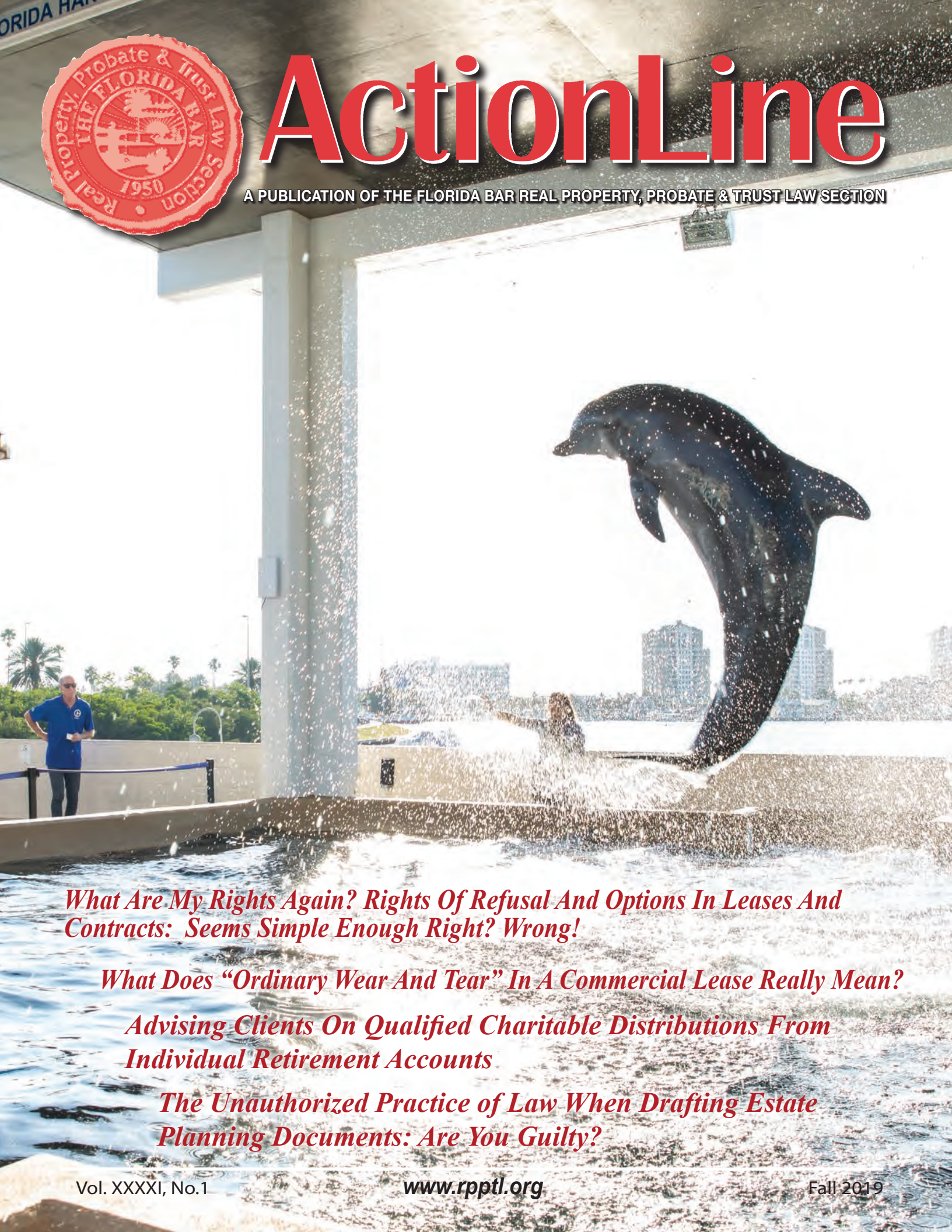

ActionLine

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

What Are My Rights Again? Rights Of Refusal And Options In Leases And Contracts: Seems Simple Enough Right? Wrong!

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Advising Clients On Qualified Charitable Distributions From Individual Retirement Accounts

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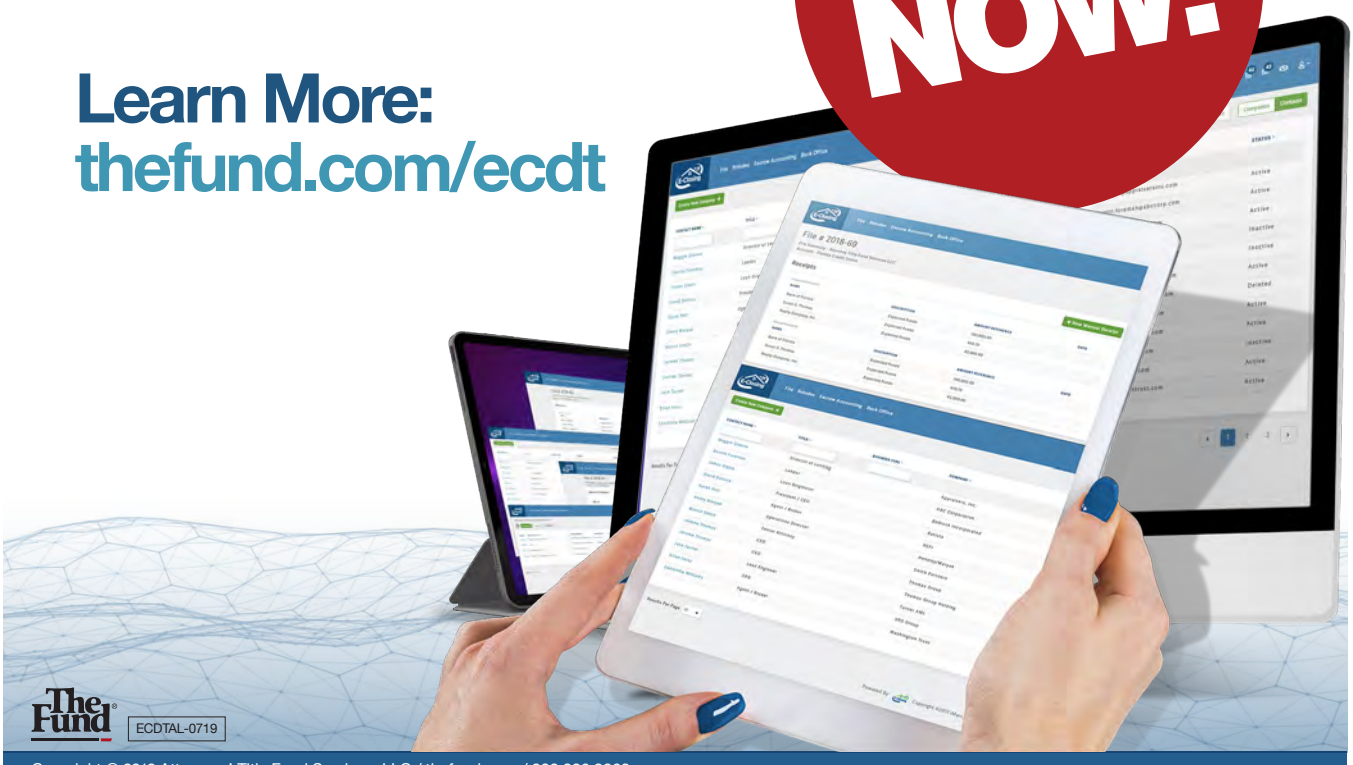

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The Times They Are A-Changin'

"Your life is a story of transition. You are always leaving one chapter behind while moving on to the next." — Anonymous



Chair's Column

By Robert S. Freedman
Section Chair, 2019-2020

The beginning of the new Bar year each July 1st brings about transition within the Section, and this year such a transition resulted in me taking over as Chair of the Section. I am humbled and honored to be serving in this role for the 2019-2020 Bar year, and I will do my best to make you proud during my chapter in the Section's book.

I would be remiss if the first act of transition was not to thank our Immediate Past Chair, **Deb Boje**, for an excellent 2018-2019 Bar year. Deb, many thanks for all of your diehard efforts to make the Section better for all.

My second act is to thank the "back row" (more commonly known as the Section's Past Chairs) for the faith and confidence that you have shown in me and for your wise counsel and mentoring that you have provided to me over the years. I have a daunting task to live up to the standards that you have set, and I will do my best.

Transition also means that there is a new Executive Committee in place, and I look forward to working with this team of outstanding individuals during the coming year. That team is comprised of **Bill Hennessey** as Chair-Elect; **Bob Swaine** as Real Property Division Director; **Sarah Butters** as Probate & Trust Law Division Director; **Steve Mezer** as Secretary; **Cary Wright** as Treasurer; **Larry Miller** as Director of the At Large Members; **Katherine Frazier** and **Jon Scuderi** as Co-Chairs of the Legislative Review Committee; **John Moran** and **Willie Kightlinger** as Co-Chairs of the CLE Seminar Coordination Committee; and **Deb Boje** as Immediate Past Chair. I could not ask for a better group of folks – actually, it is my second family (Sheri and my kids still come first!) – to work with; while our areas of practice differ, and differ significantly, we are all still rowing as one in the same direction, that being for the betterment of the Section.

We have had a great start to the Bar year, having already held the first meeting on July 25-28 at the Breakers in Palm Beach. The 39th Annual Legislative and Case Law Update was held on July 26th, and as usual, it was a tremendous success. **Stacy Kalmanson** and **Tom Karr** co-chaired this year's event, and they and their committee deserve the many kudos that were offered following the program. Highlights of the program include presentations about the article new remote notarization act, the do's and don'ts of dot com estate planning, open and expired permits and family trust companies. I want to especially thank Stacy, whose term as Chair of the Legislative Update Committee has now concluded, for her tireless work in preparing for, organizing and executing these seminars over the past several years. We also had a spirited Executive Council meeting on July 27th. Our meeting started with a moment of silence for longtime Executive Council member **Bill Parady**, who passed away a week before following a courageous battle against cancer. A tribute to Bill can be found on page 56, and our hearts and prayers go out to Bill's wife Salome Zikakis (also an Executive Council member) and their sons John and Alex. We then discussed proposed rules brought to the Section which could have a significant impact on mediations, the Section's strategic plan, legislative proposals pertaining to directed trusts, foreclosures and notice of administration, and heard various committee reports.

The next Executive Council meeting and committee meetings will be held on November 7-10, 2019, at the JW Marriott Marquis in downtown Miami. If you have not been to this hotel, you are in for a treat – the sleeping rooms are quite spacious and luxurious, and we will have plenty of room for our committee meetings and Executive Council meeting. One special event that we are planning is a Section sit-down luncheon on Friday (open to all Section members), where we will have a speaker providing a free 1 hour CLE on cybersecurity issues for lawyers. This program will qualify to meet your technology credit requirements for the Bar. Also, plan on purchasing your tickets for our blowout Thursday evening reception, which will be held at the JW Arena – this is the space where the Miami Heat have practiced and multiple commercials with Lebron James have been filmed, but the space will be converted with flair and panache for our event.

continued, page 6

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Dolphin Show By Mike Gelfand

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Get Included In ***ActionLine!***

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

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

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

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

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



J. BASKIES



M. BEDKE

Letter From The Co-Editors-In-Chief

Members of the Real Property, Probate and Trust Law Section (RPPTL) are remarkable leaders, not only in their volunteer services to the Section and the Florida Bar at large, but also to the entire population of Florida. Indeed, RPPTL members provide so many services to the community, it is hard to mention them all. However, in this issue of *ActionLine*, you will read about many of our section leaders and their significant accomplishments. You will also read about RPPTL Section initiatives and projects that help raise money and support Floridians in many tangible ways.

Service is a part of the DNA of RPPTL Section members. This will be evident when you read:

i) the biographies of the incredible *ActionLine* authors;

ii) the Section Spotlight feature on this year's Section awards recipients;

iii) the story about two RPPTL Section members receiving The Florida Bar Foundation's highest recognition, the Medal of Honor Award (duly noting how proud we are of *ActionLine* co-editor-in-chief, Mike Bedke); and

iv) the moving In Memoriam article about the late Bill Parady who personified selflessness and class.

Section members volunteer and lead in so many ways. While we are still in hurricane season, we will try not to jinx ourselves. However, whether or not a disaster strikes Florida, the Section is leading the way in preparedness. The Section's No Place Like Home Project, through its tremendous volunteers led by Larry Miller and the At Large Members of the Executive Council, continues to stand at the ready. In fact, these dedicated volunteers are proactively working to assist those in need to clear title and take other action so our fellow Floridians may take advantage of resources available to disaster victims should the need arise.

At the Section's Annual Convention, a Jail 'N Bail was held to raise money for The Florida Bar Foundation. Several Section leaders spent time in the pokey until they could raise sufficient bail money to be released under the watchful eyes of Deb Boje and Dresden Brunner. A check for more than $40,000 was presented by the Section to The Florida Bar Foundation as a result of the "bail" money, as you can see in the accompanying photograph.



As is the case with every issue of your Section magazine, we are certain you will learn something from the substantive articles. Rarely, if ever, does *ActionLine* fail to deliver practical, pragmatic information that helps practitioners hone their craft and provide better service to their clients. You, the readers, report this to us time and time again. In addition, it is you, the readers, who provide the content of our beloved publication. In doing so, you assist your colleagues and serve the public by sharing your knowledge. In addition to providing your insight, you often share your humor and your photos. Keep it coming!

In the meantime, put on some music, grab your pumpkin spice latte, open the windows to get some cool fresh air, and take advantage of this tremendous Section benefit….in FULL COLOR! Be sure to read the Political Roundup where you will receive an "at-a-glance" summary of the latest legislative changes of particular interest to Section members. Also, review the "Friends of the Section" article to learn who helped the Section initiatives this past legislative session. We believe this information alone produces an excellent return on investment for one's dues dollars!

Finally, we appreciate our Section sponsors and the advertisers who support *ActionLine*. Without them, we would not exist. Please join us in supporting our Section sponsors. — The Editors

After the reception, plan to join us in the Hospitality Suite, which I promise is unlike any other that we have ever had. (Hint: it has its own bowling lanes!)

The following Executive Council meeting will be held on January 30-February 2, 2020, at the Grand Hyatt Hotel in Tampa. The hotel has been recently renovated and boasts tremendous views and has excellent rooms. Weather permitting, our Thursday evening reception will be held outdoors at Oystercatchers Restaurant overlooking Tampa Bay – this promises to be a memorable event.

The final Executive Council meeting of the Bar year is in conjunction with the RPPTL Annual Convention, and it will take place on May 28-31, 2020 at the Loews Sapphire Falls at Universal Orlando. The theme for this year's Convention is…a secret – this will be revealed at the appropriate time. (This is known as a teaser!) The Convention is a family-friendly event, so plan to bring your family and spend time with the Section.

Each of the above Executive Council meetings will be accompanied by various substantive and standing committee meetings. The vast majority of these committee meetings are open to all Section members, and this is a great way to learn more about various topics in your practice area, become involved in committee activities, see how the Section operates and functions, and meet your peers and reacquaint with colleagues. My next column will focus on the strength and importance of our committees, which are the backbone of the Section.

Now, you may be saying to yourself, Rob, what about your Out-of-State meeting? Well, the Out-of-State Executive Council meeting will be held April 1-5, 2020, in Amsterdam. As this is an Executive Council meeting, given the tremendous amount of interest shown by Executive Council members in attending this event and the limited number of hotel rooms in the room block that could be secured at the Hotel Okura, the onset registration will only be opened to Executive Council members. If we find that there will be sufficient room for attendance by non-Executive Council members of the Section, we will advise accordingly on the Section website (www.rpptl.org).

If you are interested in becoming more active with the Section, please do not hesitate to reach out to me or any member of the Executive Committee – we're happy to assist!

And thus, another chapter has begun, and soon enough another period of transition will follow – that is the nature of the Bar year. It goes by quickly!

With that, I leave you with a perceptive quote from a perceptive man:

"How could I have been anyone other than me?" - Dave Matthews

Until next time,

Rob



WHAT?
Notice To Creditors By A Trustee?

By J. Grier Pressly, III, Esq., Pressly, Pressly, Randolph & Pressly, P.A., Palm Beach, Florida

Lawyers in different areas of the state have reported incidents of "Notice to Creditors" being published by the trustees of revocable trusts whose settlors have died. In each of these cases, the trustee's attorney published an altered version of the probate Notice to Creditors form found in Florida Bar Form P-3.0740. The notice stated that all creditors of the deceased settlor on whom a copy of the notice was served had two years from the decedent's date of death to file their claims with the trustee or be forever barred. The notice also stated that creditors not served must file claims with the trustee within the two-year period or be forever barred.

Presumably, these notices were published by the trustees in an effort to "smoke out" the claims of creditors of the decedent while avoiding probate in the process. Perhaps the attorneys for the trustees who used the altered notice to creditors form were fondly recalling a vestige of our old trust administration statues that predated Florida's adoption of the Florida Trust Code. Prior to its legislative repeal in 1995 following a brief two year existence, former Fla. Stat. § 737.3057 (1993) ("Trustee's Duty to Notice Creditors") required trustees of revocable trusts to publish and serve a notice to creditors in those instances where "the settlor's estate is not represented and there is no personal representative of the estate to whom letters of administration have been issued so that the publication and notice requirements of Fla. Stat. § 733.212 have not been discharged."[1] Regardless of their motivation or inspiration, attorneys who publish this altered notice to creditors on behalf of their trustee clients are not only engaging in an ineffectual methodology, they are likely committing an ethical breach and could be exposing themselves to liability.

Rule 4-4.1(a) of the Florida Rules of Professional Conduct prohibits a lawyer from making a false statement of law to a third person. Potential creditors of a deceased settlor should be afforded the protections of this rule of conduct. The only statutory provisions for notice to creditors that will bar creditor claims call for publication and service by a personal representative or publication by a person who obtains an order of summary administration. To be effective, a claim must be timely filed in probate court, even if the claimant must open a probate administration as an interested person. Today's Florida Trust Code plainly provides in Fla. Stat. §736.1014(1) (2019) that a creditor may not bring a direct action against a trust described in Fla. Stat. § 733.707(3) that is dependent on the settlor's individual liability and that such claims must be filed in probate court.

It is improper and misleading to represent to creditors that a claim may be perfected by filing it with a trustee who can, of course, ignore the claim with impunity. There is no statutory procedure for objecting to a claim filed with a trustee[2] and thus no notice of objection to a claimant who, by the way, because of Fla. Stat. § 736.1014 (2019) has no option to file an independent action to enforce the claim even if an objection from the trustee is received. Suppose a creditor who relied upon a trustee's notice to creditors did not file a claim *in probate* within two years of the settlor's death and was barred from enforcing the claim. Isn't it likely that there could be an action for fraud against the trustee based on the trustee's misrepresentation of the law governing creditors' claims? And if the trustee's attorney is not a defendant in that action by the grace of privity, won't he or she at least face a disciplinary complaint?

If you want to identify, or bar, claims of unknown creditors, at a minimum file a summary administration proceeding and publish a bona fide notice to creditors. If not, don't risk discipline and litigation by misrepresenting the law, and don't waste the trust's money by publishing a useless notice to creditors from a trustee. The "probate" of revocable trusts died with the repeal of former Fla. Stat. §737.3057 (1993) more than two decades ago. The practice of filing a trustee's notice to creditors should have died with it.



G. PRESSLY

J. Grier Pressly, III *is a shareholder at Pressly, Pressly, Randolph & Pressly, P.A. in Palm Beach, Florida. He practices exclusively in the areas of Wills and Trusts and Estate and Trust Litigation.*

Endnotes

1 Former Fla. Stat. §737.3057(a) read: A notice shall be published once a week for 2 consecutive weeks, two publications being sufficient, in a newspaper published in the county where the trust is administered or, if there is no newspaper published in the county, in a newspaper of general circulation in that county. The notice shall notify all persons having claims or demands against the settlor which such person seeks to recover from the trust to serve their claims with the trustee serving at the time of or as a result of the settlor's death within the time periods set forth in Fla. Stat. § 733.702 with respect to notice of administration, or be forever barred.

2 In fact, one major criticism of former Fla. Stat. §737.3057 (1993) was its lack of procedural direction once a creditor had served its claim upon the trustee.

PART ONE

What Are My Rights Again? Rights Of Refusal And Options In Leases And Contracts: Seems Simple Enough Right? Wrong!

By Brenda B. Ezell, Esq., Ezell Law Firm, P.A., Jacksonville, Florida

I. Right Of First Refusal Vs. Options And Related Rights

A. Are They Really Different?

There are a number of Florida cases regarding the confusion between the distinguishing characteristics of rights of first refusal versus options. A right-of-first refusal is defined as a right to elect to take specified property at the same price and on the same terms and conditions as those contained in a good faith offer by a third person if the owner manifests a willingness to accept the offer and may also be referred to as a preemptive right.[1] An option is defined as "a unilateral contract which gives the option holder the right to purchase under the terms and conditions of the option agreement."[2] Adding to this confusion, there are also other types of related contract-based rights, such as rights of first negotiation, rights of last negotiation, and rights of first and last offer (which are beyond the scope of this article). These contractual rights can be used in a myriad of contract-based arrangements such as sale of personal property, stock sales, etc., but this article is limited to the discussion of rights of first refusal in real estate sales and leasing contracts.

Rights of first refusal are sometimes confused with options, but are actually distinct legal concepts.[3] The *Steinberg* court held that "[a] right of first refusal is a right to elect to take specified property at the same price and on the same terms and conditions as those contained in good faith offer by a third person if the owner manifests a willingness to accept the offer."[4] The court held the right was executory and by its nature does not provide specific terms such as price, as those terms must be dictated by a third party, whose offer the holder of the right of first refusal must match in all essential details.[5] In Florida, a right of first refusal will be upheld unless it is deemed an unreasonable restraint on the alienability of the property, which is measured by whether it (1) negatively impacts the marketability of the property and/or (2) discourages improvements to the property.[6] Conversely, an option is an agreement where a seller makes an irrevocable offer to sell on specified terms and conditions, which creates a right for the buyer to accept and is therefore deemed an executed contract.[7] In *Steinberg,* the court held that the trial court erred as a matter of law by holding that a right of first refusal was void for lack of enforceable terms such as price and the time period since these terms are to be supplied by a third party offer.[8] Further, the court stated that rights of first refusal must be exercised within a reasonable time period. [9] Unlike an option, a right of first refusal does not grant the holder the power to force the owner to sell.[10] A right of first refusal ripens into an option only after the owner manifests a willingness to accept a good faith offer.[11]

B. Exercising a Right of First Refusal

1. What Exactly Does "Same Terms and Conditions" Mean? While a right of first refusal is a right to elect to purchase certain property for the same price and on the same terms as those contained in a good faith offer by a third party if the owner shows a willingness to accept the offer, in many cases the primary issue to be decided is whether the exercise must be exactly on the same terms as the third party offer. Courts differ on whether the holder of the right of first refusal must exactly match the language in the third party offer. The party drafting the right of first refusal should be careful to show the intentions of the parties in this respect. The Fourth District Court of Appeal has held that the exercise of a right of first refusal must be identical to the essential terms of the third party offer.[12] In *International Christian Fellowship,* the court held that a contract delivered by the holder of the right of first refusal did not match numerous terms found in the third party contract, such as the closing date, financing terms and the seller's repair obligations.[13] The court upheld the lower court's finding against International, validating the contract of the original offer, stating that International's right of first refusal was activated at the time the owner expressed a willingness to accept the offer, and finding that International failed to properly exercise its right of first refusal as there were several terms in the offer that International failed to match, including the closing date, duty to repair, and terms of financing.[14]

In *Coastal Bay,*[15] the terms of the right of first refusal holder's exercise were at issue. The tenant was the holder of a right of first refusal that gave tenant the right to purchase the subject property on the same terms and conditions offered by a third party. The owner received an offer from a third party to purchase the property for $2,200,000, payable as follows:

continued, page 9

"$200,000 at closing, with the balance bearing interest at seven percent per year and payable $600,000 six months after closing, $700,000 two years after closing, and $700,000 three years after closing." The agreement also called for payment of a brokerage commission in the amount of $200,000. The tenant exercised its right of first refusal by offering to purchase the property for $2,000,000 payable as follows: "$200,000 at closing, $600,000 six months after closing, $700,000 two years after closing and $500,000 three years after closing." On appeal, the tenant argued that its offer matched the first offer, except that it did not offer the payment of the broker's commission because no broker was needed in its transaction.

The trial court held that the purchase price offered by the right of first refusal holder was substantially different and that there was a significant difference in the interest to which the seller would have been entitled under the two contracts: in the third-party contract, the seller would receive seven percent interest on $700,000 for three years, but in the tenant's right of first refusal offer, the seller would receive seven percent interest on only $500,000 for three years. The Third District Court of Appeal agreed with the trial court that the tenant's offer did not match the third-party offer because the tenant's offer "required a disposition of the property by a different method and under different conditions" than the first offer.[16] The court reasoned that the broker performed by procuring a contract and had earned the commission, obligating the owner to pay it, whether the sale was made to the third party purchaser or to the holder of the right of first refusal and the first contract required the purchaser to pay the commission, which then became a part of the purchase price.[17]

There is no magic language necessary to sufficiently exercise a right of first refusal. In *Castelli v. Castelli*, the Fourth DCA held that a sufficient exercise of a right of first refusal is made when a party simply states that they wish to exercise it.[18] In this case, a former husband was the holder of a right of first refusal to purchase the marital residence by virtue of a final judgment of dissolution of marriage. The husband sought to exercise his right through a simple email to the wife stating he was doing so in accordance with the court order and the contract.[19] Stating "sometimes less is truly more,"[20] the court distinguished cases where the holder of a right of first refusal added or removed terms, which made the holder's offer different than the third party offer.

It should be noted that notice and other requirements should be strictly followed. Additionally, once the property owner manifests an intent to sell the property to a third party, the right of first refusal converts to an irrevocable option to purchase.[21] In that regard, even the judicial cancellation of the third party sale won't affect the right of first refusal holder's ability to seek specific enforcement of its rights.[22]

2. Is it Like Comparing Apples to Oranges? Where the use proposed by a third party offeror is significantly different from the use of the holder of the right of first refusal, the Fourth District Court of Appeal has held it would be unreasonable to allow the holder only one opportunity to proffer a formal contract when the third party offer contemplated a different use and some of the conditions in its contract were not applicable if the holder of the right of first refusal purchased the property.[23] In *7-Eleven, Inc.*, the court held the conditions in the third party offer made the exercise of the right of first refusal by 7–Eleven more complicated because of the difference in uses. Therefore, 7–Eleven's first proposed contract should not have been the only opportunity to match the third party's offer. The court reasoned it was not relevant that other non-material terms were yet to be negotiated.[24]

3. A Drafter's Tale. A word of caution: there are cases in other jurisdictions involving contracts that include both a right of first refusal and an option. One of the key issues in these cases is whether the exercise (or lack thereof) of one of the rights extinguishes the other right. The sole Florida appellate opinion on this matter held the failure to exercise the right of first refusal after an offer by a third party does not impair a separate option contained in the lease.[25] However, the Virginia Supreme Court held a lessee that had both a fixed-price option and a right of first refusal forfeited the option after it became aware of a third party offer for the property and failed to exercise the right of first refusal.[26] Therefore, drafters beware! The *Shepherd* court noted a split of authority on this issue and stated the result will rest on the language in the contract. In that case, the contract contained language in the right of first refusal section stating "notwithstanding anything contained in this agreement to the contrary," which prefatory language did not appear in the provision containing the option. However, there are federal court cases holding the failure of a lessee to exercise a right of first refusal does not affect the fixed-price option.[27] For example, in *McDonald's Corp. v. Lebow Realty Trust*,[28] the First Circuit Court of Appeals held that, where there is no ambiguity, a fixed-price option will remain exercisable despite the fact that circumstances triggering a right of first refusal have occurred.[29]

On a final drafting note, there is one Florida right of first refusal case that involves attorney professional conduct. In *Abstract & Title Corp. of Florida v. Cochran*,[30] an attorney purchased a parcel of property from a client without the benefit of a contract. In the deed of conveyance, the attorney included a right of first refusal for a parcel adjacent to the subject lands. The client subsequently sold the adjacent parcel and after an unsuccessful attempt to exercise his right of first refusal, the attorney sued the client and purchaser and on cross appeal, the client and purchaser argued that the trial court should have invalidated the right of first refusal based on abuse of the attorney-client relationship and overreaching. The court agreed, reasoning an attorney must be held to a higher

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standard of good faith than that required in a normal arm's length transaction and must carry this burden by clear and convincing evidence. The court invalidated the right of first refusal.[31] Therefore, it is wise to advise clients to seek separate counsel in connection with transactions involving clients.

II. Statutory Rights Of First Refusal

The following statutory rights of first refusal have been codified in Florida:

337.25. Acquisition, lease, and disposal of real and personal property

(4) The department [Florida Department of Transportation] may convey, in the name of the state, any land, building, or other property, real or personal, which was acquired under subsection (1) and which the department has determined is not needed for the construction, operation, and maintenance of a transportation facility. When such a determination has been made, property may be disposed of through negotiations, sealed competitive bids, auctions, or any other means the department deems to be in its best interest, with due advertisement for property valued by the department at greater than $10,000. A sale may not occur at a price less than the department's current estimate of value, except as provided in paragraphs (a)-(d). The department may afford a right of first refusal to the local government or other political subdivision in the jurisdiction in which the parcel is situated, except in a conveyance transacted under paragraph (a), paragraph (c), or paragraph (e).

420.9075. Local housing assistance plans; partnerships

Eligible sponsors that offer rental housing for sale before 15 years or that have remaining mortgages funded under this program must give a first right of refusal to eligible nonprofit organizations for purchase at the current market value for continued occupancy by eligible persons.

718.612. Right of first refusal (Conversions to Condominium)

(1) Each tenant, who for the 180 days preceding a notice of intended conversion has been a residential tenant of the existing improvements, shall have the right of first refusal to purchase the unit in which he or she resides on the date of the notice, under the following terms and conditions…

719.612. Right of first refusal (Conversion to Cooperative)

(1) Each tenant, who for the 180 days preceding a notice of intended conversion has been a residential tenant of the existing improvements, shall have the right of first refusal to purchase the unit in which he or she resides on the date of the notice, under the following terms and conditions…

723.071. Sale of mobile home parks

(1)(a) If a mobile home park owner offers a mobile home park for sale, she or he shall notify the officers of the homeowners' association created pursuant to §§ 723.075-723.079 of the offer, stating the price and the terms and conditions of sale. (b) The mobile home owners, by and through the association defined in s. 723.075, shall have the right to purchase the park, provided the home owners meet the price and terms and conditions of the mobile home park owner by executing a contract with the park owner within 45 days, unless agreed to otherwise, from the date of mailing of the notice and provided they have complied with §§ 723.075-723.079.

In *Brate v. Chulavista Mobile Home Park Owners Ass'n, Inc.*,[32] mobile home park owners did not "offer" a park for sale to the general public. Therefore, the association's right of first refusal was not triggered.[33] Fla. Stat. § 723.071(3)(b) (1983) defines "offer" as "any solicitation by the park owner to the general public." In this case, no signs were posted at or near the property, there were no for-sale notices placed in newspapers, and it appears that one of the owners was unwilling to sell the park until the moment of closing.[34]

In the conclusion of this article which will follow in the next edition of *ActionLine*, the Rule Against Perpetuities and Remedies will be discussed.



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Endnotes

1 *Old Port Cove Holdings, Inc. v. Old Port Cove Condo. Ass'n One, Inc.*, 986 So. 2d 1279, 1285 (Fla. 2008) (citing *Pearson v. Fulton*, 497 So.2d 898, 900 (Fla. 2d DCA 1986).

2 *Id.* (citing *S. Inv. Corp. v. Norton*, 57 So. 2d 1, 2 (Fla.1952)).

3 *Steinberg v. Sachs*, 837 So. 2d 503, 505–06 (Fla. 3d DCA 2003).

4 *Id.* (citing *Coastal Bay Golf Club, Inc. v. Holbein*, 231 So. 2d 854, 857 (Fla. 3d DCA 1970)).

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5 *Id.*

6 *Smurfit-Stone Container Enterprises, Inc. v. Zion Jacksonville Ltd. Partnership*, 52 So. 3d 55, 57–58 (Fla. 1st DCA 2010).

7 *See Coastal Bay Golf Club*, 231 So. 2d at 857.

8 837 So. 2d at 506.

9 *Id.* (citing *De Cespedes v. Bolanos*, 711 So. 2d 216, 218 (Fla. 3d DCA 1998).

10 *See Old Port*, 986 So. 2d at 1285 (citing, e.g., 6 Am. L. Prop. § 26.64.).

11 *Id.*

12 *See International Christian Fellowship, Inc. v. Vinh on Property, Inc.*, 954 So. 2d 1214 (Oct. 2007) (*citing Schwey v. Vara*, 674 So. 2d 935, 936 (Fla. 4th DCA 1996)).

13 *Id*. at 1216.

14 *Id*.

15 231 So. 2d at 857.

16 *Id*. at 858.

17 *See also Green v. First Am. Bank & Trust*, 511 So. 2d 569, 574 (Fla. 4th DCA 1987) (holding that an offer to pay the purchase price, less the brokerage commission was not a sufficient or matching offer); *But See Schwey v. Vara*, 674 So. 2d 935 (Fla. 3rd DCA 1996) (holding that a broker is not entitled to a commission where the third party contract provided that it would be void and the broker would not receive a commission if a right of first refusal was exercised. This court distinguished the facts in *City National Bank of Miami Beach v. Lundgren*, 307 So. 2d 870 (Fla. 3d DCA), cert. denied, 316 So. 2d 286 (Fla.1975) where the court stated in dicta that the owner was required to pay the commission even if the holder of the right of first refusal purchased.) *See also R. W. S. Inv. Corp. v. Maule Indus., Inc.*, 254 So. 2d 856, 857 (Fla. 3d DCA 1971) (holding that after satisfaction of a purchase money mortgage, a right of first refusal was no longer effective, which right of first refusal provided that: "[t]his right of first refusal shall only extend as long as said purchase money mortgage is in good standing." Since the mortgage had been paid, the right of first refusal expired on its satisfaction).

18 159 So. 3d 271 (Fla. 4th DCA 2015).

19 *Id.* at 273.

20 *Id.* at 275.

21 *See Vorpe v. Key Island, Inc.*, 374 So. 2d 1035 (Fla. 1979).

22 *Id*. (reversing the trial court's refusal to order specific performance based on its erroneous judgment that there was no "pending sale" and thus no basis for the offer). *See also, Keys Lobster, Inc. v. Ocean Divers, Inc.*, 468 So. 2d 360, 361–62 (Fla. 4th DCA) (holding that once Keys Lobster clearly manifested an intent to accept the third party's offer by entering into the purchase agreement and sending a copy of the agreement to Ocean Divers for its consideration, Ocean Divers' right of first refusal ripened into an option which was exercised when it sent Keys Lobster the acceptance letter.)

23 *See 7-Eleven, Inc. v. Stin, L.L.C.*, 961 So. 2d 977, 981 (Fla. 4th DCA 2007).

24 *Id.* (citing e.g., *Am. Capital Network v. Command Credit Corp.*, 707 So. 2d 874 (Fla. 4th DCA 1998); *Hous. Auth. of City of Fort Pierce v. Foster*, 237 So. 2d 569 (Fla. 4th DCA 1970); *Bluevack, Inc. v. Walter E. Heller & Co. of Fla.*, 331 So. 2d 359 (Fla. 3d DCA 1976).

25 *Barco Holdings, LLC v. Terminal Inv. Corp.*, 967 So. 2d 281, 290–91 (Fla. 3d DCA 2007) (finding the lease did not expressly indicate or imply that the option to purchase would be suspended while a third-party offer to purchase the property was pending and that the right of first refusal and option to purchase were separate and legally distinct rights so that failure to exercise the right of first refusal will not operate to terminate the purchase option).

26 *See Shepherd v. Davis,* 574 S.E. 2d 514 (Va. 2003).

27 47 Real Property, Probate and Trust Law Journal 93 (Spring 2012).

28 888 F. 2d 912 (1st Cir., 1989).

29 *Id.* at 915. *See also Gulf Oil Corp. v. Chiodo*, 804 F. 2d 284 (4th Cir. 1986); *But see Shell Oil Co. v. Blumberg*, 154 F. 2d 251 (5th Cir.1946) (holding the first refusal option "limits or modifies" the fixed price option and when the tenant refused to exercise the right of first refusal, the fixed price option lapsed).

30 414 So. 2d 284 (Fla. 4th DCA 1982).

31 *Id*. at 285.

32 559 So. 2d 1190 (Fla. 2d DCA 1990), review denied 574 So. 2d 140.

33 Fla. Stat. Ann. § 723.071 (1983).

34 *See also Ell-Cap/Diversified 75 Naples Estates v. Naples Estates Homeowners Ass'n, Inc.*, 975 So. 2d 577 (Fla. 2d DCA 2008) (holding that individual mobile home unit owners did not have any contractual or statutory right of first refusal to purchase mobile home park, therefore the owner's association, which had the right, could not maintain an action against the park owner as a class representative, but could only maintain the action as a distinct corporation.) Fla. Stat. Ann. §723.071 (1997).



Presumptive Legal Fees Entitlement Or "Weather Permitting"?

By Stephen P. Heuston, Esq., Heuston Legal PLLC, Melbourne, Florida, and
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In 1995, the Florida Legislature adopted a statutory scheme for calculating reasonable legal fees for an attorney representing either a personal representative in probate or a trustee in an initial post-death trust administration of a revocable trust.[1] It has now been twenty-four years since the adoption of this statutory framework, and it is time for some reflection.

The statutory scheme is found in Fla. Stat. § 733.6171 (2018), for an attorney representing a personal representative in a probate proceeding, and in Fla. Stat. § 736.1007 (2018), for an attorney representing a trustee in the post-death initial administration of a revocable trust. These statutes are robust and thorough, but somewhat complicated. The premise of these two statutes is a useful legal fiction known as the presumption. Under these statutes, if certain minimal criteria are met, then the statutorily calculated legal fees[2] for ordinary services are presumptively reasonable.

A presumption is often used to make a finding based on establishing certain criteria. A presumption can help the court in making a finding that would otherwise be difficult or impossible. For example, when an original will cannot be located after the maker's death, how is the determination made that the will was accidentally lost without the intent to revoke, or purposely destroyed by the maker with the clear intent to revoke the will?

To solve this conundrum, the common law created a presumption that an original will that cannot be located after the decedent's death was presumed to have been revoked if: (1) the maker of the will was last known to be in possession of the original will, and (2) the original will cannot be found.[3] Simple, but not necessarily true. A presumption is merely the starting point. A presumption can be rebutted by shifting the burden of proof to the party attempting to overcome the presumption.

In the above example of a presumptively revoked will, the presumption can be rebutted by presenting evidence, such as, that a person who would benefit from the will being revoked had access to the decedent's home where the decedent kept her original will.[4] Of course, the presumption may be the starting point *and* the ending point if there is no rebuttal evidence.

Under Fla. Stat. § 733.6171 (2018) and Fla. Stat. § 736.1007 (2018) a reasonable attorney fee for ordinary services[5] is presumed reasonable based on an amount calculated at a statutory percentage of the date of death value of the assets plus the income earned during the administration. This presumption arises if the attorney is employed by the personal representative or trustee to perform ordinary legal services, and the attorney performs those services, and the legal fees are less than the statutory percentage. Thus, the legal fee is presumed reasonable by merely being hired by the fiduciary, performing the ordinary services for the fiduciary during the administration and charging legal fees that are no more than the statutory percentage. Not a high standard.

Therefore, in almost every contested matter of probate or trust administration legal fees, the burden shifts to the beneficiary to rebut the presumption to prove that the particular facts of such administration do not warrant the presumptive legal fee. As the *presumption* almost always attaches, many attorneys mistakenly believe they are *entitled* to the presumptive fee. This entitlement[6] does not align with the statutory scheme. The presumption is the starting point; the ending point depends on the weather.

A lawyer is no more entitled to the presumptive fee for representing a fiduciary in an estate or trust, than a concert goer is entitled to a perfect performance in an outdoor environment. If it rains, you are going to get wet. The concert goer knows this when the ticket is purchased. The lawyer should know this when he or she is retained by the fiduciary.

Both Fla. Stat. § 733.6171 (2018) and Fla. Stat. § 736.1007 (2018) provide that the attorney and the fiduciary can enter into an agreement regarding the attorney's compensation, either based on the percentage calculation of the presumptive fee or in a manner or amount other than the presumptive fee, such as on an hourly basis or a fixed dollar amount. However, importantly, these statutes provide that the fee agreement is not binding on the persons bearing the impact of the compensation unless such persons consent to the agreement or are provided notice of the agreement and do not object.

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Thus, the presumptive fee is not an entitlement because the beneficiaries are not bound by such an agreement absent consent or notice.

An attorney can sometimes forget that the fiduciary is the client and *pays* the attorney fee, but the fiduciary does not *bear the impact* of the legal fees, unless the fiduciary is also a beneficiary. This is most problematic when the fiduciary is not a beneficiary.[7] This can often lead to sweetheart fee agreements, or lack of oversight by the fiduciary who does not bear any impact of the legal fees paid from the estate or trust.

Another indication in the statutes that an attorney is not entitled to a presumptive legal fee for representing a fiduciary is the required statutory criteria a court must consider when asked to review the reasonableness of the fee. Any interested person in the proceeding, most often a beneficiary, may petition the court to increase or decrease the compensation paid or to be paid to the attorney representing the fiduciary. The criteria for the court to review the legal compensation is mandatory. The statutes provide that "the court *shall* consider all of the following factors giving such weight to each as the court may determine to be appropriate."[8] The statutory criteria to review the attorney compensation is the rebuttal evidence to the presumption of the reasonableness of the fees.

Attorney fees must be disclosed to the beneficiaries on the fiduciary accountings, or in a probate proceeding also on the petition for discharge of the personal representative. It is a fundamental requirement of due process that the beneficiaries who bear the impact of the legal fees be provided notice of the fees and the manner in which the fees were calculated. The beneficiaries have the ability to rebut the presumptive fee based on the statutory criteria.

The above review process clearly indicates that the presumptive fee is not an entitlement but will depend on the weather. A review of the criteria will determine if perhaps there was a light rain, or, a catastrophic thunderstorm. The criteria to review the compensation of the attorney representing the fiduciary are as follows:

- The promptness, efficiency, and skill with which the administration was handled by the attorney.
- The responsibilities assumed by, and potential liabilities of, the attorney.
- The nature and value of the assets that are affected by the decedent's death.
- The benefits or detriments resulting to the estate or trust, or the estate's or trust's beneficiaries, from the attorney's services.
- The complexity or simplicity of the administration and the novelty of issues presented.
- The attorney's participation in tax planning for the estate, the trust and the trust's beneficiaries and tax return preparation, or review and approval.
- The nature of the assets, the expenses of administration, and the claims payable by the estate or trust, and the compensation paid to other professionals and fiduciaries.
- Any delay in payment of the compensation after the services were furnished.
- Any other relevant factors.[9]

Attorneys should review these factors at the time of engagement to determine if the attorney is entitled to the presumptive legal fee. For example, if the attorney is inexperienced in estate or trust matters then the presumptive fee may not be applicable, or, if the assets of the estate or trust are large in value but otherwise uncomplicated, then the simplicity of the administration may require the presumptive fee to be adjusted. An estate or trust with an unusually large date of death value may lead to an absurdly high presumptive fee, without other factors to support the presumptive fee. Other times, the presumptive fee arrangement may need to be revisited during the administration. For example, if, after the attorney enters into the engagement, the attorney has other obligations or personal problems that prevent the attorney from promptly completing the administration, then the presumptive fee should be voluntarily reduced.

The legislature intended to provide a statutory framework to make it easy to determine the reasonable fee for the attorney representing the fiduciary. The legislature accomplished this goal by creating a presumption. If the attorney meets certain minimal criteria and charges a fee based on the statutory percentage calculation, then the presumption arises. However, the presumption of the reasonableness of the attorney fee for ordinary services is not an entitlement. It will always depend on the weather.



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Endnotes

1 Fla. Stat. § 736.1007(8) (2018) defines "initial trust administration" as "administration of a revocable trust during the period that begins with the death of the settlor and ends on the final distribution of trust assets outright or to continuing trusts created under the trust agreement but, if an estate tax return is required, not until after the issuance of an estate tax closing letter or other evidence of termination of the estate tax proceeding. *This initial period is not intended to include continued regular administration of the trust*" (emphasis added). In other words, the presumed reasonable legal fee is not a recurring annual fee. It is a one-time fee for the short period of administration immediately following the settlor's death through the final distribution of the trust assets.

2 This article will not discuss the calculation of the amount of the presumed reasonable attorney fee for ordinary services, but only whether or not the attorney is entitled to the presumptive fee. For a good primer on the calculation of the reasonable attorney fee, please read Rohan Kelley's excellent overview of compensation of personal representatives and attorneys in probate contained in *Practice Under Florida Probate Code* Chapter 15 (Fla. Bar CLE 9th ed. 2017).

3 *See Potts v. American Legion Hospital for Crippled Children*, 34 So.2d 561 (Fla. 1948).

4 *See* Fla. Evid. Code 90.301 – 90.303 (2018); *See also Estate of Baird*, 343 So.2d 41 (Fla. 4th DCA 1977).

5 Ordinary services are those routine services provided by an attorney to a personal representative or trustee. The relevant statutes, Fla. Stat. § 733.6171 (2018) and Fla. Stat. § 736.1007 (2018), do not define ordinary or extraordinary services, but the statutes do provide a non-exhaustive list of the types of services considered ordinary versus extraordinary. Sometimes an attorney may charge an additional fee for extraordinary services for what are clearly ordinary services. An attorney representing a beneficiary should be careful to review these statutes to be familiar with what constitutes ordinary versus extraordinary services.

6 Entitlement is defined in Webster's dictionary as "a right to benefits specified especially by law or contract" or "a belief that one is deserving of or entitled to certain privileges."

7 This is even more problematic when the attorney who drafted the will or trust names himself or herself as the fiduciary. Effective September 2018, the comments to Rule 4-1.8 of the Rules Regulating the Florida Bar were changed to add, "A lawyer may prepare a document that appoints the lawyer or person related to the lawyer to a fiduciary office if the client is properly informed, the appointment does not violate rule 4-1.7, the appointment is not the product of undue influence or improper solicitation by the lawyer, and the client gives informed consent, confirmed in writing." In addition to written informed consent by the client, a best practice would be to have a discussion with the client on fees during the drafting period and include in the document how the drafting attorney will charge for the various services as a fiduciary and as attorney for the fiduciary.

8 Fla. Stat. § 733.6171(5) (2018) and Fla. Stat. § 736.1007(6) (2018).

9 This catchall criterion is often used by courts to look at the hours expended by the attorney and the attorney's staff. It will be prudent of any attorney charging a flat fee or a presumptive percentage fee to maintain contemporaneous time records. A challenge to the presumptive fee can result in an unpleasant deposition of the attorney, which deposition can be made more unpleasant when the attorney has no records to support his or her efforts in representing the fiduciary.



How To Avoid Falling Into Unlicensed Status: Five Practical Tips To Give Your Construction Client

By Brikena Isai Tomasic, Esq., Martin | Hild, P.A., Orlando, Florida

It is good practice to make the construction client aware of the litany of terrible things that flow from ignoring the Florida license requirements.[1] The construction client who makes the considerable effort of reaching out to an attorney for advice is the person who is least likely to intentionally take on construction work without a license. Such a person is trying to "play by the rules" and "do the right thing."

A real risk our construction clients face, however, is finding themselves transacting business in an unlicensed status without the intent of doing so. For that reason, any cautionary tales on unlicensed activity should always be followed with practical tips on how the client can avoid unintentionally falling into unlicensed status.

Five Practical Tips To Give Your Construction Client

Be aware when making changes to the legal structure of the construction company and when teaming up with other companies to pursue projects. Such efforts may impact licensing status.

Florida law has a broad definition of construction "contracting."[2] In addition to the actual construction services to be provided by the contractor, "contracting" also includes the "attempted sale" of such services and the "negotiation or bid for a contract" on those services.[3] Florida statutes require a contractor to apply to the Department of Business and Professional Regulation ("DBPR") in order to become the qualifying agent for the business organization before the business organization may engage in contracting for construction services.[4] Furthermore, DBPR rules state that "[a] joint venture, including a joint venture composed of qualified business organizations, is itself a separate and distinct organization which must be qualified . . .."[5] Finally, recognizing that the dynamics of running a construction business may involve business entity name changes, fictitious name changes, and entity conversions, DBPR has promulgated Form # DBPR CILB 23 facilitating requests by contractors to transfer a license registration when such changes occur.[6] As seen against the backdrop of such regulatory landscape, changing the construction entity's legal structure and teaming up to pursue projects can trigger major licensing issues that greatly impact the client's construction business. The construction client should be alerted of such situations in order to avoid unintentionally falling into unlicensed status.

Ensure work to be performed is within the scope of the license registration. Work outside the scope of the license is work without a license.

Florida law defines a "contractor" as a person who "for compensation, undertakes to, submits a bid to, or does himself or herself or by others construct, repair, alter, remodel, add to, demolish, subtract from, or improve any building or structure . . . for others . . ." and whose job scope is within one of the contractor categories specified by the statute.[7] The following contractor categories require registration from the DBPR: general; building; residential; sheet metal; roofing; air-conditioning; mechanical; swimming pool/spa; plumbing; underground utility and excavation; solar and pollutant storage.[8] A detailed explanation of what kind of work may be performed under each category is set forth in the statute.[9] The statute also provides a "specialty" contractor category which encompasses work that is limited to a phase of construction and to a subset of activities included in the rest of the contractor categories.[10]

DBPR is required to issue a cease and desist order to prohibit anyone who does not hold the required certification for the work being performed from engaging in contracting for that work.[11] Also, under Florida law, anyone "performing an activity requiring licensure is . . . guilty of unlicensed contracting if he or she does not hold a valid active certificate or registration authorizing him or her to perform such activity.[12] The statute making contracts entered by unlicensed contractors unenforceable defines "unlicensed" to mean the individual contractor or business entity "does not have the license required . . . concerning the scope of the work to be performed under the contract."[13] In light of the significant legal consequences mandated by the law, a client should be alerted about the possibility of unwittingly agreeing to perform work that might be outside the scope of the client's license.

The client should not make assumptions when it comes to whether an exemption from licensing applies to the circumstances of the client's business. Making the wrong assumption can lead to unlicensed status.

Florida statutes provide for a number of exemptions from licensing requirements. The requirements that trigger some of the exemptions are clear. For example, contractors who

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"work on bridges, roads, streets, highways, or railroads" are not required to obtain a license from DBPR to perform such work.[14] The same is true for contractors who sell and install finished products that "do not become a permanent fixed part of the structure."[15] Material suppliers also are exempt from the requirement to have a license issued by DBPR.[16]

The requirements that bring into play other exemptions, however, are not as straight forward. For instance, one such exemption gives a subcontractor the ability to work without a license if the subcontractor is supervised by a contractor.[17] However, the exemption applies only if the work being provided by the subcontractor is within the scope of the license of the supervising contractor and—importantly—the work the subcontractor provides does not fall under any of the contractor categories DBPR requires to be licensed.[18] Moreover, this exemption does not impact the application of any local ordinances that require local construction licensing.[19] Glossing over these essential and nuanced qualifications to the exemption could lead the client to making the wrong assumption on whether the client's work is exempt from licensing. The construction client should be made aware of the potential for such wrong assumptions that lead to unlicensed status.

Be aware of situations when the qualifying agent ceases to be affiliated with the construction company. Losing the qualifying agent may lead to unlicensed status.

Under Florida law, construction companies are not issued a license of their own. A licensed contractor must be registered as a qualifying agent for the company in order for the company to do business.[20] If the qualifying agent ceases to be affiliated with the construction company, DBPR must be immediately notified of the disaffiliation.[21] It must be noted that if the qualifying agent is the only licensed contractor affiliated with the construction company, the company has only 60 days to find and employ another qualifying agent.[22] Once the only qualifying agent becomes disaffiliated with the construction company, the company may only finish work on "incomplete contracts."[23] The right to finish such work is not automatic, however. The company must apply to obtain a temporary, nonrenewable certificate designating one of the company's officers as the qualifying agent for the purpose of completing such work.[24] In the meantime, the company may not engage in contracting, i.e. bidding or taking on new work.[25] If the construction company loses the only qualifying agent, the situation is ripe for falling into unlicensed status. The construction client should be alerted of this potential scenario in order to avoid unsuspectingly engaging in work without proper license registration for the construction company.

No work must be performed if the license registration is "inactive." Such designation is considered the same as "unlicensed" by DBPR.

Florida law allows the construction client to engage in contracting only while the license registration is on "active status."[26] A contractor may choose to place its license registration on "inactive" status.[27] However, when the license registration is designated as such, absolutely no contracting work using the license registration may take place.[28] This is because the statute equates "inactive" with "unlicensed" status.[29] Also, while on "inactive" status, certain requirements such as renewal of license must take place.[30] Furthermore, if the construction client decides to change the status of the license to "active" and resume contracting work, such change does not happen automatically. Application, fees, and documentation must be submitted to DBPR before status of the license can be changed to "active" and construction contracting can be allowed to proceed.[31] Needless to say, choosing to place the construction license on "inactive" status without fully understanding all the ramifications, could lead to performing work while unlicensed. The construction client should be cautioned about this possibility in order to avoid unintentionally falling into such unlicensed status.

It is always beneficial to a client to receive guidance that prevents potential legal issues.[32] When advising the construction client on licensing matters, an attorney should always strive to provide the client with practical tips (including those discussed in this article) so that the client can avoid unintentionally falling into unlicensed status.



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Endnotes

1 Under Florida law, a contractor cannot enforce a contract if the contractor was unlicensed at the time of entering into the contract. Fla. Stat. § 489.128(1) (2019). In addition, there are other consequences of working without a license such as the following: loss of lien rights (Fla. Stat. § 713.02(7) (2019)), criminal penalties (Fla. Stat. § 489.127(2) (2019)), treble damages (Fla. Stat. § 768.0425 (2019)), sanctions by Department of Business and Professional Regulation (Fla. Stat. § 489.13 (2019)), among others.

2 Fla. Stat. § 489.105(6) (2019).

3 *Id.; See Greenhut Const. Co. v. Henry A. Knott, Inc.,* 247 So.2d 517, 520-521 (Fla. 1st D.C.A. 1971).

4 Fla. Stat. § 489.119(2) (2019); *See Taylor Morrison Services, Inc. v. Ecos,* 163 So.3d 1286, 1289 (Fla. 1st D.C.A. 2015).

5 F.A.C. Rule 61G4-15.0022(1) (2019).

6 CILB 23 - Request for Name Change for Construction Business Entity *available at* https://www.myfloridalicense.com/CheckListDetail.asp?SID=&xactCode=8010&clientCode=0601&XACT_DEFN_ID=12982

7 Fla. Stat. § 489.105(3) (2019); *See Scott & Son Engineering, Inc. v. Tarafa Const., Inc.,* 907 So.2d 553, 554 (Fla. 4th D.C.A. 2005).

8 Fla. Stat. § 489.105(3)(a)-(p) (2019).

9 *Id.; See also* Fla. Stat. § 489.113(3) (2019).

10 *See* Fla. Stat. § 489.105(3)(q) (2019); Op. Att'y Gen. Fla. 91-77 (1991).

11 Fla. Stat. § 489.113(2)(a) (2019).

12 Fla. Stat. § 489.13(1) (2019); *See DBPR v. Ricky Lee Diemer*, 2019 WL 1510929 (Fla.Div.Admin.Hrgs.).

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13 Fla. Stat. § 489.128(1)(a) (2019); *See Lake Eola Builders, LLC v. Metro. at Lake Eola, L.L.C.* 416 F.Supp.2d 1316, 1318-1319 (M.D. Fla. 2006).

14 Fla. Stat. § 489.103(1) (2019).

15 Fla. Stat. § 489.103(6) (2019).

16 Fla. Stat. § 489.103(12) (2019).

17 Fla. Stat. § 489.113(2) (2019); Op. Att'y Gen. Fla. 93-62 (1993); Op. Att'y Gen. Fla. 94-84 (1994).

18 Fla. Stat. § 489.113(2) (2019).

19 *Id.*; Op. Att'y Gen. Fla. 93-62 (1993).

20 Fla. Stat. § 489.119(3)(a) (2019); *Lake Eola Builders, LLC,* 416 F.Supp.2d at 1318.

21 Fla. Stat. § 489.119(3)(a) (2019).

22 *Id.*; *Lake Eola Builders, LLC,* 416 F.Supp.2d at 1320.

23 Fla. Stat. § 489.119(3)(a) (2019).

24 *Id.*

25 Fla. Stat. § 489.119(3)(a) (2019).

26 Fla. Stat. § 489.116(1) (2019).

27 Fla. Stat. § 489.116(2) (2019).

28 Fla. Stat. § 489.116(1) (2019).

29 Fla. Stat. § 489.127(1) (2019).

30 Fla. Stat. § 489.116(4) (2019).

31 Fla. Stat. § 489.116(3) (2019).

32 Such a practice also makes business sense for the attorney as it gives the client a sense of getting value for money spent on attorney's fees.

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Unlocking The Hidden Value Of Prejudgment Interest In Construction Defect Litigation

By Nicholas J. Elder, Esq., Gunster, Yoakley & Stewart, P.A., Jacksonville, Florida

One of the most important responsibilities of retained counsel when evaluating a claim is to identify the risks and potential exposure to a client. An aspect of damages often overlooked in this evaluation is prejudgment interest. In the arena of construction defect litigation, due to the significant time it takes to resolve such matters, combined with the length of time in which these claims manifest, prejudgment interest is often substantial. In order to properly calculate the potential prejudgment interest at stake in such a dispute, an early analysis pinpointing the start date of interest accrual must be conducted. Unfortunately, recent Florida rulings appear to show a divide between the District Courts of Appeal as to the extent and scope of evidence necessary to establish when prejudgment interest begins to run.

Florida's Loss Theory

Pursuant to the pivotal Florida Supreme Court holding in *Argonaut Ins. Co. v. May Plumbing Co.*,[1] prejudgment interest awards in Florida are governed by the "loss theory." Under the loss theory, "when a verdict liquidates damages on a plaintiff's out-of-pocket, pecuniary losses, plaintiff is entitled, as a matter of law, to prejudgment interest at the statutory rate from the date of that loss."[2] Often in construction defect litigation, a complaint consists of both tort and contract claims. That being said, courts have awarded prejudgment interest in tort and contract cases, as long as the claimed loss is wholly pecuniary, and may be fixed as of a definite time.[3]

In 2010, the Florida Supreme Court reemphasized its adherence to the loss theory in *Bosem v. Musa Holdings, Inc.*[4] Thus, based on the rulings in both *Argonaut* and *Bosem*, the two prerequisites for an award of prejudgment interest are (1) an out-of-pocket pecuniary loss,[5] and (2) a fixed date of the loss.[6] Regarding the second prong, a verdict is said to have the effect of liquidating damages if the verdict establishes the loss and "the pertinent date can be ascertained from the evidence."[7]

Applying this precedent, the prevailing law in Florida holds that if the judge or jury can pinpoint from the record evidence a specific date when the plaintiff suffered a "loss," prejudgment interest must be awarded from the date of that loss.[8] However, the District Courts of Appeal in Florida have issued differing opinions as to what record evidence is necessary to establish the exact starting date for calculating prejudgment interest damages.

The Flexible Approach of the Fourth DCA

The Fourth District appears to have taken a more liberal view in deciding when the clock for prejudgment interest begins to run. In *Pine Ridge at Haverhill Condo. Assoc., Inc. v. Hovnanian of Palm Beach II, Inc.*,[9] the court considered a construction defect matter involving a condominium association in West Palm Beach, Florida. Following the trial, the jury awarded plaintiff damages for construction defects, including failure to install adequate lighting and windows. However, the jury verdict did not specifically indicate a date of loss. Citing the precedent outlined above, the court determined that the jury verdict awarding these damages "had the effect of fixing the damages at no later than the turnover date of the condominium property to the association, which was in January 1985."[10] As such, the court ruled that prejudgment interest should start accruing as of the date of turnover.[11] Notably, the turnover date was years prior to the verdict, greatly increasing the amount of interest and total damages awarded to the plaintiff.

Subsequent to the *Pine Ridge* decision, the Fourth District again examined entitlement to prejudgment interest in *Centex-Rooney Const. Co., Inc. v. Martin County.*[12] In the underlying matter, the jury entered a $14 million verdict against the general contractor for numerous construction defects to the Martin County Courthouse. The verdict included $5,411,156 in prejudgment interest calculated from December 12, 1988, the date the courthouse complex was certified substantially complete.[13] On appeal, the parties argued that the award of prejudgment interest was in error because the county did not incur the majority of its expenses until several years after substantial completion.[14] The court, citing *Pine Ridge*, held that the jury's verdict established the date of the breach as the date the county's damages were fixed (the date of substantial completion), and rejected the contractor's argument that such interest should run from the date of actual repairs to the property.[15] Again, this early accrual date greatly increased the overall interest damages awarded.

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More recently, in 2008, the Fourth District analyzed prejudgment interest in a breach of contract claim relating to a condominium project in *Berloni S.P.A. v. Della Casa, LLC.*[16] As the parties disputed the damages at issue and there was no evidence presented as to a fixed date of loss, the trial court denied plaintiff's request for prejudgment interest.[17] The Fourth District reversed the decision, holding that it was not necessary for a jury to decide either entitlement to, or the amount of, prejudgment interest.[18] The court further held that record evidence of a fixed date of loss was not required because in breach of contract actions, the date of a payment demand is the appropriate start date for prejudgment interest.[19] Surprisingly, even with no evidence of such a pre-suit demand, the court ruled that interest should be calculated from the date the lawsuit was filed, as the filing of a complaint in essence constituted a demand for payment.[20]

The More Stringent Standard of the Second and Third DCAs

In direct contrast to the Fourth District Court of Appeals, both the Second and Third Districts have refused to infer a prejudgment interest start date when there has been no supporting evidence in the trial record.

In *Albanese Popkin Hughes Cove, Inc. v. Scharlin,*[21] the Third District addressed the issue of the court's right to award prejudgment interest where there was no finding of the date of loss in the jury's verdict. The homeowners of a single family home sued their contractor alleging numerous construction defects, leading to water intrusion, mold and other damages. Following a jury trial, the homeowners were awarded $814,614.46 in compensatory damages for repairs and loss of use damages. However, the jury verdict form did not identify a date of loss for the actual construction defect damages. Further, the verdict form did not identify the dates for which the jury believed the homeowners were entitled to be reimbursed for the loss of use of their home.[22] Because the court could not determine from the record when the particular pecuniary losses occurred, it awarded prejudgment interest from the date of the jury verdict.[23] This greatly reduced the potential prejudgment interest award sought by the plaintiff.

Citing *Albanese*, the Second District also analyzed the timing of a prejudgment interest award in *Citizens Property Ins. Corp. v. Alvarez.*[24] Following a jury trial on a disputed sinkhole claim, the insureds argued entitlement to prejudgment interest on the judgment award from a point in time prior to the verdict.[25] Importantly, the claim for prejudgment interest was first raised with the trial court after the jury had returned its verdict, and the jury instructions and verdict form solely tasked the jury with determining the amount of loss by establishing the cost to repair the damage. Under these circumstances, the court held:

Nothing in the record, including the expert testimony on the cost of repair, supports a theory that the jury was determining that cost for a date other than the date of the verdict. There was dispute as to the cost of the repair, and the jury resolved that dispute and liquidated the claim as of the date of the verdict. There simply is no factual determination establishing an earlier "fixed date of loss" from which to calculate prejudgment interest.[26]

In determining the date upon which prejudgment interest should be granted, both the Second and Third Districts relied on the evidence, or lack thereof, and held that without a clear indication in the record of a fixed date of loss, prejudgment interest must begin on the date the jury reaches its verdict.

The Pragmatic View of the First DCA

Considering the above rulings, the First District has more recently taken a seemingly middle-of-the-road approach in determining what evidence is necessary to establish a fixed date of loss for prejudgment interest calculations.

In *Arizona Chemical Co., LLC v. Mohawk Industries, Inc.*,[27] Arizona Chemical supplied Mohawk Industries with a resin designed for use as a component of carpet manufactured by Mohawk. After a few years in the business relationship, Arizona Chemical altered its formula for making the resin without notifying Mohawk of the change. Thereafter, Mohawk began receiving a number of complaints from consumers, causing Mohawk to discontinue its use of the resin and sustain losses on the remaining carpet.

Mohawk was ultimately successful in its breach of contract and warranty claims and thereafter moved for an award of prejudgment interest. In regard to when prejudgment interest began to run, the trial court used the date that Mohawk applied the resin to each roll of carpet that was later found to be defective. On appeal, Arizona Chemical argued that the prejudgment interest should not accrue until the plaintiff actually suffered the pecuniary loss for which it was awarded damages. The First District agreed, holding:

In sum, our review of all recent controlling precedent leads us to the conclusion that the beginning date for the accrual of prejudgment interest depends on the timing of the pecuniary loss for which damages have been awarded, not the type of action the plaintiff has brought. Whether the case sounds in tort or contract, ***when prejudgment interest is proper, it is awarded from the date of the plaintiff's actual loss***, be that loss a diminution in the value of the plaintiff's property, a payment the plaintiff has made to a third party, or some other form of pecuniary loss for which prejudgment interest is authorized (emphasis added).[28]

Applying the above rule to the circumstances of the case, the First District held that "Mohawk was not entitled to recover prejudgment interest from the date the defective resin was delivered or applied to the carpet. Rather, Mohawk was entitled to recover prejudgment interest from the date it realized each loss in dollars."[29] The Court remanded the matter to the trial

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court to reassess prejudgment interest, and if "the dates of Mohawk's losses cannot be ascertained with precision, the court should elect, as to each loss, the earliest date by which the evidence shows the loss must have been sustained."[30]

Unlike the Fourth District, the First District refused to take the more liberal approach of starting the interest clock when the defective chemical was initially applied. In fact, the court explicitly recognized the Fourth District's holdings in *Pine Ridge* and *Centex-Rooney* and seemingly rejected the rulings.[31] However, the court also declined to automatically select the verdict date as the fixed date of loss for prejudgment interest purposes when the record was not clear as to when the loss actually occurred.

The Equitable Exception

Finally, it should be noted that the Florida Supreme Court has outlined an equitable exception to the loss theory, denying recovery of prejudgment interest based on "considerations of fairness."[32] Recent appellate cases have recognized this exception and cautioned against an interest award that results in a windfall to the plaintiff or improperly penalizes the defendant.[33] The above *Arizona* decision highlighted this exception and allowed the trial judge a wide level of discretion to apply equitable considerations when determining the start date of prejudgment interest.[34] Thus, because of the potentially significant prejudgment interest sums in construction litigation, the equities of a case should also be at the forefront of any interest analysis.

Conclusion

Taking the above holdings into consideration, a prudent litigator will focus at the outset on identifying evidence (or the lack thereof), which could establish a specific date of loss by the aggrieved plaintiff. Doing so will provide a clearer picture regarding the amount of prejudgment interest at stake in the dispute. Identifying these "hidden" damages early in the litigation will allow for a more accurate evaluation of potential exposure and the value of the claims at issue.



N. ELDER

***Nicholas J. Elder** is an attorney with Gunster, Yoakley & Stewart, P.A. in Jacksonville, Florida. He has experience representing clients in a variety of matters, including construction defect claims, complex commercial litigation and multi-faceted contractual disputes. Nicholas is currently focused on representing owners, developers and design professionals in state and federal courts throughout the country.*

Endnotes

1 *Argonaut Ins. Co. v. May Plumbing Co.*, 474 So. 2d 212 (Fla. 1985).

2 *Argonaut*, 474 So. 2d at 215; *see also Bosem v. Musa Holdings, Inc.*, 46 So. 3d 42, 43 (Fla. 2010) (the "Court's precedent has remained unchanged for over one century, and that prejudgment interest is a matter of right under the prevailing 'loss theory' of recovery for pecuniary damages, i.e., damages for economic or tangible losses").

3 *Bosem*, 46 So. 3d at 46; *see also Specialty Marine & Industrial Supplies, Inc. v. Venus*, 66 So. 3d 306 (Fla. 1st DCA 2011) (since plaintiff's negligent misrepresentation tort claim sought purely pecuniary damages and the loss leading up to the damages was fixed in time, prejudgment interest was awarded).

4 *Bosem,* 46 So. 3d at 43.

5 "Out-of-pocket pecuniary loss" should not be confused with an actual monetary expenditure. In cases involving the destruction of a vested property right, which is often a focus of construction litigation, the plaintiff is not required to provide evidence of any actual expenditure to replace or repair the property in order to recover prejudgment interest. *Underhill Fancy Veal, Inc. v. Padot*, 677 So. 2d 1378, 1380 (Fla. 1st DCA 1996).

6 *Bosem,* 46 So. 3d at 44-46; *see also, Underhill,* 677 So. 2d at 1380.

7 *Pace Property Fin. Auth., Inc. v. Jones*, 24 So. 3d 1271, 1272 (Fla. 1st DCA 2009).

8 Importantly, there does not have to be a special verdict identifying the date of loss, where the loss is established by the verdict and the date can be ascertained from the evidence. *Pace*, 24 So. 3d at 1272; *see also Bergen Brunswig Corp. v. State, Dept. of Health and Rehabilitative Services*, 415 So. 2d 765, 767 (Fla. 1st DCA 1982) (the verdict established the amount of damages, and the record evidence indicated that the parties' contractual relationship was terminated by formal notice on a date certain prior to the lawsuit being filed).

9 *Pine Ridge at Haverhill Condo. Assoc., Inc. v. Hovnanian of Palm Beach II, Inc.,* 629 So. 2d 151 (4th DCA 1993).

10 *Id.* at 151.

11 *Id.*

12 *Centex-Rooney Const. Co., Inc. v. Martin County*, 706 So. 2d 20 (Fla. 4th DCA 1997).

13 *Id.* at 23.

14 *Id.* at 29.

15 *Id.;* it should be further noted that the Court ruled that the defendants had waived their right to contest the prejudgment interest award because they specifically requested the deflation of the county's damages to 1988 dollars when the county offered to present evidence of its damages in terms of 1996 dollars. Since the defendants treated the county's losses as occurring in 1988, the county was further entitled to recover prejudgment interest on these damages from 1988.

16 *Berloni S.P.A. v. Della Casa, LLC*, 972 So.2d 1007 (Fla. 4th DCA 2008).

17 *Id*. at 1009.

18 *Id.* at 1011.

19 *Id.* at 1012.

20 *Id.*

21 *Albanese Popkin Hughes Cove, Inc. v. Scharlin*, 141 So. 3d 743 (Fla. 3d DCA 2014).

22 *Id.* at 747.

23 *Id.*

24 *Citizens Property Ins. Corp. v. Alvarez*, 198 So. 3d 45 (Fla. 2d DCA 2015).

25 *Id*. at 46.

26 *Id.*

27 *Arizona Chemical Co., LLC v. Mohawk Industries, Inc.*, 197 So. 3d 99 (Fla. 1st DCA 2016).

28 *Id.* at 104-105.

29 *Id.* at 105.

30 *Id*. at 106.

31 *Id.* at 105.

32 *See Broward County v. Finlayson*, 555 So. 2d 1211, 1213 (Fla. 1990).

33 *Arizona Chemical*, 197 So. 3d at 107; *Leila Corp. of St. Pete v. Ossi*, 230 So. 3d 488, 494 (Fla. 2d DCA 2017).

34 *Arizona Chemical*, 197 So. 3d at 105.

RPPTL Section Members Michael A. Bedke And Richard C. Milstein Receive The Florida Bar Foundation Medal Of Honor Award At The 2019 Florida Bar Convention

By Gwynne A. Young, Esq., Carlton Fields, Tampa, Florida
and Robert Dale Noll, Akerman, Esq., LLP, Miami, Florida

At its annual dinner on June 27, The Florida Bar Foundation recognized Real Property, Probate and Trust Law Section members and leaders Michael A. Bedke and Richard C. Milstein by awarding them the 2019 Medal of Honor, the Foundation's highest award. The award recognizes outstanding achievements in the improvement of the Administration of Justice.

Michael A. Bedke

Mike Bedke is an active member of the Section's Executive Council and an ACREL Fellow. He is a real estate partner in the DLA Piper Tampa Office. In presenting the award, FLMIC Board Member Juliet Roulhac stated that Mike was honored, "for his exceptional dedication to providing pro bono service, his remarkable advocacy for AIDS patients and domestic violence survivors both locally and internationally, his invaluable support developing the No Place Like Home program and his commitment to improving the lives of veterans, disaster survivors and law students."

Throughout his career, Mike Bedke has demonstrated an uncanny ability to identify areas of greatest need for the delivery of free legal services to those who cannot afford to hire a lawyer and the creativity to craft effective programs to help meet those needs. Beginning with his days as President of the Student Body at the University of Florida, he has built a network of contacts that enable him to find the funding and support to implement these programs.

Active RPPTL Section members are well aware of his work with No Place Like Home, the Section's top pro bono project, which provides services to clear title to real property before disaster strikes. That said, Mike's contributions have impacted many other legal and social issues.

As a young lawyer, Bedke accepted pro bono cases representing persons with AIDS at a time when the general public was both fearful and uneducated about the disease. He encouraged colleagues to take similar cases and served on the board of the Tampa Aids Network.



Mike Bedke is congratulated by friend since U.F. undergraduate days and past Florida Bar President, Eugene Pettis.

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After Hurricane Andrew, Bedke worked to pass Good Samaritan legislation that removed an impediment to lawyers providing pro bono help to disaster survivors. He was also involved in relief efforts in response to Hurricane Inike in Hawaii, the Oklahoma City bombing, and September 11. While Chair of the ABA YLD, he founded the Greater Access and Assistance Project, modeling it after the Courthouse Assistance Project he created as a member to the Bay Area Legal Services Board.

He is nationally known as a leading advocate for victims of Domestic Violence. He was appointed to the National Advisory Committee on Violence Against Women in 2002 and has served on numerous boards working to improve access to legal help for survivors of domestic violence.

Under Mike's leadership, Bay Area Legal Services chose to focus its 50th Anniversary celebration in 2017 on raising funds to endow its veterans' program. This effort raised $400,000 in endowment for the Program.

Most recently, Mike worked with Bay Area to conceive the idea of creating and funding a veterans' legal hotline patterned after Bay Area's successful statewide Senior Legal Hotline. Mike led a team of volunteers working with key legislators (including Section Executive Council member Ben Diamond) to fund this hotline through the Department of Veterans Affairs. This bipartisan effort resulted in the approval of $500,000 to fund this effort.

As you can see, based upon these and many other inspirational contributions to the improvement of the Administration of Justice, Mike Bedke is a most deserving recipient of this Award.

Richard C. Milstein

Richard Milstein is a longtime active member of the Section and an ACTEC Fellow. Richard is an Equity Partner at Akerman LLP in its Tax, Trusts and Estates practice. When Juliet presented Richard with his award, she stated that he was honored for "his exemplary and unending capacity for pro bono work as a volunteer Guardian Ad Litem for more than 35 years, his leadership and advocacy for marriage equality and civil rights, and his efforts to enact legislation to protect minors in the dependency system. He has gone above and beyond as a volunteer on behalf of foster children and abused children."

Richard's commitment to pro bono efforts and community involvement is evident. In 45 years in practice, Richard has handled countless pro bono probate, guardianship, family law and nonprofit cases. Dade Legal Aid Put Something Back estimates he has worked on more than 2,000 matters.

Richard has been involved in many difficult, sensitive and emotional matters. His work on a case in which a Judge asked him to advise a court on a three-year old being removed from life support led to changes in the standards for medical decision-making related to severe child abuse.



Annual Dinner 2019 Juliet Roulhac and Richard Milstein

After representing a minor whose guardianship funds were misappropriated and recovering a substantial portion of those funds, Milstein worked to enact legislations to protect the interests of similarly situated children. He represented a transgender teen who wanted to change the name and gender marker on his birth certificate, resulting in a decision that set a precedent for transgender teens in Florida, who can now amend their birth certificates' gender markers.

In his efforts to defend the rights of the LGBT community and in the fight against HIV and AIDS, Richard has sat on the boards of directors for SAVE, formerly SAVE DADE, and Careresource, formerly Health Crisis Network and CRI. Richard was on the AIDS Walk Miami committee for 25 years and continues to be a top fundraiser for the annual event. Richard personally raised over $15,000 for the 2019 AIDS Walk Miami, making him (once again) the top individual donor and making Akerman the top team. His commitment to civil rights is reflected in Richard's participation with his husband in a challenge against Florida's ban on same-sex marriage, resulting in marriage equality statewide.

Richard's pro bono and civil rights work demonstrate that he is also a most deserving recipient of this award.

The RPPTL Section is proud to have two members who have made such significant contributions to the improvement of the administration of justice. This is the first time that the Foundation has recognized co-recipients of the Medal of Honor. It is also the first time that two members of the same section have been recognized at the same time.

POLITICAL ROUNDUP

Changes From The 2019 Regular Legislative Session

By Peter M. Dunbar, Esq., Dean, Mead & Dunbar, Tallahassee, Florida

The 2019 Regular Session of the Legislature produced a variety of changes that will affect the practice areas of RPPTL Section members, many of which were a part of the Section's legislative package. The Section is particularly appreciative of the Members of the House and Senate that sponsored initiatives this year, and these Members are acknowledged below with the legislation that passed during this Session.

All of the bills from this year's Regular Session appear in chronological order by bill number with a brief summary along with the applicable Chapter Law citation for each initiative. The effective date for each of the changes varies, and at the end of each summary, the date that the new law took effect is also noted. The final status and full text of each enrolled bill, including the legislative staff reports and Chapter Law citation, is available on the legislative web sites (www.leg.state.fl.us; www.flsenate.gov; www.myfloridahouse.com).

I. SECTION INITIATIVES AND TECHNICAL ASSISTANCE

Lis Pendens: CS/CS/HB 91 by Representative Altman and Senator Powell contains the Section's initiative amending s. 48.23 to clarify that a valid recorded notice of lis pendens remains in effect through the recording of an instrument transferring title unless it has expired, been withdrawn, or discharged. The legislation also extends the authority for individuals who can provide substituted service of process under section 48.021; it requires that the service of process receipt list all pleadings served; and it clarifies the service options for a limited liability company when the address is a virtual office or mini suite. **(Chapter 2019-67, *Laws of Florida*.)**

Real Property Legal Descriptions: CS/CS/CS/SB 248 by Senator Hooper directs that the legal description, home address and any other identifying information of law enforcement personnel and civilian personnel employed by a law enforcement agency be redacted from the public records by the Clerk. The legislation was amended to address the Section's technical concerns, and the new law provides that information can be released upon the written consent of the protected individual(s). **(Chapter 2019-12, *Laws of Florida*.)**

Electronic Legal Documents: CS/CS/HB 409 by Representative Perez is the legislation authorizing remote notarization and prescribing online procedures for implementing the remote authority. The initiative extends the new procedures to all instruments, but it imposes limitations on instruments involved with estate planning. The final version of the legislation was amended to provide protections for vulnerable adults consistent with the Section's concerns, and the legislation provides for delayed implementation for portions of its content. **(Chapter 2019-71, *Laws of Florida*.)**

Open and Expired Permits: CS/CS/HB 447 by Representative Diamond and Senator Perry is the legislation containing the Section's initiative to provide procedures for the closing of open permits and satisfying any applicable permit requirements of said permits. Among its provisions, the legislation authorizes counties to provide notice of expiring permits; it authorizes a one-time search fee; and it provides for the closing of permits after 6 years in the absence of a final inspection. **(Chapter 2019-75, *Laws of Florida*.)**

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Real Property--Right of Entry: CS/CS/HB 767 by Representative Robinson and Senator Simmons contains the Section's proposed revisions that add limitations on the right of entry by any local government, water management district or other state agency to explore for mineral rights on small parcels of property consisting of less than 20 acres. The bill also permits a property owner to petition a local government, water management district or other governmental entity for a complete release of the reserved mineral right interests. **(Chapter 2019-85, *Laws of Florida*.)**

Business Organizations: CS/CS/HB 1009 by Representative Byrd is the Business Law Section initiative that revises the chapters governing Florida corporations, Florida limited liability companies, Florida corporations not-for-profit, and Florida limited partnerships. Among the provisions in the 527-page bill the legislation:

a.) modernizes the applicable chapters and makes technical updates that include clarifying definitions;

b.) provides that electronic notice may be authorized in the articles of incorporation and that notices must be provided in English unless otherwise agreed to;

c.) revises language relating to records inspection and the regulation of registered agents and registered offices;

d.) provides revised provisions relating to corporate mergers, conversions, domestication dissolution, and derivative actions;

e.) permits remote participation at shareholders meetings and electronic transmission of information to directors; and

f.) revises provisions relating to the indemnification and the fiduciary standards for officers and directors.

The Section provided technical assistance on the initiative, and the final version is consistent with the Section's assistance. **(Chapter 2019-90, *Laws of Florida*.)**

Family Trust Companies: HB 7033 by the House Oversight Subcommittee is a Section-supported initiative that removes the scheduled repeal of the public records exemption in Chapter 662 for Family Trust Companies. The effect of the legislation is to protect any personal identifying information, including the names of shareholders or members of the family trust company. **(Chapter 2019-31, *Laws of Florida*.)**

Inter-Spousal Transfers: CS/HB 7123 by the House Ways and Means Committee and Representative Avila is the legislative session's annual tax package. Among its provisions, the legislation eliminates the 1-year limitation on the Section's 2018 initiative exempting inter-spousal transfers of homestead property from doc stamp charges; it reduces the sales tax on commercial leases to 5.5 percent; it authorizes "sales tax holidays" for back-to-school supplies and disaster preparedness; and it provides for the refund of sales taxes paid for agriculture fencing replacements damaged by Hurricane Michael. **(Chapter 2019-42, *Laws of Florida*.)**

II. INITIATIVES OF INTEREST

Residential Properties—Vegetable Gardens: CS/SB 82 by Senator Bradley will prohibit a county or municipality from regulating vegetable gardens on residential properties, and it provides that any local ordinance attempting to do so is void and unenforceable. The provisions do not preclude ordinances that regulate the use of water during drought conditions, restrict the use of fertilizer, or dictate the control of invasive species. The legislation defines residential "vegetable gardens" to include growing plots that include herbs, fruits, flowers or vegetables for human ingestion. **(Chapter 2019-120, *Laws of Florida*.)**

Motor Vehicle Title Transfer: CS/CS/HB 87 by Representative Ponder revises the procedures for motor vehicle registration, and among its provisions the legislation provides that if a surviving spouse does not present a death certificate for the transfer of a motor vehicle, the Department of Highway Safety and Motor Vehicles may verify the necessary information through the electronic file of death records that is maintained by the Florida Department of Health. **(Chapter 2019-66, *Laws of Florida*.)**

Dependent Children: CS/SB 124 by Senator Bean specifies the venue for the appointment of a guardian for a dependent child or dependent young adult shall be the county where the child or young adult resides. The legislation also provides that when dealing with a child under the jurisdiction of a dependency court, the court may receive and consider any information provided by the Guardian Ad Litem Program or the child's attorney ad litem. The Section offered technical assistance for portions of the legislation, and the Section's technical revisions are included in the final version of bill. **(Chapter 2019-10, *Laws of Florida*.)**

Permit Fees: CS/HB 127 by Representative Williamson will require counties and municipalities to post a schedule of building permit fees and inspection fees. The legislation also requires each local government to create and post an "inspection utilization report" that will include the direct and indirect costs incurred to enforce the Florida Building Code; the specific background on the number of building inspections and personnel involved with the inspection process; and a summary of the revenue received from fees and fines received in the enforcement of the building code. **(Chapter 2019-121, *Laws of Florida*.)**

Lost or Abandoned Property: SB 180 by Stargel provides specific exemptions from Florida's unclaimed property act for lost or abandoned property that has been found on the premises of a theme park, entertainment complex, public lodging establishment, or food service establishment. For the

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exempt establishments, the unclaimed property that has not been claimed by the owner within 30 days cannot be sold, but it may be disposed of or donated to a charitable institution that is exempt from federal income tax under s. 501 (c) (3) of the IRS Code. **(Chapter 2019-6, *Laws of Florida*.)**

Impact Fees: CS/HB 207 by Representative Donald provides revised conditions and restrictions on the ability of a local government to impose impact fees. Among the bills provisions, a local government cannot require payment of a fee prior to issuance of a building permit; the impact fee must be reasonably related to impact of the proposed new construction; and the expenditure of the revenue from the impact fee must be reasonably related to benefits. The legislation exempts water and sewer connection fees for the bill's provisions. **(Chapter 2019-106, *Laws of Florida*.)**

Insurance: CS/CS/CS/HB 301 by Representative Santiago is a comprehensive insurance package and amends the laws involving a variety of insurance products. Among the provisions, section 5 of the bill revises the obligations of general liability insurers and imposes a duty on the insurers to defend claims in accordance with the policy terms and apportion defense costs among the impacted insurers. Section 6 of the bill limits the time that notice of bad faith violation of policy coverage in a residential dispute can be filed when an appraisal of the loss has been sought, and it provides that the notice may not be filed within a 60 day period after the appraisal has been requested. **(Chapter 2019-108, *Laws of Florida*.)**

County Court Jurisdiction: CS/CS/HB 337 by Representative Leek makes a variety of revisions to the state court system, and among its provision are staged increases in the jurisdictional limits for Florida's county courts. Effective January 1, 2020, the jurisdictional sum for county courts will be increased to $30,000; and effective January 1, 2023, the jurisdictional limit will be increased to $50,000. **(Chapter 2019-58, *Laws of Florida*.)**

Community Development Districts: CS/CS/HB 437 by Representative Buchanan provides that a petition for creation of a new CDD of less than 2,500 acres may identify future contiguous lands to be included within the CDD, and it provides the procedures for inclusion of the contiguous lands. The legislation also authorizes a CDD to merge with another type of special district created by special act or by filing a petition for establishment of a new CDD. It also provides for the allocation of indebtedness and retirement of debt upon a merger of the districts. **(Chapter 2019-164, *Laws of Florida*.)**

Wetland Mitigation: CS/HB 521 by Representative McClure modifies s. 373.4135 to permit a local government to allow a permittee to provide restoration or enhancement of lands purchased or owned by a local government if state or federal mitigation credits are otherwise not available to offset adverse impacts of a development project. Under the legislation, a local government may also be awarded mitigation credits pursuant to the uniform mitigation assessment provided in Chapter 62-345 of the Florida Administrative Code. **(Chapter 2019-110, *Laws of Florida*.)**

Military Base Buffering Easements: CS/CS/SB 620 by Senator Broxson enacts a series of military-friendly initiatives, and among its provisions, the legislation provides that military base buffering easements acquired through fee simple acquisition or a less-than-fee simple acquisition under Section 288.980 (2) (b) shall survive the foreclosure of a tax deed. **(Chapter 2019-144, *Laws of Florida*.)**

Qualified Blind Trusts—Repealed: SB 702 by Senator Lee repealed a provision in the Code of Conduct for Public Officers and Employees that provided a format for blind trusts that could be used by public officials in lieu of the statutory financial disclosure requirements. The provision is now no longer available for that purpose. **(Chapter 2019-60, *Laws of Florida*.)**

Attorney Fees and Costs: CS/CS/CS/HB 829 by Representative Sabatini provides for the award of prevailing party attorney fees and costs in a proceeding that successfully challenges the adoption or enforcement of a local county or municipal ordinance on the grounds that the subject matter of the ordinance is expressly preempted by the state constitution or state law. Proposed ordinances that are withdrawn within 30 days of receipt of notice by a petitioner and ordinances adopted pursuant to Part II of Chapter 163, Section 553.73, or Section 633.20 are exempt for the provisions of the act. **(Chapter 2019-151, *Laws of Florida*.)**

Admission to Metal Health Facilities—Records Exemption: CS/CS/SB 838 by Senator Powell provides that all petitions, court orders and related records involving voluntary and involuntary admissions for mental health treatment are confidential and exempt from the public records. The pleadings and other documents made exempt by the legislation may be disclosed by the clerk upon request from a designated list of authorized persons, including the petitioner, petitioner's attorney, respondent, respondent's attorney, and in the case of a minor respondent, the respondent's parent, guardian or guardian advocate. **(Chapter 2019-51, *Laws of Florida*.)**

Human Trafficking: CS/CS/CS/HB 851 by Representative Fitzenhagen provides a new regulatory framework for addressing human trafficking and will be relevant to practitioners who are advising clients offering lodging to the public. Under the legislation there is new annual awareness training required for all employees who perform housekeeping duties and employees who work at the front desk reception areas of a public lodging establishment. The training is also required for all new employees of a lodging establishment, and the training must completed within 60 days of employment. The new requirements become effective on January 1, 2021,

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and the new law also requires posting of a human trafficking public awareness disclosure at conspicuous locations in the public lodging establishments. **(Chapter 2019-152, *Laws of Florida*.)**

Property Rights: CS/HB 1159 by Representative La Rosa creates a generic Property Owner Bill of Rights to be posted on the website of the property appraiser's office. The Property Owner Bill of Rights offers a non-exclusive outline of rights and protections for property owners. The legislation also creates a partial preemption of local tree ordinances, and the provisions of the bill permit tree trimming and tree removal by a residential property owner who obtains an arborist's or landscape architect's certificate that the tree to be trimmed or removed presents a danger to persons or property. **(Chapter 2019-155, *Laws of Florida*.)**

Construction Bonds: CS/CS/HB 1247 by Representative Perez revises the claims procedures under construction bonds. Among its provisions, the legislation requires that the notice of nonpayment be provided under oath to the contractor and surety; it provides a prescribed form for the notice of nonpayment to be used by the claimant; it provides that a claimant filing a fraudulent notice of nonpayment forfeits his or her rights under the surety bond; and it provides that the service of fraudulent notice of nonpayment is a complete defense to the lienor's claim against the bond. **(Chapter 2019-94, *Laws of Florida*.)**

Comprehensive Plan Amendments: HB 6017 by Representative Duggan removes the "cumulative annual 120-acre effect" restriction for all small-scale amendments to a local government comprehensive plan. The legislation continues to maintain the remaining criteria for small-scale comprehensive plan amendments. **(Chapter 2019-157, *Laws of Florida*.)**

Depositions: CS/SB 7006 by the Senate Judiciary Committee enacts the Uniform Interstate Deposition Act. Among the provisions in the Act are requirements that a party from a foreign jurisdiction submit to the clerk of court in the county of this state in which discovery is sought; upon such submission the clerk is required to promptly issue a subpoena for whom the foreign subpoena is directed; the subpoena must be served in compliance with Florida Rules of Civil Procedure; and any application to enforce, quash or modify a foreign subpoena must comply with the applicable statutes and rules of Florida. **(Chapter 2019-13, *Laws of Florida*.)**

Vaping: CS/SB 7012 by Senate Committee on Innovation, Industry and Technology implements the recent constitutional amendment on vaping. The legislation adds vaping to the Florida Clean Indoor Air Act, and it imposes the same restrictions on vaping in an indoor workplace that currently exist on smoking in an indoor workplace. **(Chapter 2019-14, *Laws of Florida*.)**

Assignment of Benefits: CS/CS/HB 7065 by the House Judiciary Committee creates a new regulatory format for the assignment of insurance benefits under a property insurance contract. Among its provisions, the legislation provides that any assignment of benefits must be in writing; it provides for mandatory content and warning notices in the assignment; it eliminates any add-on fees; it permits an insurer to restrict the assignment of benefits in the insurance policy; and it provides for prevailing party attorney's fees when a dispute over an assignment of benefits moves into court. **(Chapter 2019-57, *Laws of Florida*.)**

Transportation Corridors: CS/SB 7068 by the Senate Appropriations Committee was a major Senate priority and creates the Multi-use Corridors of Regional Economic Significance Program within the Department of Transportation, and it holds the potential for significant development of rural areas of the state. The primary purpose of the legislation is to plan for, and locate, major transportation connectors between Collier and Polk Counties; Citrus and Jefferson Counties; and the extension of the northern terminus of the Florida Turnpike from Sumter County to the Suncoast Parkway. **(Chapter 2019-43, *Laws of Florida*.)**

Community Development: CS/CS/HB 7103 by the House Judiciary Committee and Representative Fischer revises the permitting process for community development and housing projects. Among the provisions, the legislation imposes timely review standards on development applications; it authorizes ordinances to provide incentives for affordable housing that require set-asides or contributions to a housing fund; it provides that impact fees cannot be required before issuance of a building permit; and it provides that impact fees must have a rational nexus to the impact of the development. The legislation also contains provisions that extend the deadline for the retrofit of fire sprinklers in residential condominiums in excess of 75 feet in height until January 1, 2024, and it exempts balconies from the sprinkler retrofit requirement. **(Chapter 2019-165, *Laws of Florida*.)**



P. DUNBAR

***Peter Dunbar** is the managing attorney of the Tallahassee office of the Dean Mead law firm. Mr. Dunbar served as a member of the Florida House of Representatives for ten years, and prior to returning to private practice, he served as General Counsel and Director of Legislative Affairs for the Office of the Governor.*

Mr. Dunbar serves legislative counsel for the Real Property, Probate and Trust Law Section; he is a member of the Condominium and Planned Development Law Certification Committee of the Florida Bar; and he is a member of the American College of Real Estate Lawyers.

FRIENDS OF THE SECTION

2019 Legislative Session

By Brittany O. Finkbeiner, Esq., Dean, Mead & Dunbar, Tallahassee, Florida

During the 2019 Legislative Session, a number of members of the House and Senate contributed to the passage of Section initiatives and other bills of interest to the Section in their roles as bill sponsors, committee chairs, and leaders in the Legislature. Legislators who participated in the success of this year's Section bills are acknowledged below, along with a brief biographical profile and list of committee memberships.



Rep. Vance Aloupis, Jr.

Representative Vance Aloupis, Jr. sponsored House Bill 7033 to extend the public records exemption for family trust companies. He was elected to the House in 2018. He serves on the Education Committee; the Energy & Utilities Subcommittee; the Insurance & Banking Subcommittee; the Joint Administrative Procedures Committee; the Oversight, Transparency & Public Management Subcommittee; and the PreK-12 Innovation Subcommittee. Representative Aloupis is a non-profit executive in Miami.

Rep. Thad Altman



This year Representative Altman sponsored the Section's *Lis Pendens* initiative, House Bill 91. Prior to his current term in the Florida House, Representative Altman served as a House member from 2003-2008 and as a Florida Senator from 2008-2016. He was elected to the House again in 2016. Representative Altman is a member of the Agriculture & Natural Resources Appropriations Subcommittee; the Education Committee; the Higher Education & Career Readiness Subcommittee; the Insurance & Banking Subcommittee; the Public Integrity & Ethics Committee; and the Transportation & Infrastructure Subcommittee. Outside of his legislative service, he is the President of The Astronauts Memorial Foundation, based at the John F. Kennedy Space Center.



Rep. Bryan Avila

Representative Bryan Avila sponsored the annual Tax Package, House Bill 7123, which included the elimination of the one-year limitation on the exemption for inter-spousal transfers of homestead property. He was elected to the House in 2016. He is the Chair of the Ways & Means Committee and also a member of the Appropriations Committee; the Commerce Committee; the Gaming Control Subcommittee; the PreK-12 Innovation Subcommittee; and the Rules Committee. He is a College Professor living in Miami Springs. Representative Avila is a Second Lieutenant in the Florida Army National Guard and recipient of the National Defense Service Medal.



Sen. Lori Berman

Senator Lori Berman sponsored the Section's Probate bill, Senate Bill 1154. Senator Berman has previously served as the Democratic Deputy Whip and Chair of the Women's Legislative Caucus in the House. Senator Berman has sponsored and worked on many Section initiatives since becoming a member of the Florida House of Representatives in 2010.

Senator Berman is an attorney and Section member who has served as in-house counsel to a federal savings bank and has practiced in the areas of commercial litigation, regulatory real estate law, and estate planning. Representative Berman has her LL.M. in Estate Planning.

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Sen. Jeff Brandes

Senator Jeff Brandes sponsored Electronic Legal Documents, House Bill 409, in the Senate. He was a member of the House from 2010-2012 before becoming a Senator in 2012. He is the Chair of the Appropriations Subcommittee on Criminal and Civil Justice; the Vice Chair of the Criminal Justice Committee; the Alternating Chair of the Joint Legislative Auditing Committee; and also sits on the Appropriations Committee; the Appropriations Subcommittee on Transportation, Tourism, and Economic Development; the Banking and Insurance Committee; the Innovation, Industry, and Technology Committee; the Rules Committee; and the Joint Legislative Budget Commission. Senator Brandes was in the U.S. Army Reserves and served in Iraq. He currently works in real estate.



Sen. Doug Broxson

Senator Doug Broxson was the Senate sponsor for the bill extending the public records exemption for family trust companies, House Bill 7033. He served in the House from 2010-2016 before he was elected to the Senate in 2016. He is the Chair of the Banking and Insurance Committee and also a member of the Agriculture Committee; the Appropriations Subcommittee on Agriculture, Environment, and General Government; the Community Affairs Committee; the Military and Veterans Affairs and Space Committee; and the Joint Committee on Public Counsel Oversight. He works in insurance and real estate in Pensacola.



Rep. Colleen Burton

Representative Colleen Burton sponsored House Bill 837 on Unclaimed Property for Small Accounts. She has been a member of the House since 2014 and is the current Majority Chief Deputy Whip. She is the Chair of the Health Quality Subcommittee; Vice Chair of the Transportation & Infrastructure Subcommittee; and serves on the Health and Human Services Committee; the Higher Education & Career Readiness Subcommittee; the Higher Education Appropriations Subcommittee; and the Ways & Means Committee. Representative Burton lives in Lakeland where she works as a consultant in strategic planning and community visioning.



Rep. Ben Diamond

Representative Ben Diamond sponsored the Section's Open and Expired Permits bill, House Bill 447. He was elected to the House in 2016 and is the Democratic Ranking Member of the Judiciary Committee in addition to serving on the Appropriations Committee; the Civil Justice Subcommittee; and the Insurance & Banking Subcommittee. Representative Diamond is a longtime, active Section member and his practice in St. Petersburg includes guardianship and estate planning.



Rep. Nick DiCeglie

Representative Nick DiCeglie worked on the Section's Start/Stop bill, Senate Bill 1258, on the House side. He has been a member of the House since 2018. He serves on the Civil Justice Subcommittee; the Health & Human Services Committee; the Justice Appropriations Subcommittee; the Local, Federal & Veterans Affairs Subcommittee; the PreK-12 Innovation Subcommittee; and the State Affairs Committee. He is a small business owner in Indian Rocks Beach.



Rep. Fentrice Driskell

Representative Fentrice Driskell sponsored the Section's Probate bill, House Bill 1307. She was elected to the House in 2018. Representative Driskell serves on the Energy & Utilities Subcommittee; the Insurance & Banking Subcommittee; the Judiciary Committee; and the Transportation & Infrastructure Subcommittee. She is an AV Preeminent-rated attorney and Section member from Tampa. She specializes in commercial litigation and bankruptcy matters.



Rep. Heather Fitzenhagen

Representative Heather Fitzenhagen played an important part in working with the Section on the Community Associations bill, House Bill 1075, as Chair of the Business & Professions Subcommittee. She was elected to the Florida House in 2012. In addition to her chairmanship, she is Vice Chair of the Health Market Reform Subcommittee; and also serves on the Commerce Committee; the Criminal Justice Subcommittee; the Judiciary Committee; and the Ways & Means Committee. She is an attorney in Fort Myers practicing in the areas of business law and securities litigation.



Rep. Joseph Geller

Representative Joseph Geller sponsored the Section Guardianship bill, House Bill 1085. He has been a House member since 2014. He is the Democratic Ranking Member on the Gaming Control Subcommittee and also serves on the Appropriations Committee; the Judiciary Committee; the Rules Committee; and the Transportation & Tourism Appropriations Subcommittee. He is a Section member and litigator in Fort Lauderdale.

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Sen. Joe Gruters

Senator Joe Gruters sponsored the Community Associations bill, Senate Bill 1362. Senator Gruters also offered the amendment to the Tax Package on the Senate side to include the elimination of the one-year limitation on the exemption for inter-spousal transfers of homestead property. He was elected to the Senate in 2018. Prior to becoming a Senator, he served in the House from 2016-2018. He is the Chair of the Commerce and Tourism Committee; Vice Chair of the Finance and Tax Committee; and a member of the Appropriations Subcommittee on Criminal and Civil Justice; the Banking and Insurance Committee; and the Joint Committee on Public Counsel Oversight. Senator Gruters is a certified public accountant in Sarasota.



Sen. Ed Hooper

Senator Ed Hooper sponsored the Section's Start/Stop legislation, Senate Bill 1258. He was a House member from 2006-2014 prior to his election to the Senate in 2018. He is the Chair of the Governmental Oversight and Accountability Committee and Alternating Chair of the Joint Select Committee on Collective Bargaining. Senator Hooper also serves on the Appropriations Subcommittee on Agriculture, Environment, and General Government; the Appropriations Subcommittee on Health and Human Services; the Health Policy Committee; the Infrastructure and Security Committee; and the Joint Administrative Procedures Committee. He is a retired firefighter and contract analyst.



Rep. Mike La Rosa

Representative Mike La Rosa facilitated the passage of Open and Expired Permits, House Bill 447, in his role as Chair of the Commerce Committee. He was first elected to the House in 2014. In addition to his chairmanship, he is also a member of the Appropriations Committee; the Gaming Control Committee; and the Rules Committee. He works in real estate brokerage and development in St. Cloud.



Sen. Kathleen Passidomo

Senator Kathleen Passidomo has sponsored and facilitated the passage of numerous Section initiatives and bills of interest to the Section over the years. This year she was a champion of many Section priorities in her role as a leader in the Senate. Senator Passidomo is the Senate Majority Leader and serves on the Appropriations Committee; the Appropriations Subcommittee on Health and Human Services; the Appropriations Subcommittee on Health and Human Services; the Ethics and Elections Committee; the Innovation, Industry, and Technology Committee; and the Rules Committee. She was elected to the Senate in 2016 and before that was a member of the Florida House of Representatives beginning in 2010. Senator Passidomo is a Section member and is Board Certified in Real Estate. Her practice in Naples centers on real estate and corporate and business law.



Rep. Daniel Perez

Representative Daniel Perez sponsored Electronic Legal Documents, House Bill 409. He was elected to the House in 2017. He is a member of the Agriculture & Natural Resources Appropriations Subcommittee; the Agriculture and Natural Resources Subcommittee; the Education Committee; the Gaming Control Subcommittee; and the Insurance & Banking Subcommittee. He is an attorney in Miami and is slated to be the Speaker of the Florida House in 2024-26.



Sen. Keith Perry

Senator Keith Perry was the Senate sponsor for the Section's Open and Expired Permits bill, House Bill 447. He was elected to the Senate in 2016 and served as a House member from 2010-2016. He is the Chair of the Criminal Justice Committee; Vice Chair of the Infrastructure and Security Committee; and also sits on the Appropriations Subcommittee on Criminal and Civil Justice; the Appropriations Subcommittee on Transportation, Tourism, and Economic Development; the Banking and Insurance Committee; the Education Committee; and the Joint Administrative Procedures Committee. Senator Perry is the founder and CEO of a roofing contractor in Gainesville.



Sen. Bobby Powell

Senator Powell sponsored the Section's *Lis Pendens* bill, House Bill 91, in the Senate. Additionally, he has been a friend of the Section throughout his legislative career. Senator Powell was a member of the Florida House of Representatives from 2012-2016 before being elected to the Senate. Senator Powell is the Vice Chair of the Appropriations Subcommittee on Agriculture, Environment, and General Government. Additionally, he serves on the Appropriations Committee; the Ethics and Elections Committee; the Finance and Tax Committee; and is the Alternating Chair of the Joint Committee on Public Counsel Oversight. Senator Powell is an urban design planner and project manager. He is a member of the American Institute of Certified Planners and the American Planning Association.

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Sen. David Simmons

Senator David Simmons was the Senate Sponsor for the Section's Right of Entry Bill, House Bill 767. He is the Chair of the Judiciary Committee, where he was an integral part in the process of moving Section bills through the Senate. In addition to his chairmanship, he serves as the President Pro Tempore of the Senate and sits on the Appropriations Committee; the Appropriations Subcommittee on Education; the Community Affairs Committee; the Education Committee; and the Rules Committee. He is a Section member who practices in Orlando.



Rep. Chris Sprowls

Representative Chris Sprowls was integral to the progress of numerous Section bills this Session. He is the Chair of the House Rules Committee and also serves on the Appropriations Committee. In addition to his committee assignments, he is a key member of the House leadership team and will serve as the Speaker of the House in 2020-22. He was elected to the Florida House of Representatives in 2014. Prior to his election to the Florida House, Representative Sprowls spent seven years as an Assistant State Attorney for Pasco and Pinellas Counties where he successfully prosecuted a number of high-profile first degree murder cases. Representative Sprowls is a litigator in Tampa.



Rep. Paul Renner

As the Chair of the Judiciary Committee, Representative Paul Renner facilitated the passage of several Section bills. A retired Commander in the U.S. Navy, he has been a member of the Florida House since 2015. He serves on the Appropriations Committee; the Justice Appropriations Subcommittee; and the Rules Committee. Part of House leadership, Representative Renner will serve as the Speaker of the House in the 2022-24 term. Representative Renner is a Section member practicing in Jacksonville.



Rep. Will Robinson

Representative Will Robinson sponsored the Section's Right of Entry bill, House Bill 767. He was elected to the House in 2018. His committee assignments include the Agriculture & Natural Resources Subcommittee; the Commerce Committee; the Criminal Justice Subcommittee; the Gaming Control Subcommittee; the Higher Education Appropriations Subcommittee; and the Joint Committee on Public Counsel Oversight. He is a Section Member and real estate attorney in Bradenton.



Rep. Anthony Rodriguez

Representative Anthony Rodriguez sponsored House Bill 1075 on Community Associations. He was elected to the Florida House in 2018. He serves on the Business & Professions Subcommittee; the Higher Education & Career Readiness Subcommittee; the State Affairs Committee; the Transportation & Tourism Appropriations Subcommittee; and the Workforce Development & Tourism Subcommittee. He works in the field of property management in Miami.



Sen. Jose Javier Rodriguez

Senator Jose Javier Rodriguez sponsored Senate Bill 1338 on Guardianship, which was a Section initiative. He is the Vice Chair of the Judiciary Committee; the Appropriations Subcommittee on Agriculture, Environment, and General Government; the Ethics and Elections Committee; and the Rules Committee. He served in the Florida House from 2012-2016 before he was elected to the Senate. Senator Rodriguez is an attorney in Coral Gables.

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SECTION SPOTLIGHT

Congratulations To The 2018-2019 Awards Recipients

By Debra Boje, Esq. (RPPTL Section Immediate Past Chair) and
Jeffrey A. Baskies, Esq. (ActionLine Co-Editor-In-Chief)

Rising Star Award



Brenda Ezell

The Rising Star Award is given to members of the Real Property, Probate and Trust Law Section who demonstrate the potential for future Section leadership through their active participation in Section committees and projects. It may be awarded annually to a member of each of the Real Property and Probate Divisions of the Section who have made significant contributions to the Section. This year's recipients of the Rising Star award have been lighting up the Section for a long time.

The Rising Star from the Real Property Division was in our inaugural class of Fellows. Brenda Ezell has served as Vice Chair and then Co-Chair of Real Property Leasing Committee; Co-Vice Chair of Real Property Finance and Lending Committee; was a member of the Florida Bar Realtor-Attorney Joint Committee; and was a Section-sponsored Fellow on the Florida Bar Leadership Academy. Brenda is the current Chair of the Real Property Leasing Committee, where she is responsible for overseeing the CLE programs on leasing and leading and the periodic review of Residential Lease and Landlord Tenant Eviction forms previously adopted by the Florida Supreme Court to determine if any changes should be made to comply with current Florida law. In addition, she is the current Co-Chair of the Membership and Inclusion committee; current Co-Vice Chair of Legislative Update; and is a member of the Section's Strategic Planning Committee.



Sancha Brennen Whynot

The Probate and Trust Law Division Rising Star has been a familiar face in the Section her entire life. Sancha Brennen Whynot's father was a former Chair of the Section, David Brennan. Like the children of other former Section Chairs, Sancha learned early on not to ask what the Section can do for her but what she can do for the Section. She is not one to seek glory or recognition. She is often found working behind the scene. For many years, Sancha served on, and eventually chaired, the Legislative Update Committee and can still be found each year behind the registration desk helping check in attendees. In addition, she was a Vice Chair of the CLE Seminar Coordination Committee; was a Co-Vice Chair of both Deb Goodall's, and Drew O'Malley's Convention Coordination Committee; and she has assisted with numerous seminars both for the Section and FLISSI/FLEA. Since 2012, Sancha has served as a Co-Vice Chair of the Ad Hoc Guardianship Law Revision Committee which has spent hundreds, if not thousands, of hours working on a complete rewrite of the Florida Guardianship Code. In addition, she currently serves as Co-Chair of Logistics for the Section's Strategic Planning Committee and helped coordinate the two-day meeting in Tampa as well as the subcommittee reports. For this coming year, Sancha is the Chair of Rob Freedman's Convention Coordination Committee where she has already begun her planning. She also assumed the role of a Vice Chair of the Guardianship Law and Procedure Committee on July 1st.

At Large Member (ALM) Of The Year



Susan Seaford

Formerly called Circuit Representatives, the RPPTL section now has At Large Members (referred to as ALMs). The ALMs play an active role in outreach to Section members. The At Large Member of the Year Award recognizes the "outstanding at-large member of the Executive Council who has provided the highest level of service in assisting the Section with its needs." Prior winners have demonstrated exemplary commitment, creativity and leadership. This year's winner, Susan Seaford, is no exception and has untiringly helped to create, coordinate and carry out the Section's focus on reaching out to new Section and Executive Council members. Susan started and led the New Attendee Program and Welcome Initiative. In her continuing and successful efforts to improve the program she helped start, Susan has brought together and encouraged ALMs participation --as well as that of others-- as mentors and resources for new attendees at Executive Council meetings and for new Section members. Susan has worked to bolster the sense of commitment by the Section to its newest members and enhanced the mission and objectives of the Section by her efforts — all while acting as Vice President/Senior Underwriting Counsel at Old Republic Title in Tampa. The Section is very grateful for and is very happy to recognize the exemplary efforts of this year's At Large Member of the Year--- 13th Circuit At Large Member, Susan Seaford.

John Arthur Jones Annual Service Award

Burt Bruton and Angela Adams

The John Arthur Jones Annual Service Award is presented annually to one or two Section members who rendered dedicated and significantly outstanding service to the Section, and its varied programs, throughout the current year. In selecting the recipient of this annual award, the Section considers both the character and magnitude of the service furnished by the nominee throughout the year, with particular emphasis given on the benefits which accrue to the Section and the lawyers of Florida as a result of such service. John Arthur Jones, past chair of the Section, embodies the outstanding service recognized by this Award. The name "John Arthur Jones" is synonymous with the term "Section Service."



The first recipient, Burt Bruton, worked tirelessly this past year drafting, redrafting, responding to, negotiating and navigating the waters (and its many rip tides) of the e-wills and remote notarization legislation. Burt spent hundreds of hours working on at least 15 different versions of the legislation. As a result of Burt's efforts (and the efforts of his committee), the Section was able to reach the best possible outcome given the political climate and numerous stakeholders that were involved, each having varying agendas. Burt successfully carved out the ability to use electronic notarization for certain provisions of powers of attorney, which was a big concern for the Probate and Trust Law Division of the Section. In addition, Burt served as member of the Strategic Planning Committee.



The second recipient of the Annual Service Award, Angela Adams, also worked tirelessly this past year on the e-wills legislation. In addition to that hard work, Angela served her fourth term as Chair of the Trust Law Committee, and she was program chair of the Trust Law Seminar and assisted in drafting the joint asset legislation. Also, Angela served as Co-Chair of the Ad Hoc Study Committee on Professional Fiduciary Licensing; spoke at the Wills, Trusts and Estates Certification Review Course and Advanced Practice Update; chaired the Convention Seminar in June of 2019 on "Tricky Homestead Issues and Other Hot Topics 2019"; assisted in the writing the 2018-2019 edition of Belcher's Redfern Wills & Administration in Florida; served on the Strategic Planning Committee; and was a Vice-Chair of Debra Boje's Convention Coordination Committee.

Robert C. Scott Award

Tae Kelley Bronner

This next award was established in 1985 by the Section to memorialize the memory and many extraordinary accomplishments of Robert C. Scott. At his death in 1982, Robert C. Scott was a dedicated member and Past Chair of the Section whose distinguished practice was primarily centered in Palm Beach County. His many contributions include development of the Florida Association of Realtors — The Florida Bar Accord, and the acceptance of the initial Realtors — Florida Bar approved Contract For Sale and Purchase of Real Estate. Even though he had completed his outstanding chairmanship of the Section in 1973, Mr. Scott continued

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his tireless effort on behalf of the Section and the lawyers of Florida until his death. He was faithful in his attendance at Section meetings and participated in the Section's programs, and he never overlooked the opportunity to advance the objectives of the Section. This Award given in recognition of Mr. Scott's many years of untiring, devoted and valuable service to the Section. While not granted on an annual basis, the award will be granted when the occasion requires to those Section members who best exemplify the devotion and continued service of Robert C. Scott to the Section and its membership.

This year's recipient of the Robert C. Scott Award, Tae Kelley Bronner, was appointed along with Debra Boje to work on re-writing the entire Florida Probate Code. Tae went on to Co-Chair the newly created Membership and Diversity Committee in 2005 and continued in that position for 5 years. Her service on this committee was recognized by the President of The Florida Bar. In 2008, Tae was tasked with chairing the newly formed Fellowship Committee. She served in this role for 3 years and continues to serve as a member of that committee. Tae has also served on The Florida Bar Probate Rules Committee; she is the past Chair of the Probate Law and Procedure Committee; has served as Chair of the Ad Hoc Leadership Academy Committee; and has served as a Vice-Chair of several Convention Coordination Committees, including the June 2019 Convention Committee. Furthermore, Tae is a past officer of the Section, having served as CLE Seminar Coordination Co-Chair, Legislation Committee Co-Chair and Treasurer. In addition, Tae has spoken at numerous Section seminars. Tae currently serves on the budget committee and is a Vice-Chair of the Attorney Trust Officer Liaison Committee. In addition, Tae is a Co-author of The Florida Bar Probate System and a Co-Author of Chapter 19, Homestead and Exempt Personal Property – Practice under the Florida Probate Code. Regarding legislation, Tae has drafted and assisted with numerous pieces of Section legislation, including the Small Accounts Legislation, POLST and Decedent's Remains, which all saw action this legislative year even though they were not enacted. Tae is also a member of the Section Strategic Planning Committee. In addition to this Section award, Tae was an inaugural recipient of the Sections Rising Star Award and she is a past recipient of John Arthur Jones Annual Service Award.

William S. Belcher Lifetime Professionalism Award



Michael Dribin

The William S. Belcher Lifetime Professionalism Award was established in 2003. The award is presented, at the discretion of the Section, to an Executive Council member in recognition of her or his lifetime contributions to the Section, the Executive Council, Florida attorneys, and the public, in promoting the highest standards of ethics and professionalism. William S. "Bill" Belcher was a Past Chair of the Section and devoted many years of service to the Section and its members. He was highly respected for his expertise and knowledge of Florida probate law; and rather than keeping that knowledge and expertise to himself, he regularly shared his thoughts through seminar presentations and through his numerous publications. Bill's professional, civic, charitable, and personal conduct always reflected the highest standards of professionalism and devotion to his profession as an attorney. He graciously and voluntarily shared his knowledge, expertise, ethics, and professionalism with his fellow attorneys. Bill died in 1992. This award is granted to an Executive Council member who best exemplifies the qualities and virtues demonstrated by Bill Belcher during his lifetime of service to the profession.

This award is a lifetime contribution award, and the recipient, Michael Dribin, has been a member of the Section and The Florida Bar longer than any of the other award recipients. Michael has served many different positions over his years of service to the Section. He has served as a Liaison with Corporate Fiduciaries; Co-Vice Chair of Legislative Update; Chair of the Convention Coordinator Committee; and a member of the budget committee. He is a member of most, if not all, the Probate and Trust Law Division Committees. In addition, of course, Michael has served as an officer of the Section, serving as the Secretary, Treasurer, Division Director of the Probate and Trust Law Division; Chair-Elect and Chair of the Section. But this award is not just for service to the Section. It takes into consideration the total contribution of the recipient to promoting the highest standards of ethics and professionalism in the practice of law. In all of these regards, Michael is recognized for being the "complete package."

He is an Estate Planning Advisor in the University of Miami Masters in Estate Planning Program; Past President of the Estate Planning Council of Miami; and Dean of the Florida Fellows Institute of the America College of Trust & Estate Counsel.

Outside of his work for the Section, Michael is the past Chairman of the Professional Advisory committee of the Foundation of Jewish Philanthropies of the Greater Miami Jewish Federation. He has served as a member of the Professional advisory committees of the American Red Cross, the Baptist Hospital Foundation, the United Way of Dade County, and the Dade Community Foundation. Further, recently Michael was appointed to serve on Professional Ethics Committee of The Florida Bar.

RPPTL Section Executive Council Meeting
Opal Sands Resort, Clearwater Beach, Florida
May 29-June 2 , 2019

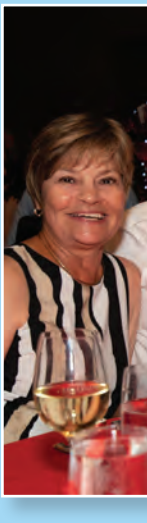




RPPTL section officers



Alison Wright and Cary Wright (former Actionline Editor-In-Chief)





Jason Ellison, new ActionLine vice chair, and family



The Hon. Celeste Muir and Toby Muir



Bruce Stone and Stewart Marhsall



Sancha Brennan Whynot and family



Rohan Kelley and family and Terrell Ezell.



Christine, Gabriel and Bill Ertl

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





Eamonn Gunther and Laird Lile



Debbie Boje passes gavel to Rob Freedman



Judy and Paul Roman, Larry and Lisa Miller



Sandra Krumbein and Martin Schwartz



Kit Van Pelt and Debbie Faulkner



View Photo Albums at www.rpptl.org





Debbie Boje takes a seat in the "back row" with Melissa Murphy



Roundtable

Highlights Of The Meeting Of The RPPTL Section

PROBATE AND TRUST DIVISION

Saturday, June 1, 2019

Opal Sands Resort, Clearwater, Florida

Prepared By Eamonn Gunther, Esq., Boca Raton, Florida

Thank you to Sponsors: Stout Risius Ross, LLC and Guardian Trust

William ("Bill") Hennessey, Director of the Probate and Trust Division, called the meeting to order at 8:00 a.m.

Action Items

Probate and Trust Litigation Committee — J. Richard Caskey, Chair: Sean Lebowitz reported on the Committee's work to adopt a Section legislative position support for proposed legislation to amend Fla. Stat. § 733.212, which governs the contents of a notice of administration, to require additional language to provide adequate notice that a party may be waiving their right to contest a trust if they fail to timely contest the will.

Trust Law Committee — Angela Adams, Chair: Angela Adams reported on efforts by the Committee to adopt a Section legislative position in support of proposed legislation to amend Fla. Stat. § 736.0417 to authorize pro rata or non-pro rata funding of separate trusts created by severance.

IRA, Insurance, and Employee Benefits – L. Howard Payne and Alfred J. Stashis, Jr., Co-Chairs: The Committee reported on its work to adopt a Section legislative position support for proposed legislation to adopt a revision of Fla. Stat. § 221.21(2)(c) to clarify that an ex-spouse's interest in an IRA which is received in a transfer incident to divorce is exempt from the claims of the transferee ex-spouse's creditors.

Ad Hoc Guardianship Law Revision – David Brennan, Chair: Co-Vice Chair, Sancha Whynot reported on efforts by the Committee to adopt a Section legislative position in support of proposed legislation adopting the new Florida Guardianship Code chapter 745, Florida Statutes which improves upon Florida's current guardianship code (Chapter 744).

Committee Reports

Legislation – Katherine Frazier and Jon Scuderi, Co-Chairs:

Section initiatives and technical assistance:

Lis Pendens: CS/CS/HB 91 by Representative Altman and Senator Powell (approved by the Governor) contains the Section's initiative amending s. 48.23 to clarify that a valid recorded notice of lis pendens remains in effect through the recording of an instrument transferring title unless it has expired, been withdrawn or discharged. (Chapter 2019-67, Laws of Florida).

Real Property Legal Descriptions: CS/ CS/CS/SB 248 by Senator Hooper (approved by the Governor) directs that the legal description, home address and any other identifying information of law enforcement personnel and civilian personnel employed by a law enforcement agency to be redacted from the public records by the Clerk. The legislation has been amended to address the Section's concerns, and the information can be released upon written consent of the protected individual. (Chapter 2019-12, Laws of Florida.)

Electronic Legal Documents: CS/CS/HB 409 by Representative Perez (approved by the Governor) is the legislation authorizing remote notarization and prescribing online procedures for implementing the remote authority. The final version of the legislation was amended to provide protections for vulnerable adults consistent with the Section's concerns. (Chapter 2019-71, Laws of Florida).

Open and Expired Permits: CS/CS/HB 447 by Representative Diamond and Senator Perry (approved by the Governor) is the legislation containing the Section's initiative to provide procedures for the closing of open permits and satisfying any applicable permit requirements of said permits. Among its provisions, the legislation authorizes counties to provide notice of expiring permits; it authorizes a one-time search fee; and provides for closing of permits after 6 years in the absence of a final inspection. (Chapter 2019-75, Laws of Florida).

Real Property--Right of Entry: CS/CS/HB 767 by Representative Robinson and Senator Simmons contains the Section's proposed revisions that add limitations on the right of entry by any local government, water management district or other state agency to explore for mineral rights on small parcels of property consisting of less than 20 acres. (Chapter 2019-85, Laws of Florida).

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Business Organizations: CS/CS/HB 1009 by Representative Byrd is the Business Law Section initiative that revises the chapters governing Florida corporations, Florida limited liability companies, Florida corporations not-for-profit, and Florida limited partnerships. The Section provided technical assistance on the initiative, and the final version (approved by the Governor) is consistent with the Section's assistance. The revisions:

a) modernize the applicable chapters and make technical updates that include clarifying definitions;

b) provide that electronic notice may be authorized in the articles of incorporation and that notices must be provided in English, unless otherwise agreed to;

c) revise language relating to records inspection and the regulation of registered agents and registered offices;

d) provide revised provisions relating to corporate mergers, conversions, domestication dissolution, and derivative actions;

e) permit remote participation at shareholder meetings and electronic transmission of information to directors; and

f) revise provisions indemnification and the fiduciary standards for officers and directors. (Chapter 2019-90, Laws of Florida).

Family Trust Companies: HB 7033 by the House Oversight Subcommittee is a Section-supported initiative that removes the scheduled repeal of the public records exemption in chapter 662 for Family Trust Companies. (Chapter 2019-31, Laws of Florida).

Inter -Spousal Transfers: CS/HB 7123 by the House Ways and Means Committee and Representative Avila (approved by the Governor) is the session's annual tax package. Among its provisions, the legislation eliminates the 1-year limitation on the Section's 2018 initiative exempting inter-spousal transfers of homestead property from doc stamp charges; it reduces the sales tax on commercial leases to 5.5 percent; it authorizes "sales tax holidays" for back-to-school supplies and disaster preparedness; and it provides for the refund of sales tax paid for fencing replacements damaged by Hurricane Michael. (Chapter 2019-42, Laws of Florida).

Asset Protection – Brian Malec, Chair: Rick Gans continues to lead the subcommittee on research concerning tenancy by the entirety in personal property. The Committee continues to monitor the progress of the Uniform Voidable Transfer Act ("UVTA") legislation, which did not come before the Florida legislature again this session. Legislation similar to the UVTA is now law in many other states, including: Alabama, Arkansas, California, Georgia, Idaho, Indiana, Iowa, Kentucky, Michigan, Minnesota, Nebraska, New Mexico, North Carolina, North Dakota, New York, Pennsylvania, Rhode Island, Utah, Vermont, Washington, and West Virginia.

Attorney/Trust Officer Liaison Conference – Tattiana Bernes-Stahl,Chair: The next ATO Conference will be at The Breakers on August 22 – August 24, 2019.

Estate and Trust Tax Planning – Robert Lancaster, Chair: The Committee (Richard Sherrill) discussed a brief Summary of *North Carolina Department of Revenue v. The Kimberley Rice Kaestner 1992 Family Trust*, 814 S.E.2d 43 (NC 2018), cert. granted, 139 S.Ct. 915 (U.S. Jan. 11 2019) (addressing the rights of states to tax the income of a trust solely based on the residence of a beneficiary). A review of IRC §199A was also discussed (Stacey Prince-Troutman). Finally, two subcommittees gave their reports on transfer of interests in entities at death through trust on death designation or governing agreement (Bill Lane), and a report was given on ongoing research regarding possible Florida statutory community property trusts (Travis Hayes).

Guardianship, Power of Attorney, and Advance Directives – Nicklaus Curley, Chair: The Committee is actively working on the following projects:

Assisting with implementation of the initiatives raised in the Judicial Management Council Guardianship Workgroup Final Report.

Addressing access to tenancy by the entireties accounts for necessary expenses of a guardianship ward.

Payment of Court Appointed Counsel's fee in good faith cases where no guardianship is established.

Communications between Judges and the Court Clerk in guardianship accounting actions.

Procedures for objecting to a suggestion of capacity – Fla. Stat. § 744.464.

Matters relating to the newly formed Office of Public and Professional Guardian.

Approval of fees paid to guardians and counsel for guardians.

The use of alternative dispute resolution procedures in guardianship proceeding.

IRA, Insurance and Employee Benefits – Howard Payne and Al Stashis, Co-Chairs: The Committee continues to research Florida law with respect to reforming beneficiary designations. It reviewed the amendments it drafted to Fla. Stat. § 221.21(2)(c) to clarify that an ex-spouse's interest in an IRA which is received in a transfer incident to divorce is exempt from the claims of the transferee ex-spouse's creditors. The Committee also discussed an overview of the proposed SECURE Act 2019 (Setting Every Community Up for Retirement Enhancement Act) – US House of Representatives – Ways & Means Committee; and RESA Act of 2019 (Retirement Enhancement and Savings Act) – US Senate – Finance Committee. These proposed Acts would result in dramatic changes to the stretch distribution rules wherein non-spouse and non-minors would be required to receive full payout of the retirement account within 10 years of the principal's death, or within 5 years under the US Senate proposal. Finally, the Committee is engaging in research of the Uniform Transfer

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to Minor Act and whether Florida might amend its version of same, under Chapter 710, Florida Statutes, to allow for delayed payout to the beneficiary of a retirement account to age 21, or 25, versus the current payout requirement at age 18.

Principal and Income – Edward Koren and Pamela Price, Co-Chairs: This Committee is studying the new Uniform Model Principal and Income Act and considering what changes if any should be made to Florida's Principal and Income Act.

Probate and Trust Litigation – John Richard Caskey, Chair: The Committee continues to work on possible revisions to the Statute of Limitations to challenge a Will and Trust, and recovery of property for the benefit of the Estate (*Parker v. Parker*). The Committee reviewed the proposed changes to Fla. Stat. § 733.212, which governs the contents of a notice of administration, to require additional language to provide adequate notice that a party may be waiving their right to contest a trust if they fail to timely contest the will.

Probate Law and Procedure **– Travis Hayes, Chair:** Cristina Papanikos discussed possible changes to Fla. Stat. § 28.223 which changes are being proposed by the Real Property Division of the Section. These changes would require that certain probate pleadings, including the Petition for Administration, be recorded in the Official Records. The Committee continues to work on numerous pending projects via its various subcommittees, including: efforts to codify the rights of artificial reproductive technology heirs; independent action subcommittee; *Mori Case* subcommittee; subcommittee on issues around probate courts in South Florida requiring restricted depositories and posting of mandatory bonds; and, the subcommittee on proposed changes to Fla. Stat. § 732.507 to address the statutory deficiency that arose in the *Gordon v. Fishman* case where the statute does not cover a provision written in a will, executed outside of marriage, that provides for an ex-spouse.

Trust Law – Matthew Triggs, Chair: The Committee reviewed its ongoing subcommittee projects, including: review of the Florida Trust Code and Probate Code for better uniformity; the process of Trustees making distributions to beneficiaries and conditioning the distribution on receipt of signed receipts from the beneficiaries; review of the Prudent Investor Rule; review of the mandatory limitations and/or requirements upon resignation of trustee; drafting of a uniform directed trust act in Florida; a subcommittee on funding subdivided trusts, and a subcommittee to research the duties of the trustee of a revocable trust (including review and recommendations regarding *Hilgendorf v. Estate of Coleman,* 201 So. 3d 1262 (Fla. 4th DCA 2016)).

Wills, Trusts and Estates Certification - Jeffrey Goethe, Chair: The review course took place on April 5 and 6. The same dates should apply to the 2020 Certification Review Course.

Charitable Planning and Exempt Organizations – Seth Kaplan, Chair: The Committee will hold its inaugural CLE Course in September or October 2020.

Ad Hoc Electronic Wills – Sarah Butters confirmed that the electronic legal documents and remote notarization legislation was approved by the Governor. The legislation authorizes online witnessing and notarization of estate planning documents and specifies requirements and standards for performance of such online notarizations. The law contains certain safeguard rules to ensure against fraud and exploitation of vulnerable adults. The law becomes effective as to estate planning documents on July 1, 2020.

Ad Hoc Guardianship Law Review – David Brennan, Chair: The draft legislation for the revised guardianship statutes is now complete. The Committee is now sharing and soliciting comments from various disciplines and Sections of the Florida Bar. The comments are being considered in an effort to finalize the draft legislation.

Ad Hoc Study On Professional Fiduciary Licensing – *Angela Adams and Darby Jones:* The Committee is studying how Florida can require professional fiduciaries to be licensed or regulated by way of a state administrative agency and licensing requirements and rules, and educational requirements for professional fiduciaries.

Adjournment. The next Probate and Trust Division Roundtable meeting will be held at The Breakers Hotel, Palm Beach, Florida on July 27, 2019.

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Roundtable

Highlights Of The Meeting Of The RPPTL Section

REAL PROPERTY DIVISION

Saturday, June 1, 2019 • 3:00-5:00 p.m.

Opal Sands, Clearwater, Florida

Prepared by Colleen C. Sachs, Esq., Pensacola, Florida

Thank you to the Roundtable Sponsor: Fidelity National Title Group

The Director of the Real Property Division, Bob Swaine, called the meeting to order at 8:00 a.m.

Sponsor Recognition. The Director thanked Fidelity National Title Group for sponsoring the meeting.

Introduction of Guests. The Director welcomed visiting law students and Michael Tanner, from the Florida Bar Board of Governors.

Summary of the Orlando Roundtable Meeting. The Director noted the summary of the Orlando Roundtable Meeting. There were no comments regarding the summary.

Action Items

Title Issues and Title Standards Committee – Christopher Smart, Chair: Chris Smart presented the proposed Fla. Stat. § 95.2311, Description Errors in Deeds, intended to be a curative statute for obvious errors in legal descriptions on deeds. He explained that the situation is not unique to Florida and that there are similar statutes in five other states. Since the prior meeting, the proposed statute was revised (i) to clarify that the grantor could not have owned other property in the subject subdivision in the past five years, (ii) to require such statement in the notice that is to be filed of record, (iii) to correct the jurat, and (iv) to provide that the filing of notice would clear any clouds on title related to the subject of the notice. He made a motion that the Division support the proposed legislation for consideration by the Executive Council. Motion was seconded.

There was much discussion. Several questions were raised about the need for the statute if the error is obvious, whether the industry is behind it, whether there are due process concerns, and if this statute would open the door to fraud. An additional concern raised, based on *Regions v DeLuca, 97 So.3d 879* (Fla 2d DCA 2012), is that the statute would keep parties, including insurers, from being able to address on a case by case basis. The final concern raised is that improper parties will be executing the affidavit or providing an opinion on title just to get a deal closed.

The proponents of the new statute explained that the proposed curative statute is designed to address only obvious errors where the intent of the grantor is clear and that it will help sellers more quickly provide good title for the benefit of the buyer. Motion passed.

Real Property Finance & Lending Committee – David Brittain and Richard McIver, Co-Chairs: Rich McIver presented on the proposal to repeal Fla. Stat. § 83.561 (2015), which statute provides for termination of rental agreements upon foreclosure and which contains some terms inconsistent with the federal Protecting tenants and Foreclosure Act. Rich made a motion that the Division support the proposed repeal for consideration by the Executive Council. Motion was seconded.

There was a concern about what would happen if the federal statute went away. A suggestion was that there be a statute that says that it applies only when there is not a federal statute.

Motion to support the repeal of Fla. Stat. § 83.561 (2015) passed.

Realtor-Attorney Joint Committee – Fred Jones, Liaison: Fred presented the proposed rider for the FR/BAR Comprehensive Riders: "CC. Miami-Dade County Special Taxing District Disclosure." He made a motion, which was seconded, for the Division's support of this rider. Motion passed.

Fred also updated the Division on the various topics being discussed by the Joint Committee, including PACE disclosure, assignment of insurance, open permits, the idea of merging the appraisal contingency into the definition of loan approval (based on F*lorida Investment Group 100, LLC v. Lafont, 271 So.3d 1* (Fla. 4th DCA 2019)), and the possibility of making county or region-specific riders.

Information Items

CLE Planning for the 2018-2019 Bar Year – Steve Mezer, CLE Co-Chair: Steve spoke about CLE. He thanked everyone for their participation in the spring CLE programs. He encouraged the production of webinars in the busy fall CLE season. Steve introduced Willie Kightlinger as the upcoming CLE chair. She spoke about the Attorney Loan Officer conference and asked everyone to help encourage more bankers to attend.

Legislation – S. Katherine Frazier, Legislation Co-Chair:

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Katherine thanked everyone who participated in the legislative session. She asked that any committee considering legislation contact the legislative committee prior to moving forward so that the Executive Council and other stakeholders would be aware and to avoid duplication of time and efforts of multiple committees. Pete discussed the process of getting legislation to the governor's desk, and the items the Section is backing that are still in process.

Committee Reports

Attorney-Loan Officer Conference – Robert G. Stern, Chair; Kristopher E. Fernandez and Wilhelmina F. Kightlinger, Co-Vice Chairs: No report.

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: Bill reported that the committee has started on the next legislative package.

Condominium and Planned Development Law Certification Review Course – Richard D. DeBoest II and Sandra Krumbein, Co-Chairs: Sandra reported that the second annual certification review course was a success and they are now planning the third. They are considering having the program in south Florida to help increase attendance, and to partner with a law school. There are 65 new bond certified attorneys, for a total of 191 board certified attorneys in Condominium and Planned Development Law.

Construction Law – Scott P. Pence, Chair; Reese J. Henderson, Jr. and Neal A. Sivyer, Co-Vice Chairs: Michael Meyer reported on the joint meeting with the insurance and surety committee which discussed legislation that is of interest to both.

Construction Law Certification Review Course – Melinda S. Gentile and Deborah B. Mastin, Co-Chairs; Elizabeth B. Ferguson and Gregg E. Hutt, Co-Vice Chairs: No report.

Construction Law Institute – Sanjay Kurian, Chair; Diane S. Perera, Jason J. Quintero and Brian R. Rendzio, Co-Vice Chairs: No report.

Development & Land Use Planning – Julia L. Jennison, Chair; Colleen C. Sachs, Vice Chair: Colleen requested input for topics of interest for CLE.

Insurance & Surety – Michael G. Meyer and Scott P. Pence, Co-Chairs; Frederick R. Dudley, Katherine L. Heckert and Mariela M. Malfeld, Co-Vice Chairs: No report.

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: Manny reported. He asked that board certified attorneys contact him to discuss how the review course can be changed up this coming year.

Real Estate Leasing – Brenda B. Ezell, Chair; Richard D. Eckhard and Christopher A. Sajdera, Co-Vice Chairs: No report.

Real Estate Structures and Taxation – Michael A. Bedke, Chair; Deborah Boyd and Lloyd Granet, Co-Vice Chairs: Mike reported on the joint meeting with Commercial Real Estate Committee on the Opportunity Zone CLE.

Real Property Finance & Lending – David R. Brittain and Richard S. McIver, Co- Chairs; Bridget Friedman, and Robert G. Stern, Co-Vice Chairs: Rich reported that they had a good meeting with a seminar on proving standing in foreclosures. He also announced that David Brittain was rolling off of the committee and the Executive Council and expressed that he will be missed.

Real Property Litigation – Marty J. Solomon, Chair; Amber E. Ashton, Manuel Farach and Michael V. Hargett, Co-Vice Chairs: Mike reported on a good meeting.

Real Property Problems Study – Lee A. Weintraub, Chair; Mark A. Brown, Jason M. Ellison, Stacy O. Kalmanson, Susan K. Spurgeon Co-Vice Chairs: Lee reported that the open permits legislation passed. He reported that the bill almost did not pass, due to an amendment that was tacked on, which amendment the Section did not support. He thanked Ben Diamond and French Brown for their instrumental efforts on convincing the amendment proponents to revise the amendment to something the Section would not oppose. Lee announced that Burt is working on an initiative that started with NAIOP to do away with witnesses on commercial leases. He also announced that the committee hosted a great CLE by Chris Smart on title insurance.

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: Had a very busy meeting. Fred Jones presented a synopsis on the Lafont case to the committee. They also talked about remote online notarization and the fact that FinCEN was extended.

Title Insurance and Title Insurance Liaison – Brian W. Hoffman, Chair; Cynthia A. Riddell, Vice Chair: Brian reported. They are hoping to have a CLE on title claims at The Breakers.

Title Issues and Standards – Christopher W. Smart, Chair; Robert M. Graham, Brian W. Hoffman, Melissa Sloan Scaletta and Karla J. Staker, Co-Vice Chairs: No report.

What Does "Ordinary Wear And Tear" In A Commercial Lease Really Mean?

By Matthew R. Chait, Esq., Shutts & Bowen LLP, West Palm Beach, Florida

Many commercial leases include a provision guiding the tenant as to the condition in which the leased premises must be kept during the lease term, or the condition in which the premises must be upon turnover back to the landlord at the end of the lease term. These provisions may vary depending on the tenant's particular use. It is common, however, for a provision about the leased premises condition to except "ordinary wear and tear." Such exceptions are a tacit recognition that properties deteriorate from use and over time, even under the care of the best tenant stewards. What does "ordinary wear and tear" mean, though? Florida courts have not provided a bright line rule, but they have provided some guidance to commercial landlords and tenants.

As an initial matter, the general rule is that a commercial landlord has no obligation to make repairs, absent a specific agreement with the tenant to do so.[1] In *Rizzo v. Naranja Lakes Condo. Assoc. Numbers One, Two, Three, Four and Five*, a tenant sought to use an "ordinary wear and tear" clause to shift responsibility for certain repairs to the landlord.[2] The Second District Court of Appeal reversed the trial court's ruling that the landlord was responsible for all capital repairs that could not be achieved through ordinary maintenance.

The lease at issue in *Rizzo* had a maintenance provision requiring that the tenant "keep and maintain at the Lessee's own expense any and all buildings, interior and exterior, and improvements and all personal property now on the premises or which may hereafter be placed upon the leased premises in good and substantial order and repair, ordinary wear and tear excepted...."[3] The court noted the general rule about a landlord's lack of obligation to make repairs and that the parties' lease had no provision to the contrary. The written opinion does not describe the repairs at issue, but the court did provide some guidance as to what "ordinary wear and tear" means. In ruling for the landlord, the court rejected the tenant's attempt to rely on the carve-out, holding that "[t]he exception of "ordinary wear and tear" merely relieves the lessee of any duty to the landlord to maintain the leasehold in a 'like-new' condition."[4]

The Third District Court of Appeal came to a similar conclusion in *Walgreen Co. v. Habitat Development Corp.*[5] The lease in *Walgreen* required the tenant to return the premises to the landlord at the end of the lease term "in a safe condition and reasonably good order and repair."[6] The trial court interpreted that provision to mean that the tenant had to return the premises "in tenantable and rentable condition so that the premises are returned in reasonably like-new or nearly-new condition, safe and fit for immediate occupancy and rental."[7]

The Third District Court of Appeal reversed. The court held: "The phrase 'reasonably good order and repair' does not imply that the property must be returned in 'like-new or nearly-new condition.' Further, 'reasonably good order and repair' does not equate with 'reasonably like-new or nearly-new condition,' nor does it necessarily equate with 'fit for immediate occupancy and rental.'"[8] While the phrase "reasonably good order and repair" is facially different from "ordinary wear and tear excepted," the holdings in *Rizzo* and *Walgreen* suggest that the phrases may be deemed to have similar meanings. Indeed, both courts ruled that those phrases, respectively, meant "not like-new." Of course, "not like-new" may itself need amplification and could be similar to "ordinary wear and tear excepted," as shown by *Rizzo* and *Walgreen*.

In *Multach v. Adams*, the Fourth District Court of Appeal considered a specific example of wear and tear and opined on whether it was "reasonable."[9] The lease at issue in *Multach* required the tenant "to maintain said premises in the same condition, order and repair as they are at the commencement of said term, excepting only reasonable wear and tear arising from the use thereof under this agreement, and to make good to said lessor immediately upon demand, any damage to water apparatus, or electric lights or any fixture, appliances or appurtenances of said premises, or of the building, caused by any act or neglect of lessee, or of any person or persons in the employ or under the control of the lessee."[10]

The tenant had placed two holes in an exterior wall for an air conditioning unit and a garage door.[11] The tenant also damaged the floor by using the premises for a purpose not

continued, page 45

allowed by the lease.[12] The court held that all of those actions violated the lease provision regarding the condition of the premises.[13] The court did not explain why these particular items were deemed to violate the lease provision, nor does the opinion describe the extent of the damage.[14] But the court seemed to apply a "we know it when we see it" type of test in finding that the damage at issue was not "reasonable wear and tear."

More recently, a federal court applying Florida law weighed in on an "ordinary wear and tear" exception. In *Apple Glen Investors, L.P. v. Express Scripts, Inc.*, the court had to consider the meaning of several undefined terms in a commercial lease, including "ordinary wear and tear."[15] The lease at issue was for a building developed to be a "Mission Critical Facility," meaning that the premises "were designed and constructed with extraordinary levels of redundancy and reliability of critical systems, particularly, with atypical levels of redundancy in the power service, water service, emergency power, HVAC, and communications necessary to keep the facility fully operational at all times."[16] As a result, the lease had a high standard for the tenant's care of the premises, requiring that the tenant maintain the premises "in a first class condition and order of repair, except for ordinary wear and tear, and shall promptly make all repairs and replacements of every kind and nature, whether foreseen or unforeseen…."[17]

In ruling for the landlord, much of the court's opinion focused on how the various conditions at the property meant that the tenant did not maintain the property "in a first class condition." Noting that "ordinary wear and tear" was undefined in the lease, the court stated: "Under Florida law, where a lease includes an "ordinary wear and tear" exception, that exception does not eliminate the tenant's obligation to make capital replacements and repairs, which wear out during tenancy and cannot be corrected by ordinary maintenance."[18] The court proceeded to evaluate whether each of the alleged conditions at the property violated the lease. In doing so, the court ruled that "[c]onditions are not due to ordinary wear and tear where there is significant deferred maintenance or in an instance where systems, components, or equipment are approaching, have reached, or have exceeded their typical expected useful life."[19]

While the high maintenance standard in the *Apple Glen* lease should be noted, that case does provide what most resembles a definition of "ordinary wear and tear." Practitioners, both those who draft leases and those who litigate them, should focus on the exact wording used in a particular lease's provisions concerning standards for the condition of the leased premises. While Florida courts have given guidance as to the definition of the commonly used "ordinary wear and tear" exception, they have first looked to the exact words used in the lease.


M. CHAIT

Matthew R. Chait *is a partner in the business litigation practice group at Shutts & Bowen LLP in West Palm Beach. His practice focuses on commercial real estate litigation and complex business disputes. He is a co-founder and co-editor of Shutts & Bowen's Florida Commercial Real Estate Litigation Blog.*

Endnotes

1 *City of St. Petersburg v. Competition Sails, Inc.*, 449 So. 2d 852, 854 (Fla. 2d DCA 1984).
2 498 So.2d 451 (Fla. 2d DCA 1986).
3 *Id.* at 452 (Fla. 2d DCA 1986).
4 *Id.*
5 655 So.2d 164 (Fla. 3d DCA 1995).
6 *Id.* at 165.
7 *Id.*
8 *Id.*
9 *Multach v. Adams*, 418 So.2d 1254 (Fla. 4th DCA 1982).
10 *Id.* at 1255.
11 *Id.*
12 *Id.*
13 *Id.*
14 *Id.*
15 2016 WL 909322 at *11-12, Case No. 8:14-cv-1527-T-33EAJ (M.D.Fla. March 10, 2016), aff'd 700 Fed.Appx. 935 (11th Cir. 2017).
16 *Id.* at *2.
17 *Id.* at *3.
18 *Id.* at *12 (citation omitted).
19 *Id.* at *13.

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Advising Clients On Qualified Charitable Distributions From Individual Retirement Accounts

By Alfred J. Stashis, Jr., Dunwody White & Landon, P.A., Naples, Florida

The Qualified Charitable Distribution ("QCD"), also known as the IRA Charitable Rollover, has become a popular way for taxpayers to make charitable gifts from their IRAs. This trend is expected to continue as more taxpayers will be utilizing the standard income tax deduction rather than itemizing their deductions.[1]

Originally added to the Internal Revenue Code in 2006, Section 408(d)(8) expired several times over the next nine years before being made permanent in December 2015.[2]

Code Section 408(d)(8) provides that a taxpayer who is age 70-1/2 or older may direct his or her IRA custodian to transfer up to $100,000 per year directly to one or more eligible charities. The funds which are transferred to charity are excludible from the taxpayer's gross income, even though they originate from an IRA and otherwise may satisfy the taxpayer's required minimum distribution (RMD) for that year. The amount passing to charity is not includible in gross income because there is no charitable income tax deduction available in connection with the QCD.

Taxpayer Age 70-1/2 or Older

Only taxpayers who are actually age 70-1/2 or older may make QCDs.[3] This is in contrast to the rule for required minimum distributions from IRAs, which is based upon the year in which the taxpayer turns age 70-1/2. Taxpayers should be advised to take note of this distinction. Distributions made to charities before the taxpayer reaches age 70-1/2 are not QCDs. Taxpayers younger than age 70-1/2 as of the date of the charitable distribution will be required to report his or her charitable gift made from the IRA as taxable income and, if he or she itemizes, then he or she may claim an offsetting charitable income tax deduction.[4]

From an IRA

QCD may only be made from IRAs.[5] Lifetime charitable gifts made from other types of retirement accounts (such as a 401(k), 403(b), profit sharing plan, etc.) must be reported as taxable income and may then be claimed as an offsetting charitable income tax deduction (assuming itemization of deductions).[6]

QCDs may be made from traditional IRAs or from inherited IRAs, but they may not be made from SEP-IRAs or SIMPLE IRAs (retirement plans created by small businesses) which are "ongoing." A SEP-IRA or a SIMPLE IRA is considered "ongoing" if a contribution was made to the plan during that calendar year.[7] As long as there were no contributions made to the SEP-IRA or a SIMPLE IRA during that year, a charitable gift from a SEP or SIMPLE IRA account can qualify as a QCD.

QCDs may also be made from Roth IRAs. No taxpayer is likely to do so, however, as most Roth IRA distributions are already tax-free and therefore the QCD would provide no taxable benefit.

Up to $100,000 per Calendar Year

The taxpayer may direct that up to $100,000 per year be paid to one or more eligible charities.[8] This is an annual limitation per taxpayer, not a limitation per IRA account or per charity.

If spouses file a joint income tax return, then each spouse may transfer up to $100,000 per year from his or her respective IRA,[9] but there is no portability of unused annual limitation between spouses.

EXAMPLE: If Husband makes $80,000 of QCDs from his IRA to eligible charities in 2019, and Wife makes $120,000 of charitable distributions from her IRA to eligible charities in 2019, Wife is limited to $100,000 of QCDs for the 2019 tax year. The amount by which Wife exceeded her annual QCD limitation, $20,000, must be reported by Wife as 2019 taxable income, and Wife may claim an offsetting $20,000 charitable deduction, if she and Husband itemize their deductions.

Directly to One or More Eligible Charitable Organizations

For QCD purposes, an "eligible charitable organization" includes a public charity described in IRC Section 170(b)(1)(A), which excludes donor advised funds, supporting organizations, and most private grant-making foundations.[10]

Because the charitable distribution from the IRA must be one that would otherwise be eligible for a full charitable deduction under Code Section 170, a gift to a split-interest trust (such as a charitable remainder trust) will not qualify as a QCD. Nor would an IRA distribution made for an auction, raffle ticket, fund raiser, dinner, gala, or other type of quid pro quo transaction qualify as a QCD. If there is any financial benefit received by the taxpayer, the entire distribution is taxable income and the taxpayer may be able to obtain a partially offsetting charitable income tax deduction, if he or she itemizes.[11]

Code Section 408(d) does not limit the number of charities to which IRA owners may make QCDs in a given year. The

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only limitation is that the aggregate amount of all such gifts may not exceed $100,000 per year. Although the Code does not restrict the number of charities to which QCDs may be made in a particular year, taxpayers should consult with their IRA custodians in order to determine their custodians' QCD guidelines. For example, certain custodians may require that requests for QCDs be made on a particular form. Others may set a certain minimum amount as to each QCD made (e.g., $1,000 or $2,500 or more). Still others may charge an administrative fee for each QCD check issued.

Importantly, the taxpayer should instruct the IRA custodian to make the distribution check payable directly to the charity. The distribution cannot be paid to the taxpayer and then be paid from the taxpayer to the charity. If that happens, the taxpayer must include the entire distribution in gross income and must hope that he or she can take an offsetting itemized charitable income tax deduction.

It is permissible, however, for the IRA custodian to deliver the check (made payable to the charity) to the taxpayer, who may in turn may make a copy of the check for his or her records, and then deliver the check to the charity, all before the December 31 RMD deadline.[12]

Timing of Qualified Charitable Distributions

As noted above, the QCD can be used to satisfy some or all of the taxpayer's RMD from his or her IRAs. This can provide a significant tax benefit.

EXAMPLE: If a taxpayer in the 24% bracket has an $80,000 RMD, and he or she wishes to make $25,000 of gifts to charity but needs the remainder of the RMD for his or her own living expenses, then he or she will have reduced his or her tax bill on the RMD from $19,200 to $13,200 (24% of $55,000).[13]

Not only do QCDs reduce the tax paid with respect to the actual IRA distribution, but in reducing the taxpayer's adjusted gross income and taxable income, QCDs may also reduce a taxpayer's required Medicare premiums, reduce the amount of tax withheld from Social Security distributions, and reduce or eliminate the net investment income tax and/or the alternative minimum tax, all of which together may further reduce the taxpayer's overall tax rate.

Timing of QCDs is very important. The RMD is presumed to be satisfied by the first distribution that comes out of the IRA for the particular tax year. If the taxpayer has already withdrawn funds from the IRA for a particular year, but later in the year decides to make a QCD, it may be too late. There is no way to return the earlier-withdrawn money to the IRA in order to make a QCD at that time.[14] The previously-withdrawn funds are considered part of the taxpayer's RMD and are reportable as taxable income.

Taxpayers should be advised to make their charitable gifts from their IRAs early in the tax year in order to ensure their charitable distributions will satisfy part of their RMD for that year.

Documentation Requirements

QCDs must also satisfy Code Section 170(f)(8) substantiation requirements. Specifically, gifts of $250 or more must be substantiated with a contemporaneous written acknowledgment from the charity which states the amount of the contribution received and which certifies that the taxpayer did not receive any financial benefit in consideration of the gift.[15] Taxpayers should obtain these tax receipts from charities to whom they make QCDs.

The substantiation requirements underscore another important reason for taxpayers to make their QCDs early in the year. If, for example, a QCD distribution check sent to a charity late in the year gets lost in the mail, there may not be enough time left in the year for the taxpayer to learn of the error, stop payment on the prior distribution check, and direct that a new check be issued and sent to the charity, all prior to December 31. What's worse, the taxpayer's failure to effectuate that lost-check charitable contribution may mean that the taxpayer has not taken his or her full RMD for the tax year in question and is therefore subject to a 50% under-distribution penalty. Taxpayers in this situation might consider filing Form 5329 to request a waiver of this 50% penalty due to reasonable cause.[16]

Who Benefits Most from Qualified Charitable Distributions

Several classes of individuals will benefit most from QCDs. The Tax Cuts and Jobs Act of 2017 doubled the standard deduction - in 2019, $24,400 for married filing jointly, $18,350 for head of household, and $12,200 for single and married filing separately. Therefore, many individuals who previously itemized their deductions will now find the standard deduction to be more advantageous. This may be particularly true for older taxpayers whose mortgages are paid in full. QCDs allow taxpayers no longer able to itemize to continue to receive tax benefits from their charitable contributions.

EXAMPLE: Husband and Wife, both age 72, have adjusted gross income of $250,000, including $120,000 in RMDs. They wish to distribute $15,000 to charity but will not itemize their deductions. Their 2019 taxable income will be $223,000 ($250,000 AGI - $24,400 standard deduction - $2,600 additional standard deduction for taxpayers over age 65), for a tax of $41,869.[17] In contrast, if the $15,000 charitable contribution is made using a QCD, their 2019 taxable income will now be $208,000, due to the exclusion of the $15,000 QCD from gross income, and will result in a new total tax of $38,269, or a total tax savings of $3,600.

Taxpayers who have exceeded their percentage of income limitation for charitable deductions (presently 60% of AGI), and whose charitable deductions are therefore limited, might also benefit from use of QCDs.

Taxpayers who continue to itemize need to consider possible gifting alternatives and should run the numbers as to each

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possible scenario. While QCDs from the IRA remain a viable option for making charitable gifts, if the taxpayer also owns appreciated securities outside of his or her IRA, he or she may obtain a greater tax benefit from gifting his or her appreciated securities directly to charity, as doing so not only avoids recognition of capital gain but also qualifies for an itemized deduction of the charitable contribution. In many cases, this alternative will result in greater tax savings than the QCD gift.

Pre-Tax vs. After-Tax Dollars

Some taxpayers own IRA accounts which hold both pre-tax contributions and after-tax (non-deductible) contributions. Code Section 408(d)(8)(D) provides that any QCD made from an IRA is deemed to come first from the taxable portion of the IRA (rather than pro-rata across the account).[18] In addition, all IRA accounts are aggregated together to determine the total taxable amount that is eligible for a pre-tax QCD.

EXAMPLE: Taxpayer has a $150,000 IRA which was rolled over from his or her prior 401(k) plan. He or she also has another $20,000 IRA, of which $15,000 consists of after-tax (non-deductible) contributions. If he or she makes a $12,000 QCD from either account, that distribution is considered to come first from pre-tax dollars.

Similarly, to the extent that the QCD uses all of the taxpayer's available pre-tax funds from all of his or her IRA accounts, leaving only after-tax funds, a distribution to charity from that portion of the IRA will be eligible for a charitable deduction, just as if the taxpayer first withdrew those funds in a non-taxable distribution and in turn donated the funds to charity.

EXAMPLE: If Taxpayer had only a $20,000 IRA, of which $15,000 consisted of after-tax (non-deductible) contributions, and he or she directed a $12,000 distribution to charity, the first $5,000 would be considered a QCD (not includible in taxable income, nor deductible as an itemized deduction), and the remaining $7,000 would be eligible for a charitable income tax deduction (assuming that Taxpayer itemizes) as though withdrawn by Taxpayer in a non-taxable distribution and subsequently donated to charity.

How to Report Qualified Charitable Distributions

Reporting QCDs on Form 1040 can be tricky. This is because there is no separate box on the Form 1099-R which reflects QCDs made during the tax year. Therefore, the taxpayer must remember to inform their tax preparer of the QCDs made during the tax year and should provide him or her with copies of the substantiating documentation. QCDs should be included in the amount reported on line 4a of Form 1040 (IRAs, pensions and annuities) but not in the taxable amount reported on line 4b.[19] Also, the 2018 instructions to Form 1040 provide that "QCD" should be entered in the margin next to line 4b.

EXAMPLE: Taxpayer, age 75, has an RMD of $12,600. He or she requests that his or her IRA custodian send $10,000 to his or her local community foundation as a QCD and to send his or her the remaining $2,600. His or her Form 1099-R reflects total distributions of $12,600. When he or she files his or her Form 1040, he or she will report the total distribution of $12,600 on line 4a, and he or she will report a taxable amount of $2,600 on line 4b. He or she will also write "QCD" next to line 4b, in order to indicate that the remaining $10,000 is a QCD and therefore not taxable.

Conclusion

Now that they have been made permanent, QCDs will enjoy increasing popularity in the future, particularly in light of the doubling of the standard deduction.



A. STASHIS

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Endnotes

1 The Joint Committee on Taxation estimates that only 18 Million taxpayers will itemize their deductions in 2018, down from 46.5 Million itemizers in 2017. *See* https://www.jct.gov/publications.html?func=startdown&id=5093

2 *See* the Protecting Americans from Tax Hikes (PATH) Act of 2015.

3 *See* IRC 408(d)(8)(B)(ii).

4 *See* IRS Notice 2007-7, Q&A 43.

5 *See* IRC 408(d)(8)(B).

6 *See* IRS Notice 2007-7, Q&A 43.

7 IRS Notice 2007-7, Q&A-36.

8 *See* IRC 408(d)(8)(A).

9 IRS Notice 2007-7, Q&A-34.

10 *See* IRC 408(d)(8)(B)(i).

11 *See* IRC 408(d)(8)(C).

12 IRS Notice 2007-7, Q&A-41.

13 Assumes the entire RMD in this example is taxed at a rate of 24%.

14 *See* IRC 408(d)(3)(E).

15 *See* IRC 170(f)(8). Ordinarily for charitable contributions, the donor must obtain from the charity a contemporaneous written acknowledgment which describes the gift, and which states the value, if any, of any goods or services provided by the charity in exchange for the gift. In the context of a QCD, however, no such quid pro quo financial benefit is permitted.

16 *See* IRS 2018 Instructions to Form 5329, "Additional Tax on Excess Accumulation in Qualified Retirement Plans (Including IRAs), Waiver of Tax," at p. 8.

17 Assumes the first $19,400 of income is taxed at 10%, the next $59,550 is taxed at 12%, the next $89,450 is taxed at 22%, and the balance is taxed at 24%.

18 *See* IRC 408(d)(8)(D).

19 *See* IRS 2018 Instructions to Form 1040, "Lines 4a and 4b: IRAs, Pensions and Annuities: IRA Distributions, Exception 3," at p. 29.

The Unauthorized Practice of Law When Drafting Estate Planning Documents: ARE YOU GUILTY?

Yoshimi O. Smith, Esq., Beller Smith, P.L., Boca Raton, Florida

For years the Florida sun and beaches have caused individuals to flee to the Sunshine state. With the overhaul of last year's tax reform and Florida's favorable tax climate, now many more are considering the migration in an effort to avoid taxation. Oftentimes, these new Floridians have well established relationships with their advisors from their former state of domicile, including their estate planning attorney. Rather than seeking to establish new relationships in this state, some choose instead to maintain their existing relationships and counsel. However, their out-of-state attorney may not be admitted to practice law in the State of Florida. This article will explore the unauthorized practice of law in Florida in a typical scenario when an out-of-state attorney drafts estate planning documents having Florida implications and the ethical issues involved when a Florida attorney reviews those documents to comply with Florida law.

The Unauthorized Practice of Law

The Florida Bar, Florida attorneys, and the citizens of Florida undoubtedly have an interest in making sure that out-of-state unlicensed attorneys are not permitted to practice law in the State of Florida. Among other things, it maintains the integrity of the legal profession. In fact, the unlicensed practice of law in Florida is a third degree felony.

Pursuant to Rule 4-5.5(a) of the Rules Regulating The Florida Bar, Florida attorneys are not permitted to assist a non-lawyer in engaging in the unlicensed practice of law. The definition of the unlicensed practice of law in Rule 10 – 2.1(c) of the Rules Governing the Investigation and Prosecution of the Unlicensed Practice of Law, covers attorneys admitted in other jurisdictions who are not licensed to practice in Florida. Florida courts have defined the practice of law broadly:

> if the giving of [the] advice and performance of [the] services affect important rights of a person under the law, and if the reasonable protection of the rights and property of those advised and served requires that the persons giving such advice possess legal skill and a knowledge of the law greater than that possessed by the average citizen, then the giving of such advice and the performance of such services by one for another as a course of conduct constitute the practice of law.[1]

The Florida Supreme Court noted in the case of *Florida Bar v. Sperry* that the practice of law includes the rendering of advice to others as to their rights and obligations under the law even though such matters may not then or ever be subject to proceedings in court.[2] When applying this test, courts have held that "the single most important concern in the Court's defining and regulating the practice of law is the protection of the public from incompetent, unethical, or irresponsible representation."[3]

Rule 4-5.5(c)(4) of The Rules Regulating The Florida Bar provides a broad exception that allows an out-of-state attorney to provide legal services on a "temporary basis" in Florida if the services of the out-of-state attorney are performed for a client who resides in or has an office in the jurisdiction in which the attorney is authorized to practice.

In the context of trusts and estates, over 45 years ago, in *Florida Bar v. Larkin*, the Florida Supreme Court seemed to endorse the practice of having Florida counsel review documents prepared by an out-of-state attorney.[4] The Supreme Court determined that the preparation of a will by a person not authorized to practice law in the State of Florida constituted the unlicensed practice of law. However, the Court suggested that if the out-of-state attorney had the documents reviewed and approved by a Florida attorney, the out-of-state attorney would avoid the claim of the unlicensed practice of law. For many years thereafter, practitioners

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followed the tacit approval of the Florida Supreme Court in the opinion.

In 2003, The Florida Bar ethics counsel created a stir when it issued Florida Bar Staff Opinion 24894. A Florida Bar Staff Opinion is an informal advisory ethics opinion issued to a member of The Florida Bar who questions certain ethical conduct. The opinions do not carry any judicial force, but it provides insight into how The Florida Bar may respond to such future conduct. This particular opinion dealt with how a Florida attorney should respond to correspondence or demands from an out-of-state attorney who gives legal advice to their clients when interpreting Florida real estate documents, Florida condominium documents, and Florida law in general.

The opinion noted that out-of-state attorneys are writing on behalf of clients who reside in Florida part-time and have a residence in the other state where the attorney is admitted. Florida Bar ethics counsel considered the activities of the out-of-state attorney in writing demand letters and interpreting Florida legal documents as the unauthorized practice of law. The Florida opinion concluded that the Florida attorney acted appropriately in alerting the out-of-state attorneys of the rules regarding the unlicensed practice of law in Florida.

Shortly after the opinion was released, a Florida practitioner evaluated the applicability of the opinion to the practice of wills, trusts and estates. [5] The commentator opined that if this ethics opinion were interpreted literally, it may prohibit Florida attorneys from reviewing estate planning documents for out-of-state attorneys because it could constitute aiding and abetting the unauthorized practice of law.

Ultimately, the Division Director for Ethics, UPL, and Professionalism for The Florida Bar took the unique step of writing a letter to the Chair of the RPPTL Section on May 25, 2004 clarifying the Staff Opinion. The letter noted that the Staff Opinion was written in response to a specific set of facts regarding an attorney´s own conduct and is not necessarily applicable to anyone other than the inquiring attorney on the specific facts presented. The letter noted that the extension of the opinion presented "additional facts and scenarios not presented in the staff opinion" as well as opinions that are not necessarily that of The Florida Bar. The letter noted:

> There are many situations where a Florida attorney may communicate with a member of another state bar on Florida matters. For example, out-of-state attorneys may consult with a Florida attorney on Florida law as it relates to a real estate transaction for the purpose of giving that information to their client or incorporating that information into an opinion for their client. Such communication is not prohibited. Nor is the Florida attorney prohibited from reviewing the documents as stated in the article. As noted in the article, Florida attorneys are often asked to review estate planning documents drafted by out-of-state attorneys. This review is not improper and is in fact encouraged.

Who Should Be the Client?

Assuming that the unauthorized practice of law issues are not implicated and the Florida attorney undertakes to review the estate planning documents prepared by an out-of-state attorney, there is still a second issue which needs to be addressed, to wit, who is the client? Can the attorney review the documents on behalf of the law firm and receive compensation from the law firm? Is it better to represent the client or the

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firm? The answers are unclear. However, the following issues should be considered:

Rule 4-1.2 of the Rules Regulating The Florida Bar permits an attorney to limit the scope of a representation if the limitation is reasonable under the circumstances and the client gives informed consent confirmed in writing. If the review is limited to "Florida compliance" of the documents, it may be prudent to have the client confirm the scope of the representation. Rule 4-1.4 of the Rules Regulating The Florida Bar requires an attorney to communicate with the client and explain a matter to the extent reasonably necessary to permit the client to make an informed decision. Therefore, the scope of the engagement should be disclosed and explained to the client thereby enabling the client to give informed consent.

Rule 4-1.5(g) of the Rules Regulating The Florida Bar only permits a division of legal fees between attorneys who are not in the same firm if the fee agreement specifies the division of fees, the total fee is reasonable, and (a) the division is in proportion to the services performed by each attorney; or (b) the client agrees in writing. Each attorney must also assume joint responsibility and must be available to consult with the client.

Rule 4-1.6 of the Rules Regulating The Florida Bar, which is patterned on the model rule, requires an attorney to keep information confidential unless it is reasonably necessary to serve a client's interest.

There is also a risk to the out-of-state attorney in selecting and supervising the work of the Florida attorney. Most attorneys expect that they will be charged with the duty to properly supervise other attorneys within their own firm. However, many attorneys may not realize that, under certain circumstances, they may have duties to supervise an attorney who is not only associated with another law firm, but who practices law in another state.

In the case of *Whalen vs. Degraff*,[6] the client initially retained an attorney ("Lawyer 1") to represent her in a partnership dispute. Lawyer 1 obtained a judgment for the client in the amount $1,235,976.00 against Julius Gerzof. Before the judgment was satisfied, Gerzof died a resident of Florida. Lawyer 1 sought the assistance of a Florida attorney ("Lawyer 2") to preserve the client's rights against Gerzof's estate. Lawyer 2 did not properly preserve client's rights in Gerzof's estate. The client sued Lawyer 1 for, among other things, vicarious liability for Lawyer 2's action and/or negligently failing to supervise Lawyer 2. The court ultimately held Lawyer 1 liable for damages to client.

The court held that as a general rule, an attorney is not ordinarily liable for the acts or omissions of co-counsel in another firm because that attorney is usually an independent agent of the client.[7] In this case, however, Lawyer 1 solicited Lawyer 2 and obtained the assistance of Lawyer 2 without the client's knowledge. Although the client was later advised that Lawyer 2 had been retained by Lawyer 1, the client had no contact with Lawyer 2 and did not enter into any agreement with Lawyer 2. Lawyer 1 conceded that the client completely relied on him to take the necessary steps to protect client's interests in the Florida estate. The court found that under those circumstances, Lawyer 1 assumed responsibility to the client for the Florida estate claim and Lawyer 2 became a "sub-agent" of Lawyer 1.[8] As such, Lawyer 1 had a duty to supervise the actions of Lawyer 2. The court cited to Restatement (Third) of Law Governing Lawyers, § 58, comment e, as well as Restatement (Third) Agency, § 3.15 and Restatement (Second) Agency, §§ 5 and 406 in its holding.[9]

Best Interest of the Client

It appears that a Florida attorney, at least in some circumstances, may safely review estate planning documents prepared by an out-of-state attorney. Although such action may be permitted, it generally should not be recommended or encouraged. Out-of-state attorneys that lack the knowledge and understanding of general Florida law and the nuances that are often encountered, are ill equipped to properly advise their clients and provide them with options and solutions. Clients may therefore suffer from the attorney´s limited understanding. To avoid all of the potential ethical and malpractice issues, it may be in the best interest of the clients for them to retain new Florida counsel upon changing domicile to Florida in the preparation of their estate planning documents.


Y. SMITH

Yoshimi O. Smith *is a co-founding partner of the law firm of Beller Smith, P.L. where she concentrates her practice in the areas of estate and tax planning, estate and trust administration, and business succession planning. Ms. Smith is a frequent speaker on tax and estate planning topics and has published articles and lectured for the NYU Tax Institute, The Florida Bar, New York State Bar Association, and the Northwest Federal Tax Conference, among others. Ms. Smith is a member of the Ethics and Professionalism Committee of RPPTL, the Co-Vice Chair of the RPPTL Estate and Trust Tax Planning Committee, the Probate and Trust Law CLE Vice Chair for RPPTL, and a member of the Executive Council of RPPTL.*

Endnotes

1 *Florida Bar v. Sperry*, 140 So. 2d 587, 591 (Fla. 1962), vacated on other grounds, 373 U.S. 379 (1963).

2 *Id.* at 591.

3 *Florida Bar v. Moses,* 380 So. 2d 412, 417 (Fla. 1980).

4 298 So.2d 371 (Fla. 1974).

5 Keith S. Kromash, A Primer on Florida Attorneys' Ethical Obligation to Avoid Assisting in the Unauthorized Practice of Law- Florida Bar Staff Opinion 24894, ActionLine, The Florida Bar, RPPTL Section (Spring 2004).

6 863 N.Y.S.2d 100 (2008 N.Y.Slip Op 6342).

7 Restatement (Third) of Law Governing Lawyers, § 58, comment e.

8 *Id.*

9 *Id.*

A TRIBUTE TO DEBRA BOJE

By Jane L. Cornett, Esq., Becker & Poliakoff, P.A., Stuart, Florida

Debra Boje (or Debbie as she prefers to be called) is the immediate past Chair of the Real Property, Probate and Trust Law Section's (the "Section") Executive Council. Debbie is a shareholder at the firm of Gunster, Yoakley & Stewart, P.A. in the Tampa office.



Debbie has been a member of the Florida Bar since 1992 with her graduation from Stetson University College of Law. Debbie's undergraduate degree is from Jacksonville University in accounting, and after law school at Stetson in 1993, she earned an LLM in taxation from the University of Florida. Her original plans were to be a tax litigator but, to the great benefit of all Members of the Section, Debbie started her career in estate planning with the law firm of Shear, Newman, Hahn and Rosenkranz, handling estate planning, guardianship and probate matters. Fortunately for us, her focus has been on the "death side" ever since.

Debbie's first involvement with the Section and attendance at her very first meeting was only a few short years after her law school graduation. By 1996, she was heavily engaged with the Probate Law Committee. Under the guidance of the then Chair, Rohan Kelley, Debbie became fully immersed in the Florida Probate Code. Debbie states, "Having Rohan as a mentor was unbelievably priceless." After hours and hours (and even more hours) of being part of the committee effort of researching and drafting, comparing the Florida Probate Code to the Uniform Probate Code and relevant cases, by 2000, the draft legislation with an entire rewrite of the Probate Code was completed by that Committee and Debbie was "hooked."

Debbie's march up the ladder to Chair of the Section began in 1997 when she joined the group that was then called the "Circuit Representatives," and now is the At-Large Members. In that role, Debbie wanted to attend all the different Committee meetings in the Probate division, but she found that it was impossible because so many meeting times overlapped. She then offered to organize meetings in the future, so they didn't overlap, and for many years, it was her job to make sure the meetings were scheduled with as little overlap as possible. She started out dealing with Probate meetings and then was asked by the Real Estate side for help, also. This was Debbie's job for more than ten years and it was only when Mary Ann Obos was able to take it over that Debbie gave up that vital task. We can all thank Debbie and her years of hard work for using her great organization skills with flash cards for the benefit of the Section.

As is the practice of Section leadership, Debbie progressed over the years through various roles filled by the Members of the Executive Committee including Director of ALMs, Secretary (twice), Director of the Probate Division, Chair-Elect and, finally, Section Chair for 2018-2019.

When asked about the most difficult or challenging part of serving as the Chair of the Section, Debbie pointed to the "unknown" type issues that were "thrown at you by other areas of law," such as issues that arose from the proposed constitutional revision provisions. Another challenge for a Chair is to constantly react to legislative initiatives coming from myriad sources. The most challenging issues during Debbie's tenure were electronic wills and e-notaries. Debbie points out that there were many different groups involved whose interests had to be balanced, the vast majority of whom are not part of our Section.

Another real challenge which arose during her tenure was Hurricane Michael and the extensive legal problems spawned by that devastating storm. Building on the lessons learned from that terrible storm, Debbie created a new committee to assist attorneys everywhere to better prepare for future events. That committee, currently chaired by Brian Sparks, is the Disaster and Emergency Preparedness and Response Committee.

When asked about the positive side of serving as Section Chair, Debbie pointed to the multitude of Section Members who gave so much time, energy and effort for the citizens of the State of Florida. Debbie stated that while the work is very time-consuming, it is also very rewarding to be able to work with friends and colleagues to help better the practice of law. Debbie especially focused on mentoring and help for law students as well as first-time attendees to Section meetings as ways to make things better for the future practice of law in the State of Florida.

Debbie commented that there has never ever been a time,

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no matter what the job or the role, when she asked folks to help and had anyone decline. Debbie cites this willingness of everybody to "jump in" and share the burden as the basis that defines our Section as the "Gold Standard" for all other Florida Bar Sections. Debbie commented that you never hear "I"; rather, it is always "we," and that consensus building is what makes our Executive Committee and our Executive Council great.

Another very interesting facet about Debbie's year as the Section Chair is her ability to get all kinds of folks — especially non-lawyers and family — to jump in and help. Debbie's mother, aunt, and cousin were involved with preparing the centerpieces and balloons for the event in Amelia Island. Other family members were present to help in preparing decorations in Orlando, which included 250 "Mickey" centerpieces taking on average of 40 minutes each to prepare. Debbie even managed to recruit Mary Ann Obos' mother for centerpiece assistance at both the Breakers in 2018 and at the recent convention in Clearwater. When I arrived at the Aquarium in Clearwater, the very nice lady at the door who handed me the program was Debbie's mother. One of her cousins went to at least four of the Section meetings. I can imagine that Debbie's family is ready for a break!

Debbie's advice to future Section Chairs is to stay focused on the right thing to do for the citizens of Florida and take the opportunity to build on what was developed by those who came before. Debbie reports that the Members of the Executive Committee have always been willing to listen to new input and other opinions, and that willingness to consider is what sets this Section apart.

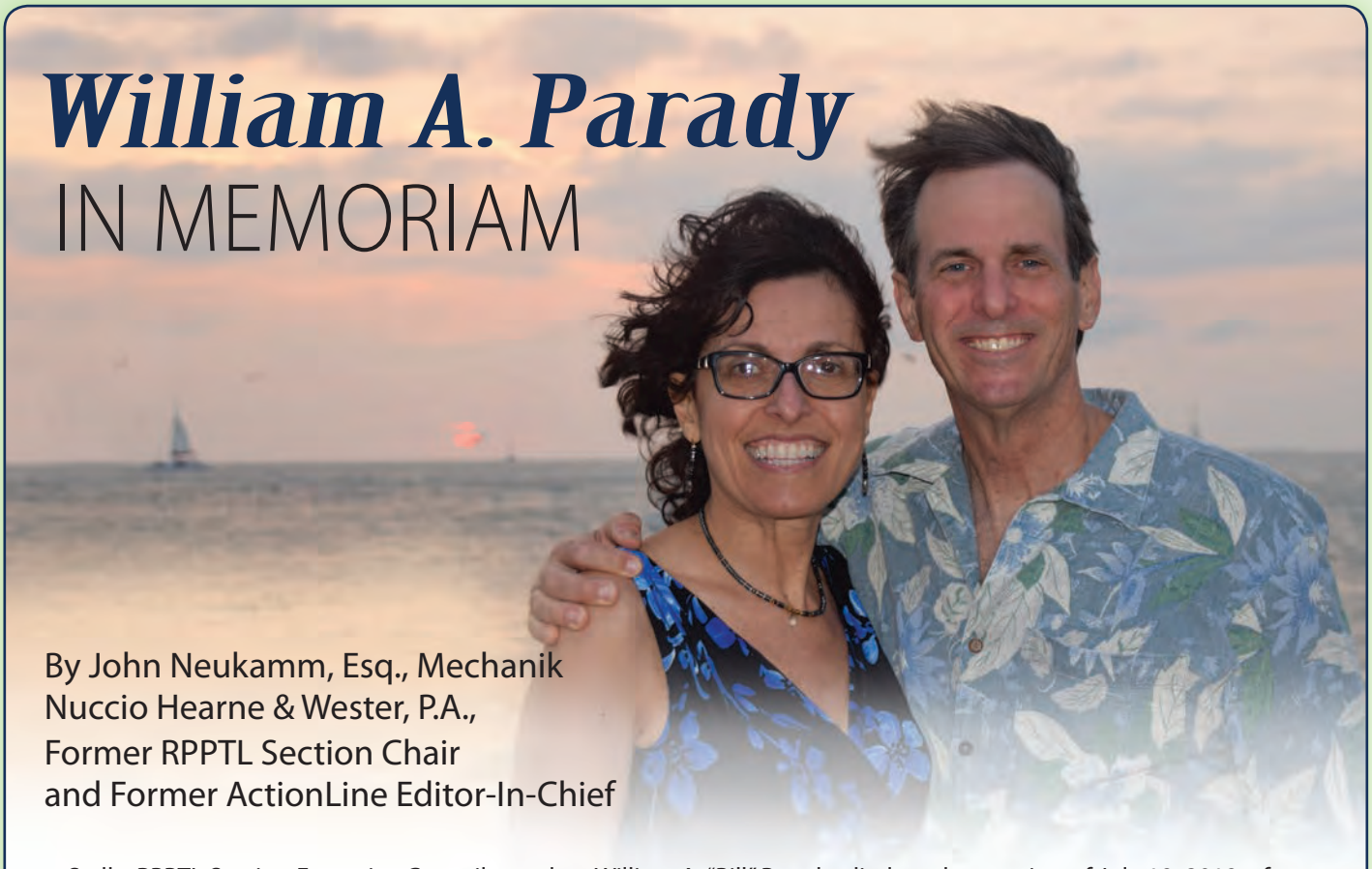
Anyone who attended any of the meetings during Debbie's year can certainly observe that the venues were all outstanding. Debbie acknowledges she might have gotten a little "overzealous" in her plans for Italy in that there was a tour every day plus sixteen optional tours, but everyone who attended reported having a fabulous trip.

It is obvious that Debbie is a real stickler for details in both the planning and execution of all Section meetings. One small detail that many people might overlook was the condition of the bacon. Before every Executive Council meeting, Debbie would meet with the chef and provide detailed instructions on the fact that the bacon must be able to be held upright as a measure of being sufficiently cooked. If Debbie was willing to go to this length on that detail, just imagine how much time and energy she must have spent on all the other details involved with every Executive Council meeting!

All of us in the Section owe an extreme debt of gratitude to Debbie for her leadership in the calendar year 2018-2019. Welcome to your well-deserved seat on the back row, Debbie!



William A. Parady
IN MEMORIAM



By John Neukamm, Esq., Mechanik Nuccio Hearne & Wester, P.A.,
Former RPPTL Section Chair
and Former ActionLine Editor-In-Chief

Sadly, RPPTL Section Executive Council member, William A. "Bill" Parady, died on the evening of July 19, 2019, after a valiant 2-year struggle with esophageal cancer. Bill never allowed the disease to overcome his dignity, decency, wit and strength of body and character; he even participated, while in the midst of his cancer treatments, in an arduous "Ride the Rockies" bicycle race a year ago and was handling his law firm's business affairs up to a week before his death. Fortunately, his beloved wife, fellow RPPTL Executive Council member Salome Zikakis, his sons, John (who has been admitted to both the Florida and New York Bars and who clerked for recently retired Florida Supreme Court Justice, Peggy Quince) and Alex (an engineering student at the University of Central Florida) and his daughter-in-law, Lauren (a successful banker with BNY Mellon in NYC), were with him during his final days.

Bill, an accomplished and successful probate, estate planning and business lawyer, served in an active role on our Section's Member Communications & Information Technology Committee (n/k/a Information Technology) for many years, and served as its Chair from 2014-2017. During his tenure, Bill oversaw modernization of our Section's website and technology to elevate those to higher standards and oversaw fixes to the Section's website when older programming resulted in worrisome security problems. Bill was adept at understanding these complicated technology issues and easily explained those issues in a clear and understandable manner to less "tech savvy" individuals.

Bill and Salome (a valued member of our Section's Real Estate Division) have been active members of our Section for many years, where they have developed many deep personal friendships and valued business relationships. In addition to being married for 33 years, Bill and Salome were partners in the Parady & Zikakis law firm in Ft. Lauderdale for nearly 30 years. Bill, who graduated from Clearwater High School in 1977, was a "double-Gator." After graduating with an accounting degree from UF in 1981, he practiced as a CPA for several years before returning to earn his law degree in 1986.

Bill was a devoted family man, a voracious reader and a dedicated athlete who participated in four grueling bike races in Coloradoan Ironman at age 50 and in 30 marathons all over the world, in Athens, Paris, the Big Sur, San Francisco, New York City, Berlin, Dublin, London and the Marathon du Médoc. Bill readily adopted Salome's Greek cultural traditions after marriage, and both he and Salome loved to travel and entertain. A number of RPPTL Section members, two former Florida Bar Presidents and many long-time clients and friends, celebrated Bill's 60th birthday bash exactly 6 months before his death while enjoying Greek cuisine at their beautiful home just off the Intercoastal Waterway in Ft. Lauderdale, last January.

Bill will be sorely missed, but his spirit will live on through the countless lives he touched during his short time with us! Condolences may be expressed to Salome and Bill's family at 2756 NE 16th Street, Ft. Lauderdale, Florida 33304 or szikakis@parziklaw.com.

Your Application is Denied!

What you must provide to a prospective tenant pursuant to the Fair Credit Reporting Act when an adverse action is taken based upon a consumer report.

By Gabrielle Jackson, Esq. Gelfand & Arpe, P.A., West Palm Beach, Florida

Pursuant to the Fair Credit Reporting Act, when any adverse action is taken based solely, or in part, on information obtained from a consumer report, the person taking the adverse action is required to provide the consumer with certain information.

Are your landlord and association clients denying tenant applications based upon information contained in a consumer report? If so, then, pursuant to the Fair Credit Reporting Act, they are required to provide the denied person certain information. A consumer report is generally defined in pertinent part as:

"…any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's creditworthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility…"

for certain transactions, including, but not limited to, purposes specifically authorized by the consumer.[1] Consumer reports may only be obtained for a permissible purpose, which, when authorized by the prospective tenant in writing, can include housing.[2] When a person uses a consumer report to evaluate a consumer, including a prospective tenant, and an "adverse action" is taken, including, but not limited to, denying a lease application, based in whole or in part on information contained in a consumer report, then the Fair Credit Reporting Act requires that the denying party:

(1) provide oral, written, or electronic notice of the adverse action to the consumer;

(2) provide to the consumer written or electronic disclosure—

(A) of a numerical credit score as defined in section 1681g(f)(2)(A) of this title used by such person in taking any adverse action based in whole or in part on any information in a consumer report; and

(B) of the information set forth in subparagraphs (B) through (E) of section 1681g(f)(1) of this title;

(3) provide to the consumer orally, in writing, or electronically—

(A) the name, address, and telephone number of the consumer reporting agency (including a toll-free telephone number established by the agency if the agency compiles and maintains files on consumers on a nationwide basis) that furnished the report to the person; and

(B) a statement that the consumer reporting agency did not make the decision to take the adverse action and is unable to provide the consumer the specific reasons why the adverse action was taken; and

(4) provide to the consumer an oral, written, or electronic notice of the consumer's right—

(A) to obtain, under section 1681j of this title, a free copy of a consumer report on the consumer from the consumer reporting agency referred to in paragraph (3), which notice shall include an indication of the 60-day period under that section for obtaining such a copy; and

(B) to dispute, under section 1681i of this title, with a consumer reporting agency the accuracy or completeness of any information in a consumer report furnished by the agency.[3]

Thus, as practitioners, it is incumbent on us to familiarize ourselves with the Fair Credit Reporting Act and inform clients of their duty to provide certain information if an adverse action is taken based on information obtained in a consumer report.

Endnotes

1 15 U.S.C. § 1681a(d).
2 15 U.S.C. § 1681b(a).
3 15 U.S.C. § 1681m(a).

Family Matters: Family Law Considerations In Estate Planning

By Samah T. Abukhodeir, Esq., The Florida Probate & Family Law Firm, Miami, Florida

People create irrevocable trusts for a variety of reasons including qualifying for government benefits, inheritance purposes, and creditor protection. The last of these uses has recently been accosted from an unlikely direction; domestic support obligations, better known as exceptions to spendthrift provisions. Estate planning attorneys must be cognizant of their client's entire legal situation when drafting irrevocable trusts for the purpose of asset and creditor protection.

Fla. Stat. § 736.0503(2) states that there are some exceptions to a spendthrift provision of a trust in Florida.[1] Specifically, these provisions will be unenforceable against:

(1) "a beneficiary's child, spouse, or former spouse who has a judgment or court order against the beneficiary for support or maintenance";

(2) "a judgment creditor who has provided services for the protection of a beneficiary's interest in the trust"; and

(3) "a claim of this state or the United States to the extent a law of this state or a federal law so provides."[2]

What does this really mean in plain terms? Just because you have a trust with a spendthrift provision does not mean that you can get away with not paying alimony or child support! Fla. Stat. § 736.0503(3) goes on to state that a claimant to whom one of these exceptions applies, "may obtain from a court or pursuant to the Uniform Interstate Family Support Act, an order attaching present or future distributions to or for the benefit of the beneficiary."[3] However, the order must limit relief to what is necessary under the specific circumstances and this form of remedy is only available for the court to award as a "last resort" option.[4] The claimant must first show that traditional methods were used and insufficient to attempt to enforce the court order before pursuing the exception to the spendthrift provision.[5]

In *Bacardi v. White*, the Supreme Court of Florida held that disbursements may be made from a spendthrift trust in certain circumstances to enforce court orders or judgments of alimony and such funds may be given to the alimony recipient before they were to reach the beneficiary of the trust.[6] Mr. Bacardi was the beneficiary of a trust containing a spendthrift provision, which he refused to use to pay alimony to Mrs. Bacardi, despite having previously agreed to pay her alimony until death or until she remarried. The court reasoned that the state of Florida has had a stronger public policy in favor of enforcement of alimony and child support than it did for upholding spendthrift provisions of trusts.[7]

The Second District Court of Appeal decided similarly in *Berlinger v. Casselberry*, where the parties were divorced and agreed to the payment of permanent alimony by the former husband to the former wife.[8] The former husband had been paying for his living expenses out of a trust containing a spendthrift provision but stopped all alimony payments in the years following the divorce.[9] The court held that, under Florida Statutes, a court order enforcing alimony outweighs the enforcement of a spendthrift trust, and therefore the court granted the former wife's motion for continuing writs of garnishment.[10]

In that same vein, special needs trusts can also be subject to domestic support obligations. In *Alexander v. Harris*, the Second District Court of Appeal found that the existence of a spendthrift special needs trust did not bar the enforcement of a child support order.[11] The mother, who had previously been awarded child support from the father, sought to garnish these payments from the father's special needs trust, which contained proceeds resulting from a catastrophic injury sustained in a car accident when he was a child.[12] The court held that discretionary disbursements are not protected from the continuing garnishment for payment of child support and the mother had exhausted all traditional options for enforcing the child support order.[13] Because the father's only means of making the child support payments was through distributions from his special needs trust, a writ of garnishment was appropriate.[14]

As a rule of thumb, estate planning attorneys should always counsel their clients as to the limitations of the protections built into irrevocable spendthrift trusts. Indeed, planners should be on the lookout when drafting for a client who has

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In support of the Leadership Academy, the RPPTL Section will select up to 2 active contributing members of a RPPTL Section Committee, to apply to the Leadership Academy as the Section's scholarship nominee.

If a RPPTL Section nominee is chosen as an Academy Fellow, the Section will reimburse the participant up to $3,500 for out of pocket travel and hotel expenses incurred in attending the Leadership Academy. To receive the scholarship, the nominee(s), if chosen by The Florida Bar for the Leadership Academy, must agree to remain actively involved in the RPPTL Section after the conclusion of the Leadership Academy.

A full explanation of the Florida Bar Leadership Academy is available on the Florida Bar's website at http://www.floridabar.org/leadershipacademy.

To request an application or for questions regarding the RPPTL Section scholarships for the Leadership Academy, contact Kristopher E. Fernandez, (813) 832-6340, kfernandez@kfernandezlaw.com; Allison Archbold, (941) 960-8825, jaa@archbold.law; or Bridget Friedman, (407) 830-6331, bfriedman@ff-attorneys.com.

Family Matters: Family Law Considerations In Estate Planning,* *from page 58

been divorced or has child support obligations as these issues create yet another vulnerability in the traditional irrevocable spendthrift trust. The Courts in Florida continue to rule against litigants attempting to shirk their domestic support obligations. In their rulings, they have said that public policy far outweighs the enforcement of spendthrift provisions, and this trend shows no sign of reversing.

Endnotes

1 Fla. Stat. §736.0503(2). (2019).
2 *Id.*
3 Fla. Stat. §736.0503(3). (2019).
4 *Id.*
5 *Id.*
6 *Bacardi v. White*, 463 So.2d 218, 220 (Fla. 1985).
7 *Id.* at 221.
8 *Berlinger v. Casselberry*, 133 So.3d 961, 962 (Fla. 2d DCA 2013).
9 *Id.* at 965.
10 *Id.* at 966.
11 *Alexander v. Harris*, So.3d 1, 3 (Fla. 2d DCA 2019).
12 *Id.*
13 *Id.*
14 *Id.*

State Tax Case Summaries

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

Taxpayer's exemption from ad valorem tax was upheld after Value Adjustment Board affirmed denial which removed exemption Taxpayer had for years prior.

Crapo v. Gainesville Area Chamber of Commerce, No. 1D17-0452, (Fla. 1st DCA 2019)

Up until 2014, the Gainesville Area Chamber of Commerce was granted an exemption from ad valorem taxation. When the exemption was denied in 2014, the Chamber of Commerce challenged the denial with the Value Adjustment Board. The Value Adjustment Board sustained the denial of the exemption, prompting the Chamber of Commerce to challenge the denial in circuit court. Holding in favor of the taxpayer, the circuit court found that the Gainesville Area Chamber of Commerce did operate for a "charitable purpose" and therefore qualified for the exemption. The Alachua County property appraiser and tax collector challenged the circuit court's findings on appeal.

The First DCA found the definition of "charitable purposes" in Fla. Stat. § 196.012(7) (2019) is clear and unambiguous. Determining that no statutory construction was necessary, they turned their attention to addressing whether the activities of the Gainesville Area Chamber of Commerce qualified as "charitable purposes" within the meaning of the statute. The court rejected Alachua County's argument that the tax exemption should be restricted to "benevolent purposes." Instead, the purpose of the chamber "to create, expand, and retain businesses in this state, to recruit businesses from around the world, and to facilitate other job-creating efforts" was deemed to fall squarely within the statute. In addition, the court found the exemption would be upheld because the discontinuance of the services provided by the Chamber of Commerce could result in the allocation of public funds for those services.

County's ranch property located in a second county was not immune from ad valorem taxation in the second county.

Joiner v. Pinellas County, No. 2d17-1040, (Fla. 2nd DCA 2019)

In May 2015, Pinellas County filed suit against the Pasco Property Appraiser seeking declaratory and injunctive relief relating to its immunity from ad valorem taxes on 12,400 acres of property owned by Pinellas County but located within Pasco County. Final summary judgment was granted in favor of Pinellas County determining that the property located within Pasco County was immune from ad valorem tax.

On appeal, the court addressed the question of whether any property owned by a county, regardless of the property's geographic location, is immune from taxation or whether the immunity is confined within the borders of the county. The Pasco Property Appraiser argued that in cases of overlapping sovereignty, the entity acting outside of its territory must be treated as a private entity. In contrast, Pinellas County argued that, as a political subdivision of the state of Florida, it was afforded "inherent sovereign immunity" from taxation.

While the court agreed that the counties were political subdivisions of the state of Florida and their ad valorem taxing authority must yield to the immunity of the state, they disagreed that one county's taxing authority must yield to another's. Therefore, the court held that the Pinellas County's ranch property was not immune from taxation by Pasco County.

School district lacked standing to intervene in a condominium owners association's challenge against the property appraiser and tax collector regarding their exemption from ad valorem taxation.

School District of Escambia County v. Santa Rosa Dunes Owners Association, Inc., No. 1D18-91, (Fla 1st DCA 2019)

The Santa Rosa Dunes Owners Association challenged an ad valorem tax assessment of property underlying the Association's condominium development on the basis that it was exempt under Fla. Stat. § 196.199(2)(b) (2019). Arguing that the statutory exemption of Fla. Stat. § 196.199(2)(b) (2019) was unconstitutional, the School District of Escambia County moved to intervene in the suit. The condominium association challenged the school district's standing to intervene on the basis that the public official standing doctrine prohibited the school district from bringing such a constitutional challenge. The trial court agreed with the condominium association that the school district lacked standing to challenge the constitutionality of the statutory exemption, leading to an appeal in the First District Court of Appeals.

The District argued that the public official standing doctrine had a narrow application only for scenarios in which the challenged statute is the one the public officials are "charged with administering." However, the court found the public official standing doctrine to broadly prohibit ministerial officers from challenging legislative enactments. Furthermore, the statute challenged by the school district did, in fact, affect

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the official duties of the District. Finally, because the districts alleged injuries failed to fall within the narrow exception to the public official standing doctrine, the trial court's order granting summary judgment for the condominium association was affirmed.

Administrative finality doctrine does not preclude property appraiser from denying ad valorem tax exemption when (1) VAB previously ruled in favor of taxpayer on the same issue and (2) property appraiser failed to challenge the prior VAB determination.

Crapo v. Academy for Five Element Acupuncture, Inc., No. 1d17-1895, (Fla 1st DCA 2019)

The Academy for Five Element Acupuncture, Inc., was first denied their educational tax exemption on its property in 2008 when it relocated from Broward County to Alachua County. The Academy challenged the denial in front of the Alachua County VAB to resolve the dispute, which ultimately concluded that the Academy did qualify as an educational institution for tax purposes under Fla. Stat. § 196.012(5) (2019). Property Appraiser Crapo did not seek a de novo hearing in circuit court to challenge the VAB's granting of the exemption.

In 2014, Property Appraiser Crapo again denied the educational tax exemption on the basis that the Academy did not meet the definition of an educational institution. The Academy once again challenged the denial with the VAB, which again upheld the tax exemption as it had in the original 2008 case. Property Appraiser Crapo moved forward in this case, seeking a de novo hearing in circuit court to challenge the VAB's determination. In addition to arguing that the Academy qualified for the exemption, the Academy brought a secondary argument of administrative finality positing that the property appraiser could not now, in 2013, challenge the exemption when they failed to challenge the VAB determination on the same issue in 2008. The circuit court found in favor of the Academy regarding the exemption but rejected their administrative finality argument on the basis that each tax year stands on its own.

Reversing the circuit court's decision, the First District Court of Appeals agreed with the Academy's administrative finality argument. Specifically, the court found that Property Appraiser Crapo could not revisit or challenge the Academy's tax exemption any more after the VAB's 2008 decision. As a result, they did not reach the substantive issue of whether the nature of the Academy's business qualified for the educational tax exemption. Property Appraiser Crapo then filed a motion for rehearing en banc, which resulted in a reversal.

On rehearing, the court determined that the Academy's programs did not satisfy the Department's certification requirements under Fla. Stat. § 196.012(5) (2019) because they were issued a license by the Florida Commission for Independent Schools, an entity outside of those identified by the statute, and any ambiguities regarding tax exemptions are to be resolved in favor of the state. In addition, the court tackled the question of whether administrative finality attached to VAB decisions which are not subsequently litigated in circuit court. Deciding that a VAB decision does not have a preclusive effect, the court again held in favor of the property appraiser. Instead, the court found that to achieve preclusive finality of a tax ruling, a case must either go directly to circuit court in the first instance, or there must be a suit filed in circuit court for de novo review and disposition of an issue previously presented to the VAB. It is only then that the circuit court has a preclusive effect, and that is only if the case is not appealed.

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Real Property Case Summaries

Prepared by J. Christopher Barr, Bryant, Higby, & Barr, Panama City, Florida

The United States Supreme Court overrules *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172 (1985*), which required that parties must first sue in state court when seeking just compensation for a Fifth Amendment takings claim under 42 U.S.C. § 1983. A property owner may now bring a Fifth Amendment claim in federal court when the government takes or condemns property without just compensation, without first exhausting relief in state court.

Knick v. Township of Scott, 139 S. Ct. 2162 (2019)

The Township of Scott, Pennsylvania, passed an ordinance requiring that "[a]ll cemeteries . . . be kept open and accessible to the general public during daylight hours." Rose Mary Knick, whose 90-acre rural property includes a small family graveyard, was notified that she was violating the ordinance. Knick sought declaratory and injunctive relief in state court on the ground that the ordinance resulted in a taking of her property, but she did not bring an inverse condemnation action under state law seeking compensation. The Township responded by withdrawing the violation notice and staying enforcement of the ordinance. Without an ongoing enforcement action, the court held, Knick could not demonstrate the irreparable harm necessary for equitable relief, so it declined to rule on her request.

In response, Knick filed an action in Federal District Court under 42 U.S.C. § 1983, alleging that the ordinance violated the Takings Clause of the Fifth Amendment. The Federal District Court dismissed her claim under the United States Supreme Court's holding in *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172 (1985)*. The *Williamson County* decision held that property owners must seek just compensation under state law in state court before bringing a federal takings claim under 42 U.S.C. § 1983. On appeal, although the Third Circuit noted that the subject ordinance was "extraordinary and constitutionally suspect," it ultimately affirmed the District Court in light of the Supreme Court's *Williamson County* decision. The United States Supreme Court granted certiorari to reconsider the holding of *Williamson County*.

The Supreme Court held that a government violates the Takings Clause when it takes property without compensation, and a property owner may bring a Fifth Amendment claim under 42 U.S.C. § 1983 at that time. The Supreme Court recognized that in *Williamson County,* a property developer's federal takings claim was deemed "premature" because the developer had not sought compensation through the State's inverse condemnation procedure. The Supreme Court found that the unanticipated consequence of the *Williamson County* ruling was that a takings plaintiff who complied with *Williamson County* and brought a compensation claim in state court would, on proceeding to federal court after the unsuccessful state claim, have its federal claim barred because the full faith and credit statute requires the federal court to give preclusive effect to the state court's prior decision. In light of this preclusion trap, in a 5-4 decision, the Supreme Court overruled the state-litigation requirement in *Williamson County.*

A party hired to inspect completed construction, including a licensed structural engineer, is not hired with regard to the pre-construction design, planning, or construction of a structure, and thus may not invoke the ten-year statute of repose under Fla. Stat. § 95.11(3) (2017). Said post-construction inspector may remain liable under a theory of negligence, under the Delayed Discovery Doctrine, until four (4) years after a plaintiff discovers the negligence.

Manney v. MBV Eng'g, Inc., 2019 Fla. App. LEXIS 7200, 2019 WL 2079379 (Fla. 5th DCA 2019)

Prior to purchasing a newly constructed house in November 2002, Manney hired MBV, a licensed structural engineer, to review construction drawings and inspect the house to determine whether there were any structural defects. MBV advised Manney that the structural integrity of the house was in excellent shape and there were no signs of structural distress. Thirteen (13) years after purchasing the house, and with the assistance of another licensed structural engineer, Manney discovered that the house had significant latent structural defects, including a design defect of the foundation.

Six months after receiving the structural engineer's report identifying the latent defects, Manney filed a negligence complaint naming several defendants, including MBV. As to MBV, Manney's complaint alleged that prior to purchasing the home, Manney hired MBV to provide her with professional engineering services, including reviewing the original construction drawings and by performing an on-site structural inspection of the home to determine whether the home was correctly designed and constructed. Manney further alleged that she purchased the home in reliance on MBV's assurance of the structural integrity of the house, and but for MBV's assurance, she would not have purchased the home. Finally,

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she alleged that MBV breached its duty to her by negligently performing its review and inspection of the house and by negligently advising her that the overall structural integrity of the house was in excellent shape with no signs of structural distress.

In response, MBV filed a motion for judgment on the pleadings, arguing that the claims raised by Manney against MBV were barred by the ten (10) year statute of repose contained in Fla. Stat. § 95.11(3)(c) (2017), which provides in pertinent part that "[a]n action founded on the design, planning, or construction of an improvement to real property . . . must be commenced within 10 years after the date of actual possession by the owner . . . ."[1] The trial court found that the work completed by MBV fell within the purview of Fla. Stat. § 95.11(3)(c) (2017) because "said work is related to the planning, design, and construction of the Plaintiff's structure"; therefore, the ten-year statute of repose precluded Manney's claim against MBV.

Florida's Fifth District Court of Appeal disagreed and reversed the trial court's dismissal. The court found that Fla. Stat. § 95.11(3)(c) (2017) is not applicable to Manney's claims against MBV. The court reasoned that the crux of Manney's complaint was that MBV negligently performed an inspection of a completed, albeit newly constructed, structure. As such, the court found that MBV did not design, plan, or construct an improvement to real property. While the inspection may have required the observation of completed "construction," the court held that this does not transform the claim into one founded on the "construction" of an improvement to real property, as that term is commonly understood. As a result, Florida's Fifth District Court of Appeal found that the plain language of Fla. Stat. § 95.11(3)(c) (2017) did not bar Manney's claim against MBV.

A trial court may not reserve jurisdiction to enter a potential future deficiency judgment against a borrower in a foreclosure final judgment when the borrower had not yet been personally served with process.

Avila v. HMC Assets, LLC, 2019 Fla. App. LEXIS 8450, 2019 WL 230585 (Fla. 5th DCA 2019)

HMC Assets, LLC ("HMC") brought an action to foreclose a mortgage against borrowers, Luis Avila and Cristine Rosenhaim (the "Avilas"). HMC attempted to effectuate personal service on the Avilas but could not locate them. Instead, HMC properly effectuated constructive service. The Avilas maintained their objection to personal jurisdiction throughout the proceedings. Ultimately, the trial court entered a final summary judgment of foreclosure in favor of HMC in which it reserved jurisdiction to enter further orders, including a deficiency judgment against the Avilas following the foreclosure sale.

On appeal, Florida's Fifth District Court of Appeal provided comment that such a reservation was not appropriate. As the trial court never acquired the necessary in personam jurisdiction to enter a personal money judgment or deficiency judgment against the Avilas, the reservation of jurisdiction to do so in the final summary judgment was error.

Endnotes

1 Fla. Stat. § 95.11 (2017).

Meet The Section's New Board Of Governors Liaison:

MICHAEL TANNER



John Stewart (former Section Liaison himself and current President of The Florida Bar) appointed Mike as the Board's 2019-2020 liaison to the Section. The liaison plays a vital role in acting as an intermediary between the Section and The Bar. The Liaison attends our meetings, reports to us on issues at the Board of Governors that are of interest to the Section, and, on occasion, is called upon to help navigate challenges the Section encounters within the Bar.

Mike has fully embraced his position. Even before he officially assumed his role, he attended the Section's March meeting at Amelia Island, the annual convention in Clearwater, and the meeting at The Breakers. He also volunteered to be part of the Section's Jail-N-Bail at our annual convention to raise money for The Florida Bar Foundation.

We hope you will take the opportunity to meet and get to know Mike!

Probate And Trust Case Summaries

Prepared by Denise B. Cazobon, Esq.
Dunwody, White & Landon, P.A., Naples, Florida

Order that simply ruled on the admission of a codicil to probate and did not make any rulings of fact or law as to the contents of the codicil, the legal positions of the parties, or the effect of the codicil on orders previously entered in the case was not appealable.

Maercks v. Maercks, 272 So. 3d 485, 2019 WL 1461493 (Fla. 3d DCA 2019)

The decedent executed a will, which was admitted to probate, and another document that addressed the distribution of her assets. The decedent's three children were the beneficiaries under the decedent's will. The appellee ("Appellee"), who was a child of the decedent and who was serving as sole personal representative, petitioned to have the second document admitted to probate as a codicil. The trial court granted the motion and admitted the document to probate as a codicil. The order at issue stated:

By entering this Order, the Court *does not* make any rulings of fact or law, as it applies to the content of the [Codicil] . . ., the legal positions of the parties, *or* the effect of the Codicil on the Order entered in this case. *Any such arguments will need to be further litigated by the parties.* The Court *simply rules on the admission* of the Codicil which was executed on November 16, 2013, to probate.

Another child of the decedent (the "Appellant") appealed the trial court's order, and the Appellee moved to dismiss for lack of jurisdiction.

Appellant argued that the Third District Court of Appeal (the "Appellate Court") had jurisdiction pursuant to Fla. R. App. P. 9.170(b)(2), (12) & (13), which provides a non-exclusive list of probate orders that are appealable. Fla. R. App. P. 9.170(b) provides that "appeals of orders rendered in probate and guardianship cases shall be limited to orders that finally determine a right or obligation of an interested person as defined in the Florida Probate Code."

The Appellate Court granted the motion to dismiss, finding that the order at issue did not finally determine a right or obligation of an interested person. The Appellate Court noted that the order expressly stated that the trial court simply ruled on the admission of the codicil and did not make any rulings of fact or law as to the contents of the codicil, the legal positions of the parties or other orders entered in the case. Further, the order at issue expressly contemplates further litigation by the parties. Therefore, the order did not terminate judicial labor or provide finality with respect to any issue or party in the case.

Trial court erred in transferring venue of a consolidated trust dispute to another county where insufficient evidence was presented to show that such change was necessary for the convenience of the parties or the interest of justice and where the trial court failed to consider whether the disputes could have initially been filed in the proposed venue.

Cohen v. Scarnato, 270 So. 3d 410 (Fla. 4th DCA 2019)

In 1992, the settlor of the trust at issue executed a will and revocable trust in Broward County. The settlor initially appointed herself as trustee of her revocable trust. The beneficiaries of the settlor's revocable trust were her son, daughter and granddaughter. After the settlor resigned as trustee of her revocable trust, her daughter and granddaughter ("Appellants") became successor trustees. The settlor subsequently amended her revocable trust to remove Appellants as trustees and beneficiaries. Appellants filed a complaint in Broward County seeking a declaratory action that the settlor lacked capacity to amend the trust. The settlor filed a separate complaint against Appellants alleging mismanagement of the settlor's revocable trust. The two complaints were consolidated.

The settlor moved to Flagler County, where she executed a new will and revocable trust that expressly revoked the 1992 trust. The settlor subsequently died. The settlor's son ("Appellee") filed a petition for administration in Flagler County, and Appellants objected to such petition and filed the 1992 will in Broward County. Appellee moved to transfer the disputes relating to the 1992 trust from Broward County to Flagler County. The trial court granted Appellee's motion, finding that the cases should be transferred in the interest of justice and judicial economy because Flagler County was the only proper venue for the administration of the settlor's estate.

The Fourth District Court of Appeal (the "Appellate Court") reversed the trial court's order transferring the venue from Broward County to Flagler County. Fla. Stat. § 47.122 (2018) provides that "[f]or the convenience of the parties or witnesses or in the interest of justice, any court of record may transfer any civil action to any other court of record in which it might have been brought." The Appellate Court held that the trial court

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erred in transferring the disputes to Flagler County because there was insufficient evidence presented to show that the change of venue was necessary for the convenience of the parties or witnesses or in the interest of justice. The Appellate Court stated that any potential injustice could be avoided by abating the trust disputes until the will contest is resolved. The Appellate Court also found that the trial court erred by not considering whether the trust disputes could have initially been filed in Flagler County.

Trial court departed from essential elements of the law in sua sponte setting aside an order of summary administration more than a year after the order was entered and without notification to the heirs.

In re Estate of Bunda, 268 So. 3d 255 (Fla. 1st DCA 2019)

In 2013, an insurance check in the amount of $273,100 was delivered to the Division of Unclaimed Property within the Department of Financial Services ("DFS"). The check was made payable to the estate of Larry Bunda (the "decedent") and HomeQ Servicing Corporation ("HomeQ"), as loss payee on the decedent's home insurance policy. HomeQ subsequently transferred its rights to Ocwen Loan Servicing ("Ocwen").

In 2016, the decedent's three children filed a petition for summary administration requesting an order distributing one-half of the insurance proceeds to the decedent's three children. The trial court issued an order of summary administration authorizing the distribution. A claim for one-half of the insurance proceeds was filed with DFS on behalf of the decedent's children. Ocwen filed a competing claim for the proceeds.

In August 2017, DFS issued a Notice of Intent stating it was going to enter an order approving Ocwen's claim to the proceeds and notified the trial court of DFS's decision, expressing concern over the conflict between the order of summary administration and the DFS decision. In November 2017, the trial court issued an order setting aside the order for summary administration. One of the decedent's children (the "Petitioner") filed a petition for writ of certiorari with the First District Court of Appeal (the "Appellate Court"). The Appellate Court granted the petition and quashed the trial court's order setting aside the order for summary administration.

The Petitioner argued that without the order for summary administration, the decedent's heirs lose their inheritance because any individual claiming an entitlement to a decedent's unclaimed property must submit to DFS a certified copy of a probate court order identifying the beneficiaries and the proportional entitlement of each to the estate. Petitioner further argued that the trial court departed from essential requirements of law when it vacated the order for summary administration without legal basis and without adequate notice to be heard.

The Appellate Court agreed, finding that by vacating *sua sponte* the order for summary administration, the trial court took away the ability of the decedent's heirs to make a claim for the proceeds, causing irreparable harm. The Appellate Court then analyzed Fla. R. Civ. Pro. 1.540, which allows a trial court to grant relief from final orders under certain circumstances. The Appellate Court found that Fla. R. Civ. Pro. 1.540(a) did not apply because it only permits a trial court to *sua sponte* set aside a final order in cases of clerical mistake, which was not present in the case at issue. Further, Fla. R. Civ. Pro. 1.540(b) did not apply because that rule requires that the trial court act on a motion from a party. Further, in most cases, Fla. R. Civ. Pro. 1.540(b) limits the trial court's ability to set aside a final order to no more than a year after the final order had been entered. More than a year had passed since the order of summary administration was entered. The Appellate Court also stated that the requirement that a final order can only be vacated on the motion of a party gives other parties notice and the opportunity to be heard, a right of which the decedent's heirs were deprived. The Appellate Court found this constituted a departure from the essential elements of the law.

Party awarded attorney's fees under Fla. Stat. § 736.1004 may not recover fees for hours spent litigating an unsuccessful motion for fees under Fla. Stat. § 57.105.

Levine v. Stimmel, 272 So. 3d 847 2019 WL 2147611 (Fla. 5th DCA 2019)

Scott Levine ("Appellant") filed a complaint against his sister ("Appellee") claiming undue influence, tortious interference with an expectancy and breach of fiduciary duty and seeking a removal of trustee, an accounting and the appointment of a special fiduciary. The trial court entered final judgment in favor of the Appellee, who subsequently moved for attorney's fees and costs pursuant to Fla. Stat. § 736.1004(1)(a) (2017) on the grounds that the Appellant's claims revolved around Appellee's alleged breaches of fiduciary duty. Appellee separately moved for attorney's fees and costs pursuant to Fla. Stat. § 57.105 (2017), claiming that she should be entitled to such fees because the Appellant chose to prosecute baseless claims.

The trial court denied Appellee's motion for attorney's fees and costs pursuant to Fla. Stat. § 57.105 (2017), but granted Appellee's motion pursuant to Fla. Stat. § 736.1004 (2017). Appellee included in her request for fees pursuant to Fla. Stat. § 736.1004 (2017) time spent litigating her unsuccessful claim for attorney's fees under Fla. Stat. § 57.105 (2017). The trial court reduced the amount for attorney's fees requested by Appellee by $20,000 but did not include its rationale for such reduction in its order.

Appellant appealed to the Fifth District Court of Appeal (the "Appellate Court"), which reversed the trial court's order

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in part and remanded the case back to the trial court. The Appellate Court stated that the Appellee had the burden of demonstrating what portion of her attorney's efforts were expended on claims for which Fla. Stat. § 736.1004 (2017) authorized attorney's fees. The Appellate Court further stated that attorney's fees for time spent litigating an alternative and unsuccessful ground for fees were not expressly authorized under Fla. Stat. § 736.1004 (2017). Thus, Appellee cannot recover for time spent litigating under Fla. Stat. § 57.105 (2017). The Appellate Court directed the trial court remove the time spent litigating the unsuccessful Fla. Stat. § 57.105 (2017) motion in its award or, if the trial court already reduced the amount of the award for such time spent, then it should make it clear in its subsequent order.

Discretionary distributions made by the trustee of a special needs trust are subject to a continuing writ of garnishment for ongoing child support obligations of the beneficiary.

Alexander v. Harris, No. 2D17-3218 2019 WL 2147281 (Fla. 2d DCA 2019)

The appellee ("Appellee") in this case is the sole beneficiary of a special needs trust established pursuant to 42 U.S.C. § 1396p with settlement funds from an action brought on Appellee's behalf. The special needs trust is a spendthrift trust that contains numerous restrictions on how distributed funds can be used. Appellee does not exercise any control over the trust, cannot compel the trustee to make disbursements, and does not personally receive any disbursements from the trust. Disbursements are made directly to third parties for the sole benefit of Appellee.

The appellant ("Appellant") obtained a valid child support order against Appellee in May 2009. As of May 2017, the total arrearage for child support was $91,780.28. The special needs trust receives monthly income of $3,035.59 throughout Appellee's lifetime, and his monthly expenses average $2,478. The value of the special needs trust as of December 2016 was $141,997.27.

Appellant filed a motion for contempt for failure to pay child support in September 2009, which motion was granted in January 2010. Appellant subsequently filed motions for civil contempt and enforcement in 2010 and 2016. The trial court denied the 2016 motion for contempt and enforcement, determining that Appellee had no ability to pay the arrearage or his ongoing support obligations. The Second District Court of Appeal (the "Appellate Court") reversed the trial court's decision. The Appellate Court held that the special needs trust does not protect Appellee from his legal obligation to support his child and that a continuing writ of garnishment is appropriate in the case at issue.

On appeal, Appellant argued that, pursuant to Fla. Stat. § 736.0503 (2016), spendthrift provisions are unenforceable against a valid child support order and that discretionary disbursements are not protected from continuing garnishment for support payment. The Appellate Court agreed, citing to Fla. Stat. § 736.0503(2) (2016) (which provides that "a spendthrift provision is unenforceable against…[a] beneficiary's child… who has a judgment or court order against the beneficiary for support or maintenance") and prior decisions of the Florida Supreme Court in *Bacardi v. White*, 463 So. 2d 218 (Fla. 1985) and the Appellate Court in *Berlinger v. Casselberry*, 133 So. 3d 961 (Fla. 2d DCA 2013).

In determining that a continuing writ of garnishment was appropriate in this case, the Appellate Court considered that the Appellant had exhausted the traditional methods of enforcing a valid child support order and that the Appellee's only available income for payment of his support obligation is the trust. The Appellate Court also considered the equities between the two parties and the competing public policies relating to enforceability of spendthrift provisions and payment of support. Citing to its decision in *Berlinger*, the Appellate Court stated that where the two public policies conflict, the Appellate Court has held that Florida's public policy favoring enforcement of support orders takes precedence.

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For more information contact the Chair of the Sponsorship Committee

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What's Happening Within The Section...

As one of the largest sections of The Florida Bar, the RPPTL Section provides numerous opportunities to meet and network with other attorneys who practice in real property and probate & trust areas of the law, whether through getting involved in one of the various RPPTL Section committees or attending a RPPTL Section sponsored CLE course. Members have access to a wealth of information on the RPPTL Section website, including up-to-date news and articles regarding case law and legislative changes, publications such as ActionLine, upcoming RPPTL Section sponsored CLE courses (see page 46), and a whole host of relevant links to other Real Property, Probate & Trust Law websites.

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

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NOVEMBER 6-10, 2019
JW Marriott Marquis Miami - Florida
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SEE PAGE 57-58

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