in s. 192.001, and other than an interest in a trust to which ch. 736
31 applies.

32 (b) The term "record" has the meaning given it in s. 605.0102.

33 (6) The common law of tenancy by the entireties and of joint tenancy with rights of
34 survivorship supplements this section except to the extent modified by it.

35 (7) This section creates no inferences as to joint tenancies with rights of survivorship or
36 tenancies by the entireties in personal property in existence on its effective date.

37 Section 2. This Act shall become effective upon becoming law.

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

White Paper on Proposed Enactment of Florida Statutes Section 689.151

I. SUMMARY

The proposed legislation originates from The Estate and Trust Tax Planning Committee (the "Committee") of the Real Property, Probate and Trust Section of The Florida Bar (the "RPPTL Section").

The proposed legislation would enact new Florida Statutes Section 689.151 to provide that joint tenancies with rights of survivorship and tenancies by the entireties can be created in personal property without regard to the unities of time and title required under common law. The statute would thus codify common law to the effect that when one spouse transfers solely-owned property to both spouses as tenants by the entirety that the property is, in fact, owned by them as tenants by the entirety.

The proposed statute creates a rebuttable presumption of clear and convincing evidence that a tenancy by the entireties exists where one spouse adds the name of his her spouse to a document of title evidencing ownership of personal property.

Enactment of the proposed legislation would make the requirements for the valid creation of joint tenancies with rights of survivorship and tenancies by the entireties in personal property broadly (but not necessarily entirely) consistent with those applicable to real property, and would bring clarity and certainty to an area of the law in which there is considerable apprehension, confusion and misconception.

II. CURRENT SITUATION

At common law, four unities must be present to create a joint tenancy with right of survivorship: (1) unity of possession (joint ownership and control); (2) unity of interest (the interest in the property must be identical); (3) unity of title (the interests must have originated in the same instrument); and (4) unity of time (the interests must have commenced simultaneously). A fifth unity, unity of person, is also required to establish a tenancy by the entireties.

Florida Statutes 689.11(1) overrides the requirement for the unities of time and title in the case of conveyances of real estate involving married persons, allowing, for example, either spouse to create a tenancy by the entireties by conveying the property to both spouses. Similarly, under Florida Statutes Section 655.79(1) deposits in Florida banks and credit unions held in the name of married persons are considered to be a tenancy by the entirety (unless otherwise specified in writing), without regard to the common law unities.

In *Beal Bank, SSB v. Almand & Associates*, 780 So. 2d 45 (Fla. 2001), the Florida Supreme Court addressed whether certain accounts held in the names of both spouses were held as tenants

by the entireties. The Supreme Court reasoned that there was a rebuttable presumption of an intent to create a tenancy by the entireties in an account held by husband and wife where the account documentation was silent with respect to type of ownership intended.

Beal Bank is a misunderstood case. It does not, as is generally supposed, stand for the proposition that an asset held in the names of husband and wife is presumed to be held as tenants by the entirety. Much to the contrary: in *Beal Bank* the Court *assumed* that the four common law unities of possession, interest, title and time were present. *Beal Bank* is significant chiefly because the Court concluded that the fact that the spouses intended to hold the account as tenants by the entireties – in other words, the fifth unity of person – could be presumed and did not have to be proved by the account owner. Instead, the fact that the account was *not* intended to be held as tenants by the entireties had to be proved by a preponderance of the evidence by the party arguing that the account was not so owned.

Beal Bank does *not* stand for the proposition that the other four common law unities are not necessary for the creation of a tenancy by the entireties. That this is so has been demonstrated by the decision of United States Bankruptcy Court for the Southern District of Florida in *In re Aranda*, 2011 WL 87237 (Bkrtcy, S.D. Fla. 2011), where the court held that an account was not held as tenants by the entireties because the common law unity of time was not present.

There is no compelling policy reason to make it more difficult for a husband and wife to create a tenancy by the entireties in personal property than it is for real property. Married couples have a legitimate expectation that personal property that they hold jointly should be treated no differently from their jointly-owned home. A statute that does for personal property what Florida Statutes Section 689.11(1) does for real property would provide greater uniformity and predictability, and would reduce confusion and litigation.

The Bankruptcy Court in *In re Shahegh*, 2013 WL 364821 (Bkrtcy, S.D. Fla 2013), after struggling with the existing, muddled state of the law on the creation of tenancies by the entireties, in a sense of exasperation asked “[s]hould the concept of TBE ownership in personal property be changed and modified? Section 689.11, Fla. Stat., suggests that changes may also be warranted when it comes to TBE interests in personalty.”

The legislative proposal does not go so far as to import the bright-line clarity to personal property that Section 689.11, Fla. Stat., does for real property. It does abolish the common law unities of time and title. However, where a spouse adds the name of his or her spouse to any documentary evidence of title for personal property – as opposed to a transfer of the property from one spouse to both of them as tenants by the entireties – a presumption is created that both spouses own such property as tenants by the entireties. The presumption may only be overcome by clear and convincing evidence of a contrary intent. The statute does not deem it to be tenants by the entireties property.

**III. EFFECT OF PROPOSED LEGISLATION
(DETAILED ANALYSIS OF PROPOSED STATUTE)**

A. Effect of Proposed Legislation Generally.

The proposed legislation would create Section 689.151 of the Florida Statutes. If enacted, the statute would eliminate the requirement that certain common law unities be present to create a joint tenancy with rights of survivorship or a tenancy by the entireties in certain personal property.

B. Specific Statutory Provisions

1. Subsection (1)

Subsection (1) dispenses with the requirements of the unities of time and title for personal property in the valid creation of a joint tenancy with right of survivorship.

Thus, for example, Owner One, who is the 100% owner of Asset X, can convey Asset X to Owner One and Owner Two as joint tenants with rights of survivorship, and the joint tenancy will exist notwithstanding the lack of unities of time and title. The same result will flow from the addition of a new owner or owners to an asset, whether or not the addition of names is a "transfer" in the traditional sense. Thus, it will no longer be necessary for Owner One first to convey Asset X to a "straw man," who would then convey the Asset to Owner One and Owner Two as joint tenants with right of survivorship.

The conveyance or the addition of new owners to title can also be evidenced by an unwritten (e.g., electronic) record. The statute borrows the definition of "record" from the Florida Revised Uniform Limited Liability Company Act, Ch. 605 Florida Statutes.

2. Subsection (2)

Subsection (2) dispenses with the requirements of the unities of time and title for personal property in the valid creation of a tenancy by the entireties.

Thus, for example, Married Person, who is the 100% owner of Asset X, can convey Asset X to Married Person and his or her spouse as tenants by the entireties, and the tenancy by the entireties will exist notwithstanding the lack of unities of time and title. The same result will flow from the addition of a spouse as another titleholder of an asset, whether or not the addition of names is a "transfer" in the traditional sense. Thus, it will no longer be necessary for Married Person first to convey Asset X to a "straw man," who would then convey the Asset to Married Person and his or her spouse as tenants by the entireties.

Subsection (2) of the proposed statute tracks the substance, if not the language, of Section 689.11(1), Florida Statutes. As in the real estate statute, the proposed legislation would allow one spouse to create a valid tenancy by the entireties in personal property by conveying the property to herself and her spouse.

It should be noted that there is common law that supports the ability of one spouse who owns personal property to create a joint ownership in both spouses that establishes all the unities of an entireties estate in such property without a straw man. See, e.g., *In re Kossow*, 325 B. R. 478 (Bankr. S.D. Fla. 2005); *In re Golub*, 80 B. R. 230 (Bankr. M.D. Fla. 1987).

The conveyance or addition to title to create the tenancy by the entireties can be by an instrument or other record.

3. Subsection (3)

If one spouse adds the name of his or her spouse to a written instrument of title for personal property (as opposed to a transfer of personal property from one spouse to both spouses as tenants by the entireties), there exists a presumption that the spouses own the property as tenants by the entireties, which may be overcome by clear and convincing evidence of a contrary intent.

The subsection imports the reasoning of Section 655.79(1), Florida Statutes, which provides that a bank deposit held by married persons “is considered to be” a tenancy by the entireties. Further, Section 655.79(2), Florida Statutes, provides that “[t]he presumption created in this section may be overcome by proof of fraud, undue influence or clear and convincing proof of a contrary intent.” The Legislature added this presumption to implement the public policy articulated by the Florida Supreme Court in *Beal Bank*, 780 So. 2d at 62, n. 24. That Section has been construed by Florida courts as establishing a presumption that a deposit subject to the statute is held as tenants by the entireties. See, e.g., *Regions Banks v. Hyman*, 2013 WL 10253581 (M.D. Fla. 2013); *Branch Banking and Trust Co. v. Maxwell*, 2012 WL 4078407 (M.D. Fla. 2012).

4. Subsection (4)

The proposed legislation does not cover assets and financial arrangements already covered elsewhere in the Florida Statutes.

5. Subsection (5)

This subsection defines the terms “personal property” and “record” as used in the proposed statute. An interest in a trust subject to the Florida Trust Code, Chapter 736, Florida Statutes, is excluded by this definition. The legislative proposal is not the proper place to address so-called “tenancy by the entireties trusts.”

6. Subsection (6)

The new statute would supersede common law principles of tenancy by the entireties and joint tenancy with rights of survivorship only to the extent it is inconsistent with those principles.

7. Subsection (7)

Application of the statute will be prospective only. Given the current muddled and confused state of the common law on the creation of joint tenancies and tenancy by the entireties, the Committee did not want to create any inference as to whether the unities of time and title were,

or were not, dispositive of the valid creation of these relationships prior to the statute. Such questions will still be answered with regard to applicable pre-enactment law.

IV. FISCAL IMPACT ON STATE AND LOCAL GOVERNMENTS

Adoption of this legislative proposal by the Florida Legislature should not have a fiscal impact on state and local governments. It should instead be revenue neutral.

V. DIRECT IMPACT ON PRIVATE SECTOR

The certainty and predictability that the proposed legislation will lend to rights and liabilities in personal property intended to be owned as joint tenants with right of survivorship or tenants by the entireties will benefit the private sector.

VI. CONSTITUTIONAL ISSUES

The proposed legislation is prospective in application. There are no known Constitutional issues.

VII. OTHER INTERESTED PARTIES

Other groups that may have an interest in the legislative proposal include the Family and Business Law Sections of The Florida Bar and the Florida Bankers Association.

LEGISLATIVE POSITION REQUEST FORM

GOVERNMENTAL AFFAIRS OFFICE

Date Form Received _____

GENERAL INFORMATION

Submitted By Hung V. Nguyen, Chairman, Guardianship, Power of Attorney, and Advance Directives Committee of the Real Property Probate & Trust Law Section

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Telephone: (786) 600-2530

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

CONTACTS

Board & Legislation Committee Appearance

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Sarah Butters, Holland & Knight, 315 South Calhoun Street, Suite 600, Tallahassee, FL 32301, Telephone (850) 224-7000
Peter M. Dunbar, Pennington, Moore, Wilkinson, Bell & Dunbar, P.O. Box 10095, Tallahassee, Florida 32302-2095, Telephone (850) 222-3533
Martha J. Edenfield, Pennington, Moore, Wilkinson, Bell & Dunbar, P.O. Box 10095, Tallahassee FL 32302-2095, Telephone (850) 222-3533
 (List name, address and phone number)

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

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

PROPOSED ADVOCACY

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

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

Indicate Position Support Oppose _____ Tech Asst. _____ Other _____

Proposed Wording of Position for Official Publication:

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

Reasons For Proposed Advocacy:

Under current law, s. 744.3725(6), Fla. Stat. prohibits a court from granting a guardian the power to initiate divorce proceedings on behalf of a ward if the ward's spouse refuses to consent to the dissolution. This is unfair (and may raise an equal protection problem) to the ward since the spouse is able to initiate divorce proceedings from a ward without the ward or the ward's guardian's consent. Under the current law, the spouse has the right to absolutely bar the ward or the ward's guardian from initiating a divorce proceeding, even if doing so is in the ward's best interest. The proposed change does not change the procedure under sections 744.3215(4) and 744.3725, Fla. Stat., which recognize that initiating a divorce proceeding is an extraordinary remedy requiring that a high burden be met before the relief can be granted, but rather simply removes the spousal consent requirement.

1 A bill to be entitled

2 An act relating to guardianship, amending s. 744.3725, to remove prohibition that
3 prevents a guardian from initiating a petition for dissolution of marriage for a ward if the
4 ward's spouse refuses to consent to the dissolution; and providing for an effective date.

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

6 Section 1. Subsection (4) of section 744.3725, Florida Statutes is amended and
7 Subsection (6) is deleted to read:

8 744.3725. Procedure for extraordinary authority.--Before the court may grant
9 authority to a guardian to exercise any of the rights specified in s. 744.3215(4), the court
10 must:

11 (1) Appoint an independent attorney to act on the incapacitated person's behalf,
12 and the attorney must have the opportunity to meet with the person and to present
13 evidence and cross-examine witnesses at any hearing on the petition for authority to
14 act;

15 (2) Receive as evidence independent medical, psychological, and social
16 evaluations with respect to the incapacitated person by competent professionals or
17 appoint its own experts to assist in the evaluations;

18 (3) Personally meet with the incapacitated person to obtain its own impression
19 of the person's capacity, so as to afford the incapacitated person the full opportunity to
20 express his or her personal views or desires with respect to the judicial proceeding and
21 issue before the court;

22 (4) Find by clear and convincing evidence that the person lacks the capacity to
23 make a decision about the issue before the court and that the incapacitated person's
24 capacity is not likely to change in the foreseeable future; and

25 (5) Be persuaded by clear and convincing evidence that the authority being
26 requested is in the best interests of the incapacitated person; ~~and.~~

27 ~~(6) In the case of dissolution of marriage, find that the ward's spouse has~~
28 ~~consented to the dissolution.~~

29 The provisions of this section and s. 744.3215(4) are procedural and do not establish any
30 new or independent right to or authority over the termination of parental rights,
31 dissolution of marriage, sterilization, abortion, or the termination of life support
32 systems.
33 Section 2. This act shall take effect upon becoming law.

WHITE PAPER

PROPOSED STATUTE ALLOWING A COURT TO AUTHORIZE A GUARDIAN TO SEEK A DISSOLUTION OF MARRIAGE WITHOUT THE CONSENT OF THE WARD'S SPOUSE

I. SUMMARY:

Florida currently requires a court to find that a ward's spouse has consented to the dissolution of marriage before it can authorize a guardian to seek dissolution of marriage. The ward is denied access to the courts unless the spouse consents. The proposed revision to Section 744.3725 would remove the requirement that the court must find that the ward's spouse consents to the dissolution before authorizing a guardian to seek dissolution of the ward's marriage.

II. CURRENT SITUATION:

Section 744.3215(4) provides that certain acts may only be exercised by a guardian if the guardian obtains specific authority from the court. Among those acts is the initiation of a petition for dissolution of marriage. §744.3215(4)(c), Fla. Stat. Section 744.3725 provides the procedure the court must employ before authorizing a guardian to perform the acts enumerated in Section 744.3215(4). The court must:

- (1) Appoint an independent attorney to act on the incapacitated person's behalf, and the attorney must have the opportunity to meet with the person and to present evidence and cross-examine witnesses at a full judicial hearing;
- (2) Receive as evidence independent medical, psychological, and social evaluations with respect to the incapacitated person by competent professionals or appoint its own experts to assist in the evaluations;
- (3) Personally meet with the incapacitated person to obtain its own impression of the person's capacity, so as to afford the incapacitated person the full opportunity to express his personal views or desires with respect to the judicial proceeding and issue before the court;
- (4) Find by clear and convincing evidence that the person lacks the capacity to make a decision about the issue before the court and that the incapacitated person's capacity is not likely to change in the foreseeable future;
- (5) Be persuaded by clear and convincing proof that the authority being requested is in the best interests of the incapacitated person; and
- (6) In the case of dissolution of marriage, find that the ward's spouse has consented to the dissolution.

The court may not authorize a guardian to petition for dissolution of marriage unless the court finds that the spouse has consented to the dissolution. Although Section 744.3215(1)(k) provides that a ward retains the right to have access to the court, a ward is denied access to the court to seek dissolution unless the court first finds that the ward's spouse consents.

As one commentator noted, “[B]ased on this requirement, a guardian’s ability to initiate a divorce on behalf of his or her ward is contingent on the approval of the ward’s spouse, the very person who may be the ward’s abuser. If the ward’s spouse has an incentive to remain married, he or she can simply veto the proposed divorce, thereby terminating the divorce proceeding. Given that the purpose of a statute authorizing a guardian to initiate a divorce is to protect the ward, the current legislation contravenes that purpose by leaving the ward’s spouse with complete and absolute control over the marriage and the ward without adequate legal recourse against potential abuse.” Bella Feinstein, *A New Solution to an Age-Old Problem: Statutory Authorization for Guardian Initiated Divorces*, NAELA JOURNAL 10(2).

III. EFFECT OF PROPOSED CHANGE

The proposed revision to the statute eliminates the requirement that the court must find that the spouse has consented to the dissolution of marriage before it can authorize the guardian to petition for dissolution. The elimination of subsection (6) of Section 744.3725 preserves the ward’s right to access to the courts. The other procedural protections set forth in Section 744.3725 will protect the ward from any improvident exercise of the authority.

IV. FISCAL IMPACT ON STATE AND LOCAL GOVERNMENTS

None.

V. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR

None.

VI. CONSTITUTIONAL ISSUES

None.

VII. OTHER INTERESTED PARTIES

The Elder Law Section and Family Law Section of The Florida Bar

LEGISLATIVE POSITION REQUEST FORM

GOVERNMENTAL AFFAIRS OFFICE

Date Form Received _____

GENERAL INFORMATION

Submitted By Angela M. Adams, Chair, Trust Law Committee of the Real Property, Probate & Trust Law Section

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Position Type Trust Law Committee, Real Property, Probate & Trust Law Section of The Florida Bar

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Martha J. Edenfield, Dean Mead, P.O. Box 10095, Tallahassee FL 32302-2095, Telephone (850) 222-3533

Appearances before Legislators

N/A at this time
(List name and phone # of those appearing before House/Senate Committees)

Meetings with Legislators/staff

N/A at this time
(List name and phone # of those having face to face contact with Legislators)

PROPOSED ADVOCACY

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

If Applicable, List The Following

N/A at this time

(Bill or PCB #)

(Bill or PCB Sponsor)

Indicate Position

Support

Oppose

Technical Assistance

Other

1 A bill to be entitled
2 An act relating to notice for charitable trusts;
3 amending ss. 736.0110(3), 736.1201, 736.1205,
4 736.1206(2), 736.1207, 736.1208(4(b)), and 736.1209 F.S.
5

6 Be it enacted by the Legislature of the State of Florida:
7

8 Section 1. Subsection (3) of Section 736.0110, Florida
9 Statutes is amended to read:

10 736.0110. Others treated as qualified beneficiaries.-

11 (3) The Attorney General may assert the rights of a
12 qualified beneficiary with respect to a charitable trust having
13 its principal place of administration in this state. The
14 Attorney General has standing to assert such rights in any
15 judicial proceedings.

16 Section 2. Subsections (2) through (4) of Section 736.1201,
17 Florida Statutes, are renumbered as Subsections (3) through (5),
18 respectively; Subsection (5) is deleted, a new Subsection (2) is
19 added to that Section to read:

20 736.1201. Definitions.--(1) "Charitable organization" means
21 an organization described in s. 501(c)(3) of the Internal Revenue
22 Code and exempt from tax under s. 501(a) of the Internal Revenue
23 Code.

24 (2) "Delivery of notice" means delivery of a written notice
25 required under this part by sending a copy by any commercial
26 delivery service requiring a signed receipt or by any form of
27 mail requiring a signed receipt.

28 ~~(2)~~(3) "Internal revenue code" means the Internal Revenue
29 Code of 1986, as amended.

30 ~~(3)~~(4) "Private foundation trust" means a trust, including
31 a trust described in s. 4947(a)(1) of the Internal Revenue Code,
32 as defined in s. 509(a) of the Internal Revenue Code.

33 ~~(4)~~(5) "Split interest trust" means a trust for individual
34 and charitable beneficiaries that is subject to the provisions of
35 s. 4947(a)(2) of the Internal Revenue Code.

36 ~~(5) "State attorney" means the state attorney for the~~
37 ~~judicial circuit of the principal place of administration of the~~
38 ~~trust pursuant to s. 736.0108.~~

39 Section 3. Section 736.1205, Florida Statutes is amended to
40 read:

41 736.1205. Notice that this part does not apply.-

42 In the case of a power to make distributions, if the trustee
43 determines that the governing instrument contains provisions that
44 are more restrictive than s. 736.1204(2), or if the trust
45 contains other powers, inconsistent with the provisions of s.
46 736.1204(3) that specifically direct acts by the trustee, the
47 trustee shall notify the ~~state attorney~~ Attorney General by
48 delivery of notice when the trust becomes subject to this part.
49 Section 736.1204 does not apply to any trust for which notice has
50 been given pursuant to this section unless the trust is amended
51 to comply with the terms of this part.

52 Section 4. Section 736.1206(2), Florida Statutes is amended
53 to read:

54 736.1206(2). Power to amend trust instrument.-

55 (2) In the case of a charitable trust that is not subject
56 to the provisions of subsection (1), the trustee may amend the
57 governing instrument to comply with the provisions of s.
58 736.1204(2) after delivery of notice to, and with the consent of
59 the ~~state attorney~~ Attorney General.

60 Section 5. Section 736.1207, Florida Statutes is amended to
61 read:

62 736.1207. Power of court to permit deviation.-

63 This part does not affect the power of a court to relieve a
64 trustee from any restrictions on the powers and duties that are

65 placed on the trustee by the governing instrument or applicable
66 law for cause shown and on complaint of the trustee, ~~state~~
67 ~~attorney~~ Attorney General, or an affected beneficiary and notice
68 to the affected parties.

69 Section 6. Subparagraph (4) (b) of Section 736.1208, Florida
70 Statutes is amended to read:

71 736.1208. Release; property and persons affected; manner of
72 effecting.-

73 (4) Delivery of a release shall be accomplished as follows:

74 * * * *

75 (b) If the release is accomplished by reducing the class of
76 permissible charitable organizations, by delivery of notice a
77 ~~copy~~ of the release to the ~~state attorney~~ Attorney General
78 including a copy of the release.

79 Section 7. Section 736.1209, Florida Statutes ~~is~~ amended to
80 read:

81 736.1209. Election to come under this part.-

82 With the consent of that organization or organizations, a
83 trustee of a trust for the benefit of a public charitable
84 organization or organizations may come under s. 736.1208(5) by
85 delivery of notice filing with the state attorney to the Attorney
86 General ~~an~~ of the election, accompanied by the proof of required
87 consent. Thereafter the trust shall be subject to s. 736.1208(5).

88 Section 8. This act shall take effect on July 1, 2017.

WHITE PAPER

PROPOSED AMENDMENTS TO PART XII OF CHAPTER 736, FLORIDA STATUTES NOTICE FOR CHARITABLE TRUSTS

I. SUMMARY

The purpose of the proposed amendments to Part XII of Chapter 736 of the Florida Statutes is to make consistent and clarify that notice for charitable trusts be sent to only one entity, the Attorney General, rather than to the state attorney in some instances and the Attorney General in others. The proposed amendments also define how the Attorney General is to receive notice under Part XII of Chapter 736 of the Florida Statutes. The proposed legislation is a product of study and analysis by the Trust Law Committee, Real Property, Probate and Trust Law Section of the Florida Bar (the "Committee").

II. CURRENT SITUATION

Section 736.0110(3) of the Florida Statutes provides that the Attorney General may assert the rights of a qualified beneficiary with respect to a charitable trust¹ having its principal place of administration in the State of Florida. However, Part XII of Chapter 736 of the Florida Statutes, also governing charitable trusts,² requires that notice be given to and action be taken by the state attorney, rather than the Attorney General. Specifically, Part XII of Chapter 736 of the Florida Statutes provides:

- Section 736.1205 requires that the trustee of a charitable trust notify the state attorney if the power to make distributions are more restrictive than Section 736.1204(2) or if the trustee's powers are inconsistent with Section 736.1204(3).
- Section 736.1206(2) provides that the trustee of a charitable trust may amend the governing instrument with consent of the state attorney to comply with Section 736.1204(2).
- Section 736.1207 clarifies that Part XII does not affect the power of a court to relieve a trustee from restrictions on that trustee's powers and duties for cause shown and upon complaint of the state attorney, among others.

¹ "Charitable trust" for purposes of Section 736.0110 of the Florida Statutes means a trust, or portion of a trust, created for a charitable purpose as described in s. 736.0405(1).

² The provisions of Part XII of Chapter 736 of the Florida Statutes apply to all private foundation trusts and split interest trusts, whether created or established before or after November 1, 1971, and to all trust assets acquired by the trustee before or after November 1, 1971.

- Section 736.1208(4)(b) requires that a trustee who has released a power to select charitable donees accomplished by reducing the class of permissible charitable organizations must deliver a copy of the release to the state attorney.
- Section 736.1209 permits the trustee to file an election with the state attorney to bring the trust under Section 736.1208(5), relating to public charitable organization(s) as the exclusive beneficiary of a trust.

Together, section 736.0110 and Part XII of Chapter 736 of the Florida Statutes can be read to require that notice be given to the Attorney General for certain charitable trusts and to the state attorney for the same charitable trusts. There is no case law directly addressing this inconsistency. However, in dicta, the First District Court of Appeal in *Delaware ex rel. Gebelein v. Florida First National Bank of Jacksonville*, stated that, as a general rule, only the Attorney General may enforce a charitable trust because the beneficiaries of such a trust are the public at large. 381 So. 2d 1075, 1077 (1st DCA 1979). The court also recognized that an entity other than the Attorney General can be a proper party to enforce a charitable trust, including trustees and persons having a special interest.

Trustees are often confused as to whether the notifications, releases, and elections described in Part XII of Chapter 736 of the Florida Statutes must be provided to the Attorney General, the state attorney, or both when administering a charitable trust or in litigation matters involving charitable trusts. Accordingly, the Committee has proposed amendments to Part XII of Chapter 736 of the Florida Statutes to replace the state attorney with the Attorney General.

In addition, there is uncertainty as to how the Attorney General should be notified and receive releases or elections under Part XII of Chapter 736 of the Florida Statutes. The Committee has proposed amendments to Part XII of Chapter 736 of the Florida Statutes defining how the Attorney General should receive those notifications, releases, and elections.

III. EFFECT OF PROPOSED CHANGES

Under the proposed changes to Part XII of Chapter 736 of the Florida Statutes, the Attorney General, rather than the state attorney, would receive notifications, releases, and elections for charitable trusts under Sections 736.1205 and 736.1207 - 736.1209 of the Florida Statutes. Furthermore, the Attorney General, rather than the state attorney, would consent to a charitable trust amendment effectuated by the trustee under Section 736.1206 of the Florida Statutes. Lastly, the proposed changes define how the Attorney General is to be given the notifications, releases, and elections under Part XII of Chapter 736 of the Florida Statutes.

IV. FISCAL IMPACT ON STATE AND LOCAL GOVERNMENTS

The proposal may have a positive fiscal impact on the state attorney's office in that its employees would no longer be required to handle matters currently falling under Part XII of Chapter 736 of the Florida Statutes. The proposal may have a negative fiscal impact on the Attorney General's office in that its employees would be required to handle notifications related to matters currently falling under Part XII of Chapter 736 of the Florida Statutes, although the Committee has determined that under the current law, it is not uncommon for trustees to notify the Attorney General's office of matters involving Part XII of Chapter 736 of the Florida Statutes because of the inconsistency with Section 736.0110 of the Florida Statutes. As such, the fiscal impact to the Attorney General's office may be minimal. The proposal defining how the Attorney General is to receive notifications, releases, and elections under Part XII of Chapter 736 of the Florida Statutes should have no fiscal impact.

V. DIRECT FISCAL IMPACT ON PRIVATE SECTOR

It is anticipated that this proposal will have a direct economic impact on the private sector by resolving various confusing provisions that require additional effort by the trustees of charitable trusts.

VI. CONSTITUTIONAL ISSUES

It is not anticipated that this legislation will raise constitutional issues.

VII. OTHER INTERESTED PARTIES.

None.

LEGISLATIVE POSITION REQUEST FORM

GOVERNMENTAL AFFAIRS OFFICE

Date Form Received _____

GENERAL INFORMATION

Submitted By Angela Adams, Chair, Trust Law Committee, of the Real Property Probate & Trust Law Section and Donald R. Tescher, Chair, Ad Hoc Committee on Decanting, a subcommittee of the Trust Law Committee
(RPPTL Approval Date _____, 2016)

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Position Type Ad Hoc Committee on Decanting, a subcommittee of the Trust Law Committee, RPPTL Section of The Florida Bar

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Committee Appearance**

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Martha J. Edenfield, Dean, Mead, Egerton, Bloodworth, Capouano & Bozarth, P.A., 215 S. Monroe Street, Suite 815, Tallahassee, FL 32301, Telephone: (850) 999-4100 Email: medenfield@deanmead.com

Appearances

Before Legislators (SAME)

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

**Meetings with
Legislators/staff** (SAME)

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

PROPOSED ADVOCACY

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

If Applicable,

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

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

Proposed Wording of Position for Official Publication:

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

Reasons For Proposed Advocacy:

The proposed revisions to F.S. 736.04117: (1) allow a trustee to distribute principal in further trust pursuant to a power of distribution that is limited by an ascertainable standard (currently such distributions are only permitted pursuant to a trustee's power to distribute principal pursuant to an absolute power to make distributions); (2) add a provision to allow a trustee to distribute trust principal to a supplemental needs trust when a beneficiary is disabled; and (3) expand the notice requirements to require the trustee to provide a copy of the proposed distributee trust instrument prior to the distribution (currently, providing a copy of the proposed trust instrument is a safe harbor, but it is not mandatory).

PRIOR POSITIONS TAKEN ON THIS ISSUE

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

Most Recent Position None known
(Indicate Bar or Name Section) (Support or Oppose) (Date)

Others
(May attach list if more than one) None known
(Indicate Bar or Name Section) (Support or Oppose) (Date)

REFERRALS TO OTHER SECTIONS, COMMITTEES OR LEGAL ORGANIZATIONS

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

Referrals

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

Tax Section of the Florida Bar
(Name of Group or Organization) (Support, Oppose or No Position)

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

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

AD HOC DECANTING SUBCOMMITTEE
DRAFT STATUTE

An act relating to trusts, amending Section 736.04117, Florida Statutes, expanding the power of a trustee to make discretionary distributions to decant trust assets.

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

Section 1. Section 736.04117, Florida Statutes, is substantially amended to read:

736.04117 Trustee's power to ~~invade principal in trust~~ decant. —

~~(1)(a) Unless the trust instrument expressly provides otherwise, a trustee who has absolute power under the terms of a trust to invade the principal of the trust, referred to in this section as the "first trust," to make distributions to or for the benefit of one or more persons may instead exercise the power by appointing all or part of the principal of the trust subject to the power in favor of a trustee of another trust, referred to in this section as the "second trust," for the current benefit of one or more of such persons under the same trust instrument or under a different trust instrument; provided: DEFINITIONS. — As used in this section, the term:~~

~~1. The beneficiaries of the second trust may include only beneficiaries of the first trust;~~

~~2. The second trust may not reduce any fixed income, annuity, or unitrust interest in the assets of the first trust; and~~

~~3. If any contribution to the first trust qualified for a marital or charitable deduction for federal income, gift, or estate tax purposes under the Internal Revenue Code of 1986, as amended, the second trust shall not contain any provision which, if included in the first trust, would have prevented the first trust from qualifying for such a deduction or would have reduced the amount of such deduction.~~

~~(b) For purposes of this subsection, an absolute power to invade principal shall include~~

~~(a) "Absolute power" means a power to invade principal that is not limited to specific or ascertainable purposes, such as health, education, maintenance, and support, whether or not the term "absolute" is used. A power to invade principal for purposes such as best interests, welfare, comfort, or happiness shall constitute an absolute power not limited to specific or ascertainable purposes.~~

~~(b) "Appointive property" means the property or property interest subject to a power of appointment.~~

32 (c) "Authorized trustee" means a trustee who has the power to invade the principal of a
33 trust other than (i) the settlor or (ii) a beneficiary.

34 (d) "Internal Revenue Code" means the Internal Revenue Code of 1986, as amended.

35 (e) "Beneficiary with a disability" means a beneficiary of the first trust who the
36 authorized trustee believes may qualify for governmental benefits based on disability, whether or
37 not the beneficiary currently receives those benefits or is an individual who has been adjudicated
38 incapacitated.

39 (f) "Current beneficiary" means a beneficiary that on the date the beneficiary's
40 qualification is determined is a distributee or permissible distributee of trust income or principal.
41 The term includes the holder of a presently exercisable general power of appointment but does
42 not include a person that is a beneficiary only because the person holds any other power of
43 appointment.

44 (g) "Governmental benefits" means financial aid or services from any state, federal or
45 other public agency.

46 (h) "Power of appointment" means a power of appointment as defined in s.731.201(30).

47 (i) "Presently exercisable power of appointment" means a power of appointment
48 exercisable by the powerholder at the relevant time. The term:

49 1. includes a power of appointment exercisable only after the occurrence of a
50 specified event, the satisfaction of an ascertainable standard, or the passage of a specified time
51 only after:

52 (a) the occurrence of the specified event;

53 (b) the satisfaction of the ascertainable standard; or

54 (c) the passage of the specified time; and

55 2. does not include a power exercisable only at the powerholder's death.

56 (j) "Substantially similar" means that there is no material change in a beneficiary's
57 beneficial interests or in the power to make distributions. A power to make a distribution under a
58 second trust for the benefit of a beneficiary who is an individual is substantially similar to a
59 power under the first trust to make a distribution directly to the beneficiary. A distribution is for
60 the benefit of a beneficiary if:

61 1. the distribution is applied for the benefit of a beneficiary;

62 2. the beneficiary is under a legal disability or the trustee reasonably believes the
63 beneficiary is incapacitated, and the distribution is made as permitted under this code; or

64 3. the distribution is made as permitted under the terms of the first trust
65 instrument and the second trust instrument for the benefit of the beneficiary.

66 (k) "Supplemental needs trust" means a trust the authorized trustee believes would not be
67 considered a resource for purposes of determining whether the beneficiary with a disability is
68 eligible for governmental benefits.

69 (l) "Vested interest" means:

70 1. a current unconditional right to receive a mandatory distribution of income, a
71 specified dollar amount or a percentage of value of a trust, or a current unconditional right to
72 withdraw income, a specified dollar amount or a percentage of value of a trust, which is not
73 subject to the occurrence of a specified event, the passage of a specified time, or the exercise of
74 discretion; or

75 2. a presently exercisable general power of appointment.

76 A beneficiary's interest in a trust is not a vested interest if the trustee has discretion to
77 make a distribution of trust property to a person other than such beneficiary.

78 (2) The exercise of a power to invade principal under subsection (1) shall be by an
79 instrument in writing, signed and acknowledged by the trustee, and filed with the records of the
80 first trust. DISTRIBUTION TO SECOND TRUST IF ABSOLUTE POWER.--

81 (a) Unless the trust instrument expressly provides otherwise, an authorized trustee who
82 has absolute power under the terms of a trust to invade the principal of the trust, referred to in
83 this section as the "first trust," to make current distributions to or for the benefit of one or more
84 beneficiaries, may instead exercise such power by appointing all or part of the principal of the
85 trust subject to such power in favor of a trustee of one or more other trusts, whether created
86 under the same trust instrument as the first trust or a different trust instrument, including a trust
87 instrument created for the purposes of exercising the power granted by this section, each referred
88 to in this section as the "second trust," for the current benefit of one or more of such
89 beneficiaries; provided:

90 1. The beneficiaries of the second trust may include only beneficiaries of the first
91 trust; and

92 2. The second trust may not reduce any vested interest.

93 (b) In an exercise of absolute power, the second trust may:

94 1. Retain a power of appointment granted in the first trust;

95 2. Omit a power of appointment granted in the first trust, other than a presently
96 exercisable general power of appointment;

97 3. Create or modify a power of appointment if the powerholder is a current
98 beneficiary of the first trust;

99 4. Create or modify a power of appointment if the powerholder is a beneficiary of
100 the first trust who is not a current beneficiary, but the exercise of the power of appointment may
101 take effect only after the powerholder becomes, or would have become if then living, a current
102 beneficiary; and

103 5. Extend the term of the second trust beyond the term of the first trust.

104 (c) The class of permissible appointees in favor of which a created or modified power of
105 appointment may be exercised may be broader than or different from the beneficiaries of the first
106 trust.

107 (3) DISTRIBUTION TO SECOND TRUST IF NO ABSOLUTE POWER. Unless the
108 trust instrument expressly provides otherwise, an authorized trustee who has a power (that is not
109 an absolute power) under the terms of a first trust to invade principal to make current
110 distributions to or for the benefit of one or more beneficiaries may instead exercise such power
111 by appointing all or part of the principal of the first trust subject to such power in favor of a
112 trustee of one or more second trusts. If the authorized trustee exercises such power:

113 (a) The second trusts, in the aggregate, shall grant each beneficiary of the first trust
114 beneficial interests in the second trusts which are substantially similar to the beneficial interests
115 of the beneficiary in the first trust.

116 (b) If the first trust grants a power of appointment to a beneficiary of the first trust, the
117 second trust shall grant such power of appointment in the second trust to such beneficiary and the
118 class of permissible appointees shall be the same as in the first trust.

119 (c) If the first trust does not grant a power of appointment to a beneficiary of the first
120 trust, then the second trust may not grant a power of appointment in the second trust to such
121 beneficiary.

122 (d) Notwithstanding paragraphs (a), (b), and (c) of this subsection, the term of the second
123 trust may extend beyond the term of the first trust, and, for any period after the first trust would

124 have otherwise terminated, in whole or in part, under the provisions of the first trust, the second
125 trust may with respect to property subject to such extended term also:

126 1. Include language providing the trustee with the absolute power to invade the
127 principal of the second trust during such extended term; and

128 2. Create a power of appointment if the powerholder is a current beneficiary of
129 the first trust or expand the class of permissible appointees in favor of which a power of
130 appointment may be exercised.

131 (4) DISTRIBUTION TO SUPPLEMENTAL NEEDS TRUST.

132 (a) Notwithstanding the provisions of subsections (2) and (3), unless the trust instrument
133 expressly provides otherwise, an authorized trustee who has the power under the terms of a first
134 trust to invade the principal of the first trust to make current distributions to or for the benefit of
135 a beneficiary with a disability, may instead exercise such power by appointing all or part of the
136 principal of the first trust in favor of a trustee of a second trust which is a supplemental needs
137 trust if:

138 1. The supplemental needs trust benefits the beneficiary with a disability;

139 2. The beneficiaries of the second trust include only beneficiaries of the first trust;

140 and

141 3. The authorized trustee determines the exercise of such power will further the
142 purposes of the first trust.

143 (b) Except as affected by any change to the interests of the beneficiary with a disability,
144 the second trusts, in the aggregate, shall grant each other beneficiary of the first trust beneficial
145 interests in the second trusts which are substantially similar to such beneficiary's beneficial
146 interests in the first trust.

147 (5) TAX RELATED PROVISIONS.

148 (a) An authorized trustee may not distribute the principal of a trust under this section in a
149 manner that would prevent a contribution to that trust from qualifying for or that would reduce
150 the exclusion, deduction, or other federal tax benefit that was originally claimed or could have
151 been claimed for that contribution, including:

152 1. the exclusions under s. 2503(b) or 2503(c) of the Internal Revenue Code;

153 2. a marital deduction under s. 2056, 2056A, or 2523 of the Internal Revenue

154 Code;

155 3. a charitable deduction under s. 170(a), 642(c), 2055(a), or 2522(a) of the
156 Internal Revenue Code;

157 4. direct skip treatment under s. 2642(c) of the Internal Revenue Code; or

158 5. any other tax benefit for income, gift, estate, or generation-skipping transfer
159 tax purposes under the Internal Revenue Code.

160 (b) If S corporation stock is held in the first trust, an authorized trustee may not distribute
161 all or part of that stock to a second trust that is not a permitted shareholder under s. 1361(c)(2) of
162 the Internal Revenue Code. If the first trust holds stock in an S corporation and the first trust is,
163 or but for provisions of this section other than this subsection, would be a qualified subchapter-S
164 trust within the meaning of s. 1361(d), the second trust instrument may not include or omit a
165 term that prevents the second trust from qualifying as a qualified subchapter-S trust.

166 (c) Except as provided in paragraphs (a), (b) and (d) of this subsection, an authorized
167 trustee may distribute the principal of a first trust to a second trust regardless of whether the
168 settlor is treated as the owner of either the first or second trust under ss. 671-679 of the Internal
169 Revenue Code; however, if the settlor is not treated as the owner of the first trust, then the settlor
170 may not be treated as the owner of the second trust unless the settlor has the power at all times to
171 cause the second trust to cease being treated as owned by the settlor.

172 (d) If an interest in property that is subject to the minimum distribution rules of s.
173 401(a)(9) of the Internal Revenue Code is held in trust, an authorized trustee may not distribute
174 the trust's interest in the property to a second trust under subsection (2), (3) or (4) if the
175 distribution would shorten the maximum distribution period otherwise applicable to such
176 property.

177 (6) EXERCISED BY A WRITING. – The exercise of a power to invade principal under
178 subsection (2), (3) or (4) shall be by an instrument in writing, signed and acknowledged by the
179 authorized trustee, and filed with the records of the first trust.

180 (3) (7) RESTRICTIONS. – The exercise of a power to invade principal under subsection
181 (1) (2), (3), or (4):

182 (a) shall be considered the exercise of a power of appointment, other than a power to
183 appoint to the authorized trustee, the authorized trustee's creditors, the authorized trustee's
184 estate, or the creditors of the authorized trustee's estate, and

185 (b) shall be subject to the provisions of s. 689.225 covering the time at which the
186 permissible period of the rule against perpetuities begins and the law that determines the
187 permissible period of the rule against perpetuities of the first trust,

188 (c) may be to a second trust created or administered under the law of any jurisdiction, and

189 (d) may not (i) increase the authorized trustee's compensation beyond the compensation
190 specified in the first trust instrument or (ii) relieve the authorized trustee from liability for breach
191 of trust or provide for indemnification of the authorized trustee for any liability or claim to a
192 greater extent than the first trust instrument; provided, however, that the exercise of the power
193 may divide and reallocate fiduciary powers among fiduciaries and relieve a fiduciary from
194 liability for an act or failure to act of another fiduciary as permitted by any other section of this
195 code or under another provision of law or under common law.

196 (8) NOTICE.

197 (4) (a) The authorized trustee shall notify all ~~qualified beneficiaries~~ of the first trust,
198 following in writing, at least 60 days prior to the effective date of the authorized trustee's
199 exercise of the authorized trustee's power to invade principal pursuant to subsection ~~(1)~~ (2), (3)
200 or (4), of the manner in which the authorized trustee intends to exercise the power: ~~A copy of the~~
201 ~~proposed instrument exercising the power shall~~

- 202 1. all qualified beneficiaries of the first trust,
- 203 2. if paragraph (c) of subsection (5) applies, the settlor of the first trust,
- 204 3. all trustees of the first trust, and
- 205 4. any person who has the power to remove or replace the authorized trustee of
206 the first trust.

207 (b) To satisfy the trustee's notice obligation under this subsection, the trustee shall
208 provide copies of the proposed instrument exercising the power, the trust instrument of the first
209 trust and the proposed trust instrument of the second trust.

210 (c) If all ~~qualified beneficiaries~~ of those required to be notified waive the notice period by
211 signed written instrument delivered to the authorized trustee, the authorized trustee's power to
212 invade principal shall be exercisable immediately.

213 (d) The authorized trustee's notice under this subsection shall not limit the right of any
214 beneficiary to object to the exercise of the authorized trustee's power to invade principal except
215 as provided in other applicable provisions of this code.

216 ~~(5)~~ (9) SPENDTHRIFT. – The exercise of the power to invade principal under subsection
217 ~~(1)~~ (2), (3) or (4) is not prohibited by a spendthrift clause or by a provision in the trust instrument
218 that prohibits amendment or revocation of the trust.

219 ~~(6)~~ (10) NO DUTY TO EXERCISE. – Nothing in this section is intended to create or
220 imply a duty to exercise a power to invade principal, and no inference of impropriety shall be
221 made as a result of an authorized trustee not exercising the power to invade principal conferred
222 under subsections ~~(1)~~ (2), (3) and (4).

223 ~~(7)~~ (11) NO ABRIDGMENT OF COMMON LAW RIGHTS. – The provisions of this
224 section shall not be construed to abridge the right of any trustee who has a power of invasion to
225 appoint property in further trust that arises under the terms of the first trust or under any other
226 section of this code or under another provision of law or under common law.

227 Section 2. This act shall take effect upon becoming law. This act applies to all trusts
228 created before, on, or after such date.

**REAL PROPERTY, PROBATE AND TRUST LAW SECTION OF THE FLORIDA BAR
WHITE PAPER ON PROPOSED CHANGES TO FLORIDA'S DECANTING STATUTE,
F.S. SECTION 736.04117**

I. SUMMARY

The proposed Section 736.04117 (the "Act") modifies Florida's current decanting laws in a manner that is consistent with Florida's policy of maximizing the usefulness of trusts, while at the same time protecting the settlor's intent and the interests of the trust beneficiaries. Florida's current decanting statute was enacted only 9 years ago, but it has quickly become outdated (in comparison to the decanting statutes of other states and the Uniform Decanting Act). This Act implements a moderate amount of modernization to Florida's decanting statute, but only to the extent such improvements are also consistent with Florida's policy of protecting the integrity of the settlor's intent and the interests of the beneficiaries.

The term "decanting" describes a trustee's distribution of principal from one trust into a second trust (as opposed to distributing principal directly to the beneficiary). Florida law currently allows a trustee to decant principal to a second trust when the trustee has absolute power to make principal distributions. *See Phipps v. Palm Beach Trust Co.*, 196 So. 2999 (Fla. 1940) and Section 736.04117 (which was enacted in 2007). The trustee's authority to decant to the second trust is subject to several safeguards to ensure that the distribution is consistent with the settlor's intent.

Decanting is a useful tool for trustees and beneficiaries who wish to cure or avoid issues with the terms of the first trust, while still preserving the settlor's intention of maintaining the assets in trust (as opposed to distributing to a beneficiary outright). Unlike a trust modification, which often times is only available through a court proceeding, a trust decanting is an exercise of the trustee's discretionary authority to make distributions. This exercise avoids having to expend significant trust funds for judicial involvement. Further, the trustee's decision to decant is held to the same fiduciary standards as the decision to make a discretionary principal distribution (i.e., the beneficiary can sue the trustee for a decanting distribution to the same extent the beneficiary could sue the trustee for an outright distribution). This approach is adopted by the Restatement (Third) of Trusts, which states, in §87, that "when a trustee has discretion with respect to the exercise of a power, its exercise is subject to supervision by a court only to prevent abuse of discretion."

However, to avoid misuse and abuse, it is also necessary to impose restrictions and safeguards on the trustee's authority to decant to ensure that the power is exercised only in a manner that is consistent with the settlor's objectives and in the best interests of the beneficiaries. Decanting has been authorized in Florida since 1940 (76 years) and expressly authorized by the Florida Trust Code since 2007 (9 years), and there is no known pervasive abusive of the decanting authority. Therefore, it is believed that while the opportunity for abuse exists with any and all trust distributions, the authority to decant does not appear to be a favored or widely used vehicle for such abuse. Nonetheless, the proposal expands the notice requirements because doing so does not appear to diminish the usefulness of the decanting transaction.

The purpose of the proposed revisions is to improve, update, and modernize the current Florida Statute in three ways:

- Authorize a trustee to decant principal to a second trust pursuant to a power to distribute that is not an absolute power (i.e., pursuant to a power to distribute that is limited by an ascertainable standard);
- Authorize a trustee to decant principal to a supplemental needs trust when the beneficiary is disabled; and
- Expand the notice requirements that apply to a trust decanting done pursuant to Fla. Stat. § 736.04117.

II. CURRENT STATUS OF FLORIDA DECANTING LAW

Currently, a trustee can decant principal to a second trust only if the trustee has absolute power to make principal distributions. A trustee cannot decant pursuant to an authority to make principal distributions that is subject to a specific or ascertainable purpose, such as health, education, maintenance, and support.

If a trust beneficiary is disabled, the trustee cannot decant the assets to a supplemental needs trust (the assets of which are excluded in the determination of entitlements to government benefits) unless the terms of the trust provide that the trustee has absolute power to invade the trust principal for the benefit of the disabled beneficiary.

Currently, under Section 736.04117, a trustee is not required to provide a copy of the second trust (the trust that will receive the decanted assets) prior to the decanting transaction. A trustee is required to give notice of the decanting, but the statute does not mandate that the notice include a copy of the decanting instrument or a copy of the proposed second trust.

III. EFFECT OF PROPOSED CHANGES

The proposed legislation: (i) modifies Florida law to allow a trustee to decant principal to a second trust pursuant to a power to invade principal that is not an absolute power (i.e., a power to distributable principal for the beneficiary's health, education, maintenance and support); (ii) allows the trustee to decant assets to a supplemental needs trust when the beneficiary is suffering from a disability; and (iii) expands the notice requirements that apply to a trust decanting done pursuant to Section 736.04117. The following is a detailed summary of each revised subsection:

1. Section 736.04117(1):

This subsection is new. For statutory organizational purposes, terms used throughout the statute are defined at the outset to allow for ease of understanding and clarity. All of the definitions are new except the definition of "absolute power," which is found in Section 736.04117(1)(b). Among the definitions of particular significance are the definitions of "authorized trustee," "vested interest" and "substantially similar."

Authorized Trustee. Trustees under Section 736.04117 currently have full authority to decant, regardless of whether the trustee is a settlor or a beneficiary. In order to avoid any potential or conceivable transfer tax issues and conflicts of interest, the definition of “authorized trustee” has been added to specifically exclude a trustee who is a settlor or a beneficiary from exercising decanting authority.

Fixed Interests. Under Section 736.04117(1)(a)2., a decant may not reduce certain “fixed” interests, such as income, annuity and unitrust interests. Other non-contingent or discretionary interests of a beneficiary, such as a current unconditional right to withdraw principal or the possession of a general power of appointment, were subject to modification or elimination through a decant. The trend with more modern decanting statutes is to prevent any such modification or elimination, so the encompassing term “vested interests” has been introduced to include such interests.

Substantially Similar. “Substantially similar” generally means that there is no material change in the interest being modified, whether it is a beneficiary’s beneficial interest or in the power of a trustee to make distributions. As explained in the official Comment to s. 12 of the Uniform Decanting Act, “a distribution standard that was more restrictive or more expansive would not be substantially similar. Thus if the first trust permitted distributions for support, health care and education, the beneficial interests would not be substantially similar if the second trust permitted distributions only for support and health care. If the first trust, however, permitted distributions for education without elaboration with respect to what was included within the term, the second trust might define education to include college, graduate school and vocational schools if otherwise consistent with applicable law.”

2. Section 736.04117(2):

Subsection (2) authorizes decanting where an authorized trustee has an absolute power with respect to discretionary distributions of principal. This subsection is based upon existing Section 736.04117(1).

Subsection (2) expands upon current law by clarifying the permissible or impermissible modification of certain trust provisions. For example, under existing law, the statute is silent as to whether a power of appointment granted under the distributing trust (defined as the “first trust”) must be maintained or may be modified in the receiving trust (defined as the “second trust”), or whether the second trust may grant a power of appointment to a beneficiary where none was created in the first trust. The general belief is that omitting, creating or modifying a power of appointment was permitted in a decant pursuant to an absolute power. Subsection (2) clarifies this point by specifically providing that the second trust may omit, create or modify a power of appointment.

In addition, the second trust may not reduce any vested interest which, as noted above, is an expansion on the existing prohibition on reducing certain fixed interests.

3. Section 736.04117(3):

Decanting is only permitted under Section 736.04117 if the trustee's discretionary distribution authority is absolute. Although Florida was one of the first states to enact a decanting statute, since the enactment of Section 736.04117, 22 other states have either enacted or modified decanting statutes and all such statutes – other than Michigan's statute - permit decanting where the trustee's discretionary distribution authority is not an absolute power, i.e., is limited to an ascertainable standard.

Subsection (3) modifies current law by specifically authorizing decanting where an authorized trustee has a power to invade principal which is not an absolute power. When such power is not absolute, the authorized trustee's decanting authority is restricted so that generally, each beneficiary of the first trust must have a substantially similar interest in the second trust. Substantially similar, in this instance, also includes powers of appointment, meaning that if a beneficiary is granted a power of appointment in the first trust, a substantially similar power must be granted to such beneficiary in the second trust.

Furthermore, as explained in the official Comment to s. 12 of the Uniform Decanting Act, "a severance of a trust [is permitted] if the beneficial interests in the second trust[s], in the aggregate, are substantially similar to the beneficial interests in the first trust. For this purpose, an equal vertical division of a trust in which multiple beneficiaries have equal discretionary interests would usually be considered to be substantially similar."

With respect term of the trust in which all interests must vest, subsection (3) specifically authorizes the second trust to extend the term from the first trust. In the event of any such extension (the "extended term"), the interests of beneficiaries during the extended term are not required to be substantially similar to those during the prior term. For example, if, under the first trust, where the trustee's discretionary authority is not absolute, a beneficiary's interest is required to be distributed upon the beneficiary's attaining age thirty-five, and under the second trust the beneficiary's interest continues instead for the beneficiary's lifetime, the trustees may be granted absolute discretionary authority for the term of the beneficiary's trust beginning with the beneficiary's thirty-fifth birthday; during the term prior to the beneficiary's thirty-fifth birthday, the beneficiary's interest in the second trust must be substantially similar to the beneficiary's interest in the first trust.

4. Section 736.04117(4):

Current law is silent as to whether a decant may take into consideration a particular beneficiary's disability and whether the beneficiary would be best served by the second trust contained supplemental needs provisions. If the trustee has absolute power, the trustee has the ability to decant to a supplemental needs trust; however, the trustee cannot eliminate the disabled beneficiary's "fixed interest".

Subsection (4) specifically authorizes a decant for supplemental needs purposes regardless of whether the authorized trustee has an absolute discretionary power or

discretionary power limited to an ascertainable standard. Nonetheless, if the decant to a second trust occurred pursuant to the authority granted in subsection (4), the interests of all beneficiaries, other than the disabled beneficiary, must be substantially similar to the interests of such beneficiaries in the first trust.

5. Section 736.04117(5):

Section 736.04117(1)(a)3. provides that certain tax benefits associated with the first trust, such as qualification for the federal estate tax marital deduction, must be maintained in the second trust. Certain additional tax provisions, such as direct skip treatment for generation-skipping transfer tax purposes or qualification as an eligible shareholder for a subchapter S corporation, are not referenced.

Subsection (5) considers and adopts such additional tax provisions, which also includes the gift tax annual exclusion and any and all other tax benefits for income, gift, estate or generation-skipping transfer tax purposes:

Subsection (5) also incorporates provisions regarding “grantor” trust status under Subchapter J of the Internal Revenue Code. Under subsection (5), grantor trust status is not a decanting consideration, meaning that an authorized trustee may decant from a grantor trust to a non-grantor trust and from a non-grantor trust to a grantor trust; with respect to the a transfer from a non-grantor trust to a grantor trust, the second trust must provide the settlor with the power to relinquish such grantor trust status.

6. Section 736.04117(6):

Subsection (6) incorporates Section 736.04117(2) in full and expands the provisions therein to incorporate the ability to decant pursuant to a non-absolute power (subsection (3)) and the ability to decant to a supplemental needs trust (subsection (4)).

7. Section 736.04117(7):

Subsection (7) is an expanded version of Section 736.04117(3). Subsection (7) explicitly recognizes that the second trust may be created under the laws of any jurisdiction and to institute certain safeguards to prohibit an authorized trustee from decanting to a second trust which provides the authorized trustee with increased compensation or greater protection under an exculpatory or indemnification provision. An authorized trustee is permitted to decant to a second trust that divides trustee responsibilities among various parties, including one or more trustees and others. The language is broad enough to include others to whom fiduciary powers can be given, whether currently authorized or authorized by future law, such as investment advisors and trust protectors.

8. Section 736.04117(8):

Section 736.04117(4) contains various notice provisions with respect to a decant by providing that notice of the exercise of the power to decant be provided to all

qualified beneficiaries of the first trust, in writing, at least 60 days prior to the effective date of the decant. Subsection (8) maintains these notice requirements but also provides that notice be provided to, (a) the settlor of the first trust, if the first trust was not a grantor trust and the second trust will be a grantor trust; (b) all trustees of the first trust; and (c) any person with the power to remove the authorized trustee of the first trust.

Consistent with Section 736.04117(4), if all of those entitled to notice waive the notice period by signed written instrument, the authorized trustee may exercise the power to decant immediately.

Subsection (8) also provides that the notice provided by the authorized trustee also include copies of both the first and second trusts. The purpose for this additional requirement is to allow each notice recipient the opportunity to review the differences in the two trust instruments.

9. Section 736.04117(9):

Subsection (9) incorporates Section 736.04117(5), in full, and expands the provisions therein to incorporate the ability to decant pursuant to a non-absolute power (subsection (3)) and the ability to decant to a supplemental needs trust (subsection (4)).

10. Section 736.04117(10):

Subsection (10) incorporates Section 736.04117(5) in full and expands the provisions therein to incorporate the ability to decant pursuant to a non-absolute power (subsection (3)) and the ability to decant to a supplemental needs trust (subsection (4)).

11. Section 736.04117(11):

Subsection (11) incorporates Section 736.04117(7) in full.

IV. FISCAL IMPACT ON STATE AND LOCAL GOVERNMENTS

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

V. DIRECT IMPACT ON PRIVATE SECTOR

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

VI. CONSTITUTIONAL ISSUES

It is not anticipated that this legislation will raise constitutional issues.

VIII. OTHER INTERESTED PARTIES

The Tax Section of the Florida Bar and the Florida Bankers Association may have an interest in this proposal.

To amend Section 736.0504 to read as follows:

(1) As used in this section, the term "discretionary distribution" means a distribution that is subject to the trustee's discretion whether or not the discretion is expressed in the form of a standard of distribution and whether or not the trustee has abused the discretion.

(2) Whether or not a trust contains a spendthrift provision, if a trustee may make discretionary distributions to or for the benefit of a beneficiary, a creditor of the beneficiary, including a creditor as described in s. 736.0503(2), may not:

(a) Compel a distribution that is subject to the trustee's discretion; or

(b) Attach, garnish or otherwise reach the interest, if any, which the beneficiary might have as a result of the trustee's authority to make discretionary distributions to or for the benefit of the beneficiary.

(3) If the trust contains a spendthrift provision, a creditor of the beneficiary, other than a beneficiary's child as provided in s. 736.0503(2)(a) or a creditor described in s. 736.0503(2)(b) or (c), may not attach, garnish or otherwise reach in any manner the interest to which a beneficiary becomes entitled as a result of the trustee exercising its discretion to make discretionary distributions to or for the benefit of the beneficiary.

(4) Whether or not a trust contains a spendthrift provision, if there is an unsatisfied judgment or court order against a beneficiary, the trustee may, without liability to any of such beneficiary's creditors, make discretionary distributions to or for the benefit of the other beneficiaries of the trust to the maximum extent permitted by the trust instrument.

(5) If the trustee's discretion to make distributions for the trustee's own benefit is limited by an ascertainable standard, a creditor may not reach, garnish or compel distribution of the beneficial interest except to the extent the interest would be subject to the creditor's claim were the beneficiary not acting as trustee.

(6) This section does not limit the right of a beneficiary to maintain a judicial proceeding against a trustee for an abuse of discretion or failure to comply with a standard for distribution.

133 So.3d 961
District Court of Appeal of Florida,
Second District.

Bruce D. BERLINGER, Appellant,
v.
Roberta Sue CASSELBERRY,
Appellee.

No. 2D12-6470. | Nov. 27, 2013. |
Rehearing Denied March 12, 2014.

Synopsis

Background: Former wife filed motion for contempt against former husband arising out of his failure to pay alimony, and obtained writs of garnishment against discretionary trusts that paid former husband's expenses. After a successor trustee was appointed for the trusts, the Circuit Court, Collier County, Elizabeth V. Krier, J., entered orders granting former wife's motion for continuing writs of garnishment, and substituting the successor trustee as a party to the proceeding and as the garnishee of the writs. Former husband appealed.

[Holding:] The District Court of Appeal, Sleet, J., held that trial court had authority to grant continuing writs of garnishment against the discretionary trusts.

Affirmed.

See also — So.3d —, 2013 WL 6212021.

West Headnotes (4)

[1] **Divorce**
☞ Trusts and trustees

Trial court had authority to grant continuing writs of garnishment against discretionary trusts in order to enforce the payment of trust beneficiary's alimony obligation to his former wife, even though trusts had spendthrift provisions; order granting the continuing writs of garnishment specifically found that traditional enforcement remedies were not effective and imposed the writs as a last resort, and writs did not compel any distributions, but simply garnished any distributions made by the trustee in his discretion. West's F.S.A. §§ 736.0503, 736.0504.

1 Cases that cite this headnote

[2] **Divorce**
☞ Trusts and trustees

Statute barring creditors from compelling distributions from discretionary trusts does not expressly prohibit a former spouse

from obtaining a writ of garnishment against discretionary disbursements made by a trustee exercising its discretion. West's F.S.A. § 736.0504(2).

favoring enforcement of alimony and support orders.

Cases that cite this headnote

Cases that cite this headnote

[3]

Divorce

☛ Trusts and trustees

Neither statute making a spendthrift provision of a trust unenforceable against certain creditors, nor statute limiting such creditors' claims against a discretionary trust, protects a discretionary trust from garnishment by a former spouse with a valid order of support. West's F.S.A. §§ 736.0503, 736.0504.

Cases that cite this headnote

[4]

Child Support

☛ Enforcement

Divorce

☛ Trusts and trustees

Trusts

☛ Validity of spendthrift trusts

Florida has a public policy favoring spendthrift provisions in trusts and protecting a beneficiary's trust income; however, it gives way to Florida's strong public policy

Attorneys and Law Firms

*962 Michael R. Presley, Robert M. Presley, and Steven M. Presley of Presley Law and Associates, P.A., Wellington, for Appellant.

Michael A. Hymowitz of Braverman and Hymowitz, Fort Lauderdale, for Appellee.

Opinion

SLEET, Judge.

Bruce Berlinger, the former husband, appeals an order of the trial court granting Roberta Casselberry's, the former wife, motion for contempt and motion for a continuing writ of garnishment over any disbursements made from the Berlinger Discretionary Trusts¹ to or for the benefit of Berlinger (the garnishment order). Berlinger argues that the order violates the provisions of sections 736.0503(3) and 736.0504, Florida Statutes (2011). We affirm the portion of the order granting contempt without further discussion. Because the court had the ability to enter an order granting writs of garnishment against the discretionary trusts, we affirm.

I. BACKGROUND

“Oh what a tangled web we weave when we first practice to deceive.”² Although financially able to pay, Berlinger and his attorneys went to extraordinary lengths to avoid his support obligation to Casselberry.

After thirty years of marriage, Berlinger and Casselberry divorced in 2007. Pursuant to a marital settlement agreement ratified by the court and incorporated into the final judgment of dissolution, Berlinger agreed to pay Casselberry \$16,000 a month in permanent alimony. Thereafter, Berlinger and his current wife enjoyed a substantial lifestyle sustained through payments made to Berlinger directly or on his behalf by the Berlinger Discretionary Trusts. The trusts paid for all of his living expenses including, but not limited to, mortgage payments, property taxes, insurance, utilities, food, groceries, and miscellaneous living expenses. Although he continued to live on the substantial proceeds of the Berlinger Discretionary Trusts, Berlinger voluntarily stopped paying alimony in May 2011.

When Berlinger stopped paying alimony, Casselberry filed a motion to enforce and for contempt and set it for hearing in August 2011. Just prior to the hearing, the parties reached a settlement wherein Berlinger agreed to satisfy his alimony arrears by liquidating an IRA account. An agreed order was entered August 25, 2011. After the IRA liquidation, \$32,625.54 plus interest remained owing on the arrears judgment. The court issued writs of garnishment to SunTrust as trustee to the Berlinger Discretionary Trusts.

Unbeknownst to Casselberry, Berlinger executed deeds on July 21, 2011, conveying his two-third interest in his real property, including his residence (the Banyon Property), into a never-before-disclosed trust, the Schweiker–Berlinger Irrevocable Life Insurance Trust. Michael Presley, Berlinger’s attorney, enlisted the assistance of his longtime friend, attorney Richard Inglis,³ to prepare the deeds and set up the new trust.

*963 Berlinger reported his two-third interest in the Banyon Property to be worth \$1,386,000; the deed reflected that he was the sole holder of the beneficial interest in the new trust. Berlinger never amended or supplemented his financial disclosures to reveal the real property transfer or the existence of the Schweiker–Berlinger Irrevocable Life Insurance Trust. To the contrary, Berlinger gave a deposition eight days after he executed the deeds and set up the new trust and swore that there were no life insurance trusts and that he was no longer the trustee for any of the family trusts. However, Casselberry’s discovery efforts revealed this new trust, that attorney Presley was named as trustee, and that Berlinger was trustee until October 11, 2011.

Around September 2011, Berlinger was provided a Visa card from SunTrust Bank (the then corporate co-trustee of the Berlinger Discretionary Trusts) to use for paying expenses not directly paid by the trusts. The trusts paid the Visa credit card bills, including expenses for travel, entertainment, clothing, medical expenses, grooming, gifts, and Berlinger’s current wife’s credit card bills.

In January 2012, Casselberry filed a second motion for civil contempt and enforcement against Berlinger. On January 17, 2012, the trial court issued writs of garnishment against SunTrust. Neither Berlinger nor SunTrust objected to these writs.

On April 26, 2012, Casselberry filed a motion for continuing writ of garnishment against SunTrust seeking to attach the present and future distributions made to or for the benefit of Berlinger from any trust. Casselberry alleged that traditional methods of enforcing alimony were insufficient. Attorney Presley filed a response in opposition to garnishment on behalf of SunTrust. The trial court set a hearing on that motion for November 6, 2012.

While the garnishment and family law matters were proceeding, the probate court removed SunTrust and substituted attorney Inglis as the new corporate trustee. SunTrust transferred all of the Berlinger Discretionary Trusts' funds and assets to Inglis's designated custodian, Rochdale, a securities firm. Thereafter, attorney Presley filed a motion on behalf of SunTrust Bank and Inglis seeking to substitute Inglis for SunTrust as a party to the ongoing family law case.

On November 5, 2012, one day before the hearing on Casselberry's motion for continuing writs of garnishment, Inglis withdrew his motion for substitution and filed an action seeking a declaration that the family trusts at issue were discretionary trusts.

During the November 6, 2012, hearing,

Inglis testified that for the past year, the trustees, including Inglis, had not made any payments directly to Berlinger. Instead, the trustees made payments on behalf of Berlinger directly to his creditors and utilities. He asserted that the trusts were discretionary and opined that the applicable trust statute, section 736.0504, prohibited any creditor, including Casselberry, from attaching any distributions paid on behalf or for the benefit of Berlinger.

Additional evidence adduced at the hearing revealed that Berlinger and his current wife continued to live on the Banyon Property and that the mortgage loan for the property remained in Berlinger's name. *964 Neither Berlinger nor his wife were employed and neither of them intended to look for work. All of their expenses were paid by the trusts. To avoid making distributions directly to Berlinger, the Berlinger Discretionary Trusts, by and through Inglis, directly paid for Berlinger and his current wife's health insurance and household expenses, including: the mortgage, property taxes, homeowner's insurance, electricity, water, garbage, sewer, telephone, internet, lawn care, pool care, and pest control.

Evidence regarding the Visa credit card given to Berlinger in September 2011 was admitted. The credit card bills all went to the trustee who paid them from the trust assets. Berlinger also took cash advances on the card to pay their maid, provide cash to his current wife, and to pay her personal expenses.

On November 27, 2012, the trial court entered orders granting Casselberry's motion for continuing writs of garnishment

and the motion for substitution, which substituted Inglis as the garnishee as to the continuing writs of garnishment. The order on the continuing writs provided that all distributions made directly or indirectly to, on behalf of, or for the benefit of Berlinger by the trustees of all the Berlinger Discretionary Trusts to which Berlinger was a beneficiary would be made payable to Casselberry unless, at the time of any future distributions, there was no alimony or alimony arrears owed. Further, the order provided that if the trustee wished to make distributions to Berlinger beyond the amount of the then outstanding amount of alimony, the trustee must seek court approval before doing so to ensure that there remained sufficient assets in the trust to secure the continued payment of alimony.

Berlinger and Inglis pursued separate appeals. *See Inglis*, slip op. at 1, — So.3d at —.

II. ANALYSIS

A. Discretionary Trusts

[1] Berlinger argues that section 736.0504 specifically prohibits Casselberry from attaching distributions made to or for Berlinger because the trusts are discretionary trusts⁴ and are afforded greater protection from creditors under the Florida Trust Code. We disagree. We conclude that the Florida Supreme Court's decision in *Bacardi v. White*, 463 So.2d 218 (Fla.1985), is controlling. *See also* §§ 736.0503, 736.0504.

Because resolving this issue involves statutory interpretation, we review the trial court's order de novo. *Heart of Adoptions, Inc. v. J.A.*, 963 So.2d 189, 194 (Fla.2007).

The facts of this case are very similar to the facts in *Bacardi*, 463 So.2d 218. The parties in *Bacardi* entered into a marital settlement agreement during the divorce process in which the former husband agreed to pay the former wife \$2000 per month in alimony. *Id.* at 220. Soon after entry of the final judgment, he stopped paying alimony. *Id.* The former wife obtained two judgments for unpaid alimony and a judgment for attorney's fees. *Id.* She then served a writ of garnishment on the trustee of the trust and later obtained a continuing writ of garnishment against the trust income for future alimony payments as they became due. *Id.*

The trustee and the former husband appealed the garnishment order, asserting that the trust could not be garnished for the collection of alimony because it contained a spendthrift provision. *Id.* at 221. *965 The Florida Supreme Court concluded that, in support cases, the restraint of spendthrift trusts should not be an absolute bar to the enforcement of alimony orders. *Id.* at 222. The court further held that garnishment as an enforcement alternative should be allowed only as a "last resort" and that when traditional remedies available to the spouse seeking to enforce support orders are not effective, "it would be unjust and inequitable to allow the debtor to enjoy the benefits of wealth without being subject to the responsibility to support those whom he has a legal obligation to support." *Id.* The

court limited the right of garnishment to disbursements that are due to be made or which are actually made from the trust. *Id.* The court specifically addressed whether a discretionary disbursement is subject to a writ of garnishment and concluded that “[i]f disbursements are wholly within the trustee’s discretion, the court may not order the trustee to make such disbursements. However, if the trustee exercises its discretion and makes a disbursement, that disbursement may be subject to the writ of garnishment.” *Id.*

Like *Bacardi*, the trusts in this case include spendthrift provisions. As such, the provisions are not a bar to the enforcement of the alimony orders or judgment in this case. *Id.* The trial court’s order granting Casselberry’s motion for continuing writs of garnishment specifically finds that traditional enforcement remedies are not effective and imposes the writs as a last resort. In accordance with *Bacardi*, the trial court’s order granting Casselberry’s motion for continuing writs of garnishment against the Berlinger Discretionary Trusts was proper.

B. Sections 736.0503 and 736.0504

In 2006, the Florida legislature enacted the Florida Trust Code. Sections 736.0503 and 736.0504 of the code are especially relevant to this case. Section 736.0503, which pertains to spendthrift provisions, provides:

(2) To the extent provided in subsection (3), a spendthrift provision is unenforceable against:

(a) A beneficiary’s child, spouse, or former spouse who has a judgment or court order against the beneficiary for support or maintenance.

....

(3) Except as otherwise provided in this subsection and in s. 736.0504, a claimant against which a spendthrift provision may not be enforced may obtain from a court, or pursuant to the Uniform Interstate Family Support Act, an order attaching present or future distributions to or for the benefit of the beneficiary. The court may limit the award to such relief as is appropriate under the circumstances. Notwithstanding this subsection, the remedies provided in this subsection apply to a claim by a beneficiary’s ... former spouse, ... only as a last resort upon an initial showing that traditional methods of enforcing the claim are insufficient.

According to subsections (2) and (3), a spendthrift provision is unenforceable against a beneficiary’s former spouse who has a judgment or court order against the beneficiary for support or maintenance and permits the former spouse to obtain a court order attaching present or future distributions to or for the benefit of the beneficiary. Thus, the spendthrift provisions included in Berlinger’s trusts are unenforceable as to Casselberry because she has an order against him for support.

^[2] A former spouse’s remedies under 736.0503(3) are subject to the exceptions and provisions found in 736.0504. According to section 736.0504(2), a former

spouse *966 may not compel a distribution that is subject to the trustee's discretion or attach or otherwise reach the interest, if any, which the beneficiary may have. The section does not expressly prohibit a former spouse from obtaining a writ of garnishment against discretionary disbursements made by a trustee exercising its discretion. As a result, it makes no difference that the instant trusts are discretionary. Casselberry is not seeking an order compelling a distribution that is subject to the trustee's discretion or attaching the beneficiary's interest. Instead, she obtained an order granting writs of garnishment against discretionary disbursements made by a trustee exercising its discretion.

^[3] Sections 736.0503 and 736.0504 codify the Florida Supreme Court's holding in *Bacardi*. Neither section protects a discretionary trust from garnishment by a former spouse with a valid order of support. The order in this case complied with the *Bacardi* decision and sections 736.0503 and 763.0504 of the Florida Trust Code.

C. Public Policy

^[4] Florida has a public policy favoring spendthrift provisions in trusts and protecting a beneficiary's trust income; however it gives way to Florida's strong public policy favoring enforcement of alimony and support orders. *See Gilbert v.*

Gilbert, 447 So.2d 299, 302 (Fla. 2d DCA 1984) ("In light of our strong public policy toward requiring persons to support their dependents, we hold that spendthrift trusts can be garnished for the collection of arrearages in alimony."); *see also Bacardi*, 463 So.2d at 222 ("We have weighed the competing public policies and, although we reaffirm the validity of spendthrift trusts, we conclude that in these types of cases the restraint of spendthrift trusts should not be an absolute bar to the enforcement of alimony orders or judgments.").

III. CONCLUSION

Accordingly, we affirm the trial court's order granting the former wife's motion for continuing writs of garnishment.

Affirmed.

CASANUEVA and MORRIS, JJ., Concur.

Parallel Citations

38 Fla. L. Weekly D2482

Footnotes

¹ (1) The Rosa B. Schweiker Trust; (2) the Frederick W. Berlinger Trust; (3) the Rose S. Berlinger Trust; and (4) the Schweiker-Berlinger Irrevocable Life Insurance Trust.

² Sir Walter Scott, *Marmion*, in *The Complete Poetical Works of Scott* 88, 145 (Horace E. Scudder ed. 1900).

3 Attorney Inglis's involvement in these proceedings is further detailed in the companion case, *Inglis v. Casselberry*, No. 2D12-6463, — So.3d —, 2013 WL 6212021 (Fla. 2d DCA Nov. 27, 2013).

4 The parties concede that the trusts are discretionary.

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**IN THE CIRCUIT COURT OF THE TWENTIETH JUDICIAL CIRCUIT
IN AND FOR COLLIER COUNTY, FLORIDA**

BRUCE D. BERLINGER,
PETITIONER/FORMER HUSBAND

03 DR 4973

vs.

**ROBERTA SUE CASSELBERRY,
FNA SUE C. BERLINGER.**
RESPONDENT/FORMER WIFE/GARNISHOR

CASE NO. 03-4973-CA-CG

vs.

SUNTRUST BANK, Garnishee

INSTR 4769935 OR 4860 PG 3396
RECORDED 12/4/2012 2:27 PM PAGES 11
DWIGHT E. BROCK, CLERK OF THE CIRCUIT COURT
COLLIER COUNTY FLORIDA
REC \$95.00

**OMNIBUS ORDER GRANTING MOTION FOR CONTEMPT AND
GRANTING MOTION FOR CONTINUING WRIT OF GARNISHMENT**

THIS CAUSE having come to be heard on November 5, 2012, on Former Wife's Motion for Contempt dated January 4, 2012, and Former Wife's Motion for Continuing Writ of Garnishment dated April 26, 2012, and the Court, having received testimony, evidence and being otherwise advised in the Premises, does hereupon:

FILED 22
COLLIER COUNTY, FLORIDA
NOV 29 AM 7:59
CLERK OF COURTS
D.C.

FIND AND ORDER:

1. Former Husband and Former Wife were divorced pursuant to a Final Judgment of Dissolution of Marriage dated November 21, 2007, which judgment incorporated the parties' Marital Settlement Agreement dated September 15, 2007. Pursuant to the final judgment and incorporated agreement, Former Husband is ordered to pay Former Wife alimony in the amount of \$16,000 per month on the first of each month so long as the parties are alive and Former Wife has not remarried. The parties are both alive and Former Wife has not remarried.

2. By separate order dated August 25, 2011, Former Husband's alimony arrears were adjudicated through August 9, 2011 and a judgment for the same was entered in favor of Former Wife. Former Husband was further ordered to liquidate his IRA and remit the liquidated sum to

Former Wife as a purge/partial satisfaction payment, which he did. Nevertheless, there remains a principal balance of \$32,625.54, plus 6% interest thereon, owed from the order dated August 25, 2011, which Former Wife has been unable to collect. Except as specifically provided herein, the *Agreed Order on Former Wife's Motion for Contempt - Enforcement* dated August 25, 2011, is not superseded or supplanted by this order, remains in full force and effect and this order is without prejudice to any and all rights and remedies that Former Wife may have regarding that order including the separately pending writs of garnishment.

3. Former Husband is the beneficiary of various trusts including, but not limited to:

(1) the Rose S. Berlinger Family Trust under the Rose S. Berlinger Deed of Trust Dated October 17, 1991, as Amended and Restated; (2) the Frederick W. Berlinger Marital Trust; (3) the Frederick W. Berlinger Family Trust; (4) the Leo G. Balzereit Trust; (5) and the Rosa B. Schweiker Trust. For ease of reference, these will be commonly referred to the trusts to which Former Husband is a beneficiary collectively as the Berlinger family trusts.

4. On July 21, 2011, just prior to the August 2011 hearing scheduled on Former Wife's first motion for contempt, Former Husband executed deeds conveying his 2/3 interest in the real property where he lives to yet another trust, the Schweiker-Berlinger Irrevocable Life Insurance Trust, which 2/3 interest he valued at \$1,386,000.00 (the other 1/3 interest was previously transferred by Former Husband to one of the trusts). Notwithstanding, eight days after executing those deeds, Former Husband denied that there were any life insurance trusts in his sworn deposition for Attorney Michael Presley was present and discovery revealed Attorney Presley to be the trustee of the aforementioned life insurance trust. (INSERT Addendum Paragraph #1)

5. Former Husband and his current wife continue to live on the real property Former Husband transferred into the trust. The property consists of several adjacent lots, or parts thereof, i.e. part of lot 68, lot 69 and part of lot 70, and is commonly referred to as the "Banyan" property or

residence. At one point in this litigation, it was suggested to the Court by counsel for the trusts, with whom Former Husband has a claimed joint defense agreement, that part of the property Former Husband transferred into trust in 2011 consists of a "vacant lot." The evidence reveals that all parts of the adjacent lots are enclosed by a single high hedge-wall to form the curtilage of Former Husband's residence.

6. In July 2011, Former Husband also responded to interrogatories under oath stating that he was no longer the trustee for any of the Berlinger family trusts, yet at a hearing earlier in these proceedings, Mr. Presley confirmed that there were no changes in the trustees of Berlinger family trusts such that Former Husband was not a trustee of the Berlinger family trusts as he claimed under oath in his answers to interrogatories.

7. Former Husband does not work, has no income and is not seeking employment. He claims to have only minimal assets of value remaining in his name. Yet, Former Husband and his wife continue to enjoy a substantial lifestyle, including their continued occupancy of the multimillion-dollar residence, which lifestyle has been sustained through the payments made to or on behalf of Former Husband by the various trusts of which he is a beneficiary. The trust pays for the mortgage for the aforementioned residence, ~~neither~~ Former Husband nor his wife pay rent to the trusts, ^Tthe trusts pay all of their living expenses including health insurance, electric, water, garbage, and sewer, telephone, internet, lawn care, pool care, pest control, miscellaneous household expenses, food and grocery items. In or about September 2011, Former Husband was provided a Visa credit card from SunTrust Bank (the corporate co-trustee of the trusts) to use for paying expenses that are not directly paid for by the trusts. The trusts pay the bills for the Visa credit card. The expenses for Former Husband and his wife paid through the credit card include gasoline, restaurants, groceries, clothing, medical expenses, grooming, travel and even gifts and his wife's credit cards. Former Husband also takes cash advances from the credit card. While Former

Husband did not use any part of the cash advances taken thus far from the credit card to pay alimony, he used those funds to pay such things as the mortgage, insurance and taxes on his wife's pre-marital real property.

8. Former Husband owns a Volkswagen automobile worth \$18,395.00. Former Husband also owns additional assets ^{whose} worth ~~is unknown~~ (Insert Addendum Paragraph #2) *OK*

9. For the period of September 1, 2011, through the date of the hearing, Former Husband has not paid anything towards his ongoing alimony obligation and he is indignant about his continued obligation to pay alimony to Former Wife, saying, "If my ex wants more, she should take a look and see what she has gotten and what she should be thankful for."

10. Former Husband has willfully failed to comply with his alimony obligation. Former Wife's Motion for Civil Contempt/ Enforcement is granted. (Insert Addendum Paragraph #3)

11. Former Husband is adjudicated in contempt.

12. By 12/28, 2012, Former Husband shall pay a purge in the amount of \$ 15,000⁰⁰, for which he has the present ability to pay by virtue of the Volkswagen automobile, and such payment shall be delivered and made payable to Braverman & Hymowitz Trust Account, 625 NE 3rd Avenue, Ft. Lauderdale, FL 33304. If Former Husband fails to make the purge payment by the date ordered, he shall appear at the Collier County Jail at 8:00 a.m. the following morning where he shall be incarcerated for a period of 179 days or until he pays the purge, whichever is earlier. Former Husband's failure to pay or appear for incarceration shall result in a writ of arrest being issued. Following his incarceration, the Sheriff of Collier County is authorized to accept the purge, or any partial payment thereto, and shall forward the same payable and delivered to the Braverman & Hymowitz Trust Account, 625 NE 3rd Avenue, Ft. Lauderdale, FL 33304, telephone (954) 524-0505. *OK*

13. In addition to the alimony arrears separately adjudicated in the order dated August 25, 2011, Former Husband owes Former Wife alimony for the period of September 1, 2011, to November 1, 2012, inclusive, in the principal sum of \$240,000.00, plus pre-judgment interest thereon of \$6,822.31, for a total sum of \$246,822.31. Former Wife is entitled to have the same adjudicated in a money judgment.

14. Former Wife, ROBERTA SUE CASSELBERRY, who's address is 2908 Tiburon Blvd. E. Naples, FL 34109, shall recover from Former Husband, BRUCE D. BERLINGER, the sum of Two Hundred Thousand, Eight Hundred Twenty-Two Dollars and Thirty-One Cents (\$246,822.31), plus interest thereon at the statutory rate of interest on judgments (4.75% per annum) commencing November 6, 2012, until all such principal and interest are paid for which let execution issue. *FOR WHICH LET EXECUTION ISSUE.*

15. Former Wife's also requests a continuing writ of garnishment against all trusts to which Former Husband is a beneficiary.

16. In *Bacardi v. White*, 463 So. 2d 218, 222 (Fla. 1985), the Florida Supreme Court held that a spendthrift provision in a trust will not avoid a former spouse's efforts to garnish that trust to enforce alimony owed by the trust's beneficiary when traditional methods of enforcing alimony are ineffective and insufficient. While the beneficial interest itself may not be garnished and a trial court cannot compel the trustee to make a discretionary distribution, when the trustee exercises its discretionary to make distributions, those distributions may be subject to a writ of garnishment before reaching the beneficiary and such writ may be a continuing garnishment. *Id.* at 222-223. The Court further held that, to ensure the future payment of ongoing alimony, if the trustee wishes to make distributions beyond the alimony then due, the trustee should seek court approval and the court may authorize such payments if sufficient assets remain in the trust or other provisions are made to secure the payment of alimony to the person who should receive it. *Id.*

Per Section 736.0503 of the Florida Statutes, a trustee is authorized to make such payments which therefore may be ordered by a court, despite language to the contrary contained in the trust documents.

223. Finally, the Court held that awards of attorney's fees which result from divorce or enforcement proceedings are collectible in the same manner. *Id.*

17. The *Bacardi* decision has since been codified by statute in Florida Statutes §736.0503 and §736.0504.

18. Fla. Stat. § 736.0503 provides:

(1) As used in this section, the term "child" includes any person for whom an order or judgment for child support has been entered in this or any other state.

(2) To the extent provided in subsection (3), a spendthrift provision is unenforceable against:

(a) A beneficiary's child, spouse, or former spouse who has a judgment or court order against the beneficiary for support or maintenance.

(b) A judgment creditor who has provided services for the protection of a beneficiary's interest in the trust.

(c) A claim of this state or the United States to the extent a law of this state or a federal law so provides.

(3) Except as otherwise provided in this subsection and in *s. 736.0504*, a claimant against which a spendthrift provision may not be enforced may obtain from a court, or pursuant to the Uniform Interstate Family Support Act, an order attaching present or future distributions to or for the benefit of the beneficiary. The court may limit the award to such relief as is appropriate under the circumstances. Notwithstanding this subsection, the remedies provided in this subsection apply to a claim by a beneficiary's child, spouse, former spouse, or a judgment creditor described in paragraph (2)(a) or paragraph (2)(b) only as a last resort upon an initial showing that traditional methods of enforcing the claim are insufficient.

19. Fla. Stat. § 736.0504 provides:

(1) As used in this section, the term "discretionary distribution" means a distribution that is subject to the trustee's discretion whether or not the discretion is expressed in the form of a standard of distribution and whether or not the trustee has abused the discretion.

(2) Whether or not a trust contains a spendthrift provision, if a trustee may make discretionary distributions to or for the benefit of a beneficiary, a creditor of the beneficiary, including a creditor as described in *s. 736.0503(2)*, may not:

(a) Compel a distribution that is subject to the trustee's discretion; or

(b) Attach or otherwise reach the interest, if any, which the beneficiary might have as a result of the trustee's authority to make discretionary distributions to or for the benefit of the beneficiary.

(3) If the trustee's discretion to make distributions for the trustee's own benefit is limited by an ascertainable standard, a creditor may not reach or compel distribution of the beneficial interest except to the extent the interest would be subject to the creditor's claim were the beneficiary not acting as trustee.

(4) This section does not limit the right of a beneficiary to maintain a judicial proceeding against a trustee for an abuse of discretion or failure to comply with a standard for distribution.

20. The Court finds that Fla. Stat. § 736.0504 (2) (b) does not preclude attachment to distributions made from a discretionary trust. Consistent with *Bacardi*, Fla. Stat. § 736.0503 (3) specifies certain creditors, including a former spouse with a judgment or order for the payment of alimony, that have the right to attach "present or future distributions made to or for the benefit of the beneficiary." Also consistent with *Bacardi*, Fla. Stat. § 736.0504 (2) (b) merely precludes the attachment to "the interest" which a beneficiary may have in a discretionary trust. The "interest" a beneficiary might have in a discretionary trust is separate and distinct from the actual "distributions" made to or for the benefit of the beneficiary of a discretionary trust. "Interests of the beneficiaries" means the beneficial interests provided in the terms of the trust." Fla. Stat. 736.0103 (10). While "beneficial interest" is not statutorily defined in Florida Statutes Chapter 736, it is well recognized in trust law "to refer to interest of the beneficiary in right to income or principal of trust funds, in contrast to the trustee who holds the legal title." BLACK'S LAW DICTIONARY 156 (6th ed. 1990). The term "distribution" is also not statutorily defined in Florida Statutes Chapter 736, but is recognized in trust law as the "amount paid or credited to the beneficiaries of a trust, [which] payment may be in the form of cash or property and is generally income to the beneficiary." BLACK'S LAW DICTIONARY 475 (6th ed. 1990). Furthermore, if Fla.

Stat. § 736.0504 (2) (b) was intended to preclude the attachment to discretionary distributions actually made, then Fla. Stat. § 736.0504 (2) (a) would be unnecessary. If Fla. Stat. § 736.0504 (2) (b) were interpreted to mean that actual distributions made are not subject to attachment, then it would not matter whether the Court were authorized to compel a distribution or not, as it would not be reachable regardless. Also, the Court notes that Fla. Stat. § 736.0502 (3) uses the terms “interest” and “distribution” as separate terms in the same sentence. Accordingly, while Fla. Stat. § 736.0504 (2) (b) may preclude attachment to the beneficial “interest” itself, it does not preclude attachment to the actual “distribution” if and when the trustee elects to make a discretionary distribution to or on behalf of the beneficiary. This interpretation is consistent with *Bacardi* and any alternative interpretation would be in violation of the more paramount public policy of the State of Florida for the payment of support as expressed in *Bacardi*.

21. Former Husband further argued that *Mason v. Mason*, 798 So. 2d 895 (Fla. 5th DCA 2001) requires the denial of Former Wife’s motion at bar. *Mason* is distinguishable from the case at bar. In *Mason*, the appellate court followed *Bacardi* and affirmed the trial court’s denial of former wife’s request to garnish discretionary distributions from a spendthrift trust for purposes of collecting past-due medical expenses for the children “because the former wife has made no showing that traditional enforcement methods would be futile in *that* case, the preliminary step required under *Bacardi*.” *Mason*, at 898 [emphasis added]. The *Mason* court noted that Mr. Mason was both the trustee and beneficiary of the trust and that the subject children were also beneficiaries and therefore, “in contempt proceedings, [Mr. Mason’s] role as both trustee and beneficiary would assure his ability to pay the court ordered obligation.” *Id.*, n. 1.

22. Unlike in *Mason*, the authority to make discretionary distributions from the trusts involved here is held by the institutional co-trustees for the various trusts to which Former Husband is a beneficiary, not Former Husband. Moreover, as indicated above, Former Husband receives no

(Insert Addendum Paragraph #4 as footnote)

income and has no assets in his name other than that which the Court used for determining his present ability to make the purge payment provided above (which purge payment amounts to only a small fraction of the outstanding alimony arrears as adjudicated under this order). Traditional methods of enforcing past due and future alimony are clearly ineffective and would be insufficient in this case. As in *Bacardi*, it would be inequitable and unjust for the Former Husband here to continue enjoying the benefits of wealth without being subject to the responsibility to support Former Wife for whom he has a legal duty to support. Therefore, the Court finds that it is appropriate to enter the instant writ for garnishment and for the same to be a continuing garnishment.

23. All distributions made directly or indirectly to, on behalf of or for the benefit of Former Husband by the trustees of all trusts to which Former Husband is a beneficiary including, but not limited to, the Rose S. Berlinger Family Trust, the Leo G. Balzereit Trust, the Frederick W. Berlinger Marital Trust, the Frederick W. Berlinger Family Trust, the Rosa B. Schweiker Trust and the Schweiker-Berlinger Irrevocable Life Insurance Trust shall be made payable to Former Wife unless, at the time of any such future distribution, there is no alimony or alimony arrears (principal or interest thereon). This shall include, but not be limited to, any direct payments of expenses related to the home where Former Husband resides, and any payments or cash advances made on any credit card held by Former Husband.

24. Consistent with *Bacardi*, if the trustee wishes to make distributions to Former Husband beyond the amount of then outstanding alimony (and accrued interest thereon), the trustee shall seek court approval and the court may authorize such payments if sufficient assets remain in the trust or other provisions are made to secure the continued payment of alimony.

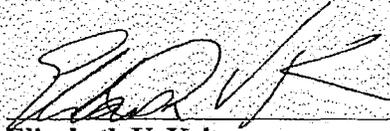
25. The Court reserves jurisdiction over Former Wife's claims for attorney's fees and costs, which, consistent with *Bacardi*, may be enforced through garnishment in the same fashion as provided above for alimony.

26. The Court reserves jurisdiction over the parties and the subject matter of this action for enforcement and such other purposes as just and proper.

27 Attached hereto are certain additions and modifications to the *

DONE AND ORDERED in Chambers in Collier County, Naples, Florida, on

NOV. 27th, 2012.


Elizabeth V. Krier
Circuit Court Judge

cc: Alan J. Braverman, Esq., 625 N.E. 3rd Avenue, Fort Lauderdale, FL 33304
Suzanne D. Lanier, Esq., TIB Financial Center, 599 Ninth Street North, Naples, FL 34102
Michael R. Presley, Esq., 1200 Corporate Center Way, Suite 200, Wellington, FL 33414
Gary Rudolf, 615 NE 3rd Avenue, Ft. Lauderdale, FL 33304

 Order which are hereby incorporated in it.

**ADDENDUM
TO OMNIBUS ORDER GRANTING MOTION FOR CONTEMPT AND GRANTING MOTION FOR CONTINUING WRIT
OF GARNISHMENT**

1. The two-thirds interest of this property which is the Former Husband's residence is now held by one of the Berlinger Family Trusts— the Rosa B. Schweiker Trust. This property was transferred to such trust via the Schweiker-Berlinger Irrevocable Life Insurance Trust. (The court hereby takes judicial notice of the recorded deeds of July 21 and August 22 of 2011 and April 26 and June 20th of 2012 regarding both lots 68 and 69 of the subject property. These deeds have been attached to various motions and memorandum filed in this Case.) It is significant that this property was transferred to a Berlinger Family Trust via the Life Insurance trust because if this property had been transferred directly from the Former Husband to the Rosa B. Schweiker Trust, that property and possibly the entire trust might be subject to creditors' claims. Self-settled trusts are not protected from creditors.
2. There is an on-going discovery controversy in this Case that is on appeal. It is the position of the Former Husband and the current Trustee, that the Former Wife is not entitled to documents or information relating to trust assets or any accountings and supporting documents pertaining to payments that benefit the Former Husband.
3. The basis of the Court's finding of the Former Husband's willful non-compliance includes the following:
 - A. The Former Husband testified that he regularly takes cash advances against the credit card of which he has use and which is paid by Berlinger Trusts. He testified that he uses the cash advances most often to pay personal expenses of his present wife including some of her the premarital obligations. If the Former Husband can take cash advances for his current wife, he should be able to take some for his Former Wife.
 - B. While the Former Husband relies on the language of the Berlinger Trusts to protect him from paying alimony, the Florida Statutes explicitly allow for payment of spousal support from "spendthrift" trusts regardless of the language of such trusts. See, Section 736.0503 of the Florida Statutes. This Section is not vague and subject to confusion. It is quite explicit. (See this Section quoted in the body of the Court's Order)
 - C. The Former Husband transferred his interest in his home out of his name into one of the Berlinger family trusts via a method designed to obscure or avoid the possibility of such a trust becoming a self-settled trust. (see above)
 - D. The Former Husband did not receive any more than nominal consideration for the transfer of his remaining 2/3rd interest in his residence despite stating in deposition that it was worth \$1,386,000.00 at that time.
 - E. The Former Husband's responses to discovery questions via interrogatories and deposition have not been credible and reflect an intent to avoid paying alimony.
4. *Footnote:* Florida attorney Richard K. Inglis had been substituted as trustee of the Berlinger family trusts in the probate cases. Counsel for the Former Husband has requested that this Court do the same in this family law case. The Court intends to grant this Motion in connection with the Continuing Writ of Garnishment, but not for the already perfected writs. (See separate Order)

34 So.3d 172
District Court of Appeal of Florida,
Fourth District.

James F. MILLER, Ken Bastani and
Centennial Bank, (as successor by
merger with Marine Bank),
Appellants,

v.

Gary KRESSER and Castles
Construction and Development LLC,
Appellees.

Jerry Miller, as Trustee of the James
F. Miller Irrevocable Trust, Ken
Bastani and Centennial Bank, (as
successor by merger with Marine
Bank), Appellants,

v.

Gary Kresser, James F. Miller, Castles
Construction and Development, LLC,
Barbara Miller, and Castles Unlimited
Inc., a Florida Corporation, Appellees.

Nos. 4D09-759, 4D09-760. | May 5,
2010. | Rehearing Denied June 11, 2010.

Synopsis

Background: Judgment creditor brought proceedings supplementary against judgment debtor, and impleaded trustee of spendthrift trust of which judgment debtor was the beneficiary. Following a bench trial, the Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County, Thomas H. Barkdull, III, J., entered judgment against trustee, and trustee appealed.

Holdings: The District Court of Appeal, Damoorgian, J., held that:

[1] judgment creditor could not reach spendthrift trust's principal, though trustee rubber-stamped beneficiary's requests, as the trustee had sole discretion to make distributions, and

[2] trust did not terminate under the merger doctrine.

Reversed.

West Headnotes (6)

[1] **Trusts**
← Spendthrift trusts

A spendthrift trust is a trust created with a view of providing a fund for the maintenance of another, and at the same time securing it against his own improvidence or incapacity for self-protection.

1 Cases that cite this headnote

[2] **Trusts**
← Spendthrift trusts

If a spendthrift trust allows the beneficiary to control all of the trust assets by terminating the trust or demanding distribution of the entire trust corpus, a court will allow the beneficiary's creditor to reach the entire trust corpus. West's F.S.A. §§ 736.0502(3), 736.0506(2).

6 Cases that cite this headnote

[3]

Trusts

☛ Spendthrift trusts

Judgment creditor of beneficiary of spendthrift trust could not reach the corpus of the trust, though beneficiary controlled almost all important decisions concerning trust assets and the trustee, beneficiary's brother, rubber-stamped beneficiary's decisions, where the trustee under the express provisions of the trust had sole discretion to make distributions. West's F.S.A. §§ 736.0502(3), 736.0504, 736.0506(2).

6 Cases that cite this headnote

[4]

Trusts

☛ Nature and essentials of trusts

Trusts

☛ Merger of estates

In order to sustain a trust entity,

there must be a separation between the legal and equitable interests of the trust; when no separation exists, legal and equitable interests merge and the trust may be terminated.

1 Cases that cite this headnote

[5]

Trusts

☛ Merger of estates

Merger applies to terminate a trust only when the legal and equitable interests are held by one person and are coextensive and commensurate, i.e., the legal estate and the equitable estate are the same.

1 Cases that cite this headnote

[6]

Trusts

☛ Merger of estates

Spendthrift trust did not terminate under the merger doctrine as a result of the merger of trust's legal estate and equitable estate, though beneficiary controlled almost all important decisions concerning trust assets and the trustee, beneficiary's brother, rubber-stamped beneficiary's decisions, where trustee did not convey legal title of the trust principal to beneficiary.

3 Cases that cite this headnote

Attorneys and Law Firms

*173 Norman L. Schroeder, II, of Norman L. Schroeder, II, P.A., Lake Worth, for appellant, James F. Miller.

Rebecca M. Plasencia and Christopher N. Bellows of Holland & Knight LLP, Miami, for appellants, Ken Bastani and Centennial Bank.

Brian M. O'Connell, Ashley N. Girolamo of Casey Ciklin Lubitz Martens & O'Connell, West Palm Beach for appellant, Jerry Miller, as Trustee of the James F. Miller Irrevocable Trust.

Ronald M. Gache and Scott A. Simon of Broad and Cassel, West Palm Beach, for appellee, Gary Kresser.

Opinion

DAMOORGIAN, J.

James F. Miller, Jerry Miller, as Trustee of the James F. Miller Irrevocable Trust, Ken Bastani, and Centennial Bank appeal a final judgment in proceedings supplementary.¹ We reverse the portion of the final judgment in which the trial court terminated the trust's spendthrift provision and allowed Gary Kresser to reach undistributed trust assets.

In April 2004, Elizabeth Miller established

the James F. Miller Irrevocable Trust ("the James Trust") for the benefit of her son, James. She named her other son, Jerry, sole trustee. The James Trust is a discretionary trust under which Jerry has absolute discretion to make distributions for James and James's qualified spouse.

The James Trust contains a spendthrift provision² and a provision under Article V(B) which gives Jerry, as trustee, the complete discretion to terminate the trust by distributing the entire principal to the beneficiary for any reason.³

*174 After forming the James Trust, Elizabeth transferred to the trust a one-third interest in a residence located in Islamorada, Florida. She transferred another one-third interest in that property to the Jerry E. Miller Irrevocable Trust, and retained the final one-third interest. At that time, the property had a value in excess of one million dollars.

On June 21, 2007, Gary Kresser obtained a judgment against James Miller and Castles Construction and Development, LLC, for \$1,019,095.82. The judgment arose out of Kresser's involvement in a business deal with James and Castles.

Before creating the James Trust, Elizabeth had established her own testamentary trust ("the Elizabeth Trust"), whereby she provided for dispositions upon her death to James and Jerry. A few days after the trial court entered the final judgment in favor of Kresser, Elizabeth amended the Elizabeth Trust to eliminate all dispositions to James, individually, replacing them with dispositions directly to the James Trust. Elizabeth died on September 10, 2007.

When Kresser was unable to collect on his judgment from James or Castles, he brought proceedings supplementary against them and impleaded Jerry, as trustee of the James Trust. Kresser asserted that he was entitled to execute on the James Trust's assets, including its one-third interest in the Islamorada property, because James exercised dominion and control over all of the trust assets and over Jerry, as trustee. Kresser also recorded a lis pendens in Monroe County, Florida on the Islamorada property.

While the proceedings supplementary were ongoing, Ken Bastani purchased the Islamorada property. Centennial Bank provided the mortgage financing for which it received a mortgage from Bastani which encumbered the Islamorada property. The James Trust received one-third of the sale proceeds.

The trial court conducted a non-jury trial in the proceedings supplementary, at which the relevant issue was whether the spendthrift provision in the James Trust could be invalidated or pierced and the trust's assets executed upon by Kresser, as judgment creditor. In a written final judgment, the trial court found that the spendthrift provision in the James Trust was valid at the time the trust was settled, and that Elizabeth transferred several assets to the James Trust, including the one-third interest in the Islamorada property.

The trial court then set forth a detailed account of James's significant control over the James Trust and over Jerry, as trustee. The court found that Jerry had almost

completely turned over management of the trust's day-to-day operations to James. James controlled all important decisions concerning the trust assets, including investment decisions. Jerry never independently investigated these decisions to determine whether they were in the best interest of the trust, and some of the decisions have turned out to be unwise. The trial court concluded that Jerry simply rubber-stamped James's decisions and "serve[d] as the legal veneer to disguise [James's] exclusive dominion and control of the Trust assets."

Ultimately, the court held that James's exclusive dominion and control over the James Trust served to terminate the trust's spendthrift provision, allowing Kresser to reach all of the trust's assets to *175 satisfy his judgment. The court further concluded that Jerry, by giving James control over the trust and complete access to the trust's assets, effectively turned over to James all of the trust's assets pursuant to Article V(B) of the trust, thereby subjecting the assets to execution.

After dealing with the other trust assets, the court ruled that the conveyance of the Islamorada property to Ken Bastani was subject to the outcome of the proceedings supplementary because of the lis pendens. Accordingly, the court directed the clerk to issue a writ of execution to the Sheriff of Monroe County for the execution, levy and sale of the trust's one-third interest in the property.

The first issue on appeal is whether a court can invalidate a spendthrift provision in a discretionary trust where the beneficiary has

no express control over the trust, and thereby allow the beneficiary's creditors to reach trust assets before they are distributed. The second issue is whether a merger occurred such that the James Trust terminated by law or through Article V(B) of the trust. These issues are purely legal and are subject to de novo review by this court. See *City of Hollywood v. Petrosino*, 864 So.2d 1175, 1177 (Fla. 4th DCA 2004).

^[1] Florida law recognizes the validity of spendthrift trusts. See *Waterbury v. Munn*, 159 Fla. 754, 32 So.2d 603, 605 (1947). A spendthrift trust is a trust "created with a view of providing a fund for the maintenance of another, and at the same time securing it against his own improvidence or incapacity for self-protection." *Croom v. Ocala Plumbing & Elec. Co.*, 62 Fla. 460, 57 So. 243, 244 (1911). When a trust includes a valid spendthrift provision, a beneficiary may not transfer his interest in the trust and a creditor or assignee of the beneficiary may not reach any interest or distribution from the trust until the beneficiary receives the interest or distribution. § 736.0502(3), Fla. Stat. (2009). However, when a trust requires mandatory distributions to a beneficiary, a creditor or assignee of the beneficiary may reach those distributions if the trustee has not made them within a reasonable time after the designated distribution date. § 736.0506(2), Fla. Stat. (2009).

^[2] Courts have invalidated spendthrift provisions where a trust provides a beneficiary with express control to demand distributions from the trust or terminate the trust and acquire trust assets. See *Croom*, 57 So. at 244-45; see, e.g., *Dollinger v. Bottom*

(*In re Bottom*), 176 B.R. 950, 952 (Bankr.N.D.Fla.1994); *First Fla. Nat'l Bank, N.A. v. Smith (In re Smith)*, 129 B.R. 262, 264-65 (M.D.Fla.1991); *Putney v. May (In re May)*, 83 B.R. 812, 814-15 (Bankr.M.D.Fla.1988); *In re Gillett*, 46 B.R. 642, 644-45 (Bankr.S.D.Fla.1985); *Nixon v. P.J. Pedone & Co. (In re Nichols)*, 42 B.R. 772, 776 (Bankr.M.D.Fla.1984). In these cases, the beneficiary's express control over the trust determines the extent to which the spendthrift provision is invalid. If the trust allows the beneficiary to control all of the trust assets by terminating the trust or demanding distribution of the entire trust corpus, a court will allow the beneficiary's creditor to reach the entire trust corpus. See, e.g., *In re Smith*, 129 B.R. at 264-65; *In re Gillett*, 46 B.R. at 644-45; *Croom*, 57 So. at 244-45. Likewise, if the trust allows for the beneficiary to demand a distribution of only a portion of the trust property, the courts have allowed a creditor to attach that portion over which the beneficiary has express control. See, e.g., *In re May*, 83 B.R. at 814; *In re Monahan*, 68 B.R. 997, 1000 (Bankr.S.D.Fla.1987).

^[3] The James Trust does not give James any express control over distributions *176 of the assets. Jerry, as trustee, has sole discretion to distribute income or principal to James, or to terminate the trust under Article V(B). Nevertheless, the trial court concluded that James's exercise of significant control over the trust invalidated the spendthrift provision, allowing James's creditors to reach the entire trust corpus. While we agree that the facts in this case are perhaps the most egregious example of a trustee abdicating his responsibilities to manage and distribute trust property, the law

requires that the focus must be on the terms of the trust and not the actions of the trustee or beneficiary. In this case, the trust terms granted Jerry, not James, the sole and exclusive authority to make distributions to James. The trust did not give James any authority whatsoever to manage or distribute trust property.

When a trust document provides the trustee with complete discretion over distributions, a creditor may only reach those distributions the trustee chooses to make. § 736.0504(2), Fla. Stat. (2009). The creditor may not compel a distribution from the trustee or attach any interest in the trust before the trustee makes a distribution. *Id.* This applies whether or not the trustee has abused his discretion in managing the trust. § 736.0504(1), Fla. Stat. (2009). There is no law in Florida suggesting that a beneficiary's creditors may reach trust assets in a discretionary trust simply because the trustee allows the beneficiary to exercise significant control over the trust. It is only when a beneficiary has received distributions from the trust, or has the *express right* to receive distributions from the trust, that the creditor may reach those distributions.

In this case, James may ask Jerry for as many distributions as he wants, and Jerry may choose to fulfill all of those requests. However, because Jerry has sole discretion to make distributions, he may also choose to deny James's requests at any time, and James would have no recourse against him unless he were abusing his discretion as trustee. Until Jerry makes a distribution to James, Kresser and other creditors may not satisfy James's debts through trust assets.

Accordingly, the trial court erred in invalidating the James Trust's spendthrift provision and allowing Kresser to reach trust assets before they have been distributed to James.

To conclude otherwise would ignore the realities of the relationship between a beneficiary and trustee of a discretionary trust—the beneficiary always pining for distributions which he feels are rightfully his, and the trustee striving to allow only those distributions that coincide with the settlor's express intent, as set forth in the trust documents. It is the settlor's prerogative to choose the trustee she believes will best fulfill the conditions of the trust. In the case before us, it is not the role of the courts to evaluate how well the trustee is performing his duties. We are instead limited, by statute, to evaluating the express language of the trust to determine the extent of the beneficiary's control and the extent to which a creditor may reach trust assets. It is the legislature's function to carve out any exceptions to the protections afforded by discretionary and spendthrift trusts.

As an additional ground for allowing Kresser to reach trust assets, the trial court concluded that Jerry had effectively turned over all of the James Trust's assets to James, triggering Article V(B) of the trust. Article V(B) allows Jerry to terminate the trust by distributing the entire principal to James. The court held that there had been a merger of the trustee and beneficiary by virtue of James's control over the trust. The court clarified, however, that it was not terminating the trust altogether.

*177 [4] [5] "In order to sustain a trust entity,

there must be a separation between the legal and equitable interests of the trust.” *Contella v. Contella*, 559 So.2d 1217, 1218 (Fla. 5th DCA 1990) (citing *Axtell v. Coons*, 82 Fla. 158, 89 So. 419, 420 (1921)). When no separation exists, legal and equitable interests merge and the trust may be terminated. *Id.* However, “merger applies *only* when the legal and equitable interests are held by one person and are coextensive and commensurate-*i.e.*, the legal estate and the equitable estate are the same.” *Id.* at 1219.

[6] Upon the establishment of the James Trust, Jerry held legal title and James held equitable title. *See Hansen v. Bothe*, 10 So.3d 213, 216 (Fla. 2d DCA 2009) (“Upon the establishment of a trust, the legal title is held by the trustee, but equitable title rests with the beneficiary.”). For the merger doctrine or Article V(B) to apply, Jerry would have to convey legal title of the trust principal to James. This conveyance never occurred. Moreover, the trial court did not terminate the trust, as would be required

with a merger or under Article V(B). Thus, to the extent that the trial court relied on these mechanisms to allow Kresser to reach trust assets, it erred.

We therefore reverse the final judgment in proceedings supplementary to the extent that it invalidates the James Trust’s spendthrift provision and allows Kresser to reach trust assets before they are distributed to James. In so doing, we also quash the writ of execution on the Islamorada property.

Reversed.

HAZOURI and MAY, JJ., concur.

Parallel Citations

35 Fla. L. Weekly D996

Footnotes

¹ We sua sponte consolidate cases 4D09-759 and 4D09-760 for purposes of this opinion.

² Article X, the trust’s spendthrift provision, states the following:
The right of any person to receive any amount, whether of income or principal, pursuant to any of the provisions of this agreement, shall not, in any manner, be anticipated, alienated, assigned or encumbered, and shall not be subject to any legal process or bankruptcy or insolvency proceeding or to interference or control by creditors or others.

³ Article V(B) of the trust, entitled “Discretionary Payments by Independent Trustee,” states the following:
In granting the trustee discretion over the payment of the income and principal of the trusts under this agreement, it is the settlor’s intention that the independent trustee ... (2) shall have complete discretion to terminate any trust by distributing the entire principal to the beneficiary or beneficiaries eligible to receive distributions from such trust (and if more than one, in equal or unequal shares and to the exclusion of any one or more of them) without further accountability to anyone if the independent trustee determines that continuation of such trust is inadvisable in view of the size of the trust or for any other reason.

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463 So.2d 218
Supreme Court of Florida.

Adriana BACARDI, Petitioner,
v.
Robert B. WHITE, Trustee, and Luis
Facundo Bacardi, Respondents.

No. 65181. | Jan. 31, 1985.

Husband, the beneficiary of a spendthrift trust, along with one of the trustees, appealed from order of the Circuit Court, Dade County, Lewis B. Whitworth, J., directing that trust income be garnished to satisfy provision in final judgment of dissolution which required husband to pay \$2,000 per month in alimony and providing for a continuing writ of garnishment for future alimony payments without further order of the court. The District Court of Appeal, Third District, 446 So.2d 150, reversed and remanded. On application for review, the Supreme Court, Alderman, J., held that disbursements from spendthrift trusts, in certain limited circumstances, may be garnished to enforce court orders or judgments for alimony before such disbursements reach debtor beneficiary; also, order or judgment for attorney fees awarded incident to divorce or enforcement proceedings may be collected in same manner.

Quashed and remanded.

Boyd, C.J., dissented.

West Headnotes (5)

- [1] **Divorce**
 - ☞ Trusts and trustees
 - Divorce**
 - ☞ Enforcement and contempt

Disbursements from spendthrift trusts, in certain limited circumstances, may be garnished to enforce court orders or judgments for alimony before such disbursements reach debtor beneficiary; also, order or judgment for attorney fees awarded incident to divorce or enforcement proceedings may be collected in same manner.

5 Cases that cite this headnote

- [2] **Trusts**
 - ☞ Application of general rules of construction

Basic tenet for construction of trusts is to ascertain intent of settlor and to give effect to this intent.

4 Cases that cite this headnote

- [3] **Divorce**

☞ Alimony and Support Arrearages;
Credits and Overpayments

Divorce

☞ Trusts and trustees

Garnishment of spendthrift trust to enforce alimony orders or judgment should be allowed only as last resort; if debtor or his property is within jurisdiction of state's courts, traditional methods of enforcing alimony arrearages may be sufficient.

5 Cases that cite this headnote

[4]

Divorce

☞ Trusts and trustees

Right to garnish spendthrift trust to enforce alimony orders or judgment is limited to disbursements that are due to be made or which are actually made from the trust; if, under terms of the trust, disbursement of corpus or income is due to debtor beneficiary, such disbursement may be subject to garnishment; if disbursements are wholly within trustee's discretion, court may not order trustee to make such disbursements; however, if trustee exercises its discretion and makes disbursement, that disbursement may be subject to writ of garnishment.

9 Cases that cite this headnote

[5]

Divorce

☞ Trusts and trustees

Continuing garnishment against spendthrift trust may be sustained in lieu of ne exeat as necessary to secure payment of alimony, but this is a "last resort" remedy that is available only when traditional methods of enforcing alimony arrearages are not effective; where continuing garnishment is appropriate, trustee, if it wishes to make payments to debtor beneficiary in excess of alimony then due, should seek court approval before it makes such payments, and court may then authorize such payments if sufficient assets remain in trust or if other provisions are made to secure payment of alimony to person who should receive it.

10 Cases that cite this headnote

Attorneys and Law Firms

*219 Joe N. Unger of the Law Offices of Joe N. Unger, P.A., Miami, and Nard S. Helman of Helman & Young, Coral Gables, for petitioner.

Steven Naclerio, Miami, for Robert B. White.

Roger D. Haagenon, Fort Lauderdale, for Luis Facundo Bacardi.

Opinion

ALDERMAN, Justice.

Adriana Bacardi seeks review of the decision of the District Court of Appeal, Third District, in *White v. Bacardi*, 446 So.2d 150 (Fla. 3d DCA 1984), which expressly and directly conflicts with *Gilbert v. Gilbert*, 447 So.2d 299 (Fla. 2d DCA 1984).¹

*220 [1] The issue presented is whether disbursements from spendthrift trusts can be garnished to satisfy court ordered alimony and attorney's fee payments before such disbursements reach the debtor-beneficiary. The Third District in *Bacardi* held that a former wife of a spendthrift trust beneficiary may not reach the income of that trust for alimony before it reaches the beneficiary unless she can show by competent and substantial evidence that it was the settlor's intent that she participate as a beneficiary. We quash the decision of the district court and hold that disbursements from spendthrift trusts, in certain limited circumstances, may be garnished to enforce court orders or judgments for alimony before such disbursements reach the debtor-beneficiary.² We also hold that an order or judgment for attorney's fees awarded incident to the divorce or the enforcement proceedings may be collected in the same manner.

The facts relevant to this holding are as follows: Luis and Adriana Bacardi were married for approximately two years and

had no children. When the marriage ended in divorce, they entered into an agreement whereby Mr. Bacardi agreed to pay Mrs. Bacardi alimony of \$2,000 per month until the death of either of them or until she remarried. The final judgment dissolving their marriage incorporated this agreement.

Shortly thereafter Mr. Bacardi ceased paying alimony. Mrs. Bacardi subsequently obtained two judgments for the unpaid alimony, with execution authorized, in the total amount of \$14,000. She also obtained a third judgment for attorney's fees in the amount of \$1,000 awarded incident to the divorce. In aid of execution on the three judgments, she served a writ of garnishment on Robert White as a trustee of a spendthrift trust created by Mr. Bacardi's father for the benefit of his son Luis. Additionally, she obtained a continuing writ of garnishment against the trust income for future alimony payments as they became due.

The trust instrument contained a spendthrift provision which stated:

No part of the interest of any beneficiary of this trust shall be subject in any event to sale, alienation, hypothecation, pledge, transfer or subject to any debt of said beneficiary or any judgment against said beneficiary or process in aid of execution of said judgment.

Both Luis Bacardi and Mr. White appealed the trial court's garnishment order. They

asserted that under this spendthrift provision, *221 the trust could not be garnished for the collection of alimony and incident attorney's fees. The district court agreed, reversed the trial court's order, and remanded the case for further proceedings.

The district court noted that this state has long recognized the validity of spendthrift trust provisions, *Waterbury v. Munn*, 159 Fla. 754, 32 So.2d 603 (1947), and further that Florida has no statutory law limiting or qualifying spendthrift provisions where alimony payments are involved. In deciding this case, the district court aligned itself with what it believed to be both the modern trend and the best reasoned view. It stated that its holding squares with the public policy of this state as expressed in *Waterbury v. Munn*. It concluded that the legislature, rather than the courts, should resolve the question whether that public policy should yield to the competing public policy of enforcing support.

Respondents urge that we approve the district court's decision and hold that the settlor's intent prevails over any public policy arguments which would allow the alienation of disbursements from the trust. They contend that an ex-wife's debt is no different than any ordinary debt even though it represents unpaid alimony and related attorney's fees and that, therefore, her claim should be treated the same as the claim of any other creditor. They assert that it is clear from reading the spendthrift provision that the settlor did not intend Adriana Bacardi to participate as a beneficiary and that this intent precludes garnishment.

This case involves competing public

policies. On the one hand, there is the long held policy of this state that recognizes the validity of spendthrift trusts. On the other hand, there is the even longer held policy of this state that requires a former spouse or a parent to pay alimony or child support in accordance with court orders. When these competing policies collide, in the absence of an expression of legislative intent, this Court must decide which policy will be accorded the greater weight.

[2] We recognize that spendthrift trusts serve many useful purposes such as protecting beneficiaries from their own improvidence, protecting parties from their financial inabilities, and providing a fund for support, all of which continue to have merit. We acknowledge that one of the basic tenets for the construction of trusts is to ascertain the intent of the settlor and to give effect to this intent. See *West Coast Hospital Association v. Florida National Bank*, 100 So.2d 807 (Fla.1958). We are also aware that some courts of other jurisdictions have refused to invade spendthrift income for alimony and support solely on the basis that the settlor's intent controls. For example, in *Erickson v. Erickson*, 197 Minn. 71, 266 N.W. 161 (1936), the Minnesota Supreme Court held that the ex-wife of a spendthrift trust beneficiary could not reach his interest for alimony and support and stated:

When unrestrained by statute it is the intent of the donor, not the character of the donee's obligation, which controls the availability and disposition of his gift. The donee's obligation to pay alimony or support money, paramount though it may be, should not, in our opinion, transcend the right of the donor to do as he pleases

with his own property and to choose the object of his bounty. Our conclusion does not arise out of any anxiety for the protection of the beneficiary. In the absence of statute and within the limits as to perpetuities, a donor may dispose of his property as he sees fit, and this includes corpus or principal as well as income.

Id. at 78; 266 N.W. at 164 (emphasis supplied). *Accord Bucknam v. Bucknam*, 294 Mass. 214, 200 N.E. 918 (1936); *Dinwiddie v. Baumberger*, 18 Ill.App.3d 933, 310 N.E.2d 841 (1974).

Other jurisdictions have permitted an ex-spouse to reach the income of a spendthrift trust for alimony and child support on public policy grounds finding that the legal obligation of support is more compelling than enforcing the settlor's intent. *See *222 Safe Deposit & Trust Co. v. Robertson*, 192 Md. 653, 65 A.2d 292 (1949) (spendthrift trust provisions should not be extended to alimony claims because the ex-spouse is a favored suitor and the claim is based upon the strongest public policy grounds); *Lucas v. Lucas*, 365 S.W.2d 372 (Tex.Civ.App.1962) (public policy will not allow a spendthrift trust beneficiary to be well taken care of when those who he has a legal duty to support must do without such support); *Dillon v. Dillon*, 244 Wis. 122, 11 N.W.2d 628 (1943) (public policy will not prohibit spendthrift trust funds from being reached by a beneficiary's wife). *See also Restatement (Second) of Trusts* § 157 (1959).

This state has always had a strong public policy favoring the enforcement of both alimony and child support orders. For

example, in *Brackin v. Brackin*, 182 So.2d 1 (Fla.1966), we held that the basis of an order awarding alimony or support money is the obligation imposed by law that a spouse do what in equity and good conscience he or she ought to do under the circumstances. We said: "Unlike judgments and decrees for money or property growing out of other actions, alimony and support money may have no foundation other than the *public policy* which requires the husband to pay what he ought to pay...." *Id.* at 6 (emphasis supplied). In *City of Jacksonville v. Jones*, 213 So.2d 259 (Fla. 1st DCA 1968), the district court stated "[t]he *public policy* of this state requires that judicial orders providing for payment of child support be enforceable." *Id.* at 259.

We have weighed the competing public policies and, although we reaffirm the validity of spendthrift trusts, we conclude that in these types of cases the restraint of spendthrift trusts should not be an absolute bar to the enforcement of alimony orders or judgments. Florida's interest in the enforcement of these awards under certain limited circumstances is paramount to the declared intention of the settlor and the restraint of a spendthrift trust.

[3] In not every case where someone is attempting to enforce alimony orders or judgment, however, will garnishment of a spendthrift trust be appropriate. This enforcement alternative should be allowed only as a last resort. If the debtor himself or his property is within the jurisdiction of this state's courts, the traditional methods of enforcing alimony arrearages may be sufficient. In this event, there would be no overriding reason to defeat the intent of the

settlor. Florida courts have a variety of methods available to enforce alimony and child support. When these traditional remedies are not effective, it would be unjust and inequitable to allow the debtor to enjoy the benefits of wealth without being subject to the responsibility to support those whom he has a legal obligation to support.

[4] We further limit this right of garnishment to disbursements that are due to be made or which are actually made from the trust. If, under the terms of the trust, a disbursement of corpus or income is due to the debtor-beneficiary, such disbursement may be subject to garnishment. If disbursements are wholly within the trustee's discretion, the court may not order the trustee to make such disbursements. However, if the trustee exercises its discretion and makes a disbursement, that disbursement may be subject to the writ of garnishment.

This case raises another issue. The trial court ordered a continuing garnishment against the Bacardi trust for future payments of alimony as the sums became due. This order was challenged on appeal by the trustee and the debtor-beneficiary. In light of its holding that the trust was not subject to garnishment, the district court did not consider this issue. Since we quash the district court's holding, it is appropriate that we consider and resolve this issue.

The same point was presented and decided by the Second District in *Gilbert v. Gilbert*. In that case, the husband objected to a continuing writ of garnishment for future alimony against his spendthrift trust. He argued that section 61.12(2), Florida Statutes (1981), which authorized

continuing writs of garnishment to enforce orders for alimony and child support, is *223 applicable only to the garnishment of an employer. The Second District, in responding to this argument, held that the same result could be obtained under the provisions of section 61.11, Florida Statutes (1981), which reads as follows:

61.11 *Effect of judgment of alimony.*—A judgment of alimony granted under s. 61.08 or s. 61.09 releases the party receiving the alimony from the control of the other party, and the party receiving the alimony may use his alimony and acquire, use, and dispose of other property uncontrolled by the other party. When either party is about to remove himself or his property out of the state, or fraudulently convey or conceal it, the court may award a ne exeat or injunction against him or his property and make such orders as will secure alimony to the party who should receive it.

The *Gilbert* court said:

The remedy is drastic but appropriate to cope with the husband's misconduct. We, therefore, sustain the continuing aspect of the

order in lieu of ne exeat as necessary to secure payment of alimony. The bank may continue to administer the trust according to its provisions, but to protect itself it will need to withhold all payments due to the husband in excess of alimony then due and owing in order to secure the future alimony payments. The bank is entitled to seek the court's instructions, and the order is always subject to modification upon a proper showing by any interested party. *Id.* at 302-03.

^{15]} We agree that the continuing aspect of such orders may be sustained in lieu of ne exeat as necessary to secure payment of alimony. It should be remembered, however, that a continuing garnishment against a spendthrift trust in lieu of ne exeat is also a "last resort" remedy that is available only when the traditional methods of enforcing alimony arrearages are not effective. We also note that where a continuing garnishment is appropriate, the trustee, if it wishes to make payments to the debtor-beneficiary in excess of alimony then due, should seek court approval before it makes such payments. The court may then authorize such payments if sufficient assets

remain in the trust or if other provisions are made to secure the payment of alimony to the person who should receive it.

We also hold that an order awarding attorney's fees or a judgment for such fees which result from the divorce or enforcement proceedings are collectible in the same manner. Such awards represent an integral part of the dissolution process and are subject to the same equitable considerations. If the ex-spouse must pay attorney's fees out of the support awards, it only reduces the amount of support available to the needy party. This is especially true where post-decretal services are required by an attorney to enforce such awards.

Accordingly, we quash the decision of the district court and remand this case for further proceedings consistent with our opinion.

It is so ordered.

ADKINS, OVERTON, McDONALD, EHRlich and SHAW, JJ., concur.

BOYD, C.J., dissents.

Parallel Citations

10 Fla. L. Weekly 93

Footnotes

¹ The facts in *Gilbert*, as stated by the Second District Court, are as follows:

In the judgment of dissolution, the court ordered the husband to pay permanent periodic alimony of \$2,500 per month and lump sum alimony in the amount of \$35,000 payable in six-month installments of \$3,500. The court also required that he be responsible for reasonable and necessary medical expenses of the wife attributable to her multiple sclerosis and that he pay her attorney's fees of \$24,750. The husband never paid the attorney's fees and later stopped paying alimony and the wife's medical expenses. The court entered a writ of ne exeat and held him in contempt, but these actions proved futile because he fled the jurisdiction. He is now thought to be living in England. The husband also removed his assets from the state, thereby thwarting the wife's efforts to collect the arrearages.

In her efforts to enforce the dissolution judgment, the wife sought to garnish the husband's interest in a trust established by Emily H. Gilbert for the benefit of various beneficiaries and administered by Southeast Bank as trustee. The trust contained the following paragraph:

5.2—Spendthrift Provision; the interest of each beneficiary in the income or principal of each trust hereunder shall be free from the control or interference of any creditor of a beneficiary or of any spouse of a married beneficiary and shall not be subject to attachment or susceptible of anticipation or alienation.

Notwithstanding this provision, the court entered judgment in garnishment against the bank as trustee for \$50,500 arrearages in alimony and medical expenses and \$18,000 in attorney's fees. The court also entered a continuing writ of garnishment directing the bank to pay to the wife out of the trust the periodic and lump sum alimony as it becomes due. *Id.* at 300-01.

The *Gilbert* court held:

In light of our strong public policy toward requiring persons to support their dependents, we hold that spendthrift trusts can be garnished for the collection of arrearages in alimony. We also believe that a claim for attorney's fees awarded incident to the divorce is collectible in the same manner. *Id.* at 302.

- 2 Although this case involves a garnishment to enforce court orders or judgments for alimony, the rationale of our holding would also apply to child support cases.

500 So.2d 737
District Court of Appeal of Florida,
First District.

In re The Former Marriage of Sandra (Mundy)
STONE, and Harry L. Mundy, III.
SOUTHEAST BANK OF SARASOTA, Appellants,

v.
Sandra (Mundy) STONE, Appellee.

No. BI-311.

Jan. 13, 1987.

Trustee of discretionary spendthrift trust appealed order of the Circuit Court for Escambia County, M.C. Blanchard, J., directing trustee to deduct child support payments from its trust account in favor of ex-husband. The District Court of Appeal, Smith, J., held that circuit court was not authorized to issue income deduction or to compel exercise of discretion by trustee.

Reversed.

West Headnotes (2)

[1] **Child Support**
☞ Garnishment and Wage Execution

Neither case law nor statute providing remedy for collecting child support payments by means of income deduction order authorized trial court to order disbursements from discretionary trust. West's F.S.A. § 61.1301.

1 Cases that cite this headnote

[2] **Child Support**
☞ Execution

Circuit court erred in issuing unconditional income deduction order against ex-husband's discretionary spendthrift trust account prior to there having been an actual disbursement.

West's F.S.A. § 61.1301.

2 Cases that cite this headnote

Attorneys and Law Firms

*737 Kathleen E. Gainsley of Levin, Warfield, Middlebrooks, Mabie, Thomas, Mayes & Mitchell, Pensacola, for appellants.

J.B. Murphy of Murphy, Beronet, Parks and Oberhausen, Pensacola, for appellee.

Opinion

SMITH, Judge.

Appellant, Southeast Bank of Sarasota, appeals the trial court's income deduction order directing the bank to deduct child support payments from its trust account in favor of Harry L. Mundy, III. Appellant also appeals the trial court's order awarding attorney's fees to the ex-wife. We reverse.

Southeast Bank is the trustee of a discretionary spendthrift trust in favor of the grandson and ex-husband, Harry L. Mundy, III. All disbursements to Mundy are at the sole discretion of the trustee. There are no scheduled distributions and no percentages to be distributed to Mundy at specified times.

Harry L. Mundy, III, and Sandra (Mundy) Stone, formerly husband and wife, were divorced on February 5, 1976. The wife received custody of their minor child, Phillip L. Mundy, and the husband was ordered to pay monthly child support. The *738 husband failed to meet his support obligations which necessitated intervention by the court on several occasions.

On March 13, 1985, the court issued an income deduction order directed to Southeast Bank. The bank contested the order and the ex-wife, Mrs. Stone, responded by filing a motion to enforce the order. After hearing argument of counsel, the court issued an order on August 7, 1985, directing Southeast Bank to deduct from the trust in favor of Harry L. Mundy, III, first from income and then from principal, if necessary, the sum of \$5,254.00, representing the arrearage of child support, plus the sum of \$604.00

per month for a period of fourteen months and thereafter the sum of \$504.00 per month during the child's dependency. In a separate order dated August 20, 1985, the trial court ordered Southeast Bank to pay the ex-wife's legal fees in the amount of \$1,000.00.

[1] Appellant contends that section 61.1301, Florida Statutes (1984 Supp.), does not authorize a trial court to order disbursements from a discretionary trust. We agree.

[2] Section 61.1301, Florida Statutes (1984), states the following:

In addition and together with any such child support order or modification thereof pursuant to Section 61.13(1)(c), the court shall issue an income deduction order which directs the employer or former employer, or other person or agency providing or administering income to the person obligated for payment of child support, as specified in section 61.181(3)(b)(3), to deduct from all money DUE AND PAYABLE to such person, the ENTITLEMENT to which moneys is based upon, but not limited to, remuneration for present and past employment, commissions and bonuses, retirement dividends, royalties, or TRUST ACCOUNTS, such amounts as are required to meet the obligation as provided in section 61.181(3)(b). The income deduction order shall be forwarded to the entity authorized by law to receive, record, and disburse the child support payments of the person obligated for payment of child support; and the order shall take effect only upon service of a copy thereof in accordance with the provisions of section 61.181(3) or section 409.2574(4), as appropriate. (Emphasis supplied).

The above provision provides a remedy for collecting child support payments by means of an income deduction order. The trial court is authorized, among other things, to direct the trustee of a trust to deduct child support payments from all moneys "due and payable" to the debtor or beneficiary to which he is entitled according to the terms and conditions of the trust. By the use of such language as "due and payable" and "entitlement," it is

clear that the Legislature intended this provision to apply to trusts involving scheduled distributions. Conversely, it is clear that the Legislature did not intend this provision to apply to compel payment from trusts where distributions are wholly within the discretion of the trustee, because there would be no moneys "due and payable" and no "entitlement" to any income until the trustee had exercised his discretion to distribute funds. Since, in the instant case, distributions to the ex-husband are solely within the trustee's discretion, the circuit court erred as a matter of law in issuing an unconditional income deduction order against the ex-husband's trust account prior to there having been an actual disbursement.

Appellant also contends that *Bacardi v. White*, 463 So.2d 218 (Fla.1985), controls the issuance of income deduction orders against spendthrift trusts. We agree. In *Bacardi*, the Florida Supreme Court held that spendthrift trusts were subject to garnishment to enforce support orders and judgments. However, the court placed certain limitations on the power of the trial court to invade spendthrift trusts. First, the court stated that this was a last resort remedy which should be used only after all traditional methods of enforcement had been exhausted. Second, the court stated that the remedy would be available against disbursements due to be made or which were actually made from the trust and that *739 disbursements wholly within the discretion of the trustee would be excluded until such disbursements were actually made, at which point, they would be subject to a writ of garnishment.

Section 61.1301 was enacted by the 1984 Legislature (Chapter 84-110) and became effective on January 1, 1985. The Florida Supreme Court released its *Bacardi* opinion on January 31, 1985 which was after the effective date of the statute. When the Legislature enacted section 61.1301, two intermediate appellate court decisions had been released on the issue of whether spendthrift trusts were subject to garnishment for payment of court-ordered alimony. *White v. Bacardi*, 446 So.2d 150 (Fla. 3d DCA 1984) and *Gilbert v. Gilbert*, 447 So.2d 299 (Fla. 2d DCA 1984). These two decisions were in direct and explicit conflict.

In drafting section 61.1301, the Legislature included "trust accounts" in its enumeration of sources of income which would be subject to income deduction orders. The provision is silent on the status of spendthrift trusts, however. In light of the long-standing validity of spendthrift trusts in this state and the confusion in the case law when the statute was passed, it is clear that the Legislature simply did not address the issue, except for its exclusion by implication of discretionary distributions which were not due and payable. Had the Legislature

intended to limit or qualify the effectiveness of spendthrift trusts, it is reasonable to assume it would have specifically addressed the issue.

To reiterate, neither *Bacardi v. White, supra*, nor section 61.1301, Florida Statutes (1984 Supp.) authorizes the circuit court to issue an income deduction order to compel the exercise of discretion by the trustee of a discretionary spendthrift trust. First, we have noted that *Bacardi* controls the issuance of income deduction orders against spendthrift trusts. However, had the trust instrument herein not included a spendthrift clause, then section 61.1301 would still have prohibited the order from being issued because of the discretionary nature of the trust. Both statutory and case law are in agreement that until disbursements are actually made or due to be made from a

discretionary trust, they are not subject to court-ordered enforcement measures.

REVERSED.

WENTWORTH and BARFIELD, JJ., concur.

All Citations

500 So.2d 737, 12 Fla. L. Weekly 249

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LEGISLATIVE POSITION REQUEST FORM

GOVERNMENTAL AFFAIRS OFFICE

Date Form Received _____

GENERAL INFORMATION

Submitted By Lauren Detzel and Charles Nash, Co-Chairs, Ad Hoc Study Committee on Elective Share Revision Real Property Probate & Trust Law Section

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(List name, address and phone number)

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

Meetings with Legislators/staff (SAME)
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PROPOSED ADVOCACY

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

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

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

Proposed Wording of Position for Official Publication:

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

Reasons For Proposed Advocacy:

With respect to the changes relating to protected homestead, those changes are necessary because there is a serious anomaly that results with respect to the amount of the elective share that a surviving spouse receives based upon whether a marital residence was owned as tenants by the entireties by both spouses or if it was owned solely by the deceased spouse. The statutory changes are designed to ameliorate those discrepancies. With respect to the change in the amount of the elective share, the current statute provides for an elective share equal to 30% of the elective estate, no matter how short or long the decedent and spouse were married. Under current law, the elective share amount is the same whether a decedent was married to his/her spouse for 40 minutes or 40 years. It is believed a sliding percentage based upon the number of years of marriage would be more equitable. With respect to the new provisions dealing with attorney's fees, it was determined that there should be an award of attorney's fees and costs applicable to all parties who litigate in an elective share proceeding and adopts the standard used in other sections of the Florida Probate Code and the Florida Trust Code, thus making it applicable to all parties involved in an elective share litigation, whereas currently attorney's fees are only allowed to the personal representative. An additional interest provision was added to incentivize personal representatives and other persons to make payment of the elective share amount in a timely basis and therefore, if as to any amount of the elective share unpaid after two years, interest will be assessed at the regular Florida statutory rate. Finally, an additional provision was added to Florida Statute 738.606 to assure that elective share trust qualification is not inadvertently lost due to improper drafting.

PRIOR POSITIONS TAKEN ON THIS ISSUE

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

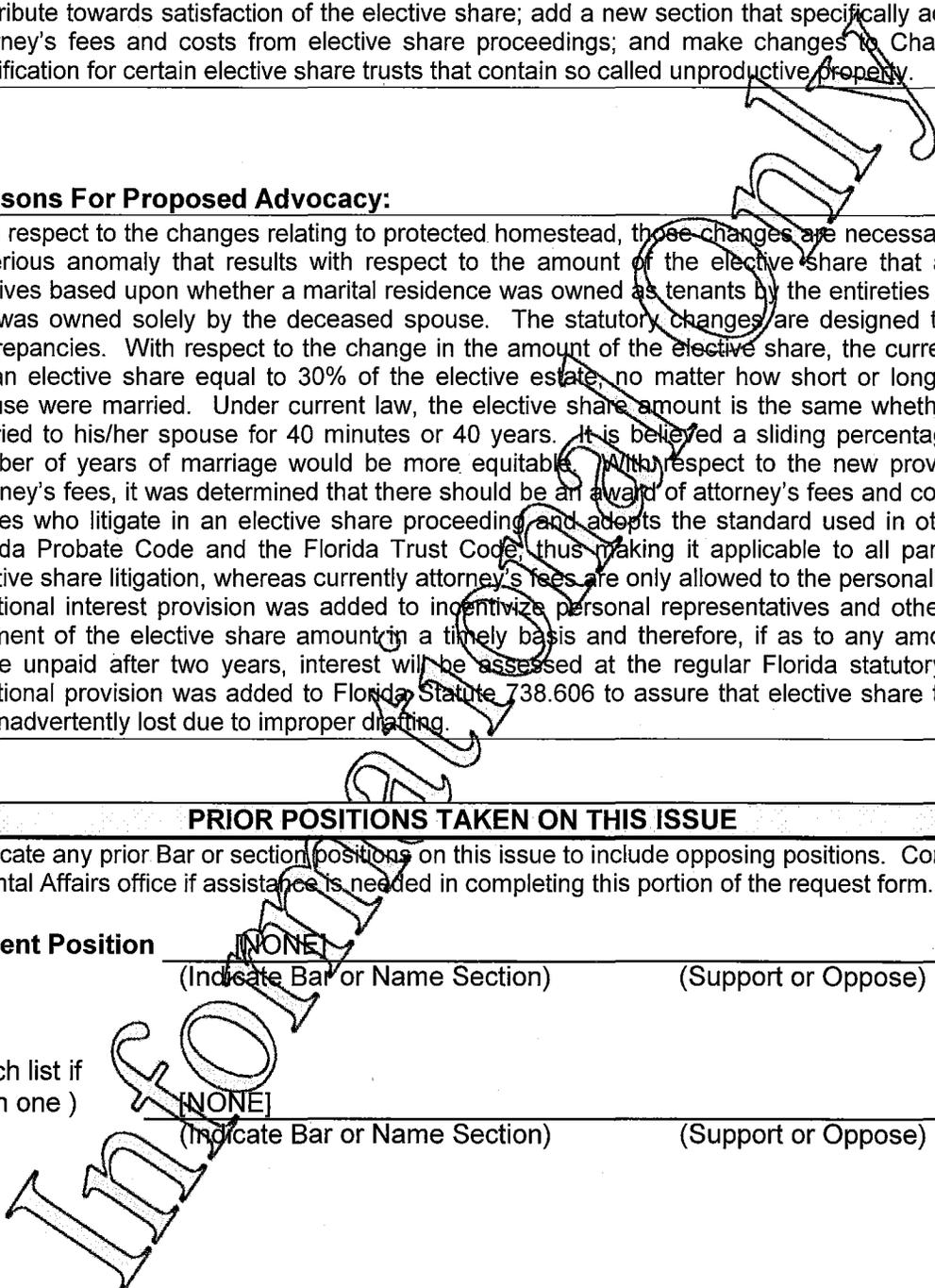
Most Recent Position

[NONE] _____
(Indicate Bar or Name Section) (Support or Oppose) (Date)

Others

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Referrals

Family Law Section of The Florida Bar (Name of Group or Organization)	(Support, Oppose or No Position)
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Please submit completed Legislative Position Request Form, along with attachments, to the Governmental Affairs Office of The Florida Bar. Upon receipt, staff will further coordinate the scheduling for final Bar action of your request which usually involves separate appearances before the Legislation Committee and the Board of Governors unless otherwise advised. For information or assistance, please telephone (904) 561-5662 or 800-342-8060, extension 5662.

Informational Only

1 A bill to be entitled

2 An act relating to the elective share; amending s. 732.2035, F.S., to include protected
3 homestead in the elective estate, and renumbering subsections thereunder; amending
4 732.2045, F.S., to modify the circumstances under which property which constitutes
5 the decedent's protected homestead is excluded from the elective estate; amending
6 732.2055, F.S., to add provisions to quantify the value in the elective estate of an
7 interest in the decedent's protected homestead property received by the surviving
8 spouse, and renumbering subsections thereunder; amending s. 732.2065, F.S., to
9 quantify the amount of the elective share based upon the length of the decedent's
10 marriage to the surviving spouse; amending s. 732.2085, F.S., to impose statutory
11 interest on any portion of a contribution required to satisfy the elective share that
12 remains unpaid two years after the decedent's death; amending s. 732.2095, F.S., to
13 add provisions regarding the satisfaction of the elective share with protected
14 homestead, and renumbering subsections thereunder; amending s. 732.2135, F.S., to
15 strike the provision allowing assessment of attorney's fees and costs as being
16 unnecessary with the enactment of new section 732.2165, F.S., pursuant to this act;
17 amending s. 732.2145, F.S., to harmonize the payment of interest required on
18 contributions to the elective share with the changes made by this act to s. 732.2085,
19 F.S.; creating new section 732.2165, F.S., pertaining to the award of attorney fees
20 and costs in elective share proceedings; and amending s. 738.606, F.S., to ensure
21 that the surviving spouse can require the trustee of an elective share trust to make
22 the trust property productive of income.

23 Section 1. Section 732.2035, Florida Statutes, is amended to add a new
24 subsection (2), to amend existing subsections (3), (4) and 5(a), and to renumber
25 existing subsections (3) through and including (9), to read:

26 **732.2035 Property entering into elective estate.**

27 Except as provided in s. 732.2045, the elective estate consists of the sum of
28 the values as determined under s. 732.2055 of the following property interests:

29 (1) The decedent's probate estate.

30 (2) The decedent's interest in property which constitutes the protected
31 homestead of the decedent.

32 ~~(2)(3)~~ The decedent's ownership interest in accounts or securities registered in
33 "Pay On Death," "Transfer On Death," "In Trust For," or coownership with right of
34 survivorship form. For this purpose, "decedent's ownership interest" means, in the
35 case of accounts or securities held in tenancy by the entirety, one-half of the value of
36 the account or security, and in all other cases, that portion of the accounts or
37 securities which the decedent had, immediately before death, the right to withdraw
38 or use without the duty to account to any person.

39 ~~(3)(4)~~ The decedent's fractional interest in property, other than property
40 described in subsection ~~(2)(3)~~ or subsection (7), held by the decedent in joint tenancy
41 with right of survivorship or in tenancy by the entirety. For this purpose, "decedent's
42 fractional interest in property" means the value of the property divided by the
43 number of tenants.

44 ~~(4)(5)~~ That portion of property, other than property described in subsection
45 (2) and subsection (3), transferred by the decedent to the extent that at the time of

46 the decedent's death the transfer was revocable by the decedent alone or in
47 conjunction with any other person. This subsection does not apply to a transfer that is
48 revocable by the decedent only with the consent of all persons having a beneficial
49 interest in the property.

50 ~~(5)~~(6)(a) That portion of property, other than property described in subsection
51 (2), subsection (3)(4), subsection (4)(5), or subsection (7)(8), transferred by the
52 decedent to the extent that at the time of the decedent's death:

53 1. The decedent possessed the right to, or in fact enjoyed the possession or
54 use of, the income or principal of the property; or

55 2. The principal of the property could, in the discretion of any person other
56 than the surviving spouse of the decedent, be distributed or appointed to or for the
57 benefit of the decedent.

58 In the application of this subsection, a right to payments under a commercial or
59 private annuity, an annuity trust, a unitrust, or a similar arrangement shall be treated
60 as a right to that portion of the income of the property necessary to equal the
61 annuity, unitrust, or other payment.

62 (b) The amount included under this subsection is:

63 1. With respect to subparagraph (a)1., the value of the portion of the property
64 to which the decedent's right or enjoyment related, to the extent the portion passed
65 to or for the benefit of any person other than the decedent's probate estate; and

66 2. With respect to subparagraph (a)2., the value of the portion subject to the
67 discretion, to the extent the portion passed to or for the benefit of any person other
68 than the decedent's probate estate.

69 (c) This subsection does not apply to any property if the decedent's only
70 interests in the property are that:

71 1. The property could be distributed to or for the benefit of the decedent only
72 with the consent of all persons having a beneficial interest in the property; or

73 2. The income or principal of the property could be distributed to or for the
74 benefit of the decedent only through the exercise or in default of an exercise of a
75 general power of appointment held by any person other than the decedent; or

76 3. The income or principal of the property is or could be distributed in
77 satisfaction of the decedent's obligation of support; or

78 4. The decedent had a contingent right to receive principal, other than at the
79 discretion of any person, which contingency was beyond the control of the decedent
80 and which had not in fact occurred at the decedent's death.

81 ~~(6)~~(7) The decedent's beneficial interest in the net cash surrender value
82 immediately before death of any policy of insurance on the decedent's life.

83 ~~(7)~~(8) The value of amounts payable to or for the benefit of any person by
84 reason of surviving the decedent under any public or private pension, retirement, or
85 deferred compensation plan, or any similar arrangement, other than benefits payable
86 under the federal Railroad Retirement Act or the federal Social Security System. In
87 the case of a defined contribution plan as defined in s. 414(i) of the Internal Revenue
88 Code of 1986, as amended, this subsection shall not apply to the excess of the
89 proceeds of any insurance policy on the decedent's life over the net cash surrender
90 value of the policy immediately before the decedent's death.

91 ~~(8)~~(9) Property that was transferred during the 1-year period preceding the
92 decedent's death as a result of a transfer by the decedent if the transfer was either
93 of the following types:

94 (a) Any property transferred as a result of the termination of a right or
95 interest in, or power over, property that would have been included in the elective
96 estate under subsection (4) or subsection (5) if the right, interest, or power had not
97 terminated until the decedent's death.

98 (b) Any transfer of property to the extent not otherwise included in the
99 elective estate, made to or for the benefit of any person, except:

100 1. Any transfer of property for medical or educational expenses to the extent
101 it qualifies for exclusion from the United States gift tax under s. 2503(e) of the
102 Internal Revenue Code, as amended; and

103 2. After the application of subparagraph 1., the first annual exclusion amount
104 of property transferred to or for the benefit of each donee during the 1-year period,
105 but only to the extent the transfer qualifies for exclusion from the United States gift
106 tax under s. 2503(b) or (c) of the Internal Revenue Code, as amended. For purposes of
107 this subparagraph, the term "annual exclusion amount" means the amount of one
108 annual exclusion under s. 2503(b) or (c) of the Internal Revenue Code, as amended.

109 (c) Except as provided in paragraph (d), for purposes of this subsection:

110 1. A "termination" with respect to a right or interest in property occurs when
111 the decedent transfers or relinquishes the right or interest, and, with respect to a
112 power over property, a termination occurs when the power terminates by exercise,
113 release, lapse, default, or otherwise.

114 2. A distribution from a trust the income or principal of which is subject to
115 subsection (4), subsection (5), or subsection (9) shall be treated as a transfer of
116 property by the decedent and not as a termination of a right or interest in, or a power
117 over, property.

118 (d) Notwithstanding anything in paragraph (c) to the contrary:

119 1. A "termination" with respect to a right or interest in property does not
120 occur when the right or interest terminates by the terms of the governing instrument
121 unless the termination is determined by reference to the death of the decedent and
122 the court finds that a principal purpose for the terms of the instrument relating to the
123 termination was avoidance of the elective share.

124 2. A distribution from a trust is not subject to this subsection if the
125 distribution is required by the terms of the governing instrument unless the event
126 triggering the distribution is determined by reference to the death of the decedent
127 and the court finds that a principal purpose of the terms of the governing instrument
128 relating to the distribution is avoidance of the elective share.

129 ~~(9)~~⁽¹⁰⁾ Property transferred in satisfaction of the elective share.

130 Section 2. Section 732.2045, Florida Statutes, is amended at subsection (1)(i)
131 to read:

132 ~~732.2045~~ Exclusions and overlapping application.—

133 (1) Exclusions — Section 732.2035 does not apply to:

134 (a) Except as provided in s. 732.2155(4), any transfer of property by the
135 decedent to the extent the transfer is irrevocable before the effective date of this

136 subsection or after that date but before the date of the decedent's marriage to the
137 surviving spouse.

138 (b) Any transfer of property by the decedent to the extent the decedent
139 received adequate consideration in money or money's worth for the transfer.

140 (c) Any transfer of property by the decedent made with the written consent of
141 the decedent's surviving spouse. For this purpose, spousal consent to split-gift
142 treatment under the United States gift tax laws does not constitute written consent
143 to the transfer by the decedent.

144 (d) The proceeds of any policy of insurance on the decedent's life in excess of
145 the net cash surrender value of the policy whether payable to the decedent's estate,
146 a trust, or in any other manner.

147 (e) Any policy of insurance on the decedent's life maintained pursuant to a
148 court order.

149 (f) The decedent's one-half of the property to which ss. 732.216-732.228, or
150 any similar provisions of law of another state, apply and real property that is
151 community property under the laws of the jurisdiction where it is located.

152 (g) Property held in a qualifying special needs trust on the date of the
153 decedent's death.

154 (h) Property included in the gross estate of the decedent for federal estate
155 tax purposes solely because the decedent possessed a general power of appointment.

156 (i) Property which constitutes the protected homestead of the decedent
157 ~~whether held by the decedent or by a trust at the decedent's death~~ but only if the
158 surviving spouse validly waived his or her homestead rights as provided under s.

159 732.702 or otherwise under applicable law and did not receive any interest in the
160 protected homestead upon the decedent's death.

161 Section 3. Section 732.2055 is amended to add new section (1); amend existing
162 section (1); amend existing section (2); amend existing section (3); amend existing
163 section (4); renumber existing paragraph (5), to read:

164 **732.2055 Valuation of the elective estate**

165 For purposes of s. 732.2035, "value" means:

166 (1) In the case of protected homestead:

167 (a) If the surviving spouse receives a full fee simple interest, the fair market
168 value of the protected homestead on the date of the decedent's death;

169 (b) If the surviving spouse takes a life estate as provided in s. 732.401(1), or
170 validly elects to take an undivided one-half interest as a tenant in common as
171 provided in s. 732.401(2), one-half of the fair market value of the protected
172 homestead on the date of the decedent's death;

173 (c) If the surviving spouse validly waived his or her homestead rights as
174 provided under s. 732.702 but nevertheless receives an interest in the protected
175 homestead, other than an interest described in s. 732.401, including an interest in
176 trust, the value of the surviving spouse's interest is determined as property interests
177 that are not protected homestead.

178 (d) For purposes of subsections (a) through (c) above, fair market values shall
179 be net of the aggregate amount, as of the date of the decedent's death, of all
180 mortgages, liens, or security interests to which the protected homestead is subject

181 and for which the decedent is liable, but only to the extent that such amount is not
182 otherwise deducted as a claim paid or payable from the elective estate.

183 ~~(1)(2)~~ In the case of any policy of insurance on the decedent's life includable
184 under s. 732.2035~~(4)(5)~~, ~~(5)(6)~~, or ~~(6)(7)~~, the net cash surrender value of the policy
185 immediately before the decedent's death.

186 ~~(2)(3)~~ In the case of any policy of insurance on the decedent's life includable
187 under s. 732.2035~~(8)(9)~~, the net cash surrender value of the policy on the date of the
188 termination or transfer.

189 ~~(3)(4)~~ In the case of amounts includable under s. 732.2035~~(7)(8)~~, the transfer
190 tax value of the amounts on the date of the decedent's death.

191 ~~(4)(5)~~ In the case of other property included under s. 732.2035~~(8)(9)~~, the fair
192 market value of the property on the date of the termination or transfer, computed
193 after deducting any mortgages, liens, or security interests on the property as of that
194 date.

195 ~~(5)(6)~~ In the case of all other property, the fair market value of the property
196 on the date of the decedent's death, computed after deducting from the total value
197 of the property:

- 198 (a) All claims paid or payable from the elective estate; and
199 (b) To the extent they are not deducted under paragraph (a), all mortgages,
200 liens, or security interests on the property.

201 Section 4. Section 732.2065, Florida Statutes, is amended to read:

202 **732.2065 Amount of the elective share.—**

203 ~~The elective share is an amount equal to 30 percent of the elective estate.~~

204 The elective share to which the surviving spouse is entitled is determined
205 based upon the number of years of the surviving spouse's marriage to the decedent,
206 determined as of the date of the decedent's death, as follows:

207 (a) If the decedent and the surviving spouse were last married to each other
208 for less than 5 full years, the elective share is an amount equal to 10 percent of the
209 elective estate.

210 (b) If the decedent and the surviving spouse were last married to each other
211 for at least 5 full years but less than 15 full years, the elective share is an amount
212 equal to 20 percent of the elective estate.

213 (c) If the decedent and the surviving spouse were last married to each other
214 for at least 15 full years but less than 25 full years, the elective share is an amount
215 equal to 30 percent of the elective estate.

216 (d) If the decedent and the surviving spouse were last married to each other
217 for 25 full years or more, the elective share is an amount equal to 40 percent of the
218 elective estate.

219 Section 5. Section 732.2085, Florida Statutes, is amended at subsection (3)(a)
220 to read:

221 **732.2085 Liability of direct recipients and beneficiaries.—**

222 (1) Only direct recipients of property included in the elective estate and the
223 beneficiaries of the decedent's probate estate or of any trust that is a direct
224 recipient, are liable to contribute toward satisfaction of the elective share.

225 (a) Within each of the classes described in s. 732.2075(2)(b) and (c), each
226 direct recipient is liable in an amount equal to the value, as determined under s.
227 732.2055, of the proportional part of the liability for all members of the class.

228 (b) Trust and probate estate beneficiaries who receive a distribution of
229 principal after the decedent's death are liable in an amount equal to the value of the
230 principal distributed to them multiplied by the contribution percentage of the
231 distributing trust or estate. For this purpose, "contribution percentage" means the
232 remaining unsatisfied balance of the trust or estate at the time of the distribution
233 divided by the value of the trust or estate as determined under s. 732.2055.

234 "Remaining unsatisfied balance" means the amount of liability initially apportioned to
235 the trust or estate reduced by amounts or property previously contributed by any
236 person in satisfaction of that liability.

237 (2) In lieu of paying the amount for which they are liable, beneficiaries who
238 have received a distribution of property included in the elective estate and direct
239 recipients other than the decedent's probate estate or revocable trusts, may:

- 240 (a) Contribute a proportional part of all property received; or
- 241 (b) With respect to any property interest received before the date of the
242 court's order of contribution:

- 243 1. Contribute all of the property; or
- 244 2. If the property has been sold or exchanged prior to the date on which the
245 surviving spouse's election is filed, pay an amount equal to the value of the property,
246 less reasonable costs of sale, on the date it was sold or exchanged.

247 In the application of paragraph (a), the “proportional part of all property received” is
248 determined separately for each class of priority under s. 732.2075(2).

249 (3) If a person pays the value of the property on the date of a sale or
250 exchange or contributes all of the property received, as provided in paragraph (2)(b):

251 (a) No further contribution toward satisfaction of the elective share shall be
252 required with respect to that property; except if a person's required contribution is
253 not fully paid by the date that is two years after the date of death of the decedent,
254 such person must also pay interest at the statutory rate on any portion of the required
255 contribution that remains unpaid.

256 (b) Any unsatisfied contribution is treated as additional unsatisfied balance
257 and reapportioned to other recipients as provided in s. 732.2075 and this section.

258 (4) If any part of s. 732.2035 or s. 732.2075 is preempted by federal law with
259 respect to a payment, an item of property, or any other benefit included in the
260 elective estate, a person who, not for value, receives the payment, item of property,
261 or any other benefit is obligated to return the payment, item of property, or benefit,
262 or is personally liable for the amount of the payment or the value of that item of
263 property or benefit, as provided in ss. 732.2035 and 732.2075, to the person who
264 would have been entitled to it were that section or part of that section not
265 preempted.

266 Section 6. Section 732.2095 is amended to amend existing subparagraph
267 (1)(a)6; amend existing subparagraph (1)(a)8; amend existing paragraph (2)(a); add
268 new paragraphs (2)(b) and (c); renumber the existing paragraphs under section (2), to
269 read:

270 **732.2095 Valuation of property used to satisfy elective share.—**

271 (1) DEFINITIONS.—As used in this section, the term:

272 (a) “Applicable valuation date” means:

273 1. In the case of transfers in satisfaction of the elective share, the date of the
274 decedent’s death.

275 2. In the case of property held in a qualifying special needs trust on the date
276 of the decedent’s death, the date of the decedent’s death.

277 3. In the case of other property irrevocably transferred to or for the benefit of
278 the surviving spouse during the decedent’s life, the date of the transfer.

279 4. In the case of property distributed to the surviving spouse by the personal
280 representative, the date of distribution.

281 5. Except as provided in subparagraphs 1., 2., and 3., in the case of property
282 passing in trust for the surviving spouse, the date or dates the trust is funded in
283 satisfaction of the elective share.

284 6. In the case of property described in s. 732.2035(2), (3) or ~~(3)(4)~~, the date of
285 the decedent’s death.

286 7. In the case of proceeds of any policy of insurance payable to the surviving
287 spouse, the date of the decedent’s death.

288 8. In the case of amounts payable to the surviving spouse under any plan or
289 arrangement described in s. 732.2035~~(7)~~(8), the date of the decedent’s death.

290 9. In all other cases, the date of the decedent’s death or the date the
291 surviving spouse first comes into possession of the property, whichever occurs later.

292 (b) "Qualifying power of appointment" means a general power of appointment
293 that is exercisable alone and in all events by the decedent's surviving spouse in favor
294 of the surviving spouse or the surviving spouse's estate. For this purpose, a general
295 power to appoint by will is a qualifying power of appointment if the power may be
296 exercised by the surviving spouse in favor of the surviving spouse's estate without the
297 consent of any other person.

298 (c) "Qualifying invasion power" means a power held by the surviving spouse or
299 the trustee of an elective share trust to invade trust principal for the health, support,
300 and maintenance of the surviving spouse. The power may, but need not, provide that
301 the other resources of the surviving spouse are to be taken into account in any
302 exercise of the power.

303 (2) Except as provided in this subsection, the value of property for purposes of
304 s. 732.2075 is the fair market value of the property on the applicable valuation date.

305 (a) If the surviving spouse has a life interest in property not in trust that
306 entitles the surviving spouse to the use of the property for life, including a life estate
307 in protected homestead as provided in s. 732.401(1), the value of the surviving
308 spouse's interest is one-half of the value of the property on the applicable valuation
309 date.

310 (b) If the surviving spouse elects to take an undivided one-half interest in
311 protected homestead as a tenant in common as provided in s. 732.401(2), the value of
312 the surviving spouse's interest is one-half of the value of the property on the
313 applicable valuation date.

314 (c) If the surviving spouse validly waived his or homestead rights as provided in
315 s. 732.702 or otherwise under applicable law but nevertheless receives an interest in
316 protected homestead, other than an interest described in 732.401, including an
317 interest in trust, the value of the surviving spouse's interest is determined as property
318 interests that are not protected homestead.

319 ~~(b)~~(d) If the surviving spouse has an interest in a trust, or portion of a trust,
320 which meets the requirements of an elective share trust, the value of the surviving
321 spouse's interest is a percentage of the value of the principal of the trust, or trust
322 portion, on the applicable valuation date as follows:

- 323 1. One hundred percent if the trust instrument includes both a qualifying
324 invasion power and a qualifying power of appointment.
- 325 2. Eighty percent if the trust instrument includes a qualifying invasion power
326 but no qualifying power of appointment.
- 327 3. Fifty percent in all other cases.

328 ~~(e)~~(e) If the surviving spouse is a beneficiary of a trust, or portion of a trust,
329 which meets the requirements of a qualifying special needs trust, the value of the
330 principal of the trust, or trust portion, on the applicable valuation date.

331 ~~(d)~~(f) If the surviving spouse has an interest in a trust that does not meet the
332 requirements of either an elective share trust or a qualifying special needs trust, the
333 value of the surviving spouse's interest is the transfer tax value of the interest on the
334 applicable valuation date; however, the aggregate value of all of the surviving
335 spouse's interests in the trust shall not exceed one-half of the value of the trust
336 principal on the applicable valuation date.

337 (e)(g) In the case of any policy of insurance on the decedent's life the
338 proceeds of which are payable outright or to a trust described in paragraph (b)(d),
339 paragraph (c)(e), or paragraph (d)(f), the value of the policy for purposes of s.
340 732.2075 and paragraphs (b)(d), (c)(e), and (d)(f) is the net proceeds.

341 (f)(h) In the case of a right to one or more payments from an annuity or under
342 a similar contractual arrangement or under any plan or arrangement described in s.
343 732.2035(7)(8), the value of the right to payments for purposes of s. 732.2075 and
344 paragraphs (b)(d), (c)(e), and (d)(f) is the transfer tax value of the right on the
345 applicable valuation date.

346 Section 7. Section 732.2135, Florida Statutes, is amended at subsection (5) to
347 read:

348 **732.2135 Time of election, extensions; withdrawal.—**

349 (1) Except as provided in subsection (2), the election must be filed on or
350 before the earlier of the date that is 6 months after the date of service of a copy of
351 the notice of administration on the surviving spouse, or an attorney in fact or
352 guardian of the property of the surviving spouse, or the date that is 2 years after the
353 date of the decedent's death.

354 (2) Within the period provided in subsection (1), the surviving spouse or an
355 attorney in fact or guardian of the property of the surviving spouse may petition the
356 court for an extension of time for making an election. For good cause shown, the
357 court may extend the time for election. If the court grants the petition for an
358 extension, the election must be filed within the time allowed by the extension.

359 (3) The surviving spouse or an attorney in fact, guardian of the property, or
360 personal representative of the surviving spouse may withdraw an election at any time
361 within 8 months after the decedent's death and before the court's order of
362 contribution.

363 (4) A petition for an extension of the time for making the election or for
364 approval to make the election shall toll the time for making the election.

365 ~~(5) If the court determines that an election is made or pursued in bad faith,~~
366 ~~the court may assess attorney's fees and costs against the surviving spouse or the~~
367 ~~surviving spouse's estate.~~

368 Section 8. Section 732.2145, Florida Statutes, is amended at subsection (1) to
369 read:

370 **732.2145 Order of contribution; personal representative's duty to collect**
371 **contribution.—**

372 (1) The court shall determine the elective share and contribution.
373 Contributions shall bear interest at the statutory rate beginning 90 days after the
374 order of contribution. In addition, any amount of the elective share not satisfied
375 within two years of the date of death of the decedent shall bear interest at the
376 statutory rate until fully satisfied, even if an order of contribution has not yet been
377 entered. The order is prima facie correct in proceedings in any court or jurisdiction.

378 (2) Except as provided in subsection (3), the personal representative shall
379 collect contribution from the recipients of the elective estate as provided in the
380 court's order of contribution.

381 (a) If property within the possession or control of the personal representative
382 is distributable to a beneficiary or trustee who is required to contribute in satisfaction
383 of the elective share, the personal representative shall withhold from the distribution
384 the contribution required of the beneficiary or trustee.

385 (b) If, after the order of contribution, the personal representative brings an
386 action to collect contribution from property not within the personal representative's
387 control, the judgment shall include the personal representative's costs and
388 reasonable attorney's fees. The personal representative is not required to seek
389 collection of any portion of the elective share from property not within the personal
390 representative's control until after the entry of the order of contribution.

391 (3) A personal representative who has the duty under this section of enforcing
392 contribution may be relieved of that duty by an order of the court finding that it is
393 impracticable to enforce contribution in view of the improbability of obtaining a
394 judgment or the improbability of collection under any judgment that might be
395 obtained, or otherwise. The personal representative shall not be liable for failure to
396 attempt collection if the attempt would have been economically impracticable.

397 (4) Nothing in this section limits the independent right of the surviving spouse
398 to collect the elective share as provided in the order of contribution, and that right is
399 hereby conferred. If the surviving spouse brings an action to enforce the order, the
400 judgment shall include the surviving spouse's costs and reasonable attorney's fees.

401 Section 9. Section 732.2165, Florida Statutes, is created to read:

402 **732.2165 Award of Fees and Costs in Elective Share Proceedings.**

403 (1) In all proceedings concerning the elective share under ss. 732.201-
404 732.2155, the court in its discretion may award taxable costs as in chancery actions,
405 including attorney fees, in such proportions as the court may determine, including an
406 amount against the elective share. No taxable costs, including attorney fees, may be
407 awarded against a person for legal services rendered to prepare or file any document
408 required or permitted by Rule 5.360, Florida Probate Rules.

409 (2) When awarding taxable costs, including attorney fees, the court in its
410 discretion may direct payment from a person's interest in any asset included in the
411 elective estate, or enter a judgment which may be satisfied from other assets of the
412 person to the extent of that person's interest in assets included in the elective
413 estate.

414 (3) Nothing in this section shall be construed to create or impose personal
415 liability for costs, including attorney fees, on a person in an amount that exceeds the
416 person's interest in assets included in the elective estate.

417 (4) This section shall apply to all proceedings commenced after its effective
418 date, without regard to the date of the decedent's death.

419 Section 10. Section 738.606, Florida Statutes, is amended at subsection (1) to read:

420 **738.606 Property not productive of income.—**

421 (1) If a marital deduction under the Internal Revenue Code or comparable law
422 of any state is allowed for all or any part of a trust, or if assets are transferred to a
423 trust that satisfies the requirements of ss. 732.2025(2)(a) and (c), whose assets have
424 been used in whole or in part, to satisfy an election by a surviving spouse under s.
425 732.2125, the income of which must be distributed to the grantor's spouse and, but

426 the trust assets of which consist substantially of property that, in the aggregate, does
427 not provide the surviving spouse with sufficient income from or use of the trust
428 assets, and if the amounts the trustee transfers from principal to income under
429 s. 738.104 and distributes to the surviving spouse from principal pursuant to the terms
430 of the trust are insufficient to provide the surviving spouse with the beneficial
431 enjoyment required to obtain the marital deduction (even though, in the case of an
432 elective share trust, a marital deduction is not made or is only partially made), the
433 surviving spouse may require the trustee of such marital trust or elective share trust
434 to make property productive of income, convert property within a reasonable time, or
435 exercise the power conferred by ss. 738.104 and 738.1041. The trustee may decide
436 which action or combination of actions to take.

437 (2) In cases not governed by subsection (1), proceeds from the sale or other
438 disposition of an asset are principal without regard to the amount of income the asset
439 produces during any accounting period.

440 Section 11. This act shall take effect July 1, 2017.

441 3362512.00012

**Real Property, Probate and Trust Law Section of The Florida Bar
White Paper**

**Proposed Amendments to
Part II of Ch. 732, Florida Statutes,
Sections 732.201 – 732.2155, F.S.**

I. SUMMARY

The proposed legislation would amend certain provisions of Part II of the Chapter 732, Florida Statutes, pertaining to the right of a surviving spouse to take an elective share of the decedent's assets after death. With one exception, a wholesale revision to the text or conceptual framework of the Florida's elective share statutes is not intended.

II. CURRENT SITUATION

Florida's elective share laws are codified in Part II of Chapter 732 of the Florida Statutes. Sections 732.201 - 732.2155, Fla. Stat., in the aggregate give the surviving spouse of a decedent who was domiciled in the State of Florida on his or her death the right to a forced share of the decedent's estate known as the "elective share." Very broadly (and misleadingly simply) stated, the elective share is 30% of the aggregate value of the all of the decedent's assets at death. There are technical rules that govern what is included in the asset base against which the elective share can be taken, and the valuation of those assets for elective share purposes

The surviving spouse must make a timely election to take the elective share, otherwise the right to the elective share is forfeited. The elective share is paid outright to the surviving spouse and is awarded only to the extent that the value of other assets that pass from the decedent to the surviving spouse as a part of the decedent's overall testamentary plan do not rise to the requisite 30% level. An award of elective share to the surviving spouse is in addition to whatever else the decedent may have provided for the surviving spouse. If the surviving spouse takes an elective share, he or she is *not* treated as having predeceased the decedent.

The Real Property, Probate and Trust Law ("RPPTL") Section of The Florida Bar convened an ad hoc committee (the "Committee") to study Florida's elective share laws. The goal in doing so was not to undertake a significant revision of those laws; rather, the objective was to focus on certain narrow and specific provisions of the elective share statutes that, over the years, practical experience and application revealed to be worth study or a fresh look. The legislative proposal is the product of the Committee's many months of close study and in-depth discussion.

III. EFFECT OF PROPOSED CHANGES GENERALLY

Absent any marital agreement to the contrary, the proposed legislation would:

- Make changes to the manner in which so-called “protected homestead” is included in the elective estate and how it is valued for purposes of satisfying the elective share;
- Quantify the amount of the elective share to which the surviving spouse is entitled with reference to the length of the marriage;
- Add a provision assessing interest against persons who are very delinquent in fulfilling their statutory obligations to pay or contribute towards satisfaction of the elective share;
- Add a new section that specifically addresses awards of attorney fees and costs in elective share proceedings; and
- Make changes to Chapter 738, Florida Statutes, to assure qualification for certain elective share purposes of trusts that contain so-called unproductive property.

IV. SECTION-BY-SECTION ANALYSIS

Section 1, Section 2, Section 3 and Section 6 of the proposed legislation all deal with so-called “protected homestead.”

When a spouse dies, the manner in which the marital residence was titled at the time of death can have a dramatic impact on the amount of the elective share to which the surviving spouse is entitled. Specifically, the elective share calculation can be dramatically different depending on whether the marital residence was owned as tenants by the entirety by both spouses (in which case the marital residence by statute *is not* protected homestead) or was owned solely by the deceased spouse (in which case the marital residence *is* protected homestead), even though in both cases the surviving spouse will end up with the same ownership interest in the marital residence.

This anomaly results from the interaction between the Florida homestead statutes and the elective share statutes. Property that is the protected homestead of the decedent is presently *excluded* from the calculation of the elective estate under Section 732.2045, Fla. Stat., and is not an asset to be considered for purposes of satisfaction of the elective share under Section 732.2075, Fla. Stat. Conversely, property owned by the decedent and the surviving spouse as tenants by the entireties is *included* in the calculation of the elective estate at one-half of the fair market value of the property as of the decedent’s date of death under Section 732.2035(3), Fla. Stat., and at the same value for purposes of satisfaction of the elective share under Section 732.2075, Fla. Stat. Accordingly, the surviving spouse of a decedent with protected homestead

would receive more upon the decedent's death (the homestead plus the elective share) than a surviving spouse that owned property with the decedent as tenants by the entireties (only the elective share), based on an asset titling decision.

Section 1 of the proposed legislation includes protected homestead in the value of the elective estate. This results in a more consistent elective share amount for surviving spouses. This result is more equitable for both surviving spouses and the families of the deceased spouses, because it ensures that the elective share calculation takes into account all that the surviving spouse has received from the decedent and is not altered by an asset titling decision usually made without regard to elective share concerns.

Section 2 of the proposed legislation excludes the protected homestead from the elective estate if the surviving spouse waives his or her homestead rights in a marital agreement under Section 732.702, Fla. Stat., or otherwise, and receives no interest in it. This prevents a spouse who has waived his or her right to the homestead in a premarital or postmarital agreement during the decedent's lifetime from circumventing the marital agreement by claiming a portion of the homestead's value indirectly by taking the elective share after the decedent's death.

Section 3 of the proposed legislation sets forth rules governing the valuation of the interest in the protected homestead that the surviving spouse receives. These rules apply for purposes of valuing the elective estate. The Committee believes that valuing the life estate that the surviving spouse may receive in the protected homestead by operation of Section 732.401(1), Fla. Stat., will avoid likely disputes about the value of the life estate. The Committee believes that the 50% valuation convention for the spouse's life estate is fair to the surviving spouse and to the remainder beneficiaries because the surviving spouse has the unilateral right under Section 732.401(2), Fla. Stat., to elect to take a 50%, one-half, interest in the property.

Section 6 of the proposed legislation provides valuation conventions for protected homestead for purposes of using the property to satisfy the elective share. These rules parallel those set forth in Section 3 of the proposal.

Section 4 of the proposed legislation changes the amount of the elective share, which is currently 30% of the elective estate no matter how short or long the decedent and his or her spouse were married. Under current law, if the decedent was married to his or her spouse for 40 minutes or 40 years, the amount of the elective share is the same.

In 1999, the RPPTL Section proposed a sliding percentage identical to the current proposal, discussed below. Through the legislative process the final statutory version fixed the elective share percentage at 30% of the elective estate. There have been attempts in other areas of the law (divorce, for example) to tie the spousal entitlements to the duration of the marriage. This is in keeping with the contemporary view of marriage as an economic partnership in which there is a presumed unspoken agreement between the spouses that each is to enjoy a one-half interest in the property acquired during the marriage. A decedent who disinherits his or her surviving

spouse, or does not leave his or her surviving spouse a sufficient percentage of his or her estate, is seen as having reneged on that agreement. The general effect of applying the partnership theory to the elective share is to increase the entitlement of a surviving spouse in a long-term marriage and decrease the entitlement of a surviving spouse in a short-term marriage (for example, a marriage later in life in which neither spouse contributed much, if anything, to the acquisition of the other's wealth).

The Committee believes that a surviving spouse's elective share rights in the assets of the deceased spouse should, in the absence of a binding marital agreement to the contrary, be tied to the length of the marriage.

As proposed, the percentage of the elective estate to be awarded as an elective share would be based upon the length of the decedent's most recent marriage to the surviving spouse, as follows: (a) less than 5 years: 10% of the elective estate; (b) at least 5 years but less than 15 years: 20% of the elective estate; (c) at least 15 years but less than 25 years: 30% of the elective estate; and (d) 25 years or more: 40% of the elective estate.

Section 5 of the proposed legislation provides that direct recipients and beneficiaries who are required to make a payment to the surviving spouse of some portion of the elective share are responsible for the interest on any unsatisfied amount after two years. The legislative proposal is intended to encourage settlement and prompt resolution of elective share disputes.

Section 6 of the legislative proposal is discussed above.

Section 7 of the proposed legislation strikes the provision in Section 732.2135(5), Fla. Stat., that presently permits an award of attorney fees and costs against a surviving spouse if an election is made or pursued in bad faith to avoid possible conflict with the proposed statute. The changes in Section 9 of the proposed legislation, discussed in greater detail below, would permit the trial court to award attorney fees and costs against the elective share if the surviving spouse is the non-prevailing party, even if the surviving spouse does not act in bad faith. The new provision clearly empowers the court to award attorney fees and costs against a surviving spouse or other person who is found to have acted in bad faith or committed wrongdoing, although such a finding is not required.

Section 8 of the proposed legislation provides for the payment of interest at the statutory rate allowed by Florida law for any amount of the elective share that remains unsatisfied two years after the decedent's date of death. It complements Section 5 of the proposed bill and is designed with the same objectives in mind.

Section 9 of the proposed legislation enacts new Section 732.2165, Fla. Stat., to make the award of attorney fees and costs applicable to all parties who litigate in an elective share proceeding. It adopts the standard used in Sections 733.609, 732.615, 732.616 and 736.1004, Fla. Stat., for an

award of attorney fees and costs “as in chancery actions” in claims for surcharge and to modify or reform a will or trust.

Case law provides further detail on the standard explaining that the well-settled rule in chancery actions is that “costs follow the judgment unless there are circumstances that render application of this rule unjust.” *In re Estate of Simon*, 549 So. 2d 210, 212 (Fla. 3rd DCA 1989); *Wilhelm v. Adams*, 136 So. 397 (Fla. 1931); *Schwartz v. Zaconick*, 74 So. 2d 108 (Fla. 1954). This is a “prevailing party rule” subject to the court’s discretion, as justice requires, to order that “costs follow the result of the suit, apportion the costs between the parties, or require all costs be paid by the prevailing party.” *Nalls v. Millender*, 721 So. 2d 426, 427 (Fla. 4th DCA 1998). When multiples issues are litigated, the courts have determined that a party can prevail or lose on one or more issues and attorney fees and costs may be apportioned based on the result on each issue.

Subsection (1) of proposed new Section 732.2165, Fla. Stat., vests discretion in the court to award taxable costs as in chancery actions, including attorney fees, in proportions that the court may determine. It also instructs that no award of attorney fees or costs may be made for legal services required to file any document required or permitted under Rule 5.360, Florida Probate Rules. The attorney fees and costs associated with the ordinary and usual legal services involved in the preliminary determination of elective share entitlement and the amount of the elective share are excluded from the statute.

The legal services excluded from the statute that are contemplated under Rule 5.360 include the preparation and filing of the following documents: (a) election to take the elective share, (b) petition for approval to make the election, (c) formal notice of the petition, (d) petition for an extension of time to make the election, (e) withdrawal of the election, (f) notice of election by the personal representative, (g) objection to the election, (h) petition to determine the amount of the elective share, (i) inventory of the elective estate, (j) objection to the amount or distribution of assets to satisfy the elective share, and (k) petition to relieve the personal representative from the duty to enforce contribution.

Subsection (2) of proposed new Section 732.2165, Fla. Stat., provides that a court may award attorney fees and costs from a person’s interest in any asset included in the elective estate. Alternatively, the court may enter judgment against a person that may be satisfied from other assets of that person to the extent of the person’s interest in assets included in the elective estate. This provision accounts for circumstances in which a person involved in an elective share dispute receives non-probate assets and attorney fees and costs are assessed against the person.

Subsection (3) of proposed new Section 732.2165, Fla. Stat., provides that the statute does not create or impose personal liability for attorney fees or costs on a person beyond the amount of the person’s interest in assets included in the elective estate. Thus, a personal representative cannot be held personally liable for attorney fees or costs incurred by a surviving spouse under the statute. Nor can a beneficiary of an estate, or a person having an interest in a non-probate

asset of the decedent included in the elective estate, be held personally liable beyond the amount of the person's interest in the estate, or assets comprising the elective estate, as the case may be.

Subsection (4) of proposed new Section 732.2165, Fla. Stat., provides that the statute is prospective and thus applies to all proceedings filed after the effective date of the statute, without regard to the date of the decedent's death.

Section 10 of the proposed legislation expands the scope of the savings clause in Section 738.606, Fla. Stat., a part of the Florida Uniform Principal and Income Act, Chapter 738, Fla. Stat., to include an "elective share trust," as that term is defined in Section 732.2025(2), Fla. Stat. As with marital trusts intended to qualify for the estate tax marital deduction (which trusts are presently protected by the savings provisions of Section 738.606, Fla. Stat.), to qualify as an elective share trust, the governing instrument that creates the trust must give the surviving spouse the power to compel the trustee to convert property that is not productive of income into property that is so productive. Because not all elective share trusts will also be made subject to a marital deduction election, it is necessary to specifically extend the savings provision of this statute to those elective share trusts for which a marital deduction is not elected in order to satisfy the requirements for an elective share trust.

IV. FISCAL IMPACT ON STATE AND LOCAL GOVERNMENTS

The proposal is not expected to have a fiscal impact on state or local governments.

V. DIRECT IMPACT ON PRIVATE SECTOR

The proposal is not expected to have a direct, measurable economic impact on the private sector.

VI. CONSTITUTIONAL ISSUES

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

VII. OTHER INTERESTED PARTIES

Family Law Section of The Florida Bar.

3380167.00012-FL BAR COMM AD

LEGISLATIVE POSITION REQUEST FORM

GOVERNMENTAL AFFAIRS OFFICE

Date Form Received _____

GENERAL INFORMATION

Submitted By John C. Moran, Chair, Probate Law and Procedure Committee of the Real Property Probate & Trust Law Section (RPPTL Approval Date _____, 2016)

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Position Type Probate Law and Procedure Committee, RPPTL Section, The Florida Bar

CONTACTS

Board & Legislation Committee Appearance

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Peter M. Dunbar, Dean, Mead, Egerton, Bloodworth, Capouano & Bozarth, P.A., 215 S. Monroe Street, Suite 815, Tallahassee, FL 32301, Telephone: (850) 999-4100, Email: pdunbar@deanmead.com

Martha J. Edenfield, Dean, Mead, Egerton, Bloodworth, Capouano & Bozarth, P.A., 215 S. Monroe Street, Suite 815, Tallahassee, FL 32301, Telephone: (850) 999-4100, Email: medenfield@deanmead.com

Appearances

Before Legislators

(SAME)

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

Meetings with

Legislators/staff

(SAME)

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

PROPOSED ADVOCACY

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

If Applicable,

List The Following

N/A

(Bill or PCB #)

(Bill or PCB Sponsor)

Indicate Position

Support _____

Oppose _____

Tech Asst. _____ Other _____

Proposed Wording of Position for Official Publication:

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

Reasons For Proposed Advocacy:

Currently there is no mechanism for a testator to deposit their original will for safekeeping with the clerk of court. Similarly, there is no system for the custodian of an original will to deposit a will for safekeeping when the testator cannot be located. The proposed legislation is aimed at avoiding improprieties such as fraud and undue influence as it relates to wills. The benefits of depositing a will are that it will be kept safe, away from public viewing during the testator's lifetime, and protected from loss and inadvertent destruction.

PRIOR POSITIONS TAKEN ON THIS ISSUE

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

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

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

REFERRALS TO OTHER SECTIONS, COMMITTEES OR LEGAL ORGANIZATIONS

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

Referrals

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

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

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

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

WPB_ACTIVE 7199335.1

Informational ONLY

1 A bill to be entitled
2 An act relating to the deposit of original wills with
3 the clerk of court for safekeeping.

4 Be it enacted by the Legislature of the State of Florida:

5 Section 1. Section 732.902, F.S. is created as follows:

6 732.902 Deposit of wills.

7 (1) This Section applies with respect to a testator whose
8 will is to be deposited if:

9 (a) the testator is alive; or

10 (b) it is unknown if the testator is alive.

11 (2) As used in this Section:

12 (a) the term "depositor" shall mean any person who
13 deposits a will with the clerk under this Section; and

14 (b) the term "will" includes a separate writing as
15 described in s. 732.515.

16 (3) A will may be deposited by a testator who is alive with
17 the clerk of the court of the county in which the testator
18 resides at the time of the deposit of the will. A will may be
19 deposited by any other depositor with the clerk of court of the
20 county where the depositor knows, reasonably believes or can
21 reasonably conclude or infer from the face of the will:

22 (a) the testator resided at the time of the deposit of
23 the will;

24 (b) the testator resided when the testator executed
25 the will; or

26 (c) the testator executed the will.

27 (4) An attorney in possession of a will may not deposit a
28 will pursuant to this Section unless the attorney:

29 (a) has either never had contact with the testator or
30 has not had contact with the testator for at least seven (7)
31 years prior to depositing the will;

32 (b) has made a good faith attempt to locate the
33 testator; and

34 (c) has been unable to locate the testator despite a
35 good faith effort to do so.

36 (5) An attorney in possession of a will shall, at the time
37 of the deposit of the will with the clerk, submit an affidavit,
38 together with the will, in substantially the following form:

39 STATE OF FLORIDA

40 COUNTY OF

41 Before me, the undersigned authority, personally
42 appeared (name of Affiant), who swore or affirmed that:

43 I am an attorney licensed to practice law in the state
44 of . I am submitting this affidavit in connection
45 with a will that I am depositing in accordance with the
46 provisions of s. 732.902. I have either never had contact with
47 the testator or I have not had contact with the testator for at
48 least seven (7) years. I have made a good faith attempt to
49 locate the testator and have been unable to do so.

50 (signature of Affiant)

51 Sworn to (or affirmed) and subscribed before me this
52 day of (month), (year) by (name of Affiant)

53 (Signature of Notary Public-State of Florida)

54 (Print, Type, or Stamp Commissioned Name of Notary Public)

55 Personally Known OR Produced Identification

56 (Type of Identification Produced)

57 (6) Upon receipt of a will deposited under this Section,
58 the clerk shall transform and store the will on film, microfilm,
59 magnetic, electronic, optical, or other substitute media or
60 record the will onto an electronic recordkeeping system in
61 accordance with the standards adopted by the Supreme Court of
62 Florida. The clerk shall also retain and preserve the original
63 will in its original form for at least twenty (20) years.

64 Transforming and storing a will on film, microfilm, magnetic,
65 electronic, optical, or other substitute media or recording a
66 will onto an electronic recordkeeping system, whether or not in
67 accordance with the standards adopted by the Supreme Court of
68 Florida, or permanently recording a will does not eliminate the
69 requirement to preserve the original will. If the original will
70 deposited under this Section either cannot be located or is
71 destroyed, an electronic copy of the deposited will that was
72 stored by the clerk shall be deemed to be an original will for
73 purposes of offering the will for probate. Notwithstanding the
74 foregoing, any will deemed to be an original under this paragraph
75 is not a lost or destroyed will under the provisions of s.
76 733.207.

77 (7) Except as otherwise provided in paragraph (9) of this
78 Section, a will deposited under this Section shall not be deemed
79 a public record as that term is defined in s. 119.011(12) and is
80 confidential and exempt from s. 119.07(1) and s. 24(a), Art. I of
81 the State Constitution.

82 (8) While the testator is alive, the only individuals to
83 whom the clerk may deliver the will are:

- 84 (a) the testator, or
85 (b) a person authorized to receive the will by an
86 order of a court.

87 (9) If the clerk, who is in possession of a will deposited
88 under this Section receives a certified copy of the death
89 certificate of the testator, then the clerk shall retain and
90 preserve the will in accordance with the provisions of s.
91 732.901(4). Provided, however, if venue over the probate
92 administration of the testator's estate is in a state or county
93 outside of the clerk's county, then any interested person may
94 seek an order of the circuit court directing the clerk as to
95 where, or as to whom, to deliver the will. For purposes of

96 determining when the 20-year period for retention of the will
97 begins under s. 732.901(4), the will shall be deemed deposited
98 under s. 732.901(4) as of the date of the clerk's receipt of a
99 certified copy of the death certificate of the testator, or the
100 date that the will is deposited with the clerk of court with
101 venue over the probate administration of the testator's estate,
102 whichever is later.

103 (10) The clerk shall have no liability in connection with
104 any will deposited, retained, destroyed or delivered in
105 accordance with the provisions of this Section.

106 Section 2. This act shall take effect July 1, 2017.

Informational

WHITE PAPER

PROPOSED ADDITION TO PART IX OF CHAPTER 732, FLORIDA STATUTES

SECTION 732.902 – DEPOSIT OF WILLS

(Last updated June 8, 2016)

I. SUMMARY

Currently there is no system for testators or custodians of original wills to deposit wills for safekeeping with the clerk of court. The purpose of proposed Section 732.902 is to provide a statutory framework for testators to deposit their original wills with the clerk for safekeeping during their lifetimes, and for other custodians, such as attorneys, to deposit original wills with the clerk when the testator cannot be located.

The proposed legislation is aimed at avoiding improprieties such as fraud and undue influence as it relates to wills. The benefits of depositing a will are that it will be kept safe, away from public viewing during the testator's lifetime, and protected from loss and inadvertent destruction.

A number of states have already enacted statutes that allow for the deposit of wills. These states include Virginia, Colorado, and Indiana. Proposed Section 732.902 is roughly patterned after Indiana Code Section 29-1-7-3.1. The proposed statute is numbered as Section 732.902, Florida Statutes because it shares many concepts with Section 732.901, Florida Statutes. Section 732.901, Florida Statutes already addresses the deposit of wills following the death of a testator.

II. CURRENT SITUATION

Under current Florida law, there is no mechanism for a testator to deposit their original last will and testament for safekeeping with the clerk of court during his or her life. Similarly, there is no system for the custodian of an original will to deposit a will for safekeeping with the clerk when the testator cannot be located. This is known as the "orphan will" problem. However, pursuant to Section 732.901, Florida Statutes, it is mandatory for a "custodian of a will ... to deposit the will [of a testator] with the clerk of the court having venue of the estate of the decedent within 10 days after receiving information that the testator is dead."

III. EFFECT OF PROPOSED CHANGES

The effect of proposed Section 732.902, Florida Statutes is to provide a statutory framework for testators and other custodians of original wills to deposit those wills with the clerk of court for safekeeping.

Paragraph (1) provides that the Section applies either when the testator is alive or if it is unknown if the testator is alive. Paragraph (1) is intended to clarify that this proposal addresses both the "orphan will" problem and that it permits testators to deposit original wills during their lives.

Paragraph (2) defines the terms “depositor” and “will.” The use of the term “person” to describe a “depositor” means that a depositor of a will may be an individual, a bank, a trust company, an attorney, etc. See Section 1.01(3), Florida Statutes. Moreover, by stating that a will, which is defined in Section 731.201(40), Florida Statutes, includes a separate writing described in Section 732.515, Florida Statutes, this paragraph mirrors Section 732.901(5), Florida Statutes and makes clear that a separate writing may be deposited under Section 732.902, Florida Statutes.

Paragraph (3) provides that a will may be deposited by a testator who is alive only with the clerk of the county in which the testator resides at the time of the deposit of the will. However, where the depositor is an individual other than the testator, Paragraph (3) provides that the will is to be deposited either with the clerk of the county where the testator resided at the time of the deposit of the will, where the testator resided at the time of the execution of the will, or where the testator executed the will.

Paragraph (4) provides that in order for an attorney to deposit a will with the clerk, the attorney must not have had contact with the testator for at least seven (7) years prior to depositing the will, that the attorney must have made a good faith effort to locate the testator, and that the attorney must have been unable to locate the testator despite a good faith effort to do so. Paragraph (4) is included to address document retention obligations that are unique to attorneys.

Paragraph (5) provides a form affidavit that must be submitted by an attorney who deposits a will with the clerk.

Paragraph (6) directs the clerk to make an electronic copy of the will and to retain the original will for twenty (20) years. This twenty (20) year time period mirrors the time period already provided for in Section 732.901(4), Florida Statutes. Paragraph (6), in large measure, mirrors Section 732.901(4), Florida Statutes. Paragraph (6) also provides that if an original will deposited under this Section cannot be located or is destroyed, the electronic copy is deemed to be an original will for purposes of offering the will for probate. Finally, Paragraph (6) provides that any will deemed to be an original for purposes of offering it for probate is not a “lost or destroyed” will under the provisions of Section 733.207, Florida Statutes.

Paragraph (7) provides that a will deposited under this Section is a private document and is not a public record for as long as the testator is alive.

Paragraph (8) provides that while the testator is alive, the only individual to whom the clerk may deliver a will is the testator or a person authorized to receive the will by an order of the court.

Paragraph (9) addresses what happens when a testator whose will is on deposit dies, and it provides that a certified copy of the death certificate of the testator is necessary in order to establish the death of the testator. If venue over the probate of the testator’s will is in the county where the will is already on deposit, the will is deemed deposited under Section 732.901(4), Florida Statutes, and the twenty (20) year holding period under Section 732.901(4), Florida Statutes begins running as of the date that the clerk received the certified

copy of the testator's death certificate. However, if venue is in a state or county outside of the clerk's county, then an order of the circuit court will be needed to direct the clerk as to where, or as to whom, to deliver the will. If the will is then transferred to another county in the State of Florida, the twenty (20) year holding period under Section 732.901(4), Florida Statutes begins running on the date that the will is deposited with the clerk with venue over the probate administration of the testator's estate.

Paragraph (10) provides that the clerk has no liability in connection with any will deposited, retained, destroyed, or delivered in accordance with Section 732.902, Florida Statutes.

IV. FISCAL IMPACT ON STATE AND LOCAL GOVERNMENTS

It is anticipated that this proposal will have a fiscal impact on the clerks of court in the State of Florida. Under the proposal, clerks will need to scan wills, physically store wills, and maintain records of wills that have been both stored and scanned. Although clerks already provide these services and accept wills for deposit upon the death of Florida citizens, the proposal would authorize wills to be deposited while testators are alive or cannot be located. Although not expressly addressed in the proposed statute, it is anticipated that the clerks will charge a reasonable fee for the deposit of any will under this section.

V. DIRECT FISCAL IMPACT ON PRIVATE SECTOR

None.

VI. CONSTITUTIONAL ISSUES

None.

VII. OTHER INTERESTED PARTIES

Other interested parties include the clerks of court of the State of Florida.

Informational Only

LEGISLATIVE POSITION REQUEST FORM

GOVERNMENTAL AFFAIRS OFFICE

Date Form Received _____

GENERAL INFORMATION

Submitted By Angela M. Adams, Chair, Trust Law Committee of the Real Property, Probate & Trust Law Section

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Position Type Trust Law Committee, Real Property, Probate & Trust Law Section of The Florida Bar

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Martha J. Edenfield, Dean Mead, P.O. Box 10095, Tallahassee FL 32302-2095, Telephone (850) 222-3533

Appearances before Legislators

N/A at this time

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

Meetings with Legislators/staff

N/A at this time

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

PROPOSED ADVOCACY

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

If Applicable, List The Following

N/A at this time

(Bill or PCB #)

(Bill or PCB Sponsor)

Indicate Position

Support

Oppose

Technical Assistance

Other

1 A bill to be entitled
2 An act relating to settlor intent as provided in the
3 terms of a trust; amending ss. 736.0103(11), 736.0105
4 (2)(c), and 736.04040 F.S.

5
6 Be it enacted by the Legislature of the State of Florida:

7
8 Section 1. Subsection (11) of Section 736.0103 is amended
9 to read :

10 736.0103 Definitions.

11 Unless the context otherwise requires, in this code:

12 (11) "Interests of the beneficiaries" means the beneficial
13 interests intended by the settlor as provided in the terms of the
14 a trust.

15 Section 2. Section 736.0105(2)(c) is amended to read :

16 736.0105 Default and Mandatory Rules.

17 (2) The terms of a trust prevail over any provision of this
18 code except:

19 (b) The duty of the trustee to act in good faith and in
20 accordance with the terms and purposes of the trust and the
21 interests of the beneficiaries.

22 (c) ~~The requirement that a trust and its terms be for the~~
23 ~~benefit of the trust's beneficiaries, and that the trust have a~~
24 purpose that is lawful, not contrary to public policy, and
25 possible to achieve.

26 Section 3. Section 736.0404 is amended to read :

27 736.0404 Trust Purposes.

28 A trust may be created only to the extent the purposes of
29 the trust are lawful, not contrary to public policy, and possible
30 to achieve. ~~A trust and its terms must be for the benefit of its~~
31 ~~beneficiaries.~~

32 Section 4. This act shall take effect July 1, 2017.

The Florida Bar
Real Property, Probate and Trust Law Section
Trust Law Committee
Settlor Over Beneficiary Subcommittee*

WHITE PAPER

Proposed Revisions to §§736.0103, 736.0105 and 736.0404, Florida Statutes

I. SUMMARY

The purpose of the proposed amendments to §§736.0103, 736.0105 and 736.0404 of the Florida Statutes is to clarify and illuminate upon Florida's well established jurisprudence in favor of donative freedom, so that it is crystal clear that the settlor's intent is paramount when interpreting and applying Florida trust law. Florida has a strong and robust tradition of protecting settlor's intent, and these proposed amendments reaffirm these protections in order to make certain that effectuating the settlor's intent continues to be a hallmark of Florida trust law.

II. CURRENT SITUATION:

Under American trust law, there always has been tension between the dual goals of effectuating the settlor's intent and protecting the interests of beneficiaries. This tension is a natural byproduct of the essential nature of a trust—where the settlor transfers legal title of the trust's assets to the trustee while simultaneously creating equitable interests for the trust beneficiaries. Historically, trust law has tilted towards the primacy of the settlor's intent, because donative freedom has been the jurisprudential foundation of American trusts and estates law. See, e.g., Lee-ford Tritt, *The History, Impact, and Future of the Beneficiary Rule (Part One)*, Estate and Personal Financial Planning (Thomson-West) (December 2014).

Indeed, the organizing principle of trusts and estates law is that the "donor's intention is given effect to the maximum extent allowed by law." Restatement (Third) of Prop. § 10.1. And, this fundamental principle is reflected in the General Comment to Uniform Trust Code (UTC) Article 8 and UTC § 801 (Duty to Administer Trust), which describes an overarching duty to

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fulfill donative intent. In Florida, a donor's right to bequeath property is so sacred that it may be a constitutionally protected right. *See, Shriners Hospitals v. Zrillic*, 563 So.2d 64 (Fla. 1990) ("that the right to devise property is a property right protected by the Florida Constitution"). Accordingly, under Florida law, a court should give primary consideration to the preservation of the settlor's intent as expressed in the terms of the trust when applying or interpreting the state's trust laws. And, the settlor's intent as set forth in the terms of the trust govern the duties and powers of the trustees and the interests of the beneficiaries.

In general, a fiduciary has a fundamental obligation to follow the terms of the will or trust. Recently, however, there has occurred an erosion or shift from the principle of protecting the settlor's donative intent towards the concept of protecting the beneficiaries perceived interests despite the donative intent. *See, e.g., Thomas P. Gallanis, The New Direction of American Trust Law*, 97 Iowa L. Rev. 215 (2011). This shift is reflected in the so-called "Benefit-of-the-Beneficiary" rule, which was included as a mandatory rule in the 2000 version of the UTC. Thus, when Florida modeled the new Florida Trust Code (the "Trust Code") after the UTC, and adopted Chapter 736 of the Florida Statutes in 2006, this seemingly innocuous rule also was adopted and became part of Florida law.

The Benefit-of-the-Beneficiary rule is a mandatory, non-waivable requirement under Florida's Trust Code that provides that a "trust and its terms must be for the benefit of its beneficiaries." *See, Fla. Stat. §§ 736.0105(2)(c) and 736.0404*. This mandatory rule applies not only to the entire trust or its general purpose, but to each of its terms, individually. *See, Fla. Stat. § 736.0105(2)(c)*. Since the enactment of the rule, some academics have written about possible implications of this rule that were neither addressed nor considered by the Uniform Law Commissions, the Florida Bar, or the Florida Legislature. Some of these commentators foresee that these provisions may undermine the strong common law tradition of protecting the settlor's intent. Thus, the Benefit-of-the-Beneficiary rule will have a significant adverse impact on estate planning and trust administration if it is interpreted as some academic commentators have advocated. This was not the aim, purpose, or meaning of the statute when proposed by the Florida Bar and adopted by the Florida Legislature.

By way of example, one such commentator suggests that a settlor's waiver of the Trustee's duty to diversify would be void, even where the settlor specifically set out his rationale

for that choice.¹ Thus, the broad view of the Benefit-of-the-Beneficiary rule as espoused by some in academia would have the effect of converting the “Prudent Investor Rule” (See Fla. Stat. §518.11), from its present status as a “default rule” under trust law into a “mandatory” rule. See Fla. Stat. §§736.0901 and 736.0105.

The Benefit-of-the-Beneficiary rule’s impact likely may be much broader than just investment directives. It also implicates conditional gifts, single-purpose trusts, and “spend thrift” provisions, to name a few. See, e.g., Lee-ford Tritt, *The History, Impact, and Future of the Benefit of the Beneficiary Rule (Part Two)*, Estate and Personal Financial Planning (Thomson-West) (December 2014). That change alone would vitiate many existing estate plans, including those taking advantage of popular estate planning instruments such as “grantor retained annuity trusts” (GRAT) or “irrevocable life insurance trusts” (ILIT), both of which rely on concentrated investments to properly function. More profoundly, this interpretation of the Benefit-of-the-Beneficiary rule would shift the fundamental focus of Florida trust law away from donative intent and donative freedom solely in favor of the beneficiaries’ economic interests. Accordingly, this law requires clarification before it is misapplied in the State of Florida.

The deleterious impact of the Benefit-of-the-Beneficiary rule upon traditional trust law has not gone unnoticed. At least two states that otherwise have adopted some version of the UTC—New Hampshire and Ohio—recently have enacted legislation that deletes the mandatory Benefit-of-the-Beneficiary rule and replaces it with a more settlor-friendly default rule to re-establish the primacy of donative intent. See N.H. Rev. Stat. §§564-B:1-112, 564-B:1-105, 564-B:4-404 and Ohio Rev. Code § 5804.04. Another state, Georgia, has not adopted the UTC; but nevertheless, its Legislature has seen fit recently to adopt legislation re-affirming the primacy of donative intent in the context of Georgia’s version of the Prudent Investor Rule. See Ga. Code § 53-12-341. Finally, the notion of the primacy of donative intent was recently re-affirmed in Delaware as well. See, *In re Trust Under Will of Flint for the Benefit of Shadek*, 2015 WL 3823900 (Del. Ch. June 17, 2015). This proposal follows this movement.

¹See John H. Langbein, *Burn the Rembrandt? Trust Law's Limits on the Settlor's Power to Direct Investments*, 90 B.U. L. REV. 375, 392 (2010) (“The settlor's well-intentioned but primitive views on investment matters do not justify investment directions that are otherwise objectively foolish by the standards of the field. . . . Sincere belief in folly does not make folly any less foolish.”). Note that Langbein’s flippant characterization of investment standards is far from a uniform belief among professional investors. See, e.g., Jeffrey A. Cooper, *Empty Promises: Settlor's Intent, the Uniform Trust Code, and the Future of Trust Investment Law*, 88 B.U. L. REV. 1165, 1191 (2008) (discussing legendary investor, Warren Buffet’s well-known aversion to diversification).

III. EFFECT OF THE PROPOSED CHANGE:

Under the proposed changes to Sections 736.0103, 736.0105 and 736.0404, Florida Statutes, the current, mandatory requirement that a trust and its terms be administered for the benefit of the beneficiaries would be eliminated. Instead, effectuating the settlor's intent would remain the paramount, guiding principle of Florida trust law. These changes would clarify that the suggestions made by some academics post-enactment do not reflect the intended meaning of the relevant statutes, as adopted, and would illuminate and reaffirm the robust concept of the protection of settlor's intent in the State of Florida.

Section 736.0103(11), Florida Statutes, is amended to clarify that the "interests of the beneficiaries" are to be determined solely by the settlor, whether that intent is expressed in the trust instrument or must be established by other evidence that would be admissible in a judicial proceeding. *See also* Fla. Stat. §736.0103(21). This change, in conjunction with the deletion of the phrase "benefit of the beneficiaries" elsewhere in the Code, has the effect of unifying the terminology used throughout the Code to describe the legal rights possessed by beneficiaries of a trust. *See, e.g.*, Fla. Stat. §736.0105(2)(b). Changing the definite article in the final clause ("as provided in the terms of a trust") clarifies that the phrase used there is the same phrase defined in Section 736.0103(21), Florida Statutes.

Section 736.0105(2)(c), Florida Statutes, is amended to remove the requirement that a trust be for the "benefit" of its beneficiaries, leaving only the mandatory (and traditional common law) conditions that the trust have a purpose that is (i) lawful, (ii) not contrary to public policy, and (iii) possible to achieve.

Section 736.0404, Florida Statutes, is amended to remove the requirement that a trust be for the "benefit" of its beneficiaries, leaving only the mandatory (and traditional common law) conditions that a trust have a purpose that is (i) lawful, (ii) not contrary to public policy, and (iii) possible to achieve. Grammatically, the statement that a trust must "be for the benefit of its beneficiaries" is little more than a meaningless tautology. To the extent such a phrase might be interpreted by courts as imposing an additional requirement on the creation of a trust that relegates a settlor's intent as a secondary consideration to the economic interests of a beneficiary,

it is inconsistent with existing Florida common law.² This amendment separates the protection of a beneficiary's legal and equitable rights in a trust (which are already addressed elsewhere in the Trust Code) from the determination of the *validity* of a trust or its provisions.

IV. FISCAL IMPACT ON STATE AND LOCAL GOVERNMENT - None.

V. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR - None.

VI. CONSTITUTIONAL ISSUES – The amendments to Sections 736.0404 and 736.0105(2)(c) clarify the Trust Code so as to preempt an unconstitutional interpretation of those provisions. The Benefit-of-the-Beneficiary rule, if interpreted as suggested by some academic commentators, would apply not only to the creation of every single trust, but to each provision of every trust. Under the Benefit-of-the-Beneficiary rule, a trust or trust provision that did not advance the purely economic interests of the beneficiaries might be void, ineffective, or at least interpreted in a way that benefits the beneficiary in a manner not contemplated by the settlor. Thus, the effect of the Benefit-of-the-Beneficiary rule would be to elevate the rights of those receiving an entirely gratuitous disposition of property above the rights of the individual making such a disposition. By limiting an individual's ability to dispose of property *in each and every instance* of disposition by trust, the Benefit-of-the-Beneficiary rule may unconstitutionally infringe upon the right of disposition that is inherent in property ownership. *See, Shriners Hospitals v. Zrillic*, 563 So.2d at 67 (“Thus, the phrase ‘acquire, possess and protect property’ in article I, section 2 [of the Florida Constitution], includes the incidents of property ownership: the ‘[c]ollection of rights to use and enjoy property, including [the] right to transmit it to others.’” (emphasis in original)) quoting Black's Law Dictionary 997 (5th ed. 1979); *see also, Hotel v. Irving*, 481 U.S. 704, 715, 107 S. Ct. 2076, 2082-83 (1987) (“there is no question, however, that the right to pass on valuable property to one's heirs is itself a valuable right.”). The proposed revisions would resolve any potential uncertainty in the law.

² *See, e.g., Provost v. Justin*, 19 So. 3d 333, 334 (Fla. 2d D.C.A. 2009) (“The polestar of trust interpretation is the settlors' intent.”) quoting *L'Argent v. Barnett Bank, N.A.*, 730 So.2d 395, 397 (Fla. 2d DCA 1999); *Bryan v. Dethlefs*, 959 So. 2d 314, 317 (Fla. 3d D.C.A. 2007) (“The polestar of trust or will interpretation is the settlor's intent.”) citing *Arellano v. Bisson*, 847 So.2d 998 (Fla. 3d D.C.A. 2003) and *Phillips v. Estate of Holzmann*, 740 So.2d 1, 2 (Fla. 3d D.C.A. 1998); and *Minassian v. Rachins*, 152 So. 3d 719, 725 (Fla. 4th D.C.A. 2014) (“[t]he polestar of trust or will interpretation is the settlor's intent”) quoting *Bryan v. Dethlefs*, 959 So.2d 314, 317 (Fla. 3d D.C.A. 2007).

VII. OTHER INTERESTED PARTIES - None.

VIII. EFFECTIVE DATE – The contemplated amendments to Sections 736.0103, 736.0105 and 736.0404, Florida Statutes, are proposed as a clarification to existing Florida law rather than as a substantive change. The amendments mirror and are similar to those made in other states that are intended to prospectively preclude an entirely novel interpretation of a UTC provision advanced by a minority of academic commentators subsequent to the publication of the UTC. As clarifying changes, the amendments would—once enacted—have retroactive effect and would be applicable immediately to all existing Florida trusts.

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