

ActionLine

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

Special Tax Feature: Tax Cuts and Jobs Act of 2017

Articles by: Jeffrey A. Baskies, Elizabeth A. Bowers, Keith C. Durkin, Lisa H. Lipman, David Spacht, and Jerome L. Wolf

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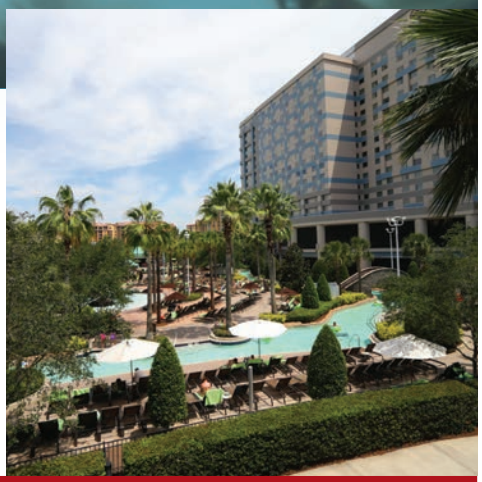

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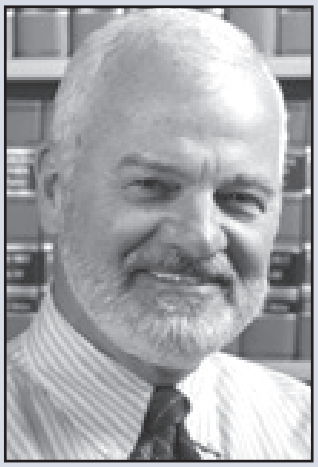
Building The Section Through The Membership And Inclusion Committee



Chair's Column

By Andrew M. O'Malley
Section Chair, 2017- 2018

The Real Property, Probate and Trust Law Section of The Florida Bar (the "Section") is one of the largest sections of The Florida Bar with well over 10,000 members, with a member mark that has remained consistent for the past several years. The many benefits that the Section provides to its members cannot be overstated. Such benefits range from great networking opportunities, educational committee meetings and discussions, writing opportunities and speaking engagements. The Section certainly plays an important role in its members' professional development.

The Membership and Inclusion Committee (the "Committee") contributes to the Section's success by focusing on growing and maintaining diverse membership while, at the same time, promoting active involvement of members with Section activities. Under the current leadership of Co-Chairs Jason Ellison and Brenda Ezell, the Committee tirelessly and enthusiastically continues to work towards the Section's membership goals through the following programs and activities.

Law School Outreach Program

The Section offers an affiliate membership for law students who are interested in or considering a future practice in the areas of real property or probate and trust law. For a nominal fee, an affiliate law student member can enjoy all the privileges of active Section members, except for voting rights or holding office. The Committee, through its Law School Outreach Program, actively promotes and facilitates the student affiliate membership by organizing several events during the academic year at law schools within the state. Examples include the very popular "Eat-N-Educate," where Section members speak to law students during the lunch hour, "Coffee and Donuts," where Section members provide practical tips to law students during final exams week, and ordinary "meet and greet" sessions, where law students can meet and ask questions of Section members. At the conclusion of these outreach events, many law students become affiliate members and start attending Section meetings. The law schools that routinely participate in these events are Florida State University College of Law, Thomas M. Cooley Law School, Stetson University College of Law, Barry University College of Law, Florida International University College of Law, University of Miami School of Law, St. Thomas University School of Law and Nova Southeastern University Shepard Broad College of Law.

These events are not only well received by law students and the respective law school administrations, but they provide great speaking opportunities to our Section members and At-Large members. Speakers from every judicial circuit in Florida enthusiastically share their personal rewarding experience within the Section, and their own practice serves as an anecdote to law students.

Committee members Lynwood Arnold, Kymberlee C. Smith and Sandy Boisrond are working together to continue the Section's outreach to Florida law schools and local organizations in order to build interest and new membership with law students and younger attorneys.

Career Coaching Program

The Committee, through its Career Coaching Program, offers an invaluable service to law students with mock job interviews and resumé critique sessions. These on-campus sessions, coordinated with law school administrators, help 2Ls to prepare for summer associate position interviews and 3Ls to polish their interview and resumé techniques to land their first job. The law students who participated in the mock interview process were extremely thankful to the Section for such a remarkable and worthwhile experience.

Long time Committee members Guy Emerich and Phil Baumann lead the Career Coaching Program and continue working assiduously with law students.

Diversity Outreach

One of the main membership goals of the Section is to attract and retain minority members to reflect the demographics of our diverse communities. The Committee affirms its commitment towards diversity and inclusion by sponsoring a number of events during the year, such as the Caribbean Bar Association's Annual Scholarship Banquet, which is the largest fundraiser to fund paid internships for minority law students, the Annual Public School Legal Initiative, organized by Committee member Kymberlee C. Smith and sponsored by The Florida Bar's Diversity Grant Program, which is a two-part program for minority middle and high school students that provides an opportunity for such students to explore various

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

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

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Mary Ann can help with most everything, such as membership, the Section's website, committee meeting schedules, and CLE seminars.

practice areas in law and careers in law enforcement, and minority mentoring picnics across the state, including Tampa, Orlando and Miami.

One such picnic, the *Annual Kozyak Minority Mentoring Picnic in Miami,* is the ultimate networking event, focusing on inclusion and diversity in the legal profession. For the past 14 years, this annual event is well attended by many judges, attorneys and law students from all over Florida. This is a fun and informal setting in which one may find a mentor or a mentee while enjoying the many outdoor activities, music, vast variety of food, and networking opportunities that this event has to offer. This year, the Kozyak Minority Mentoring Picnic took place on February 3, 2018, at a new venue: the world-famous Zoo Miami. As it is every year, the Section is one of the many sponsors of this event and had a tent full of the Section's promotional materials and Section members ready to engage and connect with law students and prospective affiliate members.

Pro Bono Opportunities

One of the Section's primary purposes is to "inculcate in its members the principles of duty and service to the public." The Committee is also dedicated to the Section's public service purpose. Besides the adoption of the No Place Like Home Project (described in detail in the Fall 2017 ActionLine Chair's Column), the Section recently approved a pro bono initiative of the Committee to host Estate Planning Clinics for Healthcare Directives. The event was structured as a Saturday clinic, jointly sponsored between the Section and local legal aid organizations, with the stated purpose to educate the public on estate planning matters and provide legal assistance with healthcare directives for low-income residents. The initial pro bono clinic, co-sponsored by Legal Services of Greater Miami, was scheduled to take place during the National Pro Bono week in October 2017. The Committee worked closely with At-Large Members who gladly volunteered as either speakers or one-to-one consultants. The enthusiasm and expectations for this first pro bono project, however, were abridged due to effects of Hurricane Irma. The increasing volume of post-hurricane related matters left Legal Services of Greater Miami with no other option than to postpone this event.

The Committee continues to strengthen relationships with community service organizations and legal aid organizations such as Hispanic Unity of Florida, Bay Area Legal Services, Legal Aid Service of Broward County, and the Mission United/Veterans Pro Bono Project.

Our enthusiastic Committee members leading Pro Bono Opportunities are Annabella Barboza, Ashley Zohar, Lynwood Arnold and Gwynne Young. Gwynne and Ashley are currently organizing an estate planning clinic in conjunction with Bay Area Legal Services. Lynwood and Annabella are re-scheduling the Miami project and embarking on new ventures with Mission United/Veterans Pro Bono Project. The dates for the upcoming pro bono events will be posted on our website.

The Committee, through its many efforts, continues to connect our members and future members to our Section and their specific areas of practice in real property, probate or trust law.

Special thanks to Annabella Barbosa of Barbosa Law and Associates in Ft. Lauderdale, Florida, for assistance in writing this column.

Letter From The Editors

Dear Readers:

We hope you are enjoying the new features in ActionLine, including this Letter from the Editors. We'd love to hear from you regarding the magazine. So please feel free to email us with any comments, suggestions or general input.

This issue includes another ActionLine first. In this Spring 2018 Issue all of the Probate and Trust Law articles are focused on the Tax Cuts and Jobs Act (TCJA) of 2017 (signed December 22, 2017). TCJA presented the most sweeping changes in federal tax laws in decades. The Editors felt these momentous changes in both the income tax and transfer tax laws impacting all practitioners (but uniquely impacting trusts and estates advisors) warranted a unique feature in the Spring 2018 Issue of ActionLine. Elizabeth Bowers provides us with an overview of the TCJA changes and opportunities for clients. David Spacht looks into unique planning issues caused by the potential for the exemptions to "snap back" in 2026. Keith Durkin offers a detailed look at the Section 199A 20% deduction for owners of certain pass-through entities. Jerry Wolf and Jeff Baskies offer some planning ideas for clients in light of the new estate tax exemption. Finally, Lisa Lipman explores changes in charitable planning caused by TCJA.

In addition to the special feature on the TCJA, the Spring 2018 Issue of ActionLine includes 3 terrific articles from Larry Leiby, Cary Wright, Jaret Fuente, and Michael Rothfeldt, and Steve Lesser on the following Real Estate topics: arbitration clauses, notices of a claim under Chapter 558, and "time is of the essence" clauses in construction contracts. Plus, there are the general interest articles, practice corners, case reviews, roundtable highlights, the new Section Spotlight (Mike Bedke writing on "The Internet of Things") and the new Political Roundup (Cari Roth summarizing the 2018 Legislative Session).

We are also pleased to note, this is the first issue of ActionLine in which all 3 Co-Editors-in-Chief authored content as well as organized and edited the magazine.

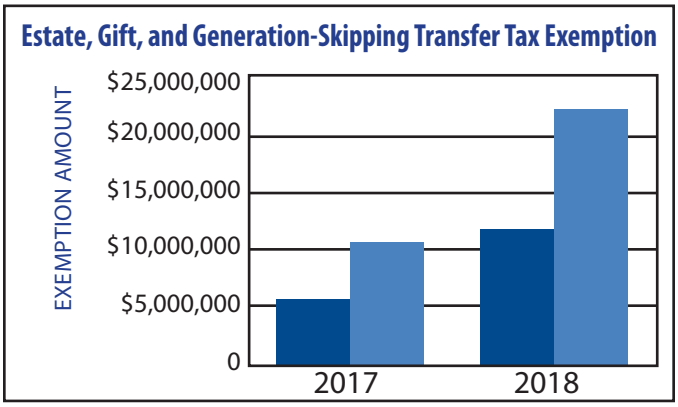
—The Editors

Tax Cuts And Jobs Act Creates Unique Planning Opportunity For Wealthy Clients

By Elizabeth A. Bowers, Esq., Gunster, Yoakley, & Stewart, P.A., West Palm Beach, FL

The Tax Cuts and Jobs Act ("TCJA"), signed into law by President Trump on December 22, 2017, made significant changes to prior transfer tax laws.[1] The most notable change was the doubling of the estate, gift, and generation-skipping transfer tax exemptions. These changes became effective on January 1, 2018, and are set to sunset on January 1, 2026 (provided the legislation is not modified by subsequent legislation). This short window creates a unique planning opportunity for wealthy clients to significantly reduce their taxable estates by transferring wealth to their descendants or other intended beneficiaries.

In 2018, the tax exemption amounts increased to $11.18 million for individuals and $22.36 million for married couples. This is over double the exemption amounts from 2017, which were $5.49 million and $10.98 million, respectively. The TCJA further provides that the exemption amounts are indexed for inflation each year until January 1, 2026, when the rates are scheduled to revert to 2017 levels.



This significant, temporary increase presents a unique opportunity for wealthy clients. Clients interested in taking advantage of this opportunity will presumptively consult with their estate planning counsel to determine how to efficiently pass wealth to their beneficiaries.

The TCJA also modified the law regarding 529 plans. A 529 plan is a tax-advantaged savings plan designed to encourage individuals to begin saving for their descendants' tuition. One of the major benefits of a 529 plan is that earnings grow income tax free. Another is that withdrawals from a 529 plan are not subject to income tax as long as the funds are used to cover "qualified education expenses."

Previously, only withdrawals to cover college tuition costs constituted "qualified education expenses." After the TCJA, however, withdrawals up to $10,000 for each beneficiary also constitute "qualified education expenses" if those funds are used to cover tuition for K-12 schools.

When considering how to take advantage of the planning opportunities presented by the TCJA, clients and practitioners should keep the following issues in mind:

- **Tax Rate.** The tax rate for the estate, gift, and generation-skipping transfer taxes remains at 40%. So, the ability for clients to transfer assets equal to their exemptions tax-free (before the exemption decreases in 2026) presents an opportunity for clients to (i) immediately reduce their taxable estates; and also (ii) remove any future appreciation on the transferred assets from their taxable estates.
- **Annual Exclusion Gifts.** In addition to the increased lifetime exemptions, every individual can still make tax-free gifts up to the annual gift tax exclusion amount each year. In 2018, the annual gift tax exclusion amount increased to $15,000 per donee ($30,000 for a married couple). These gifts can be made outright or in trust (subject to certain restrictions). An individual can also fund a 529 plan at an accelerated rate by transferring $75,000 per donee ($150,000 for a married couple). This special exception for 529 plans allows an individual to prepay 5 years of annual exclusion gifts, subject to certain conditions.
- **Portability.** The TCJA did not affect the portability election, which allows a surviving spouse to use his or her deceased spouse's unused federal estate tax exemption.
- **Basis Planning.** If a client owns an asset at his or her death, the basis of the asset increases (or decreases) to the fair market value of the asset as of the client's death. The ability to "step-up" (or "step-down") an asset is generally lost if the asset is transferred by inter vivos gift during the client's life. For this reason (and others), income tax planning has become an important aspect of estate tax planning. Clients will ask their estate planning attorneys how to take advantage of the increased gift and estate tax exemptions while minimizing potential income tax exposure.

In addition to the increased lifetime exemptions and the annual gift tax exclusion amount, clients are still allowed to

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make unlimited tax-free gifts by: (i) paying a donee's tuition directly to a qualified education institution; and (ii) paying a donee's medical bills directly to a qualified medical provider.[2] These gifts also are not subject to generation-skipping transfer tax,[3] which means that this is a very attractive technique for individuals who have used their transfer tax exemptions but would like to still pass additional wealth to their grandchildren or more remote descendants.

These often overlooked exclusions provide significant planning opportunities to clients, especially given the ever-rising costs of tuition and medical expenses. Before engaging in this type of planning, clients may wish to discuss the following issues with their counsel:

- **Must payments be made directly to providers?** Yes. In the case of both the educational and medical expense exceptions, a payment must be made directly to the provider. This is a crucial aspect of the exclusion. For example, if a grandmother gives her grandchild $40,000 to pay her college tuition, the transfer is subject to both gift tax and generation-skipping transfer tax. Even if the grandchild immediately turns around and transfers the $40,000 to her college to cover her tuition costs, the tax result does not change.

  The repayment of student loans or medical loans similarly does not qualify for this exception. Assume a grandchild borrows money to pay her tuition expenses. If her grandmother decides the very next day to pay off her student loans, the grandmother's repayment of her grandchild's student loans is subject to gift and generation-skipping transfer tax.
- **Do any other educational expenses besides tuition fall under this exclusion?** No. The educational expense exclusion is limited to tuition.[4] Clients who wish to cover other costs, like books and room and board, can make annual exclusion gifts to donees to cover these expenses. As set forth above, an individual can transfer $15,000 to a donee to cover these additional costs, while a married couple can transfer $30,000.
- **What types of schools qualify for this exception?** The regulations specifically provide that tuition payments to primary, secondary, preparatory schools, high schools, colleges and universities all qualify.[5] There is also some authority to suggest that tuition payments to a minor's day care center qualifies for tax-free treatment.[6]
- **Can you prepay several years of tuition?** Yes, subject to certain conditions. The Internal Revenue Service ("Service") previously took the position that an individual could prepay his descendants' tuition payments as long as the payments were not subject to refund and would be forfeited if the donees ceased to attend the school.[7] The prepayment of the descendants' tuition was not subject to gift or generation-skipping transfer tax.

  More recently, in a private letter ruling, the Service again determined that a donor could prepay tuition costs.[8] In this private letter ruling, the Service determined that the prepayments qualified for tax-free treatment because the tuition payments were non-refundable and the prepayments did not guarantee enrollment or afford the donor's grandchildren any additional privileges at the school. In this instance, the donor was able to prepay tuition for numerous years for all 6 of her grandchildren.
- **What medical expenses qualify?** Qualified medical expenses include, but are not limited to, the following: (i) the payment of medical insurance; and (ii) amounts paid for diagnosis, cure, mitigation, treatment, or prevention of disease.[9]

The following illustrations exemplify the benefits of this type of planning:

Assume that Husband and Wife have already used their estate and generation-skipping transfer tax exemption and are looking for additional planning opportunities to transfer wealth to their descendants. In order to reduce financial pressure on their children, Husband and Wife agree to cover the cost of their 8 grandchildren's tuition. Assume all of the grandchildren will attend the same private school for K-12, the tuition is $25,000 a year, and the tuition payments are nonrefundable. As set forth below, if Husband and Wife prepay their grandchildren's tuition, they can transfer $2.6 million today without incurring any gift or generation-skipping transfer tax.

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Grandchild	Number of Years Prepaid (K-12)	Cost of Tuition (per year)	Prepayment Per Grandchild
1	13	$25,000	$325,000
2	13	$25,000	$325,000
3	13	$25,000	$325,000
4	13	$25,000	$325,000
5	13	$25,000	$325,000
6	13	$25,000	$325,000
7	13	$25,000	$325,000
8	13	$25,000	$325,000
		Total Prepayment	**$2,600,000**

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This transfer avoids the imposition of gift tax of $1.04 million.

Total Transfer	**$2,600,000**
Gift Tax Rate	**40%**
Gift Tax Imposed	**$1,040,000**

It also avoids the imposition of generation-skipping transfer tax of $1.04 million.

Total Transfer	**$2,600,000**
GST Tax Rate	**40%**
GST Tax Imposed	**$1,040,000**

In total, the combined tax savings are $2.08 million.

Gift Tax Imposed	**$1,040,000**
GST Tax Imposed	**$1,040,000**
Total Transfer Taxes	**$2,080,000**

Aside from the tax savings and financial benefits, clients receive a significant emotional benefit by engaging in this type of planning because it relieves their children from substantial financial pressure and allows the clients to take an active part in ensuring their grandchildren receive a top-notch education.

The new planning opportunities created by the TCJA coupled with existing planning strategies create significant planning opportunities for high net worth clients. While clients may be inclined to immediately take advantage of this significant, temporary increase in the exemption amounts, they should first consult with their estate planning counsel to come up with a holistic plan that takes into account the planning issues discussed herein.


E. BOWERS

Elizabeth A. Bowers *is a probate litigator and estate planner in the Private Wealth Services group at Gunster, Yoakley & Stewart, P.A. Her practice focuses on probate and trust administration, litigation, and estate planning for high net worth individuals. Elizabeth serves on the Executive Council of the Real Property, Probate & Trust Law Section of the Florida Bar. Prior to joining Gunster, Elizabeth was a clerk for Judge Donald M. Middlebrooks of the U.S. District Court for the Southern District of Florida. Elizabeth graduated with a B.S. from Georgetown University (with honors) and received her J.D. (with honors) and LL.M in Taxation from the University of Florida.*

Endnotes

1 Public Law No. 115-97.
2 26 U.S.C. § 2503(e).
3 26 U.S.C. § 2642(c)(3)(B).
4 Treas. Reg. § 25.2503-6(b)(2).
5 26 U.S.C. § 2503(e)(2)(A); 26 U.S.C. § 170(b)(1)(A)(ii); Treas. Reg. § 1.170A-9(c)(1).
6 Rev. Rul. 78-446.
7 TAM 199941013 (October 15, 1999).
8 PLR 200602002 (January 13, 2006).
9 26 U.S.C. § 2503(e)(2)(B); 26 U.S.C. § 213(d).

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What Goes Up Must Come Down: Estate Planning With The Current Exclusion, While We Still Have It

By David Spacht, Esq., Pryor Cashiman, LLP, New York, New York

Public Law 115-97, commonly referred to as the Tax Cuts and Jobs Act (the "Act"), was signed into law on Dec. 22, 2017.[1] The Act significantly altered many provisions of the Internal Revenue Code, resulting in substantial changes to the calculation of personal and entity-level income taxes and the further reduction to the pool of individuals to whom the estate, gift and generation skipping transfer taxes will apply. Although less than .02 percent of taxpayers are affected by the federal wealth transfer tax, depending on an individual's age and life expectancy, taxpayers who would not be subject to an estate tax under the current exemption levels may still find opportunities for making lifetime gifts.[2] By incorporating flexibility in the structure and mechanics of a client's estate plan, practitioners can assure a client who is uncertain about the future "opportunity cost" of his/her gift that his/her plans can adapt with changing family and legal circumstances. Even for those individuals who are not likely to be affected by the federal estate or gift tax, several constants remain which should continue to drive estate planning, including state estate tax reduction or avoidance, asset protection or using the larger exemption to cushion smaller gifts of hard-to-value assets from the risks of an audit.

Changes to the Wealth Transfer Tax System

After several weeks of partisan negotiations, on November 2, 2017, House of Representative Republicans presented their first iteration of the proposed tax bill. Anticipating the probability of a Democratic filibuster if a permanent bill with a 60 vote-requirement by the Senate was proffered, Republicans incorporated a "sunset" provision, requiring only a simple majority but restricting the law's applicability to eight years. Although the bill presented to the House of Representatives included the repeal of the estate and generation skipping transfer (GST) taxes, the Senate's version of the bill proposed a doubling of the estate, gift and GST tax exemptions. The Conference Committee ultimately adopted the Senate's version, which became law with the passage of the Act.

The Act nearly doubled the wealth that individuals can transfer without incurring a wealth transfer tax from an already historically high $5,490,000 to $11,180,000 (technically the "Basic Exclusion Amount," but often simply referred to as the "exemption," and, as was the case under prior law, will be indexed for a cost of living inflation adjustment. The exemption levels will return to $5 million (indexed for inflation) on Jan. 1, 2026, when many provisions of the Act expire, or perhaps even sooner if a newly elected administration legislates preemptively.[3] Taxpayers were confronted with a similar scenario in 2011 and 2012, when the $5 million exemption was slated to return to $1 million at the expiration of the Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010, Public Law 111-312 ("the 2010 Tax Act") on Dec. 31, 2012.[4] Anticipating the possible 80 percent reduction in the exemption, a large number of potentially affected taxpayers were presented with the opportunity to remove wealth from their taxable estates. For example, had the exemption reverted to previous levels, many individuals owning life insurance policies would have likely had gross estates in excess of a $1 million exemption. Therefore, the onus driving individuals to make gifts during 2011 and 2012 was largely the concern that the increased gift tax exemption might lapse.

Despite the gifting opportunities of 2011 and 2012, practitioners cautiously advised clients of the possibility that large transfers could be "clawed back" and subject to estate tax if the taxpayer died in a year in which the estate tax exemption failed to exceed the gift tax exemption used for an earlier gift. The American Taxpayer Relief Act of 2012 (ATRA), passed on Jan. 1, 2013, extended the $5 million estate tax exemption amount, so this issue never surfaced. Lessons learned from the possibility of ATRA's sunset at the end of 2012 indicate that it is unlikely that the Internal Revenue Service (IRS) would apply

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a clawback. Section 2001(g)(2) of the Act, originally sourced from the 2010 Tax Act, authorizes the Treasury Department to issue regulations to address the potential for a clawback. The legislative history seems to indicate that the intended purpose of the request for regulations stems from the technicality of drafting regulations sufficient to prevent gifts exempt from gift tax from being clawed back. Nevertheless, until regulations are issued, practitioners should continue to advise clients of the possibility of a clawback.

Planning for Changes in the Tax Law

Some individuals who made, or contemplated making, gifts in 2011 or 2012 may be hesitant to make current lifetime gifts out of skepticism that the wealth transfer tax exemption levels will actually decrease. This "wait and see" approach may result in a missed opportunity that practitioners should challenge under the appropriate circumstances. By dispelling two common misconceptions – first, that gifting necessitates the relinquishment of all access and control of the transferred funds, and second, that gifting precludes a future step-up in income tax basis for the appreciated or appreciating assets, practitioners can provide added value to clients who would benefit from lifetime gifting. As such, gifts made through the use of flexible trust structures can accomplish these goals through periods of unforeseen and changing circumstances.

One such structure, known as a Spousal Lifetime Access Trust (SLAT), is a trust whereby married individuals, siblings, or a pair of individuals, can utilize the increased estate tax exemptions without relinquishing permanent access to the funds.[5] Most commonly used between spouses, SLATs are structured so that each spouse creates and funds a reciprocal trust for the discretionary lifetime benefit of the other and their issue. Each spouse is able to serve as the trustee of the trust created by the other for his or her benefit, provided that he or she is limited to making distributions to himself or herself pursuant to an "ascertainable standard" for the purposes of health, education, maintenance, or support.[6] An independent co-trustee should also be appointed with authority to make distributions for any purpose, in such co-trustee's sole and absolute discretion.[7] Further, if each spouse creates a SLAT for the other, the trusts must be drafted with material differences in order to avoid the re-inclusion of the transferred assets in each spouse's estate pursuant to the "reciprocal trust doctrine."[8] Negating the intended utility of the structure, the trusts will be uncrossed if, after funding each trust, the spouses have left themselves "in approximately the same economic position as they would have been in had they created trusts naming themselves as life beneficiaries."[9]

Each spouse's transfer to the SLAT is treated as a completed gift with the objective of utilizing lifetime gift tax exemption and removing assets and commensurate future appreciation from estate and gift taxation, and, if structured to be GST exempt, even for future generations.[10] During their joint lifetimes, each spouse has access to the trust created for his or her benefit, and, assuming the spouses maintain a happy marriage, each spouse also retains beneficial enjoyment of the trust that he or she created as a result of the beneficiary spouse receiving distributions from the trust. Although it is not necessary for both spouses to each create such a trust, doing so enables the couple to effectively double the amount of transferred wealth while minimizing the risk of losing indirect access to the assets upon the first spouse's death. Ideally, the couple will never require distributions from their trusts, allowing the unreduced trust funds to grow for the benefit of future generations. Nevertheless, if the spouses lack sufficient individual assets to maintain their desired lifestyles without receiving distributions from the trusts, accessing the funds in each of the SLATs is still possible.

In a majority (albeit gradually decreasing number) of states, a grantor cannot be the beneficiary of a trust that he/she has created without the trust assets being includible in his/her estate upon his/her death.[11] Therefore, the trust will terminate at the beneficiary spouse's death and the balance of the trust principal will continue to be held in further trust for the benefit of the couple's children and grandchildren. Consequently, at such time, the grantor spouse will lose indirect access to the beneficiary spouse's trust that he/she enjoyed during his/her lifetime. Moderately wealthy clients who were motivated to plan primarily for asset protection, state estate tax savings, or reasons other than federal estate tax savings, may, however, require access the trust funds of both trusts. Often by naming a corporate or individual trustee with a presence in a self-settled domestic asset protection trust (DAPT) jurisdiction, the trust can authorize an independent party to add the grantor as a permissible trust beneficiary should he/she require access to the trust funds after the death of the donee spouse.[12] If the trust is not initially sited in a self-settled DAPT jurisdiction, the trustees should ensure that the situs of the trust is moved to such a jurisdiction prior to adding the grantor as a permissible beneficiary.[13]

Historical estate planning convention generally prioritized avoiding the estate tax over the income tax consequences to beneficiaries inheriting assets. This philosophy developed primarily due to a significant disparity between the estate and gift tax rates and the capital gains rates. For example, from 2001 through 2008, the estate and gift tax exemptions ranged from approximately $675,000 to $2,000,000 with tax rates ranging from 45 percent to 55 percent, whereas the long-term capital gains rates generally ranged around 15 percent to 20 percent during the same period. Income tax planning has become an increasingly vital component of a comprehensive estate plan as the federal estate tax has applicability to fewer individuals.

Despite this paradigm shift, determining at the time of planning whether to gift an asset to utilize the high gift tax

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exemption or retain it in order to obtain a step-up in basis is made a near-impossible task by a series of variables relating not only to the grantor, but also to the ultimate beneficiaries.[14] For example, estate tax exemptions and rates and the income tax brackets and rates that will likely be in effect in the grantor's or beneficiary's state of residency, the life expectancy of the grantor, as well the nature of the inherited asset and the likelihood that it will be sold or retained by the beneficiary, are all circumstances that cannot be determined with any reasonable degree of certainty. If, at the time of the grantor's death, the estate tax exemption remains at historically high levels or the beneficiary has a large portion of unused estate tax exemption available, it may be advantageous to cause a portion or all of the trust assets to be included in the taxable estate of a beneficiary or another third party.

Therefore, although SLATs are initially structured to avoid estate inclusion, the current estate planning environment dictates the use of flexible mechanisms that, if engaged, will selectively trigger a step-up in income tax basis. Estate inclusion can be accomplished by granting a disinterested trustee the discretion to later confer a general power of appointment (GPOA) to the grantor, a trust beneficiary or independent third party. The value of the property subject to the exercise of the GPOA is includible in the estate of the powerholder and any appreciated assets subject to the power will receive a step-up in basis at the powerholder's death, regardless of the whether the power is actually exercised.[15] Authorizing a trustee to confer a GPOA eliminates some of the uncertainties present at the time of the trust's creation by allowing the trustee to determine the appropriate time, individual, and assets over which to trigger estate inclusion.

Furthermore, a trustee may confer a GPOA upon an elderly relative of the grantor with a modest estate to achieve a step-up in basis at the time of the relative's death.[16] Choosing an individual whose estate would not exceed any state or federal estate tax exemptions in place at the time of his or her death would achieve a step-up in basis without any estate tax consequence. To mitigate any risk that the GPOA would be exercised by a third party donee, the grantor may mandate that the exercise requires the consent of a non-adverse party, or, alternatively, the donee can be given a limited power of appointment restricted to its exercise among the grantor's issue or other family members that could later be converted into a GPOA by another individual.[17]

If the grantor has available exemption, other techniques may be used to cause estate inclusion that would not require reliance on a third party. For example, if the grantor is not concerned with her own potential creditors, the trustees can simply distribute the trust assets to the grantor. Furthermore, the trustee may choose to confer a GPOA upon an ailing grantor, if doing so would result in the imposition of an estate tax at the time of the Grantor's death.[18] It is also common for trusts to include a power of substitution, also called a "swap power," which enables the grantor to reacquire the trust principal by substituting it with other property of equivalent value. If the grantor possesses minimally appreciated assets, he/she may exercise this discretion to replace appreciated trust property that would benefit from a basis step-up with such lesser appreciated assets.[19] Exercising a swap power is likely to be more advantageous than a direct distribution, as it enables the grantor to retain the creditor protection of assets held in trust assets while also maintaining estate tax and GST tax efficiencies of the trust.

It is also common for trusts to include a power of substitution, also called a "swap power," which enables the grantor to reacquire the trust principal by substituting it with other property of equivalent value.

Practitioners often also incorporate the swap power into their trust agreements as a practical means of triggering "grantor trust" status. The grantor's payment of the trust income serves to further reduce his/her estate, allowing for the tax-free growth of trust assets, permits the grantor to engage in sale transactions with the trust without triggering gain, and, may result in a lower income tax burden, as undistributed trust income will be taxed at the highest rate bracket at only $12,500 of income.[20] Although triggering grantor trust status has traditionally been an important, if not automatic, estate planning device, practitioners should rethink whether doing so will best suit taxpayers given the changes instituted by the Act.

The Act capped the federal itemized deduction for state and local income, sales, and property taxes paid (SALT) to $10,000 and increased the standard deduction to $12,000 for unmarried tax filers and $24,000 for joint filers. Taken together, many taxpayers in high tax states such as New York and New Jersey who likely have SALT deductions in excess of $10,000, will have an increase in income tax liability either from itemizing with fewer deductions or because they will be limited to the standard deduction. As a result, although federal taxation of the non-grantor trust income would be imposed at significantly compressed income tax brackets, the grantor could avoid state income tax in the grantor's state of residency and have the opportunity to reduce the grantor's state and federal income taxes by shifting investment income to beneficiaries pursuant to Sections 661 and 662.[21]

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By default, a SLAT is automatically taxed as a grantor trust pursuant to Section 677(a), because the trust income and principal may be distributed to the spouse in the discretion of the trustee.[22] Grantor trust status may be avoided, however, if all distributions to the spouse are subject to the consent of an adverse party.[23] Furthermore, some powers that trigger grantor trust status, such as a swap power, may still be desirable in order to obtain a basis step-up for appreciated trust assets. In such a circumstance, the swap power may also be made subject to the consent of an adverse party, which would prevent it from causing grantor trust status, but would still provide basis planning flexibility.[24]

For residents of high income tax states creating completed gift SLATs or hybrid DAPTs in self-settled asset protection trust jurisdictions, many of which do not impose a state income tax, creating SLATs taxed as non-grantor trusts or later "toggling off" grantor trust status can provide the additional benefit of avoiding state income tax on the trust income. The decision to create a non-grantor trust will depend largely on the expected income generated by the trust's investments as well as whether, to whom and to what extent, the trustees anticipate making distributions that will carry out income to one or more beneficiaries. If either of the grantors anticipate that they will require a significant portion of the trust income during their lifetimes, then structuring the SLATs as non-grantor trusts will likely offer little income tax benefit. However, avoiding grantor trust status may result in a total net income tax savings if income is not required or if distributions will be made to the grantor's children, who may be taxed at lower tax brackets or who may reside in states without an income tax. For grantors living in states without an income tax, traditional grantor trust planning is more likely the favorable option. If grantor trust status would again become desirable under a future change in state or federal tax laws or a grantor moves to a low income tax state, the SLAT can be modified accordingly to re-engage grantor trust-triggering powers.

Conclusion

The decision to part with the control of one's wealth is not always an easy one for an individual to make. In contrast to previous years, when taxpayers faced a narrow gifting window before exemption levels were slated to sunset, taxpayers now have several years to make their decision. Given the unprecedented opportunity for wealth transfer, however, even those who would not be subject to a federal gift or estate tax at current exemption levels, should consider making lifetime gifts. The decision to part with assets may be made easier for many individuals through the use of flexible trust structures, given the benefits of reacquiring use of the trust assets and adjusting income, estate, and/or GST tax consequences as circumstances change.



D. SPACHT

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Endnotes

1 Tax Cuts and Jobs Act, Pub. L. No. 115-97, 12/22/17.

2 With a Basic Exclusion Amount of $5,430,000, 99.8 percent of taxpayers would not be subject to the estate tax. Joint Committee on Taxation, History, Present Law, and Analysis of the Federal Wealth Transfer Tax System, March 16, 2015, JCX 52-15.

3 The Act utilizes the Chained Consumer Price Index for All Urban Consumers ("C-CPI-U") instead of the Consumer Price Index for All Urban Consumers ("CPI-U") as a measure of inflation, which will slow the typical increase in the annual inflation adjustment in future years. I.R.C. § 2010(c)(3)(C).

4 The Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010, Public Law 111-312 ("the 2010 Tax Act") established an estate tax exemption of $5 million, effective Jan. 1, 2010 through Dec. 31, 2012. I.R.C. §§302(a), 101(a).

5 *See Estate of Levy*, T.C. Memo. 1983-453 (1983); *Lehman v. Commissioner*, 109 F.2d 99 (2nd Cir. 1940), *cert. denied*, 310 U.S. 637 (1940); *Estate of Bischoff*, 69 TC 32 (1977).

6 Treas. Reg. § 25.2511-1(g).

7 A beneficiary who has the power to distribute assets to himself that is not limited by an ascertainable standard, will have a GPOA and will be required to include the assets in his gross estate for estate tax purposes pursuant to Section 2041. Section 2041 includes an ascertainable standard exception for a power that is limited to the health, education, support, or maintenance of the decedent.

8 A discussion of the particulars of drafting non-reciprocal trusts is beyond the scope of this article.

9 *United States v. Estate of Grace*, 395 U.S. 316, 324 (1969).

10 Contributions to the trust are completed gifts for gift tax purposes because the trust does not satisfy the requirements of qualified terminable interest property under I.R.C. § 2523(f)(2).

11 Due to the lack of creditor protections to self-settled trusts in non-DAPT states, the grantor cannot retain a beneficial interest in trusts sited such jurisdictions without causing the transfer to be an incomplete gift or included in the grantor's estate. See Rev. Rul. 76-103; Rev. Rul. 77-378; and *Paolozzi v. Commissioner*, 23, T.C. 102 (1954); I.R.C. §§ 2036(a)(1), 2036(a)(2), 2038.

12 Seventeen states have adopted self-settled trust legislation. *See Eleventh Annual ACTEC Comparison of the Domestic Asset Protection Trust Statutes, updated through August 2017, Edited by David G. Shaftel,* Nine other states have adopted some more limited version of a self-settled trust legislation. *www.actec.org/assets/.../Shaftel-Comparison-of-the-Domestic-Asset-Protection-Trust*. There is a risk that creating a self-settled trust in a jurisdiction that the grantor does not reside in will cause the trust to be subject to such spouse's creditor claims. As such, it may be prudent to provide that the independent person, preferably acting in a non-fiduciary capacity, can add any individual in the class of persons consisting of the descendants of the grantor's parents rather than specifying that the grantor may be added specifically. Such a trust is often referred to as a "hybrid" domestic asset protection trust. Steven J. Oshins, The Hybrid Domestic Asset Protection Trust, LEIMBERG ASSET PROTECTION PLANNING NEWSLETTER #200 (May 10, 2012).

13 *Supra* note 11.

14 If an individual at her death owned assets that have appreciated in value since the date of the acquisition, the beneficiary inheriting the asset will receive a step-up in income tax basis to the fair market value of the asset at the date of the decedent's death. I.R.C. § 1014.

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15 I.R.C. § 1014(b)(4) and (9). There are also some exceptions to this definition, including a power that is subject to an ascertainable standard relating to health, education, support, or maintenance, and a power that is exercisable jointly with the creator or with a person having a substantial adverse interest. I.R.C. §§ 2041(b)(1)(A), (C).

16 This planning can be achieved through use of a Power of Support Trust or ("POAST"). Generally, a trust structured as a POAST is intended to benefit not only the Grantor's descendants, but also the Grantor's parents or grandparents, while utilizing such ancestor's unused exemption and/or obtaining a basis step-up at the ancestor's death. For a more detailed analysis of the POAST, see Austin, Beaudry, Law, Introducing The Power of Appointment Support Trust ("POAST"), Trust & Estates, Dec. 2015. See Austin, Beaudry, Law, Introducing The Power of Appointment Support Trust ("POAST"), Trust & Estates, Dec. 2015, and Law and Zaritsky, Portability – So Many Questions, So Few Clear Answers, 51st Annual Heckerling Institute on Estate Planning.

17 Query whether the donee of a GPOA needs to be notified of such a power. If the trust is formed in a jurisdiction that permits silent trusts, there may not be a need to even inform the power holder of the existence of the GPOA.

18 Under I.R.C. § 2041, the consent of a person without an adverse interest does not affect the characterization of a power of appointment as general. In particular, a trustee who has no beneficial interest in the trust does not have an adverse interest. Treas. Reg. § 20.2041-3(c)(2).

19 I.R.C. § 675(4)(C) and Rev. Rul. 2008-22, 2008-16 I.R.B. 796. In this circumstance, it is also desirable for the grantor to authorize her power of attorney agent to swap assets in the event of the grantor's incapacity, as both the grantor and the trustee are involved in the transaction.

20 I.R.C. § 1(j)(2).

21 States such as Arizona, California, and Kentucky, for example, may impose a state income tax on income from trusts with no contacts other than maintaining Trustees who reside in such respective states. Therefore, shifting income to the beneficiaries through distributable net income does not work in all states.

22 I.R.C. § 677(a).

23 An adverse party is any person who has a "substantial" beneficial interest in the trust that would be adversely affected by the exercise or non-exercise of the power. The law is not settled as to what constitutes a "substantial" financial interest that would qualify that individual as adverse. I.R.C. § 672(a); Treas. Reg. § 1.672(a)-1.

24 Treas. Reg. § 1.675-1(b)(4).

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SPECIAL TAX FEATURE

The 20% Tax Deduction For Pass-Through Entities Explained

By Keith C. Durkin, Esq., Broad and Cassel, Orlando, Florida

On December 22, 2017, President Trump signed the new tax act, the Tax Cuts and Jobs Act (the "TCJA"). The TCJA substantively revised the Internal Revenue Code. A significant change is new Internal Revenue Code §199A, which creates a 20% deduction for qualified business income for owners of certain pass-through entities. This article summarizes and provides comprehensive examples to illustrate the provision's complexity.

I. Introduction

New Internal Revenue Code § 199A, applies to owners of pass-through entities. Pass-through entities are S corporations, partnerships, sole proprietorships, and limited liability companies that are taxed as an S corporation, partnership, or reported as a disregarded entity on a taxpayer's Schedule C. The deduction applies only to "Qualified Business Income" derived from a qualified trade or business operated in the United States or Puerto Rico. Foreign income does not qualify as Qualified Business Income. The deduction does not apply to C corporation income.

The deduction is applied at the partner level for partnerships and the shareholder level for S corporations. This means the deduction calculation is made at the individual's level based on his or her interest in the entity and not at the entity level. For individual taxpayers with taxable income less than $157,500 and married taxpayers with taxable income less than $315,000, the deduction is equal to 20% of Qualified Business Income. If a taxpayer qualifies for the 20% deduction, then the taxpayer will be taxed only on 80% of his or her Qualified Business Income rather than 100% of the Qualified Business Income. The deduction is a "below-the-line" deduction reducing the taxpayer's taxable income, but not his or her adjusted gross income. The deduction is available regardless of whether the taxpayer itemizes his or her deductions. The deduction applies to trusts and estates.

Example 1 **–** A and B are married. A's distributable share of income from an S corporation is $250,000, which is Qualified Business Income. B earns $50,000 from an unrelated employer. Their combined taxable income is less than $315,000. Accordingly, A receives the full 20% deduction and can deduct $50,000 ($250,000 x 20% = $50,000).

For individual taxpayers earning more than $207,500 and married individuals filing jointly earning more than $415,000, the deduction is much more complex and will generally[1] be calculated in one of three ways: (a) 20% of Qualified Business Income; (b) 50% of the W-2 wages paid from the qualified trade or business; or (c) 25% of the W-2 wages paid from the qualified trade or business plus 2.5% of the unadjusted basis of qualified property. (See example on the bottom of page 17). Qualified property is generally any tangible property that is depreciable, which excludes inventory. Specifically, §199A allows a taxpayer to deduct the LESSER of: (a) 20% of the Qualified Business Income; or the GREATER of: (b) 50% of W-2 wages, or (c) 25% of W-2 wages plus 2.5% of the unadjusted basis of qualified property. Accordingly, one first calculates (b) and (c), determines which is greater, and then compares that amount to 20% of the Qualified Business Income. The deduction is the lesser of the latter comparison, *i.e.*, the greater of (b) and (c), which is then compared to (a).

Qualified Business Income is defined as the "net amount of qualified items of income, gain, deduction, and loss with respect to any qualified trade or business." A qualified item is any income effectively connected with the conduct of a trade or business within the United States or Puerto Rico. Dividends, capital gains, and capital losses are excluded from Qualified Business Income. Interest income qualifies as Qualified Business Income only if it is related to a qualified trade or business. Most importantly, compensation paid to a shareholder or guaranteed payments to a partner for services rendered to the trade or business are excluded from the definition of Qualified Business Income. Generally, Qualified Business Income will equal ordinary business income less ordinary business deductions.

Example 2 **–** Assume there is an LLC taxed as a partnership[2] with the following ownership structure: (a) Member 1 owns 50% of the LLC; (b) Member 2 owns 40% of the LLC; and (c) Member 3 owns 10% of the LLC. All of the partners are married filing jointly with taxable incomes of more than $415,000. The LLC has $1,000,000 in Qualified Business Income, pays $3,000,000 in W-2 wages, and owns no qualified property.

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Example 2 **–** the deduction will be calculated as follows:

MEMBER:	20% QUALIFIED BUSINESS INCOME CALCULATION:	W-2 WAGE CALCULATION:	PARTNER'S ALLOWABLE DEDUCTION:	PARTNER'S QUALIFIED BUSINESS TAXABLE INCOME:
Member 1 50%	$100,000 (50% x $1,000,000 = $500,000 x 20% = $100,000)	$750,000 (50% x $3,000,000) = $1,500,000 x 50% = $750,000)	$100,000	$400,000 ($1,000,000 x 50% = $500,000 - $100,000 = $400,000)
Member 2 40%	$80,000 (40% x $1,000,000 = $400,000 x 20% = $80,000)	$600,000 (40% x $3,000,000 = $1,200,000.00 x 50% = $600,000)	$80,000	$320,000 ($1,000,000 x 40% = $400,000 - $80,000 = $320,000)
Member 3 10%	$20,000 (10% x $1,000,000 = $100,000 x 20% = $20,000)	$150,000 (10% x $3,000,000 = $300,000 x 50% = $150,000)	$20,000	$80,000 (10% x $1,000,000 = $100,000 - $20,000)

Example 3 **–** Assume the same facts as Example 2 above, except the LLC pays $100,000 in W-2 wages. In this example, the deduction will be calculated as follows:

MEMBER:	20% QUALIFIED BUSINESS INCOME CALCULATION:	W-2 WAGE CALCULATION:	ALLOWABLE DEDUCTION:	PARTNER'S QUALIFIED BUSINESS TAXABLE INCOME:
Member 1 50%	$100,000 (50% x $1,000,000 = $500,000 x 20% = $100,000)	$25,000 (50% x 100,000) = $50,000 x 50% = $25,000)	$25,000	$475,000 ($1,000,000 x 50% = $500,000 - $25,000 = $475,000)
Member 2 40%	$80,000 (40% x $1,000,000 = $400,000 x 20% = $80,000)	$20,000 (40% x $100,000 = $40,000 x 50% = $20,000)	$20,000	$380,000 ($1,000,000 x 40% = $400,000 - $20,000 = $380,000)
Member 3 10%	$20,000 (10% x $1,000,000 = $100,000 x 20% = $20,000)	$5,000 (10% x $100,000 = $10,000 x 50% = $5,000)	$5,000	$95,000 (10% x $100,000 = $100,000 - $5,000)

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The 20% Tax Deduction For Pass-Through Entities Explained, from page 16

Example 4 – Assume the same facts as Example 2, except the LLC pays no W-2 wages. In this example, there is no §199A as the deduction will be calculated as follows:

MEMBER:	20% QUALIFIED BUSINESS INCOME CALCULATION:	W-2 WAGE CALCULATION:	ALLOWABLE DEDUCTION:	PARTNER'S QUALIFIED BUSINESS TAXABLE INCOME:
Member 1 50%	$100,000 (50% x $1,000,000 = $500,000 x 20% = $100,000)	$0.00	$0.00	$500,000
Member 2 40%	$80,000.00 (40% x $1,000,000 = $400,000.00 x 20% = $80,000)	$0.00	$0.00	$400,000
Member 3 10%	$20,000.00 (10% x $1,000,000 = $100,000 x 20% = $20,000)	$0.00	$0.00	$100,000

The W-2 limitation may seem patently unfair to a capital-intensive enterprise rather than a labor-intensive enterprise. §199A includes an accommodation to capital-intensive enterprises by allowing them to deduct the lesser of: (a) 20% of the pass-through entity's Qualified Business Income; or (b) 25% of the entity's W-2 wages plus 2.5% of the unadjusted basis of qualified property. The entity is allowed to include 2.5% of the property's unadjusted basis beginning on the date the property is placed in service and ending on the later of: (y) 10 years; or (z) the last day of the last full year of the asset's regular depreciation period. §199A excludes utilization of the alternative depreciation system required in certain situations by the Internal Revenue Code. Unadjusted basis means the amount utilized in the calculation will not be reduced by depreciation and will equal the asset's acquisition basis.[3]

Example 5 – Assume there is an LLC taxed as a partnership with the following ownership structure: (a) Member 1 owns 50% of the LLC; (b) Member 2 owns 40% of the LLC; and (c) Member 3 owns 10% of the LLC. All of the partners are married filing jointly with taxable incomes exceeding $415,000. The LLC is a capital-intensive enterprise with $2,000,000 in Qualified Business Income, $600,000 in W-2 wages, and $7,000,000 in qualified property. The deduction is calculated as follows:

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MEMBER:	20% QUALIFIED BUSINESS INCOME CALCULATION:	W-2 WAGE CALCULATION:	W-2 CALCULATION AND UNADJUSTED BASIS:	ALLOWABLE DEDUCTION:	PARTNER'S QUALIFIED BUSINESS TAXABLE INCOME:
Member 1 50%	$200,000 (50% x $2,000,000 = $1,000,000 x 20%)	$150,000 (50% x $600,000 = $300,000 x 50%)	$162,500 (50% x $600,000 = $300,000 x 25% = $75,000 + $87,500 (.2.5% x $3,500,000)	$162,500	$837,500
Member 2 40%	$160,000 (40% x $2,000,000 = $800,000 x 20%)	$120,000 (40% x $600,000 = $240,000 x 50%)	130,000 (40% x $600,000 = $240,000x 25% = $60,000+ $70,000 (2.5% x $2,800,000)	$130,000	$670,000
Member 3 10%	$40,000 (10% x $2,000,000) = $200,000 x 20%)	$30,000 (10% x $600,000 = $60,000 x 50%)	$32,500.00 (10% x $600,000 = $60,000 x 25% = $15,000 + $17,500 (2.5% x $700,000)	$32,500	$167,500

Example 6 – Assume the same facts as in Example 5, on page 17, except the LLC is a capital-intensive enterprise with no W-2 wages, and $10,000,000 in qualified property. The deduction is calculated as follows:

MEMBER:	20% QUALIFIED BUSINESS INCOME CALCULATION:	W-2 WAGE CALCULATION:	W-2 CALCULATION AND UNADJUSTED BASIS:	ALLOWABLE DEDUCTION:	PARTNER'S QUALIFIED BUSINESS TAXABLE INCOME:
Member 1 50%	$200,000 (50% x $2,000,000 = $1,000,000 x 20% = $200,000)	$0.00	$125,000 ($5,000,000 x 2.5%)	$125,000	$875,000
Member 2 40%	$160,000 (40% x $2,000,000 = $800,000 x 20%)	$0.00	$100,000 ($4,000,000 x 2.5%)	$100,000	$700,000
Member 3 10%	$40,000 (10% x $2,000,000) = $200,000 x 20%)	$0.00	$25,000 ($1,000,000 x 2.5%)	$25,000	$175,000

§199A contains a phase-in limitation on the W-2 wage and capital limitation for married individuals earning more than $315,000, but less than $415,000, and individual taxpayers earning more than $157,500, but less than $207,500. The phase-in limitation reduces the available deduction based on a fraction where: (a) the numerator equals the difference between the taxpayer's total taxable income and the applicable threshold, i.e., $315,000 or $157,5000; and (b) the denominator equals $100,000 (for married taxpayers filing jointly) or $50,000 (for individual taxpayers), as applicable. Put another way, as the taxpayer's taxable income increases toward $207,500, or $415,000, as applicable, the available deduction is reduced, and the W-2 wage and capital limitations are phased-in.

The phase-in calculation is complicated. The first step is to determine the "excess amount." The excess amount is the difference between: (a) 20% of the Qualified Business Income and the GREATER of: (b) 50% of the entity's W-2 wages; and (c) 25% of the entity's W-2 wages plus 2.5% of the unadjusted basis of acquired qualified property. The excess amount is determined without reference to any income limitations. This means one simply calculates (a), (b), and (c) and subtracts the greater of (b) and (c) from (a). After determining the excess amount, the next step is to derive a fraction calculated by: (y) subtracting the applicable threshold amount (i.e., $315,000 or $157,500) from the taxpayer's total taxable income; and (z) dividing the amount derived in (y) by $100,000 or $50,000, as applicable. The excess amount is then multiplied by the resulting fraction and subtracted from the amount calculated as 20% of Qualified Business Income.

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LRS

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Example 7 – A and B are married filing jointly. A owns 100% of an S corporation and A's distributable share of income from an S corporation is $200,000, which is Qualified Business Income. The S corporation has $50,000 of W-2 wages and $100,000 of qualified property. B earns $175,000 from an unrelated employer. Their combined taxable income equals $375,000.

Example 7 – STEP 1: Determine Excess Amount.

20% QUALIFIED BUSINESS INCOME CALCULATION:	W-2 WAGE CALCULATION:	W-2 CALCULATION AND UNADJUSTED BASIS:
$40,000 (20% X $200,000)	$25,000 (50% X $50,000)	$15,000 (25% X $50,000) = $12,500 + $2,500 (2.5% X $100,000)
The excess amount equals $15,000 ($40,000 - $25,000).		

Example 7 – STEP 2: Determine Fraction.

The denominator in the fraction is equal to $100,000 because the taxpayers are married filing jointly. The numerator is determined by subtracting the threshold amount, $315,000, from the taxpayer's total income, $375,000. That makes the numerator equal to $60,000. Accordingly, the applicable fraction equals 60% ($60,000/$100,000).

Example 7 – STEP 3: Multiply Excess Amount by Fraction and Subtract That Amount From 20% Qualified Business Income Deduction.

The next step is to multiply the excess amount, *i.e.* $15,000 by 60%, which equals $9,000. This amount is then subtracted from the amount calculated as the taxpayer's 20% Qualified Business Income deduction, *i.e.*, $40,000 - $9,000 = $31,000. Accordingly, in this example, the taxpayer's 20% Qualified Business Income deduction equals $31,000.

The phase-in calculation is only required when the excess amount is a positive number because the deduction is limited to the lesser of: (a) 20% of the Qualified Business Income; or the GREATER of: (b) 50% of W-2 wages or (c) 25% of W-2 wages plus 2.5% of the unadjusted basis of qualified property. If the excess amount is negative, then there is nothing to phase-in because (a) is less than the greater of (b) and (c).

Example 8 - A and B are married filing jointly. A owns 100% of an S corporation, and A's distributable share of income from an S corporation is $375,000, which is Qualified Business Income. The S corporation has $500,000 of W-2 wages and $1,000,000 of qualified property. B has no income. Their combined taxable income equals $375,000.

***Example 8 -STEP 1: Determine Excess Amount*. (See chart below)**

The excess amount equals ($175,000). In this example, A and B are subject to the phase-in; however, there is nothing to phase-in because the 20% of Qualified Business Income is less than the W-2 wage or capital limitation. §199A excludes any phase-in calculation when 20% of the taxpayer's Qualified Business Income is less than either the W-2 wage or capital limitation. Thus, you can skip Steps 2 and 3.

II. *Trade or Business Qualification*.

Internal Revenue Code §199A defines qualified trade or business by exclusion. A qualified trade or business is any business that is not a specified service trade or business or any trade or business where an individual would be providing services as an employee.[4] The latter limitation was incorporated to prevent employees from restructuring themselves as independent contractors to take advantage of the deduction. A specified service trade or business is: (a) a business performing services in the fields of health, law, accounting, actuarial science, performing arts, consulting, athletics, financial services, and brokerage services; (b) a business where the principal asset is the reputation or skill of one or more of its employees or owners; or (c) a business involving investment and investment management services, trading or dealing in securities (stock, publicly traded partnership interests, bonds, notional principal contracts, derivatives…etc.). §199A, however, specifically excludes engineering services and architecture services from the definition of a specified service trade or business, so those businesses will be considered qualified trades or businesses.

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Example 8 – STEP 1: Determine Excess Amount.

20% QUALIFIED BUSINESS INCOME CALCULATION:	W-2 WAGE CALCULATION:	W-2 CALCULATION AND UNADJUSTED BASIS:
$75,000 (20% X $375,000)	$250,000 (50% X $500,000)	$150,000 (25% X $500,000 = $125,000) + $25,000 (2.5% X $1,000,000)

As specified service trade or business will not qualify as a qualified trades or business and will not generate any Qualified Business Income. Therefore, these businesses will not receive any deduction.

There is, however, an exception for taxpayers married filing jointly whose taxable income is below $315,000 and single taxpayers whose taxable income is below $157,500. Taxpayers with specified service trades or businesses below these taxable income thresholds will receive the 20% deduction.

Example 9 – A is a shareholder in a law firm operating as an S corporation. A is married to B. A and B have $300,000 of taxable income. A received $75,000 of wages from the law firm and $225,000 as his or her distributable share of income from the law firm. A and B are entitled to the 20% deduction. The deduction equals $45,000 ($225,000 x 20%).

For married taxpayers filing jointly whose taxable income is more than $315,000, but less than $415,000, and single taxpayers whose taxable income is more than $157,500 and less than $207,500, the deduction is phased-out. The phase-out limitation reduces the available deduction based on a fraction where: (a) the numerator equals the difference between the taxpayer's total taxable income and the applicable threshold, i.e., $315,000 or $157,500; and (b) the denominator equals $100,000 or $50,000, as applicable. Put another way, as the taxpayer's taxable income increases toward $415,000 or $207,500, as applicable, the available deduction is phased-out and the W-2 wage and capital limitations discussed above are phased-in. As soon as the taxpayer's taxable income reaches $415,000 or $207,500, as applicable, the deduction is lost for any specified service trade or business.

Example 10 – A is a shareholder in a law firm operating as an S corporation. A is married to B. A and B have $700,000 of taxable income. A received $300,000 of wages from the law firm and $400,000 as his or her distributable share of income from the law firm. A and B receive no deduction because their taxable income is greater than $415,000.

III. *Conclusion*.

Internal Revenue Code §199A is complex, and planning for the deduction will be vital in the future. There is uncertainty, and likely to be substantial litigation, regarding a taxpayer's eligibility for the deduction. Practitioners will need a comprehensive understanding of Internal Revenue Code §199A to plan for the deduction and defend IRS audits of the deduction.



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Endnotes

1 §199A contains certain rules regarding qualified REIT dividends, qualified publicly traded partnership income, qualified cooperative dividends, and other modifications that will not apply to most taxpayers and are beyond the scope of this Article and its discussion.

2 All examples in this article assume allocations and distributions are made pro-rata. For partnerships, this may not always be true as partnership agreements can allocate items differently so long as the allocations have substantial economic effect. For partnerships, §199A requires W-2 wages be allocated in the same proportion as W-2 expenses. Accordingly, if a partner is allocated 50% of the W-2 expenses, then he or she will be allocated 50% of the W-2 wages for the §199A W-2 wage calculation. §199A requires a partner's share of the 2.5% unadjusted basis of qualified property be allocated in the same manner as the partner's share of depreciation. Accordingly, if a partner is allocated 25% of depreciation, then he or she will be allocated 25% of the capital limitation.

3 This provision was not incorporated into either the original Senate Bill or House Bill and was added while the Bill was being finalized in conference committee. The incorporation of this provision is intended to accommodate owners of capital-intensive enterprises, such as shopping centers and hotels, but will also affect owners of real property.

4 The statute's specific language states a qualified trade or business excludes the "trade or business of performing services as an employee."

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SPECIAL TAX FEATURE

Possible Estate Planning Strategies Arising From The Tax Cuts and Jobs Act

By Jerome L. Wolf, Esq., and Jeffrey A. Baskies, Esq.,
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The Tax Cuts and Jobs Act (TCJA), signed into law on December 22, 2017, and effective as of January 1, 2018, increased the lifetime gift tax exemption from $5 million ($5,490,000 for 2017 as adjusted for inflation) to $10 million ($11,180,000 for 2018 as adjusted for inflation). This increase presents planners and their clients with a tremendous opportunity to transfer more wealth without paying any federal transfer tax. For some clients, the tax changes will allow them to transfer additional sums to already existing irrevocable trusts, or to reduce any outstanding debts by reducing or eliminating existing promissory notes. Other clients may terminate QTIP trusts or use their exemptions on new planning strategies altogether.

It is anticipated that many clients will be eager to use the added exemption due to concerns that the federal gift and estate tax exemptions may "snap back" to pre-2018 levels. However, it is also anticipated that a significant hurdle for many clients will be reluctance to transfer assets without the possibility of receiving the transferred assets back in the future if faced with hard economic times. For those clients, there are a number of planning opportunities to consider, including: "self-settled spendthrift trusts," Spousal Limited Access Trusts ("SLATs"), or Inter Vivos QTIP's that might offer answers.

General Tax Considerations

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

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

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

Thus, it appears the determination of whether a transfer of assets as part of an estate planning strategy is a completed gift for federal gift tax purposes is based upon the law of the state where the trust or other planning vehicle is established.

While 17 states have adopted legislation that validates self-settled spendthrift trusts (sometimes referred to herein as Domestic Asset Protection Trusts, or "DAPTs"), there is evolving legal authority that a taxpayer who resides in a non-DAPT state might not be deemed to have made a completed gift to a trust settled in a DAPT state, or that if there was a completed gift, nevertheless, the assets in the DAPT may be included in the taxpayer's gross estate upon death.

For DAPT planning purposes, Florida does not afford creditor protection for settlors of self-settled spendthrift trusts. As part of the Florida Trust Code, Fla. Stat. §736.0505(1)(b) codified Florida's adoption of the common law rule that "no man can live in luxury and in debt at the same time," by directing that "a creditor or assignee of the settlor may reach the ***maximum amount that can be distributed to or for the settlor's benefit***." (emphasis added).

Self-Settled Spendthrift Trusts: Creation And Tax Issues

Assume a settlor transfers all of his/her right, title, interest, dominion and control over assets to an irrevocable trust, pursuant to the terms of which an independent trustee has the discretion to distribute all or a portion of the income or principal to the settlor as one member of a class of beneficiaries. The trust is designed with a spendthrift clause and is intended to shield the assets from the settlor's creditors.

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Aside from the asset protection advantages of self-settled spendthrift trusts, the transfer of assets to a self-settled spendthrift trust can be structured as completed gifts to use the newly increased federal transfer tax exemption.

Whether such a transfer will be treated as a completed gift, and thereby cause the exclusion of the trust assets from the settlor's gross estate for federal estate tax purposes, depends on the trust law of the state or country in which the trust is created, as well as the applicable sections of the Internal Revenue Code and the rulings and case law interpreting such sections. Therefore, if the trust assets are in fact protected from the claims of the settlor's creditors, and if such a trust is otherwise properly drafted to avoid inclusion in the estate of the settlor, then this type of self-settled spendthrift trust should not be included in the client's estate.

On the other hand, if the assets in the self-settled spendthrift trust are available to the creditors of the settlor, then under Sections 2036 and 2038 of the Code, the trust would be included in the settlor's estate.

So, the difficult questions arise when Florida residents seek to form DAPTs in states that permit them. Under such circumstances, the issue is whether a court will apply the law of the nonresident settlor's domicile rather than the DAPT law selected in the trust instrument. Assume, for example, a Florida resident establishes a self-settled spendthrift trust in a DAPT state. Subsequently, the settlor is sued in either the state of residence or in federal court. The federal court may be located in the settlor's state or in the DAPT state. Further assume that the court obtains jurisdiction over the trustee of the DAPT. The party suing the settlor ("creditor") will presumpably argue that the court should choose the spendthrift trust law of the settlor's state of residence, rather than the law of the DAPT state. If the court opts to apply the law of the settlor's state of residence—which does not provide asset protection for DAPTs—then the creditor may be allowed to reach the trust assets. If that's the case, then as a result of the assets being available to the creditors of the settlor, the tax consequence would be that these were not completed transfers for federal and gift tax purposes, and all of the trust assets would be included in the settlor's gross estate.

Choice of Law

The Full Faith and Credit Clause along with the substantive due process protections under the Fifth and Fourteenth Amendments to the United States Constitution restrict a forum state's ability to apply its own law to disputes between outsiders.

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

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

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

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

The bankruptcy judge found that Alaska law would apply if Alaska had a substantial relation to the trust. However, Alaska was determined to have had only a minimal relation to the trust, despite the LLC being formed under Alaska law and the certificate of deposit being situated in Alaska; whereas, Washington had a strong public policy against self-settled spendthrift trusts. Therefore, since the trust was a self-settled trust, the transfers into the trust were void.

While the issue of which law to apply is still somewhat unclear, if the *Huber* decision resonates and accurately states the law, then residents of Florida cannot create DAPTs and expect them to be completed gifts and outside of their taxable estates.

SLATs

An estate planning strategy recommended under the new tax regime is the so-called "Spousal Lifetime Access Trust," or "SLAT." The basic concept of the SLAT is simple and straightforward – it would function like a bypass or credit shelter trust, but be funded during life instead of at death, with the intention of using it to take advantage of the $11.18 million estate tax exemption before it drops back to $5 million (adjusted for inflation) as is scheduled in 2026.

Essentially, the SLAT allows a donor/spouse to create a lifetime "credit shelter trust" for the benefit of a spouse and issue, funded with the donor/spouse's federal gift tax exemption. So, the SLAT is an effective vehicle to utilize clients' gift exemptions as the gifted assets and all appreciation thereon, remain outside the taxable estate of the donor/spouse, the donee/spouse, and the issue of the donor.

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This technique should work well to allow a client to use the exemption comfortably knowing the funds can be used not only for descendants but also for a spouse. However, the comfort can be somewhat tenuous as the funds will become unavailable to the client if the spouse dies.

The problem arises under Florida law upon the distribution of the principal of the SLAT in the event the donee/spouse predeceases the donor/spouse. If the donor/spouse is the remainderman, the retained interest would cause the trust principal to be subject to the donor/spouse's creditors under Fla. Stat. §736.0505(1)(b). That would be the result even if the donee/spouse has a testamentary power of appointment in favor of the donor/spouse and issue, because a creditor of the donor/spouse may "reach the maximum amount that *can be distributed to or for the settlor's benefit.*"

The primary purpose of Fla. Stat. §736.0505(1)(b) is to protect against recognition of "self-settled spendthrift trusts" by which a settlor could give to a trustee all of his/her dominion and control over his/her assets but retain a discretionary right to income and/or principal in the discretion of the trustee. Although the primary focus was to avoid the use of such trusts for asset protection purposes, an additional result, intended or not, is to limit the ability to engage in certain estate planning strategies.

Therefore, if the settlor resides in Florida, since local law subjects the entire property of such a trust to the settlor's creditors, the transfer of assets to an irrevocable trust in which the settlor has a contingent remainder interest would arguably be incomplete for federal gift tax purposes.

Inter Vivos QTIP Trusts

Alternatively, assume a settlor transfers all of his/her right, title, interest, dominion, and control to a trust for the benefit of his/her spouse, from which the spouse is entitled to all of the income for life, and the trust qualifies as "qualified terminable interest property" for marital deduction purposes. In fact, the settlor has no retained current interest in the trust, but only a contingent right to an interest in the trust if the spouse predeceases and fails to exercise a power of appointment. This structure is often referred to as an "Inter Vivos QTIP Trust". Treasury Regulation §25.2523(f)-1(f), Example 11, addressed the issue of whether the trust principal would be included in the donor/spouse's estate as a gift with a retained interest. Because the donor/spouse makes the QTIP election, on the donee/spouse's death, the trust property is included in the donee/spouse's gross estate and, therefore, the donee/spouse is deemed the transferor of the property at death. Because the donee/spouse is treated as the transferor of the property, even if the assets fund a "spend thrift" type trust for the benefit of the original donor/spouse, the property in the trust is not subject to inclusion in the donor/spouse's estate under Section 2036 or 2038.

Before the enactment of the exemption under Fla. Stat. §736.0505(3), it was unclear whether assets contributed to an Inter Vivos QTIP Trust in Florida would nonetheless be subject to estate tax upon the donor/spouse's death because under local law, a creditor of the donor/spouse may reach the maximum amount that can be distributed for the donor/spouse's benefit.

Fla. Stat. §736.0505(3) was passed and created an exception to the general rule that a creditor of the settlor of an irrevocable trust may reach the maximum amount that can be distributed to or for the settlor's benefit. The exception deals with a lifetime irrevocable trust described in Section 2523(e) of the Internal Revenue Code (life estate with power of appointment in the donee/spouse), or a trust for which an election under Section 2523(f) ("qualified terminable interest property" trust) has been made. The exception is intended to parallel the effect of Treasury Regulation Section 25.2523(f)-1(f), Example 11, to assure that no portion of the trust principal will be included in the donor/spouse's estate since the property is deemed passing from the donee/spouse's estate, rather than the donor/spouse.

Therefore, a Florida resident might use an Inter Vivos QTIP trust plan to transfer assets out of the resident's name and might be able to be the beneficiary of the trust after the spouse dies if the trust is included in the estate of the donee/spouse.

However, this is not an ideal tax planning tool, as all appreciation on the assets used to fund the Inter Vivos QTIP trust will be included in the donee/spouse's estate, thus making all the growth taxable. Therefore, while this technique might allow a Florida resident to transfer assets to a trust for a spouse and elect to QTIP the trust, and while the resident settlor of the trust might be a permissible beneficiary of the trust after the donee/spouse's death, all of the assets, and their appreciated value, will be included in the donee/spouse's estate.

Further, as a result of the inclusion in the donee/spouse's estate, if the donee/spouse lives past 2025, and if the exemption "snaps back," this Inter Vivos QTIP plan would not have helped the clients use the new increased exemption. Therefore, the Inter Vivos QTIP plan is likely not going to be a desirable approach to using clients' increased exemptions.

Going Off-Shore – Foreign Asset Protection Trusts

If a self-settled spendthrift trust sounds like the appropriate planning concept for a Florida client, but if the planner hesitates to use a DAPT due to concerns for the efficacy of DAPTs (as described above), perhaps off-shore self-settled spendthrift trusts ("FAPTs") offer a better solution. Unlike DAPTs, FAPTs are not subject to the same US Constitutional concerns (the full faith and credit and due process concerns). Instead, FAPTs have a long history of avoiding the claims of creditors.

While the motivation for creating a FAPT in this circumstance may not be creditor protection, the asset protection aspects

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of FAPTs is what makes them ideal for planning to utilize one's gift and estate tax exemption, because the success of FAPTs in stopping creditors' claims is the key to their success in estate planning. As noted, if a client creates a self-settled spendthrift trust that is a completed gift and not available to the client's creditors, then the client should be able to use the new exemption while still being a permissible beneficiary of the trust – and that's likely the ultimate planning goal for many clients.

Therefore, while Florida does not recognize DAPTs, it would appear a Florida resident can create a properly drafted FAPT and avail oneself of the estate and gift tax planning benefits of using one's exemption on the transfer while remaining a potential beneficiary of the creditor-protected, self-settled spendthrift trust.[4]

Conclusion

Although self-settled spendthrift trust legislation has not been adopted in Florida, there are still opportunities for Florida clients to use the increased gift and estate tax exemption using some of the estate planning opportunities outlined herein – primarily SLATs and FAPTs.

Endnotes

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



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Charitable Planning Under the New Tax Plan

By Lisa H. Lipman, Esq., Roetzel & Andress, Naples, Florida

By nearly doubling the standard deduction and eliminating several of the itemized deductions formerly available to taxpayers, The Tax Cuts and Jobs Act of 2017 (TCJA)[1] may dramatically affect the amount of money that individuals donate to charities. Whereas donors who make larger gifts may be better positioned under the TCJA, donors who contribute less than the standard deduction may no longer receive a tax benefit through charitable giving.

Under prior law, the standard deduction was $6,350 for individuals and $12,700 for married couples. Various expenses such as accountant fees, investment fees, and legal fees related to tax advice, could be itemized as long as they exceeded 2% of the taxpayer's adjusted gross income. The combination of a low standard deduction and the existence of many expenses that qualified as deductions caused taxpayers to eschew the standard deduction in favor of itemized deductions – which also included amounts donated to charities.

The enactment of the TCJA raised the standard deduction to $12,000 for individuals, $18,000 for head of household filers, and $24,000 for married couples. It also eliminated the deductibility of expenses including: various professional fees, employee expenses related to home offices, and most personal casualty losses, just to name a few.[2] The result of these changes is that a majority of taxpayers will now elect to use the standard deduction, because itemizing deductions will, total an amount less than the standard deduction, in most cases.

For taxpayers who choose the standard deduction, any charitable gifts made by that taxpayer will not be deductible on their income tax returns. Remember those letters taxpayers used to receive from charities stating, "your contribution is tax-deductible?" That language is a thing of the past under TCJA. All charities will have to re-draft their acknowledgement letters to state that donors should check with their accountant to determine if a contribution is tax-deductible – which will only be the case if the taxpayer chooses to itemize.

While some charitable donors make their gifts because they want to sustain the charitable organization, the tax benefit of making donations under prior federal tax law has been a significant motivator in encouraging people to donate to charity. That motivation has now disappeared for many would-be charitable donors. A study undertaken at the Indiana University Lily Family School of Philanthropy predicts that the changes in tax law could cause a $13 billion drop in charitable giving between now and 2025, when most of the provisions of the TCJA – including those regarding the increased standard deduction and the reduced number of available itemized deductions – will expire.[3] Other experts predict that the impact to charities could be significantly higher.

Given the changes regarding charitable giving, are there any techniques that can be used by a donor to maximize the deductibility of his or her charitable gifts? Yes – but many donors and their advisors are not familiar with these strategies. Attorneys, accountants, and development officers for charities are going to have to learn about these methods in order to educate their donors/clients about the most tax-efficient ways to donate to charity, including the options discussed below.

"Bunching" Charitable Contributions

The easiest charitable giving technique is "bunching," or giving an amount in a particular year that represents multiple years of gifts. For example, if a donor typically gives $10,000 per year, that amount would not be deductible under the TCJA if the taxpayer did not have other deductions to make itemizing worthwhile; he or she would elect to take the standard deduction. If the same taxpayer made five years of gifts ($50,000) in 2018 and then refrained from making any charitable gifts for the following four years, the taxpayer would opt to itemize his or her deductions for 2018. In doing so, a married taxpayer would receive $26,000 more in deductions on the taxpayer's 2018 federal income tax return than if he or she elected to take the standard deduction.

Some donors will not find this technique satisfactory as it will result in acknowledgement from the charity for the year in which the gifts were made, but not in the subsequent years in which the gifts are not made. For those taxpayers, a donor-advised fund may be a better solution.

Donor-Advised Funds

A donor-advised fund (DAF) is an account that a donor sets up at a financial institution or a community foundation with the understanding that all amounts contributed to the account will be used solely for charitable purposes. The donor has the ability to direct the financial institution to make contributions from the DAF in specific amounts to charities of the donor's choice. The taxpayer would receive a deduction for any amounts contributed to the DAF, and the benefits to the taxpayer would be the amount by which the contributions (plus any other itemized deductions) exceed the value of the standard deduction. Distributions from the DAF to a charity are not required to be paid in the same tax year that the deduction is taken. If a donor contributed $50,000 to a DAF, the donor could direct the DAF administrator to make annual gifts of $10,000 to the charity. The $50,000 charitable deduction could be itemized on the taxpayer's income tax return in the year that the DAF was funded.

So what effect does a DAF have on the donor and on the charity? The donor receives the same benefit that the

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bunching technique provides; deductibility of a larger portion of the charitable contribution than if he or she had merely contributed the same amount directly to the charity over a period of years, with the additional benefit of being able to make an annual gift that the charity would acknowledge each year. Although the annual gifts would be made by the DAF, not the donor, the name of the DAF can be the donor's name (i.e., The Jim S. Smith Fund).

There are some drawbacks to a DAF, however. Typically, most financial institutions have a minimum initial contribution – often $5,000 – to set up a DAF. Most have a minimum gift requirement, which means that only amounts at or in excess of the requirement (often $50-$100) can be contributed to charities. Furthermore, the financial institution holding the DAF charges an administrative fee to manage it. Additionally, the organization that holds the DAF has control over what types of charities receive the funds, and it can reject a request made by the donor if the organization does not meet the DAF's requirements. Thus, taxpayers should only consider setting up a DAF if they understand the fees associated with DAFs, the limited control regarding selection of charitable beneficiaries, and if they are comfortable funding it with at least the minimum amount required by the financial institution.

Contributions from an IRA

Taxpayers over 70 ½ who have an Individual Retirement Account (IRA) have an additional way to make tax-efficient charitable contributions. As was the case before the enactment of the TCJA, an individual may make qualified charitable distributions (QCD) of up to $100,000 from his or her IRA in any given tax year. In order to qualify as a QCD, the distribution must be made directly from the IRA to the charity. Any amounts distributed to the taxpayer and then contributed to charity will not qualify as a QCD. The QCD counts as part of a taxpayer's required minimum distribution (RMD), and – unlike the remainder of the RMD – will not count as taxable income to the taxpayer.

It is crucial that the taxpayer obtain an acknowledgement of the charitable contribution directly from the charity. If the acknowledgement is not obtained, the donation will not be considered a QCD and the funds will be considered part of the taxpayer's taxable income.

Making Larger Contributions

Wealthy taxpayers who make charitable contributions that significantly exceed the standard deduction can take advantage of new provisions of the TCJA. Under prior law, the "Pease limitation" reduced the value of a taxpayer's itemized deductions by the lesser of either: (1) 3 percent for every dollar of taxable income above a certain threshold (formerly $266,700 for single filers and $320,000 for joint filers), or (2) 80 percent of the total value of itemized deductions. Under the TCJA, the Pease limitation was eliminated, therefore providing a greater motivation for high earners to contribute to charities.

The TCJA gives high-income earners another tax break related to charitable giving. Prior to the enactment of the TCJA, the available deduction for charitable contributions of cash was limited to 50% of the taxpayer's adjusted gross income (AGI). Excess contributions were converted to charitable carryforwards and could be deductible in one of the next five tax years (subject to the same 50% limit). Under the TCJA, the amount now available for a deduction increased to 60% of the taxpayer's AGI.[4] This increased limit also applies to charitable carryforwards of cash gifts, including those that had been made in years subject to the 50% AGI limit.

What is the impact of these changes to high-earning taxpayers wishing to make charitable gifts? These taxpayers may make larger gifts than in the past, given that (1) the repeal of the Pease limitation allows them to fully deduct the amount of the charitable gift, and (2) they are able to contribute a higher percentage of their income. High-earning taxpayers should take advantage of these laws now, since absent any legislative action, the Pease limitation will be revived in 2026, and the available deduction for charitable contributions will return to the 50% limitation of AGI.

Setting Up a Charitable Trust

As was the case under prior law, creating a charitable trust is another option available to the altruistic taxpayer. Charitable lead trusts (CLTs) pay out a specific amount to a charity each year for a term of years and then distribute the remaining assets to a beneficiary or group of beneficiaries. A CLT allows a taxpayer to fund current gifts to charity while still providing eventual support for family members. CLTs are not exempt from income tax and are established as either grantor trusts or non-grantor trusts for income tax purposes.

In grantor CLTs, the value of the amount contributed to the trust for charity is computed by reference to a discount rate determined by the Treasury each month under §7520 of the Internal Revenue Code. That amount is deductible on the taxpayer's income tax return, subject to the new limitations and expansions of charitable deductions provided by the TCJA. Future income generated by the trust is attributable to the grantor and the tax due is paid by the grantor. In non-grantor CLTs, there is no initial charitable deduction, but future payouts to charity are deductible, a rule that was not changed by the TCJA.

The taxable gift is equal to the initial value of the assets contributed to the trust, less the value of the charity's interest in the trust. This would generate gift tax unless sheltered by the donor's exemption from the gift tax, an amount that was doubled through year 2025 by the TCJA.

Charitable remainder trusts (CRTs) pay out a specific amount to a beneficiary for a term of years, then distribute the remaining assets to a charity or group of charities. They provide a way to fund lifetime spending needs while eventually

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providing for charity and generating an immediate charitable deduction. The amount qualifying as a charitable deduction is calculated by applying a factor published by the Internal Revenue Service in Publication 1457 (for a charitable remainder annuity trust) or Publication 1458 (for a charitable remainder unitrust).

Both CLTs and CRTs should be approached with caution for several reasons. They are expensive to create and typically require a significant transfer to these trusts – generally at least $1 million – to make them financially worthwhile. Additionally, charitable trusts are irrevocable, although the Grantor can reserve the right to change the charitable beneficiary. The irrevocability of the trust can be problematic given that a typical CLT term is 10-20 years, or even longer. (CRT terms are restricted to 20 years or less unless based on the donor's life or donors' joint lives.) The laws regarding charitable giving will revert back to prior law on January 1, 2026 – or sooner, if political winds become more favorable to those who oppose the TCJA. Committing to an expensive, long-term trust that cannot be altered in the next seven years requires a clear understanding of whether the taxpayer will realize other non-income tax advantages (i.e., estate or gift tax savings) of setting up this type of trust. Furthermore, since a portion of the funds contributed to a charitable trust are for non-charitable beneficiaries, the deduction available to the taxpayer is only the amount calculated that will pass to charity, not the total amount contributed to the trust.

Conclusion

While the TCJA will significantly impact the bottom line for many charities by removing the tax benefits of making charitable contributions with a value under the standard deduction, there are several techniques that altruistic taxpayers can take advantage of in order to maximize the deductibility of charitable donations. Those techniques include "bunching," setting up a donor-advised fund, making charitable gifts from retirements accounts, or creating charitable trusts. High-earning taxpayers wishing to make large donations may realize greater benefits under the TCJA than they could under prior law.



L. LIPMAN

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Endnotes

1 H.R. 1, 115th Cong. (2017). The Tax Cuts and Jobs Act is Public Law 115-97.

2 See Sec. 11044 & 11045.

3 Ind. U. Lilly Family Sch. of Philanthropy, Tax Policy and Charitable Giving Results, , p. 21, Scenario 4, https://scholarworks.iupui.edu/bitstream/handle/1805/12599/tax-policy170518.pdf (last visited February 6, 2018).

4 See Section 11023(G)(i).

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Two Ways to Improve Your Trust & Estate Practice

Statewide Online Access To Courts For Parents Caring For Disabled Children

By Joseph P. George, Jr., Esq., P.A., Miami, Florida

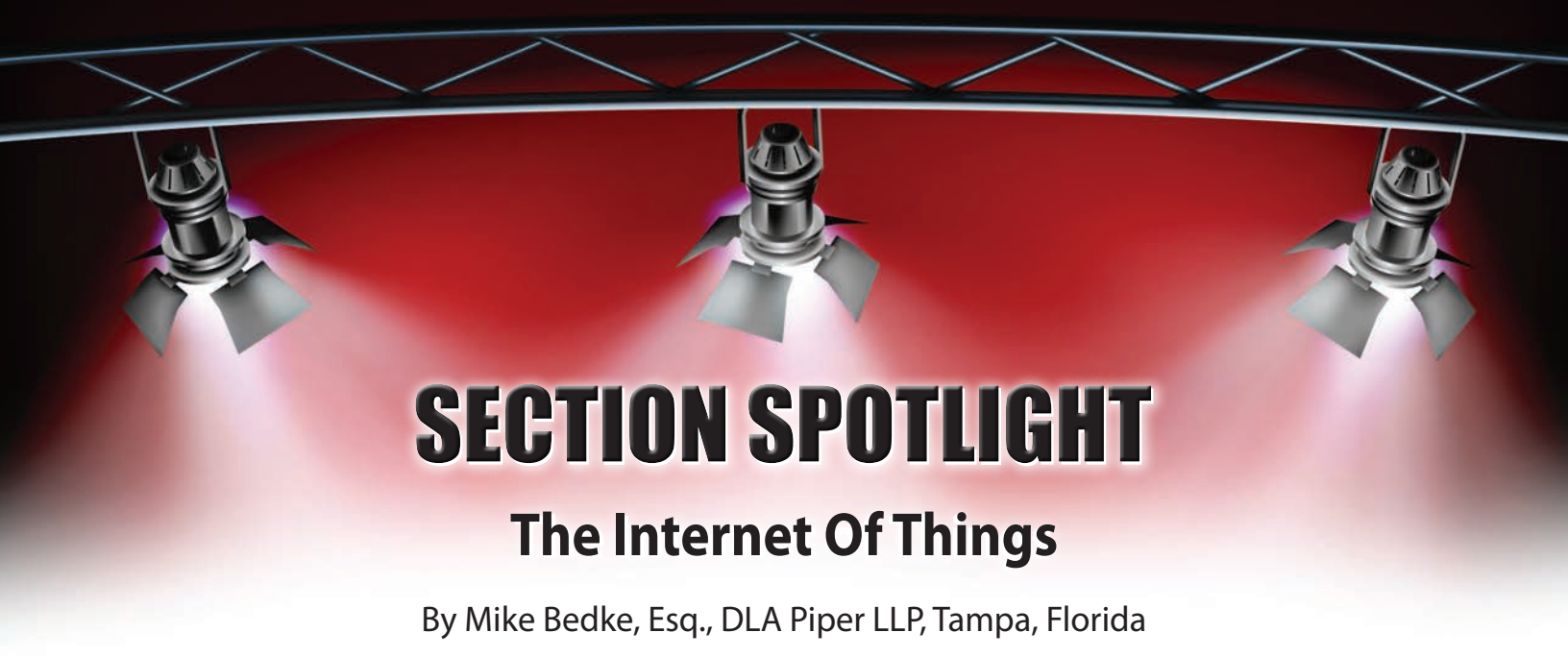
On September 7, 2017, the Florida Supreme Court simplified electronic access to the courts for parents required to become Guardian Advocates for their disabled children when a physician declines to provide necessary medical care without that legal status. In issuing Supreme Court Administrative Order 17-47 on September 7, 2017, and as amended on September 22, 2017, the Court amended Florida's Access Security Matrix (Matrix) to give parents of disabled children access to electronic court case records. The order grew out of the "Simplifying Access to Courts for Parents Caring for Disabled Children," initiative begun by Marisol Vilasuso, Richard F. Joyce and Joe George, Jr., that sought a miracle to simplify access to the court system to help parents caring for their disabled children. On February 1, 2017, the Honorable Robert Hilliard of Santa Rosa County presented the initiative to amend the Matrix to the Access Governance Board, which passed it unanimously. On May 18, 2017, Judge Hilliard and former RPPTL Chair Laird A. Lile of Naples presented it to the Florida Courts Technology Commission (FCTC), where it also passed unanimously. The Administrative Order, by amending the Matrix, unifies access to Florida's courts by standardizing, authorizing and directing each of Florida's Clerks of Court to allow online access to parents required, or seeking to become, Guardian Advocates for their disabled children. Such access did not previously exist.

Young attorney Marisol Vilasuso's need of an immediate heart transplant was the integral spur for the mission to amend the Matrix. When Marisol learned she needed an immediate heart transplant or perish, she also knew that if, in the interim she became unable to care for herself, she would need her parents to become her legal Guardian Advocates for medical care. At that time, there was no online access for family members seeking that status in Miami-Dade County. Marisol went into the hospital November 14, 2016, lived to receive the transplant on January 11, 2017 and was released from the hospital 15 days later. A modern miracle. One final miracle is needed from the Clerks of Court – to promptly and successfully implement the new Supreme Court order statewide. Please support the Clerks of Court efforts in this regard. Probate lawyers in particular can urge the Clerks' attention to understanding and implementing the new Administrative Order AOSC17-47 and simplifying access to courts for parents caring for their disabled children.

Additional support was provided by the Honorable Harvey Ruvin, Clerk of Court for the 11th Judicial Circuit Court for Miami-Dade County, Florida, with Chief Information and Innovation Officer Laurie Reaves and Family Law Division Chief Jennifer Ann Cates, Esq., Probate Administrative Judge, the Honorable Maria M. Korvick and Michelle McClaskey, Esq., Director of Probate for the 11th Judicial Circuit Court for Miami-Dade County, Florida, the Honorable David R. Ellsperman, Clerk of Court for the 5th Judicial Circuit for Marion County, Florida, the Honorable Lisa Munyon of Orange County, Florida, the Florida Academy of Elder Law Attorneys through Twyla Sketchley and Cary Moss, the Dade County Bar Association by Jordan Dresnick and Jane Muir, the Ad Hoc Guardian Advocacy Subcommittee of the Guardianship & Advance Directives Committee of the Real Property, Probate & Trust Law Section of The Florida Bar, by Nicklaus Curley, Travis Finchum and Steven Hitchcock, and the Florida Bar Foundation by Bruce Blackwell.

Parents required or seeking to become legal Guardian Advocates for their disabled children may take comfort that the advocates of the RPPTL section remain steadfast in their support.





SECTION SPOTLIGHT

The Internet Of Things

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

As we celebrate the 10th anniversary of the iPhone, consider this question – What the heck is IoT, and how is it meaningful to real estate lawyers?

Admit it, even if you are a "digital native," "techie" and "early adapter" you probably had to think about the question for a minute or two before answering. Those of us who only recently gave up using our original Blackberries, talking on our flip phones and chiseling in stone tablets, and are not among the two billion people who are on Facebook, are likely resembling the proverbial deer in the headlights. (Note, to those of you who thought LEED Standards, "green leasing," and the like were "fads," this is your chance to redeem yourselves!)

IoT is "the internet of things." If you are like most people, that still does not help in providing a meaningful answer to the question presented. A reference to M2M (machine-to-machine) technology only adds a bit of clarity. So, think of the internet of things as the connectivity among the world's roughly 6.4 billion or so smart devices. Consider, as an example, using your handheld device to open the garage door, turn on your house lights, adjust the temperature of your home, see who is at the front door, and check on your pets. Pretty cool.

As real estate lawyers, we can easily envision how the internet of things might increase energy efficiency and, conceptually at least, decrease common area maintenance (CAM) costs. Cars may be directed to open parking spaces, saving tenants and visitors time and aggravation in much the same way smart elevators get us to our offices more quickly. We may ponder the impact of smart cities and driverless and electric cars as we consider urban planning, revisions to zoning codes, and other reforms designed to make our cities more livable, more sustainable and, more attractive to the group Richard Florida, best-selling author, professor, and urbanist calls "the creative class."

Optimists see a future utopia. A place where retailers are able to direct customers to the goods they want and to the shortest check-out line. A place where transportation/transit is coordinated based on who is going where, and at what speed. A place where there is a seamless response to emergencies because fire, police, and EMT's all instantly know who is where and what they each are doing.

Pessimists are likely to see a dystopia. An Orwellian nightmare where "Big Brother" (or Siri or Alexa) knows everything about you and hackers unlock doors and turn off alarms for burglars, turn off power and turn on all the faucets in your house to flood your home, turn your heat off in the winter and turn it on in the summer, and cause your self-driving car to take you on something akin to Mr. Toad's wild ride.

There is currently not a lot of case law in the area of IoT. This will surely change in the very near future. The retailer Target Corporation has entered into an $18.5 million settlement as a result of a breach of its customer data. However, what you may not know that hackers used a security company's customers' own security camera to spy on a family. The FTC brought an action when a baby monitor was hacked, and private photos and videos were posted. Such privacy violations cause us to think about how data is collected (and by whom) as well as how it gets saved, accessed, and used. Interestingly, China very recently enacted a new cyber security law. It creates comprehensive privacy obligations and regulations regarding a myriad of business data, especially as it pertains to the transfer of data outside of China.

My prediction is the cases that will be brought soon will be based on traditional claims and legal concepts. There will be products liability claims, cases based on negligence standards … breaches of contracts … breaches of warranties … privacy violations. We will see traditional legal concepts applied to new IoT related fact patterns.

As lawyers, we will likely respond by crafting disclosures, disclaimers, waivers, and releases. The National Association of Realtors is already working on relevant language. For example, a Seller may disclose what smart home features exist

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E-recording: All The Cool Clerks Are Doing It!

By Sabine Seidel, Esq., Westcor Land Title Insurance Company, Maitland, Florida

Sometimes differentiating between e-closings, e-notarizations, e-filings and e-recordings is certainly challenging, especially for those of us who had an ATARI as our first video gaming system! Nonetheless, we must keep up with progress or be left behind. As of the writing of this article, and according to Simplifile, one of several e-recording service providers, approximately 75% of the counties in Florida accept e-recorded documents. The enabling legislation came into effect in 2007 and is found under Fla. Stat. § 695.27, also known as the Uniform Real Property Electronic Recording Act. Additionally, the electronic recording standards are found in Florida Administrative Code § 1B-31.002. These standards set forth the technical requirements for e-recording and mandate that the County Recorders who choose to allow e-recording establish and publish Business Rules regarding how e-recording will be governed.

Without getting into the technological aspect, the basic process consists of this: The closing attorney's office contracts with a third-party e-recording service to e-record the relevant documents relating to the real estate transaction. Original documents for the transaction are executed in the closing attorney's office by the parties. The closing attorney then, through the software provided by a third-party e-recording service provider, transmits the documents electronically via scanner to the county clerk's office for recording. From there, the process is very much the same as if the documents had been walked in for recording. The benefit, of course, is that any errors in the submitted document or errors in the fees, etc., will be caught immediately and the documents are returned within minutes or hours.

This raises the question of fees. How do the e-recording fees get paid? The Clerks publish their accepted method of payment in their Business Rules. A common method of payment between the third-party provider and the clerk is the ACH (Automated Clearing House) Deposit where the provider authorizes a disbursement debit from its account to the clerk's designated account for the e-recorded documents for the day. For the attorney's office, this means you will owe a fee for the e-recording service itself, usually on a per document basis, and the regular recording fees which are transmitted by the third-party provider to the clerk via the ACH. The question has arisen, how does the fee to the third-party provider get paid? Is it out of the operating account, the escrow/trust account, or a separate account altogether?

The escrow/trust account is obviously not an account to which you want a third-party provider having direct access. The most common method is to open a separate account to have only the recording fees, including the e-recording provider's fee, flow through from the real estate trust/escrow account. This separate recording account should also be three-way reconciled on a per file basis so any overages can be disbursed back to the customer and any shortages would have to be recouped from the customer, or from the operating account.

Another option, if your e-recording provider offers it, is to use e-check as a method of making a payment from the escrow/trust account. This method allows for the payment to be electronic, but not like an ACH, and the access to the account is the same as with a paper check. It is forwarded to the bank as a Check 21 file for payment. The benefit to this is that it is trackable on a per file basis, there is no need to open a separate recording account, and your escrow/trust account has no more exposure than with a paper check. You authorize payment after the documents have been recorded and the funds would be disbursed only for the amount you approve on a per file basis.

Note: When I refer to e-closings above, I mean the process of having all closing documents signed electronically including the mortgage and disclosure documents. E-notarizations refers to the process of having a notary who is registered as an e-notary perform the acknowledgment of signatures electronically (this is not the same as remote notarization) and e-filing of course is the process of electronically filing case pleadings, etc., with the clerk in a particular court case.

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and Buyers may be advised to reset devices, codes and the like after closing. Those will then be tested in the courts. We have seen this with lead paint, radon, and similar issues. Next, the insurance industry will adapt and adjust by creating new coverages in the same way environmental insurance, reps and warranty insurance and D&O coverage came into existence.

The wise reader will begin thinking about these matters now.

RPPTL Section Out-of-State Executive Council Meeting Boston, Massachusetts

By Scott P. Pence, Esq., Carlton Fields, Tampa, FL and Alison B. Wright, Tampa, FL

The RPPTL Section's annual out-of-state executive council meeting for the 2017-2018 bar year was held in Boston, Massachusetts, October 11-15, 2017. The weather was crisp and beautiful, averaging between 47° at night to 65° during the day. The Welcome Reception was held at Skinner Auctioneers & Appraisers, not far from the Boston Public Garden. The reception rooms were filled with European furniture and decorative arts on display in preparation for their next auction to be held on Friday, October 13th. This included fine silver, paintings and tapestries, furniture, and earthenware and porcelain. Everyone enjoyed catching up following their travels to Boston.



Richard and Lynda McIver and Kathy Neukamm

On Thursday morning, members ventured out to either take a walking tour of the Freedom Trail or a tour on the Old Town Trolley. Those who walked the Freedom Trail were guided by General Henry Knox. General Knox seemed to have as much fun referring to our group as the "reptiles" as the group did with the General's charismatic storytelling. We started at the Boston Common where our guide told us about how the first English settler in Boston, Reverend William Blaxton (also spelled Blackstone), living on what would become known as the Boston Common, invited John Winthrop and his Puritan followers, who had landed in nearby Charlestown, to live on his land because the Puritans experienced problems finding potable water in Charlestown. We then travelled to the Granary Burying Ground, where many famous American Revolutionaries are buried, including Paul Revere, the five victims of the Boston Massacre, Samuel Adams, and John Hancock. Our guide enjoyed telling us that the Beantown Pub, located directly across the street from the burying grounds, was "the only place you could order an ice cold Sam Adams while looking at an ice cold Sam Adams." We then travelled on to other sites on the tour, including the Old State House, the site of the Boston Massacre, Faneuil Hall, and the home of Paul Revere. We finished with a nice lunch at one of the many Italian restaurants located in the North End of Boston.

The Old Town Trolley Tour began with a tour of the Massachusetts State House. We then saw a broad view of the sights of Boston, including the Boston Common, the starting point for the Freedom Trail, and Beacon Hill, where the original Cheers, "where everybody knows your name," is located. Crossing the Inner Harbor, we visited Bunker Hill and saw the oldest commissioned naval vessel in the world, the warship USS Constitution. Our guide explained that it is a very special event when "Old Ironsides" is taken out in Boston Harbor in the annual underway cruise. We went through the North End to Faneuil Hall and the marketplace. In addition, we traveled the Back Bay and saw a variety of townhomes. Our tour ended with lunch at the historic Union Oyster House.

The Fenway Park Tour was very interesting, both from a historical perspective and for its present-day significance. This park is one of the few remaining stadiums built during the "Golden Age of Ballparks" (1909-1923). Our guide explained how the park has changed and grown over the years. We saw the park from various vantage points, including the most recent additions, and gained an appreciation for the fan experience across the complex. In addition, we spent time in the broadcaster's box which was filled with pictures of various notable people who had been there over the years. Although the temperature was brisk and the wind gusts tended to be strong, the tour was well worth the effort.

On Friday, several members took a tour bus to Salem for the day. We stopped first to visit the famous Marblehead Light, located on Marblehead Neck. From there, we travelled to the Turner-Ingersoll Mansion, also known as the House of Seven Gables, the backdrop of Nathaniel Hawthorne's famous book of the same name. Members enjoyed a group tour of the house, which was restored in 1908 to its original appearance, including a secret narrow stairwell spiraling the home's main chimney that we were able to ascend to access an upstairs room. From there, we travelled to the Salem Witch Museum where we learned about the events leading up to the famous witch trials of 1692. According to the museum, a special Court of Oyer (to hear) and Terminer (to decide) was formed in 1692 in Salem to hear cases of witchcraft, based on "fits" of local young women that doctors were unable to explain. That court was disbanded later that same year by the governor, presumably because his wife had been accused of witchcraft, but not before twenty men and women had been found guilty of witchcraft and killed – nineteen being hanged and one man being killed after he was tortured by being "pressed" beneath

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an increasingly heavy load of stones put on his body in an effort to make him plead guilty to the charges. The Superior Court of Judicature was then formed to replace the Court of Oyer and Terminer and the new court released those men and women who had been arrested for witchcraft and pardoned those who had been convicted and were awaiting execution, effectively ending the witch trials of 1692. We then enjoyed a late lunch at a local seafood restaurant, after which we were set free to tour the quaint, historical harbor side village and marina of Pickering Wharf on our own. After a long day experiencing some of the history of Salem, we boarded the bus to make our way back to Boston.

Many of those who did not experience the trip to Salem opted for the famous Boston Duck Tour to see some of the top sights in the city. In beautiful sunny weather, we drove into the Charles River and cruised down the waterway enjoying the views of Lederman Park and the cityscape. Passing under the Longfellow Bridge, we came to the Charles River Esplanade and the Hatch Memorial Shell, best known for hosting the Boston Pops Orchestra's annual Fourth of July performance. Our fun-loving guide, decked out in Boston sportswear, cracked one joke after another, while also providing his insights on the city and its history. This included bantering with random people on the city streets. We learned things we didn't know and laughed a lot.

After the Executive Council Meeting on Saturday morning, many took the Urban Adventures Bike Tour for a fun ride through the streets of the city. Although there was drizzly rain throughout most of our ride, the outing was both enjoyable and worthwhile. The guides did an excellent job managing traffic and keeping us safe. We ate lunch at the Charles River Esplanade and rode across the Harvard Bridge to ride along the river by MIT in Cambridge. The fun fact that we learned on this journey is that the Harvard Bridge is 364.4 "smoots" long, plus or minus one ear (2,035 feet). Our guide explained that the "smoot" measurement came from an MIT fraternity pledge, Oliver Smoot, who was 5 feet, 7 inches tall. He repeatedly laid down on the bridge until they counted the total number of smoots on the bridge. There are smoot markings which are maintained on the bridge by the fraternity. Oliver Smoot became a lawyer, and eventually was chair of the American National Standards Institute (ANSI) and president of the International Organization for Standardization (ISO).

The group rounded out the stay in Boston with an unexpected police escort to the Kennedy Library. There, over the next several hours, we toured the Library and had a lovely dinner. If you haven't been to the Kennedy Library, it is a must see. As you may expect, a tour of the Library takes one back to a time in our nation's history where Camelot and tragedy collide. The Library was impeccable and very presidential. The dinner was held in the atrium area, where the dinner and conversations were fantastic and enjoyed by all.

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Out-of-State Executive Council Meeting
Fairmont Copley Plaza • Boston, Massachusetts
October 11 -15, 2017



Dianne and Drew O'Malley and Michael Gelfand at Skinner event



RPPTL Members on the Green Monster - Fenway Park Tour

View Photo Albums at www.rpptl.o



House of Seven Gables - Salem Witch tour



Zakim Bridge



RPPTLs at Gasparilla



Mike Bedke and Rob Stern

Photo credits: Michael Gelfand, John Neukamm and Silvia Rojas.
Photo Editor (selection and conact): Jeffrey Baskies.

RPPTL Section Executive Council Meeting
The Ritz-Carlton • Naples, Florida
December 7-10, 2017



Giant gingerbread house in the Ritz



Havana Nights Party…
John and Kathy Neukamm



Drew and Dianne O'Malley at the Ngala Wildlife Preserve



Gunster attorneys recuse themselves from Naples meeting



Sarah Butters sharing some photos with Jerry Wells



Drew O'Malley, Laird Lile and Rob Freedman





Sophia Lopez



Bill Hennessey said "a bet is a bet"



Dresden Brunner, Jason Ellison, Melissa Murphy, and Bob Swaine

Roundtable

Highlights Of The Meeting Of The RPPTL Section

PROBATE AND TRUST DIVISION

Friday, December 8, 2017 - 3:00-5:00 p.m.

Ritz-Carlton, Naples, Florida

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

Thank you to the Roundtable Sponsor: Stout

Debra Boje, Director of the Probate Division, called the meeting to order at 3:00 p.m.

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

Other Discussion/Announcements. The Division Director discussed how to become an At-Large-Member and that the deadline for doing so is December 15, 2017. This is how to get on the Executive Council without being either a Chair or Vice Chair of a committee.

The Division Director also discussed openings on various Florida Bar committees, like the Probate Rules Committee, and advised that RPPTL applicants should contact Bill Hennessey after applying so that he can aid in the process.

Our website consultant, Tracy Eller, is the consultant for committee pages. She will fill Steven Goodall's shoes when he goes to college; she can help with social media marketing.

Deb Boje reminded committee chairs to update their list server and update their committee rosters. Substantive committees were also advised they need to submit articles to ActionLine and the Florida Bar Journal. Deb also stressed the importance of the committee reports, which are due December 15, 2017. These reports are vital to the Section and aid in deciding who will move up in the committees and other leadership positions.

ACTION ITEMS

Coins and Bullions

John Moran, Chair of the Probate Law and Procedure Committee, spoke about the TCJAion item on coins and bullions. Currently, there is uncertainty about whether these items are tangible personal property. Are they personal property subject to a separate writing or a residuary clause? There is authority that these items are tangible personal property. This legislation codifies that coins and bullions are tangible personal property to clarify any confusion.

Formal Notice Does Not Provide Personal Jurisdiction

Chris Wintter presented on the suggested changes to Fla. Stat. § 731.301 to make clear that formal notice does not confer personal jurisdiction on those "served." Formal notice is for *in rem* jurisdiction but not for getting judgments against individuals personally; formal notice is not process. There are some appellate cases which held that personal jurisdiction was acquired based on formal notice and this proposed change aims to fix those holdings.

INFORMATION ITEMS

Changes to Fla. Stat. § 744.457

Nick Curley, Chair of the Guardianship, Power of Attorney, and Advance Directives Committee, presented the first informational item.

Proposed changes to Fla. Stat. § 744.457 emanate from *Romano v. Olshen*, 153 So. 3d 912 (Fla. 4th DCA 2014), where a wife attempted to block a guardian from using the ward's funds, owned jointly with her, on guardianship expenses including fees. This proposed change would allow a guardian to obtain access to marital assets based on several factors with court approval.

Steve Hearn pointed out that the way the statute is written, it could possibly favor the ward over the spouse. Bruce Stone pointed out that this is changing tenants by the entireties law.

Changes to Fla. Stat. § 744.3701

Nick Curley also presented on proposed changes to Fla. Stat. § 744.3701, which seek to clarify the standard a court should employ when determining whether to allow access to certain guardianship records as "good cause." The reformatting also makes the statute read better.

Changes to Fla. Stat. § 744.331(4)

Nick Curley finally presented changes to Fla. Stat. § 744.331(4), which seek to amend the mechanism for when courts can dismiss petitions to determine incapacity. Currently, courts must dismiss petitions when a majority of members (2 out of 3) of the examining committee finds no incapacity. The problem is this does not allow other evidence to be presented showing lack of capacity and takes away the court's discretion to decide these issues. The proposed fix allows automatic

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dismissal only when all three examining committee members find no incapacity, but also provides a mechanism for the petitioner to challenge the dismissal.

Lawyers as Fiduciary – Bill Hennessey, Chair of the Ad Hoc Estate Planning Conflict of Interest Committee, presented information on the Florida Supreme Court's amendments to Florida Bar Rule 4-1.8, effective February 1, 2018, relating to gifts to lawyers serving as fiduciaries based on documents they drafted. The proposed changes prohibit the solicitation of gifts by lawyers, whether substantial or not. Major changes also require lawyers who draft themselves into fiduciary roles to: (1) make sure the client is properly informed, (2) ensure it does not violate Rule 4-1.7, (3) confirm it is not the product of undue influence or an improper solicitation by the lawyer, and (4) obtain the client's informed consent in writing. The proposed changes also require lawyers to get informed consent in writing showing that they advised the clients that the lawyer may be entitled to a fee for serving as the fiduciary as well as a fee for serving as counsel.

STANDING COMMITTEE REPORTS

Attorney/Trust Officer Liaison Conference – The Committee is working on the next ATO conference to be held at The Breakers on August 23-26, 2018.

Estate and Trust Tax Planning – This Committee is working with the Florida Bankers Association to change the effective date of Fla. Stat. § 689.151 (this language was approved at the last meeting). The Committee is working on a deal regarding the creation of joint tenants with rights of survivorship and tenants by the entireties title relating to personal properties, investment accounts, etc., to get rid of the need for a straw man in some of these transactions. This includes eliminating the presumptions and some unities and studying community property held through statutory community trusts. All of this is being studied. This Committee is working on a joint seminar for November 30, 2018, along with the Asset Protection Committee.

The committee also provided an update on the Corporations Act. The Business Law Section is working on this to update and modernize this area of law. David Atkins will reach out to the Business Law Section to see what they are doing so we can comment. Brian Sparks and Travis Hayes are Co-Chairing that study group.

Uniform Voidable Transfers Act – Lauren Detzel advised that this Committee is working with the Business Law Section on changes we want. This act was passed in 2014 by the Uniform Law Commission and impacts our practice. We want to revise language concerning: (1) the homestead exemption, (2) converted entities or created entities, and (3) transfer of illiquid assets into trusts because these transfers could be void *per se* based on the current language. The Tax Section had many problems with the TCJA as well. These proposed changes did not pass in the 2017 legislative session but they are back at it again. The Committee is trying to work a compromise and there is a compromise in principle but not in words.

Guardianship, Power of Attorney, and Advance Directives – An update was provided about the Ad Hoc Guardianship Law Revision Committee. Their work is continuing, and they hope to have something concrete in 2018. Joe George provided an update on the Access Security Matrix, which is the court's internal matrix regarding who gets what information in guardianships and guardian advocate cases. This is a Florida Supreme Court Administrative Order.

Probate Law and Procedure Committee – John Moran spoke about the coins and bullions project. It was noted that the effective date was moved from July 1, 2018 to immediately as a clarification to existing law. This is intended to be retroactive.

IRA Employee Benefits – The committee is working on a modification to beneficiary distributions.

Principle and Income Act – The Uniform Law Commission is working on its Principle and Income Act and reorganizing it. Once this is done, the Committee will analyze it for adoption in Florida.

Probate Trust Litigation – There is a seminar/symposium scheduled for March 2, 2018. Tami Conetta and Richard Caskey are heading that project.

Trust Law – The committee is working on issues relating to representation and resignation, addressing new case law on trust accounting, and new trust protector/directed trustee language. Significantly, the trust legislation from last year that was killed was refiled. The Committee is also working on its seminar.

Wills Certification Review – The review course will take place on April 6-7, 2018. There is a 7 a.m. bonus session for additional in-depth probate and trust codes review. There will be a case law update and analysis of the new tax bill if it passes Congress [which it did].

Legislative Committee – Sarah Butters provided a legislative update. The Section's trust legislation from last year is moving forward. The POLST legislation that we oppose has also been reintroduced. Our homestead waiver bill will be filed. The Section oppose the Uniform Voidable Transfers Act (UVTA) unless it gets changes. The UVTA has not been filed yet.

Members of the Gunster law firm left the room because of their lobbying work on the e-notary legislation, so the Section could discuss this subject. Several stakeholders, including notarize.com and others, have filed legislation allowing electronic or remote notarizing. We have concerns and are working on it with them.

Adjournment. The meeting was adjourned.

Roundtable

Highlights Of The Meeting Of The RPPTL Section

REAL PROPERTY DIVISION

Friday, December 8, 2017 - 3:00-5:00 p.m.

Ritz Carlton, Naples, Florida, Florida

By Colleen Coffield Sachs, Esq., Santa Rosa Beach, Florida

Thank you to the Roundtable Sponsor, Fidelity National Title Group

Meeting opened at 3:00 p.m. by Real Property Division Director, Rob Freedman.

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

Introduction of Guests: The Division Director opened the floor for introductions of the law students and other guests in attendance. Jacqueline Peregrin is a Real Property Division Fellow. She spoke and gave information on her practice.

Notification of Resignation of Real Property Division Members of the Executive Council: The Division Director announced Bryan Leebrick has resigned because he is now with the Bay County Attorney's Office and can no longer travel. Pat Hancock is retiring from Fidelity National Title Group and will no longer be on the Executive Council.

Recognition of Drew O'Malley: The Division Director recognized Drew O'Malley for his work on behalf of the Section.

Introduction of Tracey Eller. The Division Director introduced Tracey Eller, who discussed her role in technology for the Section. She said that she can help with webpages. She also said that if anyone has events or pictures, she can assist with posting those and getting them onto social media in real time. She can be reached through Mary Ann Obos.

Summary of Breakers Roundtable Meeting: The summary of the meeting will be in ActionLine.

COMMITTEE REPORTS:

Title Issues and Standards – Christopher W. Smart, Chair; Robert M. Graham, Brian W. Hoffman, Melissa Sloan Scaletta and Karla J. Staker, Co-Vice Chairs. Chris introduced his Vice-Chairs and gave the report. They have been working on a proposed Fla. Stat. § 95.2311 to cure obvious errors in legal descriptions. Barry Scholnik spoke on the bill. He said five other states have passed such statutes. There would have to be obvious errors, the grantor could not own the property erroneously described, and the deed would have to have been of record for one year. An affidavit must come from the scrivener or an officer of the title company or partner in the law firm that employed the scrivener. It would have a narrow focus, but it would catch the most obvious errors. This would help with making it unnecessary to get indemnification letters. Mr. Smart also referenced that the Committee is working on revising standards to Chapter 4 for LLCs and Corporations. It is hoped that would be available for consideration at St. Augustine. The Committee is also working on short video clips that would address title standards.

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. Raul introduced his Vice Chairs. The Committee is working on comments and technical assistance on MRTA bills. The Committee is looking at the effect of document numbers and book and page numbers, and what effect that is having on real estate practitioners. The Committee wants to unify the standard in counties and with clerks on how documents are referenced. The Committee is looking at interspousal transfers, particularly in the event of divorce, and judgments attaching at the time of the divorce. Does the protection of tenancy by the entireties continue until the property is ultimately conveyed out? The Committee is also looking at Fla. Stat. § 28.223 pertaining to certain title requirements in probate where documents have to be recorded to insure title. Some clerks in some counties have refused to record documents, and the committee wants to give the clerks the proper authority to record the documents. There will be something to review in St. Augustine.

Residential Real Estate and Industry Liaison – Salome J. Zikakis, Chair; Louis E. "Trey" Goldman, James Marx and Nicole M. Villarroel, Co-Vice Chairs. Salome introduced her Vice Chairs. Salome gave the report. The Committee works with the joint committee to review revisions to the FL-BAR contract. The Committee is working on a process for reviewing the revisions, so they aren't rushed in the review. She also discussed Pace Loans for financing solar panels, impact windows, and other improvements to homes. This shows up as a lien on the property and a special assessment for taxes. This is important because a payoff of the loan doesn't pay off the special assessment on the tax bill. The Committee is formulating a resolution to

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address this. She advised that there is an extra level of due diligence needed when dealing with these loans. It is a super lien. This is coming out after the due diligence is over on the property when you get your title commitment. There should be a seller's disclosure. The Committee also had a discussion about an attorney in Broward County sending out letters to buyers' realtors saying if they send the closing to him, he will waive his settlement fee and no longer represent the seller. It was suggested by the Division Director that the Professionalism and Ethics Committee should address this issue. Salome said Melissa Murphy did a presentation on e-closings. This will be mainstream by 2020.

Real Property Problems Study – Arthur J. Menor, Chair; Mark A. Brown, Stacy O. Kalmanson, Robert S. Swaine and Lee A. Weintraub, Co-Vice Chairs. Art gave the report. The Committee has worked on five bills that are currently on the legislative agenda. Unlawful detainer and ejectment were bundled together and coupled with a bill on customary use and are on track to move through. Two bills deal with construction lien law, including the duration of the notice of commencement. The fifth was the open permits bill, and it will hopefully get traction this session. The Committee is also dealing with the ADA Drive By issue. There are those who team with law firms and become serial filers targeting shopping centers and other buildings just to create a suit. This is primarily a federal issue, and it is hoped that by working with other groups, something can be done to ameliorate some of the property owner risk with respect to these suits. The Committee is working on MRTA, dealing with deeds that have Schedule B-II attached to the deed, thereby reimposing items that could have been subject to extinguishment. The Committee is looking for a fix that allows people to still add permitted exceptions without creating too broad liability for the grantor, while giving the grantee some of the benefits. There was discussion about having a draft for St. Augustine, then it would be an information item for the Convention and an action item for the Breakers. The Committee is also working on a proposal relating to the automatic release of entry associated with certain reservations in deeds from governmental entities. Originally, there was a provision in deeds from the TIIF that there would be reservations of mineral rights. The deeds provided for automatic release from the right of entry in deeds for 20 acres or less. There was not similar language in deeds from other governmental entities. It would be helpful to know that the rights of entry have been automatically released, and the Committee would like the 20-acre amount to be applied to other types of conveyances from other governmental entities. This would also be looked at during the next meeting. The Vice-Chairs were introduced.

Real Property Litigation – Marty J. Solomon and Susan K. Spurgeon, Co-Chairs; Manuel Farach and Michael V. Hargett, Co-Vice Chairs. Susan reported. The Committee has pending legislation to close the gap where a lis pendens is involved. It would be effective up to the recording of the instrument needed to transfer title. The Committee has discussed the concept of equitable subrogation. The *Havoco* case addressed whether you can put ill-gotten gains and put it into homestead to exempt it from claims of creditors. *Flinn v. Doty* addressed the issue. There is now a proposed constitutional revision which would expand creditor remedies on homestead. The proposal would expand creditor remedies. You have to be able to trace the proceeds from the bad acts into the homestead, and there had to be an element of fraud. The amendment would have it include one piece, but not require both. The Committee is concerned that if the revision moves forward it has to be specific to the class of creditors. The Committee has also been discussing a joint CLE between Real Property Litigation and Computer Law. Susan discussed where there were litigants with a hearing on a motion for attorney fees. The judge took the motion under advisement. One attorney asked the other attorney to set a status conference when the judge didn't rule. A motion for the status conference was filed. Judge ordered attorney fees and uploaded to the portal. The other attorney didn't get the ruling, and it was deleted from his system because of a spam filter. The attorney didn't find out about the ruling until after 30-day rehearing/appeal period. An IT consultant testified that he told the attorney to get better spam protection, and that it was going to get him in trouble someday. This case started a discussion in the Committee about whether they are placing too much on emails being delivered and received. Manny Farach is working with the Computer Law Section on a CLE on this topic. Another proposed joint CLE would be between the Committee and Old Republic Title, and it would look at practitioners dealing with primarily commercial transactions where warranties of title are "subject to" a list of schedule B-II exceptions. Listing the exceptions by book and page can keep the items in the B-II exceptions from being terminated by MRTA. The Committee is also looking at inconsistencies in the statute of limitations on notes and mortgages, and the statute of repose where the statute of repose lasts longer than the statute of limitations. The *CCM Pathfinder* case discusses the statute of limitations and the statute of repose. The court in *CCM Pathfinder* invites us to bring more clarity brought to the statute of repose.

Real Property Finance & Lending – David R. Brittain, Chair; Bridget Friedman, Richard S. McIver and Robert G. Stern, Co-Vice Chairs. David gave the report. The Committee had an extended meeting. The Committee discussed the supplement to the third party legal opinions report. The sections on standards for rendering of opinions and diligence to support opinions on LLCs and Trusts are of most importance to real property attorneys. The Committee has been working on preparing text of those sections, and the Committee has sent them to the Business Law Section for review and comment.

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They found they don't have many issues. In the section on LLCs, there is a subsection where the Business Law Section revised the Committee's language to include the words "best practice." Use of the words "best practice" implies that there is a higher standard of obligation and liability. A statement of authority is a document that states the name of the company, the authority or limitation thereof of a manager or officer to execute documents. If a certified copy is recorded, it is conclusive in favor of third parties such as bona fide purchasers and lenders of the authority to sign. Recording statements of authority is not used often because business entities like to keep them off the record, and there are better ways of doing it. There should be a statement saying statements of authority are an available procedure for clarifying authority if there is a difference in the statement and the information publicly available. It could be an assurance to lenders but wouldn't be required. There was a question about how deep you had to go on identifying layer cake entities. Unless you have a manager that can sign at the highest level, you need to name all the entities until you get to a person. The Committee is going to go back to the Business Law Section to discuss taking out the words "best practice." David also discussed the current standards say that even for a single member LLC if there is no operating agreement you can't give a legal opinion that it is organized. He suggested looking at Windsor I LLC, a Delaware case (2017 Westlaw 3499919). The court, after a detailed analysis of a letter of intent for purposes of restructuring of a loan transaction, said the letter of intent was non-binding. Loan commitment letters now are more of a letter of intent and less of a commitment. Dave introduced his Vice Chairs.

Real Estate Structures and Taxation – Michael A. Bedke, Chair; Deborah Boyd, Lloyd Granet and Cristin C. Keane, Co-Vice Chairs. Mike introduced his Vice Chairs. Lee Weintraub gave a presentation on Florida's Public Private Partnership statute at the Committee meeting. Lee participated in the drafting of the statute. Mike believes that PPPs will be the norm in a few years, and not just on high dollar projects. Mike discussed documentary stamp exemptions on interspousal transfer on homestead property. Mike said to let him know if you are interested in being involved in the Chapter 607 rewrite of the corporation statute by the Business Law Section. It will not be coming up this legislative session, but the following. The language will be on the REST Committee webpage. The Committee is looking for comments on the Chapter 607 proposal and will be the repository for comments. The Committee has CLEs coming up, down the road.

Real Estate Leasing – Richard D. Eckhard, Chair; Brenda B. Ezell and Christopher A. Sajdera, Co-Vice Chairs. Rick introduced his Vice-Chairs. The Committee had a good CLE program yesterday at the Committee meeting about pre-leasing due diligence. The Committee has three CLEs for the coming year. One will be on restaurant leasing. There will be another on medical marijuana leasing. Finally, there will be a CLE on cell tower leasing. Adele Stone has identified two or three overlaps with the Commercial Real Estate Committee, and Rick will follow up on these.

Real Estate Certification Review Course – Manuel Farach, Chair; Lynwood F. Arnold, Jr., Martin S. Awerbach and Brian W. Hoffman, Co-Vice Chairs. Manny reported. The course will be February 9 and 10, 2018. He is waiting for materials from presenters. It will be at Loews Portofino in Orlando.

Liaisons with FLTA – Alan K. McCall and Melissa Jay Murphy, Co-Chairs; James C. Russick, Vice Chair. No report.

Insurance & Surety – Scott P. Pence, Chair; Michael G. Meyer and Frederick R. Dudle, Co-Vice Chairs. Scott gave the presentation. The Committee had a presentation on insurance coverage mistakes at its Committee meeting this morning, and only got through half of it. The Committee hopes to have the remaining part of the presentation on one of its monthly calls. The Committee has a free CLE once a month. A speaker series will start in December 2017 on different insurance products. The Committee's newsletter has just been finished and will be available at the Executive Council meeting tomorrow morning. The Committee is looking at the possibility of board certification for Insurance Law. There is a new issue on the probate side where property is deeded in the name of a trust and because it's not in the name of an individual, the insurance companies don't want to cover the property. There is also an issue when a person dies, and the property goes into the estate. They will be working with people on the probate side to seek a resolution to the problem. Scott introduced his Co-Chair and Vice-Chairs.

Development & Land Use Planning – Vinette D. Godelia and Julia L. Jennison, Co-Chairs; Colleen C. Sachs, Vice Chair. Julia introduced her Co-Chair and Vice Chair. Scott Pence spoke at the Committee meeting on Chapter 558 limitations of liability. Julia also discussed videos that are on the webpage on different topics. There was a CLE presentation at the last Committee meeting on real estate development and technology. The Committee is working with the County and Local Government Section to put together a CLE on technology and its impact on development.

Construction Law Institute – Sanjay Kurian, Chair; Diane S. Perera, Jason J. Quintero and Bryan R. Rendzio, Co-Vice Chairs. Jason said CLI is coming up March 8–10, 2018 at the J.W. Marriott in Orlando, and they welcome sponsors. There are four exhibitor booths left. This will be presented in conjunction with the Construction Law Certification Review course.

Construction Law Certification Review Course – Melinda S. Gentile and Deborah B. Mastin, Co-Chairs; Elizabeth B. Ferguson and Gregg E. Hutt, Co-Vice Chairs. Deb reported that the program will be on March 8-10 in Orlando in conjunction with the Construction Law Institute.

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Construction Law – Scott P. Pence, Chair; Reese J. Henderson, Jr. and Neal A. Sivyer, Co-Vice Chairs. Scott introduced his vice chairs. The Committee has an article in the pipeline for submission to ActionLine, and another that is being peer reviewed for inclusion in The Florida Bar Journal. The Committee has put together a task force to look into Chapter 558 dealing with the conditions of construction defect claims. Initially, the chapter dealt only with residential projects. Each year more gets added to the chapter and it works almost like a presuit condition. The Committee wants to look at the current legislation and determine if Chapter 558 is doing what it is intended to do and if there are suggestions to correct any perceived problems with the legislation. The Committee would be looking at 2020 for a proposal.

Condominium and Planned Development Law Certification Review Course – Richard D. DeBoest II and Sandra Krumbein, Co-Chairs. Richard reported. The course outline has been finalized. Speakers are onboard. The course will be held February 9 and 10, 2018 at the Loew's Portofino in Orlando. Sandra reported that it will include the entire condominium-PUD area of practice. This is geared toward helping those in attendance pass the exam. There will be a general real estate portion of the exam.

Condominium and Planned Development – William P. Sklar, Chair; Kenneth S. Direktor and Alexander B. Dobrev, Co-Vice Chairs. Alex gave the presentation. He said that the "condominium glitch bill" is now a repository of changes that would be more in depth than a glitch bill. The glitch bill will be on the website. The Division Director asked that for proposed bills, when putting them on the website, make sure there is a watermark "draft." Also, this has not been reviewed by the Committee nor the Section. Alex reported that the Committee's CLE is the Ins and Outs of Condo Law in the spring.

Commercial Real Estate – Adele Ilene Stone, Chair; E. Burt Bruton, R. James Robbins, Jr. and Martin D. Schwartz, Co-Vice Chairs. Adele introduced her Vice Chairs. The main purpose of the Committee has been producing CLEs. There will be two CLEs coming up. One is on mindfulness, and it will be for an ethics credit. That will be for the St. Augustine meeting. There will also be an in-house counsel panel discussion. That will be for St. Pete Beach Convention meeting. Adele is hoping to pair with another committee so that two committees can use the same room.

Attorney-Loan Officer Conference – Robert G. Stern, Chair; Kristopher E. Fernandez and Wilhelmina F. Kightlinger, Co-Vice Chairs. Rob gave the report. The first ALO Conference was in 2017 and was very successful. The concept of rotating tables with a different topic at each table was very popular. The ALO Conference for 2018 will be October 12th at the Loew's Pacific Resort, Universal Studios, Orlando. Rob presented a list of topics. The Committee is looking at better banker involvement. Bankers tend to not get together with each other because they view each other as competitors. The conference for 2018 has been moved from mid-week to Friday, and there is an offsite hotel option that will be less expensive. Rob asked that everyone attend, ask speakers to come back, and talk it up to banking friends, colleagues, and clients.

The Division Director discussed appointments to the Florida Bar committees. The RPPTL Section can make recommendations to the Florida Bar committees. For anyone who has applied, please send the Division Director an email so that the RPPTL Section can send a letter on behalf of the individual.

The meeting was adjourned at 4:44 pm.



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POLITICAL ROUNDUP

State Politics And The 2018 Legislative Session

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

It's political junkie high season! Primaries will be upon us on August 28, and the general election showdowns are the first Tuesday in November. Four Cabinet races, a likely U.S. Senate race, and an evolving number of constitutional amendments are coming to a ballot box near you. And, with just two days of overtime, the annual 60-day regular legislative session recently concluded with its usual pell-mell rush of activity.

Legislative sessions during election years are traditionally more tranquil as everyone wants to get home to campaign. But, the 2017 Session had ended with some rough divisions between the House and the Senate resulting in the need for a special session to complete the budget. And Session started while the Capitol was still reeling with accusations of sexual harassment, and resignations of two Senators. Yet, by mid-February, the work of the session was proceeding relatively smoothly, with final negotiations yet to conclude on the budget and multiple controversial proposals.

When the Session began, we expected that much of the Legislature's attention would be dominated by the devastating impacts of Hurricane Irma and other storm recovery. Then, with three weeks to go before scheduled sine die, the tragic shooting deaths of 17 at Parkland High School riveted the Capitol as well as the rest of the State. The Capital City saw demonstrations and other public activism like we hadn't seen in decades. Senate and House leaders swiftly assembled a response which passed after lengthy emotional floor debates. It was controversial, passing by the slimmest of margins in the Senate, and relatively narrowly in the House, opposed by a combination of Democrats who felt the proposals didn't go far enough joined by Republicans who thought it went too far.

The effect of the Parkland shooting on the 2018 Legislature cannot be overstated. It reordered spending priorities and took the air out of many other controversial issues. However, in addition to the budget, (at $88.7 billion the largest ever), and the school safety package, the Legislature passed a bill with $53 million in funding aimed at stemming the opioid epidemic, a package of tax breaks totaling $170 million, many aimed at hurricane recovery, and a revamp of the higher education system, a priority of the Senate President. The Speaker was able to pass a controversial proposal that would force teachers' unions to disband if their membership fell below 50% of the employees they represent and a constitutional amendment proposal that would require an extraordinary vote for future State tax increases. Left undone was a legislative resolution to gaming to address the expiring Seminole compact, PIP and assignment of benefits reform, a ban on sanctuary cities, and passage of legislation that would have made texting while driving a primary offense. Also failing was a very late attempt to put electronic wills on the notary legislation. That bill had good company as only 200 bills of the 3,192 bills filed crossed the final finish line.

Now that the Session is over, the campaigning will ramp up. It will be a busy and expensive election year. The race for **Governor** has changed a bit since my last column. Congressman Ron DeSantis, has, as expected, officially entered the race for the Republican nomination. Commissioner Putnam still substantially leads in fundraising with over $23.5 million raised. Some polling suggests that Congressman DeSantis has improved his positive name recognition amongst Republican voters by his official entry into the race, frequent appearances on FOX news and some praise via Tweet from President Trump. However, his total fundraising is not quite $3.5 million and he is spending his money rapidly. While its very early still, a February poll found that a whopping 43% of Republican voters are undecided at this point. Fundraising is still the focus of many candidates to prepare for the expensive media and other campaign activities of a statewide race focused on those undecided voters. Speaker of the House Richard Corcoran is expected to enter the Governor's race now that the legislative

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session is over. If he does, he will no longer be hampered by the ban on fundraising by legislators while the Legislature is in session. While fundraising was prohibited, spending was not, and Corcoran's Watchdog PAC spent over $2.2 million in February, much going to advertising. The PAC has been airing a somewhat controversial ad focused on sanctuary cities and Corcoran has engaged in a Facebook Live debate with Tallahassee Mayor Andrew Gillum, a Democratic candidate for Governor on the subject. Corcoran also has a well-oiled social media campaign, including a rather amusing Corcoran Family Super Bowl video sent by e-mail to supporters. Jack Latvala has now officially left the Governor's race, after resigning from the Florida Senate in the wake of sexual harassment accusations. He has started to refund some campaign contributions, but still has $3.8 million in his political committee.

Democratic candidates former Representative Gwen Graham and Miami Beach Mayor Philip Levine are leading those seeking the Democratic nomination and are very close in polling, with Andrew Gillum and Orlando businessman Chris King lagging well behind. One would expect that former congresswoman Graham's campaign would benefit from the name recognition she might have as the daughter of former Governor Bob Graham, but so far that has not translated as well as expected in polling. Levine has led fundraising in both amounts and pace and still has more in his campaign coffers left to spend. He has recently loaned his campaign another $800,000, bringing his total loans to over $1.8 million. Levine has already started to air television ads, and he is spending money at a faster clip. Graham's fundraising did pick up some steam in January, bringing her totals to over $5 million. Attorney John Morgan, after publicly toying with the idea of running as a Democrat, breaking with the Democratic party, then flirting with the idea of a run as an independent, is now saying he won't run at all.

The other Cabinet posts, Agriculture Commissioner, Attorney General and Chief Financial Officer (CFO), are also up in November, and while they traditionally garner less attention than the Governor's race, all will be competitive. The race for **Attorney General** is the most crowded with four announced Republican candidates. Former Assistant U.S. Attorney and 13th Circuit Court Judge, Ashley Moody, announced early. Moody continues to garner a lot of attention as well as endorsements from sheriffs, state attorneys and from Attorney General Pam Bondi. Three sitting House members, Jay Fant, Ross Spano and Frank White are also in the Republican primary, and some sparks have started to fly, particularly as Fant publicly questioned Moody's conservative *bona fides*. Fant's fundraising has lagged and his expenditures have been the highest as he seeks to get more traction. White, 39, elected to the House in 2016 from Pensacola, continues to lead the pack in fundraising with contributions over $2 million, with approximately 80% of his contributions coming from himself and family members. White is general counsel to his wife's family car dealership business. He has taken a little heat for his sponsorship of legislation, eliminating public funding of campaigns while putting considerable personal wealth into his own campaign. Ashley Moody's fundraising continues to be a bit less than White's, but while White and the rest of the Republican field were prohibited from fundraising during the legislative session, she continues to report solid numbers. RPPTL Section member Representative Ross Spano from the Tampa area was the last to enter the Republican primary race when he announced in mid-November, and has raised less than $100,000 before the session start prohibited further fundraising.

On the Democratic side, another Democrat has now entered the race, House Representative Sean Shaw. Shaw was elected to the Florida House in 2016 from the Tampa area. He is the son of the first African American Florida Supreme Court Chief Justice, Leander Shaw. Shaw worked for former CFO Alex Sink as Insurance Consumer Advocate. He announced his candidacy for A.G. after the beginning of session, so his fundraising to date has been minimal. Ryan Torrens, an attorney from Odessa, Florida, has continued to raise small amounts, nowhere near the cash it takes to run statewide.

The **Commissioner of Agriculture** spot also features two sitting legislators in the Republican primary, Representative Matt Caldwell from Lee County and Senator Denise Grimsley from Wauchula. Both continue to burn up the miles doing as many grass roots events as possible between their duties as legislators. They remain relatively close in fundraising, but Grimsley's campaign has had significantly higher expenditures. Don't you know all these legislators running for office are glad for session to be over! Former Representative Baxter Troutman, from Winter Haven, Florida, still leads the fundraising for this seat with an initial pledge of $2.5 million of his own money. He is spending money now on his campaign and gaining some other financial support. Troutman posted the highest numbers in January and February of any of the Republican candidates, with over $200,000 in contributions to his campaign. While the candidates for Cabinet posts other than Governor vie for attention, grassroots organization and fundraising are critical to success. Running for these statewide races is an expensive undertaking, especially with so many statewide campaigns going on, and it doesn't matter where the money comes from- it all spends.

The final Cabinet race is for **CFO.** Former Representative and Public Service Commissioner Jimmy Patronis was appointed to the post by Governor Scott at the end of June 2017, and entered the race to keep the job in early November 2017. His fundraising in that short time has been very successful. Patronis has raised close to $2 million, with his fundraising gathering steam over the first two months of the year. Senator Tom Lee, who has over $2.2 million in the bank, continues to say that he will also run for the Republican primary nomination

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for the post. Former Senator Jeremy Ring remains the only Democrat in the race, and while he continues to report modest contributions, his fundraising will need to really ramp up if he is to compete in the general election. As a legislator, he reported considerable personal wealth, so he is capable of putting more personal funds into the race.

And in the last expected statewide race, long serving Senator Bill Nelson, a Democrat, is still expected to be challenged by Governor Rick Scott who is termed out of the Governor's office at the end of 2018. While the party in power traditionally suffers in mid-term elections, Scott improved his profile during Hurricane Irma and in the wake of the Parkland shootings and can bring tremendous fundraising potential to the race. He has not yet announced for the seat, but *The Washington Post* recently reported that Scott was meeting with some key Republican donors on financial and political plans that could guide his potential bid. Polling is showing that the Governor would be a very formidable opponent to Senator Nelson. All signs point to this being a fierce contest with a great deal of national interest. One particular effect of Scott's run for Senate could be the impact on the Florida Supreme Court. Justices Pariente, Lewis and Quince are required to step down because of their age on the date Scott would be leaving office. If he successfully runs for the U.S. Senate, he will need to leave the office of Governor early unless Congress delays its usual start date, the week before the Governor's term is set to end. A new resign to run law passed by the Legislature will not require Scott to resign before qualifying.

Speaking of elections, there has been an unprecedented number of legislative special elections. Democrat Annette Taddeo won a seat back for the Senate Democrats in late 2017, and Section member, Representative Lori Berman, appears well on her way to replacing Senator Jeff Clemens in the Senate in an April general election. Other special elections for House seats in Miami Dade, Orange and Hillsborough counties replaced Republicans with Republicans and a Polk County House seat appears to be headed for a similar result. Republican Representative Alex Miller of Sarasota resigned last year and the recent February special election to fill her seat was solidly won by RPPTL member Margaret Good, a Democrat running against the son of a sitting U.S. Congressman in a district dominated by Republican registrations. The race garnered a lot of attention nationally, and lots of speculation in the political world on what this win in an unusually high turnout special election may signal for upcoming elections.

While Democrats are obviously pleased with some of their recent victories, the Florida Democratic Party remains an unknown force in upcoming statewide elections. Former Chairman Stephen Bittel resigned in the midst of complaints about his behavior towards women, and the party has a new party chair in 70-year-old Terrie Rizzo. Juan Peñalosa was hired as the party's executive director in early February, and he clearly has his work cut out for him to raise the funds necessary to support five statewide races. The Republican Party has historically better success at party fundraising, but the many contested primaries may slow their fundraising down until the end of the summer.

All the candidates will have the policy issues of several constitutional amendments also on the ballot which may drive constituencies to vote that might normally sit out mid-term elections. The Constitution Revision Commission (CRC) and its committees met frequently through the beginning of the year, sifting through the many member and public proposals. The Commission has narrowed down the 100 plus proposals to 36 amendments. Still being actively considered are proposals to: allow cross-party primary voting if the winner of the primary will only be opposed by a write-in candidate (P11); removing any presumption of correctness for an agency's interpretation of a statute in a state court or administrative challenge (P6); increasing the age to which a judge may serve to 75 (P41); creating a ten-year Bar membership requirement, five of which must be in Florida, to serve as a county or circuit judge (P47); a measure sought by the Court Clerks requiring the Legislature to provide for payment of fees to offset the cost of clerks' services where parties do not pay filing fees (P55); and increasing the required votes necessary to pass a constitutional amendment (P97). Several potentially very controversial amendments are not on the active consideration list, but the CRC rules still allow for those to be revived. The Commission's final recommendations for the 2018 ballot are scheduled to be completed by early May. They toured the state for public hearings through mid-March, and they have now scheduled meetings for the full Commission to meet to hold its own Session from March 19 to May 10.

Whatever the Commission votes to include on the ballot will join 5 other proposals already on the ballot by citizen initiative or legislative vote. Amendment 1 is a $25,000 increase in the homestead exemption for assessed value of homes between $100,000 and $125,000. Amendment 2 makes the 10% cap on increases in assessments of non-homestead property permanent as the current limit is set to expire in 2019 if not readopted. Amendment 3 requires voter approval of casino gambling, a measure supported by the theme park industry and the Seminole Tribe. Amendment 4 restores the right to vote to those who have served their sentences for felonies, including probation and parole. Additionally, the 2018 Legislature adopted an amendment proposal to require a 3/5 supermajority for the legislature to increase state taxes.

Attorneys are always very civically active, and there's so much of statewide interest coming before the voters in August and November!

Choices In Using Arbitration

By Larry R. Leiby, Esq., Malka & Kravitz, P.A., Fort Lauderdale, Florida

Parties to a dispute, including their lawyers, may voluntarily choose to arbitrate their dispute for binding resolution in lieu of litigation. One simple decision, right? Not so fast. Litigation is as easy as choosing the court that has jurisdiction. Arbitration has several choices, including who administers the dispute and how the dispute is administered. Arbitration affords a little more freedom than litigation, but with that freedom comes the responsibility to make an educated choice and understand the options available.

The choice to arbitrate must be consensual since the parties forego their constitutionally guaranteed right to a judge or jury trial in favor of a final hearing before an arbitrator (or panel of arbitrators) chosen by the parties. An arbitration award may be enforced as a court judgment once an arbitration award is confirmed by court motion.[1] The court has authority to add reasonable attorney fees and other reasonable expenses of litigation incurred in a contested court motion seeking confirmation, modification, or correction of an arbitration award.[2] The concept is that arbitration is intended to be final and not strung out with post award proceedings that lack merit.

The standard statutory authority for arbitration of commercial disputes in Florida is either the Revised Florida Arbitration Code;[3] or if the case involves interstate commerce, the Federal Arbitration Act.[4] If the parties are international, the parties may choose the Florida International Commercial Arbitration Act.[5] Another choice is arbitration or voluntary trial resolution pursuant to Fla. Stat. §44.104 (2017). *Many lawyers are not aware of this last option.*

Once the applicable statute is determined, then rules must be chosen if not already designated in the pre-dispute arbitration clause. One point to remember is that even if rules have already been agreed to in a pre-dispute arbitration agreement, the parties may always subsequently agree to modify those rules or choose to abandon them in favor of other rules and procedures.

One of the benefits of arbitration is that the parties may select arbitrators with specialized training to decide the dispute, and there are specific industry-related rules, such as construction. The American Arbitration Association ("AAA") has several specialized rules for construction disputes, e.g., construction industry rules, rules for fixed time and cost in construction cases, residential rules, consumer rules, etc. The International Institute for Conflict Prevention and Resolution and JAMS also have rules for construction-related arbitration claims.

There are some litigation purists who do not choose arbitration because of very restricted appellate review and the fact that the rules of evidence do not automatically apply. However, for those litigation purists who would like to have the case decided more quickly than the court schedule permits and wish to have a decision maker with subject matter expertise, the parties can agree to: (i) require the rules of evidence to apply; (ii) allow for expanded appellate review; and (iii) under Fla. Stat. §44.104(2017), they may choose a special master, voluntary trial resolution judge, or an arbitrator to ensure a trier of fact who has specialized knowledge of the disputed subject matter. One down side is that the parties will be required to pay for the time of the special master, voluntary trial resolution judge, or arbitrator.[6] In litigation, there is one filing fee and no separate charge for the judge and/or jury. On the other hand, if arbitration or voluntary trial resolution is chosen pursuant to Fla. Stat. §44.104 (2017), the case is not administered by an arbitration tribunal, so there is no administrative fee for the services of the arbitration tribunal. These cost factors should be considered and balanced against the benefit of specialized knowledge of the decision maker and the potentially expedited time to have the dispute heard.

When a special master, a voluntary trial resolution judge, or arbitration is chosen pursuant to Fla. Stat. §44.104 (2017), the following is true: (i) the clerk of court is the repository of filings/documents;[7] (ii) the rules of evidence apply;[8] and (iii) there is a right to appellate review.[9] In the case of voluntary trial resolution or arbitration pursuant to Fla. Stat. §44.104 (2017), the appellate review under this section has some limitations, but the appellate review is broader than for a classic arbitration award. In arbitration pursuant to the Florida Arbitration Code appellate review is limited to situations where:[10]

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1. the award was procured by corruption, fraud, or other undue means;
2. there was evident partiality or corruption by an arbitrator;
3. there was misconduct by an arbitrator prejudicing the rights of a party to the arbitration proceeding;
4. the arbitrator refused to postpone the hearing upon sufficient cause shown, refused to hear evidence material to the controversy; or otherwise failed to conduct the hearing as required by law so as to substantially prejudice the rights of any party;
5. the arbitrator exceeded the arbitrator's powers or there was no agreement to arbitrate;
6. there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award;
7. the arbitrator awarded upon a matter not submitted to the arbitration, unless it was a matter not affecting the merits of the decision upon the matter submitted; and
8. the award was imperfect in matter of form, not affecting the merits of the controversy.

The Federal Arbitration Act contains substantially similar grounds for appellate review.

In an arbitration or voluntary trial resolution pursuant to Fla. Stat. §44.104 (2017), the following additional grounds for review exist:[11]

1. any alleged failure of the arbitrator to comply with the applicable rules of procedure or evidence;
2. any alleged partiality or misconduct by an arbitrator prejudicing the rights of any party; and
3. whether the decision reached a result contrary to the Constitution of the United States or of the State of Florida.

Note that factual findings are not subject to appeal.[12] Also in an arbitration or voluntary trial resolution proceeding under Fla. Stat. §44.104 (2017), there is only one right of appeal, with no further appellate review unless there is a constitutional issue.[13]

Other aspects of arbitration that may be added by agreement of the parties are:

1. offers of settlement (analogous to Fla. Stat. § 768.79 for litigated disputes);[14]
2. specific requirements for arbitrators;
3. high-low parameters for the arbitration award;
4. baseball arbitration procedures (each side submits a proposed award and the arbitrator(s) must choose one, not go in the middle);
5. appellate arbitration;[15] and
6. other provisions that may be important to the parties.

The decision to arbitrate should consider the foregoing issues.


L. LIEBY

Larry R. Leiby, *has been serving as an arbitrator since 1981. He was selected as a fellow in the College of Commercial Arbitrators in 2011. In 2017 he was a contributing author to the 4th edition of the Protocols for Expeditious, Cost Effective Arbitration published by the College of Commercial Arbitrators; and he wrote "Florida Provides Private Arbitration and Appeal Process" for the ABA Section of Litigation-ADR website.*

Mr. Leiby founded and was the first chair of the Construction Law Committee of the Florida Bar Real Property Section (1976-1994). He was a member of the original Florida Bar Construction Law Certification Committee appointed in 2004, later chaired that committee, and was in the 2005 (original) class of Florida Bar Board Certified Construction Lawyers.

He is the author of the Florida Construction Law Manual published originally by Shepard's/McGraw Hill in 1981, and published annually by Thomson-Reuters-West, in print, as an e-book, and as Volume 8 of the Florida Practice Series on Westlaw.

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Endnotes

1 Fla. Stat. §682.12 and §682.15 (2017); Fla. Stat. §44.104(11) (2017); 9 U.S.C. §13 (2017).

2 Fla. Stat. §682.15(3) (2017).

3 Revised Florida Arbitration Code, Fla. Stat. Chapter 682 (2017).

4 9 U.S.C. (2017).

5 Florida International Commercial Arbitration Act, Fla. Stat. Chapter 684 (2017).

6 Fla. Stat. §44.104(3) (2017).

7 Fla. Stat. §44.104(5) (2017).

8 Fla. Stat. §44.104(9) (2017).

9 Fla. Stat. §44.104(10) (2017).

10 Fla. Stat. §§ 682.13 - 14 (2017).

11 Fla. Stat. §44.104 (10) (2017).

12 Fla. Stat. §44.104(11) (2017). The statute states "factual findings determined in the voluntary trial are not subject to appeal." It is not clear whether this limitation means that factual findings in only voluntary trial are not subject to review, but there does not appear to be a reason to distinguish between a voluntary trial or arbitration under Fla. Stat. § 44.104.

13 Id.; Kaplan v. Epstein, 219 So.3d 932 (Fla. 4th DCA 2017).

14 Note that Fla. Stat. §768.79 (2017) applies only to civil actions.

15 Both the AAA and JAMS have published rules for appellate arbitration. Note that a transcript may be needed to have a meaningful appeal.

Abandoning The Paper Chase: Mobile Home Title Retirement

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

Despite their development into stationary and sizeable double and triple-wide residences, mobile homes are treated as vehicles in the state of Florida with proof of ownership shown on physical certificates of title. According to the Manufactured Housing Institute, Florida has about 828,000 mobile homes—more than any other state, which makes for a lot of certificates. In fact, each section of a mobile home has its own certificate of title, e.g., a single-wide has one certificate, a double-wide has two certificates, etc. Often lost, misplaced, or in error, mobile home certificates of title can be the source of stress in real property transactions. In probate situations, locating the title can be the first hurdle. In a sale or conveyance of real property, the additional process of transferring a mobile home title comes as a surprise or a hassle to those involved.

To avoid the chase for the title certificate, owners of mobile homes can "go paperless" by retiring the certificate of title, so the mobile home can be transferred via a deed for the underlying real property. To retire the certificate, the mobile home must be permanently affixed to the underlying real property. An "RP" (Real Property) sticker on the mobile home is an indication that the mobile home is permanently affixed to the real property. The Property Appraiser's office determines whether a mobile home is permanently affixed and issues a DR-402 form. This form allows an owner to purchase an RP sticker from the Tax Collector, have their mobile home taxed as real property, and apply for a Homestead Exemption.

If permanently affixed to the underlying land, Fla Stat. §319.261 provides a two-step recording and application process to retire title certificates and convey mobile homes as real property. The retirement process begins with the Clerk of Court and is completed with the Florida Department of Highway Safety and Motor Vehicles.

First, the following documents must be recorded with the Clerk of Court: (1) the original title, including model year, make, width, length, and vehicle identification number, (2) if there is a recorded lienholder, a statement from the lienholder that the interest in the home has been released or will be released upon retirement of the title, (3) a legal description of the underlying real property, and (4) an owner's affidavit stating that the home is permanently affixed to the real property in accordance with Florida law. The Clerk will record these documents to fulfill the first prong of the retirement process.

Second, an application for retirement of the certificate of title, together with an attached copy of the recorded documents listed above, must be filed with the Department of Highway Safety and Motor Vehicles. A form power of attorney should be provided with the application by an office handling this procedure on behalf of a client. The Department of Highway Safety and Motor Vehicles will then retire the title and notify the applicant. From this point forward, the mobile home can be transferred via a deed as if it were a site-built home.

If circumstances change such that ownership of the underlying real property will be transferred separately from the ownership of the mobile home, the statute also provides that a new certificate of title can be issued for removal of the mobile home.

A mobile home owner who is preparing to sell, devise, or otherwise transfer their property should secure the certificate of title and can use this statutory process of title retirement to save time and relieve any beneficiaries of the stress of the paper chase.

Litigators Beware: The Need To Challenge Facially Valid Previous Wills In Revocation Proceedings, Even If Not Offered To Probate

By Daniel L. McDermott, Esq., Adrian Philip Thomas, P.A., Fort Lauderdale, Florida

When representing clients wishing to challenge the validity of a last will and testament, whether the challenge is based upon undue influence, lack of capacity, fraud, or any of the various other theories that may exist, lawyers face a minefield when it comes to advising clients of the potential statutory bars that could eviscerate the client's opportunity to challenge the will at issue. For example, if your client is an interested person who was served with a copy of a notice of administration but failed to object within three months from service of the notice of administration, your client may be forever barred from contesting the will.[1] Similarly, if a nominated personal representative or other interested person served your client a petition for administration with formal notice and your client failed to serve a response within 20 days of service, they also may be forever barred.[2] Consequently, given the potential disaster that both the client and attorney could face for failing to comply with one of the aforementioned statutory deadlines, many probate litigators have committed these statutory time requirements to memory, implemented redundant calendaring systems to ensure no deadlines are blown on their watch, and availed themselves to available prophylactic mechanisms, such as the filing of a caveat, in order to ensure that their clients don't unknowingly allow one of these statutory deadlines to lapse.[3]

While the forgoing safeguards may help probate litigators (and their respective carriers) sleep a bit easier after the workday, they may not be, in and of themselves, sufficient to ensure that your client will be able to survive the pleading stage of a will contest. Rather, lurking in the annals of Florida decisional law lies another body of law that every probate litigator should be aware of, however counter-intuitive this body of jurisprudence may seem at first blush. Stated simply, it may very well be that if your client has failed to challenge a will that has not even been offered to probate, but which is "before the court," he or she may be barred from challenging the only will that has actually been offered for, or admitted to, probate.

Cates and *Wehrheim*: The "facially valid previous will"

In the seminal case of *Cates v. Fricker*,[4] the Second District Court of Appeal affirmed a trial court's order granting summary judgment. The grant of summary judgement denied a petition for revocation of probate filed by a child of the decedent, who was seeking to revoke a will that excluded said child as a beneficiary of their father's estate. The Court reasoned that "[t]he basis for the summary judgment was that appellant 'was specifically excluded as a beneficiary in two (2) previous Wills, the validity of which have not been questioned....'" [5] Consequently, while "Section 733.109(1), Florida Statutes (1987), provides that any 'interested person' may bring an action for revocation of probate" and "[a]n 'interested person' may be an heir at law," the *Cates* Court held that "it was properly determined in this case that appellant is not an heir at law and thus is not such an 'interested person.'" [6] The Court reasoned that "when an at least facially valid previous will is before the court, the burden is on the potential heir at law who wishes to contest a will to show that the previous will which excluded the contestant was invalid or that the doctrine of dependent relative revocation did not apply." [7] Finally, the Court noted

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that "[s]uch facial validity may be shown . . . through copies of previous wills which include copies of the signatures of the testator and witnesses and of the notary certificate."[8]

Revocation proceedings such as the one in *Cates* are considered adversarial in nature, and therefore governed by the Florida Rules of Civil Procedure. However, Florida Courts have held that "[w]hile in most types of civil cases standing is generally considered an affirmative defense that can be waived if not properly pled, this is not the case in adversarial probate proceedings to contest the validity of a decedent's will or to attempt to remove the designated personal representative."[9] Rather, as the Fifth District Court of Appeal explained in *Wehrheim*, "[i]n this instance, it is the burden of the petitioner seeking to revoke the present will to establish that the previous will, which also excludes the petitioner as a beneficiary, is invalid."[10] Consequently, under the body of law developed around *Cates* and *Wehrheim,* Courts recognize that "a petitioner may not be an interested person in revocation and removal proceedings if previous and presumptively valid wills have been discovered that, similar to the current will, do not include the petitioner as a beneficiary of the estate."[11]

The *Gordon v. Kleinman* Workaround

What does this all mean for a probate litigator and his or her clients? Well, for one it means that the lawyer and client should discuss early on in the representation whether any other "facially valid previous will" exists or may exist. But what if a probate litigator learns from his or her client that there is, in fact, one or more "facially valid previous wills," and the client's only avenue to receiving a benefit through the estate is under the laws of intestacy or another estate planning document that pre-dates the "facially valid previous will?" Does this mean the client has reached the end of the road? Does the jurisprudence owing to *Cates* and *Wehrheim* make the very existence of such a "facially valid previous will" the proverbial dagger to the heart of your client's will contest? Fortunately, the answer to that question is no, or at least not necessarily, as Florida courts have also set forth a potential workaround to *Cates* and *Wehrheim*. Nevertheless, in order to take advantage of this judicially created solution, a probate litigator must be cognizant of what is required to avoid the pitfall of being bounced out of Court based on a *Cates/Wehrheim* lack of standing argument.

In *Gordon v. Kleinman*,[12] a case that post-dates *Cates* by nearly twenty-five years, the Fourth District Court of Appeal first acknowledged the doctrine set forth by its sister Courts in *Cates, Wehrheim,* and their progeny, and observed that "whether a person is an 'interested person' is an element that must be established by the petitioner seeking revocation of probate." In *Gordon*, the trial court had granted a "motion to dismiss arguing that petitioner lacked standing to assert the claims and she failed to allege any facts supporting her claim of undue influence."[13] Before announcing its holding in *Gordon*, the Fourth District Court of Appeal cited to *Wehrheim* for the proposition that "a petitioner may not be an interested person in revocation and removal proceedings if previous and presumptively valid wills have been discovered that, similar to the current will, do not include the petitioner as a beneficiary of the estate."[14] However, unlike the result in *Cates* and *Wehrheim*, the Fourth District Court of Appeal in *Gordon* ultimately reversed the trial court's dismissal of the petition for revocation, holding that because "petitioner alleged that she was the beneficiary of the 1983 will and that *all of the prior wills* under which she was not a beneficiary were the result of undue influence and/or testamentary incapacity and therefore invalid," the "Petitioner has pleaded sufficient allegations of standing and the trial court erred in dismissing her petition."[15]

Conclusion

In light of the forgoing, and notwithstanding how counter-intuitive it may seem to challenge a will that has not even been offered to probate, that is precisely what probate litigators should be advising their clients if a "facially valid previous will" is known to exist and their client either takes under the laws of intestacy or pursuant to another will that pre-dates said facially valid previous will. Moreover, to avoid the risk that an unknown "facially valid previous will" may eventually be brought before the Court, a probate litigator would be well advised to counsel their clients to include a prophylactic allegation modelled after the allegation included in the petition that the Fourth District Court of Appeal reviewed in *Gordon*, i.e., an allegation such as "client is a beneficiary under the laws of intestacy/the XX/XX/19XX will and *all of the prior wills* under which client was not a beneficiary were the result of undue influence and/or testamentary incapacity and therefore invalid." At a minimum, the inclusion of such an allegation should ensure that your client has pleaded sufficient allegations of standing to survive a motion to dismiss if a "facially valid previous will" is already before the court or comes before the court subsequent to the institution of the will contest.

Endnotes

1 *See* Fla. Stat. §733.212(3).
2 *See* Fla. Stat. §733.2123.
3 *See* Fla. Stat. §731.110.
4 *Cates v. Fricker,* 529 So.2d 1253 (Fla. 2d DCA 1988).
5 *Id*. at 1254.
6 *Id*.
7 *Id*. at 1254-55.
8 *Id*. at 1255.
9 *See Wehrheim v. Golden Pond Assisted Living Facility*, 905 So.2d 1002, 1005-06 (Fla. 5th DCA 2005).
10 *Id*. at 1006.
11 *Id*.
12 120 So.3d 120, 121 (Fla. 4th DCA 2013)
13 *Id*. at 121.
14 *Id*. at 121-122.
15 *Id*. at 122.

Notice Of A Claim Pursuant To Florida's Pre-Suit Notice Of Construction Defect Statute, Chapter 558, May Trigger An Insurer's Duty To Defend

By Wm. Cary Wright, Esq., Jaret J. Fuente, Esq., and Michael G. Rothfeldt, Esq.,
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Commercial general liability (CGL) insurance policies are necessary for construction projects of all types. General contractors routinely require through their subcontract agreements that their subcontractors obtain CGL insurance policies, and that those policies specifically include the general contractor as a named additional insured, in part, so that if a construction defect-related dispute arises regarding a subcontractor's work on a project, the general contractor is afforded a legal defense in connection with, and is otherwise insured against, claims made in connection with such a dispute. This sort of insurance coverage arrangement is particularly important if a subcontractor is no longer in business at the time a claim is made regarding its work on a project. Notwithstanding such insurance, however, contractors and insurers often have different views on what exactly triggers an insurer's duty to defend.

Chapter 558, Florida Statutes

Chapter 558, Florida Statutes, is a pre-suit mechanism to resolve construction defect disputes by requiring claimants to furnish contractors with notice and opportunity to repair specified defects. Specifically, Chapter 558 provides that a claimant, as defined in the statute, "may not file an action … without first complying with the requirements" of Chapter 558.[1] It also provides a very detailed pre-suit "notice and opportunity to repair" process that must be followed before filing an action alleging a construction defect, as defined in the statute.[2] The Florida Legislature has described Chapter 558 as an "alternative dispute resolution mechanism."[3]

Recipients of Chapter 558 notices of construction defect claims typically immediately notify the relevant contractors, subcontractors, suppliers, or design professionals, as well as their CGL carriers. Such notification is intended to trigger, and typically does trigger, a pre-suit investigation that often includes hiring counsel, experts, and consultants, which can be costly. Often, this process results in a dispute between a recipient of a Chapter 558 notice of claim and the insurance carriers notified with regard to who must pay those pre-suit investigation costs.

Insureds typically expect a legal defense upon receipt of a Chapter 558 notice of construction defect and its tender to the insurer. Insurers often decline to provide a legal defense before a lawsuit is filed. Therein lies the dispute that was at issue in *Altman Contractors, Inc. v. Crum & Forster Specialty Ins. Co.*[4]

Altman Contractors, Inc. v. Crum & Forster Specialty Ins. Co.

Altman involved a dispute between the general contractor for the construction of a high-rise condominium in South Florida (Altman Contractors) and its CGL insurer (Crum & Forster).[5] The condominium served Altman with notices of claim pursuant to Chapter 558, covering more than 800 construction defects at the condominium. Altman, in turn, notified Crum & Forster and demanded, pursuant to the CGL policy, a defense and indemnification. Crum & Forster denied that the notices invoked a duty to defend, arguing the notices did not constitute a "suit" as defined in the policy.

Crum & Forster insured Altman through seven consecutive one-year CGL policies in effect from February 1, 2006 through February 1, 2012. The policy language at issue provided:

> We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for "bodily injury" or "property damage" to which this insurance does not apply. We may, at our discretion, investigate any "occurrence" and settle any claim or "suit" that may result.
>
> "Suit" means a civil proceeding in which damages because of "bodily injury," "property damage" or "personal and advertising injury" to which this insurance applies are alleged. "Suit" includes:

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a. An arbitration proceeding in which such damages are claimed and to which the insured must submit or does submit with our consent; or

b. Any other alternative dispute resolution proceeding in which such damages are claimed and to which the insured submits with our consent.[6]

That policy language is identical to the standard Insurance Services Offices (ISO) form policy language. The policy did not further define "civil proceeding" or "alternative dispute resolution proceeding" as used within its definition of "suit." Nor does the standard ISO form.

The condominium subsequently served Altman with a supplemental Chapter 558 notice claiming additional defects and demanding that Altman take all measures necessary to correct them.[7] By then, Altman had hired its own counsel. Altman forwarded the supplemental Chapter 558 notice to Crum & Forster and again requested a legal defense. Crum & Forster maintained its position, but engaged counsel to defend Altman under a reservation of rights in anticipation of litigation.[8] Altman objected to the selection of counsel, demanded its original counsel be permitted to continue providing its defense, and requested reimbursement of fees and expenses incurred since the time it provided notice of the claim.[9] Crum & Forster denied Altman's requests, Altman settled the claims without Crum & Forster's involvement, and Altman then filed a declaratory judgment action in the Southern District of Florida, seeking a declaration that Crum & Forster owed it a duty to defend and indemnify.[10]

The Southern District ruled that the condominium's written notices of claim pursuant to Chapter 558 did not trigger a duty to defend because the Chapter 558 process did not constitute a "suit" as defined in the policy, and it entered summary judgment in Crum & Forster's favor.[11]

Altman appealed to the Eleventh Circuit, and argued that the Chapter 558 process meets the policy's definition of "suit" because it is a "civil proceeding" or "proceeding," as defined by *Black's Law Dictionary* and *Merriam-Webster's Dictionary of Law*, and that even if it is not, it nonetheless constitutes an "alternative dispute resolution proceeding," and is therefore a "suit" as defined in the policy.[12] Altman further argued that without the benefit of insurer participation and defense during the Chapter 558 process, policyholders may decline to participate in that process and even invite litigation in order to trigger insurer participation, thereby undermining the intent of Chapter 558.[13]

In response, Crum & Forster argued that imposing a duty to defend "during the Chapter 558 process will fuel an insurance crisis in the State by dramatically increasing the cost of insurance to those in the construction trade and limiting its availability."[14] The American Insurance Association and Florida Insurance Council, in their *amici curiae* brief in support of Crum & Forster, argued that if insurers must appoint contractor counsel at the Chapter 558 stage, claimants are likely to retain counsel as well, and once they do, their legal fees will make it more difficult to settle cases, thereby frustrating the intent of Chapter 558.

Recognizing "the possible policy implications with respect to this question of first impression," the Eleventh Circuit certified the following question to the Florida Supreme Court:

> *Is the notice and repair process set forth in Chapter 558 of the Florida Statutes a 'suit' within the meaning of the CGL policies issued by Crum & Forster to Altman Contractors?*[15]

The Florida Supreme Court recently answered that question in the affirmative in *Altman Contractors, Inc. v. Crum & Forster Specialty Ins. Co.*[16] In doing so, the Court explained that whether Crum & Forster has a duty to defend during the Chapter 558 process is determined by whether the process is a "suit" as defined by the policy.[17] The court noted that at the time of the condominium's Chapter 558 notices, Fla. Stat. § 558.001 (2012), provided:

> The Legislature finds that it is beneficial to have *an alternative method to resolve construction disputes that would reduce the need for litigation as well as protect the rights of property owners*. An effective *alternative dispute resolution mechanism* in certain construction defect matters should involve the claimant filing a notice of claim with the contractor, subcontractor, supplier, or design professional that the claimant asserts is responsible for the defect, and *should provide the contractor, subcontractor, supplier, or design professional with an opportunity to resolve the claim without resort to further legal process*.[18]

As did the Southern District, the Florida Supreme Court looked to the definition of "proceeding" as defined by *Black's Law Dictionary* (9th ed. 2009) ("any procedural means for seeking redress from a tribunal or agency") and *Merriam-Webster's Dictionary of Law* (1996) ("a particular step … in the enforcement, adjudication, or administration of rights, remedies, laws, or regulations"), and as set forth in the court's decision in *Raymond James Financial Services, Inc. v. Phillips*.[19] But the court also noted that the term "civil proceeding" was added to the 2014 version of *Black's Law Dictionary*, which defined the term to mean "a judicial hearing, session, or lawsuit in which the purpose is to decide or delineate private rights and remedies…."[20]

The Court noted that the Crum & Forster policy at issue initially defines "suit" as a type of "civil proceeding" and found that the Chapter 558 process is not a "civil proceeding" under the terms of the policy, or pursuant to the foregoing definitions, because a Chapter 558 notice recipient's participation in the Chapter 558 process is "not mandatory or adjudicative."[21] A recipient may choose to not respond and thereby force a claimant to file suit. A recipient has no obligation to participate in the Chapter 558 process.

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The Court further noted that the Chapter 558 framework has never been anything other than a voluntary dispute resolution mechanism on the part of the insured. It does not take place in a Court of law or employ any type of adjudicatory body. Nor does it produce legally binding results. Rather, it "sets forth a presuit process whereby a claim may be resolved solely by the parties through a negotiated settlement or voluntary repairs without ever filing suit."[22]

However, the Court noted that subparagraph (b) of the Crum & Forster policy at issue broadened the definition of "suit" to include "[a]ny other alternative dispute resolution proceeding in which such damages are claimed and to which the insured submits with our consent."[23] Relying again on *Black's Law Dictionary*, the Court noted that "alternative dispute resolution" is defined to mean "[a] procedure for settling a dispute by means other than litigation."[24]

Regardless of what happens on remand,* Altman *will have implications for all involved in construction disputes where CGL insurance is involved.

The Court concluded that Chapter 558 falls within that definition as a statutorily required pre-suit process aimed at encouraging claimants and insureds to settle construction defect claims without resorting to litigation, and in doing so noted that the Legislature explicitly described Chapter 558 as "'[a]n effective alternative dispute resolution mechanism.'"[25] The Court also found that Chapter 558 provides for damages as required by the policy's definition of "suit" because it defines a "claimant" as one asserting "a claim for damages," requires that a notice of claim provide a description of the damage or loss alleged, and includes a "monetary payment" as a potential resolution of a claim.[26] Thus, the Court held that the Chapter 558 process fell within the policy's definition of "suit."

As a result, in answering the certified question in the affirmative, the Florida Supreme Court held that the notice and repair process set forth in Chapter 558 constitutes a "suit" within the meaning of the Crum & Forster policy at issue. Although not a "civil proceeding," the Chapter 558 pre-suit process is included in the policy's definition of "suit" as an "alternative dispute resolution proceeding" to which the insurer's consent is required to invoke the insurer's duty to defend the insured.[27]

The Court expressly declined to determine whether Crum & Forster *consented*, as required by the policy, to Altman's participation in the Chapter 558 process.[28] The Court noted that the issue of consent was "outside the scope of the certified question and an issue of fact disputed by the parties," and remanded the case to the Eleventh Circuit for further proceedings.[29]

On remand, the Eleventh Circuit recently reversed the Southern District's grant of summary judgment in Crum & Forster's favor, vacated the final judgment, and remanded the case to the Southern District for further proceedings.[30] Regardless of what happens on remand, *Altman* will have implications for all involved in construction disputes where CGL insurance is involved.

***Altman's* Implications for Contractors and Insurers**

Altman could result in a decrease in the number of disputes about an insurer's obligation to provide legal counsel in connection with the Chapter 558 notice and opportunity to repair process, which would benefit contractors. That, of course, would only occur where policies contain the broader definition of "suit" as an "alternative dispute resolution" as in *Altman*. That is likely, given that the standard ISO policy contains that broader definition of "suit."

However, the standard ISO policy also requires insurer consent to participate in the Chapter 558 process as a pre-requisite to triggering its duty to defend. Because the Florida Supreme Court did not address consent in *Altman*, it is presently unclear how courts will interpret that issue. For now, contractors and other policyholders would be wise to review their policies to determine whether they are the standard ISO policy or otherwise broadly define "suit" so that it fits within the Florida Supreme Court's analysis in *Altman*, and also to request insurer consent to participate in the Chapter 558 process.

Altman could also result in increased costs and decreased availability of CGL coverage in the construction industry, as the American Insurance Association and Florida Insurance Council posited in their *amici curiae* brief in support of Crum & Forster. It is also possible that the insurance industry could modify policy language to either include the Chapter 558 pre-suit process within the insurer's duty to defend for an additional premium, or to expressly exclude it. This is precisely what happened in the wake of the Florida Supreme Court's decision in *U.S. Fire Ins. Co. v. J.S.U.B., Inc.*,[31] regarding the "your work" exclusion in CGL policies, where insurance carriers modified to reduce coverage.

Legislative Possibilities

The Florida Legislature could also address *Altman* by amending Chapter 558 to clarify its interaction with CGL insurance, or to otherwise address the public policy issues identified in the Eleventh Circuit's initial opinion certifying the question to the Florida Supreme Court. In light of the unresolved issue of insurer consent to participation in the Chapter 558 process, the Legislature could also amend the statute to address consent. For now, however, it seems settled that a Chapter 558 notice of claim is a "suit" as defined in the standard ISO policy. Time will tell whether "consent" will become a new issue. AL

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Endnotes

1 Fla. Stat. § 558.003. Should a claimant file a lawsuit alleging a construction defect prior to complying with the Chapter 558 process, the court shall stay the action, upon timely motion by a party to the suit, until the claimant complies. *See id.*

2 Fla. Stat. § 558.004.

3 Fla. Stat. § 558.001 (2015).

4 124 F.Supp.3d 1272 (S.D. Fla 2015).

5 *Id.* at 1274-75.

6 *Id.* at 1278-79.

7 *Id.* at 1274.

8 *Id.* at 1274-75.

9 *Id.* at 1275.

10 *Id.*

11 *See id.* at 1281.

12 *Altman Contractors, Inc. v. Crum & Forster Specialty Ins. Co.*, 832 F.3d 1318, 1323-1324 (11th Cir. 2016).

13 This view was shared by Altman's *amici curiae*, the Construction Association of South Florida, the Leading Builders of America, and the South Florida Associated General Contractors. *See id.* at 1326.

14 *Id.*

15 *Id.* at 1326.

16 No. SC16-1420, 2017 WL 6379535 (Fla. Dec. 14, 2017).

17 *Id.* at *2.

18 *Id.* (quoting Fla. Stat. § 558.001 (2006)).

19 *Cf. id.* at *4 (quoting Raymond James Financial Services, Inc. v. Phillips, 126 So. 3d 186, 190 (Fla. 2013) (internal quotation marks and citations omitted)); with Altman, 124 F.Supp. at 1281.

20 *Altman*, 2017 WL 6379535 at *4.

21 *Id.*

22 *Id.*

23 *Id.* at *5.

24 *Id.*

25 *Id.* (quoting Fla. Stat. § 558.001).

26 *Id.*

27 *Id.*

28 *Id.* at **1, 4 and 5. Interestingly, the Southern District expressly declined to adopt this interpretation of "civil proceeding" as requiring insurer consent by virtue of being an alternative dispute proceeding, as stated in dicta in *The Cincinnati Ins. Co. v. AMSCO Windows*, 593 Fed. Appx. 802, 811 (10th Cir. 2014). *See Altman,* 124 F.Supp.3d at 1281-1282.

29 *Id.* at *5.

30 *Altman Contractors, Inc. v. Crum & Forster Specialty Ins. Co.*, No. 15-12816, 2018 WL 560523 (11th Cir. Jan. 26, 2018).

31 979 So. 2d 871, 874-75 (Fla. 2007) (holding that a "post-1986 standard form [CGL] policy with products completed operations hazard coverage, issued to a general contractor, provides coverage when a claim is made against the contractor for damage to the completed project caused by a subcontractor's defective work," provided that the policy contains the subcontractors exception to the "your work" exclusion).

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Who Knew? The Misplaced Use Of "Time Is Of The Essence" Clauses In Construction Contracts

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"Time is of the essence" clauses have become commonplace in most standard form construction agreements published by the AIA,[1] ConsensusDOCS[2] and EJCDC.[3] For the most part, this clause is typically found in one miscellaneous paragraph to generally indicate that "time is of the essence" (hereinafter sometimes referred to as the "clause") relative to all specified time deadlines in the agreement. However, relying on a general clause could pose a trap for the unwary construction lawyer.

Developing case law suggests that a generic clause may not be sufficient to transform every specified time frame into a material breach of contract.[4] To make each deadline a material requirement, the best practice may be to specify that "time is of the essence" with each referenced time limit. This approach will enhance the likelihood that the failure to perform timely will constitute a material breach of contract. Reliance on standardized agreements between the owner and architect pose the greatest risk since a "time of the essence" clause has not been included in these agreements.[5]

Recognizing the significance of deadlines in these agreements, construction practitioners should also exercise care to avoid the owner's waiver of the clause when granting an extension of time. This article explores these issues and provides practical advice for use of "time of the essence" clauses in real estate, design, and construction contracts.

THE MEANING OF TIME IS OF THE ESSENCE

Judicial Treatment of Time is of the Essence Clauses

Contract law provides that mere delayed performance does not constitute grounds for default under an agreement; rather, for there to be a default, the breach must be material.[6] Therefore, parties regularly include a "time is of the essence" clause to require timely performance as an express condition of the contract.[7] In this way, the owner announces at the time of contracting that damages are a foreseeable result of delay.[8] By operation of law, no matter how trivial a deviance, the failure to meet a required condition within the time specified can automatically equate to a material breach that allows for rescission and termination of all further obligations.[9] The effective use of the clause can make a deadline material so as to convert a minor breach to an incurable basis for termination of the contract.[10] This approach can provide owners with leverage over contractors when enforcing contract deadlines. In response, contractors often seek to minimize that risk by specifying that the time limits *are simply terms of the contract* rather than of the essence of the contract. Alternatively, the parties may negotiate to specify that only certain deadlines will give rise to a material breach of contract such as the start, completion or certain interim construction milestone dates.

When Will Time be Considered a Material Term?

"Time is of the essence" is not the standard rule; accordingly, general dates specified within an agreement are considered "not of the essence" unless expressly stated or stipulated as such in the contract.[11] Courts generally recognize four methods for determining when time will be treated as material. First, time will be considered of the essence, and therefore material, when the agreement expressly recites such, *i.e.*, "Time is of the essence in this Agreement."[12] Second, in the absence of an express provision, time will be of the essence where given the nature of the subject matter of the contract, the circumstances imply time was clearly an essential part of the bargain.[13] The third scenario is when treating time as non-essential would produce a hardship and delay by one party in completing or in complying with a term would necessarily subject the other party to a serious injury or loss.[14] Lastly, a party may expressly make time of the essence by providing notice to the defaulting party that the contract is required to be performed within a reasonable, stated time.[15]

Time is of the Essence Impacts Performance and Remedies

When parties expressly include a "time is of the essence" clause in their agreement, the clause affects both the timing of performance as well as available remedies. When time is considered of the essence, then the obligated performance must occur at the "stated and unquestionable time."[16] In contrast, when time is non-essential, parties generally must perform within a reasonable time.[17] Moreover, as discussed above, by allocating time as essential to performance, the failure to comply is deemed a material breach so that the non-breaching party may either rescind the contract or, if available under the circumstances, move for specific performance.

Scope Of A Time Is Of The Essence Clause

Clause Placement is Important

At first glance, the insertion of a single clause may seem sufficient. However, most agreements contain *multiple*

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promises and performance requirements by each party. Since contracts regularly contain multiple deadlines, it is difficult to predict whether a general clause will successfully express the parties' intentions for strict performance as to all time limits.

Generally, courts are reluctant to apply the general "time is of the essence" clause to all "promises for sundry performance" since each obligation varies in importance.[18] In this setting, one court observed that when the clause has been incorporated from a form contract, it has been inserted without realization of its significance.[19] Thus, the language of the clause taken in connection with the disputed subject matter may present uncertainty as to the intended scope of the clause.

Normally, the clause will be given effect only if it is shown to be clearly applicable to the contract requirement to which it is sought to be applied.[20] For example, a clause in a residential purchase agreement's "Other Essential Terms" section was found inapplicable to a section which governed options for appraisal.[21] The court held that the intended scope of the provision was to apply to the specified closing date and any slight delay in appraisal negotiation would not affect closing.[22]

Similarly, where the buyer was unable to timely receive a bank loan certification, the court "strictly" applied the form contract's clause and held that it was inapplicable because it was in a different paragraph which related to the closing of the purchase as opposed to pre-closing conditions.[23] Additionally, a contract for the purchase of twenty-three developed lots containing a "time is of the essence" clause in the paragraph pertaining to closing did not encompass the provision in the addendum that all construction debris had to be removed by closing.[24] These cases may be compared to *Arvilla Motel* where the clause was located under the heading Purchase and Sale.[25] Here the court found that "the parties clearly intended to make time essential as to the closing date" and therefore seller had an immediate right to cancel if buyer was unable to timely perform.[26] The court reasoned that because the clause was placed within the provision pursuant to which the seller could seek rescission, the parties clearly contemplated timely performance to be a material requirement.[27]

Guidelines for Drafting

As the previous cases demonstrate, "[a] 'time is of the essence' clause is not necessarily a stock phrase."[28] In order to give the clause the intended effect the court will attempt to ascertain whether the required performance is a condition to trigger the other party's obligation.[29] As a result, courts have warned against relying on a blanket clause buried in verbose language which may specify a time for performance in multiple contexts.[30]

Recognizing that use of a single blanket clause in construction and design agreements may impact the ability to enforce those deadlines, case law suggests that the better practice would be to include the clause together with each specified deadline.[31] Although it is not the norm to have contracts containing more than one "time is of the essence" clause, drafting the contract in this manner provides the best assurance that the time specified will be given effect as being "of the essence." In fact, one court opined if the condition was of crucial importance, a separate clause should have been explicitly included to govern the condition along with a separate date if necessary.[32]

Avoid Waiver Of Time Is Of The Essence

To avoid waiver, a party claiming breach of a "time is of the essence" clause must do so in a timely manner.[33] This is because waiver may be inferred from conduct when a party is led to believe to his detriment such right has been waived.[34] "When time has not been made essential to the contract or has been waived, the party entitled to insist on performance must fix a definite date in the future for performance."[35]

In *Royal Palm*, the owner allowed the contractor to exceed the specified substantial completion date without setting a new deadline.[36] The Eleventh Circuit held that the owner's conduct of issuing hundreds of change orders after expiration of the original substantial completion date while failing to establish a new date constituted waiver of the "time is of the essence" clause.[37] Under these circumstances, the owner was precluded from recovering liquidated damages.[38] The result in *Royal Palm* can be distinguished from *Faussner* where the seller's repeated extensions of time to the purchaser who was unable to raise funds to purchase real estate did not constitute waiver.[39]

In a construction context, a contractor may be unable to meet its deadline. Rather than terminating the contract, it may prove beneficial for the owner to provide an extension of time but to proceed cautiously to avoid waiving the clause. Based upon the foregoing case law, whenever a deadline is extended, the owner should establish a new date, stating that "time is of the essence," to avoid waiver. In this manner, the newly established deadline can be deemed expressly material and enforceable.

Conclusion

It is well established that courts will not rewrite agreements between parties to a contract.[40] In a construction setting, standard form agreements containing a generic clause may not be sufficient to make various performance requirements material to support a claim of breach of contract. Standard form agreements should not be accepted at "face value" but must be carefully reviewed and modified to meet the objectives of your client. This is especially true for standardized owner and architect agreements that fail to include a "time is of the essence" clause. To achieve greater certainty in enforcing deadlines, consider using the phrase "time is of the essence" with each obligation that you may ultimately seek to enforce. Lastly, when the time for performance has been extended, in order to avoid waiver of time being of the essence, case law suggests that a revised deadline for performance be established.AL

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Endnotes

1 "Time limits stated in the Contract Documents are of the essence of the Contract. By executing the Agreement, the Contractor confirms that the Contract Time is a reasonable period for performing the Work." A201-2017 § 8.2.1. In the second sentence the Contractor acknowledges that the Contract Time is a reasonable period for it to substantially complete the work in an effort to prevent the Contractor from subsequently contending that the time is insufficient.

2 "Time is of the essence with regard to the obligations of the Contract Documents." ConsensusDOCS-200 (Owner Contractor Agreement), § 6.1.2 (2017).

3 "All time limits for Milestones, if any, Substantial Completion, and completion and readiness for final payment as stated in the Contract Documents are of the essence of the Contract." EJCDC C-520 Owner and Contractor, § 4.01(A) (2013). Interestingly this clause prompts parties to specify that certain events constitute "Milestones" and be subject to the time of the essence clause. It is important to note however, that the agreement may include other significant timing provisions other than "Milestones", "Substantial Completion" and "Final Payment", but none of those provisions have been designated as being subject to time is of the essence.

4 Traditional time deadlines could apply to other time related provisions such as the triggering of liquidated damages when the contract time is exceeded, satisfying notice deadline requirements for termination and discovery of unforeseen conditions, the time period for providing the opportunity to cure a material breach, and deadlines for notifying the owner of delay. *See* CATHY ALTMAN et al., THE 2017 A201 DESKBOOK 116-17 (PETER W. HAHN et al. eds., 2017). The concept applies equally to agreements with design professionals such as the time to respond to requests for information as well as review of shop drawings and submittals.

5 *See* AIA-B Series Agreements (2017); *see also* EJCDC E-500, §3.02 (2014) (Agreement Between Owner and Engineer for Professional Services) ("Engineer shall complete its obligations within a reasonable time").

6 *See Foundation Health v. Westside EKG Associates*, 944 So. 2d 188 (Fla. 2006).

7 *See* 15 WILLISTON ON CONTRACTS § 46:2 (4th ed.).

8 *See Hadley v. Baxendale*, 9 Exch. 341 (Court of Exchequer, 1854).

9 *Rybovich Boat Works, Inc. v. Atkins*, 587 So. 2d 519, 521 (Fla. 4th DCA 1991); *Garcia v. Alfonso,* 490 So.2d 130, 131 (Fla. 3d DCA 1986). However some jurisdictions consider extrinsic evidence by examining the parties' intentions concerning the provision's meaning even where the contract contains an express clause. *Chariot Holdings, Ltd. v. Eastmet Corp.*, 505 N.E.2d 1076, 1082 (Ill. App. 1st 1987); *see Asset Recovery Contracting, LLC v. Walsh Const. Co. of Illinois*, 980 N.E.2d 708, 726 (Ill. App. 1st 2012) (court considered whether plaintiff knew about the delays at the time the contract was made).

10 *See Holmby, Inc. v. Dino,* 647 P.2d 392, 394 (1982).

11 *I. Kushnir Hotels, Inc. v. Durso*, 912 So. 2d 633, 635 (Fla. 4th DCA 2005).

12 No particular word or phrase is necessary to make time material so long as it is plainly expressed that it was the intention of the parties that time should be of the essence of the contract. *See Treasure Coast, Inc. v. Ludlum Constr. Co., Inc.,* 760 So.2d 232, 235 (Fla. 4th DCA 2000).

13 *Mayfield v. Koroghli,* 184 P.3d 362, 366 (2008); *Sublime, Inc. v. Boardman's Inc.*, 849 So. 2d 470 (Fla. 4th DCA 2003).

14 *Tim Hortons USA, Inc. v. Singh*, No. 16-23041-CIV, 2017 WL 4837552, at *8 (S.D. Fla. Oct. 25, 2017); *Edward Waters College v. Johnson*, 707 So. 2d 801, 802 (Fla. 1st DCA 1998).

15 *Id.* However, a contract that contains only a date for performance is insufficient, standing alone, to make time of the essence. *Command Sec. Corp. v. Moffa*, 84 So. 3d 1097, 1100 (Fla. 4th DCA 2012).

16 *Holmby, Inc.,* 647 P.2d at 394. Parties are not entitled to a reasonable time thereafter to perform and cure. *Id.*

17 *Mayfield,* 184 P.3d at 366.

18 *Arvilla Motel, Inc. v. Shriver*, 889 So. 2d 887, 890 (Fla. 2d DCA 2004).

19 *Id.*

20 *Royal Dev. & Mgmt. Corp. v. Guardian 50/50 Fund V, Ltd.*, 583 So. 2d 403, 405 (Fla. 3d DCA 1991); *Jackson v. Holmes*, 307 So.2d 470 (Fla. 2d DCA 1975).

21 *Vanbuskirk v. Nakamura*, No. 67816, 2016 WL 2985026, at *2-3 (Nev. May 20, 2016).

22 *d.* Additionally the court noted the appraisal section did not include a specific date and called for an additional procedure before the agreement could be cancelled. *See id.*

23 *Jackson*, 307 So. 2d at 471. Interestingly the trial court rejected the seller's argument that they wanted the buyer's loan certification at an early date so they could proceed with assurance to purchase a new home. *Id.* at 472. This result was likely because the clause was preprinted in a form contract.

24 *Royal Dev. & Mgmt. Corp.*, 583 So. 2d at 404-05 ("[t]he trial court correctly considered that provision unimportant in this context"); *see Johnson v. Gabbard*, No. CA87-01-005, 1987 WL 16061, at *1 (Ohio Ct. App. Aug. 24, 1987) (parties litigated whether time is of the essence clause governed the entire agreement or applied to only time for acceptance of the offer).

25 *Arvilla Motel, Inc.*, 889 So. 2d at 890. The clause appeared in bold on the first page of the printed form contract. *Id.*

26 *Id.*

27 *Id.*

28 *Rybovich Boat Works, Inc.,* 587 So.2d at 521.

29 *See Vanbuskirk v. Nakamura*, No. 67816, 2016 WL 2985026, at *2 (Nev. May 20, 2016).

30 *See id.*; *Arvilla Motel, Inc.*, 889 So. 2d at 890; CORBIN ON CONTRACTS § 37.3 (JOSEPH M. PERILLO ed., rev. ed. 1999).

31 *Fletcher v. Jones*, 333 S.E.2d 731, 734 n.1 (1985); *see In re: First Farmers Finan. Lit. Orlando Int'l. Hotels, LLC, v. Michael M. Nanosky*, No. 14 CV 7581, 2017 WL 6026652, at *12 (N.D. Ill. Dec. 5, 2017).

32 *See In re: First Farmers Finan. Lit. Orlando Int'l. Hotels, LLC*, No. 14 CV 7581, 2017 WL 6026652, at *12 (agreement containing two time is of the essences clauses, one with regard to the closing date and one regarding performance obligations).

33 *Adrian Developers Corp. v. de la Fuente*, 905 So. 2d 155, 156 (Fla. 3d DCA 2004); *see Lake Eola Builders, LLC v. The Metro. at Lake Eola, LLC*, No. 605CV346ORL31DAB, 2006 WL 1360909, at *3 (M.D. Fla. May 17, 2006).

34 *Faussner v. Wever*, 432 So. 2d 100, 101 (Fla. 2d DCA 1983).

35 *See McNeal v. Marco Bay Assocs.,* 492 So.2d 778, 781 (Fla. 2d DCA 1986).

36 *RDP Royal Palm Hotel, L.P. ex rel. PADC Hosp. Corp. I v. Clark Const. Grp., Inc.*, 168 F. App'x 348, 354 (11th Cir. 2006).

37 I*d.*

38 *See id.*

39 *Faussner*, 432 So. 2d at 101. Except for the one day oral extension, all extensions were given in consideration of an additional deposit. *Id.*; *see Miami Child's World, Inc. v. City of Miami Beach*, 688 So. 2d 942, 943 (Fla. 3d DCA 1997) (repeated extensions of closing date did not amount to waiver of the time is of the essence clause since forbearance alone is insufficient); *Lake Eola Builders, LLC v. The Metro. at Lake Eola, LLC*, No. 605CV346ORL31DAB, 2006 WL 1360909, at *3 (M.D. Fla. May 17, 2006).

40 *Brooks v. Green*, 993 So. 2d 58, 61 (Fla. 1st DCA 2008).

Real Property Case Summaries

By Lian de la Riva, Esq., Palmer, Palmer and Mangiero, Miami, Florida

Fla. Stat., §673.3091(1)(a) does not require a party seeking to enforce a lost promissory note to prove how, when or by whom the note was lost.

Frederick Sabido and Jonelle Sabido v. The Bank of New York Mellon f/k/a The Bank of New York, Successor to JP Morgan Chase Bank, N.A., as Trustee for CWALT, Inc., Alternative Loan Trust 2007-J1, L'Hermitage Community Association, Inc., and CitiBank, N.A., Case No. 4D16-2944 (Fla. 4th DCA 2017).

It is well established that in order to bring a foreclosure action, the Plaintiff must tender the original Promissory Note to the trial court. If the original is lost, Fla. Stat., §673.3091 specifically directs a Plaintiff on how to reestablish the lost note. In this case, several entities serviced the borrowers, Mr. and Mrs. Sabido, and therefore the Promissory Note passed through several hands. It is believed the original Promissory Note was lost at some point along the chain of financial entities which serviced the loan. The final entity, Bank of New York Mellon (hereinafter "Bank"), was not in possession of the original Promissory Note when it brought a foreclosure action against the Sabidos. At trial, it was established that the original lender, Washington Mutual Bank, failed to endorse the note, and consequently, later transferees were not entitled to enforce it as holders. Due to this mistake, the Bank was left to prove the chain of transaction leading to its acquisition of the Promissory Note as set forth in Fla. Stat., §673.3091(1)(a)(2). The Bank introduced into evidence a lost-note affidavit which was signed by a JP Morgan Chase Bank, N.A. (hereinafter "Chase") employee. The Chase affidavit did not establish that any putative transferees were ever entitled to enforce the note and did not state that it was lost at the time in which the affidavit was signed. At the time the affidavit was signed, Chase was the fourth entity to service this loan. The Bank also called a Chase employee as a witness. However, the employee's testimony could not be used to establish the lost note because Chase was not the original lender. It is not necessary for the Bank to prove exactly when, how or by whom the original note was lost. However, the Bank must prove that it acquired ownership of the instrument from a person who was entitled to enforce the instrument when it was lost. The Bank failed to prove it had the right to enforce the Promissory Note.

Citizens' input regarding a proposed apartment complex may be a sufficient ground to support a governmental land use decision under the rational basis test.

Pinellas County v. The Richman Group of Florida, Inc., Case No. 2D16-3279 (Fla. 2d DCA 2017).

In 2012, The Richman Group and the City of Safety Harbor entered into a contract for 34.55 acres of land to build an apartment complex. The contract was subject to approval from Pinellas County, since nearly 16 acres needed to be rezoned from Industrial Limited to Residential Medium. In accordance with the Special Act governing Pinellas County land use, The Richman Group made application with the City of Safety Harbor to have the land use plan amended. The City of Safety Harbor Commission (hereinafter "City Commission") approved The Richmond Group's proposal to rezone 16 acres of land. The City Commission then submitted the proposal to the Pinellas County Planning Council (hereinafter "County Council"), who ultimately approved the rezoning of the 16 acres from Industrial Limited use to Residential Medium use. The Richman Group needed all 34.55 acres to be Residential Medium to carry forward its plans. It was noted in the Court's opinion that both the City Commission and the County Council faced neighborhood opposition to The Richman Group's proposed apartment complex. The County Council forwarded the proposed amendment to rezone the 16 acres to the Pinellas County Planning Authority (hereinafter "CPA"). In 2013, after public hearings, where hundreds of residents expressed their opposition, the CPA unanimously voted to deny the proposed amendment to rezone the 16 acres of land. The Richman Group obtained a hearing before an Administrative Law Judge (hereinafter "ALJ") which ultimately recommended that the proposed amendment to rezone the 16 acres should be approved. In January 2014, the CPA had a final public hearing, and despite the ALJ's Order, denied the proposed amendment. The Richman Group sued the County for damages in the amount of $16.5 million under 42 U.S.C. § 1983 (2012) and alleged a violation of its equal protection and substantive due process rights.

The Richman Group argued the denial of their application meant they were treated differently than similarly-situated applicants and the denial was "irrational, arbitrary and capricious decision without rational basis in fact or law." The trial court found for The Richman Group on both counts and rejected the County's argument that the opposition from the neighbors was a rational basis for the CPA to deny the proposed amendment to rezone land. Without citing any authority, the trial court determined the neighborhood opposition is not a legitimate basis for denying a land use application.

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The trial court was reversed on appeal. The appellate court found the CPA had the rational basis to deny the amendment of the 16 acres of land use. The appellate court reviewed the trial court's use of the fairly debatable standard and found the trial court erred, since a reasonable person could differ as to the propriety of the CPA's decision. The CPA was required to make a legislative decision at the final public hearing and pursuant to the Special Act noticed all residents affected by The Richman Group's proposed amendment. Hundreds of local residents made specific, rational concerns about the proposed amendment and its effects on their general welfare and day to day life. The Court found the CPA did not violate the Constitution when it considered legitimate public concern.

A recorded mortgage missing the legal description of the property was still enforceable between the parties in a mortgage foreclosure action because the mortgage contained sufficient information to locate the property.

Salam v. U.S. Bank National Association, Case No. 4D16-1693 (Fla. 4th DCA 2017).

In 2005, Abdul Salam (hereinafter "Salam") executed a note in favor of Wells Fargo Bank, N.A. Salam also executed a mortgage securing the note, which includes the address of the property and includes a stamp reflecting the recording information. The recording information specifically stated the recording date and time as well as the book and page number references. The mortgage referenced an attached legal description, but the legal description was never recorded.

In 2014, U.S. Bank National Association, as Trustee, Successor in Interest to Wachovia Bank, National Association, as Trustee for Wells Fargo Asset Securities Corporation (hereinafter "Bank"), brought an action to foreclosure on the mortgage of Salam. The bank used the recording information stamped on the original mortgage to identify the property. At trial, Salam argued that the bank failed to state a cause of action since the legal description was not used to identify the property in question. Salam further argued that a legal description is necessary to protect third parties: "It could be foreclosing on only part of the actual subject property." Salam's motion for involuntary dismissal was denied and noted the absence of a legal description of the property in question should have been raised as an affirmative defense.

On appeal, the Court found the Bank had presented a prima facie case of foreclosure. The Court heavily relied on *Mendelson v. Great Western Bank*, F.S.B., 712 So. 2d 1194 (Fla. 2d DCA 1998) and the rule that a conveyance was upheld if the deed contained sufficient information to permit a surveyor to locate the land. In *Mendelson*, the information on the document supported a line of inquiry in the county public records which matched the property. Ultimately, the mortgage executed by Salam properly named the parties and contained sufficient information to identify the property. Therefore, the appellate court found the Bank established a prima facie case of foreclosure.

A party cannot avoid the writing requirements of the Statute of Frauds by reformulating a breach of oral contract claim into a fraud claim. Additionally, a buyer that chooses, in accordance with an agreed-upon contract, to receive the return of its deposit as its exclusive remedy is not entitled to bring an action for breach of contract.

940 Lincoln Road Associates LLC v. 940 Lincoln Road Enterprises, Inc., Case No. 3D16-2748 (Fla. 3d DCA 2017).

In 2012, 940 Lincoln Road Associates LLC and CA 947 Lincoln Road LLC (collectively "Buyers") entered into agreements to purchase two separate properties from 940 Lincoln Road Enterprises, Inc., 947 Lincoln Road Investments, Inc., and Leon Zwick (collectively "Sellers"). The Buyers exercised their contractual right to terminate the purchase and sale agreements after it became clear that neither closing would take place. Buyers provided a termination letter to Sellers and stated that a) Sellers had not removed existing tenants prior to closing and b) Sellers would not be able to convey clear title because Leon Zwick's sister, Bejla Miller (hereinafter "Miller"), filed two lis pendens and claimed ownership in the two properties. The Buyers received their deposits for the two properties. The Buyers allege the Sellers verbally agreed to sell the two properties with the same conditions and for the same price once the Miller litigation was settled. This verbal agreement was not referenced in the termination letter provided to the Sellers by the Buyers. In 2013, after the Miller litigation was resolved, the Sellers sold the two properties to another buyer.

The Buyers filed two actions against the Sellers and filed notices of lis pendens against the two properties. The trial court entered separate orders granting the Sellers' motion for summary judgment and dissolved the lis pendens. The appellate court found the final summary judgments were properly granted against the Buyers. Furthermore, the appellate court agreed with the lower court's finding that the Buyers selected their remedy under the default provision of the purchase agreements by terminating the contract and receiving their deposits. The Buyers forfeited their right to bring an instant breach of contract action against the Sellers. The appellate court found the alleged verbal agreement between the Buyers and Sellers was not valid since it is well settled that a party cannot avoid the writing requirement of the statute of frauds by reformulating what amounts to a breach of an oral contract claim into a fraud claim. The statute of frauds may not be avoided by a suit for fraud base on an oral representation. The Buyers never presented evidence that the Sellers did not intend to comply with their contractual obligations to convey clear title at the time they entered into the agreements.

Probate And Trust Case Summaries

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

Because undue influence is a species of fraud, undue influence is subject to the delayed discovery doctrine and therefore a daughter's claim of undue influence filed 10 years after her parent's execution of their irrevocable trust may not be time-barred.

Flanzer v. Kaplan, 2017 Fla. App. LEXIS 17696, 42 Fla. L. Weekly D 2525, 2017 WL 5759041 (Fla. 2d DCA Nov. 29, 2017).

In 2015, Jan Flanzer filed suit alleging that several of her parent's estate planning instruments were invalid because they were subject to undue influence. Her parents Gloria and Louis Flanzer, settled assets in a philanthropic trust created in 2005. By its terms, the trust became irrevocable at its creation. Louis Flanzer died in June of 2013 and Gloria Flanzer died in March of 2015.

Thereafter, Jan Flanzer filed suit challenging numerous estate planning documents, including the philanthropic trust, ten years after the creation of these documents. Flanzer alleged in her suit that her mother suffered from diminished capacity and the trustees maintained a fiduciary relationship with her mother and served as her personal accountant, business and financial advisor, as well as her attorney, and therefore her mother was particularly susceptible to undue influence of the Trustees. Flanzer also alleged the Trustees exploited their confidential relationship with her mother to alienate Flanzer and eliminate her from her mother's estate plan. In Count V of the complaint, Flanzer alleged that the philanthropic trust was the result of undue influence and called for the revocation of the trust.

The Trustees moved to dismiss Count V with prejudice because the trust became irrevocable at its creation in 2005, and according to Fla. Stat., § 95.11(3) (2015), the applicable statute of limitations to challenge an irrevocable trust is four (4) years. The circuit court agreed with the Trustees, and dismissed Count V with prejudice as a matter of law. Flanzer timely appealed the decision to the Second District Court of Appeal.

Under the Florida Trust Code, a challenge to the validity of a revocable trust "may not [be] commenced until the trust becomes irrevocable by its terms or by the settlor's death." *See* Fla. Stat. § 736.0207(2)). But the Florida Trust Code does not specify time limitations to challenge a trust. Therefore, the Second District Court of Appeal examined Chapter 95 of the Florida Statutes to determine the time limitations to challenge a trust for undue influence. Fla. Stat. § 95.11(3)(j) (2015), provides that a legal or equitable action *founded on fraud* must be made within four (4) years.

Flanzer and the Trustees agreed that the action is limited to four (4) years under Fla. Stat. § 95.11(3)(2015). However, the parties disagreed that Fla. Stat. § 95.031(2)(a) or the delayed discovery doctrine applies to undue influence claims. Fla. Stat. § 95.031(2)(a)(2015) provides the following:

> 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.

The effect of the delayed discovery doctrine is that the cause of action does not accrue until the plaintiff either knows or reasonably should know of the tortious act giving rise to the cause of action, and should the doctrine apply, then a cause of action could be brought within 12 years after the date of the commission of the alleged fraud.

On appeal, Flanzer argued that since undue influence is treated as a species of fraud, undue influence is subject to the delayed discovery doctrine. *See Peacock v. DuBois*, 105 So. 321, 322 (Fla. 1925) (fraud and undue influence are not strictly speaking synonymous, though undue influence has been classified as either a species of fraud and a kind of duress, and in either instance is treated as fraud in general. *See also In Re Guardianship of Rekasis*, 545 So. 2d 471, 473 (Fla. 2d DCA 1989).

On the other hand, the Trustees argued that the elements of undue influence and fraud are distinguishable and therefore undue influence claims should fall outside the meaning of actions "founded upon fraud." The Second District Court of Appeal recognized that undue influence and fraud are distinguishable causes of actions and cited to *GEICO Gen. Ins. Co. v. Hoy,* 136 So. 3d 647, 651 (Fla. 2d DCA 2013) (enumerating elements of fraud in the inducement); and *Greenberg v. Van Dam,* 833 So. 2d 810, 812 (Fla. 3d DCA 2002) (enumerating elements of undue influence). But the Second District Court of Appeals held that "the uses of the prepositions 'founded upon fraud' and 'founded on fraud' in Fla. Stat. §§ 95.031(2)(a) and 95.11(3)(j)(2015), respectively, plainly countenance

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a broader class of claims than merely actions alleging fraud in general." The Second District Court of Appeal agreed with Jan Flanzer, and took note that the Trustees pointed to no authority supporting the circuit court's conclusion that that challenge to the trust must be brought within four (4) years of its becoming irrevocable. Thus, the appellete court saw no reason why Fla. Stat. § 95.031(2)(a)(2015) would not apply to Jan Flanzer's claim of undue influence provided that the section requirements are met, and reversed and remanded the case for further proceedings.

No fundamental error occurred when AIP'scourt-appointed counsel did not read the Notice, and where committee reports were submitted after the 15 day deadline.

Sarfaty v. M.S., 2017 Fla. App. LEXIS 15722, 42 Fla. L. Weekly D 2337, 2017 WL 4938812.

On December 3, 2015, Gilberto Sarfaty filed a verified petition to determine incapacity of his 46-year old brother, M.S. The verified petition alleged that M.S. was incapacitated and had been his entire life. Attached to the petition was a psychological assessment report prepared by a South Florida consulting psychologist. The assessment report was prepared six months prior to the filing of the petition and stated that M.S. received assistance from a Peruvian aide and her husband with his shopping, appointments, and outings. The assessment report also stated that M.S. "requires ongoing function support" and that one of his sisters managed his money. In the verified petition, Sarfaty alleged that M.S. cognitive disability leaves him susceptible to exploitation and undue influence. The verified petition alleged that the powers of attorney given by M.S. had been used by M.S.'s sisters and mother to transfer M.S.'s shares in a family controlled business from voting stock to non-voting stock, in breach of their fiduciary duty. The petition requested plenary guardianship and the appointment of a professional guardian and not the petitioner or M.S.'s mother and sisters to serve as guardian of the person and property.

On December 10, 2015, just days following the filing of the petition, the probate court issued an order appointing three examining committee members and an independent, court-appointed counsel for M.S. The court also scheduled an adjudicatory hearing on the petitions for January 13, 2016. Sarfaty's attorney as well as M.S. promptly notified M.S.'s mother and two sisters of the guardianship proceedings and within ten (10) days of the issuance of the order, the mother and two sisters retained four (4) separate Miami law firms who filed appearances in the case. On December 18, 2015, the attorneys and their law firms appeared on behalf of M.S., not the mother and sisters, and filed a motion for substitution of counsel for the independent, court-appointed counsel, which was signed by M.S. The court-appointed counsel filed objections to the motion for substitution of counsel and noted that she was uncertain as to who hired private counsel for M.S. and that the circuit court should assure that private counsel is a disinterested third party with M.S.'s best interests in mind.

The day after the objections were filed, the circuit court issued an order granting private counsel's emergency motion for substitution in place of the independent, court-appointed counsel. The law firms for all interested persons and for M.S. filed a motion for continuance because of ongoing settlement negotiations and scheduling conflicts. The court granted the motion and directed counsel to reschedule the incapacity hearing for a later date. By January 8, 2015, all three examining committee members filed their reports. Thereafter, M.S.'s private counsel filed a motion to strike all three examining committee reports and a notice to require in person testimony of the three examining committee members. At a non-evidentiary hearing, M.S.'s private counsel argued that the court-appointed counsel failed to read the petition and form notice to M.S., and the examining committee members did not file their reports within the fifteen (15) day period allowed by the form notice and Fla. Stat. § 744.331(3)(e)(2016).

Sarfaty's counsel argued that M.S.'s private counsel stepped into the shoes of the court-appointed attorney and had the duty to read the petition to M.S., as well as to assist M.S. with the timely scheduling of interviews with the examining committee members. The probate court ruled that the proceedings needed to begin anew and that the petitioner would not be allowed to amend the petition. The grounds for the circuit court's decision to dismiss and disallow an amended petition were based on failure of due process; untimely filing of the examining committee reports; and that the objection by the initial, court-appointed counsel to the substitution of M.S.'s private counsel was prejudicial to M.S.

On appeal, the Third District Court of Appeal, in dictum, stated "as soon as private counsel was substituted for court-appointed counsel, the normal urgency in guardianship cases apparently diminished, because all of the attorneys stipulated to the continuance of the originally-set evidentiary hearing, and that M.S.'s reliance on strict adherence to the time and notice requirements in section 744.331(3)(e), Florida Statutes, and in the probate court's notice and order mailed on December 11, 2015, is not persuasive." The appellate Court noted the following: "that there are no Florida cases holding that the timing set forth in the statute cannot be waived by the AIP or by the AIP's counsel. Nor have we identified a case holding that the timing set forth in the statute is so significant to the process and parties that a petition must be dismissed, without leave to amend, if the time requirements are not strictly fulfilled."

M.S., his mother, and sister's arguments were premised on *In re Fey,* 624 So. 2d 770 (Fla. 4th DCA 1993) (holding that compliance with section Fla. Stat. § 744.331(2017) and Fla. Prob. R. 5.550 is mandatory, where the noncompliance was failing

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to appoint independent, court-appointed counsel for the AIP until "the commencement of the final hearing" and "long past the pleadings and trial preparation stage"); and *Borden v. Guardianship of Borden-Moore*, 818 So. 2d 604 (Fla. 5th DCA 2002)(holding that compliance with Fla. Stat. § 744.331(2002) and Fla. Prob. R. 5.550 is mandatory where the noncompliance included no consideration of examining committee reports because the examining committee had not yet completed the required examinations, and court-appointed attorney did not participate because he was not notified of the hearing).

The Third District Court of Appeal held that those cases were inapplicable to the instant case because the AIP and the AIP's private counsel had notice, whereas in *Bolden,* no notice was provided, the examining reports were late and not completed, and where it was apparent that the AIP's private counsel and the AIP received the petition and notice before signing and filing a motion for substitution of counsel. Therefore, the appellate Court held there was no failure of due process and strict adherence to the statute was waived. The Third District Court of Appeal further held that the petition and the attachments were facially sufficient to allege that M.S. is incapacitated, and therefore reversed the probate court's dismissal of the petition and remanded for further proceedings.

Although the trial court concluded in error that the property at issue is homestead property and subject to an equitable lien, the trial court decision was affirmed because the Fourth District Court of Appeal determined the property was not homestead and therefore the equitable lien was proper.

Pamela B. Stuart vs Catherine S. Ryan, Deborah A. Stuart, et al., No 4D16-3921 November 29, 2017.

Ms. Stuart appealed the trial court's order approving a plan of distribution of her father's estate. She argued the court erred when it determined that, while she qualified for exemptions the Florida state constitution provides to residents over their homestead, her wrongful acts as trustee of the trust required the imposition of an equitable lien against her homestead interest.

The Fourth District Court of Appeal recognized the Florida homestead exemption law as robust and that the Florida Constitution provides exceptions as to when homestead is unprotected.

The homestead protection found in Art. X, §4(a)(1), Fla. Const., can only be breached in limited situations: (1) government entities with a tax lien or assessment on the property, (2) banks or other lenders with a mortgage on the property which originated from the purchase of the property, and (3) creditors with liens on the property which originated from work or repair performed on the property. Art X, § 4(a), Fla. Const. Further, the Court recognized that the law requires that homestead exemptions should be liberally applied but the exceptions are strictly construed *See Butterworth v. Caggiano,* 605 So. 2d 56, 58, 61 (Fla. 1992).

On appeal, the Fourth District Court of Appeal agreed that the equitable lien against Ms. Stuart's homestead would have been improper if the property was, in fact, her homestead. The Fourth District Court of Appeal held that the presumption that this property was Mrs. Stuart's homestead was incorrect. Mrs. Stuart testified that although she had a Florida driver license, was registered to vote in Florida, and joined a community church in Florida; however, she stated that she "intended to make Florida her permanent residence at some point in the future," but her current permanent residence was in Washington, D.C. The appellate Court also noted that Ms. Stuart was simultaneously seeking to have the court determine two separate pieces of property in Florida as her homestead. See Art VII§ 6(b) Fla. Const. ("not more than one exemption shall be allowed by any individual or family unit…"). Therefore, the presumption that the property at issue was her homestead was in error, and placing an equitable lien on the subject property was permissible. The decision was therefore affirmed.

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Winslow vs. Deck Case Summary

By Brandan J Pratt, Esq.
and Jennifer L. Fox, Esq., Huth, Pratt, Milhauser, Boca Raton, Florida

When may a litigant amend a petition in a contested probate proceeding? The Fourth District Court of Appeal addressed this issue in *Winslow v. Deck*, 225 So. 3d 276 (Fla. 4th DCA 2017). In *Winslow*, the issue presented to the appellate court was whether the trial court erred in dismissing appellant's counter-petition for administration on the grounds that appellant failed to properly request relief to revoke a prior will admitted to probate within three months of receiving a notice of administration. Fla. Stat., §733.212(3), provides in pertinent part that "any interested person on whom a copy of the notice of administration is served must object to the validity of the will…by filing a petition or other pleading requesting relief… on or before the date that is 3 months after the date of service… or those objections are forever barred." Fla. Stat., §7733.208, provides that "on the discovery of a later will or codicil, any interested person may petition to revoke the probate of a prior will or probate a later will."

In this case, Michael S. Deck, the decedent, passed away on March 9, 2015. The decedent's daughter, Mallory, filed a petition to admit a will dated January 11, 1991 and a codicil dated October 2, 2008 to probate. On May 14, 2015, the probate court entered orders admitting the 1991 will and 2008 codicil to probate and appointing Mallory as the personal representative of the estate. The decedent's longtime girlfriend, Karen Winslow, did not receive notice of the filings. On May 27, 2015, Karen filed a will dated November 13, 2014 with the probate court. On May 29, 2015, the Notice of Administration was formally served on Karen. On the same day, Karen filed a counter-petition for administration in which she sought to have the 2014 will admitted to probate. Karen did not file a petition to revoke the order admitting the 1991 will and 2008 codicil to probate, and her counter-petition for administration did not contain a prayer for such relief. After the three month deadline contained in Fla. Stat., § 733.212(3), had expired, Mallory moved to dismiss the counter-petition, arguing that Karen did not seek to timely revoke the probate of the 1991 will and 2008 codicil. Karen sought leave to amend her counter-petition however the probate court dismissed Karen's counter-petition with prejudice.

The Fourth District Court of Appeal held that the trial court erred is dismissing Karen's counter-petition for administration because the trial court should have been provided with the opportunity to amend her counter-petition. The appellate court explained:

"Florida Probate Rule 5.020(a) provides that "[a]ll technical forms of pleadings are abolished. No defect of form impairs substantial rights, and no defect in the statement of jurisdictional facts actually existing renders any proceeding void." Moreover, after an interested person petitions the court to probate a later will or requests to revoke an earlier will, the proceedings are declared adversarial and the Florida Rules of Civil Procedure govern the proceedings. *See* Fla. Prob. R. 5.025(d)(2)… Florida Rule of Civil Procedure 1.190(a), which governs amendments to pleadings, "reflect[s] a clear policy that, absent exceptional circumstances, requests for leave to amend pleadings should be granted."

As a general rule, the appellant court held that "trial courts should not prevent a petitioner from challenging a will because of a technical defect in the petitioner's pleading without allowing for a reasonable opportunity to amend. The law is clear that trial courts must liberally construe court rules to allow parties to freely amend their pleadings in the interests of justice." *Winslow* at 279. Absent exceptional circumstances, requests for leave to amend pleading should be granted unless the privilege has been abused, there is prejudice to the opposing party or the amendment would be futile. *Winslow* at 279; Florida Rule of Civil Procedure 1.190(a). Specifically, the appellate court held that the probate court erred in not granting Karen leave to amend her counter-petition to include a statement in the prayer for relief to revoke the probate of the 1991 will and 2008 codicil since an amendment would not prejudice Mallory and would not be futile. Additionally, the appellant court noted that the counter-petition was timely filed under Fla. Stat., §733.212(3), because Karen filed the original counter-petition within three months after receiving a copy of the notice of administration, and the amendment would relate back to the date she filed the original counter-petition, citing Fla. R. Civ. P. 1.190(c).

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The FLSSI forms are developed by members of the Real Property, Probate and Trust Law Section of The Florida Bar. **Forms carry the Supreme Court required 3" x 3" blank square for Court Clerk's use. Probate Judges prefer and some require the use of 2018 FLSSI forms.**

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2018 PROBATE FORMS

OPTION #1 **2018 FORMS AND INDEX - .PDF ON DISK $397.10**
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2018 GUARDIANSHIP FORMS

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

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ACTION LINE JANUARY 2018

What's Happening Within The Section...

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

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

2018 EXECUTIVE COUNCIL MEETINGS

MAY 31 – JUNE 3, 2018

Executive Council Meeting & Convention

Tradewinds Island Resort on St. Pete Beach, St. Pete Beach, Florida
Room Rate: $249; Tropical View Hotel Room Rate: $269;* Tropical View One Bedroom Suite: $319*

JULY 25 – 28, 2018

Executive Council Meeting & Legislative Update

The Breakers, Palm Beach, Florida
Room Rate: $225/ Deluxe King

SEPTEMBER 26 – 30, 2018

Out of State Executive Council Meeting

The Westin Excelsior, Rome, Rome, Italy (with pre-event in Florence, Italy – TBA)
Standard Room: Euro 325 Euro (single) Euro 335 (double) - includes Breakfast

DECEMBER 5-9, 2018

Executive Council Meeting

Four Seasons Hotel, Orlando, Florida
Standard Room: $285 (single/double) Park View Rooms: $399 (single/double)

** To be added to the waitlist for this event, please email Hilary Stephens at hstephens@floridabar.org*
Be sure to include in the email the nights for which reservations are needed and your full contact information.

2018 CLE SCHEDULE:

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

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

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

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Scan here for instant access to the Section website.

ACTIONLINE BULLETIN BOARD

PRACTICE CORNER:

Don't miss these short tips to assist in your practice. See page 48-50.

SAVE the DATE

MAY 31 - JUNE 3, 2018
Executive Council Meeting & Convention
Tradewinds Island Resort, St. Pete Beach, FL

BE AWARE

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

FinCEN

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

SAVE the DATE!

RPPTL Legislative Case Law Update Seminar
JULY 27, 2018
The Breakers, Palm Beach

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