

ActionLine

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

Take-Two: Legislature Amends Florida's Construction Statute Of Limitations And Repose Again In 2018

Navigating A Foreclosure Title Commitment

A Comparative Study Of The "Joint Spousal LLC"

Vol. XXXIX, No.4 www.rpptl.org Summer 2018

The Fund® ALWAYS DRIVEN™

The Expertise You Deserve; The Information You Trust.



Who is The Fund?

The Fund exists to support and promote the success of Florida attorneys and their real estate practices.

More than 4,000 Members rely on The Fund's expertise as well as our exceptional information, technology and educational offerings to enhance their practices and sharpen their competitive edge.

Unparalleled Education

The Fund delivers the very best education and training for Florida real estate attorneys and paraprofessionals so you can **stay informed and remain competitive.**

Training & Events

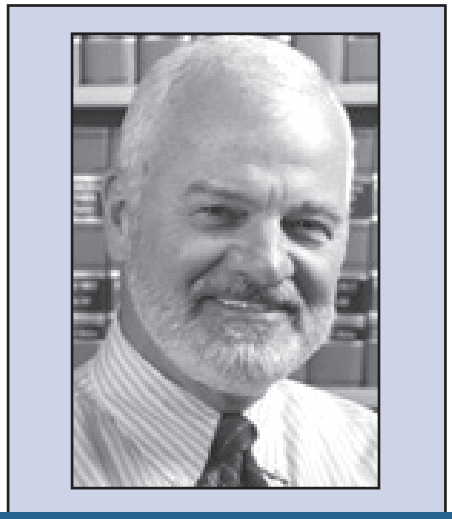
- New Member Training
- Closing Real Estate Transactions for Non-Attorneys
- Continuing Legal Education Webinars
- Local Real Estate Council Programs
- Fund Assembly
- Fund Affiliate Assembly

For more information or to become a Member
(800) 336-3863 | thefund.com

The Fund® Copyright © 2018 Attorneys' Title Fund Services, LLC
thefund.com / 800.336.3863

BDAL-0618

ALMs – The Section's Emissaries



Chair's Column

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

Many of our Section members receiving *ActionLine* will note the acronym "ALM" throughout the publication. While those on the Section's Executive Council might know who these folks are and what the acronym "A, L, and M" stands for, some readers might appreciate a little background into who they are and insight into what these Section members have been up to recently.

ALMs are at-large-members elected to the Executive Council by annual vote of the Section membership as representatives of the Section's members. There are currently 88 ALMs. In addition to working on Section projects, the ALMs serve as the channels of communication between the Section leadership and the Section members. The ALMs represent the Section throughout the state, participate in the Section's committees, keep current on issues of concern to the members, and communicate regularly with the members. All of Florida's twenty judicial circuits have a "Lead ALM," who is responsible for direct communication with members in that circuit. Katherine Frazier of Hill Ward Henderson in Tampa, Florida has served as the Director of the ALMs during the 2017 – 2018 Bar year. In the 2018 – 2019 Bar year the ALMs will be ably led by Larry Miller of Gutter, Chaves, Josepher, Rubin, Forman, Fleisher, Miller, P.A. in Boca Raton.

The last several years have been busy ones for the ALMs. As a former Director of the ALMs, I am proud to see the many projects this group has undertaken and wanted Section members to be aware of some of the ALMs' current initiatives.

One of the most ambitious and imaginative ALM's projects is the Section's "No Place Like Home" program ("NPLH"), which was the focus of my Chair's Column in the Fall 2017 issue of ActionLine. NPLH is a joint project of the Section, legal aid offices throughout Florida, and the National Legal Services Corporation that seeks to resolve and rectify title issues experienced by certain members of the state's underserved population which might otherwise preclude them from receiving or experiencing the benefits of real property ownership or title, including receipt of available disaster aid or assistance. With the help of the ALMs, NPLH was initially rolled out, in the 1st, 2nd, 12th, 13th, 14th, 15th, and 17th Judicial Circuits and has now been taken statewide. The project has received several grants to assist with costs. If you wish to participate in the NPLH project, please register as a volunteer with Larry Miller at *lmiller@floridatax.com*.

The ALMs have also been actively working in conjunction with the Section's Membership & Inclusion Committee on attracting new members, retaining current members, and connecting with law school students. Recently, law school events have been held in conjunction with Ave Maria, Florida International, Florida State, Miami, Nova Southeastern, Stetson, and St. Thomas (among others). Through the ALMs' efforts, we have noted an uptick in law students attending our Section, Committee and Executive Council meetings. This increase in law school student participation and interest has led the ALMs to expand its mentoring initiatives, including the very popular mock interview process in which Section members conduct simulated interviews with law students and then provide feedback to better prepare the students for the real thing. A new member welcoming reception is also in the works that, by the time you read this magazine, will be implemented starting with the Executive Council Meeting & Convention in St. Pete Beach in June, and thereafter will be a recurring event at each of the Section's four in-state meetings. Please plan to come and enjoy the receptions, meet Section Executive Council members, learn about the benefits of Section membership and find out the many ways you can get involved in Section activities.

Our ALMs also have taken on projects that will help Section members in their law practice. For example, a local rules project is in the works to compile information and links from all of the Lead ALMs about local court and judiciary procedures that real estate and probate/trust lawyers would need for particular courts and judges. This information will include guidance on local procedures pertaining to requirements for notaries, recording, case law citations, hearing coordination, telephone hearing procedures and protocols for opening estates. Once compiled, this information will be posted on the Section's website, *www.RPPTL.org*. Additionally, the ALMs are working to compile a database of Florida Ethics Opinions and cases related to probate ethics with the help of our Section's Fellowship Program. The ALMs have also worked with the Membership & Inclusion Committee to promote and participate in the Section's free estate planning clinic held in Broward County in conjunction with the United Way of Broward County, Mission United and Legal Services of Broward County. The clinic provides military veterans with

continued, page 5

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

Andrew Marvel O'Malley, Tampa
Chair
Debra Lynn Boje, Tampa
Chair-Elect
Lawrence Jay Miller, Boca Raton
Secretary
Robert S. Swaine, Sebring
Treasurer
S. Katherine Frazier, Tampa
Director, At-Large Members
William Thomas Hennessey III, West Palm Beach
Director, Probate and Trust Law Division
Robert S. Freedman, Tampa
Director, Real Property Law Division
Deborah Packer Goodall, Boca Raton
Immediate Past Chair
Jeffrey A. Baskies, Boca Raton
Co-Editor-in-Chief
Mike Bedke, Tampa
Co-Editor-in-Chief
Wm. Cary Wright, Tampa
Co-Editor-in-Chief
Renee Bourbeau, Palm Beach Gardens
Advertising Coordinator
George D. Karibjanian, Boca Raton
Editor – National Reports
Paul E. Roman, Boca Raton
Editor – Ethics
Benjamin F. Diamond, St. Petersburg
Features Editor
Lee Alan Weintraub
Reporters' Coordinator – Real Property
Justin M. Savioli
Reporters' Coodinator – Probate and Trust
Sean M. Lebowitz, Boca Raton
Editor – Probate & Trust Case Summaries
Salomé Bascuñan, Miami
Editor – Real Estate Case Summaries

Editors-at-Large
Celia Ellen Deifik, Naples
Lisa Van Dien, Naples
Keith Durkin, Orlando
Erin Farrington Finlen, Ft. Lauderdale
Mariela M. Malfeld, Miami
Jeanette E. Moffa Wagener, Ft. Lauderdale
Michael G. Rothfeldt, Tampa
Angela K. Santos, Boca Raton

Janellen S. Green, Santa Rosa Beach
Publications Coordinator/Copy Editor
Laura Pichard-Murphy, Tallahassee
Design/Layout

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

About the Cover:: "The Well at The Collector," photo by John Neukamm.

IN THIS ISSUE:

ALMs – The Section's Emissaries 3
Take-Two: Legislature Amends Florida's Construction Statute Of Limitations And Repose Again In 2018 6
Heads I Win, Tails I Break Even: The Design, Funding & Administration Of Grantor Retained Annuity Trusts 9
Navigating A Foreclosure Title Commitment 12
Navigating The Murky Waters Of I.R.C. §199A 19
Arbitrator Control Of Counsel 22
A Comparative Study Of The "Joint Spousal LLC" 25
PACE Financing Traps For The Unwary 30
Section Spotlight - RPPTL Fellowship: ActionLine Interview With Former Section Fellow, Stacy Rubel 32
RPPTL Section Executive Council Meeting, St. Augustine, FL Photos 34
Roundtable Real Property Division 36
Roundtable Probate And Trust Division 38
Making The Most Of The First Planning Appointment: How To Cut To The Client Chase 41
Political Roundup: State Politics And 2018 Elections 44
Practice Corner: Real Property Division - Partitioning Out Attorney's Fees 48
Practice Corner: Probate and Trust Division - The Attorney-Client Privilege Is Alive And Well, Hallelujah! 49
Probate And Trust Case Summaries 52
Real Property Case Summaries 57
State Tax Case Summaries 59
Construction Law Case Summaries 62
What's Happening Within the Section 67
Actionline Bulletin Board 68

Get Included In *ActionLine!*

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

ARTICLES: Forward any proposed article or news of note to Jeff Baskies at jeff.baskies@katzbaskies.com. Deadlines for all submissions are as follows:

VOLUME NO.	ISSUE	DEADLINE
1	Fall	July 15
2	Winter	October 15
3	Spring	January 15
4	Summer	April 15

ADVERTISING: For information on advertising, please contact Renee Bourbeau at rbourbeau@wltic.com .

PHOTO SUBMISSIONS: If you have a photo that you'd like to have considered for the cover, please send it to the photo editor, Janellen Green at jane@emeraldgreenconsulting.com.

GENERAL INQUIRIES: For inquiries about the RPPTL Section, contact Mary Ann Obos at The Florida Bar at 800-342-8060 extension 5626, or at mobos@flabar.org.

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

advice on the importance of having a proper estate plan and gives them the opportunity to schedule an appointment with volunteer attorneys to obtain living wills and advanced health care directives.

The ALMs have one of the most up-to-date Section webpages, with information on the latest initiatives, and a link to the current list of the Section's certified mediators.

One of the most recent initiatives has been the focus on providing educational opportunities to citizens on legal topics including the NPLH project and the Veterans Wills Clinic. The ALM's website is a source of additional information on these activities.

The Section is well served and represented by its dedicated and hard-working ALMs. Even with all the great initiatives and events that are in place, the ALMs are always looking for new opportunities to serve their communities. Section members are encouraged to contact their Lead ALM for more information about the Section, or with their ideas and thoughts on future projects.

The following is a list of current Lead ALMs:

1st Circuit: Colleen C. Sachs • colleen@dunlapshipman.com

2nd Circuit: Lynwood F. Arnold • larnold@arnold-law.com

3rd Circuit: (by 8th Circuit) Richard M. White, Jr. • RMW@gate.net

4th Circuit: Christene M. Ertl • cme@ansbacher.net

5th Circuit: Arlene C. Udick • arlene@udicklaw.com

6th Circuit: Rebecca C. Bell • Rebecca@delzercoulter.com

7th Circuit: Jerry B. Wells • jbw@jerrybwells.com

8th Circuit: Richard M. White, Jr. • RMW@gate.net

9th Circuit: Alex H. Hamrick • alex.hamrick@wellsfargo.com

10th Circuit: Sandra G. Sheets • sandra.sheets@gray-robinson.com

11th Circuit: Stuart Altman • saltman@fowler-white.com

12th Circuit: Allison Archbold • AArchbold@fergesonskipper.com

13th Circuit: Thomas N. Henderson, III • tom.henderson@hwhlaw.com

14th Circuit: Brian D. Leebrick • bleebrick@barronredding.com

15th Circuit: Robert M. Schwartz • Bob@RobertSchwartzPA.com

16th Circuit: (by 11th Circuit) Stuart Altman • saltman@fowler-white.com

17th Circuit: Robert B. Judd • rjudd@hojlaw.com

18th Circuit: Stephen Paul Heuston sheuston@fresehansen.com

19th Circuit: Jane L. Cornett • jcornett@bplegal.com

20th Circuit: Alan Stephen Kotler • skotler@kotlerpl.com

Special thanks to current ALM Michael Sneeringer of Porter, Wright, Morris and Arthur, LLP for his assistance in writing this column.

Letter From The Editors

Dear Readers:

We hope you are enjoying the "new and improved" tone and tenor of your Section magazine, ActionLine. Tremendous gratitude goes to all of those Editors and contributors who have gone before us and made ActionLine the incredible publication it is. Many Section members tell us ActionLine provides a return on investment. We hope that what began as a superb Section newsletter has transformed into a user friendly publication that provides relevant and, in some cases, entertaining information resulting in value in exchange for members' dues dollars.

Each issue provides us with an opportunity to thank so many people. Drew O'Malley finished up his year as Section Chair leaving a legacy with the No Place Like Home Project. He also allowed us to continue the evolution of this publication.

Our colleague and Co-Editor-In Chief, Cary Wright is moving on to bigger and better things in service to the Section. However, Cary contributed as co-author of a terrific article to this edition of ActionLine, beginning on page 6.

The At-Large-Members serve as liaisons and ambassadors to the rank and file Section members who often can't make it to Section meetings but who represent the Section well every day in the service they provide to their clients, their communities and the public. The ALMs, together with you, dear readers, amaze us daily. It is the work you do and the contributions you make that result in the articles, case summaries, spotlight features and material that are reported between the covers of ActionLine.

If you are like us, while reading this issue, you will find yourself highlighting new cases, circulating information pertaining to legislative updates to your friends and colleagues and thanking our sponsors. Rarely does an issue of ActionLine come out that does not provide information used in our day-to-day practices. It is just one of the many benefits of Section membership, but it inures to the benefit of all +/-11,000 RPPTL members!

We hope you enjoy reading your magazine as much as we enjoy putting it together (with the help of the entire ActionLine team as credited on page 4).

—The Editors

Take-Two: Legislature Amends Florida's Construction Statute Of Limitations And Repose Again In 2018

By Wm. Cary Wright, Esq., Jaret J. Fuente, Esq., Katherine L. Heckert, Esq. and Monica L. Strady, Esq., Carlton Fields, Tampa, Florida

Last year, in an attempt to clarify, if not tighten, the time within which actions founded on construction defects must be brought, the Florida Legislature amended Florida Statute Section 95.11(3)(c) to define "completion of the contract," one of the four triggers in Florida's statute of limitations ("SOR") and repose ("SOL").[1] A year later, the Legislature has amended Section 95.11(3)(c) again, this time to refine last year's amendment, and to also extend or incorporate a cushion into the SOR in certain circumstances. This article provides an overview of these amendments and explores how they might affect certain construction defect actions.

Florida's Statute of Limitations and Repose

Florida has a four-year SOL for actions founded on the design, planning, or construction of an improvement to real property (referred to herein as "construction defect actions"), with the time for commencing such actions running from the latest of the date of:

1. actual possession by the owner;
2. issuance of a certificate of occupancy;
3. abandonment of construction if not completed; or
4. completion of the contract or termination of the contract between the professional engineer, registered architect, or licensed contractor and his or her employer.[2]

The SOL includes a delayed discovery provision, which provides that when actions involve a latent defect, the time for commencing them does not begin to run until a defect is discovered or should have been discovered with the exercise of due diligence.[3] However, the incorporated 10-year SOR provides, "[i]n any event, such actions must be commenced within ten years after" the latest of the four triggers set forth above.[4]

The 2017 Amendment: Completion of the Contract

Before 2017, "completion of the contract" was undefined in Section 95.11(3)(c). Not surprisingly, that trigger became the subject of disputes about the timeliness of construction defect actions.

In *Cypress Fairway Condominium v. Bergeron Const. Co. Inc.*,[5] for example, condominium owners and their association filed a construction defect action against various entities involved in the condominium's original construction. One such entity moved to dismiss the action as time-barred by the SOR because it was not commenced within 10 years of completion of the contract, which it argued occurred upon final *payment application*.[6] The plaintiffs countered that completion of the contract did not occur until final payment, which was made three days after the final payment application.[7]

"Convinced that the Legislature intended that the date of completion of the contract had to do with the date of completion of the construction that would have been done under the contract, not the date of final payment," the trial court dismissed the action as untimely.[8] The Fifth District reversed, and held that "completion of the contract means completion of performance by both sides of the contract, not merely performance by the contractor."[9]

A similar issue arose more recently in *Busch v. Lennar Homes, LLC*.[10] There, a homeowner filed a construction defect action against Lennar more than 10 years after closing on the purchase of a home.[11] Lennar moved to dismiss the action as time-barred by the SOR, and argued the parties' contract was completed at the time of the closing.[12] The trial court agreed and dismissed the action.[13]

Relying in part on the *Cypress Fairway* court's "performance by both sides" interpretation, and in part on the terms of the purchase contract at issue, the Fifth District reversed.[14] The court reasoned that the purchase contract expressly contemplated that closing could occur even if work required by the purchase contract remained incomplete, and the homeowner had not alleged in his complaint that no work was completed after closing; therefore, the homeowner's allegations did not conclusively establish the contract was completed upon closing.[15]

The 2017 Legislature attempted to address such disputes, and specifically the *Cypress Fairway* issue, by defining "completion of the contract" as "the later of the date of final performance of all the contracted services or the date that final payment for such services becomes due without regard to the date final payment was made."[16] It seemingly adopted the *Cypress Fairway* court's "performance by both sides" interpretation, and in doing so eliminated the possibility for one party to delay completion of the contract and thereby extend the SOR simply by nonpayment. However, the 2017 Legislature did not define "final performance."

The 2018 Amendment: Completion of the Contract Refined

The 2018 Legislature recently amended Section 95.11(3)(c), by adding the following provision:

> With respect to actions founded on the design, planning, or construction of an improvement to real property, if such construction is performed pursuant to a duly issued building permit and if a local enforcement agency, state

continued, page 7

> enforcement agency, or special inspector, as those terms are defined in s. 553.71, has issued a final certificate of occupancy or certificate of completion, then as to the construction which is within the scope of such building permit and certificate, the correction of defects to completed work or repair of completed work, whether performed under warranty or otherwise, does not extend the period of time within which an action must be commenced.[17]

The 2018 Legislature intended the amendment to address "an issue that arises regarding the definition of final performance, namely whether warranty work performed by the contractor has the effect of extending the time of final performance to the date that the warranty work is completed."[18] It noted that "the term warranty work refers to the common term in a construction contract that requires the contractor to warrant, or assure, that all work performed will be free from defects in materials and workmanship for some fixed period of time."[19]

The 2018 amendments should decrease litigation over the timeliness of construction defect actions under both the SOL and the SOR.

In analyzing the proposed amendment, the 2018 Legislature referenced *Busch v. Lennar Homes, LLC*, stating that "recent case law suggests . . . a contract is not complete, and thus the timeframes for bringing a lawsuit cannot begin to run, until all punch-list or other follow-up work is complete."[20] It reported that "the bill substantially counters this case law by effectively providing that a construction contract performed pursuant to a building permit is complete when a final certificate of occupancy or certificate of completion is issued."[21] "After that point, the correction or repair of completed work that is within the scope of the building permit and final certificate does not delay the running of the timeframes in which a construction-defect action may be commenced."[22]

The 2018 Legislature essentially refined its earlier definition of "completion of the contract" in an attempt to clarify that repair or correction of completed work, including warranty work, performed after issuance of a certificate of occupancy or completion, does not delay the start of the running of the SOL or SOR or extend the time to commence a construction defect action. This amendment further clarifies the time within which actions founded on construction defects must be brought.

The 2018 Amendment: Limited Extension of the Statute of Repose

The 2018 Legislature also amended Section 95.11(3)(c), by adding the following bold language, thereby extending the SOR:

> In any event, the action must be commenced within 10 years after the date of actual possession by the owner, the date of the issuance of a certificate of occupancy, the date of abandonment of construction if not completed, or the date of completion of the contract or termination of the contract between the professional engineer, registered architect, or licensed contractor and his or her employer, whichever date is latest. **However, counterclaims, crossclaims, and third-party claims that arise out of the conduct, transaction, or occurrence set out or attempted to be set out in a pleading may be commenced up to 1 year after the pleading to which such claims relate is served, even if such claims would otherwise be time barred.**[23]

This amendment has the opposite effect of the amendment regarding contract completion. It actually extends the statute of repose, though only for "counterclaims, crossclaims, and third-party claims" that arise out of the "conduct, transaction, or occurrence" set out in a pleading to which they relate, and only for one year. However, because the extension runs from the time the underlying pleading is served, as opposed to filed, the repose deadline could extend well beyond one year given Florida's 120-day service of process rule.[24]

This amendment effectively provides a cushion for defendants in construction defect actions, upon being served, to investigate, identify and commence an action (specifically a counterclaim, crossclaim or third-party claim) against other responsible persons or entities. It squarely addresses an issue that arises when, for example, a homeowner sues his or her general contractor on the eve of the expiration of the SOR, thereby leaving the general contractor limited time, or no time depending on the date of service of process, to investigate, identify and commence an action against responsible subcontractors. The extension could minimize, if not eliminate, disputes about the timeliness of counterclaims, crossclaims or third-party claims in such circumstances.

The concept of a cushion, or a limited extension of time to commence actions against others, is not unique to Florida. Other states, such as Texas and Oklahoma, for example, have codified a similar cushion or extension of time to commence crossclaims and counterclaims, though theirs are separate from their SOL and SOR.[25]

Implications of the 2018 Amendments

The 2018 amendments should decrease litigation over the timeliness of construction defect actions under both the SOL and the SOR. The refined definition of "completion of the contract" addresses the issues raised in *Cypress Fairway* and *Busch* and thereby draws a clearer line with respect to the time within which construction defect actions must be commenced, while the limited extension of the SOR clears up timeliness issues for counterclaims, crossclaims and third-party claims that arise from even the most late-filed construction defect actions.

continued, page 8

Effective Date

The 2018 amendments to Fla. Stat. §95.11(3)(c) apply to any action commenced on or after July 1, 2018, regardless of when the cause of action accrued, except that any action that would not have been barred under Section 95.11(3)(c) prior to the 2018 amendments may be commenced before July 1, 2019, and if it is not commenced by that date and is barred by the 2018 amendments, it shall be barred.[26]



J. FUENTE

Jaret Fuente *is a shareholder at Carlton Fields in Tampa. He represents businesses and professionals in commercial disputes, class actions, and tort litigation in the construction, development, products manufacturing, and real estate industries. He represents builders, contractors, and developers in breach of contract, construction defect, mold, and building product-related claims. He is certified as a Circuit Civil Mediator by the Florida Supreme Court and as a mediator by the United States District Court for the Middle District of Florida.*



K. HECKERT

Katherine Heckert*, a Florida Board Certified Specialist in Construction Law, advises and represents construction clients in mediation, arbitration, and litigation proceedings. She has experience resolving complex contract disputes, construction defect claims, regulatory investigations, and lien and bond disputes. Her clients include nationwide home builders, general contractors, developers, public owners, large project owners, subcontractors, marine contractors, equipment lessors, condominium associations, steel fabricators, and heavy construction companies.*



M. STRADY

Monica Strady *is an attorney at Carlton Fields in Tampa. She is developing her practice in the areas of construction litigation and construction transactions. She represents general contractors and subcontractors in litigation involving construction defects, construction liens and contract disputes; she also advises clients in the preparation and negotiation of all types of contracts and forms related to construction and development transactions.*



C. WRIGHT

Wm. Cary Wright *is a shareholder and Co-Chair of Carlton Fields' Construction Practice Group. He has extensive experience representing clients in construction disputes, including construction claims, water intrusion and sick-building syndrome issues; construction liens; insurance coverage matters; risk management; and bond claims. Such engagements have involved bridges, convention centers, high-rise condominiums, highways, hospitals, stadiums and hotels. Mr. Wright also has substantial experience in contract drafting and contract review including the preparation of owner-contractor agreements and contractor-subcontractor agreements. He is Co-Editor-in-Chief of ActionLine.*

Endnotes

1 See Fla. Stat. §95.11(3)(c) (2017); see also Bret M. Feldman, *A Practical Guide to Florida's Construction Statute of Repose After 2017 Legislative Changes*, Vol. XXXIX, No. 1, *ActionLine*, 20 (Winter 2017-18).

2 See Fla. Stat. §95.11(3)(c) (2017).

3 *Id.*

4 *Id.*

5 Cypress Fairway Condominium v. Bergeron Const. Co. Inc., 164 So. 3d 706 (Fla. 5th DCA 2015) (decided under Fla. Stat. §95.11(3)(c) (2010)).

6 *Id.* at 707.

7 *Id.*

8 *Id.* at 708 (emphasis added).

9 *Id.*

10 *Busch v. Lennar Homes, LLC*, 219 So. 3d 93 (Fla. 5th DCA 2017) (decided under Fla. Stat. §95.11(3)(c) (2015), and before the Legislature's 2017 amendment).

11 *Id.* at 94.

12 *Id.* at 95.

13 *Id.*

14 *Id.* at 95-96.

15 *Id.*

16 See Fla. Stat. §95.11(3)(c) (2017).

17 Ch. 18-97, §1, 2018 Fla. Laws 1 (amending Fla. Stat. §95.11 (2017)) (effective July 1, 2018).

18 Fla. H.R. Comm. on Judiciary, HB 875 (2018) Final Bill Analysis 4 (Mar. 27, 2018).

19 *Id.*

20 Fla. S. Comm. on Cmty. Aff., SB 536 (2018) Bill Analysis and Fiscal Impact Statement 1 (Feb. 28, 2018).

21 *Id.*

22 *Id.*

23 Ch. 18-97, §1, 2018 Fla. Laws 1 (amending Fla. Stat. §95.11 (2017)) (effective July 1, 2018).

24 See Rule 1.070(j), Fla. R. Civ. P.

25 See Tex. Civ. Prac. & Rem. Code Ann. §16.069 (West 2017), which provides: "(a) If a counterclaim or cross claim arises out of the same transaction or occurrence that is the basis of an action, a party to the action may file the counterclaim or crossclaim even though as a separate action it would be barred by limitation on the date the party's answer is required. (b) The counterclaim or cross claim must be filed not later than the 30th day after the date on which the party's answer is required." See also Okla. Stat. Ann. Title 12 §2013(C) (West 2018), which provides: ". . . Where a counterclaim and the claim of the opposing party arise out of the same transaction or occurrence, the counterclaim shall not be barred by a statute of limitation notwithstanding that it was barred at the time the petition was filed, and the counterclaimant shall not be precluded from recovering an affirmative judgment. Where a counterclaim and the claim of the opposing party: 1. Do not arise out of the same transaction or occurrence; 2. Both claims are for money judgments; 3. Both claims had accrued before either was barred by a statute of limitation; and 4. The counterclaim is barred by a statute of limitation at the time that it is asserted, whether in an answer or an amended answer, the counterclaim may be asserted only to reduce the opposing party's claim. Where a counterclaim was barred by a statute of limitation before the claim of the opposing party arose, the barred counterclaim cannot be used for any purpose."

26 Ch. 18-97, §2, 2018 Fla. Laws 2 (amending Fla. Stat. §95.11 (2017)) (effective July 1, 2018).

Heads I Win, Tails I Break Even: The Design, Funding & Administration Of Grantor Retained Annuity Trusts

By Louis Nostro and Alexander Nostro,
Nostro Jones, P.A., Coral Gables, Florida

Grantor retained annuity trusts ("GRATs") have become an integral part of estate plans for many high net worth clients. GRATs allow for the transfer of the appreciation of trust assets in excess of the interest rate determined under Section 7520 of the Internal Revenue Code (the "Section 7520 rate") to the grantor's beneficiaries free of gift tax.[1]

Increase of Estate Tax Exemption Amount

Despite the increase in the 2018 basic exclusion amount for estate and gift tax from $5,490,000 to $11,180,000,[2] GRATs remain a desirable estate planning strategy to transfer assets to a younger generation without gift tax. The 2017 Tax Act includes an automatic "sunset" of the basic exclusion amount on January 1, 2026, at which time the amount will return to the 2011 level of $5 million, with (reduced) inflation adjustments. Unless a client dies before that date, the increased basic exclusion amount has little relevance. Clients should continue to use GRATs and other estate planning vehicles to shift appreciation to children if the value of their estates is expected to be greater than their available exemptions.

What Is a GRAT?

A GRAT is an irrevocable trust under which the grantor retains the right to receive a fixed dollar amount annually during the term of the GRAT. At the end of the term, any remaining assets pass to the GRAT remainder beneficiaries. The grantor of a GRAT must survive the GRAT term for the GRAT to be effective. If the assets in the GRAT appreciate at more than the Section 7520 rate (sometimes referred to as the "hurdle rate") at the end of the term of the GRAT, the remaining GRAT principal is distributed to the remainder beneficiaries (either outright or in trust) free of gift tax. If the rate of appreciation does not beat the hurdle rate, all of the GRAT principal will be returned to the grantor over the term of the GRAT. It has been described as a "heads I win, tails I break even" estate planning technique. Prominent names, such as Sheldon Adelson and the Walton family, have been among those to shift hundreds of millions of dollars of stock, free of gift tax, through the strategic use of GRATs.[3]

The grantor may serve as trustee of the GRAT. A GRAT can achieve the balance of allowing a grantor to maintain control over the investment of assets, and receive fixed distributions annually, while transferring the appreciation over the Section 7520 rate to the grantor's remainder beneficiaries, tax free. GRATs are most productive in a rising equity market and low interest rate environment. A low hurdle rate creates a low required annuity payment, which distributes a greater amount of assets to the remainder beneficiaries.

If the grantor fails to survive the GRAT term, the GRAT assets will be included in the grantor's gross estate for estate tax purposes (and the gift tax exemption applied to the transfer to the GRAT will be returned to the deceased grantor's estate).[4]

How to Set the GRAT Annuity Rate?

The amount of the taxable gift is the difference between (i) the fair market value of the property transferred to the GRAT; and (ii) the actuarial value of the interest retained by the grantor. The grantor's retained interest is valued based on the Section 7520 rate.[5]

A GRAT can be established using either level annuity payments or escalating annuity payments.[6] A "back-loaded" GRAT with escalating annuity payments can be very useful for GRATs funded with illiquid assets with an anticipated liquidity event in the future.

"Zeroed-Out" GRAT

A GRAT may be structured to "zero-out" the value of the gift to the remainder beneficiaries. The amount of the annuity payments to the grantor can be set high enough to result in the projected actuarial value of the remainder interest to be zero (generally $1). By using a "zeroed-out" GRAT design, unsuccessful GRATs result in the loss of only a single dollar of gift tax exemption. The only cost to the grantor is the legal and accounting expense in establishing and administering the GRAT.

Funding of a GRAT

To fund a GRAT, the grantor should select assets that the grantor believes will appreciate over the GRAT term at a rate that exceeds the 7520 rate. Some grantors elect to fund several GRATs (instead of a single GRAT). Some of the GRATs may beat the hurdle rate (generating a GRAT "profit"), while others may not (with all of the GRAT assets being returned to the grantor in satisfaction of the required annuity payments). In each case, the GRATs should be structured to report separate $1 gifts.

How to Select the GRAT Term

A GRAT can be structured with a term of as little as two years. There is no maximum term of a GRAT; however, the grantor must survive the GRAT term for the GRAT to be effective. Many practitioners (including the authors) often use two-year GRATs to capture volatility in investment assets and markets. Some believe that a longer GRAT term is desirable to lock in the current low Section 7520 rates. Others may favor GRAT terms ending when the doubled exemption sunsets in 2026. In any event, advisors should consider the grantor's health, age and life expectancy in establishing a GRAT term.[7] *continued, page 10*

Example 1: Level Two Year Tesla GRAT

Suppose Elon Musk transferred 100,000 shares of Tesla Motors to a 2-year GRAT on 3/1/2012 when Tesla traded at $34 per share. The fair market value of the transfer to the 2012 GRAT was $3,400,000. The Section 7520 rate was 1.4%. The GRAT was structured to pay 51.05166% of the initial GRAT value to Elon on an annual basis for two years (an annual annuity payment is $1,735,756), with any remaining balance going to his children at the end of two years.

The initial year performance was disappointing: Tesla did not appreciate in value during the first GRAT year ending 3/1/2013. The GRAT distributed 51,052 shares of Tesla worth $1,735,756 to Elon in satisfaction of the required first year annuity payment. There were 48,948 shares of Tesla remaining in the 2012 GRAT.

The 2012 GRAT "struck gold" in year two: Tesla increased in value from $34 per share to $250 by 3/1/2013! Elon received a second annuity distribution of 6,943 shares of Tesla in satisfaction of the required $1,735,756 GRAT payment. The remaining 42,005 shares of Tesla (valued at $10,501,250) passed to the Musk children free of gift tax. The amount of gift tax exemption used to transfer $10,501,200 without gift tax was only 54 cents.

Escalating GRAT Payments

As earlier noted, a GRAT can be established using escalating annuity payments so long as the escalating payments do not increase by more than twenty percent each year.[8] If the grantor believes that the GRAT eventually can earn an amount in excess of the hurdle rate, a "back-loaded" GRAT should always be considered. Escalating annuity payments can also be very useful for GRATs funded with illiquid assets with an anticipated liquidity event sometime in the future.

Example 2: Two Year Escalating Tesla GRAT

Elon Musk transferred 100,000 shares of Tesla Motors worth $3,400,000 to an escalating 2-year GRAT on 3/1/2012. The GRAT was structured to pay 46.44034% of the initial GRAT value to Elon at the end of year one ($1,579,000) and 55.72840% on the initial GRAT value ($1,894,766) at the end of year two.[9]

The GRAT distributed 46,411 shares of Tesla to Elon in satisfaction of the required first year annuity payment. There were 53,559 shares of Tesla remaining in the 2012 GRAT.

Tesla increased in value from $34 per share to $250 by 3/1/2013, and Elon received a second annuity distribution of 7,579 shares of Tesla in satisfaction of the required $1,894,766 year two GRAT payment. The remaining 45,980 shares of Tesla (valued at $11,495,000) pass to the Musk children free of gift tax. The use of an escalating two year GRAT transferred close to $1,000,000 more to the Musk children than they would have received pursuant to a two year GRAT with a level annuity payment.

Rolling Two Year GRATs

A "rolling GRAT" plan, using the minimum two-year term and "rolling over" the first year GRAT annuity payment to a new two-year GRAT, should also be considered. There is a single GRAT in year one and two GRATs to be administered in the second (and later) years of a rolling two-year GRAT plan. This concept allows clients to capture significant gains in GRAT assets realized over a short term and hedge against volatility in the markets.

Example 3: Rolling Two Year GRATs

Referring back to Example 1, if Elon transferred the 51,052 shares of Tesla worth $1,735,756 on 3/1/2013 (the initial 2012 GRAT annuity payment) to a new 2013 GRAT with a two-year term, the value of the shares would have appreciated to $12,763,000 by 3/1/2014. The required first year annuity payment would have been $1,735,756. The additional $11,017,244 would be the GRAT "profit" as of the end of the first year of the 2013 GRAT.

Funding a GRAT with Illiquid Assets

A GRAT may be funded with illiquid assets. Care should be given to choose a term beyond the expected liquidity event date or to fund the GRAT with at least some liquid assets to facilitate the required GRAT payments in its early years. The GRAT can also be "back-loaded" under a 20% annual escalating annuity payment structure to minimize the annuity payments in the early years of a GRAT.

Tax Reporting

1. Gift Tax Return. The funding of a GRAT should be reported on a gift tax return in a manner which satisfies the adequate disclosure rules. This limits the ability and timeframe for the IRS to audit the gift tax return, challenge the funding value, or challenge administration of the GRAT.[10] This is especially important for GRATs funded with illiquid or hard-to-value assets.

2. Income Tax Return. A GRAT is subject to the same tax reporting requirements as other types of grantor trusts. A GRAT must obtain a taxpayer identification number. All items of income, deductions and credits of the trust are reported on a separate form attached to Form 1041, naming the grantor as owner of these items.

Prohibited GRAT Actions:

Although there is some flexibility in using GRATs as a planning tool, there are several actions which are prohibited. A grantor cannot make additional contributions to a GRAT and special care must be taken to make certain that a GRAT is funded on a single date.[11] In addition, a grantor is prohibited from using promissory notes to pay a GRAT's annuity obligation.[12]

GRAT Pitfalls to Avoid

1. Beginning GRAT Date. The GRAT agreement should specify that the annuity payments begin on the anniversary of the funding date, not the date of formation. This allows the GRAT to be funded in the month following the GRAT formation date and use the Section 7520 rate in effect in the date of formation.

continued, page 11

A higher 7520 rate can result in a much larger gift. The 7520 rate changes monthly. A GRAT may be executed on the 30th day of a month but not funded until the 2nd day of the following month. If, for example, the Section 7520 rate rises from 2.0% to 2.6%, the gift reported on the funding of a $10 million two year "zeroed-out GRAT" would increase from $1 to $87,557.

2. Failing to Make an Annuity Payment. A GRAT annuity payment must be made within 105 days of the anniversary date of the GRAT funding. The failure to make a timely annuity payment may result in full inclusion of the GRAT assets in the grantor's estate for estate tax purposes.

GRAT "Immunization" or "Freezing"

A GRAT can be "immunized" or "frozen" to either "lock in" substantial appreciation or "start anew" when a GRAT is "under water" (not beating the hurdle rate). In the case of an "in the money" GRAT, the grantor can swap other assets that have an equivalent value with the appreciated GRAT assets.[13] This can be done by substituting cash or a promissory note for the GRAT assets.[14]

Of course, not every GRAT will enjoy extraordinary success. Asset values do not always go up and, when they do, it does not usually occur in a lineal fashion. A GRAT which has declined in value can also be immunized. By immunizing an "under water" GRAT, the grantor can "re-GRAT" the assets to a new GRAT and begin again using the lower asset value.

Basis Planning with Appreciated GRAT Assets

Although a GRAT can be an extremely effective vehicle to shift future appreciation gift-tax-free, the remainder beneficiaries will receive the assets without a step-up in cost basis.[15] However, the grantor can swap cash or other high basis assets, such as bonds, for highly appreciated property with the GRAT trustee to remove the low basis assets from the GRAT prior to the termination date.[16] The high basis assets received by the grantor could then be held and receive a stepped-up basis for capital gains purposes on the grantor's death.

If the grantor does not have sufficient cash or other high basis assets to swap for this purpose, we believe it may be worth considering a sale of some or all of the appreciated assets prior to the end of the annuity term, while the GRAT is treated as a grantor trust for income tax purposes. The capital gain will be taxed to the grantor rather than ultimately realized on a later sale by the remainder beneficiaries.

In light of the anticipated sunset of the new increased basic exclusion amount at the end of 2025, GRATs should continue to be used to reduce or eliminate the projected estate tax liability of high net worth clients.

Editors' Note: This article was submitted by a father and son who are both active RPPTL Section members.



L. NOSTRO



A. NOSTRO

Lou Nostro *is partner of Nostro Jones, P.A., a South Florida estate planning law firm. He is board certified by the Florida Bar as a specialist in two fields: Taxation and Wills, Trusts & Estates. Lou is a frequent speaker at estate planning seminars and a fellow of the American College of Trust and Estate Counsel (ACTEC). He has received three degrees from the University of Florida: BSBA with honors (1978); J.D. with honors (1982) and LL.M. in Taxation (1987).*

Alexander Nostro *joined Nostro Jones as an associate in 2014. He graduated with an LL.M. in Estate Planning from the University of Miami in 2017. Mr. Nostro earned a J.D. from American University's Washington College of Law. During law school, Mr. Nostro was a staff editor for the Journal of Gender, Social Policy & the Law. Mr. Nostro is licensed to practice law in Florida and in the District of Columbia.*

Endnotes

1 The February 2018 Section 7520 rate is 2.6%; this rate has fluctuated between 1% and 3% over the last seven years.

2 Because the 2017 Tax Act changed the manner in which the inflation adjustment is calculated, doubling the 2011 basic inclusion amount from $5 million to $10 million does not result in doubling what would have been the 2018 exemption under the old law. At the time this article was written the official figure has not been released, but estimates put it at $11.18 million.

3 See Zachary R. Mider, *GRAT Shelters: An Accidental Tax Break for America's Wealthiest*, WASHINGTON POST, December 28, 2013.

4 Includible in gross estate under IRC Section 2036 (retained income, possession and/or enjoyment of trust/GRAT assets) or IRC 2039 (retained right to receive annuity in transferred trust/GRAT property).

5 The Section 7520 rate is set monthly by the Internal Revenue Service to be used in connection with transfers to various split-interest trusts, such as GRATs. Unlike charitable remainder trust planning (which can use the most favorable rate issued for the month of funding or one of the two preceding months), a GRAT must use the Section 7520 rate in effect for the month of funding of the GRAT. The Section 7520 rate is equal to 120% of the mid-term applicable federal rate compounded annually and rounded up to the nearest 2/10ths of one percent.

6 Treasury Regulation Section 25.2702-3(b)(1)(ii) provides that the annuity amount may be a stated dollar amount or fixed percentage of the initial fair market value of the property transferred to the trust, but only to the extent that the amount does not exceed 120% percent of the fixed stated amount or fixed percentage payable in the preceding year.

7 The examples set forth below in this article all use a two-year GRAT term.

8 Treasury Regulation Section 25.2702-3(b)(1)(ii).

9 The escalating annuity percentages were calculated at the maximum allowable twenty percent.

10 Treasury Regulation Section 301.6501(c)-1(f)(5).

11 Treasury Regulation Section 25.2702-(3)(b)(5).

12 Treasury Regulation Section 25.2702-3(b)(5)(1).

13 The grantor will often take the immunized assets received from the GRAT and form a new two-year GRAT (known as "re-GRATing").

14 In today's low interest rate environment, a short-term promissory note can be used to swap the assets at a nominal cost to the grantor.

15 Assets received by gift do not receive a step up in cost basis. See IRC Section 1015.

16 In order to take advantage of this option, the GRAT Agreement must have a provision allowing the swap of assets for property having an equivalent value as described in IRC Section 675(4).

Navigating A Foreclosure Title Commitment

By Richard S. McIver, Esq., Kass Shuler, P.A., Tampa, Florida and
Joseph J. Tschida, V.P. WFG National Title Insurance Company, Lake Mary, Florida

The purpose of this article is to help practitioners understand a foreclosure title commitment and how to use the commitment to obtain marketable title at the conclusion of a foreclosure case. Understanding which parties need to be named and served in the foreclosure case and the parties that cannot be foreclosed is critical to obtaining complete relief in a foreclosure action in a timely and effective manner. Failure to include the necessary parties or to correct legal description errors may result in delays and additional expense before the property can be marketed and sold with clear title. No attorney wants to inform his or her client that there is a title defect that was not corrected in the foreclosure case, and that more time and expense will be incurred before the lender will be able to sell the property. Prior to commencing a foreclosure case, the plaintiff should obtain a current title search by a reputable title examiner or title insurance company. While there are different title products available such as "property information reports" and other similar title search products that provide information about the ownership and liens affecting title, this Article will focus on the "foreclosure title commitment." A foreclosure title commitment issued by a licensed Florida title insurer commits the insurer to issue an owner's policy of title insurance insuring the lender's title upon successful completion of a foreclosure case, provided that, the foreclosing lender complies with all of the requirements of the commitment. The title commitment form used by Florida title insurers is promulgated by the Florida Office of Insurance Regulation ("OIR") as required by Florida law.[1] A new title commitment form was approved by OIR in early 2017 which is the American Land Title Association ("ALTA") Commitment form dated August 1, 2016 with Florida Modifications.

This Article will explain the elements of a foreclosure title commitment and how to effectively use the commitment as a "roadmap" to obtain marketable title in favor of the lender upon completion of the foreclosure case. The three main elements of a foreclosure commitment that this article will discuss are: (1) Schedule A; (2) Schedule B-1; and (3) Schedule B-2. This article will not discuss the changes made to the commitment form in 2017.

Schedule A. Schedule A is a "snapshot" of the current status of title, and describes the proposed policy to be issued to the foreclosing lender. Schedule A consists of the following numbered sections:

1. **Commitment Date** (also referred to as the Effective Date). This is the date through which the Public Records in the county where the property is located have been searched and examined.
2. **Policies to be issued.** In the foreclosure context, this typically refers to an Owner's Policy to be issued in favor of the foreclosing lender upon successful completion of the foreclosure case. The foreclosing lender would be the "Proposed Insured." If a Loan Policy will be issued, the loan policy would be described here. The Proposed Policy Amount, if known, should be shown in this section.
3. **Estate or Interest in the Land.** The commitment describes the type of interest or estate to be insured, such as fee simple, a leasehold interest, or an easement. Most mortgage foreclosures result in the lender obtaining fee simple title to the property. However, some leasehold mortgages are secured only by the borrower's interest as a lessee in a long-term lease (in a co-op, for example), and the lender can only foreclose that leasehold interest. Thus, the foreclosing lender would only acquire a leasehold interest in the property subject to the terms of the long-term lease.
4. **Title to the estate or interest in the Land is at the Commitment Date vested in Owner(s) of record.** This section describes the current owner(s) or holder(s) of the estate or interest in the land as shown by the Public Records of the county where the property is located. The owner is a necessary and indispensable party to the foreclosure action. A foreclosure judgment entered where the record owner of the property was not a party is void.[2]
5. **The Land referred to in this Commitment is described as follows.** The Title Commitment should include an accurate legal description of the property to be foreclosed. An accurate legal description is one in which a surveyor, applying the rules of surveying, can locate the property.[3] It is critical that the correct legal description be used throughout the foreclosure case as a matter of due process. All parties to the foreclosure action must be informed of the property being foreclosed. An error in the legal description in the advertisement of the notice of sale will require vacating the final judgment of foreclosure, the judicial sale, and the certificate of title.[4] If the mortgage, or the deed into the mortgagor, contain errors in the legal description, the foreclosure case may also include a count to reform the legal description in the mortgage or the deed vesting title into the mortgagor.

Schedule B-1 (Requirements). Schedule B-1 contains the list of action items required by the title insurer for the lender to complete in its foreclosure case to obtain insurable title under the terms of the commitment. The standard commitment requires that "***all of the following Requirements must be met***"

continued, page 13

for the insurer to issue an owner's policy of title insurance after completion of the foreclosure case. The requirements may vary depending upon the title insurer who issues the foreclosure title commitment; however, the following list of requirements ("action items") is typical for a foreclosure title commitment:

1. **Inform the title insurer.** The foreclosing lender must inform the title insurer in writing of any other party not referred to in the commitment who will obtain an interest in the land or who will make a loan on the land, so that the title insurance underwriter may make additional requirements as are appropriate. For example, if the lender will take title in the name of a subsidiary or other company, the title insurer should be advised so that appropriate requirements can be added to the commitment.
2. **Pay the agreed amount.** Payment of the agreed amount for the estate or interest to be insured is required for a title insurance policy to be issued. In the foreclosure context, this would be the lender's credit bid at the foreclosure sale as established by the final judgment.
3. **Pay the premiums.** The title insurance premium for the policy to be issued must be paid to the title insurer.
4. **Record documents in the public records satisfactory to the title insurer that convey the title to be insured.** In a foreclosure, this means that a Certificate of Title issued in a "properly conducted action foreclosing the mortgage" must be issued in the name of the foreclosing lender (or its assignee), and recorded in the Public Records of the County where the property is located.
5. **Properly serve record owners.** All owners listed on Schedule A, part 4, of the commitment must be joined and properly served in the foreclosure case. Which parties to name in the foreclosure action is critical and is described in greater detail later in this article.
6. **Properly name and serve all other parties with rights or interests in the land.** While #5 requires the owners of record as set forth in Schedule A, part 4, be included in the foreclosure case to eliminate their ownership interest, requirement #6 and its subparagraphs pertain to inferior liens and interests to be eliminated in the foreclosure:
   - **a.** All parties claiming an interest after the "effective date of the commitment," but before the recording of the notice of lis pendens. This is the "Gap Period" between the date of the commitment and the date that the lis pendens is recorded. A "gap search" is required to determine if any parties acquired an interest in the property during the "gap period" between the date of the commitment and the recording of the lis pendens. Those parties must be named and served with an amended complaint to eliminate their interests. A requirement to search this Gap Period is made at Requirement #7.
   - **b.** All parties known to the plaintiff or its attorney who may claim an interest in the property even if their interests are not disclosed by a current title search. A title search for a foreclosure commitment is performed by reviewing the Public Records of the County where the property is located and is not performed on off-record matters. Therefore, this requirement pertains to matters such as deeds, liens or other interests not recorded in the Public Records but which are known to the plaintiff or the plaintiff's attorney. Those matters must be disclosed to the title insurer so that they may be added as requirements in the commitment to be eliminated in the foreclosure.
   - **c.** All parties in possession. For residential properties, the foreclosing lender typically names all known and unknown tenants in possession of the premises to eliminate their interests. However, for commercial foreclosures, it may be a business decision for the lender to leave the current tenants in place so that the income stream for the property will not be interrupted by the transfer of title through foreclosure. In the alternative, the lender may wish to have the commercial property vacant at the conclusion of the foreclosure, in which case the tenants should be named and served.
   - **d.** Unknown spouses of record owners, if any. The unknown spouses of record title holders are always named as defendants to eliminate any possible homestead rights or claims that they may have to the property arising by virtue of their marriage to the record owner.
   - **e.** Subordinate liens, mortgages, certified money judgments, code enforcement liens, federal tax liens, or other miscellaneous liens. The holders of all inferior liens must be named and served in the foreclosure case to eliminate their liens.
   - **f.** Homeowners' or condominium owners' associations pursuant to recorded declarations of covenants and restrictions. In order for the foreclosing lender to take advantage of the "safe harbor" limitation of liability for assessments, the Owners' Association must be joined as a defendant in the foreclosure case.

The numbering of the requirements to eliminate inferior interests in the foreclosure case will vary depending upon the title insurer who issues the foreclosure title commitment. Here we have shown them as subparagraphs of Requirement #6, but they may be listed as separately numbered requirements.

7. **Title Update after Recording of Lis Pendens.** This is the requirement to perform the "gap search" mentioned in Requirement # 6(a) herein. The purpose of this requirement is to perform a search after the lis pendens is recorded to determine if any parties acquired an interest in the property in the gap period between the effective date of the commitment and the date that the lis pendens was recorded. All parties that recorded an interest in this gap

continued, page 15



SPECIAL NEEDS TRUST TOO SMALL FOR THE BANK?

PROFESSIONAL TRUSTEE SERVICES

Guardian TRUST

www.GuardianTrusts.org

- Individual (d)(4)(A) Trusts, Third-Party Trusts, & Pooled Special Needs Trusts
- Professional, courteous service and bilingual staff (English & Spanish)
- Immediate response to distribution requests
- Co-Trustees are experienced practicing Elder Law Attorneys
- Direct payment to caregivers or third parties
- No minimums and timely accountings

"You have been wonderful to my sister and family. I appreciate your prompt response to our questions, as well as taking care of all the details involved in transferring her trust account from another trust company. This Thanksgiving I will be thinking of both of you when remembering all the people for whom I am thankful."
- Anne K., Beneficiary's Family

727 - 210 - 1185 | 901 CHESTNUT STREET, CLEARWATER, FL 33756

period must be named as defendants and served with the foreclosure complaint. Most interests recorded after the lis pendens are eliminated by the lis pendens as long as the foreclosure is completed and a certificate of title is issued.

8. **All Relevant Appeal Periods have Expired.** Before a final title policy may be issued, the foreclosure final judgment must no longer be appealable, and all post-foreclosure sale objections must have been ruled upon in favor of the lender and are final. If an appeal is pending, a title insurer will not insure until the appeal has been resolved in favor of the foreclosing lender.

9. **Additional Requirements.** The title insurer will usually reserve the right to review the foreclosure proceedings and add additional requirements as necessary to clear title upon completion of the foreclosure. The foreclosure case may not be finished as of the effective date of the commitment, so this requirement allows the title insurer to make additional requirements after the foreclosure is complete if deficiencies are found in the foreclosure case. For example, lack of proper service of process on any defendant or the lack of a diligent search for constructive service of process.

10. **Payment of all municipal liens or charges under Chapter 159.** This is a standard requirement for payment of non-foreclosable liens for water, sewer or other charges incurred against the property. Liens for unpaid water or sewer service under Florida Statute Section 159 and related statutes do not have to be recorded and have priority over the mortgage being foreclosed no matter when the lien arises. The foreclosure commitment will have a requirement for proof of payment of these liens and will have a corresponding exception for the liens. Whether the exception can be deleted from the final policy upon proof of payment of all water and sewer bills will require a discussion with the title insurer.

Schedule B-II (Exceptions). Schedule B-II lists the exceptions from coverage that will be included in the final title policy (many of which are superior to the mortgage and may not be foreclosed), unless cleared to the satisfaction of the title company:

1. Defects, liens, encumbrances, adverse claims or other matters first appearing in the public records or attaching subsequent to the effective date of the commitment, but prior to the date that the proposed insured acquires for value of record the estate to be insured by the commitment. This is commonly known as the "Gap Exception" but is different than the "Gap Search" previously discussed, which was the gap between the effective date of the commitment and the date the lis pendens was recorded. This "Gap Exception" is for the period between the effective date of the commitment and the date that the proposed insured acquires title of record. In the foreclosure context, the end date of this gap is the date that the certificate of title is recorded. Therefore, the Gap Exception is the gap between the effective date of the commitment and the date that the certificate of title is recorded. A second "gap search" should be performed after the certificate of title is recorded to determine if any additional interests have been recorded after the effective date of the commitment and prior to the recording of the certificate of title. This exception will be required to be removed if the foreclosing plaintiff amends its complaint to name and serve such parties to eliminate their interests.[5] In a non-foreclosure transaction, whether a gap search is performed or not, the title insurer is required by law to remove this exception after the transaction closes and disburses.[6]
2. General or special taxes and assessments for the current year, and any prior year, if unpaid. Because ad valorem taxes are superior to mortgages, this exception cannot be removed through the foreclosure action. Generally, a title policy will always have an exception for ad valorem taxes for the year the transaction closes unless it closes towards the end of the year after the tax bills are issued and the ad valorem taxes are paid for that year. In that case, the policy will contain an exception for ad valorem taxes for the next year.
3. Rights of parties in possession. The title policy will contain an exception for parties in possession unless their rights are eliminated through the foreclosure action and they are subsequently evicted from the premises. In the non-foreclosure situation, if the seller or mortgagor provides an affidavit swearing that nobody other than the seller or mortgagor is in possession of the property, this exception must be removed.[7]
4. Encroachments, encumbrances, violations, variations or adverse circumstances that would be disclosed by an inspection of the property or an accurate and complete land survey of the property. This is known as the standard survey exception. This exception must be removed if a current survey is obtained. If a survey is obtained, this standard survey exception would then be replaced by

continued, page 16



exceptions for specific encroachments and other matters shown on the survey.[8]

5. Easements or claims of easements not recorded in the public records. This exception pertains to unrecorded easements such as prescriptive easements or easements by adverse possession. This exception may be deleted from the final title policy if the survey does not show any items such as roads or paths that do not correspond with recorded easements already listed as exceptions, and the seller's affidavit or the owner's affidavit confirms that there are no unrecorded easements on the property.
6. Any lien or right to a lien for services, labor or materials furnished to the property, and not recorded in the public records. This is the standard construction lien exception. This exception may be removed by obtaining an affidavit from the foreclosing lender confirming that no improvements were made to the property within 90 days of the closing that have not been paid for.[9]
7. An owner's policy will typically include an exception for any adverse claim by the State of Florida by right of sovereignty to any portion of the land, including submerged, filled or artificially exposed lands, and lands accreted to such lands. This water rights exception may be removed if the title agent can determine that the land was never submerged, or that the land is not near tidally influenced water bodies, or near lakes, rivers, streams or other fresh water bodies. Foreclosure actions cannot alter this exception.
8. Superior mortgages that cannot be foreclosed will be listed as an exception in the owner's policy.
9. Any declaration of covenants, conditions, or restrictions establishing a property owners' or condominium owners' association will likely be recorded prior to the mortgage to be foreclosed, and it cannot be eliminated by the foreclosure action and will be listed as exceptions in the final policy.
10. Conservation or access easements recorded prior to the mortgage will not be foreclosable, and it will be listed as an exception in the policy.
11. Declarations establishing a Community Development District, which assessments are typically co-equal to taxes in terms of priority, may not be foreclosed and will be listed as exceptions in the final title policy.
12. Restrictions, easements and dedications on a recorded subdivision plat are usually recorded prior to the recording of the mortgage so they may not be foreclosed and will be listed as exceptions in the final title policy.

Litigation Based Upon the Foreclosure Title Commitment

Deceased Owners. Schedule B-I (5) of the title commitment requires that the foreclosure action include the record title owners of the property to obtain clear title to the property. What happens if one or more of the owners are deceased? If the property was jointly owned by two spouses as tenants by the entireties, upon the death of one spouse, title passes by operation of law to the surviving spouse.[10] Likewise, property owned by two or more people as joint tenants with rights of survivorship, title passes upon the death of a joint tenant to the remaining joint tenants. However, in situations where title does not automatically pass to a spouse or a joint tenant by survivorship, if a probate has been filed, and the court has entered an Order Determining Homestead, such orders typically state to whom the property descended upon the death of the deceased, and those parties should be named in the foreclosure. If there is a pending probate, and the court has not determined to whom the property descended, the personal representative and any beneficiaries listed in the Petition for Administration should be named as parties. If no probate has been filed, it is not usually necessary for the foreclosing lender to file a probate case to determine the beneficiaries for inclusion as parties. Where no probate has been filed, a diligent search must be performed to determine the identity of any possible beneficiaries to be joined as defendants. All known and unknown beneficiaries should be named as defendants in the foreclosure case. The unknown beneficiaries will be served by constructive service of process and any known beneficiaries that cannot be located after a diligent search may also be served by constructive service of process.

Parties with subordinate interests. Schedule B-I (6) requires parties holding inferior mortgages and liens be named and served with the foreclosure complaint to eliminate their interests. Liens include certified judgments,[11] federal tax liens,[12] code enforcement liens,[13] and other miscellaneous liens.[14] Condominium owners' or homeowners' associations should also be named in the foreclosure case so that the mortgagee may take advantage of the limited liability for assessments afforded to first mortgagees when taking title pursuant to a foreclosure case, commonly known as "safe harbor." Fla. Stat. §718.116 and §720.3085 generally provide that a foreclosing institutional mortgagee is only liable to pay assessments in the amount of 1% of the original mortgage debt or 12 months of assessments, whichever is less. The association must be named as a defendant in the foreclosure action for the lender to receive the safe harbor limitation of liability. This is a fertile area for litigation as lenders and associations fight over whether a foreclosing lender is entitled to safe harbor, and if so, what that means.[15] Any known or unknown tenants should also be named as parties if the lender wishes to foreclose the tenants' right of possession.[16]

Service of Process. It is incumbent upon the foreclosing lender to perfect service of process upon all parties with an interest in the property, as required by Schedule B-I. Personal service of process is the preferred method of giving notice to parties of the pending litigation under Florida law, and is strictly construed and enforced.[17] However, service of process by publication ("constructive service") is permitted under

continued, page 17

Florida law "to enforce any legal or equitable lien or claim to any title or interest in real or personal property within the jurisdiction of the court."[18] The plaintiff must demonstrate that a diligent search and inquiry has been made to locate and serve the defendant personally before constructive service of process by publication will be considered to be valid.[19] For service in foreign countries, personal service should be attempted there as well, provided there is a treaty (such as the Hague Convention) between the United States and the foreign jurisdiction recognizing such service of process.[20]

Service of Process on Entities. Active corporations should be served in compliance with Fla. Stat. §48.081. Service of process upon a dissolved corporation depends upon when the corporation was dissolved. For example, prior to 1997, Fla. Stat. §48.101 provided that process could only be served on a trustee director of a dissolved corporation. After the 1997 amendment, Fla. Stat. §48.101 provided that service on a corporation dissolved after July 1, 1990, must be made in accordance with Fla. Stat. §48.081.[21] A general partnership may be sued in its name, and may be served by serving any general partner.[22] An active limited partnership may be served by serving any general partner.[23] A limited liability company may be served with process by serving its registered agent.[24] However, note that if it becomes necessary to serve an LLC by serving the Florida Secretary of State, an allegation in the complaint must plead that the registered agent conceals its whereabouts, or previously conducted business in Florida but subsequently became a non-resident.[25] A land trust may be served by serving the trustee.[26] The trustee and beneficiaries of non-land trusts should be included as parties and served with the complaint, as the beneficiaries have the right to defend litigation against the trust if the trustee fails to do so.[27]

Recording a Notice of Lis Pendens is part of the Gap Search required by Schedule B-I (7). The recording of the notice of lis pendens at the time of the filing of the foreclosure complaint puts the world on constructive notice of the pendency of the foreclosure litigation.[28] The lis pendens constitutes a

> bar to the enforcement against the property described in the notice of all interests and liens, including, but not limited to, federal tax liens and levies, unrecorded at the time of recording the notice unless the holder of any such unrecorded interest or lien intervenes in such proceedings within 30 days after the recording of the notice. If the holder of any such unrecorded interest or lien does not intervene in the proceedings and if such proceedings are prosecuted to a judicial sale of the property described in the notice, the property shall be forever discharged from all such unrecorded interests and liens.[29]

A purchaser *pendente lite* from one who is a party to an action which involves the property is bound by the judgment in the action to which the vendor is a party.[30] The lis pendens also bars claims recorded after the entry of the final judgment, through the holding of the foreclosure sale.[31]

Legal Description. The title commitment should reflect if there are any issues with the validity of the legal description in the mortgage to be foreclosed, or the deed or deeds in the chain of title to the mortgagor. If there is an error in the legal description in the mortgage or deeds, the foreclosing lender should add a reformation count to the foreclosure complaint to reform the descriptions in the affected instruments. Reformation is an equitable remedy designed to correct mutual mistakes in drafting written instruments to accurately reflect the true agreement of the parties. This principle is applicable to instruments of conveyance of real property and can be applied to correct an erroneous legal description in order to protect a person's rights in such property.[32] All interested parties in the defective instrument should be named in the suit,[33] and intent must be proven by clear and convincing evidence.[34] Florida courts have repeatedly held descriptions of property in mortgages to be sufficient despite minor mistakes and irregularities where the description of the property intended to be encumbered could be determined from the entire instrument.[35]

Reforeclosure. If an error is made in the foreclosure action (such as a necessary party was omitted, or the legal description contained an error), despite the lender's best efforts to follow the requirements of the title commitment, the lender can bring a reforeclosure action to correct the error.[36] As a practical matter, it is a good idea to include in the final judgment of foreclosure a reservation of jurisdiction to file reforeclosure pleadings, as the failure to do so may require the lender to file a separate action to reforeclose the mortgage.[37] The best practice, however, is to follow the roadmap of the foreclosure title commitment, so that your client will have clear and marketable title at the conclusion of your case.



R. MCIVER



J. TSCHIDA

Richard McIver *is a shareholder of Kass Shuler, P.A. in Tampa, Florida, and has represented banks, mortgage companies and loan servicers in litigation matters in Florida for over 30 years. He is Board Certified by The Florida Bar as a specialist in Real Estate Law, and is Vice-Chair of the RPPTL Section's Real Property Finance and Lending Committee.*

Joe Tschida *is Vice President and State Counsel for WFG National Title Insurance Company's Florida operations. Joe has over 24 years of experience in the title industry.*

Joe received his Bachelor's degree in finance from Florida State University and his J.D. from Stetson University College of Law. Joe began his legal career as an

continued, page 18

Assistant State Attorney before joining an Orlando law firm as a commercial litigator. He is a member of The Florida Bar, serving on the Executive Council of the Real Property, Probate & Trust Law Section of The Florida Bar and is an active member of the Florida Land Title Association.

Joe provides underwriting support, guidance and education for WFG's Florida agent base. Joe has underwriting experience from residential transactions to complex commercial transactions. Joe is based out of WFG's Regional Office in Lake Mary, Florida.

Endnotes

1 Fla. Stat. §627.777.

2 Citibank, N.A. v. Villanueva, 174 So. 3d 612 (Fla. 4th DCA 2015); *Miller v. Washington Mut. Bank*, 184 So. 3d 558, 559 (Fla. 4th DCA 2016) (Final judgment of foreclosure reversed where husband, as co-owner, was not a party to the foreclosure suit); *Sudhoff v. Federal National Mortgage Association*, 942 So. 2d 425 (Fla. 5th DCA 2006) (Wife, as co-signer of mortgage, was a necessary party, and failure to include her deprived her of the equity of redemption. The right of redemption is an incident of all mortgages and cannot be extinguished except by due process of law.); contrast with *Mitchell v. Federal National Mortgage Association*, 763 So. 2d 358 (Fla. 4th DCA 1998) (Original mortgagor who has previously conveyed his interest in property was neither a necessary nor a proper party to foreclosure suit).

3 Maynard v. Miller, 182 So. 220 (Fla. 1938).

4 The complaint and lis pendens must contain a good legal description, otherwise the foreclosure may be defective, and may need to be re-filed. *Lucas v. Barnett Bank of Lee County*, 705 So. 2d 115 (Fla. 2d DCA 1998); *Caddy v. Wells Fargo Bank, N.A.*, 198 So. 3d 1149 (Fla. 4th DCA 2016).

5 Fla. Stat. §627.7841.

6 Id.

7 Fla. Stat. §627.7842(1)(b).

8 Fla. Stat. §627.7842(1)(a).

9 Fla. Stat. §627.7842(1)(c).

10 Knapp v. Fredricksen, 4 So. 2d 251, 252 (Fla. 1941) (A conveyance of real estate in fee simple to husband and wife creates an estate by entireties in them, at least where a lawful contrary interest is not duly shown; and, at the death of one spouse, the entire estate in the property vests in the survivor).

11 Fla. Stat. §55.10. For a judgment to be a lien against property, it must be certified, it must contain the address of the judgment creditor, and be recorded in the public records. Judgments first recorded after July 1, 1994 are good for 10 years and may be extended for an additional 10 years by re-recording a certified copy prior to the expiration of the lien. Judgments that don't comply with the statute are not liens on property. Judgments against only one spouse do not attach to property owned by both spouses as tenants by the entirety.

12 A federal tax lien against one spouse attaches to entireties property owned by that spouse. *United States v. Craft*, 122 S.Ct. 1414 (2002). The United States, as the holder of a federal tax lien, has a 120 day right of redemption after the foreclosure sale under 28 U.S.C. §2410.

13 Code enforcement liens recorded after the recording of the mortgage are probably inferior to the mortgage, as the Florida Supreme Court has ruled that a municipality cannot enact a local ordinance that provides for super priority of code liens. *City of Palm Bay v. Wells Fargo Bank, N.A.*, 114 So. 3d 924 (Fla. 2013). However, a lien in favor of a municipality for services provided to the property such as utilities, improvements, or costs of repair may be superior to the mortgage under Fla. Stat. §153.67 and Fla. Stat. §159.17. *See also Gleason v. Dade County*, 174 So. 2d 466 (Fla. 3d DCA 1965) and *Miami Shores Village v. Gibraltar Savings and Loan Assoc.*, 561 So. 2d 27 (Fla. 3d DCA 1990).

14 Public defender liens under Fla. Stat. §938.29 may be a lien, even if not certified. Restitution liens under Fla. Stat. §775.089 may also be a lien on real property, even if not certified. Likewise, child support liens under Fla. Stat. §61.14(6)(a)(1) and welfare liens under Fla. Stat. §402.33 do not need to be certified to be a lien on real property.

15 See Federal National Mortgage Association v. Mirabella at Mirasol Homeowners' Association, Inc., 204 So. 3d 164 (Fla. 4th DCA 2016). However, a homeowners' association may not be entitled to receive any prior assessments if the declaration is more restrictive than the statute. *See also, Pudlit 2 Joint Venture, LLP v. Westwood Gardens Homeowners Association, Inc.*, 169 So. 3d 145 (Fla. 4th DCA 2015); *Ballantrae Homeowners Ass'n, Inc. v. Federal National Mortgage Ass'n,* 203 So. 3d 938 (Fla. 2d DCA 2016); *U.S. v. Forest Hill Gardens East Condominium Ass'n, Inc.,* 990 F.Supp.2d 144 (S.D. Fla. 2014); and *Coral Lakes Community Association v. Busey Bank, N.A.*, 30 So. 3d 579 (Fla. 2d DCA 2010). Accordingly, a thorough review of the rights of the association and lenders as described in the association's declaration is necessary to determine what a mortgagee may be obligated to pay.

16 Commercial Laundries, Inc. v. Golf Course Towers Associates, 568 So. 2d 501, 503 (Fla. 3d DCA 1990) (The trial court lacked jurisdiction to terminate a tenant's lease where the tenant was not a party to the foreclosure action).

17 Koster v. Sullivan, 160 So. 3d 385 (Fla. 2015).

18 Fla. Stat. §49.011(1).

19 Southeast and Associates, Inc. v. Fox Run Homeowners Association, Inc., 704 So. 2d 694 (Fla. 4th DCA 1998) (Trial court has a duty to determine whether plaintiff conducted adequate search, and the plaintiff has the burden of showing that it reasonably employed the knowledge at its command, made diligent inquiry, and exerted an honest and conscientious effort to acquire the information necessary to serve the defendant personally); *Godsell v. United Guaranty Residential Insurance,* 923 So. 2d 1209 (Fla. 5th DCA 2006) (Mortgagor made no diligent search and inquiry to located mortgagor in Canada and the judgment was void).

20 The Hague Convention applies in all cases where there is an occasion to transmit a judicial or extrajudicial document for service abroad. *Bevilacqua v. U.S. Bank, N.A.,* 194 So. 3d 461 (Fla. 3d DCA 2016).

21 Cannella v. Auto–Owners, Inc., 801 So. 2d 94, 97 (Fla. 2001).

22 Fla. Stat. §620.8307(1).

23 Fla. Stat. §620.1404-1405.

24 Fla. Stat. §605.0117.

25 Green Emerald Homes, LLC v. Nationstar Mortgage, LLC, 210 So. 3d 263 (Fla. 2d DCA 2017).

26 Fla. Stat. §689.071 and §689.073.

27 Genauer v. Downey & Downey, P.A., 190 So. 3d 131 (Fla. 4th DCA 2016).

28 U.S. Bank National Association v. Bevans, 138 So. 3d 1185 (Fla. 3d DCA 2014) (A recorded lis pendens serves as constructive notice of the claims asserted against the property in the pending litigation with respect to one acquiring an interest in the property after the lis pendens is filed).

29 Fla. Stat. §48.23.

30 Howard Cole & Co., Inc. v. Williams, 27 So. 2d 352 (Fla. 1946); *See also*, *Barnsdale Holdings, LLC v. PHH Mortg. Corp.,* 170 So. 3d 863, 864 (Fla. 3d DCA 2015) (The law is well settled that a person who acquires title after the recording of a lis pendens is a "stranger to the record" and must file a motion to intervene within 30 days of the lis pendens recording or be barred).

31 Ober v. Town of Lauderdale-by-the-sea, 218 So. 3d 952 (Fla. 4th DCA 2017) (When a foreclosure action is prosecuted to a judicial sale, that sale discharges all liens, whether recorded before the final judgment or after, if the lienor does not intervene in the action within 30 days after the recording of the notice of lis pendens).

32 Providence Square Association, Inc. v. Biancardi, 507 So. 2d 1366 (Fla. 1987); *Spear v. McDonald*, 67 So. 2d 630 (Fla. 1953).

33 Palm v. Taylor, 929 So. 2d 566 (Fla. 2d 2006).

34 Losner v. HSBC Bank USA, N.A., 190 So. 3d 160 (Fla. 4th DCA 2016) (No legal description attached to the mortgage, and the lender failed to prove by clear and convincing evidence what property was intended to be encumbered by the mortgage).

35 Regions Bank v. Deluca, 97 So. 3d 879 (Fla. 2d DCA 2012). For example, a mortgage which did not contain a legal description, but did include a property address, was found to be sufficient to establish a prima facie case for foreclosure. *Salam v. U.S. Bank, N.A., as Trustee,* 2017 WL 6506438 (Fla. 4th DCA Dec. 20, 2017).

36 Quinn Plumbing Co. v. New Miami Shores Corporation, 129 So. 690 (Fla. 1930) (The purchaser at such a foreclosure sale occupies the same position as the first mortgagee, having become equitably subrogated to his rights, which may be enforced by such purchaser against the junior mortgagee to the same extent as they could have been enforced in the original foreclosure, had the junior mortgagee been made a party thereto. The junior mortgagee may defend to the same extent as if the irregular foreclosure had not occurred).

37 Ross v. Wells Fargo Bank, 114 So. 3d 256 (Fla. 3d DCA 2013) (Final judgment did not provide that the trial court retained jurisdiction to bring a reforeclosure action, and thus post-judgment action to re-foreclose was improper).

Navigating The Murky Waters Of I.R.C. §199A

By John F. DeStefano and Nathan R. Brown,
Proskauer Rose LLP, Boca Raton, Florida

On December 22, 2017, President Trump signed into law the Tax Cuts and Jobs Act (the "Act").[1] News outlets described the "sweeping" tax bill as "the most far-reaching overhaul of the U.S. tax system in decades."[2] One prominent change wrought by the Act is the reduction of the corporate income tax rate, changing from graduated brackets with a maximum rate of 35 percent to a flat 21 percent rate, which provides a significant income tax savings to C corporation taxpayers.[3] In an effort to create some degree of parity in the tax treatment afforded to businesses operated as either sole proprietorships or "pass-through" entities (e.g., limited liability companies, partnerships, and S corporations) (a "§199A Business"), the Act introduced new §199A ("§199A"). Generally speaking, §199A provides taxpayers operating a §199A Business with a deduction (subject to limits) equal to 20 percent of the taxpayer's "qualifying income" from the §199A Business, thereby reducing the effective tax rate on such income to 29.6 percent.[4] Unlike application of the reduced corporate tax rate, which is rather straightforward, the application of §199A is more complex. Taxpayers and their advisors must navigate carefully its intricate set of rules to determine if, and to what extent, the §199A deduction is available. This article provides an overview of §199A and an introduction to its complex provisions.

This article provides an overview of §199A and an introduction to its complex provisions.

Qualifying for the Deduction

Beginning January 1, 2018, and continuing through December 31, 2025, certain taxpayers may deduct under §199A a portion of the income that they receive from business operations.[5] To be eligible for the §199A deduction, the taxpayer must have derived income from a "qualified trade or business" structured as a sole proprietorship, a single member limited liability company (treated as a "disregarded entity"), a partnership (whether structured as a state law partnership or a limited liability company), or an S corporation.

A "qualified trade or business" is any trade or business other than a "specified service trade or business" (a "Service Business") or the trade or business of being an employee.[6] A Service Business includes businesses performing services in the fields of health, law, accounting, actuarial sciences, performing arts, consulting, athletics, financial services, brokerage services, or, importantly, any other trade or business where the principal asset is the reputation or skill of one or more of its employees or owners.[7] In addition, a Service Business includes businesses that perform services consisting of investing, investment management, trading, or dealing in securities (as defined in §475(c)(2)), partnership interests, or commodities (as defined in §475(e)(2)).[8]

Despite the apparent blanket exclusion of a Service Business from the application of §199A, as discussed below, in certain circumstances a Service Business will be treated as a qualified trade or business for purposes of §199A.

Determining the Baseline Deduction Amount

The baseline deduction amount is generally equal to the lesser of, (1) the taxpayer's "combined qualified business income amount," and (2) 20 percent of the excess (if any) of the taxpayer's, (i) taxable income minus (ii) net capital gain.[9] A taxpayer's "combined qualified business income amount" is generally equal to 20 percent of the taxpayer's aggregate "qualified business income" ("QBI") with respect to each qualified trade or business.[10]

QBI is defined as the net amount of items of income, gain, deduction, and loss with respect to any qualified trade or business effectively connected with the U.S. (within the meaning of §864(c)).[11] QBI does not include, (1) dividends, (2) interest income not properly allocable to the trade or business, (3) short-term and long-term capital gains and losses, and (4) related items.[12] Additionally, (1) any guaranteed payment described in §707(c) paid to a partner for services rendered with respect to the trade or business, (2) §707(a) payments for services rendered with respect to the trade or business, and (3) any qualified real estate investment trust dividends, qualified cooperative dividends, or qualified publicly traded partnership income, are excluded from QBI.[13] Thus, QBI is akin to the income from business operations and not from traditionally passive sources such as financing or investing activities.

EXAMPLE 1: In 2018, Tom has $100,000 of QBI from a sole proprietorship and $20,000 of net capital gain. Tom has $110,000 of taxable income. Tom's baseline deduction amount under §199A would be $18,000, which is the lesser of, (1) $100,000 x 20% ($20,000), and (2) ($110,000 - $20,000) x 20% ($18,000)).

Limitations on the Baseline Deduction Amount

If taxable income exceeds a certain threshold amount, the baseline deduction amount may be reduced or disallowed entirely. The "Threshold Amount" is $315,000 for married taxpayers filing jointly and $157,500 for taxpayers filing separately.[14] If taxable income exceeds the Threshold Amount, the so-called "W-2 Wage Limitation" phases-in and starts to reduce the baseline deduction amount. *continued, page 20*

The "W-2 Wage Limitation" is equal to the greater of, (1) 50 percent of the taxpayer's share of "W-2 wages" with respect to the qualified trade or business, and (2) the sum of (i) 25 percent of the taxpayer's share of "W–2 wages" with respect to the qualified trade or business and (ii) 2.5 percent of the unadjusted basis immediately after acquisition of all "qualified property."[15] If the baseline deduction amount exceeds the W-2 Wage Limitation (such excess referred to as the "Excess Amount"), the baseline deduction amount is reduced by an amount which bears the same ratio to the Excess Amount as, (1) the amount by which the taxpayer's taxable income exceeds the Threshold Amount, bears to (2) $100,000 (for a married taxpayer filing jointly) or $50,000 (for a taxpayer filing separately).[16]

EXAMPLE 2: Assume Brian, who files a joint return, has $350,000 of taxable income, a baseline deduction amount of $30,000, and a W-2 Wage Limitation of $20,000 (the Excess Amount is $10,000). The baseline deduction amount would be reduced by $3,500 (i.e., $10,000 x (($350,000 - $315,000) / $100,000)). Accordingly, Brian's §199A deduction would be $26,500 (i.e., $30,000 - $3,500).

The W-2 Wage Limitation is fully phased-in for taxpayers with taxable income of $415,000 for married taxpayers filing jointly and $207,500 for taxpayers filing separately (the "Cutoff Amount").[17] Thus, for taxpayers with taxable income in excess of the Cutoff Amount, the §199A deduction is limited to the W-2 Wage Limitation.

The term "W-2 wages" is defined as all wages subject to withholding, elective deferrals and deferred compensation paid by the qualified trade or business with respect to employment of its employees.[18] W-2 wages does not include any amount not properly allocable to the QBI as a qualified item of deduction.[19]

"Qualified property" is defined as tangible personal property subject to depreciation under §167, (1) held by and available for use in the qualified trade or business at the close of the taxable year, (2) used at any point during the taxable year in the production of QBI and (3) the depreciable period for which has not ended before the close of the taxable year.[20] For these purposes, the "depreciable period" means the later of, (1) 10 years from the original placed in service date, or (2) the last day of the last full year in the applicable recovery period determined under §168.[21]

EXAMPLE 3: Jack, who files a joint income tax return, has $200,000 of QBI from a qualified trade or business, $50,000 of net capital gain, taxable income for the year of $200,000, and his share of W-2 wages paid by the business is $50,000. The business places into service depreciable equipment with a basis of $100,000. Because Jack's taxable income is less than the $315,000 Threshold Amount, the W-2 Wage Limitation does not apply. Accordingly, Jack's §199A deduction is equal to $30,000 (*i.e.*, the lesser of, (1) 20% of $200,000 ($40,000), and (2) 20% of $200,000 - $50,000 ($30,000)).

EXAMPLE 4: The facts are the same as Example 3, except that Jack's taxable income for the year is $350,000. Because Jack's taxable income exceeds the $315,000 Threshold Amount, the W-2 Wage Limitation applies. Jack's baseline deduction amount is $40,000 (i.e., the lesser of, (1) 20% of $200,000 ($40,000), and (2) 20% of $350,000 - $50,000 ($60,000)). The W-2 Wage Limitation is equal to $25,000 (*i.e.*, the greater of, (1) 50% of $50,000 ($25,000), and (2) the sum of, (i) 25% of $50,000 ($12,500), and (ii) 2.5% of $100,000 ($2,500)). The Excess Amount is $15,000 ($40,000 - $25,000). The baseline deduction amount is reduced by $5,250 (*i.e.*, $15,000 x (($350,000 - $315,000) / $100,000)). Accordingly, Jack's §199A deduction would be $34,750.

EXAMPLE 5: Bob, who is single, has $400,000 of QBI from a qualified trade or business, $150,000 of net capital gain, taxable income for the year of $450,000, and his share of W-2 wages paid by the business is $100,000. Because Jack's taxable income exceeds the $157,500 Threshold Amount, the W-2 Wage Limitation applies. Bob's baseline deduction amount is $60,000 (*i.e.*, the lesser of, (1) 20% of $400,000 ($80,000), and (2) 20% of $450,000 - $150,000 ($60,000)). The W-2 Wage Limitation is equal to $50,000 (*i.e.,* the greater, (1) 50% of $100,000 ($50,000), and (2) the sum of, (i) 25% of $100,000 ($25,000), and (ii) 2.5% of $0 ($0)). The Excess Amount is $10,000 ($60,000 - $50,000). Because Bob's taxable income exceeds the Cutoff Amount, Bob's §199A deduction is limited to the W-2 Wage Limitation of $50,000.

Specified Service Trade or Business Exclusion

A Service Business will not qualify as a qualified trade or business if a taxpayer has taxable income in excess of the Cutoff Amount. As a result, the taxpayer will not be entitled to a §199A deduction for any income derived from the Service Business. If, however, taxable income does not exceed the Cutoff Amount, the Service Business is treated as a qualified trade or business.[22] As a result, the taxpayer is entitled to a §199A deduction.

If taxable income does not exceed the Threshold Amount, the taxpayer's §199A deduction is calculated in the same manner as any other qualified trade or business.[23] If taxable income exceeds the Threshold Amount but is less than the Cutoff Amount, the baseline deduction amount is determined by taking into account only the "applicable percentage" of qualified items of income, gain, deduction or loss, W-2 wages and the unadjusted basis immediately after the acquisition of qualified property allocable to the Service Business.[24] The "applicable percentage" equals 100 percent, reduced (but not below zero) by the percentage equal to the ratio of, (1) the taxable income of the taxpayer in excess of the Threshold Amount, to (2) $100,000 for joint filers or $50,000 for individual filers.[25]

continued, page 21

EXAMPLE 6: Kathy, who files a joint return, has $200,000 of QBI, taxable income of $375,000, and her share of W-2 wages from the business is 100,000. Kathy's applicable percentage is 40 percent (100% - (($375,000 - $315,000) / $100,000). To determine the baseline deduction amount, Kathy takes into account 40 percent of QBI of $200,000 ($80,000) and 40% of taxable income of $375,000 ($150,000). The baseline deduction amount is equal to $16,000 (*i.e.*, the lesser of, (1) 20% of $80,000 ($16,000), and (2) 20% of $150,000 - $0 ($30,000)). For purposes of determining the W-2 Wage Limitation, Kathy takes into account 40 percent of W-2 wages of $100,000 ($40,000). The W-2 Wage Limitation is equal to $20,000 (*i.e.*, 50% of $40,000). Because the baseline deduction amount is less than the W-2 Wage Limitation, Kathy's §199A deduction is equal to $16,000.

Loss Carryover

Section 199A changes how losses generated by a qualified trade or business are treated. If the net amount of qualified income, gain, deduction, and loss with respect to the qualified trades or businesses is less than zero, such amount shall be treated as a loss from a qualified trade or business in the succeeding taxable year.[26] In other words, a loss generated by a qualified trade or business is carried forward to the next year, thereby reducing the §199A deduction in the following year.

EXAMPLE 7: Assume that in 2018, a taxpayer generates $40,000 of QBI from practicing law as a sole practitioner as well as a loss of $50,000 from a separate qualified trade or business, and that in 2019, the taxpayer generates $60,000 of QBI from her law practice and $20,000 of QBI from her other qualified trade or business. In 2018, a $10,000 loss is carried forward to 2019 and no §199A deduction is allowed. To calculate the deduction in 2019, the taxpayer reduces the §199A deduction amount (i.e., 20 percent multiplied $80,000) by 20 percent of the $10,000 carryover loss. Therefore, in 2019, the §199A deduction is $14,000 (*i.e.*, $16,000 minus $2,000).

Understatement Penalty

Taxpayers should be aware that the threshold amounts for an IRS imposed penalty are reduced in the context of §199A. If a §199A deduction is taken, a penalty may be imposed under §6662 if the income tax understatement exceeds the greater of (1) 5 percent of the tax required to be paid, or (2) $5,000.[27] The first threshold amount was reduced from 10 percent of the tax required to be paid.[28]

Conclusion

Section 199A may benefit owners of sole proprietorships, partnerships, limited liability companies, and S corporations by reducing to 29.6 percent the maximum effective income tax rate on income received from business operations (for those entitled to the full §199A deduction). Taxpayers and their advisors will need to navigate carefully the complex provisions of §199A to determine if and to what extent the §199A deduction may be available.



N. BROWN



J. STEFANO

Nathan R. Brown *and* ***John F. DeStefano*** *are attorneys in the Boca Raton office of Proskauer Rose LLP, where they are members of the firm's Private Client Service Department.*

Endnotes

1 Tax Cuts and Jobs Act, H.R. 1, 115th Cong. (1st Sess. 2017).

2 Louis Radnofsky, *Trump Signs Sweeping Tax Overhaul Into Law*, Wall St. J., Dec. 22, 2017, https://www.wsj.com/articles/trump-signs-sweeping-tax-overhaul-into-law-1513959753. John Wagner, *Trump Signs Sweeping Tax Bill Into Law*, Washington Post, Dec. 22, 2017, https://www.washingtonpost.com/news/post-politics/wp/2017/12/22/trump-signs-sweeping-tax-bill-into-law/?noredirect=on&utm_term=.a1be2b58a834. Sullivan and Tacket, *In Signing Sweeping Tax Bill, Trump Questions Whether He Is Getting Enough Credit*, New York Times, Dec. 22, 2017, https://www.nytimes.com/2017/12/22/us/politics/trump-tax-bill.html?rref=collection%2Fnewseventcollection%2Ftrump-tax-cut-plan&action=click&contentCollection=politics&region=stream&module=stream_unit&version=latest&contentPlacement=6&pgtype=collection.

3 See §11(b). All section references in this article shall be to sections of the Internal Revenue Code of 1986, as amended.

4 Assuming such income would otherwise be taxable at the maximum individual income tax rate of 37 percent.

5 The §199A deduction sunsets on December 31, 2025. *See* §199A(i).

6 Sections 199A(d)(1)(A), (B).

7 Section 199A(d)(2)(A); §1202(e)(3)(A). Notably, engineering and architecture businesses were specifically excluded from the definition of a "specified service trade or business," even though listed in §1202(e)(3)(A).

8 Section 199A(d)(2)(B).

9 Section 199A(a). The determination of the baseline deduction amount is more complex if the taxpayer has qualified REIT dividends, qualified Publicly Traded Partnership income, or qualified cooperative dividends in the taxable year. For purposes of this article, however, we have intentionally omitted discussion of these items to reduce complexity.

10 Section 199A(b)(1).

11 Sections 199A(c)(1), (3)(A).

12 Section 199A(c)(3)(B).

13 See §199A(c)(1), (3)(B).

14 Section 199A(e)(2)(A). The Threshold Amounts are adjusted for inflation for years after 2018.

15 See §199A(b)(1), (2).

16 Section 199A(b)(3)(B)(ii).

17 Section 199A(b)(3)(B)(i).

18 Section 199A(b)(4)(A); §§6051(a)(3), (8).

19 Section 199A(b)(4)(B).

20 See §199A(b)(6).

21 Section 199A(b)(6)(B).

22 Section 199A(d)(3).

23 See §199A(d)(3)(A).

24 See §199A(d)(3)(A)(ii).

25 See §199A(d)(3)(B).

26 Section 199A(c)(2).

27 Section 199A(h).

28 Id.

Arbitrator Control Of Counsel

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

You are in arbitration approximately 10 days before the scheduled final hearing and you receive one of two things:

1) motion to withdraw by opposing counsel;

2) notice of appearance by new counsel for the other side, either substituting in or appearing as co-counsel, where the new counsel has an ethical conflict with one of the arbitrators, (e.g., his or her firm represents one of the arbitrators.)

Either event creates a problem for your case. You do not want to postpone the final hearing. You do not want to have the case heard by an arbitrator whose firm is being represented by the new counsel. What do you do? If the case is administered (e.g., AAA, JAMS) do you complain to the arbitral administrator? Do you take it up with the arbitrators? Do you seek court intervention? Who has control/jurisdiction over this situation?

What does the arbitration agreement say?

Where the arbitration agreement gives that issue to the arbitrators, then the issue should be presented to the arbitrators. The agreement will likely not specifically address the control of counsel per se, but such authority may be found in a more general description of what is to be arbitrated. In one case, the agreement to arbitrate specified "all claims, disputes and other matters in question arising out of, or relating to, this Agreement or the breach thereof, shall be decided by arbitration."[1] The court held that the issue of disqualification of counsel constitutes an "other matter in question arising out of or relating to" the agreement.[2]

Where a law firm added an attorney to the firm, in which the attorney created an ethical conflict, the aggrieved party filed a motion in court seeking to have the offending firm disqualified. While the trial court complied, the appellate court reversed saying that this was an issue within the jurisdiction of the arbitrators, not the court.[3]

If the arbitration agreement incorporates the AAA Construction Industry Arbitration Rules or AAA Commercial Arbitration Rules, those rules provide that (i) the arbitrator shall interpret and apply the applicable rules insofar as they relate to the arbitrator's powers and duties;[4] and (ii) the arbitrator has the power to rule on his or her own jurisdiction.[5] Rule R-27 in the AAA Construction Industry Rules and Rule R-26 in the AAA Commercial Arbitration Rules say that any party may participate without representation (pro se), or by counsel or any other representative *of that party's choosing, unless such choice is prohibited by applicable law*. (emphasis added)

California appears to treat jurisdiction over counsel in arbitration as Florida does. In a California case, a party to an arbitration proceeding sought an order from the arbitrators disqualifying counsel for having seen confidential notes.[6] The arbitration panel (who ruled on the issue) declined to disqualify counsel on the basis that there was insufficient evidence to support disqualification. Later, the aggrieved party sued the lawyer and his firm for breach of fiduciary duty. The trial court dismissed the case based on the ruling of the arbitrators to not disqualify counsel. This dismissal was reversed on appeal. The arbitrators' decision on disqualification was not a complete bar to a claim for breach of loyalty.

In another California case, a motion to disqualify counsel was made and denied by the arbitration panel.[7] The aggrieved party filed a motion to vacate the award rendered later based on the arbitrators' failure to disqualify counsel. The motion to vacate was denied and the award upheld because the heavy burden of proof needed to support vacating the award, i.e., that the "erroneous granting or denying of a motion to disqualify *affected the outcome of the proceeding to the prejudice of the complaining party,*"[8] was lacking.

Arbitrator control of counsel may be different in jurisdictions where the seat of arbitration is not Florida.

In a New York case, a motion was filed in federal court to disqualify counsel. The court entertained the motion but did not grant it on the merits, stating:

> Scant authority has been found and none has been submitted by the parties on the issue of whether the disqualification of an attorney from an arbitration is a matter left to the arbitrators or to the Court…" The question whether the parties have submitted a particular dispute to arbitration, i.e., the "question of arbitrability," is "an issue for judicial determination [u] nless the parties clearly and unmistakably provide otherwise." *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002) (emphasis in the original) (quoting *AT & T Technologies, Inc. v. Communications Workers*, 475

continued, page 23

> U.S. 643, 649 (1986)). In *Howsam*, the Court observed that the "question of arbitrability" encompasses "the kind of narrow circumstance where contracting parties would likely have expected a court to have decided the gateway matter, where they are not likely to have thought that they had agreed that an arbitrator would do so, and, consequently, where reference of the gateway dispute to the court avoids the risk of forcing parties to arbitrate a matter that they may well not have agreed to arbitrate.[9]

In another New York case, the federal district court held (without much discussion about the issue) that the "Court had jurisdiction to entertain [the] original petition to appoint an arbitrator as well as the subsequent motion to reopen the case and disqualify counsel."[10]

In yet another New York case, the New York appellate court said:

> We have held matters of attorney discipline are beyond the jurisdiction of arbitrators (Matter of *Erdheim v. Selkowe*, 51 A.D.2d 705, 380 N.Y.S.2d 20). Issues of attorney disqualification similarly involve interpretation and application of the Code of Professional Responsibility and Disciplinary Rules, as well as the potential deprivation of counsel of the client's choosing ... and cannot be left to the determination of arbitrators selected by the parties themselves for their expertise in the particular industries engaged in.[11]

What must you show to disqualify counsel?

Generally, parties have the right to retain any counsel of their choosing within ethical and legal constraints.[12] It has been held that a court may only deny a withdrawal or substitution of counsel where "the requested withdrawal or substitution of counsel would interfere with the efficient, orderly and proper functioning of the court."[13] On the other hand, refusal to allow withdrawal of counsel has been upheld where it would impact the ordinary functioning of the court, such as on the eve of trial.[14]

In seeking to disqualify counsel it is the movant's burden to show a basis for disqualification.[15] This basis may be a conflict between one of the arbitrators and the lawyer.

In litigation, when seeking an order to disqualify counsel or deny a motion to withdraw in the eleventh hour, judges "enjoy broad discretion to determine who shall practice before them and to monitor the conduct of those who do."[16] In judicial cases it has been held that if the court concludes that the case has been pending for a long period of time when the new lawyer seeks to appear, this militates against permitting the new appearance in the absence of an overriding need for a particular lawyer.[17] In one case, a party challenged in court the denial of its motion for leave to associate additional counsel from yet another law firm for its defense team when grant of the motion to add new counsel would require the recusal of the trial judge who managed the litigation for fifteen months. The denial of adding new counsel was upheld.[18]

In the judicial setting, the Eleventh Circuit in *Robinson* and *BellSouth* identified the following objective factors to consider and balance in the disqualification analysis: (1) the potential for manipulation or impropriety; (2) the judicial time invested; (3) the court's docket; (4) the delay in reaching a decision; (5) the injury to the other party; (6) the fundamental right to counsel; and (7) the expense to the party that retained counsel.[19] These factors are not exclusive, nor are they all necessary. Their weight will vary with the circumstances.

Where the objective factors weigh in favor of disqualification, a party resisting such disqualification must show an overriding need for its choice of counsel, i.e., a need that would reflect upon its ability to have its case fairly presented.

The cases on disqualification in judicial proceedings provide guidance for arbitrators and counsel on how to address the issue in arbitration. Upon appearance of new counsel who has a conflict with an arbitrator, it may be appropriate to seek to remove the conflicted arbitrator through the arbitration provider. Rule R-2 in both the AAA Construction Industry Arbitration Rules or AAA Commercial Arbitration Rules provides that the AAA is authorized to administer the arbitration, but seeking replacement of the conflicted arbitrator may not be best or adequate where the attempt to add counsel with the conflict occurs close to the time for final hearing (with the result of removal of the conflicted arbitrator, appointment of a new arbitrator, and delay of the final hearing).

Arbitrator practice tip

One practice tip on this issue is for the arbitrator to discuss at the preliminary conference the issue of timely withdrawal if there is an issue with counsel getting paid. The order after the preliminary conference, or scheduling order, may provide that a motion to withdraw may not be made less than 30 days, or perhaps 60 days, prior to final hearing. An unexpected bankruptcy or health issue may be a basis to modify or take exception to that prohibition in the order, but such an order makes clear to counsel that they should address finances well before the final hearing. This may help to alleviate the situation where the withdrawal is based on nonpayment and is essentially a ploy to delay the proceedings. Of course, it is also possible for the arbitrator(s) to permit the withdrawal if it is made clear from the motion, or at the hearing on the motion, that withdrawal will be permitted only if the hearing is not postponed and the party losing counsel does not object.

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.*

continued, page 24


L. LEIBY

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.

Endnotes

1 Reuter Recycling of Florida, Inc. v. City of Hallandale, 993 So. 2d 1178 (Fla. 4th DCA 2008).

2 Id.

3 Id.

4 Rule R-8 in AAA Construction Industry Rules and Rule R-7 in AAA Commercial Arbitration Rules.

5 Rule R-9 in AAA Construction Industry Rules and Rule R-8 in AAA Commercial Arbitration Rules.

6 Benasra v. Mitchell Sillberberg & Knupp, 96 Cal. App. 4th 96 (Cal. App. 2002).

7 Pour Le Bebe, Inc. v. Guess? Inc., 5 Cal. Rptr. 3d 442, 465 (Cal. Ct. App. 2d 2003).

8 Id. (internal quotation marks omitted) (emphasis in original).

9 Employers Ins. Co. of Wausau v. Munich Reinsurance America, Inc., 2011 WL 1873123 at *1 (S.D. N.Y. May 16, 2011).

10 Northwestern Nat. Ins. Co. v. Insco, Ltd., 866 F.Supp.2d 214, 219 (S.D. N.Y. 2011).

11 Bidermann Industries Licensing, Inc. v. Avmar N.V., 570 N.Y.S.2d 33 (N.Y. App. Div. 1991) (internal citations omitted).

12 T*exas Catastrophe Property Ins. Ass'n v. Morales*, 975 F.2d 1178, 1181 (5th Cir. 1992) (quoting *McCuin v. Texas Power & Light Co.*, 714 F.2d 1255, 1262 (5th Cir. 1983)).

13 Atlantic Commercial Development Corp. v. Nortek, Inc., 403 So. 2d 624, 625 (Fla. 5th DCA 1981).

14 Id.; *Brooks v. State*, 980 So. 2d 1095 (Fla. 4th DCA 2008); *Securities and Exchange Commission v. International Scanning Devices, Inc.,* 415 F.Supp. 3 (W.D. N.Y. 1974); *Vachula v. General Elec. Capital Corp.,* 199 F.R.D. 454 (D. Conn. 2000).

15 See *A.J. by L.B. v. Kierst*, 56 F.3d 849, 859 (8th Cir. 1995); *In re: RFC and Rescap Liquidating Trust Litigation,* 2016 WL 7177706 (D. Minn. Dec. 8, 2016).

16 United States v. Dinitz, 538 F.2d 1214, 1219 (5th Cir. 1976), cert. denied, 429 U.S. 1104, 97 S.Ct. 1133, 51 L.Ed.2d 556 (1977); *Robinson v. Boeing Co.*, 79 F.3d 1053, 1055 (11th Cir. 1996).

17 Robinson, 79 F.3d at 1054-55.

18 Id. See also In re BellSouth Corp., 334 F.3d 941, 962-65 (11th Cir. 2003); In re F.C.C., 208 F.3d 137, 139-40 (2d Cir. 2000); *McCuin v. Tex. Power & Light Co.,* 714 F.2d 1255, 1257 (5th Cir. 1983).

19 See Robinson, 79 F.3d at 1055; *In re BellSouth Corp.,* 334 F.3d at 962-66.

RPPTL General Sponsors

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

SPONSOR	CONTACT	PHONE
Attorneys' Title Fund Services, LLC	Melissa Murphy	800-336-3863
Fidelity National Title Group	Karla Staker	407-618-2935
First American Title Insurance Co.	Alan McCall/Len Prescott	407-691-5295/305-908-6252
J.P. Morgan Chase	Carlos Batlle/Alyssa Feder	305-579-9485
Management Planning, Inc.	Roy Meyers	609-924-4200
Old Republic National Title	Jim Russick	813-228-0555
Phillips	Jennifer Jones	212-940-1272
Stewart Title Guaranty Company	Laura Licastro	813-804-4715
Stout	Garry Marshall	713-225-9580
The Florida Bar Foundation	Bruce Blackwell	407-960-7000
Wells Fargo Private Bank	Mark Middlebrook/Johnathan Butler/Alex Hamrick	813-225-6544
Westcor Land Title Insurance Company	Renee Becker Bourbeau	561-631-0731
WFG National Title Insurance Company	Joe Tschida	407-708-0408

A Comparative Study Of The "Joint Spousal LLC"

By Anthony P. Guettler, Esq.,
Gould Cooksey Fennell, Vero Beach, Florida

Limited liability companies ("LLCs") are regularly used by senior family members to carry out their estate planning goals. An LLC can be used as a vehicle to manage the family's wealth, protect assets, and transfer economic ownership to younger generations while allowing the senior generation to retain control. An LLC allows for a custom, flexible plan for asset management, business succession, and protection of family wealth. Estate planners most commonly associate LLCs with business succession planning, asset protection and tax efficient wealth transfer from senior to lower generations. However, LLCs can also accomplish several important estate planning objectives for married couples.

For example, many couples desire to establish one or more irrevocable trusts for the surviving spouse ("Trust for Surviving Spouse") to protect the trust assets from creditor claims and divorce from a subsequent spouse, and to utilize the deceased spouse's estate and generation-skipping transfer tax exemptions. However, if the couple's primary financial assets are owned jointly with rights of survivorship ("JWROS"), this will require dividing assets that have traditionally been jointly owned (unless the couple is comfortable with disclaimer planning). In some cases, spouses will be reluctant to divide and separate their primary assets. An LLC can be used to bridge the gap between separate ownership and joint control. With an LLC, the couple can maintain joint management and control over all assets, and each spouse's interest in the LLC can be transferred under his or her estate plan to a Trust for Surviving Spouse. The same approach can also be useful in situations where one spouse owns the majority of the couple's primary financial assets. An LLC can be used to shift value to the other spouse while allowing the transferring spouse to retain control.

The purpose of this article is to examine how a limited liability company established by spouses ("Joint Spousal LLC") could accomplish several important estate planning goals for married couples living in non-community property states that desire joint management and control, asset protection and restrictions on transfers. This article compares the Joint Spousal LLC to property owned JWROS, and planning with joint revocable trusts in non-community property states ("Joint Trust").

Funding Separate Revocable Trusts

The Joint Spousal LLC could be funded with the couple's primary financial assets, and the LLC's equity could be divided between the couple in any percentage they deem appropriate. For purposes of this article, we will assume equal ownership by each spouse. With this structure, each spouse's one-half interest in the Joint Spousal LLC would pass according to the terms of his or her separate revocable trust. For married couples that desire to establish a Trust for Surviving Spouse upon the death of the first spouse (and do not want to rely on disclaimer planning), the ability to fund each revocable trust with a one-half interest in the Joint Spousal LLC is an important benefit over assets owned JWROS. It should be noted that the same result could be accomplished by simply dividing the assets and transferring one-half to each spouse's separate revocable trust. However, some clients may prefer a structure that requires joint management of all assets and may be uncomfortable relinquishing control as to a portion of the combined wealth.

Asset Management

The Joint Spousal LLC could be a manager-managed limited liability company with both spouses serving as managers. The operating agreement may set forth the provisions governing the management of assets owned by the Joint Spousal LLC and can require that significant distributions and other major decisions be approved by both spouses. The ability to draft provisions that govern how the assets will be managed and distributed is an important benefit of the Joint Spousal LLC. With most jointly owned financial accounts, each spouse has the unilateral right to withdraw the funds at any time, and there is no ability to modify bank rules governing management and distributions. With separate ownership, each spouse will have control over the assets in his or her revocable trust (which may not be consistent with the couple's estate planning goals).

In the event of a deadlock, the operating agreement may provide for a mechanism to resolve the disagreement. For example, an advisory board consisting of one or more family members could be appointed to serve as the tiebreaker. The ability to determine how disputes will be resolved is an advantage over jointly owned property.

continued, page 26

The Joint Spousal LLC provides significant flexibility in planning for disability and death. The operating agreement may set forth the provisions governing the management and distribution of assets upon disability of a spouse and during the lifetime of the surviving spouse. The operating agreement may require that an independent party serve as co-manager with the remaining spouse after the death or disability of the other spouse. In comparison, analogous protective planning can be achieved by dividing assets between the married couple's separate trusts and incorporating appropriate protective provisions for each spouse's death or disability, however, such planning would not restrict the surviving or non-disabled spouse's unilateral control over the assets in his or her trust. Additionally, analogous protective planning is not possible with jointly owned property.

Although the Joint Trust is also a good option from an asset management perspective (especially in the event of death or disability), the Joint Trust implicates a number of tax issues[1] that can be avoided with the Joint Spousal LLC.

Asset Protection

With a multi-member limited liability company, a creditor seeking to enforce a judgement against a member owning an interest in the LLC would be limited to obtaining a charging order against that member's interest.[2] Although charging order protection is beneficial, greater protection can be achieved by a married couple during their joint lifetimes through joint ownership of assets as tenants by the entireties ("TBE"). TBE property may not be used to satisfy either spouse's individual debts (but may be used to satisfy a joint liability).[3] The primary disadvantage of relying on the creditor protections of TBE property is that after the first spouse's death, the assets pass automatically to the surviving spouse and could then be used to satisfy the debts and liabilities of the surviving spouse.

Upon the first spouse's death, the interest in the Joint Spousal LLC owned by such spouse could be transferred to a Trust for Surviving Spouse. With property owned JWROS, the interest owned by the first spouse to die passes directly to the surviving spouse (not in trust). Although it is possible to fund a Trust for Surviving Spouse upon the death of the first spouse to die with property owned JWROS, this would require a disclaimer by the surviving spouse. This disclaimer planning may subject the assets to creditor claims.

The asset protection features of a Joint Trust depend upon the terms of the trust. There can be significant asset protection benefits if the Joint Trust can be structured as TBE property.[4] However, if the Joint Trust is structured so that all assets may become subject to the creditor claims of just one spouse, the couple would be better off maintaining separate ownership.

Transfer Restrictions

If protecting assets from passing outside the family is an important goal, the Joint Spousal LLC can be a useful tool. The operating agreement for the Joint Spousal LLC may be drafted to restrict each spouse's ability to transfer his or her membership interest to persons outside the family. In addition, the operating agreement can require transfer restrictions to remain in place during the lifetime of the surviving spouse. The ability to limit transfers by the surviving spouse is a protection often sought by a married couple and can help keep the assets of the Joint Spousal LLC within the initial class of beneficiaries. Similar protections and limitations are possible with a Joint Trust; however, the estate and gift tax issues associated with Joint Trusts may be a significant hurdle.[5]

Income Tax and Tax Basis

In establishing the Joint Spousal LLC, the couple should elect federal income tax treatment as a partnership. In general, no gain or loss will be triggered in funding a Joint Spousal LLC that elects to be treated as a partnership for federal income tax purposes.[6] One exception to this general rule is for a partnership classified as an investment company under I.R.C. §721(b). When contributing appreciated securities to a Joint Spousal LLC, couples should avoid having the Joint Spousal LLC classified as an investment company.

Upon the first spouse's death, the interest in the Joint Spousal LLC owned by such spouse will be included in his or her gross estate,[7] and the basis will be adjusted to its fair market value as of the date of the first spouse to die.[8] The fair market value of the interest in the Joint Spousal LLC owned by the first spouse to die may be subject to discounts for lack of control and lack of marketability under the principles of Rev. Rul. 59-60.[9] If valuation discounts apply, the resulting lower valuation may reduce (or potentially eliminate) any benefits from a step-up in basis. Additionally, the Joint Spousal LLC could make a "754 election" allowing the partnership to increase the inside bases of partnership assets pursuant to Internal Revenue Code §743(b). From a basis adjustment planning perspective, the Joint Spousal LLC structure has significant drawbacks when compared to property owned JWROS. In the case of property owned JWROS by a married couple in a non-community property state, one-half of the joint assets will be included in the estate of the first spouse to die and receive a basis adjustment.[10]

Upon the death of the surviving spouse, the surviving spouse's interest in the Joint Spousal LLC will be included in his or her gross estate, and the basis in such interest will be adjusted to fair market value as of the date of such spouse's death.[11] Additionally, the Joint Spousal LLC could make another 754 election as well. However, as mentioned above, it is likely that valuation discounts will apply, and the step-up in basis will be reduced as a result of the lower valuation. With jointly owned property, the surviving spouse would own all of the assets at the time of his or her death, and the basis of all assets included in such spouse's taxable estate would be adjusted to

continued, page 27

Joint Spousal LLC Comparison Chart

	JOINT SPOUSAL LLC	JOINT TRUST	TBE PROPERTY	SEPARATE REVOCABLE TRUSTS
Asset Protection	This can provide charging order protection against creditor claims (even joint creditors).	TBE status may be possible. If TBE status is not achieved, all assets may be subject to creditors of one spouse. There is no protection against joint creditors.	Protects assets from creditors against one spouse while both spouses are living. There is no protection against joint creditors.	Assets owned by one spouse's revocable trust will not be subject to creditors of the other spouse. There is no protection against joint creditors.
Asset Management	All assets can be managed and controlled consistent with estate planning goals.	All assets can be managed and controlled consistent with estate planning goals; however, there are gift and estate tax concerns and basis uncertainty.	Both spouses have equal authority and control. One spouse may be able to unilaterally exercise his or her rights over the property. Does not provide for a mechanism to resolve disputes.	Each spouse has full control and authority over the assets owned by his or her revocable trust.
Transfer Restrictions	Yes, a Joint Spousal LLC can limit transfers outside of the family.	Yes, a Joint Trust can limit transfers outside of the family; however, there are gift and estate tax concerns and basis uncertainty.	No, both spouses have equal access to TBE property.	No, each spouse has full control over the assets owned by his or her revocable trust.
Step-Up in Basis	LLC interest included in taxable estate of deceased spouse will be adjusted to fair market value; however, valuation discounts may erode income tax benefits.	Depends on trust terms. Up to one-half of the assets may be adjusted to fair market value upon the death of the first spouse to die (even if all assets are included in such spouse's taxable estate).	One-half of the assets will be adjusted to fair market value upon the death of the first spouse to die. All assets will be adjusted to fair market value upon the death of the surviving spouse.	Assets owned by the revocable trust of the deceased spouse will be adjusted to fair market value.
Estate Tax	LLC interest owned by the first spouse to die will be included in his or her taxable estate. Valuation discounts may be used to reduce estate taxes.	Depends on trust terms. All assets may be included in the taxable estate of the first spouse to die if such spouse holds a GPOA over the entire Joint Trust.	One-half of the assets will be included in the taxable estate of the first spouse to die.	Assets owned by the revocable trust of the deceased spouse will be included in his or her taxable estate.
Gift Tax	There are no gift tax concerns in funding the Joint Spousal LLC.	Depends on trust terms. May result in a taxable gift at the time of funding, and by the surviving spouse on the death of the first spouse to die.	There are no gift tax concerns in establishing TBE property.	There are no gift tax concerns in funding the revocable trusts.

continued, page 28

fair market value (with no valuation discounts applicable).[12] The ability to receive a step-up in basis on all assets owned by the surviving spouse at the time of his or her death is a significant benefit if the assets have appreciated in value.

With a Joint Trust in a non-community property state, it can be difficult to determine what portion of the assets will receive a step-up in basis at death. For example, unless the first spouse to die holds a general power of appointment ("GPOA") over the entire Joint Trust at his or her death, it may be difficult to determine what portion of the assets owned by the Joint Trust will be included in the taxable estate of the first spouse to die; as result, it can be difficult to determine what portion of the assets will receive a step-up in basis.[13] Further, even if the first spouse to die holds a GPOA over the entire Joint Trust at his or her death, it may not be possible to achieve a full step-up in basis on all assets owned by the Joint Trust.[14]

Estate Tax

On December 22, 2017 the Tax Cuts and Jobs Act was signed into law. The new tax law essentially doubles the previous federal estate, gift and GST tax exemption levels. Under the new law, exemption levels will be increased to approximately $11,180,000 per person ($22,360,000 combined for a married couple).[15] It is important to keep in mind that the increased exemption levels are set to expire and be reduced by half on January 1, 2026.

For married couples that may still face an estate tax, the Joint Spousal LLC can have advantages over jointly owned property. One advantage is that each spouse's separately owned interest in the Joint Spousal LLC may be used to fund a credit shelter trust, designed to utilize the deceased spouse's generation-skipping transfer tax exemption. Note, it is also possible to fund a credit shelter trust with property owned JWROS; however, this would require a qualified disclaimer by the surviving spouse, which would not be possible if the surviving spouse accepts "the interest or any of its benefits" before making the disclaimer.[16] With the advent of portability, it is not as critical to fund a credit shelter trust - at least not from a federal estate tax perspective. However, before relying on portability, there are a number of factors to consider including GST tax planning, the last deceased spouse rule and state death taxes.[17]

Another advantage of the Joint Spousal LLC is that the value of the interest being transferred may be subject to discounts for lack of marketability and lack of control.[18] One way to reduce estate taxes is to transfer a non-controlling interest in the Joint Spousal LLC to a trust that is not included in the transferring spouse's taxable estate. As an example, a minority interest in the Joint Spousal LLC could be transferred to an irrevocable spousal access trust. It should be noted that there are estate tax planning opportunities for certain types of joint property as well. For example, if a married couple owned a tract of land as tenants in common, the value of each spouse's separate fractional interest in the property may be subject to valuation discounts.[19]

With a Joint Trust, it is possible that only half of the assets will be included in the taxable estate of the first spouse to die; however, depending on the terms of the trust, the IRS may take the position that the entire value of the Joint Trust will be included in the taxable estate of the first spouse to die.[20] In addition, if the Joint Trust seeks to establish a credit shelter trust for the surviving spouse, careful drafting is required to ensure that the credit shelter trust is not included in the taxable estate of the surviving spouse.[21] A possible solution to protect against the credit shelter trust being included in the surviving spouse's taxable estate is to grant the first spouse to die a GPOA over the entire Joint Trust at his or her death.[22] A GPOA will ensure that all assets are included in the taxable estate of the first spouse to die and, as a result, the first spouse to die is treated as the transferor for transfer tax purposes.[23]

Gift Tax

In general, there are no gift tax consequences upon the creation or funding of the Joint Spousal LLC if the Joint Spousal LLC is owned exclusively by a married couple (or their respective revocable trusts).[24] Similarly, there are generally no gift tax issues in establishing jointly owned property between a married couple.[25] One important exception to this general rule will be in cases where the transferee spouse is not a U.S. citizen.[26] If the transferee spouse is not a U.S. citizen, the unlimited gift tax marital deduction is not applicable, but the annual exclusion limit is increased to $100,000 adjusted for inflation (which was equal to $149,000 in 2017).[27]

Careful drafting is required to avoid taxable gifts at the time of funding and upon the death of the first spouse with a Joint Trust. In order to avoid making a taxable gift at the time of funding, each spouse could retain the unilateral right to terminate the Joint Trust and receive the property he or she originally contributed to the Joint Trust (including property into which the original property was converted).[28] If the Joint Trust becomes irrevocable upon the death of the first spouse, the Joint Trust will need to grant the surviving spouse sufficient power to direct or invade the principal of the Joint Trust to avoid a completed gift by the surviving spouse to the remainder beneficiaries.[29]

Conclusion

The Joint Spousal LLC applies the principles traditionally used by senior generations in planning with LLCs for business succession to estate planning for married couples. The Joint LLC is most useful in situations where a married couple desires joint asset management, wants to limit transfers outside the family, is facing the possibility of an estate tax and has an estate plan that contemplates the establishment of a Trust for Surviving Spouse without disclaimers. It is important to note that although the Joint Spousal LLC can be useful, it may add complexity and expense to the estate plan and may not be

continued, page 29

appropriate in situations where simplification is an important goal.


A. GUETTLER

Anthony P. Guettler *is the primary author of this article and gratefully acknowledges the contributions made in preparing this article by Todd W. Fennell. Anthony is a shareholder with the law firm of Gould Cooksey Fennell and a member of the firm's Estate Planning and Tax Group. Anthony is board certified as a specialist in Wills, Trust and Estates, has an LL.M degree in taxation from the University of Florida and focuses on estate planning, estate administration and related areas of taxation. He assists clients in developing and implementing strategies to meet their estate planning goals, minimize tax and protect assets for future generations.*

Endnotes

1 Thomson Reuters, *Checklist of tax dangers in use of joint revocable living trusts*, 33,207 Planning Articles, Thomson Reuters/Tax & Accounting (2018).

2 §605.0503 Fla. Stat. (2014).

3 *Beal Bank, SSB v. Almand & Associates*, 780 So.2d 45 (Fla. 2001); *First Nat'l Bank v. Hector Supply Co.*, 254 So.2d 777 (Fla. 1971).

4 Craig Harrison, *Trusts: TBE or Not TBE*, 87 Fla. Bar J. 30 (2013) (discussing the creation of a tenancy by the entirety trust).

5 Id. at 1.

6 I.R.C. §721(a), (b).

7 I.R.C. §2031(a).

8 I.R.C. §1014.

9 Rev. Rul. 59-60, 1959-1 CB 237.

10 I.R.C. §2040, Id. at 8.

11 Id. at 7-8.

12 Id. at 7-8.

13 I.R.C. §2041, Thomson Reuters, *How much of trust is included in estate of first dying spouse-grantor?*, 33,210 Planning Articles, Thomson Reuters/Tax & Accounting (2018).

14 P.L.R. 9308002, 11/16/1992, IRC Sec(s) 1014.

15 Howard Zaritsky, *Tax Cuts and Jobs Act Does Not Quite Double the Applicable Exclusion Amount and GST Exemption for 2018*, 17 Howard Zartisky's Estate Planning Update, 22 (1/15/18).

16 I.R.C. 2518.

17 Lester Law and Andrew T. Huber, *Estate Planning with Portability in Mind, Part I*, 86 Fla. Bar J. 29 (March 2012), Lester Law and Andrew T. Huber, *Estate Planning with Portability in Mind, Part II*, 86 Fla. Bar J. 25 (April 2012).

18 Id. at 9.

19 Katherine A. Gilbert and C. Ryan Stewart, *Valuing Real Estate Fractional Ownership*, 92 Intangible Asset Valuation Insights (Summer 2010).

20 Thomson Reuters, *How much of trust is included in estate of first dying spouse-grantor?*, 33,210 Planning Articles, Thomson Reuters/Tax & Accounting (2018).

21 Thomson Reuters, *Use of a joint revocable living trust can hinder estate tax planning with credit shelter trust*, 33,212 Planning Articles, Thompson Reuters/Tax & Accounting (2018).

22 Louis S. Harrison, *Joint Trusts in Separate Property States: "Just Say 'Yes' . . . Sometimes"*. https://www.flprobatelitigation.com/wpcontent/uploads/sites/206/2013/08/Joint_Trusts_in_Separate_Property_States.pdf.

23 Id. at 20.

24 I.R.C. 2523.

25 Id at 24.

26 I.R.C. 2523(i).

27 Thomson Reuters, *Annual exclusion amount for gifts to noncitizen spouse*, 48,204 Estate Planning Analysis, Thomson Reuters/Tax & Accounting (2018).

28 Thomson Reuters, *Funding a joint revocable living trust may give rise to immediate taxable gifts*, 33,208 Planning Articles, Thomson Reuters/Tax & Accounting (2018).

29 Thomson Reuters, *Death of first spouse may result in taxable gift by surviving spouse*, 33,209 Planning Articles, Thomson Reuters/Tax & Accounting (2018).

Your Clients Demand Financial Strength

...and there's strength in numbers.

FIDELITY NATIONAL TITLE GROUP®

Florida Agency

Fidelity National Title Group Inc., which is a wholly-owned subsidiary of Fidelity National Financial (NYSE: FNF).

*Source ALTA 12 mos. 2016

**"FORTUNE" and "FORTUNE 500" are registered trademarks of Time Inc. and are used under license. From FORTUNE Magazine, June 15, 2017 ©2017 Time Inc. Used under license. FORTUNE and Time Inc. are not affiliated with, and do not endorse the products or services of Fidelity National Financial.

1 We're #1 in overall national market share.*

293 We're proudly ranked 293 on the FORTUNE 500® list of America's largest companies. You can assure your clients that you represent the highest ranked company in the title insurance industry.**

1.48 billion dollars in claims reserves. Simply put, we can back up our policies.

2 SOC2 that is...and we're compliant. This is a measure of the security of our data handling processes. In plainspeak, your data is safe with us.

Discover how you can get the financial strength your clients deserve. Visit us at www.fntgflorida.com

©2017 Fidelity National Title Group

PACE Financing Traps For The Unwary

By Nicole M. Villarroel, Esq.,
Hackleman, Olive & Judd, P.A., Fort Lauderdale, Florida

PACE Financing - What is it?

PACE is short for Property Assessed Clean Energy. PACE loans provide financing from the local municipality or county government, often through a third-party provider, to private individuals for qualified energy efficient improvements to residential and commercial properties. Florida passed PACE enabling legislation in 2010 and created Florida's PACE Act,[1] stating as the public policy behind the legislation that:

> …All improved properties not protected from wind damage by wind resistance qualifying improvements contribute to the burden affecting all improved property resulting from potential wind damage. Improved property that has been retrofitted with wind resistance qualifying improvements receives the special benefit of reducing the property's burden from potential wind damage. Further, the installation and operation of qualifying improvements not only benefit the affected properties for which the improvements are made, but also assist in fulfilling the goals of the state's energy and hurricane mitigation policies. In order to make qualifying improvements more affordable and assist property owners who wish to undertake such improvements, the Legislature finds that there is a compelling state interest in enabling property owners to voluntarily finance such improvements with local government assistance.[2]

PACE loans are repaid through a non-ad valorem tax assessment added to the subject property's annual tax bill. The property owner contracts directly with a qualified contractor to make the improvements, and the local government finances the cost of the qualifying improvements through a loan to the property owner, funded with a bond. PACE liens have super priority over other liens since they have equal priority to county property taxes. PACE has made its way to Florida and you should expect to see more property owners take advantage of the financing option in the wake of Hurricane Irma.

Many companies that offer PACE financing advertise the program as an "easy, more affordable" way to finance eligible improvements to your home or business. However, this new program creates several challenges throughout the real estate closing process. As more and more property owners in Florida are financing eligible improvements to their properties, Florida real estate attorneys and title agents need to be aware of the possible pitfalls in clearing title and protecting the buyers of these properties along the way.

It is here – Now what?

Sell! Many property owners are taking advantage of the increase in value to their homes after they complete an eligible improvement. However, real estate attorneys and title agents need to be aware of this financing option as it creates a lien against the subject property and adds a non-ad valorem assessment to the annual tax bill.

Pursuant to Fla. Stat. §163.08(14), sellers are required to disclose, in writing, the existence of a levied PACE non-ad valorem assessment prior to the execution of a contract by a buyer for sale and purchase of the subject property.[3] However, few sellers are aware of this requirement and most sellers fail to provide any notice. Further, the PACE financing option is so novel that many realtors are unaware that the disclosure is required.

PACE assessments may be assumed by the buyer, and need not be paid off, if all the parties agree to such terms. In that case, the buyer would take over the payments as part of the annual tax bill. However, if the buyer is obtaining a loan for the purchase of the property, many institutional lenders, including but not limited to Fannie Mae and Freddie Mac, will require the PACE lien to be paid in full prior to closing.

How do I payoff a PACE lien?

As set forth in Florida's PACE Act, notice of a PACE financing assessment must be recorded in the Public Records of the County where the subject property is located within five (5) days after execution of a PACE financing agreement.[4] As such, a real estate attorney or title agent issuing an owner's or mortgagee's title insurance policy will find in the title commitment a requirement to obtain and record a release of the PACE lien in the Public Records. You can request a payoff quote from the third party that processes the payoff quotes for the various companies that offer the PACE financing option.

Attorneys and Title Agents Beware

Upon receipt of the payoff quote, you must carefully review the quote and inquire with the tax collector's office to confirm that there is no pending assessment for the current tax year. There is often a timing problem with the notice of the financing by PACE vendors to the County tax collector. If the seller enters into the PACE financing agreement and sells the subject property within the same taxable year, the first year's assessment will not be provided by the tax collector's office until the tax bill is released in November. This poses a problem for attorneys and title agents issuing title insurance as there is

continued, page 31

no way to determine what the first year's tax assessment will be without reviewing a full copy of the financing agreement. Agents cannot rely solely on the payoff quote as it is not necessarily the full payoff figure.

If you see a PACE lien encumbering the subject property, request and review a copy of the seller's financing agreement prior to closing. The vendors are still working on clarifying and fine tuning their payoff statements, but it is up to you to investigate so that you are not caught short and your buyer does not unknowingly end up with a lien or increased assessment against the property.

Endnotes

1 Fla. Stat. §163.08.

2 Fla. Stat. §163.08(1)(b).

3 Fla. Stat. §163.08(14) provides the specific form of the required disclosure, and requires that it be set forth in the contract or in a separate writing.

4 Fla. Stat. §163.08(8).

NEED FORMS? We have them!

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

Download ORDER FORMS from our website to obtain those FLSSI forms that are so useful in your practice:

www.flssi.org

Florida Lawyers Support Services, Inc.

P.O. Box 568157
Orlando, FL 32856-8157
(407) 515-1501 • Fax (407) 515-1504

OLD REPUBLIC TITLE

COMMERCIAL REAL ESTATE EXPERIENCE

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



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

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

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

Carolyn Broadwater, Esq.
cbroadwater@oldrepublictitle.com
Susan Seaford, Esq.
sseaford@oldrepublictitle.com
E. Ashley McRae, Esq.
emcrae@oldrepublictitle.com
Carter Jones
carterj@oldrepublictitle.com
James "Jim" Russick, Esq.
jrussick@oldrepublictitle.com
Eric Tomchin, Esq.
etomchin@oldrepublictitle.com
Raymond O'Connor
roconnor@oldrepublictitle.com
Greg Winters
gwinters@oldrepublictitle.com

800.342.5957 oldrepublictitle.com/fl

11/2017 | © Old Republic Title | Old Republic Title's underwriters are Old Republic National Title Insurance Company and American Guaranty Title Insurance Company

SECTION SPOTLIGHT

RPPTL Fellowship: ActionLine Interview With Former Section Fellow, Stacy Rubel

By Jeffrey A. Baskies, Esq., Katz Baskies & Wolf PLLC, Boca Raton, Florida
and Stacy Rubel, The Virgil Law Firm, Coral Gables, Florida

Q: Jeff Baskies (editor): Stacy, I'm sure many readers think it is great that the RPPTL Section has fellows, but they may have no real idea what a fellow is and does. Can you tell us what the fellowship program is about?

A: Stacy Rubel (former fellow): The purpose of the fellowship program is to attract and retain young lawyers to the Section.

Q: But what does a fellow do?

A: A fellow attends Section meetings, including the Executive Council meetings, and commits to substantive projects. Each fellow is also assigned a substantive mentor and social mentor to help the fellow integrate into the Section and find an appropriate project.

Q: What were your mentors like?

A: I personally had wonderful mentors who I would speak with often to obtain advice both relating to the Section and the practice of law. I also asked my mentors to introduce me to many other Section members, which helped me tremendously.

Q: About how much time would you say it took you to be an effective fellow?

A: It varied based on my projects. For example, taking the minutes at a committee meeting was only a few hours, while work for a subcommittee can sometimes be very time consuming. I once researched similar statutes for all the other states, so that was a busy time. That said, I definitely believe the more you put into it, the more you get out of it.

Q: It sounds like a fellowship can be time consuming, so was the fellowship worth it?

A: Absolutely. The stipend that comes with the fellowship to help offset costs is just the icing on the cake. The real benefits are the opportunities I had and the people I met. I try to socialize with other fellows, and we are invited to the Section social events, so I have gone bowling, to the zoo, and even on a scavenger hunt through Key West with my dog. At one time, I think my yorkie, Bailey, was being called the unofficial RPPTL mascot.

Q: Since you became a Section fellow, what sorts of experiences have you had?

A: Among other endeavors, I have become a member of all the substantive committees I am interested in. Plus, I am chairing or involved in sub-committees for all my substantive committees. In addition, it is expected that fellows will write for the section in The Florida Bar Journal and ActionLine. In fact, I co-authored a publication in The Florida Bar Journal, and have had several articles/stories published in ActionLine.

Q: Can you share your point of view on the Section fellowship and/or share some of your personal experiences as a Section fellow?

A: I saw the fellowship as a VIP all-access pass to committee meetings and Section events. I could point to my blue fellow sticker under my nametag, and everyone always welcomed me with open arms, gave me advice, and allowed me to participate in various projects. Yes, a few people thought I was a student and asked me which law school I was visiting from, but that gave me a chance to brag about my Gators, which I saw as an added benefit.

Q: Is there more to making the most of the fellowship opportunity?

A: As a trusts and estates litigator, I am not shy. I definitely took the initiative to become so involved.

Q: Do you have any advice or suggestions for current or future section fellows?

A: My advice for current fellows and other young lawyers: find a topic or project you are interested in and express your interest in helping in any way needed. And be patient. I took minutes for a year before I was added to one of my committees.

continued, page 33

Q: Do you have any suggestions for other RPPTL Section members on how to optimize the fellows?

A: My advice for other Executive Committee members: be friendly and approachable. If you need help with a project and do not know the fellows, reach out to the committee chair to connect you to one. The leaders of the fellows section are always looking for ways to connect and engage the fellows.

Q: What comes next for you now that you are a "former fellow?"

A: As with all other members active in the Section, the Executive Committee takes notice of fellows and makes efforts to find them a place on the Executive Council. For me, in addition to becoming an At-Large-Member, I was added as a Vice-Chair to the Ad Hoc Guardianship Law Revision Committee. More recently, I was added as a Vice-Chair of the Guardianship, Power of Attorney and Advance Directives Committee. In two years, I went from sitting in the back of the room watching, in admiration, those working on fixes to Florida Statutes, to assisting in revising the entire guardianship chapter.

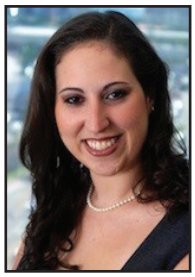
Q: Any final thoughts or last words?

A: The fellowship program changed the path of my legal career. I hope sharing my experience inspires future applicants and encourages Section members to get to know our fellows and younger lawyers. Though I no longer have the blue "VIP pass," I believe the lessons I have learned will help me continue to navigate the Section and look forward to additional "passes" I may be able to obtain in the future.



J. BASKIES

Jeffrey A. Baskies, Esq. *is a native of Peabody, MA and a graduate of Trinity College (highest honors) and Harvard Law School (cum laude). A member of the Florida and Massachusetts bars, Jeff is a co-founding partner of Katz Baskies & Wolf PLLC, located in Boca Raton, Florida. Jeff is Co-Editor-in-Chief of ActionLine. Jeff is board certified by The Florida Bar as an expert/specialist in Wills, Trusts and Estates law.*



S. RUBEL

Stacy B. Rubel *is a partner in the Virgil Law Firm in Coral Gables, concentrating her practice on probate, trust and guardianship litigation. She is a former fellow for the Real Property, Probate and Trust Law Section of the Florida Bar and recently graduated from the Florida Fellows Institute for the American College of Trust and Estate Counsel. Ms. Rubel is also a vice-chair of the Dade County Bar Association's Probate and Guardianship Committee, and, in 2016, was recognized by the Dade County Bar Association as a "Legal Luminary" winner for the probate and estate planning category.*

NEED FORMS?

We have them!

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

Download ORDER FORMS from our website to obtain those FLSSI forms that are so useful in your practice:

www.flssi.org

Florida Lawyers Support Services, Inc.

P.O. Box 568157
Orlando, FL 32856-8157
(407) 515-1501 • Fax (407) 515-1504

RPPTL Section Executive Council Meeting Casa-Monica Hotel
St. Augustine, Florida
February 22 – 25, 2018



Kris Fernandez, Raul Ballaga and Robert Naberhaus.



Roundtable meeting

View Photo Albums at www.rpptl.o



Kathy Neukamm, Bill and Gayle Sklar, Tae Kelley Bronner, David Akins, Jeff Baskies (co-editor-in-chief of ActionLine), Jennifer Robinson and Jim George at "the Well"



Sarah Butters



Section members and pirates

Photos by: John Neukamm, Silvia Rojas and Michael Gelfand



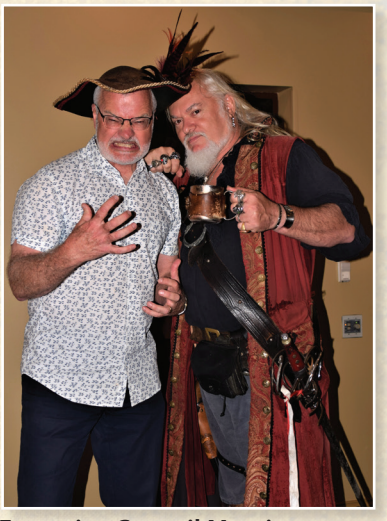
Eric Virgil, Liz Hughes, Ricky Hearn, Jacobeli Behar, Krysta Johnston and Cady Huss.



Special visitor to the Executive Counsel Meeting.



Free coffee or tea.



Executive Council Meeting — one of these guys is a professional pirate…



Deb Boje, Laird Lile and Sandy Diamond at the Casa Monica.



Eryn Roconda and Mike Kanyas at RPPTL reception.



Law students join the RPPTL meetings.



Debbie Goodall and her son Steven; and Bill Hennessey and his wife Cathy.





Jeremy Leathe, Mindy Leathe, Len Prescott, Jason Ellison, Brittney Paige Baker and Hung Nguyen.

Roundtable

Highlights Of The Meeting Of The RPPTL Section

REAL PROPERTY DIVISION

Friday, February 23, 2018 • 3:00-5:00 pm

Casa Monica Hotel, St. Augustine, Florida

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

Thank you to the Roundtable Sponsor: Fidelity National Title Group

Meeting opened at 3:00 p.m. by Real Property, Probate and Trust Law Section Chair, Andrew O'Malley.

Informational Announcement: The Chair announced that he would be presiding over the meeting, as the Division Director, Rob Freedman, was unable to attend the meeting.

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

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

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

ADMINISTRATIVE MATTERS

(a) Submission of Committee Agendas to Webmaster for Posting to Committee Webpage. Neil Shoter reminded committee chairs to submit agendas to the webmaster as early as possible in order to get them into the event App.

(b) Updating Committee Webpages. Neil also reminded committee chairs to update their webpages.

ACTION ITEMS

(a) Title Issues and Title Standards Committee — Christopher Smart, Chair, made a motion to approve changes and additions to the following sections of Chapter 4 of the Uniform Title Standards Concerning Corporations and Limited Liability Companies:

4.1 Acknowledgment of Corporate Instruments (revised)

4.2 Prior Conveyance of all or Substantially All Property and Assets of a Corporation (revised)

4.2-1 Current Conveyance of all or Substantially all Property and Assets of a Corporation (revised)

4.3 Conveyance by Corporations (revised)

4.3-1 Conveyance by Corporations: Authority to Convey; Fraud (revised)

4.4 Foreign Corporations (revised)

4.4-1 Dissolved Foreign Corporation (revised)

4.5 Administratively Dissolved Corporations (new) 4.5-1 Voluntarily Dissolved Corporations (new)

4.6 Corporation Name Omitted From Signature (revised)

4.7 Use of Scroll Seal by Corporation (revised)

4.8 Conveyance by a Limited Liability Company (new)

4.9 Statutory Apparent Authority of a Manager of a Manager-Managed Limited Liability Company (new)

4.10 Limited Liability Company Statement of Authority (new)

4.11 Single Member Limited Liability Company (new)

4.12 Foreign Limited Liability Company (new)

4.13 Foreign Limited Liability Companies (new)

Motion was seconded by Melissa Murphy. Motion passed unanimously.

INFORMATIONAL ITEMS

(a) Real Property Problems Study Committee — Art Menor, Chair, presented a proposed amendment to Fla. Stat. §270.11, Automatic Release of Right of Entry, relating to reservations of mineral rights. Art gave the background on the two 1986 Florida Statute amendments that (1) broadened the entities for which the automatic mineral rights reservations applied and (2) provided for the automatic release of the right of entry for parcels that are 20 acres or less, and explained that the two amendments did not work together. The automatic release applied only to The Internal Improvement Trust Fund ("TIITF") and the Florida Board of Education and not to the governmental entities for which the automatic mineral right reservations was extended. In the absence of the automatic release, there is a procedure where you can obtain a release by applying, paying for a fee, and waiting for a release. The subcommittee working on this issue reviewed legislative history to see if it was intentional in 1986 that the automatic release not apply to the newly added governmental entities in Fla. Stat. §270.11. The subcommittee determined that it likely was not intentional. The Committee is, therefore, proposing a bill that matches up the two amendments such that the

continued, page 37

automatic release would apply to all of the governmental entities to which the automatic reservation of rights applies. Discussion followed during which the Division expressed its initial approval.

(b) Real Property Problems Study Committee — Art Menor, Chair, presented a proposed amendment to Fla. Stat. §712.03(1). Art explained that, commonly, practitioners will include a list of permitted exceptions on a deed. The issue is that practitioners may inadvertently be reimposing any restrictions that would otherwise be extinguished by the Marketable Record Title Act ("MRTA"). The proposed bill intends to provide clarity to the intent of the parties with respect to whether such restrictions are re-imposed. Discussion was had whether the language could be clearer and whether the existing language of the statute that provides that a general reference does not reimpose the restriction should remain in the statute instead of being stricken by the proposed bill. Generally, the Division was in favor of the goal of the bill, but felt further drafting was necessary to clarify what methods may be used to avoid extinguishment.

(c) Real Property Problems Study Committee — Art Menor, Chair, presented a proposed amendment to Fla. Stat. §712.04. Christopher Smart presented proposed legislation known as the "Callusa Trust Fix." The Division is in favor of the proposed legislation, but discussion was had about how to handle this from a political position. Most legislators do not want to deal with this. If the Section tries to get this passed next year as part of the MRTA legislation, it is likely that none of the MRTA legislation will pass. Because this is a big concern to the title insurance industry, it was suggested that the proponents of this bill team up with the Florida Land Title Association ("FLTA") and work with all stakeholders to get a buy-in.

(d) Title Issues and Title Standards Committee — Christopher Smart, Chair. Barry Scholnik reported on the proposed legislation to create Fla. Stat. §95.231 and the need to be able to statutorily fix obvious errors in legal descriptions. He explained that it does not fix mistakes and that you still need a scrivener's error affidavit is still needed. Additionally, there can only be one error, unless it is a transposition error, such as switching the lot and block. Discussion was had as to whether the definition of "scrivener" was broad enough to include an attorney or title agent instead of the original scrivener of the document, whether the bill should apply if there were more than one error, and whether the muniments of title should be expanded. Barry is going to go back to the subcommittee to review these discussion points.

(e) CLE Planning for the 2018-2019 Bar Year — Steve Mezer, CLE Co-Chair. Steve gave a brief report, reminding the Division members that there are CLEs available on demand.

COMMITTEE REPORTS

(a) Title Insurance and Title Insurance Liaison — Raul P. Ballaga and Brian W. Hoffman, Co-Chairs; Alan B. Fields, Cynthia A. Riddell and Melissa N. VanSickle, Co-Vice Chairs. Brian presented. The committee continues to discuss and work with the probate side on matters related to recording probate petitions. The committee is reviewing legislation that would give the personal representative power to convey homestead if there is not a surviving spouse or minor child. The committee is planning a CLE on title insurance policy endorsements.

(b) Residential Real Estate and Industry Liaison — Salome J. Zikakis, Chair; Louis E. "Trey" Goldman, James Marx and Nicole M. Villarroel, Co-Vice Chairs. Salome presented. The committee is planning a webinar on Practicing with a Professional in the residential real estate arena. They are looking for ideas and speakers.

(c) Real Property Litigation — Marty J. Solomon and Susan K. Spurgeon, Co-Chairs; Manuel Farach and Michael V. Hargett, Co-Vice Chairs. Susan Spurgeon reported. The committee had a CLE presentation on legal writing. They also adopted a motion to ask the Section to seek amicus in *Glass v. Nationstar* dealing with prevailing party attorney's fees where one party lacks standing to enforce the contract.

(d) Real Property Finance & Lending — David R. Brittain, Chair; Bridget Friedman, Richard S. McIver and Robert G. Stern, Co-Vice Chairs. David presented. The committee will be holding a 1-hour CLE on current trends with finance and lending. The legal opinion subcommittee remains engaged with the business law committee and hopes to have a final legal opinion report to present at the next Executive Council meeting.

(e) Real Estate Leasing — Richard D. Eckhard, Chair; Brenda B. Ezell and Christopher A. Sajdera, Co-Vice Chairs. Rick gave the report. The committee will have a meeting by phone on March 14, 2018. The committee is planning a CLE on cannabis.

(f) Liaisons with FLTA — Alan K. McCall and Melissa Jay Murphy, Co-Chairs; James C. Russick, Vice Chair. Melissa presented. The committee has worked closely with FLTA on various legislation. She reported that they had a good Lobby Days event and reminded everyone about the Claims Roundtable in April and the FLTA convention in November.

(g) Development & Land Use Planning — Vinette D. Godelia and Julia L. Jennison, Co-Chairs; Colleen C. Sachs, Vice Chair. The committee had a CLE at their meeting, presented by Jason Teal, Deputy General Counsel for City of Jacksonville, providing an overview of code enforcement processes and related matters.

(h) Construction Law Institute — Sanjay Kurian, Chair; Diane S. Perera, Jason J. Quintero and Brian R. Rendzio, Co-Vice Chairs. Sanjay presented. The 2018 CLI will be in March at the J.W. Marriott, and around 400 attendees are expected. Last year there were 350 attendees.

continued, page 39

Roundtable

Highlights Of The Meeting Of The RPPTL Section

PROBATE AND TRUST DIVISION

Friday, February 23, 2018

Casa Monica Resort and Spa, St. Augustine, Florida

By Hung V. Nguyen, Esq., Coral Gables, Florida

Thank you to the Roundtable Sponsor: Stout

Deb Boje, Director of the Probate Division, called the meeting to order at 3:00 PM.

Sponsor Statement

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

Legislative Update and Other Discussion

Sarah Butters gave the report on pending legislation. She spoke about the e-notary bill, which has been proposed again this year. Aside from the concerns regarding fraud, there is also a concern that passage of e-notary could lead to renewed efforts to pass legislation on e-wills. Right now, the proposed bill provides for remote notarization of documents with certain safeguards. There is a delay provision for testamentary notarization which will take effect in 2020; this is all subject to change, however. Sarah also discussed the trust law bill, which is a RPPTL Section initiative. It is well positioned to pass and is currently pending a third reading. Sarah also spoke about the homestead waiver bill which she believes is going to become law.

It was noted that the legislature convened earlier this year because all members were required to run for re-election. Next year, the legislature will meet at the normal time, which starts in early March.

The Section is forming a committee to study electronic wills. While the governor vetoed it last year, many predict that it will return, and the Section should be ready to deal with it.

Shane Kelley announced that the Trust Litigation Symposium is scheduled for March 2, 2018 in Tampa. It was also announced that Bill Hennessey will give a one-hour CLE on changes to the bar rule about conflicts of interest and how fiduciaries should act given this change. Cristina Papanikos presented on the Florida Supreme Court's decision to reconsider its prior ruling relating to Fla. Stat. §90.5021, wherein it adopted the statute to the extent that it is procedural. This opinion is retroactive to 2011 when Fla. Stat. §90.5021 was adopted.

Action Items

1. *Romano v. Olshen*, 153 So.3d 912 (Fla. 4th DCA 2014). Nick Curley, Chair of the Guardianship, Power of Attorney, and Advance Directives Committee, presented the first action item.

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

   Lauren Detzel asked what happens to funds transferred to the guardianship once the ward dies. Several people raised concerns because the remaining funds are not going to be returned to the surviving spouse. There was a vote, and the majority of the people want the remaining funds in the guardianship returned to the surviving spouse. The committee will review this project to determine whether and how to proceed given the vote.

2. Confidentiality in the Guardianship Code. Nick Curley also presented on proposed changes to Fla. Stat. §744.3701, which seeks to reformat this statute to clarify whether the standard that a court should employ when determining whether to allow access to certain guardianship records should be "good cause." The reformatting also makes the statute read better.

Informational Items

1. Fla. Stat. §733.610 — Conflict of Interest. John Moran gave this report and discussed the proposed amendment to Fla. Stat. §733.610, that expands the categories of entities and persons related to the personal representative for purposes of determining whether the personal representative, or someone sufficiently related to the personal representative

continued, page 39

for conflict purposes, holds a substantial beneficial or ownership interest that could create a conflict of interest when engaging in a sale, encumbrance, or other transaction.

2. Fla. Stat. §689.151— Changes to Ownership of Personal Property. David Akins discussed the creation of Fla. Stat. §689.151, which would: (i) permit the creation of JTWROS and TBE in personal property through direct transfers by abolishing the common law unities of time and title required for the creation of a JTWROS or TBE in personal property (eliminating the need to make indirect transfers through a straw man), (ii) create evidentiary presumptions favoring the creation of JTWROS and TBE in personal property, and (iii) permit the creation of unequal shares in a JTWROS in personal property by abolishing the common law unity of interest required for the creation or continuation of a JTWROS in personal property (permitting survivorship to operate on unequal shares).

Standing Committee Reports

Guardianship Revision Committee. The Committee gave a brief report that it is still working on its revisions to the Guardianship Code.

Asset Protection. The Committee is working on revisions to Fla. Stat. §736.0505(3), to broaden the types of trusts that qualify for protection against creditor claims. This will be a joint effort with the Florida Bar's Tax Section. There was also a discussion about a South Dakota statute which seeks to remove a trustee every time a foreign judgement is domesticated to seek assets from a South Dakota asset protection trust. However, this creates an endless loop and may not work as intended.

Attorney/Trust Officer Liaison Conference. The next ATO Conference will be from August 23-25, 2018 at The Breakers.

Estate and Trust Tax Planning. In addition to the Information Item regarding Fla. Stat. §689.151, the Committee is working on enacting a law like Alaska has where residents can opt into community property scheme. There was also discussion concerning *Blechman v. Blechman*, 160 So. 3d 152 (Fla. 4th DCA 2015) and how a governing instrument can control a testamentary disposition.

Guardianship, Power of Attorney, and Advance Directives. The Committee is busy working to address the *Rothman* fix, clarifying venue in guardianships of the minor cases; dealing with legislation concerning injunctions against the exploitation of the elderly (HB 1059).

IRA, Insurance and Employee Benefits. The Committee is working to address a 2007 PLR regarding retroactive beneficiary designations where no trust exists; the Committee wants to do CLE and webinars on this topic.

Principal and Income. This committee is working with the uniform law commissioners to revise the Principal and Income Act.

Probate and Trust Litigation. The chair announced that this Committee's symposium was next Friday.

Probate Law and Procedure. John Moran, Chair, thanked people who helped during this legislative session. They worked on legislation including the parentage bill, the recording of probate pleading, payment to successors out of financial accounts, and a bill addressing the decriminalizing of the theft of wills.

Wills Cert. Review. The next CLE will be in Orlando, and people can get 21 hours of CLE in one weekend!

Adjournment. The next Probate and Trust Division Roundtable meeting will be held at the Tradewinds Island Resort on St. Pete Beach, Florida, around May 31-June 3, 2018.

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

(j) Commercial Real Estate — Adele Ilene Stone, Chair; E. Burt Bruton, R. James Robbins, Jr. and Martin D. Schwartz, Co-Vice Chairs. Adele presented. The Committee held a CLE on mindfulness at its meeting.

(k) Condominium and Planned Development — William P. Sklar, Chair; Kenneth S. Direktor and Alexander B. Dobrev, Co-Vice Chairs. The Community Association certification exam is coming up on March 8, 2018. The Annual Ins and Outs CLE will be held April 27, 2018 in Tampa. There is another major legislative initiative rewrite of the operation sections of the Condo Act and probably Chapter 720. The legislative subcommittee has been very responsive.

CLOSING COMMENTS

The meeting was adjourned at 4:45 p.m.

PROBATE | TRUST | GUARDIANSHIP

LITIGATION

THE LAW OFFICES OF
ADRIAN PHILIP THOMAS P.A.



SOME THINGS NEVER CHANGE

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

TOLL FREE: 800-249-8125

DIVISION OF FEES PAID IN ACCORDANCE WITH FLORIDA BAR RULES.

Making The Most Of The First Planning Appointment: How To Cut To The Client Chase

By Carla A. DeLoach, Esq. and Jordan DeLoach, Esq.
Hurlburt, DeLoach, P.L., Orlando, Florida

Most of us recognize the idiom "cut to the chase," interpreting it to mean "get to the point." But its original meaning was quite different. The use of this phrase purportedly began during the 1920's silent film era, where acting in motion pictures was comprised of facial expressions and gestures. Frequently, romantic tales would climax in a chase sequence to keep the audience engaged in the movie. While filming, directors would cue in a chase scene by shouting something like: "Criminal escapes…cut to chase." The figurative use of this saying arrived in the 1940's when it took on the now attributed meaning, "Get to the point!" How is the original use of the expression similar to the scenes of an initial estate planning meeting? As a practitioner, how do you transform this experience from "the chase" and instead "get to the point" with your client? Read on to find out.

Time has taught the authors that gaining traction with a new estate planning client can be a challenge. The data collection phase unfolds much like the chase sequence described above. The initial client meeting ends, the client "escapes," and — like the director—we find ourselves cutting to the chase scene; spending days, weeks, or even months trying to obtain the pertinent information we need to begin the planning. How do you avoid this? How do you get client commitment to the process and garner active participation from the client? Straight-forward forms and clearly defined steps, coupled with consistency, alignment, and delegation within your organization can make a potentially challenging endeavor smooth, predictable, and lean. Here's how:

Avoid the Chase

A client's planning of his or her estate often lacks urgency. It is this lack of urgency, and perhaps the difficult nature of the subject matter, that often impedes planning progress. This results in wasted efforts including the pleasant first meeting, the "friendly" check-in e-mail, the litany of voicemails, and the letter (months later) explaining that the firm file was never opened and there will be no further follow-up. The traditional approach cannot compete with the increasingly breakneck pace of our culture. A different tactic is in order. The planner must establish a user-friendly client interface customized to extract the necessary information. The interface must be limited to truly critical information, accessible, and received in advance by the practitioner.

Be Concise

The initial information worksheet should be concise if there is to be any hope of movement. A typical intake worksheet is extensive and solicits facts which are beyond the scope of the first stage of representation. This counterproductive approach involves the attorney's appeal for volumes of information which can only be obtained through a trip to the attic, a call to the CPA, and (God forbid) an email to the former estate planner with whom the client has had no contact for several years. The tone of the discourse becomes negative and the client perceives the process as burdensome. The attorney never reaches the drafting stage because the client is overwhelmed at the close of the exploratory stage. Instead, consider utilizing an information worksheet which requires only those items that can be readily identified by the client and includes the information essential to beginning a proper planning engagement. Challenge yourself to limit the information worksheet to one page.

Identify What is Truly Critical

Remember your goals: confirm the viability and suitability of the client matter, procure a signed legal representation agreement, and collect a fee deposit. What information is truly critical at this stage? There are two "buckets" of information needed: (1) detailed contact/personal information, and (2) basic financial data comprised of the client's total estimated net worth classified in broad asset categories. Answers to pivotal questions must be provided, examples of which are listed below:

- Are you a United States citizen or resident?
- Do you own a business?
- Do you own real estate which is not occupied by you?
- Have you been divorced?
- If you have been divorced, do you have pending obligations to your former spouse as a result of the divorce?
- Did you and your current spouse enter a pre/postnuptial agreement?
- Do you have minor children?
- Do you have a child with special needs?
- Are you aware of any family members who are represented by our firm?
- Do you have existing estate planning documents?

continued, page 42

- Have you or your spouse made prior gifts to trusts or individuals?
- Have you or your spouse ever filed for bankruptcy?

The above questions focus on what is truly critical in determining the complexity of the representation, your law firm's suitability for the matter, and fee expectation. They can be answered with little exertion and without reference to record archives or need for third party involvement. More involved documents such as: governing agreements, marital settlement agreements, previously executed estate planning documents, tax returns, detailed financial information, nuptial agreements, loan documentation, contracts, and other paperwork can (and should) be obtained. But attempting to collect those documents during the initial stage is unnecessary, frustrating to the client, and counter to progress. After years of using an exhaustive information worksheet, we have concluded that a concise form, requesting critical information, is key to moving forward efficiently.

Make it Accessible

The initial worksheet must be accessible by clients if it is to be used correctly. Doubtless, this means availability on the firm website with little navigation required. And, if the data sought can be entered in a fillable PDF and uploaded through a secure portal, even better! Directing clients to your website drives awareness of your practice and other resources which may be helpful to clients or their loved ones. Accessibility to the initial worksheet is essential to client onboarding.

Require it in Advance

Let's assume you adopt this protocol. Is that enough? We don't think so. You must also secure the opportunity to:

1. scrutinize the information received;
2. consider resulting questions;
3. evaluate fee ranges; and
4. contemplate the best path for each potential client.

These opportunities never come without advance consideration. To permit the necessary evaluation, we recommend requiring the initial information 24 hours before the client meeting. Doing so ensures the quality of the first meeting and creates alignment between the parties, both of whom have now invested time in the process before the relationship has officially begun. For years, physicians have required critical information in advance of appointments with their patients. Attorneys would be well-served to follow suit.

You may be thinking, "What if the client does not provide the requested information in advance?" We would maintain that

continued, page 43



the first meeting should be delayed until the information can be obtained. You may also be thinking, "This is not practical." And you would be partly correct. This approach is not viable without the proper internal structure. Within our firm, the successful implementation of this process required a new position, the "case manager." A case manager provides a point of contact for the client, who can troubleshoot all intake issues in advance of the initial meeting. The duties broadly include: accepting the initial call from the client, providing intake forms to the client, initiating follow-up for completed forms, requesting missing details, coordinating the appointment, facilitating delivery of the representation agreement, and completing file set up.[1] The case manager's effectiveness depends upon his or her responsiveness, customer service orientation, follow-through, and initiative. While we believe this position is a critical part of the process, other practitioners may choose to incorporate these duties with an existing employee in charge of scheduling and setting up files. No matter who carries out these tasks within your organization, it is imperative that the duties be clearly delegated to one individual (a non-attorney) who implements them consistently across your client base. While the first client meeting may be delayed as a result of missing information, over the long run, adherence to strict initial meeting protocol saves time for everyone involved. Further, it creates consistency for prospective clients, as well as within your organization.

Our experience demonstrates that when presented with a user-friendly process, marked by a concise, accessible information worksheet, clients readily engage in the process. And when they do, regardless of the size and complexity of the matter, it ushers in the opportunity to facilitate a productive interaction with the client. Instead of embarking on a chase during the first meeting, you engage in a discussion highlighted by pertinent questions, legal feedback, process explanation, timeline estimation, and finally (and most importantly), fee collection.



C. DELOACH

Carla DeLoach *is a partner in the Orlando firm, DeLoach, P.L. She graduated cum laude from Stetson University College of Law, 1998; and holds an LL.M. in Taxation from the University of Florida Levin College, 2003. Her practice emphasis includes estate planning, succession planning, and probate and trust administration. She is Certified AV Preeminent with Martindale-Hubbell and a graduate of the Florida Fellows Institute of the American College of Trust and Estate Counsel's inaugural class. She has spoken for the University of Florida Levin College of Law, Orlando Christian Foundation, Orange County Bar, and National Association for the Blind, among others. She is an adjunct professor at Stetson University College of Law where she teaches a class on law office management.*



J. DELOACH

Jordan DeLoach Hurlburt *is a partner in the Orlando firm, DeLoach, P.L. She graduated magna cum laude graduate from the University of Florida Levin College, 2008; and holds an LL.M. in Taxation from New York University, 2009. Her practice emphasis consists of estate planning, probate and trust administration, and succession planning. Jordan is Board Certified in Wills, Trusts and Estates by The Florida Bar Board of Legal Specialization, 2017; and a graduate of the Florida Fellows Institute of the American College of Trust and Estate Counsel's inaugural class. She has spoken for the Central Florida Bankruptcy Law Association, among others.*

Endnotes

1 The duties listed relate to the initial intake process. However, although beyond the scope of this article, the case manager, in our Firm, touches the client process from initial intake to document execution. Administratively, the case manager is the client's point of contact. This ensures consistency among the client base, no matter the service provider, permitting the service providers to do what they do best, namely, provide legal services.



POLITICAL ROUNDUP

State Politics And 2018 Elections

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

As one political commentator recently quipped about the upcoming election season: "Welcome to the Thunderdome!" By the third week in June, the window to qualify for local, state and federal races will have concluded and the table officially set for what promises to be a very intense 2018 election season. There are a large number of statewide races on the ballot this year, plus constitutional amendments, not to mention a plethora of legislative and local government elections. There will be no escaping the onslaught of political and candidate messages as everyone vies for the voter's attention on the airwaves, in social media and in the mailbox! By the time you read this article, the deluge will have started.

As children go back to school in August, and the heat of summer is at its apex, primary voting will conclude on August 28. And, I do mean conclude. Mail ballots must be sent to absentee voters by July 14th, and early voting begins on August 18th. It's not unusual these days to have a third of the votes in any election be cast well in advance of election day. Personally, I like to walk down to the neighborhood community center which is my precinct on election day, see my neighbors, and have that great feeling of participating in democracy, as noisy and wild as it can be. Plus, that wildness sometimes yields some late-in-campaign twists that just might change your mind about a candidate.

Whenever you vote, if you plan to vote in the primary, you must be registered by July 30th. Registration for the general election on November 6, 2018 must be accomplished by October 9.

Speaking of registration, Florida continues to be a state of independent voters - voters who not only refrain from voting consistently with their party affiliation, but increasingly, don't register either as a Democrat or a Republican. Statewide, No Party Affiliation voters comprise 24% of the current registrations, with some areas over 30%, which means that a significant number of voters can't vote in a party primary but are usually left to choose between the two main parties' nominees. Democrat registrations (38%) slightly exceed Republican registrations (35%) statewide, and as discussed further below, some Senate districts are very close in registration which leads to a lot of speculation on how the party currently holding the seat will fare.

Traditionally, voter interest and participation drops off in years where there is not a Presidential race on the ballot. This year in Florida there will be much to drive voters to the polls. There will be five statewide races with all four statewide Cabinet positions up for election, as well as one of Florida's U.S. Senate seats. There have also been an unusual number of resignations of current officeholders from posts in the state legislature and in Congress, creating a domino effect as current legislators run for other posts, creating even more open seats with no incumbent running for reelection. Plus, there is the unknown impact of a sometimes controversial President, and what some Democrats hope will be a Blue Wave.

Statewide Races

US Senate- Governor Scott has now officially entered the race to challenge long-serving U.S. Senator Bill Nelson. Early polling tells us this race will be very competitive, and because of the national significance of changing a long-time Democrat seat to Republican in a closely divided U.S. Senate, this race will get lots of national interest and money. We are already seeing ads that attempt to erode Governor Scott's recent high approval ratings by reminding voters of the Governor's past history as an executive in the private hospital business. I expect this race to be exceptionally rancorous this year.

Governor- Agriculture Commissioner Adam Putnam and Congressman Ron DeSantis are the two major candidates vying for the Republican nomination. Putnam is way ahead on fundraising, and has worked the Republican grass roots for over a year longer than any other candidate. Ron DeSantis, a

continued, page 45

Republican congressman from Northeast Florida has received President Trump's twitter blessings and pledges of support from national interests, although the Putnam camp is working hard to keep the President from endorsing in advance of the primary. Although DeSantis' PAC and campaign fundraising lags substantially behind Putnam's, unaffiliated PACs may play a major role in this primary. House Speaker Richard Corcoran declined to enter the race as he had hinted he would do, and he publicly endorsed Putnam. Corcoran's Watchdog PAC had over $2 million in the bank as of the end of April. Early polling shows a remarkable 43% of undecided voters in this Republican primary.

Democrats Philip Levine, Mayor of Miami Beach, and former Congresswoman Gwen Graham are leading what is now a four person primary. Tallahassee Mayor Andrew Gillum and Orlando businessman Chris King are still in the race as of this writing, but they have not shown the fundraising acumen necessary to have a large enough communications effort to win a statewide nomination. Levine still leads fundraising, and has started television ads, but Graham continues to post solid fundraising and is spending carefully. If all four of these major candidates remain in the race, then it changes the dynamic of the primary as the nominee will be whoever garners the most votes, not a majority of votes. Will any drop out? Will they endorse another candidate? Pundits believe that Graham is the more viable candidate in a general election. She was certainly treated as a front runner by her opponents as she was the focus of criticism by her fellow Democratic candidates during their first debate. As the daughter of former Governor Bob Graham, she knows politics is a contact sport, and she responded probably with the most memorable line of the debate, "That's ok. [sigh] Gwen and the men."

Early polling shows Mayor Levine running ahead, especially in voter-rich South Florida. The Democratic primary will certainly be impacted by two late twists. Palm Beach billionaire Jeff Greene has now entered the already crowded field for the Democratic nomination. Early polling shows him to be impacting more of Graham's support in the populous Democratic stronghold of South Florida. Greene spent $23 million of his own money in 2010 in a failed attempt to win the Democratic primary for U.S. Senate. Also former congressmen Patrick Murphy briefly flirted with the idea of running in the Democratic primary with former congressman, Republican David Jolly as his lieutenant governor running mate. Instead, he has endorsed Gwen Graham.

Attorney General- Three Republicans are now running for the post of Attorney General. RPPTL Section member Representative Ross Spano decided to switch to a Congressional race when Congressman Dennis Ross surprised his community by deciding not to run for reelection to the U.S. House seat representing Polk, Lake, and Hillsborough Counties. Left in the race are former Assistant U.S. Attorney and Circuit Court Judge Ashley Moody from Tampa, Representative Frank White from Pensacola, and Representative Jay Fant from Jacksonville. White and Fant appear to be targeting the same type of very conservative voter and have been attacking Moody on her conservative credentials. A three-way race, in my opinion, probably benefits Moody. Moody's more populous central Florida base may also be to her advantage, and her earlier start gave her an opportunity to lock up more endorsements from state attorneys and sheriffs. As noted in previous articles, White has contributed a great deal of personal and family money to his campaign coffers, and leads fundraising. In this down ballot race, it will take a great deal of funds and hustle for a first term House member from the farthest corner of NW Florida to win the battle for voters.

Representative Sean Shaw, former Consumer Advocate under CFO Alex Sink, announced for the Democratic nomination for Attorney General during the legislative session when he couldn't raise money but has quickly jumped to a commanding lead in the funding race. His primary race opposition, Ryan Torrens, appears to be fading fast. While the Republicans duke it out for the nomination, I expect Shaw's campaign to be the focus of energized Democrats, probably receiving attention from around the nation.

Agriculture Commissioner

Senator Denise Grimsley from Lake Placid, Representative Matt Caldwell from Ft. Myers and former Representative Baxter Troutman, Winter Haven, are running for the Republican nomination. Troutman has put a great deal of his own money in and leads the money race. Caldwell and Grimsley are close behind and are capitalizing on years of goodwill built while serving in the Legislature. Post-session fundraising activities have Grimsley ahead in campaign contributions and Caldwell ahead on the PAC fundraising. Caldwell is spending more conservatively and has more in the bank. No Democrat of any statewide presence has yet indicated any interest in this seat. I wouldn't expect the Democrats to cede a Cabinet seat to the Republicans in a year like this, but there are already plenty of battles for them to fund.

Chief Financial Officer

This is the only statewide race where the general election ballot appears to be virtually finalized. Gubernatorial appointee and former Representative and Public Service Commissioner Jimmy Patronis appears to be the Republican nominee for CFO. Senator Tom Lee announced early that he would join the race after the Legislative Session was over, but he recently decided that his responsibilities to his family did not fit in well with running a statewide campaign. Former Senator Jeremy Ring from Fort Lauderdale is the only Democrat running, and he certainly would have benefited from a tough Republican primary. But he served as a Senator from a very populous part of the State for 8 years, and while his fundraising has been

continued, page 46

lackluster, his financial reporting as a Senator indicated that he is personally wealthy, reportedly from his role as the first sales chief of Yahoo. He never relied on fundraising for his Senate campaigns, and if he commits additional personal funds to his quest to be CFO, this race could be competitive.

Constitutional Amendments

No doubt our membership is aware that the Constitution Revision Commission ("CRC") has been meeting and has concluded its work. Required by the Constitution to convene every 20 years, this 37 member Commission is comprised of appointees from across the state, 15 appointed by the Governor, 9 each by the House Speaker and Senate President, and 3 by the Chief Justice. They have been meeting since last fall, and after multiple public hearings and 782 proposals from the public, the Commission met during the spring to debate and pick its priorities for constitutional revisions.

Going into the final round of discussions, the Commission had already whittled down over 123 Commissioner proposals to final consideration of 35. In the end, the Commission, by a minimum of 22 affirmative votes on each proposal, placed 8 amendments on the ballot. Unlike citizen initiatives and legislative proposals, CRC amendments are not limited to a single subject. Of the 8 CRC amendments, 6 proposals contain multiple subjects, bundling such revisions as a prohibition on offshore oil drilling with adding vaping to the smoking ban for indoor facilities. Another combines death benefits for first responders with tuition waivers for surviving spouses and children with creation of a state governance requirement in the Constitution of the 28 state and community colleges, a provision already in the statutes. Another proposal combines new provisions on victims' rights with an increase in the mandatory retirement age for judges from age 70 to 75.

The CRC's eight constitutional amendment proposals join 5 placed there by citizen initiative or legislative action. Expect to spend a lot of time in the voting booth! It will be interesting to see how much fall off there is from voting in the statewide races to the amendments. One of the amendments which failed to pass the CRC would have changed the 60% favorable requirement for passage of a constitutional amendment to 60% of those voting on the amendment. Right now the number is based on those voting in the election.

The proposals that were rejected by the CRC were as remarkable as what passed. They passed on such controversial amendments such as a redefinition of personal rights designed to impact abortion rights and mandatory state immigration status verification. A proposal for an eight year term limit for school board members was adopted, but a requirement to elect all school board superintendents was rejected. The Commission also did not have the votes to change our primary voting system. Currently, primary elections are only open to registered party members unless the winner of the primary will be unopposed in the general election. It has become common practice to close a primary to non-party members by having a write-in candidate run in the general election. Proposals to completely open up primary voting were rejected early, and the proposal to remove the write in candidate loophole failed to garner the minimum 22 votes to be on the ballot late in the Commission's deliberations.

Legislature

Senate - Half of the 40 state Senate seats are up for election, and while traditionally incumbents have an easy path to reelection, this year both parties are gearing up for some close races. Republicans currently hold a 23 to 16 majority in the Senate, with one seat vacant due to the resignation of Republican Sen. Latvala. Expect incoming President Sen. Bill Galvano to focus much attention on the Tampa seat of Republican Senator Dana Young. Senator Young is a lawyer and frequently sponsors Section initiatives. She will be challenged by Representative Janet Cruz who just finished 8 years in the Florida House, ending her House service as Minority Leader. Bob Buesing, a Section member who ran well against Young in 2016, bowed out of the race for the Democratic nomination after Cruz's entry. That 2016 race was also influenced by an independent candidate who garnered over 9% of the vote. Young is a hard-working campaigner and has consistently prevailed in this seat which leans slightly Democrat in registrations. This is a seat with over 25% of the registered voters not registered Democrat or Republican, so expect a great deal of effort to be focused on them.

Another Republican Senator who may be in a tight race is Keith Perry. Senator Perry represents a sprawling north central Florida district which includes Gainesville. Perry beat former state Democratic Party chair and State Senator Rod Smith in 2016 despite a sizeable Democratic advantage in voter registrations in this seat. This time, Perry is being challenged by Kayser Enneking of Gainesville, a doctor. Her donations are mostly small checks and from within the district, while Perry's reflect the statewide appeal which you would expect of an incumbent. Perry worked hard to win his seat and expect both candidates to receive lots of help from their parties. Will either candidate motivate the student population in November?

Other Republican controlled Senate seats with tight party registrations do not yet have well-funded or well-known Democratic candidates for the general election. Those include the seat of incumbent Senator Kelli Stargel, who has great name identification based on 8 years in the House and 4 in the Senate representing Polk County. Stargel has also sponsored Section bills. Senator Garcia from Miami is termed out in a Senate district with very close party registration, but the only serious candidate as of this writing is Republican House member Manny Diaz, a school administrator. Senator Latvala's former Senate seat in Pinellas and Pasco Counties

continued, page 47

leans solidly Republican and the leading candidate is a well-known Clearwater City Commissioner and former House member, Ed Hooper. Former Representative Amanda Murphy has now entered that race. Senator Brandes, the incumbent in a southern Pinellas Senate seat, will be challenged by former prosecutor and personal injury lawyer, Carrie Pilon, a Democrat. Pilon is the daughter-in-law of former Rep. Ray Pilon who endorsed Brandes shortly after his daughter-in-law announced her candidacy. Republicans have a 4 point advantage over Democrats in this seat, with a sizeable 25% of voters registered without a party affiliation. Brandes has a considerable jump in contributions.

Section member and frequent Section initiative sponsor Dorothy Hukill will be up for reelection this year, and her long-time service as a City Commissioner, Florida House member and now Senator should serve her well in this Volusia and Brevard district, which leans solidly Republican. Senator Lee from Tampa considered a run for the Congressional seat currently held by Dennis Ross instead of running for reelection to the state Senate, but decided against entering that race. Presumably he will run for reelection to the Senate. If he leaves the Senate, that Senate seat is very close on party registrations and has over 25% of no party affiliation voters. Two incumbent Republican House members, both attorneys, have expressed interest in the race if Lee decides to run for Congress, Rep. Danny Burgess and Rep. Shawn Harrison.

On the Democratic side, few of the seats held by incumbents have any Republican opposition likely to succeed. Recall that Democrat Annette Taddeo beat Representative Jose Felix Diaz in the special election in late 2017 to fill the seat of Republican Frank Artiles who resigned in the wake of racial remarks to a fellow Senator. Senator Taddeo is back on the ballot in November. As of this writing, Artiles still had a campaign account open, and curiously spent money for political consulting in April. Is he considering running for his old seat? While this seat is close in registrations, it is the Democrats' to lose and the Democrats will fight hard to keep this seat. Democratic Senator Jose Rodriguez had earlier announced a run for Congress, but decided to keep his Senate seat so that seat is not up for election this year. Senator Rodriguez has been very helpful on a variety of Section initiatives. Section member Rep. Lori Berman, a Democrat, handily won the special election in Palm Beach County this spring and won't have to run again until 2020.

House - While the Senate will not likely have many new members, the Florida House will have over a quarter of its seats filled with new faces as seats have opened up due to term limits or members leaving to run for other races. Speaker-designate Rep. Jose Oliva and the members elected by their peers to follow him in the powerful Speaker's role, Rep. Chris Sprowls and Rep. Paul Renner, will have their hands full this election year helping fill these open seats, assisting their current incumbents with any challenges, as well as running their own reelections. The Republicans are not likely to lose much ground on their current majority of 75 members. Sprowls is an attorney from Pinellas and is the current chair of the House Judiciary committee and thus was very influential on Section issues. Renner, from Palm Coast, is an attorney and has also been very helpful to the Section in his role as the Ways and Means chair.

House District 72, a Sarasota County seat recently won by Democrats in a special election, will be back in play this year. Attorney Margaret Good won that race over the son of a sitting Congressman, but the seat is solidly Republican in registration and Good is being challenged by former Rep. Ray Pilon, who left due to term limits. The Republicans have a few seats at risk as well. Republican Rep. Mike Miller is leaving a House seat in which Democratic registration exceeds Republican and has a huge amount of independent voters. Rep. Kathleen Peters is leaving her Pinellas House seat and there appears to be a very competitive general election shaping up there. This district is close on party registrations and has a high number of no party affiliation voters.

A couple of final notes on factors which may impact this year's elections. The gun debate enmeshed in the school safety package, which passed in the wake of the Parkland shootings, hasn't stopped. While that package passed by spare margins, expect the NRA, which opposed some provisions, to weigh in with its massive membership, especially in Republican primaries in the open seats. Parenthetically, NRA membership is alleged to be up as are gun sales. The NRA doesn't give much in campaign contributions, but they do motivate a good number of voters. Meanwhile, an expected influx of young voters also motivated by the gun debate has not yet materialized. Similarly, we have not seen large numbers of Puerto Rican registrations from those who have relocated to the Sunshine State after Hurricane Maria devastated their nation, but Governor Scott, Senator Nelson and several other statewide candidates have clearly seen the vote potential in this group of voters largely residing in the swing I-4 corridor.

So, as we are pulled headlong into election season, expect lots of candidates and advocates for and against constitutional amendments to be asking for your help and your vote. Me, I'm praying for a quiet hurricane season—the political maelstrom this summer and fall will be enough! AL



C. ROTH

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

Partitioning Out Attorney's Fees

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

Florida courts follow the "American Rule" that attorney's fees may be awarded by a court only when authorized by statute, by agreement of the parties or by court order.[1] Under Rule 1.525, Fla. R. Civ. P., "[a]ny party seeking a judgment taxing costs, attorneys' fees, or both shall serve a motion no later than 30 days after filing of the judgment, including a judgment of dismissal, or the service of a notice of voluntary dismissal." The 30-day time requirement under Rule 1.525, Fla. R. Civ. P. does not apply when the trial court has already determined entitlement to attorneys' fees and costs and only reserves jurisdiction to determine the amount.[2] However, when it comes to partition actions, attorney's fees are governed under Fla. Stat. §64.081, and Rule 1.525, Fla. R. Civ. P. applies.

When joint owners of property cannot agree on the disposition or management of the property and the parties cannot negotiate a resolution, Chapter 64 of the Florida Statutes allows for a remedy, a partition action. A partition action is a cause of action filed by one or more co-owners against other co-owner(s). The action is grounded and guided in equitable principles. From determining whether the property should be divided in-kind or by sale to determine who is entitled to receive attorney's fees and who pays for costs and fees. Unlike the traditional "prevailing party" standard for attorney's fees, Fla. Stat. §64.081, provides that every party shall be bound by the judgment to pay a share of the costs, including attorney's fees, to a plaintiff's or a defendant's attorneys, or to both, based on the services rendered and their respective benefit to the partition action. In other words, every party in a partition action must pay a share of the total costs of the action, including a portion of the other party's attorney's fees.The court awards attorney's fees for the services of each attorney based on the services the attorney performed and the benefits gained from the attorney's skills and labor in pursuing the partition action.[3]

The court makes this determination based on equitable principles and the party's proportional interest in the property that is at issue. So plaintiff's and defendant's counsel alike could recover attorney's fees, and each party is responsible for paying their proportional share. In fact, it is error for a trial court to assign responsibility for attorneys' fees and costs to only one party because Fla. Stat. §64.081, requires each party to share the costs and that fees and costs be apportioned so that the greater burden falls on the party with the majority interest in the property.[4] When allocating attorney's fees in a partition action, the trial court must take into account the services rendered, customary charges and time consumed.[5] In *Fernandez-Fox v. Reyes*, 79 So. 3d 895 (Fla. 5th DCA 2012), a co-owner was entitled to attorney's fees in a partition action because both the co-owner's attorney and personal representative rendered services of benefit to the action. After an entry of partial summary judgment against the co-owner on her first three counts, all that was left at trial were monetary claims each side was making for maintenance and other expenses. The co-owner was successful in their monetary claims for reimbursement for maintenance and other expenses, and both parties agreed partition was appropriate. Therefore, both the co-owner's attorney and the personal representative rendered services of benefit to the partition action. The personal representative provided greater services because he had to defend and overcome the co-owner's first three counts to even get the case into partition posture, but that fact did not preclude the co-owner's attorney from receiving some award of fees under Fla. Stat. §64.081 (2010).

Although Chapter 64 governs attorney's fees in partition actions, providing that every party share in the costs and fees and permitting both plaintiff's and defendant's counsel to recover under certain conditions, it is important to keep in mind that other procedural and judicial rules will also apply. Rule 1.525, Fla. R. Civ. P. still requires the parties to serve their motion for attorney's fees within thirty (30) days of the final judgment of the partition action, and under 1.090(b) Fla. R. Civ. P., a party can enlarge the time for filing their 1.525 motion.[6] Similarly, Rule 2.514, Fla. R. Jud. Admin., or the mailbox rule, may also provide an additional five days to serve a motion under Rule 1.525, Fla. R. Civ. P.

Endnotes

1 See *Florida Patient's Compensation Fund v. Rowe*, 472 So. 2d 1145, 1148 (Fla. 1985), modified, *Standard Guar. Ins. Co. v. Quanstrom*, 555 So. 2d 828 (Fla. 1990) and *Moakley v. Smallwood*, 826 So. 2d 221 (Fla. 2002).

2 See *AmerUs Life Ins. Co v. Lait*, 2 So. 3d 203 (Fla. 2009).

3 See *Robinson v. Barr*, 133 So. 3d 599,600 (Fla. 2d DCA 2014).

4 See *Deshommes v. Bazin*, 421 So. 2d 806 (Fla. 3d DCA 1982).

5 See *Adler v. Schekter*, 197 So. 2d 46, 1967 (Fla. 3d DCA 1967).

6 See *Svoboda v. Bayer Corp*, 946 So. 2d 1204 (Fla. 5th DCA 2006).

The Attorney-Client Privilege Is Alive And Well, Hallelujah!

By Lian de la Riva, Esq., Markowitz, Ringel, Trusty and Hartog, Miami, Florida

The Attorney-Client Privilege is an indispensable tool of any attorney. Practitioners rely on their client's communications and the free flow of information to be effective advocates. The privilege can be loosely traced back to the Roman Republic. In the 16th century, under the rule of Elizabeth I, the privilege was firmly established in English law.[1] During the Elizabethan Era, the privilege was based on a concept of honor and barred any barrister from testifying against their client. Over time, the privilege morphed into the tool we utilize today. The privilege creates a sacred space between the attorney and the client, and therefore allows the attorney to provide "sound legal advice [and] advocacy."[2] The doctrine of the Attorney-Client Privilege has been defined by the distinguished Dean Wigmore as follows: "(1) Where legal advice of any kind is sought (2) from a professional legal adviser in his [or her] capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his [or her] instance permanently protected (7) from disclosure by [the client] or by the legal adviser, (8) except the protection be waived." [3]

Florida first codified the Attorney-Client Privilege in 1976.[4] However, certain privileged communications are not absolutely protected. An exception to the Attorney-Client Privilege was carved out for communications between an attorney and a client who is acting in a fiduciary capacity. This exception can be traced as far back as Trust cases in the English Courts.[5] The Fiduciary Exception was particularly troublesome in the world of Guardianship, Probate and Estate Planning because the exception permitted certain communications to become discoverable. Due to litigants' (typically a beneficiary) creative arguments, the Fiduciary Exception was used to pierce the veil of protected communications, resulting in a chilling effect on the free flow of information from the fiduciary clients, whether a Guardian, a Personal Representative or a Trustee. The District Court of Appeal for the Second District of Florida recognized that billing records and other confidential communications between the fiduciary and her attorney could become discoverable if it was found that the services rendered were for the benefit of a third-party beneficiary. See *Jacob v. Barton*[6] and *Tripp v. Salkovitz*.[7] The United States Supreme Court also turned its attention to the matter of the Attorney-Client Privilege in the context of a fiduciary client in *United States v. Jicarilla Apache Nation*,[8] and held that the fiduciary exception to privileged communications does not apply to the general trust relationship between the United States and Indian tribes.

Given the ambiguity and attacks on the Attorney-Fiduciary Client Privilege, in 2011 the Florida Legislature enacted Fla. Stat. §90.5021, which provides that communications between a lawyer and client acting as a fiduciary are privileged and protected from disclosure to the same extent as if the client were not acting as a fiduciary. Fla. Stat. §90.5021 was intended to clarify Florida law and protect communications between the attorney and the fiduciary client. The Florida Trust Code[9] and Probate Rules[10] were also amended to ensure qualified beneficiaries and interested persons were made aware of the Attorney-Fiduciary Client privilege applicability to both Personal Representatives and Trustees. Most practitioners sighed in relief upon the passing of this statute, but the relief was short lived.

Our state's Supreme Court has been balancing the fiduciary client's privilege versus the need to pierce the Privilege for the benefit of the victim (typically a third-party beneficiary) of that privilege. Although passed in 2011, Fla. Stat. §90.5021, was not adopted until January 25, 2018. In 2014, the Supreme Court questioned the need for and casted doubt on the privilege on what appeared to be procedural grounds.[11] Then again in 2017, the High Court outright declined to adopt the Fla. Stat. §90.5021.[12] Thankfully, in part due to work of the Probate Rules Committee and this Section, the Supreme Court formally adopted Section 90.5021 of the Evidence Code in an out-of-cycle report.[13]

This is a moment to rejoice and then review what many consider basic principles of the Attorney-Client Privilege. For seven years, we have cautiously advised our Fiduciary Clients of the potential litigation and possibility of communications becoming discoverable. Now is the time to take a proactive

continued, page 51



From the very beginning, we've made a commitment to support our agents and real estate attorneys at every opportunity.

We are an underwriter who competes for our agents, not against them. Our commercial team focuses on providing one-stop service for real estate attorneys and title agents. **Here's what Westcor can do for you:**

- **Single point of contact**
- **Unparalleled underwriting support**
- **No direct operations**
- **Excellent financial strength rating**
- **Back office support provided by industry veterans**
- **Industry leading search and examination products**

Contact a representative today for more information.



Renee Becker Bourbeau
VP/Commercial Division
rbourbeau@wltic.com
(561) 631-0731



Sabine Seidel
Commercial Underwriting Counsel
sseidel@wltic.com
(407) 629-5842

www.wltic.com | 866.629.5842

WESTCOR
LAND TITLE INSURANCE COMPANY

approach and educate our clients about the intricacies of the Privilege, how it works, how it can be lost or waived and how the communications can be used against them. First you should assess each Client's understanding of the privilege and evaluate the dangers of losing it on a case-by-case basis. A key point to review with our clients is when the privilege can be asserted, these basic elements must be present: a *communication* between lawyer and client and the purpose of which is to *seek legal advice*.

It must be understood that the Fiduciary Protection, found under Fla. Stat. §90.5021, is not absolute and can be pierced leading certain communications to become discoverable.[14] Most often the privilege is lost by the intentional or inadvertent production of the communication to a third party, such as a beneficiary in a Trust or Probate Administration. Many times, production of a privileged communication occurs when a Fiduciary Client forwards an email thread including communications between them and their attorney. Fiduciary Clients should be consulted during the engagement process and during the progression of the matter of the dangers of making any disclosures or deciding to include beneficiaries in what would have been a privileged communication. Although cumbersome, a one-time review of communications your client intends on sending to third-parties to assess whether any privileged information is being disclosed is reasonable and efficient way to protect the privilege. Avoid electronic mail threads where privileged and non-privileged communications may be discussed interchangeably. It's better to send separate emails. Finally, writing Attorney-Client Privilege in a subject line of a communication will not provide the protection if the communication is sent to a third party.AL

Endnotes

1 Edna Selan Epstein, THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK-PRODUCT DOCTRINE 2 (4th ed. 2001).

2 *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981).

3 John Henry Wigmore, EVIDENCE IN TRIALS AT COMMON LAW §2292, at 554 (McNaughton 1961 & Supp. 1991).

4 1976 Fla. Laws ch. 237, §1.

5 See In re Mason, 22 Ch. D. 609 (1883); *Talbot v. Marshfield*, 2 Dr. & Sm. 549, 62 Eng. Rep. 728 (1865); *Wynne v. Humberston*, 27 Beav. 165, 54 Eng. Rep. 165 (1858).

6 877 So. 2d 935 (Fla. 2d DCA 2004).

7 919 So. 2d 716 (Fla. 2d DCA 2006).

8 131 S.Ct. 2313 (2011).

9 Fla. Stat. §736.0813(1)(a).

10 Fla. Prob. R. 5.240(b)(2).

11 In re Amendments to the Florida Evidence Code, 144 So. 3d 536 (Fla. 2014).

12 In re Amendments to the Florida Evidence Code, 210 So. 3d 1231 (Fla. 2017).

13 In re Amendments to the Florida Evidence Code — 2017 Out-of-Cycle Report, No. SC17-1005.

14 Notably, in most will and trust contests, exceptions to the Attorney-Client Privilege have been codified to authorize the disclosure of most communications between an estate planning attorney and their deceased client. See, e.g., Fla. Stat. §90.502(4)(b), (d) and (e).

CLE Opportunities

JULY 11, 2018	***Mindfulness and the (Ethical and Professional) Practice of Law***	Webcast
JULY 27, 2018	***RPPTL Legislative and Case Law Update 2018***	The Breakers, Palm Beach, FL
AUGUST 23-25, 2018	***RPPTL Attorney/Trust Officer Liaison Conference***	The Breakers, Palm Beach, FL

Florida Bar CLE–24/7, Online & downloadable

For the Bar, By the Bar.
www.floridabar.org/CLE

Probate And Trust Case Summaries

Prepared by Daniel L. McDermott, Esq. – Adrian Philip Thomas, P.A., Fort Lauderdale, Florida

A Respondent in a trust contest, who happens to be both the drafting attorney and co-trustee of the contested trust, cannot assert that a trust contestant lacks standing, then refuse to produce the documents that would help establish that she does have standing. Consequently, the trial court erred by granting a protective order, which effectively eviscerated the trust contestant's claim, while making no finding of good cause and providing no explanation for denying the motion.

Boren v. Rogers, et al, 2018 WL 663727 (Fla. 5th DCA F2018)

In 2014, Ann Boren (the "Contestant") filed an amended complaint seeking to void a 2014 trust and a 2013 trust executed by Elaine Mullins (the "Settlor"). The allegations in the amended complaint were that Respondent, Evelyn Rivera (the "Alleged Influencer"), who was not a family member, befriended the Settlor late in life, at a point when the Settlor was in failing health and suffering from cognitive deficits, and unduly influenced the Settlor to execute the two trust instruments that substantially benefitted the Alleged Influencer and excluded the Contestant. The Contestant alleged that but for this undue influence she would have been a beneficiary and that for many years prior to the Settlor's death in December 2014, the Settlor had maintained a longstanding estate plan whereby her assets would pass to certain family members upon the Settlor's death, including the Contestant.

The attorney who drafted both the 2013 and 2014 trusts, Co-Respondent, Thomas Rogers, Esquire (the "Drafting Attorney/Trustee"), was also appointed trustee under both the 2013 and 2014 trusts that he drafted. In responding to the amended complaint, the Drafting Attorney/Trustee argued that the Contestant lacked standing to challenge the trusts "under the doctrine of dependent relative revocation because the trust was initially created in 1992 and 'was amended and/or restated in 1996, 2000, 2002, 2005, 2007, 2013 and 2014.'" The Drafting Attorney/Trustee argued that the Contestant must first show that she would have been a beneficiary under an earlier trust before she would be entitled to receive a copy of the most recent trust documents.

The Contestant then served a request for production of documents to the Drafting Attorney/Trustee, requesting the production of copies of all trust documents prepared by the Drafting Attorney/Trustee, his law firm, or by anyone else for the Settlor's signature. The request also sought together with copies of all notes, memoranda, or other documents created or maintained by the Drafting Attorney/Trustee relative to both the trust documents and communications to and from the Settlor regarding the preparation or execution of the trust documents and other estate planning documents. Finally, the request sought communications between the Drafting Attorney/Trustee and the Alleged Influencer.

The Drafting Attorney/Trustee moved for a protective order as to all requested documents on four grounds, which included, in pertinent part, that the requested documents were irrelevant and that he should not have to produce them because the Contestant did not identify the specific trust of which she claimed to be a beneficiary. The trial court conducted a hearing and directed the Drafting Attorney/Trustee to produce trust instruments from 1992-2007 for in camera review. The documents were submitted to the court under seal. Following its review, the trial court entered an order finding that the Contestant was "not entitled to a review" of any of the documents sought in the request for production and granted the motion for protective order in its entirety and without further explanation. The Contestant filed a petition for writ of *certiorari* with the Fifth District Court of Appeal seeking reversal of the order denying discovery.

The Fifth District Court of Appeal quashed the motion for protective order entered by the trial court. While the Fifth District Court of Appeal began its opinion noting that "[c]ertiorari is rarely available to review orders denying discovery because in most cases the harm can be corrected on appeal," it went on to recognize that "in those rare circumstances when the discovery is relevant or is reasonably calculated to lead to the discovery of admissible evidence and the order effectively eviscerates a party's claim, defense, or counterclaim, relief by writ of certiorari is appropriate." Moreover, the trial court made no finding of good cause, provided no explanation in its order for denying the motion, nor did it separately analyze the individual requests contained in the respective paragraphs of the Contestant's discovery request, which the Fifth District Court of Appeal stated "is insufficient when, as here, Boren's document request is directed at items that, based on the allegations in the amended complaint, would appear to be admissible at trial or otherwise reasonably calculated to lead to admissible evidence."

In quashing the motion for protective order, the Fifth District Court of Appeal reasoned that the Contestant would need the requested trust documents in order to establish at trial that she has standing as a prior beneficiary of the trust to bring suit. With no access to the requested trust documents, the Contestant lacked the ability to explain or demonstrate how those trust

continued, page 53

documents would have established her standing. Thus, the Court concluded that "the order effectively eviscerates her claim, which cannot be remedied on direct appeal because, at the very least, with no access to these documents, [the Contestant] lacks the ability to explain or demonstrate on direct appeal how the trust documents would have established her standing." Accordingly, the trial court's denial of discovery in this case effectively prevented the Contestant from proving her case and constituted a departure from the essential requirements of the law. The Fifth District Court of Appeal further directed the lower court to permit discovery of the requested trust documents or, alternatively, make the requisite finding of good cause as to why these trust documents must be protected from production.

Trial court erred in entering summary judgment in favor of defendants on (1) a count alleging breach of fiduciary duty by successor trustee and (2) counts alleging civil theft and conversion against individual defendant who had failed to return trust funds transferred to her solely where there was evidence sufficient to demonstrate existence of material disputed issues of fact.

Prewitt v. Kimmons, 2018 WL 791395 (Fla. 5th DCA 2018)

The Appellant, Brenda Prewitt, a named beneficiary of an irrevocable trust (the "Trust") established by her then deceased mother, Pauline Tyler ("Settlor"), sued her sisters, Shirley Kimmons ("Kimmons") and Sandra Perkins ("Perkins") (collectively the "Appellees"). Count III of Appellant's multi-count second amended complaint alleged that Kimmons, who was the successor trustee of the Trust, "breached her fiduciary duty to Appellant by, (1) failing to distribute funds as provided for by the trust documents, (2) failing to seek return of $10,000 of trust assets wrongly retained by Perkins, and (3) failing to return monies that Kimmons had misappropriated from the trust account prior to [Settlor's] death." Similarly, Count V (conversion) and Count XIII (civil theft) both sought damages from Perkins for (1) failing to return monies to the Trust that she received for "safekeeping" purposes and (2) misappropriating monies from the Trust account prior to Settlor's death. The trial court granted summary final judgment in favor of Appellees on all claims and Appellant filed an appeal to the Fifth District Court of Appeal.

The Fifth District Court of Appeal reversed the trial court's order, in part, after concluding that "disputed material issues of fact precluded the entry of summary judgment on Counts 3, 5, and 13." The court concluded that record evidence was sufficient to permit Appellant to proceed with her claims as set forth in Counts 3, 5, and 13 where: (1) there was record evidence that the Kimmons, as trustee, had paid lease payments on a car that was ultimately conveyed to a beneficiary and that said payments were not consistent with the terms of the Trust; (2) there was evidence that Perkins had received $10,000 from the Settlor solely for "safekeeping" purposes, that these monies had never been returned to the Trust account, and that Kimmons had taken no action to recover these monies; and (3) there was record evidence that during a time when the Settlor "was in deteriorating health and receiving morphine, the Kimmons improperly disbursed money from the trust account to herself and her daughter." The court ultimately concluded that the aforementioned record evidence created questions of fact as to Appellant's breach of fiduciary duty claim against Kimmons, citing to Fla. Stat. §736.0801, §736.0811, and §736.0812, and was sufficient to preclude summary judgment as to Count V (conversion) and Count XIII (civil theft) against Perkins.

Trial court erred by denying motion for entitlement to attorney's fees and costs pursuant to Fla. Stat. §744.108, after concluding that none of the services rendered by appellants benefitted the ward. In a specially concurring opinion, the Honorable Judge J. Robert Luck opined that the Third District Court of Appeal and other appellate courts of this state have read into subsection (1) of section Fla. Stat. §744.108, a requirement that the attorneys' services must benefit the ward or the ward's estate, which is a requirement the legislature did not intend when drafting Fla. Stat. §744.108.

Schlesinger v. Jacob, 43 Fla. L. Weekly D419a, 2018 WL 988292 (Fla. 3d DCA, February 21, 2018)

Appellants, Michael J. Schlesinger, of Schlesinger & Associates, P.A., and Luis E. Barreto, of Luis E. Barreto & Associates, P.A. (collectively "Appellants") provided services in a guardianship proceedings, which included (1) filing a petition to determine incapacity, which the trial court granted upon a determination that the Ward was totally incapacitated; and (2) filing a petition to establish a plenary guardianship, which the trial court also granted after determining that such was necessary "to provide for the welfare and safety of the Ward," and because there was no less restrictive alternative to plenary guardianship that would "sufficiently address the problems and needs



continued, page 54

of the Ward." Appellants filed a motion for entitlement to attorney's fees and costs pursuant to Fla. Stat. §744.108, which the trial court denied. In its order denying the motion for entitlement to attorney's fees and costs, the trial court concluded that none of the services rendered by Appellants benefitted the Ward. Consequently, Appellants filed an appeal of the trial court's order denying the motion for entitlement to attorney's fees and costs.

On appeal, the Third District Court of Appeal reversed the trial court's order denying Appellants' motion for entitlement to attorney's fees and costs after finding that the trial court's conclusion was unsupported by competent substantial evidence in the record. Specifically, the Third District Court of Appeal found that as a result of the Appellants' services, "the Ward received the full benefit and protection of a plenary guardianship of person and property under Florida law." In addition to finding that the trial court's conclusion was unsupported by competent substantial evidence in the record, the Third District Court of Appeal also noted that "[t]he trial court's order appears to have conflated the separate determinations of entitlement to attorney's fees with the reasonable amount of fees to be awarded." Entitlement to attorney's fees is governed by Fla. Stat. §744.108(1), which provides that "[a] guardian, or an attorney who has rendered services to the ward or to the guardian on the ward's behalf, is entitled to a reasonable fee for services rendered and reimbursement for costs incurred on behalf of the ward, whereas the reasonableness of said fee is governed by subsection 744.108(2), Fla. Stat."

The majority opinion noted that the Third District Court of Appeal "has adopted our sister courts' construction of section 744.108(1)" and cited to *Losh v. McKinley*, 106 So. 3d 1014, 1015 (Fla. 3d DCA 2013), but did not delve any further into *Losh*. However, in a special concurring opinion, the Honorable Robert J. Luck, opined that the Third District Court of Appeal "should recede from Losh and read section 744.108 as the legislature wrote it." The special concurrence explained that "because our court in *Losh v. McKinley*, 106 So. 3d 1014 (Fla. 3d DCA 2013) joined the other district courts in welding onto the guardianship attorney's fee statute, section 744.108(1), the requirement that an attorney's services 'benefit' the ward for the attorney to be entitled to fees" exists in the Third District Court of Appeal, "even though the word 'benefit' is found nowhere in section 744.108(1) ("A guardian, or an attorney who has rendered services to the ward or to the guardian on the ward's behalf, is entitled to a reasonable fee for services rendered and reimbursement for costs incurred on behalf of the ward.")."

Judge Luck's occurrence explained that "[b]y authorizing attorney's fees for services rendered to the ward, the legislature sought to encourage concerned family members and other interested parties to investigate abuses of a ward and to bring good-faith claims to the probate court." While those claims may not be successful in the end, the special concurrence opined that the family members and other interested persons who bring them are nevertheless "rendering services to the ward by making sure they are well cared for and that the guardian is doing his or her job." Thus, "[b]y authorizing attorney's fees for services rendered to the ward, the legislature has essentially asked family members and interested parties, the ones best suited to watch over the ward, to be vigilant in protecting the ward's rights and bring to the trial court's attention good-faith concerns that the ward is being abused." Here, the specially concurring opinion noted, even "if the ward's daughter had been unsuccessful in her petitions, they triggered the trial court to appoint three doctors who were required to meet with the ward and his family physician and caretaker, diagnose him, and evaluate his capacity to manage his financial affairs and make medical decisions concurrence." Thus, "[b]y filing and litigating the petitions, the attorney rendered services to the ward by making sure he was being properly cared for and was of sound mind to exercise his rights."

While the specially concurring opinion agreed with the outcome of the majority opinion, it went on to express its disagreement with the Court's previous recognition of there being "a benefit requirement to Fla. Stat. §744.108(1)," which Judge Luck opines discourages attorneys from bringing guardianship claims that would otherwise be brought. The special concurrence explained that under Losh and the other cases cited by the majority opinion, the additional requirement that an attorney's services must benefit the ward has "consequences that were not intended by the legislature." Moreover, the concurrence notes that under *Losh*, "if the attorney services rendered to the ward are not successful, then the attorney is not entitled to fees." Consequently, the result of this additional, and legislatively unintended, requirement is that "attorneys are less likely to represent family members and interested parties concerned about how the ward is treated because they will not get paid, and thus, fewer claims by family members and interested parties will be brought to court," which will result in less oversight of the most vulnerable members of our community. Thus, because Fla. Stat. §744.108(1), provides for attorney's fees where services were rendered to the ward, "*Losh* and the other cases cited by the majority opinion are contrary to the legislature's decision to expand the scope of those entitled to attorney's fees to those who render services to the ward, and not just to successful parties, as it has done in countless other statutes."

The special concurrence concludes by explaining that the structure of Fla. Stat. §744.108, shows that the legislature intended that the benefit resulting from the litigation is not to be considered when determining whether the attorney is entitled to fees. Rather, as Judge Luck explained, "[s]ubsection

continued, page 55

(1) is the entitlement section, and says that an attorney who renders service to the ward is entitled to a reasonable fee for services rendered. §774.108(1), Fla. Stat." Then, and only once the trial court determines that an attorney is entitled to fees under subsection (1), does the trial court proceed to subsection (2), which provides the set of criteria for the court to consider in determining the amount of the fee award. It is these factors in subsection (2) that, "unlike in subsection (1), go to the benefit received by the ward from the attorney's services." In other words, subsection (1) deals with entitlement and subsection (2) accounts for benefit to the ward when considering the amount of fees to be awarded. The concurrence concludes that "*Losh* and the other cases flip the analysis and consider the benefit factors at the entitlement stage" and "[t]his is not what the legislature wrote and it is not what it intended."

Trial court erred by entering temporary injunction requiring non-party financial institution to remove its unilateral freeze of accounts without requisite findings, without a demonstration of substantial likelihood of success or irreparable harm, and without requirement of posting of bond by the moving party.

Dubner v. Ferraro, 43 Fla. L. Weekly D767b (Fla. 4th DCA, April 11, 2018)

Appellant, Ronald N. Dubner, Esquire ("Appellant"),[1] instituted several lawsuits in Palm Beach Circuit Court (including trust, probate, and tort actions) based on claims that his half-siblings had unduly influenced their mother to alter the estate plan of their mother and father in order to give them millions of dollars in *inter vivos* gifts, to the detriment of Appellant. Appellant also filed a separate lawsuit in Broward Circuit Court, which related to separate conduct and causes of action (unjust enrichment, constructive fraud, tortious interference with a business relationship, exploitation of a vulnerable adult, and declaratory action) by his half-siblings, which also named as defendants two companies in which Appellant previously held ownership interests and the financial broker (the "Broker") holding accounts of Appellant's half-sister, half-brother, and other family entities (the "Broward Action").

After the Broward Action was filed, the Broker, without a court order, put a unilateral freeze on the accounts in dispute in the Broward Action pursuant to a contractual right contained in an account agreement with Broker. The Personal Representative of Appellant's late half-brother's estate and Appellant's half-sister (collectively "Defendants"), filed an emergency verified motion for injunctive relief in the Palm Beach County probate case seeking an Order enjoining the Broker to remove the freeze or the posting of a $60 million bond by Appellant. Defendants claimed "irreparable harm" insofar as their purported "inability to access critical funds not subject of a court order." Defendants also claimed a likelihood of success on the merits because Appellant had not moved for injunctive relief prior to the Broker instituting the freeze. Moreover, Defendants claimed that allowing the broker to arbitrarily freeze client accounts would be a disservice to the public interest "as it would allow more frivolous filings of lawsuits simply naming different financial institutions in complaints as a method of securing prejudgment relief." The trial court set a hearing on Defendants' verified motion for injunctive relief, at which the trial court granted Defendant's motion and ordered the Broker to release any hold or freeze on the accounts.

The Appellant appealed the trial court's temporary injunction order to the Fourth District Court of Appeal. Appellant argued, in pertinent part, that (1) the injunction was defective for failure to comply with the procedural and substantive requirements for temporary injunctions, (2) the injunction was defective for failure to include a bond in accord with the express requirements of Florida Rule of Civil Procedure 1.610(b), and (3) Defendants had failed to meet the standard of proof for issuance of a temporary injunction. The Fourth District Court of Appeal agreed with the Appellant's three aforementioned arguments and reversed the trial court's temporary injunction order.

The Fourth District Court of Appeal agreed with Appellant's first argument that the injunction was defective for failure to comply with the procedural and substantive requirements for temporary injunctions. The Fourth District Court of Appeal noted that the trial judge orally announced at the hearing, "I'm ruling that the brokerage house have no freeze on it . . . ; that there's not to be any freeze," but there was no other oral explanation or findings in the Court's pronouncement or its order. Consequently, the temporary injunction order failed to comply with the requirements of Rule 1.610(c), Fla. R. Civ. P. Moreover, as to Appellant's argument that Defendants failed to meet the standard of proof for issuance of a temporary injunction, the Fourth District Court of Appeal agreed and noted that "defendants failed to demonstrate a substantial likelihood of success or irreparable harm." Finally, the Court agreed with Appellant's argument that "the injunction is defective for failure to include a bond in accord with the express requirements of Florida Rule of Civil Procedure 1.610(b). See *Fla. High Sch. Athletic Ass'n. v. Rosenberg*, 117 So. 3d 825 (Fla. 4th DCA 2013)." While Defendants argued that Appellant waived his bond challenge, the Court noted that "we disagree and see no basis for avoiding the bond requirement." Consequently, the Fourth District Court of Appeal reversed the trial court's order and remanded with instruction to dissolve the mandatory injunction.

Endnote

1 It should be noted that the author of this case summary is lead counsel for the Appellant.

Welcome Hilary Stephens

Hilary Stephens joined The Florida Bar in February as the Section's new Program Coordinator. Hilary comes to us from Dothan, Alabama where she worked as a Community Manager for military housing at Fort Rucker. Hilary will be working alongside Mary Ann Obos, our Section's administrator. While you will likely find her behind the registration desk at nearly any RPPTL event, she will also be working behind the scenes on CLE programs and other Section projects. As the newest member of this Section, Hilary invites you to reach out to introduce yourself by phone at 850/561-3155 or by email at hstephens@floridabar.org.





Real Property Case Summaries

Prepared by Jacqueline J. Peregrin, Esq., Peregrin Law Firm, PA, Naples, Florida

If a tax deed sale is overturned, the successful party must reimburse the purchaser for all monies paid for the tax deed plus 12% interest. Rights of parties in a tax deed dispute are determined by the Statutes in effect at the time the tax deed is issued.

Ashear v. Sklarey, Case No. 3D16-888 (Fla. 3d DCA 2018)

In 2010, Apellant Ashear won the bid for a tax deed property and received the deed the following day. Days later, property owner Sklarey filed a complaint against Ashear to set aside the tax deed. The trial court set aside the tax deed; however, the court failed to require Sklarey to reimburse Asher for the tax deed and interest from the date it was issued, as stated in Fla Stat §197.602. The Appellate Court found that Ashear was entitled to reimbursement, and Ashear additionally sought attorney's fees and costs under the revised 2017 version of Fla Stat 197.602. Citing to Florida Supreme Court case *Culmer v. Office Realty Co.*, 189 So. 52, 54 (Fla. 1939) the Appellate Court ruled against Ashear, as the rights of private purchasers of tax deeds "are governed by the law in force at the time the tax sale certificates are issued to them or to their assignors at the tax sale or at the time the State transfers the certificates to private purchasers." As Ashear purchased the tax deed in 2010, he could not rely on the 2017 version of the statute to collect attorney's fees and costs.

The statute of limitations for actions in construction defect matters runs from the time the defect is or should have been discovered. If the time of discovery is not obvious, the commencement of the tolling of the statute of limitations is a question for the jury, not a matter of law.

Inlet Marina Of Palm Beach, Ltd. v. Sea Diversified, Inc., Case No. 4D17-1406 (Fla. 4th DCA 2018)

Appellees Sea Diversified, Inc., Anderson-Moore Construction Corp., and Ardaman & Associates, Inc. designed a concrete runway slab for dry storage forklift traffic at Appellant Inlet Marina of Palm Beach, Ltd.'s water launch. Appellant sued for cracks and deterioration in the slab. The trial court granted the Appellees' motion for summary judgment based on the expiration of a four-year statute of limitations.

On appeal, Appellant argued that a genuine issue of material fact existed concerning when the defects were discovered or should have been discovered. The Court reversed the judgment, as Fla Stat §95.11(3)(c) states that actions involving a latent defect have a statute of limitations counted from "the time the defect is discovered or should have been discovered with the exercise of due diligence." The Court relied on *Performing Arts Center Authority v. Clark Const. Group, Inc.,* 789 So. 2d 392 (Fla. Dist. Ct. App. 2001) to determine that the question of whether the Appellant was on notice of the defect should be a question for a jury: "where the manifestation (of a defect) is not obvious but could be due to causes other than an actionable defect, notice as a matter of law may not be inferred."

To establish standing after a series of mergers and acquisitions, a lender-plaintiff must connect all entities in unbroken succession.

Fielding v. PNC Bank National Association, Case No. 5D16-440 (Fla. 5th DCA 2018)

Appellant Borrower executed a note and mortgage with Fidelity Federal Bank and Trust in 2003. In 2007, the lender converted to a national bank by the name of Fidelity Bank, National Association, then merged into National City Bank. In 2008, National City Mortgage filed a foreclosure complaint against the Appellant Borrower with a "lost note" count. The Borrower raised standing as an affirmative defense. In 2009, National City Bank merged with Appellee PNC Bank National Association. In 2010, National City Mortgage moved to substitute PNC Bank National Association as successor by merger to National City Bank, which was successor by merger to Fidelity, the original lender in the chain.

At trial, Appellee presented a copy of the certificate of merger between Fidelity and National City Bank and a copy of the certificate of merger for National City Bank to Appellee PNC Bank National Association. A judgment of foreclosure was entered.

The Appellate Court reversed this ruling, as the Appellee did not show that National City Mortgage—the bank that filed the action—had standing to enforce the note. The chain of documents presented at trial left out National City Mortgage altogether. Citing to *Green v. Green Tree Services*, Case No. 4D17–983, the court stated that "banks must establish and explain the relationship between the entities in the entire chain of mergers in order to establish standing."

Ownership of a corporation does not entitle a sole shareholder to a homestead exemption of corporate property, even if the sole shareholder resides on the corporate property.

continued, page 58

DeJesus v. A.M.J.R.K. Corp., Case No. 2D17-2374 (Fla. 2d DCA 2018)

In 2012, Appellant DeJesus was injured on property owned by Appellee A.M.J.R.K. Corp. and sued for damages. Appellee Guillen is the president and sole shareholder of the Corporation. In 2014, while litigation was still pending, the Corporation executed and recorded a faulty quitclaim deed purporting to transfer the property to Guillen who began to reside at the property in 2015. In December 2015, DeJesus was awarded $390,649.64 in damages. In 2016, DeJesus filed a supplementary complaint to collect on the judgment and alleged that the Corporation had attempted to transfer the property to avoid a forced sale to satisfy the judgment. DeJesus further sought to implead Guillen in the matter. While this proceeding was pending, the Corporation again attempted to transfer the property to Guillen, but again, the quitclaim deed was faulty. The trial court implead Guillen as a third-party defendant and entered an injunction to prevent the transfer of the property. In its Order, the trial court ruled that 1) neither quitclaim deed achieved a transfer of the property from the Corporation to Guillen; 2) homestead protection attached to the property when Guillen started living there in 2015; 3) DeJesus was entitled to a lien because homestead did not attach until after DeJesus filed a claim; and 4) the property was protected from forced sale due to its homestead status.

The Appellate Court reversed the finding that Guillen had any homestead protection, as Guillen never had any ownership interest in the property. The Court distinguished the trial court's reliance on *Callava v. Feinberg*, 864 So. 2d 429 (Fla. Dist. Ct. App. 2003), which held that a beneficiary of spendthrift trust was entitled to homestead protections, even though the beneficiary did not have fee simple interest in the property against Guillen's case where the quitclaim deeds were faulty and no interest in the property ever vested in Guillen. Under *Mease v. Warm Mineral Springs, Inc.*, 128 So. 2d 174 (Fla. Dist. Ct. App. 1961), "[t]he stockholders do not have vested interest in the title in the corporate property." Thus, even as president and sole shareholder of the Corporation, Guillen never had an interest in the property to merit homestead protection.

When a new loan servicer fails to timely provide information about where to make payments to a borrower, and the borrower continues to pay under the terms of the loan, a default on the loan meriting foreclosure is not triggered, even when a "goodbye letter" from a prior servicer was received by the borrower.

Coconut Grove Acquisition, LLC v. S&C Venture, Case No. 3D17-434 (Fla. 3d DCA 2018)

In 2007, Appellee Borrower executed a balloon payment note and mortgage with Mercantil CommerceBank, N.A. ("Mercantil"). The note had a maturity date in 2012 and an extension option until 2017. Payments to Mercantil were deducted from an operating account at Mercantil and regularly funded by Appellee. In November 2011, Mercantil sold the loan to Stabilis Fund II, LLC ("Stabilis"). While Mercantil no longer held the Appellee's note, Mercantil sent a "goodbye letter" on November 14, 2011, advising that the loan had been sold, payments would no longer be deducted from the Mercantil operating account, and payments should be directed to Stabilis. Despite the letter, Appellee continued to deposit funds to cover the payment with Mercantil.

The following month, Appellee received a letter from Stabilis with payment instructions that promised the arrival of a billing statement in two weeks. Rather than a billing statement, on January 11, 2012, Appellee received a default notice calling the balance of the loan due because of existing defaults from November and December. The parties attempted to resolve the matter, and Appellee continued to pay amounts as they came due as directed by Stabilis.

In 2012, Stabilis filed a complaint stating that Appellee failed to make payments in November and December of 2011, and Appellee argued that Stabilis was responsible for any delay in payments due to the confusion of letters. The trial court ruled in favor of the Appellee, and the Appellate court affirmed the decision as it was "supported by competent substantial evidence," particularly that 1) the executed note itself directed that the payments should be made to the Mercantil account until otherwise designated in writing (performing otherwise would be a violation of the terms of the note); 2) the Mercantil account maintained sufficient funds to cover all funds in question at all times; and 3) the properly tendered November and December payments were the only payments in question and were made before Stabilis sent notice of where to direct payments on the loan. Thus, the Court affirmed that no default on the loan existed.

Absent demonstrated prejudice, substantial compliance with default notice requirements in a foreclosure matter is sufficient.

Citigroup Mortgage Loan Trust Inc. v. Scialabba, Case No. 4D17-401 (Fla. 4th DCA 2018)

Borrower-Appellees executed a promissory note and mortgage with a "Property Address" of "9484 South Military Trail #15" and later entered into a loan modification agreement with a "Property Address" of "9486 S MILITARY TRL 4." The Borrowers defaulted, and Appellant Bank sent default notices to the Property Address on the loan modification agreement. The Bank filed a foreclosure action and alleged compliance will all conditions precedent. In their answer, the Borrowers admitted that they reside at Unit 4 and received mail addressed to "#15" and "Unit 4." The Borrowers denied compliance with

continued, page 61

State Tax Case Summaries

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

Miami-Dade tax collector cannot narrow Florida statute requiring intertest due on refunded ad valorem taxes that were determined to be overpaid by the value adjustment board.

*Williams Island Ventures, LLC v. Saiz de la Mora, No. 3D15-2037, 2018 WL 1936576, at *1 (Fla. Dist. Ct. App. Apr. 25, 2018)*

On May 1, 2014, Marcus Saiz de la Mora succeeded Fernando Casamayor as the Miami-Dade tax collector. Casamayor had previously remitted 12% interest on refunds resulting from assessment reductions obtained either through a ruling of the Value Adjustment Board ("VAB") special magistrate after a hearing or from the execution of a Petition Withdrawal Agreement without a hearing. However, upon succeeding Casamayor, Saiz de la Mora made a substantial change to this policy. Saiz de la Mora decided that interest would be paid on refunds only if an assessment was reduced after a formal VAB hearing and there was an issuance of a formal, written VAB ruling reducing the assessment.

Saiz de la Mora reasoned that in cases in which a Petition Withdrawal Agreement was executed, the VAB had not, in fact, determined that a refund was due. As a result, Saiz de la Mora stopped paying interest on refunds related to petitions, even when a taxpayer's assessment was reduced during the time Casamayor was in office. Later, in January 2015, Saiz de la More made an additional change by issuing written demand letters to taxpayers who had received interest on refunds received through executed Petition Withdrawal Forms to repay those interest payments. These "clawback taxpayers," along with one taxpayer to whom interest was owed, filed a class action suit on behalf of all affected taxpayers on March 24, 2015. The trial court granted Saiz de la Mora's motion to dismiss with prejudice, which prompted the appeal.

The Third District Court of Appeal ("DCA") determined that the trial court erroneously dismissed the case when (1) the taxpayers' claims were based on a valid interpretation of Fla. Stat. §194.014; (2) the determination of whether a tax collector has the right to claw back overpayments was subject to determination by the trial court; and (3) the taxpayers pled factual allegations to satisfy each of the elements of their claims. Furthermore, Saiz de la Mora's argument that the acts of a prior tax collector were ultra vires acts that did not bind the current tax collector was an affirmative defense that should not have been considered on the motion to dismiss. Consequently, the case was reversed and remanded for further proceeding.

County homestead tax lien takes priority over mortgage on foreclosed property.

Miami-Dade Cty. v. Lansdowne Mortg., LLC, 235 So. 3d 960 (Fla. Dist. Ct. App. 2017), reh'g denied (Jan. 4, 2018)

Miami-Dade County appealed a final judgment of foreclosure that granted Lansdowne Mortgage, LLC summary judgment on its claim that the county homestead tax lien was inferior to Lansdowne Mortgage, LLC's mortgage on the property at issue. The mortgage on the property was recorded in September 2007. Meanwhile, the homestead tax lien was recorded on January 2014 upon the determination by the tax assessor that the homestead benefits were improperly received.

In May 2015, Lansdowne Mortgage, LLC filed a foreclosure action, arguing that the mortgage took priority over the county tax lien because the mortgage was recorded prior to the lien. Each party filed a motion for summary judgment.

The county argued that Fla. Stat. §197.122(1) (2015), clearly states that taxes imposed pursuant to Florida law are to be "a first lien, superior to all other liens." Meanwhile, Lansdowne put forth the argument that a more narrow statute, specifically, Fla. Stat. §196.161 (2015), controlled. Fla. Stat. §196.161, states that prior to the filing of the notice of the homestead tax lien, "any purchaser for value of the property shall take free and clear of such lien."

The Third District Court of Appeals disagreed on the relevancy and application of Fla. Stat. §196.161. Specifically, the court found that the statute addressed when and how such a lien attaches to a property, rather than the express or implied effect of its priority over other liens. Therefore, the appellate court reversed the trial court's ruling, finding that the priority of the county's lien should be governed by Fla. Stat. §197.122(1), and not Fla. Stat. §196.161, and that the county's motion for summary judgment should have been granted.

Property that was equitably owned by university qualified for immunity from ad valorem taxes; taxes erroneously paid should be refunded.

Crapo v. Provident Grp.-Continuum Properties, L.L.C., No. 1D17-280, 2018 WL 771163 (Fla. Dist. Ct. App. Feb. 8, 2018)

The nonprofit corporation that owned property developed and used as housing for graduate and professional students under an agreement with the University of Florida brought an action against the county property appraiser, seeking

continued, page 61

THE FLORIDA BAR



JUST PUBLISHED

The Florida Bar Probate System

FIFTH EDITION © 2018

Rohan Kelley, Tae Kelley Bronner, authors; legal and tax commentary by Jeffrey Baskies

AUTHORS YOU CAN RELY ON

The Florida Bar Probate System is written by preeminent probate scholars—Rohan Kelley and Tae Kelley Bronner—and it includes a discussion of probate tax issues by tax specialist Jeffrey Baskies. The new edition is replete with numerous practice forms from the authors, as well as 2018 forms from Florida Lawyers Support Services.

The latest edition of this venerable source has been revised and updated over the course of four years. During this time, the work was substantially enhanced and expanded with many additional forms and the how-to guidance needed to navigate probate administration.

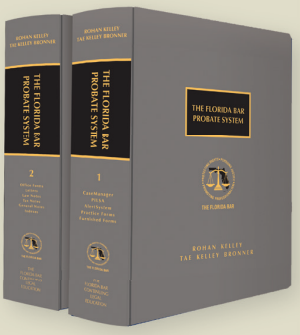
NEW MATERIAL IN THE FIFTH EDITION

- The authors' "Florida Homestead Paradigm" for navigating Florida's complex homestead statutes and constitutional provisions
- Additional forms provided by the authors
- Updated case law

YOUR ROADMAP THROUGH ALL FACETS OF PROBATE ADMINISTRATION

- Detailed how-to instructions for each step in the probate process
- Employment and fee agreements
- Personal representative qualification issues
- Service requirements and statutory and rule authority for each form
- Over 155 pleading and practice forms
- Essential office forms and checklists for handling each client conference, from the moment of employment to the closing of the file
- Forms and notices that need to be filed by the attorney or the decedent's personal representative with the court, or with creditors, beneficiaries, or heirs
- 81 sample letters to send to banks, appraisers and tax consultants, the IRS, the Social Security or Veteran's Administrations, family members, estate claimants, or service providers
- Applicable legal and tax issues including exemptions, contributions, out-of-state realty, business interests, digital assets, elective share calculations, abatement, and DSUE
- Cross references throughout that further enhance the System's utility

COMPLETELY REVISED AND UPDATED



$495

2 volumes, loose-leaf, Pub. #22871,
ISBN 9781632846129

FOR MORE INFORMATION OR TO ORDER:

ONLINE AT **lexisnexis.com/FLad**

CALL 800.533.1637

LexisNexis®

Prices do not reflect sales tax, shipping and handling. Prices current as of 5/15/2018. Prices subject to change without notice. LexisNexis and the Knowledge Burst logo are registered trademarks of RELX Inc. © 2018 LexisNexis. OFF04262-0 0618

conditions precedent and raised notice noncompliance as an affirmative defense. A trial witness verified that the Borrowers did not cure the default on the loan.

The trial court entered an involuntary dismissal due to insufficiency of notice, and the Bank appealed stating that the loan modification agreement amounted to a notice of change of address from the Borrowers that modified the "Property Address." The Appellate Court ruled in favor of the Bank, quoting *Perez v. Perez*, 973 So. 2d 1227 (Fla. Dist. Ct. App. 2008) "an involuntary dismissal is properly entered only where the evidence considered in the light most favorable to the non-moving party fails to establish a prima facie case. The trial court may not weigh and judge the credibility of the evidence." The Appellate Court cited two additional cases in which notice was deemed sufficient: (1) in *Fed. Nat'l Mortg. Ass'n v. Hawthorne*, 197 So. 3d 1237 (Fla. 4th DCA 2016), notice was sent to a second home of record, and (2) in *Caraccia v. U.S. Bank, Nat'l Ass'n* 185 So.3d 1277 (Fla. 4th DCA 2016), notice was determined to be sufficient where the USPS sent the Bank an updated address to a PO Box and a Borrower mailed correspondence to the Bank using the same return address.

In the referenced cases and in the present case, the Borrowers did not suffer any prejudice, nor did they attempt to cure the default on the loan. Satisfied that the Bank substantially complied with the notice condition precedent, the court ruled in favor of the Bank and closed its opinion with reference to *Lopez v. JPMorgan Chase Bank*, 187 So. 3d 343, 345 (Fla. 4th DCA 2016) stating that the Bank's substantial compliance "while not full performance, is no nearly equivalent to what was bargained for that it would be unreasonable to deny the promise the benefit of the bargain."

Endnotes

1 It should be noted that the author of this case summary is lead counsel for the Appellant.

declaratory relief that the property was immune from ad valorem taxation and for a refund of taxes previously paid. The trial court granted the relief sought.

The First District Court of Appeals found that the main purpose of the agreement between the nonprofit corporation and the university was to provide additional needed graduate and professional student housing. The university had the right to approve project plans, use, financing, operations, and rental terms for the project. The university furthermore allowed the project to use its name and affiliation to attract students and provided services to the residents of the housing project through a trained staff resident. Any surplus funds from the rental of the housing was directly applied to the university's debt. Additionally, once the repayment obligations are satisfied, the university is entitled to legal title without any additional payment. Most importantly, in totality, the documents established the existence of a trust for the university's benefit.

The court agreed with the trial court that although the nonprofit corporation which owns the property was the legal owner, the university was the equitable owner because it administered the current operations of the project and also benefits from them. As a result, the court held that the property was immune from ad valorem taxation and affirmed the declaratory judgment.

Florida Bar CLE–24/7,
Online & downloadable

For the Bar, By the Bar.
www.floridabar.org/CLE

Construction Law Case Summaries

By Greg K. Demers, Esq., Ball Janik LLP, Orlando, Florida

A construction subcontract for digging utility lines which contained an indemnification provision indemnifying the indemnitee for its own negligence was not subject to the Fla. Stat. §725.06 requirement of a monetary limitation.

Blok Builders, LLC v. Katryniok, No. 4D16-1811 (Fla. 4th DCA, March 23, 2018)

BellSouth Telecommunications entered into a contract with Mastec North America ("Mastec") to perform the work necessary to provide access to underground telecommunications lines. Mastec then entered into a subcontract with Blok Builders ("Blok") to perform the excavation work. The subcontract between Mastec and Blok contained a provision requiring Blok to indemnify Mastec for Mastec's own negligence and incorporated the terms of the contract between Mastec and BellSouth, which contained a similar indemnification provision requiring Mastec to indemnify BellSouth. When a homeowner sued Blok, Mastec, and BellSouth for injuries he suffered when his driveway collapsed, Mastec and BellSouth crossclaimed against Blok to indemnify them under the subcontract. Blok defended and stated that the indemnification provisions were invalid under Fla. Stat. §725.06 because the subcontract did not contain a monetary limitation. Under Fla. Stat. §725.06, indemnification provisions in contracts for construction of a "building, structure, appurtenance, or appliance, including moving and excavating associated therewith" are void unless the contract contains a monetary limitation.

The issue before the Fourth District Court of Appeal was whether Fla. Stat. §725.06 extends to excavation. Blok relied primarily on *Camp, Dresser & McKee v. Paul N. Howard Co.*, 721 So.2d 1254 (Fla. 5th DCA 1998), where Section 725.06 was found applicable to the construction of concrete tunnels. However, the appellate court rejected Blok's position, finding that concrete tunnels constitute "structures" under the statute. Mastec and BellSouth relied on *Church & Tower of Fla., Inc. v. BellSouth Telecomm., Inc.*, 936 So.2d 40 (Fla. 3d DCA 2006), where the court enforced an indemnity provision in a contract for the installation of utility poles. The Blok court stated in dicta that Fla. Stat. §725.06 would not apply in that case because utility poles are not buildings or structures.

Ultimately, the court found that in order for Fla. Stat. §725.06 to apply to excavation, it must be related to "construction, alteration, repair, or demolition of a building, structure, appurtenance, or appliance …." The appellate court affirmed the lower court's ruling in part, granting summary judgment to Mastec and finding that Blok owed Mastec a duty to indemnify and defend. However, the appellate court reversed the lower court's ruling in part, holding that Blok had no duty to defend or indemnify BellSouth. The court found that neither the contract between Blok and Mastec, nor the contract between Mastec and BellSouth contained a provision requiring Blok to defend or indemnify BellSouth, and the incorporation of the contract with Mastec did not create any new duties.

Plaintiffs are not allowed to satisfy overlapping judgments entirely, and defendants may use the satisfaction of the overlapping portion as a bar to payment of the judgment.

Addison Constr. Corp. v. Vecellio LLC, No. 4D16–0618, 2018 WL 1413001 (Fla. 4th DCA Mar. 21, 2018)

The buyers of a single-family home sued the developers, the general contractor, and the subcontractors for construction defects related to mold and moisture intrusion issues. The buyers made claims under FDUTPA, breach of contract, negligent failure to disclose, fraud, securities fraud, and violations of the building code. Prior to trial, the buyers settled with the subcontractors for $2.7 million. After a jury trial, the trial court found that the buyers were entitled to $3.5 million in damages for repair and $2.5 million for loss of use, recoverable against the general contractor under the warranty; $3.3 million was recoverable against the developer and seller under the Addendum; and $2.4 million was recoverable against the seller under the Purchase Agreement. Many of the damages overlapped between the developer, general contractor, and seller. The trial court also found that buyers incurred about $75,000 in damages following the fraud.

The general contractor and developer moved the court to apply the subcontractor settlements as set-offs against the judgments. The trial court granted the set-off for the breach of contract awards. The court denied the set-off as to the fraud awards because there was no evidence that the general contractor, developer, or the seller could be liable for fraud based upon action of the subcontractors. The Fourth DCA affirmed the lower court's decision.

Setoffs for collateral recoveries are available pursuant to Fla. Stat. §768.041(2) and Fla. Stat. §46.015(2). Fla. Stat. §768.041(2) specifies that if a defendant demonstrates that a plaintiff has

continued, page 63

released a "person, firm, or corporation in partial satisfaction of the damages sued for, the court shall set off this amount from the amount of any judgment to which the plaintiff would be otherwise entitled at the time of rendering judgment and enter judgment accordingly." Fla. Stat. §46.015(2), includes a nearly-identical provision.

Under Florida law, a party is not permitted to recover for the same damages more than once. If settlement proceeds are not apportioned between: (a) claims for which co-defendants are jointly and severally liable with the settling co-defendant, and (b) claims which were only asserted against the settling co-defendant, then the entire amount of the undifferentiated recovery is allowable as a set-off. Plaintiffs are allowed to obtain overlapping judgments against multiple defendants for the same damages. However, plaintiffs are not allowed to satisfy each of these judgments entirely, and defendants may use the satisfaction of the overlapping portion as a bar to payment of the judgment. This is a post-judgment issue. The appellate court interpreted the set-off statute, Fla. Stat. §46.015(2), finding that when determining whether to apply a settlement as a set-off, it is immaterial what the plaintiff was entitled to recover, only what the plaintiff sued for. The appellate court rejected the buyers' argument that the scope of damages should be based on what they could have actually recovered against the subcontractors. When determining the respective scopes of the settlement agreements, the court may not apportion proceeds based on the representations of the settling party when the agreement does not make the same apportionment.

The statute of limitations on a claim for breach of a surety bond contract accrued at the time the duty to pay the bond arose, when the principal failed to construct improvements, not when the obligee made a demand for damages.

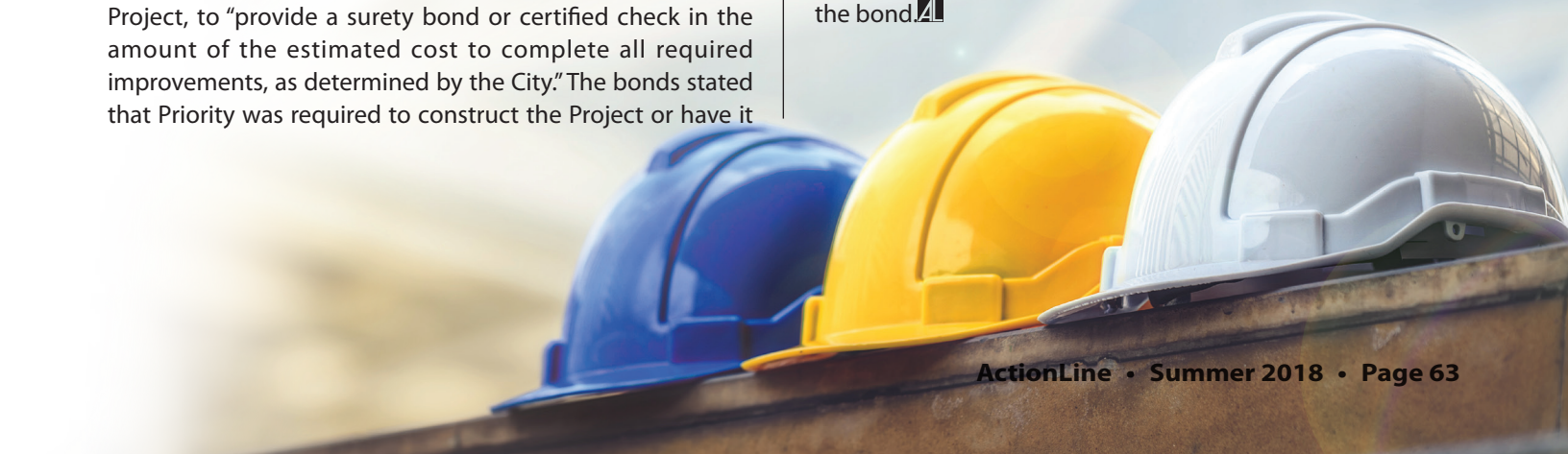
Lexon Ins. Co. v. City of Cape Coral, 42 Fla. L. Weekly D2521, 2017 WL 5759059 (Fla. 2d DCA Nov. 29, 2017)

On January 31, 2005, the City of Cape Coral ("City") enacted Ordinance 14-05 authorizing Priority Developers, Inc. ("Priority"), to construct a single-family home subdivision called the Entrada Planned Development Project ("Project"). Ordinance 14-05 required Priority, as the developer of the Project, to "provide a surety bond or certified check in the amount of the estimated cost to complete all required improvements, as determined by the City." The bonds stated that Priority was required to construct the Project or have it constructed and save the City harmless from any damage caused by its failure to complete the Project. If Priority failed to comply, the Surety, Lexon Insurance Company ("Lexon"), upon receipt of a Resolution of the City indicating that the improvements were not complete, was required to complete the improvements or pay the City a sum, up to the amount of the bond.

By 2007, photographs taken by the City confirmed that the contractor had ceased working on the Project. On October 27, 2010, the City contacted the Surety about making a claim against the Bonds. Lexon responded to the City by requesting information, but the City did not provide the information or proceed with the claim because it was receiving interest from potential buyers. In March of 2012, Coco of Cape Coral, LLC ("Coco") purchased the Project and on July 23, 2012, the City enacted a new ordinance to demand that Lexon fulfill its obligations under the bond. On October 23, 2012, the City commenced its action against Lexon for breach of the bonds and declaratory relief. Soon thereafter, the City assigned its claims to Coco, which was substituted as plaintiff.

The trial court held a bench trial, finding in favor of Coco and rejecting Lexon's position that the statute of limitations had expired before the City filed its complaint. The statute of limitations on contractual claims is five (5) years, and the cause of action accrues once the last element constituting the cause of action occurs. Fla. Stat. §§95.11(2)(b), 95.03(1) (2012). The trial court held that surety bonds, as a type of insurance contract, are breached once a claim is wrongfully denied. Lexon appealed, arguing that the statute of limitations barred Coco's claim because the five-year statute of limitations on bonds commences when the principal breaches its underlying obligation. For that reason, Lexon contended that the statute of limitations began to run in March of 2017 when Priority abandoned the project.

On appeal, the Second District Court of Appeal rejected the trial court's holding, instead finding that when Priority failed to construct the improvements, the City's right of action on the bonds accrued. The appellate court relied heavily on *U.S. v. Cocoa Berkau Inc.*, 990 F.2d 610, 613 (Fed. Cir. 1993), which held that "the date of accrual occurs at the time of the breach of the bond," meaning, when the principal failed to perform an action, not when the surety failed to make payment under the bond.



Save the Date



38th Annual

RPPTL Legislative & Case Law Update Seminar

July 27, 2018

8 a.m. – 4:45 p.m.

(Continental breakfast & lunch included)

Breakers Hotel

Palm Beach, Florida

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

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

FR/BAR CONTRACTS & RIDERS

FOR THE SALE AND PURCHASE OF RESIDENTIAL PROPERTY

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

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

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

_____ **Package(s) of FR/BAR COMPREHENSIVE RIDERS (Revised October 2017)** **$50.00 per package**
(a package is ten copies of each rider listed below)

Condominium Rider
Homeowners' Association/Community Disclosure
Seller Financing (Purchase Money Mortgage; Security Agreement to Seller)
Assumption of Existing Mortgage(s)
Federal Housing Administration (FHA)/U.S. Department of Veterans Affairs (VA)
Appraisal Contingency
Short Sale Approval Contingency
Homeowner's/Flood Insurance
Interest-Bearing Account
"As Is"
Right to Inspection and Right to Cancel
Defective Drywall
Coastal Construction Control Line
Insulation Disclosure for New Residence
Lead-Based Paint Disclosure (Pre-1978 Housing)
Housing for Older Persons
Rezoning Contingency
Lease Purchas/Lease Option
Pre-Closing Occupancy by Buyer
Post-Closing Occupancy by Seller
Sale Of Buyer's Property
Back-Up Contract
Kick Out Clause
Sellers's Attorney Approval
Buyer's Attorney Approval
Licensee Disclosure of Personal Interest in Property
Binding Arbitration

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

Firm: _____

Attn: _____ Attorney Bar #: _____

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

City/State/Zip: _____

PLEASE CIRCLE ONE: COMMERCIAL or RESIDENTIAL Address

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

Mail this form with check to the address listed above or include credit card information and fax. VISA or MasterCard ONLY.

$ _____ _____ _____/_____ ___ ___ ___ _____
Charge Card Number Exp. Date CODE Signature of Cardholder

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

Check # _____ $ _____ Authorization Date _____/_____/2018 # ____ ____ ____ ____ ____

SHIP DATE _____/_____/2018 LB____ $_____ # ___ ___ ___ ___ ___ ___ ___ ___ January 2018 OFFICE

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

PROBATE & GUARDIANSHIP FORMS

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

Firm: _____

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

Physical Address: _____

City/State/Zip: _____

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

2018 PROBATE FORMS

OPTION #1 **2018 FORMS AND INDEX - .PDF ON DISK $397.10**
OPTION #2 **2018 FORMS AND INDEX - 1 PHYSICAL COPY OF EACH $417.20**

2018 GUARDIANSHIP FORMS

OPTION #1 **2018 FORMS AND INDEX - .PDF ON DISK $360.10**
OPTION #2 **2018 FORMS AND INDEX - 1 PHYSICAL COPY OF EACH $380.20**

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

==========

METHOD OF PAYMENT

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

$ _____ _____ ____/____ _____ _____
Charge **Card Number** **Exp. Date** **3 Digit Code** **Signature of Cardholder**

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

==========

FLSSI USE ONLY

Check # _____ $ _____ Authorization date ____/____/2018 # __ __ __ __ _____

SHIP DATE _____/_____/2018 LB_____ $_____ # ___ ___ ___ ___ ___ ___ ___ ___

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

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)

MARCH 13 – 17, 2019

Executive Council Meeting

Omni Resorts, Amelia Island Plantation
Room Rates: Hotel/Villa Guestrooms $259 (single/double)
One Bedroom Oceanfront Villa: $299 (single/double)
Two Bedroom Oceanfront Villa: $399.00 (single/double)
Three Bedroom Oceanfront Villa: $459 (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

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

Scan here for instant access to the Section website.

REPTILES ON THE GO

ACTIONLINE BULLETIN BOARD

PRACTICE CORNER:

Don't miss these short tips to assist in your practice. See page 48-51.

ATTORNEY TRUST OFFICER CONFERENCE

37th Annual Attorney Trust Officer Conference

AUGUST 23-25, 2018

The Breakers, Palm Beach, FL

BE AWARE

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

See Florida Bar website for additional information.

Looking for simple ways to earn CLE from your desk, visit www.RPPTL.org to find new available webcasts.

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.)