ActionLine

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



Is The Fraud Disclaimer Clause In Your Contract Enforceable? Billington Gives Us The Answer

Changes From The 2016 Regular Legislative Session

End Of Year Planning In 2016: Gifting To Offshore Self-Settled Spendthrift Trusts

Major Developments With Estate Tax Liens

Vol. XXXVIII, No. 1 www.rpptl.org Fall 2016

The Fund®

MOBILE APP

The ability to read over 15 years of Fund Concept issues from *anywhere*.

Download for FREE today:

Download on the App Store

ANDROID APP ON Google play

Available on iOS and Android smartphones and tablets

For more information, visit
TheFund.com/App



Copyright ©2016 Attorneys' Title Fund Services, LLC
thefund.com 800.336.3863
Apple, the Apple logo, iPad and iPhone are trademarks of Apple Inc., registered in the U.S. and other countries. App Store is a service mark of Apple Inc. Google Play™ is a trademark of Google Inc.

Gratitude



Chair's Column

By Deborah Goodall
Section Chair, 2016- 2017

I began 2016 with a new type of resolution — not to eat healthier or to exercise daily or to save more money for retirement — although these are all admirable goals worthy of consideration. This year I wanted to try something different. I decided to take time to focus on "an attitude of gratitude." Each day I try to spend a few minutes, usually first thing in the morning before things become too chaotic, saying aloud, "I am grateful for…" There are the big things of course — my faith, my family, my friends, my health and my profession. Then there are the little things — there is coffee, the burnt toast didn't set off the smoke detector, the green light lasted just long enough for me to cross the intersection, and that I wasn't speeding when I passed that very well-hidden radar-toting police officer. So I thought it appropriate that I dedicate my first Chair's Column to expressions of thanks to the many people in the RPPTL world who have helped mold me into the lawyer that I am today and have made the Section so strong.

I am grateful for the "back row" also known as the RPPTL Long Range Planning Committee. The Long Range Planning Committee is comprised of all of the Past Chairs of the Section who are still Executive Council members: Michael Gelfand, Mike Dribin, Peggy Rolando, Fletch Belcher, George Meyer, Brian Felcoski, John Neukamm, Sandy Diamond, Melissa Murphy, Rohan Kelley, Jay Zschau, Laird Lile, Lou Guttmann, Steve Hearn, Mike Swaine, Tom Smith, Bruce Stone, Julie Williamson, Bob Goldman, Ruth Kinsolving, Bruce Marger, Chip Waller, Louie Adcock, Jerry Aron, Roger Isphording, Ed Koren, David Brennan, Joan Kayser, Pat Christiansen, Walter Beales and John Grimsley. Even though they are no longer with us, I cannot leave out John Arthur Jones and Bill Sherman who both led the Section and inspired me and other younger lawyers to become involved. These men and women have given me the opportunity to follow in their gigantic footsteps. They meet annually and select someone from the Executive Council to become a member of the twelve-person Executive Committee. I hope that they will forgive me for not elaborating about how each and every one of them has helped me at one point or another in my career, but space limitations prevent me from doing so here. Without a doubt the members of the Long Range Planning Committee have served as mentors to literally hundreds (perhaps thousands) of lawyers over the years. They have given tirelessly of their time and talent — and they continue to do so today. What differentiates our Section from many others is the role that our past plays in our present and in our future. Almost all of our past chairs remain as active Section members. Many of them have leadership roles on substantive committees and they volunteer to head important task forces when requested to do so. They also serve as our institutional knowledge and they represent all that is good about the work that our Section does. I have often thought that one of the reasons they prefer to sit in the back row at our meetings is from that perspective, they have a view of the entire room in front of them. Perhaps that is how they have managed to assemble an Executive Committee that works so well together.

I am grateful for the eleven other dedicated members of the RPPTL Executive Committee — Immediate Past Chair Michael Gelfand, Chair-Elect Drew O'Malley, Probate Division Director Debbie Boje, Real Property Division Director Rob Freedman, Treasurer Tae Kelley Bronner Secretary Bill Hennessey, At-Large Member Director Katherine Frasier, CLE Seminar Co-Chairs Bob Swaine and Shane Kelley and Legislation Co-Chairs Steve Mezer and Sarah Butters. We have different backgrounds, we are at different stages of our lives and our careers, we practice in different areas — both substantively and geographically — yet we are uniquely unified in a spirit of teamwork that is unmatched in any other group to which I have been privileged to belong. One benefit of having a leadership ladder with as many rungs the Section has is that by the time one becomes Chair, one has had the chance to wear many different officer hats. When we transition from one job to the next, there is always that feeling of uncertainty or the "what do I do now" period. There is not one person on our Executive Committee who has an attitude of "that's not my job" and, in fact, what is most often heard is "what can I do to help?" Everyone has reached out to lend a hand to help his or her successor learn the ropes, to provide advice or to share stories of past experiences. We spend so much time together — in person at meetings, or on the telephone between meetings, and it is a pleasure. Working with these men and women rejuvenates me because they are the personification of professionalism, volunteerism and plain old-fashioned caring. Doing my job without them would be impossible.

continued, page 5

This newsletter is prepared and published by the Real Property, Probate & Trust Law Section of The Florida Bar as a SERVICE to the membership.

Deborah Packer Goodall, Boca Raton
Chair

Andrew Marvel O'Malley, Tampa
Chair-Elect

William Thomas Hennessey III, West Palm Beach
Secretary

Tae Kelley Bronner, Tampa
Treasurer

S. Katherine Frazier , Tampa
Director, At-Large Members

Debra Lynn Boje, Tampa
Director, Probate and Trust Law Division

Robert S. Freedman, Tampa
Director, Real Property Division

Michael J. Gelfand, West Palm Beach
Immediate Past Chair

Jeffrey A. Baskies, Boca Raton
Co-Editor-in-Chief

Wm. Cary Wright, Tampa
Co-Editor-in-Chief

Kathrine S. Lupo, Sarasota
Advertising Coordinator

George D. Karibjanian, Boca Raton
Editor – National Reports

Paul E. Roman, Boca Raton
Editor – Ethics

Benjamin F. Diamond, St. Petersburg
Features Editor

Lee Alan Weintraub
Reporters' Coordinator – Real Property

Justin M. Savioli
Reporters' Coodinator – Probate and Trust

Sean M. Lebowitz, Boca Raton
Editor – Probate & Trust Case Summaries

Shari Ben Moussa, Miami
Editor – Real Estate Case Summaries

Kelly Nicole Catoe, Tampa
Photo Editor

Laura Pichard-Murphy, Tallahassee
Design/Layout

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

ABOUT THE COVER:

Universal Studios, Orlando.

Photo by Silvia Rojas

IN THIS ISSUE:

Gratitude 3

Is The Fraud Disclaimer Clause In Your Contract Enforceable? *Billington* Gives Us The Answer 6

Changes From The 2016 Regular Legislative Session 10

End of Year Planning In 2016: Gifting To Offshore Self-Settled Spendthrift Trusts . 14

Major Developments With Estate Tax Lien Releases 20

Florida Fiduciary Access To Digital Assets Act "The 411" What You Should Know 22

RPPTL Section Executive Council Meeting Loews Portofino Bay Hotel, Orlando 25

Executive Council Meeting Loews Portofino Bay Hotel, Orlando, June 1-5, 2016 26

Probate And Trust Division Roundtable 28

Real Property Division Roundtable 30

FinCEN's GTO Expanded And Extended 32

A Tribute To Michael J. Gelfand 33

Friends Of The Section 2016 Regular Legislative Session 34

Fear Not—All May Not Be Lost (or Removed) If The Landlord Can Obtain A *Distress Writ* 38

Practice Corner: Leasing Rules And Pitfalls For Buyers Of Residential Real Estate .40

Practice Corner: If You Aren't Properly e-Serving Your §57.105 Motion, It May Not Be Enforceable 41

Probate And Trust Case Summaries 42

Real Estate Case Summaries 45

What's Happening Within The Section 51

ActionLine Bulletin Board 52

Get Included In *ActionLine!*

Readers are invited to submit material for publication concerning real estate, probate, estate planning, estate and gift tax, guardianship, and Section members' accomplishments.

ARTICLES: Forward any proposed article or news of note to Wm. Cary Wright at cwright@carltonfields.com. Deadlines for all submissions are as follows:

ISSUE	DEADLINE
Spring	January 31
Summer	April 30
Fall	July 31
Winter	October 31

ADVERTISING: For information on advertising, please contact Kathrine Lupo at Kathrine@koontzassociates.com.

PHOTO SUBMISSIONS: If you have a photo that you'd like to have considered for the cover, please send it to the photo editor, Kelly Nicole Catoe at kcatoe@hnh-law.com.

GENERAL INQUIRIES: For inquiries about the RPPTL Section, contact Mary Ann Obos at The Florida Bar at 800-342-8060 extension 5626, or at mobos@flabar.org.
Mary Ann can help with most everything, such as membership, the Section's website, committee meeting schedules, and CLE seminars.

I am grateful for the other 231 members of the Executive Council. They are comprised of the Chairs and Vice-Chairs of the 52 Section Committees, At Large Members (ALMs) and Section Liaisons with other groups and organizations including, among others, the judiciary, ABA, ACTEC, ACREL, The Florida Bar Board of Governors, out-of-state members, and the Clerks of Court. Becoming a member of the Section's Executive Council requires a tremendous commitment of time, talent and resources. Frequently, it will take years of work at the committee level before a person becomes a member of the Executive Council. The work of our committees is absolutely vital to what we are able to accomplish as a Section. The committees tackle problems that impact our practices and often deal with crafting legislative solutions to difficult issues. The committee leadership works diligently behind the scenes between Executive Council meetings to prepare agenda materials and keep the work of the subcommittees moving forward. The ALMs help extend the reach of our Executive Council members and act as ambassadors to the vast number of Section members in the various geographic locations throughout the state who do not regularly participate in our committee meetings. The Liaisons serve an important role by acting as bridges and facilitating avenues of communication. Each person on the Executive Council has the chance to shine and to make a difference.

I am grateful for our Legislative Consultant Team. Without their guidance and direction, all of the Section's hard work might be placed on a shelf instead of becoming law. I never miss an opportunity to remind myself that when they call, time is usually of the essence so please respond immediately.

I am grateful for our eight Fellows. Their enthusiasm is contagious. They help me remember what it was like to be a wide-eyed newcomer to the Section. I hope I can be for them what Mike Swaine was for me at my first meeting – welcoming, gracious and inspiring.

I am grateful for the members of the Section (over 11,700 as of this writing). They motivate us to produce high quality CLE programs, publish ActionLine, submit informative articles to The Florida Bar Journal, populate our website (www.rpptl.org) with relevant and timely content, and expand our methods of communication to include Facebook and Twitter. (I am grateful for my teenage children for many things - included in that list is helping me learn how to Tweet.)

I would also like to thank the Board of Governors of the Florida Bar, President Schifino, President-Elect Higer and the Executive Staff for working so diligently to understand the issues that are of great concern to the Section. I am also thankful to the members of the Council of Sections for sharing ideas and knowledge so that we can all work to maximize the efficiency of our Section governance and provide the best service to our members and to the public. Very special thanks is due to the recently retired Paul Hill. Paul has been known to refer to himself as "the almost never specific and usually general counsel" of The Florida Bar. Paul's dedication to the Section over the years has been extraordinary. He has helped shepherd the Section's many amicus requests and legislative positions through the Board of Governor approval process. On behalf of the Section, and especially the amicus committee and our legislative team, I can say we will miss Paul greatly but we are thankful he will be succeeded by Booter Imhof who has a long history of dedicated service and professionalism.

Last but absolutely, most positively, not least – I am grateful for Mary Ann Obos, who is the most dedicated, talented and pleasant Section administrator ever! Mary Ann is a blessing to us all. She is the first line of contact for almost everyone who contacts the Florida Bar with questions regarding the Section. She juggles all of her duties without dropping a ball, she keeps things running smoothly behind the scenes at all of our meetings and CLEs, and if anything does happen to go wrong, she handles the situation with grace and calm and in most instances, we only learn of these challenges after she has resolved them. Mary Ann is intelligent and witty and we are fortunate to have her as part of our RPPTL family. I am also grateful that she shares her "real" family with us and even puts them to work for us. I won't be surprised if Sebastian learns his ABCs by helping his mom alphabetize nametags for our Executive Council meetings.

Every day, spend just a moment or two to think about what you are thankful for – and then try to make a positive difference in someone's life. It feels good to be grateful. And remember, perhaps the best way to "Pay it Forward" is for each of us to lend a hand to someone else. It might be a chance to mentor a younger lawyer, an experienced lawyer who has relocated to Florida, a Florida lawyer who is changing practice areas, or a law student interested in our area of the law. It might be a chance to offer assistance to someone who asks you for legal advice. Always keep in mind that you may be the only lawyer that person has ever met and your response can shape the view that he or she has about the entire legal profession. If you are able to do so, take on a pro bono matter or volunteer to take a case from your local legal aid office. If time or other problems prevent you from doing that, consider making a donation to The Florida Bar Foundation or a legal aid organization in your area.

Please take five minutes out of your busy day today, grab your cell phone, leave your desk and your laptop behind, go outside for a breath of fresh air and make a call to someone that made a difference in your life just to let them know you are thankful. Both of you will be glad you did.

Is The Fraud Disclaimer Clause In Your Contract Enforceable? *Billington* Gives Us The Answer

By Manuel Farach, McGlinchey Stafford, Fort Lauderdale, Florida


M. FARACH

Fraud claims can interfere with even the most carefully drafted agreement, so practitioners employ disclaimer clauses to make certain their contracts remain enforceable even in the face of fraud claims. The area of contractual disclaimers has, however, been fraught with confusion as to which clauses are enforceable and which are not. The recent case of *Billington v. Ginn-La Pine Island, Ltd., LLLP*,[1] gives real estate lawyers much needed clarity. Specifically, the Fifth District Court of Appeal ruled in *Billington* that "non-reliance clauses," i.e., clauses where the parties contractually state they have not relied on statements other than those contained in the contract itself, are clearly enforceable. And while not certain that it was on completely solid ground in doing so, the Fifth District also held that "merger and integration clauses," i.e., clauses which state that all pre-execution representations and statements are merged and disappear into the contract, are also enforceable.[2]

Background

Ian Billington entered into a contract to buy an expensive lot in a subdivision from Ginn–La Pine Island, LTD., LLLP. The contract contained the following disclaimer clause:

> 14. BROKER AGENCY DISCLOSURE; COMMISSIONS; DISCLAIMER OF REPRESENTATIONS.
>
> NOTE: BEFORE BUYER SIGNS THE CONTRACT, BUYER SHOULD READ IT CAREFULLY AND IS FREE TO CONSULT AN ATTORNEY OF BUYER'S CHOICE.
>
> c. Buyer understands and acknowledges that the salespersons representing Seller in connection with this transaction do not have authority to make any statements, promises or representations in conflict with or in addition to the information contained in this Contract and the Community Documents, and Seller and Broker hereby specifically disclaim any responsibility for any such statements, promises or representations. By execution of this Contract, Buyer acknowledges that Buyer has not relied upon such statements, promises or representations, if any, and waives any rights or claims arising from any such statements, promises or representations.
>
> ANY CURRENT OR PRIOR UNDERSTANDINGS, STATEMENTS, REPRESENTATIONS, AND AGREEMENTS, ORAL OR WRITTEN, INCLUDING, BUT NOT LIMITED TO, RENDERINGS OR REPRESENTATIONS CONTAINED IN BROCHURES, ADVERTISING OR SALES MATERIALS AND ORAL STATEMENTS OF SALES REPRESENTATIVES, IF NOT SPECIFICALLY EXPRESSED IN THIS CONTRACT OR IN THE COMMUNITY DOCUMENTS, ARE VOID AND HAVE NO EFFECT. BUYER ACKNOWLEDGES AND AGREES THAT BUYER HAS NOT RELIED ON ANY SUCH ITEMS.

Billington later contracted to buy a second lot from the same seller in the same subdivision, which second contract contained substantially the same language. Billington sued the seller and various associated entities for breach of contract and also claiming he was fraudulently induced into the contract by misrepresentations of the prices charged other buyers for lots as well as the ability to build private boat docks on the lots. The trial court ruled that the waiver clauses negated the fraud causes of action, and dismissed the fraud actions. Billington appealed.[3]

Analysis

The Fifth District begins its analysis by discussing the three different types of disclaimer clauses:

> There appear to be three categories of disclaimer clauses identified in court decisions and treatises. First, there are "merger" or "integration" clauses, which are clauses that purport to make extrinsic agreements unenforceable unless they are contained within the written contract. *Mejia v. Jurich*, 781 So. 2d 1175, 1178 (Fla. 3d DCA 2001). These clauses might also contain statements that negate the authority of an agent to vary the terms of the agreement. See Restatement (Second) of Contracts § 216 cmt. e (Am. Law Inst.1981) (observing that merger clause "may negate the apparent authority of an agent to vary orally the written terms"). Second, there are "non-reliance,""no-reliance" or "anti-reliance" clauses, which state that the parties to the contract did not rely upon statements or representations not contained within the document itself. *Vigortone AG Prods., Inc. v. PM AG Prods., Inc.*, 316 F.3d 641, 644 (7th Cir. 2002). Finally, there are clauses that purport to waive or release claims for fraud. See, e.g., *Tex. Standard Oil & Gas, L.P. v. Frankel Offshore Energy, Inc.*, 394 S.W. 3d 753, 768 (Tex. App. 2012) (describing waiver or release as broadest form of disclaimer for fraud). While the contracts at issue here contain all three of these categories of disclaimers, our decision turns on the non-reliance and waiver clauses.

continued, page 7

The court's decision was not based on waiver, so it did not discuss those forms of clauses. The court's analysis of non-reliance clauses is straightforward: non-reliance clauses are enforceable in the majority of jurisdictions that have studied the issue and enforce the contract signer's representations, objectively stated, that the contract signer did not rely on statements other than those in the contract itself.[4] But due to a seeming conflict between two older Florida Supreme Court cases, the Fifth District's analysis of merger and integration clauses is more complicated.[5]

Non-reliance clauses present a more effective way to give credence to and support contracts.

The problem lies in trying to reconcile two Florida Supreme Court decisions that seem at odds with each other: *Oceanic Villas, Inc. v. Godson*,[6] and the earlier *Cassara v. Bowman*,[7] cases decided just two years apart. Both cases involved purported fraud in the inducement of a lease where the alleged fraud consisted of purported misrepresentations of income and profitability. Both cases came to the Florida Supreme Court on orders dismissing complaints as the result of disclaimer clauses. And both cases have similar disclaimer clauses. The primary problem arises in that the Florida Supreme Court's *Oceanic Villas* decision distinguishes *Cassara* by stating that the allegations in the complaints in the two cases were "entirely different."[8]

Oceanic Villas created a problem among courts both on philosophical and practical grounds. Philosophically, most courts that have analyzed the two forms of clauses have found a difference between non-reliance and merger and integration clauses and view non-reliance clauses effective in vitiating fraud claims but merger and integration clauses ineffective in doing so, the difference being non-reliance clauses eliminate a critical element of fraud (reliance)[9] while merger and integration clauses are merely an agreement as to evidence.[10] The former eliminates the cause of action such that the suit can be dismissed at the pleadings stage; the latter merely states different proof must be used to establish the fraud at trial. Practically speaking, the difference between the two opinions has caused problems among different courts applying its rulings, sometimes between panels in the same District Court of Appeal as the courts attempt to discern the differences between the two opinions. In other words, the two opinions create uncertainty as to whether merger and integration clauses are effective to negate fraud claims.[11]

Conclusion

Billington is an extensive discussion of the differences between non-reliance and merger and integration clauses, and explains well why non-reliance clauses are more effective than merger and integration clauses. The take-away for practitioners is clear: non-reliance clauses present a more effective way to give credence to and support contracts. While there seems to be no harm in including both types of clauses in a contract and while there may be contractual situations where a merger and integration clause is desired, a non-reliance clause seems the most effective in avoiding fraud in the inducement claims.

***Manuel Farach**, a Member at McGlinchey Stafford in Fort Lauderdale, is the author of Florida Real Estate Law, the real estate component of West's Florida Practice Series, and serves as Chair of the Florida Supreme Court Committee on Standard Jury Instructions for Contract Cases as well as serving on the Executive Councils of the Real Property, Business Law and ADR Sections of the Florida Bar, and currently serves as a Vice-Chair of The Florida Bar and American Bar Association Real Property Litigation Committees. He can be reached at mfarach@mcglinchey.com.*

Endnotes

1 192 So. 3d 77 (Fla. 5th DCA 2016).

2 The Florida Supreme Court has not ruled on this issue since 1941, and the law of fraudulent inducement has developed a great deal since that time. As a result, district courts are left to review newer cases on fraudulent inducement such as *Johnson v. Davis*, 480 So. 2d 625 (Fla. 1985) and *Butler v. Yusem*, 44 So. 3d 102 (Fla. 2010), to attempt to discern the Florida Supreme Court's views on the topic. However, none of these cases discusses waiver clauses.

3 It appears at first blush that the trial court's dismissal was not a "final order" capable of being appealed since claims other than the fraud claims survived, but the Fifth District pointed out that the dismissal was "final" as to several parties as it completely removed some parties from the litigation. Accordingly, appellate jurisdiction was proper at this time as to those parties.

4 The Fifth District noted that some courts distinguish between sophisticated and non-sophisticated parties in reaching their decisions, but rejected this approach: "[w]e cannot discern a logical basis for a distinction based on the sophistication of the party against whom the clause is sought to be enforced, because all parties, big and small, are bound by the terms of a contract." Moreover, the court went on to state that parties should be placed on notice that contractual provisions control over non-contractual statements and representations because of the use of a written contract. In other words, parties should know that it is not the basis of the deal if it is not in writing.

5 The Fifth District valiantly tried to tee the issue up for the Florida Supreme Court by certifying conflict with the Fourth District Court of Appeal's decision in *Lower Fees, Inc. v. Bankrate, Inc.*, 74 So. 3d 517 (Fla. 4th DCA 2011) (finding that the "non-reliance" clause does not negate a claim for fraud). If that were not enough, the Fifth District certified six questions of great public importance to the Florida Supreme Court. While review was not mandatory, this combination

continued, page 9

Guardian
TRUST

SNT too small for the bank?



PROFESSIONAL TRUSTEE SERVICES:

- Individual (d)(4)(A) Trusts, Third-Party Trusts, and Pooled Special Needs Trusts
- Discretionary & Spendthrift Trusts
- Professional, courteous service & bilingual staff (English & Spanish)
- Immediate response to distribution requests
- Timely Accountings
- No minimums for any Trust
- Direct payment to caregivers or third parties
- Conservative Investment Strategy
- Co-Trustees are Board Certified Elder Law Attorneys

901 Chestnut Street • Clearwater, Florida 33756
toll free: 800.669.2499
www.GuardianTrusts.org

Guardian Foundation, Inc., a Florida non-profit corporation

of direct conflict and great public importance certifications was as close to a "lock" on discretionary review as one could find. Unfortunately, none of the parties sought review in the Florida Supreme Court, and as a result the mandate issued, returning the case to the trial court for further proceedings.

6 4 So. 2d 689 (1941).

7 186 So. 514 (1939).

8 The Fifth District was also troubled by the fact that a superficial review of the two cases indicates that merger and integration clauses negate fraud claims but non-reliance clauses do not, a position that is directly contrary to the great weight of authority. Conceding that the Florida Supreme Court does not overrule itself *sub silentio*, the Fifth District reconciled the seeming conflict by noting that the clause in *Oceanic Villas* contained a clear waiver, and held that "[w]e interpret this to mean that an express waiver of the right to maintain a fraud claim is all that is required to avoid liability for fraud."

9 The Fifth District spent a great deal of time discussing Florida Supreme Court decisions on the issue of reliance, including taking the parties to task for arguing "justifiable reliance" issues when the Florida Supreme Court ruled in *Butler v. Yusem*, 44 So. 3d 102 (Fla. 2010), that justifiable reliance is not an element of fraud. The Fifth District took this opportunity to discuss the concepts of "justifiable reliance" and "reasonable reliance," and the Florida Supreme Court's seeming rejection of justifiable reliance in *Butler* but seeming adoption of the concept in *M/I Schottenstein Homes v. Azam*, 813 So. 2d 91 (Fla. 2002). In short, the Fifth District found Florida Supreme Court law on the concept of reliance to be unclear.

10 As a result, non-reliance clauses can be used as the basis for motions to dismiss because the lack of reliance eliminates the cause of action for fraud, while merger and integration clauses do not because the merger and integration clause is merely an agreement to not use parol evidence at trial.

11 The Fifth District noted that different panels of its own court had reached conflicting conclusions on the issue. Likewise, the Fifth District also noted that the Third District had reached conflicting interpretations as well. *See Cas–Kay Enters., Inc. v. Snapper Creek Trading Ctr., Inc.*, 453 So. 2d 1147, 1148 (Fla. 3d DCA 1984) (finding that an integration clause does not negate a fraud claim), *Weiss v. Cherry*, 477 So. 2d 12, 13 (Fla. 3d DCA 1985) (holding that a fraud claim does not "survive" an integration clause), *and Wasser v. Sasoni*, 652 So. 2d 411, 413 (Fla. 3d DCA 1995) (holding that an integration clause negates a fraud claim). Meanwhile, the Fourth District's decision in *Lower Fees, Inc. v. Bankrate, Inc.*, 74 So. 3d 517, appears to conflict with its earlier decision in *Hillcrest Pac. Corp. v. Yamamura*, 727 So. 2d 1053, 1055–56 (Fla. 4th DCA 1999) (holding that an integration clause can be the basis of a motion to dismiss a fraud claim).

RPPTL General Sponsors

The RPPTL Section is grateful to all of its sponsors who faithfully support the good work of the Section. In addition to recognizing them in each issue of *ActionLine* as we do, we want to offer information to you in the event you wish to speak with a sponsor about the services it provides. Below are the names of the sponsors and contact information. Again, thank you, sponsors, for supporting RPPTL!

SPONSOR	CONTACT	PHONE
Attorneys' Title Fund Services, LLC	Melissa Murphy	800-336-3863
Fidelity National Title Group	Pat Hancock	800-669-7450
First American Title Insurance Co.	Alan McCall	407-691-5200
Guardian Trust	Ashley Gonnelli	727-631-0970
J.P. Morgan Chase	Carlos Batlle / Alyssa Feder	305-579-9485
Management Planning, Inc.	Roy Meyers	609-924-4200
Old Republic National Title	Jim Russick	813-228-0555
Stout Risius Ross, Inc.	Garry Marshall	713-225-9580
The Florida Bar Foundation	Bruce Blackwell	407-960-7000
Wells Fargo Private Bank	Mark Middlebrook / George Lange / Alex Hamrick	813-225-6544
Wright Investors' Service	Stephen R. Soper	203-783-4320

Changes From The 2016 Regular Legislative Session

By Peter M. Dunbar, Esq., Dean, Mead & Dunbar, Tallahassee, Florida



P. DUNBAR

The 2016 Regular Session of the Legislature produced a variety of changes that will affect the practice areas of RPPTL Section members, many of which were a part of the Section's legislative package. The Section is particularly appreciative of the Members of the House and Senate that sponsored initiatives this year, and these Members are acknowledged below with the legislation that passed during this Session.

All of the bills from this year's Regular Session appear in chronological order by bill number with a brief summary along with the applicable Chapter Law citation for each initiative. The effective date for each of the changes varies, and at the end of each summary, the date that the new law took effect is also noted. The final status and full text of each enrolled bill, including the legislative staff reports and Chapter Law citation, are available on the legislative web sites (www.leg.state.fl.us; www.flsenate.gov; www.myfloridahouse.com).

Section Initiatives and Technical Assistance

Family Trust Companies: SB 80 by Senator Richter and Representative Roberson contains the Section's initiative to complete the authorizing legislation for Chapter 662 of the Florida Statutes that was passed in 2014. The new legislation permits the creation and regulation of family trust companies, foreign family trust companies, and licensed family trust companies in Florida. The legislation became effective on March 10, 2016. (**Chapter 2016-35, *Laws of Florida*.**)

Guardianship: CS/CS/CS/SB 232 by Senator Detert and Representative Ahern reorganizes the Statewide Public Guardianship Office and the Section provided technical assistance for the final version of the bill. The legislation directs that the least restrictive means to be used; it establishes practice standards, training and regulation for public and professional guardians. It also provides for the oversight and disciplinary procedures for professional guardians regulated under the new legislation. The legislation became effective on March 10, 2016. (**Chapter 2016-40, *Laws of Florida*.**)

Medical Marijuana—Designated Representatives: CS/CS/CS/HB 307 by Representative Gaetz provides for patients and legal representatives to purchase and possess marijuana for medical use. CS/CS/CS/HB 307 also contains a provision allowing the legal representative to be designated by a power of attorney, and the Section helped to resolve technical issues with this portion of the bill. The final version of the legislation was amended to include the Section's recommended revision to provide that the legal representative of the patient be a designated health care surrogate. The legislation became effective on March 25, 2016. (**Chapter 2016-123, *Laws of Florida*.**)

Civil Action—Non-Resident Bonds: SB 396 by Senator Bradley and Representative Sprowls contains the Section's initiative to repeal the antiquated requirement for posting of a bond by non-resident plaintiffs in a civil action. The legislation became effective on July 1, 2016. (**Chapter 2016-43, *Laws of Florida*.**)

Digital Assets: CS/CS/SB 494 by Senator Hukill and Representative Fant contains the Section's initiative relating to the right of access to digital assets. The legislation creates the "Florida Fiduciary Access to Digital Assets Act." It authorizes access to digital records by appropriate representatives designated by a principal, and it provides the procedures for gaining the access to the digital assets of a principal under the procedures in the Act. The legislation became effective on July 1, 2016. (**Chapter 2016-46, *Laws of Florida*.**)

Estates: CS/CS/CS/SB 540 by Senator Hukill and Representative Berman contains the Section's following trust and estate initiatives—(1) it provides for the disposition of assets of a non-domiciliary; (2) it authorizes the use of trust assets to defend a breach of trust claim; and (3) it includes the Section's technical clarification to the elective share statute. The legislation became effective on July 1, 2016. (**Chapter 2016-189, *Laws of Florida*.**)

Service of Process: CS/CS/SB 1432 by Senator Stargel provides for the service of process at the virtual office of a party, at a party's executive office, or at the mini-suite of a party in the same manner as service of process on a party at a private mailbox. Section members provided technical comments on the legislation and portions of the comments were adopted to the bill prior to passage of the bill. The legislation became effective on July 1, 2016. (**Chapter 2016-207, *Laws of Florida*.**)

continued, page 11

OTHER INITIATIVES OF INTEREST

Substance Abuse—"Ulysses" Agreements: CS/SB 12 by Senator Garcia is a comprehensive mental health initiative. In Section 70 there is a new provision that creates a workgroup to study the feasibility and appropriate uses of "Ulysses" agreements within the Department of Children and Family Services. The legislation became effective on July 1, 2016. (**Chapter 2016-241, Laws of Florida.**)

Residential Property—Discharge of a Firearm: CS/CS/CS/CS/SB 130 by Senator Richter prohibits the discharge of a firearm in certain residential areas, and it provides for criminal penalties for an unlawful discharge of a firearm in a residential community with a density of one unit or more per acre. The legislation became effective on February 24, 2016. (**Chapter 2016-12, *Laws of Florida*.**)

Service Personnel—Rental Approvals: CS/SB 184 by Senator Bean provides a series of benefits for U. S. military service personnel. Among the provisions in the bill (Section 1) is new Section 83.683, Florida Statutes. The new provision imposes a 7-day time limit on a condominium association or mandatory homeowners association to review an application by a member of the military as a prospective tenant in the community. The legislation became effective on July 1, 2016. (**Chapter 2016-242, *Laws of Florida*.**)

Conservation Easements: CS/SB 190 by Senator Hutson amends Section 196.26, Florida Statutes to provide that a property owner is not required to file a renewal application for a conservation easement. A new application will not be required until the use of the property no longer complies with the restrictions and requirements of the existing conservation easement. The legislation became effective on July 1, 2016. (**Chapter 2016-110, *Laws of Florida*.**)

Public Records—Government Contractors: CS/HB 273 by Representative Beshears modifies the access to public records maintained by a private contractor providing services to a state or local public entity under Chapter 119, Florida Statutes. The bill requires that requests for access to records be submitted directly to the agency's records custodian. It further provides that the records are exempt until the contractor transfers them to the public agency. It also limits the contractor's liability to the failure to transfer the records to the agency at the completion of the contract. The legislation became effective on March 8, 2016. (**Chapter 2016-20, *Laws of Florida*.**)

Title Insurance—Reinsurance: CS/CS/HB 413 by Representative Hager increases a title insurance company's level of risk, and the legislation provides for appropriate reinsurance coverage from recognized companies to cover the risk levels. The legislation became effective on July 1, 2016. (**Chapter 2016-88, *Laws of Florida*.**)

Special Districts: CS/HB 479 by Representative Metz revises the accountability provisions for dependent and independent special districts, including CDDs. Among its provisions are (1) the requirements to annually file a status statement with the Department of Economic Opportunity; (2) the obligation to include meeting or workshop materials on the special district's website; and (3) the requirement to produce records of the special district when requested by a county, city or the Legislative Auditing Committee. The legislation becomes effective on October 1, 2016. (**Chapter 2016-22, *Laws of Florida*.**)

Cohabitation Ban—Repealed: SB 498 by Senator Sobel repeals the ban on an unmarried man and woman cohabiting together that is currently contained in state's criminal code found in Section 798.02, Florida Statutes. The legislation became effective on April 6, 2016. (**Chapter 2016-188, *Laws of Florida*.**)

Ad Valorem Taxes: CS/CS/HB 499 by Representative Avila makes a series of revisions to the ad valorem tax chapters of the Florida Statutes. Among these are provisions requiring that a tax return be timely filed before a taxpayer may contest an assessment; provisions requiring a 30-day written notice before a tax lien may be filed; and provisions designating authorized representatives of a taxpayer before the value adjustment board. The authorized representatives may include an attorney, real estate broker, certified public accountant, and a person acting under a power of attorney that conforms to Part II, Chapter 709, Florida Statutes. The legislation became effective on July 1, 2016. (**Chapter 2016-128, *Laws of Florida*.**)

Building Codes: CS/CS/CS/HB 535 by Representative Eagle is a comprehensive bill updating the state's building codes. Two of its provisions relate to existing residential structures and may be of interest to practitioners. The first provision is found in Section 5 of the bill, and it extends the provisions of the Homeowners' Construction Recovery Fund to individual single-family residences. The second provision requires the installation of minimum radio service strength in all high-rise buildings, and those buildings not in current compliance with the required service strength must do so by January 1, 2022. The legislation became effective on July 1, 2016. (**Chapter 2016-129, *Laws of Florida*.**)

Water Policy Revision: CS/CS/SB 552 by Senator Dean is a comprehensive initiative dealing with the state's water quality, water supply and water conservation programs. The legislation mandates a new data base of conservation lands and a consolidated annual report on water quality and quantity. The bill contains a 5-year planning process for water resource projects to be funded, and it creates the Florida Springs and Aquifer Protection Act. The legislation gives funding preference to water projects that (1) have a measurable impact on improving water quality and quantity; (2) have state or regional significance; (3) impact areas of greatest impairment;

continued, page 12

(4) projects that are recommended by multiple water management districts; (5) projects that are recommended by multiple local governments; (6) projects with a significant local funding match; and (7) projects with significant private sector financial contributions. The legislation became effective on July 1, 2016. (**Chapter 2016-1, *Laws of Florida*.**)

Title Insurance—Reserves: CS/HB 695 by Representative Boyd revises the reserve requirements to be maintained by title insurance companies doing business in Florida. The legislation specifies the manner in which reserves must be released; and it provides for the reserve requirements of a title insurer that transfers its domicile to the state of Florida. The legislation became effective on July 1, 2016. (**Chapter 2016-57, *Laws of Florida*.**)

Agricultural Lands—Conservation Easements: CS/CS/HB 749 by Representative Rayburn addresses a variety of agricultural policy initiatives, and Section 4 of the legislation provides that permitted uses on agricultural lands encumbered by a conservation easement may include forestry cultivation and livestock grazing activities. The legislation became effective on July 1, 2016. (**Chapter 2016-88, *Laws of Florida*.**)

Mobile Homes: CS/CS/SB 826 by Senator Latvala revises the Florida Mobile Home Act and imposes notice requirements for complaints filed with the Division of Condominiums, Timeshare and Mobile Homes. The legislation also directs implementation of a training program for board members of a mobile homeowners' association. It requires a 90-day notice prior to lot rental increases by a mobile home park owner. It clarifies membership and quorum requirements for a mobile homeowners' association. The legislation became effective on July 1, 2016. (**Chapter 2016-169, *Laws of Florida*.**)

Cremated Remains: CS/CS/SB 854 by Senator Hukill makes regulatory changes to the providers of funeral and cemetery services. Among its provisions, Section 30 declares that cremated remains are not considered property as a matter of law and are not subject to partition. The legislation provides that a division of cremated remains requires the consent of the legally authorized person who authorized the cremation. The legislation became effective on July 1, 2016. (**Chapter 2016-172, *Laws of Florida*.**)

Unclaimed Property: CS/SB 966 by Senator Benacquisto retroactively requires all insurers for life policies, annuity contracts and retained asset accounts to pay the unclaimed benefits to the beneficiary or heir. If the beneficiary or heir cannot be located within a specified period, the payment becomes unclaimed property payable to the Bureau of Unclaimed Property at Department of Financial Services. The legislation became effective on April 12, 2016. (**Chapter 2016-219, *Laws of Florida*.**)

Community Development Districts: CS/HB 971 by Representative Sullivan modifies the regulation of CDDs by increasing the minimum size requirements for the creation of districts at the county level, revising the procedure for changing district boundaries, and providing for procedures to merge existing community development districts. The legislation became effective on July 1, 2016. (**Chapter 2016-94, *Laws of Florida*.**)

Judgments: CS/SB 1042 by Senator Simmons amends Chapter 56, Florida Statutes relating to judgments. The legislation provides new definitions, and clarifies the procedures governing the execution and collections of judgments. It establishes criteria for the sale of property, creates the procedures for resolving third-party claims, and sets out the rights of both judgment debtors and judgment creditors. The legislation became effective on July 1, 2016. (**Chapter 2016-33, *Laws of Florida*.**)

State Lands: CS/CS/HB 1075 by Representative Caldwell is a comprehensive initiative dealing with state lands. Provisions revise the procedures for the appraisal and acquisition of state lands. The legislation places an emphasis on alternatives to fee simple acquisition of lands in cooperation with private owners for preservation, conservation and recreational purposes. The bill encourages innovation preservation options, including the purchase of development rights, acquisition of conservation and flowage easements, acquisition of timber and mineral rights, and the use of life estates. The legislation became effective on July 1, 2016. (**Chapter 2016-233, *Laws of Florida*.**)

Financial Institutions—Service of Process: CS/CS/SB 1104 by Senator Flores amends Sections 48.092 and 655.0201, Florida Statutes, and it designates the manner for making service of process on financial institutions for all matters in Florida. The legislation becomes effective on January 1, 2017. (**Chapter 2016-180, *Laws of Florida*.**)

Community Residential Homes—Siting: CS/SB 1174 by Senator Diaz de la Portilla amends Chapter 419, Florida Statutes to clarify the distance requirements for siting community residential homes, and it provides that a residential home regulated under the Chapter may not be sited within 1,200 feet of an existing home. The legislation became effective on July 1, 2016. (**Chapter 2016-74, *Laws of Florida*.**)

Growth Management: CS/CS/HB 1361 by Representative La Rosa provides for the modification of projects previously approved by a local government by permitting reductions in the project's density and intensity. It modifies the procedures for challenges to comprehensive plan amendments; it creates a procedure to permit the exchange of designated land uses within an approved project, and it creates a process to permit the addition of acreage to a previously approved project. The legislation became effective on July 1, 2016. (**Chapter 2016-148, Laws of Florida.**)

Land Use—Airport Zoning: CS/SB 1508 by Senator Simpson revises the state's airport zoning code, and the legislation imposes new permitting requirements on structures, building

continued, page 13

alterations, and the construction of landfills that are adjacent to an airport or located in an airport protection area. The legislation became effective on July 1, 2016. (**Chapter 2016-209, *Laws of Florida*.**)

Elevator Retrofits: CS/CS/SB 1602 by Senator Galvano requires all elevators in private residential structures to have a clearance of no more than 3 inches between the hoistway doors and the edge of a hoistway landing. The legislation was amended to provide that the standard is applicable only to new structures, and the final version of the legislation does not require retrofitting of existing structures. The legislation became effective on July 1, 2016. (**Chapter 2016-211, *Laws of Florida*.**)

Ad Valorem Tax Exemption: HB 7023 by the House Finance and Tax Committee expands the ad valorem tax exemptions for deployed service personnel by including deployments to military operations up to, and including, the 2014 calendar year. The legislation became effective on March 8, 2016. (**Chapter 2016-26, *Laws of Florida*.**)

Ad Valorem and Sales Tax Incentives: CS/HB 7099 by the House Finance and Tax Committee and Representative Gaetz is the comprehensive tax incentive package. Among its provisions in Section 2, is a new option for counties to defer ad valorem taxes on data center equipment for up to 20 years. In Section 11, there is a new sales tax exemption for agricultural-related business equipment used in postharvest activities. The legislation became effective on July 1, 2016. (**Chapter 2016-220, *Laws of Florida*.**)

Public Corruption—Government Contractor: HB 7071 by Representative Workman revises the standard of public corruption by which an officer or employee of a state, local or municipal government will be judged. The legislation also extends the public corruption standard to any person or company who contracts to provide services on behalf of a government entity, including any officer or employee of a person or company contracting with a governmental entity. The legislation becomes effective on October 1, 2016. (**Chapter 2016-151, *Laws of Florida*.**)

Peter M. Dunbar *is the managing shareholder of the Tallahassee office of Dean Mead. He is former member of the Florida House of Representatives; an adjunct professor at the FSU College of Law; and a member of the American College of Real Estate Lawyers.*

NEED FORMS? We have them!

- Contract for Sale and Purchase Forms
- Probate & Guardianship Forms

Download ORDER FORMS from our website to obtain

Florida Lawyers Support Services, Inc.

P.O. Box 568157 • Orlando, FL 32856-8157

(407) 515-1501 • Fax (407) 515-1504

those FLSSI forms that are so useful in your practice:

www.flssi.org

End Of Year Planning In 2016: Gifting To Offshore Self-Settled Spendthrift Trusts

By Jerome L. Wolf, Esq., Katz Baskies & Wolf PLLC, Boca Raton, Florida


J. WOLF

The Tax Relief, Unemployment Insurance Reauthorization and Job Creation Act of 2010 increased the lifetime gift tax exemption from $1 million to $5 million for 2011 and, as a result of an inflation adjustment, to $5,450,000 in 2016. This increase presents planners and their clients with a tremendous opportunity to transfer significantly more wealth without paying any federal transfer tax. However, a significant hurdle to gifting has always been the client's reluctance to transfer assets without the possibility of receiving the transferred assets back in the future if faced with hard economic times. A solution to this age-old problem lies with gifting to irrevocable trusts established in jurisdictions that allow the settlors to be discretionary beneficiaries of their own trusts. So long as the gifts to such trusts are not part of a fraudulent scheme, creditors of the settlors cannot reach the trust assets. Such trusts are commonly referred to as ***self-settled spendthrift trusts***.

Aside from the asset protection advantages of self-settled spendthrift trusts, the transfer of assets to a self-settled spendthrift trust, under certain circumstances, can be structured as a completed gift for federal transfer tax purposes. Whether such a transfer is treated as a completed gift, and causes the exclusion of the trust assets from the settlor's gross estate for federal estate tax purposes, depends on the trust law of the state or country in which the trust is sitused, as well as the applicable sections of the Internal Revenue Code and the rulings and case law interpreting such sections. While 16 states[1] have adopted legislation that validates self-settled spendthrift trusts (sometimes referred to herein as Domestic Asset Protection Trusts, or "DAPTs"), there is evolving legal authority that a taxpayer who resides in a non-DAPT state might not be deemed to have made a completed gift to a trust settled in a DAPT state. However, there is a large body of law supporting the efficacy of self-settled spendthrift trusts in off-shore jurisdictions.

Consequently, gift and estate tax planning utilizing offshore trusts (Offshore Asset Protection Trusts, or "OAPTs") may be extremely appealing to many clients this year as part of the anticipated year-end rush to capture valuation discounts (prior to the adoption of the proposed regulations under Section 2704) and to avoid the potential roll-back of the $5,450,000 exemption (a concern heading into the November elections).

Completed Gifts

Treasury Regulations Section 25.2511-2(b) provides that a gift is complete if the donor "has so parted with dominion and control as to leave in him no power to change its disposition, whether for his own benefit or for the benefit of another…." Courts have consistently held that gifts to self-settled spendthrift trusts are not complete in jurisdictions that allow a settlor's creditors to reach the maximum amount that the trustee could distribute to the settlor.[2] These courts reasoned that the settlor retained a beneficial interest in the assets, because the settlor ***could*** incur debt, and the settlor's creditors could thus reach the trust assets to satisfy those obligations. Another way to describe the courts' view is that the settlor, indirectly, has retained the economic access to the trust assets through the ability to "run up" debt.

The Internal Revenue Service ("IRS") reached a similar result in Revenue Ruling 76-103, holding that a transfer to a self-settled spendthrift trust was an incomplete gift because local law subjected the entire property of the trust to the claims of the grantor's creditors whenever such claims arose.[3] Thus, when determining whether a transfer is a completed gift, the focus of the IRS and the courts is on whether the settlor's creditors can reach the discretionary income or principal distributable to the settlor/beneficiary.

In contrast, when local law prevents a settlor's creditors from reaching the assets of a self-settled spendthrift trust, courts have held that a gift to such trust, absent some retained interest or power, is complete for federal gift tax purposes.[4] The IRS took a similar approach in Revenue Ruling 77-378, where local law prohibited a settlor's creditors from reaching the assets of a self-settled spendthrift trust, despite the fact that the trustee was given "absolute and uncontrolled discretion" to distribute income and principal to the settlor.[5] The ruling concluded that even though a trustee may have an unrestricted power to distribute all of the trust assets to the settlor, if the settlor's interest in the trust is not enforceable either by the settlor or on the settlor's behalf, the settlor has parted with dominion and control, and the gift is complete. The ruling further states that a mere expectancy that the trustee will distribute the trust assets to the settlor does not prevent the completion of the gift or reduce its value.

In a private letter ruling, issued in 2009, the IRS endorsed the use of a DAPT as an estate planning strategy.[6] This ruling indicates that gifts to an Alaskan DAPT are complete, and, absent an implied understanding or other factors that would result in estate tax inclusion, the trust assets will not be included in the settlor's gross estate. In the letter ruling, an Alaska resident established an Alaska law DAPT. Alaska adopted legislation that validates self-settled spendthrift trusts and provides that a self-settled spendthrift trust is not subject

continued, page 15

to the settlor's creditors unless: (1) the settlor may revoke or terminate the trust; (2) the transfer to the trust was made with the intent to defraud a creditor, (3) the settlor is in default of child support payments ***at the time of the transfer*** into the trust, or (4) the trust ***requires*** the income or principal to be distributed to the settlor. The terms of the trust at issue in the ruling provided that the settlor could not compel distributions to himself, and therefore, the settlor's creditors could not reach any of the assets held in the trust, absent a fraudulent transfer. A key fact in the ruling is that the settlor was a resident of the state in which the trust was sitused; i.e., in that circumstance the trust would likely be upheld by the state of the settlor's residence.

Thus, it appears the rationale for this private letter ruling is based upon the law of the state where the trust is established. In contrast to the Alaska self-settled spendthrift trust statute, other DAPT states have legislated certain exceptions to its law, such as to fulfill the settlor's obligation under a divorce decree or other "family" claims, or for claims for personal injury or property damage (i.e., claims in tort). Consequently, in those states, the potential relegation of the trust principal to discharge the settlor's legal obligations could cause a gift to a DAPT to be deemed incomplete.

In addition to the concerns about completed gifts, planners also have to be concerned with estate inclusion issues. While it is possible a gift to a DAPT may be deemed completed, that does not mean the DAPT assets are assuredly out of the settlor's estate. Instead, it is possible that even if a transfer is a completed gift, the trust funds may be included in the settlor's estate as a result of the creditors' ability to access the trust assets.

Choice of Law Concerns

For taxpayers who reside in non-DAPT states, some planners are concerned about the uncertainty surrounding whether a court will apply the law of the nonresident settlor's domicile rather than the DAPT law selected in the trust instrument. Assume, for example, a nonresident of a DAPT state establishes a self-settled spendthrift trust in a DAPT state. Subsequently, the settlor is sued in either the state of the settlor's residence or in federal court. The federal court may be located in the settlor's state or in the DAPT state. Further assume that the court obtains jurisdiction over the trustee of the DAPT. The party suing the settlor (referred to herein as the "creditor") will argue that the court should choose the trust law of the settlor's state of residence, rather than the spendthrift law of the DAPT state. If the court opts to apply the law of the settlor's state of residence—which does not provide asset protection for DAPTs—to the question of whether the settlor's creditors can attach the trust assets, the creditor may be allowed to reach the trust assets, with the tax consequence of causing all of the trust assets to be included in the settlor's gross estate.[7]

Substantive due process protections under the Fifth and Fourteenth Amendments to the United States Constitution restrict a forum state's ability to apply its own law to disputes between outsiders.

The forum state must have "significant contact" with the dispute that creates "state interests," such that the use of the forum's law is not "arbitrary or unfair."

The Restatement of Conflict of Laws states that the forum state should apply another state's laws if that state has the dominant interest in the question of exemption. If the debtor and creditor are domiciled outside the forum state, "a state to which they both have substantial relationships . . . may be the state of dominant interest."

The Due Process Clause merely mandates that the forum state must have sufficient interests in the matter that the application of its laws would not be arbitrary or unfair.

In Florida, the determination of personal jurisdiction over a nonresident is based on the two-part test promulgated in *Venetian Salami Co. v. Parthenais*.[8] The plaintiff must first allege sufficient facts to justify bringing an action within one of the criteria under Florida's long arm statute. Secondly, if the long arm jurisdiction is properly plead, sufficient minimum contacts must be demonstrated to satisfy the requirements of federal due process.

Section 736.0202, Florida Statutes, is entitled **Jurisdiction over trustee and beneficiary** and provides, in part:

> **(1) IN REM JURISDICTION.** ANY BENEFICIARY OF A TRUST HAVING ITS PRINCIPAL PLACE OF ADMINISTRATION IN THIS STATE IS *SUBJECT TO THE JURISDICTION OF THE COURTS OF THIS STATE* TO THE EXTENT OF THE BENEFICIARY'S INTEREST IN THE TRUST. (EMPHASIS ADDED)
>
> **(2) PERSONAL JURISDICTION**
>
> (A) ANY TRUSTEE, TRUST BENEFICIARY, OR OTHER PERSON, WHETHER OR NOT A CITIZEN OR RESIDENT OF THIS STATE, WHO PERSONALLY OR THROUGH AN AGENT *DOES ANY OF THE FOLLOWING* ACTS RELATED TO A TRUST, SUBMITS TO THE JURISDICTION OF THE COURTS INVOLVING THAT TRUST:
>
> * * *
>
> 3. Serves as trustee of a trust created by a settlor who was resident of this state at the time of creation of the trust or serves as trustee of a trust having its principal place of administration in this state. (emphasis added)
>
> (b) A court of this state may exercise personal jurisdiction over a trustee, trust beneficiary, or other person, whether found within or outside the state, to the maximum extent permitted by the State Constitution or the Federal Constitution.
>
> * * *

Therefore, any person who serves as trustee of a trust

continued, page 16

established by a settlor who was a resident of the state of Florida at the time the trust was created is subject to Florida's long-arm statute. Consequently, even if a Florida resident creates a self-settled spendthrift trust in a DAPT state, the trustee of that DAPT trust is subject to Florida's long arm statute.

Similarly, even if personal jurisdiction cannot be obtained over the DAPT trustee under the long-arm statute, subsection (2)(b) ensures the trustee may be subject to federal diversity jurisdiction.

Assuming the Florida courts are able to obtain personal jurisdiction over the DAPT trustee, or the proceeding is brought in the federal courts, there must still be a determination as to whether there are sufficient contacts with the state of Florida so that its law, rather than the law chosen in the DAPT's governing law provision, will prevail.

Section 736.0107, Florida Statutes, entitled **Governing law** provides:

> The meaning and effect of the terms of a trust are determined by:
>
> (1) The law of the jurisdiction designated in the terms of the trust, *provided there is sufficient nexus to the designated jurisdiction* at the time of the creation of the trust or during the trust administration, including, but not limited to the location of real property held by the trust or the residence or location of an office of the settlor, trustee, or any beneficiary; or
>
> (2) In the absence of a controlling designation in the terms of the trust, the law of the jurisdiction where the settlor resides at the time the trust is first created.
>
> Notwithstanding subsection (1) or subsection (2), a designation in the terms of a trust is *not controlling as to any matter for which the designation would be contrary to a strong public policy of this state*. (emphasis added)

The quoted language may be used to argue that it is a strong public policy of Florida to permit a settlor's creditors to reach the assets of a self-settled spendthrift trust, and, therefore, the choice of governing law statute in Florida should require Florida law to supersede the law of the jurisdiction adopted in the DAPT.

While there are counterveiling arguments promoters of DAPTs assert to support the position that creditors of a Florida resident ought not be able to reach the assets of a DAPT created properly in a DAPT jurisdiction, the law is not clear enough, in the author's opinion, to comfortably advise Florida clients of the efficacy of DAPTs for gift and estate tax planning purposes.

Recent Cases

1. *In re Huber*, 493 B.R. 798 (Bankr. W.D. Wash. 2013).

The debtor, Donald Huber, was a real estate developer and a lifelong resident of the State of Washington. When Mr. Huber realized that many of his real estate projects were about to fail and be foreclosed upon, and his personal guarantees called, he transferred substantially all of his assets into an Alaska limited liability company ("LLC"), and transferred a 99% LLC membership interest into the Donald Huber Family Trust, an irrevocable self-settled spendthrift trust in Alaska. The assets with which the LLC was capitalized were situated in Washington, and the trust was funded with the LLC membership interest and a $10,000 certificate of deposit situated in Alaska. The beneficiaries of the trust were Mr. Huber and his descendants, all of whom were residents of Washington.

The bankruptcy judge granted summary judgment to the bankruptcy trustee, finding that the trust did not protect its assets from the settlor's creditors. In determining the choice of law rules, the court pointed to the fact that the Ninth Circuit, to which the case would be appealed, applies the choice of law rules set forth in the RESTATEMENT (SECOND) OF CONFLICT OF LAW (the "Second Restatement"). The Second Restatement directs that a provision in a governing instrument of an inter vivos trust that declares that the validity of the trust will be controlled by the laws of a specific state will be followed only if (a) the state declared in the trust instrument as controlling has substantial relation to the trust, and (b) the application of its local law does not violate a strong public policy of the state with which, as to the matter at issue, the trust has its most significant relationships. Alaska law would apply if Alaska had a substantial relation to the trust. However, Alaska was determined to have had only a minimal relation to the trust, despite the LLC being formed under Alaska law and the certificate of deposit being situated in Alaska; whereas, Washington had a strong public policy against self-settled spendthrift trusts. Therefore, since the trust was a self-settled trust, the transfers into the trust were void.

2. *In re Zuckerkorn*, 484 B.R. 182 (Bankr. 9th Cir. 2012).

Sally Zuckerkorn created a revocable inter vivos trust for herself, naming American Trust Co. of Hawaii, Inc. as the corporate trustee. Sally's trust contained a spendthrift provision and directed that the trust shall be construed and regulated by the law of Hawaii. Upon Sally's death, the trust divided into separate subtrusts for each of her sons, Herbert and Jack. Herbert had filed for bankruptcy in the State of California, and, under California law, the bankruptcy trustee was entitled to 25% of the distributions from the trust. Herbert claimed that Hawaii law governed the trust, and, based upon its spendthrift provision, the bankruptcy trustee was entitled to nothing.

continued, page 17

The Ninth Circuit and California adopt the Second Restatement to determine the applicable choice of law rules. In determining which state - Hawaii or California - had the most substantial relation to the trust, and whether the application of the law of either state would violate a strong public policy of the state with which, as to the matter at issue, the trust has its most significant relationship, the court found that the assets were originally maintained in Hawaii and not California. However, the court distinguished the fact that the trust was not self-settled as it related to Herbert, because "self-settled trusts are void against the public policy in California…" and if a self-settled trust had been involved, California law would have applied instead of Hawaii.

3. *U.S. v. Evseroff*, 109 A.F.T.R. 2d (RIA) 1957 (E.D.N.Y 2012).

The IRS was seeking to recover taxes from the settlor of an irrevocable trust he created for the benefit of his two sons in 1992. At the time, the settlor was estranged from his wife and argued that the trust was established for the purpose of ensuring that the assets would pass at his death to his children and not his wife. The trust was funded with the settlor's residence; however, the settlor remained as the named payee on the homeowner's insurance policy. The trustees of the trust were a series of the settlor's friends and business associates. There was little evidence that any trustee ever managed the trust – in fact, one trustee testified that he thought he would become trustee only when the settlor died. The accounting for the trust was done for free by the accountants for the settlor's law firm.

The court held that the IRS could recover from the trust on three separate grounds: (i) fraudulent conveyance, (ii) the settlor retained too much control over the trust assets ***(nominee theory***), and (iii) the settlor retained too much control over the trust itself ***(alter ego theory***). The take-aways from this case are that although the alter ego theory is rarely seen outside of the business entity context, there appears to be a trend towards application of the theory to trusts; and, courts are looking to see whether defeating creditors' claims is a "significant motivation" for the planning, and not necessarily whether it was the only motivation, or even the primary motivation.

Offshore Asset Protection Trusts

With uncertainty regarding the ability to create DAPTs to accomplish clients' goals of creating completed gifts to irrevocable trusts of which clients are permissible beneficiaries, why not consider setting up OAPTs?

There are three primary legal advantages of OAPTs over the DAPTs:

1. DAPTs may be forced to recognize a judgment in other states under the Due Process or Full Faith and Credit clauses of the U.S. Constitution, to which OAPTs are not bound. In fact, the laws of most OAPT jurisdictions do not recognize judgments of U.S. courts.

2. OAPTs usually have a shorter statute of limitations on fraudulent conveyances, and the burden of proving a fraudulent conveyance is shifted to the creditor.

3. The laws of most OAPT jurisdictions do not exempt child support obligations, matrimonial rights, or other statutorily identified claims that may be enforceable against DAPTs.

Additionally, there are authorities, such as Revenue Ruling 77-378 and Private Letter Ruling 9332006, indicating that the analysis applied under Private Letter Ruling 200944002 should similarly apply to a U.S. settlor who wishes to establish a self-settled spendthrift trust in an appropriate offshore jurisdiction. Absent a fraudulent scheme, the assets transferred to an OAPT are protected from creditors' claims and, therefore, the gift should be complete for federal gift tax purposes, and the property should not be includable in the settlor's gross estate. Moreover, even if a judgment creditor's claim is obtained in a non-DAPT state, it may be significantly more difficult, administratively and legally, to enforce that claim against an offshore trustee than a trustee of a DAPT. Thus, the legal theories supporting the above-cited rulings indicate that a properly created OAPT should be considered by clients interested in locking in discounts and/or using their $5,450,000 exemptions before the end of the year, but wishing to have access to the gifted assets in case of future misfortune. Indeed, given the strength of OAPTs, they should be considered as a primary tool for our clients' gift and estate tax planning goals.

A natural question is where to establish such trusts. Some will use the Cook Islands, while others may prefer Nevis, the Cayman Islands or Belize. However, a pending development in its Parliament and its trust law may make Nassau, in the Commonwealth of the Bahamas, a favored jurisdiction for many of our Florida clients.

As of September 1, 2016, Section 40 of the TRUSTEE ACT, 1998 of the Commonwealth of the Bahamas, entitled "Restriction against Alienation," provides:

> 1. Notwithstanding any rule of law or equity to the contrary, it shall be lawful for an instrument or disposition to provide that any estate or interest in any property given or to be given to any individual as a beneficiary shall not during the life of the beneficiary, or such lesser period as may be specified in the instrument or disposition, be alienated or pass by bankruptcy, insolvency or liquidation, or be liable to be seized, sold, attached, or taken in execution by process of law and where so provided such provision shall take effect accordingly.
>
> 2. Where property is given subject to any of the

continued, page 19

PROBATE | TRUST | GUARDIANSHIP

LITIGATION

THE LAW OFFICES OF
ADRIAN PHILIP THOMAS P.A.



HE'S BACK!

515 East Las Olas Boulevard | Suite 1050 | Fort Lauderdale, FL 33301
www.florida-probate-lawyer.com

TOLL FREE: 800-249-8125

DIVISION OF FEES PAID IN ACCORDANCE WITH FLORIDA BAR RULES.

restrictions contained in subsection (1), the right to derive income from such property by a beneficiary and any income derived therefrom shall not pass by bankruptcy, insolvency or liquidation or be liable to be seized, attached or taken in execution by process of law.

3. Where property is given subject to a restriction against alienation then the right to derive income from that property shall not be alienable for as long as that restriction remains in force.

4. A restriction imposed pursuant to this section may at any time be removed in accordance with any provisions for such removal in the instrument or disposition and in the manner specified therein.

5. Neither the settlor nor any other person donating property to a trust may *benefit from the provisions of this section*. (emphasis added)

In summary, under Bahamian law, a provision in a trust that prevents a beneficiary's interest from being alienated, passing by bankruptcy, being seized, sold, attached or taken in execution by process of law is valid, lawful and enforceable. This provision codifies the common law "spendthrift trust" which is a trust that prohibits a beneficiary's interest from being alienated or assigned and also prevents a creditor from attaching that interest.

Of concern to the international estate planning community, however, is subsection (5), which provides that "neither the settlor nor any other person donating property to a trust may benefit from the provisions of this section." The net effect is that to satisfy a judgment, a creditor of a settlor who is a beneficiary of a Bahamian trust may seize or attach assets the settlor transfers into the trust.

Considering the commercial implications to its international banking, trust and financial services industries, all of which compete against jurisdictions whose laws, either by statute or case law, already recognize the value of self-settled spendthrift trusts, the proposed TRUSTEE ACT (AMENDMENT) BILL, 2016, is now pending submission and approval by the Bahamian Parliament and provides for an amendment to Section 40 of the TRUSTEE ACT as follows:

Section 40 of the principal Act is amended by the deletion of paragraph (5) of section 40 and substitution therefore with the following new paragraph (5)

(5) Subject to the Fraudulent Dispositions Act, 1991, the settlor or any other person donating property to a trust may benefit from the provisions of this section.

It is anticipated that the Bahamian Parliament will adopt this amendment and modernize its spendthrift trust laws by the time of this article's publication. If passed, this change to the Bahamas statutes will likely make it a favored jurisdiction for Florida clients setting up offshore self-settled spendthrift trusts for any reason – including to facilitate end-of-year gifting in 2016.

Summary

The authorities cited above suggest that clients concerned with asset protection and the minimization of transfer taxes upon death should consider gifts to self-settled spendthrift trusts established in an offshore jurisdiction. Although Private Letter Ruling 200944002 established the IRS position that assets transferred to an Alaskan self-settled spendthrift trust will not be included in the settlor's gross estate absent an implied agreement that the settlor would benefit from the trust, (a) private letter rulings cannot be cited as precedent,[9] and (b) even if they could, not every taxpayer has the benefit of residing in a state with a DAPT statute, let alone a DAPT statute as strongly worded for creditor protection purposes as Alaska's. Therefore, Florida clients should consider using OAPT to achieve these results. As noted above, authorities such as Revenue Ruling 77-378 and Private Letter Ruling 9332006, indicate that the analysis applied under Private Letter Ruling 200944002 should similarly apply to Florida clients creating self-settled spendthrift trusts in offshore jurisdictions.

Offshore planning with proper self-settled spendthrift trusts structured as completed gifts may help many clients effectively transfer assets to achieve tax savings, yet allow them to remain secure in the knowledge that the transferred assets may be accessible in the event of financial hard times. With the threatened loss of discounts and the potential decrease in the exemption looming, end-of-year tax planning will require creativity on the part of planners, and using off-shore asset protection plans may be just the arrows planners should have available in their quivers.

Jerome L. Wolf *is a partner in Katz Baskies & Wolf PLLC in Boca Raton. Mr. Wolf is an ACTEC Fellow and is Board Certified in Wills, Trusts and Estates. He is author of the chapter "Creditors' Rights To Assets In Trust" in ADMINSTRATION OF TRUSTS IN FLORIDA, Eighth Edition.*

Endnotes

1 Alaska, Colorado, Delaware, Nevada, New Hampshire, Oklahoma, Rhode Island, South Dakota, Tennessee, Utah, Wyoming, Hawaii, Virginia, Ohio, Mississippi and West Virginia as of September 1, 2016.

2 See, e.g., *Commissioner v. Vander Weele*, 254 F.2d 895 (6th Cir. 1958); *Outwin v. Commissioner*, 76 T.C. 153 (1981); *Estate of Paxton v. Commissioner*, 86 T.C. 785 (1986); *In re Estate of Uhl*, 241 F2nd 867 (7th Cir 1957) (the settlors' retained rights under local law was viewed as a retention of the economic benefit and enjoyment of the entire trust income and corpus because the trust assets could be relegated to the settlors' creditors).

3 Rev. Rul. 76-103, 1976-1 C.B. 293.

4 See *Estate of Uhl*, 241 F.2d 867 (7th Cir 1957); *Estate of German v. United States*, 7 Ct. Cl. 641 (1985).

5 Rev. Rul. 77-378, 1977-2 C.B. 347.

6 See PLR 200944002 (10/30/2009).

7 Some commentators recently have argued that "[S]ection 2036(a)(1) does not apply where the grantor retains something that is merely speculative and/or contingent." That is, the fact that a court may choose to apply the law of the settlor's domicile and allow a creditor to reach the assets of the trust is not "retention" under Section 2036(a)(1).

8 554 So. 2d 499 (Fla. 1989).

9 IRC §6110(k)(3).

Major Developments With Estate Tax Lien Releases

Laird A. Lile, Lile & Hayes, PLLC, Naples, Florida

The government has changed the rules regarding Estate Tax Lien Releases, in a big way. Moreover, the changes were made apparently, with no notice to, and presumably no guidance from, practitioners. If your client wishes to convey real estate unencumbered by the automatic estate tax lien (under §6324 of the Internal Revenue Code), you will want to be aware of these new rules.

To obtain a discharge (sometimes referred to as a release) of the lien against real estate which is included in the decedent's gross estate, you will now need to provide documentation that the selling price is a fair price, and your client will not be permitted to access the net proceeds from the sale. When the government is satisfied with the submissions, you still won't get a certificate actually discharging the lien until the net proceeds are paid as the government requires. Only then is the certificate discharging the lien issued by the government.

Here is a summary of the new requirements as explained to the author by two employees of the IRS, including a recap of the telephone conferences.

Fair Price? Now, the government requires submission of third party documentation that the selling price is a fair price.

Government: We will also need an appraisal.

Author: A what?

G: An appraisal, so that we know the selling price is for fair value.

A: Uh, this is a sale to an unrelated third party, you know. Isn't that the very definition of getting a fair price, you know that "fair market value" concept?

G: Well sure you are selling to an unrelated third party. But how do we know that the selling price is a fair price?

A: We don't really have time to get an appraisal. [Thinking: my client has bigger problems than the government if he is selling an estate asset for less than fair market value.]

G: Oh, can you get a letter from a real estate broker who is knowledgeable about the market and comparable properties, instead of an appraisal? Maybe a letter from the broker who is handling the sale?

A: You mean the listing broker?

G: Yes, that would be perfect!

A: Sure, let me try that. [Thinking: no person on the face of the planet has a bigger conflict of interest in making the representations required by our government than the listing broker. Of course, the listing broker will be more than pleased to say that he knows the particular market well and that the price on the contract is a fair price.]

Access to Sales Proceeds: Now, the entire net proceeds will either be (i) sent to the IRS as payment toward estate tax or (ii) held in escrow. The only permitted reductions seem to be for amounts needed to satisfy mortgages and for "reasonable" selling expenses. So, don't plan on using net proceeds to pay claims, administration expenses, or cash gifts.

Government: The net proceeds must be held in escrow.

Author: Until when?

G: Until the government receives full payment of estate tax, after either the return has been accepted as filed or an audit or litigation has finally determined the amount of estate tax.

A: But the net proceeds will be several thousand dollars and the estate tax return won't be filed for months.

G: Well, instead of escrowing the net proceeds, the amount can be paid to the government as a prepayment of estate tax.

A: But there won't be any estate tax due for this estate!

G: Well, then you'll want to use the escrow arrangement. When you tell me the name of the escrow agent, I'll send you a form for the Escrow Agreement. But don't even think of changing anything in the Escrow Agreement; some lawyers try to change it, but we don't allow it because our lawyers at the IRS have already approved this form.

A: Uh, okay. [Thinking: my client really wants this sale to close. Good thing these funds are not needed for paying debts or expenses.]

G: We can fax a draft of the Escrow Agreement to you for your review.

A: Why would I want to see a draft if you won't accept any changes?

G: Good point. So, tell me who the escrow agent will be, and I'll complete the Escrow Agreement with the legal description that you already provided and send you the Escrow Agreement to be signed by the escrow agent and your client.

A: Great. Will you send that by e-mail, and then I can get signatures from the escrow agent and the personal representative and send it back to you?

G: Oh, we don't email. We fax. But you can't fax the signed agreement back. You see, we need "pen and ink" signatures from each party; from the personal representative, from the Escrow Agent, and from my supervisor at the IRS. Oh, and even though I'm in California, my supervisor is in New Jersey.

A: So, you can fax to me the Escrow Agreement, I can get it signed by the Escrow Agent, and then send that by overnight delivery to the personal representative for him to sign, and then he can send it to your supervisor in New Jersey, and then he can sign and send it to you in California. Then you'll send us the certificate discharging, or releasing, the real estate from the automatic lien?

G: Well, we don't actually issue the discharge at that point. We issue a conditional commitment, which will allow the sale

continued, page 21

to close. Once we have confirmation that the funds are in the possession of the Escrow Agent, we can issue the actual certificate discharging the lien.

Certificate Discharging the Real Estate from the Lien: Before issuing the actual certificate that discharges, or releases, the real estate being sold from the lien, the funds must be received by the escrow agent (or paid to the IRS).

Government: Once we have approved all of the submissions, including the fully executed original Escrow Agreement, then I will send you a Conditional Commitment to Discharge Certain Property from Federal Estate Tax Lien. The closing agent can close based upon that document.

Author: What if the closing agent wants the property to be discharged or released from the lien before paying the net proceeds, and won't rely upon that conditional document?

G: I don't know. But that has never happened.

A: Ok. [Thinking: Well, I hope I'm not the first. And how long did she say she'd been working on these lien releases - two weeks?] Will you fax that document to me when it is ready?

G: Sure. But I've got a lot of releases in front of yours, so I am not sure when that will be.

A: Oh. Thanks. I appreciate the help and I'll get the materials to you as quickly as possible!

These discussions occurred after submission of a completed Form 4422, Application for Certificate Discharging Property Subject to Estate Tax Lien, with all of the attachments required in the instructions for that form. The form can still be provided as part of the submission, but the author's impression is that the form is no longer required. The author's suggested optimal submission, which should be sent to Guy Esposito, National Advisory Estate Tax Manager, Internal Revenue Service, 4 Paragon Way, Suite 2, Freehold, New Jersey 07728-7895, contains the following:

1. Completed, and signed, Form 4422, Application for Certificate Discharging Property Subject to Estate Tax Lien.

2. Appraisal or letter from broker, indicating the sales price is a fair price.

3. Title insurance commitment, which will show the legal description and the exception for the lien for which release is being requested. (For goodness' sake, if the commitment does not require addressing this lien, then just close the transaction and avoid these issues altogether!).

4. Draft of the closing statement, showing closing costs and net proceeds. (You'd better like the amount of the net proceeds shown on the closing statement because that will be the amount referenced in subsequent documents from the government.)

5. An indication of whether the net proceeds will be paid to the IRS toward estate taxes or held by an escrow agent. If held in escrow, you should also provide the name of the escrow agent. You could try to submit an Escrow Agreement signed by the personal representative and the Escrow Agent, and that might be accepted if it is in the form used by the government. *See* www.Lile-Hayes.com for the form of Escrow Agreement provided to the author by the government.

6. When in doubt, call Guy Esposito at 732.761.3340. He is the manager at the IRS for this new process. And he was very helpful.

Please see www.Lile-Hayes.com/EstateTaxLienRelease for any updates on these issues.



L. LILE

Laird A. Lile *specializes in estate and trust matters, based in Naples, Florida. Keeping busy with the Board of Governors of The Florida Bar, the Supreme Court's Judicial Management Council and the Florida Courts Technology Commission and as a past Chair of the Real Property, Probate and Trust Law Section, he is most proud of his 17 year old daughter, Allie, and his 22 year old son, Langdon.*

Judicial performance feedback sought from Bar members



The Judicial Administration & Evaluation Committee is encouraging all Bar members to participate in the Confidential Judicial Feedback Program developed by the committee and approved by the Florida Bar Board of Governors.

The purpose of the Confidential Judicial Feedback Program is to promote judicial self-improvement and enhance the quality of our judiciary as a whole. Attorneys are asked to evaluate the judge's demeanor, knowledge, fairness, and other factors, but not to discuss issues of their specific cases. The commenting attorney's identity is kept confidential and the comments are provided only to the judge who is the subject of the review. All feedback is and remains confidential pursuant to Florida Rule of Judicial Administration 2.051(c)(4).

There are separate forms for trial court judges and appellate court judges. Feedback may be provided two ways: by competing the forms online at www.floridabar.org/JudicialFeedback or by downloading the forms at www.floridabar.org/JAEC and following the instructions.

Florida Fiduciary Access To Digital Assets Act "The 411" – What You Should Know

Sasha A. Klein, Sabadell United Bank, Palm Beach, Florida

We live in a rapidly growing digital world. It is not unusual for an individual's life to be entirely paperless and kept virtually in their email, social media and other types of digital accounts. These accounts can have significant value, be it monetary or sentimental.

Unlike tangible assets, digital assets are governed by a labyrinth and sometimes contradictory snarl of terms-of-service agreements.[1] Such agreements and applicable state and federal laws[2] can restrict a user's ability to provide fiduciaries access to their digital assets after death or disability. This limits a fiduciary's ability to manage digital assets, as well as retrieve critical digital data such as email, on-line financial accounts and digital photo albums. It is also especially problematic for fiduciaries because they have a duty to administer assets, but find themselves unable to do so by these antiquated, or non-existent, laws.

The Solution

On March 10, 2016, Florida adopted the Florida Fiduciary Access to Digital Assets Act (the "Act") creating a new chapter 740 in the Florida Statutes.[3] The Act provides the "rules of the road" for the management and disposition of digital assets upon death or disability by vesting fiduciaries with the legal authority to access and manage such assets. Now users have the ability to plan around their digital assets by specifying whether they should be preserved, distributed to heirs or deleted. Prior to the Act, there was little-to-no direction for dealing with the access to, or succession of, digital assets. This was because Florida, along with many other states, did not have laws specifically addressing access and antiquated laws existed that seemed to prohibit fiduciary access. The new law is effective July 1, 2016, and applies retroactively to all fiduciaries.

Now that this law is in effect, clients should be advised to consider updating their estate planning documents accordingly in order to ensure that they can effectively manage their digital assets under this new law. This article intends to provide the "411" on the Act.

The Act

Objectives

The Act intends to accomplish the following: (1) define digital assets and related terms;[4] (2) provide clear rules for fiduciary access; (3) allow for user intent and privacy desires to control; (4) encourage custodian compliance; (5) establish clear procedures for custodian interaction with fiduciaries; (6) provide protection from liability under the various laws (state and federal) for fiduciaries and custodians; and (7) clarify that the Act is not applicable to digital assets of employers used by employees in the ordinary course of business.

continued, page 23

Key Provisions to Know

SECTION	BRIEF SYNOPSIS
F.S. §740.02	Definitions of terms
F.S. §740.003	Online tool authorization – allows or prohibits a custodian from disclosing digital assets
F.S. §740.004	Treatment of terms-of-service agreements
F.S. §740.005	Disclosure of Digital Assets Custodian has 3 options: (1) Allow Fiduciary Access (2) Allow Fiduciary Partial Access (3) Data Dump on the Fiduciary Disclosure required in 60 days Not required to disclose deleted assets
F.S. §740.006-.04	Rights of personal representatives, agents acting pursuant to a power of attorney, trustees and guardians. Includes procedures for a fiduciary to request access to a digital asset, which generally involves a written request accompanied by letters of administration and a copy of the applicable provisions of the decedent user's will or applicable record (or a court order authorizing access).
F.S. §740.05	Imposes fiduciary duties
F.S. §740.07-.09	Miscellaneous issues including making the effective date July 1, 2016.

The Trumping Rule – Opt In

The Act breaks through roadblocks to fiduciary access, but only if triggered. Negotiations with custodians[5] and to fit within the framework of the federal privacy and anti-hacking laws[6] (so as not to be preempted by those laws) resulted in an "opt in" approach. Access under the Act does not fully occur by default, but must be triggered "on." Failure to do so renders a fiduciary back into the morass of antiquated rules potentially preventing access.

The Act takes a three-step approach to "opt in" for access – a/k/a The Trumping Rule:

- A user's direction through an online tool;[7]
- A user's direction in a record, *i.e.,* will, trust, power of attorney, etc; or
- Custodian's Terms-of-Service Agreements ("TOSA").[8]

If a user provides direction through an online tool, such direction prevails over both an offline direction in a will or other record and the TOSA. If a user provides direction in a record, it prevails over the TOSA. If a user does not provide direction either through an online tool or a record, the custodian's TOSA controls or if the TOSA is silent on fiduciary access, then the Act applies.[9] It is important to understand that the Act only governs access, not the underlying ownership or title of assets, which is not changed by the Act.

The Trumping Rule, however, is not your last stop! Access is also impacted by the type of fiduciary and the type of digital asset.

Types of Fiduciaries and Disclosure

The law applies to four types of fiduciaries: (1) personal representatives of decedents' estates, (2) guardians of the property of minors or incapacitated persons, (3) agents who are acting under a power of attorney, and (4) trustees. Disclosure under the Act's Trumping Rule is divided into sections as to the type of fiduciary and whether the disclosure relates to the *content of an electronic communication*, the *catalogue of electronic communications* or *other digital assets*. Disclosure of content is stricter under the Act when compared to catalog and other digital assets that have lesser protection under federal privacy laws.[10]

The distinction between "*content*" and "*catalogue*" must be mastered by advisors. "Catalogue" is the information that identifies each person with which a user has electronically communicated, the time and date of the communication, and the electronic address of the person (think "outside of the envelope").[11] "Content" means information involving the substance or meaning of the communication not readily accessible to the public – *e.g.,* the body of an email (think "inside of the envelope").[12] The reason for the distinction is privacy and the sensitivity to the disclosure of one's private electronic communications.

Content versus Catalogue Access Distinction - The default rule for content, unlike catalogue, is non-disclosure unless the user indicates otherwise through an online tool or his/her estate planning documents. Even with an indication by a user through an online tool or his/her estate planning documents, a custodian may request a court order that (1) the user had a specific account with the custodian, (2) disclosure of the content would not violate any applicable state or federal law, (3) the user consented to disclosure of the content (unless through an online tool), and/or (4) disclosure of the content is reasonably necessary for the administration of the estate.[13]

An unsettling takeaway is that a custodian has the right to require a court order regarding the disclosure of the content of an electronic communication even if the user has consented to the disclosure through the user's estate plan.

With respect to disclosure – not all fiduciaries are treated the same. There are two fiduciary distinctions worth mentioning – of course, there are small nuances for access between each type of fiduciary and access by them should be handled pursuant to the Act.

Guardians – Unlike the other types of fiduciaries covered, the Act is unclear as to the disclosure of content to a guardian. At first blush, it seems that a guardian would need a court order to access content. But, digging even deeper, the Act does not seem to require the custodian to disclose it, even with the court order. With respect to guardians and content, it seems a guardian may need direct consent from the ward to get content.[14]

Trustees – The Act makes a distinction as to whether the trustee is the original user of an account. If the trustee is the original user, then such trustee has access to all digital assets, including content. If the trustee is not the original user, similar rules apply as they do to personal representatives. At this point, very few (if any) online accounts allow a trustee to be the original user. Most require a person to register and do not allow a trustee to register. Though, this is probably coming – so stay tuned.

Plan

When provisions for digital assets were first drafted, there was a lack of sensitivity for the different types of digital assets and the thought that clients may want to treat them differently. When discussing the issue of digital assets with clients, it is important that advisers explain the distinction between a client's consent to the contents of an electronic communication versus catalog versus other types of digital assets. If requested, a client can specifically bifurcate the disclosure or non-disclosure between content and other digital assets. Notwithstanding the difficulty of post-mortem access, it is nevertheless surprising that some clients may want to prohibit all post-mortem access to some or all of their digital assets. Although the Act only requires an express grant

continued, page 24

of authority over content in a power of attorney, all estate planning documents should be explicitly clear and consistent.

Applying the "411" of the Act, below is sample language that can be inserted into estate planning documents.

Example Language to Include In Planning Documents - "Opt In"

Will

Notwithstanding any contrary provision in the Florida Statutes, my Personal Representative and any successor shall lawfully have the following powers and authority regarding electronic communications and other digital assets:

(a) My personal Representative shall have the right to receive, access, transfer, or otherwise exercise ownership rights over all digital assets (excluding the catalogue or content of any electronic communications sent or received by me), including, but not limited to: (1) any information stored on a computer or other digital device, (1) content uploaded onto any websites, including photos, documents, or other content, and (3) rights in digital property, such as domain names and blogs.

(b) My personal representative shall have the right to receive and access the catalog or content of electronic communications sent or received by me.

Other options for (b) – bifurcating consent.

Or (b) My personal representative shall have the right to receive and access the catalog of electronic communications sent or received by me, provided, however, that my Personal Representative shall have no right to receive or access the content of any electronic communications sent by me. For avoidance of doubt, I do not consent to the disclosure to my Personal Representative of the content of any electronic communication sent or received by me.

Or (b) My Personal Representative shall not have any right to receive and access the catalog or content of any electronic communications sent or received by me. For avoidance of doubt, I do not consent to the disclosure to my Personal Representative of the catalog or content of any electronic communication sent or received by me.

Power of Attorney

Consider adding a separately designated section that requires the client to initial consent to disclosure of each type of digital asset. Some clients may not want certain digital assets disclosed, they may want to safeguard their privacy.

Notwithstanding any contrary provision hereunder, my attorney-in-fact shall lawfully have the authority to exercise only those specifically numerated powers regarding digital assets listed below which I have initialed (provided the exercise is consistent with my attorney-in-fact's duties):

(a) ___ [initial here] Right to receive, access, transfer, or otherwise exercise ownership right overs all digital assets (excluding the catalog or content of any electronic communications sent or received by me), including but not limited to: (1) any information stored on a computer or other digital device, (2) content uploaded onto any websites, including photos, documents, or other content, and (iii) rights in digital property, such as domain names and blogs.

(b) ___ [initial here] Right to receive and access a catalog of electronic communications sent or received by me.

(c) ___ [initial here] Right to receive and access the content of all electronic communications sent or received by me.

For avoidance of doubt, if I have not initialed next to a box, I specifically do not consent to the disclosure to my attorney-in-fact of the relevant digital asset.

Conclusion

This Act provides the necessary tools for fiduciaries to access and manage a client's digital assets. We need to ensure that their estate plans include the necessary tools to "opt in" to the Act.[4]


S. KLEIN

***Sasha A. Klein, J.D., LL.M.**, is Senior Vice President and Director of Trusts and Wealth Services for Sabadell Bank & Trust, responsible for working with clients and their advisors to develop practical and efficient wealth transfer plans and for guiding the firm on fiduciary issues. Klein holds a post-doctorate degree in tax law. Klein is a frequent published author and national lecturer on a range of estate planning, wealth management and tax law topics. Among other honors, Ms. Klein has been awarded Article of the Year from the American Bar Association's Probate and Property Magazine.*

Endnotes

1 A terms-of-service agreement, also referred to as end-user license agreement, is defined as an agreement that controls the relationship between the user and custodian. This is the item that users see right before opening an account and generally requires the user (who typically does not read the agreement) to click "ok" confirming he/she has reviewed and agrees to the terms.

2 Federal law impacting access to digital assets relates to two areas: (1) privacy of digital information, and (2) unauthorized access to digital assets. Privacy is governed by the Stored Communication Act of 1986, 18 U.S.C. 2701-2711 ("SCA"), as part of the Electronic Communications Privacy Act. Unauthorized access issues are governed by the Computer Fraud and Abuse Act, 18 U.S.C. 1030 (1986) ("CFAA"). Both of these Acts date from the pre-Internet late 1980s.

3 The Act is an adaptation of the Revised Uniform Fiduciary Access to Digital Assets Act drafted by the Uniform Law Commission in 2014, and revised in 2015.

4 Fla. Stat. §740.02 (2016).

5 Fla. Stat. §740.002(7) (2016) – Custodian means a person that carries, maintains, processes, receives, or stores a digital asset of a user.

6 SCA, 18 U.S.C. 2710-2711 (1986) and CFAA, 18 U.S.C. 1030 (1986).

7 If an online tool does not provide the user the right to modify or delete a direction, then it appears that a contrary direction in a will or other record would control. The online tool authorization does not have to be completed under any of the testamentary execution requirements that are required for most states.

8 Fla. Stat. § 740.003 (2016) (User Direction for disclosure of digital assets).

9 Revised Uniform Act, § 4 cmt. at 11 (2015).

10 Revised Uniform Act, § 7 cmt. at 15 (2015).

11 Fla. Stat. § 740.002(4) (2016).

12 Fla. Stat. § 740.002(5) (2016).

13 Fla. Stat. § 740.006(5)(c) (2016).

14 Fla. Stat. § 740.04(2) (2016); also *See* commentary and legislative history to the Act.

RPPTL Section Executive Council Meeting
Loews Portofino Bay Hotel, Orlando
June 1-5, 2016

By Erin H. Christy, Esq., Williams Parker, Sarasota, Florida

Members of the Executive Council of the Real Property, Probate and Trust Law Section of the Florida Bar celebrated *la dolce vita* while strolling along the decorative façades of the Italian Riviera as the Spring RPPTL meetings took place June 1-5 at the Loews Portofino Bay Hotel in Orlando, Florida.

Members wandered along the cobbled hallways to meeting rooms Thursday morning, greeted upon arrival by friendly faces from The Florida Bar Foundation. Committee meetings were packed with discussion and action items as the brain trusts worked to finalize upcoming legislative positions and the Legislative Update Committee worked to finalize details on the 2016 session to present in July at The Breakers.

Thursday evening was spent together socializing with friends and colleagues while enjoying cocktails and dinner *al fresco* in the Citrus Piazza during the Welcome Reception sponsored by Old Republic Title and JP Morgan.

The Section presented *The RPPTL's Guide to the International Investor Client: Scaling "The Wall" of Cross Border Legal Issues* Friday morning. Topics included foreign investment and immigration issues, international aspects of estate planning for multi-national families, corporate and tax structuring of international business transactions, and litigation and service issues for non-US residents. The CLE is available on the Florida Bar website as course number 2057R. Following the seminar, RPPTL members attending the Annual Membership Luncheon heard a riveting presentation from Gilbert King, the 2014 Pulitzer Prize winning author of *Devil in the Grove*. Mr. King provided an overview of his book which details the racial injustice in the Florida town of Groveland in 1949, involving four black men falsely accused of rape and drawing civil rights crusader and eventual Supreme Court Justice Thurgood Marshall into the legal battle.

Saturday found members back at work for the Executive Council Meeting from 10:00 am-1:30 pm, and congratulating Michael Gelfand on a tremendous job as Chair as he passed the gavel to Deborah Goodall, the 2016-2017 Chair of the RPPTL Section.

Upcoming meetings of the Executive Council are October 5-9, 2016, at The Walt Disney World BoardWalk Inn in Orlando and December 7-11, 2016, at The Westin Resort and Marina in Key West. We hope that if you are in the area you can join us and attend any committee meeting that interests you.

OLD REPUBLIC TITLE

COMMERCIAL REAL ESTATE EXPERIENCE

backed by STRENGTH & STABILITY *for* OVER A CENTURY.



Old Republic Title's Florida Commercial Services Team is comprised of experienced commercial real estate attorneys, paralegals, title examiners and other professionals, who are dedicated to providing our agents with solutions and support for complex commercial real estate transactions.

- Solution Oriented Underwriting • Escrow Services • Closing Support
- Survey Reviews • Due Diligence Services • 1031 Exchange Services
- Multi-State/Multi-Site Coordination • UCC Coverage

Lean on Old Republic Title for your next commercial real estate transaction.

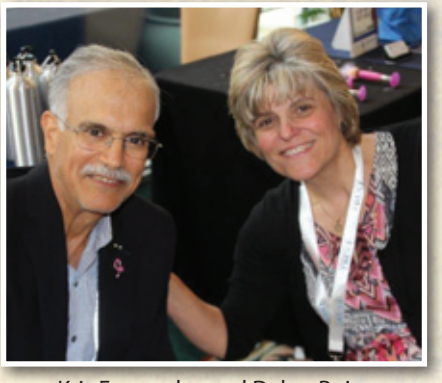
Carolyn Broadwater, Esq.
cbroadwater@oldrepublictitle.com
James "Jim" Russick, Esq.
jrussick@oldrepublictitle.com
Susan Seaford, Esq.
sseaford@oldrepublictitle.com
Wilhelmina "Willie" Kightlinger, Esq.
wkightlinger@oldrepublictitle.com
Sergio Osorio, Esq.
sosorio@oldrepublictitle.com

800.342.5957 oldrepublictitle.com/fl

RPPTL Section Executive Council Meeting
Loews Portofino Bay Hotel, Orlando
June 1-5, 2016



Awards to Vinette Godelia and Nick Curley



Kris Fernandez and Debra Boje



Part of the Goodall Family



Chef's at Emeril's Tchoup Chop Preparing Dinner for Hungry RPPTLs



Michael Gelfand hands service award to Silvia Rojas, Editor-in-Chief



Wm. Cary Wright



Guest Speaker Gilbert King autographs book for Brenda Ezell



Steven Lessne, Deborah Goodall, Debbie Faulkner, Keith Braun and other RPPTLs watching Michael Gelfand's speech

Photos by Photos by John Neukamm, Silvia Rojas, Michael Gelfand and Jeffrey Baskies



Jerry Wolf, Shane Kelley, Sean Kelley and George Lange



Roger Isphording, Drew O'Malley and Fletcher Belcher



Michael Gelfand and George Meyer



Loews Portofino Bay Hotel



Michael Gelfand and Mary Ann Obos



Deborah Goodall and Michael Gelfand



Sarah Cortvriend and Jane Cornett



RPPTL ladies on the lake at Portofino Bay Hotel



Silvia Rojas



Guy Emerich, Michelle Suskauer, and Michael Bedke



Prof. Lee-Ford Tritt

Roundtable

Highlights Of The Meeting Of The Rpptl Section

PROBATE AND TRUST DIVISION

Saturday, June 4, 2016

Loews Portofino Bay • Orlando, Florida

Prepared by Gail Fagan Esq., Sarasota, Florida

The following briefly identifies for future reference some notable presentations at the Division Roundtable.

Thank you to the Roundtable Sponsor, Stout Risius Ross, Inc.

The meeting was called to order at 8:25 a.m. by Probate and Trust Law Division Director, Debra Boje.

Sponsor Announcement. The Division Director acknowledged the sponsor of the Roundtable meeting, Stout Risius Ross, Inc. ("SRR").

Committee Reports

Guardianship, Powers of Attorney and Advance Directives – Hung Nguyen, Chair: Hung Nguyen reported that the Committee has two motions that will be before the Executive Council for a vote. The first is a motion to provide that the funeral-related expenses a guardian can expend with court approval is not limited to $6,000.00, by amending Section 744.441(16), Florida Statutes. The second is a motion to amend Section 744.331, to require: (i) the Clerk of Court to timely serve the examining committee reports; (ii) the parties to an incapacity proceeding to notice an objection to an examining committee member's report at least 5 days prior to the adjudicatory hearing or have the objection waived. In addition, the committee will present an information item at the Executive Council meeting proposing support of legislation to permit a court to approve a guardian's request to initiate a petition for dissolution of marriage of a ward without the requirement that the ward's spouse consent to the dissolution, which would be an amendment to Section 744.3725, Florida Statutes. Finally, he reported that the Committee continues to discuss the *Rothman v. Rothman* decision, 93 So. 3d 1052 (Fla. 4th DCA 2012), which addresses the constitutionality of Section 744.331(4), Florida Statutes, which states that a petition to determine incapacity must be dismissed if a majority of the examining committee members find that the proposed ward is not incapacitated.

Asset Protection - George Karibjanian, Chair: George Karibjanian reported that the Committee continues to review and discuss the Uniform Voidable Transactions Act and is working on a response to a note contained in the proposed UVTA, which could have a serious effect on several estate planning and asset protection techniques.

Attorney/Trust Officer Liaison Conference - Laura Sundberg, Chair: Stacey Cole reported that the next ATO Conference will be held on June 24 and 25 at The Breakers Resort in Palm Beach, Florida.

Digital Assets and Information Study Committee – Eric Virgil, Chair: Debra Boje reported that the Florida Fiduciary Access to Digital Assets Act (Chapter 740) passed both houses of the Florida Legislature unanimously, and the Governor has signed the bill into Law. The Committee is putting together a CLE program to discuss the new Act, which will take place in the fall.

Estate & Trust Tax Planning – David Akins, Chair: David Akins reported on the recent changes to proposed statute Section 689.151, Florida Statutes. Under the proposed changes, if an individual adds a spouse to the title of an asset there is a presumption that it is owned as tenants by the entireties. The presumption may be overcome by clear and convincing evidence of contrary intent. The Committee is also reviewing whether Florida should permit statutory community property trusts and/or community property trusts established by election.

IRA, Insurance and Employee Benefits – Howard Payne and Kristen Lynch, Co-Chairs: Howard Payne reported on recently enacted legislation that requires insurance companies to research to determine whether an insured has died. Also, under the new legislation, if a death benefit is required to be paid out but no beneficiary takes under the policy then the insurance company is required to pay the death benefit to the state of Florida as part of the decedent's unclaimed property.

continued, page 29

Probate & Trust Litigation – Jon Scuderi, Chair: Jon Scuderi reported that work was done by the Committee to change the elder law statutes concerning the definition of a vulnerable adult, but similar changes have yet to be made to the definitions for the statutes involving a civil cause of action and the Committee is looking to work on that effort. Next, Jon reported that the Committee had a productive discussion around the proposed statutes involving assisted reproductive treatment and procedures.

Probate Law & Procedure – John Moran, Chair: John Moran reported that the Committee has approved draft legislation on the Will Depository and Orphan Will project, and it will be an information item at the next Executive Council meeting. The Committee continues to work on revisions to the Summary Administration statutes. John reported the Committee is considering if coins and bullions should constitute tangible personal property under the probate code. The Committee will also address proposed legislation, at its next meeting, on substantial compliance as it relates to Florida's Will execution requirements.

Trust Law – Angela Adams, Chair: Angela Adams reported that its proposal regarding the required notifications for charitable trusts is an information item at the Executive Council meeting. The proposed legislation continues to require notification to the Attorney General, but removes the requirement to notify the State Attorney and also clarifies the manner in which notice is to be given. A subcommittee is working on a project to modify some of the language in Section 736.0103, Florida Statutes, as it relates to the benefit of the beneficiary rule. Plus, the Committee is working on new legislation on Florida's decanting statute.

Wills, Trusts & Estates Certification Review Course – Jeff Goethe, Chair: Jeff Goethe reported that the CLE seminar in April was a success. New topics for the next seminar, as well as new Committee projects, will be addressed at the next meeting at The Breakers.

Professionalism and Ethics – Larry Miller, Chair: Larry Miller introduced Joan Boles who works with the Bay Area Legal Services in Tampa, Florida to discuss the Safe At Home project, on which the Section is interested in working. Joan reported that the project seeks attorney volunteer assistance to clear title to real property for vulnerable low-income Florida residents, thereby allowing such residents to receive disaster-related relief, access to community development funds, and available real property tax exemptions.

Legislation Committee – Sarah Butters, Chair: New Legislative chair, Sarah Butters, provided a brief overview of the status of the RPPTL Section's legislative initiatives.

Ad Hoc Committee Reports

Ad Hoc Committee on Physicians Orders for Life Sustaining Treatment (POLST) - Jeff Baskies and Tom Karr, Co-Chairs: Jeff Baskies reported that the proposed legislation drafted by the Ad Hoc Committee is an information item at the Executive Council meeting. POLST is a form of medical directive. A completed POLST form is intended to help with patient self-determination as to how much treatment the patient wants, or does not want, at the end of life stage. Executed POLSTs are portable from one medical facility to another, and are intended to travel with the patient. The legislation requires that the POLST be signed by the patient, or a health care proxy, guardian, power of attorney, and the physician and requires the physician to attest to having discussed the POLST form and health care options with the patient, as it relates to the patient's medical conditions.

Ad Hoc Guardianship Law Revision Committee – David Brennan, Chair: The Guardianship Task Force is drafting a new Chapter 744. The goal is to have a proposal ready this summer, with a target enactment date in 2018.

Ad Hoc Study Committee on Estate Planning Conflict of Interest - Bill Hennessey, Chair: Bill Hennessey reported that the proposal regarding fiduciary fee disclosures has been put on hold. He is hopeful the Section can sponsor the bill in next year's legislative session. The Florida Bar Board of Governors approved a proposed change to the Florida Rules of Professional Conduct which mirrors the proposed changes to the statute. It requires the lawyer to explain to the client, in writing and for the client to accept, that the fee charged by the lawyer might be higher to serve as both lawyer and fiduciary, as opposed to acting solely as the lawyer; and, requires the lawyer to explain who is eligible to serve as fiduciary. The proposed rule change now requires approval by the Florida Supreme Court.

Ad Hoc Study Committee on Spendthrift Trust Issues – Lauren Detzel and Jon Scuderi, Co-Chairs: Jon Scuderi reported that the Committee continues to work on a legislative proposal which will address the holding in *Berlinger v. Casselberry*, 133 So. 3d 961 (Fla. 2d DCA 2013). The proposal seeks to revise Section 736.0504, Florida Statutes to overrule the *Berlinger* decision, thereby eliminating exception creditors, except for child support.

Adjournment. Ms. Boje concluded the Roundtable meeting at 9:48 a.m. The next Probate and Trust Law Division Roundtable meeting will be held on Saturday, July 31, 2016 at The Breakers Hotel, in Palm Beach, Florida.



Roundtable

Highlights Of The Meeting Of The RPPTL Section

REAL PROPERTY DIVISION

Saturday, June 4, 2016

Loews Portofino Bay • Orlando, Florida

Prepared by Anne Pollack Esq., Tampa, Florida

The following briefly identifies for future reference some notable presentations at the Division Roundtable.

Thank you to the Roundtable Sponsor, Fidelity National Title Group

Meeting was called to order at 8:00 a.m. by Real Property Law Division Director, Drew O'Malley.

Sponsor Announcement. The Division Director thanked the Roundtable Sponsor, Fidelity National Title Group and Pat Hancock gave the sponsor message.

Introduction of Guests. The Division Director opened the floor for introductions of the law students and other guests in attendance.

Approval of Minutes. The first order of business was the approval of the minutes of the prior meeting, which were passed unanimously.

Reports From Other Divisions – Informational Items

Introduction of the "Safe at Home" Project, Joan Boles with Bay Area Legal Services, on behalf of the Professionalism and Ethics Committee: Joan Boles reported on the Safe at Home Project, which is an effort to assist low-income people with the wave of legal issues that arise after a disaster. The project seeks attorney volunteer assistance to clear title to real property for vulnerable low-income Florida residents whereby residents receive disaster-related relief, access to community development funds and available real property tax exemptions. A CLE program has been created to train attorneys in a multitude of areas. As this is a statewide issue, the Committee encouraged attendees and ALMs to spread the word and make the CLE training available statewide.

Action Items

Real Estate Structures and Taxation Committee: Cristin Keane, Chair. Cristin Keane explained the necessity for the Support of Marriage Documentary Stamp Tax Act, Section 201 .02(7), Florida Statutes, which will create a total exemption for documentary stamp taxes for transfers of real property between spouses. At this time, the law only has an exclusion for transfers between spouses incident to divorce. The Tax Section supports the proposed bill. Cristin made the following Motion:

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

The motion passed unanimously.

Informational and Administrative Matters

Real Estate Structures and Taxation Committee: Cristin Keane, Chair. Cristin Keane reported. The Committee is proposing changes to the ad valorem statute to treat assessment of property transferred to and from Florida land trusts the same as transfers to and from other trusts in Florida, including changes to Sections 193.1554(5) and 193.1555(5), Florida Statutes, which would be modified to include transfers between the land trustee and the beneficial owners of a land trust.

Real Property Finance and Lending: David Brittain, Chair. Ashley McRae reported. A subcommittee has been created to put together an Attorney Loan Officer conference in conjunction with the Breakers Legislative Update and Executive Council meeting in July, 2017.

Open/Expired Permits Task Force: Lee Weintraub and Michael Tobin, Co-Chairs. Robert Graham presented on the current status of negotiations on legislation to make it easier to close open and expired permits.

Title Insurance and Title Insurance Liaison: Raul Perez Ballaga, Chair. Pat Hancock reported. The Department of Financial Services proposes to amend the unlawful inducement regulations to include prepayment of an estoppel fee as an unlawful inducement, and to regulate closing services charges. The Committee is preparing a white paper to explain the Section's opposition to this proposal.

continued, page 31

Administrative Matters

Committee CLE/Publication Objectives: Bob Swaine reported on the big increase in e-CLEs, and advised that the RPPTL website includes information on upcoming events as well as forms to be used for submitting ideas and coordinating CLEs. Silvia Rojas reported that this is her last issue as Editor-in-Chief of ActionLine and Cary Wright and Jeff Baskies will be taking over that position as Co-Editors-in-Chief.

Committee Reports

Commercial Real Estate – Adele Stone, Chair; Burt Bruton and Martin Schwartz, Co- Vice Chairs. Adele Stone provided a list of proposed CLEs and programs that the Committee is planning in an effort to avoid duplication and to gather support. She requested that the Section create a clearinghouse of CLEs and programs put on by the various committees so Section members can be made aware of and coordinate programs to avoid duplication and attend the programs of interest.

Condominium and Planned Development: Bill Sklar, Chair; Alex Dobrev and Steve Daniels, Co-Vice Chairs. Bill Sklar provided the current status of Board Certification for Condominium and Planned Development Law. Nominees to the Certification Committee have been identified, and over the next 18 months the procedures and exam will be developed. The April CLE was very successful. The Committee discussed the numerous legislative items which are expected to be revisited in 2017 Legislative Session.

Construction Law Institute: Reese Henderson, Chair; Sanjay Kurian, Diane Perera and Jason Quintero, Co-Vice Chairs. Diane Perera reported on the huge success of the 2016 Construction Law Institute, with over 300 attendees.

Development & Land Use Planning: Vinette Godelia, Chair; Mike Bedke, Neil Shoter and Anne Pollack, Co-Vice Chairs. Vinette Godelia reported on the Committee's series of 10-15 minute videos that will be uploaded to the Section website. A short segment of one was presented to those attending the Roundtable.

Real Estate Leasing: Rick Eckhard Chair; Brenda Ezell, Vice Chairs. Rick Eckhard reported that the Committee has begun its four-part series of videos for lawyers, which will provide guidance for lawyers on leasing office space. He encouraged members to spread the word of this program to a broader audience.

Liaison with FLTA – Alan McCall, Jim Russick, Melissa Murphy and Alex Overhoff, Co-Chairs; Pat Hancock and Barry Scholnik, Co-Vice Chairs. Alan McCall reported that the FLTA's Board of Directors has voted to support the notice of commencement termination bill which is primarily designed to eliminate the necessity to stop work as a condition of terminating a filed Notice of Commencement.

Insurance & Surety: Wm. Cary Wright and Scott A. Pence, Co-Chairs; Fred Dudley and Michael Meyer, Co-Vice Chairs. Cary Wriight reminded the Division of its monthly CLEs, including a program regarding flood insurance and assignment of benefits legislation. Cary also reminded the Division of a 3-part series on risk management that will be held in the fall.

Real Estate Certification Review Course: Jennifer Tobin, Chair; Manuel Farach and Martin Awerbach, Co-Vice Chairs. Jennifer Tobin reported that the 2016 Real Estate Certification Review Course was a success and that they had a good turnout. The Committee is preparing for next year's course and will be requesting speakers.

Real Property Finance & Lending: David Brittan, Chair; E. Ashley McRae, Richard S. McIver and Robert Stern, Co-Vice Chairs. David Brittan reported on the Committee's successful program on swaps for non-specialists. He reminded the Division about a legal opinions webinar planned for August 31st and the proposed Attorney Loan Officer conference in 2017.

Real Property Litigation: Susan Spurgeon, Chair; Manuel Farach and Martin Solomon, Co-Vice Chairs. Susan Spurgeon reported on the *Billington* case, in which the 5th DCA found that if a contract included integration and non-reliance clauses, then any lawsuit for fraud is barred and will be dismissed with prejudice. Susan asked for discussion as to whether the Section should file an amicus related to the decision, to assist the court in determining whether the decision should just relate to the sanctity of contract or should address public policy issues raised by the decision. Discussion was held and multiple opinions raised.

Real Property Problems Study – Art Menor, Chair; Mark A. Brown, Robert Swaine, Stacy Kalmanson, Lee Weintraub and Patricia J. Hancock, Co-Vice Chairs. Art Menor reported that the Committee is working with the Real Property Leasing Committee to redraft the unlawful detainer and ejectment statutes, which were created more than a century ago and have not been modernized.

New Business

Rob Freedman acknowledged Drew O'Malley's leadership as the Division Chair. Drew thanked the members of the Division for their participation.

The Meeting was adjourned at 9:45 a.m.

The Real Property, Probate & Trust Law Section of the Florida Bar

www.rpptl.org

FinCEN's GTO Expanded And Extended

By Margaret (Peggy) Williams, Attorneys' Title Fund Services, LLC,
as a member of the FinCEN GTO Subcommittee of the Problems Study Committee

The Financial Crimes Enforcement Network (FinCEN) has issued new Geographic Targeting Orders (GTOs) expanding and extending the time for reporting information pertaining to residential transactions purchased for cash by legal entities. Beginning August 28, 2016, all title insurers in Florida are required to report information about purchasers of residential property valued at $1 million or more, when the purchasers are legal entities (not natural persons or trusts); the property is located in Miami-Dade, Broward or Palm Beach counties; there is no bank loan or external financing; and the funds are transmitted by any means other than a wire. The reporting requirements continue through February 23, 2017, unless extended by FinCEN. For more information about the data required to be reported, please see "Complying with FinCEN's Geographic Targeting Order in Miami-Dade County," ActionLine, Summer 2016, Page 37, or the RPPTL website, www.rpptl.org.

Fiduciary Accounting System

TEdec

Service Bureau

Professional Fiduciary Accounting Software

TEdec provides attorneys, CPAs and other professionals with the most proven, reliable and full featured Trust and Estate Accounting Software on the market.

One-time data entry ensures accuracy while saving time in preparing:
- Court Inventories & Accountings
- Management Reports
- Estate Tax & Income Tax Returns by bridge to Lacerte® Tax Software
- Much more!

TEdec provides a Risk Free 100% Money Back Guarantee!

Eliminate Mistakes and Increase Profits!

Lacerte® is a registered trademark of Intuit Inc. in the United States and other countries.



Outsource to **TEdec** for all your fiduciary accounting needs

Our Professional Team Can Provide:
- Data Entry
- Court Inventories
- Accountings - Formal or Informal
- Releases

All compliant with the official forms for: NY, PA, NC, FL, CA, National Fiduciary Accounting Standards.

TEdec Systems, Inc.
207 Court Street, Little Valley, NY 14755

Learn More. Try Us Today!
Online at **www.tedec.com**
Call **1-800-345-2154**

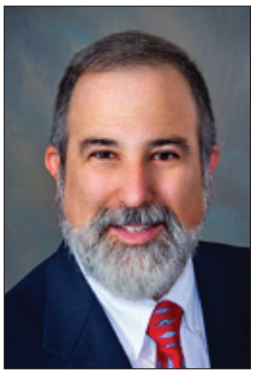
Two Ways to Improve Your Trust & Estate Practice

Is your E-MAIL ADDRESS current?

Log on to The Florida Bar's web site (www.FLORIDABAR.org) and go to the "Member Profile" link under "Member Tools."

A Tribute To Michael J. Gelfand

By Jane L. Cornett, Esq., Becker & Poliakoff, P.A., Stuart, Florida



Michael J. Gelfand of Gelfand & Arpe, P.A., located in West Palm Beach, served as Chair of the Real Property, Probate and Trust Law Section of the Florida Bar for the 2015-2016 term.

Michael first became involved with the Section many years ago when he was an associate working for a Palm Beach County firm. A partner in the firm had been serving on the Condominium & Planned Development Committee, then Chaired by Richard DeBoest, Sr., but was unable to attend so he sent Michael to the meeting. The meeting drew Michael's interest and soon after he had an opportunity to comment to Richard about his concerns related to some proposed legislation. Richard responded that if Michael was concerned, he should get involved and so he did. The rest is history. Michael served on the Condominium & Cluster Housing Committee as Secretary, as Vice-Chair, as Co-Chair and as the "Condo" Committee Chair before serving as Vice-Chair of the Legislative Committee. From there, in 2009, he moved forward serving as the last solo Legislative Chair before that position was split into Co-Chairs, and worked his way through the ranks of the Executive Committee to the position of Chair.

Michael's primary goal for his year as Chair of the Section was to reinforce what professionalism means to the practice of law, not just for the Executive Council but for all members of the Section. Michael also stated, "I sought to make it easy for members to participate in what the Section does." The goals were met through increased communication to Section members from the At Large Members ("ALMs"), the proliferation of ListServes for most committees, the expanded and amazing website, www.RPPTL.org, that now serves the Section, and an increased number of webinars and CLEs that are presented to Section members within days of the emergence of new and important issues. The Berlin journey was a priceless component, educating members, attendees and those who read of the journey, of the fragility of the rule of law and our duty as professionals to speak up and protect due process rights. Wrapping it together, Michael sought a shared identity for Section members by branding all efforts with the Section's "meatball" red logo and www.RPPTL.org.

When asked about the best part of serving as Chair, Michael pointed to the opportunity to see and observe how the information provided to our Section members has helped citizens, attorneys and laypersons, throughout the state. When asked about the worst part of serving as Chair, Michael mentioned the difficult position of having to say no to requests that no one else wanted to address. Michael also pointed out that the position involves a fair amount of administrative work. But, any negative aspect is more than offset by the positive interactions among the members of the Executive Council and the Section members.

Michael opined that rising through the ranks of the Executive Committee to become the Chair is a somewhat lengthy process, but that the process builds *esprit de corps* among Executive Committee Members; the leadership ladder structure removes a lot of rivalry in the process of moving up to the Chair position.

Michael could not say enough positive things about the supportive Bar staff, and the congeniality of the Section members. Michael, as many Chairs before him, emphasized that no Chair does it alone. The other officers and committee Chairs are all part of what the Section accomplishes. Michael expressed that the very, very best part of being Chair is being able to pass the Section on to the next generation of leaders with accomplishments from the past year setting the foundation for successes in the years to come.

The amount of time that any Chair devotes to serving as the Chair must be incredible. It is amazing that good folks like Michael continue to step forward, willing to accept that role. We owe an immense debt of gratitude for his service, not just this past year but also the many prior years. Welcome to the back row Michael and enjoy your well-deserved and revered position among past Chairs!

Our partner Attorneys enjoy healthy referral fees equal to their profits, and their clients get insurable title on tax deed properties quicker and cheaper than QTA.

Hold all the Aces!

You enjoy all the benefits of the client relationship, whilst we relieve the burden of executing on QTA instructions.

CALL TODAY TO DISCUSS HOW WE CAN ALL WIN!

Want to

free up time and
get valuable passive income?

Fed up with delay and hassle of QTA files?

Let us take the stress of your QTA business

cleartosell.com

1-855-680-4908
info@cleartosell.com

Friends Of The Section
2016 Regular Legislative Session

By Brittany O. Finkbeiner, Esq., Dean, Mead & Dunbar, Tallahassee, Florida

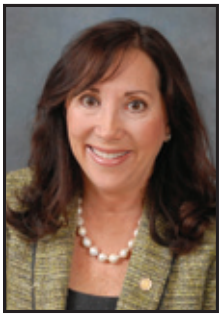
During the 2016 Legislative Session, a number of Members of the House and Senate advocated for Section initiatives in their roles as committee chairs, bill sponsors, and in debate. Following are the legislators who contributed to the success of this year's Section bills. The Section appreciates their leadership.


REP. PASSIDOMO

Rep. Kathleen Passidomo

As Chair of the Civil Justice Subcommittee, Representative Kathleen Passidomo helped to facilitate the passage of the Section's initiatives on estates and trusts and the repeal of non-resident bonds. She was also the sponsor of the clarifying provision to the elective share options for a surviving spouse.

In addition to serving as Chair of the Civil Justice Subcommittee, Representative Passidomo is Vice Chair of the Judiciary Committee, and also serves on the Insurance and Banking Subcommittee, the Transportation and Ports Subcommittee, and the Veteran & Military Affairs Subcommittee. She has been a member of the Florida House of Representatives since 2010. She is a Section member and is Board Certified in Real Estate. She is a partner in the law firm of Kelly, Passidomo & Alba, LLP in Naples. Her practice centers on real estate and corporate and business law.


REP. BERMAN

Rep. Lori Berman

Representative Lori Berman sponsored House Bill 540, which contained a number of the Section's trust and estate initiatives. She serves on the Civil Justice Subcommittee, the Finance and Tax Committee, the Health and Human Services Committee, the Joint Committee on Public Counsel Oversight, and the Rules, Calendar and Ethics Committee. Representative Berman is the Chair of the Women's Legislative Caucus and has been a member of the Florida House of Representatives since 2010.

She is an attorney and Section member who has served as in-house counsel to a federal savings bank and has practiced in the areas of commercial litigation, regulatory real estate law, and estate planning. Representative Berman has her LL.M. in Estate Planning.


REP. SPROWLS

Rep. Chris Sprowls

Representative Chris Sprowls sponsored the Section's initiative to repeal the antiquated requirement for posting of a bond by non-resident plaintiffs in a civil action. He serves as a member of the Government Operations Subcommittee, the Health and Human Services Committee, the Health Innovation Subcommittee, the Health Quality Subcommittee, the K-12 Subcommittee, and the Select Committee on Affordable Healthcare Access. He was elected to the Florida House of Representatives in 2014.

Representative Sprowls is an attorney. Before becoming a House member, he successfully prosecuted a number of high profile cases as an Assistant State Attorney for Pasco and Pinellas Counties. He is now a Special Prosecutor in the Gang Unit of the State Attorney's Office.


REP. MORAITIS

Rep. George Moraitis, Jr.

Representative George Moraitis, Jr. has been a member of the Florida House of Representatives since 2010 and has been involved in a number of successful Section initiatives. He is the Vice Chair of both the Local Government Affairs and Transportation and Economic Development Appropriations Subcommittees and serves as a member of the Civil Justice Subcommittee and the Appropriations Committee.

Representative Moraitis is a graduate of the United States Naval Academy and served in the United States Navy for seven years. During his military service, he earned the Navy Commendation Medal, Navy Achievement Medal, Navy Expeditionary Medal, and the Arctic Service Ribbon. Representative Moraitis is a Section member and practicing real estate attorney at Moraitis, Cofar, Karney & Moraitis in Fort Lauderdale.

continued, page 35


REP. ROBERSON

Rep. Ken Roberson

Representative Ken Roberson was the House sponsor for Senate Bill 80, which contained the Section's initiative to authorize Family Trust Companies to operate in Florida. He is the Chair of the Health Innovation Subcommittee and also serves on the Appropriations Committee, Government Operations Subcommittee, Health and Human Services Committee, and the Health Care Appropriations Subcommittee. He has been a member of the Florida House of Representatives since 2008 and is the current Chair of the Charlotte County Delegation.

Representative Roberson is a funeral director who holds certification as a Certified Cemetery Executive from the International Funeral and Cemetery Association. He is a former Chairman and current member of the State Board of Funeral Directors and Embalmers and a former non-lawyer member of The Florida Bar 20th Judicial Circuit Grievance Committee.


REP. MCBURNEY

Rep. Charles McBurney

Representative Charles McBurney has been integral in guiding the Section's initiatives through the process as the Chair of the Judiciary Committee. Additionally, he is the Vice Chair of the Select Committee on Redistricting, and also serves on the Appropriations Committee, the Rulemaking Oversight and Repeal Subcommittee, and the Rules, Calendar, and Ethics Committee. He has been a member of the Florida House since 2007.

Representative McBurney is a business attorney in Jacksonville. His family has a long history of public service in both the Florida House of Representatives and the United States Congress. He is the Chairman of the Duval County Legislative Delegation and former President of the Florida Association of Tiger Bay Clubs. He has received numerous awards for his public service, including The Florida Bar Business Law Section Distinguished Legislator Award and The Florida Bar Legislative Award.


REP. SPANO

Rep. Ross Spano

Representative Ross Spano was a key supporter of the clarifying provisions on the elective share during debate before the full House of Representatives. He is an attorney practicing residential and commercial foreclosure defense as well as estate planning, and estate and trust administration and litigation. He is a shareholder at the firm of Spano & Woody, P.A. in Riverview. He has been a member of the Florida House since 2012 and is Vice Chair of both the Justice Appropriations and K-12 Subcommittees. He also serves on the Criminal Justice Subcommittee, the Education Committee, and the Transportation and Ports Subcommittee.


REP. FANT

Rep. Jay Fant

Representative Jay Fant was the House sponsor for the Section's successful Digital Assets initiative, Senate Bill 494. He has been a member of the Florida House since 2014 and serves on the Criminal Justice Subcommittee, the Finance and Tax Committee, the Government Operations Subcommittee, the Insurance and Banking Subcommittee, and the Judiciary Committee.


REP. FITZENHAGEN

Rep. Heather Fitzenhagen

Representative Heather Fitzenhagen sponsored House Bill 225 on Self-Authentication of Documents. While the bill was unsuccessful this year, the Section appreciates her leadership. She is an attorney at the Fort Myers office of Morgan & Morgan, practicing in the areas of business law and securities litigation. She was elected to the Florida House in 2012 and currently serves on the Business and Professions Subcommittee, the Economic Affairs Committee, the Economic Development and Tourism Subcommittee, the Education Appropriations Subcommittee, and the Rulemaking Oversight and Repeal Committee.


SEN. HUKILL

Senator Dorothy Hukill

Senator Dorothy Hukill sponsored several successful Section initiatives and bills of interest during the 2016 Legislative Session. She was the sponsor for Senate Bill 494 on Digital Assets, Senate Bill 854 on Cremated Remains, and Senate Bill 540, which contained a number of the Section's trust and estate priorities. She has also sponsored a number of other Section bills over the years. She is the Chair of the Finance and Tax Committee, Vice Chair of the Communications, Energy, and Public Utilities Committee, and sits on the Appropriations Committee, the Banking and Insurance Committee, the Fiscal Policy Committee, and the Joint Committee on Public Counsel Oversight. She has been a member of the Florida Senate since 2012 and was a member of the Florida House of Representatives from 2004-2012. She is the former Mayor of the City of Port Orange.

continued, page 36

Senator Hukill is a practicing attorney in Daytona and a Section member. Her practice focuses on business, real estate, and probate law.


SEN. JOYNER

Senator Arthenia Joyner

Senator Arthenia Joyner has sponsored numerous Section bills over the years. She has been a member of the Florida Senate since 2006 and is the current Minority (Democratic) Leader. Prior to becoming a Senator, she was a member of the Florida House of Representatives from 2000-2006. She serves as the Vice Chair of the Appropriations Subcommittee on Criminal and Civil Justice and is also a member of the following committees: Appropriations; Health Policy; Higher Education; Judiciary; Rules; and the Joint Legislative Budget Commission.

Senator Joyner is a practicing probate attorney from Tampa. She has received a number of awards throughout her legislative career including The Florida Bar Legislative Award in 2013.


SEN. LATVALA

Senator Jack Latvala

Senator Jack Latvala sponsored Senate Bill 826, revising the Florida Mobile Home Act. He has been involved in numerous other successful Section initiatives and bills of interest during his legislative career. He is the Chair of the Appropriations Subcommittee on Transportation, Tourism, and Economic Development and also serves on the Committees on Appropriations; Commerce and Tourism; Governmental Oversight and Accountability; Regulated Industries; and Rules. He is the Chair of the Pinellas Legislative Delegation and was a member of the Florida Senate from 1994-2002 and from 2010 to the present.

Senator Latvala is the CEO of GCI Printing Services, Inc. in Largo. He is a former Senate Majority Leader and has received multiple awards for his leadership, including awards from Associated Industries of Florida and Disabled American Veterans. His son, Chris Latvala, is a current member of the Florida House of Representatives.


SEN. RICHTER

Senator Garrett Richter

Senator Garrett Richter sponsored the Senate version of the Family Trust Companies bill, Senate Bill 568. He is currently serving as the President Pro Tempore of the Florida Senate and served in the Florida House of Representatives from 2006-2008. He is the Chair of the Ethics and Elections Committee; Vice Chair of the Banking and Insurance Committee; and also sits on the Appropriations Committee; the Appropriations Subcommittee on Health and Human Services; the Commerce and Tourism Committee; the Regulated Industries Committee; and the Rules Committee.

Senator Richter is the President of First National Bank of the Gulf Coast. He served in the U.S. Army and the U.S. Air Force Reserves. Awards for his military service include the Vietnam Bronze Star and Combat Infantry Badge.


SEN. RING

Senator Jeremy Ring

Senator Jeremy Ring has sponsored multiple Section initiatives over the years. He chairs the Governmental Oversight and Accountability Committee; is the Vice Chair of the Judiciary Committee; and also serves on the Appropriations Committee; the Appropriations Subcommittee on Education; the Children, Families and Elder Affairs Committee; and the Commerce and Tourism Committee. He has been a Florida Senator since 2006.

Senator Ring is an entrepreneur from Broward County. He is the co-founder of SUPERB (Students United with Parents and Educators to Resolve Bullying) and has served on multiple boards of directors, including the Florida Ocean Sciences Institute and the National Jewish Democratic Committee.


SEN. STARGEL

Senator Kelli Stargel

Senator Kelli Stargel sponsored Senate Bill 1432 on Service of Process, which incorporated technical changes recommended by the Section. Senator Stargel has been a Florida Senator since 2012 and previously served in the Florida House of Representatives from 2008-2012. She is the Chair of the Higher Education Committee and is a member of the Appropriations Subcommittee on Education; the Fiscal Policy Committee; the Judiciary Committee; the Military and Veterans Affairs, Space, and Domestic Security Committee; the Regulated Industries Committee; and the Joint Committee on Public Counsel Oversight.

She is an investment property manager in Polk County and mother of five. She has received multiple awards for her public service, including the United States Digital Learning Association Eagle Award and the Friend of Free Enterprise Award.

continued, page 37


SEN. DIAZ DE LA PORTILLA

Senator Miguel Diaz de la Portilla

Senator Miguel Diaz de la Portilla sponsored SB 1174 on Siting Requirements for Community Residential Homes. In his role as Chair of the Judiciary Committee, he has facilitated the passage of numerous Section initiatives. Senator Diaz de la Portilla also serves on the Appropriations Subcommittee on Transportation, Tourism, and Economic Development; the Community Affairs Committee; the Finance and Tax Committee; the Regulated Industries Committee; and the Rules Committee. He is a former Miami-Dade County Commissioner and has been a member of the Florida Senate since 2010. His family has a long history of political and civic involvement in both Cuba and the United States.

Senator Diaz de la Portilla is an attorney from Miami, and is Co-Chair of his firm's Municipal & Governmental Practice Group, and a member of the firm's Property Tax Appeals and Land Use Practice Groups.


SEN. BRADLEY

Senator Rob Bradley

Senator Rob Bradley sponsored Senate Bill 396 containing the Section's initiative to repeal the antiquated requirement for posting of a bond by non-resident plaintiffs in a civil action. He also sponsored Senate Bill 352 on Self-Authentication of Documents, which did not pass.

Senator Bradley has been a Florida Senator since 2012. He chairs the Regulated Industries Committee; co-chairs the Fiscal Policy Committee; and also serves on the Appropriations Subcommittee on Criminal and Civil Justice; the Communications, Energy, and Public Utilities Committee; the Community Affairs Committee; the Criminal Justice Committee; the Reapportionment Committee; and the Joint Legislative Auditing Committee. He is a managing partner at the firm of Kopelousos, Bradley & Garrison, P.A. in Orange Park. Senator Bradley is Board Certified in City, County, and Local Government Law. His practice includes government law; civil litigation; election, campaign and political law; public finance and bonds; and zoning, planning and land use.

Senator Nancy Detert

Senator Nancy Detert sponsored Senate Bill 232 reorganizing the Statewide Public Guardianship Office, among other guardianship initiatives over the years. She is a former Sarasota County School Board member and served in the Florida House from 1998-2006 before becoming a Senator in 2008. Senator


SEN. DETERT

Detert is Chair of the Commerce and Tourism Committee; Vice Chair of the Education Pre-K-12 Committee; and is a member of the Appropriations Subcommittee on Transportation, Tourism, and Economic Development; the Banking and Insurance Committee; the Children, Families and Elder Affairs Committee; and the Joint Administrative Procedures Committee. She has received numerous honors and awards for her service, including Guardian ad Litem Children's Champion and the Florida Bar Trial Lawyers Section Champion of Justice Independence Award.


SEN. SIMMONS

Senator David Simmons

Senator David Simmons sponsored Senate Bill 1042, which made a number of amendments related to judgments, including criteria for the sale of property. He was also a key supporter of the Section's 2016 Legislative Package. Senator Simmons chairs the Rules Committee and also serves on the Appropriations Committee; the Appropriations Subcommittee on Education; the Banking and Insurance Committee; the Environmental Preservation and Conservation Committee; the Higher Education Committee; the Judiciary Committee; the Reapportionment Committee; and the Joint Legislative Budget Commission. He was a member of the Florida House from 2000-2008 and was first elected to the Florida Senate in 2010.

He is the Financial Managing Partner of de Beaubien, Knight, Simmons, Mantzaris, & Neal, LLP in Orlando. His practice includes civil litigation specializing in complex commercial matters.


B. FINKBEINER

***Ms. Finkbeiner** is an Associate in Dean, Mead & Dunbar's Tallahassee office. Her practice focuses on Real Property and Administrative law. Prior to going into private practice, Ms. Finkbeiner served as a chief attorney for the Department of Business and Professional Regulation, Division of Florida Condominiums, Timeshares, and Mobile Homes. In addition, she's worked at the Florida Department of Economic Opportunity, The Florida Senate Judiciary Committee and as a legislative aide for the Florida Senate.*

Fear Not—All May Not Be Lost (Or Removed) If The Landlord Can Obtain A *Distress Writ*

By Matthew Sackel, Shutts & Bowen, LLP, West Palm Beach, Florida[1]

In addition to an action for eviction and money damages that a commercial landlord may initiate when a tenant fails to pay rent, a landlord may additionally seek a *distress writ* from a court to secure its interest by enjoining the tenant from removing or destroying any of the tenant's valuable property in the premises. The proceeding is *ex parte* in nature and commenced by filing a verified distress for rent complaint and a distress bond.

Once the Landlord makes the decision to evict,[2] but before it initiates an action for eviction or damages, it should consider whether there is any equipment or goods on the premises that may be valuable and/or useful for attracting a new tenant.[3] Frequently landlords spend significant sums in tenant improvement allowances to provide a means for a tenant to purchase equipment for the tenant's operation. For example, a sports bar may spend significant tenant improvement allowances for purchasing refrigeration units, shelving, security systems, and expensive televisions. If the landlord simply filed an eviction action without a court order specifically requiring the tenant to leave all equipment in the premises, the tenant might try to move out in the middle of the night with the equipment. While there is a landlord's lien pursuant to Section 83.08, Florida Statutes, which provides for civil and criminal penalties when a tenant intentionally removes property from the premises, from a practical standpoint, a court order stating that the tenant cannot remove the property from the premises is a far more powerful tool.[4] Were the tenant or its employees to violate a court order, they could be held in contempt of court.

Specifically, Section 83.12, Florida Statutes (2016) and the relevant case law provide for a distress writ when the following conditions are met: (1) the writ shall not issue without judicial authorization; (2) the writ may issue only upon allegations of specific facts; (3) the party seeking to invoke a writ is required to post a bond to guarantee the tenant's interests in the event the writ was later determined to be improperly issued; (4) the tenant has the opportunity to obtain an immediate hearing to dissolve a writ; and (5) there is the opportunity for a prompt hearing on the merits, though not necessarily a pre-deprivation hearing.[5]

An ex-parte verified complaint for a distress writ typically should be filed in the circuit court (provided the value of the equipment exceeds $15,000), and the landlord must post a bond for either twice[6] the amount owed or double the amount of the estimated value of the property in order to obtain the writ, whichever is greater.[7, 8] Because a distress writ, at its core, is essentially a prejudgment writ, to understand its limits, it is important to look back at how the statute evolved into its current form.

Sections 83.11 and 83.12, Florida Statutes (2016), govern the process for a plaintiff seeking to obtain a distress writ against a defendant; however, the statutory language has been amended over time. Section 83.12 evolved from a statute with minimum requirements and procedural safeguards into its current version after the Florida Supreme Court determined in *Phillips v. Guin & Hunt, Inc.* that Sections 83.11 and 83.12 were unconstitutional.[9] The *Phillips* court heavily examined the United States Supreme Court's treatment of prejudgment statutes and reiterated the balancing test required to determine a prejudgment statute's constitutionality. The court in *Phillips* pointed out that early courts frequently upheld the interests of creditors by upholding prejudgment statutes; however, once the American economy grew more dependent on credit, courts began to reevaluate the rights and duties of interested parties.

The *Phillips* Court held a proper balancing occurs when: (1) a judge is satisfied that the writ should issue; (2) the party seeking to invoke state action posts a bond to guarantee the interests of the creditor; and (3) there is a full hearing as to the right of possession without undue delay, which does not need to occur before the actual deprivation of property.[10] Ultimately, the *Phillips* Court found the aforementioned statutes unconstitutional on their face because: (1) they did not provide the right to a hearing promptly after the issuance of the writ or even before the property is levied upon; and (2) they did not require that either a judicial officer or a clerk to make an independent factual determination that the statute has been complied with to issue the writ.[11]

The *Phillips* Court also established the proper interpretation of the statute governing service of process required for distress writs. The Court held that Section 83.13, Florida Statutes (1977) allowing for service of process by posting notice of the writ "if the defendant cannot be found," was constitutional, but was applied unconstitutionally by the county court.[12] The *Phillips* Court determined that the statute should have been interpreted so that the provision stating "if defendant can be found" includes the entire state of Florida and not just the county in which the property is located.[13] Therefore, the *Phillips* Court determined that Section 83.13 was constitutional provided the search for the defendant before posting notice of the writ included the entire state of Florida.[14]

In response to the Court in *Phillips*, which found Sections 83.11 and 83.12 to be unconstitutional, the Florida Legislature amended Sections 83.11 and 83.12, and added Section 83.135, Florida Statutes in 1980. Section 83.11 was amended to require that the complaint be verified and that it allege the name and relationship of the defendant to the plaintiff and how the

continued, page 39

obligation arose.[15] Section 83.12 was amended to require that the distress writ be issued by a judge as opposed to a clerk of court, and Section 83.135 was added to provide tenants with the right to move for a dissolution of the writ at any time.[16]

A commercial tenant challenged the statute's constitutionality in 1992 in *Goodman v. Brasseria La Capannina*.[17] In *Goodman*, the landlord complied with the statute's requirements by filing a two-count verified complaint against the tenant, who operated a restaurant on the premises, for breaching its lease by failing to timely pay rent and other charges due.[18] The trial court held an *ex parte* hearing and issued the distress writ so the sheriff could serve the writ on the tenant. Since the tenant operated a restaurant on the premises, it filed a motion to modify the writ to exclude food and alcohol in order to keep the restaurant operating. Two days later, although the trial court held an emergency hearing at which the tenant's motion to modify the distress writ was denied and bond was set for the tenant to pay to repossess the distrained property, the tenant was unable to pay the bond and the distress writ remained in effect. A month later, the trial court denied the tenant's motion to dissolve the distress writ and rejected its arguments that the statute was unconstitutional. The tenant appealed the trial court's decision and the Fourth District Court of Appeal found Section 83.12 unconstitutional on its face as violative of due process requirements because it failed to provide the presiding judge with the discretion required by *Phillips* for an impartial factual determination about whether or not to issue the distress writ.[19]

The Florida Supreme Court reversed the Fourth District Court of Appeal and interpreted the language of Section 83.12, Florida Statutes (1992) to mean the judge's required factual determination consists of: (1) determining whether a verified complaint meets the requirements of the statute; and (2) determining whether it alleges a *prima facie* case. Furthermore, the *Goodman* Court construed Section 83.12's language stating that "a distress writ shall be issued by a judge" as merely identifying the individual with the authority to issue a distress writ and not restricting the judge's discretion to make the required determination.[20]

The Florida Supreme Court in *Goodman* recognized that Section 83.12 was constitutional because it granted a judge the authority to make the required impartial factual determination that the complaint was verified, it met the requirements of Section 83.11 and it alleged a *prima facie* case for obtaining a distress writ. The *Phillips* Court effectively articulated the purpose of the distress writ as a preliminary procedure designed to stop a tenant from acting in bad faith by destroying or alienating the property and, thus, harming the landlord's interest. Providing notice and opportunity to be heard before issuing a distress writ could destroy its very purpose since both would effectively warn the tenant of the landlord's intention to place a lien on its property and give the tenant time to act in bad faith.[21]

In *Goodman*, the Court noted that the "issuance of that writ may substantially deprive the tenant of its property interest, even though the sheriff has yet to levy on the property."[22] Therefore, the *Goodman* Court created an exception to its holding by requiring an adversarial hearing on a tenant's motion to dissolve a distress writ in cases where the writ effectively deprives an entity of its ability to operate its business. Because the writ in these cases constitutes an "immediate and substantial deprivation of property," the adversarial hearing must be held as soon as reasonably possible so the court may consider all relevant matters put forth by the tenant in a motion to modify or dissolve the writ. Furthermore, the landlord will have the burden of proving probable cause that the writ is justified at such hearing.[23]

Accordingly, while a prejudgment distress writ can be a powerful means of ensuring that valuable fixtures, goods and equipment are not removed from the premises and can provide the landlord with significant leverage in a dispute, the courts have found the statute to be constitutional only if the landlord adheres to the specific statutory procedures and requirements.



M. SACKEL

***Matthew Sackel** is a partner in the West Palm Beach office of Shutts & Bowen LLP, where he is a member of the Business Litigation Practice Group.*

Endnotes

1 Joleen East, a rising 3L at University of Florida Law School, assisted with the research and drafting of this article.

2 Summary Procedure is governed by Fla. Stat. § 51.011 (2016).

3 Fla. Stat. § 51.011 (2016).

4 *See* Fla. Stat. § 83.08 (2016).

5 *See Phillips v. Guin & Hunt, Inc., 344 So. 2d 568, 571-72 (Fla. 1977).*

6 *See* Fla. Stat. §83.12 (2016) and G*oodman v. Brasseria La Capannina, Inc.*, 602 So.2d 1245 (Fla. 1992). Before issuing a distress writ, the court must determine whether the verified complaint meets the statutory requirements and whether it alleges a *prima facie* case that the tenant may damage or dispose of property or remove property.

7 Fla. Stat. § 83.12 (2016).

8 *See Phillips*, 344 So.2d at 570 (stating that landlord posted a bond for twice the value of the property sought to be levied upon as required to balance the interests of the parties).

9 *Phillips, 344 So.2d 568.*

10 *Id.*

11 *Id.*

12 *Id.* at 573.

13 *Id.*

14 *Id.*

15 Section 83.11 (1980), Section 83.12 (1980), Section 83.15 (1980).

16 *Id.*

17 *Goodman*, 602 So.2d 1245 (Fla. 1992).

18 *Id.* at 1246.

19 *Id.*

20 *Id.* at 1248.

21 *Id. at 1247.*

22 *Id. at 1248.*

23 *Id.*

Leasing Rules And Pitfalls For Buyers Of Residential Real Estate

Prepared by Christopher A. Sajdera, Sajdera Kim, PLLC, Boca Raton, Florida

Real estate practitioners who are advising their clients on the purchase of a residential property within a community that has either a condominium association or homeowners association should carefully examine all use and rental restrictions and other monetary obligations in an association's governing documents. They should also examine all rulemaking authority that allows the association to adopt new rules governing the owner's use of the property. Such associations often possess rule-making authority in their governing documents that can alter the use restrictions of an owner's property. Buyers should understand that certain uses of their property may be changed by these rules. Upon purchasing the property, the buyer is placed on notice of this authority.

A recent decision highlighted the importance of evaluating rules that affect leasing restrictions. Community associations cannot adopt rules that expressly contradict the rights stated in the association's declaration. However, there is varying, wide-ranging authority provided to associations on this topic, and the plain language of the declaration must provide express rights to the owners. In a recent decision, *Le Scampi Condominium Association, Inc. v Hall*, Case No. 2D15-3208 (Fla. 2d DCA 2016), the court found a leasing restriction rule to be enforceable as the rule does not expressly contradict the governing documents. In the declaration, the leasing section did not expressly create an "unrestricted" right to lease, sell, or transfer units to persons who are not family members, as the declaration had in another section for family members. Because of this, the association prohibited a lease where the owners sought to lease their unit for less than one month and without prior approval to persons who were not family members. The association cited the rule recorded in the declaration as its stated restriction. The owners argued that the rule was unenforceable since it contradicted their unrestricted right to lease their unit. The court found that the trial court erred in its interpretation of the plain language of the declaration that the rule contradicted an unrestricted right to lease the unit. The court held that the plain language of the section did not expressly provide an unrestricted right to sell, lease or transfer a unit to parties other than family members. The court reasoned that since the language in the declaration did not expressly provide such a right that the trial court could not determine such a right existed. As such, the court determined that no conflict existed between the rule and language of the declaration. In applying the principle of statutory construction, *expression unius est exclusion alterius*, the court further explained that the declaration specifically granted an unrestricted right to the sale, lease, and transfer of units for family members, but that same right was not specifically provided for persons other than family members. The granting of the right in one section does not imply the same right for another section.

Due to this recent decision, real estate practitioners must be mindful of recorded rules and regulations—particularly evaluating how the rules may apply to rights on transferring property.

Ethics Questions?

Call The Florida Bar's Ethics Hotline **1-800-235-8619**

If You Aren't Properly e-Serving Your §57.105 Motion, It May Not Be Enforceable

By Jennifer L. Grosso, Esq., Bentley & Bruning, P.A., Sarasota, Florida

In my practice, I have been fortunate that I haven't had to send many motions pursuant to Section 57.105, Florida Statutes. This statute allows sanctions to be imposed against a party, and that party's attorney, for raising claims and defenses not supported by the facts or the law. Subsection (4) of Section 57.105, Florida Statutes, provides:

> A motion by a party seeking sanctions under this section must be served but may not be filed with or presented to the court unless, within 21 days after service of the motion, the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected.

This is essentially a warning, giving the offending party an opportunity to withdraw the claim before being subject to a motion for sanctions. Historically, a party seeking the remedies under Section 57.105, Florida Statutes, may have simply sent a letter to opposing counsel by mail or email, attaching the proposed motion. However, upon the institution of mandatory electronic filing in Florida in 2013, this approach falls short.

The Fourth District Court of Appeal looked at the application of the electronic filing requirements to the service of a motion pursuant to Section 57.105, Florida Statutes, in *Matte v. Caplan*, 140 So. 3d 686 (Fla. 4th DCA 2014). In *Matte*, the Fourth District affirmed the denial of a motion for fees sought as a sanction pursuant to Section 57.105, Florida Statutes, because the email that served the motion did not strictly comply with Rule 2.516 of the Florida Rules of Judicial Administration. Rule 2.516 requires that service must be by email, and must: (1) provide a PDF copy of the motion or a link to the motion on a website maintained by the clerk; (2) contain, in the subject line in all capital letters, the words "SERVICE OF COURT DOCUMENT," followed by the case number; and (3) contain, in the body of the email, the case number, name of the initial party of each side, title of each document served with that e-mail, and the sender's name and telephone number. The court held that Section 57.105, Florida Statutes, requires strict compliance with the service statute before fees may be awarded, even if the recipient receives the motion and has actual notice of same. Since the sender in *Matte* did not meet the specific e-mail service requirements in Rule 2.516, attorney's fees could not be awarded as a sanction pursuant to the Section 57.105, Florida Statutes motion.

Hopefully you won't find the need to send a 21-day "warning" to opposing counsel pursuant to Section 57.105, Florida Statutes; but if you do, make sure you strictly comply with the e-mail service requirements of Florida Rule of Judicial Administration 2.516 as set forth above. Substantial compliance is not sufficient. If the service requirements are not met, the motion is not enforceable.



Probate And Trust Case Summaries

Prepared by Jennifer L. Grosso, Esq., Bentley & Bruning, P.A., Sarasota, Florida

If a settlor revokes or amends trust under "any other method" provision of Section 736.0602(3)(b)(2), Florida Statutes, including by a will that does not expressly name the prior trust, then settlor's intent must be established by clear and convincing evidence.

Bernal v. Marin, 2016 WL 3265760 (Fla. 3d DCA 2016).

In 2004, Renee Maria Zintgraff, as settlor, executed the Renee Maria Zintgraff Revocable Living Trust u/a/d October 15, 2004 ("Trust"), naming herself as the initial trustee and her cousin, Marin, as the successor trustee. Zintgraff specifically reserved her right to revoke the Trust during her lifetime, but the Trust did not provide a method for revocation. Four years later, Zintgraff met with an attorney and executed her Last Will and Testament ("Will"), appointing Bernal as her personal representative and devising all of her tangible personal property and residuary estate to Bernal. The Will includes language that she was "revoking all other wills, trust and codicils previously made by me," but the Will did not specifically refer to the Trust by name.

Marin, the trustee, filed a complaint seeking a temporary injunction and a declaratory judgment finding the alleged revocation of the Trust in the Will was ineffectual, so that the Trust remained valid. The trial court granted Marin's motion for summary judgment and entered a Final Declaratory Judgment in Marin's favor, concluding that because the Will did not specifically name or expressly refer to the Trust, the Will did not revoke the Trust. Bernal appealed the summary judgment.

In a matter of first impression, the Third District Court of Appeal analyzed the interpretation of Section 736.0602(3), Florida Statutes. This section provides for the revocation or amendment of a revocable trust by the settlor in three circumstances: by substantial compliance with a method provided in the terms of the trust; or, if the terms of the trust do not provide a method, by either "1. a later codicil or will that expressly refers to the trust or specifically devises the property that would otherwise have passed according to the terms of the trust; or 2. Any other method manifesting clear and convincing evidence of the settlor's intent." It was undisputed the Trust did not provide a method for revocation. It was also undisputed the Will did not expressly refer to the Trust or expressly devise the property that would otherwise have passed according to the Trust. Therefore, the analysis focused on the third option – whether Zintgraff undertook any other method manifesting clear and convincing evidence of her intent to revoke the Trust. The trial court found that the "any other method" of revocation did not include a will that failed to expressly name the Trust or specifically devise the property. The Third DCA disagreed.

In its analysis, the Court reasoned that the first two options allow for the amendment or revocation of a trust almost automatically, without any evidence of the settlor's intent. However, the third option is available any time the other two options are not triggered, and therefore, requires the proponent to not only prove intent, but to do so by clear and convincing evidence. This would include proving that the settlor intended to revoke her trust, even by way of a will that did not specifically name the trust. The Court concluded the purpose of Section 736.0602(3), Florida Statutes, is to reduce the burden of establishing a revocation or amendment of a trust if the trust provides for the method to revoke or amend or if a later will or codicil complies with the specific requirement of Section 736.0602(3)(b)(1), Florida Statutes; and to increase the burden when neither of these methods is available by requiring clear and convincing evidence of a settlor's intent.

In the case, the Will was not the only evidence of Zintgraff's intent. The record evidence also included the deposition testimony of the drafting attorney and an affidavit of Zintgraff's close friend, both of whom asserted Zintgraff intended to revoke the prior trust and leave everything to Bernal. The Third DCA concluded the trial court erred by not considering this evidence. As such, the Final Declaratory Judgment was reversed, and the matter was remanded to the trial court for further proceedings.

Statements of claim must be filed electronically; paper submissions to the Clerk are not sufficient, except in very specific circumstances.

United Bank v. Estate of Edward G. Frazee, 2016 WL 3745512 (Fla. 4th DCA 2016).

United Bank ("Bank") appealed an order declining to find that it timely filed statements of claim as a creditor in the probate administration of the *Estate of Edward G. Frazee*. The Bank was served with a notice to creditors on April 11, 2013. Under Section 733.702(1), Florida Statutes, the Bank's deadline to file a claim was May 15, 2013. The Bank's attorney, who was located

continued, page 43

in West Virginia but was a member of the Florida Bar, mailed two statements of claim to the Clerk of Court by certified mail. The Clerk received the claims on May 14. After the Clerk notified the Bank of the requirement to file electronically, the Bank electronically filed the statements of claim on May 23. Therefore, unless the court would deem the claims as having been filed on May 14 when the Clerk received the paper filing, the claims would be time-barred. The Bank moved the trial court to find the claims as timely filed. The trial court declined, striking the claims.

In upholding the trial court's order, the Fourth District Court of Appeal examined Rule 2.520 of the Rules of Judicial Administration which provides, "[a]ll documents filed in any court shall be filed by electronic transmission." The court found Rule 2.520 is not ambiguous. Therefore, a statement of claim, even if submitted in paper, is not filed unless it is electronically submitted or falls within one of the exceptions to electronic filing. An unauthorized attempt to make a paper filing does not fit within the exceptions. Moreover, since the late filing was due to the negligence or lack of knowledge by a licensed Florida attorney, justice did not require the court to allow for the paper filing. The trial court's order striking the claims as untimely was therefore affirmed.

The relation back doctrine applies to validate a notice to creditors that was published one day prior to the appointment of the personal representatives.

Richard v. Richard, 2016 WL 2340787 (Fla. 3d DCA 2016).

One day prior to the court's order appointing them as co-personal representatives, the co-personal representatives signed and published the first notice to creditors. The decedent's spouse, while attempting to assert a claim under a prenuptial agreement, argued the notice to creditors was null and void because it was not published by a duly appointed personal representative as required under Florida law, due to the fact that the co-personal representatives were not appointed until the day after the notice was published. She argued the relation back doctrine did not apply because Section 733.601, Florida Statutes, expressly provides only that a personal representative's powers relate back, but does not provide for the relation back of a personal representative's duties. The spouse argued the publication of the notice to creditors is a duty, not a power, so the notice to creditors was premature. The trial court agreed.

The Third District Court of Appeal looked to the language of Section 733.601, Florida Statutes, which provides, "[t]he duties and powers of a personal representative commence upon appointment. The powers of a personal representative relate back in time to give acts by the person appointed, occurring before appointment and beneficial to the estate, the same effect as those occurring after appointment." The court reasoned that while the statute provides that the powers relate back in time, the same sentence goes on to clarify that they relate back to give acts by the person appointed the same effect as those occurring after appointment. Therefore, it is the acts of the person later appointed that are granted the same effect as those occurring after appointment, as long as the acts are beneficial to the estate.

The court further held that the Legislature included the word "duties" in the first sentence, but not the second, to avoid imposing a statutory duty upon a person to act on behalf of the estate prior to appointment as personal representative. To do so might lead to unintended consequences where a personal representative might be deemed to have a duty to do certain acts, even prior to decedent's death. Having clarified the difference in the two sentences of Section 733.601, Florida Statutes, the Third DCA concluded the relation back doctrine applies to the personal representative's act of publishing the notice to creditors since it was for the benefit of the estate. The order of the trial court was reversed, and the case was remanded.

Court cannot impose a fee award against a person beyond what may be paid from his or her share of the estate, except in limited circumstances.

Anderson v. McDonough, 189 So. 3d 266 (Fla. 2d DCA 2016).

Appellant appealed a final order requiring him to pay fees and costs to his mother's estate following an unsuccessful will contest. The fee award was granted pursuant to Section 733.106, Florida Statutes, even though the appellant did not receive anything from the estate. The Second District Court of Appeal held that Section 733.106, Florida Statutes, does not authorize the imposition of a fee award beyond what may be paid from his or her share of the estate, and does not create personal liability for attorney's fees.

The estate argued the fee award was a sanction for bad faith litigation. The court disagreed, finding that the estate did not properly invoke Section 57.105, Florida Statutes, and that the inequitable conduct doctrine did not apply, where the estate never served appellant with a 57.105 motion, and where the case was not so clear cut so to render the litigation a matter of bad faith, even though the appellant lost his will contest. As a result, the court reversed the fee award in its entirety.



The Practice Resource Institute

The Florida Bar's most comprehensive resource for running your law practice.

The Florida Bar's Practice Resource Institute is designed to help Florida lawyers with law office operations and to assist members' use of technology. This new digital resource is available on The Florida Bar's website, where members can:

The Florida Bar Practice Resource Institute
PRI
Promoting Excellence in the Profession

- Live chat with PRI practice management advisors and receive answers in real time.
- Explore comprehensive lists of law office technology, tools, and resources.
- Check out new providers and services in the Bar's Member Benefits program.
- Access shareable electronic tools, web-based archives of articles, blog posts, and podcasts.
- Sign up to be notified of the latest updates.



www.floridabar.org/PRI

Real Property Case Summaries

Prepared by Christopher A. Sajdera, Sajdera Kim, PL, Boca Raton, Florida

A real estate broker was held liable for her agent's fraudulent nondisclosure to a buyer in the real estate purchase where the agent knew of facts that materially affected the value of the property and did not disclose the facts to the buyer.

Goodman v. Rose, 2016 WL 2744975 (Fla. 4th DCA 2016).

The seller of a home served as his own real estate agent in this transaction, and the seller, as the real estate agent, was affiliated with a broker. In the completion of the sale, the seller completed disclosure documents stating that he had no knowledge of any defects in the home. After the closing, the buyer discovered many defects that materially affected the value of the property, which were not readily observable and not known to the buyer. The buyer sued both the seller and his real estate broker since the seller acted as a real estate agent and was affiliated with the real estate broker. The trial court entered an order granting summary judgment for the broker.

The Fourth District Court of Appeal reversed the trial court decision, holding that the trial court did not take the facts in the light most favorable to the non-moving party, and thereby, summary judgment should not have been entered in favor of the real estate broker since the seller, as the agent of the broker, imputed liability to the real estate broker. As such, the seller knew of the facts that materially affected the value of the property and failed to disclose them. The duty of disclosure announced in *Johnson v. Davis* extends to a real estate broker. The broker, as the principal, is liable for the tortious acts of its agent (here, the seller), despite the acts being fraudulent, since the acts are within the scope of an agency relationship. Any information that was withheld or failed to be disclosed was done during the scope of the agent attempting to sell the property, and the broker has an interest in the sale and will earn a commission from the completed sale.

The trial court erred in imposing an equitable lien in favor of the plaintiff lender whose unsecured loan proceeds were used to pay off a note and mortgage held by another lender where the plaintiff lender failed to establish that its loan proceeds unjustly enriched the defendant lender.

Wichi Management LLC v. Masters, 2016 WL 2340743 (Fla. 3d DCA 2016).

Wichi Management LLC, as the mortgagee, filed an action for foreclosure of the mortgage and the note of Masters, the mortgagor. Masters had been held in default on different occasions, and subsequently, resolved each of the defaults. During the various defaults and settlements, Masters entered into a series of promissory notes with R & L, and failed to repay the loans resulting in final judgment against Masters. The R & L promissory notes were not secured by any security interest, including the real property that was the subject of the litigation between Wichi and Masters. In March 2013, R & L sought to intervene in the Wichi foreclosure, in an effort to assert an equitable lien based on the argument that its interests would be affected by the foreclosure because at least a portion of the proceeds Masters received from R & L had been used to pay Wichi's past due amounts and to bring the mortgage current. The trial court granted the motion to intervene. Thereafter, the trial court, despite Wichi's objection, granted a summary judgment for R & L asserting an equitable lien against Wichi's mortgage and note based on the fact that payments for the Wichi mortgage were made from proceeds of the R & L notes.

The Third District Court of Appeal reversed, granting a motion for summary judgment because R & L could not prove entitlement to the equitable lien. First, no written contract, or evidence of one, demonstrated intent to subject the real property as a security interest. Second, evidence did not support granting the equitable lien based on the conduct of the affected parties. To warrant an action for an equitable lien, the funds used must be directly traceable to the property in question, causing an unjust enrichment. The evidence showed that neither Wichi nor its predecessor had knowledge that the source of Masters' payment was from funds from the R & L note. Further, the court reasoned that Wichi did not communicate or make any representations, or exhibit any other conduct, which would justify an equitable lien. As a result, R & L failed to demonstrate how Wichi was unjustly enriched by the funds provided to Masters. Masters owed a debt to Wichi and Wichi's predecessor and a payment was made on that debt. The fact that Masters applied the funds from the note provided by R & L does not create an entitlement to the equitable lien.

Article X, Section 4 of the Florida Constitution did not preclude an action for specific performance when both spouses signed the contract and agreed to the remedy in the contract.

continued, page 46

Mirzataheri v. FM East Developer, LLC, 2016 WL 1039124 (Fla. 3d DCA 2016).

The sellers entered into a contract with a buyer to sell their homestead property. After the buyer completed inspections and notified the sellers of its willingness to proceed forward with the purchase of the property, the sellers chose not to proceed with the closing. The buyer sued for specific performance and damages for breach of contract. The buyer also filed a notice of lis pendens against the property. After filing an answer, the sellers filed a motion for summary judgment on the buyer's claim for specific performance and filed an emergency motion to discharge the lis pendens. The trial court granted the sellers' motion for summary judgment finding that specific performance was not an available remedy and denied the emergency motion.

The Third District Court of Appeal quashed the trial court's order on the motion for summary judgment finding that Article X, Section 4 of the Florida Constitution did not apply to actions for specific performance, and specific performance can be used to enforce contracts for the sale of homestead property, and affirming the order denying the motion to discharge the lis pendens. The sellers contend that Article X, Section 4 of the Florida Constitution precludes an action for specific performance to enforce a contract based on the homestead status of the property, in applying the *Taylor v. Maness* decision. However, the court did not extend *Taylor* to this case since both spouses signed the contract to sell the homestead property; the buyer paid a deposit and was ready, willing, and able to close on the property; and the contract provided for the specific performance as a remedy. The court reasoned that, in this case, specific performance is an agreed-upon sale, and not a forced sale in violation of Article X, Section 4. As such, specific performance is not precluded by Florida's Constitution as a remedy to enforce a contract for the sale of homestead property where the contract is executed by both spouses.

Contractor was precluded from bringing an action on a recorded lien transferred to a surety bond, even though suit had been filed on such lien, because the contractor failed to commence an action on the transfer bond within the requisite 60-day period.

Hiller v. Phoenix Associates of South Florida, Inc., 189 So. 3d 272 (Fla. 2d DCA 2016).

Phoenix entered into an oral contract to complete construction work on Hiller's home. After Hiller failed to pay, Phoenix recorded a claim of lien on Hiller's property for the amount due on the contract. Thereafter, Phoenix filed a complaint to foreclose on the lien, breach of contract, and unjust enrichment. After Phoenix commenced the action on the lien, Hiller transferred the lien to a surety bond removing the lien from the property. Hiller then filed a notice to contest the lien shortening the time within which Phoenix could commence the action on the transfer bond to sixty days. Despite receiving notice of the transfer of the lien and notice of contesting lien, Phoenix failed to commence an action on the transfer bond within the shortened 60-day period. After the period expired, Phoenix moved to amend the complaint in the pending action to name the surety of the transfer bond in the pending action on the lien. Since the 60-day period had expired, Hiller filed a motion to release the transfer bond. The trial court denied the motion to release the transfer bond finding that the suit to enforce the lien was timely filed and the delay in joining the surety did not prejudice the surety.

The Second District Court of Appeal reversed the trial court's ruling finding that Phoenix had an obligation to commence suit on the transfer bond and surety within 60 days after the filing of the notice to contest lien secured by the transfer bond, despite the fact that Phoenix had commenced an action on the lien recorded against the property. The court found that the construction lien must be strictly construed. As such, Section 713.24, Florida Statutes, permits an owner to transfer a lien from his encumbered property to a surety bond, thereby releasing the claim on the property. Further, Section 713.22(2), Florida Statutes, allows an owner to shorten the time period to commence an action against the surety by filing a notice to contest lien. The court determined that the lien on the property was extinguished and transferred to the surety bond. Thereafter, Phoenix failed to file suit naming the surety and the transfer bond within 60 days, thereby extinguishing the right to foreclose on the lien or the surety bond. The fact that suit was pending on the lien on the property did not excuse Phoenix from the obligation to comply with requirements on the statute relating to the transfer bond and the certain time-period restrictions. Further, in 2005, the legislature added the requirement to file an action on a surety bond within one year from the date of transferring the lien to the surety, unless the time is shortened by the notice to contest lien. The court determined that Phoenix was not prejudiced because the action against the transfer bond could have been timely filed.

Landlord was precluded from bringing an action against his tenant because the rights to any claims relating to damage to the premises had been assigned to landlord's foreclosing lender pursuant to the terms and conditions of the mortgage.

Artiles v. Pino, 184 So. 3d 607 (Fla. 3d DCA 2016).

The landlord's property was in mortgage foreclosure when a fire occurred at the property. At the time of the fire, the property was insured by the lender's forced-placed insurance.

continued, page 47

Pursuant to the lender's forced-placed insurance, the insurance carrier paid the lender the proceeds for the fire damage to the property. In 2011, the landlord brought an action against the tenant for allegedly negligently starting the fire that damaged the property. The insurance carrier also sought to subrogate its rights against the landlord's claim to the tenant and the tenant's insurance carrier. In May 2012, the landlord and lender settled the pending foreclosure action, and as part of the settlement the lender agreed to waive any deficiency judgment against the landlord and exchange mutual releases, and the landlord agreed that the lender was entitled to the insurance proceeds from the fire. In the landlord's negligence action against the tenant, the trial court granted a motion for summary judgment finding that the landlord assigned his rights to additional damages against the tenant to the lender in the negotiated settlement with the lender from the mortgage foreclosure.

The Third District Court of Appeal affirmed the trial court's order granting summary judgment by holding that the landlord could not bring an action to recover damages against the tenant for any related claim to the property because the landlord assigned the rights to the lender. The court reasoned that the landlord could not prevail on a cause of action where his rights were assigned to another party. Section 11 of the mortgage stated that all miscellaneous proceeds were assigned to the lender, and that the proceeds would be used to repair the property or to satisfy the mortgage. Since all proceeds qualified under this section, the court found that the landlord assigned to the lender the landlord's rights to any damages against the tenant. Further, since the settlement of the foreclosure action provided that the landlord would not contest the foreclosure, the landlord, pursuant to the terms and conditions of the mortgage, further assigned his rights to all insurance proceeds to the lender effective as of the time the lender forecloses on the property. Finally, the court rejected the landlord's argument that any mediated settlement agreement modified the mortgage because the settlement agreement did not modify the terms of the assignment.

Evaluated for professionalism
Tested for expertise…
Board certified lawyers are legal experts dedicated to professional excellence.
ARE YOU READY FOR THE CHALLENGE?
DO YOU KNOW…Board Certification CLE credit hours are now available for viewing online. Visit www.floridabar.org/certification and click "*Check Your Board Certification CLE Credits*" to view and print a record of your current certification credit hours.

THE Florida BAR PODCAST
LISTEN FOR FREE:
www.floridabar.org/PRI
iTunes
iHeart RADIO
LEGAL TALK NETWORK
SOUNDCLOUD
Listen to on-demand educational interviews and stay on top of what's happening with The Florida Bar.
Download The Legal Talk Network Apps:
Available on the App Store
Get it on Google play
LEGAL TALK NETWORK
www.legaltalknetwork.com











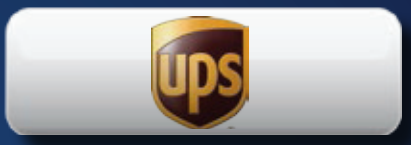






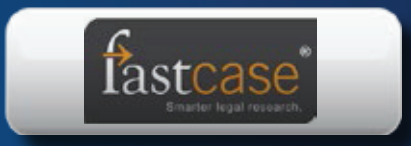




















Are you getting the most from your Member Benefits?

Visit

www.floridabar.org/memberbenefits

for a complete list of member benefits

Florida Lawyers Support Services, Inc.
Post Office Box 568157 - Orlando, Florida - 32856-8157 (407) 515-1501 Fax (407) 515-1504 www.flssi.org

FR/BAR CONTRACTS & RIDERS

FOR THE SALE AND PURCHASE OF RESIDENTIAL PROPERTY

Approved by The Florida Bar, Real Property, Probate & Trust Law Section and The Florida Realtors

_____ Set(s) of 10 FR/BAR CONTRACTS (Revised February 2016) **$50.00 per set**

_____ Set(s) of 10 FR/BAR "AS IS" CONTRACTS (Revised February 2016) **$50.00 per set**

_____ Package(s) of FR/BAR COMPREHENSIVE RIDERS (Revised September 2015) **$50.00 per package**
(*a package is ten copies of each rider listed below*)

Condominium Rider
Homeowners' Association/Community Disclosure
Seller Financing (Purchase Money Mortgage; Security Agreement to Seller)
Assumption of Existing Mortgage(s)
Federal Housing Administration (FHA)/U.S. Department of Veterans Affairs (VA)
Appraisal Contingency
Short Sale Approval Contingency
Homeowner's/Flood Insurance
Interest-Bearing Account
"As Is"
Right to Inspection and Right to Cancel
Defective Drywall
Coastal Construction Control Line
Insulation Disclosure for New Residence

Lead-Based Paint Disclosure (Pre-1978 Housing)
Housing for Older Persons
Rezoning Contingency
Lease Purchas/Lease Option
Pre-Closing Occupancy by Buyer
Post-Closing Occupancy by Seller
Sale Of Buyer's Property
Back-Up Contract
Kick Out Clause
Sellers's Attorney Approval
Buyer's Attorney Approval
Licensee Disclosure of Personal Interest in Property
Binding Arbitration

Order Sub-Total	$_____
Sales Tax 6.5%	$_____
Shipping & Handling	$ 9.00
TOTAL	**$_____**

Firm:_____

Attn:_____ Attorney Bar #: _____

Street Address:_____ (WILL NOT DELIVER TO P.O. BOX)

City/State/Zip:_____

PLEASE CIRCLE ONE: COMMERCIAL or RESIDENTIAL Address

Phone: (_____)_____ Fax: (_____)_____

E-mail address:_____

METHOD OF PAYMENT

I have enclosed check #_____, in the amount of $_____

OR

Please Circle One: VISA or MASTER CARD Amount to be charged $_____

_____ _____/_____ _____
Card Number Exp. Date Signature of Cardholder (REQUIRED)

Billing Address:_____ _____
Print Name

ACTION LINE MARCH 2016

Florida Lawyers Support Services, Inc.
PO Box 568157 - Orlando, Florida - 32856-8157 407.515.1501 Fax 407.515.1504 www.flssi.org

PROBATE & GUARDIANSHIP FORMS

The FLSSI forms are developed by members of the Real Property, Probate and Trust Law Section of The Florida Bar. **Forms carry the Supreme Court required 3" x 3" blank square for Court Clerk's use. Probate Judges prefer and some require the use of 2016 FLSSI forms.**

Firm: _____

Attorney Name: _____ **Attorney Bar #:**_____

Physical Address: _____

City/State/Zip: _____

Phone: (_____)_____ E-mail Address: _____

2016 PROBATE FORMS

OPTION #1	**2016 FORMS AND INDEX - .PDF ON DISK**	**$390.10**
OPTION #2	**2016 FORMS AND INDEX - 1 PHYSICAL COPY OF EACH**	**$410.20**
OPTION #3	**2016 NEW & REVISED FORMS ONLY - .PDF ON DISK**	**$178.30**

2016 GUARDIANSHIP FORMS

OPTION #1	**2016 FORMS AND INDEX - .PDF ON DISK**	**$347.10**
OPTION #2	**2016 FORMS AND INDEX - 1 PHYSICAL COPY OF EACH**	**$367.20**
OPTION #3	**2016 NEW & REVISED FORMS ONLY - .PDF ON DISK**	**$214.30**

If you would like to order individual forms, please visit www.flssi.org to download our "long" order form which lists each form for separate purchase.

==========

METHOD OF PAYMENT

Either mail this form with check to the address listed above or include credit card information and fax to 407.515.1504. Prices include shipping, handling and sales tax. **VISA or MasterCard Only.**

$ _____ _____ ____/____ _____

Charge **Card Number** **Exp. Date** **Signature of Cardholder**

_____ _____

Credit card billing address (If different from shipping address above) **Printed Name of Cardholder**

==========

FLSSI USE ONLY

Check # _____ $ _____ Authorization date ____/____/2016 # __ __ __ __ _____

SHIP DATE _____/_____/2016 LB_____ $_____ # ___ ___ ___ ___ ___ ___ ___ ___

AL 2016

What's Happening Within The Section...

As one of the largest sections of The Florida Bar, the RPPTL Section provides numerous opportunities to meet and network with other attorneys who practice in real property and probate & trust areas of the law, whether through getting involved in one of the various RPPTL Section committees or attending a RPPTL Section sponsored CLE course. Members have access to a wealth of information on the RPPTL Section website, including up-to-date news and articles regarding case law and legislative changes, publications such as ActionLine, upcoming RPPTL Section sponsored CLE courses, and a whole host of relevant links to other Real Property, Probate & Trust Law websites.

Additionally, the Section is working on human resource pages where searches can be done for out-of-state licensed Section members, law students available for clerkships or special project assistance, and other classifications. Further, each Section committee has listservs that discuss issues and current hot topics available to committee members.

SCHEDULE

2016 EXECUTIVE COUNCIL MEETINGS

OCTOBER 5 – OCTOBER 9, 2016

Executive Council Meeting

The Walt Disney World BoardWalk Inn • Lake Buena Vista, Florida*
Reservation Link: http://disneyurl.com/TheFloridaBarRealPropertyProbateTrustLaw
Room Rate: $249 (single/double occupancy) – SOLD OUT*

DECEMBER 7 – DECEMBER 11, 2016

Executive Council Meeting

The Westin Resort and Marina • Key West, Florida
Reservation Link: https://www.starwoodmeeting.com/events/start.action?id=1510057567&key=1AFAC12C
Room Rate: $279 (single/double occupancy) – SOLD OUT*

FEBRUARY 22 – 25, 2017

Out of State Executive Council Meeting

Four Seasons Hotel • Austin, TX
Reservation Link: http://www.fourseasons.com/austin/
Room Rate: $299 (single/double occupancy) – SOLD OUT*

** To be added to the waitlist for this event, please email Whitney Kirk at wkirk@floridabar.org*

Be sure to include in the email the nights for which reservations are needed and your full contact information.

2016 CLE SCHEDULE:

Check the RPPTL Section website www.rpptl.org under the CLE tab's dropdown menu for topics, dates and locations for upcoming CLE seminars. Check The Florida Bar website www.floridabar.org/CLE for detailed information as it becomes available.

For the most up-to-date information on Section activities, visit the Section website (www.rpptl.org) or The Florida Bar's website (www.floridabar.org).

The Florida Bar
651 East Jefferson Street
Tallahassee, FL 32399-2300

PRSRT-STD
U.S. POSTAGE
PAID
TALLAHASSEE, FL
Permit No. 43

Scan here for instant access to the Section website.

ACTIONLINE BULLETIN BOARD

FinCEN

has expanded its GTOs.

For more information

Go to www.rpptl.com.

BE AWARE

of email phishing/malware schemes affecting **Florida Bar members**

See Florida Bar website for additional information.

SAVE THE DATE!

For the **10th Annual Construction Law Institute**

March 16-18, 2017, at the JW Marriott Orlando Grande Lakes

PRACTICE CORNER:

Don't miss these short tips to assist in your practice.

See page 40-41.

Sign up for Probate Division CLE

Don't miss the Estate and Gift Tax and Asset Protection Committees joint seminar on December 1, 2016 in Fort Lauderdale

SAVE THE DATES!

"Risk Management Series"

brought to you by the Insurance and Surety Committee

Noon-1:00 p.m. on the third Monday of each month from October, 2016 through January, 2017

If you are working on an interesting case or legal issue that you'd like to turn into an article for *ActionLine*, we would love to publish it for you! No article is too small or too large. (Submission information is on page 4.)