ActionLine

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



How SECURE is your IRA Planning?

The Regulatorily Induced Coma of the London Interbank Offered Rate ("LIBOR")! What now?

Traction in Client Onboarding

Vol. XXXXI, No.3 www.rpptl.org SPRING 2020

Save the Date!

Fund Assembly
May 14-16 | Orlando



The premier educational event for Florida real estate attorneys, Fund Assembly heads to the luxurious Rosen Shingle Creek Resort in Orlando.



Awarded the AAA Four Diamond designation annually since 2007, the hotel offers an array of amenities:

- The 18-hole par 72 Shingle Creek championship golf course
- The Spa at Shingle Creek, a full-service spa with nine treatment rooms
- State-of-the-art fitness center
- 15 dining/lounging options
- Lighted tennis courts, outdoor swimming pools, and more
- Nature trail and seasonal fishing
- Close proximity to International Drive and world-famous attractions

Stay Informed; Remain Competitive

- Industry Insights from Recognized Experts
- Education Tailored to Real Estate Attorneys
- Practice-Enhancing Information
- Exceptional Networking

Learn More
fundassembly.com

The Fund Copyright © 2020 Attorneys' Title Fund Services, LLC / thefund.com / 800.336.3863

FAAL-0120

The Substantive Committees of the RPPTL Section

PART II



Chair's Column

By Robert S. Freedman
Section Chair, 2019-2020

In my previous *ActionLine* column, I focused on some of the activities of the Probate and Trust Law Division committees. This time around, I want to highlight the work of some of the Real Property Division committees, as well as the work being undertaken by the RPPTL Section's At-Large Members.

Real Property Division. The Real Property Division consists of 18 committees: Attorney-Loan Officer Conference; Commercial Real Estate; Condominium and Planned Development; Condominium and Planned Development Law Certification Review Course; Construction Law; Construction Law Certification Review Course; Construction Law Institute; Development & Land Use Planning; Insurance & Surety; Liaisons with FLTA; Real Estate Certification Review Course; Real Estate Leasing; Real Property Finance & Lending; Real Property Litigation; Real Property Problems Study; Residential Real Estate and Industry Liaison; Title Insurance and Title Insurance Liaison; and Title Issues and Standards. As is plainly evident, a wide variety of topic areas and certification courses are discussed and covered. So, if you practice involves real estate, you need to be involved with one or more of these committees!.

Bob Swaine is the Section's current Real Property Division Director, and he provided the below information pertaining to activities of some of the Division's committees:

Attorney-Bankers Conference (f/k/a Attorney-Loan Officer Conference). This year's program was held on February 28th in Tampa at Stetson University College of Law and was the most successful program yet as it was attended by more than 100 attorneys and bankers.

Condominium and Planned Development Law Certification Review Course. This year's course was held on February 21-22 in Ft. Lauderdale at Shepard Broad College of Law at Nova Southeast University. This is the third year of this certification program being in existence, and it was well-attended.

Construction Law Institute and Construction Law Certification Review Course. These two programs are held together each year, so as to maximize the use of speakers and to enable networking and connectivity. This year's programs were held March 5-7 in Orlando at the JW Marriott. More than 450 registrants attend the programs, and this was the highest number ever to attend these programs.

Development and Land Use. This committee has been focusing on being a resource to other members and committees, and to that end, put together a brief survey seeking input from other members as to topics they would like to learn about. With that information in hand, the committee is currently working on several CLEs. In addition to converting a recent committee program on how to use a public relations firm in complex land development matters into a CLE webinar, the committee is working on CLE programs pertaining to subdivision platting, mixed-use development, and golf course redevelopment. Additionally, the committee has over the past several years put together several short videos that address basic development and land use topics - these can be found on the committee's webpage.

Insurance and Surety. The committee is currently working on various activities, including:

1) determination of whether a Florida Bar certification program in insurance law is possible, and in this regard, they are reaching out to other Bar Sections in preparation for garnering the necessary signatures to properly petition The Florida Bar;
2) working on glitch bills pertaining to recent insurance legislation;
3) continued publication of *Insurance Matters!*, the committee's quarterly publication;
4) our Committee edits, publishes, and distributes at each In-State Executive Council Meetings; and
5) holding monthly committee conference calls and providing 1 hour of CLE programming on varying insurance, surety, and risk management topics.

Real Property Problems Study. The committee has been focusing on the presentation of CLEs at the committee's

continued, page 7

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

Robert S. Freedman
Chair
William T. Hennessey III
Chair-Elect
Steven H. Mezer
Secretary
W. Cary Wright
Treasurer
Lawrence J. Miller
Director, At Large Members
Sarah S. Butters
Director, Probate and Trust Law Division
Robert S. Swaine
Director, Real Property Division
Debra L. Boje
Immediate Past Chair
Jeffrey A. Baskies
Co-Chair - Co-Editor-in-Chief
Michael A. Bedke
Co-Chair - Co-Editor-in-Chief
George D. Karibjanian
Co-Vice Chair - Editor - National Reports
Paul Edward Roman
Co-Vice Chair - Editor - Ethics/Professionalism
Sean M. Leibowitz
Co-Vice Chair - Editor - Fellows Coordinator
Daniel L. McDermott
Co-Vice Chair - Editor
Rick Eckhard
Co-Vice Chair - Editor
Jason M. Ellison
Co-Vice Chair - Editor
Jeanette Moffa Wagener
Co-Vice Chair - Editor - State Tax
Renee Bourbeau
Advertising Coordinator
Benjamin F. Diamond
Features Editor
Lee Alan Weintraub
Reporters' Coordinator - Real Property
Justin M. Savioli
Reporters' Coordinator - Probate and Trust
Salome Bascunan
Editor - Fellows Coordinator

Editors-At-Large:
Celia Ellen Deifik, Naples
Lisa Van Dien, Naples
Keith Durkin, Orlando
Erin Farrington Finlen, Ft. Lauderdale
Mitchell A. Hipsman, Miami
Laura Fannin Jacqmein, Jacksonville
Amber Jade F. Johnson, Maitland
Mariela M. Malfeld, Miami
Rachel Oliver, St. Petersburg
Michael G. Rothfeldt, Tampa
Angela K. Santos, Boca Raton
Jo Claire Spear, Tampa

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

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

About the Cover:
Miami at Night by John Neukamm

IN THIS ISSUE:

Chair's Column 3
Letter From The Co-Editors-In-Chief 5
How Secure Is Your IRA Planning? 8
Traction In Client Onboarding 14
Are Decisions And Recommendations Still Mutually Exclusive Concepts?
Expanding The Professional Liability Of Architects And Engineers To Contractors 16
Lady Bird Deed: An Inexpensive Probate Avoidance Technique 20
The Regulatorily Induced Coma Of The London Interbank Offered Rate ("Libor")!
What Now? 24
Section Spotlight
Cooley Law School Mock Interviews 28
13Th Circuit Coffee And Doughnuts With Judges 29
Cooley Law Student And 13Th Circuit ALMs Visit 30
RPPTL Section Executive Council Meeting Photos 32
Roundtable Real Property Division 34
Roundtable Probate And Trust Division 38
Practice Corner: Real Property Division
Text Marketing Basics – An Introduction To The Regulation Of Text Message Marketing 44
Practice Corner: Probate And Trust Division
Critical Considerations In Recent Rule Revisions 46
Florida Bar CLE Opportunities 47
Probate And Trust Case Summaries 48
Real Property Case Summaries 51
What's Happening Within The Section 58
Actionline Bulletin Board 60

Get Included In ***ActionLine!***

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

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

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

ADVERTISING: For information on advertising, please contact Jason Ellison at jellison@elattorneys.com.

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

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

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



J. BASKIES



M. BEDKE

Letter From The Co-Editors-In-Chief

Dear Readers,

We are writing to alert you to changes in Florida's notary public laws that will impact documents you are drafting. In case you have not yet heard, we want to alert all readers that effective January 1, Florida's notary laws changed. These changes to Florida's notary laws impact the notary blocks (sometimes called "jurats") in all of the Florida documents you are creating.

As a result of the new laws, remote/electronic/online notarization is now permitted under Florida law. You should review Fla. Stat. § 117.05 for the details. If certain criteria are met and the requisite statutory protections are in place, a notary need not be in the physical presence of the person signing the instrument being notarized. There are rules in the statute defining what's required for a valid remote notarization and how to become a remote notary – e.g. what training and insurance must be in place.

However, the changes to Fla. Stat. § 117.05 not only permit and impact electronic notarizations, but they also impact ALL notarizations in Florida. Even if you are not considering remote notarization for documents you are drafting, this statutory change impacts your notary blocks. Indeed, Fla. Stat. § 117.05 requires that we all go back and revise our form notary blocks in all of the documents, instruments and affidavits we draft that require notarization. Further, these notary block form changes are mandatory for all notarizations after January 1, 2020, regardless of whether or not the forms are remotely/electronically notarized.

Pursuant to Fla. Stat. § 117.05 (4)(c), whenever notarizing a signature, the notary public must complete a notarial certificate (jurat) containing an indication as to whether the signer personally appeared before the notary public by physical presence (the notary personally witnessed the signing in her or his physical presence) or by means of audio-video communication technology as authorized by the new statute. For example, the statute requires something like the following:

> The foregoing instrument was acknowledged before me, by means of ☐ physical presence or ☐ online notarization, this _____ day of _____, _____(year), by _____.

Or

> Sworn to (or affirmed) and subscribed before me by means of ☐ physical presence or ☐ online notarization, this _____ day of _____, _____(year), by _____ …

This new notary acknowledgment language is required for every notarization after January 1, 2020 (regardless of the recording date). For example, a document signed in December of 2019 without this language can be validly recorded in January 2020, but a document executed without this language after January 1, 2020 risks rejection (for recording) and fails to meet the new statutory requirements.

Finally, although the statute took effect January 1, it appears future changes/corrections are needed for many of the statutes Section members frequently deal with (e.g. Fla. Stat. § 732.503 - our self-proof of will statute). While such statutes may not have caught up with the new notary rules, we recommend that you use updated notary blocks immediately on all forms and documents so as to avoid any problems.

We believe it is prudent and proper practice to update all notary blocks, including all deeds, all self-proving wills and other forms.AL

— The Editors



YOUR SNT TRUSTEE

TRUST US TO PROTECT THE FUTURE FOR YOUR CLIENTS EACH AND EVERY DAY.

Guardian TRUST

www.GuardianTrusts.org

- **Affordable Fees**
- **Protect Public Benefits Eligibility**
- **No Minimum Trust Deposits or Balances**
- **Professional and Compassionate Service**
- **Experienced and Knowledgeable Trustee**

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

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

meetings, and is launching a webinar/e-CLE series. The committee has begun to study the possibility of expanding the scope of the Rules of Ethics and Professionalism to provide the enforcement for litigation abuse that Section 57.105, Fla. Stat. (2019) does not presently cover.

Real Property Certification Review Course. This year's program will be held on April 17-18 in Orlando at the Airport Hyatt. Prior to this year's program, the committee reviewed surveys from prior years' courses in order to better prepare applicants for the exam and spoke with the Exam Committee to determine (within the boundaries set by BLSE) how better to prepare students. The committee also is instituting a "care program" to continue to give exam takers access to lecturers after the course and before the exam. The committee will continue to evaluate and re-evaluate speakers so as to provide the highest quality programming possible in future years.

Real Property Finance and Lending. The committee is currently working on various activities, including: (1) evaluation of potential changes to Sections 697.07 (assignment of rents) and 702.10(2) (payments to lender during foreclosure for non-owner occupied property) to make those provisions applicable to third parties that acquire properties subject to mortgages in foreclosure; (2) approved and submitted to the Executive Council for consideration the First Supplement to the Report on Third Party Legal Opinion Practice in Florida (which was approved by the Executive Council at its meeting in Tampa on February 1st); and (3) review of the proposed adoption of the Uniform Commercial Receivership Act.

As you will note, not all committees and not all activities are listed here; this is because our editors have put me on a word count, and providing all of such information would have eliminated the ability for any other columns and articles in this edition (and I want you to see what our ALMs are doing)! If you have questions about a committee's activities or want to get involved, you can either reach out to the committee chair (listed on www.rpptl.org) or contact Bob Swaine (bob@heartlandlaw.com).

ALMS. The RPPTL Section's At-Large Members ("ALMs") are led by ALMs Director Larry Miller. The ALMs continue to assist with programs, coordinating information gathering and providing support and information both in their respective communities and within the RPPTL Section and its Executive Council.

As to community projects, programs and support, ALMs' involvement in "outreach" programs throughout the state has continued to grow. ALMs provide staffing and organizational support for law student mock interviews statewide in conjunction with the RPPTL Section's Law School Mentoring and Programming Committee. Interview programs have been held or are planned with the participation of ALMs in the 7th, 9th, 11th, 13th and 20th Circuits. In addition, attorney diversity programs in circuits across the state continue to include ALMs at both the organizational and participation level. In each of these programs, ALMs assist the RPPTL Section's Membership and Inclusion Committee in programming or in attending events and providing resource and contact information, including networking, with minority bar members and representatives of the diverse legal communities present in the circuits.

The ALMs have also continued to provide strong support for the organization and delivery of legal services through the No Place Like Home ("NPLH") program, a partnership between the RPPTL Section and legal aid offices around the state. ALMs' participation in NPLH has provided part of the volunteer base for teaching Florida lawyers the need for and method to cure title defects which threaten occupancy, government subsidy and continued ownership of Florida residences. Such participation has also included ALMs taking on pro-bono cases to rectify title issues, also in conjunction with legal aid offices around the state. The ALMs' NPLH focus now also includes investigation into possible funding alternatives which may assist Florida's underserved population in remaining in long term generational residences by addressing title defects and issues.

ALMs have also continued to provide coordination and sponsorship opportunities for CLE and other local bar association programs in the circuits which grow the relationship between the Section and it members and provide support for programs which enhance lawyer education and involvement on a statewide basis.

As to the ALMs' focus within the RPPTL Section and its Executive Council, information-gathering work continues with increased focus on ALMs coordination with the RPPTL Section's committees through Committee Liaisons. Most recently, and with the assistance of the ALMs' Guardianship Committee Liaison, guardianship fee information was gathered by ALMs in each of the state's circuits and provided to the Guardianship, Advance Directives and Power of Attorney Committee for study in responding to questions and issues arising in the efforts to revise statewide guardianship legislation. Additionally, enhanced contact by ALMs in their respective circuits with RPPTL Section members is being facilitated to disseminate information about the RPPTL Section and its programs to RPPTL Section members and others, both in person (at meetings) and through enhanced newsletter information, including a newly proposed template for information dissemination to RPPTL Section members in each circuit.

If you would like more information about the ALMs program, you can either review the ALMs webpage on www.rpptl.org or contact Larry Miller (lmiller@floridatax.com).

Until next time,





How SECURE Is Your IRA Planning?

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

Perhaps the most unwelcome of holiday surprises to arrive this year was the SECURE Act ("SECURE"),[1] which was signed into law by the President on December 20, 2019 as part of the federal spending bill and which took effect on January 1, 2020.[2]

The new law grafts onto existing law, with some significant changes:

Taxpayers who work past age 70-1/2 may continue to contribute to their IRAs. The prior age 70-1/2 limit on further employee contributions has been eliminated.[3]

Taxpayers are now required to start taking distributions from their retirement accounts beginning at age 72, up from age 70.[4, 5]

The stretch distribution rules applicable to the beneficiaries of a decedent's IRA have, with certain important exceptions, now been eliminated in favor of a 10-year payout.

The result is that many beneficiaries will now be forced to distribute their inherited retirement accounts sooner and at higher tax cost than would previously have been the case.

Potentially Significant Loss of Tax Deferral

Consider for example a decedent who dies in 2020 leaving a $2 Million IRA to her 55-year old Daughter. Under prior law, Daughter would have been required to withdraw 1/29.6 of the IRA in year 1 (3.38%), 1/28.6 in year 2 (3.50%), and so on. That meant Daughter had 29.6 years to distribute the entire account. Under the new rules, however, Daughter must now distribute the inherited account over 10 years' time.[6] This is a significant loss of tax deferral as compared to prior law.

Various policy arguments may be advanced concerning the merits of the new law. Defenders of SECURE point out that the accelerated distribution of taxable retirement accounts will help the Treasury raise revenue to reduce federal budget deficits (and to offset other spending portions of the appropriations bill).[7] Other supporters note that while the original account owner and his spouse need to be able to stretch the IRA distributions over their retirement years, when it comes to inherited accounts, those funds are really just a

continued, page 9

windfall to the beneficiaries who do not save them for their own retirements and therefore should not receive stretch treatment.[8] Detractors of SECURE, on the other hand, rightly contend that the sudden switch from a stretch distribution rule to a 10-year rule significantly upends settled expectations under which most taxpayers have been operating since 2001.

New Rules for Post-Death Distributions

It appears that the authors of SECURE took at least some of these policy considerations into account by preserving the stretch distribution rule for certain special categories of beneficiaries. Specifically, there are now three classes of beneficiaries of inherited accounts for decedents dying on or after January 1, 2020:

First is **designated beneficiaries**, which continues to mean a person with an actuarial life expectancy or a trust which qualifies as a "see through" trust. Designated beneficiaries must withdraw their inherited IRAs over a 10-year period.[9] There is no required minimum distribution when the 10-year rule applies, but the entire IRA account must be paid out by December 31 of the year of the tenth anniversary of the original account owner's death.

Next is **eligible designated beneficiaries**. This is a new category. Eligible designated beneficiaries are a subset of designated beneficiaries and include:

1) the surviving spouse of the account owner;

2) a person who is not more than 10 years younger than the account owner;

3) a minor child of the account owner;

4) a disabled individual; or

5) a chronically ill individual.[10]

Eligible designated beneficiaries may stretch distributions over their lifetimes,[11] but upon the eligible designated beneficiary's death, the inherited retirement account must be paid out within 10 years.[12]

Last is **non-designated beneficiaries**. This would include beneficiaries such as an estate, a charity, or a trust which does not qualify as a "see through" trust. Non-designated beneficiaries must pay out the inherited account within 5 years' time (if the account owner died before his required beginning date, now age 72) or over the deceased account owner's remaining life expectancy (if the account owner died after his required beginning date).

Eligible Designated Beneficiaries

Surviving spouses of account owners continue to have favored treatment when it comes to retirement accounts. As an eligible designated beneficiary, a surviving spouse who takes the IRA as an inherited account may withdraw it over her life expectancy. A spouse also has the additional option to roll the decedent's IRA into her own account, in which case she would not be required to begin taking distributions until age 72, and would have other benefits typically available only to the original account owner of the IRA.

A person who is not more than 10 years younger than the deceased account owner is also an eligible designated beneficiary who may use the life expectancy payout method. Consider for example the decedent's sibling, friend, or significant other who might fit into this category.

A minor child of the deceased account owner may also use the stretch distribution method, but only until reaching the age of majority at which time the 10-year rule kicks in. Note that this rule applies only to a minor child of the account owner, and not to a minor grandchild or any other minor person. Generally the state law definition of majority will apply (e.g., age 18), but certain children may be able to extend the age of majority to age 26, due to an exception under the Regulations to Code Section 401(a)(9)(F) for "a child who has not completed a specified course of education and [who] is under the age of 26."[13]

A disabled or chronically ill person can also stretch distributions. An individual is **disabled** under SECURE if she meets the definition of Code Section 72(m)(7), which means she is "unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or to be of long-continued and indefinite duration." An individual is **chronically ill** if she meets the definition of Code Section 7702B(c)(2), namely if she is unable to perform at least two activities of daily living without substantial assistance from another individual for a period of at least 90 days or if she requires substantial supervision to protect her from threats to health or safety due to severe cognitive impairment. The Secretary of the Treasury may require proof of disability or chronic illness.

Note that a beneficiary's status as disabled or chronically ill is determined as of the account owner's death. A designated beneficiary who later becomes disabled or chronically ill may not then switch over to a life expectancy payout.

Importantly, a trust for the benefit of one or more disabled or chronically ill eligible designated beneficiaries (even an accumulation trust) will qualify for the stretch distribution payout, provided that no one who is not a disabled or chronically ill eligible designated beneficiary may become a beneficiary until after the death of all disabled or chronically ill eligible designated beneficiaries. Care must be taken in drafting such trusts not to include other beneficiaries who are not disabled or chronically ill.

Late 2019 Deaths; Pre-2020 Deaths with RMDs Already Underway

Keep in mind that the new rules under SECURE apply only to accounts of decedents dying on or after January 1, 2020. Beneficiaries of decedents dying in late 2019 may continue to apply the prior law and take stretch distributions over their lifetimes.

continued, page 10

Beneficiaries should consider the strategic use of disclaimers for late 2019 deaths. For example, if Husband passed away on December 1, 2019, leaving his entire $8 Million IRA (as well as the balance of his estate) to Wife, Wife might consider disclaiming all or a portion of the IRA to the contingent beneficiaries (for example, her children or trusts for her children), provided Wife has sufficient other assets available to her. That would allow those contingent beneficiaries (her children) to avail of the stretch distribution payout.

Similarly, SECURE does not affect beneficiaries of inherited IRAs already in payout status from decedents who died years ago. Those beneficiaries may likewise continue to take stretch distributions; but upon each of their deaths, the 10-year rule will apply as to their beneficiaries.

How Should Designated Beneficiaries Take Distributions?

As noted above, designated beneficiaries must take their distributions over 10 years, but there is no required minimum distribution in any particular year. This creates both an opportunity and a challenge. As to Roth IRAs, the inheriting beneficiaries will likely do best to defer distribution of their accounts for as long as possible. So doing maximizes the tax-free growth of the assets. As to Traditional IRAs on the other hand, the inheriting beneficiaries will likely want to spread out their distributions, withdrawing some amount each year so as not to cause an undue bunching of taxable income at the end of the 10-year distribution period. That said, each beneficiary has flexibility to determine the amount to be distributed in each particular year, and may elect to take larger distributions in years where those distributions will be taxed at lower marginal rates and to take smaller distributions in years where those distributions will be taxed at higher marginal rates.

Which Clients Are Most Likely to Be Impacted?

For many clients today, the retirement assets constitute a significant portion of their overall wealth. As a result, SECURE can be expected to be relevant in many client situations. But it will not impact everyone.

Among those least likely to be affected by the new law are:

1) those with no retirement plans or whose retirement plans are relatively small;

2) those whose retirement plans are to be divided among a large number of beneficiaries, such that each beneficiary's share will be relatively small;

3) those whose beneficiaries are in low marginal income tax brackets and who are unlikely to be adversely affected from an income tax perspective by losing that ability to stretch distributions; and

4) those whose retirement plans are ultimately payable to spouses, close-in-age persons, other eligible designated beneficiaries, or to charity.

Clients most likely to be impacted by SECURE are:

1) those with larger retirement accounts;

2) those whose accounts are to be divided among a relatively small number of beneficiaries, such that each beneficiary's share will be relatively large;

3) those whose beneficiaries are in high marginal income tax brackets;

4) those who presently name grandchildren as beneficiaries in order to obtain the longest stretch deferral; and

5) those who need to name trusts as beneficiaries of their retirement plans.

How To Help Clients Who Are Most Impacted

Some clients will, in the end, decide not to make any changes to their current beneficiary designations or to do anything different with regard to the administration of their retirement accounts, notwithstanding potentially adverse income tax consequences their future beneficiaries may face due to the bunching of income over 10 years. A number of considerations factor into that decision, including the cost and relative complexity of the proposed planning, clients' general unwillingness to accelerate any optional income tax now, clients' concerns over potentially needing the money for themselves, and so forth. Clients who are, however, open to further planning might consider undertaking a series of simple strategies that, if put into effect each and every year over a number of years, may help to mitigate the unwanted bunching of taxable income for their future beneficiaries:

Contribute Less. Clients who are still working and contributing to their retirement plans may want to contribute incrementally less to those plans going forward.

Draw Down the Taxable Accounts Faster. Clients over age 59-1/2 might consider drawing down their taxable accounts now, a little bit each year, perhaps earlier than they might otherwise have done but for the changes under the new law. Clients over age 72 might consider withdrawing incrementally more than their RMDs, whether for qualified charitable distributions, current consumption, savings, gifting, Roth conversions, or the like. Bracket management will be important. This is a strategy to be implemented over many years consecutively (potentially for 20-30 years' time), and clients need not and likely will not wish to venture into significantly higher marginal tax brackets when applying this strategy.

Split Up the Account Differently. Many clients default to naming their surviving spouse as 100% primary beneficiary and their children as 100% contingent beneficiaries. If the surviving spouse will have sufficient other assets available at the account owner's death, the client might consider directing a portion of the IRA to the children directly at the account owner's death. So doing will allow the children to start a separate 10-year payout

continued, page 11

period as to that portion received, and will avoid having 100% of both spouses' IRAs bunched together and received by the children following the surviving spouse's death.

Of course, the decision to split up the IRA could be left to the surviving spouse through execution of a qualified disclaimer within nine months of the deceased account owner's death. But, relying on the surviving spouse to make a disclaimer can be a risky proposition. For example, the qualified disclaimer rules may inadvertently be violated, the spouse may be of diminished capacity or overwhelmed, family members or advisors may disagree as to the appropriate course of action, and so forth.

Convert to Roth. Roth conversions may be an increasingly important new strategy. Clients might consider making a series of Roth conversions starting now, a little bit each year, year after year. Consider for example a married couple, each age 60, with a $10 Million net worth, $4 Million of which is in Traditional IRAs. Their plan is to leave their IRAs to one another and then to their children. This couple could begin to make a series of Roth conversions of perhaps $50,000 to $80,000 annually (or whatever amount they may comfortably convert each year without reaching the next marginal income tax bracket). Over a 25-year time period, this couple will have converted $1.25 – 2.0 Million (and the appreciation thereon) to after-tax Roth accounts, and they will have accomplished that in manageable segments. They are well on their way to reducing the future bunching of income for their children.

Some advisors recommend converting to Roth all at once given today's historically low federal income tax rates. Prudence however may dictate spreading the conversions over several years' time. First, spreading the Roth conversions reduces the risk of converting a large portion of the account, only to then experience a significant stock market reversal. (Remember that Roth re-characterizations have now been eliminated.) Second, spreading the conversions spreads the income tax bill over a series of years. And third, spreading the Roth conversions insulates against the effects of a future change in government policy regarding taxation of Roth accounts.

The economics of Roth conversions may be particularly compelling for clients who are likely to pay federal estate tax at death, and for clients who have unused charitable carry forwards, net operating losses, or current year ordinary losses which can be soaked up in the Roth conversion.

Benefit Charity. Some clients who are charitably inclined may wish to give more to charity from their IRA accounts, since charities will not pay tax on IRA distributions. Such gifts may be accomplished either during lifetime in the form of qualified charitable distributions or at death by naming charities on the IRA beneficiary designation form.

Other clients may decide to name one or more charitable remainder trusts (CRTs) as beneficiaries at death so as to mimic the stretch distribution rules previously in effect. The CRT is tax-exempt and can receive the IRA benefits with no consequence at the account owner's death. It would pay an annual annuity or unitrust distribution (5% - 50%) to Beneficiary for life (or for a term of years up to 20 years), and upon expiration of the trust term (or Beneficiary's death), the balance of the trust would be distributed to one or more charities. The annual distribution rate can be specified in the trust or determined according to a formula.[14]

Note that the annual CRT payments to the individual beneficiary are taxed first as ordinary income to the extent of the trust's current and accumulated ordinary income. Then, once all of the ordinary income is used up, the annual CRT payments to the individual beneficiary are taxed next as capital gains to the extent of the trust's current and accumulated capital gains.

The CRT strategy has appeal in that it looks somewhat similar to the prior stretch distribution rule. But while similar, the CRT strategy is not quite as flexible. First, the CRT beneficiary receives a fixed annuity or unitrust amount (and only that amount) each year, which generally must be paid outright (with a limited exception for special needs trusts). This is in comparison with the stretch IRA, where the beneficiary was required to receive at least the RMD each year, but could take out more in any particular year if needed.

A significant concern with CRTs is that the individual beneficiary may die shortly after the trust is funded, causing the charitable remainder beneficiary to receive substantially more wealth than the account owner likely intended. One way to mitigate that risk is to use a two-life CRT (e.g., unitrust to Individual A for life, then to Individual B for life, then to Charity). Another solution would be to insure the life of the individual beneficiary.

In order for the CRT to be a viable strategy, there needs to be at least some charitable intent on the part of the account owner. This is because the CRT rules require that the charitable remainder interest has a value of at least 10% of the trust value at inception, calculated based on the age of the beneficiary and the 7520 rate. In other words, some significant portion of these dollars are very likely to go to charity at some point in time, and the account owner should be comfortable with that.

Combination of Strategies. The cumulative effect of using multiple strategies outlined above may significantly reduce the bunching of taxable income otherwise experienced by future designated beneficiaries.

Conduit and Accumulation Trusts Not as Attractive

For clients who need to name trusts as IRA beneficiaries, the options under the new law are generally less attractive.

Many important questions remain unanswered regarding trust planning to receive retirement benefits under SECURE.

continued, page 12

These will likely be clarified over time through updated Treasury Regulations and through other administrative authority such as Private Letter Rulings.

There are two basic types of "see through" trusts that can receive IRA benefits: conduit trusts and accumulation trusts.

A **conduit trust** is less flexible than an accumulation trust because it requires that all distributions from the IRA which are paid to the trust must in turn be distributed to the beneficiary of the trust, more or less immediately. As a result, the conduit trust beneficiary is considered the sole beneficiary of the trust, and remainder beneficiaries can be disregarded.

Conduit trusts can still work well under the new law where established for an eligible designated beneficiary such as a surviving spouse, a disabled individual or chronically ill person, or a minor child. These persons may continue to stretch distributions (the minor child only until reaching the age of majority, at which time the 10-year rule begins to run). Be careful to draft these trusts so as to benefit the eligible designated beneficiary as the only beneficiary during his or her lifetime, in order to qualify for stretch treatment.

Conduit trusts could be a disaster for other types of beneficiaries, including beneficiaries such as adult children who are not disabled or chronically ill. Due to the new 10-year rule, conduit trusts for non-eligible designated beneficiaries won't work as previously intended to keep the assets in trust for the beneficiary's lifetime. Instead the entire account will now be required to be distributed to the trust, and then out to the trust beneficiary, within 10 years of the account owner's death. For those beneficiaries who may still need trusts, consider the accumulation trust alternative.[15]

An **accumulation trust** is more flexible than a conduit trust because it permits the trustee to accumulate or distribute IRA assets to the trust beneficiaries as the trustee deems advisable. Under an accumulation trust, all beneficiaries who might ever receive distribution of the retirement plan are counted as beneficiaries, unless considered "mere potential successors in interest." This means generally that you need to look at many more beneficiaries in order to determine whether or not an accumulation trust qualifies as a "see through" trust.

Accumulation trusts still work but they too are not as attractive as they once were. Under the new 10-year rule, the inherited IRA account will need to be distributed to the trust (but not necessarily the trust beneficiary) within 10 years' time.[16, 17] Because the retirement plan must be paid out to the trust within 10 years, much of the distributions could be taxed at the highest marginal income tax bracket of 37% after only $12,950 of taxable income.

As noted above, lots of questions remain in the area of trust planning. What appears clear for now is that if you must name a trust which is not a conduit trust for an eligible designated beneficiary, there may be a significant bunching of taxable income problem. Consider Roth conversions if you need to use an accumulation trust; or if that is not possible, perhaps a charitable remainder trust will do the trick.



A. STASHIS

Alfred J. Stashis, Jr. *is a shareholder in the Naples office of Dunwody White & Landon, P.A. He is board certified in wills, trusts and estates. He serves as co-chair of RPPTL's IRA, Insurance and Employee Benefits Committee and as a member of RPPTL's Charitable Planning and Exempt Organizations Committee.*

Endnotes

1 Pub.L. 116-94. SECURE stands for "Setting Every Community Up for Retirement Enhancement."

2 SECURE is found within the Further Consolidated Appropriations Act of 2020.

3 Previously contributions were prohibited for taxpayers beyond age 70-1/2. The new law eliminates the age cap for taxpayers who continue to work beyond retirement age.

4 Each taxpayer must take his or her first RMD by April 1 of the year after the year in which the taxpayer reaches age 72. Most taxpayers will take this first distribution in the year they actually reach retirement age, and will not wait until the following April 1, in order to avoid a double payment in that subsequent year, given that the RMD for the subsequent year must be taken by December 31 of that year.

5 Taxpayers turning age 70-1/2 on or before December 31, 2019 need to start taking their RMDs by April 1 of the year after the year they turned age 70-1/2. Account owners turning 70-1/2 in 2020 or later don't need to start taking RMDs until April 1 of the year after they turn age 72.

6 Technically these distributions can be spread over eleven different tax years. The inherited account must be paid out in full by December 31 of the year containing the tenth anniversary of the death of the original account owner.

7 The Congressional Research Service estimates that the changes to the law under the SECURE Act will raise an additional $15.7 Billion over the next 10 years.

8 Accord *Clark v. Rameker*, 134 S.Ct. 2242 (2014).

9 *See* IRC 401(a)(9)(H)(i).

10 *See* IRC 401(a)(9)(E)(i).

11 *See* IRC 401(a)(9)(H)(ii).

12 *See* IRC 401(a)(9)(H)(iii).

13 *See* Treas. Reg. 1.401(a)(9)-6, Q&A 15.

14 A formula example would be "the rate that results in the actuarial value of the charity's remainder interest being equal to 10%."

15 If an IRA account owner dies with a conduit trust in place, it may be possible to judicially modify the trust to an accumulation trust. See Fla. Stat. 736.04113(b) (2019) and Fla. Stat. 736.0416 (2019). Pursuant to Fla. Stat. 736.04113(b), a court may modify a trust if, because of circumstances not anticipated by the settlor, compliance with the terms of the trust would defeat or substantially impair the accomplishment of a material purpose of the trust (i.e. deferring income taxation and keeping assets out of the hands of the trust beneficiary). Pursuant to Fla. Stat. 736.0416, a court may modify the terms of a trust, in a manner not contrary to the settlor's probable intent, in order to achieve the settlor's tax objectives (i.e., deferring income taxation of retirement benefits over the beneficiary's life expectancy rather than over 10 years).

16 There is, however, one type of accumulation trust for the benefit of a disabled or chronically ill person that can qualify for stretch distribution payout.

17 Most commentators believe that a see-through accumulation trust for the surviving spouse (such as an income-only marital trust) will generally not be eligible for the life expectancy payout.

easysoft

Real Estate Closing Software Used by Thousands of Attorneys Nationwide For Over 30 Years

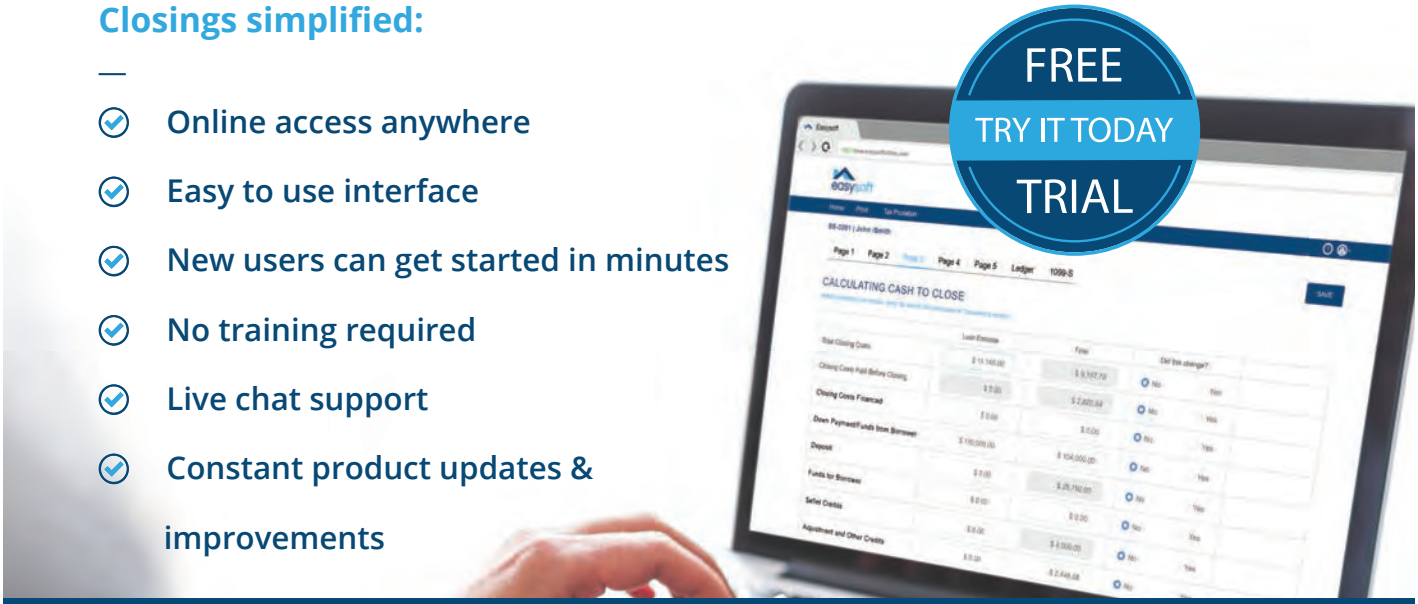
Reduce Closing Time By 70%

Easysoft eliminates the need for real estate professionals to manually calculate complex calculations in the Closing Disclosure and HUD forms by generating them for you. Helping you to close faster and make more money from your real estate work.

Closings simplified:

—

- Online access anywhere
- Easy to use interface
- New users can get started in minutes
- No training required
- Live chat support
- Constant product updates & improvements



RPPTL Friend of the Section

Get 20% Off With a 1 Year Subscription*

*For new customers only

1-800-905-7638 | www.easysoft-usa.com | sales@easysoft-usa.com

Traction In Client Onboarding

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



To build a thriving firm, efficiencies must be identified and leveraged. In the ActionLine Summer 2018 edition, we explored how to be more intentional in the initial client meeting — how to "cut to the chase." This article reviews the corollary to effective initial client meetings: client onboarding.

After you win the client, you must collect the fee and transfer the work to your team with clear expectations. This is a huge challenge! Conversion is a process and requires the following:

- Drafting and delivery of a concise, but thorough, legal representation agreement;
- Collecting the fee prior to producing any legal work; and
- Communicating the client's facts, scope of work, and related deadlines with the team charged with accomplishing the client objectives.

Deliver the Legal Representation Agreement. With the assistance of ethics counsel, a concise legal representation agreement can be developed (our standard legal representation agreement is under one page). With limited prose, the agreement should identify: the parties; the scope of work, with specificity (including that which is *outside* of the scope of work); and billing details (including fees and costs, and the extent to which a retainer is required). The legal representation agreement should appropriately identify the nature of the legal fees, whether "retainer" or "fee." Clear articulation of the nature of the legal fee proves helpful to an accounting department in journaling/directing receipts (in "trust" or otherwise), and eliminating the need for attorney sidebars on the subject. Particular concerns regarding third party payors, joint representation with a single communicator, third party communications, conflict waivers, and file transfers should be excluded from the legal representation agreement. This improves the client focus on and understanding of the legal representation agreement. A succinct agreement (ours is completed by hand) should be processed quickly, ensuring delivery proximate to the client's decision to proceed--while their attention is captured. A concise, albeit sufficient, form can help achieve just that.

Collect the Fee. Most law firms pay little attention to their cash cycle creating bloated delays between billing and collection only after months of carrying the "WIP" or work in progress. The extended cash cycle can have many negative consequences, including:

- lack of client commitment to the onboarding process;
- increased client and attorney disconnection;
- misalignment of one client's priorities over another's (which can frustrate deadlines); and
- difficulty in collecting fees.

To truncate the cash cycle, payment should be procured prior to producing any legal work. With hourly work, retainers should be requested, without exception; those retainers should be replenished monthly. Where flat fees are given, they should be collected, in full, in advance of legal work. The vast majority of your client base should be transitioned over time; although certain relationships will demand exception to which you should be sensitive. Once fully implemented, the cash cycle is optimized and billing is simplified dramatically. It is worth noting, however, that this collection model only works when attorneys deliver their advice/drafts within a reasonable time following payment. Otherwise, clients' willingness to provide payment prospectively will dwindle. Though beyond the scope of this article, at our firm, with our high net worth clients, we have transitioned to annual flat fee billing (generally paid quarterly), based on an annual plan of legal work. These clients seek a planning relationship that is high touch and hallmarked by our management of their annual recurring planning needs, as well as those needs which evolve as their planning matures.

Communicate with the Team. After the legal representation agreement is signed and the fee is collected, well-timed, organized team communication is crucial. In our firm, this communication is directed to two teams: support team and legal team. Our support team members have data processing skills and other administrative skills required to support our clients, and this team is largely comprised of legal assistants, case managers, and accounting executives. Our legal team is comprised of attorneys, exclusively.

Our support team processes the legal representation agreement by:

continued, page 15

- establishing the matter in our case management software;
- preparing the necessary files (electronic and physical);
- scanning all pertinent client documents; and
- attending to any special administrative concerns, including the third party payor form, joint representation with single communicator form, third party communication issues, generally, conflict waivers, and file transfer letters.

Addressing these concerns appropriately is critical -- which means addressing them at *this stage* and by *the appropriate team* to ensure the case gains traction.

After the above-described processing, the lead attorney produces an email (which becomes part of the client's permanent file) to all members of the legal team, and includes unusual or noteworthy clients facts, legal task delegation *among members of the legal team*, and deadlines and client expectations. The email does not supplant meeting notes taken at the client meeting. Instead, it is designed to put the legal team on alert about the new matter or project. It outlines the following:

- demands as to communication mode;
- relationship issues or complexities;
- the priority of certain objectives over others;
- missing documents or financial details;
- required advisor coordination;
- significant legal or tax concerns;
- research needs; and
- deliverable deadlines.

Since legal tasks are completed as a team, all major steps are delegated with specificity to the team member *best aligned with a particular task*. The support team receives a copy of the email and populates all delegated legal tasks from the email into our case management tracking tool (multi-user document). This allows our legal team to prioritize their workload before a file has even hit their desk, and provides the lead attorney with a consolidated forum to closely monitor case details and items accomplished (with greater ease and efficiency).

It is important that communication models are tailored to your firm's needs and other processes. Memos may be preferred over emails, or your meeting notes may assume a more developed format. No matter the form or mode, communication at this point in the representation is critical and should be systemized to create predictability for your team. By doing so, team members will be better equipped to identify their work load and prioritize among client matters.

Effective (and efficient) client onboarding is crucial to maintaining momentum gained in the first meeting. And, it is critical to the next phase of the process: planning and drafting. Systematic onboarding garners client confidence and creates a foundation of trust for the relationship. Additionally, it ensures the same experience for all clients regardless of who is serving as the lead attorney. A commitment to teamwork is crucial. If pursued, the rewards are felt by all parties:

- team members are delegated tasks aligned with their strengths, creating higher job satisfaction and commitment to the firm;
- clients experience a stronger, more tailored relationship because all team members are familiar with the firm's client base; and
- the lead attorney's role as "counselor" can be exercised without pressure or constraint.

Further, the firm, as a business, is able to seize opportunities and grow.



C. DELOACH

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



J. DELOACH

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

Are Decisions And Recommendations Still Mutually Exclusive Concepts? Expanding The Professional Liability of Architects and Engineers to Contractors

By Randy Dow, Becker & Poliakoff, West Palm Beach, Florida

More than 45 years ago, the Florida Supreme Court established in A.R. Moyer v. Graham that an architect can be liable to a contractor who is impacted by the architect's negligence. A.R. Moyer established the potential for liability even without contractual privity between the architect and the contractor. Opinions that have directly applied A.R. Moyer to architects and engineers have closely examined the question of whether these professionals had final authority to terminate a contractor, shut down a project or withhold payment. Architects who merely made "recommendations" to owners did not have true supervisory authority and therefore often owed no duty to contractors. In the recent Singer opinion, the Fourth District Court of Appeal has arguably blurred the line between decisions and recommendations, thereby potentially expanding liability for architects and engineers. The reasoning of Singer suggests that architects and engineers who make recommendations to receptive owners that are relying on the professional's expertise may owe contractors a duty.

The Facts of *Singer*

The Plaintiff in *Singer* was a contractor terminated by the county in the final stages of an airport improvement project. The trial court entered summary judgment in favor of the architect on a professional negligence claim asserted by the contractor. The Fourth District Court of Appeal reversed the summary judgment ruling and remanded the case to the trial court.

The facts concerning the architect's contractual obligations to the county and its day-to-day work on the project are discussed at some length in the opinion. The architect in *Singer* had broad responsibility for oversight on the project. The architect agreed, among other things, to visit the site regularly, update the owner, manage paperwork, assist the owner in determining payment amounts, review shop drawings, assist in change order review and prepare the final punch list. Despite these broad duties and obligations, the architect in *Singer* lacked final control and complete authority over key aspects of the project. As the court observed, the architect could not terminate the contractor and could not stop work. Indeed, the ultimate decision to terminate the contractor from the project was made by the county based on a recommendation from the architect.

In analyzing and weighing these factors, the court may have been swayed by the candid testimony of the principal of the architectural firm, who described himself as the county's "eyes and ears" on the project and characterized his firm as part of the team that would "run the job." While we can only guess at the impact this blunt testimony had on the appellate court, we know that, on balance, the court concluded there was sufficient basis to reverse the summary judgment. What makes *Singer* fascinating is that the court did not weigh the architect's expansive role in the project against its lack of final authority and conclude that the architect might owe a duty despite its lack of final authority. Instead, the court appears to have redefined final authority as something akin to a mere recommendation, and in doing so, concluded that the architect in *Singer* had such authority.

Given that the Fourth DCA was merely reversing a summary judgment, it might be tempting to discount the opinion as somehow less significant. However, the language of the opinion, and in particular its analysis of what constitutes real "authority" on a construction project, is worth consideration. If *Singer's* definition of final authority gets traction in other districts, architects and engineers may see a real expansion of their potential exposure to claims by contractors.

Defining a Duty Is Always a Balancing Act

From the beginning, *A.R. Moyer* made clear that determining the scope of an architect's extra-contractual duties was a

continued, page 17

balancing act. The Florida Supreme Court recited numerous factors relied upon by courts in other states, including: the foreseeability of harm to the contractor as a result of architect's negligence, the certainty of the harm, the closeness of the connection between the architect's conduct and the injury to the contractor, and even the "moral blame" attached to the architect's conduct.[4] In addition to these factors, the Court noted the overarching theory that the "legal responsibility of the architect should be commensurate with his control of the construction project."[5] Where an architect has complete authority over the most critical decisions, such as stopping work on a project, that architect essentially holds the "power of economic life or death over the contractor."[6] An architect or engineer vested with such power should expect to be burdened with expansive duties.

In practical application, courts applying *A.R. Moyer* to architects and engineers have relied heavily on two factors as tools to evaluate foreseeability and the required nexus described by the Supreme Court. First, courts have examined the scope of the professional's work on the project. This inquiry has included whether they were involved in the project for a lengthy or limited period of time, whether they actually designed plans that contractors would rely upon or merely inspected work, and whether they had representatives on site on a regular basis.

The second factor examined by courts has been whether the architect had final authority on the project. Essentially, courts have asked whether the architect had the power to shut down a job, stop payments and otherwise "control" the contractor. This is the power of financial "life or death" the Supreme Court spoke of in *A.R. Moyer*. The Fourth DCA's treatment of this second consideration and its arguable break from past precedent are what make *Singer* potentially troubling for architects and engineers.

Casa Clara's Strict Limitation of *Moyer*

A.R. Moyer has been cited over 100 times by state and federal courts applying Florida law. However, the Florida Supreme Court's 1993 opinion in *Casa Clara* strictly limited the holding in *A.R. Moyer* to the facts of that case.[7] As a result of the limitations imposed by *Casa Clara*, and the fact that *A.R. Moyer* has been pulled into the vortex of the general economic loss rule discussion, few of the 100 citations involve a meaningful application of *A.R. Moyer* to architects and engineers.

Many of the cases that do analyze *A.R. Moyer* in the context of architects and engineers provide limited guidance because they analyze fairly one-sided fact sets. In many cases, the engineers and architects had limited roles in the projects, and they lacked final authority.[8] In other cases, the professionals had critical supervisory roles in the project and final authority.[9] *Singer* tackles the much more interesting situation where an architect had an expansive role in a project but still lacked final authority.

Decisions and Recommendations Are Mutually Exclusive Concepts

The one-sided fact patterns analyzed prior to *Singer* seemed to lend themselves to sweeping language and definitive statements by the courts. Where courts found no duty, the opinions often justified the result by observing that the architect or engineer lacked final decision-making authority. As one opinion bluntly stated, "*decisions* and *recommendations* are mutually exclusive concepts."[10] The significance of the Fourth DCA equating the mere power to recommend with the power to control can only be appreciated in the context of this strong language that permeated prior opinions.

In 1989, in *E.C. Goldman*, the Fifth District Court of Appeal analyzed a roof inspector's potential liability to a roof contractor. The appellate court affirmed judgment on the pleadings in favor of the inspector. The court based its ruling, in part,

continued, page 18



on the fact that the inspector had no final decision-making authority. The inspector could only make recommendations to the school board. As the court observed, "Plaintiffs were not harmed by the consultant's opinion, but rather by the school board's refusal to pay based upon that opinion."[11] The power to advise and recommend was not the true power over economic life and death.

The Second District Court of Appeal analyzed the scope of an architect's duty to an electrical contractor in the 1991 *McElvy* opinion. In that case, the contractor had obtained a jury verdict establishing that it was entitled to a recovery from the architect as a result of the architect's negligence in interpreting plans and specifications. The Second DCA overturned that judgment and mandated that the trial court enter judgment in favor of the architect, in part because the architect lacked final authority on the project. The court acknowledged that the architect was charged with making recommendations. The court further observed that all parties understood that the plaintiff might be harmed if the owner followed the architect's recommendations. There was no question as to the foreseeability of the harm. Still, the court focused on the fact that ultimate authority rested with the owner.[12]

Finally, in 2011, in *Recreational Design,* the Southern District of Florida analyzed an engineer's potential liability to a contractor building a water slide. The court dismissed the action with prejudice on the motion of the engineer. The contractor's claim had previously been dismissed based on an argument that the engineer owed no duty to the contractor. In order to avoid a second dismissal, the contractor was careful to allege that the engineer had total control and decision-making authority. However, as the court observed, this was not reality. The contracts established that the engineer merely made recommendations to the City and the final authority rested with the City. As the court observed, *"decisions and recommendations* are mutually exclusive concepts."[13] The court noted that the engineer was hired to evaluate and report, and the ultimate decision to red tag the slide and reject plaintiff's work rested with the City.

Circling Back to *Singer*

When read on its own, the language of *Singer* seems not only reasonable, but compelling. Consider these quotes from *Singer* analyzing the authority of the architect.

"The principal admitted he recommended the contractors' termination to the county and knew termination could happen upon his recommendation."[14]

"…the county paid the contractor based on the principal's recommendation."[15]

"Although the county had final authority to terminate the contractor or otherwise stop work, it relied on the architect's duty as consultant to makes its ultimate determination to terminate the contractor. The architect was given near absolute authority regarding payments to the contractor, demonstrating the architect's influence over the contractor's economic vitality."[16]

Each of these excerpts paints the picture of an architect who was in charge and essentially running a construction project. Further, these quotes seem to describe an owner who was relying on, if not completely dependent on, the architect for guidance. Under these circumstances, it is easy to understand how an architect could be held liable for potential damages resulting from its negligent recommendations. However, when the language of *Singer* is juxtaposed with the reasoning and language of earlier opinions, the analysis becomes less straightforward. Consider these quotes from the cases discussed above.

"Plaintiffs were not harmed by the consultant's opinion, but rather by the school board's refusal to pay based on the opinion."[17]

"Plaintiff could not possibly dispute that decisions and recommendations are mutually exclusive concepts."[18]

"Under their contract with the City, the architects undertook to render good faith advice and interpretation; they did not undertake to render the ultimate decision even though the City's ultimate decision might be similar."[19]

It is hard to mistake the bright-line approach of these earlier opinions. Architects and engineers either had complete and final authority, or they did not. The power to recommend, even to a receptive owner likely to rubber stamp that recommendation, was not the power to decide. Having teased out the language and reasoning of these prior opinions, it seems apparent *Singer* is a shift in approach and a lowering of the bar for potential professional liability. *Singer* does not hold that decisions and recommendations are the same thing, but it plainly rejects the view that they are mutually exclusive concepts.

The Bottom Line

The *A.R. Moyer* analysis has always been a complex balancing act. Post *Singer*, courts will continue to examine a variety of factors. As such, *Singer* certainly does not turn the *A.R. Moyer* analysis on its head. However, in cases like *Singer*, where the scales are relatively balanced, the new standard for defining control will make a difference. Where *A.R. Moyer* once singled out architects with final authority over the "economic life and death" of a contractor, *Singer* now states that "influence over the contractor's economic vitality" may be enough.



R. DOW

Randy Dow *is a Shareholder in Becker's Construction Law & Litigation Practice. Randy represents clients in construction disputes involving construction defects, as well as delay and impact claims arising out of residential, commercial, and industrial projects. He also defends clients in general and product liability claims relating to construction equipment, aerial lifts and scaffolding.*

Endnotes

1 *A.R. Moyer, Inc. v. Graham*, 285 So. 2d 397 (Fla. 1973).

2 *McElvy, Jennewein, Stefany, Howard, Inc. v. Arlington Electric, Inc.*, 582 So. 2d 47, 50 (Fla. 2d DCA 1991); E.C. *Goldman, Inc. v. A/R/C Associates, Inc.*, 543 So. 2d 1268, 1270 (Fla. 5th DCA 1989), *Recreational Design & Construction, Inc. v. Wiss, Janney, Elstner & Associates, Inc.*, 867 F. Supp. 2d 1234, 1238 (S.D. Fla. 2011). *See also Posen Construction, Inc. v. Lee County, T.Y.*, 921 F. Supp 2d 1350, 1362 (M.D. Fla. 2013) (noting the significance of final authority and comparing those areas where the architect had such authority versus those where they merely made recommendations).

3 *Grace and Naeem Uddin, Inc. v. Singer Architects, Inc.*, 278 So. 3d 89, 91 (Fla. 4th DCA 2019).

4 *A.R. Moyer,* 285 So. 2d at 401.

5 *Id.*

6 *Id.*

7 *Casa Clara Condo v. Chales Toppino & Sons, Inc.*, 620 So. 2d 1244, 1248 (Fla. 1993). Receded From by *Tiara Condominium Ass'n, Inc. v. Marsh & McLennan Companies, Inc.*, Fla., March 7, 2013.

8 *McElvy,* 582 So. 2d at 50; E.C. *Goldman,* 543 So. 2d at 1270; *Recreational Design*, 867 F. Supp.2d at 1238.

9 *Suffolk Constr. Co. v. Rodriguez and Quiroga Architects Chartered*, 2018 WL 1335185 (S.D. Fla.) (denying motion to dismiss and finding duty arising out of broad supervisory authority, power to reject the contractors work and contractor's reliance on plans created by the architect).

10 *Recreational Design,* 867 F. Supp.2d at 1238 (emphasis in original).

11 *E.C. Goldman*, 543 So. 2d at 1271.

12 *McElvy*, 582 So. 2d at 50.

13 *Recreational Design,* 867 F. Supp.2d at 1238.

14 *Singer*, 278 So. 3d at 91.

15 *Id.* at 92.

16 *Id.* at 93.

17 *E.C. Goldman*, 543 So. 2d at 1271.

18 *Recreational Design*, 867 F. Supp.2d at 1238 (emphasis in original).

19 *McElvy*, 582 So. 2d at 50.



Lady Bird Deed:

An Inexpensive Probate Avoidance Technique

By Joseph M. Percopo, Esq., Mateer Harbert, Orlando, Florida

Probate is the legal process of transferring ownership of individually owned assets after death. If a decedent died owning an individually titled asset without a beneficiary designation, then that asset is subject to probate. The costs for probate can range between $2,500 to $7000 and can last between two months to a year.

Probates with major complications or litigation cost significantly more and last significantly longer. At estate planning conferences, there is an opportunity to counsel clients on methods to accomplish their estate planning objectives and bypass the expense and length of probate.

Traditional Methods to Avoid Probate

Although Lady Bird Deeds are the focus of this article, it is important to discuss the traditional methods of probate avoidance first. The most common probate avoidance techniques encompass beneficiary designations, trusts, and joint ownership. Updating beneficiary designations is a simple and inexpensive method to avoid probate. Beneficiary designations typically apply to assets such as annuities, IRAs, 401(k)s, life insurance policies, and 529 plans. Additionally, many financial institutions (banks, credit unions, investment custodians, etc.) allow beneficiaries to be designated on accounts.[1] Assets with a valid beneficiary designation will bypass probate[2] and be distributed directly to the designated beneficiaries. Clients should routinely review their assets and any beneficiary designations.

Trusts are a more complex and expensive method to avoid probate. A trust offers an alternative to probate by allowing a grantor to create a legal instrument (the "trust") which can hold legal title to the grantor's property. If a grantor retitles all of the grantor's assets in the trust, then, upon the grantor's death, the grantor owns no individually owned assets and the need for probate is minimized.[3] A simple trust is often less expensive than probate, but will still cost a few thousand dollars to prepare. For clients with complex family situations, complex distributions schemes, or with real property located in multiple states, the trust may make the most sense financially to properly achieve the clients' goals. The retitling of assets in the trust is critical. Failure to retitle a single asset in the trust could result in probate which means the client paid for the preparation of a trust and will pay for a probate administration.

Between the simple (beneficiary designations) and complex (trusts) lies joint ownership of assets. Assets, both real and personal, can be owned as tenants in common, joint tenants with rights of survivorship ("JTWROS")[4], tenants by the entirety ("TBE")[5], or as a life estate. Tenants in common ownership does not avoid probate. Tenants in common ownership is where two or more people own a certain percentage of an asset. If any owner dies his or her percentage of the asset will be subject to probate. JTROS and TBE accounts are different forms of joint ownership, where upon the death of an owner, the decedent's interest in the asset passes to the other owner(s) automatically by operation of law, bypassing probate.[6] Florida homestead property can be owned as JTROS and TBE, and such ownership does not violate the Florida Constitutional restrictions on devise and decent of homestead property.[7]

A life estate also avoids probate. The Lady Bird Deed is an enhanced version of the life estate. It is important to understand how a traditional life estate works so as to properly appreciate the differences between it and the Lady Bird Deed. A life estate contains two elements: (1) the life tenant(s); and (2) the remaindermen. Upon the death of the last life tenant, the property ownership passes to the remaindermen, which can be one or more persons or entities. Each of the life tenants and remaindermen are subject to certain rights and responsibilities. The life tenant has the right to full and exclusive possession of the property.[8] Accordingly, the life tenant maintains the life tenant's homestead creditor protection and tax exemptions.[9] The life tenant is

a) responsible for ordinary expenses (interest on mortgage, general repairs, general upkeep, HOA fees, and insurance);[10]

b) permitted to rent the home and keep the rent (does not need to share with remaindermen);

continued, page 21

c) liable for common law waste to property;[11]

d) not able to sell or encumber the property without the consent of the remaindermen;

and

e) unable to file a partition action to force sale of the property.[12] The remaindermen interest may be held as tenants in common, JTWROS, or TBE and the remaindermen may convey their remainder interest during the life tenant's lifetime. The remaindermen has no right to possess or use the property during the life tenant's lifetime and is responsible for principal payments on a secured debt, expenses related to the title of the property, environmental matters (such as hurricane damage), and extraordinary repairs.[13] Consequently, a remaindermen is not eligible to claim the property as homestead and receive the homestead benefits until the life tenant's death.[14]

The Lady Bird Deed

The name "Lady Bird Deed" is a title that has been applied to the deed and does not denote an actual deed type. The technical name for a Lady Bird Deed is an "Enhanced Life Estate Deed" because it is a life estate deed with specially reserved powers (the enhanced part). The Lady Bird Deed permits the grantor to retain control over the property (including the ability to convey without the joinder of the remaindermen) but upon the grantor's death, it will pass automatically to the remaindermen, bypassing probate.[15] The Lady Bird Deed is not prescribed or expressly permitted by statute. Instead, the genesis of the authority for the Lady Bird Deed in Florida stems from a Florida Supreme Court Case in 1917 which held a reservation of powers in a life tenant as valid.[16] Therefore, the language and reservation of powers that appear in Lady Bird Deeds are often a reflection of someone's creative writing. It is imperative that the reserved powers be plainly and clearly stated to be effective.[17] For example, a power to "sell and convey" in a Lady Bird Deed is not a retained authority of the grantor to make a gift of property.[18] Here is an example of the reservation of power language that can be included in a Lady Bird Deed:

Grantor reserves unto herself for and during her lifetime, the exclusive possession, use, and enjoyment of the rents and profits of the property described herein. Grantor further reserves unto herself, for and during her lifetime, the right, without the joinder or consent of the remainderman, to sell, lease, encumber by mortgage, pledge, lien, or otherwise manage and dispose, in whole or in part, or grant any interest therein, of the aforesaid premises, by gift, sale, or otherwise so as to terminate the interests of the Grantee, as Grantor in her sole discretion shall decide, except to dispose of said property, if any, by devise upon death. Grantor further reserves unto herself, the right to cancel and divest this deed by further

continued, page 22

LET'S GET REAL:
Time is money.

You're busy and successful, and hard work takes time. At Bank OZK, we offer a full suite of trust services, wealth management, and banking solutions tailored to save you time and money.

Our goal is to provide you and your clients with smart, straightforward financial solutions along with the exceptional customer service, efficiency and expertise you deserve.

That's Bank OZK.



Bank OZK | TRUST & WEALTH

NOT A DEPOSIT | NOT FDIC INSURED | NOT INSURED BY ANY FEDERAL GOVERNMENT AGENCY | NOT GUARANTEED BY THE FINANCIAL INSTITUTION | MAY GO DOWN IN VALUE

Start a relationship with a partner you can trust today.

1.866.625.6691 | ozk.com/trust-wealth

conveyance which may destroy any and all rights which the Grantee may possess under this deed. Grantee shall hold a remainder interest in the property described herein and upon the death of the Grantor, if the property described herein has not been previously disposed of prior to Grantor's death, all right and title to the property remaining shall fully vest in Grantee, subject to such liens and encumbrances existing at that time.[19]

In addition to plainly stating the reserved powers, the Attorneys' Title Fund has strongly suggested that any new deed divesting remaindermen (without their consent) of their interest include language in the divestment deed to that effect.[20] Here is an example of proposed language to include in a divestment deed:

Grantor hereby expressly exercises her reserved right, in the prior recorded enhanced life estate warranty deed recorded on July 11, 2019, to divest the remainderman, John Smith, by further conveyance and destroy any and all rights which the remainderman may have possessed under the prior recorded deed.[21]

A properly drafted Lady Bird Deed can be an excellent and inexpensive tool for bypassing probate of a client's real property at death. Of course, if a client has a trust, or after review of their estate plan it is determined that a trust is best for the client, then title to the real property could be retitled in the trust.[22] The Lady Bird Deed is very effective for those clients that do not require a trust. For example, it is common for an older client to own homestead property, a retirement account, and receive social security income. These assets would not often warrant the cost and complexity of a trust. Instead, a client could execute a Lady Bird Deed for the homestead and update his or her retirement account beneficiary designation to avoid probate. The previous example incorporated homestead property but failed to include information about whether the grantor has a spouse or minor child. When drafting a Lady Bird Deed with homestead property, it is necessary to consider Florida's Constitutional restriction on devise and descent.[23] Because a Lady Bird Deed is an incomplete gift and is akin to a testamentary disposition, the devise restrictions for homestead still apply.[24] This is an important difference from the traditional life estate discussed above and could potentially have a disastrous impact on a client's estate plan.[25] However, like a traditional life estate, the grantor can still maintain the grantor's homestead creditor protection and tax benefits.[26]

Using a Lady Bird Deed also involves some additional differences and benefits beyond probate avoidance that do not all exist with a traditional life estate deed. The first benefit is the complete retained control by the grantor without any liability to the remaindermen. A noticeable difference is that the costs and expenses related to the property are bore solely by the grantor and not the remaindermen.[27] This means the remaindermen do not have any liability as it relates to the property until such time of the grantor's death.[28] Secondly, using a Lady Bird Deed (a) results in a step-up to the property's cost basis to fair market value at the grantor's death (which a traditional life estate also provides),[29] (b) is not considered a transfer of an asset by the Department of Children and Families, and, therefore, does not cause any Medicaid penalty,[30] and (c) does not trigger documentary stamp tax.[31]

The Lady Bird Deed is not without disadvantages which should be considered and explained to clients. The drafting of the deed is critical and the proper powers must be plainly stated in the deed. Failure to include the correct power could cause a problem for the grantor when the grantor attempts to gift, sell, convey, encumber, or otherwise dispose of the real property. However, despite a well-drafted reservation of powers, some title insurance companies may still require the remaindermen to sign off on any transfer before agreeing to provide title insurance. This, of course, is directly contrary to the earlier referenced Florida Supreme Court precedent and hinders a major benefit of using the Lady Bird Deed. Lenders may also be skittish to lend or refinance real property where a Lady Bird Deed has been recorded. This stems from the lenders' fear that the remaindermen will later argue that the note cannot be enforced against the property after the grantor's death. Should a client have an issue with a title company, the client should consider other title companies which may be more inclined to insure the Lady Bird Deed. And if a bank has an issue with the Lady Bird Deed, a client could execute a new deed re-conveying the property to himself or herself in fee simple, and then after the mortgage/loan is approved and processed, re-execute a Lady Bird Deed to avoid probate.



J. PERCOPO

***Joseph M. Percopo, LL.M.**, practices law in Orlando, Florida with Mateer & Harbert, PA. His practice concentrates on estate & trust planning, estate & trust administration, asset protection planning, business, and tax law. He is a graduate of the Florida State University College of Law with highest honors and earned his Master of Laws (LL.M.) in taxation from the University of Florida Levin College of Law Graduate Tax Program.*

Endnotes

1 Commonly referred to as "pay-on-death" or "transfer-on-death" designations. See Fla. Stat. 655.82

2 This also means because the asset will not be part of the probate estate, any Will or Trust will not govern the transfer of that particular asset.

3 Some may still want to open a probate so they can publish the notice to creditors and get the creditor claims period clock to start running.

4 It is worth noting that it should be explained to a client that a JTROS account will pass only to the other account owner(s). This is particularly important where a client has only one of several children on an account because the asset will only pass to the joint child owner and not to any of the child's siblings. This is seldom the intent, as usually the purposes for adding only one child is for ease of access and assistance to the client, not to eliminate other children from receiving a portion of the asset.

continued, page 23

5 This is a form of joint ownership with survivorship rights but only between two married individuals. There are 6 unities required to form TBE ownership, the details of whichare beyond the scope of this article.

6 See Fla. Stat. §689.15 (pertaining to real and personal property) and §655.79 (creates survivorship presumption for financial accounts); see also *Beal Bank, SSB v. Almand & Associates*, 780 So.2d 45 (provides a presumption of TBE for financial accounts where applicable).

7 Fla. Stat. §732.401(5); see also *Marger v. De Rosa,* 57 So. 3d 866 (Fla. 2d DCA 2011).

8 *Sauls v. Crosby,* 258 So. 2d 326, 327 (Fla. 1st DCA 1972).

9 *Vandiver v. Vincent,* 139 So. 2d 704 (Fla. 2d DCA 1962) (holding an individual "could claim exemption in whatever interest she has in the property as her homestead"); *Souther Walls, Inc. v. Stilwell Corp.*, 810 So. 2d 566, 569 (Fla. 5th DCA 2002) (holding that the Florida constitution "does not designate how title to the property is to be held and it does not limit the estate that must be owned, i.e., fee simple, life estate, or some lesser interest").

10 Fla. Stat. 738.801(2)(a); *Chapman v. Chapman,* 526 So. 2d 131, 135 (Fla. 3d DCA 1988); *Schneberger v. Schneberger,* 979 So. 2d 981 (Fla. 4th DCA 2008).

11 *Sauls v. Crosby,* 258 So. 2d 326, 327 (Fla. 1st DCA 1972) (waste includes not paying real property taxes, removal of timber, crops, or minerals, and any destruction to the property).

12 See Joseph M. Percopo, *The Impact of Co-ownership on Florida Homestead, Fla. B.J., May 2012* (text accompanying FN 47).

13 Fla. Stat. 738.801(2)(b); *Schneberger v. Schneberger,* 979 So. 2d 981 (Fla. 4th DCA 2008).

14 *Aetna Insurance Company v. LaGasse,* 223 So. 2d 727 (Fla. 1969).

15 See Florida Uniform Title Standard 6.10 and 6.11.

16 *Ogleby v. Lee,* 73 So. 840 (Fla. 1917); see also *Green v. Barrow,* 8 So. 2d 283 (Fla. 1942).

17 See *Bloom v. Weiser,* 348 So. 2d 651 (Fla. 3d DCA 1977) (pertaining to plainly stating authority and powers in a power of attorney to be effective); see also Attorney Title Fund Notes TN 4.02.03.

18 *Johnson v. Fraccacreta,* 348 So. 2d 570 (Fla. 4th DCA 1977); *De Bueno v. Castro,* 543 So. 2d 393 (Fla. 4th DCA 1989).

19 Please note, this is merely suggested language and the author makes no guarantee of effectiveness or acceptance by a court or underwriter.

20 Insuring Title out of Enhanced Life Estates, Jepson, The Fund Concept, October 2016 Vol. 48.

21 Please note, this is merely suggested language and the author makes no guarantee of effectiveness or acceptance by a court or underwriter.

22 Some planners may want to avoid retitling homestead in the trust (usually because of creditor protection concerns and questions as to whether a trust can be owned as TBE), in such cases a Lady Bird Deed may be employed where the trust is named as the remaindermen.

23 See Fla. Const. Art. VII, §6 and Fla. Const. Art. X, §§4(a), (b), & (c); see also Fla. Stat. §732.4015(1) & §732.401(1); see also see also Fla. Stat. 732.7025 (waiver of homestead rights through deed) and *Stone v. Stone*, 157 So.3d 295 (Fla. 4th DCA 2014) (holding that a spouse joining in the deed waived homestead rights).

24 *In re: Estate of Johnson,* 397 So. 2d 970 (Fla. 4th DCA 1981); Aronson v. Aronson, 81 So. 3d 515 (Fla. 3d DCA 2012); see also Florida Uniform Title Standard 6.12.

25 See *Aronson v. Aronson,* 81 So. 3d 515 (Fla. 3d DCA 2012) (what the grantor intended to happen with the homestead property did not occur because the gift failed the devise and descent restrictions for testamentary transfers of homestead resulting in unintended consequences).

26 Fla. Stat.. §193.155 &193.1554; see also AGO 2001-31 (April 26, 2001).

27 Fla. Stat. §738.801(3) (provides the life estate/remaindermen costs do not apply where inconsistent with the deed).

28 However, it is possible that the IRS may be able to attach a lien on the remainder interest for a debt of the remaindermen. See *Drye v. United States,* 120 S. Ct. 474 (1999) (the decedent's daughter disclaimed a devise, however, the IRS was still able to place a lien on the daughter's disclaimed interest).

29 IRC §2036(a) & §1014 (step-up in basis means that the remaindermen will own the property with a basis (amount considered invested in the asset) equal to the fair market value of the real property at the death of the grantor).

30 ESS Manual 1640.0613.01.

31 Letter of Technical Advice No. 00B4-024 addressed to Fund member, Mike Pyle, Esq (2000).

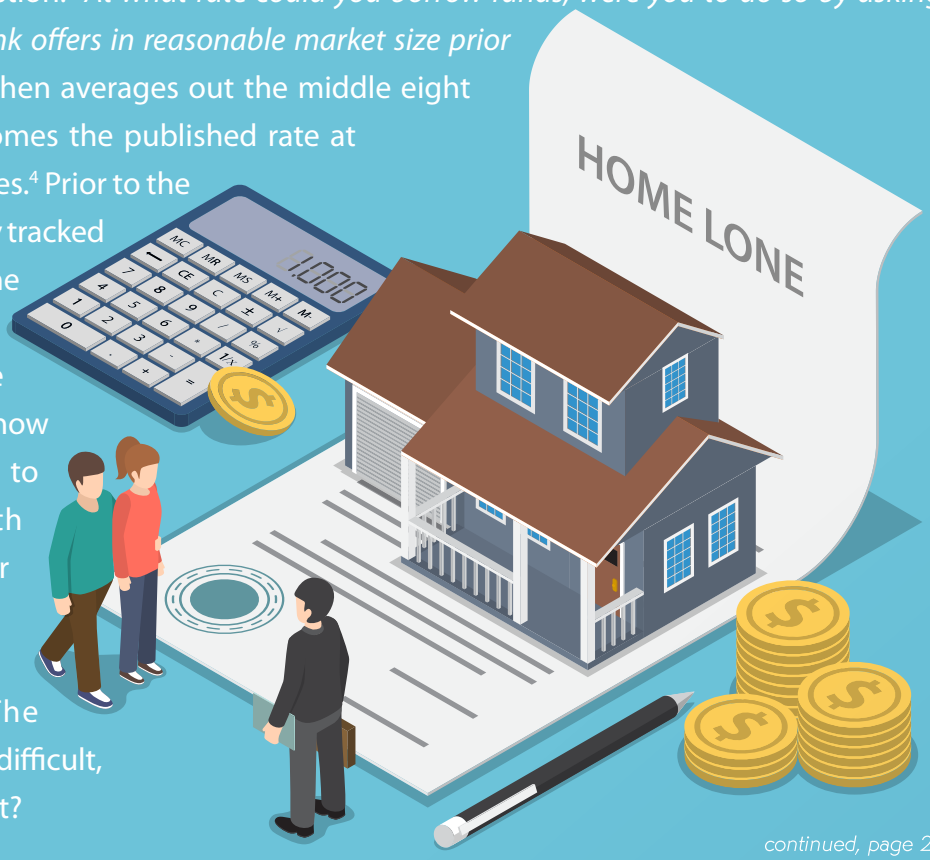


The Regulatorily Induced Coma Of The London Interbank Offered Rate ("LIBOR")!

What Now?

By Edward "Ed" Hamann, Esq., First American Title Insurance Company, Maitland, Florida

Fifty years ago, humans landed on the moon; the Beatles released their legendary album *Abbey Road*; of course, we can't forget Woodstock and its imprint on music and culture, and the surprising championship seasons of the New York Mets and the Jets. Curiously, and lesser known, is the genesis of LIBOR in the form of an $80 Million syndicated loan to the Shah of Iran arranged by a Greek banker.[1] Fast forward, and LIBOR has been suggested as the most important number in the financial world. It is calculated and published daily in five currencies and seven different maturities and generally used as a reference rate for a lender's cost for virtually most consumer and derivative based financial transactions in the world. In the U.S. alone, it is the index for $200 trillion in financial instruments, including approximately two-thirds of all variable or adjustable rate mortgages, whether residential or commercial ("ARM").[2] However, to really understand LIBOR, you need to know that it is based on daily responses or submissions, from major global banks called panel banks (currently sixteen), to the following question: "*At what rate could you borrow funds, were you to do so by asking for and then accepting interbank offers in reasonable market size prior to 11 am?*"[3] An administrator then averages out the middle eight submissions, which then becomes the published rate at the various respective maturities.[4] Prior to the great recession, LIBOR generally tracked other market indicators, but the extreme economic pressures exposed how easily this rate could be manipulated.[5] So it now lies in a coma and connected to a regulatory life support with death expected sometime after December 2021. You might be asking the basic question of how did this happen? The second, and perhaps the more difficult, question is what can we expect?



continued, page 25

A Brief History Of LIBOR And Its Terminal Illness

As to the first question, you might have noticed that LIBOR is really based on estimates, and not actual transactions, by major global banks that are also LIBORs largest consumers in their various lines of business. One would consider this quite a significant conflict of interest and ripe for manipulation, which did occur in 2012. News broke that traders at large banks manipulated their LIBOR submissions which prompted governmental probes and triggered the Financial Conduct Authority ("FCA") to assume its role as first governmental regulator. [6] These probes also resulted in widely reported settlements of several major banks totaling more than $3.5 billion USD. In the summer of 2014, the Financial Stability Board, a global financial watch group, recommended that LIBOR be replaced. Later that year, the Federal Reserve and the Federal Reserve Bank of New York convened the Alternative Reference Rates Committee ("ARRC") to identify a LIBOR alternative. In June of 2017, ARRC recommended that the Secured Overnight Financing Rate ("SOFR") replace LIBOR. SOFR is currently published as a daily rate by the Federal Reserve Bank of New York reflecting the cost of overnight borrowing secured by U.S. Treasury Securities in a market generally considered to be the largest overnight trading market in the world at about $700 billion daily.[7] LIBOR never actively traded in excess of $800 million daily. Shortly thereafter, the FCA announced it would no longer compel panel banks to make LIBOR submissions after 2021 pronouncing "LIBORs Regulatorily Induced Coma."[8] Since the summer of 2017, ARRC has been working aggressively to transition from LIBOR to SOFR.

SOFR As A LIBOR Alternative?

SOFR is only the U.S. solution to the unplugging of LIBORs regulatory life support, while the rest of the major market countries are selecting their own alternative rate, with most choosing a reference rate based on unsecured transactions.[9] What is clear is that there will no longer be one index. That being said, a principal goal of ARRC has been to find the most robust rate possible that inoculates it from manipulation while best reflecting the cost of lending. In a nutshell, ARRC selected an alternative rate that was already heavily traded, based on secured transactions and under the supervision of the Federal Reserve. With the choice of SOFR as a replacement, ARRC was then tasked with providing a transition plan to address two basic elements: 1) implementation of SOFR on a technical basis; and 2) recommending the necessary changes to contracts and agreements to implement this replacement rate, generally referred to as fallback language, both of these elements are referenced hereinafter as the "LIBOR Transition Plan." One critique that has been raised about SOFR is the variability based on cyclical spikes. The Chair of ARRC responded to this comment in a December 6, 2019 editorial opinion in Bloomberg by pointing out that the three month SOFR average rate was still consistently less volatile than the comparable three month LIBOR rate by about two basis points.[10]

What To Expect From The LIBOR Transition Plan?

The implementation element of the LIBOR Transition Plan, currently underway, is a two-pronged approach: 1) creating a 'futures market' based on SOFR reported transactions for the myriad of financial transactions other than ARMs; and 2) creating a conversion protocol for the averaging of SOFR data to make it comparable to commonly reported LIBOR maturities, which appears to be the approach that will be adopted by mortgage lenders ("SOFR Conversion"). It is expected to begin being published by the Federal Reserve in the first half of 2020 in the most common LIBOR maturities. The prongs of the implementation elements of the LIBOR Transition Plan are important for two major reasons:

LIBOR is based on unsecured transactions while SOFR is based on secured transactions creating a comparison of apples and oranges resulting in spreads being fundamentally different and needing to be reconciled.[11]

The needed changes to contracts to allow for an alternative reference rate when LIBOR is no longer available. It is widely accepted that virtually all ARMs have fallback provisions that are either silent or specify that: "if the index is no longer available, the Note Holder will choose a new index that is based on comparable information" hereinafter ("Existing Fallback Provisions").

As part of the LIBOR Transition Plan, in the last year, ARRC has convened several consultations with market participants to address one or all the issues raised above. Starting with the Existing Fallback Provisions, it is easy to find ambiguity. For instance, what does "no longer available" mean? Does it mean LIBOR is no longer being published or simply no longer reliable as determined by what metric? Considering the efforts to find a replacement index, what does: "will choose a new index that is based on comparable information" mean? As discussed, there is currently nothing "comparable" to LIBOR. Does "comparable" mean only an index that is based on credit risk without reliance on security? Is "comparable" supposed to refer to having the least impact on the borrower? ARRC has engaged in consultations with market participants on all these questions, which has happened for syndicated loans, floating rate notes, and new issue ARMs. As to new residential ARMs, ARRC issued a white paper on the use of an averaged SOFR for ARMs that received an immediate positive response from FANNIE MAE, FREDDIE MAC and FHA, which has been most recently echoed in November of 2019.[12] Should SOFR be used in these ARMs, then some of the changes that could be expected based on the ARRC recommendations is that ARMs would reset every six months, rather than every year. The SOFR term to be averaged would be significantly shortened to thirty days, possibly ninety days, rather than the one year averaging with LIBOR with spreads (e.g. profit margins) increasing from

continued, page 26

2.25% to somewhere between 2.75% and 3%.[13] Changes that would likely be very confusing to consumers and might seem like the lenders' costs are going down and profits arbitrarily increasing. Further, consider how confusing this might be for other possible intervening lienors such as those that might claim under respective mechanics lien laws, judgment liens or both as the easiest example.

The proposed fallback language is geared toward defining a trigger point for a replacement index and arriving at what that replacement index might be. The trigger points being either: 1) LIBOR is no longer published; or 2) LIBOR's Administrator or a regulator issues a public statement that LIBOR is no longer reliable.[14] Once the trigger event has occurred what will be the replacement index? How is that replacement index implemented? What obligations if any does a noteholder have to minimize the cost to the borrower? This is where the uncertainty in the LIBOR Transition Plan begins to crystalize, and the practitioner needs to be thinking about the implication to their clients. What might the implications be of these developments for the real estate practitioner?

What Might Real Estate Practitioners Expect?

What is certain is that the transition away from LIBOR will be disruptive, almost a little Y2Kish.[15] We can expect mortgage modifications, refinances, and defaults. Ideally, borrowers and lenders will look to refinance as a hard reset, but of course that will not work for many distressed borrowers and projects, leading to modifications or defaults and litigation. As practitioners, whether representing lenders, borrowers or otherwise, it represents an opportunity to help understand the upcoming changes and recognize that with major changes come unforeseen risks and the need to mitigate and manage those risks. Institutional lenders are working on managing the implementation of LIBOR Transition Plan, as many of them are members of ARRC; but regional and small lenders are generally unaware of the future of LIBOR. Naturally, existing and new borrowers, are the least aware. Collectively, this is where the practitioner has the greatest opportunity to educate clients when terms are being set, whether in the case of original issue loans, refinances, or modifications. The remainder of this article will explore what we know and can reasonably expect based on the efforts of ARRC. Along with, with highlighting some questions that practitioners should be asking themselves and their clients, the practitioner should be prepared for more questions arising as we move thru the transition away from LIBOR.

Mortgage Modifications

Mortgage modifications will most likely be in commercial financing as they are generally tied to LIBOR, especially since these loan documents are usually customized, making the LIBOR transition likely to be tailored and making mortgage modifications much more likely. ARRC's work, although important, has been focused on consumer related products such as residential ARMs that have standardized forms, and not commercial real estate financing causing AARC's efforts to really be in the form of guidance. Assuming this collaboration, what should be the trigger away from LIBOR, and what type of notice will be involved? If the ARMs are syndicated, or pooled, can the servicer or trustee make these modifications unilaterally? What approval is needed? Will borrowers and lenders adopt SOFR Conversion or some other more conventional mortgage lending rate such as the prime rate? If a SOFR Conversion is adopted by mortgage lenders will the spread adjustment be a conversion factor reported by the Federal Reserve as is expected or an alternative? What fallback approaches and language will be best suited for mortgage lenders, both commercially and residentially? What about ceilings or interest rate caps for these types of changes?[16] In residential transactions consumers generally receive a forty-five day notice of change in interest rate.[17] With SOFR Conversion, will that notice trigger the onset of the averaging period or will the averaging period have already occurred?[18] Should the period averaged be thirty, sixty or ninety days? This may depend also on whether it is a residential or commercial loan.

Then there is the question of cost for these modifications, not just the lender and its attorneys, but also the title insurance premium that might be due for endorsements to the title insurance policies. As a threshold matter, Florida's Administrative Code states that premium will be due on the unpaid principal balance for any endorsement to a loan policy insuring "a modification of a mortgage . . . where the modification agreement effects ***any change in the terms, conditions, priority, or security, other than***" eight safe harbor provisions.[19] Two of the safe harbors address changes in terms related to interest rates: 1) if there is a categorical reduction in interest rate as long as preceding caps or ceilings interest rates are not altered; and 2) if there is an exception for loss of priority when there is an increase in the interest rate.[20] It is very difficult to place a change that fundamentally alters the index rate within a safe harbor provision, causing a presumption that substitution loan rates will apply. As an example, consider a LIBOR based construction loan that needs to be extended and future advances given, and LIBOR needs to be replaced and there are open Notices of Commencement, or worse, recorded Construction Liens. Two immediate issues will need to be considered by the stakeholders: 1) a potential risk of change or loss of priority; and 2) whether the change triggers substitution loan rates. Similarly, any intervening mechanics liens, judgment liens and other similar title matters that have appeared of record since the original mortgage should be expected to be reviewed and underwritten with proper requirements or new exceptions. Of course, the natural tendency of customers and

continued, page 27

clients is that these are changes with low risk that should be priced nominally.

Default And Litigation Risk

The myriad of questions posed already suggests there is a high likelihood for default and litigation both on the borrower and lender side. Of course, a continued robust real estate market would be ideal in dampening this effect, but what if there is any type of dip in the real estate cycle that naturally leads to an increase in foreclosures? It would not be surprising and unexpected to see foreclosure defense attorneys assert many defenses regarding the enforceability of interest due as a result of unilateral changes away from LIBOR by lenders. Could unilateral changes be deemed unconscionable? Could existing LIBOR provisions be deemed impossible or impracticable once LIBOR is no longer available? What about allegations that current or new issue LIBOR based provisions without adequate fallback provisions should be deemed deceptive and unfair trade practices? To bring things into greater focus, a simple example is an interest only mortgage set to balloon after LIBOR is no longer available. The borrower refuses to make payments asserting that the lack of provision for an alternative reference rate excuses the borrower from monthly payments until the loan matures since LIBOR is no longer available. All of these questions could find themselves having to be answered by Florida's courts, with uncertain consequences for all affected. What about litigation between the lender and its pool of investors over the use of LIBOR to begin with? Then consider how confusing this will be to junior lienors, such as subordinate lenders, construction lienors and judgment lienors, increasing the risk of allegations of equitable subrogation and priority challenges.

Preparedness Is Key

It is difficult to fathom the full scope of issues that lenders, legal practitioners and title professionals will face, but what is certain is that there is a sea of change coming and proactive and collaborative communications amongst all stakeholders will be key. To a certain extent, the most recent hurricane season comes to mind and the nervous preparedness of all of us as a very powerful and well-defined Category 5 Hurricane Dorian churned in the Caribbean appearing to have its eyes set on Florida. Florida was spared, but it wreaked unimaginable havoc on several islands in the Bahamas. No one could have predicted what happened at that time, but what was critical was the emergency preparedness needed to weather any such storm. As Floridians, we are very familiar with the importance of hurricane preparedness come June 1st. Similarly, in the case of LIBOR, understanding what is looming in the distant horizon is critical to minimizing a financial hurricane of uncertain strength when LIBOR's regulatory life support is removed. As practitioners, preparedness starts with educating ourselves and having proactive discussions with clients.

***Edward "Ed" Hamann**, Esquire is Senior Underwriting Counsel for First American Title Insurance Company. Ed is fully bilingual Spanish speaking real estate attorney and commercial underwriter with over 15 years of legal and title industry experience. Ed graduated from Rollins College with a Bachelor of Arts in Psychology, received a Master of Science in Industrial/Organizational Psychology from the University of Central Florida, and received his Juris Doctor from the University of Florida College of Law. He is an active member of the Real Property, Probate and Trust Law and the International Law Sections of the Florida Bar.*

Endnotes

1 David Hou and David Skeie, LIBOR: Origins, Economics, Crisis, Scandal and Reform, Staff Report No. 667 March 2014 at Page 1, available at https://www.newyorkfed.org/medialibrary/media/research/staff_reports/sr667.pdf.

2 Alternative Reference Rates Comm. ("ARRC"), Frequently Asked Questions, version: September 19, 2019, ("ARRC FAQ") Question 2 available at https://www.newyorkfed.org/medialibrary/Microsites/arrc/files/ARRC-faq.pdf.

3 Hou, *supra* at Page 2.

4 *Id.*

5 *Id.* at Page 5.

6 *See* Masters in Business Podcast dated March 29, 2018 where Barry Ritholtz interviews David Enrich author of the Book "The Spider Network: The Wild Story of a Math Genius, a Gang of Backstabbing Bankers, and One of the Greatest Scams in Financial History."

7 ARRC FAQ *supra* at Question 5.

8 *Id.* at Question 2.

9 *Id.* at Question 15.

10 Tom Wipf. "Wave Goodby to LIBOR. Welcome Its Successor, SOFR." Published December 6, 2019 available at https://www.bloomberg.com/opinion/articles/2019-12-06/wave-goodbye-to-libor-welcome-its-successor-sofr.

11 ARRC FAQ, *supra* at Question 16.

12 Fannie Mae press release of November 15, 2019, entitled: "Fannie Mae to Use ARRC Recommended Fallback Language for Single-Family ARMs," available at https://freddiemac.gcs-web.com/static-files/fadeef26-762e-485b-b796-55cfca87e544. Freddie Mac Press Release of November 15, 2019, entitled "Freddie Mac to Use ARRC Recommended Fallback Language for Single-Family Adjustable Rate Mortgages, available at https://freddiemac.gcs-web.com/static-files/fadeef26-762e-485b-b796-55cfca87e544. Both last checked January 7, 2020.

13 ARRC, Overview of the ARRC's Proposed Models of SOFR ARMs available at https://www.newyorkfed.org/medialibrary/Microsites/arrc/files/2019/ARRC-SOFR-ARM-overview.pdf.

14 ARRC, ARRC Recommendations Regarding More Robust LIBOR Fallback Contract Language For New Closed-End, Residential Adjustable Rate Mortgages dated November 15, 2019 at Page 7, available at https://www.newyorkfed.org/medialibrary/Microsites/arrc/files/2019/ARM_Fallback_Language.pdf.

15 Richard Leong, U.S. mortgage industry wary of transition from LIBOR – Reuters May 23, 2018. https://www.reuters.com/article/us-usa-libor-mortgages-idUSKCN1IO2JK.

16 ARRC, Options for Using SOFR in Adjustable Rate Mortgages at page 11 available at https://www.newyorkfed.org/medialibrary/Microsites/arrc/files/2019/ARRC-SOFR-indexed-ARM-Whitepaper.pdf.

17 *Id.* at 9.

18 *Id.* at 8.

19 *See* Fla. Admin. Code R. 69O-186.0059(13).

20 *Id.*

SECTION SPOTLIGHT

Cooley Law School Mock Interviews
September 20, 2019

By Johnathan Butler, Lead ALM, 13th Circuit, Tampa, Florida

On Friday, September 20, 2019, Attorney Phil Bauman plus 13th Circuit At Large Members (ALMs) Amber Ashton, John Redding, and Johnathan Butler participated in mock interviews at Cooley Law School in Tampa. Several Cooley law students spent 20-30 minutes with the interviewers to gain tips on resume writing, to be coached in the interviewing process, and to discuss their career aspirations. Interviewers shared with interviewees the "do's" and "don'ts" for before, during, and after the interview, in order to help the students shine and stand out among the pack. The students asked several good questions on the what to discuss or ask during the interview, whether to bring writing samples, whether to have references available and more. Laura A. Bare, Esq., Associate Director of Career and Professional Development at Cooley, summed it up quite well after the interviews, "Thank you again to you all for coming this afternoon! As always it was a fun afternoon."



RPPTL 13th Circuit ALMs John Redding Jr (third from left) and Johnathan Butler (far right) visit with Cooley Law Students after finishing mock interviews.



RPPTL 13th Circuit Member Phillip Baumann with Cooley Law Students at the conclusion of the mock interviews.



RPPTL 13th Circuit ALM Amber Ashton (right) greets a Cooley Law Student at the beginning of her mock interview.

13th Circuit Coffee and Doughnuts with Judges January 7, 2020

By Johnathan Butler, Lead ALM, 13th Circuit, Tampa, Florida

The probate guardianship trust gavel changed hands this week as outgoing Judge Catherine Catlin thanked nearly 25 Section Members and local 13th Circuit At Large Members (ALMs) for recognizing her work over the past few years at the helm while welcoming Judge Vivian Corvo as the new Probate Guardianship and Trust judge. Catlin especially showed her appreciation to the local bar for helping her along the way in education and training in this area. She noted, "I think this is the first time to hold this reception recognizing a judge who is rotating to another bench. Thank you all." Judge Corvo thanked everyone, too, and noted how she looks forward to the new challenge.

Thanks to Judge Catlin's judicial assistant, Jackie Morgan, and Judge Corvo's judicial assistant, Robyn D'Agresta, for helping to organize this event. Attendees enjoyed the coffee and doughnut break with the judges in the 6th floor judicial conference room at the George Edgecombe courthouse in downtown Tampa. RPPTL stories were told and humor was ever present during the session. Who knows? If possible, we may do this annually in January with the judges, including adding healthier choices of fruit and yogurt to the menu next time for those "New Year's resolutions" attendees. The 13th Circuit ALMs announced the upcoming RPPTL meeting at month's end in Tampa, plus they announced upcoming law school social events planned this month at Cooley and Stetson.



Judge Catherine Catlin tells the group some stories about her time on the guardianship trust and probate bench.



RPPTL Jounice Nealy Brown and ALM Ricky Hearn.



Jackie Morgan, Robyn D'Agresta, Judge Catherine Catlin, RPPTLs Steve Hearn, Deb Boje and Rich Caskey.



Staff Attorney Rachel Simpson, RPPTL Jonathan Wolf, ALM Ricky Hearn, RPPTL Jolyon Acosta and ALM Mike Kangas enjoy the gathering.

Cooley Law Student and 13th Circuit ALMs Visit January 7, 2020

By Johnathan Butler, Lead ALM, 13th Circuit, Tampa, Florida

Nearly 30 law students and four 13th Circuit At Large Members (ALMs) enjoyed Pizza Hut pizza and soft drinks to start the winter semester on Tuesday, January 7, 2020 over the lunch hour at Cooley Law School in Riverview (near Tampa). Thanks to Laura Bare, Cooley's Director of Career Development, for helping arrange the gathering in the Cooley Law student lounge.

Students learned about the Section and the upcoming winter meetings in Tampa in January at the month's end; students registered on the spot to attend. Students received copies of *ActionLine* plus RPPTL "swag" for attending, and more importantly, they learned about committee meetings and the ALMs meeting, which has a new attendee/law student's reception that will follow on Thursday, January 30th. While at Cooley, I, along with fellow ALMs, discovered a "reptile" theme in the lounge, as you can see in the photos.



Cooley law students complete student registration forms for upcoming Winter RPPTL Meeting in Tampa at month end, as ALM Mike Kangas (right) speaks with the law students about RPPTL committee meetings while Eryn Riconda (second from left) listens in.



13th Circuit (Tampa) RPPTL At Large Members (ALMs) Mike Kangas (left), Shawn Brown, John Redding Jr and Johnathan Butler.



John Redding Jr speaks with Cooley law students about how to get involved with the Section.



RPPTLs Johnathan Butler (far left), Eryn Riconda, with Cooley law students enjoying the RPPTL swag and Action Lines, at far right is Laura Bare, Associate Director of Career and Professional Development.



Cooley law student, 2L "Barron" shakes hands with John Reddimh Jr as Shawn Brown cannot resist a photo bomb.

easysoft

Real Estate Closing Software Used by Thousands of Attorneys Nationwide For Over 30 Years

Reduce Closing Time By 70%

Easysoft eliminates the need for real estate professionals to manually calculate complex calculations in the Closing Disclosure and HUD forms by generating them for you. Helping you to close faster and make more money from your real estate work.

Closings simplified:

- Online access anywhere
- Easy to use interface
- New users can get started in minutes
- No training required
- Live chat support
- Constant product updates & improvements



RPPTL Friend of the Section

Get 20% Off With a 1 Year Subscription*

*For new customers only

1-800-905-7638 | www.easysoft-usa.com | sales@easysoft-usa.com

RPPTL Section Executive Council Meeting
J.W. Marriot Marquis • Miami, Florida
November 6-9, 2019

View Photo Albums at www.rpptl.org



Young Executive Council Meeting Attendees



Bill Hennessey, Chair-elect and Rob Freedman, Section Chair.



RPPTL Section Chair Rob Freedman with past chairs Debbie Goodall and Mike Gelfand



Jeff Baskies and Liz Hughes



RPPTLs outside cocktail party



RPPTLs meeting in Miami



Laird Lile and Cady Huss.

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



Il Gabbiano Restaurant



Lee Weintraub, ActionLine editor.



Katherine Frazier, Sancha Brennan Whynot, and John Harrison





RPPTL section members on a road (boat) trip



Resolution honoring the late section past chair Lew Kanner, accepted by his daughter



Section Ethics skit: Eric Virgil and Hung Nguyen



RPPTLs at work

Roundtable

Highlights Of The Meeting Of The RPPTL Section

REAL PROPERTY DIVISION

Saturday, November 9, 2019

JW Marriott Marquis, Miami Florida

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

Thank you to Roundtable Sponsor: Fidelity National Title Insurance

The Director of the Real Property Division, Bob Swaine, opened the meeting at 8:30 a.m.

Sponsor Announcement. The Director thanked Fidelity National Title Insurance for sponsoring the Roundtable.

Recognition and Introductions. Recognition of guests, students, and dignitaries in attendance. The Director welcomed guests to the meeting.

Summary of Breakers Roundtable Meeting. There was a motion to approve the summary from The Breakers Roundtable meeting. The motion passed.

Action Items

Construction Law Committee — Reese J. Henderson, Jr., Chair: Reese Henderson presented in support of legislation: (1) expanding the definition of contractor under Fla. Stat. §713.01 to include construction managers; (2) clearing ambiguities in improper payments made by an Owner prior to abandonment of a project by contractor; (3) requiring a tenant's information on a Notice of Commencement where a tenant is contracting for leasehold improvements; (4) codifying a net judgment rule for attorney fee claims under Chapter 713 as opposed to the prevailing party standard set forth in *Trytek v. Gale Industries*; (5) clearing ambiguity in Flat. Stat. §337.18 as it relates to waiver and release of payment bond claims in public transportation projects; (6) repealing Fla. Stat. §255.05(7), which allows for cash to serve as an alternative form of security on public projects as opposed to payment bonds; and (7) repealing Fla. Stat. §713.245, which created conditional payment bonds.

Reese indicated that after the proposal was circulated to interested committees there was push back on the significant issues test which would be the former net judgment rule standard instead of the *Trytek* standard, as well as the attorneys' fees provision. The committee is trying to get its priorities out to the legislature and have one bill that would make consensus changes to the lien laws.

Reese explained that it is planned to drop the net judgment rule portion of the proposal. Lee Weintraub explained the attorneys' fees saying the intent of the bill is that there must be a prevailing party. The other attorneys' fees issue was on the significant issues test. The net judgment rule was in place, then the court went to the significant issues test. Members of the construction law committee wanted to go back to the net judgment rule. Since then, committees have accepted taking out the reversion to the net judgment rule.

There was a motion to approve the action item with an amendment to drop the change to the attorneys' fees provision in Fla. Stat. §713.29 so that the attorneys' fees provisions in lines 259-270 would be stricken. After discussion and a vote the motion carried.

Real Property Finance and Lending Committee — Richard McIver, Chair: Richard McIver presented on the adoption of the First Supplement to the Report on Third Party Legal Opinion Customary Practice in Florida. The Business Law Section approved the supplement earlier this year, subject to some modifications by the Section. He is seeking approval of the supplement from the real property division. If approved, it would be taken up at the next Executive Council meeting. A motion was made to approve the supplement. The motion carried.

Information Item

Amicus Coordination — Robert W. Goldman, Co-Chair.

Robert Goldman presented on the Second DCA case of *Hayslip vs. U.S. Home Corp.*, which recently certified a question as one of great public importance, essentially: whether mandatory arbitration provisions included in a real property deed can be binding on subsequent owners.

Bob Swaine asked for input about the policy questions that would have us get involved in this case.

The Real Property Litigation committee asked how this arbitration touches and concerns the land, as well as use, occupation, and enjoyment.

Robert asked whether the clause has to be tailored to running with the land.

continued, page 35

Bill Sklar said one of the difficulties is how the certified question is framed. He said the issue is not the arbitration provision, and that touch and concern is the focus, but the way the question is framed has put emphasis on the arbitration provision. He went on to say that the fact that it is in the deed and is not a contractual provision and doesn't touch and concern the property requires fundamental education of the court of the basic elements of touch and concern showing up in the deed and is a danger from a public policy perspective if allowed to stay. He said the case is a real problem for many committees from the section as a matter of precedent.

Peggy Rolando disagreed with the position. She thinks it is generally accepted that if the language was in a declaration of covenants, then there would be no issue, and that is done frequently now. Also, she thinks the issue with touch and concern is that it is widespread in academia and in real estate case law to move away from touch and concern. She thinks it is much ado about nothing. She said it all comes down to the medium you want to resolve issues in.

Shawn Brown expressed his concern that if you have this language in deeds a unit owner may not be able to maintain class standing.

Michael Gelfand said he agrees with Peggy that the distinction in having it in the deed or covenants is meaningless. However, he wants to know whether we are going to allow regular damage claims to be part of the covenant running with the land.

Homer Duvall disagreed with Peggy that the touch and concern issue is being abrogated. The issue is determining whether it runs with the land or whether it is a personal covenant. If you just start having builders put this in deeds the average buyer is not going to understand it and is probably not going to read the deed before closing anyway. That could create a consumer issue that should be considered.

Jerry Aron said the erosion of touch and concern has been in covenants, but not in the deed. He doesn't think we should be a forerunner to change something that has been in place for 100 years.

Reese Henderson said the Florida cases weren't really on point, but the cases from other jurisdictions were close. His concern is that this doesn't deal with the covenants that are part of your deed. They are in a predecessor deed, causing a lack of notice.

Manny Farach said we may be overcomplicating things. This is a provision that benefits one party, not the land. If that is the case it is a personal covenant, and not one running with the land.

Bill Sklar pointed out that the result of this case may encourage loading up the deed with covenants. Michael Gelfand added that we don't want to load up deeds with things that don't touch and concern the land.

There was a discussion about what could be presented to the court. There will be a vote in the Executive Council Meeting whether the Section should get involved.

Committee Reports (time permitting)

Attorney-Loan Officer Conference — Robert G. Stern, Chair; Kristopher E. Fernandez, Wilhelmina F. Kightlinger, and Ashley McRae, Co-Vice Chairs: Wilhelmina Kightlinger presented. The conference has been rebranded to ABC – Attorney Banker Conference. It will be held Friday, February 28th at the downtown Tampa campus of Stetson University and will be a full day of CLE. Wells Fargo is sending their economist on top trends. Burt Bruton will present on documentary stamp taxes. The conference will include panels and roundtables. Topics will include lending on sale of hemp, the new remote online notary law, fraud, cybersecurity, and residential lending.

Commercial Real Estate — Jennifer J. Bloodworth, Chair; E. Burt Bruton, Ashley McRae, R. James Robbins, Jr. and Martin A. Schwartz, Co-Vice Chairs: Jennifer Bloodworth presented. She reported that Marty Schwartz finished his top 10 presentation. There was an excellent CLE on leasehold interests.

Condominium and Planned Development — William P. Sklar and Joseph E. Adams, Co-Chairs; Alexander B. Dobrev, Vice Chair: William Sklar discussed a four-part webinar as well as the first edition of a new two-part book coming out soon.

Condominium and Planned Development Law Certification Review Course — Sandra Krumbein, Chair; Jane L. Cornett and Christene M. Ertl, Co-Vice Chairs: Sandra Krumbein said the committee is in active preparation stages for the February 21st and 22nd course at the Nova Law School. All speakers are lined up.

Construction Law — Reese J. Henderson, Jr., Chair; Sanjay Kurian, Vice Chair: Reese Henderson said the committee meets the second Monday of each month.

Construction Law Certification Review Course — Melinda S. Gentile and Elizabeth B. Ferguson Co-Chairs; Gregg E. Hutt and Scott P. Pence, Co-Vice Chairs: Melinda Gentile said both the Construction Law Institute and the Certification Review Course are moving along. Speakers are lined up and topics identified.

Construction Law Institute — Jason J. Quintero, Chair; Deborah B. Mastin and Brad R. Weiss, Co-Vice Chairs: Jason Quintero reported that the Construction Law Institute will be held March 6th and 7th, with a great line-up of speakers.

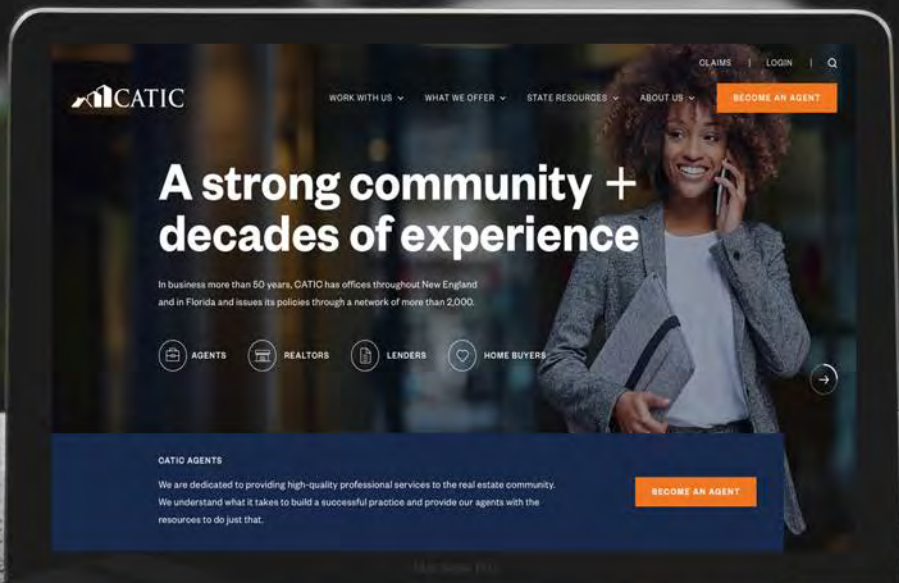
Development & Land Use Planning — Julia L. Jennison, Chair; Jin Liu and Colleen C. Sachs, Co-Vice Chairs: Jin Liu reported. The committee meeting included an excellent presentation on technology impacts on real estate development by Louis Archambault. The committee is going to take different types of development such as residential and golf

continued, page 37

PROVIDING THE TOOLS OUR AGENTS NEED TO BE SUCCESSFUL.

HIGH-QUALITY TITLE RESOURCES AT YOUR FINGERTIPS

CATICTRAC | PREPEXPRESS | CATIC EXCHANGE | UCPEXPRESS



Have you checked out our new website?

YOU SHOULD.

SEE WHAT FULL-TIME TITLE AGENT SUPPORT LOOKS LIKE.

AGENT DRIVEN. INSURING RESULTS.

RESIDENTIAL & COMMERCIAL TRANSACTIONS

CATIC

MILLENIA PARK ONE
4901 VINELAND ROAD, ORLANDO, FL 32811

www.CATIC.com 833-FL-CATIC

course development and do a series of CLEs on those topics.

Insurance & Surety — Michael G. Meyer, Chair; Katherine L. Heckert and Mariela M. Malfeld, Co-Vice Chairs: No report.

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

Real Estate Certification Review Course — Manuel Farach, Chair; Lynwood F. Arnold, Jr., Martin S. Awerbach, Lloyd Granet and Brian W. Hoffman, Co-Vice Chairs: Manuel Farach reported that the course will be April 17th and 18th in Orlando. The test is May 7th. Materials will be released early for those taking the test. There is going to be a business entities and taxation presentation included this year.

Real Estate Leasing — Brenda B. Ezell, Chair; Richard D. Eckhard and Christopher A. Sajdera, Co-Vice Chairs: Brenda Ezell reported. On November 20th there will be a webinar on sharing space in a digital world.

Real Property Finance & Lending — Richard S. McIver, Chair; Jason Ellison and Deborah B. Boyd, Co-Vice Chairs: Richard McIver reported on the FIRPTA seminar at the meeting. The committee is moving forward with a bill amending Fla. Stat. §697.07 on assignment of rents, and Fla. Stat. §702.10 on mortgage payments during foreclosure. The bills are close to being in a form that can be circulated to other committees. Jason Ellison reported that UCRERA, the Uniform Receivers Act, has been proposed as a senate bill. The Financing and Lending Committee voted to not take a position on the bill.

Real Property Litigation — Michael V. Hargett, Chair; Amber E. Ashton, Manuel Farach and Christopher W. Smart, Co-Vice Chairs: Amber Ashton said the committee talked about *Hayslip*. They also had a great presentation on the Uniform Tenant in Common Act. It will probably be adopted this session.

Real Property Problems Study — Lee A. Weintraub, Chair; Adele Ilene Stone, Stacy O. Kalmanson and Susan K. Spurgeon, Co-Vice Chairs: Lee Weintraub said there is work on strengthening Fla. Stat. §57.105. This is being worked on by Susan Spurgeon and Gwynne Young, and they have asked that people email Lee or Susan with war stories. There will be substantive YouTube presentations of 10-15 minutes. Anne Pollack said there was another presentation by Chris Smart on title insurance. Chris will be putting on a two-part webinar in December and January on the topic.

Residential Real Estate and Industry Liaison — Nicole M. Villarroel and Salome J. Zikakis, Co-Chairs; Raul Ballaga, Louis E. "Trey" Goldman, and James A. Marx, Co-Vice Chairs: Salome Zikakis said the committee also had a FIRPTA CLE. The joint committee with the Florida Association of Realtors and Florida Bar needs more attorney applicants. The deadline has been extended to November 15th.

Title Insurance and Title Insurance Liaison — Brian W. Hoffman, Chair; Mark A. Brown, Alan B. Fields, Leonard Prescott and Cynthia A. Riddell, Co-Vice Chairs: Brian presented. The committee talked about *Hayslip*. The committee is working with FLTA to help resolve problems with the redaction bill on legal descriptions.

Title Issues and Standards — Christopher W. Smart, Chair; Robert M. Graham, Brian W. Hoffman, Karla J. Staker, and Rebecca Wood, Co-Vice Chairs. No report.

Andy Sasso discussed the Professionalism and Ethics Committee proposed change to the Florida Bar Rule 4-1.14 (Client Under a Disability) by adopting with modifications the ABA Rule on Client with Diminished Capacity. The change could provide more guidance for attorneys by providing more detail. Guardianship also made modifications. The Elder law section voted unanimously to seek adoption. If it is approved at Executive Council today it would go to the Florida Bar Board of Governors, then to the Florida Supreme Court.

Adjournment. The meeting was adjourned at 9:30.

We Find Missing Heirs
A Better Way®

Reasonable Non-Percentage-Based Fees

Authorized Search Services

97% Success Rate Since 1967

Documented Court-Ready Reports

Worldwide Service

Call 1-800-663-2255

HeirSearch™
www.heirsearch.com

Proud Sponsor

A8800288

Roundtable

Highlights Of The Meeting Of The RPPTL Section

PROBATE AND TRUST DIVISION

Saturday, November 9, 2019

JW Marriott Marquis, Miami, Florida

By Eamonn Gunther, Esq., Boca Raton, Florida

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

Sarah Butters, Director of the Probate and Trust Division, called the meeting to order at 8:15 a.m.

Action Item

Trust Law Committee — J. Matthew Triggs, Chair: Matt explained the action item up for consideration at the Executive Council meeting today. The item asks that the Section adopt a legislative position in support of the "Florida Directed Trust Act," a modified version of the Uniform Directed Trust Act, which clarifies and changes various aspects of the Florida Statutes relating to directed trusts.

Professionalism and Ethics Committee — Gwynne A. Young, Chair: Andrew Sasso reported on the Committee's review and support of the new ABA Rule 1.14 and explained the action item up for consideration at the Executive Council meeting today. The item asks that the Section adopt a position in support for proposed changes to Rule 4-1.14 (sc. Client Under a Disability) of the Rules Regulating The Florida Bar. The amendments to ABA Rule 1.14 include changes to terminology from clients with a "disability" to clients with "diminished capacity," which is explained as a change in terminology only. The new ABA Rule 1.14 focuses on degrees of a client's capacity with provisions for emergency legal assistance for clients with seriously diminished capacity and sets forth protective measures a lawyer may take short of requesting a guardian if a lawyer reasonably believes that there is risk of substantial harm unless action is taken. The commentary provides guidance to attorneys dealing with clients with diminished capacity. The old commentary regarding an attorney acting as "de facto" guardian for the client was deleted.

Information Item

Ad Hoc Guardianship Law Revision Committee — Nicklaus J. Curley, and Sancha Brennan Whynot, Co-Chairs: The Committee confirmed potential changes to the Guardianship Code that would (1) require court approval of a guardian's consent to a DNR unless a pre-existing DNR was signed prior to incapacity; (2) broaden a guardian's duty to disclose conflicts of interest; and (3) prohibit a professional guardian from petitioning for his/her own appointment absent an extraordinary circumstance.

Homestead Issues Study Committee — Jeffrey S. Goethe and J. Michael Swaine, Co-Chairs: Jeffrey Goethe reported on the status of the current RPPTL Section Position on legislation concerning homestead held in revocable trusts. A proposed compromise has been drafted and approved by the Homestead Issues Committee concerning the vesting of title in the trust beneficiaries if the trust holds title to protected homestead. It is hoped that the compromise will allow the remainder of the proposal to move forward in the legislature for the 2021 legislative session.

Model and Uniform Acts Committee — Bruce M. Stone and Richard W. Taylor, Co-Chairs: Patrick Duffey explained the Uniform Partition of Heirs Property Act and Proposed Florida HB349, which seeks to improve the law of partition with respect to cases involving certain family-owned tenancy-in-common property by ensuring that each cotenant in a partition action is treated fairly and the proceeds from any sale of the property are maximized. The Act is law in sixteen jurisdictions and is currently pending in six legislatures. The Section has provided technical assistance to the sponsors of the Bill in the Florida House and Senate.

Proposed Amendments to Florida Probate Rules to Add Mediation/Arbitration Provisions — Grier Pressley explained the Section's historical action with regard to the Florida Dispute Resolution Center's (the "Center") proposed amendments to the mediation/arbitration rules as applied to elder law issues. The RPPTL Section's Executive Council approved a Section position on September 27, 2019 in opposition to the proposed Rule amendments and has submitted comments to the Center to address Section's concerns. The Center seeks to establish mediation and arbitration provisions within the Florida Family Law Rules, the Florida Rules of Civil Procedure, and most recently, the Florida Probate Rules (through the addition of proposed Probate Rules 5.181, 5.182, 5.183, 5.184 and 5.185). It is the Section's position that the proposed Rule amendments fail to adequately define a threshold for application; the Section believes that the proposed Rule amendments are unnecessary

continued, page 39

because adversarial probate and guardianship proceedings are already governed by the Florida Rules of Civil Procedure under Rule 5.025(d)2); the Section disagrees with the proposed limitations placed on the pool of mediators/arbitrators available for selection; and, the Section is concerned that certain guardianship matters, those involving a determination of the ward's capacity and the restriction of the ward's rights, are not appropriate for mediation. In addition to providing the Center with its comments, the Section has requested that the Center refer the proposed new probate rules to the Probate Rules Committee for further consideration.

Committee Reports

Probate and Trust Litigation Committee — J. Richard Caskey, Chair: Richard Caskey reported on sub-committee work around ambiguities or potential conflicts between Fla. Stat. §§ 733.212, 733.2123, and 733.208 (2020) on whether service of the petition for administration or notice of administration bar later discovered wills; and, whether a cutoff date should be set for offering a later discovered will. Additionally, the sub-committee is considering changes to the contents of a notice of administration, to require additional language providing adequate notice that a party may be waiving their right to contest a trust if they fail to timely contest the will. Additional sub-committee work will involve the study and proposal regarding limitations on Trustees' liability from making distributions from a subsequently contested trust.

Trust Law Committee — Matthew Triggs, Chair: Matthew reported that the Committee has drafted the newly proposed Florida Uniform Directed Trust Act which although almost in final form may not be ready for legislative action until the 2021 legislative session. Matthew also reported on continuing research projects by various sub-committees, including: (1) should Florida have a statute regarding qualifications of a Trustee; (2) matters relating to grantor trust tax reimbursements; (3) revisions to the prudent investor rule; (4) the duties of a trustee of a revocable trust; and (5) conditioning distributions upon a receipt and release.

IRA, Insurance, and Employee Benefits — L. Howard Payne and Alfred J. Stashis, Jr., Co-Chairs: The Committee reported on its completion of the changes to Fla. Stat. § 221.21(2)(c) (2020) to clarify that an ex-spouse's interest in an IRA, which is received in a transfer incident to divorce, is exempt from the claims of the transferee ex-spouse's creditors. These proposed changes are being submitted during this current legislative session and if passed will become law upon signature of the Governor. The Committee is also working on ongoing research projects involving possible changes to Florida's Uniform Transfers to Minors Act, Chapter 710, F.S. concerning extending custodianship of retirement accounts to age 25; and research regarding changes within the Uniform Principal and Income Act with respect to IRAs and retirement benefits.

continued, page 40



Legislation — Katherine Frazier and Jon Scuderi, Co-Chairs: The following legislation is being proposed by the Section during this 2020 Florida Legislative Session:

IRA Transfer in Divorce: Changes to Fla. Stat. § 221.21(2)(c) (2020) clarifying that an ex-spouse's interest in an IRA which is received in a transfer incident to divorce is exempt from the claims of the transferee ex-spouse's creditors.

Homestead Leasehold Cooperative: Proposed amendment to Fla. Stat. § 719.103(25) (2020) to provide much needed clarification and guidance regarding the inurement of the constitutional exemption from creditors' claims upon the death of a Florida resident who owns a leasehold cooperative unit.

Family Trust Company: Legislation creating Fla. Stat. § 662.149 (2020) to establish an exemption for the publication of applications of a family trust company (1) seeking to operate as a licensed family trust company under Fla. Stat. § 662.121 (2020) or (2) seeking to register and operate in the State of Florida, Fla. Stat. § 662.122 (2020).

Notice of Administration Changes: Amends Fla. Stat. § 733.212 (2020), which governs the contents of a notice of administration, to require additional language to provide adequate notice that a party may be waiving their right to contest a trust if they fail to timely contest the will.

Notice of Administration Changes: Legislation to improve the notice of administration to the surviving spouse to include notice 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, including changes to Fla. Stat. § 733.212(2)(e) (2020).

Personal Representative/Beneficiary Standing To Recover Assets: 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, including changes to Fla. Stat. §§ 731.201(32), 733.607(1), and 733.612(20) (2020).

Coins and Bullion: Proposed legislation defining "tangible personal property" in the Florida Probate Code to make it clear that tangible personal property includes, but is not limited to, precious metals in any tangible form, such as bullion and coins.

Formal Notice Does Not Confer Personal Jurisdiction: Amendment to Chapter 731, Florida Statutes (2020), to provide that formal notice as provided in the Florida Probate Rules does not confer in personal jurisdiction over persons receiving formal notice.

Personal Representative Conflicts of Interests: Amendment to Fla. Stat. § 733.610 (2020) by expanding the categories of entities and persons related to the personal representative for purposes of determining whether the personal representative, or someone sufficiently related to the personal representative for conflict purposes, holds a substantial beneficial or ownership interest that could create a conflict of interest when engaging in a sale, encumbrance, or other transaction.

Naming Yourself As A Fiduciary: Legislation which provides that a lawyer, or certain people related to, or affiliated with, the lawyer will not be entitled to receive compensation for serving as a fiduciary if the lawyer prepared the instrument making the appointment unless: (a) the lawyer or person appointed is related to the client; or (b) certain disclosures are made to the client before the instrument is signed and confirmed in a writing signed by the client.

Asset Protection — Brian Malec, Chair: The Committee continues to monitor the progress of the Uniform Voidable Transfer Act ("UVTA") legislation, which has not yet come before the Florida legislature again this session. The Committee is working on a white paper and draft legislation allowing for tenancy by the entirety trusts providing for putting tenancy by the entirety property into a joint trust and the property maintaining its tenancy by entirety status. This is intended for best use by people that are not subject to estate tax and for purposes of distributing the property outside of probate.

Attorney/Trust Officer Liaison Conference — Tattiana Bernes-Stahl and Cady Huss, Co-Chairs: The next ATO Conference will be at The Breakers on August 21 – August 22, 2020.

Estate and Trust Tax Planning — Robert Lancaster, Chair: The Committee reported on Rick Gans' presentation to the group on the SECURE Act, now law as of December 20, 2020. The Committee is working on a statutory proposal for community property trusts in Florida. The Committee is also working with the Trust Committee on the research regarding grantor trust tax reimbursement and some possible tweaks to the family trust company statutes.

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

- Assisting with implementation of the initiatives raised in the Judicial Management Council Guardianship Workgroup Final Report;
- Addressing access to tenancy by the entireties accounts for necessary expenses of a guardianship ward;
- Payment of Court Appointed Counsel's fee in good faith cases where no guardianship is established;
- Communications between Judges and the Court Clerk in guardianship accounting actions;
- Procedures for objecting to a suggestion of capacity – Fla. Stat. § 744.464 (2020);
- Matters relating to the Office of Public and Professional Guardian;

continued, page 41

- Approval of fees paid to guardians and counsel for guardians;
- The use of alternative dispute resolution procedures in guardianship proceeding; and
- The implementation of procedures for a guardian's use of Do-Not-Resuscitate Orders.

Principal and Income — Edward Koren and Pamela Price, Co-Chairs: This Committee is studying the new Uniform Model Principal and Income Act and considering what changes if any should be made to Florida's Principal and Income Act. This Committee is close to finalizing its review and expects to present its proposed changed to the Section in early 2020.

Probate Law and Procedure — Travis Hayes, Chair: The Committee continues to work on numerous pending projects via its various subcommittees, including: Notice of Administration and Elective Share Rights; "Probate Potpourri"; small estates; mandatory bonds and restricted depository accounts; revisions to Self-Proof Affidavit; Priority of Payment of Court-Appointed Fiduciaries; efforts to codify the rights of artificial reproductive technology heirs; independent action subcommittee; and, the subcommittee on proposed changes to Fla. Stat. § 732.507(2) (2020) to address the statutory deficiency that arose in the *Gordon v. Fishman* case where the statute does not cover a provision written in a will, executed outside of marriage, that provides for an ex-spouse.

Wills, Trusts and Estates Certification — Jeffrey Goethe, Chair: The Certification Review Course will take place on April 17 and 18 at the Orlando International Airport. The CD or DVD recording of the 2019 Wills Trusts & Estates Certification Review Course, course number 2976 , is available for purchase through the Florida Bar.

Charitable Planning and Exempt Organizations — Seth Kaplan, Chair: The Committee will hold its inaugural CLE Course in September or October 2020. The Conference will include nationally renowned speakers from around the country discussing charitable planning trends and the future of philanthropy and planned giving. Sponsors include the University of Miami, South Dakota Trust Company and national charities and financial institutions. At each Committee meeting, a charitable organization is brought in as a speaker to discuss charitable giving from the organization's prospective. Prior speakers have included the American Cancer Society and the United Way of Miami-Dade. Also, at each meeting some time is allocated to discussion of planning techniques and current events.

Elective Share Review — Lauren Detzel, Chair: The Committee is considering contractual rights with respect to testamentary aspects or promises on Florida elective share provisions in a divorce settlement agreement (and whether the divorce settlement agreement trumps the elective share statute), as well as consent and waivers on IRA beneficiary designations.

Ad Hoc Electronic Wills — Sarah Butters confirms that the electronic legal documents and remote notarization legislation becomes effective as to estate planning documents on July 1, 2020. The legislation authorizes online witnessing and notarization of estate planning documents and specifies requirements and standards for performance of such online notarizations. The law contains certain safeguard rules to ensure against fraud and exploitation of vulnerable adults. The Committee is now focusing on education, a potential glitch bill and working with the Clerk of Courts on implementation of e-will deposits.

Ad Hoc Guardianship Law Review — David Brennan, Chair: The Committee continues to work on finalization of the draft legislation for the revised guardianship statutes.

Ad Hoc Study On Professional Fiduciary Licensing — Angela Adams, Chair: The Committee is working on draft legislation for licensing of professional fiduciaries, and is starting an annual seminar commencing on February 6, 2020, at the Poynter Institute in St. Petersburg, Florida. The seminar will be available via webcast as well.

AD Hoc Study on Jurisdiction, Due Process and Service of Process — Chair Barry Spivey: The Committee is working on a total review of the Florida Trust Code as compared to the Uniform Trust Code to consider what if anything should be updated or changed under Florida law to comport with the Uniform Laws.

Probate and Trust Liaisons With ACTEC — Elaine Bucher, Shane Kelley, Charles Nash, Tasha Pepper-Dickinson, and Diana Zeydel: Jerry Wolf reported on the success of the ACTEC Florida Fellows Institute with a 124 graduates. Jerry also reported on ACTEC's recent new white paper on self-settled trusts which serves as a great reference point for anyone looking to consider the latest aspects of the law in this area.

Adjournment. The next Probate and Trust Division Roundtable meeting will be held at The Grand Hyatt Tampa Bay Hotel, Tampa, Florida on February 1, 2020.

BECOME A SPONSOR!

Reach hundreds of Florida attorneys!
Real Property, Probate & Trust Law Section Sponsorship Opportunities

Friend of the Section

Limited to 12 sponsors

Benefits:

- Receive a list of names, addresses, telephone numbers and email addresses of all Executive Council members, upon request.
- Discount on ActionLine advertising.
- Preferred opportunity to reserve exhibition space at the annual Section Convention Meeting, at a twenty percent (20%) discount off of standard rate.
- Recognition as a "Friend of the Section" at RPPTL Section meetings and in Section materials.
- Listing as a "Friend of the Section" on the RPPTL website (www.rpptl.org) and the event app.
- Receive one free ticket to the Thursday night reception. Opportunity to purchase up to two additional tickets to any event at the price offered to Executive Council members. Additional tickets may be purchased based upon availability at actual cost.
- Priority notification of vendor opportunities as they arise.
- Invitation for up to two attendees at any designated reception for Sponsors.
- Acknowledgement and thanks by RPPTL leadership at the Executive Council meeting.

FRIENDS WILL RECEIVE PRIORITY OVER NON-SPONSORS TO UPGRADE TO A GENERAL SPONSORSHIP SLOT WHEN AND IF OPPORTUNITIES BECOME AVAILABLE.

Committee Sponsor

Limited to 3 sponsors per committee

Benefits:

- Sponsor of a particular committee that meets during our Executive Council meeting weekend.
- Introduction at the beginning of the committee meeting that they sponsor and an opportunity to address those in attendance at the committee meeting.
- Discount on ActionLine advertising;
- Recognition as a "Committee Sponsor of the Section" at RPPTL Section meetings and in Section materials;
- Listing as a "Committee Sponsor of the Section" on the RPPTL website (www.rpptl.org) and the event app.
- Priority notification of vendor opportunities as they arise.
- Priority on a seniority basis, to upgrade to a different committee sponsorship slot, to Friend of the Section, or to General Sponsorship, if and when opportunities become available.

General Sponsor

PREMIER SPONSORSHIP CATEGORY!

Limited to 3 sponsors per event

Benefits:

- Recognition as a "General Sponsor of the Section" at in-state Executive Council meetings and in promotional materials relating to the meeting.
- Introduction at the event that is sponsored and opportunity to address members in attendance at the event.*
- Listing as a "General Sponsor of the Section" on the RPPTL website (www.rpptl.org) and the event app.
- Ability to bring and distribute marketing materials to the members at the event sponsored (venue permitting).
- Receive a list of names, addresses, telephone numbers and email addresses of all Executive Council members, upon request.
- Receive up to two free tickets to the event sponsored or at the sponsor's option to the Thursday night reception. Opportunity to purchase up to four additional tickets to any event at the price offered to Executive Council members. Additional tickets may be purchased based upon availability at actual cost.
- Guaranteed ability to reserve up to two rooms at the event hotel for in-state meetings at the RPPTL discounted rate.
- Discount on ActionLine advertising.
- Preferred opportunity to reserve exhibition space at the Legislative Update meeting and the annual Section Convention Meeting, at a twenty-five percent (25%) discount off of standard rate.
- Priority, on a seniority basis, to upgrade to a different General Sponsorship slot if and when one becomes available.
- Invitation for up to four attendees at any designated reception for Sponsors.
- Inclusion on RPPTL signage via Sponsor logo and lead contact information.
- Acknowledgement and thanks by RPPTL leadership at the Executive Council meeting, with Sponsor representatives in attendance being asked to stand and be acknowledged.

* *This benefit is available for General Sponsors of the Thursday night reception; Friday night reception; Friday night dinner; Roundtable meetings; and Saturday night function. General Sponsors of breakfasts, luncheons and the Executive Council meeting sponsors will be introduced and thanked at the Executive Council meeting. RPPTL reserves the right to not hold one or more designated events at one or more meetings during the Term. If an event is not held at a meeting, the RPPTL will provide substitute recognition and an opportunity to address the Executive Council.*

For more information contact the Chair of the Sponsorship Committee
Eric Virgil • eric@virgillaw.com • 1-305-448-6333

RPPTL GENERAL SPONSORS

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

SPONSOR	CONTACT	PHONE
Attorneys' Title Fund Services, LLC	Melissa Murphy	800-336-3863
Fidelity National Title Group	Karla Staker	407-618-2935
First American Title Insurance Co.	Alan McCall/Len Prescott	407-691-5295/305-908-6252
Guardian Trust	Ashley Gonnelli	717-210-1185
J.P. Morgan Chase	Carlos Batlle/Alyssa Feder	305-579-9485
Management Planning, Inc.	Roy Meyers	609-924-4200
Old Republic National Title	Jim Russick	813-228-0555
Phillips	Jennifer Jones	212-940-1272
Stewart Title Guaranty Company	David R. Shanks, Esq.	305-240-3049
Stout	Garry Marshall	713-225-9580
The Florida Bar Foundation	Donny MacKenzie	407-960-7007
Wells Fargo Private Bank	Mark Middlebrook/Johnathan Butler/Alex Hamrick	813-225-6544
Westcor Land Title Insurance Company	Sabine Seidel	866-629-5842
WFG National Title Insurance Company	Joe Tschida	407-708-0408

Text Marketing Basics – An Introduction to the Regulation of Text Message Marketing

By Kristen King Jaiven, Esq., In-House Counsel
to The Signature Real Estate Companies, Boca Raton, Florida

Introduction

Adults spend, on average, more than four hours per day on mobile devices.[1] A review of your "screen-time activity" on your mobile device will open your eyes to the reality of the hours you spend consuming information such as text messages, social media, and email on any given day. Effective advertisers use an array of marketing mediums targeted at your mobile device to solicit business. Text message marketing, specifically, is becoming an increasingly popular tool used by businesses (including law firms and real estate brokerages) to solicit prospective clients and customers because text messaging offers increased open rates and responses (as compared to other marketing mediums like email).[2] While text marketing may be effective, such campaigns must be carefully designed and deployed to ensure compliance with various laws, including the rules regulating the Florida Bar, the Federal Telephone Consumer Protection Act ("TCPA"), the Florida Telemarketing Act, and the recently-enacted Pallone-Thune TRACED Act, which increases the fines associated with sending improper text messages and, potentially, increases the government's oversight of violations related to robocalls and text messages.[3] Failure to comply with such rules (including minor technical violations), can put practitioners at risk of statutory penalties and costly litigation for non-compliance.[4]

Florida Bar Board of Governors Determination

The Florida Bar Board of Governors has authorized text messages as a form of solicitation to prospective clients, analogizing text messages to other forms of written communication such as print or email advertising.[5] More specifically:

The Board of Governors also has determined that the in-person solicitation prohibition does not extend to unsolicited text messages meeting the requirements of Rule 4-7.18(b), as long as the lawyer provides an "opt-out" for recipients; recipients are not required to pay for receipt of the text messages; and the lawyer complies with all applicable state and federal laws, rules, and regulations regarding unsolicited text messages. The lawyer is responsible for determining compliance with applicable laws, rules and regulations, including the [F]ederal Telephone Consumer Protection Act, 47 U.S.C. §227.[6]

In addition to the requirements specific to text messages, the content advertised through text messages must also comply with the rules applicable to written/email communication, such as indicating the text message is an "advertisement" in the first line of the message.[7]

Telephone Consumer Protection Act ("TCPA") Basics

The TCPA[8] is a complicated consumer protection law that should be thoroughly reviewed prior to the implementation of any text marketing campaign. To begin your review of the TCPA, start by understanding: 1) what qualifies as a telemarketing text, 2) how consumers consent to receive telemarketing texts, and 3) the connection between the TCPA Do-Not-Call rules and text marketing. Here are the basics:

What is a telemarketing text? Telemarketing is defined broadly under the TCPA and its implementing rules to include text messages made from automatic telephone dialing systems. Telemarketing, specifically, is defined as "the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person."[9]

How do you obtain consumer consent? Telemarketing Texts (i.e. marketing texts made from an automatic dialing system) may not be sent to a consumer without: 1) the consumer's signed written consent and 2) the consumer's ability to opt out of receiving further solicitations via text (for example: by replying STOP to a solicitation).[10] Best practices for obtaining

continued, page 45

and recording a consumer's consent to receive text messages is through what is known as a double opt-in where, regardless of the mechanism by which a consumer's consent is obtained prior to initiating a text message to the consumer's phone, the initial text message to the consumer asks the consumer to consent again to receiving telemarketing texts (accomplished through a reply text).[11] This double opt-in process allows you to specifically tie the consent to the text message thread, so there is no question that the consumer understood they were consenting to the receipt of text marketing.

How do you ensure you are complying with the Do-Not-Call portion of the TCPA? The TCPA establishes the Do-Not-Call registry and its corresponding rules that also apply to text messages. The TCPA's safe harbor protections under the Do-Not-Call rules require solicitors to maintain detailed policies, procedures, compliance and training programs that ensure company records are constantly updated to reflect changes in the national (and internal) Do-Not-Call lists.[12]

State Regulatory Considerations

The Florida Department of Agriculture and Consumer Services regulates those acting as "Telephone Solicitors" and requires the registration of such individuals or companies[13] unless a specific exemption applies.[14] Prior to initiating a text message marketing campaign, you have to determine if such activity falls under the Florida Telemarketing Act and whether there are any filing requirements.

Conclusion

If you are considering utilizing text marketing as part of your marketing and advertising initiatives, be aware that such addition must be implemented after the proper safeguards are in place to ensure such messages are being sent in a compliant manner and proper documentation is being stored. While many service providers can easily help you design and commence a text marketing campaign, such providers often cannot confirm the program is compliant or litigation proof. Taking the time to understand all the moving parts of a text marketing program can save you the unnecessary cost and frustrations arising from TCPA-related claims.

Endnotes

1 Melanie Curtin, Are You On Your Phone Too Much? The Average Person Spends This Many Hours On It Every Day, Inc. (October 30, 2018), https://www.inc.com/melanie-curtin/are-you-on-your-phone-too-much-average-person-spends-this-many-hours-on-it-every-day.html.

2 Dan Slavin, *Text Message Marketing: The Ultimate Mobile Engagement Tool,* Business.com (January 24, 2019), https://www.business.com/articles/text-message-marketing-benefits/.

3 Florida Realtors, *You Could Be Sending Illegal Robocalls and Not Know IT, https://www.floridarealtors.org/news-media/news-articles/2020/01/you-could-be-sending-illegal-robocalls-and-not-know-it* (last visited January 14, 2020).

4 Florida Realtors, *More Florida Brokers Face Lawsuits Over Robotexts*, https://www.floridarealtors.org/news-media/news-articles/2019/09/more-fla-brokers-face-lawsuits-over-telecommunication-law (last visited January 5, 2020) (real estate brokers); *see also* Mike Eshelman, *Opinion The risk of TCPA Litigation for Mortgage lenders is increasing,* National Mortgage News (December 27, 2019), https://www.nationalmortgagenews.com/opinion/the-risk-of-tcpa-litigation-for-mortgage-lenders-is-increasing (mortgage brokers); *see also* Salcedo v. Hanna, No. 17-14077 (11th Cir. 2019) (attorney/law firm).

5 *Bar Board Finds Texting is not Prohibited Solicitation,* The Florida Bar News (August 15, 2015), https://www.floridabar.org/the-florida-bar-news/bar-board-finds-texting-is-not-prohibited-solicitation/.

6 The Florida Bar, Handbook on Lawyer Advertising and Solicitation, 4 (2018) *available at:* https://www-media.floridabar.org/uploads/2019/12/Handbook-2018-12-13-19-ADA-Compliant.pdf.

7 The Florida Bar News*, supra note* 5.

8 47 U.S.C. § 227 (1991).

9 47 C.F.R §64.1200(f)(12).

10 Florida Realtors, *supra* note 4 (note: non-telemarketing texts still require the express consent of the customer; however, such consent does not need to be in writing).

11 Call Fire, What Is Double Opt-In for Text Message Marketing?, https://www.callfire.com/blog/2017/11/17/what-is-double-opt-in-for-text-message-marketing (last visited January 5, 2019).

12 Florida Realtors, *supra* note 4.

13 Fla. Stat. § 501.607 (1991) and Fla. Stat. § 501.059 (1987) (for definition of Telephone Solicitor).

14 Fla. Stat. § 501.604 (1991) (Note: in certain circumstances, even if an exemption applies, a filing is still required by the Florida Department of Agriculture and Consumer Services).

THE DIAMOND LAW FIRM



Rachel Oliver, Sandra Diamond, Ben Diamond

Estate Planning
Probate & Trust Administration
Probate & Trust Litigation
Guardianships

150 Second Avenue North, Suite 570
St. Petersburg, FL 33701
727-823-1400
DiamondLawFlorida.com

PRACTICE CORNER

Probate and Trust Division

Critical Considerations In Recent Rule Revisions

By Antonio P. Romano, Esq., Comiter, Singer, Baseman & Braun LLP

Effective January 1, 2020, the powers that be revised and approved a series of changes to the Florida Probate Rules, Florida state law, and the Florida Rules of Procedure, which are critical for every practitioner to know.

First, as to the changes to the Florida courts' jurisdictional limits, which directly impact those who handle administrations, and more importantly, those that may represent a creditor in an independent action against an estate:

Small Claims: As of January 1, 2020, small claims cases will include cases up to $8,000. Cases exceeding the $8,000 amount in controversy will require a civil cover sheet that specifies the dollar amount in dispute. However, the new law maintains the current rules that limit the provision of subsidized court mediation services to county court cases with an amount in controversy up to $15,000.

County Court Cases: As of January 1, 2020, the county court jurisdictional threshold increased to $30,000, which will then increase to $50,000 on January 1, 2023. Further, appeals of county court orders or judgments with an amount in controversy greater than $15,000 will be heard by the district courts of appeal until January 1, 2023, when the provision is repealed.

Substantive changes were also made to the Florida Probate Rules, including:

Fla. Prob. R. 5.240. Notice of Administration, was revised as to the *required language* in a notice of administration. This revision is one of the most crucial to be aware of, as failure to comply with a notice requirement may provide an opposing party a reasonable basis to argue that the notice is defective, and thus that the time bar does not apply.

Fla. Prob. R. 5.020. Pleadings; Verification; Motions, subsection (d) Rehearing, was revised to require that a motion for rehearing of any order or judgment shall be served not later than fifteen (15) days after the date of filing the order or judgment with the clerk as shown on the face of the order or judgment. The previous rule permitted ten (10) days.

Fla. Prob. R. 5040. Notice, was revised as to the guidelines and requirements for formal notice, including providing for service by first-class mail when only in rem or quasi in rem relief is sought under certain circumstances.

Fla. Prob. R. 5.200. Petition for Administration, was substantially revised with regard to required language in petitions for administration, including a statement of specific facts that show the petitioner's qualifications to serve as personal representative under Florida law, and a statement identifying any other person who has equal or higher preference than the petitioner for the appointment of a personal representative.

Fla. Prob. R. 5.275. Burden of Proof in Will Contests, was revised to adopt subdivision (b), which states that in any transaction or event to which the presumption of undue influence applies, the presumption shifts the burden of proof under Fla. Stat. §§ 90.301-90.304.



Fiduciary Accounting System

TEdec

Service Bureau

Professional Fiduciary Accounting Software

TEdec provides attorneys, CPAs and other professionals with the most proven, reliable and full featured Trust and Estate Accounting Software on the market.

One-time data entry ensures accuracy while saving time in preparing:
- Court Inventories & Accountings
- Management Reports
- Estate Tax & Income Tax Returns by bridge to Lacerte® Tax Software
- Much more!

TEdec provides a Risk Free 100% Money Back Guarantee!

Eliminate Mistakes and Increase Profits!

Lacerte® is a registered trademark of Intuit Inc. in the United States and other countries.



Outsource to **TEdec** for all your fiduciary accounting needs

Our Professional Team Can Provide:
- Data Entry
- Court Inventories
- Accountings - Formal or Informal
- Releases

All compliant with the official forms for: NY, PA, NC, FL, CA. National Fiduciary Accounting Standards.

TEdec Systems, Inc.
207 Court Street, Little Valley, NY 14755

Learn More. Try Us Today!
Online at **www.tedec.com**
Call **1-800-345-2154**

Two Ways to Improve Your Trust & Estate Practice

Florida Bar CLE Opportunities
Online & downloadable –24/7
www.floridabar.org/CLE

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

Is your E-MAIL ADDRESS current?

Log on to The Florida Bar's web site (www.FLORIDABAR.org) and go to the "Member Profile" link under "Member Tools."

Probate And Trust Case Summaries

Prepared by Joseph M. Percopo, LL.M. Mateer & Harbert, P.A.

New probate rules have been adopted pertaining to pleadings, notices, petitions for administration, burden of proof, and settlement of minors' claims.

In re: Amendments to the Florida Probate Rules
Case No. SC19-164 – December 19, 2019

5.020 – changes the deadline for service of a motion for rehearing from 10 days to 15 days after the date of filing of the order or judgment.

5.040 – added new subdivisions: (1) allows for service by first-class mail only when in rem or quasi in rem relief is sought, and (2) removed requirement to serve registered office and replaced with "as provided in chapter 48, Florida Statutes."

5.200 – person seeking appointment as personal representative must indicate whether any other person has equal or greater preference under Fla. Stat. § 733.301 (2019), and if so the person's name and whether they will be served with formal notice. Additionally, a statement must be included by the personal representative indicating qualification to serve under Fla. Stat. §§ 733.303 & 733.304 (2019) (for people) and Fla. Stat. § 733.305 (2019) (for businesses).

5.275 – added a new subdivision which provides that where the presumption of undue influence applies, the presumption shifts the burden of proof under Fla. Stat. §§ 90.301-90.304 (2019).

5.636 – added the provision "equals or" directly preceding the phrase "exceed $50,000" pertaining to settlement for minors' claims under subdivisions (d) and (e).

A cooperative apartment cannot be considered homestead for purposes of the Florida homestead restriction on devise and descent. Due to enactment of new Cooperative Act subsequent to Florida Supreme Court precedent and a conflict between the 3rd and 2nd DCA, the court of appeals certified a question to the Florida Supreme Court regarding the application of homestead for purposes of devise and descent to a cooperative apartment.

Walters v. Agency for Health Care Administration, Fla. L. Weekly D2898a (Fla. 3d DCA 2019)

Pauline Walters, the sole heir to her mother's estate, filed a petition for summary administration and requested the court to declare the interest in a cooperative apartment ("Property") constituted protected homestead. The Property was the only sole asset of the estate. The Agency for Health Care Administration ("AHCA") filed a claim in the estate for approximately $81,000 and objected to the homestead petition, arguing that the Property was not entitled to homestead protection because it was not a "fee simple interest in land." The trial court agreed with AHCA and this appeal follows under the de novo standard of review.

The 3rd DCA acknowledges that there are 3 types of homestead: (1) provides homestead with an exemption from taxes, (2) protects homestead from forced sale, and (3) provides restrictions on the ability to alienate or devise the homestead property. Different rules apply to the application of the different homestead types. Ms. Walters argued that the rules applicable to a forced sale protection homestead (item (2) above) should apply to the Property and AHCA contended that that the rules applicable to alienation and devise (item (3) above) are appropriate for the Property. The Florida Supreme Court in *Wartels v. Wartels*, 357 So. 2d 708 (Fla. 1978) held that a cooperative apartment cannot be considered homestead property for purposes of devise and descent because it was not an interest in realty. The 3rd DCA adhered to the prior precedent, finding this to be a type (3) homestead situation and further finding that the homestead rules of devise and descent do not apply to cooperative apartments.

The 3rd DCA further notes that subsequent to Wartels, Florida enacted the Cooperative Act, Chapter 76-222, Laws of Florida. A substantially similar issue having come before this court in 2007, the Court of Appeals determined then that it was bound by Wartels but certified to the Florida Supreme Court a question as the continued applicability of Wartels after the Cooperative Act. The Florida Supreme Court initially accepted jurisdiction but later exercised its discretion and discharged jurisdiction. Prior to this case but subsequent to Wartels and the 2007 case, the 2nd DCA in Geraci v. Sunstar EMS, 93 So. 3d 384 held that the application of the rules from type (2) forced sale were applicable to a cooperative apartment and such property was exempt from forced sale even though it did not constitute a fee simple interest. Therefore, due to the passage of the Cooperative Act and two subsequent Court of Appeals cases in conflict, the 3rd DCA again certified to the Florida Supreme Court the question: "Does the Florida Supreme Court's decision in In re Estate of Wartels v. Wartels, 357 So. 2d 708 (Fla. 1978), have continuing vitality in light of the adoption

continued, page 49

by the Florida Legislature of the cooperative act, Chapter 76-222, Laws of Florida?"

Trial court erred in entering an order for payment of medical expenses based upon information that was not admitted into evidence at trial.

Negedly v. Smith, 2019 WL 6223115 (Fla. 5th DCA 2019)

Appellee entered into an agreement to pay the costs of rehabilitation of Gregory Smith. Following Mr. Smith's death, the rehabilitation facility sought to collect all outstanding medical expenses from Appellee. The Appellee and rehabilitation facility reached an agreement where the Appellee agreed to pay $15,000 and the rehabilitation facility assigned its claim for medical expenses to Appellee. Thereafter, the Appellee filed a creditor claim with the estate for the full amount of the medical expenses.

The trial court, after conducting an evidentiary hearing, permitted the full amount of the medial expense claim and entered an order based on the information from the rehabilitation center's billing history that was attached to Appellee's complaint. The case was appealed to the 5th DCA.

The 5th DCA found that the only evidence admitted at trial was for the $15,000 payment via testimony from Appellee, and that the billing history from the rehabilitation center had not been properly admitted into evidence. Therefore, the trial court was reversed and remanded to enter an order reducing the award of medical expenses to $15,000.

Trial Court did not error in award for accounting fees assessed against the former guardian; however, the Trial Court erred in its award of attorney fees and incarceration for failure to pay purge amount because the Trial Court failed to (1) make the necessary findings of "bad faith," (2) determine a nexus existed between the bad faith and attorney fees incurred by other party, and (3) take testimony and make findings as to the reasonable number of attorney hours and reasonable hourly rate.

Hicks v. Hicks, 44 Fla. L. Weekly D2791a (Fla. 4th DCA 2019)

Reginald Hicks ("Former Guardian") appealed an order holding him in indirect civil contempt and awarding attorney's fees and accounting fees for his failure to file a final guardianship report as previously ordered by the trial court. Several court orders were issued to Former Guardian to place assets in a restricted account, file annual plans, file annual accountings, file inventories, and complete guardian education course.

Sister of the Former Guardian filed a petition which resulted in the trial court entering an order permitting a forensic accountant to be employed and such costs to be bore by the Former Guardian. In response to Former Guardian's failure to comply with the aforementioned, the trial court removed him as guardian and directed him to file his final guardianship report. When Former Guardian again failed to comply with the trial court's order, the trial court entered additional orders for sanctions and contempt.

Sister, upon receiving the accounting report, moved for contempt to compel the final guardianship report, as well as requesting sanctions, attorney's fees, and forensic accountant fees. Thereafter, Sister properly noticed a hearing which Former Guardian failed to attend, resulting in the trial court finding indirect civil contempt, awarding attorney fees, awarding accounting fees, and directed incarceration if the Former Guardian failed to remit payment.

The standard of review on appeal was "abuse of discretion" and "substantial competent evidence" pertaining to sanctions for bad faith and award of attorney fees, respectively. The 4th DCA affirmed the award of accounting fees but reversed the award of attorney's fee because the trial court failed to make specific finds of "bad faith," failed to show a nexus between the fees and bad faith, and failed to take expert testimony or make findings as the reasonable number of hours and reasonableness of the hourly fee. In addition, the court of appeals reversed the incarceration order because the trial court failed to make findings to show the Former Guardian had the present ability to pay the purge amount. The matter of reasonable fees and the ability of the Former Guardian to pay was remanded to the trial court for further proceedings consistent with the findings of the court of appeals.

Florida Bar CLE–24/7,
Online & downloadable
For the Bar, By the Bar.
www.floridabar.org/CLE

Trial Court did not error in award of attorney fees for guardianship action brought in bad faith; however, the award of a lump sum fee recovery was improper because the trial court failed to provide a breakdown of (1) the reasonable time for work performed by the attorney and paralegal and (2) which entries were duplicative or considered administrative.

Forman v. Forman, 44 Fla. L. weekly D2695a (Fla. 4th DCA 2019)

This appeal followed from a trial court's assessment of attorney fees and costs against Brenda Forman ("Wife") personally, arising out of Wife's action to determine incapacity of her estranged husband, Howard Forman ("Husband") and to appoint an emergency temporary guardian. The trial court applied Fla. Stat. § 744.331(7) (2017) to order fees based on Wife's "bad faith" with regards to Husband's capacity.

Husband's attorney initially sought in excess of $100,000 in fees that were comprised of time he and his paralegal spent working on the capacity matter. The trial court determined what was a reasonable number of hours (171.42 hours) and applied a reduced hourly fee ($350/hour) for the attorney and the billed rate for the paralegal ($125/hour) resulting in $59,997 fee assessment against Wife with an additional $1,400 for fees spent on litigating fees. In reviewing the time, the trial court determined that some of the entries were duplicative and/or constituted administrative work; however, the trial court did not provide any specific breakdown of how it reached the lump sum fee amount.

Attorney fees must be supported by substantial competent evidence and express findings as to the number of hours reasonably expended at a reasonable hourly rate; moreover, the court is not permitted to "reverse engineer" its findings based on a lump sum award. The trial court order failed to include the required findings as to the number of hours specifically expended by the attorney and paralegal and failed to specify which time entries it found duplicative or administrative.

The 4th DCA affirmed the award of fees on fees of $1,400 because it was properly within the discretion of the trial court under Fla. Stat. § 744.331 (2017). However, the court of appeals reversed and remanded to the trial court to make specific findings as to the reasonable time spent by each of the attorney and paralegal and to include which entries the trial court found to be duplicative or administrative.



Real Property Case Summaries

Prepared by Prepared by Michelle Gomez Hinden, Esq., B.C.S., Nishad Khan, P.L., Orlando, Florida

The application of Fla. Stat. § 196.161(1)(b) (2003), is not limited to only those persons who are not permanent residents of Florida.

Fitts v. Furst, Case No. 2D18-538 (Fla. 2d DCA 2019) (Opinion Filed Sept. 13, 2019)

In *Fitts v. Furst,* the court considered an appeal filed by William David and Nancy B. Fitts ("Fittses"), in response to a summary judgment in favor of Furst, which determined that the Fittses violated Fla. Stat. §196.031(5) (2018), and were subject to sanctions in Fla. Stat. §196.161(1)(b) (2003).

The Fittses owned and lived in their Sarasota County home as Florida permanent residents and benefitted from a homestead tax exemption on their home. Unbeknownst to the Fittses, for several years, they simultaneously benefitted from an Ohio permanent residency tax exemption due to a third-party error. The Sarasota County Property Appraiser Office ("Property Appraiser") performed an audit and discovered the Fittses were simultaneously benefitting from the Florida homestead and the Ohio permanent resident tax exemptions, in violation of Fla. Stat. §196.031(5) (2018), which prohibits a person from simultaneously receiving a Florida homestead tax exemption and a permanent residency tax exemption in another state.

The Property Appraiser subsequently delivered a notice to the Fittses of its intent to record a tax lien against the Florida home, pursuant to Fla. Stat. §196.161(1)(b) (2018), and imposed the following sanctions: (1) recordation of a tax lien against the Florida home; (2) revocation of the Fittses' homestead tax exemption; and (3) revocation of the Fittses' "Save Our Homes" tax cap benefit. The Fittses subsequently filed suit. The trial court agreed with the Property Appraiser and entered a final summary judgment in its favor and the Fittses appealed. On appeal, the Fittses argued that, as Florida permanent residents, they are not subject to sanctions in Fla. Stat. §196.161(1)(b) (2018), because both the title to Fla. Stat. §196.161 (2018), and the language within subsection (1), reflect the Legislature's intent to impose a lien against a person's property only when such person claims a Florida homestead exemption but is not a Florida permanent resident. In response, the court applied the rules of statutory construction and explored legislative history to determine the legislative intent relating to Fla. Stat. §191.161 (2018).

Based on a plain language review of Fla. Stat. § 196.161(1)(b) (2018), the court determined that the plain language did not limit the Section's application to persons who are not Florida permanent residents, and instead, applied to persons not entitled to a homestead exemption. Based on principles of statutory construction, the court also concluded that the Legislature's use of different terms in different portions of Fla. Stat. §196.161 (2018) was a strong indication that different meanings were intended in subsections (1)(a) and (1)(b).[1] In other words, subsection (1)(a) specifically applied to an estate, with Florida homestead property being probated in another state and addressed the process for the cancellation of any claim of lien or lien upon a determination that the decedent was a Florida permanent resident. The court further noted that Fla. Stat. §196.161(1)(b) (2018) does not contemplate Florida permanent residents; therefore, the court concluded that had the Legislature intended the penalties set forth in Fla. Stat. § 196.161(1)(b) (2018) to only apply to persons who are not Florida permanent residents, the Legislature would have expressed that intent as it did in subsection (1)(a).[2] The court also researched the legislative history of Fla. Stat. § 196.161 (2018) and found that it further supported its conclusion as the title to Fla. Stat. § 196.161 (2018) remained mostly unchanged, and a 1986 amendment to subsection 1(b) specifically deleted the phrase "not a permanent resident of this state," which, the court reasoned, further confirmed the Legislature's intent that subsection 1(b) was not limited to persons who are not Florida permanent residents.[3] Lastly, while not on point, the court also relied on the precedent established in *Mitchell v. Higgs,* which held a person subject to the sanctions in Fla. Stat. §196.161(1)(b) (2018) even though he was a Florida permanent resident. Therefore, the court concluded that even Florida permanent residents were subject to the sanctions set forth in Fla. Stat. §196.161(1)(b) (2018).[4]

Exculpatory provisions are enforceable in contracts when such language unequivocally demonstrates a clear and understandable intention for one party to be relieved from liability. Further, absent a specific provision within a contract, commercial landlords have no duty to repair premises.

Pillay v. Pub. Storage, Inc., Case No. 4D19-84 (Fla. 4th DCA 2019) (Opinion Filed Nov. 13, 2019)

In *Pillay v. Public Storage, Inc.*, the court considered an appeal filed by Vignaraj Munsami Pillay ("Pillay"), in response to a final order of dismissal with prejudice in favor of Public Storage,

continued, page 52

Inc. ("Public"), which determined that Public had no duty to safeguard Pillay's property.

Pillay entered into a written agreement with Public in 2000 to rent 2 storage units to store personal property valued over $100,000. The written rental agreement contained certain exculpatory provisions, which essentially:

1) provided that any items stored in the units were at Pillay's sole risk;

2) released Public from any liability arising from any loss or damage to property;

3) released Public from any liability arising from the active or passive acts, omission or negligence of Public; and

4) did not guarantee the safety of the premises or Pillay's property.

Pillay subsequently moved to Maryland and, over the years, received multiple phone calls from Public alerting him that his storage units had been burglarized. Pillay returned to the storage units in December 2015 and alleged that: (1) the storage units were in disrepair; (2) pieces of the ceiling had dropped onto his personal property; and (3) several high value items were either missing or damaged. Pillay met with the new facility manager who refused to cooperate, and thereafter, Pillay filed suit.



REALTOR® for Probate and Divorce Homes

Marjorie K. Nanian, J.D.,

understands the practice of law.

She is a Florida REALTOR®, residing in Dade City,

who practiced law in Michigan for 30 years.

Call her cell phone: (248)-231-7167

to list your client's home.

Momentum Real Estate

The trial court agreed with Public and entered a final order of dismissal with prejudice in its favor and Pillay appealed. On appeal, Pillay argued that Public committed gross negligence based on Public's failure to safeguard his property. The court found the claim failed, as a matter of law, and opined, among other reasons, that Pillay's claim failed due to the exculpatory terms within the rental agreement. The court reasoned that Florida courts have held exculpatory provisions as enforceable in contracts when the language unequivocally demonstrates a clear and understandable intention for one party to be relieved from liability.[5] Given that Pillay freely entered into the rental agreement and did not allege any unconscionability within the contract, the court found Public had no duty to safeguard Pillay's property.[6]

Pillay further argued that Public was grossly negligent based on its failure to repair the storage units. The court disagreed and found that, absent a specific provision within a contract, commercial landlords do not have a duty to repair premises.[7] The court reasoned that Florida Statutes delineate the duties imposed in residential tenancies and commercial tenancies, which provide for a duty to repair on a residential landlord but do not impose the same duty on a commercial landlord.[8] Further, the court found, absent a specific provision in a contract, the tenant has the duty to make repairs to the premises, not the landlord.[9] The court found that the rental agreement did not impose a duty on Public to repair Pillay's units since commercial landlords have no duty to repair, absent a specific provision within a contract.[10]

In an adverse possession claim, permissive use may become adverse at the time that the possessor asserts a hostile right.

Batterbee v. Roderick, 278 So. 3d 882 (Fla. 2d DCA 2019) (Opinion Filed Aug. 30, 2019)

In *Batterbee v. Roderick*, the court considered an appeal filed by Michael Batterbee ("Batterbee"), in response to the trial court rejecting his quiet title suit based on adverse possession. The trial court found that Batterbee failed to prove he and his predecessors in interest held the property in a hostile manner for the required 7 years.

Wylma Hinkley owned and conveyed real property to her Trust in which she served as Trustee. In 2008, Wylma invited her son, Scott, and his girlfriend, Suzann, to move into the home so they subsequently took exclusive possession. In 2009, after Scott and Suzann married, Wylma quit claimed the property to Scott; however, Wylma did not execute the deed as Trustee of her Trust, rendering it ineffective. Scott accepted and recorded the deed and lived with Suzann on the property, openly and exclusively, improved the property, and paid all applicable property taxes. No one was aware that the deed was ineffective. After Wylma passed, Scott's sister, Merri, succeeded as Trustee. In 2014, Scott and Suzann began divorce

continued, page 53

proceedings and Merri became aware of Scott and Suzann's claim of ownership of the property so, in 2015, Merri recorded a corrective deed that conveyed the property back to the Trust. In 2016, a final judgment dissolving the marriage awarded the property to Suzann who occupied the property until she died. Upon her death, her interest in the property ultimately passed to Batterbee who subsequently filed a quiet title suit based on adverse possession. The trial court rejected Batterbee's suit citing he failed to prove that he and his predecessors in interest possessed the property for 7 years in a hostile manner as such possession was not hostile until Merri learned of Scott and Suzann's claim of ownership.

On appeal, Batterbee argued that the invalid deed satisfied the hostility requirement. The court determined that to support an adverse possession claim the possession must have been for the full 7 years, under claim of right or color of title, and must have been actual, open, visible, notorious, continuous, and hostile.[11] When considering hostility, the court found that, generally, permission to occupy property will negate the hostility element.[12] However, the court further reasoned that permissive use can become hostile if the user used the property in a manner inconsistent with the permissive use or if the user notified the owner in a clear, positive and distinct way that it claimed ownership of the property other than by permission.[13] The court disagreed with the trial court and found that Scott asserted a hostile right at the time he accepted and recorded the deed under the good faith belief that he owned the property and he possessed the property as if he was the true owner of the property. The court found that the hostility element commenced at the time of the invalid deed. Therefore, the requisite statutory period was satisfied.

A purchaser of property cannot rely on a fraudulent satisfaction of mortgage to avoid a foreclosure judgment.

1601 Bay LLC v. Wilmington Sav. Fund Soc'y, FSB, 282 So. 3d 1027 (Fla. 3d DCA 2019) (Opinion Filed Nov. 20, 2019).

In *1601 Bay LLC v. Wilmington Savings Fund Society, FSB*, the court considered an appeal filed by Mr. Coakley and 1601 Bay (collectively, "1601 Bay"), in response to the trial court denying a motion for rehearing. This cause of action arose from a foreclosure against a subsequent purchaser of property at a foreclosure sale. In 2007, Washington Mutual Bank gave a first mortgage loan in the amount of $464,000.00 to a prior owner of the property (the "Loan"). The property was subsequently sold and the closing statement, in connection with the closing, revealed that funds were collected for the payoff of the Loan. Interestingly, the Loan was never paid off. A purported satisfaction of mortgage was recorded 10 months after the closing and was later deemed as fraudulent. In 2014, Mr. Coakley was the winning bidder at a foreclosure sale for the property, which he believed he was purchasing free and clear of any other mortgage liens. After purchasing the property, Mr. Coakley quit claimed the property to 1601 Bay LLC. Assignee lender, Wilmington Savings Fund Society, FSB (the "Lender"), subsequently filed suit for foreclosure of the property against 1601 Bay. A motion for summary judgment was filed by the Lender and evidence was submitted with the motion, such as, the verified allegations within the complaint, an affidavit establishing that the mortgage had not been satisfied and that its "Payoff Tracking System" did not reflect an order for a satisfaction of mortgage, a recorded assignment of the mortgage after the recordation of the fraudulent satisfaction of mortgage, and another affidavit establishing the defaults and outstanding balances under the Loan and the absence of any request for a satisfaction of mortgage. 1601 Bay failed to timely respond to the motion and to attend the hearing citing miscalendaring issues. After the hearing, 1601 Bay filed a motion for rehearing with its attached response in opposition. In its attached response, Mr. Coakley provided an affidavit, which stated that "he relied on the validity of the satisfaction of mortgage, recorded in 2009 and that he had no knowledge of any other mortgage holder when he acquired title to the [p]roperty."[14] The trial court denied the motion for rehearing and 1601 Bay appealed.

The court agreed with the lower court and affirmed the decision on the basis of previously established precedent regarding reliance on fraudulent records in a chain of title, which provided that the recording of a forged document is not sufficient to protect those who claim under it.[15]

continued, page 54

Ethics Questions?

Call The Florida Bar's Ethics Hotline:

1-800-235-8619

Statutes requiring the Legislature to appropriate funds before the State of Florida could pay any judgments rendered against any of its executive departments, as applied to a person who seeks enforcement of a judgment for taking of his or her property, violated the takings clause of state and federal constitutions, where statutes, as applied, were not merely regulating payment but were allowing a Florida executive department to completely avoid payment of the required compensation.[16]

Fla. Dep't of Agriculture & Consumer Servs. v. Dolliver, Case No. 2D18-1393 (Fla. 2d DCA 2019)

In *Florida Department of Agriculture and Consumer Services v. Dolliver*, the court considered an appeal filed by the Florida Department of Agriculture and Consumer Services ("Department") in response to an order finding that Fla. Stat. §§ 11.066(3) and (4) (2001), were unconstitutional, as applied, and issuing a writ of mandamus directing the Department to pay certain outstanding judgments totaling $14,518,134.71. The judgments arose from the Department's prior taking of healthy citrus trees in its attempt to eradicate citrus canker. The affected homeowners petitioned the Florida Legislature in its 2017 session for an appropriation to pay the outstanding judgments and, ultimately, the appropriation request was denied.

In response, the homeowners filed a petition for either a writ of mandamus or to declare Fla. Stat. §§ 11.066(3) and (4) (2001) unconstitutional. The trial court found that the homeowners satisfied the requirements for a writ of mandamus; however, despite having satisfied the requirements, Fla. Stat. §§ 11.066(3) and (4) (2001) barred the court from issuing a writ of mandamus. Upon further examination, the trial court declared Fla. Stat. §§ 11.066(3) and (4) (2001) unconstitutional as applied. Based upon its findings, the trial court ruled it would either: (1) enter a writ of mandamus ordering the Department to immediately pay the judgments with the possibility of being held in contempt if it failed to comply; or (2) issue a writ of execution requiring the Department to submit a list of the Department's properties for the court's consideration of which of those properties may be subject to a writ of execution. The trial court issued the writ of mandamus and the Department appealed.

On appeal, the Department argued that the trial court erred in issuing the writ absent its present ability to pay the judgments and that it was not legally required to pay the judgments until an appropriation is made pursuant to Fla. Stat. §§11.066(3) and (4) (2001).[17] The court reviewed the evidence presented, which revealed that: (1) the Department previously made no efforts to pay the judgments or to secure moneys to do so; (2) the Department failed to petition for an appropriation from the Florida Legislature; (3) in response to the homeowners' appropriations request, the Department cited the judgments were not final, which resulted in non-payment; and (4) the Department's 2018-2019 budget requested millions of dollars for increased salaries and vehicles but neglected to address the outstanding judgments.

Based on the evidence presented, the court found that the Department failed to establish an actual inability to pay. The court further affirmed all of the trial court's findings but focused its analysis on its most compelling findings, which were: (1) the right to full compensation for a government taking;[18] (2) the doctrine of separation of powers;[19] (3) the power of the judiciary;[20] and (4) the writ of execution. The court concluded that the trial court did not err in declaring Fla. Stat. §§ 11.066(3) and (4) (2001) unconstitutional, as applied, and in issuing a writ of mandamus compelling payment because the application of Fla. Stat. §§ 11.066(3) and (4) (2001) would prevent a court from issuing a writ of mandamus thereby violating the homeowners' constitutional right to payment of full compensation for the government taking and would also permit the Legislature to control the amount of compensation that the homeowners were entitled to receive in contravention of the doctrine of separation of powers and of the power of the judiciary.[21]

Endnotes

1 Quoting *State v. Bussey*, 463 So. 2d 1141, 1143 (Fla. 1985) (quoting *State v. Mark Marks, P.A.*, 698 So. 2d 533, 541 (Fla. 1997)).

2 See *Leisure Resorts, Inc. v. Frank J. Rooney, Inc.*, 654 So. 2d 911, 914 (Fla. 1995).

3 See *ch. 81-219, § 12, Laws of Fla.*; *See ch. 86-300, § 10, Laws of Fla.*

4 *Mitchell v. Higgs*, 61 So. 3d 1152 (Fla. 3d DCA 2011).

5 See *Sanislo v. Give the Kids the World, Inc.*, 157 So. 3d 256, 260-61 (Fla. 2015); *Brooks v. Paul*, 219 So. 3d 886, 888 (Fla. 4th DCA 2017); *Fresnedo v. Porky's Gym III, Inc.*, 271 So. 3d 1185, 1186 (Fla. 3d DCA 2019).

6 See *Barakat v. Broward Cty. Hous. Auth.*, 771 So. 2d 1193, 1195 (Fla. 4th DCA 2000).

7 See *Veterans Gas Co. v. Gibbs*, 538 So. 2d 1325, 1328 (Fla. 1st DCA 1989).

8 See *Id.*

9 *Rizzo v. Naranja Lakes Condo Ass'n. Nos. One, Two, Three, Four and Five*, 498 So. 2d 451, 452 (Fla. 3d DCA 1986).

10 See *Fischer v. Collier, 143 So. 2d 710*, 712 (Fla. 2d DCA 1962).

11 See *Douglass v. Aldridge*, 90 Fla. 51, 105 So. 145, 146 (1925).

12 *Herrin v. O'Hern*, 168 Wash.App. 305, 275 P.3d 1231, 1234 (2012); see also *Turner v. Wheeler*, 498 So.2d 1039, 1042 (Fla. 1st DCA 1986).

13 *Turner*, 498 So. 2d at 1042.

14 *1601 Bay LLC v. Wilmington Savings Fund Society, FSB,* 282 So. 3d 1027, 1028-29 (Fla. 3d DCA 2019).

15 See *Lloyd v. Chicago Title Ins. Co.*, 576 So. 2d 310, 311 (Fla. 3d DCA 1990).

16 U.S. Const. Amend. 5; Fla. Const. art. 10, § 6; Fla. Stat. §§ 11.066(3), 11.066(4) (2001).

17 See *State v. Amos*, 100 Fla. 1335, 131 So. 122, 123 (1930); *State v. Tavares, & G.R. Co.*, 78 Fla. 329, 82 So. 833, 835 (1919); *Conner v. Mid-Fla. Growers, Inc.*, 541 So. 2d 1252, 1256 n.7 (Fla. 2d DCA 1989).

18 Fla. Const. art. 10, § 6.

19 Fla. Const. art. 2, § 3.

20 Fla. Const. art. 5, § 1.

21 Fla. Const. art. 10, § 6.



Real Property, Probate & Trust Law Section
FELLOWSHIP PROGRAM

The RPPTL Section of the Florida Bar encourages involvement of attorneys from diverse backgrounds, including geographic, racial and ethnic backgrounds, that are traditionally underrepresented in the law and the Section. The mission of the RPPTL Fellows program is to recruit attorneys who have a demonstrated interested in practicing in the area of wills, trusts, estates, and/or real estate, and who are interested in greater involvement in the RPPTL Section and its committees, but who would not otherwise be able to participate due to financial constraints or needs. Our goal is to provide opportunities for deserving attorneys to achieve their career goals through leadership training and working closely with leading attorneys in their field, while at the same time fostering diversity within the Section. The Fellowship Program is open to all lawyers who are members of the RPPTL Section and who have been admitted to the Bar for fewer than 12 years.

RPPTL will be selecting a maximum of 4 candidates (2 real property Fellows and 2 probate Fellows) to receive up to $2,500 to reimburse each Fellow for attending our meetings and social events.

- ❏ Scholarships will be considered for applicants who best meet the following criteria:
- ❏ Demonstrated interest in wills, trusts, estates, and/or real estate as a part of the applicant's practice;
- ❏ Demonstrated interest in the activities of the RPPTL Section, and is likely to be dedicated and excel in such activities;
- ❏ Diversity, including a geographic, racial or ethnic background that is traditionally underrepresented in the RPPTL Executive Council and Section;
- ❏ Demonstrated need for financial assistance in order to attend Section meetings;
- ❏ Service to the profession or community.

If you answered **YES!** to each of these questions,
apply for the RPPTL Fellowship Program **TODAY!**

APPLICATION DEADLINE - MAY 8, 2020.

Potential applicants must submit an application to mobos@floridabar.org on or before May 8, 2020. Follow the link for the application and additional information about the Fellowship Program: RPPTL Fellows Information and Application (or visit www.RPPTL.org, click "About Us" and Choose "Fellows").

If you have any questions, please contact the chair of the Fellowship Committee, Christopher A. Sajdera at cas@sk-attorneys.com or 561-910-3082.

Download the application at www.RPPTL.org

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

FR/BAR CONTRACTS & RIDERS

FOR THE SALE AND PURCHASE OF RESIDENTIAL PROPERTY

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

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

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

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

Condominium Rider
Homeowners' Association/Community Disclosure
Seller Financing (Purchase Money Mortgage; Security Agreement to Seller)
Assumption of Existing Mortgage(s)
Federal Housing Administration (FHA)/U.S. Department of Veterans Affairs (VA)
Appraisal Contingency
Short Sale Approval Contingency
Homeowner's/Flood Insurance
Interest-Bearing Account
"As Is"
Right to Inspection and Right to Cancel
Defective Drywall
Coastal Construction Control Line
Insulation Disclosure for New Residence

Lead-Based Paint Disclosure (Pre-1978 Housing)
Housing for Older Persons
Rezoning Contingency
Lease Purchas/Lease Option
Pre-Closing Occupancy by Buyer
Post-Closing Occupancy by Seller
Sale Of Buyer's Property
Back-Up Contract
Kick Out Clause
Sellers's Attorney Approval
Buyer's Attorney Approval
Licensee Disclosure of Personal Interest in Property
Binding Arbitration

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

Firm: _____

Attn: _____ Attorney Bar #: _____

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

City/State/Zip: _____

PLEASE CIRCLE ONE: COMMERCIAL or RESIDENTIAL Address

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

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

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

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

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

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

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

PROBATE & GUARDIANSHIP FORMS

The 2020 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 the use of 2020 FLSSI forms.**

Firm: _____

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

Physical Address: _____

City/State/Zip: _____

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

2020 PROBATE FORMS

OPTION #1 **2020 FORMS AND INDEX - .PDF ON FLASH DRIVE $449.10**
OPTION #2 **2020 FORMS AND INDEX - 1 PHYSICAL COPY OF EACH $469.20**

2020 GUARDIANSHIP FORMS

OPTION #1 **2020 FORMS AND INDEX - .PDF ON FLASH DRIVE $392.10**
OPTION #2 **2020 FORMS AND INDEX - 1 PHYSICAL COPY OF EACH $412.20**

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.

==========

METHOD OF PAYMENT

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.**

$ _____ _____ ____/____ _____ _____

Charge **Card Number** **Exp. Date 3 Digit Code** **Signature of Cardholder**

_____ _____

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

CHECK # _____ $ _____ AUTHORIZATION _____/_____/2020 # __ __ ___ ___ _____

SHIP _____/_____/2020 LB_____ $_____ UPS # ___ ___ ___ ___ ___ ___ ___ ___ *AL 2020*

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 55), 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.

EXECUTIVE COUNCIL MEETING & CONVENTION

MAY 28 – MAY 31, 2020
Loews Sapphire Falls • Orlando, Florida
Standard Guest Room Rate (two queens): $209 (single/double),
$234 (triple), $259 (quad)
July 23 – July 26, 2020

EXECUTIVE COUNCIL MEETING & LEGISLATIVE UPDATE

JULY 23 – JULY 26, 2020
The Breakers • Palm Beach, Florida
Room Rate (Deluxe Room – King): $239
Premium Room Rate: $290

OUT OF STATE EXECUTIVE COUNCIL MEETING

SEPTEMBER 30 – OCTOBER 4, 2020
Four Seasons Resort • Jackson Hole, Wyoming
Standard Guest Room Rate: $395 (single/double)

EXECUTIVE COUNCIL & COMMITTEE MEETINGS

DECEMBER 3 – DECEMBER 6, 2020
Disney's Yacht Club • Orlando, Florida
Standard Guest Room Rate: $289 ($25 pp for each person over 18 years old)

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).

PROBATE | TRUST | GUARDIANSHIP

LITIGATION

THE LAW OFFICES OF
ADRIAN PHILIP THOMAS P.A.



TRUE LOVE?

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

TOLL FREE: 800-249-8125

DIVISION OF FEES PAID IN ACCORDANCE WITH FLORIDA BAR RULES.

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

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

Scan here for instant access to the Section website.

ACTIONLINE BULLETIN BOARD

Fellows Applications

FOR DETAILS, SEE PAGE 55

REMINDER

Time to renew your Section membership. Memberships expire on 06/30/20 — check your Florida Bar Portal for the most up to date information.

Need CLE?

Check our website at RPPTL.org for a list of OnDemand products available at a discount to Section members.

PRACTICE CORNER:

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

SEE PAGE 44-46

WANT TO BE AN ACTIONLINE AUTHOR?
See RPPTL website for guidelines and deadlines on submitting articles.

Recent Case Summaries

SEE PAGE 49-54

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.)