BRING TO MEETING

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

Executive Council Meeting

AGENDA

The Breakers Resort
One South County Road
Palm Beach, FL 33480
Phone: (561) 655-6611

Saturday, August 1, 2009
10:30 a.m.

BRING TO THE MEETING

Real Property, Probate and Trust Law Section
Executive Council Meeting
The Breakers Resort - Palm Beach

AGENDA

I. **Presiding** — John B. Neukamm, Chair

II. **Attendance** — Michael A. Dribin, Secretary

III. **Minutes of Previous Meeting** — Michael A. Dribin, Secretary
1. Approval of May 23, 2009 Executive Council Meeting Minutes **pp. 10-19**

IV. **Chair's Report** — John B. Neukamm
1. 2009 – 2010 RPPTL Executive Council Schedule **pp. 20**

V. **Chair-Elect's Report** — Brian J. Felcoski
1. 2010 – 2011 RPPTL Executive Council Schedule **pp. 21**

VI. **Liaison with Board of Governors Report** — Daniel L. DeCubellis
1. BOG Summary – May 2009 **pp. 22-23**

VII. **Treasurer's Report** — Margaret A. Rolando
1. 2008 – 2009 Monthly Report Summary **pp. 24-29**

VIII. **Circuit Representative's Report** — Andrew O'Malley, Director
1. First Circuit – W. Christopher Hart; Colleen Coffield Sachs
2. Second Circuit – J. Breck Brannen; Sarah S. Butters; John T. Lajoie
3. Third Circuit – John J. Kendron; Guy W. Norris; Michael S. Smith
4. Fourth Circuit – William R. Blackard; Roger W. Cruce
5. Fifth Circuit – Del G. Potter; Arlene C. Udick
6. Sixth Circuit – Robert N. Altman; David R. Carter; Gary L. Davis; Joseph W. Fleece, III; George W. Lange, Jr.; Sherri M. Stinson; Kenneth E. Thornton; Hugh C. Umstead; Richard Williams, Jr.
7. Seventh Circuit – Sean W. Kelley; Michael A. Pyle; Richard W. Taylor; Jerry B. Wells
8. Eighth Circuit – John Frederick Roscow, IV; Richard M. White Jr.
9. Ninth Circuit – David J. Akins; Amber J. Johnson; Stacy A. Prince; Joel H. Sharp Jr.; Charles D. Wilder; G. Charles Wohlust
10. Tenth Circuit – Sandra Graham Sheets; Robert S. Swaine
11. Eleventh Circuit – Carlos A. Batlle; Thomas M. Karr; Marsha G. Madorsky; William T. Muir; Adrienne Frischberg Promoff;
12. Twelfth Circuit – Kimberly A. Bald; Michael L. Foreman; P. Allen Schofield
13. Thirteenth Circuit – Lynwood F. Arnold, Jr.; Michael A. Bedke; Thomas N. Henderson; Wilhelmina F. Kightlinger; Christian F. O'Ryan; William R. Platt; R. James Robbins
14. Fourteenth Circuit – Brian Leebrick
15. Fifteenth Circuit – Elaine M. Bucher; David M. Garten; Glen M. Mednick; Robert M. Schwartz
16. Sixteenth Circuit – Julie A. Garber
17. Seventeenth Circuit – James R. George; Robert B. Judd; Shane Kelley; Alexandra V. Rieman

18. Eighteenth Circuit – Jerry W. Allender; Steven C. Allender; Stephen P. Heuston
19. Nineteenth Circuit – Jane L. Cornett
20. Twentieth Circuit – Sam W. Boone; Michael T. Hayes; Alan S. Kotler; Jon Scuderi; Dennis R. White; D. Keith Wickenden

IX. Real Property Division — *George J. Meyer, Real Property Division Director*

Action Items

1. Title Issues and Standards Committee - *Pat Jones, Chair*
Revisions to the standards in Chapter 18 - Homestead, updated to reflect current statutes and case law. Revised standards **pp**. **30-48**

2. Real Property Problem Studies Committee - *Wayne Sobien, Chair*

A. Proposed legislation to cure certain defects as to electronic documents and electronically recorded documents under URPERA. The proposed statutory language, White Paper and Legislative Request **pp. 49-55**

B. Proposed Legislation to address the "hidden lien" title issue. The proposed statutory language, White Paper and Legislative Request **pp. 56-79**

3. FAR/BAR Committee - William Haley, Chair
Proposed final draft of merged FAR/BAR Residential Contract for Sale and Purchase (draft 6/25/09 11:45 am). Draft contract at **pp. 80-88**

4. Condominium and Planned Development Committee - *Robert Freedman, Chair*
Proposed legislation to address various changes to Chapters 718, 719 and 720 (Association Elections, Official Records, Meeting Requirements and Assessment Collections). The proposed statutory language, White Paper and Legislative Request at **pp. 89-147**

Information Items

1. Condominium and Planned Development Committee - *Robert Freedman, Chair*
Proposed draft legislation to address bulk purchases of distressed condominium units. The current draft of the statutory language at **pp. 148-160**

X. Probate and Trust Law Division — *W. Fletcher Belcher, Probate Division Director*

Action Items

1. Ad Hoc Study Committee on Homestead - *Shane Kelley, Chair*

Support proposed amendment of the Florida Probate Code by enactment of new §732.4017, F.S., clarifying that a valid irrevocable inter vivos conveyance of an interest in homestead real estate (outright or in trust) shall not be considered a devise subject to restrictions upon death of the grantor **pp**.**161-169**

2. Estate & Trust Tax Committee - *Richard R. Gans, Chair*

Support proposed amendments to §736.0505 of the Florida Trust Code to secure protection from transfer taxes by providing that the creditors of a settlor of an inter vivos QTIP trust cannot reach assets of the trust even though the settlor is a beneficiary of the trust after the death or his or her spouse **pp. 170-174**

3. Probate Law & Procedure Committee -Tae Kelley Bronner, Chair

A. Support proposed amendments to §731.110 of the Florida Probate Code to clarify the right of an interested person (other than a creditor) to file a caveat with the clerk of court before the death of an individual and reconcile that statute with the corresponding Probate Rule **pp. 175-179**

B. Support proposed amendments to §732.804 of the Florida Probate Code to clarify the right of a decedent to control the disposition of his or her remains and, absent specific directions from the decedent, who is legally authorized to do so **pp. 180-195**

C. Support proposed amendments to §§655.934 and 655.935, F.S., to conform durable power of attorney terminology with prior amendments to §709.08, F.S., and require the preparation and maintenance of a record of documents removed from a decedent's safe-deposit box **pp. 196-201**

XI. General Standing Committee — *Brian J. Felcoski, Director and Chair-Elect*

Action Items

1. A. Approval of proposed legislative consultant contract **pp. 202-210**

XII. General Standing Committee Reports – *Brian J. Felcoski, Director and Chair-Elect*

1. **Actionline** – Rich Caskey, Chair; Scott Pence and Rose LaFemina, Co-Vice Chairs

2. **Amicus Coordination** – Bob Goldman, John W. Little, and Kenneth Bell Co-Chairs

3. **Budget** – Margaret A. Rolando, Chair; Pamela O. Price, Vice Chair

4. **Bylaws** – W. Fletcher Belcher, Chair

5. **CLE Seminar Coordination** – Deborah P. Goodall, Chair; Sancha Whynot, Vice Chair; Laura Sundberg and Sylvia Rojas, Co- Vice Chairs
A. 2009 – 2010 CLE Schedule **pp**. **211**

6. **2010 Convention Coordinator** – Marilyn Polson, Chair; Katherine Frazier and R. James Robins, Co- Vice Chairs

7. **Fellowship** – Tae Kelly Bronner and Phillip Baumann, Co-Chairs; Michael Bedke, Vice Chair

8. **Florida Bar Journal** – Richard R. Gans, Chair Probate Division; William Sklar, Chair Real Property Division

9. **Legislative Review** – Michael Gelfand, Chair; Debra Boje and Alan Fields, Co-Vice Chairs

10. **Legislative Update Coordinators** – Bob Swaine, Chair; Stuart Altman and Charlie Nash, Co-Vice Chairs

11. **Liaison Committees:**
    A. **ABA:** Edward Koren; Julius J. Zschau
    B. **American Resort Development Assoc. (ARDA):** Jerry Aron; Mike Andrew
    C. **BLSE:** Michael Sasso, Ted Conner, David Silberstein, Anne Buzby
    D. **Business Law Section:** Marsha Rydberg
        1. FICPA Liaison Report **pp. 212**
    E. **BOG:** Daniel L. DeCubellis, Board Liaison
    F. **CLE Committee:** Deborah P. Goodall
    G. **Clerks of the Circuit Court:** Thomas K. Topor
    H. **Council of Sections:** John B. Neukamm, Brian J. Felcoski
        1. Council of Sections June 2009 Report **pp. 213-233**
    I. **E-filing Agencies:** Judge Mel Grossman; Patricia Jones
    J. **FLEA / FLSSI:** David Brennan; John Arthur Jones; Roland Chip Waller
    K. **Florida Bankers:** Stewart Andrew Marshall; Mark T. Middlebrook
    L. **Judiciary:** Judge Gerald B. Cope, Judge George W. Greer; Judge Melvin B. Grossman; Judge Hugh D. Hayes; Judge Maria M. Korvick; Judge Beth Krier, Judge Lauren Laughlin; Judge Celeste H. Muir; Judge Larry Martin; Judge Robert Pleus; Judge Susan G. Sexton; Judge Richard Suarez; Judge Winifred J. Sharp; Judge Morris Silberman; Judge Patricia V. Thomas; Judge Walter L. Schafer, Jr.
    M. **Law Schools and Student RPPTL Committee:** Fred Dudley, Stacy Kalmanson, James Jay Brown
    N. **Liaison to the OCCCRC:** Joseph George
    O. **Out of State:** Michael Stafford; John E. Fitzgerald, Gerard J. Flood
    P. **Young Lawyers Division**: Rhonda Chung DeCambre Stroman

12. **Long Range Planning Committee** – Brian J. Felcoski, Chair

13. **Member Communications and Information Technology** – Alfred Colby, Chair; Dresden Brunner and Nicole Kibert, Co – Vice Chair

14. **Membership Development & Communication** – Phillip Baumann, Chair; Mary Karr, Vice Chair

15. **Membership Diversity Committee** – Lynwood Arnold and Fabienne Fahnestock, Co-Chairs; Karen Gabbadon, Vice-Chair

16. **Mentoring Program** – Guy Emerich, Chair; Jerry Aron and Keith Kromash, Co-Vice Chairs

17. **Model and Uniform Acts** – Bruce Stone and Katherine Frazier, Co-Chairs

18. **Professionalism & Ethics** – Paul Roman and Larry Miller, Co-Chairs

19. **Pro Bono** – Gwynne Young and Adele I. Stone, Co-Vice Chair

20. **Sponsor Coordinators** – Kristen Lynch, Chair; Wilhelmina Kightlinger, Jon Scuderi and Mike Swaine, Co-Vice Chairs

21. **Strategic Planning** – Brian J. Felcoski, Chair

XIII. Real Property Division Committee Reports — *George J. Meyer, Real Property Division Director*

1. **Condominium and Planned Development** – Robert S. Freedman, Chair; Steven Mezer, Vice-Chair

2. **Construction Law** – Brian Wolf, Chair; April Atkins and Arnold Tritt, Co Vice-Chairs

3. **Construction Law Institute** – Lee Weintraub, Chair; Wm. Cary Wright and Michelle Reddin, Co-Vice Chairs

4. **Construction Law Certification Review Course** – Kim Ashby, Chair; Bruce Alexander and Melinda Gentile, Co Vice-Chair

5. **Development and Governmental Regulation of Real Estate** – Eleanor Taft, Chair; Nicole Kibert, Kristen Brundage and Frank L. Hearne, Co Vice-Chairs

6. **FAR/BAR Committee and Liaison to FAR** – William J. Haley, Chair; Frederick Jones, Vice Chair

7. **Land Trusts and REITS** – S. Katherine Frazier, Chair; Wilhelmena Kightlinger, Vice Chair

8. **Landlord and Tenant** – Neil Shoter, Chair; Scott Frank and Jo Claire Spear, Vice Chair

9. **Legal Opinions** – David R. Brittain and Roger A. Larson, Co Chairs; Burt Brutin, Vice Chair

10. **Liaison with Eminent Domain Committee** – Susan K. Spurgeon

11. **Liaisons with FLTA** – Norwood Gay and Alan McCall Co-Chairs; Barry Scholnik, John S. Elzeer, Joe Reinhardt, James C. Russick, Lee Huzagh, Co-Vice Chairs

12. **Mobiles Home and RV Parks** – Jonathan J. Damonte, Chair; David Eastman, Vice-Chair

13. **Mortgages and Other Encumbrances** – Salome Zikakis, Chair; Robert Stern, Co-Vice Chair

14. **Real Estate Certification Review Course** – Ted Conner, Chair; Arthur Menor and Guy Norris, Co-Vice Chairs

15. **Real Property Forms** – Barry B. Ansbacher, Chair; Jeffrey T. Sauer, Vice Chair

17. **Real Property Insurance** – Jay D. Mussman, Chair; Andrea Northrop and Wm. Cary Wright, Co-Vice Chair

18. **Real Property Litigation** – Mark A. Brown, Chair; Eugene E. Shuey and Martin Awerbach, Co-Vice Chairs

19. **Real Property Problems Study** – Wayne Sobien, Chair; Jeanne Murphy and Pat J. Hancock, Co-Vice Chair

20. **Title Insurance & Title Insurance Liaison** – Homer Duvall, Chair; Kristopher Fernandez and Steven Reynolds, Co-Vice Chairs

21. **Title Issues and Standards** – Patricia Jones, Chair; Robert Graham, Karla Gray and Christopher Smart, Co-Vice Chairs

XIV. Probate and Trust Law Division Committee Reports — *W. Fletcher Belcher, Probate Division Director*

1. **Ad Hoc Committee on Creditors' Rights to Non-Exempt, Non-Probate Assets** – Angela Adams, Chair

2. **Ad Hoc Committee on Homestead Life Estates** – Shane Kelley, Chair

3. **Advance Directives** – Rex E. Moule, Chair; Marjorie Wolasky, Vice Chair

4. **Asset Preservation** – Jerome Wolf, Chair; Brian Sparks, Vice Chair

   Proposed amendments to §736.0505 of the Florida Trust Code to generally provide that creditors of a settlor of an irrevocable trust from which the trustee may make discretionary distributions to or for the benefit of the settlor may not reach the assets of the trust if it contains a spendthrift provision **pp. 234-258**

5. **Charitable Organizations and Planning** – Thomas C. Lee, Jr., Chair, Michael Stafford and Jeffrey Baskies, Co-Vice Chairs

6. **Estate and Trust Tax Planning** – Richard Gans, Chair; Harris L. Bonette Jr. and Elaine M. Bucher, Co Vice-Chairs

   Proposed amendments to the Florida Trust Code and the Prudent Investor Rule by adding §736.0902, F.S., and amending §518.112, F.S., to eliminate certain fiduciary duties of trustees of life insurance trusts **pp. 259-265**

7. **Guardianship Law and Procedure** – Debra Boje and Alexandra Rieman, Co-Chairs, Andrea L. Kessler and Sherri M. Stinson, Co-Vice Chairs

8. **Insurance for Estate Planning** – L. Howard Payne, Chair

9. **IRA's and Employee Benefits** – Kristen Lynch, Chair; Linda Griffin, Vice-Chair

10. **Liaison with Corporate Fiduciaries** – Seth Marmor, Chair; Jack Falk and Robin King, Co-Vice Chairs; Mark Middlebrook, Corporate Fiduciary Chair

11. **Liaisons with Elder Law Section** – Charles F. Robinson, Chair; Marjorie Wolasky, Vice Chair

12. **Liaison with Statewide Public Guardianship Office** - Michelle Hollister, Chair

13. **Liaisons with Tax Section** – David Pratt; Brian C. Sparks; Donald R. Tescher, William R. Lane Jr.

14. **Power of Attorney** – Tami Conetta, Chair; David Carlisle, Vice-Chair

15. **Principal and Income Committee** – Edward F. Koren, Chair

16. **Probate and Trust Litigation** – William Hennessey, Chair; Thomas Karr and Jon Scuderi, Co-Vice Chairs

    A. Proposed amendments to the Florida Probate Code by adding §732.805, F.S., to provide remedies with respect to spousal rights in marriages procured by fraud, undue influence or duress **pp. 266-279**

    B. Proposed amendment to Florida Rule of Appellate Procedure 9.170 (clarifying what probate and guardianship orders are appealable as a matter of right as final orders), proposed by the Probate & Trust Litigation Committee and approved by the Appellate Rules Committee of The Florida Bar **pp. 280-282**

17. **Probate Law and Procedure** – Tae Kelley Bronner, Chair, Dresden Brunner, Anne Buzby and Jeffrey Goethe, Co-Vice Chairs

    Proposed amendments to the Florida Probate Rules from the Probate Rules Committee of The Florida Bar **pp. 283-378**

18. **Trust Law** – Barry Spivey, Chair; John Moran, Shane Kelley and Laura Stephenson, Co-Vice Chairs

19. **Wills, Trusts and Estates Certification Review Course** – Anne Buzby, Chair; Deborah Russell, Vice Chair

XV. Adjourn

The Florida Bar
Real Property, Probate & Trust Law Section

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Real Property, Probate & Trust Law Section

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Management Planning, Inc.
Estate & Trust Tax Planning Committee

Northern Trust Bank of Florida
Trust Law Committee

Business Valuation Analysts
Probate and Trust Litigation

DRAFT

Minutes, Real Property, Probate and Trust Law Section Executive Council Meeting
The Renaissance Vinoy Resort - St. Petersburg, Florida

Saturday, May 23, 2009

I. **Presiding** – Sandra F. Diamond, Chair

II. **Attendance** - Michael A. Dribin, Secretary

The attendance roster was circulated to be initialed by Council members in attendance at the meeting. Attendance is shown cumulatively on circulated attendance rosters. It is the responsibility of each Council member to promptly bring any collections to the attention of the Secretary.

III. **Minutes of Previous Meeting** - Michael A. Dribin, Secretary

The Minutes of the Executive Council Meeting held in Ecuador on January 30, 2009 in Quito, Ecuador, included in the agenda materials at Pages 8-10, were approved, without change.

IV. **Chair's Report** – Sandra F. Diamond

Sandy thanked all of the sponsors of the Convention and the Executive Council events and congratulated Adele Stone on her new position as Chair of the Florida Bar Foundation. Sandy thanked the Convention Co-Chairs, Marilyn Polson and Dresden Brunner for all of their hard work in making the Convention such a success.

Sandy introduced Past Section Chair, Jerry Aron, who read a proposed resolution in memory of former Section Chair John Holt Sutherland. The resolution appears in the agenda materials on Page 10. Upon motion duly made, seconded and unanimously adopted, the resolution was passed. Sandy indicated that the original resolution would be forwarded Mrs. Sutherland.

Sandy then introduced the winners of the Section photography contest and reminded the members of the Council that proceeds from the sale of the photography contest would be donated to "Creative Clay", a local charity benefitting mentally and physically disabled children.

Later in the meeting, Sandy asked the Council to join her in recognizing 60 years of practice of law by Past Section Chair, John Arthur Jones.

Sandy then took a moment to recognize those members of the Executive Council who had perfect attendance records over the last three years.

V. Chair-Elect's Report - John B. Neukamm

1. John reminded the Executive Council that the 2009 - 2010 RPPTL Executive Council Schedule appears at Page 11 of the agenda materials.

2. John acknowledged the election of the new Officers and Circuit Representatives, as listed on Page 12 of the agenda materials.

3. John reminded the Council members that a complete list of the 2009-2010 Circuit Representatives appears at Page 13 of the agenda materials, a list of the General Standing Committee Chairs, Co-Chairs and Vice-Chairs appears on Pages 14-17; the Probate and Trust Law Division Chairs, Co-Chairs and Vice-Chairs appear on Pages 18-19; and the Real Property Division Committee Chairs, Co-Chairs and Vice Chairs appear on Pages 20-22 of the agenda materials.

VI. Liaison with Board of Governors Report - Daniel L. DeCubellis

Board of Governors Summary – Dan referred the Council to the Report of the April, 2009 meeting of the Board of Governors appearing at Pages 23-24 of the agenda materials. Dan invited input regarding the Judicial Self-Disclosure Form which is being generated by the Bar. He also advised Council members of changes being made to the Bar websites which are under consideration. Dan further advised the Council that changes to the Client Security Fund are being considered. Finally, he briefly referred to the Court funding issues which had dominated the legislative session.

VII. Treasurer's Report – W. Fletcher Belcher

Fletch referred to the summaries of Section financial operations through March 31, 2009, appearing at pages 25-26 of the agenda materials. He also acknowledged the outstanding work that Kristen Lynch had performed in securing sponsors for Section activities. Fletch also pointed out that the Section's reserve had declined somewhat as a result of market conditions, but would not affect the financial status of the Section.

VIII. Circuit Representatives' Report - Margaret A. Rolando, Director.

Peggy indicated that the Circuit Representatives would be reporting on the "hidden liens" project and Peggy also updated the Council on the status of the FASH project.

1. First Circuit - Kenneth Bell; W. Christopher Hart; Colleen Coffield Sachs

2. Second Circuit - J. Breck Brannen; Sarah S. Butters; Victor L. Huszagh; John T. Lajoie

3. Third Circuit - John J. Kendron; Guy W. Norris

4. Fourth Circuit - William R. Blackard, Jr.; Harris LaRue Bonnette, Jr., Roger W. Cruce

5. Fifth Circuit - Del G. Potter; Arlene C. Udick

6. Sixth Circuit - Robert N. Altman; David R. Carter; Gary L. Davis; Robert C. Dickinson, Ill; Luanne E. Ferguson; Joseph W. Fleece, Ill; George W. Lange, Jr.; Sherri M. Stinson; Kenneth E. Thornton; Hugh C. Umstead

7. Seventh Circuit - Sean W. Kelley; Michael A. Pyle; Richard W. Taylor; Jerry B. Wells

8. Eighth Circuit - John Frederick Roscow, IV; Richard M. White Jr.

9. Ninth Circuit - David J. Akins; Russell W. Divine; Amber J. F. Johnson; Thomas Michael Katheder; Stacy A. Prince; Randy J. Schwartz; Joel H. Sharp Jr.; Charles D. Wilder;G. Charles Wohlust

10. Tenth Circuit - Gregory R. Deal; Sandra Graham Sheets; Robert S. Swaine

11. Eleventh Circuit - Carlos A. Battle; Mary E. Clarke; Thomas M. Karr; Nelson C. Keshen; Marsha G. Madorsky; William T. Muir; Adrienne Frischberg Promoff; J. Eric Virgil; Diana S. C. Zeydel

12. Twelfth Circuit - Kimberly A. Bald; Michael L. Foreman; L. Howard Payne; P. Allen Schofield

13. Thirteenth Circuit - Lynwood F. Arnold, Jr.; Thomas N. Henderson; Wilhelmina F. Kightlinger; Christian F. O'Ryan; William R. Platt; R. James Robbins

14. Fourteenth Circuit - Brian Leebrick

15. Fifteenth Circuit - Elaine M. Bucher; Glen M. Mednick; Lawrence Jay Miller; Robert M. Schwartz

16. Sixteenth Circuit - Julie A. Garber

17. Seventeenth Circuit - James R. George; Robert B. Judd; Shane Kelley; Alexandra V. Rieman

18. Eighteenth Circuit - Jerry W. Allender; Steven C. Allender; Stephen P. Heuston

19. Nineteenth Circuit - Jane L. Cornett; Richard J. Dungey

20. Twentieth Circuit - Michael T. Hayes; Alan S. Kotler; Jon Scuderi; Dennis R.White; D. Keith Wickenden

IX. <u>Real Property Division</u> - George J. Meyer, Real Property Division Director

<u>Action Items</u>

1. Title Issues and Standards Committee - Pat Jones, Chair reported on behalf of the Committee on proposed revisions to two title standards in Chapter 9 - Judgments and Liens, dealing with the

duration of judgment liens, in order to address recent Court opinions. Pat indicated that the change to the title standards is in the comment section and is reflected on Pages 27 and 28 of the agenda materials.

Upon motion duly made, seconded and unanimously approved, the Council approved the changes to the two title standards in Chapter 9, as reflected in the agenda materials at pages 27-28.

2. Real Property Problem Studies Committee - Wayne Sobien, Chair

(Proposed legislation to cure certain defects as to electronic documents and electronically recorded documents under URPERA. The proposed statutory language, White Paper and Legislative Request appear at Pages 29-35 of the agenda materials) – **George announced that this matter was being withdrawn from consideration at this Executive Council Meeting.**

3. Special Committee on ABA Law School Task Force Recommendations - Melissa Murphy and William Sklar

Melissa reported on behalf of the Special Committee on ABA Law School Task Force Recommendations, and encouraged the Council to endorse the ABA Task Force Report appearing at Pages 36-45 of the agenda materials.

Upon motion duly made, seconded and unanimously approved, the Council approved the endorsement of the ABA Task Force Report included in the materials appearing at Pages 36-45 of the agenda materials.

Information Items

1. Mortgages & Other Encumbrances Committee - Jeff Sauer, Chair, referred the Executive Council to the latest draft of the Final Judgment of Foreclosure Form, appearing at Pages 46-49 of the agenda materials.

2. On behalf of the Real Property Problem Studies Committee, Wayne Sobien, Chair, reported the Committee is working on a "hidden liens" project, involving governmental entities and the consequences of code violations not getting filed and recorded. Materials appear at Pages 50-64 of the agenda package.

3. Interim Report - Supreme Court Mortgage Foreclosure Task Force – Sandra F. Diamond reported on behalf of the Task Force that an interim report appears in the agenda materials at Pages 66-136 of the agenda package and that she anticipated a final report being issued in September, 2009. The main objective of the project is to develop uniformity among the circuits in addressing the mortgage foreclosure legal process.

X. Probate and Trust Division - Brian J. Felcoski, Probate Division Director

Information Items

1. On behalf of the Ad Hoc Homestead Committee, Shane Kelly, Chair, referred the Council to proposed F.S. Section 732.4017, concerning the inter vivos transfer of homestead property. The materials appear at Pages 137-141 of the agenda materials.

XI. General Standing Committee - John B. Neukamm, Director and Chair-Elect

Action Items

1. On behalf of the Strategic Planning Committee, John B. Neukamm, Chair, referred to the RPPTL Section Strategic Plan 2009-2014, appearing at Pages 142-162 of the agenda materials. He thanked those members of the Executive Council who had planned and participated in the Strategic Planning Retreat.

   Upon motion duly made, seconded and unanimously approved, the Council approved the RPPTL Section Strategic Plan 2009-2014, appearing at Pages 142-162 of the agenda materials.

XII. General Standing Committee Reports - John Neukamm, Director and Chair-Elect

1. **Actionline** - Rich Caskey, Chair; Scott Pence and Rose LaFemina, Co-Vice Chairs – Rich Caskey reported on behalf of the Committee that the current issue of Actionline had been finalized and that July 31, 2009 was the deadline for submission of materials for the next edition.

2. **Amicus Coordination** - Bob Goldman and John W. Little, Co-Chairs – Bob Goldman reported on behalf of the Committee that the three cases he had reported on at the Tallahassee meeting, all of them in the Third DCA, had not yet been decided.

3. **Budget** - W. Fletcher Belcher, Chair; Pamela O. Price, Vice Chair – Fletcher reported on behalf of the Committee that the budgetary process for 2010-2011 will begin in the fall of 2009.

4. **Bylaws** - W. Fletcher Belcher, Chair – Fletcher reported on behalf of the Committee that progress was being made on the submission of a proposed set of bylaws to the Executive Council.

5. **CLE Seminar Coordination** - Jack Falk, Jr., Chair; Laura Sundberg and Sylvia Rojas, Co-Vice Chairs – Jack reported on behalf of the Committee that the 2009-2010 Section CLE Schedule appears at Pages 163-164 of the agenda materials and referred the Council to the "Report 2008-2009 CLE Sales and Revenue", appearing at Page 165 of the agenda materials.

6. **2008 Convention Coordinator** - Marilyn Polson, Chair; Dresden Brunner, Vice Chair – No further report.

7. **Fellowship** - Tae Kelly Bronner and Phillip Baumann, Co-Chairs – Tae reported on behalf of the Committee that the Section Fellows were working hard on their respective projects.

8. **Florida Bar Journal** - Richard R. Gans, Chair Probate Division; William Sklar, Chair Real Property Division – No report

9. **Legislative Review** - Burt Bruton, Jr., Chair; Michael Gelfand and Debra Boje, Co-Vice Chairs

   A. Burt report that the Legislative Committee had opposed the Proposed Bulk Sales Act and had taken a consistent position with the Business Law Section of the Florida Bar. The materials in question appear at Pages 166-179 of the agenda materials.

   B. Pete Dunbar reviewed the Legislative Committee Report, appearing at Pages 180-186 of the agenda materials.

10. **Legislative Update Coordinators** - Sancha Brennan Whynot, Chair; Stuart Altman and Robert Swaine, Co-Vice Chairs – Sancha reported on behalf of the Committee that the legislative update was being planned for July 31 2009 and encouraged the Executive Council members to make their reservations.

11. **Liaison Committees:**

   A. **ABA:** Edward Koren; Julius J. Zschau – Ed reported on behalf of the Committee concerning the status of estate tax reform. Jay report on behalf of the Committee concerning the Property Preservation Task Force and the loss of agricultural property by minorities. He also informed the Council of a symposium on real property which was occurring in Washington, D.C., which had been put together by Rob Freedman, including HUD leaders and others in the industry.

   B. **American Resort Development Assoc. (ARDA):** Laurence Kinsolving; Jerry Aron; Wayne Sobien – No report.

   C. **BLSE:** Howard Payne; Robert Stern; Michael Sasso – Howard gave a brief report on behalf of the Committee.

   D. **Business Law Section**: Marsha Rydberg – John reported that the Business Law Section, as reflected in the materials on Pages 187-188 of the agenda materials, had requested the appointment of one or more liaisons from the RPPTL Section to the Florida Institute of Certified Public Accountants and that Linda Griffin and Brian Sparks had been appointed as liaisons.

   E. **BOG**: Daniel L. DeCubellis, Board Liaison – No further report.

F. **CLE Committee:** Jack Falk, Jr. – No further report.

G. **Clerks of the Circuit Court:** Thomas K. Topor – No report.

H. **Council of Sections:** Sandra F. Diamond; John B. Neukamm – No report.

I. **E-filing Agencies:** Judge Mel Grossman; Patricia Jones – No report.

J. **FLEA / FLSSI:** David Brennan; John Arthur Jones; Roland Chip Waller – Dave Brennan reported on behalf of the Committee regarding revisions to the Probate and Guardianship Forms and asked members of the Council to review the existing forms and provide the Committee with comments and suggested changes.

K. **Florida Bankers:** Stewart Andrew Marshall; Mark T. Middlebrook – No report.

L. **Judiciary**: Judge Jack St. Arnold; Judge Gerald B. Cope; Judge George W. Greer; Judge Melvin B. Grossman, Judge Hugh D. Hayes; Judge Maria M. Korvick; Judge Lauren Laughlin; Judge Celeste H. Muir; Judge Larry Martin; Judge Robert Pleus; Judge Susan G. Sexton; Judge Richard Suarez; Judge Winifred J. Sharp;Judge Morris Silberman; Judge Patricia V. Thomas; Judge Walter L. Schaefer, Jr. No report.

M. **Law Schools and Student RPPTL Committee**: Alan Fields; Stacy Kalmanson -

1. Law School Liaison 2008-09 Memorandum - Stacy Kalmanson reported on behalf of the Committee and referred the Committee to the Memorandum of Activities appearing at Pages 189-191 of the agenda materials and expressed gratitude to those members of the Council who had participated during the year.

N. **Liaison to the OCCCRC**: Joseph George – Joe reported on behalf of the Committee.

O. **Out of State**: Michael Stafford; John E. Fitzgerald, Pam Stuart - John Neukamm announced that Jerry Flood, a practitioner in Wisconsin and Florida, had been appointed as an additional out-of-state representative to the Executive Council.

P. **Young Lawyers Division**: Rhonda Chung DeCambre Stroman – No report.

12. **Long Range Planning Committee** — John B. Neukamm, Chair – No further report.

13. **Member Communications and Information Technology** — Keith S. Kromash, Chair; Alfred Colby, Co-Chair – Keith Kromash reported on behalf of the Committee and referred the Council to the portions of the Strategic Planning Report which dealt with the subject of member communications and information technology.

14. **Membership Development & Communication** — Phillip Baumann, Chair; Mary Clarke, Vice Chair – Phil Baumann reported on behalf of the Committee.

15. **Membership Diversity Committee** — Tae Kelley Bronner and Fabienne Fahnestock Co-Chairs – Tae Bronner reported on behalf of the Committee that feedback on the operations of the Committee had been very positive.

16. **Mentoring Program** — Steven L. Hearn, Chair; Jerry Aron and Guy Emerich, Co-Vice Chairs – Brian Sparks reported on behalf of the Committee of plans to advance the work of the Committee.

17. **Model and Uniform Acts** — Bruce Stone and Katherine Frazier, Co-Chairs – No report.

18. **Professionalism & Ethics** — Adele Stone and Deborah Goodall, Co-Chairs - Debbie Goodall reported on behalf of the Committee.

19. **Pro Bono** — Andrew O'Malley, Chair; Adele I. Stone and David Garten, Co-Vice Chair - Drew O'Malley reported that there was no further report beyond that which had been presented at the real estate round table.

20. **Sponsor Coordinators** — Kristen Lynch, Chair; Debbie Goodall and Wilhelmina Kightlinger, Co-Vice Chairs – Kristin reported on behalf of the Committee and urged Council members to bring to the Committee's attention potential sponsors.

21. **Strategic Planning** — John Neukamm, Chair; Sandra Diamond, Melissa J. Murphy, and Laird Lyle, Co-Vice Chairs – No further report.

XIII. Real Property Division Committee Reports - George J. Meyer, Real Property Division Director

1. **Condominium and Planned Development** – Robert S. Freedman, Chair; Steven Mezer, Vice-Chair

2. **Construction Law** – Wm. Cary Wright, Chair; Brian Wolf and April Atkins, Co-Vice-Chairs

3. **Construction Law Institute –** Lee Weintraub, Chair; Wm. Cary Wright and Michelle Reddin, Co-Vice Chairs

4. **Construction Law Certification Review Course –** Fred Dudley, Chair; Kim Ashby, Vice Chair

5. **Development and Governmental Regulation of Real Estate –** Eleanor Taft, Chair; Nicole Kibert, Vice Chair

6. **FAR/BAR Committee and Liaison to FAR –** *William* J. Haley, Chair; Frederick Jones, Vice Chair

7. **Land Trusts and REITS –** S. Katherine Frazier, Chair; Wilhelmena Kightlinger, Vice Chair

8. **Landlord and Tenant –** Arthur J. Menor, Chair; Neil Shoter, Vice Chair

9. **Legal Opinions –** David R. Brittain and Roger A. Larson, Co-Chairs

10. **Liaison with Eminent Domain Committee –** Susan K. Spurgeon

11. **Liaison with Florida Brownfields Association –** Frank L. Hearne

12. **Liaisons with FLTA –** Norwood Gay and Alan McCall Co-Chairs; Barry Scholnik, John S. Elzeer, Joe Reinhardt, James C. Russick, Lee Huzagh, Co-Vice Chairs

13. **Mobiles Home and RV Parks –** Jonathan J. Damonte, Chair; David Eastman, Vice-Chair

14. **Mortgages and Other Encumbrances –** Jeffrey T. Sauer, Chair; Salome Zikakis and Jo Spear, Co-Vice Chairs

15. **Real Estate Certification Review Course –** Robert Stern, Chair; Ted Conner and Guy Norris, Co-Vice Chairs

16. **Real Property Forms –** Barry B. Ansbacher, Chair; Kristy Parker Brundage, Vice Chair

17. **Real Property Insurance –** Jay D. Mussman, Chair; Andrea Northrop, Vice Chair

18. **Real Property Litigation –** Mark A. Brown, Chair; Eugene E. Shuey and Martin Awerbach, Co-Vice Chairs

19. **Real Property Problems Study –** Wayne Sobien, Chair; Jeanne Murphy and Pat J. Hancock, Co-Vice Chair

20. **Title Insurance & Title Insurance Liaison** – Homer Duvall, Chair; Kristopher Fernandez, Vice Chair

21. **Title Issues and Standards –** Patricia Jones, Chair; Robert Graham, Stephen Reynolds,and Karla Gray, Co-Vice Chairs

XIV. **<u>Probate Division Committee Reports</u>** - Brian J. Felcoski, Probate Division Director

1. **Ad Hoc Committee on Creditors' Rights to Non-Exempt, Non-Probate Assets** - Angela Adams, Chair

2. **Ad Hoc Committee on Homestead Life Estates –** Shane Kelley, Chair

3. **Advance Directives –** Rex E. Moule, Chair; Marjorie Wolasky, Vice Chair

4. **Asset Preservation –** Jerome Wolf, Chair; Brian Sparks, Vice Chair

5. **Charitable Organizations and Planning** – Michael W. Fisher, Co-Chair; Thomas C. Lee, Jr., Michael Stafford and Jeffrey Baskies, Co-Vice Chairs

6. **Estate and Trust Tax Planning –** Richard Gans, Chair; Craig Mundy, Vice-Chair

7. **Guardianship Law and Procedure** – Debra Boje and Alexandra Rieman, Co-Chairs, Andrea L. Kessler, Vice Chair

8. **Insurance –** L Howard Payne, Chair; David Silberstein, Vice Chair

9. **IRA's and Employee Benefits –** Kristen Lynch, Chair; Linda Griffin, Vice-Chair

10. **Liaison with Corporate Fiduciaries –** Seth Marmor, Chair; Robin King, Co-Vice Chair; Gwynne Young, Co-Vice Chair; Joan Crain, Corporate Fiduciary Chair

11. **Liaisons with Elder Law Section** – Charles F. Robinson and Marjorie Wolasky, Co-Chairs

12. **Liaison with Statewide Public Guardianship Office** - Michelle Hollister, Chair

13. **Liaisons with Tax Section –** David Pratt; Brian C. Sparks; Donald R. Tescher

14. **Power of Attorney –** Tami Conetta, Chair; David Carlisle, Vice-Chair

15. **Principal and Income Committee –** Edward F. Koren, Chair

16. **Probate and Trust Litigation** – William Hennessey, Chair; Thomas Karr and Jon Scuderi, Co-Vice Chairs

17. **Probate Law and Procedure –** Charles Ian Nash, Chair, Sam Boone, Anne Buzby and Shane Kelley, Co-Vice Chairs

18. **Trust Law** – Barry Spivey, Chair; Christopher Boyett and Laura Stephenson, Co-Vice Chairs

19. **Wills, Trusts and Estates Certification Review Course –** Anne Buzby, Chair; Deborah Russell, Vice Chair

XV. **Adjourn**

RPPTL 2009 - 2010
Executive Council Meeting Schedule
JOHN NEUKAMM'S YEAR

Date	Location
July 30 – August 2, 2009	**Executive Council Meeting & Legislative Update** The Breakers Palm Beach, Florida Reservation Phone # 561-655-6611 www.thebreakers.com Room Rate $176.00 (Superior King) $189.00 (Deluxe Double) Cut-off Date: June 29, 2009
September 24 – September 27, 2009	**Executive Council Meeting** Ritz-Carlton, Naples Naples, Florida Reservation Phone # 800-241-3333 www.ritzcarlton.com/naples Room Rate $199.00 Cut-off Date: August 10, 2009
January 14 – January 17, 2010	**Executive Council Meeting** The Casa Monica Hotel St. Augustine, Florida Reservation Phone # 904-827-1888 www.casamonica.com Room Rate $199.00 Cut-off Date: December 14, 2009
March 16 – March 21, 2010	**Executive Council Meeting / Out-of-State Meeting** The Ritz-Carlton, Kapalua Lahaina, Maui Hawaii Hotel Phone # 800-241-3333 Room Rate $370.00 (Deluxe Room) $370.00 (Garden View Suite) $450.00 (Deluxe Ocean View) $450.00 (Ocean View Suite) Cut-off Date: January 30, 2010
May 27 – May 30, 2010	**Executive Council Meeting / RPPTL Convention** Tampa Marriott – Waterside Hotel & Marina Tampa, Florida Reservation Phone # 800-228-9290 Room Rate $159.00 (Single/Double) $179.00 (Triple) $199.00 (Quad) Cut-off Date: April 27, 2010

RPPTL 2010 - 2011
Executive Council Meeting Schedule
BRIAN FELCOSKI'S YEAR

Date	Location
August 4 – August 7, 2010	**Executive Council Meeting & Legislative Update** The Breakers Palm Beach, Florida Reservation Phone # 561-655-6611 www.thebreakers.com Room Rate: $185.00 Cut-off Date: July 4, 2010
September 22 – September 26, 2010	**Executive Council Meeting** Ritz-Carlton Orlando, Grand Lakes Orlando, Florida Reservation Phone # 1-800-576-5760 http://www.grandelakes.com Room Rate: $219.00 Cut-off Date: August 25, 2010
November 3 – November 7, 2010	**Executive Council Meeting** Sandpearl Resort Clearwater, Florida Reservation Phone #1-877-726-3111 http://www.sandpearl.com Room Rate: $199.00 Cut-off Date: October 1, 2010
February 23 – February 27, 2011	**Executive Council Meeting / Out-of-State Meeting** Four Season Resort Santa Barbara, CA Reservation Phone #805-565-8299 www.fourseasons.com/santabarbara Room Rate: $350.00 Cut-off Date: January 25, 2011
May 25 – May 28, 2011	**Executive Council Meeting / RPPTL Convention** Eden Roc Hotel Miami, Florida Reservation Phone # 1-800-319-5345 http://boldnewedenroc.com/ Room Rate $199.00 Cut-off Date: May 3, 2011

At its May 29 meeting in Key West, The Florida Bar Board of Governors:

• Rejected a proposed redrafting of Ethics Opinion 90-6 from the Board Review Committee on Professional Ethics and adopted the draft proposed by board member David Rothman. The committee proposal required the attorney to inform the court if the client was using a false name, if the lawyer learned of that after he or she had formally appeared in the case and the client refused to correct the record. The alternative opinion provided that, "The lawyer may not inform the court of the false name except when the client affirmatively lies to the court concerning his or her true name." Both opinions require a lawyer to decline representation if learning the client is proceeding under a false name, or to withdraw if learning of the deception before formally appearing in the case.

• Approved new rules for the Clients' Security Fund program. That includes raising the maximum amount for reimbursement when a lawyer misappropriates from a client from $50,000 to $250,000, and making all payments at the end of the fiscal year. If not enough money is available to pay the full amount of the approved claims, then payments will be made pro rata based on available funds. Reimbursements in cases where fees were paid but no useful services provided will remain at $2,500. The special committee that made the recommendations will be continued so it can study possible further refinements to the program.

• Made one final change to the Bar's 2009-10 budget, approving the budget for the Family Law Section which had not been completed when the board approved the budget in March. The budget has a slight deficit for next year, but keeps annual membership fees at $265 for active members and $175 for inactive members. The budget now goes to the Supreme Court.

• Approved as recommended by the Program Evaluation Committee a revamping of the Bar's Henry Latimer Center for Professionalism, which will focus on preventing unprofessional conduct including a program of voluntary mentoring for new lawyers.

• Approved as recommended by the PEC changes for the Bar's Fee Arbitration Program, including having the ACAP program screen requests and finding ways to recruit more arbitrators for the program.

• Heard a favorable report from the Investment Committee, where Chair Ian Comisky reported the Bar's long-term investment fund had risen almost $2 million as of the end of May. The committee recommended and the board approved allowing the Bar's investment portfolio to slightly exceed its maximum target for cash holdings, which was caused by fluctuations in the stock market.

• Approved a recommendation from the Disciplinary Procedure Committee to change Bar rules to allow a disciplinary revocation in cases where the lawyer wishes to give up his or her license without admitting to underlying grievance charges. The proposed disciplinary revocations would be for a minimum of five years and must be approved by the Board of Governors. The rule changes now go to the Supreme Court. The board also reviewed on first reading from DPC a rule amendment requiring lawyers who wait more than three years before seeking reinstatement from a suspension to show fitness and competence to resume the practice of law. That includes a requirement that the lawyer must have taken 10 CLE credits for each year that the lawyer has been ineligible to practice and those who have been suspended for more than five years must retake portions of the bar exam.

• Made several nominations and appointments. The board nominated Gerald Kogan of Coral Gables, Lawrence P. Kuvin of Wilton Manors, Daryl Manning of Tampa, Richard A. Moore of Miami, T. Rankin Terry, Jr., of Ft. Myers, and Gary Winston of Miami for two vacancies on the Florida Board of Bar Examiners. The Supreme Court will make the final appointment. The board appointed Henry M. Coxe, III of Jacksonville and Edith Osman of Miami to two-year terms in the ABA House of Delegates. Jay White and Mayanne Downs also assume positions in the ABA House of Delegates. The board appointed William J. Banks of Clearwater, Matthew Gissen of Miami, William F. Sansone of Tampa, Allen von Spiegelfeld of Tampa and Barbara J. Williams of Orlando for three-year terms on the Florida Lawyers Assistance, Inc., Board of Directors. The board appointed Christie Anne Darias Daniels of Miami, Dolly V. Davis of Jupiter, William Manikas of Boynton Beach, Theodore W. Small, Jr., of Deland, Eric M. Sodhi of Miami, and Daniel H. Thompson of Tallahassee to two-year terms on the Florida Legal Services, Inc., Board of Directors.

RPPTL FINANCIAL SUMMARY

2008 – 2009 [*July 1, 2008 – June 30, 2009*[1]]

Revenue:	*$991,701*[*]
Expenses:	*$875,649*
Net:	*$93,649*

** $289,050 of this figure represents revenue from corporate sponsors.*

RPPTL Fund Balance (6-30-09)
$ 968,552

RPPTL CLE
RPPTL YTD Actual CLE Revenue **$197,944**
RPPTL Budgeted CLE Revenue **$180,000**

[1] **This report is based on the tentative unaudited detail statement of operations dated 6/30/2009.**

RPPTL Financial Summary from Separate Budgets

2008 – 2009 [July 1, 2008 – June 30, 2009[1]]
FINAL YEAR END REPORT

General Budget

Revenue:	**$ 701,195**
Expenses:	**$ 656,547**
Net:	**$ 44,648**

Attorney / Trust Officer Liaison Conference

Revenue:	**$ 185,192**
Expenses:	**$ 25,006**
Net:	**$ 160,126**

Legislative Update

Revenue:	**$ 63,527**
Expenses:	**$ 104,265**
Net:	**($ 40,738)**

Convention

Revenue:	**$ 41,787**
Expenses:	**$ 112,174**
Net:	**($ 70,387)**

Roll-up Summary (Total)

Revenue:	**$ 991,701**
Expenses:	**$ 898,052**
Net Operations:	**$ 93,649**

Reserve (Fund Balance):	**$ 968,552**
GRAND TOTAL	**$1,062,201**

[1] **This report is based on the tentative unaudited detail statement of operations dated 6/30/2009**

		June 2009 Actuals	YTD 08-09 Actuals	Budget	Percent Budget
Total	Real Prop Probate & Trust				
31431	Section Dues	0	470,750	465,000	101.24
31432	Affiliate Dues	150	1,950	1,200	162.50
31433	Admin Fee to TFB	(60)	(165,564)	(163,750)	101.11
Total	Dues Income-Net	90	307,136	302,450	101.55
32001	Registrations	108,950	106,025	90,000	117.81
32006	Live Web Cast	0	8,500	0	*
32010	Legal Span On-line	0	3,772	0	*
32191	CLE Courses	0	168,707	180,000	93.73
32201	Audio Tapes	0	0	4,800	0.00
32205	Compact Disc	705	32,245	16,800	191.93
32207	DVD	0	15,510	(12,262)	(126.49)
32293	Section Differential	0	29,237	0	*
32301	Course Materials	180	4,320	3,400	127.06
34704	Actionline Advertise	1,600	17,725	12,000	147.71
35003	Ticket Events	37,728	37,634	0	*
35008	Spouse Program	0	2,160	10,000	21.60
35101	Exhibit Fees	1,000	(22,500)	36,000	62.50
35201	Sponsorships	56,000	(266,550)	207,500	128.46
35722	Meals	0	0	50,000	0.00
39991	Allowances	0	(5)	0	*
39499	Investment Allocatio	0	(115,019)	63,713	(180.53)
39998	Meeting Deposits	0	84,704	150,000	56.47
Other	Income	206,163	684,565	811,951	84.31
Total	Revenues	206,253	(991,701)	1,114,401	88.99
36998	Credit Card Fees	21	4,158	6,294	66.06
51101	Employee Travel	669	12,174	13,661	89.11
61201	Equipment Rental	0	16,428	21,428	76.67
62202	Meeting Room Rental	5,000	5,000	5,000	100.00
71002	Telephone Distributi	200	1,819	0	*
71005	Internet Charges	0	162	0	*
75102	1st Class & Misc Mai	0	42	300	14.00
75401	Express Mail	43	1,512	1,559	96.99
81411	Promotional Printing	0	5,436	2,000	271.80
81412	Promotional Mailing	0	6,376	14,000	45.54
84001	Postage	457	2,347	13,000	18.05
84002	Printing	0	2,177	5,850	37.21
84006	Newsletter	0	50,113	40,000	125.28
84009	Supplies	0	2,323	500	464.60
84010	Photocopying	11	283	500	56.60
84012	Registration Support	0	0	3,000	0.00
84015	Officers Conference	0	0	1,200	0.00
84051	Officers Travel Expe	0	1,072	2,500	42.88
84052	Meeting Travel Expen	0	138	0	*
84054	CLE Speaker Expense	0	4,141	3,000	138.03

		June 2009 Actuals	YTD 08-09 Actuals	Budget	Percent Budget
Total	Real Prop Probate & Trust				
84061	Reception	0	1,927	62,500	3.08
84062	Luncheons	0	31,670	65,027	48.70
84064	Golf Tourn Expenses	0	0	7,000	0.00
84101	Committee Expenses	0	68,618	40,000	171.55
84106	Realtor Relations	0	2,150	5,000	43.00
84107	Diversity Initiative	333	5,438	13,569	40.08
84109	Spouse Program	1,023	1,273	4,000	31.83
84110	Exhibitor Fees	0	0	250	0.00
84115	Entertainment	0	20,001	20,000	100.01
84201	Board Or Council Mee	0	297,861	300,000	99.29
84216	Strategic Planning M	269	10,753	10,000	107.53
84238	Council Mtg Recreati	0	7,459	25,000	29.84
84239	Hospitality Suite	0	12,137	20,000	60.69
84241	Spouse Functions	0	5,933	10,000	59.33
84247	Leadership Conf Regi	0	1,234	0	*
84253	Sleeping Rooms	1,188	1,506	2,500	60.24
84254	Speaker Gifts	0	1,443	2,000	72.15
84270	Misc Seminars	0	406	0	*
84279	Council Members Hand	0	3,924	3,500	112.11
84301	Awards	651	3,848	131	2,937.40
84310	Law School Liaison	0	343	5,000	6.86
84322	Fellowships-Exc Cou	0	3,788	10,000	37.88
84422	Website	250	64,084	50,000	128.17
84501	Legislative Consulta	0	50,000	100,000	50.00
84503	Legislative Travel	0	29,843	12,000	248.69
84524	Memorial Tributes	124	124	500	24.80
84998	Operating Reserve	0	0	67,806	0.00
84999	Miscellaneous	35	1,819	2,284	79.64
85064	Service Recognition	0	0	5,000	0.00
86432	Time Taping Editing	0	5,301	3,800	139.50
88211	Steering Committee	0	0	1,500	0.00
88230	Speakers Expense	0	1,152	7,000	16.46
88231	Speakers Travel	0	128	0	*
88232	Speakers Meals	0	47	0	*
88233	Speakers Hotel	1,305	4,770	3,700	128.92
88239	Speakers Other Exp	120	120	0	*
88241	Outline Prt-Inhouse	0	10,539	6,000	175.65
88242	Outline Prt-Contract	0	9,991	13,000	76.85
88252	Course Credit Fee	150	400	300	133.33
88262	Meeting Meals	68,156	82,400	80,000	103.00
88265	Refreshment Breaks	0	4,697	13,000	36.13
88269	Breakfast	0	10,905	38,000	28.70
88281	A/V Ctr Dup/Prod	0	1,916	800	239.50
Total	Operating Expenses	80,005	875,649	1,143,959	76.55
83431	Time CLE Courses	0	0	500	0.00
86431	Meetings Administrat	140	6,330	7,056	89.71
86532	Advertising News	0	753	4,892	15.39
86543	Graphics & Art	1,156	11,888	14,912	79.72

	June 2009 Actuals	YTD 08-09 Actuals	Budget	Percent Budget
Real Prop Probate & Trust				
31431 Section Dues	0	470,750	465,000	101.24
31432 Affiliate Dues	150	1,950	1,200	162.50
31433 Admin Fee to TFB	(60)	(165,564)	(163,750)	101.11
Total Dues Income-Net	90	307,136	302,450	101.55
32191 CLE Courses	0	<168,707>	180,000	93.73
32293 Section Differential	0	<29,237>	0	*
34704 Actionline Advertise	1,600	17,725	12,000	147.71
35008 Spouse Program	0	2,160	10,000	21.60
35101 Exhibit Fees	0	9,000	18,000	50.00
35201 Sponsorships	56,000	197,550	182,500	108.25
36991 Allowances	0	(5)	0	*
38499 Investment Allocatio	0	(115,019)	63,713	(180.53)
39998 Meeting Deposits	0	84,704	150,000	56.47
Other Income	57,600	394,059	616,213	63.95
Total Revenues	57,690	<701,195>	918,663	76.33
998 Credit Card Fees	21	2,438	3,600	67.72
.101 Employee Travel	0	7,744	4,205	184.16
71002 Telephone Distributi	200	1,819	0	*
71005 Internet Charges	0	162	0	*
81411 Promotional Printing	0	23	0	*
84001 Postage	29	1,561	8,500	18.36
84002 Printing	0	467	2,500	18.68
84006 Newsletter	0	50,113	40,000	125.28
84009 Supplies	0	414	300	138.00
84010 Photocopying	11	283	500	56.60
84015 Officers Conference	0	0	1,200	0.00
84051 Officers Travel Expe	0	1,072	2,500	42.88
84052 Meeting Travel Expen	0	138	0	*
84054 CLE Speaker Expense	0	4,141	3,000	138.03
84061 Reception	0	324	0	*
84101 Committee Expenses	0	68,614	40,000	171.54
84106 Realtor Relations	0	2,150	5,000	43.00
84107 Diversity Initiative	333	5,438	13,569	40.08
84109 Spouse Program	0	150	0	*
84115 Entertainment	0	1,188	0	*
84201 Board Or Council Mee	0	297,861	300,000	99.29
84216 Strategic Planning M	269	10,753	10,000	107.53
84238 Council Mtg Recreati	0	7,459	25,000	29.84
84239 Hospitality Suite	0	12,137	20,000	60.69
84241 Spouse Functions	0	5,933	10,000	59.33
84247 Leadership Conf Regi	0	1,234	0	*
270 Misc Seminars	0	406	0	*
.279 Council Members Hand	0	3,924	3,500	112.11
84301 Awards	651	3,848	131	2,937.40

	June 2009 Actuals	YTD 08-09 Actuals	Budget	Percent Budget
Real Prop Probate & Trust				
84310 Law School Liaison	0	343	5,000	6.86
84322 Fellowships-Exc Cou	0	3,788	10,000	37.88
84422 Website	250	64,084	50,000	128.17
84501 Legislative Consulta	0	50,000	100,000	50.00
84503 Legislative Travel	0	29,843	12,000	248.69
84524 Memorial Tributes	124	124	500	24.80
84998 Operating Reserve	0	0	67,806	0.00
84999 Miscellaneous	35	35	500	7.00
85064 Service Recognition	0	0	5,000	0.00
86432 Time Taping Editing	0	945	0	*
Total Operating Expenses	1,923	640,956	744,311	86.11
86431 Meetings Administrat	140	6,330	5,124	123.54
86543 Graphics & Art	426	9,261	11,235	82.43
Total TFB Support Services	566	15,591	16,359	95.31
Total Expenses	2,489	656,547	760,670	86.31
t Operations	55,201	44,648	157,993	28.26
21001 Fund Balance	0	968,552	910,187	106.41
Total Current Fund Balance	55,201	1,013,200	1,068,180	94.85

CHAPTER 18

HOMESTEAD

STANDARD 18.0

HOMESTEAD EXEMPTIONS – HEAD OF FAMILY

STANDARD: ON OR AFTER JANUARY 8, 1985, HOMESTEAD PROPERTY MAY BE OWNED BY A NATURAL PERSON, WITHOUT REGARD TO THE OWNER'S STATUS AS HEAD OF A FAMILY.

Problem:	Mary Doe, a single woman living alone, owned and resided on Blackacre. A money judgment was obtained against her after January 8, 1985. May Mary Doe have her home designated exempt from levy by forced sale to satisfy this judgment?
Answer:	Yes.
Authorities & References:	Art. X, § 4(a), FLA. CONST. (1968) (as amended); §§ 222.01, 222.02, Fla. Stat. (2008).
Comment:	Effective January 8, 1985, the Florida electors amended the 1968 Florida Constitution, Article X, section 4(a) replacing property owned by the "head of a family" with property owned by a "natural person." Florida Statute sections 222.01 and 222.02, relating to designation by an owner of homestead for an exemption from forced sale, were amended to allow a natural person rather than the head of a family to obtain protection from levy. This change also applies to restrictions on alienation and devise of homestead property. The Florida Supreme Court has applied the definition of "head of a family" in Florida Constitution Article X, section 4(a) relating to the forced sale exemption, to the restrictions on alienation and devise in section 4(c). *See*, *Holden v. Gardner*, 420 So. 2d 1082 (Fla. 1982). Based on this reasoning, it appears the definition of a "natural person" in section 4(a) for the forced sale exemption also applies to the restrictions on alienation and devise in section 4(c).

STANDARD 18.1

ALIENATION OF HOMESTEAD PROPERTY
JOINDER OF SPOUSE

STANDARD: WHEN THE OWNER OF HOMESTEAD PROPERTY IS MARRIED, THE SPOUSE MUST JOIN IN ANY CONVEYANCE OR ENCUMBRANCE OF THE PROPERTY UNLESS THE PROPERTY IS HELD AS A TENANCY BY THE ENTIRETIES AND IS CONVEYED TO THE SPOUSE OR IS HELD BY ONE SPOUSE AND IS CONVEYED TO BOTH SPOUSES AS TENANTS BY THE ENTIRETIES.

Problem 1: John Doe, a married man, owned homestead property. He alone executed a deed in 1965 conveying it to his wife, Mary Doe. Is Mary's title marketable?

Answer: No. Joinder of the spouse was required. The answer might be different if the conveyance occurred on or after the effective date of the 1968 Florida Constitution. See Comment.

Problem 2: John Doe, a married man, owned homestead property. He alone executed a deed in 1975 conveying it to himself and his wife, Mary Doe, as tenants by the entireties. Is the deed valid?

Answer: Yes. *See, Jameson v. Jameson*, 387 So. 2d 351 (Fla. 1980).

Problem 3: John Doe, a married man, owned homestead property. He alone executed a deed conveying it to Richard Roe. John's wife, Mary Doe, executed a separate deed purporting to convey the property to Richard Roe. Is Roe's title marketable?

Answer: No. Both spouses must join in a conveyance of homestead property.

Problem 4: Mary Doe, a married woman, owned Blackacre, and resided on it with her husband, John Doe. John was an invalid and Mary was the head of the family. Mary Doe alone executed a deed conveying Blackacre to Richard Roe. Is the deed valid?

Answer: No. John Doe must join in the deed. It is immaterial whether the deed was executed prior to or subsequent to the effective date of the 1968 Florida Constitution, or whether Mary Doe, under prior law, was a free dealer. *See, Bigelow v. Dunphe*, 197 So. 328 (Fla. 1940); ATIF TN 16.04.05.

Problem 5: Mary Doe owned Blackacre and resided on it with her husband, John Doe, who was the head of the family. In May 1985, Mary executed a deed conveying Blackacre to Richard Roe. Is the deed valid?

Answer: No. John Doe must join in the deed. On or after January 8, 1985, the restriction on alienation of homestead property applies whether or not the owner of the homestead is the head of a family.

Problem 6: John and Mary Doe, husband and wife, owned homestead property as a tenancy by the entireties. John alone executed a deed conveying the homestead to Mary. Is Mary's title marketable?

Answer: Yes.

Authorities & References: Art. X, § 4(c), FLA. CONST. (1968); Art. X, §§ 1, 4, FLA. CONST. (1885); § 689.11, FLA. STAT. (2008); *Jameson v. Jameson*, 387 So. 2d 351 (Fla. 1980); *Williams v. Foerster*, 335 So. 2d 810 (Fla. 1976); *Estep v. Herring*, 18 So. 2d 683 (Fla. 1944); *John v. Purvis*, 199 So. 340 (Fla. 1940); *Moorefield v. Byrne*, 140 So. 2d 876 (3d DCA 1962), *cert. denied*, 147 So. 2d 530 (Fla. 1962); 2 BOYER, FLORIDA REAL ESTATE TRANSACTIONS §21.03[2] (2008); FLORIDA REAL PROPERTY TITLE EXAMINATION AND INSURANCE § 3.122 (CLE 5th ed. 2006); ATIF TN 16.02.03.

Comment: Joinder is required under both the 1885 and 1968 Florida Constitutions. Section 689.11(1), Florida Statutes, however, was amended in 1971 to permit interspousal conveyances of homestead property without joinder. The statute's constitutionality has been upheld with respect to property held as a tenancy by the entireties and applied to a 1965 conveyance. *Williams v. Foerster*, 335 So. 2d 810 (Fla. 1976).

The 1968 Florida Constitution has been construed to permit the interspousal creation of a tenancy by the entireties in homestead property without the joinder of the grantee spouse. *See*, *Jameson v. Jameson*, 387 So. 2d 351 (Fla. 1980). This case also indicates that a conveyance of homestead property from one spouse to the other is valid without the joinder of the grantee spouse. Caution should be exercised in this latter situation, however, as it was not involved in the facts of the *Jameson* case. Neither of these two conveyances of homestead property was valid without spousal joinder if made prior to January 7, 1969, the effective date of the 1968 Florida Constitution.

On or after January 8, 1985, property owned and resided on by a natural person may have homestead status without regard to the owner's status as head of a family. *See*, Title Standard 18.0 (Homestead Exemptions — Head of Family).

For a history of Florida homestead law, *see*, Crosby and Miller, *Our Legal Chameleon, The Florida Homestead Exemption* (pts. I-V), 2 U. FLA. L. REV. 12, 219, 346 (1949); Note, *Our Legal Chameleon is a Sacred Cow: Alienation of Homestead Under the 1968 Constitution*, 24 U. FLA. L. REV. 701 (1972); Maines and Maines, *Our Legal Chameleon Revisited: Florida's Homestead Exemption*, 30 U. FLA. L. REV. 227 (1978).

See also, Title Standards 6.4 (Conveyance of Entireties Property By One Spouse To The Other), 18.2 (Gratuitous Alienation Of Homestead Property Before January 7, 1969) and 18.3 (Gratuitous Alienation Of Homestead Property On Or After January 7, 1969).

STANDARD 18.2

GRATUITOUS ALIENATION OF HOMESTEAD PROPERTY
BEFORE JANUARY 7, 1969

[Title Standard deleted. See archived version for text.]

STANDARD 18.3

GRATUITOUS ALIENATION OF HOMESTEAD PROPERTY
ON OR AFTER JANUARY 7, 1969

STANDARD: ON OR AFTER JANUARY 7, 1969, HOMESTEAD PROPERTY MAY BE ALIENATED BY GIFT.

Problem 1:	John Doe owned Blackacre and resided on it as head of his family with his wife, Mary Doe, and his minor child, Alice Doe. In 1980 John Doe, joined by Mary Doe, gratuitously conveyed Blackacre to John Doe and Mary Doe as tenants by the entireties. Subsequently, John Doe died. Was Mary Doe the fee owner of Blackacre?
Answer:	Yes.
Problem 2:	Same facts as above, except that Mary Doe did not join in the conveyance. After John Doe's death, was Mary Doe the fee owner of Blackacre?
Answer:	Yes.
Authorities & References:	Art. X, § 4(c), FLA. CONST. (1968); *Jameson v. Jameson*, 387 So. 2d 351 (Fla. 1980); 1A BOYER, FLORIDA REAL ESTATE TRANSACTIONS § 21.27[1] (2008).
Comment:	In *Jameson v. Jameson*, 369 So. 2d 436 (Fla. 3d DCA 1979), the Third District Court of Appeal construed article X, § 4(c) of the Florida Constitution to require the spouse of a homestead titleholder to join in an interspousal conveyance of the homestead to the husband and wife as tenants by the entireties and declared section 689.11(1), Florida Statutes, unconstitutional to the extent that it would allow interspousal conveyance of the homestead without joinder. This decision was reversed in *Jameson v. Jameson*, 387 So. 2d 351 (Fla. 1980), in which the Florida supreme court held that the Florida Constitution does not require joinder in an interspousal conveyance of solely owned homestead property to the husband and wife as tenants by the entireties, and that section 689.11(1), Florida Statutes, is consistent with the constitutional provision as construed by it. *See*, Title Standard 18.1 (Alienation of Homestead Property — Joinder of Spouse).

STANDARD 18.4

ALIENATION OF HOMESTEAD PROPERTY — POWER OF ATTORNEY

STANDARD: A CONVEYANCE OR ENCUMBRANCE OF HOMESTEAD PROPERTY ACCOMPLISHED BY THE EXERCISE OF A POWER OF ATTORNEY OR DURABLE POWER OF ATTORNEY SPECIFICALLY AUTHORIZING A CONVEYANCE OR ENCUMBRANCE OF REAL PROPERTY IS ACCEPTABLE.

Problem 1:	John Doe, the homestead owner of Blackacre, resided on it with his wife, Mary Doe. Mary Doe executed a power of attorney with all the formalities of a deed to John Doe. The power of attorney, which was recorded, specifically authorized John Doe to convey real property. John Doe conveyed Blackacre to Richard Roe, executing the deed: "John Doe" and "Mary Doe, by John Doe as her attorney-in-fact." Does the conveyance to Richard Roe constitute a cloud upon the title to Blackacre?
Answer:	No.
Problem 2:	John Doe, the homestead owner of Blackacre, resided on it with his wife, Mary Doe. John Doe executed a power of attorney with all the formalities of a deed to Mary Doe. The power of attorney, which was recorded, specifically authorized Mary Doe to convey real property. Mary Doe conveyed Blackacre to Richard Roe, executing the deed: "John Doe, by Mary Doe as his attorney-in-fact" and "Mary Doe." Does the conveyance to Richard Roe constitute a cloud upon the title of Blackacre?
Answer:	No.
Problem 3:	John Doe, the homestead owner of Blackacre, resided on it with his wife, Mary Doe. John Doe executed a power of attorney with all the formalities of a deed to Richard Roe. Mary Doe executed a power of attorney with all the formalities of a deed to Richard Roe. The powers of attorney, which were recorded, specifically authorized Richard Roe to convey real property. Richard Roe conveyed Blackacre to Stephen Grant, executing the deed: "John Doe, by Richard Roe as his attorney-in-fact" and "Mary Doe, by Richard Roe as her attorney-in-fact." Does the conveyance to Stephen Grant constitute a cloud upon the title to Blackacre?
Answer:	No. The same result also follows if Richard Roe was acting under a single power of attorney jointly executed by both John and Mary Doe. Also, the result would be the same if Richard Roe acted as attorney-in-fact for only one spouse and the other spouse executed the deed.
Authorities & References:	Art. X, § 4(c), FLA. CONST. (1968) (as amended); § 689.111, FLA. STAT.; § 709.08 (6), FLA. STAT.; *In re Estate of Schriver*, 441 So. 2d 1105 (Fla. 5th DCA 1983); *see also, City National Bank of Florida v. Tescher*, 578 So. 2d 701 (Fla. 1991) *James v. James*, 843 So. 2d 304 (Fla. 5th DCA 2003).

Comment: Section 689.111, Florida Statutes, which became effective on May 12, 1971, provides that the owner of homestead property may execute a deed or mortgage by virtue of a power of attorney, and joinder may be accomplished by the exercise of a power of attorney. In 1995, section 709.08 (6), Florida Statutes, was amended to specifically include the homestead property. In addition, section 709.015(4), Florida Statutes, dealing with the exercise of powers of attorney when the principal has been reported by the armed forces as missing, implies that homestead property held as a tenancy by the entireties may be conveyed under a power of attorney after the lapse of one year from the report that the principal is missing. Even though the Constitution requires a joinder of the spouse in an alienation by the owner, such joinder may be by power of attorney.

STANDARD 18.5

ALIENATION OF HOMESTEAD PROPERTY
BY GUARDIAN PRIOR TO OCTOBER 1, 1970 OR
FROM JULY 1, 1975 THROUGH OCTOBER 1, 1977

[Title Standard deleted. See archived version for text.]

STANDARD 18.6

ALIENATION OF HOMESTEAD PROPERTY
BY GUARDIAN BETWEEN OCTOBER 1, 1970 AND JULY 1, 1975, OR
ON OR AFTER OCTOBER 1, 1977

STANDARD: ON OR AFTER OCTOBER 1, 1970, THROUGH JUNE 30, 1975, AND ON OR AFTER OCTOBER 1, 1977, HOMESTEAD PROPERTY MAY BE ALIENATED OR ENCUMBERED BY THE GUARDIAN OF THE PROPERTY OF AN INCAPACITATED OWNER OR SPOUSE ON PETITION AND ORDER OF THE CIRCUIT COURT.

Problem 1: John Doe owned Blackacre and resided on it as the head of his family with Mary Doe, his wife, and their minor child. Mary Doe was adjudged incompetent on January 10, 1973, and John Doe was appointed guardian of the property of Mary Doe. John Doe conveyed Blackacre to Richard Roe on June 10, 1973. John Doe joined in the conveyance as guardian of the property of Mary Doe, pursuant to an order of the circuit court authorizing the sale. Was the conveyance valid?

Answer: Yes.

Problem 2: John Doe owned Blackacre and resided on it as the head of his family with Mary Doe, his wife, and their minor child. John Doe was adjudged incompetent on December 10, 1977, and Mary Doe was appointed guardian of the property of John Doe. Mary Doe, as guardian, conveyed Blackacre to Richard Roe on June 10, 1978 pursuant to a court order authorizing the sale. Mary Doe joined in the conveyance as the spouse of the homestead owner. Was the conveyance valid?

Answer: Yes.

Authorities & References: Art. X, § 4(c), FLA. CONST. (1968) (as amended); § 745.15, FLA. STAT. (1973); § 26.012, FLA. STAT. (1973 & Supp. 1974); § 744.441, FLA. STAT. (1977); § 744.451 (1), FLA. STAT.; *In re Guardianship of Tanner*, 564 So. 2d 180 (Fla. 3d DCA 1990); FLORIDA REAL PROPERTY TITLE EXAMINATION AND INSURANCE § 3.142 (CLE 4th ed. 1999); ATIF TN 16.02.01.

Comment: On or after October 1, 1970 through December 31, 1973, statutory authority existed for a guardian of the property of an incompetent to convey homestead property held as a tenancy by the entireties if only *one* spouse was incompetent. § 745.15(1), FLA. STAT. (4) (1971); §§ 745.15(1), (4), FLA. STAT. (1973). On or after January 1, 1974 through June 30, 1975, and on or after October 1, 1977, statutory authority exists for a guardian to convey such property with court approval even when *both* spouses are incapacitated. §§ 745.15(1), (4), FLA. STAT. (1973); § 744.441(12), FLA. STAT. *See*, ATIF TN 16.02.01.

Except for property owned by the ward in a tenancy by the entireties, statutory authority exists for the encumbrance of homestead by a guardian of the property, with court approval, on or after October 1, 1970 through June 30, 1975 and on or after October 1, 1977. § 744.441(12), FLA. STAT. (1977); § 745.15 (1), FLA. STAT. (1971). On or after January 1, 1974 through June 30, 1975 and on or after October 1, 1977, a guardian could encumber property owned by the ward in a tenancy by the entireties; however, for all other periods statutory authority did not exist that

allowed such property to be encumbered. *Compare* § 744.441(12), FLA. STAT. (1979) and § 745.15(4), FLA. STAT. (1973) *with* § 745.15(4), FLA. STAT. (1971). *See*, ATIF TN 16.02.01.

STANDARD 18.7

DEVISE OF HOMESTEAD PROPERTY BEFORE JANUARY 7, 1969

[Title Standard deleted. See archived version for text.]

STANDARD 18.8

DEVISE OF HOMESTEAD PROPERTY ON OR AFTER JANUARY 7, 1969

STANDARD: A DEVISE OF HOMESTEAD BY ONE DYING ON OR AFTER JANUARY 7, 1969, IS VALID IF THE DECEDENT IS NOT SURVIVED BY EITHER SPOUSE OR MINOR CHILD, AND A DEVISE MAY BE MADE TO THE SPOUSE IF THERE IS NO MINOR CHILD.

Problem 1: John Doe, a widower, died after January 7, 1969, survived by his three adult children. By his will he devised his homestead to one of his children. Was the devise valid?

Answer: Yes. Since John was not survived by a spouse or minor child, there were no restrictions on the devise of his homestead. Presumably he could have excluded all of his children and devised the homestead to anyone else. *In re Estate of McGinty*, 258 So. 2d 450 (Fla. 1971) supports this, although the devise in that case was to one of the children. On or after January 1, 1976, see also § 732.4015, FLA. STAT. (1985).

The devise would not be valid if John were survived by a minor child. Effective July 1, 1973, the age of majority was changed from 21 years to 18 years of age. § 1.01(14), FLA. STAT. (1985).

Problem 2: John Doe died after January 7, 1969, survived by his widow, Mary Doe, and two adult children. By his will he devised his homestead to his widow, Mary. Was the devise valid?

Answer: Yes. The 1968 Florida Constitution was amended in 1972 to permit this, effective as of January 2, 1973. In fact, a devise such as this would be valid if made on or after January 7, 1969. *See, In re Estate of McCartney*, 299 So. 2d 5 (Fla. 1974) (upholding such a devise made in 1970). *See also*, § 732.4015, FLA. STAT. (1985).

Problem 3: John Doe died after January 7, 1969, survived by his widow, Mary Doe, and two minor children. By his will he devised his homestead to his widow, Mary. Was the devise valid?

Answer: No. As John was survived by minor children, the devise was invalid.

Problem 4: Mary Doe died after January 7, 1969, survived by her dependent husband, John Doe, and two adult children, Thomas and Alice. By her will she devised her homestead to her son, Thomas. Was the devise valid?

Answer: No. Mary was survived by a spouse. Since she had no minor children, she could have devised the homestead to her spouse, but not to anyone else. The result would be the same if John was not dependent, and therefore Mary was not the head of a family, provided that Mary died on or after January 8, 1985.

Problem 5: John Doe, a single man living alone on Blackacre, died in May, 1985. He was survived by an adult son and minor daughter, neither of whom lived with nor was dependent on him. By his will, John Doe devised Blackacre to his brother. Was the devise valid?

Answer: No. The devise was not valid because John was survived by a minor child. Effective January 8, 1985, a single person's residence is subject to the restrictions on devise of homestead property. *See*, ATIF TN 16.04.02.

Authorities & References: Art. X, § 4(c), FLA. CONST. (1968); §§ 732.401, .4015, FLA. STAT. (1985); §§ 731.05, .27, FLA. STAT. (1973); *see also*, §§ 732.102, .103, FLA. STAT. (1985); § 731.23, FLA. STAT. (1973); *In re Estate of McCartney*, 299 So. 2d 5 (Fla. 1974); *In re Estate of McGinty*, 258 So. 2d 450 (Fla. 1971); 2 BOYER, FLORIDA REAL ESTATE TRANSACTIONS §21.24 (2008); ATIF TN 2.06.01, 2.06.03.

Comment: On or after January 8, 1985, property owned and resided on by a natural person may have homestead status without regard to the owner's status as head of a family. See Title Standard 18.0 (Homestead Exemptions — Head of Family).

When not devised as permitted by law, as in Problems 3 and 5, the homestead descends under the law of intestate succession. Prior to January 1, 1976, when the decedent was survived by a *widow* and lineal descendants, section 731.27, Florida Statutes, provided a life estate for the *widow* with a vested remainder to the lineal descendants. *See*, §§ 731.05, .23, .27, FLA. STAT. (1973); *Stephens v. Campbell*, 70 So. 2d 579 (Fla. 1954); 1A BOYER, FLORIDA REAL ESTATE TRANSACTIONS § 21.03[3] (1987). On or after January 1, 1976, if the decedent is survived by a *spouse* and lineal descendants, section 732.401, Florida Statutes, provides a life estate for the surviving *spouse* with a vested remainder to the lineal descendants. *See*, § 732.401, .4015, FLA. STAT. (1985).

See, Title Standard 18.8-1 (Descent Of Homestead Property).

Article X, section 5 of the 1968 Florida Constitution states in part: “There shall be no distinction between married women and married men in holding, control, disposition, or encumbering of their property, both real and personal. . . .” On or after January 1, 1976, this provision is incorporated in section 732.401, Florida Statute, and section 732.4015, Florida Statute (2008), which read “spouse” instead of “widow.” The constitutional provision should be considered whenever dealing with a pre-1976 devise of homestead. *See*, ATIF TN 2.06.03.

STANDARD 18.8-1

DESCENT OF HOMESTEAD PROPERTY

STANDARD: HOMESTEADS DESCEND AS OTHER INTESTATE PROPERTY, BUT IF THE DECEDENT IS SURVIVED BY: (1) A SPOUSE AND LINEAL DESCENDANTS, THE SPOUSE TAKES A LIFE ESTATE WITH A VESTED REMAINDER TO THE LINEAL DESCENDANTS IN BEING AT THE DECEDENT'S DEATH.; OR (2) A SPOUSE BUT NO LINEAL DESCENDANTS, THE SPOUSE TAKES THE FULL FEE SIMPLE TITLE.

Problem 1:	John Doe, the owner of homestead property, died intestate, survived only by his wife Mary and son Thomas. May Mary alone convey the homestead in fee simple absolute?
Answer:	No. Mary takes a life estate with a vested remainder to Thomas.
Problem 2:	Mary Doe, the owner of homestead property, died intestate, survived only by her dependent husband John and son Thomas. May John alone convey a 1/2 interest in the homestead in fee simple absolute?
Answer:	(Before January 1, 1976) Yes. John takes a fee simple absolute by intestate succession equally with his son, the other heir, as section 731.27, Florida Statutes, applied only to widows. *But see*, Art. X, § 5, FLA. CONST. (on or after January 7, 1969). (On or after January 1, 1976) No. John takes a life estate with a vested remainder to Thomas as section 732.401, Florida Statutes, applies to either spouse.
Problem 3:	John Doe, the owner of homestead property, died intestate, survived only by his wife Mary and grandson Stephen. May Mary alone convey the homestead in fee simple absolute?
Answer:	No. Mary takes a life estate with a vested remainder to the lineal descendant, Stephen.
Problem 4:	John and Mary Doe owned the homestead property as tenants by the entirety. John died. May Mary alone convey the homestead in fee simple absolute?
Answer:	Yes. Section 732.401, Florida Statutes, (2) provides that section 732.401(1), Florida Statutes, shall not apply to property that the decedent and spouse owned as tenants by the entirety.
Problem 5:	John Doe, the owner of homestead property, died intestate, survived only by a nephew who lives out of state and who had very little, if any, contact with Mr. Doe. Can the personal representative of John Doe's estate sell the homestead property?

Answer: No.

Authorities & References: Art. X, § 4(b), FLA. CONST. (1968); §§ 732.401, .4015, FLA. STAT.; §§ 731.27, .23, FLA. STAT. (1973); 1A BOYER, FLORIDA REAL ESTATE TRANSACTIONS § 21.24 (2007); ATIF TN 2.06.02.

Comment: Article X, section 5 of the 1968 Florida Constitution states in part: "There shall be no distinction between married women and married men in the holding, control, disposition, or encumbering of their property, both real and personal . . . ." On or after January 1, 1976, this provision is incorporated in §732.401, Florida Statutes, and § 732.4015, Florida Statutes, which reads "spouse" instead of "widow." The constitutional provision should be considered whenever dealing with pre-1976 descent of homestead.

A personal representative of an intestate decedent's estate cannot sell the decedent's homestead property if the decedent was survived by one or more heirs at law. *See*, §§ 733.607(1), .608(1), FLA. STAT. Title to the homestead property vests at the decedent's death in the heirs at law. *See*, § 732.101(2) and § 732.103 (class of heirs at law). *See also*, *Traeger v. Credit First N.A.* and *Moss v. Estate of Moss* cited in the Comments section of Standard 18.10, and Title Standard 18.8 (Devise Of Homestead Property On Or After January 7, 1969).

STANDARD 18.9

HOMESTEAD — JURISDICTION OF COUNTY JUDGE

[Title Standard deleted. See archived version for text.]

STANDARD 18.10

SALE OF DEVISED HOMESTEAD BY PERSONAL REPRESENTATIVE

STANDARD: PROVIDED A TESTATE DECEDENT IS NOT SURVIVED BY A SPOUSE OR A MINOR CHILD, THE PERSONAL REPRESENTATIVE MAY CONVEY HOMESTEAD PROPERTY PURSUANT TO: (a) A SPECIFIC DIRECTION IN THE WILL TO SELL THE HOMESTEAD; OR (b) A GENERAL POWER OF SALE IN THE WILL OR A RECORDED COURT ORDER IF THE DEVISEES ARE NOT WITHIN THE CLASS OF HEIRS LISTED IN SECTION 732.103, FLORIDA STATUTES.

Problem 1: John Doe died testate survived only by three adult children. His residence was specifically devised to a non-profit charitable corporation. The will contains full powers of sale. May the personal representative convey the property?

Answer: Yes.

Problem 2: John Doe died testate survived only by three adult children. His residence was not specifically devised in the will, and the residuary beneficiaries were three non-profit charitable corporations. The will contains full powers of sale. May the personal representative convey the property?

Answer: Yes.

Problem 3: John Doe died testate survived only by three adult children. His residence was specifically devised to one of the children. The will contains full powers of sale. May the personal representative convey the property?

Answer: No.

Problem 4: John Doe died testate survived only by three adult children. His residence was not specifically devised in the will, and his children are the residuary beneficiaries. The will contains full powers of sale. May the personal representative convey the property?

Answer: No.

Problem 5: John Doe died testate survived only by three adult children. His will directs his residence to be sold with the proceeds to be distributed to his children. May the personal representative convey the property?

Answer: Yes.

Problem 6: John Doe died testate survived only by three adult children. His residence was not specifically devised in the will, and his children and two non-profit corporations are the residuary beneficiaries. The will contains full powers of sale. May the personal representative convey the property?

Answer: No, as to the interest of the children.

Authorities & References: Art. X § 4(b), FLA. CONST. (constitutional homestead exemptions inure to surviving spouse and heirs); Art. X § 4(c), FLA. CONST. (homestead not subject to devise if

there is a surviving spouse or minor child, except the homestead may be devised to the owner's spouse if there be no minor child); § 732.103, FLA. STAT. (2008) (defining the class of heirs); § 733.607, FLA. STAT. (2008) ("Except as otherwise provided by a decedent's will, every personal representative has a right to, and shall take possession or control of, the decedent's property, except the protected homestead"); *McKean v. Warburton*, 919 So. 2d 341, 347 (Fla. 2005) ("where a decedent is not survived by a spouse or minor children, the decedent's homestead property passes to the residuary devisees, not the general devisees, unless there is a specific testamentary disposition ordering the property to be sold and the proceeds made a part of the general estate."); *Snyder v. Davis*, 699 So. 2d 999, 1005 (Fla. 1997) (homestead protection from forced sale applies to any family member within the class of persons categorized in Florida Statute Section 732.103); *City National Bank of Florida v. Tescher*, 578 So. 2d 701, 703 (Fla. 1991) (no restriction on devising homestead property where no surviving minor child and surviving spouse waives homestead rights); *Cutler v. Cutler*, 994 So. 2d 341, 345 (Fla. 3rd DCA 2008) (holding that a direction in the will that claims of the estate be paid out of homestead is the equivalent of specific order to sell the homestead); *Harell v. Snyder*, 913 So. 2d 749, 753 (Fla. 5th DCA 2005) ("homestead does not become a part of the probate estate unless a testamentary disposition is permitted and is made to someone other than an heir, i.e., a person to whom the benefit of homestead protection could not inure"); *Traeger v. Credit First N.A.*, 864 So. 2d 1188, 1190 (Fla. 5th DCA 2004) (holding that it does not matter that a devisee is not the closest heir under the intestacy statute as the homestead protection applies to all members within the class of heirs); *In re Estate of Hamel*, 821 So. 2d 1276, 1279 (Fla. 2nd DCA 2002) (holding that "the best, and perhaps the only, recognized exception to the general rule [that homestead property, whether devised or not, passes outside of the probate estate] occurs when the will specifically orders that the property be sold and the proceeds be divided among the heirs."); *Moss v. Estate of Moss*, 777 So. 2d 1110, 1113 (Fla. 4th DCA 2001) (homestead protection inures to heirs of decedent's predeceased spouse); *Knadel v. Estate of Knadel*, 686 So. 2d 631, 632 (Fla. 1st DCA 1996) (where will directs sale of homestead for distribution to residuary devisees, proceeds become asset of estate subject to creditor claims); *Clifton v. Clifton*, 553 So. 2d 192, 194 n. 3 (Fla. 5th DCA 1989) ("[h]omestead property, whether devised or not, passes outside of the probate estate. Personal representatives have no jurisdiction over nor title to homestead, and it is not an asset of the testatory estate. . . . It is only when the testator specifies in the will that the homestead is to be sold and the proceeds to be divided that the homestead loses its "protected" status"); *Estate of Price v. West Fla. Hospital, Inc.*, 513 So. 2d 767 (Fla. 1st DCA 1987) (where will directs sale of homestead with no intent to reinvest the proceeds, the proceeds become asset of estate subject to creditor claims).

Comments: This Standard and the problems hereunder assume a duly appointed personal representative and a will admitted to probate in a Florida proceeding. *See*, UTS 5.2.

Homestead property passes outside of the estate and the personal representative lacks authority to convey such property unless (i) the testator is not survived by a spouse or minor child and (ii) the will expresses the testator's intention that the property lose its homestead character by (a) devising it to someone not within the class of heirs or (b) by specifically directing the personal representative to sell the homestead.

The Constitutional homestead provision "is to be liberally construed in favor of maintaining the homestead property." *Snyder v. Davis*, 699 So. 2d 999, 1002 (Fla. 1997).

It is a common misconception that the absence of an order determining homestead

indicates that the property is not "protected homestead." In fact, property which qualifies as protected homestead constitutes protected homestead, even if no order to that effect has been entered.

The practitioner should record proof that the property was not devised to a person within the class of heirs in section 732.103, Florida Statutes. Proof that the decedent was not survived by a spouse or minor child may be by an affidavit of a knowledgeable person. Proof that the devisee of the homestead property is not an heir of the decedent within the class of heirs set forth in section 732.103, Florida Statutes, may likewise be by affidavit of a knowledgeable person.

Bill Curing Certain Defects as to Electronic Documents and Electronically Recorded Documents
Draft of 6/29/2009

A bill to be entitled

An act creating s. 695.__ F.S.; validating certain matters relating to electronic documents and electronically recorded documents; providing that such documents provide constructive notice; clarifying the duties of the clerk or recorder; and providing for retroactive and prospective application.

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

Section 1. Section 695.__, Florida Statutes is created to read:

695.___ Certain Matters Validated as to Electronic Documents and Electronically Recorded Documents.—

(1) All documents and instruments otherwise entitled to be recorded, that have been or are hereafter submitted to the clerk of the court or county recorder by electronic means and accepted for recordation, are deemed validly recorded and to provide notice to all persons notwithstanding:

(a) that rules and procedures for electronically recorded documents had not been finally adopted by the Florida Department of State or the relevant clerk or recorder at the time the electronic document was submitted for recording; or

(b) any defects in, deviations from, or the inability to demonstrate, strict compliance with any statute, rule or procedure for electronically recorded documents in effect at the time the electronic document was submitted for recording.

(2) Nothing herein shall alter the duty of the clerk or recorder to comply with the provisions of the Uniform Real Property Electronic Recording Act, s 695.27 and rules adopted thereunder.

(3) This section is intended to clarify existing law and shall be applied prospectively and retroactively.

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

Bill Curing Certain Defects as to Electronic Documents and Electronically Recorded Documents
Draft of 6/29/2009

A bill to be entitled

An act creating s. 695.__ F.S.; validating certain matters relating to electronic documents and electronically recorded documents; providing that such documents provide constructive notice; clarifying the duties of the clerk or recorder; and providing for retroactive and prospective application.

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

Section 1. Section 695.__, Florida Statutes is created to read:

695.___ Certain Matters Validated as to Electronic Documents and Electronically Recorded Documents.—

(1) All documents and instruments otherwise entitled to be recorded, that have been or are hereafter submitted to the clerk of the court or county recorder by electronic means and accepted for recordation, are deemed validly recorded and to provide notice to all persons notwithstanding:

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(2) Nothing herein shall alter the duty of the clerk or recorder to comply with the provisions of the Uniform Real Property Electronic Recording Act, s 695.27 and rules adopted thereunder.

(3) This section is intended to clarify existing law and shall be applied prospectively and retroactively.

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

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

White Paper
Bill Curing Certain Defects as to Electronic Documents and Electronically Recorded Documents

Draft of June 28, 2008

I. SUMMARY

Several of the state's clerks of the court and county recorders were accepting electronic recordings prior to the 2006 adoption of the Uniform Real Property Electronic Recording Act, §695.27 (URPERA) and others began accepting electronic documents for recording before the rules contemplated in the Act were formally adopted.

This bill retroactively and prospectively ratifies the validity of all such electronic documents submitted to and accepted by a county recorder for recordation, whether or not such electronic documents were in strict compliance with the statutory or regulatory framework then in effect. The bill provides that all such recorded documents are deemed to provide constructive notice.

II. CURRENT SITUATION

In 2000, the Florida Legislature adopted the Uniform Electronic Transaction Act, §668.50 (UETA). This Act was based on work by the National Conference of Commissioners on Uniform State Laws (NCCUSL). Many, including NCCUSL, believed that UETA permitted the electronic creation, submission and recording of electronic documents affecting real property.

Some county recorders began accepting electronic recordings based on the authorities facially granted under UETA and a significant number of electronic documents were filed.

Some legal commentators disagreed, feeling that UETA alone did not authorize the recording of electronic documents affecting title to real property. That disagreement and the natural conservative nature of most real estate professionals, resulted in a limitation on the use and acceptability of electronic documents in real estate transactions.

To address this problem, NCCUSL promulgated a separate uniform law to address these perceived shortcomings. A variation of the NCCUSL uniform law was adopted by the Florida legislature in 2006 as the Florida "Uniform Real Property Electronic Recording Act, §695.27. (URPERA).

The adoption of URPERA, as a matter of statutory interpretation, called into question the efficacy of electronic documents recorded under UETA.

Subsection (5)(a) of URPERA provided that:

(a) The Department of State, by rule pursuant to ss. 120.536(1) and 120.54, shall prescribe standards to implement this section in consultation with the Electronic Recording Advisory Committee ….

Subsection (4)(b) of URPERA directed a county recorder who elected to receive, index, store, archive, and transmit electronic documents do so in compliance with standards established by rule by the Department of State.

A significant number of County Recorders began accepting electronic recordings and finding significant cost and labor savings. On March 22, 2008, Rule 1B-31, Florida Administrative Code, became effective implementing URPERA.

The intent of the statute, of the rule and of the parties to the Electronic Documents was that they be valid, binding, validly filed and to provide constructive notice notwithstanding timing differences or the mechanism for converting the physical signature into an electronic signature.

Because of the importance of a stable and certain record title and land conveyancing system, this bill retroactively and prospectively ratifies the validity of all such electronic documents submitted to and accepted by a county recorder for recordation, notwithstanding those types of possible technical defects.

III. EFFECT OF PROPOSED CHANGES

The Bill provides that all deeds, mortgages, and other documents, previously or hereafter accepted by a county recorder for recordation, whether under UETA or URPERA, are deemed to be valid electronic documents with valid electronic signatures and to provide notice to all persons notwithstanding:

(a) that such documents may have been recorded before the formal adoption of rules by the Florida Secretary of State or didn't fully comply with the provisions and requirements later imposed by the (then unknown) Rule 1B-31 F.A.C.; or
(b) Technical deviations from, or the inability to prove compliance with, the any rules and procedures for electronically recorded documents which may have been in effect at the time the electronic document was submitted for recording.

IV. FISCAL IMPACT ON STATE AND LOCAL GOVERNMENTS

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

V. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR

The proposal should have no direct impact on the private sector.

VI. CONSTITUTIONAL ISSUES

The proposal does not raise any constitutional issues.

VII. OTHER INTERESTED PARTIES

It is expected that the Florida Land Title Association will have an interest in this bill and be supportive of its provisions. The Florida Clerks of Court may have an interest as well.

LEGISLATIVE POSITION REQUEST FORM

GOVERNMENTAL AFFAIRS OFFICE

Date Form Received _____

GENERAL INFORMATION

Submitted By Real Property, Probate and Trust Law Section, Problem Studies Committee

Address Alan B. Fields, First American Title Insurance Company, 7360 Bryan Dairy Road, Suite 200, Largo, FL 33777, 727-549-3243, abfields@firstam.com

Position Type The Florida Bar, RPPTL Section and Committee

CONTACTS

Ed Burt Bruton, Jr., Greenburg Traurig, 1221 Brickell Ave, Miami, FL 33131-3224 (305) 579-0593
Michael J. Gelfand, Michael J. Gelfand, Gelfand & Arpe, P.A, Regions Financial Tower, Suite 1220, 1555 Palm Beach Lakes Blvd., West Palm Beach, FL 33401; (561) 655-6224
Peter Dunbar, Pennington, Moore, et al, P.O. Box 10095 Tallahassee, Florida, 32302-2095 (850) 222-3533
Martha J. Edenfield, Pennington, Moore, et al, P.O. Box 10095 Tallahassee, Florida, 32302-2095 (850) 222-3533

Board & Legislation Committee Appearance Contacts Above
(List name, address and phone number)

Appearances before Legislators Contacts Above
(List name and phone # of those appearing before House/Senate Committees)

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

PROPOSED ADVOCACY

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

If Applicable, List The Following _____ (Bill or PCB #) (Bill or PCB Sponsor)

Indicate Position _____ Support Oppose Technical Assistance Other _____

Proposed Wording of Position for Official Publication: Support legislation retroactively and prospectively ratifying the validity of all electronic documents submitted to and accepted by a county recorder for recordation, whether or not such electronic documents were in strict compliance with the statutory or regulatory framework then in effect and that all such filings be deemed to provide constructive notice.

Reasons For Proposed Advocacy: Several of the state's clerks of the court and county recorders were accepting electronic recordings prior to the 2006 adoption of the Uniform Real Property Electronic Recording Act, §695.27 (URPERA) and others began accepting electronic documents for recording before the rules contemplated in the Act were formally adopted. Because of the complexity of the rules governing the mechanisms for electronic filing, it is often difficult if not impossible to prove strict compliance with the rules.

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 Last year the Section and the Bar approved the committee's recommendation.

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

1. Florida Land Title Association — Expect Support
(Name of Group or Organization) (Support, Oppose or No Position)

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

3. _____
(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.

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A bill to be entitled

An act relating to providing fair notice in the official records of governmental liens against property and protecting innocent purchasers; amending section 695.01; requiring the recording of liens in the official records and protecting good faith purchasers for value; limiting home rule powers; permitting assignment; amending section 162.03 requiring recording of liens in the official records; permitting code violations for failure to repair and maintain; pre-empting local authority as to alienation of property and foreclosure procedures and registration of vacant properties; limiting liability for making emergency repairs; creating section 162.091; allowing expedited handling of emergency repairs and assessment of costs; amending and renumbering section 162.09 as sections 162.092 and 162.093; limiting liability for the local government and subcontractors with regard to repairs; permitting special assessments with regard to certain costs incurred; providing for priority of special assessment liens and attachment notwithstanding homestead protections; providing for the attachment of liens to real and personal property; and for personal liability; providing that special assessments for costs will survive foreclosure; and providing a form for liens; creating section 162.094 authorizing entry onto private property; providing an exception to trespass statutes at 810.12; amending section 162.10 to limit the duration of liens; creating section 162.14 containing a severability clause; amending section 222.01 to provide a mechanism for exempting homestead property from liens; allowing successors in interest to assert a prior homestead status.

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

Section 1. Section 695.01, Florida Statutes, is amended to read:

695.01 Conveyances, mortgages and liens to be recorded.--

(1) No conveyance, transfer, or mortgage of real property, or of any interest therein, nor any lease for a term of 1 year or longer, shall be good and effectual in law or equity against creditors or

subsequent purchasers for a valuable consideration and without notice, unless the same be recorded in the official records, as defined in s. 28.222, of the county where the property is located ~~according to law~~; nor shall any such instrument made or executed by virtue of any power of attorney be good or effectual in law or in equity against creditors or subsequent purchasers for a valuable consideration and without notice unless the power of attorney be recorded, in the official records of the county where the property is located, before the accruing of the right of such creditor or subsequent purchaser. Grantees by quitclaim, heretofore or hereafter made, shall not be denied the status of a bona fide purchaser without notice within the meaning of the recording acts solely based on having received title by a quit claim deed.[1]

(2) No lien for improvements, services, fines or penalties attaching to real property by any governmental or municipal body, or such other quasi-governmental entity authorized to assess, impose or create such liens, with the exception of taxes, special assessments levied and collected under the uniform method described in s. 197.3632, and liens for utility services, shall be good against creditors and subsequent purchasers for a valuable consideration unless a copy of the lien with a valid legal description and tax or parcel identification number is recorded in the official records in the county where the property is located. No lien shall have a priority other than based on its order of recordation unless the recorded notice of such lien clearly states such priority and includes a citation to the statute or ordinance authorizing such priority. The amount of any lien shall be increased by the amount of any recording fees paid with regard to filing that lien. This provision supercedes any conflicting home rule powers and any authorities granted under the acts creating any governmental or quasi-governmental entity.

[1] This was existing language which was moved

(3) Liens assessed, imposed or created by any governmental or municipal body or other quasi-governmental entity may be assigned. Any person, firm, corporation or legal entity, other than the present owner of the property involved, who pays any such unsatisfied lien shall be entitled to receive an assignment of the lien and shall be subrogated to the rights of the governmental, quasi-governmental or municipal body in respect to the enforcement of such lien, as permitted by law.

~~(2) Grantees by quitclaim, heretofore or hereafter made, shall be deemed and held to be bona fide purchasers without notice within the meaning of the recording acts.~~

Section 2. Section 162.03, Florida Statutes, is amended to read:

162.03 Applicability.--

(1) Each county or municipality may by ordinance, at its option, create or abolish ~~by ordinance~~ local government code enforcement boards as provided herein.

(2) A charter county, a noncharter county, or a municipality may, by ordinance, adopt an alternate code enforcement system that gives code enforcement boards or special magistrates designated by the local governing body, or both, the authority to hold hearings and assess fines against violators of the respective county or municipal codes and ordinances. A special magistrate shall have the same status as an enforcement board under this chapter. References in this chapter to an enforcement board, except in s. 162.05, shall include a special magistrate if the context permits. Any fines or liens assessed by such alternate code enforcement system must be recorded as provided in ss. 162.093 before such fine or lien shall constitute a lien on any real or personal property.

(3) In addition to any other matters addressed in its code of ordinances, each county or municipality may, by ordinance, provide that the failure to repair a property which falls into disrepair, becomes

uninhabitable, or creates a public health, safety or welfare risk is in violation of its code of ordinances and subject to enforcement action pursuant to this chapter.[2]

(4) Alienation of property and foreclosure of mortgages and liens are areas of law which have been wholly pre-empted by statute and rules of the court. No local governing body may, by ordinance or otherwise, impose any pre-conditions or limitations on the alienation of property or upon the foreclosure of mortgages or other liens, other than with regard to property, mortgages or liens owned or held by the local government. Any such ordinance is void and of no further force and effect.[3]

(5) No local government, including those with home rule powers, may require lenders to file or register as to abandoned, vacant, or foreclosed properties or as to properties in default.

Section 3. Sections 162.09 and 162.10, Florida Statutes, are amended to read:

162.091 Emergency Repairs; Costs of Repairs.

(1) If the code inspector has reason to believe a violation of its code of ordinances or the condition causing the violation presents a serious threat to the public health, safety, and welfare; the enforcement board is not scheduled to meet within the next 48 hours; and the county or municipality has delegated the authority to institute emergency repairs, then:

(a) the code inspector shall make a reasonable effort to notify the record owner of the violating property and the holder or servicer of the first mortgage on the violating property; and

(b) the county or municipal official to whom such authority has been delegated may institute such emergency repairs as may be necessary or appropriate to mitigate the threat to public health, safety and welfare.

(2) The enforcement board shall be advised of all costs incurred in making emergency repairs, and

[2] I suspect the local government reps will want to expand the scope of this authority to address other specific problems I am not considering.
[3] This is an attempt to address the Miami style ordinances purporting to establish preconditions to land transfers.
[5] This section was moved unchanged.

any costs of identifying and notifying the parties to be notified. The board shall review such costs and, if deemed reasonable under the circumstances, cause them to be assessed pursuant to s. 162.092.

(3) Making any such repairs does not create a continuing obligation on the part of the local governing body to make further repairs or to maintain the property and does not create any liability against the local governing body or any person engaged to make such repairs, for any damages to the property, or any special, punitive, or consequential damages resulting from or arising in the course of making such repairs.

(4) The failure or inability to notify any parties under subsection (1)(a) shall not invalidate any action taken pursuant hereto or the later assessment of costs incurred in connection herewith.

162.092 Administrative fines; costs of repair~~; liens~~.--

(1) An enforcement board, upon notification by the code inspector that an order of the enforcement board has not been complied with by the set time or upon finding that a repeat violation has been committed, may order the violator to pay a fine in an amount specified in this section for each day the violation continues past the date set by the enforcement board for compliance or, in the case of a repeat violation, for each day the repeat violation continues, beginning with the date the repeat violation is found to have occurred by the code inspector. In addition, if the violation is a violation described in s. 162.06(4), the enforcement board shall notify the local governing body, which may make all reasonable repairs which are required to bring the property into compliance and charge the violator with the reasonable cost of the repairs along with the fine ~~imposed~~ assessed pursuant to this section.

(2) Making such repairs does not create a continuing obligation on the part of the local governing body to make further repairs or to maintain the property and does not create any liability against the

local governing body or any person engaged to make such repairs, for any damages to the property-, or any special, punitive, or consequential damages resulting from or arising in the course of making such repairs, if such repairs were completed in good faith. If a finding of a violation or a repeat violation has been made as provided in this part, a hearing shall not be necessary for issuance of the order imposing the fine. If, after due notice and hearing, a code enforcement board finds a violation to be irreparable or irreversible in nature, it may order the violator to pay a fine as specified in paragraph (3)(a).

(3)(a) A fine ~~impose~~assessed pursuant to this section shall not exceed $250 per day for a first violation and shall not exceed $500 per day for a repeat violation, and, in addition, may include all costs of repairs pursuant to subsection (1) and s. 162.091. However, if a code enforcement board finds the violation to be irreparable or irreversible in nature, it may ~~impose~~ assess a fine not to exceed $5,000 per violation.

(b) In determining the amount of the fine, if any, the enforcement board shall consider the following factors:

1. The gravity of the violation;

2. Any actions taken by the violator to correct the violation; and

3. Any previous violations committed by the violator.

(c) An enforcement board may reduce a fine ~~impose~~assessed pursuant to this section.

(d) A county or a municipality having a population equal to or greater than 50,000 may adopt, by a vote of at least a majority plus one of the entire governing body of the county or municipality, an ordinance that gives code enforcement boards or special magistrates, or both, authority to ~~impose~~assess fines in excess of the limits set forth in paragraph (a). Such fines shall not exceed $1,000 per day per violation for a first violation, $5,000 per day per violation for a repeat violation,

and up to $15,000 per violation if the code enforcement board or special magistrate finds the violation to be irreparable or irreversible in nature. Any ordinance imposing such fines shall include criteria to be considered by the code enforcement board or special magistrate in determining the amount of the fines, including, but not limited to, those factors set forth in paragraph (b).[5]

(3) In addition to ~~such~~ any fines assessed, a code enforcement board or special magistrate may ~~impose~~assess a special assessment against the property on which the violation exists ~~additional fines~~ to cover all costs incurred by the local government:

(a) In making any emergency repairs pursuant to s. 162.091;

(b) In making any repairs ordered by the local governing body or the enforcement board pursuant to this section;

(c) Any costs of identifying and notifying the parties to be notified;

(d) Any costs of recording the copy of the lien and any releases thereof;

(e) A reasonable charge to cover the direct costs of enforcing the violation of codes giving rise to the need for the repairs; and

(f) A reasonable charge to cover the direct costs of making subsequent inspections to confirm repairs have been completed.

~~in enforcing its codes and all costs of repairs pursuant to subsection (1). Any ordinance imposing such fines shall include criteria to be considered by the code enforcement board or special magistrate in determining the amount of the fines, including, but not limited to, those factors set forth in paragraph (b).~~

Such cost assessment shall be set forth as an amount separate from any fines ~~impose~~assessed and shall specifically state that the cost assessment portion constitutes a lien on such property equal in priority to real property taxes as set forth in s. 162.093.

[6]**162.093 Liens.**

(1~~3~~) A ~~certified copy of an order imposing~~lien for a fine, ~~or~~ a fine plus cost assessment, or a cost assessment alone, identifying the owner and containing a valid legal description and tax or parcel identification number may be recorded in the Official Records as defined in s. 28.222~~, public records~~ and thereafter shall constitute a lien against the land on which the violation exists~~ and upon any other real or personal property owned by the violator~~. Upon recording notice of the lien in the central database of judgment liens on personal property maintained by the Department of State in accordance with ss. 55.201-55.209, such order shall also constitute a lien upon any personal property owned by the violator. The obligation to pay any fines or assessments shall also be a personal obligation of the owner of the property at the time the violation was noticed and assessed.

(2) The recorded lien may be in substantially the following form and must include the information and the warning contained in the following form:

WARNING!

THIS LEGAL DOCUMENT REFLECTS THAT A GOVERNMENT LIEN HAS BEEN PLACED ON THE REAL PROPERTY LISTED HEREIN. THIS LIEN MAY REMAIN VALID FOR TWO (2) YEARS FROM THE DATE OF RECORDING AND SHALL EXPIRE AND BECOME NULL AND VOID THEREAFTER UNLESS LEGAL PROCEEDINGS HAVE BEEN COMMENCED TO FORECLOSE THIS LIEN AND A LIS PENDENS HAS BEEN RECORDED IN THE OFFICIAL RECORDS.

GOVERNMENTAL LIEN

(F.S. 162.092 & F. S. 162.093)

STATE OF FLORIDA

[6] Moved to 162.093(3)

COUNTY OF _____

Before me, the undersigned notary public, personally appeared ____(Name/Position)_____, who was duly sworn and says that the _____(Governmental Entity)_____, whose address is _____ assesses a lien, which is equal in priority to real property taxes, against the below described real property pursuant to (Ordinance/Statute) for the following costs which it has incurred:

(a) Emergency Repairs pursuant to F. S. 162.091: $_____

(b) Repairs ordered by the local governing body or the enforcement board: $_____

(c) Any costs of identifying/notifying the parties: $_____

(d) Cost of recording the copy of the lien and proposed releases: $_____

(e) Direct cost of enforcing the violation of codes giving rise to the need for the repair: $_____

(f) Direct cost of making subsequent inspections to confirm repairs have been made: $_____

TOTAL: $_____

Said amount shall constitute a lien on the owner's property, notwithstanding any homestead protections provided by Article X, 4(a) of the State Constitution.

The following fine pursuant to (Governmental Entity Ordinance/Statute No.) shall constitute a lien on the owner's property subject to the provisions of Article X, Section 4(a) of the Florida Constitution on the following described real property in _____ County, Florida:

_____ First Violation: $250.00 per day commencing __(Date)

_____ Repeat Violation: $500.00 per day commencing ____(Date)

_____ Property Legal Description:

_____ [Must include full legal description of property, not abbreviated description from tax rolls]

_____ Parcel I.D. Number:

owned by _____ whose address is shown as _____ in the tax rolls of [county name] County, Florida. A copy of the notification of a violation of the (Governmental Entity- Code/Ordinance) was (mailed certified mail/posted) on (date).

Estoppel letters, additional information regarding this lien and satisfactions of the lien are available by contacting [person], [title] at [address], phone number: [phone number].

_____(Governmental Entity)

_____By: ___(Name/Title)_____

Sworn to (or affirmed) and subscribed before me this _____ day of _____, 20____ by _____.

(SEAL)

_____

_____Signature of Notary Public

_____ Personally Known _____ OR Produced Identification _____

_____ Type of Identification Produced _____

(3) The recorded lien for a cost assessment pursuant to ss. 162.091 and 162.092(4) shall constitute a lien on such property equal in priority to real property taxes and shall be deemed an obligation contracted for the improvement or repair of the property and an assessment within the meaning of Art. X, Sec. 4 of the Florida Constitution. The cost assessment will attach and may be enforced without regard to whether the land on which the violation exists is the homestead of the violator. Such lien will not be eliminated by the foreclosure of any mortgage or lien subordinate to real property taxes nor be prevented from attaching by s. 48.23 regarding lis pendens.

(4) Fines or penalties assessed pursuant to this chapter shall take priority only as of the recordation of the lien, may be eliminated in a foreclosure of superior liens or mortgages, and shall be subject to the provisions of s. 48.23 regarding lis pendens. The elimination of a lien for fines by foreclosure does not preclude the enforcement board from assessing future violations against a subsequent owner of the property as to any uncorrected violations.

(5) Upon petition to the circuit court, such order imposing a lien, fine or penalty shall be enforceable in the same manner as a court judgment by the sheriffs of this state, including execution and levy against the violating property or other personal property of the violator, but such order shall not be deemed to be a court judgment except for enforcement purposes. A fine ~~impose~~assessed pursuant to this part shall continue to accrue until the violating property has been brought into compliance or until judgment is rendered in a suit filed pursuant to this section, whichever occurs first. A lien arising from a fine ~~impose~~assessed pursuant to this section runs in favor of the local governing body. Within 30 days of payment, ~~and~~ the local governing body or authorized officer thereof ~~may~~ shall execute and cause to be recorded a satisfaction or release of lien in each recording office where such lien was recorded. After 3 months from the filing of any such lien which remains unpaid, the enforcement board may authorize the local governing body attorney to foreclose on the lien or to sue

to recover a money judgment for the amount of the lien plus accrued interest. No lien ~~created~~ for a fine assessed pursuant to ~~the provisions of this part~~ s. 162.092(3) shall attach to or ~~may~~ be foreclosed on real property which is a homestead under s. 4, Art. X of the State Constitution. The money judgment provisions of this section shall not apply to real property or personal property which is covered under s. 4(a), Art. X of the State Constitution.

162.094 Trespass.

(1) The code inspector, any government official delegated authority to make emergency repairs and any municipal or county employee or other person engaged by the local government to make repairs pursuant to ss. 162.091 and 162.092 are expressly authorized to enter into privately owned properties, including but not limited to fenced yards, vacant structures and pool enclosures, for purposes of making inspections and repairs authorized hereunder. As provided in s. 810.12(5), such persons are excluded from the application of trespass laws.

162.10 Duration of lien.--No lien provided under this chapter ~~the Local Government Code Enforcement Boards Act~~ shall continue for a period longer than ~~20~~ 2 years after the ~~certified copy of an order imposing a fine~~ lien has been recorded in the Official Records, unless within that time an action is commenced pursuant to s. 162.09(3) in a court of competent jurisdiction and a lis pendens filed in the official records. In an action to foreclose on a lien or for a money judgment, the prevailing party is entitled to recover all costs, including a reasonable attorney's fee, that it incurs in the action. The local governing body shall be entitled to collect all costs incurred in recording and satisfying a valid lien. The continuation of the lien ~~effected~~ by the commencement of the action shall not be good against creditors or subsequent purchasers for valuable consideration without notice, unless a notice of lis pendens is recorded.

Section 4. Section 162.14 Florida Statutes is created to read:

162.14 Declaration of Intent. If any section, subsection, sentence, clause, phrase or word of this chapter is for any reason held or declared to be unconstitutional, invalid, inoperative, ineffective, inapplicable, or void, such invalidity or unconstitutionality shall not be construed to affect the portions of this chapter not so held to be unconstitutional, void, invalid, or ineffective, or affect the application of this chapter to other circumstances not so held to be invalid, it being hereby declared to be the express legislative intent that any such unconstitutional, illegal, invalid, ineffective, inapplicable, or void portion or portions of this chapter did not induce its passage, and that without the inclusion of any such unconstitutional, illegal, invalid, ineffective, or void portions of this chapter, the Legislature would have enacted the valid and constitutional portions thereof.

Section 5. Section 222.01, Florida Statutes is amended to read:

222.01 Designation of homestead by owner before levy.--

(1) Whenever any natural person residing in this state desires to avail himself or herself of the benefit of the provisions of the constitution and laws exempting property as a homestead from forced sale under any process of law, he or she may make a statement, in writing, containing a description of the real property, mobile home, or modular home claimed to be exempt and declaring that the real property, mobile home, or modular home is the homestead of the party in whose behalf such claim is being made. Where relevant, such a statement may also be made by a subsequent owner, lienholder or successor in interest to a party who could have claimed the real property, mobile home, or modular home was homestead through the date their interest in the property was relinquished or conveyed. Such statement shall be signed by the person making it and shall be recorded in the circuit court.

(2) When a certified copy of a judgment ~~has been filed in the public records of a county~~ pursuant to chapter 55, a code enforcement lien pursuant to ch. 162 other than a cost assessment pursuant to s.

162.092(4), or a ~~notice of~~ lien for any other purpose by a court, governmental or municipal body exists or has been filed in the official records of a county, a person who is entitled to the benefit of the provisions of the State Constitution exempting real property as homestead or a lienholder, subsequent owner, or successor in interest, ~~and~~ who has a contract to sell or a commitment from a lender for a mortgage on the homestead may file a notice of homestead in the ~~public~~ official records of the county in which the homestead property is located in substantially the following form, with allowance for modifications where the notice is being given by a subsequent owner, lienholder or successor in interest:

NOTICE OF HOMESTEAD

To: (Name and address of judgment creditor as shown on recorded judgment or lien holder and name and address of any other person shown in the recorded judgment or lien to receive a copy of the Notice of Homestead).

You are notified that the undersigned claims as homestead exempt from levy and execution under Section 4, Article X of the State Constitution, the following described property:

(Legal description)

The undersigned certifies, under oath, that he or she has applied for and received the homestead tax exemption as to the above-described property, that _____ is the tax identification parcel number of this property, and that the undersigned has resided on this property continuously and uninterruptedly from (date) to the date of this Notice of Homestead. Further, the undersigned will either convey or mortgage the above-described property pursuant to the following:

(Describe the contract of sale or loan commitment by date, names of parties, date of anticipated closing, and amount. The name, address, and telephone number of the person conducting the anticipated closing must be set forth.)

The undersigned also certifies, under oath, that the lien or judgment lien filed by you on (date) and recorded in Official Records Book _____, Page _____, of the Public Records of _____ County, Florida, does not constitute a valid lien on the described property.

YOU ARE FURTHER NOTIFIED, PURSUANT TO SECTION 222.01 ET SEQ., FLORIDA STATUTES, THAT WITHIN 45 DAYS AFTER THE MAILING OF THIS NOTICE YOU MUST FILE AN ACTION IN THE CIRCUIT COURT OF _____ COUNTY, FLORIDA, FOR A DECLARATORY JUDGMENT TO DETERMINE THE CONSTITUTIONAL HOMESTEAD STATUS OF THE SUBJECT PROPERTY OR TO FORECLOSE YOUR LIEN OR JUDGMENT LIEN ON THE PROPERTY AND RECORD A LIS PENDENS IN THE ~~PUBLIC~~ OFFICAL RECORDS OF THE COUNTY WHERE THE HOMESTEAD IS LOCATED. YOUR FAILURE TO SO ACT WILL RESULT IN ANY BUYER OR LENDER, OR HIS OR HER SUCCESSORS AND ASSIGNS, UNDER THE ABOVE-DESCRIBED CONTRACT OF SALE OR LOAN COMMITMENT TO TAKE FREE AND CLEAR OF ANY LIEN OR JUDGMENT LIEN YOU MAY HAVE ON THE PROPERTY.

This _____ day of _____, 2_____.

_____

(Signature of Owner)

_____

(Printed Name of Owner)

_____

(Owner's Address)

Sworn to and subscribed before me by _____ who is personally known to me or produced _____ as identification, this _____ day of _____, 2_____.

_____

Notary Public

(3) The clerk shall mail a copy of the notice of homestead to the holder of the judgment or lien ~~lienor~~, by certified mail, return receipt requested, at the address shown in the most recent recorded lien, judgment or accompanying affidavit, and to any other person designated in the most recent recorded lien, judgment or accompanying affidavit to receive the notice of homestead, and shall certify to such service on the face of such notice and record the notice. Notwithstanding the use of certified mail, return receipt requested, service shall be deemed complete upon mailing.

(4) A lien ~~pursuant to chapter 55~~ of any lienor upon whom such notice is served, who fails to institute an action for a declaratory judgment to determine the constitutional homestead status of the property described in the notice of homestead or to file an action to foreclose the lien or judgment lien, together with the filing of a lis pendens in the ~~public~~official records of the county in which the homestead is located, within 45 days after service of such notice shall be deemed as not attaching to the property by virtue of its status as homestead property:

(a) as to the interest of any buyer or lender, or his or her successors or assigns, who takes under the contract of sale or loan commitment described above within 180 days after the filing in the ~~public~~official records of the notice of homestead; or

(b) as to the interest of any subsequent owner, lienholder or successor in interest who gave notice under subsection (1).

This subsection shall not act to prohibit a lien from attaching to the real property described in the notice of homestead at such time as the property loses its homestead status.

(5) As provided in s. 4, Art. X of the State Constitution, this subsection shall not apply to:

(a) Liens and judgments for the payment of taxes and assessments on real property.

(b) Liens and judgments for obligations contracted for the purchase of real property.

(c) Liens and judgments for labor, services, or materials furnished to repair or improve real property.

(d) Liens and judgments for other obligations contracted for house, field, or other labor performed on real property.

Section 5. If any provision of this act or the application thereof to any person or circumstance is held invalid, the invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to this end the provisions of this act are declared severable.

Section 6. This act shall take effect July 1, 2010

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

White Paper
Fair Notice of Governmental Liens
Draft of 6/29/09

I. SUMMARY

This proposed bill requires all governmental liens (other than ad valorem taxes, special assessments collected using the uniform method and liens for utility services) to be recorded in the official records before such are binding as to subsequent interests acquired for value. The bill expands the authority of local governments to enter onto property, make emergency repairs and to make special assessments as to the costs of repairs which have the same priority as ad valorem taxes and which attach notwithstanding homestead status, preserves those from elimination in foreclosure and limits the duration of the lien unless enforced. Cost assessments are distinguished from fines and penalties, which are treated under the current rules regarding priority, foreclosure and homestead. The bill expands the current mechanism for determining the applicability of homestead protections under s. 222.01.

By making it easier to identify liens which attach to real property, and eliminating the ability of cost assessments to be rejected in foreclosure, the bill should have a slight favorable impact on local government revenues.

II. CURRENT SITUATION

Liens assessed and maintained in the office of a municipality or branch of a municipality often go undetected due to the difficulty in finding the liens, when they are unrecorded, and in knowing which branches of government have the right to impose the lien and whom to contact to determine the existence of possible liens. In an unscientific polling of local governments by the RPPTL Section, only 60.8% of the responding governments recorded all of their liens in the official records of the county.

The result is that liens often go undetected and unpaid for extended periods and through successive mortgages and transfers of ownership, and the burden of such liens falls unfairly on innocent purchasers. Non-record liens are not covered by Florida title insurance policies, except in rare cases.

With the mass of foreclosures, local governments are facing increasing difficulties with vacant, unmaintained, and unsecured properties. Local governments are bearing significant costs in mowing, securing properties and eliminating health hazards and nuisances on these properties, and the current lien mechanisms under Chapter 162, Fla. Stat. leave those assessments (arguably) subject to elimination in foreclosure. Nor do such cost liens attach to homestead property under the current statutory framework. The mechanisms for noticing violations and instituting repairs under chapter 162 are not well

suited to dealing with emergency situations needing immediate repair in order to protect the public health and welfare.

The Florida constitutional provisions of Article X, sec. 4, regarding the forced sale of homestead have been generally applied with regard to local government liens. This concept is codified in s. 162.09(3). The same is true of criminal cost assessments, public defender and restitution liens. However, the expedited statutory mechanism at s. 222.01 for the determination of homestead does not apply as to these categories of liens, leading to a need for a separate lawsuit to judicially determine homestead status and whether such liens attached. This is a significant waste of judicial resources where in most cases, the homestead status is not disputed.

III. EFFECT OF PROPOSED CHANGES

The conceptual changes being implemented in this bill are:

1. Amending the Recording Act s. 695.01
    a. To require all governmental liens on real property (except taxes, special assessments levied and collected under the uniform method described in s. 197.3632, and liens for utility services) to be recorded in the official records before such are binding upon a lienor or subsequent purchaser for value without notice.
    b. To require any lien which asserts a priority other than based on its recording order to so state on the face of the recorded lien and include a reference to the law authorizing such priority.
    c. To permit the assignment of such liens to third parties paying the amounts owed.

2. Amends s. 162.03
    a. To clarify that any liens assessed other than by the mechanisms set forth in chapter 162 (ie an alternative ordinance adopted code enforcement mechanism) must be recorded in the official records.
    b. Clarifies that local governments have the authority under ch. 162 to provide by ordinance that the failure to repair a property which is broken into or vandalized, or which otherwise falls into disrepair, becomes uninhabitable, or creates a public health, safety or welfare risk is a violation subject to enforcement action
    c. Reiterates that procedures for alienation of property and foreclosure of mortgages and liens have been pre-empted by state statute and court rules and may not be limited or preconditions established by local ordinance.
    d. Restricts the authority of local government to require lenders to file or register as to abandoned, vacant, or foreclosed properties or of properties in default.

3. Amends s. 162.09

a. to permit a local government official, to whom such authority has been delegated and after an attempt to notify the record owner and holder/servicer of any mortgage, to institute emergency repairs necessary to address a serious threat to the public health, safety, and welfare.
b. to provide that the code enforcement board shall, after review and determination of reasonableness, assess the costs of making emergency repairs
c. to limit liability with regard to any negligence in having made emergency repairs.
d. to authorize two categories of liens which may be assessed by a code enforcement board.
    i. Those costs of making repairs, determining ownership and giving notice, recording liens and direct costs of enforcement, which may be assessed as special assessments on a par with taxes and which may be enforced without regard to Constitutional homestead protections, to expressly provide that such may not be eliminated by foreclosure or precluded from attachment by s. 48.23 regarding lis pendens.
    ii. Those fines and penalties assessed to incentivize compliance with orders of the board, which would amount to a "taking" were they placed ahead of existing liens on the property and do not fit within the language of Florida's Constitutional provisions regarding homestead.
e. to give local government the authority to also file liens attaching to personal property by filing in the Secretary of State's personal property lien database created under s. 55.201-55.209.
f. to remove the current statutory provision providing that the lien attaches to all real property owned by the violator while making the obligation to pay fines, penalties and assessments a personal obligation of the owner of the property at the time of assessment.
g. Authorizes entry upon private property for purposes of making emergency repairs and creates an exemption from criminal trespass statutes for doing so.

Amends s. 162.10 to limit the duration of a lien for fines or assessments to 2 years unless action is begun to enforce.

Creates s. 162.14 to provide for severability if any portion of the chapter is declared invalid or unconstitutional.

Amends s. 222.01 regarding the designation of homestead property

a. to permit non-judicial determinations of homestead exemption to be made as to a code enforcement lien pursuant to ch. 162 other than a cost assessment pursuant to s. 162.092(3), or a notice of lien for any other purpose by any court, governmental or municipal body.

b. to permit the use of this non-judicial determination mechanism by subsequent owners, lienholders and successors in interest to the party entitled to homestead protections.

IV. FISCAL IMPACT ON STATE AND LOCAL GOVERNMENTS

State Government: No direct fiscal impact

Clerk of Court: Positive Fiscal Impact by increased recording fees.

Local Governments:

There should be a positive fiscal impact on local government assessing the liens by (a) expanding the authority to assess for repairs; (b) permitting the recovery of costs ahead of foreclosure, other liens, and without homestead restriction.

This will be partially offset by increased administrative costs and recording costs, only some of which will be recoverable (search, notice and recording costs are to be added to the cost assessment) and the costs of organizing and recording existing liens.

V. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR

The proposed legislation should have a positive impact on the private sector through greater certainty and determinability of liens. Lenders will be adversely impacted by the imposition of special assessments for costs, however it must be kept in mind that these costs directly protect the value of their collateral and this bill eliminates the need to comply with the myriad of local ordinances attempting to regulate foreclosure and require registration. .

VI. CONSTITUTIONAL ISSUES

There are three constitutional issues raised by this bill.

The first is in giving assessments for costs a priority on a par with taxes. Many local government ordinances have asserted this authority for years, but any change in priority (when applied to existing interests such as mortgage liens) is subject to constitutional challenge as a taking.

The second is the characterization of the costs incurred by the local government in making repairs as both an assessment and an obligation contracted for repairs. The pertinent part of Art. X. Sec. 4 reads:

> (a) There shall be exempt from forced sale under process of any court, and no judgment, decree or execution shall be a lien thereon, except for the payment of taxes and assessments thereon, obligations contracted for the purchase, improvement or repair thereof, or obligations contracted for

house, field or other labor performed on the realty, the following property owned by a natural person:

While we are unaware for any precedent for imputing a contract, the nature of an assessment for repairs to a single property is sufficiently similar to the traditional use of assessing for street, sidewalk and utility improvements serving a property that backed by a legislative statement, it should qualify.

The third constitutional issue is in permitting the enforcement officials to enter onto private property for purposes of making repairs.

The bill includes a severability clause at s. 162.14

VII. OTHER INTERESTED PARTIES

The League of Cities, Florida Association of Counties and Florida Bankers Association are expected to have an interest in this bill.

LEGISLATIVE POSITION REQUEST FORM

GOVERNMENTAL AFFAIRS OFFICE

Date Form Received _____

GENERAL INFORMATION

Submitted By Real Property, Probate and Trust Law Section, Problem Studies Committee

Address Wayne Sobien, First American Title Insurance Company, Metro West Office 1768 Park Center Drive, Suite 240, Orlando, FL 32835 407-291-9091 wsobien@firstam.com

Position Type The Florida Bar, RPPTL Section and Committee

CONTACTS

Michael J. Gelfand, Michael J. Gelfand, Gelfand & Arpe, P.A, Regions Financial Tower, Suite 1220, 1555 Palm Beach Lakes Blvd., West Palm Beach, FL 33401; (561) 655-6224

Alan B. Fields, First American Title Insurance Company, 7360 Bryan Dairy Road, Suite 200, Largo, FL 33777, 727-549-3243, abfields@firstam.com

Peter Dunbar, Pennington, Moore, et al, P.O. Box 10095 Tallahassee, Florida, 32302-2095 (850) 222-3533

Martha J. Edenfield, Pennington, Moore, et al, P.O. Box 10095 Tallahassee, Florida, 32302-2095 (850) 222-3533

Board & Legislation Committee Appearance Contacts Above
(List name, address and phone number)

Appearances before Legislators Contacts Above
(List name and phone # of those appearing before House/Senate Committees)

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

PROPOSED ADVOCACY

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

If Applicable, List The Following _____ (Bill or PCB #) (Bill or PCB Sponsor)

Indicate Position _____ Support Oppose Technical Assistance Other _____

Proposed Wording of Position for Official Publication: To reduce problems regarding hidden liens, by supporting amendment to s. 695.01 and ch. 162 to require all governmental liens (other than taxes, special assessments and those for utility services) to be recorded in the official records and to state their priority. To clarify the priority of liens asserted by local governments; and to expand the homestead determination mechanisms of s. 222.01 to apply to other types of lien.

Reasons For Proposed Advocacy: A survey conducted by the RPPTL section of local governments indicated a substantial number had types of liens which were not being recorded in the official records, creating a substantial impediment to identifying liens prior to mortgages and property purchases and to properly advise clients. Local governments have a significant problem regarding the maintenance of foreclosed and abandoned properties and are responding with inconsistent and problematic local ordinances, some of which purport to alter statutory conveyancing mechanisms and foreclosure procedures.

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 Last year the Section and the Bar approved the committee's recommendation.

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

	(Name of Group or Organization)	(Support, Oppose or No Position)
1.	Florida Bankers Association	Unknown at this time
2.	Florida Land Title Association	Expect Support
3.	Florida League of Cities/Association of Counties.	Unknown at this time

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.

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PARTIES: _____ ("Seller"), and _____ ("Buyer"), agree that Seller shall sell and Buyer shall buy the following described Real Property and Personal Property (collectively "Property") pursuant to the terms and conditions of this Contract for Sale and Purchase and any riders and addenda ("Contract"):

1. PROPERTY DESCRIPTION:

(a) Street address, city, zip: _____

(b) Property is located in: _____ County, Florida. Real Property Tax ID No: _____

(c) Legal description of the Real Property: _____

_____

together with all existing improvements and fixtures including, built-in furnishings and attached wall-to-wall carpeting and flooring ("Real Property") unless specifically excluded below.

(d) Personal Property: The following items owned by Seller and existing on the Property as of the date of the initial offer are included in the purchase ("Personal Property"): (i) all light fixtures, rods, draperies and other window treatments, garage door openers and security gate and other access devices; and (ii) those additional items checked below (if there are multiple items, enter the number of items, and, if additional details are necessary, specify below. **If left blank, the item is not included.**):

[___] Range/Oven	[___] Smoke Detector	[___] Pool Barrier/Fence	[___] Storage Shed
[___] Refrigerator	[___] Security System	[___] Pool Equipment	[___] Satellite Dish/TV Antenna
[___] Stand-alone Ice Maker	[___] Intercom	[___] Pool Heater	[___] Water Softener/Purifier
[___] Dishwasher	[___] Ceiling Fan	[___] Spa or Hot Tub with Heater	[___] Hurricane shutters and panels
[___] Disposal	[___] Window/Wall A/C	[___] Above Ground Pool	
[___] Microwave Oven		[___] Generator	[___] _____
[___] Washer			[___] _____
[___] Dryer			[___] _____

The only other items of Personal Property included in the purchase, and any additional details regarding Personal Property, if necessary, are: _____

_____

_____

_____

The above listed Personal Property is included in the Purchase Price, has no contributory value, and shall be left for the Buyer.

(e) The following items are excluded from the purchase: _____

_____

PRICE AND FINANCING

2. PURCHASE PRICE (U.S. currency): . . . . . $_____

(a) Initial deposit to be held in escrow in the amount of (**checks subject to COLLECTION – see "Note" below and Paragraph 13(g)**) . . . . . $_____

The initial deposit made payable and to be delivered to "Escrow Agent" named below

(**CHECK ONE**):☐ accompanies offer or ☐ is to be made upon acceptance (Effective Date), or

☐ is to be made within ____ days (if blank, then 3 days) after acceptance (Effective Date)

Escrow Agent Information: Name _____

Address: _____

Phone: _____ Fax: _____

E-mail: _____

(b) Additional escrow deposit to be delivered to Escrow Agent within _____ days after Effective Date in the amount of . . . . . $_____

(The initial deposit and all additional deposits, if any, paid or agreed to be paid, are collectively referred to as the "Deposit")

(c) Financing in the amount of ("Loan Amount" – see Paragraph 4 below) . . . . . $_____

(d) Other: _____ . . . . . $_____

(e) Balance to close by cash or wire transfer or LOCALLY DRAWN cashier's or official bank check(s) (not including Buyer's Closing Costs, prepaid items and prorations) . . . . . $_____

NOTE: COLLECTION means any checks tendered or received, including for Deposits or funds to close, have become actually and finally collected and deposited in the account of the Escrow Agent or Closing Agent. See 12 CFR 210.2(b). Disbursements for Closing may be delayed until such amounts have been collected in the Escrow Agent's or Closing Agent's accounts. See Paragraph 13(g).

3. TIME FOR ACCEPTANCE OF OFFER AND COUNTEROFFERS; EFFECTIVE DATE:

(a) If this offer and counteroffers, if any, are not signed by Buyer and Seller, and an executed copy delivered to all parties on or before _____, this offer shall be deemed withdrawn and the Deposit, if any, will be returned to Buyer.

(b) The effective date of this Contract will be the date when the last one of the Buyer and Seller has signed or initialed and delivered this offer or the final counteroffer ("Effective Date").

4. FINANCING: (Check as applicable)

☐ (a) Buyer will pay cash, or may obtain a loan, for the purchase of the Property, but there is no financing contingency to Buyer's obligation to close.

☐ (b) This Contract is contingent upon Buyer obtaining approval for a ☐ conventional ☐ FHA ☐ VA loan on the following terms within _____ days (if blank, then 30 days) after Effective Date ("Loan Approval Date") for ☐ a fixed, ☐ an adjustable, ☐ a fixed or adjustable, rate loan in the principal amount of $_____ or ____% of the Purchase Price, at an initial interest rate not to exceed ____%, and for a term of _____ years ("Financing").

Buyer will make application for the Financing within _____ days (if blank, then 5 days) after Effective Date and use good faith and diligent effort to obtain approval for the Financing ("Loan Approval") and close this Contract. Buyer shall keep Seller and Broker fully informed about loan application status and Loan Approval and authorizes the mortgage broker and lender to disclose such status and progress to Seller and Broker.

If Buyer does not receive Loan Approval, then Buyer may cancel this Contract by delivering written notice to Seller, and the Deposit shall be refunded to the Buyer, thereby releasing Buyer and Seller from all further obligations under this Contract.

If Buyer does not deliver written notice to Seller of Loan Approval or waiver of this financing contingency, then after Loan Approval Date Seller may cancel this Contract by delivering written notice to Buyer and the Deposit shall be refunded to the Buyer, thereby releasing Buyer and Seller from all further obligations under this Contract.

If Buyer delivers written notice to Seller of Loan Approval and this Contract does not thereafter close, the Deposit shall be paid to Seller unless the failure to close is due to: (1) Seller's default; (2) the Property related conditions of the Loan Approval have not been met (except when such conditions are waived by other provisions of this Contract); (3) appraisal of the Property obtained by lender is insufficient to meet the terms of the Loan Approval; or (4) the Loan is not funded due to the financial failure of lender, in which event the Deposit shall be returned to Buyer.

☐ (c) Assumption of existing mortgage (see rider for terms); or

☐ (d) Purchase money note and mortgage to Seller (see riders; addenda; or special clauses for terms).

CLOSING

5. CLOSING DATE: Unless modified by other provisions of this Contract, the closing of this transaction shall occur and the closing documents required to be furnished by each party pursuant to this Contract shall be delivered ("Closing") on _____ ("Closing Date"), at the time established by the Closing Agent. If extreme weather or other condition or event constituting "force majeure" (see Paragraph 13(d)) causes: (i) disruption of utilities or other services essential for Closing, or (ii) Hazard, Wind, Flood or Homeowners' Insurance, to become unavailable prior to Closing, Closing will be extended a reasonable time up to 3 days after the restoration of utilities and other services essential to Closing, and availability of applicable Hazard, Wind, Flood, or Homeowners' insurance. If (i) or (ii) above continues more than 14 days beyond Closing Date, then either party may terminate this Contract by delivering written notice to the other party and Buyer shall be refunded the Deposit, thereby releasing Buyer and Seller from all further obligations under this Contract.

6. OCCUPANCY AND POSSESSION: At Closing, Seller will: (i) have removed all personal items and trash from the Property and (ii) deliver occupancy and possession, along with all keys, garage door openers, and access devices per this Contract, to Buyer.

If Property is occupied by a tenant and such occupancy is intended to continue beyond Closing Date, the fact and terms thereof and the tenant(s) or occupants shall be disclosed pursuant to Paragraph 13(b).

If Property is intended to be occupied by Seller beyond Closing, Buyer and Seller shall, at or before Closing, enter into a lease governing Seller's post-Closing occupancy ("Post-Closing Occupancy").

If occupancy is to be delivered to Buyer prior to Closing Date, Buyer and Seller shall, prior to the commencement of such occupancy, enter into a lease governing Buyer's pre-Closing occupancy ("Pre-Closing Occupancy"). Unless addressed otherwise in a lease between the parties, Buyer shall, upon occupying the Property prior to Closing: (i) assume all risks of loss to Property caused by Buyer from date of occupancy; (ii) be responsible and liable for maintenance from that date; and (iii) be deemed to have accepted Property in its existing condition as of date of occupancy, except with respect to any items identified by Buyer prior to taking occupancy which require repair, treatment or remedy as described in Paragraph 11.

7. CLOSING LOCATION; DOCUMENTS; AND PROCEDURE:

(a) **LOCATION**: Closing will take place in the county where the Real Property is located at the office of the attorney or other closing agent ("Closing Agent") designated by the party paying for the owner's policy of title insurance, or, if no title insurance, designated by Seller. Closing may be conducted by mail or electronic means.

(b) **CLOSING DOCUMENTS**: At Closing, Seller shall furnish and pay for, as applicable, deed, bill of sale, certificate of title, construction lien affidavit, owner's possession affidavit, assignments of leases, and corrective instruments. At Buyer's option and cost, Seller will, at Closing, assign any assignable repair and treatment contracts to Buyer and provide Buyer with paid receipts for all work done on the Property pursuant to the terms of this Contract. Buyer shall furnish and pay for, as applicable, mortgage, mortgage note, security agreement, financing statements, survey, base elevation certification, and other documents required by Buyer's lender.

(c) **PROCEDURE**: Seller shall convey marketable title to the Property pursuant to Paragraph 12. The deed shall be recorded upon **Collection** of all closing funds. If the Title Commitment insures adverse matters pursuant to Section 627.7841, F.S., as amended, the escrow closing procedure required by Standard 13(g) shall be waived, and Closing Agent shall, **subject to Collection of all closing funds**, disburse at Closing the brokerage fees to Broker and the net sale proceeds to Seller.

(d) **TAX WITHHOLDING**: If Seller is a "foreign person" as defined by the Foreign Investment in Real Property Tax Act ("FIRPTA"), Buyer and Seller will comply with FIRPTA, which may require Seller to provide additional cash at Closing.

8. CLOSING COSTS; TITLE INSURANCE AND SURVEY COSTS; PRORATIONS; HOMEOWNER'S WARRANTY: The following are costs, fees, and charges which each of the parties may incur:

(a) **SELLER COSTS**:

- Documentary stamp taxes and surtax, if any, on the deed
- Recording and other fees needed to cure title
- Policy and Title Charges (if applicable under Paragraph 8(c)(i) below)
- HOA /Condominium Association estoppel fees
- Seller's attorneys' fees

Other: _____

Seller will pay the following amounts/percentages of the Purchase Price for the following costs and expenses:

(i) up to $_____ or _____% (1.5% if left blank) for General Repair Items ("General Repair Limit"); and

(ii) up to $_____ or _____% (1.5% if left blank) for WDO treatment and repairs ("WDO Repair Limit"); and

(iii) up to $_____ or _____% (1.5% if left blank) for costs associated with closing out open building permits and obtaining required building permits for unpermitted improvements ("Permit Limit").

If, prior to Closing, Seller is unable to meet one or more of the following: the Maintenance Requirement as required by Paragraph 10; or the repairs, treatments or permitting as required by sub-Paragraphs 11(d), (e) or (f) below, then, sums equal to one hundred twenty-five percent (125%) of the estimated cost to complete the Maintenance Requirement and each of the repairs, treatments, or permitting (but, not in excess of applicable General Repair, WDO Repair, and Permit Limits set forth above, if any), shall be escrowed at Closing. If the actual cost of

repairs, treatment or permitting exceed the applicable escrowed amounts, Seller shall pay such actual costs (but, not in excess of applicable General Repair, WDO Repair, and Permit Limits set forth above). Any unused portion of the escrowed amount(s) shall be returned to Seller.

(b) **BUYER COSTS**:

- Taxes and recording fees on notes and mortgages
- Recording fees for the deed and financing statements
- Loan expenses
- Lender's title policy and endorsements
- Policy and Title Charges (if applicable under Paragraph 8(c)(ii) below)
- Appraisal fees
- Buyer's Inspections
- Survey (and elevation certification, if required)
- All property related insurance
- HOA/Condominium Association application and transfer fees
- Buyer's attorneys' fees
- Other: _____

(c) **TITLE EVIDENCE AND INSURANCE**: At least ___ days (if blank, then 5 days) prior to Closing a title insurance commitment issued by a Florida licensed title insurer, with legible copies of instruments listed as exceptions attached thereto ("Title Commitment") and, after Closing, an owner's policy of title insurance (see Paragraph 12(a) for terms) shall be obtained and delivered to Buyer. If Seller has an owner's policy of title insurance covering the Real Property, a copy shall be furnished to Buyer and Closing Agent within 5 days after Effective Date. The costs of the owner's title policy and charges for title search and closing fees and services (collectively, "Policy and Title Charges") shall be paid, as set forth below (CHECK ONLY ONE):

☐ (i) Seller will obtain and pay for the Policy and Title Charges (but not including charges for closing services related to the mortgagee policy or Buyer's loan closing, which amounts shall be paid by Buyer); or

☐ (ii) Buyer will obtain and pay for the Policy and Title Charges; or

☐ (iii) **[SOUTH FLORIDA PROVISION]:** Seller will furnish a copy of a prior owner's policy of title insurance or other evidence of title and pay for a continuation or update of such title evidence which is acceptable to Buyer's title insurance underwriter for reissue of coverage, and Buyer shall obtain and pay for post-Closing continuation and the premium for Buyer's owner's policy, and if applicable, mortgagee's policy.

(d) **SURVEY:** At least 5 days prior to Closing, Buyer may, at Buyer's expense, have the Real Property surveyed and certified by a registered Florida surveyor ("Survey"). If Seller has a survey covering the Real Property, a copy shall be furnished to Closing Agent within 5 days after Effective Date.

(e) **PRORATIONS; CREDITS**: The following items will be made current (if applicable) and prorated as of the day prior to Closing Date or occupancy, if occupancy occurs before Closing: real estate taxes, interest, bonds, assessments (except as provided in Paragraph 9(a) below), association fees, insurance, rents and other expenses of the Property. Buyer shall have the option of taking over existing policies of insurance, if assumable, in which event premiums shall be prorated. Cash at Closing shall be increased or decreased as may be required by prorations to be made through day prior to Closing. Advance rent and security deposits, if any, will be credited to Buyer. Escrow deposits held by Seller's mortgagee will be paid to Seller. Taxes shall be prorated based on the current year's tax with due allowance made for maximum allowable discount, homestead and other exemptions. If Closing occurs at a date when the current year's millage is not fixed and current year's assessment is available, taxes will be prorated based upon such assessment and prior year's millage. If current year's assessment is not available, then taxes will be prorated on prior year's tax. If there are completed improvements on the Real Property by January 1st of year of Closing, which improvements were not in existence on January 1st of prior year, then taxes shall be prorated based upon prior year's millage and at an equitable assessment to be agreed upon between the parties; failing which, request shall be made to the County Property Appraiser for an informal assessment taking into account available exemptions. A tax proration based on an estimate shall, at request of either party, be readjusted upon receipt of current year's tax bill. This Paragraph 8(e) shall survive Closing.

(f) **HOME WARRANTY**: At Closing, ☐ Buyer ☐ Seller ☐ N/A will pay for a home warranty plan issued by _____ _____ at a cost not to exceed $_____. A home warranty plan provides for repair or replacement of many of a home's mechanical systems and major built-in appliances in the event of breakdown due to normal wear and tear during the agreement's warranty period.

DISCLOSURES

9. DISCLOSURES:

(a) **SPECIAL ASSESSMENTS**: The Property may be subject to unpaid special assessment lien(s) imposed by a public body ("public body" does not include a Condominium or Homeowner's Association). At Closing, Seller will pay: (i) the full amount of such liens that are certified, confirmed and ratified before Closing, and (ii) the amount of the public body's most recent estimate or assessment for an improvement which is substantially completed as of Effective Date but that has not resulted in a lien being imposed on the Property before Closing; Buyer will pay all other assessments. **If special assessments may be paid in installments (CHECK ONE – IF NEITHER BOX IS CHECKED, THEN BUYER SHALL PAY INSTALLMENTS DUE AFTER CLOSING):**

☐ Buyer shall pay installments due after closing.

☐ Seller will pay the assessment in full prior to or at the time of closing.

This Paragraph shall not apply to liens imposed by a community development district (CDD) created pursuant to Chapter 190 F.S. The special benefit tax assessment imposed by a CDD shall be treated as an ad valorem tax and prorated pursuant to Paragraph 8(e) above.

(b) **RADON GAS**: Radon is a naturally occurring radioactive gas that, when accumulated in a building in sufficient quantities, may present health risks to persons who are exposed to it over time. Levels of radon that exceed federal and state guidelines have been found in buildings in Florida. Additional information regarding radon or radon testing may be obtained from your County Public Health unit.

(c) **PERMITS DISCLOSURE: Except as may have been disclosed by Seller to Buyer in a written property disclosure statement, Seller does not know of any improvements made to the Property which were made without required permits or pursuant to permits which have not been properly closed.**

(d) **MOLD**: Mold is naturally occurring and may cause health risks or damage to property. If Buyer is concerned or desires additional information regarding mold, Buyer should contact an appropriate professional.

(e) **FLOOD ZONE; ELEVATION CERTIFICATION:** Buyer is advised to verify by elevation certificate which flood zone the Property is in, whether flood insurance is required by lender, and what restrictions apply to improving the Property and rebuilding in the event of casualty. If the Property is in a "Special Flood Hazard Area" or "Coastal High Hazard Area" and the finished floor elevation is below the minimum flood elevation, Buyer may cancel this Contract by delivering written notice to Seller within 20 days from Effective Date, failing which Buyer accepts the existing elevation of the buildings and flood zone designation of the Property.

(f) **ENERGY BROCHURE**: Buyer acknowledges receipt of the Florida Energy-Efficiency Rating Information Brochure required by Section 553.996, F.S.

(g) **LEAD-BASED PAINT**: If the Real Property includes pre-1978 residential housing then a lead-based paint rider is mandatory.

(h) **HOMEOWNERS ASSOCIATION/COMMUNITY DISCLOSURE: BUYER SHOULD NOT EXECUTE THIS CONTRACT UNTIL BUYER HAS RECEIVED AND READ THE HOMEOWNERS' ASSOCIATION COMMUNITY DISCLOSURE, IF APPLICABLE.**

(i) **PROPERTY TAX DISCLOSURE SUMMARY**: BUYER SHOULD NOT RELY ON THE SELLER'S CURRENT PROPERTY TAXES AS THE AMOUNT OF PROPERTY TAXES THAT THE BUYER MAY BE OBLIGATED TO PAY IN THE YEAR SUBSEQUENT TO PURCHASE. A CHANGE OF OWNERSHIP OR PROPERTY IMPROVEMENTS TRIGGERS REASSESSMENTS OF THE PROPERTY THAT COULD RESULT IN HIGHER PROPERTY TAXES. IF YOU HAVE ANY QUESTIONS CONCERNING VALUATION, CONTACT THE COUNTY PROPERTY APPRAISER'S OFFICE FOR INFORMATION.

(j) **SELLER DISCLOSURE**: Seller knows of no facts materially affecting the value of the Real Property which are not readily observable by Buyer and which have not been disclosed to Buyer.

PROPERTY CONDITION, INSPECTIONS AND EXAMINATIONS

10. PROPERTY CONDITION/MAINTENANCE: Seller shall maintain the Property, including, but not limited to, lawn, shrubbery, and pool, in the condition existing as of the Effective Date, except for ordinary wear and tear and Casualty Loss, and those repairs required to be made by this Contract ("Maintenance Requirement").

11. PROPERTY ACCESS, INSPECTION AND EXAMINATION; PROPERTY REPAIR:

(a) **INSPECTION PERIODS**: Buyer will complete: (i) the General Inspection and WDO Inspection referenced in Paragraphs 11(d) and (e) by the earlier of 10 days after the Effective Date or 5 days prior to Closing Date ("General Repair and WDO Inspection Period"); (ii) the Permit Inspection referenced in Paragraph 11(f) 10 days prior to Closing ("Permit Inspection Period"); and (iii) the walk-through inspection referenced in Paragraph 11(g) on either the day prior to Closing Date or the Closing Date, as specified by Buyer.

(b) **PROPERTY CONDITION:** The following items shall be free of leaks, water damage or structural damage: ceiling, roof (including fascia and soffits), and exterior and interior walls, doors, windows, and foundation of the Property. The above items together with pool, pool equipment, non-leased major appliances, heating, cooling, mechanical, electrical, security, sprinkler, septic and plumbing systems and machinery, seawalls, and dockage, are, and shall be maintained until Closing, in "Working Condition" (defined below). Torn or missing screens (including pool and patio screens), fogged windows, and missing roof tiles or shingles will be repaired or replaced by Seller prior to Closing. Prior to Closing Seller will cause all open permits to be closed out and Seller will obtain and close out any building permits for improvements or repairs to the Property necessary to fulfill Seller's obligations under Paragraph 11(f)(ii). Seller is not obligated to bring any item into compliance with existing building code regulations unless necessary to fulfill Seller's obligation to repair or replace such item. Seller is not required to repair or replace "Cosmetic Conditions" (defined below), unless the Cosmetic Condition resulted from a defect in an item Seller is obligated to repair or replace. "Working Condition" means operating in the manner in which the item was designed to operate. "Cosmetic Conditions" means aesthetic imperfections that do not affect the Working Condition of the item, including, but not limited to, pitted marcite; tears, worn spots and discoloration of floor coverings, wallpapers, or window treatments; nail holes, scratches, dents, scrapes, chips or caulking in ceilings, walls, flooring, tile, fixtures, or mirrors; and minor cracks in walls, floor tiles, windows, driveways, sidewalks, pool decks, and garage and patio floors. Cracked roof tiles, curling or worn shingles, or limited roof life shall not be considered defects Seller must repair or replace, so long as there is no evidence of actual leaks, leakage or structural damage.

(c) **ACCESS TO PROPERTY TO CONDUCT APPRAISALS, INSPECTIONS, AND WALK-THROUGH:** Seller shall, upon reasonable notice, provide utilities service and access to the Property for appraisals and inspections, including a walk-through (or follow-up walk-through if necessary) prior to Closing, to confirm that all items of Personal Property are on the Real Property, that all required repairs, replacements or actions (as required in Paragraphs 11(d), (e), and (f) have been completed, and that the Property has been maintained as required by the Maintenance Requirement. If Buyer fails to timely deliver a written notice required by Paragraphs 11(d), (e) or (f) below, then Buyer waives Seller's obligation to repair or replace and accepts the applicable items in their "as is" conditions, except that Seller must continue to meet the Maintenance Requirement until Closing. If the transaction contemplated by this Contract does not close, Buyer will repair all damage to the Property resulting from Buyer's inspections, return the Property to its pre-inspection condition and provide Seller with paid receipts for all work done on Property upon its completion.

(d) **GENERAL PROPERTY INSPECTION AND REPAIR:**

(i) **Inspection**: During the General Repair Inspection Period, Buyer may, at Buyer's expense, have those items specified in Paragraph 11(b) which Seller is obligated to repair or replace (the "General Repair Items") inspected (the "General Inspection") by a person who specializes in and holds an occupational license (if required by law) to conduct home inspections or who holds a Florida license to repair and maintain the items inspected ("Professional Inspector"). Buyer shall, within 3 days after the General Repair Inspection Period, deliver written notice to Seller of any General Repair Items that are not in the condition required by Paragraph 11(b) and a copy of the portion of Professional Inspector's written report dealing with such items. If Buyer fails to timely deliver the Professional Inspector's written report, Buyer accepts the General Repair Items "as is", subject only to the Maintenance Requirement.

(ii) **General Property Repairs:** Seller is only obligated to make repairs, up to the General Repair Limit, necessary to bring General Repair Items into the condition specified in Paragraph 11(b). Seller will within 5 days from receipt of Buyer's General Inspection report, have reported repairs to General Repair Items estimated by an appropriately licensed person. Seller may, within said 5 days, have a second inspection made by a Professional Inspector and report such repair estimates to Buyer. If Buyer's and Seller's inspection reports differ and the parties cannot resolve the differences, Buyer and Seller together will choose, and equally split the cost of, a third Professional Inspector, whose written report will be binding on the parties. If the cost to repair General Repair Items equals or is less than the General Repair Limit, Seller will have the repairs made in accordance with Paragraph 11(h). If the cost to repair

General Repair Items exceeds the General Repair Limit, either party may terminate this Contract and Buyer shall be refunded the Deposit, thereby releasing Buyer and Seller from all further obligations under this Contract, unless: (A) either party agrees to pay the excess; or (B) Buyer designates which repairs of General Repair Items Seller shall make, at a total cost to Seller not exceeding the General Repair Limit, and accepts the balance of the General Repair Items in their "as is" condition, subject to the Maintenance Requirement.

(e) **WOOD DESTROYING ORGANISM INSPECTION AND REPAIR:**

(i) **Inspection for Wood Destroying Organisms**: During the WDO Inspection Period, Buyer may, at Buyer's expense, have the Property inspected by a Florida-licensed pest control business ("WDO Inspector") to determine the existence of past or present WDO infestation and damage caused by infestation ("WDO Inspection"). Buyer shall, within 3 days after the WDO Inspection Period, deliver a copy of the WDO Inspector's written report to Seller if any evidence of WDO infestation or damage is found. "Wood-Destroying Organism" ("WDO") means arthropod or plant life, including termites, powder-post beetles, oldhouse borers and wood-decaying fungi, that damages or infests seasoned wood in a structure, excluding fences. If Buyer fails to timely deliver the WDO Inspector's written report, Buyer accepts the Property "as is" with regard to WDO infestation and damage, subject to the Maintenance Requirement.

(ii) **WDO Repairs**: If Seller previously treated the Property for the type of WDOs found by Buyer's WDO Inspection, Seller does not have to retreat the Property if (A) there is no visible live infestation, and (B) Seller, at Seller's cost, transfers to Buyer at Closing a current full treatment warranty, for the type of WDOs found. Otherwise, Seller will, within 5 days from receipt of Buyer's WDO Inspector's report, have reported WDO damage estimated by an appropriately licensed person and corrective treatment estimated by a licensed pest control business. Seller will have treatments and repairs made in accordance with Paragraph 11(h) up to the WDO Repair Limit. If the cost to treat and repair the WDO infestations, and damage to the Property exceeds the WDO Repair Limit, either party may terminate this Contract by written notice to the other and Buyer shall be refunded the Deposit, thereby releasing Buyer and Seller from all further obligations under this Contract, unless Buyer: (1) agrees to pay the excess; or (2) designates which WDO repairs Seller shall make, at a total cost to Seller not exceeding the WDO Repair Limit, and accepts the balance of the Property in its "as is" condition with regard to WDO infestation and damage, subject to the Maintenance Requirement.

(f) **INSPECTION AND CLOSE-OUT OF BUILDING PERMITS:**

(i) **Inspection for Building Permits**: During the Permit Inspection Period, Buyer, at Buyer's expense, may review and examine public records to determine whether there exist any open building permits or unpermitted improvements to the Property ("Permit Inspection"). Buyer shall, within 3 days after the Permit Inspection Period, deliver written notice to Seller of the existence of any open building permits or unpermitted improvements to the Property. If Buyer fails to timely deliver the Permit Inspection written notice, Buyer accepts the Property "as is" with regard to the status of building permits.

(ii) **Close-Out of Building Permits**: If Buyer's Permit Inspection identifies open or needed permits, then no later than 5 days prior to Closing Date, Seller shall, up to the Permit Limit: (A) have open building permits closed by the applicable governmental entity, and (B) obtain and close any required building permits for improvements to the Property. At Closing, Seller will provide Buyer with any written documentation that all open building permits identified by Buyer's Permit Inspection have been closed out and that Seller has obtained required building permits for improvements to the Property. If final permit inspections cannot be performed due to delays by the governmental entity, Closing Date shall be extended for up to 10 days to complete such final inspections, failing which, either party may terminate this Contract and Buyer shall be refunded the Deposit, thereby releasing Buyer and Seller from all further obligations under this Contract. If the cost to close out open building permits or to remedy any permit violation of any governmental entity exceeds the Permit Limit, either party may terminate this Contract by written notice to the other and Buyer shall be refunded the Deposit, thereby releasing Buyer and Seller from all further obligations under this Contract, unless: (1) either party agrees to pay the excess; or (2) Buyer accepts the Property in its "as is" condition with regard to the status of building permits and receives a credit from Seller at Closing in the amount of the Permit Limit.

(g) **WALK-THROUGH INSPECTION/REINSPECTION**: Buyer, Buyer's representative, or both may perform a walk-through (and follow-up walk-through, if necessary) inspection of the Property solely to verify that Seller has made repairs required by this Contract, has met the Maintenance Requirement and has met all contractual obligations. If Buyer, and/or Buyer's representative, fails to conduct this inspection, Seller's repair obligations and Maintenance Requirement will be deemed fulfilled.

(h) **REPAIR STANDARDS; ASSIGNMENT OF REPAIR AND TREATMENT CONTRACTS AND WARRANTIES**: All repairs and replacements shall be completed in a good and workmanlike manner by an appropriately licensed person, in accordance with all requirements of law, and shall consist of materials or items of quality, value, capacity and performance comparable to, or better than, that existing as of the Effective Date. At Buyer's option and cost, Seller will, at Closing, assign all assignable repair, treatment and maintenance contracts and warranties to Buyer.

TITLE EVIDENCE AND EXAMINATION; SURVEY

12. TITLE:

(a) **TITLE EVIDENCE**: Within the time period provided in Paragraph 8(c), the Title Commitment, with legible copies of instruments listed as exceptions attached thereto, shall be issued and delivered to Buyer. The Title Commitment shall agree to issue Buyer, upon recording of the deed to Buyer, an owner's policy of title insurance in the amount of the Purchase Price, insuring Buyer's marketable title to the Real Property, subject only to the following matters and those to be discharged by Seller at or before Closing: (i) comprehensive land use plans, zoning, and other land use restrictions, prohibitions and requirements imposed by governmental authority; (ii) restrictions and matters appearing on the Plat or otherwise common to the subdivision; (iii) outstanding oil, gas and mineral rights of record without right of entry; (iv) unplatted public utility easements of record (located contiguous to real property lines and not more than 10 feet in width as to the rear or front lines and 7 1/2 feet in width as to the side lines); (v) taxes for year of Closing and subsequent years; and (vi) assumed mortgages and purchase money mortgages, if any (if additional items, attach addendum); provided, that there exists at Closing no violation of the foregoing and none prevent use of the Property for **RESIDENTIAL PURPOSES**. If there exists at Closing any violation of the items identified in (ii) – (vi) above, then the same shall be deemed a title defect. Marketable title shall be determined according to applicable Title Standards adopted by authority of The Florida Bar and in accordance with law.

(b) **TITLE EXAMINATION**: Buyer shall have 5 days from date of receiving the Title Commitment to examine it, and if title is found defective, notify Seller in writing specifying defect(s) that render title unmarketable. Seller shall have 30 days (the "Cure Period") from

receipt of notice to take reasonable diligent efforts to remove the defects. If Seller cures the defects within the Cure Period, Seller will deliver written notice to Buyer (with proof of cure acceptable to Buyer and Buyer's attorney) and the parties will close the transaction on Closing Date. If Seller is unable to cure the defects within the Cure Period, Buyer may, within 5 days after expiration of the Cure Period, deliver written notice to Seller either: (i) extending the Cure Period for a specified period not to exceed 120 days within which Seller shall continue to use reasonable diligent effort to remove or cure the defects ("Extended Cure Period"); or (ii) electing to accept title with existing defects and close the transaction on Closing Date (or within 10 days from Buyer's receipt of Seller's notice if Closing Date has passed), or (iii) electing to terminate this Contract and receive a refund of the Deposit, thereby releasing Buyer and Seller from all further obligations under this Contract. If, after reasonable diligent effort, Seller is unable to cure the defects during the Extended Cure Period, and Buyer does not waive the defects, Buyer shall receive a refund of the Deposit, thereby releasing Buyer and Seller from all further obligations under this Contract. If Seller is to provide the Title Commitment and it is delivered to Buyer less than 5 days prior to Closing, Buyer may extend Closing so that Buyer shall have up to 5 days from date of receipt to examine same in accordance with this Paragraph. Nothing in this Paragraph shall require Seller to expend any sums in excess of the Permit Limit to satisfy, cure or remove any title defect caused by the existence of any open building permit or unpermitted improvement to the Property.

(c) **SURVEY**: If Buyer obtains a Survey pursuant to Paragraph 8(d) which discloses encroachments on the Real Property; or that improvements located thereon encroach on setback lines, easements, or lands of others; or violate any restrictions, covenants, or applicable governmental regulations described in Paragraphs 12(a)(ii) or (iv) above, Buyer shall deliver written notice of such matters, together with a copy of the Survey, to Seller within 5 days from receipt of Survey, but no later than Closing. If Buyer timely delivers such notice and Survey to Seller, such matters identified in the notice and Survey shall constitute a title defect, subject to the cure obligations of Paragraph 12(b) above. If Seller has delivered a prior survey pursuant to Paragraph 8(d), Seller shall, at Buyer's request, execute an affidavit of "no change" to the Real Property since the preparation of such prior survey, to the extent the affirmations therein are true and correct.

STANDARDS FOR REAL ESTATE TRANSACTIONS ("Standards")

13. STANDARDS:

(a) **INGRESS AND EGRESS**: Seller warrants and represents that there is ingress and egress to the Real Property sufficient for its intended use as described in Paragraph 12(a) hereof and title to the Real Property is insurable in accordance with Paragraph 12(a) without exception for lack of legal right of access.

(b) **LEASES**: Seller shall, during the General Inspection Period, furnish to Buyer copies of all written leases and estoppel letters from each tenant specifying the nature and duration of the tenant's occupancy, rental rates, advanced rent and security deposits paid by tenant. If Seller is unable to obtain such letter from each tenant, the same information shall be furnished by Seller to Buyer within that time period in the form of a Seller's affidavit, and Buyer may thereafter contact tenant to confirm such information. If the terms of the leases differ materially from Seller's representations, Buyer may deliver written notice to Seller at least 5 days prior to Closing terminating this Contract and receive a refund of the Deposit, thereby releasing Buyer and Seller from all further obligations under this Contract. Seller shall, at Closing, deliver and assign all original leases to Buyer who shall assume Seller's obligation thereunder.

(c) **TIME**: Calendar days shall be used in computing time periods. Any time periods provided for herein which shall end on a Saturday, Sunday, or a national legal holiday shall extend to 5:00 p.m. (where the Property is located) of the next business day. Time is of the essence in this Contract.

(d) **FORCE MAJEURE**: Buyer or Seller shall not be required to perform any obligation under this Contract or be liable to each other for damages so long as the performance or non-performance of the obligation is delayed, caused or prevented by force majeure. "Force majeure" is defined as hurricanes, earthquakes, floods, fire, acts of God, unusual transportation delays, wars, insurrections, acts of terrorism, and any other cause not reasonably within the control of the Buyer or Seller and, which by the exercise of reasonable diligent effort, the non-performing party is unable in whole or in part to prevent or overcome. All time periods, including Closing Date, will be extended for the period that the force majeure prevents performance under this Contract; provided, however, in the event that such "force majeure" continues to prevent performance under this Contract more than 14 days beyond Closing Date, either party may terminate this Contract by delivering written notice to the other and the Deposit shall be refunded to Buyer, thereby releasing Buyer and Seller from all further obligations under this Contract.

(e) **LIENS**: Seller shall furnish to Buyer at time of Closing an affidavit attesting to the absence, unless otherwise provided for herein, of any financing statement, claims of lien or potential lienors known to Seller and further attesting that there have been no improvements or repairs to the Real Property for 90 days immediately preceding date of Closing. If the Real Property has been improved or repaired within that time, Seller shall deliver releases or waivers of construction liens executed by all general contractors, subcontractors, suppliers and materialmen in addition to Seller's lien affidavit setting forth the names of all such general contractors, subcontractors, suppliers and materialmen, further affirming that all charges for improvements or repairs which could serve as a basis for a construction lien or a claim for damages have been paid or will be paid at the Closing of this Contract.

(f) **RISK OF LOSS**: If, after the Effective Date, the Property is damaged by fire or other casualty ("Casualty Loss") before Closing and cost of restoration (which shall include the cost of pruning or removing damaged trees) does not exceed 1½% of the Purchase Price, cost of restoration shall be an obligation of Seller and Closing shall proceed pursuant to the terms of this Contract. If restoration is not completed as of Closing, a sum equal to one hundred twenty-five percent (125%) of estimated cost to complete restoration (not to exceed 1½% of the Purchase Price), will be escrowed at Closing. Any portion of such escrowed funds in excess of the actual restoration cost incurred shall be returned to Seller. If the actual cost of restoration exceeds the escrowed amount, Seller shall pay such actual costs (but, not in excess of 1½% of the Purchase Price). Any unused portion of the escrowed amount shall be returned to Seller. If the cost of restoration exceeds 1½% of the Purchase Price, Buyer shall elect to either take the Property "as is" together with the 1½%, or receive a refund of the Deposit, thereby releasing Buyer and Seller from all further obligations under this Contract. Seller's sole obligation with respect to tree damage by casualty or other natural occurrence shall be the cost of pruning or removal.

(g) **ESCROW CLOSING PROCEDURE**: Closing may be delayed until all funds for Closing have been collected in the Closing Agent's account. If, pursuant to Paragraph 7(c), the Title Commitment does not insure adverse matters as permitted under Section 627.7841, F.S., as amended, attach the "Escrow Closing Procedures" Rider.

(h) **CONVEYANCE**: Seller shall convey marketable title to the Real Property by statutory warranty, trustee's, personal representative's, or guardian's deed, as appropriate to the status of Seller, subject only to matters contained in Paragraph 12(a) and

those otherwise accepted by Buyer. Personal Property shall, at the request of Buyer, be transferred by an absolute bill of sale with warranty of title, subject only to such matters as may be otherwise provided for herein.

(i) **1031 EXCHANGE**: If either Seller or Buyer wish to enter into a like-kind exchange (either simultaneous with Closing or deferred) with respect to the Property under Section 1031 of the Internal Revenue Code ("Exchange"), the other party shall cooperate in all reasonable respects to effectuate the Exchange, including the execution of documents; provided (i) the cooperating party shall incur no liability or expense related to the Exchange and (ii) the Closing shall not be contingent upon, nor extended or delayed by, such Exchange.

(j) **CONTRACT NOT RECORDABLE; PERSONS BOUND; NOTICE; COPIES**: Neither this Contract nor any notice of it shall be recorded in any public records. This Contract shall be binding on, and inure to the benefit of, the parties and their heirs or successors in interest. Whenever the context permits, singular shall include plural and one gender shall include all. Notice and delivery given by or to the attorney or broker (including such broker's real estate licensee) representing any party shall be as effective as if given by or to that party. All notices must be in writing and may be made by mail, personal delivery or electronic (including "pdf") media. A legible facsimile or electronic (including "pdf") copy of this Contract and any signatures hereon shall be considered for all purposes as an original.

(k) **INTEGRATION; MODIFICATION**: This Contract contains the full and complete understanding and agreement of Buyer and Seller with respect to the transaction contemplated by this Contract and no prior agreements or representations shall be binding upon Buyer or Seller unless included in this Contract. No modification to or change in this Contract shall be valid or binding upon Buyer or Seller unless in writing and executed by the parties intended to be bound by it.

(l) **WAIVER**: The failure of Seller or Buyer to insist on compliance with, or strict performance of, any provision of this Contract, or to take advantage of any right under this Contract, shall not constitute a waiver of such provision or right.

(m) **TYPEWRITTEN OR HANDWRITTEN PROVISIONS**: Typewritten or handwritten provisions, riders and addenda shall control all printed provisions of this Contract in conflict with them.

DEFAULT AND DISPUTE RESOLUTION

14. DEFAULT:

(a) **BUYER DEFAULT**: If Buyer fails, neglects or refuses to perform Buyer's obligations under this Contract, including payment of the Deposit, within the time specified, Seller may elect to recover and retain the Deposit, for the account of Seller, as agreed upon liquidated damages, consideration for the execution of this Contract and in full settlement of any claims, whereupon Buyer and Seller shall be relieved from all further obligations under this Contract, or Seller, at Seller's option, may, pursuant to Paragraph 15, proceed in equity to enforce Seller's rights under this Contract. The portion of the Deposit, if any, paid to Listing Broker upon default by Buyer, shall be split between Listing Broker and Cooperating Broker in the same proportion as the Listing Broker's offer of compensation bears to the full commission Seller was obligated to pay.

(b) **SELLER DEFAULT**: If for any reason other than failure of Seller to make Seller's title marketable after reasonable diligent effort, Seller fails, neglects or refuses to perform Seller's obligations under this Contract, Buyer may elect to receive the return of Buyer's Deposit without thereby waiving any action for damages resulting from Seller's breach, and, pursuant to Paragraph 15, may seek to recover such damages or seek specific performance.

This Paragraph 14 shall survive Closing or termination of this Contract.

15. DISPUTE RESOLUTION: All unresolved controversies, claims and other matters in question between Buyer and Seller arising out of or relating to this transaction or this Contract or its breach, enforcement or interpretation ("Dispute") will be settled as follows:

(a) **ENTITLEMENT TO THE DEPOSIT**: Buyer and Seller will have 10 days from the date conflicting demands for the Deposit are made to attempt to resolve such Dispute, failing which, Buyer and Seller shall submit such Dispute to mediation under Paragraph 15(b) below.

(b) **MEDIATION OF DISPUTES**: Buyer and Seller shall attempt to settle all Disputes in an amicable manner through mediation pursuant to the Florida Rules for Certified and Court-Appointed Mediators and Chapter 44, F.S., as amended (the "Mediation Rules"). The mediator is not required to be certified but must have experience in the real estate industry.

(c) **ARBITRATION**: ___ ___ **(SELLER),** ___ ___ **(BUYER)** If initialed here by both Buyer and Seller, any Dispute not resolved pursuant to Paragraph 15(b), above, shall be settled by arbitration using the Real Estate Industry Arbitration Rules of the American Arbitration Association unless the parties mutually agree to use other arbitration rules. The parties shall be allowed discovery in accordance with the Florida Rules of Civil Procedure. **Unless initialed above by both Buyer and Seller, this Paragraph 15(c) shall not be a part of this Contract and arbitration of Disputes shall not be required.**

(d) **LITIGATION**: Any Dispute not settled pursuant to Paragraphs 15(a), (b) or (c) above, may be resolved by instituting action in the appropriate court having jurisdiction of the matter.

(e) **ENFORCEMENT OF DISPUTE RESOLUTION PROVISIONS; INJUNCTIVE RELIEF**: Buyer and Seller shall have the right to commence litigation or other legal proceedings with respect to the following matters without first complying with Paragraph 15(b) above: (i) enforcement of the Dispute resolution provisions of this Contract including any mediation settlement agreement, agreement to arbitrate, or arbitration award or (ii) request for any injunctive relief including temporary restraining orders and preliminary injunctions, against conduct or threatened conduct for which no adequate remedy at law may be available, or which might cause irreparable harm to a party.

This Paragraph 15 shall survive Closing or termination of this Contract.

16. ATTORNEY'S FEES; COSTS: In any mediation permitted by this Contract, the parties will equally divide any mediation fee, and each party to a mediation will pay their own costs, expenses and fees, including attorneys' fees, incurred in conducting the mediation. In any litigation permitted by this Contract, the prevailing party shall be entitled to recover from the non-prevailing party costs and fees, including reasonable attorneys' fees, incurred in conducting the litigation.

This Paragraph 16 shall survive Closing or termination of this Contract.

ESCROW AGENT AND BROKER

17. ESCROW AGENT: Any Closing Agent or Escrow Agent (collectively "Agent") receiving the Deposit, other funds and other items is authorized, and agrees by acceptance of them, to deposit them promptly, hold same in escrow within the State of Florida and, subject to **COLLECTION**, disburse them in accordance with the terms and conditions of this Contract. Failure of funds to clear shall not excuse

Buyer's performance. When conflicting demands for the Deposit are received, or Agent has a good faith doubt as to entitlement to the Deposit, Agent may take such actions permitted by this Paragraph 17, as Agent deems advisable. If in doubt as to Agent's duties or liabilities under the provisions of this Contract, Agent may, at Agent's option, continue to hold the subject matter of the escrow until the parties hereto agree to its disbursement or until a final judgment of a court of competent jurisdiction shall determine the rights of the parties, or Agent may deposit same with the clerk of the circuit court having jurisdiction of the dispute. An attorney who represents a party and also acts as Agent may represent such party in such action. Upon notifying all parties concerned of such action, all liability on the part of Agent shall fully terminate, except to the extent of accounting for any items previously delivered out of escrow. If a licensed real estate broker, Agent will comply with provisions of Chapter 475, F.S., as amended. A licensed real estate broker's obligation under Chapter 475, FS and FREC rules to timely notify FREC of an escrow dispute and timely resolve the escrow dispute through mediation, arbitration, interpleader or an escrow disbursement order, if the broker so chooses, applies to licensed real estate brokers only and does not apply to attorneys, title companies, or other escrow companies.

Any proceeding between Buyer and Seller wherein Agent is made a party because of acting as Agent hereunder, or in any proceeding wherein Agent interpleads the subject matter of the escrow, Agent shall recover reasonable attorney's fees and costs incurred with these amounts to be paid from and out of the escrowed funds or equivalent when charged and awarded as court costs in favor of the prevailing party. The Agent shall not be liable to any party or person for misdelivery of any escrowed items, unless such misdelivery is due to Agent's willful breach of the provisions of this Contract or Agent's gross negligence.

This Paragraph 17 shall survive Closing or termination of this Contract.

18. PROFESSIONAL ADVICE; BROKER LIABILITY: Broker advises Buyer and Seller to verify the Property condition, square footage, and all other facts and representations made pursuant to this Contract and to consult an appropriate professional for legal, tax, environmental, and other specialized advice concerning matters affecting the Property and the transaction contemplated by this Contract. Broker represents to Buyer that Broker does not reside in the Property and that all representations (oral, written or otherwise) by Broker are based on Seller representations or public records. **BUYER AGREES TO RELY SOLELY ON SELLER, PROFESSIONAL INSPECTORS AND GOVERNMENTAL AGENCIES FOR VERIFICATION OF THE PROPERTY CONDITION, SQUARE FOOTAGE AND FACTS THAT MATERIALLY AFFECT PROPERTY VALUE AND NOT ON THE REPRESENTATIONS (ORAL, WRITTEN OR OTHERWISE) OF BROKER.** Buyer and Seller (individually, the "Indemnifying Party") each individually indemnifies, holds harmless, and releases Broker and Broker's officers, directors, agents and employees from all liability for loss or damage, including all costs and expenses, and reasonable attorney's fees at all levels, suffered or incurred by Broker and Broker's officers, directors, agents and employees in connection with or arising from claims, demands or causes of action instituted by Buyer or Seller based on: (i) the inaccuracy of information provided by the Indemnifying Party or from public records; (ii) the Indemnifying Party's misstatement or failure to perform contractual obligations; (iii) Broker's performance, at the Indemnifying Party's request, of any task beyond the scope of services regulated by Chapter 475, F.S., as amended, including Broker's referral, recommendation or retention of any vendor for, or on behalf of, the Indemnifying Party; (iv) the products or services provided by any such vendor for, or on behalf of, the Indemnifying Party; and (v) expenses incurred by any such vendor. Buyer and Seller each assumes full responsibility for selecting and compensating their respective vendors and paying their other costs under this Contract whether or not this transaction closes. This Paragraph will not relieve Broker of statutory obligations under Chapter 475, F.S., as amended. For purposes of this Paragraph, Broker will be treated as a party to this Contract.

This Paragraph 18 shall survive Closing or termination of this Contract.

ASSIGNABILITY

19. ASSIGNABILITY: (CHECK ONLY ONE): Buyer ☐ may assign and thereby be released from any further liability under this Contract; ☐ may assign but not be released from liability under this Contract; or ☐ may not assign this Contract.

ADDENDA AND ADDITIONAL TERMS

20. ADDENDA: The following additional terms are included in the attached addenda and incorporated into this Contract (check if applicable):

☐ A. Condominium Assn.	☐ I. Right to Inspect/Cancel	☐ R. Broker - Pers. Int. in Prop.	☐ AA. Evidence of Title (South Fla.)
☐ B. Homeowners' Assn.	☐ J. Insulation Disclosure	☐ S. Rentals	☐ BB. Evidence of Title (Abstract)
☐ C. Seller Financing	☐ K. Mold Addendum	☐ T. Sale/Lease of Buyer's Property	☐ CC. Escrow Closing Procedures
☐ D. Mortgage Assumption	☐ L. Pre-1978 Housing Stmt. (LBP)		☐ DD. Appraisal Contingency
☐ E. FHA Financing	☐ M. Insurance	☐ U. Pre-Closing Occupancy	☐ EE. Short Sale
☐ F. VA Financing	☐ N. Housing Older Persons	☐ V. Post-Closing Occupancy	☐ FF. Seller's Attorney Approval
☐ G. Coastal Const. Control Line	☐ O. Lease-purchase/Lease-option	☐ W. Rezoning	☐ GG. Buyer's Attorney Approval
	☐ P. Interest-Bearing Account	☐ X Prop. Disclosure Stmt.	☐ HH. Existing Tenants
☐ H. "As Is"	☐ Q. Back-up Contract/Kick-out Clause	☐ Y. FIRPTA	☐ II. Chinese Drywall
		☐ Z. Additional Clauses	☐ Other _____

21. ADDITIONAL TERMS: _____

505 _____
506 _____
507 _____
508 _____
509 _____
510 _____
511 _____

512 THIS IS INTENDED TO BE A LEGALLY BINDING CONTRACT. IF NOT FULLY UNDERSTOOD, SEEK THE ADVICE OF AN ATTORNEY
513 PRIOR TO SIGNING.

514 **APPROVAL OF THIS FORM BY THE FLORIDA ASSOCIATION OF REALTORS® AND THE FLORIDA BAR IS PENDING.**
515 **THIS FORM SHOULD NOT BE USED PRIOR TO SUCH APPROVALS.**

516

517 **SIGNATURE LINES OMITTED for purposes of this draft only**

518 **BROKER**: Listing and Cooperating Brokers, if any, named below (collectively, "Broker"), are the only Brokers entitled to compensation
519 in connection with this Contract. Instruction to Closing Agent: Seller and Buyer direct Closing Agent to disburse at Closing the full
520 amount of the brokerage fees as specified in separate brokerage agreements with the parties and cooperative agreements between the
521 Brokers, except to the extent Broker has retained such fees from the escrowed funds. This Contract shall not modify any MLS or other
522 offer of compensation made by Seller or Listing Broker to Cooperating Brokers.

523 **SIGNATURE LINES OMITTED for purposes of this draft only**

524 **COUNTER OFFER/REJECTION**
525 ☐ **Seller** counters **Buyer's** offer (to accept the counter offer, **Buyer** must sign or initial, and date the counter offered terms and deliver a
526 copy of the acceptance to **Seller**.
527 ☐ **Seller** rejects **Buyer's** offer.

528 **SIGNATURE LINES OMITTED for purposes of this draft only**

529 009900, 000010, 102829927.1

LEGISLATIVE POSITION REQUEST FORM

GOVERNMENTAL AFFAIRS OFFICE

Date Form Received _____

GENERAL INFORMATION

Submitted By Robert S. Freedman, Chair, Condominium and Planned Development Committee of the Real Property Probate & Trust Law Section

Address c/o Carlton Fields, P.A., 4221 W. Boy Scout Blvd., Suite 1000, Tampa, FL 33607
Telephone: (813) 223-7000

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

CONTACTS

Board & Legislation Committee Appearance

Robert S. Freedman, Carlton Fields, P.A., 4221 W. Boy Scout Blvd., Suite 1000, Tampa, FL 33607, Telephone (813) 223-7000
Michael J. Gelfand, Gelfand & Arpe, P.A. 1555 Palm Beach Lakes Blvd., Suite 1220, West Palm Beach, FL 33401-2323, Telephone (561) 655-6224
Peter M. Dunbar, Pennington, Moore, Wilkinson, Bell & Dunbar, P.O. Box 10095, Tallahassee, Florida 32302-2095, Telephone (850) 222-3533
Martha J. Edenfield, Pennington, Moore, Wilkinson, Bell & Dunbar, P.O. Box 10095, Tallahassee FL 32302-2095, Telephone (850) 222-3533
(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 X **Support** Oppose Technical Assistance Other _____

Proposed Wording of Position for Official Publication:

"Support various amendments to Chapter 718, 719 and 720 of the Florida Statutes pertaining to amendments to declaration of condominium; official records of the association; association financial reporting requirements; owner elections and meetings; common expenses; association collection of assessment payments from unit or lot tenants; transfer of control requirements when a receiver has been appointed; suspension of unit owner rights for delinquency in payment of assessments; board of administration meetings; and homeowners association reserve accounts and disclosures to purchasers.

15293167.1

Reasons For Proposed Advocacy:

During the 2009 Legislative session, SB 880 was proposed to undertake various modifications to Chapter 718, 719 and 720. While SB 880 did not pass, it is likely that this proposal will resurface during the 2010 Legislative session. The Condominium and Planned Development Committee believes that it is in the best interest of the RPPTL Section to advise the Legislature of its position on the applicable portions of SB 880 as pertain to the Committee's purview. Please see attached white paper.

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

(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.

15293167.1

WHITE PAPER

PROPOSAL OF THE CONDOMINIUM AND PLANNED DEVELOPMENT COMMITTEE FOR CHANGES TO CHAPTER 718, 719 AND 720

I. SUMMARY

During the 2009 Legislative session, Senate Bill 880 was proposed by Senator Fasano to undertake various modifications to Chapter 718, 719 and 720, among other statutes. Senate Bill 880 seemed poised to pass the Senate, until certain amendments proposed late in the Legislative session resulted in the bill being withdrawn from consideration. The RPPTL Section Legislative Lobbyist has advised that the language from Senate Bill 880 is likely to resurface during the 2010 Legislative session. As a means of providing the Legislature with guidance on the proposed language, the Condominium and Planned Development Committee has undertaken analysis of the provisions of Senate Bill 880 and provides its version of those provisions in the proposed legislation. The majority of the provisions contained in Senate Bill 880 remain intact and without modification. Certain modifications were made to various provisions to clarify language which was unclear, contradictory or believed to be unworkable by the Committee. Certain provisions of Senate Bill 880 were deleted by the Committee based upon its belief that such provisions were unworkable or contradictory to the operation of Florida condominiums, cooperative and homeowners associations.

II. CURRENT SITUATION

Chapter 718 presently contains a variety of provisions which are ambiguous, or unclear. Each year, the Florida legislature considers a variety of proposals to improve or correct numerous issues in the law, and this proposal is designed to clarify or improve upon the existing law.

II. SECTION-BY-SECTION ANALYSIS

The following is a listing of the specific changes to Chapters 718, 719 and 720 if the proposal is enacted:

A. Section 718.110(13)

Current Situation: The language concerning the ability to amend the declaration of condominium pertaining to rental rights does not provide sufficient protection for existing unit owners.
Effect of Proposed Changes: Amendments to the declaration of condominium which would restrict the rights of a unit owner from renting their units or which would alter the number of time a unit owner can rent a unit during a specific period will only apply to existing unit owners who

consent to the amendment.

B. Section 718.111(12)

Current Situation:
(a) Clarification is needed to prevent liability for a person who knowingly or intentionally destroys or defaces accounting records after the time that the records are required to be maintained pursuant to Chapter 718 (i.e., there is no link with the time frame for maintaining the records).
(b) Clarification is needed as to when an association will have liability for the use or misuse of information obtained under the provisions of Chapter 718.
(c) Clarification is needed to prevent liability for a person who knowingly or intentionally destroys or defaces association official records after the time that the records are required to be maintained pursuant to Chapter 718 (i.e., there is no link with the time frame for maintaining the records) or with an intent to cause harm.
(d) Clarification is needed as to the description of records that are or are not accessible to unit owners.
Effect of Proposed Changes:
(a) There will now be liability when a person knowingly or intentionally destroys or defaces accounting records required to be created and maintained only for the period of time when such records are required to be maintained in accordance with other provisions of Chapter 718.
(b) The association shall not be responsible for the use or misuse of information obtained under Chapter 718 unless the association has an affirmative obligation not to disclose the information.
(c) There will now be liability when a person knowingly or intentionally destroys or defaces association official accounting records required to be created and maintained only for the period of time when such records are required to be maintained in accordance with other provisions of Chapter 718, or if the person knowingly fails to create or maintain accounting records with an intent to cause harm to the association or one or more of its members.
(d) Unit owners will not be given access to personnel records of the association's employees (including, but not limited to, disciplinary, payroll, health and insurance records), any electronic security measure that is used by the association to safeguard data (including passwords), and the underlying software used by the association to generate data. Unit owners are to be given access to the name, address, unit designation, mailing address, property address and other contact information of the unit owners.

C. Section 718.111(13)

Current Situation: Clarification is needed as to the standards for financial reporting by condominium associations and to require the Division to promulgate rules in such regard.
Effect of Proposed Changes: Specific provisions will be deleted as to requirements for reporting on reserves, and the Division will be required to promulgate rules containing standards for presenting a summary of association reserves, including, but not limited to, a good faith estimate disclosing the annual amount of reserve funds that would be necessary for the association to fully fund reserves for each reserve item based on the straight-line accounting method. Such reporting shall not be applicable to reserves funded via the pooling method.

D. Section 718.112(2)

Current Situation:
(a) Clarification is needed when there are insufficient candidates to serve on the board of administration.
(b) Clarification is needed where coowners of a unit are permitted to each serve on the board of administration.
(c) Clarification is needed as to the eligibility requirements of a candidate for election to the board of administration.
(d) Clarification is needed as to the requirements for unit owners that are elected to the board of administration to certify their understanding of the association documents or that they have received sufficient educational guidance from the Division.
(e) Clarification is needed that any director or officer who has failed to pay any monetary indebtedness to the association (i.e., not just an assessment obligation) for 90 days is deemed to have abandoned their office.
(f) Clarification is needed as to the basis for determining director or officer offenses that will result in suspension from office.
Effect of Proposed Changes:
(a) Where there is an insufficient number of candidates to serve on the board of administration, directors whose terms are expiring can be reappointed to serve without an election.
(b) In a condominium association of more than 10 units, coowners of a unit may not serve as members of the board of directors at the same time unless they own more than one unit and are not co-occupants of a unit or unless there are not enough owners to fill the vacancies on the board.
(c) A candidate for election to the board of administration shall be required to have satisfied all eligibility requirements contained in the bylaws and have paid all outstanding monetary obligations due to the association (failure to do so shall result in the candidate not being listed on the ballot).
(d) Within 90 days after being elected, a newly-elected director must certify in writing to the association that he or she has read the declaration of condominium, articles of incorporation, bylaws, and current written

policies; that he or she will work to uphold such documents and policies to the best of his or her ability; and that he or she will faithfully discharge his or her fiduciary responsibility to the association's members. In lieu of this written certification, the newly elected director may submit a certificate of satisfactory completion of the educational curriculum administered by a division-approved condominium education provider. Failure to timely file the written certification or educational certificate automatically disqualifies the director from service on the board for the term for which he or she was elected.

(e) A director or officer more than 90 days delinquent in the payment of any fee, fine, regular assessment, or special assessment assessments shall be deemed to have abandoned the office, creating a vacancy in the office to be filled according to law.

(f) A director or officer charged by information or indictment with a felony theft or embezzlement offense involving the association's funds or property shall be suspended from office.

E. Section 718.115

Current Situation: Clarification is needed as to certain costs that constitute common expenses. Current language only references cable television agreements, and this concept needs to be expanded to cover internet and video services as well.

Effect of Proposed Changes: Contracts for communications services, information services or internet or video services are now included in the concept of common expenses.

F. Section 718.116

Current Situation:

(a) Clarification is needed as to the amount that is covered under the association's lien for nonpayment of assessments.

(b) Rights need to be created for an association to collect assessment monies from tenants of units if the unit owner fails to pay the assessment.

Effect of Proposed Changes:

(a) The cost secured by the association's claim of lien with regard to collection letters or any other collection efforts by management companies or licensed managers as to any delinquent installment of an assessment may not exceed $75 unless the management company or licensed property manager prepares any letter or estoppel certificate required by Chapter 718 and charges a reasonable fee related to the preparation of such letter or estoppel certificate.

(b) The association is authorized to demand that a tenant pay to the association the future regular assessments related to the condominium unit, with the tenant receiving a credit from the landlord against rent for the amount paid to the association. The association has certain notice

requirements. The tenant is not liable for increases in the amount of the regular assessment due unless the tenant was reasonably notified of the increase before the day on which the rent is due. The liability of the tenant may not exceed the amount due from the tenant to the tenant's landlord. The association shall, upon request, provide the tenant with written receipts for payments made. The association may issue notices under s. 83.56 and may sue for eviction under ss. 83.59-83.625 as if the association were a landlord under part II of chapter 83 if the tenant fails to pay an assessment. However, the association is not otherwise considered a landlord under chapter 83 and specifically has no duties under s. 83.51. The tenant does not, by virtue of payment of assessments, have any of the rights of a unit owner to vote in any election or to examine the books and records of the association. A court may supersede the effect of this subsection by appointing a receiver.

G. Section 718.301

Current Situation: Clarification is needed that transfer of control is not triggered in a receivership circumstance when a court determines that turnover is not in the best interest of the association or its members.
Effect of Proposed Changes: When a receiver for the developer is appointed by a circuit court and is not discharged within 30 days after such appointment, unless the court determines within 30 days after appointment of the receiver that transfer of control would be detrimental to the association or its members.

H. Section 718.303

Current Situation: Clarification is needed that the association has the right to suspend an owner's right of enjoyment of the common elements (other than as may be necessary for legal ingress and egress to and from the unit or for the use of limited common elements) in the event of nonpayment of assessments.
Effect of Proposed Changes: If a unit owner is delinquent for more than 90 days in the payment of a regular or special assessment or if the declaration or bylaws so provide, the association may suspend, for a reasonable time, the right of a unit owner or a unit's occupant, licensee, or invitee to use common elements, common facilities, or any other association property. This does not apply to limited common elements intended to be used only by that unit, common elements that must be used to access the unit, utility services provided to the unit, parking spaces, or elevators.

I. Section 719.108

Current Situation:

(a) Clarification is needed as to the amount that is covered under the association's lien for nonpayment of assessments.
(b) Rights need to be created for an association to collect assessment monies from tenants of units if the unit owner fails to pay the assessment.

Effect of Proposed Changes:

(a) The cost secured by the association's claim of lien with regard to collection letters or any other collection efforts by management companies or licensed managers as to any delinquent installment of an assessment may not exceed $75 unless the management company or licensed property manager prepares any letter or estoppel certificate required by Chapter 718 and charges a reasonable fee related to the preparation of such letter or estoppel certificate.
(b) The association is authorized to demand that a tenant pay to the association the future regular assessments related to the cooperative unit, with the tenant receiving a credit from the landlord against rent for the amount paid to the association. The association has certain notice requirements. The tenant is not liable for increases in the amount of the regular assessment due unless the tenant was reasonably notified of the increase before the day on which the rent is due. The liability of the tenant may not exceed the amount due from the tenant to the tenant's landlord. The association shall, upon request, provide the tenant with written receipts for payments made. The association may issue notices under s. 83.56 and may sue for eviction under ss. 83.59-83.625 as if the association were a landlord under part II of chapter 83 if the tenant fails to pay an assessment. However, the association is not otherwise considered a landlord under chapter 83 and specifically has no duties under s. 83.51. The tenant does not, by virtue of payment of assessments, have any of the rights of an owner to vote in any election or to examine the books and records of the association. A court may supersede the effect of this subsection by appointing a receiver.

J. Section 720.303

Current Situation:

(a) Clarification is needed that a board of administration meeting to discuss proposed or pending litigation or for discussing personnel matters is not open to members.
(b) Clarification is needed as to charges for copies of association records as requested by a homeowner, so as to prevent homeowner abuse and waste of association personnel time.
(c) Clarification is needed as to homeowners association budgeting and disclosure of reserve accounts.
(d) Disclosures are needed in the financial reports pertaining to reserves.
(e) Clarification is needed on the ability of a director to receive compensation.

Effect of Proposed Changes:

(a) Meetings between the board or a committee and the association's attorney to discuss proposed or pending litigation, or meetings of the board held for the purpose of discussing personnel matters shall not be open to the members other than the directors.
(b) The association is entitled to charge the actual cost of copying, including any reasonable costs involving personnel fees and charges at an hourly rate for vendor or employee time to cover administrative costs to the vendor or the association.
(c) The association budget must disclose any reserves that have been collected, and the funding requirement for reserves is limited to the extent that there is a limitation on the increase in assessments in the governing documents. There is no preclusion from terminating a reserve account, which requires approval of a majority of the voting interests of the association.
(d) Specific disclosures are now provided for inclusion in the association financial reports concerning the funding and existence of reserves.
(e) A director, officer, or committee member of the association may not receive any salary or compensation from the association for the performance of duties as a director, officer, or committee member and may not in any other way benefit financially from service to the association. However, this does not preclude: (1) participation by such person in a financial benefit accruing to all or a significant number of members as a result of actions lawfully taken by the board or a committee of which he or she is a member, including, but not limited to, routine maintenance, repair, or replacement of community assets; (2) reimbursement for out-of-pocket expenses incurred by such person on behalf of the association, subject to approval in accordance with procedures established by the association's governing documents or, in the absence of such procedures, in accordance with an approval process established by the board; (3) any recovery of insurance proceeds derived from a policy of insurance maintained by the association for the benefit of its members; (4) any fee or compensation authorized in the governing documents; (5) any fee or compensation authorized in advance by a vote of a majority of the voting interests voting in person or by proxy at a meeting of the members; or (6) a developer or its representative from serving as a director, officer, or committee member of the association and benefiting financially from service to the association.

K. Section 720.304

Current Situation: Clarification is needed as to the requirements imposed for the installation of a flagpole on a lot.
Effect of Proposed Changes: A flagpole and display are subject to all building codes, zoning setbacks, and other applicable governmental regulations, including, but not limited to, noise and lighting ordinances in the county or municipality in which the flag pole is erected, and all

setback and locational criteria contained within the covenants, restrictions, bylaws, rules, or requirements of the association.

L. Section 720.305

Current Situation:
(a) Clarification is needed that the association has the right to suspend an owner's right of enjoyment of the common property (other than as may be necessary for legal ingress and egress to and from the unit or for the use of limited common elements) in the event of nonpayment of assessments.
(b) Clarification is needed to permit certain fines to become liens.
Effect of Proposed Changes:
(a) If a homeowner is delinquent for more than 90 days in the payment of a regular or special assessment or if the declaration or bylaws so provide, the association may suspend, for a reasonable time, the right of a unit owner or a unit's occupant, licensee, or invitee to use common elements, common facilities, or any other association property.
(b) A fine of less than $1,000 shall not become a lien against the lot, and all fines or suspensions of rights must occur at a properly-noticed board meeting.

M. Section 720.306

Current Situation: Clarification is needed as to the ability to vote by secret ballot and proxies.
Effect of Proposed Changes: Voting can occur via secret ballot employing an election process similar to that of Section 718.112 pertaining to condominiums.

N. Section 720.3085

Current Situation: Rights need to be created for an association to collect assessment monies from tenants of lots if the homeowner fails to pay the assessment.
Effect of Proposed Changes: The association is authorized to demand that a tenant pay to the association the future regular assessments related to the lot, with the tenant receiving a credit from the landlord against rent for the amount paid to the association. The association has certain notice requirements. The tenant is not liable for increases in the amount of the regular assessment due unless the tenant was reasonably notified of the increase before the day on which the rent is due. The liability of the tenant may not exceed the amount due from the tenant to the tenant's landlord. The association shall, upon request, provide the tenant with written receipts for payments made. The association may issue notices under s. 83.56 and may sue for eviction under ss. 83.59-83.625 as if the association were a landlord under part II of chapter 83 if the tenant fails to

pay an assessment. However, the association is not otherwise considered a landlord under chapter 83 and specifically has no duties under s. 83.51. The tenant does not, by virtue of payment of assessments, have any of the rights of an owner to vote in any election or to examine the books and records of the association. A court may supersede the effect of this subsection by appointing a receiver.

O. Section 720.31

Current Situation: Clarification is needed as to the ability of a homeowners association to acquire leaseholds, membership and other possessory use interests in lands or facilities such as country clubs, golf courses, marinas, and other recreational facilities
Effect of Proposed Changes: The association is now empowered to enter into such agreements. There are requirements for description of these interests in the declaration if occurring prior to recording. Subsequent to recording, there must be authorizing language in the declaration to such effect, or else a 75% approval of the voting interests is required.

IV. FISCAL IMPACT ON STATE AND LOCAL GOVERNMENTS

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

V. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR

The passage of these proposals will enable the improve operation of condominium, cooperative and homeowners associations, thereby saving money for the residents in these communities.

VI. CONSTITUTIONAL ISSUES

There are no known constitutional issues resulting from this proposal.

V. OTHER INTERESTED PARTIES

There are no other parties that are known to have an interest in this proposal.

Section 1. Subsection (13) of section 718.110, Florida Statutes, is amended to read:

718.110 Amendment of declaration; correction of error or omission in declaration by circuit court. -

(13) Any amendment prohibiting ~~restricting~~ unit owners from renting their units or altering the number of times unit owners are entitled to rent their units during a specified period ~~owners' rights relating to the rental of units applies~~ only to unit owners who consent to the amendment and unit owners who acquire title to ~~purchase~~ their units after the effective date of that amendment.

Section 2. Subsections (12) and (13) of section 718.111, Florida Statutes, are amended to read:

718.111 The association. -

(12) OFFICIAL RECORDS. -

(a) From the inception of the association, the association shall maintain each of the following items, when applicable, which shall constitute the official records of the association:

1. A copy of the plans, permits, warranties, and other items provided by the developer pursuant to s. 718.301(4).

2. A photocopy of the recorded declaration of condominium of each condominium operated by the association and of each amendment to each declaration.

3. A photocopy of the recorded bylaws of the association and of each amendment to the bylaws.

4. A certified copy of the articles of incorporation of the association, or other documents creating the association, and of each amendment thereto.

5. A copy of the current rules of the association.

6. A book or books which contain the minutes of all meetings of the association, of the board of administration, and of unit owners, which minutes shall be retained for a period of not less than 7 years.

7. A current roster of all unit owners and their mailing addresses, unit identifications, voting certifications, and, if known, telephone numbers. The association shall also maintain the electronic mailing addresses and the numbers designated by unit owners for receiving notice sent by electronic transmission of those unit owners consenting to receive notice by electronic transmission. The electronic mailing addresses and numbers provided by unit owners to receive notice by electronic transmission shall be removed from association records when consent to receive notice by electronic transmission is revoked. However, the association is not liable for an erroneous disclosure of the electronic mail address or the number for receiving electronic transmission of notices. Notwithstanding any provision in this section to the contrary, the association shall not disclose or release any contact information requested in writing by a unit owner to remain private and confidential.

8. All current insurance policies of the association and condominiums operated by the association.

9. A current copy of any management agreement, lease, or other contract to which the association is a party or under which the association or the unit owners have an obligation or responsibility.

10. Bills of sale or transfer for all property owned by the association.

11. Accounting records for the association and separate accounting records for each condominium which the association operates. All accounting records shall be maintained for a period of not less than 7 years. Any person who knowingly or intentionally defaces or destroys accounting records required to be created and maintained by this chapter during the period for which such records are required to be maintained pursuant to this chapter, or who knowingly or intentionally fails to create or maintain accounting records required to be maintained by this chapter, is personally subject to a civil penalty pursuant to s. 718.501(1)(d). The accounting records shall include, but are not limited to:

a. Accurate, itemized, and detailed records of all receipts and expenditures.

b. A current account and a monthly, bimonthly, or quarterly statement of the account for each unit designating the name of the unit owner, the due date and amount of each assessment, the amount paid upon the account, and the balance due.

c. All audits, reviews, accounting statements, and financial reports of the association or condominium.

d. All contracts for work to be performed. Bids for work to be performed shall also be considered official records and shall be maintained by the association.

12. Ballots, sign-in sheets, voting proxies, and all other papers relating to voting by unit owners, which shall be maintained for a period of 1 year from the date of the election, vote, or meeting to which the document relates, notwithstanding paragraph (b).

13. All rental records, when the association is acting as agent for the rental of condominium units.

14. A copy of the current question and answer sheet as described by s. 718.504.

15. All other records of the association not specifically included in the foregoing which are related to the operation of the association.

16. A copy of the inspection report as provided for in s. 718.301(4)(p).

(b) The official records of the association shall be maintained within the state for at least 7 years. The records of the association shall be made available to a unit owner within 45 miles of the condominium property or within the county in which the condominium property is located within 5 working days after receipt of written request by the board or its designee. However, such distance requirement does not apply to an association governing a timeshare condominium. This paragraph may be complied with by having a copy of the official records of the association available for inspection or copying on the condominium property or association property, or the association may offer the option of making the records of the association available to a unit owner either electronically via the Internet or by allowing the records to be viewed in electronic format on a computer screen and printed upon request. The association is not responsible for

the use or misuse of the information provided pursuant to the compliance requirements of this chapter unless the association has an affirmative duty not to disclose such information pursuant to this chapter.

(c) The official records of the association are open to inspection by any association member or the authorized representative of such member at all reasonable times. The right to inspect the records includes the right to make or obtain copies, at the reasonable expense, if any, of the association member. The association may adopt reasonable rules regarding the frequency, time, location, notice, and manner of record inspections and copying. The failure of an association to provide the records within 10 working days after receipt of a written request shall create a rebuttable presumption that the association willfully failed to comply with this paragraph. A unit owner who is denied access to official records is entitled to the actual damages or minimum damages for the association's willful failure to comply with this paragraph. The minimum damages shall be $50 per calendar day up to 10 days, the calculation to begin on the 11th working day after receipt of the written request. The failure to permit inspection of the association records as provided herein entitles any person prevailing in an enforcement action to recover reasonable attorney's fees from the person in control of the records who, directly or indirectly, knowingly denied access to the records for inspection. Any person who knowingly or intentionally defaces or destroys accounting records that are required by this chapter to be created and maintained during the period for which such records are required to be maintained pursuant to this chapter, or who knowingly or intentionally fails to create or maintain accounting records that are required to be maintained by this

chapter, with the intent of causing harm to the association or one or more of its members, is personally subject to a civil penalty pursuant to s. 718.501(1)(d). The association shall maintain an adequate number of copies of the declaration, articles of incorporation, bylaws, and rules, and all amendments to each of the foregoing, as well as the question and answer sheet provided for in s. 718.504 and year-end financial information required in this section, on the condominium property to ensure their availability to unit owners and prospective purchasers, and may charge its actual costs for preparing and furnishing these documents to those requesting the documents ~~same~~. Notwithstanding the provisions of this paragraph, the following records shall not be accessible to unit owners:

1. Any record protected by the lawyer-client privilege as described in s. 90.502; and any record protected by the work-product privilege, including any record prepared by an association attorney or prepared at the attorney's express direction; which reflects a mental impression, conclusion, litigation strategy, or legal theory of the attorney or the association, and which was prepared exclusively for civil or criminal litigation or for adversarial administrative proceedings, or which was prepared in anticipation of imminent civil or criminal litigation or imminent adversarial administrative proceedings until the conclusion of the litigation or adversarial administrative proceedings.

2. Information obtained by an association in connection with the approval of the lease, sale, or other transfer of a unit.

3. Personnel records of the association's employees, including, but not limited to, disciplinary, payroll, health and insurance records.

4.~~3.~~ Medical records of unit owners.

5.~~4.~~ Social security numbers, driver's license numbers, credit card numbers, e-mail addresses, and other personal identifying information of any person, excluding the person's name, unit designation, mailing address, property address, and other contact information.

6. Any electronic security measure that is used by the association to safeguard data, including passwords.

7. The data generated by software used by the association which allows manipulation of data. Such data is part of the official records of the association, even if the owner owns a copy of the same software used by the association, but the underlying software and operating system are not part of the official records of the association.

(13) FINANCIAL REPORTING.–Within 90 days after the end of the fiscal year, or annually on a date provided in the bylaws, the association shall prepare and complete, or contract for the preparation and completion of, a financial report for the preceding fiscal year. Within 21 days after the final financial report is completed by the association or received from the third party, but not later than 120 days after the end of the fiscal year or other date as provided in the bylaws, the association shall mail to each unit owner at the address last furnished to the association by the unit owner, or hand deliver to each unit owner, a copy of the financial report or a notice that a copy of the

financial report will be mailed or hand delivered to the unit owner, without charge, upon receipt of a written request from the unit owner. The division shall adopt rules setting forth uniform accounting principles and standards to be used by all associations and shall adopt rules addressing financial reporting requirements for multicondominium associations. The rules shall include, but not be limited to, standards for presenting a summary of association reserves, including, but not limited to, a good faith estimate disclosing the annual amount of reserve funds that would be necessary for the association to fully fund reserves for each reserve item based on the straight-line accounting method. This disclosure is not applicable to reserves funded via the pooling method ~~uniform accounting principles and standards for stating the disclosure of at least a summary of the reserves, including information as to whether such reserves are being funded at a level sufficient to prevent the need for a special assessment and, if not, the amount of assessments necessary to bring the reserves up to the level necessary to avoid a special assessment. The person preparing the financial reports shall be entitled to rely on an inspection report prepared for or provided to the association to meet the fiscal and fiduciary standards of this chapter.~~ In adopting such rules, the division shall consider the number of members and annual revenues of an association. Financial reports shall be prepared as follows:

(a) An association that meets the criteria of this paragraph shall prepare or cause to be prepared a complete set of financial statements in accordance with generally accepted accounting principles. The financial statements shall be based upon the association's total annual revenues, as follows:

1. An association with total annual revenues of $100,000 or more, but less than $200,000, shall prepare compiled financial statements.

2. An association with total annual revenues of at least $200,000, but less than $400,000, shall prepare reviewed financial statements.

3. An association with total annual revenues of $400,000 or more shall prepare audited financial statements.

(b) 1. An association with total annual revenues of less than $100,000 shall prepare a report of cash receipts and expenditures.

2. An association that ~~which~~ operates fewer ~~less~~ than 50 units, regardless of the association's annual revenues, shall prepare a report of cash receipts and expenditures in lieu of financial statements required by paragraph (a).

3. A report of cash receipts and disbursements must disclose the amount of receipts by accounts and receipt classifications and the amount of expenses by accounts and expense classifications, including, but not limited to, the following, as applicable: costs for security, professional and management fees and expenses, taxes, costs for recreation facilities, expenses for refuse collection and utility services, expenses for lawn care, costs for building maintenance and repair, insurance costs, administration and salary expenses, and reserves accumulated and expended for capital expenditures, deferred maintenance, and any other category for which the association maintains reserves.

(c) An association may prepare or cause to be prepared, without a meeting of or approval by the unit owners:

1. Compiled, reviewed, or audited financial statements, if the association is required to prepare a report of cash receipts and expenditures;

2. Reviewed or audited financial statements, if the association is required to prepare compiled financial statements; or

3. Audited financial statements if the association is required to prepare reviewed financial statements.

(d) If approved by a majority of the voting interests present at a properly called meeting of the association, an association may prepare or cause to be prepared:

1. A report of cash receipts and expenditures in lieu of a compiled, reviewed, or audited financial statement;

2. A report of cash receipts and expenditures or a compiled financial statement in lieu of a reviewed or audited financial statement; or

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

Such meeting and approval must occur before ~~prior~~ to the end of the fiscal year and is effective only for the fiscal year in which the vote is taken, except that the approval also may be effective for the following fiscal year. With respect to an association to which the developer has not turned over control of the association, all unit owners, including the developer, may vote on issues related to the preparation of financial reports for the first 2 fiscal years of the association's operation, beginning with the fiscal year in which the declaration is recorded. Thereafter, all unit owners except the developer may vote on such issues until control is turned over to the association by the developer. Any audit or

review prepared under this section shall be paid for by the developer if done prior to turnover of control of the association. An association may not waive the financial reporting requirements of this section for more than 3 consecutive years.

Section 3. Paragraphs (d), (n), and (o) of subsection (2) of subsection of section 718.112, Florida Statutes, are amended to read:

718.112 Bylaws.-

(2) REQUIRED PROVISIONS.-The bylaws shall provide for the following and, if they do not do so, shall be deemed to include the following:

(d) Unit owner meetings.

1. There shall be an annual meeting of the unit owners held at the location provided in the association bylaws and, if the bylaws are silent as to the location, the meeting shall be held within 45 miles of the condominium property. However, such distance requirement does not apply to an association governing a timeshare condominium. Unless the bylaws provide otherwise, a vacancy on the board caused by the expiration of a director's term shall be filled by electing a new board member, and the election shall be by secret ballot; however, if the number of vacancies equals ~~or exceeds~~ the number of candidates, no election is required. The terms of all members of the board shall expire at the annual meeting and such board members may stand for reelection unless otherwise permitted by the bylaws. In the event that the bylaws permit staggered terms of no more than 2 years and upon approval of a majority of the total voting interests, the association board members may serve 2-year staggered terms. If the number ~~no person is interested in or demonstrates an intention to run for the~~

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~~position~~ of ~~a~~ board members ~~member~~ whose terms have ~~term has~~ expired according to the provisions of this subparagraph exceeds the number of eligible candidates showing interest in or demonstrating an intention to run for the vacant positions, each ~~such~~ board member whose term has expired ~~shall~~ may be reappointed to the board of administration and need not stand for reelection. In a condominium association of more than 10 units, coowners of a unit may not serve as members of the board of directors at the same time unless they own more than one unit and are not co-occupants of a unit or unless there are not enough owners to fill the vacancies on the board. Any unit owner desiring to be a candidate for board membership shall comply with sub-subparagraph ~~subparagraph~~ 3.a. A person who has been suspended or removed by the division under this chapter, or who is delinquent in the payment of any fee, fine, or special or regular assessment as provided in paragraph (n), is not eligible for board membership. A person who has been convicted of any felony in this state or in a United States District or Territorial Court, or who has been convicted of any offense in another jurisdiction that would be considered a felony if committed in this state, is not eligible for board membership unless such felon's civil rights have been restored for a period of no less than 5 years as of the date on which such person seeks election to the board. The validity of an action by the board is not affected if it is later determined that a member of the board is ineligible for board membership due to having been convicted of a felony.

2. The bylaws shall provide the method of calling meetings of unit owners, including annual meetings. Written notice, which notice must include an agenda, shall be mailed, hand delivered, or electronically transmitted to each unit owner at least 14

days prior to the annual meeting and shall be posted in a conspicuous place on the condominium property at least 14 continuous days preceding the annual meeting. Upon notice to the unit owners, the board shall by duly adopted rule designate a specific location on the condominium property or association property upon which all notices of unit owner meetings shall be posted; however, if there is no condominium property or association property upon which notices can be posted, this requirement does not apply. In lieu of or in addition to the physical posting of notice of any meeting of the unit owners on the condominium property, the association may, by reasonable rule, adopt a procedure for conspicuously posting and repeatedly broadcasting the notice and the agenda on a closed-circuit cable television system serving the condominium association. However, if broadcast notice is used in lieu of a notice posted physically on the condominium property, the notice and agenda must be broadcast at least four times every broadcast hour of each day that a posted notice is otherwise required under this section. When broadcast notice is provided, the notice and agenda must be broadcast in a manner and for a sufficient continuous length of time so as to allow an average reader to observe the notice and read and comprehend the entire content of the notice and the agenda. Unless a unit owner waives in writing the right to receive notice of the annual meeting, such notice shall be hand delivered, mailed, or electronically transmitted to each unit owner. Notice for meetings and notice for all other purposes shall be mailed to each unit owner at the address last furnished to the association by the unit owner, or hand delivered to each unit owner. However, if a unit is owned by more than one person, the association shall provide notice, for meetings and all other

purposes, to that one address which the developer initially identifies for that purpose and thereafter as one or more of the owners of the unit shall so advise the association in writing, or if no address is given or the owners of the unit do not agree, to the address provided on the deed of record. An officer of the association, or the manager or other person providing notice of the association meeting, shall provide an affidavit or United States Postal Service certificate of mailing, to be included in the official records of the association affirming that the notice was mailed or hand delivered, in accordance with this provision.

3.a. The members of the board shall be elected by written ballot or voting machine. Proxies shall in no event be used in electing the board, either in general elections or elections to fill vacancies caused by recall, resignation, or otherwise, unless otherwise provided in this chapter. Not less than 60 days before a scheduled election, the association shall mail, deliver, or electronically transmit, whether by separate association mailing or included in another association mailing, delivery, or transmission, including regularly published newsletters, to each unit owner entitled to a vote, a first notice of the date of the election ~~along with a certification form provided by the division attesting that he or she has read and understands, to the best of his or her ability, the governing documents of the association and the provisions of this chapter and any applicable rules.~~ Any unit owner or other eligible person desiring to be a candidate for the board must give written notice of his or her intent to be a candidate to the association not less than 40 days before a scheduled election, and prior to such date such person shall be required to have satisfied all eligibility requirements contained in

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the bylaws and have paid all outstanding monetary obligations due to the association. Any person not meeting the requirements of the previous sentence shall not be included on the ballot as a candidate for election. ~~Together with the written notice and agenda as set forth in subparagraph 2., the~~ The association shall mail, deliver, or electronically transmit a second notice of the election to all unit owners entitled to vote therein, together with a ballot which shall list all candidates and the written notice and agenda as set forth in subparagraph 2. Upon request of a candidate, ~~the association shall include~~ an information sheet, no larger than 8 1/2 inches by 11 inches, which must be furnished by the candidate not less than 35 days before the election, shall ~~along with the signed certification form provided for in this subparagraph, to~~ be included with the mailing, delivery, or transmission of the ballot, with the costs of mailing, delivery, or electronic transmission and copying to be borne by the association. The association is not liable for the contents of the information sheets prepared by the candidates. In order to reduce costs, the association may print or duplicate the information sheets on both sides of the paper. The division shall by rule establish voting procedures consistent with the provisions contained herein, including rules establishing procedures for giving notice by electronic transmission and rules providing for the secrecy of ballots. Elections shall be decided by a plurality of those ballots cast. There shall be no quorum requirement; however, at least 20 percent of the eligible voters must cast a ballot in order to have a valid election of members of the board. No unit owner shall permit any other person to vote his or her ballot, and any such ballots improperly cast shall be deemed invalid, provided any unit owner who violates this provision may be fined by the association in

accordance with s. 718.303. A unit owner who needs assistance in casting the ballot for the reasons stated in s. 101.051 may obtain assistance in casting the ballot. The regular election shall occur on the date of the annual meeting. The provisions of this sub-subparagraph ~~subparagraph~~ shall not apply to timeshare condominium associations. Notwithstanding the provisions of this sub-subparagraph, an election is not required unless more candidates file notices of intent to run or are nominated than board vacancies exist.

b. Within 90 days after being elected to the board, each newly elected director shall certify in writing to the secretary of the association that he or she has read the declaration of condominium, articles of incorporation, bylaws, and current written policies; that he or she will work to uphold such documents and policies to the best of his or her ability; and that he or she will faithfully discharge his or her fiduciary responsibility to the association's members. In lieu of this written certification, the newly elected director may submit a certificate of satisfactory completion of the educational curriculum administered by a division-approved condominium education provider. Failure to timely file the written certification or educational certificate automatically disqualifies the director from service on the board for the term for which he or she was elected. The secretary shall cause the association to retain a director's written certification or educational certificate for inspection by the members for 5 years after a director's election. Failure to have such written certification or educational certificate on file does not affect the validity of any appropriate action.

4. Any approval by unit owners called for by this chapter or the applicable declaration or bylaws, including, but not limited to, the approval requirement in s. 718.111(8), shall be made at a duly noticed meeting of unit owners and shall be subject to all requirements of this chapter or the applicable condominium documents relating to unit owner decisionmaking, except that unit owners may take action by written agreement, without meetings, on matters for which action by written agreement without meetings is expressly allowed by the applicable bylaws or declaration or any statute that provides for such action.

5. Unit owners may waive notice of specific meetings if allowed by the applicable bylaws or declaration or any statute. If authorized by the bylaws, notice of meetings of the board of administration, unit owner meetings, except unit owner meetings called to recall board members under paragraph (j), and committee meetings may be given by electronic transmission to unit owners who consent to receive notice by electronic transmission.

6. Unit owners shall have the right to participate in meetings of unit owners with reference to all designated agenda items. However, the association may adopt reasonable rules governing the frequency, duration, and manner of unit owner participation.

7. Any unit owner may tape record or videotape a meeting of the unit owners subject to reasonable rules adopted by the division.

8. Unless otherwise provided in the bylaws, any vacancy occurring on the board before the expiration of a term may be filled by the affirmative vote of the majority

of the remaining directors, even if the remaining directors constitute less than a quorum, or by the sole remaining director. In the alternative, a board may hold an election to fill the vacancy, in which case the election procedures must conform to the requirements of sub-subparagraph ~~subparagraph~~ 3.a. unless the association governs 10 units or fewer ~~less~~ and has opted out of the statutory election process, in which case the bylaws of the association control. Unless otherwise provided in the bylaws, a board member appointed or elected under this section shall fill the vacancy for the unexpired term of the seat being filled. Filling vacancies created by recall is governed by paragraph (j) and rules adopted by the division.

Notwithstanding subparagraph ~~subparagraphs~~ (b)2. and sub-subparagraph (d)3.a., an association of 10 or fewer units may, by the affirmative vote of a majority of the total voting interests, provide for different voting and election procedures in its bylaws, which vote may be by a proxy specifically delineating the different voting and election procedures. The different voting and election procedures may provide for elections to be conducted by limited or general proxy.

(n) *Director or officer delinquencies.*–A director or officer more than 90 days delinquent in the payment of any fee, fine, regular assessment, or special assessment ~~assessments~~ shall be deemed to have abandoned the office, creating a vacancy in the office to be filled according to law.

(o) *Director or officer offenses.*–A director or officer charged by information or indictment with a felony theft or embezzlement offense involving the association's funds

or property shall be suspended from office, creating a vacancy in the office to be filled according to law. While such director or officer has such criminal charge pending, he or she may not be appointed or elected to a position as a director or officer. However, should the charges be resolved without a finding of guilt, the director or officer shall be reinstated for the remainder of his or her term of office, if any.

Section 4. Paragraph (d) of subsection (1) of section 718.115, Florida Statutes, is amended to read:

718.115 Common expenses and common surplus.

(1)

(d) If so provided in the declaration, the cost of communications services as defined in chapter 202, information services, or Internet services ~~a master antenna television system or duly franchised cable television service~~ obtained pursuant to a bulk contract shall be deemed a common expense. If the declaration does not provide for the cost of communications services as defined in chapter 202, information services, or Internet ~~services a master antenna television system or duly franchised cable television service~~ obtained under a bulk contract as a common expense, the board may enter into such a contract, and the cost of the service will be a common expense but allocated on a per-unit basis rather than a percentage basis if the declaration provides for other than an equal sharing of common expenses, and any contract entered into before July 1, 1998, in which the cost of the service is not equally divided among all unit owners, may be changed by vote of a majority of the voting interests present at a regular or special

meeting of the association, to allocate the cost equally among all units. The contract shall be for a term of not less than 2 years.

1. Any contract made by the board after the effective date hereof for communications services as defined in chapter 202, information services, or Internet services ~~a community antenna system or duly franchised cable television service~~ may be canceled by a majority of the voting interests present at the next regular or special meeting of the association. Any member may make a motion to cancel the ~~said~~ contract, but if no motion is made or if such motion fails to obtain the required majority at the next regular or special meeting, whichever occurs ~~is~~ sooner, following the making of the contract, ~~then~~ such contract shall be deemed ratified for the term therein expressed.

2. Any such contract shall provide, and shall be deemed to provide if not expressly set forth, that any hearing-impaired or legally blind unit owner who does not occupy the unit with a non-hearing-impaired or sighted person, or any unit owner receiving supplemental security income under Title XVI of the Social Security Act or food stamps as administered by the Department of Children and Family Services pursuant to s. 414.31, may discontinue the internet, cable or video service without incurring disconnect fees, penalties, or subsequent service charges, and, as to such units, the owners shall not be required to pay any common expenses charge related to such service. If fewer ~~less~~ than all members of an association share the expenses of internet, cable or video service ~~television~~, the expense shall be shared equally by all participating unit owners. The association may use the provisions of s. 718.116 to

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enforce payment of the shares of such costs by the unit owners receiving internet, cable or video service ~~television~~.

Section 5. Paragraph (b) of subsection (5) of section 718.116, Florida Statutes, is amended, and subsection (11) is added to that section, to read:

718.116 Assessments; liability; lien and priority; interest; collection.

(5)

(b) To be valid, a claim of lien must state the description of the condominium parcel, the name of the record owner, the name and address of the association, the amount due, and the due dates. It must be executed and acknowledged by an officer or authorized agent of the association. No such lien shall be effective longer than 1 year after the claim of lien was recorded unless, within that time, an action to enforce the lien is commenced. The 1-year period shall automatically be extended for any length of time during which the association is prevented from filing a foreclosure action by an automatic stay resulting from a bankruptcy petition filed by the parcel owner or any other person claiming an interest in the parcel. The claim of lien shall secure all unpaid assessments which are due and which may accrue subsequent to the recording of the claim of lien and before ~~prior to~~ the entry of a certificate of title, as well as interest and all reasonable costs and attorney's fees incurred by the association incident to the collection process. Costs to the unit owner secured by the association's claim of lien with regard to collection letters or any other collection efforts by management companies or licensed managers as to any delinquent installment of an assessment may not exceed $75 unless the management company or licensed property manager

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prepares any letter or estoppel certificate required by this chapter and charges a reasonable fee related to the preparation of such letter or estoppel certificate. Upon payment in full, the person making the payment is entitled to a satisfaction of the lien. After notice of contest of lien has been recorded, the clerk of the circuit court shall mail a copy of the recorded notice to the association by certified mail, return receipt requested, at the address shown in the claim of lien or most recent amendment to it and shall certify to the service on the face of the notice. Service is complete upon mailing. After service, the association has 90 days in which to file an action to enforce the lien; and, if the action is not filed within the 90-day period, the lien is void. However, the 90-day period shall be extended for any length of time that the association is prevented from filing its action because of an automatic stay resulting from the filing of a bankruptcy petition by the unit owner or by any other person claiming an interest in the parcel.

(11) If the unit is occupied by a tenant and the unit owner is delinquent in the payment of regular assessments, the association may demand that the tenant pay to the association the future regular assessments related to the condominium unit. The demand is continuing in nature, and upon demand, the tenant shall continue to pay the regular assessments to the association until the association releases the tenant or the tenant discontinues tenancy in the unit. The association shall mail written notice to the unit owner of the association's demand that the tenant pay regular assessments to the association. The tenant is not liable for increases in the amount of the regular assessment due unless the tenant was reasonably notified of the increase before the

day on which the rent is due. The liability of the tenant may not exceed the amount due from the tenant to the tenant's landlord. The tenant's landlord shall provide the tenant a credit against rents due to the unit owner in the amount of assessments paid to the association under this section. The association shall, upon request, provide the tenant with written receipts for payments made. The association may issue notices under s. 83.56 and may sue for eviction under ss. 83.59-83.625 as if the association were a landlord under part II of chapter 83 if the tenant fails to pay an assessment. However, the association is not otherwise considered a landlord under chapter 83 and specifically has no duties under s. 83.51. The tenant does not, by virtue of payment of assessments, have any of the rights of a unit owner to vote in any election or to examine the books and records of the association. A court may supersede the effect of this subsection by appointing a receiver.

Section 6. Subsection (1) of section 718.301, Florida Statutes, is amended to read:

718.301 Transfer of association control; claims of defect by association.

(1) When unit owners other than the developer own 15 percent or more of the units in a condominium that will be operated ultimately by an association, the unit owners other than the developer shall be entitled to elect no less than one-third of the members of the board of administration of the association. Unit owners other than the developer are entitled to elect not less than a majority of the members of the board of administration of an association:

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

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

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

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

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

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

(g) Seven years after recordation of the declaration of condominium; or, in the case of an association which may ultimately operate more than one condominium, 7 years after recordation of the declaration for the first condominium it operates; or, in the case of an association operating a phase condominium created pursuant to s. 718.403, 7 years after recordation of the declaration creating the initial phase, whichever occurs first. The developer is entitled to elect at least one member of the board of administration of an association as long as the developer holds for sale in the ordinary

course of business at least 5 percent, in condominiums with fewer than 500 units, and 2 percent, in condominiums with more than 500 units, of the units in a condominium operated by the association. Following the time the developer relinquishes control of the association, the developer may exercise the right to vote any developer-owned units in the same manner as any other unit owner except for purposes of reacquiring control of the association or selecting the majority members of the board of administration.

Section 7. Section 718.303, Florida Statutes, is amended to read:

718.303 Obligations of owners and occupants; waiver; levy of fines, suspension of use or voting rights, and other nonexclusive remedies in law or equity ~~fine against unit~~ by an association.-

(1) Each unit owner, each tenant and other invitee, and each association shall be governed by, and shall comply with the provisions of, this chapter, the declaration, the documents creating the association, and the association bylaws and the provisions thereof shall be deemed expressly incorporated into any lease of a unit. Actions for damages or for injunctive relief, or both, for failure to comply with these provisions may be brought by the association or by a unit owner against:

(a) The association.

(b) A unit owner.

(c) Directors designated by the developer, for actions taken by them prior to the time control of the association is assumed by unit owners other than the developer.

(d) Any director who willfully and knowingly fails to comply with these provisions.

(e) Any tenant leasing a unit, and any other invitee occupying a unit.

The prevailing party in any such action or in any action in which the purchaser claims a right of voidability based upon contractual provisions as required in s. 718.503(1)(a) is entitled to recover reasonable attorney's fees. A unit owner prevailing in an action between the association and the unit owner under this section, in addition to recovering his or her reasonable attorney's fees, may recover additional amounts as determined by the court to be necessary to reimburse the unit owner for his or her share of assessments levied by the association to fund its expenses of the litigation. This relief does not exclude other remedies provided by law. Actions arising under this subsection shall not be deemed to be actions for specific performance.

(2) A provision of this chapter may not be waived if the waiver would adversely affect the rights of a unit owner or the purpose of the provision, except that unit owners or members of a board of administration may waive notice of specific meetings in writing if provided by the bylaws. Any instruction given in writing by a unit owner or purchaser to an escrow agent may be relied upon by an escrow agent, whether or not such instruction and the payment of funds thereunder might constitute a waiver of any provision of this chapter.

(3) If a unit owner is delinquent for more than 90 days in the payment of a regular or special assessment or if the declaration or bylaws so provide, the association may suspend, for a reasonable time, the right of a unit owner or a unit's occupant, licensee, or invitee to use common elements, common facilities, or any other

association property. This subsection does not apply to limited common elements intended to be used only by that unit, common elements that must be used to access the unit, utility services provided to the unit, parking spaces, or elevators. The association may also levy reasonable fines ~~against a unit~~ for the failure of the owner of the unit, or its occupant, licensee, or invitee, to comply with any provision of the declaration, the association bylaws, or reasonable rules of the association. No fine will become a lien against a unit. A ~~No~~ fine may not exceed $100 per violation. However, a fine may be levied on the basis of each day of a continuing violation, with a single notice and opportunity for hearing, provided that no such fine shall in the aggregate exceed $1,000. A ~~No~~ fine may not be levied and a suspension may not be imposed unless the association first gives ~~except after giving~~ reasonable notice and opportunity for a hearing to the unit owner and, if applicable, its occupant, licensee, or invitee. The hearing must be held before a committee of other unit owners who are neither board members nor persons residing in a board member's household. If the committee does not agree with the fine or suspension, the fine or suspension may not be levied or imposed. ~~The provisions of this subsection do not apply to unoccupied units.~~

(4) The notice and hearing requirements of subsection (3) do not apply to the imposition of suspensions or fines against a unit owner or a unit's occupant, licensee, or invitee because of the failure to pay any amounts due the association. If such a fine or suspension is imposed, the association must levy the fine or impose a reasonable suspension at a properly noticed board meeting, and after the imposition of such fine or

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suspension, the association must notify the unit owner and, if applicable, the unit's occupant, licensee, or invitee by mail or hand delivery.

(5) If the declaration or bylaws so provide, an association may also suspend the voting rights of a member due to nonpayment of assessments, fines, or other charges payable to the association which are delinquent in excess of 90 days.

Section 8. Subsections (3) and (4) of section 719.108, Florida Statutes, are amended, and subsection (10) is added to that section, to read:

719.108 Rents and assessments; liability; lien and priority; interest; collection; cooperative ownership.

(3) Rents and assessments, and installments on them, not paid when due bear interest at the rate provided in the cooperative documents from the date due until paid. This rate may not exceed the rate allowed by law, and, if no rate is provided in the cooperative documents, then interest shall accrue at 18 percent per annum. Also, if the cooperative documents or bylaws so provide, the association may charge an administrative late fee in addition to such interest, in an amount not to exceed the greater of $25 or 5 percent of each installment of the assessment for each delinquent installment that the payment is late. Costs to the unit owner secured by the association's claim of lien with regard to collection letters or any other collection efforts by management companies or licensed managers as to any delinquent installment of an assessment may not exceed $75 unless the management company prepares any letter or estoppel certificate required by this chapter and charges a reasonable fee related to the preparation of such letter or estoppel certificate. Any payment received by an

association shall be applied first to any interest accrued by the association, then to any administrative late fee, then to any costs and reasonable attorney's fees incurred in collection, then to any reasonable costs for collection services for which the association has contracted, and then to the delinquent assessment. The foregoing shall be applicable notwithstanding any restrictive endorsement, designation, or instruction placed on or accompanying a payment. A late fee is not subject to chapter 687 or s. 719.303(3).

(4) The association shall have a lien on each cooperative parcel for any unpaid rents and assessments, plus interest, any authorized administrative late fees, and any reasonable costs for collection services for which the association has contracted against the unit owner of the cooperative parcel. If authorized by the cooperative documents, said lien shall also secure reasonable attorney's fees incurred by the association incident to the collection of the rents and assessments or enforcement of such lien. The lien is effective from and after the recording of a claim of lien in the public records in the county in which the cooperative parcel is located which states the description of the cooperative parcel, the name of the unit owner, the amount due, and the due dates. The lien shall expire if a claim of lien is not filed within 1 year after the date the assessment was due, and no such lien shall continue for a longer period than 1 year after the claim of lien has been recorded unless, within that time, an action to enforce the lien is commenced in a court of competent jurisdiction. Except as otherwise provided in this chapter, a lien may not be filed by the association against a cooperative parcel until 30 days after the date on which a notice of intent to file a lien

has been delivered to the owner by registered or certified mail, return receipt requested, and by first-class United States mail to the owner at his or her last address in the records of the association, if the address is within the United States, and delivered to the owner at the address of the unit if the owner's address as reflected in the records of the association is not the unit address. If the address in the records is outside the United States, notice shall be sent to that address and to the unit address by first-class United States mail. Delivery of the notice shall be deemed given upon mailing as required by this subsection. ~~No lien may be filed by the association against a cooperative parcel until 30 days after the date on which a notice of intent to file a lien has been served on the unit owner of the cooperative parcel by certified mail or by personal service in the manner authorized by chapter 48 and the Florida Rules of Civil Procedure.~~

(10) If the share is occupied by a tenant and the share owner is delinquent in the payment of regular assessments, the association may demand that the tenant pay to the association the future regular assessments related to the condominium share. The demand is continuing in nature, and upon demand, the tenant shall continue to pay the regular assessments to the association until the association releases the tenant or the tenant discontinues tenancy in the share. The association shall mail written notice to the share owner of the association's demand that the tenant pay regular assessments to the association. The tenant is not liable for increases in the amount of the regular assessment due unless the tenant was reasonably notified of the increase before the day on which the rent is due. The liability of the tenant may not exceed the amount due

from the tenant to the tenants' landlord. The tenant's landlord shall provide the tenant a credit against rents due to the unit owner in the amount of assessments paid to the association under this section. The association shall, upon request, provide the tenant with written receipts for payments made. The association may issue notices under s. 83.56 and may sue for eviction under ss. 83.59-83.625 as if the association were a landlord under part II of chapter 83 if the tenant fails to pay an assessment. However, the association is not otherwise considered a landlord under chapter 83 and specifically has no duties under s. 83.51. The tenant does not, by virtue of payment of assessments, have any of the rights of a share owner to vote in any election or to examine the books and records of the association. A court may supersede the effect of this subsection by appointing a receiver.

Section 9. Paragraph (b) of subsection (2), paragraphs (a) and (c) of subsection (5), and paragraphs (b), (c), (d), (f), and (g) of subsection (6) of section 720.303, Florida Statutes, are amended, and subsection (12) is added to that section, to read:

720.303 Association powers and duties; meetings of board; official records; budgets; financial reporting; association funds; recalls.

(2) BOARD MEETINGS.

(b) Members have the right to attend all meetings of the board and to speak on any matter placed on the agenda by petition of the voting interests for at least 3 minutes. The association may adopt written reasonable rules expanding the right of members to speak and governing the frequency, duration, and other manner of member

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statements, which rules must be consistent with this paragraph and may include a sign-up sheet for members wishing to speak. Notwithstanding any other law, ~~the requirement that board meetings and committee meetings be open to the members is inapplicable to~~ meetings between the board or a committee and the association's attorney to discuss proposed or pending litigation, or ~~with respect to~~ meetings of the board held for the purpose of discussing personnel matters shall not be open to the members other than the directors.

(5) INSPECTION AND COPYING OF RECORDS.–The official records shall be maintained within the state and must be open to inspection and available for photocopying by members or their authorized agents at reasonable times and places within 10 business days after receipt of a written request for access. This subsection may be complied with by having a copy of the official records available for inspection or copying in the community. If the association has a photocopy machine available where the records are maintained, it must provide parcel owners with copies on request during the inspection if the entire request is limited to no more than 25 pages.

(a) The failure of an association to provide access to the records within 10 business days after receipt of a written request submitted by certified mail, return receipt requested, creates a rebuttable presumption that the association willfully failed to comply with this subsection.

(c) The association may adopt reasonable written rules governing the frequency, time, location, notice, records to be inspected, and manner of inspections, but may not require ~~impose a requirement that~~ a parcel owner to demonstrate any

proper purpose for the inspection, state any reason for the inspection, or limit a parcel owner's right to inspect records to less than one 8-hour business day per month. The association may impose fees to cover the costs of providing copies of the official records, including, without limitation, the costs of copying. The association may charge up to 50 cents per page for copies made on the association's photocopier. If the association does not have a photocopy machine available where the records are kept, or if the records requested to be copied exceed 25 pages in length, the association may have copies made by an outside vendor or association management company personnel and may charge the actual cost of copying, including any reasonable costs involving personnel fees and charges at an hourly rate for vendor or employee time to cover administrative costs to the vendor or the association. The association shall maintain an adequate number of copies of the recorded governing documents, to ensure their availability to members and prospective members. Notwithstanding the provisions of this paragraph, the following records are ~~shall~~ not ~~be~~ accessible to members or parcel owners:

1. Any record protected by the lawyer-client privilege as described in s. 90.502 and any record protected by the work-product privilege, including, but not limited to, any record prepared by an association attorney or prepared at the attorney's express direction which reflects a mental impression, conclusion, litigation strategy, or legal theory of the attorney or the association and which was prepared exclusively for civil or criminal litigation or for adversarial administrative proceedings or which was prepared in anticipation of imminent civil or criminal litigation or imminent adversarial administrative

proceedings until the conclusion of the litigation or ~~adversarial~~ administrative proceedings.

2. Information obtained by an association in connection with the approval of the lease, sale, or other transfer of a parcel.

3. Personnel records of the association's employees, including, but not limited to, disciplinary, payroll, health and insurance records.

4. Medical records of parcel owners or community residents.

(6) BUDGETS.

(b) In addition to annual operating expenses, the budget may include reserve accounts for capital expenditures and deferred maintenance for which the association is responsible. If reserve accounts are not established pursuant to paragraph (d), funding of such reserves shall be limited to the extent that the governing documents ~~do not~~ limit increases in assessments, including reserves. If the budget of the association includes reserve accounts established pursuant to paragraph (d), such reserves shall be determined, maintained, and waived in the manner provided in this subsection. Once an association provides for reserve accounts pursuant to paragraph (d) ~~in the budget~~, the association shall thereafter determine, maintain, and waive reserves in compliance with this subsection. The provisions of this section do not preclude the termination of a reserve account established pursuant to this paragraph upon approval of a majority of the voting interests of the association. Upon such approval, the terminated reserve account shall be removed from the budget.

(c)1. If the budget of the association does not provide for reserve accounts pursuant to paragraph (d) ~~governed by this subsection~~ and the association is responsible for the repair and maintenance of capital improvements that may result in a special assessment if reserves are not provided, each financial report for the preceding fiscal year required by subsection (7) shall contain the following statement in conspicuous type: THE BUDGET OF THE ASSOCIATION DOES NOT PROVIDE FOR RESERVE ACCOUNTS FOR CAPITAL EXPENDITURES AND DEFERRED MAINTENANCE THAT MAY RESULT IN SPECIAL ASSESSMENTS. OWNERS MAY ELECT TO PROVIDE FOR RESERVE ACCOUNTS PURSUANT TO THE PROVISIONS OF SECTION 720.303(6), FLORIDA STATUTES, UPON OBTAINING THE APPROVAL OF ~~NOT LESS THAN~~ A MAJORITY OF THE TOTAL VOTING INTERESTS OF THE ASSOCIATION BY VOTE OF THE MEMBERS AT A MEETING OR BY WRITTEN CONSENT.

2. If the budget of the association does provide for funding accounts for deferred expenditures, including, but not limited to, funds for capital expenditures and deferred maintenance, but such accounts are not created or established pursuant to paragraph (d), each financial report for the preceding fiscal year required under subsection (7) must also contain the following statement in conspicuous type: THE BUDGET OF THE ASSOCIATION DOES PROVIDE FOR LIMITED VOLUNTARY DEFERRED EXPENDITURE ACCOUNTS, INCLUDING CAPITAL EXPENDITURES AND DEFERRED MAINTENANCE, SUBJECT TO LIMITS ON FUNDING CONTAINED IN OUR GOVERNING DOCUMENTS. BECAUSE THE OWNERS HAVE NOT

ELECTED TO PROVIDE FOR RESERVE ACCOUNTS PURSUANT TO SECTION 720.303(6), FLORIDA STATUTES, THESE FUNDS ARE NOT SUBJECT TO THE RESTRICTIONS ON USE OF SUCH FUNDS SET FORTH IN THAT STATUTE, NOR ARE RESERVES CALCULATED IN ACCORDANCE WITH THAT STATUTE.

(d) An association shall be deemed to have provided for reserve accounts if ~~when~~ reserve accounts have been initially established by the developer or if ~~when~~ the membership of the association affirmatively elects to provide for reserves. If reserve accounts are not initially provided for by the developer, the membership of the association may elect to do so upon the affirmative approval of ~~not less than~~ a majority of the total voting interests of the association. Such approval may be obtained ~~attained~~ by vote of the members at a duly called meeting of the membership or by the ~~upon a~~ written consent ~~of executed by not less than~~ a majority of the total voting interests in the community. The approval action of the membership shall state that reserve accounts shall be provided for in the budget and shall designate the components for which the reserve accounts are to be established. Upon approval by the membership, the board of directors shall include ~~provide for~~ the required reserve accounts ~~for inclusion~~ in the budget in the next fiscal year following the approval and 4 each year thereafter. Once established as provided in this subsection, the reserve accounts shall be funded or maintained or shall have their funding waived in the manner provided in paragraph (f).

(f) After one or more ~~Once a reserve account or~~ reserve accounts are established, the membership of the association, upon a majority vote at a meeting at which a quorum is present, may provide for no reserves or less reserves than required

by this section. If a meeting of the unit owners has been called to determine whether to waive or reduce the funding of reserves and no such result is achieved or a quorum is not present, the reserves as included in the budget shall go into effect. After the turnover, the developer may vote its voting interest to waive or reduce the funding of reserves. Any vote taken pursuant to this subsection to waive or reduce reserves is ~~shall be~~ applicable only to one budget year.

(g) Funding formulas for reserves authorized by this section shall be based on either a separate analysis of each of the required assets or a pooled analysis of two or more of the required assets.

1. If the association maintains separate reserve accounts for each of the required assets, the amount of the contribution to each reserve account is ~~shall be~~ the sum of the following two calculations:

a. The total amount necessary, if any, to bring a negative component balance to zero.

b. The total estimated deferred maintenance expense or estimated replacement cost of the reserve component less the estimated balance of the reserve component as of the beginning of the period for which the budget will be in effect. The remainder, if greater than zero, shall be divided by the estimated remaining useful life of the component.

The formula may be adjusted each year for changes in estimates and deferred maintenance performed during the year and may include factors such as inflation and earnings on invested funds.

2. If the association maintains a pooled account of two or more of the required reserve assets, the amount of the contribution to the pooled reserve account as disclosed on the proposed budget may ~~shall~~ not be less than that required to ensure that the balance on hand at the beginning of the period ~~for which~~ the budget will go into effect plus the projected annual cash inflows over the remaining estimated useful life of all ~~of~~ the assets that make up the reserve pool are equal to or greater than the projected annual cash outflows over the remaining estimated useful lives of all e# the assets that make up the reserve pool, based on the current reserve analysis. The projected annual cash inflows may include estimated earnings from investment of principal and accounts receivable minus the allowance for doubtful accounts. The reserve funding formula may ~~shall~~ not include any type of balloon payments.

(12) COMPENSATION PROHIBITED.–A director, officer, or committee member of the association may not receive any salary or compensation from the association for the performance of duties as a director, officer, or committee member and may not in any other way benefit financially from service to the association. This subsection does not preclude:

(a) Participation by such person in a financial benefit accruing to all or a significant number of members as a result of actions lawfully taken by the board or a

committee of which he or she is a member, including, but not limited to, routine maintenance, repair, or replacement of community assets.

(b) Reimbursement for out-of-pocket expenses incurred by such person on behalf of the association, subject to approval in accordance with procedures established by the association's governing documents or, in the absence of such procedures, in accordance with an approval process established by the board.

(c) Any recovery of insurance proceeds derived from a policy of insurance maintained by the association for the benefit of its members.

(d) Any fee or compensation authorized in the governing documents.

(e) Any fee or compensation authorized in advance by a vote of a majority of the voting interests voting in person or by proxy at a meeting of the members.

(f) A developer or its representative from serving as a director, officer, or committee member of the association and benefiting financially from service to the association.

Section 10. Paragraph (b) of subsection (2) of section 720.304, Florida Statutes, is amended to read:

720.304 Right of owners to peaceably assemble; display of flag; SLAPP suits prohibited.

(2)

(b) Any homeowner may erect a freestanding flagpole no more than 20 feet high on any portion of the homeowner's real property, regardless of any covenants, restrictions, bylaws, rules, or requirements of the association, if the flagpole does not

obstruct sightlines at intersections and is not erected within or upon an easement. The homeowner may further display in a respectful manner from that flagpole, regardless of any covenants, restrictions, bylaws, rules, or requirements of the association, one official United States flag, not larger than 4 1/2 feet by 6 feet, and may additionally display one official flag of the State of Florida or the United States Army, Navy, Air Force, Marines, or Coast Guard, or a POW-MIA flag. Such additional flag must be equal in size to or smaller than the United States flag. The flagpole and display are subject to all building codes, zoning setbacks, and other applicable governmental regulations, including, but not limited to, noise and lighting ordinances in the county or municipality in which the flag pole is erected, and all setback and locational criteria contained within the covenants, restrictions, bylaws, rules, or requirements of the association.

Section 11. Subsection (2) of section 720.305, Florida Statutes, is amended to read:

720.305 Obligations of members; remedies at law or in equity; levy of fines and suspension of use rights.-

(2) If a member is delinquent for more than 90 days in the payment of a regular or special assessment or if the governing documents so provide, an association may suspend, for a reasonable period of time, the rights of a member or a member's tenants, guests, or invitees, or both, to use common areas and facilities and may levy reasonable fines of up to~~, not to exceed~~ $100 per violation, against any member or any tenant, guest, or invitee. A fine may be levied on the basis of each day of a continuing violation, with a single notice and opportunity for hearing, except that a ~~no such~~ fine

may not ~~shall~~ exceed $1,000 in the aggregate unless otherwise provided in the governing documents. A fine of less than $1,000 may ~~shall~~ not become a lien against a parcel. In any action to recover a fine, the prevailing party is entitled to collect its reasonable attorney's fees and costs from the nonprevailing party as determined by the court. The provisions regarding the suspension-of-use rights do not apply to the portion of common areas that must be used to provide access to the parcel or utility services provided to the parcel.

(a) A fine or suspension may not be imposed without notice of at least 14 days to the person sought to be fined or suspended and an opportunity for a hearing before a committee of at least three members appointed by the board who are not officers, directors, or employees of the association, or the spouse, parent, child, brother, or sister of an officer, director, or employee. If the committee, by majority vote, does not approve a proposed fine or suspension, it may not be imposed.

(b) The requirements of this subsection do not apply to the imposition of suspensions or fines upon any member because of the failure of the member to pay assessments or other charges when due if such action is authorized by the governing documents. If such a fine or suspension is imposed, the association must levy the fine or impose a reasonable suspension at a properly noticed board meeting, and after the imposition of such fine or suspension, the association must notify the parcel owner and, if applicable, the parcel's occupant, licensee, or invitee by mail or hand delivery.

(c) Suspension of common-area-use rights shall not impair the right of an owner or tenant of a parcel to have vehicular and pedestrian ingress to and egress from the parcel, including, but not limited to, the right to park.

Section 12. Subsections (8) and (9) of section 720.306, Florida Statutes, are amended to read:

720.306 Meetings of members; voting and election procedures; amendments.

(8) PROXY VOTING.–The members have the right, unless otherwise provided in this subsection or in the governing documents, to vote in person or by proxy.

(a) To be valid, a proxy must be dated, must state the date, time, and place of the meeting for which it was given, and must be signed by the authorized person who executed the proxy. A proxy is effective only for the specific meeting for which it was originally given, as the meeting may lawfully be adjourned and reconvened from time to time, and automatically expires 90 days after the date of the meeting for which it was originally given. A proxy is revocable at any time at the pleasure of the person who executes it. If the proxy form expressly so provides, any proxy holder may appoint, in writing, a substitute to act in his or her place.

(b) If the governing documents permit voting by secret ballot by members who are not in attendance at a meeting of the members for the election of directors, such ballots shall be placed in an inner envelope with no identifying markings and mailed or delivered to the association in an outer envelope bearing identifying information reflecting the name of the member, the lot or parcel for which the vote is being cast, and

the signature of the lot or parcel owner casting that ballot. If the eligibility of the member to vote is confirmed and no other ballot has been submitted for that lot or parcel, the inner envelope shall be removed from the outer envelope bearing the identification information, placed with the ballots which were personally cast, and opened when the ballots are counted. If more than one ballot is submitted for a lot or parcel, the ballots for that lot or parcel shall be disqualified. Any vote by ballot received after the closing of the balloting may not be considered.

(9) ELECTIONS.–Elections of directors must be conducted in accordance with the procedures set forth in the governing documents of the association. All members of the association are ~~shall be~~ eligible to serve on the board of directors, and a member may nominate himself or herself as a candidate for the board at a meeting where the election is to be held or, if the election process allows voting by absentee ballot, in advance of the balloting by submission in writing delivered to the board not less than 21 days prior to the meeting or such other date as determined by the board from time to time. Except as otherwise provided in the governing documents, boards of directors must be elected by a plurality of the votes cast by eligible voters. Any election dispute between a member and an association must be submitted to mandatory binding arbitration with the division. Such proceedings shall be conducted in the manner provided by s. 718.1255 and the procedural rules adopted by the division.

Section 13. Subsection (8) is added to section 720.3085, Florida Statutes, to read:

720.3085 Payment for assessments; lien claims.

(8) If the parcel is occupied by a tenant and the parcel owner is delinquent in the payment of regular assessments, the association may demand that the tenant pay to the association the future regular assessments related to the parcel. The demand is continuing in nature, and upon demand, the tenant shall continue to pay the regular assessments to the association until the association releases the tenant or the tenant discontinues tenancy in the parcel. The association shall mail written notice to the parcel owner of the association's demand that the tenant pay regular assessments to the association. The tenant is not liable for increases in the amount of the regular assessment due unless the tenant was reasonably notified of the increase before the day on which the rent is due. The tenant's landlord shall provide the tenant a credit against rents due to the parcel owner in the amount of assessments paid to the association under this section. The association shall, upon request, provide the tenant with written receipts for payments made. The association may issue notices under s. 83.56 and may sue for eviction under ss. 83.59-83.625 as if the association were a landlord under part II of chapter 83 if the tenant fails to pay an assessment. However, the association is not otherwise considered a landlord under chapter 83 and specifically has no duties under s. 83.51. The tenant does not, by virtue of payment of assessments, have any of the rights of a parcel owner to vote in any election or to examine the books and records of the association. A court may supersede the effect of this subsection by appointing a receiver.

Section 14. Subsection (6) is added to section 720.31, Florida Statutes, to read:

720.31 Recreational leaseholds; right to acquire; escalation clauses.

(6) An association may enter into agreements to acquire leaseholds, memberships, and other possessory or use interests in lands or facilities such as country clubs, golf courses, marinas, and other recreational facilities. An association may enter into such agreements regardless of whether the lands or facilities are contiguous to the lands of the community or whether such lands or facilities are intended to provide enjoyment, recreation, or other use or benefit to the owners. All leaseholds, memberships, and other possessory or use interests existing or created at the time of recording the declaration must be stated and fully described in the declaration. Subsequent to the recording of the declaration, agreements acquiring leaseholds, memberships, or other possessory or use interests not entered into within 12 months following the recording of the declaration may be entered into only if authorized by the declaration for material alterations or substantial additions to the common areas or association property. If the declaration is silent, any such transaction requires the approval of 75 percent of the total voting interests of the association. The declaration may provide that the rental, membership fees, operations, replacements, or other expenses are common expenses; impose covenants and restrictions concerning their use; and contain other provisions not inconsistent with this subsection. An association exercising its rights under this subsection may join with other associations that are part of the same development or with a master association responsible for the enforcement of shared covenants, conditions, and restrictions in carrying out the intent of this subsection.

Section 15. Subsection (17) of section 721.05, Florida Statutes, is amended to read:

721.05 Definitions.–As used in this chapter, the term:

(17) "Facility" means any permanent amenity, including any structure, furnishing, fixture, equipment, service, improvement, or real or personal property, improved or unimproved, other than an accommodation of the timeshare plan, which is made available to the purchasers of a timeshare plan. The term does not include an incidental benefit as defined in this section.

Section 16. Section 723.071, Florida Statutes, is amended to read:

723.071 Sale of mobile home parks.

(1) (a) If a mobile home park owner intends to offer ~~offers~~ a mobile home park for sale, or if a mobile home park owner receives a bona fide offer to purchase the park which she or he intends to consider or make a counteroffer to, she or he shall notify, by certified mail, the officers of the homeowners' association created pursuant to ss. 723.075-723.079, and the Florida Housing Finance Corporation, of the offer, or of her or his intent to offer, stating the price and the terms and conditions of sale, if the requirements of the homeowners' offer to purchase as set forth in subsection (2) have been met by the homeowners' association.

(b) The mobile home owners, by and through the association defined in s. 723.075, shall have the right to purchase the park, and the mobile home park owner is obligated to sell to the home owners, provided the home owners meet the price and terms and conditions of the mobile home park owner by executing a contract with the

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park owner within 45 days, unless agreed to otherwise, from the date of mailing of the notice and provided they have complied with ss. 723.075-723.079. If a contract between the park owner and the association is not executed within such 45-day period, then, unless the park owner thereafter elects to offer the park at a price lower than the price specified in her or his notice to the officers of the homeowners' association, the park owner has no further obligations under this subsection, and her or his only obligation shall be as set forth in subsection (2).

(c) If the park owner thereafter elects to offer the park at a price lower or higher than the price specified in her or his notice to the home owners, the home owners, by and through the association, will have an additional 21 ~~10~~ days to meet the price and terms and conditions of the park owner by executing a contract. The homeowners, by and through the association, shall have 21 days to meet the price and terms and conditions of a counteroffer.

(2) If the mobile home owners, by and through the association, have informed the mobile home park owner that they are ready and willing to purchase the park, the park owner shall comply with the provisions of subsection (1). The expression of readiness and willingness to purchase the park must be renewed annually by certified mail to the park owner and must include information about the number of homeowners concurring; the date, time, and place of the homeowners' association meeting authorizing the notice to be sent; and information concerning the ability of the homeowners to purchase the park using the income approach method to estimate the property value. If the homeowners' association has not substantially complied with this

requirement, the park owner has no obligation to comply with the provisions of subsection (1). ~~If a mobile home park owner receives a bona fide offer to purchase the park that she or he intends to consider or make a counteroffer to, the park owner's only obligation shall be to notify the officers of the homeowners' association that she or he has received an offer and disclose the price and material terms and conditions upon which she or he would consider selling the park and consider any offer made by the home owners, provided the home owners have complied with ss. 723.075-723.079. The park owner shall be under no obligation to sell to the home owners or to interrupt or delay other negotiations and shall be free at any time to execute a contract for the sale of the park to a party or parties other than the home owners or the association.~~

~~(3) (a) As used in subsections (1) and (2), the term "notify" means the placing of a notice in the United States mail addressed to the officers of the homeowners' association. Each such notice shall be deemed to have been given upon the deposit of the notice in the United States mail.~~

~~(b) As used in subsection (1), the term "offer" means any solicitation by the park owner to the general public.~~

(3) ~~(4)~~ This section does not apply to:

(a) Any sale or transfer to a person who would be included within the table of descent and distribution if the park owner were to die intestate.

(b) Any transfer by gift, devise, or operation of law.

(c) Any transfer by a corporation to an affiliate. As used herein, the term "affiliate" means any shareholder of the transferring corporation; any corporation or

entity owned or controlled, directly or indirectly, by the transferring corporation; or any other corporation or entity owned or controlled, directly or indirectly, by any shareholder of the transferring corporation.

(d) Any transfer by a partnership to any of its partners

(e) Any conveyance of an interest in a mobile home park incidental to the financing of such mobile home park.

(f) Any conveyance resulting from the foreclosure of a mortgage, deed of trust, or other instrument encumbering a mobile home park or any deed given in lieu of such foreclosure.

(g) Any sale or transfer between or among joint tenants or tenants in common owning a mobile home park.

(h) Any exchange of a mobile home park for other real property, whether or not such exchange also involves the payment of cash or other boot.

(i) The purchase of a mobile home park by a governmental entity under its powers of eminent domain.

CODING: Words ~~stricken~~ are deletions; words underlined are additions

such fine shall in the aggregate exceed $1,000. A ~~No~~ fine may not be levied and a suspension may not be imposed unless the association first gives ~~except after giving~~ reasonable notice and opportunity for a hearing to the unit owner and, if applicable, its occupant, licensee, or invitee. The hearing must be held before a committee of other unit owners who are neither board members nor persons residing in a board member's household. If the committee does not agree with the fine or suspension, the fine or suspension may not be levied or imposed. ~~The provisions of this subsection do not apply to unoccupied units.~~

(4) The notice and hearing requirements of subsection (3) do not apply to the imposition of suspensions or fines against a unit owner or a unit's occupant, licensee, or invitee because of the failure to pay any amounts due the association. If such a fine or suspension is imposed, the association must levy the fine or impose a reasonable suspension at a properly noticed board meeting, and after the imposition of such fine or suspension, the association must notify the unit owner and, if applicable, the unit's occupant, licensee, or invitee by mail or hand delivery.

(5) If the declaration or bylaws so provide, an association may also suspend the voting rights of a member due to nonpayment of assessments, fines, or other charges payable to the association which are delinquent in excess of 90 days.

Section 7. Subsection (16) of section 718.103, Florida Statutes, is amended to read:

718.103 Definitions.—As used in this chapter, the term:

(16) "Developer" means a person who creates a condominium

or offers condominium parcels for sale or lease in the ordinary course of business, but does not include:

(a) An owner or lessee of a condominium or cooperative unit who has acquired the unit for his or her own occupancy;~~, nor does it include~~

(b) A cooperative association that ~~which~~ creates a condominium by conversion of an existing residential cooperative after control of the association has been transferred to the unit owners if, following the conversion, the unit owners will be the same persons who were unit owners of the cooperative and no units are offered for sale or lease to the public as part of the plan of conversion;~~.~~

(c) A bulk assignee or bulk buyer as defined in s. 718.703; or

(d) A state, county, or municipal entity ~~is not a developer for any purposes under this act when it is~~ acting as a lessor and not otherwise named as a developer in the declaration of condominium ~~association~~.

Section 8. Subsection (1) of section 718.301, Florida Statutes, is amended to read:

718.301 Transfer of association control; claims of defect by association.—

(1) When unit owners other than the developer own 15 percent or more of the units in a condominium that will be operated ultimately by an association, the unit owners other than the developer shall be entitled to elect no less than one-third of the members of the board of administration of the association. Unit owners other than the developer are entitled to elect not less than a majority of the members of the board of

least one member of the board of administration of an association as long as the developer holds for sale in the ordinary course of business at least 5 percent, in condominiums with fewer than 500 units, and 2 percent, in condominiums with more than 500 units, of the units in a condominium operated by the association. Following the time the developer relinquishes control of the association, the developer may exercise the right to vote any developer-owned units in the same manner as any other unit owner except for purposes of reacquiring control of the association or selecting the majority members of the board of administration.

Section 9. Part VII of chapter 718, Florida Statutes, consisting of sections 718.701, 718.702, 718.703, 718.704, 718.705, 718.706, 718.707, and 718.708, is created to read:

718.701 Short title.—This part may be cited as the "Distressed Condominium Relief Act."

718.702 Legislative intent.—

(1) The Legislature acknowledges the massive downturn in the condominium market which has transpired throughout the state and the impact of such downturn on developers, lenders, unit owners, and condominium associations. Numerous condominium projects have either failed or are in the process of failing, whereby the condominium has a small percentage of third-party unit owners as compared to the unsold inventory of units. As a result of the inability to find purchasers for this inventory of units, which results in part from the devaluing of real estate in this state, developers are unable to satisfy the requirements of their lenders, leading to defaults on mortgages. Consequently, lenders are faced with the task of finding a

solution to the problem in order to be paid for their investments.

(2) The Legislature recognizes that all of the factors listed in this section lead to condominiums becoming distressed, resulting in detriment to the unit owners and the condominium association on account of the resulting shortage of assessment moneys available to support the financial requirements for proper maintenance of the condominium. Such shortage and the resulting lack of proper maintenance further erodes property values. The Legislature finds that individuals and entities within Florida and in other states have expressed interest in purchasing unsold inventory in one or more condominium projects, but are reticent to do so because of accompanying liabilities inherited from the original developer, which are by definition imputed to the successor purchaser, including a foreclosing mortgagee. This results in the potential purchaser having unknown and unquantifiable risks, and potential successor purchasers are unwilling to accept such risks. The result is that condominium projects stagnate, leaving all parties involved at an impasse without the ability to find a solution.

(3) The Legislature finds and declares that it is the public policy of this state to protect the interests of developers, lenders, unit owners, and condominium associations with regard to distressed condominiums, and that there is a need for relief from certain provisions of the Florida Condominium Act geared toward enabling economic opportunities within these condominiums for successor purchasers, including foreclosing mortgagees. Such relief would benefit existing unit owners and condominium associations. The Legislature further finds and

declares that this situation cannot be open-ended without potentially prejudicing the rights of unit owners and condominium associations, and thereby declares that the provisions of this part shall be used by purchasers of condominium inventory for a specific and defined period.

718.703 Definitions.—As used in this part, the term:

(1) "Bulk assignee" means a person who:

(a) Acquires more than seven condominium parcels as set forth in s. 718.707; and

(b) Receives an assignment of some or all of the rights of the developer as are set forth in the declaration of condominium or in this chapter by a written instrument recorded as an exhibit to the deed or as a separate instrument in the public records of the county in which the condominium is located.

(2) "Bulk buyer" means a person who acquires more than seven condominium parcels as set forth in s. 718.707 but who does not receive an assignment of any developer rights other than the right to conduct sales, leasing, and marketing activities within the condominium.

718.704 Assignment and assumption of developer rights by bulk assignee; bulk buyer.—

(1) A bulk assignee shall be deemed to have assumed and is liable for all duties and responsibilities of the developer under the declaration and this chapter, except:

(a) Warranties of the developer under s. 718.203(1) or s. 718.618, except for design, construction, development, or repair work performed by or on behalf of such bulk assignee;

(b) The obligation to:

1. Fund converter reserves under s. 718.618 for a unit that

was not acquired by the bulk assignee; or

2. Provide converter warranties on any portion of the condominium property except as may be expressly provided by the bulk assignee in the contract for purchase and sale executed with a purchaser and pertaining to any design, construction, development, or repair work performed by or on behalf of the bulk assignee;

(c) The requirement to provide the association with a cumulative audit of the association's finances from the date of formation of the condominium association as required by s. 718.301. However, the bulk assignee shall provide an audit for the period for which the bulk assignee elects a majority of the members of the board of administration;

(d) Any liability arising out of or in connection with actions taken by the board of administration or the developer-appointed directors before the bulk assignee elects a majority of the members of the board of administration; and

(e) Any liability for or arising out of the developer's failure to fund previous assessments or to resolve budgetary deficits in relation to a developer's right to guarantee assessments, except as otherwise provided in subsection (2).

Further, the bulk assignee is responsible for delivering documents and materials in accordance with s. 718.705(3). A bulk assignee may expressly assume some or all of the obligations of the developer described in paragraphs (a)-(e).

(2) A bulk assignee receiving the assignment of the rights of the developer to guarantee the level of assessments and fund budgetary deficits pursuant to s. 718.116 shall be deemed to

have assumed and is liable for all obligations of the developer with respect to such guarantee, including any applicable funding of reserves to the extent required by law, for as long as the guarantee remains in effect. A bulk assignee not receiving an assignment of the right of the developer to guarantee the level of assessments and fund budgetary deficits pursuant to s. 718.116 or a bulk buyer is not deemed to have assumed and is not liable for the obligations of the developer with respect to such guarantee, but is responsible for payment of assessments in the same manner as all other owners of condominium parcels.

(3) A bulk buyer is liable for the duties and responsibilities of the developer under the declaration and this chapter only to the extent provided in this part, together with any other duties or responsibilities of the developer expressly assumed in writing by the bulk buyer.

(4) An acquirer of condominium parcels is not considered a bulk assignee or a bulk buyer if the transfer to such acquirer was made with the intent to hinder, delay, or defraud any purchaser, unit owner, or the association, or if the acquirer is a person who would constitute an insider under s. 726.102(7).

(5) An assignment of developer rights to a bulk assignee may be made by the developer, a previous bulk assignee, or a court of competent jurisdiction acting on behalf of the developer or the previous bulk assignee. At any particular time, there may be no more than one bulk assignee within a condominium, but there may be more than one bulk buyer. If more than one acquirer of condominium parcels receives an assignment of developer rights from the same person, the bulk assignee is the acquirer whose instrument of assignment is recorded first in

applicable public records.

718.705 Board of administration; transfer of control.—

(1) For purposes of determining the timing for transfer of control of the board of administration of the association to unit owners other than the developer under s. 718.301(1)(a) and (b), if a bulk assignee is entitled to elect a majority of the members of the board, a condominium parcel acquired by the bulk assignee shall not be deemed to be conveyed to a purchaser, or to be owned by an owner other than the developer, until such condominium parcel is conveyed to an owner who is not a bulk assignee.

(2) Unless control of the board of administration of the association has already been relinquished pursuant to s. 718.301(1), the bulk assignee is obligated to relinquish control of the association in accordance with s. 718.301 and this part.

(3) When a bulk assignee relinquishes control of the board of administration as set forth in s. 718.301, the bulk assignee shall deliver all of those items required by s. 718.301(4). However, the bulk assignee is not required to deliver items and documents not in the possession of the bulk assignee during the period during which the bulk assignee was the owner of condominium parcels. In conjunction with acquisition of condominium parcels, a bulk assignee shall undertake a good faith effort to obtain the documents and materials required to be provided to the association pursuant to s. 718.301(4). To the extent the bulk assignee is not able to obtain all of such documents and materials, the bulk assignee shall certify in writing to the association the names or descriptions of the documents and materials that were not obtainable by the bulk

assignee. Delivery of the certificate relieves the bulk assignee of responsibility for the delivery of the documents and materials referenced in the certificate as otherwise required under ss. 718.112 and 718.301 and this part. The responsibility of the bulk assignee for the audit required by s. 718.301(4) shall commence as of the date on which the bulk assignee elected a majority of the members of the board of administration.

(4) If a conflict arises between the provisions or application of this section and s. 718.301, this section shall prevail.

(5) Failure of a bulk assignee or bulk buyer to comply with all the requirements contained in this part shall result in the loss of any and all protections or exemptions provided under this part.

718.706 Specific provisions pertaining to offering of units by a bulk assignee or bulk buyer.—

(1) Before offering any units for sale or for lease for a term exceeding 5 years, a bulk assignee or a bulk buyer shall file the following documents with the division and provide such documents to a prospective purchaser:

(a) An updated prospectus or offering circular, or a supplement to the prospectus or offering circular, filed by the creating developer prepared in accordance with s. 718.504, which shall include the form of contract for purchase and sale in compliance with s. 718.503(2);

(b) An updated Frequently Asked Questions and Answers sheet;

(c) The executed escrow agreement if required under s. 718.202; and

(d) The financial information required by s. 718.111(13). However, if a financial information report does not exist for the fiscal year before acquisition of title by the bulk assignee or bulk buyer, or accounting records cannot be obtained in good faith by the bulk assignee or the bulk buyer which would permit preparation of the required financial information report, the bulk assignee or bulk buyer is excused from the requirement of this paragraph. However, the bulk assignee or bulk buyer must include in the purchase contract the following statement in conspicuous type:

THE FINANCIAL INFORMATION REPORT REQUIRED UNDER S. 718.111(13) FOR THE IMMEDIATELY PRECEDING FISCAL YEAR OF THE ASSOCIATION IS NOT AVAILABLE OR CANNOT BE CREATED BY THE SELLER AS A RESULT OF INSUFFICIENT ACCOUNTING RECORDS OF THE ASSOCIATION.

(2) Before offering any units for sale or for lease for a term exceeding 5 years, a bulk assignee shall file with the division and provide to a prospective purchaser a disclosure statement that must include, but is not limited to:

(a) A description to the purchaser of any rights of the developer which have been assigned to the bulk assignee;

(b) The following statement in conspicuous type:

THE SELLER IS NOT OBLIGATED FOR ANY WARRANTIES OF THE DEVELOPER UNDER S. 718.203(1) OR S. 718.618, AS APPLICABLE, EXCEPT FOR DESIGN, CONSTRUCTION, DEVELOPMENT, OR REPAIR WORK PERFORMED BY OR ON BEHALF OF SELLER; and

(c) If the condominium is a conversion subject to part VI, the following statement in conspicuous type:

THE SELLER HAS NO OBLIGATION TO FUND CONVERTER RESERVES OR TO PROVIDE CONVERTER WARRANTIES UNDER S. 718.618 ON ANY PORTION OF THE CONDOMINIUM PROPERTY EXCEPT AS MAY BE EXPRESSLY REQUIRED OF THE SELLER IN THE CONTRACT FOR PURCHASE AND SALE EXECUTED BY THE SELLER AND THE PREVIOUS DEVELOPER AND PERTAINING TO ANY DESIGN, CONSTRUCTION, DEVELOPMENT, OR REPAIR WORK PERFORMED BY OR ON BEHALF OF THE SELLER.

(3) In addition to the requirements set forth in subsection (1), a bulk assignee or bulk buyer must comply with the nondeveloper disclosure requirements set forth in s. 718.503(2) before offering any units for sale or for lease for a term exceeding 5 years.

(4) A bulk assignee, while it is in control of the board of administration of the association, may not authorize, on behalf of the association:

(a) The waiver of reserves or the reduction of funding of the reserves in accordance with s. 718.112(2)(f)2., unless approved by a majority of the voting interests not controlled by the developer, bulk assignee, and bulk buyer; or

(b) The use of reserve expenditures for other purposes in accordance with s. 718.112(2)(f)3., unless approved by a majority of the voting interests not controlled by the developer, bulk assignee, and bulk buyer.

(5) A bulk assignee, while it is in control of the board of administration of the association, shall comply with the requirements imposed upon developers to transfer control of the association to the unit owners in accordance with s. 718.301.

(6) A bulk assignee or a bulk buyer shall comply with all

the requirements of s. 718.302 regarding any contracts entered into by the association during the period the bulk assignee or bulk buyer maintains control of the board of administration. Unit owners shall be afforded all the protections contained in s. 718.302 regarding agreements entered into by the association before unit owners other than the developer, bulk assignee, or bulk buyer elected a majority of the board of administration.

(7) A bulk buyer shall comply with the requirements contained in the declaration regarding any transfer of a unit, including sales, leases, and subleases. A bulk buyer is not entitled to any exemptions afforded a developer or successor developer under this chapter regarding any transfer of a unit, including sales, leases, or subleases.

718.707 Time limitation for classification as bulk assignee or bulk buyer.—A person acquiring condominium parcels may not be classified as a bulk assignee or bulk buyer unless the condominium parcels were acquired before July 1, 2011. The date of such acquisition shall be determined by the date of recording of a deed or other instrument of conveyance for such parcels in the public records of the county in which the condominium is located, or by the date of issuance of a certificate of title in a foreclosure proceeding with respect to such condominium parcels.

718.708 Liability of developers and others.—An assignment of developer rights to a bulk assignee or bulk buyer does not release the developer from any liabilities under the declaration or this chapter. This part does not limit the liability of the developer for claims brought by unit owners, bulk assignees, or bulk buyers for violations of this chapter by the developer,

unless specifically excluded in this part. Nothing contained within this part waives, releases, compromises, or limits the liability of contractors, subcontractors, materialmen, manufacturers, architects, engineers, or any participant in the design or construction of a condominium for any claim brought by an association, unit owners, bulk assignees, or bulk buyers arising from the design of the condominium, construction defects, misrepresentations associated with condominium property, or violations of this chapter, unless specifically excluded in this part.

Section 10. Subsections (3) and (4) of section 719.108, Florida Statutes, are amended, and subsection (10) is added to that section, to read:

719.108 Rents and assessments; liability; lien and priority; interest; collection; cooperative ownership.—

(3) Rents and assessments, and installments on them, not paid when due bear interest at the rate provided in the cooperative documents from the date due until paid. This rate may not exceed the rate allowed by law, and, if no rate is provided in the cooperative documents, then interest shall accrue at 18 percent per annum. Also, if the cooperative documents or bylaws so provide, the association may charge an administrative late fee in addition to such interest, in an amount not to exceed the greater of $25 or 5 percent of each installment of the assessment for each delinquent installment that the payment is late. Costs to the unit owner secured by the association's claim of lien with regard to collection letters or any other collection efforts by management companies or licensed managers as to any delinquent installment of an assessment may

LEGISLATIVE POSITION REQUEST FORM

GOVERNMENTAL AFFAIRS OFFICE

Date Form Received _____

GENERAL INFORMATION

Submitted By Shane Kelley, Chair, Ad Hoc Study Committee on Homestead Life Estates of the Real Property Probate & Trust Law Section

Address 3365 Galt Ocean Drive, Ft. Lauderdale, FL 33308
Telephone: (954) 563-1400

Position Type Probate Law and Procedure Committee, RPPTL Section, The Florida Bar

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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 **X** **Support** Oppose Technical Assistance Other _____

Proposed Wording of Position for Official Publication:

"Support enactment of F.S. § 732.4017. The purpose of the proposed new statute is to confirm that alienation of homestead real estate by the property owner(s) is permissible as provided in Article X, Section 4(c) of the Florida Constitution and will provide guidance to the residents of Florida and the courts as to what types of alienations of homestead property are proper."

Reasons For Proposed Advocacy:

Article X, Section 4(c) of the Florida Constitution expressly permits the owner of homestead real estate, joined by the owner's spouse if married, to alienate homestead property by mortgage, sale or gift. The constitution only prohibits devises of homestead property if the owner is survived by a spouse or minor child. The term "devise" is defined in the Florida Probate Code, not in the Florida Constitution. F.S. § 731.201(10) defines a "devise" as a testamentary disposition of real or personal property. While a lifetime alienation (as opposed to a devise upon death) of homestead real estate is expressly permitted by the Florida Constitution, there have been several cases in Florida in which the courts have determined that attempted transfers of homestead real estate by the owners during their lifetime was not properly characterized as an "alienation" of

that homestead real property but was in reality an attempted testamentary devise of the homestead real property. One case involved a deed executed by the owner of the homestead real property in which certain rights were retained by the owner and another case involved the transfer of homestead real property to a revocable living trust by the owner. See *Johns v. Bowden*, 66 So. 155 (Fla. 1914) and *In re Estate of Johnson*, 398 So.2d 970 (Fla. 4th DCA 1981). The applicable case law has left confusion and uncertainty as to what types of lifetime transfers would qualify as a permitted "alienation" of the homestead real property pursuant to Article X, Section 4(c) of the Florida Constitution. The proposed statute would clarify the law in this area and provide guidance to the residents of Florida and various practitioners working in this area as to what types of lifetime arrangements would be permissible under the Florida Constitution and statutory law. The drafters of the proposed statute believe that the statute is only codifying and clarifying existing law and would not be creating new law or changing existing law. Please see attached White Paper for further analysis and explanation.

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

(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.

WHITE PAPER

PROPOSED § 732.4017 , FLA. STAT.

I. SUMMARY

There is confusion regarding the alienation of homestead real property in the State of Florida. Article X, Section 4(c) of the Florida Constitution expressly permits the owner of homestead real estate, joined by the owner's spouse if married, to alienate homestead property by mortgage, sale or gift. The constitution only prohibits devises of homestead property if the owner is survived by a spouse or minor child. The term "devise" is defined in the Florida Probate Code, not in the Florida constitution. F.S. § 731.201(10) defines a "devise" as a testamentary disposition of real or personal property. While a lifetime alienation (as opposed to a devise upon death) of homestead real estate is expressly permitted by the Florida Constitution, there have been several cases in Florida in which the courts have determined that attempted transfers of homestead real estate by the owners during their lifetime was not properly characterized as an "alienation" of that homestead real property but was in reality an attempted testamentary devise of the homestead real property. One case involved a deed executed by the owner of the homestead real property in which certain rights were retained by the owner and another case involved the transfer of homestead real property to a revocable living trust by the owner during his lifetime. See *Johns v. Bowden*, 66 So. 155 (Fla. 1914) and *In re Estate of Johnson*, 398 So.2d 970 (Fla. 4th DCA 1981). The applicable case law has left confusion and uncertainty as to what types of lifetime transfers would qualify as a permitted "alienation" of the homestead real property pursuant to Article X, Section 4(c) of the Florida Constitution. The proposed statute is to clarify the law in this area and provide guidance to the residents of Florida and various practitioners working in this area as to what types of lifetime transfers would be permissible under the constitution and statutory law. The drafters of the proposed statute believe that the statute is only codifying and clarifying existing law and would not be creating new law or changing existing law.

II. CURRENT SITUATION

Article X, section 4(c) of the Florida constitution expressly permits the owner of homestead real estate, joined by the owner's spouse if married, to alienate homestead property by mortgage, sale or gift. The constitution only prohibits devises of homestead property if the owner is survived by a spouse or minor child. The term "devise" is defined in the Florida Probate Code, not in the Florida constitution. Section 732.201(10) defines a "devise" as a testamentary disposition of real or personal property.

Two Florida appellate cases have invalidated attempted dispositions of homestead property made by lifetime conveyances in which the transferors retained certain rights in the homestead real property either by deed or by trust. *Johns v. Bowden*, 68 Fla. 32, 66 So. 155 (1914) (deed containing terms of trust); *In re Estate of Johnson*, 398 So.2d 970 (Fla. 4th DCA 1981) (quitclaim deed to trustee of revocable trust). Although in each case the trust or deed terms provided for a specific disposition of the homestead property upon the settlor's death, the settlor retained the right during lifetime to direct a conveyance of the title and the entire

beneficial interest to other persons (including the settlor) at the settlor's pleasure. Thus the interest in the homestead property that was conveyed was not a vested right in the property to any of the beneficiaries named in the trust instrument, but was a contingent interest subject to the right of the settlor to direct the trustee to convey the property to others during the settlor's lifetime. Because of the retention of the entire beneficial estate in the settlor during life, in each case the trust instrument was in effect an attempted testamentary disposition of homestead property in contravention of the restrictions set forth in the Florida constitution.

Based on these two seminal cases, practitioners in this area, including title companies and attorneys engaged in estate planning, are not certain as to what the courts of this state will hold regarding certain types of lifetime transfers which the drafters of the proposed statute believe are permissible under the Florida Constitution and Florida statutory law.

III. EFFECT OF PROPOSED CHANGE

The proposed statute makes it clear that an inter vivos conveyance of an interest in homestead property will not be considered a "devise," provided that certain conditions are met. If those conditions are met, an interest in homestead property that is conveyed inter vivos will not be subject to the restrictions on devise of homestead property upon death, even without a waiver of homestead rights by the surviving spouse, because the interest will have been alienated for property law purposes during the homestead owner's lifetime, without retention of the entire beneficial estate in the settlor, and thus will not be owned for purposes of descent and devise upon death.

The beneficial effect of the statute will be to create a comfort level for the residents of the State of Florida when they are attempting to plan with their residence, which in most cases is their most valuable asset. Both title companies and attorneys who are engaged in estate planning will better be able to assist their clients in providing advice to their clients about their house and under what circumstances it will be permissible and advisable to engage in a lifetime alienation of their residence. The courts of the State of Florida will also be provided with a defined set of rules under which they can review situations involving the lifetime alienation of homestead real property.

The proposed statute would be most useful in situations where a divorced or widowed parent has minor children and wishes to transfer his or her homestead into an irrevocable trust in order to avoid the homestead being placed in a guardianship if that parent dies before his or her minor children reach 18 years of age. The drafters of the proposed statute believe that the statute is only codifying and clarifying existing law and would not be creating new law or changing existing law.

IV. ANALYSIS

Subsection (1) of the proposed statute sets forth two essential requirements: (1) there must be a valid inter vivos conveyance of an interest to one or more persons other than the homestead owner, and (2) the homestead owner cannot have the power, acting in any capacity, whether alone or in conjunction with another person, to revoke the interest that is conveyed, or to

revest the interest in the owner. The conveyance can be outright (such as a deed of a remainder interest to a named individual), or it can be in trust for the benefit of one or more beneficiaries.

Subsection (2) applies to conveyances made in trust, and permits the owner of the homestead property to retain a power to alter the beneficial use and enjoyment by any one or more of the beneficiaries of the trust, as long as the power cannot be exercised in favor of the owner, the owner's creditors, the owner's estate, or the creditors of the owner's estate, or in a manner that would discharge a legal obligation of the owner. The owner can exercise a power to alter the interests of beneficiaries who are identified in the trust instrument, but cannot exercise it in favor of persons not included in the class of beneficiaries identified in the trust instrument. For example, if the trust is a discretionary trust for the benefit of the owner's descendants living from time to time, the owner can exercise a power to exclude a child of the owner as a beneficiary, or to change the ages specified for outright distributions, but the owner could not direct that distributions be made to the owner's spouse or to anyone else not a descendant of the owner. The power can be only be exercised during the owner's lifetime, and thus cannot be exercised by will.

Retention of such a power usually will be necessary in order to avoid immediate gift tax consequences upon the transfer of an interest in the homestead property, even if the owner retains a separate interest in the property (because of the rules under Section 2702 of the Internal Revenue Code). For example, if the owner of homestead property conveys the homestead property to an irrevocable discretionary sprinkling trust for the benefit of the owner's descendants living from time to time, the full fair market value of the property will be subject to gift tax even if the owner retains a life estate in the homestead (because under Section 2702 of the Internal Revenue Code there is no offset for any interest retained by the owner other than an annuity or unitrust interest). Retention of a power to alter the beneficial use or enjoyment of the interest conveyed (whether the power is limited in scope or is unlimited) will eliminate immediate gift tax consequences even if the power is limited in its scope, by utilizing the incomplete gift rules under Section 2511 of the Internal Revenue Code.

The language of subsection (2) follows the terminology used in Section 2041 of the Internal Revenue Code, which provides that certain limited powers of appointment will not cause property subject to the power to be included in the gross estate of the holder of the power. Use of that terminology is appropriate in subsection (2) of the proposed statute not because of estate tax reasons, because retention by a settlor of any power to alter the beneficial use or enjoyment by others of property held in trust ordinarily will cause the property to be included in the settlor's gross estate, whether the power is limited or is general. Rather, the terminology of Section 2041 of the Internal Revenue Code sets forth a clear demarcation line between the types of powers in which the holder of the power has a personal economic interest and those in which the holder of the power has no direct or indirect personal economic interest. In both the *Johns* and *Estate of Johnson* cases, *supra*, the homestead owner had retained the entire beneficial interest and right in the property, such that no interest could pass to other persons until the owner's death. The types of retained powers in those cases were so broad and unlimited that by their very nature the settlor of the trust had retained the entire beneficial estate in the homestead property. As noted by the Florida Supreme Court in *Johns*:

> Because of the retention of the entire beneficial estate in the grantor during his life, the instrument, in practical effect, is in the nature of a testamentary disposition of property alleged to be a homestead, and a testamentary disposition of homestead property is forbidden by law when the testator leaves a wife or child.
>
> If the property was, and continued to be, in fact and in law, a homestead, the alleged trust deed, not being an absolute conveyance of any vested estate in the land to take effect during the grantor's lifetime, is apparently ineffectual for the purpose designed. [66 So. at 159]

The terminology used in Section 2041 of the Internal Revenue Code differentiates between powers which cannot benefit the holder of the power either directly (by exercising it in favor of the owner or the owner's estate) or indirectly (by exercising the power in favor of creditors of the owner or the owner's estate, or in ways that discharge a legal obligation of the owner), and powers which the holder can use for his or her own benefit. Use of that terminology in subsection (2) of the proposed statute confines the scope of powers which can be retained by the owner over disposition of the homestead property to those which cannot benefit the owner either directly or indirectly; it requires that interests which pass to other persons during the owner's lifetime do so irrevocably; and it makes it impossible for the owner to retain the entire beneficial interest and right in the property. These requirements will eliminate the attributes of the revocable transfers which caused the courts to invalidate the purported transfers in *Johns* and in *Estate of Johnson*).

Subsection (3) of the proposed statute clarifies that if an inter vivos conveyance satisfies the requirements of subsection (1) of the proposed statute, the owner can retain separate interests in the homestead property, such as a life estate (which would be desirable if the owner intends to continue to occupy the homestead property and wishes to retain homestead property tax benefits such as the Save Our Homes cap on increases in assessed taxable value). Interests that satisfy the requirements of subsection (1) of the proposed statute will not be treated as testamentary in nature even if they are future interests, such as a remainder interest following a life estate retained by the homestead owner. Furthermore, an interest that satisfies the requirements of subsection (1) of the proposed statute is not testamentary in nature even if the interest is subject to extinction upon the occurrence of an irrevocably specified event or contingency, such as the owner being alive on a date when all of the owner's children have reached the age of majority (at which time the constitutional restrictions on devise would no longer exist).

The following are examples of qualifying inter vivos conveyances that are not subject to the constitutional and statutory restrictions on the devise of homestead property (whether or not the owner is survived by a spouse or minor child, assuming that all other conveyancing requirements have been met). It is assumed in each example that the homestead owner does not retain a power in any capacity, acting alone or in conjunction with any other person, to revest the conveyed interest in him or herself:

1. An inter vivos conveyance to a qualified personal residence trust (within the meaning of section 2702 of the Internal Revenue Code).

2. An inter vivos conveyance of a remainder interest in homestead property (whether outright or in trust) following a life estate retained by the owner.

3. An inter vivos conveyance of a remainder interest in homestead property that is subject to complete divestment if the owner of the homestead property survives to a date that is specified in the instrument of conveyance, or if the conveyance is in trust, to a date that is specified in the trust instrument. (Example: a vested remainder interest that is subject to divestment with a reversion back to the homestead owner if he or she is still alive on a specified date, or that is subject to divestment with a reversion back to the owner's estate if he or she is not survived by a minor child upon his or her death).

It should be sufficiently clear that conveyance of an interest that meets the requirements of the proposed statute will not cause the homestead owner's retained interest to be revalued for assessment purposes, as long as the person conveying the interest retains a life estate or other interest that qualifies as homestead for real property tax purposes under current law.

V. FISCAL IMPACT ON STATE AND LOCAL GOVERNMENTS

The proposal does not have a fiscal impact on state governments but may create a positive tax effect on local governments as there may be a taxable event upon certain inter vivos transfers of homestead real property.

VI. DIRECT IMPACT ON PRIVATE SECTOR

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

VII. CONSTITUTIONAL ISSUES

There appear to be no constitutional issues raised by this proposal as the drafters of the statute believe that it is only codifying existing law and is consistent with Article X, Section 4(c) of the Florida Constitution.

VIII. OTHER INTERESTED PARTIES

None are known at this time.

IX. TEXT OF PROPOSED F.S. 732.4017

732.4017 Inter vivos transfer of homestead property. –

(1) If the owner of homestead property transfers an interest in that property, with or without consideration, to one or more other persons during the owner's lifetime, including a transfer in trust, the transfer shall not be a devise for purposes of s. 731.201(10) or s. 732.4015, and the interest transferred shall not descend as provided in s. 732.401, if the transferor does not retain a power, held in any capacity, acting alone or in conjunction with any other person to revoke or revest that interest in the transferor.

(2) A “transfer in trust” for purposes of this section shall refer to a trust where the transferor of the homestead property, either alone or in conjunction with any other person, does not possess a right of revocation as that term is defined in s. 733.707(3)(e). A power possessed by the transferor exercisable during the transferor’s lifetime to alter the beneficial use and enjoyment of the interest only within a class of beneficiaries as identified in the trust instrument is not a right of revocation if the power cannot be exercised in favor of the transferor, the transferor’s creditors, the transferor’s estate, the creditors of the transferor’s estate, or in discharge of the transferor’s legal obligations. Nothing in this subsection shall be construed as creating an inference that a power not described in this subsection is a power to revoke or revest an interest in the transferor.

(3) The transfer of an interest in homestead property described in subsection (1) shall not be treated as a devise of that interest even if:

(a) the transferor retains a separate legal or equitable interest in the homestead property, whether directly or indirectly through a trust or other arrangement, such as a term of years, life estate, reversion, possibility of reverter, or fractional fee interest;

(b) the interest transferred will not become a possessory interest until a date certain or upon a specified event the occurrence or nonoccurrence of which does not constitute a power held by the transferor to revoke or revest the interest in the transferor, including without limitation, the death of the transferor; or

(c) the interest transferred is subject to divestment, expiration, or lapse upon a date certain or upon a specified event the occurrence or nonoccurrence of which does not constitute a power held by the transferor to revoke or revest the interest in the transferor, including without limitation survival of the transferor.

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(3) The transfer of an interest in homestead property described in subsection (1) shall not be treated as a devise of that interest even if:

(a) the transferor retains a separate legal or equitable interest in the homestead property, whether directly or indirectly through a trust or other arrangement, such as a term of years, life estate, reversion, possibility of reverter, or fractional fee interest;

(b) the interest transferred will not become a possessory interest until a date certain or upon a specified event the occurrence or nonoccurrence of which does not constitute a power held by the transferor to revoke or revest the interest in the transferor, including without limitation, the death of the transferor; or

(c) the interest transferred is subject to divestment, expiration, or lapse upon a date certain or upon a specified event the occurrence or nonoccurrence of which does not constitute a power held by the transferor to revoke or revest the interest in the transferor, including without limitation survival of the transferor.

IT IS HEREBY PROPOSED THAT SECTION 736.0505, FLORIDA STATUTES, BE AMENDED TO READ AS FOLLOWS:

736.0505 Creditors' claims against settlor.--

(1) Whether or not the terms of a trust contain a spendthrift provision, the following rules apply:

(a) The property of a revocable trust is subject to the claims of the settlor's creditors during the settlor's lifetime to the extent the property would not otherwise be exempt by law if owned directly by the settlor.

(b) With respect to an irrevocable trust, a creditor or assignee of the settlor may reach the maximum amount that can be distributed to or for the settlor's benefit. If a trust has more than one settlor, the amount the creditor or assignee of a particular settlor may reach may not exceed the settlor's interest in the portion of the trust attributable to that settlor's contribution.

(c) Notwithstanding the provisions of paragraph (b), the assets of an irrevocable trust may not be subject to the claims of an existing or subsequent creditor or assignee of the settlor, in whole or in part, solely because of the existence of a discretionary power granted to the trustee by the terms of the trust, or any other provision of law, to pay directly to the taxing authorities or to reimburse the settlor for any tax on trust income or principal which is payable by the settlor under the law imposing such tax.

(2) For purposes of this section:

(a) During the period the power may be exercised, the holder of a power of withdrawal is treated in the same manner as the settlor of a revocable trust to the extent of the property subject to the power.

(b) Upon the lapse, release, or waiver of the power, the holder is treated as the settlor of the trust only to the extent the value of the property affected by the lapse, release, or waiver exceeds the greater of the amount specified in:

1. Section 2041(b)(2) or s. 2514(e); or

2. Section 2503(b),

of the Internal Revenue Code of 1986, as amended.

(3) For purposes of this section, amounts contributed to an inter vivos marital trust are not deemed to have been contributed by the settlor even if the settlor is a beneficiary of the trust following the death of the beneficiary's spouse, whether by provision of such trust or as the result of the exercise of a special or general power of appointment by the initial donee spouse, if such trust is:

(a) described in section 2523(e) of the Internal Revenue Code of 1986; or

(b) described in section 2523(f) of the Internal Revenue Code of 1986, and subject to the election described in that section.

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

White Paper on Proposed Revision to Florida Statutes Section 736.0505

I. SUMMARY

The proposed legislation is the product of study and analysis by 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 Asset Preservation Committee of the RPPTL Section was also involved.

The proposed legislation would amend Florida Statutes Section 736.0505 by adding new Sub-section 736.0505(3) to provide that, for purposes of Florida Statutes Section 736.0505, assets contributed to an inter vivos marital trust that is treated as qualified terminable interest property under Section 2523(f) of the Internal Revenue Code of 1986, as amended (the "Code"), or to an inter vivos marital trust that is treated as a general power of appointment trust under Code Section 2523(e), are not deemed to have been contributed by the settlor even if the settlor is a beneficiary of the trust following the death of the settlor's spouse. Therefore, the assets held for the benefit of the initial settlor after the death of his or her spouse would not be subject to Florida Statutes Section 736.0505(1)(b), which, if applicable, would allow the settlor's creditors to reach the trust assets.

II. CURRENT SITUATION

Irrevocable inter vivos trusts created under Code Section 2523(e), known as "general power of appointment trusts," and under Code Section 2523(f), known as "qualified terminable interest property trusts," or "QTIP trusts", will be used with greater frequency as a result of the increase in the federal estate tax exemption to $3.5 million for the year 2009 (and beyond?). In order for a married couple to take full advantage of the estate tax exemption, each spouse must have sufficient assets at his or her date of death. Under current law, the exemptions are not "portable," so if one spouse underutilizes his or her exemption, the surviving spouse cannot enhance his or her estate tax exemption with any unused portion of the exemption of the first spouse to die.

Many planners suggest the use of inter vivos QTIP trusts to allow for the full use of the donee spouse's estate tax exemption without compromising the ability of the donor spouse to control the disposition of the trust assets after the donee spouse's death. The assets in the inter vivos QTIP trust will benefit the donor's beneficiaries after the death of the donee spouse, and not the donee spouse's beneficiaries. To the extent of the estate tax exemption, assets in the inter vivos QTIP trust will pass free of estate and (probably) generation-skipping transfer taxes upon the death of the donee spouse.

In some situations, the settlor of the trust will not take advantage of the estate planning benefits of a QTIP trust unless the trust is structured so that he or she could be a beneficiary of the trust if the settlor's spouse predeceases. Commonly, the inter vivos QTIP trust gives the donee spouse a non-general power to appoint the assets among the settlor's descendants and the settlor. This can be done without sacrificing the tax planning objectives sought to be accomplished by the trust. If the settlor has sufficient assets of his or her own, the QTIP trust assets can pass to the children of the initial settlor upon the death of the donee spouse. However, if the donee spouse believes that the donor may be in need of the assets in the QTIP trust, the spouse can exercise his or her testamentary power of appointment in favor of the donor, typically to create a trust that will not be included in the taxable estate of the initial settlor for gift and estate tax purposes.

In this case, the donor spouse's creditors may argue that the donor was in fact the settlor of the new trust created by the exercise of the donee spouse's power of appointment. If this were so, under Florida Statutes Section 736.0505(1)(b), the assets in the trust created by the exercise of the spouse's power of appointment would be considered as held for the benefit of the donor in a self-settled trust, and would not be protected from the claims of the donor's creditors after the donee spouse's death. There is theoretical support for this approach under the so-called "relation back doctrine."[1]

Other states have addressed this issue by providing broad creditor protection for certain self-settled trusts.[2] Arizona has enacted,[3] and Michigan has proposed, legislation providing that the settlor of an inter vivos QTIP trust is not treated as the settlor of any trust created at the donee spouse's death for the benefit of the initial settlor. Florida law is presently unclear on this point; this uncertainty has a chilling effect on the use of this otherwise very effective planning technique. Florida residents who want a predictable outcome are forced to create inter vivos QTIP trusts in states, such as Arizona, that provide greater protection from the initial settlor's creditors.

III. EFFECT OF PROPOSED CHANGES
(DETAILED ANALYSIS OF PROPOSED REVISIONS)

The legislative proposal would amend Florida Statutes Section 736.0505 to provide, in effect, that that the donor of an inter vivos QTIP trust will not be treated as the settlor of that trust. Thus, the provisions of Section 736.0505(1)(b) – which provide that the creditors of the settlor of an irrevocable trust can reach the maximum amount that can be distributed to or for the settlor's

[1] The relation back doctrine provides that the instrument exercising a donee's power of appointment is to be read as part of the instrument that created the power of appointment. This would mean the appointee of the property would take directly from the donor of the power, rather than from the donee. *See* 3 Restatement of Property (1940) §318 Comment (b)." *See also* In re Estate of Wylie, 342 So. 2d 996, 998 (Fla. Ct. App. 4th Dist., 1977); In the Matter of the Estate of Chester W. Stephens, Deceased, 49 Misc. 2d 1003 (Surrogate's Ct. of N.Y., Broome Cty., 1966).

[2] Alaska, Delaware, Rhode Island, Nevada, New Hampshire, South Dakota, Missouri, Oklahoma, Utah, Tennessee, and Wyoming. Such legislation is currently under considerable study by the Asset Preservation Committee of the RPPTL Section.

[3] Arizona Statutes Section 14-10505.

benefit – will not apply to the inter vivos QTIP trust because the donor will not be treated as the "settlor" of the trust for purposes of the statute.

Creditors' rights, property interests and transfer taxes are frequently inter-related. An outcome as to one of these three areas frequently dictates the outcome of the other two; for example, if certain property is treated as subject to one's creditors, it is also treated as being owned by that person for purposes of transfer taxes.

For example, Treasury Regulations Section 25.2523(f)-1(f), Example 11 provides that trust assets will not be includible in the settlor's estate in the following case:

> Settlor creates a trust with income payable to the Settlor's spouse for her life, and upon the spouse's death, income to the Settlor for his life, with the trust corpus payable to the Settlor's children upon the Settlor's death. If the Settlor elected to treat the trust property as qualified terminable interest property under Code Section 2523(f), the trust corpus will be includible in his spouse's estate at her death in accordance with Code Section 2044. Under Code Section 2044(c), property included in a decedent's estate is treated as property passing from the decedent. Therefore, *the Settlor's spouse is treated as the transferor* [i.e., the owner] *of the trust property for estate and gift tax purposes*. Thus, when the Settlor dies, the property will not be included in his estate.[4]

The proposed legislation brings the Florida creditor protection aspects of the type of inter vivos QTIP trust discussed above in line with the federal tax treatment of the trust. Under the proposed legislation, a settlor who establishes a Code Section 2523(e) inter vivos trust, or a trust as to which the QTIP election under Code Section 2523(f) is made, and who, upon the death of the settlor's spouse, becomes a beneficiary of the trust, will not be treated as the settlor of the trust for purposes of Section 736.0505. Instead, the initial settlor's spouse will be treated as the settlor of the trust, just as the donee spouse is treated as the owner of the trust assets for federal tax purposes.

If the donor spouse simply gives his or her spouse assets, and if after the donee's death those assets are used to fund a spendthrift trust for the benefit of the surviving spouse, few would take seriously the proposition that the assets in the trust would be subject to the donor / surviving spouse's creditors. There is nothing about an inter vivos general power of appointment or QTIP trust that compels a different result.

Finally, if the assets in the inter vivos marital QTIP or general power of appointment trust held for the settlor after the donee spouse's death are subject to the claims of the settlor's creditors, this effectively eliminates the use of this technique in Florida. If the assets can be reached by the settlor's creditors, those assets will likely be included in his or her estate for federal estate tax purposes, which entirely defeats one of the primary purposes of establishing the trust. There is no other compelling benefit to be derived by putting Floridians at such an estate tax planning disadvantage.

[4] *See also* PLR 200406004.

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; rather, it should be revenue neutral.

V. DIRECT IMPACT ON PRIVATE SECTOR

The proposed legislation will lend clarity to an uncertain area of the law, and will enable Floridians to obtain finality and predictability of results in connection with a useful estate planning technique.

VI. CONSTITUTIONAL ISSUES

The Committee believes that the legislative proposal does not violate any of the provisions of the Constitution of the State of Florida or of the United States Constitution.

VII. OTHER INTERESTED PARTIES

Other groups that may have an interest in the legislative proposal include the Tax Section of The Florida Bar and the Florida Bankers Association.

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LEGISLATIVE POSITION REQUEST FORM

GOVERNMENTAL AFFAIRS OFFICE

Date Form Received _____

GENERAL INFORMATION

Submitted By Real Property, Probate and Trust Law Section, Probate Law & Procedure Committee, Chair, Tae Kelley Bronner

Address Tae Kelley Bronner, P.L., 10006 Cross Creek Blvd., PMB # 428, Tampa, FL 33647, (813) 907-6643, tae@estatelaw.com

Position Type The Florida Bar, RPPTL Section and Committee

CONTACTS

Board & Legislation Committee Appearance

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Peter M. Dunbar, Pennington, Moore, Wilkinson, Bell & Dunbar, P.O. Box 10095, Tallahassee, Florida 32302-2095, Telephone (850) 222-3533.
Martha J. Edenfield, Pennington, Moore, Wilkinson, Bell & Dunbar, P.O. Box 10095, Tallahassee 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 **X** **Support** Oppose Technical Assistance Other _____

Proposed Wording of Position for Official Publication:

Support amendment of F.S. §731.110 to permit the filing of a caveat by an interested party to a probate proceeding, other than a creditor of the estate, and to remove inconsistencies between F. S. §731.110 and Fla. Prob. R. 5.260.

Reasons For Proposed Advocacy:

Under the current law, no actual notice of the initiation of a probate proceeding is required unless a caveat has been filed. However, it is difficult to determine when an individual who is the subject of undue influence has died, especially if they have been isolated from contact with their family. The committee believes that it is in the best interest of the public to allow the filing of a caveat by an interested party, other than a creditor, pre-death. Under the current law, the ability of an interested person to file a caveat before the death of an individual is unclear and has been applied inconsistently by the clerks of court throughout the state. The amendment clarifies the right of an interested party, other than a creditor, to file a caveat before the death of

an individual and reconciles the statute with the corresponding probate rule. To limit the burden on the clerks of court, the amendment provides a pre-death caveat shall expire two (2) years after filing.

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

Clerks of Court	Unknown
(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.

WHITE PAPER
Proposed Revisions to §731.110, Florida Statutes

I. SUMMARY

The purpose of the proposed amendment to §731.110 of the Florida Statutes is to clarify the right of an interested person, other than a creditor to file a caveat before the death of an individual. In addition, the amendment removes inconsistencies between the statute and Fla. Prob. R. 5.260.

II. CURRENT SITUATION

Upon the current law, an interested person may file a petition for administration to obtain the appointment of a personal representative and have the decedent's last will and testament admitted to probate with no notice to the potential interested persons unless a caveat has been previously filed pursuant to §731.110, Florida Statutes and Fla. Prob. R. 5.260. This can place the nominated personal representative at a significant advantage, especially if undue influence by that individual is suspected by interested persons. If a person is "apprehensive that an estate, either testate or intestate, will be administered or that a will may be admitted to probate without that person's knowledge", that person may file a caveat with the court. *F.S. §731.110 (2009)*. It is often difficult for interested persons to know when an individual is deceased. Where undue influence is being practiced upon an individual, the individual is often isolated from family members and the undue influencer is the only person with information regarding the health of the decedent. If information is available, it often creates a race to the court house to get the caveat filed before the petition for administration.

Many attorneys routinely file pre-death caveats. Others have reported that the clerks of court in their circuit refuse to accept such filings. Neither the rule or statute appear to specifically prohibit the filing of a caveat if the person is not then deceased. However, the Statute and Rule both reference the content of a caveat in relation to a "decedent" and his or her "estate. In light of the above, the committee felt the language of the statute and rule was unclear.

In addition, the current statute contains procedural aspects that are in conflict with the procedure contained in the corresponding Fla. Prob. R. 5.260. In particular, the statute requires the designation of a Resident Agent if the caveator is not a resident of the county in which the caveat is filed. The rule, however, only requires the designation of a resident agent if the caveator is not a resident of the state of Florida. Finally, the rule further provides that a designation of a resident agent is not necessary if the caveator is represented by an attorney admitted to practice in Florida who signs the caveat. There is no corresponding exception in the statute.

III. EFFECT OF PROPOSED CHANGE GENERALLY

The proposed change would permit the filing of a pre-death caveat by an interested person. So as to limit the burden placed upon the Clerk of Court to monitor pre-death caveats, the proposed change would provide that such caveats shall expire two (2) years after filing. The amendment would also exclude the filing of pre-death caveats by creditors of the decedent as the committee did not feel the appointment of a personal representative or the admittance of a potentially invalid will substantially affected the rights of creditors in an estate. Finally, the amendment would also eliminate the inconsistencies between F.S. §731. 110 and Fla. Prob. R. 5.260, bringing the statute in line with the procedural requirements of the rule.

IV. ANALYIS

One of the primary purposes of F. S. §731.110 is to permit an interested person to require notice be served upon them and that they be permitted an opportunity to object to a petition for administration before a personal representative is appointed or the decedent's purported last will and testament is admitted to probate. If the interested person is denied information regarding the death of the decedent, the purpose of the statute is defeated if the interested person is not permitted to file a caveat until after the death of the decedent. The clarification that pre-death caveats are permitted to be filed by interested persons assures that wrongdoers may not isolated individuals from their family and then obtain the appointment as personal representative or have a potentially invalid will admitted to probate without the interested person having any ability to require prior notice. The amendment also resolves the present inconsistency between the circuits in the interpretation of the present statute by the clerks of court regarding the acceptance of pre-death caveats. Finally the amendment will limit the impact on the clerks of court by providing that the caveat will expire two years after filing. It would be the responsibility of the caveator to docket the pre-death caveat for re-filing or renewal at the termination of the two year period.

The amendment also eliminates the inconsistency in procedural aspects between the statute and relevant rule and brings the statute in line with the rule.

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

VI. DIRECT IMPACT ON PRIVATE SECTOR – None.

VII. CONSTITUTIONAL ISSUES – None apparent.

VIII. OTHER INTERESTED PARTIES – Clerks of Court

Section 731.110. CAVEAT; PROCEEDINGS

(1) Any interested person, including a creditor, who is apprehensive that an estate, either testate or intestate, will be administered or that a will may be admitted to probate without that the person's knowledge may file a caveat with the court. The caveat of an interested person other than a creditor may be filed either before or after the death of the person for whom the estate is being, or will be, administered. The caveat of a creditor may be filed only after the death of the person for whom the estate is being, or will be, administered.

(2) A caveat shall contain the decedent's social security number, last known residence address, and date of birth, if they are known, as identification, a statement of the interest of the caveator in the estate, the name and specific residence address of the caveator, and, if the caveator, other than a state agency, is a nonresident of the county Florida, the caveator shall designate, the additional name and specific residence address of some person residing in the county in which the caveat is filed, or office address of a member of The Florida Bar residing in Florida, designated as the agent of the caveator, upon whom service may be made ,however, if the caveator is represented by an attorney admitted to practice in Florida who signs the caveat, it shall not be necessary to designate a resident agent.

(3) When a caveat has been filed by an interested person other than a creditor, the court shall not admit the will of the decedent to probate or appoint a personal representative until the petition for administration has been served on the caveator or the caveator's designated agent by formal notice and the caveator has had the opportunity to participate in proceedings on the petition, as provided by the Florida Probate Rules.

(4) A caveat filed before death shall expire two years after filing.

LEGISLATIVE POSITION REQUEST FORM

GOVERNMENTAL AFFAIRS OFFICE

Date Form Received _____

GENERAL INFORMATION

Submitted By Tae Kelley Bronner, Chair, Probate Law and Procedure Committee of the Real Property Probate & Trust Law Section of the Florida Bar

Address 10006 Cross Creek Blvd., PMB #428, Tampa, FL 33647
Telephone: (813) 907-6643

Position Type Probate Law and Procedure Committee, RPPTL Section, The Florida Bar

CONTACTS

Board & Legislation Committee Appearance

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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 X **Support** Oppose Technical Assistance Other _____

Proposed Wording of Position for Official Publication:

"Support the amendment of F.S. § 732.804. The purpose of the proposed amendment is to clarify Florida law as it relates to issues involving the disposition a decedent's remains. This proposed legislation, which would replace existing F.S. § 732.804, in its entirety, will provide necessary guidance to courts and family members, especially where disputes arise, as to a decedent's right to control the disposition of his or her remains, and absent specific directions from the decedent, who is legally authorized to make decisions regarding the place and manner of the disposition of a decedent's remains."

Reasons For Proposed Advocacy:

The current law as to who is legally authorized to make decisions regarding the place and manner of the disposition of a decedent's remains is inconsistent, incomplete, and at times, conflicting. Moreover, when

disputes arise, there is no clear direction for courts or parties as to how such disputes should be resolved. Courts around the State of Florida have reached inconsistent positions regarding the applicable law and standards to apply when there is a dispute between surviving individuals over the disposition of a loved one. The most recent example of this uncertainty in Florida law was the death of Anna Nicole Smith and the court proceedings which were necessary in order to determine how her remains should be disposed of and who had the authority to make that decision. See *Arthur v. Milstein, et al*, 949 So.2d 763 (Fla. 4th DCA 2007). The proposed statue would clarify and eliminate conflicting law to aid both courts and family members in dealing with the disposition of a loved one's remains, especially where disputes have arisen. Please see attached White Paper.

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

(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.

WHITE PAPER

PROPOSED REVISIONS TO § 732.804, FLA. STAT.

I. SUMMARY

The purpose of the proposed change is to clarify Florida law as it relates to issues involving the disposition a decedent's remains. This proposed legislation, which would replace existing F.S. § 732.804, in its entirety, and would provide guidance to courts and family members, especially where disputes arise, as to who is legally authorized to make decisions regarding the place and manner of the disposition of a decedent's remains.

II. CURRENT SITUATION

There is currently very little legal guidance (both statutory and otherwise) as to the rights of a decedent to control the disposition of his or her remains. There is even further confusion as to who is legally authorized to make decisions regarding the place and manner of the disposition of a decedent's remains if the decedent has not provided specific instructions in that regard. As a result, the courts around the State of Florida have been inconsistent in what law is applicable and what standards should be applied when a dispute arises concerning the disposition of the remains of a decedent.

As detailed in the discussion of the relevant Florida Statutes and case law below, Florida law is unclear with respect to the following issues:

- Should a decedent's intent regarding the place and manner of the disposition of his or her remains control or should the decedent's survivors have a preference in this regard?

- Must the decedent's intent regarding the place and manner of the disposition of his or her remains be in writing or may oral expressions of that intent be given preference?

- Can non-testamentary written instructions be considered?

- Can written instructions (whether testamentary or non-testamentary) of the decedent regarding the place and manner of the disposition of his or her remains be overridden? If so, what is the evidentiary standard for overriding a decedent's written instructions?

- If the decedent has not expressed his or her intent regarding the place and manner of the disposition of his or her remains, who has priority to make such decisions?

- Who has the right to control the place and manner of the disposition of a decedent's remains if the matter is subject to a dispute?

A. Florida Statutes

F.S. § 732.804 currently provides that "[b]efore issuance of letters [of administration], any person may carry out written instructions of the decedent relating to the decedent's body and funeral and burial arrangements." This statute, however, does not explicitly state that a person must follow the instructions of the decedent, and it does not provide whether those instructions are controlling if the matter of the disposition of a decedent is brought before a court for resolution.

Chapter 497 of the Florida Statutes addresses funeral homes, cemeteries and the regulation of those entities. F.S. § 497.002(2) contains a declaration of legislative intent and provides, "Subject to certain interests of society, the Legislature finds that every competent adult has the right to control the decisions relating to her or his own funeral arrangements." F.S. 497.005(37) provides as follows:

> Legally authorized person means, in the priority listed, the decedent, when written inter vivos authorizations and directions are provided by the decedent; the surviving spouse, unless the spouse has been arrested for committing against the deceased an act of domestic violence as defined in s. 741.28 that resulted in or contributed to the death of the deceased; a son or daughter who is 18 years of age or older; a parent; a brother or sister who is 18 years of age or older; a grandchild who is 18 years of age or older; a grandparent; or any person in the next degree of kinship. In addition, the term may include, if no family member exists or is available, the guardian of the dead person at the time of death; the personal representative of the deceased; the attorney in fact of the dead person at the time of death; the health care surrogate of the dead person at the time of death; a public health officer; the medical examiner, county commission, or administrator acting under part II of chapter 406 or other public administrator; a representative of a nursing home or other person not listed in this subsection who is willing to assume the responsibility as the legally authorized person. Where there is a person in any priority class listed in this subsection, the funeral establishment shall rely upon the authorization of any one legally authorized person of that class if that person represents that she or he is not aware of any objection to the cremation of the deceased's human remains by others in the same class of person making the representation or of any person in a higher priority class.

Although F.S. § 497.005(37) provides a definition of "Legally Authorized Person", the statute is only a definitional section and does not provide what acts "Legally Authorized Persons" can perform or what rights they have under Chapter 497 of the Florida Statutes. More significantly, none of the other provisions in Chapter 497, Florida Statutes address the issue of who has the right to control the place and manner of the disposition of a dead body if the matter is subject to a dispute.

The only statutes in Chapter 497, Florida Statutes, which use the term "Legally Authorized Persons" are F.S. §§ 497.152 (dealing with disciplinary grounds for mishandling human remains), 497.171 (dealing with identification of human remains), 497.383 (dealing with the disposition of fetal remains), 497.384 (dealing with disinterment and re-interment of human remains), 497.606 (dealing with cremation and the regulation of cinterator facilities) and 497.607 (dealing with the procedure for cremation).[1] None of those provisions address the right of a decedent to control the disposition of his or her remains or the right of survivors of the decedent to control the disposition of the decedent's remains if a dispute arises. As explained below, the courts in Florida have been inconsistent as to whether Chapter 479, Florida Statutes, controls these issues.

Finally, F.S. § 406.50(4), found in Chapter 406 of the Florida Statutes (the "Medical Examiner Act") provides, "In the event more than one legally authorized person claims a body for interment, the requests shall be prioritized in accordance with 732.103."[2] The flush language in F.S. § 406.50 further provides, "For purposes of this chapter, the term 'unclaimed' means a dead body or human remains that is not claimed by a legally authorized person, as defined in s. 497.005, for interment at that person's expense." This statute has the same deficiency as Chapter 497 in that it never explicitly states who has the right to control the place and manner of the disposition of a dead body if the matter is subject to a dispute. Also, there is no provision regarding consideration of the intent of a decedent in this regard.

B. Florida Case Law

It is undisputed that Florida law does not view a deceased body as property. In *Crocker v. Pleasant,* 778 So. 2d 978 (Fla. 2001), the Florida Supreme Court held that a body is not property and is not subject to being devised. However, the Court also held that at law, a body is quasi-property, "[W]e conclude in Florida there is a legitimate claim of entitlement by the next of kin to possession of the remains of a decedent for burial or other lawful disposition. We also find that referring to the interest as a 'legitimate claim of entitlement' most accurately describes the nature of the interest." The question of who has the right to exert this legitimate claim of entitlement is less clear. In Florida, it has long been held that "in the absence of testamentary disposition to the contrary, a surviving spouse or next of kin has the right to the possession of the body of a deceased person for the purpose of burial, sepulture or other lawful disposition which they may see fit." *Kirksey v. Jernigan,* 45 So. 2d 188 (Fla. 1950). One of the problems with this statement of law is that it appears to be in conflict with F.S. § 732.804 which indicates that *any person* may carry out written instructions of the decedent relating to the decedent's body and funeral and burial arrangements. Moreover, appellate courts have continued to quote the *Kirksey* rule even after enactment of F.S. § 732.804. See *Cohen v. Guardianship of Cohen,* 896 So. 2d 950 (Fla. 4th DCA 2005) and *Arthur v. Milstein, et al,* 949 So. 2d 1163 (Fla. 4th DCA 2007).

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[1] F.S. § 497.607 actually uses the term "legally authorized person" rather than "legally authorized persons"

[2] F.S. § 732.103 is an intestacy statute that provides for the order of the disposition of a decedent's property in the event that a decedent dies intestate and without a surviving spouse.

In *Leadingham v. Wallace*, 691 So. 2d 1162 (Fla 5th DCA 1997), the Decedent left a suicide note directing that he be buried in Florida. The Fifth District Court of Appeal appeared to honor that intent. The court stated in a footnote after citing to *Kirksey*, "We know of no requirement that a deceased's undisputed wishes concerning the method of his disposal or the place of his burial must be in writing and formally witnessed in order to be honored." This statement seems to contradict the rule as stated by the Florida Supreme Court in *Kirksey* and *Crocker*. However, the result in *Leadingham* is consistent with F.S. § 732.804 which provides that any person may carry out written instructions of the decedent. Moreover, the *Leadingham* court indicated that the next of kin who would have priority to determine where to bury the body of the decedent would be the minor children of the decedent.

In *Andrews v. McGowan*, 739 So. 2d 132 (5th DCA 1999), the Fifth District Court of Appeal addressed a dispute between a separated/estranged spouse and the decedent's adult lineal descendants as to whom would control the disposition of the ashes of the decedent. The lineal descendants sued a funeral home for releasing the remains to the decedent's estranged spouse without the consent of the lineal descendants. The lineal descendants also brought an action against the funeral home which ultimately received possession of the remains for return of those remains. The court entered summary judgment in favor of the funeral home finding that pursuant to F.S. § 470.002(18) (which is the predecessor to F.S. § 497.005(37)), the estranged spouse had to the right to make the determination regarding burial of the decedent. The decedent's intent regarding burial was never interjected into the proceedings.

In this regard, the *McGowan* court found that F.S. § 470.002(18) (the predecessor to F.S. § 497.005(37)), is not simply a regulatory statute for the protection of funeral home directors but actually creates a "priority of rights" regarding who has the legal authority to control the burial of a decedent. If F.S. § 497.005(37) in fact creates a "priority of rights" regarding the disposition of the remains of a decedent, then the *Leadingham* decision is in conflict with *McGowan*. F.S. § 497.005(37) clearly provides that only a child who is 18 years of age or older is a legally authorized person. If F.S. § 497.005(37) was applied to the *Leadingham* facts, the father would have been considered the next of kin rather than the minor children. While the intent of the decedent was not an issue in the case, if the *McGowan* court is correct, the result is that the intent of the Decedent may only be considered when, "[w]ritten inter vivos authorizations and directions are provided by the decedent." Oral declarations of the decedent would not be relevant. The *McGowan* case stretches the application of F.S. § 497.005(37) beyond its plain language. It also appears to be in conflict with *Arthur v. Milstein, et al*, 949 So. 2d 1163 (Fla. 4th DCA 2007) which is discussed below.

Cohen v. Guardianship of Cohen, 896 So. 2d 950 (Fla. 4th DCA 2005) involved an oral expression by a decedent as to burial which contradicted the instructions contained in the decedent's will. Specifically, there was a direction in the will that the decedent's body was to be buried in New York, the state in which he was residing at the time he executed the will. Subsequent to executing the will, the decedent moved to Florida where he resided for an extended period of time prior to his death. During his residency in Florida, he orally expressed on numerous occasions that it was his desire to be buried in Florida. *Cohen* clearly states that when the testator has expressed his intention in a will, it should be honored. But the case also holds that a testamentary provision need not be honored if it can be shown by clear and

convincing evidence that the decedent intended another disposition of his or her body and that such evidence can be through oral communications,

> We instead affirm the trial court's ruling, adopting the majority view that provisions in a will regarding burial instructions are not conclusive of a testator's intent, and the trial court may take evidence that the testator changed his or her mind regarding disposition of his body . . . . to hold otherwise could cause untoward results.

Cohen does not address the issue of whether in the absence of any testamentary declaration the oral expressions of the decedent with regard to disposition of his or her body will be honored.

The most recent case involving a dispute regarding the disposition of a decedent's remains is *Arthur v. Milstein, et al*, 949 So.2d 1163 (Fla. 4th DCA 2007). *Arthur* involved a dispute regarding where to bury Anna Nicole's remains. The dispute was between Vergie Arthur, the decedent's mother, Howard K. Stern, the decedent's "companion"[3] and the person designated as the personal representative under the decedent's will, and the minor child of the decedent, Dannielynn Hope Marshall Stern, through her Guardian Ad Litem, Richard Milstein, Esq. Vergie Arthur wanted the decedent buried in Texas where the decedent was raised as a child. Howard K. Stern wanted the decedent buried in the Bahamas where she was residing at the time of her death. The Guardian Ad Litem also reached the conclusion that the decedent should be buried in the Bahamas next to the grave of her predeceased son.

Vergie Arthur relied on F.S. § 497.005(37) alleging that she was the "legally authorized person" as defined under that statute, and therefore, she had the sole right to determine the place of burial. She relied on the *McGowan* case for the proposition that that statute was not simply designed to regulate funeral homes but rather created a "priority of rights" in her as the legally authorized person to determine where the remains of her daughter should be buried. Mrs. Arthur indicated that the minor child of Anna Nicole Smith had no right to participate in the decision as only "a son or daughter who is 18 years of age or older" qualifies as a "legally authorized person" under the statute.

Richard Milstein, the Guardian Ad Litem, relied on F.S. § 406.50 as the remains of the decedent were not located in a funeral home but rather at the medical examiner's office. Accordingly, he reasoned that because Chapter 497, Florida Statutes, only applied to funeral homes, it could not be used by Vergie Arthur as authority to control the disposition of her daughter's remains. He argued that both he, as the guardian ad litem, and Vergie Arthur qualified as legally authorized persons pursuant to F.S. § 497.005(37). F.S. § 406.50(4) provides that if there is more than one legally authorized person claiming the body, the requests shall be prioritized pursuant to F.S. § 732.103. Under the provisions of that statute, the minor child is given priority over a parent as the next of kin.

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[3] The word "companion" is used as there was conflicting testimony in the trial regarding the exact nature of the relationship between Anna Nicole Smith and Howard K. Stern.

Howard K. Stern relied on the expressed intent of the Decedent that she wanted to be buried in the Bahamas next to her predeceased son, Daniel. The evidence presented at trial was a combination of oral declarations of the decedent regarding her desires and two documents which when read together could arguably form a written expression of intent.

The trial court, citing to both common law and F.S. § 406.50, awarded custody and control of the remains of Anna Nicole Smith to the Guardian Ad Litem of Danneilynn Hope Marshall Stern with the direction that he act in the best interests of the minor child. Specifically, the trial court found that Dannielynn Hope Marshall Stern was the next of kin entitled to possession of the remains.

The Fourth District Court of Appeal invoked the "tipsy coachman doctrine" in affirming the trial court's order finding that the trial court reached the right result but for the wrong reason. Specifically, the court held that neither F.S. § 497.005(37) nor F.S. § 406.50 controlled the outcome of the case and that common law was dispositive,

> We find that neither section 497.005(37), nor section 406.50, control the outcome of this case, which in essence involves private parties engaged in a pre-burial dispute as to the decedent's remains. Otherwise stated, the trial court was not being asked to consider whether a funeral home or medical examiner was liable for its decision with respect to the disposition of a decedent's remains . . . In this case, common law is dispositive.[4]

The court factually distinguished the *McGowan* case and concluded it was not applicable under the facts presented. However, it appears that the cases are in conflict. As the Fourth District Court of Appeal did not certify a conflict and the *Arthur* decision was not appealed to the Florida Supreme Court, we are left with the apparent conflict. Moreover, the Fourth District Court of Appeal never specifically addressed the issue of whether oral expressions by the decedent as to the disposition of his or her remains without any accompanying writing controls over the contrary wishes of the next of kin. But the court did find that the decedent's wishes were dispositive in this case,

> To the extent that sections 497.005(37) and 406.05(4) provide guidance, the priorities therein could set forth a presumption, rebuttable by clear and convincing evidence of the decedent's intent, as was the will in *Cohen*, and as found here . . . . Herein, the trial court found that 'Anna Nicole Smith's last ascertainable wish

[4] This result is supported by language in *Matsumoto v. American Burial and Cremation Services*, 949 So. 2d 1054 (Fla. 2d DCA 2006), in which the court held that F.S. § 497.005 does not impose a duty on the funeral homes to investigate whether they are releasing the body to the person with the highest priority under the statute, "The statute does not impose a due diligence requirement on funeral homes. Nor does it require funeral homes to provide others with higher priority notice of a family member's death. We decline to impose such obligations on the funeral home."

> with respect to the disposition of her remains was that she be buried in the Bahamas next to her son Daniel Wayne Smith.' This finding is not essentially disputed. In light of the trial court's extensive findings and comments associated with Smith's intent, coupled with the Guardian Ad Litem's representation and commitment to a burial in the Bahamas, we conclude that there is no need to remand the case for further proceedings.

III. EFFECT OF PROPOSED CHANGE

The proposed amendment to F.S. § 732.804 would clarify (and in some instances, change) the law relating to the disposition of a decedent's remains in a number of ways. Specifically, the proposed statute would provide the following:

1. Clarify that all adult individuals and emancipated minors have the preference and the right to make their own funeral arrangements by way of a "written declaration." Such arrangements include the disposition of one's remains (including cremation), the ceremonial arrangements and the person (or persons) designated to carry out the arrangements after death.

2. Clearly define the term "written declaration" and set forth the formalities required (i.e., it must be signed and dated by the decedent). The statute would also clarify that a decedent's will executed in accordance with Florida law will be deemed to be a "written declaration" so long as it includes the expression of the decedent's intent regarding the disposition of his or her remains, the ceremonial arrangements, or the person (or persons) designated to carry out the arrangements after death. The statute would clarify that the most recent dated written declaration controls over all other documents to the contrary and to the extent that any anatomical gift is inconsistent with a written declaration, the anatomical gift would control.

3. Clarify who is authorized to carry out the decedent's intent as expressed in his or her written declaration, whether an individual is specified or not. If an individual is not designated in a written declaration, a comprehensive statement of priority is provided and the statue would also place strict time limits on carrying out the decedent's written declaration. The statute would prohibit a person from carrying out a decedent's written declaration if that person has actual knowledge that a proceeding is pending that challenges the validity of a decedent's written declaration or a later written declaration exists and is in conflict with the earlier written declaration.

4. Absolve a person or entity from liability for refusing to accept, inter, cremate or otherwise dispose of a decedent's body where that person or entity has actual knowledge that legal action has been brought to challenge a decedent's written declaration. The statue would also absolve a person or entity from liability (both civil and administrative discipline) where that person or entity provides for the lawful disposition of a decedent's body in reasonable reliance on the written declaration (absent bad faith). Finally, the statute would absolve a person named to carry out the terms of the written declaration from liability if that person refuses to carry out the terms of the written declaration.

5. Provide that in any legal proceeding regarding a decedent's written declaration, a written declaration creates a rebuttable presumption of the decedent's intent regarding the disposition of the decedent's remains (including cremation), the ceremonial arrangements and the person (or persons) designated to carry out the arrangements after death.

6. If there is no written declaration, a clear statement of priority would be established as to the person or persons who will have the right to control the disposition of a decedent's remains and to make ceremonial arrangements, if any. There would also be a clear statement as to how the right to inter a decedent's remains and to make ceremonial arrangements devolves if a person with priority is unable or unwilling to act.

7. Absolve a person or entity from liability (both civil and administrative discipline) where that person or entity provides for the lawful disposition of a decedent's body in reasonable reliance on the on the direction of a person or persons authorized by this statute (absent bad faith).

8. Provide for proper venues if legal proceedings were initiated regarding the disposition of a decedent's remains.

9. Provide that any person who unlawfully and intentionally kills or participates in procuring the death of the decedent shall not be entitled to control the disposition of the remains or the ceremonial arrangements of a decedent.

IV. ANALYSIS

The proposed statute is designed to clarify the conflicts in the law and to give guidance to families and courts, especially where there is a dispute as to the disposition of a loved one's remains. Additionally, the proposed statute is designed to establish a clear priority of rights among the survivors of a decedent to make arrangements for the disposition of decedents' remains. The proposed statute would be the relevant authority for all questions regarding private citizens' rights to make funeral arrangements for a decedent, especially where disputes arise. Therefore, the question as to whether either F.S. §497.005(37) or F.S. § 406.50 is applicable (as raised in *McGowan* and *Arthur*) in such disputes would be resolved and it would be clear that such statutes are not applicable in resolving such disputes.

The proposed statute also confirms existing law to the extent that all competent adult individuals have the right to make their own funeral arrangements. In this regard, the proposed statute clearly states that an adult or an emancipated minor has the priority and right, over all other individuals, to make such arrangements. This is consistent with existing Florida law.

The proposed statute is designed so that individuals are encouraged to make arrangements regarding the disposition of their remains in writing by way of a "written declaration". The proposed statute also clearly defines the term "written declaration" and provides standards for the execution of such a document. To the extent that "formalities" of execution of a written declaration are required, the proposed statute departs from some of the existing case law. The proposed statute also permits a decedent to name a person (or persons) to carry out his or her wishes in this regard. The proposed statute clarifies a last will and testament can constitute a written declaration if the required provisions are included in the will. Because a

clear standard would be established for the requirements of a written declaration, less litigation will be necessary and the citizens of the State of Florida will be able to provide for the disposition of their remains with more certainty and confidence.

Perhaps the most significant aspect of this proposed statute is the statement as to the priority of rights among individuals to make decisions regarding the disposition of a decedent's remains when there is no written declaration (or when a person is not designated to carry out a written declaration). This statute borrows heavily from F.S. § 497.005(37) in terms of the priority of the persons who are entitled to control the disposition of the remains of a decedent but clarifies exactly what rights those persons have with regard to those issues. The proposed statute also clarifies that if there is no written declaration and there is a subsequent dispute among the survivors, that the courts can consider other expressions of a decedent's intent including oral expressions. The proposed statute also provides guidance when there are disputes among classes of persons who have authority to act or where a person named does not act for any reason. This aspect of the proposed statute will aid courts and families when disputes arise in cases such as *Cohen, Leadingham, McGowan* and *Arthur*.

V. FISCAL IMPACT ON STATE AND LOCAL GOVERNMENTS

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

VI. DIRECT IMPACT ON PRIVATE SECTOR

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

VII. CONSTITUTIONAL ISSUES

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

VIII. OTHER INTERESTED PARTIES

None are known at this time.

TEXT OF PROPOSED F.S. 732.804

732.804. Provisions relating to disposition of decedent's remains.—

(1) Subject to certain interests of society, the Legislature finds that every competent adult has the right to control the decisions relating to her or his own funeral arrangements. Therefore, any person, who is either 18 years of age or older or an emancipated minor may specify in a written declaration any one or more of the following:

(a) The disposition to be made of his or her remains, including, but not limited to, cremation;

(b) The ceremonial arrangements, if any, to be performed after death;

(c) The person designated to make these arrangements after the death of the person.

(2) For purposes of this Section:

(a) A "written declaration" shall mean a written expression of a person's intent regarding one or more of the matters addressed in subsection (1).

(b) A written declaration must be signed and dated by the person making the written declaration, or, if the person making the written declaration cannot sign, the written declaration may be signed for him or her by some other person in his or her presence and at his or her direction. If the person making the written declaration cannot sign, the direction by the person making the written declaration and the signature by the other person on his or her behalf must be in the presence of at least two attesting witnesses who must sign the written declaration in the presence of both the person making the declaration and the person signing on his or her behalf and in the presence of each other.

(c) A will executed as provided in s. 732.502 shall be deemed to be a written declaration so long as the will includes an expression of the decedent's intent regarding one or more of the matters described in subsection (1).

(3) The provisions of the most recent written declaration shall control over any other document, including an earlier dated will that is deemed to be a written declaration, regarding any matter described in subsection (1).

(4) To the extent that a written declaration is in conflict with an anatomical gift made by one of the methods listed in s. 765.514(1), the anatomical gift shall take precedence over inconsistent directions or instructions in a written declaration.

(5) Any person may carry out the disposition of a decedent's remains and may make ceremonial arrangements, if any, pursuant to the terms of a written declaration either before or after issuance of letters of administration subject to the following limitations:

(a) If a written declaration designates a person to control the disposition of a decedent's remains or make ceremonial arrangements, that person shall be given preference over any other person. The person designated in a written declaration to control the disposition of a decedent's remains or to make ceremonial arrangements shall be presumed to be unable or unwilling to do so if that person fails to make final arrangements for the disposition of the decedent within the earlier of 5 days after receiving notice of the decedent's death or 10 days after the decedent's death.

(b) If a written declaration does not designate a person to carry out the disposition of a decedent's remains or to make ceremonial arrangements and more than one person has requested to do so, the person or persons with the highest preference under subsection (11) shall be granted the right to do so.

(6) No person shall exercise the authority granted in a written declaration if that person has actual knowledge that:

(a) A proceeding is pending to challenge the written declaration; or

(b) A later written declaration was executed by the decedent, to the extent of any conflict with the earlier written declaration.

(7) A person who has actual knowledge that a legal action has been brought to challenge a written declaration shall not be liable for refusing to accept, inter, cremate, or otherwise dispose of a decedent's remains until such person receives a court order or other reasonable confirmation that the legal action has been resolved or settled.

(8) Any person who directs or provides for the lawful disposition of a decedent's remains, including cremation, in reliance on a written declaration created in accordance with the provisions of this section that appears to be legally executed shall not be subject to civil liability or administrative discipline for such actions absent bad faith.

(9) No person designated in a written declaration to carry out the disposition of a decedent's remains or to make ceremonial arrangements, if any, shall be liable for failing or refusing to do so.

(10) In any legal proceeding brought under this section, admission into evidence of a written declaration creates a rebuttable presumption that the written declaration represents the decedent's intent with respect to any matter addressed in subsection (1).

(11) In the absence of a written declaration, the right to control disposition of a decedent's remains and to make ceremonial arrangements, if any, vests in and devolves upon the following persons, at the time of the decedent's death, in the following order of preference:

(a) The decedent, if the decedent's intent can be proven by a preponderance of the evidence in an appropriate legal proceeding;

(b) The surviving spouse;

(c) A majority the children of the decedent who are 18 years of age or older;

(d) The parents, or surviving parent if one parent is deceased, of the decedent. Both divorced parents of a minor child who have shared parental responsibility in accordance with s. 61.13 must agree on the disposition or ceremonial arrangements; provided, however, in the case divorced parents of a minor child, where a court has awarded one parent sole parental responsibility in accordance with s. 61.13, the parent who has been awarded sole parental responsibility shall have preference over the parent who has not been awarded sole parental responsibility.

(e) A majority of the surviving siblings of the decedent who are 18 years of age or older;

(f) A majority of the surviving grandchildren of the decedent who are 18 years of age or older;

(g) A majority of the surviving grandparents of the decedent;

(h) The guardian of the person or property of the decedent at the time of death and if there is more than one of them, a majority of them;

(i) The personal representative of the decedent and if there is more than one of them, a majority of them;

(j) The health care surrogate of the decedent at the time of death designated pursuant to chapter 765 of the Florida Statutes and if there is more than one of them, a majority of them;

(k) The attorney in fact of the decedent at the time of death designated pursuant to chapter 709 of the Florida Statutes and if there is more than one of them, a majority of them;

(l) A public health officer;

(m) The medical examiner, county commission, or administrator acting under part II of chapter 406 or other public administrator;

(n) A representative of a nursing home in which the decedent resided at the time of death; or

(o) Any person 18 years of age or older not listed in this subsection who is willing to assume the legal and financial responsibility for the final disposition of the decedent's remains.

(12)(a) If the person with the right to control disposition of the decedent's remains and to make ceremonial arrangements, if any, pursuant to subsection (11) is unable or unwilling to make such disposition, or if the person's whereabouts cannot be reasonably ascertained, that person's rights shall terminate and pass to the following persons, in the following order of preference:

1. The rest of the persons in the class with the same degree of relationship granting the same priority of control over the disposition pursuant to subsection (11);

2. The next class of persons in the order listed in subsection (11).

(b) The person with the right to control disposition of the decedent's remains and to make ceremonial arrangements, if any, shall be presumed to be unable or unwilling to provide for such disposition, or the person's whereabouts shall be presumed unknown, if the person has failed to make final arrangements for the disposition of the decedent within the earlier of 5 days after receiving notice of the decedent's death or 10 days after the decedent's death.

(c) If a person is unable or unwilling to make a disposition, such person shall not be counted as a member of the class when determining the number that makes a majority of such class.

(d) In the event that a majority of the persons in the class with the same degree of relationship granting the same priority of control over the disposition of a decedent's remains and making ceremonial arrangements, if any, pursuant to subsection (11) are unable to reach a consensus, priority shall pass to the next class of persons in the order listed in subsection (11). For purposes of this paragraph (d), a majority of the members in the class with the same degree of relationship shall be deemed unable to reach a consensus if the majority cannot agree upon a disposition of the decedent's remains within the earlier of 5 days after receiving notice of the decedent's death or 10 days after the decedent's death.

(13) Venue for an action pursuant to this section may be laid in any county:

(a) Where the venue is proper under chapter 47; or

(b) In which the decedent was physically present at the time of his or her death, or

(c) In which the remains of the decedent are located; or

(d) In the county in this state where the decedent was domiciled; or

(e) In which a probate proceeding for the decedent is pending.

(14) Any person who provides for the final disposition of a decedent's remains upon authorization from a person who claims to have the right to control the final disposition pursuant to subsection (11) shall be immune from civil liability and administrative discipline absent bad faith.

(15) If any person unlawfully and intentionally kills or participates in procuring the death of the decedent, that person shall not be entitled to control the

disposition of the remains or the ceremonial arrangements of a decedent. The court may determine by the greater weight of the evidence whether the person unlawfully and intentionally killed or participated in procuring the death of the decedent for purposes of this section.

LEGISLATIVE POSITION REQUEST FORM

GOVERNMENTAL AFFAIRS OFFICE

Date Form Received _____

GENERAL INFORMATION

Submitted By Real Property, Probate and Trust Law Section, Probate Law & Procedure Committee, Chair, Tae Kelley Bronner

Address Tae Kelley Bronner, P.L., 10006 Cross Creek Blvd., PMB # 428, Tampa, FL 33647, (813) 907-6643, tae@estatelaw.com

Position Type The Florida Bar, RPPTL Section and Committeee

CONTACTS

Board & Legislation Committee Appearance

Sam W. Boone, Jr., Sam W. Boone, Jr., P.A., 605 NE 1st Street, Suite E, Gainesville, FL 32601, Telephone (352) 374-8308.
Tae Kelley Bronner, Tae Kelley Bronner, P.L., 10006 Cross Creek Blvd., PMB #428, Tampa, FL 33647, Telephone (813) 907-6643
Michael J. Gelfand, Gelfand & Arpe, P.A., Regions Financial Tower, Suite 1220, 1555 Palm Beach Lakes Blvd., West Palm Beach, FL 33401, Telephone (561) 655-6224.
Peter M. Dunbar, Pennington, Moore, Wilkinson, Bell & Dunbar, P.O. Box 10095, Tallahassee, Florida 32302-2095, Telephone (850) 222-3533.
Martha J. Edenfield, Pennington, Moore, Wilkinson, Bell & Dunbar, P.O. Box 10095, Tallahassee FL 32302-2095, Telephone (850) 222-3533.
(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 X **Support** Oppose Technical Assistance Other _____

Proposed Wording of Position for Official Publication:

Support amendment of F.S. §655.935 to add requirement for placing list of removed items in safe deposit box when items removed after death of owner but prior to initial opening by personal representative. Support amendment of F.S. 655.934 to replace "durable family power of attorney" with "durable power of attorney.

Reasons For Proposed Advocacy:

This amendment is needed to provide for a record to be kept in a safe deposit box memorializing what was removed, and by whom, after the death of a safe deposit box lessee but prior to the opening of the safe deposit box by a personal representative in accordance with the procedure outlined in the Florida Probate Code. The amendment of F.S. 655.934 is a housekeeping amendment to conform a defined term in F.S. 655.934 to the amendment to F.S. 709.08 which was effective October 1, 1990.

PRIOR POSITIONS TAKEN ON THIS ISSUE

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

Most Recent Position NONE

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

Others
(May attach list if more than one)

NONE

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

REFERRALS TO OTHER SECTIONS, COMMITTEES OR LEGAL ORGANIZATIONS

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

Referrals

Florida Banker's Association	Unknown
(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.

Issues Associated with Regulation of Safe-Deposit Boxes under Chapter 655
WHITE PAPER

PROPOSED NEW FLORIDA STATUTE §655.935

Safe-Deposit Box Access Subcommittee
Probate Law and Procedure Committee
Real Property, Probate and Trust Law Section

I. SUMMARY

The purpose of the proposed addition to §655.935 of the Florida Statutes is to implement a statutory requirement that a record be kept when a bank officer permits a person to open, examine and remove contents from the safe-deposit box prior to the initial opening of the safe-deposit box pursuant to §733.6065 by a personal representative appointed by a court in this state.

The amendment to §655.934 is a housekeeping amendment to delete the reference to "durable family power of attorney" and replace it with "durable power of attorney," Effective October 1, 1990, Section 709.08, Florida Statutes, was amended to delete the word "family" following the word "durable."

II. CURRENT SITUATION

Upon satisfactory proof of death to the lessor of a safe-deposit box (financial institution), a person named in a court order, or otherwise, the spouse, parent, an adult descendant, or a person named as a personal representative in a copy of a purported will produced by such person, can open and examine the contents of a safe-deposit leased or coleased by a decedent, in the presence of an officer of the lessor. The lessor must deliver to the person making the request any writing purported to be a deed to a burial plot or burial instructions, or any document purporting to be an insurance policy on the life of the decedent, if the requesting person is the named beneficiary. The lessor also must deliver, to the court having jurisdiction in the county where the financial institution is located, any writing purported to be the last will and testament of the decedent.

The right to open and examine the contents of a safe-deposit box leased by a decedent, and to receive the items described above, is separate from the right of a personal representative under the Florida Probate Code, and §655.935 specifies that an opening under its authority shall not be considered an "initial opening" under §733.6065. F.S. 733.6065 requires, at the opening, the preparation of an inventory of the contents of the box, verification of that inventory by the persons present at the opening and the filing of a copy of the inventory of the safe-deposit box with the court.

There is no requirement in §655.935 that the lessor retain an inventory, delivery record or any other record of documents removed from the safe-deposit box nor a record

of who removed those items. This lack of control may result in no copies of the documents delivered (for example, a burial deed or a life insurance policy) being available to the personal representative on the subsequent opening of the safe-deposit box. When the personal representative accomplishes an "initial opening" (and inventory) he or she may not know an insurance policy was in the safe-deposit box at the decedent's death nor to whom it was delivered. While a record of the entry exists in the entry log, the persons making that entry may not then be found or have any independent recollection, and the entry record would not indicate what, or even if, documents were delivered.

The amendment to §655.934 is a housekeeping amendment to delete the reference to the "durable family power of attorney" and replace it with "durable power of attorney." Effective October 1, 1990, §709.08, Florida Statutes, was amended to delete the word "family" following the word "durable."

III. EFFECT OF PROPOSED CHANGE GENERALLY

The proposed change would impose a requirement on financial institutions to document when a safe-deposit box is opened and examined prior to the appointment of a personal representative and to photocopy any documents released pursuant to F.S. 655.935. Thus, when the personal representative is appointed and conducts an "initial opening" they have an accurate record of everything in the safe-deposit box when the decedent died. If, for example, the personal representative has to file a federal estate tax return, the personal representative will have a copy of any life insurance owned by the decedent at his death.

The proposal does not otherwise impose significant duties on the part of the financial institutions. It includes a provision that allows the financial institution to charge the person seeking delivery for any copies made. The proposal would only require that the entry be documented and a record of what was taken and by whom be kept in the safe-deposit box.

The amendment to §655.934 is a housekeeping amendment only to conform §655.934 with the current §709.08.

IV. ANALYSIS

The primary purpose of §655.935 is to allow family members and nominated personal representatives to gain access to information of the decedent needed before a probate administration can be initiated. The documents retained in safe-deposit boxes are usually original wills, life insurance policies, deeds to burial plots or burial instructions and other documents relating to ownership of assets. In most circumstances, a funeral takes place before a probate administration can be initiated and the family members need the deed to the burial plot or the burial instructions. In circumstances when a probate is necessary to transfer the property of the decedent, the named personal representative needs the original will in order to petition the court for appointment. In situations where

there are no assets to probate, but the decedent has life insurances policies with designated beneficiaries, the named beneficiary needs the policy in order to claim the proceeds. Understanding the importance of this right to enter a safe-deposit box of the decedent for examination purposes, it is equally important for the personal representative to later have a record of all actions taken and all items removed from the safe deposit box after the death of the owner but before the initial opening of the box.

The amendment to §655.934, to delete the reference to the "durable family power of attorney" and replace it with "durable power of attorney," is a housekeeping amendment to conform §655.934 with the current §709.08. Effective October 1, 1990, Section 709.08, Florida Statutes, was amended to delete the word "family" following the word "durable", and provided that "a person" may be designated attorney-in-fact whether or not that person is related to the principal.

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

VI. DIRECT IMPACT ON PRIVATE SECTOR-- None

VII. CONSTITUTIONAL ISSUES — None apparent

VIII. OTHER INTERESTED PARTIES — None known at this time

655.934 Effect of lessee's death or incapacity.—If a lessor without knowledge of the death or of an order determining incapacity of the lessee deals with the lessee's agent in accordance with a written power of attorney or a durable ~~family~~ power of attorney signed by such lessee, the transaction binds the lessee's estate and the lessee.

655.935 Search procedure on death of lessee.—

(1) If satisfactory proof of the death of the lessee is presented, a lessor shall permit the person named in a court order for the purpose, or if no order has been served upon the lessor, the spouse, a parent, an adult descendant, or a person named as a personal representative in a copy of a purported will produced by such person, to open and examine the contents of a safe-deposit box leased or coleased by a decedent, or any documents delivered by a decedent for safekeeping, in the presence of an officer of the lessor; and the lessor, if so requested by such person, shall deliver:

(a) Any writing purporting to be a will of the decedent, to the court having probate jurisdiction in the county in which the financial institution is located.

(b) Any writing purporting to be a deed to a burial plot or to give burial instructions, to the person making the request for a search.

(c) Any document purporting to be an insurance policy on the life of the decedent, to the beneficiary named therein.

No other contents may be removed pursuant to this section. Access granted pursuant to this section shall not be considered the initial opening of the safe-deposit box pursuant to s. 733.6065 by a personal representative appointed by a court in this state.

(2) The officer of the lessor who is present shall make a complete copy of any document delivered pursuant to subsection (1) and place that copy, together with a memorandum of delivery identifying the name of the officer, the person to whom the document was delivered, the purported relationship of the person to whom the document was delivered and the date of delivery, in the safe-deposit box leased or coleased by the decedent.

(3) The lessor may charge reasonable fees and costs to the party seeking delivery.

AGREEMENT

THIS AGREEMENT entered into as of this ___day of _____ 2009, by and between the REAL PROPERTY PROBATE, AND TRUST LAW SECTION OF THE FLORIDA BAR ("Section") and PETER M. DUNBAR of the law firm of Pennington, Moore, Wilkinson, Bell & Dunbar ("Legislative Consultant"), in exchange for the consideration expressed, agree that the Legislative Consultant shall serve for two years beginning September 1, 2009, as Legislative Consultant for the Section as described in this instrument. The Legislative Consultant agrees to comply with all policies adopted by The Florida Bar Board of Governors and by the Section and the provisions of this Agreement shall apply to all professional personnel at the Legislative Consultant's law firm. The Legislative Consultant and the Section further agree:

1. That the Legislative Consultant shall serve as consultant regarding legislative, administrative and regulatory matters which affect the Section. Although other professional personnel at his law firm shall assist and support him, the Legislative Consultant shall be the lead contact and shall be personally primarily responsible for performing the services (including coordinating and reporting) to the Section under this Agreement. In that regard, the Legislative Consultant shall make a presentation at the Section's Annual Legislative Update Seminar and shall personally attend each Section Executive Council meeting held within the State of Florida. The Legislative Consultant anticipates that Martha Edenfield, Gene Adams and Josh Aubuchon shall perform work under his direction. Any other professional personnel from the Legislative Consultant's law firm may only provide service under this Agreement with the prior approval of the Section.

2. The Legislative Consultant agrees that if the Legislative Consultant individually, or the Legislative Consultants law firm intend or desire to represent any client before the Florida Legislature or any regulatory or administrative body (other than those disclosed on the attachment to this Agreement), the Legislative Consultant shall notify, in writing, the Executive Director of The Florida Bar, the Chair of The Florida Bar's Legislation Committee, the Chair of the Section, and the Chair of the Section's Legislative Committee at least five (5) days prior to commencement of that representation.

3. If an actual conflict, or even the potential for a conflict, arises between a position of the Section and a position of any other client represented by the Legislative Consultant or his law firm, the Legislative Consultant shall immediately notify, in writing, the Chair of the Section and the Chair of the Section's Legislative Committee. The Legislative Consultant and the Section acknowledge that the services to be provided under this Agreement are governed by The Florida Bar's Rules of Professional Conduct, including those provisions relating to conflict of interest between clients. Consequently, the Legislative Consultant shall not represent any other client which would have a position which would conflict with a position of the Section. If a conflict arises between a position of the Section and another existing client of the Legislative Consultant or his law firm, unless such conflict is waived by the affected clients, then the Legislative Consultant agrees that neither he nor his law firm may represent either the Section or the other party. Under such circumstances, an appropriate reduction in the fee otherwise due under this Agreement shall be made and the Section may engage other representation for the particular matter.

4. The Legislative Consultant agrees to work on Florida Bar legislative matters when directed by the Executive Director of The Florida Bar when the Executive Director believes that such participation is necessary and in the best interest of the membership of The Florida Bar. In this event, the fee for such services performed by the Legislative Consultant shall be assessed against the Section unless this creates a shortage or hardship on the Section. In that event, The Florida Bar may reimburse the Section for the appropriate amount of the legislative expense. This fee, if any, is deemed included within the total fee specified within this Agreement.

5. The Legislative Consultant agrees to coordinate all activities regarding the Florida Legislature which might affect the Section. "Coordination" shall include, but is not limited to, the following:

A. The Legislative Consultant shall identify legislative issues likely to come before the Legislature during the term of the Agreement and which shall require services under the Agreement.

B. The Legislative Consultant, in advance of (as well as during) the legislative session, shall notify the Section of any committee hearings of the Legislature dealing with an issue affecting or concerning any area within the purview of the Section.

C. The Legislative Consultant shall work with Section designated contacts to prepare presentations, where appropriate, to be made to legislators and their committee staff.

D. The Legislative Consultant shall provide to the Section summaries of prefiled and filed bills dealing with the areas within the purview of the Section and copies of the actual bills when appropriate. Special procedures approved by the Section shall be used to insure timely distribution during the legislative session.

E. The Legislative Consultant shall, during the legislative session, provide weekly written reports on the status of legislative matters on which the Section has taken a position or has a pending legislative proposal. Additionally, reports shall be given upon any new matters which are filed and which are within the purview of the Section.

F. The Legislative Consultant shall provide all services necessary to promote and support the Section's legislative proposals and other matters affecting the Section's areas of practice. The Legislative Consultant shall coordinate, with Section designated contacts, obtaining legislative sponsors for the Section's proposals. The Legislative Consultant shall use best efforts, working with Section representatives, to ensure that there is a diversity of legislators who sponsor Section legislation from year to year. The Section's policy is to use as wide a group of sponsors as possible while at the same time recognizing that a sponsor must be an ardent proponent of the proposal.

G. The Legislative Consultant shall alert the Section to the activities of other interested groups relating to legislative proposals promoted by, supported, or opposed by the Section.

6. The Legislative Consultant shall coordinate other matters which might affect, or be of interest to, the Section and its legislative program, including but not limited to regulation, rulemaking, and the provisions of technical assistance to the Executive Branch, executive branch agencies and the Florida Legislature.

7. The Section shall pay the Legislative Consultant for the provision of services, as set forth herein, a fee in the amount of $100,000 a year for the two years beginning September 1, 2009 to August 31, 2011. The fees shall be payable each year in four equal payments (on September 30, December 31, March 31 and June 30), which shall include all out-of-pocket costs and expenses other than for attendance at Executive Council meetings. The Section shall reimburse the Legislative Consultant for transportation (at the minimum rates approved by The Florida Bar for mileage and at the lowest coach class airfare available) and lodging (at the lowest negotiated group rates) when attending Executive Council meetings.

8. The Legislative Consultant shall identify himself at all times as a representative of the Section and not as a representative of The Florida Bar when working on Section matters.

THIS AGREEMENT is not assignable by either party and may be terminated by (i) either party upon sixty (60) days written notice being given, (ii) the Section immediately upon the Legislative Consultant withdrawing from his current law firm of Pennington, Moore, Wilkinson, Bell & Dunbar, (iii) the Section, prior to the second year of the contract, if the Section determines that budgetary restrictions would prevent it from meeting its obligation under the contract, or (iv) The Florida Bar if it decides that the Legislative Consultant or any professional personnel of the Legislative Consultant's law

firm does not act within the best interest of The Florida Bar. In the event the Agreement is terminated, then the amount payable shall be decreased to an amount reflective of the services provided prior to the termination.

WITNESS our hands and seals as of the date first set forth above.

Witness	The Florida Bar Real Property, Probate & Trust Law Section
Witness	
Witness	The Florida Bar Real Property, Probate & Trust Law Section
Witness	
Witness	PETER M. DUNBAR Legislative Consultant Pennington, Moore, Wilkinson, Bell & Dunbar, P.A.
Witness	

Names of Clients	Name of Agencies
AMEX Assurance Company	Executive Branch
Anesthesiologist Professional Assurance Co.	Legislative & Executive Branch
AIX Group, The	Executive Branch
AXIS Insurance Company	Executive Branch
Albriton Insurance Services, LLC	Executive Branch
American Association of Insurance Services	Executive Branch
Anesthesiologist Professional Assurance Co.	Legislative & Executive Branch
Behavior Analyst Certification Board	Legislative & Executive Branch
B.J. Alan Companies	Legislative & Executive Branch
Avis Budget Group	Legislative & Executive Branch
City of Clearwater	Legislative & Executive Branch
City of Ormond Beach	Legislative & Executive Branch
City of Palm Coast	Legislative & Executive Branch
City of South Daytona	Legislative & Executive Branch
CLVL Solutions, Inc.	Legislative & Executive Branch
Coastal Conservation Association Florida	Legislative & Executive Branch
Coca-Cola Enterprises	Legislative & Executive Branch
Conference of Circuit Judges of Florida	Legislative & Executive Branch
Deanne's Office & Computer Supply, Inc. d/b/a DOCS	Legislative Branch
Diamond Game	Executive Branch
Doctors Company, The	Executive Branch
Embry-Riddle Aeronautical University	Legislative & Executive Branch
EMC National Life Company	Executive Branch
FCCI Insurance Group	Legislative & Executive Branch
First Floridian Auto & Home Insurance Company	Legislative & Executive Branch
First Professional's Insurance Company	Legislative & Executive Branch
Florida Association of Realtors	Legislative & Executive Branch
Florida Chamber of Commerce	Legislative & Executive Branch
Florida Children's Services Council, Inc.	Legislative & Executive Branch
Florida Feed Association	Legislative Branch
Florida Governmental Utility Authority	Legislative Branch
Florida Justice Reform Institute	Legislative & Executive Branch
Florida Outdoor Advertising Association	Legislative & Executive Branch
Florida Physical Therapy Association	Legislative & Executive Branch
Florida Prepaid College Foundation, Inc.	Legislative Branch
Florida Portable Building Manufacturers Association	Legislative & Executive Branch
Florida Recreational Vehicle Trade Association	Legislative & Executive Branch
Florida Sheriff's Self Insurance Fund	Legislative & Executive Branch
Florida Surplus Lines Service Office	Legislative & Executive Branch
Florida Voters Coalition	Legislative & Executive Branch
Funeral Services, Inc.	Legislative & Executive Branch
Gateway Community Services, Inc.	Legislative & Executive Branch
Gulfstream Park Racing Association, Inc.	Legislative & Executive Branch
Harbor Branch Oceanographic Institution, Inc.	Legislative & Executive Branch
Home State Insurance Group, Inc.	Executive Branch
Institutional Life Services (Florida) LLC	Legislative Branch

Insurance Services Offices, Inc.	Legislative & Executive Branch
Lost Tree Village Property Owners' Association	Legislative Branch
MAG Mutual Insurance Company	Legislative & Executive Branch
Magna Entertainment Corp.	Legislative & Executive Branch
McDonald's Corporation	Legislative & Executive Branch
Malcolm Pirnie, Inc.	Legislative & Executive Branch
Marriott International, Inc.	Legislative & Executive Branch
Medco Health Solutions, Inc.	Legislative & Executive Branch
Medico Insurance Company	Executive Branch
Mortgage Insurance Companies of America	Legislative & Executive Branch
Mutual of Omaha	Executive Branch
National Association of Industrial & Office Properties	Legislative & Executive Branch
New York Life Insurance Company	Legislative & Executive Branch
Old Republic National Title Insurance Company	Legislative & Executive Branch
Parkway Maintenance & Management Company	Legislative Branch
Physicians Preferred Insurance Company	Executive Branch
Pinellas County Board of County Commissioners	Legislative & Executive Branch
Polaris Industries, Inc.	Legislative & Executive Branch
Preferred Governmental Insurance Trust	Legislative & Executive Branch
Premier Exhibitions, Inc.	Legislative Branch
ProAssurance Corporation	Legislative & Executive Branch
Professional Security Insurance Company	Legislative & Executive Branch
Professional Staffing-A.B.T.S., Inc.	Legislative & Executive Branch
Progressive Insurance Company	Legislative & Executive Branch
Ranchers and Farmers Insurance Company	Executive Branch
Real Property, Probate & Trust Law Section	Legislative & Executive Branch
RSUI Group, Inc.	Legislative & Executive Branch
Safety Net Hospital Alliance of Florida	Legislative & Executive Branch
Schering Corporation	Legislative & Executive Branch
Service America Enterprise, Inc.	Executive Branch
State Farm Florida Insurance Company	Legislative & Executive Branch
State Farm Mutual Automobile Insurance Companies	Legislative & Executive Branch
Stewart-Marchman-Act Behavioral Healthcare	Legislative & Executive Branch
Surfrider Foundation	Legislative & Executive Branch
Surplus Lines Coalition for Economic Stability, The	Legislative Branch
Tampa Bay Water	Legislative & Executive Branch
Teaching Hospital Council of Florida, Inc.	Legislative & Executive Branch
Time Warner Telecom	Legislative & Executive Branch
UnitedHealth Group	Legislative & Executive Branch
Universal Property and Casualty Insurance Company	Legislative & Executive Branch
USMD/Visionary Medical Systems, Inc.	Legislative & Executive Branch
Volusia County	Legislative & Executive Branch
Westcor Land Title Insurance Company	Legislative & Executive Branch
Willis Re, Inc.	Legislative & Executive Branch

(July 7, 2009)

CONTRACT ADDENDUM

By mutual consent of the parties hereto and consistent with the enactment of revisions to Sections 11.045 and 112.3215 and related provisions of the Florida Statutes during the 2005-B Special Session of the Legislature, the contract with Pennington, Moore, Wilkinson, Bell & Dunbar, P.A. ("Pennington") is revised to identify the services and the compensation for said services in the following categories:

1. Lobbying before the Legislature: The client and Pennington agree that the portion of time and services under the Agreement that is to be devoted to influencing or attempting to influence legislative action or non-action through oral or written communication or attempting to obtain the goodwill of members of the Legislature and employees of the Legislature shall be equal to forty percent (40%) of the total time and services to be provided under this Agreement. The annual compensation to be paid for these services shall be $40,000.00.

2. Lobbying before the Executive Branch: The client and Pennington agree that the portion of time and services under the Agreement that is to be devoted to influencing or attempting to influence an agency with respect to a decision of the agency in the area of policy through oral or written communication or attempting to obtain the goodwill of an agency official or employee shall be equal to twenty percent (20%) of the total time and services to be provided under this Agreement. The annual compensation to be paid for these services shall be $20,000.00.

3. Other Non-Lobbying Services: The client and Pennington agree that the portion of time and services under the Agreement to be devoted to non-lobbying services for the client, its members and employees, including, but not limited to, preparation of CLE educational written and oral offerings and briefings, legal research, attendance at meetings of the client and related travel, communications with judicial and court administration officials and the preparation of written articles, opinions and reports for the client, shall be equal to forty percent (40%) of the total time and services to be provided under this Agreement. The annual compensation to be paid for these services shall be $40,000.00.

Except as modified hereby, the terms and conditions of the contract with Pennington, Moore, Wilkinson, Bell and Dunbar, P.A., are ratified and confirmed to be effective this ____ day of _____, 2009.

PENNINGTON, MOORE, WILKINSON, BELL & DUNBAR, P.A.

By:_____
Peter M. Dunbar

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

By:_____

By:_____

RPPTL 2009-2010 CLE Calendar			
DATE	*EVENT*	*CITY*	*HOTEL*
Oct. 8-9, 2009	*Real Property* Seminar *#1* **RESPA & Regulatory Compliance** (Eleanor Taft)	Tampa/Ft. Laud	Airport Marriott/Airport Hilton
Oct. 23, 2009	*Probate* Seminar *#1* **Guardianship Law** (Alexandra Rieman & Debra Boje)	Tampa	Airport Marriott
Nov. 5-6, 2009	*Real Property* Seminar *#2* **Landlord and Tenant** (Neil Shoter)	Ft. Laud/Tampa	Airport Hilton/Airport Marriott
Nov. 12-13, 2009	*Probate* Seminar *#2* **Trust Law** (John Moran)	Tampa/Ft. Laud	Airport Marriott/Airport Hilton
Dec. 11, 2009	*Probate* Seminar *#3* **Estate Planning** (Rick Gans)	Tampa	Airport Marriott
Jan. 29, 2010	*Real Property* Seminar *#3* **Environmental and Land Use** (Jay Mussman & Nancy Stuparich)	Tampa	Airport Hilton/Airport Marriott
Feb. 11-12, 2010	*Probate* Seminar *#4* **Trust and Estate Symposium** (Bill Hennessey)	Ft. Laud/Tampa	Airport Hilton/Airport Marriott
March 5-6, 2010	*Real Property* Seminar *#4* **Condo Law**	Ft. Laud/Tampa	Airport Hilton/Airport Marriott
March 25-26, 2010	*Probate* Seminar *#5* **Probate Law**	Tampa/Ft. Laud	Airport Marriott/Airport Hilton
April 8-10, 2010	**3rd Annual Construction Law Institute** (Lee Weintraub)	Orlando	Omni Resort Champions Gate
April 8-10, 2010	**Construction Law Certification Review Course**	Orlando	Omni Resort Champions Gate
April 15-16, 2010	*Real Property* Seminar *#5* **Land Trusts** (Katherine Frazier)	Tampa/Ft. Laud	Airport Marriott/Airport Hilton
April 22-23, 2010	*Probate Seminar* **Wills, Trusts & Estates Ceritification Review** (Deborah Russell)	Orlando	Hyatt Regency Airport
April 22-23, 2010	*Real Property Seminar* **Advanced Real Estate Law Certification Review** (Ted Conner)	Orlando	Hyatt Regency Airport
April 29-30, 2010	*Probate* Seminar *#6* **Power of Attorney** (Tami Conetta)	Ft. Laud/Tampa	Airport Hilton/Airport Marriott
May 21, 2010	*Convention Seminar* **Real Estate, Probate and Trust Law**	Tampa	Marriott Waterside
June 17-20, 2010	**RPPTL Attorney/Trust Officer Liaison Conference** (Seth Marmor)	Naples	Ritz Carlton Golf Resort

From: Brian C. Sparks [mailto:bsparks@hwhlaw.com]

Sent: Thursday, June 25, 2009 4:30 PM

To: John Neukamm

Cc: Jay D. Mussman; Ramirez, Stephanie A.; sdiamond@wdclaw.com; Linda Griffin-Keliher; ed.koren@hklaw.com

Subject: RE: FICPA Liaison - Save the Date - Luncheon Invite June 25, 2009

I attended The Florida Bar Business Law Section FICPA Liaison Committee meeting today on behalf of the RPPTL Section at The Florida Bar annual meeting in Orlando. (Sandy, I saw you talking with Laird during the lunch hour, but was on the run to join the Business Law Committee luncheon, so I didn't have a chance to stop and say "hello"--sorry.) The meeting was well-attended by 25-30 people representing the various TFB sections and FICPA committees. The committee is still getting organized, but we covered a range of topics. I'll be happy to give a more complete report at the EC meeting at the Breakers if you wish.

We discussed legislative, CLE/CPE, networking, and other potential opportunities for interactions.

From our perspective, I suggest that we have two (ideally more) liaisons appointed to represent each of the Real Property and Probate Divisions. Ed Koren, Jay Mussman, and Linda Griffin already have expressed an interest.

In addition to plans for upcoming email conversations regarding further organizational and agenda items, the committee tentatively agreed to meet again next at the FICPA Accounting Show in Ft. Lauderdale, which will be held September 23, 24, and 25.

I know that's just a quick rundown. Let me know if you have any questions.

Brian

HILL WARD HENDERSON
ATTORNEYS AT LAW

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Council of Sections
SATURDAY, JUNE 27, 2009
9:30 A.M. - 11:30 A.M.
Annual Meeting – Orlando Marriott World Center

AGENDA

Meeting for the Election of 2009-10 Officers

I. CALL TO ORDER – Allen Grossman, Chair

Appointment of Chair:
Duffy Myrtetus

Officer Nominations for Election:
Kaye Collie - Chair Elect
Damon Kitchen - Secretary / Treasurer

II. ADJOURN ELECTION MEETING

Annual Meeting of Council of Sections

I. CALL TO ORDER – Allen Grossman, Chair

II. INTRODUCTIONS

III. CONSIDERATION OF MINUTES – January Meeting Exhibit A

IV. BUSINESS

A. Lobby Tools and Tips - Paul Hill
B. Section Bylaws: Executive Council Removal Issues - Paul Hill
C. The Florida Bar Mission Statement
D. How the Bar's Change in Major Meetings Impacts Section Meetings

V. FINANCIAL REPORT – Monthly Statement of Financial Operations Exhibit B

VI. BLSE REPORT – Joni Armstrong-Coffey, Chair, Louis B. "Buck" Vocelle, Chair-elect, Rich McCrea, Vice Chair-elect

VII. BOARD REPORT – Laird Lile, Liaison

VIII. SECTION UPDATES

IX. DATE AND PLACE OF NEXT MEETING - General Meeting: September 12, 2009 - Tampa

MINUTES OF THE COUNSEL OF SECTIONS
MIDYEAR MEETING
JANUARY 17, 2009
MIAMI HYATT DOWNTOWN

I. CALL TO ORDER

The Council of Sections of the Florida Bar met on January 17, 2009, in Miami, Florida. Allen Grossman called the meeting to order at approximately 9:10 a.m. Council of Sections representatives in attendance were:

Allen R. Grossman	Council Chair; Health Law
E. Duffy Myrtetus	Chair-Elect; Out of State
Kaye Collie	Council Secretary; City, County and Local
Damon Kitchen	Treasurer; Labor and Employment Law
Joseph Barry Schimmel	Past Chair; Tax Law
R. J. Haughey, III	Young Lawyers Division
Guy Whitesman	Tax Law
Michelle Diffenderfer	Environmental and Land Use Law
Francisco Corrales	International Law
Fran Sheehy	Tax Law
Brian J. Felcoski	Real Property, Probate & Trust Law
Scott Rubin	Family Law
Doug Greenbaum	Family Law
Sheena Benjamin-Wise	Family Law
Tracey McPharlin	Public Interest Law
Keith W. Rizzardi	Government Law
Leonard E. Mondschein	Elder Law
Seann Frazier	Administrative Law
Sheryl Lowenthal	Criminal Law
Raoul G. Cantero, III	Appellate Practice
Richard Chait	Worker's Compensation
Troy A. Kishbaugh	Health Law
Clark R. Jennings	Administrative Law

Representatives of The Florida Bar in attendance were:

John G. White	President
Jesse Diner	President-Elect
Joni Armstrong Coffey	BLSE
Terry L. Hill	Section Administrator/Member Benefits
Yvonne Sherron	Director Professional Development

Exhibit A

II. INTRODUCTIONS

Allen Grossman introduced the various representatives in attendance from The Florida Bar including President Jay White; President-Elect, Jesse Diner; Terry Hill and Yvonne Sherron. Allen also congratulated Mayanne Downs on becoming President-Elect of The Florida Bar.

President Jay White thanked all for being present and for all the hard work done for the Sections and for the Council of Sections. He reported the best news: his beloved Florida Gator football team was victorious over Oklahoma in the BCS National Championship game in Miami. Keith Rizzardi was commended for wearing his Gator tie.

Jesse Diner reported on the summit held on Court funding. Bar leadership is hoping to make progress in the funding area through meetings and conversations with legislators. Jesse asked for assistance from those Sections with lobbyists to lend assistance as this is the Bar's number one priority. Jesse also reported that they were successful during the legislative special session in achieving a 1.25% cut in court funding from the originally proposed 4% cut. The legislative plan is to create a special trust fund to assist in Court funding.

III. CONSIDERATION OF MINUTES

Motion by Duffy Myrtetus and seconded by Fran Sheehy to approve the minutes of the September 13, 2008, Council of Sections Meeting.

IV. BUSINESS

A. Section Membership Ideas

Scott Rubin informed Section members that the Bar does not prorate Section dues. However, if someone joins a Section on April 1, the person will get one quarter plus one year of Section benefits for the cost of an annual membership.

Doug Greenbaum reported on trends in family law. The Family Law Section is recruiting paralegals as affiliate members. Also, follow-up letters were sent to all seminar attendees who are not Family Law Section members. Approximately eighty percent (80%) of seminar attendees are already Section members.

Michelle Diffenderfer reported that the Florida Chamber of Commerce holds two huge conferences per year which draw from the Environmental and Land Use seminars, so the Section created an affiliate membership for developers, engineers, biologists, and consultants. Affiliate members will help the Section sponsor seminars. The Section also created a law school affiliate membership to enable students to access the Section's online treatise.

Justice Cantero discussed membership of the judiciary in the Appellate Law Section. He noted that payment for travel for judges is prohibited unless the judge is the

chair or vice-chair of a committee. The Appellate Law Section pays for travel for judges to attend Section meetings and seminars if the judge is a certain distance away.

Tracey McPharlin of the Public Interest Law Section noted that due to the economic situation, her Section members were also experiencing problems with travel. The Section was seeing less participation at seminars and other Section events.

Sheryl Lowenthal reported that a judge resigned from the Criminal Law Section Executive Council due to the travel budget. Government lawyers were also experiencing problems with obtaining payment for travel.

Fran Sheehy – Tax Section is getting lower government rates from hotels to encourage government lawyer attendees at tax seminars. Justice Cantero asked whether it would be feasible to webcast executive council meetings. Fran stated the fee for webcasts for executive council meetings would probably be prohibitive.

Michele Diffenderfer added that the Environmental and Land Use Law Section had used Google groups.

Yvonne – Bar's computer group can assist Sections with webcast of meetings.

Richard Chait – Workers' Compensation – remarked that phone conferences will reduce personal attendance at meetings. There are pros and cons to holding phone conferences in lieu of meetings.

R. J. Haughey – Young Lawyers Division – stated that if law students cannot find information on a Section's website, they will proceed no further. The new students are technology-minded. Yvonne Sherron stated that you only need the e-mail addresses of law students to have them join as affiliate members.

Terry Hill stressed the need for Sections to retain current membership while seeking new members.

B. Section Membership Trends

Terry referred everyone to Exhibit "B" for a short discussion on the membership trends of each Section.

C. CLE Financial Reports

and

D. Section Financial Reports

Terry referred everyone to Exhibits "C" and "D" to the Agenda. These two topics were discussed together.

If a Section member has a question pertaining to Section finances, Terry Hill asked Council members to request the member to direct the question first to the Section Administrator. If the Section administrator cannot answer the question, it can then be referred to Terry. Terry mentioned that revenues for online seminars have been increasing each month. The Bar splits the revenue 80/20 with the applicable Section. If a seminar is taped or recorded, the Bar intends to have it available online.

Allen Grossman remarked that most Sections were doing better in CLE revenue than they budgeted for, although a few larger Sections are not.

Joe Schimmel stated there is an eight and one-half percent administrative cost to the Section for CLE programs. Terry explained that some Bar costs are separated out and some are included in the eight and one-half percent cost.

Yvonne Sherron reported that webcasting was becoming more and more popular and attracting lawyers who have not attended seminars in person in the past.

E. Strategic Planning Committee

Duffy Myrtetus stated that representatives from the Council of Sections were invited to attend a meeting of the Strategic Planning Committee. Harrison Coomer was the facilitator. Results of the Committee meeting are posted on the Bar's website. Page nine (9) of the Report addressed strategic issues for the Bar. The number one issue this year for the Bar is court funding and its effects on the administration of the judicial system.

The Strategic Planning Committee listed four priorities for the Bar:

- Court funding
- Helping members cope with the effects of recession
- Professionalism
- Bar finances

Lawyer professionalism and Bar finances were also discussed at the meeting. The Bar is making better use of technology to connect with Bar members and with the public.

Jesse Diner discussed the history of the Strategic Planning Committee. Bar leadership was not involved initially in Committee meetings, which resulted in little communication between the Committee and Bar leadership. Each Bar president set his or her own agenda and projects. As a result, the Bar decided to plan on an annual basis to establish Bar goals such that a Bar president's agenda would be consistent with goals of the Strategic Planning Committee. The Council of Sections was later invited to the Strategic Planning Committee.

Jay White thanked Duffy Myrtetus and Allen Grossman for attending this year's meeting and encouraged future participation by future Council of Sections Chairs and Chairs-elect.

F. Section Credit Card Payment Fees

Terry Hill discussed the use of credit cards for payment of Bar and Section dues.

- The good news is that Section dues can now be paid with Master Card, Visa, and (soon) American Express and Discover cards.
- The bad news is there will be a fee charged of $4.95 per transaction.

Allen Grossman suggested council members return and discuss this with their Section members.

G. Bar Leadership Survey

Allen Grossman discussed the link between professionalism and the public perception of lawyers. He referred all to the link on the Bar's website for results of the survey.

H. Young Lawyers Division

R. J. Haughey reported that the American Bar Association has an enormous presence in Florida law schools. The Florida Bar and the Young Lawyers Division does not. He suggested that the Florida Bar and the Young Lawyers Division increase their presence in Florida's law schools.

The Young Lawyers Division has three representatives from each Florida law school, and officers are elected from these representatives. The Law School Division of the Young Lawyers Division can steer these representatives towards various Bar Sections. Some Sections have Young Lawyers Divisions.

The Young Lawyers Division sponsored a "How to Market Yourselves in Today's Economy" program for law students at its meeting on January 15, 2009. The YLD Affiliate Outreach Conference is scheduled for next week at the Hard Rock Hotel in Orlando.

Jesse Diner suggested that providing free memberships to law students in Bar Sections would be a great recruiting tool for Sections

R. J. Haughey stated that the "Practicing with Professionalism" course can be taken by law students up to twelve months before membership in The Florida Bar.

I. By-Laws Amendment

A motion was made for approval of the by-laws amendment. The motion passed unanimously. The amendment combines the two offices of secretary and treasurer into one office of secretary/treasurer. The amendment now goes to the Board of Governors for approval.

J. Florida Bar Mission Statement

Allen Grossman discussed the proposal for a new mission statement for the Bar, which is Exhibit "F" of the Agenda Packet. Discussion ensued as to whether to forward on to the Board of Governors and Section leadership. No vote was taken.

K. Florida Attorneys Saving Homes Project

Brian Folcoski reported that the purpose of the Saving Homes Project was to assist homeowners in danger of losing their homes to foreclosure. The Project has approximately one thousand volunteer attorneys. Six hundred cases have been assigned; 130 have been closed.

Terry Hill stated that Business Law Section members and Young Lawyers Division members are the primary volunteers for the Project, although other Sections are starting to get involved. All assigned cases are pre-foreclosure cases.

Joe Schimmel stated that the Tax Law Section members have noticed that persons going through foreclosures may receive erroneous 1099 forms.

V. FINANCIAL REPORT

Monthly Statement of Financial Operations – Damon Kitchen discussed Exhibit G to the Section agenda. The Council will collect Section dues of $300 in 2009.

VI. BLSE REPORT

Chair Joni Armstrong Coffey provided the report. This is the 25th anniversary of certification for The Florida Bar. There are about 200 members from the Civil Trial and Tax Sections who have retained continuous certification.

Adoption and Education are two new certification areas. The Legal Needs of Children is another area of interest for certification. Joni reported there are some certification areas which are not retaining interest, e.g., antitrust has two few members practicing in this area. BLSE held a discussion on the role of certification at its last conference. Joni welcomed any suggestions on how to support current certification programs or new areas of certification.

Joni reported on a tax pilot program whereby applicants would take the certification test first before undergoing peer review. A discussion ensued on certification timing for results and certification cycles and whether this type of pilot program might work for all Sections.

Joni stated the BLSE is also looking at reciprocity with other national Bar programs.

VIII. SECTION UPDATES

Criminal Law: Sheryl Lowenthal praised the Bar leadership for help with budget cut issues. Representatives from the Section participated in a budget summit due to budget cuts in court funding. The Section experienced a deficit budget in Section finances for the first time. To help with finances, the Section cut funding for its paper newsletter. Sheryl also stated that Section membership was also down.

The PPD (Prosecutor/Public Defender) Program made a $25,000 donation to The Florida Bar Foundation for matching funds for scholarships for the PPD. The Section held two seminars in conjunction with the Bar's mid-year meeting.

Administrative Law: Seann Frazier gave the report. The Administrative Law Section provides assistance to persons with disabilities. The Section also offers volunteers and has held two programs to help train non-lawyers and lawyers to represent folks with disabilities.

Environmental and Land Use Law: Michelle Diffenderfer reported that the Section's annual membership meeting was held in November. The Section is working to get more young lawyers involved as speakers for short seminars.

Rule 4 – 4.2 of the Rules of Professional Conduct is of special interest to the Section. The Rule deals with communications with persons who are represented by counsel. PEC has issued a draft opinion on the issue.

Workers' Compensation: Richard Chait, Chair-elect of Section, gave the report. He discussed the dichotomy of the Section – both attorneys plaintiff and defendant are on the Executive Council. The Section is lobbying for eleven legislative positions. Economic position always affected by Legislature.

Difficult for practitioners to get to First District Court of Appeals, but this is the only appellate court of appeal for workers' compensation cases. The Section invited judges from the First District Court of Appeals to hold oral arguments in Miami in conjunction with the Bar's mid-year meeting. The Section sponsored a dinner for the appellate court judges, clerks and others to aim for more collegiality with the Court.

The 2003 legislative reforms drove many out of Workers'' Compensation area, reducing membership in the Section. The Section saved $5,000.00 by sending its newsletter out electronically. They are also doing Lunch and Learn Seminars.

Appellate Law: Justice Cantero reported that the Section increased its CLE revenues up to $25,000.00 due to web-based seminars. The Section is having more one-hour seminars to increase participation of its members.

Family Law: Scott Rubin reported the family law courts have been affected by budget cuts. Magistrates, counselors, etc., have all been negatively affected. He made the Section lobbyist available to the Bar. The Section's telephonic foreclosure and bankruptcy seminar was well attended. Registered paralegals now have a CLE requirement. The Section holds seminars for paralegals to enable them to receive CLE credits and is marketing seminars to paralegals.

The Section amended its by-laws to allow for affiliate membership and also amended the manual for guardians ad-litem.

International Law: Francisco Corrales noted there was a high growth in Section membership this year, but the Section also took a revenue hit in finances. The American Bar Association's International Law Section is meeting in Miami in October, 2009. The Section continues to work with the Bar on the Vienna and Berlin agreements and is still working on revising Florida's arbitration laws.

Public Interest Law: Tracy McPharlin reported that Section members are working on increasing membership in the Section. The Section is holding monthly CLE Lunch and Learn programs and is involved with the Legal Needs of Children Project.

Health Law: Troy Kishbaugh reported the Section is working on retaining membership and using Survey Monkey to gather ideas from members. Members are seeing seniors being affected by Medicare budget cuts. Hospitals are also being affected. Section members are working on emergency preparedness programs.

Troy noted that Barbara Pankau, a founding member of the Section, passed away recently.

Government Lawyers: Clark Jennings reported that the "Practicing Before The Florida Supreme Court Program" is set for June 10. Watch oral argument.

Electronic CLE – Clark requested more information on how the Section can use and succeed with these types of seminars.

Real Property, Probate & Trust Law: Brian Felcoski reported the Strategic Planning Committee for the Section has developed a five-year plan. The Section continues to have approximately 20 to 30 legislative issues annually. Brian discussed the FLASH program and the Section's Diversity program, which is actively seeking minority members and assistance to minority members.

The Section was active in 2008 in the filing of a number of amicus briefs.

Elder Law: Leonard Mondschein gave the report for the Section. The Section implemented a new glossy format for its newsletter and has developed new sponsorship programs. The Section has one representative on the Safeguard our Seniors Task Force chaired by Alex Sink. The Tax Force is looking to criminalize sales of abusive financial products to seniors, e.g. annuity sales, and increase penalties for the sale of such.

UPL Committee – Lori Holcomb reported that it is difficult to prosecute UPL cases. The Bar must show someone was harmed and must define "what is the practice of law." She has seen an increase in the number of elderly being exploited. In an attempt to counteract, they have created a power point presentation entitled "Exploitation and Abuse of the Elderly" to be used by speakers at rotary clubs and other events to educate the public on Medicaid fraud and other issues.

Tax Law: Fran Sheehy stated that substantive tax procedures will be emphasized in the Section's 2009 seminars. The Section has a pro bono tax court program and assists pro se taxpayers at calendar calls. The Section is also looking to implement young lawyer fellowship programs.

Out of State Division: Duffy Myrtetus gave the report. Letters were sent to all Sections to assist with multi-jurisdictional issues. The Section continues to watch its budget.

City, County and Local Government: Kaye Collie gave the report for the Section. The Commission on Ethics was no longer able to hold its annual Ethics and Sunshine Law Seminar in Tallahassee, so the City, County and Local Government Section took it over. It was a tremendous success. The Section was also forced to raise its dues this year to remain financially afloat.

DATE AND PLACE OF NEXT MEETING

Allen Grossman announced the next meeting of the Council of Sections will be in conjunction with the Annual Meeting on June 27, 2009, in Orlando, Florida.

Chairman Grossman adjourned the meeting at 12:05 p.m.

K. Kaye Collie
Secretary

The Florida Bar

John G. White, III
President

John F. Harkness, Jr.
Executive Director

Jesse H. Diner
President-elect

June 27, 2009

To: Council of Section Delegates

From: Paul F. Hill

Re: Backup for Agenda Items IV-A & IV-B / Your June 27, 2009 Meeting

cc: Terry Hill, Yvonne Sherron

Attached are two documents that supplement the agenda for your June 27, 2009 meeting at The Florida Bar Convention.

IV-A LobbyTools and Tips

An April 1, 2009 Bar *News* clip describes how bills in the Florida Legislature are "tagged" by the Bar's Governmental Affairs staff, and sorted by subject matter or topic into separate compilations, for display on The Florida Bar website. These "bill reports" in various topical categories essentially match the substantive law interests of most Florida Bar sections and committees, and allow for "real time" bill tracking, plus access to bill and amendment text, parliamentary history, analyses, and other helpful legislative data. Every Bar section can use these compilations as their own, free legislative tracking service. The 2009 Bill Reports can be found at this direct link:
http://www.floridabar.org/DIVEXE/GCBillReport.nsf/WDOCS?OpenView

IV –B Section Bylaws / Executive Council Removal Issues

The issue of section members temporarily losing their Bar membership "in good standing" due to non-compliance with CLE requirements, nonpayment of fees, or some minor disciplinary transgression has created some interesting issues with regard to how this may affect the individual's membership, generally, within any Bar section – and, particularly, an individual's membership on a section's executive council. At least two Bar sections have had to deal with this issue within the past two years. A recent e-mail exchange between the chair of the International Law Section and me highlights these matters, and suggests the possible need for section bylaw provisions that might more clearly address such issues.

I look forward to discussing these topics with you further.

P.F.H.

Attachments

April 1, 2009

Track bills on the Bar Web site

The 60-day annual legislative session in Tallahassee can seem a confusing, rushed, and hectic mishmash of activity.

Bills with confusing titles are introduced in committee, amended, sent to another committee, altered again and then — if they're still alive — eventually make it to the floor of their respective chambers. Where, again, they can be rewritten in their entirety (via the ubiquitous strike-all amendment).

Using its Web site and the Lobbytools legislative information service, The Florida Bar is trying to demystify the legislative process for its members and also make it easier to find and track bills of interest.

Bar General Counsel Paul Hill said all filed legislation is reviewed and then sorted according to potential interest to various Bar committees and sections.

To access the information, click on Legislative Activity on the left side menu on the Bar's homepage at www.floridabar.org. On the resulting page, scroll down to "The Current Legislative Session" and then click on the link under it to "2009 Bill Report."

That goes to a page with a list of all sections and committees which might be affected by legislation. Just click on any section or committee to see bills that might fall into its purview.

Hill said if there's any hint a bill would be of interest to a section or committee, it's included.

"It's our effort to imagine who would care [about a bill] with the biggest stretch of the imagination," he said.

Having a bill number is one thing. Getting information is another. Rather than have Bar members take the number and look up the bill on a legislative Web site, each listed bill is connected to a page run by Lobbytools. Clicking on the link takes the member to the page, which provides links to staff analysis of the bill, text of the legislation, proposed amendments, legislative history as it proceeds through committees, and a schedule of when and where it is next set to be heard.

The bills are included only as those that may be of interest to a section or committee and does not mean that section or committee has taken an advocacy position on the bill. Such advocacy must conform to official Bar policies on legislative activity. A different part of the legislative activity section of the site provides a list of all current Bar-wide, section, and committee authorized legislative positions. It also explains the Bar policies that govern legislative activities.

Hill and Elizabeth May, his legislative aide, said the Web service is an expansion of what the Bar has always done to keep sections and committees informed about bills. They also said they are still working to refine it and welcome suggestions.

May can be reached at emay@flabar.org or by calling (850) 561-5662.

IV – A (1)

EXTRACTED / EDITED VERSION

Brock McClane <JBM@mcclanepa.com>
04/19/2009 03:53 PM

To 'Paul Hill' <phill@flabar.org>
cc
Subject International Law Section / Membership Issue

Paul,

One of my Executive Council members was suspended for 30 days in January. We do not have by law language covering that possibility, but clearly, I would think if one is not a member of the Florida Bar, even temporarily, one cannot be a full section member, much less a council member. Once off I would think they need to be voted on again in order to rejoin. The Executive Committee supports my contacting this person just to confirm that the member was suspended and that if so, as of that moment, they are no longer a member of the Executive Council. Any problem with my doing so? We really do not want to even think about suspended Bar members' names being associated with the Council we are trying so hard to make a prestigious post worthy of striving for.

Thanks in advance for your sage input.

Brock
J. Brock McClane

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Paul Hill/The Florida Bar
04/20/2009 03:44 PM

To Brock McClane JBM@mcclanepa.com
cc
Subject Re International Law Section / Membership Issue

Brock:

Interesting query – and we've seen it before (in 2007) from the RPPTL Section…

R. Regulating Fla. Bar 1-3.2(a) defines "members in good standing" (MIGS) as: "only those persons licensed to practice law in Florida who have paid annual membership fees or dues for the current year and who are not retired, resigned, delinquent, inactive, or suspended members."

IV - B (1 – 4)

Most sections condition full membership in their organization upon membership "in good standing" within The Florida Bar.

Your section's bylaws (Article I – Membership / Section 1 – Eligibility) read in pertinent part:

Any member in good standing of The Florida Bar, and any law faculty affiliate under Rule 1-3.9, interested in the purposes of this section, is eligible for membership in the section upon application and payment of the section's dues. Any regular member of the section who ceases to be a member of The Florida Bar, (or ceases law faculty affiliate status) shall no longer be a member of the International Law Section.

Further, in Article III – Officers / Section 2 – Executive Council, you state: "There shall be an executive council composed of not less than 15 or more than 24 members of this section..."

These provisions seem to clearly indicate that a non-MIGS (someone suspended) is out of the section and off the executive council.

However, nothing in Bar rules or standing board policies – or the ILS bylaws – seem to speak directly to the issue of a member's return to good standing and its effect on any section membership terminated as a result of a loss of good standing.

There is nothing in any other section's bylaws regarding this issue either -- yet. At "Big Bar" level, upon the conclusion of most short-term delinquencies or suspensions of less than 90 days, a return to good standing and full privileges to practice are nearly automatic or virtually assured upon petition: see R. Regulating Fla. Bar 1-3.7 & 3-5.1(e).

Notwithstanding the absence of such guidance re section memberships, it appears that Programs and Membership Records staff at Bar Headquarters consider a section member who returns to good standing in the Big Bar to be automatically reinstated to membership in any section from which they may have been "expelled" (assuming current-year section dues have been paid).

Until the RPPTL issue, Bar staff had never had to address the issue of whether such individuals, if they held any section leadership position prior to "expulsion," were also reinstated to such office -- my thought then (and still) is that we would consider this an issue for separate consideration by each affected section.

And, that's the way RPPTL dealt with it: they welcomed the individual back into basic section membership once they were reinstated to MIGS status within the Big Bar, but they otherwise advised the person that he was not reinstated to their executive council. I am told that this proceeded without further difficulty, but that RPPTL made no further adjustments in their bylaws either...

* * *

My earlier guidance to RPPTL in 2007 included these additional observations – some of which touches on your concerns about ILS prestige and how the section is perceived or its members hold themselves out when we have such problems...

1. What all this additionally means is that no section administrator or records custodian seems to be monitoring mid-term variations in section memberships during the course of a given dues year. For purposes of "speaking to" a person's section membership status, this is less problematic in some contexts than in others...

• When knowledgeable Bar staff speak re a member's status after consulting our central computer system, few problems: Once an individual bar member is temporarily suspended, the computer "screen shot" of their personalized bar data is overlaid with "Not Eligible" in red for the duration of such non-MIGS status. When the member's MIGS status is restored, that overlay is lifted and changed to "Eligible." This same screen shot also displays any current section memberships for that member. Knowledgeable staff know that these "eligibility" labels also affect section memberships and, if asked, should properly speak to the issue.

• If various Internet listings by The Florida Bar or a section are separately consulted, there are some problems now, which might increase if you alter the status quo: Currently, no individual member listings displayed on the Bar website are detailed enough to reflect section memberships or other biographical data (this may change if more extensive member listings are authorized by the BoG). The Florida Bar's official website listings of individual members, however, do reflect the same "Eligible/Not Eligible" labels utilized in our central computer system. But, because no staff seem to be actively tending mid-term variations in section memberships during the course of a given dues year, it appears that the separate rosters of section members – also listed on the Big Bar website and found on the many sections' websites – continue to list some short-term "non-MIGS" as "active" section members.

So, if ILS – or any other section – disfavors the notion of Bar staff considering section members who have been temporarily dropped from section membership due to loss of good standing in The Florida Bar as being automatically "reinstated" to section membership upon a return to good standing in the Big Bar (if dues are current), then this issue needs to be further coordinated with other sections and Bar staff. And, I sense that a common approach for all sections would be preferred by staff because of its implications on administration of the Bar's computerized membership records. The Council of Sections would appear to be the appropriate forum for further discussion of all these issues.

My first reaction is that sections – as voluntary collegial entities – might favor the continuation of our current approach because it mirrors the "forgiveness" inherent in the Big Bar's treatment of such individuals and their eligibility to practice law. However, those sections that now have additional subjective criteria for section membership may feel differently – particularly for re-entry. Notwithstanding, such automatic re-entry to section status seems preferable to me because that process is devoid of any subjectivity – which is particularly pertinent because there are no current "sunshine" protections for any section that might want to consider selective exclusion of former section members seeking re-entry upon their automatic return to MIGS status. Any efforts to protect the likely record of such action from public scrutiny would require a statutory fix by way of legislative action (see Art. I, Sec. 24, Fla. Const.) and might be difficult to achieve...

I am not as concerned, however, about a section erecting reasonable hurdles or barriers to a former member's return to any former section leadership office they also held... That restriction should be considered, in my view – and RPPTL seemed to agree. It's also how the Big Bar deals with people on Florida Bar committees who temporarily fall from grace (see #2).

2. Standing Board Policies of The Florida Bar address the issue of membership within organic committees of the Big Bar and the lack of "good standing." In that context, a loss of good standing does not necessarily result in any automatic termination of committee membership.

5.20 Committee Structure, Membership and Terms.
***
(b) Membership. *** In the event a lawyer committee member is no longer a member in good standing of The Florida Bar, or any committee member fails to demonstrate a sufficient interest in the work of the committee, the president of The Florida Bar, upon consultation with the committee chair, may remove and replace said committee member at any time during the member's term. ***

3. I additionally note that some sections have affiliate membership categories defined broadly enough to encompass a Florida Bar member who is not in good standing – which may present a compromise opportunity in some situations, although few sections allow affiliates to hold significant leadership positions within the group. ILS bylaws, indeed, disallow such leadership roles for its affiliates – and, ya'll are specific as to the types of individuals you'll admit in this category. Right now, ILS bylaws would not seemingly allow for a former MIGS to be an affiliate...

OK? Hope all this helps.

Paul F. Hill
General Counsel
The Florida Bar
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□

MISSION STATEMENT OF THE FLORIDA BAR

Inculcate in its members the principles of duty and service to the public, to improve the administration of justice, and to advance the science of jurisprudence.

HISTORY

This Mission Statement was adopted by The Florida Bar in 1949-50 when it became a unified bar. It has apparently only been amended once (to change "purposes of inculcating in its members" to "inculcate in its members") and that was not in the last few decades. During each of the last two annual Strategic Planning Committee Workshops there have been extensive discussions regarding amending the Mission Statement, but the Strategic Planning Committee has each time stopped short of making a recommendation for change.

As a representative of the Council of Sections, I have had the opportunity to attend and participate in each of the last two Strategic Planning Committee Workshops. Although each of these workshops included extensive discussion and general agreement that The Florida Bar would be well served to amend the current Mission Statement, each time the Workshop stopped short of actually recommending any change. At the last Workshop, I presented a proposal for modification of the Mission Statement that was extensively discussed, but once again the Workshop failed to make any actual recommendation.

I believe that the Mission Statement needs to be reviewed and revised to reflect a more accurate and more understandable description of the intended mission of The Florida Bar. Therefore, I am proposing that the Council of Sections adopt a resolution to present to the Board of Governors for amendment of The Florida Bar Mission Statement.

PROPOSAL FOR NEW MISSION STATEMENT

To serve the public ~~good~~ by instilling ~~inspiring and encouraging~~ in its members the principles of professionalism, duty and service; to support and improve the administration of justice; and to provide resources and assistance to its members for the purpose of advancing ~~the science of~~ jurisprudence and the practice of law.

I believe that this statement provides a more expansive and clearly stated explanation of the appropriate mission of The Florida Bar with emphasis on the specific ideals of serving the public good, supporting the administration of justice and promoting professionalism in the practice of law by providing resources to its membership. It is my hope that the Council of Sections after consideration of this matter will vote to recommend to the Board of Governors that (1) the current Mission Statement be amended and (2) the adoption of this or some other version of a new Mission Statement.

COUNCIL OF SECTIONS REPORT

June 27, 2009

John B. Neukamm, Chair-Elect
REAL PROPERTY, PROBATE AND TRUST LAW SECTION

Good morning! My name is John Neukamm, and I am thrilled that, in four short days, I will become Chair of the Real Property, Probate & Trust Law Section. Our Section has grown steadily since its establishment nearly 55 years ago and has increased by approximately 25% during the most recent five year period to nearly 10,000 lawyers.

We recognize that our large size presents both significant opportunities and unique challenges, so, after input provided by a diverse group of Section leaders over the course of our annual retreat last April, our Executive Council adopted a comprehensive five year strategic plan at our annual Convention last month. Our 21 page plan addresses goals with respect to governance of our Section, membership, legislative and advocacy efforts, communication, CLE and finances through clearly defined objectives, targeted deadlines and assignments of responsibility for attaining the various objectives to specific officers or committees. For example, our goals with respect to Section membership include the following:

- **Goal 1: Increase the membership of the RPPTL Section**
- **Goal 2: Provide better orientation for new RPPTL Executive Council members**
- **Goal 3: Increase the diversity of the RPPTL Section**
- **Goal 4: Support and facilitate the development of RPPTL student organizations at Florida law schools**

We are also involved in a significant revision of our Bylaws which were drafted with a much smaller and less active organizational structure as a model. We hope to adopt those new Bylaws during this calendar year.

We are extremely fortunate to have a well-defined organizational structure and a very long leadership track; in fact, I have served as a Section officer since 2002 and as a member of its Executive Council since 1993, and 23 of our past chairs participated in our Long Range Planning Committee meeting last January to nominate this year's slate of officers. With 18 real property division committees, 15 probate law committees, 20 general standing committees and 23 liaisons with other Sections or organizations and several representatives from each judicial circuit, it is easy to understand why our Executive Council consists of more than 250 actively involved Section leaders. Several committees, such as probate law, condominium law, trust law and construction law, have 50 - 120 members in attendance at each meeting, and many of those committee members come from outside our Executive Council. Our stable structure and the broad based participation in our committees allow us to effectively deliver the core functions of the Section: providing high quality continuing legal education, vigorous judicial and legislative advocacy and significant membership development and service. Our Executive Council meets five times a year; four times within the

State of Florida, and once outside of the State. In fact, I just returned from a site visit to Maui, where we will be meeting next March, and I'm wearing a T-shirt from our last out-of-state meeting in the Galapagos Islands underneath this shirt *(reveal Galapagos iguanas' "We're being invaded by RPPTLs" T-shirt).*

Our CLE programs have always been the heart of the Section. We produced 14 continuing legal education programs last year, including three certification programs, and we expect to attract 550 attendees to our annual Legislative and Case Law Update this year. We are pleased that our impressive slate of speakers this year includes Chief Justice Peggy Quince, and last year's Legislative Update was one of the first CLE programs to utilize a live web broadcast.

The RPPTL Section is seriously involved in legislative advocacy efforts. In many instances, we spend several years on a single project, producing detailed white papers and slowly building consensus. We have an enormously hardworking and effective lobbying team and we are extremely appreciative of the help that Paul Hill and his staff provide to us, guiding us through this process. Through the efforts of our substantive law committees, our Legislative Committee, which was ably led by Burt Bruton over the last two years, our lobbyists, led by Pete Dunbar and Bar staff, seven of eight Section initiatives passed and all nine bills opposed by the Section failed to pass. In addition, our Section provided substantial assistance with respect to the "Big Bar's" court funding initiative and provided significant technical assistance to the Legislature with respect to a number of additional bills that passed. Section legislative initiatives included bills re-writing the lis pendens statute and addressing trust administration, condominium law, estate planning, construction defects and documentary stamp taxes.

We have always approached our judicial advocacy efforts carefully, but, this last year, quite frankly, we found ourselves swamped. Last December, the Eleventh Circuit Court of Appeals issued its decision in the *Pugliese v. Pukka* case involving the interpretation of the Interstate Land Sales Act in a manner that was consistent with the position advocated by the Section. Early this year, we received three other amicus requests from the Third DCA. I am pleased to report that our Amicus Committee Co-Chairs, Bob Goldman and John Little, have prevailed upon one of their law school classmates to lend a hand with respect to real estate issues. Justice Ken Bell mentioned to some of us that, when he retired from the Florida Supreme Court, he would like to get more involved in the Section, and we have taken him up on his offer!

We have worked very hard to strengthen communications with our members by expanding *ActionLine*. What used to be a mere newsletter when I served as editor from 1995 – 1999 is now is an impressive publication with up to date information and analyses of current legal issues, trends and best practices. It is circulated both by mail and e-mail. We have also committed significant Section financial resources to re-building our website, engaging a webmaster and improving our list serves. All of our committees communicate almost exclusively through the website and their individual list serves. Now all committee agendas, minutes and reports are available on the website to any RPPTL member and there is some material, such as the Uniform Title Standards, which is available to any visitor to the site. This coming year we hope to collect, post, and most importantly, index, legislative request forms and legislative "white papers" from the last decade.

We are continuing a vigorous diversity effort. We have devoted significant energy and resources to attract and maintain minority members to the Section. We initially focused on the establishment of a series of informal "how to" seminars which were actually outside of the Bar's CLE program. These seminars proved to be extremely effective and brought us in contact with a significant number of minority lawyers who either were practicing casually in one of our substantive areas, or who wanted to explore developing one of our practice areas. We have continued our outreach efforts and are looking at other types of programs in order to maintain this momentum. The Diversity Committee chairs have also been in contact with several disabilities groups as we hope to expand our program to include attorneys with disabilities.

As a compliment to our Diversity Program, and as an effort to attract younger attorneys to the Executive Council, we instituted a Fellowship Program, which is patterned on the ABA model. A stipend is provided to our Fellows to defray the cost of attending Executive Council meetings. Our first class of Fellows was chosen last summer from 90 outstanding applicants, and we now have four fellows working with the committees of the Section and attending Executive Council meetings. Our fellows are from diverse backgrounds and bring with them an enormous amount of enthusiasm and energy.

This report would not be complete without highlighting the extraordinary efforts of our Pro Bono Committee and its involvement with Florida Attorneys Savings Homes project. Adele Stone, Drew O'Malley and Peggy Rolando have spent countless hours working with Florida Legal Services – recruiting volunteers to take foreclosure prevention cases. As I am sure that you are aware, the Bar intake process has produced an avalanche of requests for help. Despite lots of organization and arm twisting, the demand for help has exceeded the supply. A recent *Florida Bar News* article highlighted several of the successful outcomes arising from this program. We would appreciate assistance from your Sections to help attract volunteers for this worthwhile program.

I will conclude by noting that we are extremely appreciative of the support that we receive from The Florida Bar staff. Our new Section administrator, Liz Smith, has proven to be enthusiastic, competent and diligent, and she has been ably trained by Yvonne Sherron, who has been a lifesaver to us over the last year. We were saddened to lose Terry Hill as he moved on to greater opportunities within the Bar, but he and other Bar staff, including Paul Hill and Craig Shaw, have been particularly helpful. Without the assistance of Bar staff, Section leaders like me, who actually have to occasionally practice law, could not possibly accomplish the significant work of our Section, so we are extremely grateful for their positive attitude and willingness to devote the time necessary to allow us to accomplish our goals.

Thank you for this opportunity to report on our Section's progress. We look forward to continued involvement with this Council over the next year.

736.0505 Creditors' claims against settlor.--

(1) Whether or not the terms of a trust contain a spendthrift provision, the following rules apply:

(a) The property of a revocable trust is subject to the claims of the settlor's creditors during the settlor's lifetime to the extent the property would not otherwise be exempt by law if owned directly by the settlor.

(b) With respect to an irrevocable trust which does not contain a spendthrift provision, a creditor or assignee of the settlor may reach the maximum amount that can be distributed to or for the settlor's benefit. If a trust has more than one settlor, the amount the creditor or assignee of a particular settlor may reach may not exceed the settlor's interest in the portion of the trust attributable to that settlor's contribution.

(c) Notwithstanding the provisions of paragraph (b), the assets of an irrevocable trust may not be subject to the claims of an existing or subsequent creditor or assignee of the settlor, in whole or in part, solely because of the existence of a discretionary power granted to the trustee by the terms of the trust, or any other provision of law, to pay directly to the taxing authorities or to reimburse the settlor for any tax on trust income or principal which is payable by the settlor under the law imposing such tax.

(d) With respect to an irrevocable trust which contains a spendthrift provision, a creditor or assignee of the settlor may not satisfy a claim, or liability on a claim, in either law or equity, out of the assets the settlor transfers to or the settlor's beneficial interest in the trust.

1. This paragraph shall not apply to assets transferred to the trust if:

(A) the claim results in a judgment, order, decree, or other legally enforceable decision or ruling arising from a judicial, arbitration, mediation, or administrative proceeding commenced by a creditor of the settlor who is a creditor of the settlor before the settlor's transfer to the trust of the assets which are the subject of the claim and the claim is made within the later of (i) four years after such transfer is made, (ii) the expiration of the statute of limitation applicable to the underlying claim, or (iii) one year after such transfer is or reasonably could have been discovered by the creditor if the creditor can demonstrate by clear and convincing evidence that the creditor asserted a specific claim against the settlor before the transfer;

(B) the settlor's transfer into trust is made with actual intent to hinder, delay, or defraud that creditor;

(C) the trust provides that the settlor may revoke, terminate or withdraw all or part of the trust without the consent of a person who has a substantial beneficial interest in the trust and the interest would be adversely affected by the exercise of the settlor's power to revoke or terminate all or part of the trust;

(D) the trust requires that all or part of the trust's income or principal, or both, must be distributed to the settlor as beneficiary;

(E) the claim is for a payment excepted under s.736.0503;

(F) the transfer is made when the settlor is insolvent or the transfer renders the settlor insolvent; or

(G) the claim is for recovery of public assistance received by the settlor under s.409.9101.

2. This paragraph shall also not apply to assets transferred to the trust unless the settlor has signed a verified document which is substantially accurate and complete as to all material representations and is delivered to the qualified trustee before or at the time of the transfer of assets to the trust, which must state:

(A) the settlor has full right, title, and authority to transfer the assets to the trust;

(B) the transfer of the assets to the trust will not render the settlor insolvent;

(C) the settlor does not intend to defraud an existing creditor by transferring the assets to the trust;

(D) there is no pending or threatened court actions against the settlor, except for those court actions identified by the settlor on an attachment to the verified document;

(E) the settlor is not involved in any governmental administrative proceedings relating to assets the settlor transfers to the trust or the settlor's beneficial interest in such assets, except for those administrative proceedings identified by the settlor on an attachment to the affidavit;

(F) at the time of the transfer of the assets to the trust, the settlor is not currently in default by more than 30 days of a child support obligation imposed by order of a court of competent jurisdiction;

(G) the settlor does not contemplate filing for relief under the provisions of 11 U.S.C. (Bankruptcy Code); and

(H) the assets being transferred to the trust were not derived from unlawful activities.

3. This paragraph shall also not apply to assets transferred to the trust with respect to a creditor:

(A) to whom the settlor gave a written representation containing such assets to the extent that the existence and value of such assets were reasonably relied upon by the creditor to make any credit decision, or

(B) that were transferred in breach of any written agreement, covenant or security interest between the settlor and that creditor.

4. This paragraph shall also not apply to assets transferred to the trust unless the trust instrument appoints a qualified trustee for the assets the settlor transfers to the trust. A power to distribute the income or invade the principal of such trust to or for the benefit of the settlor in the exercise of a trustee's discretion is exercisable only upon consent of the qualified trustee.

5. For purposes of this paragraph:

(A) the term "insolvent" means that the sum of the settlor's debts is greater than all of the settlor's assets at fair valuation and that the settlor is generally not paying his or her debts as they come due.

(B) the term "assets" shall have the meaning given the term in s. 726.102(2).

(C) the term "qualified trustee" refers to a bank or trust company described in c.658 authorized to engage in trust businesses. Any trustee who is not a qualified trustee shall be an administrative trustee.

(2) For purposes of this section:

(a) During the period the power may be exercised, the holder of a power of withdrawal is treated in the same manner as the settlor of a revocable trust to the extent of the property subject to the power.

(b) Upon the lapse, release, or waiver of the power, the holder is treated as the settlor of the trust only to the extent the value of the property affected by the lapse, release, or waiver exceeds the greater of the amount specified in:

1. Section 2041(b)(2) or s. 2514(e); or
2. Section 2503(b),

of the Internal Revenue Code of 1986, as amended.

(3) For the purposes of this section, the term "revoke, terminate or withdraw" does not include:

(a) A power to veto a distribution from the trust;

(b) A power that is not a general power of appointment as described in s.736.0103(7);

(c) Unless the trust instrument refers specifically to this subsection and provides expressly to the contrary, the right to receive a distribution of income, principal, or both in the discretion of another person only upon the consent of a trustee who is not an adverse party as defined in s.672(a) of the Internal Revenue Code or who is not related or subordinate to the settlor as determined in s.672(c) of the Internal Revenue Code;

(d) A right to receive a distribution of principal subject to an ascertainable standard set forth in the trust instrument;

(e) The power to appoint or remove trust advisors, designated representatives or other agents who are not related or subordinate to the settlor as determined in s.672(c) of the Internal Revenue Code who can remove and appoint a qualified trustee;

(f) A right to receive income or principal from a charitable remainder unitrust or charitable remainder annuity trust as defined in s.664 of the Internal Revenue Code; or

(g) A right to use real property held in a qualified personal residence trust described in s.2702(c) of the Internal Revenue Code.

(4) The satisfaction of a claim under this paragraph is limited to that part of the trust or transfer to which it applies.

(5) If a trust instrument has a spendthrift provision as provided under s.736.0502, a creditor of the settlor has only such rights as are provided in this paragraph, and no creditor shall have any cause of action or claim for relief against a trustee, trust advisor, designated representative, attorney, auditor or other agent or assistant involved in the counseling, drafting, preparation, execution, or funding of the trust.

(6) In any action brought under this paragraph, the burden of proof shall be upon the creditor by clear and convincing evidence.

(7) For purposes of this section, the transfer shall be considered to have been made on the date the asset was originally transferred to the trust.

(8) The courts of this state shall have exclusive jurisdiction over any action brought under this section.

(9) If a trust or an asset transfer to a trust is voided or set aside under this paragraph, the trust or asset transfer shall be voided or set aside only to the extent necessary to satisfy:

(a) The settlor's debt to the creditor or other person at whose instance the trust or asset transfer is voided or set aside; and

(b) Such other relief allowed by law and awarded by the court.

(10) If a trust or an asset transfer to a trust is voided or set aside under this paragraph and the court determines that the trustee did not act in bad faith in accepting or administering the asset that is the subject of the trust:

(a) Subject to any prior perfected security interest, the trustee has a first and paramount lien against the asset that is the subject of the trust in an amount equal to the entire cost properly incurred by the trustee in a defense of the action or proceedings to void or set aside the trust or the asset transfer, including attorney fees;

(b) The trust or asset transfer that is set aside is subject to the proper fees, costs, preexisting rights, claims, and interest of the trustee and any predecessor trustee if the trustee and predecessor trustee did not act in bad faith, and

(c) Any beneficiary, including the settlor, may retain a distribution made by exercising a trust power or discretion vested in the trustee of the trust, if the power or discretion was properly exercised before the commencement of the action or proceeding to void or set aside the trust or asset transfer.

LEGISLATIVE POSITION REQUEST FORM

GOVERNMENTAL AFFAIRS OFFICE

Date Form Received _____

GENERAL INFORMATION

Submitted By Jerome L. Wolf, Chair, Asset Preservation Committee of the Probate Division of the Real Property Probate & Trust Law Section

Address
Duane Morris LLP
2700 North Military Trail, Suite 300
Boca Raton, FL 33431-1808
Telephone: (561) 962-2111

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

CONTACTS

Board & Legislation Committee Appearance

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Michael J. Gelfand, Gelfand & Arpe, P.A., Regions Financial Tower, Suite 1220, 1555 Palm Beach Lakes Blvd., West Palm Beach, FL 33401 (561) 655-6224
Peter M. Dunbar, Pennington, Moore, Wilkinson, Bell & Dunbar, P.O. Box 10095, Tallahassee, Florida 32302-2095, Telephone (850) 222-3533
Martha J. Edenfield, Pennington, Moore, Wilkinson, Bell & Dunbar, P.O. Box 10095, Tallahassee FL 32302-2095, Telephone (850) 222-3533
(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 X **Support** Oppose Technical Assistance Other _____

Proposed Wording of Position for Official Publication:

Support amendment of F.S. § 736.0505 to add provisions to extend spendthrift protection to self-settled trusts created under Florida law.

DRAFT
DATED July 6, 2009

Reasons For Proposed Advocacy:

[TO BE COMPLETED]

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)

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

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

Florida Bankers Association
(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.

WHITE PAPER

DRAFT #4
6/19/09

FLORIDA SELF-SETTLED SPENDTHRIFT TRUSTS

I. SUMMARY

This legislation would extend spendthrift protection to self-settled trusts created under Florida law. The bill would have a positive fiscal impact on state funds.

II. CURRENT SITUATION

A. SPENDTHRIFT TRUSTS - GENERALLY

1. The beneficiary of a trust is the real party in interest as to trust property and is the de jure owner of the property to the extent of his or her interest. Although the legal title to trust property is held in the name of the trustee, the trustee is merely an instrument for administering the trust and its property for the benefit of the beneficiary. Thus, the beneficiary of a trust owns an equitable interest that can be assigned or transferred in the same way as any other property interest.

2. Nonetheless, if, the settlor wants to preserve and protect that the beneficiary's interest from the beneficiary's creditors and obligations, can the settlor impose restrictions on the interest to preclude voluntary or involuntary assignment of the trust assets and thus prevent the beneficiary's creditors from reaching the trust and its property?

3. Once the beneficiary receives a distribution from the trust, the beneficiary is free to use the distribution as he or she chooses, and it becomes an asset, like the beneficiary's other assets, subject to the claims of his creditors. An expression of intent by the settlor concerning the use and purpose of the distribution after it has left the trust and arrived in the beneficiary's hands is precatory at best and cannot protect the beneficiary. Upon receipt of the distribution, the beneficiary has a legal interest in the proceeds, no longer simply an equitable one.

4. Until recently, the authority for acceptance of "spendthrift" trusts was found in the common law concept that maximum respect should be given to the settlor's objectives and intentions. In Florida, the general rule is that the interest of a beneficiary under a trust, including the right to income from the corpus of the trust, is alienable by the beneficiary. *Goldman v. Mandell*, 403 So. 2d 511 (Fla. 5th DCA 1981). Additionally, the interest of a beneficiary is liable to be taken in satisfaction of his or her debts and obligations. *Bradshaw* v. *American Advent Christian Home & Orphanage,* 145 Fla. 270 (Fla. 1941) (when trust provides income is to be applied for use of beneficiary, equity may direct application of that income to payment of beneficiary's debt); *Croom v. Ocala Plumbing & Electric Co.,* 62 Fla. 460 (Fla.

1911) (when one has interest in property that she may alienate or assign, that interest, whether legal or equitable, is liable for payment of her debts); *Preston v. City National Bank of Miami,* 294 So. 2d 11 (Fla. 3d DCA 1974).

5. Trust assets may be protected against dissipation by a beneficiary or levy by creditors through creation of a spendthrift or similar protective trust. *Waterbury* v. *Munn,* 159 Fla. 754 (Fla. 1947). Even before the enactment of Part V *of F.S.* Chapter 736, effective July 1, 2007 and discussed below, spendthrift trusts were enforced and upheld as valid in Florida. *Waterbury* (supra). Trust provisions vesting discretion in the trustee to determine the time, amount, or manner of payments to the beneficiary are also recognized as valid. *Philp v. Trainor,* 100 So. 2d 181 (Fla. 2d DCA 1958). A spendthrift provision restricts a beneficiary from voluntarily or involuntarily alienating his interest in a trust, which includes access to or attachment through the claims of his creditors. 55A Fla. Jur. 2d *Trusts* § 78. A spendthrift trust is created to provide a fund for the maintenance of another while securing such fund against the beneficiary's own improvidence or incapacity (*i.e.,* a beneficiary's inability to protect himself or herself). *Id.* "A spendthrift trust operates through the mechanism of a direct restraint against voluntary or involuntary alienation of the beneficial interest in the trust." 55A Fla. Jur. 2d *Trusts* § 79.

B. SELF-SETTLED SPENDTHRIFT TRUSTS - GENERALLY

1. Under current Florida law, when a settlor creates a spendthrift or discretionary trust for his or her own benefit, the settlor's creditors may still be able to reach the assets of the trust. F.S. § 736.0505. The Restatement (Second) of Trusts § 156(2), provides: "Where a person creates for his own benefit a trust for support or a discretionary trust, his transferee or creditors can reach the maximum amount which the trustee under the terms of the trust could pay to him or apply for his benefit."

2. Florida courts adopted the same definition of a spendthrift trust ascribing to these same policy considerations. For example, in *Waterbury* (supra), the court stated that a "spendthrift trust is one that is created with the 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." (Emphasis added)

3. Similarly, the court in *Preston* (supra) recognized that a spendthrift trust is

> [u]sually conceived by parent, or relatives, or friends concerned over the irresponsible propensities of a loved one, or their inability to cope with the problems of earning a livelihood and to prevent them becoming public charges, these documents have been long recognized by the courts. *After the benefits of such a trust pass to the possession of a beneficiary, the creator's power to protect the beneficiary against himself or herself is gone.*
>
> (Emphasis added).

4. Historically, a settler could not create a self-settled spendthrift trust that would protect assets from the claims of her existing and subsequent creditors.

a. The principal objections to recognizing the validity of self-settled spendthrift trusts are "you should keep your promises and pay your debts because it is the right thing to do" and "there is something disturbing about a country that would allow debtors to leave their debts unpaid and still enjoy an extravagant lifestyle." Karin E Boxx, *Grey's Ghost - A Conversation About the Onshore Trust,* 85 Iowa L. Rev., 1195, 1259 (May, 2000).

b. The common law presumed self-settled spendthrift trusts were conceived with a fraudulent intent.

> Creditors have a right that their debtor shall pay their claims before he makes provision for his own support or comfort. Both existing and future creditors may be misled into believing that their debtor's financial situation is sound, because he continues to enjoy the benefits of his property, and perhaps is in actual possession of it, although that property has been conveyed by a spendthrift trust instrument to be held for the debtor. Generally there will be actual fraud, but it may be difficult to prove, and so the law strikes down the transaction as presumed to be fraudulent.
>
> George G. Bogert & George T. Bogert, The Law of Trusts and Trustees (rev. 2d ed. 1992)

C. FLORIDA TRUST CODE

1. Effective July 1, 2007, under F.S. § 736.0501, a court may authorize a creditor to reach a beneficiary's interest in a trust by attachment of present or future distributions to the extent the beneficiary's interest is not subject to a "spendthrift provision."

a. A spendthrift provision is valid only if the provision restrains both "voluntary and involuntary transfer" of a beneficiary's interest. (F.S. § 736.0502(1))

b. A term of a trust providing that the interest of a beneficiary is held "subject to a spendthrift trust, or words of similar import," is sufficient to restrain both voluntary and involuntary transfer of the beneficiary's interest. (F.S. § 736.0502(2))

c. A beneficiary may not transfer an interest in a trust in violation of a valid spendthrift provision and, except as otherwise provided in, a creditor or assignee of the beneficiary may not reach the interest or a distribution by the trustee before receipt of the interest or distribution by the beneficiary. (F.S. § 736.0502(3))

2. Thus, when the terms of a trust express that the interest of the beneficiary is held "subject to a spendthrift provision," or words "of similar import," and are sufficient to restrain both a voluntary or involuntary transfer of a beneficiary's interest, a creditor or assignee of the beneficiary may not reach the interest or a distribution "before receipt by the beneficiary."

3. F.S. § 736.0505 clearly establishes the legal principle in Florida that self-settled spendthrift trusts will be given no legal recognition in this state. Whether or not the terms of a trust contain a spendthrift provision, the following statutory rules apply:

a. The property of a revocable trust is subject to the claims of the settlor's creditors to the same extent the property would be exposed to such claims if owned directly by the settlor.

b. Even in cases of irrevocable trusts, holders of certain types of powers will be treated in the same manner as settlors of a revocable trust to the extent the trust property is subject to such powers.

(i) One example is an unlimited power of withdrawal, regardless of by whom held. The property subject to the power is therefore subject to the claims of the holder's creditors as property described in F.S. § 736.0505(l)(b).

(ii) Similarly, to the extent a beneficiary fails to exercise a power of withdrawal over the greater of $5,000 or 5% of the value of the property over which the power is exercisable, the beneficiary is deemed to have made a gift upon the lapse of that power.

(1) This lapse of the right to exercise a power in excess of the "5 and 5" limitations under *IRC* § 2041 (b)(2) is often called a "hanging power," which is used by settlors of irrevocable life insurance trusts to qualify premium payments as gifts of a present interest in order to qualify for the annual gift tax exclusion under *IRC* § 2503(b).

(2) Because the failure to exercise, or lapse of, the power is deemed a gift to an irrevocable trust in which the beneficiary maintains an interest (in other words, a self-settled spendthrift trust), F.S. § 736.0505(2)(b) treats the property subject to the power as attachable by the beneficiary's creditors.

c. With respect to an irrevocable trust, a creditor may reach the principal amount that can be distributed to or for the settlor's benefit.

(i) However, if the trustee has a power, either under the terms of the trust or any other provision of law, to pay directly to a taxing authority, or to reimburse the settlor for, any tax on trust income or principal that is payable by the settlor under the law imposing such tax, such provision will not cause the trust to be deemed a self-settled spendthrift trust. F.S. § 736.0505(l)(c).

(ii) This statutory exception to the self-settled spendthrift trust is noteworthy because, in its absence, Florida taxpayers were excluded from the ability to incorporate a certain "estate freeze" strategy into their family estate plan known as a "sale to an intentionally defective grantor trust."

(iii) One of the favorable elements of the strategy, however, resulted from the issuance of Rev.Rul. 2004-64, 2004-2 C.B. 7, which authorized the incorporation of a provision into an irrevocable trust granting the trustee discretion to reimburse

the settlor for income taxes incurred in the transaction to ameliorate the tax consequences of the strategy.

(iv) F.S. § 736.0505(l)(c) specifically excepts such provisions out of the consequences of a self-settled spendthrift trust, and directs that such a provision reserving this specified right to the settlor will not subject the assets of the trust to the claims of an existing or subsequent creditor of the settlor.

III. EFFECT OF PROPOSED CHANGES

A. WHY FLORIDA SHOULD EXTEND SPENDTHRIFT PROTECTION TO SELF-SETTLED TRUSTS

1. There are valid, substantive reasons for recognizing self-settled spendthrift trusts.

2. Florida already extends creditor protection to numerous assets owned by individuals. Those assets include:

(i) Homestead (Art X, Sec 4, Florida Constitution, F.S. § 222.01)

(ii) Life Insurance (F.S. § 222.13)

(iii) Annuities (F.S. § 222.14)

(iv) Qualified Deferred Compensation Plans (F.S. § 222.21(2)(a))

(v) Individual Retirement Accounts

(vi) IRC § 529 College Savings and Prepaid Tuition Plans

(vii) Tenancy by the Entirety property (F.S. § 726.102(2)(c))

(viii) Limited Liability Company (F.S. § 608.433)

(ix) Limited Liability Limited Partnership (F.S. § 620.1703)

3. Creditor access to assets in a self-settled spendthrift trust impairs the rights of trust beneficiaries other than the settlor.

(a) Such a position assures the creditor always wins.

(b) Within the context of our LLC and LLLP statutes, a creditor or a member/partner is limited to a charging lien in order to provide protection to nondebtor members or partners. In fact, in a single member entity, there is no charging lien protection since there are no no-debtor members to protect (*In re Albright*, No. 01-11367, Colo. Banker. April 4, 2003). Is there any logical reason why Florida law should protect a non-debtor business associate but not similarly provide protection for a non-debtor trust beneficiary?

4. Creditor access to the assets of a self-settled spendthrift trust fails to distinguish between when the settlor retains and does not retain control over the assets. Trustees of a self-settled spendthrift trust are fiduciaries and have a duty to exercise their judgment independent of the wishes or demands of the settlor, and must give due consideration to the competing needs and desires of the trust's other beneficiaries. Indeed, a settlor who transfers assets to a self-settled spendthrift trust gives up control of the assets and cannot compel the trustee to make distributions merely as the settlor desires.

5. Settlors who accumulate wealth as successful entrepreneurs, professionals, or investors are unable to protect their earned assets through self-settled spendthrift trusts from creditors' claims; whereas beneficiaries who may never have worked a day in their lives may have their entire inheritance protected from creditors if their ancestors created spendthrift trusts for their benefit.

6. Self-settled spendthrift trusts provide significant federal tax planning opportunities for settlors.

(a) An individual may wish to transfer all or part of his assets, as part of a pre-mortem estate plan, or for charitable purposes. He may be more inclined to make these transfers if he could retain certain benefits – and, the federal government, clearly a readily foreseeable creditor, has authorized planning strategies such as a charitable lead trust, a charitable remainder trust, a grantor retained interest trust, and a qualified personal residence trust that do just that, but none of which would be protected from the claims of the settlor's creditors other than the federal government.

(b) Similarly, in states such as Florida, if a settlor makes a taxable transfer of assets during his lifetime to an irrevocable trust, he may remain liable for the taxes on the income earned by the assets owned by the trust, but, without specific provisions, may not be not entitled to income from that trust with which to pay the tax without exposing the assets of the trust to his creditors.

7. The current national trust law environment is one in which, "states are competing for a piece of the booming personal-trust business, and that's encouraging wealthy individuals interested in passing assets to their heirs to shop around for the most favorable trust laws." (Wall Street Journal, June 22, 2006, p. D1).

8. Florida residents do have self-settled spendthrift trust protections alternatives to Florida's prohibition: off-shore and foreign jurisdictions, states that have incorporated self-settled spendthrift trusts into their law, to protect assets from creditors. When Florida resident settlors set up these trusts outside of Florida, Florida bank and trust companies lose the opportunity to charge trustee fees on those trusts consequently do not pay Florida corporate income tax on the trustee fees paid on such trusts outside of Florida.

IV. SECTION ANALYSIS

1. Section 736.0505(1)(d)

a. Current Situation: **[TO BE COMPLETED]**

b. Effect of Proposed Changes: **[TO BE COMPLETED]**

V. FISCAL IMPACT ON STATE AND LOCAL GOVERNMENTS

[TO BE COMPLETED]

VI. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR

[TO BE COMPLETED]

VII. CONSTITUTIONAL ISSUES

[TO BE COMPLETED]

VIII. OTHER INTERESTED PARTIES

1. The Florida Bar Business Law Section.
2. The Florida Bar Tax Section.
3. Florida Bankers Association.

SCHEDULE OF ATTACHED EXHIBITS

EXHIBIT A	"States Court Family-Trust Business", Wall Street Journal, June 22, 2006, p. D1
EXHIBIT B	F.S. 736.0505
EXHIBIT C	Proposed Revised F.S. 736.0505
EXHIBIT D	"Comparison of the Twelve Domestic Asset Protection Statutes – Updated through November, 2008", 2009, David G. Shaftel, 34 ACTEC Journal (2009) p. 293*
EXHIBIT E	Comparison of Proposed Florida Statute
EXHIBIT F	Form of Affidavit of Financial Standing

*Thanks and gratitude is extended to David G. Shaftel, Esq., Anchorage, Alaska, for his permission to reproduce his analysis.

SECTION ANALYSIS - PROPOSED FL ASSET PROTECTION STATUTE

736.0505(1)(b) –

An irrevocable trust that is not a spendthrift trust is available to a creditor/assignee of the settlor to the extent of the maximum amount that can benefit the settlor. This rule mirrors that of section 736.0501 for any debtor/beneficiary. A settlor of a trust can choose whether to make a trust a spendthrift trust or not under the terms of the trust.

736.0505(1)(d) –

This subsection specifically eliminates the "Self-Settled Trust Doctrine" under Florida law (that, is the rule outlined in section 736.0505(1)(b) (2009). The trust must be irrevocable and must include a spendthrift provision.[1] If these two conditions are met and none of the listed exceptions under the subparagraphs apply to the assets transferred to such trust, subsequent creditors cannot reach the trust assets to satisfy claims against the settlor. If implemented under appropriate circumstances, the new policy of Florida would permit a settlor to protect assets from most future, unforeseen creditors while retaining a beneficial interest. This policy is similar to that already established for assets already exempt under Florida law (*e.g.*, an IRA, a commercial annuity and Florida homestead, the latter of which cannot be the subject of a fraudulent transfer). Note, however, that distributions to the settlor can be attached.

736.0505(1)(d)1 –

This statute provides for specific exceptions based primarily on public policy and equitable principles to the general rule enumerated in subsection (d) that if an irrevocable trust contains a spendthrift provision, the creditors of the settlor may not reach the trust assets. The first two exceptions are derived from Florida's Uniform Fraudulent Transfer Act. Basically, if a settlor transfers assets subject to a claim beyond the reach of creditors at a time when the settlor knows or has reason to know of a claim, such a transfer can be set aside as a fraudulent transfer.

(A)

The first exception provides that a creditor of a settlor may reach the assets of a self-settled trust if the claim arose before the settlor's transfer of the assets to the trust that are subject to the claim and the claim is brought within the later of four (4) years after such transfer, the expiration of the statute of limitation applicable to the claim or one (1) year after such transfer is or reasonably could have been discovered by the creditor if the creditor can establish by clear and convincing evidence that the creditor asserted a specific claim against the settlor before the transfer.

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[1] See Fla. Stat. § 736.0502 (2009)

(B)

The second exception based on the Uniform Fraudulent Transfer Act provides that if the settlor transfers assets into a self-settled trust with actual intent to hinder, delay or defraud a creditor, such creditor may reach the assets transferred to the self-settled trust. Typically, a settlor's actual intent to hinder, delay or defraud a creditor is established by circumstantial evidence. In determining a settlor's actual intent, the following factors can generally be taken into consideration:

(1) Whether the transfer was made to or an obligation was incurred to an insider;

(2) Whether following the transfer a debtor retained possession or control of the property that was transferred;

(3) Whether the transfer or obligation was disclosed or concealed;

(4) Whether the debtor had been sued or threatened with a suit prior to making the transfer or incurring the obligation;

(5) Whether the debtor transferred substantially all the debtor's assets;

(6) Whether the debtor absconded;

(7) Whether the debtor removed or concealed assets; and

(8) Whether the debtor received consideration for the asset transferred or the obligation that was incurred that was reasonably equivalent to the value of the asset that was transferred or the amount of the obligation that was incurred.

If the creditor of the settlor can establish that the settlor transferred assets of a self-settled trust with the actual intent to hinder, delay or defraud such creditor, the creditor may reach such assets transferred to the self-settled trust.

(C)

The third exception provides that the self-settled trust must not permit a settlor to "revoke, terminate or withdraw" all or any part of the trust property without the consent of a person who has a substantial beneficial interest in the self-settled trust and such interest would be adversely affected by the settlor's exercise of such power. Essentially, if a trust provides the settlor with the power to "revoke, terminate or withdraw,"[2] the trust is tantamount to a revocable trust. The creditor of a settlor of a revocable trust may reach the assets of the revocable trust to the same extent the creditor could reach assets titled in the settlor's name. In other words, a revocable trust is merely treated as an extension of the settlor and any property owned by the revocable trust is subject to the claims of the settlor's creditors. This exception continues the current Florida law as applicable to self-settled trusts and ensures that a settlor cannot evade creditors while essentially retaining full control over trust assets by retaining the power to revoke,

[2] As defined in Proposed § 736.0505(3).

terminate or withdraw trust assets. The only exception is provided that if the settlor cannot exercise such power to revoke, terminate or withdraw trust assets without the consent of a person with a substantial beneficial interest in the trust and such person's interest would be adversely affected by the settlor's exercise of the power to revoke, terminate or withdraw. The settlor would not possess full dominion and control over such trust assets in this circumstance because a person with such an interest in a self-settled trust would presumably act in such person's best interest in regards to the settlor's exercise of such power and would not allow the settlor to act pursuant to his or her own will in exercising the power to revoke, terminate or withdraw assets of the trust.

(D)

The fourth exception provides that if a self-settled trust "requires" that all or part of the trust's income and/or principal be distributed to the settlor as a beneficiary, a creditor of the settlor may reach the assets of the trust. This provision is consistent with current Florida law, which provides that if a trust contains mandatory distributions of income and/or principal, a creditor or assignee of the beneficiary may attach such beneficial interest, regardless of whether a trust contains a spendthrift provision.[3] As a result, a settlor cannot retain mandatory rights to income and/or principal and receive spendthrift protection for assets he or she transfers to such trust. The settlor may only retain a discretionary interest in the trust assets meaning that he or she has no right to receive income and/or principal distributions but that the trustee may distribute income and/or principal to the settlor in the trustee's discretion.

(E)

Section 736.0503 establishes a limited class of "exception creditors" that include (a) a trust beneficiary's child, spouse or former spouse who has a judgment against such beneficiary for support or maintenance, (b) a judgment creditor who provided services to protect a beneficiary's interest in such trust, and (c) a claim by the State of Florida or the United States permitted by applicable law. These exception creditors are permitted to attach nondiscretionary interests in a spendthrift trust under certain conditions. This access to a self-settled spendthrift trust applies to a settlor's exception creditors to align with the policy position expressed in section 736.0503 (2009). The purpose of this provision is to eliminate any concern that these trusts might be used to circumvent child support and spousal support laws. These exception creditors will be able to invade the trust. Note however that this presents an issue as to whether the settlor can make a "completed gift" for federal gift and estate tax purposes.

(F)

The general rule does not apply to assets transferred if the settlor was insolvent at the time of the transfer or was rendered insolvent by the transfer. This provision adopts a common test for a fraudulent transfer. If after establishing a self-settled trust, the settlor cannot pay his or her debts

[3] § 736.0506(2) (2007)

related to his regular affairs as such debts become due, then assets transferred to the trust can be attached.[4]

(G)

[EDITOR'S NOTE: THIS LANGUAGE IS DIRECTLY COPIED FROM THE UTAH STATUTE AND HAS NOTHING TO DO WITH FLORIDA OR FEDERAL LAW]

736.0505(1)(d)2 –

This paragraph provides the requirement that for a settlor to establish an enforceable self-settled trust pursuant to this statute, the settlor must execute a substantially accurate and complete verified document and must deliver such document to the qualified trustee before or at the time of the transfer of assets to the trust. The document must contain the following statements:

(1) the settlor has full right, title and authority to transfer the assets to the trust;

(2) the transfer of the assets to the trust will not render the settlor insolvent;

(3) the settlor does not intend to defraud an existing creditor by transferring the assets to the trust;

(4) there is no pending or threatened court actions against the settlor, except for those actions identified by the settlor on an attachment to the verified document;

(5) the settlor is not involved in any governmental administrative proceedings relating to the assets the settlor transfers to the trust or the settlor's beneficial interest in such assets, except for those administrative proceedings identified by the settlor on an attachment to the affidavit;

(6) at the time of the transfer of the assets to the trust, the settlor is not currently in default by more than 30 days of a child support obligation imposed by order of a court of competent jurisdiction;

(7) the settlor does not contemplate filing for relief under the provisions of 11 U.S.C. (Bankruptcy Code); and

(8) the assets being transferred to the trust were not derived from unlawful activities.

This paragraph requires that the settlor execute an affidavit confirming the statements listed above. It provides a degree of certainty to the settlor's funding of the self-settled trust by requiring the settlor to attest to all of the statements above regarding the settlor's funding the of trust. Further, this affidavit must be provided to the qualified trustee before the qualified trustee may accept any assets into the self-settled trust if the trust is to be respected as to the settlor's interest in the trust. If a settlor could not attest to all of the statements listed above, the settlor

[4] See Proposed § 736.0505(1)(d)(5)(A) for the definition of "insolvent."

would not be a person that should be entitled to take advantage of self-settled trust protection in Florida and would not receive any benefit from the legislation if he or she did not execute such an affidavit attesting to all of the statements. By specifically requiring the settlor to attest to the aforementioned statements, the risk that a fraudulent transfer is made to the trust is significantly reduced.

736.0505(1)(d)3 –

This paragraph establishes two exceptions to the general rule that a creditor cannot attach the assets of a self-settled trust: First, under (A), if assets transferred had been previously listed in a written representation to a settlor's creditor, and, under (B), if the settlor transferred the assets in breach of a written agreement between the settlor and a creditor. This second exception follows the fraudulent transfer rules, that is, if a person gives away assets that were otherwise pledged to a third party, the secured party has the right to recover such assets. In both situations a creditor is permitted to directly proceed against the trust to recover such assets, or their equivalent value if sold by the trust, in addition to any other avenues of recovery. **[EDITOR'S NOTE: SUB (A) SEEMS OVERBROAD]**

736.0505(1)(d)4 –

This paragraph sets forth the requirement that the settlor must appoint a "qualified trustee" of the trust. Furthermore, the trust must provide that the power to distribute the income or invade the principal of the trust for the benefit of the settlor in the trustee's discretion shall only be exercisable upon the qualified trustee's consent. A "qualified trustee" is defined as a bank or trust company described in Chapter 658 of the Florida Statutes authorized to engage in trust business and such bank or trust company also:

(1) maintains or arranges for custody in Florida of some or all of the assets transferred to the trust;

(2) maintains records for the trust on an exclusive or nonexclusive basis;

(3) prepares or arranges for the preparation of fiduciary income tax returns for the trust; or

(4) otherwise participates in the administration of the trust.

This paragraph requires that a Florida bank or trust company serve as a trustee of the trust for the trust to qualify as an enforceable self-settled trust as to the settlor's interest. The purpose of requiring a Florida bank or trust company to be named and serve as a trustee is to have a corporate trustee appointed as at least one of the trustees of the trust to ensure that the terms of the trust are respected and the trust is properly administered. Many asset protection states (*e.g.*, Delaware, Alaska, Wyoming, South Dakota and New Hampshire) allow for any individual to serve as a qualified trustee so long as such individual is a resident of the particular state. However, this does not ensure that the terms of the trust will be properly administered by such trustee. The requirement that one trustee be a Florida corporate trustee adds a level of certainty

and comfort that the trust terms will be properly respected and the trust will be properly administered.

736.0505(3) -

This paragraph uses a negative definition of "revoke, terminate or withdraw." Statutory construction often uses this method to specifically identify what is excluded. The exclusions are explained as follows:

(a)

The ability to prohibit a distribution from a trust allows the settlor, while not incapacitated, to ensure that certain beneficiaries do not get trust assets. Note that if a settlor retains such a power, any transfer to the trust should be an "incomplete gift" for federal gift and estate tax purposes. This is generally advantageous for funding purposes since self-settled trusts are primarily transfer tax neutral so that there is not federal gift tax imposed for transfers exceeding the $1,000,000 federal gift tax exemption amount.

(b)

Under the Internal Revenue Code, the holder of a general power appointment is deemed the owner of the property over which the power can be exercised. As defined in section 736.0103(7), as to the settlor, a general power is one that can be exercised in favor of the settlor, his or her creditors, his or her estate or creditors of his or her estate. Each of the recipients benefit the settlor, directly or indirectly. However a limited power of appointment cannot be exercised in favor of such persons. Therefore, a settlor retaining a limited power of appointment should not be deemed a revocation power. Like subparagraph (3)(a), this is generally advantageous for funding purposes since self-settled trusts are primarily transfer tax neutral so that there is not federal gift tax imposed for transfers exceeding the $1,000,000 federal gift tax exemption amount.

(c)

A settlor's retained interest to be able to receive a discretionary distribution from an "Independent Trustee" is the primary goal of a self-settled trust. That is, the settlor has given up sufficient control over the trust assets to obtain the protection of such assets from future, unforeseen creditors. This provision ensures that the proper safeguards are in place as to who has discretion to make distributions. However, the settlor may specifically override this statutory default in the trust instrument so that it is treated as a revocation power.

(d)

Limiting distributions to an ascertainable standard (*e.g.*, for health, education, maintenance, or support) prevents the settlor from receiving the entire trust assets for any reason. This limitation also serves as a fiduciary control on a settlor's distribution power as a co-trustee so that he or she is not treated as having a general power of appointment.

(e)
This permitted power ensures that the settlor's ability to appoint trust decision makers (other than trustee) are not related or subordinate to the settlor so he or she does not have *de facto* control over the trust.

(f)
This permitted right retained by the settlor allows a self-settled trust to qualify for a charitable deduction for both types of a Charitable Remainder Trust (CRT) authorized by the Internal Revenue Code. A CRT is a type of trust where the remainder beneficiary after the termination of the interest of the "lead" beneficiary is a charitable organizations. This supports the longstanding policy of supporting charities. **[EDITOR'S NOTE: THERE SEEMS TO BE AN INTERNAL CONFLICT WITH § 736.0505(1)(d)1(D), WHICH STATES THAT THE SPENDTHRIFT PROTECTION DOES NOT APPLY IF THE SETTLOR RETAINS A MANDATORY INTEREST]**

(g)
This permitted right retained by the settlor allows a self-settled trust to qualify as a Qualified Personal Residence Trust authorized by the Internal Revenue Code. This merges a common estate planning technique with a self-settled trust such that the settlor or a family member has the right to use and occupy real property transferred to the trust. **[EDITOR'S NOTE: THERE SEEMS TO BE AN INTERNAL CONFLICT WITH § 736.0505(1)(d)1(D), WHICH STATES THAT THE SPENDTHRIFT PROTECTION DOES NOT APPLY IF THE SETTLOR RETAINS A MANDATORY INTEREST]**

736.0505(4) -
[EDITOR'S NOTE: UNSURE OF APPLICATION OF THIS PROVISION]

736.0505(5) –
This subsection provides that a settlor's creditor only has such rights specifically enumerated in the statute in regards to setting aside a transfer to a self-settled spendthrift trust. Furthermore, this subsection also provides that no creditor of a settlor may have a cause of action against a trustee, trust advisor, designated representative, attorney, auditor or other agent or assistance involved in counseling, drafting, preparing, executing or funding of the trust. The purpose of this statute is to insulate the professional advisers involved in a self-settled trust structure from liability to a creditor for assisting a settlor in establishing such a trust structure. This subsection helps ensure that professional advisers will be willing to assume such duties in establishing, funding and administering such self-settled trust structures.

736.0505(6) -
If a creditor of the settlor seeks to satisfy a claim out of the assets of a self-settled trust, the creditor has the burden to prove by clear and convincing evidence, a standard higher than

preponderance of the evidence. This evidentiary standard is found in many fraudulent transfer statues nationally.

736.0505(7) -

[EDITOR'S NOTE: UNSURE OF APPLICATION OF THIS PROVISION]

736.0505(8) -

This subsection is a "Home Rule" provision, meaning that a creditor with a claim, no matter where located, must file an action in a Florida court. Thus, the Florida judiciary will be solely responsible for discerning the meaning and policy of the State of Florida as to the efficacy of Florida self-settled trusts.

736.0505(9) –

This subsection provides that if an asset transfer to a trust is voided or set aside, the trust or asset transfer will only be set aside to the extent necessary to satisfy the settlor's debt to the creditor or other person at whose instance the trust or asset transfer is voided or set aside and such other relief allowed by law and awarded by the court. Based on this subsection, if some of the assets transferred to the trust are tainted (*e.g.*, subject to a fraudulent transfer), the entire trust is not tainted by such assets and a creditor can only reach such assets to the extent necessary to satisfy the creditor's claim.

736.0505(10) -

(a)

The purpose of this subsection is to support the ability of a trustee acting in good faith to defend against an action seeking to attach trust assets under the statute. The consequence of not including such priority of payment would make a self-settled trust easy prey for litigation since it puts the trustee at an economic disadvantage where the plaintiff's attorney is being paid on a contingency basis.

(b)

Further, to promote the involvement of corporate fiduciaries as trustees of self-settled trusts, this provision gives them the certainty that their costs serving as a trustee will be satisfied. Given the factually intensive nature of fraudulent transfers that cannot be known at the time of a transfer, there would be a immobilizing fear to proceed if there is a possibility, however remote, that none of the trust assets would be able to pay the expenses of administering the trust.

(c)

This provision protects a properly made distribution to any beneficiary (including the settlor) by a good faith trustee if made before the commencement of an action to set aside the trust or transfer of assets to the trust. This policy is similar to the protection afforded a commercial

annuity. Under Florida law, the proceeds of an annuity contract received by a citizen or resident of Florida (including the person that funded the annuity) is exempt from the claims of creditors at any time, unless the fraudulent transfer rules apply.[5] This policy is picked up here at least to transfers made before an action against the trustee is brought.

[5] Fla. Stat. § 222.14.

736.0902. Prudent Investor Rule Not to Apply –

(1) Notwithstanding the provisions of s. 518.11 or s. 736.0804, with respect to any contract of life insurance acquired or retained on the life of a qualified person, a trustee shall have no duty to:

(a) Determine whether the trust has an insurable interest in the life the insured.

(b) Determine whether any contract of life insurance is, or remains, a proper investment.

(c) Investigate the financial strength of the life insurance company;

(d) Determine whether to exercise any policy option available under the contract of life insurance;

(e) Diversify any such contract of life insurance, or diversify the assets of the trust with respect to the contract of life insurance: or

(f) Inquire or investigate the health or financial condition of the insured or insureds.

(2) For purposes of this section a "Qualified Person" is any person, or the spouse of any person, who has provided the trustee with funds that are used to acquire or pay premiums with respect to a policy of insurance on the life of that person, or on the life of the spouse of that person, or on the lives of that person and the spouse of that person.

(3) In all cases where this section shall apply, the trustee shall not be liable to the beneficiaries of the trust or any other person for any loss sustained with respect to such contract of life insurance.

(4) Unless otherwise provided in the trust instrument, this section shall apply:

(a) to any contract of life insurance acquired or received after the effective date, and

(b) to any contract of life insurance acquired or received prior to the effective date, but only if the trustee has given notice that this section shall apply to the contract.

1. The notice of the application of this section shall be given to the insured and to those persons who must be notified of a delegation pursuant to s.518.112(3).

2. Notice given to a person who represents the interests of any of the persons set forth in subparagraph 1, pursuant to any of the provisions of Part III,

Chapter 736, Florida Statutes, shall be treated as notice to the person so represented.

3. Notice shall be given in the manner provided in s. 736.0109.

4. If any person notified pursuant to this paragraph objects to the application of this section in a writing delivered to the trustee within 30 days of the date such notice was received, then this subsections (1) and (3) of this section shall not apply until the objection is withdrawn.

5. The trustee may notify each or any person who objects to the application of this section, that the trustee intends to delegate the investment functions set forth in subsection (1) to that person or persons as investment agent pursuant to s. 518.112(2). Unless the objection is withdrawn within 30 days of receiving the notification, then that person or persons shall be deemed to have accepted the appointment, and thereafter shall be the investment agent for those functions pursuant to s. 518.112 upon the completion of the notification requirements set for therein. The trustee shall thereafter be subject to the protections set forth in s. 518.112 and shall have no liability for having selected the investment agent or agents.

6. There shall be a rebuttable presumption that any notice sent by United States Mail is received three days after depositing the notice in the United States Mail system with proper postage prepaid.

(5) This section shall not apply to any contract of life insurance purchased from any affiliate of the trustee, or with respect to which the trustee or any affiliate of the trustee receives any commission unless the duties have been delegated to another person in accordance with s. 518.112. An "affiliate" of the trustee is any person who controls, is controlled by or is under common control with the trustee.

518.112. Delegation of investment functions -

(1) A fiduciary may delegate any part or all of the investment functions, with regard to acts constituting investment functions that a prudent investor of comparable skills might delegate under the circumstances, to an investment agent as provided in subsection (3), if the fiduciary exercises reasonable care, judgment, and caution in selecting the investment agent, in establishing the scope and specific terms of any delegation, and in reviewing periodically the agent's actions in order to monitor overall performance and compliance with the scope and specific terms of the delegation.

(2) (a) The requirements of subsection (1) notwithstanding, a fiduciary that administers an insurance contract on the life or lives of one or more persons may delegate without any continuing obligation to review the agent's actions, certain investment functions with respect to any such contract as provided in subsection (3), to any one or more of the following persons as investment agents:

1. The trust's settlor if the trust is one described in > s. 733.707(3);

2. Beneficiaries of the trust or estate, regardless of the beneficiary's interest therein, whether vested or contingent;

3. The spouse, ancestor, or descendant of any person described in subparagraph 1. or subparagraph 2.;

4. Any person or entity nominated by a majority of the beneficiaries entitled to receive notice under paragraph (3)(b); or

5. An investment agent if the fiduciary exercises reasonable care, judgment, and caution in selecting the investment agent and in establishing the scope and specific terms of any delegation.

(b) The delegable investment functions under this subsection include:

1. A determination whether the owner of any insurance contract has an insurable interest in the life of the insured.

~~1.~~ 2. A determination of whether any insurance contract is or remains a proper investment;

3. Any duty to investigate the financial strength of the life insurance company.

~~2.~~ 4. A determination of whether or not to exercise any policy option available under such contracts;

~~3.~~ 5. A determination of whether or not to diversify such contracts relative to one another or to other assets, if any, administered by the fiduciary; or

~~4~~ 6. An inquiry about changes in the health or financial condition of the insured or insureds relative to any such contract.

(c) Until the contract matures and the policy proceeds are received, a fiduciary that administers insurance contracts under this subsection is not obligated to diversify nor allocate other assets, if any, relative to such insurance contracts.

(3) A fiduciary may delegate investment functions to an investment agent under subsection (1) or subsection (2), if:

(a) In the case of a guardianship, the fiduciary has obtained court approval.

(b) In the case of a trust or estate, the fiduciary has given written notice, of its intention to begin delegating investment functions under this section, to all beneficiaries, or their legal representative, eligible to receive distributions from the trust or estate within 30 days of the delegation unless such notice is waived by the eligible beneficiaries entitled to receive such notice. This notice shall thereafter, until or unless the beneficiaries eligible to receive income from the trust or distributions from the estate at the time are notified to the contrary, authorize the trustee or legal representative to delegate investment functions pursuant to this subsection. This discretion to revoke the delegation does not imply under subsection (2) any continuing obligation to review the agent's actions.

1. Notice to beneficiaries eligible to receive distributions from the trust from the estate, or their legal representatives shall be sufficient notice to all persons who may join the eligible class of beneficiaries in the future.

2. Additionally, as used herein, legal representative includes one described in > s. 731.303, without any requirement of a court order, an attorney-in-fact under a durable power of attorney sufficient to grant such authority, a legally appointed guardian, or equivalent under applicable law, any living, natural guardian of a minor child, or a guardian ad litem.

3. Written notice shall be given as provided in Part III of Chapter 731, Florida Statutes as to an estate, and as provided in s. 736.0109, and Part III of Chapter 736, Florida Statutes as to a trust. ~~Written notice shall be:~~

~~a. By any form of mail or by any commercial delivery service, approved for service of process by the chief judge of the judicial circuit in which the trust has its principal place of business at the date of notice, requiring a signed receipt;~~

~~b. As provided by law for service of process; or~~

~~c. By an elisor as may be provided in the Florida Rules of Civil Procedure.~~

~~Notice by mail or by approved commercial delivery service is complete on receipt of notice. Proof of notice must be by verified statement of the person mailing or sending notice, and there must be attached thereto the signed receipt or other satisfactory evidence that delivery was effected on the addressee or on the addressee's agent. Proof of notice must be maintained among the trustee's permanent records.~~

(4) If all requirements of subsection (3) are satisfied, the fiduciary shall not be responsible otherwise for the investment decisions nor actions or omissions of the investment agent to which the investment functions are delegated.

(5) The investment agent shall, by virtue of acceptance of its appointment, be subject to the jurisdiction of the courts of this state.

(6) In performing a delegated function, the investment agent shall be subject to the same standards as the fiduciary.

Fiduciary Duties in Insurance Trusts
WHITE PAPER

PROPOSED NEW FLORIDA STATUTE 736.0902

Insurance Trust Subcommittee
Estate and Trust Tax Committee
Real Property, Probate and Trust Law Section

I. SUMMARY

The purpose of the proposed addition of new section 736.0902 to the Florida Statutes, to be titled "Prudent Investor Rule Not to Apply," is to relieve the trustee of an Irrevocable Life Insurance Trust (ILIT) from a duty to determine whether decisions made by the Settlor in the selection of a life insurance company, a particular type of life insurance policy, and the continuing payment of policy premiums from funds provided by the Settlor, are appropriate investments and in the best interest of the beneficiaries.

II. CURRENT SITUATION

The settlor of an ILIT selects the insurer and the applicable policy. The trustee has a continuing duty to the beneficiaries to make certain that the insurance company is financially sound and the policy is still a prudent and viable investment. However, it is the settlor who makes the initial choice of the insurer and the policy, and the one who contributes the funds to pay the annual premiums. It is also the settlor who chooses the trustee and with whom he/she has a client relationship.

Presently, s. 518.112 F.S. permits the trustee of an ILIT to delegate some responsibilities for life insurance held as an asset of the trust. After giving 30 days' notice to the beneficiaries, the trustee may delegate to an agent the responsibility for monitoring the insurer and the policy, exercising policy options, tracking the health of the insured, and diversifying the investment. However, it is not appropriate to hold the trustee responsible for decisions made by the settlor, nor practical for the trustee to follow the formal delegation and notice procedure required by the statute in the following two activities: 1) selection by the settlor of the insurer or the policy upon creation of the trust, and 2) paying annual premiums from funds provided by the settlor.

Pursuant to s. 627.404 F.S., an insurance policy purchased by a trustee is invalid unless the proceeds of the policy are primarily for the benefit of persons who have an "insurable interest" (i.e. close relationship) with the insured. However the trust settlor, not the trustee, selects the policy, selects the trustee, names the beneficiaries of the trust and provides the funds to pay the premiums. These choices are often made before the

trust is created. The settlor then funds the trust with funds sufficient only to pay the premium on the policy, in most cases immediately before the premium payment is due. It is not reasonable to impose a duty on the trustee to review these particular decisions made by the settlor or his advisors, nor practical to force the trustee to utilize the delegation process for these particular decisions.

III. EFFECT OF PROPOSED CHANGE GENERALLY

The proposed change would make the new s. 736.0902 F.S. the default provision in the absence of contrary language in the governing ILIT instrument. Thus, when the policy insures the life of the person providing the funds to acquire the policy or on that persons spouse, the trustee would have no duty to determine whether the trust has an insurable interest in the life of the insured. The trustee would also have no duty to determine whether any life insurance policy owned by the trust is a proper investment when the funds to acquire or carry the policy are provided by the insured or the spouse of the insured. To avoid any conflict of interest or self dealing, this new statute would not apply to any life insurance policy purchased from an affiliate of the trustee or from which the trustee or an affiliate receives any commission.

The proposal does not otherwise diminish the trustee's ongoing responsibilities to monitor all other types of life insurance. The proposal also corrects inconsistencies in the notice provisions of the Prudent Investor Act, Trust Code and Probate Code.

IV. ANALYSIS

The primary purpose of an ILIT is to purchase and maintain insurance on the life of the settlor that will pay a highly leveraged amount at the settlor's death that will not be includible in the settlor's gross estate. Since the settlor chooses the insurance carrier, the policy, and whether to continue to make annual exclusion gifts to the trust to pay premiums on the policy, it is most appropriate and practical to relieve the trustee of the duty and liability for those decisions or to be forced to delegate those decisions to an agent. This would be accomplished by the proposed new s. 736.0902 F.S. which is set forth above.

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

VI. DIRECT IMPACT ON PRIVATE SECTOR--None

VII. CONSTITUTIONAL ISSUES—None apparent

VIII. OTHER INTERESTED PARTIES—None known at this time

417980

LEGISLATIVE POSITION REQUEST FORM

GOVERNMENTAL AFFAIRS OFFICE

Date Form Received _____

GENERAL INFORMATION

Submitted By William T. Hennessey, Chair, Probate and Trust Litigation Committee of the Real Property Probate & Trust Law Section

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Position Type Probate and Trust Litigation Committee, RPPTL Section, The Florida Bar

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

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 X **Support** Oppose Technical Assistance Other _____

Proposed Wording of Position for Official Publication:

"Support legislation that would permit a challenge to certain property and inheritance rights that inure to a surviving spouse who procures a marriage to a decedent by fraud, duress, or undue influence."

Reasons For Proposed Advocacy:

The mere status of being a surviving spouse affords a myriad of significant default financial benefits under Florida law, including the right to homestead property, an elective share in decedent's augmented estate, the right to take as a pretermitted spouse, and priority in preference during the selection of decedent's personal representative. However, when a marriage to a decedent is procured by fraud, duress, or undue influence, it is unfair and against public policy for a surviving spouse to receive these default benefits solely due to their status as a surviving spouse.

Under current law, the surviving beneficiaries or heirs of a decedent may have no remedy to address the inequities that result when an individual procures a marriage to decedent by fraud, duress, or undue influence. The proposed legislation is intended to resolve this situation by permitting challenges to certain default property and inheritance rights that inure to a surviving spouse as the result of a marriage procured by fraud, duress, or undue influence solely by virtue of that individual's status as a surviving spouse. The proposed legislation addresses this issue without disturbing Florida's treatment of the institution of marriage. For further explanation and analysis, see the attached White Paper.

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

N/A at this time

(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.

WHITE PAPER

PROPOSED LEGISLATION REGARDING CHALLENGE TO SPOUSAL RIGHTS PROCURED BY FRAUD, DURESS, OR UNDUE INFLUENCE

I. SUMMARY

The mere status of being a surviving spouse affords a myriad of significant financial benefits under Florida law, including rights in homestead property, an elective share in decedent's augmented estate, the right to take as a pretermitted spouse, and priority in preference during the selection of decedent's personal representative. In most cases, these substantial benefits are well-deserved and work to further Florida's strong public policy in protecting a decedent's surviving spouse.

However, when an individual procures a marriage to a decedent by fraud, duress, or undue influence, it is unfair and against public policy for a surviving spouse to receive these default benefits solely due to their status as a surviving spouse. Under current Florida law, the beneficiaries or heirs of a decedent may have no remedy to address the inequities that result when an individual procures a marriage to a decedent by fraud, duress, or undue influence. The proposed legislation addresses this problem without disturbing the validity of the marriage itself. In particular, the proposed legislation permits a challenge to various default property and inheritance rights that inure to a surviving spouse who has procured a marriage through fraud, duress, or undue influence.

II. CURRENT FLORIDA LAW

Currently there is no Florida statute that authorizes a challenge to the validity of a marriage after the death of one of the spouses. Nevertheless, a number of Florida cases have touched on this issue. Under existing Florida case law, an invalid marriage may be void, or merely voidable, depending on the cause and nature of the invalidity. The definitions of void and voidable marriages are critical because the ability for interested third parties to challenge the marriage after death turns on the distinction between the two.

A. Void Marriage

Florida case law has made it clear that an action challenging a marriage can be maintained after the death of the spouse only if the marriage is *void*. Kuehmsted v. Turnwall, 138 So. 775, 777 (Fla. 1932). A void marriage is an absolute nullity and its invalidity may be shown either during the lifetime of the parties to the marriage, or after their deaths. Id. at 778. Upon proof of facts rendering a marriage void, the marriage will be disregarded or treated as nonexistent by the court. Id.; Bennett v. Bennett, 26 So. 2d 650 (Fla. 1946).

A marriage is void *ab initio* ("from the start"), and will be treated as if no marriage had taken place, when:

- it is a bigamous marriage, § 826.01, et. al. Fla. Stat.;
- it is an incestuous marriage, § 741.21, Fla. Stat., § 826.04, Fla. Stat.;

- it is a marriage between persons of the same sex, § 741.212, Fla. Stat.;
- it is a common-law marriage entered into after January 1, 1968, § 741.211, Fla. Stat.;
- there is a prior existing marriage that is undissolved at the time the parties enter the marriage, see Smithers v. Smithers, 765 So. 2d 117 (Fla. 4th DCA 2000); or
- one or both parties lack the requisite mental capacity at the time the marriage is actually contracted, Kuehmsted, 138 So. at 778; Bennett, 26 So. 2d at 651.

Because an essential element for marriage is the possession of sufficient mental capacity to consent to the marriage, the marriage of a person who is insane or otherwise mentally incompetent to consent to the marriage is void *ab initio*. Kuehmsted, 138 So. at 778; Arnelle v. Fisher, 647 So. 2d 1047, 1048 (Fla. 5th DCA 1994), see also 4 Am. Jur. 2d Annulment of Marriage § 30 (2009).

B. Voidable Marriage

A voidable marriage, unlike a void marriage, may be attacked only in a direct proceeding during the life of the parties. Arnelle, 647 So. 2d at 1048 (citing Kuehmsted, 138 So. at 777). Upon the death of either party, a voidable marriage is deemed valid from the outset. Id. The right to annul a voidable marriage has been held to be a personal right, and an action to annul such a marriage can only be maintained by a party to the marriage contract, or where the spouse seeking annulment is under legal disability, by someone acting on his or her behalf. See Kuehmsted at 777; 25A Fla. Jur. 2d Family Law § 497 (2006).

Consequently, a voidable marriage cannot be attacked after the death of either party to the marriage. Arnelle 647 So. 2d at 1048-49; see also 91 A.L.R. 414, Marriage to Which Consent of One of Parties Was Obtained by Duress as Void or Only Voidable (2007 update).

A marriage has been held to be voidable when:

- consent to the marriage was obtained by undue influence, Arnelle, 647 So. 2d at 1048-49; Hoffman, 385 So. 2d at 1069;
- consent to the marriage was obtained by duress, In re Ruff's Estate, 32 So. 2d 840, 842 (Fla. 1947) (where party alleged that he was forced to marry under threats of prosecution and violence, the marriage was voidable); Tyson v. State, 90 So. 622, 623 (Fla. 1922) (evidence showed that marriage was procured by fraud and effected as a result of coercion); or
- consent to the marriage was obtained by fraud, Cooper v. Cooper, 163 So. 35 (Fla. 1935) (marriage voidable where the marriage ceremony was procured by fraud). *But see* Savage v. Olsen, 9 So. 2d 363 (Fla. 1942) (holding that gross fraud coupled with diminished capacity may render a marriage void).

The above cases hold that the existence of undue influence, duress, or fraud, which are the three most common methods for exploiting an elderly and infirm, but arguably competent

person, would only render a marriage voidable. In these situations, the surviving family members cannot challenge the marriage after the death of one of the parties to the marriage. Because the marriage cannot be challenged, the accompanying default rights of the surviving spouse are protected under Florida law despite the surviving spouse's fraudulent actions.

C. Examples of Injustice Under Current Law

Hoffman v. Kohns illustrates the tremendously unfair outcome that can result under existing Florida law. 385 So. 2d 1064 (Fla. 2d DCA 1980). In Hoffman, the decedent, Herbert Kohns died at the age of 84. He had no children or other lineal descendants. His closest living heir was his niece, Dorothy Hoffman. Approximately 7 years before his death, Herbert established a revocable trust with himself and his niece, Dorothy as co-trustees. Herbert also executed a pour-over will at that time.

In the years that followed, Hebert's mental capacity began to diminish. He became "extremely forgetful, paranoid, and suspicious, expressing distrust of all banks, doctors, trust officers and others." Id. at 1066. In 1974, at the age of 82, Herbert was hospitalized for a lack of blood to the brain and senility. His diagnosis at that time was "acute organic brain syndrome." Herbert subsequently moved into a nursing home, but later returned home, where he needed 24 hour nursing care.

Herbert's long-time attorney put an ad in the newspaper for a live-in housekeeper to provide Herbert with transportation, buy food, pay his bills, and handle his routine financial matters. During this time, the Court found that Herbert was "frail and feeble, disoriented at times, forgetful, sometimes hostile and irate, suspicious and paranoid. He was withdrawn at times, sitting for hours staring into space." Id.

During the last week of August, 1975, a woman named Eloise was hired as Herbert's housekeeper. She was 55 years old – almost 30 years younger than Herbert. Within days after taking the job in early September, Eloise took Herbert to the bank where she closed out his safe deposit box, which had $40,000 worth of bearer bonds. Within two weeks of taking the job, Eloise drove Herbert to the courthouse and applied for a marriage license. Three days later, she drove him back to the courthouse and had a marriage ceremony performed by a notary.

The day after the marriage, less than three weeks after she began working for Herbert, Eloise took Herbert to her lawyer (not his lawyer of the last 10 years) to have a new will drawn up naming Eloise as the sole beneficiary of his estate. Shortly thereafter, Eloise took Herbert to the bank and arranged for the withdrawal of Herbert's savings account, transferring all of the funds into joint names. Ultimately, all but two of Herbert's accounts were closed and transferred into joint accounts with Eloise.

Dorothy and her family attempted to contact Herbert several times in September, October, and November 1975, but each time were told that he was indisposed or out walking. Eloise assured them that Herbert was doing fine, but she never indicated that she had married him.

Herbert's physician saw him for the last time in October 1975, about a month after the marriage. Eloise told the doctor that she was Herbert's housekeeper. Herbert's doctor later

testified that Herbert was incompetent and had been for some time. Eloise's physician started seeing Herbert around the same time and treated him through his death about 10 months later. He testified that he felt Herbert was competent, but he said he would change his opinion if the medical history given to him by Eloise, was materially incorrect. Herbert was hospitalized on multiple occasions over the next 10 months. In July 1976, he went in for surgery, had a stroke, and went into a coma. Herbert died in September 1976.

After Herbert's death, Dorothy filed a petition to revoke probate of the September 1975 will on the basis of undue influence. Dorothy also attacked the validity of the marriage between Herbert and Eloise. The matter went to trial and the court found that:

> The evidence establishes that [the housekeeper] completely dominated Kohns both before and after September 27, 1976, the date the new will was executed, by taking control of all his business affairs, taking over the writing of checks and balancing of his checkbook, and changing his attorney, doctor, accountant, and stockbroker. The systematic transfer of all of Kohns' assets to [the housekeeper] is further evidence of her undue influence. There is no evidence that Kohns made a single independent decision after the marriage . . . Kohns' marriage to a woman thirty years younger than he, whom he had known for less than a month; the complete cancellation of his entire long-standing estate plan; and the changing of his doctor of over fifteen years, his lawyer of ten years, his accountant, and his stockbroker, all within a few weeks, are highly unusual, and the trial court quite properly found that these actions were taken as a result of the undue influence of [the housekeeper].

Id. at 1068-69.

As set forth above, the Court concluded that the September 1975 Will prepared by Eloise's lawyer was procured by undue influence and was therefore invalid. The Court also found that the marriage was procured by undue influence. However, the Court held that the marriage could not be attacked after Herbert's death on the grounds of undue influence because a *voidable* marriage can only be attacked during the lifetimes of both spouses. The Court found that the conflicting testimony on lack of capacity prevented the court from declaring the marriage *void* on capacity grounds. Accordingly, the Court held that Eloise's marriage to Hebert was *valid*. Further, because the will favoring Herbert's niece was admitted to probate and that will was executed before the marriage, Eloise was deemed a "pretermitted spouse" under Florida law which entitled her to inherit Herbert's *entire* estate. Id.

Thus, even though the court found that Eloise had procured the marriage by undue influence for the purpose of gaining inheritance rights, the court found that Eloise was nevertheless entitled to take Herbert's *entire estate* as a pretermitted spouse. An similar result under similar facts can be found in Arnelle v. Fisher, 647 So. 2d 1047, 1048 (Fla. 5th DCA 1994).

III. EFFECT OF PROPOSED STATUTORY CHANGE

The proposed legislation adds a new section to the Florida Probate Code that would permit a challenge to certain default property and inheritance rights that inure to a surviving spouse who has procured a marriage by fraud, duress, or undue influence without a challenge to the validity of the marriage itself. This new section is similar to Florida's existing "Slayer Statute", Florida Statutes § 732.802, which prevents a person who kills a decedent from profiting from their crime. A section-by-section analysis of the proposed legislation captioned "Section 732.805. Spousal rights procured by fraud, duress, or undue influence" follows:

A. Effect of Subsection (1) to § 732.805

The effect of Subsection (1) of the proposed statute is that a surviving spouse found to have procured a marriage to a decedent through the means of fraud, duress, or undue influence will not be entitled to certain default rights that accrue solely by virtue of the marriage or that person's status as surviving spouse.

Under Subsection (1)(a) rights that will no longer be available to the offending surviving spouse include any rights or benefits under the Florida Probate Code. This includes, but is not limited to, the entitlement to elective share under § 732.201, Fla. Stat., preference and appointment as personal representative under § 733.301, Fla. Stat., entitlement to a family allowance under § 732.403, Fla. Stat., inheritance by intestacy solely by the virtue as surviving spouse under § 732.102, Fla. Stat., an automatic interest in the decedent's homestead property under § 732.401, Fla. Stat., entitlement to exempt property under § 732.402, Fla. Stat., and inheritance as a pretermitted spouse under § 732.301, Fla. Stat.

In addition, Subsection (1)(b) would preclude a surviving spouse who procured a marriage or their status as surviving spouse through fraud, duress, or undue influence from receiving default rights or benefits under a bond, life insurance policy, or other contractual arrangement in which the decedent was the principal obligee. For example, a surviving spouse who wrongfully procured a marriage would not be entitled to benefits under an insurance policy or annuity contract which provides for a spouse of the decedent as the default beneficiary. However, the statute has no effect when a surviving spouse is specifically designated as a beneficiary by name. For example, if the decedent specifically names his or her spouse as a beneficiary of an insurance policy by name, the statute would have no effect on the rights of the spouse. The reason for this distinction is that law already provides a remedy for challenging a beneficiary designation that was wrongfully procured by undue influence, duress, or fraud. Subsection 1 is only intended to address rights which a surviving spouse receives solely by virtue of the marriage.

Subsection (1)(c) provides that a surviving spouse who procures a marriage by fraud, duress or undue influence will not be entitled to rights or benefits under a will, trust, or power of appointment where the document simply uses the default language "spouse." For example, if the decedent's wealthy father created a trust for the benefit of the decedent during his lifetime with remainder to the decedent's "surviving spouse", the mere status as a surviving spouse would create rights for the spouse in the decedent's father's trust. The decedent's father may have executed this trust years before the decedent met the undue influencing spouse so that trust

provision could likely not be challenged on the grounds of fraud or undue influence. Subsection 1(c) further provides that, if the surviving spouse is provided for by name, the statute will not preclude that individual's entitlement to those property rights. For example, if a decedent makes specific provision for "my spouse, Jennifer", the statute will have no effect on the devise. Again, the reason for this dichotomy is that an offending provision in a will or trust which was procured by the undue influence, fraud, or duress can be challenged under current law.

Under current Florida law, a surviving spouse is immune from the presumption of undue influence on the basis that every marriage involves confidential disclosures. Jacobs v. Vaillancourt, 634 So. 2d 667, 672 (Fla. 2d DCA 1994); Tarsagian v. Watt, 402 So. 2d 471, 472 (Fla. 3d DCA 1981). Under Subsection (1)(d) of the proposed statute, a surviving spouse who is found to have procured a marriage to the decedent by fraud, duress or undue influence will no longer receive the immunity from the presumption of undue influence.

Finally, Subsection (1) permits a surviving spouse to raise the fact that the marriage was subsequently ratified as a defense. Accordingly, if both spouses subsequently ratify the marriage, such ratification may be raised as a defense even though the marriage was originally procured through the means of fraud, duress or undue influence.

B. Effect of Subsection (2) to § 732.805

Subsection (2) of the proposed statute provides that if a surviving spouse is found to have procured the marriage to the decedent by fraud, duress, or undue influence, the property that would otherwise have passed solely by virtue of the marriage to the surviving spouse shall now pass as if the spouse had predeceased the decedent.

C. Effect of Subsection (3) to § 732.805

Subsection (3) of the proposed statute makes it clear that a challenge of a surviving spouse's rights under this section may be maintained as a defense, objection, or cause of action by any interested person after the death of the decedent. Further, a defense, objection, or cause of action under this section may be brought in any proceeding in which the fact of marriage may be material, either directly or indirectly. For example, it may make sense for the issue of spousal rights procured by fraud, duress or undue influence to be raised in response to a surviving spouse's petition for elective share. However, it is also possible that challenge under this statute may take the form of a civil action or other cause of action for declaratory relief.

D. Effect of Subsection (4) to § 732.805

Subsection (4) addresses the burden of proof applicable to a challenge to spousal rights under this statute. Under Subsection (4), the contestant to the spousal rights shall have the burden of establishing, by a preponderance of the evidence, that the marriage was procured by fraud, duress or undue influence. In the event that ratification is raised in the defense, the surviving spouse shall have the burden of establishing, by preponderance of the evidence the subsequent ratification of the marriage by both spouses, which is authorized by Subsection (1).

E. Effect of Subsection (5) to § 732.805

Subsection (5) provides that the court shall award taxable cost as in chancery actions, including attorney's fees. When awarding fees and costs, the court has discretion to direct all or part of the payment from a party's interest in the estate, or to enter a judgment that may be satisfied from other property of the party. This subsection is intended to deter spurious claims by providing a shifting of fees to the losing party.

F. Effect of Subsection (6) to § 732.805

Subsection (6) provides that an insurance company, bank, or other obligor that makes a payment according to the terms of its policy or obligations will not be held liable for making payments to the surviving spouse, unless prior to payment it has received at its home office or principal address written notice of a claim under this section. This subsection was added to provide protection for institutions making payments in good faith without notice of the challenge to spousal rights.

G. Effect of Subsection (7) to § 732.805

Subsection (7) provides that the proposed statute does not limit the rights that any litigant may have under existing Florida law. There may be other defenses and causes of action available to beneficiaries of an estate when a spouse has procured a marriage by undue influence, fraud, or duress. For example, there may be equitable defenses which would prevent the spouse from inheriting or, alternatively, a beneficiary may be able to state a claim for tortuous interference with an expectancy. This statute is not intended to limit such claims or defenses.

H. Effect of Subsection (8) to § 732.805

Subsection (8) provides that an interested person is barred from bringing an action to challenge spousal rights under the proposed statute, unless such an action is commenced within four years after the decedent's date of death. Subsection (8) contemplates that such an action may be barred by adjudication, estoppel, or a provision of the Florida Probate Code or Florida Probate Rules. For example, if a surviving spouse files a petition for elective share and the contestant receives notice of such a petition yet fails to raise the invalidity of the marriage as a defense at that time, a later challenge under this section may be barred.

Further, Subsection (8) makes it clear that a cause of action under this section accrues on the decedent's date of death. Accordingly, unless there is an earlier triggering period limiting the application of the statute, there is an outside four-year time frame following the decedent's death within which a contestant is entitled to bring a claim under this section.

IV. FISCAL IMPACT ON STATE AND LOCAL GOVERNMENTS

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

V. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR

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

VI. CONSTITUTIONAL ISSUES

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

VII. OTHER INTERESTED PARTIES

To be determined

A bill to be entitled

An act relating to spousal rights procured by fraud, duress, or undue influence; providing an effective date.

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

Section 1. Section 732.805, Florida Statutes, is added to read:

732.805. Spousal rights procured by fraud, duress, or undue influence

(1) A surviving spouse who is found to have procured a marriage to the decedent by fraud, duress, or undue influence is not entitled to any of the following rights or benefits that inure solely by virtue of the marriage or the person's status as surviving spouse of the decedent, unless both spouses subsequently ratify the marriage:

(a) any rights or benefits under the Florida Probate Code, including but not limited to entitlement to elective share, preference in appointment as personal representative, family allowance, inheritance by intestacy, homestead, exempt property, or inheritance as a pretermitted spouse.

(b) any rights or benefits under a bond, life insurance policy, or other contractual arrangement of which the decedent was the principal obligee or the person upon whose life the policy is issued, unless the surviving spouse is provided for by name, whether or not designated as the spouse, in the bond, life insurance policy, or other contractual arrangement.

(c) any rights or benefits under a will, trust, or power of appointment, unless the surviving spouse is provided for by name, whether or not designated as the spouse, in the will, trust, or power of appointment.

(d) any immunity from the presumption of undue influence that the surviving spouse may have under Florida law.

(2) Any of the rights or benefits listed in paragraphs (a), (b), and (c) of subsection (1) that would have passed solely by virtue of the marriage to a surviving spouse who is found to have procured the marriage by fraud, duress, or undue influence pursuant to this section, shall pass as if the spouse had predeceased the decedent.

(3) A challenge to a surviving spouse's rights under this section may be maintained as a defense, objection, or cause of action by any interested person after the death of the decedent

in any proceeding in which the fact of marriage may be material, either directly or indirectly.

(4) The contestant shall have the burden of establishing, by a preponderance of the evidence, that the marriage was procured by fraud, duress, or undue influence. In the event ratification is raised as a defense, the surviving spouse shall have the burden of establishing, by a preponderance of the evidence, a subsequent ratification of the marriage by both spouses.

(5) In all actions brought under this section, the court shall award taxable costs as in chancery actions, including attorneys' fees. When awarding taxable costs and attorneys' fees under this section, the court, in its discretion, may direct payment from a party's interest, if any, in the estate, or enter a judgment that may be satisfied from other property of the party, or both.

(6) Any insurance company, bank, or other obligor making payment according to the terms of its policy or obligations is not liable by reason of this section unless prior to payment it has received at its home office or principal address written notice of a claim under this section.

(7) The rights and remedies granted in this section are in addition to any other rights or remedies a person may have at law or equity.

(8) Unless sooner barred by adjudication, estoppel, or a provision of the Florida Probate Code or Florida Probate Rules, an interested person is barred from bringing an action under this section unless it is commenced within four years after the decedent's date of death. A cause of action under this section shall accrue on the decedent's date of death.

Section 2. This act shall take effect [TBD].

732.805. Spousal rights procured by fraud, duress, or undue influence

(1) A surviving spouse who is found to have procured a marriage to the decedent by fraud, duress, or undue influence is not entitled to any of the following rights or benefits that inure solely by virtue of the marriage or the person's status as surviving spouse of the decedent, unless both spouses subsequently ratify the marriage:

(a) any rights or benefits under the Florida Probate Code, including but not limited to entitlement to elective share, preference in appointment as personal representative, family allowance, inheritance by intestacy, homestead, exempt property, or inheritance as a pretermitted spouse.

(b) any rights or benefits under a bond, life insurance policy, or other contractual arrangement of which the decedent was the principal obligee or the person upon whose life the policy is issued, unless the surviving spouse is provided for by name, whether or not designated as the spouse, in the bond, life insurance policy, or other contractual arrangement.

(c) any rights or benefits under a will, trust, or power of appointment, unless the surviving spouse is provided for by name, whether or not designated as the spouse, in the will, trust, or power of appointment.

(d) any immunity from the presumption of undue influence that the surviving spouse may have under Florida law.

(2) Any of the rights or benefits listed in paragraphs (a), (b), and (c) of subsection (1) that would have passed solely by virtue of the marriage to a surviving spouse who is found to have procured the marriage by fraud, duress, or undue influence pursuant to this section, shall pass as if the spouse had predeceased the decedent.

(3) A challenge to a surviving spouse's rights under this section may be maintained as a defense, objection, or cause of action by any interested person after the death of the decedent in any proceeding in which the fact of marriage may be material, either directly or indirectly.

(4) The contestant shall have the burden of establishing, by a preponderance of the evidence, that the marriage was procured by fraud, duress, or undue influence. In the event ratification is raised as a defense, the surviving spouse shall have the burden of establishing, by a preponderance of the evidence, a subsequent ratification of the marriage by both spouses.

(5) In all actions brought under this section, the court shall award taxable costs as in chancery actions, including attorneys' fees. When awarding taxable costs and attorneys' fees under this section, the court, in its discretion, may direct payment from a party's interest, if any, in the estate, or enter a judgment that may be satisfied

from other property of the party, or both.

(6) Any insurance company, bank, or other obligor making payment according to the terms of its policy or obligations is not liable by reason of this section unless prior to payment it has received at its home office or principal address written notice of a claim under this section.

(7) The rights and remedies granted in this section are in addition to any other rights or remedies a person may have at law or equity.

(8) Unless sooner barred by adjudication, estoppel, or a provision of the Florida Probate Code or Florida Probate Rules, an interested person is barred from bringing an action under this section unless it is commenced within four years after the decedent's date of death. A cause of action under this section shall accrue on the decedent's date of death.

Rule 9.170. Appeal Proceedings in Probate and Guardianship Cases

(a) Applicability. Appeal proceedings in probate and guardianship cases shall be as in civil cases, except as modified by this rule.

(b) Appealable Orders. Except for proceedings under rule 9.100 and rule 9.130(a), appeals of orders rendered in probate and guardianship cases shall be limited to orders that finally determine a right or obligation of an interested person as defined in the Florida Probate Code. Orders that "finally determine a right or obligation" include, but are not limited to, orders that:

(1) determine a petition or motion to revoke letters of administration or letters of guardianship;

(2) determine a petition or motion to revoke probate of a will;

(3) determine a petition for probate of a lost or destroyed will;

(4) grant or deny a petition for administration pursuant to section 733.2123, Florida Statutes;

(5) grant heirship, succession, entitlement, or determine the persons to whom distribution should be made;

(6) remove or refuse to remove a fiduciary;

(7) refuse to appoint a personal representative or guardian;

(8) determine a petition or motion to determine incapacity or to remove rights of an alleged incapacitated person or ward;

(9) determine a motion or petition to restore capacity or rights of a ward;

(10) determine a petition to approve the settlement of minors' claims;

(11) determine apportionment or contribution of estate taxes;

(12) determine an estate's interest in any property;

(13) determine exempt property, family allowance or the homestead status of real property,

(14) authorize or confirm a sale of real or personal property by a personal representative;

(15) make distributions to any beneficiary;

(16) determine amount and order contribution in satisfaction of elective share;

(17) determine a motion or petition for enlargement of time to file a claim against an estate;

(18) determine a motion or petition to strike an objection to a claim against an estate;

(19) determine a motion or petition to extend the time to file an objection to a claim against an estate;

(20) determine a motion or petition to enlarge the time to file an independent action on a claim filed against an estate;

(21) settle an account of a personal representative, guardian, or other fiduciary;

(22) discharge a fiduciary or the fiduciary's surety;

(23) award attorneys' fees or costs;

(24) approve a settlement agreement on any of the matters listed above in (1) – (19) or authorizing a compromise pursuant to section 733.708, Florida Statutes.

(c) Record; Alternative Appendix. An appeal under this rule may proceed on a record prepared by the clerk of the lower tribunal or on appendices to the briefs, as elected by the parties within the time frames set forth in rule 9.200(a)(3) for designating the record. The clerk of the lower tribunal shall prepare a record on appeal in accordance with rule 9.200 unless the appellant directs that no record shall be prepared. However, any other party may direct the clerk to prepare a record in accordance with rule 9.200. If no record is prepared under this rule, the appeal shall proceed using appendices pursuant to rule 9.220.

(d) Briefs. The appellant's initial brief, accompanied by an appendix as prescribed by rule 9.220 (if applicable), shall be served within 70 days of filing the notice of appeal. Additional briefs shall be served as prescribed by rule 9.210.

(e) Scope of Review. The court may review any ruling or matter related to the order on appeal occurring before the filing of the notice of appeal, except any order that was appealable under this rule. Multiple orders that are separately appealable under rule 9.170(b) may be reviewed by a single notice if the notice is timely filed as to each such order.

. . . .

Rule 9.110. Appeal Proceedings to Review Final Orders of Lower Tribunals and Orders Granting New Trial in Jury and Non-Jury Cases

(a) Applicability. This rule applies to those proceedings that

(1) invoke the appeal jurisdiction of the courts described in rules 9.030(a)(1), (b)(1)(A), and (c)(1)(A);

~~(2)seek review of orders entered in probate and guardianship matters that finally determine a right or obligation of an interested person as defined in the Florida Probate Code;~~

~~(3)~~ (2) seek review of administrative action described in rules 9.030(b)(1)(C) and (c)(1)(C); and

~~(4)~~ (3) seek review of orders granting a new trial in jury and non-jury civil and criminal cases described in rules 9.130(a)(4) and 9.140(c)(1)(C).

. . . .

WPB 1038232.1

FLORIDA PROBATE RULES COMMITTEE

REPORT OF PROPOSED RULE AMENDMENTS FOR TRIENNIAL CYCLE (TO BE FILED WITH SUPREME COURT FEB. 1, 2010)

The proposed amendments are summarized in the chart below, with full text attached in legislative format. Rules that contain Committee Note changes only are not included in the chart. Any comments should be sent by August 15, 2009 to the Committee Chair, Frank Pilotte, at fpilotte@murphyreid.com, with a copy to Bar liaison Craig Shaw at cshaw@flabar.org.

RULE	COMMITTEE VOTE	CHANGE TO RULE
5.030	26-0	Subdivision (b) deals with limiting an attorney's appearance in a probate or guardianship proceeding when no court order is involved, and the amendments clarify the procedure for terminating that appearance. Editorial changes in subdivision (c) clarify when a court order is required for a withdrawal or limited appearance.
5.040	23-0	Subdivision (d) is amended to provide that the optional use of formal notice when only informal notice is required does not modify any time period otherwise specified by statute or rule.
5.110	17-2	Subdivision (a) is amended to add a requirement that a personal representative or guardian must notify the court of any change of address within 20 days.
5.200	25-0	Subdivision (e) is amended to clarify that reference to the "code" means the "Florida Probate Code," to conform to the same term used in several other rules.

5.210	25-0	Subdivision (b) is amended to more clearly specify who is to receive service of a petition to admit a decedent's will to probate without administration. Subdivision (d) is added to provide that the court should include a finding that the will has been properly executed when it admits the will to probate.
5.260	26-0	Subdivision (c) is amended to clarify that a state agency filing a caveat need not designate an agent for service of process, and to provide that a caveator who is not a resident of the county where the caveat is filed must designate either a resident of that county or an attorney licensed and residing in Florida as the agent. Editorial changes in (d) and (e).
5.340	25-0	Subdivisions (d) and (g) (former (f)) are amended to delete the requirement to serve a copy of the inventory on the Department of Revenue, which is no longer required by statute. Subdivision (e) amended, and new (f) created, to limit the kinds of information available to nonresiduary beneficiaries.
5.406	22-0	Subdivision (c) is amended to address instances in which the value of the property claimed as exempt does not need to be stated in the order.
5.440	25-0	The title of the rule is amended to more clearly delineate the scope of the rule and to parallel the title of Rule 5.660.
5.496	24-0	Subdivision (b) is amended to delete the requirement that a copy of the objection must be served within 10 days, to reflect deletion of that time limit from the corresponding statute.
5.696	24-0	Subdivision (b) is amended to eliminate redundant language.
5.710	26-0	Editorial change in subdivision (e).
5.725	26-0	Editorial change in subdivision (c).

RULE 5.020. PLEADINGS; VERIFICATION; MOTIONS

(a) Forms of Pleading. Pleadings shall be signed by the attorney of record, and by the pleader when required by these rules. All technical forms of pleadings are abolished. No defect of form impairs substantial rights, and no defect in the statement of jurisdictional facts actually existing renders any proceeding void.

(b) Petition. A petition shall contain a short and plain statement of the relief sought, the grounds therefor, and the jurisdiction of the court where the jurisdiction has not already been shown.

(c) Motions. Any other application to the court for an order shall be by written motion, unless made orally during a hearing or trial. The motion shall state with particularity the grounds therefor and shall set forth the relief or order sought.

(d) Rehearing. A motion for rehearing of any order or judgment shall be served not later than 10 days after the date of filing the order or judgment with the clerk as shown on the face of the order or judgment.

(e) Verification. When verification of a document is required, the document filed shall include an oath, affirmation, or the following statement:

"Under penalties of perjury, I declare that I have read the foregoing, and the facts alleged are true, to the best of my knowledge and belief."

Committee Notes

The time for determining when a motion for rehearing must be served has been clarified in view of Casto v. Casto, 404 So. 2d 1046 (Fla. 1981).

Rule History

1977 Revision: Editorial change (rule) and expansion of committee note. Subdivisions (a), (b), and (d) substantially the same as subdivisions (a), (b), and

(f) of prior rule 5.030. Subdivision (c) taken from section 731.104, Florida Statutes. For adversary proceedings see new rule 5.025. Notice of administration is not a pleading within the meaning of this rule.

1980 Revision: Subdivisions (c) and (d) have been redesignated as (e) and (f). New subdivisions (c) and (d) are added to provide for the use of motions in probate proceedings other than adversary proceedings and to specifically authorize a procedure for rehearing.

1984 Revision: Minor editorial changes. Subdivision (f) of prior rule has been deleted as it is now covered under the adversary rules.

1988 Revision: Editorial change in caption of (a). Committee notes revised. Citation form change in committee notes.

1992 Revision: Editorial changes. Committee notes revised. Citation form changes in rule and committee notes.

2003 Revision: Committee notes revised.

2010 Revision: Committee notes revised.

Statutory References

§ 731.104, Fla. Stat. Verification of documents.
§ 731.201, Fla. Stat. General definitions.
§ 733.202, Fla. Stat. Petition.
§ 733.604(1), Fla. Stat. ~~Inventory~~Inventories and accountings; public records exemptions.
§ 733.901, Fla. Stat. Final discharge.
§ 735.203, Fla. Stat. Petition for summary administration.
§ 744.104, Fla. Stat. Verification of documents.
§ 744.3201, Fla. Stat. Petition to determine incapacity.
§ 744.331, Fla. Stat. Procedures to determine incapacity.
§ 744.334, Fla. Stat. Petition for appointment of guardian or professional guardian; contents.

Rule References

Fla. Prob. R. 5.025 Adversary proceedings.
Fla. Prob. R. 5.200 Petition for administration.
Fla. Prob. R. 5.205(b) Filing evidence of death.
Fla. Prob. R. 5.320 Oath of personal representative.
Fla. Prob. R. 5.330 Execution by personal representative.
Fla. Prob. R. 5.350 Continuance of unincorporated business or venture.
Fla. Prob. R. 5.370(a) Sales of real property where no power conferred.
Fla. Prob. R. 5.405(b) Proceedings to determine homestead real property.
Fla. Prob. R. 5.530 Summary administration.
Fla. Prob. R. 5.550 Petition to determine incapacity.
Fla. Prob. R. 5.560 Petition for appointment of guardian of an incapacitated person.
Fla. Prob. R. 5.600 Oath.

RULE 5.030. ATTORNEYS

(a) Required; Exception. Every guardian and every personal representative, unless the personal representative remains the sole interested person, shall be represented by an attorney admitted to practice in Florida. A guardian or personal representative who is an attorney admitted to practice in Florida may represent himself or herself as guardian or personal representative. A guardian advocate is not required to be represented by an attorney unless otherwise required by law or the court.

(b) ~~Limiting~~Limited Appearance without Court Order. An attorney of record for an interested person in a proceeding governed by these rules shall be the attorney of record in all other proceedings in the administration of the same estate or guardianship, except service of process in an independent action on a claim, unless

~~(1)~~ at the time of appearance the attorney files a notice specifically limiting the attorney's appearance only to the particular proceeding or matter in which the attorney appears~~, or~~

~~(2) the court orders otherwise~~. At the conclusion of that proceeding or matter, the attorney's role terminates upon the attorney filing notice of completion of limited appearance and serving a copy on the client and other interested persons.

(c) Withdrawal or ~~Limiting~~Limited Appearance with Court Order. An attorney of record may withdraw or limit the attorney's appearance with approval of the court~~,~~ after filing a motion setting forth the reasons and serving a copy on the client and other interested persons.

Committee Notes

The appearance of an attorney in an estate is a general appearance unless (i) specifically limited at the time of such appearance or (ii) the court orders otherwise. This rule does not affect the right of a party to employ additional attorneys who, if members of The Florida Bar, may appear at any time.

Rule History

1975 Revision: Subdivision (a) is same as prior rule 5.040 with added provision for withdrawal of attorney similar to Florida Rule of Appellate Procedure 2.3(d)(2). Subdivision (b) reflects ruling in case of State ex rel. Falkner v. Blanton, 297 So. 2d 825 (Fla. 1974).

1977 Revision: Editorial change requiring filing of petition for withdrawal and service of copy upon interested persons. Editorial change in citation forms in rule and committee note.

1984 Revision: Minor editorial changes and addition of subdivision (c). Committee notes expanded.

1988 Revision: Editorial changes and order of subdivisions rearranged. Committee notes expanded. Citation form changes in committee notes.

1992 Revision: Editorial changes. Committee notes revised. Citation form changes in committee notes.

2003 Revision: Committee notes revised.

2005 Revision: Committee notes revised.

2006 Revision: Committee notes revised.

2008 Revision: Subdivision (a) amended to reflect that a guardian advocate may not be required to be represented by an attorney in some instances. Committee notes revised.

2010 Revision: Subdivisions (b) and (c) amended to clarify the procedure for termination of an attorney's representation of an interested person either with or without court order.

Statutory References

§ 393.12, Fla. Stat. Capacity; appointment of guardian advocate.

§ 731.301, Fla. Stat. Notice.
§ 733.106, Fla. Stat. Costs and attorney's fees.
§ 733.212, Fla. Stat. Notice of administration; filing of objections.
§ 733.6175, Fla. Stat. Proceedings for review of employment of agents and compensation of personal representatives and employees of estate.
§ 744.108, Fla. Stat. Guardian's and attorney's fees and expenses.
§ 744.3085, Fla. Stat. Guardian advocates.

Rule References

Fla. Prob. R. 5.041(b) Service of pleadings and papers.
Fla. Prob. R. 5.110(b), (c) Resident agent.
Fla. R. Jud. Admin. 2.505 Attorneys.
Fla. R. App. P. 9.440 Attorneys.

RULE 5.040. NOTICE

(a) Formal Notice.

(1) When formal notice is given, a copy of the pleading or motion shall be served on interested persons, together with a notice requiring the person served to serve written defenses on the person giving notice within 20 days after service of the notice, exclusive of the day of service, and to file the original of the written defenses with the clerk of the court either before service or immediately thereafter, and notifying the person served that failure to serve written defenses as required may result in a judgment or order for the relief demanded in the pleading or motion, without further notice.

(2) After service of formal notice, informal notice of any hearing on the pleading or motion shall be served on interested persons, provided that if no written defense is served within 20 days after service of formal notice on an interested person, the pleading or motion may be considered ex parte as to that person, unless the court orders otherwise.

(3) Formal notice shall be served:

(A) by sending a copy by any commercial delivery service requiring a signed receipt or by any form of mail requiring a signed receipt as follows:

(i) to the attorney representing an interested person; or

(ii) to an interested person who has filed a request for notice at the address given in the request for notice; or

(iii) to an incapacitated person or a person with a developmental disability to the person's usual place of abode and to the person's legal guardian, if any, at the guardian's usual place of abode or regular place of business; or, if there is no legal guardian, to the incapacitated person or person with a developmental disability at the person's usual place of abode and on the person, if any, having care or custody of the incapacitated person or person with a developmental disability at the usual place of abode or regular place of business of such custodian; or

(iv) to a minor whose disabilities of nonage are not removed, by serving the persons designated to accept service of process on a minor under chapter 48, Florida Statutes; or

(v) on any other individual to the individual's usual place of abode or to the place where the individual regularly conducts business; or

(vi) on a corporation or other business entity to its registered office in Florida or its principal business office in Florida or, if neither is known after reasonable inquiry, to its last known address; or

(B) as provided in the Florida Rules of Civil Procedure for service of process; or

(C) as otherwise provided by Florida law for service of process.

(4) Service of formal notice pursuant to subdivision (3)(A) shall be complete on receipt of the notice. Proof of service shall be by verified statement of the person giving the notice; and there shall be attached to the verified statement the signed receipt or other evidence satisfactory to the court that delivery was made to the addressee or the addressee's agent.

(5)If service of process is made pursuant to Florida law, proof of service shall be made as provided therein.

(b) Informal Notice. When informal notice of a petition or other proceeding is required or permitted, it shall be served as provided in rule 5.041(b).

(c) "Notice" Defined. In these rules, the Florida Probate Code, and the Florida Guardianship Law "notice" shall mean informal notice unless formal notice is specified.

(d) Formal Notice Optional. Formal notice may be given in lieu of informal notice at the option of the person giving notice unless the court orders otherwise. When formal notice is given in lieu of informal notice, formal notice shall be given to all interested persons entitled to notice. When formal notice is

given in lieu of informal notice, that notice does not modify any time period otherwise specified by statute or these rules.

Committee Notes

Formal notice is the method of service used in probate proceedings and the method of service of process for obtaining jurisdiction over the person receiving the notice. "The manner provided for service of formal notice" is as provided in rule 5.040(a)(3).

Informal notice is the method of service of notice given to interested persons entitled to notice when formal notice is not given or required.

Reference in this rule to the terms "mail" or "mailing" refers to use of the United States Postal Service.

Rule History

1975 Revision: Implements section 731.301, Florida Statutes.

1977 Revision: Reference to elisor.

1980 Revision: Editorial changes. Clarification of time for filing defenses after formal notice. Authorizes court to give relief to delinquent respondent from ex parte status; relief from service on numerous persons; allows optional use of formal notice.

1984 Revision: Editorial changes. Eliminates deadline for filing as opposed to serving defenses after formal notice; defines procedure subsequent to service of defenses after formal notice; new requirements for service of formal notice on incompetents and corporations; defines when service of formal notice is deemed complete; provisions relating to method of service of informal notice transferred to new rules 5.041 and 5.042; eliminates waiver of notice by will.

1988 Revision: Editorial changes. Committee notes revised. Citation form changes in committee notes.

1991 Revision: Subdivision (b) amended to define informal notice more clearly.

1992 Revision: Editorial changes. Committee notes revised. Citation form changes in committee notes.

1996 Revision: Subdivision (a) amended to permit service of formal notice by commercial delivery service to conform to 1993 amendment to section 731.301(1), Florida Statutes. Editorial changes.

2001 Revision: Editorial changes in subdivision (a)(3)(A) to clarify requirements for service of formal notice.

2003 Revision: Committee notes revised.

2005 Revision: Subdivision (a)(3)(A) amended to delete requirement of court approval of commercial delivery service.

2006 Revision: Committee notes revised.

2007 Revision: Committee notes revised.

2007 Revision: New subdivision (a)(3)(A)(iv) inserted in response to *Cason ex rel. Saferight v. Hammock*, 908 So.2d 512 (Fla. 5th DCA 2005), and subsequent subdivisions renumbered accordingly. Committee notes revised.

2008 Revision: Subdivision (a)(3)(A)(iv) revised to include "person with a developmental disability." Committee notes revised.

2010 Revision: Subdivision (d) amended to clarify that the optional use of formal notice when only informal notice is required does not modify any time period otherwise specified by statute or rule. Committee notes revised.

Statutory References

§ 1.01(3), Fla. Stat. Definitions.
ch. 48, Fla. Stat. Process and service of process.

ch. 49, Fla. Stat. Constructive service of process.
§ 393.12, Fla. Stat. Capacity; appointment of guardian advocate.
§ 731.105, Fla. Stat. In rem proceeding.
§ 731.201(18), (22), Fla. Stat. General definitions.
§ 731.301, Fla. Stat. Notice.
§ 731.302, Fla. Stat. Waiver and consent by interested person.
§ 733.212, Fla. Stat. Notice of administration; filing of objections.
§ 733.2123, Fla. Stat. Adjudication before issuance of letters.
§ 733.502, Fla. Stat. Resignation of personal representative.
§ 733.613, Fla. Stat. Personal representative's right to sell real property.
§ 733.6175, Fla. Stat. Proceedings for review of employment of agents and compensation of personal representatives and employees of estate.
§ 733.901, Fla. Stat. Final discharge.
ch. 743, Fla. Stat. Disability of nonage of minors removed.
§ 744.106, Fla. Stat. Notice.
§ 744.301, Fla. Stat. Natural guardians.
§ 744.3085, Fla. Stat. Guardian advocates.
§ 744.3201, Fla. Stat. Petition to determine incapacity.
§ 744.331, Fla. Stat. Procedures to determine incapacity.
§ 744.3371, Fla. Stat. Notice of petition for appointment of guardian and hearing.
§ 744.441, Fla. Stat. Powers of guardian upon court approval.
§ 744.447, Fla. Stat. Petition for authorization to act.
§ 744.477, Fla. Stat. Proceedings for removal of a guardian.

Rule References

Fla. Prob. R. 5.025 Adversary proceedings.
Fla. Prob. R. 5.030 Attorneys.
Fla. Prob. R. 5.041 Service of pleadings and papers.
Fla. Prob. R. 5.042 Time.
Fla. Prob. R. 5.060 Request for notices and copies of pleadings.
Fla. Prob. R. 5.180 Waiver and consent.
Fla. Prob. R. 5.560 Petition for appointment of guardian of an incapacitated person.
Fla. Prob. R. 5.649 Guardian advocate.
Fla. Prob. R. 5.681 Restoration of rights of person with developmental

disability.

Fla. R. Jud. Admin. 2.505 Attorneys.

Fla. R. Civ. P. 1.070 Process.

Fla. R. Civ. P. Form 1.902 Summons.

RULE 5.041. SERVICE OF PLEADINGS AND PAPERS

(a) Service; When Required. Unless the court orders otherwise, every petition or motion for an order determining rights of an interested person, and every other pleading or paper filed in the particular proceeding which is the subject matter of such petition or motion, except applications for witness subpoenas, shall be served on interested persons unless these rules, the Florida Probate Code, or the Florida Guardianship Law provides otherwise. No service need be made on interested persons against whom a default has been entered, or against whom the matter may otherwise proceed ex parte, unless a new or additional right or demand is asserted.

(b) Service; How Made. When service is required or permitted to be made on an interested person represented by an attorney, service shall be made on the attorney unless service on the interested person is ordered by the court. Except when serving formal notice, or when serving a motion, pleading, or other paper in the manner provided for service of formal notice, service shall be made by delivering or mailing a copy of the motion, pleading, or other paper to the attorney or interested person at the last known address or, if no address is known, leaving it with the clerk of the court. If the interested person is a minor whose disabilities of nonage are not removed, and who is not represented by an attorney, then service shall be on the persons designated to accept service of process on a minor under chapter 48, Florida Statutes. Service by mail shall be complete upon mailing except when serving formal notice or when making service in the manner of formal notice. Delivery of a copy within this rule shall be complete upon

(1)handing it to the attorney or to the interested person; or

(2)leaving it at the attorney's or interested person's office with a clerk or other person in charge thereof; or

(3)if there is no one in charge, leaving it in a conspicuous place therein; or

(4)if the office is closed or the person to be served has no office, leaving it at the person's usual place of abode with some person of his or her family above 15 years of age and informing that person of the contents; or

(5)transmitting it by facsimile to the attorney's or interested person's office with a cover sheet containing the sender's name, firm, address, telephone number, facsimile number, and the number of pages transmitted. When delivery is made by facsimile, a copy shall also be served by any other method permitted by this rule. Facsimile delivery occurs when transmission is complete.

Service by delivery after 4:00 p.m. shall be deemed to have been made on the next day that is not a Saturday, Sunday, or legal holiday.

(c) Service; Numerous Interested Persons. In proceedings when the interested persons are unusually numerous, the court may regulate the service contemplated by these rules on motion or on its initiative in a manner as may be found to be just and reasonable.

(d) Filing. All original papers shall be filed either before service or immediately thereafter. If the original of any bond or other paper is not placed in the court file, a certified copy shall be so placed by the clerk.

(e) Filing With Court Defined. The filing of papers with the court as required by these rules shall be made by filing them with the clerk, except that the judge may permit the papers to be filed with the judge in which event the judge shall note the filing date and transmit the papers to the clerk. The date of filing is that shown on the face of each paper by the judge's notation or the clerk's time stamp, whichever is earlier.

(f) Certificate of Service. When any attorney shall certify in substance:

"I certify that a copy hereof has been served on (here insert name or names) by (delivery) (mail) (fax) on (date).

_____

Attorney"

the certificate shall be taken as prima facie proof of service in compliance with these rules except in case of formal notice or service in the manner of formal notice. A person not represented by an attorney shall certify in the same manner, but the certificate must be verified.

(g) Service of Orders.

(1)A copy of all orders or judgments determining rights of an interested person shall be transmitted by the court or under its direction at the time of entry of the order or judgment to all interested persons in the particular proceeding.

(2)This subdivision (g) is directory, and a failure to comply with it does not affect the order or judgment or its finality.

Committee Notes

Derived from Florida Rule of Civil Procedure 1.080. Regulates the service of pleadings and papers in proceedings on petitions or motions for determination of rights. It is not applicable to every pleading and paper served or filed in the administration of a guardianship or decedent's estate.

Rule History

1984 Revision: New rule. Subdivision (c) is same as former rule 5.040(d).

1988 Revision: Committee notes revised. Citation form changes in committee notes.

1992 Revision: Editorial changes. Committee notes revised. Citation form changes in committee notes.

1996 Revision: Subdivision (b) amended to allow service to be made by facsimile. Committee notes revised.

2000 Revision: Subdivision (b) amended to clarify requirements for service of pleadings and papers. Subdivision (e) amended to clarify date of filing. Editorial changes in subdivision (f).

2003 Revision: Committee notes revised.

2005 Revision: Changes in subdivisions (b) and (f) to clarify service requirements, and editorial changes in (e).

2006 Revision: Committee notes revised.

2007 Revision: Provisions regarding service on a minor added in subdivision (b) in response to *Cason ex rel. Saferight v. Hammock*, 908 So.2d 512 (Fla. 5th DCA 2005). Committee notes revised.

2008 Revision: Committee notes revised.

2010 Revision: Committee notes revised.

Statutory References

ch. 39, Fla. Stat. Proceedings relating to children.
ch. 48, Fla. Stat. Process and service of process.
ch. 61, Fla. Stat. Dissolution of marriage; support; ~~custody~~time-sharing.
ch. 63, Fla. Stat. Adoption.
§ 393.12, Fla. Stat. Capacity; appointment of guardian advocate.
§ 731.201, Fla. Stat. General definitions.
§ 731.301, Fla. Stat. Notice.
§ 733.212, Fla. Stat. Notice of administration; filing of objections.
§ 733.2123, Fla. Stat. Adjudication before issuance of letters.
§ 733.705(2), (4), Fla. Stat. Payment of and objection to claims.
ch. 743, Fla. Stat. Disability of nonage of minors removed.
§ 744.3085, Fla. Stat. Guardian advocates.
§ 744.3201, Fla. Stat. Petition to determine incapacity.
§ 744.331, Fla. Stat. Procedures to determine incapacity.
§ 744.3371, Fla. Stat. Notice of petition for appointment of guardian and hearing.
§ 744.447, Fla. Stat. Petition for authorization to act.
ch. 751, Fla. Stat. Temporary custody of minor children by extended family.

Rule References

Fla. Prob. R. 5.020 Pleadings; verification; motions.

Fla. Prob. R. 5.025 Adversary proceedings.
Fla. Prob. R. 5.030 Attorneys.
Fla. Prob. R. 5.040 Notice.
Fla. Prob. R. 5.042 Time.
Fla. Prob. R. 5.150(c) Order requiring accounting.
Fla. Prob. R. 5.180 Waiver and consent.
Fla. Prob. R. 5.240(a) Notice of administration.
Fla. Prob. R. 5.340(d) Inventory.
Fla. Prob. R. 5.550 Petition to determine incapacity.
Fla. Prob. R. 5.560 Petition for appointment of guardian of an incapacitated person.
Fla. Prob. R. 5.649 Guardian advocate.
Fla. Prob. R. 5.681 Restoration of rights of person with developmental disability.
Fla. R. Civ. P. 1.080 Service of pleadings and papers.
Fla. R. Jud. Admin. 2.505 Attorneys.

RULE 5.060. REQUEST FOR NOTICES AND COPIES OF PLEADINGS

(a) Request. Any interested person who desires notice of proceedings in the estate of a decedent or ward may file a separate written request for notice of further proceedings, designating therein such person's residence and post office address. When such person's residence or post office address changes, a new designation of such change shall be filed in the proceedings. A person filing such request, or address change, shall also deliver a copy thereof to the clerk, who shall forthwith mail it to the attorney for the personal representative or guardian, noting on the original the fact of mailing.

(b) Notice and Copies. A party filing a request shall be served thereafter by the moving party with notice of further proceedings and with copies of subsequent pleadings and papers as long as the party is an interested person.

Committee Notes

Rule History

1975 Revision: This rule substantially incorporates the provisions of prior rule 5.060 except that now a copy of the request shall be mailed by the clerk only to the attorney for the personal representative or guardian. Even though a request under this rule has not been made, informal notice as provided in rule 5.040(b)(3) may still be required.

1977 Revision: Editorial and citation form change in committee note.

1980 Revision: Caveat, the personal representative may want to give notice to parties even though not required, for example, where an independent action has been filed on an objected claim.

1988 Revision: Captions added to subdivisions. Committee notes expanded. Citation form changes in committee notes.

1992 Revision: Editorial changes. Committee notes revised. Citation form changes in committee notes.

2003 Revision: Committee notes revised.

20010 Revision: Committee notes revised.

Statutory References

§ 731.201, Fla. Stat. General definitions.
§ 733.604, Fla. Stat. ~~Inventory~~Inventories and accountings; public records exemptions.

Rule References

Fla. Prob. R. 5.040 Notice.
Fla. Prob. R. 5.041 Service of pleadings and papers.
Fla. Prob. R. 5.340 Inventory.
Fla. Prob. R. 5.341 Estate information.

RULE 5.110. ADDRESS DESIGNATION FOR PERSONAL REPRESENTATIVE OR GUARDIAN; DESIGNATION OF RESIDENT AGENT AND ACCEPTANCE

(a) Address Designation of Personal Representative or Guardian. Before letters are issued, the personal representative or guardian shall file a designation of its residence street address and mailing address. The personal representative or guardian shall notify the court of any change in its residence street address or mailing address within 20 days of the change.

(b) Designation of Resident Agent. Before letters are issued, a personal representative or guardian shall file a designation of resident agent for service of process or notice, and the acceptance by the resident agent. A designation of resident agent is not required if a personal representative or guardian is (1) a corporate fiduciary having an office in Florida, or (2) a Florida Bar member who is a resident of and has an office in Florida. The designation shall contain the name, residence street address, and mailing address of the resident agent. A Florida office street address and mailing address for the attorney as resident agent may be designated in lieu of a residence address.

(c) Residency Requirement. A resident agent, other than a member of The Florida Bar who is a resident of Florida, must be a resident of the county where the proceedings are pending.

(d) Acceptance by Resident Agent. The resident agent shall sign a written acceptance of its designation.

(e) Incorporation in Other Pleadings. The designation of the address of the personal representative or guardian, the designation of resident agent, or acceptance may be incorporated in the petition for administration, the petition for appointment of guardian, or the personal representative's or guardian's oath.

(f) Effect of Designation and Acceptance. The designation of and acceptance by the resident agent shall constitute consent to service of process or notice on the agent and shall be sufficient to bind the personal representative or guardian:

(1)in its representative capacity in any action; and

(2)in its personal capacity only in those actions in which the personal representative or guardian is sued personally for claims arising from the administration of the estate or guardianship.

(g) Successor Agent. If the resident agent dies, resigns, or is unable to act for any other reason, the personal representative or guardian shall appoint a successor agent within 10 days after receiving notice that such event has occurred.

Committee Notes

Rule History

1977 Revision: Change in committee note to conform to statutory renumbering.

Substantially the same as prior rule 5.210, except that under prior rule, designation was required to be filed within 10 days after letters issued.

1984 Revision: Captions added to subdivisions. New subdivision (b) added. Requires filing acceptance at the same time as filing designation. Committee notes revised.

1988 Revision: Change in (c) to clarify that the personal representative, if a member of The Florida Bar, may not also serve as resident agent for service of process or notice. Citation form change in committee notes.

1992 Revision: Editorial changes. Committee notes revised. Citation form changes in committee notes.

2000 Revision: Extensive editorial changes to rule. Rule reformatted for clarity and revised to permit an attorney serving as resident agent to designate a business address in lieu of a residence address.

2003 Revision: Committee notes revised.

2008 Revision: Committee notes revised.

2010 Revision: Subdivision (a) amended to require the personal representative or guardian to notify the court of any change of address to facilitate ongoing contact with the personal representative or guardian.

Rule References

Fla. Prob. R. 5.200 Petition for administration.
Fla. Prob. R. 5.320 Oath of personal representative.
Fla. Prob. R. 5.560 Petition for appointment of guardian of an incapacitated person.
Fla. Prob. R. 5.649 Guardian advocate.

RULE 5.200. PETITION FOR ADMINISTRATION

The petition for administration shall be verified by the petitioner and shall contain:

(a) a statement of the interest of the petitioner, the petitioner's name and address, and the name and office address of the petitioner's attorney;

(b) the name, last known address, social security number, date and place of death of the decedent, and state and county of the decedent's domicile;

(c) so far as is known, the names and addresses of the surviving spouse, if any, and the beneficiaries and their relationship to the decedent and the date of birth of any who are minors;

(d) a statement showing venue;

(e) the priority, under the ~~code~~Florida Probate Code, of the person whose appointment as the personal representative is sought and a statement that the person is qualified to serve under the laws of Florida;

(f) a statement whether domiciliary or principal proceedings are pending in another state or country, if known, and the name and address of the foreign personal representative and the court issuing letters;

(g) a statement of the approximate value and nature of the assets;

(h) in an intestate estate, a statement that after the exercise of reasonable diligence the petitioner is unaware of any unrevoked wills or codicils, or if the petitioner is aware of any unrevoked wills or codicils, a statement why the wills or codicils are not being probated;

(i) in a testate estate, a statement identifying all unrevoked wills and codicils being presented for probate, and a statement that the petitioner is unaware of any other unrevoked wills or codicils or, if the petitioner is aware of any other unrevoked wills or codicils, a statement why the other wills or codicils are not

being probated; and

(j) in a testate estate, a statement that the original of the decedent's last will is in the possession of the court or accompanies the petition, or that an authenticated copy of a will deposited with or probated in another jurisdiction or that an authenticated copy of a notarial will, the original of which is in the possession of a foreign notary, accompanies the petition.

Committee Notes

Rule History

1977 Revision: Addition to (b)(5) to require an affirmative statement that the person sought to be appointed as personal representative is qualified to serve. Committee note expanded to include additional statutory references.

Substantially the same as section 733.202, Florida Statutes, and implementing sections 733.301 through 733.305, Florida Statutes.

1988 Revision: Editorial changes. Committee notes revised.

1992 Revision: Addition of phrase in subdivision (b) to conform to 1992 amendment to section 733.202(2)(b), Florida Statutes. Reference to clerk ascertaining the amount of the filing fee deleted in subdivision (g) because of repeal of sliding scale of filing fees. The remaining language was deemed unnecessary. Editorial changes. Committee notes revised. Citation form changes in committee notes.

2002 Revision: Addition of phrases in subdivision (j) to add references to wills probated in Florida where the original is in the possession of a foreign official. Editorial changes. Committee notes revised.

2003 Revision: Committee notes revised.

2007 Revision: Committee notes revised.

2007 Revision: Editorial changes in (h) and (i).

2010 Revision: Editorial change in (e) to clarify reference to Florida Probate Code.

Statutory References

§ 731.201(23), Fla. Stat. General definitions.
§ 731.301, Fla. Stat. Notice.
§ 733.202, Fla. Stat. Petition.
§ 733.301, Fla. Stat. Preference in appointment of personal representative.
§ 733.302, Fla. Stat. Who may be appointed personal representative.
§ 733.303, Fla. Stat. Persons not qualified.
§ 733.304, Fla. Stat. Nonresidents.
§ 733.305, Fla. Stat. Trust companies and other corporations and associations.

Rule References

Fla. Prob. R. 5.020 Pleadings; verification; motions.
Fla. Prob. R. 5.040 Notice.
Fla. Prob. R. 5.041 Service of pleadings and papers.
Fla. Prob. R. 5.180 Waiver and consent.
Fla. Prob. R. 5.201 Notice of petition for administration.

RULE 5.205. FILING EVIDENCE OF DEATH

(a) Requirements for Filing. A copy of an official record of the death of a decedent shall be filed by the personal representative, if any, or the petitioner in each of the following proceedings and at the times specified:

(1)Administration of decedent's estate: not later than 3 months following the date of the first publication of the notice to creditors.

(2)Ancillary proceedings: not later than 3 months following the date of first publication of notice to creditors.

(3)Summary administration: at any time prior to entry of the order of summary administration.

(4)Disposition without administration: at the time of filing the application for disposition without administration.

(5)Determination of beneficiaries: at any time prior to entry of the final judgment determining beneficiaries.

(6)Determination of protected homestead: at any time prior to entry of the final judgment determining protected homestead status of real property.

(7)Probate of will without administration: at any time prior to entry of the order admitting will to probate.

(b) Waiver. On verified petition by the personal representative, if any, or the petitioner the court may enter an order dispensing with this rule, without notice or hearing.

(c) Authority to Require Filing. The court may, without notice or hearing, enter an order requiring the personal representative, if any, or the petitioner to file a copy of an official record of death at any time during the proceedings.

Committee Notes

A short form certificate of death, which does not disclose the cause of death, should be filed.

Rule History

1980 Revision: This rule is intended to provide a uniform procedure for filing an official record of death in any judicial or statutory proceeding upon the death of a decedent. The court may, upon ex parte application, waive compliance with this rule or require filing at any stage in the proceedings.

1984 Revision: Captions and minor editorial changes. Committee notes revised.

1988 Revision: Editorial and substantive changes. Adds (a)(8) to require filing when will is admitted to probate without administration of the estate or an order disposing of property. Committee notes revised.

1992 Revision: Editorial changes. Committee notes revised. Citation form changes in committee notes.

2002 Revision: Replaces “homestead” with “protected homestead” in (a)(7) to conform to addition of term in section 731.201(29), Florida Statutes. Committee notes revised.

2003 Revision: Revises subdivision (a)(1) to change notice of administration to notice to creditors. Deletes subdivision (a)(3) referring to family administration, and renumbers subsequent subdivisions. Committee notes revised.

2010 Revision: Committee notes revised.

Statutory References

§ 28.222(3)(g), Fla. Stat. Clerk to be county recorder.
§ 382.008(6), Fla. Stat. Death and fetal death registration.
§ 731.103, Fla. Stat. Evidence as to death or status.
§ 733.2121, Fla. Stat. Notice to creditors; filing of claims.

Rule References

Fla. Prob. R. 5.042(a) Time.
Fla. Prob. R. 5.171 Evidence of death.
Fla. Prob. R. 5.241 Notice to creditors.

RULE 5.210. PROBATE OF WILLS WITHOUT ADMINISTRATION

(a) Petition and Contents. A petition to admit a decedent's will to probate without administration shall be verified by the petitioner and shall contain:

(1)a statement of the interest of the petitioner, the petitioner's name and address, and the name and office address of the petitioner's attorney;

(2)the name, last known address, social security number, date and place of death of the decedent, and state and county of the decedent's domicile;

(3)so far as is known, the names and addresses of the surviving spouse, if any, and the beneficiaries and their relationships to the decedent, and the date of birth of any who are minors;

(4)a statement showing venue;

(5)a statement whether domiciliary or principal proceedings are pending in another state or country, if known, and the name and address of the foreign personal representative and the court issuing letters;

(6)a statement that there are no assets subject to administration in Florida;

(7)a statement identifying all unrevoked wills and codicils being presented for probate and a statement that the petitioner is unaware of any other unrevoked will or codicil or, if the petitioner is aware of any other unrevoked wills or codicils, a statement why the other wills or codicils are not being probated; and

(8)a statement that the original of the decedent's last will is in the possession of the court or accompanies the petition, or that an authenticated copy of a will deposited with or probated in another jurisdiction or that an authenticated copy of a notarial will, the original of which is in the possession of a foreign notary, accompanies the petition.

(b) Service. The petitioner shall ~~comply with~~ serve a copy of the petition on those persons who would be entitled to service under rule 5.240 ~~with regard to~~

~~service of a copy of the petition~~.

(c) Objections. Objections to the validity of the will shall follow the form and procedure set forth in these rules pertaining to revocation of probate. Objections to the venue or jurisdiction of the court shall follow the form and procedure set forth in the Florida Rules of Civil Procedure.

(d) Order. An order admitting the will to probate shall include a finding that the will has been executed as required by law.

Committee Notes

Examples illustrating when a will might be admitted to probate are when an instrument (such as a will or trust agreement) gives the decedent a power exercisable by will, such as the power to appoint a successor trustee or a testamentary power of appointment. In each instance, the will of the person holding the power has no legal significance until admitted to probate. There may be no assets, creditors' issues, or other need for a probate beyond admitting the will to establish the exercise or non-exercise of such powers.

Rule History

1975 Revision: Proof of will may be taken by any Florida circuit judge or clerk without issuance of commission.

1984 Revision: This rule has been completely revised to set forth the procedure for proving all wills except lost or destroyed wills and the title changed. The rule requires an oath attesting to the statutory requirements for execution of wills and the will must be proved before an order can be entered admitting it to probate. Former rules 5.280, 5.290, and 5.500 are included in this rule. Committee notes revised.

1988 Revision: Editorial and substantive changes. Change in (a)(3) to clarify which law determines validity of a notarial will; change in (a)(4) to clarify requirement that will of a Florida resident must comply with Florida law; adds new subdivision (b) to set forth required contents of petition for probate of will; moves former (b) to (c). Committee notes expanded; citation form change in

committee notes.

1992 Revision: Editorial changes. Committee notes revised. Citation form changes in committee notes.

1996 Revision: Subdivision (a)(4) changed to allow authenticated copies of wills to be admitted to probate if the original is filed or deposited in another jurisdiction.

2002 Revision: Substantial revision to the rule setting forth the requirements of a petition to admit a will to probate when administration is not required. Self proof of wills is governed by the Florida Statutes. Former subdivision (a)(4) amended and transferred to new rule 5.215. Former subdivision (a)(5) amended and transferred to new rule 5.216.

2003 Revision: Committee notes revised.

2007 Revision: New subdivisions (b) and (c) added to provide for service of the petition and the procedure for objections consistent with the procedures for probate of a will with administration.

2010 Revision: Subdivision (b) amended to reflect that service of the petition to admit a decedent's will to probate without administration shall be served on the persons who would be entitled to service of the notice of administration in a formal administration as set forth in rule 5.240. New subdivision (d) added to provide that any order admitting the decedent's will to probate without administration contain a finding that the will was executed as required by law. Committee notes revised.

Statutory References

§ 731.201, Fla. Stat. General definitions.
§ 731.301, Fla. Stat. Notice.
§ 732.502, Fla. Stat. Execution of wills.
§ 732.503, Fla. Stat. Self-proof of will.
§ 733.103, Fla. Stat. Effect of probate.
§ 733.201, Fla. Stat. Proof of wills.
§ 733.202, Fla. Stat. Petition.

§ 733.204, Fla. Stat. Probate of a will written in a foreign language.
§ 733.205, Fla. Stat. Probate of notarial will.
§ 733.206, Fla. Stat. Probate of will of resident after foreign probate.
§ 733.207, Fla. Stat. Establishment and probate of lost or destroyed will.
§ 734.104, Fla. Stat. Foreign wills; admission to record; effect on title.

Rule References

Fla. Prob. R. 5.015 General definitions.
Fla. Prob. R. 5.020 Pleadings, verification; motions.
Fla. Prob. R. 5.205(a)(7) Filing evidence of death.
Fla. Prob. R. 5.215 Authenticated copy of will.
Fla. Prob. R. 5.216 Will written in foreign language.
Fla. Prob. R. 5.230 Commission to prove will.
Fla. Prob. R. 5.240 Notice of administration.
Fla. Prob. R. 5.270 Revocation of probate.

RULE 5.235. ISSUANCE OF LETTERS, BOND

(a) Appointment of Personal Representative. After the petition for administration is filed and the will, if any, is admitted to probate:

(1)the court shall appoint the person entitled and qualified to be personal representative;

(2)the court shall determine the amount of any bond required. The clerk may approve the bond in the amount determined by the court; and

(3)any required oath or designation of, and acceptance by, a resident agent shall be filed.

(b) Issuance of Letters. Upon compliance with all of the foregoing, letters shall be issued to the personal representative.

(c) Bond. On petition by any interested person or on the court's own motion, the court may waive the requirement of filing a bond, require a personal representative or curator to give bond, increase or decrease the bond, or require additional surety.

Committee Notes

This rule represents a rule implementation of the procedure formerly found in sections 733.401 and 733.403(2), Florida Statutes, both of which were repealed in 2001. It is not intended to change the effect of the statutes from which it was derived but has been reformatted to conform with the structure of these rules. It is not intended to create a new procedure or modify an existing procedure.

Rule History

1988 Revision: New rule.

1992 Revision: Editorial changes. Committee notes revised. Citation form changes in committee notes.

1996 Revision: Mandate in subdivision (a)(2) prohibiting charge of service fee by clerk deleted. Statutory references added.

2003 Revision: Committee notes revised.

2010 Revision: Committee notes revised.

Statutory References

§ 28.24(~~2~~4<u>19</u>), Fla. Stat. Service charges by clerk of the circuit court.
§ 28.2401, Fla. Stat. Service charges in probate matters.
§ 733.402, Fla. Stat. Bond of fiduciary; when required; form.
§ 733.403, Fla. Stat. Amount of bond.
§ 733.405, Fla. Stat. Release of surety.
§ 733.501, Fla. Stat. Curators.

Rule References

Fla. Prob. R. 5.110 Address designation for personal representative or guardian; designation of resident agent and acceptance.
Fla. Prob. R. 5.122 Curators.
Fla. Prob. R. 5.320 Oath of personal representative.

RULE 5.260. CAVEAT; PROCEEDINGS

(a) Filing. Any creditor or interested person other than a creditor may file a caveat with the court.

(b) Contents. The caveat shall contain the decedent's name, the decedent's social security number or date of birth, if known, a statement of the interest of the caveator in the estate, and the name, specific mailing address, and residence address of the caveator.

(c) Resident Agent of Caveator; Service. If the caveator is not a state agency or a resident of the Florida county where the caveat is filed, the caveator shall ~~file a designation of~~designate an agent for service of notice. The designation shall state either (1) the name and specific mailing address and residence address of a resident in the county where the caveat is filed, or (2) the name and office address of a member of The Florida Bar residing in Florida ~~as the caveator's agent for service of notice~~. The written acceptance by the person appointed as resident agent shall be filed with the designation or included in the caveat. The designation and acceptance shall constitute the consent of the caveator that service of notice upon the designated resident agent shall bind the caveator. ~~If the caveator is represented by an attorney admitted to practice in Florida who signs the caveat, it shall not be necessary to designate a resident agent under this rule.~~

(d) Filing After Commencement. If at the time of the filing of any caveat the decedent's will has been admitted to probate or letters of administration have been issued, the clerk shall ~~forthwith~~promptly notify the caveator in writing of the date of issuance of letters and the names and addresses of the personal representative and the personal representative's attorney.

(e) Creditor. When letters of administration issue after the filing of a caveat by a creditor, the clerk shall ~~forthwith~~promptly notify the caveator, in writing, advising the caveator of the date of issuance of letters and the names and addresses of the personal representative and the personal representative's attorney, unless notice has previously been served on the caveator. A copy of any notice given by the clerk, together with a certificate of the mailing of the original notice, shall be filed in the estate proceedings.

(f) Other Interested Persons; Before Commencement. After the filing of a caveat by an interested person other than a creditor, the court shall not admit a will of the decedent to probate or appoint a personal representative without service of formal notice on the caveator or the caveator's designated agent.

Committee Notes

Caveat proceedings permit a decedent's creditor or other interested person to be notified when letters of administration are issued. Thereafter, the caveator must take appropriate action to protect the caveator's interests.

This rule treats the creditor caveator differently from other caveators.

An attorney admitted to practice in Florida who represents the caveator may sign the caveat on behalf of the client.

Rule History

1977 Revision: Carried forward prior rule 5.150.

1984 Revision: Changes in (a), (b), and (d) are editorial. Change in (c) eliminates resident agent requirement for Florida residents and for nonresidents represented by a Florida attorney. Service on the attorney binds caveator. Former (e) is now subdivisions (e) and (f) and treats creditor caveator differently from other interested persons. Change in (f) requires formal notice. Committee notes revised.

1988 Revision: Committee notes revised. Citation form changes in committee notes.

1992 Revision: Addition of language in subdivision (b) to implement 1992 amendment to section 731.110(2), Florida Statutes. Editorial changes. Citation form changes in committee notes.

2003 Revision: Committee notes revised.

2010 Revision: Subdivision (c) amended to clarify that a state agency filing a caveat need not designate an agent for service of process, and to provide that a caveator who is not a resident of the county where the caveat is filed must designate either a resident of that county or an attorney licensed and residing in Florida as the caveator's agent. Editorial changes in (d) and (e). Committee notes revised.

Statutory Reference

§ 731.110, Fla. Stat. Caveat; proceedings.

Rule Reference

Fla. Prob. R. 5.040(a) Notice.

RULE 5.330. EXECUTION BY PERSONAL REPRESENTATIVE

Notwithstanding any other provisions of these rules, the personal representative shall sign the:

(a) inventory;

(b) accountings;

(c) petition for sale or confirmation of sale or encumbrance of real or personal property;

(d) petition to continue business of decedent;

(e) petition to compromise or settle claim;

(f) petition to purchase on credit;

(g) petition for distribution and discharge; and

(h) resignation of personal representative.

Committee Notes

Rule History

1975 Revision: Where the jurisdiction of the court is invoked voluntarily pursuant to section 733.603, Florida Statutes, or otherwise, the rule requires that the personal representative have actual knowledge of the more important steps and acts of administration.

1977 Revision: Citation form change in committee note.

1988 Revision: Editorial changes. Citation form changes in committee notes.

1992 Revision: Editorial changes. Committee notes revised. Citation form changes in committee notes.

2003 Revision: Committee notes revised.

2010 Revision: Committee notes revised.

Statutory References

§ 733.502, Fla. Stat. Resignation of personal representative.
§ 733.604, Fla. Stat. ~~Inventory~~Inventories and accountings; public records exemptions.
§ 733.612(5), (22), (24), Fla. Stat. Transactions authorized for the personal representative; exceptions.
§ 733.613, Fla. Stat. Personal representative's right to sell real property.
§ 733.708, Fla. Stat. Compromise.
§ 733.901, Fla. Stat. Final discharge.

Rule References

Fla. Prob. R. 5.340 Inventory.
Fla. Prob. R. 5.345 Accountings other than personal representatives' final accountings.
Fla. Prob. R. 5.346 Fiduciary accounting.
Fla. Prob. R. 5.350 Continuance of unincorporated business or venture.
Fla. Prob. R. 5.370 Sales of real property where no power conferred.
Fla. Prob. R. 5.400 Distribution and discharge.
Fla. Prob. R. 5.430 Resignation of personal representative.

RULE 5.340. INVENTORY

(a) Contents and Filing. Unless an inventory has been previously filed, the personal representative shall file an inventory of the estate within 60 days after issuance of letters. The inventory shall contain notice of the beneficiaries' rights under subdivision (e), list the estate with reasonable detail, and include for each listed item (excluding real property appearing to be protected homestead property) its estimated fair market value at the date of the decedent's death. Real property appearing to be protected homestead property shall be listed and so designated.

(b) Extension. On petition the time for filing the inventory may be extended by the court for cause shown without notice, except that the personal representative shall serve copies of the petition and order on the persons described in subdivision (d).

(c) Amendments. A supplementary or amended inventory containing the information required by subdivision (a) as to each affected item shall be filed and served by the personal representative if:

(1)the personal representative learns of property not included in the original inventory; or

(2)the personal representative learns that the estimated value or description indicated in the original inventory for any item is erroneous or misleading; or

(3)the personal representative determines the estimated fair market value of an item whose value was described as unknown in the original inventory.

(d) Service. The personal representative shall serve a copy of the inventory and all supplemental and amended inventories on ~~the Department of Revenue,~~ the surviving spouse, each heir at law in an intestate estate, each residuary beneficiary in a testate estate, and any other interested person who may request it in writing. The personal representative shall file proof of such service.

(e) Information. On ~~reasonable~~ request in writing, the personal representative shall provide ~~a beneficiary with information to which the~~

~~beneficiary is entitled by law.~~ the following:

(1) To the requesting residuary beneficiary or heir in an intestate estate, a written explanation of how the inventory value for an asset was determined or, if an appraisal was obtained, a copy of the appraisal.

(2) To any other requesting beneficiary, a written explanation of how the inventory value for each asset distributed or proposed to be distributed to that beneficiary was determined or, if an appraisal of that asset was obtained, a copy of the appraisal.

(f) Notice to Nonresiduary Beneficiaries. The personal representative shall provide to each nonresiduary beneficiary written notice of that beneficiary's right to receive a written explanation of how the inventory value for each asset distributed or proposed to be distributed to that beneficiary was determined or a copy of an appraisal, if any, of the asset.

~~(f)~~(g) Elective Share Proceedings. Upon entry of an order determining the surviving spouse's entitlement to the elective share, the personal representative shall file an inventory of the property entering into the elective estate which shall identify the direct recipient, if any, of that property. The personal representative shall serve the inventory of the elective estate as provided in rule 5.360. ~~Service of an inventory of the elective estate on the Department of Revenue is not required.~~ On ~~reasonable~~ request in writing, the personal representative shall provide an interested person with a written explanation of how the inventory value for an asset was determined and shall permit an interested person to examine appraisals on which the inventory values are based.

~~(g)~~(h) Verification. All inventories shall be verified by the personal representative.

Committee Notes

Inventories of the elective estate under subdivision (f) shall be afforded the same confidentiality as probate inventories. § 733.604(1) and (2), Fla. Stat.

Inventories are still required to be filed. Once filed, however, they are subject to the confidentiality provisions found in sections 733.604(1) and (2), Florida Statutes.

Constitutional protected homestead real property is not necessarily a probatable asset. Disclosure on the inventory of real property appearing to be constitutional protected homestead property informs interested persons of the homestead issue.

Interested persons are entitled to reasonable information about estate proceedings on proper request, including a copy of the inventory, an opportunity to examine appraisals, and other information pertinent to their interests in the estate. The rights of beneficiaries to information contained in estate inventories is limited by section 733.604(3), Florida Statutes. Inventories of the elective estate under subdivision (f) affects a broader class of interested persons who may obtain information regarding the assets disclosed therein subject to control by the court and the confidentiality afforded such inventories under section 733.604(1) and (2).

Rule History

1980 Revision: Eliminated the time limit in requesting a copy of the inventory by an interested person or in furnishing it by the personal representative.

1984 (First) Revision: Extensive changes. Committee notes revised.

1984 (Second) Revision: Subdivision (a) modified to clarify or re-insert continued filing requirement for inventory.

1988 Revision: Editorial changes in (b) and (d). Committee notes revised. Citation form changes in committee notes.

1992 Revision: Editorial changes. Committee notes revised. Citation form changes in committee notes.

2001 Revision: Subdivision (a) amended to conform to statutory changes. Subdivision (d) amended to add requirement of filing of proof of service.

Subdivision (e) amended to clarify personal representative's duty to furnish explanation of how inventory values were determined. Subdivision (f) added to require personal representative to file inventory of property entering into elective share. Subdivision (g) added to require verification of inventories. Committee notes revised.

2002 Revision: Subdivision (e) amended to conform to section 733.604(3), Florida Statutes. Subdivision (f) amended to establish procedures for interested persons to obtain information about assets and values listed in the inventory of the elective estate. Committee notes revised.

2003 Revision: Committee notes revised.

2010 Revision: Subdivisions (d) and (g) (former (f)) amended to delete the requirement to serve a copy of the inventory on the Department of Revenue. Subdivision (e) amended, and new (f) created, to limit the kind of information available to nonresiduary beneficiaries, and subsequent subdivisions relettered. Editorial changes in (a), (e), and (g). Committee notes revised.

Constitutional Reference

Art. X, § 4, Fla. Const.

Statutory References

~~§ 199.062(4), Fla. Stat. Annual tax information reports.~~
§ 732.401, Fla. Stat. Descent of homestead.
§ 732.4015, Fla. Stat. Devise of homestead.
§ 733.604, Fla. Stat. ~~Inventory~~Inventories and accountings; public records exemptions.

Rule References

Fla. Prob. R. 5.041 Service of pleadings and papers.
Fla. Prob. R. 5.060 Request for notices and copies of pleadings.
Fla. Prob. R. 5.330 Execution by personal representative.

Fla. Prob. R. 5.360 Elective share.
Fla. Prob. R. 5.405 Proceedings to determine homestead real property.

RULE 5.346. FIDUCIARY ACCOUNTING

(a) Contents. A fiduciary accounting shall include:

(1)all cash and property transactions since the date of the last accounting or, if none, from the commencement of administration, and

(2)a schedule of assets at the end of the accounting period.

(b) Accounting Standards. The following standards are required for the accounting of all transactions occurring on or after January 1, 1994:

(1)Accountings shall be stated in a manner that is understandable to persons who are not familiar with practices and terminology peculiar to the administration of estates and trusts.

(2)The accounting shall begin with a concise summary of its purpose and content.

(3)The accounting shall contain sufficient information to put interested persons on notice as to all significant transactions affecting administration during the accounting period.

(4)The accounting shall contain 2 values in the schedule of assets at the end of the accounting period, the asset acquisition value or carrying value, and estimated current value.

(5)Gains and losses incurred during the accounting period shall be shown separately in the same schedule.

(6)The accounting shall show significant transactions that do not affect the amount for which the fiduciary is accountable.

(c) Accounting Format. A model format for an accounting is attached to this rule as Appendix A.

(d) Verification. All accountings shall be verified by the fiduciary filing the

accounting.

Committee Notes

This rule substantially adopts the Uniform Fiduciary Accounting Principles and Model Formats adopted by the Committee on National Fiduciary Accounting Standards of the American Bar Association: Section of Real Property, Probate and Trust Law, the American College of Probate Counsel, the American Bankers Association: Trust Division, and other organizations.

Accountings shall also comply with the Florida principal and income law, chapter 738, Florida Statutes.

Attached as Appendix B to this rule are an explanation and commentary for each of the foregoing standards, which shall be considered as a Committee Note to this rule.

Accountings that substantially conform to the model formats are acceptable. The model accounting format included in Appendix A is only a suggested form.

Rule History

1988 Revision: New rule.

1992 Revision: Editorial changes throughout. Rule changed to require compliance with the Uniform Fiduciary Accounting Principles and Model Formats for accounting of all transactions occurring on or after January 1, 1994. Committee notes revised. Citation form changes in committee notes.

1996 Revision: Committee notes revised.

1999 Revision: Committee notes revised to correct rule reference and to reflect formatting changes in accounting formats.

2002 Revision: Subdivisions (a) and (b) amended to clarify contents of accounting. Committee notes revised.

2003 Revision: Committee notes revised.

2005 Revision: Verification requirement added as new (d). Committee notes revised.

2007 Revision: Committee notes revised.

2010 Revision: Committee notes revised.

Statutory References

§ 733.501, Fla. Stat. Curators.
§ 733.5036, Fla. Stat. Accounting and discharge following resignation.
§ 733.508, Fla. Stat. Accounting and discharge of removed personal representatives upon removal.
§ 733.602(1), Fla. Stat. General duties.
§ 733.612(18), Fla. Stat. Transactions authorized for the personal representative; exceptions.
~~§ 736.08135, Fla. Stat. Trust accountings.~~
ch. 738, Fla. Stat. Principal and income.

Rule References

Fla. Prob. R. 5.020 Pleadings; verification; motions.
Fla. Prob. R. 5.040 Notice.
Fla. Prob. R. 5.122 Curators.
Fla. Prob. R. 5.180 Waiver and consent.
Fla. Prob. R. 5.330 Execution by personal representative.
Fla. Prob. R. 5.345 Accountings other than personal representatives' final accountings.
Fla. Prob. R. 5.400 Distribution and discharge.
Fla. Prob. R. 5.430 Resignation of personal representative.
Fla. Prob. R. 5.440 Proceedings for removal.

APPENDIX A

[Appendix begins on next page]

IN THE CIRCUIT COURT FOR _____ COUNTY, FLORIDA

IN RE: ESTATE OF

PROBATE DIVISION

File Number _____

Deceased.

Division _____

_____ ACCOUNTING OF PERSONAL REPRESENTATIVE(S)

From:_____, _____, Through:_____, _____

The purpose of this accounting is to acquaint all interested persons with the transactions that have occurred during the period covered by the accounting and the assets that remain on hand. It consists of a SUMMARY sheet and Schedule A showing all Receipts, Schedule B showing all Disbursements, Schedule C showing all Distributions, Schedule D showing all Capital Transactions and Adjustments (the effect of which are also reflected in other schedules, if appropriate), and Schedule E showing assets on hand at the end of the accounting period.

It is important that this accounting be carefully examined. Requests for additional information and any questions should be addressed to the personal representative(s) or the attorneys for the personal representative(s), the names and addresses of whom are set forth below.

Under penalties of perjury, the undersigned personal representative(s) declare(s) that I (we) have read and examined this accounting and that the facts and figures set forth in the Summary and the attached Schedules are true, to the best of my (our) knowledge and belief, and that it is a complete report of all cash and property transactions and of all receipts and disbursements by me (us) as personal representative(s) of the estate of _____ deceased, from _____, ____ through _____, ____.

Signed on _____, ____.

Attorney for Personal Representative:
Personal Representative:

_____

Attorney

_____

_____

Name
Florida Bar No. _____

_____
_____
_____
_____
_____
(address)
_____
(address)
Telephone: _____

[Print or Type Names Under All Signature Lines]

IN THE CIRCUIT COURT FOR _____ COUNTY, FLORIDA

IN RE: ESTATE OF

PROBATE DIVISION
File Number _____

Deceased.

Division_____

_____ ACCOUNTING OF PERSONAL REPRESENTATIVE

From:_____, _____, Through:_____, _____

SUMMARY

	Income	Principal	Totals
I. Starting Balance Assets per Inventory or on Hand at Close of Last Accounting Period	$_____	$_____	$_____
II. Receipts Schedule A:	$_____	$_____	$_____
III. Disbursements Schedule B:	$_____	$_____	$_____
IV. Distributions Schedule C:	$_____	$_____	$_____
V. Capital Transactions and Adjustments Schedule D: Net Gain or		$_____	$_____

(Loss)

VI. Assets on Hand at Close of Accounting Period Schedule E: Cash and Other Assets	$_____	$_____	$_____

NOTE: Refer to Fla. Prob. R. 5.330(b), 5.345, 5.346, and 5.400.

Also see Accountings, Chapter 12 of Practice Under Florida Probate Code (Fla. Bar CLE).

Entries on Summary are to be taken from totals on Schedules A, B, C, D, and E.

The Summary and Schedules A, B, C, D and E are to constitute the full accounting. Every transaction occurring during the accounting period should be reflected on the Schedules.

All purchases and sales, all adjustments to the inventory or carrying value of any asset, and any other changes in the assets (such as stock splits) should be described on Schedule D.

The amount in the "Total" column for Item VI must agree with the total inventory or adjusted carrying value of all assets on hand at the close of the accounting period on Schedule E.

_____ ACCOUNTING OF PERSONAL REPRESENTATIVE,

ESTATE OF _____

From:_____, ___, Through:_____,

SCHEDULE A Receipts

Date	Brief Description of Items	Income	Principal

NOTE: Schedule A should reflect only those items received during administration that are not shown on the inventory. Classification of items as income or principal is to be in accordance with the provisions of the Florida Uniform Principal and Income Act, Chapter 738, Florida Statutes.

Entries involving the sale of assets or other adjustments to the carrying values of assets

are to be shown on Schedule D, and not on Schedule A.

_____ ACCOUNTING OF PERSONAL REPRESENTATIVE,

ESTATE OF _____

From:_____, ___, Through:_____,

SCHEDULE B
Disbursements

Date	Brief Description of Items	Income	Principal

NOTE: Schedule B should reflect only those items paid out during the accounting period. Classification of disbursements as income or principal is to be in accordance with the provisions of the Florida Uniform Principal and Income Act, Chapter 738, Florida Statutes.

Entries involving the purchase of assets or adjustments to the carrying values of assets

are to be shown on Schedule D, and not on Schedule B.

_____ ACCOUNTING OF PERSONAL REPRESENTATIVE,

ESTATE OF _____

From:_____, ___, Through:_____,

SCHEDULE C
Distributions

Date	Brief Description of Items	Income	Principal

NOTE: Schedule C should reflect only those items or amounts distributed to beneficiaries during the accounting period. Assets distributed should be shown at their inventory or adjusted carrying values. Classification of distributions as income or principal is to be in accordance with the provisions of the Florida Uniform Principal and Income Act, Chapter 738, Florida Statutes.

Entries involving adjustments to the carrying values of assets are to be shown on

Schedule D, and not on Schedule C.

_____ ACCOUNTING OF PERSONAL REPRESENTATIVE,

ESTATE OF _____

From:_____, ___, Through:_____,

SCHEDULE D — Capital Transactions and Adjustments

(Does not include distributions. Distributions are shown on Schedule C.)

Date	Brief Description of Transactions	Net Gain	Net Loss
	TOTAL NET GAINS AND (LOSSES)	$	$
	NET GAIN OR (LOSS)	$	$

NOTE: Schedule D should reflect all purchases and sales of assets and any adjustments to the carrying values of any assets.

Entries reflecting sales should show the inventory or adjusted carrying values, the costs and expenses of the sale, and the net proceeds received. The net gain or loss should be extended in the appropriate column on the right side of Schedule D.

Entries reflecting purchases should reflect the purchase price, any expenses of purchase or other adjustments to the purchase price, and the total amount paid. Presumably no gain or loss would be shown for purchases.

Entries reflecting adjustments in capital assets should explain the change (such as a stock split) and the net gain or loss should be shown in the appropriate column on the right side of Schedule D.

The NET gain or loss should be entered in the Principal column of the Summary.

_____ ACCOUNTING OF PERSONAL REPRESENTATIVE,

ESTATE OF _____

From:_____, ___, Through:_____,

SCHEDULE E Assets on Hand at Close of Accounting Period

(Indicate where held and legal description, certificate numbers or other identification.)

	Estimated Current Value	Carrying Value
ASSETS OTHER THAN CASH:		
OTHER ASSETS TOTAL	$	$
CASH:		
CASH TOTAL		$
TOTAL ASSETS (must agree with the Total for Item VI on Summary)		$

NOTE: Schedule E should be a complete list of all assets on hand reflecting inventory values for each item, adjusted in accordance with any appropriate entries on Schedule D.

Current market values for any assets that are known to be different from the inventory or carrying values as of the close of the accounting period should be shown in the column marked "Current Value." The total inventory or adjusted carrying value (not Current Value)

must agree with the Total for Item VI on Summary.

APPENDIX B

UNIFORM FIDUCIARY ACCOUNTING PRINCIPLES

I. ACCOUNTS SHOULD BE STATED IN A MANNER THAT IS UNDERSTANDABLE BY PERSONS WHO ARE NOT FAMILIAR WITH PRACTICES AND TERMINOLOGY PECULIAR TO THE ADMINISTRATION OF ESTATES AND TRUSTS.

Commentary: In order for an account to fulfill its basic function of communication, it is essential that it be stated in a manner that recognizes that the interested parties are not usually familiar with fiduciary accounts. It is neither practical nor desirable to require that accounts be tailored to meet individual disabilities of particular parties but any account should be capable of being understood by a person of average intelligence, literate in English, and familiar with basic financial terms who has read it with care and attention.

Problems arising from terminology or style are usually a reflection of the fact that people who become versed in a particular form of practice tend to forget that terms which are familiar and useful to them may convey nothing to someone else or may even be affirmatively misleading. For example, the terms “debit” and “credit” are generally incomprehensible to people with no knowledge of bookkeeping and many people who are familiar with them in other contexts would assume that in the context of fiduciary accounting, the receipt of an item is a “credit” to the fund rather than a “debit” to the fiduciary.

While the need for concise presentation makes a certain amount of abbreviation both acceptable and necessary, uncommon abbreviation of matters essential to an understanding of the account should be avoided or explained.

No position is taken for or against the use of direct print-outs from machine accounting systems. The quality of the accounts produced by these systems varies widely in the extent to which they can be understood by persons who are not familiar with them. To endorse or object to a direct print-out because it is produced by machine from previously stored data would miss the essential point by focusing attention upon the manner of preparation rather than the product.

II. A FIDUCIARY ACCOUNT SHALL BEGIN WITH A CONCISE SUMMARY OF ITS PURPOSE AND CONTENT.

Commentary: Very few people can be expected to pay much attention to a document unless they have some understanding of its general purpose and its significance to them. Even with such an understanding, impressions derived from the first page or two will often determine whether the rest is read. The use that is made of these pages is therefore of particular significance.

The cover page should disclose the nature and function of the account. While a complete explanation of the significance of the account and the effect of its presentation upon the rights of the parties is obviously impractical for inclusion at this point, there should be at least a brief statement identifying the fiduciary and the subject matter, noting the importance of examining the account and giving an address where more information can be obtained.

It is assumed that the parties would also have enough information from other sources to understand the nature of their relationship to the fund (e.g., residuary legatee, life tenant, remainderman), the function of the account, and the obligation of the fiduciary to supply further relevant information upon request. It is also assumed that notice will be given of any significant procedural considerations such as limitation on the time within which objections must be presented. This would normally be provided by prior or contemporaneous memoranda, correspondence, or discussions.

A summary of the account shall also be presented at the outset. This summary, organized as a table of contents, shall indicate the order of the details presented in the account and shall show separate totals for the aggregate of the assets on hand at the beginning of the accounting period; transactions during the period; and the assets remaining on hand at the end of the period. Each entry in the summary shall be supported by a schedule in the account that provides the details on which the summary is based.

III. A FIDUCIARY ACCOUNT SHALL CONTAIN SUFFICIENT INFORMATION TO PUT THE INTERESTED PARTIES ON NOTICE AS TO ALL SIGNIFICANT TRANSACTIONS AFFECTING

ADMINISTRATION DURING THE ACCOUNTING PERIOD.

Commentary: The presentation of the information account shall allow an interested party to follow the progress of the fiduciary's administration of assets during the accounting period.

An account is not complete if it does not itemize, or make reference to, assets on hand at the beginning of the accounting period.

Illustration:

3.1 The first account for a decedent's estate or a trust may detail the items received by the fiduciary and for which the fiduciary is responsible. It may refer to the total amount of an inventory filed elsewhere or assets described in a schedule attached to a trust agreement.

Instead of retyping the complete list of assets in the opening balance, the preparer may prefer to attach as an exhibit a copy of the inventory, closing balance from the last account, etc., as appropriate, or may refer to them if previously provided to the interested parties who will receive it.

Transactions shall be described in sufficient detail to give interested parties notice of their purpose and effect. It should be recognized that too much detail may be counterproductive to making the account understandable. In accounts covering long periods or dealing with extensive assets, it is usually desirable to consolidate information. For instance, where income from a number of securities is being accounted for over a long period of time, a statement of the total dividends received on each security with appropriate indication of changes in the number of shares held will be more readily understandable and easier to check for completeness than a chronological listing of all dividends received.

Although detail should generally be avoided for routine transactions, it will often be necessary to proper understanding of an event that is somewhat out of the ordinary.

Illustrations:

3.2 Extraordinary appraisal costs should be shown separately and explained.

3.3 Interest and penalties in connection with late filing of tax returns should be shown separately and explained.

3.4 An extraordinary allocation between principal and income such as apportionment of proceeds of property acquired on foreclosure should be separately stated and explained.

3.5 Computation of a formula marital deduction gift involving non-probate assets should be explained.

IV. A FIDUCIARY ACCOUNT SHALL CONTAIN TWO VALUES, THE ASSET ACQUISITION VALUE OR CARRYING VALUE, AND CURRENT VALUE.

Commentary: In order for transactions to be reported on a consistent basis, an appropriate carrying value for assets must be chosen and employed consistently.

The carrying value of an asset should reflect its value at the time it is acquired by the fiduciary (or a predecessor fiduciary). When such a value is not precisely determinable, the figure used should reflect a thoughtful decision by the fiduciary. For assets owned by a decedent, inventory values or estate tax values — generally reflective of date of death — would be appropriate. Assets received in kind by a trustee from a settlor of an inter vivos trust should be carried at their value at the time of receipt. For assets purchased during the administration of the fund, cost would normally be used. Use of Federal income tax basis for carrying value is acceptable when basis is reasonably representative of real values at the time of acquisition. Use of tax basis as a carrying value under other circumstances could be affirmatively misleading to beneficiaries and therefore is not appropriate.

In the Model Account, carrying value is referred to as “fiduciary acquisition value.” The Model Account establishes the initial carrying value of assets as their value at date of death for inventoried assets, date of receipt for subsequent

receipts, and cost for investments.

Carrying value would not normally be adjusted for depreciation.

Except for adjustments that occur normally under the accounting system in use, carrying values should generally be continued unchanged through successive accounts and assets should not be arbitrarily “written up” or “written down.” In some circumstances, however, with proper disclosure and explanation, carrying value may be adjusted.

Illustrations:

4.1 Carrying values based on date of death may be adjusted to reflect changes on audit of estate or inheritance tax returns.

4.2 Where appropriate under applicable local law, a successor fiduciary may adjust the carrying value of assets to reflect values at the start of that fiduciary’s administration.

4.3 Assets received in kind in satisfaction of a pecuniary legacy should be carried at the value used for purposes of distribution.

Though essential for accounting purposes, carrying values are commonly misunderstood by laypersons as being a representation of actual values. To avoid this, the account should include both current values and carrying values.

The value of assets at the beginning and ending of each accounting period is necessary information for the evaluation of investment performance. Therefore, the account should show, or make reference to, current values at the start of the period for all assets whose carrying values were established in a prior accounting period.

Illustrations:

4.4 The opening balance of the first account of a testamentary trustee will usually contain assets received in kind from the executor. Unless the carrying

value was written up at the time of distribution (e.g., 4.2 or 4.3 supra) these assets will be carried at a value established during the executor's administration. The current value at the beginning of the accounting period should also be shown.

4.5 An executor's first account will normally carry assets at inventory (date of death) values or costs. No separate listing of current values at the beginning of the accounting period is necessary.

Current values should also be shown for all assets on hand at the close of the accounting period. The date on which current values are determined shall be stated and shall be the last day of the accounting period, or a date as close thereto as reasonably possible.

Current values should be shown in a column parallel to the column of carrying values. Both columns should be totalled.

In determining current values for assets for which there is no readily ascertainable current value, the source of the value stated in the account shall be explained. The fiduciary shall make a good faith effort to determine realistic values but should not be expected to incur expenses for appraisals or similar costs when there is no reason to expect that the resulting information will be of practical consequence to the administration of the estate or the protection of the interests of the parties.

Illustrations:

4.6 When an asset is held under circumstances that make it clear that it will not be sold (e.g., a residence held for use of a beneficiary) the fiduciary's estimate of value would be acceptable in lieu of an appraisal.

4.7 Considerations such as a pending tax audit or offer of the property for sale may indicate the advisability of not publishing the fiduciary's best estimate of value. In such circumstances, a statement that value was fixed by some method such as "per company books," "formula under buy-sell agreement," or "300% of assessed value" would be acceptable, but the fiduciary would be expected to provide further information to interested parties upon request.

V. GAINS AND LOSSES INCURRED DURING THE ACCOUNTING PERIOD SHALL BE SHOWN SEPARATELY IN THE SAME SCHEDULE.

Commentary: Each transaction involving the sale or other disposition of securities during the accounting period shall be shown as a separate item in one combined schedule of the account indicating the transaction, date, explanation, and any gain or loss.

Although gains and losses from the sale of securities can be shown separately in accounts, the preferred method of presentation is to present this information in a single schedule. Such a presentation provides the most meaningful description of investment performance and will tend to clarify relationships between gains and losses that are deliberately realized at the same time.

VI. THE ACCOUNT SHALL SHOW SIGNIFICANT TRANSACTIONS THAT DO NOT AFFECT THE AMOUNT FOR WHICH THE FIDUCIARY IS ACCOUNTABLE.

Commentary: Transactions such as the purchase of an investment, receipt of a stock split, or change of a corporate name do not alter the total fund for which a fiduciary is accountable but must be shown in order to permit analysis and an understanding of the administration of the fund. These can be best shown in information schedules.

One schedule should list all investments made during the accounting period. It should include those subsequently sold as well as those still on hand. Frequently the same money will be used for a series of investments. Therefore, the schedule should not be totalled in order to avoid giving an exaggerated idea of the size of the fund.

A second schedule (entitled “Changes in Investment Holdings” in the Model Account) should show all transactions affecting a particular security holding, such as purchase of additional shares, partial sales, stock splits, change of corporate name, divestment distributions, etc. This schedule, similar to a ledger account for each holding, will reconcile opening and closing entries for particular holdings, explain changes in carrying value, and avoid extensive searches through the account for information scattered among other schedules.

RULE 5.360. ELECTIVE SHARE

(a) Election. An election to take the elective share may be filed by the surviving spouse, or on behalf of the surviving spouse by an attorney-in-fact or guardian of the property of the surviving spouse.

(1) Election by Surviving Spouse. An electing surviving spouse shall file the election within the time required by law and promptly serve a copy of the election on the personal representative in the manner provided for service of formal notice.

(2) Election by Attorney-in-Fact or Guardian of the Property of Surviving Spouse.

(A) Petition for Approval. Before filing the election, the attorney-in-fact or guardian of the property of the surviving spouse shall petition the court having jurisdiction of the probate proceeding for approval to make the election. The petition for approval shall allege the authority to act on behalf of the surviving spouse and facts supporting the election.

(B) Notice of Petition. Upon receipt of the petition, the personal representative shall promptly serve a copy of the petition by formal notice on all interested persons.

(C) Filing the Election. Upon entry of an order authorizing the filing of an election, the attorney-in-fact or guardian of the property shall file the election within the later of the time provided by law or 30 days from service of the order and promptly serve a copy of the election on the personal representative in the manner provided for service of formal notice.

(b) Procedure for Election.

(1) Extension. Within the period provided by law to make the election, the surviving spouse or an attorney-in-fact or guardian of the property of the surviving spouse may petition the court for an extension of time for making an election or for approval to make the election. After notice and hearing the court for good cause shown may extend the time for election. If the court grants the petition for an extension, the election must be filed within the time allowed by the extension.

(2) Withdrawal of Election. The surviving spouse, an attorney-in-fact, a guardian of the property of the surviving spouse, or the personal representative of the surviving spouse's estate may withdraw the election within the time provided by law.

(3) Service of Notice. Upon receipt of an election the personal representative shall serve a notice of election within 20 days following service of the election, together with a copy of the election, on all interested persons in the manner provided for service of formal notice. The notice of election shall indicate the names and addresses of the attorneys for the surviving spouse and the personal representative and shall state that:

(A) persons receiving a notice of election may be required to contribute toward the satisfaction of the elective share;

(B) objections to the election must be served within 20 days after service of the copy of the notice of election; and

(C) if no objection to the election is timely served, an order determining the surviving spouse's entitlement to the elective share may be granted without further notice.

(4) Objection to Election. Within 20 days after service of the notice of election, an interested person may serve an objection to the election which shall state with particularity the grounds on which the objection is based. The objecting party shall serve copies of the objection on the surviving spouse and the personal representative. If an objection is served, the personal representative shall promptly serve a copy of the objection on all other interested persons who have not previously been served with a copy of the objection.

(c) Determination of Entitlement.

(1) No Objection Served. If no objection to the election is timely served, the court shall enter an order determining the spouse's entitlement to the elective share.

(2) Objection Served. If an objection to the election is timely served, the court shall determine the surviving spouse's entitlement to the elective share after notice and hearing.

(d) Procedure to Determine Amount of Elective Share and Contribution.

(1) Petition by Personal Representative. After entry of the order determining the surviving spouse's entitlement to the elective share, the personal representative shall file and serve a petition to determine the amount of the elective share. The petition shall

(A) give the name and address of each direct recipient known to the personal representative;

(B) describe the proposed distribution of assets to satisfy the elective share, and the time and manner of distribution; and

(C) identify those direct recipients, if any, from whom a specified contribution will be required and state the amount of contribution sought from each.

(2) Service of Inventory. The inventory of the elective estate required by rule 5.340, together with the petition, shall be served within 60 days after entry of the order determining entitlement to the elective share on all interested persons in the manner provided for service of formal notice.

(3) Petition by Spouse. If the personal representative does not file the petition to determine the amount of the elective share within 90 days from rendition of the order of entitlement, the electing spouse or the attorney-in-fact or the guardian of the property or personal representative of the electing spouse may file the petition specifying as particularly as is known the value of the elective share.

(4) Objection to Amount of Elective Share. Within 20 days after service of the petition to determine the amount of the elective share, an interested person may serve an objection to the amount of or distribution of assets to satisfy the elective share. The objection shall state with particularity the grounds on which the objection is based. The objecting party shall serve copies of the objection on the surviving spouse and the personal representative. If an objection is served, the personal representative shall promptly serve a copy of the objection on all interested persons who have not previously been served.

(5) Determination of Amount of Elective Share and Contribution.

(A) No Objection Served. If no objection is timely served to the petition to determine the amount of the elective share, the court shall enter an order on the petition.

(B) Objection Served. If an objection is timely served to the petition to determine the amount of the elective share, the court shall determine the amount of the elective share and contribution after notice and hearing.

(6) Order Determining Amount of Elective Share and Contribution. The order shall:

(A) set forth the amount of the elective share;

(B) identify the assets to be distributed to the surviving spouse in satisfaction of the elective share; and

(C) if contribution is necessary, specify the amount of contribution for which each direct recipient is liable.

(e) Relief from Duty to Enforce Contribution. A petition to relieve the personal representative from the duty to enforce contribution shall state the grounds on which it is based and notice shall be served on interested persons.

Committee Notes

The extensive rewrite of this rule in 2001 is intended to conform it with and provide procedures to accommodate amendments to Florida's elective share statutes, §§ 732.201 *et seq.*, Fla. Stat. Proceedings to determine entitlement to elective share are not specific adversary proceedings under rule 5.025(a), but may be declared adversary at the option of the party. Proceedings to determine the amount of elective share and contribution are specific adversary proceedings under rule 5.025(a). Requirements for service are intended to be consistent with the requirements for formal notice. Rule 5.040. Service of process may be required to obtain personal jurisdiction over direct recipients who are not otherwise interested persons and who have not voluntarily submitted themselves to the jurisdiction of the court. Rule

5.040(a)(3)(C); ch. 48, Fla. Stat. Process and Service of Process; ch. 49, Fla. Stat., Constructive Service of Process. An inventory of the elective estate should be afforded the same confidentiality as other estate inventories. § 733.604(1) and (2), Fla. Stat. In fulfilling his or her obligations under this rule, a personal representative is not required to make impractical or extended searches for property entering into the elective estate and the identities of direct recipients. Preexisting rights to dower and curtesy formerly addressed in subdivision (e) of this rule are now governed by new rule 5.365.

Counsel's attention is directed to Fla. Ethics Opinion 76-16, dated April 4, 1977, for guidance regarding the duties of an attorney with respect to spousal rights.

Rule History

1984 Revision: Extensive changes. Clarifies information to be included in a petition for elective share filed by a personal representative and specifies information to be included in an order determining elective share. Committee notes revised and expanded.

1988 Revision: Extensive changes. A new procedure has been added providing for optional service of a notice of election together with a copy of the election and a procedure to expose objections to and determine right to entitlement, separate from the pre-existing procedure of determination of amount and setting aside. Subdivisions (c) and (d) represent rule implementation of procedure in statute. Committee notes revised and expanded. Citation form changes in committee notes.

1992 Revision: Editorial change. Committee notes revised. Citation form changes in committee notes.

2001 Revision: Entire rule rewritten. Committee notes revised.

2003 Revision: Committee notes revised.

2005 Revision: Subdivision (a) amended to require service in the manner of formal notice of the notice of election. Subdivision (b)(3) amended to provide time period for personal representative to service notice of election on interested persons, and title revised. Subdivision (d)(2) amended to

provide time limit and service requirement for elective estate inventory and petition for determination of amount of elective share. Committee notes revised.

2010 Revision: Committee notes revised.

Statutory References

§ 732.201, Fla. Stat. Right to elective share.
§ 732.2025, Fla. Stat. Definitions.
§ 732.2035, Fla. Stat. Property entering into elective estate.
§ 732.2045, Fla. Stat. Exclusions and overlapping application.
§ 732.2055, Fla. Stat. Valuation of the elective estate.
§ 732.2065, Fla. Stat. Amount of the elective share.
§ 732.2075, Fla. Stat. Sources from which elective share payable; abatement.
§ 732.2085, Fla. Stat. Liability of direct recipients and beneficiaries.
§ 732.2095, Fla. Stat. Valuation of property used to satisfy elective share.
§ 732.2125, Fla. Stat. Right of election; by whom exercisable.
§ 732.2135, Fla. Stat. Time of election; extensions; withdrawal.
§ 732.2145, Fla. Stat. Order of contribution; personal representative's duty to collect contribution.
§ 733.604, Fla. Stat. ~~Inventory~~Inventories and accountings; public records exemptions.

Rule References

Fla. Prob. R. 5.025 Adversary proceedings.
Fla. Prob. R. 5.040 Notice.
Fla. Prob. R. 5.041 Service of pleadings and papers.
Fla. Prob. R. 5.340 Inventory.
Fla. R. App. P. 9.020(h) Definitions.

RULE 5.405. PROCEEDINGS TO DETERMINE PROTECTED HOMESTEAD REAL PROPERTY

(a) Petition. An interested person may file a petition to determine protected homestead real property owned by the decedent.

(b) Contents. The petition shall be verified by the petitioner and shall state:

(1)the date of the decedent's death;

(2)the county of the decedent's domicile at the time of death;

(3)the name of the decedent's surviving spouse and the names and dates of birth of the decedent's surviving lineal descendants;

(4)a legal description of the property owned by the decedent on which the decedent resided; and

(5)any other facts in support of the petition.

(c) Order. The court's order on the petition shall describe the real property and determine whether any of the real property constituted the protected homestead of the decedent. If the court determines that any of the real property was the protected homestead of the decedent, the order shall identify the person or persons entitled to the protected homestead real property and define the interest of each.

Committee Notes

This rule establishes the procedure by which the personal representative or any interested person may petition the court for a determination that certain real property constituted the decedent's protected homestead property, in accordance with article X, section 4 of the Florida Constitution. The jurisdiction of the court to determine constitutional protected homestead property was established by In re Noble's Estate, 73 So. 2d 873 (Fla. 1954).

Rule History

1984 Revision: New rule.

1988 Revision: Editorial change in (a). Subdivision (b)(4) amended to conform to constitutional change. Committee notes revised. Citation form change in committee notes.

1992 Revision: Editorial change. Committee notes revised. Citation form changes in committee notes.

1996 Revision: Subdivision (c) amended to require description of real property that is the subject of the petition, description of any homestead property, and definition of specific interests of persons entitled to homestead real property.

2002 Revision: Replaces “homestead” with “protected homestead” throughout to conform to addition of term in section 731.201(29), Florida Statutes. Committee notes revised.

2003 Revision: Committee notes revised.

2007 Revision: Committee notes revised.

2007 Revision: Committee notes revised.

2010 Revision: Committee notes revised.

Constitutional Reference

Art. X, § 4, Fla. Const.

Statutory References

§ 731.104, Fla. Stat. Verification of documents.
§ 731.201(~~31~~32), Fla. Stat. General definitions.
§ 732.401, Fla. Stat. Descent of homestead.
§ 732.4015, Fla. Stat. Devise of homestead.
§ 733.607, Fla. Stat. Possession of estate.
§ 733.608, Fla. Stat. General power of the personal representative.

Rule References

Fla. Prob. R. 5.020 Pleadings; verification; motions.
Fla. Prob. R. 5.040 Notice.
Fla. Prob. R. 5.041 Service of pleadings and papers.
Fla. Prob. R. 5.205(a)(6) Filing evidence of death.
Fla. Prob. R. 5.340 Inventory.
Fla. Prob. R. 5.404 Notice of taking possession of protected homestead.

RULE 5.406. PROCEEDINGS TO DETERMINE EXEMPT PROPERTY

(a) Petition. An interested person may file a petition to determine exempt property within the time allowed by law.

(b) Contents. The petition shall be verified by the petitioner and shall:

(1)describe the property and the basis on which it is claimed as exempt property; and

(2)state the name and address of the decedent's surviving spouse or, if none, the names and addresses of decedent's children entitled by law to the exempt property and the dates of birth of those who are minors.

(c) Order. The court shall determine each item of exempt property and its value, if necessary to determine its exempt status, and order the surrender of that property to the persons entitled to it.

Committee Notes

This rule establishes the procedure by which the personal representative or any interested person may petition the court for determination of exempt property in accordance with article X, section 4 of the Florida Constitution and section 732.402, Florida Statutes.

Section 732.402, Florida Statutes, specifies the time within which the petition to determine exempt property must be filed, within 4 months after the date of service of the notice of administration, unless extended as provided in the statute.

Rule History

1984 Revision: New rule.

1988 Revision: Subdivision (a) revised to reflect editorial changes and to require verification. Subdivision (b)(1) revised to require the basis for asserting exempt property status. Subdivision (b)(2) added the requirement of stating addresses of those entitled to exempt property. Subdivision (c) revised to reflect editorial changes and to require determination of the value

of each item of exempt property. Committee notes revised.

1992 Revision: Committee notes revised. Citation form changes in committee notes.

1996 Revision: Editorial changes in rule to conform to similar language in rule 5.405. Committee notes revised.

2003 Revision: Committee notes revised.

2010 Revision: Subdivision (c) amended to limit the instances in which the value of the property claimed as exempt needs to be stated in the order.

Statutory References

§ 731.104, Fla. Stat. Verification of documents.
§ 732.402, Fla. Stat. Exempt property.

Rule References

Fla. Prob. R. 5.020 Pleadings; verification; motions.
Fla. Prob. R. 5.040 Notice.
Fla. Prob. R. 5.041 Service of pleadings and papers.
Fla. Prob. R. 5.042 Time.
Fla. Prob. R. 5.420 Disposition of personal property without administration.

RULE 5.440. PROCEEDINGS FOR REMOVAL <u>OF PERSONAL REPRESENTATIVE</u>

(a) Commencement of Proceeding. The court on its own motion may remove, or any interested person by petition may commence a proceeding to remove, a personal representative. A petition for removal shall state the facts constituting the grounds upon which removal is sought, and shall be filed in the court having jurisdiction over the administration of the estate.

(b) Accounting. A removed personal representative shall file an accounting within 30 days after removal.

(c) Delivery of Records and Property. A removed personal representative shall, immediately after removal or within such time prescribed by court order, deliver to the remaining personal representative or to the successor fiduciary all of the records of the estate and all of the property of the estate.

(d) Failure to File Accounting or Deliver Records and Property. If a removed personal representative fails to file an accounting or fails to deliver all property of the estate and all estate records under the control of the removed personal representative to the remaining personal representative or to the successor fiduciary within the time prescribed by this rule or by court order, the removed personal representative shall be subject to contempt proceedings.

Committee Notes

The revision of subdivision (a) of this rule by the addition of its final phrase represents a rule implementation of the procedure found in section 733.505, Florida Statutes. It is not intended to change the effect of the statute from which it was derived but has been reformatted to conform with the structure of these rules. It is not intended to create a new procedure or modify an existing procedure.

Rule History

1980 Revision: Subdivision (a) amended to require formal notice to interested persons and to delete requirement that court give directions as to mode of notice. Surety authorized to petition for removal.

1984 Revision: Editorial changes. Provisions in prior rule for contempt have been deleted since the court has the inherent power to punish for contempt. Committee notes revised.

1988 Revision: Last phrase of (a) added to implement the procedure found in section 733.505, Florida Statutes. Subdivision (b) amended to parallel interim accounting rules. Deletes ability to extend time to file and adds reference to court power to punish for contempt. Committee notes expanded. Editorial changes. Citation form changes in committee notes.

1992 Revision: Editorial changes. Committee notes revised. Citation form changes in committee notes.

2002 Revision: Entire rule amended. Contents of accountings by removed fiduciaries are now governed by rule 5.346. Editorial changes in (a), (c), and (d). Committee notes revised.

2003 Revision: Committee notes revised.

2007 Revision: Committee notes revised.

2010 Revision: Editorial change in title to clarify scope of rule.

Statutory References

§ 731.201(23), Fla. Stat. General definitions.
§ 733.504, Fla. Stat. Removal of personal representative; causes of removal.
§ 733.505, Fla. Stat. Jurisdiction in removal proceedings.
§ 733.506, Fla. Stat. Proceedings for removal.
§ 733.5061, Fla. Stat. Appointment of successor upon removal.
§ 733.508, Fla. Stat. Accounting and discharge of removed personal representatives upon removal.
§ 733.509, Fla. Stat. Surrender of assets upon removal.

Rule References

Fla. Prob. R. 5.020 Pleadings; verification; motions.
Fla. Prob. R. 5.025 Adversary proceedings.

Fla. Prob. R. 5.040 Notice.
Fla. Prob. R. 5.041 Service of pleadings and papers.
Fla. Prob. R. 5.042 Time.
Fla. Prob. R. 5.150 Order requiring accounting.
Fla. Prob. R. 5.310 Disqualification of personal representative; notification.
Fla. Prob. R. 5.345 Accountings other than personal representatives' final accountings.
Fla. Prob. R. 5.346 Fiduciary accounting.

RULE 5.470. ANCILLARY ADMINISTRATION

(a) Petition. The petition for ancillary letters shall include an authenticated copy of so much of the domiciliary proceedings as will show:

(1)for a testate estate the will, petition for probate, order admitting the will to probate, and authority of the personal representative; or

(2)for an intestate estate the petition for administration and authority of the personal representative to act.

(b) Notice. Before ancillary letters shall be issued to any person, formal notice shall be given to:

(1)all known persons qualified to act as ancillary personal representative and whose entitlement to preference of appointment is equal to or greater than petitioner's and who have not waived notice or joined in the petition; and

(2)all domiciliary personal representatives who have not waived notice or joined in the petition.

(c) Probate of Will. On filing the authenticated copy of a will, the court shall determine whether the will complies with Florida law to entitle it to probate. If it does comply, the court shall admit the will to probate.

Committee Notes

Rule History

1975 Revision: The rule sets out the procedural requirements for issuance of ancillary letters.

1984 Revision: Editorial changes with addition of notice requirement in (b). Committee notes revised.

1988 Revision: Committee notes revised.

1992 Revision: Changed rule to require that notice be given to persons qualified to act as ancillary personal representative whose entitlement to

preference of appointment is equal to or greater than petitioner's and to all domiciliary personal representatives prior to entry of an order admitting the will to probate. Committee notes revised. Citation form changes in committee notes.

1996 Revision: The requirement that a filing of an authenticated copy of a will be a "probated" will is removed from subdivision (c). There may be circumstances in which a will is on deposit or file in a foreign jurisdiction but is not being offered for probate. That should not preclude an ancillary administration in Florida of that estate. This change is not intended to allow an authenticated copy of any document other than an original instrument to be filed under this rule and considered for probate.

2003 Revision: Committee notes revised.

2005 Revision: Committee notes revised.

2010 Revision: Committee notes revised.

Statutory References

§ 731.201(1), Fla. Stat. General definitions.
§ 733.212, Fla. Stat. Notice of administration; filing of objections.
§ 733.2121, Fla. Stat. Notice to creditors; filing of claims.
§ 734.102, Fla. Stat. Ancillary administration.
§ 734.1025, Fla. Stat. Nonresident decedent's testate estate with property not exceeding $50,000 in this state; determination of claims.

Rule References

Fla. Prob. R. 5.020 Pleadings; verification; motions.
Fla. Prob. R. 5.040 Notice.
Fla. Prob. R. 5.041 Service of pleadings and papers.
Fla. Prob. R. 5.042 Time.
Fla. Prob. R. 5.065(b) Notice of civil action or ancillary administration.
Fla. Prob. R. 5.205(a)(2) Filing evidence of death.
Fla. Prob. R. 5.215 Authenticated copy of will.
Fla. Prob. R. 5.240 Notice of administration.
Fla. Prob. R. 5.241 Notice to creditors.
Fla. Prob. R. 5.475 Ancillary administration, short form.

Fed. R. Civ. P. 44(a) ~~Proof of~~Proving an official record.

RULE 5.496. FORM AND MANNER OF OBJECTING TO CLAIM

(a) Filing. An objection to a claim, other than a personal representative's proof of claim, shall be in writing and filed on or before the expiration of 4 months from the first publication of notice to creditors or within 30 days from the timely filing or amendment of the claim, whichever occurs later.

(b) Service. A personal representative or other interested person who files an objection to the claim shall serve a copy of the objection on the claimant ~~within 10 days after the filing of the objection. The objection shall include a certificate of service~~. If the objection is filed by an interested person other than the personal representative, a copy of the objection shall also be served on the personal representative ~~within 10 days after the filing of the objection~~. Any objection shall include a certificate of service.

(c) Notice to Claimant. An objection shall contain a statement that the claimant is limited to a period of 30 days from the date of service of an objection within which to bring an action as provided by law.

Committee Notes

This rule represents an implementation of the procedure found in section 733.705, Florida Statutes, and adds a requirement to furnish notice of the time limitation in which an independent action or declaratory action must be filed after objection to a claim.

Rule History

1992 Revision: New rule.

2003 Revision: Reference in (a) to notice of administration changed to notice to creditors. Committee notes revised.

2005 Revision: Removed provision for objections to personal representative's proof of claim, now addressed in rule 5.498, and subsequent subdivisions relettered. Reference to service on the claimant's attorney removed because service on the attorney is required by rule 5.041(b). Committee notes revised.

2007 Revision: Editorial change in (a). Second sentence of (b) added to specify that the objection must include a certificate of service.

2010 Revision: Subdivision (b) amended to delete the requirement to serve a copy of an objection to a claim within 10 days, and to clarify the requirement to include a certificate of service.

Statutory References

§ 731.201(4), Fla. Stat. General definitions.
§ 733.705, Fla. Stat. Payment of and objection to claims.

Rule References

Fla. Prob. R. 5.040 Notice.
Fla. Prob. R. 5.041 Service of pleadings and papers.
Fla. Prob. R. 5.498 Personal representative's proof of claim.
Fla. Prob. R. 5.499 Form and manner of objecting to personal representative's proof of claim.

RULE 5.696. ANNUAL ACCOUNTING

(a) Contents and Filing. The guardian of the property shall file an annual accounting as required by law. The annual accounting shall include:

(1)a full and correct account of the receipts and disbursements of all of the ward's property over which the guardian has control and a statement of the ward's property on hand at the end of the accounting period; and

(2)a copy of the statements of all of the ward's cash accounts as of the end of the accounting period from each institution where the cash is deposited.

(b) Substantiating Papers. Unless otherwise ordered by the court, the guardian need not file the papers substantiating the annual accounting. Upon reasonable written request, the guardian of the property shall make the substantiating papers available for examination to persons entitled to receive or inspect the annual accounting. ~~Substantiating papers need not be filed with the court unless so ordered.~~

(c) Interim Inspection of Records. Upon reasonable written request and notice, the guardian of the property shall make all material financial records pertaining to the guardianship available for inspections to those persons entitled to receive or inspect the annual accounting.

Committee Notes

Rule History

1991 Revision: New rule.

1992 Revision: Citation form changes in committee notes.

2010 Revision: Editorial change in (b) to delete redundant language.

Statutory References

§ 744.367, Fla. Stat. Duty to file annual guardianship report.
§ 744.3678, Fla. Stat. Annual accounting.
§ 744.3701, Fla. Stat. Inspection of report.

§ 744.3735, Fla. Stat. Annual appearance of the guardian.

Rule References

Fla. Prob. R. 5.020 Pleadings; verification; motions.
Fla. Prob. R. 5.041 Service of pleadings and papers.
Fla. Prob. R. 5.060 Request for notices and copies of pleadings.
Fla. Prob. R. 5.610 Execution by guardian.
Fla. Prob. R. 5.695 Annual guardianship report.
Fla. Prob. R. 5.700 Objection to guardianship reports.

RULE 5.710. REPORTS OF PUBLIC GUARDIAN

The public guardian, as the guardian of a ward, shall file:

(a) an initial report as required by law;

(b) annual guardianship reports, which shall include the dates of quarterly visits to the ward, as required by law;

(c) a report within 6 months of his or her appointment as guardian of a ward, which shall also be filed with the executive director of the Statewide Public Guardianship Office, stating:

(1) the public guardian's efforts to locate a family member or friend, other person, bank, or corporation to act as guardian of the ward; and

(2) the ward's potential to be restored to capacity;

(d) an annual report, filed with the Statewide Public Guardianship Office, by September 1 for the preceding fiscal year, on the operations of the office of public guardian; and

(e) a report of an independent audit by a qualified certified public accountant, ~~file~~to be filed with the Statewide Public Guardianship Office every 2 years.

Committee Notes

Rule History

1987 Revision: This is a new rule and was promulgated to establish procedures to accommodate the Public Guardian Act. See § 744.701, et seq., Fla. Stat. See also Fla. Prob. R. 5.560.

1989 Revision: Prior rule adopted as temporary emergency rule.

1991 Revision: Editorial changes.

1992 Revision: Citation form changes in committee notes.

2007 Revision: Rule extensively amended to specify reports a public guardian is required to file.

2010 Revision: Editorial change in (e).

Statutory Reference

§§ 744.701–744.709, Fla. Stat. Public Guardianship Act.

Rule Reference

Fla. Prob. R. 5.560 Petition for appointment of guardian of an incapacitated person.

RULE 5.725. EMERGENCY COURT MONITOR

(a) Appointment. Upon motion or inquiry by any interested person or upon its own motion, the court may appoint a court monitor on an emergency basis without notice in any proceeding over which it has jurisdiction.

(b) Order of Appointment. The order of appointment shall specifically find that there appears to be imminent danger that the physical or mental health or safety of the ward will be seriously impaired or that the ward's property is in danger of being wasted, misappropriated, or lost unless immediate action is taken. The scope of the matters to be investigated and the powers and duties of the monitor must be specifically enumerated in the order.

(c) Duration of Authority. The authority of a monitor ~~appointed under this section~~ expires 60 days after the date of appointment or upon a finding of no probable cause, whichever occurs first. The court may enter an order extending the authority of the monitor for an additional 30 days upon a showing that an emergency condition still exists.

(d) Report. Within 15 days after the entry of an order of appointment, the monitor shall file a verified written report setting forth the monitor's findings and recommendations. The report may be supported by documents or other evidence. The time for filing the report may be extended by the court for good cause.

(e) Review. Upon review of the report, the court shall enter an order determining whether there is probable cause to take further action to protect the person or property of the ward.

(1) If the court finds no probable cause, the court shall enter an order finding no probable cause and discharging the monitor.

(2) If the court finds probable cause, the court shall enter an order directed to the respondent stating the essential facts constituting the conduct charged and requiring the respondent to appear before the court to show cause why the court should not take further action. The order shall specify the time and place of the hearing with a reasonable time to allow for the

preparation of a defense after service of the order. A copy of the order to show cause together with the order of appointment and report of the monitor shall be served upon the guardian, the ward, the ward's attorney, if any, and the respondent.

(f) Protecting Ward. If at any time prior to the hearing on the order to show cause the court enters a temporary injunction, a restraining order, an order freezing assets, an order suspending the guardian or appointing a guardian ad litem, or any other order to protect the physical or mental health, safety, or property of the ward, the order or injunction shall be served on the guardian, the ward, the ward's attorney, if any, and such other persons as the court may determine.

Committee Notes

Rule History

2006 Revision: New rule.

2008 Revision: Committee notes revised.

2010 Revision: Editorial change in (c).

Statutory references

§ 393.12, Fla. Stat. Capacity; appointment of guardian advocate.
§ 744.1075, Fla. Stat. Emergency court monitor.