

ActionLine

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

Is it Time to Expand Florida's Slayer Statute?

A Lawyer's Obligation to Protect Confidential Client Information in the Digital Age

The Engagement Letter and the Residential Real Estate Attorney

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Chair's Column

By Michael Gelfand
Section Chair, 2015- 2016

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How does all this happen? The RPPTL Section Chair stands on the shoulders of others: officers; committee chairs; committee members; and Section members. They do seem to be having a good time, but they are also hard workers.

The secret? Those regularly engaged in other Bar activities and volunteer organizations point out that one significant "secret" to success is not a secret, but is there for all to see - our process of selecting leaders. The "leadership ladder" is spelled

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Blue Heron on the lookout at Tampa Bay.

Photo by John Neukamm

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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 Silvia Rojas at srojas@thefund.com. Deadlines for all submissions are as follows:

ISSUE	DEADLINE
Spring	January 31
Summer	April 30
Fall	July 31
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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.

out in the RPPTL Section Bylaws, downloadable at www.RPPTL.org and also found in the Executive Council Membership Directory.

The leadership selection process is not quick. It is deliberative, detailed, and yes, at times frustrating with the time-consuming complexity of balancing professionals' abilities and organizational needs. Yes, there are still processes where fast is not best!

Do you want to be a leader? Continued, consistent performance is the key! Members of the Executive Committee and the Long Range Planning Committee observe over time, taking notice of those who write articles, those who speak at seminars, those who draft proposals, those who contribute to committee efforts. Thoughtful dissent and respectful discussion is revered. Simple "Yes Men" nodding heads are not sought. Leadership is built on those who reach out, conveying information to their peers, showing aptitude at organizing and leading, questioning respectfully to others, and doing it all in a positive, mentoring fashion.

The leadership ladder begins with the membership as a whole. Officially, most committee chairs and vice chairs are appointed by the Incoming Section Chair. Section Officers, and Division Directors are appointed by the Long Range Planning Committee composed of past Chairs of the Section.

At the start of the RPPTL year, every July 1, the formal process begins anew as leadership casts it net far and wide, seeking input for the next year's selection process. The Executive Committee comprised of the Chair, Chair-Elect, Immediate Past-Chair, Division Directors, Treasurer, Secretary and the CLE and Legislative Committees Co-Chairs solicit recommendations. Usually in January the Executive Committee meets for a full day evaluating who is at the top of their practice, and making recommendations to the Chair-Elect and the Long Range Planning Committee.

Illustrative of the success of the leadership ladder design, observe that the past Section Chairs do not show up just for Executive Council meetings. Nearly all are active, participating day in and day out. By way of example, note the two most recent past chairs' involvement: Immediate Past Chair **Michael Dribin,** continues as a member of the Executive Committee serving as an important archive and providing guidance; and, Michael's immediate predecessor, Past Chair **Margaret "Peggy" Rolando,** enthusiastically accepts requests to serve on committees, reviews materials and provides needed counsel. All of their predecessors are always available on a moment's notice for consultation, and frequently to their credit, they anticipate issues and are there before you ask.

Of course, Section Administrator **Mary Ann Obos**' return must be appreciated and recognized. She brings a practical, efficient touch with thoughtful foresight to ensure event successes.

As I pass the torch of leadership to Chair-Elect **Debra Packer Goodall**, I express my sincere appreciation and gratitude to her for her efforts to help ensure that this year has been a success for not only my chairmanship, but also for all RPPTL Section members. Despite her busy schedule, practice and family raising two great children who you see at our meetings regularly and are a part of the Section family with her husband Gadget, Debbie always has a very knowledgeable, practical approach and touch.

To Debbie: The past year has been great working with you, as has been the near decade that we have served with each other on the Executive Committee. I am proud to be your colleague and friend. 2016-17 shall be a great success under your leadership!

In these changing times, I urge the Section not to be stagnant but all rise to the RPPTL's challenge - stand up and be counted. Observing our responsibilities beyond the edge of our desk, or the walls of our offices, remember the ancient but still evocative call to action:

If I am not for myself, who will be for me?
But if I am only for myself, who am I?
If not now, when?

Jump in! Get involved! Do it again! You will have a great and fulfilling experience participating as a RPPTL! Continue to pick up the phone and call, or send a message and say hello.

Have a great summer!

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Is it Time to Expand Florida's Slayer Statute?

By Jeffrey A. Baskies and Justin M. Savioli, Katz Baskies & Wolf PLLC, Boca Raton, Florida[1]

Florida's Slayer Statute[2] has stood on the books virtually unchanged over the past 40 plus years. It has literally been untouched for over 30 years, except for its adoption in the Florida Trust Code. While the public policy expressed by the statute (that a killer ought not to be entitled to inherit from the estate of the one murdered) has not changed during those years, a number of ancillary issues relating to the statute have led other states to expand their Slayer Statute in interesting ways. Given the new and interesting issues being addressed by other state Slayer Statutes, and the 30-40 plus year hiatus in revising Florida's Slayer Statute, it seems time to reconsider the statute and possibly expand its scope and reach.

Some commentators have suggested most state Slayer Statutes do not go far enough by failing to remove the rights of the collateral heirs (e.g., children) of the killer to inherit. Other commentators have questioned the wisdom of Slayer Statutes in existence today. Some argue the reach of these statutes extends too far, ensnaring individuals that should not be deprived of their inheritance rights.[3] For example, should someone who kills in self-defense or by reason of insanity be precluded from inheriting? And yet, other commentators argue that Slayer Statutes should also remove the inheritance rights of someone who has engaged in elder abuse or financially exploited the decedent.[4]

Many commentators suggest that if the Florida Slayer Statute is re-examined, there are at least three questions that should be considered:

(i) Should collateral heirs of the killer be permitted to inherit?

(ii) Should self-defense or mental illness be considered by the Slayer Statute?

(iii) Should the category of those punished by the statute be expanded to deny inheritance rights to those who commit elder abuse or exploitation upon the deceased?

Collateral Beneficiaries/Heirs – Should they be excluded by the Slayer Statute?

Florida's Slayer Statute clearly severs the rights of a murderer to inherit from the victim under a will, joint tenancy, and/or contractual arrangement (including beneficiary designation). However, the current statute does not address the rights of the collateral beneficiaries/heirs. The statute reads in pertinent part:

732.802 Killer not entitled to receive property or other benefits by reason of victim's death.—

(1) A surviving person who unlawfully and intentionally kills or participates in procuring the death of the decedent is not entitled to any benefits under the will or under the Florida Probate Code, and the estate of the decedent passes as if the killer had predeceased the decedent. Property appointed by the will of the decedent to or for the benefit of the killer passes as if the killer had predeceased the decedent.

(2) Any joint tenant who unlawfully and intentionally kills another joint tenant thereby effects a severance of the interest of the decedent so that the share of the decedent passes as the decedent's property and the killer has no rights by survivorship. This provision applies to joint tenancies with right of survivorship and tenancies by the entirety in real and personal property; joint and multiple-party accounts in banks, savings and loan associations, credit unions, and other institutions; and any other form of coownership with survivorship incidents.

(3) A named beneficiary of a bond, life insurance policy, or other contractual arrangement who unlawfully and intentionally kills the principal obligee or the person upon whose life the policy is issued is not entitled to any benefit under the bond, policy, or other contractual arrangement; and it becomes payable as though the killer had predeceased the decedent.

(4) Any other acquisition of property or interest by the killer, including a life estate in homestead property, shall be treated in accordance with the principles of this section.

(5) A final judgment of conviction of murder in any degree is conclusive for purposes of this section. In the absence of a conviction of murder in any degree, the court may determine by the greater weight of the evidence whether the killing was unlawful and intentional for purposes of this section.

This same slayer rule is similarly applied to sever a murderer's beneficial interests in revocable trusts under § 736.1104, F.S. (2015). Yet again, the statute applies to the murderer, not to collateral heirs of the murderer. As quoted above, the Slayer Statute is limited to severing the rights of a surviving person who unlawfully and intentionally kills another (i.e., the killer). In that event, the murderer is treated as predeceasing the victim. However, there is no mention of excluding anyone other than the murderer from a will, trust, joint account or otherwise.

Consider the following scenarios:

A. If a wife kills her husband and his will leaves his entire estate to his wife or if she predeceases to his children (or generically to persons who may be considered the natural objects of his bounty), is it sufficient for the Slayer Statute to treat only the wife as predeceased?

B. If a wife kills her husband and his will leaves his entire

estate to his wife or if she predeceases to her children (or generically to persons who may not be considered the natural objects of his bounty), is it sufficient for the Slayer Statute to treat only the wife as predeceased?

In Scenario A, a Slayer Statute that "only" disinherits the slayer/spouse is probably adequate. But in Scenario B, that same statute perhaps fails to accomplish its policy and purposes in the majority of cases.

The Fourth District Court of Appeal considered Scenario B in *Fiel v. Hoffman,*[5] also known as the Ben Novack, Jr. case, and held that Florida's Slayer Statute only disinherits the slayer/murderer (in this case, the wife) and not the other beneficiaries (the wife's children) even if they were not the natural objects of the victim's bounty. The Fourth DCA noted there may be public policy issues exposed by the facts of the case, but declined to "legislate" a result, relying instead on the plain meaning of the statute.

Facts of the *Fiel* case

The underlying case that led to this appeal is the ongoing and fascinating probate of Ben Novack, Jr ("Ben"), an heir to the fortune of the developer of the iconic Fontainebleau hotel on Miami Beach. Ben Novack, Sr. was the primary developer and initial operator of the Fontainebleau hotel until it was lost in bankruptcy in 1977.

Ben was murdered in a particularly gruesome and sordid manner in July, 2009. Details of his torture and murder made national news. After Ben's murder, a subsequent investigation into the prior death of his mother, Bernice Novack, revealed that she too was murdered, although her death in April, 2009, was initially ruled accidental.

In 2012, Ben's wife, Narcy Novack, was convicted of the crimes and sentenced to life in prison for paying hitmen to torture and kill her husband and mother-in-law, Ben and Bernice.

In this probate case, Ben's wife, Narcy, had been treated as predeceased by the application of the Florida Slayer Statute,[6] which prohibits a murderer from inheriting from the estate of the person she killed. However, the alternate beneficiaries of Ben's will, if Narcy and his mother predeceased him, were Narcy's daughter, May Abad (who of course was also Ben's step-daughter), receiving a pecuniary bequest and trusts for May's children Marcello and Patrick (Narcy's two adult grandsons) as the residuary beneficiaries.

Two of Ben's cousins, Meredith and Lisa Fiel, who (according to the Fourth DCA's holding) were beneficiaries under Ben's prior will (the "2002 Will") sued to invalidate the probated, last will (the "2006 Will") alleging: (a) the 2006 Will was the product of undue influence and (b) the Slayer Statute should be applied to exclude not only Narcy as a beneficiary under the 2006 Will, but it should also exclude her daughter and grandchildren (which would then leave the disposition in the 2006 Will invalid and thus either the estate would pass to the cousins as heirs at law or under the prior 2002 Will). The trial court dismissed the two claims, and the two issues were heard on appeal by the Fourth DCA.

The Fourth DCA overturned the dismissal of the undue influence claims, and thus the cousins may still ultimately prevail in the case. However, the Fourth DCA upheld the dismissal of the cousins' claims under the Slayer Statute.

The Fourth DCA held the Slayer Statute was clear and the court had no discretion to disinherit anyone other than the murderer (there, the wife/spouse/Narcy). The appellate panel indicated its hands were tied due to the unambiguous statute. Further, the opinion noted, it is the purview of the legislature to address whether or not to expand the Slayer Statute's reach. Thus, the Fourth DCA didn't say the statute shouldn't be expanded to disinherit collateral beneficiaries as well as the murderer, but in its ruling, the court said it couldn't hold that way under the statute as it was presently constituted.

The holding seems to invite discussion of legislation to address the collateral heirs/beneficiaries issue.

Discussion

Today, nearly all states have some sort of Slayer Statute or common law doctrine prohibiting a murderer from inheriting from his or her victim's estate.[7]

Slayer Statutes were enacted to fill the gap created when English common law doctrines of attainder, forfeiture and corruption of blood were not carried over into the American legal system.[8] Florida has a similar statute, which prohibits a surviving spouse from directing how the remains of his or her spouse are to be disposed if the surviving spouse has been arrested for committing an act of domestic violence against the deceased (as defined under§ 741.28, F.S., that resulted in or contributed to the death of the deceased).[9]

However, a gap still exists regarding whether it ought to be the public policy to disinherit collateral beneficiaries, at least those who are not also related to the victim. Ben Novack's case also highlights why discussions of this issue are so difficult.

On the one hand, since Ben's wife, Narcy, murdered him, she is treated as predeceasing Ben; however, to some it is odd that Narcy's descendants (the children and grandchildren of the murderer) may walk away with Ben's entire estate. This result may be difficult to accept when considering Narcy's daughter and grandchildren were not Ben's child and grandchildren and were not adopted or otherwise related to Ben.

On the other hand, however, based on the statements of Carl Schuster (Ben's estate planning counsel), Ben had genuine affection for May and her children. Further, Ben very explicitly did not want to leave anything to his cousins (the Plaintiffs seeking his entire estate). Thus, if the Slayer Statute had been expanded to automatically disinherit Narcy's daughter and grandchildren, it appears that result would have been inapposite to Ben's real intentions. It seems fair to wonder

if Ben's assertions (even to his estate planning attorney) regarding his intentions for his estate might have been different if he knew that Narcy would murder him.

The bottom line is that there are a lot of assumptions that would have to be made if the Slayer Statute was to be expanded to cover collateral heirs. Had the deceased actually known all of the facts, what would the deceased have done in his or her will? Perhaps that is impossible to discern or assume. Or perhaps that is just the type of public policy decision the legislature should be making.

The bottom line is that there are a lot of assumptions that would have to be made if the Slayer Statute were to be expanded to cover collateral heirs.

In *Fiel v. Hoffman*, citing to prior Florida case law on the Slayer Statute, the Fourth DCA refused to extend the Slayer Statute's reach to other beneficiaries of the estate plan. In its holding, the Fourth DCA approvingly quoted from *In re Estate of Benson*[10]*:*

> We have no difficulty in rejecting appellant's contention that there exists a public policy in Florida that would extend Florida's Slayer Statute so as to disinherit the natural and/or statutory heirs of a killer who except for his murderous act would have been a beneficiary of his victims' estates. We find the statutory language clear and unambiguous. If there is to be declared in Florida such a public policy as appellant urges, it must be accomplished by a legislative amendment to the Slayer Statute and not by a pronouncement of this court. . . . It is difficult to advance a credible argument as to any ambiguity in the statute or how the legislature could have more clearly spoken. It is the 'surviving person who . . . kills' who is prohibited from benefiting from the act of killing. The statute clearly states without any exceptions that the property of the decedent 'passes as if the killer had predeceased the decedent.'

While the issue of a killer's heirs inheriting is not necessarily a new one, perhaps the *Fiel* case offers the Florida Bar and legislature a valid reason to give the issue a fresh look - which seems to be invited by the Fourth DCA.

Indeed, while the Slayer Statute may be clear and unambiguous, and thus the results in the *Benson* and *Fiel* cases may be proper (based on the law as it presently exists), should the public policy be revisited in light of their holdings? Does it make sense that heirs of the murderer should inherit from the victim's estate?

To make the facts simpler, suppose a man's will (let's call him Joe) left a pecuniary bequest to his children and the residue of his estate to his friends and caregivers, Bob and Betty Jones, husband and wife, or all to the survivor of them. If it later turns out Betty killed Joe by slowly poisoning him, and as a result she is treated as predeceased by the Slayer Statute, should public policy permit Joe's entire estate to pass Betty's spouse, Bob, instead of Joe's children? Or should public policy presume the bequest was conditioned on Joe's belief that Bob and Betty were helping him, and if Joe knew Betty was instead killing him, then Joe likely would not have benefited either of them in his plan?

At a minimum, this issue seems worthy of some consideration by the RPPTL Section of the Florida Bar and perhaps ultimately by the Florida legislature if it is deemed appropriate that the state's public policy should be revisited.

Collateral Beneficiaries Issue Exists in Many States

This is not a uniquely Florida issue, as several other states have similar statutes. If the Florida statute is to be expanded, there are models worthy of consideration. The Fourth DCA notes the appellants cited several cases from other states with laws that may be more progressive on this issue.

According to the decision, the appellants cited to state Slayer Statutes and cases in Rhode Island, Indiana and Illinois, all of which precluded stepchildren from inheriting where their parent was the killer.[11]

The Fourth DCA quoted from the Rhode Island Act, which in pertinent part provides that "[n]either the slayer *nor any person claiming through him or her* shall in any way acquire any property or receive any benefit as the result of the death of the decedent, but the property shall pass as provided in this chapter." Quoting *Swain v. Estate of Tyre ex rel. Reilly*,[12] the court held that the Rhode Island statute precluded stepchildren of the deceased from inheriting from her, when their father was charged with her murder, and the children stated that they would use their inheritance to pay for their father's criminal defense.

The Fourth DCA also cited to an Illinois case, *In re Estate of Mueller*,[13] noting the Illinois Slayer Statute provides that a slayer should not receive "any property, benefit, or other interest by reason of the death, whether as heir, legatee, beneficiary... or in any other capacity ...." In *Mueller*, the court construed this language as prohibiting the slayer/wife's children from their share of her husband's estate, because the wife could receive a benefit in her capacity as guardian of her minor child.[14]

Perhaps the slayer statutes in Rhode Island, Indiana or Illinois offer helpful examples.

Public Policy Implications: Should Slayer Statutes Exclude Those Who Commit Murder in Self-Defense or Because of Mental Illness?

If an abused spouse (or child) takes the life of the abuser in self-defense, should that spouse or child be deprived of the right to inherit from the victim's estate?

A similar question arises if the wrongdoer committed the act as the result of mental illness. Would a parent want to deprive their mentally ill child of any funds to pay for mental health treatment?

While these issues are not addressed in *Fiel*, and one may think these cases would be rare, at least one commentator believes them prevalent enough that they need to be addressed.[15]

Bright line rules have the benefit of creating clear results. Unfortunately, in an effort to ensure that individuals like Narcy Novack (or her heirs) do not inherit for their wrongdoing, these rules can also trap individuals who were not contemplated at the time of enactment. For this reason, perhaps it makes sense to also give a court discretion to avoid a manifest injustice

Thus, one option might be to adopt a bright-line test, but also add a provision to the Slayer Statute allowing a court to disregard the statute if the preponderance of the evidence indicates application of the statute would cause a manifest injustice. That's an approach worthy of consideration.

Public Policy Implications: Should Slayer Statutes Exclude those who commit Elder Abuse and Exploitation?

Although this issue was also not presented in *Fiel*, a subject worthy of consideration is whether or not to expand the class of persons triggering the exclusions of the Slayer Statute beyond those who have killed (murderers).[16]

For example, recently eight states have expanded their Slayer Statutes to broaden the categories of persons triggering the statute beyond murderers, to cover those who abused or financially exploited a decedent.

In 2009, the state of Washington expanded its Slayer Statute to disqualify heirs who are "abusers" and took advantage of a vulnerable adult. The obvious intention of the legislation was to protect victims from financial exploitation and abuse.

The states that broadened their Slayer Statutes to apply to abusers are: Arizona, Oregon, California, Illinois, Kentucky, Maryland, Michigan and Washington. Some of these states require only financial exploitation (Arizona, Maryland and Washington), while others require both physical and financial abuse (Oregon, California, Illinois, Kentucky, and Michigan).

Some states also do not require a criminal conviction, but only require clear and convincing evidence of abuse (California and Washington); whereas the other states require a criminal conviction as a basis for triggering the disqualification of the Slayer (and abuser) Statutes.

The public policy of most (if not all) states has long held that a killer should not inherit from the victim's estate, based on a theory that the wrongdoer shouldn't benefit from his or her wrongdoing. Now that eight states have already done so, perhaps it is time for Florida to consider expanding the class of wrongdoers who are disinherited by statute to include various forms of financial abuse and exploitation of vulnerable seniors.

A way to ameliorate the potentially harsh results of such an expansion of the Slayer Statute is to consider also adopting a statutory "escape clause" allowing a court not to apply the Slayer Statute if the preponderance of the evidence indicates application of the statute would cause a manifest injustice.

Conclusion

Developments in other states as well as interesting Florida cases such as the *Fiel* case should lead the Florida Bar to review the current Slayer Statute and consider if some expansion and modernization is in order. Any expansion of the statute should also consider the addition of an option for a court to avoid the application of the statute if the preponderance of the evidence indicates application of the statute would cause a manifest injustice.

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Endnotes

1 A prior and quite different article on this subject was published in Leimberg Information Systems, Inc. (LISI) as a Newsletter. That newsletter has been significantly altered in this article but to the extent any text is shared with that article, it is republished with permission of Steve Leimberg.

2 § 732.802, F.S. (2015).

3 *See* Carla Spivack, *Killers Shouldn't Inherit from Their Victims – Or Should They?*, Georgia L. Rev. 145 (2013).

4 Jennifer Piel, JD, MD, *Expanding Slayer Statutes to Elder Abuse*, J. Am. Acad. of Psychiatry Law, Vol. 43, No. 3, p. 369-76 (2015).

5 169 So. 3d 1274 (Fla. 4th DCA 2015).

6 § 732.802, F.S. (2015).

7 *See* Ala. Code § 43-8-253 (2015); Alaska Stat. Ann. §13.12.803 (West 2015); Ariz. Rev. Stat. Ann. §14-2803 (2015); Ark. Code Ann. §28-11-204 (West 2015); Cal. Prob. Code §§250-258 (West 2016); Colo. Rev. Stat. Ann. §15-11-803 (West 2015); Conn. Gen. Stat. Ann. §45a-447 (West 2015); Del. Code Ann. tit. 12, §2322 (West 2015); D.C. Code §19-320 (2016); Fla. Stat. Ann. §732.802 (West 2015); Ga. Code Ann. §53-1-5 (West 2015); Haw. Rev. Stat. Ann. §560:2-803 (West 2015); Idaho Code Ann. §15-2-803 (2016);755 Ill. Comp. Stat. Ann. 5/2-6 (West 2015); Ind. Code Ann. §29-1-2-12.1 (West 2016); Iowa Code Ann. §633.535 (West 2015); Kan. Stat. Ann. §59-513 (West 2015); Ky. Rev. Stat. Ann. §381.280 (Baldwin 2015); La. Civ. Code Ann. art. 946 (West 2015); Me. Rev. Stat. Ann. tit. 18-A, §2-803 (West 2015); Mass. Gen. Laws Ann. ch. 265, §46 (West 2016); Mich. Comp. Laws Ann. §700.2803 (West 2016); Minn. Stat. Ann. §524.2-803 (West 2015); Miss. Code Ann. §91-1-25 (West 2015); Mo. Ann. Stat. §461.054 (Vernon 2015); Mont. Code Ann. §72-2-813 (West 2015); Neb. Rev. Stat. §30-2354 (West 2015); Nev. Rev. Stat. Ann. §41B.200 (West 2015); N.J. Stat. Ann. §§3B:7-1.1 to 7-7 (West 2015); N.M. Stat. Ann. §45-2-803 (West 2015); N.Y. Est. Powers & Trusts Law §4-1.6 (McKinney 2015) (only applies to joint accounts); N.C. Gen. Stat. Ann. §§31A-3 to A-12 (West 2015); N.D. Cent. Code §30.1-10-03 (West 2015); Ohio Rev. Code Ann. §2105.19 (Baldwin 2015); Okla. Stat. Ann. tit. 84, §231 (West 2015); Or. Rev. Stat. Ann. §§112.455-112.555 (West 2015); 20 Pa. Cons. Stat. Ann. §§8801-8815 (Purdon 2016); R.I. Gen. Laws Ann. §§33-1.1-1 to 33-1.1-16 (2015); S.C. Code Ann. §62-2-803 (West 2015); S.D. Codified Laws §29A-2-803 (West 2015); Tenn. Code Ann. §31-1-106 (West 2015); Tex. Stat. and Code Ann. §201.058 (Vernon 2015) (only applies to insurance); Utah Code Ann. §75-2-803 (West 2015); 14 Vt. Stat. Ann. §322 (West 2015); Va. Code Ann. §64.2-2501 (West 2012); Wash. Rev. Code Ann. §11.84.010-11.84.020 (West 2016); W. Va. Code Ann. §42-4-2 (West 2015); Wis. Stat. Ann. §§852.01(2m), 854.14 (West 2015); Wyo. Stat. Ann. §2-14-101 (West 2015). Common-law Slayer Rules exist in Maryland, see *Price v. Hitaffer*, 165 A. 470 (Md.1933) and *Cook v. Grierson*, 845 A.2d 1231 (Md. 2004); Missouri, see *Perry v. Strawbridge*, 108 S.W. 641, 648 (Mo. 1908); and New York, see *Riggs v. Palmer*, 22 N.E. 188, 190-91 (N.Y. 1889).

8 *See* Alison Reppy, *The Slayer's Bounty – History of Problem in Anglo-American Law*, 19 N.Y.U. L. Q. Rev. 229, 232-33 (1942).

9 *See* § 497.005(37), F.S. (2015). Note, this statute only appears to apply if the decedent's body is with a funeral home.

10 548 So. 2d 775 (Fla. 2d DCA 1989).

11 The court cited to the Appellants' brief noting they relied on several cases from other states which concluded that their Slayer Statutes precluded stepchildren from inheriting. *See Swain v. Estate of Tyre ex rel. Reilly*, 57 A.3d 283, 292-94 (R.I. 2012); *Heinzman v. Mason*, 694 N.E.2d 1164, 1167-68 (Ind.Ct.App.1998); *In re Estate of Mueller*, 275 Ill.App.3d 128, 211 Ill.Dec. 657, 655 N.E.2d 1040 (1995).

12 57 A.3d 283 at 291 (R.I. 2012).

13 655 N.E.2d 1040, at1043 (Ill. App. 1 Dist. 1995).

14 *Id.* at 1046.

15 *See* Carla Spivack, *Killers Shouldn't Inherit from Their Victims – Or Should They?*, Georgia L. Rev. 145 (2013).

16 "Expanding Slayer Statutes to Elder Abuse" by Jennifer Piel, JD, MD, in the Journal of the American Academy of Psychiatry and the Law, 43:369-76, 2015.

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Tortious Interference with an Expectancy Plus The Wrongful Act Doctrine Equals Attorneys' Fees for Probate Litigants

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A. FEIN

Our clients are living longer than ever, often spending decades as retirees. With increased life expectancy comes a longer period of possible mental decline and susceptibility to financial exploitation. Such exploitation can take the form of undue influence by family members, or outright theft by caregivers or other predators. After the death of a financially exploited senior, their rightful heirs and beneficiaries can be faced with lengthy and costly litigation against the wrongdoer to recover the ill-gotten gains. Often, such claims are abandoned because of the expense of pursuing them, namely, the attorneys' fees. However, there is a little-used theory in Florida jurisprudence that may provide an entitlement to attorneys' fees for such probate litigants: The Wrongful Act Doctrine.[1]

The Wrongful Act Doctrine

Like Homestead, the Wrongful Act Doctrine is a bit of a legal chameleon. It has been characterized as one of the very few exceptions to the "American Rule" which holds that all parties to civil litigation pay their own attorneys' fees unless recovery from the opposing party is authorized by statute or contract.[2] It is alternatively viewed as a theory of damages, providing a measure of damages to a wronged party that includes attorneys' fees incurred as a result of the tortious or wrongful conduct of a third party.

A logical starting point for an understanding of the Wrongful Act Doctrine (hereafter "the Doctrine") is Section 914(2) of the Restatement (Second) of Torts, which states:

> One who through the tort of another has been required to act in the protection of his interests by bringing or defending an action against a third person is entitled to recover reasonable compensation for loss of time, attorney fees and other expenditures thereby suffered or incurred in the earlier action.[3]

The first appearance in Florida's jurisprudence of the Doctrine was in *Milohnich v. First National Bank of Miami Springs*.[4] In reviewing the sufficiency of a complaint for breach of contract, the Third District stated:

> [W]here the breach of a contract has forced one of the contracting parties to maintain or defend an action against a third person, he is entitled to recover from the party breaching the contract attorney fees and any other expenses incurred in the prior litigation.[5]

Seven years later, the first definitive statement of the Doctrine also emanated from the Third District in *Canadian Universal Insurance Company v. Employers Surplus Lines Insurance Company*,[6] where the court stated,

> The general rule of law is that where the wrongful act of the defendant has involved the claimant in litigation with others or placed him (or her) in such relation with others as makes it necessary to incur expenses to protect his interest, such costs and expenses, including attorney's fees, should be treated as the legal consequences of the original wrongful act and may be recovered as damages.[7]

Since then, the Doctrine has been accepted and recognized by each of Florida's District Courts of Appeal.[8] Interestingly, the Doctrine is entirely a creature of the District Courts of Appeal, having never been discussed by the Florida Supreme Court in a published opinion.

Many other states also recognize the Doctrine, but there is great divergence over what to call it. Hawaii calls it the "Wrongful Act" exception to the American Rule.[9] Indiana, Minnesota and Oregon call it the "Third-Party Litigation" exception.[10] Missouri calls it the "Collateral Litigation" exception.[11] California and Wyoming call it the "Tort of Another" exception.[12] Washington calls it the "ABC Rule".[13] Colorado calls it the "Wrong of Another Doctrine" and even recognizes it as its own independent cause of action.[14]

The essence of the Doctrine requires that in order for there to be a recovery of attorneys' fees, these fees must have been incurred in litigation with a third-party other than the wrongdoer. The attorneys' fees incurred by the wronged-party are treated as damages recoverable by the wronged-party against the wrongdoer, i.e., tortfeasor.

The Underlying Tort: Intentional Interference with the Expectancy of an Inheritance

The tort of Intentional Interference with the Expectancy of an Inheritance also originated in the Third District Court of Appeal. In *Allen v. Leybourne*,[15] Chief Judge Hendry wrote for the Court that

> It is our opinion that when there is an allegation that the testator had a fixed intention to make a bequest in favor of the plaintiff and there existed a strong probability that this intention would have been carried out but for the wrongful acts of the defendant there exists a cause of action.[16]

Over time, the courts have recognized four elements of the cause of action: (1) the existence of an expected inheritance; (2) intentional interference with the expectancy through tortious conduct by the tortfeasor; (3) causation; and (4) damages.[17] The Restatement (Second) of Torts added this cause of action in 1979:

> One who by fraud, duress or other tortious means intentionally prevents another from receiving from a third person an inheritance or gift that he would otherwise have received is subject to liability to the other for loss of the inheritance or gift.[18]

In addition, the Florida cases have recognized a *de facto* fifth element to the cause of action: exhaustion of probate remedies. In order to recover under the tort, the claimant must show that they have exhausted their available probate remedies, or conversely, that the available probate remedies are inadequate to provide complete relief.[19] The tort is not limited to expectancies created by a will. The tort can be based upon any testamentary expectancy, whether created by a revocable trust or other non-probate mechanism.[20]

The Legal Crossroads

It is at the crossroads of the Wrongful Act Doctrine and the tort of Intentional Interference with an Expectancy where we may find the entitlement to attorneys' fees for a probate litigant. A litigant seeking to recover fees will apply a two-step legal strategy in which he or she will initially litigate the substantive claim with the third-party holding a disputed asset. If successful in recovering the disputed asset from the third-party, the litigant will then sue the wrongdoer for Intentional Interference, and include the attorneys' fees from the first suit as an element of damages in the second suit. Let's now examine a few common scenarios for a probate litigant:

Accounts with JTWROS, POD or TOD Designations. An unscrupulous tortfeasor may procure a beneficiary designation on a bank account, or have herself or himself added as a co-owner with rights of survivorship, through an exercise of undue influence or duress upon a senior with diminished capacity. Indeed, most estate planners have probably encountered this in their practice, in the form of an overreaching caregiver or an aggressive relative of an elderly client, who accompanies their frail target to the bank and causes them to change a beneficiary designation or account title.

In a case where the titling or beneficiary designation on an account has been wrongfully manipulated, the claimant would bring suit against the bank or other financial institution maintaining the account, seeking a declaratory adjudication concerning the questionable account document. If successful against the neutral third-party, the attorneys' fees for such effort would then be sought from the tortfeasor in a separate tort action for Intentional Interference.

Life Insurance or Annuity Death Benefit. In the case where a beneficiary designation on a life insurance policy or annuity has been wrongfully changed, a claimant would sue the insurance company in contract or for a declaratory judgment, seeking payment of the death benefits. Indeed, in such a scenario, the insurance company may in fact interplead the contested proceeds, joining all competing claimants and providing the predicate third-party litigation for the probate claimant. If successful, the claimant would then sue the tortfeasor for the attorneys' fees incurred in the litigation with the insurance company.

IRA, 401(k) or Other Retirement Benefit. Similarly, in the case where a beneficiary designation on an IRA, 401(k) or other retirement plan has been changed, a claimant would sue the custodian of the account or the plan sponsor to set aside or void the objectionable designation, and enforce the earlier, valid designation. The successful beneficiary would then sue the tortfeasor for the attorneys' fees incurred in suing the custodian or plan sponsor.

Traditional Will Contest. The Doctrine may even be of use in a traditional will contest. The challenger of a last will and testament, of course, must initially seek relief from the probate court, by either objecting to the initial probate of the will, or seeking revocation of probate after the initial admission. The contest will proceed by way of an adversary proceeding before the probate court under the Florida Probate Rules. The Personal Representative, acting on behalf of the Estate, will necessarily be a respondent in the proceeding, as will other interested persons (beneficiaries) who will be impacted by the outcome. If successful in setting aside the will, the contestant/challenger will be entitled to recover attorneys' fees, *but only* from the assets of the Estate.[21] While the fee recovery could be charged against the remaining beneficial share of the Estate (if any) inuring to the party wrongfully procuring the invalidated will, the contestant's fees may not be awarded directly against the wrongdoer.

Such a fee recovery from the Estate may not provide complete relief to a successful challenger. It would not be unusual for a tortfeasor to procure a will leaving the tortfeasor all of the testator's estate, and replacing a prior will which left everything to the contestant, and nothing to the tortfeasor. A successful will contestant would reinstate the earlier will, become sole beneficiary of the estate, and eliminate the tortfeasor's interest in the estate. A recovery of attorneys' fees from the estate in this scenario is meaningless, because the successful contestant would only be recovering fees from the proceeds of her or his own inheritance. However, the Doctrine could then be invoked to make the contestant whole, by having the fees paid out of the pocket of the true wrongdoer, as tort damages.

But isn't the Doctrine available only if there was litigation with a third party? Yes, but in this example, the third party is

the Estate. A successful contestant will have had to engage in litigation with the Estate because of the tortfeasor's conduct. Because estates appear in proceedings by and through their personal representative, a third party (the Estate) will always necessarily be involved. Indeed, even where the tortfeasor is the personal representative (as is frequently the case), the contestant will be litigating with the tortfeasor as personal representative, and not the tortfeasor as beneficiary/ wrongdoer. The differing legal capacities - of the tortfeasor as personal representative versus the tortfeasor as beneficiary - provides the legal basis for application of the Doctrine.

Trust Contest. Like a will, a trust can be challenged based upon fraud, duress, lack of capacity or undue influence.[22] Such an action typically proceeds as a civil action in the probate or civil division of the Circuit Court. The trustee will be a necessary and indispensable party defendant in such action. As in the will contest example, the successful plaintiff in such a trust action would then seek recovery of fees under the Doctrine against the procurer of the overturned trust.

Additional Considerations

While the application of the Doctrine in the context of probate litigation appears largely untested in Florida's reported appellate jurisprudence, several additional factors should be considered in planning for this legal strategy:

Pleading. Based on *Stockman v. Downs*,[23] the claim for attorneys' fees under the Doctrine should be expressly pled at all stages. The First District has held that attorneys' fees under the Doctrine are special damages which must be pled as such.[24]

Segregation of Fees. Use of the Doctrine in probate litigation contemplates two serial pieces of litigation. The first against the neutral third-party holding or responsible for the disputed asset; and the second against the tortfeasor to recover attorneys' fees expended in the first litigation. However, a claimant may attempt to combine the two steps into one action containing separate counts. For example, count one might be a declaratory judgment against the stakeholder concerning the rightful beneficiary of an asset, while count two would be a tort claim for intentional interference against the wrongdoer. In such a case, it will be necessary to segregate the fees incurred in relation to the two counts, because only the fees for the first count may be recovered as damages in the second count.

Proof of Reasonableness. The typical claim for attorneys' fees requires proof of the reasonableness of both the hourly rate and the hours expended by way of expert testimony. However, where attorneys' fees are recoverable as an element of damages under the Doctrine, the Fourth and Fifth Districts have held that expert testimony is not required to prove the fees.[25] The Third District, however, appears to require proof of reasonableness.[26] In 2011, the Florida Supreme Court accepted jurisdiction to review the Fifth District's holding, but the case was settled before an opinion was issued.[27] Until the issue is settled, prudence and effective trial presentation would suggest that expert testimony be presented to the trier of fact.

Conclusion

Avoiding probate has been an American pass time for at least the last 50 years.[28] While the use of "will substitutes" to transfer wealth to succeeding generations bypasses the supervision of probate courts, it also deprives the intended beneficiaries of those assets of the protections of the Probate Code. As the Baby Boomer generation dies and passes on wealth, this trend of probate avoidance will likely accelerate.[29] Moreover, retirement accounts will likely be a significant fraction of the transferred wealth. In 2012, the Federal Reserve estimated that Americans had accumulated in excess of $23 trillion dollars in retirement plan assets, with more than $9 trillion of those dollars held in IRA's and 401(k)'s.[30] Nearly all of those accounts will pass to beneficiaries generations outside the supervision of probate courts, often by way of unwitnessed beneficiary designations on file with private financial institutions. Therefore, there is significant potential for abuse and overreaching.

An effective legal remedy for such abuse and overreaching, including recovery of attorneys' fees, not only protects the intended beneficiaries, but also protects the donative intent and wishes of the elderly Floridians who worked hard to accumulate those assets. The public policy underlying the use of the Wrongful Act Doctrine in probate litigation advances the same public policy underlying the tort of Intentional Interference, as expressed by the Second District:

> Interference with an expectancy is an unusual tort because the beneficiary is authorized to sue to recover damages primarily to protect the testator's interest rather than the disappointed beneficiary's expectations. The fraud, duress, undue influence, or other independent tortious conduct required for this tort is directed at the testator. The beneficiary is not directly defrauded or unduly influenced; the testator is. Thus, the common law court has created this cause of action not primarily to protect the beneficiary's inchoate rights, but to protect the deceased testator's former right to dispose of property freely and without improper interference.[31]

The Wrongful Act Doctrine should be a powerful tool in the probate litigator's arsenal to further protect these rights.

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Endnotes

1 This article is intended to expand upon the December, 2015, article in the Florida Bar Journal, which more generally discussed the Wrongful Act Doctrine. *See* Jeremy M. Colvin, *The Wrongful Act Doctrine: A Common Law Exception to the American Rule on Entitlement to Attorneys' Fees in Florida*, Florida Bar Journal, Volume 89, No. 10 (December 2015).

2 *Dade County v. Pena*, 664 So. 2d 959 (Fla. 1995).

3 Restatement (Second) of Torts § 914(2) (1979).

4 224 So. 2d 759 (Fla. 3d DCA 1969)

5 *Id.* at 762 (*quoting* 25 C.J.S. *Damages* § 50e).

6 325 So. 2d 29 (Fla. 3d DCA 1976).

7 *Id.* at 30.

8 *See, e.g.*, *City of Tallahassee v. Blankenship & Lee*, 736 So. 2d 29 (Fla. 1st DCA 1999); *Reiterer v. Monteil*, 98 So. 3d 586 (Fla. 2d DCA 2012); *State Farm Fire & Cas. Co. v. Pritcher*, 546 So. 2d 1060 (Fla. 3d DCA 1989); *Martha A. Gottfried, Inc. v. Amster*, 511 So. 2d 595 (Fla. 4th DCA 1987); *Rayburn v. Bright*, 163 So. 3d 735 (Fla. 5th DCA 2015).

9 *Seabright Ins. Co. v. Matson Terminals, Inc.*, 828 F. Supp. 2d 1177 (D. Hawaii 2011).

10 *Bank One, N.A. v. Surber*, 899 N.E. 2d 693 (Ind. App. 2009); OnePoint *Solutions, LLC v. Borchert*, 486 F.3d 342 (8th Cir. 2007); *Montara Owners Association v. La Noue Development, LLC*, 353 P.3d 563 (Ore. 2015).

11 *Birdsong v. Children's Division*, 461 S.W. 3d 454 (Mo. App. 2015).

12 *Gray v. Don Miller & Assocs., Inc.*, 674 P.2d 273 (Cal. 1984); *Sundown, Inc. v. Pearson Real Estate Co., Inc.*, 8 P.3d 324 (Wyo. 2000).

13 *LK Operating, LLC v. Collection Group, LLC*, 330 P.3d 190 (Wash. 2014).

14 *Kesling v. American Family Mut. Ins. Co.*, 861 F. Supp. 2d 1274 (D. Colo. 2012).

15 190 So. 2d 825 (Fla. 3d DCA 1966).

16 *Id.*

17 *Whalen v. Prosser*, 719 So. 2d 2 (Fla. 2d DCA 1998); *see also Schilling v. Herrera*, 952 So. 2d 1231 (Fla. 3d DCA 2007).

18 Restatement (Second) of Torts § 774B (1979).

19 *DeWitt v. Duce*, 408 So. 2d 216 (Fla. 1981).

20 *See Metropolitan Life Ins. Co. v. Carter*, 2005 WL 2810699 (M.D. Fla. Oct. 27, 2005) (interference with annuity beneficiary designation); *Henshall v. Lowe*, 657 So. 2d 6 (Fla. 2d DCA 1995) (interference through misuse of power of attorney to divert assets); *Davison v. Feuerherd*, 391 So. 2d 799 (Fla. 2d DCA 1980) (interference with revocable trust).

21 *See* § 733.106, Fla. Stat. (2015); *In re Wilmott's Estate*, 66 So. 2d 465 (Fla. 1953); *In re Cobb's Estate,* 26 So. 2d 442 (Fla. 1946); *In re Griffis Estate*, 366 So. 2d 80 (Fla. 4th DCA 1978).

22 *See* §§ 736.0207 & 736.0406, Fla. Stats. (2015).

23 573 So. 2d 835 (Fla. 1991).

24 *Robbins v. McGrath*, 955 So. 2d 33 (Fla. 1st DCA 2007); Fla. R. Civ. P. 1.120(g).

25 *Schwartz v. Bloch*, 88 So. 3d 1068 (Fla. 4th DCA 2012); *Sea World of Fla., Inc. v. Ace Am. Ins. Cos., Inc.*, 28 So. 3d 158 (Fla. 5th DCA 2010), *rev. dismissed*, 53 So. 3d 1021 (Fla. 2011).

26 *Seitlin & Co. v. Phoenix Ins. Co.*, 650 So. 2d 624 (Fla. 3d DCA 1994).

27 *See Ace Am Ins. Cos. v. Sea World of Fla., Inc.*, 36 So. 3d 83 (Fla. 2010) (accepting conflict jurisdiction), *rev. dismissed*, 53 So. 3d 1021 (Fla. 2011) (dismissing review pursuant to stipulation).

28 *See, e.g.*, Dacey, Norman F., *How to Avoid Probate!* (1966).

29 *What Baby Boomers' Retirement Means for the U.S. Economy*, May 7, 2014, http://fivethirtyeight.com/features/what-baby-boomers-retirement-means-for-the-u-s-economy/.

30 Board of Governors of the Federal Reserve System, "Financial Accounts of the United States: Flow of Funds, Balance Sheets and Integrated Macroeconomic Accounts." Fourth Quarter 2013.

31 *Whalen*, 719 So. 2d at 6.

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A Lawyer's Obligation to Protect Confidential Client Information in the Digital Age

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R. MCCONNELL

In a world becoming increasingly reliant on the storage and communication of electronic information, the threat of data breaches is constant, and lawyers are not immune to these dangers. It can be the total breach of digitally stored client information, or it can be as simple as an intercepted e-mail containing one client's personal information. Law firms are repositories for all kinds of sensitive information, and firms without adequate security measures in place risk exposing this information to malicious outside sources.

In response to concerns about the security of personal information kept in electronic form by government and commercial entities (including law firms), the Florida Legislature enacted a stronger information protection statute in 2014 in the form of the Florida Information Protection Act.[1] Realizing the ethical implications that may arise from the unauthorized access or inadvertent disclosure of confidential client information, the Florida Bar followed suit in 2015, and recommended an amendment to the Rules of Professional Conduct that dictates how lawyers should protect confidential information relating to the representation of clients. The result of those efforts is Rule 4-1.6(e), which became effective on October 1, 2015.

Both of these measures should motivate lawyers to reassess the safeguards they have in place for protecting confidential client information that is stored or transmitted electronically. If a lawyer or law firm does not take proper measures to protect their clients' information, or fails to inform them that the law firm has suffered a data breach, the firm and lawyers may be subject to penalties under Florida law. Each may also undermine the trust of clients who lose faith in the firm's ability to protect their confidential information. Furthermore, lawyers now have the additional concern of violating the ethical standards set forth in the Florida Rules of Professional Conduct.

The Florida Information Protection Act

The Florida Information Protection Act was enacted as Florida Statute § 501.171 in 2014, as a replacement of Florida Statute § 871.5681. Its aim is to protect personal information kept on record in electronic form with various "covered entities." A "covered entity" is any kind of association, corporation, partnership, sole proprietorship, or other commercial entity. Law firms, for example, are covered entities.

The statute defines "personal information" as an individual's first name—or first initial—and last name, combined with one of the following: (i) social security number, (ii) driver's license number, passport number, military identification number, (iii) financial account number or credit/debit card numbers in combination with passwords or security codes, (iv) medical information, or (v) health insurance policy number or other information that insurers use to identify an individual.

The statute provides that covered entities must take reasonable measures to protect data in electronic form that contains personal information. In the event such personal information is breached, the covered entity has a duty to notify an individual within a certain time period, and fix the system that was breached, or it will face penalties.

Rule 4-1.6(e)

The Florida Rules of Professional Conduct were also revised in 2015 to require lawyers to use reasonable efforts to protect confidential client information. On June 11, 2015, in its biennial petition to the Florida Supreme Court to amend the Rules Regulating the Florida Bar, the Florida Bar proposed an amendment to Rule 4-1.6, Confidentiality of Information.[2] The Bar cited the evolution of technology, and the need for lawyers to prevent the inadvertent or unauthorized disclosure of confidential information.

The new Rule 4-1.6(e) states, "A lawyer must make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client." Although Rule 4-1.6(e) does not explicitly refer to electronic means of storage and communication, it is clear the intent of the Bar was to advise lawyers of their ethical duty to protect client information that could be vulnerable when it is stored on a law firm's server or when it is transmitted via email.

The comment to Rule 4-1.6(e) provides the factors to be considered when determining whether a lawyer used reasonable efforts including: (i) the sensitivity of the information, (ii) the likelihood of disclosure without additional safeguards, (iii) the cost of employing additional safeguards, (iv) the difficulty of implementing the safeguards, and (v) the extent to which the safeguards adversely affect the lawyer's ability to represent clients.

Furthermore, the comment to the Rule also states that practitioners "must take reasonable precautions to prevent the information from coming into the hands of unintended recipients" when sending communications that contain confidential information. Although the sender of an e-mail is generally considered to have a reasonable expectation

of privacy, and Rule 4-1.6(e) does not go so far as to require extra security measures, if the lawyer is aware the email contains confidential or personal information of the client, it is reasonably prudent to encrypt the email before sending it, and to password protect its contents so only the intended recipient can access it.

The Obligation in Practice

Lawyers and their support staff—especially those who practice in the areas of real estate, probate, and estate planning law—deal with personal information of clients daily, including, but not limited to, social security numbers, medical information, and financial account information. Much of this information is contained in documents stored on an internal server, and these documents are often transmitted by email. In many real estate transactions, documents like a HUD-1 or 1099-S will contain an individual's name and social security number. Probate and estate planning attorneys often transmit copies of tax documents, death certificates, beneficiary designation forms, and petitions for administration, all of which contain personal identifying information.

Without adequate safeguards, confidential information—including personal information of the client—can be accessed by hackers. Firewalls are commonly utilized to protect internal servers, but third party encryption services are not as widely used. When an email is sent from one email address to another, if the recipient's email server does not have sufficient encryption service, or if the recipient receives the email on an unsecured internet network, the email can be intercepted, and the information contained in the correspondence can be accessed by unintended recipients. However, if a law firm uses third party encryption services or password protects the contents of the email transmission, then this extra layer of protection will ensure that the client's personal information remains protected.

Rule 4-1.6(e) does not explicitly require practitioners to install data security systems on their internal servers, or use encryption and password protection systems for email, but considering the greater likelihood of hacks and intercepted emails, lawyers must keep in mind that it is their duty to protect confidential client information. Lawyers are entrusted to act in the best interests of their clients and taking reasonable measures to protect confidential client information is a legal and ethical obligation. Failure to invest in safeguards or observe best practices now could result in serious consequences in the future, for both the client and the lawyer. Although there have been no reported cases yet involving Florida Statute § 501.171 or Rule 4-1.6(e), courts are unlikely to look favorably upon lawyers who failed to take any precautions whatsoever in a time when digital threats are so prevalent.

Law firms of all sizes are susceptible to hacking attempts. Recently, venerable Wall Street law firms Weil, Gotshal & Manges and Cravath, Swaine & Moore were victims of data breaches targeted toward obtaining insider-trading information.[3] Smaller firms may be targeted in an effort to reap personal identifying information of clients that can be used to perpetuate fraud and identity theft. While many big law firms can afford top of the line data security and encryption systems to attempt to foil hackers, smaller firms may not be able to dedicate financial resources toward the most impenetrable systems. However, Rule 4-1.6(e) simply requires that lawyers put reasonable measures in place, and the cost of such measures is factored in to the reasonableness determination. For smaller firms, this may simply be using firewalls for internal servers, and third party encryption and password protection software to protect the personal information of clients that is transmitted via email. Such third party encryption services are often very simple to use once installed, and are compatible with existing email platforms. As an additional measure, password protecting the contents of an email helps reduce the risk of unauthorized access or inadvertent disclosure to an unintended recipient. These steps can go a long way toward ensuring the security of a client's personal information.

Conclusion

While the appropriate security measures to implement are unique to the resources and limitations of each firm, the best practice for firms and their lawyers is to take affirmative steps to ensure that they comply with not only the law, but also the Rules of Professional Conduct. Although Florida Statute § 501.171 and Rule 4-1.6(e) do not set forth specific requirements for data security programs, a little effort, planning, and investment can prevent significant injury to clients and later headaches for the lawyer. However, regardless of whether a lawyer takes these affirmative steps to protect client information from a data breach, if a data breach does occur, the lawyer should take steps to fix the problem and immediately notify clients of the breach and what information may have been compromised. Now more than ever, lawyers should be vigilant in protecting their clients' personal information.

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Endnotes

1 § 501.171, Fla. Stat.

2 *In re Amendments to the Rules Regulating the Fla. Bar (Biennial Petition)*, 167 So. 3d 412, 415 (Fla. 2015).

3 Nicole Hong & Robin Sidel, *Hackers Breach Law Firms, Including Cravath and Weil Gotshal*, Wall St. J. (March 29, 2016), http://www.wsj.com/articles/hackers-breach-cravath-swaine-other-big-law-firms-1459293504.

What Happens to the Rent After Exercise of a Lease Purchase Option?

By John B. Neukamm, Esq., Mechanik Nuccio Hearne & Wester, P.A., Tampa, Florida


J. NEUKAMM

A more complete phrasing of the title of this article could be: "Does a tenant in possession of leased property remain obligated under Florida law to continue to pay rent between the date a purchase option set forth in a lease is exercised and the closing date in the absence of a lease provision which specifically addresses that issue?" At first blush (and as emphatically and unanimously stated by a number of Florida real estate attorneys to whom that question was posed in connection with a recent expert witness engagement), the answer would seem to be a definitive "Yes, of course!" However, as noted by Plato in *The Phaedrus* nearly 2,400 years ago, things are not always as they first appear.[1]

The majority rule, in fact, is that the exercise of an option to purchase generally converts a lease to an agreement of sale, and, as a result, a tenant can lawfully refuse to pay rent because that obligation ceases by operation of law. However, express language in the lease to the contrary can overcome that general rule.[2] Thus, in *Gautier v. LaPof*, the Florida Supreme Court noted "[t]here is no question that a vendee of lands under a contract of purchase is regarded as the beneficial owner thereof from the time the contract is executed."[3] The Court went on to explain that the tenants became "the equitable owners of the lot … when they exercised the option to purchase. The majority rule is that the change of position from optionee to purchaser occurs at the date an option becomes, by acceptance, a contract of sale and purchase."

Similarly, in *Pensacola Wine and Spirits v. Gator Distributors*, a Florida appellate court held, in ruling that ejectment, rather than eviction, was the proper cause of action for a landlord seeking possession of property after a tenant had exercised a purchase option, "the trial court correctly concluded that a lease is terminated when an option to buy is exercised. The vendee then becomes an equitable owner of the property pursuant to an executory contract."[4] As noted in *Doolittle v. Fruehauf Corp.*, the two steps necessary to exercise an option are: "(1) there must be a decision by the optionee to purchase the property under the terms of the option; (2) the optionee must communicate the decision to the optionor within the life of the option."[5]

Nevertheless, in a dispute concerning the exercise of a purchase option in a lease agreement for commercial property, the appellate court in *Twelfth Avenue Investments v. Smith* did not disturb the trial court's ruling granting the landlord's counts for rent and holdover rent despite its affirmation of the trial court's ruling that the tenant was entitled to specifically enforce its option to purchase the leased property.[6] In that case, the court, citing *Doolittle*, confirmed that once notice exercising the purchase option was given, "the option became a bilateral contract, binding on both parties, and susceptible of enforcement by a court of equity in a suit for specific performance." The court went on to state that once the tenant notified the landlord of his desire to purchase the property pursuant to option terms in accordance with the agreed-upon procedure, "the lease ended and the parties were then bound by the terms within the option to purchase." Specifically, the court noted that, "by invoking the right to purchase, the parties entered into a contract of sale, terminating the lease and [the tenant] thereby became an equitable owner of the property." Interestingly, however, as noted above, the appellate court let stand, without explanation, the trial court's determination that the landlord was entitled to rent.

Thus, while it is abundantly clear under Florida law that the landlord/tenant relationship is replaced by a buyer/seller relationship at the moment a purchase option in a lease is properly exercised, Florida law remains unclear regarding a tenant's continuing rent obligation after exercise of a purchase option. In fact, there is no Florida appellate decision which explicitly concludes that the obligation to pay rent ceases immediately upon the exercise of a purchase option when the tenant remains in possession of the leased property. Furthermore, cases from other states support the contrary view that rental obligations may continue after exercise of a purchase option in a lease.

Specifically, in *Cottonwood Hill v. Ansay*, a Colorado court determined that neither party could have anticipated the significant closing delay that resulted from the need to seek a judicial resolution of the large discrepancy in appraisal values.[7] Thus, the court determined that the landlord was entitled to rental for the tenant's use and possession of the property beyond the "normal anticipated delay" and the date the closing price was actually tendered. After recognizing the general rule that, in the absence of a saving provision, the tenant has no obligation to pay rent after exercise of an option to purchase and, despite the fact that the lease agreement contained no provision for the payment of rent subsequent to exercise of the purchase option, the court chose to allow equity to work in favor of the landlord under the "unique facts" present in that case. The court acknowledged that, "under normal circumstances, it is up to the parties to protect themselves" but justified its determination that rent was payable because "neither party could have anticipated the large discrepancy in appraisal values and the resultant delay caused by the judicial

resolution of the valuation issue. Thus equity dictates some relief since the tenant, "has in practical terms remained as the lessee – both in possession and use of the property." Thus, the court concluded that rents were not due for those days which constituted the normal anticipated delay but that, "[t]hereafter, equity dictates that rents be paid … through the time of tender of the purchase price."

A Rhode Island Superior Court cited the *Cottonwood* decision in an unpublished opinion[8] which held, notwithstanding the majority view enunciated therein[9], it would be equitable to require the tenant to pay the reasonable rental value for the leased premises during the period of time prior to conveyance of title if the tenant retained possession of the property during that time. In rationalizing its determination, the court noted that a tenant holding over after expiration of the lease term is liable for the fair rental value of the premises. Continuing, the court explained that it "must consider the actual positions of the parties for whom equity can fashion some relief." With respect to the tenant, the court reasoned that its surrender of the property before the closing (which would be a logical requirement in the event the lease was, in fact, terminated) would require the tenant "to remove all of its signs and lay off its employees and in turn, permit the [landlord] to erect new signs and hire new employees." Thereafter, at closing, the tenant, "now also an equitable owner of the property, would be required to re-enter and claim possession after payment of the purchase price. Absent some agreement by the parties, the law does not require one to do a vain act." The court then shifted its attention to the landlord, and explained that it would be inequitable for the tenant "to enjoy both the premises and the purchase money without compensating the vendor for either." Thus, the court concluded that it would be equitable for the tenant to pay the landlord "the reasonable value of the premises for its enjoyment of same during this interval prior to conveyance of title."

Thus, courts in three different states have suggested three different approaches with respect to the minority view that payment of rent may be due between the date a lease purchase option is exercised and closing has occurred. In *Twelfth Avenue Investments*, the Florida court simply affirmed, without explanation, the trial court's holding that rent was payable. In *Cottonwood Hill*, the Colorado court found that the tenant was liable for rent, presumably at the rate set forth in the lease, for the period of time between the closing date, as contemplated by the lease, and the actual closing date. Finally, the Rhode Island court determined, in *Forcier*, that equity required the tenant to pay a reasonable rental (not necessarily the rental set forth in the lease) between the date the option was exercised and closing if the tenant remained in possession of the property during that time.

On the other hand, a majority of other states take the position that no rent is due after the exercise of a purchase option under a lease absent a contrary provision in the lease.

On the other hand, a majority of other states take the position that no rent is due after the exercise of a purchase option under a lease absent a contrary provision in the lease. This majority view is enunciated by several commentators (see end note 2 below), as well as in *Dartt Dev. Co. v. Tri-State Asphalt Corp.*, a case cited by one of those commentators.[10] In *Dartt*, the court confirmed that Pennsylvania follows the general rule in response to the tenant's allegation that its exercise of an option to purchase the leased property terminated its obligation to pay rent. The court specifically stated that Pennsylvania "case law holds that when a lessee of real property exercises an option to purchase that is contained in the lease, the parties' relationship as landlord and tenant ceases to exist and the lease is converted into a contract of sale." Nevertheless, the court ruled that pursuant to the express language in the lease, the parties agreed that the lease would not terminate upon the tenant's exercise of the purchase option, but instead would continue until the landlord delivered the deed and abstract of title to the tenant. Thus, the court found that the express lease language overcame the general presumption that rent was not payable after the tenant's exercise of the purchase option.

In *Industrial Steel Construction v. Mooncotch*, an Illinois appellate court also confirmed the majority view that, "when accepted and exercised according to its terms," an option "becomes a present contract for the sale of the premises" whereupon "the parties' prior relationship of lessor and lessee is terminated, and the resulting relationship becomes that of vendor and vendee."[11] Thus, since there was no contrary provision in the lease, the court upheld the majority position that the landlords were not entitled to the rent after the tenant had properly exercised its purchase option.

Notwithstanding the fact that only a few courts have held that rent should continue to be paid after exercise of a purchase option if the tenant remains in possession of the

leased property until closing, that minority approach seems to make far more sense than the contrary approach adopted by a majority of the states. The general rule that the lease is terminated and no rent is therefore payable upon exercise of the purchase option is troublesome for a number of reasons. Furthermore, that position may give rise to significant uncertainty and undue confusion. Taking the majority view to its illogical conclusion could wreak havoc during the period between the exercise of the purchase option and closing since, in addition to the rental obligation, a number of other lease obligations could be impacted by a termination of the lease, including the obligation to maintain the leased property, the obligation to insure and pay taxes with respect to the leased property, the rights and obligations of the parties with respect to the construction of improvements upon the leased property, the obligation to assure that the leased property remains in compliance with applicable laws, covenants, and restrictions, indemnification obligations, and provisions addressing the handling of casualty losses or proceeds from eminent domain or other takings of the leased property.

Furthermore, if the leased property is subject to a leasehold mortgage or the lease has been pledged as collateral for a loan obligation, what happens to that mortgage or pledge upon the exercise of the purchase option? How would liability be apportioned for hazardous substances located upon or beneath the leased property after exercise of the purchase option? Who would be entitled to federal income tax deductions for amortization, depreciation, and similar items between the option exercise and closing? What would be the effect of a holdover rent provision after exercise of an option to purchase? Would miscellaneous lease terms, such as provisions addressing attorneys' fees, venue, notices, and calculation of time periods also terminate upon exercise of the purchase option? How would a provision requiring the tenant to surrender possession of the leased property upon any expiration or other termination of the lease be impacted upon the exercise of a purchase option (which, under the majority view, operates to terminate the lease)? The possible difficulties and conflicts arising under the majority approach seem beyond measure.

Presumably, the rationale with respect to the obligation to pay (or not to pay) rent after a tenant's exercise of an option to purchase would be equally applicable with respect to a tenant's exercise of a right of first refusal to purchase the leased property. In fact, rights of first refusal to purchase are far more likely to be provided to a tenant than an option to purchase in a typical lease.[12] Thus, the concerns addressed in this article may arise in many leases encountered in a real estate attorney's typical practice.

While it may not presently be a standard practice for Florida real estate lawyers to specifically provide in a lease that a tenant in possession of leased property remains obligated to continue to pay rent (or observe other lease provisions) between the date a purchase option provision or right of first refusal is exercised and the closing date, landlords' attorneys might consider proactively addressing this issue in any lease providing a tenant with a right to purchase the leased property. The inclusion of a simple provision confirming that all lease terms, including the obligation to pay rent, continue after the exercise of a purchase option or right of first refusal until the closing of the purchase and sale transaction should be sufficient to avoid the potential pitfalls outlined in this article. In fact, in light of the current ambiguity under Florida law, such an approach might be well advised.

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Endnotes

1 "Things are not always what they seem; the first appearance deceives many." *Plato's Phaedrus* (from *Plato in Twelve Volumes, Vol. 9*, translated by Harold N. Fowler, Cambridge, MA, Harvard University Press; London, William Heinemann Ltd. 1925).

2 Gregory G. Gosfield, *A Primer on Real Estate Options*, 35 Real Prop. Prob. & Tr. J. 129 (Spring 2000), citing *Dartt Dev. Co. v. Tri-State Asphalt Corp.*, 609 A.2d 171 (Pa. Super. 1992). *See also*, Jerome D. Whalen, *Commercial Ground Leases*, Practicing Law Institute, March 2012, which provides, in §19.1.1, that "[e]xercise of an option to purchase the premises contained in a lease converts the lease to a contract of sale with no continuing rent obligation. There should be express language in the lease that rent should be paid up to and prorated as of the closing of the sale."

3 *Gautier v. LaPof*, 91 So. 2d 324 (Fla. 1956), citing *Foxworth v. Maddox*, 137 So. 161 (Fla. 1931) and 32 Am.Jur., *Landlord and Tenant* §300.

4 *Pensacola Wine and Spirits v. Gator Distributors*, 448 So. 2d 34 (Fla. 1st DCA 1984), citing *Atlantic Beach Improvement Corp. v. Hall*, 197 So. 464 (Fla. 1940).

5 *Doolittle v. Fruehauf Corp.*, 332 So. 2d 107 (Fla. 1st DCA 1976).

6 *Twelfth Avenue Investments v. Smith*, 979 So. 2d 1216 (Fla. 4th DCA 2008).

7 *Cottonwood Hill v. Ansay*, 709 P.2d 62 (Colo. App. 1985).

8 *Forcier v. Woloohojian Realty*, 1991 WL 789771 (RI Super. Ct. 1991).

9 Citing 51 C.J.S. 82(1)(b) and 91 C.J.S. 13, the court explained that, typically, "[w]hen an option to purchase land is duly exercised, the relation of landlord and tenant ceases and that of vendor and purchaser arises. Execution converts the option into a binding executory contract for the sale of land. Under Rhode Island law, the purchaser in an executory contract becomes the equitable owner of such land though the vendor still holds legal title." The Court then recognized the majority rule that "absent some express agreement otherwise in the lease, a lessor is not entitled to rent after a lessee has validly exercised his option at purchase, at which time the lessee becomes the vendee in an executory contract for the sale of land."

10 *Dartt Dev. Co. v. Tri-State Asphalt Corp.*, 609 A.2d 171 (Pa. Super. 1992).

11 *Industrial Steel Construction v. Mooncotch*, 637 N.E.2d 202 (Ill. App. 1994).

12 As noted by Jerome D. Whalen, *Commercial Ground Leases* §19.1, Practicing Law Institute, March 2012, "rights granted to the tenant to purchase the landlord's fee interest in the premises are relatively unusual in normal occupancy leases; in ground leases, they are common More likely, the developer may obtain a 'right of first refusal' or similar right."

Is a Building a Product? *Tiara* and the Economic Loss Rule from Past to Present

By Jared E. Smith, Esq. and Dara L. Jebrock, Esq., Rumberger Kirk & Caldwell, P.A.

Hopefully, all construction practitioners are well aware of the Florida Supreme Court's *Tiara* decision and have at least put more than a passing thought into the application of that ruling in the construction context.[1] *Tiara* expressly ended the application of the "contractual privity" economic loss rule ("ELR") and left only the "product liability" ELR intact.[2] The question practitioners are left to struggle with is whether a building is a product and, if not, whether tort actions are barred in the typical construction defect case. In order to better understand the implications of this ruling in the construction context, it is helpful to lay out a backdrop of the development of the ELR.[3]

Before development of the product liability doctrines as they exist today, consumers could find themselves in situations of no remedy at law when injured by a product: "[T]hird parties, without any fault on their part, were injured by the negligence of the manufacturer, vendor, or furnisher of the *following articles*, while the parties thus injured were innocently using them for the purposes for which they were made or furnished, and the courts held that there could be no recovery, because the makers, vendors, or furnishers owed no duty to strangers to their contracts of *construction*, sale, or furnishing[.]" See *Huset v. J. I. Case Threshing Mach. Co.*[4] The *Huset* court's reference to the "following articles" included what we would usually view as products (such as oil lamps and stage coaches), but also included what we would view as construction (defective walls, defective porches, and improperly hung chandeliers).[5] So even at this early stage of discussion of product liability law, we see a conceptual mixing of things constructed with things manufactured. The seminal decision recognizing a theory of product liability in the absence of contractual privity is *MacPherson v. Buick Motor Co.*[6] In *MacPherson*, the New York Court of Appeals refused to apply the privity requirement to bar recovery in an action brought by a driver of an automobile for injuries caused by a defective wheel the automobile manufacturer had negligently failed to inspect.[7] Product liability law took a further developmental step in the New Jersey decision of *Henningsen v. Bloomfield Motors, Inc.*[8] In *Henningsen,* the court held "[u]nder modern marketing conditions, when a manufacturer puts a new automobile in the stream of trade and promotes its purchase by the public, an implied warranty that it is reasonably suitable for use as such accompanies it into the hands of the ultimate purchaser."[9] Although the phrase "strict liability" was not used in the *Henningsen* opinion, this decision is credited as the starting point for strict liability in product liability cases.[10] With the influx of strict liability in product liability cases, arose the need for a doctrine to protect manufacturers in situations of pure economic loss. Hence, the birth of the economic loss doctrine.

In *Seely v. White Motor Co.*, generally seen as the seminal decision for the ELR,[11] the court held, "[the manufacturer] can appropriately be held liable for physical injuries caused by defects by requiring his goods to match a standard of safety defined in terms of conditions that create unreasonable risks of harm . . . [The consumer] can be fairly charged with the risk that the product will not match his economic expectations unless the manufacturer agrees that it will."[12] This standard was adopted by the United States Supreme Court in *East River Steamship Corp. v. Transamerica Delaval.*[13] There, the Court made an interesting observation about the development of the product liability doctrine: "Products liability grew out of a public policy judgment that people need more protection from dangerous products than is afforded by the law of warranty.[14] It is clear, however, that if this development were allowed to progress too far, contract law would drown in a sea of tort."[15] The ELR was adopted in Florida in 1987.[16] In a parallel ruling the following year, the Florida Supreme Court expressly held that privity of contract is required for breach of implied warranty actions.[17] So the question emerged, is a building a product and therefore subject to the ELR?

This question was answered by the Florida Supreme Court in 1993 in *Casa Clara Condominium Association, Inc. v. Charley Toppino & Sons, Inc*.[18] In *Casa Clara*, a concrete supplier (Toppino) supplied defective concrete to the site which ultimately resulted in significant alleged structural defects. The homeowners' negligence claims were dismissed and that dismissal was upheld on appeal. Citing to the *Seely* and *East River* decisions noted above, both of which were product liability economic loss rulings, the court opined as follows: "*Seely* sets out the economic loss rule, which prohibits tort recovery when a product damages itself, causing economic loss, but does not cause personal injury or damage to any property other than itself. *E.g.*, *East River*. . . . The rule is 'the fundamental boundary between contract law, which is designed to enforce the expectancy interests of the parties, and tort law, which imposes a duty of reasonable care and thereby encourages citizens to avoid causing physical harm to others.' Sidney R. Barrett, Jr., *Recovery of Economic Loss in Tort for Construction Defects: A Critical Analysis*, 40 S.C.L.Rev. 891, 894 (1989)."[19] While on its face, one may say the Florida Supreme Court was impermissibly mixing the contractual privity ELR with the product liability ELR, this would be an inaccurate observation. At its roots, the ELR in the product liability setting is in fact inextricably tied to the existence or non-existence of contractual privity.

In 2004, the Florida Supreme Court in *Indemnity Insurance Co. v. American Aviation, Inc.* expressly created a division between what it deemed the contract privity ELR versus the product liability ELR.[20] In *Indemnity*, an aircraft owner sued the company that allegedly negligently serviced the landing gear causing the plane to be damaged (thankfully with no personal injuries). There was no privity of contract between the maintenance company and owner; the Court was faced with the question of whether the negligence suit would be barred by the ELR. The Court found that neither the product liability ELR nor the contractual privity ELR applied, but more critical than the holding for the sake of this article is whether *Casa Clara* was cited in the decision and, if so, whether *Casa Clara* was cited as an example of the product liability ELR or contractual privity ELR. *Casa Clara* was expressly and solely cited in *Indemnity* as an example of the *product liability* ELR.[21]

At its roots, the ELR in the product liability setting is in fact inextricably tied to the existence or non-existence of contractual privity.

With this backdrop of legal history and the development of the distinction between products liability and the ELR, it appears a building should be treated as a product and the ELR should be an applicable defense in construction defect cases. Of course, if the answer was that simple, there would be no need to write this article. Furthermore, there is a curious red flag that Westlaw has placed on the *Casa Clara* decision stating it was "receded from" in the Florida Supreme Court's *Tiara* decision. Prior to writing this article, Westlaw representatives were contacted to inquire as to the basis of the red flag. For the benefit of the reader, Westlaw's response is set forth (in slightly truncated version) below:

> Although *Tiara* does cite *Casa Clara* approvingly in outlining the origin of the economic loss rule, the discussion takes a turn when the Court focuses more specifically on the products liability economic loss rule. The Court states,
>
> 'An examination of the application of the economic loss rule in Florida from its inception to our ruling in *Florida Power*, reveals that this Court adhered strictly to the reasoning of *East River* and *Seely*. Subsequent to our ruling in *Florida Power*, however, we issued a number of rulings which, as aptly stated in *Moransais*, 'appeared to expand the application of the rule beyond its principled origins and have contributed to applications of the rule by trial and appellate courts to situations well beyond our original intent.'
>
> The first example of a ruling that expanded the application of the economic loss rule 'beyond its principled origins' is *AFM*; the second example is *Casa Clara*…
>
> Under our standards, this warrants a 'receding from' reference.

A careful look at the *Tiara* decision shows the court does not in fact expressly state that *Casa Clara* is "an example" of expanding the ELR "beyond its principled origins." Rather, arguably, the *Casa Clara* decision may be an example the Court was trying to use of its pre-*Tiara* efforts to "roll back the economic loss rule to its product liability roots."[22] Regardless, the red flag remains and practitioners should certainly be wary and ready to speak to the true effect of the *Tiara* decision in the context of *Casa Clara* and whether a building should be treated as a product for application of the product liability ELR.

If a building should be treated as a product for purposes of application of the ELR, one question that must be faced is whether a building should then be subject to strict liability as are other manufactured products. This question was actually addressed by the Florida Supreme Court five years prior to the *Casa Clara* decision in *Easterday v. Masiello*.[23] In *Easterday*, the Court refused to employ the principles of strict liability in relation to the construction of a jail facility and instead permitted the contractor to raise a *Slavin* doctrine defense.[24] Reading *Easterday* and *Casa Clara* together, a building is a product for purposes of application of the products liability ELR, but a building is not subject to strict liability.

So how have courts been handling the interplay of *Casa Clara* and the *Tiara* decision? The authors are aware of several reported Circuit Court decisions from the Ninth Judicial Circuit which seem to favor treating buildings as a product and permit the application of the ELR in the construction defect context. For example, in *Central Park LV Condominium Association, Inc. v. Summit Contractors, Inc., et al.*, the trial court held the ELR precluded a plaintiff condominium association from bringing a tort claim because the only damages it suffered were to the homes, that is, the products themselves.[25]

In *Siena at Celebration Master Association, Inc. v. Winter Park Construction Co.*, a trial court dismissed a plaintiff condominium association's negligence cause of action based on the ELR because the only damages alleged to have been suffered were to the condominium units themselves and not damage to other property.[26] A trial court reached a similar conclusion in 2014 in *Promenades at Bella Trae Condominium Association, Inc. v. Pulte Home Corp., et al.*, when it dismissed a negligence claim based on the ELR in a construction defect case.[27] In 2015, in *Artisan Club Condominium Association, Inc. v. The St. Joe Co., et al.*, a trial court denied a developer leave to amend to bring negligence claims against subcontractors based on the ELR.[28] While it is unclear how other Florida trial courts or appellate

courts will rule on this issue, the ELR appears to be alive and well in post-*Tiara* construction defect cases.



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Endnotes

1 *Tiara Condo. Ass'n v. Marsh & McClennan Cos., Inc.*, 110 So. 3d 399 (Fla. 2013).

2 *Id.* at 407.

3 In 2004, the Florida Supreme Court did an excellent job summarizing the historical development of the ELR in *Indemnity Insurance Co. v. American Aviation, Inc.*, 891 So. 2d 532 (Fla. 2004), which these authors admittedly glean from herein.

4 120 F. 865, 869 (8th Cir. 1903) (emphasis added). *Huset* is cited as a historical ELR decision by the Florida Supreme Court in *Matthews v. Lawnlite Co.*, 88 So. 2d 299 (Fla. 1956).

5 *Huset*, 120 F. at 869.

6 217 N.Y. 382 (N.Y. 1916).

7 *Id.* at 394–95.

8 161 A. 2d 69 (N.J. 1960).

9 *Id.* at 83 (emphasis added).

10 *Indem. Ins. Co.*, 891 So. 2d at 538.

11 403 P. 2d 145 (Cal. 1965).

12 403 P. 2d 145, 149 (Cal. 1965).

13 476 U.S. 858, 871 (1986).

14 *Id.* at 866 (citing *Seely*, 403 P. 2d at 149).

15 *Id.*

16 *Fla. Power & Light v. Westinghouse Elec. Corp.*, 510 So. 2d 899 (Fla. 1987) (emphasis added).

17 *Kramer v. Piper Aircraft Corp.*, 520 So. 2d 37 (Fla. 1988).

18 620 So. 2d 1244 (Fla. 1993).

19 *Id.* at 1246 (emphasis added). Note the Florida Supreme Court's reliance on a law review article related to construction defects in its discussion of the economic loss doctrine.

20 891 So. 2d 532 (Fla. 2004).

21 *Id.* at 537, 541.

22 *Tiara*, 110 So. 3d at 406.

23 *Easterday v. Masiello*, 518 So. 2d 260 (Fla. 1988).

24 *Id.* at 262 (citing *Slavin v. Kay*, 108 So. 2d 462 (Fla. 1958)). The *Slavin* doctrine is a defense addressing whether a project owner retains liability for patent construction or design defects when someone is injured thereby due to the owner's failure to have the defect corrected.

25 No. 2010-CA-015748-O (Fla. 9th Cir. Ct. May 24, 2013).

26 No. 2009-CA-6474 (Fla. 9th Cir. Ct. Sept. 4, 2013).

27 No. 2013-CA-3556 (Fla. 9th Cir. Ct. Jan. 28, 2014).

28 No. 2009-CA-10804 (Fla. 9th Cir. Ct. July 15, 2015).

RPPTL Section to Provide "No Place Like Home" Program

Summary of Issue: Longstanding record title defects (a significant number of which are capable of resolution) preclude many low income Florida residents from accessing relief and community development funds necessary to repair and rebuild their long term residences following times of individual or collective disaster.

Summary of RPPTL Section Objective for Addressing Issue: To make available RPPTL Section member assistance in clearing title to real property for vulnerable low income Florida residents, thereby allowing such residents to not only receive disaster-related relief and access to community development funds, but also assuring them available real property tax exemptions.

General Description of Section Action: Using prior successes and the input of Bay Area Legal Services (Tampa), the Section would be providing RPPTL Section and Executive Council members as title attorneys, teachers, leaders and mentors for clearing title for low-income house and mobile home residents, providing substantive materials as to legal remedies, and directly assisting community and local bar associations in addressing and resolving such title defects.

For Further Information: Further information is available in the June, 2016 RPPTL Section Executive Council Agenda posted on the RPPTL Section Website.

Welcome Linda and Charlie!



Guardian Trust is pleased to welcome attorneys Linda Chamberlain and Charlie Robinson to our Advisory Board.

Linda R. Chamberlain is a Board Certified Elder Law Attorney who has practiced in Clearwater since 1991. Linda brings many years of experience and knowledge as a professional in the aging community. Her Elder Law practice includes Medicaid Planning, Medicaid Applications, Long Term Care and Disability Issues, Qualified Income Trusts, Special Needs Trusts, Veterans Benefits and Estate Planning. Linda is the Founder and President of "Aging Wisely, LLC", a professional care management company and "EasyLiving, Inc.", a non-medical private duty home care company. Charles F. Robinson is a Board Certified Elder Law Attorney who has practiced in Clearwater since 1967. His practice specializes in Elder Law, including asset protection planning (Medicaid), incapacity planning, veterans benefits planning, disability planning, special needs planning, probate, and fiduciary services (trust and estate administration). Over the years Charlie has made a phenomenal difference in our community, our region, and our state, in the area of elder law and special needs. He is one of this area's strongest advocates for seniors.

For more information regarding Guardian Trusts and our professional trustee services, please visit our website or give us a call today.

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RPPTL Section Executive Council Meeting
Tampa Marriott Waterside Hotel & Marina, Tampa
February 24-28, 2016

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

The winter meeting of the RPPTL Executive Council was held February 24 through 28 at the beautiful Tampa Marriott Waterside Hotel & Marina.

Just a month after the annual Gasparilla Pirate Festival and invasion of Tampa Bay by mythical Spanish pirate José Gaspar, the RPPTLs had their own invasion of downtown Tampa at the Marriott Waterside, overlooking Tampa Bay. Committee meetings were underway early Thursday morning and continued throughout the afternoon until members gathered at the welcome reception hosted by sponsors JP Morgan and Old Republic National Title. Networking and good conversation continued in the hospitality suite.

Becoming an honored tradition, the Friday morning Reptiles Run took our wellness-minded members on an icicle run as temperatures dipped and the winds picked up. Runners were back, thawed, and ready to work when meetings started Friday morning at 8:00 a.m.

Friday was full of activity as committees worked to get legislative positions and white papers in place for voting over the weekend. The afternoon included both Real Property and Probate Roundtable meetings from 3:00-5:00 p.m. Members attended a reception sponsored by Wells Fargo Private Bank in the ballroom followed by a dinner sponsored by First American Title Insurance Company and Regions Private Wealth Management. After dinner, members again retired to the hospitality suite in the Commodore Lounge.

Saturday found members back at work for the Executive Council Meeting from 9:00 a.m to noon, each anticipating the curtain raise at 2:00 p.m. for Matilda the Musical, no doubt bringing joy to Steve Mezer that the RPPTLs were finally finding his passion for Broadway musicals. The production, based on a novel by Roald Dahl, won an Olivier Award for Best New Musical and received 13 Tony nominations, winning 5 trophies. It was a special treat for all who were able to attend. Saturday's dinner followed at the Columbia, a restaurant that has been owned and operated by 5 generations of the same family for over 110 years.

Next up is the always popular Legislative and Case Law Update and Executive Council meeting scheduled for July 28-31, 2016 at The Breakers – truly one of the most beautiful hotels around. As always, information on upcoming meetings will be posted on the RPPTL website. If you are in the area, we hope you can join us and attend any committee meeting that interests you.



RPPTL Section Executive Council Meeting
Tampa Marriott Waterside Hotel & Marina, Tampa
February 24-28, 2016



Members of both the American College of Real Estate Lawyers (ACREL) and the RPPTL Section meet on Feb. 24th



Tae Kelley Bronner and students from the Wharton High School National Honor Society leading the Council's school supplies contributions



Our RPPTL Administrator, Mary Ann Obos with Immediate Past Chair, Michael Dribin



Chair Michael Gelfand with a recent addition to the Executive Council, Kathrine Lupo, at one of Section receptions



Florida Bar Chair-Elect William Schifino, Jr., and Adele Stone, Commercial Real Estate Committee Chair



Discussion on open permits legislation during a packed Real Property Problems Study Committee meeting



UF Law students, Jordan Horowitz, Mac Ross and Chris Bucalo at the Real Property Roundtable



Real Property Division Director, Drew O'Malley, with law students, Gianvito Grieco, Carlos Sanchez and Dale Tan



Debrah Boyd informing Title Insurance Committee members about the FinCEN GTO



Charlie Robinson addressing members of the Guardianshp, POA and Advance Directives Committee



Steven Goodall making sure all registrations and packages for attendees are well organized



Jim Russick multi-tasking at a committee meeting



James Simberg, Jr., addressing the Real Property Finance and Lending Committee with insights on the The Channelside Urban Mixed Use Development Plan in Tampa

Debbie Goodall, Chair-Elect with many of the Past Chairs of the Section at the Long Range Planning meeting



View photo albums at **www.rpptl.org**



Our ever up-beat Salome Zikakis - giving her Committee's report at the Council meeting



Two members of the Kelley clan, Tae Bronner and dad, past RPPTL Section Chair Rohan Kelley



Pete Dunbar and Martha Edenfield, both keeping us all updated on new legislation



Lance Scriven reflecting on a possible run for the Florida Bar Presidency addressed the Council

Photos by John Neukamm and Silvia Rojas

Roundtables

Friday, February 26, 2016
Tampa Marriott Waterside Hotel & Marina
Tampa, Florida

Prepared by Jennifer Jones Bloodworth, Esq., Winter Park, Florida, and Eamonn Gunther, Esq., Boca Raton, Florida

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

Highlights of the Meeting of the RPPTL Section

REAL PROPERTY DIVISION Roundtable

Thank you to the Roundtable Sponsor, Fidelity National Title Group

Meeting was called to order at 3:00 p.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 minutes were passed unanimously.

Probate and Trust Law Division Informational Items:

Pulse Orders and Ulysses Agreements: Tae Bronner on behalf of the Probate & Trust Law Division. Tae reported on Pulse Orders and Ulysses Agreements, explaining what each is, including the pros and cons of each. She also briefed the Real Property Division on pending legislation regarding these items and explained the Probate & Trust Law Division's important concerns regarding the legislation. The Probate & Trust Law Division is hoping to stop the current bills and, ideally, act offensively and introduce bills drafted and backed by the Section that will narrowly address these issues in a manner that is acceptable to the Section.

Action Items

Real Property Problems Study Committee - Arthur Menor, Chair: Alan McCall reported. Alan McCall presented the history and explained the necessity for a bill to revise the Notice of Commencement statute when mortgaging or conveying property mid-construction. He made the following Motion:

Motion to (A) adopt as a Section position to remove the requirement for cessation of construction as a condition

See "Real Property Division," next page

Highlights of the Meeting of the RPPTL Section

PROBATE AND TRUST DIVISION Roundtable

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

The Director of the Probate and Trust Law Division of the Real Property, Probate and Trust Law ("RPPTL") Section of the Florida Bar, Debra Boje, called the meeting to order at 3:10 p.m.

Sponsor Announcement. The Division Director acknowledged the sponsor of the Roundtable meeting, Stout Risius Ross, Inc. ("SRR"). Garry Marshall reported that SRR currently has approximately 400 appraisers working across 12 offices, and that they have approximately 50 appraisers in their Estate and Trusts Group (which is the largest estates and trusts valuation group in the country). Mr. Marshall indicated that SRR has the intellectual capital and real-world valuation experience to assist with contested valuations.

Probate & Trust Law Information Items. The Division Director reported that the Probate and Trust Law Division will have two Information Items at the upcoming RPPTL Executive Council meeting:

Guardianship, Power of Attorney & Advanced Directives – Hung V. Nguyen, Chair: Hung Nguyen reported on the Committee's proposal to revise F.S. § 744.441(16) by removing the $6,000 cap on funeral-related expenses that a guardian can expend with court approval. The proposal would allow the court to determine a reasonable amount to spend on funeral-related expenses (e.g., funeral, internment and grave marker expenses).

Guardianship, Power of Attorney & Advanced Directives– Hung V. Nguyen, Chair: Hung Nguyen reported on the Committee's proposed amendments to F.S. § 744.331 to address the decision of *Shen v. Parkes* by providing a notice procedure requiring parties to a Chapter 744 incapacity proceeding to give notice of any objection to all or part of the examining committee members' report(s) at least 5 days prior to the adjudicatory hearing and to give notice

See "Probate & Trust Division," next page

REAL PROPERTY DIVISION

to terminating a Notice of Commencement, including an amendment to Sec. 713.132(3), F.S., and (B) to find that such legislative position is within the purview of the RPPTL Section; and to expend Section funds in support of the proposed legislative position.

Motion passed unanimously.

Informational and Administrative Matters

Real Estate Structures and Taxation Committee - Cristin Keane, Chair: Burt Bruton reported. The Committee proposed support of the proposed Marriage Documentary Stamp Tax Act, Sec. 201.02(7), F.S., creating a total exemption for documentary stamp taxes for transfers of real property between spouses.

Real Property Litigation Committee - Susan Spurgeon, Chair: Susan reported. The Committee proposed amendments to Sec. 90.902, F.S., "Self-Authentication of Documents" and requested assistance regarding authentication methods. Susan also reported that there is no sponsor for the bill regarding statutes of repose for mortgages.

Real Property Problems Study Committee - Arthur Menor, Chair: Lee Weintraub reported. The Committee has been asked to consider whether it is necessary to clarify that a notice of commencement can provide for a term of less than one year. The Committee is analyzing the issue.

Open/Expired Permits Task Force - Lee Weintraub and Michael Tobin, Co-Chairs: Lee presented current status of negotiations on legislation to make it easier to close open and expired permits. The two items of interest he noted include the following proposed provisions: (1) contractors that are engaged to close these permits would expressly not be liable for prior work, but only work that they actually undertake; and (2) the owner would need to hire an architect and inspector to certify that all requirements of the permit have been met.

Residential Real Estate and Industry Liaison (RREIL) Committee - Salome Zikakis, Chair: Salome reported on the following:

1. Request by the Committee that the Executive Committee approve revisions to the FR/BAR Residential Contract for Sale that are needed to address the recent increases and other revisions to the withholding requirements set forth in the Foreign Investment in Real Property Tax Act ("FIRPTA").

2. Informational item regarding the U.S. Department of the Treasury FinCEN Geographic Targeting Order, which imposes record-keeping and reporting requirements by title agents on certain purchases made by entities of residential real property located in Miami-Dade County, Florida for a total purchase price in excess of $1,000,000.

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PROBATE & TRUST DIVISION

that the examining committee members will have to testify. The proposal also addresses who is required to pay for the examining committee members to attend the hearing, as well as certain due process issues.

Committee Reports

Estate & Trust Tax Planning – David Akins, Chair: David Akins reported that the Committee is co-sponsoring - with the Asset Protection Committee - a joint CLE program, chaired by Jeffrey Baskies and Michael Singer, on October 21, 2016. David Akins reported on recent developments to the tenancy by the entireties ("TBE") draft legislation (likely to be F.S. § 689.151), regarding removal of the unities of time and title for TBE. The Committee is also reviewing whether Florida should permit statutory community property trusts and/or community property trusts established by election.

Probate & Trust Litigation - Jon Scuderi, Chair. The Committee is sponsoring a joint seminar with the Trust Law Committee on March 4, 2016. Jonathan Galler will also present a "Lunch & Learn" CLE program on attorney fees in probate and trust litigation proceedings on March 30th. The Committee continued to discuss the expansion of standing to pursue a civil claim for the exploitation of a vulnerable adult, relating to House Bill 577.

Probate Law & Procedure - John Moran, Chair: John Moran reported that the Committee is focused on a Will depository statute. The Committee is also close to finalizing a proposal which would revise the summary administration statutes (Chapter 735, Florida Statutes) and a statutory proposal regarding the proper classification of coins, bullion and other valuable metals in probate administrations as tangible personal property (or not).

Trust Law - Angela Adams, Chair: Angela Adams reported that the Committee's nonjudicial modification legislation has been put on hold indefinitely. The Committee is reviewing the roles of and the uses of trust protectors, trust advisors and special trustees.

Digital Assets and Information Study - Eric Virgil, Chair: The Florida Fiduciary Access to Digital Assets Act (Chapter 740) has passed both houses of the Florida Legislature unanimously and is expected to be signed into law by the Governor. Mr. Virgil thanked the Vice-Chairs and the Committee members for their hard work.

Elective Share Review Committee - Lauren Detzel and Charlie Nash, Co-Chairs: Lauren Detzel reported on a recent decision out of the 3d DCA, *In re: Estate of Richardson.* In this case, the 3d DCA held that there is nothing in the statute stating that the surviving spouse gets to keep assets exceeding the elective share amount once the election has been made. The

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REAL PROPERTY DIVISION

Real Property Finance & Lending Committee - David Brittain, Chair: David reported on the Committee's proposed legislation that would expand the authority of state court-appointed receivers under Sec. 702.12, F.S. There was a lot of discussion and concern, so David withdrew the current proposal and is going back to the committee for additional work.

Administrative Matters

Committee CLE/Publication Objectives: The Division Director reported on the need to present CLEs for the entire Section, not just committees or a specific Division.

Committee Reports

Condominium and Planned Development - Bill Sklar, Chair: Bill Sklar reminded the Division of the upcoming seminar in Tampa in April. Bill also announced that Board Certification for Condominium and Planned Development Law was approved. The Committee is now in the implementation phase and looking to shorten the process so they can get the test in place as soon as possible.

Construction Law Institute - Reese Henderson, Chair: Sanjay Kurian, Co-Vice Chair, reminded the Division of the upcoming Construction Law Institute scheduled for March 10-12 in Orlando.

Development and Land Use Planning - Vinette Godelia, Chair: Vinette reported on the following: (1) Committee initiative to get newer members involved; and (2) the Committee has developed a series of 10-15 minute videos that will be uploaded to the Section website.

Real Estate Leasing - Rick Eckhard Chair: Brenda Ezell, Vice Chair, reported that the Committee is working on a four-part series of videos for lawyers, which videos will provide guidance for lawyers on leasing office space.

Insurance and Surety - Wm. Cary Wright and Scott Pence, Co-Chairs: Cary reminded the Division of an upcoming Seminar in June focusing on the assignment of benefits legislation and the re-authorization of the Biggert-Waters Act regarding flood insurance.

Real Estate Certification Review Course - Jennifer Tobin, Chair: Jennifer reported that the 2016 Real Estate Certification Review Course was a success and that they had a good turnout.

The Division Director took a moment to recognize and thank all of the Section members who presented.

Real Property Finance & Lending - David Brittain, Chair: David reminded the Division about an upcoming seminar in March and advised that the Committee was uploading current case law to the Committee website.

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PROBATE & TRUST DIVISION

Committee offered technical advice to proposed legislation to clarify that (1) the election does not reduce the amount which the surviving spouse would otherwise receive pursuant to the decedent's estate plan, (2) the surviving spouse is not treated as predeceased because of the filing of the election, and (3) this is a clarification of existing law. The legislation will be included as an amendment to the House Bill for the omnibus estates package.

Asset Protection – George Karibjanian, Chair: Brian Malec reported that the Committee continues to review and discuss the Uniform Voidable Transactions Act. In particular, the Committee is working on a response to a comment contained in the proposed Act 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.

Guardianship, Power of Attorney & Advance Directives - Hung Nguyen, Chair: Hung Nguyen reported that Committee is working on a fix to the decision in *Romano v. Olshen*, 152 So. 2d 912 (Fla. 4th DCA 2014), holding that a guardian was allowed to access assets which the ward owned as tenants by the entireties, with his wife, in order to pay post-death expenses. The Committee is also considering the *Rothman v. Rothman* decision, 93 So. 3d 1052 (Fla. 4th DCA 2012) which challenged the constitutionality of F.S. § 744.331(4), which states that the petition to determine incapacity must be dismissed if a majority of the examining committee members find that the proposed ward is not incapacitated. The trial court in *Rothman* found that the statute is unconstitutional and takes the discretion away from the judge. Mr. Nguyen concluded his report by stating that the RPPTL Section continues to monitor and appropriately respond to non-Section sponsored, guardianship-related legislation.

Wills, Trusts & Estates Certification Review Course - Jeffrey Goethe, Chair: The annual review course will take place on April 8 and 9. Many qualified speakers, including members of the Section's Executive Council, volunteered to speak.

Legislation Committee - Tae Kelley Bronner, Chair: Tae Kelley Bronner gave a brief overview of the status of the RPPTL Section's legislative initiatives. The estates omnibus bill, the digital assets bill, and the family trust company "glitch" bill have all passed through the Florida Legislature and are expected to be signed by the Governor. Ms. Bronner concluded her report by discussing the guardianship bill sponsored by Sen. Nancy Detert to regulate professional guardians.

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REAL PROPERTY DIVISION

Real Property Litigation - Susan Spurgeon, Chair: Susan reported that the Committee reviewed recent case law, including *Jallali v. Knightsbridge Village Homeowners Association, Inc.,* in which the 4th DCA found that no other court has jurisdiction over a given piece of real property if a *lis pendens* has been recorded and is still active in another case.

Adjournment: The Division Director adjourned the Roundtable meeting at 4:30 p.m.



The Real Property, Probate & Trust Law

Section of the Florida Bar

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PROBATE & TRUST DIVISION

Ad Hoc Committee Reports

Ad Hoc Guardianship Law Revision – David Brennan, Chair: Debra Boje reported the Guardianship Task Force is drafting a new Chapter 744.

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 indefinitely.

Ad Hoc Study Committee on Spendthrift Trust Issues – Lauren Detzel and Jon Scuderi, Co-Chairs: Lauren Detzel reported that the Committee continues to work on a legislative proposal to address the holding in *Berlinger v. Casselberry,* 133 So. 3d 961 (Fla. 2d DCA 2013).

Ad Hoc Decanting Committee – Don Tescher, Chair: Don Tescher reported that the Committee's proposal should be an Information Item at the next RPPTL Section meeting. Twenty-two states currently have decanting statutes. Florida was actually the first state to permit the decanting of trusts as a result of the Florida Supreme Court's holding in *Phipps v. Palm Beach Trust Company*, which was decided in 1940. The legislative proposal will allow a trustee to decant using absolute discretion or pursuant to an ascertainable standard (in certain circumstances), and will specifically allow decanting to a supplemental or special needs trust.

Ad Hoc Committee on Physicians Orders for Life Sustaining Treatment (POLST) – Jeff Baskies and Tom Karr, Co-Chairs: Tae Kelley Bronner reported the POLST bill which was before the Florida Legislature during this session died in committee. The Committee is preparing legislation governing the use of POLSTs and a white paper. Mr. Baskies commented that the Committee's proposal contains important safeguards which were missing from the opposed legislation, including that an examining physician must sign an affidavit that all options were discussed with the patient prior to the execution of the POLST, and that the patient sign a document which lists the consequences of executing the POLST.

"Ulysses Agreements." Tae Kelley Bronner next discussed legislation which was proposed during this session which would permit the use of "Ulysses Agreements" in Florida. Ulysses Agreements allow someone with a mental health condition (such as bipolar disorder or schizophrenia) to name a surrogate to make decisions on his or her behalf during periods of temporary incapacity (such as a manic episode). Ulysses Agreements were added to the Ad Hoc POLST Committee.

Adjournment. The next Probate and Trust Law Division Roundtable meeting will be held on Saturday, June 4, 2016 at the Lowes Portofino Bay Hotel in Orlando, Florida. There being no further business to be discussed, The Division Director adjourned the Roundtable meeting at 4:38 pm.





















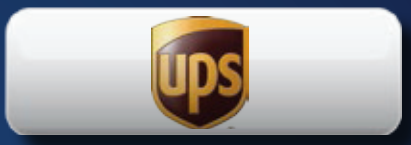





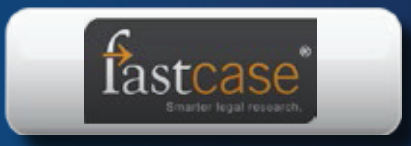









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The Engagement Letter and the Residential Real Estate Attorney

By Scott A. Marcus, Becker & Poliakoff, P.A., Fort Lauderdale, Florida


S. MARCUS

Introduction

In most legal scenarios, the reason an attorney is sought out and eventually hired by a client is to assist that client with a specific legal need. For example, a person charged in a criminal action hires counsel (or has counsel appointed by the State) to defend him or her against criminal prosecution. In a contract dispute, the attorney is retained by a client to seek money damages or an equitable remedy. Those who wish to prepare for death (life's inevitable end), retain counsel to prepare their estate - and consequently attempt to alleviate their loved ones from legal complications which could arise upon their passing. The real estate attorney's practice, however, can be unlike other practices of law. Each real estate transaction could potentially contain a number of non-real estate related legal components - all of which could affect the ownership of the real property, the client, as well as the attorney. So why is it that so many real estate law practitioners fail to obtain even the most simplified form of written engagement letter or fail to adequately define the *scope of their engagement* with their clients? Although the above scenario is not limited to the *residential real estate practitioner* (attorneys handling commercial transactions are certainly not immune to these same issues), this article is tailored for the attorney handling residential real estate transactions on a regular basis. Retainer agreement, engagement letter, whatever you want to call them. Have one.[1]

The General Rule Regarding Written (and Signed) Engagement Letters

With the exception of contingent fee cases,[2] the Rules Regulating the Florida Bar ("Rules" or "Rule") do not require that the attorney-client relationship be reduced to a written contract, signed by both attorney and client. Rather, in circumstances where the attorney has not regularly represented the client, prior to or within a reasonable time after commencing the representation, the Rules establish *a preference* for written communication between the attorney and the client as to the basis or rate of the fee as well as the costs.[3] In addition, where a legal fee is *nonrefundable*, the Rules require that the nature and amount of the nonrefundable fee be *confirmed* in writing.[4] This confirmation does not however require the attorney to obtain a signed acknowledgment from the client memorializing the terms of the fee. A letter from the attorney to the client setting forth the basis or rate of the fee and the intent of the parties in regards to the nonrefundable nature of the fee is sufficient to meet the requirements of this rule.[5]

Contingency Fee Arrangements

The Florida Bar has well established rules by which engagement letters in contingency fee cases are governed. Rule 4-1.5(f)(1) states that:

> [a] contingent fee agreement shall be in writing and shall state the method by which the fee is to be determined, including the percentages that shall accrue to the lawyer in the event of settlement, trial or appeal, litigation and other expenses to be deducted from the recovery, and whether such expenses are to be deducted before or after the contingent fee is calculated.[6]

In addition, Florida Bar Rule 4-1.5(f)(2) states that

> [e]very lawyer who accepts a retainer or enters into an agreement, express or implied, for compensation for services rendered or to be rendered...whereby the lawyer's compensation is to be...contingent in whole or in part upon the successful prosecution or settlement thereof **shall do so only where such fee arrangement is reduced to a written contract, signed by the client, and by a lawyer**....[7] (Emphasis added)

The Rules provide parameters governing the percentage the attorney is entitled to collect for his or her fee in addition to how those fees can be divided between lawyers in different law firms.[8]

The Unique Role of the Residential Real Estate Attorney

As alluded to in the preamble of this article, the residential real estate attorney's practice can be rather ambiguous. When dissected, a standard real estate transaction has potentially many components in addition to contract and title law. There are aspects of community association law, corporate law, tax law (both foreign and domestic), estate planning and asset protection that could all affect any particular transaction. While the attorney need not be versed in all of the above areas of law, it is the duty of the attorney to identify the aspects of the transaction which could potentially impact the client and allow the client to determine how he or she would like to address those areas not serviced by the attorney. The client may choose to retain the services of a Certified Public Accountant to address the tax-related issues or the client may choose to retain separate counsel for the services not covered under the attorney's scope of representation. It is also possible that the client may decide that he or she is not concerned with any of the additional aspects of the transaction and forego that type of representation all together. At a minimum, however, the

client should clearly comprehend the scope of representation offered by the attorney and have the choice to expand that scope either with the assistance of the attorney or through alternate means. Based on the breadth of any one residential real estate transaction, the potential for attorney malpractice can be significant based on the damage potential to the client; yet it is all too common for the residential real estate practitioner to forge head-on into a matter without even the most informal confirmation to the client (written or otherwise) setting forth the aspects of the transaction the attorney *is,* and more importantly, *is not* handling.

Transitioning to the Engagement Letter as a Standard Practice

Why would a real estate attorney willingly assume legal liability on a transaction by failing to properly outline the scope of engagement in writing to the client? I was guilty of this practice during my early years in private practice; however, upon taking refuge in a large firm with strict governance policies and procedures, it became evident that my days of handling a transaction without even so much as a handshake were, by mandate, a thing of the past. This was not an easy transition. Clients whom I had serviced for years were at first confused by the formal nature of the engagement letter process. They attributed the additional layer of "bureaucracy" to the large firm culture and equated this new procedure to increased fees. This was an incorrect assessment made by the client and served to reinforce, for me, that part of a lawyer's role is to educate clients on non-billable procedural matters as well as to abate any fears associated therewith. Clear and effective communication became a cornerstone of each new engagement. After some discussion, clients realized the benefits of the engagement letter for both the attorney and the client and it generally has avoided confusion and misunderstanding as to the role of the attorney in the transaction.

You know it is needed, so what's stopping you?

Timing. If you have practiced in the area of residential real estate law long enough, you have most likely been on the receiving end of the following statement from a potential client: "I purchased a house and I would like to know how much you would charge to represent me." Knowing exactly what was meant by the statement, my response is always the same: "If you've already *purchased* a house, you don't need me." This prompts the potential client to rephrase with what they believe sets them apart from other clients. "No (chuckle) I signed a contract, I just want to know how much you will charge to represent me." My reply is no less cynical: "So you've served as your own counsel for the contractual phase - now you want me to step in and handle the rest?" This primes a discussion which usually starts with the potential client saying "isn't it just a form?" and ending with the client feeling - shall we say - a tad bit humbled. Point being, the nature of our practice is that we often are faced with picking up where our "lawyer-clients" leave off. *What can go wrong, right? It is just a form.* The above scenario could give the attorney a false sense of informality that they are merely needed to make sure title is marketable. Stop. Take a moment and realize this is more (not less) of a reason to require an engagement letter. You want to make it clear to the client that they arrived at your doorstep with an already executed contract. If you did not assist the client with this portion of the service, why would you want to assume responsibility for the client's work?

The Title Company Dilemma. In Florida, a "title insurance agent" is a defined term under § 626.841, F.S. In order to be licensed to act as a title insurance agent, one need not be an attorney; the applicant need only pass a state exam to become licensed.[9] An attorney may issue title insurance without the requirement of licensure due to an exemption contained in the chapter.[10] The implication is that an attorney is not required to take the state licensing exam due to the fact that the attorney passed the Florida Bar exam. The involvement of non-attorney owned or non-attorney managed title agencies in the residential real estate arena has blurred the line between *legal representation* and *title insurance*. While this portion of the article is not intended as an attack on non-attorney owned title agencies, there is a stark difference between comprehensive legal representation and merely confirming title is insurable. Title agencies do not provide legal representation. However, they have become the norm in residential closing circles. The formality involved with the engagement letter process is a necessary break from that norm. The attorney who subscribes to a level of informality on par with title agencies is forgetting that the title agency protects itself with disclosure documents outlining their limited role. If it is important enough for a title agency to disclose to a customer that the agency is not providing legal representation, it is even more critical for the attorney to disclose to the client the scope of the attorney's representation.

Referral Sources. The typical real estate attorney acquires a significant number of his or her matters from licensed real estate agents. This referral source, when correctly educated by the attorney, can be a blessing. Where the real estate agent is not properly briefed by the attorney on both the importance of timing and the difference between legal representation and title insurance, the referral source can actually impede timely and effective representation, potentially damaging the client and the transaction. I have learned that it is critical to educate my referral sources on timing their referrals properly and that the terms of art in the industry of "closing agent" and "settlement agent" do not automatically denote legal representation. The correct timing to refer a buyer or seller of real property to an attorney is in advance of that person making an offer or accepting that offer, whichever is the case. While this may seem like a rather obvious consideration, real estate agents are often under significant pressures from

the buyer and seller as well as other realtors to expedite the process. The suggestion of attorney involvement during the negotiation phase could be perceived by those involved as an additional impediment to a binding contract. To overcome these negatives, the attorney must be responsive, in addition to knowledgeable. In larger law firms, the system for conflicts checks needs to be streamlined to avoid delaying the attorney's ability to converse with a potential client. In smaller firms without the same level of formality, managing a business as well as practicing law can be overwhelming and prevent the attorney from responding in a timely fashion. Whether large firm or small firm practice, the role of the attorney with respect to the referral source is the same. Specifically, the lawyer should educate the referral source on the benefits to the client and the referral source of the involvement of a competent real estate attorney prior to having a binding contract, the difference between legal representation and title insurance as well as your process of engagement. These should all be concepts your referral sources are versed in so the referral is smooth.

Fear of Judgment. Too often, attorneys expand their services to include real estate transactions and title work without much knowledge of the area. This is due in part to survival and, in some cases, greed. To those facing either or both scenarios, "don't take on work for the money [without the appropriate experience]."[11] You are not doing your clients or the practice any favors. Whatever your reason for practicing in this area without significant training, remember, this is not just another real estate transaction. A real estate acquisition (residential or commercial) is often the largest financial investment a client will make. The client's needs must be paramount. Only practice in this arena once you have a firm grasp of contract, real estate and title law. In addition, at a minimum, know enough to know the other aspects of law which impact the prospective transaction and do not fear telling a client "I don't do that work."[12] Use the engagement letter as a tool to define the scope of your involvement and do not allow your moral compass to waiver.

The Template Engagement Letter and Conclusion

The Residential Real Estate and Industry Liaison ("RREIL") Committee of the RPPTL Section of the Florida Bar, through a subcommittee chaired by this author, has drafted a sample form engagement letter which addresses most elements present within a residential real estate transaction. The template is available to all members of the RPPTL Section by accessing the member login at www.rpptl.org and proceeding to the RREIL Committee's web page.

The county in which the property is located will, along with the contract, dictate whether the buyer or the seller is responsible for selecting and paying the Closing Agent[13] for the title insurance premium and as such, the role of the attorney will fluctuate depending on the location of the property, the contract and the services selected by the client. This particular template was drafted with a "buyer-pay" contract in mind, and is intended as a starting point for the residential real estate attorney to tailor to the specific needs of the transaction and the client. At a minimum, the template engagement letter should define the scope of representation as well as detail the services not included in that scope.

A fee and/or cost retainer should become a standard practice, particularly to avoid violating the unlawful inducements rules of the Florida Department of Financial Services.[14] The Template Engagement Letter also addresses that any costs advanced by the attorney on behalf of the client would be reimbursed by the client. These provisions were added to clarify that the attorney is not advancing these costs as part of an unlawful inducement to obtain business and that the intention is for the attorney to be reimbursed for these costs. Provisions pertaining to granting consent to the title underwriter's audit of the firm's trust account and consent to electronic communication were included in response to avoid ethical concerns.

In sum, a retainer agreement/engagement letter can (in addition to all of the reasons discussed in this article) be a marketing opportunity used to differentiate yourself from a title agency and from other attorneys. Use it to show your value to your prospective clients.

Scott A. Marcus, is a shareholder at Becker & Poliakoff, P.A, where he manages the firm's residential real estate department as well as the firm's affiliated title agency, Association Title Services. His law practice focuses almost exclusively in residential transactions since 1995. He is sought out by some of the top-producing real estate agents in Broward County to handle transactions for their customers. His clients include first-time home buyers, real estate investors, institutional and private owners and developers. He frequently lecturers to real estate brokerage companies on contractual compliance issues.

Endnotes

1 Brian Tannebaum, *The Practice* (American Bar Association, 2015).

2 R. Reg. Fla. Bar 4-1.5(f).

3 R. Reg. Fla. Bar 4-1.5(e).

4 R. Reg. Fla. Bar 4-1.5(e), "A fee for legal services that is nonrefundable in any part **shall be** confirmed in writing...." (Emphasis added).

5 R. Reg. Fla. Bar 4-1.5 Editors' Notes.

6 R. Reg. Fla. Bar 4-1.5(f)(1).

7 R. Reg. Fla. Bar 4-1.5(f)(2).

8 R. Reg. Fla. Bar 4-1.5(f)(4) (B) and 4-1.5(g).

9 §626.8417(3)(a) and (b), F.S. contain the full requirements for licensure.

10 §626.8417, F.S., states: "Title insurers or attorneys duly admitted to practice law in [Florida] and in good standing with The Florida Bar are exempt from the provisions of this chapter **related to title insurance licensing and appointment requirements."** (Emphasis Added). Note, the exemption only applies to the licensing and appointment requirements, not the Chapter's entirety.

11 Brian Tannebaum, *The Practice* (American Bar Association 2015).

12 *Id.*

13 Defined term in the FAR/BAR Purchase and Sale Contract.

14 Fla. Admin. Code 69B-186.010, interpretation of §626.9541(1)(h)3, F.S.

2016-2018
Class of Fellows

By: E. Ashley McRae, Ben Diamond and Joshua Rosenberg

We received a large number of overwhelmingly impressive applications for the 2016-2018 Fellows Program. After much deliberation, the Fellows Selection Committee selected Stephanie Villavicencio and Angela Santos for the probate/trust side and Amber Ashton and Scott Work for the real property side. When you see our new Fellows please welcome them, guide them and most importantly, encourage them to become actively involved in your committee.



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



Angela Santos is an Associate with Duane Morris LLP located in Boca Raton, Florida. She completed her undergraduate studies at Ohio State University, earned her law degree in 2009 at Syracuse University College of Law and obtained an L.L.M. in taxation in 2010 from Georgetown University Law Center. Ms. Santos is admitted in Florida, New York and Connecticut. Her practice areas include private wealth planning and representing personal representatives/executors and trustees on complex estate and trust administration. Ms. Santos has been a member of the RPPTL Section for four years. She is a graduate of the 2015-2016 inaugural class of the Florida Fellows Institute of the American College of Trust and Estate Counsel. She has authored and co-authored several articles, including an article titled ""Pre-Immigration U.S. Tax Planning Essentials" published by the International Bar Association, 21st Annual International Wealth Transfer Practices Conference, February 2016, and an article titled "Offshore Trusts and Reporting Obligations" published by the Palm Beach Daily News, Estate Planning Supplement, in January of 2014.



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



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

Complying with FinCEN's Geographic Targeting Order in Miami-Dade County

From March 1, 2016 through August 27, 2016, real estate transactions in Miami-Dade County are subject to a Geographic Targeting Order (GTO) issued by the Financial Crimes Enforcement Network (FinCEN), a U.S. Department of Treasury agency. The GTO requires several title insurance underwriters and their policy-issuing agents to report information pertaining to transactions that meet the listed criteria. The criteria are:

1. The buyer is a legal entity, defined by the GTO as a corporation, limited liability company, partnership, or other similar business entity, formed in the United States or any foreign jurisdiction;
2. The property is residential real property located in Miami-Dade County;
3. The purchase price is more than $1 million;
4. The purchase does not involve a loan or external financing from a financial institution; and
5. Any portion of the purchase price is paid using a Monetary Instrument (currency, cashier's check, certified check, traveler's check, or money order).

If the transaction meets the listed criteria, the title insurance underwriter or its agent must report the following information:

1. The identity of the individual representing the legal entity purchasing the property;
2. A description of the identification used by the individual (driver's license, passport);
3. The identity of the purchaser and any beneficial owner(s) of the purchaser;
4. Date of closing;
5. Total amount paid in the form of a Monetary Instrument;
6. Total purchase price of the transaction; and
7. Address of the real property.

A beneficial owner is defined as an individual who directly or indirectly owns 25 percent or more of the equity interest in the purchasing entity. If the purchasing entity is owned by another legal entity, the GTO requires that the beneficial owners of any and all of the related legal entities be reported.

Title insurance underwriters have notified their agents about this GTO and their processes and forms for reporting the information.

The purpose of the GTO is to allow FinCEN to collect and analyze cash transactions in their effort to detect money laundering. While the current GTO affects a limited geographic area for a short time, FinCEN has the option to expand the geographic area to more counties and extend the time.

For a more detailed explanation and discussion of the GTO, please refer to:

- ALTA News – ALTA Develops Fact Sheet for FinCEN Geographic Targeting Orders (March 3, 2016) - www.alta.org/news/news.cfm?newsID=30593&eID=0
- American Land Title Association Fact Sheet for Financial Crimes Enforcement Network Geographic Targeting Orders for Manhattan, N.Y., and Miami-Dade County, Fla., which includes links to the GTOs, FinCEN's Press Release, and ALTA's Background Article. All of these documents may be found on the RPPTL website, www.rpptl.org.
- FinCEN Report from 2012, explaining the "back story" that led to the current GTO - https://www.fincen.gov/news_room/rp/files/Title_and_Escrow_508.pdf

By Margaret (Peggy) Williams,
Risk Manager, Attorneys' Title Fund Services, LLC,
as a member of the FinCEN GTO Subcommittee of the
Problems Study Committee of the Real Property, Probate
& Trust Law Section of the Florida Bar



Membership and Inclusion Committee Law School Outreach and Events

February through April 2016



University of Miami Law School



Ava Maria School of Law



Stetson University College of Law

The Membership and Inclusion Committee of The Real Property, Probate and Trust Law Section (Committee) is working to organize or participate in events with all of the law schools in Florida this year to build interest and membership in the Section with law students and younger attorneys. In connection with that work, the Committee successfully organized or participated in a number of events with law schools during the months of February, March and April of 2016.

On February 1, 2016, the Committee joined with the Florida State University College of Law Elder Law and Estate Planning Society (ELEPS) to put on a "Coffee & Doughnuts" event at FSU. Many students enjoyed stopping by on their way to class for coffee and doughnuts, and to learn about the benefits of Section membership and participation. Representing the Section were Manny Farach, Melissa VanSickle, Sarah Butters and Lynwood Arnold. On April 11, 2016, the Committee sponsored a lunchtime presentation to the FSU Real Estate Law Students (RELS) by the Trust for Public Land, a nonprofit organization that acts as an intermediary between property owners and governmental entities purchasing environmentally sensitive land. Lynwood Arnold welcomed the students on behalf of the Section.

On February 18, 2016, the Committee, represented by Annabella Barboza and Kymberlee Smith, organized and sponsored an Eat-N-Educate event at Florida International University College of Law. Section members Raul Perez-Ballaga, Amy Beller and Jorja Williams, panelists of this event, gladly volunteered their time to inspire the future generation of FIU lawyers.

On February 25, 2016, the Committee sponsored a Meet and Greet event in connection with the Executive Council meeting in Tampa for the benefit of

Western Michigan University Cooley Law School students. Over 20 Western Michigan University Cooley Law School students attended the event and several University of Florida Levin College of Law students who registered for the Executive Council meeting also attended the event. The students had the opportunity to meet with the RPPTL leadership and members of the Committee to learn more about the work done by Section members in their careers and on behalf of the Section.

Members of the Committee were excited to attend the University of Miami School of Law's Eighteenth Annual Informational Career Fair on March 2, 2016. The Section hosted a table at the Career Fair. There were approximately 30 law firms and agencies present at the Career Fair with nearly 100 law students in attendance. Section members Kymberlee Smith and Annabella Barboza had the opportunity to speak with several law students interested in real property or estate planning. Ms. Smith and Ms. Barboza were able to provide these students with valuable guidance about careers in these practice areas, as well as information about the Section.

The Section participated as a sponsor in back-to-back mentoring programs in Orlando, at the Barry University Dwayne O. Andreas School of Law Attorney Mentoring Event on March 2, 2016 and at the Florida Agricultural and Mechanical University College of Law Attorney Mentoring Event on March 3, 2016. Both events were organized through the efforts of Amber Jade F. Johnson and Alex Hamrick. At Barry University, Fred Jones, Patricia Jones, and Kristine L. Tucker discussed with students how they got their start in the legal profession, what employers look for in hiring new lawyers, the challenges of the impending Bar Exam, life/work/school balance, and finding their calling in the legal profession. At FAMU, Amber Jade F. Johnson, Jennifer Bloodworth, Reed Bloodworth, and Charles Wilder participated in a panel that discussed everything from their first jobs as attorneys to how students can make themselves stand out in a stack of resumes. In the evening, At Large Members of the Executive Council of the Section Patricia Jones, Fred Jones, Alex Hamrick, and Stacy Prince-Troutman met with Professor Nise Nekheba's Real Property class to speak with students about their careers, challenges they have faced in the legal profession, and the joy and fulfillment their legal careers have given them.

On March 17, 2016, the Section participated as a sponsor of the Ave Maria School of Law Professional Networking Association Expo. Representing the Section at the Expo were Noelle Melanson and Caitlin Powell.

On March 22, 2016, the Committee organized an Eat-N-Educate event at the Shepard Broad College of Law at Nova Southeastern University. The panel for the event consisted of the Honorable Judge Mark Speiser, and Section members Adele Stone and Sophia Lopez. The event was well-attended by 18 law students. The Real Property, Probate, and Trust Law Society and Transactional Law Practice Group of the Shepard Broad College of Law at Nova Southeastern University were co-sponsors of the event. The students were grateful for the career insight and advice provided by the panel. Several attendees became Section members.

On March 24, 2016, the Section and Stetson University College of Law's Real Property, Probate and Trust Law Association co-hosted the annual "Meet & Greet" at the Tampa Club in downtown Tampa, which was sponsored by Wells Fargo Advisors. More than a dozen Section members and 20 law students attended the event. This event provided an opportunity for law students who are expressing an interest in the practice areas of the Section to meet current practitioners.

The Section also held an outstanding and productive Eat-N-Educate event on April 7, 2016, at St. Thomas University School of Law. Guest speakers included Section members Marsha Madorsky, Manny Farach, and Matt Kramer. The event was co-sponsored by the St. Thomas University School of Law's Real Property, Probate, and Trust Law student organization. The 20 law students in attendance benefitted greatly from inspiring career advice and information about the benefits of involvement in the Section.

By Douglas Christy
Membership & Inclusion Committee
Outreach Law School Program

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PRACTICE CORNER

Practice Corner is a new column in Actionline dedicated to short practice pointers for Section members. Each edition will include one article covering real estate law and one article covering probate law. The entries are typically submitted by the Section's Fellows.

Pleading and Proving a Reformation Case

By Bridget M. Friedman, Friedman & Friedman, P.A., Lake Mary, Florida

In preparing a complaint to reform a mortgage or deed, certain allegations are essential. First, the existence of an instrument or agreement must be pleaded. Second, there should be an allegation stating why the document does not speak the truth or is inconsistent with the intention and agreement of the parties. Third, the time and manner that the inconsistency was discovered must be alleged. Fourth, one must plead that the plaintiff has been injured. Fifth, it should be pleaded that a demand was made to the defendant to remedy the nonconformity and that the defendant refused to comply with the demand. Lastly, although not clearly required under the case law, it should be pleaded that there is an inadequate remedy at law. This last requirement is recommended because a court sitting in equity will not entertain an equitable action unless there is an inadequate remedy at law. *Id*.

As for proving a reformation case, a case out of the Fourth District, *Losner v. HSBC Bank USA, N.A.,* 2016 Fla. App. LEXIS 5300 (Fla. 4th DCA 2016), is insightful. In that case, the appellate court overturned a trial court's judgment reforming a mortgage where no legal description had been inserted into the mortgage at the time of its recordation. The reasoning was that the plaintiff had not proved by clear and convincing evidence the terms actually agreed upon by the lender and the borrower. The only evidence the lender put into the record was an assignment of mortgage, which had the legal description of the property at issue, but was recorded three years after the mortgage had been executed. The appeals court noted that the record was void of any evidence to show what the lender and borrower had intended at the time of the mortgage. The court reversed and remanded with instructions for the trial court to enter an involuntary dismissal of the reformation count and to modify the final judgment to grant the bank only a monetary judgment for the homeowner's failure to make payments on the note. *Id*.

In litigating a reformation case, it is important that the practitioner make allegations and submit record evidence as to the intent of the parties at the time the mortgage was taken out. An affidavit in support of a summary judgment could be one method to provide the requisite clear and convincing evidence. Alternatively, a request for admission to the borrower(s), or deposition testimony could suffice, so long as the discovery at least focuses on the parties' intent at the time the mortgage was executed. Otherwise, lenders could be left with only an unsecured lien to seek repayment.AL

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.

Estate Planners - Are You Planning for the Post-Death Fight?

By Stacy B. Rubel, Chepenik Trushin LLP, North Miami, FL

When it comes to estate planning, there is always a possibility that testamentary documents will be challenged following the death of the testator. This possibility increases when the testator devises the estate either disproportionately between family members or differently than the estate would be split under the law of intestacy. There are multiple steps drafting attorneys can take to limit litigation following the testator's death and to protect the intent of the testator.

While there are no requirements for the execution of a will other than the requirement that the testator sign in the presence of witnesses who sign in the presence of the testator and each other, the drafting attorney, the witnesses and the notary (who are often staff at the law office) may someday testify about the circumstances surrounding the execution. It is advisable for all estate planning attorneys to have a specific protocol that is followed for all executions. As the attorney and staff may witness hundreds of documents every year, it is unrealistic to expect people will remember each signing and be able to testify in detail about each execution. However, if all executions are handled the same way, then the firm's procedures can be explained.

It is advisable that no one leave the office or conference room during the execution ceremony. Florida law requires the witnesses and testator to visibly see the others sign, a requirement that is easy to fail if, for example, a secretary leaves the room, even for a second, to answer the phone. During an execution, there should be no interruptions or distractions which may give rise to a post-death argument regarding proper execution. While not all estate planning documents have the same requirements of a will execution, it is best practice to follow the same protocol with all documents, for consistency.

Additionally, clients, particularly elderly clients who no longer drive, often bring family members, friends, or caregivers with them. Unless the presence of such third parties in the room is essential, it is best practice for all other persons to wait in the waiting room, especially if they are beneficiaries of the estate. During the initial meeting with the client to discuss the preparation of the documents, especially when litigation may be likely, it is prudent to discuss the factors from the seminal case, *In re Estate of Carpenter*, 253 So. 2d 697 (Fla. 1971). Counsel may explain the steps that may be taken to avoid a presumption of undue influence in a later will contest. That way, the client can make informed decisions regarding whether, for example, to bring anyone else to the office, or to discuss the estate plan with anyone.

While these tips may not apply to every situation, and could even create additional litigation under certain circumstances, every estate planning firm should establish some type of protocol to use in their planning cases and anticipate how their procedure may withstand a contest down the road.AL

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Real Estate Case Summaries

Prepared by Bridget M. Friedman, Esq., Friedman & Friedman, P.A.

Lake Mary, Florida

Dismissal of foreclosure action accelerating payment on one default does not bar a subsequent foreclosure action on a later default if the subsequent default occurred within five years of the original action. Whether a dismissal is with or without prejudice is irrelevant to a lender's right to file subsequent foreclosure actions on subsequent defaults. Lender was under no obligation to decelerate loan after dismissal of foreclosure action. Installment nature of loan continues following acceleration, and no more than dismissal of foreclosure action is necessary to decelerate an accelerated loan.

Deutsche Bank Trust Co. Americas v. Beauvais, 2016 Fla. App. LEXIS 5584 (Fla. 3d DCA 2016)

Upon rehearing, *en banc*, the Third District Court of Appeals withdrew and substituted its previous opinion in *Deutsche Bank Trust Co. Ams. v. Beauvais*, 2014 Fla. App. LEXIS 20422, 40 Fla. L. Weekly D 1 (Fla. 3d DCA 2014). The salient facts in the underlying action were that Deutsche filed for foreclosure to accelerate the loan balance. Its case was involuntarily dismissed, without prejudice. The governing condominium association later filed for foreclosure of its outstanding assessments, ultimately acquiring title to the property. Deutsche filed a new foreclosure and named the association since it was the property owner by that time. The association defended the action citing to the statute of limitations. The trial court granted summary judgment in favor of the association determining that Deutsche's acceleration of the note in the first foreclosure triggered the statute of limitations with respect to the entire balance of the mortgage and note. Since more than five years had elapsed between the first foreclosure and the second, the statute of limitations had run, and the lender was precluded from foreclosing.

Upon rehearing, after submissions from The Florida Bar's Business Law Section and the Real Property Probate and Trust Law Section, among others, the court substituted its opinion, ultimately reversing the trial court's order and remanding the cause to the trial court for further proceedings. In the substituted opinion, the court followed the earlier line of cases holding that, regardless of whether a case is dismissed voluntarily or dismissed with or without prejudice, upon dismissal, acceleration of the note and mortgage is abandoned and the parties return to the status quo that existed prior to the filing of the dismissed action. The lender is then free to accelerate and foreclose on subsequent defaults. Further, no affirmative act is required to decelerate an accelerated loan.

Mortgagee's liability to association under statute's safe harbor provision did not include amounts for interest, late fees, attorney's fees, or costs.

Catalina West Homeowners Ass'n v. FNMA, 41 Fla. L. Weekly D810 (Fla. 3d DCA 2016).

On December 23, 2005, Adriana Villamizar and her husband Luis Reyes entered into a mortgage with JPMorgan Chase Bank, N.A., for property located in a development called Lakes by the Bay. On or about February 6, 2006, FNMA purchased the loan that was the subject of the mortgage. FNMA filed a mortgage foreclosure action in 2011, and Catalina West Homeowners Association, Inc. and Old Cutler Lakes by the Bay Community Association, Inc. (the "Associations") were named as defendants. Final judgment was entered in favor of FNMA on February 6, 2013. On April 2, 2013, a certificate of title was issued to FNMA.

On December 19, 2013, the Associations each provided payoff/estoppel letters to FNMA. In addition to quarterly assessments and late charges, the letters sought amounts for violation charges, costs, and attorney's fees.

FNMA filed a complaint for declaratory and injunctive relief, alleging that the amounts set forth in the estoppel letters did not comply with the "safe harbor" protection provided to first mortgagees in Sec. 720.3085(2)(c), F.S. Specifically, FNMA asserted that the Associations improperly included attorney's fees and costs which they were not entitled to collect from FNMA. FNMA further alleged that the Associations refused to provide estoppel letters providing FNMA with the safe harbor protection of Sec. 720.3085(2)(c), F.S. FNMA alleged that it was in need of a declaration that FNMA was entitled to the protection of Sec. 720.3085(2)(c), F.S., and that the Associations were not entitled to attorney's fees, costs, interest, or other charges accruing prior to the certificate of title being issued.

The Associations each filed an answer and affirmative defenses. As affirmative defenses, the Associations alleged that Sec. 720.3085, F.S., required them to apply any payments received from FNMA first to late charges and interest, and then to costs and attorney's fees incurred in collection, and only then to assessments. The Associations further alleged that they alerted FNMA to sums necessary to bring FNMA's account current, and that the Associations would have to violate Sec. 720.3085, F.S., in order to provide the relief it requested.

FNMA filed a motion for summary judgment, asserting that the Associations' demand for attorney's fees and costs was

inconsistent with FNMA's entitlement to limited liability under Sec. 720.3085(2)(c), F.S. The trial court entered final judgment in favor of FNMA. The trial court found that, pursuant to Sec. 720.3085(2)(c), F.S., FNMA's liability to the Associations for unpaid assessments and all other charges, including attorney's fees, costs, interest, and late fees, incurred prior to April 2, 2013 was limited to the 12 past months of assessments prior to FNMA taking title to the property. The trial court concluded that because the safe harbor protection of Sec. 720.3085(2)(c), F.S., applied, the Associations were not entitled to interest, late fees, attorney's fees, court costs, collection costs, or other charges incurred.

The Associations filed a motion for rehearing, arguing that the final judgment reads out of existence Sec. 720.3085(3)(b), F.S. The Associations asserted that, were they to apply the sums FNMA was directed to pay in the final judgment in the order required by Sec. 720.3085(3)(b), F.S., it would not bring current either Association's account.

Ultimately, the appeals court ruled in favor of FNMA and affirmed the trial court's judgment so that FNMA's liability to the Associations under the safe harbor provision did not include amounts for interest, late fees, attorney's fees, or costs and only included the assessment amount.

Trial court lacked jurisdiction to enter final judgment of foreclosure in favor of homeowner's association where association's foreclosure proceeding was filed while mortgagee's separate foreclosure proceeding was pending against same property and after mortgagee had recorded its notice of lis pendens.

Fallon Rahima Jallali v. Knightsbridge Vill. Homeowners Ass'n, 41 Fla. L. Weekly D 263 (Fla. 4th DCA 2016)

In 2006, the homeowner's association recorded a notice of lis pendens and filed an action against Jallali to foreclose a lien on her property for failure to pay assessments. The association obtained a final judgment in February 2007, which was satisfied in March 2008.

In May 2007, the mortgagee filed a foreclosure action against Jallali and recorded its notice of lis pendens against her property. The association was named as a defendant in that action. The mortgagee's successor-in-interest obtained a final judgment of foreclosure in 2014.

However, previously in 2011, while the mortgagee's action was pending, the association filed and recorded a claim of lien for delinquent maintenance fees against the same property. In 2012, it filed a separate action against Jallali to foreclose on that lien and obtained a default final judgment, which the court affirmed in *Jallali v. Knightsbridge Village Homeowners' Ass'n,* 2014 Fla. App. LEXIS 11682 (Fla. 4th DCA 2014).

Subsequently, in 2015, Jallali and her successor-in-interest moved to vacate the association's 2012 final judgment of foreclosure based on *U.S. Bank Nat'l Ass'n v. Quadomain Condo Ass'n,* 103 So. 3d 977 (Fla. 4th DCA 2012) and Sec. 48.23, F.S. (2015).

The issue on appeal was whether the mortgagee's supplemental lis pendens divested the trial court of jurisdiction to adjudicate the association's lien. The appellate court found in Jallali's favor on the basis that the association's final judgment of foreclosure obtained in 2012 was void due to the trial court's lack of jurisdiction at the time. The trial court lacked jurisdiction since exclusive jurisdiction to foreclose on Jallali's property was in the circuit court conducting the mortgagee's foreclosure action in 2007.

Suit against homeowner's association challenging amendments to subdivision's restrictive covenants on ground that amendments were null and void because they were not properly enacted was time-barred where suit was not filed within five years of dates amendments were recorded.

Hilton v. Pearson, 41 Fla. L. Weekly D 359 (Fla. 1st DCA 2016)

In July 2013, Appellees (the "Pearsons") filed suit against the homeowner's association for the Paradise by the Sea subdivision alleging that the amendments to the subdivision's restrictive covenants recorded in September 2001 and April 2005 were null and void because they were not properly enacted. Specifically, the suit alleged that the amendments were not enacted in compliance with the subdivision's original restrictive covenants because the 2001 amendments were never voted on or approved by the owners within the subdivision and the 2005 amendments were approved by only 70% of the owners even though the amendments affected the owners' property rights.

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The Appellant (the "Hiltons") were permitted to intervene to oppose the relief sought by the Pearsons, and the Hiltons filed an answer asserting the affirmative defense that the Pearsons' suit was barred by the statute of limitations. The Hiltons subsequently filed a motion for summary judgment on the statute of limitations issue in which they argued that *Harris v. Aberdeen Property Owners Association, Inc.,* 135 So. 3d 365 (Fla. 4th DCA 2014) was directly on point and controlling.

In March 2015, after a bench trial, the trial court entered an amended final order declaring the 2001 and 2005 amendments void and finding that the subdivision's original restrictive covenants remained in effect. The order also reaffirmed the trial court's rejection of the Hiltons' statute of limitations defense, finding that *Harris* was not applicable.

On appeal, the court ruled that a suit challenging the validity of an amendment to restrictive covenants must be filed within five years of the date that the amendment is recorded even if the suit alleges that the amendment was void because it was not properly enacted. In this case, the Pearsons' suit was filed almost 12 years after the 2001 amendment was recorded and more than 8 years after the 2005 amendment was recorded. Therefore, the suit was barred by the statute of limitations.

Trial court had jurisdiction to enter final judgment of foreclosure in favor of lender where lender's foreclosure was filed after association's foreclosure action but where lender's mortgage was of record at the time the association filed its lien and commenced its foreclosure.

CitiMortgage, Inc. v. Flowers, 41 Fla. L. Weekly D916 (Fla. 4th DCA 2016)

CitiMortgage recorded its mortgage in November 2006. Appellee homeowners' association recorded a claim of lien in May 2012. In August 2012, the association filed an action in county court to foreclose its lien and recorded a notice of lis pendens. The lender filed its foreclosure in October 2012 in a separate suit. While the lender's suit was pending, the association obtained a judgment, and the property was sold in 2013. Thereafter, the lender obtained judgment, and the court allowed the buyer (in the association's case) to intervene. The intervenor moved to vacate the lender's judgment arguing that the court lacked jurisdiction due to the association's previously filed foreclosure action and lis pendens, citing to *U.S. Bank Nat' Ass'n v. Quadomain Condo. Ass'n*, 103 So. 3d 977 (Fla. 4th DCA 2012). The court entered an Order vacating the lender's judgment.

On appeal, the court distinguished *Quadomain* on its facts because it applied to actions on interests which were *unrecorded* at the time of the initial lis pendens (emphasis added). Since the lender's mortgage was recorded at the time of the association's lis pendens, *Quadomain* was inapplicable, and the court hearing the lender's case had jurisdiction to enter the judgment.

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Probate Case Summaries

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Marriage was void when the ward did not obtain prior court approval and he lacked the right to marry.

Smith v. Smith, 2016 WL 803625 (Fla. 4th DCA 2016)

A guardian was appointed for the ward pursuant to an order appointing a plenary guardian. The order specifically removed the ward's right to contract, and provided that the ward's right to marry was subject to court approval. Subsequent to the issuance of the order, the ward and appellant married without court approval. The ward's independent counsel in the guardianship case then filed a lawsuit to annul the marriage. The trial court ultimately granted the annulment, and the woman whom the ward "married" appealed.

The appellant's argument on appeal, among other things, was that prior court approval was not required. The Fourth District Court of Appeal (Fourth DCA) cited § 744.3215(2), Fla. Stat., which indicates that the right to marry may be removed from a person in an incapacity proceeding, but may not be delegated to a guardian. Further, the Fourth DCA cited § 744.3215(2)(a), Fla. Stat.: "[i]f the right to enter into a contract has been removed, the right to marry is subject to court approval."

The appellee did not file a brief. The Fourth DCA held that the trial court must comply with the plain and ordinary language of the statute. Here, the right to marry is subject to court approval, and if a marriage is entered into by a person who does not have the right to marry, that marriage is void. *See Kuehmsted v. Turnwall*, 138 So. 775, 777-78 (Fla. 1932). Therefore, the Fourth DCA found the trial court's interpretation of the guardianship code correct and affirmed the decision.

In the absence of an action properly commenced by a guardian against co-trustees, the guardianship court does not have the authority to override the decisions of the co-trustees in the management of a trust.

In re Guardianship of Mount, 41 Fla. L. Weekly D507 (Fla. 2d DCA 2016)

This appeal stems from a non-adversarial guardianship proceeding over a ward, Ronald J. Mount. The ward's court-appointed attorney filed a motion, and the trial court entered a non-final order, compelling the co-trustees of a trust to return trust funds held in a law firm's trust account to the trust's primary bank account. The Second District Court of Appeal (Second DCA) held that "[i]n the absence of an action properly commenced by the guardianship against the co-trustees, the Ward's beneficial interest in the trust does not afford the guardianship court the authority to override the decisions of the co-trustees in the management of the trust." The Second DCA cited *Cohen v. Friedland*, 450 So. 2d 905, 906 (Fla. 3d DCA 1984), which held that a court is without authority to remove trust assets from the control of the trustee in the absence of proof that the trustee has performed arbitrarily or failed to perform. The appellate Court therefore reversed the trial court's order and remanded the matter back to the trial court.

A beneficiary cannot rely on representations made during settlement negotiations that were not written into the settlement agreement.

Moriber v. Dreiling, 41 Fla. L. Weekly D169 (Fla. 3d DCA 2016)

Leatrice Dreiling, the decedent, was survived by her three children. Multiple trusts were established by the decendent and her husband, Albert, who predeceased her. During the decedent's life, disputes arose between the decedent and one of her daughters, Sara, and they ceased communicating. In 1999, litigation ensued regarding Albert's estate, and ultimately a settlement agreement was reached. One of the terms of the settlement agreement was that Sara would receive her one-third interest in 3 life insurance policies on the decedent's life, which policies were procured pursuant to a split-dollar agreement between an irrevocable trust that Albert created and the family business, Dreiling Medical Management (DMM). However, in 1997, Mrs. Dreiling caused DMM to stop paying premiums for the 3 life insurance policies, and as a result, the policies were cancelled and their cash value was paid to DMM.

Upon the decedent's death in February 2009, Sara filed a claim against the estate for her one-third share of the life insurance policies. Subsequently the decedent's counsel wrote a letter informing Sara that the policies had been cancelled by the decedent approximately twelve years earlier. Sara then sued the estate for: (1) breach of the split-dollar agreement, (2) conversion, (3) fraudulent inducement to enter into the settlement agreement, and (4) fraudulent misrepresentations regarding the settlement agreement. Sara argued that she never would have entered into the settlement agreement had she known that the life insurance policies had been cancelled. The trial court granted summary judgment against Sara on all four counts, finding that there had been no affirmative misrepresentations made, and even if there were, she could

not rely on those representations, so her fraud claims were not actionable. The trial court also found that the fraud claims were barred by the statute of limitations and that the release that Sara signed as part of the settlement agreement precluded her from asserting the claims.

On appeal, the Third District Court of Appeal (the Third DCA) found that the trial court was correct in determining that, as a matter of law, Sara could not rely on any affirmative misrepresentations, even if they had been made. The Third DCA held that a plaintiff may not rely on statements made by litigation adversaries to establish fraud claims, as a matter of law, citing *Columbus Hotel Corp. v. Hotel Management Co.*, 156 So. 893 (Fla. 1934). The Third DCA specifically found that Sara entered into the settlement agreement without demanding proof of the status of the insurance policies and without insisting that any terms be inserted into the agreement regarding the status of the policy, the value of the split dollar agreement, or the contents of the relevant trusts. Therefore, the Third DCA held that the fraud claim failed as a matter of law and affirmed the entry of a final summary judgment against Sara.

A petitioner can voluntarily dismiss a petition to determine incapacity prior to an adjudicatory hearing, even after the examining committee reports find incapacity.

Gort v. Gort, 185 So. 3d 607 (Fla. 4th DCA 2016)

An older brother filed a petition for incapacity and for appointment of a limited guardian for his younger brother. The younger brother opposed the petition and alleged that he had total capacity. His cousin also opposed the petition, and the cousin counter-petitioned for incapacity and sought his appointment as plenary guardian. The examining committee found that the younger brother was incapacitated and therefore lacked the capacity to contract. Prior to the incapacity hearing, the trial court sent the parties to mediation. The mediation resulted in a settlement agreement, where the brother and cousin would dismiss their pending incapacity petitions without a requirement for prior court approval. The settlement agreement also included various other requirements for the parties.

Over a year later, the older brother filed an action in court to have the settlement agreement declared valid and enforceable. The younger brother filed a counter-petition seeking to have the settlement agreement declared invalid and unenforceable. The cousin also responded and asserted affirmative defenses. The older brother then moved for summary judgment, which the younger brother opposed, and the cousin joined in the younger brother's response.

The younger brother included an affidavit in his opposition to the summary judgment where he claimed, among other things, that in mediation, he felt extremely vulnerable and pressured to sign the agreement, and that he believed that if he didn't sign, he would be sent to a state mental facility.

The trial court heard arguments from both sides and then asked the parties to submit supplemental authorities and a proposed order, which they did, and each received notice of the other's proposed orders. The trial court ultimately adopted the older brother's order and entered summary judgment approving the settlement agreement.

On appeal, the younger brother and cousin argued that the settlement agreement is void under Florida law and public policy, and specifically, that the older brother could not voluntarily dismiss the incapacity petition without the statutorily required adjudicatory hearing. They also argued that the contrary allegations in the older brother's incapacity petition estopped him from arguing that the younger brother had capacity to enter into a contract. The older brother's response was that his younger brother was presumed to have capacity and the reports are inadmissible hearsay, that the doctrine of judicial estoppel did not apply, and his voluntary dismissal of the incapacity petition was not a due process violation.

The Fourth DCA found that while the Florida Statutes are clear on some of the requirements in incapacity proceedings, they are silent on whether an incapacity petition can be voluntarily dismissed prior to an adjudicatory hearing. The Court found *Katke v. Bersche*, 161 So. 3d 574 (Fla. 5th DCA 2014) helpful, which recognized the voluntary dismissal of an incapacity petition when ruling on a writ of prohibition. The Court specifically distinguished this case from their decision in *Jasser v. Saadeh*, 97 So. 3d 241 (Fla. 4th DCA 2012), which involved a settlement agreement and mutual dismissal following the appointment of an emergency temporary guardian for the ward.

The Fourth DCA specifically found that the guardianship and probate rules do not prohibit a party from voluntarily dismissing a petition to determine incapacity, and § 744.311, Fla. Stat., does not mandate an adjudicatory hearing. Additionally, there was no evidence of improper or coercive conduct by the older brother supporting an argument of duress, and no issue with the settlement agreement lasting an indefinite amount of time. The Fourth DCA therefore affirmed the summary judgment, and affirmed the fee award without explanation in favor of the older brother.

Ethics Questions?

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A creditor is entitled to full interest under a promissory note, the estate cannot contest the award of interest when no objection to the claim is filed, and the court cannot use its equitable powers to award less interest.

Oreal v. Steven Kwartin, 2016 WL 1239756 (Fla. 4th DCA 2016)

The decedent died in 2009 and his will was admitted to probate. Steven Kwartin and Steven Kwartin, P.A. each filed a statement of claim against the estate. The individual claim was based on a promissory note in the amount $125,000.00 and the firm's claim was based on a promissory note in the amount of $500,000.00. At the time, the remaining principal on the firm's note was $375,000.00 with an accrued interest of $397,000.00, for a total of $772,500.00. The estate objected to the individual claim, but not the firm's claim.

The estate eventually moved for an extension of time to object to the claim, and the firm moved to compel payment of the claim. The trial court denied the extension of time to object and granted the motion to compel payment, directing the estate to pay the principal, but reserving on the amount of interest due. The estate appealed both orders, but the Fourth DCA affirmed without an opinion.

The trial court found that since the estate did not object to the claim, the court had no authority to conduct an evidentiary hearing to determine the amount of interest due, but then exercised its equitable powers and reserved the right to determine whether a setoff was appropriate due to any "unexcused and excessive delay exercised by [the firm] in attempting to perfect and collect on [its] valid unpaid claim." The trial court ultimately granted the estate's motion for equitable setoff, found the firm had an equitable duty to prevent the accumulation of interest, and held that interest only accrued until the date that the estate moved for an extension of time to object to the claim.

The firm appealed the ruling limiting interest. On appeal, the Fourth DCA reviewed 733.705(9), Fla. Stat., which provides that "[i]nterest shall be paid by the personal representative on written obligations of the decedent providing for the payment of interest." The Fourth DCA held that based on the plain language of the statute, the firm was entitled to the entire amount of interest as outlined in the promissory note, and specifically the default interest. The Fourth DCA also held that the trial court erred by imposing an equitable setoff, because a court cannot use equity to remedy a situation that it perceives to be unfair when there is a full, adequate and complete remedy at law. The Fourth DCA found all other arguments raised in the consolidated appeal without merit, and therefore, affirmed in part, reversed in part, and remanded with directions to award the full amount of interest due to the firm.

The court must review the trust instrument as a whole and not rely on isolated terms of the trust.

Vigliani v. Bank of America, N.A., 2016 WL 886226 (Fla. 2d DCA 2016)

Mario Vigliani was the settlor of a trust, naming his wife, Maryann, and his children and grandchildren as the beneficiaries. Maryann and Bank of America, N.A. ("BOA"), were the co-trustees when a trust action was initiated, but Maryann died during the appeal and BOA became the sole trustee. The trust was created in 1994 and restated in 2009. The decedent died in 2010. Under the terms of the restatement, upon the decedent's death, the co-trustees were to divide the residue of the trust into two shares: one to the Marital Share and the other to the Family Trust. According to the restatement, the split in the two shares was to be governed, in part, by the applicable estate tax laws. The restatement also contained a specific section on the decedent's intentions.

The sole issue on appeal is the amount required to fund the Family Trust per the terms of the trust. The co-trustees filed a declaratory action to determine the proper amount and the beneficiaries fully cooperated. The trial court determined that the Family Trust should be funded with $3.5 million, which resulted in increasing the marital share payable to the surviving spouse. On appeal, the trustees argued the trial court was correct in using the tax exemption available in 2009, which was when the restatement was executed. The beneficiaries of the Family Trust argued that the Family Trust should be properly funded with $5 million because it was improper to isolate a single portion of the trust, which should be read and interpreted as a whole, including the provisions for the settlor's intentions. They further argued that the settlor's intent was largely to avoid paying estate taxes to the extent possible.

The Second DCA found that the trial court erred when it isolated certain provisions and did not interpret the trust as a whole. The Second DCA found that, when reviewing the trust as a whole, the settlor wanted the Family Trust to be funded with the federal individual exemption amount applicable in 2009 unless the circumstances at his death required a different outcome. Further, the Second DCA found that it was clear that other circumstances existed at the time of the settlor's death that likely required funding the Family Trust with an amount other than $3.5 million. The Second DCA also found that the facts in the record were insufficient to make a determination of the appropriate amount, and that this determination is properly a decision for the trustee, who should be afforded an opportunity to make a decision before further court intervention is necessary. Therefore, the decision was reversed and remanded.

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