

ActionLine

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

An Overview of REIT Qualification Requirements And Common Structures

Delayed Discovery Doctrine: How Long Does A Litigant Have To Bring An Undue Influence Claim?

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It is an honor and privilege to serve as your chair of the Real Property, Probate and Trust Law Section for the 2018-19 bar year.



Chair's Column

By Debra Lynn Boje
Section Chair, 2018-2019

Thank you to all who joined us for the Executive Council Meeting and Legislative and Case Law Update at The Breakers in July. I hope each of you will take the opportunity to attend at least one meeting this year to see firsthand how hard the Section committees work year-round. The commitment and dedication of our members is nothing short of remarkable. Our remaining in-state meetings are as follows:

- December 5-9, 2018, Four Seasons Hotel in Orlando,
- March 13-17, Omni Resorts, in Amelia Island Planation,
- May 29-June 2 (Annual Convention), Opal Sands Resorts in Clearwater Beach.

As usual, this year promises to be exciting legislatively. At the Breakers Executive Council meeting, votes were cast in support for proposed legislation in the upcoming session to allow for remote notarization and electronic wills with proper safeguards built-in to protect the citizens of Florida. This proposed legislation, as well as all of the Section's legislative positions, can be found on the Section's website at www.rpptl.org.

If you have ever attended one of the Section's continuing legal education programs, I am sure you will agree that the topics and speakers at the programs are second to none. Many of our speakers are nationally recognized. This coming year we will be introducing the *RPPTL Practice Series*, which are one-hour programs aimed at providing probate and real estate practitioners with practical knowledge about important issues that frequently arise in everyday practice. The *RPPTL Practice Series* will be available via webcast or download, and will be the perfect option for those who need a quick primer on the go. Be sure to be on the lookout for these programs in the months to come!

Once every five years the Section embarks on a mission of Strategic Planning. We are in 2018/2019: the year of review. The Strategic Planning Committee co-chairs are Rob Freedman and me. The two primary sub-committees are Logistics (co-chaired by Sancha Brennan Whynot and Salome J. Zikakis) and Substantive (co-chaired by Deborah Packer Goodall, Michael J. Gelfand and Andrew M. O'Malley).

The Logistics sub-committee is broken out into three working groups. The first working group (chaired by Michael Bedke) will address issues regarding membership, communications, inclusion and technology. The second working group (chaired by William Sklar) will address Legislative issues. The third working group (chaired by Linda Griffin) will address financial issues and budget issues.

The Substantive sub-committee is also broken out into three working groups. The first working group (chaired by Nicklaus Curley) will address structure, administration, organization, leadership, succession and bylaws issues. The second working group (chaired by Tae Kelley Bronner) will address meeting planning, facilities and logistics. The third working group (chaired by Adele Stone) will address the various substantive committees.

The Strategic Planning Committee will be meeting and planning this year making recommendations regarding the Section's future to the Executive Council in the first quarter of 2019. The goal is to address issues of how the Section can better serve its members in a myriad of different ways. The end result will be a set of achievable goals from the Section moving forward and anticipated changes and new processes to succeed in reaching them.

The Section leadership is interested in everyone's input, so please contact us with thoughts and suggestions regarding the Strategic Planning or any initiatives in the Section. We look forward to serving and working with you all.

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2	Winter	October 15
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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.

A Potential New Safe Harbor For Florida Trustees: Advance Notice Of Proposed Trustee Action

By J. Grier Pressly III, Esq. and John "Randy" Randolph, Esq.,
Pressly, Pressly, Randolph & Pressly, P.A., Palm Beach, Florida

What if there was a mechanism in the Florida Trust Code that allowed a trustee to be protected from surcharge liability with respect to a trust administration decision, provided the trustee gave the beneficiaries written notice of the proposed action and the beneficiaries failed to object to the proposed action? Presently, no such mechanism exists in our trust statutes.

California's Advance Notice Statute: An Outline

The California legislature recently added this type of advance notice statute to its trust law.[1] A similar statute exists in California probate law.[2] In California, the advance notice statute is optional for the trustee. The trustee can proceed with a proposed action without using the advance notice statute.[3]

The California advance notice statute works as follows: if a trustee chooses, the trustee may send out written notice to the beneficiaries.[4] The notice describes the proposed action to be taken and an explanation of the reasons for the proposed action.[5] The notice must describe the date on or after which the proposed action would be taken.[6] Also, the notice must specify the time period within which an objection to the proposed action must be made, and the period to object must be at least 45 days from the delivery or receipt of the notice.[7] If a beneficiary does not object to the proposed action, then the trustee is not liable for the action taken as described in the notice.[8] However, if a beneficiary timely objects to the proposed action, then the trustee or the beneficiary may petition the court to determine whether the proposed action will be taken, taken with modifications, or denied altogether.[9] The trustee does not have to go to court in reply to an objection. Instead, after notice to the beneficiaries, the trustee may decline to move forward with the proposed action as a result of the objection.[10]

It is important to note that the California statute prohibits use of the statute for several items, primarily involving proposed actions pertaining to the trustee personally, such as trustee fees, settlement of accounts, and self-dealing trustee transactions.[11]

Reasons in Favor of Adopting an Advance Notice Statute in Florida's Trust Code

Here are a number of reasons why Florida should consider adopting a notice of proposed trustee action statute as part of its Trust Code:

1. **Prevent Monday morning quarterbacking:** With respect to the proposed action, the statute would preclude a beneficiary from using hindsight in a surcharge action to the detriment of the trustee.
2. **Trustee not forced to rely upon statute of limitations protection:** A trustee could obtain "closure" on a transaction without having to wait until the expiration of a six-month or longer limitations period.
3. **Avoid failure of remedy for the beneficiary:** In many instances, a surcharge judgment is not an effective remedy, either because (a) it is expensive for the beneficiary to pursue; (b) it would not make the trust whole (e.g., judgment proof trustee); or (c) the trustee would be unable to unwind the transaction (e.g., sale of a family legacy asset). The notice of proposed trustee action would provide the beneficiary with the opportunity to prevent a prospective transaction that would damage the trust before it happens.
4. **Engagement of the beneficiaries in the trust administration:** An advance written notice statute would increase the involvement of beneficiaries in monitoring the trustee's administration.
5. **Efficiency and judicial economy:** An advance written notice statute would ease the burden on the courts by reducing the need for surcharge and instruction proceedings. The trustee could also move more quickly to effectuate the proposed transaction after the expiration of the notice period, rather than incurring the time and expense of a court proceeding for instructions which would require the filing and service of a complaint and summons on all qualified beneficiaries.
6. **Reluctance of courts to enter advisory-type rulings:** Occasionally, courts will refuse to entertain a petition for instructions brought by a fiduciary, forcing the fiduciary to decide whether to take a prospective action without the protection of a court order.[12]
7. **Consistency within the Florida Trust Code and related statutes:** Adopting a new advance notice statute would be consistent with other notice statutes found in Chapters 736 and 738. For instance, Fla. Stat. § 736.04117(4)(2018) requires a 60-day advance notice to qualified beneficiaries before a trustee decants;

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Fla. Stat. § 736.0417 (2018) mandates advance notice before dividing or combining a trust; and, Fla. Stat. § 738.1041(2)(c) (2018) requires advance notice to beneficiaries with respect to unitrust actions.

8. **Making the trustee's job more appealing:** An advance notice statute may make an individual less reluctant to serve as trustee, knowing that he or she could be protected from surcharge liability by utilizing the advance notice statute.
9. **Codifying a practice already being used "informally":** Many trustees already try to reduce liability for discretionary decision-making by sending beneficiaries letters describing an intended transaction and requesting the beneficiaries send written notice of any objection within a specified period of time. However, this practice is not codified by a statute in our Trust Code.
10. **Avoid potential jurisdiction and service concerns:** In instances where one or more trust beneficiaries reside in another state or country, there may be a struggle in obtaining satisfactory service of process of the trustee's petition for instructions, or the trustee may confront a jurisdiction challenge brought by the "foreign beneficiary" that at the very least would require motion practice to resolve.
11. **Improved clarity of tax consequences:** Arguably, a beneficiary allowing the notice period to expire without objection would be less likely to be perceived by the IRS as making an indirect gift for federal gift tax purposes.

If Florida were to adopt an advance notice statute, the authors would recommend the statute require that the notice include an admonition that the beneficiaries should seek independent counsel in the event they have questions concerning the proposed trustee action, similar to the admonition to beneficiaries contained in the suggested language for a "limitation notice" in Fla. Stat. § 736.1008(4)(c) (2018).

Reasons Against Adopting an Advance Notice Statute in Florida's Trust Code

Here are a few arguments against Florida adopting a notice of proposed trustee action statute as part of its Trust Code:

1. **Trustees should do their job:** A trustee has the duty to administer the trust in good faith[13] and with reasonable care, skill and caution.[14] To the detriment of the beneficiaries, a trustee may substitute the use of the notice statute for performing the necessary analysis for a decision. Is the trust really a trust if the trustee relies on the notice statute for all major trust decisions, thereby essentially shifting decision making to the beneficiaries, or to the courts?
2. **It is to the beneficiary's disadvantage if the advance notice statute takes the place of court proceedings for trustee instructions:** Arguably, a petition for instructions court proceeding is a superior vehicle for vetting a proposed action of a trustee (particularly for larger, more complex transactions) because such a proceeding provides beneficiaries the opportunity to question the trustee under oath concerning the transaction and to challenge the trustee's assumptions in front of an impartial judge.
3. **Suitable mechanisms already exist which make an advance notice statute unnecessary:** The Florida Trust Code already authorizes a trustee to obtain consent to a proposed action.[15] And, if obtaining express beneficiary consent isn't practicable, the trustee may set up a de facto beneficiary "waiver" by "informally" sending notification to beneficiaries to inform them of the proposed transaction and to advise that the trustee intends to undertake the transaction in the absence of written objection within a specified period of time. If the trustee wants even more protection, the trustee may seek instructions or a declaratory judgment from the court pursuant to Fla. Stat. § 736.0201 (2018).
4. **Fla. Stat. § 736.1008(2) (2018) is sufficient protection for trustees:** For the trustee who declines to seek court authorization for a prospective transaction through a petition for instructions, the trustee still has backup surcharge protection through the six-month limitations on actions for breach of trust under 736.1008(2) (2018).
5. **Still no absolute clarity of tax consequences:** There exists the possibility that the failure to object to the proposed action constitutes an indirect gift by a trust beneficiary, akin to certain instances where a beneficiary allows a surcharge limitations period to expire. See Revenue Ruling 81-264, 1981-2 C.B. 185.[16]

Examples of Potential Use of the Statute

Here are a few examples involving fairly common administration decisions where a notice of proposed action statute would be helpful to the trustee and the trustee's lawyer:

- Income beneficiary has been unresponsive to trustee's efforts to discuss selling Trust's shares in XYZ Company, a closely held family business. XYZ Company was founded by income beneficiary's mother prior to her death many decades ago. XYZ Company has recently faced stiff competition by other competitors who have technology capable of disrupting the industry's status quo. Trust has a concentrated position in XYZ Company's shares and the Trustee intends to give advance notice to the qualified beneficiaries, including income beneficiary, of Trustee's intention to sell all the shares in XYZ Company to a private equity company.
- Pursuant to Fla Stat. §§ 733.810(5) and 736.0816(22) (2018), Trustee intends to make non-pro-rata, in-kind

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distributions to Trust remainder beneficiaries and intends to provide advance notice to the remainder beneficiaries of these distribution intentions.

- Trustee intends to allow the sole lifetime income beneficiary to occupy a residence owned by the Trust free of rent. Trustee plans on sending out advance notice of this intended action to the qualified beneficiaries.

If Florida Adds an Advance Notice Statute to Its Trust Code, Should Florida Go the Extra Mile and Add an Advance Notice Statute to Its Probate Code as Well?

In addition to its recent enactment of an advance notice statute in its trust law, California has had an advance notice statute in its probate law since 2005.[17] The authors have had anecdotal conversations with several California attorneys who have spoken favorably about their experiences with the probate statute and its usefulness in their estate administrations.

Should Florida follow California's example and adopt an advance notice statute as part of its Probate Code if the same type of statute is added to the Florida Trust Code? A primary argument in favor would be that since a Florida personal representative's fiduciary duty is the same as the fiduciary duty of a Florida trustee,[18] when it comes to fiduciary exposure to actions for breach of trust our state's personal representatives and trustees should share the same tools to avoid liability. Ultimately, creating uniformity by having "sister statutes" in both the Florida Probate Code and Florida Trust Code may be worth considering. However, for the following reasons, the authors believe that initial priority should be given to adopting an advance notice statute as part of Florida's Trust Code:

1. Since a probate administration is part of an existing, ongoing court proceeding, a personal representative can easily and inexpensively file a petition for instructions with the probate court and serve beneficiaries by formal notice in advance of acting on an important estate matter at any time during the administration.[19] This is not the case with a trust administration, where there is usually no active court file within which to seek judicial instruction or authority.[20] A trustee would be required to initiate a brand new court proceeding through filing a complaint to seek instructions or a declaratory judgment pursuant to Fla. Stat. § 736.0201 (2018) in advance of a trustee action, and to serve beneficiaries with a summons.
2. Probate administrations generally have much shorter time frames as compared to trust administrations. This means that it is less likely that a personal representative will need to use an advance notice procedure.
3. Initially, adopting an advance notice statute in the Florida Trust Code would provide practitioners an opportunity to gauge its effectiveness, its frequency of use, and its shortcomings. The RPPTL Section could then decide whether it is appropriate to adopt an advance notice statute in the Florida Probate Code, either in the same form as the trust notice statute or in a form improved on the basis of practitioner experience.



G. PRESSLY

Conclusion

Attorneys representing California fiduciaries have found the California advance notice statute to be very helpful in their practice. The RPPTL Section should investigate whether a similar statute should be made available for use by Florida practitioners in Florida probate or trust administrations, or both.



J. RANDOLPH

J. Grier Pressly, III *and* ***John "Randy" Randolph*** *are shareholders of Pressly, Pressly, Randolph & Pressly, P.A. in Palm Beach, where they concentrate their practice in trusts and estates.* *The authors are grateful for the editorial assistance of the firm's summer associate, Justin Shifrin (University of Florida Levin College of Law J.D. Candidate, 2020).*

Endnotes

1 Cal.Prob. Code § 16501 (West 2018).
2 Cal. Prob. Code § 10580 (West 2018).
3 Cal. Prob. Code § 16504 (West 2018).
4 Prob. § 16501.
5 Cal. Prob. Code § 16502 (West 2018).
6 Id.
7 Id.
8 Cal. Prob. Code § 16503 (West 2018).
9 Id.
10 Id.
11 Prob. § 16501(d).
12 See *In re Estate of Wejanowski*, 920 So.2d 190 (Fla. 2d DCA 2006).
13 Fla. Stat. § 736.0801 (2018).
14 Fla. Stat. § 736.0804 (2018).
15 See Fla. Stat. § 736.1012 (2018).
16 Permitting the statute of limitations period to run on the recovery of a loan to a solvent family member constitutes a taxable gift.
17 Prob. § 10580.
18 Fla. Stat. § 733.609(1) (2018).
19 See Fla. Stat. § 733.603 (2018).
20 Fla. Stat. § 736.0201(3) (2018).

Letter From The Editors

Please note this issue's in-depth coverage of the Section's Convention. On page 29, enjoy a summary of the photo contest (the winner graces this issue's cover). On pages 30-31, note the plethora of meeting candid photos. On page 32, enjoy the Section spotlight focused on this year's Section awards recipients (the Section awards were given at the Convention). Finally, the Roundtables from the Convention are highlighted on pages 33-36.

— The Editors



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Take it Or Leave It – FR/BAR As-Is Contract Is Straightforward And Enforceable

By Jason Ellison, Esq. and Paige Baker, Esq.,
Ellison | Lazenby, St. Petersburg, Florida

In an opinion filed on June 13, 2018, Florida's Third District Court of Appeal analyzed a buyers' and sellers' obligations under the "As-Is" FR/BAR contract for the sale of residential real property. *Diaz v. Kosch*, —So.3d —, Nos. 3D17–1498 & 3D17–621 (Fla. 3d DCA 2018). The Court concluded that the case turned on strict, but enforceable, provisions in the "As-Is" FR/BAR contract, and affirmed summary judgment for the sellers, including an attorney fee judgment for $850,000 against the purchasers.

The Florida Realtors/Florida Bar Contract

As its name implies, the Florida Realtors/Florida Bar ("FR/BAR") contract is a product of the joint efforts of the Florida Realtors and The Florida Bar. The first version of the contract was published in 1973, and has been continually updated, revised, amended, and expanded to include a vast array of changes and versions tracking current legal issues and regulations, with the intent to provide a standard, efficient, and enforceable contract which can be utilized in nearly every type of residential real estate transaction. As a result, the FR/BAR forms have become the primary contracts utilized for the sale of residential real property in Florida.

The most often utilized FR/BAR form is the "As-Is" contract, which limits a seller's repair obligations, while still incorporating the disclosure requirements set forth by the Florida Supreme Court in the landmark *Johnson v. Davis*[1] decision. The disclosure and repair requirements placed upon a seller under the "As-Is" FR/BAR contract, as well as the remedies afforded under the contract, were the issues analyzed in the *Diaz* opinion.

A Solid Contract Meets Difficult Facts

In *Diaz*, the Buyers and the Sellers entered into the standard form FR/BAR "As-Is" contract (ASIS-1 Rev. 6/10) (the "Contract") for the sale of a home in Coral Gables. The Sellers executed a property disclosure form covering sixteen (16) different topics. Pertinent to the ensuing litigation, the Sellers provided on the disclosure form they had "No" knowledge of improvements to the property constructed in violation of applicable building codes, or without necessary permits, and they had "No" knowledge of any open permits on the property. The Sellers also marked "No" to any awareness of any toxic substances in the residence, including accumulated radon.

The Buyers learned during their ten-day inspection period there were open building permits on the property, as well as unpermitted work, some of which may have been performed when the Sellers owned the property. The Buyers notified their broker of the permitting issues the day before the inspection period expired, advising they were conferring with a builder and an architect, and would likely need to return to the property with a city inspector. However, the Buyers failed to seek an extension of the inspection period or exercise their rights to cancel the Contract under the inspection contingency.

Instead, the following day on which the inspection period expired, the Buyers emailed the Sellers and their broker accusing them of making affirmative misrepresentations in the Property Disclosures and threatening "full scale litigation," including claims for punitive damages, which they warned would result in attorney's fees that "could easily be in the hundreds of thousands of dollars," and result in the property being unmarketable for a significant amount of time. The Buyers tendered the second deposit which was due the same day under protest and "with full rights reserved."

Negotiations began, but twelve days after the inspection period expired, with no resolution in sight, the Buyers provided written notice to the Sellers they were terminating the Contract. The Buyers further instructed the escrow agent to return their entire $285,000 deposit to them. The written notice of termination did not allege a breach by the Sellers nor did it claim an inability of the Buyers to obtain financing, a contingency which remained in the Contract. The escrow agent refused to release the deposit, and the Buyers initiated a lawsuit against the Sellers.

The fourth amended complaint filed by the Buyers asserted claims for breach of contract, conversion, fraud in inducement, fraud in concealment, negligent misrepresentation, and conspiratorial fraud, with a claim for punitive damages asserted as well. The Sellers counterclaimed for the Buyers' breach and for the deposit as damages for the Buyer's default. Years of highly contentious litigation ensued.

Nearly five years after initiation of the lawsuit, the Sellers were granted summary judgment as to the Buyers' claims and the Sellers' counterclaim for the still-escrowed deposit, with a final summary judgment entered in March 2017. The Sellers were subsequently awarded $850,000 in attorney's fees and costs which was reduced to an amended final judgment entered in June 2017. The Buyers appealed both the final summary judgment and the award of fees.

"Strict, But Enforceable"

In affirming both the final summary judgment and the award of fees, the Third District Court of Appeal held that the "strict, but enforceable" terms of the "as-is" Contract prevented the Buyers from transforming the "as-is" Contract into one in which

continued, page 10

the Sellers were obligated to repair and remediate the property to the Buyers' satisfaction. The court concluded the Contract contained precise language addressing the exact issues the Buyers took umbrage with, and subsequently litigated extensively over, ultimately to their $850,000 detriment.

The court relied on four areas in the Contract which explicitly relieved the Sellers from the obligations the Buyers sought to impose upon the "as-is" deal.

First, the appeals court found the "time is of the essence" clause foreclosed the Buyers' argument they were entitled to an automatic extension of the inspection period by virtue of discovering an open or necessary permit on the property, irrespective of the fact such issues may require time beyond the contractual inspection period to resolve.

Second, the Contract contained an integration and modification clause specifying the Contract represented the complete understanding of the parties and could only be modified by a subsequent writing executed by both the Buyers and the Sellers. The Court found this provision further foreclosed the Buyers' argument that they were entitled to an extension of the inspection period.

The third area of the Contract the court found supported judgment in favor of the Sellers was the disclosures section, which addressed radon gas, open permits, and unpermitted work.

The fourth area, which the court found "of particular importance" were several provisions contained in paragraph 12 of the Contract; most notably:

> Paragraph 12(a), "**PROPERTY INSPECTIONS AND RIGHT TO CANCEL**" which provided the Buyers complete discretion to terminate the Contract within the inspection period and receive back their full deposit, absent which, the provision provided that "the Buyer accepts the physical condition of the Property and any violation of governmental, building, environmental, and safety codes, restrictions, or requirements..."
>
> Paragraph 12(c), "**SELLER ASSISTANCE AND COOPERATION IN CLOSE–OUT OF BUILDING PERMITS**," which provides that if Buyer's Inspection of the Property identifies open or needed building permits, then Seller shall promptly deliver to Buyer all plans, written documentation or other information in Seller's possession, knowledge, or control relating to improvements to the Property which are the subject of such open or needed Permits, and shall promptly cooperate in good faith with Buyer's efforts to obtain estimates of repairs or other work necessary to resolve such Permit issues. Seller's obligation to cooperate shall include Seller's execution of necessary authorizations, consents, or other documents necessary for Buyer to conduct inspections and have estimates of such repairs or work prepared, but in fulfilling such obligation, Seller shall not be required to expend, or become obligated to expend, any money.[2]

The Buyers asserted paragraph 12(c) required the Sellers to extend the inspection period to comply with the Buyers' demands. The Court found paragraph 12(c) "contain[ed] no provision for an extension of the ten-day inspection period and right to cancel."[3] Rather, paragraph 12(c) merely imposed a duty on the sellers to provide information and documentation to assist the Buyers' resolution of any open or needed permits *after* the inspection period ends without cancellation.[4]

Additionally, the court found paragraph 12(a) does not permit the Buyers to conditionally perform a contractual obligation (such as the Buyers' "conditional tender" of the second required deposit), thereby ostensibly performing under the Contract, while attempting to compel the Sellers to perform and pay for repairs, permitting issues, and related expenses outside the "as-is" nature of the property.

What About *Johnson v. Davis* Claims?

The Buyers also argued they were entitled to terminate the Contract and receive their deposit back outside the inspection period because the Sellers failed to disclose the existence of the permitting issues and elevated radon levels, which the Buyers alleged they learned of after expiration of the inspection period, in the Sellers' Disclosures. The appeals court, however, was without sympathy.

As to the permitting issues, the appeals court also found (1) the Buyers learned of the permitting issues during the inspection period; (2) the permitting issues were also discoverable through an on-line municipal permit search; and, yet (3) the Buyers declined to terminate the Contract during the inspection period upon learning of the permitting issues.

The appeals court noted as to the alleged non-disclosure of elevated radon levels the:

> (1) Contract contained the statutory radon disclosure;
>
> (2) Sellers' attorney disclosed the elevated radon test, which was conducted after the Sellers executed the disclosures, via email;
>
> (3) Buyers were "experienced real estate attorneys familiar with radon tests;"[5] and, yet
>
> (4) Buyers failed to conduct a radon test during the inspection period or after learning of the prior elevated radon test.

In an apparent narrowing of *M/I Schottenstein Homes, Inc. v. Azam*,[6] in which the Florida Supreme Court disapproved the Third District's rule that "statements concerning public record cannot form the basis for a claim of actionable fraud," enunciated in *Pressman v. Wolf*,[7] the appeals court went on to quote its *Pressman* opinion, stating:

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> "[a]s this Court held in *Pressman v. Wolf*, 732 So. 2d 356, 362 (Fla. 3d DCA 1999), *Johnson v. Davis* does not extend to conditions that 'were readily observable and/or within the buyer's ability to know or easily discover"

and distinguishing *Azam*'s disapproval as "not address[ing] on-line municipal permit records." [8]

In line with the requirements of *Johnson v. Davis*, the FR/BAR Contract requires the disclosure of known material defects to the real property to be sold. (2017 ver., para. 10(j)). When read in conjunction with the remainder of the Contract, especially paragraph 12, however, it becomes clear not every instance of non-disclosure automatically gives rise to a *Johnson v. Davis* claim. Logically, a Seller may not have knowledge of defects, such as unpermitted work prior to Seller's ownership of the property, and memories are never perfect – just ask any litigator familiar with cross examination of witnesses. Instead, and as the *Diaz* court held, upon learning of the open permits and unpermitted work during the inspection period, paragraph 12(a) provided the Buyers two options: tender written notice of termination prior to the inspection period expiration and receive their full deposit back, or allow the inspection period to expire, whereupon the Buyers were deemed to accept the property "as-is."

Litigation Considerations

While home buying can be an emotionally draining and blinding experience for the parties involved, the standard form contracts published by The Florida Bar and Florida Realtors seek to remove some of the uncertainty through clearly defined contract terms and obligations which govern the parties' actions through the course of the transaction. When a dispute arises, whether under a FR/BAR contract or otherwise, the strengths, weaknesses, remedies, goals, and costs must be objectively considered before undertaking any course of action. Here, while the Buyers felt they had been the victims of intentional and wrongful act by the Sellers, they failed to recognize the limitation on their remedies, while also failing to recognize the extent of their potential exposure to a fee award against them should they lose.

Instead of exercising their contractual rights, the Buyers attempted to create a new remedy outside the Contract. Like the Buyers in *Diaz*, litigants may be tempted to "reserve all rights" while traversing a difficult transaction. However, as demonstrated through the *Diaz* opinion, a party's attempted reservation of an important contractual right does not equate to an extension of contractual terms or creation of new rights in favor of such party. Conversely, it may act to provide false security and a sense of control to a party faced with less than ideal choices.

As a result, in *Diaz*, the Buyers lost their deposit and had an $850,000 judgment entered against them for the Seller's attorney's fees, which does not include any fees the Buyers may have paid to their own attorneys. Although it may be easy to second-guess the decisions of parties when given the benefit of hindsight, this may be a lesson and reminder to the litigant – and their counsel – to objectively evaluate, and maybe re-evaluate, legal positions and consequences early and often.

Conclusion

As noted by the Third District in the instant cause, the "As-Is" FR/BAR contract terms are "strict, but enforceable" and intended to reduce legal fees. The significant work of the Florida Realtors and The Florida Bar in preparing the FR/BAR forms has produced a reliable and straightforward contract for the average residential real estate transaction. By attempting to create a remedy unsupported by the strict, but enforceable, FR/BAR contract terms, the Buyers controverted the purpose of the Contract and cost themselves years of litigation with a hefty price tag and undesirable outcome.



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Endnotes

1 *Johnson v. Davis*, 480 So. 2d 625 (Fla. 1985).
2 *Diaz* at 2-3.
3 *Id.* at 10.
4 *Id.* at 7.
5 *Id.* at *8.
6 813 So. 2d 91 (Fla. 2002).
7 732 So. 2d 356 (Fla. 3d DCA), review denied, 744 So. 2d 459 (Fla. 1999).
8 *Id.* at *8.

How I Learned To Stop Worrying And Love The ILIT

By Scott Johns, Esq., Doane, & Doane, P.A., North Palm Beach, Florida

There are certain kinds of irrevocable trusts which are so regularly used in estate planning that the planning community at large, long ago, deemed them worthy of an acronym. Irrevocable Life Insurance Trusts, or "ILITs," are one such kind, and while the author does not have statistics to support this claim, he is comfortable speculating that ILITs are among the more frequently created kinds of irrevocable trusts. This article attempts to focus on issues, both tax and non-tax related, that regularly need addressing when drafting an ILIT. The author does not have the temerity to suggest that this article addresses every issue that should be considered with regards to drafting an ILIT, but rather is but a humble effort to focus on some of the more significant ones.

Gross Estate Inclusion Overview

A decedent's gross estate will include the value of proceeds of an insurance policy on the decedent's life to the extent those proceeds are receivable by the executor[1] of the decedent's estate.[2] A decedent's gross estate will also include the value of proceeds of insurance on the decedent's life, irrespective of who receives those proceeds, if the decedent possessed any of the "incidents of ownership" of the insurance policy, exercisable either alone or in conjunction with any other person.[3] Treasury Regulations provide that this concept of "incidents of ownership" is not limited to legal ownership of the policy, but instead focuses on certain "economic benefits" of the policy.[4] Some examples of incidents of ownership are the right to change a beneficiary designation, to surrender or cancel the policy, assign or revoke an assignment of the policy, pledge the policy for a loan, or utilize a policy's surrender value to obtain a loan from the insurer. Generally, it is irrelevant either how many incidents of ownership the decedent retained, or how substantive any one incident of ownership is deemed to be, as the retention of *any* incident of ownership will result in the inclusion of *the full amount* receivable under the policy.[5]

The reason for the creation of an ILIT is to avoid the application of these rules to a particular insurance policy by having the proceeds be receivable by the ILIT trustee and by having the ILIT trustee own the policy in such a manner that the decedent does not have any incidents of ownership over the policy. Ensuring the proceeds are not receivable by the executor of the decedent's estate is easy enough, but ensuring that the decedent does not possess any incidents of ownership requires further attention.

Don't let the Settlor serve as Trustee of an ILIT

Beginning with a relatively banal issue, incidents of ownership need not be held by the decedent in an individual capacity to cause estate inclusion problems; the possession of incidents of ownership as the trustee of a trust may similarly cause gross estate inclusion.[6] A decedent, acting as trustee, will be deemed to possess incidents of ownership over a policy on the decedent's life if the decedent either (1) transferred the policy to the trust; or (2) has transferred any other property to the trust which served as consideration for the purchase or maintenance of the policy, notwithstanding that those incidents cannot be exercised for the Decedent's benefit.[7] As many ILITs either involve the settlor funding the ILIT by transferring an existing insurance policy to the trustee, or involve the settlor making contributions to the trust in order for policy premiums to be paid, the proceeds of any policy held by such a trust would be included in the settlor's gross estate if the settlor was serving as trustee. Similarly, if the settlor is given the ability to remove and replace the trustee, a provision should be included preventing the settlor from naming himself or a related or subordinate party to serve as trustee.[8]

Structure the Trust's Acquisition of the Insurance Policy (IRC § 2035)

It is important to note that a settlor cannot simply fund a trust with an insurance policy and be rid of estate tax issues, as a settlor's parting with an insurance policy (or incidents of ownership therein) before death does not conclusively exclude the proceeds of such policy from the settlor's gross estate for federal estate tax purposes. If the decedent makes a transfer of an insurance policy, or relinquishes a power or "incident of ownership" with respect to that policy, during the 3-year period ending on the date of the decedent's death, the value of that property will be included in the settlor's gross estate for federal estate tax purposes,[9] unless that transfer was made for adequate and full consideration in money or money's worth.[10] Thus, if the decedent transfers an insurance policy to a trust for less than full and adequate consideration and dies within three years, policy proceeds will be included in the decedent's estate.[11] If, instead, money is transferred to a trustee who then (without being bound by the terms of the trust agreement to buy insurance) purchases an insurance policy, policy proceeds may not be included in the settlor's gross estate.[12]

As to policies not yet in effect, it is therefore critical to follow the just-discussed order of operations of having the settlor make a gift to the trustee, followed by the trustee purchasing the policy and the policy being issued to the trustee as owner. If instead, you are dealing with a pre-existing policy, do not forget the rule for transfers having full and adequate consideration. As a transfer of the policy to the trustee would result in a gift anyway, the better course of action is for the settlor to fund the trust with cash equal to the policy's current gift tax transfer value and to later have the settlor sell the policy to the trustee. If the sale is structured properly, IRC § 2035(d) should preclude the policy proceeds from being included in the settlor's gross

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estate if the settlor dies within 3 years of the sale. Further, if the ILIT has properly been structured as a grantor trust, that grantor trust status should permit invocation of the exception to the "transfer for value" rule of IRC § 101, which will preserve the income-tax free receipt of policy proceeds by the trustee.[13]

Allow for Loans to Settlor's Estate – But Do Not Mandate Them

A common use for ILITs is to provide liquidity for an otherwise illiquid estate,[14] as cash proceeds from an insurance policy can provide the funds with which to pay tax liabilities (or to pay liabilities or maintenance costs associated with other estate property) and removing insurance proceeds from an estate maximizes available cash by preventing any of the proceeds from having to "self-pay" tax liability they would incur if included in the settlor's estate. In order for an estate to utilize this cash, an ILIT trustee may loan money to the executor of a decedent's estate. While the Florida Trust Code does have a default rule permitting a trustee to make loans,[15] there are states that do not have default provisions in their trust codes authorizing trustees to make loans. As such, it is prudent to examine existing ILITs settled by clients who are now moving to Florida to see if express authority is granted for the trustee to make loans and, if not, to determine whether default rules in the jurisdiction where the trust is principally being administered nevertheless authorize loans. If there is no such authority, consideration should be given to moving the trust's principal place of administration or, if other considerations warrant it, decanting the trust to one settled and administered in Florida.

Further, in situations where the beneficiaries of an ILIT are not the same as the beneficiaries of the estate, those ILIT beneficiaries may have valid reasons for not wanting ILIT monies to be loaned to an executor. As a practical matter, specifying in a trust agreement that loans to the executor of the settlor's estate are contemplated within the scope of lending, rather than simply relying on default statutory law, may help the trustee in tempering objections from the ILIT beneficiaries. However, *do not mandate* that ILIT monies be made available to the estate, otherwise such funds may be included in the settlor's gross estate to the extent they are ultimately used to pay taxes, debts, or other charges enforceable against the settlor's estate.[16]

Creating and Structuring "Crummey" Withdrawal Powers

Invariably, a large component of structuring an ILIT is minimizing the use of a settlor's unified credit on transfers to the trust. This requires allowing such contributions to the ILIT to qualify for the gift tax annual exclusion.[17] This is commonly done by granting beneficiaries the right to withdraw contributions made to the trust, known as "Crummey" powers.[18] A donor can utilize the gift tax annual exclusion only if the gift made is one of a present interest in property.[19] Typically, the intent of placing property in trust is to avoid giving the beneficiary a present possessory interest in trust property, and so a beneficiary's beneficial interest in trust property is usually a future interest in property. These two concepts are thus in direct conflict with one another. Enter "Crummey" withdrawal powers, whereby conferring upon a beneficiary a power to demand outright ownership of property held in trust converts the interest into one of a present interest, which then permits a gift to qualify for an annual exclusion. To borrow from a Danish prince, the rub then is how best to frame withdrawal powers, as failure to frame them properly may cause a practitioner to develop sleep issues.

Withdrawal Powers and the Magic of IRC § 678(b) (for the most part)

It is important to remember that a withdrawal power is a general power of appointment over the property subject to withdrawal. This can lead to myriad tax issues for beneficiaries. To begin, the lapse of a general power created after October 21, 1942, is treated as a release of such power. The release of a power is treated as exercise of the power,[20] meaning that upon lapse the beneficiary will be treated as having made a gift.[21] Depending upon the terms of the trust, this gift may be for the full value of property subject to the lapsed power, without reduction for any interest in the trust retained by the beneficiary.[22] However, a lapse will not be treated as a release of the power to the extent the lapse does not exceed a value which is the greater of $5,000 or 5% of the value of assets over which the power exists. This rule is colloquially known as the "5 and 5 rule," and a power limited to this amount is known as a "5 and 5 power."

The facts of a situation may require that the settlor contribute property which, across all beneficiaries holding withdrawal powers, exceeds the amount to which 5 and 5 power lapses can relate. For example, if a settlor transferred $60,000 to a trust with 4 beneficiaries who each are given withdrawal powers as to one-quarter of contributions ($15,000 per beneficiary), all $60,000 would qualify for the gift tax annual exclusion. However, if the beneficiaries withdrawal rights were to lapse in full, an aggregate of $40,000 would not be treated as property contributed by the trust beneficiaries, which would create a potentially significant estate tax problem for the beneficiaries in their own right.[23] In order to protect a beneficiary from all of the consequences of a lapsed power, withdrawal powers can be extended until such time as the amounts subject to withdrawal can safely lapse within the terms of the 5 and 5 rule. This is accomplished by creating a "hanging" power. If a power is framed as a hanging power, the value of property subject to withdrawal only lapses to the extent permitted by the 5 and 5 rule, and excess amounts continue to be exercisable by the beneficiary. In the above example, this would mean that each beneficiary's withdrawal rights would lapse as to $5,000, and would continue as to the remaining $10,000. This continued

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power of withdrawal would normally cause the beneficiary to be treated as owner, for income tax purposes, of the portion of the trust still subject to withdrawal.[24] It is worth noting that this income tax issue is not exclusive to hanging powers, as there is also potential for a beneficiary to be treated as owner, again for income tax purposes, over amounts previously subject to a released power.[25]

Thus, withdrawal powers can lead to the result of a beneficiary both making a gift and being treated as owner of trust property under the "grantor trust" rules.[26] If it seems that withdrawal powers can create a veritable hornet's nest of tax issues, they can. Fear not, however, as IRC § 678(b) quells the sting. This code subsection provides that if the original settlor is otherwise treated as owner of the trust under any of the other "grantor trust" rules,[27] nobody else can be treated as owner of any portion of the trust.[28] Thus, as long as an ILIT is a grantor trust in the first instance, its grantor trust status will prevent any of the beneficiaries from becoming the new grantor over trust property for income tax purposes. This rule, in effect, protects beneficiaries possessing hanging powers from being treated as grantor for income tax purposes. Since an ILIT does not often generate income, this may seem like an irrelevant issue. However, it turns out to be a critical issue should there ever be reason to transfer the insurance policy. One can alternatively think of IRC § 678(b) as "preserving" grantor status as to the settlor for the trust in question, which therefore helps preserve use of the "transfer for value" rule exception, discussed earlier, should there ever be a desire to transfer an insurance policy out of that trust.

Unfortunately, IRC § 678(b) is but a cure for income tax issues. Estate and generation-skipping transfer tax ("GST") issues are not so easily solved. As to that portion of property over which the hanging power has not lapsed, such property will be included in the gross estate of the beneficiary if he or she dies while holding the power.[29] Gross estate inclusion will in turn cause the beneficiary to be treated as the transferor under the GST rules, with the result that the portion of the trust included in the beneficiary's estate will be treated as a new trust for GST purposes.[30] As to those amounts where a beneficiary's withdrawal power has lapsed, since the power holder is treated as the transferor upon lapse of a power greater than the $5,000 or 5% amount just discussed, that transfer will also create a new separate trust for GST purposes with the beneficiary as transferor.[31] This has the potential to waste the settlor's GST exemption which is allocated to the trust. In this situation, it will be important to plan the extent to which withdrawal rights may be exercised, and weigh the strategy of limiting withdrawal rights and reporting taxable gifts against running the risk that the GST exemption may be wasted.

Do not Express the Withdrawal Power as a Condition Subsequent

If hanging powers are to be used, be certain they are framed correctly, as hanging powers will not be given effect if they are phrased in terms stating that the value of property subject to withdrawal, or the amount of a withdrawal power that lapses, will be modified based upon subsequent determination of gift tax liability. This type of language is known as phrasing a power as a "condition subsequent." Powers phrased in this manner are not given effect on the basis of public policy,[32] with the rationale being that it would be a waste of judicial resources to determine that tax was owed, only for the terms of the document to immediately re-determine the transaction in order for there to be no gift tax liability. As such, withdrawal powers should affirmatively state the amount of property over which the withdrawal power applies, or in the case of a hanging power, should state the amount over which the withdrawal power will lapse.

Limit the Duration of the Withdrawal Power

If the period in which withdrawal rights may be exercised is unreasonably short, it can be argued that the withdrawal power is illusory. Annual exclusion gifts have been permitted when withdrawal powers were limited to a period as short as 15 days.[33] However, as the IRS is not keen on withdrawal powers, it is generally accepted practice to use a period no shorter than 30 days from the date of contribution, as the IRS has privately ruled that such time period is acceptable.[34]

Permit Withdrawal Powers to be Restricted

Much of the attention devoted to withdrawal powers thus far focused on whether a settlor's contribution in trust constitutes a gift of a present interest eligible for the gift tax annual exclusion. However, the inconvenient corollary to conferring withdrawal powers so as to give a beneficiary a present interest is that the beneficiary may indeed presently enjoy the property by exercising the withdrawal power. If a settlor conveys property to an ILIT in hopes that it will be used to pay a pending premium, what is the settlor to do if a hot-handed beneficiary exercises his withdrawal rights? Should the settlor contribute more property to make up the difference? What if those subsequently contributed amounts are also withdrawn?

The solution is to draft an ILIT so as to permit the settlor to determine in the first instance whether or not a contribution will be subject to the withdrawal rights otherwise conferred in the agreement. For instance, the ILIT agreement could state that all contributions are subject to withdrawal powers unless the settlor informs the trustee at the time of contribution that part or all of such contribution will not be subject to withdrawal powers.[35] Allowing a settlor to impose this type of condition upon the property transferred should be a non-issue for purposes of estate tax inclusion, as it is not a power over the disposition of property that should result in gross estate inclusion.[36] However, opting to restrict withdrawal rights will have gift tax ramifications as the contributed property will no longer be eligible for the gift tax annual exclusion. This may,

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nevertheless, be the superior option to having a policy lapse due to a trustee not having sufficient funds to pay a premium because of exercised withdrawal rights.

Address the Direct Payment of Premiums to the Insurance Company

Consideration of the practicalities should always be given when drafting a document, and an ILIT is no different. Among those practicalities is the formality (or lack thereof) of contribution of property or money to the trustee which the trustee may then apply to the payment of premiums on the insurance policy owned by the trustee. Particularly when the trustee is an individual who is unfamiliar with serving in such a role, it is not uncommon for both the settlor and trustee to ignore/overlook/forget the formalities just mentioned and for the settlor to send a premium payment directly to the insurance company, rather than making a gift to the trust. If the trustee is never in receipt of the money for those premium payments, how can that money possibly be subject to withdrawal by trust beneficiaries? Fortunately, the tax court held in *Estate of Clyde W. Turner, Sr. v. Commissioner*[37] that where a trust instrument provides that both direct and *indirect* transfers to the trust are subject to withdrawal powers, and where the trustee is authorized to distribute other trust property or to *borrow against the cash value* of a policy to obtain cash to satisfy those withdrawal rights, direct payment of premiums by the insured will constitute gifts of a present interest (emphasis added).

There are a couple of important takeaways from this opinion. First, the court seemed to focus in multiple instances on the trust document's grant of withdrawal rights to both direct and indirect gifts, despite the analysis of this issue being very short. From that, it would seem prudent to ensure that a trust document specifically states that indirect gifts are subject to withdrawal powers. Second, the court did not state in its recitation of facts if the policies pertaining to the premiums in question were in fact cash value policies. Indeed, the court noted that "specifically, respondent argues the beneficiaries' withdrawal rights were illusory because [the decedent] did not deposit money with the trustees … but instead paid the life insurance premiums directly and because the beneficiaries did not receive notice of the transfers." The author wonders if the IRS did not focus on the borrowing element because the policies at issue had cash value. However, if the facts bear out that the trustee had no practical way of satisfying withdrawal requests (such as if policies held by the trustee are term policies and the trust has no other assets or borrowing power), the IRS's "illusory" withdrawal right argument seems to be a strong one. In such an instance, the safe practice is to ensure that funds are first transferred to the trustee, rather than relying on any language in the trust document pertaining to indirect gifts.

It is important to note that a decedent's payment of insurance premiums, without more, should not cause the policy proceeds to be included under IRC § 2042.[38] In addition, those premium payments made by the decedent directly to the insurance company within three years of the decedent's death should not be pulled in the decedent's estate by reason of IRC § 2035.[39]

Address Automatic GST Allocation / Electing Out

Creating withdrawal powers sufficient to permit gift transfers to an ILIT to qualify for the gift tax annual exclusion is not the end of a draftsman's job, as there are quite likely lurking GST issues in any such trust. This is because gifts in trust must

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comply with additional requirements in order to be eligible to utilize the GST annual exclusion.

A transfer in trust is not eligible for the GST annual exclusion unless the terms of the trust provide that during the beneficiary's life, no portion of corpus or income may be distributed to (or for the benefit of) any person other than such individual,[40] and if the trust does not terminate before the individual dies, the assets of the trust must be includible in the gross estate of such individual.[41] This first issue may be addressed by complying with the GST separate share rules,[42] and the second issue may be addressed by providing the beneficiary of each such separate share with a general testamentary power of appointment over that beneficiary's separate share.

However, the settlor's plan of disposition for the ILIT may not allow for compliance with these rules, in which case care must be taken to determine whether the trust is subject to the GST automatic allocation rules. GST is automatically allocated to gift transfers which are made to a "GST Trust."[43] A GST Trust is a trust which *could* have a generation-skipping transfer with respect to the transferor unless the trust instrument requires that more than twenty-five (25%) of trust corpus must be distributed or may be withdrawn by one or more non-skip individuals:

- Before the date that the individual attains age 56;
- On or before one or more dates set forth in the trust which will occur before the date that such individual attains age 46; or
- Upon the occurrence of an event that may reasonably be expected to occur before the date that such individual attains age 46.

As a typical ILIT's dispositive provisions don't mandate the distribution of assets (if distribution is mandated at all) until the settlor's death, it will often be the case that an ILIT does not satisfy these rules and will therefore be categorized as a GST Trust. Therefore, in order to avoid having GST allocated to the transfer, the gift will need to be reported on an IRS Form 709 in order to "opt out" of the GST Trust automatic allocation rules,[44] even in situations where the full transfer was eligible for the gift tax annual exclusion.

Protect the Trustee from Causes of Action Relating to Insurance Ownership

In Florida, a trustee's fiduciary duties includes the duty to invest and manage assets in a prudent manner (also known as the "prudent investor rule"), by imposing on a fiduciary the duty "to invest and manage investment assets as a prudent investor would considering the purposes, terms, distribution requirements, and other circumstances of the trust."[45] This rule creates a conflict with the concept of having a trust heavily, or exclusively, invested in insurance, as insurance policies can often lose their value (such as when a permanent policy does not perform as anticipated when the policy was issued) or lapse (such as when a term policy lapses due to the insured's age, or if the trustee does not have access to assets to pay premiums). It is therefore important to insulate the trustee from liability to beneficiaries simply due to holding onto the insurance policy (as holding the policy is precisely what the settlor intended). The Florida Trust Code offers a trustee protection in this respect by specifically providing for the non-application of the prudent investor rule as to life insurance contracts in Fla. Stat. § 736.0902 (2018). However, this comes with some caveats. In order for a trustee to take advantage of some of the protections afforded by statute, either the trust agreement must reference that statutory section and make them applicable to contracts of life insurance held by the trust.[46] or the trustee gives notice to the trust's qualified beneficiaries that the section applies.[47] As the statute provides beneficiaries the opportunity to object to the trustee's notice,[48] the better course of action is to ensure the trust agreement specifically references this section.

Clearly Define the Scope of Beneficial Interests Given to a Spouse

Although a topic on ILITs calls one's attention to the insurance component, one must not ignore that the first "I" in the acronym-du-jour is "irrevocable." It is common for a settlor to prioritize the use of trust assets in the period immediately following the settlor's death for the benefit of a surviving spouse rather than for surviving children. Because of this, care should be given to defining the scope of any beneficial interest given to the settlor's spouse when drafting an ILIT.

Divorce (and the failure of people to update their documents post-divorce) has become so prevalent that many states, including Florida, have enacted statutes which treat an ex-spouse as having predeceased the settlor for purposes of interpreting dispositions that do not become effective until death, such as interests given to an ex-spouse by way of a will,[49] revocable trust,[50] or beneficiary designation on non-probate assets. However, these types of statutes relate only to transfers which are otherwise revocable or modifiable by the settlor/decedent.[51] The justification given for these types of statutes is that the failure of the settlor to revoke or modify a transfer to eliminate an ex-spouse in favor of a substitute taker is likely due to inattention on the part of the settlor/decedent.[52] However, an interest given to a spouse in an inter vivos irrevocable trust cannot similarly be eliminated through the use of one of these "divorce savings" statutes. The reason for this is that the beneficial interests granted in an irrevocable trust are fixed at the time of creation, and therefore the justification given for altering dispositions in revocable instruments is inapplicable. Therefore, if a settlor intends for a beneficial interest given to a spouse to be contingent upon that person continuing to be married to the settlor (or having been the settlor's spouse at the time of the settlor's death), such a contingency should be clearly elucidated in the trust agreement.

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Acts impacting familial relationships such as having children or divorcing a spouse are typically viewed as independent acts of significance for estate tax purposes, such that imposing such a condition on a spouse's beneficial interest in trust should not be viewed as a retained power over property that results in gross estate inclusion,[53] and the IRS has privately ruled that conditioning a spouse's interest on being/remaining the settlor's spouse is not an "incident of ownership" as to an insurance policy.[54]


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Endnotes

1 While the author recognizes that such fiduciary position in Florida is known as a "personal representative," the term executor will be used for consistency with terminology found in the Internal Revenue Code.

2 IRC § 2042(1).

3 IRC § 2042(2).

4 Treas. Reg. § 20.2042-1(c)(2).

5 Treas. Reg. § 20.2042-1(a)(3). However, there may be situations where only a portion of the policy is included in the settlor's estate, such as with split-dollar arrangements or when a policy is purchased with community property. See also Rev. Rul. 79-46.

6 Treas. Reg. § 20.2042-1(c)(4).

7 Rev. Rul. 84-179; *Estate of Skifter v. Comm'r*, 468 F.2d 699 (2d Cir. 1972).

8 Rev. Rul. 95-58. Not including this limiting language creates 2036 and 2038 problems for the settlor (Rev. Rul. 79-353) as well as IRC § 2042 problems (PLR 8922003). Though both these rulings involve facts where the trustee could be removed without cause (as opposed to for cause), risk of estate inclusion is not worth the risk, and compliance with Rev. Rul. 95-58 is advised.

9 IRC § 2035(a), particularly regarding the mention in IRC § 2035(a)(2) of IRC § 2042.

10 IRC § 2035(d).

11 See Rev. Rul. 71-497, Situation 2, in which the decedent purchased an insurance policy naming his children as owners. The ruling would necessarily be the same if the decedent first purchased the policy in his own name and then transferred the policy.

12 *Estate of Headrick v. Comm'r,* 918 F.2d 1263, 1266 (6th Cir. 1990).

13 IRC § 101(a)(2)(B); Rev. Rul. 2007-13.

14 For purposes of this article, discussion of an estate shall include a revocable trust settled by a decedent/settlor.

15 Fla. Stat. § 736.0816(19) (2018).

16 Treas. Reg. §§ 20.2042-1(b)(1) and 20.2042-1(c)(2); But see *Estate of Silas B. Mason,* (1941) 43 BTA 813, for the proposition that property will only be included to the extent actually used to pay debts.

17 IRC § 2503(b).

18 *Crummey v. Commissioner,* 397 F.2d 82 (9th Cir. 1968), involved IRC § 2503(b), providing that the gift tax annual exclusion applies only to gifts in which the donee has a "present interest," as opposed to a "future interest." The *Crummey* court held a beneficiary's right to withdraw assets gifted to a trust (even if the right to withdraw is only for a limited period) creates a present interest that qualifies the gift for the gift tax annual exclusion.

19 IRC § 2503(b)(1).

20 IRC § 2514(b).

21 See for example PLR 9804047.

22 IRC § 2702.

23 The beneficiaries would be treated as having transferred property to the trust while retaining an interest in the trust. This quite likely invokes IRC § 2036 and causes a portion of the trust to be included in each beneficiary's estate.

24 IRC § 678(a)(1).

25 IRC § 678(a)(2).

26 IRC §§ 671-679.

27 IRC § 671-679.

28 While § 678(b) plainly only applies to a power over income, see PLR 2000603040, in which the IRS has privately held that IRC § 678(b) would prevent a beneficiary from being treated as grantor of any portion of the trust even though the beneficiary had a power of withdrawal over principal due to the grantor being treated as owner under IRC § 677(a)(1).

29 IRC § 2041(a)(2); Rev. Rul. 79-373; Treas. Reg. § 20.2041-3(d)(3).

30 IRC § 2652(a)(1)(A); Treas. Reg. § 26.2652-1(a)(1).

31 Treas. Reg. § 26.2652-1(a)(5) ex 5.

32 Rev. Rul. 86-41; *Comiss'r v. Procter,* 142 F.2d 824 (4th Cir. 1944)

33 *Estate of Maria Cristofani,* 97 T.C. 74 (1991).

34 See for instance PLR 8004172.

35 Given that inaction is easier than taking affirmative action, it would be prudent to require written direction that contributions are *not* subject to withdrawal, i.e., having the trust's "default rule" be that contributions are subject to withdrawal, as the alternative of requiring written instruction that contributions *are* subject to withdrawal would likely result in many contributions being ineligible for the gift tax annual exclusion due to failure of the settlor to provide such instructions, either through inattentiveness or forgetfulness. See also Issue #1 of this article for problems brought about through client inattention.

36 While not specifically addressing this issue, PLR 8901004 held, in the context of an intended non-grantor trust, that a settlor's power to exclude beneficiaries from participating in withdrawal rights was insufficient by itself to cause the settlor to be treated as owner for income tax purposes under the "grantor trust rules," IRC §§ 671-679. As these rules are easier to trigger than those for gross estate inclusion, it can be reasoned that such a power would not bring the property into the settlor's gross estate.

37 TC Memo 2011-209.

38 See *Estate of Headrick v. Comm'r,* 918 F.2d 1263, 1266 (6th Cir. 1990), involving a trustee paying premiums with funds provided by the insured, *Estate of Leder v. C.I.R.,* 893 F.2d 237, 242 (10th Cir. 1989), involving the insured's wholly owned corporation paying premiums, and *Perry v. Commissioner,* 927 F.2d 209 (5th Cir. 1991), involving the insured's payment of premiums which were issued to the decedent's sons as owners.

39 *Estate of Leder,* at 239-241.

40 IRC § 2642(c)(2)(A).

41 IRC § 2642(c)(2)(B).

42 Treas. Reg. § 26.2654-1.

43 IRC § 2632(c).

44 IRC § 2632(c)(5).

45 Fla. Stat. § 518.11(2018).

46 Fla. Stat. § 736.0902(5)(a) (2018).

47 Fla. Stat. § 736.0902(5)(b) (2018).

48 Fla. Stat. § 736.0902(5)(b)4 (2018).

49 Fla. Stat. §732.507(2) (2018).

50 Fla. Stat. § 736.1105 (2018).

51 See for instance Uniform Probate Code § 2-804 (amended 2010) and the comments thereunder, discussing "will substitutes."

52 *Stillman v. Teachers Ins. & Annuity Ass'n Coll. Ret. Equities Fund,* 343 F.3d 1311, 1318 (10th Cir. 2003) (quoting Statement of the Joint Editorial Board for Uniform Probate Code Regarding the Constitutionality of Changes in Default Rules as Applied to Pre-existing Documents at 4 (1991)).

53 See Rev. Rul. 80-255; *Estate of Tully v. United States,* 528 F.2d 1401 (Ct. Cl. 1976).

54 PLR 8819001.



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An Overview Of REIT Qualification Requirements And Common Structures

By Arkadiy (Eric) Green, CPA and David R. Shanks, Esq. LL.M., Boca Raton, Florida

The recent explosion in real estate development in the State of Florida has seen investors from all over the United States and, indeed, the world coming to the Sunshine State. Many real estate holding entities have opted for a Real Estate Investment Trust (REIT) structure in which to hold title to their investments. The question becomes whether this structure is right for your client. The following article is an overview of REIT history and qualification requirements. The article also contains a high-level discussion of commonly used REIT structures. There are many nuances to these complex real estate holding and operating structures. Thus, a tax professional should always be consulted before deciding on an ownership structure.

Background

Generally, a REIT is a corporation with special tax treatment that, in most cases, results in a single taxation of income to the shareholders (i.e., most REITs do not pay tax at the corporate level). REITs were created to facilitate public investment in commercial real estate.[1] REITs allow investors to invest in large-scale, income producing property and mortgages, provide access to real estate investments without directly investing in real estate, and provide liquidity by establishing a market for a REIT's shares.

A typical REIT is a company which owns, and may operate, income-producing real estate or real estate assets such as office buildings, shopping malls, multi-family properties, or warehouses, etc. REITs typically acquire and/or develop assets to hold them as part of their long-term investment portfolio. REITs are generally precluded from being a dealer by being subjected to a 100% prohibited transaction tax on gains from sale of dealer type property. In contrast, non-REIT entities may prefer to develop properties and resell upon completion.

Today, there are approximately 225 publicly traded REITs, plus many more privately held REITs.[2] There are three kinds of REITs.[3] An Equity REIT, the most common kind of REIT, owns and operates income-producing real estate.[4] A Mortgage REIT provides money to real estate owners through mortgages or through mortgage backed securities.[5] A Hybrid REIT is combination of Equity and Mortgage REIT.[6] The State of Florida has seen growth in all three kinds of REITs.

REITs have been around since 1960,[7] originating out of Massachusetts Business Trusts.[8] Congress intended REITs to operate similarly to Regulated Investment Companies (RICs), commonly known as mutual funds. Thus, a REIT is similar to a mutual fund but for real estate. A REIT cannot, however, be a financial institution or insurance company.[9]

The Real Estate Investment Trust Act of 1960 required REITs to hire third party companies to provide all management and leasing services.[10] However, over time these requirements have been relaxed. Since the Tax Reform Act of 1986, REITs have been allowed to manage their own properties and provide certain customary services to tenants either directly or through an independent contractor. Also, since the enactment of the Tickets to Work and Work Incentives Improvement Act of 1999, REITs have been allowed to use Taxable REIT Subsidiaries ("TRS") to provide customary and non-customary services to tenants.[11]

The REIT's key tax benefit is the "dividends paid" deduction which generally allows REIT shareholders to avoid double taxation. By paying out the dividends to shareholders, most REITs are able to avoid the tax normally assessed at the corporate level. REIT shareholders still experience the typical benefits of owning real estate, such as deductions for interest payments, depreciation, and operating expenses taken at the REIT level. However, unlike partnerships and S corporations, REITs are not true "flow-through entities" in the sense that the REIT's income and losses do not flow through to the shareholders' tax returns. Instead, REIT shareholders must pay taxes on the dividends they receive from a REIT, which can be either ordinary or capital gains dividends. It is important to note that the recent Tax Cuts and Jobs Act included a substantial benefit for individual REIT shareholders by establishing a deduction equal to 20% of the shareholder's ordinary REIT dividend income (which, unlike a similar deduction for flow-through entities, is not subject to limitations based on wages paid and basis of qualified property).[12]

Key Requirements

In exchange for this special tax treatment, REITs are required to meet a number of organizational and operational requirements. In practice, establishing and maintaining the REIT requirements can be a substantial administrative burden for the REIT. The stakes become even higher when the REIT's exit strategy involves the sale of REIT shares, in which case the REIT will typically have to prove to the buyer (as part of buyer's due diligence process) that the REIT has complied with all of

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the REIT qualification requirements throughout its life as a REIT. Still, in many cases, the benefits of being a REIT can well outweigh the additional administrative costs and complexity.

1. Organizational Requirements
   a. A REIT must be organized as a corporation, trust or association and be managed by one or more trustees or directors.[13]
   b. Beneficial ownership of the REIT must be evidenced by transferable shares.[14]
   c. A REIT must generally have a minimum of 100 shareholders.[15]
   d. A REIT cannot be closely held, that is more than 50% of the REITs shares cannot be held by five or fewer individuals.[16]
2. Quarterly Asset Tests
   a. At the close of each quarter, at least 75% of value of a REIT's total assets must consist of real estate assets, cash or cash items, and government securities.[17] Real estate assets generally include real property, mortgages on real property, shares in other REITs, and certain personal property leased with real property (to the extent that such personal property does not exceed 15% of combined real and personal property value).[18]
   b. Beginning in 2018, not more than 20% of the value of the REIT may consist of securities of one or more Taxable REIT Subsidiary (TRS).
   c. Not more than 25% of the value of the REIT assets may be represented by non-qualified publicly offered REIT debt instruments.
   d. A REIT's investment in securities of any one issuer (except for securities qualifying for the 75% asset test and securities of a TRS) cannot:
      i. exceed 5% of the value of the REIT's total assets,
      ii. represent more than 10% of the total voting power of any one issuer's securities, or
      iii. represent more than 10% of the value of the securities of any one issuer.
3. Income Tests
   a. At least 75% of the REIT's gross income for the taxable year must be derived from:
      i. rents from real property;
      ii. interest from mortgage obligations;
      iii. gain from the sale of real property and mortgages on real property;
      iv. other specified real estate source income;
      v. dividends from other REITs;
      vi. abatements or refunds from real property tax;
      vii. income and gain from "foreclosure property"
      viii. certain commitment fees;
      ix. income from certain temporary investments of new capital.[19]
   b. at least 95% of the REIT's gross income must be from income items qualifying for the 75% income test, and other interest, dividends and gain from the sale of stock or securities.[20]

For REIT income test purposes, rents from real property generally include: 1) amounts received for the right to use real property; 2) additional amounts collected from tenants for their share of real estate taxes or operating expenses and utilities; 3) rent attributed to personal property leased under a lease for real property if personal property rent does not exceed 15% of the total rent; and 4) charges for "customary" services rendered in connection with rental or real property.[21]

Rents from real property generally exclude: 1) rent based on net income or profits of any person (however, rents based on gross income are generally permissible); 2) related party rents (if the REIT owns 10% or more interest in the tenant, determined by applying specific attribution rules); and 3) impermissible tenant services income. If impermissible service income from a property exceeds 1% of total revenue derived from the property, then all income from the property is "tainted" as non-qualifying income (however, a TRS can generally provide impermissible services income to REIT's tenants without tainting rents).[22]

4. Distribution Requirements
   a. A REIT must distribute 90% of its real estate investment trust taxable income ("REITTI").[23] The deduction for dividends paid for the taxable year must equal or exceed:
      i. (i) 90% of REITTI (excluding capital gain and without regard to the dividends paid deduction);[24] and
      ii. (ii) 90% of the excess of net income from foreclosure property over the tax on such income, minus any excess noncash income.[25]

Failure to Qualify

Failure to meet the REIT qualification requirements have harsh results: a REIT entity could be treated like a regular C corporation (i.e., losing the dividends paid deduction), or it could be fined.[26] Failure may also result in a loss of REIT status for five years, unless the IRS grants a waiver for some portion of years.[27]

However, there is a Reasonable Cause Exception for failing an income test, under which a REIT may retain its REIT status if the failure is due to reasonable cause and not willful neglect, and if the REIT pays a penalty tax.[28]

REITs are generally allowed to cure timely identified asset test violations by disposing the "bad" assets within 30 days after the end of a REIT's calendar quarter. There are also exceptions

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for failing an asset test beyond the 30 day cure period. First, there is an exception for de minimis failure of the 5% or 10% securities asset tests, as long as the asset that caused the failure does not exceed the greater of 1% of total value of a REIT's assets or ten million dollars ($10,000,000.00) and is disposed within six (6) months after last day of quarter of identification.[29] Second, there is an exception for non de minimus failure – as long as the asset that caused the failure is disposed within six (6) months after last day of quarter of identification; the failure is due to reasonable cause and not willful neglect; and the REIT pays penalty tax of greater of fifty-thousand dollars ($50,000.00) or the amount computed as the net income from the asset multiplied by the highest corporate tax rate.

Commonly Used REIT Structures

While REITs can raise capital and hold assets directly, most REITs use more complicated structures known as UPREITs and DownREITs in order to take advantage of certain tax benefits and additional structuring flexibility that these structures may provide. REITs may also decide to comply with certain additional requirements in order to facilitate their foreign and tax-exempt investors.

In an Umbrella Partnership REIT structure ("UPREIT"), a REIT does not own assets directly but rather contributes its capital to an Operating Partnership ("OP") which then invests in real estate assets (either directly or through other partnerships). The UPREIT structure was designed to get around recognition of taxable income by investors who wanted to contribute appreciated assets to a REIT and achieve asset diversification.[30] In a typical UPREIT transaction, OP investors contribute appreciated assets to the OP in exchange for OP units that are economically equivalent to shares of a REIT's common stock (if structured property, this can be accomplished as a non-taxable transaction). OP investors typically negotiate for "put rights" which allow them to ultimately "put" their OP units in exchange for cash or REIT shares in a one-for-one ratio of OP Units and REIT stock (which results in a taxable event for the OP investors).

The DownREIT structure often provides additional structuring flexibility for REITs. In a typical DownREIT structure, the REIT (or the OP of an UPREIT) enters into a partnership (or a variety of partnerships) with third party property owners who contribute property into a DownREIT Partnership. (If structured property, this can be accomplished as a non-taxable transaction.) The contributing property owners may also receive "put rights" which allow them to ultimately exchange their DownREIT Partnership interests for cash or REIT shares; however, such put options are typically valued by reference to the property of the DownREIT Partnership (and not the REIT).

When it comes to foreign investors, Domestically Controlled REITs ("DC REITs") provide significant benefits. A DC REIT is a REIT with more than 50 percent of the value of its stock owned, directly or indirectly, by U.S. persons. DC REITs can be structured to allow foreign investors to sell the stock of the DC REIT without incurring U.S. tax. DC REITs also act as good "blockers" and can help minimize U.S. federal and state tax filing obligations for foreign investors. DC REIT's operating dividends paid to foreign shareholders are still subject to U.S. tax at a flat 30% rate (which may be reduced by a treaty). FIRPTA rules also generally subject DC REIT's capital gain dividends to U.S. income tax. However, disposition of DC REIT's stock by foreign investors is generally exempt from FIRPTA.

Foreign governments that invest in non-controlled U.S. REITs may also qualify for exemption from U.S. federal tax under Section 892 on income derived from investments in US stocks (such as dividends or interest received from a non-controlled U.S. REIT), and their gains from the sale of stock of a non-controlled U.S. REIT are generally also exempt from U.S. federal tax.[31] For these exceptions to apply, a REIT cannot be a "controlled commercial entity," which is defined as an entity engaged in commercial activities if 1) 50% or more of its interest (by value or vote) is held directly or indirectly by the foreign government, or 2) the foreign government holds any interest in such entity which provides it with effective control.[32]

Since REITs are C corporations, they can often serve as good unrelated business taxable income (UBTI) blockers for U.S. tax-exempt investors. However, a section 401(a) pension trust shareholder that owns more than 10% of the value of stock of a "pension-held" REIT may still be subject to UBTI on a portion of dividends received. Generally, a pension-held REIT is a REIT that would have failed to satisfy the "not-closely held" requirement except for the special look-through rule for pension trusts[33] and that is predominantly held by pension trusts. A REIT is considered predominantly held by pension trusts when either (1) one pension trust shareholder owns more than 25% of value of the REIT's stock, or (2) when one or more greater than 10% pension trust shareholders hold in the aggregate more than 50% of value of the REIT's shares.[34]

Conclusion

In conclusion, REITs can provide substantial tax benefits to both domestic and foreign shareholders. As a trade-off, however, REITs are subject to complex regulatory requirements which carry additional administrative burden and costs of compliance. Structuring and negotiating a REIT related transaction can easily become a very technically complex undertaking, and it is imperative to get a group of competent tax advisors involved as early as possible in the planning process.


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Endnotes

1 Franklin Allen Et Al, Principles of Corporate Finance 395 (9Th Ed. 2008).

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7 Michael K. Carnevele, Esq. "Real Estate Investment Trusts," 742-3rd Tax Mgmt. (BNA) at A-1 (May 1, 2008).

8 William Dockser, Real Estate Investment Trusts, An Old Business Form Revitalized, 17 U Miami L. Rev. No. 2, Winter 1962 115 (1962), available at: http://repository.law.miami.edu/umlr/vol17/iss2/1.

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11 The Ticket to Work and Work Incentives Improvement Act of 1999, Pub. L. No. 106- 170, 113 Stat. 1942.

12 Tax Cuts and Jobs Act, Pub. L. No. 115-97, 131 Stat. 2054.

13 26 U.S.C. § 856(a)(1); Treas. Reg. § 1.856-1.

14 26 U.S.C. § 856(a)(2); Treas. Reg. § 1.856-1(b)(2) and (d)(2).

15 26 U.S.C. § 856(a)(5).

16 26 U.S.C. § 856(h)(1)(B) and the definition of "closely held" under 26 U.S.C. § 542(a)(2).

17 26 U.S.C. § 856(c)(4)(A).

18 26 U.S.C. § 856(c)(9)(A).

19 26 U.S.C. § 856(c)(3).

20 26 U.S.C. § 856(c)(2).

21 Treas. Reg. § 1.856-4(a).

22 26 U.S.C. § 856(d)(7)(B); see also Rev. Rul. 98-60, 1998-51 C.B. 16.

23 26 U.S.C. § 857(b)(2).

24 26 U.S.C. § 857(a)(1)(A)(i).

25 26 U.S.C. § 857(a)(1)(A)(ii).

26 26 U.S.C. § 856(g)(5).

27 26 U.S.C. § 856(g)(3).

28 26 U.S.C. § 856(c)(7) as defined by 26 U.S.C. § 582(c)(2).

29 Id. at § 856(c)(7)(B).

30 Since the non-recognition rule of section 351 does not apply to transfers to an "investment company", investors would generally have to recognize any built-in gain upon direct contribution of appreciated assets to a REIT.

31 Treas. Reg. § 1.892-3T.

32 26 U.S.C. § 892(a)(2)(B).

33 26 U.S.C. § 856(h)(3)(A).

34 26 U.S.C. § 856(h)(3)(C) and (D).



Delayed Discovery Doctrine: How Long Does A Litigant Have To Bring An Undue Influence Claim?

By Stacy B. Rubel, Esq., The Virgil Law Firm, Coral Gables, Florida

When it comes to challenging estate planning documents, one of the most prevalent challenges is on the grounds of undue influence. The Florida Probate Code indicates that a will, or any part thereof, is void if the execution is procured by fraud, duress, mistake, or undue influence.[1] However, given that a will must be admitted to probate, contesting the validity of a will is not subject to any traditional statute of limitations because it is treated as a defense to the admission of the will. The Florida Probate Rules provide procedural time limitations to contest the will and the applicable time limitation generally depends on what type of notice, if any, interested persons receive. For example, if a petition for administration is served with formal notice, Fla. Prob. R. 5.040(a)(1) provides the recipient only twenty (20) days from receipt of the formal notice to file any objections to the will. If not previously served with formal notice, Fla. Stat. § 733.109 (2018) allows a potential contestant to commence a proceeding to contest the will any time before the final discharge of the personal representative. However, the time-period to contest the will is shortened to three months for anyone who is served with a copy of the notice of administration.[2]

Similar to the Florida Probate Code, Fla. Stat. § 736.0406 (2018) of the Florida Trust Code invalidates to the validity of any portion of a trust procured by fraud, duress, mistake, or undue influence.[3] However, under Fla. Stat. § 736.0207(2) (2018), an action to contest the validity of a trust "may not be commenced until the trust becomes irrevocable by its terms or by the settlor's death." Although the Florida Trust Code does not specify a time limitation to bring such an action, Chapter 95, F.S., sets forth the applicable statute of limitations for various causes of action. Note that while outside the scope of this article, practitioners must be aware of *Pasquale v. Loving*, 82 So. 3d 1205, 1207 (Fla. 4th DCA 2012), which held that a failure to contest a decedent's will that incorporates by reference a trust may bar an interested person from contesting the decedent's trust.

There is a four-year statute of limitations, found in Fla. Stat. § 95.11(3)(j) (2018), for legal or equitable actions founded on fraud. However, Chapter 95 also provides an exception to commencing an action within four years in certain situations where the facts giving rise to the cause of action were not discovered until later. Specifically:

> An action founded upon fraud under s. 95.11(3), including constructive fraud, must be begun within the period prescribed in this chapter, with the period running from the time the facts giving rise to the cause of action were discovered or should have been discovered with the exercise of due diligence, instead of running from any date prescribed elsewhere in s. 95.11(3), but in any event an action for fraud under s. 95.11(3) must be begun within 12 years after the date of the commission of the alleged fraud, regardless of the date the fraud was or should have been discovered.

Fla. Stat. § 95.031(2)(a) (2018). The delay in the accrual of the cause of action based on when the plaintiff either knows or should have known of the tortious act is commonly referred to as the "delayed discovery doctrine."[4]

While undue influence is not specifically referenced in Chapter 95, and while undue influence and fraud each have their own elements to the cause of action, the Florida Supreme Court has defined undue influence as a species of fraud.[5] Should a contestant of estate planning documents have a different period of time to contest a document depending on whether the basis is undue influence versus fraud?

The Second District Court of Appeal recently confirmed that the delayed discovery doctrine applies to undue influence claims in *Flanzer v. Kaplan*, 230 So. 3d 960 (Fla. 2d DCA 2017). In *Flanzer*, Gloria and Louis Flanzer created an *irrevocable*, philanthropic trust in 2005. The trust named the Flanzers' personal accountant and attorney as co-trustees of the trust.[6]

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Louis died in 2013, and Gloria died in March 2015.[7] In November 2015, their daughter, Jan Flanzer, filed suit challenging various estate planning documents executed by her parents, including the trust.[8] The co-trustees filed a motion to dismiss, arguing that Jan was time barred from challenging the trust based on undue influence, because more than four years had passed since the creation of the irrevocable trust.[9] The trial court agreed and dismissed the undue influence count.[10]

The daughter appealed arguing that the delayed discovery doctrine applies to undue influence claims, and therefore her suit was not time-barred. Specifically, Jan Flanzer argued that since courts treat undue influence as species of fraud, undue influence claims are subject to the delayed discovery doctrine.[11] The co-trustees' response highlighted the elements that distinguish undue influence claims from fraud claims in support of their position that the distinctions place undue influence claims outside the meaning of actions "founded on fraud."[12]

When considering whether a document is void based on undue influence, the court must find that the influence amounts "to over persuasion, duress, force, coercion, or artful or fraudulent contrivances to such an extent that there is a destruction of free agency and willpower of the testator."[13] To prove undue influence, there is no requirement that the alleged undue influencer say anything untruthful. On the other hand, fraud requires a false statement of material fact, so it defeats the intent of the testator or settlor based on deception.[14]

The Second DCA agreed with the daughter's argument and confirmed the applicability of the delayed discovery doctrine in undue influence cases.[15] Specifically, the Court found that the terms *founded upon fraud* and *founded on fraud* include more claims than merely fraud itself, and therefore there was no reason why the delayed discovery doctrine would not apply to Jan Flanzer's undue influence claim.[16]

The delayed discovery doctrine is not limited to undue influence claims contesting estate planning documents. For example, in *In re Guardianship of Rekasis*, 545 So. 2d 471 (Fla. 2d DCA 1989), the Second District Court of Appeal found the delayed discovery doctrine applicable when a guardian contested *inter vivos* transfers previously made by the ward to the ward's health care aide. In *Rekasis*, the trial court determined that the guardian's claims were time-barred, as the transfers occurred more than four years prior to the initiation of the lawsuit.[17] However, the Second District Court of Appeal reversed, holding that the time period for bringing the guardian's claim for undue influence, which is treated as fraud in general, begins to run "from the time the facts giving rise to the cause of action were discovered or should have been discovered with the exercise of due diligence but, in any event, within twelve years after the date of the commission of the alleged fraud."[18] The court also held that "facts giving rise to a cause of action based on undue influence do not become discoverable by the exercise of reasonable diligence until the termination of the influence."[19]

Based on the holdings in *Rekasis* and *Flanzer*, the delayed discovery doctrine is applicable to any cause of action for undue influence in Florida.[20] The key question is when did the person bringing the undue influence claim learn of the facts giving rise to the claim or when should the person have learned of the claim using due diligence. The answer when there is a pattern of undue influence may be that the facts are not discoverable until the undue influence terminates, which for estate planning challenges, may be the death of the settlor. Attorneys considering representing a litigant in an undue influence case should be aware of the existence of the delayed discovery doctrine and consider whether the applicability of the doctrine affects their case.


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Endnotes

1 Fla. Stat. § 732.5165 (2018).

2 Fla. Stat. § 733.212(3) (2018); Fla. Prob. R. 5.240.

3 Fla. Stat. § 736.0406 (2018) provides that "[i]f the creation, amendment, or restatement of a trust is procured by fraud, duress, mistake, or undue influence, the trust or any part so procured is void.

4 *See Hearndon v. Graham*, 767 So. 2d 1179, 1184 (Fla. 2000).

5 *Peacock v. DuBois*, 105 So. 321, 322 (Fla. 1925).

6 *Id.* at n.1.

7 *Id.*

8 *Id.*

9 *Id.*

10 *Id.*

11 *Id.* at 962.

12 *Id.*

13 *Raimi v. Furlong*, 702 So. 2d 1273 (Fla. 3d DCA 1997).

14 *Finney v. Frost*, 228 So. 2d 617, 618 (Fla. 4th DCA 1969).

15 *Flanzer*, 230 So. 3d at 962.

16 *Id.*

17 *Id.*

18 *Id.* at 473.

19 *Id.* at 474.

20 To reiterate, in those situations where a trust is incoporated by reference into the decedants' will, the *Pasquale* holding may limit the time to contest the trust for undue influence despite the general applicability of the delayed discovery doctrine.

POLITICAL ROUNDUP

The Table is Set for November Elections

By Cari L. Roth, Esq., Dean Mead & Dunbar, Tallahassee, Florida

The August 28th primary is now behind us, and the ballots are set for the General Election on November 6, 2018. The primary races were intense, raucous and expensive. But, before we talk about November races, a few numbers.

Registered Voters: As of the primary, there were about 13 million voters registered in the State. This was a 1.2% increase over the 2016 election. Slightly over 4.6 million voters are registered Democrat, and almost 4.2 million are registered Republican. Since 2016, voters choosing not to register with any party have grown more than 3 times faster than party registrations. No Party Affiliation (NPA) voters are now a whopping 26.8% of the voters in Florida. While these voters had no vote in partisan primaries, they will be the focus of electioneering statewide and in several swing legislative seats where party registrations are close.

Voter turnout: While voter turnout is traditionally lower in non-presidential election years, the unusual number of competitive statewide races generated a much healthier voter turnout in this primary. Statewide, turnout was 27.4% compared to 17.6% in the 2014 primary. Voter rich Broward County increased its turnout by over 12.5 percentage points. Keeping with recent trends, a record number of voters used vote by mail or early polling opportunities. By primary day, nearly 2 million Floridians had already cast their votes.

Campaign Funding: Contributions in advance of an election used to be a great indicator of a candidate's strength, but in this primary election cycle, this old truism was faulty. Many candidates with the most cash did not prevail, nor did the candidates who funded their campaign mostly out of their own pockets.

Statewide Races

Governor: In 2016, Congressman Ron DeSantis briefly ran for U.S. Senate while Sen. Marco Rubio sought the Republican nomination for President. When Rubio opted out of the Presidential race, DeSantis chose not to run against him, and he eventually pivoted to the Governor's race. Two other candidates who could have garnered enough votes to change the outcome of the primary, Speaker Richard Corcoran and Sen. Jack Latvala, dropped out of the race, and it was left to DeSantis to take on Agriculture Commissioner Adam Putnam, a long-time favorite son of many in the Florida Republican party. Putnam had a good head start in both campaign organization and funding, and appeared invincible, polling well ahead in the beginning of the summer. Then DeSantis gained the full-throated endorsement of President Trump in June, and the tide turned. While Putnam tried in vain to get voters to focus on his expertise on Florida issues, Trump's blessing plus the free media opportunities as a frequent guest on Fox News gave DeSantis a huge boost. Despite being out-spent by Putnam 2-1, DeSantis had a decisive victory in the Republican primary by a margin of 56.4% – 36.5%.

In the Democratic primary, a crowded field yielded a surprising victory to Tallahassee Mayor Andrew Gillum. Early polling showed Miami Beach mayor Phillip Levine ahead, then those numbers changed going into the election and showed former Congresswoman Gwen Graham leading. Gillum was polling well below Graham, Levine and Palm Beach businessman Jeff Greene in all polling, but late in the campaign he gained the endorsement of Sen. Bernie Sanders. He also had considerable funding and ground game assistance from progressives from out of state. The energetic and strategic

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efforts in the most populous counties, plus the dynamics of a crowded race gave Gillum a victory in all the most populous counties, earning 34.3% of the statewide vote to Graham's 31.33%. Graham won in more counties, but the overwhelming numbers from Miami-Dade, Broward, Orange and Hillsborough put Gillum over the top. Levine ended up in third with 20.31% of the statewide vote. Jeff Greene, a late addition to this field, ran fourth with 10.07% of the vote. Interestingly, Gillum and Graham were both vastly outspent by Levine and Greene, both of whom put a great deal of personal wealth into their campaigns. Winter Park businessman Chris King rounded out the field with just 2.48% of the vote.

The unexpected Gillum/DeSantis match up has the party strategists pondering a path to victory for their candidate. This election will turn on who can motivate their base to come out, and who can excite the involvement of independent voters. Remember that 26.8% of independent voters? As close as elections have been in our state the last several rounds, appealing to these 3.5 million voters will be an important part of the strategy.

With these candidates, this race for Governor is already of great national interest and will most certainly keep the focus on national rather than Florida issues. Both candidates relied heavily on out-of-state funding, and that will probably continue. Motivating their party's base is key. Gillum has his work cut out uniting the voters for his four rivals behind him, despite the candidates' endorsements. But the historic opportunity for a 39-year-old black man to be Governor of Florida should keep his voters energized. He ran a pretty positive campaign in the primary, but in order to get moderate Democrats and independents to vote for him, he will have to play up fears of a Trump supporter leading Florida. And while he is a seasoned politician, there is an open FBI investigation in Tallahassee of corruption. Gillum says he's not the target, but a former associate and political supporter is, and this will remain an issue. On the Republican side, the President's support in the primary was clearly decisive for DeSantis, but will it help him motivate more than the dedicated Republican voter base? Recent polling has the President's negatives outdistancing his approvals amongst Independents and registered Democrats. While the more centrist Graham might have lured some cross-over Republicans, Gillum is less likely to do so. Whoever wins, we will have the youngest Governor in quite some time. Both DeSantis and Gillum are 39.

Attorney General: The Republican primary for this race narrowed to two candidates, House member Frank White from Pensacola and former Assistant U.S. Attorney and Circuit Court Judge Ashley Moody from Tampa. Rep. and Section member Ross Spano dropped out of this race to run for Congress (and won his party's nomination for that seat on primary day.) Rep. Jay Fant, also dropped out. This race turned ugly, but in the end, Ashley Moody prevailed with 56.8% of the votes cast. White put considerable personal and family wealth into his campaign and outspent Moody almost 2-1.

Rep. Sean Shaw, former Consumer Advocate under CFO Alex Sink, won the Democratic Party nomination. He handily beat Ryan Torrens, 74% to 26%. Torrens raised little to support his candidacy. He had more publicity from Shaw's efforts to have him removed from the ballot for election finance violations than any campaigning he did. (While the Circuit Court agreed with Shaw, the appellate court declined to consider the case before the election.) The Moody/Shaw match up will pit two youthful Tampa based attorneys against each other.

Agriculture Commissioner: This open Cabinet seat attracted much attention from both parties. Rep. Matt Caldwell from Ft. Myers won a four way Republican primary with 34.6% of the votes cast, followed by Sen. Denise Grimsley with 26.6%, former Rep. Baxter Troutman with 26%, and Mike McCalister with 12.7%. Caldwell spent the least amount of the three major candidates but worked tirelessly crisscrossing the state, as documented in the social media following #2lanetravels, introducing himself to the party faithful. An NRA endorsement certainly helped his candidacy as well. Caldwell will face attorney and medical marijuana lobbyist Nikki Fried, who easily won a three-way Democratic primary with almost 59% of the votes cast. In what was supposed to be the year of the woman, Fried is the only remaining female statewide candidate.

Chief Financial Officer: This was the only statewide race which had no primary. Former Rep. and Public Service Commissioner Jimmy Patronis was appointed to the CFO position when Jeff Atwater resigned early to take a position with Florida Atlantic University. Patronis' fundraising has been very successful, raising over $4 million. The sole Democrat in the race is former Sen. Jeremy Ring. Ring is considerably behind Patronis in fundraising, but this year we've seen a decreased advantage gained by campaign spending. Ring's Senate seat covered populous Broward County and may benefit from an excited Democratic base turning out for the Governor's race.

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US Senate: Governor Rick Scott, termed out of his current post, is challenging long-serving Sen. Bill Nelson for a Senate seat which has national importance in a closely divided U.S. Senate. Scott easily won his primary and the race between Scott and Nelson is fully engaged. The economy and environment are hot issues as will be judicial appointments and the President's agenda. The race is proving to be as rancorous as expected.

State Senate: In November, 2018, the leadership of the Florida Senate will be taken over by Republican Sen. Bill Galvano, an attorney from Bradenton, Florida. Galvano, with 7 years of service in the Florida House, and 6 in the Florida Senate, has proved to be a steady leader in this body. While half of the Senate would be up for election this year, two sitting Senators, both Democrats, were unopposed. Sen. Daphne Campbell (D) lost her reelection bid in the primary to Jason Pizzo, who has no general election opposition. And Sen. Gary Farmer (D) beat former Rep. Jim Waldman to win the Democratic primary for his seat, and he has only write-in opposition for the general election.

Galvano leads election efforts for a Senate that currently has a Republican majority, with 23 seats held by Republicans. Only three Senate seats have no incumbent. One is the Pinellas and Pasco County based seat formerly held by Jack Latvala. In that seat, former Rep. Ed Hooper handily won his Republican primary and will face former House member, Amanda Murphy. Hooper's support is reflected in fundraising which has far outdistanced Murphy's in this seat which leans solidly Republican. In the race to replace Sen. Grimsley, Rep. Ben Albritton faces slim opposition in the general election. In the Miami-Dade seat now held by termed out Sen. Garcia (R), Rep. Manny Diaz (R), will face David Perez (D). This seat has close party registrations, but Diaz had a huge head start over the late entry Perez and has the endorsements of many local officials and the departing Garcia.

Most of the remaining Senate seats on the November ballot are comfortably controlled by Republicans or Democrats, but there are four other Senate seats held by Republicans, and one seat held by a Democrat in districts with tight party registrations. In Pinellas County, Sen. Brandes faces opposition from political newcomer Lindsay Cross, placed on the ballot at the last possible minute by party appointment after the original candidate dropped out. Brandes has a daunting lead in the campaign including funding. Across the bay in Hillsborough, Sen. Dana Young (R) is being challenged by former House minority leader, Janet Cruz in a seat which, by the numbers, could be won by a Democrat. Both women will have plenty of financial resources but Young's campaign work ethic is legendary. Young has been a frequent sponsor of Section initiatives.

In Polk County, Sen. Kelli Stargel (R) will face retired Circuit Court Judge Bob Doyel who shrugged off a primary challenge by former Rep. Ricardo Rangel. Stargel has served 8 years in the House and 4 in the Senate and has also sponsored Section legislation. History and numbers favor a Stargel reelection. Another sitting Republican who may be in a tight race is Keith Perry who represents a sprawling Senate district including Gainesville. Perry will face Dr. Kayser Enneking, a first-time candidate. An activated student voting base could make a difference in this election.

In Miami-Dade, Sen. Annette Taddeo (D) beat a well-respected and funded candidate in José Diaz in a special election in late 2017. Sen. Taddeo is back on the ballot this November and is taking nothing for granted. Her opponent is Marili Cancio, an attorney and well-known Republican in the area. Republicans are determined to take back this seat, so expect a hard fought campaign.

State House: While the Florida Senate will not likely have many new faces, the Florida House will have over a quarter of its seats filled by first time members. Speaker-designate José Oliva and the members elected by their peers to follow him, attorneys Rep. Chris Sprowls and Rep. Paul Renner are actively campaigning for their members. Like the Senate, few seats are in areas where party registrations would indicate a tight race, so Republicans are not likely to lose much, if any, ground on their current majority of 75 members. Former Rep. Ray Pilon will try to return to the House by unseating attorney and Section member Rep. Margaret Good in a Sarasota seat Rep. Good won in a special election earlier this year. The area is heavy on Republican voters, but Good may be hard to unseat in this district she just recently won and which votes more purple than red. Section members Will Robinson (R), Sarasota, and Spencer Roach (R), Ft. Myers are running in open seats and are in good position to join the House this fall.

Constitutional Amendments: Thirteen constitutional amendments may be on the ballot. Five were placed there by citizen initiative or legislative action. The final 8 amendments on the ballot were placed there by the Constitutional Revision Commission. As of this writing, many of the initiatives are being challenged for misleading or incomplete ballot summaries. I commend our section to the comprehensive discussion of these amendments in the September/October edition of the Florida Bar Journal.

One final note — Go vote ya'll! Every vote matters.



C. ROTH

***Cari Roth** is a shareholder in the Tallahassee Office of Dean, Mead & Dunbar. For the 35 years that she has practiced law, she has had a combined focus in government affairs, and land use, environmental and administrative law. She is a proud member of the Dean, Mead & Dunbar governmental relations team for the Real Property, Probate and Trust Law Section of the Florida Bar.*

PHOTO CONTEST WINNERS



Second Place by Rohan Kelley



Honorable Mention by Dresden Brunner

Dear Readers:

This issue features a special cover photograph.

At the Annual Convention in St. Pete Beach in June, RPPTL Section members participated in a photo contest. The winning photo is actually on the cover of this magazine. We hope you enjoy it as much as we do.

The editors wish to congratulate Nicole Kibert who was the first place winner for her stunning photograph. In addition, the editors congratulate second place winner, former Section Chair, Rohan Kelley, for his beautiful photograph. Finally, our hearty congratulations also go out to honorable mention award winner, former ActionLine editor-in-chief, Dresden Brunner.

We know everyone who participated enjoyed the photo contest, and we hope all of you who attended the RPPTL Section meeting and Convention enjoyed it as well. Congratulations again to our winners.

—The Editors



RPPTL Section Executive C
Tradewinds Island Resort
St. Petersburg, F
May 31 - June 3



The American College of Real Estate Lawyers.
Back Row Left to Right: Rob Stern, Lee Weintraub, Cary Wright, George Meyer, Chip Waller, Burt Bruton, Alan Fields, Manny Farach, Steve Mezer, Drew O'Malley, Jim Russick, Mike Bedke and John Neukamm.

Front Row Left to Right: Melissa Murphy, Gisela Munoz, Art Menor, Michael Gelfand, Rob Freedman, Peggy Rolando, and Bill Sklar



Alyse and Matthew Comiter and their twins



Martha Edenfield, Debbie Goodall and Sandy Diamond



RPPTL family time on the beach



John Moran and Amy Beller at the podium



Marjorie Wolasky, Steven Goodall and Silvia Rojas (former Actionline Editor-in-Chief)



Chair Deb Boje and Rep. Ben Diamond



Kathy Neukamm playing in the band



Shane and Sean Kelley



Dan Seigel checking in at the convention



Photos by: John Neukamm and Silvia Rojas. Photo editor, Jeff Baskies.

Council Meeting
on St. Pete Beach
Florida
, 2018



RPPTL Painting Class



RPPTLS at the convention

View Photo Albums at www.rpptl.org





Alan Fields and Burt Bruton



2nd Generation: Sebastian Obos and Steven Goodall



Section leaders at work



RPPTL Section beach party



John Neukamm (former ActionLine editor in chief) and Kathy Neukamm on the beach



Drew O'Malley and Debra Boje

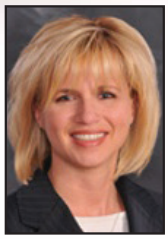


Stacy Rubel and Danny McDermott

SECTION SPOTLIGHT

Congratulations To The 2017-2018 Awards Recipients

By Mike Bedke, Esq., DLA Piper, LLP, Tampa, Florida


W. KIGHTLINGER


M. GELFAND


A. DOBREV


T. HAYES


A. ARCHIBOLD


J. BASKIES


M. BEDKE

While there were no tuxedos, flowing gowns, red carpets or klieg lights, as is done at each of its annual meetings, Section awards were presented to various members for service to the Section and the public.

Wilhelmina "Willie" Kightlinger received the **Robert C. Scott Award**. The award is not given every year. Instead, it is bestowed only when the occasion requires appropriately recognizing someone who best exemplifies the devotion, continued commitment and service Mr. Scott provided to the Section during his life. Mr. Scott championed the pre-cursor of the FAR/BAR contract. (Editors' Note: Be sure to read the article in this issue on the recent Diaz case on page 9.) Willie has tirelessly served the Section in a myriad of ways over the years, never overlooking an opportunity to advance the objectives of the Section.

The **William S. Belcher Lifetime Professionalism Award** is another honor presented periodically at the discretion of the Section. The award, when given, is in honor of an Executive Council member's lifetime of commitment and service to the Section, the Executive Council, Florida attorneys, and the public. In order to be recognized with the award, one must promote and exhibit the highest standards of ethics and professionalism. Former Section Chair, **Michael Gelfand** (who continues to be one of the hardest working members of the Section and who is regarded as the "conscience of the Section" by many) received the Award at the 2018 Annual Meeting. You will regularly see photographs taken by Michael appearing in ActionLine.

Alex Dobrev and **Travis Hayes** were co-recipients of the **Rising Star Award**. Alex is a "dirt" lawyer from Orlando and Travis practices in Naples on the "death" side of the Section. Both demonstrated the potential for future leadership in the Section as evidenced by their active and meaningful participation to date in Section committees, projects and activities. Each of these gentlemen has made significant and positive contributions to the Section making them worthy of being designated as "Stars."

The **At-Large Member of the Year Award** was presented to **J. Allison Archibold**. Allison, a former Marine Judge Advocate General (JAG), in recognition of being the outstanding at-large member ("ALM"). Allison provided service to and by liaising with Section "constituents" and advancing key Section initiatives. She was exemplary in promoting No Place Like Home, a program designed to help clear title on property after a natural disaster, in her 12th Circuit. She appeared before city council, worked closely with the local legal aid office, and produced almost twenty NPLH volunteers in a forty-eight hour period.

Finally, the **John Arthur Jones Annual Service Award** has been presented every year for nearly three and a half decades. This award is presented to a Section member rendering dedicated and significantly outstanding service to the Section. This year, the award was presented to two Section members. The recipients were **Jeff Baskies** and **Mike Bedke**, your humbled and appreciative Co-Editors-In-Chief of ActionLine, for continuing work on this publication that provides tremendous value to Section members. Because we are the Co-Editors-In-Chief, we are taking this opportunity to make it clear countless former and current authors, editors, and contributors are far more deserving than us. Our speech (if there were speeches) would be a simple "We accept this award on their behalf, in their honor and with thanks to the readers."

Roundtable

Highlights Of The Meeting Of The RPPTL Section

REAL PROPERTY DIVISION

Saturday, June 2, 2018 – 7:30-9:30 a.m.

Tradewinds Resort – St. Pete Beach

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

Thank you to the Roundtable Sponsor: Fidelity National Title Group

Meeting opened at 7:30 a.m. by Real Property Division Director, Rob Freedman.

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

Introduction of Guests: The Chair opened the floor for introductions of the law students, guests, and Fellows in attendance.

Summary of Naples Roundtable Meeting: There were no comments to the summary of the St. Augustine Roundtable Meeting.

ADMINISTRATIVE MATTERS:

Committee Liaisons for 2018-2019 Bar Year. The Director reminded committee chairs to identify and submit the names of their CLE and Technology Liaisons by June 15, 2018.

Updating Committee Webpages. The Director also reminded committee chairs to update their webpages.

CLE Planning for 2018-2019 Bar Year. Steve Mezer reminded the committee chairs that every committee needs to host a CLE. Webinars are easy and inexpensive and typically receive CLE approval timely.

ACTION ITEMS:

Real Property Problems Study Committee. Christopher Smart discussed the committee's work on Fla. Stat. §§ 712.03 and 712.04 (2018), Marketable Record Title Act. The committee has been working on Fla. Stat. § 712.03 (2018), MRTA to address concerns that practitioners could be inadvertently reimposing restrictions that would otherwise be extinguished by MRTA by preparing deeds and attaching a schedule making the deed subject to the items on the schedule. The proposed amendment would give clarity to the intent of the drafter in order to address this issue.

There was a motion to approve the proposed amendment to Fla. Stat. § 712.03 (2018). The motion was seconded and passed.

Chris also presented a proposed amendment to Fla. Stat. § 712.04 (2018). This proposed amendment was presented last year and did not go anywhere.

This will be an informational item at the Executive Council meeting.

Chris presented the proposed change known as the "Calusa Trust Fix." This proposed amendment would address the judicial exception created by *Save Calusa Trust v. St. Andrews Holdings, Ltd.*, 193 So.3d 910 (Fla. 3d DCA 2016), for restrictions imposed in connection with governmental zoning, development, or building approvals. This did not go anywhere last year.

There was a motion to approve the proposed amendment to Fla. Stat. § 712.04 (2018). The motion was seconded and passed.

These two proposed amendments will be presented as one piece at the Executive Council meeting.

Real Property Problems Study Committee. Sylvia Rojas presented a proposed amendment to Fla. Stat. § 270.11 (2018), Automatic Release of Right of Entry, relating to reservations of mineral rights. Amendments in 1986 provided for an automatic release of the right of entry for parcels that are 20 acres or less only to the TIITF and Florida Board of Education. It did not add the automatic release for local government, state agencies and water management districts. This proposed amendment will do so.

There was a motion to approve the proposed amendment to Fla. Stat. § 270.11 (2018). The motion was seconded and passed.

Title Issues and Standards Committee. Christopher Smart, Chair. Regarding the committee's proposed legislation to create Fla. Stat. § 95.2311 (2018), which would statutorily fix obvious errors in legal descriptions, Chris and Barry Scholnick reported on the committee's work to address some issues discussed at the St. Augustine meeting. After presentation of the revised proposed legislation, much discussion was had and several members, as well as the Real Property Litigation Committee, continued to express concern. This will remain an informational item and will be heard again at the next meeting.

Legislative Proposals:

Remote Notarization. The Director explained that there has been a subcommittee working on this legislation, however this

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will not be a RPPTL bill. Instead of proposing the legislation itself, the goal is to give our lobbyist the Section's full and complete position and authority to lobby on the Section's behalf. The subcommittee will have a final proposal of the Section's position to share at The Breakers for final approval.

COMMITTEE REPORTS:

Attorney-Loan Officer Conference. Robert G. Stern, Chair; Kristopher E. Fernandez and Wilhelmina F. Kightlinger, Co-Vice Chairs. Robert reported that the next ALO conference will be on October 12, 2018, at Loew's Pacific Resort in Orlando. They are looking for new speakers and attendees on the banking side.

Commercial Real Estate. Adele Ilene Stone, Chair; E. Burt Bruton, R. James Robbins, Jr. and Martin D. Schwartz, Co-Vice Chairs. Martin presented. The Committee held a CLE on inside counsel expense from outside counsel. The committee has several more CLEs coming up, including one on sales tax as it relates to real property transactions.

Condominium and Planned Development. William P. Sklar, Chair; Kenneth S. Direktor and Alexander B. Dobrev, Co-Vice Chairs. William presented. He shared that 129 attorneys received board certification in condominium and planned development law this year, the largest number of any certification for inaugural members. Now that there will be a certification review course each year, there is no need for another full day seminar. So, the committee will begin doing more webinar series.

Condominium and Planned Development Law Certification Review Course. Richard D. DeBoest II and Sandra Krumbein, Co-Chairs. Sandra and Richard presented. The committee is already getting ready for next year, identifying speakers, reviewing the program, and revising as necessary. The next certification review course will be in February 2019 in Orlando.

Construction Law. Scott P. Pence, Chair; Reese J. Henderson, Jr. and Neal A. Sivyer, Co-Vice Chairs. Scott presented and reminded everyone that they continue to have monthly meetings and CLEs.

Construction Law Institute. Sanjay Kurian, Chair; Diane S. Perera, Jason J. Quintero and Brian R. Rendzio, Co-Vice Chairs. Brian presented. They had a great event in March with 418 attendees. They are already preparing for next year's event, which will be at the JW Marriott in Orlando on March 7-9, 2019.

Construction Law Certification Review Course. Melinda S. Gentile and Deborah B. Mastin, Co-Chairs; Elizabeth B. Ferguson and Gregg E. Hutt, Co-Vice Chairs. Melinda presented. The committee is already getting ready for next year, identifying speakers, reviewing the program, and revising as necessary.

Development & Land Use Planning. Vinette D. Godelia and Julia L. Jennison, Co-Chairs; Colleen C. Sachs, Vice Chair. Vinette presented. They had a great CLE this meeting on cannabis. The rest of the year will hold conversations on the change in wetlands permitting and how it's being threatened by the state. She reminded the members that there is also good information on their committee website.

Insurance & Surety. Scott P. Pence and W. Cary Wright, Co-Chairs; Frederick R. Dudley and Michael G. Meyer, Co-Vice Chairs. Scott presented. The committee continues to hold monthly calls and CLEs. They just completed a 6-part series on Insurance 101.

Real Estate Certification Review Course. Manuel Farach, Chair; Lynwood F. Arnold, Jr., Martin S. Awerbach and Brian W. Hoffman, Co-Vice Chairs. Manuel presented. The committee was able to combine the real estate certification review course with the condominium and planned development review course this year but will not be able to do so in 2019. The exam will be in May 2019.

Real Estate Leasing. Richard D. Eckhard, Chair; Brenda B. Ezell and Christopher A. Sajdera, Co-Vice Chairs. Brenda presented. The committee had a joint CLE with development land use. On June 20th, the committee will present a CLE on restaurant leasing negotiations on restaurant. They plan to have a seminar on cell towers at the meeting at The Breakers. And, in October, they are planning a CLE on SNDAs.

Real Estate Structures and Taxation. Michael A. Bedke, Chair; Deborah Boyd, Lloyd Granet and Cristin C. Keane, Co-Vice Chairs. Mike presented. The committee is planning another joint CLE with the Commercial Real Estate Committee at The Breakers.

Real Property Finance & Lending. David R. Brittain, Chair; Bridget Friedman, Richard S. McIver and Robert G. Stern, Co-Vice Chairs. David presented. The LIBOR regulatory agency has called for LIBOR to end by 2021. The committee discussed the issues related to this, for example, what happens to loan documents in effect that are based on LIBOR? Another topic on the horizon is the issue of the statutory safe harbor provisions for lenders in homeowners' associations versus condominium associations and how they differ based on whether the association is "initially" named in the foreclosure action. The committee is working on legislation to align the statutes – with the goal of removing "initially" from chapter 720.

Real Property Litigation. Marty J. Solomon and Susan K. Spurgeon, Co-Chairs; Manuel Farach and Michael V. Hargett, Co-Vice Chairs. Susan reported. The lis pendens bill did not pass this year, but the committee will try again. The committee also adopted a motion to ask the Section to seek amicus in *Glass v. Nationstar* dealing with prevailing party attorneys' fees where one party lacks standing to enforce the contract.

Residential Real Estate and Industry Liaison. Salome J. Zikakis, Chair; Louis E. "Trey" Goldman, James Marx and Nicole M. Villarroel, Co-Vice Chairs. Salome presented. The committee had a presentation on FRBar and a joint meeting on block chain and crypto-currency.

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Roundtable

Highlights Of The Meeting Of The RPPTL Section

PROBATE AND TRUST DIVISION

Saturday, June 2, 2018

Tradewinds, St. Petersburg Beach, Florida

By Eamonn Gunther, Esq., Boca Raton, Florida

Thank you to the Roundtable Sponsor: Stout

William ("Bill") Hennessey, Director of the Probate and Trust Division, called the meeting to order at 7:45 AM.

Sponsor Statement. Garry Marshall spoke on behalf of Stout and about their services.

Legislative Update. The following initiatives, relative to estate, probate and trust law, passed the legislature and were approved by the Governor. These include:

Trust Law. HB 413

1. A provision to resolve the inconsistency in the modernization of the statutory authority for decanting trusts;
2. a provision to clarify that the settlor's intent is paramount when interpreting the terms of the trust; and
3. a provision to clarify the duty of a trustee concerning accounting during any period.

Homestead. CS/SB 512

Statutory language for the waiver of any devise restriction of spousal homestead rights under Article X of Section 4 (c) of the Florida Constitution.

Elder Abuse. CS/CS/CS/HB 1059

This was an Elder Law Section initiative creating a cause of action for an injunction to protect against exploitation of a vulnerable adult.

Guardianship. CS/HB 1187

The law expands the rights of the Clerk to conduct audits of annual guardianship reports; it will permit ex parte communications with a judge; and it will permit the Clerk to disclose information to the Department of Family Services or law enforcement agencies as provided in an order of the court.

There is pending electronic notary legislation that is likely to be presented to the Florida Legislature again in its next session. The Section has formed a Committee to study electronic wills. While the Governor vetoed it last year, many predict that it will return, and the Section should be ready to deal with it, including carve-out provisions precluding remote witnessing and a distinct procedure for self-proving electronic wills. The Uniform Law Commission is drafting legislation, as well, that will likely allow for electronic wills and remote witnessing.

ACTION ITEMS

Estate and Trust Tax Planning Committee. David J. Akins, Chair. Bill Fletcher reported on a motion by the Section to adopt a Section legislative position supporting proposed legislation creating Fla. Stat. § 689.151 (2018) to: (1) permit the creation of a joint tenancy with right of survivorship and a tenancy by the entirety in personal property through direct transfers by abolishing the common law unities of time and title required for the creation of a joint tenancy with right of survivorship or a tenancy by the entirety in personal property; (2) to create evidentiary presumptions favoring the creation of a joint tenancy with right of survivorship and a tenancy by the entirety in personal property; and (3) permit the creation of unequal shares in a joint tenancy with right of survivorship in personal property by abolishing the common law unity of interest required for the creation or continuation of a joint tenancy with right of survivorship in personal property.

Probate Law and Procedure Committee. John C. Moran, Chair. John reported on a motion to adopt a Section legislative position supporting for proposed amendment to Fla. Stat. § 733.610 (2018) by expanding the categories of entities and persons related to the personal representative for purposes of determining whether the personal representative, or someone sufficiently related to the personal representative for conflict purposes, holds a substantial beneficial or ownership interest that could create a conflict of interest when engaging in a sale, encumbrance, or other transaction.

INFORMATIONAL ITEMS

Guardianship, Power of Attorney, and Advance Directives Committee. Nicklaus J. Curley, Chair. Nick discussed support for amending several Florida Statutes, including amending Fla. Stat. § 744.331 (2018), to create a new statutory procedure which would allow for the presentation of additional evidence before a petition to determine incapacity is dismissed in the

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event that there is a unanimous finding of the examining committee that a person is not incapacitated.

In addition, Nick also discussed a possible amendment to Fla. Stat. § 744.1097 (2018), to specifically address venue for the appointment of a guardian in minor guardianships proceedings.

Ad Hoc Electronic Wills Study Committee. Sarah Butters, Chair. Bill Hennessey discussed the Committee's current considerations and working proposal on draft RPPTL legislation regarding electronic wills. A detailed discussion was had concerning the proposal.

STANDING COMMITTEE REPORTS

Guardianship Revision Committee. The Committee gave a brief report that it is continuing to work on its revisions to the Guardianship Code. The Committee plans to have a more final working draft by the end of 2018.

Asset Protection. The Committee continues to work on revisions to Fla. Stat. § 736.0505(3) (2018) to broaden the types of trusts that qualify for protection against creditor claims. This will be a joint effort with the Florida Bar's Tax Section. There was also discussion of tenancy by the entirety trusts. Lastly, the Committee reported making progress on its requested revisions to the proposed Uniform Voidable Transfers Act.

Attorney/Trust Officer Liaison Conference. The next ATO Conference will be at the Breakers on August 23 – August 25, 2018.

Estate and Trust Tax Planning. In addition to the Information Item regarding Fla. Stat. § 689.151 (2018), the Committee is working on considerations of enacting a community property trust statute in Florida. The Committee is looking at similar statutes adopted by other states.

Guardianship, Power of Attorney, and Advance Directives. The Guardianship Committee began with a presentation on behalf of the Florida WINGS initiative which was sanctioned by Chief Justice Labarga to address ongoing concerns relating to the guardianship system and those effected by the system. Additionally, the Committee debated a near completed proposal to Fla. Stat. § 744.387 (2018) to raise the monetary threshold for required minor guardianships from $15,000 to $25,000 with further discretion to the judiciary. Furthermore, the Committee addressed inconsistencies between circuits on how the Court required elisor is handled, seeking to address an unnecessarily confusing procedural point of the Guardianship Code.

IRA, Insurance and Employee Benefits. The Committee discussed the *Sveen v. Melin* case and state laws terminating the rights of a spouse named as beneficiary where the named beneficiary is an ex-spouse as of the time of the participant's death. The issue is whether the retroactive application of these laws is constitutional when the beneficiary designation was made prior to the enactment of such state law.

Principal and Income. This Committee is waiting for the Uniform Law Commission to finish its latest draft of the Principal and Income Act before making any proposals to the Executive Council.

Probate and Trust Litigation. The Committee addressed possible changes proposed by the Alternative Dispute Resolution Section of the Florida Bar to rules that will require all court appointed mediators to be certified. Many Sections of the Florida Bar appear to be opposed this effort. The Committee is looking into the ADR's materials and justification for proposing such changes.

Probate Law and Procedure. The Committee is looking into the drafting of a possible elder abuse slayer statute and is considering whether the existing pretermitted spouse statute should include surviving spouses of nonresident decedents. The Committee also continues to work on its ongoing research of other state statutes codifying the rights of Artificial Reproductive Technology Heirs.

Elective Share. The Committee is considering again possible sliding scale provisions and working with the Family Law Section to accomplish same. The Committee is also considering including the amount of family allowance and exempt property in the calculation of the elective share so that it impacts the calculation and is included as satisfaction for the elective share.

Trust Law. The Uniform Directed Trust Act has been finalized. Now the Committee is looking at possible aspects of the Act that Florida may want to adopt.

ADJOURNMENT

The next Probate and Trust Division Roundtable meeting will be held at The Breakers Hotel, Palm Beach, Florida on July 28, 2018.

Title Insurance and Title Insurance Liaison. Raul P. Ballaga and Brian W. Hoffman, Co-Chairs; Alan B. Fields, Cynthia A. Riddell and Melissa N. VanSickle, Co-Vice Chairs. Brian presented. The committee hosted a panel discussion on block chain and crypto-currency.

Title Issues and Standards. Christopher W. Smart, Chair; Robert M. Graham, Brian W. Hoffman, Melissa Sloan Scaletta and Karla J. Staker, Co-Vice Chairs. Christopher presented. The Uniform Title Standards are available in electronic format, which is a great tool; however, it is difficult to keep updated. The committee is working on creating written processes and procedures with the goal of re-engaging law student RPPTL members to help with keeping the electronic version up to date. The committee is now working on sections 6.10-6.13 – enhanced life estate deeds.

Synthetic Debt Is Better Than Convertible Notes For Startup Investors

By Steven M. Chamberlain, Esq., Ocala, Florida

Most startups are funded with convertible notes, but convertible notes often provide bad tax consequences for the investor. For example, if the note calls for delayed payments of interest (e.g., a balloon in three years), then the original issue discount rules require that the investor report the accrued, but unpaid interest (i.e., phantom income).[1] If the business fails, the investor's losses are short-term capital losses (STCLs) which cannot be deducted until it is clear that the debt will not be repaid, and then only against capital gains, plus $3,000 per year.[2]

What is synthetic debt? For purposes of this article synthetic debt is a preferred equity position which is designed to mimic the economics of a convertible note. This is typically accomplished by forming the operating entity as an LLC taxed as a partnership.[3] The operating agreement would provide for:

(1) the investor to become a member by making a capital contribution equal to the face value of what would have been the convertible note;

(2) special allocations of profits to the investor's capital account to mimic interest accruals on the note;

(3) mandatory distributions to the investor in the same amounts and at the same time as those called for under the note;

(4) conversion of the preferred equity into common equity on the same terms as the note; and

(5) whatever other features may be in the note, such as an anti-dilution and change of control clause.

Economics. Once the payments due to the preferred equity holder are set to be the same as the payments due to the convertible note holder, and the note and preferred equity have the same conversion and other features, it becomes difficult to envision a situation where the economic results - other than taxes, of course - would not be the same. After all, preferred equity has the next priority after debt – and shifting debt to preferred equity reduces the debt by the amount shifted.

The only realistic scenario where the status of debt versus equity would potentially be significant as an economic matter would be in the unlikely scenario where the company dissolves with less than enough to pay both its business creditors and the convertible note holders. Even that possibility may be an illusion. The business creditors may be able to use the fraudulent transfer statutes or an involuntary bankruptcy to claw back payments made to the convertible note holders.[4]

Pre-opening expenses. Generally, pre-opening expenses must be capitalized. But IRC § 174 allows R&D expenses to be deducted even though the company is not yet conducting business.[5] A lender is not an owner and thus gets no deductions. Regardless of whether the business is being conducted, the owners may have their losses suspended by the at-risk rules[6] or passive activity loss rules.[7] Those suspended losses will probably be completely wasted if the investor is a lender and the business fails.

Special allocations of deductions. However, if the investment is structured as preferred equity, the operating agreement could specially allocate deductions to the investor up to the amount of his or her investment.[8] The at-risk rules will not suspend such deductions because the investor made an actual investment. However, the passive activity loss rules will usually suspend those deductions until the investor disposes of the investment or the investor has income from that or another passive activity. Even if deferred, at least the deductions will not be wasted.

Valuation. Promoters often spend considerable effort coming up with a value for their contributions to the business. Besides emotional considerations, what does the valuation accomplish? Clearly, the valuation affects the economics because the promoter gets a capital account (usually with a zero basis). However, it is easy to mimic those economic results via drafting of equity positions.

One problem in that regard is that special allocations of deductions reduce the partners' capital accounts. If there is a desire that the investors and the promoters be on equal footing (e.g., equal capital accounts) after all the investors' contributions are deducted, it will often be the case that the intended economics and tax effects can only be achieved if the promoters' contributions get a zero valuation.

LTCG Royalties. If the business involves some technological improvement, it may be that the royalty stream from a licensing of the technology will be eligible for long-term capital gain (LTCG) treatment under IRC § 1235. That benefit is not available

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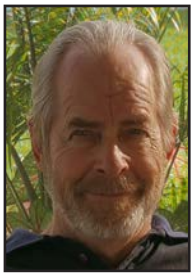
to a creditor. Even if the creditor converts to partner status, the tax benefit is not available if the conversion happens after the technology is reduced to practice.[9]

Conclusions. For investors in a startup company, any economic disadvantage of being a preferred equity holder instead of a creditor is minimal and perhaps just an illusion. The ability to deduct their investments, avoid both phantom income and STCLs and possibly qualify for LTCG treatment on a royalty stream makes synthetic debt (i.e., preferred equity) clearly superior to a convertible note.


S. CHAMBERLAIN

***Steve Chamberlain** is a tax attorney practicing in Ocala. He has a degree from MIT and was an economist before getting his J.D. and LL.M. degrees from UF. He has been a long-time member of the Executive Council of the Tax Section, where he founded the Bankruptcy/Tax Committee. He has had several articles published in the Florida Bar Journal and has given numerous CLE lectures. His latest passion is designing an internet site and YouTube video, including a calculator, to explain how a small business owner can convert future income to capital gain without losing control.*

Endnotes

1 IRC § 1272, *et. seq.*

2 IRC § 1211(b). Of course, ordinary losses could be reported if the investor is in the business of making loans.

3 Not only are special allocations possible with partnership status, but convertible debt could be considered a second class of stock which would terminate an S election. (IRC § 1361(c)(5)(B)(ii)). Further, IRC §1235 benefits (discussed below) are not available unless the operating entity is a sole proprietorship or partnership.

4 *See, Fla. Stat.* § 726 (2016); 11 U.S.C. § 548.

5 IRC § 174 was amended by the Tax Cuts and Jobs Act of 2017 so that after 2021 research and software development expenditures may only be amortized over five years.

6 IRC § 465.

7 IRC § 469.

8 To mimic the note, the operating agreement would provide that the special allocations would not affect the "interest" increments to the investor's capital account. Note that ordinary loss treatment may also be available via abandonment. *See*, Treas. Reg. § 1.165-2.

9 The Tax Cuts and Jobs Act of 2017 amended IRC § 1221(a)(3) to exclude "a patent, invention, model or design (whether or not patented), a secret formula or process" as a capital asset, but the author's view is that IRC § 1235 should nevertheless control, if applicable.

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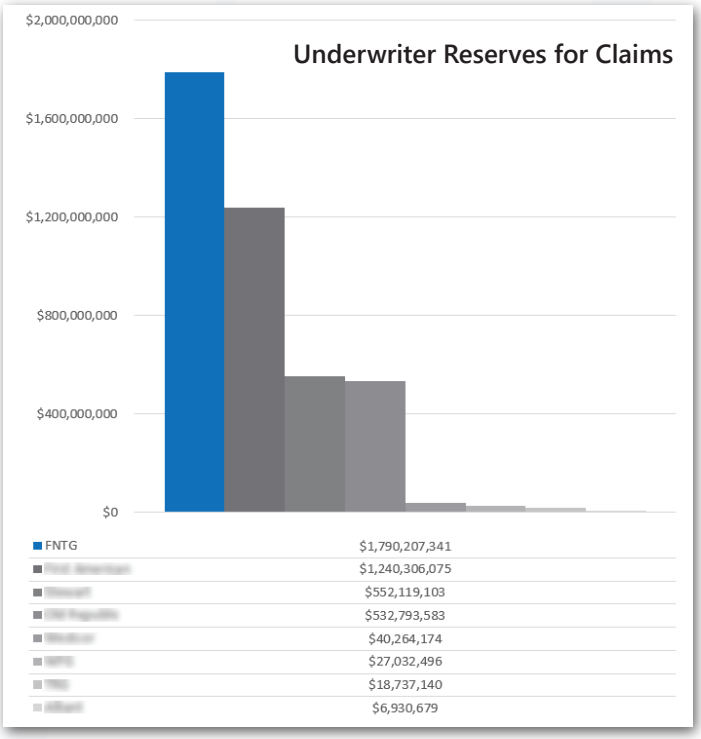

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PRACTICE CORNER

Probate and Trust Division

Solutions To Hazards Of Heir Property II

By Jami Coleman, Esq., Williams & Coleman P.A., Tallahassee, Florida

In a previous practice corner, I discussed some of the problems with heir property, primarily 1) that you cannot sell it or borrow against it if the property is left in the name of the decedent; 2) the difficultly in identifying who are the heirs-at-law and where they are located; and 3) the costs associated with probating the decedent's estate. I also discussed a couple of solutions to avoiding the hazards of heir property, which were to create 1) an enhanced life estate deed; and 2) an LLC, taxed as a partnership or disregarded entity, and have the LLC own the real property, the heirs own the LLC and become members, and adopt and agree to have pay on death or transfer on death instructions under the Florida Uniform Transfer-On-Death Security Registration Act.[1] However, there are additional problems associated with heir property. Heir property may result in conflict among the family members of the decedent. As a practitioner, one of the most common causes of conflict is when multiple family members live on the property, but only one family member is paying the property taxes or maintaining the property. A few solutions to dealing with this issue of heir property, provided the parties cannot agree, include partition actions, quiet title actions, adverse possession, and tax deed sales, all of which include probate or providing notice to all interested parties and heirs at law.

Fla. Stat. Chapter 64 allows for a partition action or a lawsuit filed by one or more co-owners against other co-owner(s). The action is grounded and guided in equitable principals. Therefore, when joint owners of property cannot agree on the disposition or management of the property, and the parties cannot negotiate a resolution, then a partition action may be a solution. However, probating the decedent's estate is preferred and essential before moving forward with this type of litigation.

A second solution to the problems of heir property includes a quiet title action. Fla. Stat. Chapter 65 allows for quiet title actions to clear a party's title or remove a cloud on title to cure and perfect legal title to real property. Essentially, a quiet title action is a proceeding in which the plaintiff seeks to establish title to real property by forcing an adverse claimant to prove ownership of the property or forever cease from asserting it. In a quiet title action, where the property is left in a decedent's name, the court may require full administration of the estate or a petition to determine interested parties, affidavit of heirs, and appointment of an attorney ad litem to represent the unknown defendants or estates that may have an interest in the property.

A third solution to heir property problems is adverse possession. Under Fla. Stat. Chapter § 95.18 (2018), to adversely possess without color of title, the claimant must have been in "actual continued occupation of the real property for a period of seven (7) years under a claim of title exclusive of any other right, but not founded on a written instrument, judgment or decree." Additionally, the property actually occupied shall be held adversely if the person claiming adverse possession: (1) made a return or application of Adverse Possession to the property appraiser of the county where it is located within 1 year after entering into possession (2) and has subsequently

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paid all taxes and matured installments of special improvement liens levied against the property by the state, county, and municipality. A person claiming adverse possession without color of title, who has satisfied the above requirements, must then make a return of the property by providing to the property appraiser a uniform return or application on a form provided by the Department of Revenue. The adverse possession claimant is required to pay the taxes for seven (7) successive years after she has filed the claim of adverse possession with the county property appraiser's office. Again, the court may require diligent inquiry of search for the unknown or undiscovered heirs and notice of the proceedings under Fla. Prob. R. 5.040.

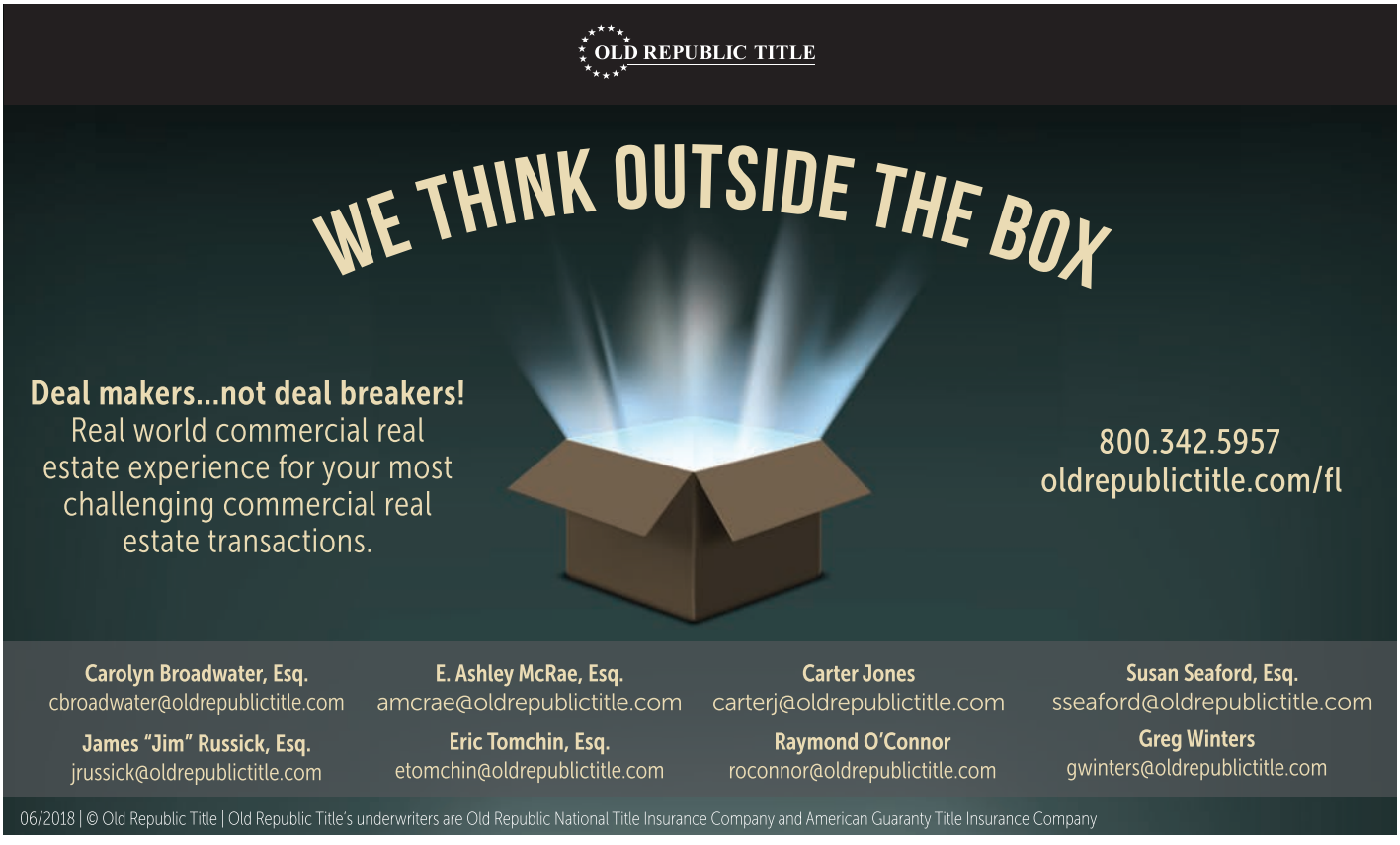
Finally, another solution to the hazards of heir property includes purchasing the tax deed certificates to the heir property and applying and acquiring a tax deed. The purchase of a tax certificate and ultimately obtaining a tax deed may be the most efficient way to resolve the problem of heir property when the heirs at law will not pay the taxes, and they cannot be located. The delinquent payment of property taxes causes a lien on the property. Under Fla. Stat. § 197.502 (2018), within 45 days of delinquency, the tax collector shall advertise the tax lien and attempt to sell the tax certificate which gives the purchaser the right to collect the tax debt from debtor or property owner. On or before June 1st or the 60th day after the date of delinquency, whichever is later, the tax collector shall advertise once each week for three (3) weeks and shall sell tax certificates on all real property having delinquent taxes. A tax sale certificate is issued to the person who will pay the taxes, interest, costs, and charges on the real property. After two (2) years of tax certificate ownership, the purchaser may apply for tax deed on property; however, if seven (7) years pass after the issuance of tax certificate and before application for deed, the tax certificate becomes null and void. The procedures regulating the public sale and the issuance of a tax deed are in Fla. Stat. §§ 197.502-197.552 (2018), and these procedures must be strictly followed.

Tax deed sales can be a successful tool for family members who want to keep the property in their family but want to be record title holder of the property, because the issuance of a tax deed divests the former landowner of title to the property and constitutes the source of a new and independent title. Although there is a notice requirement to all owners of the real property as well as those who may have an interest in the property, the purchaser is not required to probate the estate to acquire clear title to the property. However, the heirs at law will need to probate the decedent's estate in order to acquire the sale proceeds, if any, from the sale or foreclosure of the property.

These solutions can be an effective form of action when seeking resolutions to heir property dilemmas.

Endnotes

1 The editors believe the efficacy of a "pay on death" designation associated with a member interest in a LLC or a partnership interest is unclear under Florida law. However, a RPPTL Section committee is examining this issue and may propose statutory changes to confirm the effectiveness of this technique.



Hedge Your Tax Deed Bets: Confirm Notice and State Your Claims

By Jacqueline J. Peregrin, Esq., Peregrin Law Firm, P.A., Naples, Florida

Bidding on tax deed properties is a favorite of Florida's real estate gambling novice investors and savvy property-flipping professionals alike (see also, foreclosure sales). Whether an individual holds a lien on a property listed for tax sale or aims to place a winning bid for big gains, keeping track of the requirements for notices and claims under Chapter 197 of the Florida Statutes can help avoid future losses of the tax deed or the value of an existing claim on the subject property.

When a tax certificate holder files a tax deed application with the tax collector, the tax collector will compile and deliver a "property information report" to the clerk of court identifying parties to be noticed regarding a tax deed sale. Under Fla. Stat. § 197.502(4) (2018), this property information report must include:

1. the legal title holder;
2. any lienholder of record;
3. any mortgagee of record;
4. any vendee either listed on a recorded agreement for deed or who has applied to receive notice;
5. any lienholder who applied to the tax collector and supplied a notice address;
6. the person to whom the property was assessed on the tax roll when last assessed;
7. if a mobile home is located on the property, any lienholder of record for that mobile home; and
8. title holders of contiguous property (only if the property is submerged land or common elements of a subdivision, and the continuous property owner is on the conveyance document to the legal title holder).

Once this report is delivered, the clerk must issue 4 types of notices regarding the application for tax deed and potential sale date under Fla. Stat. § 197.502(5) (2018) by:

1. certified mail to the parties listed in the tax collector's property information report;
2. service on the legal title holder by the sheriff in the

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county where the legal title holder resides, or, if service cannot be made, by leaving a copy of the notice at the legal title holders last known address;

3. recording a notice of tax deed application in the official records of the county (effective for one year). The purpose of this recording is to give conclusive notice to any party seeking to gain an interest in the subject property. This notice is automatically released upon the tax sale of the property; and
4. publication of a notice of the application for tax deed and date of the tax deed sale in a newspaper for four consecutive weeks.

Receipt of proper notice is a common challenge to the validity of a tax deed. It is a good practice to confirm that all statutory notices and publications have been achieved prior to bidding on a property.

Lienholders that receive a notice of application and sale should take note of the results of the sale in order to seek a portion of the sales surplus, if any. If the successful bid results in a surplus, those filing claims for the surplus funds are entitled to notice from the clerk. A claimant has only 120 days to respond to the clerk with their claim to the surplus funds under the newly revised Fla. Stat. § 197.582 (2018).

After the tax sale, the successful bidder receives a clerk-issued tax deed that grants a right of immediate possession to the tax deed holder. While the tax deed holder is still subject to: covenants running with the land, easements for conservation, draining, and ingress or egress; the tax deed holder is not subject to prior assessments or covenants requiring the tax deed holder to spend money for any reason prior to holding the tax deed, with the exception of any assessments for sanitation or preventing undesirable conditions.

A tax deed holder will often file a quiet title action to gain marketable title and insure the title. This requires another round of notice and service of process. Alternatively, a tax deed holder can wait the statutory four-year period to block claims of former title holders under Chapter 95 of the Florida Statutes.

A successful bid does not equate to quiet enjoyment for the tax deed holder. Even after all the required notices above are achieved, some tax deeds may be set aside, and the prevailing party is entitled to attorney's fees and costs. Notwithstanding, the winning bidder is entitled to reimbursement under Fla. Stat. § 197.602 (2018), including 1) the amount paid for the tax deed and taxes on the land plus 12% interest; 2) all legal expenses and costs to acquire the tax deed; and 3) the fair cash value of all maintenance and permanent improvements upon the land made by the tax deed holder. The total amount of reimbursement is subject to the court's final determination. The recent decision in *Ashear v. Sklarey*, Case No. 3D16-888 (Fla. 3d DCA 2018) reminds us that the specific reimbursements required are those that fall under the statute in effect at the time the tax deed is issued. Multiple notices, statutory reimbursements, and a four-year limitation on claims make tax deed investments a safer bet than any placed in a Vegas casino! Check your clerk's website for details.

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Two Ways to Improve Your Trust & Estate Practice

Practice Pointers: Estate Planning Best Practices

By Henri Bardhi, Esq. and Debra A. Faulkner, Esq.,
Burke Faulkner Law, P.A., Tampa, Florida

At first glance, the practice of estate planning seems straightforward. Accordingly, many new lawyers and solo practitioners begin offering estate planning services without fully appreciating the complex matrix of laws that form the foundation of a proper plan. Estate planning for non-taxable estates generally involves drafting a will, trust, power of attorney, and advance health care directives. Generic forms of these documents can easily be obtained online, and unsuspecting practitioners often use these forms with few changes other than to modify client-specific information. Unfortunately, many practitioners view the process of drafting and executing estate planning documents as highly mechanical, simple and static, rather than customized, complex and dynamic. Simple, generic estate planning forms regularly fail to adequately address contingencies, incorporate creditor protection for the beneficiaries, or provide sufficient definitions to resolve patent ambiguity. Failing to properly appreciate the gravamen of each provision in a will or trust can result in poorly drafted documents, or even malpractice. Ultimately, this practice can be catastrophic to the client.

Estate planning involves the application of a wide variety of legal rules to each client's case, and the integration of such rules with client preferences. Clients often report to lawyers the simplicity of their wishes when such wishes, if drafted as conveyed, could create an unintended minefield of tax or legal implications. For example, a client may wish to leave his or her entire estate outright to the beneficiaries, one of whom is then receiving public benefits. Upon receipt of the bequest, such beneficiary is likely to be removed from the public benefit program — a result completely unanticipated by the client. To complicate the estate planning practice further, drafting mistakes often remain unnoticed for long periods of time — in many instances, they are not discovered until the client's death. Therefore, an attorney may continue practicing for years, routinely making the same mistakes or omissions, completely unaware of such drafting mistakes.

This article discusses certain provisions that should be included in wills and trusts (referred to herein for simplicity as the "document" when such terms could be used interchangeably), along with drafting practices of which estate planning attorneys should remain mindful, such as the inclusion of the client's family information, the use of definitions, inclusion of the survival provision, and the use of efficient, accurate language. Although the following discussion applies to both wills and trusts, the examples used may refer only to one or the other. The key to a well-drafted document is consistency and clarity.

1. Family Information

Every document should contain an article (or section) devoted to providing the basic family information of the client. Such article should always provide the following information:

(1) whether the client is married or unmarried, and if married, the full name of the spouse;

(2) the number of living children of the client and the name of each child; if a child is predeceased, the document could also provide the name of such deceased child.

The family information section is particularly important when a client wishes to treat stepchildren equally with the client's descendants because Florida law excludes stepchildren from the statutory definition of descendants, thereby excluding them from estates that pass by intestate succession. At the end of the list of children, and individuals to be treated as children, the Section can further define that these individuals and their children are collectively referred to as the "testator's descendants" or "grantor's descendants." Including such definitions maintains consistency, avoids ambiguity, and makes the document easier to interpret by successor trustees and heirs.

2. Use of Definitions Efficiently and Only Where Appropriate

A myriad of terms should be defined in a will or a trust. Definitions keep a document neat, consistent, and easily interpreted by the client and others - another attorney, a trustee, or a judge. Take the simple example discussed above: when a provision refers to the client's children collectively, defining them in the beginning of the document as "grantor's children" avoids the repetition of listing each child's name every time the document refers to the children. Another simple and helpful definition involves referring to a person by

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first name rather than first and last name (e.g. "John Joe Doe (referred to herein as "**John**"). The use of defined names can be especially helpful when a family has a "junior" and "senior" with the same full name. In that instance, a shortened version of the individual's name with the suffix (e.g. "JJD Jr.") can be especially helpful.

Terms left undefined often leave a document open to multiple interpretations, which can ultimately lead to litigation. No drafting attorney wants their will or trust to become the subject of a will contest or trust action. If there is any possibility that a pertinent term can have multiple interpretations, the term should be defined clearly, succinctly, and completely within the operative document to ensure the grantor's intent is effectuated.

Despite the foregoing, not every term should be defined, or the document would become unduly burdensome to read. If a term is commonly understood, and it is being used in its ordinary context without change, there is no need to define such term within the operative document. For example, "trustee" is a commonly understood term utilized in every trust and therefore does not require a separate definition unless the term is being used in various contexts, or for various persons acting in such capacity. For example, if the document provides for a "directed trustee" and a "discretionary trustee," the types of trustees should be specifically defined to avoid confusion about the duties of each type of trustee. "Children" is commonly understood and has only one ordinary meaning; however, if the client disinherits a child or in some other way wishes to alter the commonly used term to add or subtract individuals that would otherwise fall under the definition, the term should be defined within the four corners of the planning instrument.

When determining whether to define a term within your document, ask yourself whether (1) a term has a specific definition somewhere in the law, (2) whether such term has a common, widely understood meaning and (3) whether the common, widely understood meaning applies to the term throughout the document, and (4) whether failure to define the term creates patent or latent ambiguity that would leave the document vulnerable to multiple interpretations. If unsure, it is better to err on the side of caution and define a term that comports with your client's intentions.

Finally, if a term is defined in the document, the first letter of such term should be capitalized throughout the document to distinguish such term from a similar word used in a different context. For example, "Related Person" is defined in the context of Internal Revenue Code ("IRC") § 672(c) with regard to independent trustees and if used as such, it should be capitalized to distinguish such term from the ordinary words "related" and "person" that may be used in other contexts within the operative document.

3. Never Forget about the Residuary!

Every will or trust must contain a residuary clause. The residuary clause provides for the disposition of any property that is not specifically listed in the document. In the absence of a residuary clause, property not specifically devised or subject to a devise that lapses, passes under Florida's intestacy statutes. The residuary clause ensures that all of the decedent's property – and not just the specifically devised property – passes to the beneficiaries chosen by the decedent. A residuary clause is often quite simple (e.g. "I give the residue of my estate to. . ."), though it is important enough to merit its own article in a will or trust. It is good practice to define what the term "residuary" means, either in the article dealing with the residuary estate or in the definitions section of the document, making sure to include in the definition that any lapsed gifts become part of the residuary estate.

4. Penalty Clauses

Fla. Stat. § 732.517 (2018) provides "a provision in a will purporting to penalize any interested person for contesting the will or instituting other proceedings relating to the estate is unenforceable." This type of clause is referred to as an "*in terrorem*" clause, and this statute makes clear that *in terrorem* or penalty clauses are unenforceable in Florida. However, other clauses can be included to help deter will challenges and make the testator's intent clear. For instance, if the testator's intent is to disinherit specific family members, that intention can be stated specifically, providing something akin to "Testator makes no provision for X for reasons known to X." Although this provision would not prevent a disinherited heir form challenging the testator's will, it does make clear that the testator intended to disinherit the individual, thereby reducing the likelihood of success in a will challenge.

5. Survivorship Clause

A survivorship provision should always be included in a will or trust. This clause addresses whether a beneficiary is required to survive the client and, if so, by how long. Clients are often perplexed by this provision and may even ask that it be removed before its purpose is explained. This clause requires a beneficiary to survive a client for a period of days or weeks before inheriting a share of the estate, or otherwise be treated as having predeceased the grantor. The purpose of the provision is to ensure that the grantor's estate is passed to the grantor's intended beneficiaries rather than to the specific devisees or beneficiaries named in a primary beneficiary's will or trust. The survivorship clause is of particular importance in multiple marriage situations wherein the spouses have different dispositive provisions within their estate plans. For example, if John names Mary, his second wife, as his sole beneficiary if she survives him, and she survives but dies shortly thereafter, Mary's estate will receive all of John's assets which will be further distributed to Mary's beneficiaries or heirs

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rather than to the contingent beneficiaries named in John's documents. This is most often an unintended consequence.

Most clients envision that after their death, their beneficiaries will live for years enjoying the fruits of their labor. Very few clients contemplate a simultaneous or closely-timed death situation. A survivorship provision effectuates a client's actual intent to have the estate pass to the beneficiaries named in the operative instrument for their use and enjoyment. A well-drafted survival provision addresses (1) the length of time a beneficiary is required to survive grantor to receive its portion of the estate; and (2) who is deemed to survive in the case of simultaneous deaths.

Incorporating a survivorship clause can prevent the undesirable outcome of having a grantor's estate pass to a beneficiary's estate, thereby enriching the heirs of a beneficiary versus the beneficiaries of the grantor.

7. Contingent Beneficiaries

Consider a simple example where a will provides that the testator's tangible personal property would be divided equally between the testator's children. The will also provides that the residue would be divided equally between the testator's children. What would happen if all the children predeceased the testator? Florida provides default rules under the "anti-lapse" provisions in Fla. Stat. § 732.603 (2018). In this example, the predeceased child's property would be divided equally among the predeceased child's descendants, per stirpes. In many cases, this comports with the testator's intent, but it is not always the case. Even if a testator desires the outcome provided in Florida's anti-lapse and class gift statutes, setting forth the testator's intent within the will leaves no question as to the desired distribution in the event of an untimely death of a beneficiary. Moreover, stating contingent beneficiaries within the will helps minimize the risk of will contests over testator's intent.

A well-drafted distribution clause provides for multiple contingencies, and it sets forth multiple layers of contingent beneficiaries leaving no doubt as to the testator's intended distribution of property. Of course, no definite end exists to contingencies, so most distribution clauses provide that if no named beneficiaries are then living, the estate passes to heirs-at-law or charitable organizations.

8. Divide the Property into Shares rather than by Percentages and Fractions

A client's property will inevitably be divided among different beneficiaries. The provisions dealing with the division of property often use percentages or fractions to denote the portion of the overall estate to which a beneficiary is entitled. For example, a trust may provide that residuary estate shall be divided equally among four beneficiaries, each taking 25% of the property. The math is simple provided all beneficiaries survive, but becomes more complicated if a beneficiary predeceases and the 25% is divided pro rata for contingent beneficiaries. The situation becomes increasingly complex if provisions for additional beneficiaries lapse. While this issue is addressed through a clause providing for a pro rata distribution of any lapsed devise, a simpler and cleaner approach may be to divide the estate into as many equal shares as needed to effectuate the decedent's devises at the time of distribution.

Using shares of an estate (also referred to as "parts" or "portions") rather than percentages or fractions sets forth clearly the intended division of assets while allowing for consistency throughout the document. In the first example above, instead of writing 25% to each of four beneficiaries, the trust estate would be divided into four (4) equal shares, and each beneficiary would receive one (1) share. In a more complex example, if the estate is divided into seven equal shares and one bequest lapses, the estate is divided into six equal shares. The use of shares eliminates the need do the math in the document itself, thereby streamlining the document, providing clarity, and ease of application for the trustee.

Well drafted estate plans are readily achievable. By incorporating carefully written definitions, contingent beneficiaries, survivorship clauses, and clearly established distributive shares into one's drafting, an estate planning attorney can more easily set forth a grantor's intentions completely while leaving little room for differing interpretations. AL


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Sales Tax Basics For Construction Lawyers

By Jeanette Moffa, Esq., Moffa, Sutton, & Donnini, P.A., Ft. Lauderdale, Florida

While sales of tangible, personal property are subject to Florida's sales tax laws, real property contracts are not. At first glance, the difference seems simple: purchasing a hammer at the store is taxable; paying for a contractor to remodel a bathroom is not. However, the reality is anything but simple. Contractors who mistakenly believe they are immune from Florida sales tax laws could face devasting assessments as a result.

This article will focus on some of the main issues contractors face in a sales tax audit, such as: the misuse of resale certificates and failure to properly pay use tax; the tax treatment of a sale of tangible personal property plus installation versus a sale of a real property improvement; the unique tax treatment of fabrication; and, various issues relating to sales to exempt entities.

Contractors Should Pay Use Tax on Materials

It is not uncommon for a contractor to start a business, obtain a resale certificate from the Department of Revenue, and operate under the belief that all purchases made by the business are tax exempt. Many vendors allow contractors to leave their resale certificate number on file so that sales tax is automatically removed from all purchases.

If a contractor is exclusively in the business of providing real property improvements to its customers, the reality is that it typically should not even have an exemption certificate. The resale certificate is only for items purchased for resale. Although the items purchased ultimately end up in the possession of the customer, the Department of Revenue's position is that these items are consumed by the contractor in the performance of a real property improvement. In other words, the contractor is the end user of the materials and must pay use tax on all materials purchased.

In summary, if contractors purchase materials tax-free for resale and sell them to their customers, they must *collect* tax from their customers. Alternatively, if the contractors are purchasing materials for use in a real property improvement, the contractor must *pay* use tax on those purchases. The end sale of the real property improvement to the customer would not be subject to tax.

Occasionally a taxpayer collects tax from the customer in a real property improvement and did not pay tax on the purchase of materials. Typically, the Department will credit the collected sales tax towards the outstanding use tax liability. However, there is a possibility of double tax. The reasoning for this is that the customer paid the sales tax while the taxpayer was liable for the use tax on materials. As such, to give credit would be to allow customer money, wrongly collected, to offset a liability of the taxpayer.

Know the Difference: Tangible Personal Property + Install versus Real Property Improvement

As previously mentioned, the difference between a sale of tangible personal property and a real property improvement is significant for sales tax purposes. While the difference between purchasing a hammer and a bathroom renovation seems obvious, many contractors work in the gray area between these two types of transactions.

For example, the Florida Department of Revenue considers installed blinds and shades to be sales of tangible personal property,[3] while installed plantation shutters are real property improvements.[4] On the other hand, mirrors can be both tangible personal property or real property improvements and determining when a mirror crosses the line from tangible personal property to an element in a real property improvement is wholly unclear.

Despite ambiguities in the law, the distinction is vital for determining the sales tax treatment of the transaction. While most labor is not subject to sales tax in Florida, installation becomes taxable as part of the full selling price, regardless of whether it is separately stated, in transactions for the sale of tangible personal property. Installation in a real property improvement, on the other hand, is generally not taxable. As a result, installation may or may not be taxable depending on the nature of the transaction.

Sometimes a project falls into both categories. The tax treatment of a mixed contract, which includes both real property improvements and the installation of tangible personal property, will depend on the predominant nature of the work performed under the contract. When contracts fall under this category during audit, the taxpayer must deal with the uphill battle of evidencing the predominate nature of the work performed. If the evidence is unclear, the Department of Revenue will likely try to tax the installation labor, arguing that the predominant purpose was for an installation of tangible personal property and not a real property improvement.

Fabrication Labor

Not only can materials be subject to sales tax, but fabrication labor can be subject to sales tax as well. Fabrication labor becomes taxable when it is attributable to items that a contractor manufactures for their own use in performing contracts for improvements to real property. For example, a cabinetmaker who manufacturers kitchen cabinets that they install into real property would owe sales tax on the cost of the materials and the cost of the labor used to manufacture the cabinets at a plant or shop maintained by the contractor. It does not include items manufactured at a temporary manufacturing plant or at the job site.

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In fabrication transactions, materials plus labor are subject to sales tax. Labor is defined broadly to include wages, bonuses, benefits, insurance costs, workmen's compensation, compensation of officers and costs of service, engineering, design, or other support employees allocated to production, at the manufacturing plant. Surtax is also due in surtax counties.

Incoming freight is also subject to sales tax, which includes delivery charges for direct materials to the fabricator. In addition, warehousing and handling is subject to sales tax for direct materials from the time they are purchased until fabrication is complete. Finally, services, including consulting or professional services by employees and non-employees, are subject to sales tax as well when they are associated with the fabrication.

It is not all bad news for fabricators though. Rule 12A-1.051(2)(a) specifically exempts both the cost of transporting fabricated items from the contractor's plant to the real property job site and the cost of labor at the job site where the fabricated items are incorporated into the real property improvement.

Fabricators often do not realize that they fall under different tax rules than other real property contractors until they are under audit. Even when fabricators do properly remit use tax on their purchases, they can be blindsided by an assessment on taxable labor. When employees perform both fabrication and non-fabrication work, the burden will fall to the taxpayer to distinguish between the taxable and nontaxable labor. If records are deemed insufficient, the Department of Revenue could potentially assess all labor.

Exempt Entities

Tax on purchases is always going to be less than the total tax on the contract price to the final customer unless something has gone terribly wrong on a job. If the goal is to keep the overall price down, why would a contractor ever want to structure a project as a sale of tangible personal property plus installation?

Generally, it only makes sense to structure a project as a sale of tangible personal property plus installation when the sale is to a 501(c)(3) or government entity. If the end customer is exempt, then the contractor can purchase tangible personal property exempt for resale and then charge no sales tax to the exempt entity at retail. Such transactions are called "3d Contracts" for 501(c)(3) entities while contractors must obtain a Certificate of Entitlement from the government entity.[5]

For 3d Contracts, the taxpayer must contract for and follow the same terms of the Certificate of Entitlement.[6] While these Certificates of Entitlements are exclusively for government entities, the Department of Revenue will evaluate the 3d Contract using the same five-part test. These five requirements for state government entities specifically are:

(1) The Purchase Order is issued directly to the vendor supplying the tangible personal property the Contractor will use in the identified public works;

(2) The vendor's invoice will be issued directly to Governmental Entity;

(3) Payment of the vendor's invoice will be made directly by Governmental Entity to the vendor from public funds;

(4) Governmental Entity will take title to the tangible personal property from the vendor at the time of purchase or of delivery by the vendor; and

(5) Governmental Entity assumes the risk of damage or loss at the time of purchase or delivery by the vendor.

The difficulty for 3d Contracts falls in the requirement that all materials to be incorporated into the project be itemized and priced in the contract before work begins. If a contract itemizes some materials, but not all, the contract fails as a 3d Contract. As is surely imaginable, it is a rare project when every nail and piece of plywood required for a project is known prior to the start of the work. Consequently, it is vital that 3d Contracts are planned meticulously and carefully and, when possible, approved by the Department in advance.

The complexities of sales and use tax laws both in and outside of Florida are endless for contractors. It is vital that construction law attorneys have a basic understanding of the potential issues their clients may face in an audit by the Florida Department of Revenue. In Florida, if a taxpayer has never been registered with the state, the Department of Revenue can assess back to the beginning of the business. Such an assessment could bankrupt an unprepared business. Meanwhile, if a business is registered with the state, the Department is generally restricted by a statute of limitations of three years. Options such as voluntary disclosures are available for taxpayers who want to fix past errors before they are audited. But those who do nothing run the risk of being blindsided by an assessment of tax they never realized they owed. AL



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Endnotes

1 Fla. Stat. § 212.05 (2018).

2 Fla. Admin. Code R. 12A-1.051 (2018).

3 Fla. Dep't of Rev. "Sales and Use Tax on Construction, Improvements, Installations and Repairs," GT-800067 R.09/14.

4 Fla. Dep't of Rev. Technical Assistance Advisement – TAA 13A-025 (November 7, 2013).

5 Fla. Admin. Code R. 12A-1.051 (2018).

6 Fla. Admin. Code R. 12A-1.094 (2018).

Probate And Trust Case Summaries

Prepared by Lian de la Riva Esq. - Markowitz, Ringel, Trusty & Hartog, Miami, FL

A Testator's devise to a friend of his homestead real property cannot be challenged when he or she does not have a surviving spouse or minor child.

Webb v. Blue, 243 So.3d 1054 (Fla. 1st DCA 2018)

The First District Court of Appeals ("1st DCA") provided a review on the finer points of Florida's homestead law with an appeal from the circuit court in Baker County regarding the denial of homestead property. Ultimately, the 1st DCA rejected the argument that homestead devised to a non-heir beneficiary is not a valid devise when the decedent was survived by heirs but not survived by a spouse or minor child.

At bar, the decedent died testate with no spouse or minor children. The decedent devised his "entire estate" to a friend, Judith D. Blue ("Blue"). However, there was no specific provision regarding the homestead property. Blue was nominated as the Personal Representative and sole heir of the estate. The decedent's Last Will and Testament contained the following provision: "My entire estate is all property I own at my death that is subject to this Will. I leave my entire estate to Judith D. Blue."

Blue filed a Petition for Administration and Inventory, listing on each the non-exempt homestead property of the decedent. The relatives of the decedent ("Appellants") firmly believed that the homestead property was not part of the estate since the will failed to include specific language. In the trial court, the Appellants filed a Petition to Determine Homestead Status of Real Property and alleged the property at issue was the decedent's homestead and therefore descended to the decedent's heirs at law since there was no specific homestead intent in the will. Blue objected to the Petition. The trial court denied the Appellants' Petition finding that because the decedent was not survived by a spouse or minor child, he was within his right to freely devise his homestead to anyone. Furthermore, the lower court found the decedent's intent to leave his entire estate to Blue was clear.

On appeal, the 1st DCA affirmed the trial court's denial of the Petition to Determine Homestead Status of Real Property. The 1st DCA evaluated who specifically is protected by Article X, section 4(c) of the Florida Constitution. The Florida homestead law narrowly identifies two classes of persons: spouses and minor children. The decedent's relatives unequivocally do not fall in either of those classes. The 1st DCA also cited to the Florida Supreme Court, which held any "restraint on the right of an individual to devise property at death should not be extended beyond that expressly allowed by the constitution." *City Nat'l Bank of Fla. v. Tescher*, 578 So. 2d 701, 703 (Fla. 1991) (quoting *Wadsworth v. First Union Nat'l Bank of Fla.*, 564 So. 2d 634, 636 (Fla. 5th DCA 1990)).

In its ruling, the 1st DCA reaffirmed the "elementary principal that a person can dispose of his or her property by will as he or she pleases so long as that person's intent is not contrary to any principle of law or public policy." *McKean v. Warbuton*, 919 So. 2d 341, 344 (Fla. 2005). The 1st DCA found there was no constitutional, statutory, or common law requirement that the decedent specifically devise his homestead to a non-heir since he was survived by collateral heirs. Moreover, this case reaffirms that homestead property becomes an asset subject to probate administration and loses its protected status when devised to a non-heir.

Beneficiaries of an irrevocable trust, without the consent of the Trustee, failed to terminate the trust via judicial modification by arguing that there will be a savings on future administrative expenses.

Horgan v. Cosden, No. 2D17-1354, 2018 WL 2374443 (Fla. 2d DCA 2018)

A settlor established a revocable trust and named his son as the income beneficiary upon the settlor's death. The settlor then named three education institutions as the residual beneficiaries after the death of his son. Upon the death of the settlor, the trust became irrevocable. The son and the three educational institutions entered into an agreement to terminate the irrevocable trust and divide the trust's assets ($3 Million) based on their actuarial interests.

The four beneficiaries of the trust entered into an agreement and cited Fla. Stat. §§ 736.04113 and 736.04115 (2018). The son and the three educational institutions specifically relied on Fla. Stat. § 736.04113 (2018) which allows for judicial modification of an irrevocable trust on complaint of a trustee or a qualified beneficiary if: (1) the purposes of the trust have been fulfilled or have become illegal, impossible, wasteful, or impracticable to fulfill; (2) because of circumstances not anticipated by the settlor, compliance with the terms of the trust would defeat or substantially impair the accomplishment of a material purpose of the trust; or (3) a material purpose of the trust no longer exists. Fla. Stat. § 736.04115 (2018) similarly allows judicial modification if compliance with the terms of a trust is in the best interests of the beneficiaries, taking into account the intent of the settlor and the current circumstances and best

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interests of the beneficiaries. The Trustee of the trust did not consent to the agreement.

The son filed a complaint against the Trustee to terminate the trust citing the above statutes. Both parties moved for summary judgment. The trial court held in favor of the son and the educational institutions. The trial court found that terminating the trust would be in the best interest of all four beneficiaries because it would eliminate the administrative expenses. The Second District Court of Appeal ("2nd DCA") reversed the trial court and held that terminating the trust would be a contradiction of the settlor's intent. Furthermore, the son and educational institutions had failed to meet the requirements set forth in Fla. Stat. § 736.04113 (2018). The court ruled that terminating a trust based on the usual administrative fees of the Trustee was not and should not be a basis for termination. The court held mere saving of Trustee's fees is not sufficient to terminate a trust.

An Answer and Affirmative Defenses filed in response to a Petition for Administration may serve as a Caveat for purposes of F.S. 731.110, if certain information is included in the Answer.

Crescenzo v. Simpson, 239 So.3d 213 (Fla. 2d DCA 2018)

The 2nd DCA of Florida held that the functional equivalent of a caveat may serve to properly contest a Last Will and Testament.

The Personal Representative of the Estate had the will of the decedent admitted to probate despite the filing of Crescenzo's pleading styled "Answer and Affirmative Defenses" instead of a caveat.

Crescenzo appealed from the order admitting the will to probate and argued that before it could admit the will, the probate court had to decide a challenge to the will's validity that was contained in an answer he filed. The Personal Representative of the Estate alleged since the challenge was not contained in a caveat under Florida Probate Rule 5.260, the court did not have to decide that challenge before admitting the will to probate.

The trial court did not conduct a hearing to consider the issues raised in the Answer and Affirmative Defenses and simply entered an order admitting the will to probate. The order found that the will had been validly executed, and also found that there had been no objection to the will being admitted to probate (which was contrary to the Answer and Affirmative Defenses). In his appeal, Crescenzo arguing that the probate court was required to consider his challenges to the will's validity and the appointment of a personal representative before admitting the will to probate. The 2nd DCA held that Crescenzo's Answer and Affirmative Defenses was the functional equivalent of a caveat and reversed the trial court's ruling.

The 2nd DCA relied on Fla. Stat. § 731.110(3) (2018) in its ruling which states as follows: "If a caveat has been filed by an interested person other than a creditor, the court may not admit a will of the decedent to probate or appoint a personal representative until formal notice of the petition for administration has been served on the caveator or the caveator's designated agent and the caveator has had the opportunity to participate in proceedings on the petition, as provided by the Florida Probate Rules." Fla. Stat. § 731.110(3) (2018). In *Rocca v. Boyansky*, 80 So. 3d 377, 381 (Fla. 3d DCA 2012), the court confirmed that Florida law requires the rights of caveators to be determined prior to the issuance of letters of administration. Therefore, a caveat serves to begin the process of challenging a will. Furthermore, the District Court made the distinction of substance over form. Florida Probate Rules specify the information requirements for a caveat as 1) the name of the person for whom the estate will be, or is being, administered; 2) the last 4 digits of the person's social security number or year of birth, if known; 3) a statement of the interest of the caveator in the estate; and 4) the name and specific mailing address of the caveator. Fla. Prob. R. 5.260(b).

Crescenzo's Answer and Affirmative Defenses identified the name of the estate to which it applied, identified Crescenzo's interest as half-owner of the estate's sole asset, provided the name and mailing address of Crescenzo's attorney, and referenced a document containing the social security of the decedent and birth year as well as the case number.

While formalities can sometimes matter and be dispositive to an action failing, here the 2nd DCA said that substance matters over form when "the substance of what [appellant] was doing is obvious"—looking for a decision on his will contest.

An Appellant failed to appeal the first appealable order which determined she was not an interested person and therefore was barred from appealing later orders in proceedings.

Tenzer v. Tenzer, 240 So. 3d 754 (Fla. 4th DCA 2018)

The Appellant is the ex-wife of a Ward in a guardianship matter. The Appellant and the Ward have a minor son. The trial court administering the guardianship matter entered an Order approving a trust for the benefit of the Ward. The Appellant argued that she was denied due process because she was not permitted to participate in the hearing seeking the court's approval of the trust.

On appeal, the Fourth District Court of Appeal (the "4th DCA") dismissed the matter due to lack of jurisdiction since the trial court had already entered an Order striking the Appellant from the trust proceedings because she was not an interested person. More interesting was that the Appellant failed to appeal the portion of the Order determining that she was not an interested person in the proceedings to establish a trust

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for the Ward. Her failure to appeal this order barred her from appealing the final Order to approve the trust.

The 4th DCA's decision highlights the importance of the determination of status as an interested person. The Florida Supreme Court in *Hayes v. Guardianship of Thompson*, 952 So. 2d 498 (Fla. 2006) analyzed whether Fla. Stat. § 744.108 (2018) limited standing to the guardian and the Ward, and ultimately held that the determination of who else would be considered an "interested person" in a particular guardianship proceeding varies depending on the facts and the particular matters at issue. "Interested person" status is not conferred by blood relation or the filing of notice and request for copies under Fla. Prob. R. 5.060. This case shows that a determination of lack of interested party status is a final order for appellate purposes.

A trial court allows the Professional Emergency Temporary Guardian to continue as the Permanent Guardian through an evidentiary hearing and fact-finding order.

In re: Guardianship of Jones, 243 So. 3d 503 (Fla. 2d DCA 2018)

The 2nd DCA interprets the recent legislative changes related to the appointment of a professional guardian by specifically and carefully construing the language in Fla. Stat. § 744.312 (2018). The Court ultimately determined that the requirements set forth by the statute had been met for this emergency temporary guardian to remain as permanent guardian for the Ward.

Zebny is a professional guardian who was appointed as the emergency temporary guardian for the Ward. At the time the emergency temporary guardianship was commenced, the Ward was a ninety-seven year old male widower suffering from dementia. It was alleged that he made changes to his long established estate plan in favor of Lyublanovits. Unsurprisingly, Lyublanovits objected to any allegations of unduly influencing the Ward, as well as the Petition for Emergency Temporary Guardianship and the Petition to Appoint Zebny as the permanent guardian. The trial court waived the restriction of Zebny, a previously serving emergency temporary guardian, and allowed her to continue serving as the Ward's permanent plenary guardian pursuant to Fla. Stat. § 744.312 (2018).

Fla. Stat. § 744.312 (4)(b)(2018) states "An emergency temporary guardian who is a professional guardian may not be appointed as permanent guardian of a Ward unless one of the next of kin of the alleged incapacitated person or the Ward requests that the professional guardian be appointed as permanent guardian. The court may waive the limitations of this paragraph if the special requirements of the guardianship demand that the court appoint a guardian because he or she has special talent or specific prior experience. The court must make specific findings of fact that justify waiving the limitations of this paragraph." The statute thereby creates two specific situations in which the professional guardian could remain serving: 1) at the request of the Ward or Ward's next of kin, or 2) if the Court waived the limitation based on specific findings of fact regarding the special requirements of the guardianship.

The trial court conducted an evidentiary hearing and provided a detailed order based on its findings and ruling. In compliance with Fla. Stat. § 744.312(4)(b)(1) and (2) (2018), the trial court specifically found that the Ward wanted Zebny to stay on as his guardian and over the course of the emergency temporary guardianship (five months), the Ward and Zebny developed a positive rapport. The 2nd DCA affirmed the trial court's findings, citing to the substantial evidence in the record. The 2nd DCA held that the trial court did not abuse its discretion in appointing Zenby as guardian.

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Real Property Case Summaries

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Despite the general rule that prejudgment interest begins to run from the date of the loss, the court has discretion to find that interest should be awarded from the date the defendant receives notice of a default when considerations of fairness and equity support the interest running from the later date.

Sterling Village of Palm Beach Lakes Cd'm. Ass'n., Inc. v. Lacroze, 2018 WL 3301472 (Fla. 4th DCA 2018)

Joel Lacroze (the "Homeowner") acquired title to a condominium unit with a successful bid at a foreclosure sale. Sterling Village is the condominium association (the "Association"), and a dispute arose regarding the amounts due to the Association from the Homeowner, for assessments both before and after the Homeowner acquired title. Therefore, the Homeowner sued both the Association and the prior owner of the unit. The Association filed a counter-suit for payment of the assessments, filed a claim of lien, and then added a count for foreclosure on the claim of lien.

The trial court, in a non-jury trial, entered a final judgment in favor of the Association and awarded an amount for unpaid assessments as well as prejudgment interest from the date the claim of lien was recorded. The Association filed a post-judgment motion seeking prejudgment interest from the date the unpaid assessments became due (rather than the date the claim of lien was recorded), and it sought a revision of the final judgment to include a specific amount of prejudgment interest owed. The trial court denied the post-judgment relief.

The Fourth District Court of Appeal held that the trial court did not abuse its discretion in determining that the prejudgment interest began to accrue from the date the claim of lien was recorded. The purpose of the award of prejudgment interest is to make the plaintiff whole from the date of the loss. However, the Appellate Court pointed to a 1990 Florida Supreme Court Case, *Broward County v. Finlayson,* 555 So. 2d 1211 (Fla. 1990), which held that the general rule that prejudgment interest runs from the date of the loss is not absolute. In *Finlayson,* the Court found that interest is given in response to considerations of fairness and denied when exaction would be inequitable. Therefore, the court has discretion to find that interest should be awarded from the date that a party received notice of a default, and not earlier. Here, the Appellate Court affirmed the trial court's decision to award interest from the time of notice of the default and remanded the case back for a determination of the amount of interest.

A trial court did not have discretion to decrease the amount of interest due on unpaid assessments, even for equitable reasons. (Note the conflict with Lacroze above).

First Equitable Realty III, Ltd. v. Grandview Palace Condominium Association, Inc., 2018 WL 1734020 (Fla. 3D DCA 2018)

Grandview Palace Condominium Association (the "Association") sued First Equitable Realty III, Ltd. (the "Developer") for unpaid condominium assessments and the Developer filed a counter-claim for unjust enrichment and rescission. The Developer owned three units in the condominium and therefore, pursuant to Fla. Stat. § 718.116 (2018) was obligated to pay all assessments which came due while Developer was the owner. Fla. Stat. § 718.116 (2018) also provides that unpaid assessments shall bear interest from the due date until paid. The trial court held in favor of the Association and awarded the unpaid assessments plus interest, but the court decreased the amount of interest due for "equitable considerations." The trial court found that the Association was responsible for protracted litigation giving rise to the right to pursue the unpaid assessments, and the Association failed to mitigate its damages in the case.

The Third District Court of Appeal held that the trial court lacked the discretion to decrease the interest owed because the Legislature plainly and unambiguously provided for the recovery of interest. Therefore, the Appellate Court held that equity plays no role. The Appellate Court reversed and remanded the case with instructions that the trial court award the Association all interest as provided by Fla. Stat. § 718.116 (2018) and the Declaration of Condominium.

A party is entitled to prevailing party attorney's fees and costs where the court finds breach of a contract even if there is no award of damages. In order to establish entitlement to a mandatory injunction, there must be a clear legal right which has been violated, irreparable harm must be threatened, and there must be a lack of an adequate remedy at law.

Coconut Key Homeowner's Association, Inc. v. Gonzalez, 2018 WL 2126725 (Fla. 4th DCA 2018)

Gonzalez sued Coconut Key Homeowner's Association (the "Association") alleging that the Association breached, and continued to breach, its governing documents by failing to manage the surface water management system, which caused flooding and damage to Gonzalez. Gonzalez also included a

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count for injunction, seeking enforcement of various applicable covenants and restrictions in the governing documents. These issues went to trial and the jury found the Association breached its obligations under the governing documents, but that the breach was not the cause of Gonzalez's damage. Therefore, no monetary damages were awarded on the breach count. The trial court conducted a post-trial hearing on whether to issue an injunction, and based on the jury's finding that the Association violated rights under the governing documents, which caused Gonzalez irreparable harm and left her without an adequate remedy at law, the judge granted the injunction. Gonzalez then filed a motion for attorney's fees and costs pursuant to Fla. Stat. § 720.305(1) (2018), which the trial court denied. Gonzalez appealed the denial of fees and the Association appealed the granting of an injunction.

Upon review, the Fourth District Court of Appeal affirmed the issuance of a mandatory injunction. Specifically, the Appellate Court found that a clear legal right was violated when the jury found the Association violated its governing documents. Next, Gonzalez proved irreparable harm when several witnesses testified that the problem could only be resolved if certain structures were fixed. Last, Gonzalez did not have an adequate remedy at law because compensatory damages could only address repairs to damage already done, but future damage could only be prevented by an injunction.

However, the Appellate Court reversed the denial of attorney's fees and costs. Fla. Stat. § 720.305(1) (2018) indicates that the prevailing party in any such litigation is entitled to recover reasonable attorney's fees and costs. The Court explained that for awarding fees, prevailing party means the party who won on the significant issues in the litigation. The Appellate Court found the trial court erred in determining that Gonzalez was not the prevailing party because she did not receive any award for monetary damages. Despite the lack of damages, Gonzalez prevailed because the jury found that the Association breached its obligations under the governing documents. Further, the Appellate Court referenced Black's Law Dictionary, which defines prevailing party as "[a] party in whose favor a judgment is rendered, regardless of the amount of damages awarded." Black's Law Dictionary 1154 (8th ed. 2004) (emphasis added). Therefore, the Appellate Court remanded the case to determine reasonable attorney's fees and costs for both the breach and injunction claims.

A case is not moot merely because the renovations of a condominium pursuant to a special assessment had already been completed and the special assessment paid.

Smulders for 129–31 Harrison Street, LLC v. Thirty–Three Sixty Condominium Association, Inc., 2018 WL 1956343 (Fla. 4th DCA 2018)

Several unit owners ("Owners") brought suit against their condominium association (the "Association") for injunctive and declaratory relief to challenge the board of directors' approval of a special assessment, arguing the board acted contrary to the declaration of condominium. The Owners moved for a temporary injunction to stop the renovations, which was denied, and so the Owners paid the special assessment.

Both sides moved for summary judgment. One of the Association's arguments was that the renovations were completed, and the special assessment was paid by all owners, so there was "no bona fide, actual, present need for a declaration," and that the adverse interests were moot because the assessment was paid. The trial court granted summary judgment for the Association and the Owners appealed.

The Fourth District Court of Appeal reversed, holding that it is important to have a checks and balances on the power of an associations and its board of directors. "If the spending of an assessment always rendered moot a challenge to its legality, then the self-governance contemplated by the Condominium Act would be severely undermined; a board would have little check on its handling of money." The Appellate Court held that the case is not moot because the Owners may be entitled to reimbursement of the assessment paid, as well as attorney's fees if they are the prevailing party.

A lease agreement's exculpatory clause was ambiguous and thus unenforceable when it contained language both absolving the lessor from liability and then imposing liability for failure to exercise ordinary care to prevent unauthorized access to a safe.

Obsessions in Time, Inc. v. Jewelry Exchange Venture, LLLP, 2018 WL 2122801 (Fla. 3d DCA 2018)

Obsessions In Time, Inc. ("Obsessions") leased a booth from Jewelry Exchange Venture, LLLP ("Lessor"). As part of the lease, the Lessor provided a master safe where Obsessions had the option to store valuable items. The lease contained the following provision:

In making this lease, it is hereby agreed that lessor does not assume the relations and duty of bailee and shall not be liable for any loss or damage to the contents of the vault within the premises caused by burglary, fire, or any cause whatsoever, but that the entire risk of such loss or damage is assumed by the lessee. The lessor shall not be liable for any delay caused by failure of the vault doors to lock, unlock or otherwise operate and the sole liability of the lessor hereunder is limited to the exercise of ordinary care to prevent the opening of said vault or boxes contained therein by any person other than lessee or the authorized agent of the lessee.

Obsessions filed suit alleging that Lessor allowed an unauthorized person access to the safe and that person removed items valued at approximately $2 million dollars.

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State Tax Case Summaries

By Jeanette Moffa, Esq., Moffa, Sutton, & Donnini, P.A., Fort Lauderdale, Florida

Tax-free" internet sales come to an end as the Supreme Court of the United States holds that physical presence is no longer required for states to exercise taxing jurisdiction over remote sellers.

South Dakota v. Wayfair Inc., Dkt. No. 17-494 (2018) (slip op.).

On June 21, 2018, the Supreme Court of the United States heard its first sales tax case since 1992. The rise of online sales made into states by remote retailers was causing devastating revenue losses for states due to case precedent requiring retailers have an actual, physical presence within a state to create the Constitutionally required nexus for that state to compel the retailer to collects and remit the state's sales tax. In response to lost revenues, states across the country began disregarding the physical presence requirement, imposing various new nexus standards either within the court systems or explicitly in statutes.

Wayfair involved a nexus standard known as an "economic nexus" threshold. Specifically, South Dakota passed Senate Bill 106, which imposed nexus when a retailer made either $100,000 in sales or more than 200 separate transactions into the state within a year. Physical presence was not a factor in establishing nexus under Senate Bill 106. Wayfair, Inc., Overstock.com, and Newegg all challenged the law, first through the South Dakota courts and then in the Supreme Court of the United States.

On June 21, 2018, in a 5-4 split decision, the Supreme Court overturned over 50 years of case precedent, eliminating the physical presence requirement and upholding the economic nexus threshold enacted in South Dakota. The opinion of the court found that physical presence was not the necessary test for substantial nexus. In addition, the court held that the physical presence test created market distortions and was too formalistic for the modern-day economy. The dissenting opinion, meanwhile, believed that a change in the economy did not support overturning five decades of precedent and opined that Congress was better equipped to handle the issue uniformly amongst the states.

Florida has yet to enact legislation similar to South Dakota's, and state case law precedent is based upon the recently overturned physical presence requirement. For now, Florida businesses that make sales out-of-state should prepare for the burdens of new nexus standards. The compliance burden of collecting and remitting to both state and local agencies across the country can be substantial. The process may be further confused by varying taxing statutes and exemptions, which can differ dramatically. Worse yet, some states are applying new nexus standards retroactively, exposing businesses to years of liability for back taxes.

Meanwhile, remote businesses making sales into Florida should hope for the best but prepare for the worst. While Florida has been slow to act, the lack of clarity regarding Florida's nexus standard post-*Wayfair* is likely to be resolved soon. Sellers may want to enter into Florida's voluntary disclosure program to limit exposure or query the Department of Revenue in a formal advisement request to determine the taxability of certain transactions. As questions remain for Florida business owners, one thing is certain: sales tax laws across the country are permanently changing in 2018.

Nonprofit construction corporation did not qualify for educational or charitable property tax exemption.

National Center for Construction Education and Research LTD., Corp., v. Crapo, Case No. 1D17-765 (Fla. 1st DCA 2018).

The First DCA issued an opinion on June 13, 2018, addressing the educational and charitable exemptions from ad valorem taxes available to qualifying taxpayers. Florida's tax scheme is clear: ambiguities in a taxing statute are to be resolved in favor of a taxpayer. However, ambiguities regarding exemptions are construed in favor of the taxing authority.

National Center for Construction Education and Research LTD., Corp. (NCCER), a registered 501(c)(3) organization, owns and operates in a commercial multi-story office building in Alachua County. NCCER develops training materials for the construction industry. In January 2018, NCCER filed a single application claiming both a charitable and education exemption from ad valorem taxes. When the application was rejected, NCCER filed two separate applications one day apart. The rejection of these applications resulted in the case at issue.

NCCER argued that the educational function it provided served a charitable purpose. The court found, based on prior case law, that for purposes of claiming an exemption for educational use, the property must be owned by an educational institution. NCCER was not a qualifying educational institution, so it did not qualify for the exemption.

NCCER further argued that because the government can spend tax dollars on education, "educational purposes" are also "charitable purposes." However, the court found that such an interpretation would allow for any nonprofit engaged in an educational function to receive a "charitable purposes"

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State Tax Case Summaries, from page 54

exemption regardless of its status as an educational institution and would render the statute establishing the standards for educational institutions (Fla. Stat. § 196.198) (2018), meaningless. Finally, the court noted that tax exemptions are to be construed strictly, resolving any ambiguities in favor of the taxing authority. As a result, the trial court's final judgment upholding the property appraiser's denial of the exemption applications was affirmed.

Real Properties Case Summaries, from page 53

The suit was for breach of contract and negligence. The Lessor moved to dismiss and the trial court dismissed the claims with prejudice. Obsessions appealed.

The Third District Court of Appeal reversed, holding that the exculpatory clause is ambiguous and therefore unenforceable. Specifically, exculpatory clauses are viewed with disfavor and therefore Florida law requires that such clauses be strictly construed against the party claiming to be relieved of liability. In the instant case, the clause is ambiguous because it first appears to relieve the lessor of liability, but then imposes liability if the Lessor fails to exercise ordinary care to prevent unauthorized access. Therefore, the Appellate Court remanded the case back to the trial court for further proceedings.

THE FLORIDA BAR



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An application form will be posted to the RPPTL website soon. For any questions regarding the RPPTL Section scholarships for The Florida Bar Wm. Reece Smith, Jr. Leadership Academy, or to request an application, contact Kristopher E. Fernandez, (813) 832-6340, kfernandez@kfernandezlaw.com, Brian C. Sparks, (813) 222-8515, brian.sparks@hwhlaw.com or Allison Archbold, (941) 960-8825, jaa@archbold.law.

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ACTION LINE JANUARY 2018

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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.

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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,
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