

# State-to-State

flabaroutofstaters.org

Winter 2007

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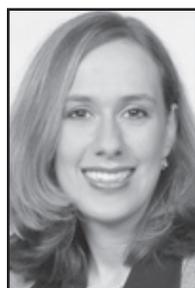
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## Wendy Fischman receives 2007 Out-of-State Pro Bono Award

by Brian D. Burgoon



Washington, D.C., attorney Wendy P. Fischman has been selected to receive the **2007 Florida Bar President's Pro Bono Service Award** for out-of-state attorneys. From 1999 to October 2006, Fischman was a litigation associate at Fried, Frank, Harris, Shriver & Jacobson, practicing in the areas of white-collar criminal defense and internal investigations. She now is an attorney with Fannie Mae.

Each year, The Florida Bar recognizes one attorney from each of the state's 20 judicial districts and one out-of-state attorney for their dedication to pro bono legal services. These annual awards were created in order to encourage more Florida lawyers to provide assistance to people who are unable to afford an attorney. Fischman and the other 20 in-state circuit winners were recognized by the Florida Supreme Court and Florida Bar President Hank Coxe at a ceremony in Tallahassee on Jan. 25.

Fischman has dedicated over 675 hours to pro bono efforts since 1999, including 168 hours in 2005 and 278 hours in 2006 while working only three days per week as a part-time attorney. She dedicated her time while fully meeting her firm's billable hour expectations as well as being on maternity leave twice.

Fischman's pro bono matters have included the following:

- From 1998 to 2000, she represented an indigent widow of a World War II veteran who had been improperly denied Depen-

dency and Indemnity (DIC) benefits since her husband's death in 1972. Fischman successfully persuaded the Department of Veterans Affairs to award her client ongoing benefits as well as \$137,000 in retroactive benefits.

- Fischman is currently representing a veteran's widow before the Board of Veterans Appeals to seek DIC benefits, including pursuing a claim that the veteran's death in a VA hospital was caused by negligent and improper care provided to him.

- Fischman represented numerous victims of an immigration fraud scheme set up by an unscrupulous former immigration attorney, which not only bilked her clients out of thousands of dollars, but also caused them to lose an irreplaceable opportunity to seek permanent residence in the United States pursuant to a federal statute that has since expired. Fischman began representing the victims after the dismissal of a class action lawsuit filed by other counsel. Fischman successfully petitioned the court to vacate its prior dismissal and permit any victim to continue the lawsuit in an individual and non-representative capacity. Fischman is currently pursuing this lawsuit on behalf of 31 victims.

- Fischman successfully obtained Social Security disability benefits for a former schoolteacher suffering from multiple sclerosis who had been repeatedly discouraged from applying for benefits by Social Security Administration personnel.

- Fischman also has assisted with several guardian ad litem proceedings in child custody

See "Fischman," page 3

**"Florida Law in the Windy City" CLE**

**March 30  
Chicago Bar  
321 Plymouth Court  
Chicago, Illinois**

**See page 7 to register!**



## Division recognizes three attorneys for distinguished pro bono service

by Brian D. Burgoon

The Out-of-State Practitioners Division has awarded three out-of-state Florida lawyers with the division's *Pro Bono Service Recognition*, recognizing their outstanding commitment to pro bono legal services. The following attorneys have received this award:



• **Wendy P. Fischman.** Wendy Fischman is an attorney with Fannie Mae. She is also the recipient of this year's Florida Bar President's Pro Bono Service Award for out-of-state attorneys (see story on page 1).



• **Donna M. Francesceni.** Donna Francesceni is counsel with the Washington, D.C., office of Skadden, Arps, Slate, Meagher & Flom, where she focuses her practice on energy matters. Francesceni has provided over 1,600 hours of pro bono legal services since 1997, including 372 hours last year. In 2001, Francesceni represented an HIV-positive woman whose parole from drug-related offenses was revoked by the U.S. Parole Commission on the grounds that her alleged sexually permissive behavior was a risk to the community after she was arrested for

sexual solicitation. The commission ordered her to serve the remaining 10 years of her sentence. Francesceni successfully persuaded the commission to reverse its decision, grant her a new parole hearing and amend its policies and procedures to prevent the commission from relying on impermissible factors in future hearings for other similarly situated prisoners. Francesceni has also assisted with several death penalty appeals, including successfully gaining the reversal of one death sentence, which resulted in a commutation to a life sentence. In 2004, she obtained a satisfactory settlement in civil rights litigation on behalf of an inmate who alleged he had been subjected to inhumane conditions while being transported cross-country for 45 hours by a private company. Francesceni also serves on the board of directors of Justice for Children, a nonprofit legal service provider that advocates for the rights of children. Francesceni received her undergraduate degree from Boston College in 1990 and her law degree from the George Washington University School of Law in 1996. She is admitted to practice in Florida, New York and the District of Columbia.



• **Mark J. Newman.** Mark Newman is a partner with Troutman Sanders in Atlanta, Ga., and heads the firm's immigration law team. Prior to moving to Atlanta

in 1989, Newman practiced immigration and trial law in Miami. Newman's pro bono efforts began in the early 1980s, when the Dade County juvenile judges appointed him to chair a Blue Ribbon Panel to review conditions at the juvenile detention facility. The panel's recommendations focused on creating better educational opportunities and conditions for the youths. Newman also served as lead counsel in the federal class action proceedings to acquire lawful permanent residence for more than 125,000 Cubans who came to the United States as part of the Mariel boatlift in 1980, successfully negotiating with the federal government to allow the refugees to apply for residency. Newman regularly takes pro bono immigration cases as part of the Atlanta Bar Asylum Project, and he serves on the project's board of directors. He has recently represented, or is currently representing, a Columbian journalist, a Columbian police officer who was targeted by a higher ranking officer in an assassination attempt (and who was shot several times) and a young woman from Togo who alleged sexual abuse by her stepfather. Newman also is providing pro bono counsel to Health Students Taking Action Together, a group of medical students in Atlanta trying to understand the new Georgia Immigration Act and how it affects healthcare providers. Newman is a graduate of Princeton University and the University of Miami School of Law, and is admitted to practice in Florida and Georgia.

**THE FLORIDA BAR ANNUAL MEETING**  
**June 27 - 30, 2007**  
**Orlando World Center Marriott, Orlando, Florida**  
**[OOSPD Executive Council Meeting & Reception]**

*Save the date!*



## Fischman

from page 1

matters, and has represented an indigent mother in her divorce from the abusive father of her two young children.

Fischman received her undergraduate degree from the University of Florida in 1994 and her law degree, with high honors, from the George Washington University Law School in 1998. She is a member of the Florida and District of Columbia Bars.

Seven outstanding Florida attorneys from across the country were nominated for the out-of-state award. The selection committee for the award included U.S. District Judge Timothy C. Batten, Sr., of the Northern District of Georgia; Pro Bono Partnership Executive Director Rick Hobish of White Plains, NY; former Atlanta Legal Aid Society President and 2005 Pro Bono Award winner Rick Horder; former American Bar Association President Bill Ide; D.C. Bar Pro Bono Program Director Maureen Syracuse; and was chaired by Board of Governors member Brian Burgoon.

*Brian D. Burgoon has served as an out-of-state member of The Florida Bar Board of Governors since 2000. He practices in the area of commercial litigation with Sutherland Asbill & Brennan in Atlanta, Ga.*

## Author! Author!

We want your articles related to subjects of general interest to legal practitioners with multi-jurisdictional practices. Articles are best when relevant to issues impacting a number of jurisdictions, not just local issues.

Please send documents in rich text format (rtf) via email to [editor@ctf.nu](mailto:editor@ctf.nu).

Include a brief (two or three sentence) biography and include a photo (digital preferred). If you don't have a digital photograph, please mail a print to The Florida Bar, OOSPD, 651 East Jefferson Street, Tallahassee, FL 32399-2300. Your photo and bio will be kept on file and need only be submitted once.



The Florida Bar Continuing Legal Education Committee and the Out-of-State Practitioners Division present

## Practical Solutions for Inter-State Client Legal Services

COURSE CLASSIFICATION: ADVANCED LEVEL

One Location: February 10, 2007 • St. Johns University  
101 Murray Street • New York, NY 10007

Course

### SEMINAR

8:15

Latent/Welcome

Guardianship Litigation – *Phil Bauman, FL*

Florida Trust Code and Other New Developments –

*Art Morris, FL*

Building a Marketing Niche – *Richard Tanner, NJ*

What You Don't Know You Don't Know and Why it Matters (NOW) –

*David Powell, FL*

Lunch (provided with registration)

Assault on the Privilege: How to Protect Your Clients in a Multi-

Jurisdictional Practice – *John Allen, MI*

Practical and Legal Risks Facing Lawyers in Issues Raised Under

Anti-Money Laundering Laws – *Ian Comisky, PA*

3:10 p.m. – 4:00 p.m.

Medicaid Planning After Reform – *Tom Begley, NJ*



## State-to-State

THE PUBLICATION OF THE FLORIDA BAR  
OUT-OF-STATE PRACTITIONERS DIVISION

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*State-to-State* is devoted to Florida and multi-jurisdictional legal matters. It is editorially reviewed and peer reviewed for matters concerning relevancy, content, accuracy and style. *State-to-State* is mailed to over 1,200 legal practitioners throughout the United States.

Statements or expressions of opinion or comments appearing herein are those of the contributors and not of The Florida Bar or the division.

The deadline for the **Spring 2007** issue is **March 16, 2007**. Articles should be of interest to legal practitioners with multi-jurisdictional practices. Please submit articles in rich text format (rtf) via e-mail to Susan Trainor, [editor@ctf.nu](mailto:editor@ctf.nu). Please include a brief (2-3 sentence) biography and photograph of the author. If a digital photo is not available, please mail a print to The Florida Bar, OOSPD, 651 East Jefferson Street, Tallahassee, FL 32399-2300.

# Update on non-resident personal representative statute

by William A. Lee III



In the last issue of this newsletter, we asked Bar members to send us accounts of any difficulties they had encountered in their practices with the statutory exclusion of most non-residents from being able to serve as personal representatives in Florida estates. We heard from a half dozen Florida Bar members, from Maine to Michigan, who either had to decline when clients asked them to serve or had been named as personal representatives but their clients had changed to Florida residency, thereby disqualifying them from being able to serve. One Bar member commented that the statute has a negative impact on gay and lesbian couples, since that relationship is not recognized by the statute. We also heard from several individuals who had not been impacted by the statute, but strongly support changing it. Not surprisingly, no one we asked supports the statute as it presently exists.

Over the last several months the out-of-state members of the Board of Governors and the OOSPD Executive Council have been active in opposing the non-resident personal representative exclusion of Florida Bar members. At the July Board of Governors meeting, the out-of-state Board of Governor members were successful in

having the Real Property Probate and Trust Law (RPPTL) Section's request to the Board of Governors to allow it to lobby for its legislative position opposing any change in the personal representative statute postponed to the September Board of Governors meeting. The RPPTL legislative position on this subject has been the same for approximately 20 years. The Board of Governors does not actually endorse a legislative position, but only authorizes, upon request, a section to lobby for a particular position. In light of the impact such a position has on non-resident Florida Bar members, the non-resident governors believed a postponement was necessary to allow input from the OOSPD.

After the postponement, the OOSPD Executive Council conferenced telephonically and voted to oppose the RPPTL position and to have E. Duffy Myrtetus and William A. Lee III prepare a position statement on the statute to be presented to the Board of Governors at the September meeting. The position statement that was submitted follows this article.

At the September meeting, it was determined the Board of Governors has no legal basis to oppose the RPPTL's request to be able to lobby for its legislative position on the statute. However, in recognition of the importance of the issue to the division, Bar President Hank Cox appointed Board of Governor members Hal Melville and Scott Hawkins to meet with two representatives

from the RPPTL and two representatives from our division to discuss possible amendments to the non-resident personal representative statute. Members appointed by the RPPTL are Broward County Probate Judge Melvin Grossman and RPPTL Chair-elect Sandra Diamond. The OOSPD Executive Council appointed E. Duffy Myrtetus and William A. Lee III to represent its interests.

The initial telephone conference took place on Oct. 3, 2006. Both members of the RPPTL admitted they were not aware of any empirical data showing there were more problems with non-resident personal representatives than with resident ones. A concern expressed by Judge Grossman about amending the statute to at least allow non-resident Florida Bar members to serve as personal representatives was that it is more difficult to hold non-resident personal representatives accountable because they are beyond the probate court's contempt power. A practical concern expressed by Diamond was that efforts to amend the statute to allow non-resident attorneys to serve would be seen as a self-serving attempt by lawyers to enrich themselves. While the first concern can easily be addressed (all Florida Bar members are subject to the disciplinary process if they act improperly), the second concern is a substantial one, given the public's cynical attitude toward the legal profession.

The dialogue with the RPPTL will continue, although some immediate breakthrough appears unlikely. In the meantime, the division is going to develop a legislative position recommending that the statute be amended to at least allow non-resident Florida Bar members to serve as personal representatives. The division is also considering asking a state legislator to sponsor an amendment to the statute. If necessary, the division may also explore the possibility of a legal challenge to the statute. The statute's constitutionality today is questionable.

***[www.flabaroutofstaters.org](http://www.flabaroutofstaters.org)***

The OOSPD's website offers lots of useful information about division events, and provides a goldmine of information for you when you practice in Florida. Everything from court websites to court rules to an attorney search directory. And it provides everything you need to know about your CLE requirements.

# POSITION STATEMENT OUT-OF-STATE PRACTITIONERS DIVISION

## RE: RPPTL LEGISLATIVE POSITION OPPOSING POSSIBLE AMENDMENTS TO §§ 733.302 AND § 733.304 FLORIDA STATUTES

### INTRODUCTION

The OOSPD opposes the Legislative Position proposed by RPPTL on the grounds that it seeks to advance a legislative position which is expressly in opposition to the fair treatment of all Bar members in our integrated Bar, and which would preclude RPPTL support of legislative action favorable to Bar members. To that end, the proposed Legislative Position also is objectionable upon the grounds that it is one that carries the potential of deep philosophical division among a substantial segment of the members of the Bar and is “divisive” within the meaning of Standing Board Policy 9.50<sup>1</sup> and applicable Rules Regulating the Florida Bar. Additionally, the proposed Legislative Position is beyond the scope of permissible Bar lobbying and political activity.<sup>2</sup> Therefore, we believe that the Board of Governors cannot and should not approve or authorize it under prevailing Bar rules and standards.

OOSPD’s opposition is limited to the extent that the position opposes any amendment to the subject statutes, which might expand the class of persons eligible to serve as a Personal Representative of Florida probate estates including Florida Bar licensees geographically located outside of Florida.

### ARGUMENT

#### **I. Non-Resident Exclusion in General:**

The relevant statutes are as follows:

**§733.302, Florida Statutes** states:

**WHO MAY BE APPOINTED PERSONAL REPRESENTATIVE.** -- “Subject to the limitations in this part, any person who is sui-juris, and is a resident of Florida at the time of the death of the person whose estate is to be administered, is qualified to act as Personal Representative in Florida.”

A related statute, **§733.304, Florida Statutes** states:

**NON-RESIDENTS.** -- A person who is not domiciled in the state cannot qualify as Personal Representative unless the person is:

- (1) A legally adopted child or adoptive parent of the decedent;
- (2) Related by lineal consanguinity to the decedent;
- (3) A spouse or a brother, sister, uncle, aunt, nephew, or niece of the decedent, or someone related by lineal consanguinity to any such person; or
- (4) The spouse of a person otherwise qualified under this section.

The RPPTL section opposes any amendment to these statutes that would expand the class of non-residents which may serve as Personal Representatives because, the Section contends, this may subject the entire statute to a renewed constitutional challenge. The Board of Governors is

*See “Position statement,” page 8*



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CLE**

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Out-of-State Division present

# Florida Law in the Windy City

COURSE CLASSIFICATION: INTERMEDIATE LEVEL

**One Location: March 30, 2007**

**Chicago Bar, Association 321 Plymouth Court, Chicago Illinois  
312/554-2000**

Course No. 0437R

8:15 a.m. – 8:45 a.m.

## Late Registration

8:45 a.m. – 9:00 a.m.

## Welcome and Introduction

*Scott Patterson, Baltimore, Maryland*

9:00 a.m. – 10:00 a.m.

## Trends and Developments in Legal Ethics

*James Grogan, Chief Counsel, Illinois Attorney  
Registration and Disciplinary Commission, Chicago,  
Illinois*

10:00 a.m. – 11:00 a.m.

## Developments in E-Discovery

*Matthew A. Rooney and Donna Panich  
Mayer, Brown, Rowe and Maw, LLP, Chicago Illinois*

11:00 a.m. – 11:15 a.m.

## Break

11:15 a.m. – 12:15 p.m.

## The Eight Keys to Effective Negotiation

*Allyn D. Kantor, Miller, Canfield, Paddock & Stone,  
P.L.C., Ann Arbor Michigan*

12:15 p.m. – 1:15 p.m.

## Lunch (included in registration fee)

1:15 p.m. – 2:15 p.m.

## Blogging Your Way to a Better Reputation and Internet Searches

*Eric Meeks, Meeks Law Firm, Inc., Cincinnati, Ohio*

2:15 p.m. – 3:15 p.m.

## The Impaired Lawyer, When a Colleague Needs Help

*Janet Piper Voss, Executive Director  
Susan Riegler, Clinical Director, Lawyers Assistance  
Program, Chicago, Illinois*

3:15 p.m. – 3:30 p.m.

## Break

3:30 p.m. – 4:30 p.m.

## Trends and Developments in Legal Malpractice

*Thomas P. Sukowicz, Hinshaw & Culbertson, LLP,  
Ft. Lauderdale Florida*

5:00 p.m. – 6:00 p.m.

## Reception (included in registration fee)

### OUT-OF-STATE DIVISION

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General: 7.0 hours      Ethics: 3.5 hours

Seminar credit may be applied to satisfy both CLER and Board Certification requirements in the amounts specified above, not to exceed the maximum credit. Refer to Chapter 6, Rules Regulating The Florida Bar, for more information about the CLER and Certification Requirements.

Prior to your CLER reporting date (located on the mailing label of your Florida Bar News) you will be sent a Reporting Affidavit or a Notice of Compliance. The Reporting Affidavit must be returned by your CLER reporting date. The Notice of Compliance confirms your completion of the requirement according to Bar records and therefore does not need to be returned. You are encouraged to maintain records of your CLE hours.

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Form with  
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## Register me for the "Florida Law in the Windy City" Seminar

**ONE LOCATION: (156) CHICAGO BAR ASSN., CHICAGO, IL (MARCH 30, 2007)**

TO REGISTER OR ORDER AUDIO/CD OR COURSE BOOKS, BY MAIL, SEND THIS FORM TO: The Florida Bar, CLE Programs, 651 E. Jefferson Street, Tallahassee, FL 32399-2300 with a check in the appropriate amount payable to The Florida Bar or credit card information filled in below. If you have questions, call 850/561-5831. ON-SITE REGISTRATION, ADD \$25.00. **On-site registration is by check only.**

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**AJC: Course No. 0437R**

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- Non-section member: \$201
- Full-time law college faculty or full-time law student: \$121
- Persons attending under the policy of fee waivers: \$25



Check here if you have a disability that may require special attention or services. Please attach a general description of your needs. We will contact you for further coordination.

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- Enclosed is my separate check in the amount of \$30 to join the Out-of-State Division. Membership expires June 30, 2007.

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being asked to permit the RPPTL Section to lobby on behalf of this position.

This position presupposes that the statutes serve the public interest in any meaningful way. The court in **In re: Estate of Greenberg, 397 So. 2d 40 (Fla. 1980)**, heard a challenge to the constitutionality of the non-resident Personal Representative exclusion. In a 4-3 decision the court found that the testamentary disposition of property and related matters such as appointing a Personal Representative is not a constitutional right but only a statutory one. The court then employed a rational basis analysis and gave three possible reasons to support the exclusion of certain non-residents from serving as Personal Representatives:

- (1) Having the Personal Representative in close proximity to protect rights of interested parties;
- (2) Preventing needless delays caused by travel; and,
- (3) Reducing cost to the estate by travel or having to employ in-state representatives to perform estate duties.

These rationales will be discussed in turn.

**(1) Having the Personal Representative in close proximity to protect the rights of interested parties.** Geographically, Florida is a large state. A resident Personal Representative is not necessarily in close proximity. Also, Personal Representatives routinely employ agents to protect real property, and tangible personal property (i.e. changing the locks on a residence and performing an inventory and appraisal on personal property). Protection of intangible property such as investments or bank accounts is easily accomplished by communications with an investment representative or bank. To the extent there is a legitimate concern about protecting estate interests, it can be accomplished by the posting of a bond. The requirements of “restricted accounts” by the Circuit Court are another often used protection for beneficiaries.

**(2) Needless delays caused by travel.** Most estates are administered from beginning to end with the *ex parte* Clerk and without any court appearance being required. With current travel options, a non-resident Personal Representative can travel to a particular place in Florida virtually as quickly as a resident Personal Representative can. A non-resident Personal Representative is not going to delay the administration of the estate solely by virtue of being out-of-state.

**(3) Reducing travel costs and costs of employing in-state agents.** Air travel to Florida is not a significant relative expense in contrast to in-state travel costs; and, resident Personal Representatives routinely employ a variety of professionals in the administration process (i.e. bookkeepers, accountants, financial consultants, and real estate brokers) to perform duties in the administration of estates.

It has been twenty six (26) years since the **Greenberg** opinion was issued. The Florida Supreme Court has since pointedly criticized the analysis of the case, finding that the testamentary disposition of property is a specifically expressed constitutional property right. **Shriners Hospital for Crippled Children v. Zrillic, 563 So. 2d 64 (Fla. 1990)**. It should be noted that the **Greenberg** court determined the constitutionality of the statute before the adoption of the amendment allowing anyone related by lineal consanguinity to a variety of relatives to serve. This

is the amendment which permits distant cousins and in-laws to serve – people who are unlikely to have any significant relationship to the decedent.

Also, in **Fain v. Hall**, 463 F.Supp. 661 (M.D. Fla. 1979), the court found that the non-residency restrictions of § 733.304, Florida Statutes were unconstitutional, violating the Testator's 14<sup>th</sup> Amendment Due Process Rights.

The attempted justification for the exclusion of non-residents fails when one considers the array of non-resident, distant relatives and in-laws who are entitled to serve as Personal Representatives of Florida estates. Why is the spouse of a first cousin twice-removed in Alaska more capable of administering a decedent's estate in Florida than a trusted friend or attorney who resides in Georgia? While the spouse of a decedent's distant relative can serve as a Personal Representative, the decedent's own spouse's relative cannot serve as a Personal Representative under the current statutory scheme. *In re: Estate of Angeleri*, 575 So. 2d 794 (Fla. 4<sup>th</sup> DCA 1991) (holding a non-resident brother-in-law cannot serve as a Personal Representative). A decedent is far more likely to have a close relationship with a brother-in-law than a distant cousin or cousin's spouse.

The various exceptions to the residency requirement simply do not make sense. As distinguished University of Florida Law School Professor David T. Smith stated in urging the repeal of the statute: "***All that needs to be said is that section 733.304 is an abhorrent little piece of legislation.***" David T. Smith, "The Potential Personal Representative: Ready, Willing, But Perhaps Unable to Act in Florida," 48 Fla.L.Rev. 675, 693 (1996).

It has been argued that the residency problem is solved by the use of a living trust, since Florida residence for trustees is not required. This argument begs the question: What is the justification for a non-residency exclusion? Also, a living trust is a valuable estate planning device for some people, but an unnecessary and very expensive one for many others.

Finally, who is better qualified than the decedent to determine who should administer his or her estate? Since it is the decedent's property, should not the government to the maximum extent possible allow the decedent to decide who is going to administer the estate? The **Zrillic** court's finding that the testamentary disposition of property is a constitutional right compels this conclusion.

## II. **Non-Resident Florida Bar Member Exclusion:**

Unlike other individuals in the class of persons ***NOT*** eligible to serve as a Personal Representative of a Florida estate, out-of-state Florida Bar licensees have a particular nexus to Florida:

- a. we take the same oath as our in-state colleagues *in an integrated Bar*;
- b. we pay the same dues;
- c. we comply with the Bar's requirements for licensure and general regulatory requirements (including malpractice coverages; IOLTA accounting; etc.);
- d. we comply with/are regulated by the same Rules Regulating the Florida Bar;
- e. we are subject to the disciplinary authority of the Bar, and ultimately the Florida Supreme Court;
- f. we have already satisfied the Florida Bar's high standards for admission, including without limitation: (i) ***educational qualifications***; (ii) ***satisfactory evidence of technical competence in the areas of Florida Wills and Administration of Estates***;<sup>3</sup> and, (iii) ***proof of character & fitness in compliance with the requirements of the Florida Bar's Board of Examiners***; and,

*continued, next page*

## Position statement

from page 9

- g. we have an automatic connection to the state, which independently leads to personal jurisdiction by the Circuit Court's Probate Division.

Moreover, the reasons advanced in support of RPPTL's Legislative Position are not supported within the current procedural framework. The statutes' combined legislative history is littered with amendments, which reflect a tortured exercise to manufacture defenses to constitutional challenges and to legislate economic protectionism. Beyond the esoteric discussions about how the form of the statute has survived past challenges to its constitutionality, nobody advancing the RPPTL's position against expanding the class of eligible persons has offered **any empirical or other objective data** to support the notion that an out-of-state person—let alone an out-of-state Florida Bar licensee—is less qualified to serve as a Personal Representative than an in-state Bar member.

In addition, Circuit Court judges are given a great deal of latitude under local practice and applicable substantive law in determining whether to require or to waive a bond as a condition precedent for issuing Letters of Administration—even where the provisions of a Will expressly waive the requirement. Some courts typically require that liquid assets be deposited into a “restricted account,” where disbursements cannot be made without court order. By way of example, this will typically be a demand account with a local banking institution over which the court exercises jurisdiction and control by Order for disbursements. A restricted account must be used in all instances where a bond is not given. Typically these accounts are domiciled in the local jurisdiction, where the estate is administered.

Current procedural protections for beneficiaries of Florida estate are adequate. The Circuit Court has a separate set of procedural rules<sup>4</sup> governing the administration of probate estates, adversary proceedings, etc. The Florida Probate Rules include the following provisions:

- Rule 5.025 Adversary Proceedings
- Rule 5.030 Attorneys
- Rule 5.110 Address Designation for Personal Representative or Guardian; Designation of Resident Agent and Acceptance
- Rule 5.150 Order Requiring Accounting
- Rule 5.160 Production of Assets
- Rule 5.235 Issuance of Letters, Bond
- Rule 5.310 Disqualification of Personal Representative; Notification
- Rule 5.320 Oath of Personal Representative
- Rule 5.340 Inventory
- Rule 5.341 Estate Information
- Rule 5.346 Fiduciary Accounting
- Rule 5.355 Proceedings for Review of Employment of Agents and Compensation of Personal Representatives and Estate Employees
- Rule 5.401 Objections to Petition for Discharge or Final Accounting
- Rule 5.440 Proceedings for Removal

Note also that an otherwise eligible out-of-state Personal Representative **must** nonetheless appoint a local person as its agent for service of process in Florida. In other words, the Rules already require that a non-resident have a person appointed as a local agent for service of process

*continued, page 12*

## Survey of state jurisdictions – Appointment of personal representatives

STATE	NO PROHIBITION	PROHIBITED	RESTRICTION <sup>1</sup>
Alabama	x		
Alaska	x		
Arizona	x		
Arkansas			Resident agent required for service of process
California	x		
Colorado	x		
Connecticut	x		
Delaware	x		
District of Columbia			Agent
Georgia	x		Georgia law is much less restrictive. Any living adult (over 18) not under a legal disability can serve. There used to be a U.S. citizenship requirement. Even that no longer applies.
Hawaii	x		
Idaho	x		
Illinois	x		
Indiana			Bond requirement
Iowa	x		A nonresident must be court appointed.
Kansas			Agent
Kentucky			A nonresident personal representative must be related to decedent; can be through marriage.
Louisiana			Agent
Maine	x		
Maryland			Agent
Massachusetts			Agent
Michigan	x		
Minnesota	x		
Mississippi	x		
Missouri			Agent
Montana	x		
Nebraska	x		
Nevada			Resident co-administrator requirement
New Hampshire			At judge's discretion; otherwise prohibited
New Jersey	x		
New Mexico	x		
New York			Resident co-representative
North Carolina			Agent
North Dakota	x		
Ohio			Nonresident must be related to decedent by "consanguinity or affinity," or named in, or nominated pursuant to, a will.
Oklahoma			Agent
Oregon	x		
Pennsylvania	x		Register shall have discretion to refuse the appointment.
Rhode Island			Agent
South Carolina	x		
South Dakota	x		
Tennessee	x		
Texas			Agent
Utah	x		
Vermont			Decedent's spouse, child or parent must request that the nonresident be appointed. Or, court has discretion.
Virginia			Agent
Washington			Agent
West Virginia			Bond requirement
Wisconsin			Agent
Wyoming			Resident co-representative required

This chart is intended to update the data included in an article by Frederick J. Bosch and John F. Licari entitled, "Is Florida's Personal Representative Statute Constitutional?" published in The Florida Bar Journal, February 1992.

<sup>1</sup> Usually requires that the nonresident personal representative appoint the clerk of court as agent for the purposes of personal service.

## Position statement

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as a condition precedent to issuance of Letters of Administration. (See Fla. Prob. R. 5.110) The implied notion that jurisdictional problems may arise is simply false; and, this is particularly the case where a Florida Bar licensee acts.

### CONCLUSION

Florida remains a holdout in the extreme minority of jurisdictions, which limit or restrict the appointment of non-residents as Executors/Personal Representatives of domestic probate estates. In 26 states, there is no restriction upon a non-resident serving as a Personal Representative. In 14 states, there is nothing more than a requirement that the non-resident Personal Representative designate a resident agent for purposes of service of process and submission to the jurisdiction of the local state court. In the remaining 10 states, *only* Florida includes an absolute prohibition for non-residents outside the narrowly defined class of persons eligible to serve as Personal Representatives. That status effectively leaves Florida as a minority of *one*! Attached to these materials is a chart, summarizing current requirements in other states. The foregoing data may support a basis for challenge to the statutes generally. However, our position is limited to the class of persons comprising out-of-state Florida bar licensees only.

While Florida Bar members need to be mindful of ethical issues, resident Florida Bar members can simultaneously serve as Personal Representatives and attorneys for the estate, saving the estate money by having legal and Personal Representative duties performed by one person. Non-resident Florida Bar members should be qualified to serve in both capacities as well. The Florida Bar, through its Sections, should not be supporting economic protectionist legislation or opposing amendments beneficial to Florida Bar members solely on the basis of being a resident Florida Bar member; nor should it be supporting legislation that discriminates by creating two classes of Florida Bar members.

### Endnotes:

- 1 See Standing Board Policy 9.50. Although not generally required for Section legislative activities (in contrast to Standing Board Policy 9.20(c) for Bar positions), no statement of OOSPD opposition has been submitted with the subject legislative position
- 2 The Board of Governors (whether directly or indirectly -i.e. through its Sections) and the Sections are proscribed from advocating a legislative issue which is not related to the purposes of The Florida Bar as an integrated bar (see Standing Board Policy 9.10(b) and Procedure, *et seq.* and *In re: Frankel*, 581 So.2d 1294 (Fla. 1991), cert. denied, 498 U.S. 951, 111 S.Ct. 371, 112 L.Ed. 333 (1990))
- 3 Per the provisions of Rule 4-22 (Part A), Rules of the Supreme Court Relating to Admissions to the Bar
- 4 See Florida Rules of Probate Procedure

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