

ActionLine

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

Piercing The Homestead Veil

Documenting With Drones

Navigating The Regulatory Maze Of Private Lending

Vol. XXXVIII, No. 4 www.rpptl.org Summer 2017

FUND APP

VERSION 2.0 NEW! IMPROVED CALCULATORS

Learn more by visiting:

thefund.com/app



Features Include

Updated Premium Calculator Results

The results screen on the premium calculator has been updated to show a simplified calculation summary for ease of quick-quoting and estimations.

Send Your Completed Calculations

Calculation results can now be saved, printed and shared. Calculator results can be generated in a worksheet ready to email.

Download Today

for both Apple and Android Devices

Download on the App Store

ANDROID APP ON Google play

FMC-753 AL42717

Copyright ©2017 Attorneys' Title Fund Services, LLC • thefund.com 800.336.3863
Apple, the Apple logo, iPad and iPhone are trademarks of Apple Inc., registered in the U.S. and other countries.
App Store is a service mark of Apple Inc. Google Play™ is a trademark of Google Inc.

The Fund ALWAYS DRIVEN

The RPPTL Family

As I sit down to finalize my last Chair's Column, my mind is filled with many thoughts and memories about this journey, about the ever-changing practice of law, about professionalism and about families – both my own family and my RPPTL Family. I have not yet unpacked from the Section Convention in Bonita Springs titled "Work. Learn. Meet. Repeat" where we held committee meetings, a family friendly carnival reception complete with a dunk tank, a CLE focused on technology and on disaster preparedness, our Section annual election lunch, more committee meetings, an Academy Award themed dinner to recognize those who have tirelessly worked to support our Section, our Substantive Committee Roundtables, our Executive Council meeting, a poolside party with games, an evening party with s'mores, and a farewell brunch. This multi-day event was one of the largest Conventions in the Section's history and, most importantly from my perspective, drew a significant number of children of all ages - from babies to grown adults. I owe a special debt of gratitude to the entire Executive Committee, the Convention Coordination Committee chaired by Dresden Brunner and her vice chairs, Sancha Brennan Whynot and Jon Scuderi, as well as our Treasurer, Tae Kelley Bronner, and our Section Administrator, Mary Ann Obos, with valuable assistance from Whitney Kirk, for the immense amount of time and effort leading up to this memorable meeting.



Chair's Column

By Deborah Goodall
Section Chair, 2016- 2017

When I was planning our Executive Council meetings for the 2016–2017 year, my goal was to include venues that would appeal to families. The time that we spend on Section business is substantial, and it is my hope that if our families feel welcome at events, they will want to attend and will make friends and will create bonds that will cause them to look forward to future meetings and may even pave the way to their own future career choices.

In addition to our symbolic family, we also have many examples of literal RPPTL families. Five of the past chairs of our section have children that currently serve on the Executive Council. The Kelley Family wins the prize for most family members – Past Chair Rohan Kelley serves with three of his children – Tae Kelley Bronner, Shane Kelley and Sean Kelley. Tae and Shane are both current members of the Executive Committee with Tae serving as our Treasurer and Shane as our CLE Co-Chair. Sean serves as Co-Vice Chair of the Jurisdiction, Due Process and Service of Process Committee. Past Chair Mike Swaine is father to Bob Swaine, who also serves on the Executive Committee as Co-Chair of the CLE Committee and who will be succeeding Tae as Treasurer for the 2017–2018 year. Past Chair David Brennan serves with his daughter, Sancha Brennan Whynot. Sancha serves as Co-Vice Chair of the Guardianship Law Revision Commission chaired by David, and she also served as Co-Vice Chair of the Convention Coordination Committee. Past Chair Sandra Diamond serves with her son, Benjamin Diamond, who chairs the Fellows Committee. In addition to both being active members of the Executive Council, they also share a legacy of elected leadership roles. Sandy is a current member of the Florida Bar Board of Governors and in November, Ben was elected to the Florida House of Representatives. Past chair George Meyer serves with his son Michael Meyer, who is a current Co-Vice Chair of the Insurance and Surety Committee.

In addition to Past Chairs, we also have other examples of parent-child relationships on the Executive Council. Jennifer Jones Bloodworth serves as Co-Vice Chair of the Fellows and as an At Large Member along with both of her parents Fred and Pat Jones. Judge Hugh Hayes serves as a Judicial Liaison, and his son Travis Hayes serves as Co-Vice Chair of the Digital Assets Committee and the Probate Law and Procedure Committee.

I do not believe that it is a coincidence that we have so many legacy members of the Executive Council. For many of these folks, they have literally grown up in the Section and have looked forward to returning to meetings as adults after graduating from law school. Love and respect of the Section is contagious – and once you become truly involved, it becomes a way of life and something that is as natural as eating and sleeping.

We also have many examples of Executive Council members who are married to other Executive Council Members. I am not suggesting that Section meetings are an alternative to Match.com; however, it is certainly the case that lifetime relationships are forged at RPPTL Section meetings. Our hard-working couples include Tami Conetta and Barry Spivey; Bill Parady and Salome Zikakis; Mary and Tom Karr; and Erin and Doug Christy.

Aside from these examples of actual family members, I believe there is a real sense of the RPPTL family at our meetings – albeit an extremely large extended family. That

continued, page 5

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

Deborah Packer Goodall, Boca Raton
Chair
Andrew Marvel O'Malley, Tampa
Chair-Elect
William Thomas Hennessey III, West Palm Beach
Secretary
Tae Kelley Bronner, Tampa
Treasurer
S. Katherine Frazier , Tampa
Director, At-Large Members
Debra Lynn Boje, Tampa
Director, Probate and Trust Law Division
Robert S. Freedman, Tampa
Director, Real Property Division
Michael J. Gelfand, West Palm Beach
Immediate Past Chair
Jeffrey A. Baskies, Boca Raton
Co-Editor-in-Chief
Wm. Cary Wright, Tampa
Co-Editor-in-Chief
Kathrine S. Lupo, Sarasota
Advertising Coordinator
George D. Karibjanian, Boca Raton
Editor – National Reports
Paul E. Roman, Boca Raton
Editor – Ethics
Benjamin F. Diamond, St. Petersburg
Features Editor
Lee Alan Weintraub
Reporters' Coordinator – Real Property
Justin M. Savioli
Reporters' Coodinator – Probate and Trust
Sean M. Lebowitz, Boca Raton
Editor – Probate & Trust Case Summaries
Salomé Bascuñan, Miami
Editor – Real Estate Case Summaries
Kelly Nicole Catoe, Tampa
Photo Editor
Celia Ellen Deifik
Editor-at-Large
Mariela M. Malfeld, Miami
Editor-at-Large
Jeanette E. Moffa, Ft. Lauderdale
Editor-at-Large
Michael G. Rothfeldt, Tampa
Editor-at-Large
Angela K. Santos, Boca Raton
Editor-at-Large
Janellen S. Green, Santa Rosa Beach
Publications Coordinator/Copy Editor
Laura Pichard-Murphy, Tallahassee
Design/Layout
Statements or expressions of opinion or comments appearing herein are those of the editors or contributors and not The Florida Bar or the Section.

IN THIS ISSUE:

The RPPTL Family 3
About the Cover 5
Piercing The Homestead Veil 6
Documenting With Drones: Practical Implications Of Multiple Tiers Of Regulation 12
I'm Still Standing: Revocable Trusts — Do Beneficiaries Have Standing To Assert Claims Against Trustees? A Discussion Of *Hilgendorf V. Estate Of Coleman* And Related Case Law 14
Navigating The Regulatory Maze Of Private Lending 18
Practice Corner: Probate And Trust Division
Out To Pasture: Estate Planning For Horses 22
Practice Corner: Real Property Division
Don't Let The Mailbox Rule Box You Out 23
Exploring The Limits Of *Parens Patriae* From Two Recent Guardianship Cases 24
Rpptl Section Executive Council Meeting, Key West 27
The Rpptl Visits Austin, Texas 28
Rpptl Section Executive Council Meeting, Key West, Florida Photos 30
Rpptl Out Of State Executive Council Meeting, Austin, Texas Photos 31
Roundtable Real Property Division 32
Roundtable Probate And Trust Division 34
The New 2016 Alta Commitment With Florida Modifications:
Expressing The Limitations On Liability 38
Florida Domestication Statutes And Good Title For Real Estate:
A Trap For The Unwary 40
Technology And Florida Real Estate
(Introducing New Technology To An Established Industry) 43
A Primer On Dementia For Legal Professionals 47
Probate And Trust Case Summaries 52
Real Property Case Summaries 54
What's Happening Within The Section 59
Actionline Bulletin Board 60

Get Included In *ActionLine!*

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

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

ISSUE	DEADLINE
Spring	January 15
Summer	April 15
Fall	July 15
Winter	October 15

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.

means that each of our five annual meetings presents a unique opportunity for a working family reunion. I am not a child of an attorney, and I don't think that a legal career is in the cards for either my son Steven or my daughter Ellie – but I absolutely feel like I am among family whenever I am at a RPPTL event, a Florida Bar event when other RPPTLs are present, or an ACTEC event where other RPPTL members are present. Although I am not involved with ACREL or the ABA, I am certain that the same is true for those organizations as well.

My last two legal positions have been with firms of attorneys that I have met through the Section. I know of many people that have attended meetings with a resume in hand and have left at the end of the weekend with an offer or an interview.

Just like any family, we don't always agree. In fact, sometimes that disagreement can be rather strong. But from my vantage point, what is very special about the Section is that we can discuss topics in meeting rooms, in e-mail chains, on telephone calls – and when we meet again, greet one another with a smile. Sometimes we must simply "agree to disagree" while simultaneously maintaining collegial relationships with each other. On one issue, your views may be completely diametrically opposed to another; but on the next topic, your opinions may be absolutely aligned. My advice for all in almost every scenario is this: do not hold grudges; do not be judgmental; do not take disagreements personally; do not jump to conclusions; rather, treat others as you would want to be treated, invite conversation and welcome debate.

Section service also has the benefit of being a tremendous source of knowledge and comradery. Our substantive committee meetings are much like high-level CLEs. When you are involved in committees that are working on proposed legislation, you are leaps and bounds ahead of those who only learn about the new laws once they are passed and signed by the Governor. If you have a question about a substantive area of the law outside of your general practice area, you need only glance in the RPPTL Directory for someone who knows the topic and reach out for assistance. Please do not miss the opportunity to be a mentor to someone who needs your expertise – or to reach out for advice to someone who has more knowledge than you. Become involved in section committees and attend meetings and participate. Look for chances to bring your family with you so that you – and they – will look forward to our meetings. Be flexible and stay positive at all times.

As you may recall, the Disney meeting had almost historically large advance registrations, but unfortunately Hurricane Matthew caused it to not proceed as planned. Nevertheless, it was perhaps the most unique meeting I can recall with unparalleled opportunities to spend time with each other and to create memories to last a lifetime. Even before that unexpected event, we had organized the CLE that we just held at the Convention relating to Disaster Preparedness, Insurance and Technology Security. We had originally thought that the program would be timely with the Convention being held at a coastal hotel during the first few days of the 2017 Hurricane Season. Imagine our surprise when, instead, the October storm took an unexpected turn and caused the cancellation of most of our carefully planned events. Fortunately, the damage was minimal, and it was a valuable trial run for being prepared for a major hurricane. And, looking for silver linings in those hurricane clouds, it was a wonderful opportunity to showcase the incredible capabilities of our beloved Section Administrator, Mary Ann Obos, when it comes to restructuring major events with style, grace and humor - and an unforeseen way to promote our Convention CLE.

Effective as of January 1, 2017, Florida lawyers are now required to take a minimum of three hours of technology-related CLE courses during each three-year reporting cycle. Mike Simon, Brian Sparks and Jon Lyon educated us on important technology issues, survival skills and insurance coverage concerns. If you were not able to attend in person or to watch on the live-webcast, I encourage you to review it when it becomes available for download. This CLE is eligible for 2 hours of Technology Credit and 1 hour of Ethics Credit. Thanks to Cary Wright for doing a wonderful job as Program Chair and to all three talented presenters.

At the annual election, we approved the slate of officers that included two new Executive Committee Members for the 2017 – 2018 Bar year: William (Cary) Wright, who will serve as the Real Property Legislation Committee Co-Chair and Larry Miller who will be the Secretary. On behalf of the Executive Committee, we welcome Cary and Larry to the team. It has been an honor and a privilege to serve as the Chair of this exceptional Section and I know that the RPPTLs will be in great hands under the leadership of Andrew (Drew) O'Malley. Drew, my advice to you is this: always go with the flow, roll with the punches, be ready to change plans, count on your colleagues to support you (because they will), keep the faith, smile as much as possible and remain optimistic.

I end this last column as I started my first — with gratitude for all who have assisted me along the way on this incredible journey — most especially my family — both biological and RPPTL. I could not have done this without you.

ABOUT THE COVER: "*The Wrecker,*" photo by John Neukamm
The sculpture "The Wreckers," captures the frontier spirit of Key West. The early wreckers are depicted saving lives and cargo from a vessel that had wrecked on a nearby reef. Wrecking was the island's first economy, and ultimately Key West became the richest city per capita in the U.S. during the mid-1800s due to salvage fees and ancillary businesses from the wrecking industry. The sculpture and 36 busts of men and women who had the greatest impact on Key West were created by internationally acclaimed sculptor James Mastin of Miami, Florida, and late husband of long-time Section member Deborah Mastin. The sculpture and busts are contained in the Key West Historic Memorial Sculpture Garden in Mallory Square.

Piercing The Homestead Veil

By Michael V. Hargett, Esq., Barnett, Bolt, Kirkwood, Long & Koche, P.A., Tampa, Florida and
T. Bradford Petrino, Esq., Korshak & Associates, P.A., Casselberry, Florida

The Fourth DCA recently decided *Flinn v. Doty*, holding that an equitable lien could be imposed on a homestead as a remedy for unjust enrichment.[1] But homestead is constitutionally exempt from the claims of judgment creditors[2]—why was this allowed?

The *Flinn* court held: "Unjust enrichment is sufficient in these circumstances to permit an equitable lien against a homestead."[3] This appears, at least superficially, to be in conflict with the Supreme Court's holding in *Havoco of America, Ltd. v. Hill*, which requires fraud or egregious conduct when granting equitable liens against a homestead.[4] The genesis of this article was the concern that a hasty reader—whether a member of the bar or the bench—might not realize *Flinn* and *Havoco* belong in distinctly different branches of chancery jurisprudence. In the view of the authors, it would be a mistake to come away from *Flinn* and *Havoco* believing (a) they are necessarily in conflict, (b) that *Flinn* authorizes equitable liens on homestead for all cases of unjust enrichment, or (c) that *Havoco* requires fraud or egregious conduct to pierce the homestead veil in all cases.

The arcane lexicon of chancery

Circumstances supporting equitable remedies are as numerous as the remedies employed by the courts. And it is a fact that chancery practice is increasingly esoteric. The terminology used in many decisions is ambiguous, inconsistent, or both. So the first step is to understand the relationship between the exceptions to the homestead exemption in the literal text of the Florida Constitution, together with four important terms that the courts often use interchangeably: *equitable lien*, *equitable subrogation*, *equitable estoppel*, and *unjust enrichment*.

The constitution provides three exceptions which, for lack of a better term, we refer to as the "voluntary exceptions": 1) payment of taxes and assessments on the homestead; 2) obligations contracted for the purchase, improvement, or repair of the homestead; and 3) obligations contracted for house, field, or other labor performed on the homestead.[5]

Equitable lien is a very broad term meant to describe any state of being in which a party has or is entitled to a right, charge, or encumbrance upon a thing.[6] In that sense it merely describes the destination, and the use of the term alone, such as the Fourth DCA did in *Flinn*, doesn't show you the road traveled to get there.

Subrogation means to put one party in the shoes of another, so *equitable subrogation* is "subrogation that arises by operation of law or by implication in equity to prevent fraud or injustice."[7] In real property litigation, it is often used as a remedy that puts a wronged party in the shoes of a pre-existing lienholder.[8] In a sense, this kind of subrogation is not the imposition of a new lien, but merely a shifting of power to enforce a lien from one party to another. On the other hand, it does amount to a right, charge, or encumbrance on property. While the courts that use the term *equitable lien* in place of *equitable subrogation* may be contributing to our confusion, they're not wrong.

Equitable estoppel and *unjust enrichment* are particular causes of action for which an equitable lien (via subrogation or otherwise) may be the remedy.[9] Equitable estoppel is, in essence, a plaintiff's claim that a defendant made a misrepresentation or concealment of material facts, and the plaintiff detrimentally changed his own position or status in reliance thereon.[10] Unjust enrichment is a claim that the plaintiff conferred a benefit on the defendant that was knowingly accepted or retained by the defendant, and it would be unjust for the defendant to retain the benefit without paying the plaintiff the fair value of it.[11] Understanding these legal theories is critical to deciphering the case law governing the imposition of equitable liens.

Look to the facts, not the courts' terminology

The 1993 Florida Supreme Court decision in *Palm Beach Savings & Loan Association, F.S.A. v. Fishbein* (relied on extensively by the *Flinn* court) is illustrative of the need to focus on the facts and remedy applied in each case and not the terms used by a court to describe them.[12] In *Fishbein*, Palm Beach S&L loaned Mr. Fishbein $1.2 million in exchange for a mortgage on Mr. & Mrs. Fishbein's residence, but the documents were executed outside of the bank's presence, and Mr. Fishbein forged Mrs. Fishbein's signature on the mortgage.[13] Mr. Fishbein then directly applied about $930,000 of the loan to satisfy three pre-existing liens and property taxes.[14] When the Fishbeins divorced, Mrs. Fishbein ultimately received the marital residence, but meanwhile Palm Beach S&L commenced foreclosure.[15]

At trial, Mrs. Fishbein argued that because the house was her homestead and she wasn't a party to the mortgage on which her name was forged, Palm Beach S&L could not foreclose her interest.[16] The trial court agreed that Mrs. Fishbein's homestead was protected from foreclosure of the $1.2 million mortgage that she didn't sign, but granted Palm Beach S&L an equitable lien on the house to the extent that its funds were used to

continued, page 7

satisfy preexisting mortgages and taxes.[17] In other words, the trial court allowed the lender to subrogate to the position of the pre-existing liens, but called the remedy an equitable lien.

On appeal, the Fourth DCA reversed the trial court's imposition of an equitable lien because Mrs. Fishbein had not committed fraud or egregious conduct.[18] The Fourth DCA was right that Mrs. Fishbein had not committed any misconduct; and it was right that existing case law only allows the imposition of an equitable lien for fraud or egregious conduct.[19]

And the Florida Supreme Court was right to reverse.

If that seems like a contradiction, it is because you're looking at the name of the remedy the court used, and not the road the court traveled to get there. Again, the Fourth DCA's opinion is supported by a line of prior Florida Supreme Court cases that includes *Rinker Materials* in 1978 and *Jones* in 1925, all consistently holding that fraud or egregious conduct is required to equitably extend the constitution's voluntary exceptions to liens on homestead.[20] But on appeal to the supreme court, Palm Beach S&L didn't argue that it was entitled to a constitutional exception, it argued "because its loan proceeds were used to satisfy the prior liens, it stands in the shoes of the prior lienors under the doctrine of equitable subrogation."[21] And so the Supreme Court reversed the Fourth DCA and allowed the equitable lien, but it never expressly declared that subrogation is how it got there—instead the Court based its conclusion on three points which we must piece together on our own: $930,000 of the $1.2 million mortgage was used directly to pay off liens on the homestead, Palm Beach S&L was entitled to a $930,000 equitable lien on the homestead—but not more than the amount used to benefit the homestead—and "Mrs. Fishbein stands in no worse position than she stood in before the execution of the [fraudulent] mortgage . . . ."[22]

This remedy was subrogation in all but name. We conclude that *Fishbein* supports equitable subrogation as a remedy that pierces—or perhaps more aptly, bypasses—the homestead protection without a requirement that the party claiming the homestead exemption committed fraud or egregious conduct.[23] Of course, the same essential conditions in *Fishbein* must be met: circumstances that support an equitable remedy in the first place, such as unjust enrichment, and direct application of wrongfully acquired funds to satisfy a pre-existing valid lien against the homestead.

Case law falls into one of three categories

Because it is often impossible to determine why a court has permitted a right, charge, or encumbrance against a homestead from how they name their remedy, the practitioner must review the facts in each decision carefully. We have distilled these overlapping terms and concepts into three categories of facts under which a party may pierce the veil of homestead protection:

(1) Stretching beyond the voluntary exceptions where fraud or egregious conduct were used to invest in, purchase, or improve the homestead or to obtain house, field or other labor performed on the homestead; (2) Fitting one of the Constitution's voluntary exceptions; and (3) Stepping into the shoes of someone already entitled to enforce a pre-existing lien on the homestead, like a mortgagee.

Stretching beyond the constitution's voluntary exceptions

In *Havoco*, the supreme court recognized that it has occasionally allowed equitable liens to pierce the homestead by "stray[ing] from the literal language of the exemption where the equities have demanded it; however, [it] had done so rarely and always with due regard to the exceptions provided in article X, section 4."[24] But *Havoco* is another very challenging case to understand and apply, because the supreme court discussed cases falling into all three of our categories, (including *Fishbein*, where the court allowed an equitable lien in the absence of fraud or egregious conduct), and concluded its analysis of those cases with the statement: "We" have invoked equitable principles to reach beyond the literal language of the exceptions only where funds obtained through fraud or egregious conduct were used to invest in, purchase, or improve the homestead."[25] Because the Supreme Court does not overrule itself *sub silentio*,[26] we believe the requirement of fraud or egregious conduct only applies to cases other than subrogation and the voluntary exceptions.[27]

Jones v. Carpenter is a good example of a case where fraud and egregious conduct were required.[28] A bread company CEO embezzled funds that he directly applied to make improvements on his homestead.[29] The Court found that his conduct was "reprehensible," so it granted the bread company (via its bankruptcy trustee) an equitable lien on the CEO's homestead for the amount spent on improvements.[30]

But Jones only said "reprehensible"[31]—the modern source of the "fraud and egregious conduct" requirement is the Supreme Court's 1978 decision in *Rinker Materials Corp. v. Palmer First National Bank & Trust Company of Sarasota*.[32] In *Rinker Materials*, sub-contractors sought an equitable lien to be placed in higher priority than the construction lender, based on a theory of equitable estoppel.[33] The construction lender had convinced the contractors to continue their supply of materials and labor by providing assurances—not promises—that the trial court ultimately found to be truthful.[34] The Supreme Court held that equitable estoppel requires "proof of fraud, misrepresentation, or other affirmative deception," and would not allow the equitable lien.[35] Limiting the fraud or egregious conduct requirement in *Havoco* to equitable liens based on equitable estoppel eliminates the potential conflict with *Havoco's* affirmation of *Fishbein* and other equitable subrogation decisions that were based on unjust enrichment but do not include facts supporting fraud or egregious conduct.

continued, page 9

Guardian
TRUST

SNT too small for the bank?



PROFESSIONAL TRUSTEE SERVICES:

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

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

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

The final requirement for this class of equitable lien is that the facts hew closely to one of the voluntary exceptions, as *Havoco* said: "Virtually all of the relevant cases involve situations that fell within one of the three stated exceptions to the homestead provisions."[36] Returning to *Jones*, where the CEO directly applied embezzled funds to improve his homestead, the facts fit, albeit loosely, into one of the voluntary exceptions—obligations contracted for improvements on the homestead.[37] When the facts don't fit even a stretched version of the voluntary exceptions, even the "transfer of nonexempt assets into an exempt homestead with the intent to hinder, delay, or defraud creditors" will not pierce the homestead veil.[38]

Voluntary exceptions to the Constitution's Exemption

The voluntary exceptions are routinely the basis of equitable liens on homestead that do not require fraud or egregious conduct. In this context they are often, but not universally, referred to as "vendor's liens," imposed when a party voluntarily lends money for the purchase of property but fails to obtain or perfect a mortgage lien.[39]

In *Golden v. Woodward*, Mr. Woodward sold his home to the Goldens under a written agreement that the Goldens would make monthly payments of the purchase price and refrain from encumbering the house until paid in full; but Mr. Woodward did not obtain a recorded mortgage or other lien of record.[40] The Goldens then breached the agreement by mortgaging the house, so Mr. Woodward sued for an equitable lien.[41] The trial court expressly found insufficient proof of fraud by the Goldens, but awarded Mr. Woodward's estate (he had passed away shortly after filing suit) a vendor's lien for the unpaid balance due under the agreement.[42]

On appeal, the First DCA distinguished the case from *Rinker Materials* and other equitable lien cases founded on equitable estoppel.[43] The court explained that the Goldens would be unjustly enriched if the equitable lien was not allowed, and that "Florida courts have long held that unjust enrichment is a different ground for imposing an equitable lien."[44] Since an express agreement to lend funds for the purchase of a homestead fits the voluntary exceptions, an equitable lien may be imposed on the homestead and fraud or egregious conduct are not required.

Equitable subrogation and *Flinn v. Doty*

Unlike equitable estoppel, the doctrine of equitable subrogation does not require a showing of fraud or egregious conduct because its legal basis is unjust enrichment.[45] As in *Fishbein* and *Brannon v. Hills,*[46] the typical re-finance case involves a contractual obligation between the current owner and a prior lien holder "for the purchase, improvement, or repair of the homestead." The new lender's funds are used to pay the existing lien, and the new mortgage is defective for one of a variety of reasons. The new lender requests the court, under its equitable powers and following the doctrine of equitable subrogation, to place it into the shoes of the prior lender. Once in the prior lender's shoes, the new lender falls within a voluntary exception to the homestead exemption.

In *Flinn v. Doty*, Gail Flinn obtained property, valued at $390,000 via a quit claim deed, from her parents during the final weeks and months of their lives.[47] Ms. Flinn used the proceeds from the sale of the property to satisfy a $206,000 first mortgage on her residence and homestead.[48] Ms. Flinn's sister, as her parents' guardian, filed suit following her mother's death alleging lack of mental capacity and undue influence and sought the imposition of an equitable lien on her sister's homestead.[49] Unfortunately, Ms. Flinn's father passed away during the proceedings.[50] The trial court found that Mr. Flinn lacked legal capacity but did not find undue influence. The court imposed two equitable liens on Ms. Flinn's homestead.[51] The first equitable lien, in the amount of $206,000, the amount used to satisfy the first mortgage, and a second equitable lien, in the amount of $185,000, for the balance of the proceeds of the property received from her parents.[52]

The estate then sought to foreclose the equitable liens. After entry of the final judgment of foreclosure, Ms. Flinn appealed, asserting homestead as a defense for the first time. On appeal, the Fourth DCA affirmed the trial court's imposition of the $206,000 equitable lien, directly rebutting Ms. Flinn's argument that fraud or egregious conduct was required and holding that "[U]njust enrichment is sufficient in these circumstances to permit an equitable lien against a homestead."[53] The Fourth DCA found error in the trial court's foreclosure of the $185,000 equitable lien, citing *Fishbein,* and stating that it could not be imposed on the homestead.[54] As in many Florida decisions, the Fourth DCA did not clarify whether or not it was following the doctrine of equitable subrogation or its sister remedy, an equitable lien.

The court stated that it granted an equitable lien.[55] However, the facts and remedy suggest that the doctrine of equitable subrogation was employed by the court because there was a prior lien on Ms. Flinn's homestead, and the court limited the remedy to the amount of the prior lien. Further, the facts of the case do not fit either a voluntary exception to the homestead exemption nor any "stretching" of an exception. Therefore, the simple imposition of an equitable lien will not pass constitutional muster.

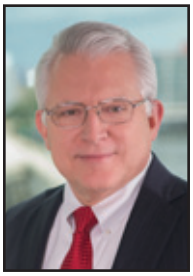
The existence of a prior lien and its limitation on the remedy provided by the court indicate that the doctrine of equitable subrogation was followed. Further, the court stated that "*Fishbein* authorizes the equitable lien on appellant's homestead for the amount of money she used to pay off her mortgage." As previously set forth, the doctrine of equitable subrogation was employed in *Fishbein*, which further strengthens the argument.

However, *Flinn v. Doty* is not a typical equitable subrogation

continued, page 10

case, and its facts do not meet several of the *mandatory* elements established by four of the five district courts: (1) the subrogee made the payment to protect his or her own interest, (2) the subrogee did not act as a volunteer, (3) the subrogee was not primarily liable for the debt, (4) the subrogee paid off the entire debt, and (5) subrogation would not work any injustice to the rights of a third party."[56] The elements of equitable subrogation originated in *Dade County School Board* and were properly prefaced with "equitable subrogation is *generally appropriate* where . . . ."[57] Further, equitable subrogation is founded on doing justice without regard to form and exists to prevent unjust enrichment.[58] Therefore, *Flinn v. Doty* was decided under the doctrine of equitable subrogation and resulted in the Doty estate stepping into the shoes of Flinn's prior lienholder. The resulting $206,000 lien fell within a voluntary exception to the homestead exemption and passed constitutional muster.

Practitioners researching equitable remedies on Florida homestead must always review the facts and remedies employed by the court to determine the underlying legal doctrine and cause of action, rather than relying on the language in a decision. Only practitioners who conduct proper legal research and carefully examine the facts and circumstances of their case will ensure that the remedy they seek passes constitutional muster. The Fourth DCA bought new life to the doctrine of equitable subrogation by reaching back to its roots in *Flinn v. Doty*. It will be interesting to observe creditors' attorneys' use of the decision to expand the imposition of equitable liens against Florida homesteads.


M. HARGETT

Michael Hargett *is a board certified real estate attorney, the Co-Vice Chair of the RPPTL Real Property Litigation Committee and a current member of the RPPTL Real Property Problem Studies Committee. He is a partner with Barnett, Bolt, Kirkwood, Long & Koche in Tampa, Florida, where his practice focuses on business and real property litigation. He is licensed to practice in all State and Federal Courts in the State of Florida. Additionally, he is a double graduate of the University of Florida with a B.S. in Chemical Engineering and a J.D. from the University of Florida Levin College of Law. Further, during his 20 year business career, he obtained an M.B.A. from Clemson University. Michael's vast business and legal experience combined with his registration as an attorney with the United States Patent and Trademark Office uniquely position him to relate to business owners and meet their legal needs.*


B. PETRINO

Bradford Petrino *is an associate attorney at Korshak & Associates, P.A. in Casselberry, Florida, where his practice focuses on business and real property litigation. He is a current member of the RPPTL Real Property Litigation Committee, and a former At-Large Member of the RPPTL. Also a double-graduate of the University of Florida with a B.A. in Philosophy, and J.D. from the University of Florida Levin College of Law.*

Endnotes

1 No. 4D15-2424, slip op. at 3 (4th DCA Mar. 8, 2017), *r'hrg denied* (Apr. 24, 2017).

2 Fla. Const. of 1968, Art. X, § 4(a).

3 *Flinn*, slip op. at 3.

4 790 So. 2d 1018, 1028 (Fla. 2001) ("We have invoked equitable principles . . . only where funds obtained through fraud or egregious conduct were used . . . .").

5 Fla. Const. of 1968, Art. X, § 4(a).

6 *Havoco*, 790 So. 2d at 1025 n.10 (*quoting Jones v. Carpenter*, 106 So. 127, 129 (Fla. 1925)).

7 *Id.* at 1025 n.11 (*quoting* Black's Law Dictionary 1440 (7th ed. 1999)).

8 *See, e.g.*, *Spikes v. Onewest Bank FSB*, 106 So. 3d 475, 477 (Fla. 4th DCA 2012); *Suntrust Bank v. Riverside Nat'l Bank of Fla.*, 792 So. 2d 1222, 1223-24 (Fla. 4th DCA 2001).

9 *Golden v. Woodward*, 15 So. 3d 664, 669-70 (Fla. 1st DCA 2009) (*citing Torres v. Reimondez*, 979 So.2d 1074 (Fla. 3d DCA 2008); *Spridgeon v. Spridgeon*, 779 So. 2d 501, 502 (Fla. 2d DCA 2000); *Gordon v. Flamingo Holding P'ship*, 624 So. 2d 294, 297 (Fla. 2d DCA 1993); *Plotch v. Gregory*, 463 So.2d 432, 436 n.1 (Fla. 4th DCA 1985); *Blumin v. Ellis*, 186 So. 2d 286, 294 (Fla. 2d DCA 1966)); *see also*, *Lexi Dev. Co. v. Lexi N. Bay, LLC (In re Lexi Dev. Co.)*, 453 B.R. 440, 444 (Bankr. S.D. Fla. 2011); *Tribeca Lending Corp. v. Real Estate Depot, Inc.*, 42 So. 3d 258, 262 (Fla. 4th DCA 2010).

10 *Rinker Materials Corp. v. Palmer First Nat'l Bank & Trust Co. of Sarasota*, 361 So. 2d 156, 157 (Fla. 1978) ("the essential elements of an equitable estoppel or estoppel in pais, as related to the party to be estopped, are: (1) conduct which amounts to a false representation or concealment of material facts, or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) the intention, or at least the expectation, that such conduct shall be acted upon by, or influence, the other party or other persons; and (3) knowledge, actual or constructive, of the real facts. And, broadly speaking, as related to the party claiming the estoppel, the esential elements are (1) lack of knowledge and of the means of knowledge of the truth as to the facts in question; (2) reliance, in good faith, upon the conduct or statements to the party to be estopped; and (3) action or inaction based thereon of such a character as to change the position or status of the party claiming the estoppel, to his injury, detriment, or prejudice." (*quoting* 28 Am. Jur. 2d *Estoppel & Waiver* § 35)).

11 *Golden*, 15 So. 3d at 670 ("To state a claim for unjust enrichment, a plaintiff must plead the following elements: 1) the plaintiff has conferred a benefit on the defendant; 2) the defendant has knowledge of the benefit; 3) the defendant has accepted or retained the benefit conferred; and 4) the circumstances are such that it would be inequitable for the defendant to retain the benefit without paying fair value for it." (*quoting Della Ratta v. Della Ratta*, 927 So. 2d 1055, 1059 (Fla. 4th DCA 2006) (other citation omitted)).

12 *Palm Beach Sav. & Loan Ass'n, F.S.A. v. Fishbein,* 619 So. 2d 267 (Fla. 1993).

13 *Id.* at 268.

14 *Id.*

15 *Id.* at 268-69.

16 *Id.* at 269.

17 *Id.*

18 *Id.*

19 *See Fishbein v. Palm Beach Sav. & Loan Ass'n, F.S.A.*, 585 So. 2d 1052, 1055 (Fla. 4th DCA 1991) (*citing Isaacson v. Isaacson*, 504 So. 2d 1309, 1310-11 (Fla. 1st DCA 1987)), *rev'd*, 619 So. 2d 267; *accord Rinker Materials Corp. v. Palmer First Nat'l Bank & Trust Co. of Sarasota,* 361 So. 2d 156, 158-59 (Fla. 1978) (citations omitted).

20 *Rinker Materials*, 361 So. 2d at 157-59; *Jones v. Carpenter*, 106 So. 127, 130 (Fla. 1925).

21 *Fishbein*, 619 So. 2d at 269.

22 *Id.* at 270-71.

23 *Accord Havoco of Am., Ltd. v. Hill*, 790 So. 2d 1018, 1024 (Fla. 2001) (stating

continued, page 11

that in *Fishbein* the Court ruled in Palm Beach S&L's favor "under the doctrine of equitable subrogation as its loan proceeds were used to satisfy the prior liens against the home.")

24 *Id.* at 1023-24.

25 *Id.* at 1024-28.

26 *Arsali v. Chase Home Fin. LLC*, 121 So. 3d 511, 516-17 (Fla. 2013).

27 *Accord Golden v. Woodward*, 15 So. 3d 664, 670 (Fla. 1st DCA 2009).

28 106 So. 127 (Fla. 1925)

29 *Id.* at 128.

30 *Id.* at 130.

31 *Id.*

32 361 So.2d 156, 159 (Fla. 1978).

33 *Id*. at 157.

34 *Id.*

35 *Id.* at 159 (emphasis added).

36 790 So. 2d at 1027 (*quoting Butterworth v. Caggiano*, 605 So. 2d 56, 60 n.5 (Fla. 1992)).

37 *See Jones v. Carpenter*, 106 So. 127, 128 (Fla. 1925).

38 *Havoco,*790 So. 2d at 1028.

39 *E.g., Spikes v. Onewest Bank FSB*, 106 So. 3d 475, 478 (Fla. 4th DCA 2012) (*citing Craven v. Hartley*, 135 So. 899 (Fla. 1931); *Golden v. Woodward*, 15 So. 3d 664, 669 (Fla. 1st DCA 2009)) (other citations omitted).

40 15 So. 3d at 666-67.

41 *Id.* at 667.

42 *Id.* at 668.

43 *Id.* at 670.

44 *Id.* (*citing Spridgeon v. Spridgeon*, 779 So. 2d 501, 502 (Fla. 2d DCA 2000); *Plotch v. Gregory*, 463 So.2d 432, 436 n.1 (Fla. 4th DCA 1985); *Circle Fin. Co. v. Peacock*, 399 So. 2d 81, 84 (Fla. 1st DCA 1981)).

45 *Palm Beach Sav. & Loan Ass'n, F.S.A. v. Fishbein,* 619 So. 2d 267, 271 (Fla. 1993).

46 149 So. 556 (Fla. 1933).

47 *Flinn v. Doty,* No. 4D15-2424, slip op. at 1-2 (Fla. 4th DCA Mar. 8, 2017).

48 *Id.*

49 *Id.*

50 *Id.*

51 *Id.*

52 *Id.*

53 *Id.* at 3.

54 *Id.* at 4.

55 *Id.*

56 *Compare id.* at 1-2, *with Columbia Bank v. Turbeville,* 143 So.3d 964, 968 (1st DCA 2014), *and State Farm Mut. Auto. Ins. Co. v. Johnson,* 18 So.3d 1099, 1100 (Fla. 2d DCA 2009), *and Biscayne Inv. Group, Ltd., v. Guar. Mgmt. Servs., Inc.,* 903 So. 2d 251, 255 (Fla. 3d DCA 2005), *and Villa Maria Nursing & Rehab. Ctr., Inc., v. South Broward Hosp. Dist.,* 8 So.3d 1167, 1169 (Fla. 4th DCA 2009). *But see, Allstate Ins. Co. v. Theodotou,* 171 So.3d 163, 167 (Fla. 5th DCA 2015).

57 *Dade County School Bd. v. Radio Station WQBA,* 731 So. 2d 638, 646 (Fla. 1999) (emphasis added). *Dade County* is a tort case as are all of the District Court cases that recite the elements of equitable subrogation. However, the *Dade County* Court cited *Fowler v. Lee,* 143 So. 613, 614 (Fla. 1932), a real estate equitable subrogation case, as the source of the elements of equitable subrogation. 731 So. 2d at 646.

58 *Dantzler Lumber & Exp. Co. v. Columbia Cas. Co.,* 156 So. 116, 119 (Fla. 1934); *Federal Land Bank of Columbia v. Godwin,* 145 So.2d 883, 885 (Fla. 1933).

RPPTL General Sponsors

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

SPONSOR	CONTACT	PHONE
Attorneys' Title Fund Services, LLC	Melissa Murphy	800-336-3863
Fidelity National Title Group	Pat Hancock	800-669-7450
First American Title Insurance Co.	Alan McCall	407-691-5200
Guardian Trust	Ashley Gonnelli	727-210-1185
J.P. Morgan Chase	Carlos Batlle / Alyssa Feder	305-579-9485
Management Planning, Inc.	Roy Meyers	609-924-4200
Old Republic National Title	Jim Russick	813-228-0555
Stout Risius Ross, Inc.	Garry Marshall	713-225-9580
The Florida Bar Foundation	Bruce Blackwell	407-960-7000
Wells Fargo Private Bank	Mark Middlebrook / George Lange / Alex Hamrick	813-225-6544
WFG National Title Insurance Company	Joe Tschida	407-792-1094
Wright Investors' Service	Stephen R. Soper	203-783-4320

Documenting With Drones: Practical Implications Of Multiple Tiers Of Regulation

By Mariela Malfeld, Esq., Watt, Tieder, Hoffar & Fitzgerald L.L.P., Miami, Florida

Drones have revolutionized the way the construction industry can monitor the progress of a project from precarious heights or treacherous locations. They can also be used to track equipment and materials, and deliver materials to workers in hard-to-reach areas. Thermal drones, for example, offer the user the ability to record infrared images of a project, which may be used to detect water intrusion and sources of a leak. The advantages of drone use may seem rather clear, but ensuring best practices is more opaque.

Over time, the technology has become more reliable, more affordable, and as a direct result, more widely employed. In February 2012, Congress enacted the FAA Modernization and Reform Act of 2012, which required the FAA to integrate drones into the national airspace by September 2015. Due to the proliferation of drones and the potential risks associated therewith, the last two years have ushered in new regulatory legislation at the Federal, State, and local levels.[1]

FAA Part 107

The Federal Aviation Administration (FAA) refers to drones as Unmanned Aircraft Systems (UAS) and, as the name suggests, the FAA considers drones to be a form of aircraft. On June 21, 2016, the FAA released Part 107 of the Federal Aviation Regulations (the "Regulation" or "Part 107"), which regulates the use of drones when operated for commercial purposes. If the drone operator will be receiving any form of compensation for use of the drone, the use will be considered commercial and Part 107 applies.

The Regulation largely restricts *who* may operate an UAS and *where* it may be operated. For example, only a certified drone pilot may commercially operate a drone. The most significant imposition is that the user may only operate the drone in Class G airspace. Class G is uncontrolled airspace, but it is also likely that in a dense urban environment, the project will be located in regulated airspace. Figure 1 on the following page displays the airspace over Southeastern Florida. The circled areas are examples of regulated airspace.

There are also visual flight rules and visibility requirements which must be met in class G airspace. These regulations are set forth in lengthy detail in the Aeronautical Information Manual published by the FAA. Fortunately, the FAA also has a smartphone application named "B4UFLY" that helps drone operators determine whether there are any restrictions or requirements in effect at the location where they want to fly a commercial drone. Once the drone operator has determined what airspace restrictions, if any, apply to the project site, the next step is to obtain any available waivers.

If the location in which the operator would like to use the drone is within five miles of an airport, it is incumbent upon him or her to notify the airport tower and obtain authorization. Other venues over which the airspace is restricted include national parks, nuclear power plants, NOAA marine sanctuary areas, military bases, prisons, stadiums, and largely crowded areas. Depending on the classification of the restriction, a waiver may be available upon request from the FAA website.[2] It is highly suggested that appropriate waivers be sought, without delay, since the FAA may take several weeks to grant one.

Florida Statute § 934.50

While the Federal Regulation focuses on safety in use of drones, Fla. Stat. § 934.50 (2015) addresses privacy concerns that may arise through the use of drones. Known as The Freedom from Unwarranted Surveillance Act (FUSA), Fla. Stat. § 934.50 was enacted in 2013 and amended in 2015. The regulation prohibits a person, state agency, or political subdivision from using a drone to capture an image of privately owned property or those on the property—including an owner, occupant, or invitee—with the *intent* to conduct surveillance.

Under this law there is a presumption that a person has a reasonable expectation of privacy on his or her privately owned real property if he or she is not observable by persons located at ground level in a place where they have a legal right to be. Individuals have a private right of action to seek compensatory damages, punitive damages, attorneys' fees, and injunctive relief for violations of the surveillance prohibition.

An exception applies to "a person or an entity engaged in a business or profession licensed by the state, or by an agent, employee, or contractor thereof, if the drone is used only to perform reasonable tasks within the scope of practice or activities permitted under such person's or entity's license."[3] Pending legislation has proposed another exception applying to communications providers.[4]

As noted above, there must be the intent to conduct surveillance. Moreover, the law does not prohibit the use of a drone by a person or an entity engaged in a business or profession licensed by the state, or by an agent, employee, or contractor thereof, if the drone is used only to perform reasonable tasks within the scope of practice or activities permitted under such person's or entity's license.[5] As such, it is not likely that the operation of a drone for the purpose of monitoring a project will violate the regulation. However, the drone operator should still be mindful of whether the drone will be incidentally capturing images or video of private property while surveying the project.

continued, page 13

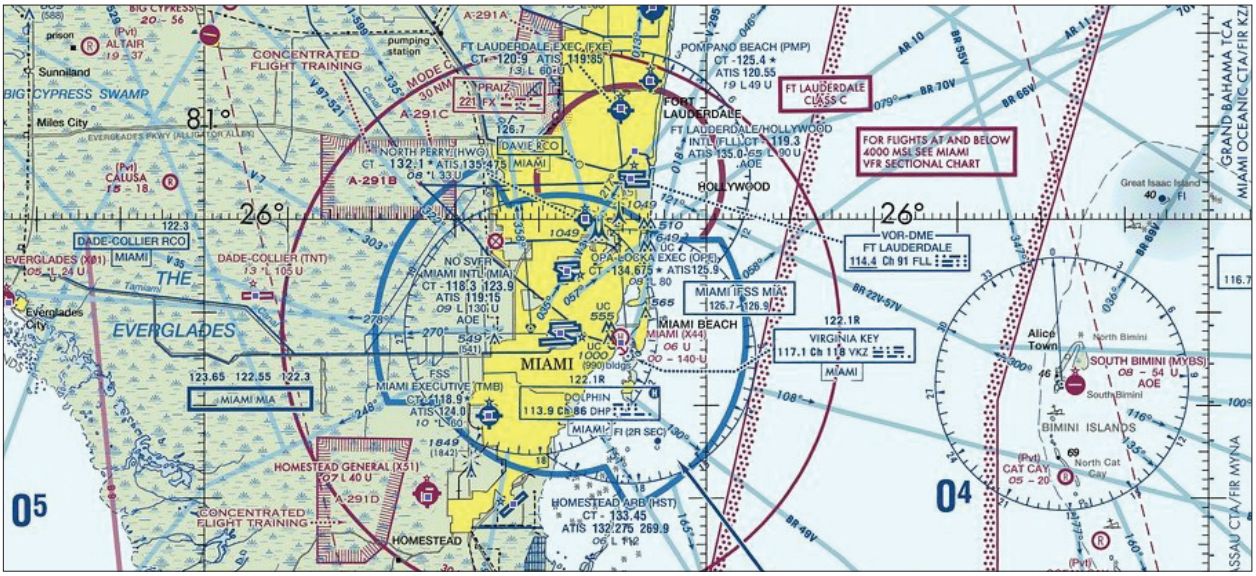


Figure 1.

Local Ordinances

Over the past couple years, a number of municipalities throughout the State of Florida have passed regulations which further restrict the use of drones. The patchwork of local regulations further complicates legal compliance.[6] Generally speaking, the local ordinances tend to create additional permitting requirements and restrict use over areas of public gathering, but the specifics across city and county lines are inconsistent.

Moreover, in March of 2016, Pam Bondi, the Florida Attorney General, issued an opinion that Fla. Stat. § 934.50 does not preempt the adoption of a municipal ordinance prohibiting the use of drones by private individuals for surveillance which invades the privacy rights of the city's residents.[7] As such, the number of disjointed local regulations will likely only increase with time.

Practical Considerations

The most important takeaway from this article is to find a certified drone pilot to perform the surveying, because use of the drone will undoubtedly be considered commercial. The next is whether the possibility exists to infringe on someone's right of privacy during the course of the surveying. If yes, then the company retaining the drone operator might consider obtaining a waiver from the affected person(s), when possible.

There may be other avenues of liability that arise from hiring an outside vendor to perform drone surveying. As a precaution, consider including an indemnity provision in the agreement with the drone operator. The FAA classification for small drones includes those weighing up to 55 pounds. In the event of an accident, the drone could cause serious injury or property damage. If there is such an accident, it must be reported within 10 days to the FAA.

Furthermore, *any* unsafe occurrence or hazardous situation that involves the use of the drone should be reported to the Aviation Safety Reporting System (ASRS), which is run by the National Aeronautics and Space Administration (NASA). First, reporting is confidential. Second, although the incident may constitute a violation of an FAA regulation, neither a civil penalty nor certificate suspension will be imposed if four criteria are met: (i) the violation was inadvertent; (ii) it does not disclose a lack of competency or qualification; (iii) the operator has not been found to have committed a violation in the preceding five years; and (iv) the operator can prove that within 10 days of knowing of a violation, it was reported to NASA through ASRS.

Accidents can happen and liabilities arise, but proactive measures can insulate those who wish to take advantage of the benefits of drones and sophisticated technologies, which monitor the progress of construction projects.

Mariela Malfeld *represents a variety of clients both in public and private construction contracts and focuses her practice on construction litigation and suretyship. For construction litigation matters, Mariela represents the client from the inception of litigation through trial or arbitration.*

Endnotes

1 Public Law 112-95, February 14, 2012, The FAA Modernization and Reform Act of 2012; Richard Thompson, *Drones in Domestic Surveillance Operations: Fourth Amendment Implications and Legislative Responses*, Congressional Research Service, April 3, 2013, available at www.fas.org/sgp/crs/natsec/R42701.pdf (last visited April 19, 2017).

2 https://www.faa.gov/uas/request_waiver/

3 Fla. Stat. § 934.50(4)(d).

4 On February 9, 2017, Florida Senator Dana D. Young introduced SB 832. If passed, it would amend the statute to add an exception to the prohibited uses of drones for communications service providers or their contractors for routing, siting, installation, maintenance, or inspection of facilities used to provide communications services. However, the bill has since been adjourned sine dine.

5 Fla. Stat. § 934.50(4)(d).

6 See e.g., Chapter 37-12, of the Code of the City of Miami; City of Orlando Ordinance No. 2016-87; and, Chapter 14, Article II – Aircraft, Sec. 14-35, Town of Palm Beach.

7 Fla. Op. Att'y Gen., 2016-04, March 30, 2016 (2016 WL 1635038).

I'm Still Standing: Revocable Trusts — Do Beneficiaries Have Standing To Assert Claims Against Trustees?

A Discussion of *Hilgendorf v. Estate of Coleman* and Related Case Law

By Matthew Rochman, Esq., and Jonathan A. Galler, Esq.,
Proskauer Rose LLP, Boca Raton, Florida

In recent years, revocable trusts have become increasingly popular as will substitutes. Despite this growth in usage, questions remain regarding the rights of certain parties under revocable trusts. For example, if you are a beneficiary of a revocable trust and suspect that the trustees of the trust may have breached certain duties during the time when the trust was still revocable, would you be able to maintain an action against the trustees for these suspected breaches? The discussion below explores the answer to this question, in addition to highlighting some recent Florida case law on the issue.

Extent of Trustee's Duties to Beneficiaries of a Revocable Trust During Settlor's Lifetime

A settlor of a revocable trust typically retains the power to revoke the trust and regain the assets or otherwise change the beneficiaries before the settlor's death. This power of revocation is usually held by the settlor personally without restriction. Having such power is, in substance, the equivalent of ownership of the trust assets. Thus, while the trust is revocable and the settlor has capacity, the rights of beneficiaries are generally subject to the settlor's control.

Given this power, the general rule is that trustees of a revocable trust owe duties exclusively to the settlor.[1] The trustee generally cannot be held liable for any conduct knowingly approved by the settlor.[2] Further, the duty to inform and report is generally owed exclusively to the settlor of the revocable trust, and not the beneficiaries, as long as the settlor has capacity.[3]

This rule regarding a trustee's duties being owed exclusively to the settlor of the revocable trust is codified in jurisdictions that that have enacted the Uniform Trust Code.[4] The Uniform Trust Code § 603(a) states that the duties of the trustee are owed "exclusively" to the settlor, while the comment to the Restatement (Third) § 74 states that the duties are owed "primarily" to the settlor.[5] And, in Florida, this rule was codified in Fla. Stat. § 736.0603(a), which provides that "[w]hile a trust is revocable, the duties of the trustee are owed exclusively to the settlor."[6]

Interestingly, the question of what happens when a settlor becomes incapacitated has caused much debate. Originally, the Uniform Trust Code provided that, once the settlor was incapacitated, the trustee had a duty to provide annual reports and other information regarding the trust to the beneficiaries.[7] However, this position was not well-received. As a result, the 2004 amendments to the Uniform Trust Code included an amendment that bracketed the capacity limitation and made this language optional for enacting jurisdictions.[8] As indicated above, most jurisdictions, including Florida, have chosen not to adopt the capacity limitation.[9]

Additionally, the general rule is that beneficiaries do not have standing to bring claims against trustees related to their administration of a revocable trust during the settlor's lifetime.[10] But this rule is nuanced – especially in Florida – because, as discussed below, courts have allowed beneficiaries to pursue such claims under certain situations.[11]

Florida Case Law on Standing of Beneficiaries to Pursue Claims

Florida's Fourth District Court of Appeal has written at least four opinions on the standing of a beneficiary to bring claims against trustees related to the time period when the trust was still revocable. Specifically, the cases are *Carvel v. Godley,*[12] *Siegel v. Novak,*[13] *Brundage v. Bank of America,*[14] and, most recently, *Hilgendorf v. Estate of Coleman*.[15] These four cases, and their impact on the state of the law in Florida, are discussed below.

Siegel v. Novak

In *Siegel*, after the settlor's death, the trustee of a revocable trust filed a complaint for a judicial accounting and a discharge from any liability during the accounting period.[16] The beneficiaries of the trust answered and filed affirmative defenses, challenging certain transfers made before the settlor's death.[17] The trial court granted summary judgment for the trustees.[18] The court ruled that the beneficiaries had no standing to challenge distributions made prior to the settlor's death (since the trust was revocable and the beneficiaries had no present interest in the trust while the settlor was alive).[19] The beneficiaries appealed.[20]

continued, page 15

On appeal, the Fourth District held that, under New York law, the beneficiaries had standing to challenge certain distributions made before the settlor's death.[21] The court noted that, in this case, the settlor was not the trustee of the revocable trust.[22] Therefore, the court reasoned that a person or entity other than the settlor could have conceivably removed property from the trust without the settlor's knowledge or consent.[23] Accordingly, the court stated that "[i]n this situation, we hold that, under New York law, after the death of the settlor, the beneficiaries of a revocable trust have standing to challenge pre-death withdrawals from the trust which are outside of the purposes authorized by the trust and which were not approved or ratified by the settlor personally or through a method contemplated through the trust instrument."[24] The court felt that it would be contrary to the court's sense of justice to allow a trustee to allegedly violate its fiduciary duty and purportedly authorize withdrawals contrary to the provision of trust, and yet escape responsibility because the settlor did not discover such purported transgressions during his lifetime.[25] Thus, the Fourth District found that the beneficiaries had standing and reversed the decision of the trial court.[26]

Carvel v. Godley

The Fourth District also decided the case of *Carvel v. Godley* in 2006.[27] In *Carvel*, the settlor's niece became the voluntary guardian of the settlor while the settlor was alive and, in her capacity as guardian, she brought an action against the trustees of the settlor's revocable trust.[28] In this action, the guardian sought a trust accounting and damages for breach of fiduciary duty based on allegations that the trustees failed to provide for the support of the settlor, mismanaged the trust assets, and charged excessive compensation.[29] In response, the trustees voluntarily submitted certain accountings and then filed a counterclaim seeking judicial approval of the accountings and a release and discharge of the trustees.[30] Since the accountings addressed the main count of the complaint, the guardian voluntarily dismissed her complaint leaving her only as a counterclaim defendant, but she still maintained objections to the accounting.[31]

Thereafter, the settlor passed away.[32] The guardian was appointed personal representative of the probate estate.[33] Litigation challenging the validity of certain will provisions continued in both New York and Florida.[34] In Florida, the trustees moved for summary judgment on their counterclaim.[35] At the hearing on the motion, the trustees argued that the personal representative (former guardian) lacked standing.[36] The trial court agreed and denied the personal representative's objections to the accounting on the basis that she lacked standing.[37]

On appeal, the Fourth District found that the personal representative had standing to maintain her objections to the accounting.[38] The court found that, since one of the express purposes of the trust instrument was to pay the claims and expenses of the settlor's probate estate, the estate was an intended beneficiary of the trust.[39] Further, the appellate court reasoned that the estate could be likened to a known beneficiary to a contract.[40] And, applying contract principles, the court held that the personal representative of the estate had standing to call for (and object to) the accounting, just like the settlor herself would have, because a known beneficiary under a contract is owed the same duty as the party to a contract.[41] Accordingly, the Fourth District reversed summary judgment holding that the estate had standing.[42]

Brundage v. Bank of America

In 2008, the Fourth District issued its opinion in *Brundage v. Bank of America*.[43] In *Brundage*, the beneficiaries of a revocable trust brought an action against the trustees alleging breach of fiduciary duties.[44] Specifically, the beneficiaries alleged that the trustees violated a specific trust provision regarding self-dealing.[45] As to this claim, the trial court granted the trustees' motion for involuntary dismissal.[46] The trial court determined that, during the settlor's lifetime, the trustees owed no fiduciary duty to the contingent beneficiaries.[47] An appeal ensued.[48]

On appeal, the Fourth District agreed with the trial court's determination that the trustees did not owe a duty to the contingent beneficiaries during the settlor's lifetime.[49] However, the appellate court noted that the trustees did owe a duty to the settlor and the trust.[50] And it stated that "once the interest of the contingent beneficiary vests upon the death of the settlor, the beneficiary may sue for breach of a duty that the trustee owed to the settlor/beneficiary which was breached during the lifetime of the settlor and subsequently affects the interest of the vested beneficiary."[51] Accordingly, the appellate court remanded the case for a determination of whether the settlor was competent when she consented to the challenged transaction.[52]

Hilgendorf v. Estate of Coleman

Most recently, in 2016, the Fourth District once again dealt with the issue of a beneficiary's standing in *Hilgendorf v. Estate of Coleman*.[53] In *Hilgendorf*, the settlor of a revocable trust initially served as the trustee of her trust.[54] The trust provided that, while the settlor was alive, the net income and principal of the trust were to be paid to her.[55] Additionally, the trust instrument provided that, while the settlor was alive, no accountings were required; it merely required that the books and records of the trust be open and available for inspection by the grantor or any beneficiary.[56]

The settlor managed and controlled all of the trust assets as her own and kept all the books and records herself.[57] Before her death, the settlor voluntarily resigned as trustee and she appointed her granddaughter, Jennilynn Smith ("Smith"), as successor trustee.[58] Smith succeeded the settlor as trustee but, despite the change, the settlor continued to manage and control the trust assets, as she had always done.[59] The settlor

continued, page 16

also continued to keep all the books and records of the trust herself, as she had always done.[60]

The settlor died in 2007.[61] After her death, Smith (the successor trustee) and one of the settlor's surviving sisters, Hilgendorf, were appointed co-personal representatives of the probate estate.[62] The trust was the sole residuary beneficiary of the estate.[63]

Smith and Hilgendorf then began litigating against each other.[64] First, both parties unsuccessfully attempted to remove the other as personal representative of the estate.[65] Subsequently, Hilgendorf, both in her capacity as personal representative of the settlor's estate and in her capacity as a beneficiary of the trust, filed suit against Smith, as trustee, seeking a pre-death accounting of the trust.[66] Hilgendorf was later removed as personal representative and, once the removal occurred, Smith moved to dismiss Hilgendorf's claim for a pre-death accounting.[67] The basis for the motion to dismiss was that Hilgendorf, as a beneficiary, was no longer a party that could maintain such an action.[68] Smith also argued that Hilgendorf, as a post-death beneficiary of the trust, was not entitled to a pre-death accounting.[69]

The trial court granted the motion to dismiss holding as a matter of law that the trustee had no duty to account to the remainder beneficiary of the revocable trust.[70] Hilgendorf appealed.[71]

On appeal, Hilgendorf cited to the Fourth District's prior opinions in *Brundage*, *Carvel*, and *Siegel* to argue that she had standing to bring such claims in her capacity as a beneficiary of the trust.[72] But the Fourth District disagreed with Hilgendorf – holding that, under these facts, she could not compel the trustees to account – and the court distinguished its opinion from each of its prior cases.[73]

First, the court distinguished *Brundage* on the basis that Hilgendorf did not sue for the violation of a specific provision of the trust, while the beneficiates in *Brundage* did.[74] The court also noted that, in *Hilgendorf*, Hilgendorf only sought an accounting, which was not required by the trust or any statute, as opposed to alleging any type of violation of a trust provision or general breach of duty.[75] The court in *Hilgendorf* noted that "[i]n fact, Fla. Stat. § 736.0813, which provides for the duty of the trustee to provide trust accountings to qualified beneficiaries, specifically does not apply while a trust is revocable…."[76]

Second, the court discussed the case of *Carvel* and distinguished it on the bases that: (1) in *Carvel*, the demand for accountings and claims against the trustees were filed on behalf of the settlor during her lifetime, while the settlor had the right to demand an accounting of the trustees of her revocable trust; and (2) after the settlor's death, the trust was required to pay for the expenses of administration of the probate estate and, to the extent those expenses had gone unpaid, the trustees had breached a provision of the trust and the estate had an interest in the outcome of any accountings, such that the estate (and the personal representative of the estate) had standing.[77] Additionally, the *Hilgendorf* court noted that *Carvel* was also decided prior to the enactment of section 736.0813, Florida Statutes, which limits the duty to account.[78] The *Hilgendorf* court went on to state that, in contrast to *Carvel*, the settlor in *Hilgendorf* had never demanded an accounting from the trustee.[79] And while the trust in *Hilgendorf* had a provision for the payment of probate administration expenses, all those expenses had already been paid by the trust at the time the petition for an accounting was filed.[80] Thus, in *Hilgendorf*, the estate did not have an interest in the outcome of any accountings.[81]

Finally, the court distinguished its holding in *Hilgendorf* from its opinion in *Siegel* on the bases that: (1) *Siegel* was decided under New York law; and (2) just as in *Carvel* and *Brundage*, the beneficiaries in *Siegel* had sued the trustees for allegedly violating specific terms of the trust, while Hilgendorf claimed only a general right to an accounting and never alleged that the trustee violated any of the terms of the trust.[82]

Impact of *Hilgendorf*

In the context of these other opinions, *Hilgendorf* leaves open the question: had Hilgendorf, as a beneficiary, alleged a specific violation of the trust, or had the trust instrument required accountings to the settlor while the settlor was alive (and such accountings were not provided), would Hilgendorf have been able to maintain her action in her capacity as a beneficiary? Under this hypothetical, would the beneficiary also have had to show that the purported breach in not providing accountings affected its interest as a vested beneficiary in order to maintain her suit? Or would alleging a breach alone, without showing that the purported breach affected the beneficiary's interest, be enough?

The answer to the first question is seemingly, yes, because based on *Brundage* and the statements made by the court in *Hilgendorf*, if Hilgendorf had alleged a specific violation of a trust provision, she likely would have been able to maintain her suit in her capacity as a beneficiary. But it is unclear whether Hilgendorf would have also had to show that the purported breach affected her interest as a vested beneficiary in order to maintain her suit.

Additionally, it seems somewhat counterintuitive for the case law to dictate that beneficiaries have standing to bring actions against trustees if they allege a specific breach, while also holding that beneficiaries do not have a general right to receive an accounting without alleging a specific breach, because it would presumably be difficult for beneficiaries to determine if any breach occurred without first receiving an accounting. Nevertheless, that seems to be the current state of the law.

Moreover, while *Hilgendorf* on its face appears to limit the situations wherein a beneficiary has standing to bring claims against a trustee, the opinion also appears to be very

continued, page 17

fact-specific and, thus, seemingly of limited application. In most instances, a beneficiary will likely be able to at least allege a specific violation of a trust provision and, thus, have standing. But, as mentioned above, the task of alleging a breach may indeed prove more difficult in the absence of the right to demand an accounting for that time period (without first alleging a breach). Accordingly, the true impact of *Hilgendorf* remains to be seen.


M. ROCHMAN

Matthew Rochman *is an associate in the Litigation Department and a member of the Firm's Fiduciary Litigation and Financial Services Groups. Matthew's practice concentrates on complex commercial litigation, with a focus on probate and trust litigation. Prior to joining Proskauer, Matt served as an Assistant United States Attorney (AUSA) with the civil division of the U.S. Attorney's Office in Miami. As an AUSA, he represented the United States of America and its agencies in significant bankruptcy-related litigation, such as pursuing fraudulent transfer claims, defending non-dischargeability adversary proceedings and otherwise defending the United States' claims in various capacities as a creditor in bankruptcy proceedings.*


J. GALLER

Jonathan A. Galler *is a senior counsel in the Litigation Department. He concentrates his practice in the areas of probate and trust litigation, as well as commercial litigation, representing fiduciaries and beneficiaries in high stakes trust and estate disputes. Working closely with Proskauer's team of estate planning and administration lawyers, Jonathan litigates undue influence claims, will and trust contests, inheritance disputes, breach of fiduciary duty claims, trust construction and modification actions, and similar probate and trust matters through all phases of dispute resolution. Jonathan has been appointed the Chair of the Florida Probate Rules Committee for the 2017-2018 year.*

Endnotes

1 *See, e.g.*, Unif. Trust Code § 603(a); Fla. Stat. § 736.0603.

2 *See* Unif. Trust Code § 808(a) ("[w]hile a trust is revocable, the trustee may follow a direction of the settlor that is contrary to the terms of the trust"); Fla. Stat. § 736.0808.

3 *See* Restatement Third, Trusts § 74, comment e ("[A]s long as the settlor has capacity … the trustee of a revocable trust is not to provide reports or accountings or other information concerning the terms or administration of the trust to other beneficiaries without authorization either by the settlor or in the terms of the trust or a statute."); Fla. Stat. § 736.0813(4) ("As provided in s. 736.0603(1), the trustee's duties under this section extend only to the settlor while a trust is revocable.")

4 *See, e.g.*, Unif. Trust Code § 603(a); Fla. Stat. § 736.0603.

5 Unif. Trust Code § 603(a); Restatement (Third) of Trusts § 74, comment e.

6 Fla. Stat. § 736.0603(a).

7 Unif. Trust Code § 603(a) (2000).

8 Unif. Trust Code § 603, comment.

9 Bogert's Trust and Trustees, Alan Newman, George Gleason Bogert, George Taylor Bogert, and Amy Morris Hess. *The Law of Trusts and Trustees* § 964 (September 2016 Update) (stating that only 7 of the first 23 jurisdictions to enact the Uniform Trust Code have adopted its rule that the trustee of a revocable trust owes duties to beneficiaries other than the settlor while the settlor lacks capacity); *see* Fla. Stat. § 736.0603.

10 *See, e.g., Montrone v. Valley Bank and Trust Co.*, 875 P.2d 557 (Utah Ct. App. 1994) (remainder beneficiary of revocable trust could not demand accounting from trustee); *Hoelscher v. Sandage*, 462 N.W.2d 289 (Iowa Ct. App. 1990) (remainder beneficiaries lacked standing to sue the trustee of a revocable trust for breach of duty during the settlor's lifetime); *Linthicum v. Rudi*, 122 Nev. 1452, 148 P.3d 746 (2006) (holding that remainder beneficiaries of a revocable trust did not have standing to challenge the trust during the settlor's life because their interests didn't vest until the settlor's death).

11 *See Siegel v. Novak*, 920 So. 2d 89 (Fla. 4th DCA 2006) (after settlor's death, remainder beneficiaries were held, under New York law, to have standing "to challenge pre-death withdrawals from the trust which are outside of the purposes authorized by the trust and which were not approved or ratified by the settlor personally or through a method contemplated through the trust instrument"); *Carvel v. Godley*, 939 So. 2d 204 (Fla. 4th DCA 2006) (personal representative of settlor's estate had standing to compel trustees of settlor's revocable trust to account because Fla. Stat. § 733.707(3) mandated payment of estate expenses by a revocable trust when estate's funds are insufficient, and because trust's terms provided that a purpose of the trust was to pay settlor's funeral expenses and debts, and the expenses of administering her estate); *Brundage v. Bank of America*, 996 So. 2d 877 (Fla. 4th DCA 2008) (finding that, after settlor's death, remainder beneficiaries had standing to bring an action asserting self-dealing by trustee during settlor's lifetime); *see also Evangelho v. Presoto*, 67 Cal. App. 4th 615, 79 Cal. Rptr. 2d 146 (1st Dist. 1998) (holding that, after settlor's death, remainder beneficiaries were allowed to pursue an accounting for periods before settlor's death where there was evidence trustee moved trust funds to a joint account between settlor and trustee, used funds from the joint account for personal expenses, and wrote checks on a trust account after she ceased to be trustee); *Davis v. Davis*, 889 N.E. 2d 374 (Ind. Ct. App. 2008) (allowing a remainder beneficiary to pursue an accounting action against trustee, who also was a remainder beneficiary, for his administration of the trust before and after settlor's death).

12 *Carvel v. Godley*, 939 So.2d 204 (Fla. 4th DCA 2006).

13 *Siegel v. Novak*, 920 So.2d 89 (Fla. 4th DCA 2006).

14 *Brundage v. Bank of America*, 996 So.2d 877 (Fla. 4th DCA 2008).

15 *Hilgendorf v. Estate of Coleman*, 201 So. 3d 1262 (Fla. 4th DCA 2016).

16 *Siegel v. Novak*, 920 So.2d 89, 92 (Fla. 4th DCA 2006).

17 *Id. at 93.*

18 *Id.*

19 *Id.*

20 *Id.*

21 *Id.* at 95.

22 *Id.*

23 *Id.*

24 *Id.*

25 *Id.* at 96.

26 *Id.*

27 *Carvel v. Godley*, 939 So.2d 204 (Fla. 4th DCA 2006).

28 *Carvel v. Godley*, 939 So.2d 204, 206 (Fla. 4th DCA 2006).

29 *Id.*

30 *Id.*

31 *Id*. at 206-07.

32 *Id*. at 207.

33 *Id*.

34 *Id*.

35 *Id*.

36 *Id*.

37 *Id*.

38 *Id*. at 208.

39 *Id*.

40 *Id*.

41 *Id*.

42 *Id*.

continued, page 21

Navigating The Regulatory Maze Of Private Lending

By Christopher Finley, Esq.,
The Law Offices of Christopher Finley P.L., Delray Beach, Florida

By now, large and institutional lenders have adapted to the sweeping regulations that followed the global financial crisis that began in 2008. Unfortunately, small private lenders do not often have the time, money, or resources to conduct a thorough review of their lending practices in order to ensure that they are acting in compliance with all applicable Federal and State laws. This article will provide an overview of the regulatory and licensing requirements associated with private lending and will discuss a recent decision by the Florida Office of Financial Regulation, which provides some clarity on the types of loan transactions that may not require licensing in the State of Florida.

Private and Hard Money Loans

For a multitude of reasons, certain individual and corporate owners and purchasers will seek financing from private lenders in connection with the acquisition, improvement, or refinancing of real property. Private lenders fall into three broad categories, which are typically made up of individuals, seller finance transactions, and hard money lenders.

Private loans are often made by individuals that the borrower knows and has some sort of relationship with. An example of a private loan would be parents loaning money to one of their children so they can purchase or make improvements to a home or investment property.

Seller financing transactions allow the purchaser of real property to get the funds needed to complete the purchase while avoiding the often stringent requirements of an institutional lender. Because individual sellers are not subject to the regulations governing institutional lenders (more on this later), the approval process and loan documentation are significantly reduced.

Hard money loans are typically made by individuals or small groups and not by institutions. These loans are made to borrowers who are unwilling or unable to borrow from traditional lenders either because of time constraints or difficulty in satisfying the lender income or credit requirements. Since hard money loans are based primarily on the equity the borrower has in real property, hard money lenders are able to make loans that do not appeal to traditional lenders. Hard money loans often have lower loan to value ratios, have shorter terms, and have prepayment penalties. The payment terms of hard money loans are typically interest only or interest plus small principal amounts followed by a balloon payment. The interest rates, fees, and penalties for default are typically greater than those for traditional loans because hard money loans involve greater risk. The bottom line for hard money lenders is whether the borrower has sufficient equity in the property to provide reasonable certainty that the lender will recoup his investment in the event of foreclosure.

The Regulatory Environment Prior to the Global Financial Crisis

Prior to the burst of the real estate bubble in 2008 and before the enactment of the sweeping changes to the lending industry that followed, the major federal regulations governing the activities of lenders were the Real Estate Settlement Procedures Act ("RESPA"), the Truth in Lending Act ("TILA"), and the Gramm-Leach-Bliley Act ("GLB"). Under the applicable regulations then in effect, private lenders that made less than $1,000,000.00 in loans per year were not subject to the regulations.[1] This exemption applied even if the loan was made to an individual borrower and was secured by the borrower's primary residence. In addition, RESPA also provided an exemption for loans made primarily for business, commercial or agricultural purposes.[2]

The Current Federal Regulatory Framework

In response to the global financial crisis that started in 2008, President Barak Obama signed The Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank") into law in July of 2010. Dodd-Frank ushered in broad changes to the rules regulating the lending and mortgage industry.

Fortunately, like its predecessors RESPA, TILA, and GLB, Dodd-Frank does not apply to loans made primarily for business, commercial or agricultural purposes and loans made to entities.[3] Unfortunately, because Dodd-Frank broadly defines "loan originator" as a person who, for compensation, extends consumer credit, or represents to the public he or she can perform such an activity, it applies to loan transactions that would have been exempted from the coverage of RESPA, TILA, and GLB. Specifically, Dodd-Frank provides, in part, that:

> *"loan originator" means a person who, in expectation of direct or indirect compensation or other monetary gain or for direct or indirect compensation or other monetary gain, performs any of the following activities: takes an application,* offers, *arranges, assists a consumer in obtaining or applying to obtain, negotiates, or otherwise*

continued, page 19

obtains or makes an extension of consumer credit for another person; or through advertising or other means of communication represents to the public that such person can or will perform any of these activities.[4]

Based on this broad definition, Dodd-Frank governs all private loans and seller financing transactions. Fortunately, in response to significant pushback from individuals and industries, the Consumer Financial Protection Board ("CFPB") provided two exceptions to the definition of "loan originator" for seller financing transactions that are made to borrowers who will occupy the subject property as their primary residence. These exceptions are often referred to as the "One Property Exception" and the "Three Property Exception."

The One Property Exception

The One Property Exception is only applicable to an owner of residential property who is a natural person, estate, or trust.[5] Assuming the seller/owner of the property meets the initial threshold, they can provide financing to a purchaser of real property and not be considered a "loan originator" if they satisfy the following additional criteria.

1. The seller natural person, estate, or trust provides seller financing for the sale of only one property in any 12-month period.
2. The property being sold serves as security for the financing.
3. The natural person, estate, or trust has not constructed, or acted as a contractor for the construction of, a residence on the property in the ordinary course of business of the person.
4. The seller financing repayment terms do not result in negative amortization.
5. The financing has a fixed rate or an adjustable rate that is adjustable after five or more years, subject to reasonable annual and lifetime limitations on interest rate increases.[6]

The One Property Exception also provides certain safe harbors with respect to the annual and lifetime interest rate increases for adjustable rate loans. Specifically, the safe harbor provides that annual rate increase of two percentage points or less are reasonable,[7] and lifetime increases of six percentage points or less, (with a maximum ceiling that does not exceed the applicable usury limit), are reasonable.[8] Finally, the seller providing the financing is not required to undertake any steps to determine the borrower's ability to repay the loan.

The Three Property Exception

The Three Property Exception is applicable to an owner of residential property who is a natural person or an organization, including a corporation, partnership, proprietorship, association, cooperative, estate, trust, or government unit.[9] Assuming the seller/owner of the property meets the initial threshold, they can provide financing to a purchaser of real property and not be considered a "loan originator" if they satisfy the following additional criteria.

1. The person provides seller financing for the sale of three or fewer properties in any 12-month period.
2. The property being sold serves as security for the financing.
3. The person has not constructed, or acted as a contractor for the construction of, a residence on the property in the ordinary course of business of the person.
4. The financing is fully amortizing.
5. The financing is one that the person determines in good faith the consumer has a reasonable ability to repay.
6. The financing has a fixed rate or an adjustable rate that is adjustable after five or more years, subject to reasonable annual and lifetime limitations on interest rate increases.[10]

The Three Property Exception is subject to the same safe harbors with respect to the annual and lifetime interest rate increases for adjustable rate loans as the One Property Exception. However, unlike the One Property Exception, a seller seeking to qualify for the Three Property Exception must determine that the borrower has a reasonable ability to repay the loan.[11] A seller is deemed to have determined the borrower's reasonable ability to pay if they have considered: (i) evidence of the borrower's current and expected income; (ii) W-2 earnings; (iii) income from other sources such as government benefits; and (iv) any income generating assets of the borrower. When determining the borrower's reasonable ability to pay, the seller may rely on copies of tax returns that the borrower previously filed with the IRS.[12]

Under the current Federal regulatory framework and subject only to the two exceptions set forth above, any person or entity making a consumer loan to an individual that is secured by the individual's primary residence will be considered a "loan originator," will have to be licensed as a mortgage broker or lender, and will have to comply with all aspects of Dodd-Frank applicable to loan originators, brokers, and lenders.

Loan Activities Requiring Licensing under Florida Law

Chapter 494, Florida Statutes, contains a comprehensive body of law regulating the mortgage industry, which includes the licensing requirements for loan originators, mortgage brokers, and mortgage lenders. Pursuant to Chapter 494, any person originating, making, or brokering a mortgage loan in the State of Florida is required to be licensed as a loan originator,[13] mortgage lender,[14] or mortgage broker.[15]

The licensing requirements for loan originators, mortgage brokers, and mortgage lenders are fairly stringent. The requirements include such things as background checks, determinations on character, fitness, and financial responsibility.[16] There are prelicensing classes and testing requirements for loan originators, and audited financial statements[17] and net worth requirements for mortgage

continued, page 20

lenders. Additionally, the statute imposes requirements for maintaining a principal place of business, record keeping, advertising restrictions, and fees.[18] Finally, the statute imposes administrative penalties for ordinary violations and criminal liability and liability to third parties for serious violations.[19]

Exemptions to the Licensing Requirements

Because of the stringent licensing requirements applicable to loan originators, mortgage brokers, and mortgage lenders, many private lenders try to fall within a statutory exemption to the licensing requirement or to structure their loans in such a way so that they will not be considered loan originators, mortgage brokers, or mortgage lenders.

Section 494.00115, Florida Statutes, sets forth all of the exemptions to the licensing requirements, which include such things as the activities of persons licensed in accordance with the S.A.F.E. Mortgage Licensing Act of 2008[20] and attorneys licensed in the State of Florida who negotiate the terms of a mortgage loan on behalf of a client as an ancillary matter to the attorney's representation of the client.[21] Notably, unlike Dodd-Frank which only provides an ***exception*** for seller financing transactions that meet specific requirements, Florida provides for a complete ***exemption*** for seller finance transactions.[22]

Recent OFR Decision

Any private or hard money lender that does not fall within a specific exemption to the Florida licensing requirement may seek to structure their loans in such a way as to fall outside the licensing requirements.

In a recent Declaratory Statement and Final Order,[23] the Florida Office of Financial Regulation ("OFR") provided some clarity on the types of transactions, which would not require a lender to be licensed as a loan originator, mortgage broker, or mortgage lender.

In the case at issue, a Georgia hard money lender was proposing to make loans in the State of Florida on residential investment properties with four or fewer units. The lender petitioned the OFR for a declaratory statement regarding the applicability of the mortgage lending licensing requirements to its proposed business activities. In support of their petition, the lender confirmed that all of its loans were investment loans (for business purposes only), were secured by residential property consisting of one to four units, were not used to finance commercial real property, will not be used to finance real property consisting of five or more dwelling units, and that none of the properties would be occupied by the borrower.

The lender also included copies of its Business Purpose Loan Application and Certification of Business Purpose, which would be signed by each borrower. Both of these documents required the borrower to attest that the property securing the loan was a one-to-four residential property that was not going to be occupied by the borrower and that the property is leased or intended to be leased or occupied by an entity or person other than the borrower.

In reaching its decision, the OFR relied on the definitions of loan originator, mortgage broker, mortgage lender, and mortgage loan contained in Chapter 494, Florida Statutes.

Section 494.001(17), Florida Statutes, defines "loan originator" as follows:

> an individual who, directly or indirectly, solicits or offers to solicit a mortgage loan, accepts or offers to accept an application for a mortgage loan, negotiates or offers to negotiate the terms or conditions of a new or existing mortgage loan on behalf of a borrower or lender, or negotiates or offers to negotiate the sale of an existing mortgage loan to a noninstitutional investor for compensation or gain. The term includes an individual who is required to be licensed as a loan originator under the S.A.F.E. Mortgage Licensing Act of 2008. The term does not include an employee of a mortgage broker or mortgage lender whose duties are limited to physically handling a completed application form or transmitting a completed application form to a lender on behalf of a prospective borrower.

Section 494.001(22), Florida Statutes, defines "mortgage broker" as follows:

> a person conducting loan originator activities through one or more licensed loan originators employed by the mortgage broker or as independent contractors to the mortgage broker.

Section 494.001(23), Florida Statutes, defines "mortgage lender" as follows:

> a person making a mortgage loan or servicing a mortgage loan for others, or, for compensation or gain, directly or indirectly, selling or offering to sell a mortgage loan to a noninstitutional investor.

Section 494.001(24), Florida Statutes, defines "mortgage loan" as follows:

> (a) Residential loan primarily for personal, family, or household use which is secured by a mortgage, deed of trust, or other equivalent consensual security interest on a dwelling, as defined in s. 103(v) of the federal Truth in Lending Act, or for the purchase of residential real estate upon which a dwelling is to be constructed;
>
> (b) Loan on commercial real property if the borrower is an individual or the lender is a noninstitutional investor; or
>
> (c) Loan on improved real property consisting of five or more dwelling units if the borrower is an individual or the lender is a noninstitutional investor.

Based on the OFR's findings that no loan funds would be used: (i) for residential properties for personal, family, or household use; (ii) to finance commercial real property; or (iii)

continued, page 21

to finance improved real property consisting of five or more dwelling units, it ruled that the lender did not have to be licensed as a loan originator, mortgage broker, or mortgage lender. Essentially, the OFR determined that the lender's proposed business activities did not meet the definition of a mortgage loan under Section 494.001(24).

The Legislature Responds

Unfortunately, the clarification offered by the OFR's Declaratory Statement and Final Order was short-lived. This year, the Florida legislature passed HB 747, which broadened the definition of Mortgage Loan in Section 494.001(24).[24] Under the revised definition, a Mortgage Loan is now defined to include a ***"Residential loan that is secured by a mortgage, deed of trust, or other equivalent consensual security interest on a dwelling as defined in s. 103(w) of the federal Truth in Lending Act, or for the purchase of residential real estate upon which a dwelling is to be constructed."*** As a result of this change, any loan secured by residential property is considered a Mortgage Loan, which subjects the lender to the licensing requirements of Section 494.

Conclusion

The regulatory landscape for private lenders has changed significantly since 2010. Under the current regulations, many private lenders making loans secured by residential real property are subject to federal and state regulations and licensing requirements. Therefore, all private lenders should seek counsel to review their loan documentation and business practices in order to determine which, if any, state or federal regulations are applicable.

Christopher Finley *began his legal career representing large commercial and institutional developers and lenders while working at the law firms of Holland & Knight, Greenberg Traurig, and Gunster Yoakley. Chris regularly represents REITS, developers, private lenders, borrowers, and investors in all phases of the acquisition, development, financing, and disposition of residential and commercial real property. He also represents landlords and tenants in the negotiation and drafting of residential, commercial, industrial, and office leases.*

Endnotes

1 12 U.S.C.A. §2602 (1).
2 Id.
3 12 U.S.C. §1026.3(a) (2013).
4 12 U.S.C. §1026.36(a)(1)(i) (2013).
5 12 U.S.C. §1026.36(a)(5) (2013).
6 Id.
7 12 U.S.C. §1026.36(a)(4)(i) (2013).
8 12 U.S.C. §1026.36(a)(4)(ii) (2013).
9 12 U.S.C. §1026.36(a)(4) and §1026.2(a)(22) (2013).
10 12 U.S.C. §1026.36(a)(4) (2013).
11 12 U.S.C. §1026.36(a)(4)(ii) (2013).
12 See Official Interpretation to 36(a)(4) at https://www.consumerfinance.gov/eregulations/1026-36/2016-06834#1026-36-a-4-iii-C.
13 §494.00312, Fla. Stat. (2016).
14 §494.00321, Fla. Stat. (2016).
15 §494.00611, Fla. Stat. (2016).
16 §494.00312, Fla. Stat. (2014), §494.00321, Fla. Stat. (2014), §494.00611, Fla. Stat. (2014).
17 §494.063, Fla. Stat. (2016).
18 §494.00312, Fla. Stat. (2014), §494.00321, Fla. Stat. (2014), §494.00611, Fla. Stat. (2014).
19 §494.0018, Fla. Stat. (2016).
20 §494.00115(1)(a), Fla. Stat. (2016).
21 §494.00115(1)(d), Fla. Stat. (2016).
22 §494.00115(2)(b), Fla. Stat. (2016).
23 In Re: Petition for Declaratory Statement, 7 F.A.L.R. 324-A (Fla. Office of Fin. Regulation 1999).
24 *Fla. S. Jour.* (Reg. Sess. 2017) Unless vetoed by the Governor, the law will become effective July 1, 2017.

I'm Still Standing, from page 17

43 *Brundage v. Bank of America*, 996 So.2d 877 (Fla. 4th DCA 2008).
44 *Brundage v. Bank of America*, 996 So. 2d 877, 879 (Fla. 4th DCA 2008).
45 *Id*.
46 *Id*. at 880.
47 *Id*. at 881.
48 *Id*.
49 *Id*. at 882.
50 *Id*.
51 *Id*.
52 *Id*. at 884.
53 Hilgendorf v. Estate of Coleman, 201 So. 3d 1262 (Fla. 4th DCA 2016).
54 *Hilgendorf v. Estate of Coleman*, 201 So. 3d 1262, 1263 (Fla. 4th DCA 2016).
55 *Id*.
56 *Id*. at 1264.
57 *Id*. at 1263.
58 *Id*.
59 *Id*.
60 *Id*.
61 *Id*.
62 *Id*.
63 *Id*.
64 *Id*.
65 *Id*.
66 *Id*.
67 *Id*. at 1264.
68 *Id*.
69 *Id*.
70 *Id*.
71 *Id*.
72 *Id*. at 1264-65.
73 *Id*.
74 *Id*. at 1264.
75 *Id*.
76 *Id*.
77 *Id*. at 1265.
78 *Id*.
79 *Id*.
80 *Id*.
81 *Id*.
82 *Id*.

Out To Pasture: Estate Planning For Horses

By Angela K. Santos, Esq., Duane Morris LLP, Boca Raton, Florida

Your client is the owner of beloved horses. When designing or revising your client's estate plan, does the plan address who will care for the horses if something happens to your client, whether it's illness, injury, incapacity or death? Horses are personal property, and so the client's durable power of attorney, last will and testament and revocable trust are all instruments that can include specific instructions to provide for the care of the horses. While not exhaustive, review the following considerations with your client to determine what estate planning instruments best address the client's wishes to ensure the care and well-being of these special family members.

Placement of the horses

The client must determine whether his or her spouse, children, or other heirs are willing and knowledgeable enough to manage the horses. If not, you can help your client find a retirement facility by asking local equine professionals such as veterinarians, farriers and others in the horse community.

The client might consider a charitable donation to a therapeutic riding center, or a nonprofit riding program if the horse is fit for light riding, and receive a charitable deduction for the donation. If the client desires to commit substantial resources, then a professional horse retirement home, which varies in the level of personal, hands-on care, may better fulfill the wishes of the client. In either case, encourage the client to visit any potential placement facility to see for him or herself the services and amenities provided, to take notice of the horses living there, to meet employees and ask questions. It's important to look for the level of care that the client demands and to talk to the people at the facility. Are the horses well cared for? Do they have a healthy coat? Are they bright-eyed and seemingly content? Can the horses have visitors any time? Will your specific daily care instructions be accepted? The client should ask for references of current and past clients and should contact them about their experience at the facility.

If your client has one horse, and a retirement facility isn't suitable, the client might consider contracting someone who has only one horse to offer the horse as a companion, since horses are herd animals by nature and thrive with equine companionship.

Care instructions and other details

The client should prepare detailed instructions that address routine and extraordinary medical and dental care, diet, grooming, riding, and any other particulars for each horse.

If the horses will need to be transported to a facility, the client should plan for the logistics and expenses.

It is important to discuss euthanasia with the client and any particular wishes with a horse's remains. Whether a horse becomes ill, injured, is miserable without its owner or in its new home, or is old and at its end of life, the client should determine when euthanasia is appropriate for the horse.

Pet Trust

While an outright testamentary distribution of the horses to a designated caretaker along with a sum of money to provide the resources for the horse's lifetime care might be sufficient in some circumstances, it lacks enforcement controls to ensure that the animals are cared for according to the client's wishes. It also does not serve in the circumstances of the client's incapacity or other inability to care for the horses during the client's lifetime, and the time after the client's death and through probate administration. A revocable "pet trust" (codified in Fla. Stat. §736.0408) can operate in all circumstances, during the client's lifetime, incapacity and immediately upon death without probate court delays, and can be prepared to include all of the foregoing considerations with as much flexibility and specificity as the client desires.

A pet trust would operate as a traditional revocable trust during the client's lifetime, with the client as sole beneficiary and trustee. If the client prefers that his or her estate beneficiaries have little involvement or knowledge of the arrangements for the horses, then a stand-alone revocable pet trust is appropriate. To ensure a smooth transition and avoid delays, the pet trust should be funded during the client's lifetime with both cash, the horses, and any other personal property used in their maintenance and care.

After the client's incapacity or death, the trust would include trustee guidelines for placement of the horses, care instructions, management of the trust assets, and directions to pay or apply distributions for the benefit of the horses. In addition to a

continued, page 23

Don't Let The Mailbox Rule Box You Out

By Amber Ashton, Esq., DSK Law Firm, Orlando, Florida

We all know that Rule 2.514, Fla. R. Jud. Admin., may provide additional time within which to serve a response to a motion or respond to written discovery. Many practitioners, however, do not understand the potential implications of Rule 2.514, Fla. R. Jud. Admin., as it relates to service of motions for summary judgment and summary judgment evidence in advance of a hearing.

Computation of time is governed by Rule 1.090(a), Fla. R. Civ. P., which adopts and incorporates the computation procedures set forth in Rule 2.514, Fla. R. Jud. Admin., for the purposes of calculating deadlines. Rule 2.514(b), Fla. R. Jud. Admin., which is frequently referred to as "the mailbox rule" ("Mailbox Rule"), provides that "[w]hen a party may or must act within a specified time after service and service is made by mail or e-mail, 5 days are added [to the time period]." These days, where service is regularly effectuated through e-mail, and despite the instantaneous nature of e-mail, the Mailbox Rule still provides that an additional five (5) days are to be added to the time period when service is accomplished by e-mail. It is important to note that service through the e-portal is still considered e-mail service and there is no special provision of either the *Florida Rules of Civil Procedure* or the *Florida Rules of Judicial Administration* that specifically address service through the e-portal for the purposes of computation of time.

Rule 1.510(c), Fla. R. Civ. P., requires that both a motion for summary judgment and all summary judgment evidence be served at least twenty (20) days in advance of the date set for the hearing thereon. If service is accomplished through only the e-portal or e-mail, by application of the Mailbox Rule, both the motion for summary judgment and all affidavits and other summary judgment evidence must, in fact, be served at least twenty-five (25) days in advance of the date fixed for the hearing on the motion for summary judgment. *See, Nelson v. Balkany,* 620 So. 2d 1138, 1139 (Fla. 3d DCA 1993). Generally, a hearing cannot be set until such time as the motion for summary judgment is filed, but it is not uncommon for affidavits to be amended or updated within the weeks leading up to the hearing. By application of the Mailbox Rule, if your affidavit in support of a motion for summary judgment is filed twenty (20) days prior to the hearing and served via e-mail, you may find yourself without evidentiary support for your motion if this procedural deficiency is raised.

Until such time as the *Florida Rules of Judicial Administration* are revised to eliminate the Mailbox Rule for documents served via e-mail or through the e-portal, the best course of action is to continue with the practice most practitioners adopted years ago and serve documents via facsimile when the deadline for mail service has passed. Facsimile service continues to be considered on par with hand-delivery and, as such, allows you to serve your summary judgment evidence twenty (20) days in advance of the scheduled hearing.

Practice Corner Probate and Trust Division, from page 22

Out To Pasture: Estate Planning For Horses

trustee responsible for the investment, management and distribution of the trust assets, the client might also select other roles and duties for the care of the horses, such as a caretaker, a horse "guardian," and a trust protector where appropriate, and successors to the client's initially designated roles. For example, the trustee may make monthly payments to the caretaker (e.g., the placement facility) for the care of the horses, and for any discretionary payments beyond the caretaker's covered services. The guardian for the horses might have visiting rights to inspect the horses and ensure the caretaker is fulfilling his or her role and following any specific instructions. The protector would generally enforce the terms of the trust as the client intended and might have the power to remove and replace persons serving in other roles. After the death of the last surviving horse, the trust would terminate and if there are trust assets remaining, the client would need to determine the beneficiaries of the excess trust assets, if any.

Thorough review of these considerations, and any other special details with your client, will aid each of you to the most appropriate estate planning for these fuzzy family members.

Exploring The Limits Of *Parens Patriae* From Two Recent Guardianship Cases

By Hung V. Nguyen, Esq., The Nguyen Law Firm, Coral Gables, Florida

Modern guardianship law in Florida and across the country has its roots and legal justification in the concept of *parens patriae*, which is Latin for "parent of his or her country" or "parent of the country."[1] *Parens patriae* is the doctrine that the state has the right to take action to care for those unable to care for themselves.[2] The concept of *parens patriae* has been successfully relied upon for government intervention in cases involving antitrust enforcement, environmental protection, child welfare, including forced medical treatment for children, guardianships, and other cases,[3] and has its origins arguably dating back to the time of Edward I of England (1272-1307).[4]

With *parens patriae* as the legal basis, states have enacted procedures to take away an incapacitated person's rights so that others can direct some or all aspects of it, even if the individual disagrees with his or her guardian's directives.[5] There is no doubt that this is an awesome power, rivaling that of the state's police powers to imprison criminals – yet in guardianship proceedings, the alleged incapacitated person has not committed any act of transgression against society. The use of *parens patriae* in guardianship cases, while a necessity, conflicts with the individual's liberty interests and individual freedoms.

Because liberty and freedom are essential to our way of life, the state's role in removing an individual's civil rights under the *parens patriae* doctrine must be continually scrutinized to jealously defend the rights of citizens. As Justice Louis Brande forcibly wrote regarding government power, "[e]xperience should teach us to be most on our guard to protect liberty when the government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in the insidious encroachment by men of zeal, well-meaning but without understanding."[6]

While the concept of *parens patriae* is well established, courts have recognized limitations to this doctrine, including that the state's exercise of power should be narrowly tailored to be least intrusive on the rights of the individual.[7] Similarly, the Florida Legislature has also recognized the limits of state power over incapacitated individuals when it enacted the Guardianship Code and mandated that the law be interpreted in a manner that is least intrusive on the rights of the individual.[8] Commentators over the decades have also criticized the state's use of *parens patriae*.[9]

Two recent guardianship cases, *Gort v. Gort*,[10] and *Smith v. Smith*,[11] *rehearing denied* in *Smith v. Smith*[12] (where the case was certified as one of great public importance to the Florida Supreme Court), highlight the need for continued vigilance and the inherent tension that exists when a state exercises its authority to limit or remove an individual's rights in the name of protecting that individual.

Gort v. Gort

In *Gort*, the Fourth District Court of Appeal ("Fourth DCA") held that once an incapacity proceeding is initiated, the petitioner can voluntarily dismiss the petition. This was the case even though the examining committee members found that the alleged incapacitated person lacks capacity.[13] This decision comports with the Fifth District Court of Appeal's ("Fifth DCA") decision in *Katke v. Bersche,*[14] where the Fifth DCA held in dicta that a petition to determine incapacity can be voluntarily dismissed. However, the *Gort* decision appears to conflict with the Fourth DCA's own prior opinion in *Jasser v. Saadeh,*[15] where the court held that a petition to determine incapacity cannot be dismissed after it is filed. The issue of whether a petitioner can voluntarily dismiss a petition to determine incapacity and thereby terminate an incapacity proceeding once it has been initiated has been the subject of some controversy among guardianship attorneys and judges, and many had believed that once an incapacity proceeding is initiated, the adjudicatory hearing must be conducted.

Those who believe a petitioner should be prohibited from voluntarily dismissing the petition to determine incapacity make the compelling argument that the proceeding is necessary to protect the alleged incapacitated person. They argue that a paramount interest of the state is protecting those who cannot protect themselves. The *Saadeh* court made this argument when it reasoned, "[t]o permit dismissal of proceedings where a party is in fact incompetent may endanger that person."[16]

On the contrary, those who believe a petitioner should be able to voluntarily dismiss the petition to determine incapacity also make compelling arguments. First, the law in Florida generally is that parties can voluntarily dismiss their lawsuits.[17] Since guardianship disputes are adversarial in nature, they should follow the Florida Rules of Civil Procedure, including

continued, page 25

Rule 1.420 (Dismissal of Actions).[18] The case law interpreting Rule 1.420 indicates that voluntary dismissal is an "almost absolute right."[19] In addition, what right does the court have to compel petitioners to continue with a lawsuit against their wishes? Why must a petitioner be compelled to absorb attorney's fees and costs? Further, what if a petitioner may be liable for the other side's attorney's fees for bringing the incapacity action and they are forced to proceed by the courts? Does the analysis change if dismissal is filed in response to a motion for sanctions pursuant to Fla. Stat. § 57.105 (which would still be a voluntary dismissal)? These questions do not even broach the ethical landmines and problems that may exist between a client who does not wish to proceed with a lawsuit and the client's lawyer.

It is the author's opinion that voluntary dismissals should be allowed for petitions to determine incapacity, and that the reasoning in *Katke* and *Gort* is sound. While it is in the state's interest to protect its citizens, courts should not, barring extreme scenarios, be allowed to force people to litigate issues against their will. The *parens partriae* doctrine allows the state to intervene to protect its vulnerable citizens, but forcing a petitioner to proceed would appear to be one step beyond that – it is forcing *others* to affirmatively act (and to pay for that privilege) to protect the state's vulnerable citizens. Moreover, to prohibit voluntary dismissal requires the court to interpret the law in a manner that engrafts such language into the Guardianship Code where it does not presently exist.[20] The two general exceptions found in the law which compel individuals to maintain their actions are: 1) fraud on the court, and 2) unresolved child custody proceedings.[21] The public policy supporting these exceptions to the "almost absolute" right to voluntarily dismiss is not present in incapacity cases, and the burden should not be placed on individuals to discharge the state's *parens patriae* duties.

While some argue that dismissal is improper where the examining committee reports have been filed and would tend to prove that the alleged incapacitated person lacks total or some capacity, those reports are hearsay.[22] Instead, one better approach is to notify the Florida Department of Children and Families, which is the executive agency with the authority to petition for incapacity.[23] It should be noted that the Legislature has the power to change the language of Fla. Stat. Ch. 744 to prohibit voluntary dismissals – something it has not done. Perhaps one day the Florida Supreme Court (or the Legislature) will clarify the law on this issue as there appears to be a conflict between the Fourth DCA (*Saadeh*) and Fifth DCA (*Katke*), and potentially an intra-district conflict within the Fourth DCA (*Gort* and *Saadeh*).

Smith v. Smith

One case that will be decided by the Florida Supreme Court soon, unless it changes its mind about accepting jurisdiction, is *Smith*. Like *Gort*, the state's *parens patriae* power in the guardianship context is implicated in the *Smith* decision. The issue presented is whether a court can ratify a marriage by an individual who has had his right to contract removed but retains his right to marry (in other words, whether the marriage is void or simply voidable), and it is currently pending before the Florida Supreme Court.[24] The Fourth DCA held in *Smith* that a marriage is void if an individual marries after his right to contract has been removed even though he retains the right to marry. According to the decision, failing to obtain prior approval voids a marriage, and it cannot be ratified after the fact. The *Smith* decision revolves around the language in Fla. Stat. §744.3215(2)(a), which states in pertinent part, "[i]f the right to enter into a contract has been removed, the right to marry is subject to court approval." However, there appears to be no law interpreting what "subject to court approval" means.

The majority in *Smith* reasoned that the "right" to marry is subject to court approval – and thus that "right" must be approved prior to any marriage. They argue that it would be difficult to unravel a marriage that is the result of exploitation and it is easier to prevent the marriage in the first instance. The burden of obtaining court approval is not a heavy burden according to them.

In a blistering five-page dissent, Judge Warner (who also dissented in *Gort*) makes the case for why a marriage should be voidable instead of void when only the right to contract has been removed, and the ward retains the right to marry. She notes that the right to marry is a fundamental right, citing *Obergefell v. Hodges*,[25] (the U.S. Supreme Court's landmark decision legalizing gay marriage). She also notes that Florida's public policy regarding guardianships is to take away as little of a person's rights as possible – citing to Fla. Stat.§ 744.1012. Thus, where the language is not clear as to whether "subject to court approval" requires prior court approval, she argues that the state should take the least restrictive approach and allow for ratification after the fact. Judge Warner argues that there should at least be an opportunity to inquire about the circumstances surrounding the marriage, and points to the underlying facts which show that the marriage was of great benefit to the ward because of his wife's companionship and her financial help.

Two of the amicus briefs filed in this case were written by the Elder Law Section and the Real Property, Probate and Trust Law Section ("RPPTL Section") of the Florida Bar. Given the compelling arguments on both sides of this issue, it is no wonder that the two sections have taken opposing views. The Elder Law Section supports the holding that the marriage is void while the RPPTL Section supports the position that the marriage is only voidable – in other words, a marriage can be ratified after the fact. This author agrees with the RPPTL Section and Judge Warner's dissent and wonders why a marriage cannot be ratified if, after an inquiry or hearing, the facts

continued, page 26

support that the marriage is in the ward's best interests and was entered into in good-faith. Moreover, an interpretation that a ward's marriage is absolutely void when the ward retains the right to marry would make the right to marry (and the ability to keep same) almost meaningless. It may be that the restriction on the right to marry that is triggered when the right to contract has been removed (while the right to marry has been retained) is unconstitutional because the right to marry is a fundamental right.

In the contest between protecting those who cannot protect themselves versus protecting individual liberty, the courts must be vigilant not to erode liberty – lest the court, and therefore the state, becomes the thing from whom people need protection. Florida's appellate courts have constantly issued reminders about government's intrusion in guardianship cases, often quoting the language from, *In re McDonnell*,[26] that, "[i]n our present day paternalistic society we must take care that in our zeal for protecting those who cannot protect themselves we do not unnecessarily deprive them of some rather precious individual rights."[27]

Conclusion

The state is charged with the well-being of its citizens and indeed should take that duty very seriously. However, under the fundamental principle of separation of powers, there must be limits to judicial intervention – otherwise the courts expand their powers beyond that of interpreting laws into creating them, thereby treading on the legislature's province. In *Gort*, the measured approach is one that respects a litigant's right to voluntarily dismiss his or her incapacity petition because the statutes do not prohibit such an action. In *Smith*, since the law is silent about what "subject to court approval" means, the courts should follow Florida's long standing public policy of using the least restrictive means possible and intruding on an individual's life only to the extent needed to protect the ward.

Hung V. Nguyen *is a shareholder at The Nguyen Law Firm where he focuses on probate, trust and guardianship law. In addition, he is a Florida Supreme Court Certified Circuit Civil Mediator. Prior to founding The Nguyen Law Firm, he was the managing partner at a boutique law firm. Hung started his career as an assistant general counsel for the Eleventh Judicial Circuit of Florida where he was a legal adviser to judges in the probate and civil divisions. He currently serves on the Executive Council of The Florida Bar Real Property, Probate and Trust Law Section (RPPTL), is chair of the RPPTL's Guardianship, Power of Attorney and Advance Directives Committee, and is a former recipient of the RPPTL Fellowship. Hung was an active member of the Probate Rules Committee and frequently lectures on probate, trust and guardianship law. He is a former President of the Asian Pacific American Bar Association of South Florida. Hung graduated from the University of Texas and University of Miami School of Law.*

Endnotes

1 *In re Beverly*, 342 So. 2d 481, 485 (Fla. 1977) (*parens patriae* used to establish guardianships); *Global Travel Marketing, Inc. v. Shea*, 908 So. 2d 392, 399 (Fla. 2005) (*parens patriae* means "parent of the country"); Natalie Loder Clark, *Parens Patriae and a Modest Proposal for the Twenty-First Century: Legal Philosophy and a New Look at Children's Welfare*, Mich. J. Gender and L., Vol. 6, Issue 2 (2000) (*parens patriae* means "parent of his or her country").

2 *See, e.g., Global Travel Marketing, Inc.*, 908 So .2d at 399.

3 *Global Travel Marketing, Inc.*, 908 So. 2d at 392 (child welfare); *Adelman v. Elfenbein*, 174 So. 3d 516 (Fla. 4th DCA 2015) (guardianships); *In re Beverly*, 342 So. 2d 481 (Fla. 1977) (child welfare, guardianships, and involuntary commitment); *In re Byrne*, 402 So .2d 383 (Fla. 1981) (involuntary commitment); *In re D.G.*, 970 So. 2d 486 (Fla. 2d DCA 2007) (forced medical treatment for children); *Hawaii v. Standard Oil Co. of Cal.*, 405 U.S. 251 (1972) (*citing Georgia v. Pennsylvania R. Co.*, 324 U.S. 439, 65 S.Ct. 716 (1945) for the proposition that *parens patriae* provides standing in antitrust matter); *Satsky v. Paramount Commc'ns, Inc.*, 7 F.3d 1464, 1470 (10th Cir.1993) (environmental protection).

4 Lawrence Custer, *The Origins of the Doctrine of Parens Patriae*, 27 Emory L. J. 195 (1978).

5 The Florida Guardianship Code is codified in Fla. Stat. ch. 744.

6 *Olmstead v. U.S.*, 277 U.S. 438 (1928) (Brandeis, J., dissenting).

7 *Public Health Trust of Dade County v. Wons*, 541 So. 2d 96 (Fla. 1989) (*parens patriae* does not allow court to force life-saving blood transfusion on a competent adult); *Matter of Dubreuil*, 629 So. 2d 819 (Fla. 1993) (same as *Wons*); *AMI Anclote Manor Hosp. v. State ex rel. Weber*, 553 So. 2d 199 (Fla. 2d DCA 1989) (state attorney and public defender have no standing to petition for writ of habeas corpus on behalf of a patients in an insane asylum based on *parens patriae*); *M.N. v. S. Baptist Hosp. of Florida, Inc.*, 648 So. 2d 769 (Fla. 1st DCA 1994) (the state's action must be narrowly tailored so as to produce the least intrusive interference with individual rights, although the preservation of life has been described as the most significant state interest).

8 Fla. Stat. § 744.1012 (legislative intent in favor of the least restrictive form of guardianship); Fla. Stat. § 744.331(6)(b) (courts must consider alternatives to guardianship prior to appointment of a guardian).

9 George B. Curtis, *The Checkered Career of Parens Patriae: The State as Parent or Tyrant?*, DePaul L. Rev., Vol. 25, Issue 4, Summer 1976; Natalie Loder Clark, *Parens Patriae and a Modest Proposal for the Twenty-First Century: Legal Philosophy and a New Look at Children's Welfare*, Mich. J. Gender and L., Vol. 6, Issue 2 (2000); Neil B. Posner, *The End of Parens Patriae in New York:Guardianship Under the New Mental Hygiene Law Article 81*, Marq. L. Rev., Vol. 79, Issue 2, Winter 1996.

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

11 *Smith v. Smith*, 199 So. 3d 911 (Fla. 4th DCA 2016).

12 *Smith v. Smith*, 195 So. 3d 416 (Fla. 4th DCA 2016).

13 *Gort*, 185 So. 2d at 609.

14 *Katke v. Bersche,* 161 So. 3d 574 (Fla. 5th DCA 2014).

15 *Jasser v. Saadeh,* 97 So. 3d 241 (Fla. 4th DCA 2012).

16 *Jasser v. Saadeh*, 97 So. 3d 241, 247 (Fla. 4th DCA 2012).

17 *See, e.g., Katke v. Bersche,* 161 So. 3d 574, 576 (Fla. 5th DCA 2014).

18 *See* Fla. Prob. R. 5.025(d)(2).

19 *Katke,* 161 So. 3d at 576, *citing Cutler v. Cutler*, 84 So. 3d 1172 (Fla. 3d DCA 2012).

20 *Gort*, 185 So. 2d at 611 ("[T]he statute is silent on whether a court is required to hold an adjudicatory hearing every time a petition is filed. It is also silent on whether a party may voluntarily dismiss a petition to determine incapacity.").

21 *Tobkin v. State*, 777 So. 2d 1160, 1164 (Fla. 4th DCA 2001).

22 *Shen v. Parkes*, 100 So. 3d 1189 (Fla. 4th DCA 2012).

23 *L.Y. v. Dep't of Health & Rehab. Servs.*, 696 So. 2d 430, 431 (Fla. 4th DCA 1997) ("Any adult person may file a petition to determine that an individual is incapacitated."); *Borden v. Guardianship of Borden-Moore*, 818 So. 2d 604, n2 (Fla. 5th DCA 2002) (same).

24 *Smith* is pending before the Florida Supreme Court with case number SC16-1312 at the time this article was submitted for publication.

25 *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015).

26 *In re McDonnell*, 266 So. 2d 87 (Fla. 4th DCA 1972).

27 *See, e.g., McJunkin v. McJunkin*, 896 So. 2d 962, 963 (Fla. 2d DCA 2005); *Adelman*, 174 So. 3d at 518-19; *Losh v. McKinley*, 86 So. 3d 1150, 1154 (Fla. 3d DCA 2012); *In re Maynes-Turner*, 746 So. 2d 564, 565 (Fla. 3d DCA 1999).

RPPTL Section Executive Council Meeting
The Westin Resort And Marina, Key West

December 7 – December 11, 2016

By Erin H. Christy, Esq., Willams Parker Harrison Dietz & Getzen, Sarasota, Florida

The RPPTL Section members donned their flip flops and parrot head shirts as they flocked to escape the bitter cold 70-degree temperatures of "north" Florida in exchange for the 80s at the Westin Resort and Marina in Key West where the Winter Executive Council Meeting took place.

The RPPTL Runners/Walkers enjoyed the rare quiet of Duval Street and trotted past six-toed cats on their way down to the Southernmost Point each morning before getting to work. The running/walking group continues to expand each meeting and we welcome you all to join the movement at the next one, rain or shine!

Meetings kicked off at a leisurely 10:00 a.m. Thursday morning. Committee meetings had a slightly different set-up this time around, and it was enjoyable to sit in small groups during some committee meetings to get to know others working toward the same goal.

Thursday evening's Sunset Welcome Reception on the Pier lacked a sunset, but made up for it with a still-stunning view, cool ocean breezes, and lively conversation. Members continued on to The Doyle and Debbie Show where we heard a repertoire of country parody filled with clever lyrics that were heard repeated that evening at the hospitality suite. If you missed the hospitality suite in Key West (maybe you were having your own sweet time on Duval), then you missed the best one yet. Ocean to the left, pool off to the right, and there we were, stuck in the middle with RPPTLs. The outdoor suite served as the perfect backdrop for a Key West meeting and was even able to lure members off Duval Street for a night-cap and conversation before an early bedtime to prepare for Friday's meetings.

The weekend was busier than usual as members came together armed and ready after the cancellation of October's meeting due to Hurricane Matthew. Work was being done in arm chairs, on the steps, in the corner of rooms, and of course in the committee meetings. RPPTLs epitomize the "can do" attitude and it showed in spades during the Key West meeting. While the weather might not always cooperate the way we envision, RPPTLs find a way to get the job done and have fun doing it.

Saturday evening's catamaran cruise and lighted boat parade were cancelled due to high seas, but that didn't stop Section members from getting a taste of all Key West has to offer at the holidays. It is rumored wine and cookies were smuggled on to many a holiday trolley ride to enjoy the lights of the locals and the company of our friends.

Get insurable title on tax deed properties faster and cheaper than QTA!

cleartosell™
Avoid QTA. We Certify Tax Deeds in 20 days! .com

Contact us today on 1-855-680-4908 or info@cleartosell.com



The RPPTL Visits Austin, Texas Joining With The Locals To Keep Austin Weird

By Silvia R. Rojas, Esq., Attorneys' Title Fund Services, Miami, FL



The annual out-of-state conference was held at the historic city of Austin, Texas. We were blessed with pleasant sunny weather most days. The conference started with a reception at the Four Seasons' grounds which fronts the Colorado River, a picturesque 862-mile river that empties into the Gulf of Mexico. During the reception we enjoyed a sumptuous buffet and were entertained by music from the Much Love Band playing good ol' oldies from musicians such as Neil Young and Bob Marley. After the buffet we all gathered at the "Little Colony" hospitality suite for desserts and beverages.

On Thursday morning, we enjoyed a continental breakfast and then gathered for a tour of the city. Some of the attendees had already woken up much earlier for a beautiful 15-mile bike ride on the trails bordering the Colorado River, Lady Bird Lake and the capitol. They joined us at breakfast still wearing their colorful bike gear, and later changed clothes just in time for the tour.



After breakfast, our guides directed us to the waiting buses on the side of the hotel. We were greeted by our bus tour guide and driver. Our driver, Melinda, and guide, Brandy, soon gave us warnings that those sitting on the top floor should be aware that they would have to duck the trees on queue and that the bus would not stop for flying hats. As the top floor got filled quickly, and the temperature that day would be over 80 degrees and quite sunny, there were other Section members that chose to ride on the 1st level of the bus. We listened to Stevie Ray Vaughan music and later passed by his statue while Brandy described the sites along the way. Stevie Ray Vaughan is highly regarded in Austin as a blues legend and is considered one of the most influential guitarists in the history of music. As Brandy described, Austin's predominant music genre is blues and the city hosts a number of large music festivals such as the March SXSW which brings in about 300 thousand people and the October ACL Music Festival. Passing by the Austin City Limits, we caught a glimpse of the statue honoring Willie Nelson. Brandy pointed out that the city has grown around history such as the "Treaty Oak" across the street from the original Whole Foods store. The Treaty Oak is a 500 year-old tree where Stephen F. Austin negotiated lands with the native Americans. Brandy continued pointing out sites and information about Austin: it is a green city, so no plastic bags are available at stores; Janis Joplin & many other musicians got their start at a Threadgill's restaurant, one of which we drove by; Franklin Barbecue in the artsy SoCo (South Congress Avenue) district is one of the best BBQ's in the world and people line up from 7 a.m. in the morning for an 11:00 a.m. opening; Austin is known also for its gourmet food trucks that travel alone or sit together at food trailer parks; the motto for Austin is "Keep Austin Weird" meaning keep it unique and local; and Austin is known for the million bats that between March and October come out at dusk from under the Congress bridge, which is walking distance from the Four Seasons.





The first stop on the bus tour was at the Capitol building where we toured several floors of the historic building and on which the "Goddess of Liberty" sits atop the capitol dome. The building inside is lined with paintings, sculptures and photographs of past House members, senators and governors as well as some of their family members and historical figures.



After the capitol tour, we mounted a couple of large air conditioned buses to travel over to the University of Texas where the Lyndon Baines Johnson Library is located. We toured the library, including a mechanical LBJ that entertained us with humorous quotes. A lot of historical artifacts lined the walls of the building from his time in office. Many stopped at the gift shop for mementos of the tour.

After that tour, it was time for a BBQ buffet lunch with sausages, sandwiches, and other snacks and beverages at the Easy Tiger where the kids and some parents also enjoyed playing ping pong and relaxing while we went over the day's events and all the information shared by the guides. We enjoyed the lunch between 1:30 p.m.-3:30 p.m. and then some took the bus back, and others walked back to the hotel, which was around a 15-minute walk while enjoying the scenery along the way.

continued, page 29

After a few hours on our own, we all mounted back on the bus for a ride to the Stubbs (yes – same as the BBQ sauce) building at the C/B bar portion of the building where we all were fitted for cowboy hats and enjoyed a huge BBQ buffet, beverages and dancing. We had a great line dancing instructor who led us in several difference dance routines. The buses left around 9:00 p.m. back to the hotel and the hospitality suite for desserts and beverages.



On Friday after an early 7:00 a.m. breakfast of burritos and a continental breakfast of fruits, yogurt, bread and beverages, the buses were loaded for a one-hour ride to San Antonio or Waco depending on which tour was chosen. Having taken the San Antonio choice, we traveled down I-35 that thankfully was against traffic. The view was mostly grasslands with intermittent communities along the way. My group toured the Alamo and grounds and then went to a barge tour of the beautiful Riverwalk complex. I noticed that there have been considerable improvements around the Riverwalk area from a few years ago. The barge tour on the San Antonio River lasted an hour as it only covered a small portion of the river which runs for many miles through the city. Afterwards we broke up in groups for lunch. The group I joined ate at Baubros's where a delicious guacamole was prepared tableside and was quite an educational experience. I'll never slice avocados the same way again. We left San Antonio around 2:45 p.m. on the same large tour bus but hit heavy traffic coming back into town, veering off on a fronting road for several miles, which did not seem to speed up the travel.

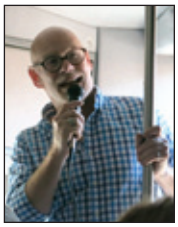


Another group, consisting of women and two intrepid husbands, toured the Magnolia Market at the Silos featured in HGTV's series "Fixer Upper." After enjoying some pastries, the group headed next door to the market, which is readily visible on account of the two huge adjacent grain silos. The market was a shopper's paradise, and there was also much to explore within the lovely gardens and grounds, which included corn hole games, balls, frisbees, bean bag chairs and the ever-present food trucks. Some of the group ventured into the City of Waco via the free shuttle bus, but, frankly, the Magnolia Market was the highlight of the city. Returning to Austin, the bus driver allowed the group to experience another Texas treasure, a bathroom break at Buc-ee's, an amazing combination of a truck stop, Sam's Club and souvenir shop with the largest and cleanest public bathrooms on earth. The first Buc-ee's will be coming to the State of Florida later this year.



After arriving back at the hotel and relaxing a short while, around 7:00 p.m. we split into several groups for dinner. Having had so much BBQ already, I chose Searsucker which served great continental food such as quail, salmon, even duck fat fried fries. Other restaurants to choose from were: Cooper's Old Time Pit Bar-B-Que, Max's Wine Dive, Fonda San Miguel and Lamberts Downtown Barbecue. Afterwards, we walked back to the hotel and met at the hospitality suite for churros, tres leches desserts and beverages.

Saturday morning was the full breakfast and the Executive Council meeting. The agenda is online. Our Chair, Deborah Goodall, presided over the short meeting with announcements on the state of the Section and the upcoming legislation. Pete Dunbar gave a good summary of the legislation that the Section supports or is concerned about. In the afternoon, the group split in two and went separate ways – one group went on the BBQ and Brew tour and the other one on the Art Crawl. Steven "Spanky" McFarlin, our tour guide and Kurt Lammers guided us through the BBQ tour. We were fortunate to be informed and entertained with Spanky, who is also a gifted and world renown comedian. At night, Spanky is currently performing in comedy club routines in Austin and Kurt plays in a band. Spanky pointed out that there are approximately 3,500 breweries in Austin. We would be touring two of them, Independence & St. Elmos. At Independence, we also were served samplings of the brisket and sausage from Franklin Barbecue – and we didn't even have to stand in line. We also went to Terry Black's BBQ restaurant for some more delicious brisket and a tour of the smokehouse in the back of the restaurant where the brisket is cooked for over 9 hours at low heat to bring out the flavor.



Those who chose the Art Crawl were treated to quality exhibits at several local galleries, a quick lunch at an Austin institution known as Torchy's Tacos, the graffiti art featured on the famous and massive Austin Mural Wall and a private meeting with a graffiti artist, where the group decorated cookies with edible spray paint.

We all arrived back at the hotel at 4:00 p.m. and then met downstairs in the lobby to walk to different restaurants and shows on our own. A group of us went to dinner at Moonshine Patio Bar & Grill and then met up with other Section members at Antone's for some blues jazz music until around midnight. Next morning was breakfast on your own or just catching transportation to the airport.

Thank you to our 2016-17 RPPTL Chair, Deborah Goodall, and all those who planned and coordinated the events of this fabulous visit to the historic city of Austin, Texas.

A Special Thanks to John Neukamm for his contributions to this article.

RPPTL Section Executive Council Meeting
Westin Key West Resort And Marina, Key West, Florida
December 8-10, 2016







RPPTLs doing what they do well…
Enjoying at the Hogs Breath Saloon



New Actionline Co-Editor-In-Chief
Michael Bedke, Marsha Madorsky
and Gutman Skrande.



Debra Boje and Michael Gelfand
at the outdoor cocktail party



The Honorable Celeste and Toby Muir



Our Hotel ... The Westin Key West



RPPTL Conch Tour Train

View Photo
Albums at
www.rpptl.org



John Neukamm and a statute
…somewhere in Key West



George Karibjanian and Lauren Detzel passionately
debate the UVTA while Drew O'Malley intently looks on



Photos by Jeff Baskies and John Neukamm

RPPTL Out Of State Executive Council Meeting
The Four Seasons, Austin, Texas
February 22-26, 2017



Section Sponsors, Carlos A. Batlle (JP Morgan) and Alex Hamrick (Wells Fargo)





Cary and Alison Wright looking great



Debbie Goodall, Mary Ann Obos and Debra Boje



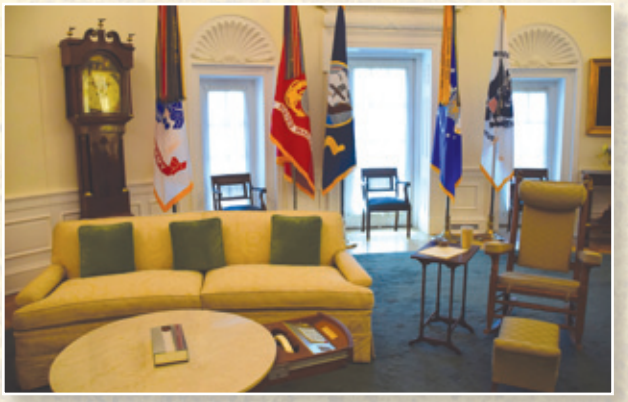
Bill and Cathy Hennessey with Dan Seigel



RPPTL leadership at CB's Lounge in Austin



RPPTL bikers



"Oval Office" at the Lyndon Baines Johnson Library and Museum tour



Michael Swaine with his family

Roundtable

Highlights Of The Meeting Of The RPPTL Section

REAL PROPERTY DIVISION

Friday, December 9, 2016 - 2:00-4:00 pm

Westin Key West Resort & Marina, Key West, FL

Prepared by Jennifer Jones Bloodworth, Esq., Winter Park, Florida

Thank you to the Roundtable Sponsor, Fidelity National Title Group

Meeting opened at 2:00 p.m. by Real Property Law Division Director, Rob Freedman.

Sponsor Announcement. The Division Director thanked the Roundtable Sponsor, Fidelity National Title Group.

General Announcements. Jim Russick announced the passing of Section friend and colleague, Alan Atlas. The Division Director applauded the efforts and hard work of Mary Ann Obos and advised the Division members of a collection being taken to fund a holiday bonus for Mary Ann and a birthday donation to Sebastian Obos' Florida pre-paid college fund. The gifts would be presented to Mary Ann at the Executive Council meeting on December 10, 2016.

Approval of Summary. The first order of business was the approval of the summary of the prior meeting, which motion passed unanimously.

Action Items:

Consideration of Proposed Changes to FR/Bar Contract as Approved by the Joint Realtor-Attorney Committee of The Florida Bar – Salome Zikakis.

Salome Zikakis and Tom Ball presented the summary of the changes to the FR/Bar Contract. Discussion was had regarding the *force majeure* clause and whether an "unusual transportation delay" is, in fact, a *force majeure*. It was agreed that the Joint Committee would look at this issue during the next round of revisions but that no motion to revise the proposed FR/Bar Contract would be made at this meeting. It was also discussed whether a 30-day delay, increased from 14 days, due to *force majeure* was reasonable. It was explained that the extension was at the request of attorneys and realtors in particular areas that know from experience that they cannot be ready to conduct business within 14 days after a hurricane or similar disaster. It was also clarified that the *force majeure* must still be in effect for the closing to be delayed. A motion was made to revise the proposed FR/Bar Contract and keep the *force majeure* clause at 14 days. The motion failed and the *force majeure* clause will be 30 days, as approved by the Joint Committee.

Discussion was had regarding the financing clause and what constitutes "loan approval." The purpose of the revisions was to try to provide more certainty about what the time frames are in an environment where lenders are not providing "loan commitments." Tom and Salome acknowledged some uncertainty would remain, but that it was better than the current provision.

Discussion was had regarding permits. The only change to the existing contract was that if the seller makes a disclosure regarding permits, then the seller must also furnish the buyer with the documentation the seller has regarding same. If the buyer's inspection finds an open permit or work needing a permit, the seller's obligations are similar to those where the seller discloses an issue pertaining to permits.

Motion was made and seconded to approve the revised FR/Bar Contract as approved by the Joint Committee, with the exception of the HOA Rider, which rider was not finalized for consideration. Motion passed. The revised FR/Bar Contract, with the exception of the HOA Rider, went before the Executive Council for approval on December 10, 2106. After much discussion, the Executive Council approved same. The HOA Rider will be considered at the Real Property Division Roundtable and Executive Council meeting on June 3, 2017.

Real Property Problems Study Committee: Arthur Menor, Chair. Unlawful Detainer. Mark Brown presented the final proposed legislation regarding a modernization of the unlawful detainer statute. The proposed amendment to the statute provides an explicit remedy for unlawful detainer, defines "property" under the statute, clarifies that no pre-suit notice is required to file an action, and removes the procedural jury verdict form.

Motion was made and seconded to approve the final proposed legislation. Motion passed unanimously. This was the second reading. It was read at the Executive Council meeting on December 10, 2016, and will be up for a vote before the Executive Council on July 29, 2017.

Real Property Problems Study Committee: Arthur Menor, Chair. Ejectment. Mark Brown presented the final proposed legislation regarding ejectment. Mark explained that the proposed revisions to the statute are intended to provide clarification. Those changes include providing a statutory

continued, page 33

definition for ejectment actions, clarifying that no pre-suit notice is required to file an ejectment action, and providing jurisdiction for such actions in the circuit courts.

Motion was made and seconded to approve the final proposed legislation. Motion passed unanimously. This was the second reading. It was read at the Executive Council meeting on December 10, 2016, and will be up for vote before the Executive Council on July 29, 2017.

Informational And Administrative Matters:

Legislative Committee Update – Steve Mezer. Steve reminded the Division about the steps to bring legislative proposals before the Real Property Division Roundtable. First, proposed legislation has to be vetted by stakeholders, other committees, other sections, and any other persons or groups that would have an interest in the proposed legislation. Second, you need three items: (1) legislative position statement from The Florida Bar, (2) the White Paper, and (3) the proposed bill. They must all be attached together in that order. All forms are on the RPPTL website and Section members must use the most current forms.

Additionally, the Division Director mentioned that, recently, more than one committee has been discussing the same topic at multiple committee meetings. This is not efficient. The Division Director asked that committee chairs coordinate the consideration of new topics with the Division Director to avoid duplicative efforts among committees.

Real Property Problems Study Committee: Arthur Menor, Chair. NOC Statute. Lloyd Garret presented proposed revisions to the notice of commencement statute and the landlord/tenant lien statute, Fla. Stat. §713.10 and 713.13, which revisions are intended to clarify, respectively, that (1) the interest of a landlord is not subject to liens for improvements made by a lessee of a mobile home lot; and (2) the effective time period of a Notice of Commencement can be shortened to a period of time shorter than 1 year. This was the first reading.

Real Property Litigation – Susan K. Spurgeon, Chair; Manuel Farach and Marty J. Solomon, Co-Vice Chairs. Susan Spurgeon presented proposed legislation to revise the *lis pendens* statute, addressing the potential impact of *Ober v. Town of Lauderdale-by-the-Sea*. The proposed legislation would clarify that a *lis pendens* remains in effect through the issuance of an instrument transferring title pursuant to a judicial sale. This was the first reading.

Note: On January 25, 2017, the 4th DCA issued its opinion on a Motion for Rehearing in *Ober v. Town of Lauderdale-by-the-Sea*. In the opinion on the Motion for Rehearing, the 4th DCA reversed its initial opinion and found that a *lis pendens* is effective through the date of the judicial sale.

Open/Expired Permits Task Force: Lee A. Weintraub and Michael Tobin, Co-Chairs.

Lee Weintraub provided an update from the joint committee meeting on Open/Expired Permits held on December 8, 2016. The revised version of the proposed legislation was approved at the joint committee meeting and circulated to this Division for review. The proposed legislation provides procedures for efficiently closing open and expired permits to facilitate the sale of property. One of the last remaining sticking points with the building officials is the sun-setting provision that provides that, after a certain number of years, the building department cannot penalize an owner for failing to properly close out a permit. Discussion was had regarding the need for a licensed contractor's involvement in the process and whether the proposed legislation should be revised to add that a contractor should have an obligation to disclose code violations by others uncovered during the contractor's work in closing the permit. A motion was made to add such a provision to the proposed legislation. Motion failed. This was the first reading.

Estoppel Letter Task Force: Melissa Murphy, Chair. Melissa Murphy announced that the FLTA is continuing to work on its bill and that the task force has nothing further to add or share at this time.

Florida Bar Leadership Academy: Kris Fernandez. Kris Fernandez reported that the application deadline for the Florida Bar Leadership Academy was December 15, 2016.

Probate & Trust Law Division Informational Items:

George Karibjanian and Rob Lancaster presented information to the Division regarding the Uniform Voidable Transfer Act ("UVTA"), which is being proposed by the Business Law Section. The UVTA seeks to revise and update the current Uniform Fraudulent Transfer Act, but, as George and Rob explained, the uniform legislation has a much wider scope than simply a name change in that it could affect many commonly used estate planning and business strategies. The real harm was not in the legislation per se, but rather in the official comments that would be used to interpret the law. George and Rob explained that the Probate and Trust Litigation Division was opposed to the UVTA and requested that the Executive Council members of this Division oppose it, as well, during the vote at the Executive Council meeting on December 10, 2016. George and Rob further explained that the reason this request was being made with such short notice was because the Probate and Trust Litigation Division had been working with the Business Law Section to create a proposal that the Probate and Trust Litigation Division could accept. By the date of this meeting, such efforts had not succeeded and the Section was in a position of having to take action with short notice. Bruce Stone echoed the sentiments of George and Rob and explained that this was not good legislation and the comments were excessively far-reaching. After considerable debate, eventually the Executive Council voted to oppose the UVTA pending potential changes that would appease the Section.

Committee Reports:

None

The Meeting was adjourned at 4:00 p.m.

Roundtable

Highlights Of The Meeting Of The RPPTL Section

PROBATE AND TRUST DIVISION

Friday, December 9, 2016

Westin Key West Resort & Marina, Key West, FL

Prepared by Eamonn Gunther, Esq. Boca Raton, Florida

Thank you to the Roundtable Sponsors, Stout Risius Ross and Guardian Trust.

The Director of the Probate and Trust Law Division of the Real Property, Probate and Trust Law Section of the Florida Bar, Debra Boje, called the meeting to order at 2:00 pm.

Sponsor Announcement. The Division Director acknowledged the sponsor of the Roundtable meeting, Stout Risius Ross, Inc., a valuation company, and Guardian Trust, a professional trust company.

Action Item. Ad Hoc Study Committee on Due Process, Jurisdiction & Service Chair Barry F. Spivey reported on the following action item which would be up for a vote at the Executive Council meeting in Key West: to adopt as a Section position legislation to address the court's holdings in *Corya v. Sanders*, 155 So. 3d 1279 (Fla. 4th DCA 2015) (limiting a trustee's duty to account to beneficiaries), by amending Fla. Stat. §736.08135 and §736.1008, Fla. Stat., to clarify that: (1) Fla. Stat. §736.08135(3) does not limit the beginning period for which a trustee of an irrevocable trust is statutorily required to render a trust accounting to beneficiaries; and (2) a beneficiary's actual knowledge of the existence of an irrevocable trust for which he or she has not received a trust accounting does not commence the running of any limitations or laches period that would bar the beneficiary's assertion of a claim or cause of action against the trustee for breach of trust based upon the trustee's failure to provide a trust accounting as required by law.

Probate & Trust Law Information Items. The Division Director reported that the Probate and Trust Law Division will have six Information Items at the Key West Executive Council meeting:

Report on the Florida Supreme Court Judicial Management Council Guardianship Workshop – Laird Lile: Laird reported that Florida Chief Justice Jorge Labarga established a Guardianship Workgroup under the Supreme Court's Judicial Management Council to study guardianships in the court system with a goal of improving accountability to better protect vulnerable people – children, adults with developmental and mental disabilities, and the elderly. Laird reported that he was appointed to serve on the Workshop Committee along with other attorneys and Judges.

Proposed Treasury Regulation under IRS Code Section 2704 – Brian Malec: Brain reported that the tax section and RPPTL section to the Florida Bar submitted joint commentaries to the proposed 2704 Regulation. The comments are available in the Executive Council Meeting Agenda at page 40.

Model and Uniform Acts – Bruce Stone and Richard Taylor, Co-Chairs. Bill Hennessey confirmed that the Business Law Section of the Florida Bar is moving forward on its support of adoption of the Uniform Voidable Transfers Act ("UVTA") in Florida. Bill reported that the UVTA contains official Comments that suggest a presumption of fraud with regard to certain estate planning techniques. As such, because the Business Law Section is unwilling to change the Comments (as proposed by the RPPTL section) and is moving forward with its support to adopt the UVTA in Florida as is, the RPPTL Section is forced to oppose adoption of the UVTA unless certain revisions are made to the Act. This formal opposition will require a vote by the Executive Council for interim action. Fletcher Belcher expressed concerns that the RPPTL's legislative position should include language that any changes to the proposed UVTA should not expand or further limit Florida's existing law as to self-settled trusts (the legislative position paper was adjusted accordingly).

Amendment to Florida's Elective Share Statute – Debra Boje: Debra reported that the revisions to the elective share statute were approved by the Executive Council. Although the changes to the statute were approved by the Executive Council, the provisions regarding attorneys' fees required some further changes before it could be presented to the Executive Council for a vote. The attorney fee provision provides for an award of attorney's fees and costs applicable to all parties who litigate in an elective share proceeding. Currently, attorney's fees are only allowed to the personal representative. The provision adopts the standard used in other sections of the Florida Probate Code and the Florida Trust Code as to award of attorneys' fees, thus making it applicable to all parties involved in an elective share litigation.

Action Regarding Proposed Rules Regarding Public

continued, page 35

and Professional Guardians – Debra Boje: Debra reported on action taken by members of the Executive Committee to oppose the rules recently instituted by the Department of Elder Affairs, Office of Public and Professional Guardians, which, in effect, create new law and are in conflict with current statutes. In order to have commentaries opposing the rules submitted for consideration and for action to be taken by the Department of Elder Affairs, a rule challenge court action is required. A litigant who has standing to contest the rules was required in order to file the court action. Darby Jones stepped up as the litigant for the cause. Sarah Butters has worked diligently to submit and manage the court action, and Holland & Knight has agreed to represent Darby Jones in the action.

No Place Like Home Initiative – Larry Miller: Larry Miller reported that the "No Place Like Home Initiative" program is intended to address the needs of a large percentage of underserved individuals and families in Florida who apply for state and federal disaster relief subsidies and find that they do not have valid title to their homes which makes them ineligible for the subsidies. The program was piloted by the Bay Area Legal Aid Services in Tampa, which will now be expanded by the RPPTL Section. At-Large Members of RPPTL will be asking RPPTL members to get involved in this effort and will be sending out applications to Section members for those who want to participate.

Committee Reports

Asset Protection - George Karibjanian, Chair; Rick Gans and Brian Malec, Co-Vice-Chairs: George Karibjanian reported that the Committee continues to discuss the *Berlinger* case decision. The Committee's work to resolve its differences with the Business Law Section of the Florida Bar concerning the official Comments to be adopted in Florida as part of the Uniform Voidable Transfers Act ("UVTA") has come to an impasse. Assuming that the Executive Council approves interim action be taken on this matter, the RPPTL Section will oppose the adoption of the UVTA in its current form unless there is an agreement as to changes to the Comments or the proposed Act. Finally, Mr. Karibjanian reported that Elizabeth Bowers presented case law updates to the Committee.

Attorney/Trust Officer Liaison Conference - Laura Sundberg, Chair; Stacey Cole, Co-Vice Chair (Corporate Fiduciary), Tatiana Brenes-Stahl and Patrick Emans, Co-Vice Chairs: Ms. Sundberg reported that the Conference will take place at The Breakers in Palm Beach from August 24 through 27, 2017.

Digital Assets and Information Study Committee – Eric Virgil, Chair; Travis Hayes and Dresden Brunner, Co-Vice Chairs: Eric Virgil reported that he co-authored an article in ActionLine concerning the new statute. There was also a thorough presentation of the statute at the most recent RPPTL seminar presented by the Estate and Trust Tax Planning and Asset Protection Committees.

Elective Share Review Committee – Lauren Detzel and Charlie Nash, Co-Chairs; Jenna Rubin, Vice Chair: No Report.

Legislation Committee –Sarah Butters, Chair; Steve Mezer, Travis Hayes, Rob Lancaster, Alan Fields and Arthur Menor, Co-Chairs: Sarah Butters reported that there are about thirteen new legislative initiatives. Committee Session Week for the Florida legislature starts January 9, 2017. Some of the initiatives include the guardianship marriage issue and hearsay exception; the new proposed decanting statute; revisions to the elective share statute; a Physician Ordered Life Sustaining Treatment statute known as "POLST," and the Will deposit statute.

Estate and Trust Tax Planning – David Akins, Chair; Tasha Dickinson and Rob Lancaster, Co-Vice Chairs: Ms. Dickinson reported that the proposed legislation, and revisions thereto, on tenancy-by-the-entirety and joint ownership with right of survivorship as to tangible personal property was approved by the Committee.

Guardianship, Powers of Attorney and Advance Directives – Hung Nguyen, Chair; Tatiana Brenes-Stahl, David Brennan, Eric Virgil and Nicklaus Curley, Co-Vice Chairs: Hung Nguyen reported that the *Olshen* case project got approved by the Committee revising the guardianship statutes to allow for guardians to petition the court to use tenancy-by-the-entirety property for expenses of the ward. The *Rothman v. Rothman* case continues to be discussed by the Committee and there is constructive debate among Committee members as to whether a statutory change should be considered to give the court discretion as to whether to dismiss a petition for incapacity even where the majority of the examining committee agrees that there is no cause for incapacity. Hung also reported that, as chair of the Guardianship Committee, he assisted in the amicus brief submitted on the *Smith v. Smith* case where, after the ward's right to contract was removed, the ward married. The issue was whether the marriage is void or voidable. The amicus brief takes the position that the marriage is voidable, whereas the Elder Law Section disagrees and believes the marriage is void.

IRA, Insurance and Employee Benefits – Howard Payne and Kristen Lynch, Co-Chairs; Carlos Rodriguez, Vice Chair: Rich Amari reported that Linda Griffin gave a presentation on split dollar insurance. Rich also reported that there was a recent PLR decision that states that IRAs and death benefits from IRAs cannot be recognized as community property. Finally, the Committee reported on a recent case involving stranger owned life insurance ("STOLI"): *Wells Fargo Bank, N.A. v. Pruco Life Insurance Company*, No. SC15-382, where the Florida Supreme Court considered the issue as to whether a party could challenge an insurance policy as being void *ab initio* for lack of the insurable interest required by Fla. Stat. § 627.404 if the challenge occurred after the expiration of the

continued, page 37

PROBATE | TRUST | GUARDIANSHIP

LITIGATION

THE LAW OFFICES OF
ADRIAN PHILIP THOMAS P.A.



WHERE THERE'S A WILL, THERE'S A...RELATIVE!

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

TOLL FREE: 800-249-8125

DIVISION OF FEES PAID IN ACCORDANCE WITH FLORIDA BAR RULES.

two-year contestability period. The Florida Supreme Court determined that, because the two year contestability period had expired, the party could not challenge the insurance policy, and there was no exception for STOLI contracts. Rick Gans also reported on several Greenbook proposals relating to IRAs and the possible elimination of stretch IRAs, with a spouse being the only exception.

Principal and Income – Ed Koren, Chair; Pam Price, Vice-Chair: Ms. Price reported that the Committee is working diligently on a project to determine how to properly assess principal and income with regard to cash distributions from a closely-held company to which the trust holds an interest.

CLE – Shane Kelley and Bob Swaine, Co-Chairs: Shane Kelley reported that the Section presented a successful probate law seminar. The Trust and Estate symposium is scheduled for early March 2017 in Fort Lauderdale. The Certification review course for Trust and Estates is on target for its usual time in early May 2017, and finally there is an upcoming guardianship seminar in Miami.

Probate and Trust Litigation – Jon Scuderi, Chair; Jim George, Rich Caskey and Lee McElroy, Co-Vice Chairs: Mr. Scuderi reported that the Committee voted to approve the Artificial Reproductive Treatment statutory proposal led by Larry Miller in conjunction with the Probate Law and Procedure Committee. In addition, there is also work being done on the statutory deadlines to challenge the validity of a will and/or trust.

Probate Law and Procedure – John Moran, Chair; Sarah Butters, Travis Hayes, and Sean Kelley, Co-Vice Chairs: The Committee passed a new definition with respect to the inclusion of coins and bullions as tangible personal property. The Committee is working on the review of recently proposed Florida legislation on electronic wills. Finally, there is a project underway to address conflicts of interest of a personal representative, as well as work to amend the statute requiring mailing of the Notice to Creditors to the Florida Department of Revenue.

Trust Law - Angela Adams, Chair; Tami Connetta, Jack Falk and Mary Karr, Co-Vice Chairs. Chuck Rubin is working on heading up a sub-committee to study when the conduct of one beneficiary binds another beneficiary, and to review the role of trust protectors, financial advisors and designated representatives. The Committee is also looking at the prudent investor rule to determine if some areas should be updated or amended to conform to the Uniform Act. Additionally, the Committee is studying forms relating to releases in trust administration and to what extent distributions can be conditioned on the beneficiary signing a release. Finally, the Committee is working with the Florida Bankers on their proposed revisions to the accounting statute relating to the electronic notice of the shortened statute of limitation provision on an accounting.

Liaison to Elder Law Section - Charles Robinson and Marjorie Wolasky, Liaisons: The National Academy of Elder Care is considering looking at establishing legislation to allow a competent person under the age of 65 to establish his/her own disabled or special needs trust, which can now only be undertaken by a parent, grandparent, a guardian or a court. Separately, John Hancock is withdrawing from the long term health care insurance care business; this needs to play into our planning work for clients as care will become more expensive as more players like John Hancock leave the market.

Liaison to Tax Section – Harris Larue Bonnette; Lauren Detzel; William Roy Lane Jr.; David Pratt; Brian Sparks; Don Tescher, Liaisons: No report.

Liaison to ACTEC – Elaine Bucher, Liaison: Ms. Bucher **c**ongratulated Keith Braun as a new ACTEC Fellow. Elaine announced that Shane Kelley is the new Chair Elect for ACTEC for 2017. The ACTEC Florida Fellows Institute had 22 graduates last year and is slated to have 38 students this year. Lauren Detzel is the new Regent for ACTEC and Elaine Bucher is now part of the governing body for ACTEC National.

FLA BAR Real Estate Contracts – members from the RPPTL Real Estate Section presented proposed changes to the Florida Bar real estate contract relating to the provisions on financing contingencies. Currently there is no deadline for the buyer to ask for his/her deposit back. The proposed changes require that the buyer determine whether he/she can comply with the financing contingency within thirty days, thereby requiring the buyer to request his/her deposit back within the 30-day time period or otherwise waive his/her deposit.

Ad Hoc Committee Reports

Ad Hoc Guardianship Law Revision Committee – David Brennan, Chair; Sancha Brennan Whynot, Hung Nguyen and Charlie Robinson, Co-Vice Chairs. Sancha reported that the Committee is drafting a brand new Chapter 744. The Committee should have a first full draft of the revisions to the statutes by early 2017. The new Chapter 744 should be on target for a 2018 enactment date.

Ad Hoc Study Committee on Estate Planning Conflict of Interest - Bill Hennessey, Chair; Paul Roman, Vice Chair. No Report.

Ad Hoc Study Committee on Jurisdiction and Service of Process - Barry Spivey, Chair; Sean Kelley and Christopher Wintter, Co-Vice Chairs. No Report.

Ad Hoc Committee on Physicians Orders for Life Sustaining Treatment (POLST). Tae Kelley Bronner reported that the proposed POLST legislation drafted by the Committee was approved by the Executive Council at the meeting in Orlando. Florida State University had assembled their own POLST Committee comprised of professionals who represent sectors of Florida's population that will be affected by POLST and who have studied POLST movements around the country.

continued, page 39

The New 2016 ALTA Commitment With Florida Modifications: Expressing The Limitations On Liability

By Christopher Smart, Esq., Carlton Fields, Tampa

A significant change to one of the standard title insurance forms recently went into effect. The new 2016 ALTA Commitment with Florida Modifications both streamlines the existing features of the title insurance commitment and, for the first time, expressly sets out many of the fundamental title insurance industry assumptions underlying such commitments. The clear and laudable aim of this new form is more clarity, less misunderstanding, and therefore, a better relationship among the contracting parties. This article summarizes the changes to the form, with a particular focus on the important new notice and the express prescription on the title insurance issuing agent's limited role on behalf of the title insurer.

Background. On June 9, 2016, the ALTA Board of Governors approved recommendations to adopt new and revised forms, including the 2016 ALTA Commitment for Title Insurance, which was published in final with an effective date of August 1, 2016. Florida's Office of Insurance Regulation has subsequently approved the 2016 ALTA Commitment for Title Insurance with Florida Modifications for use in Florida (the "2016 Commitment"), and that form became available for use on May 15, 2017.

The 2016 Commitment is a more streamlined version of the 2006 ALTA Commitment, and it contains important clarifications of the obligations between the title insurer, proposed insured and title insurance issuing agent.

While you will recognize many of the changes as mere codifications of the existing standard, industry understanding of what a title insurance commitment is, what it does, and why it is issued, its new terms are worth considering in some detail.

Notice. The most significant revision is the incorporation of a "Notice," prominently placed at very top of the jacket of the 2016 Commitment. The Notice expressly sets forth that the 2016 Commitment is only an offer to issue the specified title insurance policy and not "an abstract of title, report of condition of title, legal opinion, opinion of title, or other representation of the status of title." In other words, the 2016 Commitment is simply the first step in the formation of a binding contract, the title insurance policy. The Notice further confirms that the procedures used by the title insurer in determining insurability, including any title search or examination, are for the benefit of the insurance company only.

The Notice is of particular significance because, previously, title insurance commitments had been asserted as the basis of tort claims against title insurers, and some courts had actually determined that a title insurance commitment could be the basis for a title insurer's liability in tort, if, for example, a title encumbrance or defect of record was not listed in the commitment. The error in this determination is that it is premised on the fundamental misconception that a commitment is designed to disclose the state of title, including all title encumbrances and defects of record, to the proposed insured.

Commitments are not, of course, designed to disclose the state of title, and title insurers are not engaged in the business of abstracting title, issuing legal opinions of title, or making any representations as to the state of title. Instead, title insurance is best thought of as the process by which a title insurer comes to determine the risk of, and premium for, issuing a policy of title insurance that will provide the insured with a defense and possible indemnification in the event that title is not as insured, pursuant to the terms, conditions and stipulations of the policy that is ultimately issued. Thus, commitments have always only been, as the 2016 Commitment now expressly states, an offer to issue a policy to a proposed insured if the conditions of the commitment are met.

Importantly, an offer to issue a title insurance policy and the policy itself are not warranties or guaranties that title is as set forth in the offer (commitment) or the ultimate contract (policy). Instead, the policy is a contract of indemnification and expressly contemplates the obligations of the insured and insurer in the event there is an allegation that title is not as insured. For example, title insurance policies impose specific notice obligations on the insured in the event of a claim and also provide the insurer with a range of options on how to address a claim, including defending, curing, or paying diminution in value. In other words, the title insurance policy that is the end result of the offer contained in the title insurance commitment, far from warranting that title is as insured, expressly contemplate the possibility that title will not be as insured and then sets forth the parties' contractual obligations under those circumstances.

It is not difficult to understand why an insurance industry that calculates its insurance premiums based on potential limited contractual liability arising from the risk of a recorded encumbrance or defect was concerned to correct

continued, page 39

The New 2016 ALTA Commitment With Florida Modifications, from page 38

misinterpretations of its contractual offer to issue title insurance as representation of title that could open insurers to potentially unlimited tort damages. It is an important goal for the title insurance industry and for all of the participants in the residential and commercial real estate industry, as title insurance is what allows real estate professionals to close real estate transactions efficiently, affordably, and with confidence.

The Commitment. The 2016 Commitment is comprised of the Notice, Schedule A, the Requirements in Schedule B, Part I, the Exceptions in Schedule B, Part II, and the Commitment Conditions. Each part of the 2016 Commitment is required for it to be effective and, in particular, the amount of insurance and the name of the proposed insured must be included in Schedule A before it becomes effective. The 2016 Commitment expressly states that it terminates within 6 months of the effective date if the requirements in Schedule B, Part I are not met before that time. The 2016 Commitment conditions, discussed below, also go on to state that if the requirements in Schedule B, Part I are not met within this time, then the insurer's obligations and liability terminate along with the commitment.

The Commitment Conditions.

- **Definitions.** The 2016 Commitment now contains definitions of certain key terms such as "Knowledge," "Land," and "Public Records," that will prove helpful to anyone reading it, including proposed insureds.
- **Counter-signature.** The condition that the commitment be counter-signed by the insurer or the insurer's title insurance issuing agent had always been expressed simply in the fact of the authorized signature block, but the 2016 Commitment Conditions now expressly state this requirement.
- **Right to Amend.** The 2016 Commitment now also expressly states the insurer's right to amend the commitment at any time to add defects, liens, encumbrances, adverse claims or other matters recorded in the official records and places detailed and specific limitations on any possible liability to the proposed insured in the event of such an amendment.
- **Limitation on Liability.** The 2016 Commitment also expressly limits liability of the title insurer by providing that only the identified proposed insured is entitled to make a claim pursuant to the commitment, that such claims must be in contract pursuant to the terms and provisions of the commitment, that the commitment is the entire agreement between the parties until the policy is issued at which point the obligations and liability under the commitment terminate, that any modifications must be in writing, and that any modifications to the Exceptions in Schedule B, Part II will not require the insurer to provide coverage beyond the commitment or the policy.

The Title Issuing Agent. Under Florida law, a closing agent, in addition to acting as the closing and escrow agent for the parties, can also serve in the limited capacity as title insurance issuing agent for the insurer. Although the independent title insurance agent relationship is frequently set forth in a written agency agreement with the insurer that strictly limits the scope of the agent's authority on behalf of the insurer, the parties to the transaction often subsequently allege that the agent was the insurer's agent for all purposes. Those allegations, like the allegations of tort liability for misrepresentations in the commitment, have the potential to give rise to extra-contractual and potentially unlimited liability for the insurer, given that closing agents have a duty to close a transaction in a reasonably prudent manner and their liability arises in negligence.

In order to address this problem, the 2016 Commitment affirmatively states that the title insurance issuing agent is the insurer's agent only for that purpose and not the insurer's agent for the purpose of providing closing or settlement services. Thus, this provision should help to clarify one of the most frequently misunderstood roles in any real estate transaction and end title insurers' potential liability for providing closing services, when they do not contract and are not paid for those services.


C. SMART

***Chris Smart** tries real estate, title insurance, and consumer finance cases. He represents national title insurance companies, lenders, creditors, and a broad array of real estate owners, developers, and investors. He has significant experience in title to real property, real estate contracts and transactions, title insurance, mortgage lending, consumer finance, and developer litigation. He is chair of The Florida Bar's Title Issues and Standards Committee and a member of the American Land Title Association's Title Counsel and Real Property Records committees. He is the co-leader of the firm's real property litigation practice group and title insurance industry group.*

Probate And Trust Division Roundtable, from page 37

The FSU group has agreed to accept the statute "as is." Ms. Bronner confirmed that it does not appear as though the FSU group can organize an opposition to the RPPTL proposed statute. The RPPTL POLST Committee worked diligently to ensure that the proposed statute protects a patient's right to self-determination. The RPPTL's proposed POLST statute will be submitted for legislative enactment for 2017.

Ad Hoc Study Committee on Spendthrift Trust Issues – Lauren Detzel and Jon Scuderi, Co-Chairs. Debra reported that this Committee's legislation is tabled and there will be no further action at this time.

Adjournment. The next Probate and Trust Law Division Roundtable meeting will be held at the Hyatt, Coconut Pointe Hotel, in Bonita Springs, Florida in June 2017.

Florida Domestication Statutes And Good Title For Real Estate: A Trap For The Unwary

By Leslie A. Share, Esq. and Shawn P. Wolf, Esq.,
Packman, Neuwahl & Rosenberg, Miami, Florida

Since 1989, Florida law has provided for the domestication of a non-Florida corporation to Florida. Any foreign corporation may domesticate to this state by filing a certificate of domestication and articles of incorporation with the Florida Department of State. In general, for Florida law purposes, upon the filing of these documents, the domesticated corporation is treated as if it had been a Florida corporation from the date of its formation in its original jurisdiction. As a result, it should in essence be deemed the same entity rather than as a new company. However, notwithstanding this apparent legal simplicity and clarity, the authors have unfortunately encountered difficulties attempting to explain Florida domestication law to a number of title companies with respect to a corporation redomiciled to Florida that owns Florida real estate, while incurring arguably unnecessary delays and added costs.

This conundrum has occurred in the following situation, which reflects common U.S. tax and estate planning for foreign individuals with U.S. person family members:

- Mr. X, a non-U.S. citizen and non-U.S. tax resident for all U.S. tax purposes, establishes a non-U.S. (here, Cayman Islands) corporation ("CayCo") to own Florida real estate (the "Property").
- Mr. X wants to gift the CayCo shares to Mr. Y, his U.S. citizen son. Based upon the advice of Cayman Islands and U.S. counsel, CayCo files discontinuation documents with the Cayman Islands government. The following day, the entity domesticates to Florida as "FlaCo" by filing domestication documents with the Florida Department of State. Because of the concern that the shares of a domestic corporation such as FlaCo owned by a foreign person are generally subject to U.S. estate tax upon such person's death, Mr. X immediately thereafter makes a tax-free gift of the FlaCo shares to Mr. Y.
- To avoid the application of the general U.S. 15% "FIRPTA" withholding tax applicable to dispositions of U.S. real property interests such as the Property by foreign owners, FlaCo files an appropriate Notice of Nonrecognition Treatment with the IRS within 20 days of the effective date of the domestication, confirming that the transaction qualifies as a tax-free so-called "F" reorganization. FlaCo then elects "S" corporation status. Mr. Y files IRS Form 3520 reporting a large gift from a foreign person.
- Several months later, FlaCo contracts to sell the Property to a third party for $20 million. As part of the due diligence relating to the sale, counsel for the Title Company ("TitleCo") reviews the continuation/domestication transaction. TitleCo refuses to issue title insurance, claiming that: (1) the continuation/domestication of CayCo into FlaCo did not legally vest title in FlaCo; and (2) CayCo must issue a deed to FlaCo to legally transfer title to the Property.

The Florida domestication law, Fla.Stat. §607.1801, provides:

Domestication of foreign corporations.—

(1) As used in this section, the term "corporation" includes any incorporated organization, private law corporation (whether or not organized for business purposes), public law corporation, partnership, proprietorship, joint venture, foundation, trust, association, or similar entity.

(2) Any foreign corporation may become domesticated in this state by filing with the Department of State:

(a) A certificate of domestication which shall be executed in accordance with subsection (7) and filed and recorded in accordance with s. 607.0120; and

(b) Articles of incorporation, which shall be executed, filed, and recorded in accordance with ss. 607.0120 and 607.0202.

(3) The certificate of domestication shall certify:

(a) The date on which and jurisdiction where the corporation was first formed, incorporated, or otherwise came into being;

(b) The name of the corporation immediately prior to the filing of the certificate of domestication;

(c) The name of the corporation as set forth in its articles of incorporation filed in accordance with paragraph (2)(b); and

(d) The jurisdiction that constituted the seat, siege social, or principal place of business or central administration of the corporation, or any other equivalent thereto under applicable law, immediately prior to the filing of the certificate of domestication.

(4) Upon filing with the Department of State of the certificate of domestication and articles of incorporation, the corporation shall be domesticated in this state, and the corporation shall thereafter be subject to this act, except that notwithstanding the provision of s. 607.0203 the existence of the corporation shall be deemed to have commenced on the date the corporation commenced its existence in the jurisdiction in which the corporation was first formed, incorporated, or otherwise came into being.

(5) The domestication of any corporation in this state shall not be deemed to affect any obligations or liabilities of the corporation incurred prior to its domestication.

(6) The filing of a certificate of domestication shall not affect the choice of law applicable to the corporation, except that, from the date the certificate of domestication is filed, the law of this state, including this act, shall apply to the corporation to the same extent as if the corporation has been incorporated as a corporation of this state on that date.

(7) The certificate of domestication shall be signed by any corporation officer, director, trustee, manager, partner, or

continued, page 41

other person performing functions equivalent to those of an officer or director, however named or described, and who is authorized to sign the certificate of domestication on behalf of the corporation.

In reviewing Fla. Stat. §607.1801, and considering that Cayman law required the discontinuation of CayCo prior to the formation and continuation of FlaCo, even though Fla. Stat. §607.1801 plainly indicates that FlaCo should be treated as the same company as CayCo rather than a new or different entity, TitleCo maintained that it was unclear whether title to the Property properly vested in FlaCo pursuant to the domestication. In making this determination, TitleCo compared Fla. Stat. §607.1801 to the Florida merger statutes, which provide that the "title to all real estate and other property, or any interest therein, owned by each corporation party to the merger is vested in the surviving corporation without reversion or impairment." Fla. Stat. §607.1106(1)(b). Notwithstanding the opinions of both the Cayman Islands and Florida lawyers that FlaCo was the same legal entity as CayCo with a date of incorporation of CayCo's formation, TitleCo concluded that because Fla. Stat. §607.1801 did not contain the same specific language in Fla. Stat. §607.1106(1)(b), it was unclear whether title to the Property automatically vested in FlaCo.

The practical problem in this case was that by the time TitleCo's counsel came to this conclusion, CayCo had already been formally discontinued in the Cayman Islands. According to Cayman counsel, CayCo most likely could not simply deed the Property to FlaCo in order to satisfy TitleCo without a related Cayman Islands court proceeding. To break this impasse and proceed to a closing, TitleCo ultimately required the following additional complicated (and costly) transactional steps to occur to satisfy its counsel's concerns:

- FlaCo redomiciled back to the Cayman Islands as a new company ('CayCo 2");
- The redomiciliation documents filed in the Cayman Islands reflected the intention to effectively continue the existence of CayCo (as to re-constitute CayCo would have required a court proceeding);
- FlaCo deeded the Property to CayCo 2; and
- CayCo 2 merged (rather than redomiciled) into a newly formed Florida corporation ("FlaCo 2").

The end result was that because FlaCo 2 was the surviving company of a merger transaction (which should also generally be a tax-free reorganization for U.S. tax and withholding purposes), TitleCo relied upon the language in Fla. Stat. §607.1106(1)(b) to issue title insurance for the sale of the Property by FlaCo 2.

The authors strongly disagree with TitleCo's analysis of the Florida domestication statute with respect to whether FlaCo had good title to the Property under these circumstances. We believe that TitleCo's lawyers were overly conservative because of the substantial sales price of the Property. Nevertheless, because Cayman law required the Cayman entity to be discontinued prior to its domestication to Florida, TitleCo perceived a "gap" in title. However, this "gap" is arguably illusory because Florida corporate law (as well as U.S. tax law) should recognize the Florida company as a direct continuation of the Cayman company.

Bottom line, as currently drafted, real estate practitioners could face a similar unpleasant situation for Florida property transactions involving domesticated Florida entities, especially where the original foreign jurisdiction has discontinuation laws similar to those of the Cayman Islands. Thus, to avoid this potential problem, where the foreign entity in question owns Florida real estate and the desire is to "move" the entity to Florida, consideration should be given to utilizing each jurisdiction's merger statutes (which in appropriate circumstances could also constitute a tax-free reorganization) rather than their respective continuation/domestication laws. Alternatively, Florida legislators should consider amending Fla. Stat. §607.1801 [possibly in Fla. Stat. §607.1801(4)] to include language similar to that of Fla. Stat. §607.1106(b) – (g) to hopefully avoid this problem going forward in continuations/domestications, as well as clarifying that filing the certificate of domestication in Florida after the discontinuation in the other jurisdiction does not prejudice this result.


L. SHARE

Leslie A. Share *is a shareholder in Packman, Neuwahl & Rosenberg, P.A., specializing in the areas of domestic and international tax, estate and wealth preservation planning. Mr. Share has written articles for the Florida Bar Journal, Asset Protection Journal, Entertainment Law & Finance, Estate Planning, the University of Florida Law Review, and an American Bar Association book, Foreign Investment in U.S. Real Estate – A Comprehensive Guide. He has been recognized as an FICPA Outstanding Discussion Leader, is AV rated by Martindale-Hubbell, a member of STEP and is listed in Best Lawyers in America and Florida Super Lawyers in the field of tax law. Mr. Share received his B.A. from Northwestern University, his J.D., with honors, from the University of Florida, and his Master of Laws in Taxation from New York University.*


S. WOLF

Shawn P. Wolf *earned his B.B.A. in Business Administration from the University of Miami, J.D. from The University of Pittsburgh, and LLM degree from the University of Miami.*

Shawn practices primarily in international taxation, inbound and outbound, and general taxation, including business planning and estate planning. Shawn is Board Certified in Tax. He was named a Florida Super Lawyer in 2017 and has been selected by his peers for inclusion in the 2011- 2017 editions of The Best Lawyers in America in tax law. He served as an Adjunct Professor at Florida International University, and he has taught in the University of Miami Masters of Law Program.

CLE CREDITS

CLER PROGRAM
(Max Credit: 7.0 hours)
General: 7.0 hours
Technology: 1.5 hours
CERTIFICATION:
(Max Credit: 7.0 hours)
Real Estate: 7.0 hours

JOIN US FOR THE INAUGURAL

ATTORNEY/LOAN OFFICER CONFERENCE

Wednesday, JULY 26TH, 2017 8:00am-5:00pm

The Kravis Center, West Palm Beach, Florida

The Attorney/Loan Officer ("ALO") Conference is the first of its kind in Florida, putting together top commercial bankers and attorneys to share information and learn from each other and will feature topics such as:
"What you Wish your Attorney Knew, but Doesn't; What you Wish Your Loan Officer Knew, but Doesn't", Title Problems and Solutions and Risk Management.

To register for the live presentation, you must log into The Florida Bar Members Portal at www.member.floridabar.org, click Meetings/CLE Events and scroll to select ALO

Or contact Mary Ann Obos for more details: mobos@floridabar.org
Networking and exhibit opportunities: wkightlinger@oldrepublictitle.com

Thanks to our Platinum Sponsor:

Valley National Bank®

Technology And Florida Real Estate
(Introducing New Technology To An Established Industry)

By Louis P. Archambault, Esq., Arnstein & Lehr, LLP, Miami, Florida

Driverless cars, lighter and stronger building materials, 3D printed houses; it seems every other day there is a new announcement of a technological breakthrough that will change the way we live, work and play (although I am still waiting for my George Jetson car). For Florida real estate development and businesses, each breakthrough represents an opportunity for new technology to disrupt how cities are planned and buildings are built or used. While technology companies excel at innovations, Florida lacks progressive institutional processes for approving these for use in development. In fact, our governmental, legal and financial systems are built upon well-worn practices, comforting in their familiarity, but ill-equipped for these challenges. This article will explore three disruptive intersections of technology with these systems.

Why is this issue vital for us as Florida real estate lawyers? Integrating technology into real estate practices is not a new concept. How buildings are built or used has been evolving from the start of civilization. However, at no time in history has the exponential growth of technology been as fast paced or as readily absorbed, while concurrently rendering established businesses obsolete. Uber and Airbnb are both examples where businesses changed so rapidly that established structures, including governmental controls, failed to anticipate, much less keep up with, the wave of change. "Disruption" for many business people has become a four-letter word. As Florida real estate lawyers, it is imperative to understand evolving technologies and their potential impact on our clients. This accelerated evolution can change our business practices in profound and unpredictable ways. Without this understanding, we will find ourselves bringing a knife (telex or fax machine) to the proverbial gun fight (scanners, emails, smartphones).

Although evolving technology is quickly causing disruptions in the business world, the institutional systems needed to approve the integration of these technologies are lagging behind. The United States and Florida legal systems are charged with maintaining laws to protect the public and, by their very nature, slow down new ideas in order to "sift and winnow" those that may not be deemed ready or safe for public acceptance. These laws then form the backbone for legal precedent in the courts. Against these structures, banks, investors, equity markets and other institutions underwrite their investments on projections for both profits or losses as possibilities. And for losses, how can the losses be mitigated by the value of the collateral? In high stakes real estate development, the potential profits and losses are huge. Underwriters take great care and concern in their evaluation of these risks and hold strong to underlying forms, assumptions and formulas proven over time to be "correct" or "fundamental" in evaluating development risk. This may perpetuate delusion as quickly evolving technology challenges these long held underwriting tools.

3D Printing And Mixed Use Space

According to MIT Professors, *"[t]he manufacturing industry is undergoing a major transition."* Specifically, "*[b]eyond making many copies of the same object, modern manufacturing is becoming digital and on-demand.*"[1] Three dimensional printers are not just printing small, plastic objects. As a small sampling of possibilities, 3D printers are capable of printing homes,[2] office buildings,[3] retail shoes,[4] chocolate,[5] car parts[6] and clothes.[7] Additionally, the printers can be the size of a regular office copier[8] and be environmentally friendly.[9] Future manufacturing is not limited to giant factories or industrial spaces, it may be located anywhere.

Florida zoning codes are based on the segregation of uses for the orderly structuring and livability of Florida communities. Residential, commercial and industrial uses are separated, so the needs of cities can be serviced without interfering with quiet enjoyment of residential spaces. This segregation makes sense, or did, in the world we knew. It does not serve society for iron recycling, waste management, car repair, bowling alleys or gun shops to be adjacent to schools, churches or single family homes. Three dimensional printing creates a challenge to this mindset, as the underlying concerns dictating segregation of uses may evaporate. However, some printers may still need environmental precautions for their use or would not be suitable for use within residential or retail shopping areas.[10]

Given the fluidity for the evolution of 3D printers, the practical acceptance of the technology by our institutional systems in Florida is difficult. In applying for a Certificate of Use or Business License using 3D printers, the potential

continued, page 44

use of a 3D printer or the location for its use challenges the traditional segregation of zoning in that a 3D printer's use can combine both industrial, commercial and retail applications, but not necessitate segregated use. Additionally, a 3D printing company or business using this technology, in applying for a traditional loan, may find it difficult to gain approval from a traditional lender's underwriting committee as the company's profitability and marketability is evolving. Moreover, the 3D printers themselves in most cases are not as valuable for collateral purposes as hard industrial assets and are potentially mobile, creating risks in perfecting security interests and seizure after default, more similar to inventory than fixtures. Unfortunately, 3D printers do not have the same level of legal precedent for a lender to preserve its collateral interest in the 3D printer, thus driving up costs for enforcement of its rights. Protection of these rights is, in turn, necessary for the use of 3D printers to continue to evolve.

Driverless Cars And The Parking Garage Dilemna

Tesla, Uber, Google, Toyota, BMW, Volvo, Nissan, Ford, GM, Daimler, Audi, Baidu, Honda, Hyundai, Bosch, PSA Groupe, Faraday Future, LeEco, Apple, among others, are companies working on completing self-driving and driverless cars by 2021.[11] The start of the market will be self-driving cars, which will be cars capable of driving themselves with the assistance and need of a driver as part of the process. The full evolution of the technology anticipates vehicles that will drive themselves without the need of a human in the car.

With Uber, Lyft and other ridesharing programs, the first wave of surface transportation disruption is already being experienced. The next wave would be integration of self-driving cars, potentially being able to park themselves after dropping off passengers. Without full integration, this stage would not permit substantive changes to the transportation system, as you would still have people driving on roads alongside self-driven cars and subject to current road widths, acceleration and deceleration zones, access points, etc., but fewer parking areas would be necessary as people would no longer need to access their cars in the same way. The final wave would be fully autonomous cars, triggering complete disruption to current transportation, zoning and parking requirements. Drop off and pick up zones would be most important for developments, with autonomous cars parking themselves in remote locations, potentially in areas that would not be safe for people as a result of temperature, ventilation or other risks.

A retail developer planning development of a retail center within an urban area may be currently considering a parking structure and contemplating how much parking is needed for the development. In speaking to prospective tenants, the tenants are expecting a parking ratio of 4 parking spaces per 1,000 square feet of space. However, traffic studies conclude that due to factors including mass transit, ridesharing and evolutions in self driving or autonomous cars, only 3 parking spaces per 1,000 square feet of space, or potentially even less parking density, is needed and to build more parking is not necessary. Even though the extra parking is not needed, the tenants will demand the 4:1,000 ratio as their nationwide data demands they get their ratio or they cannot approve the site. The only way to move to a 3:1,000 ratio or less would be for the local city government to pass an ordinance requiring no more than 3:1,000 ratio in parking spaces. Without intervention, the development will be under-utilized before the concrete dries. Additionally, even with a view towards repurposing the parking, if under-utilized by considering a more flexible parking structure, the parking may not be reasonably repurposed. Parking structures relative to the overall development are usually within the most undesirable locations of a site rendering the value of repurposed space less valuable than improvements that may have been built instead of the parking if a less dense parking area was permitted from commencement. Also, to build a parking structure for future adaptability, additional construction or soft costs may be needed to plan for flexibility. These additional costs, which would be speculative or not be beneficial until decades into the future, may not be accepted by the project's investors or construction lender. Moreover, investors, construction or bridge lenders will be focused on their returns within the life of their investment or loan, not the future use of the structure or project after their returns.

The Evolution Of Building Materials

Most modern city centers are an impressive combination of concrete and steel rebar to create giant skyscrapers in densely populated areas. Smaller structures are mostly concrete block construction or wood frame constructed houses. Rapidly evolving technology, however, predicts self-healing concrete capable of fixing its own cracks,[12] recycled products that can be used as supplements for wood, bricks, concrete adhesives and asphalt,[13] and newer and lighter graphene or carbon fibers being integrated into building products.[14] Renewable energy can be obtained from photovoltaic paints in roofs or parking lots.[15] Li-Fi wireless through LED lighting will replace Wi-Fi;[16] the possibilities are endless. Thankfully, the State of Florida's building code recognizes the need for evolving building standards. The State's Building Code was first adopted in the 1970s, was mandated for use by local governments in 1998 and superseded all local building codes by 2002. Today, the Florida Building Code is updated every 3 years and may be amended annually to keep up with modern building industry needs.[17] Local governments are tasked with enforcing the code.

While the State of Florida recognizes the need for its building codes to evolve, legal and financial structures need to evolve simultaneously. The approval by the State of Florida of a building material or process is just the first step. If the product

continued, page 45

or process does not have a history of successful use, a sound company capable of backing the product should it fail, or persuasive profitability in its use, a developer, lender or investor will reject the use of the product or process in a prospective project. The benefit of the product must outweigh the risk or costs in its use.

As seen from the above examples, new technology is a vital topic presenting a challenge to the realities of Florida's real estate industry. The key to resolving these challenges is education. Lawyers, bankers, investors, lenders and businesses that understand evolving technologies will be in the best position to understand what is possible, how to integrate possibilities into real construction projects or businesses and how to think of adapting to these technologies as a profitable enterprise. While technology companies can do a better job of presenting evolving technologies to traditional business, traditional business can do a better job of being receptive to new technologies. For Florida real estate developments, businesses and communities, we will all benefit.


L. ARCHAMBAULT

Louis P. Archambault, *Esq. is a partner in the Miami office of Arnstein & Lehr LLP, where he is a member of the firm's Real Estate and Corporate Transactions and Counseling Practice Groups and as a Board Certified Real Estate Expert, practices in the areas of real estate, business and corporate law. Mr. Archambault represents clients in a range of legal matters, including buyers, sellers and lenders in all aspects of residential, commercial and industrial real estate transactions; real estate and condominium development, preparation and examination of title insurance; commercial leasing; land use and zoning issues; business consulting, corporate structuring, short sales and loan workouts.*

Endnotes

1 Petch, Michael, *3D Printing Industry, MIT professors tell us about the 3D printing and design skills needed for the future*, 3D Printing Industry (April 17, 2017) https://3dprintingindustry.com/news/mit-professors-tell-us-3d-printing-design-skills-needed-future-111052/.

2 Moon, Mariella, *A San Francisco startup 3D printed a whole house in 24 hours*, Engadget (March 7, 2017) https://www.engadget.com/2017/03/07/apis-cor-3d-printed-house/.

3 Williams, Adam, *World's first 3D-printed office building completed in Dubai*, New Atlas, (May 25, 2016) http://newatlas.com/3d-printed-office-dubai-completed/43522/.

4 Tepper, Fitz, *Addidas' latest 3D-printed shoe puts mass production within sight*, Tech Crunch (April 7, 2017) https://techcrunch.com/2017/04/07/adidas-latest-3d-printed-shoe-puts-mass-production-within-sight/.

5 Schofiled, Jack and Colville, Waverly, *Belgian company takes 3D printing to chocolate*, AOL (April 17, 2017) https://www.aol.com/article/news/2017/04/17/belgian-company-takes-3d-printing-to-chocolate/22038511/.

6 Kharpal, Arjun, *Ford is 3-D printing car parts which could mean more customized vehicles*, CNBC, (March 6, 2017) http://www.cnbc.com/2017/03/06/ford-3d-printing-car-parts-which-could-mean-more-customized-vehicles.html.

7 Millsaps, Bridget Butler, *Real Clothes: Japanese Designers Create 3D Printed AMIMONO Woven Fashion*, 3DPrint.com (September 19, 2016) https://3dprint.com/149870/3d-printed-amimono-woven-fashion/.

8 Gordon, Bethany, *The Best 3D Printers of 2017*, Top Ten Reviews (April 17, 2017) http://www.toptenreviews.com/computers/3d-printers/best-3d-printers/.

9 Millsaps, Bridget Butler, *Is 3D Printing Hazardous for Your Health? Researches from University of Texas Weigh In*, 3DPrint.com (February 1, 2016) https://3dprint.com/117782/3d-printing-health-researchers/.

10 *Id.*

11 Muoio, Danielle, *19 Companies Racing to put Self-Driving Cars on the Road by 2021*, Business Insider Nordic (October 17, 2016) http://nordic.businessinsider.com/companies-making-driverless-cars-by-2020-2016-10/.

12 Stewart, Andrew, *The 'living concrete' that can heal itself*, CNN (March 7, 2016) http://www.cnn.com/2015/05/14/tech/bioconcrete-delft-jonkers/.

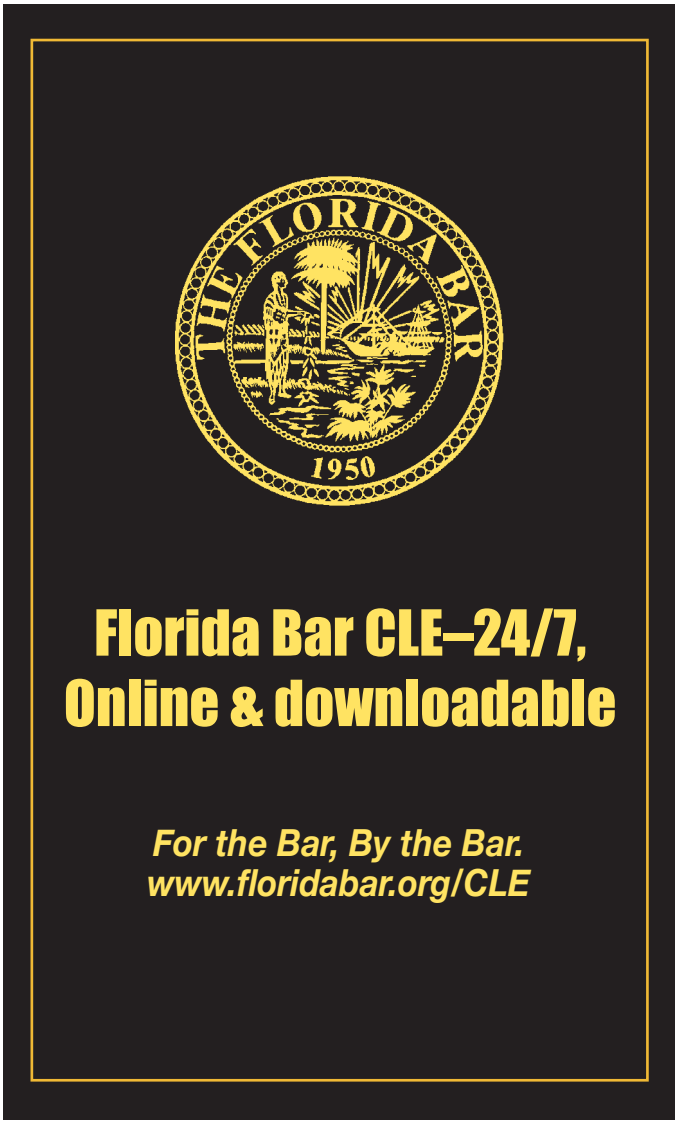
13 CityMetric Staff, *9 building materials made entirely from waste products*, CityMetric (April 15, 2015) http://www.citymetric.com/skylines/9-building-materials-made-entirely-waste-products-932.

14 *New building materials for the future of construction*, WorldBuild365 (November 22, 2016) https://www.worldbuild365.com/news/iet0guhii/building-architecture/new-building-materials-for-the-future-of-construction.

15 *New paint additive turns any surface into a solar panel*, Proud Green Home (July 8, 2015) https://www.proudgreenhome.com/news/new-paint-additive-turns-any-surface-into-a-solar-panel/.

16 Mercer, Christina, *What is Li-Fi? How does Li-Fi work? Wi-Fi vs Li-Fi; The ultimate definition of Li-Fi; Li-Fi news*, Tech World (July 19, 2016) http://www.techworld.com/big-data/what-is-li-fi-everything-you-need-know-3632764/.

17 Florida Building Code Energy Conservation 5th Edition, Preface (2014).



Take a Ride on the Reading Railroad to The Breakers – Palm Beach for the



36th Annual Attorney Trust Officer Liaison Conference: "Trustopoly" Edition





Golf Tournament: Thursday, August 24, 2017
Live Presentation: Friday & Saturday, August 25 - 26, 2017

$ - 14 CLE Credits
$ - 2 Ethics Credits
$ - Sign up at www.member.floridabar.org

Do not pass GO, Do not miss this year's ATO!

A Primer On Dementia For Legal Professionals

By Andrew K. Fein, Esq., Minerley Fein, P.A., Boca Raton, Florida

It is estimated that more than 500,000 Floridians suffer from some form of Alzheimer's disease or other ailment which causes dementia.[1] This includes approximately 12% of Florida's senior population.[2] Attorneys, judges, paralegals and other professionals working within the legal system are called upon to interact with clients and litigants in the context of their personal decision making, problem solving and other stressful events. Dementia can impact a person in subtle ways that may not be readily apparent to those interacting with the person. As a result, it is important that all legal professionals have a basic understanding of dementia in order to be cognizant of its possible presence or impact on a client, caregiver, event or transaction, and then to respond appropriately and professionally.

This article will explore, (a) some basic information about dementia and its characteristics; (b) how dementia potentially impacts certain common legal situations, including competency and testamentary capacity; and (c) the ethical obligations to be considered when dealing with a client or non-client that may be suffering from dementia. It is important to note that this article is not intended to be a medical or social science treatment of the dementia topic. Instead, it is meant to provide legal professionals with a basis of understanding so that the possible presence and impact of dementia may be recognized and appropriately considered.

What is Dementia?

Dementia is not a disease. It is a symptom that can be caused by many different diseases, conditions or traumas. Dementia describes a basket of specific impairments, each involving the loss of cognitive functioning. These impairments affect a person's ability to think, remember and reason to the point that they hinder the person's daily life and activities. The common tasks impacted are memory, language, visual perception, attention, problem-solving and judgment.[3] Complex physical tasks, such as driving, walking and swallowing, may also be impacted. These defects may be observed by changes in behavior. Persons with dementia may be unable to control their emotions, and can result in personality changes. Such persons may also have delusions, such as a strong belief that people are stealing from them. While memory loss is the most commonly impacted function, a diagnosis of dementia can be based upon the presence of any two or more of the foregoing impairments if such impairments are severe enough to prevent a person from performing normal, everyday tasks.[4] A person who suffers from only one specific defect, such as a decline in short-term memory or the inability to think of a particular word when speaking, does not have dementia but rather may be diagnosed with a mild cognitive impairment (MCI).[5]

Dementia is characterized as mild, moderate or severe, based upon the number and seriousness of the cognitive impairments. While dementia can be recognized by any medical professional, it is most commonly diagnosed and treated by a neurologist (which is a doctor specializing in disorders of the brain and central nervous system). There are a number of medications that are often prescribed for persons with dementia, including Aricept, Exelon, Razadyne and Namenda. These medications do not cure dementia, but are believed to slow the progression of memory-loss and other cognitive impairments.[6]

Causes and Types of Dementia

A healthy human brain has about 100 billion brain cells, or neurons. At its physiological core, dementia is caused when once-healthy neurons stop functioning properly and die.[7] The precise mechanisms by which these brain cells become abnormal and die are not fully understood and are the subject of ongoing scientific inquiry.

Many different and commonly known diseases cause dementia. Dementia is most frequently associated with Alzheimer's Disease, but they are not synonymous and there are many other causes. Dementia may result from a stroke (whether a single, severe event or multiple minor infarcts over time) and other vascular diseases that impair blood-flow to the brain. Damage to brain cells, and thereafter dementia, may also be caused by: oxygen deprivation during cardiac arrest; head trauma from a fall or accident; or Chronic Traumatic Encephalopathy (CTE) due to repeated blows to the head (as often occurs with professional athletes). Dementia may also be caused by alcohol abuse, drug abuse, Huntington's Disease, ALS (Lou Gehrig's Disease), multiple sclerosis, meningitis, encephalitis or depression.[8] Alzheimer's Disease, for which there is no cure, is the sixth-leading cause of death in the United States.[9] While dementia is often considered to be degenerative, it should be noted that it is the underlying medical condition which worsens, causing the symptoms to follow.

The Stigma of Dementia

As with many diseases of the brain, dealing with dementia is further complicated by the accompanying stigma. Seniors

continued, page 48

with dementia are often unwilling to acknowledge it and will make efforts to hide it from professionals of all types, including their own primary care physicians. While a client will readily admit to a history of heart disease, cancer or diabetes, he or she will often not voluntarily disclose a diagnosis of dementia or memory problems. In addition, such persons will often employ a number of coping mechanisms to hide the impact of their memory loss, such as relying upon verbal and non-verbal cues, changing the subject of conversation, answering questions vaguely, or allowing a caregiver to answer questions for them.

While some persons with dementia are in denial about their condition, others are truly not aware of their impairment. Persons with dementia may not recognize that their daily functioning is being impacted by a loss of memory or judgment. The medical term for this is *anosognosia*.[10] A person with dementia will "forget that they forget." As a result, they may become frustrated or even attribute some difficulty or problem to another person or cause. For example, a person with dementia may believe that someone is stealing jewelry from him or her, when he or she is simply misplacing items on a regular basis. Such persons may even engage an attorney to seek redress for the erroneously-perceived problem. This lack of awareness and inaccurate perceptions of the environment may cause such persons to make very poor decisions.

There are a number of reliable and simple tests which are administered quickly and easily in a medical setting to indicate the possible presence of dementia. One of the leading tests is the Folstein Mini Mental Status Exam, often referred to as the "Folstein" or the "MMSE." This test takes about ten minutes and requires only a paper and pencil. Most of it is given verbally by asking the subject a series of questions, such as "What is today's date?" and "What city are we in now?" In addition, the subject may be asked to repeat a list of three words, to spell a word backwards, and to draw a clock-face displaying three o'clock. The responses are easily scored to give an indication of the presence of dementia and the severity of same.[11] A normally functioning individual will generally always earn a perfect score (30 out of 30). Anything less than a perfect score may be indicative of some level of impairment. Clients, caregivers and even attorneys may contend that a score of 25 out of 30 is good and indicative of proper cognitive functioning, when, in reality, it is evidence of a problem.

Persons with mild-to-moderate dementia may continue to function without assistance and hide their impairment. They will live independently, drive, and manage their own finances and healthcare. The failings in these areas may be subtle and not readily apparent to legal or other professionals who may interact with them infrequently and for short periods of time.

The Caregivers

The prevalence of dementia has also created another population of individuals with their own specific needs, burdens and legal issues: the caregivers. A person with moderate-to-severe dementia cannot safely be left alone, and therefore requires constant care and attention to ensure his or her well-being and that his or her basic needs are met. The U.S. healthcare system is woefully unable to provide this care economically to persons with dementia, and, as a result, the burden frequently falls upon spouses, children and other friends and family members to fill the void.

The Alzheimer's Association reported that in 2016, some 15.9 million family and friends provided 18.1 billion hours of unpaid care to persons with dementia.[12] It is estimated that approximately 640,000 Floridians are providing $8.4 billion of unpaid care annually.[13] More than one-third of caregivers experience a loss of personal income due to reductions in their own employment caused by their caregiving responsibilities.[14] These caregivers also experience their own declines in physical and mental health, as well as financial stress.[15]

With the foregoing basic understanding of dementia, let's now examine its impact upon several common legal situations.

Dementia and Legal Incapacity

For many years, Florida law defined an "Incompetent" as "a person who, because of minority, senility, lunacy, insanity, imbecility, idiocy, drunkenness, excessive use of drugs or other physical or mental incapacity, is incapable of either managing his property or caring for himself, or both."[16] In 1988, the Florida Legislature created the Florida Guardianship Study Commission, and under the leadership of Supreme Court Justice Rosemary Barkett, an overhaul of the Florida Guardianship Law was recommended. The term "Incompetent" was eliminated and replaced with the term "Incapacitated Person" along with a more modern definition.

The Florida Guardianship Law now defines an "Incapacitated Person" as "a person who has been judicially determined to lack the capacity to manage at least some of the property or to meet at least some of the essential health and safety requirements of the person."[17] The phrase "manage property" is defined as the ability "to take those actions necessary to obtain, administer, and dispose of real and personal property, intangible property, business property, benefits, and income."[18] The phrase "meet essential requirements for health or safety" is defined as the ability "to take those actions necessary to provide the health care, food, shelter, clothing, personal hygiene, or other care without which serious and imminent physical injury or illness is more likely than not to occur."[19] Among its many reforms, the 1989 legislation introduced the concepts of limited incapacity and the limited removal and delegation of an incapacitated person's rights.

A person with mild or moderate dementia will likely meet these definitions as to some, but not necessarily all, of their regular activities of daily living. Even a person who suffers from a mild cognitive impairment, but falls short of a diagnosis of dementia, may lack capacity in one of these specific areas.

continued, page 49

The extent to which a person meets these definitions will vary widely from case to case. The subtleties of these differences may not be easily distinguishable, and it may be unreasonable to expect an examining committee member (who typically has a single, brief meeting with an allegedly incapacitated person) to accurately perceive and report these subtleties to the court.

Because most dementias are progressive and degenerative, a guardian or caregiver should be mindful that a partially incapacitated person is likely to become more incapacitated over time. While Chapter 744 contains procedures for an incapacitated person to seek restoration of his or her rights, it does not contain any internal mechanism for a re-evaluation and further removal of rights of a person already under an order of partial incapacity. Section 318 of the Uniform Guardianship Act allows for modification upon petition due to change of circumstances, and the Florida Guardianship Law should be amended to add a procedure for the removal of additional rights of a person already adjudged to be partially incapacitated.[20]

Dementia and Testamentary Capacity

Section 732.501 of the Probate Code provides that any person of "sound mind" may make a will. The requirement of a "sound mind" is generally understood by practitioners as requiring that a testatrix understand, in a general way, the nature and extent of her assets, the natural objects of her bounty, and the effect of the will being executed. This shorthand definition has been distilled from dozens of Florida Supreme Court decisions over more than a century. In view of our modern and evolving understanding of dementia and brain science, a re-examination of some of these judicial pronouncements is warranted.

The first significant opinion was *Newman v. Smith*.[21] Quoting English common law, the Florida Supreme Court laid the foundation for all future holdings:

> [I]n order to constitute a sound disposing mind, a testator must not only be able to understand that he is by his will giving the whole of his property to one object of his regard, but that he must also have capacity to comprehend the extent of his property, and the nature of the claims of others whom, by his will, he is excluding from all participation in that property; and that the protection of the law is in no cases more needed than it is in those where the mind has been too much enfeebled to comprehend more objects than one, and most especially when that one object may be so forced upon the attention of the invalid as to shut out all others that might require consideration.[22]

The Court then quoted an 1862 decision of the N.Y. Court of Appeals:

> We have held that it is essential that the testator has sufficient capacity to comprehend perfectly the condition of his property, his relations to the persons who were, or should, or might have been the objects of his bounty, and the scope and bearing of the provisions of his will. He must, in the language of the cases, have sufficient active memory to collect in his mind, without prompting, the particulars or elements of the business to be transacted, and to hold them in his mind a sufficient length of time to perceive at least their obvious relations to each other, and be able to form some rational judgment in relation to them. A testator who has sufficient mental power to do these things is, within the meaning and intent of the statute of wills, a person of sound mind and memory, and is competent to dispose of his estate by will.[23]

Fourteen years later, the Court further explained the contours of testamentary capacity:

> Testamentary capacity is not conditioned on sound health. A sick person may make a will that will be valid, even in his last illness, or when in a dying condition. And, unless the surrounding circumstances are such as show that not only was the testator afflicted with an impairment of his senses, such as would ordinarily be occasioned by diseases such as fever, paralysis, epilepsy, apoplexy, consumption, Bright's disease, diabetes, cancer, brain diseases, etc., or by reason of great suffering or delirium, but is, by reason of the effect of disease on his mind, also unable to comprehend and understand the nature of the undertaking in which he is engaged when he attempts to make his will, it cannot be said as a matter of law that testamentary capacity is shown to be so lacking as to render a will made during one's affliction and last illness invalid for want of sufficient testamentary capacity.
>
> If the testamentary requisites are found, the will may be valid, although executed by one of great age, whose mind is enfeebled, whose body is debilitated, whose memory is failing or whose judgment is vacillating, especially where the will appears to have been fairly made, is not an unnatural one, and apparently was made under conditions not inconsistent with the inference that it emanated from a free mine.[24]

So while a diagnosis of dementia may not automatically disqualify an individual from making a will, it requires a careful analysis of the mental state of such person: does the testator have the ability to simultaneously comprehend the entirety of his or her assets, the identities of the persons who could receive them, and all significant aspects of the estate plan being implemented? Is the testator able to consider these elements without prompting and hold them in his or her consciousness for a sufficient length of time to permit the exercise of reason and judgment reflective of his or her donative intent?

continued, page 50

A corollary to the requirement of testamentary capacity is the concept of the "lucid interval." A person who lacks testamentary capacity may nevertheless execute a will during a brief period during which he or she regains capacity.[25] In actuality, the concept of the lucid interval is really just another way of expressing the requirement that a testator need only have testamentary capacity at the moment of execution of the will.

An additional underpinning of testamentary capacity is the requirement that a will not be based upon an "insane delusion." The concept of the insane delusion was first recognized by the Florida Supreme Court in 1933:

> Monomania, sometimes designated paranoia, has reference to a craze or mania for a single object or class of objects. The subject of it may be perfectly sane as to all other objects. As with an insane delusion, monomania presupposes a species of mental disease. A mere belief in a state of facts, however imperfect or illogical, will not support an insane delusion. It must be the offspring of an unsound or deranged condition of the mind. Any belief which arises from reasoning from a known premise, however imperfect the process may be, or how illogical the conclusion reached, is not an insane delusion . . . .
>
> An insane delusion has been defined as a spontaneous conception and acceptance as a fact, of that which has no real existence except in imagination. The conception must be persistently adhered to against all evidence and reason. It has also been defined as a conception originating spontaneously in the mind without evidence of any kind to support it, which can be accounted for on no reasonable hypothesis, having no foundation in reality, and springing from a diseased or morbid condition of the mind.[26]

As recognized by the Florida Fifth District Court of Appeal in 1983, Florida's appellate jurisprudence reveals only one reported case *ever* in which a will was denied probate due to an insane delusion.[27] This author's research confirms that statistic to still be accurate today.

But what if a client with dementia misperceives reality and then makes a testamentary disposition based on the misperceived realities? For example, what if devises are made to a testator's two oldest grandchildren, while two younger grandchildren are omitted solely because the testator forgot them? What if a caregiver child removes cash from their parent's home for safekeeping, out of fear that the parent, who suffers from dementia, will misplace it, only to have the parent conclude that the child stole from them and should be disinherited? While dementia is not paranoia, it is a diseased condition of the mind, and should be treated as such by the law.

Ethical Considerations

When dealing with a client who is, or may be, suffering from dementia, an attorney's normal obligations of confidentiality, competency and advocacy may be altered. Rule 4-1.14 of the Rules of Professional Responsibility is entitled, "Client Under a Disability" and states:

> (a) Maintenance of Normal Relationship. When a client's ability to make adequately considered decisions in connection with the representation is impaired, whether because of minority, mental disability, or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.
>
> (b) Appointment of Guardian. A lawyer may seek the appointment of a guardian or take other protective action with respect to a client only when the lawyer reasonably believes that the client cannot adequately act in the client's own interest.

A client suffering from dementia may present a delicate ethical dilemma for an attorney. Consider the case of a client with dementia who continues to drive despite the increasing frequency of getting lost, fender benders and citations. Such a client will frequently want to maintain the independence and self-esteem associated with driving, and may seek the assistance of his or her attorney in protecting that right. An attorney normally pursues the goals and objectives of the representation as determined by the client. What is the attorney to do if he or she objectively determines that the client is not acting in his or her own best interests by continuing to drive? If the attorney takes "protective action" designed to curtail the client's driving, is the attorney acting ethically, especially when such action is inconsistent with the client's stated objectives?

The comment to Rule 4-1.14 acknowledges that the disclosure of the client's disability may be adverse to the client, and directs attorneys to seek guidance from appropriate diagnosticians. The State of Florida provides at least two resources which may be of assistance in such circumstances: The Florida Department of Highway Safety and Motor Vehicles has a program called the Florida GrandDriver Program.[28] It is a collection of resources designed to evaluate and re-train seniors in order to allow them to continue driving safely. When the time comes for a senior to retire from driving, the GrandDriver Program offers counseling and assistance with alternate forms of transportation. Alternatively, the Florida Department of Elder Affairs oversees the Alzheimer's Disease Initiative, which, operates 15 Memory Disorder Clinics throughout the state.[29] These clinics offer many resources, including evaluations of a person's level of impairment, which can provide the diagnostic input contemplated by the comments to Rule 4-1.14.

Conclusion

A basic understanding of dementia and its legal ramifications is a necessary prerequisite to an informed bar and judiciary

continued, page 51

who will be called upon to protect and adjudicate the rights of persons suffering from dementia.



A. FEIN

***Andrew K. Fein**, Esq. practices estate planning, estate and trust administration, and probate and guardianship litigation with Minerley Fein, P.A., in Boca Raton, Florida. He is Board Certified by the Florida Bar in the specialty of Wills, Trusts & Estates. He is a graduate of the University of North Carolina at Chapel Hill, where he earned his J.D. cum laude. He earned his undergraduate degree from Emory University, where he majored in psychology.*

Endnotes

1 http://elderaffairs.state.fl.us/doea/alz.php (Florida Department of Elder Affairs Alzheimer's Initiative website; visited December 3, 2016).

2 Id.

3 2016 Alzheimer's Disease Facts and Figures, Page 5. This annual report is published by the Alzheimer's Association, and can be viewed at http://www.alz.org/documents_custom/2016-facts-and-figures.pdf.

4 https://www.nia.nih.gov/alzheimers/publication/dementias/basics-dementia (website visited December 3, 2016).

5 Florida Alzheimer's Initiative Education Manual, Page 33. This resource may be found at http://elderaffairs.state.fl.us/doea/docs/adi_manual_2016.pdf.

6 http://www.alz.org/alzheimers_disease_standard_prescriptions.asp (website visited December 3, 2016).

7 Florida Alzheimer's Initiative Education Manual, Page 48.

8 https://www.nia.nih.gov/alzheimers/publication/dementias/types-dementia; https://www.nia.nih.gov/alzheimers/publication/dementias/other-conditions-cause-dementia (websites visited December 3, 2016).

9 2016 Alzheimer's Disease Facts and Figures, Page 26.

10 http://www.aplaceformom.com/blog/3-4-14-anosognosia-and-alzheimers/ (website visited December 3, 2016).

11 http://www.alz.org/alzheimers_disease_steps_to_diagnosis.asp.

12 2016 Alzheimer's Disease Facts and Figures, Page 32.

13 Florida Alzheimer's Initiative Education Manual, Page 33.

14 2016 Alzheimer's Disease Facts and Figures, Page 63.

15 2016 Alzheimer's Disease Facts and Figures, Page 36.

16 § 744.03(5), Fla. Stat. (1974).

17 § 744.102(12), Fla. Stat. (2016).

18 § 744.102(12)(a), Fla. Stat. (2016).

19 § 744.102(12)(b), Fla. Stat. (2016).

20 See § 744.464, Fla. Stat. (2016)(restoration only); Section 318 of Uniform Guardianship Act.

21 *Newman v. Smith,* 77 Fla. 633, 82 So. 236 (1918).

22 *Newman v. Smith*, 77 Fla. 633, 82 So. 236 (*quoting Harwood v. Baker*, 3 Moore, 282, 13 Eng. Rep. (Full Reprint) 117).

23 *Newman v. Smith* at 672, 248 (*quoting Delafield v. Parish*, 25 N. Y. 9 (N.Y Ct. App. 1862). Your author highly recommends that every estate planning practitioner or probate litigator read *Newman v. Smith* in its entirety. The case illustrates that the issues that estate planners and probate litigators deal with have not changed much over the last century.

24 *Smith v. Clements*, 114 Fla. 614, 616, 154 So. 520, 520-21 (1934).

25 *American Red Cross v. Estate of Haynsworth*, 708 So. 2d 602, 606 (Fla. 3d DCA 1998); *In re Supplee's Estate*, 247 So. 2d 488, 490 (Fla. 2d DCA 1971).

26 *Hooper v. Stokes*, 145 So. 855, 856 (Fla. 1933).

27 *In re Estate of Edwards*, 433 So. 2d 1349 (Fla. 5th DCA 1983).

28 http://flhsmv.gov/FloridaGrandDriver/ (website visited December 4, 2016).

29 http://elderaffairs.state.fl.us/doea/alz.php#memory.

OLD REPUBLIC TITLE

COMMERCIAL REAL ESTATE EXPERIENCE

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



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

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

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

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

800.342.5957 oldrepublictitle.com/fl

12/2016 | © Old Republic Title | Old Republic Title's underwriters are Old Republic National Title Insurance Company and American Guaranty Title Insurance Company

Probate And Trust Case Summaries

**Prepared by Stephanie Villavicencio, Esq.,
Zamora, Hillman & Villavicencio, Miami, Florida**

Personal representative must exhaust his remedies under Chapters 717 and 120 before seeking determination from a Circuit Court arising from a dispute on unclaimed property.

Yergin v. Georgopolos, 2017 WL 1277995 (Fla. 3d DCA 2017).

In 1982, Richard Yergin took out a life insurance policy naming Mary Georgopolos as his beneficiary and listing her as his mother. The policy was unknown to Yergin's family and Georgopolos. Yergin died, an estate was opened and closed without its mention, and it was not until nearly 15 years later that the policy was discovered. By such time, the insurance company had turned over the annuity to the Florida Department of Financial Services ("FDFS"). The decedent's half-brother, Glen, reopened the estate and was appointed personal representative to petition for a declaration that the insurance policy annuity was a failed transfer as Georgopolos was not the decedent's mother and as a result, was an estate asset. Georgopolos was a former landlord of the decedent and made a claim for the annuity with the FDFS. He also moved to dismiss the personal representative's petition, which was granted by the trial court. On appeal, the court was charged with determining whether an estate seeking to obtain money from the FDFS must first file a claim with the department and exhaust administrative remedies before filing suit.

The personal representative claimed the circuit court must decide the issue first because it has exclusive authority to determine whether a property is part of the estate. The Third District Court of Appeal affirmed the trial court after examining the legislative intent of Fla. Stat. §717.1241(1). That statute states that any estate or beneficiary of an estate seeking to obtain property from the FDFS must first file a claim with the department. Only after exhausting the administrative procedures can one seek relief in the circuit court.

A court order from a medical malpractice claim which determines the validity of decedent's marriage is not subject to the doctrine of res judicata if the elements of identity of the suit, cause of action, parties and quality of the persons are not present.

Bryan v. Fernald, 211 So. 3d 333 (Fla. 2d DCA 2017).

Daughter of the decedent Bryan, appealed an order on her petition to determine beneficiaries. In 2007, an estate was opened by Edward John naming himself as surviving spouse and only known beneficiary. The probate court entered an order of discharge and the case was reopened by John in 2009 to pursue a medical malpractice claim. The petition to reopen was served on the decedent's four children. An Administrator Ad Litem, Gary M. Fernald, was also appointed for the estate. Bryan filed a petition to determine intestate beneficiaries and alleged that she and the decedent's other children were not notified of the administration of the estate in 2007, and were entitled to a 50% share of the estate if their mother was married, or 100% if the mother was not married at the time of death. John and Fernald filed a response alleging that the defendant in the medical malpractice case was supporting Bryan's petition. They argued that John was lawfully married to decedent at time of death and that such issue was already determined in a 2013 order in the medical malpractice claim. Said order was to address the defendant's motion for partial summary judgment on damages.

A hearing on Bryan's petition was held, and the parties all agreed the children were beneficiaries of the estate, but they disputed the issue of marriage between the decedent and John. John argued that the order entered by the court in the medical malpractice case that referred to John's marriage to the decedent should apply. The trial court stated they would not reverse the judge in the medical malpractice case and that res judicata applies.

On appeal, Bryan argued that the doctrine of res judicata did not apply because the requirements were not satisfied. The Second District Court of Appeal reversed the trial court, and held that the first two elements of res judicata (identity of the thing sued for; and identity of the cause of action) were not satisfied. In the medical malpractice claim, the estate was suing the defendant for damages and the cause of action was negligence. In the probate case, Bryan was asking for a determination of the intestate beneficiaries and proper administration of the estate. The order was not final as it was only to address the motion for partial summary judgment. Bryan was also not in privity with the estate when it was asserting the validity of the marriage in the medical malpractice case. The court held that res judicata did not apply and that the trial court failed to engage in an independent analysis on the matter of the decedent's marriage.

continued, page 53

Decedent's estate is not vicariously liable for damages in a vehicle collision where the decedent never gave permission of its use after death and nominated personal representative was unaware of its use prior to appointment and issuance of letters of administration.

Depriest v. Greeson, 2017 WL 672155 (Fla. 1st DCA 2017).

Decedent lived with his daughter and kept his car and keys at his daughter's house. Daughter occasionally drove his car with his permission and no evidence indicated that he had given her permission to continue after his death. The decedent's will did not specifically bequeath the car and only listed his two children as remainder beneficiaries. About one month after his death, the decedent's daughter was involved in a vehicle collision while driving the decedent's car. The victims initially sued the daughter as the owner, but later amended their complaint to add the decedent's estate as a party defendant. The victims alleged the estate was vicariously liable because the estate had legal title to the car, and that the personal representative had prior knowledge of the daughter's use and impliedly consented to her use of the car by failing to take affirmative action against it.

The nominated personal representative of the estate was the decedent's stepson, who lived out-of-state. Although it was established that he took the car title to an attorney for the probate of the case, he never took possession of the car or the keys. There was no evidence as to the stepson having knowledge of the daughter using the car and because daughter had her own car, there was an expectation that she would request use of the decedent's car. The daughter advised the stepson of the accident and a probate case was filed with letters of administration being issued 20 days later.

The First District Court of Appeal affirmed the trial court's finding that the estate had no legal ownership interest in the decedent's car. The court reasoned that although the car was an asset of the estate, it did not belong to any one individual at the time of the accident. It was not bequeathed to any one individual and no one had a right to the car as it was subject to probate administration. The issue of ownership could not be settled until there was a resolution of claims, debts and other obligations of the estate. Despite the daughter having actual control of the car, she did not prove that the decedent ever gave her permission to drive it after his death. The stepson would have a right to control the vehicle as personal representative however, he was not appointed at the time and there was no imposition on the nominated personal representative to act prior to appointment. The court also stated that the obligation of imposing duties before appointment could subject nominated personal representatives to liability which contradicts legislative intent.

SAVE the DATE!



37th Annual
RPPTL Legislative & Case Law Update
Seminar

JULY 28, 2017 • 8 a.m. – 4:45 p.m.

(Continental breakfast & lunch included)

Breakers Hotel • Palm Beach, Florida

For exhibitor opportunities, please contact Mary Ann Obos at mobos@flabar.org.

Real Property Case Summaries

Prepared by Scott M. Work, Esq.,
Clark, Partington, Hart, Larry, Bond & Stackhouse, P.A., Destin, Florida

A temporary injunction is an equitable remedy, and the court has wide discretion in granting, denying, modifying or dissolving injunctions. Requiring a party to prove changed circumstances when a party can otherwise prove clear legal error or misapprehension of the facts is not consistent with the principles underlying injunctions. A trial court abuses its discretion in not dissolving or modifying an injunction when a party can prove clear legal error or misapprehension of the facts, regardless of whether or not the party can prove changed circumstances.

Planned Parenthood of Greater Orlando, Inc. v. MMB Properties, 211 So. 3d 918 (Fla. 2017).

The Supreme Court of Florida considered a conflict between the Fifth District Court of Appeal and the Third and Fourth District Courts of Appeal as to "whether a party moving to modify or dissolve a temporary injunction must establish 'changed circumstances.'" Petitioner, Planned Parenthood of Greater Orlando, Inc. ("Planned Parenthood"), purchased property in the Oak Commons medical complex in Kissimmee, Florida to perform primary preventative care for women, which included surgical abortions, and sonographic and diagnostic imaging services. All the property within Oak Commons is subject to a Declaration of Restrictions ("Declaration") which prohibit (1) an outpatient surgical center, (2) emergency medical center and (3) diagnostic imaging center, unless same were ancillary and incidental to a "physician's practice of medicine." Respondent, MMB Properties, which also owned property within Oak Commons, sought temporary and permanent injunctions against Planned Parenthood to enjoin abortions, outpatient surgery and emergency medical services including emergency contraception.

The trial court granted MMB Properties' temporary injunction finding that MMB Properties had a substantial likelihood of proving that surgical abortions would violate the Declaration and were not ancillary or incidental to a physician's practice of medicine. Although not pled, the trial court also enjoined Planned Parenthood from performing sonographic or other diagnostic imaging. Planned Parenthood filed a motion to dissolve or modify the injunction, which was summarily denied by the trial court.

Planned Parenthood appealed the temporary injunction and denial of its motion to dissolve or modify to the Fifth District Court of Appeal, and sought a stay of the temporary injunction. The Fifth District stay panel issued a stay finding that an injunction against the sonographic imaging was not pled, and that the trial court erred in finding that Planned Parenthood was not a physician's practice. The Fifth District merits panel later reversed the stay panel's ruling, and held that Planned Parenthood "needed to establish changed circumstances which it did not do," and acknowledged the conflict with the other District Courts of Appeal. When deciding the merits of the injunction, the Fifth District merits panel concluded that the Declaration prohibits outpatient surgical centers, and the trial court's factual findings, including that Planned Parenthood was not a physician's practice, were supported by competent and substantial evidence.

Planned Parenthood sought discretionary jurisdiction with the Supreme Court based on the conflict with the changed circumstances requirement, and appealed the Fifth District's denial of its motion to stay issuance of its mandate. The Supreme Court cited Florida Rule of Civil Procedure 1.610(d) and stated that it does not specify a party must prove changed circumstances or changed conditions. The Supreme Court cited favorably the Fourth District Court of Appeal's decision in *Precision Tune Auto Care, Inc. v. Radcliff*, 731 So. 2d 744, 745 (Fla. 4th DCA 1999) for the proposition that the court's decision on an injunction is discretionary, and arguments and evidence not presented to the court at the injunction hearing may be raised for the first time on a motion to dissolve or modify. The Supreme Court reiterated that temporary injunctions are equitable in nature, stated that decisions on injunctions should not be "shackled by rigid rules of procedure," and concluded that the requirement to prove changed circumstances was incompatible with equity principles when a party proves clear legal error or misapprehension of the facts by the trial court. The Supreme Court rejected the bright line changed circumstances rule, and held that it was an abuse of discretion to deny a motion to dissolve or modify when changed circumstances, clear legal error or misapprehension of the facts are proven by the moving party.

On the merits, the Supreme Court found that there was a lack of competent, substantial evidence supporting the trial court's factual findings and conclusions that MMB Properties was likely to succeed on the merits, and that the Fifth District erred in affirming the trial court's ruling on that issue. The Supreme Court quashed the Fifth District's decision affirming the trial

continued, page 55

court's temporary injunction, and its ruling that Planned Parenthood must prove changed circumstances.

The filing of a lis pendens by a first mortgagee in a foreclosure action does not bar the foreclosure of an association lien that is inferior to the mortgagee's mortgage but is imposed under the association's declaration which was recorded before the mortgagee's lis pendens.

Jallali v. Knightsbridge Vill. Homeowners Ass'n, Inc., 211 So. 3d 216 (Fla. 4th DCA 2017).

Appellent, Jallali, appealed a non-final order denying her motion to vacate a foreclosure judgment entered by her homeowners' association. The Fourth District affirmed all three issues raised by Jallili, and after the association's motion for rehearing, the Fourth District withdrew its original opinion and substituted this opinion to distinguish its prior decision in *U.S. Bank Nat. Ass'n v. Quadomain Condominum Ass'n, Inc.*, 103 So. 3d 977 (Fla. 4th DCA 2012).

Jallili's mortgage holder filed for foreclosure and recorded a lis pendens in 2007 and named the association as a defendant. In 2011, the association recorded a lien against the property, and in 2012 foreclosed the lien and obtained a default foreclosure judgment. Afterward, the mortgage holder obtained a foreclosure judgment. Jallili filed a motion under Florida Rule of Civil Procedure 1.540(b)(4) to vacate the association's foreclosure judgment. The trial court denied the motion and Jallili appealed.

On appeal, Jallili argued that the association's foreclosure judgment was void under the *Quadomain* decision because the trial court lacked jurisdiction to enter it. Jallili argued that the court conducting the mortgagee's foreclosure action had exclusive jurisdiction to foreclose the property upon the filing of the mortgagee's lis pendens. The question presented was whether the mortgage holder's lis pendens bars the association's foreclosure action filed after the lis pendens was filed.

The Fourth District factually distinguished *Quadomain* because the association in *Quadomain* was foreclosing the first mortgagee, not the owner. Second, the *Quadomain* court did not consider the effect of the declaration. The Fourth District found that the declaration is a covenant running with the land and is an interest in property for purposes of Fla. Stat. § 48.23, was recorded prior to the mortgage itself, and the lis pendens and that the declaration stated that association liens relate back to the date that the declaration was recorded. Thus, an association lien is not an interest that is unrecorded at the time of the mortgagee's lis pendens within the meaning of Fla. Stat. § 48.23. Notwithstanding that association liens relate back to the declaration, they may still be inferior to first mortgages because of the exception found in Fla. Stat. § 720.3085, which states that association liens are effective as of the date of recording as to first mortgages of record. However, this exception is used to determine priority, not the application of Fla. Stat. § 48.23.

The Fourth District concluded that *Quadomain* did not control the outcome of the case, and Fla. Stat. § 48.23 does not bar enforcement of the association lien against anyone other than the mortgagee, even though the association lien is inferior to the mortgage.

Short-term rental of residential unit does not violate a restrictive covenant that requires the property to only be used for residential uses and prohibiting business uses.

Santa Monica Beach Prop. Owners Ass'n, Inc. v. Acord, 1D16-4782, 2017 WL 1534769 (Fla. 1st DCA Apr. 28, 2017).

The Appellee, the Acords, were owners in the Santa Monica Beach subdivision in Bay County and used their property for short-term vacation rentals. The subdivision declaration had a restriction permitting property to be used for only residential purposes and prohibited business uses. The Appellant homeowners' association filed suit for declaratory relief alleging that the Acords rented their property on VRBO for short-term vacation rentals, and were thus using their property for business purposes in violation of the declaration. The Acords filed a motion to dismiss, which the trial court granted, reasoning that the character of use of the property by the renters was the critical inquiry, not the duration of the tenancy. The trial court further explained that actual residential use is not transformed into business use simply because the owners are required to obtain a transient lodging license or earned an income from the rentals. The motion to dismiss was granted and this appeal followed.

On appeal, the First District framed the issue (a matter of first impression in Florida) as whether short-term vacation rentals violate restrictive covenants allowing only residential uses and prohibiting business uses. In its reasoning, the First District cited other state courts which found that in determining whether the vacation rentals are residential uses, the critical issue is whether the renters are using the property for ordinary living purposes; that earning an income on the rentals did not transform residential use to business use, neither did advertising the rental or paying appropriate taxes due on the rental. The decisions further explain that interpreting an otherwise residential use to be in violation of a restriction against business uses just because the owner earns money for the rental is both unreasonable and strained.

The court distinguished other Florida cases in which a bed and breakfast and adult living facility were being operated from homes subject to a business use prohibition. In both cases, the distinguishing features were the many indicia of business use. The bed and breakfast had an on-site manager, separate

continued, page 56

entrances for each room and advertised itself as a bed and breakfast. The adult living facility provided transportation, entertainment and other amenities usually found in a retirement home.

The association acknowledged that it could not allege that the Acords' property was being rented for any non-residential uses. The association may have argued that the declaration was susceptible to an interpretation that precludes short-term rentals, but the court stated to input such a restriction would violate the principle that restraints on the free use of land are not favored in the courts and will be strictly construed in favor of the free use of land. The court further stated that the need for explicit language in restrictive covenants is particularly important where the use is common and predictable.

Selective enforcement defense requires proof that the association enforces restrictions or rules in an unequal and arbitrary manner; and approval authority granted to the board of directors in the declaration or rules cannot be exercised by a single board officer unless given authority by the board.

Laguna Tropical v. Barnave, 208 So. 3d 1262 (Fla. 3d DCA 2017).

Appellant, Laguna Tropical, a Condominium Association, Inc. sought injunctive and other relief alleging that Appellee, Barnave, installed certain flooring in her unit in breach of the condominium declaration. The declaration required association approval for the installation of any flooring in the units other than the flooring originally installed by the developer. The stated reason for the restriction was to ensure that adequate soundproofing materials were installed underneath the flooring. In 2010, Barnave removed the carpet installed by the developer and installed laminate flooring without association approval. When the downstairs neighbor complained about noise, the association filed suit.

Barnave asserted several defenses at the trial court level, including selective enforcement and that she had approval from a prior association president. The trial court agreed with the selective enforcement defense and entered judgment in favor of Barnave. The association appealed.

Barnave's selective enforcement argument was that the association only enforced the flooring restriction against 11 of the condominium's 94 units. The Third District Court of Appeal pointed out that there were only 11 units in the two-story condominium to which the restriction could apply. Seventy-two units were two-story units, 11 units were one-story downstairs units, and 11 units were one-story upstairs units. The 11 one-story upstairs units sat above the 11 one-story downstairs units. The Fourth District noted that the record showed a number of complaints by the downstairs unit owners that culminated in enforcement of the flooring restriction by the association. The Fourth District further noted that the record contained no evidence that any two-story unit owners lodged any noise complaints, or that the association declined to enforce any noise complaints by downstairs owners. The court, citing *White Egret Condo., Inc. v. Franklin*, 379 So. 2d 346, 352 (Fla. 1979), found that the enforcement action did not constitute unequal and arbitrary (selective) enforcement of the flooring restriction.

Barnave also argued that the association president gave her consent to install the laminate flooring by email. Citing *Curci Vill. Condo. Ass'n, Inc. v. Maria*, 14 So. 3d 1175 (Fla. 4th DCA 2009), the Fourth District disagreed with this argument because the declaration and rules clearly required review and approval by the association's board of directors, not merely one of the board's officers. The court noted that the record contained no evidence that the association authorized the president to approve installations of this kind, and Barnave admitted that she did not submit a request for approval. The Fourth District reversed the judgment in favor of Barnave.



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

FR/BAR CONTRACTS & RIDERS

FOR THE SALE AND PURCHASE OF RESIDENTIAL PROPERTY

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

_____ Set(s) of 10 FR/BAR CONTRACTS (Revised April 2017) $50.00 per set

_____ Set(s) of 10 FR/BAR "AS IS" CONTRACTS (Revised April 2017) $50.00 per set

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

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

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

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

Firm:_____

Attn:_____ Attorney Bar #: _____

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

City/State/Zip:_____

PLEASE CIRCLE ONE: COMMERCIAL or RESIDENTIAL Address

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

E-mail address:_____

METHOD OF PAYMENT

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

OR

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

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

Billing Address:_____ _____
Print Name

AL MAY 2017

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

PROBATE & GUARDIANSHIP FORMS

The FLSSI forms are developed by members of the Real Property, Probate and Trust Law Section of The Florida Bar. **Forms carry the Supreme Court required 3" x 3" blank square for Court Clerk's use. Probate Judges prefer and some require the use of 2017 FLSSI forms.**

Firm: _____

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

Physical Address: _____

City/State/Zip: _____

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

2017 PROBATE FORMS

OPTION #1 **2017 FORMS AND INDEX - .PDF ON DISK $429.10**
OPTION #2 **2017 FORMS AND INDEX - 1 PHYSICAL COPY OF EACH $449.20**

2017 GUARDIANSHIP FORMS

OPTION #1 **2017 FORMS AND INDEX - .PDF ON DISK $340.10**
OPTION #2 **2017 FORMS AND INDEX - 1 PHYSICAL COPY OF EACH $360.20**

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

==========

METHOD OF PAYMENT

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

$ _____ _____ ____/____ _____
Charge **Card Number** **Exp. Date** **Signature of Cardholder**

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

==========

FLSSI USE ONLY

Check # _____ $ _____ Authorization date ____/____/2017 # __ __ ___ ___ _____

SHIP DATE _____/_____/2017 LB_____ $_____ # ___ ___ ___ ___ ___ ___ ___ ___

AL 2017

What's Happening Within The Section...

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

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

SCHEDULE

2017 EXECUTIVE COUNCIL MEETINGS

JULY 27 – JULY 30, 2017
Executive Council Meeting & Legislative Update
The Breakers • Palm Beach, Florida
Room Block Link: https://resweb.passkey.com/go/FLABR17
Room Rate: $225

OCTOBER 11 – 15, 2017
Out of State Meeting/ Executive Council/ Boston, MA
Fairmont Copley Plaza • Boston, MA
Room Block Link: https://resweb.passkey.com/go/floridabarrrptl
Room Rate: $375-$775

DECEMBER 7 – 10, 2017
Executive Council & Committee Meetings
The Ritz-Carlton • Naples, FL
Room Rate: $285
Room Block Link: Please note at this time the group block is completely full.
You may be placed on waitlist by calling the Reservation Office directly at 877-590-8187.

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

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

2017 CLE SCHEDULE:

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

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

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

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

Scan here for instant access to the Section website.

ACTIONLINE BULLETIN BOARD

PRACTICE CORNER:

Don't miss these short tips to assist in your practice. See page 22-23.

SAVE the DATE

For the 11th Annual Construction Law Institute March 8-10, 2018 at the JW Marriott Orlando Grande Lakes.

BE AWARE

of email phishing/malware schemes affecting **Florida Bar members** See Florida Bar website for additional information.

FinCEN

has expanded its GTOs. For more information Go to www.rpptl.com.

SAVE THE DATE!

The 36th Annual Attorney Trust Officer Conference, August 24-26, 2017 at the Breakers, Palm Beach.

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