The Probate Team 2019

Probate Power Hour

Laird A. Lile
Laird A. Lile, PLLC
Naples, Florida
LLile@LairdALile.com
www.LairdALile.com

October 11, 2019
Orlando, Florida

The author thanks Langdon A.D. Lile for his assistance in preparing these materials. Langdon is in his second year at Miami Law.

The Probate Team 2019

Probate Power Hour

Laird A. Lile

Table of Contents

Probate Team

Probate Power Hour

Laird A. Lile

October 11, 2019

I. HOW TO LOSE YOUR LAW LICENSE

A. Not being able to account for clients' money is a sure-fire way to place your ability to practice law in serious jeopardy.

B. The Rules Regulating The Florida Bar ("RRTFB") set forth specific procedures and requirements for law firm trust accounts.

C. The following is a summary from FloridaBar.org[1].

1. Bank Records. These include monthly bank statements, deposit slips, wire details, and the fronts and backs of canceled checks. Attorneys should get these records every month from the bank because the bank may not be able to provide records more than a few years old. Banks often dispose of records pursuant to their retention policies and can even lose records. Attorneys should receive bank statements directly from the bank, unopened, to prevent tampering by dishonest employees.

2. Receipts and Disbursements Journal. This is a chronological list of every transaction in the trust account. The journal shows activity in the account for all clients. Like a checkbook register for a personal checking account, the journal shows the date, source of deposit or payee of disbursement, amount of the transaction and balance for the entire account. The journal must also identify the client and the reason for each transaction.

3. Ledger Cards. Ledger cards show all transactions for individual clients. There must be a separate ledger for each client, and it must identify the date, a description, and the amount of transactions. Each ledger should also contain a running balance, showing the balance the client has in the trust account at any given time. If the journal for the entire account was sorted by client, the result would be ledger cards.

4. Monthly Reconciliation. Every month, attorneys must reconcile (match) the balance in the bank account with the balance in the journal. The bank account balance, plus outstanding deposits, minus outstanding checks, must equal the balance in the journal. Most banks provide step-by-step

[1] https://www.floridabar.org/rules/rrtfb/

instructions on how to reconcile with the bank statement. Deposits that have been outstanding for more than a few days and checks that have been outstanding for several months warrant research.

5. Monthly Comparison. Every month, attorneys must compare the total balances of the ledger cards to the reconciled bank balance, and the two must match. If the reconciled bank balance is less than the total of the ledger cards, there could be a shortage in the account. If the reconciled bank balance is more than the total of the ledger cards, there's an unidentified balance of funds in the account.

6. The Written Plan. Law firms with more than one attorney must maintain a written plan for supervision and compliance of the trust account. The plan must identify the lawyer(s) responsible for signing trust checks, reconciling the account, and answering questions about the trust account. Firms must give the plan to each lawyer in the firm and update it with any material changes.

7. Record Retention. Attorneys must maintain the above records for at least six years.

D. Available Resources

1. Legalfuel.com

a. A service of The Florida Bar: "Bridging the gap between business and law."

b. Trust Accounting Resources - See Appendix 1.

2. Member benefits from The Florida Bar[2]

a. TrustBooks, for example.[3]

II. HOW TO LOSE YOUR SANITY

A. Cybersecurity attacks

1. Ransomware

2. Cyber espionage

3. Spear phishing

[2] https://www.floridabar.org/member/benefits/practice-resources/

[3] http://trustbooks.com/florida/

4. Insider threats

5. Negligence

a. Email to wrong email address

b. Lost devices

B. Policies and Training

1. Three of the 33 credit hours every 3 years must be in approved technology programs. RRTFB, Rule 6-10.3(b).

C. Available Resources

1. Legalfuel.com

a. A service of The Florida Bar: "Bridging the gap between business and law."

b. "Cybersecurity for the Everyday Lawyer" - 1 hour video

(1) This presentation focuses on 10 practical steps that will enable the smaller firm to identify its risks, take appropriate action, and protect its systems and clients.

c. "What Lawyers Need to Know about Cybersecurity" - 30 min podcast

(1) Lawyers are in the business of holding sensitive and personal information, so they are prime targets for data breaches. Do you know how to protect your firm and clients? Lawyers should prepare their firms for different types of cybersecurity threats. Firms of all sizes can implement defenses tailored to their needs, and lawyers have an ethical and legal obligation to take cybersecurity seriously.

III. EASY LISTENING

A. ACTEC Trust and Estate Talk offers professionals best practice advice, insights, and commentary on subjects that affect the profession and clients. ACTEC, a professional society of peer elected trust and estate lawyers, is passionate about estate and trust issues including elder law, estate planning, wealth management, probate law, wills, living wills, powers of attorney, guardianship, medical powers of attorney, trusts, irrevocable trusts, special needs trusts, charitable trusts, trust funds,

Rockefeller trusts, marital trusts, asset protection, family partnerships, estate taxes, gift taxes, tax legislation, tax law, and tax reform.

1. 70 episodes (and more being added every week) - See Appendix 2.
    a. Balancing Independence and Vulnerability of Older Adults
    b. Charitable Giving
    c. Marriage, Divorce, and Asset Protection
    d. Lawyers as Trustees
2. Length varies from 6 to 20 minutes

B. Or, the Ed Scales Show, most Sundays from 11 a.m. to 2 p.m.

1. Classic Rock and Roll, with a health does of music trivia
2. 104.1 on your FM dial in the Florida Keys, or www.us1radio.com,

IV. PDF/A, NOT PDF, EH

A. PDF/A is the official and required format for documents submitted through the e-filing portal.

1. Not a Canadian's reference to portable document format.

B. PDF/A is an ISO-standardized subset of PDF that eliminates certain risks to the future reproducibility of the content.

1. Unlike normal PDF, PDF/A requires that everything necessary to precisely render the document is contained in the PDF/A file, including fonts.
2. PDF/A forbids dynamic content to ensure that the user sees the exact same content both today and for years to come.

C. Administrative Order 19-23 (Corrected) dated June 10, 2019 - See Appendix 3.

D. Create a PDF/A document by:

1. Save As Other from a PDF document - See Appendix 4.
2. Print from a native document or a PDF document.

V. CHEAP OUT ON TECHNOLOGY AT YOUR OWN RISK[4]

A. Cheaping out on technology can have consequences.

1. A law firm rejected a recommendation to get an online back up system that would have cost less than $1,250 a year.

[4] *Emerald Coast Utils. Auth. v. Bear Marcus Point, LLC*, 227 So. 3d 752 (Fla. 1st DCA 2017).

2. The same firm directed its IT consultant to configure the email to delete email identified as spam without any notification to the recipient and without creation of logs, all of which was against the consultant's recommendation.

3. After realizing that an adverse order had been entered and served, and after the appeal deadline, the law firm asked the trial court to vacate and reenter the order so that a timely appeal could commence.

4. The law firm asserted that it did not receive an order which had been sent by email from the clerk of the court.

5. The trial court concluded that the law firm "made a conscious decision to use a defective email system without any safeguards or oversight in order to save money" and denied the request.

6. The trial court ruled the law firm was at fault, not the trial court or clerk.

B. Those shortcomings, which were established in the record, supported the First District Court of Appeal in affirming the trial court's denial of relief requested based upon "mistake, inadvertence, surprise or excusable neglect" which are the grounds for relief under Florida Rules of Civil Procedure 1.540(b).

C. The appellate court also noted the processes in place by the opposing law firm, which "had a protocol where an assigned paralegal would check the clerk's website every three weeks."

D. Checking dockets on line regularly should be standard procedure.

1. In probate practices, particularly before - not after - key deadlines, such as the deadline to object to claims.

2. In litigation practices, when orders are pending.

VI. WHO CAN OBJECT?[5]

A. The term "interested person" is a term of art in the Florida Probate Code and in the Florida Trust Code.

1. "Subject to additional definitions in subsequent chapters that are applicable to specific chapters or parts, and unless the context otherwise requires, in this code, in s. 409.9101, and in chapters 736, 738, 739, and 744, the term: . . .

[5] *Cruz and Cates v. Cmty. Bank & Tr. of Fla.*, 44 Fla. L. Weekly D2037 (Fla. 5th DCA August 9, 2019).

> (23) "Interested person" means any person who may reasonably be expected to be affected by the outcome of the particular proceeding involved. In any proceeding affecting the estate or the rights of a beneficiary in the estate, the personal representative of the estate shall be deemed to be an interested person. In any proceeding affecting the expenses of the administration and obligations of a decedent's estate, or any claims described in s. 733.702(1), the trustee of a trust described in s. 733.707(3) is an interested person in the administration of the grantor's estate. The term does not include a beneficiary who has received complete distribution. The meaning, as it relates to particular persons, may vary from time to time and must be determined according to the particular purpose of, and matter involved in, any proceedings. . . ." Florida Probate Code §731.201.

2. The term is "interested *person*" not "interested *party*."

B. Only an interested person may invoke the court's jurisdiction regarding the administration of a trust. Florida Trust Code §736.0201(2).

C. The children of a decedent were disappointed with their father's pour-over will/revocable trust estate plan which left his property to charity instead of to them. So, they filed to invalidate the will and the trust.

D. While that litigation was pending, the trustee of the trust served the children with a trust accounting. The accounting included the limitations notice to shorten to 6 months the period within which to object.

E. The children filed a lawsuit against the trustee regarding the administration of the trust.

F. The trustee moved to dismiss, asserting that the children lacked standing because they were not then beneficiaries. Because the will/trust contest had not yet been resolved, the trustee characterized the interest of the children as "hypothetical" based on "uncertain future events." The trial court agreed and dismissed the lawsuit brought by the children.

G. The appellate court reversed, finding that the children's potential inheritance (if they are successful in the will/trust contest) was sufficient to give them "interested person" status.

VII. CHILD TAKES PRECEDENCE OVER DISABLED PARENT[6]

A. Mother seeks satisfaction of an arrearage of nearly $100,000 for child support for minor child by a continuing writ of garnishment directed to distributions from a special needs trust for the benefit of father.

B. The trust is a discretionary trust with spendthrift protection. The parties stipulated that the father:

1. Does not exercise any control over the trust.

2. Does not have the ability to compel the trustee to disburse trust funds.

3. Does not personally receive any distributions because they are paid by the trustee directly to third parties for the sole benefit of the father.

C. The trial court determined it could not garnish, even for child support, discretionary payments for the father from a special needs trust.

D. The appellate court reversed, agreeing with the mother that:

1. Spendthrift protection is unenforceable against a valid child support order pursuant to Florida Trust Code §736.0503; and

2. Discretionary distributions are not protected from continuing garnishment for support payments.

E. The appellate decision, referring to *Bacardi v. White*, 463 So. 2d 218 (Fla. 1985) and *Berlinger v. Casselberry*, 133 So. 3d 961 (Fla. 2d DCA 2013), observes that Florida has two competing public policies: (i) respecting the protection granted by spendthrift trusts versus (ii) requiring satisfaction of support obligations by spouses and parents for alimony and child support obligations.

VIII. EXAMINING COMMITTEE EXAMINING WHAT?[7]

A. In connection with an incapacity proceeding, a three member examining committee is appointed. Florida Guardianship Law §744.331(3)(a)-(b).

1. Inclusion on the committee:

a. One member must be a psychiatrist or other physician.

[6] *Alexander v. Harris*, 44 Fla. L. Weekly D1311 (Fla. 2d DCA May 17, 2019).

[7] *Cook v. Cook*, 260 So. 3d 281 (Fla. 4th DCA 2018), original opinion at 43 Fla. L. Weekly D2159, clarified at 43 Fla. L. Weekly D2639.

b. The remaining members must be either a psychologist, gerontologist, another psychiatrist, or other physician, a registered nurse, nurse practitioner, licensed social worker, a person with an advanced degree in gerontology from an accredited institution of higher education, or other person who by knowledge, skill, experience, training, or education may, in the court's discretion, advise the court in the form of an expert opinion.

c. One member must have knowledge of the type of incapacity alleged in the petition.

d. If the attending or family physician is available for consultation, the committee must consult with the physician.

e. Members must be able to communicate, either directly or through an interpreter, in the language that the alleged incapacitated person speaks or to communicate in a medium understandable to the alleged incapacitated person if she or he is able to communicate.

2. Exclusion from the committee:

a. Unless good cause is shown, the attending or family physician may not be appointed to the committee.

b. Members may not be related to or associated with one another, with the petitioner, with counsel for the petitioner or the proposed guardian, or with the person alleged to be totally or partially incapacitated.

c. Members may not be employed by any private or governmental agency that has custody of, or furnishes, services or subsidies, directly or indirectly, to the person or the family of the person alleged to be incapacitated or for whom a guardianship is sought.

d. Members may not include the petitioner(s).

B. Each member of the examining committee shall examine the person and make a report. Florida Guardianship Law §744.331(3)(e)-(g).

1. Each examining committee member must determine the alleged incapacitated person's ability to exercise those rights specified in § 744.3215.
2. In addition to the examination, each examining committee member must have access to, and may consider, previous examinations of the person, including, but not limited to, habilitation plans, school records, and psychological and psychosocial reports voluntarily offered for use by the alleged incapacitated person.
3. The examination of the alleged incapacitated person must include a comprehensive examination, a report of which shall be part of each member's written report. The comprehensive examination report should be an essential element, but not necessarily the only element, used in making a capacity and guardianship decision. The comprehensive examination must include certain items, if indicated, or explain why not:
    a. A physical examination;
    b. A mental health examination; and
    c. A functional assessment.
4. Each member's written report must be signed by the member and must include:
    a. To the extent possible, a diagnosis, prognosis, and recommended course of treatment.
    b. An evaluation of the alleged incapacitated person's ability to retain her or his rights, including, without limitation, the rights to marry; vote; contract; manage or dispose of property; have a driver license; determine her or his residence; consent to medical treatment; and make decisions affecting her or his social environment.
    c. The results of the comprehensive examination and the member's assessment of information provided by the attending or family physician, if any.

d. A description of any matters with respect to which the person lacks the capacity to exercise rights, the extent of that incapacity, and the factual basis for the determination that the person lacks that capacity.

e. The names of all persons present during the time the member conducted his or her examination. If a person other than the person who is the subject of the examination supplies answers posed to the alleged incapacitated person, the report must include the response and the name of the person supplying the answer.

f. The date and time the member conducted his or her examination.

C. Members of an examining committee have extensive responsibility, which comports to the extensive impact on the alleged incapacitated person and the petitioner.

D. In an appeal by the ward (formerly alleged incapacitated person), the court may properly review the extent of compliance with the statutory requirements placed upon the members of the examining committee. In such an appeal, when the alleged incapacitated person demonstrates the absence of statutorily required elements in the comprehensive examination, then a remand is appropriate so that a proper report can be prepared.

IX. WHO HIRES THE WARD'S ATTORNEY?[8]

A. A ward retains many rights, one of which is the right "to counsel." Florida Guardianship Law §744.3215(1)(l).

B. However, the right to counsel is not the right to hire counsel.

1. Hiring counsel requires entering into a contract.

2. If the right to contract has been removed, as it is in plenary guardianships, then the ward does not have the right to hire counsel.

C. Only the guardian may enter into a contract to hire counsel.

D. When the guardian hires counsel for the ward, then the ward is not entitled to hire other counsel.

[8] *Jacobsen v. Busko,* 262 So. 3d 238 (Fla. 3rd DCA 2018).

X. IT MAY BE SUMMARY, BUT IS IT FINAL?[9]

A. A summary administration is intended to allow for an expedited, streamlined administration of probate assets that are below the filing threshold, currently $75,000. Florida Probate Code §735.201.

B. The usual 2 year from death limitations period applies for claims against the decedent. Florida Probate Code §§735.206(4)(f); 733.710.

C. However, "claims" by "forgotten" beneficiaries are not the types of claims that are eliminated by the 2 year period. "Florida nonclaim statute applies to claims brought against the estate by creditors. It does not apply to the beneficial interests of heirs."

D. Procedurally, the hearing in which the appealed order was entered was non-evidentiary. The lack of evidence should likely have precluded granting the relief requested, i.e., order reopening the summary administration.

1. Basic due process requires courts to receive evidence.

2. Without evidence to support the allegations in a petition, the petition should be denied.

3. In Wallace v. Watkins, the hearing on the petition to reopen a summary administration was noticed as non-evidentiary. Without evidence, the petition should have been denied. However, petitioner's counsel was saved by the court taking judicial notice of certain court records regarding an adoption. The appellate court noted that the appellants "voiced no objection to the court taking judicial notice" which eliminated any lack of due process argument.

XI. ELECTION, NOT A TESTAMENTARY GIFT[10]

A. Many marital agreements:

1. Waive the right to an elective share.

2. Expressly allow for testamentary gifts.

3. Require changes to be in writing and signed by both parties.

---

[9] *Wallace v. Watkins*, 253 So. 2d 1204 (Fla. 5th DCA 2018).

[10] *Wilson v. Wilson as Tr. Of Paul C. Wilson Living Tr.*, 44 Fla. L. Weekly D2076 (Fla. 4th DCA August 14, 2019).

B. Sometimes estate planning documents include a conditional elective share trust, just in case.

1. A so-called conditional elective share trust. Florida Probate Code §732.201, et. seq.

2. For instance, a revocable trust might direct the trustee to "set aside from the trust property as much property as is necessary to satisfy the elective share . . . provided a timely election is filed."

C. With a marital agreement including the above provisions and the deceased spouse's estate planning documents including the above elective share provisions, the surviving spouse will not receive the elective share amount.

XII. CONDITIONS[11]

A. Sometimes estate planning documents place conditions on devises. For example:

1. I leave all of my Probate Team seminar materials to David Brennan, if he is living as of my death.

a. He is either living, or not.

b. If not, then game over. So far, no possibility that he will again be living, after he is not.

2. I leave all of my Probate Team seminar materials to The Lile Family Foundation, or if that foundation is no longer in existence upon my death, then to the Florida Legal Education Association, and I hope (but do not require) those materials be displayed at a mobile symposia for which continuing legal education is available at least once each fall.

3. I leave all of my Probate Team seminar materials to The Lile Family Foundation, or if that foundation is no longer in existence as of the time for distribution, then to the Florida Legal Education Association, and I hope (but do not require) those materials be displayed at a mobile symposia for which continuing legal education is available at least once each fall.

[11] *Estate of Sibley*, 273 So. 3d 1062 (Fla. 3rdDCA 2019).

B. If the foundation is not in existence at the time the condition is tested, the devise fails. Even if the foundation had been in existence previously, was administratively dissolved as of death, and was reinstated prior to distribution.

XIII. HOMESTEAD TRIFECTA: ALL ABOUT REAL PROPERTY TAXES

A. Save Our Homes is lost if the two year requirement is not met, even if due to construction delays.[12] Taxpayers:

1. Sold homestead.
2. Bought new property with a residence.
3. Demolished new residence without qualifying for homestead.
4. Commenced construction intended to be completed in time to qualify for homesteads and port the Save Our Homes exemption.
5. Slept one night in tent on new property when they realized construction would not be timely completed.
6. Applied for homestead status for real property tax purposes within two years, in order to port the Save Our Homes exemption.
7. County denied the exemption because taxpayers had not yet moved into the new residence; the residence had not received a certificate of occupancy.
8. Received sympathy, and a denial, from the appellate court.
    a. "We sympathize with [the taxpayers'] loss of the homestead portability benefit due to circumstances largely beyond their control. The court is mindful of the financial implications of this decision to the [taxpayers]. The text of our constitution passed by the people of our state, however, compels this decision." *Id*., at 2314.

B. Double dipping not allowed, even if unintended. The consequence includes interest and penalties.[13] Taxpayers:

1. Applied for, and received, homestead tax exemption in Florida.
2. Simultaneously, received tax benefit in Ohio based upon permanent residency there.

[12] *Baldwin v. Henriquez*, 44 Fla. L. Weekly 2311 (Fla. 2nd DCA September 13, 2019).

[13] *Fitts v. Furst*, 44 Fla. L. Weekly 2314 (Fla. 2nd DCA September 13, 2019).

3. Received notice from Property Appraiser of intent to record tax lien.
4. Proved that prior to receiving notice, they were unaware they had been receiving the tax benefit in Ohio.
5. Proved that the tax benefit in Ohio was $560 for a five year period at issue.
6. Received sympathy, and a denial, from the appellate court.
    a. "We, like the circuit court, are sympathetic to the [taxpayers.] There is a tax lien on their [residence] due to an error on the part of a third party in another state that apparently went undetected by the [taxpayers] until they received the notice from the Property Appraiser. The tax credit they received in Ohio was negligible compared to the sanction they now face. But the remedy for this shortcoming 'lies with the legislature, not the courts'."

C. Double dipping not allowed, part duex.[14] Taxpayer had received tax benefit in Wisconsin for nine years, while claiming the benefits of Florida's homestead tax exemptions. Property Appraiser revoked taxpayer's exemption and recorded a tax lien. Taxpayer:
1. Received denial, without sympathy.
    a. Decision referred to prior decision, so perhaps sympathy by implication.

D. And now, for the surprise:
1. When the estate of any person is being probated or administered in another state under an allegation that such person was a resident of that state and the estate of such person contains real property situate in this state upon which homestead exemption has been allowed pursuant to s. 196.031 for any year or years within 10 years immediately prior to the death of the deceased, then within 3 years after the death of such person the property appraiser of the county where the real property is located shall, upon knowledge of such fact, record a notice of tax lien against the property among the public records of that county, and the property shall be subject to the payment of all taxes

[14] *Brielmaier v. Furst*, 44 Fla. L. Weekly 2318 (Fla. 2nd DCA September 13, 2019).

exempt thereunder, a penalty of 50 percent of the unpaid taxes for each year, plus 15 percent interest per year, unless the circuit court having jurisdiction over the ancillary administration in this state determines that the decedent was a permanent resident of this state during the year or years an exemption was allowed, whereupon the lien shall not be filed or, if filed, shall be canceled of record by the property appraiser of the county where the real estate is located.[15]

XIV. A PUBLIC SERVICE ANNOUNCEMENT

A. Florida is not a community property state.

B. However, community property rights exist even for Florida decedents. Florida Probate Code §732.216 ("Sections 732.216-732.228 may be cited as the 'Florida Uniform Disposition of Community Property Rights at Death Act.'")

C. This is not a new topic at The Probate Team.

1. 1992: Community Property - Legacy of the Visigoths, by William S. Belcher
2. 1996: Administering Community Property, by David F. Powell
3. 2005: Community Property in Florida, by Debra Boje
4. 2014: Community Property in Florida? Surprise, by Richard Warner

D. This is not an in-depth review of the Florida Uniform Disposition of Community Property Rights at Death Act ("FUDCPRDA"). However, it is a warning, a PSA if you will. But first:

1. When does it matter?

a. FUDCPRDA only applies when the decedent is survived by a spouse. No surviving spouse, then no FUDCPRDA issues.

b. FUDCPRDA only matters when property owned as of the decedent's death was acquired during the marriage in a community property jurisdiction[16] as community property.

[15] Fla. Stat. §196.161(1)(a).

[16] Traditional community property states are Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington and Wisconsin. Alaska, Tennessee, and South Dakota are so-called "opt-in states."

2. Why does it matter?

   a. Loss of Tax Benefits: Tax geeks think the surviving spouse might get a "double" step up in basis. Internal Revenue Code §1014(b)(6).

      (1) Husband and wife own stock with a $1 basis. Husband dies first, when stock has an estate tax value of $10.

         (a) If not community property, wife has a basis of $5.50 in Stock. ($1/2 + $10/2 = $5.50)

         (b) On the other hand, if community property, then wife has a basis of $10 in Stock.

   b. Incorrect Recipient: The beneficiaries of the estate of the deceased spouse and the surviving spouse will likely be impacted by whether FUDCPRDA apply.

      (1) For property titled in the name of the surviving spouse, the estate of the decedent will have rights. In those circumstances, the personal representative (or a beneficiary) may have rights to pursue assets titled in the name of the surviving spouse. Florida Probate Code §732.221.

      (2) For property titled in the name of the decedent, the surviving spouse will have rights. In those circumstances, the surviving spouse may have rights to pursue assets titled in the name of the decedent. Florida Probate Code §732.223.

3. By when must the surviving spouse act?[17]

   a. At least one court has now determined that a surviving spouse must act within the creditors claims period.

   b. The surviving spouse's efforts in her petition to determine and perfect her interest in community property was determined by the trial court as asserting a "claim" against the estate which is subject to the time periods in Florida Probate Code §§733.702 and 733.710. The trial court ruled against the surviving spouse and the appellate court affirmed.

[17] *Johnson v. Townsend*, 259 So. 3d 851 (Fla. 4th DCA 2018), original opinion at 43 Fla. L. Weekly D2383, certification granted at 44 Fla. L. Weekly D48.

c. Although a rehearing was denied, a question of great public importance was certified.

(1) "Whether a surviving spouse's vested community property rights are part of the deceased spouse's probate estate making them subject to the estate's claims procedures, or are fully owned by the surviving spouse and therefore not subject to the estate's claims procedures." *Johnson v. Townsend*, 259 43 Fla. L. Weekly D2383 (Fla. 4th DCA 2018).

E. Watch for community property issues when:

1. Planning estates; and

2. Administering estates.

XV. HOW TO COUNT[18]

A. The claims period (assuming timely service for reasonably ascertainable creditors) ends 3 months after the date of first publication. Florida Probate Code §733.702(1).

B. The three month period begins to run on the date of the first publication, not on the day after the date of the first publication.

XVI. FROM THE GOVERNMENT AND HERE TO HELP

A. The IRS has a Taxpayer Advocate Service ("TAS")

1. "TAS is an independent organization within the IRS. Our job is to ensure that every taxpayer is treated fairly and that you know and understand your rights."

B. Ways TAS has helped:

1. Developed the Taxpayer Roadmap 2019: An illustration of the Modern United States Tax System - See Appendix 5.

XVII. THINGS TO LOOK FORWARD TO, OR, COCKTAIL FODDER

A. Tax Proposals of Candidates for President - See Appendix 6.

XVIII. TAX BASIS: THE NEXT FRONTIER

A. Estate tax minimization has lost significance to most clients.

B. Income tax minimization has become more relative for many clients.

C. The dreaded call: "Your client has just learned that she will not live much longer."

[18] *Herman v. Herman*, 44 Fla. L. Weekly D1875 (Fla. 1st DCA July 23, 2019).

1. "Should we be doing anything during the brief time remaining?"

D. If the client is the beneficiary of a trust with assets that have a basis lower than fair market value, then some action may be worth considering.

E. Some ways to obtain a basis adjustment (up or down) under Internal Revenue Code §1014(b):

1. Distribute of assets to the beneficiary.

2. Grant a general power of appointment to the beneficiary.

F. Is it malpractice not to take those steps in the appropriate circumstances?

1. No, based on the specific facts in Stevenson v. Stanyer, according to an unpublished opinion in the State of Washington. Appendix 7.

2. Yes, in other situations?

XIX. REWRITE OF FLORIDA CORPORATE LAW

A. Chapter 607 has been completely overhauled.

1. Current law: "Florida Business Corporation Act," Fla. Stat. §607.0101.

2. New law: "Florida Business Corporation Act."

B. Effective January 1, 2020 - See Appendix 8.

XX. ALWAYS EXEMPT

A. The Florida Family Trust Company Act was Initially created in 2014.

B. Exemption from public records law made permanent in 2019

1. House Bill 7033 deleting Fla. Stat. §662.148(6).

XXI. EXEMPT EXCEPT WHEN NOT EXEMPT

A. Generally, all Baker Act filings are exempt from public records laws. Senate Bill 838 creating §394.464.

B. In addition to a new statutory section, Senate Bill 838 also sets forth a statement of policy.

1. The Legislature finds that it is a public necessity that petitions for voluntary and involuntary admission for mental health treatment and related court orders and records that are filed with or by a court under part I of chapter 394, Florida Statutes, and the personal identifying information of a person seeking mental health treatment published on a court docket and maintained by the clerk of the court under part I of chapter 394, Florida Statutes, be made confidential and exempt from disclosure under s. 119.07(1), Florida

Statutes, and s. 24(a), Article I of the State Constitution. The mental health of a person, including a minor, is a medical condition, which should be protected from dissemination to the public. A person's mental health is also an intensely private matter. The public stigma associated with a mental health condition may cause persons in need of treatment to avoid seeking treatment and related services if the record of such condition is accessible to the public. Without treatment, a person's condition may worsen, the person may harm himself or herself or others, and the person may become a financial burden on the state. The content of such records or personal identifying information should not be made public merely because they are filed with or by a court or placed on a docket. Making such petitions, orders, records, and identifying information confidential and exempt from disclosure will protect such persons from the release of sensitive, personal information which could damage their and their families' reputations. The publication of personal identifying information on a physical or virtual docket, regardless of whether any other record is published, defeats the purpose of protections otherwise provided. Further, the knowledge that such sensitive, personal information is subject to disclosure could have a chilling effect on a person's willingness to seek out and comply with mental health treatment services.

C. Some limited exemptions from the exemption from public records are included in this legislation. The clerk may disclose otherwise confidential and exempt documents upon request to:

1. The petitioner and the petitioner's attorney.
2. The respondent and the respondent's attorney.
3. The respondent's guardian or guardian advocate.
4. In the case of a minor respondent, the respondent's parent, guardian, legal custodian, or guardian advocate.
5. The respondent's treating health care practitioner.
6. The respondent's health care surrogate or proxy.
7. The Department of Children and Families.
8. The Department of Corrections if the respondent is committed or is to be returned to the custody of the Department of Corrections from the Department of Children and Families.
9. A person or entity authorized to view records upon a court order for good cause.

XXII. NO RUSH TO TRANSFER HOMESTEAD[19]

A. Transfers of real property in Florida results in a documentary stamp tax. Fla. Stat. §201.02.

B. The amount of tax is based upon the amount of consideration. Consideration includes money paid or agreed to be paid, of course. However, consideration also includes the amount of any mortgage, whether or not the underlying indebtedness is assumed by the transferee.

C. In 2018, an exemption was added for homestead property transferred between spouses for transfers within 1 year after the date of the marriage.

D. In 2019, the 1 year limitation was eliminated.

XXIII. HOW SMALL IS SMALL ENOUGH?[20]

A. The amount in controversy threshold for county court jurisdiction had not changed in nearly three decades.

B. The legislature and the courts worked together to study an appropriate increase.

C. The change enacted includes two steps:

1. Effective January 1, 2020, the jurisdictional amount is $30,000; and

2. Effective January 1, 2023, the jurisdictional amount is $50,000.

XXIV. CONCLUSION

[19] Fla. Stat. 201.02(7)(b), as amended by Chapter 2019-42, Laws of Florida.

[20] Chapter 2019-58, Laws of Florida.

Appendices

1. Trust Accounting Resources from LegalFuel

2. ACTEC Podcasts

3. Administrative Order 19-23 (Corrected)

4. PDF-A Example

5. Roadmap for IRS

6. Candidates' Tax Proposals prepared by Paul Morf

7. Stevenson v. Stanyer, unpublished opinion

8. Final Bill Analysis of the Florida Business Corporation Act

JULY 19, 2019 | ALL FINANCE TOPICS, ALL START A LAW FIRM TOPICS, TRUST ACCOUNTING

Trust Accounting Resources

Chapter 5, Trust Accounting, The Rules Regulating The Florida Bar

- 5-1.1 Trust Accounts
- 5-1.2 Trust Accounting Records and Procedures

Forms to Open an IOTA Account

- Notice to Eligible Institution Form
- Sample Trust Account Bank Notification Letter
- Notice to Bar Foundation Form (Complete Online)

Notice of Closed IOTA Account

- Notice of Closed IOTA Account (Complete Online)

Additional Forms

- Monthly Reconciliation Forms
- Minimum Requirements Trust Account Plan Form
- Extended Trust Account Plan Form
- Trust Account Compliance Certificate Instructions

For more forms visit our Document Library's Trust Accounting Forms category.

Here are all the Ethics Opinions regarding Trust Accounts:

- Charging fees and expenses from two cases against settlement received in one case 62-15
- Checks identifying lawyer as lawyer 65-14
- Costs advances from client placed in trust account 93-2
- Credit card payments 76-37

Recent News

2019 Clio Cloud Conference
September 5, 2019

ABA Books for Bars - August 2019 Updates
August 22, 2019

Free CLE Webinar: Tech Essentials for the Modern Lawyer
August 21, 2019

Florida Bar Annual Convention 2019 Podcasts
July 2, 2019

LegalFuel: The Practice Resource Center of The Florida Bar
May 31, 2019

BOARD RULES ON 'VIRTUAL' FIRM'S DIRECT MAIL CAMPAIGN
May 31, 2019

WaPo: It's the middle of the night. Do you know who your iPhone is talking to?
May 28, 2019

PAY YOUR ANNUAL FLORIDA BAR FEES ONLINE!
May 14, 2019

ABA Books for Bars - May 2019 Updates
May 10, 2019

Microsoft admits hackers gained access to its web email services for three months
April 15, 2019

The Florida Bar Launches Enhanced Lawyer Referral Service
February 11, 2019

Related Categories

All Finance Topics
All Start a Law Firm Topics
Trust Accounting

Search

Search

Apple Podcasts Preview

69 episodes

ACTEC Trust and Estate Talk offers professionals best practice advice, insights, and commentary on subjects that affect the profession and clients. ACTEC, a professional society of peer elected trust and estate lawyers, is passionate about estate and trust issues including elder law, estate planning, wealth management, probate law, wills, living wills, power of attorney, guardianship, medical power of attorney, trusts, irrevocable trusts, special needs trusts, charitable trusts, trust funds, Rockefeller trusts, marital trusts, asset protection, family partnerships, estate taxes, gift taxes, tax legislation, tax law, and tax reform.

ACTEC Trust & Estate Talk

The American College of Trust and Estate Counsel | ACTEC

Business

★★★★★ 4.2, 21 Ratings

Listen on Apple Podcasts ↗

AUG 27, 2019

Basic Charitable Giving

Overview of the fundamentals of basic charitable giving including income tax, the estate and gift tax, and donating to a foreign charity.

▶ PLAY 10 min

AUG 20, 2019

Balancing Independence and Vulnerability of Older Adults | Part 3 of 3

Learn what lawyers and society can do to protect an older adult's independence and reduce stereotypes - especially women – from elder financial abuse.

▶ PLAY 27 min

AUG 13, 2019

Balancing Independence and Vulnerability of Older Adults | Part 2

Elder financial abuse and who commits it, how we can help protect the autonomy of older adults and understand what the law can do to protect against such abuses.

▶ PLAY 32 min

AUG 6, 2019

Balancing Independence and Vulnerability of Older Adults

Many women have a longer lifespan than men. How does the differing longevity impact financial management and potential vulnerabilities?

▶ PLAY 29 min

Supreme Court of Florida

No. AOSC19-23
Corrected[1]

IN RE: FILING ELECTRONIC COURT DOCUMENTS STANDARDS AND DOCUMENT STORAGE AND BACKUP OF ELECTRONIC RECORDS STANDARDS

ADMINISTRATIVE ORDER

The use of personal computers by government and business has changed the way documents are archived. Prior to the 1990s, most offices maintained records on paper in centralized files. Today, however, organizations are embracing the need for digital archiving, and the Portable Document Format (PDF) file format is rapidly overtaking paper for the long-term storage of records. This administrative order adopts two sets of standards that implement the most reliable and suitable file format currently available for the long-term storage of electronic court documents.

Filing Electronic Court Documents Standards

The Florida Courts Technology Commission (commission), which is responsible among other things with updating technical standards for technology

1. This administrative order is issued to correct the Rule of Judicial Administration that is cited in the Filing Electronic Court Documents Standards that are referenced herein and attached hereto.

used in the judicial branch to receive and maintain court records by electronic means, established the Document Storage Workgroup (workgroup) and charged it with determining long-term goals and requirements for the storage of electronic court documents. After considerable research, the workgroup recommended and the commission endorsed the use of Portable Document Format for Archiving (PDF/A) as the standard for court document storage. PDF/A is recognized as the international standard for long-term archival storage. Use of PDF/A for the storage of electronic court records will maintain longevity of court PDF files and improve the security and preservation of case-related documents.

The preferred format for documents filed through the Florida Courts E-Filing Portal (Portal) is PDF/A or a current equivalent, although the Portal allows and will continue to allow documents to be submitted in Word, WordPerfect, and other PDF formats. The Portal will check each document submitted to the Portal for the required PDF/A format and convert documents that are filed in the other allowed formats.

Document Storage and Backup of Electronic Records Standards

Electronic court records custodians are responsible for the storage, processing, and accessibility of court documents and shall ensure electronic court documents that are part of a court file are stored in PDF/A format. This is a day-forward initiative and does not require clerks of court to convert previously stored

files into the PDF/A format. The record copy will retain the original intelligence as a PDF/A document; however, the redacted copy will not be required to maintain the original intelligence. Clerks of court must continue to follow the requirements of the Americans with Disabilities Act when providing on-demand, redacted documents. Additionally, digital signatures, electronic notarization, or digital hashes are not required; nevertheless, if they are included in the PDF, the signatures may be flattened.[2]

All clerks of court shall implement storage of documents in PDF/A format no later than June 1, 2021. The Court recognizes that clerks of court are in varying stages of readiness to implement PDF/A, and those clerks that are ready to move forward are encouraged to do so as quickly as practicable. Any clerk of court that determines their office cannot comply with the deadline must file, no later than December 31, 2020, a request for an extension of time that sets forth precise reasons for the non-compliance, describes the implementation steps that have been taken, and details the specific date of expected full compliance.

The Florida Courts Technology Commission determined no standards for the backup of online records were currently in place as a means to ensure continuous

2. Flattening refers to transforming an interactive PDF document into a non-interactive PDF document. When a PDF document is flattened, a user cannot modify the data in the document fields.

data protection. Thus, the Technical Standards Subcommittee (subcommittee) developed and the commission endorsed Backup of Electronic Records Standards for all electronic systems. These standards define the minimum responsibilities of the custodians of the electronic court records and are effective immediately upon the entry of this administrative order.[3]

Conclusion

For the reasons stated above, the Court hereby adopts the Filing Electronic Court Documents Standards and the Document Storage and Backup of Electronic Records Standards, which are attached hereto and incorporated herein by reference.

DONE AND ORDERED at Tallahassee, Florida, on June 10, 2019.

AOSC19-23 6/10/2019

Chief Justice Charles T. Canady

AOSC19-23 6/10/2019

ATTEST:

AOSC19-23 6/10/2019

John A. Tomasino, Clerk of Court

AOSC19-23 6/10/2019

3. If a custodian stores court-related data from another jurisdiction or agency with stricter requirements, the custodian must comply with the stricter requirement for that data.

Filing Electronic Court Documents Standards

Document Filing

Document filing will be conducted in accordance with Standards for Electronic Access to the Courts and Fla. R. Jud. Admin. 2.525, Electronic Filing.

The Portal:

- The Portal will accept new filings in Word, WordPerfect, PDF, and PDF/A formats. The preferred format for filing is the PDF/A format where original document intelligence has been maintained.
- Documents filed through the Portal will be provided to the clerk in PDF/A format when the clerk is able to receive and store a PDF/A document as follows:
    - Documents filed in an approved PDF/A format will be provided to the clerk as originally filed.
    - Documents filed in Word or WordPerfect format will be converted to an approved PDF/A format.
    - Documents filed in other searchable PDF formats will be converted to an approved PDF/A format.
    - Documents filed in other non-searchable PDF formats will be rasterized (i.e., converted into bitmap file format) as an approved PDF/A format.
    - Digital signatures and digital notarizations will not be passed or maintained by the Portal.

Document Storage and Backup of Electronic Records Standards

Document Storage Format

Electronic court records custodians are responsible for the storage, processing and accessibility of electronic court documents. Custodians shall ensure that:

- Electronic documents that are part of a court file (i.e., the record copy) are stored in the PDF/A format.
    - This is a day-forward requirement.
    - Upon implementation of the PDF/A requirement for incoming filings, existing electronic documents may remain in their current format(s) if the clerk maintenance system (CMS) is capable of managing multiple file formats.
- The record copy of each electronic court document retains the original document intelligence (i.e., as filed with the Portal) with the exception of features that use a digital hash. For example, digital signatures and electronic notarizations may be flattened and the certificates invalidated as the document moves through the filing process.

Redaction and Americans with Disabilities Act (ADA) Compliance

- Redacted copies of electronic court documents are not required to retain the original document intelligence. These copies may be flattened to accommodate existing redaction workflow processes.
- Custodians of electronic court documents are not responsible for adding ADA-compliance features to documents that they did not originate. However, custodians are required to follow acceptable ADA practices for access to court documents.

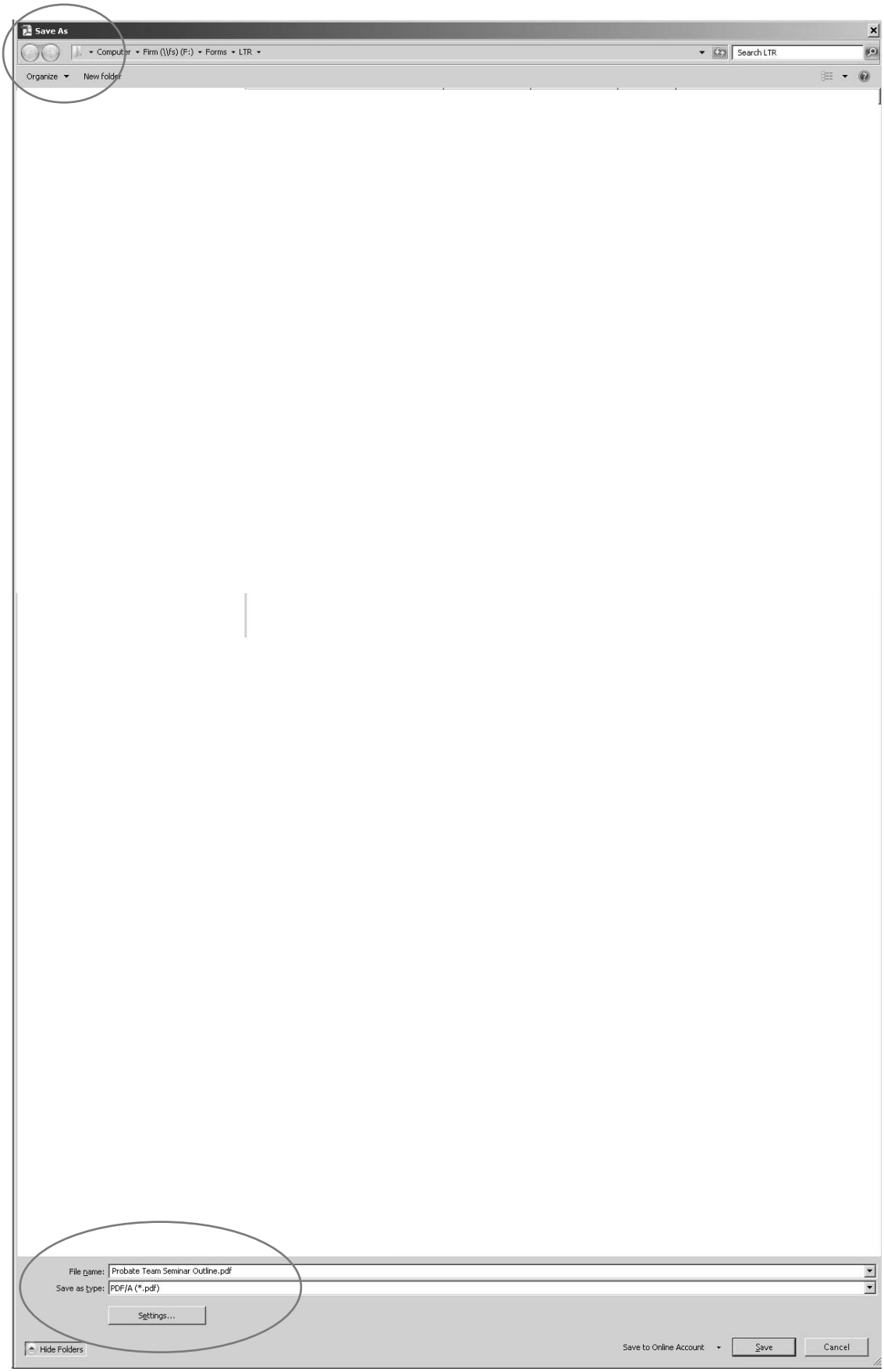
Backup of Electronic Records

Electronic court records custodians are responsible for the security, availability, and integrity of electronic court records (images and data) under their care. Custodians shall ensure that:

- Electronic court records in their care are securely backed-up and any backup data stored at a third party location must also be encrypted. The custodian of the electronic court records shall have exclusive access to the encryption key. In instances where vendors are supporting appliances onsite and are required to maintain an encryption key, the custodian will have operational policies and procedures that serve as a control prohibiting vendor access without invitation and monitoring.
- The production data or backup copy will reside in a hardened (CAT 5) facility. If a hardened (CAT 5) facility is unavailable, a tertiary copy (redundant backup) will also be maintained in its own offsite, independent facility. The production electronic court records and at least one copy of the backup(s) shall not be housed in the same building.
- Agreements with third party offsite vendors acknowledge the confidentiality of electronic court data they store, and prohibit data mining and other access/use of the data for any purpose other than to make the data accessible to the custodian.
- All backup copies of court data must be readily available to the custodian for access and restoration.

- Random sample testing is performed annually to verify that data is accessible and recoverable.
- Any known breach, or other malicious event, is reported to the chief judge or his/her designee and the Chief Information Security Officer at the Office of the State Courts Administrator Office of Information Technology as part of the custodian's Computer Security Incident Response plan.
- All court backup data is stored in the United States.
- Physical and electronic data transfer processes conform to the confidentiality and security guidelines set forth in the Data Exchange Standards.

These requirements are minimum requirements. If a custodian stores court-related data from another jurisdiction or agency with stricter requirements, the custodian must comply with the stricter requirements for that data.


Save As
Computer
Firm (\\fs) (F:)
Forms
LTR
Search LTR
Organize
New Folder
File name:
Probate Team Seminar Outline.pdf
Save as type:
PDF/A (*.pdf)
Settings...
Hide Folders
Save to Online Account
Save
Cancel

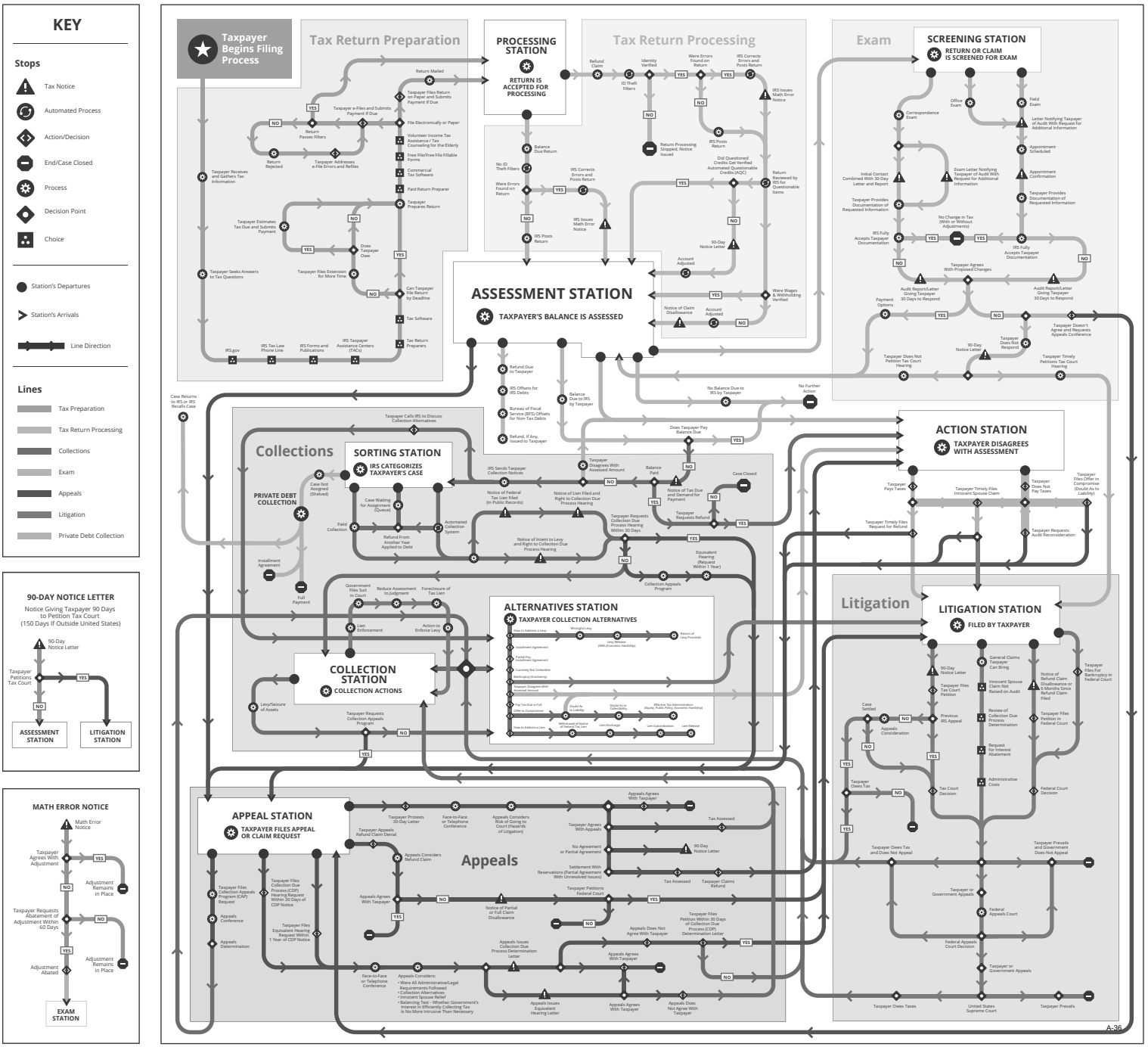
The Taxpayer Roadmap 2019

An Illustration of the Modern United States Tax System

The map below illustrates, at a very high level, the stages of a taxpayer's journey, from getting answers to tax law questions, all the way through audits, appeals, collection, and litigation. It shows the complexity of tax administration, with its connections and overlaps and repetitions between stages. As you can see from its numerous twists and turns, the road to compliance isn't always easy to navigate. But we hope this map helps taxpayers find their way. A project of the Taxpayer Advocate Service.

For more information visit **taxpayeradvocate.irs.gov**

TAXPAYER ADVOCATE SERVICE
YOUR VOICE AT THE IRS



Candidates	Eliminate Step-up Basis	Change Capital Gains Tax	Tax Wealth or Net Worth	Change Estate Tax	Tax Financial Transactions
Joe Biden	✓	✓			
Cory Booker		✓		✓	
Pete Buttigieg			✓	✓	✓
Kamala Harris				✓	✓
Amy Klobuchar		✓			✓
Beto O'Rourke	✓	✓			
Bernie Sanders	✓	✓		✓	✓
Elizabeth Warren			✓	✓	

Candidates	Eliminate Step-up Basis	Change Capital Gains Tax	Tax Wealth or Net Worth	Change Estate Tax	Tax Financial Transactions
Joe Biden	✓	✓[1]			
Cory Booker		✓[2]		✓[3]	
Pete Buttigieg			✓[4]	✓[5]	✓[6]
Kamala Harris				✓[7]	✓[8]
Amy Klobuchar		✓[9]			✓[10]
Beto O'Rourke	✓	✓[11]			
Bernie Sanders	✓	✓[12]		✓[13]	✓[14]
Elizabeth Warren			✓[15]	✓[16]	

[1] Biden's plan calls for Capital Gain tax to double at $1 million.
[2] Booker plans to tax capital gains at a "higher rate" but has not provided details on this plan.
[3] Booker plans to set estate tax exemptions back to the 2009 levels, taxing estates at 45% for net worth over $3.5 million.
[4] Buttigieg has stated he "would consider" a wealth tax, however, he has not provided details.
[5] Buttigieg plans to set estate tax exemption to "pr-2010 levels." For 2009 estate net worth over $3.5 mil were subject to 45% tax, for 2008 net worth over $2 mil were subject to 45% tax.
[6] Buttigieg has stated he "would consider" a financial transactions tax, however, he has not provided details.
[7] Harris has stated that she intends on "making the top 1% and corporations pay their fair share through more progressive income, payroll, and estate tax", however, she has not provided details.
[8] Harris's plan calls for 0.2% tax on stock trades, 0.1% on bond trades, and 0.002% on derivative transactions.
[9] Klobuchar's plan would tax capital gains at ordinary rates.
[10] Klobuchar's plan would tax "carried interest" as ordinary income.
[11] O'Rourke's plan would tax capital gains as ordinary income.
[12] Sanders' plan would "end the special (lower) rates for capital gains"
[13] Sanders' plan calls for a progressive rate on estate tax, "estates valued from $3.5 million to $10 million would be taxed at a 45% rate; estates valued from $10 million to $50 million, at a 50% rate; estates valued from $50 million to $1 billion, at a 55% rate; and estates valued at more than $1 billion, at a 77% rate."
[14] Sander's financial transaction tax calls for tax of 0.5% for stock trades, 0.1% for bond trades, and 0.005% for derivative trades.
[15] Warren's tax plan calls for an annual wealth tax assessed on net worth (including all worldwide assets) of "2% on net worth above $50 million and 3% on net worth above $1 billion."
[16] Warren's plan would establish "more progressive estate tax rates" and would reduce the exemption to the 2009 level of $3.5 mil.

Paul Morf, Simmons Perrine Moyer Bergman PLC, August 5, 2019, *pmorf@spmblaw.com*

Candidates	Eliminate Step-up Basis	Change Capital Gains Tax Rate	Tax Wealth or Net Worth	Change Estate Tax	Tax Financial Transactions
Joe Biden	✓	✓			
Cory Booker		✓		✓	
Pete Buttigieg			✓	✓	✓
Kamala Harris				✓	✓
Amy Klobuchar		✓			✓
Beto O'Rourke	✓	✓			
Bernie Sanders	✓	✓		✓	✓
Elizabeth Warren			✓	✓	

Eliminate Step-up Basis

- Three candidates would eliminate § 1014, commonly known as the "Step-up Basis." (Biden, O'Rourke, and Sanders).

Change Capital Gains Tax Rate

- Five candidates would change the capital gains rate. (Biden, Booker, Klobuchar, O'Rourke, and Sanders)
  - Three candidates would eliminate the lower rates. (Klobuchar, O'Rourke, Sanders).
  - One candidate doubles the existing rates on gains over $1 mil. (Biden).
  - One candidate plans an unspecified "higher rate." (Booker).

Wealth Tax

- Two candidates include wealth tax in their tax plans. (Buttigieg, Warren)
  - One candidate would assess an annual wealth tax on worldwide net worth of 2% on net worth above $50 mil and 3% on net worth above 1 billion. (Warren)
  - One candidate would consider an unspecified "wealth tax." (Buttigieg).

Change Estate Tax

- Five candidates change estate tax exclusion or rates. (Booker, Buttigieg, Harris, Sanders, Warren).
  - Four candidates would set the exclusion at $3.5. (Booker, Buttigieg, Sanders, Warren).
  - Five candidates would change the rate. (Booker, Buttigieg, Harris, Sanders, Warren).
    - Two candidates would tax estates at 45% (Booker, Buttigieg).
    - Three candidates plan unspecified "progressive rates." (Harris, Warren).
    - One candidate's progressive tax rates range from 45% to 77%. (Sanders)

Financial Transaction Tax

- Four candidates implement financial transaction tax. (Buttigieg, Harris, Klobuchar, Sanders).
  - Two candidates have special tax rates for transactions. (Harris, Sanders).
    - 0.2% stock, 0.1% bond, and 0.002% on derivative. (Harris)
    - 0.5% stock, 0.1% for bond, and 0.005% for derivative. (Sanders)
  - One candidate would consider an unspecified financial transaction tax. (Buttigieg).
  - One candidate would tax "carried interest" as ordinary income. (Klobuchar).

FILED
JULY 3, 2019
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

Thomas J. Stevenson, Personal Representative Of The Estate of Lorna Stevenson, Respondent, v. Brent T. Stanyer and Douglas, Eden, Phillips, DeRuyter and Stanyer, P.S., Petitioner.	)	No. 35970-1-III UNPUBLISHED OPINION

KORSMO, J. — Attorney Brent Stanyer and his firm (Stanyer) were granted discretionary review of the trial court's refusal to dismiss at summary judgment this legal malpractice action brought by the estate of one of his clients. Stanyer contends that no material questions of fact exist concerning the scope of his representation. We agree and reverse.

FACTS

In late 2015, Stanyer was engaged to review the will, codicil, power of attorney, and health care directive of Lorna Stevenson. Ms. Stevenson was 92 at the time she engaged Mr. Stanyer; she empowered her son, Thomas Stevenson, to communicate with

Stanyer. Mr. Stevenson subsequently became the personal representative of her estate and is the plaintiff in this action.

Stanyer received a listing of Ms. Stevenson's assets and then met with both Lorna and Thomas Stevenson to review the existing documents and discern his client's wishes. He then prepared an updated will, power of attorney, and health care directive. Ms. Stevenson executed those documents February 1, 2016. The will left her estate in equal shares to her two children, Thomas Stevenson and Louise Everett.

One of the assets Stanyer had reviewed was a trust of which Lorna Stevenson was trustee. The primary asset of the trust was a lake home in Idaho that Ms. Stevenson and her husband, Dr. Richard Stevenson, had placed in trust decades earlier. Upon Dr. Stevenson's death in 1989, the trust sheltered the property from estate taxes. The trust held the lake property for the benefit of Lorna Stevenson; upon her death, it was to pass in equal shares to Mr. Stevenson and Ms. Everett.

Lorna Stevenson died August 6, 2016. Stanyer was requested to begin the probate process. Upon learning that he and his sister would face significant capital gains taxes upon sale of the lake property, Mr. Stevenson hired another lawyer to represent the estate. He eventually initiated this malpractice action as personal representative of Lorna's estate.

The essence of the complaint was that Stanyer should have advised Lorna Stevenson to have entered into an agreement with the trust beneficiaries to dissolve the

trust and take the lake property as her personal asset. In theory,[1] the transfer would increase the basis in the lake home now owned by Lorna, but the increased basis would be sheltered from federal estate taxes by the significant increase in the estate exemption since the creation of the trust.[2] The damages were estimated to be $159,000 in capital gains taxes to be paid by the beneficiaries.

Stanyer eventually moved for summary judgment, arguing that any tax burden arising from the property passed by Dr. Stevenson's trust was beyond the scope of his representation of Lorna Stevenson. The children were not his clients and the tax burden was not that of Lorna's estate.

Concluding that material questions of fact existed concerning whether Stanyer was requested to give tax advice, the trial court denied summary judgment. Stanyer sought discretionary review, which our commissioner granted. The commissioner noted that there was no evidence indicating that Lorna intended Stanyer to give tax advice for the benefit of the trust beneficiaries.

A panel considered the matter without hearing oral argument.

[1] Stanyer disputes the efficacy of this approach. This appeal does not require this court to weigh in on the topic.

[2] The federal exemption was $225,000 when the trust was created. That amount had risen to $5,000,000 by 2016.

ANALYSIS

The dispositive issue presented is whether the record suggests that Stanyer owed a duty to consider the tax consequences of Lorna Stevenson's will on her beneficiaries.[3] There is neither a factual nor a legal basis for so concluding. We initially consider the governing legal standards before turning to the question of duty.

Appellate courts review summary judgment rulings under well settled standards. The reviewing court sits in the same place as the trial court and applies de novo review. *Hubbard v. Spokane County*, 146 Wn.2d 699, 706-707, 50 P.3d 602 (2002), *overruled on other grounds by Rose v. Anderson Hay & Grain Co.*, 184 Wn.2d 268, 358 P.3d 1139 (2015). The moving party bears the initial burden of establishing that it is entitled to judgment because there are no disputed issues of material fact. *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). If a defendant makes that initial showing, then the burden shifts to the plaintiff to establish there is a genuine issue for the trier of fact. *Id.* at 225-226. The plaintiff may not rely on speculation or having its own affidavits accepted at face value. *Seven Gables Corp. v. MGM/UA Entm't Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986). Instead, it must put forth evidence showing the existence of a triable issue. *Id.*

[3] Accordingly, we need not address Stanyer's additional argument that the estate suffered no damages from the alleged attorney error.

The elements of a legal malpractice action are: (1) an attorney-client relationship that gives rise to a duty of care, (2) an act or omission by the attorney in breach of that duty, (3) damage to the client, and (4) proximate causation between the breach of duty and the damage incurred. *Hizey v. Carpenter*, 119 Wn.2d 251, 260-261, 830 P.2d 646 (1992). The standard of care is uniform throughout the state of Washington: "that degree of care, skill, diligence and knowledge commonly possessed and exercised by a reasonable, careful and prudent lawyer in the practice of law in this jurisdiction." *Cook, Flanagan & Berst v. Clausing*, 73 Wn.2d 393, 395, 438 P.2d 865 (1968).

It is the first of these elements that is at issue in this case. Stanyer denies that tax advice for the trust beneficiaries was within the scope of his attorney-client relationship with Lorna Stevenson; he was hired to update Lorna's estate plan and effectuate her desire that the two children take equally from her estate. The estate argues that while the estate is the only client, basic estate planning includes tax planning and required Stanyer to advise Lorna about the possibility of converting the trust property to her personal property in order to enhance her estate and pass more of it to her heirs.

Stanyer expressly denies that he was asked to undertake any tax work on behalf of the beneficiaries and notes that the trust asset was not the property of Ms. Stevenson. Clerk's Papers (CP) at 34. Mr. Stevenson stated in his affidavit that he was familiar with his mother's retention of Mr. Stanyer and was present during their meetings. He then states: "At the time of Mr. Stanyer's retention it was my mother's intent that her death

not result in a taxable event either to her estate or the beneficiaries of her estate." CP at 112-113.

The problem for the estate is that Mr. Stevenson's affidavit does not state that his mother's intent was ever expressed to Mr. Stanyer. It states that he was present when his mother and Mr. Stanyer met, and it states that she intended that there be no tax consequences from her death. There simply is no indication that her desire to avoid tax consequences for the children was ever communicated to Mr. Stanyer. Similarly, the e-mail communications between Stanyer and Stevenson, offered into the record by both parties, do not mention the issue of tax advice.

Similarly, neither party has provided authority suggesting that estate planning advice necessarily encompasses consideration for the tax consequences faced by the beneficiary.[4] Indeed, the question of whether the estate or the beneficiary was to bear the tax consequences could easily create a conflict of interest for an attorney trying to represent the interests of both.

The estate failed to present evidence showing that Stanyer was asked to engage in an analysis of the best way for the beneficiaries to receive the trust asset. Since the lake property was not an asset of Ms. Stevenson's, and Stanyer was never hired to give advice concerning her trusteeship, it also is difficult to see how any general duty to provide tax

[4] It is easy to foresee that such an obligation could become very onerous if there were numerous beneficiaries and assets.

advice for her estate would encompass tax advice for the beneficiaries of the trust she controlled.

The estate did not establish the existence of a material question of fact concerning Stanyer's representation of Ms. Stevenson and her estate. Summary judgment should have been granted.

The ruling of the trial court is reversed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Korsmo, J.

WE CONCUR:

Fearing, J.

Lawrence-Berrey, C.J.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS
FINAL BILL ANALYSIS

BILL #: CS/CS/HB 1009 Business Organizations
SPONSOR(S): Judiciary Committee and Civil Justice Subcommittee, Byrd
TIED BILLS: **IDEN./SIM. BILLS:** CS/CS/SB 892

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee	13 Y, 0 N, As CS	Mawn	Poche
2) Judiciary Committee	17 Y, 0 N, As CS	Mawn	Poche

FINAL HOUSE FLOOR ACTION: **GOVERNOR'S ACTION:** Approved
111 **Y's** 0 **N's**

SUMMARY ANALYSIS

CS/CS/HB 1009 passed the House on April 25, 2019, and subsequently passed the Senate on April 30, 2019.

A corporation is a legal entity created through the laws of its state of incorporation. As of April 2019, Florida had approximately 778,913 corporations in existence, regulated under the Florida Business Corporation Act (FBCA), a law modeled after the Model Business Corporation Act (MBCA) promulgated by the American Bar Association in 1950.

In 2014, the Corporations, Securities, and Financial Services Committee of The Florida Bar's Business Law Section organized a drafting task force to recommend revisions to the FBCA. The task force's mission statement included a comprehensive study of the FBCA and the proposal of revisions to the FBCA with the purpose of:

- Bringing the FBCA in line with 2016 revisions to the MBCA;
- Maintaining Florida's competitiveness with other jurisdictions;
- Fixing issues created by the existing FBCA; and
- Encouraging the formation and use of Florida corporations.

The bill is a comprehensive revision to the FBCA resulting from the work of the task force. The bill includes changes to the FBCA, harmonizing changes to other Florida entity statutes, and necessary corrections to cross references. The bill predominantly mirrors the 2016 version of the MBCA, but deviates from the MBCA in a number of respects by:

- Retaining certain non-MBCA provisions contained in the existing FBCA;
- Borrowing language from the Delaware General Corporation Law; and
- Borrowing language and approaches from the Florida Revised Limited Liability Company Act for purposes of harmonizing the two statutes on issues where the task force considered harmonization appropriate.

The bill does not appear to impact state or local governments.

The bill was approved by the Governor on June 7, 2019, ch. 2019-90, L.O.F., and will become effective on January 1, 2020.

I. SUBSTANTIVE INFORMATION

A. EFFECT OF CHANGES:

Background

A corporation is a legal entity created through the laws of its state of incorporation.[1] Individual states have the power to promulgate laws relating to the creation, organization, operation, and dissolution of corporations.[2] However, in 1950, the American Bar Association (ABA) promulgated the Model Business Corporations Act (MBCA), a body of laws designed to regulate corporations uniformly across different states.[3]

As of April 2019, Florida had approximately 778,913 domestic for-profit corporations in existence, regulated by the State under the Florida Business Corporation Act (FBCA).[4] The FBCA generally follows the MBCA in regulating for-profit corporations.[5] The ABA revised and modernized the MBCA in its entirety in 2016.[6] The FBCA was last overhauled in 1989, and otherwise has undergone only patchwork amendments.[7]

In 2014, the Corporations, Securities, and Financial Services Committee of The Florida Bar's Business Law Section organized a drafting task force to recommend revisions to the FBCA.[8] The task force's mission statement included a comprehensive study of the FBCA and the proposal of revisions to the FBCA with the purpose of:

- Bringing the FBCA in line with revisions to the MBCA;
- Maintaining Florida's competitiveness with other jurisdictions;
- Fixing issues created by the existing FBCA; and
- Encouraging the formation and use of Florida corporations.[9]

CS/CS/HB 1009 is a comprehensive revision to the FBCA resulting from the work of the task force.

Effect of the Bill

General Provisions

Applicability; Severability; Effective Date (Sections 1-2, 226-227, 230-231, and 293)

CS/CS/HB 1009 amends s. 607.0101, F.S., to clarify that Part I of the FBCA applies generally to corporations; Part II of FBCA applies to social purpose corporations; and Part III of the FBCA applies to benefit corporations.[10] The bill also clarifies that when reference is made to ch. 607, F.S., the reference includes corporations organized under Parts I, II, and III.

---

[1] Legal Information Institute, Cornell Law School, Corporations, https://www.law.cornell.edu/wex/corporations (last visited May 2, 2019).
[2] *Id.*
[3] William H. Clark, Jr., The Relationship of the Model Business Corporation Act to Other Entity Laws, https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1609&context=lcp (last visited May 2, 2019).
[4] The Florida Department of State, Division of Corporations, *Yearly Statistics*, https://dos.myflorida.com/sunbiz/about-us/yearly-statistics/ (last visited May 2, 2019).
[5] The Florida Bar, Business Law Section, *Proposed Modifications to Chapter 607 (Florida Business Corporation Act)*, (Jan. 24, 2019).
[6] *Id.*
[7] *Id.*
[8] *Id.*
[9] *Id.*
[10] Both a benefit corporation and a social purpose corporation are formed with the statutory purpose of crating or pursuing public benefit activities. However, a benefit corporation has a broad purpose to benefit the public generally while a social purpose corporation can choose to limit the benefit goals it pursues. See Stuart R. Cohn and Stuart D. Ames, *Now It's Easier Being Green: Florida's New Benefit*

The bill also amends ss. 607.1701 and 607.1702, F.S., to provide that the amended FBCA applies to all corporations registered or authorized to do business in Florida on January 1, 2020. However, the bill amends s. 607.1907, F.S., to provide that any pending action, proceeding, or right accrued prior to January 1, 2020, will be completed as though the amendments made to the FBCA by this bill had not taken effect. Finally, the bill creates s. 607.1908, F.S., to provide that provisions of the bill are severable.

Powers of the Department (Section 12)

The bill amends s. 607.0130, F.S., to make a technical change that eliminates certain express powers of the Department of State (Department), but does not reduce the Department's authority or power to administer the FBCA.

Definitions (Sections 13-15, 23, 27, 38, 116, 161)

The bill amends ss. 607.01401-607.0143; 607.0208; 607.0304; 607.0601; 607.0901; and 607.1301, F.S., to add definitions for use in the FBCA.

Records and Documents; Filing

The FBCA requires domestic and foreign corporations seeking to transact business in Florida to register and file annual reports and other notices with the Department of State (Department).[11] These documents must be executed by an officer, incorporator, or fiduciary of the corporation and contain information as prescribed by law. The Department determines whether submitted filings and forms meet the pertinent statutory requirements and then records and indexes those filings in its database.[12] If the Department refuses to file a document due to a defect, the filing corporation may remedy the defect or may appeal the matter to a court of competent jurisdiction.

Extrinsic Facts (Section 3)

The bill amends s. 607.0120, F.S., to allow a corporation to make its articles of incorporation, or any amendments thereto, terms of shares, mergers, share exchanges, domestications, or conversion transactions dependent upon extrinsic facts. However, the corporation must identify within the document both the extrinsic fact and the effect it will have on the document. Further, the bill prohibits specific terms from being made dependent upon extrinsic facts, including the identity of a corporation's registered agent and the effective date of a document, and provides that a foreign corporation may not make its certificate of authority dependent upon specific facts.

Effective Dates and Times; Withdrawal; Correction (Sections 6 and 7)

The bill amends ss. 607.0123 and 607.0124, F.S., respectively, to clarify provisions relating to the date and time a document is filed with the Department, or effective, as follows:

- A corporation may make the effective date of its articles of incorporation retroactive up to five days before the date of filing;
- Articles of incorporation must take effect no later than the date of filing;
- No document, subject to provisions otherwise in law, may include a delayed effective date of more than 90 days from the date of filing;

---

and Social Purpose Corporations, The Florida Bar Journal, Vol. 89, No. 9 (Nov. 2014), https://www.floridabar.org/the-florida-bar-journal/now-its-easier-being-green-floridas-new-benefit-and-social-purpose-corporations/ (last visited May 2, 2019).

[11] S. 607.1622, F.S.

[12] Florida Department of State, Division of Corporations, *About Us*, https://dos.myflorida.com/sunbiz/about-us/ (last visited May 2, 2019).

- The default effective time of a document is changed from the "start of business" to "12:01 a.m.;" and
- The default time zone is that of the location where the document was filed.

The bill also creates a process for the withdrawal of a filing delivered to the Department. A withdrawal statement signed by or on behalf of all who filed the underlying document must be filed with the Department prior to the effective date of the document that it requests to withdraw and may not be filed with a delayed effective date. Additionally, the bill eliminates the 30-day period for correction of a document filed by a corporation. A corporation may now correct a document at any time.

Filing by Department (Section 8)

The bill amends s. 607.0125, F.S., to clarify that the Department files a document by stamping or otherwise endorsing it. Prior law only required the Department to record a document. Additionally, the bill permits the Department to issue a notice of filing by electronic mail, but limits the form of a notice sent by U.S. mail to a filed copy.

Venue for Appeal (Section 9)

The bill amends s. 607.0126, F.S., to limit a corporation's venue for appeal of the Department's refusal to file a document to the Leon County Circuit Court. Previously, a corporation could pursue an appeal in either Leon County or the county in which the corporation's principal office is located.

Certified Copies (Section 10)

The bill amends s. 607.0217, F.S., to require certified copies of documents filed with the Department to bear the secretary of state's signature, in either original or facsimile form, and the state seal. Prior law did not require any specific mark for a document to be considered certified. The bill also requires certificates issued by the Department to be received by all courts, public offices, and official bodies as prima facie evidence[13] of the facts stated therein.

Certificates of Status (Section 11)

The bill amends s. 607.0128, F.S., to clarify the information required in a certificate of status. The bill also authorizes the Department to require that the fee for the issuance of a certificate of status be paid prior to its issuance.

Incorporation

A corporation must file its articles of incorporation with the Department before it may transact business in the state. Generally, the FBCA requires articles of incorporation to include the corporation's name and address, the number of shares it is authorized to issue, and information about the registered agent.[14]

Notice of Organizational Meeting (Section 20)

The bill amends s. 607.0205, F.S., to reduce the amount of time before which a director must receive notice of a corporation's organizational meeting from three days before the meeting to two days before the meeting.

[13] Prima facie evidence is evidence sufficient to establish a given fact. Blacks' Law Dictionary 825 (6th ed. 1995).
[14] S. 607.0202, F.S.

Forum Provisions; Arbitration (Sections 17, 21, and 23)

The bill amends ss. 607.0202, 607.0206, and 607.0208, F.S., to allow articles of incorporation and bylaws to include exclusive forum provisions relating to internal corporate claims. However, the bill prohibits articles of incorporation and bylaws from including forced arbitration clauses relating to the resolution of an internal corporate claim.

Shareholder Liability Provisions (Sections 17, 21, and 71)

The bill amends ss. 607.0202, 607.0206, and 607.0732, F.S., to limit the adoption of provisions in articles of incorporation and bylaws that make shareholders liable for fees related to internal corporate claims they institute or participate in. However, the bill amends s. 607.0732, F.S., to allow such provisions pursuant to a shareholder agreement.

Proxy Access Provisions (Section 21)

The bill continues to allow a corporation to include any provision in its bylaws that is consistent with law and the articles of incorporation. However, the bill explicitly allows a corporation's bylaws to include provisions that authorize or limit proxy[15] access.

Corporate Purpose; Regulated Business (Section 24)

The bill amends s. 607.0301, F.S., to set a default corporate purpose of "engaging in any lawful business" unless a more limited purpose is stated in a corporation's articles of incorporation. The bill also limits corporations that engage in a regulated business under another Florida Statute from incorporating under ch. 607, F.S., unless the underlying regulating chapter expressly permits such incorporation.

Corporate Names

Indistinguishable Names (Section 28)

The FBCA currently requires a corporation to file a corporate name that is distinguishable from all other corporate names and that clearly indicates the corporation is not a natural person.[16] The bill amends s. 607.0401, F.S., to allow a corporation to register under a name that is indistinguishable from another entity's name if the corporation files the written consent of the similarly-named entity with its registration.

Reserved Names (Section 29)

Florida law used to permit a corporation to reserve its desired name.[17] The bill creates s. 607.04021, F.S., to restore this practice by allowing a corporation to reserve its desired name for up to 120 days prior to its incorporation and to transfer the name to another entity during the reservation period.

[15] A proxy is a written authorization given by one person to another so that the second person can act for the first, such as that given by a shareholder to someone else to represent him and vote his shares at a shareholder's meeting. Black's Law Dictionary 853 (6th ed. 1995).
[16] S. 607.0401, F.S.
[17] Ch. 98-101, § 15, Laws of Fla.

Registered Office and Agent; Service of Process

A corporation transacting business in Florida must designate and maintain a registered agent and registered office located in Florida.[18]

Qualifications; Non-Compliance (Section 31)

The FBCA currently permits a Florida resident or a corporation authorized to do business in Florida to serve as a corporation's registered agent.[19] The bill amends s. 607.0501, F.S., to allow any business entity authorized to do business in Florida[20] to serve as a corporation's registered agent. The bill amends s. 607.0501, F.S., to clarify that a corporation that does not comply with the registered agent requirements of that section may defend itself in Florida court actions but may not bring or otherwise maintain such actions in Florida until it appoints a registered agent.

Duties (Section 31)

The bill amends s. 607.0501, F.S., to explicitly set forth the duties of a registered agent. These duties include forwarding to the corporation a process, notice, or demand pertaining to the corporation which is served on or received by the registered agent and to provide notice to the corporation of his or her resignation.

Designation of Successor (Section 32)

The bill amends s. 607.0502, F.S. to require a corporation's designation of a successor registered agent to include a written statement of acceptance from the successor registered agent. The statement of acceptance operates to designate the successor registered agent as the registered agent from the moment of his or her acceptance of the position.

Resignation; Change of Name or Address (Sections 33 and 34)

The FBCA sets forth requirements regarding a registered agent's resignation or change of name or address.[21] The bill re-designates current law regarding a registered agent's resignation or change of name or address under ss. 607.0503 and 607.05031, F.S., respectively.

Service of Process (Section 36)

The bill amends s. 607.0504, F.S., to update methods of service of process on a corporation. The bill provides that service may be made on the registered agent, but provides for alternative methods of service if the corporation has not designated a registered agent or the registered agent cannot be served. The bill also specifies that nothing in the section affects the right to serve process, give notice, or make a demand in any other manner provided for by law.

Shares and Distribution; Awards

A corporation's articles of incorporation must prescribe the classes of shares and the number of shares[22] in each class the corporation may issue.[23] At least one class of shares must have unlimited voting rights, and one (which may be the same as the voting class) that is entitle to the corporation's

[18] S. 607.0501, F.S.
[19] *Id.*
[20] E.g., a limited liability corporation or a partnership.
[21] S. 607.0502, F.S.
[22] A share is a unit of stock representing ownership in a corporation. Black's Law Dictionary 958 (6th ed. 1995).
[23] S. 607.0601, F.S.

net assets. Shareholder and corporate share rights are laid out in statute, but may also be defined in a corporation's articles of incorporation, bylaws, or shareholder agreement.

Classes and Series (Section 38)

The bill amends s. 607.0601, F.S., to authorize a corporation to define both classes of shares[24] the corporation will issue and the series of shares within those classes. All shares of a class or series must have terms, including preferences,[25] limitations, and relative rights, identical with those of other shares of the same class or series.

Scrips; Fractional Shares (Section 40)

The bill deletes a provision from s. 607.0604, F.S., that allowed the board to authorize the issuance of a scrip[26] only when doing so was considered desirable, so that the board may now authorize the issuance of a scrip under any condition. The bill also deletes a provision from this section that declared the good faith judgment of the board as to the fair value of fractional shares[27] conclusive.

S*ubscription Shares (Section 41)*

The bill amends s. 607.0620, F.S., to provide that a corporation must wait to sell shares to satisfy the debt owed to it as a result of a subscription share from 20 days after demand for payment is sent to 20 days after such demand is delivered. The bill also clarifies that a subscription for shares is not enforceable against the subscriber unless it is in writing and signed by the subscriber.

Equity Compensation Awards (Section 45)

The FBCA allows a board of directors to issue equity compensation awards.[28] The bill amends s. 607.0624, F.S., to authorize a board to delegate to its committees and officers the ability to issue such awards.

Distributions to Shareholders (Section 51)

The FBCA allows a board of directors to make distributions[29] to its shareholders, subject to restrictions in the articles of incorporation and in statute.[30] The bill amends s. 607.06401, F.S., to clarify that a board of directors may fix a record date to determine which shareholders are eligible for distributions made pursuant to the terms of their shares, but that date may not be retroactive. However, if the board does not fix a record date, the record date is the date the board of directors authorizes the distribution.

---

[24] Stocks are generally issued in two or more general classes; e.g., Class A and Class B. Normally only one class has voting rights. Black's Law Dictionary 170 (6th ed. 1995).
[25] A preference share is stock giving the holder a preference, either as to receipt of dividends or as to payment in case of winding up, or both. Black's Law Dictionary 815 (6th ed. 1995).
[26] A scrip is issued in place of fractional shares. When the holder has enough scrip, he or she may exchange the scrip for a share. Black's Law Dictionary 937 (6th ed. 1995).
[27] A fractional share is a unit of stock less than a full share. This term comes into use with a stock dividend. Black's Law Dictionary 454 (6th ed. 1995).
[28] S. 607.0624, F.S.; An equity compensation award is the award of stock options, i.e., an ownership interest in the corporation to employees. See Financial Industry Regulatory Authority, Employee Stock Awards: Five Questions Workers Should Ask, http://www.finra.org/investors/employee-stock-awards-five-questions-workers-should-ask (last visited May 2, 2019).
[29] A distribution is a direct or indirect transfer of money or other property or incurrence of indebtedness by a corporation to or for the benefit of its shareholders. A distribution may be in the form of a declaration or the payment of a dividend. Black's Law Dictionary 329 (6th ed. 1995).
[30] S. 607.06401(1), F.S.

Shareholders

Shareholder Meetings; Who Can Call (Sections 52-54)

The FBCA requires a corporation to hold an annual shareholders meeting at which the shareholders will elect directors and transact business.[31] Additionally, a special meeting for an express, limited purpose may be called by a board of directors, persons authorized to call such a meeting, or a specified percentage of shareholders.[32] If a board fails to hold an annual or special meeting in a timely manner, a court may order a meeting.[33] The bill amend s. 607.0703, F.S., to lengthen from 13 months to 15 months the amount of time a corporation has to hold its annual meeting or undertake action by written consent before a court may order a meeting or other action. The bill also recognizes the court's ability to establish quorum[34] requirements for separate voting groups at a court-ordered meeting.

Shareholder Meetings; Remote Meeting Attendance (Sections 52-53, 56, and 59)

The bill amends ss. 607.0701 and 607.0702, F.S., to clarify that shareholders may participate in shareholder meetings by remote communication. The bill also amends s. 607.0705, F.S., to require a board of directors to give notice of the types of remote communication that a shareholder may use to participate in a meeting. Further, the bill amends s. 607.0709, F.S., to outline limits on participation in a meeting by remote communication.

Votes by Written Consent (Section 55)

The FBCA allows certain shareholders to instigate a vote by written consent.[35] If the shareholders deliver a sufficient number of votes by written consent to a corporation within a 60-day timeframe, the matter voted upon is adopted and the corporation must give notice of the action to all shareholders who did not give their written consent. The bill amends s. 607.0704, F.S., to allow a corporation to delay the effectiveness of a written consent vote for a reasonable time to allow it to count the votes delivered by written consent, and also clarifies that a corporation's failure to give notice of the outcome of a written consent vote does not affect the vote's outcome.

Record Dates; Shareholder Lists (Sections 58-60)

The FBCA requires a corporation to compile a list of shareholders eligible to participate in the corporation's meetings as of the record date[36] established for that purpose.[37] Any shareholder may inspect and copy this list.[38] The bill amends. s. 607.0707, F.S., to expressly allow a corporation's bylaws to establish more than one record date for separate issues, e.g., which shareholders may vote at or are entitled to notice of a meeting, who may demand a special meeting, and who may take other specified actions. The bill also sets default record dates to be used by a corporation that does not establish such dates in its bylaws.

Further, the bill creates s. 607.0709, F.S., and amends s. 607.0720, F.S., to adopt language to further implement bifurcated record dates, explicitly state that shareholders' electronic mail addresses may be excluded from the shareholder list, and remove a $5,000 civil penalty for the improper sale or

[31] S. 607.0701, F.S.
[32] S. 607.0702, F.S.
[33] S. 607.0703, F.S.
[34] A quorum is the number of members of a deliberative body who must be present before business may be transacted. Black's Law Dictionary 867 (6th ed. 1995).
[35] S. 607.0704, F.S.
[36] A record date is the date on which a person must be registered as a shareholder on the stock book of a company in order to receive a declared dividend, or among other things, to vote on company affairs. Black's Law Dictionary 882 (6th ed. 1995).
[37] S. 607.0720, F.S.
[38] *Id.*

distribution of a shareholder's list to give a court discretion to determine the amount of any such penalty.

Beneficial Ownership (Section 63)

The bill amends s. 607.0723, F.S., to modify the process for a corporation to create a beneficial ownership certificate.[39] Specifically, the bill requires the record shareholder and the person on whose behalf the shares are held to sign or assent to the beneficial ownership certificate.

Role of the Office of Inspector of Elections (Sections 64 and 68)

The bill creates s. 607.0729, F.S., to require a public corporation to appoint an inspector of elections to determine voting results at shareholder meetings and to allow any other corporation to do the same. The inspector of election generally determines the validity and number of votes cast and keeps relevant books and records relating to a corporation's shareholders. The bill also incorporates the role of the inspector of elections into s. 607.0724, F.S., and deems a determination made by an inspector of elections controlling, but also subjects the decision to de novo review by a court.

Agreements (Sections 70 and 71)

The bill amends s. 607.0731, F.S., and 607.0732, F.S., to distinguish between voting agreements and shareholder agreements. The bill also expands matters that may be subject to shareholder agreements to include:

- Imposing shareholder liability for participation in an internal corporate claim; and
- Establishing a mechanism for breaking a deadlock between the corporation's directors or shareholders.

Shareholder Derivative Actions (Sections 72-79)

A shareholder derivative action is a legal proceeding brought by a shareholder on behalf of a corporation to assert a claim that the corporation refuses to bring.[40] A shareholder may not pursue a derivative action in court before he or she requests that the corporation take specific action and the corporation either refuses to act or ignores the shareholder's request for at least 90 days.

The bill amends s. 607.07401, F.S., to conform the provisions of that section to those of the Model Act. The bill also creates s. 607.0741-607.0747, F.S., to:

- Remove the requirement that a shareholder maintain his or her shares in the corporation during the entirety of the derivative action that the shareholder initiated;
- Allow a shareholder to initiate a derivative action without waiting 90 days for the corporation to respond to his or demand, if the shareholder is able to prove that such a demand is futile;
- Permit a court to order the plaintiff in a derivative action to pay the defendant's expenses and attorney fees if the court finds that the plaintiff began or maintained the action without reasonable cause or for an improper purpose; and
- In accordance with the internal affairs doctrine,[41] allow court action as outlined in ss. 607.0743, 607.0745, and 607.0746, F.S., regarding foreign corporations, but ensure the application of their organic law otherwise.

[39] A beneficial owner does not have title to property but has rights in the property which are the normal incident of owning the property. In the corporation context, a beneficial owner certificate designates a third party to be treated as the record shareholder even though the shares are held by someone else. Black's Law Dictionary 107 (6th ed. 1995).
[40] Black's Law Dictionary 305 (6th ed. 1995).
[41] The internal affairs doctrine is a conflict of laws principle which recognizes that only one state should have the authority to regulate a corporation's internal affairs. See *Edgar v. Mite Corp.* 457 U.S. 624, 645 (1982).

Shareholder Direct Actions (Section 82)

A direct action is a suit by a shareholder against a corporation to enforce the shareholder's personal right of action.[42] Courts recognize a two-prong test for a shareholder to bring a direct action.[43] Specifically, a shareholder must allege that he or she suffered:

- Direct harm from an injury that did not flow from a general harm to the corporation; and
- A special injury separate and distinct from any injury suffered by other shareholders.[44]

Courts also recognize as an exception to the two-prong test a violation of a separate statutory or contractual duty owed to the shareholder by the defendant.[45]

The bill codifies the test and exception recognized by the courts, requiring a shareholder bringing a direct action against a corporation to plead and prove an actual or threatened injury:

- Not solely due to an injury suffered or threatened to be suffered by the corporation; or
- Resulting from a violation of a separate statutory or contractual duty owed to the shareholder by the wrongdoer, even if the injury is the same as that suffered or threatened to be suffered by the corporation.

Alternatives to Judicial Dissolution (Sections 80-81)

Under the FBCA, where harm is threated to or incurred by a corporation as a result of a deadlock between its directors, or of a director's fraudulent activity, a shareholder's only resolution is to seek judicial dissolution of the corporation under s. 607.1430, F.S., pursuant to which a court may appoint a receiver[46] or a custodian.[47] The bill creates s. 607.0748, F.S., to allow a shareholder to petition a court to appoint a receiver or custodian to manage a corporation's business and affairs where the directors are deadlocked or acting fraudulently.

The bill also creates s. 607.0749, F.S., to allow a court to appoint an impartial provisional director to remedy, outside of a judicial dissolution proceeding, a deadlock between directors that cannot be broken by shareholder action. The provisional director is vested with all the powers of an elected director and is subject to removal by a shareholder vote or court action.

Directors and Officers

A corporation is managed by and subject to the oversight of its board of directors. The FCBA requires a director to be a natural person who is at least 18 years old, but any other qualifications must come from a corporation's articles of incorporation.[48]

[42] *Strazzulla v. Riverside Banking Co.*, 175 So. 3d 879 (Fla. 4th DCA 2015).
[43] *Id.*; See also *Dinuro Investments, LLC v. Camacho*, 141 So. 3d 731 (Fla. 3d DCA 2014).
[44] *Id.*
[45] *Id.*
[46] A receiver is a person appointed by the court for the purpose of preserving property. Black's Law Dictionary 877 (6th ed. 1995).
[47] A custodian is a person who has charge or custody of property, securities, papers, assets, etc. Black's Law Dictionary 267 (6th ed. 1995).
[48] S. 607.0802(1), F.S.

Qualifications (Section 84)

The bill amends s. 607.0802, F.S., to distinguish qualifications for nomination for director from qualifications for elected or appointed directors. Any qualification for nomination prescribed after a person's nomination does not apply to such person with respect to such nomination. Likewise, a qualification for an elected or appointed director prescribed after a director's election or appointment does not apply to that director before the end of his or her term.

Terms of Office (Sections 87 and 88)

The bill amends s. 607.0805, F.S., to clarify when the term of a director expires if director terms are staggered under s. 607.0806, F.S. The bill also amends s. 607.0806, F.S., to clarify the applicable terms of office when a board is first classified and then upon subsequent annual elections when a staggered board is in place.

Removal (Section 91)

The bill creates s. 607.08081, F.S., to allow a court acting pursuant to a shareholder derivative proceeding to remove a director where other remedies are inadequate and impracticable. This remedy is limited to cases in which:

- The director acted fraudulently with respect to the corporation or its shareholders, grossly abused his or her position, or intentionally inflicted harm on the corporation; and
- Removal of the director is in the best interests of the corporation.

Vacancies (Section 92)

The bill amends s. 607.0809, F.S., governing how vacancies created by directors who were elected by a separate voting group must be filled. The bill requires the same voting group, or under certain circumstances the remaining directors elected by that voting group, to vote to fill the vacancy.

Written Consent (Section 94)

The FBCA allows a board of directors, or members of a board committee, to act without meeting, even if the action is otherwise required to be taken at a meeting, by way of a written consent signed by all members of the board or committee.[49] The bill amends s. 607.0821, F.S., to clarify that a written consent is only effective upon its delivery to the corporation.

Objections to Meetings (Section 95)

The FBCA requires a director who objects to a board meeting or to the business to be transacted at the meeting to register his or her objection at the beginning of the meeting.[50] The bill amends s. 607.0823, F.S., to require a director who objects to such things to both state an objection at the beginning of the meeting and to refuse to vote on any action taken at the meeting. If the director fails to do both, his or her presence constitutes a waiver of notice of the meeting and of all objections to the date, time, place, or purpose of the meeting.

[49] S. 607.0821, F.S.
[50] S. 607.0823, F.S.

Board Committees (Section 97)

The FBCA currently authorized a board of directors to delegate many of its functions to a board committee.[51] The bill amends s. 607.0825, F.S., to delete the duties specific to a board committee member. The duties of a board committee member will be those of directors under s. 607.0830, F.S. The bill also deletes a provision restricting the board's ability to delegate to a committee the issuance of sale or shares, or the designation of relative rights, preferences, and limitations of a voting group.

Force the Vote Provisions (Section 98)

The bill creates s. 607.0826, F.S., to authorize a board of directors to enter into an agreement that contains a "force the vote" provision. Such provisions, often used in merger agreements, require the board to submit a matter to a shareholder vote even if the board no longer wants to pursue the matter.

Standards for Directors; Conflicts of Interest (Sections 99, 103, and 105)

The bill amends s. 607.0830, F.S., to update Florida's business judgment rule and to clarify a director's fiduciary duties.[52] Specifically, the bill modifies the prudent person standard of care to require a director to act as an ordinary prudent person in a like position would reasonably believe appropriate under similar circumstances. The bill also provides guidance for whom a board director may rely upon in discharging his or her duties.

Further, the bill amends s. 60.0832, F.S., relating to director conflicts of interest. In particular, the bill requires any transaction in which a conflict of interest is present to be fair to the corporation[53] at the time it is authorized. The bill also creates a shifting burden of proof in a challenge against a conflict of interest transaction, wherein approval by a disinterested majority of directors or shareholders who received advanced notice of the conflict places the burden on the person challenging the transaction, but the lack of any such approval places the burden on the person defending the transaction.

Additionally, the bill creates s. 607.08411, F.S., which provides a standard of conduct for officers that parallels a director's fiduciary duties. Generally, the bill requires an officer to act in good faith and in a manner the officer reasonably believes to be in the best interests of the corporation. An officer must also report to or inform superior officers or other appropriate persons within the corporation of:

- Material information about the corporation's affairs;
- Actual or probable material violations of law that involve the corporation; and
- Actual or probable breaches of duty to the corporation.

Finally, the bill amends s. 607.0834, F.S., to clarify the statute of limitations for a director's liability for unlawful distributions.

Indemnification; Advanced Expenses (Sections 107-115)

The bill amends s. 607.0850, F.S., to:

- Exclude employees and agents of a corporation from indemnification[54] pursuant to law and specifying that a corporation may indemnify its employees or agents in its articles of incorporation, bylaws or other agreements;

[51] S. 607.0825, F.S.
[52] A fiduciary duty is a duty to act for someone else's benefit. Black's Law Dictionary 432 (6th ed. 1995).
[53] The term "fair to the corporation" is defined in s. 607.0832(1)(b), F.S., as a transaction that, as a whole, is beneficial to the corporation and its shareholders, taking into appropriate account whether it is: (1) fair in terms of the director's dealings with the corporation in connection with the transaction and (2) comparable to what might have been obtainable in an arm's length transaction.
[54] Indemnification is the practice by which corporations pay expenses of officers or directors who are named as defendants in litigation relating to corporate affairs. Black's Law Dictionary 529 (6th ed. 1995).

- Establish a process for the board of directors to determine whether, and the extent to which, an officer or director may be indemnified in connection with a proceeding by or in the right of the corporation;
- Set a new standard for mandatory indemnification, requiring an officer or director involved in a proceeding because of his or her role as a corporate director or officer to be "wholly successful"[55] in the action, rather than "successful on the merits;"
- Explicitly outlining how advancement of expenses may be authorized by either the board of directors or shareholders; and
- Clarifying a corporation's ability to indemnify above and beyond indemnification provided for in law.

Anti-Takeover Provisions

Affiliated Transactions (Section 116)

Florida's affiliated transaction statute is intended to deter hostile takeovers.[56] It protects minority shareholders in merger offers by ensuring that specific transactions are either approved by an appropriate number of disinterested directors or shareholders, or result in a fair price to all shareholders.[57] The bill amends s. 607.0901, F.S., to define an "interested shareholder" and to more clearly provide exceptions to the affiliated transaction statute.

Amendments to Articles of Incorporation and Bylaws (Sections 119-121, 127, 131)

A board of directors may amend the corporation's articles of incorporation without shareholder approval in limited, usually administerial, circumstances. The bill amends s. 607.1002, F.S., to allow a board to amend these documents to reduce authorized shares and to delete an extinct class of shares when no shares of the class remain. The bill also deletes language in s. 607.10025, F.S., that allowed the board to approve share splits or combinations without shareholder approval in corporations of 35 or more shareholders. The effect of this deletion is to permit all corporations to take such actions without shareholder approval.

Additionally, the bill amends s. 607.1003, F.S., to require that shareholder receive a full copy of a proposed amendment to a corporation's articles of information prior their meeting to vote on the amendment. The FBCA currently only requires shareholders to receive a summary of the amendment.[58] Further, the bill requires a board to obtain the written consent of all shareholders who will be subject to a new interest holder liability as a result of an amendment to the articles of incorporation. The bill also amends s. 607.1009, F.S., governing the effect of interest holder liability imposed as a result of an amendment to the articles of incorporation for both parties who incurred new liability and those whose existing liability is affected.

Voting for Directors (Section 131)

Finally, the bill creates s. 607.1023, F.S., to adopt language from the Model Act that provides a method of voting for directors. However, the bill provides that a corporation must elect to be governed by this section in its bylaws for it to apply to a corporation.

[55] Commentary to s. 8.52 of the Model Act provides that "A defendant is wholly successful only if the entire proceeding is disposed of on a basis which does not involve any finding of liability."
[56] A hostile takeover is an attempt to purchase a controlling stake in a corporation without the consent of the board of directors of the target company, or else continuing to negotiate with shareholders after the board rejects the bid. Cornell Law School, Legal Information Institute, Hostile Takeovers, https://www.law.cornell.edu/wex/hostile_takeover (last visited May 2, 2019)
[57] Daniel Nunn, Jr., *The Wolf at the Door: Florida's Takeover Laws Revisited*, Florida Bar Journal Vol. 83, No. 3 (Mar. 2009), https://www.floridabar.org/the-florida-bar-journal/the-wolf-at-the-door-floridas-takeover-laws-revisited/ (last visited May 2, 2019).
[58] S. 607.1003, F.S.

Mergers and Share Exchanges

Other Entities (Sections 132-134)

The FBCA does not anticipate the merger[59] of a domestic corporation with certain types of business entities, such as a limited liability corporation or a foreign eligible entity. The bill amends s. 607.1101, F.S., to account for such mergers. The bill also amends s. 607.1102, F.S., to account for share exchanges between a Florida corporation and a non-corporate domestic entity or a foreign corporation. Finally, the bill amends s. 607.1103, F.S., to clarify the process for shareholder approval of a merger or share exchange where a domestic corporation is either a party to the merger or is the entity acquired in a share exchange and allows the newly formed entity's articles of incorporation to eliminate or limit separate voting rights. An exception exists when:

- The merger or share exchange includes an amendment to the new corporation's articles of incorporation that requires voting by separate groups or classes; and
- The transaction will not affect a substantive business combination.

Two-Step Mergers (Section 135)

The bill creates s. 607.11035, F.S., to permit the merger of corporations without a shareholder vote if the tender offer is first made to shareholders and ultimately results in the offeror's acquisition of a large enough interest in the corporation to satisfy the shareholder approval that would otherwise be required. This process is known as a two-step merger.[60] In order to prevent predatory share devaluation of the shares held by (now minority) shareholders who did not sell their shares in response to the tender offer, the bill implements a guarantee that the holdout shareholders retain their right to receive the same payment offered in the initial tender offer after their shares are converted to shares of the new entity created as a result of the two-step merger.

Subsidiaries (Section 136)

The bill amends s. 607.1104, F.S., to subject mergers between a parent corporation and its subsidiary,[61] or between a parent corporation's subsidiaries, to the general merger provisions in ss. 607.1101-607.1107, F.S. Additionally, a parent corporation must give notice of a successful merger to each of the subsidiary's shareholders within 10 days of the merger's effective date. This notice requirement replaces a provision that required the parent company to wait 30 days after it sent notice of the merger to shareholders to file its notice of merger with the Department.

Articles of Merger and of Share Exchanges (Section 138)

The bill amends s. 607.1105, F.S., to provide for the formalization of articles of merger and of share exchanges, to specify the content required in the articles, and to establish a method of filing the articles with the Department. The bill also provides an effective date for the articles.

Effects (Section 139)

The bill amends s. 607.1106, F.S., to clarify the effect of mergers or share exchanges on domestic and foreign corporations. Specifically, the bill addressed the effect of a merger or share exchange on:

- Corporate existence;

[59] A merger is an amalgamation of two corporations pursuant to statutory provision in which one of the corporations survives and the other disappears. Black's Law Dictionary 682 (6th ed. 1995).
[60] See Nunn, *supra*, note 57.
[61] A subsidiary is a corporation run or owned by another corporation known as a parent corporation. Black's Law Dictionary 996 (6th ed. 1995).

- Property ownership;
- Debt obligations, other liabilities, and creditor rights;
- Ongoing proceedings;
- Articles of incorporation, bylaws, and organic rules;
- Shareholders' rights; and
- Interest holder liability.

Abandonment (Section 140)

The FBCA permits corporations to abandon a merger only before the articles of merger are filed with the Department. The bill amends s. 607.1107, F.S., to allow a statement of abandonment signed by all parties to result in the abandonment of a merger after articles of merger are filed with the Department but before they take effect.

Deleted and Reorganized Provisions (Sections 141-147)

The bill deletes ss. 607.1108-607.115, F.S., governing mergers and conversions. These subjects are reorganized and re-written by Sections 131-139 and 152-157 of the bill.

Domestication

The FBCA allows a foreign corporation to become a Florida domestic corporation by the process of domestication.[62]

Types of Domestication (Section 148)

The bill creates s. 607.11920, F.S., to expand the types of domestications permitted in Florida to include in-bound domestications by foreign corporations and out-bound domestications by Florida corporations into foreign corporations. In other words, the bill allows Florida corporations to domesticate into foreign corporations organized in other U.S. states and allows foreign corporations organized in other U.S. states to become Florida corporations if the organic law of the foreign corporation allows it.

Plan and Effect (Sections 149-152)

The bill creates ss. 607.11921-607.11923, F.S., to establish the formalization of a plan of domestication of a domestic corporation into a foreign jurisdiction, to govern the effectiveness and content of the articles of domestication, and to allow the amendment or abandonment of the plan under certain circumstances. The bill also creates s. 607.11924, F.S., to outline the effect of domestication on the domesticating corporation. Specifically, the bill outlines:

- The ultimate ownership of property, debt, and other obligations;
- Shares as between the corporations;
- Ultimate locus of governance; and
- Overall duties.

Conversion

The FBCA allows a domestic corporation to convert to another business entity organized under the laws of Florida or any other state, the United States, a foreign country, or other foreign jurisdiction.[63]

[62] S. 607.1801, F.S.
[63] S. 607.1112, F.S.

Foreign Corporations; Plan of Conversion (Section 148)

The bill creates s. 607.11930, F.S., to allow a foreign eligible entity to convert to a domestic corporation if it meets specified conditions, to generally address all conversion actions, and to require the adoption of a plan of conversion to effectuate such actions. The bill also creates ss. 607.11931-607.11932, F.S., to outline the information required in a plan of conversion and the method for adoption of a plan of conversion by the board of directors and shareholders. Additionally, the bill establishes notice requirements for shareholders of the subsumed corporation, shareholders affected by interest holder liability, and shareholders who may become general partners of the converted partnership or limited partnership.

Articles of Conversion; Abandonment (Sections 156-158)

The bill creates s. 607.11933, F.S., to establish the method for filing articles of conversion with the Department, their effective date, and the effect of such filing on the governance structure of the subsumed corporation or entity. The bill also creates s. 607.11935, F.S., to more specifically address the transfer of property, debt, records, rules, and other specific rights or duties to the converted entity. Finally, the bill creates s. 607.11934, F.S., to allow a converting entity to amend or abandon its plan of conversion before the articles of conversion take effect.

Sale, Distribution, or Disposal of Assets

Sale or Distribution (Section 159)

The FBCA allows a corporation to sell its assets in the regular course of business without approval by shareholders, unless otherwise required by its articles of incorporation. The bill amends s. 607.1201, F.S., to allow a corporation to distribute its assets pro rata[64] to shareholders, except as part of a dissolution, without shareholder approval.

Disposal (Section 160)

The bill amends s. 607.1202, F.S., to provide that a board wishing to dispose of all, or substantially all, of its property not in the usual course of business must submit such a proposal to a shareholder vote unless specific factors apply. The bill also provides that a disposition approved by shareholders may be abandoned at any time before its consummation.

Appraisal Rights

The FCBA permits minority shareholders to choose to sell their shares in a corporation by asserting appraisal rights, which triggers a fair payout for their shares.[65] This right is limited to situations where a material change in the relationship between the corporation and the shareholder is proposed, e.g., a merger or a share exchange, but the shareholder lacks a right to vote on the transaction.[66]

Determination of Value; Eligible Transactions (Sections 161-162)

The bill amends s. 607.1301, F.S. to clarify that an appraisal of fair value of a share should be determined without any discount for the share's lack of marketability or minority status. The bill also

[64] Pro rata means proportionately, or done according to a certain rate, percentage, or proportion. Black's Law Dictionary 848 (6th ed. 1995).
[65] S. 607.1302, F.S.
[66] *Id.*

amends s. 607.1302, F.S., to add conversions and domestication transactions to the list of transactions giving a shareholder the option to exercise his or her appraisal rights.

Notice to Shareholders (Section 164)

Additionally, the bill amends s. 607.1320, F.S., to require a statement of possible appraisal rights and appropriate law to be sent with notice of the meeting at which shareholder consent is solicited for specific transactions. If approval of a corporate action that would trigger appraisal rights is sought by written consent, then notice of the appraisal rights must be sent to any nonconsenting or nonvoting shareholders at least 10 days before the corporate action takes effect. The bill also requires the corporation to send pertinent financial documents to its shareholders with the notice of appraisal rights.

Assertion of Rights; Challenges (Sections 165 and 174)

The bill amends s. 607.1321, F.S., to provide that a shareholder who decides to assert his or her appraisal rights must deliver notice of intent to the board before the proposed transaction is effectuated and abstain from voting on the matter. A shareholder who wishes to assert appraisal rights pursuant to a two-step merger in which there is no shareholder vote can assert appraisal rights by delivering his or her shares to the corporation with intent to demand payment if the transaction occurs and holding back his or her shares from the tender offer. The bill also creates s. 607.1340, F.S., to limit a shareholder from challenging a corporate transaction under which it could have asserted appraisal rights except on the basis of fraud, material misrepresentation, omission of fact, or illegal approval.

Dissolution

Articles of Dissolution; Revocation (Sections 175-178)

The bill amends s. 607.1401-607.1405, F.S., to allow a corporation to dissolve at the action of its board and, if applicable, its shareholders. The bill makes several conforming changes regarding the articles of dissolution a corporation must file to formalize the dissolution, and adds a grace period that allows the corporation to revoke its dissolution within 120 days of the effective date of its articles of dissolution.

Dissolved Corporations (Sections 177, 179)

The bill amends s. 607.1403, F.S., to clarify that a “dissolved corporation” is one whose articles of dissolution are effective, and includes a “successor entity” that may exist solely for the purpose of prosecuting and defending suits on behalf of the dissolved corporation. This allows dissolved corporations to wind up and fully liquidate its assets while still meeting its duty to engage in ongoing matters. The bill also allows a corporation to fix a new record date for purposes of liquidation of assets.

Claims Against Dissolved Corporations (Sections 180-184)

Additionally, the bill amends s. 607.1406, F.S., to require a dissolved corporation to give written notice to claimants against itself no later than 270 days before the date that is 3 years after articles of dissolution take effect. The bill also deletes contingent claims and claims that are effective upon an event that may occur after dissolution form the definition of known claims that must receive notice from the dissolved corporation.

The bill creates ss. 607.1408-607.1409, F.S., to provide for the enforcement of a claim against a dissolved corporation. The bill also creates procedures for handling unknown and contingent claims against a dissolved corporation. Additionally, the bill creates s. 607.1410, F.S., to add to a director’s duties the payment of claims and distributions of assets during a corporation’s dissolution of liquidation

and to shield directors from liability against claims of breach of these duties if the corporation was properly dissolved.

Administrative Dissolution; Reinstatement (Sections 185-188)

The bill amends ss. 607.1420-607.1423, F.S., to add failure to pay a fee or penalty to the Department as a basis for the administrative dissolution of a corporation by the Department. The bill also clarifies that an administratively dissolved corporation may wind up its affairs and liquidate its assets. If a corporation wants to be reinstatement following such a dissolution, it may file appropriate forms and fees with the Department. The Department may deny reinstatement, and the corporation may appeal its denial to the Leon County Circuit Court. The FBCA currently permits a corporation to appeal its denial in the jurisdiction where the corporation resides.[67]

Judicial Dissolution (Sections 189-190,193, 195-196)

A shareholder may request that a court dissolve a corporation in which he or she owns shares for reasons including fraud and ineffectiveness. The bill amends s. 607.1431, F.S., to require a corporate defendant in a judicial dissolution proceeding to notify all shareholders, other than the petitioner, that they may avoid dissolution by electing to purchase the petitioner's shares. This remedy exists currently under the FBCA; only the notice requirement is new.

The bill amends s. 607.1434, F.S., to grant to a court in a judicial dissolution proceeding discretion to order remedies other than those outlined in the statute to avoid dissolution. The bill also amends s. 607.1436, F.S., to require that a corporation that elects to purchase its shares instead of dissolving follow through on the transaction and prohibits the corporation from ultimately dissolving. Finally, the bill amends s. 607.14401, F.S., to delete a provision requiring a dissolved corporation to deposit funds owed to a missing or incompetent shareholder with the Department of Financial Services (DFS) within 6 months of the final liquidating distribution. The dissolved corporation must still deposit such funds with DFS; only the timeframe for doing so is deleted.

Foreign Corporations

Foreign corporations operate under a certificate of authority issued by the Department and, like domestic corporations, must notify the Department of their registered agent, principal office, and other pertinent information. A foreign corporation must amend its certificate of authority to reflect any change in its operating documents within 90 days of the occurrence.

Distinguishable Names (Section 203)

The FBCA requires a foreign corporation to file for a certificate of authority under a name distinguishable from those names already in use by other entities.[68] The bill amends s. 607.1506, F.S., to allow a foreign corporation to register under a name that is not distinguishable from that of another entity with the written consent of the other entity.

Organic Law (Sections 198-199)

The bill amends s. 607.15015, F.S., to clarify that a foreign corporation's organic law[69] governs its organization, internal affairs, and shareholders' interest holder liability. The bill also amends s. 607.1502, F.S., to provide that a foreign corporation's organic law applies when the corporation fails to

[67] S. 607.1423, F.S.
[68] S. 607.1506, F.S.
[69] Organic law is the fundamental law that establishes a corporation's body of rules. Black's Law Dictionary 759 (6th ed. 1995).

hold a certificate of authority to transact business in Florida and the Florida Secretary of State is the designated agent for the corporation should any unauthorized transactions occur in Florida.

Registered Agents; Service (Sections 204-209)

The bill amends or creates ss. 607.1507-607.15091, F.S., to parallel the requirements for a foreign corporation's registered agent to those of a domestic corporation's registered agent. The bill also creates s. 607.15092, F.S., to account for notice delivery by electronic communication and amends s. 607.15101, F.S., to provide for alternative service if a foreign corporation's registered agent is unavailable for service.

Conversion; Mergers; Dissolution; Reinstatement (Sections 211-213, 216-217)

The bill creates ss. 607.1521 and 607.1522, F.S., to specify that a converting, merging, or dissolving foreign corporation must give notice to the Department of the transaction and identify its effect on the corporations' certificate of authority. The bill also amends s. 607.15315, F.S., to permit the reinstatement of a foreign corporation's certificate of authority following its revocation but deletes as a basis for reinstatement that the grounds for revocation did not or no longer exist. Finally, the bill amends s. 607.1532, F.S., to designate the Leon County Circuit Court as the proper venue for appeals of the Department's denial of a petition for reinstatement.

Records and Reports

Maintenance (Section 218)

The bill amends s. 607.1601, F.S., to replace a corporations duty to "keep as permanent records" with a duty to "maintain" certain documents. The bill also updates this section to explicitly include financial statements and notices required under s. 607.0120(11), F.S., within the record of documents a corporation must maintain.

Access (Sections 219-222)

The bill amends ss. 607.1602-607.1605, F.S., to reduce the number of days a corporation has to produce certain records upon a shareholder request form 15 to 5, and to allow such production in an electronic format. The bill also extends shareholder rights to include the inspection of corporate documents of a corporation's subsidiary. Further, the bill entitles a shareholder who must resort to court action to enforce his or her right of inspection to reimbursement of attorney fees and reasonable expenses incurred in the proceeding. Finally, the bill clarifies a court's right to impose reasonable confidentiality requirements on any court-ordered right to inspection and copy of a corporation's documents.

Financial Statements (Section 223)

The FBCA requires a corporation to provide its shareholders with a copy of its annual financial report within 120 days of the close of each fiscal year.[70] The bill amends s. 607.1620, F.S., to require a corporation to furnish shareholders with its annual financial report within 5 days of a shareholder's request for such report. If the shareholder's initial request so specifies, the corporation must give notice to all other shareholders of the availability of the financial information. The corporation may provide the requested documents by posting them on its website, may place reasonable confidentiality restrictions on their distribution, and may decline the request if it determines the request was made in bad faith or for an improper purpose.

[70] S. 627.1620, F.S.

The bill provides that a shareholder may enforce his or her right to review the corporation's financial documents in a circuit court in the applicable county. The corporation has the burden of demonstrating that its refusal to furnish its financial documents to a shareholder and any restrictions placed on the distribution of its financial documents are reasonable and made in good faith. Reimbursement of attorney fees and costs is available to a prevailing party in such an enforcement proceeding.

Conforming Changes [71]

The bill makes conforming, non-substantive changes to ss. 607.0101-607.0102; 607.0121-607.0122; 607.0203-607.0204; 607.0207; 607.0302-307.0304; 607.0403; 607.0505; 607.0621-607.0623; 607.0625, 607.0605-607.0606; 607.0722; 607.0725-607.0728; 607.0730; 607.0801; 607.0803-607.0804; 607.0807-607.0808; 607.0820; 607.0824; 607.0831; 607.0833; 607.0842; 607.0902; 607.1004-607.1008; 607.1020-607.1021; 607.1303-607.1333; 607.1432-607.1433; 607.1435; 607.1501; 607.1503-607.1505; 607.1520; 607.1530; and 607.1622, F.S.

These changes include altering references from:

- "Act" to "chapter;"
- "Department of State" to "department;"
- "Attorney General" to "Department of Legal Affairs;"
- "Stock" to "shares;"
- "Corporation's directors" to "board of directors;"
- "Executed" to "signed;" and
- "Listed on a national securities exchange" to "registered pursuant to s. 12 of the Securities Act of 1934."

The bill also makes conforming changes to Parts II and III of ch. 607, F.S.; and chs. 331; 339; 605; 617; 620; 621; 631; 658; 662; 663; and 694, F.S.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

[71] Sections 1-2, 4, 5, 18-19, 22, 25-26, 30, 37, 42-44, 46-49, 56-57, 62, 65-57, 69, 83, 85-86, 89-90, 93, 96, 100, 102, 104, 106, 117, 122-126, 128-129, 163-173, 191-192, 194, 197, 200-202, 210, 214, 225, and 232-293, F.S.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill will affect how corporations, foreign and domestic, do business in this state, which may have an indeterminate economic impact on these corporations.

D. FISCAL COMMENTS:

None.