ActionLine

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

Drafting Lease Renewal Rents Without Prescience

Qualified Opportunity Zones Explained

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The Devastation Of Hurricane Michael And How You Can Continue To Help



Chair's Column

By Debra Lynn Boje
Section Chair, 2018-2019

This was not the column I was planning to write when I became Chair, but it is the column that I need to write at this time. I hope you will all take a moment to read it.

As Floridians we all understand the possibility of a hurricane hitting Florida. We all have probably prepared for the potential of a hurricane hitting our hometown. Some of us may have felt the effects of a hurricane in the past, but few of us have actually experienced the power of a hurricane directly hitting our hometown, especially a high-end Category 4 hurricane. But, that is exactly what our fellow Floridians in the Panhandle faced on October 10th when Hurricane Michael barreled in with maximum sustained winds of 155 mph. It was the strongest storm on record in the Florida Panhandle, the fourth-strongest land-falling hurricane in the contiguous United States, in terms of wind speed, and the third most intense Atlantic hurricane in history to make landfall in the United States in terms of pressure.

The Hurricane developed very quickly. It was not until the morning of October 7th, just three days before the Hurricane hit, that Michael became a tropical storm and later that same day Governor Scott declared a state of emergency in 26 counties. In comparison, last year for Hurricane Irma, a state of emergency was declared by the Governor on September 4th, which was six days before Hurricane Irma made first landfall. By the time the Florida Panhandle fully appreciated the reality that Michael would develop into an intense hurricane and directly hit them, it was too late for many to evacuate or to properly prepare. But, how can one really prepare for one's house to be blown away?

The devastation and destruction were massive. Entire communities, like Mexico Beach, were destroyed and others, like Panama City, Fountain, Springfield, Lynn Haven, and Callaway were left in disrepair. Tyndall Air Base incurred major damage. It will take decades for many areas to fully rebuild, if they ever do. Lives were lost. The toll on the timber and the agricultural industries are in the billions of dollars. It may take years to fully know the emotional and economic impact Hurricane Michael had on Florida.

In the days following the hurricane there was an out-pouring by members of the Real Property, Probate and Trust Law Section ("RPPTL Section") asking how they could help. The Executive Committee took action authorizing the RPPTL Section to buy supplies, and the RPPTL Section Administer, Mary Ann Obos, and her husband, Jeff, delivered the supplies to the community of Fountain, Florida. RPPTL Section member, Colleen Sachs, based out of Santa Rosa Beach, Florida, opened her office and home as a make-shift supply center. RPPTL Section members throughout Florida shipped supplies to her via Amazon which she, her family, friends and staff distributed to those in need. Jerry Aron, former RPPTL Section Chair, on behalf of the RPPTL Section drove up to the Florida Panhandle with supplies and provided manpower to assist those in need. Many RPPTL Section members headed efforts in their law firms to collect money, supplies and aid. However, there is still more that can be done.

continued, page 5







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The Breakers,
by John Neukamm

IN THIS ISSUE:

Chair's Column 3
Letter From The Co-Editors-In-Chief 5
Drafting Lease Renewal Rents Without Prescience 6
Death, Probate And Due Process: Do The Notice Requirements Under The Florida Probate Code And Rules Pass Constitutional Muster? 8
An Insider's Perspective On Navigating The Florida DBPR Regulatory And Professional Boards 12
Veteran Owned And Service Disabled Veteran Owned Small Business Joint Ventures: Winning The Regulatory War 14
Introducing the RPPTL Practice Series! 17
Tax Advantages of Synthetic Leases 18
Qualified Opportunity Zones Explained 21
The Midterm Elections 26
Section Spotlight: South Florida Legal Mentoring Picnic, Palm, Florida Photos 29
PHOTOS: RPPTL Section Executive Council Meeting 30
RPPTL Section Takes On Rome 32
Roundtable Probate And Trust Division 35
Roundtable Real Property Division 37
Understanding The Underworld Of Business Identity Theft And Florida's Recent Efforts To Protect Against Fraudulent Business Filings 41
The Real Party In Interest: Trustees 45
Practice Corner: Real Property Division - E-Signatures And The Statute Of Frauds 48
Practice Corner: Probate and Trust Division - Revisiting Beneficiary Designations After Divorce 50
Probate And Trust Case Summaries 52
Real Property Case Summaries 54
State Tax Case Summaries 55
RPPTL General Sponsors 56
What's Happening Within the Section 59
Actionline Bulletin Board 60

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

ARTICLES: Forward any proposed article or news of note to 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
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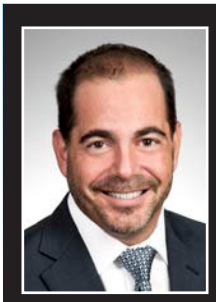
Mary Ann can help with most everything, such as membership, the Section's website, committee meeting schedules, and CLE seminars.


J. BASKIES


M. BEDKE

Letter from the Co-Editors-In-Chief

Well, another year has come and gone. Hopefully you and yours are enjoying a safe holiday season (a.k.a "year-end crunch" for many transactional lawyers) and are preparing for a prosperous 2019. Taking advantage of Qualified Opportunity Zones as discussed in the piece by Keith Durkin or using Synthetic Leases as described in the article by Steven Chamberlain, may help. Additionally, our Section sponsors are always ready, willing and able assist in helping us help our clients and ourselves.

In editing this Issue of *ActionLine* - your magazine - we were once again struck by how practical the articles and case summaries are with respect to members' day-to-day practices. The information is very user-friendly and can (and probably should) be implemented by many of us in both our tactical drafting and our strategic planning. For example, reading just the first article on drafting lease renewal clauses and then glancing over the Case Summaries may well elicit a response of "I better make a note of that!" (which is better than, "I had better notify my malpractice carrier").

After reading the Chair's Column, we suspect you too will be filled with pride in our Section, colleagues and profession. Many among us are selflessly doing the right things for the right reasons. In fact, providing exemplary service to our clients and communities, fairly well, sums up what Section members do! The next time you hear someone lamenting that there are too many lawyers we will guaranty it will not be a comment made by someone in the Panhandle who is receiving pro bono help in restoring order to their lives.

Of course, members of the Section do like to have fun while we learn and serve! If there was ever any doubt about that (which is unlikely), we encourage you to view the photos of the always popular Section Executive Council meeting at The Breakers. NOTE: You do not have to be a member of the Executive Council to attend "EC" meetings. Please join us! Then read, reminisce and smile (if you were an attendee) and, perhaps just dream and plan a future trip if you were not able to attend the Section's trip to Italy. The article provides a history lesson and has us looking ahead to see where next year's trip will visit.

Prego!

Chair's Column, from page 3

The "No Place Like Home" program ("NPLH Program") which was developed with the assistance of the RPPTL Section is, and will continue to be, in need of volunteers in the months to come to assist with clearing title to homes that have been damaged or destroyed by Hurricane Michael. We are fortunate that a NPLH pilot program had already been formed in the Florida Panhandle.

NPLH was formed after Hurricane Katrina demonstrated how difficult it can be to receive governmental aid to fix homes of storm victims without updated, clear title transfers. For example, some families lived in ancestral, family homes that were handed down from generation to generation without a single title transfer. In response to this problem, the NPLH Program was formed by Bay Area Legal Services and other community legal aid providers with the support of the RPPTL Section. The NPLH Program is designed to assist low-income Florida residents in clearing title to real property thereby allowing such residents to receive disaster-related relief and to access community development funds necessary to repair and rebuild their homes. Please consider volunteering to take just one case. If you are able to help, please email Lmiller@floridatax.com.

If you are not able to volunteer for the NPLH Program at this time, please consider a financial or in-kind donation. For those who have already contributed, thank you.

Also, Colleen Sachs has graciously agreed to continue to receive supplies. Supplies can be sent to: Colleen C. Sachs, 67 West Wild Briar Road, Santa Rosa Beach, Florida 32459. Below is a list of items that are most needed.

List of Most Needed Items

- Tarps (the bigger the better)
- Diapers (Adult and Children), Baby Wipes
- Pet Food
- Bleach, Cleaning Supplies
- Personal Items (toothpaste, toothbrushes, femine products)
- Blankets

Please continue to keep the victims of Hurricane Michael in your thoughts and prayers.

I hope to see you all at the Executive Council Meeting, March 13 -17, 2019 at the Omni Resorts, Amelia Island Plantation. Please plan on bringing your family as this is a very family-friendly venue with over 1400 acres of fun things to do.

Drafting Lease Renewal Rents Without Prescience

By Martin A. Schwartz, Esq., Bilzin Sumberg Baena Price & Axelrod LLP, Miami, Florida

In negotiating lease rentals for extension or option terms, both parties, but especially landlords, are wary of what market rents will be at some time in the not-immediate future. Lease rental rates, similar to general real estate prices, tend to be cyclical. Those living through the Great Recession can perhaps recall the collapse of the rental market in 2009-2010.

So, without the benefit of a fully functional crystal ball, how would one determine a rental rate 5, 10 or 15 years out when a tenant has requested, and the landlord has agreed to, a lease with one or more extension options?

The industry has "solved" this problem by using terms like "prevailing rate" to describe the rental rate applicable to the option terms. But a recent Third DCA case, *Jahangiri v. 1830 North Bayshore, LLC*, 48 Fla. L. Weekly D1806 (Fla. 3d DCA 2018), indicated that this "solution" is ephemeral at best.

In *Jahangiri*, the tenant secured a five-year lease with two five year extension options. The rental rate during the option terms was "the then prevailing market rate for comparable commercial office properties" at the time of each extension. The tenant exercised the first option and otherwise satisfied the preconditions for exercise of the option. But the landlord refused to extend the lease. The tenant brought a declaratory judgment action, contending that the option had been properly exercised and the term extended and enjoining the landlord from bringing any eviction action. The landlord moved for summary judgment in its favor, maintaining that the option provisions were unenforceable due to the failure to designate the rent payable during the option terms. The trial court held that the option terms were "too indefinite" and "legally unenforceable." The trial court judgment was stayed pending the appeal.

The Third DCA, in sustaining the trial court's judgment, quoted from other cases indicating that: "[T]he amount of rental is an essential element of a lease, if not the basis for a lease . . . ."[1] After noting that there was a split of authority nationally on the enforceability of such an option since some courts will determine a "reasonable rent" if the parties cannot agree, the court relied on decisions from both the First and Fifth Districts regarding option terms holding that the failure to "agree on an essential provision" in the lease indicates a lack of "meeting of the minds," an essential element for an agreement to be enforceable.[2]

The court held "Where the lease does not provide for the amount of renewal rent, the procedure for determining rent has to be definite enough, without further negotiation or litigation on the methodology used, to fix the rent with certainty."[3]

As a result of this decision, the tenant lost its lease and was obligated to pay double rent (as a holdover tenant) for the period from the expiration of its initial term until it vacated: a nightmare scenario for the tenant.

Although this case is consistent with other Florida cases, one could argue that the courts are viewing this issue out of the wrong lens. These cases do not involve a situation where the parties have failed to agree on a material term to reach an enforceable agreement. There is an existing agreement: the lease. Any analysis should be predicated on the fact that the court was not being asked to make an agreement between the parties where none existed. An agreement in the form of the lease already existed. In essence, what the court was being asked to do was not to make an agreement but sustain an existing agreement and prevent a forfeiture. By refusing to recognize the exercise of the option, the court abrogated an existing agreement and forfeited an existing tenancy. The result was the extinguishment of a leasehold estate and an asset of the tenant without any compensation to the tenant.

What the court did not consider, and perhaps was not argued by the tenant, were equitable considerations that might have been applicable. Did the tenant undertake substantial tenant improvements based on its understanding that it had a 15, rather than a 5, year lease? Did the tenant agree to pay a higher base rent for the initial term based on securing the two extension options? These perhaps equitable considerations were not addressed by the court and perhaps were inapplicable to the case at hand. But the court's somewhat simplistic analysis appears to override these considerations.

One could question whether the perceived fatal defect in the option grant could have been cured by the exercise of a court's equitable powers to prevent a forfeiture. Florida courts can and have exercised equitable powers to avoid an unjust result and unjust enrichment of a landlord.[4] And it is a shibboleth of legal jurisprudence that "equity abhors a forfeiture."[5]

Would the court have reached the same conclusion if it could be demonstrated either that the tenant had invested $10 million in leasehold improvements based on its expectation that it had a 15 year lease or that the landlord would be improperly enriched by its ability to relet the premises for substantially more rent after the option failed based on its ability to deliver improved space which it acquired for no consideration?

The analytical path followed by the court appears to make these considerations irrelevant and appears inconsistent with other Florida cases preventing unjust enrichment.[6]

But now that we know how Florida courts are leaning, what impact does it have on existing leases and future leases? As noted at the outset, clauses in leases with option terms similar

continued, page 7

to the one at issue in *Jahangiri* are common, at least in South Florida. A tenant under such an existing lease is unlikely to be able to renegotiate the lease to render the option term enforceable. Attorneys representing such tenants should advise their clients to be careful in negotiating option term rentals upon the exercise of an option or the result may be, as in [*Jahangiri*], a loss of the lease and an enhanced rental rate of 200% of the immediately prior rent during any period beyond the original lease term.

On a going-forward basis for future leases when representing the tenant, consider reference to leasing brokers' publications which typically show a range for current rental rates. Perhaps the rental rate would be described as the mid-point in such range in the most current report of, e.g., CBRE or Cushman Wakefield, at the time of the exercise. Alternatively, some form of arbitration or appraisal process, where each party designates a leasing agent and the two designated then designate a third should work. In such a situation either some average of prevailing rate determined by the leasing agents or a baseball type determination could be provided (where the amount of either landlord's or tenant's appraiser closest to the amount determined by the third appraiser/leasing agent prevails). In any event, continuation of the practice of using "prevailing rate" to describe option rental rates appears to be a practice that should be no longer acceptable to a tenant's attorney. Hopefully landlords with leases with prevailing rate option terms will not seize on this opinion to abrogate existing option terms.



M. SCHWARTZ

Martin A. Schwartz *is a partner in the Miami firm, Bilzin Sumberg Baena Price & Axelrod LLP, where he is as a member of its Real Estate Practice Group and the head of its condominium practice. He serves on the Executive Council of the Real Property Probate and Trust Law Section of The Florida Bar and is Vice Chair of the Commercial Real Estate Committee and member of the Condominium and Planned Development Committee of such Section. Mr. Schwartz has written extensively on various real estate topics and his practice includes all aspects of real estate; he is Board Certified in Condominium and Planned Development law.*

Endnotes

1 *Edgewater Enters v. Holler*, 426 So. 2d 980 (Fla. 5th DCA 1982).

2 See *Lafountain v. Estate of Kelly*, 732 So. 2d 503 (Fla. 1st DCA 1999) and [Edgewater], supra.

3 *Jahangini*, supra at 1808.

4 *Horatio Enterprises v. Rubin*, 614 So. 2d 555 (Fla. 3d DCA 1993); *Atria Group v. One Progress Plaza*, II, 170 So. 3d 884 (Fla. 2d DCA 2015).

5 *Torres v. K-Site 500 Assoc.*, 632 So. 2d 110 (Fla. 3d DCA 1994).

6 *Tollius v. Dutch Inns of America*, 244 So. 2d 467 (Fla. 3d DCA 1970).

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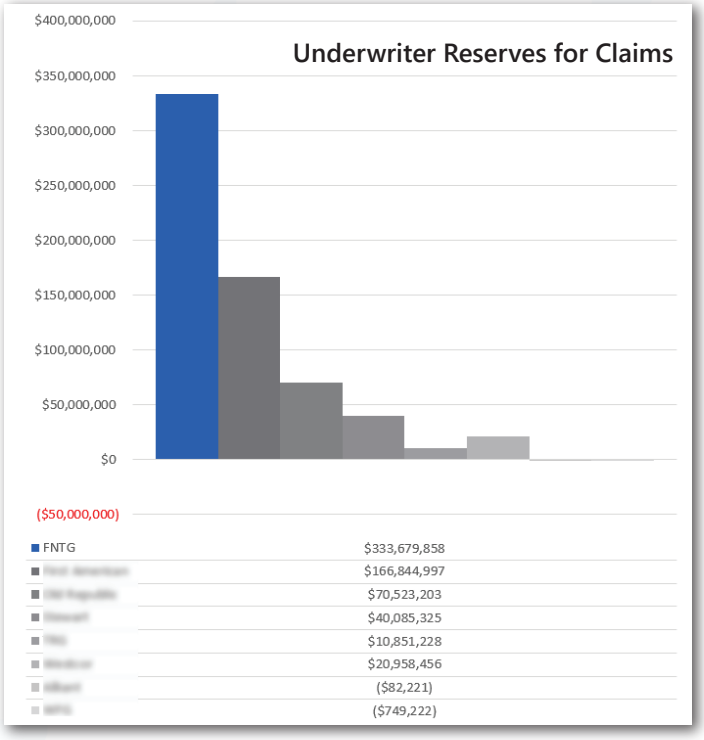

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Death, Probate And Due Process: Do The Notice Requirements Under The Florida Probate Code And Rules Pass Constitutional Muster?

By Adrian P. Thomas, Esq., Michele M. Thomas, Esq., and Daniel A. McGowan, Esq.,
Adrian Philip Thomas, P.A. in Fort Lauderdale, Florida

Property rights are among the basic substantive rights expressly protected by the Due Process Clause of the United States Constitution and the Florida Constitution.[1] Probate proceedings are *in rem* proceedings directed against property and against anyone claiming an interest in the property.[2] A proceeding to admit a will to probate affects the property rights of interested persons, and those persons are entitled to due process of law before those rights are extinguished, diminished or otherwise affected.

Due Process

The United States Supreme Court has held that "[a]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonable calculated, *under all the circumstances*, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections"[3] (e*mphasis added)*. The notice must be of such nature as reasonably calculated to convey the required information and must afford a reasonable time for those interested persons to make an appearance.[4] "When notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing" the interested person.[5]

Fla. Stat. § 733.2123 (2018): Adjudication before issuance of letters

In Florida, an extraordinary procedure exists allowing the person seeking to administer the estate of a decedent ("the petitioner") to resolve certain issues before the issuance of letters of administration.[6] One of those issues is whether the last will and testament offered for probate is valid. Fla. Stat. § 733.2123 (2018) provides, in pertinent part, that a petitioner may serve formal notice of the petition for administration on interested persons and that any person who is served with such notice before the issuance of letters may not challenge the validity of the will except in the proceedings before issuance of letters. Formal notice is the method of service used in probate proceedings and the method of service of process for obtaining jurisdiction over the person receiving the notice.[7] Formal notice must be served on the interested person or on the interested person's designated representative by using "any commercial delivery service requiring a signed receipt."[8] The probate rules further provide:

> When formal notice is given, a copy of the pleading or motion shall be served on interested persons, together with a notice requiring the person served to serve written defenses on the person giving notice within 20 days after service of the notice, exclusive of the day of service, and to file the original of the written defenses with the clerk of the court either before service or immediately thereafter, and notifying the person served that failure to serve written defenses as required may result in a judgment or order for the relief demanded in the pleading or motion, without further notice.[9]

If no written defenses are served, the petitioner may proceed on the pleading or motion *ex parte*.[10]

Civil Procedure cf. Probate Procedure

Civil litigators will recognize formal notice as the probate equivalent of the civil summons, putting a defendant on notice and requiring written defenses to be served within 20 days of service.[11] If a probate petitioner elects to serve formal notice of the petition for administration prior to the issuance of letters in order to avail himself of the shortened objection period,[12] a copy of the will offered for probate must be attached to the notice.[13] This probate rule also finds its corollary in the civil procedure rules, which require that all "documents upon which action may be brought or defense made…shall be incorporated in or attached to the pleading."[14] The similarities between a circuit civil case and a probate case involving service of a petition for administration prior to issuance of letters are striking at the outset: (1) both are commenced by filing a complaint or petition, which must include any document upon which relief is sought, and (2) both are required to be served on the defendant or interested person with a summons or notice informing the person that written defenses are due within 20 days. The similarities end there. In a civil action, if no written

continued, page 9

defenses (or any papers) are filed, the process of obtaining a default judgment requires two steps. First, a motion for clerk's default must be filed, and once the clerk's default is entered, then a motion for final default judgment must be filed. The motion for final default judgment should be verified and show 1) acquisition of jurisdiction over the defaulting party, 2) existence of default by failure to serve or file any response, 3) no pleading filed containing a certificate of service and 4) military status of defendant.[15] Most importantly, in nearly all circumstances, the motion for final default judgment must be served on the defendant, who will have the opportunity to ask the court to set aside the default for excusable neglect and due diligence. In general, a clerk's default can only be converted to a final judgment with notice to the defaulting party. Furthermore, a final default judgment can be set aside under the rules of civil procedure in accordance with Fla. R. Civ. P. 1.540, which provides relief from judgment for inadvertence, excusable neglect, newly-discovered evidence and fraud, including misrepresentation or other misconduct.[16]

Ironically, the civil procedure rules abolished the historic distinction between legal procedure and equity procedure by adopting the policy of liberality favored by equity, preferring to adjudicate matters on the merits and not on technical pleading requirements.[17] The probate rules, although written to govern the procedures applicable to courts of equity, afford *less* leniency to an interested person than the civil rules. In probate, if the interested person fails to file any written defenses within 20 days – even if that person is calling the petitioner's lawyer and requesting information – then the petitioner can walk directly into the courthouse on the morning of the 21st day and obtain an *ex parte* order, admitting the will to probate, and that order operates as a judicial finding that the will was executed by a competent testator free from fraud, duress, or undue influence.[18] In other words, the petitioner can obtain the probate equivalent of a final default judgment on the validity of the will that affects the rights of the interested person without any further notice or opportunity to be heard.

Defenders of Fla. Stat. § 733.2123 (2018) may argue the requirement that an interested person file written defenses within 20 days of service of the formal notice and petition for administration is merely a procedural rule.[19] While true, application of the rule has the practical effect of operating as a statute of limitations or mandatory non-claim provision. This is most often true in situations where the petitioner is seeking quick entry of an order admitting the will to probate to avoid an anticipated undue influence challenge to testamentary documents and runs to the courthouse on the 21st day after service. Once the order admitting will is entered, courts are loathe to vacate it if the petitioner can prove that formal notice was served and 20 days lapsed with no written defenses being filed. The special time constraints created by Fla. Stat. § 733.2123 (2018) are extraordinary and require strict compliance if interested persons who are served with formal notice of the petition for administration are to be limited to 20 days.[20] As noted above, one of those requirements is that the petition for administration must be served via formal notice along with a copy of the will being offered for probate.

What if the Last Will & Testament does not tell the whole story?

For example, what if the decedent executed a "pour-over" will that simply makes his or revocable living trust the beneficiary of his or her entire estate? How would the interested person be alerted to potential undue influence without also seeing copies of the relevant trust instrument(s)? There is no requirement under the Probate Code or the Probate Rules that a petitioner seeking to admit a pour-over will to probate must also serve a complete copy of the trust instrument, including all amendments, on the interested person so that he or she can make an informed decision about whether a challenge to the will should be made.[21] Florida courts have held that adequate notice is a fundamental element of the right to due process and although a litigant may choose to suffer default and consequences from that default, the litigant is entitled to anticipate the consequences that reasonably flow from the allegations of the complaint (which includes the exhibits to it).[22]

If the petition for administration and a copy of a pour-over will are the equivalent of a complaint with an exhibit, then how could an interested person possibly anticipate the consequences of a default (*i.e.*, the order admitting will to probate) unless he or she has also seen the trust instrument(s)?

The notice required by Fla. Stat. § 733.2123 (2018) and Fla. Prob. R. 5.201(c) is inadequate to ensure, under every scenario, that an interested person is being provided with all the information necessary to make a fully-informed decision about whether written defenses should be filed in response to the petition for administration. The probate process affects the property rights of interested persons and meaningful due process is required before stripping the interested persons of those rights. Fla. Stat. § 733.2123 (2018) and Fla. Prob. R. 5.201(c) do not include adequate due process protections because they do not mandate adequate notice if the decedent had a pour-over will. By failing to require a petitioner to serve not only the will offered for probate, but also, in the event the will is a pour-over will, a copy of the trust instrument, the statute fails to safeguard the due process rights of the interested person by failing to require *adequate* notice.

The ripple effect of an order admitting a will to probate is far reaching because it precludes not only a will contest, but also potentially a trust contest of a contemporaneously-executed trust instrument and a tortious interference action where the underlying tort is undue influence in the procurement of the will and/or trust instrument. The Probate Code provides that

continued, page 10

"the probate of a will in Florida shall be conclusive of its due execution; that it was executed by a competent testator, free of fraud, duress, mistake, and undue influence."[23] Therefore, an order admitting a will to probate could possibly be used as collateral estoppel in a trust contest or a tortious interference action. Under the current state of Florida law, a petitioner who engaged in undue influence in the procurement of a trust could serve a petition for administration and copy of the pour-over will on an interested person via formal notice, refuse to serve a copy of the trust instrument for 20 days, obtain the order admitting the will to probate on day 21, and then attempt use that order as collateral estoppel to prevent the interested person from challenging the trust instrument executed on the same date as the will because there has been a "finding" – by default judgment, not by evidence in the record – that the decedent was competent and was not the victim of undue influence, fraud or duress on the date he or she executed the testamentary documents. Furthermore, an interested person who learns of the undue influence after the will was admitted to probate may be barred from bringing a tortious interference action if the underlying tort was procurement of the will and trust through undue influence. Nowhere in the formal notice are the far-reaching and extraordinary consequences of failing to file written defenses to a seemingly innocuous petition for administration of a pour-over will spelled out for the interested person.

Fla. Stat. § 733.2123 (2018) and The Florida Probate Rules fail to protect an interested person's due process rights.

It is unclear what compelling governmental interest is advanced by the enactment of Fla. Stat. § 733.2123 (2018) (the expeditious administration of estates?) and whether that interest justifies the termination of property rights 20 days after receiving deficient notice. The following amendments to the Probate Rules would help to balance the state's interest in quickly and efficiently administering estates with an interested person's due process rights:

Modification of Rule 5.025(a): Specific Adversary Proceeding

Probate proceedings are governed by the Probate Rules; however, certain proceedings in probate are adversarial by nature, and those proceedings are conducted pursuant to the Florida Rules of Civil Procedure.[24] Adversarial proceedings are of two kinds: specific adversary proceedings and declared adversary proceedings.[25] Specific adversary proceedings are deemed adversarial by the Probate Rules. Those proceedings are: proceedings to remove a personal representative, surcharge a personal representative, remove a guardian, surcharge a guardian, probate a lost or destroyed will or later-discovered will, determine beneficiaries, construe a will, modify a will, cancel a devise, partition property for the purpose of distribution, determine pretermitted status, determine pretermitted share, determine amount of elective share and contribution, and for revocation of probate of a will.[26] With the exception of the two removal actions, every other specific adversarial proceeding involves property rights, and the more rigorous Civil Procedure Rules are invoked in lieu of the Probate Rules.

Service of a petition for administration via formal notice pursuant to Fla. Stat. § 733.2123 (2018) should be added to the list of specific adversary proceedings because it implicates the interested person's property rights. Doing so would force the proceedings to be conducted like a civil suit, which would include the procedures required for entry of a default judgment.[27]

Modification of Rule 5.040: Formal Notice

A civil summons is cautionary. It grabs the defendant's attention with a clear and stern warning:

A lawsuit has been filed against you. You have 20 calendar days after this summons is served on you to file a written response to the attached complaint with the clerk of this court. A phone call will not protect you. Your written response, including the case number given above and the names of the parties, must be filed if you want the court to hear your side of the case. If you do not file your response on time, you may lose the case, and your wages, money, and property may thereafter be taken without further warning from the court. There are other legal requirements. You may want to call an attorney right away. If you do not know an attorney, you may call an attorney referral service or a legal aid office (listed in the phone book).

Compare the language of a civil summons with the language in a formal notice:

You are notified that a petition for administration has been filed in this court, a copy of which accompanies this notice. You are required to serve written defenses on the undersigned within 20 days after service of this notice, exclusive of the day of service, and to file the original of the written defenses with the clerk of the above court either before service or immediately thereafter. Failure to serve and file written defenses as required may result in a judgment or order for the relief demanded in the pleading or motion, without further notice."

When a family member dies, people expect to receive communication from an attorney regarding probate, so the fact that a lawyer is sending notices is unremarkable. Furthermore, the formal notice includes a petition for administration, which is not adversarial, makes no accusations directed at the interested person and in no way gives any indication that the interested person's property rights will be affected. Additionally, if the will attached to the formal notice is a pour-over will, it tells the interested person *absolutely nothing* about the distribution of the decedent's estate. The formal notice does not advise the interested person that a phone call will not protect him or her.

continued, page 11

The formal notice does not advise the interested person that he or she may lose property rights without any further notice if he or she does not file written defenses. The formal notice does not advise the interested person that not only will he or she forfeit any rights in this proceeding, but the order entered admitting the will to probate may prevent him or her from bringing a trust contest or tortious interference action in the event he or she suspects or discovers undue influence later. Finally, the formal notice does not advise the interested person that he or she should call an attorney.

A more comprehensive and cautionary formal notice should be written and used if a petitioner wishes to avail himself of the extraordinarily short limitation period permitted under Fla. Stat. § 733.2123 (2018).

Modification of Rule 5.201(c): Notice of Petition for Administration

The Probate Rules currently provide that "[i]f the petitioner elects or is required to serve formal notice of the petition for administration prior to the issuance of letters, a copy of the will offered for probate must be attached to the notice."[28] The problem of insufficient notice could quickly and easily be cured by adding a second sentence stating that if the will offered for probate devises any portion of the estate to a trust instrument that a copy of the trust instrument is required to be served with the notice. The Florida Trust Code defines a "trust instrument" as "an instrument executed by a settlor that contains terms of the trust, including any amendments to the trust."[29]



A. THOMAS



M. THOMAS



D. MCGOWAN

Conclusion

The state's interest in the quick and efficient settling of a decedent's estate must be balanced against the property rights of interested persons. Any process required under the Florida Probate Code and the Florida Probate Rules must, *under every circumstance*, satisfy the requirements of Constitutional due process. The impact of an order admitting a will to probate extends beyond the probate proceeding and potentially affects the interested person's rights in the context of a trust challenge and a tortious interference claim. In certain situations, the application of Fla. Stat. § 733.2123 (2018) results in an unconstitutional violation of an interested person's due process rights; however, the simple changes to Probate Rules 5.025(a), 5.040 and 5.201(c) outlined herein could serve to protect due process rights while furthering the state's interest in the quick and efficient administration of estates.

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Endnotes

1 U.S.C.A. Const. Amend. 14; Florida Constitution, Art. 1 §9; *Moser v. Barron Chase*, 783 So.2d 231 (Fla. 2001) (citing *Department of Law Enforce. v. Real Property*, 588 So.2d 957, 964 (Fla. 1991)).

2 Fla. Stat. § 731.105 (2018).

3 Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950), 70 S. Ct. 652, 94 L. Ed. 865 (citing *Milliken v. Meyer*, 311 U.S. 457, 61 S. Ct. 339, 85 L. Ed. 278, 132 A.L.R. 1357; *Grannis v. Ordean*, 234 U.S. 385, 34 S. Ct. 779, 58 L. Ed. 1363; *Priest v. Board of Trustees of Town of Las Vegas*, 232 U.S. 604, 34 S. Ct. 443, 58 L. Ed. 751; *Roller v. Holly*, 176 U.S. 398, 20 S. Ct. 410, 44 L. Ed. 520) (emphasis added).

4 Mullane at 314.

5 Mullane at 315.

6 Fla. Stat. § 733.2123 (2018).

7 Committee Notes, Fla. Prob. R. 5.040.

8 Fla. Prob. R. 5.040(a)(3).

9 Fla. Prob. R. 5.040(a)(1).

10 Fla. Prob. R. 5.040(a)(2).

11 Fla. R. Civ. P. 1.070 and 1.140.

12 If probate is opened first and notice of administration is served after letters of administration are issued, the interested person has three (3) months after the date of service to object. Fla. Stat. § 733.212(2)(c) (2018); Fla. Prob. R. 5.240.

13 Fla. Prob. R. 5.201(c) ("If the petitioner elects or is required to serve formal notice of the petition for administration prior to the issuance of letters, a copy of the will offered for probate must be attached to the notice.").

14 Fla. R. Civ. P. 1.130.

15 Comment, Fla. R. Civ. P. 1.500.

16 Fla. R. Civ. P. 1.540(b).

17 Comment, Fla. R. Civ. P. 1.500 citing North Shore Hospital, Inc. v. Barber, 143 So.2d 849 (Fla. 1962).

18 Fla. Stat. § 733.103(2) (2018) ("In any collateral action or proceeding relating to devised property, the probate of a will in Florida shall be conclusive of its due execution; that it was executed by a competent testator; free of fraud, duress, mistake, and undue influence; and that the will was unrevoked on the testator's death.").

19 Tanner v. Estate of Tanner, 476 So.2d 793 (Fla. 1st DCA 1985).

20 In re Ballett's Estate, 426 So.2d 1196 (Fla. 4th DCA 1983) (citing *Nardi v. Nardi*, 390 So.2d 438 (Fla. 3d DCA 1980) ("If interested persons served with formal notice of administration are to be limited by special time constraints in petitioning for revocation of probate, the personal representative must strictly comply with the statute authorizing such limitations").

21 As a best practice, probate litigators simultaneously challenge both the will and the trust to avoid application of an incorporation clause in the will that could potentially serve to incorporate the terms of a trust agreement that was invalidated for undue influence.

22 Hooters v. Carolina Wings, 655 So.2d 1231 (Fla. 1st DCA 1995).

23 Fla. Stat. § 733.103(2) (2018).

24 Fla. Prob. R. 5.010 and Fla. Prob. R. 5.025.

25 Fla. Prob. R. 5.025(a).

26 Fla. Prob. R. 5.025(a).

27 Fla. Prob. R. 5.025(d)(2).

28 Fla. Prob. R. 5.201(c).

29 Fla. Stat. § 736.0103(23) (2018).

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An Insider's Perspective On Navigating The Florida DBPR Regulatory And Professional Boards

By Christopher M. Cobb, Esq., Jimerson & Cobb, P.A., Jacksonville, Florida

Many business and industries in Florida find it necessary to obtain some form of license in order to conduct business in this state. Florida's Department of Business and Professional Regulation ("DBPR") is the state agency in charge of licensing and regulating businesses and professions within Florida. The DBPR is a governmental agency under the control of the executive branch subject to the requirements of the Administrative Procedure Act, found in Chapter 120, Florida Statutes. The DBPR's stated goal is to license efficiently and regulate fairly. This article is an insider's perspective to navigating Florida's regulatory and professional boards under the jurisdiction of the DBPR.

Regulation of Businesses and Professions in Florida

The DBPR separates its regulation into businesses and professions. It regulates seven businesses, including, but not limited to: Condominiums and Cooperatives, Hotels and Restaurants, Pari-Mutuel Wagering, and Tobacco and Alcoholic Beverages. The DBPR's regulation of professions is more expansive and deals with licensing, testing, education, and discipline of about 30 professions, including, but not limited to: Architecture and Interior Design, Certified Public Accounting, Construction Industry, Electrical Contractors, Engineers, Building Codes and Standards, Mold-Related Services, Real Estate, and Veterinary Medicine.

Professional Boards Under the DBPR

There are many professional boards that exist under the DBPR. The board members are gubernatorial appointees who are confirmed by the Florida Senate. Many of the professional boards have executive directors who oversee the board and serve as a liaison between the board and the DBPR. The executive directors are responsible for ensuring the effective operation of the boards, meetings and board business and can serve as a great resource for information when navigating the administrative and regulatory process. The Florida boards are:

Division of Professions:

- Architecture & Interior Design
- Auctioneers
- Barbers
- Building Code Administrators & Inspectors
- Regulatory Council of Community Association Managers
- Construction Industry Licensing
- Cosmetology
- Electrical Contractors' Licensing
- Employee Leasing Companies
- Geologists
- Landscape Architecture
- Pilot Commissioners
- Veterinary Medicine

Division of Certified Public Accounting:

- Florida Board of Accountancy

Division of Real Estate:

- Florida Real Estate Commission

Florida Real Estate Appraisal Board

A potential licensee and/or current license holder may have to appear before any of the above boards for a number of reasons, including, but certainly not limited to: an appeal of a board ruling, an application for name change, an application for initial licensure, a disciplinary hearing, or an informal hearing. While formal administrative hearings are handled by the Department of Administrative Hearings and administrative law judges, if the matter relates to a regulated profession, the ultimate decision will eventually work its way through the administrative process to the respective board that oversees the profession.

Top 5 Tips for Appearance at a Professional Regulation Hearing

While serving on the Construction Industry Licensing Board ("CILB") from 2012 through 2018, and chairing the CILB in 2017, I observed numerous lawyers make presentations to the CILB. Observing so many different styles provided me with some insight on which tactics were effective and which ones were disastrous. While I could spend countless pages detailing the administrative process from notification of a complaint through filing of an administrative complaint, hearings, stipulations, and so on, this article is written to provide general tips for appearing in front of an administrative board in Florida.

continued, page 13

When appearing in front of an administrative board for any reason, it is important to understand the power that the board has over your client's ability to earn a livelihood in his or her chosen profession. The following are five tips for appearing at a board hearing.

Familiarize Yourself with the Board

Familiarize yourself with the procedures of the board in front of which you will be appearing. This can be accomplished by watching the board during a hearing prior to yours and reading the board rules. The meetings are open to the public and the published agenda includes dates, times, and locations of meetings. The agendas are provided months in advance and can usually be found on the DBPR website. By viewing the board at a hearing prior to your own, you can develop an understanding of the style, temperament, timing, and procedures followed by the board, and you will be better able to adhere to the same at your own hearing.

Know the Reason for the Appearance

Know the reason you are appearing, e.g., informal hearing to approve a settlement stipulation, consideration of a Petition for Declaratory Statement, or appeal of denial of licensure. Outline the issues that will be addressed at the hearing and do it quickly! The board members are also professionals, and they do not like listening to lawyers drone on about high level legal concepts. Get to the point. By preparing an outline of the issues to be addressed, you will be able to narrow the scope of your presentation to the decision points at hand. Be mindful that your hearing is not the only hearing scheduled before that particular board during that session, and any time you can streamline the process for the board by providing direct, intelligent and succinct answers, you increase your chances of prevailing.

Have Responses Ready

Be prepared to provide direct responses to questions. Be prepared to fully explain the issue with specific dates and events as well as documentary evidence if available. Do not attempt to "wing it" and provide hackneyed responses to the board's questions. They have heard every excuse you can imagine and many that you cannot. Do not show up to the hearing with a notebook of evidence that you expect the board to review at the hearing; they will not look at it. Your evidence or response must be prepared and filed well in advance of the hearing to give the board members time to consider the material. If you have taken steps to address an alleged deficiency, be prepared to discuss those steps in detail and provide the reason for taking the steps. You cannot over prepare for an appearance in front of an administrative board, but certainly, familiarity with the board and the process is an incredible and often successful advantage.

Watch Your Tone

Do not become angry during the hearing. While this may be hard in the face of various intrusive questions, it is important to remain calm and continue to provide the outlined and focused responses that you prepared in advance. Even if you disagree with a board member's contention or statement, be respectful in your response, and do not raise your voice. Remember, in almost every instance, you need the board more than they need you. Show that you are professional and well-mannered in dealing with both other professionals (i.e., the board members) as well as with the public in general. Also, an adverse ruling will have some form of appeal rights, and you may eventually be back before that same board. If you are disrespectful, they will remember you.

Dress Professionally

Finally, dress professionally. Remember that this is a hearing in which other professionals are taking time from their everyday duties and jobs to assist the state in protecting the general public. The board members rightfully take their duties very seriously, and it is in your best interest to show that you respect their time and efforts. By dressing appropriately, you convey, before you even speak, that you are taking the hearing seriously and that you recognize the serious nature of the business at hand. It is important to remember that while the board members are professionals and are required to weigh each situation on its merits, they are also human beings, and many times people begin to make assumptions about individuals based on their appearance. It is better to be overdressed for the occasion than regret your casual attire after the fact.

By following the above tips, you will be ahead of those who are unprepared and appear to be less than fully invested in the process. These basic tips will help you distinguish yourself from others appearing at administrative board hearings and will show that you are trustworthy and respect the privilege to represent and serve the general public in your chosen field or profession.



C. COBB

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Veteran Owned And Service Disabled Veteran Owned Small Business Joint Ventures: Winning The Regulatory War

By Y. Lisa Colon, Esq., Smith Currie & Hancock, LLP, Fort Lauderdale, Florida

"Honor to the soldier and sailor everywhere, who bravely bears his country's cause. Honor, also, to the citizen who cares for his brother in the field and serves, as best he can, the same cause." — Abraham Lincoln

The federal government is the largest purchaser of goods and services in the world, spending over 400 billion dollars in 2017.[1] Of that, 23.88 percent or 105 billion dollars went to small businesses, earning the government an "A" scorecard with the Small Business Administration (SBA).[2] Recognizing that veterans can benefit from doing business with the government, and in an effort to improve the lives of veterans, the government enacted the Veterans Benefits Act of 2003. The Act created a procurement program for small businesses owned and controlled by veterans and veterans with a service-connected disability.[3] In 2017, the federal government spent $17.9 billion dollars or 4.05 percent of total small business dollars with firms certified as Service Disabled Veteran-Owned Business.[4]

The Programs

Depending on the agency issuing the procurement, either the Veteran Administration (VA) or the SBA rules will control. Both programs require that a veteran seeking to qualify as either a Veteran Owned Small Business (VOSB) or a Service-Disabled Veteran Owned Small Business (SDVOSB)[5] must be at least 51 percent unconditionally owned and directly controlled by a qualifying veteran.[6]

The VA Program

VA procurements are conducted by the VA and subject to the Veteran Benefits Act.[7] In order to qualify, the eligible veteran must complete an online application, found on the Office of Small and Disadvantaged Business Utilization web page via the U.S. Department of Veteran Affairs website[8] and be subject to an interview by the VA's Center for Veteran Enterprises. Once certified, the eligible VOSB and SDVOSB will appear in the VetBiz Vendor Information Pages database as "verified." This only applies to procurements by the Veterans Administration. Companies seeking to use this status for other agencies must register with in the System for Award Management (SAM).

The SBA Program

For agencies other than the VA, SBA regulations determine the size and status of SDVOSB and VOSB'S, as well as the many other small business programs the SBA manages. Under the SBA program, a SDVOSB self certifies. In order to self-certify, the SDVOSB must state that: (1) it is an SDVOSB; (2) it is small under the North American Industry Classification System (NAICS) code assigned to the procurement; and (3) it will comply with the limitations on subcontracting requirements as set forth in 13 CFR § 125.6.

Joint Venture Agreements

Oftentimes, small businesses lack the capital, capacity and technical knowledge to competitively bid for government work, even if the work is sole sourced for small businesses. To gain a competitive advantage, small businesses can find success by forming a joint venture with other firms to pool efforts, property, money, skills, and knowledge, in support of a single government contract. Self-certification simplifies the process, making eligible SDVOSBs attractive to other eligible firms as potential joint venture partners. However, buyer beware, SDVOSBs are subject to extensive regulatory rules that are strictly applied by the SBA if the SDVOSB's status is challenged.

In 2016, the SBA overhauled the regulations governing SDVOSB joint ventures. The SBA regulations require that a SDVOSB joint venture consist of a least one SDVOSB and a small business under the NAICS code assigned to the procurement. The other joint venturer can be another small business, or the SDVOSB's mentor either under the small business or 8(a) mentor-protégé program.[9] The SBA's SDVOSB regulations require specific provisions that must be included in the joint venture agreement and as discussed below, failure to strictly comply with these provisions will deem the joint venture ineligible to bid. These provisions, which are set forth in 13 C.F.R. §125.1.8(b)(1)), are outlined below:

- The joint venture agreement must set forth the purpose of the joint venture.

continued, page 15

- *A* SDVOSB must be named the managing member of the joint venture, and the SDVOSB's employee must be named the project manager responsible for performance of the contract. Although the regulations do not require specificity, the Office of Hearings and Appeals (OHA)[10] has held that that the project manager must be specifically named.[11]
- If the joint venture is a separate legal entity, the SDVOSB must own at least 51 percent.
- The SDVOSB member must receive profits from the joint venture commensurate with the work performed by the SDVOSB, or in the case of a separate legal entity joint venture, commensurate with its ownership share.
- The parties must establish a special bank account in the name of the joint venture. This account must require the signature of all parties to the joint venture or designees for withdrawal purposes. All payments to the joint venture for performance by a SDVOSB will be deposited in the special bank account, and all expenses incurred under the contract will be paid from the account.
- All major equipment, facilities, and other resources to be furnished by each venture must be itemized, along with a detailed schedule of the cost or value of such items. This is a change from the old rule, which doesn't require this information to be set forth in an SDVOSB joint venture agreement.
- The responsibilities of the venturers with regard to contract negotiation, source of labor, and contract performance, including ways that the parties will ensure that the joint venture will meet the performance of work requirements set forth in the new rule, must be specified.
- All parties to the joint venture are obligated to ensure complete performance despite the withdrawal of any venture.
- The joint venture agreement must state that accounting and other administrative records of the joint venture must be kept in the office of the small business managing venturer unless the SBA District Director gives permission to keep them elsewhere.
- The joint venture's final original records must be retained by the SDVOSB managing venturer upon completion of the contract.
- The joint venture must provide quarterly financial statements showing cumulative contract receipts and expenditures (including salaries of the joint venture's principals), and must be submitted to the SBA not later than 45 days after each operating quarter of the joint venture. The joint venture agreement must also state that the parties will submit a project-end profit-and-loss statement, including a statement of final profit distribution, to the SBA no later than 90 days after completion of the contract.

Although the SBA does not review and approve the SDVOSB joint venture agreement under the All Small Mentor Protégé, a joint venture agreement under the 8(a) program must be approved by the SBA before award. The SBA is in the process of merging the two mentor protégé programs and eliminating the pre-approval requirement from the 8(a) program. Regardless of which program is being used for the joint venture, if the joint venture is challenged, the SBA will conduct the review and will strictly enforce the regulations and any deviation from the regulations or omission will deem the joint venture ineligible for the award.

A recent decision from the Office of VA/DoD Health Affairs (OHA) illustrates this point. In *ASIRTek Federal Services*, SBA No. VET-269 (2018), the OHA considered a protest that challenged the size and SDVOSB status of ASIRTek Federal Services, LLC (ASIRTek). ASIRTek was the awardee of an Air Force contract for engineering, management, and technical support services. Although the decision called for the interpretation of the pre-2016 rule, it highlights the importance of structuring a joint venture agreement in strict compliance with the regulations.

ASIRTek was a joint venture between ITI Solutions (the SDVOSB) and FEDITC, (LLC the non-SDVOSB). The procurement was set aside entirely for SDVOSB and the RFP stated that if the offeror was contemplating a joint venture then the offeror must meet the requirements of the FAR and 13 CFR 125.15.[12] The procurement due date was July 20, 2016.

The ASIRTek Joint Agreement

The joint venture agreement was dated April 1, 2015. It identified ITI as the managing venturer and 51 percent owner of the joint venture. FEDITC owned 49 percent and was named the Partner Venturer. The agreement stated that its purpose was to perform up to three 8(a) sole source or 8(a) competitive contracts. In particular, the joint venture agreement stated that ASIRTek intended to submit a proposal for a competitive 8(a) procurement conducted by the 25th Air Force Directorate of Communications, which was not related in any way to the procurement at issue. The joint venture agreement specified that the performance of specific responsibilities will be allocated between the ITI and FEDITC as set forth in each proposal and that the venturer primarily responsible for developing the winning proposal or who first identified an opportunity for pursuit shall be the managing venturer of that award in order to satisfy 13 C.F.R. 124.513(c)(7).

continued, page 16

The joint venture agreement required ITI to perform a minimum of 40 percent of the labor and FEDITC to perform no more than 60 percent of the labor of the contract and that the profits would be split commensurate with the work performed by the venturers. There was an addendum to the joint venture agreement which listed as the party responsible for contract performance, labor and negotiations.

The Protest

The protestor alleged that ASIRTek was not an eligible joint venture because ITI, the SDVOSB venture, did not have control of the joint venture. The protestor pointed out that ITI would be heavily reliant on FEDITC for performance of the contract because ITI had never been awarded a contract under the assigned NAICS code. The protestor accused ITI of being a front for FEDITC because FEDITC had all the requisite experience.

The protest was forwarded to the SBA office of Government Contracting for review. The SBA determined that ASIRTek was ineligible for the award because the joint venture agreement did not meet all the regulatory requirements. An appeal was taken to the SBA's Office of Hearings and Appeals (OHA). The OHA found the joint venture ineligible for the award because the joint venture agreement failed to meet the requirements of 13 C.F.R. 125.15(b)(2016).

The ASIRTek joint venture was found to be deficient because the agreement failed to state the purpose of the joint venture, delineate each venturer's responsibilities, and state the distribution of profits in accordance with the regulations.

The Purpose of the Joint Venture. The regulations require that the joint venture agreement set forth the purpose of the joint venture. The OHA found the primary issue with the joint venture agreement was that it did not address the procurement at issue or any SDVOSB procurement. The joint venture agreement was dated April 1, 2015, more than one year before the procurement was issued. The joint venture agreement referenced an unrelated 8(a) procurement. The 2016 revised regulations require that the SDVOSB joint venture set forth the purpose of the joint venture. In this case, the initial agreement should have provided that the joint venture will seek award of contracts limited to all procurements that set aside for any category.

Parties Responsibilities. The regulations required that the joint venture specify the responsibilities of the parties with regard to contract performance, source of labor and negotiation of the SDVOSB contract. The OHA found that the ASIRTek joint venture agreement did not specify the responsibilities of the parties with regard to contract performance. ASIRTek argued that because the procurement was an ID/IQ[13] contract, it was unable to include details of each venturer's responsibilities.

The OHA found this argument meritless. The OHA pointed out that the RFP provided detailed appendices, including technical requirements and labor estimates. The OHA held that ASIRTek could have utilized information in the RFP to describe the types of work each joint venture partner would perform and the labor it would contribute. The OHA also noted that although the joint venture addendum listed ITI as responsible for the labor, management and contract negotiations, the addendum was deficient because it was unsigned, and it was dated one year after the instant procurement and date of self-certification.

Further, there was no substantive information about the respective roles and responsibilities of ITI and FEDITC. The current regulations address the issue with ID/IQ contracts. The existing rule provides that in an indefinite contract or multiple award contract, where level of effort or scope of work is not known, the joint venture must provide a general description of the anticipated responsibilities of the parties with regard to the negotiation of the contract, source of labor and contract performance.

Distribution of Profits. The regulations required that the joint venture agreement state that not less than 51 percent of the net profits earned by the joint venture be distributed to the SDVOSB. The OHA found that the joint venture agreement stated that the venturers shall receive profits from the joint venture commensurate with the work performed by the venturers. The problem here was that the work to be performed by each venture was left undefined in the joint venture agreement.

The current regulations changed the requirement that the SDVOSB must receive a minimum 51 percent of the profits. Instead, the existing regulations require that the SDVOSB member must receive profits from the joint venture commensurate with the work performed by the SDVOSB or in the case of a separate joint venture legal entity, commensurate with its ownership. In short, if the joint venture is not a formal legal entity then the non SDVOSB entity will be able to take up to 60 percent of the profits as the regulations only require that the SDVOSB perform at least 40 percent of the work performed by the joint venture.

Conclusion

Joint ventures are a great tool for eligible veterans to build experience and capacity; however, the regulations are confusing and as the *ASIRTek* protest shows, failure to strictly comply can lead to costly protests and losing out on SDVOSB set aside work. Since all non-VA procurements require self-certification, it is tempting for SDVOSBs to "go it alone" and use a template or form joint venture agreement without the review of experienced counsel. Likewise, Counsel should be mindful to review the ever-changing regulations in this area and be cognizant that the SBA will strictly enforce the SDVOSB regulations.

continued, page 17


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Endnotes

1 https://www.sba.gov/blogs/new-sba-fy17-scorecard-shows-federal-agencies-award-record-breaking-105-billion-small-business

2 *Id*.

3 38 U.S.C.A § 8127

4 https://www.sba.gov/sites/default/files/2018-05/GovernmentWide_Scorecard_FY2017_0.pdf

5 Since the same rules apply to both types of veteran owned small business, this article will use the term "SDVOB" for the remainder of this article.

6 13 C.F.R. § 125.12; 38 CFR §74.3

7 38 U.S.C. § 8127(i)(1)-(4).

8 U.S. Department of Veterans Affairs Office of Small and Disadvantaged Business Utilization website: https://www.vip.vetbiz.va.gov/.

9 13 C.F.R. § 125.18(b)(1). Under the 8(a) program joint venture agreements must be approved by the SBA before contract award. For other small businesses, there is no review of the joint venture agreement unless the size/status of the business is challenged by the contracting officer or another business.

10 The Office of Hearing and Appeals is an independent office of the SBA to provide an independent, quasi-judicial appeal of certain SBA program decisions. https://www.sba.gov/oha/about-us

11 In Re Appeal of *Rush-Link One Joint Venture*, SBA No. VET-228 (2012).

12 The SBA overhauled its SDVOSB regulations in 2016. The final rule moved the SDVOSB joint venture requirements from 13 C.F.R. 125.15 to 13 CFR 125.18. The new regulations are substantially different. The ASIRTek protest was decided under the pre 2016 regulations.

13 In federal government contract the term ID/IQ means an indefinite delivery, indefinite quantity contracts. There are used when the government cannot determine the precise quantities or supplies or services that the government will require during the contract time.

Introducing the *RPPTL Practice Series!*

The CLE Committee introduced the RPPTL Practice Series in the Fall of 2018. The RPPTL Practice Series is comprised of 50 minute intermediate CLE programs on subjects that frequently arise in probate, trust, guardianship, and real property matters. The RPPTL Practice Series is available via live webcast, but it can also be downloaded for on demand listening on the go later. The RPPTL Practice Series is aimed at providing practitioners with comprehensive, yet practical, information, while at the same time providing an easily accessible hour of CLE credit. A wide range of topics are in the works, and the RPPTL Practice Series already includes 50 minute sessions on Estate Planning with IRAs, Lost Wills, Probate Adversary Proceedings, Powers of Attorney, Resolving Defective IRA Beneficiary Designations and Spousal Rights in Probate Proceedings.

Tax Advantages of Synthetic Leases

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

A lease is a contract transferring possession of property for a specified term.

A term interest (i.e., a "synthetic lease") transfers possession *and title* of property for a specified term by deed.

Either way, the landlord or remainderman has title and possession when the term expires. The significant differences between a lease and a synthetic lease are that with a synthetic lease (1) the landlord-tenant statutes do not apply; (2) there is no sales tax on rent[1] (see Sales Tax Example below); and (3) income taxation.

Amortization. A term interest is a wasting asset. It declines in value with the remaining term. For income tax purposes, the cost of the term interest can be deducted (amortized) ratably over the term if (1) the property (*e.g.*, the land[2]) is used for the production of income, and (2) the holder is not related to the remainderman.[3]

Depreciation. IRC §167(d) provides the term interest holder in a depreciable asset (*e.g.*, a building) gets the depreciation deductions during the term, regardless of whether the holder of the term is related to the remainderman.

Double deductions? The above rules mean the holder of a term interest in land and building gets to amortize the land and depreciate the building. The remaining tax issue is whether an unrelated holder gets to amortize the term interest in the building.[4]

There is solid authority for each deduction separately, but the author is not aware of authority addressing the double deductions. There is, however, a relevant private letter ruling.[5] In PLR 200852013, the Internal Revenue Service allowed the purchaser of a term interest in land and building to take both the depreciation and amortization deductions, but reduced – *without citing authority* – the amortization deduction by the amount of the depreciation deduction.[6]

A term interest holder seeking both deductions can argue by analogy to a landlord/tenant situation, to wit: there are no double deductions; the amortization deductions are in lieu of rent deductions, and the depreciation deductions are merely shifted from the landlord to the holder via statute. The holder can also argue the Supreme Court has allowed a taxpayer to take losses without having the matching investment or income, opining the remedy for the loophole lay with Congress.[7]

Valuation. The author is not aware of a market for term interests. In the estate and gift tax arena term interests are valued via Table T in IRS Publication 1457. For example, at current interest rates[8] a ten-year term interest would be valued at approximately 30% of the value of the property.

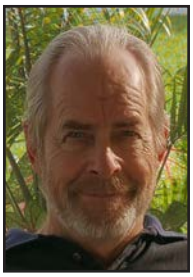
Converting rent to capital gain. It is possible for a landlord to effectively convert rent to capital gain by selling a term interest, either to the tenant or a third person if the buyer is not related to the landlord.[9] To avoid significant contrary authority, the landlord would have to dispose of the remainder interest either before or at the time of the sale of the term interest.[10]

Exchange example. Suppose there are two identical apartment complexes side by side priced at $10 million each. Two unrelated individuals, A and B, are prospective buyers. A buys a 10 year term interest in one complex for $3 million with B buying the remainder for $7 million. B buys a 10-year term interest in the other complex for $3 million with A buying the remainder for $7 million. A and B could each claim $3 million of amortization deductions not otherwise available, and after ten years they could exchange complexes (not agreed in advance.)

Sales tax example. Assume the common situation where the owner of an operating entity also owns real estate on which the business is conducted. To avoid exposing the realty to the creditors of the operating entity the realty is leased to the operating entity and Florida sales tax is imposed on the rent. Sales tax can be avoided if the owner were to deed a term interest to the operating entity as a (nontaxable) contribution to capital. Instead of paying rent the operating entity would pay the mortgage, ad valorem taxes, insurance and repairs and take all the usual deductions. The risk of possible exposure of the term interest to the creditors of the operating entity would be a function of the length of the term compared to the time needed to get the judgment. (Because the owner and operating entity are related, there would be no amortization deductions.)[11]

CONCLUSION

Structuring an acquisition as a split purchase allows the cost of the term interest to be deducted, including a term interest in land. Double deductions re depreciable assets are possible. And whenever a landlord sees no need to rely on the landlord-tenant statutes, consideration should be given to a term interest structure instead.



S. CHAMBERLAIN

Steve Chamberlain *is a tax attorney practicing in Ocala. He has a degree from MIT and was an economist before getting his JD and LLM degrees from UF. He has been a long-time member of the Executive Council of the Tax Section, where he founded the Bankruptcy/Tax Committee. He has had several articles published in the Bar Journal and has given numerous CLE lectures. His latest passion is designing an internet site and youtube video, including a calculator, to explain how a small*

continued, page 19

business owner can convert future income to capital gain without losing control.

Endnotes

1 That was the author's argument in getting a favorable DOR Notice of Decision on the issue on an appeal of a sales tax audit in 2016. Florida is the only state imposing a sales tax on commercial leases. (Gov. Rick Scott, State of the State Address, March 17, 2017.) The rate is 5.8% in 2018 and 5.7% in 2019, but many counties have added a local option sales tax of up to 1%.

2 *See,* line 12 of Schedule L on IRS Form 1120S, which reads "Land (net of amortization)"; and *Richard Hansen Land, Inc. v. Comm'r*, TC Memo 1993-248 (approving amortization of a term interest in a golf course).

3 IRC §167(e)(1) denies the deduction if the remainderman is related to the term interest holder. Roughly speaking, a related party for such purpose includes an ancestor, descendant, sibling, a beneficiary with respect to a trust or estate, and in the case of pass-through entities, a direct or indirect equity holder and the entity. IRC §§167(e)(1) and 267(e). Other related parties are described in IRC §267(b).

4 *See, e.g.,* Oshins, *Rits, Splits and Tidbits*, Tr. & Est. Mar. 1987, at 28, 39. ("The income tax considerations utilizing the joint acquisition route present some very productive planning opportunities, although many questions are unsettled [especially] in the income tax context."); *See also,* Zaritsky, *Bits and Pieces*; *Sales of Remainder Interests and Split Purchases*, 38 U.S.C. Tax Inst. ¶1600, 1601.3 (1986); Kwall, *The Income Tax Consequences of Sales of Present Interests and Future Interests: Distinguishing Time from Space,* Ohio State Law Journal, vol. 49, no. 1 (1988).

5 PLRs may not be used or cited as precedent. IRC §6110(k)(3). The IRS described PLRs in IR-2017-102 (June 1, 2017).

6 There is also scant authority regarding the basis in the remainder. Logically, the remainderman could simply be considered to have acquired the land and building for the amount paid, but not be allowed to depreciate the building until expiration of the term interest, presumably with a new useful life. *But see* IRC §167(e)(3), which increases the remainderman's basis by amortization or depreciation deductions disallowed to a related term interest holder.

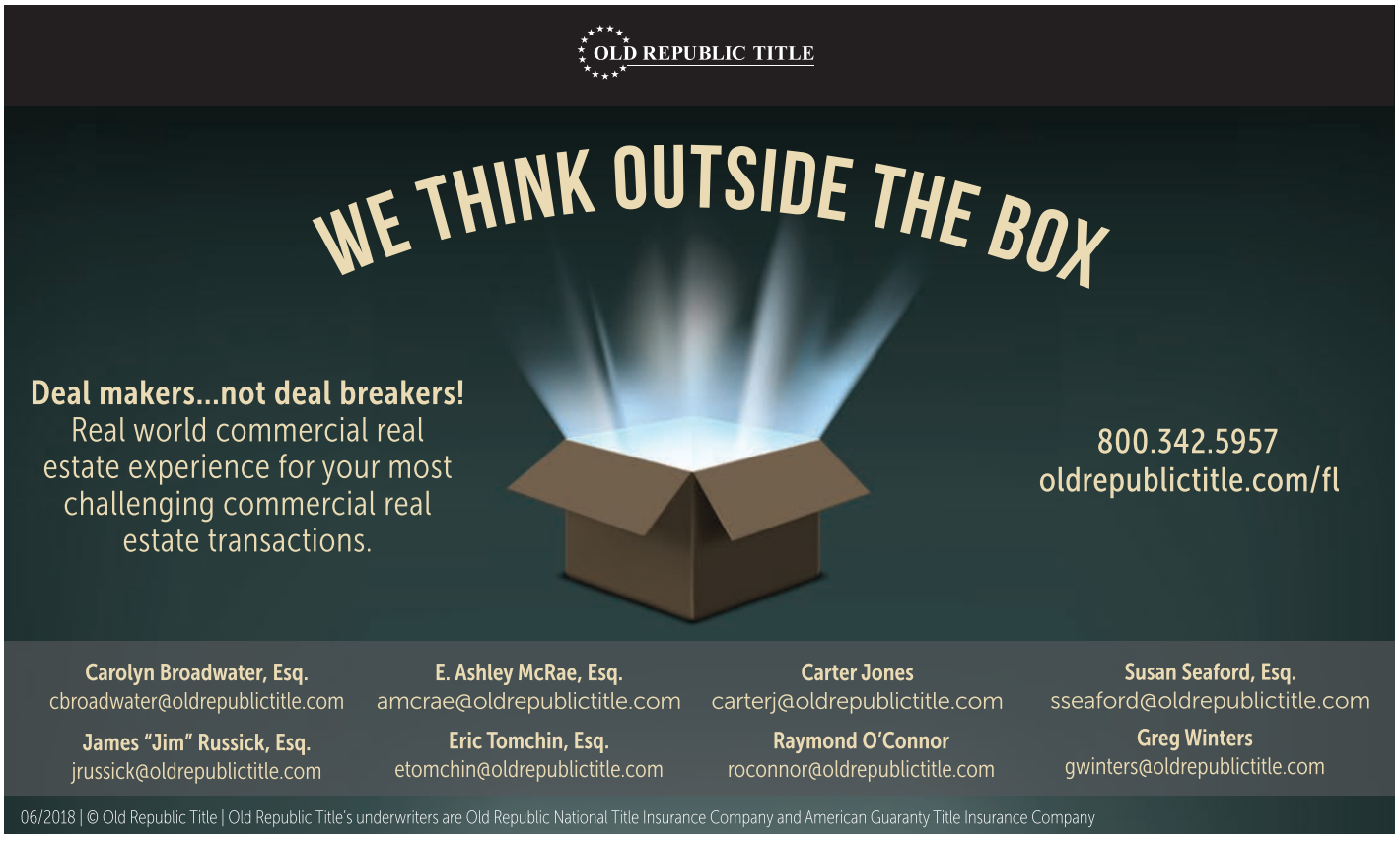
7 *Gitlitz v. Commissioner,* 531 US 206 (2001). The Supreme Court held the statutory language meant cancellation of debt income did not pass through to the subchapter S stockholder to be reported on his 1040, but did pass through for purposes of increasing his stock basis. This allowed him to take losses recognized at the corporate level without having the matching investment or income. (The author considers it likely that President Trump used that loophole to take a billion dollar loss in the 1990s without personally losing a billion dollars.)

8 *See* IRC §7520.

9 In an effort to keep taxpayers from restarting depreciation via a sale to a related party, IRC §1239 converts the gain to ordinary income. For such purpose a party is related to an entity if the party holds more than 50% of the equity in the entity. IRC §1239(c). Capital gain treatment is also available if the

10 *See, e.g., Comm'r v. P.G. Lake, Inc.*, 356 US 260 (1958). IRC §1001(e) provides the basis of a term interest acquired by gift, devise or from a spouse is zero for purposes of measuring gain on sale.

11 The author has suggested the transaction be accounted for as a contribution of the term interest to capital at a value equal to the sum of the principal payments expected to be made and the depreciation deductions expected to be taken during the term and the principal payments be treated as distributions. (Neither the real estate nor the mortgage would appear on the balance sheet.)





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Qualified Opportunity Zones Explained

By Keith C. Durkin, Esq., Baker Hostetler, Orlando, Florida

The 2017 Tax Cuts and Jobs Act, also known as the Tax Act, contains a new community revitalization program centered on the development of real property located in low-income communities, known as Qualified Opportunity Zones (QOZs). The Tax Act grants significant tax incentives to investors investing in QOZs by deferring income tax on the liquidation of appreciated assets utilized to invest in the QOZs and providing significant tax incentives for maintaining investments in QOZs. This article explains QOZs, how to invest in QOZs, the tax incentives for investing in QOZs and uncertainties within the Tax Act which must be resolved by future Treasury regulations.

Background; Overview

The Tax Act created a new Subchapter Z within the Internal Revenue Code (IRC) entitled "Opportunity Zones" containing two new provisions: §1400Z-1 and §1400Z-2. The first defines QOZs and explains the procedure for the designation of QOZs. The second provision is the more substantive of the two new provisions and explains the tax incentives available to QOZ investors.

A QOZ can be designated in any state or possession of the United States or Puerto Rico. A QOZ is a "census tract" located in a low-income community. A census tract is essentially a contiguous geographic area with a population size between 1,200 and 8,000 people, i.e.,[1] a neighborhood determined by the U.S. Census Bureau. Information gathered by the Census Bureau between 2011 and 2015 was utilized to determine census tracts eligible to be QOZs. A low-income community is defined pursuant to IRC §45D(e) as any census tract (or neighborhood) where the poverty rate is at least 20 percent or the median family income does not exceed 80 percent of statewide family income, or if in a metropolitan area, the greater of 80 percent of statewide median family income or 80 percent of metropolitan-area median family income. A contiguous census tract not meeting the definition of a low-income community set forth in IRC §45D(e) may be designated as a QOZ if such census tract is contiguous to the low-income community census tract designated as a QOZ and the median family income of the contiguous census tract does not exceed 125 percent of the median family income of the low-income census tract designated as a QOZ.

The chief executive (i.e., governor) of each state or possession had until March 21, 2018 to nominate low-income community census tracts to be designated as QOZs. The chief executives were limited to designating no more than 25 percent of the low-income communities in the state or possession as a QOZ. If a state or possession had less than 100 low-income communities, then such state or possession could designate a total of 25 census tracts as QOZs. On June 20, 2018, the Internal Revenue Service published a complete list of QOZ census tracts in Notice 2018-48. An immensely helpful and interactive map for locating all QOZs can be found on the U.S. Department of the Treasury Community Development Financial Institutions Fund (CDFI) Opportunity Zones Resources web page.[2] A QOZ designation remains in effect for 10 years after designation.

Procedure

IRC §1400Z-2 sets forth the procedures and requirements investors must meet in order to invest in QOZs. It is an arduous provision filled with definitions and cross-references. Investments in QOZs must be organized through a qualified opportunity fund (QOZ Fund). The definition of a QOZ Fund is expansive and contemplates the formation of funds investing in QOZ properties or invested in special-purpose entities investing in QOZ properties. A QOZ Fund is defined as any investment vehicle organized as a corporation or partnership for the purpose of investing in a qualified opportunity zone property (QOZ Property) holding at least 90 percent of its assets in a QOZ Property. A QOZ Property can be a qualified opportunity zone stock (QOZ Stock), qualified opportunity zone partnership interests (QOZ Partnership Interests) or a qualified opportunity zone business property (QOZ Business Property). At this time, it is unknown whether a limited liability company can be organized as a QOZ Fund. Treasury regulations should resolve this issue in the future.

The definitions for QOZ Stock and QOZ Partnership Interests are nearly identical. Accordingly, this article summarizes only the QOZ Stock provision. QOZ Stock is any domestic stock fulfilling the following requirements:[3] (a) the stock was acquired by the QOZ Fund after Dec. 31, 2017, at its original issue from the corporation in exchange for cash; (b) the corporation qualifies or will qualify as a qualified opportunity zone business (QOZ Business); and (c) during the QOZ Fund's holding period of the stock, the corporation qualified as a QOZ Business.[4] A QOZ Business is any trade or business fulfilling the following requirements:

(a) substantially all the tangible property owned or leased is QOZ Business Property;

(b) at least 50 percent of its gross income is derived from the conduct of a trade or business in the QOZ;

(c) a substantial portion of its intangible property is used in the active conduct of the trade or business in the QOZ; and

(d) less than 5 percent of the average of the aggregate unadjusted basis of the entity's property is attributable to "nonqualified financial property."[5] Private golf courses, commercial golf courses, massage

continued, page 22

parlors, country clubs, racetracks, hot tub facilities, suntan facilities, gambling establishments, bars and liquor stores can never qualify as a QOZ Business. A QOZ Fund or QOZ Stock can fulfill all the requirements set forth above but will automatically be disqualified from being a QOZ Business if it operates one of the prohibited businesses. Tangible property includes real property and is not limited to personal property.

QOZ Business Property is any tangible property used in a trade or business by the QOZ Fund if the property was acquired by the QOZ Fund by purchase after Dec. 31, 2017; the original use of the property in the QOZ commences with the QOZ Fund or the QOZ Fund "substantially improves" the property; and during the QOZ Fund's holding period for such property, substantially all use of such property was in a QOZ. Substantial improvement means the QOZ Fund (or the QOZ Stock corporation) expends funds within 30 months on the QOZ Business Property exceeding the adjusted basis of the QOZ Business Property at the beginning of the 30-month period.

Example 1: A QOZ Fund purchases real property in a QOZ for $500,000 and, within 30 months after the purchase, spends $750,000 on improvements to the property. In this example, the QOZ Fund fulfilled the substantial improvement test because the $750,000 spent on the QOZ property exceeds the basis of the QOZ Business Property ($500,000).

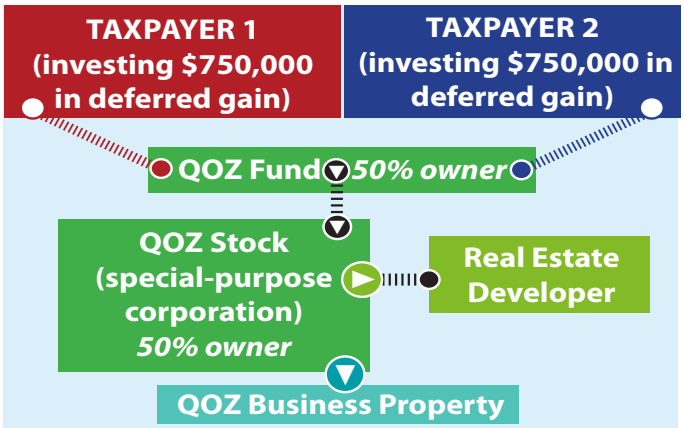
Example 2: Assume the same facts in Example 1; however, the QOZ Fund expends only $250,000 on improvements to the QOZ Business Property. In this example, the QOZ Fund has not substantially improved the QOZ Business Property; and therefore, the QOZ Business Property will not qualify as a QOZ Business Property.

The substantial improvement test also allows the purchase and continuation of operating businesses within a QOZ. The continuation of the business, however, would not qualify as an original use. Accordingly, the business must meet the substantial improvement test.

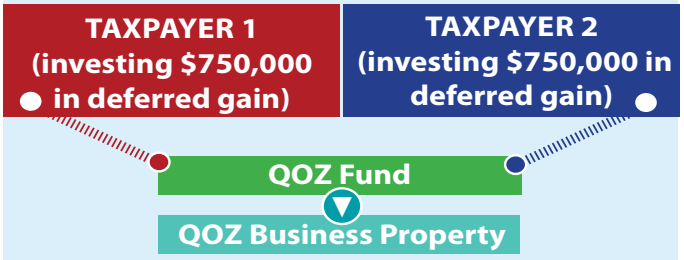
Example 3: A QOZ Fund purchases a pharmacy located in a QOZ for $500,000 and continues to operate the pharmacy. In this example, the original use of the property has not commenced with the QOZ Fund's purchase. Accordingly, the QOZ Fund must expend $500,000 to improve the pharmacy within 30 months.

Example 4: A QOZ corporation holds investments from a QOZ Fund and is partially owned by a developer. The QOZ corporation purchases a hotel located in a QOZ and converts the hotel to rental apartments. The QOZ corporation does not have to meet the substantial improvement test because the conversion to rental apartments fulfills the original use test. Put another way, the rental apartments are a first use, as the fulfillment of any conversion is likely to require the substantial improvement.

The QOZ Stock definition allows corporations to be formed to pursue QOZ projects and match developers with investors. Specifically, the interplay of the definitions allow taxpayers to form their own QOZ Funds to pool capital, and then invest in projects organized to develop or operate businesses within a QOZ. Accordingly, QOZ investments could be structured as follows:



Or, the QOZ Fund itself could be the owner of the QOZ Business as follows:



As previously stated, QOZ Funds must maintain 90 percent of their investment in a QOZ Property, which is QOZ Stock, QOZ Partnership Interests or QOZ Business Property. The statute requires a six-month test during each year of the QOZ Fund's existence. Specifically, determining whether the 90 percent hurdle is cleared is determined by the average of the percentage of the QOZ Property held in the QOZ Fund as measured on the last day of the first six months of the taxable year of the QOZ Fund and the last day of the second six months of the taxable year of the QOZ Fund. The average derived by this calculation must equal or exceed 90 percent. The failure to meet this 90 percent threshold results in a penalty equal to the difference of 90 percent of the aggregate of the QOZ Fund's assets and the aggregate amount of QOZ Property owned by the fund. The resulting value is then multiplied by the IRC §6621(a)(2) underpayment rate in effect for each month.

Example 5: A QOZ Fund has assets of $8 million, of which 80 percent is QOZ Property. The QOZ Fund does not meet the 90 percent investment requirement. Accordingly, the QOZ Fund owes a penalty calculated as follows: $7.2 million ($8 million x .9) - $6.4 million ($8 million x .8) = $800,000. The resulting $800,000 is then multiplied by the underpayment rate set forth in IRC §6621(a)(2).

continued, page 23

Tax Incentives for QOZs

Deferral of Capital Gains Tax Recognition on the Sale of an Asset

The primary objective of Subchapter Z is to incentivize investment in distressed communities to generate economic growth. Subchapter Z utilizes substantial tax incentives to achieve this goal. The first tax incentive provided allows investors in QOZs to sell assets to unrelated individuals and to defer the resulting gain. The gain derived from the sale of assets must be invested into a QOZ Fund within 180 days after the sale. The taxpayer must also make an election; however, no Treasury regulations have been issued explaining how the election is made. It is likely any such election will be made on the taxpayer's return reporting the sale.

Example 1: X owns 1,000 shares of IBM stock with a cumulative basis of $500,000 and fair market value (FMV) of $1 million. X sells the IBM stock on May 1, 2018, and invests $500,000 in an approved QOZ Fund on Sept. 1, 2018. In this example, X can defer the recognition of the $500,000 of gain from the IBM stock assuming X subsequently makes the proper deferral election set forth in §1400Z-2.

Example 2: Assume the same facts in Example 1; however, X waits until Dec. 31, 2018, to invest in an approved QOZ Fund. In this example, more than 180 days transpired between X's sale of the IBM stock and investment in the approved QOZ Fund. Accordingly, X must report the $500,000 as capital gains tax.

It is unknown whether the deferral of recognition will extend to gain other than capital gain. IRC §1400Z-2 is titled "Special Rules for Capital Gains Invested in Opportunity Zones." Assets generating capital gain can also generate ordinary income in the form of depreciation recapture, as set forth in IRC §1231(b). Based on the text of the statute, it is unclear whether ordinary income generated by the sale of a capital asset qualifies for the income tax deferral. Future treasury regulations will have to resolve this ambiguity, as advising clients to liquidate capital assets with ordinary depreciation recapture income to invest in a QOZ Fund is too risky.

Example 3: X owns an office building with an acquisition basis of $500,000, an adjusted basis of $250,000 after depreciation deductions and an FMV of $1 million. On May 1, 2018, X sells the office building for $1 million, generating a depreciation recapture of $250,000 and capital gain of $500,000. In this example, it is unclear whether X's deferral of tax is limited to $500,000 of capital gain or includes the depreciation recapture of $250,000.

Example 4: ABC LLC is taxed as a partnership and is owned equally by A, B and C. The operating agreement provides equal allocations of income, gain, loss and deduction. ABC LLC owns a widget machine integral to its business with an acquisition basis of $1 million, an adjusted basis of $500,000 and an FMV of $3 million. On May 1, 2018, ABC LLC sells the widget machine, generating capital gain pursuant to IRC §1231(b), and the proceeds, therefore, are eligible to be invested in an approved QOZ investment. It is unknown whether the depreciation recapture of $500,000 must be recognized or can also be deferred.

Three Possible Basis Increases During Ownership

The QOZ Fund investment defers the initial recognition of income only on the sale of the asset generating gain. Accordingly, a taxpayer's basis in the QOZ Fund is initially zero.[7] The zero basis ensures the original amount of gain on the property sold to invest in the QOZ is eventually recognized. IRC §1400Z-2, as an additional tax incentive, allows taxpayers to increase their zero basis in the QOZ Fund over time. For QOZ Funds held for at least five years, the basis is increased by 10 percent of the original amount of gain deferred.[8] If the QOZ Fund is held for seven years, then the basis is increased by an additional 5 percent, so the total basis offset is equal to 15 percent after seven years.

Example 5: X sells 1,000 shares of IBM stock, generating $500,000 of capital gain. X invests the $500,000 in a QOZ Fund within 180 days after the sale in 2018. The QOZ fund owns QOZ Property. In 2022, the value of X's QOZ Fund interest is $1 million. X sells his entire interest in the QOZ Fund in 2022. X recognizes the following: (a) $500,000 in deferred gain from the IBM stock and (b) $500,000 of gain in post-investment appreciation of the QOZ Fund. All gain is taxed as capital gain.

Example 6: Assume the same facts in Example 5; however, X sells his QOZ Fund interest five years after his investment. In this example, X recognizes $500,000 in deferred gain from the IBM stock and $450,000 of gain in post-investment appreciation of the QOZ Fund. X's basis in the QOZ Fund increased by 10 percent of X's deferred gain. All gain is taxed as capital gain.

Example 7: Assume the same facts in Example 5; however, X sells his QOZ Fund interest eight years after his investment. In this example, X recognizes $500,000 in deferred gain from the IBM stock and $425,000 of gain in post-investment appreciation of the QOZ Fund. X's basis in the QOZ Fund increased by 15 percent of X's deferred gain. All gain is taxed as capital gain.

The initial deferred gain does not go unrecognized until the taxpayer's sale of the QOZ Fund. The statute imposes a tax on the investment in the QOZ Fund on Dec. 31, 2026, regardless of whether the taxpayer has sold the QOZ Fund or not. The tax imposed on Dec. 31, 2026, is equal to the lesser of the deferred gain invested in a QOZ Fund over the taxpayer's basis in the QOZ Fund or the fair market value of the QOZ Fund over the taxpayer's basis in the QOZ Fund. The basis offsets for owning the QOZ Fund for five and seven years apply to the tax imposed on Dec. 31, 2026.

Example 8: X invests $500,000 of capital gain in a QOZ Fund in 2018. X holds the QOZ Fund through Dec. 31, 2026. On Dec. 31, 2026, the fair market value of X's QOZ Fund is equal to $1

continued, page 25



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million. In this example, X's basis in the QOZ Fund is equal to $75,000 (.15 x $500,000), and X must recognize $425,000 in capital gain ($500,000 - $75,000 = $425,000; $1 million - $75,000 = $925,000; $425,000 < $925,000). X owes capital gains tax of $85,000 (.2 x $425,000 = $85,000).

Example 9: Assume the same facts in Example 8, except the fair market value of X's investment in the QOZ Fund is worth only $425,000. In this example, X must recognize $350,000 of capital gain. The fair market value of X's QOZ Fund investment is less than the initial deferred gain in the investment, and therefore is the amount used to determine the taxable gain on Dec. 31, 2026 ($500,000 - $75,000 = $425,000; $425,000 - $75,000 = $350,000; $350,000 < $425,000). X owes capital gains tax of $70,000 (.2 x $350,000 = $70,000).

The taxpayer's basis in the QOZ Fund is increased by the amount of gain recognized on the Dec. 31, 2026 tax. Accordingly, in Example 8, the taxpayer's basis in the QOZ Fund is increased to $500,000 ($75,000 + $425,000), and the taxpayer's basis in Example 9 is increased to $425,000 ($75,000 + $350,000).

The unfairness of the tax imposed on Dec. 31, 2026, is offset by a final tax incentive set forth in IRC §1400Z-2(c), which allows the taxpayer's basis in the QOZ Fund to be increased to the fair market value of the QOZ Fund as of the date the QOZ Fund is sold. To qualify for this tax incentive, the taxpayer must own the QOZ Fund for 10 years and make an election. The procedure for making the election will, presumably, be clarified by a Treasury regulation issued in the future. This tax incentive allows a taxpayer to exclude any gains derived by the taxpayer beyond the initial tax deferred or the tax imposed on Dec. 31, 2026. Put another way, this election allows the post-investment appreciation in a QOZ Fund to be excluded from income.

Example 10: Assume the same facts in Example 8, except X holds the QOZ Fund until 2028, then sells his interest for $2 million and X makes the election pursuant to IRC §1400Z-2(c) changing the basis of the QOZ Fund to equal to its fair market value. In this example, X recognizes no gain in 2028. X's tax recognition was limited to the $425,000 of tax recognized in 2026. X received a basis offset of 15 percent on the initial investment, deferred gain on $500,000 of assets liquidated in 2018 until 2026 and excluded $1.5 million of taxable gain, as the QOZ Fund's post-appreciation investment amount was excluded from gain. Accordingly, in this example, X saves $230,000 of overall capital gains tax, as the appreciation above the Dec. 31, 2026 tax is not recognized (.2 x $1.575 million = $315,000; .2 x $425,000 = $85,000; $315,000 - $85,000 = $230,000).

QOZs are in effect for only 10 years. Accordingly, the tax treatment of QOZ Funds, QOZ Property and QOZ Businesses beyond 2028 is uncertain. For instance, it is unknown whether the §1400Z-2(c) tax incentive excluding the post-investment appreciation of QOZs will be allowed after 2028.

Example 11: Assume the same facts in Example 10, except the QOZ Fund is sold on Jan. 1, 2029. In this example, it is uncertain whether the post-investment appreciation will be excluded from X's income. IRC §1400Z-1(f) states QOZs remain in effect for a period of only 10 years. Accordingly, the §1400Z-2(c) election may not be available to X in 2029. It is hopeful the to-be-issued Treasury regulations will allow taxpayers to add the fair market value of their QOZ Funds to their basis in 2028 without liquidation, and therefore allow the QOZ Funds to continue operating and owning the property past 2028.

Conclusion:

QOZs represent a powerful tax deferral opportunity, especially if the QOZ Business is highly successful. Deferring capital gains tax on the liquidation of appreciated assets utilized to invest in QOZs, and providing significant basis increases for maintaining investments in QOZs gives investors substantial reasons to revitalize low-income communities through the development of real property. However, detailed Treasury regulations must be issued explaining whether income tax deferral extends to any ordinary income generated by the sale of a capital asset, and whether unliquidated QOZ Funds will be allowed to continue beyond 2028.


K. DURKIN

Keith Durkin *is an experienced tax attorney and trusted advisor to individuals, families and closely-held businesses in a broad range of matters, including sophisticated tax planning, intra-family wealth planning, business succession, business operations, asset protection, all probate matters, guardianship matters, and sophisticated estate and trust administrations. Keith routinely structures estate plans and business operations in the most tax efficient manner, with a particular emphasis on achieving intra-family goals, asset protection goals and streamlined tax reporting. Keith is also an experienced litigator, providing advice and representation in estate disputes, probate disputes, trust disputes, business disputes and tax audits.*

Endnotes

1 *See* https://www.census.gov/geo/reference/gtc/gtc_ct.html for definition of "census tract."

2 *See* https://www.cdfifund.gov/Pages/Opportunity-Zones.aspx

3 *See* IRC §1400Z-2(d)(2)(B).

4 The definition of QOZ Partnership Interests is any domestic partnership interest fulfilling the following requirements: (a) the interest was acquired by the QOZ Fund after Dec. 31, 2017, from the partnership solely in exchange for cash; (b) the partnership qualifies or will qualify as a QOZ Business; and (c) during the QOZ's holding period, the partnership qualified as a QOZ Business. *See* IRC §1400Z-2(d)(2)(C).

5 Nonqualified financial property is defined in IRC §1397(e) to be any debt, stock, partnership interests, options, future contracts, forward contracts, warrants, notional principal contracts, annuities or other similar property.

6 *See* IRC §1400Z-2(d)(3)(A)(iii).

7 *See* IRC §1400Z-2(b)(2)(B)(i).

8 *See* IRC §1400Z-2(b)(2)(B)(iii).

POLITICAL ROUNDUP

The Midterm Elections

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

The mid-term elections, aka political junkie high season, are finally in our review mirror. The races were marked by amazing turnout, eye-popping expenditures, and a few outcomes which would have seemed implausible a year ago. The eyes of the nation were once again focused on Florida as closely watched races for the U.S. Senate and Florida Governor went into overtime since Florida voters continued our modern trend of producing tight election outcomes. Three of the statewide races were so close that they triggered machine recounts, and two were within the .25 margin to mandate a manual recount.

Statewide Races: I suppose the elections of 2016 should have prepared me, but had you told this writer a year ago the results of some of the 2018 Florida general election races, I wouldn't have believed you. Those preconceptions unraveled after the August primaries. Agriculture Commissioner Adam Putnam, a favorite of the Republican Party establishment, had raised a daunting war chest and a large list of supporters for a long-expected and planned run for Governor. A year ago, the rumblings from a congressman from NE Florida just didn't seem like much of a threat to Putnam's nomination. Then President Trump showed his strength among the Party's base with a full-throated support of Congressman DeSantis, and Putnam's storied political career met its only set back ever.

I also would not have expected the Republican nominee to face Andrew Gillum, Tallahassee's Mayor, who, like DeSantis, did not have a large statewide profile before this election. But the late addition of millionaire Jeff Greene to an already crowded primary allowed Gillum to leverage the divisions of voters among 4 other substantial Democratic primary candidates to grab the nomination. Gillum had significant support in organization and funds from outside the state and an advantage in voter registration. Most polls had him winning going into election day. But DeSantis' campaign turned out the Republican base in record numbers, suppressed enthusiasm for Gillum by reminding voters of the still pending FBI investigation of wrongdoing in the City of Tallahassee and prevailed in a very close race. If Gillum is correct that he isn't the target of that FBI investigation, I expect we'll see this charismatic candidate run for office again.

Another surprise was the one Democratic victory in the five statewide races. Nikki Fried snagged that honor in the down ballot race for Commissioner of Agriculture and Consumer Services. Fried, a 40-year old attorney and lobbyist from Ft. Lauderdale, had not run for office since her days in student government at the University of Florida. Although she announced her candidacy late, she received the support of the party, and decisively won the primary. At the end of election night, it appeared that Republican Matt Caldwell had won this race, but as more votes trickled in, particularly from Broward County, that outcome flipped in the narrowest victory in the state. In the final count, only 6,753 votes out of 8,059,155 votes cast separated the two.

The races for Attorney General and CFO were also close but yielded more decisive Republican victories. Republican Ashley Moody had the highest margin of victory of any of the statewide candidates, besting Sean Shaw 52.11%- 46.1%. CFO Jimmy Patronis (R), appointed to the position by Governor Scott, won his race to stay in the position by beating former state Senator Jeremy Ring (D), 51.74% to 48.26%. Traditionally, the down ballot races see a lot of drop off in voter participation. While all of the Cabinet races showed that drop-off, the CFO race had the lowest number of total votes cast. Over 95,000 voters who voted in the Governor's race skipped voting in the CFO race. After the January inauguration of our newly composed Governor and Cabinet, three of the four seats on that body will be occupied by lawyers.

All four new Cabinet officers are busy planning their inauguration on January 8, 2019, and for the newly arriving three, the transition to their administrations. Governor-elect DeSantis has already announced he is retaining veteran staffers to be his Inspector General and lead his budget office. He has tapped former Speaker Richard Corcoran for Education Commissioner and Democratic Representative Jared Moskowitz as Director of the Division of Emergency Management. Governor DeSantis will have three Florida

continued, page 27

Supreme Court appointments to make immediately with the JNC's recommendations already received.

US Senate: For the first time since Reconstruction, Florida has an all Republican contingent in the U.S. Senate. Governor Rick Scott defeated the incumbent, U.S. Senator Bill Nelson by a margin of 10,033 votes in a race where almost 8.2 million votes were cast. Nelson had held this seat for the last 18 years, and public office since 1972. Scott smashed Nelson's fundraising and was successful in making Nelson's long history in office an albatross rather than an asset. This was one of the most expensive races this cycle. Governor Scott raised $82 million in this race, $63.5 million of which were his own funds. (Recall that Governor Scott put $73.2 million into the 2010 campaign for his first term when he went from an unknown businessman to the Governor's mansion.) On top of the Scott campaign, spending was another $32 million in outside spending. Nelson's campaign had even more outside support, $54.7 million, but the combined campaign and 3rd party spending on the part of Nelson was dwarfed by the total effort by the Governor to become the junior Senator from Florida. This was the first successful move from the Governor's mansion to the U.S. Senate since Bob Graham accomplished the feat in 1987.

Turnout: The November races also defied tradition with record turnouts around the state, with five statewide races, plus a litany of constitutional ballot initiatives, sinking billions into advertising and get-out-and-vote efforts. Early voting participation in 2018 exceeded the total number of persons voting in the last mid-term elections. Statewide participation was almost 62.5%, far surpassing the 51% turnout in the last mid-terms. We don't yet know the turnout by party affiliation and the ever-increasing percentage of voters registered without a party affiliation, but we do know that the votes in the suburban counties were key to the margin of victory and those counties have high percentages of unaffiliated voters.

Close Races and Recounts: Florida voters continued to show how our State's diversity yields tight statewide races. Close races and the recounts requiredare nothing new for Florida and are likely to continue. This was the third consecutive Governor's race decided by a point or less, and the last two presidential ballots in Florida were within a point as well. Democrats have relied on their voter registration advantages in populous urban counties, but Republican performance in traditional Republican strongholds in northeast and southwest Florida and the Panhandle, combined with solid performances in suburban counties, particularly in central Florida with closer voter registrations, lifted all but one of the statewide Republican candidates to a slight edge.

No hanging chads this year in Palm Beach County, but slow returns there and in Broward County had Republican leads narrow significantly as election tallies dragged on, causing suspicion and accusations of fraud and partisanship. Antiquated machines in Palm Beach County were unable to produce recount results meeting the timelines imposed by law. The ballot design in neighboring Broward County produced confusion and appeared to have cost Senator Bill Nelson a critical number of votes in this populous Democratic stronghold.

Narrow vote margins provoked a flurry of lawsuits, particularly in the U.S. Senate race. While none of the lawsuits or the recounts mandated by current law changed the outcome of any races, many regarded the litigation as an effort to spur court decisions and election reforms for 2020. Election reform will certainly be on the table for the 2019 Legislative session.

All of these close races proved how each vote matters. The high turnout evidences that Floridians get it, and they came out, despite polls published in advance of the election, which were almost uniformly way off in both margins and winners.

Blue Waves and Green Waves: While Democrats experienced gains throughout the nation, most notably flipping control of the U.S. House, this trend wasn't reflected in the Florida results. Other than the Agriculture Commissioner race, Democrats flipped a one State Senate, 7 State House and 2 Congressional seats from red to blue and lost their US Senate seat.

While the blue wave didn't hit Florida, the green wave certainly did. Almost $1 billion was spent in the race for Governor alone. Publicly funded dollars available for statewide candidates to match contributions of $250 or less were utilized by both gubernatorial candidates, with Governor-elect DeSantis receiving the most, $3.23 million, the highest amount of public funds ever received. Tallahassee Mayor Andrew Gillum was a sensation in the national progressive Democratic community, raising more funds from outside the state than from inside. Tom Steyer, a California billionaire and former hedge fund manager, contributed heavily to Gillum as did billionaire George Soros, both big players on the national political stage.

Constitutional Amendments: How about those Constitutional amendments?! Twelve were on the ballot, three proposed by the Legislature, two by citizen initiative and seven by the Constitution Revision Commission (CRC). (One of the measures proposed by the CRC on education was removed from the ballot by the Florida Supreme Court in a 4-3 decision finding the ballot language wasn't clear in its intent.) No matter who proposed them, the amendments needed to pass by 60% of the votes cast on the measure. There were intense campaigns waged by interest groups on both sides of several of the ballot measures, and lots of editorials written bemoaning the issue combinations in the proposals of the Constitution Revision Commission.

While many voters skipped voting on some or all of these measures, to the surprise of many, all but one passed. The one that failed was Amendment 1, an additional homestead property tax exemption. Proposed by former Speaker Richard

continued, page 28

Corcoran and passed by the Legislature in 2017, there was a late campaign by local governments against the amendment that (we presume!) proved effective enough to cause the amendment to fall short by almost 2% of the votes cast. Mark this moment, voters turned down a tax exemption!

Deciphering the voting patterns on the amendments that passed is probably somebody's PhD thesis, but it is fascinating. The highest favorable percentage was on Amendment 12 which set stricter standards on lobbying after public service and expands ethics rules for elected officials and government employees. It passed by almost 79%. The highest number of votes on any constitutional proposal was on Amendment 4 which restores voting rights to felons, excluding those convicted of murder or felony sex crimes, once they have completed the terms of their sentence. It passed by 64.5%.

The Florida Legislature

Senate: The Florida Senate Republicans maintained their majority in the upper chamber 23-17, losing one incumbent. Republican Sen. Dana Young, was narrowly bested by former House Minority Leader Janet Cruz in a race so tight it went to a manual recount. In the end, just 411 votes separated the two women. Democratic registration outnumbered Republican in this seat by almost 10,000 voters. Young, an attorney, was a frequent sponsor of Section initiatives during her time in the House and Senate, and we thank her for her service. Four other Senate seats were considered competitive due to tight party registrations, but incumbent Republican Senators Brandes, Stargel and Perry and Democrat Annette Taddeo handled their challengers decisively and will be returning.

Our new Florida Senate President is Bill Galvano, an attorney from Bradenton and a veteran of the legislative process. He has named a leadership team which includes Sen. David Simmons as President Pro Tempore and chair of Judiciary, and Sen. Kathleen Passidomo as Majority Leader. Senator Passidomo is a Section member, Board certified real estate attorney, and previous sponsor of Section initiatives. Senator Simmons is Board certified in both Business Litigation and Civil Trial, is a Section member and another frequent go-to legislator for the Section. The other members of Senate Judiciary are Sen. Jose Rodriguez (D), vice-chair, an attorney from Miami-Dade County, Sen. Dennis Baxley (R), Ocala, Minority Leader Audrey Gibson (D), Jacksonville, Sen. Travis Hutson, (R), Palm Coast, and Sen. Kelli Stargel, (R), Lakeland.

The Section is also well represented in the Democratic leadership. Senator and Section member Lori Berman has been selected as a Minority Whip. She and fellow Minority Whip Bobby Powell are also often sponsors of Section proposals. Senator Gary Farmer, an attorney from Broward County is Minority Policy Chair.

A report on the Senate would be lacking if I didn't remark how much we are going to miss Sen. Dorothy Hukill. She was a good friend, a great lawyer and just a terrifically authentic lady. Sen. Hukill passed away in October and was replaced on the ballot by Tommy Wright (R) who won the seat.

House

The Florida House continues to have a strong Republican majority (73-47), despite 7 races where Democrats narrowly beat Republicans to flip a seat previously held by a Republican. Republicans also successfully flipped two seats. One of those was a Volusia County based seat claimed by Elizabeth Fetterhoff (R) after a recount finalized her 61 vote margin. Ms. Fetterhoff is the Government Affairs director for the New Smyrna Board of Realtors, but we know her from her days ably assisting former Sen. Dorothy Hukill. Interestingly, of the nine House seats which flipped party, seven were in the central band of Florida, from Volusia to Pinellas County. Section members Will Robinson (R), Sarasota, Tommy Gregory (R), Sarasota and Spencer Roach (R) Ft. Myers handily won their first races for the House, and Section member Margaret Good (D) was able to maintain her seat in a tight race.

Term limits really show their impact in the Florida House. While there are few new faces in the Senate, the House continued to have large turnover. As a result of the 2016 elections, over a third of the members of the House were brand new legislators, and this year's crop of freshman is also over a third of that body. The first set of committee meetings in December are dedicated to "House Legislator University," to familiarize new and returning members with ethics and other rules and practicalities of being a House member as well as the subject matter of its committees.

As of this writing, Speaker Oliva has announced just the House leadership. Rep. Chris Sprowls, Speaker-designate beginning in 2020 is Rules Chair, and Section member Rep. Paul Renner, Speaker-designate for 2022 is Judiciary chairman. Both are attorneys. Sub-committee chairs and committee membership will presumably be announced by the first round of committee meetings in January.

While elections are great fun and entertainment for students of politics, I know everyone's glad to have the mid-terms behind us. Congratulations to all our new leaders in the Capitol!


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.

SECTION SPOTLIGHT

South Florida Legal Mentoring Picnic – Saturday October 27, 2018

Anabella Barboza, Esq., Barboza Law & Associates, P.A., Ft. Lauderdale, Florida

The First South Florida Legal Mentoring Picnic took place Saturday, October 27, and it was a success! There were about 400 people (attorneys, judges, law students, paralegals and family members) in attendance. Not bad for the first time we had this type of event here in Broward County, Florida. There was an official ceremony where Broward County Vice-Mayor, Mark Bogen, declared October 27 as the "Love your Broward Lawyer Day."

Several voluntary bar associations were present as well as law firms and the South Florida law schools (St. Thomas, FIU, NSU). This event was organized by the Broward County Bar Association.

The RPPTL tent was next to the NSU Law School, and we received significant traffic from law students and RPPTL members asking about how they could become more involved. Many law students picked up a law student membership application, and we provided information to law students and attorneys interested in joining the Section. The RPPTL tent was the best, and all giveaways and Halloween candy were gone!

We'd like to offer a big *thank you* to all volunteers that were helping us at the RPPTL tent: *Silvia Rojas, Marjorie Wolasky, Nina Butrim, Kym Smith, Jacqueline Revis, and Kristen Jaiven*. It was a wonderful team effort and a great success!

(Photo credit: Anabella Barboza)



RPPTL volunteers Silvia Rojas, Marjorie Wolasky, and Annabella Barboza



Broward County Vice Mayor, Mark Bogen with Braulio Rosa



RPPTL volunteers Kristen Jaiven, Silvia Rojas, Jacqueline Revis, and Nina Butrim



RPPTL Volunteers Jacqueline Revis and Nina Butrim with St Thomas Law School Students Class 1



RPPTL Members Matt Botkin, Annabella Barboza, and James Heaton

RPPTL Section Execu
The Breakers • Pa
July 25 -



Jason Ellison and family



Executive leadership pre-breakers meeting



Mike Bedke, John Redding, Shawn Brown and Rich McIver





RPPTLs at Ragtops





Photos by John Neukamm, Michael Gelfand, Silvia Rojas, Rohan Kelley, Jeff Baskies. Photo editor, Jeff Baskies.

tive Council Meeting
lm Beach, Florida
28, 2018

View Photo Albums at www.rpptl.org



Jerrie and David Akins





John Moran and his son Charlie bowling



Deb Boje and "Elvis" at Ragtops





Ed Smith, Cathy Hennessey, Yoshi Smith and Bill Hennessey



Terrell and Brenda Ezell at Breakers cocktail party



Carolyn Broadwater and Melissa Murphy



Danny McDermott, Liz Hughes, Jacobeli Behar and Stacy Rubel



Keith and Traci Braun and Angie and Brian Sparks

RPPTL Section Takes On Rome

By Erin Farrington Finlen, Esq., The Kelley Law Firm, P.L., Ft. Lauderdale, FL



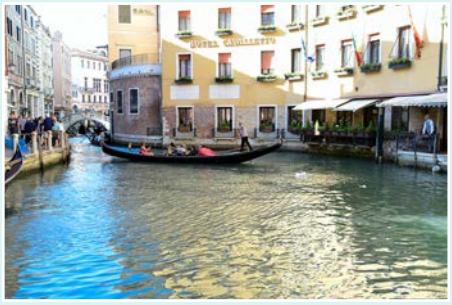
Capri Section Members



Rome - The Photographers - Rohan Kelley and Donna Kelley



Rome Trevi Fountain



Venice



Capri



Capri Shoreline



Capri Skyline



Rome - Pasta Lesson at Winery



Florence



Rome - Colosseum



Rome - Dinner at Winery



Rome - Dinner at Winery II continued, page 33

Buon Giorno! This year's out-of-state RPPTL Executive Council Meeting met in the lovely, historic city of Rome, Italy on September 29, 2018. The trip was broken down into several legs, so travelers had the option of beginning their adventure with three days in Florence and a day trip to Venice, prior to going to Rome for five days. Afterwards, travelers could take a day trip to Mount Vesuvius and Pompeii and end their journey on the Amalfi Coast. In total, the trip was twelve days long, with much of the group joining in Rome. This was one of the most attended out-of-state trips to-date with one hundred and ten people! This article will address the Rome portion of the trip.

The journey to Rome began on September 25th with members arriving throughout the day on trains from Florence and the airport. Our hotel, the Westin Excelsior, was a luxurious, historic palace centrally located to the Borghese Gardens and Spanish Steps. Most of the city was within walking distance and the temperate weather was a welcome escape from the Florida heat. On average, the temperature ranged between 75 and 80 degrees with the evenings in the 50s and 60s.

The evening that everyone arrived, we had a welcome reception with drinks and hors d'oeuvres in the hotel , allowing those joining the group a chance to say hello and get settled for the start of their voyage. Those arriving from Florence were delighted to share their stories with the new arrivals. The trip was structured with both mandatory and optional tours, giving travelers lots of opportunities to go on additional day tours or to go off on their own.

The first morning in Rome started with two optional tours: an audience and blessing with the Pope in St. Peter's Square or a walking tour of the beautiful Borghese Gardens and villa, which was, at one point, the home of Napoleon's sister. After lunch, everyone broke into small groups and went on the Imperial Rome tour, which included several UNESCO World Heritage Sites; the drive along the way was interesting, allowing the group to see the uses, or rather re-purposing, of ancient buildings in the city. To illustrate, the Teatro Marcello, an open-air theater which began construction under Julius Caesar, has modern apartments built on the top floor!

Our first stop was the Colosseum, which has two main gates, the *Porta Triumpalis* and the *Porta Libitinaria*, essentially the entrance where gladiators came onto the stage and those gladiators leaving after their death. (Libitina was a Roman goddess of death.) We entered through the *Porta Triumpalis* and found ourselves with the best view of the house, on the floor of the arena. In Roman times, the stage was built of wood and covered with sand, hiding a maze of rooms below, which were used to house the animals brought in to fight the gladiators. The closeness of Italy to Africa facilitated the introduction of exotic animals in the arena. Prior to the construction of the rooms below the stage, the area would be flooded with water for naval battle reenactments. As an attendee in ancient times, to enter the Coliseum, one had to present a stone tablet which had the section, row and seat number, much like a modern-day ticket. While it is no longer in existence, the top floor of the Colosseum was built out of wood with awnings outstretched to provide cover. This would have also been the level where slaves and unaccompanied women sat.

Our tour continued though the Forum, which was the ceremonial, legal, and business center of ancient Rome, seeing places such as the Senate House and Palentine Hill where the emperors of Rome lived for several centuries. This area has been largely excavated, and one could see how the city had been built up over the millennia with "newer" buildings significantly higher than the Roman buildings and roads. Next, we walked down the street to admire the Piazza Venezia, a white marble monument to King Victor Emmanuel II and a tribute to the Unknown Soldier. The locals affectionately refer to it as "The Wedding Cake." The Pantheon was the last stop on the tour, being one of the most well-preserved buildings of ancient Rome. The reason for this was that the former temple was made into a church very early on in its history – approximately the 7th century. The coffered, domed roof is an architectural wonder, being the world's largest unreinforced concrete dome with an oculus opening to the sky above. Everyone ended the day with a fantastic dinner at Tre Scalini, a restaurant sitting on the edge of the famous Piazza Navona in view of the baroque Fontana dei Quattro Fiumi (Fountain of Four Rivers) by Bernini. (In this writer's humble opinion, the tartufo was excellent.)

Day two started with a trip to the outskirts of Rome in Castel Romani, which are a collection of small towns nestled amongst rolling hills that have cropped up around an ancient volcano. This area is a refuge to Romans escaping the summer heat. Our destination was Castel Gandolfo, overlooking the picturesque Lake Albano, which is the location of the Pope's summer residence. This palace has only been open to the public in the past few years after Pope Francis turned it into a museum, and it is also where Pope Benedict stayed after resigning as Pope. Our tour started with a small fleet of "pope-mobiles" in the courtyard of the palace and took us through displays of furniture, religious clothing worn by various popes, personal items, portraits and state rooms where guests were officially received. We walked through the quaint town of Castel Gandolfo and had a lovely lunch outdoors provided with food grown on the Pope's private farm. The weather could not have been better with a crisp breeze on a clear, sunny day.

After lunch, people had the option to tour the formal gardens of the palace or visit the town overlooking Lake Albano, and later that afternoon we went to the Santa Benedetta winery. Upon arrival, the group was met by a trio of lively musicians and served wine while walking through the vineyards. We were greeted by the gregarious owner who explained that his family had been producing wine and olive oil for over 300 years on the land. Next we had a quick cooking lesson in pasta making

continued, page 34

and were sent off to make our own. An Italian Nona walked around and administered some tough love to those needing assistance in their pasta making. We were told it better be a good effort since we were essentially making our own dinner! Thankfully, in addition to our pasta contributions, we were met with a cornucopia of vegetables, cheeses, pasta and roasted pig – and of course wine. Later that evening we were serenaded by musicians with some intermittent singing and dancing from the group. The day could not have ended on a better note.

The next day gave travelers the option to take a tour of the basilicas of Rome starting with St. Peter's Basilica and including the Basilica di Santa Maria Maggiore – the most important Roman church dedicated to the Virgin Mary or to spend the day in Rome on their own. That evening we took a tour of the Vatican Museums by Night, which house some of the greatest Renaissance masterpieces in the world. Additionally, the Pio-Clementine Museum has the best examples of ancient Greek and Roman statues in the world, including the Apollo Del Belvedere, from the 1st Century BCE, which was considered to be the epitome of classical male beauty and one of the greatest Greek sculptures ever made. Walking through the exhibits, we saw the Hall of Tapestries and the Hall of Maps – which is the second most photographed ceiling in the museum other than the Sistine Chapel and a sight this author is unable to do justice in describing to you readers.

We visited the Papal Apartments which housed several paintings by the famous artist Raphael, including *The School of Athens*. Our knowledgeable tour guide explained and interpreted the works of art and their historical significance throughout our visit. Our tour guide also pointed out "graffiti" carved into the plaster of the Raphael room, which one would not notice without close inspection. In 1527, the army of Emperor Charles V sacked Rome, killing thousands in the process, and the Pope quickly fled the city. While the army consisted largely of mercenaries, there was also a contingent of Lutheran Mercenary Knights who saw an opportunity to thumb their nose at the Roman Church. The Sistine Chapel was used as a stable, papal manuscripts littered the floor to be destroyed by animals, and amongst many others, the name Luther was found carved on the wall of the Papal apartments, and under Raphael's work *Disputation,* which depicts transubstantiation, a Catholic doctrine rejected by Protestants. It is believed that the scraped name 'Luther' belonged to none other than Martin Luther!

Prior to the beginning of the tour, our guide spent several minutes interpreting Michelangelo's famous works in the Sistine Chapel because silence is required while inside the Chapel. He explained that the ceiling depicts scenes from the Book of Genesis and took four years to complete. The famous *Creation of Adam* is in the middle of the room and while it is over sixty-five feet high, one can see that that the hands of Adam and God do not touch. The details in the room are exquisite. The remainder of the Chapel was finished in stages and includes the famous, *Day of Judgement*, painted by Michelangelo later in life, depicting the second coming of Christ. The painting should be viewed in a clockwise motion (starting on the bottom left), with the ascension of those to heaven on the left and the souls descending into hell on the right. Michelangelo caused great uproar with the use of nudity in his paintings and was heavily criticized by many; one of his detractors was a city official, Biagio de Cesena, who also served as the papal master of ceremonies. By looking at the bottom right corner of the painting, one can see a man with donkey ears depicted in a very unflattering manner. That person is de Cesena, who complained to the pope about Michelangelo's depiction of him and demanded that he be removed. Apparently, the pope's answer was that he had no jurisdiction in hell (the right corner of the painting), so de Cesna's depiction has remained for centuries.

The morning of 29th brought the Executive Council Meeting, which was held in an expeditious manner so that the group could embark on a tour of basilicas and catacombs including the UNESCO World Heritage Site of the Basilica of St. Paul and the Old Appian Way, the oldest paved road in the world. Later, the tour explored the catacombs where early Christians practiced their religion to escape persecution from the Romans and included examples of early Christian art. Another option was a tour of the Hadrian Villa in Tivoli, which was a famous resort for Romans for over 2,000 years with its terraced gardens and hundreds of waterfalls and fountains. Everyone met later that evening to go to our last dinner together while in Rome. It was an intimate evening with groups broken up into various rooms. We were served traditional Roman dishes and serenaded by a group of musicians while many sang along. It was a fitting night to the end of a very enjoyable trip.

Many left the next day to either return to the U.S. or to stop in other areas of Europe. The RPPTL group continued on with a day trip to Naples visiting Pompeii and Mt. Vesuvius, and then onto Sorrento on the Amalfi Coast with stops in the Isle of Capri and Amalfi. As a side note, this author is a relatively new member of the RPPTL Section. Notwithstanding the experiences of seeing such wonderful place, it was great opportunity to get to know other members of the section and their families.

Lastly, this author would like to extend a big thank you to Section Administrator, Mary Ann Obos, and Section Chair, Deborah Boje, both of whom put a great deal of heart, time, and effort into making this a truly wonderful experience for everyone who took part in the trip.

(Photo credit: Rohan Kelley and Donna Kelley)

Roundtable

Highlights Of The Meeting Of The RPPTL Section

PROBATE AND TRUST DIVISION

Saturday, July 28, 2018

The Breakers, Palm Beach, Florida

Prepared by Elizabeth A. Bowers, Esq., West Palm Beach, Florida

Thank you to Sponsors: Stout and Guardian Trust

William ("Bill") Hennessey, Director of the Probate and Trust Division, called the meeting to order at 8:20 am.

Action Items

Guardianship, Power of Attorney, and Advance Directives Committee — Nicklaus J. Curley, Chair: Bill Hennessey reported on a motion by the Section to adopt as a Section legislative position support for proposed legislation amending Fla. Stat. § 744.331 to require a unanimous finding by the examining committee that a person is not incapacitated before an action is dismissed and to put in place a new statutory procedure that would allow for the presentation of additional evidence before a petition to determine incapacity is dismissed.

Guardianship, Power of Attorney, and Advance Directives Committee — Nicklaus J. Curley, Chair: Bill also reported on a motion by the Section to adopt as a Section legislative position support for proposed legislation amending Fla. Stat. § 744.1097 to specifically address venue for the appointment of a guardian in minor guardianships proceedings.

Ad Hoc Electronic Wills Study Committee — Sarah Butters, Chair: Bill discussed the Committee's current considerations and working proposal on the legislation regarding electronic wills. Bill summarized the proposal and indicated that the Section had a forensic data expert review the legislation to ensure that it worked from a technical perspective. He also discussed the Committee's position to support remote notarization of a self-proving affidavit to a will but to require two in person witnesses. Bill indicated that the jurat will indicate whether a document is remotely notarized or notarized in person. The Committee has still not concluded whether a remote notarization will be sufficient for the execution of a Durable Power of Attorney if the signatory wants to give an attorney-in-fact any of the superpowers permitted under Florida law. Bill took a straw poll on the issue. The members were fairly evenly split.

Standing Committee Reports

Ad Hoc Guardianship Law Revision Committee — David Brennan, Chair; Nicklaus Curley, Stacy Rubel, and Sancha Brennan Whynot, Co-Vice Chairs: David Brennan reported that the Committee is going through the revised Chapter 744. The Committee intends to have the revised legislation completed by the 2020 legislative session.

Ad Hoc Business Corporation Act Task Force Committee — Brian C. Sparks and M. Travis Hayes, Co-Chairs: Brian Sparks reported that the Committee met with the Business Law Section Subcommittee. The proposed legislation will be ready for the 2019 legislative session.

Ad Hoc Study Committee on Professional Fiduciary Licensing — Angela McClendon Adams and Darby Jones, Co-Chairs: Angela Adams reported that this Committee is studying whether it is necessary for a professional fiduciary to obtain a license from the State of Florida. While other professionals need licenses (for example, nail technicians, and groomers), professional fiduciaries do not. This Committee is considering whether professional fiduciaries (excluding corporate trustees and attorneys) should be required to obtain licenses.

Ad Hoc Committee on Estate Planning Conflict of Interest — William T. Hennessey, Chair; Paul Edward Roman, Vice-Chair: Bill Hennessey reported that this Committee's legislative proposal to address compensation for attorneys who are named as fiduciaries in client documents has stalled the last few years. It will likely be part of the legislative package for 2019.

Ad Hoc Committee on Due Process, Jurisdiction & Service of Process — Barry F. Spivey, Chair; Sean W. Kelley and Christopher Q. Wintter, Co-Vice Chairs: This Committee did not meet.

Asset Protection Committee — Brian M. Malec, Chair; Richard R. Gans and Michael A. Sneeringer, Co-Vice-Chairs: Brian Malec reported that the Committee continues to work

continued, page 36

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

Attorney/Trust Officer Liaison Conference — Tattiana Patricia Brenes-Stahl, Chair; Tae Kelley Bronner, Stacey L. Cole (Corporate Fiduciary), Patrick C. Emans, Gail G. Fagan and Mitchell A. Hipsman, Co-Vice Chairs Tattiana Brenes-Stahl reported that the next ATO Conference will be at the Breakers on August 23 – August 25, 2018.

Estate and Trust Tax Planning — Robert L. Lancaster, Chair; Tasha K. Pepper-Dickinson and Jenna G. Rubin, Co-Vice Chairs: Robert Lancaster reported that the Committee is working on considerations of enacting a community property trust statute in Florida. The Committee is looking at similar statutes adopted by other states. The Committee is also looking to enacting grantor trust reimbursement clauses.

Guardianship, Power of Attorney, and Advance Directives — Nicklaus Curley, Chair; Brandon D. Bellew, Darby Jones, and Stacey Beth Rubel Co-Vice Chairs: Nicklaus Curley reportred that the Guardianship Committee began with a presentation on behalf of the Florida WINGS initiative which was sanctioned by Chief Justice Labarga to address ongoing concerns relating to the guardianship system and those effected by the system. Additionally, the Committee debated a near completed proposal to Fla. Stat. § 744.387 to raise the monetary threshold for required minor guardianships from $15,000 to $25,000 with further discretion to the judiciary. Furthermore, the Committee addressed inconsistencies between circuits on how the Court required elisor is handled, seeking to address an unnecessarily confusing procedural point of the Guardianship Code.

IRA, Insurance and Employee Benefits — L. Howard Payne Chair; Charles W. Callahan, III and Alfred J. Stashis, Co-Vice Chairs: Howard Payne reported that the Committee discussed the Sveen v. Melin case and state laws terminating the rights of a spouse named as beneficiary where the named beneficiary is an ex-spouse as of the time of the participant's death, and whether the retroactive application of these laws, terminating the ex-spouse's rights where she/he was designated beneficiary before the law was passed, is Constitutional or not.

Principal and Income — Edward F. Koren and Pamela O. Price, Co-Chairs, Joloyon D. Acosta and Keith Braun, Co-Vice Chairs: Edward Koren reported that this Committee paused their work because the Uniform Commission is doing a complete rewrite of the Principal and Income Act. The Committee will resume their work once the legislation is enacted. The Committee is likely a year away from finalizing the proposed legislation.

Probate and Trust Litigation — John Richard Caskey, Chair; James R. George and R. Lee McElroy, IV, Co-Vice Chairs: Richard Caskey reported that the Committee is addressing several issues, including, enacting legislation regarding a potential limitations period for subsequently discovered wills.

Probate Law and Procedure — M. Travis Hayes, Chair; Amy B. Beller, Theodore S. Kypreos and Cristina Papanikos, Co-Vice Chairs: Travis Hayes reported that the Committee heard from Bruce Stone who discussed several issues that should be addressed in legislation codifying the rights of Artificial Reproductive Technology heirs. The Committee also heard a presentation regarding whether a copy of a decedent's will should be given to a beneficiary.

Elective Share Review — Lauren Young Detzel and Charles I. Nash, Co-Chairs; Jenna Rubin, Vice-Chair: This Committee did not present.

Trust Law — Angela McClendon Adams, Chair; Tami Foley Conetta, Jack A. Falk, Mary E. Karr, and Matthew H. Triggs, Co-Vice Chairs: Due to time constraints, there was no report from this Committee.

Wills, Trusts, and Estates Certification — Jeffrey S. Goethe, Chair; J. Allison Archbold, Rachel Lunsford, and Jerome L. Wolf, Co-Vice Chairs: Jeffrey Goethe reported that this Committee will be hosting the certification review course on April 5-6, 2019 in Orlando.

Adjournment. The next Probate and Trust Division Roundtable meeting will be held at The Four Seasons, Orlando, Florida on December 8, 2018.

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Roundtable

Highlights Of The Meeting Of The RPPTL Section

REAL PROPERTY DIVISION

Saturday, June 28, 2018

The Breakers, Palm Beach, Florida

Prepared by Colleen Sachs, Esq., Santa Rosa Beach, Florida

Thank you to the Roundtable Sponsor: Fidelity National Title Group

Bob Swaine, the Real Property Division Director, opened the meeting at 8:00 a.m.

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

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

Summary of the St. Pete Roundtable Meeting: The Director directed attention to the summary of the St. Pete Roundtable Meeting. There were no comments to the summary.

Action Items (Action Items at Executive Council Meeting)

Real Property Problems Study Committee – Lee Weintraub, Chair: Chris Smart presented proposed changes to MRTA Fla. Stat. § 712.03 (2018) and Fla. Stat. § 712.04 (2018) to address the issue with revisions inadvertently preserving or reimposing covenants that are not intended to be preserved or reimposed by excepting, by Official Records book and page number, matters of record in a deed, and addressing (in 712.04) the *Calusa Trust* case excepting all governmental restrictions from MRTA. Changes are also needed to make the whole statute consistent. A minor change (line 27) previously said "not reimpose" and now says "intent to preserve."

Real Property Problems Study Committee – Lee Weintraub, Chair: Silvia Rojas presented a proposal concerning the reservations of the IITF automatic release of the right of entry in Fla. Stat. § 270.11 (2018). A portion of the statute would include the automatic release of the right of entry on parcels of 20 acres or less. Water management districts and other entities would be included in the automatic release of right of entry.

Opposition on both of these issues is anticipated from the Local Government Section.

Legislative Update

Ad Hoc Remote Notarization Committee – Burt Bruton, Chair:

Burt Bruton reported on legislation regarding the remote notarization of instruments and this will be an action item at the Executive Council meeting. The goal is to have a piece of proposed legislation approved by the Executive Council so the Section lobbyist can work on it. It is not yet clear who will sponsor it.

There was a question about the $10 fee on line 1680 of the proposed bill. It is a registration fee with the executive office of the governor. It is not a recurring fee per transaction. There is a $25 limit on the fee a remote notary can charge per notarial act. On line 641, a notary has to have a $25,000 bond. Line 654 calls for E&O coverage of $100,000. Electronic notaries have to keep the records for 10 years. The effective date would be October 1, 2019. There was a suggestion that the language be tweaked to add the ability of judges to take oaths via remote notarization.

It is a general position that the Section is in favor of remote notarization. While the legislation that is in the packet will change, the legislative position on the Section website is very general.

In order to perform an online notarization, the remote online notary has to physically be in Florida. The signer of the documents can be outside of the state. The notarial act takes place where the notary is located. There is nothing that says one must say where the principal was located, but the acknowledgment would say it was done online.

Title Issues and Title Standards Committee – Chris Smart, Chair:

Proposed Fla. Stat. § 95.2311 (2018) – Description Errors in Deeds; Curative Provisions

Chris Smart reported on a proposed curative statute to correct obvious errors in deeds. This statute would apply when it's clear on the face of the deed that the grantor had intent to convey a property, but the deed includes an error (in plat book or page number, for example). There was a request that the curative ability be extended to developers that convey multiple lots to purchasers via deeds that contain errors. A question was raised as to whether errors in metes and bounds should be included as part of the corrective scope of the statute. It was discussed that it would be more difficult to narrowly define metes and bounds errors.

continued, page 38

CLE Planning for the 2018-2019 Bar Year – Steve Mezer, CLE Co-Chair:

Steve Mezer reported on a Practitioner Series, which will be a recorded product for sale. These are for practical items for the practitioner that would have a shelf life, not topics that would be a CLE. This would be of interest to new lawyers, judges, etc. These are topics on which someone might need a brush up. As to substantive CLE's, the Section is looking for programs to be presented four months out. Division members are encouraged to have committee members come to the Section for their CLE and encourage them to produce CLE. The Section is currently seeking webinar CLE topics, although Steve noted the topics should be submitted 4 months out for proper planning and production.

Technology Issues

Committee webpage updates: Each committee has a technology liaison to fulfill the Section's goals of creating consistency among each committee page and creating new ways for spreading Section information and updates.

Meeting App: The meeting app has been well-received.

Committee Reports

Attorney-Loan Officer Conference – Robert G. Stern, Chair; Kristopher E. Fernandez and Wilhelmina F. Kightlinger, Co-Vice Chairs: Robert Stern reported on the ALO conference being held at an Orlando resort October 12, 2018. They were working on taking it to the next level, but they needed bankers to participate and attend. They noted that bankers view each other as competition and seem hesitant to participate. The roster of our great speakers was discussed as well as discounts for various memberships, including banking associations.

Commercial Real Estate – Adele Ilene Stone, Chair; E. Burt Bruton, R. James Robbins, Jr. and Martin A. Schwartz, Co-Vice Chairs: No Report.

Condominium and Planned Development – William P. Sklar, Chair; Alexander B. Dobrev, Vice Chair: William Sklar reported on a very successful webinar series with over 200 attendees. Such a series could replace the Ins and Outs CLE program. He announced publication of the fourth edition of Condominium and Community Association of the Florida Bar. There will be an information item at the December roundtable meeting on Safe Harbor Super Priority Lien Legislation. The last opportunity to qualify for the waiver of exam requirement for certification is the application due date of August 31st.

Condominium and Planned Development Law Certification Review Course – Richard D. DeBoest II and Sandra Krumbein, Co-Chairs: Sandra Krumbein and Richard DeBoest reported that the Review Course will be held in Orlando on February 22 and 23, 2019. They have reached out to speakers and are working on programming, which is more of a focus now that one year of the course is in the books.

Construction Law – Scott P. Pence, Chair; Reese J. Henderson, Jr. and Neal A. Sivyer, Co-Vice Chairs: Scott Pence reported that the Committee holds monthly telephonic meetings with a free 1-hour CLE credit. Their Contractors University and Construction Law Institute have been a success. Contractors University programming provided continuing education for contractors in the state. The Committee is piloting Engineers University for design professionals, engineers, architects, etc.

Construction Law Certification Review Course – Melinda S. Gentile and Deborah B. Mastin, Co-Chairs; Elizabeth B. Ferguson and Gregg E. Hutt, Co-Vice Chairs: Deborah Mastin reported that the Construction Law Review Course will be held March 7-9, 2019 in Orlando, concurrent with the Construction Law Institute.

Construction Law Institute – Sanjay Kurian, Chair; Diane S. Perera, Jason J. Quintero and Brian R. Rendzio, Co-Vice Chairs: Sanjay Kurian shared that the CLI dates coincide with the Construction Certification Review Course: March 7-9, 2019, in Orlando. There are sponsorship opportunities available. CLI had over 425 attendees last year. The Committee hopes to increase sponsor rates this year as there is a waiting list for sponsors. There are also law firm sponsorships. The CLI brings in approximately $100,000 of profit for the Section.

Development & Land Use Planning – Julia L. Jennison, Chair; Colleen C. Sachs and Scott M. Work, Co-Vice Chairs: Julia Jennison announced a CLE course offered on September 6, 2018 on potential disruptive technology in land use and development.

Insurance & Surety – Michael G. Meyer and Scott P. Pence, Co-Chairs; Frederick R. Dudley, Katherine L. Heckert and Mariela M. Malfeld, Co-Vice Chairs. Scott Pence introduced the newest EC members Kate Heckert and Mariela Malfeld (who has taken over responsibility for the Insurance Matters newsletter). The Committee publishes its Insurance Matters newsletter and meets telephonically each month. The meetings offer 1 free CLE credit.

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

Real Estate Certification Review Course – Manuel Farach, Chair; Lynwood F. Arnold, Jr., Martin S. Awerbach and Brian W. Hoffman, Co-Vice Chairs. Manuel Farach reported dates of April 12 and 13, 2019 for the Certification Review Course.

Real Estate Leasing – Brenda B. Ezell, Chair; Richard D. Eckhard and Christopher A. Sajdera, Co-Vice Chairs. Brenda Ezell shared that the Committee's CLE on restaurant leasing will become a webinar in addition to the prior Committee CLE on marijuana and leasing. The restaurant leasing CLE has been approved for one credit hour. There will be a CLE on SNDAs on October 31, 2018.

continued, page 39

Real Estate Structures and Taxation – Michael A. Bedke, Chair; Deborah Boyd and Lloyd Granet, Co-Vice Chairs. Michael Bedke asked each committee to write articles for ActionLine. More real estate articles are needed for the next issue. The Real Estate Structures and Taxation Committee had a joint meeting with the Commercial Real Estate Committee.

Real Property Finance & Lending – David R. Brittain and Richard S. McIver, Co-Chairs; Bridget Friedman, and Robert G. Stern, Co-Vice Chairs. David Brittain reported on the Thursday morning meeting on CMBs and complex commercial loan issues. He announced that there will be information items before the division in December concerning Fla. Stat. §§ 720.3085(c) and 95.115(h) (2018). The legal opinions subcommittee has reached consensus with Business Law on what constitutes "duly organized" for an LLC. There must be an operating agreement or a statement of who is authorized to act on behalf of the LLC. This allows for a single member LLC affidavit rather than an operating agreement. This will be an information item in December. Two CLEs are being planned. The Committee is repurposing a presentation on the future of LIBOR as a reference rate in commercial loans as a one-hour presentation. There will be a half day CLE on lending in distressed construction projects.

Real Property Litigation – Marty J. Solomon, Chair; Amber E. Ashton, Manuel Farach and Michael V. Hargett, Co-Vice Chairs. Michael Hargett reported on the recent 3rd DCA opinion in *Diaz v. Kosch* and offered praise to the FAR/Bar subcommittee and Fred Jones for their work on the As Is Residential Contract, creating a document that is down to earth and can be used by buyers and sellers.

Real Property Problems Study – Lee A. Weintraub, Chair; Mark A. Brown, Jason M. Ellison, Stacy O. Kalmanson, Susan K. Spurgeon Co-Vice Chairs. Lee Weintraub reported on the Committee's discussion of professional enrichment components that could be added to the Section meetings, and the institution of a speaker's bureau. Some items discussed were CLE courses for ethics or technology credit, a mentoring initiative to aid in developing skills in young lawyers, a subcommittee for real estate litigation abuse and bullying to ultimately strengthen the sanctions statute, a subcommittee to review issues with e-filing related delays, and the need to stop construction to deal with a notice of commencement.

Residential Real Estate and Industry Liaison – Salome J. Zikakis, Chair; Raul Ballaga, Louis E. "Trey" Goldman, James Marx and Nicole M. Villarroel, Co-Vice Chairs. Salome Zikakis summarized the Committee discussion on the FinCen Geo-targeting order in Palm Beach, Broward, and Miami-Dade counties. The Committee will explore how attorneys in other states address the ethical issues involved. The Committee is preparing a series to help younger attorneys with fundamentals. Raising the professionalism standards at real estate closings was also part of the Committee discussion.

Title Insurance and Title Insurance Liaison – Brian W. Hoffman, Chair; Cynthia A. Riddell, Vice Chair. Brian Hoffman reported that the Committee has been working on a CLE series on title endorsements. There was positive feedback on the panel discussion on blockchain, so the Committee anticipates more discussions like that.

Title Issues and Standards – Christopher W. Smart, Chair; Robert M. Graham, Brian W. Hoffman, Melissa Sloan Scaletta and Karla J. Staker, Co-Vice Chairs. Chris Smart reported that the Committee meets every third Tuesday. Changes to proposed Fla. Stat. § 95.2311 (2018) regarding standards on enhanced life estate deeds is an anticipated information item for the December meeting. The Committee is also working on a standard regarding easements. A proposal was made for an app for uniform title standards and a CLE course on Uniform Title Standards is in the works thank to The Fund.

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Understanding the Underworld of Business Identity Theft and Florida's Recent Efforts to Protect Against Fraudulent Business Filings

By Brian W. Hoffman, Esq.,
Carver, Darden, Koretzky, Tessier, Finn, Blossman & Areaux, LLC, Pensacola, Florida

Protecting one's personal identity has become a routine aspect of life in an ever increasing technologically driven world. We protect the confidentiality of our social security number. We protect the confidentiality of our credit card numbers. We protect access to our mobile devices that contain ever increasing amounts of our personal identity. But how do we protect our business identity? The identity of the limited liability company that holds title to our investment real estate. The identity of the professional service corporation that operates your law firm. Business identity theft is the impersonation of a business, or one of its owners, employees, or officers, with the intent to defraud or to make illicit gain to the detriment of the business.[1] The risk is real and the potential harm substantial, yet to the average person, even the average lawyer, it seems remote – until one becomes a victim of business identity theft.

A Real Story of Fraud

On January 27, 2017, Yves Naman became aware that he was a victim of business identity theft when he attempted to pay the $22,000 property tax bill for a vacant residential lot located on a premier Miami Beach golf course that was owned by his Florida limited liability company – Namron Miami, LLC.[2] To Naman's surprise, the tax bill had already been paid, which immediately prompted his investigation.[3] He soon discovered that three weeks earlier on January 6, 2017, a fraudulent amended annual report had been filed with the Florida Division of Corporations that changed the company's manager from the company's legal counsel to Albert W. Vorstman.[4] The fraudulent amended annual report was filed with minimal effort via the online filing system available through the Florida Division of Corporations website at www.sunbiz.org. Interestingly, the company's address was not changed – only the manager's name. The company had one substantial asset – the unencumbered vacant residential lot. Further investigation revealed that on January 17, 2017, eleven days after the fraudulent amended annual report was filed, a $550,000 mortgage lien was executed and immediately recorded placing a first priority lien on the residential lot.[5] The mortgage lien was signed by Vorstman as manager of Namron Miami, LLC.[6] This was not a do-it-yourself loan closed without the benefit of a closing and title agent. The loan originated from a private lender being handled by a professional mortgage consultant. The mortgage was prepared by an attorney. The mortgage was insured by an underwriter. The professionals involved in the closing process had regularly worked together before on other transactions.[7]

At first glance, it appears Vorstman was the fraudster, but he was not – at least not the real Vorstman. The individual that attended the mortgage closing on January 17, 2017 was not the real Vorstman, but an imposter armed with a fake identification and a story.[8] The fake Vorstman was not an amateur. When questioned about his accent, he told the tale of his Russian great grandfather's immigration to the Caribbean.[9] When questioned about the recent address change for Namron Miami, LLC, the fake Vorstman explained without a flinch that the previous owner was his brother-in-law, which was the reason the street address had not changed.[10] The loan itself originated from what appeared a legitimate referral to the mortgage consultant.[11] Every step of the fraud was a planned process. When a private investigator was later engaged by Naman to investigate the fraud, the investigators' calls to the various parties involved in the closing created more alarm for fraud than the fake Vorstman ever did.[12]

The victims of the fraud were numerous: the real Vorstman, Naman, Namron Miami, LLC, the mortgage consultant, the private lenders, the closing agent, and the title underwriter. The victims describe the fraud as a nightmare, which resulted civil litigation to address the validity of the mortgage, and ultimately who will bear responsibility for the financial damage that has occurred.[13] Disturbingly, that is not where this story of fraud ends.

The real Vorstman was not just any person – he was a credit worthy physician that was one of the principals of another company that owned a multi-million dollar prime waterfront parcel in the Florida Keys that was listed for sale.[14] The real

continued, page 42

estate broker listing the Keys property had received calls from a prospective buyer that never showed for scheduled viewings, asking a multitude of detailed questions regarding the property, such as water frontage, building permits, site plans, and parcel identification number - the kind of information that would be relevant and necessary if the property were to be used as collateral for a loan.[15] A few weeks later, Vortsman's real estate broker received calls from a mortgage broker claiming to be working with Vorstman to secure a loan against the property.[16] The real Vortsman had never contacted or engaged a mortgage broker, but the fraudster was setting the stage to likely perpetrate the same fraud again – cash out a large loan on an otherwise unencumbered property.[17]

Ultimately, SB 610 was subsequently amended to mirror HB 661, thus continuing the current policy of placing ultimate responsibility of ensuring against fraudulent business filing on each business entity, rather than on the Department of State.

Fortunately, this fraud never occurred – presumably shut down when Naman discovered that his property taxes had been mysteriously paid by an unknown party, prompting him to contact the FBI and the Miami Beach Police Department regarding the fake Vortsman. One can only wonder if that second fraud would have happened if Naman had delayed his efforts to pay the property taxes by only a few weeks.

When removed from the real damage caused, the sophistication of the fraud is impressive. The fraudster knew property taxes would need to be paid for the financing to occur. Furthermore, the fraudster came out of pocket more than $22,000 to facilitate the fraud before any fraudulent loan funds had been received. Private lending was selected over traditional lending since it would allow for a very quick closing timeline. A company owning vacant and unencumbered property was carefully selected. Vacant and unencumbered real estate was a critical component of the scam. Vacant property does not alert an appraiser or inspector visiting the property. Vortsman was critical for two reasons as well. He provided a credit-worthy individual to perpetrate the Vortsman fraud, and then provided the launching point for the second and larger fraud that almost occurred. The referral of the loan from what appeared a trustworthy source assured the various professionals involved in the closing process that regularly worked together. The fake Vorstman had the essential fraudulent identification and played the necessary part at closing like a seasoned actor. Finally, the laws of the State of Florida helped facilitate the fraud since at that time, changing the manager of Namron Miami, LLC without any change to the business address, did not trigger notification of any kind to the replaced manager or the principals of the company.

Policy Considerations For Business Filings

The Vortsman fraud raises a number of questions regarding how business filings are made and maintained in the State of Florida. Should any person be permitted to electronically file an annual report or business filing for a Florida business? Should a password protected login system be required, or at least offered as an option for the business owner? If a fraudulent filing is made, then how should the business owner be notified, and what avenues made available to swiftly correct the fraudulent filing?

In the 2018 legislative session, the legislature examined these issues and the current business filing laws in an effort to address and rectify the problems and potential exposure to business owners as revealed by the Vortsman fraud.[18] The initial consideration became one of public policy – is the government responsible for protecting the accuracy of business filings, or is that the responsibility of the business owner? Before HB 661, this burden was clearly on the business owner, and that has not changed.

The Florida Department of State, Division of Corporations, is a ministerial filing agency; as such, the Department must file and maintain the business filings received unless the Department determines that the record does not comply with the filing requirements prescribed by law.[19] The Department filing or refusing to file a document does not affect the validity of the document, relate to the correctness of the document, or create a presumption that the document is valid.[20] Prior to HB 661, there was not a verification system in place via the www.sunbiz.org website for business entities to review filings before being filed. The only real deterrent at the time of the Vortsman fraud was a notification on the website,[21] alerting filers of the criminal penalties for false or fraudulent filings.[22]

At the time HB 661 was introduced, a companion senate bill[23] considered implementation of an optional login system that provided subscribing business owners the option of creating a password that must be inputted to initiate new business filings.[24] By contrast, HB 661 indirectly discourages fraudulent business filings by requiring the Department to send notification to businesses in certain situations and allowing businesses to correct false, misleading, or fraudulent information within fifteen (15) days at no cost, or within thirty (30) days for a fee. Ultimately, SB 610 was subsequently amended to mirror HB 661, thus continuing the current policy of placing ultimate responsibility of ensuring against fraudulent business filing on each business entity, rather than on the Department of State.

continued, page 43

Florida House Bill 661

HB 661 amends Chapters 605 (Florida Revised LLC Act), 607 (Florida Business Corporation Act), 617 (Corporations Not for Profit), and 620 (Partnership Laws) with analogous language addressing the process for correcting business records and required notifications that must be provided to business owners when business filings and changes are filed. The law was implemented effective July 1, 2018.[25]

Correcting Business Records: A statement of correction may now be filed by a business owner in order to correct a filing that contains false, misleading, or fraudulent information. If filed within fifteen (15) days of notification, then there is no filing fee for submitting the statement of correction.[26]

Required Notification: After a record is filed, the Department will now provide email notification of the filing to the electronic mail address on file with the Department, or the Department shall send a copy of the document to the address of the business or its authorized agent.[27] Additionally, if a revision is made to either the business mailing address or the electronic mail address on file, then the Department must send notice to both the new address (mail or electronic mail) and the old address (mail or electronic mail).[28]

Shortfalls of HB 661

While HB 661 makes substantial strides to curb fraudulent filings, it does not resolve all problems. HB 661 does not implement a mandatory or optional secure business filing service, or a process to allow business owners to review records pre-filing, and to reject a filing if elected by the business owners. Additionally, businesses that have recently moved or changed their listed email address and have not yet updated their records with the Division remain vulnerable. Furthermore, the window for correcting false or fraudulent filings is time-limited. Businesses may be able to file new documents to replace fraudulent documents after the correction window; however, this could lead to complications as the fraudster might receive notice of the new filings.

In sum, HB 661 makes substantial improvements to the notification process; however, it does not solve the problems presented by the Vortsman fraud. Even if notification is received by the business owner, the burden is still on that owner to review and take necessary steps in the event of a fraudulent filing. Whether the revised notification procedures are enough to prevent the Vortsman fraud is yet to be seen. However, if the changes implemented by HB 661 are to be successful, then business owners must be educated and aware of the risk and the necessity that they monitor their business filings. With almost certainty, business identity theft will be a continuing issue and problem that will require constant monitoring and update of Florida's laws governing business filing. Lawyers play a unique role in educating their clients on these issues and the solutions to be implemented as future problems arise.



B. HOFFMAN

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Endnotes

1 BusinessIDTheft.org, "What is Business Identity Theft?", http://www.businessidtheft.org/Education/WhyBusinessIDTheft/tabid/85/Default.aspx (last visited October 15, 2018).

2 *See* Verified Complaint ¶23, *Namron Miami, LLC v. Edward J. Bohne, et. al.*, Circuit Civil Case No. 2017-006465-CA-01 (Miami-Dade County); *see also* Samantha Joseph, "How a New Kind of Fraud Puts South Florida Real Estate Owners, Lenders at Risk," *FLA. BUS. R. ONLINE*, available at: https://www.law.com/dailybusinessreview/almID/1202782932347/How-a-New-Kind-of-Fraud-Puts-South-Florida-Real-Estate-Owners-Lenders-at-Risk/?slreturn=20170306184827 (last visited October 15, 2018).

3 *Id.*

4 See Verified Complaint ¶15, Namron Miami, LLC v. Edward J. Bohne, et. al., Circuit Civil Case No. 2017-006465-CA-01 (Miami-Dade County).

5 *Id.* at Verified Complaint ¶17-18.

6 *Id.*

7 Samantha Joseph, "How a New Kind of Fraud Puts South Florida Real Estate Owners, Lenders at Risk" (2017).

8 *Id.*

9 *Id.*

10 *Id.*

11 *Id.*

12 *Id.*

13 See *Namron Miami, LLC v. Edward J. Bohne, et. al.*, Circuit Civil Case No. 2017-006465-CA-01 (Miami-Dade County).

14 Samantha Joseph, "How a New Kind of Fraud Puts South Florida Real Estate Owners, Lenders at Risk" (2017).

15 *Id.*

16 *Id.*

17 *Id.*

18 See Fla. House Bill 661 (2018), Final Bill Analysis (March 23, 2018 at 11:06:34 AM).

19 *See* Fla. Stat. § 605.0206(1) (2018).

20 *See* Fla. Stat. § 605.0210(5) (2018).

21 *See* http://dos.myflorida.com/sunbiz/manage-business/efile/annual-report/instructions/ (last visited October 15, 2018).

22 See Fla. Stat. § 831.06 (2017).

23 Florida Senate Bill 610 (2018).

24 As an example, Colorado and Louisiana have implemented optional password protection for business filings. See https://www.sos.state.co.us/pubs/business/ProtectYourBusiness/secureFiling.html (last visited October 15, 2018); https://geauxbiz.sos.la.gov/staticResource/staticPage/8 (last visited October 15, 2018).

25 Ch. 2018-58, Laws of Florida.

26 *See* Fla. Stats. §§ 605.0209; 607.0124; 617.0124; 620.1207; 620.81054 (2018).

27 *See* Fla. Stats. §§ 605.0210; 607.0125; 617.0125; 620.1206; 620.8105 (2018).

28 *Id.*

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The Real Party In Interest: Trustees

By Cady L. Huss, Esq., Spivey & Fallon, P.A., Sarasota, Florida,
and Elizabeth M. Hughes, Esq., Greenspoon Marder, Miami, Florida

Florida Rule of Civil Procedure 1.210(a) permits actions to be prosecuted in the name of the real party in interest, including a personal representative or the trustee of an express trust, who may sue in that person's name without joining the party for whose benefit the action is brought. The Rules of Civil Procedure clearly contemplate that a trustee will prosecute a cause of action on behalf of the beneficiaries to which it owes fiduciary obligations. The Florida Trust Code also charges the trustee with the duty to enforce and defend claims or actions of the trust and to protect trust property.[1] To remedy a situation where a trustee is failing to adequately perform his or her duties, or maintains a conflict, the Florida Trust Code creates a mechanism which allows a beneficiary to seek the appointment of a special fiduciary.[2]

However, beneficiaries and their wily counsel have attempted to circumvent the real party in interest rule and the overarching themes of the Florida Trust Code to pursue causes of action involving trust assets in their own, individual capacities. Fortunately, trustees have reputable authority in defense of their position as the real party in interest and as the proper party to pursue actions on behalf of the trust.

Florida Statutes and Case Law: The Real Deal

The Florida Trust Code delineates specific duties and powers of a trustee. These statutes contain unequivocal provisions for which a trustee can be held liable for failing to abide. For example, Fla. Stat. § 736.0811 (2018) states: " [a] trustee shall take reasonable steps to enforce claims of the trust and to defend claims against the trust." Further, the trustee is required to collect all trust property and to accept or reject additions to trust property and to prosecute and defend claims in any jurisdiction to protect trust property.[3] The trustee also has the authority to bind beneficiaries of the trust when establishing or adding to a trust.[4]

While the Florida Trust Code outlines the various duties of a trustee and requires a trustee to take reasonable steps for the recovery of trust assets, this is not an exclusive power or responsibility under the Code. The Code does not contain language naming the trustee as the exclusive or sole party able to bring actions on behalf of a trust, and therefore, leaves a small door open for a beneficiary to pursue a claim involving trust assets. Fortunately, most of the Florida cases addressing this topic support the concept that the trustee is the proper party to bring claims on behalf of the trust as the real party in interest.

As early as 1880, the Florida Supreme Court noted the importance of the trustee in litigation involving trust assets. The court explained that, "a trustee, in whom is vested the legal estate, is a necessary party in all proceedings affecting the estate, where there is a remainder-man; for the trustee is liable for the proper care and preservation of the property."[5] The Supreme Court of the United States has recognized the vital role of the trustee in trust actions. In *Hanson v. Denkla*, the Court stated that, "Florida adheres to the general rule that a trustee is an indispensable party to litigation involving the validity of the trust. In the absence of such a party a Florida court may not proceed to adjudicate the controversy."[6] Courts have also addressed limited circumstances in which a trustee may not be required to bring the cause of action – for example, when the trust is a passive corporate entity or when the trustee possess a conflict.[7]

One of the most instructive cases in defense of the trustee as the proper party to bring claims on behalf of the trust is a 1990 case from the Second District Court of Appeal. In *Buerki v. Lochner*, the grantor, Robin Buerki, Jr. established a revocable trust that named his son, Robin Buerki III, and his live-in companion, Frances Lochner, as beneficiaries.[8] Per the terms of the amended trust, which included a cohabitation agreement, the grantor was to sell his home and place the proceeds in the revocable trust within two months.[9] When the grantor ultimately sold the home, he placed the proceeds in a money market account in trust for Ms. Lochner.[10] When the grantor died, Ms. Lochner withdrew the funds from the money market account and deposited them in an account in her own name.[11] The trustee of Mr. Buerki Jr.'s Trust filed a declaratory action naming Robin Buerki III and Ms. Lochner as co-defendants and asked the court to determine whether the trust had the duty to obtain the home proceeds from Ms. Lochner.[12] Ms. Lochner counterclaimed and alleged that the proceeds were a gift and Mr. Buerki III crossclaimed seeking the imposition of a constructive trust.[13]

continued, page 46

On summary judgment, Ms. Lochner alleged that Mr. Buerki III lacked standing to pursue his crossclaim because only the trustee had the right to assert a claim involving the trust's property.[14] The trial court agreed and dismissed the amended crossclaim with prejudice.[15] The Second District affirmed and noted that while there is little authority on the issue, a claim must be brought by or on behalf of the real party in interest.[16] As the legal title holder to trust property, the trustee would be the real party in interest to a cause of action to determine the trust's assets.[17] The court also recognized, however, that the beneficiary may have a right to intervene in a suit where the trustee is a party to secure the proper administration and distribution of trust assets.[18]

In appropriate circumstances, a trustee ad litem may be appointed to consider and, if appropriate, to maintain a proceeding against a third party on behalf of the trust and its beneficiaries.

While most courts, even outside of Florida, concur with the position stated in *Buerki* – the trustee, as legal title holder of trust property and as the real party in interest, is the proper party to bring actions involving trust assets – the Fourth District Court of Appeal in the outlier case *Marshall-Shaw v. Ford*, came to an inconsistent conclusion.

In *Marshall-Shaw v. Ford*, jewelry owned by Kathleen Ford's trust was stolen, and Ms. Ford filed an action for conversion, civil theft, conspiracy, unjust enrichment, and trespass against Anita Marshall-Shaw.[19] Ms. Ford sought writs of attachment on Ms. Marshall-Shaw's property and also moved for the issuance of a prejudgment writ of garnishment.[20] At an evidentiary hearing on Ms. Marshall-Shaw's motion to dissolve both writs, Ms. Ford's attorney testified that the jewelry was owned by Ms. Ford's trust and that he and Ms. Ford were the co-trustees of the trust while Ms. Ford was the sole beneficiary.[21] The trial court denied the motions to dissolve the writs of attachment and garnishment and Ms. Marshall-Shaw appealed.[22] Ms. Marshall-Shaw alleged that Ms. Ford and her attorney were required to bring their claims in their capacity as co-trustees because the jewelry was owned by the trust.[23] The Fourth District disagreed and looked to Rule 1.210(a) as "a rule of enlargement rather than one of limitation of parties."[24] Without further discussion, the court concluded that Rule 1.210 authorized Ms. Ford, as the sole beneficiary of her trust, to maintain the suit in her individual capacity.[25] Although not expounded by the court in *Marshall-Shaw,* the Fourth District may have been recognizing *a priori* the rule in favor of Ms. Ford as the sole beneficiary and co-trustee to carve out another narrow exception to the trustee's standing to pursue actions for the return of trust assets.[26]

Secondary Sources: The Real Statement

To further support the concept of the trustee as the real party in interest for claims involving trust assets, the practitioner can also utilize both the Second and Third Restatements of Trusts. The Restatement (Second) of Trusts notes that " [t]he trustee is under a duty to the beneficiary to take reasonable steps to realize on claims which he holds in trust."[27] The comments to §177 contemplate that it may not be reasonable for a trustee to pursue all claims. The trustee must consider the expense involved in the cause of action as well as the merits of the claim. The Restatement (Second) even considers an uncollectible defendant that may make the cause of action unsuitable for the trustee's pursuit.

The Restatement (Third) of Trusts also addresses claims by a trustee against third parties and the situations when either a trustee or a beneficiary, respectively, is the appropriate party to bring the claim. Section 107 states:

(1) A trustee may maintain a proceeding against a third party on behalf of the trust and its beneficiaries.

(2) A beneficiary may maintain a proceeding related to the trust or its property against a third party only if:

(a) the beneficiary is in possession, or entitled to immediate distribution, of the trust property involved; or

(b) the trustee is unable, unavailable, unsuitable, or improperly failing to protect the beneficiary's interest.

(3) In appropriate circumstances, a trustee ad litem may be appointed to consider and, if appropriate, to maintain a proceeding against a third party on behalf of the trust and its beneficiaries.

The comments to the Restatement (Third) also recognize that in general, the Trustee is the holder of the title to trust property (including causes of action), the party charged with representing beneficiaries, and the appropriate party to consider and bring an action on behalf of the trust against a third party.[28] Except as indicated in the limited exceptions outlined in §107(2), the beneficiary should have no standing to sue a third party on behalf of the trust.

Keeping It Real

Although the Florida trust code does not explicitly state that the trustee has the exclusive authority to bring claims for the return of, or to protect, trust assets, a comprehensive reading of the trust code provides for the application of this concept. Other than the outlier case of *Marshall-Shaw*, Florida case law substantially supports the general understanding amongst practitioners that the trustee is the best party to bring these claims on behalf of the trust unless there is a conflict, delay, or the beneficiary is entitled to immediate possession of the asset. Common law throughout the country highlights the

continued, page 47

same themes as set forth in *Buerki v. Lochner*, such that the consensus among all sister states, and the Restatement (Third) of Trusts, is the Trustee is the best party to bring causes of action involving trust assets. [4]



E. HUGHES



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Endnotes

1 Fla. Stat. § 736.0811 and § 736.0816(23) (2018).

2 Fla. Stat. § 736.1001(1)(e) (2018).

3 Fla. Stat. § 736.0816(1) and (23) (2018).

4 Fla. Stat. § 731.303(1)(b)(2) (2018).

5 *Winn v. Strickland,* 34 Fla. 610 (Fla. 1894) citing *Wilson v. Russ,* 17 Fla. 691 (Fla. 1880).

6 *Hanson v. Denckla*, 78 S.Ct. 1228, 1235 (1958).

7 *See Trueman Fertilizer Co. v. Allison,* 81 So. 2d 734 (Fla. 1955) and *Milton v. Milligan*, 2013 WL 828607 (N.D. Fla. 2012).

8 *Buerki v. Lochner*, 570 So. 2d 1061, 1062 (Fla. 2d DCA 1990).

9 *Id.*

10 *Id.*

11 *Id.*

12 *Id.*

13 *Id.*

14 *Id.*

15 Id.

16 *Id.* at 1063.

17 *Id.*

18 *Id.*

19 *Marshal-Shaw v. Ford*, 755 So. 2d 162 (Fla. 4th DCA 2000).

20 *Id. at 164.*

21 *Id.*

22 *Id.*

23 *Id.*

24 *Id.*

25 *Id.*

26 *A priori* also recognized in *St. Martin's Episcopal Church v. Prudential-Bache Securities, Inc.*, 613 So.2d 108, 109 (Fla. 4th DCA 1993) – The court cited *State of Delaware v. Florida First National Bank*, 381 So. 2d 1075 (Fla. 1st DCA 1979) which held, in dicta, "unequivocally that a beneficiary of a private trust has the power to maintain a lawsuit to enforce the trust." The Fourth DCA noted "It is not surprising, therefore, that standing to sue – as to property of the trust, anyway – is thus recognized a priori by the rule in favor of the beneficiary."

27 Restat. 2d of Trusts § 177.

28 Comments to Restat. 3d of Trusts § 107.



E-Signatures And The Statute Of Frauds

By J. Christopher Barr, Esq., Bryant, Higby & Barr, Chartered, Panama City Beach, Florida

Fla. Stat. § 725.01 (2018) requires that, in order to be enforceable, a contract involving the sale of an interest in land must be memorialized in a written instrument signed by the party against whom enforcement is sought (or by some other lawfully authorized person).[1] Accordingly, an enforceable real estate contract must satisfy two threshold conditions: (1) it must be in a written memorandum signed by the party against whom enforcement is sought, and (2) the written memorandum must disclose all the essential terms of the sale. However, practitioners should note that what exactly constitutes a "writing" and what constitutes a "signature" has evolved significantly since the codification of the Statute of Frauds. As a result, when considering the enforceability of a seemingly unexecuted real estate contract, the practitioner should carefully consider all e-mails and other correspondence exchanged between the parties.

Florida law states "[t]o satisfy the statute, a note or memorandum may take almost any possible form."[2] Written evidence from which the whole contract may be made out is all that is required. Several writings may be aggregated to satisfy the minimal threshold.[3] In interpreting the signed writing requirement of the Statute of Frauds, numerous courts have found that e-mails can meet the writing requirement under Florida law.

Furthermore, the "execution" of a written contract or memorandum may be affected by the provisions of Fla. Stat. §§ 668.001–668.006 (2018) (the "Electronic Signatures Act"). The Electronic Signatures Act provides that an electronic signature may be used to sign a writing and that electronic signatures have "the same force and effect as a written signature."[4] An electronic signature is defined as "any letters, characters, or symbols, manifested by electronic or similar means, executed or adopted by a party with an intent to authenticate a writing.[5] The law holds that a writing is electronically signed if an electronic signature is logically associated with the writing.[6] Contracts generated as electronic files, executed by electronic signature, and delivered by e-mail transmission, can be enforced under Florida law.

Today, most e-mails contain some signature from the sender. That signature, coupled with a written contract containing the agreed upon material terms of a contract could be enough to satisfy the Statute of Frauds, provided the email contains all of the essential terms of the sale.

As technology continues to advance, the courts may continue to expand the scope of what constitutes a "signed writing." With continued increase of computers and electronic media in real estate transactions, it is important that attorneys, judges, and all real estate professionals understand the ramifications of electronic signatures and electronic communications. As such, when considering the enforceability of unexecuted documents within the scope of the Statute of Frauds, practitioners should review and evaluate relevant correspondence and e-mails between the parties to determine if an enforceable contract has been created. In addition, practitioners should caution clients to use care when exchanging and negotiating the terms of real estate contracts via e-mail to avoid creating a potentially enforceable contract.

Endnotes

1 Fla. Stat. § 725.01 (2018).

2 *Kolski v. Kolski*, 731 So. 2d 169 (Fla. 3rd DCA 1999) citing to *Bader Bros. Transfer & Storage, Inc. v. Campbell*, 299 So. 2d 114, 115 (Fla. 3d DCA 1974), *Rank v. Sullivan*, 132 So. 2d 32, 36 (Fla. 2d DCA 1961), *Heffernan v. Keith*, 127 So. 2d 903, 904 (Fla. 3d DCA 1961).

3 *Cook v. Theme Park Ventures, Inc.*, 633 So. 2d 468, 471 (Fla. 5th DCA 1994).

4 Fla. Stat. § 668.004 (2018).

5 Fla. Stat. § 668.003(4) (2018).

6 Fla. Stat. § 668.003(4) (2018).



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Revisiting Beneficiary Designations After Divorce

By Denise Cazobon, Esq., Dunwody White & Landon, P.A., Naples, Florida

On June 11, 2018, the United States Supreme Court (the "Supreme Court") issued its opinion in *Sveen v. Melin*, a case that highlights the importance of updating beneficiary designations after a divorce.[1] In an 8-1 decision, the Supreme Court ruled that the retroactive application of Minnesota's "revocation-upon-divorce" statute to a life insurance beneficiary designation executed prior to the statute's enactment does not violate the Contracts Clause of the U.S. Constitution.[2] This decision also impacts Floridians, as in 2012 Florida enacted Fla. Stat. § 732.703, which is a "revocation-upon-divorce" statute similar to the pertinent Minnesota statute at issue in *Sveen*.

At issue is the concept of a "revocation-upon-divorce" statute. Generally, under these types of statutes if a married individual names his or her spouse as a beneficiary under a life insurance policy or similar asset, and subsequently the couple divorces, a "revocation-upon-divorce" statute deems the spouse as having predeceased the individual. Such statutes may apply to any financial contractual obligation that can be subject to a beneficiary designation, such as a life insurance policy, individual retirement account or annuity. The basis for this approach is simple – if a married couple divorces and as part of the divorce they settle their marital assets, the settlement should represent the completion of all financial matters arising from the marriage. Given the ramifications and pains of divorce, sometimes parties may inadvertently fail to cut all ties to the marriage. Examples of such a failure include neglecting to update estate planning documents or change all beneficiary designations away from the now former spouse. A "revocation-upon-divorce" statute therefore helps to correct an inadvertent transfer of wealth to the former spouse upon death.

In *Sveen*, Mark A. Sveen ("Mark") married Kaye L. Melin ("Kaye") in 1997. The following year, Mark purchased a life insurance policy and designated Kaye as the primary beneficiary of the policy and his two adult children from a prior marriage as the contingent beneficiaries. In 2007, Mark and Kaye divorced.The divorce decree made no mention of the life insurance policy, and Mark never changed the beneficiary designation away from Kaye. As a result, upon Mark's death in 2011, Kaye was still the primary beneficiary of the policy proceeds.

Under the Minnesota statute enacted in 2002, if one spouse named the other as beneficiary of a life insurance policy or other similar asset, the divorce automatically revokes that designation such that the proceeds pass to the contingent beneficiary named or as otherwise provided under the contract. It was unclear whether the statute would apply to a beneficiary designation that was in place prior to the statutory amendment.

The insurance company requested a determination as to whether Minnesota's "revocation-upon-divorce" statute revoked the beneficiary designation in favor of Kaye. Seeing as how she was the primary beneficiary, Kaye challenged the constitutionality of the retroactive application of the Minnesota statute, arguing that it violated the Contracts Clause of the U.S. Constitution (the "Contracts Clause") by substantially impairing a contractual relationship. At the Federal level, the lower courts were split on the issue, so this case ultimately was heard by the Supreme Court for a final determination.[3]

In the majority opinion written by Justice Kagan, the Supreme Court held that there was no violation of the Contracts Clause because, taken as a whole, the Minnesota statute does not substantially impair pre-existing contractual arrangements. As a result, Kaye was deemed to have died before Mark and therefore Mark's secondary beneficiaries received the proceeds from the life insurance policy.

Like the Minnesota statute at issue in *Sveen*, Fla. Stat. § 732.703 provides that a designation benefitting a decedent's former spouse is void as of the time the decedent's marriage

continued, page 51

is judicially dissolved or declared invalid by court order, if such designation was made prior to the dissolution or court order.[4] If the statute applies, the decedent's interest in the asset passes as if the decedent's former spouse predeceased the decedent.[5] Fla. Stat. § 732.703 does not just apply to life insurance – it also applies to a qualified annuity or other similar tax-deferred contract held within an employee benefit plan, an individual retirement account, an employee benefit plan, a payable-on-death account, a security or other account registered in a transfer-on-death form, and an annuity or other similar contract that is not held within an employee benefit plan or tax-qualified retirement account.[6] The statute contains certain exceptions to its application, including plans or policies governed by federal law (such as a "401(k)" account) and state-administered plans.[7]

After a client's divorce, it is just as important to review and update beneficiary designations as it is to update the client's will and trust.

Similar to the Minnesota statute, Fla. Stat. § 732.703 applies retroactively to all designations made by or on behalf of decedents dying on or after July 1, 2012 regardless of when the designation was made.[8] The Supreme Court's ruling in *Sveen* confirms that the retroactive application of Fla. Stat. § 732.703 to designations signed before the July 1, 2012 effective date does not violate the Contracts Clause.

Ultimately, the judicial challenges facing the Supreme Court in *Sveen* could have been avoided had the beneficiary designation been revised after the divorce. However, careful consideration must be given when advising clients post-divorce, as circumstances may arise where the policy owner may still wish to benefit the former spouse under the particular policy. Without careful drafting, the retroactive effect of a "revocation-upon divorce" statute may negate the policy owner's intent. This issue was highlighted by Justice Gorsuch in his dissent, who stated that perhaps a spouse would desire to keep the former spouse as a beneficiary out of a sense of obligation or as a cheaper and more private way to provide for minor or disabled children of the marriage rather than leaving the funds to a fiduciary.[9] In *Sveen*, Kaye had testified that she and Mark had repeatedly agreed to maintain one another as designated beneficiaries of their respective life insurance policies because the premiums for such policies had been paid using funds derived from their joint bank accounts.[10]

The best practice would be for the property settlement agreement to specifically identify and address each asset that is, or can be, subject to a beneficiary designation, such as life insurance, retirement plans, employee benefit plans, or assets subject to pay-on-death or transfer-on-death designations. Preferably, the agreement would identify the spouse that owns such asset, whether the owner-spouse must designate or continue to designate the former spouse as a beneficiary of such asset, or whether the owner-spouse is free to dispose of such asset as he or she may choose.

Once the order of dissolution is entered, the estate planning attorney should review the final order as well as the property settlement agreement and consider the implications for the client's estate plan. It may be appropriate to advise the client to sign new beneficiary designations, especially in that rare instance where the client may wish to keep the former spouse as a designated beneficiary even though there is no legal obligation to do so. After all, as affirmed by the *Sveen* decision, without a new beneficiary designation Fla. Stat. § 732.703 would otherwise likely frustrate the client's intent, rather than carry it out. In addition to reducing the potential for future conflict among family members, the execution of new beneficiary designations after the order of dissolution is entered should negate the application of Fla. Stat. § 732.703 and its potential unintended consequences.

After a client's divorce, it is just as important to review and update beneficiary designations as it is to update the client's will and trust. For many individuals, an IRA or life insurance policy can comprise a substantial portion of their wealth. Yet, it is not uncommon for these assets to be overlooked when updating a client's estate plan after divorce. Encouraging a client to review and update beneficiary designations after a divorce can help to better assure that the client's actual intent is carried out and reduce the potential for future litigation between the client's beneficiaries and his or her former spouse.

Endnotes

1 *Sveen v. Melin*, 138 S. Ct. 1815 (2018).

2 *Id*. at 1818.

3 Compare *Whirlpool Corp. v. Ritter*, 929 F.2d 1318 (8th Cir. 1991) and *Parsonese v. Midland Nat. Ins. Co.*, 550 Pa. 423, 706 A.2d 814 (1998), ruling that the retroactive application of a revocation-upon-divorce statute violated the Contracts Clause, *with Lazar v. Kroncke*, 862 F.3d 1186 (9th Cir. 2017), *Stillman v. Teachers Insurance & Annuity Ass'n College Retirement Equities Fund*, 343 F.3d 1311 (10th Cir. 2003), *In re Estate of DeWitt*, 54 P.3d 849 (Colo. 2002) and *Buchholz v. Storsve*, 740 N.W.2d 107 (S.D. 2007), adopting the opposite position.

4 Fla. Stat. § 732.703(2) (2018).

5 *Id*.

6 Fla. Stat. § 732.703(3) (2018).

7 Fla. Stat. § 732.703(4) (2018).

8 Fla. Stat. § 732.703(9) (2018).

9 *Sveen v. Melin*, 138 S. Ct. 1815, 1828-29 (2018).

10 *Id*. at 1828.

Probate And Trust Case Summaries

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In determining the incapacity of a Ward, the assessment by a three-person member committee, as required by Florida Statute, must establish their assessment using a comprehensive examination, which incorporates a physical exam, a mental exam, and a functional assessment.

Cook v. Cook, No. 4D17-1637, 2018 Fla. App. LEXIS 13270 (4th DCA Sep. 20, 2018)

The trial court determined that the alleged incapacitated person, James S. Cook ("Cook"), was incapacitated. The lower court's determination was established with the report of the three-person examination committee, as required by Florida Statute. The committee in the present case included a medical doctor ("Doctor"), layperson ("Layperson"), and psychologist ("Psychologist").

The Doctor determined Cook was "certainly disturbed" and lacked self-awareness after interviewing Cook, social workers, another member of the examining committee and Cook's brother. The Doctor did not perform either a physical or mental examination of Cook.

The Layperson interviewed Cook twice, spoke to family members, two neighbors, a friend and a social worker before submitting the report. The Layperson determined that Cook was in denial about his major depressive disorder.

The Psychologist interviewed Cook twice and reviewed his medical records and accompanying court documents, spoke to his brother and consulted with his primary care physician. The Psychologist also conducted a "Mini-Mental State Examination (MMSE-2)[1] on two occasions. He admitted that his testing was "the briefest of screening instruments for neurocognitive impairment" and that the results showed that the Appellant had no cognitive impairment. The Psychologist testified that Cook suffered from a "major depressive disorder, an unspecified anxiety disorder, and a psychotic disorder not otherwise specified." The Psychologist did not perform a physical or comprehensive mental health examination.

Although the lower court was satisfied with the testimony in determining Cook's incapacity, on appeal, the Appellate Court determined that the requirements of the statute were not met. The majority concluded that in determining Cook's incapacity, the statute also requires not only a three-person examination committee, but also for this appointed committee to rely on a comprehensive examination, including a physical exam, mental exam and functional assessment.

Florida Statute § 744.331(3)(f) (2018) states:

> "The examination of the alleged incapacitated person must include a comprehensive examination, a report of which shall be filed by each examining committee member as part of his or her written report. The comprehensive examination report should be an essential element, but not necessarily the only element, used in making a capacity and guardianship decision. The comprehensive examination must include, if indicated:
>
> 1. A physical examination;
> 2. A mental health examination; and
> 3. A functional assessment.
>
> If any of these three aspects of the examination is not indicated or cannot be accomplished for any reason, the written report must explain the reasons for its omission."

This requirement was not satisfied when determining Cook's incapacity. The majority reasoned that this comprehensive examination was a requirement because of the intent of the Legislature in drafting guardianship law in Florida. Indeed, the Appellate Court noted that it must provide greater protections to Wards as "the Legislature placed safeguards in the statute to ensure that precious human rights were not removed without due process." Thus, the Appellate Court remanded the case and proceeded with maintaining Cook's incapacity, but the ordered the appointment of a new examining committee to satisfy the comprehensive examination requirement.

Although the four-year statute of limitations in paternity probate proceedings has been amended to include a separate cause of action, the statute's amendment provides no relief to claims when the statute of limitations has expired before the amendment became law.

Dixon v. Bellamy, 43 Fla. L. Weekly D1641 (Fla. 3d DCA July 25, 2018)

The Appellate Court reversed an order granting a rehearing to determine the right to establish paternity from a biological child of the decedent. The decedent died intestate on May 26, 2016 and the estate was administered in probate court appointing Tyrone Dixon ("Dixon") as the sole beneficiary and the Personal Representative of his father's estate. Thereafter, Cheryl Dixon Bellamy ("Bellamy"), claiming she was the

continued, page 53

daughter of the decedent, filed an action in probate court to determine her heirship as the decedent's biological daughter.

Bellamy was born in 1959 and the Avuncular DNA Test performed in 2017 confirmed with 99.8% likelihood that the decedent's brother is Bellamy's uncle. Dixon then filed a Motion for Summary Judgment, arguing that Bellamy's paternity action to determine heirship was barred by the statute of limitations. The lower court initially granted the Personal Representative's Motion for Summary Judgment. Thereafter, the lower court granted Bellamy's motion for rehearing and vacated and then denied its prior order of Summary Judgment.

The Appellate Court determined that the trial court erred in its determination that Bellamy was entitled to the new cause of action under the 2009 amendment of the Florida statute. The Court reasoned that *Rose v. Sonson*, 208 So. 3d 136 (Fla. 3d DCA 2016) was correct in its determination that the Florida Legislature did not intend to make the amendment to the statute retroactive in nature. Thus, Bellamy could not establish her right to paternity in the probate proceeding because the statute of limitations had expired long before the statute was amended to include the separate cause of action. By 1981, four years after Bellamy reached the age of majority at age 18, her right to establish paternity was extinguished.

The spouse of a decedent is not entitled to the full amount of money acquired within a marriage when the presumed right to tenants by the entireties is terminated by the spouse's sole control, while the other spouse could not exercise control over the money.

Kowalski v. Rosenbaum, 43 Fla. L. Weekly D1703 (Fla. 2d DCA July 27, 2018)

Here, the Appellate Court reviewed the lower court's determination that the appellant ("Kowalski") was not entitled to the full amount of money from her and her deceased husband's business sale. The trial court determined that half of the money Kowalski held in an account from the sale of their business rightfully belonged to the decedent and must be subject to probate.

Kowalski, although married to the decedent before his death, was separated from him for approximately 16 years. In 2006, the couple sold their business and Kowalski received $3,445,066.00 from the sale. In the years leading up to the decedent's death, the decedent had requested and received $1,008,547.00 from Kowalski.

Kowalski appealed the trial court's determination that the decedent was owed the remaining monies from half of the sale in the amount of $713,986.00. She argued that the sale of their business within their marriage confirmed a rebuttable presumption that they owned the proceeds of the sale as tenants by the entireties. This would entitle Kowalski to 100% of the share after her husband's death.

However, the Appellate Court determined that the trial court was right to conclude that she was entitled to only half of the proceeds because they did not own the money together by tenants by the entireties. The money was not held in a joint account, but rather it appeared that the money was held in accounts only in her name. Thus, a tenancy of the entireties was not presumed. Additionally, the fact that the spouses were living separately, along with Kowalski's testimony that she would not have given the decedent more than half of the amount, suggested to the court that each party owned half of the money from the accounts.

Thus, the Appellate Court determined that the trial court's decision that the estate was entitled to half the monetary value of the proceeds was correct because there were no circumstances which led to the conclusion that both parties owned the proceeds as tenants by the entirety.

After the summary administration of an estate, potential heirs who were not given notice in the administration may rightfully petition the court to reopen the summary administration and distribute estate assets accordingly.

Wallace v. Watkins, 43 Fla. L. Weekly D1915 (Fla. 5th DCA August 17, 2018)

This is an appeal involving the decision to allow heirs who were not given proper notice of a summary administration to reopen the estate and redistribute assets, accordingly. The appellants, Wallace and Strawter, verified in their petition when administering the estate that they were the only "heirs at law and next of kin and beneficiaries of this estate." However, 15 years later, Terry Watkins, Sr., Delphine Watkins, and Joyce Watkins ("Appellees") filed the petition to reopen the estate based on their allegation that they were the decedent's adopted children.

Appellees were not given notice of the filing of the estate at the time of the summary administration proceedings. Wallace and Strawter argued that the petition was time-barred. Their argument relied on the nonclaim statute which provides "[a]fter 2 years from the death of the decedent, neither the decedent's estate nor those to whom it may be assigned shall be liable for any claim against the decedent, unless proceedings have been taken for the enforcement of the claim." Fla. Stat. § 735.206(4)(f) (2018). This court determined that the provision in the statute did not address a time bar for an estate from a claim by heir(s), but rather exclusively created the two-year time bar from claims by creditors against the estate. The court determined, however, that the statute specifically outlines the ability for an estate to be reopened with no time bar. Additionally, Florida Statute § 735.206 (4)(g) (2018) states in plain language:

continued, page 56

Real Property Case Summaries

Prepared by Gabrielle Jackson - Gelfand & Arpe, P.A., West Palm Beach, Florida

The trial court did not abuse its discretion in failing to vacate a final judgment of foreclosure that contained clerical errors in the legal description of the foreclosed property because the clerical errors first appeared in the final judgment.

Rodgers v. Deutsche Bank National Trust Company, as trustee for the WAMU mortgage Pass-Through Certificates, Series 2004-AR-12, 43 Fla. L. Weekly D2208 (Fla. 4th DCA Sept. 26, 2018)

Deutsche Bank filed a foreclosure complaint against Mr. Rodgers. The mortgage and the complaint properly described the real property. However, the final judgment of foreclosure contained errors in the legal description of the foreclosed property. In two instances, in place of the degree symbol, a capital "O" was used and in another place, "8.1°" was stated instead of "81.°" The improper legal description contained in the final judgment was also used in the advertising of the foreclosure sale and in the certificate of title issued at the foreclosure sale. Before the certificate of title was issued, Deutsche Bank, the purchaser at the foreclosure sale, moved to amend the final judgment to correct the errors in the legal description. The motion was never set for hearing, and Mr. Rodgers filed a motion to vacate the final judgment. The trial court denied Mr. Rodgers' motion. Mr. Rodgers appealed arguing that the court abused its discretion by not vacating the final judgment pursuant to Fla. R. Civ. P. 1.540(b).

Mr. Rodgers argued that the errors in the legal description were substantive and rendered the final judgment voidable. The court distinguished between the facts in this case and the facts in *Caddy v. Wells Fargo Bank, N.A.*, 198 So. 3d 1149 (4th DCA 2016), where the court held that an error in the legal description that first occurred in the amended complaint and was also in the consent judgment could not simply be corrected in the final judgment; reformation required vacating the final judgment, judicial sale, and the issuance of a new certificate of title. This court, however, found that this case was distinguishable because the error in the legal description did not occur in the complaint. The error first occurred in the final judgment. Therefore, although the court failed to address whether Fla. R. Civ. P. 1.540(a) relief is appropriate, the court found that the facts were more aligned to clerical error case law under Fla. R. Civ. P. 1.540(a), than to errors and mistakes in the substance of a judgment under Fla. R. Civ. P. 1.540(b). The court held that based on the record, the trial court did not abuse its discretion in failing to vacate the final judgment pursuant to Fla. R. Civ. P. 1.540(b).

A claim for unjust enrichment is not viable if an express contract exists concerning the same subject matter. Fraudulent misrepresentation or concealment of the mortgage could not support a claim of fraud where there was a recorded mortgage in the public records.

Winfield Investments, LLC v. Pascal-Gaston Investments, LLC, 43 Fla. L. Weekly D1916 (Fla. 5th DCA Aug. 17, 2018)

In 2005, a purchase-money mortgage and promissory note was executed and recorded in the public records regarding a property. In 2011, the bank filed a foreclosure action against the owners of the property and the homeowners' association. In 2012, the homeowners' association filed a cross-claim for foreclosure against the property owners. A final judgment of foreclosure was entered in favor of the association's junior lien. The property was sold at a foreclosure sale to Winfield Investments, LLC ("Winfield"). In October 2012, Winfield sold the property to Pascal-Gaston Investments, LLC ("PGI") and Winfield "promised to 'convey marketable title to the Real Property.'" PGI hired a title company to perform a title search, and the title company informed PGI that all liens on the property were cleared. In November 2012, Winfield executed a warranty deed in favor of PGI that contained a warranty against encumbrances and a promise to defend title. In December 2012, the bank obtained a final summary judgment of mortgage foreclosure in its favor. In April 2013, PGI was provided an eviction notice. PGI filed suit against Winfield for breach of warranty, unjust enrichment and fraud. The trial court found Winfield liable.

On appeal, the court found that the unjust enrichment count could not be upheld because an express contract existed. With regard to the fraud claim, the court found that Winfield was not liable for fraud under the theories of fraudulent misrepresentation or concealment of the mortgage because the mortgage was recorded in the public records. The court found that because the mortgage was recorded in the public records, it was obvious to PGI that the representations made in the warranty deed regarding no encumbrances were false. Accordingly, fraudulent misrepresentation or concealment of the mortgage could not support a claim of fraud. Therefore, the appellate court reversed the trial court's finding of unjust enrichment and fraudulent misrepresentation against Winfield.

State Tax Case Summaries

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

Nonprofit qualified for property tax exemption for property used for educational purposes.

*Crapo v. Acad. for Five Element Acupuncture, Inc., No. 1D17-1895, 2018 WL 4139276, at *1 (Fla. Dist. Ct. App. Aug. 30, 2018)*

Taxpayer operated a nonprofit, private school for acupuncture and herbal studies. The question addressed by the court was whether this postsecondary educational institution was a qualifying educational institution under the applicable statutory definition. The county property appraiser argued Taxpayer failed to meet the statutory defined "educational institution" and therefore did not qualify for the Florida property tax exemption for properties used for educational or charitable purposes. Taxpayer, however, argued the county property appraiser could not re-litigate the issue of whether Taxpayer qualified for the exemption since Taxpayer had already successfully litigated the issue a decade prior. The First District Court of Appeal found the facts and legal issues in the case at issue were identical to the prior case. Furthermore, in the prior case the property appraiser failed to take the opportunity to appeal the unfavorable ruling. As such, the First DCA held the taxpayer's exemption status was subject to decisional finality based upon the prior case. In addition, until a change in the facts or law exists, the property appraiser cannot revoke the exemption on the grounds asserted.

City was able to appeal motion denying intervention because the order constituted a final determination.

*City of Coral Gables v. Garcia, No. 3D18-1393, 2018 WL 4904915, at *1 (Fla. Dist. Ct. App. Oct. 10, 2018)*

The Miami-Dade County Value Adjustment Board's assessed value of real property improvements on land leased by the taxpayer from the city of Coral Gables was challenged by the Miami-Dade property appraiser. The taxpayer filed an answer to the property appraiser's complaint and a two-count counterclaim. The first counterclaim was pled by the taxpayer; but the second counterclaim was pled by the city and related to the assessed value of the underlying land, which was owned by the city. After a hearing on the property appraiser's motion to strike the city's counterclaim, the trial court found because the property appraiser did not bring suit against the city, the city was not a party and struck its counterclaim. The court also found the taxpayer did not have standing to assert the city's counterclaim.

Nearly five months later, the taxpayer and city jointly filed an amended counterclaim contesting the assessment of the city's land. After a hearing, the trial court struck the amended counterclaim. Only when moving for a rehearing did the city, for the first time, move to intervene in the case. The trial court denied both motions and the city appealed the striking of its (joint) counterclaim, the denial of its motion for rehearing and its motion to intervene.

The property appraiser moved to dismiss the appeals on the grounds the city lacked standing. The Third District Court of Appeal agreed the city was not a party to the case and therefore lacked standing to appeal either the order striking the amended counterclaim or the order denying rehearing and the property appraiser's motion to dismiss the appeal of those two orders was granted. However, the court did find the city had standing to appeal the order denying its motion to intervene because the order constituted a final determination of the proceeding as to the city. As a result, the property appraiser's motion to dismiss the city's appeal of the order denying the motion to intervene was itself denied. That appeal is still pending.

Determination is made at the time of sale regarding who is entitled to surplus proceeds from a tax sale.

Rahimi v. Global Discoveries, Ltd., LLC, No. 3D16-2756, 2018 WL 3636531 (Fla. Dist. Ct. App. Aug. 1, 2018)

A condominium encumbered by a mortgage was sold at a tax deed sale resulting in a surplus, after the taxes were paid, of around $90,000. Global Discoveries, Ltd., LLC obtained an assignment from the mortgagee, Regions Bank, to recover the surplus proceeds, as the amount owed on the mortgage loan was more than $208,000. However, the clerk refused to disburse the funds because two separate lawsuits were filed to recover the surplus. A lawsuit to quiet title was one brought by the successful bidder at the tax sale (Rahimi), which prompted the clerk to mark the surplus funds "do not disburse." Global Discoveries filed a declaratory action to compel the disbursement based on the position the mortgage held priority. When Rahimi moved to intervene in the declaratory action, the two cases were consolidated.

While the two cases were pending, Regions Bank recorded a release of mortgage. The release specifically stated Regions Bank cancelled and discharged the subject mortgage. Global Discoveries took the position on its motion for summary

continued, page 56

State Tax Case Summaries, from page 55

judgment that the discharge of the mortgage only released the property from serving as collateral for the loan; it did not release the prior titleholder's obligation to pay the loan. The trial court granted summary judgment in favor of Global Discoveries, holding that the later release of the mortgage lien did not impact the fact that the lien had priority to the surplus funds.

On appeal, Rahimi argued, as titleholder, he was entitled to the surplus funds on the basis at the time the trial court decided the competing claims, Regions Bank no longer was a mortgagee with rights to the surplus. Meanwhile, Global Discoveries argued entitlement to the surplus is to be determined at the time of the tax deed sale.

In analyzing the tax deed statutes, the Third District Court of Appeal found three separate instances where the time of the sale was the time at which the determination is made regarding who is entitled to the surplus. Finding determining entitlement at the time of sale allows for an orderly distribution of the surplus, and the alternative scenario would result in the clerk holding onto significant amounts of money pending lengthy litigation, the court held the entitlement to surplus proceeds is determined at the time of the tax sale. As a result, the trial court's summary judgment in favor of Global Discoveries was upheld.

Probate And Trust Case Summaries, from page 49

"(g) Any heir or devisee of the decedent who was lawfully entitled to share in the estate but who was not included in the order of summary administration and distribution may enforce all rights in appropriate proceedings against those who procured the order and, if successful, shall be awarded reasonable attorney's fees as an element of costs."

Therefore, the Fifth District Court of Appeal concluded that the Florida Statutes provided no time bar or limit when heirs may file a petition to reopen a summary administration when they were not given proper notice at the time of the estate's administration.

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

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2/22/2019	2985	Condominium Law Certification Review	JW Marriott, Orlando
3/7/2019	2984	13th Annual Construction Law Institute	JW Marriott, Orlando
3/7/2019	2950	Construction Law Certification Review	JW Marriott, Orlando
3/20/2019	2988	RPPTL Section Audio Webcast #7 The Marketable Record Title Act (MRTA)	Audio Webcast
3/29/2019	2977	Trust and Estate Symposium	Fort Lauderdale

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