ActionLine

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



Here We Go Again: Distressed Commercial Real Estate In A Pandemic PART I-Commercial Loan Workouts

Current Landscape of Commercial Foreclosures and Receiverships

I Am Interested, So Am I An Interested Person?

Novation Of A Covenant, An Oxymoron?

Recent Decision In Warner v. Quicken Loans, Inc. Provides That Certain Third Parties Have Standing To Challenge Invalid Homestead Orders

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In Memory Of Lynwood F. Arnold, Jr. – A Call To Service

By William T. Hennessey, III, Section Chair, 2020-2021

Just prior to its meeting in August, the RPPTL Section Executive Council lost a dear friend in Lynwood F. Arnold, Jr. The loss of a friend is always hard. The loss of Lynwood leaves a huge hole. You see, beyond just being a gentleman, always cordial, and always ready to lend a hand or warm embrace, Lynwood was truly a servant leader. He was a man who didn't just talk about importance of mentoring, diversity, and minority advancement, he made it is his personal mission to reach out and to engage. Lynwood, at various points, led just about every committee the Section had in this regard. Over many years of dedicated service, Lynwood was a champion for diversity initiatives and inclusivity in the Section. He worked tirelessly on Section mentoring projects for new lawyers and was instrumental in the establishment and success of the Section's Law School Programming and Mentoring Committee and the Section's Membership and Inclusion Committee. Further, he was incredibly generous with his time and provided leadership at the ground level on many pro bono projects throughout the state. Lynwood's passion for service to his profession and community was contagious and served as model for others. The Section has indeed lost a leader and a friend.



In honor of Lynwood, the Section will be establishing The Lynwood F. Arnold, Jr. Memorial Award. The award will be granted from time to time to recognize one or more of our members who give greatly of their time and knowledge to one or more of the following areas: the enhancement of diversity within the Section, including increasing minority membership and participation; mentoring of law students or new lawyers; or providing of pro bono legal services. We hope that Lynwood's legacy will inspire others in the Section to the help expand the reach of the Section into areas that have long been underserved.

In that regard, I would like to remind everyone that the Section is actively seeking and encouraging the involvement of minority members. If you are reading this column, and you serve as a leader of a minority Bar Association, I encourage and invite you to reach out to me if you have opportunities for partnership or thoughts on how we expand minority participation. We promise to do the same. The Section has set aside funds for the purpose of supporting and providing partnership grants to minority bar associations. If you are planning an event, or if you have ideas on how we can better engage your membership, I encourage you to reach out to me directly or to Annabella Barboza and Dresden Bruner, who serve as Co-Chairs of the Membership and Inclusion Committee. For our current minority and prospective members, I encourage you to give us a chance. Come to our meetings and meet our Section leadership. We have put in place structures to help mentor new attendees and to show them the ropes. I know that it can be daunting to join a new organization. I assure you that we have made it our mission to create not only a welcoming and inclusive environment but one in which all persons have a chance to shine.

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

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

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

One of the ways we have done that is through the RPPTL Section Fellowship Program. The Fellowship Program was established to recruit attorneys from diverse racial and ethnic backgrounds who have a demonstrated interest in practicing in the areas 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. The program offers scholarships of $2,500 to reimburse attorneys for attending our meetings and social events and is intended to directly encourage minority participation. The Fellowship Program teams up young lawyers with mentors in the Section to help get them involved in Section activities. If any of you are personally interested in the Fellows Program, or know of a young lawyer who may be a good candidate, please feel free to reach out to me or find more information at our website www.rrptl.org under the "About Us" tab.

The leaders of the RPPTL Section would love to be able to see a sea of diverse faces attending our meetings. I am proud of our Section and applaud our members for their diversity efforts. However, we can and should do more. We have set the table so to speak by creating programs in an effort to recruit attorneys from more diverse backgrounds, but Lynwood knew the difference between waiting for something to happen and making something happen. Our challenge as a Section is to move beyond talking about the need for diversity and to actively do something about it. Let's look at Lynwood's legacy as a call to service and move beyond talking to doing.

Lastly, as we head into the New Year, I want to remind everyone that our Section Committee and Executive Council Meetings will be available in a hybrid format such that you can participate in-person or via Zoom. For those of you who do not normally attend Section meetings, the Zoom format gives you a chance to take a direct look and participate in our Section meetings. Our RPPTL Committee Meetings provide an opportunity for you to engage at the highest levels with other practitioners to solve and address practical problems for attorneys in the areas of real estate, estates, trusts, and guardianship. If you are not familiar with our committee structure, I would suggest that you visit our RPPTL website and check out the wide range of substantive committees we have available. You are welcome to reach out to our Committee chairs and get involved. I will be sending out the Zoom information for all of our meetings to the entire membership in advance of the meetings. I strongly encourage you to take advantage of the opportunity.

Stay safe!

Your 2020-2021 RPPTL Section Chair,
William T. Hennessey, III



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Letter From The Co-Editors-In-Chief

Another year has come and gone. We suspect 2020 will be one of the most memorable in our lives and that it will shape the way we practice for years to come. This issue will, we believe, help prepare you for the next phase of legal work resulting from the pandemic. As always, our goal is to provide you with practical information that will be relevant in assisting your clients. We also hope this magazine helps keep you connected with your colleagues and the Section. Reading about the Division Roundtables and the tremendously talented, dedicated and deserving recipients of various Section awards should help in that regard. You will also meet your new Fellows.

Speaking of friends in the Section, Lynwood Arnold will be missed. If you were fortunate enough to have known Lynwood, you will be proud to read how the Section is honoring Lynwood's life and legacy. If you did not know Lynwood (who never met a stranger), Bill Hennessey's Chair Column will make you wish you had. Hung Nguyen's piece on Florida Attorneys Counseling on Evictions is further evidence of Lynwood's legacy and the Section's dedication to serving the citizens of Florida through the FACE project.

Whether or not you were in practice during the Great Recession or earlier economic downturns, there is great content in this issue to help prepare you for matters that will soon be coming in (if they haven't already). By way of example, eviction cases, foreclosure matters and bankruptcy cases are expected to begin working their way through the system again soon. Such legal matters may be delayed as the courts prioritize criminal cases (which have speedy trial rules to contend) with but we hazard to guess you will be dealing with a backlog of cases soon that are, directly or indirectly, related to COVID-19. The article by Ashley McRae and Manny Farach provides an excellent overview of commercial loan workouts. It is, appropriately, followed by an article by Amy Reagan and Janelly Crespo that will guide you through the current landscape of commercial foreclosures and receiverships.

Even if you do not handle probate, trust and guardianship matters, you will be interested in Stacy Rubel's article dealing with "interested parties." Even readers who practice solely on the "dirt" side of the Section will find the article fascinating and educational. The same holds true for the piece by Jeff Baskies and Allison Neumann explaining the Warner v. Quicken, Loans, Inc. case and the roadmap it provides for successfully challenging an invalid homestead order. As always, Michael Gelfand makes us aware of new issues and cases to ruminate over—always making us better at our profession and craft.

Political Roundup is a must-read for political junkies. Even if the 2020 elections wore you out, French Brown's synopsis of the Florida results (especially with respect to the six Constitutional Amendments) is informative and engaging.

Let us close by again referencing the Chair's Column. Bill Hennessey leaves no doubt about the Section's position on diversity and inclusion. It is not only the right thing to do, it is who we are. The Section has been welcoming minority involvement for years. Our membership and outreach evidences that, for the Section, inclusiveness has long been a "movement, not a moment." Still, as Bill writes, "we can and should do more." We hope you will help.

Stay safe, healthy and well.

Here We Go Again: Distressed Commercial Real Estate In A Pandemic PART I-Commercial Loan Workouts

By E. Ashley McRae, Esq., Old Republic National Title Ins. Co., Tampa and
Manuel Farach, Esq., McGlinchey Stafford, Ft. Lauderdale

Our favorite stores have filed for bankruptcy protection; popular restaurants have closed; offices are vacant; movie theatres sit dark; and hotel rooms and resorts are empty. The coronavirus pandemic has turned the U.S. commercial real estate market into a zombie land. This two-part article is designed to help the practitioner get back up to speed on some of the lessons learned from the Great Recession as a tsunami of workouts, foreclosures and bankruptcies are headed to our shores. The first part of this article will explore different components of a workout including necessary due diligence, extensions, modifications, workout agreements, deeds in lieu of foreclosure and title issues relating thereto. The second part, which will appear in the next issue of ActionLine, will address foreclosures and bankruptcy issues as well as the new Uniform Commercial Real Estate Receivership Act.

Workouts

When borrowers hit a rough patch and are temporarily unable to pay their loans, lenders often agree, as a first step, to extensions or modifications or other workout scenarios to avoid litigation. The workout process should be viewed as having three steps: a due diligence step, an extension step, and if a workout makes sense, a modification or workout step.

Due Diligence

The first thing both borrowers and lenders must do when facing a possible loan default is to review their files. Specifically, the file should show that the loan is properly documented and is enforceable. Some examples of matters to investigate include:

A. Verify the legal description in the instruments.
   Legal descriptions can be tricky and many mistakes occur at this point of the closing process. Make sure the legal description is accurate and harmonizes with the loan application and the survey.

B. Determine the "chain" of instruments.
   Are there assignments of the note and mortgage? Are there allonges? This should be determined at an early stage.

C. Where are the original instruments?
   Promissory notes are negotiable paper and an enforcement action takes on a different tone if the originals cannot be located.

D. Order a title insurance commitment.
   It may seem premature to order a title commitment at this time, but a title commitment – and the research done by the title examiner – can point out issues that may have been missed.

E. Verify insurance.
   Make sure the property is insured and remains insured during the workout process.

F. Verify payment of documentary stamps and intangible taxes.
   Make sure that doc stamps and intangible taxes have been paid and that payment is notated on the loan instruments. Failure to pay these taxes may create enforcement issues.

G. Investigate for Consumer Financial Protection Bureau (CFPB) issues.

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Confirm compliance with regulatory agencies (CFPB, HUD, VA) before initiating foreclosure.

H. Inspect the property.

The property should be inspected to determine if additional work or resolution of issues (such as environmental audits) is needed.

Extensions

Once the initial investigation is complete, the parties can more fully explore a potential workout. Extensions are often used when the default is relatively minor and can be cured in a short period of time or when the parties are collecting more information and are assessing whether to proceed to the third step of the workout process. While the first step is usually conducted internally by either the borrower or the lender, the second step typically requires more information from the borrower regarding the borrower's financial condition and possible insolvency. As this information is being collected and analyzed, the parties often wish to "hit the pause button" on any possible enforcement actions.

Extensions serve both these functions. The default may be temporary or easily cured, and if so, the parties may wish to just extend the loan for a period of time instead of entering into an extensive workout. If it appears that a complex workout is needed, an extension gives both parties the opportunity to obtain information from the other side, assess the information, and make a decision whether to terminate the workout process or move into the third step.

Workout Agreements

Just as a complete renovation of a house is almost as complicated as building a new house, a complete workout can be almost as complicated as an original closing. In a workout, the loan instruments have to be redrafted or modified, and the lien positions have to be re-perfected, all while dealing with a default that is still outstanding. While both parties have the same basic goal, i.e., to get the loan back to performing status, lenders are often concerned with possible deterioration of their equity cushion while borrowers are often concerned about the new restrictions and requirements the workout will inevitably place upon them (thereby creating the risk of a new default). There are many individual issues and goals in any workout, but these concerns are typically paramount.

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Deeds in Lieu of Foreclosure

When a borrower completely runs out of gas and can no longer operate or maintain the property, it may be advantageous for a lender to accept a deed in lieu of foreclosure. A savvy defense attorney will of course expect something in return; typically, a release of personal guaranties and waiver of any deficiency. In exchange, the lender will get title to the property quickly without protracted litigation.

Before deciding whether to accept a deed in lieu of foreclosure, lender's counsel should obtain a title search to determine if there are any junior liens. If there are junior liens and the lender accepts the deed without addressing those liens, the lender will take subject to them. Should the title search reveal any liens, lender's counsel should attempt to get a partial release from the junior lienors.

If the lender decides to go forward in accepting a deed in lieu of foreclosure, the parties should sign a settlement agreement and proceed with the transfer in the same manner and with the same care as if it was an actual sale. The settlement agreement should outline the terms such as:

1. setting forth the balance of the loan;
2. stating whether the deficiency is being waived and guaranties are being released;
3. providing a release for any lender liability;
4. requiring the borrower to cooperate should the deed be attacked or a foreclosure be necessary;
5. requiring assignment of leases, permits and licenses and estoppel certificates from any tenants (if applicable); and
6. confirming authority of the person signing the settlement agreement and deed. Also, rather than recording a release or satisfaction of mortgage, the mortgage should be left of record and the deed should specifically state that the mortgage is not being released and remains in full force and effect until released by written instrument.

By leaving the mortgage of record, the lender will have the flexibility of foreclosing out any junior liens or correcting any legal description error should the need arise.

It is important for the practitioner to know and advise their client that documentary stamp taxes will be due upon recording of the deed based on the amount of the debt forgiven plus any other consideration including accrued interest. The only exception is when a sale or deed in lieu of foreclosure is part of a confirmed bankruptcy plan, which is discussed below.

Lenders must also be mindful of bankruptcy considerations when taking a deed in lieu of foreclosure or entering into a workout, specifically, whether the deed in lieu was a preference or a fraudulent conveyance. The time frame for a preference is 90 days for someone who is not an "insider" (defined in the bankruptcy code) and one year for an "insider" under the bankruptcy code. The key is to determine whether the borrower was insolvent at the time of the transaction and whether the creditor received more "value" through the deed in lieu than if the property had been liquidated.

A deed in lieu may also be set aside as a fraudulent conveyance if made within one year prior to the filing of a petition in bankruptcy. To constitute a fraudulent conveyance, the conveyance must have been made with actual intent to hinder, delay, or defraud a creditor, or the borrower (i.e., the bankruptcy estate) must have received less than reasonably equivalent value for the property. In addition, the borrower must have been insolvent on the date of transfer or must have become insolvent as a result of the transfer.

Title Considerations in Workouts

When handling a workout or loan modification, the issue of title insurance coverage will likely come up in the conversation. If the lender and borrower have decided to modify the mortgage and the lender would like a title endorsement to its loan policy, the practitioner must be aware of Florida regulations concerning what are termed "substitution loans," i.e., those transactions which trigger a premium based on the substitution loan rate. The substitution loan rate applies to any endorsement which insures a mortgage modification that effects any change in terms, conditions, priority or security other than:

1. an extension of time for payment of the secured obligation;
2. any decrease in the interest rate of the insured mortgage, provided the "cap" on a variable rate mortgage is not greater than the original "cap" or greater than the original fixed rate;
3. any increase in the interest rate of the insured mortgage, provided the endorsement contains an exception for the loss of priority occasioned by the increase;
4. changes in an amortization schedule to extend the term of the insured mortgage;
5. a release of a portion of the secured property;
6. a correction to either perfect the lien of the insured mortgage or comply with the terms of the lender's original commitment;
7. future advances made pursuant to Fla. Stat. § 697.04 (2019) or;
8. encumbrances of additional parcels under a revolving construction loan agreement contained in the original mortgage and contemplated by Rule 4-186.003(8), F.A.C.

Examples of modifications that trigger substitution rate include, but are not limited to:

1. increasing the interest rate or changing the interest rate index;

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2. increasing the amount of allowable future advances or adding a future advance clause; and
3. increasing or adding new loan covenants.

Many practitioners are under the mistaken belief that the substitution loan rate can be avoided simply by adding language stating that the modification does not trigger a novation. While that is certainly a good practice, it is not dispositive of the application of the substitution loan rate.

If the substitution loan rate is triggered, the unpaid principal balance of the loan will be considered the amount of insurance on which the premium rates should be calculated. The premium schedule for substitution loan rate is as follows:

Age of Loan Policy	Premium Rates
3 years or less	30% of the original rates
From 3 years to 4 years	40% of the original rates
From 4 years to 5 years	50% of the original rates
From 5 years to 10 years	60% of the original rates
Over 10 years	100% of the original rates

Many times, a lender will want the ability to quickly acquire title to the property should the borrower default after entering into a workout agreement. It is often tempting to include a provision or agreement whereby if the borrower defaults again the lender can record a pre-signed deed being held in escrow. While two courts have upheld this practice, please be aware that underwriters may be reluctant or unwilling to insure title in such transactions absent a final non-appealable order enforcing a settlement agreement involving a deed in escrow as there is an argument that such practice constitutes a prohibited non-judicial foreclosure, equitable mortgage or clogs the equity of redemption and may be voided by the bankruptcy court should the borrower seek bankruptcy protection.

Conclusion

Workouts can be tedious and time-consuming ventures. However, a successful workout is often best for all parties. At this stage, the lender has completed its due diligence and better understands its risks. It has either addressed the loan default or obtained title to the property thus enabling the bank to sell the asset without the expense of litigation. On the other hand, the borrower is able to continue operating and stay afloat or, in the case of a deed in lieu of foreclosure, move on to its next venture. Part II of this article will address how to proceed when a workout fails, and the borrower moves into foreclosure, receivership, or bankruptcy.



M. FARACH

Manuel Farach *is the resident Member (partner) in the Fort Lauderdale office of McGlinchey Stafford, PLLC. Mr. Farach is board-certified by The Florida Bar in Real Estate Law, Business Litigation and Appellate Law and past Chair of the Florida Supreme Court Committee on Standard Jury Instructions for Contract Cases. He currently sits on the Executive Councils of the Real Property, Business Law and ADR Sections of the Florida Bar, and serves as the Chair of the ABA's Real Property Litigation Group and as Vice-Chair of ACREL's Bankruptcy and Creditor's Rights Committee. He is the author of Florida Real Estate Law, the real estate treatise in West's Florida Practice Series.*



A. MCRAE

Ashley McRae *specializes in commercial real estate and serves as Florida Commercial Counsel in Tampa for Old Republic National Title Insurance Company. She has been Director, Senior Real Estate Counsel for Bloomin' Brands, Inc. (a/k/a Outback) and was a real estate attorney at Foley & Lardner, LLP, as special counsel and as a partner at Carey, O'Malley, Whitaker & Mueller, P.A.*

Ashley earned her juris doctor degree from Nova Southeastern University in Fort Lauderdale, FL, magna cum laude. She is a member of The Florida Bar and the Executive Council of the RPPTL Section, serving on a variety of committees. In 2019 she was the President of Commercial Real Estate Women Tampa Bay (CREW) and continues to serve on its board of directors.

Endnotes

1 Fla. Stat. §201.02(1) (2019); See also Rule 12B-4.013(2), F.A.C.

2 §1146(a) of the Federal Bankruptcy Code, 11 U.S.C. §§101 *et seq,* a deed delivered under a plan confirmed under 11 U.S.C. §1129 is exempt from documentary stamp taxes.

3 11 U.S.C. § 547

4 11 U.S.C. § 548

5 Id.

6 Id.

7 Rule 69O-186.003(4) and (13), F.A.C.

9 *Ringling Joint Venture II v. Huntington National Bank*, 595 So. 2d 180 (Fla. 2d DCA 1992); *Rothschild Reserve Intern., Inc. v. Silver* 830 So. 2d 224 (Fla. 4th DCA 2002).

Current Landscape of Commercial Foreclosures and Receiverships

By Amy Reagan, Esq., Associate, DLA Piper, LLP (US), Miami and
Janelly Crespo, Esq., Associate, DLA Piper, LLP (US), Miami

The COVID-19 pandemic has continued to disrupt numerous industries, with few exceptions. The effects of COVID-19 were first felt through various closures, along with "social distancing" and "self-isolation" policies that prevented many individuals and businesses from continuing work. Due to the pandemic, many states and local jurisdictions enacted eviction and foreclosure moratoriums (primarily in the residential context). In Florida, state-wide moratoriums have been lifted and the number of actions filed in the state courts continues to increase. However, the COVID-19 pandemic continues to create uncertainties as the courts grapple with the numerous challenges that both lenders and borrowers have been facing. This article addresses the judicial process for commercial foreclosures in Florida, obtaining receiverships in commercial foreclosures under the newly enacted Uniform Commercial Real Estate Receiver Act ("UCRERA"), current considerations in commercial foreclosures, and an update on the impact of the COVID-19 pandemic on the court systems and the status of foreclosure and eviction moratoriums in the State of Florida.

(1) The Foreclosure Process in Florida

Florida, a judicial foreclosure state, requires lenders seeking to foreclose a mortgage loan to file a lawsuit in order to initiate the process. The mortgage, promissory note, and any other accompanying documentation will define what constitutes a default and what remedies the lender may pursue upon default.

Foreclosure Title Commitment and UCC Searches. Lenders should consider obtaining a foreclosure title commitment and conduct a UCC lien search prior to filing the foreclosure case. The title commitment will confirm the owner of the mortgaged property and describe the mortgages, liens, and other encumbrances affecting the property, such as (1) any senior mortgages or other liens on the property; or (2) any other liens or encumbrances affecting title.[1] Complying with each of the requirements set forth in the title commitment is recommended to help ensure the lender's ability to obtain insurable title to the mortgaged property upon conclusion of the case.

Notice of Default. After a default (and expiration of any applicable notice and cure periods), the lender is entitled to foreclose its lien on the collateral securing the repayment of the loan. Because Florida is a judicial foreclosure state, unless the borrower agrees to relinquish the mortgaged property to the lender via a deed-in-lieu of foreclosure or other process, a lender must pursue a lawsuit in order to foreclose.[2] Lenders generally commence foreclosure proceedings within 60-70 days after the default. The loan documents determine whether the lender is required to provide a notice of default and a cure period to the borrower. If the borrower does not timely cure the specified default, the lender may accelerate the maturity date and declare the entire amount of loan immediately due and payable. After acceleration of the debt, the lender may file a complaint to foreclose the mortgage and a notice of *lis pendens* in the county in which the property is located. A recorded notice of *lis pendens* gives constructive notice to potential lienors and other interested parties that the real property at issue is subject to pending litigation and the decree of the court. The recording of the *lis pendens* cuts off the rights of any person whose interest is unrecorded or arises after its recording and remains in effect through the recording of the Clerk's certificate of title arising from the foreclosure sale.[3]

Assignment of Rents. A mortgage, or other instrument, may provide for the assignment of rents of real property, or any interest therein, as security for the repayment of a debt.[4] If such an assignment is made in the mortgage, the mortgagee holds a lien on the rents, which is

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perfected upon recordation of the mortgage or separate instrument in the public records in the county where the real property is located.[5] The assignment of the rents is enforceable upon the mortgager's default and when written demand is made to the mortgagor, unless otherwise stated in writing.[6] Thereafter, the mortgagor must turn over all rents within its possession or control at the time upon the written demand.[7] In a foreclosure action, a court may require the mortgagor to deposit the collected rents into a court registry, or such other depository the court requires.[8]

Service of Process and Filing a Complaint. The lender serves the borrower with notice of the foreclosure, which is generally completed through personal service. Personal service is achieved by serving a summons and a copy of the complaint to the borrower. Personal service is achieved on an LLC by serving the LLC's registered agent or the employee of the registered agent. If service cannot be made on the registered agent, then service can be made on a member of a member-managed limited liability company, or on a manager of a manager-managed limited liability company.[9] The borrower then has 20 days from the date of service to respond and file an answer. Section 702 of the Florida Statutes contains specific pleading requirements. If the borrower does not answer within 21 days, the court may enter a default judgment against the borrower. If a lender is unable to achieve personal service after reasonable efforts, then the lender may serve the borrower by publication. If a default judgment is entered against the borrower, a final judgment of foreclosure could be issued following entry of the default judgment. Importantly, personal service is the preferred method of service because service by publication will not entitle a lender to a deficiency judgment, unless a separate deficiency claim at common law is sought and served by personal service.[10]

Filing an Answer. The borrower can either admit or deny the allegations in its answer. If all of the allegations are admitted, the lender will seek a motion for judgment on the pleadings. If the borrow denies any allegations or files affirmative defenses, the lender will likely need to eliminate factual issues and then seek a motion for summary judgment.

Discovery. Mortgage foreclosure suits are generally subject to the same rules governing discovery as in other types of civil lawsuits, including depositions. The parties have 30 days to respond to any discovery requests, such as requests for production, requests for admission, or interrogatories. A party, however, can seek no more than 30 requests for admissions

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and interrogatories. Discovery usually takes between 45 and 90 days to prepare, issue, and respond. Once discovery is completed, the lender may move for summary judgment.[11]

Summary Judgment. A motion for summary judgment will be granted if the pleadings, depositions, answers to interrogatories, admissions, affidavits, and other materials that would otherwise be admissible in evidence at trial show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.[12] If a court finds that there is an issue as to a material fact, the court will deny the motion for summary judgment in whole or in part, and the case will proceed to trial.

Trial. It is rare for a foreclosure case to proceed completely through trial. Most commercial mortgage loans contain jury trial waiver provisions, requiring that a trial be held before a judge in a bench trial. If the case proceeds all the way through trial, the total foreclosure process could take between 1 and 2 years to conclude. Due to the pandemic, which has caused significant backlogs in the judicial system nationwide, these proceedings may take even longer to conclude.

Final Judgment and the Foreclosure Sale. After a final judgment of foreclosure is entered against the borrower, a foreclosure sale is generally scheduled within 20 to 35 days per Fla. Stat. § 45.031(1)(a). Notice of the foreclosure sale must be advertised once a week for two consecutive weeks in a newspaper of general circulation in the county in which the sale is to take place. Among other things, the foreclosure notice will specify the treatment of subordinate interests, such as leases where the tenant and borrower have not entered into a subordination, non-disturbance and attornment agreement, and other subordinate interests (such as a construction lien recorded subsequent to the mortgage).[13] The second publication must be at least 5 days before the sale. If a borrower files a petition for relief with a bankruptcy court, the foreclosure sale must be cancelled since the bankruptcy code imposes an automatic stay or temporary injunction that precludes the lender from pursing the foreclosure action. Most commercial borrowers are single purpose entities and, therefore, the bankruptcy case would generally be quickly adjudicated as a single asset case. Nevertheless, the borrower can gain some extra time by filing. A foreclosing lender may assign its final judgment prior to the foreclosure sale. The assignment of judgment is not subject to documentary stamp taxes. The foreclosure sale is normally conducted by the clerk of the circuit court.[14] Many counties conduct foreclosure sales online. If the property is sold at the foreclosure sale for less than the amount owed to the lender, the lender can, unless precluded by the loan documents, seek a deficiency judgment against the borrower for any deficiency—typically the difference between the debt owed and the property's fair market value on the date of the foreclosure sale.

Redemption of the Property. Prior to the foreclosure sale, and any time before the clerk files the certificate of sale or as provided in the court's foreclosure judgment, the borrower or the holder of any subordinate interest may redeem the property by paying the amount of money specified in the foreclosure judgment. If no judgment has been issued, such redemption may occur by tendering the performance due under the loan documents, including payment of any amounts due because of the exercise of a right to accelerate, plus the reasonable expenses of foreclosure incurred to date, and reasonable attorney's fees.[15] The Certificate of Title is recorded after the expiration of the 10-day objection period. Documentary stamp taxes must be paid by the highest bidder as a condition to the recordation of the clerk's Certificate of Title, computed on the amount of the highest and best bid received for the property at the foreclosure sale.[16]

Expedited Foreclosure Process. There is an expedited process for foreclosures.[17] The lender/mortgagee may request an order to show cause for the entry of a final judgment of mortgage foreclosure, whereupon the court must immediately review the complaint. If the court finds that the complaint is verified and alleges a cause of action to foreclose on the property, the court must promptly issue and order the borrower to show cause why a final judgment of foreclosure should not be entered. This procedure is not routinely used because the borrower simply has to disagree with the allegations or raise a sufficient defense to kick the lender/mortgagee back into the standard procedure. This could cause an additional delay averaging an additional 60-90 days in the foreclosure process; thus, this process is not generally recommended, particularly if the lender/mortgagee anticipates that the borrower will contest the foreclosure.

(2) Commercial Receiverships in Florida

The UCRERA, codified in Chapter 714 of the Florida Statutes and effective as of July 1, 2020, contains the procedures for commercial real property receiverships in the context of a commercial foreclosure legal action. UCRERA only applies in the context of commercial real property or incidental personal property. For receiver appointments before July 1, 2020, UCRERA does not apply to the extent its provisions differ from the existing appointment.[18] Prior to the enactment of the UCRERA, appointment of a receiver typically required, at a minimum, a showing of waste. The UCRERA is expected to bring clarity, predictability, and uniformity regarding the standard for receiver appointments and the powers of receivers. The UCRERA will prove to be important, as the court systems anticipate higher volumes of commercial foreclosures due to the economic effects of the COVID pandemic.

Under the UCRERA, the court may appoint a receiver to assume the management and control of the property in connection with a foreclosure or other enforcement of a

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mortgage, either before or after judgment.[19] The receiver is considered an officer of the court. Some of the receiver's duties include: approving, collecting, and managing receivership property; operating a business constituting receivership property; incurring debts and paying expenses in the ordinary course of business; asserting a cause of action or defense of the owner that relates to the receivership property.[20] Additionally, the receiver must: retain appropriate business records, including the receipts, disbursements, and disposition of receivership property; account for receivership property, including the sale, lease, license, exchange, or collection of receivership property; and disclose to the court any facts arising from the receivership which would disqualify the receiver.[21] Anyone seeking appointment of a receiver may nominate a person to serve as the receiver; however, the court is not bound by the nomination.[22] A person is disqualified from appointment as a receiver if the person:

1. is an affiliate of a party;
2. has an interest materially adverse to an interest of a party;
3. has a material financial interest in the outcome of the action, other than compensation the court may allow the receiver;
4. has a debtor-creditor relationship with a party; or
5. holds an equity interest in a party, other than a noncontrolling interest in a publicly traded company.[23]

In deciding whether to appoint a receiver for the mortgaged property the court shall consider the following factors (among other relevant facts) in connection with the foreclosure or other enforcement of the mortgage:

1. appointment is necessary to protect the property from waste, loss, substantial diminution in value, transfer, dissipation, or impairment;
2. the borrower agreed in the loan documents that the lender could appoint a receiver after a default;
3. the collateral is insufficient to satisfy the secured obligation;
4. the borrower does not deliver to the lender the rents, issues and profits of the property; or
5. the holder of a subordinate lien obtains appointment of a receiver for the property.[24]

If the loan documents contain a cash management structure or lockbox, the lender should already have control over the cash and deposits. If there is no such structure, then the receiver will be able to secure control over all cash generated by the property after the receiver's appointment. The receiver may need the assistance of the court in securing control over deposits, such as tenant security deposits and advance room or banquet deposits for hotels.

(3) Current Considerations in the Commercial Foreclosure Process

Timeline. Prior to COVID-19, an uncontested case could take as little as 4 to 8 months to obtain a foreclosure judgment, and approximately 4 months thereafter for a deficiency judgment. As a result of COVID-19, however, lenders should expect significant delays in the foreclosure process. In light of the backlogs caused by the pandemic, scheduling a hearing can take an additional six to eight weeks (or longer). Thus, if a foreclosure action is to proceed to trial, the parties should expect the entire foreclosure process to take longer than typical. Also, in light of the pandemic, novel arguments related to the COVID-19 emergency orders and moratoriums can be expected.

UCC Sale. Given the delays which may ensue currently in a judicial foreclosure, a UCC sale may be a viable alternative if the lender also obtained a pledge of the borrower's equity at the time the loan was funded. The lender may be able to gain control of the property through a UCC sale of the equity (potentially within 30-60 days) and then execute a deed-in-lieu of foreclosure or otherwise proceed through an amicable foreclosure.

Right of Redemption and Bankruptcy. The equity of redemption permits a borrower to pay the amount due the lender prior to the conclusion of the foreclosure sale to prevent the loss of the borrower's property. This concept permits a borrower to protect its equity.[25] As discussed above, a lender's foreclosure action can be frustrated when a borrower files a petition for relief under the bankruptcy code just before the foreclosure sale. However, this may be avoided (or discouraged) in instances where the loan documents contain a personal guaranty of the borrower's individual owners providing for springing full recourse liability in the event of the borrower's voluntary or collusive bankruptcy filing. A careful review, the loan documents is necessary to properly analyze what options are available (*e.g.*, what collateral is pledged and what guarantor liability may exist).

(4) Foreclosure and Eviction Moratoriums

In addition to any potentially applicable federal restrictions (*e.g.*, CARES Act), state and local restrictions on foreclosure and evictions should be carefully reviewed. In Florida, Governor DeSantis issued a state-wide moratorium on evictions and foreclosure final actions for *residential tenants* and *single-family* mortgages where inability to make payment was caused by COVID-19, which was extended to and expired on October 1, 2020.[26] No similar state-wide eviction moratoriums in the context of *commercial* leases were issued as of the date of this article. Certain counties and judiciaries in the state have issued guidance and administrative orders restricting foreclosure and eviction proceedings, many local restrictions have since expired. It will be important for the foreclosing lender to fully understand the orders that specifically impacted the borrower or the mortgaged property.

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Centers for Disease Control and Prevention ("CDC"). The CDC issued an order entitled "Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19." This order took effect on September 4, 2020, and declared a national moratorium on certain *residential* evictions for nonpayment. The moratorium declared by the CDC lasts through December 31, 2020. However, the moratorium only applies to tenants who present a signed declaration to their landlord, which must be signed under the penalty of perjury. This moratorium does not apply to *commercial* evictions or leases.[27]

Supreme Court of Florida. The Florida Supreme Court issued Administrative Orders SC20-17 and SC20-23 suspending the requirement in Florida Rule of Civil Procedure 1.580(a) for the state's clerks of courts to issue a writ of possession "forthwith," or immediately. Some courts have interpreted this temporary modification as only relaxing the timing requirements for issuing such writs, instead of suspending writs of possession entirely. Pursuant to Amendment 4 of SC20-23, the suspension of this requirements ended on June 30, 2020.[28]

Miami-Dade County. The Chief Judge of the Eleventh Judicial Circuit issued Administrative Order No. 20-08-A1, citing the Supreme Court's Order AOSC20-23 as a suspension of all writs of possession—which is a broader interpretation than the suspension of the "forthwith" requirement—and noting that foreclosures and eviction matters are also addressed by the Governor's Executive Order 20-94. The Administrative Order does not include its own deadline for the suspension of writs of possession, and appears to rely on the deadlines included in the Supreme Court's Order AOSC20-23 and Governor DeSantis's Executive Order 20-94 – both of which have since expired.[29]

Broward County. The Chief Judge of the Seventeenth Judicial Circuit issued Administrative Order 20-23, which suspends the issuance of all writs of possession until normal operations of the court resume. The Court thereafter issued Administrative Order 2020-43-CIV, which established procedures for the continuation of mortgage foreclosure proceedings in compliance with the CARES Act. Administrative Order 2020-43-CIV was vacated by Administrative Order 2020-46-CIV and cited the Governor's moratorium (which has since expired), noting that local administrative orders must not conflict with Supreme Court rules or local rules.[30]

Brevard and Seminole Counties. The Chief Judge of the Eighteenth Judicial Circuit issued Administrative Order No. 20-33, which suspended all actions, including the issuance of writs of possession and issuance of summons related to mortgage foreclosure causes of action, and cancelled all pending foreclosure sales until October 1, 2020.[31]

Hillsborough County. The Chief Judge of the Thirteenth Judicial Circuit issued Administrative Order No. 20-023, which temporarily permitted the Sheriff of Hillsborough County to stay the execution of five-day evictions, writs of possession, and replevin until further order. Thereafter the Chief Judge issued Administrative Order No. 20-044 (superseding Administrative Order No. 20-023) which ordered that all foreclosure and eviction actions may proceed in accordance with Governor DeSantis's Executive Order 20-94, and as extended and amended in the future by the Governor – the Governor's moratorium expired October 1, 2020.[32]

Pinellas County. The Pinellas County clerk's office announced "[w]ith the expiration of the Governor's Executive Order 20-211, tenants facing eviction may have options available to them pursuant to the Centers for Disease Control (CDC) Order Temporarily Halting Evictions" and also provides information for a local eviction diversion program to assist mediating potential evictions caused by COVID-19.[33]

Duval County. The Duval County clerk's office website refers to the Governor's Executive Order 20-211 (which has since expired) as allowing "the resumption of most residential foreclosure and eviction proceedings, with very limited exceptions." The clerk's website notes that as of August 3, 2020 foreclosure sales resumed. [34]

As a result of these moratoriums, the judicial system experienced a significant decrease in the number of filings related to foreclosure proceedings. For example, in Miami-Dade County, there were approximately 342 foreclosure filings in March.[35] In April, there were approximately 53 filings; in May, 38 filings; and in June, 50 filings. The foreclosure filings began to increase in July and August, wherein 110 and 270 foreclosure actions were filed respectively.[36] This downward trend continued throughout the rest of the state as reflected by the 2020 U.S. Foreclosure Market Report released by ATTOM Data Solutions.[37] ATTOM Data Solutions reported the following statistics for residential foreclosure filings in Florida for the month of July: Broward County – 2 filings; Seminole County – 0 filings; Hillsborough County – 2 filings; Pinellas County – 3 filings; Duval County – 1 filing.

Courts are continuing to deal with a backlog of cases, especially as cases unrelated to the COVID pandemic are being filed in addition to those cases that directly relate to fallouts arising from the pandemic. It is currently estimated that the case backlog is approximately 990,074 cases, beginning with the new fiscal year–July 1, 2020.[38] Moreover, courts are slowly beginning to select jury pools in order to resume in-person trials. Social-distancing continues to slow down the process, and the court system has projected that nearly 5,000 jury trials will be delayed through the end of the current fiscal year, June 2021. As a result, the state court system is seeking approximately $37 million and some 300 judicial or quasi-judicial positions over the next three years in order to address the trial courts' workloads.[39]

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Conclusion

Although state closures and "stay at home" directives are lifting, and the state-wide eviction and foreclosure moratoriums have been lifted, the foreclosure process is experiencing delays. As a result, lenders/mortgagees and borrowers will likely continue to rise to the task together in order to develop creative solutions to survive the COVID-19 pandemic. Furthermore, it is of utmost importance that foreclosure attorneys remain aware of court rulings and trends as they arise during and in the aftermath of the COVID-19 pandemic.



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Prior to joining DLA Piper, Janelly worked at a civil litigation firm in Miami where her practice focused on general liability, premises liability, wrongful death, and construction litigation. Additionally, Janelly clerked for the Honorable Vance E. Salter of the Third District Court of Appeal. While in law school, Janelly served as a judicial intern for the Honorable Edwin G. Torres of the United States District Court for the Southern District of Florida.

Endnotes

1 Fla. Stat. § 712.02 (2020).

2 *See generally* Fla. Stat. § 702 (2019).

3 Fla. Stat. §48.23(1)(d) (the holder of an unrecorded interest or lien must intervene in the proceedings or upon judicial sale, the property ". . . shall be forever discharged from all such unrecorded interests and liens").

4 Fla. Stat. § 697.07(1) (2020).

5 Fla. Stat. § 697.07(2) (2020).

6 Fla. Stat. § 697.07(3) (2020).

7 *Id.*

8 Fla. Stat. § 697.07(4) (2020).

9 Fla. Stat. § 48.062(2) (2020).

10 Fla. Stat. § 702.06; *see Dyck–O'Neal, Inc. v. Meikle*, 215 So.3d 604 (Fla. 4th DCA 2017).

11 Fla. R. Civ. P. 1.510 (2020).

12 Fla. R. Civ. Pro. 1.510 (2020).

13 Fla. Stat. § 45.031(2) (2020).

14 Fla. Stat. § 45.031 (2020).

15 Fla. Stat. § 45.0315 (2020).

16 Fla. Admin. Rule 12B-4.013(3)(a) (2020).

17 Fla. Stat. § 702.10 (2020).

18 Fla. Stat. § 714.28 (2020).

19 Fla. Stat. § 714.06(1) (2020).

20 Fla. Stat. § 714.12(1) (2020).

21 Fla. Stat. § 714.12(3) (2020).

22 Fla. Stat. § 714.07(4) (2020).

23 Fla. Stat. § 714.02(9) (2020).

24 Fla. Stat. § 714.06(2) (2020).

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28 AOSC20-23 Amendment 4, Florida Supreme Court, (June 16, 2020).

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30 Administrative Order No. 2020-46-CIV, *Temporary Administrative Orders*, Seventeenth Judicial Circuit Court Of Florida (June 3, 2020), http://www.17th.flcourts.org/wp-content/uploads/2020/06/2020-46-Civ.pdf.

31 Administrative Order No. 20-33 Amended, *Brevard and Seminole Courts Procedures for COVID-19 Pandemic*, Eighteenth Judicial Circuit Courts (Sept. 9, 2020), https://flcourts18.org/docs/Covid19/AO-20-33-amd.pdf.

32 Administrative Order No. 20-044, *COVID-19 Information & Court Updates*, Thirteenth Judicial Circuit Court Hillsborough County (August 31, 2020) https://www.fljud13.org/Portals/0/AO/DOCS/S-2020-044.pdf.

33 *Evictions, Foreclosures & Mortgage Foreclosure Sales, Coronavirus (COVID-19) Updates*, Clerk Of The Circuit Court And Comptroller Pinellas County, Fl, https://www.mypinellasclerk.org/Coronavirus#1043163-coronavirus-updates (last visited on October 15, 2020).

34 *Coronavirus/COVID-19 – Clerk's Office Status*, Duval County Clerk of Courts, http://www2.duvalclerk.com/about/office-status/#contentTop (last visited on October 15, 2020).

35 *Foreclosure Filing Statistics*, Clerk of the Courts Miami-Dade County, Florida, https://www.miami-dadeclerk.com/property_mortgage_foreclosures.asp (last visited October 5, 2020).

36 *Id.*

37 *July 2020 U.S. Foreclosure Starts by County*, ATTOM Data Solutions (Aug. 13, 2020) https://www.attomdata.com/news/market-trends/foreclosures/attom-data-solutions-july-2020-u-s-foreclosure-market-report/.

38 Jim Ash, *Courts Ask for $16 Million to Clear Pandemic Backlog*, The Florida Bar (Oct. 22, 2020), https://www.floridabar.org/the-florida-bar-news/courts-ask-for-16-million-to-clear-pandemic-backlog/.

39 *Id*.

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I Am Interested, So Am I An Interested Person?

By Stacy B. Rubel,Esq., The Virgil Law Firm, Coral Gables, Florida

Probate, trust and guardianship cases tend to involve interesting people, but does that make them interested persons under Florida law? The legal standing of a potential party is a key initial consideration in any probate, trust or guardianship matter. As opposed to general civil litigation, where there is clearly a plaintiff and a defendant, the potential standing of parties in trust and estate matters can be complicated. Only "interested persons" have standing in probate, trust, and guardianship matters. The Florida Probate Code defines an interested person as "any person who may reasonably be expected to be affected by the outcome of the particular proceeding involved."[1] The definition further explains that "[t]he meaning, as it relates to particular persons, may vary from time to time and must be determined according to the particular purpose of, and matter involved in, any proceedings."[2]The Florida Trust Code and Florida Guardianship law rely on the definition set forth in the Florida Probate Code for interested person, and both routinely use the term.

So, who is an interested person? The short answer is it depends on the specific pleading or relief being sought. While this article focuses on interested persons in the guardianship context to illustrate the complexity of the concept, it also includes several examples of when interested person status is highly relevant in probate and trust matters. Florida Statutes are clear regarding who is entitled to notice of certain pleadings and therefore entitled to participate in the proceedings. For example, in probate proceedings, a personal representative must send notice of administration to the decedent's surviving spouse, beneficiaries, and the trustee of a trust described in Fla. Stat. § 733.707(3) (as well as qualified beneficiaries if the personal representative is also the trustee).[3] That notice specifically indicates that any *interested person* may file objections to the validity of the will, venue or jurisdiction of the court. However, the personal representative may serve a notice of administration on persons in addition to those required under the statute. Does everyone served become an interested person entitled to object?

Disputes over interested person status often arise in probate and trust matters relating to contested estate planning documents. Even if a will or trust is invalid, a lawsuit for a judicial determination regarding the validity of the document can only be brought by an interested person. While the issue of standing is generally an affirmative defense that can be waived if not pled in other types of civil litigation, in probate revocation proceedings interested person status is an element required to be pled by a petitioner.[4] The petition must "state the interest of the petitioner in the estate and the facts constituting the grounds on which revocation is demanded."[5] Beneficiaries of a prior will or trust, or heirs under the laws of intestacy, are interested persons in a will contest because they will be affected by the outcome of the validity determination.[6] However, if previous and presumptively valid wills have been discovered that also do not include the petitioner as a beneficiary, the beneficiary may not be an interested person unless the beneficiary contests the prior documents as well.[7]

What notice do interested persons receive? Unless the court, statutes or rules indicate otherwise, every petition or motion for an order determining rights of an interested person, and every other document filed in the proceeding which is the subject matter of such petition or motion, shall be served on interested persons.[8] However, service is not required when a default has been entered or if the matter may otherwise proceed *ex parte*.[9] Further, any interested person who desires notice of proceedings may file a separate request for notice.[10] After filing for notice, a party shall thereafter be served with notice and copies of subsequent documents as long as they are an interested person.[11]

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What rights do interested persons generally have in the guardianship context? According to Florida Statutes, some of the matters within a guardianship that interested persons may have a role in are the following: seeking a court monitor,[12] appointment of a guardian,[13] suspension of power of attorney before incapacity determination,[14] termination of voluntary guardianship,[15] objections to annual reports ,[16] judicial review,[17] petition for authorization to act,[18] restoration of capacity,[19] removal of a guardian,[20] and contempt proceedings.[21]

Involuntary guardianship proceedings for adults begin with a petition to determine incapacity. The petition to determine incapacity must be served on the alleged incapacitated person and all next of kin.[22] In 2015, the Fourth District Court of Appeal reversed and remanded a determination of incapacity and appointment of a guardian when the Ward's spouse was not permitted to fully participate in the proceedings, therefore violating her due process rights.[23] Florida Statutes require notice of a hearing on a petition for appointment of a guardian be given to next of kin when heard separately from the petition to determine incapacity.[24] The Fifth DCA, therefore recently found that a Ward's mother, as next of kin, has a due process right to meaningfully participate in a hearing on a petition to appoint a successor guardian, even if there was a motion to disqualify her from acting as guardian.[25] However, entitlement to notice at the beginning of the proceedings does not necessarily entitle next of kin to participate in all guardianship proceedings.

There are numerous cases that address the concept of interested person in guardianship matters. *Hayes v. Guardianship of Thompson*, a Florida Supreme Court case from 2006, is the most well-known case on this topic.[26] In *Hayes,* the Court determined that a person entitled to notice of a proceeding or authorized to object to a proceeding has standing to participate in guardianship proceedings.[27] The Court relied, in part, on *McGinnis v. Kanevsky*, a Third DCA case which held that heirs of a Ward's estate did not have standing to challenge guardian fees which were previously approved by the court.[28] The Court in *Hayes* rejected the bright-line rule adopted in *McGinnis* but found based on the facts in *Hayes* that the Ward's family members did not have standing to object to fees because (1) they did not file a request for notice, and (2) their involvement based on their own mistreatment of the Ward and misappropriation of her funds does not entitle them to participate in proceedings regarding fees.[29]

In *Bivens v. Rogers*, the Fourth DCA refused to extend the holding in *Hayes*, instead holding that the son of the Ward did not have standing to petition to change the residence of the Ward.[30] The court held that while the *Hayes* holding may have given the son interested person status, and therefore standing, to object to a petition by the guardian to change the Ward's residence, it did not give the son standing to initiate a proceeding to change the Ward's residence.[31] *Bivens* is a prime example of a person, here a next of kin, being an interested person in some aspects of a guardianship proceeding, but not other aspects. Note that the court in *Bivens* points out that the son had standing to seek judicial review of the guardian's actions, but warns that the statute provides for the assessment of attorney's fees if the court determines the petition is without merit.[32]

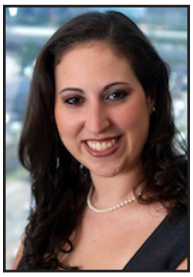
The issue of interested person status also commonly arises in relation to annual accountings and reports. In 1994, the Fifth DCA held that the Ward's next of kin had standing to object to annual reports "as well as other actions, taken or proposed to be taken by a guardian."[33] Similarly, in 2012, the Second DCA held that a Ward's son, as next of kin, was entitled to copies of initial and annual guardianship accountings, reports and plans through discovery.[34] However, the Ward's son was not entitled to trust and corporate documents, as he had no legally cognizable interest in those documents.[35] Contrary to the holdings in the Second and Fifth Districts, in 2014, the Fourth DCA affirmed a court's ruling that a Ward's mother, though next of kin and parent with shared parental responsibility of the Ward, was not an interested person entitled to inspect guardianship reports.[36] The Fourth DCA in *Rosecan* affirmed the trial court's ruling even though the Ward's guardian had previously served the mother with, and the mother was able to object to, prior reports.[37]

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An order that determines someone is not an interested person is a final order because it removes that person from the subject matter of the proceeding. Failure to appeal a final order on standing bars the purported interested person from further participation. For example, in 2018, the Fourth DCA dismissed an appeal where a mother, as natural parent and guardian of the property of her son, attempted to appeal a final order approving a trust set up by her former husband.[38] The Fourth DCA dismissed the appeal for lack of jurisdiction because the circuit court had previously entered an order striking the mother from the trust proceeding because she was not an interested person.[39] The mother failed to appeal that order.

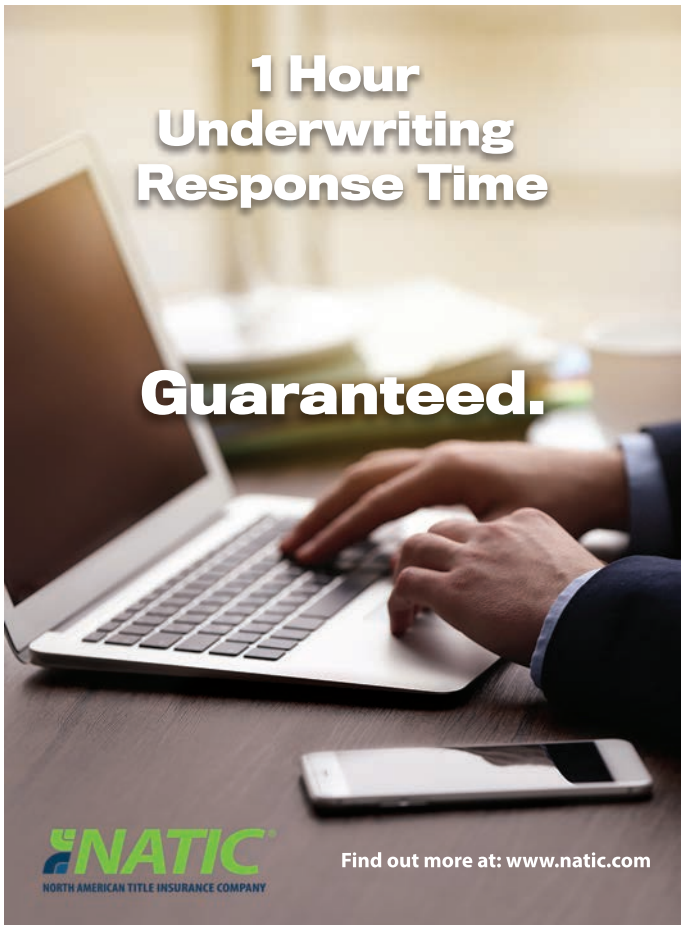
The determination of interested person status is relevant to any litigation in probate, trust and guardianship matters. The key question is whether and when a person may reasonably be expected to be affected by the outcome of a particular matter. The answer is that someone may be an interested person in some aspects of a proceeding but not an interested person in other aspects. Attorneys considering representing a litigant in these matters should be aware of this standing requirement and consider whether the definition and application of same in Florida case law affects their client.


S. RUBEL

Stacy B. Rubel *is a partner at The Virgil Law Firm, focusing on probate, trust and guardianship litigation and administration. She currently serves on the Executive Council for the RPPTL Section, is a Vice-Chair of the Guardianship, Power of Attorney & Advance Directives Committee and a Co-Chair of the Ad Hoc Guardianship Law Revision Committee. Ms. Rubel is a graduate of the Florida Fellows Institute for the American College of Trust and Estate Counsel (ACTEC) and an active member of the Florida Probate Rules Committee. She is also a Co-Chair of the Dade County Bar Association's Probate and Guardianship Committee.*

Endnotes

1 *Id.*
2 *Id.*
3 Fla. Stat. § 733.212 (2020).
4 *Wehrheim v. Golden Pond Assisted Living Facility*, 905 So. 2d 1002, 1005-06 (Fla. 5th DCA 2005).
5 Fla. Prob. R. 5.270(a).
6 Florida courts have also held that a nominated personal representative under a prior will has standing to contest a subsequent will. *See Wheeler v. Powers*, 972 So. 2d 285, 296 (Fla. 5th DCA 2008).
7 *Wehrheim*, 905 So. 2d at 1006.
8 Fla. Prob. R. 5.041.
9 *Id.*
10 Fla. Prob. R. 5.060.
11 *Id.*
12 Fla. Stat. § 744.107 (2020).
13 Fla. Stat. § 744.2005 (2020).
14 Fla. Stat. § 744.3203 (2020).
15 Fla. Stat. § 744.341(5) (2020).
16 Fla. Stat. § 744.367(4) (2020).
17 Fla. Stat. § 744.3715 (2020).
18 Fla. Stat. § 744.447 (2020).
19 Fla. Stat. § 744.464 (2020).
20 Fla. Stat. § 744.477 (2020).
21 Fla. Stat. § 744.517 (2020).
22 Fla. Prob. R. 5.550 (2020).
23 *Zelman v. Zelman*, 175 So. 3d 871 (Fla. 4th DCA 2015).
24 Fla. Stat. § 744.3371(1).
25 *Carter v. Bromberg*, 291 So. 3d 208 (Fla. 5th DCA 2020).
26 *Hayes v. Guardianship of Thompson,* 952 So. 2d 498 (Fla. 2006).
27 *Id.* at 509.
28 *McGinnis v. Kanevsky*, 564 So. 2d 1141 (Fla. 3d DCA 1990).
29 *Hayes*, 952 So. 2d at 508-09; *see also Hernandez v. Hernandez*, 230 So. 3d 119 (Fla. 3d DCA 2017) (holding that even though the Ward's nephew filed a request for notice and copies, he was not an interested person with standing to object to fee petitions where the guardianship was necessitated by his own alleged mistreatment of the Ward and misappropriation of her funds).
30 *Bivens v. Rogers*, 147 So. 3d 549 (Fla. 4th DCA 2014).
31 *Id.* at 551.
32 *Id.*
33 *Sun Bank & Trust Co. v. Jones,* 645 So. 2d 1008, 1017 (Fla. 5th DCA 1994).
34 *In re Guardianship of Trost*, 100 So. 3d 1205 (Fla. 2d DCA 2012).
35 *Id.* at 1209-10.
36 *Rudolph v. Rosecan*, 154 So. 3d 381 (Fla. 4th DCA 2014).
37 *Id.*
38 *Tenzer v. Guardianship of Tenzer*, 240 So. 3d 754 (Mem) (Fla. 4th DCA 2018).
39 *Id.* at 755.



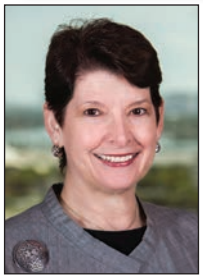
SECTION SPOTLIGHT

Congratulations To The 2019-2020 Awards Recipients

By Jen Bloodworth, Esq., Senior Underwriting Counsel, First American Title Insurance Company, and Rob Freedman, Esq., Section Chair for Bar Year 2019-2020

This year's Annual Section Awards Presentation on August 19, 2020 was another "first" in a year of firsts. Instead of a black- tie affair, the Annual Section Awards Presentation was a Zoom happy hour. Instead of each award recipient walking to the stage, Section Chair, Rob Freedman, drove around the state to personally deliver each award. Instead of real time, each presentation was captured on video and played during the Zoom happy hour. What remained constant from each prior year, however, was the honor and distinction with which each award was granted and the reverent acceptance by each recipient.

Robert C. Scott Award



Margaret "Peggy" Rolando received the **Robert C. Scott Award**. This award was established to memorialize the devotion, continued commitment, and service Mr. Scott provided to the Section during his life. His many contributions included development of the pre-cursor of the FAR/BAR contract. This award is not granted on an annual basis but, instead, granted when needed to recognize a section member who exemplifies the devotion and continued service of Mr. Scott to the Section and its members. Peggy served as Chair of the Section during the 2013-2014 Bar year and has enthusiastically continued her service. She actively participates in numerous Section committees, including Condominium and Planned Development, Real Property Problems Study, Commercial Real Estate, and Professionalism and Ethics, as well as the Executive Council meetings. She has served as a mentor to many within the Section and has consistently and effectively served to promote the Section.

William S. Belcher Lifetime Professionalism Award



The **William S. Belcher Lifetime Professionalism Award** was awarded to **Melissa Murphy**. This award is also presented at the discretion of the Section and recognizes an Executive Council member's lifetime of commitment and service to the Section, the Executive Council, Florida attorneys, and the public. Its recipient must promote and exhibit the highest standards of ethics and professionalism. After Melissa's role as Chair of the Section during the 2007-2008 Bar year, she has remained actively involved with Section activities, most recently being heavily involved in the Section's efforts in the remote notarization legislation and the education and training related such legislation. She has always recognized the importance of the Section and its role for practitioners, maintained the highest professional standards, without question, and considers the Section's interests to be of exceedingly high importance.

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John Arthur Jones Annual Service Award





The **John Arthur Jones Annual Service Award** has been presented every year since 1985 and is presented to a Section member rendering dedicated and significantly outstanding service to the Section. This year, the award was presented to two Section members, **Judge Mark Speiser** and **Michael Gelfand.**

Judge Speiser has always been a valuable contributor to the Section, but his dedication this past year was especially above and beyond. After retiring from the bench, he volunteered as a Senior Judge in the Broward County Circuit, without compensation. He spent hours traveling to and meeting legislators in Tallahassee to craft solutions to protect the elderly in the guardianship process, and he worked closely with the Broward Circuit Court and Section leaders on diversity projects designed to encourage diversity in the probate bar.

Michael served as Chair of the Section during the 2015-2016 Bar year and his continued service to the Section has been invaluable, but, like Judge Speiser, Michael's service this year has been extraordinary. Michael helmed the Strategic Planning Implementation Committee, provided advice and recommendations on various legislative matters, and currently serves on the Florida Bar's Professionalism and Ethics Committee, representing the Section in such role. Each recipient has epitomized service to the Section and to the practice of law.

Rising Star Award





Jenna Rubin and **Jennifer Jones Bloodworth** were the co-recipients of the **Rising Star Award**. This annual award is given to members (typically, one on the "death" side and one on the "dirt" side) who demonstrate the potential for future Section leadership through their participation with the Section.

Jenna is a "death" lawyer, has been involved with numerous substantive projects, is serving as Vice-Chair of the Ad Hoc E-Wills Committee, the Trust Law Committee and the Elective Share Committee, and is a frequent speaker on a variety of topics for the Section.

Jennifer is on the "dirt" side, a second-generation Executive Council Member (daughter of Fred Jones and Pat Jones), and Chair of the Commercial Real Estate Committee. Jennifer was heavily involved with the remote notarization legislation and education and training related to same, which efforts are still ongoing.

At Large Member (ALM) Of The Year



The **At-Large Member of the Year Award** was presented to **Johnathan L. Butler**, lead ALM for the 13th Judicial Circuit. Johnathan has provided the highest level of service in assisting the Section with its needs. Through his creative programming, coordination with neighboring circuits, community outreach and resource coordination, he has and continues to carry out the Section's focus and the commitment of the At Large Members to the Section, the Executive Council, and to the communities we serve. Johnathan also frequently contributes content featuring ALMs events and Section service to ActionLine, including his article on the "Frontline Heroes Program" featured on pages 36-37, herein.

A very special thank you to the Annual Section Awards Presentation sponsor – First American Title Insurance Company.

Meet Your New RPPTL Fellows

By Daniel L. McDermott, Esq., Adrian Philip Thomas, P.A., Fort Lauderdale, Florida (P&T) and Salomé Bascuñan, Esq., Bilzin Sumberg Baena Price & Axelrod LLP, Miami, Florida (RP)

In some ways the last "in person" Executive Council meeting at the Grand Hyatt in Tampa Bay doesn't seem that long ago, yet in other ways it feels like a lifetime has passed since RPPTL members were able to convene, socialize, and break bread. While advances in technology like Zoom have allowed the Committees and Executive Council to continue conducting business remotely in the time of COVID-19, gone for the time being are the Section's after-hours social gatherings that so many of us have come to enjoy as an opportunity to see old friends, make some new ones, and get to know other Section members in a more casual setting.

Another unfortunate result of having to conduct Executive Council meetings via Zoom is that it has not afforded many Section members an opportunity to meet our newest additions to the RPPTL family, the Fellows class of 2020-2021 who met remotely for the first time back in August. Thus, and to echo the sentiments of our esteemed Chair, Bill Hennessey, the challenges posed by the lack of "in person" meetings makes it especially important to find opportunities to help get our Fellows engaged as many of them are still feeling their way around the Section. To borrow a quote from Mr. Hennessey, *the most important thing we can do is be intentional about recognizing them and helping the new Fellows find some opportunities*. To that end, we here at *ActionLine* would first like to introduce and welcome the outstanding Fellows class of 2020-2021:

Terrence Harvey, RP Division, Jacksonville
https://www.theharveyfirm.com/

Erin Miller-Myers, RP Division, Naples
https://www.grantcottrell.com/attorneys/erin-miller-meyers/

Lilleth Bailey, PT Division, Fort Lauderdale
https://www.linkedin.com/in/lillethbailey/

Nicole Bell, PT Division, St Petersburg
https://www.legacyprotectionlawyers.com/our-team/nicole-bell-cleland/

The Death Side: Our Newest Probate and Trust Fellows


L. BAILEY

Lilleth Bailey, Judicial Staff Attorney at the 17th Circuit, Fort Lauderdale, Florida

First up of our new Fellows is Lilleth F. Bailey, who grew up in South Florida and comes to us from the Probate and Trust side of the Section. Lilleth and her family are no strangers to the courtroom and she comes from a family of lawyers, which includes her father, a highly trained and well-respected Miami criminal defense attorney (who also happens to have been appointed as Equerry to Her Majesty Queen Elizabeth II in1975), and her identical twin. Before carving her teeth in the legal profession, Lilleth completed her undergraduate studies at the University of South Florida, where she earned a Bachelor's of Art in Political Science and Government, before eventually receiving her juris doctorate from Florida Coastal College of Law.

Since being admitted to the Florida Bar in April 2014, Lilleth has managed to chart a career path that allows her to combine her profession with her passion for public service, helping underserved communities, educating the public about available legal resources, and promoting diversity in the legal community. In fact, after spending several years in private practice after being admitted to practice—where she focused on real estate, estate planning, probate and guardianship administration and litigation, mortgage foreclosure defense, landlord-tenant, and family law—Lilleth decided to leave private practice and moved to the public sector. Since 2016, Lilleth has worked as a Staff Attorney at the Broward County Courthouse and presently works as a Judicial Staff Attorney at the 17th Circuit advising Judge Kenneth L. Gillespie, presiding in the Probate and Guardianship Division.

Lilleth has long been interested in helping educate the public on the availability of legal services and how to take advantage of those resources. Moreover, Lilleth has a passion for probate and guardianship law and is actively involved in projects that educate her local community about the importance of estate planning. As well, Lilleth's current role as a Staff in the Broward

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County Probate and Guardianship Division gives her a unique perspective in that she is impacted firsthand by much of the legislation that emanates from the various committees in the RPPTL Section. Her background and skillset provide Lilleth with the unique ability to see first-hand the real impact(s) that result from statutory changes and revisions that originated in the Section. However, unlike private practitioners, many of whom have to wait for cases interpreting new or revised statutes to work their way through appellate courts, Lilleth is at ground-zero when changes are made that impact probate and guardianship matters. Lilleth's duties as a staff attorney include researching probate and guardianship issues, drafting memoranda of law, and peer training, which is oftentimes based on and/or directly impacted by Chapters 732, 733, and 744, Florida Statutes, and revisions thereto.

In conclusion, if you haven't already met Lilleth you should introduce yourself and consider trying to get Lilleth involved in your committee, especially if you are looking for excellent researching and writing, a real-world perspective on the impact of actual or proposed changes at the local level, or someone with a passion for helping the local community. And if you have none of these needs, you should still make a point of introducing yourself to Lilleth and helping us welcome her to the RPPTL community, just like the more senior Section members did when many of us first started coming to the meetings.


N. BELL CLELAND

Nicole Bell Cleland, Legacy Protection Lawyers, L.L.P., St Petersburg

Next up on our list is the second of our new Probate and Trust Fellows, Nicole Bell Cleland. Unlike our other new P&T Fellow, Nicole does not come from a family of lawyers; rather, Nicole is the first lawyer in her immediate family and is a second-generation descendant of Cuban entrepreneurs who grew up in Lakeland, Florida. However, setting aside their different familial histories, one shared characteristic, which will quickly become evident when you meet our new Fellows, is that both Lilleth and Nicole are driven, hardworking, and passionate about serving the public and helping their local communities.

After graduating high school, Nicole left Lakeland to attend Florida State University where she majored in English and minored in Spanish, while also managing to work throughout her undergraduate studies. Upon the completion of her undergraduate studies at FSU, Nicole put her solid foundation in researching and writing to good use when she attended Stetson University College of Law. It was during her time at Stetson that Nicole gained her first exposure to elder law and related issues when she took an Elder Law class as an elective and "loved it," an experience Nicole credits to her professor, Rebecca C. Morgan. Following her initial exposure to Professor Morgan's Elder Law class, Nicole went on to become involved in several Elder Law and Estate Planning organizations while still in law school.

Since graduating from Stetson University College of Law in 2016, Nicole has continued to make use of the lessons she learned from her involvement in elder law and estate planning organizations at FSU, including the importance of listening to each person's needs and understanding that no single approach is right for everyone. Nicole presently works at Legacy Protection Lawyers, L.L.P., the same firm she began working at while in law school. Nicole's practice is presently focused on estate planning and probate/trust administration, with an emphasis on asset protection, tax planning, and disability planning.

Nicole currently resides in St. Peterburg, Florida, which she fell in love with while in law school at Stetson. When Nicole isn't working to assist families with estate planning and estate administration matters, Nicole devotes much of her time and energy to local organizations, which includes serving as the chairperson of the Pinellas County Chapter Florida Association for Women Lawyer ("FAWL"), serving on the board of Inspire Equine Therapy Program, Inc., and serving as the chairperson of Brookwood Florida, Inc.

If you haven't already met Nicole, you should introduce yourself and consider trying to get her involved in projects involving estate planning, probate/trust administration, asset protection, tax planning, and/or disability planning. Moreover, whether or not you have already had the pleasure of meeting Nicole, next time you see her make sure to congratulate Nicole on her recent nuptials as Nicole and her husband, Joe, were married earlier this year! Unfortunately, Nicole and Joe's wedding was scheduled for the same time that COVID-19 began wreaking havoc and cancelling large gatherings en masse. Unsurprisingly, Nicole was not phased by this unexpected challenge and didn't let the pandemic deter her plans. Rather, Nicole reflected back on a lesson she learned at a young age, which is that there are no guarantees in life, and she made the best of the challenging situation by getting married in the midst of the pandemic, albeit in a much more intimate setting and without many of their loved ones being able to join. So next time you see Nicole (and hopefully Joe) at an Executive Counsel meeting, let's welcome Nicole to the Section and give her a big congratulations from the RPPTL family!

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The Dirt Side:
Our Newest Real Property Fellows


E. MILLER-MEYERS

Erin Miller-Meyers, Partner at Grant, Cottrell, Miller-Meyers PLLC, Naples, Florida

Erin was born in Meridian, Mississippi. Her family moved to Naples, Florida in 1992. She attended Gulf Coast High School, where she met her husband, Matt Meyers. In high school, Erin was a springboard diver and she now coaches the springboard diving team at Naples High School. Erin has two fur babies, a boxer named Walter and a golden retriever named Whitley.

Erin graduated *summa cum laude* and Phi Beta Kappa from the University of Florida with a Bachelor of Arts in Spanish. She studied abroad in Argentina, Puerto Rico and Mexico. Erin earned a Juris Doctor, *cum laude*, from Florida International University College of Law, where she was an articles editor for the FIU Law Review. While at FIU, she also earned a Master of Arts in Latin American and Caribbean Studies. Erin is proficient in Spanish, and has taken courses in Haitian Creole, Latin, and French.

Erin has focused her practice on representing buyers and sellers in real estate transactions in Southwest Florida. In addition to helping her clients navigate real estate transactions, she also provides educational presentations that foster professional development and lively discussions with local real estate agents. Some of her recent presentations on the NABOR and FRBAR Contracts include: Real Estate Inspections; Financing Contingencies; FIRPTA; Contract Updates; Seller's Disclosures; HOA Disclosures; Avoiding Deal Breakers; Death and Real Estate Closings; Personal Property; and Hurricane Preparedness for Realtors.

Erin is currently the Chair of the Real Estate Section of the Collier County Bar Association, an active member of the Real Property, Probate, and Trust Law Section of The Florida Bar, a member of the Naples Area Board of Realtors Legal Resources Committee, and a 2018 graduate of the Greater Naples Chamber's GAIN program. Please welcome Erin to the RPPTL family!


T. HARVEY

Terrence L. Harvey, Founder and Managing Partner of The Harvey Firm, P.L.L.C., Jacksonville, Florida

Terrence was born and raised in South Florida. He currently resides in Jacksonville with Chassidy, his wife, and Duke, their 7-year-old yorkie. Terrence has been living in Jacksonville for the past 8 years and considers Jacksonville his home, however, he continues to hold on to his 305-area code number as he likes to keep a connection to the South Florida area.

Terrence completed his undergraduate studies at the University of Florida, where he earned a degree in Business. He earned a Juris Doctor from the University of Tennessee. During law school, Terrence was on the executive board of The Tennessee Law Review and Transactions: Tennessee Business Journal. He also served as a judicial advisor at the University of Tennessee.

Terrence is experienced in the areas of civil litigation, real property, contract disputes and bankruptcy. Terrence's professional associations include past associate of the Chester Bedell Inns of Court, the Jacksonville Bar Association, Jacksonville Justice Association and Jacksonville Bankruptcy Bar Association. He also serves as an arbitrator for the Financial Industry Regulatory Authority (FINRA).

Terrence is involved in a number of community organizations and non-profit organizations. He has a passion for volunteering and helping others. He previously served as a Board Member of the Jax Journey Oversight Committee, which was tasked with providing funding for programs designed to curb crime and make neighborhoods in Jacksonville safe. Terrence also sits on the Board of Directors of the Wayman Academy of the Arts, one of Duval County's first charter schools, which provides students with a learning environment that is innovative, challenging and nurturing through the exposure of the Fine Arts. He also served as a mentor through community organizations including Big Brothers Big Sisters and has dedicated many hours to help his community through his local church. Please welcome Terrence to the RPPTL family!

Is your E-MAIL ADDRESS current?

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

POLITICAL ROUNDUP

2020 Election Debriefing

By H. French Brown, IV, Esq., Dean Mead, Tallahassee, Florida

In a year defined by uncertainty, why would anyone expect the 2020 election to be different? The only near certainty going into the November 3rd election was that this was *not* going to be a typical election: a global pandemic unlike anything seen in a hundred years; the national unemployment rate spiking to more than fourteen percent over the summer; yet the stock market maintaining near-record high values. Ultimately, Florida set numerous new election records. A red wave swept across the State for both federal and state candidates. And Florida voters approved four amendments to the State's Constitution.

Voter Registration and Turnout

During the 2016 election, Florida had more than 12.8 million registered voters. At that time, registered Democratic voters (4.878 million) outnumbered registered Republican voters (4.550 million) by more than 327,000 voters. In addition, the State had 3.436 million voters registered for either a minority political party or no party affiliation.

Since that time, voters for the Republican Party closed the gap. At the close of voter registration before the 2020 election, there were more than 14.4 million total voters in the State. Of that amount, registered Republican voters grew by 618,701 (13.6 percent), while registered Democratic voters only grew by 425,505 voters (8.7 percent). This registration surge cut the Democrats' lead to 134,242 registered voters (0.93 percent of all registered voters).

As previously discussed, the uniqueness of 2020 and concerns surrounding COVID-19 resulted in voting trends never before seen in an election. As an example, 6.6 million Florida voters cast their ballot before Election Day, either through vote by mail or in person early voting in 2016. Ultimately, 9.58 million Floridians (74.5 percent) voted in the matchup four years ago between Trump and Clinton. However this year, voting before Election Day in Florida soared to more than 9.17 million votes cast. After adding another 1.95 million votes on November 3rd, Florida finished with a record breaking 11.1 million votes, representing nearly 77 percent of the electorate. Not since 1980 have Florida voters exceeded a 75 percent voter turnout. In that election forty years ago, only 3.7 million Floridians voted, and Reagan beat Carter by 17 percent.

In addition, with a record setting number of both raw votes cast and total voter turnout, this year more Floridians voted before Election Day than ever before. Biden urged his supporters to vote by mail, and they clearly listened. Nearly 2.2 million registered Democrats voted by mail in Florida. That represents more than 41% of currently registered Democratic voters, and more than double the amount of registered Democrats that voted by mail in 2016. In contrast, Republican voters significantly won both the in-person early vote and Election Day vote. Ultimately, 84 percent of registered Republican voters cast a ballot, which outnumbered registered Democratic voters by more than 233,000 (77.5 percent of registered Democrat voters).

	Vote by Mail	Early Vote	Election Day	Total Turnout by Party
Republican	29.1%	37.9%	17.1%	84.0%
Democrat	41.2%	26.4%	9.9%	77.5%
Other	29.1%	24.5%	13.7%	67.1%

Presidential Race

Similar to the 2016 election, pollsters did not correctly predict the presidential race in Florida. Going into Election Day, most polls projected a Biden advantage of two to three percent; some projected a Biden lead by as much as seven percent. Ultimately, Trump won Florida by approximately 375,000 votes or 3.4 percent. Trump's 2020 victory improved over his victory in 2016 by more than 262,000 votes or 2.1 percent. Notably, Trump's 2020 margin of victory even exceeded Obama's Florida victories in 2012 (0.9 percent) and 2008 (2.8 percent).

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Year	Winner	Votes	Percentage
2020	Trump	375,039	3.4%
2016	Trump	112,911	1.2%
2012	Obama	74,309	0.9%
2008	Obama	236,450	2.8%
2004	Bush	380,978	5.0%
2000	Bush	537	0.01%

Interestingly, it appears a significant portion of Trump's 2020 surge came from traditionally deep-blue Miami-Dade County. In 2016, Clinton beat Trump by 290,147 votes (29.6 percent advantage) in Miami-Dade County. In 2020, Biden won Miami-Dade by less than 85,000 votes (7.34 percent advantage). This approximate 205,000 swing was both substantial and key to Trump winning the State by such a large percentage. Many election strategists believe Cuban and Venezuelan-Americans, specifically men, were concerned with the potential socialist narrative surrounding Biden and therefore voted heavily for Trump, securing his victory.

Congress

Florida's red wave was not limited to the top of the ticket. Of Florida's twenty-seven Congressional house districts, sixteen were won by Republicans. This resulted in two additional Republican members of Florida's Congressional delegation. Both districts gained were located in Miami-Dade County and Monroe County where Trump's votes surged also.

Florida's new congressional members include: Kat Cammack (Republican, District 3); Scott Franklin (Republican, District 15); Byron Donalds (Republican, District 19); Carlos Gimenez (Republican, District 26); and Maria Elvira Salazar (Republican, District 27).

Florida Senate

The Florida Senate also remained in strong Republican control. Prior to the 2020 election, Republicans held twenty-three of the forty State Senate districts. Twenty-one of these districts were up for election this year. However, Senate District 33 did not include a Republican challenger, so it was decided during the Democratic primary election in August.

Of the remaining twenty Senate races on the November 3rd ballot, only four were poised to potentially switch party. Democrats focused their resources in an attempt to flip District 9 representing parts of Seminole County and Volusia County and District 39 representing parts of Miami-Dade County and Monroe County. At the same time, Republicans attempted to win Democratic strongholds in District 3 including Leon County and ten surrounding rural counties and District 37 which represents part of Miami-Dade County. Ultimately, eight Democrats and eleven Republicans prevailed by significant margins on Election Day. Republicans Jason Brodeur and Ana Maria Rodriguez held off Democratic challengers in Districts 9 and 39, respectively. Democrat Loranne Ausley beat her Republican challenger in District 3. However, at the time of writing this post-election wrap up, Senate District 37 was still too close to call with the Republican challenger, Ileana Garcia, leading the Democratic incumbent, Jose Javier Rodriguez, by only 21 votes out of 215,411 cast in the race. That race will be going to a recount. Regardless of the outcome of Senate District 37, winning the previously mentioned eleven seats solidifies that Republicans will continue to hold, at a minimum, the same 23 seat majority until the constitutionally mandated redrawing of legislative districts occurs during the 2022 Session.

A list of the newly elected Florida Senators include: Loranne Ausley (Democrat, District 3); Jennifer Bradley (Republican, District 5); Jason Brodeur (Republican, District 9); Danny Burgess (Republican, District 20); Jim Boyd (Republican, District 21); Ray Rodriguez (Republican, District 27); Tina Polsky (Democrat, District 29); Shevrin Jones (Democrat, District 35); and Ana Maria Rodriguez (Republican, District 39). If Ileana Garcia maintains her lead in Senate District 37 after the recount, she too will be a first-time Senator.

Florida House of Representatives

Historically, the Florida House has been the more conservative of the two chambers. That held true this election. With all 120 districts on the ballot, Democrats hoped it would be possible to cut into the Republicans' 71-46 advantage, with 3 vacant seats. However, the red wave resulted in House Republicans gaining control of five seats previously held by the Democrats, leading to a 78-42 margin.

The newly elected Florida House members include: Michelle Salzman (Republican, District 1); Patt Maney (Republican, District 4); Allison Tant (Democrat, District 9); Angie Nixon (Democrat, District 14); Sam Garrison (Republican, District 18); Yvonne Hayes Hinson (Democrat, District 20); Joe Harding (Republican, District 22); Webster Barnaby (Republican, District 27); Keith Truenow (Republican, District 31); Fred Hawkins (Republican, District 42); Kristen Arrington (Democrat, District 43); Daisy Morales (Democrat, District 48); Kaylee Tuck (Republican, District 55); Andrew Learned (Democrat, District 59); Traci Koster (Republican, District 64); Linda Chaney (Republican, District 69); Michelle Rayner (Democrat, District 70); Fiona McFarland (Republican, District 72); Adam Botana (Republican, District 76); Mike Giallombardo (Republican, District 77); Jenna Persons (Republican, District 78); Lauren Uhlich Melo (Republican, District 80); Kelly Skidmore (Democrat, District 81); John Snyder (Republican, District 82); Dana Trabulsy (Republican, District 84); Omari Hardy (Democrat, District 88); Christine Hunschofsky (Democrat, District 96); Marie Woodson (Democrat, District 101); Felicia

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Simone Robinson (Democrat, District 102); Tom Fabricio (Republican, District 103); Robin Bartleman (Democrat, District 104); David Borrero (Democrat, District 105); Christopher Benjamin (Democrat, District 107); Alex Rizo (Republican, District 110); Demi Busatta Cabrera (Republican, District 114); Kevin Chambliss (Democrat, District 117); and James Mooney (Republican, District 120).

Constitutional Amendments

Six Amendments to the Florida Constitution were up for consideration on the 2020 General Election ballot. The first four amendments were citizen backed initiatives and the final two were placed on the ballot by the Florida Legislature. Since 2007, proposed amendments to the Florida Constitution require sixty percent approval by voters.

Amendment 1: Citizenship Requirement to Vote in Florida Elections – Passed 79.3%

Florida law already provides that only American citizens may vote. This amendment places the same requirement in the Florida Constitution. Sponsors of the amendment argue the amendment is necessary to prevent cities from allowing non-citizens to vote, which has occurred in states such as California and Maryland.

Amendment 2: Raising Florida's Minimum Wage – Passed 60.8%

Florida's minimum wage is currently $8.56 per hour. This amendment automatically increases the minimum wage to $10.00 per hour starting September 30, 2021. The minimum wage would then increase $1.00 per year on September 30th until the minimum wage reaches $15.00 per hour on September 30, 2026. Beginning January 1, 2028, the minimum wage shall continue to increase using the consumer price index for urban wage earners and clerical workers.

The amendment was sponsored by the organization Florida for a Fair Wage, which is chaired by attorney John Morgan. The sponsor argues the amendment will help provide a fair wage for a hard day's work. Opponents of the amendment argue it would place a disproportionate burden on businesses, which will result in higher consumer prices or businesses hiring fewer employees at a time when the pandemic has already significantly impacted Florida's tourism, entertainment, and restaurant industries.

Amendment 3: All Voters Vote – Failed 57%

Currently, only registered Republican voters may vote in the Republican primary elections for the State Legislature, Governor, or Cabinet. The same is true for registered Democratic voters in the Democratic primary elections. Registered voters of minority political parties or voters not affiliated with a political party may not vote in these primary elections.

This amendment would have opened the primary elections for the State Legislature, Governor, or Cabinet to all registered voters. The two highest vote-getters of the primary, regardless of party, would advance to the general election. This system is often known as a "jungle primary."

Amendment 4: Voter Approval of Constitutional Amendments – Failed 47.5%

This amendment would have made it harder for citizen backed initiatives to change the Florida Constitution by requiring a proposed amendment to be approved by sixty percent in two separate elections.

Amendment 5: Limitation on Homestead Assessments – Passed 74.5%

In January 2008, sixty-four percent of Florida voters approved an amendment to the State Constitution to allow a homestead property owner to transfer up to $500,000 of the "Save Our Homes" tax benefits in a current homestead property to a new homestead property. The act of transferring this benefit is known as "portability." Portability is allowed only if the new property receives the homestead exemption as of January 1 in either of the immediately preceding two years. Effectively, this two-year period only allows an owner a single full year without any homestead exemption.

Amendment 5 increases this portability period from two years to three years; thereby allowing a Save Our Homes benefit to be transferred to a new homestead established by January 1 of the third year subsequent to abandonment of the old homestead. The amendment will first apply to the 2021 property tax roll.

Amendment 6: Ad Valorem Tax Discount for Spouses of Certain Deceased Veterans – Passed 89.7%

Currently, certain veteran property owners receive a discount on their property taxes if they were honorably discharged, are over 65 and have been permanently disabled by combat. This amendment will allow spouses of such deceased veterans to continue to claim that property tax exemption if the spouse holds the title to the property and permanently lives there. It would also allow the spouse to transfer the exemption to a new property in limited cases.



F. BROWN

***French Brown** has a dozen years of experience specializing in Florida's state and local taxation. He was former leadership at the Department of Revenue.*

Novation Of A Covenant, An Oxymoron?

By Michael Gelfand, Esq., Gelfand and Arpe, P.A., West Palm Beach, Florida

Should the concept of novation apply to a covenant running with the land? While a covenant is akin to a contract, is it so different that the contractual concept of novation should not apply?

These questions were in the background in *C.V.P. Community Center, Inc. v. McCormick*[1] which addressed whether acquiring title to a condominium unit constitutes a novation of the condominium's recorded recreation lease. The issue arose in the context of whether Fla. Stat. § 57.105(7) (2014), should apply to a pre-1988 recreation area lease allowing the award of prevailing party attorney's fees, and if not, whether *Jakobi v. Kings Creek Village Townhouse Ass'n*[2] retains its vitality.

Astute readers will recall § 57.105 allows for an award of attorney's fees as a sanction for a frivolous assertion of law or fact. A 1988 amendment added a new subsection which, grossly summarized, modifies a contract's unilateral attorney's fee provision into a prevailing party fee provision.

Lead Up Facts.

Century Village of Pembroke Pines Condominium was developed in 1984. McCormick 105, LLC was an institutional mortgagee, obtaining title to a unit in the Condominium as a result of a foreclosure. C.V.P., the holder of a long-term Lease on the Condominium's recreational facilities, demanded McCormick pay Lease rental amounts accruing before the unit was transferred to McCormick.

Trial Court.

McCormick sued the landlord for declaratory relief, breach of contract, and rent abatement. The trial court held the landlord's demand for rents was contrary to the Lease. Both parties sought attorney's fees. The landlord's motion for fees based on the Lease's one-sided fee provision in favor of the landlord was denied.

McCormick sought prevailing party attorney's fees, costs and expert fees, asserting § 57.105(7) modified the Lease's one-sided attorney's fee provision which was in favor of the landlord, into a prevailing party fee provision. The trial court awarded McCormick $141,475.15.

The Opinion.

The appellate court first focused on the statute's express limitation "this subsection applies to any contract entered into on or after October 1, 1988." This limitation should prohibit the statute's application to the 1984 Lease.

To avoid the statute's 1988 threshold date, McCormick asserted its acquisition of the certificate of title after the foreclosure created new obligations and thus a novation of the Lease.[3] In essence, novation creates a new lease, and the statute's 1988 date threshold would no longer bar the statute's application.

The Appellate Court rejected McCormick's reliance on *Jakobi*. In *Jakobi,* a Kings Creek Village unit owner prevailed in a dispute over a screen enclosure and sought to apply Section 57.105(7) to the Association By-Laws' one-sided attorney's fee provision in favor of the Association. The *Jacobi* Court held the owner taking title with record notice of the declaration's duty to pay assessments assumed that duty which fulfilled the consent element for a novation.

The appellate court implied *Jakobi* misinterpreted *Sans Souci,* and then proceeded to "disagree with the reasoning with Jakobi."[4] *Sans Souci* held novation required consent to substitute a new agreement for the old agreement. The court asserted consent was not shown in *Sans Souci*. "In our view, there is no mutual ascent to a new contract; instead, the owner agreed to be bound by the terms of the old contract."

Thus, McCormick's acceptance of title did not assume a new obligation to pay rent becoming due before the certificate of title was issued. In fact, the Lease provided otherwise concerning those earlier rents. Further, there was no mutual assent.

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Concluding, addressing a procedural issue, the opinion reinforced that a trial court's post-judgment order denying a motion for attorney's fees is a final appealable order. As a result, the landlord's appeal, apparently filed more than thirty days after the order of denial, was untimely; thus, the landlord's appeal of the order denying attorney's fees was dismissed.

Considerations for Thought.

This decision impacts far beyond condominium associations and the obligation to pay rent and assessments.

Disagreement with *Jakobi* has been brewing for a long time, the decision being treated by many as a seeming outlier. Nevertheless, the Fifth District Court of Appeal in a little cited decision aligned with *Jakobi* in *Holiday Square Owners Ass'n. Inc. v. Tsetsenis*.[5] Note that *Holiday Square* does not appear to undertake the next level of analysis as Judge Warner undertook in this case when she examined *Jakobi*'s underlying support, or lack thereof!

Has *Jakobi* distracted the courts from the true nature of recorded covenants? As the other District Courts of Appeal do not include in their opinions the same analysis as Judge Warner, her opinion may be helpful for those seeking to challenge *Jakobi* while sticking with the concept of consent within novation. Still, while recognizing that the Lease, looking backward, did not provide for payment of the former owner's rents and McCormick did not agree to pay those rents, the opinion also did not address looking forward, rents due in the future and the acceptance of the obligation to pay those rents.

Query: Is the effort to shoehorn the concept of "consent" into novation of a covenant an academic effort akin to shoving a size 12 foot in a size 5 shoe, or the proverbial round peg in a square hole? In the context of covenants running with the land that are recorded, is the contract concept of novation actually applicable?

In our "real world" of real estate the acquirer of title does not "consent" to be bound by covenants in the chain of title. In fact, the contrary is the rule, reinforced by the purpose of recording laws which does away with any concept of consent to a recorded covenant. A grantee/acquirer/transferee does not need actual knowledge of a properly recorded covenant to be bound by that covenant. The acquirer's duties and obligations are set by the recorded covenants, regardless of whether the acquirer agrees or not, or has knowledge or not.[6] Superimposing consent to enforce a covenant running with the land that is recorded would add an element of proof that is not only unnecessary, but may undermine the entire concept of record notice.

Consider other adverse practical implications of *Jacobi*: should each parcel in a community or sub-division be governed by a different set of restrictions, the determination of which restriction relying in turn on which law was in effect, and that dependent on the date title was acquired? While there are certain covenant amendments whose application depend on when title was obtained or whether an owner expressly consented, such as condominium leasing restrictions and small homeowners' association restrictions, those thresholds were legislatively expressly mandated in Fla. Stat. §§ 718.110 and 720.306.

Do you ask of whether there was a potential constitutional retroactive impairment of contract? The constitutional issue was likely not reached because the statute expressly rejects retroactive application; thus, no legislative impairment. If a post 1988 contract is in issue, then the analysis likely would have to address whether the statutory provisions are deemed applicable, or whether procedural or providing a remedy and thus creating no impairment, as opposed to impacting substantive rights and creating an impermissible impairment.

We seem to be left with a split among the Districts. By providing an alternative basis for the holding, conflict certification to the Florida Supreme Court might be avoided. Nevertheless, is there an issue of great public importance that would lead to the Florida Supreme Court? Is this the case to bring the issue to the Court, especially considering the Court's recent rejection of stare decisis in *State v. Poole*[7]?



M. GELFAND

***Michael Gelfand**, Florida Bar Board Certified in Real Estate Law and in Condominium and Planned Development Law, managing shareholder of Gelfand & Arpe in West Palm Beach, practices community association law, serving also as an expert witness, arbitrator and a certified circuit court mediator. Mr. Gelfand: chairs The Florida Bar's Professional Ethics Committee; is Past Chair of RPPTL Section; is a fellow of the American College of Real Estate Lawyers; and, received Palm Beach County's Pro Bono Child Advocate of the Year Award. His Florida Bar publications include: "Alternate Dispute Resolution, Arbitration and Mediation" and "Condominium and Homeowner Association Liens."*

Endnotes

1 *C.V.P. Community Center, Inc. v. McCormick 105, LLC*, Case No. 4D19-1515 (Fla. 4th DCA August 5, 2020).

2 *Jakobi v. Kings Creek Village Townhouse Ass'n*, 665 So. 2d 325 (Fla. 3rd DCA, 1995).

3 *Jakobi v. Kings Creek Village Townhouse Association, Inc.*, 665 So. 2d 325 (Fla. 3rd DCA 1995).

4 *Sans Souci v. Division of Florida Land Sales & Condominium*, 448 So. 2d 1116, 1121 (Fla. 1st DCA 1984).

5 *Holiday Square Owners Ass'n. Inc. v. Tsetsenis* v. 820 So. 2d 450 (Fla. 5th DCA 2002).

6 *See* Fla. Stat. § 695.01(1) (2019).

7 *State v. Poole*, 292 So.3d 694 (Fla. 2020)

After this author's initial submission, McCormick petitioned for direct conflict jurisdiction in the Florida Supreme Court, Case 20-1494. At final submission for publication, the case was pending.

Recent Decision In Warner v. Quicken Loans, Inc. Provides That Certain Third Parties Have Standing To Challenge Invalid Homestead Orders

By Jeffrey A. Baskies, Esq., And Allison S. Neumann, Esq.,
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Practitioners who represent third parties and wish to challenge the jurisdiction of the probate court as it relates to an invalid homestead order after the probate proceedings have concluded often find themselves prevented from mounting a successful challenge due to the third party's lack of standing. However, the recent holding in Warner v. Quicken Loans, Inc. now provides such practitioners with a road map for successfully challenging an invalid homestead order – at least as it relates to a property held as tenants by the entireties.[1]

Prior Law and Perspective:

Jurisdiction of a Probate Court:

It has long been recognized in the State of Florida that a probate court's jurisdiction only extends to property of the estate, and any judgment of the probate court is binding only on the property over which the probate court has jurisdiction.[2] The court in *Spitzer v. Branning* stated that if a probate court does not have jurisdiction over property, no party's conduct can grant jurisdiction, and the "mere inclusion of the description of property in pleadings or order in probate proceedings cannot confer jurisdiction of the rem."[3]

What about property held as tenants by the entireties? Is it included as property of the estate? No. Property held as tenants by the entireties vests in the surviving spouse by operation of law and does not pass by descent on the death of the co-owner.[4] Therefore, the probate court does not have jurisdiction over property held as tenants by the entireties because such property is not included as an asset of the decedent's estate.

Relatedly, "protected homestead" is also not an asset of the estate and does not pass by normal descent on the death of the owner. Protected Homestead is defined in Fla. Stat. § 731.201(33) as property which was the decedent's homestead as described in Art X, Section 4(a) of the Florida Constitution and on which the exemption inures to the surviving spouse or heirs under Art X, Section 4(b) of the Florida Constitution. Protected homestead is not an asset of the probate estate, it cannot be sold to pay debts or expenses, and it is not devisable (except as described in Art X, Section 4(c) of the State Constitution). Title to protected homestead vests at the moment of death.

Nonetheless, the probate court may be called upon by interested parties to determine the protected homestead status of real property owned by a decedent under Florida Probate Rule 5.405. According to the rule, the court's order "shall determine whether any of the real property constituted the protected homestead of the decedent."

Therefore, a proceeding to determine the status of "protected homestead" may properly be brought in the probate court which has jurisdiction.[5] The probate court's jurisdiction is only invoked to determine the property's status as protected homestead and not to convey title.

However, Fla. Stat. § 732.401(5) states the provisions regarding the descent and devise of homestead property do not apply to property owned by the decedent and the decedent's spouse in tenancy by the entireties. In addition, the Florida Probate Code specifically excludes real property owned as tenants by the entireties from the definition of "protected homestead."[6] Therefore, as the defendants in *Warner* learned, property owned by a decedent and his spouse as tenants by the entireties could not be the subject of a petition to determine protected homestead, and any order entered by the court is invalid.

Facts of the Warner Case:

In *Warner*, Christine Brennan Warner and Amanda Brennan ("the daughters"), sued Quicken Loans, Inc. ("Quicken") to quiet title in Jacksonville property that once belonged to their deceased parents (Joseph M. Brennan III and Carolyn J. Brennan), and to divest Quicken of its mortgage on the property.[7] The property originally belonged to Joseph and his siblings but in 1995 was deeded to Joseph and Carolyn as

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husband and wife, creating a tenancy by the entireties.[8] Joseph and Carolyn remained married until Carolyn's death in 2014.

Carolyn died intestate and was survived by Joseph, Christine and Amanda. During the probate of Carolyn's estate, Joseph petitioned the probate court to determine the homestead status of the property, utilizing "standard" FLSSI forms for determination of homestead status in an intestate estate with a surviving spouse and descendants. The probate court entered a homestead order using the standard FLSSI form provided for a situation where a decedent dies intestate with a spouse and lineal descendants, and with the exemption from creditors inuring. In other words, the court found:

1. the decedent was the owner of certain homestead real property ("the Property");
2. the decedent died intestate;
3. the decedent was survived by a spouse and one or more lineal descendants;
4. the decedent owned and resided on the Property;
5. the Property constituted the homestead of the decedent within the meaning of Section 4 of Article X of the Florida Constitution; and
6. title to the Property descended as of the decedent's date of death and the constitutional exemption from the claims of the decedent's creditors inured to the surviving spouse …as to a life estate…and a remainder interest vested in the lineal descendants in being a the time of the decedent's death (i.e., Christine and Amanda).

Several years later Joseph mortgaged the property, and that mortgage was subsequently assigned to Quicken. After Joseph's death, the daughters filed the quiet title action in state court. Upon Quicken's uncontested motion, the action was removed to federal court based on diversity jurisdiction.

The parties did not dispute (and the court held) that Joseph and Carolyn, when they were both alive, held the property as tenants by the entireties, and that when Carolyn died, the property passed by operation of law to Joseph in fee simple.[9] The issue in the case centered on the effect of the probate court's homestead order entered in Carolyn's estate.

Arguments Presented:

Quicken's argument was that the probate court did not have jurisdiction over the property because the property passed by operation of law outside of the estate, therefore the homestead order is a *brutum fulmen*[10] and has no effect as to ownership interests in the property, and thus has no effect on Quicken's mortgage.

Quicken relied in part on *Mullins v. Mullins*, decided in 2019.[11] In *Mullins*, a mother devised her property to her three children (a daughter and two sons), giving the sons each the right to live in the property as long as either of them "desires to live there," subject to an obligation to pay the expenses of maintaining the property. The probate court entered an order determining the property to be the mother's homestead and stating it passed in equal shares to the three siblings (without mentioning the additional provisions for the two brothers). Later, one brother and the sister sued the other brother for partition of the property, citing to the court Order stating they owned it co-equally (as the holder of a remainder interest cannot force a partition against a life tenant). The defendant brother argued the Will (not the order) established their property rights, and the appellate court agreed with him. The court found the homestead order could not create new rights and that mere consent to the order did not constitute an agreement among beneficiaries. Quicken argued similarly in this case.

The daughters' argument was that the order provided their father with a life estate in the property, and the daughters with the remainder interest, therefore Quicken's mortgage could encumber only their father's life estate interest, which terminated on his death.

The daughters relied on *Cavanaugh v. Cavanaugh* in their arguments.[12] In that case, a father bequeathed his homestead property to his spouse as to a life estate with the remainder to one of their four children. The property was probated in that manner and a homestead order was issued. Later, the other three children sued the fourth child contending the property was homestead and thus descended pursuant to Fla. Stat. § 732.401(1) (1977), as a life estate to the wife and a vested remainder in all four children, despite the homestead order.

While the appellate court in the *Cavanaugh* case noted that the homestead is not an asset of the estate and that the Personal Representative and estate have no jurisdiction over it, the court also found that estoppel and laches, may prevent the siblings from subsequently pursuing a claim in a collateral proceeding. In doing so, the *Warner* court observed, "[t]he appellate court effected the policy consideration that 'all questions of succession to property be authoritatively settled,' whether the property is homestead or otherwise, and emphasized the concern of allowing the three siblings to 'collaterally attack the probate judgment by asserting a homestead claim years after the probate judgment had become final.'"[13]

The Court's Analysis:

Ultimately, the appellate court in *Warner* found that Quicken was entitled to judgment on the pleadings, and its mortgage interest was valid. The court analyzed whether the original probate court had jurisdiction over the property, and whether issue preclusion applies in this case. Under Florida law, issue preclusion prevents parties from relitigating issues if an identical issue was presented in a prior proceeding and was fully litigated by the same parties or their privies and a court

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of competent jurisdiction rendered a final decision.[14] Florida courts enforce the requirement that the issues were actually adjudicated "with rigor."[15]

In the end, the court found that, because Joseph and Carolyn owned the property as tenants by the entireties, when Carolyn died the property passed by operation of law to Joseph, it was not an asset of the estate, and thus the probate court was without jurisdiction to effectuate a change in the ownership of the property.

The court also found the daughters' reliance on *Cavanaugh* was unavailing as the probate court in *Cavanaugh* was adjudicating rights under the father's will and the appellate court was considering the need for finality in probate proceedings, thus recognized estoppel and laches as defenses; whereas, the trial court in *Warner* was not adjudicating ownership interests in the property in the homestead order.[16]

Further, the court found that issue preclusion did not apply because the issue of whether the homestead order effectuated a change in ownership interest in the property was never litigated during the probate proceedings. In addition, because the probate court did not have jurisdiction over the property, the homestead order regarding the property cannot be binding as to issue preclusion.[17]

The court also addressed the daughters' argument that Quicken lacked standing to challenge the validity of the homestead order because Quicken was on notice of the order when it acquired the property due to the public nature of the order itself and the tax bills for the property noted that the property was held in the father's name as a "life estate" with a remainder to one daughter.[18]

The court stated this argument also failed holding that Quicken was not challenging the validity of the homestead order but instead was challenging "the consequences of the order on the mortgage Quicken holds."[19] The ruling may have been different if Quicken were merely challenging the validity of the order.

Lesson Learned:

In limited circumstances, it may be possible for third parties to challenge the validity of previously entered probate court orders determining homestead status. The court in *Warner* essentially provided third parties with a road map to successfully challenging homestead orders that were improperly entered by a probate court. If practitioners should find a case with non-probate homestead (which could be tenants by the entireties property but also might be protected homestead) and wish to defeat the homestead order, they should follow that road map and focus their argument on the probate court's lack of jurisdiction over the property in question.

However, practitioners should note the *Warner* case does not overturn the *Cavanaugh* decision; therefore, certain homestead orders, even if allegedly improper, may still not be subsequently challenged, if the prior order adjudicated property ownership interests and if the equitable defenses of estoppel and laches bar a subsequent challenge, depending on the equities of the case.



J. BASKIES



A. NEUMANN

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Endnotes

1 *Warner v. Quicken Loans, Inc.*, 2020 WL 2097981 (M.D. Fla. May 01, 2020 Slip Copy).

2 *Spitzer v. Branning*, 135 Fla. 49, 53 (1938).

3 *Id.* at 53.

4 *Bendl v. Bendl*, 246 So. 2d 574, 576-577 (Fla. 3rd DCA 1971); *Regero v. Daugherty*, 69 So. 2d 178 (Fla. 1954); *Wilson v. Florida Nat. Bank & Trust Co. at Miami*, 64 So. 2d 309 (Fla. 1953); *Denham v. Sexton*, 48 So. 2d 416 (Fla. 1950); *Knapp v. Fredricksen*, 4 So. 2d 251 (Fla. 1941); *Norman v. Kannon*, 182 So. 903 (Fla. 1938).

5 *In re Noble's Estate*, 73 So. 2d 873 (Fla. 1954).

6 Fla. Stat. § 731.201(33).

7 The property is commonly described as 2721 Algonquin Avenue, Jacksonville, FL 32210-2905.

8 The court noted the deeds apparently transferred more than 100% of the property, but made no note of any impact of such.

9 *Bendl v. Bendl*, 246 So. 2d 574 (Fla. 3rd DCA 1971).

10 Black's Law Dictionary defines a *brutum fulmen* as "a judgment void upon its face," which is "in legal effect no judgment at all."

11 *Mullins v. Mullins*, 274 So. 3d 513 (Fla. 5th DCA 2019).

12 *Cavanaugh v. Cavanaugh*, 542 So. 2d 1345 (Fla. 1st DCA 1989).

13 Id at 1353; quoted in the ruling in *Warner v. Quicken Loans, Inc.*, 2020 WL 2097981 (M.D. Fla. May 01, 2020 Slip Copy) on page 14.

14 *Winn-Dixie Stores, Inc. v. Dolgencorp, LLC*, 746 F.3d 1008, 1036 (11th Cir. 2014) (citing *Essenson v. Polo Club Assocs.*, 688 So. 2d 981, 983 (Fla. 2d DCA 1997)); *Holt v. Brown's Repair Service, Inc.*, 780 So. 2d 180, 182 (Fla. 2d DCA 2001).

15 *Crowley Mar. Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, 931 F.3d 1112, 1129 (11th Cir. 2019) (citing *Brown v. R.J. Reynolds Tobacco Co.*, 611 F.3d 1324, 1334 (11th Cir. 2010)); *Gordon v. Gordon*, 59 So. 2d 40, 44 (Fla. 1952).

16 *Warner v. Quicken Loans, Inc.*, 2020 WL 2097981 (M.D. Fla. May 01, 2020 Slip Copy) pages 14-16.

17 Id.

18 Id.

19 Id.

Florida Attorneys Counseling on Evictions ("FACE")

By Hung V. Nguyen, Esq., The Nguyen Law Firm, Coral Gables, Florida

In response to the anticipated tidal wave of evictions in Florida, the RPPTL Section, led by the late Lynwood Arnold, worked in conjunction with legal aid organizations from around the State of Florida on a project labeled Florida Attorneys Counseling on Evictions ("FACE") in order to aid tenants facing eviction due to COVID-19. In Florida alone, it is estimated that over 800,000 evictions cases will be filed once the moratorium on evictions is lifted. The moratorium in Florida has been the result of various orders from Florida Governor Ron DeSantis; federal law, including the Coronavirus Aid, Relief, and Economic Security ("CARES") Act; and an order of the Center for Disease Control and Prevention ("CDC").



Through Lynwood's leadership, RPPTL created a small task force to work with legal aid organizations to create an infrastructure for attorneys to volunteer to represent tenants facing eviction. A key element of this infrastructure includes producing and disseminating CLEs to those who volunteer to take a pro bono eviction case. The work of the legal aid organizations, especially Legal Services of Greater Miami, was vital to this effort. Another key element of the project is matching those in need with volunteer lawyers. This was accomplished by working with local legal aid organizations from across the State of Florida. The list of legal aid organizations currently working with FACE includes Legal Services of Greater Miami (Miami), Legal Services of North Florida (Tallahassee), Volunteer Lawyers Program of Bay Area Legal Services (Tampa), Legal Aid Service of Broward County (Ft. Lauderdale), Coast to Coast Legal Aid of South Florida (St. Petersburg), Jacksonville Area Legal Aid, Inc. (Jacksonville), Legal Aid Foundation of the Tallahassee Bar Association (Tallahassee), Legal Aid of Manasota, Inc. (Sarasota), Gulfcoast Legal Services (St. Petersburg), Three Rivers Legal Services, Inc. (Gainesville, Lake City, and Jacksonville), Southern Legal Services (Gainesville), Legal Aid of Collier County (Naples), Legal Aid Society of the Orange County Bar Association, Inc. (Orlando), Brevard County Legal Aid (Rockledge), Community Legal Services of Mid-Florida (Orlando), Florida Rural Legal Services, Inc. (Stuart), and the Florida Bar Foundation.

FACE provides volunteer attorneys with support including CLEs and other training, legal forms, and mentors. While eviction matters are litigation based, most of the pro bono work required involves negotiating on behalf of the tenants.

FACE is currently accepting volunteers around the State of Florida, and it is anticipated that the need will be extremely high once the moratorium on evictions expires. Attorneys can volunteer by contacting their local legal aid organizations or by contacting Hung V. Nguyen.



Frontline Heroes Program

By Johnathan L. Butler, 13th Circuit Lead ALM

On July 16 and July 17, 2020, Bay Area Legal Services in Tampa Bay ("BALS") hosted the initial "Frontline Heroes Program" via Zoom. Attorney Harley Herman of Plant City originated the program theme to assist those on the front lines — health care workers, grocery store staff and other necessary employees — who work tirelessly to serve the public. As Harley stated, "as our offices were closing down during the lockdown period, I both saw the need for frontline workers to have healthcare directives and wanted Florida lawyers to demonstrate that our skills could make a meaningful contribution to the needs of our community. Anyone can sing or dance on a video, but as lawyers we have unique skills to help our frontline heroes during this crisis."

Beginning in April, our "grass roots" committee worked closely with Harley and BALS to develop the program. We served nurses and health care workers from the James A. Haley Veterans' Hospital in Tampa and some other local health care facilities. Volunteer attorneys were provided with Zoom training from BALS staff in advance of the day of service. Participants met privately with the volunteer attorneys in "breakout rooms" for 30-minute sessions to review plus complete Living Wills and Health Care Surrogate forms. As BALS Director Jena Hudson stated, "when Harley Herman approached Bay Area Legal Services and RPPTL about starting this project, I was thrilled. I have really enjoyed working with Harley, RPPTL (Johnathan and Rebecca), and my team at BALS to get this project off the ground. Being able to serve frontline heroes through this project has been such a wonderful way to give back to those who are out there working to help Floridians through this pandemic. We are so grateful for all of the RPPTL members who have stepped up to do this work. The frontline heroes we have served thus far have been beyond grateful for the assistance."

Participants shared the following comments:

"The Frontline Heroes Project made it easy and convenient to complete something most people need to do, but don't take the time to do. Our lawyer/adviser was helpful and friendly, and we appreciate her altruism in these difficult times."

—Will (participant)

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Frontline Heroes Program, from page 36

"With so many uncertainties going on in the world, knowing that there are ones, ready and willing to help us on the frontlines to plan ahead and let others know what kind of care we want. Now my loved ones are alleviated from making tough decisions regarding my health with the advance directive project. The process was smooth and everyone was so nice, I am so thankful for all those who worked on the frontline project."

—Yvonna (participant)

Volunteer attorneys Laurie Valentine and Sarah Peet shared the following:

"Getting them these documents is so necessary, especially in the event of incapacity where health care directives, powers of attorney are vital for completing estate planning. I love to participate in things like this and my firm supports this. Anything that you do, not just pro bono, give back where I get much more back. I am pleased this program was put together and for you taking the time to do this."

—Laurie Valentine, Esq. (volunteer attorney)

"During these times, I was struggling with finding how I could help those whose lives have been impacted by COVID-19. Bay Area Legal Services and the Frontline Heroes Project presented the perfect opportunity for me to give back to first responders. It makes me feel good to know we are giving some peace of mind to those on the front lines."

—Sarah Schelling-Peet, Esq. (volunteer attorney)

Sarah continued by stating, "this is amazing. I really enjoyed my time with the client and this environment where people are struggling. It is important to give back, and it is hard to know the right place to and where to help. I like to help people as it is in my nature, where first-hand, I get to the see the results of those who are on the front lines. It is certainly challenging circumstances every day. I know she (my client) is so grateful, and she said 'thanks' to me. I saw her smile as this seemed to be a 'weight lifted from her shoulders.' I was so happy to do it and would do it again. It was such an easy process (getting trained on Zoom, login) in every way."

To meet the needs of more participants, the Frontline Heroes Committee held another round of Zoom meetings with participants and volunteers on Thursday, August 27, 2020. As the committee continues to get the word out via social media, local health care associations, and word of mouth, we will provide further updates on this program. Thanks to our 6th Circuit Lead At Large Member (ALM) Rebecca Bell for helping your author in the several conference calls, committee meetings and recruiting RPPTLs to help us.



Roundtable

Highlights of the Meeting of the RPPTL Section

REAL PROPERTY DIVISION

Saturday, August 22, 2020

Virtual Meetings, Florida

Prepared by Colleen Sachs, Esq., Jin Liu, Esq., and Michelle Gomez Hinden, Esq.

Thank you to Roundtable Sponsor: Fidelity National Title Insurance

The meeting was called to order at 8:00 a.m., with the Director, Katherine Frazier, welcoming attendees.

Sponsor Recognition: The Director thanked Fidelity National Title Group for sponsoring the Roundtable and recognized Karla Staker who addressed the group.

Summary of Tampa Roundtable Meeting: There was a motion to approve the summary from the Tampa Roundtable meeting. The motion passed and Colleen Sachs was thanked for her hard work compiling the roundtable meeting summaries.

Action Item:

Condominium and Planned Development Committee – William P. Sklar and Joseph E. Adams, Co-Chairs - Bill Sklar presented a request to support legislation resolving technical inconsistencies and errors within Chapters 718 and 720, Florida Statutes, that have arisen due to multiple revisions of the Chapters and to provide additional clarification as to how Chapters 718 and 720 are to be applied.

He reported that this is a technical amendment bill that has been in the works for 3 years. It takes into account the strategic planning of the Section. It is the result of a subcommittee that reviewed the technical issues in the Chapters, avoiding major substantive changes.

Joe Adams recognized the committee members that helped with this project. He noted that there is an ongoing need to conform the various provisions of chapters 718 and 720, he provided examples of how they differ when they should be the same, indicated that the overarching goal was to create consistency in the procedural statutes, and the result would also provide consistency when advising clients.

The Condo Committee, which represents a broad spectrum covering the developer side, insurance side and association side unanimously approved this legislation.

Trey Goldman provided comment regarding some of the proposed changes in language. He noted that there were issues with inconsistency, and that there would need to be a delayed effective date to permit contracts used across the state to be changed to comply with the statute.

Joe responded that he sees the intention to winnow down what is required to be disclosed and the 2nd substantive change is that the current annual budget has been added, which seemed like a commonsensical addition of what condo purchasers need to know. He acknowledged that there may be some disconnect between certain line references and that the comment seems to be well taken.

Shawn Brown and Joe Adams recommended that all of Section 11 be removed from the proposed Bill then to move forward with passing the remainder of the Bill. There was a motion to support the legislation with the removal of Section 11. The motion was seconded and passed.

Information Items:

Condominium and Planned Development Committee – William P. Sklar and Joseph E. Adams, Co-Chairs

Bill Sklar addressed the consideration of legislation clarifying and expanding the emergency powers of community associations during a pandemic event or public health crisis. He received request from Leaders in Senate and the DBPR to provide technical input regarding the language regarding the emergency powers since pandemics were not originally contemplated.

Joe Adams noted confusion as to whether the board of directors has the ability to exercise emergency powers during a pandemic since the original statute contemplated hurricanes and not other types of emergency situations. The condo committee approved what was proposed with approximately 90% approval.

Examples of provisions addressed include provisions to expand the vote to also include Zoom or video/audio conference meetings instead of in person or by proxy; and

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the ability of a board to shut down recreational amenities, (ex. swimming pools), to control access to guests, family members and invitees, and to control access to owners coming from hot zones. Currently, the statute does allow the boards to keep owners from coming into their units, however, this is related to hurricane issues where the property may be deemed uninhabitable.

At this point, this is just an information item; however, any changes to this statute may potentially be brought up for an Action Item at the next Meeting

Condominium and Planned Development Committee – William P. Sklar and Joseph E. Adams, Co-Chairs - Consideration of removal of opposition to legislation requiring any insurance policy issued to an individual condominium unit owner to prohibit the right of subrogation against the condominium association, including a change to Fla. Stat. 627.714(4) was brought up.

Michael Gelfand stated that there had not been an opportunity for this to be adopted by the committee and moved that the item be deferred to another meeting so the committee can consider it. The motion was seconded and passed. The item will be moved back to the committee for consideration.

Real Property Finance & Lending – Richard S. McIver, Chair - Support for the amendment of the Assignment of Rents Statute (697.07) to apply to subsequent owners of real property subject to a mortgage or other instrument containing an assignment of rents as collateral for a loan; and support for the amendment of the Order to Show Cause Statute (702.10) to apply to subsequent owners of real property subject to a mortgage, in which the court may order the owner of non-homestead property to make payments during the pendency of a foreclosure were brought to the attention of the division.

Shawn Brown noted that this is a suggested legislation item. Right now, a third party buying junior liens can drag the foreclosure process, which is an issue especially prevalent in the Tampa region, and trial courts struggle to deal with. The proposed legislation provides that if there are third parties involved with the foreclosure procedures, the mortgagee can request rents received by this third party be sequestered. This proposed legislation affects condominium associations. In working with the Lending Committee it has been suggested that in the case of sequester condominium association assessments can still be paid. If the association takes title, it does not run into the same issue by renting the unit out. They now have created a committee to work through this, and hope to come back to this topic.

Any concerns on this issue should be raised with Richard S. McIver or Shawn Brown.

Supreme Court Leasing Forms Update – Brenda B. Ezell, Real Estate Leasing, Chair - Brenda said they are at a point where they have finalized the leases. She said Kristen Jaiven has done a great job of taking over this project and Brenda wants to give Kristen credit on this. Kristen discussed in detail at the committee the changes to the leases. There are not many substantive changes, but there is a lot of clean up. The next step is to present these changes to the Florida Realtors and legal aid societies to review. She hopes to bring final version to Executive Committee, at the December meeting.

Proposed New Chapter 22 Easement Standards – Rebecca Wood, Title Issues and Standards, Chair - Rebecca acknowledged the involvement of Chris Smart in this project, noting that the easement standards came together under his leadership. This effort was recently under the guidance of Greg Hall (who is the subcommittee chair). Rebecca encouraged section members to email her with feedback on the proposed legislation, indicating more input is welcome so these standards can be finalized and voted on.

Potential Remote Notary Online Notary Amendments - Melissa Murphy, Liaisons with FLTA, Chair - Melissa Murphy presented as Chair of Liaisons with FLTA. FLTA has been evaluating the experience of the real estate industry with the Remote Online Notary law and feels there are changes to the statute necessary to make it more workable within the market. Melissa summarized the changes being proposed or considered include shifting the storage of videotape from the notary to the RON service provider; certification from the RON service provider that they are in compliance with the law; deleting language that requires foreign passports to be stamped by the USCIS; permitting notaries that personally know the signer to bypass the knowledge based authentication process; distinguish between certain fees on the closing statement such as notary and use of platform fees; and amending the notarial block so that it includes which platform is used during the notarization.

She also discussed adding language that will clearly allow paper online notarization, also referred to as PRON, to make lenders more comfortable with the process.

These proposed changes have not yet been approved with the FLTA board of directors, and this is an information item so the Committee is kept up to date. She will have more information for the Section and she will keep the Section updated if anything changes. It is anticipated that FLTA will take action.

Deed Working Group on Public Record Redactions – Brian W. Hoffman, Title Insurance, Chair - Brian Hoffman presented, discussing that the deed redaction bill passed in 2019 extended the redaction of addresses to include legal descriptions. The Section opposed that legislation. This bill

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would result in redaction of close to half of the public records. Senator Kathleen Passidomo and others have recognized the issues arising from the broad definitions under the Bill so they have created a task force to address this (with RPPTL, FLTA and others). They are currently working on proposed solutions, which will then need to be vetted. Real Estate Finance is seeking to form a subcommittee. Brian reached out to Jason Ellison. Going forward, they will have a group to work through a politically viable solution. Brian hopes that they will have some proposed solutions available in time for the legislative session.

Amicus Hayslip Opinion – Brian W. Hoffman, Title Insurance, Chair - Brian Hoffman discussed *Hayslip*, a second DCA July 2019 case, which concerns a mandatory arbitration provision in an initial deed. The property was conveyed to a subsequent purchaser who filed a lawsuit against the original developer. The developer sought to enforce the mandatory arbitration provision in the initial deed. The issue was whether one can enforce the mandatory arbitration through the chain of title. The Section has approved efforts to provide an amicus brief. They have a framework and have filed a notice of intent that they will submit an amicus brief.

Committee Reports

Real Property Problems Study – Lee A. Weintraub, Chair; Adele I. Stone, Susan K. Spurgeon and Anne Q. Pollack, Co-Vice Chairs - Silvia Rojas reported on Lady Bird deeds. This is preliminary information only. Originally, the committee appointed a subcommittee; however, on reviewing other states' laws, they discovered a Model Act and decide to work with that. The Model Act came is from 2019. Nineteen states have adopted it, 3 more states have introduced it to their legislative process, 26 states have some form of this legislation. The Model Act has been reviewed, and the subcommittee/task force has taken some provisions from other states to enhance it. This will not replace or touch life estates but will address the conflict in interpretations of Lady Bird deeds, including whether the remainder is vested or not, whether the life tenant may change their mind, whether a judgment may attach, and the limitation on liens of creditors of the life tenant.

Attorney Banker Conference – E. Ashley McRae, Chair; Kristopher E. Fernandez, R. James Robbins, Jr. and Salome J. Zikakis, Co-Vice Chairs. No report.

Commercial Real Estate – Jennifer J. Bloodworth, Chair; E. Ashley McRae, Eleanor W. Taft and Martin A. Schwartz, Co-Vice Chairs. No report.

Condominium and Planned Development – William P. Sklar and Joseph E. Adams, Co-Chairs; Shawn G. Brown and Sandra E. Krumbein, Co-Vice Chairs. No report.

Condominium and Planned Development Law Certification Review Course – Jane L. Cornett, Chair; Christene M. Ertl, Vice Chair. No report.

Construction Law – Reese J. Henderson, Jr., Chair; Sanjay Kurian and Bruce D. Partington, Co-Vice Chairs. No report.

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

Construction Law Institute – Jason J. Quintero, Chair; Deborah B. Mastin and Brad R. Weiss, Co-Vice Chairs. No report.

Development & Land Use Planning –Julia L. Jennison and Colleen C. Sachs, Co-Chairs; Jin Liu and Lisa B. Van Dien, Co-Vice Chairs. No report.

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; Martin S. Awerbach, Lloyd Granet, Brian W. Hoffman and Laura M. Licastro, Co-Vice Chairs. No report.

Real Estate Leasing – Brenda B. Ezell, Chair; Christopher A. Sajdera and Kristen K. Jaiven, Co-Vice Chairs. No report.

Real Property Finance & Lending – Richard S. McIver, Chair; Jason M. Ellison and Deborah B. Boyd, Co-Vice Chairs. No report.

Real Property Litigation – Michael V. Hargett, Chair; Amber E. Ashton, Manuel Farach and Christopher W. Smart, Co-Vice Chairs. No report.

Residential Real Estate and Industry Liaison – Nicole M. Villarroel, Chair; Louis E. "Trey" Goldman and James A. Marx, Co-Vice Chairs. No report.

Title Insurance and Title Insurance Liaison – Brian W. Hoffman, Chair; Mark A. Brown, Leonard F. Prescott, IV, Cynthia A. Riddell and Jeremy T. Cranford, Co-Vice Chairs. No report.

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

Adjournment – Meeting adjourned at 9:33 a.m.

Roundtable

Highlights of the Meeting of the RPPTL Section

PROBATE AND TRUST DIVISION

Saturday, August 22, 2020

Virtual Meetings, Florida

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

Thank you to the Roundtable Sponsors:

Stout Risius Ross, LLC, Guardian Trust & Heritage Investments

Sarah Butters, Director of the Probate and Trust Division, called the meeting to order at 8:00 a.m.

Introduction of Current and New Section Fellows

Current Fellows (2019-2021):

Anthony Romano - Palm Beach Gardens

Joseph Percopo - Orlando

New Fellows (2020-2022):

Nicole Bell – St. Pete

Lilleth Bailey – Ft. Lauderdale

Recognition of 2019-2020 Award Recipients – Bill Hennessey, RPPTL Probate & Trust Section Chair

1. John Arthur Jones Annual Service Award
   a. Real Property Section: Michael J. Gelfand
   b. Probate & Trust Section: Hon. Mark Alan Speiser
2. Robert C. Scott Memorial Award: Margaret A. Rolando
3. William S. Belcher Lifetime Professionalism Award: Melissa J. Murphy
4. Rising Star
   a. Real Property Section: Jennifer J. Bloodworth
   b. Probate & Trust Section: Jenna G. Rubin
5. At-Large Member of the Year: Johnathan L. Butler

Legislative Committee Report – Wm. Cary Wright and John Moran, Co-Chairs: Updated forms, including a new Legislative or Political Position Request Form, are on the RPPTL Website. Substantive committee members working on legislation are reminded to consider the effective date of any proposed bill. The RPPTL Section has several proposed legislative initiatives for 2021, including: legislation resolving technical inconsistencies and errors within Chapters 718 and 720, Florida Statutes, that have arisen due to multiple revisions of the Chapters and to provide additional clarification as to how Chapters 718 and 720 are to be applied; glitch-bill amendments to clarify and fix certain sections of Chapter 117, Florida Statutes, relating to online notarization and the witnessing of electronic records; amendments to the Florida Probate Code and Florida Trust Code to clarify that any testamentary bequests made in favor of a former spouse is void upon divorce from that spouse, regardless of when the bequest was made; amendments to the Florida Probate Code to permit a personal representative to post a bond in lieu of the imposition of restricted depository accounts; amendments to the Florida Trust Code making it clear that the same statute of limitations for breach of trust against a trustee applies to directors, officers, and employees acting for the trustee; proposed amendments to enact a new part of the Florida Trust Code to permit married couples to create community property in Florida by transferring assets to a Florida Community Property Trust; and overhaul of Chapter 744, Florida Statues.

CLE Report – Sancha Brennan, Co-Chair:

Date	Course No.	Title	Location
11/13/2020	4068	Probate Law	Video Webcast
2/5/2021	TBD	Trust & Estate Symposium	TBD
2/12/2021	TBD	Attorney Bankers Conference	TBD
4/9-10/2021	4074	Wills Trusts & Estates Certification Review	Orlando
4/23/2021	TBD	Guardianship CLE	TBD
6/4/2021	TBD	Convention CLE	Marco Island

Action Items

Ad Hoc Committee on E-Wills – Angela Adams, Chair: Angela addressed amendments to Florida Statutes 117,285, 709.2119, 732.401, 732.503, 732.521, 732.703, and 747.051

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relating to electronic notarization of testamentary documents. The amendments correct glitches and revise forms contained in Florida Statutes to comply with the new notarization procedures.

Ad Hoc Guardianship Law Revision Committee - Nicklaus J. Curley, Stacy Rubel, and David Brennan, Co-Chairs: The Committee presented its re-write of the Guardianship Code for which legislative action is underway. The legislation is intended to intended to protect due process, maintain last resort status of guardianship, and manage the expenses of guardianship proceedings.

Probate Law Committee – M. Travis Hayes, Chair: Travis presented proposed changes, spearheaded by Richard Sherrill and his subcommittee, to clarify within the Florida Probate Code and Trust Code that any testamentary bequest made in favor of a former spouse is void upon divorce from that spouse, regardless of when the bequest was made (a fix to *Gordon v. Fishman*, 253 So. 3d 1218 (Fla. 2d DCA 2018)). Travis also addressed amendments to the Probate Code, spearheaded by Patrick Duffey and his subcommittee, to permit the posting of a fiduciary bond in lieu of a restricted depository account (a fix to *Goodstein v. Goodstein*, 263 So. 3d 78 (Fla. 2019)).

Estate and Trust Tax Planning Committee - Robert L. Lancaster, Chair: The Committee considered and discussed the adoption of a new Part XV of the Florida Trust Code to be titled "Florida Community Property Trust Act of 2021."

Probate and Trust Litigation Committee - John Richard Caskey, Chair: The Committee considered and discussed proposed changes to Florida Statutes § 736.1008 so that the same statute of limitations for breach of trust against a trustee applies to directors, officers, and employees acting for the trustee.

Information Items

Asset Protection Committee – Brian Malec, Chair: Michael Singer presented proposed changes to Chapter 222 to clarify the impact of an assignment or pledge on certain exempt assets (the fix to *Kearney v. Kearney, 129 So. 2d 381 (Fla. 1st DCA 2014)*.

Ad Hoc Professional Fiduciary Licensing Committee – Angela Adams, Chair: Angela addressed the committee's work on potential licensing of professional fiduciaries. The committee's recommendation is not to move forward with the legislation because there is insufficient fiscal funding and support for the government oversight agency or department that would implement and enforce the licensing requirements.

Adjournment. The next Probate and Trust Division Roundtable meeting was held at Disney Yacht Club, Lake Buena Vista, Orlando, Florida on December 5, 2020.

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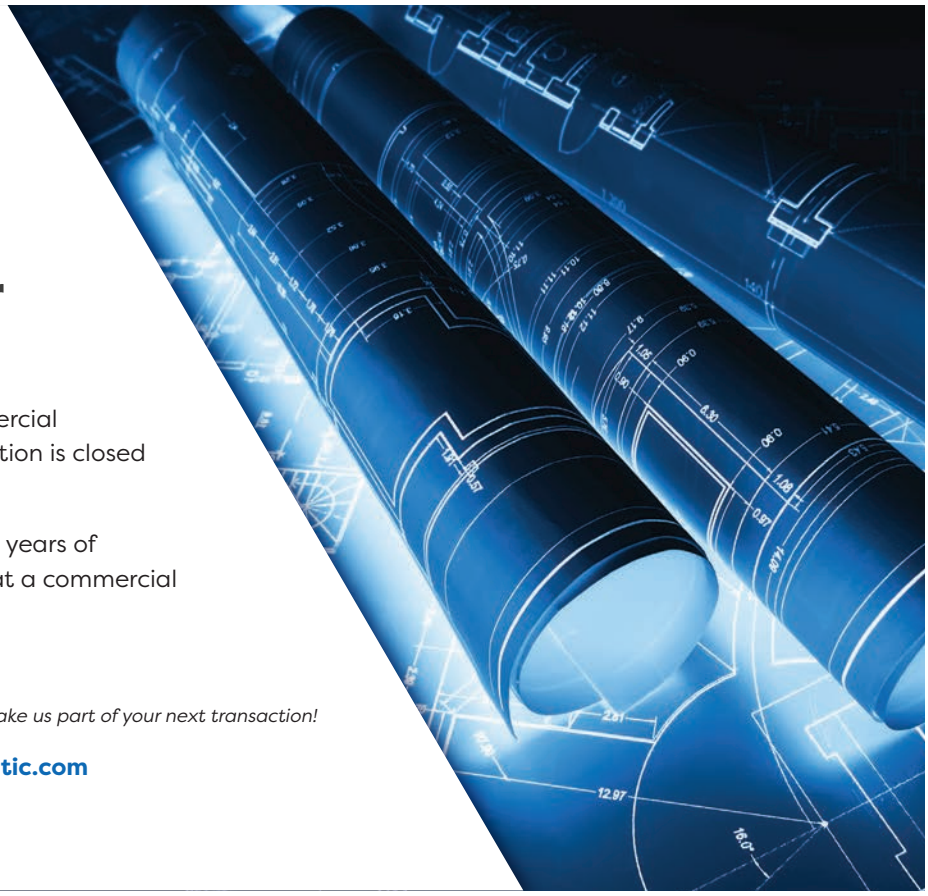
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Residential Real Estate Transactions – The Persistent Problem With Permits

By Erin Miller-Meyers, Esq., Grant Cottrell Miller-Meyers, PLLC, Naples, Florida

Real estate practitioners were hopeful that Florida House Bill 447 ("HB 447") would eliminate permit-related headaches in residential real estate transactions. Under HB 447, local governments can send written notice to an owner and a contractor that a building permit is about to expire,[1] thus potentially reducing the number of open permits discovered during a Buyer's inspection of the property. The local governments also have the discretion to close permits issued by the government that are more than six years old without requiring a final inspection where there are no apparent safety hazards,[2] thus alleviating the burden of homeowners seeking final inspections and permit resolution for decades-old improvements. However, some building officials are reluctant to administratively close expired permits, and a year after HB 447 became effective, open and expired permits can still be a painful part of a real estate transaction.

For example, Paragraph 12 of the FR/BAR Residential Contract for Sale and Purchase indicates that the permit search and notification to the Seller of any open/expired permits or unpermitted improvements must be completed within the Inspection Period.[3] When the default Inspection Period is 15 days, and closing is typically scheduled 30 to 45 days later, identifying and addressing open and expired permits prior to closing can be a challenge. Whether the permit search is performed by the attorney or a third-party provider, local municipalities are often unable to provide the permit search information within the Inspection Period specified in the contract. Even if the open or expired permits are identified early, satisfying the requirements of the permits can take weeks or months.

When Representing a Buyer

Consider including a contract provision requiring the Seller to close all open/expired permits prior to closing at Seller's expense. If the property is in an area where there are significant delays in receiving permit searches, extend the Inspection Period with respect to open/expired permit searches to allow enough time for the permit search to be received. Order the permit search early in the transaction or during negotiations. Inform the Buyer if the permit search will likely not be returned prior to the end of the Inspection Period so the Buyer can request an extension or decide whether to proceed with an As-Is transaction.

When Representing a Seller

With the Seller's written consent, order or conduct a permit search at the time of listing or prior to contract execution, to allow enough time to satisfy the permit requirements. If the Seller does not close the open/expired permits, the Seller must disclose their existence to a future purchaser.

Explain that a Buyer will likely perform a permit search and request permits to be closed as part of the real estate closing, and that depending on the terms of the real estate contract, the Seller may be required to expend up to a certain amount of funds, time, and energy to close the permits. Be mindful of the deadline for satisfying the permit requirements under the contract, as they may differ from the deadlines for completion of general repair or other remedial action.

In a transaction where the Seller selects the Closing Agent and the Buyer is not represented by counsel, consider addressing in your non-representation letter to the Buyer whether you will order a permit search. If not, the Buyer can seek a third-party provider to conduct the permit search during the Inspection Period.

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Depending on the contract, in the event the permit cannot be closed prior to closing, the Seller may be required to escrow funds until the permit requirements have been satisfied. Have an escrow agreement form ready for the parties to execute to allow a portion of the Seller's funds to be withheld until the permits are closed.

Conclusion

Due to the relative speed of a closing, the delays in obtaining permit information, resolutions, or final inspections from local governments, and the likelihood that expired permits will not be administratively closed, counsel for Buyers and Sellers should be proactive in explaining the foregoing to their clients and including provisions in the contract to manage their clients' expectations and help keep their transactions on track.

Erin Miller-Meyers *practices real estate law and presents educational events for real estate agents in Southwest Florida.*



E. MILLER-MEYERS

She is currently the Chair of the Real Estate Section of the Collier County Bar Association, a member of the NABOR Legal Resources Committee, and a 2020-2021 RPPTL Section Fellow.

Erin graduated summa cum laude and Phi Beta Kappa from the University of Florida with a Bachelor of Arts in Spanish, and earned a Juris Doctor, cum laude, from Florida International University College of Law, where she was an articles editor for the FIU Law Review and earned a Master of Arts in Latin American and Caribbean Studies.

Endnotes

1 Fla. Stat. § 125.56(4)(d) (2019).

2 Fla. Stat. § 553.79(15)(c) (2019).

3 Form FloridaRealtors/FloridaBar- 5x Rev.6/19 © 2017 Florida Realtors® and The Florida Bar.

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Westcor Land Title Insurance Company	Sabine Seidel	866-629-5842
WFG National Title Insurance Company	Joe Tschida	407-708-0408

Computershare or Computer-Nightmare?

By Nicole Bell Cleland, Esq., Legacy Protection Lawyers, L.L.P., St. Petersburg, Florida

If you are a T&E attorney, I'm certain you (or your paralegals) have had to work with clients regarding the transfer of stock held at companies such as Computershare, EQ Shareowner Services, AST Financial, etc. In almost every case, it is the same fact pattern: a client owned stock housed at a company like Computershare; the stock was titled in their sole name with no beneficiary; and the owner thought it was small and not worth mentioning during the estate planning process. Later, the owner dies and now we have a probate asset.

On the decedent's date of death, let's say the stock is worth around $25,000, so we commence a summary administration proceeding. Around a month later, we receive our Order of Summary Administration.

So far, no problem; not ideal, but it happens.

With most assets at this point, the client (or their attorney) would complete Computershare's forms and submit them with the Order of Summary Administration (certified copy) and a Death Certificate. Sounds easy, right? For some reason, Computershare accounts never work quite this simply. For those practitioners who have struggled with this very common experience, here are some tips from a new associate that had to deal with this on a routine basis:

Prepare your client to have patience. This seemingly straightforward process is anything but straightforward.

Know the forms. The forms that get mailed to your client may not necessarily be all the forms you need. Learn all the accounts your client has and get to know all the forms with each company, so it is a "one and done" submission.

Or, get with your client and complete the forms together online. This is a trickier option because many clients do not have an online Computershare account. If an online transfer is possible, then utilize the wonderful tool of Zoom and share your screen with your client to complete the forms together.

Befriend a Medallion Signature Guarantee. One recurring issue is our client's access to Medallion Signature Guarantees because fewer banks are offering them (because, fortunately, fewer banks are requiring them). However, companies like Computershare still require a Medallion Signature Guarantee (which is a notary on steroids) for stock accounts valued at over $10,000. Sometimes, the client's bank will authorize the Medallion Guarantee for them (usually if the client has an established relationship with that bank). If your client cannot obtain one from their bank, there is an online option (which is pricey). But, ideally, you should have a bank where you can refer your clients to obtain a Medallion Guarantee in the event their personal bank will not do so. If you don't have that connection, get one.

Original Certificates. If issued, the original stock certificates are required to be mailed in when transferring the stock. If lost, an affidavit and application of lost original certificate must be completed. However, it is nearly impossible to know if original certificates were issued unless your client remembers. If the original certificates are lost, the payment of a surety bond will be necessary and will cost 3% of the value of the stock plus processing fees. If possible, have your client call *before* completing the forms if there are issued paper certificates.

Babysit. Like we need to do with many institutions, we need to follow-up with the submission. Why? You don't want to mail in the documents and forget for a couple of months, to later discover they never received your submission and now you have to order a more current certified copy of the Order of Summary Administration because they won't accept anything older than 60 days. (Some are 30 days!) If possible, fax in the information instead of mail. If you get an email address, you're golden.

Of course, if you have any other tips or tricks of the trade, this Author will graciously accept them and pass them along to her team.


N. BELL CLELAND

***Nicole Bell Cleland**, Esq. is an associate attorney at Legacy Protection Lawyers, LLP based in St. Petersburg, Florida. Nicole focuses her practice on estate planning and trust/probate administrations. She received her J.D. from Stetson University College of Law, and is a 2020 Fellows for the Real Property, Probate, and Trust Law Section of The Florida Bar.*

Probate Case Summaries

Prepared by Lilleth Bailey, Esq., Fort Lauderdale, Florida

Where there is substantial, competent evidence in the record to support an award of attorney's fees and costs, the appellate court will not overturn the award.

Harris v. Estate of Harris, No. 3D19-1159, 2020 WL 5223757 (Fla. 3d DCA Sept. 2, 2020)

This case involves the Third District Court of Appeal's ("Third District") review of a fee order issued by the trial court that stemmed from the administration of an estate. The daughter of the Decedent, who was not the appointed personal representative of the estate, appealed the trial court's order granting a petition by the personal representative's attorney for attorney's fees and costs incurred during the administration of the estate. In the petition, the attorney sought expenses that included $4,500 for retaining other attorneys to defend a foreclosure action. The attorney attached detailed time and billing entries to the petition. On appeal, the daughter of the Decedent argued that the trial court failed to consider the fee agreement that the personal representative had with the attorney. However, according to the record, the Third District found that the personal representative agreed to pay the attorney $325 an hour for estate administrative services. The Third District also noted that the Decedent's daughter did not allege that the attorney acted in bad faith or that there was inequitable conduct.

In analyzing the case, the Third District used the abuse of discretion standard of review. The Third District cited to its prior ruling in *In re Ryeheck's Estate*, where it held that a probate court's order setting fees for the attorney for the estate is clothed with the presumption of correctness and would only be disturbed on appeal when there was a clear showing of evidence that contradicted the court's ruling.[1]

The Third District further cited to Fla. Stat. § 733.6171 (2019), which entitles attorneys for personal representatives to reasonable compensation for the administration of an estate without a court order and does not require the trial court to make detailed findings in connection with the considerations outlined in the statute. Therefore, because there was no abuse of discretion or reversible error, the Third District affirmed the trial court's fee order.

Appellate Court held that the son of the Settlor, who is not the Settlor's guardian, lacked standing to bring a suit challenging the Settlor's revocable trust while the Settlor is still living.

Habal v. Habal, No. 4D19-1493, 2020 WL 5372289 (Fla. 4th DCA Sept. 9, 2020)

This case involves the interpretation of the plain language of Fla. Stat. § 736.0207 (2019). A son, who was a potential beneficiary of his father's revocable trust, filed a complaint against the Trustees of his father's revocable trust. In his second amended complaint, the son alleged that the amendment his father made to his revocable trust, after his marriage to his second wife, was due to the Trustee's undue influence and his father's incapacity. The complaint included, among other things, a claim for tortious interference. The trial court dismissed the son's second amended complaint pursuant to Fla. Stat. § 736.0207, finding that a potential beneficiary could not commence an action to contest a revocable trust while the Settlor (his father) was still alive. On appeal, the son argued that medical documents supported his father's lack of capacity and that exceptional circumstances existed to allow his tortious interference claim.

In its analysis, the Fourth District Court of Appeal ("Fourth District") looked to the plain language of Fla. Stat. § 736.0207 and cited to *Greenfield v. Daniels*, where the Florida Supreme Court held that an unambiguous statutory text should "be given its plain and obvious meaning."[2] The Fourth District also emphasized that Section 736.0207 does not prohibit actions by the guardian of an incapacitated settlor's property but noted that the son was not the guardian of the father's property. Lastly, the Fourth District found that no exceptional circumstances warranted considering the son's tortious interference claim. Therefore, the appellate court affirmed the trial court's order.

Trust exemption did not apply where the Court determined that condominium sale proceeds became the property of the estate. Thus, the trial court's imposition of a constructive trust was an error.

Lefkowitz v. Schwartz, 45 Fla. L. Weekly D1430 (Fla. 5th DCA June 12, 2020)

The Decedent received a loan from his former wife's mother, Schwartz, during their marriage for $260,000 to purchase a condominium in Utah. After the Decedent and the former wife divorced, the former wife agreed to relinquish her half interest in the property. In exchange, the Decedent agreed to repay Schwartz $2,500 per month until the loan was paid, or if the

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condo were sold, he would pay off the loan at closing. Before his death, the Decedent sold the condo and used the sale proceeds to put a down payment towards another condo but died before closing the new property. Schwartz became aware of this and filed a claim in the probate proceeding. Schwartz defined her claim as "unfulfilled obligations of Usher L. Brown [the Decedent] to the Claimant based upon loans made in 2011 to Decedent."

Following an objection to her claim, Schwartz filed an independent action in civil court. In an amended complaint, she alleged, among other counts, a count for breach of contract and for adjudication of a probate claim that was objected to by the personal representative. For relief on this count, Schwartz sought the imposition of a constructive trust. The trial court entered a final judgment granting Schwartz's requested relief on her breach of contract claim and found that the elements justifying a constructive trust were met.

On appeal, the Fifth District Court of Appeal ("Fifth District") addressed two questions. First, the court addressed the question of whether the condominium sale proceeds became the estate's property and second, if so, whether the trial court erred in imposing a constructive trust over the sale proceeds.

Regarding the first question, Schwartz argued that the sale proceeds of the condominium should have never become a part of the estate and that she should have been exempt from the probate process. Thus, to resolve the question, the Fifth District considered the applicability of a generally recognized Florida common law exception known as the "trust exemption," which is an exception to the requirement that creditors file claims in the probate proceeding. The Fifth District relied on the Second District Court of Appeal's analysis in *Scott v Reyes*.[3] In *Scott,* the decedent fraudulently transferred funds from one joint account and had another joint account re-titled in his name only. Scott, the co-owner of the joint account, argued she didn't need to file her claim in the decedent's estate to assert her ownership interest and cited to the trust exception. The Second District Court of Appeal held that the trust exemption did not apply because Scott failed to "allege the existence of an express trust or any other clearly defined means by which the decedent held the accounts on her behalf." Therefore, Scott had to follow the requirements of the Probate Code to file a claim and have the probate court determine the ownership of the accounts.

Similarly, the Fifth District stated that Schwartz's claim was also subject to the Probate Code's requirements. Specifically, because Schwartz's claim was based on a debt owed by the Decedent that arose during his lifetime, she was a creditor of the estate. Therefore, the condominium sale proceeds were an estate asset, and Schwartz could not frame her probate claim as a dispute over ownership.

Additionally, regarding the second question, the Fifth District found that the trial court exceeded its authority by imposing a constructive trust in a post-petition action because, in doing so, it effectively removed the assets from the estate and gave Schwartz's claim a higher priority over the claims of other creditors. For these reasons, the Fifth District reversed the judgment of the trial court.

Interested Person status in a Guardianship is a right, not a privilege that can be removed on a case by case basis.

In re Guardianship of Martino, 45 Fla. L. Weekly D1634 (Fla. 2d DCA July 8, 2020)

This case stemmed from two appeals of two separate orders in a guardianship case that were consolidated into one case before the Second District Court of Appeal ("Second District"). The first order at issue awarded guardian fees and attorney's fees to the former guardian and the guardian's attorney. The second order was a sanction requiring the daughter of the Ward to pay the attorney's fees of the successor guardian. The issues in both cases stemmed from the Ward's daughter's menacing behavior that led to the former guardian's resignation from the Ward's case. Following the resignation, the former guardian and her attorney submitted fee petitions pursuant to Fla. Stat. § 744.108(1). The daughter of the Ward filed objections to both petitions, challenging the reasonableness of the fees. The trial court entered an order finding that the daughter was not an interested person and lacked standing to object to the fee petitions. The court ruled that the daughter was not an interested person because of her constant interference with the administration of the guardianship and the care of the Ward, which caused unnecessary expense to the guardianship estate.

Fla. Stat. § 744.108(1) indicates that a guardian or attorney who provided services to the ward or the guardian is entitled to reasonable fees and costs for the services that they render. These fees or costs cannot be approved without prior notice to the guardian or the ward unless the ward is a minor and totally incapacitated. Florida Probate Rule 5.060(a) states that any interested person who desires notice of proceedings in the estate of a ward may file a written request for notice of further proceedings. Subsection (b) extends the moving party's ability to continue to receive notice of further proceedings with copies of subsequent pleadings and documents as long as the party is an interested party. In *Hayes v. Guardianship of Thompson*, the Florida Supreme Court instructed that heirs of a ward may be considered interested persons for the purpose of participating in guardianship proceedings, including guardian and attorney's fee proceedings, depending upon the circumstances of the case and the specific issues involved.[4]

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Before the trial court and the Second District Court of Appeal, the daughter argued that she was an interested person under *Hayes* and that as an interested person, she was entitled to notice of further proceedings and to participate in the proceeding by allowing her to challenge the fee petitions filed by the former guardian and her attorney.

In analyzing the Ward's daughter's request, the Second District turned to the definition of an interested person in Fla. Stat. § 731.201(23). Under that section, an interested person is defined as "any person who may reasonably be expected to be affected by the outcome of the particular proceeding involved." However, it noted that even *Hayes* instructs that the meaning of an interested person can vary from time to time as it relates to the particular purpose and the matter involved. *Hayes*, 952 So. 2d at 507. Thus, the Second District confirmed that interested person status is not a right, but a privilege bestowed to an individual as determined by the court. Therefore, despite her request for notice pursuant to Probate Rule 5.060, the trial court's determination that the Ward's daughter was not an interested person divested her of the standing to object to the fees of the former guardian and the former guardian's attorney. Thus, the appellate court upheld the ruling of the trial court and noted that the daughter "squandered her privilege to "interested person" status because of her actions.

The Personal Representative of an estate must be substituted as a party in any suit where an indispensable party has died; failure to do so can nullify subsequent proceedings in the case.

De La Riva v. Chavez, 4D19-1371, 2020 WL 5372283 (Fla. 4th DCA Sept. 9, 2020)

In 2013, the Defendant in a motor vehicle negligence action, James P. Todd, died during the pendency of the suit. The Defendant's counsel, who was employed by his insurance company, timely filed a suggestion of death. An estate was opened for the Defendant, but no personal representative was appointed. Despite this, Plaintiff filed his First Amended Complaint on October 8, 2014, and referred to the Defendant as "John Doe, Personal Representative of the Estate of James P. Todd." The complaint was served on the Defendant's counsel but not on the Defendant's estate. Subsequently, the court appointed Lian de la Riva curator of the estate of James P. Todd on July 23, 2015. However, the Plaintiff did not substitute de la Riva as a party defendant. The Plaintiff emailed a settlement proposal, identifying the estate of James P. Todd as a party to the Defendant's counsel and de la Riva; the Plaintiff never received a response and the proposal was deemed rejected. The insurance company and de la Riva filed a motion to dismiss the Plaintiff's First Amended Complaint for failure to name de la Riva as a party. The Plaintiff expeditiously filed its Second Amended complaint to reflect the defendant as Lian de la Riva, Esq., as curator of the estate of James P. Todd.

At trial, the Plaintiff was successful and obtained a verdict against de la Riva and the insurance company in the amount of $112,118.32. After receiving a verdict in his favor, the Plaintiff petitioned the court for attorney's fees and costs based on the earlier rejection of the settlement proposal. The insurance company and de la Riva argued that because de la Riva, the curator, had not been named as a party to the suit at the time the settlement was presented, the settlement was invalid. The trial court disagreed and found that the proposal for settlement was valid and awarded attorney fees pursuant to the settlement and Section 768.79, Florida Statutes. The insurance company and de la Riva appealed the ruling.

In its analysis, the Fourth District Court of Appeal ("Fourth District") cited to Florida Rule of Civil Procedure 1.260(a)(1) which gives the trial court the authority to order the substitution of proper parties following the party's death. Additionally, the Fourth District cited to the Second District Court of Appeal's opinion in *Spradley v. Spradley* which stated that an estate is not an entity that can be a party to a litigation, but that the personal representative of the estate is the proper party.[5] Applying *Spradley* and other cases to the instant facts, the Fourth District found that it was error for the Plaintiff to continue the suit when a representative of the estate had not been appointed. Additionally, the Fourth District found that the Plaintiff violated Rule 1.260(a)(1) by failing to serve the proposal for settlement prior to the proper substitution of de la Riva as representative of the estate. This failure rendered the proposal for settlement invalid. Thus, the Fourth District reversed the trial court's order granting Plaintiff's motion for attorney's fees and costs.


L. BAILEY

Lilleth F. Bailey *received her J.D. from Florida Coastal School of Law. She works as a Judicial Staff Attorney at the 17th Circuit advising Judge Kenneth L. Gillespie, presiding in the Probate and Guardianship Division. Her duties include researching probate and guardianship issues, drafting orders and memoranda of law, and peer training. Before her current position, she worked as an associate attorney at Findlay Stokes Law Firm, where she practiced real estate, estate planning, probate and guardianship administration and litigation, mortgage foreclosure defense, landlord-tenant, and family law. Lilleth is passionate about probate and guardianship law and is actively involved in projects that educate her community about the importance of estate planning.*

Endnotes

1 *See* In re Ryecheck's Estate, 323 So. 2d 51, 53 (Fla. 3d DCA 1975).
2 Greenfield v. Daniels, 51 So. 3d 421, 425 (Fla. 2010).
3 *Scott v Reyes*, 913 So. 2d 13, 17 (Fla. 2d DCA 2005).
4 *Hayes v. Guardianship of Thompson*, 952 So. 2d 498, 506 (Fla. 2006).
5 *Spradley v. Spradley*, 213 So. 3d 1042, 1045 (Fla. 2d DCA 2017).

Real Property Case Summaries

Prepared by Terrence L. Harvey, Esq.
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A prescriptive easement will be granted when a person uses another's land without the legal right or consent, even when the parties are not aware the use was on the servient tenement's property.

Okefenoke Rural Elec. Mbrshp. Corp. v. Dayspring Health, LLC, 2020 Fla. App. LEXIS 10150 (Fla. 1st DCA 2020)

This case is an appeal by Okefenoke Rural Electric Membership Corporation ("OREMC") from the trial court's decision granting Dayspring Health, LLC's ("Dayspring") inverse condemnation claim. Dayspring alleged that OREMC, as an entity with the legal authority of eminent domain, took property away without compensation. OREMC asserted a prescriptive easement over the land. The trial court agreed with Dayspring, finding that no prescriptive easement existed.

The inverse condemnation claim arose when OREMC erected a series of power poles and transmission lines on a right-of-way belonging to the Florida Department of Transportation ("FDOT") along U.S. Route 301.[1] The installation of an inspection station in the road resulted in a jog in the right-of-way boundary, and OREMC inadvertently placed several of its poles on private property outside of the right-of-away belonging to FDOT.[2] Some fifty years later, Dayspring acquired the private property along U.S. Route 301 and later revoked permission of OREMC to use its property, however, OREMC took no corrective action.[3] Dayspring and OREMC each introduced evidence at trial that supported Dayspring's allegation that OREMC and all the predecessors in title of the private property mistakenly believed the poles were on the right-of-way until brought to their attention by Dayspring. The trial court ruled that no prescriptive easement existed, finding that the presence of the power poles was never adverse because they were in place only with the consent of Dayspring's predecessors in title. The trial court noted "placement of the utility poles was at all times consensual by [Dayspring's] predecessors in title, although such consent was based upon the deliberate, but mistaken belief of the aforesaid predecessors in title and [Dayspring] that the same were placed and located on the State Right of Way of US 1/301 and were not upon the subject property of [Dayspring]…."[4]

The First District Court of Appeals citied *Suwannee River Water Mgmt. Dist. v. Price*, 651 So.2d749, 750 (Fla. 1st DCA 1995) in determining the elements that a party must establish in order to obtain prescriptive easement.[5] The court stated that there is a presumption against a finding in favor of acquisition of prescriptive rights and that the party claiming a prescriptive easement has the burden to overcome the presumption.[6] According to the court, the only element in dispute was adversity and the court rejected Dayspring's argument regarding the insufficiency of OREMC's description of "a definite route with a reasonable certain line, width and termini" because the survey on which Dayspring relied was not properly admitted into evidence.[7] Dayspring argued there was no adverse use of the property because all prior owners permitted the use of their land during the twenty years after the placement of the power poles. The court determined that the evidence presented at trial showed that OREMC believed it had erected power poles on a state-owned right of way, and no private owner had ever objected to the poles or consented to them.[8] The court further opined that Dayspring's complaint supports this notion as none of the prior property owners knew the poles were placed on their property until decades later, contrary to any suggestion that the property owners consented to the poles on the property.

The court rejected Dayspring's other arguments: (1) OREMC's failure to provide direct evidence from someone with personal knowledge from the time the poles were first erected; and (2) OREMC's use of the power poles was not adverse to the property owners because they enjoyed the benefit of the delivered electricity to the property. The court opined that all of the circumstances of the case and evidence presented indicated that no prior owner of the property knew that the power poles were on private property and thus no consent or permission was granted. Therefore, OREMC's use of the land was not with consent, but adverse to the owners, and this adversity is not negated by the fact that the owners received electricity from OREMC; thereby, finding OREMC had demonstrated entitlement to a prescriptive easement.[9]

Chapter 726 of the Florida Statutes governs the timeliness of a fraudulent conveyance claim under Fla. Stat. §56.29(9) (2018).

Uoweit, LLC v. Fleming, 2020 Fla. App. LEXIS 10528 (Fla. 4th DCA 2020)

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The Fourth District Court of Appeal affirmed the lower court's dismissal of a complaint with prejudice due to the expiration of the statute of limitations/statute of repose.[10] The court reviewed the appeal filed by Uoweit, LLC ("Uoweit"), a creditor who held a judgment against debtor Thomas Fleming ("Debtor") and filed a "supplemental complaint" to set aside purported fraudulent transfers of real property. According to the supplemental complaint, Debtor defaulted on mortgage payments for real property. When Debtor defaulted, Steelers Trust 2010-1 sued him to foreclose a mortgage on 50 acres of farmland. Steelers Trust 2010-1 later assigned its interest to Steelers REO VII, LLC ("Steelers REO"). Two years later, the lower court entered a final judgment of foreclosure against Debtor and ordered the 50 acres to be sold at a foreclosure sale and retained jurisdiction to enter a deficiency judgment.[11] Steelers REO purchased the 50 acres at the foreclosure sale and later sold it to Lornco Farms, LLC ("Lornco Farms"). Steelers REO also sold to Lornco Farms its right to seek a deficiency judgment. Lornco Farms obtained a deficiency judgment against Debtor, but Lornco Farms later assigned the deficiency judgment to Uoweit. Prior to the entry of the foreclosure judgment, Debtor divorced former wife Robin Fleming ("Former Wife") and deeded his interest in a separate, adjacent 350-acre parcel of real property to Former Wife. Uoweit alleges that despite the divorce, the couple continued to cohabitate, and Debtor continued to control, manage, and operate the property, and that the transfer from Debtor to Former Wife constituted a fraudulent transfer.[12]

The lower court, citing *National Auto Service Centers, Inc. v. F/R 550, LLC*, 192 So.3d 498 (Fla. 2d DCA 2016), "found that the statute of repose or more aptly described, the 'one year savings clause' under the Uniform Fraudulent Transfer Act was triggered by the sale . . ." Because the creditor did not bring the claims within a one-year period, the court found the claims were barred and dismissed the complaint.[13]

On appeal, the court reviewed the application of Fla. Stat. §726.110 (2018) to proceedings supplementary under Fla. Stat. §56.29 (2018). The statute governs a proceeding supplementary but does not regulate this procedure in detail. The proceedings under Fla. Stat. §56.29 (2018) are characterized as "post-proceedings that permit a creditor to effectuate a judgment lien already existing . . . not independent causes of action," and to which outside statutes of limitation or repose do not apply. However, claims under Chapter 726, the Uniform Fraudulent Transfer Act ("UFTA"), have a shorter statutory period before the claims are extinguished.[14]

The court considered whether the shorter period under Chapter 726 applies to the creditor's claims. The court found that the "statute is clear . . . [and] specifically permits claims under 726 in a proceeding supplementary,"[15] but that those claims are subject to chapter 726 and the rules of civil procedure.[16] Simply put, Chapter 726 governs the timeliness of a UFTA claim brought under Fla. Stat. § 56.29(9) (2018). The court found that the lower court properly applied Chapter 726 and the limitation period in that chapter when it dismissed Uoweit's claims.

A mobile home is personal property even when affixed to real property; therefore, foreclosure of a real property mortgage on the land to which the mobile home is attached does not foreclose the personal property interests in the mobile home.

Ark Real Estate Servs. v. 21st Mortg. Corp., 2020 Fla. App. LEXIS 10858 (Fla. 4th DCA 2020)

Ark Real Estate Services, Inc. ("Ark") purchased real property at a foreclosure sale and subsequently sued the lender of a mobile home, 21st Mortgage Corporation ("21st Mortgage"), for the repossession of the mobile home from the land after the sale. The complaint filed by the lender of the foreclosure, Seacoast National Bank ("Seacoast"), named various defendants including the owner and 21st Mortgage. The complaint alleged that Seacoast held a mortgage on the real property and that the owner had defaulted on the loan. Seacoast alleged that "21st Mortgage, may claim some interest in and to the subject property by virtue of a Notice of Security Interest in Manufactured Home, recorded on June 13, 2011 . . . however, any such right, title or interest in and to said property is subordinate, junior, and inferior to the lien of Plaintiff's Original Mortgage Documents."[17] The court noted that the complaint contained no other reference to the mobile home and did not identify the mobile home by vehicle identification number, nor did the notice of lis pendens include any reference to the mobile home.

Ark purchased the land at the foreclosure sale with the belief that the purchase included the mobile home and the land. Ark neither ran a title search nor checked the Department of Motor Vehicles records prior to bidding on the land. The following week, 21st Mortgage repossessed and sold the mobile home, prompting Ark to sue for damages arising out of the repossession and to assert claims of conversion and civil theft. The lower court concluded that the mobile home was not included in the foreclosure, so Ark did not acquire any ownership interest in the mobile home.[18] Ark appealed arguing that the mobile home became a part of the land when it was permanently affixed to the real estate and was captured by the mortgage's after-acquired property clause. Ark further argued that 21st Mortgage's security interest should have been extinguished by the final judgment.

The Fourth District Court of Appeal rejected this argument and opined that "under Florida law, the issue of priority is established by statute, so the mobile home's status as a fixture

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does not impact the validity of the security interest on the mobile home; and . . . the foreclosure action only extinguished competing interests in the . . . land, not any interest in the mobile home."[19] The court found that the Uniform Commercial Code specifically states local law of the jurisdiction under whose certificate of title the goods are covered governs perfection and the priority of a security interest in goods covered by a certificate of title from the time the goods become covered by the certificate of title until the goods cease to be covered by the certificate of title.[20] Once a lender has complied with the statute to perfect a lien, there is no requirement to re-perfect its security interest in a mobile home.

The court found that: (1) 21st Mortgage established its lien in the mobile home pursuant to Florida Statutes; (2) the mobile home was identified as personal property in its loan documents; and (3) such classification was not lost even if it had become affixed to property and deemed so by local taxing authorities. The Court added that "although the mobile home was anchored to the land and hooked up to utilities, the financing agreement between [the owner] and 21st Mortgage demonstrated the [owner's] intent that the mobile home remain personal property through the term of the loan."[21] The court found that Fla. Stat. § 320.015(2) (2006) states that any mobile home classified by the lender as personal property at the time a security interest was granted shall continue to be so classified for all purposes relating to the security interest as long as part of the debt remains outstanding.[22]

As a result, the court held that the foreclosure action did not impact 21st Mortgage's security interest in the mobile home and provided cautionary advice that "to completely understand the status of a mobile home on real property, it is necessary to check the records of the Department of Motor Vehicles."[23]


T. HARVEY

***Terrance Harvey**, Esq. is an attorney with The Harvey Firm, PLLC. Terrence focuses his practice in the areas of real estate, civil litigation and bankruptcy. Terrence earned his B.S. in Business Administration from the Warrington College of Business at the University of Florida and his law degree from the University of Tennessee College of Law. While at Tennessee Terrence served as a member of the executive board for The Tennessee Law Review and Transactions: Tennessee Business Journal.*

Endnotes

1 *Okefenoke Rural Elec. Mbrshp.*, 2020 Fla. App. LEXIS 10150 at 1.

2 *Id.*

3 *Id.* at 2

4 *Id.* at footnote 2.

5 Four elements of prescriptive easement: (1) the claimant and any predecessors in title have made actual, continuous and uninterrupted use of the lands of another for the prescriptive period (twenty years); (2) when the claim is to a right-of-way, the use has entailed a definite route with a reasonably certain line, width and termini; (3) the use has been either with the actual knowledge of the owner or so open, notorious and visible that knowledge of the use must be imputed to the owner; and (4) the use has been adverse to the owner—that is, without permission (express or implied) from the owner, under some claim of right, inconsistent with the rights of the owner and such that for the entire period, the owner could have sued to prevent further use.

6 *Id.* at 3 (citing *Suwannee River Water Mgmt. Dist. v. Price*, 651 So.2d 749, 750 (Fla. 1st DCA 1995)).

7 *Id.* at footnote 3.

8 *Id.* at 4.

9 *Id.* at 6.

10 *Uoweit*, 2020 Fla. App. LEXIS 10858 at 1.

11 *Id.* at 2.

12 The court noted that over seven years after the deed transfer and one year after the creditor acquired the deficiency judgment in the foreclosure action, Uoweit filed its supplemental complaint against the Debtor's Former Wife.

13 *Id.* at 3.

14 See Fla. Stat. §726.1110 (2018), which provides a specific limitation period for the extinguishment of a cause of action for fraudulent transfers.

15 *Id.* at 8.

16 *Id.* at 8.

17 *Ark Real Estate Services*, 2020 Fla. App. LEXIS10858 at 3.

18 *Id.* at 5.

19 *Id.* at 6.

20 *Id.* (citing Fla. Stat. § 679.3031(3) (2013)).

21 *Id.* at 10.

22 *Id.*

23 *Id.* at 12.

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Section By-Laws Updated

By Michael Gelfand, Esq., Gelfand and Arpe, P.A., West Palm Beach, Florida

Swiftly adapting to technological advancements and the pandemic, Executive Counsel members unanimously approved amendments to the Section By-Laws. Approval occurred at the August "Breakers Legislative Update" meeting with a vote of 155 to 0.

Balancing the desire for physical attendance to foster collaboration and professionalism with embracing new methods allowing remote attendance, the amendments expanded what constitutes attendance when a governmental state of emergency has been declared for a meetings location or when a state of emergency significantly impacts a number of Section members ability to attend, or alternatively if a meeting's venue is no longer reasonably available.

If the circumstance occurs, then the Section Chair may issue protocols for attendance and voting electronically. This change applies to Section member's and Executive Council meetings.

In addition, the amendments clarify meeting notice and meeting call requirements. Notices of special Section meetings shall include the purpose of the meeting. The Annual/Election meeting shall be designated by the Section Chair.

The amendments are to Article IV, Section 5 and Article VII, Sections 1 and 2, renumbering the remaining sections. The text of the By-Laws updated with the Amendments are found on www.rpptl.org. Just click on the "About Us" tab and the "By-Laws" page. The Amendments were drafted by past Chairs constituting the Strategic Planning Implementation Committee, Committee Vice-Chairs being Michael A. Dribin, Deborah P. Goodall, Andrew M. O'Malley, Margaret A. "Peggy" Rolando. Committee Chair: Michael J. Gelfand.

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 & COMMITTEE MEETINGS
February 4 – 7, 2021
Hammock Beach Resort • Palm Coast, FL
Standard Guest Room Rate: $289 (single/double)

EXECUTIVE COUNCIL & CONVENTION
June 3 – 6, 2021
JW Marriott • Marco Island, FL
Standard Guest Room Rate: $245 (single/double)

EXECUTIVE COUNCIL & COMMITTEE MEETINGS
July 21, 2021 – July 24, 2021
The Breakers Palm Beach • 1 South County Road • Palm Beach, FL 33480

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).

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