

ActionLine

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

Point-Counterpoint: Waiver Of Spousal Devise Restrictions Under New Fla. Stat. § 732.7025

How Much Is A Guaranty Worth: A Fresh Perspective

Solidifying Liquidated Damages With Specific Performance

A Tribute To Andrew M. O'Malley

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Success Requires Planning; It Does Not Just Happen.

"Someone's sitting in the shade today because someone planted a tree a long time ago."

—Warren Buffett



Chair's Column

By Debra Lynn Boje
Section Chair, 2018-2019

The Real Property, Probate and Trust Law Section ("RPPTL Section") has planted many trees throughout the years. Those trees take root in the RPPTL Section's strategic plan which has grown as the result of the time and toil of many volunteers, hopefully including you.

In its simplest terms, a strategic plan helps an organization focus on its mission and provides a road map for achieving its objectives. The purposes of the RPPTL Section as stated in its by-laws are as follows:

(a) to provide an organization within The Florida Bar open to persons having an interest in real property (including construction), probate, trust, or related fields of law, that furthers the knowledge and practices of members in those areas;

(b) to inculcate in its members, the principles of duty and service to the public; and

(c) to serve the public and its members by improving the administration of justice and advancing jurisprudence in the fields of real property (including construction), probate, trust, and related fields of law, through all appropriate means, including the development and implementation of legislative, administrative, and judicial positions; continuing legal education programs; standards for ethical and competent practice by lawyers; and professional relationships between real property (including construction), probate, and trust lawyers, and other lawyer and nonlawyer groups.

If done correctly, a strategic plan is an on-going process. As times change, the plan must change and be updated to remain relevant. This century is seeing systemic changes more frequently than the last; thus, the officers of the RPPTL Section review the RPPTL Section's Strategic Plan every year. Every five years a Strategic Planning Review Committee is formed to undertake an in-depth, bottom-up review and then update the plan. This year is the time for the plan's five-year review.

As Chair, I along with Robert Freedman, Chair-Elect, serve as Co-Chairs of the Strategic Planning Committee. Our first task was to appoint the three immediate past chairs of the RPPTL Section, Andrew O'Malley, Deborah Packer Goodall and Michael J. Gelfand to serve as the Co-Chairs of the Substantive Strategic Planning Sub-Committee. Our second task was to appoint Sancha Brennan Whynot and Salome J. Zikakis as Co-Chairs of the Logistics Sub-Committee.

The Co-Chairs swiftly focused on areas of change and innovation. They recruited members, especially drawing on newer RPPTL Section members, to create six working groups to evaluate and set goals for:

- Membership/Communications/Inclusion/Technology
- Structure/Administration/Orgnaization/Leadership/Succession/ByLaws
- Legislation
- Meeting Planning/Facilities/Logistics
- Financial/Budgeting
- Committees

Continuing Legal Education has been part of an independent evaluation, seeking to incorporate information from The Florida Bar planning, including how to best provide you updated information to assist your practices.

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"The Four Seasons – Orlando"
By Michael Gelfand

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

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

VOLUME NO.	ISSUE	DEADLINE
1	Fall	July 15
2	Winter	October 15
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

How do you like the full color Spring edition of ActionLine? Thank you to all our advertisers!

In this issue, we are pleased to share a special "point-counter point" feature. We have two articles exploring the new statute on homestead waivers by deed, Fla. Stat. § 732.7025 (2018). As you will see on page 19, Joe Tschida examines the statute with an underwriter's perspective. For title purposes, waivers of the devise restrictions in deeds may simplify post-death closings and avoid potential pitfalls in real property sales during both probate and trust administrations. Tschida explains the statute and its utility in this respect. Next, on page 22, Angela Santos and Jeff Baskies add an estate planning perspective and urge practitioners to proceed with caution. Once the waiver is made, unless it is coupled with a binding postnuptial agreement, the non-waiving spouse could change her or his estate plan and totally frustrate the intent of the waiving party. Thus, the new statute might prove to be a malpractice trap for the unwary, as the planner/drafter of the deed may be sued by the waiving spouse for not insisting on a post-nuptial agreement to protect the waiving spouse's rights. There are also potential ethical issues where both spouses are represented by one lawyer who prepares such a potentially powerful waiver in a deed without directing the clients to separate counsel. The editors hope you will enjoy learning about the new statute from these two perspectives.

Also, the editors are pleased to encourage similar "point-counter point" articles in the future. Although they have been relatively infrequent, ActionLine has previously featured multiple articles offering differing points of view on statues and cases in the past. This approach may offer readers greater insights into developing law.

Next, please take a moment to review the feature article on RPPTL Section Immediate Past-Chair, Drew O'Malley.

As well, the editors would love to hear from more of you with stories and photos like this edition's Section Spotlight, The Bar Chili Cookoff (and last edition's - Broward County Law Day). All of the RPPTL members will enjoy sharing in the grassroots work done in our communities, so please send stories and photos to us.

We hope you enjoy your full color Spring edition of *ActionLine*.

Hopefully you will enjoy this new format. Also, please be sure to support and thank the advertisers who are feature in this edition of *Actionline*. Their support is vital for the RPPTL Section.

The Editors







Thirty-seven members of the Executive Council were selected to serve on the various working groups.[1] Since August, the working groups have been hard at work reviewing their assigned tasks.

In January, a survey was sent out to all RPPTL Section members. I hope each of you took the time to complete the survey. Your answers will be used to craft the new Strategic Plan.

On February 8-9, 2019, all 37 members of the Strategic Planning Committee met in Tampa to review the results of the RPPTL Section survey, report their group's preliminary findings, confer and discuss recommended changes, and then vote whether to recommend a new Strategic Plan.

Over the following months, those recommendations will be incorporated and finalized into an updated Strategic Plan. We hope to have the proposed revised Plan ready for approval by the Executive Council at the RPPTL Section's annual convention.

Have you planned to attend the RPPTL Section's annual convention? If not, then block your calendar and make plans to attend May 30 – June 2, 2019 at the Opal Sands on Clearwater Beach. Wait no longer.

The convention committee, chaired by Linda Griffin, and supported by Vice-Chairs, Tae Bronner and Angela Adams, has been planning the convention for almost a year. Committee meetings will be held all day on Thursday. Thursday evening there will be a special event at the Clearwater Marine Aquarium, followed by a reception on the roof top of the Marina Cantina.

As has become the custom, on Friday there will be a CLE seminar in addition to committee meetings, and the Section's annual meeting and elections. Friday night will be the Section awards dinner followed by a special night of fun and entertainment. Saturday will be the Executive Council meeting. Special events are also planned for guests throughout the meeting, and Saturday will be full of family fun.

Especially for members who have not attended a convention, ask those who do attend. They will explain that committee meetings pack more valuable information than can be imagined, usually new developments that will make a big difference to many files on your desk. As an extra bonus, you will be introduced to attorneys who are the leaders in their practice areas and who love what they do. Their perspective rubs off and will give you a positive charge to bring back to your practices.

More detailed information about the convention and registration information will be available on the Section website in late March or early April.

In closing, as you sit back in the shade reading this edition of ActionLine, just as past generations of RPPTL members did, I encourage you to help "plant a tree" for you and those who will follow you.

Endnotes

1 Our thanks to each member accepting a significant role: William Sklar, Sarah S. Butters, S. Katherine Frazier, William T. Hennessey, III, Peggy Ann Rolando, Jon Scuderi, Tae Kelley Bronner, Robert S. Freedman, Vinette Godelia, George Meyer, Andrew M. O'Malley, Linda Griffin, Steven H. Mezer, John C. Moran, Robert S. Swaine, W. Cary Wright, Pamela Price, Adele Stone, Angela Adams, Tami Conetta, Manuel Farach, Lee Weintraub, Michael Bedke, Jeffrey Baskies, Brenda B. Ezell, Travis Hayes, Robert Lancaster, Lawrence Jay Miller, Neil Shoter, Tattiana Brenes-Stahl, Nicklaus Curley, Debra L. Boje, Burt Bruton, Sandra F. Diamond, Michael J. Gelfand, Brian Hoffman and Melissa Murphy.

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A Tribute To Andrew M. O'Malley

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



Andrew (Drew) O'Malley is the immediate past Chair of the Real Property, Probate and Trust Law Section Executive Council. Drew is a partner in the Tampa firm of Carey, O'Malley, Whitaker, Mueller, Roberts & Smith P.A. Drew has been a member of the Florida Bar since November 1978 after he graduated from Duke University School of Law. Having seen the light, Drew came directly to Florida after his graduation and has been here ever since.

Drew was first recruited to join the Executive Council by Jay Zschau from Clearwater who also served as the Chair in 2005-2006. Then, a little over ten (10) years ago, Drew was recruited to serve on the Executive Committee of the Executive Council starting with the position of Director of the Circuit Representatives. It was during Drew's tenure as Director of the Circuit Representatives that the Bylaws for the Executive Council were amended, changing that position into the Director of the At-Large-Members ("ALMs").

After serving as the first Director of the ALMS, Drew worked his way up the Executive Committee ladder, finally finding himself as the Chair in June 2017. One would think with all that time spent working through the other positions on the Executive Committee, one would be prepared to serve as the Chair, but Drew reports that no one can really anticipate the demands of the Chair position until one gets there. Drew reports that the Chair deals with so many varied issues that require input from and coordination with other executive council members, often under intense time pressure. There is all of the routine "stuff," like ordering the right number of cookies for the next Executive Council meeting, but then there are the emergencies that pop up at the last minute such as responding to legislation introduced in the final few weeks of the legislative session. Quoting his predecessor, Deborah Goodall, Drew comments that serving as the Chair of the Executive Council of RPPTL and organizing its meetings is like planning five destination weddings in one year!

Drew reports that he is pleased he was able to accomplish two important goals during his tenure in addition to getting all the "wedding" planning done. The first was building on the success of the No Place Like Home project that had been started by Deborah Goodall. The No Place Like Home project, designed to provide pro bono assistance to low income residential property owners seeking to obtain clear title to their homes, had been a pilot program in four circuits and under Drew's leadership, was expanded to be statewide. Having this program in place proved to be fortuitous when our state was struck with the unfortunate events associated with Hurricanes Michael and Irma, as demonstrating ownership of damaged residences was a prerequisite to obtaining disaster relief loans and grants.

Drew's second goal was to obtain additional assistance for Mary Ann Obos, our exceptionally capable, but also overburdened, Program Administrator. This goal, due to the assistance of new Bar Executive Director Josh Doyle who was incredibly supportive, was met with great success by the addition of Hilary Stephens.

Drew recounts that the biggest challenges that face the Chair arise from the last-minute unforeseen problems that suddenly crop up and require immediate attention. But when such problems do come up, the support and assistance from other Executive Committee and Executive Council members is something on which the Chair can always count. Drew reports that the very best part of serving as the Chair is the extraordinary and incredibly talented group of people with whom the Chair gets to work. Indeed, Drew reports that these people have all become very close, personal friends.

When asked to provide words of wisdom to future Chairs, Drew counseled to rely on the folks around the Chair and to delegate whenever possible. As Drew phrased it, the Executive Committee is "the wind beneath your wings." These are folks who all very much understand the goal of working for the best interest of the citizens of Florida. Drew also expressed great praise for all the members of the RPPTL committees and Executive Council members for the many, many hours that these talented attorneys contributed during his year-long tenure.

It is Drew's sincere hope that everyone had fun during his term, and he expresses a special appreciation to his wife Dianne who is responsible for many of the party themes, menu selections and special events. This author can testify to the fun experienced in St. Augustine, especially at the "Pirate Invasion."

Drew continues on the Executive Committee as the immediate past Chair, and has passed the baton on to the current Chair, Debra Boje. This Section owes Drew an immense debt of gratitude for the time, energy and leadership he has provided. Welcome to the back row, Drew!

Solidifying Liquidated Damages With Specific Performance

By Matthew Meyer, Esq., Ansa Assuncao LLP, Tampa, Florida

Over the years, Florida courts have considered and approved contractual liquidated damages in the context of property development or construction cases. Typically, these types of cases are fact intensive and largely dependent upon the specific contractual provisions at issue as well as the respective court's opinion as to the reasonableness of the amount of liquidated damages sought. Also, Florida courts have considered and enforced the equitable remedy of specific performance in the context of such cases involving repurchase rights. For instance, in 2005 the First District Court of Appeal clarified that a fixed price purchase option of limited duration in a land sale contract is enforceable. *See Sandpiper Development and Construction, Inc. v. Rosemary Beach Land Company*, 907 So. 2d 684 (Fla. 1st DCA 2005).[1]

For the first time (that we know of), a Florida court has considered and approved contractual liquidated damages *and* the equitable remedy of specific performance based on the breach of a purchase agreement and a related Declaration of Covenants for failing and refusing to build or meet a deadline. On August 1, 2018, the Northern District Court of Florida entered an Order [Dkt. 231] on summary judgment in the case styled *EBSCO Gulf Coast Development, Inc. v. Camillo K. Salas, III, et al.*, Case No. 3:15-cv-586/MCR/EMT, providing a well-reasoned and thoughtful discussion regarding the enforcement of liquidated damages and specific performance.

Forming the Mold

In *EBSCO*, a developer claimed that the lot owner breached the purchase agreement and other related governing documents by failing to begin construction of a home on an empty lot within the agreed contractual time period, thus entitling the developer to sue for liquidated damages and seek specific performance to repurchase the lot. The liquidated damages provision at issue in *EBSCO* required the lot owner to pay approximately 0.0274% of the original sale price (or approximately $370) for each day it failed to build past the construction completion deadline.[2] The lot owner could have stopped the accrual of liquidated damages by simply commencing construction at any time.

In the context of real estate deposit forfeiture cases, this amount of liquidated damages would be enforceable as a matter of law.[3] Accordingly, any contention that it is the cumulative total of the liquidated damages, and not the per diem rate, that should be the focus of the analysis was unpersuasive. The only reason additional damages continued to accrue, and the only reason why the cumulative total of the liquidated damages grew to more than $530,000 in the *EBSCO* case, is because the lot owner continued to breach the deadline for 6 years. The lot owner cannot gain an advantage from its own decision to continue breaching its contract in an effort to drive up the cumulative damages to such an amount that the court might eventually deem them unreasonable.[4]

Solidifying the Mold

In *EBSCO*, the court recognized that, under Florida law, "[i]t is well settled that … the parties to a contract may stipulate in advance to an amount to be paid or retained as liquidated damages in the event of a breach."[5] A liquidated damages provision in a contract is enforceable so long as (1) damages as a result of the breach were not readily ascertainable at the time of the contract and (2) the sum stipulated is not grossly disproportionate to any damages that might reasonably be expected to flow from the breach, otherwise it is a penalty and unenforceable.[6] The court also recognized that Florida courts enforce liquidated damages clauses pertaining to delays in construction.[7]

Applying Florida law, the *EBSCO* court found that the liquidated damages provisions in the purchase agreement did not constitute a penalty and, thus, were enforceable. The court determined that damages were not readily ascertainable at the time the parties entered into the contract, because the contract was entered into in 2009, and the parties could not predict what the real estate market in the development would look like in future years.[8] Also, the court reasoned that:

(1) the liquidated damages were not grossly disproportionate to any damages that might reasonably be expected to flow from the breach;

(2) the purchase agreement specified liquidated damages in the amount of approximately 1% (.83-percent) of the purchase price per month, or approximately $11,205, for each month the lot owner was in breach of the construction deadline;

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(3) the parties in this case negotiated for the purchase and sale of a lot in a luxury community;

(4) both sides were clearly sophisticated and were represented by counsel; and

(5) the lot remained untouched for almost six years while the developer sold properties to other owners who have complied with the construction deadlines, and thus, the lot owner could not take advantage of his own wrongdoing to avoid responsibility.

The *EBSCO* court further found that the developer was not precluded from seeking both liquidated damages and equitable relief: "Although the right to repurchase and the liquidated damages flow from the same act, i.e. failing to comply with the construction commencement deadlines, they remedy separate and distinct harms."[9] The liquidated damages provisions remedy the damage caused to the developer because residential lots within the development are more valuable and marketable when they are surrounded by fully constructed homes rather than vacant lots or ongoing construction projects.[10] Accordingly, the court reasoned that the developer's right to repurchase seeks to ensure that the lot does not remain with the lot owner, who has made no effort to commence construction, and is instead re-sold to a buyer who will comply with the construction deadlines. Additionally, case law supports the court's conclusion that the liquidated damages provisions may be enforced in conjunction with the developer's right to repurchase the lot.[11]

Casting the Mold

The governing contractual documents must contain a clear and concise liquidated damages provision. In order to increase the likelihood that the liquidated damages clause will be enforced, drafting attorneys should note the following general guidelines: (1) the liquidated damages should not be grossly disproportionate to the actual damages that might reasonably be expected to flow from the breach, and (2) the liquidated damages must be related to the anticipated harm incurred by the particular breach, so the liquidated damages will more likely be construed as enforceable damages instead of an unenforceable penalty.[12] It is important not to be greedy when attempting to estimate an appropriate amount of liquidated damages. In the context of real estate sales contracts, liquidated damages provisions requiring the forfeiture of deposit amounts in the range of 10-20% of the total contract price have been enforced by Florida courts.[13] In the context of construction or similar delay claims, Florida courts have enforced liquidated damages of various amounts, from hundreds of dollars to thousands of dollars per day, although such cases are specific to their facts and the size of the projects involved.[14]

Also, the author suggests that the liquidated damages clause include express acknowledgements by the parties that if a specific breach occurs (such as failing to meet a deadline):

(1) it is difficult to ascertain the specific amount of actual damages that may result from the breach of the deadline;

(2) liquidated damages are appropriate;

(3) the amount of liquidated damages specified by the contract are reasonably calculated to reimburse the non-breaching party for its damages related to the particular breach;

(4) the damages are not a penalty; and

(5) the non-breaching party may also pursue equitable actions that are consistent with enforcing the liquidated damages, such as foreclosing on a claim of lien for liquidated damages; or (as in the *EBSCO* case) bringing an equitable action for specific performance to enforce a right to repurchase the property.

Real estate transactional attorneys should take care in forming their client's liquidated damages and specific performance provisions. The strength of your liquidated damages and specific performance provisions will be directly proportional to the strength of your client's future claim for an award or enforcement of the same. You know the old saying, "measure twice, cut once?" In this instance, "draft twice, execute once."


M. MEYER

Matthew J. Meyer, Esq. *is one of the founding partners of Ansa Assuncao, LLP. His litigation practice focuses on business, employment, construction, real estate, and franchise disputes. He handles litigation matters throughout Florida's state and federal courts, as well as other jurisdictions. His experience includes the representation of Fortune 100 companies, mid-sized and small businesses, and entrepreneurs. Originally from Wisconsin, Matt moved to Florida in 1997 after completing a clerkship with United States Senator Connie Mack in Washington, D.C. and graduating from law school. He resides in Tampa with his wife, son, and daughter.*

Endnotes

1 In *Sandpiper*, the Court opined, "[t]he purpose of the option here is legitimate, the duration is of a reasonably short period, and the price alone does not invalidate the overarching legitimate rationale to control the pace of development of the community." *Sandpiper* at 687.

2 *See, e.g., Hutchinson v. Tompkins*, 259 So. 2d 129, 132 (Fla. 1972) (explaining that liquidated damages provisions are particularly well suited for real estate contracts because "[t]he land sale market in Florida fluctuates from year to year and season to season").

3 *See, e.g., Hot Developers, Inc. v. Willow Lake Estates, Inc.*, 950 So. 2d 537, 541 (Fla. 4th DCA 2007) (enforcing deposit forfeiture of $550,000, which constituted 9.65% of the total contract price); *Dade Nat'l Development Corp. v. Southeast Investments of Palm Beach County, Inc.,* 471 So. 2d 113, 116-17 (Fla. 4th DCA 1985) (enforcing deposit forfeiture of 11.82% of the contract price); *Bloom v. Chandler*, 530 So. 2d 341 (Fla. 4th DCA 1988) (enforcing deposit forfeiture of 22% of the contract price); *Hooper v. Breneman*, 417 So. 2d 315, 317 (Fla. 5th

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DCA 1982) (enforcing forfeiture of 13.3% of the contract price); *Johnson v. Wortzel*, 517 So. 2d 42, 43 (Fla. 3d DCA 1987) (enforcing forfeiture of 18.2% of the contract price); *Beatty v. Flannery*, 49 So. 2d 81, 82 (Fla. 1950) (enforcing deposit forfeiture of 10% of contract price).

4 *See Waters v. Key Colony East, Inc.*, 345 So. 2d 367, 368 (Fla. 3d DCA 1977) ("A party to a contract cannot take advantage of his own wrongdoing to avoid responsibility thereunder").

5 Order [Dkt. 231], page 29 of 47, citing *Lefemine v. Baron*, 573 So. 2d 326, 328 (Fla. 1991).

6 Order [Dkt. 231], page 29 of 47, *citing Secrist v. Nat'l Serv. Indus.*, 395 So. 2d 1280, 1282 (Fla. 2d DCA 1981) (if the liquidated damages provision calls for an amount that is excessive or unreasonable; i.e. a penalty, the provision is unenforceable).

7 Order [Dkt. 231], page 30-31 of 47, citing *Osceola Cty. v. Bumble Bee Const., Inc.*, 479 So. 2d 310, 311 (Fla. 5th DCA 1985) (where contract provided liquidated damages in the amount of $250 for each day past the deadline for construction completion, court found (1) such damages were appropriate because Osceola County lost revenue due to its inability to attract tourists even though the exact monetary loss could not be ascertained at the time the contract was entered into and (2) such damages were not excessive under the circumstances); *see also Gables v. Choate*, 792 So. 2d 520, 521 (Fla. 3d DCA 2001). (Purchaser of a $700,000 condominium brought an action against the developer to enforce a liquidated damages clause incorporated in a closing agreement for failing to complete the condominium by May 1, 1996. Trial court awarded plaintiff $126,654.68 for the construction delays. Florida's Third District Court of Appeal found the liquidated damages clause enforceable on the grounds that (1) the parties in this case negotiated for the purchase and sale of a luxury residence, (2) both sides were sophisticated and represented by counsel, and (3) damages could not be determined at time of closing).

8 Order [Dkt. 231], page 34 of 47, citing *Hutchison v. Tompkins*, 259 So. 2d at 132 ("The land sale market in Florida fluctuates from year to year and season to season, and it is generally impossible to say at the time a contract for sale is drawn what vendor's loss (if any) will be should the contract be breached….").

9 Order [Dkt. 231], page 36 of 47.

10 Order [Dkt. 231], page 36-37 of 47.

11 Order [Dkt. 231], page 37-38 of 47, citing *Mineo v. Lakeside Village of Davie, LLC*, 983 So. 2d 20 (Fla. 4th DCA 2008). Florida's Fourth District Court of Appeal upheld a liquidated damages provision in a contract for the sale of real property, which entitled the seller to seek specific performance of the contract for the original purchase price plus an interest rate of up to eighteen percent per year to compensate the Seller for its delay damages.

12 *See Hyman v. Cohen*, 73 So. 2d 393, 398-401 (Fla. 1954) (holding that liquidated damages provisions are enforceable where the damages that would result from a breach were not ascertainable at the time of contracting and the sum stipulated to flow from each breach is not grossly disproportionate to any damages that might reasonably be expected to flow from the breach); *Bill Heard Leasing, Inc. v. Rocco Enterprises, Inc.*, 334 So. 2d 296, 297 (Fla. 2d DCA 1976) (reversing trial court's failure to enforce liquidated damages clause and explaining that "[i]n general, so long as a liquidated damages clause is reasonable under the circumstances, provides for a computation of damages which are by their nature uncertain, and so long as it is apparent that the parties intended the clause to provide for such damages and not merely to be a penalty against the breaching party, then it will be enforceable").

13 *See* cases set forth in footnote 3, *supra*; for examples of cases enforcing liquidated damages provisions in the context of delay claims.

14 *See, e.g., Gables v. Choate*, 792 So. 2d 520, 522 (Fla. 3d DCA 2001) (affirming award of liquidated damages to condominium owner of $5,000 per week for delay in completing construction); *Public Health Trust of Dade County v. Romart Constr., Inc.*, 577 So. 2d 636, 637-38 (Fla. 3d DCA 1991) (affirming liquidated damages award against contractor of $2,500 per day for delay in completing construction); *Osceola County v. Bumble Bee Constr., Inc.*, 479 So. 2d 310, 311 (Fla. 5th DCA 1985) (reversing trial court's failure to award liquidated damages of $250 per day to project owner due to contractor's failure to timely complete construction); *U.S. ex rel. James B. Donaghey, Inc. v. Dick Corp.,* No. 3:08CV56 MCR MD, 2010 WL 4666747, at *4 (N.D. Fla. Nov. 9, 2010) (finding enforceable liquidated damages provision that allowed for recovery of $24,898 for each day of delay).





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Bad RAPutation: How The Rule Against Perpetuities Affects Non-Judicial Modification Of Trusts Under Fla.Stat. § 736.0412

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

Non-judicial modification is old news in Florida – Fla. Stat. § 736.0412 (2018) has permitted it since 2006, and the trust code that existed before 2006 included a prior version of the statute.[1] The current statute provides that trusts are modifiable without judicial intervention if (1) the settlor is deceased, and (2) all the trustees and beneficiaries agree that the modification is advisable. However, there are some restrictions regarding when the modification statute can be utilized – and determining what those restrictions are is more complicated than it should be, due to some convoluted language in Fla. Stat. § 736.0412(4)(b) (2018) regarding the Rule Against Perpetuities. That language provides that non-judicial modification is not permitted with respect to:

> (b) Any trust created after December 31, 2000, if, under the terms of the trust, all beneficial interests in the *trust must vest or terminate within the period prescribed by the rule against perpetuities in s. 689.225(2), notwithstanding s. 689.225(2)(f)*, unless the terms of the trust expressly authorize nonjudicial modification. (Emphasis added).

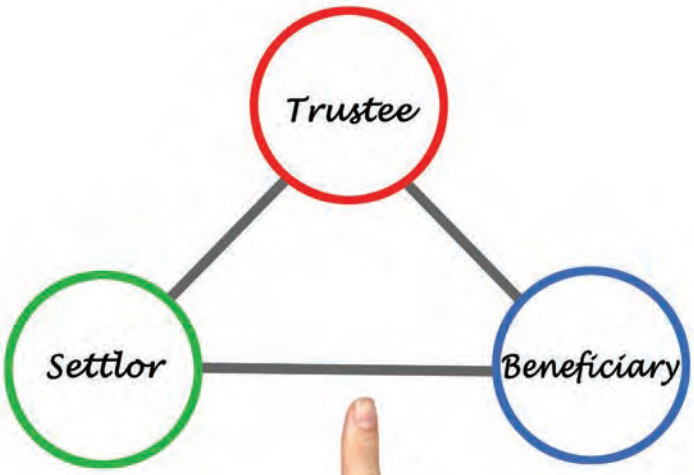
Decoding the Trust Code Language

So what does the italicized language in this statute mean? Even experienced trusts and estates attorneys have trouble deciphering this provision. However, the legislative history regarding this wording makes it clear that the statute is intended to automatically permit non-judicial modification for trusts with a 360-year Rule Against Perpetuities and prohibits it for any trust with a shorter RAP unless the trust explicitly provides that it may be nonjudicially modified after the settlor's death.

How do we know this is what the statute says? In order to understand this provision, we need to look at Fla. Stat. § 689.225 (2018). This is the statute governing the Rule Against Perpetuities. Fla. Stat. § 689.225 (2018) provides that a non-vested interest in real or personal property is invalid unless (1) it is certain to vest or terminate no later than 21 years after the death of an individual then alive;[2] or (2) it vests within 90 years after its creation.[3] However, Fla. Stat. § 689.225(f) (2018) states that if a trust is created after December 31, 2000, "this section shall apply to a nonvested property interest or power of appointment contained in a trust by substituting 360 years in place of '90 years' in each place such terms appears" in Fla. Stat. § 689.225 (2018), unless the trust terms require that all beneficial interests in the trust vest or terminate within a lesser period. In other words, for trusts created after 2000, the 360-year rule applies, unless the trust instrument provides otherwise.

That seems relatively straightforward. If a trust is created in 2001 or later, a 360-year Rule Against Perpetuities is permissible. So how does all of this square with the language in the statute governing nonjudicial modification? The word "notwithstanding" is the cause of much of the confusion. Webster's dictionary defines "notwithstanding" as "in spite of." However, substituting "in spite of" for "notwithstanding" does not clear up the issue. Does Fla. Stat. § 736.0412(4)(b) (2018) mean that the only trusts that can be nonjudicially modified are those that have a Rule Against Perpetuities period that is either 90 years or 21 years after the last life in being, despite the fact that 360-year trusts are permissible? Or does it say the exact opposite: that only trusts with a 360-year Rule Against Perpetuities qualify for nonjudicial modification? The answer can only be determined by looking back at the history of this language, and the legislative analysis that was drafted at the time Fla. Stat. § 736.0412 (2018) was proposed.

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The wording in Fla. Stat. § 736.0412 (2018) regarding the Rule Against Perpetuities is the exact language used in the statute's predecessor, Fla. Stat. § 737.0439, which was enacted in 2000. It is the exact language used in the analysis of the bill proposing Fla. Stat. § 737.0439, which was prepared by the House of Representatives' Committee on Real Property and Probate. However, that document does not explain what this language means.[4]

One of the only sources that translates this language into decipherable language is the Senate Staff Analysis and Economic Impact Statement dated March 21, 2006, which addressed the meaning of Fla. Stat. § 736.0412. It states:

"Nonjudicial modification is not only permissible, *its availability is mandatory for trusts having a perpetuities period in excess of the common law and 90-year statutory periods*. (Emphasis added). For other trusts, the availability of nonjudicial modification is within the control of the governing instrument. By default, trusts drafted to comply with the common law or 90-year statutory period are exempt from modification under s. 736.0412. The governing instrument may, however, provide to the contrary."[5]

This explanation makes it clear that non-judicial modification is *automatically* possible in any trust that has a 360-year Rule Against Perpetuities – no additional language permitting it is necessary. All other trusts must explicitly allow nonjudicial modification in order for it to be possible. In other words, a drafter who defaults to using the 360-year RAP in trust documents will *always* be able to take advantage of Fla. Stat. § 736.04112 (2018), provided the trust does not fall into the other two categories of trusts described in subsequent language of the statute.[6] A drafter whose default language includes a 90-year Rule Against Perpetuities period, or 21 years after the last life in being, will *never* qualify for non-judicial modification unless the drafter also adds language expressly permitting it.

Whereas the Rule Against Perpetuities may be the initial hurdle that an attorney faces when contemplating non-judicial modification, there are some other requirements that must be met before this technique may be used. The trustee and all qualified beneficiaries must agree that the modification is advisable. Express consent is required. This is in contrast to judicial modification, for which consent does not have to be obtained (although providing notice to the interested parties is required.).

When Should Non-Judicial Modification Be Used?

Nonjudicial modification is beneficial to all parties when used to address situations not contemplated by the deceased settlor of the trust. A beneficiary with high potential liability due to an unstable marriage or a profession with a high risk of potential liability, for example, may be amenable to modifying the terms of the trust. If the trust states that the beneficiary is to receive an outright distribution, the trustee and beneficiaries can agree to modify the terms of the trust to provide that the beneficiary's share is held in trust for his or her lifetime and that distributions are to be made at the discretion of an independent trustee. It can also be useful to create a special needs trust for a beneficiary who did not have special needs at the time the settlor created the trust.



The technique is useful in some situations to avoid state income tax. For example, if a client created a non-grantor irrevocable trust (1) while a resident of the state of Massachusetts (even if he or she died a resident of Florida); (2) the trustee is a current Massachusetts resident, and (3) there is a beneficiary that lives in Massachusetts, that trust is subject to Massachusetts state income tax.[7] However, if the trust permits a change of governing law, the current trustee can elect to have the trust governed by Florida law, and then agree (along with all of the beneficiaries) to a nonjudicial modification stating that the trustee must be a non-Massachusetts resident. This would avoid the obligation to pay Massachusetts income tax.

Nonjudicial modification may also be advisable if an error has been made in the trust language. For example, assume a trust mistakenly states it should be divided into five shares for the settlor's children, when there were only four children. A modification of this trust to correct the language to four shares might be advisable so that subsequent generations understand how many shares existed at the time the trust became irrevocable.

Changing a trust through nonjudicial modification may also be desirable if the settlor's intent does not square with the practical realities of managing a trust. A settlor who created a pot trust for his three children may have done so when the children were all minors but may not have contemplated the ensuing tensions that arise when all children are adults. (A pot trusts is a trust in which all assets for multiple beneficiates are held together, versus a trust in which each beneficiary's share is held separtely.)

Nonjudicial modification pursuant to Fla. Stat. § 736.0412 (2018) should not be confused with nonjudicial settlement agreements under Fla. Stat. § 736.0111 (2018), which states that "interested persons may enter into a binding nonjudicial settlement agreement with respect to any matter involving a trust."[8] This statute was not intended to be a way to work around the Rule Against Perpetuities provision of the nonjudicial modification statute; in fact, it explicitly states that "a nonjudicial settlement may not be used to produce a result not authorized by other provisions of this code, including, but not limited to, terminating or modifying a trust in an impermissible manner."[9] One purpose of this statute was to make it easier for corporate trustees to avoid the expense and delays of formal accountings at the termination of a trust by allowing all beneficiaries the ability to agree that certain formalities were not required in order to receive a final distribution.[10] Coupled with the virtual representation statute,[11] nonjudicial settlement agreements also allow trustees to resolve issues regarding minor or unborn beneficiaries.[12]

Nonjudicial settlement agreements can also be used to direct a trustee to take a certain action or refrain from action; to set a trustee's fee; or establish how the beneficiaries agree to interpret ambiguous language in a trust. The statute was intended to simplify the administrative aspects of trust management but was not necessarily intended to change the wording of the trust.

Conclusion

The legislative history regarding Fla. Stat. § 736.0412 (2018) makes it clear that the statute is intended to permit non-judicial modification for trusts with a 360-year Rule Against Perpetuities, but not for any trust with a shorter RAP unless the trust explicitly provides for non-judicial modification. Armed with that knowledge, a drafter who wants to always allow for the possibility of non-judicial modification should default to a 360-year Rule Against Perpetuities when drafting trusts, or the drafter must expressly permit nonjudical modifications. If nonjudicial modification is permissible, it can be used to cure a variety of errors, address a change in circumstances, or avoid state income tax. Fla. Stat. § 736.0412 (2018) is a valuable tool for any drafting attorney, provided that the attorney understands what it means.



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Endnotes

1 Fla. Stat. § 737.4032 (2018).

2 Fla. Stat. § 689.225(2)(a)(1) (2018).

3 Fla. Stat. § 689.225(2)(a)(2) (2018).

4 House of Representatives Committee on Real Property and Probate Final Analysis CS/HB 599 (July 17, 2000).

5 P. 18, Senate Staff Analysis and Economic Impact Statement CS/HB 1170 (March 21, 2006).

6 The trust must also have become irrevocable after December 31, 2000, and must not be a trust for which a charitable deduction is received. See Fla. Stat. §736.0412(a) and (c) (2018).

7 See Steve Oshins' Non-Grantor Trust State Income Tax Chart, which lists the conditions under which every states taxes a non-grantor trust. The chart is available on www.oshins.com or at https://docs.wixstatic.com/ugd/b211f-b_7299fe0acdd440ab93b42a526ee6ec6f.pdf.

8 Fla. Stat. § 736.0111(2) (2018).

9 Fla. Stat. § 736.0111(3) (2018).

10 Footnote 106, p. 11, House of Representatives Staff Analysis, HB 425, available at https://floridaprobate.lexblogplatform.com/wp-content/uploads/sites/206/2013/08/h0425.CJ_.pdf .

11 Fla. Stat. § 736.0304 (2018).

12 Footnote 106, p. 11, House of Representatives Staff Analysis, HB 425, available at https://floridaprobate.lexblogplatform.com/wp-content/uploads/sites/206/2013/08/h0425.CJ_.pdf .

How Much Is A Guaranty Worth? A Fresh Perspective.

By Matthew Kramer, Weinberg, Wheeler, Hudgins, Gunn & Dial, LLC, Miami, Florida

You receive a call from a lender client who informs you that the borrower has filed for bankruptcy protection and the only hope of collection is against the guarantor. You quickly review the guaranty and determine that the guarantor is liable for the full amount of the debt because of the borrower's bankruptcy filing. You inform the client of your finding and you recommend the immediate commencement of a lawsuit against the guarantor. After a significant amount of effort and expense, you obtain a judgment against the guarantor. You determine, however, that the guarantor is similarly uncollectible. You advise the client who is understandably disappointed but appreciates your efforts. Could the pursuit of the guarantor have been handled more effectively? This article provides a roadmap to assist in maximizing litigation value and ensuring that both lawyer and client communicate their expectations regarding the lawsuit from case inception.

STEP 1

What kind of Guaranty has been triggered?

The first issue that must be addressed is identifying the kind of guaranty that has been triggered. A guaranty is "a promise to pay the debt of another on the default of the person primarily liable for payment or performance."[1] "[T]he rules applicable to contracts, generally, likewise apply to contracts of guaranty and therefore, in order to have a binding contract, it is necessary, among other things, to have the guarantor's offer of guaranty accepted by the creditor."[2]

Guaranties are either absolute or conditional. An "absolute guaranty" is one where "the guarantor becomes liable immediately upon default in payment by another, whereas under a conditional guaranty, the guarantor does not become liable until the occurrence of certain conditions."[3] These conditions may include certain borrower acts such as the filing of a borrower bankruptcy case or the commission of waste.

Guaranties are also either a guaranty of payment or a guaranty of collection. "A guarantor of payment is primarily liable and waives any requirement that the holder of the note take action against the maker as a condition precedent to his liability on the guaranty."[4] "A guaranty of collection, on the other hand, 'is one under which the creditor can seek performance from the guarantor only after the occurrence of some condition such as the condition that the creditor has unsuccessfully . . . sought to collect the debt from the principal debtor.'"[5]

Finally, guaranties are either general or special guaranties. "A 'general' guaranty is one addressed to all persons generally and may generally be enforced by anyone to whom it is presented who acts upon it. A 'special' guaranty is one addressed to a particular entity and under it ordinarily only the named or specifically described promisee acquires rights."[6] The 5th DCA enunciated the rule regarding special guaranties as follows:

> The assignee of a special guaranty cannot enforce the special guaranty as to debt the assignee has created by extending credit to the debtor. An assignee of debt and of a special guaranty relating thereto can enforce the guaranty as to debt resulting from credit extended by the original creditor to the debtor, whether or not that assigned debt is due or past due at the time of the assignment.[7]

STEP 2:

Recourse versus Non-Recourse Liability

In the commercial real estate context, we often speak of a guarantor's liability in terms of the "deficiency" owed, which generally equals the difference between the total debt owed and the value of the collateral foreclosed upon. If a judgment is obtained against a guarantor prior to the foreclosure of collateral, the judgment amount is reduced by the value of the collateral subsequently foreclosed upon.[8] When a guarantor is liable for the full deficiency amount, this is called "full recourse" liability. A guarantor may be fully liable for the

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debt owed from loan inception. Alternatively, the guarantor may be fully liable for the debt owed upon the occurrence of certain full recourse events, such as a borrower's bankruptcy filing, an unauthorized mortgage or lien on the collateral, the unauthorized sale or transfer of an interest in the collateral, the failure to pay real estate taxes, or the violation of special purpose entity provisions. Additionally, a guarantor may be liable for limited recourse events wherein the guarantor is responsible for satisfying the damages caused by the event, which is typically less than the full deficiency amount. Examples of limited recourse events include waste, misappropriation of rents or insurance proceeds, and affiliate transfers.

Prior to 2011, it was generally understood that loans backed by commercial mortgage-backed securities ("CMBS") were generally non-recourse to the borrower and guarantor in the event of a payment default. In other words, upon a payment default, the lender could foreclose upon the collateral but take no other action against the borrower or guarantor. The borrower and guarantor would only be personally obligated on the debt in the event of certain "bad boy" acts, such as a borrower bankruptcy filing or the commission of fraud or waste. Two cases out of Michigan addressed the potentially broad reach of provisions triggering full recourse in CMBS loans. In *Wells Fargo Bank, NA v. Cherryland Mall Ltd. P'Ship*[9] and *51382 Gratiot Ave. Holdings, LLC v. Chesterfield Dev. Co.*,[10] the Michigan Court of Appeals and the United States District Court for the Eastern District of Michigan held, respectively, that the borrowers' failure to remain solvent triggered full recourse liability to the guarantors. The courts reasoned that the borrowers agreed to maintain certain special purpose entity covenants contained in the loan documents, including the covenant to remain solvent. The borrowers breached the solvency covenants by defaulting on the payment obligations to the lenders. The breach of the solvency covenants triggered full recourse liability to the guarantors pursuant to the loan documents. These cases stand in contrast to the general understanding that CMBS loans are non-recourse to the borrower and guarantor in the event of a payment default. Subsequently, the Michigan Legislature enacted the Nonrecourse Mortgage Loan Act (which became law in Michigan on March 29, 2012), which prohibits solvency covenants from triggering recourse liability on an otherwise non-recourse loan.[11]

Cherryland and *Chesterfield* have been viewed favorably in the Eleventh Circuit. In *Wells Fargo Bank, N.A. v. Mitchell's Park, LLC*,[12] the United States District Court for the Northern District of Georgia held that a guarantor was fully liable on an otherwise non-recourse loan because the borrower violated the special purpose entity provisions of the loan documents, including the obligation to maintain sufficient capital to pay its obligations. In ruling in favor of the lender, the court cited favorably to *Cherryland* and *Chesterfield*. The Eleventh Circuit affirmed the District Court's decision.[13]

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STEP 3:
The likelihood of Collection

Guaranty litigation is unique because a lender typically possesses baseline financial information of a guarantor from loan origination. This information may include audited or unaudited financial statements, tax returns, and employment information and is extremely useful when faced with a guarantor who asserts an inability to satisfy the deficiency amount. Asset searches are also useful tools to determine whether to pursue a guarantor. It is critical to determine whether a guarantor has assets in his or her own name (as opposed to assets held as tenancy by the entireties) that the lender may collect upon once a judgment is obtained.

STEP 4:
How will I prove my claim?

Before recommending to your client to commence an action against a guarantor, it is important to prepare a preliminary litigation budget. The litigation budget will be informed by the proof required to obtain a judgment. For instance, the proof required to obtain a judgment against a guarantor based on the borrower's bankruptcy filing is significantly less burdensome than the proof required to obtain a judgment on a fact-intensive waste claim. Lay and expert witnesses may be required to opine as to the extent of the waste and diminution in property value caused by the waste. Further, unlike recourse liability triggered by a borrower bankruptcy filing, a fact-intensive waste claim may not lend itself to summary judgment. Consideration must also be given as to whether the fact finder is the judge or jury.

STEP 5:
Collecting on the Guaranty

Post-judgment collection is often the most difficult, costly aspect of the deficiency claim process and should be taken into account prior to commencing a lawsuit against a guarantor. One of the most potent discovery tools is the fact information sheet, Florida Form 1.977. The fact information sheet requests that the guarantor provide a current snapshot of its assets and liabilities. When drafting a deficiency judgment, it is important to include a requirement that the guarantor respond to the fact information sheet. Proceedings supplementary (Fla. Stat. § 56.29 (2018)) are also invaluable in recovering assets that the guarantor may have transferred to third parties; however, these proceedings typically require significant time and expense to recover assets. Clients should be made aware at the outset of the engagement that the cost of collection could be greater than any recoveries.

Conclusion

In any guarantor lawsuit, it is critical that you understand the facts of your case, your chances of success, your chances of collection, and your anticipated costs, and that these factors be communicated to the client. A "back of the envelope" calculation of the probability of success, litigation costs and likely recoveries is exceedingly useful in gauging the likely risks and rewards of litigation and better informs the client during settlement discussions. A realistic assessment of the case from its inception will prove invaluable in both strategizing to maximize recoveries and providing a realistic litigation scenario for the client.



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Endnotes

1 *Fort Plantation Investments, LLC v. Ironstone Bank, FSB*, 85 So. 3d 1169, 1171 (Fla. 5th DCA 2012) (citing *New Holland, Inc. v. Trunk,* 579 So. 2d 215, 216-17 (Fla. 5th DCA 1991)).

2 *Warner v. Caldwell*, 354 So. 2d 91, 96 (Fla. 3d DCA 1977) (citing 38 Am.Jur.2d Guaranty § 1 (1968)).

3 *Id.* (citing *Anderson v. Trade Winds Enters., Corp.*, 241 So. 2d 174, 177 (Fla. 4th DCA 1970)).

4 *Ampa Cap., Ltd. v. Rozen*, No. 12-60961-CIV, 2012 WL 6044299 (S.D. Fla. Dec. 5, 2012) (quoting *Chi Title Ins. Co. v. Lerner*, 435 B.R. 732, 737 (S.D. Fla. 2010)).

5 *Id.* (quoting *Chi Title Ins. Co.*, 435 B.R. at 737-38) (quoting *United States v. Vahlco Corp.*, 800 F.2d 462, 466 (5th Cir. 1986)).

6 *New Holland, Inc. v. Trunk,* 579 So. 2d 215, 216 (Fla. 5th DCA 1991) (citing *Brunswick Corp. v. Creel,* 471 So. 2d 617 (Fla. 5th DCA 1985) (citing *Lee v. Rubin,* 117 So. 2d 230 (Fla. 3d DCA 1960)).

7 *Id.* at 219.

8 *Fort Plantation Investments, LLC v. Ironstone Bank, FSB*, 85 So. 3d 1169, 1171 (Fla. 5th DCA 2012) (citing *Mullins v. Sunshine State Serv. Corp.*, 540 So. 2d 222, 224 (Fla. 5th DCA 1989)).

9 295 Mich. App. 99, 812 N.W.2d 799, 815 (Mich. Ct. App. 2011).

10 835 F.Supp.2d 384 (E.D. Mich. 2011).

11 2012 Public Act 67.

12 Civil Action File No. 1:10-CV-3820-TWT, 2012 WL 4899888 (N.D. Ga. Oct. 11, 2012).

13 615 Fed. Appx. 561 (11th Cir. 2015).

POINT-COUNTER-POINT

Waiver Of The Spousal Devise Restriction Under New Fla. Stat. § 732.7025

By Joseph J. Tschida, WFG National Title Insurance Company, Lake Mary, Florida

On March 19, 2018, Governor Scott signed a bill[1] in to law that created Fla. Stat. § 732.7025, which became effective July 1, 2018. This small bill will have a huge impact on conveyances of homestead property to revocable trusts for estate planning purposes and on subsequent conveyances after the death of the first settlor of the trust. Prior to the new law, when title to homestead property was vested in a trustee of a revocable trust and the settlor of the trust died survived by a spouse and adult children, if the trust terms did not specifically distribute the homestead property to the settlor's surviving spouse, the disposition of the homestead property through the trust would fail, and deeds would be required from the current trustee of the trust, the settlor's surviving spouse, and from the deceased settlor's children to convey marketable title to the property.[2] Additionally, a probate on the deceased settlor may also be required depending upon the title insurer insuring the transaction. New Fla. Stat. § 732.7025(1) (2018) authorizes a spousal waiver that would, in the foregoing scenario, eliminate the requirement for deeds from the deceased settlor's surviving spouse and children, and would dispense with the requirement for probate on the deceased settlor.

On March 19, 2018, Governor Scott signed a bill in to law that created Fla. Stat. § 732.7025, which became effective July 1, 2018.

The reason that deeds would be required from the deceased settlor's surviving spouse and children under the above facts is due to the spousal devise restriction contained in Article X §4(c) of the Florida Constitution, which provides:

> The homestead shall not be subject to devise if the owner is survived by a spouse or minor child, except the homestead may be devised to the owner's spouse if there be no minor child.

The forgoing portion of Art. X §4(c) is repeated in Fla. Stat. § 732.4015(1) (2018), which states:

> As provided by the Florida Constitution, the homestead shall not be subject to devise if the owner is survived by a spouse or a minor child or minor children, except that the homestead may be devised to the owner's spouse if there is no minor child or minor children.

Florida Statute §732.401(1) (2018) provides what happens if the devise restrictions contained in Art. X §4(c) and Fla. Stat. § 732.4015(1) (2018) are violated:

> If not devised as authorized by law and the constitution, the homestead shall descend in the same manner as other intestate property; but if the decedent is survived by a spouse and one or more descendants, the surviving spouse shall take a life estate in the homestead, with a vested remainder to the descendants in being at the time of the decedent's death per stirpes.

In the non-trust situation, Art. X §4(c) and Fla. Stat. § 732.4015(1) (2018) restrict to whom the homestead property may be devised[3] to in a Will if the decedent is survived by a spouse and/or minor child or children. If the decedent is survived by a spouse and adult children, the only person that the homestead property may be devised to is the decedent's spouse.[4] A devise in a Will of the homestead property to anyone other than the decedent's spouse would fail, and the homestead would be inherited as if there had been no Will.[5] For example, if a titleholder dies survived by a spouse and three adult children, and if the titleholder's Will devised the homestead property to the adult children, that devise would fail because the only person that the homestead property may be devised to under these circumstances is the surviving spouse of the titleholder. As a result of that failure, the surviving spouse would receive a life estate in the homestead property and the deceased spouse's children would receive the remainder interest.[6] However, the surviving spouse may elect to take a one-half interest in the homestead property in lieu of the life estate.[7] If the decedent is survived by a minor child or minor children, the homestead may not be devised to anyone.[8]

To further complicate the issues with homestead, Fla. Stat. § 732.4015(2) (2018) applies the homestead devise restrictions contained in Art. X §4(c) and Fla. Stat. § 732.4015(1) (2018) to revocable trusts:

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(2) For the purposes of subsection (1), the term:

(a) "Owner" includes the grantor[9] of a trust described in s. 733.707(3)[10] that is evidenced by a written instrument which is in existence at the time of the grantor's death as if the interest held in trust was owned by the grantor.

(b) "Devise" includes a disposition by trust of that portion of the trust estate which, if titled in the name of the grantor of the trust, would be the grantor's homestead.

If subparagraph (1) of Fla. Stat. §732.4015 (2018) is reworded to insert in the definitions for "owner" and "devise" as set forth in subparagraph (2) of Fla. Stat. §732.4015 (2018), Fla. Stat. § 732.4015(1) (2018) would provide:

> As provided by the Florida Constitution, the homestead shall not be subject to [disposition by] [a revocable trust] if the [settlor] is survived by a spouse or a minor child or minor children, except that the homestead may be [disposed of by a revocable trust] to the [settlor's] spouse if there is no minor child or minor children.[11]

Florida Statute § 732.4015(2) (2018) applies the spousal devise restriction contained in the Florida Constitution and Florida Statutes to revocable trusts. Therefore, when title to homestead property is vested in a trustee(s) of a revocable trust and the first settlor-spouse dies, the spousal devise restriction would prohibit the disposition of the homestead property through the trust to anyone other than the surviving spouse. If the trust does not expressly provide that title to the homestead property passes directly to the deceased settlor's surviving spouse when the first settlor-spouse dies, the disposition of the homestead property through the trust to anyone other than the surviving spouse would fail.[12] In that event, the surviving spouse would receive a life estate in the homestead property and the children of the deceased settlor-spouse would receive the remainder interest.[13] To convey marketable title under these facts, deeds would be required from the current trustee of the trust, the settlors' surviving spouse, and from the children of the deceased settlor. Additionally, depending upon the title insurer insuring the transaction, a probate on the deceased settlor may also be required.

The complications caused by the spousal devise restriction upon the death of the first spouse may be alleviated by use of new Fla. Stat. § 732.7025(1) (2018). That statute authorizes a spouse to waive the spousal devise restriction contained in Art. X, §4(c) and Fla. Stat. § 732.4015(1) (2018) by including the following or similar waiver language in a deed:

> By executing or joining this deed, I intend to waive homestead rights that would otherwise prevent my spouse from devising the homestead property described in this deed to someone other than me.

The foregoing waiver language contained in a deed of homestead property from one spouse to the other spouse, from both spouses to one spouse, from both spouses to each other, from both spouses to a revocable trust, or from both spouses to their separate revocable trusts, will make transactions after the death of the first spouse easier because the surviving spouse will be treated as if he or she predeceased the first spouse to die.[14] Therefore, a devise in a Will, or the disposition through a trust, of the homestead property to anyone other than the decedent's surviving spouse will not be prohibited by the spousal devise restriction contained in Art. X §4(c) and Fla. Stat. § 732.4015(1) (2018).

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In the non-trust situation, where title to homestead property is vested in an individual who dies survived by a spouse and adult children, and the deed to the deceased titleholder was from the decedent's spouse, or was from both spouses to the decedent-spouse, or was joined by the deceased titleholder's spouse, if the deed contained the waiver language, then a devise of the homestead to the deceased titleholder's children would not be prohibited by the spousal devise restriction because the surviving spouse would be treated as if he or she predeceased the deceased titleholder.[15] Therefore, the devise in the Will of the homestead property to the deceased titleholder's children would be valid even though the decedent was actually survived by a spouse.

The waiver language will also make transactions much easier after the death of the first settlor-spouse when title to homestead property is vested in a trustee(s) of a revocable trust. For example, assume that both spouses, who are settlors of the trust, convey their homestead property from themselves to themselves as trustees of their revocable trust. As previously stated, when the first settlor-spouse dies, if the deed to the trustee of the trust does not contain the waiver language, the disposition of the homestead property through the trust to anyone other than the surviving spouse would fail, and deeds would be required from the current trustee of the trust, the settlor's surviving spouse, and from the children of the deceased settlor. However, if the deed to the trustee of the trust by both spouses contains the waiver language, then when the first settlor-spouse dies, the surviving spouse would be treated as if he or she pre-deceased the first spouse. Therefore, title to the homestead property could pass through the trust pursuant to the terms of the trust and, depending upon the trust terms, a deed from only the current trustee of the trust would be required to convey marketable title.[16] Furthermore, since the disposition through the trust would not fail, a probate on the deceased settlor would not be required.

Whether one can rely on a waiver of the spousal devise restriction contained in a deed will depend upon the facts of the situation. If there are any claims of interest to the homestead property by the surviving spouse or by the children of the deceased titleholder who did not receive an interest in the homestead under the deceased titleholder's Will (or under the trust), the waiver should not be relied upon to eliminate the requirement for deeds from the deceased titleholder's surviving spouse and children, or to dispense with the requirement for a probate on the deceased settlor in the trust situation.

The statutory authority for a spouse to waive the Constitutional spousal devise restriction as to homestead property in a deed is an excellent tool that should be employed in the non-trust situation whenever the titleholder desires to have no restrictions as to whom the homestead property may be devised to in his or her Will.[17] In the revocable trust situation, if a married couple or a married person joined by his or her spouse are conveying homestead property to the trustee of a revocable trust for estate planning purposes, if they desire the homestead property to be disposed of according to the terms of the trust after the death of first settlor-spouse, the deed to the trustee of the trust should contain the spousal waiver language.



J. TSCHIDA

Joe Tschida *is a Vice President and the State Counsel for WFG National Title Insurance Company. Joe is based out of WFG's Regional Office in Lake Mary, Florida.*

Endnotes

1 CS for SB 512 (2018).

2 See *Aronson v. Aronson*, 81 So.3d 515, 519 (Fla. 3d DCA 2012).

3 Fla. Stat. § 731.201(10) (2018) defines devise as: "*when used as a noun, means a testamentary disposition of real or personal property and, when used as a verb, means to dispose of real or personal property by will or trust.*"

4 Fla. Const. Art. X, §4(c); Fla. Stat. §732.4015(1) (2018).

5 Fla. Stat. § 732.401(1) (2018).

6 *Id*.

7 Fla. Stat. § 732.401(2) (2018).

8 Fla. Const. Art. X, §4(c); Fla. Stat. §732.4015(1) (2018).

9 Fla. Stat. § 731.201(19) (2018), "grantor" is synonymous with the term "settlor."

10 Fla. Stat. § 733.707(3) (2018) pertains to revocable trusts.

11 See *Aronson*, 81 So.3d at 519.

12 *Id.*

13 Fla. Stat. §732.401(1) (2018); *Aronson*, 81 So.3d at 519.

14 See *City National Bank of Florida v. Tescher*, 578 So.2d 701, 703 (Fla. 1991); *Engelke v. Engelke*, 921 So.2d 693, 696 (Fla. 4th DCA 2006).

15 *City Nat. Bank of Fla.*, 578 So.2d at 703; *Engelke*, 921 So.2d at 696.

16 The trustee may also be required to execute the deed in his/her individual capacity due to the merger doctrine. The merger doctrine, in this context, provides that when a person is both a trustee and a beneficiary of a trust, the legal title held as trustee merges with the equitable interest held as a beneficiary causing a termination of the trust and resulting in title being vested in the trustee in his/her individual capacity. Therefore, if the trustee is a beneficiary of the trust, in addition to executing the deed as trustee, he/she would also be required to execute the deed in his/her individual capacity. If the trustee is not a beneficiary of the trust, he/she would not have to execute the deed in his/her individual capacity unless the property is the homestead of the trustee. See *Axtell v. Coons,* 89 So. 419, 420 - 421 (Fla. 1921).

17 The minor child devise restriction cannot be waived. Fla. Const. Art. X, §4(c); Fla. Stat. §732.4015(1) (2018). The spousal waiver contained in Fla. Stat. § 732.7025 (2018) does not pertain to the minor child devise restriction which cannot be waived, and it does not pertain to the Constitutional requirement of spousal joinder on deeds or mortgages of homestead property. Fla. Stat. § 732.7025(2) (2018); Fla. Const. Art. X, §4(c).

POINT-COUNTER-POINT

PROCEED WITH CAUTION: Waiver of Spousal Homestead Devise Restriction by Deed

By Angela K. Santos, Duane Morris LLP and Jeffrey A. Baskies,
Katz Baskies & Wolf PLLC, Boca Raton, Florida

As of July 1, 2018, new Fla. Stat. § 732.7025 became effective, adopting a statutory rule for waiver of homestead rights by deed. As a result of the new statute, it has become very easy for a spouse to waive her or his rights as a surviving spouse with respect to the devise restrictions under Article X, Section 4(c) of the Florida Constitution.

Now, a spouse only needs to sign a deed that includes specific language – which language is enumerated in the statute – in order to waive the spousal homestead devise restrictions. If the statutory language is included in a deed and the waiving spouse joins in the deed, then the spouse who waived the homestead protections will be treated as predeceased for purposes of determining and applying the homestead devise restrictions – but only the devise restrictions (not the alienation restriction or creditor protections). As a result of the waiving spouse being treated as predeceased, the homestead-owner spouse may freely devise the homestead property after death without limitation as to a spouse (although still subject to the limitations as to any minor children).

While a spouse's ability to waive homestead rights is not new, the new Fla. Stat. § 732.7025 (2018) seemingly makes it much easier to waive the homestead devise restrictions. However, the waiver-by-deed statute does little to ensure that the homestead waiver is made knowingly, intelligently, and voluntarily - except for the fact that the waiver must appear in a deed.[1] Therefore, the authors caution against reflexive use of the waiver-by-deed statute and caution against its over-use as well. There are sound public policies surrounding the unique Florida homestead devise restrictions (dating back to the 1860s) which should give planners pause before recommending it or reflexively using it.

Background on Homestead Devise Restrictions and Waivers

The spousal devise restriction under Article X §4(c) of the Florida Constitution provides that an owner of homestead property cannot devise the homestead property if survived by a spouse or minor child, except the owner can devise the homestead to the owner's surviving spouse if there is no minor child. Unless there are no minor children and the other spouse waives homestead rights, all other devises are invalid.

Prior to Fla. Stat. § 732.7025 (2018), the homestead spousal devise restriction could be waived as provided in Fla. Stat. § 732.702 (2018), which requires such waiver to be in a written contract and each spouse to make a fair disclosure of assets if the waiver occurs after marriage.

In addition, recent case law has developed allowing a deed from a spouse to constitute a waiver of the homestead spousal devise restriction, even though there was no express wavier language in the deed at all.[2] The *Stone v. Stone* case, however, was founded on a unique fact pattern where a husband and wife were engaged in complex and sophisticated estate planning (severing a tenancy by the entireties into two tenant in common interests which were then deeded – including spousal joinders – to two separate Qualified Personal Residence Trusts). The planning they were engaged in may have included consideration of waiving the devise restrictions. It is not clear under present case law if such in-depth consideration or complex planning is a requisite to the validity of a waiver via a deed or not.

Another case – albeit one without precedential value, because it was withdrawn – is the *Habeeb v. Linder* case in Miami.[3] The court in Habeeb similarly found a waiver occurred by joinder in a deed which expressly included the words "hereditaments" in the transfer. In fact, the same term (hereditaments) was present in the deed in question in the *Stone* case. Again, it is not clear under present case law if that exact word or concept is a requisite to the validity of a waiver via a deed or not.

In light of recent case law, Fla. Stat. § 732.7025 (2018) was enacted not to resolve all possible disputes and not to overturn the prior case law, but instead to create a safe harbor so that a waiver-by-deed is conclusive where the statutory magic language is expressly included. A deed waives the homestead spousal devise restriction if the deed contains the following or similar waiver language:

> By executing or joining this deed, I intend to waive homestead rights that would otherwise prevent my spouse from devising the homestead property described in this deed to someone other than me.

Recall that a waiver-by-deed does not waive homestead restrictions against the owner's alienation of the homestead during the owner's lifetime without joinder of the owner's spouse, or homestead protection against claims of the owner's

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creditors. Moreover, it cannot waive the devise restrictions where there are minor children. The magic statutory language only impacts the spousal devise restrictions.

Conclusion: Proceed with Caution

The authors are concerned, however, that some Florida attorneys (it could be estate planners, real estate attorneys or others, as well) will see this new statute as the answer to many dreams and include it in virtually all the deeds they create. However, waiving the devise restrictions could have seriously adverse consequences, which may have been unknown and unintended by the spouse waiving via deed.

For example, if the magic language is included in a planner's deeds to fund revocable trusts, imagine this scenario. Clients are creating revocable trusts as part of their plan and they have mirror-image plans leaving the entire estate outright to the surviving spouse after the first death and then equally to their adult children on the second death. Imagine the spouses agree to fund the homestead into the Husband's revocable trust and the planner (or a real estate lawyer engaged for this purpose) includes the magic language in the deed. Suppose some time later the Husband changes his estate plan (maybe without the attorney or maybe even using online forms) to disinherit the surviving spouse, and then he dies. Yes, the homestead will count in the elective share, but the Wife will have to move out of her home; whereas, the law (for over 150 years in Florida) would otherwise have protected that Wife and allowed her to live in that home for life.

Take this one step further. What if the Wife sues the planner for preparing the deed with the homestead waiver in it claiming she didn't understand it and never would have signed it if she knew she might be thrown out of her home on her husband's death. That does not sound like a lawsuit one would like to defend.

The problem is that reflexive use of the waiver by deed statute will likely cause many unknowing waivers and certainly waivers that are not fully understood. Because the waiver by deed can be done without any understanding and without any safeguards (no separate counsel, not in the context of a complicated tax-driven estate plan, not in a post-marital agreement, etc), mistakes are bound to happen unless the waiver is used sparingly and only when it is desired and clearly understood. Moreover, for the planner's protection there should be some written record of this knowing and understood waiver and perhaps a written acknowledgement that it was done with both clients' clear understanding. Query: Should that document require separate representation?

The bottom line is Florida spouses have been presented with a new, potentially powerful and potentially dangerous weapon, and planners must exercise caution implementing these waivers – for the sake of the clients and for their own sake. Without separate counsel (or an attorney at all), and without fair disclosure of each spouse's assets (arguably),[4] a spouse can now waive the spousal homestead devise restriction, by unwittingly signing a deed with the statute's express wavier language in the deed.[5]

While some planners may view the new law as clarifying existing case law; other planners are concerned overuse of the waiver by deed may open the door for abuse, unintended consequences and litigation. The Florida Constitution has protected surviving spouses via the homestead devise restriction since the 1860s, and there is a strong public policy behind the protection. Everyone should proceed with caution regarding spousal homestead devise restriction waivers-by-deed. Such waivers should only be made reluctantly and with great thought for the ramifications. Moreover, in some situations, maybe waivers by deed should only be used in connection with a post-marital agreement that locks the estate plan in place so as to protect the waiving spouse from being disinherited by the non-waiving spouse.



A. SANTOS

Angela K. Santos *is private client tax, trust and estate attorney in the Boca Raton office of Duane Morris LLP. She advises U.S. and non-U.S. individuals, families, business owners and their advisors, designing and implementing sophisticated tax minimization and wealth transfer planning strategies, including cross-border and pre-immigration planning. She is a member of the Executive Council of the RPPTL Section of The Florida Bar, was a former RPPTL Fellow, and is an Editor-At-Large for ActionLine.*



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Endnotes

1 See *Chames v. DeMayo*, 972 So.2d 850 (Fla. 2007) (individuals may waive their constitutional rights *if* the waiver is made knowingly, intelligently and voluntarily).

2 See *Stone v. Stone*, 157 So.3d 295 (4th DCA 2014).

3 *Habeeb v. Linder,* 36 Fla.L.Weekly D300c (Fla. 3d DCA 2011).

4 It is unclear what constitutes "fair disclosure" under Fla. Stat. §732.702. Some practitioners believe that in the context of waiving homestead rights, the rights to and value of the homestead property is sufficient. The *Stone* case (see endnote 3) might be used to support that position, although it did not address fair disclosure requirements under Fla. Stat. § 732.702.

5 It remains possible for a spouse to waive spousal homestead inheritance rights without the express waiver language of Fla. Stat § 732.7025 (2018), and with only the general "hereditaments" language (or maybe even without such). It appears future litigation will be required for a resolution to those issues.



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POLITICAL ROUNDUP

Florida's New Leaders Take the Helm

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

It's a new year, and with it, new leaders in the halls of the Capitol. A new Governor, Attorney General, Commissioner of Agriculture and a CFO (with a bit of experience in the post) all briefly celebrated their inaugurals with grand celebrations and set about the work at hand. For those of us whose work involves state government, it's been a whirlwind on every front.

Governor DeSantis echoed the themes of his campaign in his inaugural address and quickly went about using his authority to implement a good many of them. To the delight of environmentalists, and perhaps a surprise to the Democrats among them, one of his first acts was an executive order directing a range of agency activities and funding priorities for addressing the algae blooms and red tide which have plagued our State's coasts. The nine members of the Governing Board of the South Florida Water Management District all resigned at his request after a December vote on a lease that Governor DeSantis opposed was not postponed.

The Governor's education priorities were addressed by an executive order repealing Common Core, and a request to legislative leaders for funding of teacher bonuses in a reinvigorated Best and Brightest program and Gardiner scholarship funding for students with special needs. The continuing needs of Hurricane Michael impacted communities in the Panhandle were addressed with additional state funding ordered by the Governor and a successful personal effort by the Governor to extend federal support.

Elected and appointed leaders not meeting his standards felt the ultimate rebuke as he suspended the Palm Beach County Supervisor of Elections following difficulties there during the November elections, the Broward Sheriff at the helm during the Parkland shootings, and the Okaloosa County School District superintendent due to her mishandling of child abuse claims. The Broward superintendent of elections was also allowed to resign after DeSantis rescinded a previous contested suspension by then Governor Scott.

Last but not least, the Governor appointed three new Supreme Court Justices to fill the vacancies of retiring Justices Quince, Pariente, and Lewis. New Justices Lagoa, Luck and Muniz were a series of firsts for the Court as Lagoa is the first Cuban-American woman, Luck the first Orthodox Jew, and Muniz, the first Nicaraguan-American justice appointed to the Court. They significantly lowered the average age on the Court and cemented a more conservative majority for decades to come if each sitting Justice serves until the new mandatory retirement age of 75.

The full Cabinet also started the year with quick actions. At the urging of Commissioner Fried with the full support of her fellow Cabinet members, the Cabinet posthumously pardoned the Groveland Four after emotional testimony by remaining family members of the four young African Americans convicted nearly 70 years ago of the rape of a 17-year-old white woman, Norma Padgett. Padgett, still alive and surrounded by her family, testified against the pardon.

The Governor and Cabinet, sitting as the State Board of Administration adopted a measure to sanction AirBnB over a company policy to prohibit rentals in the disputed West Bank. The policy, which the Cabinet viewed as commercially discriminating against the Jewish people and the State of Israel has the company on the Scrutinized Companies List which prohibits any state investment in the company. Also, CFO Patronis led a successful effort by the Cabinet to recognize Jerusalem as the Capitol of Israel.

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The Governor has also been busy appointing agency heads and key staff with a mix of new faces and a lot of familiar ones. Many selected, like the Governor, have a military background. In one of his first appointments, the Governor selected Speaker Richard Corcoran to lead the Department of Education shortly after Corcoran ended his role as leader of the House. Other current and former legislators were also tapped for key roles. Former Senator (and RPPTL member) Dana Young was appointed head of Visit Florida after her reelection bid came up short in a "close enough for a manual recount" election, and Rep. Clay Ingram termed out of his House seat and was selected to run Volunteer Florida. Two sitting Republican House members, Danny Burgess and Halsey Beshears were tapped to head the Department of Veterans' Affairs and the Department of Professional Regulation, respectively. Democrat Jared Moskowitz, a Representative from Broward County and an attorney with AshBritt Environmental, a nationwide disaster response firm was selected to head the State's Division of Emergency Management. These resignations of sitting House members to take positions in the administration will prompt special elections to replace them but not until after the legislative session.

Mary Mayhew left a top leadership role in the Trump administration in the Medicaid program to run the Agency for Health Care Administration, former Director of the Federal Bureau of Prisons, and retired U.S Army Major General, Mark Inch was selected as Secretary of the Department of Corrections. Jamal Sowell leaves the Tampa Port Authority for the Presidency of Enterprise Florida and Jonathan Satter departs a commercial real estate services firm to lead the Department of Management Services for his first employment in State government. Florida Former 1st DCA Judge Simone Marstiller who served in several top managerial and legal roles under Governor Bush and Attorney General Bill McCollum, was tapped to lead the Department of Juvenile Justice, and veteran agency head Ken Lawson moved from Visit Florida to the Department of Economic Opportunity. Department of Environmental Protection Secretary Noah Valenstein remains in place as does Lottery Secretary Jim Poppell and the Agency for Persons with Disabilities Director Barbara Palmer. Long-standing deputy Secretary Richard Prudom now serves as Secretary of Elder Affairs. Judge Laurel Lee was tapped to head the Department of State after the initial appointment of Mike Ertel ended shortly after an embarrassing Halloween costume of the then Seminole County Supervisor of Elections was revealed to the press by his ex-wife. To lead the Department of Revenue, Governor DeSantis recommended and the Cabinet approved Jim Zingale who had previously served as director of that organization under Governor Bush. Another returning leader is Kevin Thibault, who returns to head the Department of Transportation after eight years in private practice.

"Until they do take the helm, the future leaders take key chairmanships or other leadership positions, but their priorities are usually kept under wraps in deference to the current leader."



The Governor's staff also includes some veterans. Shane Strum is serving as Chief of Staff, a position he held for Governor Crist. In the interim he has served as a hospital executive. Stephanie Kopelousos served Governor Crist as his Secretary of the Department of Transportation. After a stint as County Manager for Clay County, she returns as the Governor's director of legislative affairs.

Attorney General Ashley Moody has started her administration with few interviews and headlines, quietly beginning her service as Attorney General by taking a decidedly bipartisan tone, focusing on combating fraud and the opioid epidemic. She has appointed two Tampa attorneys to key posts, John Guard as her chief deputy and Richard Martin as general counsel.

Nikki Fried, the Commissioner of Agriculture and Consumer Services, the lone Democrat on the Cabinet, has kept her focus on marijuana issues, appointing a first ever Director of Cannabis. Fried hopes to expand Florida's opportunities in industrial hemp following passage of a federal farm bill that broadly legalized hemp, a cannabis plant which does not contain THC, but is used in CBD oils, fibers, plastics, and other products. Fried also hopes to help redirect the course of the State's approach to providing medical marijuana.

Along with a new Cabinet, as of last November we have a new Senate President, attorney Bill Galvano of Bradenton and a new Speaker of the House, Jose Oliva of Miami, a CEO of a cigar company. The President of the Senate and Speaker of the House are selected by their peers and since term limits were applied to the Legislature, these selections often come almost 8 years before taking the leadership role, so the successions are rarely a surprise, except when the planned succession is interrupted with an unexpected electoral defeat or resignation. Until they do take the helm, the future leaders take key

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chairmanships or other leadership positions, but their priorities are usually kept under wraps in deference to the current leader.

Speaker Oliva has announced a desire to tackle hospital costs and has created a Health Market Reform Subcommittee. He has also focused, with the Governor, on reducing regulatory burdens and the House is expected to pass limits on local government ability to impose burdens on business and to examine the state's regulation of professions. Assignment of benefits reform is an issue that is expected to be a high priority President Galvano has expressed a desire to focus on making sure the State is planning ahead for infrastructure to handle its future population growth, particularly extending the Suncoast Parkway north to Georgia and creating a connection between Collier County and Polk County for regional connectivity for tourism, trade, broadband, water and sewer services. His desire is also to extend the opportunities of economic development to the rural parts of Florida to improve the quality of life offered there. Gaming, particularly sports betting, may be on the Senate President's priorities, but this issue has been one of the thorniest to get across the finish line.

The leaders of the Legislature have also appointed their leadership team and committee chairs. Sen. Kathleen Passidomo, a RPPTL member, and a potential candidate for the Senate Presidency in 2022 is Majority Leader and David Simmons, also a RPPTL member, is President Pro Tempore and chair of Senate Judiciary.

The House Judiciary Committee is chaired by Rep. Paul Renner, an attorney slated to be House Speaker in 2022. The House Rules Committee is chaired by attorney, Rep. Chris Sprowls, the Speaker designate for the House beginning 2020, chair of the Judiciary committee 2016-2018. Rep. Bob Rommel, a restaurant owner representing the Naples area since 2016 is the new chair of the Civil Justice Committee. He did not serve on the committee during his first term.

While the hot issues of this year's legislative session beginning March 5 are still emerging, one item we know of is the state's approach to medical marijuana. Governor DeSantis backed away from the current statutory prohibition on smokeable marijuana and called on the Legislature to repeal the current ban now mired in litigation brought by John Morgan. He pledged to drop the State's appeal if another approach isn't quickly adopted when the Legislature goes into session in March. Early efforts in the legislative process are not proceeding as well as smokeable medical marijuana proponents wanted however, as a Senate committee added a second doctor's recommendation to a bill sponsored by Sen. Brandes. A recently proposed House measure which requires a case review panel to approve a prescription for smokeable marijuana also contained what one critic called an expensive morass of red tape for patients. Meanwhile, Morgan is still pondering a constitutional amendment to legalize recreational marijuana.

This first year of a new Governor and new Legislative leadership is bound to be interesting. Despite Republicans controlling the legislature and a Republican Governor, history has shown us not to expect unanimity of approach. The Governor has some old hands amongst his key staff, so I would expect them to help greatly with communications with the Legislature. While budget revenue forecasts for the coming state fiscal year are rosy, there are warnings of a coming recession. If the Legislature does not fund the Governor's priorities, or otherwise adopts a budget which is outside of his direction, or doesn't reserve enough for coming years, I expect a large number of line item budget vetoes. No matter what, the next three months will be most fascinating to those of us who can't help but be fascinated by politics in Florida!



C. ROTH

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

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SECTION SPOTLIGHT

2019 Tallahassee Bar Association Chili Cook-off

By Vinette Godelia, Esq., Hopping Green & Sams, P.A., Tallahassee, Florida

The 23rd Annual Tallahassee Bar Association Legal Aid Foundation of Tallahassee Chili Cook-off took place Thursday, January 17th at the beautiful Goodwood Plantation. As always, the event was well attended by Tallahassee attorneys, circuit, appellate and administrative judges and other dignitaries. The competition was fierce with chili cook-off teams from a wide range of law firms, state agencies, and area organizations bringing their "A-Game" chili and margarita recipes while embracing a range of themes such as "Game of Thrones,""Black Panther," and "Weekend at Bernie's." The event was co-sponsored by the RPPTL Section and represented by At Large Member, Trey Goldman, along with members of the FSU College of Law Chapter, Deborah Huveldt and Sam Houston, with further assistance from up-and-coming RPPTL Sebastian Obos (son of Mary Ann Obos). Funds from the Chili Cook-off go to the Legal Aid Foundation of Tallahassee.



RPPTL table: Sebastian Obos



Akbar Law Firm - Matt Williams; Aaron Torres; Courtney Johnson; Quierah Caldwell; Brandi Thomas; Mutaqee Akbar



Hopping Green & Sams Law firm – left to right: Kristen Diot, Felicia Kitzmiller, Shelley Long, Jackson Hansen , Jennifer Melchior



Tallahassee Women Lawyers (TWL) - Christian Cutillo (TWL President) and Stacey Biggart

(Photo credit: Anabella Barboza)



RPPTL table: Trey Goldman (At Large Member), Deborah Huveldt, Samuel Houston

RPPTL Section E
Four Seasons
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Hon. Celeste Muir



Law students join the RPPTL Executive Council Meeting.



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RPPTL families outdoors at the Four Seasons Orlando.



Section dinner at F





Section officers and Minnie and Mickey



Chef Smith of Homecomin' and Rob Freed

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

Executive Council Meeting
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Photo
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Salomé Zikakis, Angie Sparks and Martha Edenfield



Homecomin'



Andrew and Amy Beller



Annabella Barboza and Marjorie Wolasky taking selfies



dman





Former section chair Debbie Goodall and current section chair, Deb Boje

Florida ACREL Fellows who are also RPPTL Executive Council members, held in conjunction with the RPPTL Winter Meeting in Orlando. Rear from Left: Michael Gelfand*, Melisa Murphy*, Jim Russick, Burt Bruton, Margaret Rolando*, Art Menor, Adele Stone. Front from Left: Lee Weintraub, George Meyer*, William Sklar, Manuel Farach. *denotes past RPPTL Chair



Roundtable

Highlights Of The Meeting
Of The RPPTL Section
REAL PROPERTY DIVISION

Friday, December 7, 2018
The Four Seasons Resort • Orlando, Florida
Prepared by Jaqueline Peregrin, Esq., Naples, Florida

Thank you to the Roundtable Sponsor: Fidelity National Title Group

Rob Freedman, Chair-Elect of the Section opened the meeting at 3pm.

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

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

Action Items for RP Roundtable (Action Items at EC Meeting).

Title Issues and Title Standards Committee — Christopher Smart, Chair: Committee Chair Chris Smart reported on proposed changes to Fla. Stat. § 95.2311 (2018) regarding scrivener's error affidavits to cure legal description errors in deeds. There continued to be extensive discussion about such things as the need for the affidavit, who would execute it, and potential fraud. It was determined that the scrivener would be the person to sign the affidavit.

Information Items:

Condominium & Planned Development Committee – William P. Sklar, Chair: Chair William Sklar reported on Fla. Stat. § 718.116 (2018) regarding lien priority of assessment liens securing the nonpayment of assessments and common expenses. Currently, associations have a limited super priority; however, some in the industry want a less limited super priority after the last economic downturn when lenders were slow in prosecuting foreclosures, which delays caused financial insolvency for some associations. The subcommittee, with representatives of developer and association practices, worked together to proactively deal with this issue. One goal is to preserve the weight of the law. The other goals are to create more responsibility on the part of the lenders to fairly preserve the interests of the owners, to balance the needs of the association, and to protect the interests of the lender through having secured loans.

There was extensive discussion with many good points raised, but with no final resolution on the Division's position.

Real Property Finance and Lending Committee – Committee Co-Chair Richard McIver summarized this information item regarding discrepancies between the HOA and Condo statutes. While Fla. Stat. § 720.3085 (2018) requires that a foreclosing lender must initially name the HOA in the pleadings, Chapter 718 does not have the same requirement and allows a complaint to be amended to add an association as a party. The committee proposes that the statutes should be identical such that the requirement be removed from Chapter 720, allowing complaints filed under Fla. Stat. § 720.3085 (2018) to be amended to add a party.

Comments from the floor stated that the requirement of initially naming the association as a party in the pleadings was not drafted into Chapter 718 because it is often difficult to determine who should be named due to complicated, multiple-level association structures.

There was comment that the 4th DCA found that there was a very good and equitable reason for this requirement to remain. It deals with giving the association notice and letting them be involved from the start. While some practitioners are not doing title searches the right way, it is not a good reason to take a piecemeal approach to changing the Safe Harbor provision.

It was determined that this be presented and discussed with the Condominium & Planned Development Committee before proceeding further.

Committee Co-Chair Richard McIver presented a proposed clarification of Fla. Stat. § 95.11(5)(h) regarding when the Statute of Limitations for certain claims of deficiency run for residential foreclosures. The statute currently states it is one year from the issuance of the certificate; however, a question remains regarding which certificate (sale, disbursement, or title). The Committee suggests one year from the certificate of title.

Title Issues and Title Standards Committee – Committee Chair Chris Smart presented proposed Title Standards 6.10-6.12 regarding Enhanced Life Estate Deeds. Under these deeds, the

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life tenant would reserve the right to mortgage, sell, or revoke the remainder interest. There is currently no clear statute on enhanced life estate deeds, simply scant case law, so approval is sought to adopt a title standard for this type of deed.

Discussion was had regarding concerns about the nature of the remainder interest — whether the remainder is a vested or a contingent remainder.

The Committee is going forward with some additional language to the comment section and hopes to vote at the next meeting.

Additional Information Item – Condo Disputes and Pre-Suit Mediation – William Sklar, Chair of the Condominium and Planned Development Committee, presented a time sensitive item regarding the current state of the mandatory non-binding arbitration requirement in condominium disputes. There is a general consensus that mandatory non-binding arbitration removed certain "mailbox color" disputes out of the Florida courts and provided resolution under the umbrella of the Department of Business and Professional Regulation. The process worked very well under the guidance of Karl Scheuermann, but when he left that position, the process stopped working. It was no longer efficient or effective. The committee proposed that mandatory non-binding arbitration be replaced with mandatory pre-suit mediation.

CLE Planning for the 2018-2019 Bar Year:

Co-Chair Steve Mezer announced that the RPPTL Section has more content than all other Florida Bar Sections combined. The Real Estate Leasing Committee has 2 upcoming courses: Cell Site Leasing on 1/16/19 and Medical Marijuana Leasing on 2/13/19. Condo Certification Review Course, Construction law, and MRTA are all scheduled, and the month of March is already full. Submissions for April, May, and June are being accepted.

Legislation:

Co-Chair Katherine Frazier reminded attendees that the March meeting is the last chance for submission of proposed 2020 legislation. Directions for submissions are on the website and must be in the appropriate format and approved by the committee.

Legislative session will start March 5th for 2019. The committee will be calling on committee chairs and legislative liaisons for comment.

Committee Reports:

Attorney-Loan Officer Conference – Robert G. Stern, Chair; Kristopher E. Fernandez and Wilhelmina F. Kightlinger, Co-Vice Chairs: Robert Stern reported that the 2nd annual conference was a success with much thanks to the volunteers who helped pull it together in the wake of Hurricane Michael. The presentations were excellent, and the Chairs are waiting on final numbers for income and attendance. The Committee is seeking additional bankers who would like to participate.

Real Property Litigation – Marty J. Solomon, Chair; Amber E. Ashton, Manuel Farach and Michael V. Hargett, Co-Vice Chairs: Michael Hargett briefly shared the 2nd DCA decision in Rozanski v. Wells Fargo, Case No, 2D16-3800. This decision regarding the doctrine of equitable subordination may give rise to additional pleading requirements. The Committee will provide an update on the case.

Real Estate Leasing – Brenda B. Ezell, Chair; Richard D. Eckhard and Christopher A. Sajdera, Co-Vice Chairs: Brenda Ezell reported that the committee now has a sponsor – Steel in the Air.

The following Committees had no report:

Commercial Real Estate – Adele Ilene Stone, Chair; E. Burt Bruton, R. James Robbins, Jr. and Martin A. Schwartz, Co-Vice Chairs.

Condominium and Planned Development – William P. Sklar, Chair; Alexander B. Dobrev, Vice Chair.

Condominium and Planned Development Law Certification Review Course – Richard D. DeBoest II and Sandra Krumbein, Co-Chairs

Construction Law – Scott P. Pence, Chair; Reese J. Henderson, Jr. and Neal A. Sivyer, Co-Vice Chairs.

Construction Law Certification Review Course – Melinda S. Gentile and Deborah B. Mastin, Co-Chairs; Elizabeth B. Ferguson and Gregg E. Hutt, Co-Vice Chairs.

Construction Law Institute – Sanjay Kurian, Chair; Diane S. Perera, Jason J. Quintero and Brian R. Rendzio, Co-Vice Chairs.

Development & Land Use Planning – Julia L. Jennison, Chair; Colleen C. Sachs, Vice Chair.

Insurance & Surety – Michael G. Meyer and Scott P. Pence, Co-Chairs; Frederick R. Dudley, Katherine L. Heckert and Mariela M. Malfeld, Co-Vice Chairs.

Liaisons with FLTA – Alan K. McCall and Melissa Jay Murphy, Co-Chairs; Alan Fields and James C. Russick, Co-Vice Chairs.

Real Estate Certification Review Course – Manuel Farach, Chair; Lynwood F. Arnold, Jr., Martin S. Awerbach and Brian W. Hoffman, Co-Vice Chairs.

Real Estate Structures and Taxation – Michael A. Bedke, Chair; Deborah Boyd and Lloyd Granet, Co-Vice Chairs.

Real Property Finance & Lending – David R. Brittain and Richard S. McIver, Co-Chairs; Bridget Friedman, and Robert G. Stern, Co-Vice Chairs.

Real Property Problems Study – Lee A. Weintraub, Chair; Mark A. Brown, Jason M. Ellison, Stacy O. Kalmanson, Susan K. Spurgeon Co-Vice Chairs

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.

Title Insurance and Title Insurance Liaison – Brian W. Hoffman, Chair; Cynthia A. Riddell, Vice Chair.

Adjournment. The meeting was adjourned at 5:00 p.m.

Roundtable

Highlights Of The Meeting
Of The RPPTL Section

PROBATE AND TRUST DIVISION

Friday, December 7, 2018

The Four Seasons • Orlando, Florida

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

Thank you to Roundtable Sponsors: Stout, Guardian Trust and Cumberland Trust

William ("Bill") Hennessey, Director of the Probate and Trust Division, called the meeting to order at 3:15 PM.

Action Item

Small Account Legislation – William Hennessey and Travis Hayes reported on HB1241/SB 892 known as the Small Account Legislation. This legislation is being proposed by the Florida Bankers Association. The legislation proposes to create a new Florida statute that allows a financial institution in the state of Florida, without any court proceeding, order, or judgment authorizing payment, to pay to the surviving successor of a decedent (i.e. a spouse) the funds in the account (with no pay-on-death or survivor designation). In order to pay out the funds, the surviving successor must attest by way of affidavit that the total funds on deposit at all qualified institutions does not exceed $10,000. The current position of the RPPTL Section relating to small accounts is to oppose the legislation. At the Executive Council meeting, the Section will be discussing whether to support similar legislation if safeguards are put in place to protect the rights and interests of persons rightfully entitled to the proceeds, the constitutional rights of the decedent to direct the disposition of his or her property, and the rights of creditors to recover debts through a probate proceeding.

Information Items

Probate and Trust Litigation Committee – John Richard Caskey ("Richard"), Chair: Richard Caskey gave a report on proposed amendments clarifying the personal representative's exclusive authority to pursue causes of action on behalf of the estate, including, but not limited to, claims for the return of probate assets wrongfully transferred prior to the decedent's death, which may involve changes to Fla. Stat. §§ 731.201(32), 733.607(1), 733.612(20), and 733.802(2).

Trust Law Committee – Angela Adams, Chair: Angela Adams reported on work that the Trust Law Committee is doing for the "Florida Directed Trust Act," which is a modified version of the Uniform Directed Trust Act, which clarifies and changes various aspects of the Florida Statutes relating to directed trusts. The trust director and trust protector will have the same fiduciary duties and protections as a trustee unless the settlor stipulates to a different level of obligation. If the legislation passes, it should take effect July 1, 2020.

Probate Law and Procedure Committee – Michael Travis Hayes ("Travis"), Chair: Grier Pressly reported on efforts of the sub-committee, led by Grier and Jeffrey Goethe, to improve the notice of administration to a surviving spouse. The proposed changes would include revising Fla. Stat. § 733.212(2)(e) to include in the notice requirement that an extension of the deadline for taking an elective share may be requested prior to the expiration of the deadline for making the election.

Remote Witnessing and Notarization – William Hennessey reported on the status of electronic wills legislation and separate legislation relating to remote, online notarization and witnessing as those bills relate to power of attorney documents and health care directives. Despite its support of remote witnessing and notarization of real estate deeds, the RPPTL Section is working to address its ongoing concerns related to remote witnessing and remote notarization wherever testamentary powers are effectuated.

Legislative Update – Jon Scuderi and Katherine Frazier, Co-Chairs: Jon Scuderi reported on the following legislative initiatives relative to estate, probate and trust law for the 2019 legislative session:

An amendment to Fla. Stat. Chapter 731 would provide that formal notice as provided in the Florida Probate Rules does not confer *in personam* jurisdiction over persons receiving formal notice.

Legislation defining "tangible personal property" in the Florida Probate Code would clarify that tangible personal property, includes, but is not limited to, precious metals in any tangible form, such as bullion and coins.

Legislation amending Fla. Stat. § 733.610 to expand the

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categories of entities and persons for purposes of determining conflicts of interests of the personal representative.

Legislation would require the written disclosure by an attorney to the client of the attorney's fees prior to nomination or agreement by the attorney to serve as fiduciary.

Statutory codification of tenancy by the entirety for personal property.

Statutory amendments to address decision making authority over the disposition of a decedent's remains.

Electronic Wills.

Physician Order On Life Sustaining Treatment ("POLST").

Venue for guardianship proceedings involving minors.

Possible amendments to the Family Trust Company Statutes to protect public records exemption status for Family Trust Companies.

The Small Bank Account Legislation.

Standing Committee Reports

Guardianship Law Revision Committee – The Committee gave a brief report that it is continuing to work on its revisions to the Guardianship Code. A draft of the new legislation should be available in March 2019 in preparation for the 2020 Legislative Session.

Asset Protection – Brian Michael Malec, Chair: Jerry Wolf provided the Committee with information regarding the Model Asset Protection Trust Statute. Rick Gans conducted a follow-up discussion on the topic of tenants-by-the-entireties trusts in Florida. Rachel Lunsford presented an overview of the New Hampshire Foundation Act as it relates to asset protection, and Linda Griffin discussed the IRA Exemption Statute (Fla. Stat. § 222.212) and *Lerbakken v. Sieloff and Associates, P.A.*, U.S. 590 B.R. 895 (Bankr. Ct. 8th Cir. October 16, 2018), where an IRA received by the non-contributing spouse as part of a divorce settlement is not exempt under Federal Bankruptcy exception. The Committee continues to monitor the progress of the Uniform Voidable Transfer Act ("UVTA") legislation. It is not clear whether the UVTA proposed legislation will come before the Florida legislature again this Session, but similar legislation is now law in many other states, including: Alabama, Arkansas, California, Georgia, Idaho, Indiana, Iowa, Kentucky, Michigan, Minnesota, New Mexico, North Carolina, North Dakota, Pennsylvania, Utah, Vermont, Washington, and West Virginia.

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

Estate and Trust Tax Planning – Robert L. Lancaster, Chair: Angela Adams gave an update on the Committee's work in drafting statutory revisions and new statutes concerning a proposed Florida Uniform Directed Trust Act. Rob Lancaster spoke on the Difference in the Basic Exclusion Amount, 83 Fed. Reg. 59343-01 (proposed November 23, 2018) (to be codified at 20 C.F.R. pt. 20) available at https://federalregister.gov/d/2018-25538. This relates to proposed regulations addressing the clawback issue as to gifts made between 2018 and the end of 2025 which if enacted will result in no clawback or increase in gift or estate taxes due after 2025 when the exemption amount is returned to 2017 levels. Randy Randolph gave a report on proposed modifications to the Family Trust Company Act. A brief update was given on the Tax Section's work on Fla. Stat. § 736.0505 for SLAT Reversions. Finally, various subcommittees gave their report on work relating to possible Florida statutory community property trusts, and also transfer of interests in entities through trust on death designations. The Joint CLE Seminar with the Asset Protection Committee is scheduled for May 4, 2018 in Fort Lauderdale.

Guardianship, Power of Attorney, and Advance Directives – Nicklaus Joseph 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.

Venue for guardianships of minors.

Approval of fees paid to guardians and counsel for guardians.

Court Elisor services in guardianship actions.

The use of alternative dispute resolution procedures in guardianship proceeding.

IRA, Insurance and Employee Benefits – L. Howard Payne and/or Alfred Joseph Stashis Jr., Co-Chairs: Richard Newman and Jarrett Bostwick gave a presentation on Private Placement Life Insurance. Separately, an update was given on Trustee liability relating to insurance policies. Various subcommittees reported on their work and research relating to reforming beneficiary designations; and Fla. Stat. § 222.21 in light of *Lerbakken v. Sieloff and Associates, P.A.* where IRA and 401(k) retirement assets acquired in divorce were not exempt in bankruptcy. Finally, the Committee reviewed and addressed various Private Letter Rulings and summaries of recent case law developments.

Principal and Income – Edward F. Koren and/or Pamela O. 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.

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Probate and Trust Litigation – John Richard Caskey ("Richard"), Chair: The Committee is working on possible revisions to the Statute of Limitations to challenge a Will and Trust and/or changes to the Notice of Administration, and recovery of property for the benefit of the Estate (*Parker v. Parker*).

Probate Law and Procedure – Michael Travis Hayes ("Travis"), Chair: Stacey Prince-Troutman discussed a recently issued 4th DCA opinion *Johnson v. Townsend, et al.*, No. 4D18-432 (Fla. 4th DCA 2018) which held that a wife's attempt to perfect her interest in community property was a creditor claim which was subject to the time limitations set forth in Fla. Stat. §§ 733.701(1) and 733.710(1). Tae Kelley Bronner provided an update on proposed legislation from a few years ago regarding the disposition of decedent's remains. The bill seeks to revise Fla. Stat. §§ 732.804-732.808, 409.005(39), and 496.50, and is being proposed again this legislative session. Richard Sherrill discussed a recently issued 2nd DCA opinion *Gordon v. Fishman,* et al., 2D17-1488 (Fla. 2nd DCA 2018) which addressed generally the requirement under Fla. Stat. § 732.507(2), dealing with the effect of divorce on Will provisions for the benefit of the former spouse of the testator, determining that the testator be married to the named beneficiary on the date of the Will in order for the statute to apply. Richard led a discussion regarding whether this was the intended result under Fla. Stat. § 732.507 and whether revisions to that statute need to be considered. The Committee continues to work on numerous pending projects via its various subcommittees, including: efforts to codify the rights of artificial reproductive technology heirs; possible changes to Notice of Administration; probate code representation provisions; *Saunders v. Saunders,* 796 So. 2d 1253 (Fla. 1st DCA 2001) pretermitted spouse statute; independent action subcommittee; *Malleiro v. Mori et al.,* 182 So.3d 5 (Fla. 3 DCA 2015) subcommittee; elder abuse slayer statute subcommittee; and *in rem* service subcommittee.

Trust Law – Angela Adams, Chair: The "Benefit-Of-The-Beneficiary" subcommittee co-chaired by William Lane and Patrick Duffey gave their findings on their review of the recent change in Fla. Stat. §736.0103(11), which became effective in July 2018. The change provides that the phrase "interests of the beneficiaries" as used in the statute means the beneficial interests intended by the settlor as provided in the terms of a trust. Not changed in the legislation was Fla. Stat. § 736.04115, which permits judicial modification of trusts where "compliance with the terms of a trust is not in the best interests of the beneficiaries" (referred to herein as the "Modification Statute"). A concern was raised by a panel at the recent Attorney Trust Officer Conference that the 2018 Legislation effectively changed the meaning of the phrase "best interests of the beneficiaries" in the Modification Statute and thereby changed the application of that statute to require consideration of the settlor's intent. The subcommittee's recommendation is that it does not believe that the 2018 Legislation materially impacts trust modification under the Modification Statute. To the extent that the Modification Statute is affected by the 2018 Legislation, it reaffirms that the nature and extent of a beneficiary's interest in a trust is defined by the settlor of the trust. Therefore, the Subcommittee recommends that the Committee: (1) take no action to change the 2018 Legislation, and (2) consider authorizing the subcommittee to produce and present CLE materials clarifying this issue to avoid future confusion. Separately, the Committee also 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; and, research on tenancy by the entirety trusts.

Adjournment. The next Probate and Trust Division Roundtable meeting will be held at The Omni Amelia Island Resort, Amelia Island, Florida on March 16, 2019.

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Demystifying the Code of the Fair Housing Act and its Applicability to Assistance Animals

By Michelle Gomez Hinden, Esq., Nishad Kahn, P.L., Orlando, Florida

The Fair Housing Act ("FHA") was passed in 1968 for the purpose of protecting persons against discrimination based on race, color, religion, and national origin. In 1988, the FHA was amended to prevent discrimination against handicapped persons as well. When researching the FHA and how it applies to assistance animals, many find that the federal laws are confusing, and the available case law is sparse and not always on point. This presents a genuine challenge to real estate practitioners and housing providers who are faced with the task of interpreting the applicability of the FHA, especially with respect to assistance animals. This article will help demystify the rules as they apply to real estate practitioners.

As you already know, the FHA provides that it is illegal to discriminate against a "handicapped" person in the sale or rental of housing.[1] "Handicapped" has the same meaning as "disability" under the American with Disabilities Act ("ADA"), and is broadly defined as a person having "(1) a physical or mental impairment which substantially limits one or more of such person's major life activities, (2) a record of having such an impairment, or (3) being regarded as having such an impairment."[2] A major life activity is one that is of central importance to daily life.[3] In other words, any activity that relates to a person's normal functioning of life, such as seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking or communicating, qualifies as a major life activity.[4]

If a person qualifies as "handicapped" or "disabled" under federal laws, most, but not all, housing providers are obligated to comply with the FHA. The FHA exempts: (1) owner occupied buildings with four or less units;[5] (2) single family homes sold by an owner without the use of a real estate broker provided that certain conditions are met;[6] and (3) residential properties that are sold or rented by a religious organization or a private club.[7] If none of these exemptions apply, the housing provider must comply with the FHA. In these circumstances, it is important for a housing provider to understand what a reasonable accommodation is and the ramifications for refusing to provide one to a disabled person. A "reasonable accommodation" is defined as an accommodation which would not impose an undue hardship upon the housing provider making the accommodation, and which would not undermine the purpose that the requirement seeks to achieve.[8] A housing provider should know that a refusal to reasonably accommodate a disabled person's request places the housing provider in danger of being subjected to a discrimination claim under the FHA.[9]

These days, in light of the internet and the hundreds of websites offering pet owners a quick turnaround for an "emotional support animal letter" at a cheap price, housing providers are left with the difficult task of trying to decipher: (1) what is an assistance animal; (2) what factors are considered in determining whether there is a genuine need for an assistance animal accommodation; and (3) what rights does a housing provider have in connection with the FHA.

The FHA takes a broad approach in defining assistance animals. An "assistance animal" is "an animal that works, provides assistance, or performs tasks for the benefit of a person with a disability, or provides emotional support that alleviates one or more identified symptoms or effects of a person's disability."[10] Assistance animals are comprised of service animals, dogs and other animals.[11] There is no requirement that assistance animals be individually trained or certified because an assistance animal is used in the private setting of a home as opposed to the public arena.[12] The only requirement is that the assistance animal ameliorates one or more of the disabled person's symptoms.[13] For example, the U.S. Department of Housing and Urban Development ("HUD") has declared that training is not needed for an assistance animal to support an emotionally disabled person because emotional support dogs, by their nature, and without training, relieve the effects of the disability.[14]



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A housing provider with a no-pets policy has no obligation to provide a disabled person with an assistance animal unless a request for the accommodation is made.[15] Also, a refusal, on a disabled person's part, to provide documentation so that the housing provided is afforded with an opportunity for a meaningful review of the accommodation requested cannot be construed as a specific request for an accommodation.[16] On the other hand, when a housing provider with a no-pets policy does receive a legitimate request for a reasonable accommodation of an assistance dog, it must be taken seriously. A reasonable accommodation request must be highly fact-specific and should be decided on a case-by-case basis.[17] After receiving a reasonable accommodations request, a housing provider must consider:

- Does the person making the request have a disability under the FHA?[18]
- Does the person making the request have a disability-related need for the assistance animal?[19]

To find out the answer to these questions, a housing provider may request documentation such as a letter from a physician or a licensed mental health provider that confirms the person has a disability and that explains how the assistance animal reduces the effects or symptoms of the person's disability *unless* the disability-related need for an assistance animal is readily apparent or already known.[20] For example, a blind person is not required to provide a letter demonstrating a need for a guide dog.[21] If the need is not apparent and a letter is provided, a housing provider may deny the request for the accommodation if it is insufficient to establish a handicap and the person's disability-related need for the requested accommodation.[22] For example, a deaf tenant may be denied a dog as a reasonable accommodation if the dog is not a hearing dog.[23]

As a caution to housing providers, there is a limit as to what information may be requested by the housing provider. For example, a housing provider is prohibited from inquiring as to the nature and the severity of the person's disability, so it is important for housing providers to tread carefully when reviewing the accommodations request.[24] When reviewing the documentation provided, if answer is "yes" to the questions listed above, the housing provider *must* reasonably accommodate the disabled person by permitting the assistance animal. Additionally, the housing provider must further accommodate the disabled person by waiving any extra fees or deposits for the assistance animal; however, the housing provider does reserve the right to hold the disabled person responsible for any damage caused to the property by the assistance animal.[25]

Based on the above, many housing providers would think that FHA's requirements seem a bit one-sided; however, not all is lost because there are a few exceptions to the reasonable accommodation rule that are designed to protect the housing provider.[26] If one of the exceptions applies, a housing provider may allege that the requested accommodation is unreasonable as an affirmative defense.[27] For example, a reasonable accommodations request may be denied if the housing provider is able to substantiate that the accommodation would fundamentally alter the nature of the housing provider's services.[28] Further, a reasonable accommodations request may be denied if the housing provider is able to prove that the request would impose an undue financial and administrative burden.[29] For example, HUD has permitted the denial of an accommodation where a housing provider's insurance carrier has threatened to substantially increase or cancel its insurance coverage because the insurance carrier has classified the animal as a dangerous breed.[30] Further, HUD would permit a housing provider to evict an assistance animal if the assistance animal would pose a direct threat to the health or safety of others that could not be reduced or eliminated by another reasonable accommodation.[31] For example, an eviction was warranted when the housing provider had exhausted all reasonable efforts to accommodate the owner, and it was determined that the animal's behavior placed other residents' health, safety and comfort at risk, specifically, since the owner did nothing to adequately control the animal's disruptive behavior.[32] The rationale behind evicting an animal in these circumstances is because it would be unreasonable to permit the animal when the animal continues to remain a direct threat to others, and the owner has taken no effective action to control the animal's behavior.[33] Lastly, HUD would permit a housing provider to evict an assistance animal if the assistance animal would cause substantial physical damage to the property of others that could not be reduced or eliminated by another reasonable accommodation.[34]

When confronted with a reasonable accommodation request, determining a person's need for an assistance animal can be a complicated and daunting process for a housing provider, especially when there is little guidance out there. Given this, it is understandable that a housing provider would feel frustrated in light of the growing trend of false claims regarding the need for an assistance animal. While this trend is not likely to go away, housing providers should take solace in knowing that more and more case law and government opinions are emerging, which one day will hopefully provide a clearer understanding of the FHA and how it applies to assistance animals.


M.G. HINDEN

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transactions, acquisitions and disposition of real estate assets and corporate law matters.

Michelle attended the University of Central Florida (B.S. in Psychology) and earned her Juris Doctor at the Florida Coastal School of Law. Michelle is a member of the Real Property, Probate and Trust Law Section of the Florida Bar, and also serves on the Florida Bar Committee for Real Estate Board Certification.

Endnotes

1 42 U.S.C. § 3604 (2012).

2 42 U.S.C. § 3602(h) (2012).

3 *Matarese v. Archstone Pentagon City*, 761 F. Supp. 2d 346, 358 (E.D. Va. 2011) (citing *Rohan v. Networks Presentations LLC,* 375 F.3d 266, 274 (4th Cir.2004)).

4 42 U.S.C. § 12102(2) (2012).

5 42 U.S.C. § 3603(b)(2) (2012).

6 42 U.S.C. § 3603(b)(1) (2012).

7 42 U.S.C. § 3607(a) (2012).

8 *United States v. Vill. of Marshall, Wis*., 787 F. Supp. 872 (W.D. Wis. 1991).

9 *See* 42 U.S.C. § 3604(f)(2) (2012).

10 U.S. Department of Housing and Urban Development, FHEO Notice-2013-01, *Service Animals and Assistance for People with Disabilities in Housing and HUD-Funded Programs*, at p. 2 (April 25, 2013) (hereinafter, "HUD FHEO Notice 2013-01") available at: https://www.hud.gov/sites/documents/SERVANIMALS_NTCFHEO2013-01.PDF.

11 *Id.*

12 Pet Ownership for the Elderly and Persons with Disabilities, 73 Fed. Reg. 63833, 63836 (Oct. 27, 2008) (codified at 24 C.F.R. § 5.303 (2017)).

13 *Id.*

14 *Id.*

15 Joint Statement of the Department of Housing and Urban Development and the Department of Justice, *Reasonable Accommodations under the Fair Housing Act* (May 17, 2004) (hereinafter, "Joint Statement") available at: https://www.justice.gov/sites/default/files/crt/legacy/2010/12/14/joint_statement_ra.pdf.

16 *Kromenhoek v. Cowpet Bay W. Condo. Ass'n*, 77 F. Supp. 3d 462, 471 (D. V.I. 2014).

17 *United States v. California Mobile Home Park Mgmt. Co.,* 107 F.3d 1374, 1380 (9th Cir. 1997) (citations omitted); *Kromenhoek*, 77 F. Supp. 3d at 469.

18 *See* HUD FHEO Notice 2013-01, *supra* note 10, at p. 3.

19 *Id.*

20 *Id.* at 4.

21 *Id.*

22 *Sun Harbor Homeowners' Ass'n, Inc. v. Bonura*, 95 So. 3d 262, 270 (Fla. 2d DCA 2012).

23 *Bronk v. Ineichen*, 54 F.3d 425, 429 (7th Cir. 1995).

24 *See* Joint Statement, *supra* note 15, at p. 13.

25 *Id.* at 9-10.

26 *See* HUD FHEO Notice 2013-01, *supra* note 10, at p. 3.

27 *See Township. of W. Orange v. Whitman*, 8 F. Supp. 2d 408, 428 (D.N.J. 1998).

28 *See* HUD FHEO Notice 2013-01, *supra* note 10, at p. 3.

29 *Id.*

30 U.S. Department of Housing and Urban Development, Office of Fair Housing and Equal Opportunity, Memorandum for FHEO Regional Directors, *Insurance Policy Restrictions as a Defense for Refusals to Make a Reasonable Accommodation* (June 12, 2006) available at: http://www.fhcwm.org/uploads/files/reports/HUD_Memo_-_RA_Breed_Restrictions_Insurance.pdf.

31 HUD FHEO Notice 2013-01, *supra* note 10, at p. 3.

32 *Woodside Village v. Hertzmark*, 1993 WL 268293 (Conn. Super. Ct. June 22, 1993).

33 Pet Ownership for the Elderly and Persons with Disabilities, 73 Fed. Reg. at 63837.

34 HUD FHEO Notice 2013-01, *supra* note 10, at p. 3.



Disputes Over Possession Of A Decedent's Body At Death

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

What happens to the remains of a loved one upon death is an extremely sensitive situation. Family members often have conflicting ideas and desires as to how the decedent's funeral will take place. Such disputes involve the location of the funeral and whether the funeral will be a religious ceremony and if so, which religion. In addition, family members may disagree over whether the decedent will be cremated or buried. If the decedent is cremated, family members may dispute over who should have possession of the cremains, or how the cremains will be buried or scattered. If the decedent is buried, loved ones may debate over where the decedent should be buried. This article provides instruction regarding issues related to the disposition of a decedent's remains.



Family members should be aware of the need to act quickly, since courts will consider a challenge to possession of a body moot after burial occurs. In *Leadingham v. Wallace*, a dispute arose between the decedent's ex-wife and an ex-girlfriend, each the mother of two of the decedent's children, as to who should have the right to bury him.[1] The circuit court appointed the decedent's ex-girlfriend as curator of his estate for the sole purpose of burying him. The record on appeal reflected that the decedent was buried. In affirming the circuit court's decision the Fifth District Court of Appeal held "after burial occurs, a further challenge for possession of the body is moot."[2] The Fifth District Court of Appeal explained "an appellate court will not determine a controversy where the issues have become moot."[3]

Family members should also be aware of potential financial liability. In *Kirksey v. Jernigan*, after a five-year old child was accidentally shot and killed, an undertaker took the child's body to his establishment without the mother's knowledge or consent.[4] The child's mother went to the establishment within two hours after the accident and made demand for the body. The undertaker refused to surrender the body at that time and refused to surrender the body upon repeated requests thereafter. The Supreme Court of Florida held that "unlawfully withholding the body from the relative entitled thereto is an actionable wrong, for which substantial damages may be recovered."[5] The Supreme Court of Florida held that damages for unlawfully withholding a body can include punitive damages as well as damages for mental suffering and anguish.[6]

In addition to financial damages, family members may be affected mentally and emotionally by the court process. The decedent's remains could be held by the medical examiner's office for many months while a court conducts evidentiary hearings. This could contrast with a decedent's religious beliefs,

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which may require burial within days of death. The Fourth District Court of Appeal has explained that "[i]t is a sorrowful matter to have relatives disputing in court over the remains of the deceased…. [T]here is no solution that will bring peace to all parties. We express our sympathies to both sides in their loss, which must be magnified by these proceedings."[7]

There are no statutes that substantively govern the disposition of remains. The Florida Probate Code has one provision. Fla. Stat. §732.804 (2018) provides that "[b]efore issuance of letters, any person may carry out written instructions of the decedent relating to the decedent's body and funeral and burial arrangements. The fact that cremation occurred pursuant to a written direction signed by the decedent that the body be cremated is a complete defense to a cause of action against any person acting or relying on that direction." This statute provides a release of liability, but it does not provide any substantive instruction on disposition of remains.

Practitioners need to be aware of two statutory red herrings. In *Arthur v. Milstein*, a dispute arose between a guardian ad litem (who had been appointed to represent the decedent's minor child) and the decedent's mother, as to who should have the right to handle the decedent's remains.[8] The circuit court determined that child's guardian ad litem was authorized to handle the decedent's remains instead of the decedent's mother. The circuit court relied on Fla. Stat. § 406.50 (2006), which governs the disposition of unclaimed remains by medical examiners. Fla. Stat. § 406.50 (2006) was amended after the case was decided, but the version of the statute in place at the time stated that preference should be given according to who would inherit under the laws of intestacy. On appeal, the decedent's mother argued that the circuit court should have ruled in her favor because she was the sole "legally authorized person" under Fla. Stat. § 497.005 (2006). Chapter 497 governs funeral, cemetery, and consumer services. Fla. Stat. § 497.005(37) (2006), Florida Statute defines a "legally authorized person" and outlines the priority of those persons that funeral homes and cemeteries are legally authorized to deal with, which differs from the priority outlined under the laws of intestacy.

The Fourth District Court of Appeal ultimately affirmed the lower court's decision, but the decision was affirmed on different grounds. The Fourth District Court of Appeal held that neither Fla. Stat. § 406.50 (2006) nor § 497.005 (2006) controlled the outcome of the case.[9] The Fourth District Court of Appeal explained that the sections relate to whether a funeral home or medical examiner is liable for a decision that it made with respect to the disposition of a decedent's remains.[10] The court further explained "that the intent of those statutes is to guide the funeral home operators by clearly delineating the priority of those persons who are legally authorized to make funeral arrangements for a deceased person."[11] The court held that the statutes did not control the outcome of cases that involved private parties engaged in a pre-burial dispute as to the decedent's remains.[12] In the absence of applicable statutes, the Fourth District Court of Appeal held that common law is dispositive.[13]

As a general rule, under common law, if a decedent has provided burial instructions exclusively in his or her will, the burial instructions articulated in the will should be followed. In *Kasmer v. Guardianship of Limner*, the decedent's will contained a directive that his remains be cremated.[14] The personal representatives refused to cremate the decedent's body due to "reasons of conscious." The Third District Court of Appeal ordered the personal representatives to follow the directives in the will explaining "Florida courts have long held that testamentary directions are to be complied with to the fullest extent possible. […] There is no higher duty nor greater responsibility on the courts than that of seeing to it, in proper cases, that the will of the dead is honored."[15]

However, confusion arises when a decedent's burial instructions in will are contradicted by his or her later actions. According to the Florida Probate Code, a will disposes of property that the decedent owned at death.[16] Courts have held that a decedent's remains are not property, and therefore a directive in a will regarding the disposition of a body does not have the same force and effect as do provisions directing the disposition of property.[17] Accordingly, courts have concluded that "a written testamentary disposition is not conclusive of the decedent's intent if it can be shown by clear and convincing evidence that he intended another disposition for his body."[18] A trial court may hear contrary and convincing oral or written evidence that the decedent changed his or her mind regarding the disposition of their remains after the will was signed.[19]

Evidence that the decedent changed his or her mind after the will was signed may include (1) purchasing of a prepaid funeral plan, (2) purchasing or selling a burial plot, (3) converting to a religion that does not believe in cremation, (4) death bed conversations with relatives, and (5) any other conduct of the decedent that conflicts with the provisions in the will. The burden of proof is clear and convincing evidence.[20] However, if a decedent *exclusively* expressed his or her intentions regarding the disposition of their remains through a will, then the instructions will be honored.[21]

Confusion also arises when the decedent did not provide burial instructions in his or her will. Since courts have held that a decedent's remains are not property, neither the person serving as guardian over the decedent while the decedent was alive, nor the personal representative of the decedent's estate has the authority to decide what happens to the decedent's remains in the absence of a testamentary disposition.[22] The Supreme Court of Florida addressed the issue for the first time in *Dunahoo v. Bess*.[23] In this case, a husband sued a funeral home for breach

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of contract and negligence, alleging that the funeral home embalmed his wife's body in a careless and negligent manner that caused mental anguish. The Supreme Court of Florida held "the right of the surviving spouse to have, protect and dispose of the remains of the other is a right recognized by law." The Supreme Court of Florida clarified this holding in *Kirksey*. In determining that a mother had the right to possess her deceased son's body, the Supreme Court of Florida held that "in the absence of a testamentary disposition to the contrary, a surviving spouse or next of kin has the right to the possession of the body of a deceased person for the purpose of burial, sepulcher or other lawful disposition which they may see fit."[24]

Fla. Stat. § 744.102 (2018) defines "next of kin" as "those persons who would be heirs at law of the ward or alleged incapacitated person if the person were deceased." Fla. Stat § 731.201 (2018), defines "heirs at law" as the persons "who are entitled under the statutes of intestate succession to the property of the decedent." Intestate succession is governed by Fla. Stat § 732.102 (2018) and Fla. Stat § 732.103 (2018). Pursuant to these statutes, generally, the surviving spouse followed by the decedent's children would have priority. If the decedent's children are "too young to express an opinion, a guardian could be appointed for them to act in their behalf."[25] If the decedent was not survived by a spouse and did not have any children, the decedent's parents, followed by the decedent's brothers and sisters, would have priority.

However, the common law decisions in Florida do not provide a clear roadmap for practitioners under all circumstances. To begin with, they do not clearly state whether a surviving spouse would have priority over other heirs at law, such as a child from a prior marriage. In addition, the common law decisions do not provide guidance in circumstances where heirs at law, who would inherit equally according to the laws of intestacy, disagree. This can happen if a child dies and the parents are divorced, or if the decedent is not survived by a spouse, and the decedent's children do not get along. Further, the common law decisions do not address scenarios where there are many heirs at law at different levels on the chart of consanguinity who disagree. Finally, common law decisions do not address situations where a decedent may have expressed burial instructions or purchased a prepaid funeral, but the burial instructions were not expressed in the decedent's will.

In conclusion, if the decedent expressed an intention regarding the disposition of their remains through a will, then the court will defer to the will unless an opponent can prove by clear and convincing evidence that the decedent changed their mind. If the decedent never expressed an intention regarding the disposition of their remains in a will, then the court will defer to the next of kin. The next of kin are the heirs at law under the laws of intestacy. The law is unclear as to who has priority when the next of kin disagree. One solution might be to give preference to the persons who are closest in relation on the chart of consanguinity. Another solution could be to give preference to the majority in interests of the intestate heirs, similar to who is given preference in appointment as personal representative under Fla. Stat. § 733.301(b) (2018). The disposition of one's remains is a sensitive decision that is best made by the decedent exclusively through their will.


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Endnotes

1 *Leadingham v. Wallace*, 691 So. 2d 1162 (Fla. 5th DCA 1997).
2 *Id.* at 1163 (*citing Mills v. Heenan*, 382 2d 1317, 1318 (Fla. 5th DCA 1980)).
3 *Id.* (*citing DeHoff v. Imeson*, 15 So. 2d 258 (Fla. 1943)).
4 *Kirksey v. Jernigan*, 45 So. 2d 188 (Fla. 1950).
5 *Id.* at 190.
6 *Id*.
7 *Cohen v. Guardianship of Cohen*, 896 So. 2d 950, 955 (Fla. 4th DCA 2005).
8 *Arthur v. Milstein*, 949 So. 2d 1163 (Fla. 4th DCA 2007).
9 *Id.* at 1165.
10 *Id.*
11 *Id*.
12 *Id.*
13 *Id.* at 1166.
14 *Kasmer v. Guardianship of Limner*, 697 So. 2d 220 (Fla. 3d DCA 1997).
15 *Id.* at 221.
16 Fla. Stat. § 732.6005(2) (2018).
17 *Cohen* at 954.
18 *Arthur* at 1166 (citing *Cohen* at 954).
19 *Cohen* at 955.
20 *Arthur* at 1166 (citing *Cohen* at 954).
21 *Id.* at 953.
22 *Id.* at 954.
23 *Dunahoo v. Bess*, 146 Fla. 182, 200 So. 541 (1941).
24 *Kirksey* at 189.
25 *Leadingham* at 1163.

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Special Needs Requires Special Planning

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

Approximately 78% of millennials (ages 18-36) and 64% of people in Generation X (ages 37-52) have not drafted their estate planning documents.[1] Within this 78% of the population, we are seeing more special needs children and families. It is especially important that families with special needs individuals plan for the future by creating an estate plan which accounts for the complexity of the law governing this area.

Many people do not realize that the law allows for individuals receiving Supplemental Security Income ("SSI") or Medicaid benefits to still receive these benefits while receiving an inheritance, personal injury settlement, or divorce settlement. A person's eligibility for these benefits is preserved if the assets or property are titled in a "Special Needs Trust."

The Special Needs Trust assets are exempt from the Medicaid eligibility calculation and other public benefits such as SSI, but those held in a regular trust are not. Therefore, it is essential that an experienced special needs estate planning attorney appropriately draft these documents so the SSI or Medicaid benefits are not lost.

Historically, federal law disallowed disabled individuals below the age of 65 from establishing a Special Needs Trust on their own behalf. It was only when the Special Needs Trust Fairness Act passed in December 2016 that people with disabilities were allowed to create their own Specials Needs Trust without relying on another to do so on their behalf (for example, in a guardianship).[2] In addition to disabled individuals now having the ability to establish their own trust, a parent, grandparent, legal guardian or court still has the ability to establish a Special Needs Trust on behalf of the disabled individualy.[3]

Despite the rule changes regarding who can create a Special Needs Trust having been updated within the last few years, many of the requirements for a Special Needs Trust mirror those of traditional revocable and irrevocable trusts. As is required with all manner of trusts, a Special Needs Trust will require a trustee.[4] The trustee is empowered with managing and distributing the trust assets. Under Florida law, the trustee's obligations include: to "administer the trust in good faith,"[5] to administer the trust "solely in the interests of the beneficiaries,"[6] to "act impartially in administering the trust property,"[7] and to "administer the trust as a prudent person."[8]

When choosing a trustee for a Special Needs Trust, it is essential to choose a trustee who has experience administrating these types of trusts and has knowledge regarding Medicaid rules and regulations. Therefore, it is important to appoint competent and capable individuals as trustee that can adequately meet their obligations.

In conclusion, there are a multitude of considerations when preparing estate planning documents, especially when involving a special needs family member. Properly prepared estate plan documents for special needs individuals will ensure their needs are met and their interests protected.

Endnotes:

1 https://www.aarp.org/money/investing/info-2017/half-of-adults-do-not-have-wills.html
2 42 U.S.C. §1396p(d)(4)(A).
3 42 U.S.C. §1396p(d)(4)(A).
4 Fla. Stat. §736.0402 (2007).
5 Fla. Stat. § 736.0801 (2007).
6 Fla. Stat. § 736.0802 (2016).
7 Fla. Stat. § 736.0803 (2007).
8 Fla. Stat. § 736.0804 (2007).

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Preserving And Revitalizing Association Covenants From The Marketable Record Title Act

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

Many communities in Florida have associations that rely on recorded covenants and restrictions for authority to collect assessments and enforce community standards. However, if proper notice to preserve an association's covenants and restrictions is not timely provided, then an association may find that it no longer has authority to collect assessments or initiate enforcement proceedings because its covenants have been extinguished by the Marketable Record Title Act (MRTA).

Many communities in Florida have associations that rely on recorded covenants and restrictions for authority to collect assessments and enforce community standards. However, if proper notice to preserve an association's covenants and restrictions is not timely provided, then an association may find that it no longer has authority to collect assessments or initiate enforcement proceedings because its covenants have been extinguished by the Marketable Record Title Act (MRTA). [1]

MRTA's goal is to ensure that after thirty years of ownership of land, a person has marketable title free and clear of most encumbrances. Specifically, MRTA extinguishes all estates, interests, claims, or charges, the existence of which depends upon any act, title transaction, event, or omission that occurred before the effective date of the root of title.[2] Although extinguishing encumbrances on property may normally be desirable, in some cases, especially for homeowners' associations, the expiration of covenants and restrictions can cause problems, including but not limited to an association's ability to enforce the collection of assessments.

As with most statutes, there are exceptions and MRTA is no different. Of relevance to associations is that MRTA does not extinguish estates, interests, easements, or restrictions that are preserved by recording proper written notice in the public records of the applicable county. To preserve an association's covenants, the board of directors at the first board of directors' meeting that is not the organizational meeting must consider whether the covenants should be preserved. If the directors determine that the covenants should be preserved, then the board must authorize and direct an officer, presumably the president or vice president, to file the required notice.[3] Practitioners may desire to recommend that a resolution authorizing preservation and specifying the person authorized to file the notice is adopted to ensure statutory compliance.

Once authorization has been provided, practitioners should ensure that the notice includes all of the statutory requirements, including:

1. The legal name of the association (remember to confirm the name of the association on the articles of incorporation);
2. The mailing and physical addresses of the association;
3. The names of the affected subdivision plats or, if not applicable, the common name of the community;
4. The name, address, and telephone number for the association management company, if any;
5. Indication that the association desires to preserve the association's covenants and restrictions from extinguishment under Chapter 712, Florida Statutes;
6. A list by name and recording information of the covenants and restrictions affecting the community, which are to be preserved from extinguishment;
7. The legal description of the community affected by the covenants or restrictions, which may be satisfied by a reference to a recorded plat; and
8. The signature of a duly authorized officer of the association, acknowledged in the same manner as deeds are acknowledged for record.[4]

Once the notice is prepared and executed, then the original signed notice must be recorded. After the notice has been recorded, a copy must be included in the next notice of meeting or in the next mailing to members. As with all official records, a copy of the resolution authorizing preservation, if a resolution is adopted, and the notice must be retained in the association's records. If an association files a proper notice before the expiration of the 30-year period of the root

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of title, then pursuant to the statute, the covenants will not be extinguished.

If the association fails to preserve covenants before their expiration under MRTA and the association desires to enforce its covenants and restrictions, then the covenants must be revitalized. To revitalize an association's covenants, the association must:

1. Form an organizing committee of at least three parcel owners. Practitioners must confirm that the "owners" an association appoints to the committee are actually owners of record;
2. Prepare the required documents including but not limited to the proposed revived declaration, bylaws, and articles of incorporation;
3. Obtain the consent to the revived documents of a majority of the parcel owners in writing or at a properly noticed meeting;
4. Submit the required documents, including but not limited to the proposed revived documents, to the Department of Economic Opportunity for review within sixty days of approval by parcel owners;
5. File the articles with the Division of Corporations within thirty days of approval from the Department of Economic Opportunity, if not previously filed;
6. Execute the revived documents and record the documents with the clerk of the circuit court in the county where the affected parcels are located, within thirty days of receiving division approval; and
7. Mail or hand deliver the recorded documents to the owner of each affected parcel.[5]

Although not impossible, revitalizing covenants is a far more tedious and time-consuming undertaking for both practitioners and associations than preparing a notice before covenants are extinguished. Therefore, confirming and calendaring the date when declarations of homeowners' association you represent are recorded may save you and your clients time and headaches.

Endnotes

1 Fla. Stat., Chapter 712 (2018).
2 Fla. Stat. § 712.04, Fla. Stat. (2018).
3 Fla. Stat. § 712.303(2)(e) (2018).
4 Fla. Stat. § 720.3032 (2018); *see also* Fla. Stat. §712.06, (2018).
5 Fla. Stat. § 720. 405-§720.407 (2018).

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Probate And Trust Case Summaries

Prepared by Denise B. Cazobon, Esq.
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Decedent's children are beneficiaries and qualified beneficiaries of the Family Trust, and thus have standing to challenge the administration of the Family Trust, even though the children are distributees of any remaining trust principal in the Family Trust only through a newly-created trust for their benefit upon the termination of the Family Trust.

Rachins v. Minassian, 251 So. 3d 919 (Fla. 4th DCA 2018)

The decedent executed a trust restatement in which he created a revocable trust that would become irrevocable upon his death. The decedent and his wife, Paula Minassian ("Wife"), were the sole trustees of the revocable trust at the time of the restatement. The decedent died in 2010. Upon the decedent's death, the remaining trust property was distributed to a Family Trust providing for discretionary distributions of income and principal to Wife for her health, education and maintenance. Upon Wife's death, the Family Trust would terminate, and the remainder divided into a separate trust share for each of the decedent's children. Wife is the sole trustee of the Family Trust.

The decedent's children (the "Appellants") filed a complaint against Wife alleging improper administration of the Family Trust. Wife moved to dismiss the complaint, arguing the Appellants lacked standing because they were not beneficiaries of the Family Trust. The trial court denied Wife's motion.

Wife subsequently exercised her authority under the trust instrument to appoint a trust protector and appointed the drafting attorney to serve as trust protector. The trust protector then amended the trust instrument to clarify if property remained in the Family Trust upon Wife's death, the remaining property would be disbursed to a new trust created for the benefit of the Appellants. The Appellants challenged the validity of the trust protector's amendment. The trial court held the trust was unambiguous and thus the trust protector had no authority to change the terms of the trust. In a previously issued opinion, the Fourth District Court of Appeals (the "Appellate Court") reversed the trial court order, finding the trust instrument was ambiguous and the trust protector's amendments were valid. *See Minassian v. Rachins*, 152 So.3d 719 (Fla. 4th DCA 2014).

After the earlier order of the Appellate Court addressing the validity of the trust protector amendment, Appellants filed a 14-count amended complaint, which included allegations Wife had dissipated trust assets and added the trust protector and his law firm as defendants.

In the first two counts of the amended complaint, the Appellants sought a declaration the Family Trust never came into existence because the decedent attempted to create the Family Trust with the same individual (Wife) as sole trustee and sole beneficiary. The trial court entered summary judgment in favor of Wife and the other defendants on these first two counts, finding Appellants lacked standing as they were neither beneficiaries nor qualified beneficiaries of the Family Trust, as amended by the trust protector.

The trial court subsequently entered a final order dismissing the remaining counts against Wife and the trust protector's law firm, finding Appellants lacked standing to bring any of the claims in the amended complaint because they were neither beneficiaries nor qualified beneficiaries of the Family Trust.

The Appellants appealed both orders of the trial court, arguing they are qualified beneficiaries under Fla. Stat. § 736.0103(16) (2017) and therefore have standing to question whether Wife was properly administering the Family Trust. The Appellate Court concluded the Appellants are both beneficiaries and qualified beneficiaries of the Family Trust with standing to challenge the administration of the Family Trust and reversed the trial court's order entering partial summary judgment against the Appellants with respect to the first two counts and the trial court's order dismissing the remaining counts against Wife, both of which were entered on the basis the Appellants lacked standing.

In determining the Appellants were beneficiaries of the Family Trust, the Appellate Court found Appellants have a future beneficial interest in any property remaining in the Family Trust after Wife's death because any remaining property will be disbursed to a new trust for the Appellant's benefit under the terms of the trust document. The Appellate Court reasoned, at a minimum, the Appellants have an equitable interest in any property in the Family Trust at the time of Wife's death. The fact any remaining principal of the Family Trust would flow into a new trust for the Appellants, as opposed to being distributed outright to them, does not preclude the Appellants from being beneficiaries of the Family Trust.

Further, the Appellate Court found the Appellants are "qualified beneficiaries" as defined in Fla. Stat. § 736.0103(16)(c) (2017) because they would be distributees of trust principal if the Family Trust terminated in accordance with its terms,

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even though Appellants would be distributees only through a newly-created trust for their benefit.

Fla. Stat. § 732.507(2) (2015) does not apply to void a provision in a will in favor of a former spouse when the will was executed prior to the marriage.

Gordon v. Fishman, 253 So. 3d 1218 (Fla. 2d DCA 2018)

In December 2005, the decedent executed a will devising property to his then fiancée, Silvia Gordon ("Gordon"), or if Gordon did not survive him, to her two children. The decedent and Gordon subsequently married and later divorced in 2013. The decedent died in 2015.

In April 2015, Robert Fishman ("Fishman"), as guardian for the decedent's father, petitioned for administration of the decedent's estate, alleging the decedent died intestate. In August 2015, Gordon filed the original 2005 will with the probate court. Fishman moved for an order determining the beneficiaries of the decedent's estate, arguing Fla. Stat. § 732.507(2) (2015) applied to construe the will as if Gordon predeceased the decedent. Gordon objected, arguing such statute did not apply because she was not married to the decedent at the time the will was executed.

The trial court found Fla. Stat. § 732.507(2) (2015) applied, and the will was to be construed as if Gordon predeceased the decedent. The trial court entered an order finding Gordon's two children and the decedent's father to be the beneficiaries of the decedent's estate.

The Second District Court of Appeals (the "Appellate Court") reversed the trial court order, holding the plain and unambiguous meaning of Fla. Stat. § 732.507(2) (2015) revokes the provisions of a will executed by a "married person." The Appellate Court analyzed the statute at issue, which states as follows:

> Any provision of a will executed by a married person affecting their spouse shall become void upon their divorce or upon the dissolution or annulment of the marriage. After the dissolution, divorce, or annulment, the will shall be administered and construed as if the former spouse had died at the time of the dissolution, divorce, or annulment of the marriage, unless the will or the dissolution or divorce judgment expressly provides otherwise.

Fla. Stat. § 732.507(2) (2015). The Appellate Court found the use of the adjective "married" to modify "person" is a clear indication the legislature intended the "person" executing the will to be "married" at the time of execution and, thus, Fla. Stat. § 732.507(2) (2015) only applies when the marriage predates the will. In this case, because the will predates the marriage by 15 months, Fla. Stat. § 732.507(2) (2015) does not apply.

Relation back doctrine applies to allow the substitution of the personal representative of the decedent's estate as the plaintiff to a wrongful death lawsuit where the petition for administration was filed, and letters of administration were issued, after the expiration of the statute of limitations for the wrongful death claim.

Lindor v. Florida East Coast Railway, LLC, 255 So.3d 490 (Fla. 3d DCA 2018)

Plaintiffs Weedemarck Lindor and Bernite Lindor ("Plaintiffs") filed a wrongful death lawsuit on behalf of the estate of Marie Claudia Gelin (the "Estate") against Florida East Coast Railway ("East Coast Railway"). Plaintiffs' lawsuit was filed two days before the expiration of the statute of limitations to bring the wrongful death claim. Plaintiffs' original counsel listed Plaintiffs as co-personal representatives of the Estate; however, at the time the lawsuit was filed, no petition for administration had in fact been filed.

Two and half years later, during the course of taking depositions, it was discovered Plaintiffs had not been appointed as personal representatives of the Estate. Plaintiffs subsequently filed a petition for administration and an order appointing Bernite Lindor as personal representative was entered.

In the interim, East Coast Railway moved to dismiss the complaint as a sham pleading, claiming the Plaintiffs and their counsel alleged the Plaintiffs had been properly designated as personal representatives of the Estate while aware no such designation had been made. The trial court entered an order granting East Coast Railway's motion to strike the complaint and dismissed the action without prejudice; however, since the statute of limitations to bring the wrongful death claim had run, the trial court order had the effect of dismissing the complaint with prejudice.

The Third District Court of Appeals (the "Appellate Court") reversed the trial court decision and remanded the case for further proceedings. The Appellate Court determined the case is similar to a case previously considered by the Florida Supreme Court, in which the Court determined the lower trial court committed reversible error in not allowing the cause to proceed after letters of administration had been issued and in refusing to relate the issuance of letters back to the time of the beginning of the suit. *Griffin v. Workman*, 73 So.2d 844 (Fla. 1954).

In a prior decision discussing *Griffin*, the Appellate Court found *Griffin* concluded the filing of an action for wrongful death by one purporting to be, but not yet appointed, as personal representative is not a nullity and, upon being properly named as personal representative, his status (and the capacity to sue) relates back to the date of the original filing of the complaint. *Estate of Eisen v. Philip Morris USA, Inc.*, 126

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So.3d 323, 331 (Fla 3d DCA 2013). The *Eisen* Court identified the factors to be considered in determining whether to permit an amendment to substitute a plaintiff and whether such substitution should relate back. The *Eisen* factors are whether

1. the timely-filed action gave defendants fair notice of the legal claim and the underlying allegations;
2. there is an identity of interest between the original and substituted plaintiff;
3. the amendment caused any prejudice to the defendants; and
4. the amendment to substitute plaintiffs would create a "new" cause of action.

The Appellate Court held the *Eisen* factors favor the substitution of Bernite Lindor, as personal representative of the Estate, as the plaintiff and related such designation back to the filing of the original complaint.

Surviving spouse's motion to perfect the surviving spouse's interest in community property interest filed more than two years after the decedent's death is denied as an untimely claim against the decedent's estate.

Johnson v. Townsend, No. 4D18-432, 2018 WL 5291297 (Fla. 4th DCA 2018)

This case involves an investment account acquired and titled in the decedent's name while the decedent and his wife ("Wife") were domiciled in Texas, a community property state.

The decedent died on January 21, 2015. Wife was appointed personal representative of the decedent's estate on March 19, 2015, and the notice to creditors was published on March 31, 2015. By the time the three-month claims period under Fla. Stat. § 733.702(1) (2015) expired on June 30, 2015, Wife had not filed a claim or other pleading against the estate to determine her community property interest. The two-year repose period under Fla. Stat. § 733.710(1) (2015) expired on January 21, 2017.

On September 6, 2017, Wife filed a Petition to Determine and Perfect Surviving Spouse's Community Property Interest in Estate Assets (the "Petition"), seeking to confirm and effectuate her vested 50% in the investment account acquired by the decedent while he and Wife were domiciled in Texas. The decedent's daughters moved to strike Wife's Petition, arguing the Petition was untimely under Fla. Stats. §§ 733.702(1), 733.710(1) and 732.223 (2015).

The trial court entered an order striking Wife's Petition, finding it is an untimely claim against the decedent's estate pursuant to Fla. Stat. § 733.702(1) (2015) as it is a claim or demand against the estate for personal property in the possession of the personal representative filed more than 3 months after the notice to creditors was published. The trial court also found the Petition was further barred by the two-year statute of repose contained in Fla. Stat. § 733.710(1) (2015) and there was no exception which allows Wife to file her Petition more than two years after the decedent's death.

The Fourth District Court of Appeals (the "Appellate Court") affirmed the trial court's order. The Appellate Court found Wife's community property interest was a "claim" as defined in Fla. Stat. §731.201(4) (2015) as it was "a liability of the decedent." Upon the decedent's death, his estate became liable to Wife for her community property interest, and her interest was a claim Wife had to pursue. Wife had three months after the publication of the notice to creditors to file her claim pursuant to Fla. Stat. § 733.702(1) (2015), and two years after the decedent's death to file her claim pursuant to Fla. Stat. § 733.710(1) (2015), but did not do so.

The Appellate Court rejected Wife's argument the failure of Fla. Stats. §§ 732.216 - .228 (2015) to establish a deadline when a surviving spouse must file a petition to perfect community property interest means no such deadline exists, finding the two-year statute of repose is applicable based on the plain language in Fla. Stat. § 733.710(1) (2015).

The Appellate Court denied Wife's motion for rehearing but did grant Wife's motion to certify the following question to the Florida Supreme Court: "Whether a surviving spouse's vested community property rights are part of the deceased spouse's probate estate making them subject to the estate's claims procedures, or are fully owned by the surviving spouse and therefore not subject to the estate's claims procedures."

Beneficiary's lawsuit against discharged personal representative for breach of fiduciary duty filed two years after closure of probate case was barred as res judicata and Fla. Stat. § 733.901(2).

Sims v. Barnard, No. 1D17-4545, 2018 WL 5796936 (Fla. 1st DCA 2018)

Jason Bradley Sims ("Sims") appealed a final summary judgment in favor of Robert F. Barnard ("Barnard"), who served as the personal representative of Sims' father's estate, and Barnard's law firm. Sims alleged Barnard and his law firm had committed embezzlement, gross negligence, and malpractice in the administration of his father's estate. Two years prior to the lawsuit being filed, Barnard was discharged as personal representative of Sims' father's estate. Prior to the order of discharge being entered, after notice and a hearing on the matter, the probate court approved Barnard's final accounting and plan of distribution over Sims' objection.

The trial court entered summary judgment in favor of Barnard and his law firm based on the res judicata effect of the final orders in the probate case and consistent with Fla. Stat. § 733.901. The First District Court of Appeals (the "Appellate Court") affirmed the summary judgment in favor of Barnard

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and his law firm. The Appellate Court found the record failed to support any concealment by Barnard of estate assets or distributions from the court or Sims that would have prevented Sims from raising an objection prior to the entry of the order of discharge, and therefore Sims' lawsuit was barred.

Trial court properly imposed a constructive trust in favor of decedent's former spouse with respect to life insurance proceeds otherwise payable to the decedent's surviving spouse.

Brown v. Poole, 5D17-3467, 2018 WL 6579210 (Fla. 5th DCA 2018)

The decedent and his former wife, Melinda Poole ("Poole"), entered into a marital settlement agreement in which the decedent was required to secure his alimony obligations to Poole by maintaining a $1 million life insurance policy naming Poole as the irrevocable beneficiary for the duration of the alimony obligation. The decedent subsequently married Rita Brown ("Brown") and changed the beneficiary designation for his life insurance policy from Poole to Brown.

The decedent died survived by Brown and Poole. After the decedent's death, Poole discovered the beneficiary designation had been changed and filed a lawsuit against Brown, the decedent's estate and the life insurance company seeking the imposition of a constructive trust on the insurance proceeds, and alternatively a declaratory judgment the proceeds belonged to her.

The trial court imposed a constructive trust in Poole's favor on the life insurance proceeds. The Fifth District Court of Appeals (the "Appellate Court") affirmed the trial court's order, finding it properly imposed the constructive trust. The Appellate Court determined the decedent effectively divested himself of his ownership interest in the life insurance policy by agreeing to designate Poole as his irrevocable beneficiary during such time the alimony obligation was pending. The decedent's subsequent attempts to name other beneficiaries were nullities.

The Appellate Court also found Poole's claims for a constructive trust and declaratory judgment were timely filed, determining such claims are governed by a four-year statute of limitations that did not begin to run until the decedent's death.

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Real Property Case Summaries

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

A trial court's dismissal based on lack of standing does not preclude a borrower's recovery of prevailing party attorney's fees from a lender based on the terms of the subject mortgage and Fla. Stat. § 57.105(7) (2014).

Glass v. Nationstar Mortgage, LLC, Case No. SC 17-1387 (Fla. 2019)

Nationstar Mortgage filed a verified complaint against Glass seeking *in rem* relief to foreclose a mortgage held on real property in Broward County, Florida. Glass filed a motion to dismiss the complaint contending that Nationstar failed to demonstrate that it was the proper holder of the note. The trial court granted Glass's motion to dismiss without prejudice for Nationstar to file an amended pleading within 30 days. Nationstar timely filed an amended complaint, and Glass again filed a motion to dismiss asserting that the amended complaint failed to correct any of its previous deficiencies. The trial court again granted Glass's motion to dismiss, this time with prejudice. Glass moved for attorney's fees pursuant to Florida Rule of Civil Procedure 1.525, the mortgage, and Fla. Stat. § 57.105(7)'s reciprocal provision.

Nationstar filed a notice of appeal in the Fourth District Court of Appeal, and after briefing was complete, filed a notice of voluntary dismissal of the appeal. Glass filed a renewed motion for appellate attorney's fees based on the mortgage, Fla. Stat. § 57.105(7)'s reciprocal provision, and Nationstar's voluntary dismissal of the appeal. The Fourth District Court of Appeal issued an opinion denying Glass's motion.

The issue presented to the Florida Supreme Court was Glass's entitlement to appellate attorney's fees pursuant to Fla. Stat. § 57.105(7) (2014) as a result of Nationstar's voluntary dismissal of its appeal. The Fourth District found that Glass was not entitled to appellate attorney's fees because she prevailed on her standing argument presented in the trial court. In relevant part, the Fourth District's opinion held that Glass prevailed in the circuit court based on her argument that Nationstar lacked standing under the contract. On appeal, Glass argued that the trial court correctly dismissed Nationstar's complaint for lack of standing and the Fourth District held that in a situation such as this, where a party prevails by arguing the plaintiff failed to establish it had the right pursuant to the contract to bring the action, the party cannot simultaneously seek to take advantage of a fee provision in that same contract. The Fourth District therefore denied Glass's motion for appellate attorney's fees.

The Florida Supreme Court quashed the Fourth District's decision finding that caselaw is clear that a voluntary dismissal of an appeal renders the opposing party the prevailing party for the purpose of appellate attorney's fees. Since Nationstar maintained its right to enforce the reverse mortgage contract in its appeal until the dismissal, Glass is entitled to recover her attorney's fees under the subject mortgage and Fla. Stat. § 57.105(7) (2014).

The Florida Supreme Court explained that while a party is precluded from claiming attorney's fees under a contract that has been found to have never existed, the Supreme Court has also held that when parties enter into a contract and litigation later ensues over that contract, attorney's fees may be recovered under a prevailing-party attorney's fee provision contained therein even though the contract is rescinded or held to be unenforceable. The Supreme Court found that the reverse mortgage contract clearly existed between Glass and Nationstar's purported predecessors in interest. The Court reasoned that even if one assumes that Glass prevailed on her standing argument, the contract was merely unenforceable by Nationstar because it failed to demonstrate that it was the rightful successor in interest, not that the contract did not exist. As such, Glass was entitled to recover her appellate attorney's fees under the terms of the subject mortgage and Fla. Stat. § 57.105(7) (2014).

An affidavit of diligent search is inadequate when, among other factors, the plaintiff seeking to serve the defendant via publication possesses an email address for the defendant such that plaintiff can ask defendant through email their residence address.

Benavente v. Ocean Vill. Prop. Owners Ass'n., Case No. 4D18-1819 (Fla. 4th DCA 2018)

Ocean Village Property Owners Association, Inc. (the "Association") filed a complaint against Mr. and Mrs. Benavente seeking to foreclose on a lien for unpaid assessments and certain property located in St. Lucie County, Florida. The Association sent Mr. and Mrs. Benavente the required pre-suit demand notices to three addresses: (1) the property address located in Fort Pierce; (2) a Miami address on Harbor Drive; and (3) a Miami address on Crandon Boulevard. Mr. and Mrs. Benavente signed a certified mail receipt at the Miami address on Harbor Drive. Thereafter, when the suit was filed, the Association only sought to serve Mr. and Mrs. Benavente with process at the Fort Piece property. After failing to locate

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and serve Mr. and Mrs. Benavente at the Fort Pierce property, the Association filed an Affidavit of Non-Service that reflected seven attempts at the Fort Pierce property, each with no answer at the door, with no vehicle in the driveway, and/or an indication that the property appeared vacant.

Subsequently, the Association filed an Affidavit for Service by Publication (an Affidavit of Diligent Search) that alleged Mr. and Mrs. Benavente could not be found within Florida. Based on the representations and allegations contained in the Affidavit of Diligent Search, service of process on Mr. and Mrs. Benavente was purported accomplished via publication in the St. Lucie News Tribune. Following Mr. and Mrs. Benavente's failure to respond to the allegations of the Complaint within thirty days of publication, the Association moved for, and the clerk entered, a default. Based upon the clerk's default, the Association moved for and the trial court granted a Final Default Judgment against Mr. and Mrs. Benavente and the subject property was sold at foreclosure auction to a third party.

Mr. and Mrs. Benavente subsequently filed a Motion to Vacate and Quash service together with Affidavits demonstrating the Association failed to conduct a diligent search. The Affidavits alleged that applicable public records indicated that Mr. and Mrs. Benavente's private residence was the Harbor Drive property where they received the pre-suit notice. The Affidavits further established that the Association possessed a valid email address for Mr. and Mrs. Benavente. The trial court ultimately determined there was insufficient evidence to grant the Motion to Vacate and Quash, and entered an order denying the same.

On appeal, the Fourth District Court of Appeal reversed the trial court's order finding that the ultimate foreclosure was void as a matter of law for two reasons: (1) the Affidavit of Diligent Search was facially defective, and (2) the Association did not in fact conduct a diligent search. The appeal court held that the Affidavit was patently inaccurate because it failed to note that the Association was aware of Mr. and Mrs. Benavente's Harbor Drive address. The court further found that the Association also failed to utilize Mr. and Mrs. Benavente's email address to contact the Mr. and Mrs. Benavente and inquire as to their primary residential address.

Hotel revenue can be "rents" for the purposes of an Assignment of Rents under Fla. Stat. § 697.07 (2013) and thus may be sequestered in the Court Registry.

Seaspray Resort, Ltd. V. UCF I Trust 1, Case No. 4D18-991 (Fla. 4th DCA 2018)

The Borrowers took out a $4,800,000 loan in August 2013 with the Lender to refinance an existing loan and renovate a hotel property (the "Property"). As additional security for the loan, the Borrowers executed and recorded an assignment of leases and rents, as a separate document from the subject mortgage. The subject assignment of leases and rents was broadly drafted and provided that in the event that the Borrowers defaulted under the loan, the Lender will have the right to take possession of any and all leases, licenses, rental agreements and occupancy agreements pertaining to all or any part of the Property. The assignment of leases and rents further provided the Lender with the right to collect all rents, royalties, issues, profits, revenue, income and other benefits of the Property.

The Lender filed a foreclosure complaint in January 2014 and later moved to enforce the subject assignment of leases and rents under Fla. Stat. § 697.07 (2013). The trial court granted the motion and ordered the Borrowers to deposit into the registry of the court any and all revenue derived from rents, fees, charges, accounts or other payments for the use or occupancy of hotel rooms and other hotel facilities on the Property.

The Borrowers appealed the trial court's order contending primarily that hotel revenue cannot be sequestered into the court registry as "rents" under Fla. Stat. § 697.07(4) (2013). In support of their position, the Borrowers relied on the Fifth District Court decision in *Orlando Hyatt Associates, Ltd. v. FDIC, 629 So. 2d 975 (Fla. 5th DCA 1993),* where the Fifth District stated that section 697.07 applies only to "long-term rents" and not to "profits" such as hotel revenue. Id. at 976-77. The Fourth District Court of Appeal disagreed with the Borrowers' contention and distinguished *Orlando Hyatt* because in *Orlando Hyatt*, the parties agreed that Fla. Stat. § 697.07 (2013) did not apply to hotel revenue. No such agreement existed in this case.

Fla. Stat. § 697.07 (2013) provides that if a foreclosure action is filed and there is an assignment of rents securing the loan, the court may require the borrower to deposit collected rents into the court registry pending final judgment, regardless of any asserted defenses or counterclaims. Fla. Stat. § 697.07(4) (2013). The statute further provides that the court may authorize the borrower, however, to use a portion of the collected rents to pay reasonable expenses "to protect, preserve, and operate" the property and to satisfy any legal obligations related to the property. Fla. Stat. § 697.07(4)(a) (2013).

The Fourth District Court of Appeal held that the language of the assignment of rents was sufficiently broad to include hotel revenue within its scope and expressly included all income generated by the hotel. Further, the court found that the Borrowers provided the Lender the right to collect all rents, royalties, issues, profits, revenue, income and other benefits of the Property in the event of default. As a result, the Fourth District Court of Appeal held that it could not conclude that the trial court abused its discretion under Fla. Stat. § 697.07(4) (2013) in requiring the Borrowers to deposit all hotel revenue into the court registry pending final judgment and affirmed the trial court's order. However, the appellate order provided that the Borrowers may seek authorization from the trial court to pay reasonable expenses related to the Property before depositing revenue in the registry.

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Construction Case Summaries

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

Frye test was unnecessary where forensic expert applied ASTM investigation techniques which were generally accepted in the community of Florida and national professional engineers.

D.R. Horton, Inc. - Jacksonville v. Heron's Landing Condo. Ass'n of Jacksonville, Inc., No. 1D17-1941, 2018 WL 6803698 (Fla. 1st DCA Dec. 27, 2018)

A condominium association, Heron's Landing Condominium Association of Jacksonville, Inc. (the "Association"), sued the developer and general contractor, D.R. Horton, Inc. ("D.R. Horton"), for violations of the Florida Building Code, breach of warranties, and negligence in the construction of the condominium. D.R. Horton sought to exclude testimony of the Association's experts regarding defects or repair recommendations on the basis that it was unreliable and based on improper extrapolation, and therefore did not pass the threshold for admissibility under Fla. Stat. § 90.702 (2013).

At the hearing on D.R. Horton's Motions in Limine, the Association's expert testified that a qualitative sampling method, rather than a quantitative sampling method, was supported by the American Society for Testing and Materials ("ASTM"), and that ASTM E2128 is a peer-reviewed publication. Regarding his repair recommendation, the Association's expert testified that his recommendation to remove and replace all 200,000 square feet of stucco was based upon approximately 200 square feet of testing, as well as visual observations and indications of problematic conditions with the stucco that he had previously identified on other projects. This same expert testified that another professional engineer had peer-reviewed his report.

The trial court found that the Association's experts' methods "were based upon a recognized, peer-reviewed, and generally accepted methodology." *Id.* at 2. The trial court rejected D.R. Horton's argument that a quantitative or statistically valid sampling was necessary to appropriately analyze the cause of moisture intrusion into a building envelope, what might prevent it, and the potential for moisture-related damage.

At trial, the Association's experts testified that the defects in the buildings were the result of construction activities and that the defects would have been observable during construction because the on-site construction superintendent would have had the opportunity to correct the defects. The experts also testified that there was no way to stop stucco corrosion once it has started without a full replacement, and that the corrosion accelerates with more moisture. The jury found D.R. Horton liable for violations of the Florida Building Code, breach of warranties, and negligence, and that the Association sustained $9,600,000 in damages.

D.R. Horton moved for a new trial which the trial court denied in part, finding that the Association presented evidence of excessive stucco cracking, and granted in part regarding the negligence claim based on the economic loss rule. On appeal, D.R. Horton sought to set aside the verdict because the trial court, which analyzed the issue pursuant to Fla. Stat. § 90.702 (2013) and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), erroneously admitted extrapolation evidence from the Association's experts.

The First District Court of Appeal analyzed the appeal in light of the Florida Supreme Court's recent decision, *DeLisle v. Crane Co.*, 258 So. 3d 1219 (Fla. 2018), which found the Legislature's adoption of the *Daubert* test unconstitutional and reaffirmed that *Frye* was the appropriate test in Florida. The Florida Supreme Court noted that *Frye* is inapplicable to the vast majority of cases because it applies only when experts render an opinion based on new or novel scientific principles. In the instant case, the First DCA determined that no *Frye* analysis was necessary because the Association's experts relied on "scientifically reliable and peer-reviewed methodology that was the industry standard" and found no error in the trial court's admittance of the evidence despite the trial court performing its analysis under *Daubert*. *D.R. Horton*, 2018 WL 6803698, at 4.

In addition, the First DCA affirmed the trial court's denial of D.R. Horton's motion for directed verdict on all counts. With regards to the Association's claim of building code violations under Fla. Stat. § 553.84 (2013), the First DCA rejected D.R. Horton's argument that the Association failed to present evidence of actual damages as a result of building code violations. The appellate court found that the Association had presented evidence of actual damages because numerous homeowners testified to issues that they had in their homes and the Association's experts testified regarding the defects in the units. D.R. Horton also asserted that the Association failed to present evidence that D.R. Horton knew or should have known of building code violations, which the First DCA rejected based on D.R. Horton's project supervisor's testimony that he did not have everything he needed to do the job.

The First DCA also rejected D.R. Horton's argument that the Association did not establish a breach of the implied warranty of habitability. The appellate court relied on *Maronda Homes, Inc. of Fla. v. Lakeview Reserve Homeowners Ass'n,* which held

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that "[t]he general test for whether a party has breached the implied warranties of fitness and merchantability [for a new home] 'is whether the premises meet ordinary, normal standards reasonably to be expected of living quarters of comparable kind and quality.'" 127 So. 3d 1258, 1268 (Fla. 2013) (citations omitted). The First DCA found no support for D.R. Horton's argument that in order to breach the implied warranty under Fla. Stat. § 718.203 (2013), a condominium unit must be uninhabitable.

Only the portion of an indemnity clause imposing a duty to indemnify indemnitee for its own acts or omissions was void, not the entirety of the indemnification clauses. Special relationship existed between a contractor and subcontractors to support a claim of common law indemnity.

CB Contractors, LLC v. Allens Steel Products, Inc., No. 5D17-1384, 2018 WL 6579215 (Fla. 5th DCA Dec. 14, 2018)

In *CB Contractors, LLC*, after a condominium association brought claims against the general contractor, the general contractor brought claims against its subcontractors for contractual and common law indemnification. The trial court found the entire contractual indemnity provision void and unenforceable under Fla. Stat. § 725.06 (2004) and that the subcontractors failed to allege the elements of common law indemnity.

Fla. Stat. § 725.06 requires the following:

> *Any portion of any agreement or contract* for or in connection with, or any guarantee of or in connection with, any construction, alteration, repair, or demolition of a building, structure, appurtenance, or appliance, including moving and excavating associated therewith, between an owner of real property and an architect, engineer, general contractor, subcontractor, sub-subcontractor, or materialman or any combination thereof wherein any party referred to herein promises to indemnify or hold harmless the other party to the agreement, contract, or guarantee for liability for damages to persons or property caused in whole or in part by any act, omission, or default of the indemnitee arising from the contract or its performance, *shall be void and unenforceable unless the contract contains a monetary limitation on the extent of the indemnification that bears a reasonable commercial relationship to the contract* ....

Id. (emphasis added). The Fifth DCA held that the trial court erred in finding that the clauses were void in their entirety.

Regarding the common law indemnity claims, the Fifth DCA found that a special relationship existed between the general contractor and subcontractors. The appellate court rejected the subcontractors' citation to *Paul N. Howard Co. v. Affholder, Inc.*, in which the subcontractor was in complete control of the details, labor, tools, and equipment for the project. 701 So. 2d 402 (Fla. 5th DCA 1997). Instead, the Fifth DCA followed the analysis of the Fourth DCA in *Diplomat Properties Limited Partnership v. Tecnoglass*, which distinguished *Affholder* because in that case, any claim that the underlying injury resulted solely from the negligence of the subcontractor would have been a complete defense for the general contractor. 114 So. 3d 357, 362 (Fla. 4th DCA 2013).

Compliance with Chapter 558 pre-suit notice requirement constitutes the commencement of an "action" for statute of repose purposes.

Gindel v. Centex Homes, No. 4D17-2149, 2018 WL 4362058 (Fla. 4th DCA Sept. 12, 2018)

Robert Gindel, *et. al.* ("Homeowners") sued Centex Homes and its subcontractor ("Centex") for construction defects arising from allegedly improperly constructed townhomes. The Homeowners provided Chapter 558 pre-suit notice to Centex less than 10 years after they took possession of the townhomes, when the 10-year statute of repose under Fla. Stat. § 95.11(3)(c) (2014) began to run. However, the Homeowners filed their lawsuit after the 10-year repose period expired. The trial court held that the Homeowners did not commence their action until they filed suit and therefore, the claims were untimely.

Under Fla. Stat. § 95.011: "*A civil action or proceeding,* called *"action"* in this chapter, [...] shall be barred unless begun within the time prescribed in this chapter [...]."

Pursuant to Section 95.11(3)(c):

> **An 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, the date of the issuance of a certificate of occupancy, the date of abandonment of construction if not completed, or the date of completion or termination of the contract between the professional engineer, registered architect, or licensed contractor and his or her employer, whichever date is latest.

Id.

In a case of first impression, the Fourth DCA held that because Chapter 558 includes mandatory procedures that must be complied with before filing a lawsuit, the pre-suit notice constitutes "an action" for statute of repose purposes. The Fourth DCA relied on a medical malpractice case, *Musculoskeletal Institute Chartered v. Parham*, which held that compliance with the mandatory pre-suit notice requirements under the medical malpractice statute constituted commencement of an "action" to toll the statute of repose. 745 So. 2d 946 (Fla. 1999). The Fourth DCA found that the "Homeowners should not be penalized for rightly complying with the mandates of the statute." *Gindel*, 2018 WL 4362058 at 3.

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The 2019 FLSSI forms are developed by members of the Real Property, Probate and Trust Law Section of The Florida Bar. **Forms carry the Supreme Court required 3" x 3" blank square for Court Clerk's use. Probate Judges prefer and some require the use of 2019 FLSSI forms.**

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2019 PROBATE FORMS

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The flash drive provides forms in locked .pdf format, which will only allow the user to open and print forms. These forms are not interactive and are not able to be saved or modified in any way.

Looking for the FLSSI Forms in an interactive or program format? Please visit www.flssi.org to view our list of official licensed vendors.

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Mail this form with a check to the address listed above or include credit card information and email (info@FLSSI.org) or fax (407.515.1504). Above prices **include** taxes and shipping**. VISA or MasterCard ONLY.**

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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.

ANNUAL CONVENTION

MAY 29 – JUNE 2 2019

Opal Sands Resorts in Clearwater Beach

Room Rate: $239 Deluxe Gulf Front (single/double occupancy)

EXECUTIVE COUNCIL MEETING & LEGISLATIVE UPDATE

JULY 24-27, 2019

The Breakers • Palm Beach, Florida

Room Rate: Deluxe Room - $229 (Run of House King);
Premium Room - $280 (Run of House);
Atlantic Room - $395 (Oceanfront View Run of House)

EXECUTIVE COUNCIL & COMMITTEE MEETINGS

NOVEMBER 6, 2019

JW Marriott Marquis • Miami, Florida

Room Rate: Standard Guest Room Rate: $269 (single/double)

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

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

The Florida Bar
651 East Jefferson Street
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Scan here for instant access to the Section website.

ACTIONLINE BULLETIN BOARD

PRACTICE CORNER:

Don't miss these short tips to assist in your practice.

SEE PAGE 44-46.

SAVE the DATE!

ATTORNEY TRUST OFFICER CONFERENCE

AUGUST 22-24, 2019

THE BREAKERS
PALM BEACH, FL

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

Fellowship Applications

Available Now.
Check the RPPTL website
or more details.
www.RPPTL.org

Legislative and Case Law Update Seminar

July 26, 2019 • THE BREAKERS • Palm Beach, FL

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.)