ActionLine

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



Champlain Towers in Surfside, Florida — An Introduction To Reinforced Concrete

What Do I Get Out of the RPPTL Section?

A Tribute to Outgoing Section Chair Bill Hennessey

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What do I get out of the RPPTL Section?

By Robert Swaine, Section Chair, 2021-2022

With membership, you get discounted access to top-tier CLE and a subscription to *ActionLine*, the Section's quarterly publication that includes recent Probate and Real Property case law summaries and substantive articles on a range of topics. These two items make Section membership the best deal in town, but there is more:

Get involved in the Section and get:

Friendships.

Going through the pandemic has placed a heightened value on friendships. With your involvement in the Section, you will meet wonderful lawyers from all over the state. I practice law in the small town of Sebring, and would likely not work in Jacksonville, Tallahassee, Pensacola, Tampa, Fort Lauderdale, Orlando, West Palm Beach, Naples, and Miami. But, with my involvement in the Section, I have developed great friendships with lawyers from each of those cities and from many small towns around the State. We band together and pray for one another when hard times come, especially when the diagnosis is cancer.

Networking.

Once you get involved in the Section, at some point, you will walk into a room that includes people that are smarter and more well-read than you. The funny thing about those smart, well-read people is that they are often the most willing to share their knowledge. My involvement with the Section has allowed me to network with colleagues who have expertise in both litigation and transactional work across a broad range of substantive law. Those are the people I call when I come across a novel issue of law or need a referral.

Education.

A comment I have heard repeatedly over the years is that listening to a debate on the merits of an issue is often a better education than any CLE could provide. I urge you to get involved in committee work sooner rather than later.

How do you get involved?

Go to the Section's website **www.rpptl.com**, click on "Committees" and review the lists of the substantive law committees. Contact the Chair of any committee that interests you. There are many to choose from across a large range of substantive law. If you have questions, please reach out to the Chairs of those committees or reach out to either S. Katherine Frazier, Real Property Division Director or John Moran, Probate and Trust Division Director. I hope to see you in person or via Zoom in some of the upcoming meetings.

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

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

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1	Fall	July 15
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Mary Ann can help with most everything, such as membership, the Section's website, committee meeting schedules, and CLE seminars.



J. BASKIES



M. BEDKE

Letter From The Co-Editors-In-Chief

We hope you enjoy this content-packed edition of *ActionLine*.

Our first article to address the Champlain Towers collapse in Surfside, Florida was submitted by Mark Young of West Palm Beach. Starting on page 16, this article is an educational piece on reinforced concrete. As the author stated: "unfortunately, tragedies have alway been a stimulus for improvement in the construction industry." To that we add that tragedies have also always been a call to action for RPPTL Section members and we expect more content in the coming months regarding the Section's response to the Surfside tragedy and more.

Also, Real Estate practitioners should be sure to go to page 55 and read the discussion of the 1701 Collins case. The article highlights timely issues that keep occurring regarding the documentary stamp tax, but also has ramifications regarding ad valorem tax re-sets and title insurance coverage.

Although focused on Probate and Trust litigators, we are certain you will all enjoy Cady Huss' introduction to Collaborative Law on page 25.

Next, if you are a Trust and Estates attorney who sometimes charges fees based upon the presumptively reasonable fee schedules for serving as counsel for personal representatives or trustees in post-death administrations, then you must read Grier Pressly's important article about the new statute duty to disclose your intended compensation. This new "consumer perfection" statute was not initiated by the Section and was squarely aimed at curtailing attorneys' fees in estate and trust administrations. While the new statutes do not alter the presumptively reasonable fee schedules, they do add new burdens and obligations on attorneys who seek percentage-based compensation.

Speaking of estate and trust administration, starting on page 14, Patrick Lannon of Miami shares his observations on the efficacy of a probate-avoidance technique: building inheritance agreements and terms into clients' Limited Liability Company ("LLC") operating agreements. Whether considering an LLC operating agreement as a probate-avoidance technique or as an irrevocable trust substitute, Patrick's discussion of the Blechman v. Blechman case (and others) is a must-read.

Further, we are pleased to share must-read content on the "Top Title Claims and Closing Risks" as shared by two title insurance counsel at Old Republic, Marcelana Anthony and Ashley McRae. We hope you will enjoy this uniquely insider's look at common title errors they see and tips to avoid them and deal with them. Further, do not miss their discussion of *wire fraud* issues starting on p. 22.

In addition to these articles, we are sure you will enjoy all of our RPPTL Section-focused content filling the balance of this issue:

- The Section Spotlight feature on Friends of the Section from the 2021 Legislative Session;
- Pete Dunbar's Political Roundup summary of RPPTL-Section relevant statutory changes from the 2021 Legislative Session;
- Roundtable Highlights from the Executive Committee Meeting at Marco Island;
- A Tribute to outgoing Section Chair, Bill Hennessey;
- The first chair's column from new Section Chair, Bob Swaine;
- Practice corners; and
- Case summaries.

Enjoy!

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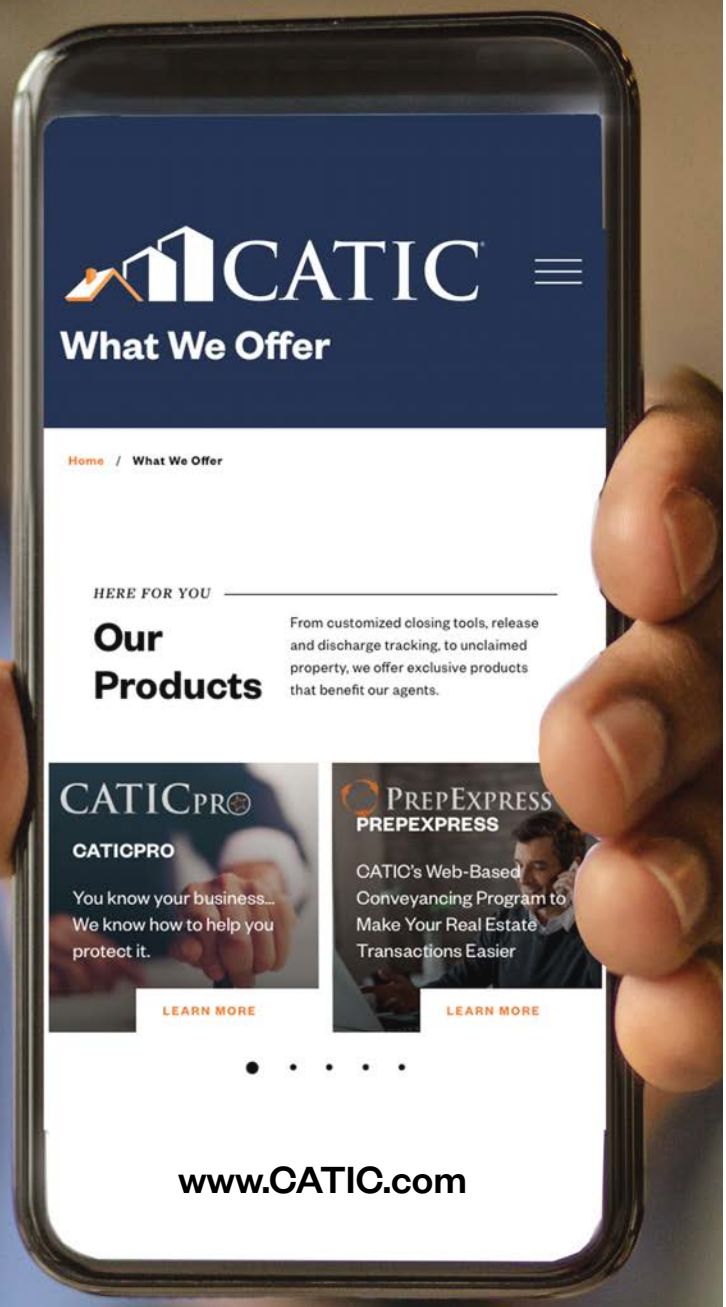

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Alert! New Duty To Disclose Your Statutory Attorney Fee In Estate And Trust Administrations

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

Estates and trusts practitioners need to be aware of recent changes to the attorney compensation statutes. CS/HB 625 is the latest piece of "consumer protection legislation" impacting our practice area (recent legislation involving gifts to lawyers and lawyers-serving-as-fiduciary come to mind). Approved by the Governor in June (and effective for estate and trust administrations beginning October 1, 2021), the new law requires certain advance written disclosures for attorneys who intend to base compensation for representing the estate's personal representative (the "P.R.") or the trustee of a revocable trust upon the settlor's death (the "Trustee") on the advisory fee schedules found in Fla. Stat. § 733.6171 (2021) and Fla. Stat. § 736.1007 (2021), respectively.

New Fla. Stat. § 733.6171 (2021) and Fla. Stat. § 736.1007 (2021) FAQs:

What written disclosures are required in order to take advantage of the advisory fee schedules of Fla. Stat. §§ 733.6171 (2021) and 736.1007 (2021)?

The following disclosures to the attorney's fiduciary client are necessary:

(1) There is no mandatory statutory attorney fee for administration.[1]

(2) The attorney fee is not required to be based on the size of the estate or trust, and the presumed reasonable statutory fee is not necessarily appropriate in all administrations.[2]

(3) The attorney fee is subject to negotiation by the P.R. or Trustee (each of whom may also be referred to herein as the "fiduciary client"), as the case may be.[3]

(4) The selection of the attorney is made at the discretion of the fiduciary client, who is not required to hire the attorney who prepared the will or revocable trust to handle the administration.[4]

(5) The fiduciary client is entitled to a summary of the legal work performed at the conclusion of the representation. Such summary "shall consist of the total hours devoted to the representation or a detailed summary of the services performed during the representation."[5]

What was the impetus for CS/HB 625 and amending Fla. Stat. §§ 733.6171 (2021) and 736.1007 (2021) to mandate written fee disclosures in the estate and trust administration context?

CS/HB 625 was not an initiative by the Real Property Probate & Trust Law Section (the "Section") and was not a part of the Section's omnibus estates and trusts bill during the 2021 legislative session. Practitioners might be surprised to know that the statutory advisory fee schedules of Fla. Stat. §§ 733.6171 (2021) and 736.1007 (2021) have been in the legislative "crosshairs" for a number of years. The initial Senate proposal in this legislative session included a dramatic rewrite of Fla. Stat. §§ 733.6171 (2021) and 736.1007(2021) which would have eliminated the presumption of reasonable compensation based on the fee schedules. The new statutes' required disclosures are the result of legislative compromise where all stakeholders' viewpoints were considered. The Section believes that the compromise strikes the right balance, maintaining the benefits of the presumed reasonable attorney fee while addressing the consumer protection concerns raised by the legislature. In the end, the courts, attorneys, and consumers will all benefit from reduced attorney fee litigation through the continuation of the advisory fee schedules and the presumed reasonable attorney fee, and the addition of the new required client disclosures.

Do the new statutes change the values and percentage rates assigned to the sliding fee schedules in Fla. Stat. §§ 733.6171 (2021) and 736.1007 (2021)?

No. The same sliding fee schedules apply, but if the attorney does not make the required written disclosures, the attorney cannot be paid without a court order or beneficiary consent.

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To whom is the attorney required to make the written disclosures?

The attorney is only required to make the statutory disclosures to the fiduciary client (disclosures are not required to be made to all beneficiaries or interested persons of the estate or trust), and only the fiduciary client is required to sign the acknowledgement that the attorney provided the required disclosures.[6]

Do the statutory disclosures apply to existing estate and trust administrations?

No. The new law applies only to "initial estate and initial trust administrations commenced on or after October 1, 2021."[7]

Do the statutory disclosures apply to the compensation of the fiduciary client?

No. The disclosures only apply to the compensation of the attorney for the fiduciary client.

Do the statutory disclosures apply to the fees that the attorney may charge in representing a Trustee in the ongoing administration of a revocable trust?

No. In the trust context, the written disclosures are only required in connection with the initial administration of the revocable trust following the death of the settlor (i.e., the administrative trust) in those instances where the Trustee's attorney intends to charge a fee based on the statutory advisory schedule provided in Fla. Stat. § 736.1007 (2021).[8]

Are the statutory disclosures necessary if the attorney intends to charge the fiduciary client on an hourly basis, or on the basis of a flat fee that is calculated without reference to the statutory advisory fee schedules?

No. The written disclosures are only required in those instances where the attorney intends to charge a fiduciary client a fee based on the statutory advisory fee schedules of Fla. Stat. §§ 733.6171 (2021) and 736.1007 (2021).[9]

Relatedly, are the statutory disclosures necessary if the attorney intends to charge the fiduciary client a fee that reflects a discount to the statutory advisory fee schedules?

Good question. The new statutes are not entirely clear on this point. The safer practice would dictate making the written disclosures in this instance because the proposed reduced fee is premised on the statutory fee schedules.

If the attorney fails to make the required disclosures, is it still possible to be paid consistent with the advisory fee schedules of Fla. Stat. §§ 733.6171 (2021) and 736.1007 (2021)?

Yes, but only with prior court approval of the fee, or, alternatively, as to an estate, with the written consent of all interested parties of the estate, and, as to a trust, with the written consent of the Trustee and all qualified beneficiaries of the trust.[10]

When does the attorney need to make the required statutory disclosures?

Best practices dictate that the required written disclosures should be made at or near the outset of the estate or trust administration. New Fla. Stat. §§ 733.6171 (2021) and 736.1007 (2021) refer to the written disclosures being made in a "timely manner under the circumstances" and to the attorney obtaining the "timely signature" of the fiduciary client acknowledging that the required disclosures were made.[11] At a minimum, "timely" means that the statutory disclosures must be made before payment of any portion of the statutory fee.

If the attorney is not being paid based on the statutory advisory fee schedules of Fla. Stat. §§ 733.6171 (2021) or 736.1007 (2021), does the attorney need court approval prior to payment of a fee?

No. Although the language of Fla. Stat. §§ 733.6171(2)(d) (2021) and 736.1007(1)(d) (2021) could have been drafted to provide more clarity as to this issue, court approval prior to payment is only required for the attorney who is seeking a fee based on the statutory advisory schedule without providing the required written disclosures.[12]

If the attorney makes the required timely written disclosures with the signed acknowledgment of the fiduciary client, is the attorney fee secured?

No! Interested persons of the estate and of the trust will still have the opportunity to challenge the reasonableness of the statutory fee under the provisions of Fla. Stat. §§ 733.6171(5) (2021) and 736.1007(6) (2021). The presumption of reasonableness is - and always has been - rebuttable. Further, the attorney also has a duty to provide the fiduciary client with a summary of services at the conclusion of the representation as required by Fla. Stat. §§ 733.6171(2)(b)5 and 736.1007(1)(b)5 (2021)!

Are the timely written disclosures required when the attorney is also acting as the P.R. and/or the Trustee?

This situation is not excluded from the new statutory protocols. While it may seem awkward in practice, the attorney should at the very least make the written disclosures to himself as the client! There is a good basis to conclude that the attorney in this instance (wearing two hats) even has a fiduciary duty to pass the written disclosures downstream to the interested persons of the estate and to the qualified beneficiaries of the trust.

What are the positives to take away from CS/HB 625?

First, the statutory changes are, at their core, consumer protection focused. They add requirements that attorneys better communicate, in writing, with clients. That is never a bad thing, especially in the context of a legal process where the fiduciary client is often dealing with the emotional stress of losing a loved one. Further, there is hope that the compromise

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legislation introducing the requirement of written disclosures to Fla. Stat. §§ 733.6171 (2021) and 736.1007 (2021) will reduce the likelihood of future legislative attacks on the advisory fee schedules. Finally, those practitioners who base their compensation on the advisory fee schedules and make the required disclosures may be better positioned to defend their statutory fee in those instances where a beneficiary or other interested person challenges the fee. If such a challenge were to arise, compliance with the written disclosures is now included among the listed factors that the court should consider in determining a reasonable fee upon the petition of an interested person.[13]



J. G. PRESSLY, III

J. Grier Pressly, III *is a shareholder with Pressly, Pressly, Randolph & Pressly, P.A. in Palm Beach where his practice focuses on estate and trust litigation, fiduciary litigation, estate and trust administration, and guardianship litigation. Grier currently serves as Vice-Chair of the Probate Rules Committee of The Florida Bar. Grier is also active in the Real Property, Probate and Trust Law Section of The Florida Bar where he is a member of the Section's Executive Council and serves as Vice-Chair of the Legislation Committee. Grier regularly authors and lectures on estate, trust and guardianship litigation topics.*

Endnotes

1 Fla. Stat. § 733.6171(2)(b)1 (2021) and Fla. Stat. § 736.1007(1)(b)1 (2021).

2 Fla. Stat. § 733.6171(2)(b)2 (2021) and Fla. Stat. § 736.1007(1)(b)2 (2021).

3 Fla. Stat. § 733.6171(2)(b)3 (2021) and Fla. Stat. § 736.1007(1)(b)3 (2021).

4 Fla. Stat. § 733.6171(2)(b)4 (2021) and Fla. Stat. § 736.1007(1)(b)4 (2021).

5 Fla. Stat. § 733.6171(2)(b)5 (2021) and Fla. Stat. § 736.1007(1)(b)5 (2021).

6 Fla. Stat. § 733.6171(2)(b) and (2)(c) (2021); Fla. Stat. § 736.1007(1)(b) and (1)(c) (2021).

7 See Section 3 of CS/HB 625.

8 See Fla. Stat. § 736.1007(1)(a) and (1)(b) (2021).

9 See Fla. Stat. § 733.6171(2)(b) (2021) and Fla. Stat. § 736.1007(1)(b) (2021).

10 Fla. Stat. § 733.6171(2)(d) (2021) and Fla. Stat. § 736.1007(1)(d) (2021).

11 Fla. Stat. § 733.6171(2)(c) and (5)(i) (2021); Fla. Stat. § 736.1007(1)(c) and (6)(i) (2021).

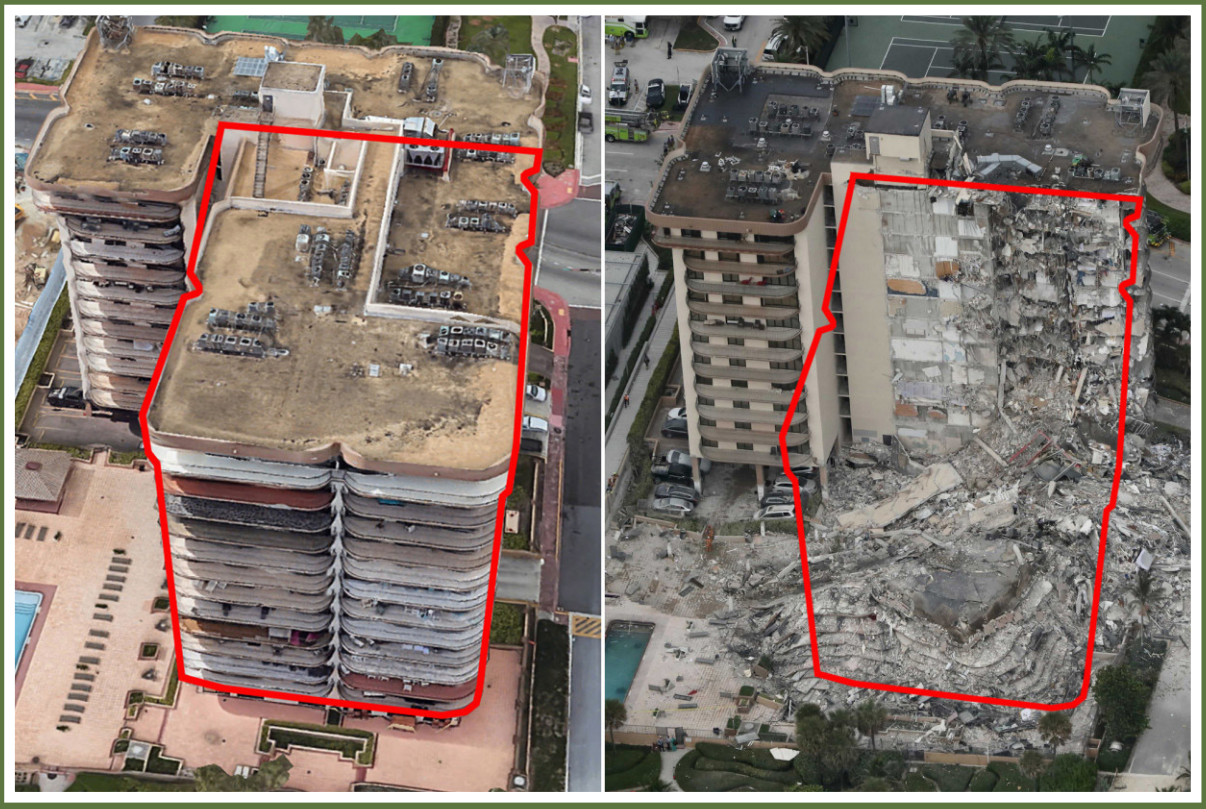
12 The House of Representatives Staff Final Bill Analysis adds a modicum of clarity to this issue.

13 Fla. Stat. § 733.6171(5)(i) (2021) and Fla. Stat. § 736.1007(6)(i) (2021).



An Introduction To Reinforced Concrete

By Mark Young, Esq., AS-BUILT Law, PLLC, West Palm Beach, Florida



This is written to educate attorneys about reinforced concrete, of increasing interest in the aftermath of the tragedy that occurred at the Champlain Towers in Surfside, Florida. Currently Miami-Dade and Broward Counties are the only two counties to require multi-story buildings be re-certified after forty years for structural and electrical compliance. The Champlain Towers were undergoing the recertification when the collapse occurred. Our hearts go out to the families affected by the collapse of Champlain Towers in Surfside, Florida. Unfortunately, tragedies have always been a stimulus for improvements in the construction industry.

Champlain Towers South was constructed in 1981 and a significant portion collapsed on June 24, 2021, at about 1:25 a.m. Subsequently, portions were demolished for public safety. At the time of this writing, about 148 people are either missing or dead. At present, two primary causes seem to have contributed to the collapse: 1) age of the building and 2) uneven settling of the foundation. It may be years before we know the actual cause(s) of the collapse.

The building was a reinforced concrete building located along the beach on the Atlantic Ocean. The age of the building has the greatest impact on the rebar within the concrete, which can rust. Corrosion of steel reinforcing members in concrete is one of the most common problems of reinforced concrete. This article will focus on the history of concrete and recent improvements.

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History of Concrete

Concrete is one of the oldest building materials known to humankind that is still widely used. The Roman Colosseum was constructed of a concrete-like material in 80 AD, almost 2000 years ago. Portions of the Colosseum still stand in Rome, a testament to the enduring nature of concrete as a building material. The Roman Pantheon is one of the oldest large concrete domes still in existence, constructed in 125 AD.

Concrete as a building material is strong in compression, but weak in tension. That means that concrete can absorb significant weight being put on it but cannot resist being pulled apart. When pulled apart (tension), concrete will crack and pull apart relatively easily.

This character of strong in compression, but weak in tension has led to several technological developments, such as the concrete arch – the arch spreads the weight to the walls that the arch connects. The lateral force created by the arch required a structure to absorb that force. The Roman Pantheon has walls about 20 feet thick to support the lateral forces created by the concrete dome; the cross-section of the dome is an arch.

The great cathedrals in Europe had massive arched ceilings. These arches required large buttresses to absorb the lateral forces created by the arch roof structures. Reinforced concrete would eliminate the need for massive buttresses.

Reinforced Concrete

In the late 19th century, reinforced concrete was developed. Narrow bars of steel are strong in tension, but weak in compression – marrying bars of steel with concrete was a natural match. With any new technology, problems arise. The problem was the bars lacked enough friction and the steel bars would literally pull out of the concrete under tension. An American, Ernest L. Ransome, developed a twisted square rod that solved the friction problem.[1] With the steel/concrete adhesion problem solved, reinforced concrete was off to a great start.

What is Concrete?

Concrete is created with three primary ingredients: 1) cement (adhesive), 2) aggregate (usually rock), and 3) water. Cement is created in a super-heated kiln and ground into a fine powder. The cement reacts with the water in an exothermic reaction to bind the aggregate together, producing concrete. Ultra-high strength concrete can have compressive strengths of over 19,000 psi – pounds per square inch. Most concrete is around 3,500 psi.

Concrete requires a certain temperature to cure. Lower temperatures will delay the hardening. Freezing temperatures can cause freezing ice crystals to form, greatly weakening the concrete. Weather that is too hot can speed up chemical reactions, causing cracks in the concrete. Concrete requires hydration during initial curing time, so water is often sprayed on concrete slabs to prevent cracking.

However, water above the amount specified in the design should NOT be added to the liquid concrete mixture – additional water in the liquid mixture will greatly weaken the final product.

Concrete Properties

Concrete will expand and contract with the heating and cooling of the day. Concrete will often have pre-fracture points to allow the concrete a specific point to relieve the stress of the daily expansion and contraction without the cracks spreading. Reinforced concrete can be somewhat flexible – the top of the Willis Tower in Chicago sways up to three feet in strong wind.[2]

Many types of concrete will continue to harden over time with proper hydration – the chemical reaction continues to go on for decades.

Concrete Additives

Additives have been developed to achieve certain qualities in the concrete. Road salts can cause chloride corrosion. Bacteria in sewage and soil can produce sulfates that react to form sulfuric acid, attacking both concrete and reinforcing steel. Additives can be used to increase the strength of the concrete. Additives can reduce and/or impede corrosion of the reinforcing steel from chlorides or sulfates.

Additives may increase the cost of the concrete. Historically, at least one additive increased the strength of concrete, but in excessive quantities caused the concrete to become brittle and unsafe after a decade. Adoption of new additives factor into the risks of unforeseen side-effects.

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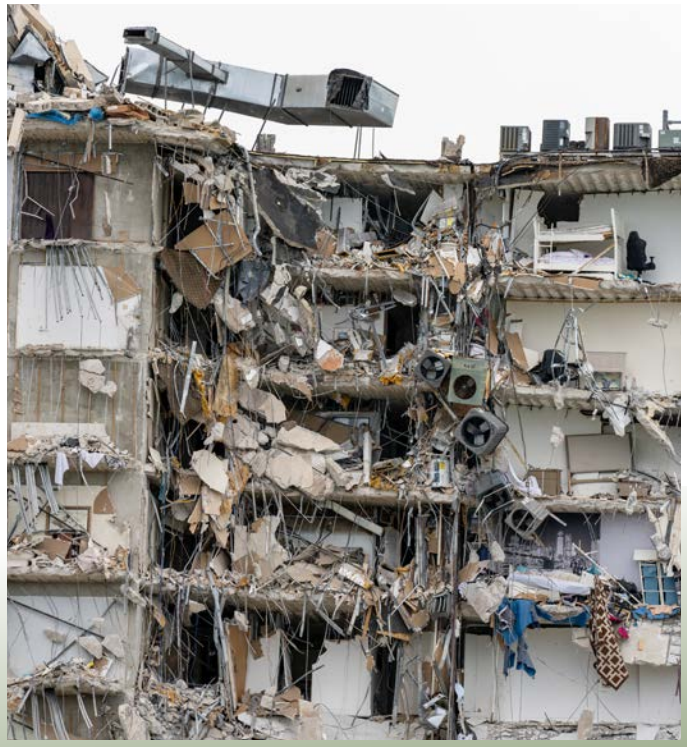

Green Rebar

Green rebar is steel rebar that is coated with epoxy. The epoxy coating prevents the steel rebar from rusting. Historically it was colored green for ease of identification. Green rebar is notoriously difficult to install because the epoxy can chip off, revealing the raw steel. This takes care and often necessitates efforts to re-coat damaged rebar with epoxy.

Concrete has difficulty adhering to epoxy, increasing the risk of the rebar pulling out of the concrete, so more rebar must be used to ensure proper adhesion to the concrete. This increases the cost. Any flaws in the epoxy coating can cause corrosion.

Fiberglass Rebar

Fiberglass rebar is a bar made with fiberglass and resin, which can be formed to have a texture like sandpaper. The technical name for fiberglass rebar is "glass fiber reinforced polymer" (GFRP). GFRP bars are immune from chloride and sulfur corrosion. GFRP is often green in color and should not be confused with green epoxy coated rebar. However, GFRP is a newer technology for reinforced concrete, so the long-term effects of using GFRP are unknown. For instance, could the daily expansions and contractions of the concrete cause the fiberglass to delaminate after 50 years? There is no suggestion that it would, however, new technologies have unknown risks.

Conclusion

Tragedies have always been a stimulus for improvements in the construction industry. GFRP is a new technology, that has unknown long-term risks, but could solve the corrosion problems.

Another method to prevent corrosion of reinforcing members could be requiring extra or new anti-corrosion additives in concrete placed in high-rise buildings within a certain physical distance from saltwater bodies (Atlantic Ocean, intracoastal, and saltwater canals). In essence, the concrete would protect the rebar with additives.

These are initial thoughts on solutions to prevent future tragedies.



M. YOUNG

Mark Young *is a Shareholder with AS-BUILT LAW, PLLC and concentrates in Construction and Business law. Mark worked as an in-house attorney for two large general contractors, as prime on projects as large as $1.8 billion. Mr. Young designed land development, roadway, train, and airport projects as a project engineer prior to attending law school.*

Endnotes

1 U.S. Patent No. 305,226.
2 Formerly known as the Sears Tower.

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Is a Limited Liability Company Inheritance Agreement Enforceable?

By Patrick J. Lannon, Esq, Shutts & Bowen, LLP, Miami, Florida

The limited liability company ("LLC") is the favored entity structure for closely held businesses and family co-investment. One of the beneficial characteristics of this form of co-ownership for families, friends, or business partners is its flexibility with respect to limitations on ownership. It is common, for example, to limit membership to the descendants (or a subset of descendants) of the founding member or members. These ownership limitations may serve a number of family or business purposes such as ensuring a family business stays in the family or protecting the S corporation status of an LLC taxed as an S corporation. Perhaps most importantly, considering the fiduciary duties of loyalty and care owed by an LLC manager,[1] is the goal of keeping membership interests out of the hands of ex-spouses, creditors, and outsiders as well as particularly litigious or adversarial family members. To a limited extent, families may see the LLC as a substitute for irrevocable trust planning; younger generation co-owners may be given very little access to and control over the assets owned by the LLC and have very few opportunities to exit the structure due to ownership limitations.

LLC operating agreement provisions typically enforce ownership limitations requiring manager or member approval for membership interest transfers other than to a limited class of permissible transferees. To prevent

1. a valid court order forcing a transfer not permitted by the operating agreement (a prohibited transfer) due to a member's bankruptcy, divorce, or death, or
2. an attempted prohibited transfer during a member's lifetime or on a member's death,[2] the operating agreement will typically
   a. grant the LLC a redemption right of first refusal and/or
   b. grant the other members a purchase right of first refusal, often with the purchase price payable by a long-term promissory note with a low interest rate.
3. Such "buy-sell" agreements have been upheld by Florida courts, in general, and of specific interest to estate planners, have been determined effective to override a contrary testamentary disposition.[3]

There may be circumstances, however, where the current members want to control the identity of an inheriting member[4] without leveraging themselves or the LLC to buy out a prohibited transferee. One way to accomplish this goal is by an agreement to make a will in accordance with Fla. Stat. § 732.701 (2001).[5] It is more elegant and likely much easier, however, to simply name the inheriting member in the LLC operating agreement itself. Without any Florida statute specifically authorizing, whether an operating agreement provision naming an inheriting member is effective to override a contrary will or revocable trust provision is an open question.

In the case of Blechman v. Estate of Blechman the court determined whether the decedent's membership interest in a limited liability company (the "Company") was part of his probate estate.[6] The decedent and his sister had each owned 50% of the Company. The Company operating agreement contained restrictions on transfer of membership interests without prior unanimous written consent of the other members, with limited exceptions. One exception allowed

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a transfer to the member's living children and the issue of a deceased child ("Immediate Family") but not to parents, spouses, stepchildren, or paramours. Upon the death of a member, unless his or her interest passed to members of the Immediate Family, the membership interest was directed to be transferred to the deceased member's then living children and issue of any deceased child, per stirpes. Contrary to the operating agreement, decedent by his revocable trust (which was funded with probate assets via a pour-over will) directed certain distributions from the Company be paid to his girlfriend.[7] The decedent's children refused to give the girlfriend the Company membership interest, arguing the membership interest passed in accordance with the operating agreement (and so, was not a probate asset passing to the revocable trust to be subject to its terms). Accordingly, the children argued, the gift to the girlfriend was void.

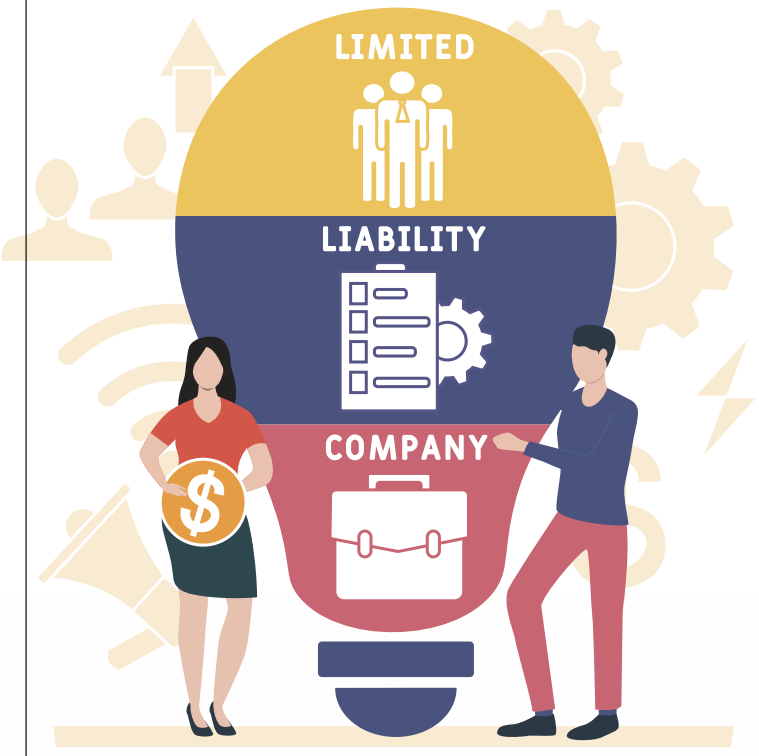
The Blechman court noted there are many ways to avoid probate, including gifts, Totten trusts, joint tenancy, life insurance, beneficiary designations, pay-on-death or transfer-on-death accounts, and other contractual means. After determining New Jersey law governed the operating agreement, the court described a number of New Jersey cases holding contracts, supported by adequate consideration, which transfer property on death are evaluated under contract law rather than the law governing wills. Finding general principals supported the use of contract law, the court then interpreted the operating agreement to validly direct disposition of the membership interest on the decedent's death despite the revocable trust provisions to the contrary.

This case raises several interesting questions, including whether this outcome would apply to a Florida limited liability company (or other entity) and, if so (or if another state law can be made to apply), when this approach might be used to guarantee the desired beneficiary will inherit membership interests on death without the need for a contract to make a will or any need to redeem or purchase the interest from a prohibited transferee.

The Blechman court gives us some hint it thinks Florida law would reach the same conclusion. The court mentions it considers this situation analogous to Murray Van & Storage, Inc. v. Murray,[8] which determined an entity buy-sell agreement trumped a conflicting provision in a will. While it can be argued an agreement to leave a membership interest to a third party without payment is distinguishable from an agreement granting members (or the LLC and the members) a purchase option, it seems likely the 4th DCA, at least, will come to the same conclusion under Florida law.

In the more recent case of Finlaw v. Finlaw,[9] the 2d DCA addressed a similar question with an Ohio partnership. The partnership agreement of Palmer-Finlaw Associates (the "Partnership") included a provision wherein the partners agreed to "have prepared and to execute a last will and testament so as to ensure his or her interest in this Partnership will, upon his or her death, pass to and vest in his or her surviving spouse. Each partner, who shall ultimately become a surviving spouse, further agrees to have prepared and execute a last will and testament so as to vest his or her interest in this Partnership in his or her children (lineal descendants)."[10] In 2014, a fifty percent owner (the "Decedent") executed a will devising the remainder of her estate to her grandson and subsequently died a resident of Florida. Her son filed a statement of claim in the Decedent's Florida probate proceeding asserting an entitlement to the partnership interest in accordance with the terms of the partnership agreement.

After determining the Ohio governing law is substantially similar to Florida law on this issue "governed primarily by familiar contract principles,"[11] the Finlaw court considered the competing interpretations of the partnership agreement and ultimately determined the son was entitled to ownership of the partnership interest. Citing only Blechman as Florida precedent, the court explained "[u]nder both Ohio and Florida law, where contracting parties expressly agree on the disposition of property upon death, that agreement generally controls over a testamentary disposition of property."[12] Inexplicably, despite the partnership agreement requiring a partner "execute a last



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will and testament" the Finlaw court failed to discuss whether the partnership agreement constituted a proper agreement to make a will in accordance with Fla. Stat. § 732.701 (2001) (or its Ohio counterpart).[13] Notwithstanding this oversight, it seems clear the 2d DCA will follow the 4th DCA in upholding an inheritance agreement contained in an entity governing instrument.

It is also possible an inheritance agreement contained in an LLC operating agreement could be construed as a transfer on death designation governed by Chapter 711 of the Florida Statutes, the Florida Uniform Transfer-On-Death Security Registration Act (the "Act"). The Act governs registration of securities and provides in part "A transfer on death resulting from a registration in beneficiary form is effective by reason of the contract regarding the registration between the owner and the registering entity and ss. 711.50-711.512 and is not testamentary."[14] The term "security," defined as "a share, participation, or other interest in property, in a business, or in an obligation of an enterprise or other issuer, and include[ing] a certificated security, an uncertificated security, and a security account," does not specifically mention LLC membership interests but is presumably broad enough to include them. However, Fla. Stat. § 711.506 (1994) provides in part a transfer on death registration "may be canceled or changed at any time by the sole owner or all then-surviving owners without consent of the beneficiary," and so does not by its terms contemplate a binding agreement controlling ownership upon death.

Assuming a limited liability company operating agreement may validly control disposition of membership interests on death under Florida law (or if another state law can be made to apply), the approach could be useful in many variations on the Blechman or Finlaw facts in order to control co-ownership of assets or a business on a member's death without the need for purchase or redemption. This approach could also be used as an alternative to trust planning to facilitate asset ownership by spendthrift children, to share ownership of assets between ex-spouses after divorce, or for any number of reasons applicable to a family situation.

For members with sufficient assets to be potentially subject to estate tax caution should be exercised to avoid a completed gift of the remainder interest in the membership (for example, by allowing members to dispose of their interest among a limited class upon death). Note a gift to a spouse with inheritance limitations (which might be a good way to provide assets to fund a "credit shelter" trust upon the spouse's death) could be a terminable interest ineligible for the marital deduction for gift tax purposes unless structured to be eligible for a "QTIP" election by including terms in the LLC operating agreement allowing sale of the interest and otherwise supporting characterization as a legal life estate.

Any interest in the potential usefulness of an inheritance agreement contained in an LLC operating agreement must be tempered by the relative lack of Florida law precedent approving such agreements. As long as other options are available to achieve the same goals, including but not limited to revocable and irrevocable trusts, it seems prudent to use them. Nevertheless, in appropriate situations an inheritance agreement contained in an LLC operating agreement may prove the best option available.


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Endnotes

1 Fla. Stat. § 605.04091(1) (2015).

2 Prohibited transfers are often allowed but subject to rights of first refusal in order to bolster the argument that gifts of membership interests qualify as present interests eligible for the annual exclusion for gift tax purposes.

3 See, e.g., Murray Van & Storage, Inc. v. Murray, 364 So.2d 68 (1978).

4 This article does not consider the differences between substitute members and assignees.

5 Fla. Stat. § 732.701(1) (2001) provides "[n]o agreement to make a will, to give a devise, not to revoke a will, not to revoke a devise, not to make a will, or not to make a devise shall be binding or enforceable unless the agreement is in writing and signed by the agreeing party in the presence of two attesting witnesses. Such an agreement executed by a nonresident of Florida, either before or after this law takes effect, is valid in this state if valid when executed under the laws of the state or country where the agreement was executed, whether or not the agreeing party is a Florida resident at the time of death."

6 160 So.3d 152 (4th DCA, 2015).

7 Since the decedent was married at the time of his death, the girlfriend technically met the definition of a paramour specifically excluded from membership in the operating agreement.

8 364 So.2d 68 (1978).

9 Case No. 2D19-3108 (Fla. Dist. Ct. App. Apr. 16, 2021).

10 Finlaw, at page 2.

11 Finlaw, at page 5.

12 Finlaw, at page 6.

13 In Potter v. Potter, Case No. 671 (Md. Ct. Spec. App. May 26, 2021), the Maryland Court of Special Appeals rejected the effectiveness of a purported transfer of a membership interest on death in accordance with the LLC operating agreement and a separate member's agreement because the relevant documents were not executed with the formalities required in Maryland for the execution of a will. In reaching this conclusion the court rejected the lower court's finding the transfer was effective because it was contractual, not testamentary, in nature.

14 Fla. Stat. §711.509 (1994).

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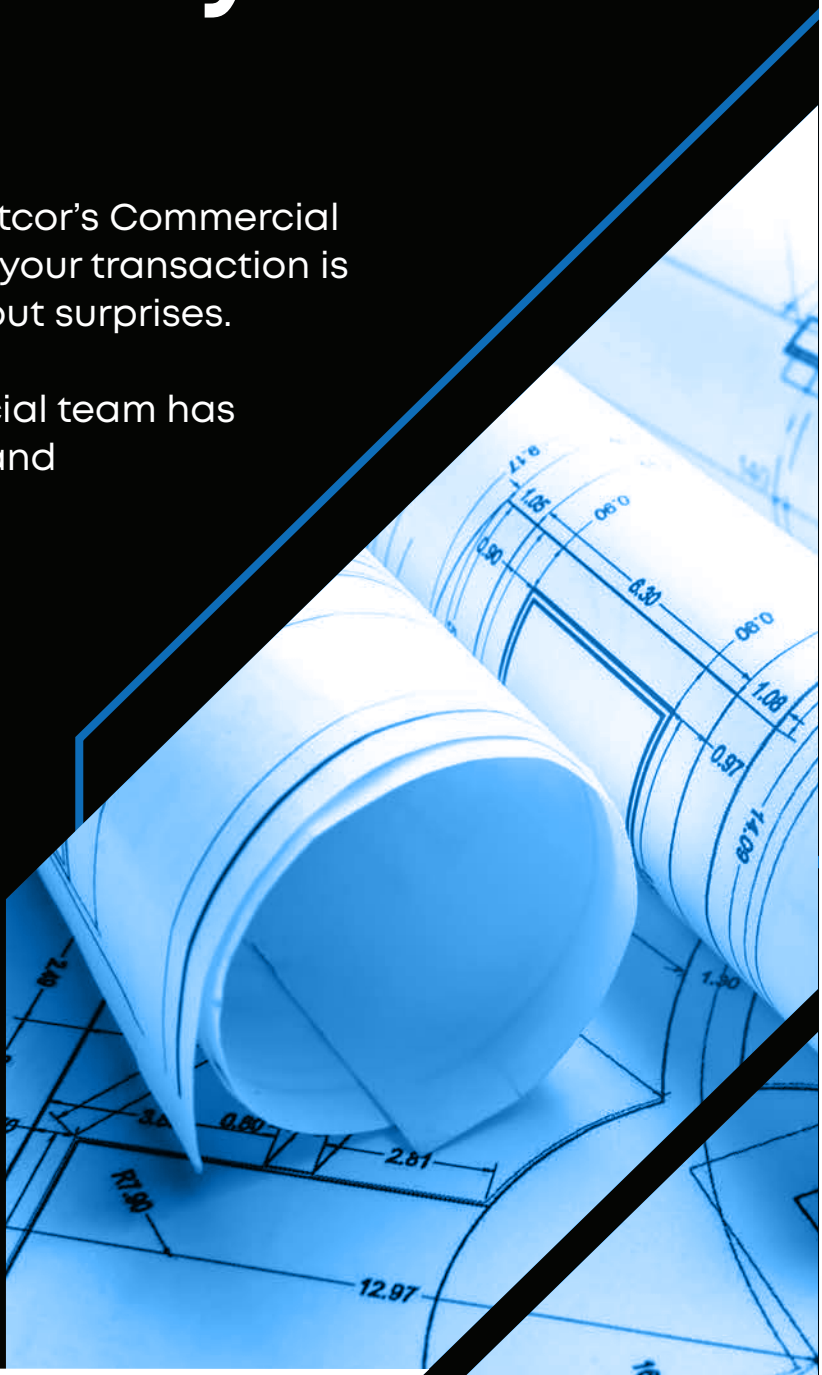

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Things That Go Bump In The Night: Top Title Claims And Closing Risks

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Everyone reading this article knows, simply based on their increased workload, that the Florida real estate market is white hot. Since 2010, the population in Florida has grown by over 13%, and Florida is now the third-largest state in the U.S. based on population.[1] The Florida Chamber of Commerce is expecting the Florida population to reach 26 million residents as early as 2030, which is more than the population of Australia.[2] The downside of increased transactions is the risk of errors that can occur in the midst of a rushed closing, resulting in title claims. This article addresses typical title claims and closing risks and suggests strategies to avoid them.

Title Claims

The three most feared words for real estate attorneys: title, insurance, claim!

While a title insurance claim may be fearsome for the closing attorney, title insurance coverage for a claim is an important comfort for property owners and lenders, providing protection against loss arising from prior defects, liens or encumbrances in title.

The most common title insurance claims in Florida include:

(1) legal description errors;

(2) prior, unreleased mortgages;

(3) outstanding ownership interests; and

(4) prior, unreleased liens or judgments.

With knowledge of real-life examples and a practical perspective on how to address a title defect and/or file a title insurance claim, a closing attorney can conquer her fear of title insurance claims.

1. Legal Description Errors

In this article, a legal description error is defined as a typographical or other mistake in the legal description of a deed or mortgage in the chain of title to a property. The effect of a legal description error in the chain of title can be insignificant, or the error can result in a full failure of title.

For example, a simple typographical error in the subdivision name of a legal description within a platted subdivision is insignificant when the remainder of the legal description is written correctly. Further, in a metes and bounds description, an error in a call misstating the feet to an identifiable monument is insignificant because the reader is directed to a set point. [3]

In 2020, through a RPPTL legislative initiative, a curative statute was enacted to correct certain scrivener's errors in deeds ("Curative Statute").[4] The Curative Statute provides that a "scrivener's error" conveys title to the intended property as if there has been no error under certain conditions. A "scrivener's error" is defined as "a single error or omission" in no more than one of the following categories: (i) the lot or block of a recorded platted lot; (ii) the unit, building or phase for a condominium or cooperative; or (iii) the directional designation or numerical fraction of a tract of land which land is described as a fractional portion of a section, township or range (note: an error or omission in the directional description and numerical fraction of the same call is considered a single error).[5]

Provided the error falls within the definition of a "scrivener's error," all of the following must apply in order to benefit from the statute:

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1. "record title to the intended property was held by the grantor of the first erroneous deed at the time the first erroneous deed was executed";
2. within the 5 years prior to the recording of the erroneous deed, the grantor of such erroneous deed did not hold title to any other property in the same subdivision, condominium or cooperative or in the same section, township or range described in the erroneous deed;
3. the intended property is not exclusively described by a metes and bounds description; and
4. a curative notice is recorded in the county where the intended property is located.[6] The Curative Statute sets forth a form curative notice.[7]

The take-away from the Curative Statute is that it only helps cure a single error in the legal description of a deed (not an error in a legal description relative to a mortgage) provided the error falls within the definition of a "scrivener's error," all the conditions set forth above apply and a curative notice is recorded. Unfortunately, as one might expect, many legal description errors will not be able to be cured using the Curative Statute. Even if you believe the Curative Statute may afford a remedy, the authors recommend contacting your underwriter for assistance in correcting any legal description error. In the short time since adoption of the Curative Statute, there has not been a reported decision on the statute.

Claims resulting from a legal description error that are more significant include: a mortgage recorded without a legal description; a deed with an incorrect lot number; a metes and bounds legal description in a deed with two missing calls; and the legal description included only a portion of a lot instead of the entire lot (or vice versa). In these instances, no curative title standard or statute will cure the errors.

How can these types of claims be prevented? Some preventive tips include:

- Type descriptions very carefully and re-read for typographical errors.
- Compare the legal description you intend to use in the transaction and compare it to prior legal descriptions in the chain of title.
- When in doubt, draw it out: have a qualified professional draw out a metes and bounds legal description to be sure it closes, has a right of access, and describes the property intending to be conveyed. Call your title insurance underwriter for assistance.
- Be sure to record all exhibits to deeds and mortgages.

2. Prior Unreleased Mortgages

Another common type of claim is a prior, unreleased or unsatisfied mortgage in the chain of title. While it can be fairly innocuous to see a prior, unreleased mortgage in title and is often easily explained, these prior encumbrances can also be a "sleeping dragon." Prior mortgage claims are so prevalent that a group of the title insurance underwriters have agreed to indemnify one another for them if the mortgage and the policy issued fit certain criteria pursuant to the terms of the Fifth Revised Florida Mutual Indemnification Agreement ("Indemnification Agreement"). Specifically, the Indemnification Agreement provides that the Indemnitor[8] indemnifies against loss or damage which may be suffered under an Indemnitee's[9] owner's or loan title insurance policy where there is doubt as to whether a recorded mortgage has been satisfied. However, the Indemnification Agreement only applies in this situation where:

1. there is no pending foreclosure action with regard to the mortgage in question;
2. the mortgage secures a principal amount of no more than $500,000; and
3. the mortgage does not appear from the record to secure a revolving loan. Note that an agent should not rely on the Indemnification Agreement without first obtaining approvals required by the agent's underwriter.

Nevertheless, when the sleeping dragon awakens, a prior unreleased mortgage can be something to be feared. Real-life examples of prior, unreleased mortgage claims include: the incorrect payoff amount was sent to a lender in a closing (a misread payoff letter) resulting in the mortgage not being fully paid; a prior mortgage was missed in the search and not paid off; a mortgage was recorded just before a closing (recorded in the "gap"), not caught in an update search, and not paid off; a home equity line of credit mortgage was found and paid in full at closing but the credit line was not closed and the borrower ran the line back up; and a subordinate mortgage in favor of HUD was found but believed to be part of the purchase money mortgage and was not paid at closing. All of these scenarios become problematic when the unpaid mortgage goes into default and the prior lender initiates foreclosure proceedings.

How can you ward off the dragon and prevent claims arising from prior, unreleased mortgages? Some preventive tips include:

- If you perform your own title searches and examinations, search title carefully.
- Update your title search often and immediately before closing.
- Always order updated payoffs directly from the mortgage holders found on the search (do not take a borrower's word for it). (This is also called the "Trust No One" tip.)
- Read every line of the payoff or estoppel letter – check the payoff amount multiple times.

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- Send payoff funds with a "direction to close the line" letter (also known as a "Kill Letter") for all home equity lines of credit. Save your shipping/tracking information for payoff and the Kill Letter. Request the borrower destroy their checks and/or credit card for the line of credit in your presence.
- Calculate per diems carefully and consider including a few extra days in case the wire is returned for incorrect information or if delivery of a check for the payoff is inadvertently delayed.

Outstanding Ownership Interests

Often in the chain of title to a property, it is unclear how an owner conveyed his or her interest in the property. As a result of an owner's death or an unrecorded or mis-indexed deed, the record may not reflect the owner's conveyance of the property. Claims arising from a prior, outstanding or missing interest are very common. Like prior, unreleased mortgages, many title insurance underwriters rely on the Indemnification Agreement in the absence of a recorded death certificate for a prior owner in the chain of title. Again, the authors recommend contacting your underwriter to see if the Indemnification Agreement applies to your situation.

But what about instances where the prior owner's heirs did not convey out their interest? What about mistakes in probate cases? These are more significant and can result in costly claims.

Real-life examples of claims involving outstanding interests include: the lack of conveyance from heirs of a deceased prior owner (no probate); the failure to get a deed from a prior owner's estate where title was held jointly as tenants in common; a probate court entered an Order Determining Homestead and the heirs disclaimed their interest in the probate action, but not by a deed; a "prior owner" never conveyed its interest and was still alive; and the prior deed contained life estate language but the remaindermen did not sign a deed.

Avoid these outstanding interest claims with these preventive tips:

- If you perform your own searches and examinations, make sure that all prior owners have properly conveyed their interest or the heirs of prior owners have properly conveyed their interest.
- Review probate cases carefully.
- Consider whether the property was the homestead of the decedent. If so, was the homestead property conveyed correctly?
- Call your underwriting attorney if you have any doubts; better to be safe than sorry.
- Underwriting counsel should be able to provide clear guidance on how to address an issue and may very well authorize an easier path to closing after looking at the facts and determining the risk is minimal.

4. Prior, Unreleased Liens and Judgments

Like prior, unreleased mortgages, claims arising from prior, unreleased liens and judgments are very common. As with the other claims above, prior, unreleased liens and judgments could remain unreleased by oversight or clerical error. Moreover, such liens and judgments may be filed against someone with a similar name to a prior owner of the property. As with most common claims, if the prior lien or judgment and policy being relied upon fit certain criteria, most underwriters are willing to indemnify one another for these matters.[10] As with some of the other title defects referenced above, many title insurance underwriters rely on the Indemnification Agreement where a judgment or lien appears in a commitment which judgment or lien was recorded prior to and not excepted from a prior policy.[11] Again, the authors recommend contacting your underwriter for guidance to see if the Indemnification can be relied on in these situations.

However, these common claims can evolve into something more formidable.

Some real-life examples of claims arising from unreleased liens or judgments include: an unreleased prior judgment holder foreclosed on the insured parcel and named the insured owner/lender; an insured owner received notice of a sheriff's levy for the property arising from a prior, unreleased judgment; an insured owner received a tax bill which included the collection of taxes and PACE lien assessments for the prior owner's financing of energy-efficient improvements; a lienholder sought to enforce and/or foreclose on several claims of lien for services that related back to prior Notices of Commencement in title.

How can you prevent claims arising from unreleased liens or judgments? Some preventive tips include:

- If you perform your own title searches and examinations, search the title carefully.
- Update your title search often and immediately before closing.
- Talk to your underwriting counsel about the impact of the judgment or lien on the property.
- Scrutinize the tax bill for any PACE liens or other assessments.
- Remember the Trust No One Rule again: do not rely solely on the seller to be truthful about their debts.
- Scrutinize any recorded Notices of Commencement with underwriting counsel. Is the work still ongoing or is it complete?

Practical Advice: How to Address a Defect or File a Claim

If in examining title for a new transaction you encounter a prior defect, lien or encumbrance on title, stop and do not

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insure the transaction without first discussing the issue with underwriting counsel. While some defects are easily addressed, covered by the Indemnification Agreement, or present little risk with reinsurance, other defects, liens or encumbrances present risks your underwriter may not want to assume. In these instances, you should advise the seller to file a title insurance claim, requesting coverage under their policy.

Filing a claim with an underwriter is relatively simple. An insured sends a copy of their policy, documents or instruments evidencing the defect, lien or encumbrance, any additional information (demands, payoffs, etc.) along with a brief statement about the claim to the address set forth on the title insurance policy jacket. Some underwriters will accept claims via email. An insured should check the website of the particular underwriter about filing claims via email or facsimile.

Once a claim is filed, the underwriter will acknowledge receipt of the claim and request any additional information needed to make their coverage determination. The claims administrator (or claims counsel) will then research the title and review the information provided by the insured. The administrator may reach out to the closing agency that issued the policy and closed the transaction to get copies of documents from their file or input of the person who performed the closing. Once all the information is gathered and the coverage investigation is completed, the claims administrator will provide a written coverage determination to the insured or the claimant.

Closing Risks

Unfortunately, certain risks, such as unreliable payoff letters and wire fraud, are lurking in every closing.

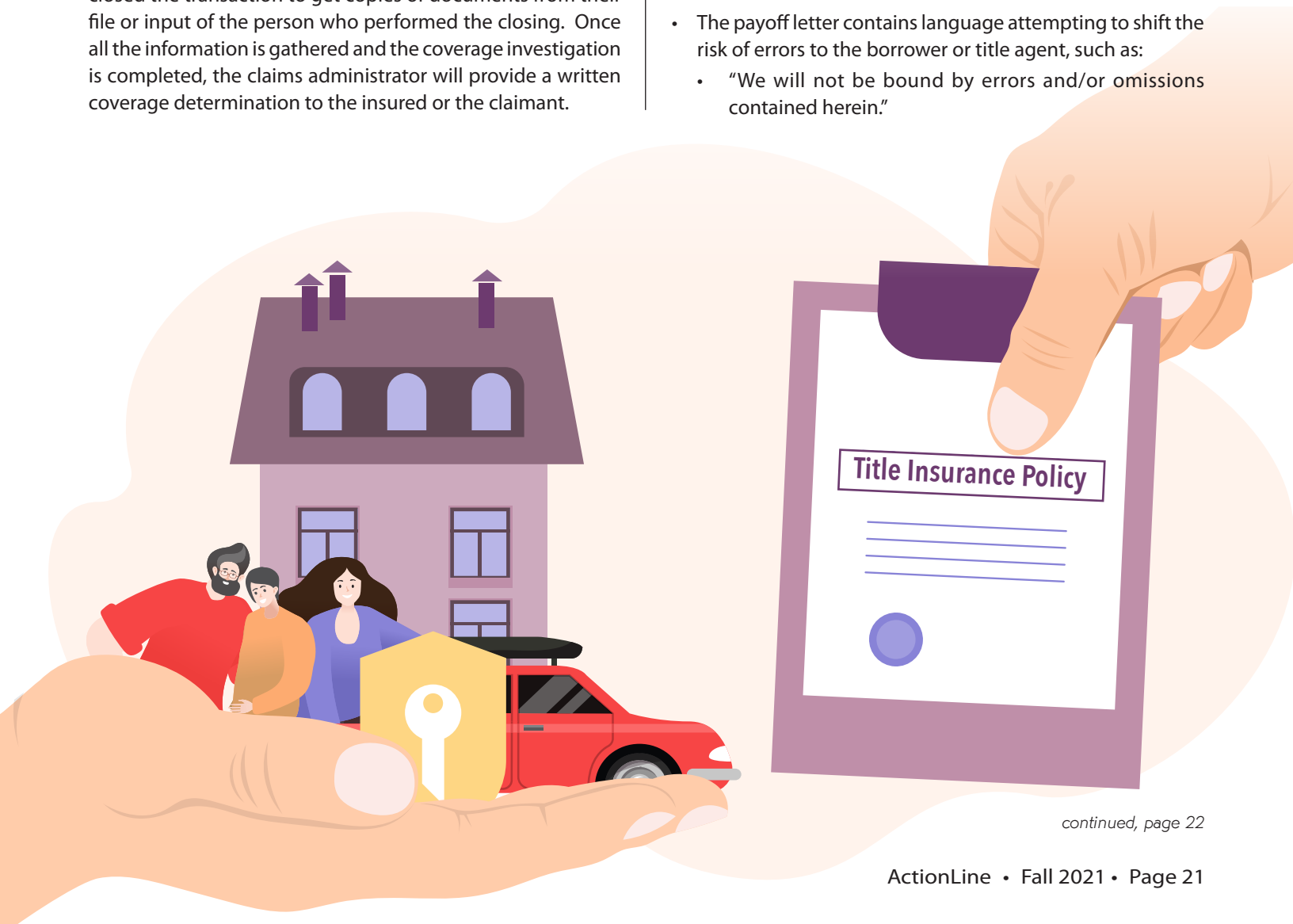
1. Relying on Unreliable Payoff Letters Can Spell Trouble

Do you review your payoff letters closely? Is there language in the payoff letter that makes the letter unreliable? Is the payoff issued to the borrower and you, as the title agent or closing attorney, so that reliance can be established? Does the payoff letter state that upon receipt of the payoff that any mortgage or collateral will be released? The entire letter should be reviewed in detail and not treated as a simple, no-risk part of closing.

Here are some examples of items and language that should cause any practitioner or paralegal to question whether they have received a reliable payoff letter:

Payoff letter is not issued by the mortgage holder, and no documents have been supplied to confirm the issuer's authority to issue such letters;

- Payoff letter does not address whether the lender will release/satisfy all security interests, such as a mortgage or other security instrument, upon receipt of the payoff.
- The payoff letter contains language attempting to shift the risk of errors to the borrower or title agent, such as:
  - "We will not be bound by errors and/or omissions contained herein."



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- "We may adjust any portion of this payoff statement, at any time, for the following the following reasons, including, but not limited to additional fees or charges and any good faith and/or inadvertent clerical errors."
- "This payoff may not include any applicable pre-payment penalty."
- "Accuracy of figures is not guaranteed, nor will a misstatement affect the rights of the Bank to collect all sums due and payable."

A number of states, including Florida, have enacted statutes addressing payoff/estoppel letters in various fashions.[12] In Fla. Stat. § 701.04 (2020) provides that within 14 days of receipt of written request, the lender must provide an estoppel letter that "must include an itemization of the principal, interest and any other charges properly due under or secured by the mortgage and interest on a per-day basis for the unpaid balance." In the authors' opinion, language contained in payoff letters that seeks to shift liability for inaccurate information to the borrower or title agent does not comply with Florida law.

Are there any remedies if a payoff is made in accordance with an estoppel/payoff letter, but the lender refuses to record a satisfaction or release the collateral securing the loan? Section 701.04 permits a title insurer to record a "Certificate of Release" for loans of less than $500,000 where full payment of the loan was made in accordance with the payoff statement furnished by the lender and the lender has failed to record a satisfaction or release of the mortgage. However, most title underwriters are reluctant to accept a Certificate of Release in lieu of a satisfaction or release of mortgage by the lender. There is another catch: while Section 701.04(6) provides a shield for liability of the title insurer in recording such a Certificate of Release, such protection applies only if the title insurance agent can show that "payment in full of the unpaid balance of the loan secured by the mortgage was made *in accordance with the estoppel letter furnished*" by the lender.[13] If for example, a title agent accepts a payoff letter that states the accuracy is not guaranteed or that the payoff may not include any pre-payment penalty or was not issued by the lender, it is questionable whether the title agent would be afforded protection by this statute.[14]

So what risks are associated with accepting a letter that fails to address release/satisfaction of the collateral or attempts to shift the risk of an error or additional fees?

A real-life example of what can happen if you proceed to close with an unreliable payoff letter: Ms. Smith, a paralegal, receives a letter from ABC Bank stating that "the bank will not be responsible for any errors and may adjust the payoff at any time without notice." Ms. Smith does not question the payoff letter. The parties proceed to close. A week later the bank contacts Ms. Smith and says the bank made an error and the payoff is actually short by over $10,000.00. Ms. Smith's employer had to pay the shortage.

Risk prevention is key in addressing unreliable payoff letters. First, reach out to the person that issued the letter. Often lenders use form letters, but sometimes (especially community or local banks), they will revise their letters to address these issues. For example, the title agent may ask the lender to add language to the letter that despite any error in the payoff, that the lender will record a release or satisfaction of any mortgage documents while still retaining its right to seek the balance owed from the borrower. Another alternative, while not as good, is for the title agent to confirm via email with the loan officer that issued the payoff letter on the morning of closing that the payoff therein is accurate and a release/satisfaction will be recorded upon receipt of the payoff amount. Some title agents faced with this issue, and unable to resolve the situation by the methods above, have held additional funds in escrow until the satisfaction is of record.

Wire Fraud! Stop. Call. Verify! DON'T BE A VICTIM OF FRAUD!

In 2020 there were 13,638 victims of wire transfer fraud resulting in over $213 million in losses,[15] up from $150 million in losses in 2018.[16] Have you noticed more spam, phishing, and/or fraudulent emails and texts since the start of the COVID-19 pandemic? It's not your imagination. Due to the increase in the number of people working from home during COVID-19, wire fraud has been even more prevalent than pre-pandemic. The FBI reported a rise in fraud scams related to the COVID-19 pandemic and issued a warning back in April in 2020 about the increase.[17] The main fraud relative to escrow accounts and wires is known as the "business email compromise," or BEC. This scheme often involves a criminal hacking into your firm email system or targeting your employees with targeted phishing emails to gain access to your email system and altering emails containing wire instructions.[18] Sometimes, BEC does not involve a hack into your firm email system, but rather a breach of the email account of those with whom you work, such as realtors, brokers, and even sellers/purchasers. Either type of BEC can result in wire transfer fraud.

How can you protect yourself and your clients? Have a wire fraud prevention plan and make sure your staff consistently follows that plan. Attached is a sample wire fraud prevention plan. Train your staff on spam and phishing tactics. Train your staff to not accept changes in bank account information via email and to always call the lender to confirm changes no matter how received. Train your staff to carefully examine all documents relative to the exchange of funds at closing. Basically, always adhere to the Trust No One tip.

Help! I have been scammed! You have been scammed! Now what? Do not hesitate! Alert the receiving bank IMMEDIATELY.

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Alert your bank IMMEDIATELY. Many times, banks will notice various red flags of wire fraud and may suspend the fraudster's access to the funds. File a Complaint on the IC3 website (IC3 is the Internet Crime Complaint Center for the FBI). Link: https://www.ic3.gov/default.aspx. Follow up with a call to the local FBI office. Even if the amount at issue is less than the $1M threshold for an FBI investigation, the FBI will make calls to the receiving bank. Call the local police and file a report.

Sample Wire Fraud Prevention Plan:




M. ANTHONY

***Marcelana (Marcie) Anthony**, serves as VP, Southeast Region Claims Manager and Claims Counsel for Old Republic National Title Insurance Company and specializes in title claims resolution and litigation. Marcie was also Claims Counsel for another national underwriter.*

Marcie is a member of the Real Property Probate & Trust Law section of the Florida Bar and a member and past President of the Pinellas County Chapter of the Florida Association for Women Lawyers. Marcie is a 2013 recipient of the Florida Association for Women Lawyers' "Leaders in the Law" award.

Marcie earned her Juris Doctor at Stetson University College of Law.


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 World Population Review: https://worldpopulationreview.com/states.

2 Florida Chamber of Commerce: https://www.flchamber.com/did-you-know-that-floridas-population-could-increase-to-nearly-26-million-by-2030/.

3 Florida Bar Title Standard 21.1, Test of Sufficiency of a Legal Description.

4 Fla. Stat. § 689.041 (2020).

5 Fla. Stat. § 689.041(1)(c)(2020).

6 Fla. Stat. § 689.041(2) (2020).

7 Fla. Stat. § 689.041(3)(2020).

8 Pursuant to the Indemnification Agreement, the Indemnitor is the underwriter that previously issued a policy without exception for the mortgage in question.

9 Pursuant to the Indemnification Agreement, the Indemnitee is the underwriter that is now issuing a policy without exception for the mortgage in question in reliance on the Indemnification Agreement).

10 Fifth Revised Florida Mutual Indemnification Agreement.

11 *Id.*

12 AL. St. §35-10-91 (Alabama); CO St. § 38-35-124.5 (Colorado); IN ST 32-29-6-13 (Indiana); M.G.L.A. 183 §54D (Massachusetts); §45-36.7-45-36.8, N.C.G.S.A (North Carolina); VA Code Ann. §6.2-418 (Virginia); §343.106, Tx Fin (Texas),W.S.A. 708.15 (Wisconsin); and 28 V.I.C. §142a (U.S. Virgin Islands).

13 Fla. Stat. §701.041(6)(c) (2020).

14 At the time of the writing of this article the Florida Land Title Association and the Commercial Real Estate Committee of the Real Property, Probate and Trust Law Section of the Florida Bar are both actively working on revisions to Section 701.041 to prohibit conditional-type language and provide a significant penalty for mortgagees who fail to comply with the statute.

15 F.B.I., Internet Crime Report (2020).

16 F.B.I., Internet Crime Report (2018).

17 F.B.I. Alert No. I-042020-PSA, April 20, 2020.

18 Take These Steps to Prevent Wire Fraud during Real Estate Transactions by Michelle Lerner, The Washington Post, January 5, 2021.


COLLABORATIVE
AGREEMENT

Collaborative Law In Probate And Trust Disputes: An Alternative Approach

Cady L. Huss, Spivey & Huss, P.A., Sarasota, Florida

Probate and trust disputes consistently involve family relationships and heightened emotions. Clients come to us in one of the worst times in their lives, like when a family member has mentally declined or has recently passed, and they are desperately searching for solutions. Many times, the only option is litigation – a lawsuit is filed to preserve a testator's estate plan or to retrieve assets fraudulently transferred during the decedent's lifetime, for example. In certain situations, though, family relationships may be preserved through an alternative dispute resolution process called collaborative law.

In 2017, Florida formally codified procedures for collaborative law by passing the Collaborative Law Process Act ("the Act") within Chapter 61, Florida's dissolution of marriage statutes. The Act is based on the Uniform Law Commission's Collaborative Law Act created in 2010. Family lawyers have seen much success in resolving disputes through this process in lieu of litigation and have urged practitioners in different areas of practice to consider collaborative law. In the right probate or trust case, collaborative law could preserve client relationships, reduce the financial and emotional stress of litigation, and enhance professionalism among lawyers.

1. The Collaborative Law Process Act

The policy of the State of Florida, as stated in the Act's purpose, is to "encourage the peaceful resolution of disputes and the early resolution of pending litigation through a voluntary settlement process."[1] The collaborative law process is meant to preserve the relationship between parties and their counsel and to reduce the financial and emotional toll of litigation.[2] Unlike court-ordered mediation, the process is completely voluntary and based in contract.

The process begins, regardless of whether a legal proceeding is pending, when the parties and their counsel enter into a collaborative law participation agreement.[3] The process continues until the parties resolve the collaborative matter by a signed record, determine that the matter or parts of the matter cannot be resolved in the collaborative law process, or by termination of the process.[4] The parties can terminate the collaborative law process with or without cause through notice to the other parties by beginning a proceeding or filing a motion related to a collaborative matter, by discharging their counsel, or by requesting that the matter be put on the court's calendar.[5]

Generally, the parties conduct multiple conferences to determine the wants and needs of the clients in an effort to resolve the matter. Collaborative law communications are confidential to the extent the parties agree in the collaborative law participation agreement.[6] Collaborative law communications are privileged and not subject to discovery nor admissible in evidence.[7] The Act defines the scope of the privilege and, much like mediation confidentiality, there are few, limited exceptions.[8] The purpose of confidentiality is to foster open communication between parties and their collaborative law counsel.

The most notable difference between collaborative law and other forms of alternative dispute resolution is the disqualification of the collaborative lawyer and the lawyer's firm from representing the client in litigation related to the collaborative law matter.[9] "Related to a collaborative matter" is defined in the Act and "means involving the same parties, transaction or occurrence, nucleus of operative fact, dispute, claim, or issue as the collaborative matter."[10] The disqualification requirement provides an incentive and enforcement mechanism to ensure problem-solving negotiations occur.[11]

2. Benefit to Probate and Trust Practitioners and Clients

Probate and trust proceedings have a lot in common with family law proceedings. They often involve disputes among family members and more often than not, relationships are strained or destroyed through litigation. While some family dynamics cannot be improved, collaborative law offers an opportunity for practitioners and clients to operate in a less stressful environment. The process happens outside of the courtroom, among like-minded lawyers and professionals, and the resolutions are developed by the clients with assistance of counsel.

Collaborative law authorizes and encourages the use of other professionals in the process. If one of the parties is suffering from dementia, it could be helpful to have a mental health professional or elder care provider available for insight or to make the client feel comfortable. In a trust dispute, there may be questions about the trustee's administration, and it would aid the process to retain a neutral accountant to review the trust's expenses and distributions and compile a formal accounting. Third-party neutrals work for both sides and

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facilitate and assist in the collaboration and problem-solving process.

All relief available through a tribunal is available through the collaborative law process but the parties have more options in crafting resolutions. While the parties will still be operating within the probate and trust codes, they can address their disputes without cumbersome discovery, unnecessary motion practice, or strained court calendars. The parties can agree to attend mediation with a neutral facilitator or have settlement conferences on their own. The parties have more control over the outcome and can create a resolution on their terms and according to the timelines they identify in the collaborative law participation agreement.

For practitioners, the major benefit is being able to work with another lawyer focused on problem solving. In litigation, arbitration, and mediation, one side may be resolution oriented while the other may be set to fight until the end. For the collaborative process to work, attorneys involved in the dispute must be willing to work with all of the collaborative law participants to resolve the issues while still being advocates for their clients.

Collaborative Law Considerations for Estate and Trust Professionals

The Act currently defines "collaborative matter" as a dispute, transaction, claim, problem, or issue for resolution. While the Act identifies specific family law disputes including marriage, divorce, dissolution, and child custody, it also notes that the Act *is not limited* to those matters.[12] The purpose of the Act supports broad adoption in all areas in which relationships among the parties could be preserved.[13] Twenty-four states have enacted or introduced the Uniform Collaborative Law Process Act and a few of those states contemplate collaborative law in all civil actions.[14] For example, North Carolina expanded collaborative law from exclusively family law disputes to all civil cases in 2020.[15]

There are a few considerations for estate and trust practitioners in assessing whether the collaborative process is a good fit for a particular fact pattern. The most obvious is the number of persons involved in estate and trust disputes. While family law is generally limited to spouses and their children, probate disputes involve interested persons which can include a broad group of stakeholders. Trust disputes can involve multiple beneficiaries, all of whom may need to be a part of any resolution. Additional practical problems are the timelines associated with an estate administration and the involvement of a personal representative and its counsel.

One of the major benefits of the collaborative law process, however, is that the parties can address the needs of the particular dispute within the collaborative law participation agreement. The parties can agree to joint filings, deadlines to provide information, and the tolling of statutes within the agreement. The personal representative can be a nominal party to the agreement and continue working with his or her counsel to administer the estate while the adversarial parties collaborate and hopefully, resolve the dispute. If the personal representative is an adversarial party, he or she could consider hiring a separate collaborative lawyer, as opposed to a litigator, to assist with the dispute. Disinterested beneficiaries can also be involved to the degree they want and need to be a part of the process. The parties can identify necessary discovery and split costs for the same. The collaborative law process is defined by the contract and is truly in the hands of the clients and their counsel.

Conclusion

The collaborative law process offers an alternative to clients and counsel slogging through the mosquito-filled swamp of litigation. It is an opportunity for lawyers to revisit their roles as counselors and problem solvers and for clients to communicate their needs in a safe, confidential space. For many clients, collaboration will be impossible, and litigation will be the only option. Some clients, though, will be interested in preserving their familial relationships and in those cases, collaborative law may be the better approach.

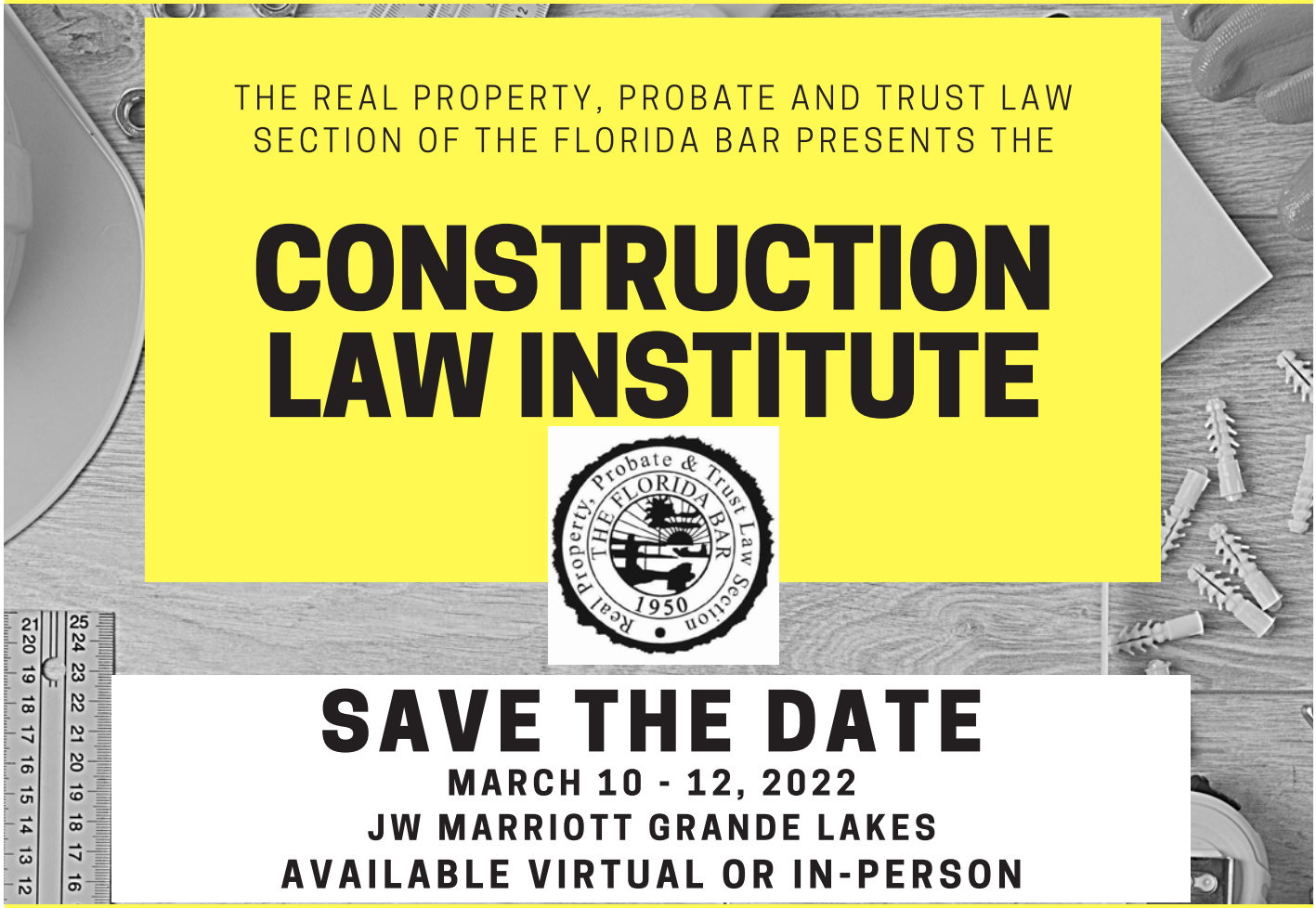


C. HUSS

Cady L. Huss *is an attorney with Spivey & Huss, P.A. in Sarasota, Florida. Cady's practice is focused on estate and trust dispute resolution and litigation. She is a member of the Executive Council of the Real Property, Probate, and Trust Law Section of the Florida Bar, the Chair of the Attorney Trust Officer Liaison Conference, the current Chair of the Florida Bar's Probate Rules Committee, and a Supreme Court of Florida Certified Circuit Court Mediator.*

Endnotes

1 Fla. Stat. § 61.55 (2020).
2 Fla. Stat. § 61.55 (2020).
3 Fla. Stat. § 61.57(1) (2020).
4 Fla. Stat. § 61.57(3) (2020).
5 Fla. Stat. § 61.57(4) (2020).
6 Fla. Stat. § 61.58 (2020).
7 Fla. Stat. § 61.58(1)(a) (2020).
8 *See* Fla. Stat. § 61.58(3) (2020).
9 Fla. Fam. L. R. Rule 12.745(f) (2017).
10 Fla. Stat. 61.56(13)(2020).
11 Uniform Law Commission's "Uniform Collaborative Rules and Uniform Collaborative Law Act Prefatory Note" (2010).
12 *See* Fla. Stat. § 61.56(5) (2020).
13 *See* Fla. Stat. § 61.55 (2020).
14 *See* https://www.uniformlaws.org/committees/community-home?communitykey=fdd1de2f-baea-42d3-bc16-a33d74438eaf&tab=groupdetails.
15 *See* N.C. Gen. Stat. Ch. 1, Subch. 15, Art. 53. Uniform Collaborative Law Act (2021).



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SECTION SPOTLIGHT

Friends of the Section — 2021 Legislative Session

Martha J. Edenfield, Esq., Dean Mead, Tallahassee, Florida

While the 2021 Legislative Session presented a unique set of challenges related to the pandemic, many of the Section's initiatives and items of interest passed favorably. During each Session there are several key members of the Florida Legislature who provide leadership in support of the Section in their various roles as committee chairs, bill sponsors, amendment sponsors and advocates in debate. Some of the legislators who made significant contributions to the Section's success in the 2021 Legislative Session are acknowledged below, along with a brief biographical profile and a list of committee memberships. As we all work hard on behalf of the Section to achieve our legislative goals, we are reminded that only sitting members of the Florida Legislature can sponsor and vote on bills. We thank these outstanding legislators for their dedication to the Section and we owe our 2021 Session legislative successes to them.



Speaker Chris Sprowls

As the Speaker of the House, Speaker Chris Sprowls assured that each of the Section's legislative priorities received consideration by the House of Representatives. Speaker Sprowls has been integral in the passage of numerous Section legislative initiatives since being elected to the House of Representatives in 2014 representing part of Pinellas County. Speaker Sprowls is a litigation attorney with Buchanan, Ingersoll & Rooney, PC. Prior to his election to the Florida House, he was an Assistant State Attorney for Pasco and Pinellas Counties where he focused on gang and homicide crime. Speaker Sprowls is serving as the 2020-2022 Speaker of the Florida House.



Senator Kathleen Passidomo

As the Chair of the Rules Committee of the Florida Senate and throughout her legislative service, Senator Kathleen Passidomo has played a key part in facilitating the passage of numerous Section initiatives and assuring that the Section's proposed legislative initiatives received successful consideration in the Florida Senate. Senator Passidomo previously served in the Florida House of Representatives from 2010-2016 and was elected to the Florida Senate in 2016 representing Collier County, Hendry County and part of Lee County. In addition to being the Rules Committee Chair, Senator Passidomo has been named the Senate President-Designate for the 2022-2024 term. Senator Passidomo also serves as a member of the Appropriations Committee, the Banking and Insurance Committee, the Regulated Industries Committee, the Education Committee and the Joint Legislative Budget Commission. She is a partner

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in the law firm of Kelly, Passidomo and Alba, LLP in Naples with a practice in real estate law, corporate law and business law. She is a Section member and is a Florida Bar Board Certified Real Estate Lawyer.



Representative Paul Renner

In his role as House Rules Committee Chair, Representative Paul Renner facilitated the scheduling and passage of the Section's legislative initiatives. Representative Renner was elected to the Florida House in 2015 representing Flagler County, part of St. Johns County and part of Volusia County. In addition to serving as the Chair of the House Rules Committee, Representative Renner serves as a member of the Appropriations Committee. He is a part of the House leadership team and has been elected by the body to serve as the Speaker of the House of Representatives in the 2022- 2024 term. He is a retired commander in the U.S. Navy and served during combat operations in support of Operation Desert Storm and later served a one–year mobilization in Afghanistan in support of Operation Enduring Freedom. As a Commander in the U.S. Navy Reserves, he served as an Intelligence Officer for a Joint Task Force in Afghanistan during which he was awarded the Defense Meritorious Service Medal. Representative Renner is a Section member practicing law with Nelson Mullins in Jacksonville. He has been a stalwart supporter of the Section throughout his legislative service.



Representative Daniel Perez

In his role as House Judiciary Committee Chair, Representative Daniel Perez facilitated the scheduling and passage of the Section's many legislative initiatives and defended them against adverse legislation. Representative Perez also serves on the Appropriations Committee and on the Public Integrity & Elections Committee. An attorney and member of the Florida Bar, he was elected to the House in 2017 representing part of Miami-Dade County and reelected subsequently. Representative Perez is part of House leadership and has been designated as the Speaker of the Florida House for the 2024-2026 term.



Representative Wyman Duggan

As the House Civil Justice & Property Rights Subcommittee Chair and as a member of the full Judiciary Committee, Representative Wyman Duggan worked tirelessly to ensure the successful passage of the Section's legislative initiatives and to defend against adverse initiatives. Representative Duggan also serves on the Ways & Means Committee, the Public Integrity & Elections Committee, and the State Administration & Technology Appropriations Subcommittee. Representative Duggan was elected to the Florida House of Representatives in 2018 representing part of Duval County. He is a Shareholder with Rogers Towers in Jacksonville where his practice areas include land use, zoning, permitting, developments of regional impact, concurrency approvals, charter amendments and property tax valuation challenges. Rep. Duggan is a graduate of the U.S. Marine Corps Officer Candidate School - Second Lieutenant, USMCR.



Senator Bobby Powell

Senator Bobby Powell sponsored the Section's Electronic Legal Documents Glitch Bill, Senate Bill 848. Senator Powell currently serves on the full Appropriations Committee, the Rules Committee, the Commerce & Tourism Committee, the Community Affairs Committee, the Criminal Justice Committee and serves as the Alternating Chair of the Joint Committee on Public Counsel Oversight. Senator Powell is an Urban Design planning and project manager and a member of the American Institute of Certified Planners and the American Planning Association. Representing part of Palm Beach County, Senator Powell was first elected to the Florida House of Representatives in 2012 where he served four years prior to being elected to the Florida Senate in 2016. Senator Powell has sponsored one or more bills every year for the Section since becoming a member of the Florida Legislature.



Representative Thad Altman

Representative Thad Altman sponsored the House version of Senate Bill 848, the Section's Electronic Legal Documents Glitch Bill. He is the chair of the Children, Families & Seniors Subcommittee and serves as a member of the Ways & Means Committee, the Health & Human Services Committee, the State Affairs Committee, and the Health Care Appropriations Subcommittee. Representative Altman is the President of The Astronauts Memorial Foundation at the John F. Kennedy Space Center. Representative Altman served as a House member from 2003 through 2008 and as a Florida Senator from 2008 through 2016 until he was termed-out of office. He was elected to the House of Representatives again in 2016 and has been reelected subsequently. Throughout his many years of legislative service representing part of Brevard County in both the House and the Senate, Representative Altman has been a tremendous friend to the Section.

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* *Stephanie Eassa Rapp:* **It's Tricky: Navigating a Potpourri of Probate Pitfalls in Florida**
* *William T. Hennessey:* **The Full Monty: An Ethics Primer on Navigating Fiduciary Fees and Costs**
* *F. Scott Westheimer:* **What Trusts and Estates Practitioners Should Know About Florida's Lawyer Discipline System And How To Avoid It**
* *Stacey Prince-Troutman:* **Spousal Rights Update: Community Property and More!**
* *J. Richard Caskey:* **Florida Case Law Update: The Recent Rulings that Every Probate Practitioner Needs to Know**
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Senator Lori Berman

Senator Lori Berman sponsored Senate Bill 1070, the comprehensive Estates and Trusts Bill that contained six separate Section initiatives and that has now been signed into law. Senator Berman also sponsored the Section's initiative on Waivers of Exemptions of Applicable Assets, Senate Bill 688 (The Kearney Fix). Senator Berman represents part of Palm Beach County since being elected to the Senate in April 2018 in a special election. She previously served four terms in the House of Representatives. Senator Berman serves as a member of the Appropriations Subcommittee on Agriculture, Environment & General Government, the Education Committee, the Finance & Tax Committee, the Ethics & Elections Committee and the Transportation Committee. Senator Berman is an attorney and a Section member practicing in the areas of commercial litigation, regulatory real estate law and estate planning. Senator Berman has her LLM in Estate Planning. Since her election to the Florida House of Representatives in 2012, Senator Berman has been a loyal supporter of the Section, sponsoring and working on numerous important Section initiatives.



Representative Ben Diamond

Representative Ben Diamond sponsored the House version of Senate Bill 1070, the comprehensive Estates and Trusts Bill that contained six separate Section initiatives and that has now been signed into law. Representative Diamond was elected to the House of Representatives in 2016 and has been reelected subsequently. Throughout his years of legislative service, Representative Diamond has been actively involved in the passage of Section legislative initiatives and advocacy of Section positions. Representative Diamond has worked in support of numerous Section positions and initiatives as the Minority Ranking Member on the House Civil Justice & Property Rights Subcommittee. He also serves as a member of the Judiciary Committee, the Appropriations Committee, the Rules Committee and the Environment, Agriculture & Flooding Subcommittee. Representative Diamond is a partner in the Diamond Law Firm, P.A., in St. Petersburg, focusing his practice on estate planning, probate administration and litigation involving wills, trusts and guardianships. Representative Diamond serves on the Executive Council of the Section and has received the Section's "Rising Star" Award for his leadership and service.



Representative William C. "Will" Robinson, Jr.

Representative Will Robinson sponsored House Bill 715, the Section's legislation on Waivers of Exemptions of Applicable Assets (The Kearney Fix). Representative Robinson is the Chair of the Professions & Public Health Subcommittee and also serves on the Health & Human Services Committee, the Select Committee on Gaming, the Insurance & Banking Subcommittee, the Regulatory Reform Subcommittee and the Health Care Appropriations Subcommittee. He was first elected to the House in 2018 representing parts of Manatee and Sarasota Counties. Representative Robinson is a Board Certified Real Estate lawyer with Blalock Walters, P.A. in Bradenton and a RPPTL Section member. An avid runner, he has completed two Boston Marathons and two Ironman races.



Senator Perry E. Thurston, Jr.

Senator Perry Thurston sponsored the Section initiative on IRA transfers in divorce, Senate Bill 702. Senator Thurston serves as a committee member on the Banking & Insurance Committee, the Rules Committee, the Judiciary Committee, the Education Committee and the Agriculture Committee. He also serves on the Appropriations Subcommittee on Agriculture, Environment, and General Government. Senator Thurston was elected to the Senate in 2016 representing part of Broward County. He was previously in the Florida House of Representatives from 2006 to 2014, serving as the House Democratic leader in his final term. An unfailing supporter of the Section's positions and initiatives throughout his legislative service, Senator Thurston is an attorney in private practice in Fort Lauderdale.



Representative Joe Geller

Representative Joe Geller sponsored House Bill 253, the Section's initiative addressing IRA Transfers in Divorce. Representative Geller serves as the Democratic Ranking Member on the Rules Committee and is a member of the Appropriations Committee, Commerce Committee and the Select Committee on Gaming. Representative Geller has been a member of the House of Representatives representing parts of Broward and Miami-Dade counties since 2014. He is a RPPTL Section member practicing with Greenspoon Marder LLP in Ft. Lauderdale focusing on civil litigation, administrate law, election law, government relations, municipal law and land use and zoning.

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Representative Geller has worked on Section issues and initiatives every year since his election to the Florida House.



Senator Dennis Baxley

Senator Dennis Baxley sponsored Senate Bill 630, the 2021 Community Associations bill that includes over thirty Section positions and technical comments. Senator Baxley served two stints in the House of Representatives from 2000-2007 and 2010-2016. He was elected to the Senate in 2016 representing Sumter County and parts of Marion and Lake Counties. Senator Baxley is the chair of the Ethics and Elections Committee and serves as the Alternating Chair of the Joint Legislative Auditing Committee. He is a member of the Judiciary Committee, the Health Policy Committee, the Community Affairs Committee, the Criminal Justice Committee, the Appropriations Committee, the Appropriations Subcommittee on Criminal and Civil Justice and the Rules Committee. Senator Baxley is a Funeral Director and consultant for Hiers-Baxley Funeral Services.



Senator Travis Hutson

Senator Travis Hutson was the prime co-sponsor of Senate Bill 630, the 2021 Community Associations bill that included over thirty Section positions and technical comments. Senator Hutson served in the House of Representatives from 2012-2015 and was elected to the Senate in a special election in 2015 representing Flagler County, St. Johns County and part of Volusia County. Senator Hutson is the Chair of the Senate Regulated Industries Committee and is a member of the Appropriations Committee, the Rules Committee, the Commerce and Tourism Committee, the Community Affairs Committee, the Education Committee and the Appropriations Subcommittee on Education. He is the Vice President of The Hutson Companies with development projects in Clay, Duval and St. Johns Counties.



Representative Jason Shoaf

Representative Jason Shoaf sponsored the House companion bill to Senate Bill 630, Community Associations, that was the culmination of several years of work and that included numerous Section positions and technical comments. Representative Shoaf was first elected to the House of Representatives in a special election in 2019, and represents Calhoun, Franklin, Gulf, Jefferson, Lafayette, Liberty, Madison, Taylor, and Wakulla Counties and part of Leon County. Representative Shoaf serves as a member of the Commerce Committee, the Government Operations Subcommittee, the Higher Education Appropriations Subcommittee, the Secondary Education & Career Development Subcommittee (Vice Chair), the Tourism, Infrastructure & Energy Subcommittee and the Ways & Means Committee. Representative Shoaf is the Vice President of St. Joe Natural Gas.



Senator Ileana Garcia

Senator Garcia sponsored the Senate version of House Bill 649, the Section initiative providing that a condominium association, cooperative association and homeowners' association may file with the value adjustment board a single joint petition on behalf of members who own units or parcels in the community, and condominium and cooperative associations may seek judicial review of a decision by the property appraiser. A radio and TV personality for over 20 years in South Florida, Senator Garcia was elected to the Senate in 2020 representing part of Miami-Dade County. She was appointed Vice Chair of both the Rules Committee and the Community Affairs Committee. She also serves as a member of the Children, Families, and Elder Affairs Committee, the Commerce and Tourism Committee, the Ethics and Elections Committee, the Health Policy Committee, the Appropriations Subcommittee on Agriculture, Environment, and General Government and the Appropriations Subcommittee on Transportation, Tourism, and Economic Development.



Representative Juan Fernandez-Barquin

Representative Fernandez-Barquin sponsored House Bill 649, the Section initiative providing that a condominium association, cooperative association and homeowners' association may file with the value adjustment board a single joint petition on behalf of members who own units or parcels in the community, and condominium and cooperative associations may seek judicial review of a decision by the property appraiser. An attorney and RPPTL Section member, Representative Fernandez-Barquin practices with Genovese, Joblove & Battista, P.A. in Miami focusing his practice on commercial litigation, real estate litigation and real estate transactions. He serves as the Vice Chair of the House Civil Justice & Property Rights Subcommittee and is a member of the Judiciary Committee, the Justice Appropriations Subcommittee, the Post-Secondary Education & Lifelong Learning Subcommittee, and the Professions & Public Health Subcommittee (Vice Chair). Representative Fernandez-Barquin was elected to the Florida House of Representatives in 2018 representing part of Miami-Dade County. He has a blue belt in Brazilian Jiu Jitsu.

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Senator Jim Boyd

Senator Jim Boyd sponsored Senate Bill 1520, the Section's initiative to revise the Marketable Record Title Act. Senator Boyd is the Chair of the Banking and Insurance Committee and is a member of the Judiciary Committee, the Agriculture Committee, the Rules Committee, the Appropriations Subcommittee on Agriculture, Environment, and General Government, the Appropriations Subcommittee on Transportation, Tourism, and Economic Development and the Joint Legislative Auditing Committee. Senator Boyd served in the House of Representatives from 2010-2018 and was elected to the Senate in 2020 representing Manatee and part of Hillsborough Counties. He is the Chief Executive Officer of Boyd Insurance & Investments in Bradenton.



Representative David Smith

Representative David Smith was the House sponsor of House Bill 1139, the Section's Marketable Record Title Act initiative. Representative Smith was elected to the Florida House in 2018 representing part of Seminole County. He serves as the Vice Chair of the Local Administration & Veterans Affairs Subcommittee and is a member of the Environment, Agriculture & Flooding Subcommittee, the Insurance & Banking Subcommittee, the PreK-12 Appropriations Subcommittee, the Public Integrity & Elections Committee and the State Affairs Committee. Representative Smith is a decorated United States Marine Corps UH - 1N helicopter pilot with 52 combat missions in Iraq and over 4600 mishap-free flight hours. After 30 years of service, Representative Smith retired at the rank of Colonel. He has worked in the private sector in the Central Florida simulation and training industry and now owns a business consulting company.



M. EDENFIELD

***Martha Edenfield** is a founding partner of the Tallahassee office of the Dean Mead law firm where she focuses her practice on governmental affairs and administrative law. She has extensive experience as legal and governmental counsel for agricultural trade groups, industrial associations, medical professionals, legal & judicial organizations and local governments. Ms. Edenfield has served as legislative counsel for the Real Property, Probate and Trust Law Section since 1999. She was a recipient of the Section's Robert C. Scott Memorial Service Award in 2011.*

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POLITICAL ROUNDUP

Changes From The 2021 Regular Legislative Session

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

The 2021 Regular Session of the Legislature produced a variety of changes that will affect the practice areas of RPPTL Section members, many of which were a part of the Section's legislative package. The Section is particularly appreciative of the Members of the House and Senate that sponsored initiatives this year, and these Members are acknowledged below with the legislation that passed during this Session.

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

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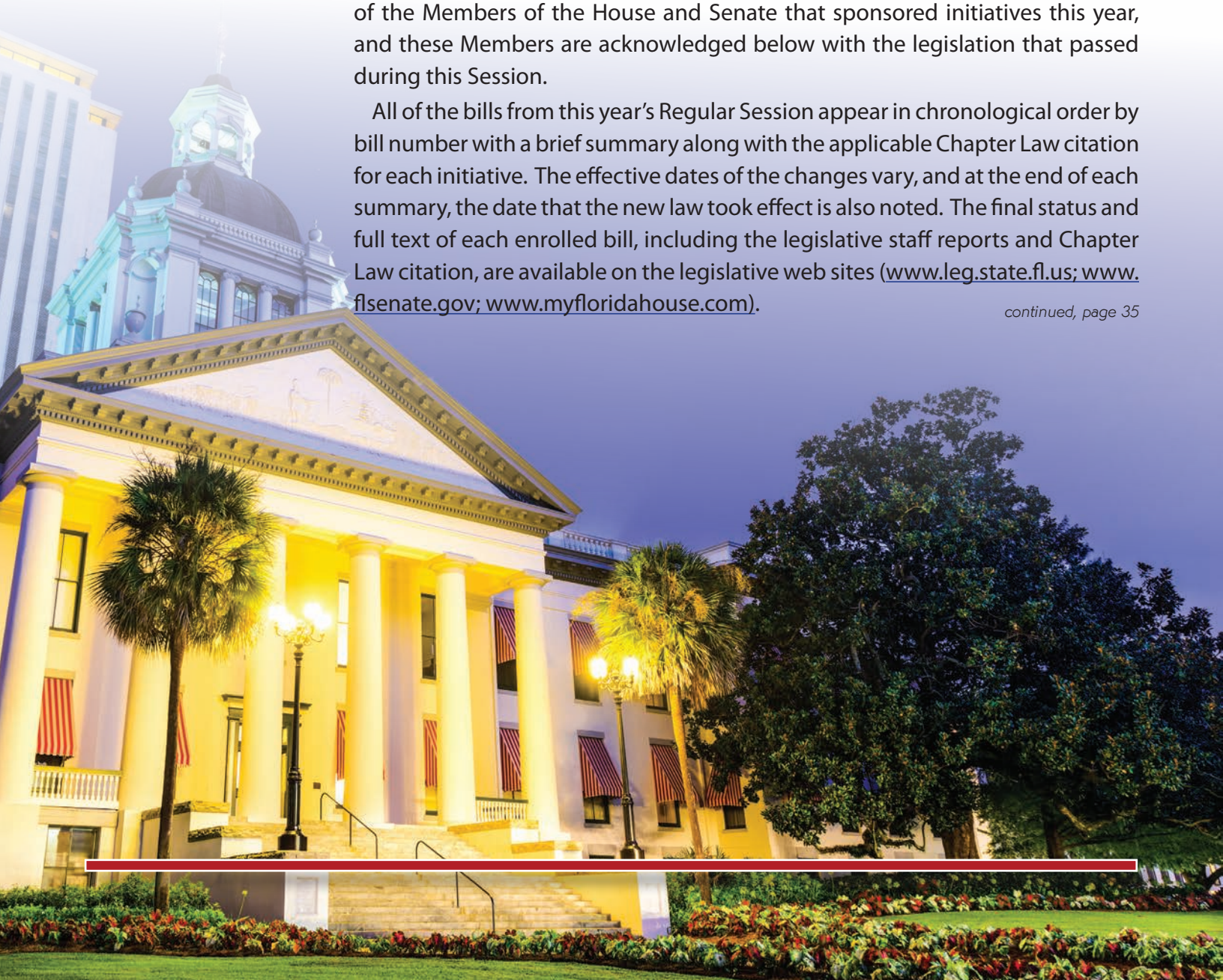

I. SECTION INITIATIVES AND TECHNICAL ASSISTANCE

Civil Liability Limitations—COVID-19: CS/SB 72 by Senator Brandes limits the liability of "business entities" from civil court actions based upon COVID-19-related claims. The Section provided technical assistance on portions of the legislation that includes not-for-profit condominium and community associations within the definition of "business entities," allowing these entities to receive the protections under the provisions of the legislation. CS/SB 72 passed the Legislature, and it was the first measure from the 2021 session approved by the Governor. **(Chapter 2021-1, *Laws of Florida*.)**

Notaries Public: CS/CS/CS/HB 121 by Representative Garrison includes the initiatives of FLTA that make a series of changes to Chapter 117, Fla. Stat., relating to remote online notarizations, and includes technical initiatives from the Sections. Among the changes, the legislation includes the ability to modify the platform technology; it clarifies that the notarial fee relates to each document; it prescribes the identification required for persons located outside the United States; it revises the registration requirements for online notaries public; it revises the record keeping of the service providers; and it imposes new responsibilities on the Department of State to publish a list of service providers. It also prohibits service providers from selling or transferring personal information that they have obtained in the course of providing online notarial services to others. CS/CS/CS/HB 121 passed the Legislature and has been approved by the Governor. **(Chapter 2021-137, *Laws of Florida*.)**

Elder Dispute Resolution Process: CS/HB 441 by Representative Hage creates an elder-focused alternative dispute resolution process as an alternative to proceedings in court. The amended version of the legislation includes the Section's technical revisions to the dispute resolution process. The legislation authorizes the elder-focused dispute resolution process to begin upon agreement between the parties, on the court's own motion, or upon a motion made by a party to the formal proceedings. CS/HB 441 passed the Legislature and was approved by the Governor. **(Chapter 2021-67, *Laws of Florida*.)**

Electronic Legal Documents: HB 483 by Representative Altman and Senator Powell includes the Section's initiatives that make a series of technical changes to Chapter 117, Fla. Stat., relating to remote online notarizations. The legislation also contains numerous clarifications, including corrections to statutory cross-references and revisions to jurats or notarial certificates in order to comply with requirements enacted in the 2020 law. HB 483 passed the Legislature and was approved by the Governor. **(Chapter 2021-205, *Laws of Florida*.)**

Business Organizations: CS/SB 602 by Senator Burgess is the Business Law Section's initiative making technical changes to Chapters 607 and 617 of the Florida Statutes. The legislation also includes the Section's technical recommendations clarifying language in Chapter 617, Fla. Stat., for associations that are defined and regulated by Chapters 718, 719, 720, 721 and 723 of the Florida Statutes to provide that provisions in those chapters will govern in the event of a conflict with the general provisions of Chapters 617 or 607 of the Florida Statutes**.** CS/SB 602 passed the Legislature and has been approved by the Governor. **(Chapter 2021-13, *Laws of Florida*.)**

Estate Administration—Attorney Compensation: CS/HB 625 by Representative Yarborough has been amended to incorporate the Section's formal position relating to the presumption of reasonable compensation of attorneys in a formal estate and trust administration. CS/HB 625 passed the Legislature and has been approved by the Governor. **(Chapter 2021-145, *Laws of Florida*.)**

Community Associations: CS/SB 630 by Senator Baxley deals with many of the same community housing issues that were pending but did not pass during the 2020 Session. Among the provisions in the legislation, are modifications to the records maintenance obligations for condominium associations and revisions to insurance coverage requirements for condominiums. The final version also includes 35 positions and technical recommendations from the Section that provide clarification that term limits enacted in 2018 are prospective only; elimination of the conflicting provisions on conflicts-of-interest in the Condominium Act; elimination of mandatory non-binding arbitration in favor of optional pre-suit mediation; expansion emergency powers to include pandemic-related events; clarification of language governing the use of purchase money deposits; and clarification of the reserve requirements in Chapter 720. It also makes conforming changes to the Cooperative and Homeowners Association Acts. CS/CS/SB 630 passed the Legislature and was approved by the Governor. **(Chapter 2021-99, *Laws of Florida*.)** *continued, page 36*



Community Associations—Ad Valorem Taxes: CS/HB 649 by Representative Fernandez-Barquin and Senator Garcia provides that a condominium association, cooperative association, or homeowners' association may file with the value adjustment board a single joint petition on behalf of members who own units or parcels in the community. It also provides that condominium associations and cooperative associations may seek judicial review of a decision by the property appraiser on behalf of the association's membership. CS/HB 649 has passed the Legislature and was approved by the Governor. **(Chapter 2021-209, *Laws of Florida*.)**

Public Records Access: CS/CS/HB 781 by Representative Robinson and Senator Hooper will provide access to the official records of the County Clerk that are otherwise exempt from Fla. Stat. § 119.071, by presenting appropriate identification for purposes of determining the marketability of title or perfecting or enforcing a lien involving real or personal property. The legislation is the product of the interim task force that included Section participation to resolve issues resulting from recent legislative exemptions to public records access. CS/CS/HB 781 passed the Legislature and was approved by the Governor. **(Chapter 2021-215, *Laws of Florida*.)**

Protection of Elderly and Disabled Persons: CS/HB 1041 by Representative Burton adds offenses to the law concerning vulnerable persons; it provides that a person convicted of abuse may not qualify as a personal representative; and it provides for the forfeiture of certain survivor benefits by an abuser or exploiter of an elderly or disabled person. The Section provided technical assistance with the final language of bill to avoid potential problems in the process of protecting vulnerable persons. CS/HB 1041 has passed the Legislature and was approved by the Governor. **(Chapter 2021-221, *Laws of Florida*.)**

Probate: CS/SB 1070 by Senator Berman and Representative Diamond contains six of the Section's Probate Division initiatives, including Uniform Directed Trust Act, Community Property Trust Act, Trustee Employment Liability, Restricted Depositories (Goodstein fix), Devises to Former Spouses (Gordon fix) and Homestead in Trusts. CS/SB 1070 passed the Legislature and was approved by the Governor. **(Chapter 2021-183, *Laws of Florida*.)**

DBPR—Condominiums: CS/CS/SB 1966 by Senator Diaz is the department legislative package for Business and Professional Regulation. Included in the legislation are changes to the Condominium Act that clarify what "delinquency" means for board eligibility; elimination of the residency requirement for the ombudsman; and a requirement for budget adoption within 14 days prior to the end of the condominium association's fiscal year. The legislation has been amended

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to accommodate the Section's technical concerns over the new budgeting requirements. CS/CS/SB 1966 has passed the Legislature and has been approved by the Governor. **(Chapter 2021-135, *Laws of Florida*.)**

Assets of an Estate in Administration: HB 6077 by Representative Robinson amends Section 69.031, F.S., by removing the outdated requirement that estate assets may only be placed in a savings and loan association that is a member of FSLIC. HB 6077 has passed the Legislature and was approved by the Governor. **(Chapter 2021-239, *Laws of Florida*.)**

II. INITIATIVES OF INTEREST

Legal Notices: CS/HB 35 by Representative Fine revises Fla. Stat. § 50.0211, to identify newspapers qualified to publish legal notices; it authorizes the publication of legal notices by a local governmental entity on a publicly accessible website; and it authorizes Internet-only publication of legal notices by newspapers. CS/HB 35 passed the Legislature and has been approved by the Governor. (**Chapter 2021-17, *Laws of Florida*.**)

Taxation: CS/CS/SB 50 by Senator Gruters is a comprehensive sales tax initiative, and among its provisions, Section 14 of the legislation provides a phased-in reduction of the sales tax rate for commercial rentals from 5.5 percent to 2.0 percent. CS/CS/SB 50 passed the Legislature and has been signed by the Governor. **(Chapter 2021-2, *Laws of Florida*.)**

Community Association Assessments: CS/CS/CS/SB 56 by Senator Rodriguez amends the Condominium Act to extend the time of the foreclosure notice requirement for assessment delinquencies from 30 days to 45 days; it requires the delivery of written notice to the delinquent owner by first class mail or e-mail and before a change in the delivery method can be made, 30 days written notice must be given to unit owners and must be acknowledged by the owners; and it provides that a delinquent unit owner may pay the delinquency without attorney fees during the notice period. CS/CS/CS/SB 56 passed the Legislature and was approved by the Governor. **(Chapter 2021-91, *Laws of Florida*.)**

Growth Management: CS/CS/CS/HB 59 by Representative McClain requires local governments to include a property rights element in their comprehensive plans; it provides that certain property owners are not required to consent to development agreement changes; it prohibits municipal annexation of certain properties; and it requires the Department of Transportation to extend the right of first refusal to certain property owners when rights-of-way are being abandoned. CS/CS/CS/HB 59 passed the Legislature and was approved by the Governor. (**Chapter 2021-195, *Laws of Florida*.**)

Property Insurance: CS/CS/CS/SB 76 by Senator Boyd is the comprehensive insurance package and among its provisions, there are new restrictions on solicitation for roof repairs by contractors and public adjusters; new restrictions on the solicitation for inspection and reconstruction of damaged residential roofs; and new limitations on the assignment of insurance claims on residential properties. CS/CS/CS/SB 76 passed the Legislature and was approved by the Governor. **(Chapter 2021-77, *Laws of Florida*.)**

Farming Operations: CS/CS/CS/SB 88 by Senator Brodeur expands the limited liability protection for nuisance claims against farm operations; it expands the definition of covered instances afforded the protection; and it prescribes the limitations for compensatory and punitive damages to be awarded to a plaintiff. CS/CS/CS/SB 88 has passed the Legislature and was approved by the Governor. (**Chapter 2021-7, *Laws of Florida*.**)

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Impact Fees: CS/CS/CS/HB 337 by Representative DiCeglie requires impact fees to be applied on dollar-for-dollar basis for the purposes collected; it caps impact fee increases; and it requires annual reporting to verify that impact fees were used in compliance with the ordinance creating the fee. CS/CS/CS/HB 337 passed the Legislature and was approved by the Governor. (**Chapter 2021-63, *Laws of Florida*.**)

Payment for Construction Services: CS/SB 378 by Senator Bradley provides penalties when a contractor, subcontractor, person or firm knowingly and intentionally fails to make payment for services or materials on a public construction project or when a contractor or subcontractor misapplies funds on public construction project. CS/SB 378 passed the Legislature and was approved by the Governor. (**Chapter 2021-124, *Laws of Florida*.**)

Florida Building Code: CS/CS/HB 401 by Representative Fetterhoff preempts local land development regulations that attempt to regulate design elements for single-family and two-family dwellings, and other enumerated exceptions that include dwellings in a flood zone, planned unit development or designated historic district. The preemption provision does not affect the validity or enforceability of private covenants relating to building design elements. The legislation also amends the Florida Building Code and provides for an appeal to the Florida Building Commission for an advisory opinion if a local ordinance or regulation is not adopted consistent with the requirements of the Florida Building Code. CS/CS/HB 401 passed the Legislature and was approved by the Governor**. (Chapter 2021-201, *Laws of Florida*.)**

Home-Based Businesses: CS/HB 403 by Representative Giallombardo provides a definition for home-based businesses; it preempts local regulation of the defined businesses; and it encourages certain business activities in residential areas. The amended version of the legislation specifically provides that the current and future covenants restricting business activities in deed restrictions are not superseded by the provisions in the legislation. CS/HB 403 passed the Legislature and was approved by the Governor. (**Chapter 2021-202, *Laws of Florida*.**)

Relief from Burdens on Real Property Rights: CS/CS/HB 421 by Representatives Tuck and Persons-Mulicka amends the Bert J. Harris, Jr. Private Property Rights Protection Act to include surface, subsurface, or mineral estates. The bill reduces

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the notice period for all claims under the Act to 90-days. The language also prospectively reverses the recent decision in *Dean Wish, LLC v. Lee County,* Case No. 2D19-4843 (Fla. 2d DCA, April 7, 2021) to provide that a property owner may maintain a claim under the Act even if title to the property changes before the final resolution of the claim. CS/CS/HB 421 passed the Legislature and was approved by the Governor. (**Chapter 2021-203, *Laws of Florida*.**)

Unclaimed Property: CS/HB 425 by Representative Clemons is a comprehensive measure dealing with unclaimed property. Among its provisions, Section 1 of the bill amends Fla. Stat. §§ 717.119 (5), to provide that if a will, codicil, or trust instrument is among the contents of a safe-deposit box, the Department of Financial Services must provide a copy of the document to anyone providing evidence of death to the department. CS/HB 425 passed the Legislature and has been approved by the Governor. (**Chapter 2021-144, *Laws of Florida*.**)

Community Association Pools: CS/HB 463 by Representative Roach provides a new exemption for community association swimming pools that serve no more than 32 parcels from supervision by the Florida Department of Health. CS/HB 463 passed the Legislature and was approved by the Governor. (**Chapter 2021-68, *Laws of Florida*.**)

Growth Management: HB 487 by Representative Duggan increases the maximum acreage of a small-scale comprehensive plan amendment from 10 acres to 50 acres and increases the maximum acreage for a small-scale comprehensive plan amendment within a rural area of opportunity from 20 acres to 100 acres. The bill allows a landowner with a development order existing before the incorporation of a municipality to abandon the development order and develop the vested density and intensity contained therein pursuant to the municipality's comprehensive plan and land development regulations. HB 487 passed the Legislature and was approved by the Governor. (**Chapter 2021-206, *Laws of Florida*.**)

Homestead Exemption for Seniors 65 and Older: CS/CS/HB 597 by Representative Woodson changes the qualifying procedures related to the additional homestead exemption provided to seniors 65 and older. Under current law, the additional homestead must be applied for annually. HB 597 changes this procedure to no longer require an annual application. Instead, the property appraiser will annually notify each taxpayer of the adjusted income limitation contained in law, and the taxpayer must notify the property appraiser by May 1 if his or her household income exceeds the most recent adjusted income limitation. CS/CS/HB 597 passed the Legislature and was approved by the Governor. **(Chapter 2021-208, *Laws of Florida*.)**

Urban Agriculture: CS/SB 628 by Senator Rouson creates a pilot program that provides for the adaptive use of vacant lands in urban areas with a population in excess of 250,000 for agriculture production. The urban agriculture program is initially limited to five locations and requires interested local governments to enact local ordinances to implement the program under the approval of the Florida Department of Agriculture. CS/SB 628 passed the Legislature and has been approved by the Governor. **(Chapter 2021-115, *Laws of Florida*.)**

Building Inspections: CS/CS/HB 667 by Representative Mooney requires a county or municipal enforcement agency to allow requests for inspections to be submitted electronically. The bill also permits a local enforcement agency to perform certain virtual inspections. The bill provides that a local enforcement agency must refund a portion of the inspection fees in certain circumstances when the work completed fails the inspection. CS/CS/HB 667 passed the Legislature and was approved by the Governor. (**Chapter 2021-212, *Laws of Florida*.**)

Occupational Licensing: HB 735 by Representative Benjamin provides for the preemption of licensing of occupations to the state except as otherwise permitted by state law. The legislation provides that a local government may not require a person to obtain a license for certain construction job scopes, and it permits counties and municipalities to issue journeyman licenses for electrical and alarm system trades and for plumbing, pipe fitting, mechanical and HVAC trades. HB 735 passed the Legislature and was approved by the Governor. (**Chapter 2021-214, *Laws of Florida*.**)

Land Use and Development: CS/CS/SB 912 by Senator Albritton tolls the expiration date for permits issued by the Department of Environmental Protection and a water management districts, and for permits and development agreements issued by a local government or other governmental agencies during a declared emergency by the Governor. The legislation specifically applies the tolling retroactively to March 1, 2020. CS/CS/SB 920 passed the Legislature and was approved by the Governor. (**Chapter 2021-179, *Laws of Florida*.**)

Outdoor Public Recreation Areas: CS/CS/SB 920 by Senator Bradley modifies the provisions of Fla. Stat. § 375.251, and authorizes private land owners who offer use of their property for outdoor public recreation purposes to recover costs for concessions or special events while retaining the liability protection provided by the Section. The legislation also expands the definition of "outdoor recreation purposes" to include use of the property for ingress and egress to public lands. CS/CS/SB 920 passed the Legislature and was approved by the Governor. (**Chapter 2021-56, *Laws of Florida*.**)

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Construction Permits: CS/CS/HB 1059 by Representative Robinson makes a series of changes relating to the issuance of building permits by municipalities and counties, and among its provisions is an amendment to Fla. Stat. § 713.135, that provides that a permitting authority may not require an applicant to provide a direct contract or a contract between a contractor and a potential lienor as condition for a building permit. CS/CS/HB 1059 passed the Legislature and was approved by the Governor. **(Chapter 2021-224, *Laws of Florida*.)**

Court System: CS/HB 1197 by Representative Alopus makes a series of procedural changes relating to the Florida court system and recordkeeping requirements by the Clerks of Court. Among the changes in Section 8 of the legislation is a provision that permits a delay for a person responding to a jury summons of up to 12 months during a declared public health emergency. The legislation also provides an adjustment and increase of the jurisdictional limit of county courts every 10 years based upon the Consumer Price Index beginning in 2030. CS/CS/HB 1059 passed the Legislature and was approved by the Governor. **(Chapter 2021-230, *Laws of Florida*.)**

Department of Financial Services—Fire Code: CS/CS/HB 1209 by Representative Fetterhoff contains a series of comprehensive revisions relating to DFS. Among its provisions in Section 25 of the bill is an amendment to the Florida Fire Code that delays the deadline for the installation of enhanced two-way radio communication systems in existing and new high-rise buildings from January 1, 2022 until January 1, 2025. CS/CS/HB 1209 has passed the Legislature and was approved by the Governor. **(Chapter 2021-113, *Laws of Florida*.)**

Limitation on Assessment of Real Property Used for Residential Purposes: HJR 1377 by Representative Chaney would seek to amend the Florida Constitution to authorize the Legislature to prohibit the consideration of any change or improvement to real property used for residential purposes made to improve the property's resistance to flood damage for purposes of determining the property's assessed value. If approved by voters in November 2022, the new exclusion from the property tax would go into effect January 1, 2023.

Department of Economic Opportunity: CS/CS/HB 1463 by Representative LaMarca is a comprehensive bill revising responsibilities at the Department of Economic Opportunity. Among its provisions, § 15 of the bill requires a building permit for a single-family residence participating in a Community Development Block Grant-Disaster Recovery program administered by the department to be issued within 15 working days. CS/CS/HB 1463 passed the Legislature and was approved by the Governor. **(Chapter 2021-25, *Laws of Florida*.)**

Emergency Management: CS/CS/SB 2006 by Senator Burgess provides revisions to the statutory provisions that govern emergency management, emergency preparations and orders, and disaster recovery. Among the provisions in the legislation are the expansion of emergency powers to public health emergencies; new legislative oversight and limitations on the duration of emergency orders issued by the governor; and limitations on the duration of orders issued by a political subdivision, including the ability of the governor to override local orders. The legislation also provides that an executive order imposing business restrictions or closures must specifically state the reasons for the restrictions; and it prohibits a business entity or a governmental entity from requiring customers to verify COVID-19 vaccination. CS/CS/SB 2006 passed the Legislature and has been approved by the Governor. **(Chapter 2021-8, *Laws of Florida*.)**

Taxation: HB 7061 by the House Ways & Means Committee is the annual "tax package" containing a number of state and local tax changes, such as sales tax holidays for disaster preparedness and back-to-school shopping. The bill includes a documentary stamp tax clarification that a modification of an original document changing only the interest rate and which is made as the result of the discontinuation of an index, such as LIBOR, is not a renewal and is not subject to the tax. The bill makes a number of changes to ad valorem taxation associated with changes of ownership and the exemption for property used predominantly for qualifying charitable, religious, scientific, or literary purposes. HB 7061 passed the Legislature and has been approved by the Governor. (**Chapter 2021-31, *Laws of Florida*.**)


P. DUNBAR

***Peter Dunbar** is the Legislative Counsel and Lobbyist for the Real Property, Probate and Trust Law Section of the Florida Bar, and he also serves as the General Counsel for the Florida Conference of Circuit Court Judges. Mr. Dunbar is a Member of the American College of Real Estate Lawyers; he is an adjunct professor at the FSU College of Law where he teaches Condominium and Community Association Law; and he is board certified in Condominium and Planned Development Law. He served five terms as a Member of the Florida House of Representatives and later served as general counsel and chief of staff for Governor Bob Martinez. Mr. Dunbar is also the author of four books on Florida housing laws.*

Roundtable

Highlights of the Meeting of the RPPTL Section

REAL PROPERTY DIVISION

Saturday, June 5, 2021

JW Marriott Marco Island Hybrid Meeting, Marco Island, Florida

Prepared by Colleen Sachs Esq., Santa Rosa Beach, Florida, Jin Liu, Esq., Tampa, Florida, and Michelle Hinden, Esq., Orlando, Florida,

Thank you to the Roundtable Sponsors:

Fidelity National Title Group

The Director of the Real Property Law Division, S. Katherine Frasier, called the meeting to order at 8:36 a.m.

Sponsor Announcement.

The Director thanked Fidelity National Title Group for sponsoring the Roundtable and recognized Karla Staker.

Recognition and Introductions.

Welcome and introductions were provided by the Director who introduced herself and welcomed all attendees, in person and via Zoom, to the meeting.

Highlights of Hybrid Hammock Beach Meeting.

There was a motion to approve the highlights of the April 24, 2021 Hammock Beach Real Property Roundtable meeting. The motion passed and Colleen Sachs, Michelle Hinden and Jin Liu were thanked for their work in compiling the roundtable meeting highlights.

Action Items.

Real Property Finance & Lending Committee — Richard S. McIver, Chair. There was a motion to approve the First Supplement to the Report on Third-Party Legal Opinion Customary Practice in Florida. It was reported that the Section previously adopted the report on Third-Party Legal Opinion Customary Practice in Florida and has worked in connection with the Business Law Section to create the First Supplement. It was approved by the by the Real Property Finance & Lending Committee Opinion Committee and adopted by the Business Law Section. The First Supplement also addresses another section on transacting business in Florida. This will be set for approval by EC at The Breakers Meeting. The motion was seconded and passed.

Condominium and Planned Development Committee — William P. Sklar and Joseph E. Adams, Co-Chairs. There was a motion to support the legislation amending Section 718.113 and Section 718.115 to clarify and enhance the ability of condominium associations and condominium unit owners to use hurricane shutters and other types of hurricane protection to protect condominium property, association property and the personal property of unit owners, and to reduce insurance costs for condominium association and unit owners.

William Sklar introduced Allison Hertz to report on the proposed legislation. Allison chaired the Hurricane Protection subcommittee and thanked the members of the subcommittee for their extensive work over a number of years on the proposed legislation that will provide more options to condominium associations and owners to ensure that their buildings are properly protected in the event of a hurricane. The proposed legislation also clarified some of the confusion regarding funding, such as offering credits to those owners who had already installed the hurricane protection equipment themselves. The motion to approve the proposed legislation changes for Sections 718.113 and 718.115, Florida. Statutes was seconded and passed.

Information Items.

The Florida Bar Florida Realtor — Attorney Joint Committee – Fred Jones. Fred Jones reported on the proposed changes to the FR/Bar Contract. He explained that there was one pending item relating to a proposal out of FLTA. He explained that Brian W. Hoffman will present and outline the issue when he gives his committee update then Fred will be taking the issue back to the next joint Attorney Realtor Joint Committee meeting to discuss the issue. It is hoped that the issue can be resolved in this contract cycle.

Real Estate Leasing Committee — Brenda B. Ezell, Chair. Brenda B. Ezell reported that the committee is seeking to propose legislation for unlawful detainer situations. Mark Brown outlined the problem, the committee's proposed fix, and the urgencies in connection with fixing the issue. The problem is that landowners and landlord are frustrated in their attempts to remove unknown parties in possession from their property.

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Some clerks in Florida will not issue a summons for unknown parties in possession, instead requiring a party name. The committee's proposed fix is legislation to authorize clerks to issue these summons and to set up a process for same. Many squatters are staying in these homes. Unknown parties are aware of this and are taking advantage of this and can now stay longer on the property since the landlord cannot get them out.

There was a question raised about due process considerations for unknown parties in possession. The committee is working on a fix for that issue for the next revisions to the proposed bill.

Mark concluded that the committee has a few weeks to revise the materials and get them in order and hopes to present at The Breakers with it being an action item in November. If the committee can get it approved in November, it may become a part of the 2022 legislative session. The Director urged the division members to submit to comments to Mark so that the committee can address them.

CLE Report. Wilhelmina F. Kightlinger, CLE, Co-Chair

Wilhelmina F. Kightlinger reported that she intended to provide her report at the Executive Council meeting**.**

Legislative Update. William Cary Wright, Legislation Committee, Co-Chair

Cary Wright had nothing to report; however, he thanked those who helped this past year. He also announced that Wilhelmina F. Kightlinger would be replacing him as a Co-Chair of the Legislation Committee in the upcoming term. The Director thanked him for his work.

Committee Reports

Attorney Banker Conference — E. Ashley McRae, Chair; Kristopher E. Fernandez, R. James Robbins, Jr. and Salome J. Zikakis, Co-Vice Chairs

Ashley McRae reported that the committee is looking to host the conference this time around. It is currently scheduled for September 25, 2021. They will be hosting the event at the Funky Buddha Brewery in the Fort Lauderdale area.

Commercial Real Estate — Jennifer J. Bloodworth, Chair; E. Ashley McRae, Eleanor W. Taft and Martin A. Schwartz, Co-Vice Chairs. Jennifer J. Bloodworth reported that the committee has created a subcommittee on conditional payoff letter. She commented that they have become problematic in closings. She further reported that the FLTA also started looking into this issue. She encouraged members of the Section to submit examples of conditional payoffs that have been received to her. Jennifer also reported that a subcommittee led by Alex Dobrev on cryptocurrency and blockchain and the potential impacts of same has been formed. The committee meeting this week included a presentation on Florida's New Receivership Statute, which was presented by Michael Provenzale with Lowndes in Orlando. The committee has an upcoming presentation on oil, gas, and minerals at The Breakers meeting.

Condominium and Planned Development — William P. Sklar and Joseph E. Adams, Co-Chairs; Shawn G. Brown and Sandra E. Krumbein, Co-Vice Chairs. William P. Sklar reported that the Condominium and Planned Development Committee created two new subcommittees, one at the request of DBPR's Division of Florida Condominiums. The committee has been invited by the Division to educate the public about condominiums. The committee appointed a subcommittee, co-chaired by Alex Dobrev and the Division Director. They will have a series of presentations to citizens of Florida to understand their rights and actions with respect to condominiums. This initiative is in reaction to the concerns of the committee that there is a lot of enforcement but not a lot of education. Another subcommittee is on commercial and mixed use condominiums and homeowners associations, with the advent of a lot of mixed use developments and with the courts giving interesting interpretations. The subcommittee is looking at portions of Chapter 718 that may not be clear about the commercial relationship. The committee continues its webinar series with two programs having been presented. He also thanked Steve Mezer and Jane Cornett for their efforts and the members of the committee for their work on the two-volume green books on condominiums and homeowners' associations.

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. Jason J. Quintero reported that the Construction Law Institute took place on May 23, 2021, with 170 live attendees and 70 virtual attendees. He reported that, between the registration and the sponsorships, they brought in about $239,000.00. He credited Mary Ann Obos and Hilary Stephens for their work in coordinating the event. The committee anticipates the next CLI to be in March of 2022.

Development & Land Use Planning — Julia L. Jennison and Colleen C. Sachs, Co-Chairs; Jin Liu and Lisa B. Van Dien, Co-Vice Chairs. Colleen C. Sachs reported that the committee had a great meeting. She reported that the committee had a presentation by Brian Schumer of Shepard, Smith, Kohlmyer & Hand, P.A. on the Bert Harris Act and the recent and anticipated changes to the Act. The committee is presenting a CLE program on flood insurance and risk rating in July.

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Insurance & Surety — Michael G. Meyer, Chair; Katherine L. Heckert and Mariela M. Malfeld, Co-Vice Chairs. Michael G. Meyer reported that the Insurance and Surety Committee had a joint meeting with Construction Law Committee yesterday. They had a CLE presentation on efficient arbitration, and it was well attended. He thanked the speakers of the CLE Presentation, Deb Mastin and Giselle Leonardo.

Liaisons with FLTA — Alan K. McCall and Melissa Jay Murphy, Co-Chairs; Alan B. Fields and James C. Russick, Co-Vice Chairs. Allan K. McCall reported that the RON bill was passed in the recent legislation due to the efforts of FLTA and the committee. FLTA reported that it caught one fraudster in the RON process and the fraudster was criminally charged. The committee has created the FLTA charitable actions foundation, increased efforts to address housing security and to identify places where they can give back within the communities. He reported that the committee is looking to address the issue with conditional payoff letters. He explained that there is a law in Wisconsin that has had some success that the committee is looking at and the committee is also asking people to provide any comments they may have.

Real Estate Certification Review Course — Manuel Farach, Chair; Martin S. Awerbach, Lloyd Granet, Brian W. Hoffman and Laura M. Licastro, Co-Vice Chairs. Manuel Farach reported they have very impressive speakers lined up for the certification review course. Manny thanked the speakers for taking additional time and presenting their material. In the last review course, they set up an additional study session on one afternoon for attendees to ask questions to speakers.

Real Estate Leasing — Brenda B. Ezell, Chair; Christopher A. Sajdera and Kristen K. Jaiven, Co-Vice Chairs. Brenda B. Ezell thanked the subcommittee who worked on the unknown parties in possession proposal. She thanked Mark Brown for his help with leading the subcommittee. She thanked Chip Waller for his help with drafting the proposed legislation. Brenda also mentioned the advance leasing seminar and history of leasing that is to be held later this year.

Real Property Finance & Lending — Richard S. McIver, Chair; Jason M. Ellison and Deborah B. Boyd, Co-Vice Chairs

Richard S. McIver reported that the committee did not meet. Their assignment of rents bill is out for approval. That was approved at Disney Yacht Club but there were some issues that surfaced and committee is working on them.

Real Property Litigation — Michael V. Hargett, Chair; Amber E. Ashton, Manuel Farach and Christopher W. Smart, Co-Vice Chairs. Michael V. Hargett reported that the committee had a few heated discussions, which is not uncommon. He thanked Chris Smart for finishing the second part of the two-part series of the new Federal Summary Judgment Standard, which was a positive development. He discussed the Wells Fargo v. Tan case from the Fourth District Court which involves some policy issues concerning senior lenders ability to elect when to appear in court. Wells Fargo did that and was defaulted. Five years later Well Fargo filed a lawsuit to deem the judgment against them void and reinstate the lien. The court found that the statute is designed to put finality on foreclosure and that same rule applies to lenders as to others. It is a change of expectation of Florida lenders. This case is expected to be appealed and the appeal deadline is Monday next week. Mike does not know whether there is an amicus brief or legislative fix.

Real Property Problems Study — Lee A. Weintraub, Chair; Adele I. Stone, Susan K. Spurgeon and Anne Q. Pollack, Co-Vice Chairs. Lee A. Weintraub reported that the committee is looking into an issue with homeowners who are from another state and the homeowners declared homestead in that state and received a homestead benefit there. Right now, Florida property appraisers are finding these homeowners and sanctioning them. There are some concerns that there may be some lender implications with this. Jeremy Cranford reported that there are some lender implications as these property appraisers are trying to gain priority over mortgages, which creates title issues. There are instances in which individuals are clearly homesteaders who are here and using the residence but by some fluke they are getting an exemption in another state. He concluded that these are major issues and he thinks we need to fix this issue, which he suspects may be unconstitutional. Lee added that this was the front end of the issue and he asked for volunteers to create a subcommittee or a task force on this.

Residential Real Estate and Industry Liaison — Nicole M. Villarroel, Chair; Louis E. "Trey" Goldman and James A. Marx, Co-Vice Chairs. James A. Marx commented that he was giving the report for Nicole M. Villarroel who could not make it the meeting. He reported that the committee had a well-attended meeting. He reported that the committee had a discussion regarding the FR/Bar Contract. Mark Brown gave an excellent presentation on serving unknown parties in possession. Kristen King-Jaiven gave a presentation on short terms rentals. Melissa Murphy gave an overview of the 2020 legislative session.

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. Brian W. Hoffman reported that, in the meeting, they discussed the decoupling of the title insurance premium from the title insurance fee. He stated this would put the closing fee on a separate line. He explained that this issue has come up in the past and it has not been approved, some are concerned it would encourage bad actors. Others feel that you do not have the ability to charge a flat fee for services because the contract does not permit it, that the current form of contract does not track regulations, and there are potential issues with problems of implementation. Brian reported that the next step will be

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Roundtable

Highlights of the Meeting of the RPPTL Section

PROBATE AND TRUST DIVISION

Saturday, June 5, 2021

JW Marriott Marco Island Hybrid Meeting, Marco Island, Florida

Prepared by Joseph M. Percopo, Orlando, Florida and Antonio P. Romano, Palm Beach Gardens, Florida

Thank you to the Roundtable Sponsors: Guardian Trust and Stout

The Director of the Probate Law Division, Sarah Butters, called the meeting to order at 8:34 am.

Sponsor Announcement. The Division Director thanked the sponsors, Stout Risius Ross, LLC and Guardian Trust.

Recognition and Introductions. The Division Director recognized Lorna E. Brown-Burton and Scott Westheimer, both candidates running for the Florida Bar President-Elect, as well as Ben Diamond who was recognized as a candidate running for Congress.

Legislative Committee Report — John Moran, Co-Chair:

Confronted with the challenges posed by COVID-19, along with other social and political issues dominating the headlines, things were very uncertain entering into Florida's 2021 Legislative Session. However, despite the unprecedented circumstances, the 2021 Legislative Session was one of the most prolific (and successful) in recent history concerning estate, trust, and guardianship issues. Some of the highlights include:

- Senate Bill 1070, which was a RPPTL Section initiative, contains several estate and trust components, including revisions to statutes regarding estates, trusts, dissolution of marriage, trustees, and homestead property. It also created the "Florida Uniform Directed Trustee Act" and the Florida "Community Property Trust Act."
- House Bill 625, which relates to an attorney's presumed reasonable compensation for providing services in connection with a formal estate or trust administration. The new law requires certain up-front written disclosures for attorneys who intend to base their compensation on the advisory fee schedules located in F.S. §§ 733.6171 and 736.1007. Absent prior court approval or the written consent of all interested persons, an attorney's failure to comply with these new disclosure requirements will prevent that attorney from receiving presumed reasonable compensation calculated pursuant to the advisory fee schedules.
- House Bill 483, which was a RPPTL Section initiative, makes a series of technical changes to Chapter 117, Florida Statutes relating to remote online notarizations. The legislation includes numerous clarifications, including corrections to statutory cross-references and revisions to jurats or notarial certificates in order to comply with requirements enacted in Chapter 2019-17, *Laws of Florida*.
- House Bill 441 creates an elder-focused alternative dispute resolution process known as "elder caring coordination" that is intended to serve as an alternative to guardianship court proceedings. This legislation is modeled after *parenting coordination* which has been used for many years in contentious child custody and visitation matters.
- House Bill 1041 is intended to protect elderly persons and disabled adults from abuse, neglect, and exploitation. Similar to Florida's *slayer statute*, this new law provides that a person convicted of abuse, neglect, exploitation, or aggravated manslaughter may not serve as a fiduciary or inherit from a victim's estate, trust, or other assets in certain circumstances. It also authorizes the Office of Statewide Prosecution to investigate and prosecute crimes under Chapter 825, Florida Statutes.

CLE Report — Sancha Brennan, Co-Chair:

Sancha Brennan reported great success with the CLE programs that have been put together and presented during this pandemic. The most recent CLE, the Trust and Estates Symposium, provided technology credits sufficient to satisfy the Florida Bar reporting requirement and had 110 people attend (live and online). A seminar on the Community Property Act is forthcoming.

List of the upcoming CLEs are as follows:

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Date of Presentation	Course #	Title	Location
10/13/2021	5140	Charitable Planning Series (4): International Charitable Planning	Audio Webcast
11/19/2021	5367	Probate Law	Fort Lauderdale
4/8/22 - 4/9/22	5482	Wills, Trusts and Estates Cerfication Review Course	Hyatt Airport, Orlando

Model and Uniform Acts Committee — Patrick Duffey, co-chair:

Patrick Duffey reported that the committee is continuing to review the pending Acts that the Uniform Law Commission is drafting. This includes review of existing model Acts for content in conflict of laws in trusts and estates, as well as other aspects of the Uniform and Model Acts that Florida has not yet adopted.

Ad Hoc Committee on RTODs — Steven Kotler, Co-chair:

Steven Kotler reported that a new Revocable Transfer on Death (RTOD) deed Ad Hoc committee was formed and is made up of members from both the Real Property Division and the Probate and Trust Division, as well as Professor Wright. The committee will be considering two initial proposals for legislation: (1) the draft act from the prior subcommittee, and (2) the draft act from Professor Wright.

Action Items: None

Information Items:

Probate Law Committee — Travis Hayes, Chair:

Travis Hayes reported on a motion before the Executive Council to support proposed amendments to F.S. § 733.705(5) (Payment of and objection to claims) to codify existing case law such that the requirement to bring an independent action is satisfied if, within 30 days of the filing of an objection to the claim: (1) a motion to substitute the fiduciary is filed in the pending action; (2) an order substituting the fiduciary is entered in the pending action; (3) such other procedure as may exist is initiated to substitute the fiduciary in the pending action; or (4) the timely filing of an arbitration is made when the decedent has entered into an agreement during lifetime which provides for mandatory arbitration relating to the claim, or arbitration is required by the decedent's will or trust.

Probate and Trust Division Committees:

Ad Hoc ART Committee — Alyse Comiter, Chair - Alyse Comiter reported that the committee approved proposed legislation prepared by the probate law sub-committee but opted not to include any provisions pertaining to homestead or the martial deduction. This proposed legislation is expected to be an information item for the next meeting.

Ad Hoc Guardianship Law Revision Committee — Nicklaus Curley, Chair - Nicklaus Curely reported that the committee is continuing to meet every Thursday to go through substantial comments received on the guardianship law rewrite.

Ad Hoc Electronic Wills Committee — Angela Adams, Chair - Angela Adams reported that the prior legislative session saw the passage of the Electronic Wills glitch bill whereby it addressed several issues with F.S. § 117.285 and remote notary supervision of witnessing. Angela responded to a question about the current state of qualified custodians. Angela noted that the committee has observed a number of remote online notaries that name themselves as qualified custodians but there is a question as to whether they are complying with the bonding and insurance requirements. Angela further noted that there is at least one attorney working on creating a new company that would act solely to serve as a qualified custodian.

Ad Hoc Study Professional Fiduciary Licensing Committee — Angela Adams, Chair - Angela Adams reported that a finalized draft for the professional fiduciary licensing has been circulated to committee members for feedback. The committee will review comments and then make final revisions with a goal to have a draft to present to the section at an upcoming meeting.

Ad Hoc Study Due Process, Jurisdiction & Service of Process Committee — Barry F. Spivey, Chair - Bill Hennessey reported that the committee is continuing to work on the designated representative statute, as well as methods for virtual representation. The committee anticipates that the draft statute should be ready for review at an upcoming meeting.

Asset Protection — Brian Malec, Chair - Brian Malec reported that the proposed fix for *Kearney v. Kearney*, 129 So.2d 381 (Fla. 1st DCA 2014) ("Kearney fix") died in the insurance and banking committee of the Florida House. Brian advised that the intent is to go back next session to try to get the Kearney fix worked out. Brian further reported that the committee has an initial white paper and proposed statutory language pertaining to the project on tenants by the entirety joint trusts.

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Attorney/Trust Officer Liaison Conference —Cady Huss, Co-Chair - Cady Huss reported that the conference will be August 19-21, 2021 at The Breakers, Palm Beach.

Charitable Planning and Exempt Organizations Committee — Seth Kaplan, Chair - Seth Kaplan reported that the Charitable Symposium Conference will continue as planned. Seth further reported on a four part CLE series for charitable planning covering: (i) Overview of different charitable trusts, (ii) Different types of exempt organizations and benefits of each, (iii) Regulatory issues (will include ethics credit), and (iv) International charitable planning and compliance matters with input from the Florida Attorney General office.

Elective Share Review Committee — Jenna Rubin, Chair

Jenna Rubin reported that the committee is reviewing whether a spousal consent is enough to keep an asset out of the elective estate calculations or whether a full spousal waiver with disclosure is necessary. Jenna further reported that the committee is also reviewing valuation discount issues and inclusion of foreign real property in the elective estate.

Estate and Trust Tax Planning — Robert Lancaster, Chair - Robert Lancaster reported that the committee has approved proposed language to clarify existing law pertaining to the transfer on death of interests in closely held organizations. Robert additionally reported that a recent Technical Assistance Advisement ("TAA") report pertaining to documentary stamp tax on transfers to revocable trusts has been withdrawn; therefore, the committee will instead work on proposed legislation (and possibly administrative code updates) to correct the documentary stamp tax issue for transfers to trusts that was created by the 2018 TAA from the Department of Revenue narrowly interpreting the exemption for documentary stamp tax as it pertains to trusts.

Guardianship, Power of Attorney and Advanced Directives — Nicklaus Curley, Chair - No Report.

IRA, Insurance and Employee Benefits — Alfred Stashis, Co-Chair - Alfred Stashis reported that the committee is working jointly with the asset protection committee on the exempt status of distributions of retirement accounts in light of the accelerated distribution schedule under the SECURE Act. Alfred further reported that the committee is involved with the Principal and Income Act rewrite, as well as reviewing the UTMA statutes as it pertains to retirement accounts.

Liaisons with ACTEC — Elaine M. Bucher, Tami F. Conetta, Thomas M. Karr, Shane Kelley, Charles I. Nash, Bruce M. Stone, and Diana S.C. Zeydel - Sarah Butters reported that Florida ACTEC will meet the day before the Breakers meeting.

Liaisons with Elder Law Section — Travis Finchum and Marjorie Wolasky - Travis Finchum reported that a trade group is in negotiations with DCF regarding the proposed prohibition for those under age 64 of pooled special needs trusts as it relates to Medicaid eligibility. While DCF has published these changes they have refrained from implementing them while reviewing the comments sent to DCF.

Liaisons with Tax Section — Lauren Y. Detzel, William R. Lane, Jr., and Brian C. Sparks

No Report

Liaison with Professional Fiduciary Council – Darby Jones - Darby Jones reported that the Professional Fiduciary Council is having monthly fiduciary webinars and is planning its annual February fiduciary conference. Darby noted that the Professional Fiduciary Council is available to assist in locating qualified professional fiduciaries.

Principal and Income — Edward Koren, Co-chair - Edward Koren reported that the Committee is nearing completion of its review of the Florida version of the Uniform Fiduciary Income and Principal Act and expects to have a white paper to accompany the proposed update at the Breakers meeting.

Probate and Trust Litigation — Rich Caskey, Chair - Rich Caskey reported that the collaborative law process, utilized in Florida for family law, is being looked into by a sub-committee for a future presentation to the committee on how similar laws may be implemented and utilized in probate litigation. Rich further reported that the committee is reviewing issues pertaining to principal venue for trusts – when does the principal place of administration change, and how does that impact venue and jurisdiction when there is a breach of trust.

Probate Law and Procedure — Travis Hayes, Chair - Grier Pressly provided a summary of the new attorney fee compensation legislation which will be further reviewed at the legislative update. Juan Antunez discussed *Johnson v. Townsend*, 259. So.3d 851 (Fla. 4th DCA 2018) and fixing rights at death affecting community property. Anthony Getler provided a summary of a new uniform disposition of community property at death act which is separate from the community property trust act. Jorja Williams reported a new issue concerning a Will's incorporation by reference of a later amended trust instrument and suggested tweaking the incorporation by reference statute to ensure it is unnecessary to update the Will with each subsequent trust amendment.

Trust Law — David Akins, Co-Chair - David Akins reported that the committee is reviewing the trustee resignation statute, as to whether the 30 day notice of resignation requirement can be waived. There was a discussion regarding the statute of limitations application to trust decanting. David additionally reported that the committee is looking at differences between the Probate Code and Trust Code and whether the Trust Code should have a preterimitted child provision and whether there should be ademption.

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Roundtable: Probate and Trust Division, from page 46

Wills, Trusts and Estates Certification Review Course — Jeffrey Goethe, Chair - Jeff Goethe reported that the Wills, Trust and Estates Certification Review Course, comprised of 18 CLE credits, is now available on-demand.

Adjournment. Meeting was adjourned at 9:50 am.

Roundtable: Real Property Division, from page 43

addressing the issues with the joint committee to determine what needs to be done. He explained that the committee does not want to stand in the way of the other FR/Bar changes being made, but the position of the Title Insurance Committee is that there is an important issue which needs to be addressed now due to class action suits being filed. He concluded that the committee needs to take the time to address all of these issues between now and The Breakers meeting.

Title Issues and Standards — Rebecca L.A. Wood, Chair, Robert M. Graham, Brian W. Hoffman and Karla J. Staker, Co-Vice Chairs. Rebeeca Wood, thanked the Title Issues and Standards subcommittees for work on the Bankruptcy, MRTA, Plat and Trust Standards.

Other Business — Adele Stone. Adele Stone gave a report on the Model and Uniform Law Committee. It is a standing committee. Rick Taylor is the co-chair on the real property side. The mission of this committee is to monitor and analyze the Model and Uniform Acts promulgated by the Uniform Law Commission and report to Section leadership on same so that they can be informed to be able to take action as may be appropriate.

Adjournment. Meeting was adjourned at 9:35 a.m.

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A Tribute to William T. Hennessey, III

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



William T. Hennessey,III, known to his friends and colleagues as Bill, served as the Chair of the Real William T. Hennessey, known to his friends and colleagues as Bill, served as the Chair of the Real Property, Probate and Trust Law Section of the Florida Bar for the challenging term of 2020-2021. Bill is a shareholder in the Gunster firm with his office located in West Palm Beach.

Bill is a "double Gato," receiving an undergraduate degree in accounting from the University of Florida in 1993 and his J.D. with highest honors in 1996. Bill grew up in South Florida near Davie and after his University of Florida graduation, settled with the Gunster firm in West Palm Beach. He has been there ever since, practicing in the areas of probate, trust and guardianship litigation, private wealth services and dispute resolution.

Bill reports that his first introduction to the RPPTL Section and its important work was when he was recruited to assist with a subcommittee involved with major revisions to the Probate Code, under the leadership of Rohan Kelley. After that successful project and introduction to the "magic" that can be performed by Section committees, Bill became involved with the workings of the Probate & Trust Litigation Committee. After actively serving on multiple subcommittees with the encouragement and support of Fletcher Belcher, Bill was appointed to the position of Vice Chair of Probate & Trust Litigation in 2004. Bill states, "I owe my start toward the position of Chair of the Section to Fletcher." In 2007, Bill took over as Chair of Probate & Trust Litigation where he served for five years.

In 2010, Brian Felcoski appointed Bill as Chair of an Ad Hoc Estate Planning Conflicts of Interest Committee which studied and addressed the issues of lawyers receiving client gifts and lawyers being named fiduciaries in testamentary documents prepared for a client. The work of the committee on these issues led to the enactment of statutory changes as well as amendments to the Rules Regulating the Florida Bar. Bill's many years of work "in the trenches" brought about significant contributions, including changes to rules and statutes that impact the practice of probate and trust law.

In 2013, Bill advanced to his first position on the Section Executive Committee as Co-Chair of the Legislation Committee. He served in that role for two years, then served as a Co-CLE Chair in 2015, Secretary in 2016, Probate Division Director in 2017 and 2018 and the rest, as they say, is history, with Bill rising to Section Chair in 2020 at the height of the pandemic. However, the pandemic proved to be just one more challenge for Bill to attack and overcome.

As we all can appreciate, the position of Chair of the RPPTL Section is a huge task. Bill reports that the year of his tenure began with a bit of disappointment and frustration when he was forced to cancel the in-person July meeting traditionally held at The Breakers. Bill relates that it was a hard but obvious decision to have to "pull the trigger" on The Breakers in-person meeting, but with cases spiking, there was no other choice. Like with most things, there was a silver lining. The virtual attendance numbers for the Breakers Meeting, including the Annual Legislative and Case Law Update, set new records with many new faces appearing for the first time via Zoom.

Despite all the challenges presented by a pandemic, Bill reports some very positive outcomes of his year for the Section. The spike in attendance created by the virtual platform continued throughout the year as the Section was able to reach a number of new members. Sancha Brennan and Willie Kightlinger as CLE Chairs re-tooled our entire CLE presentation structure to create an entire selection of on-line presentations, including some of our long running programs which had always been held in-person. Bill expressed great appreciation for Mary Ann Obos and Hilary Stephens for their role in planning meetings and events in both in-person and virtual format. Bill said "Presenting two sets of meetings – virtual and in-person was an incredible challenge which Mary Ann and Hilary not only met, but completely knocked it out of the park." Bill shared that even as in-person participation for Section meetings has returned, Zoom attendance has remained significant. Bill reports that during the recent meeting in Marco Island many folks who were physically present in Marco utilized Zoom to attend committee meetings from their hotel rooms.

When asked to describe the best part of serving as Chair of the Section, Bill replied that the best part was watching us "come together and manage this process in the face of a pandemic. It made us stronger." Bill explained that he very much enjoyed his year as Chair and that it has been "one of the greatest honors of my career." He shared that "I like to help people have a good time." If you were fortunate enough

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A Tribute to William T. Hennessey, III, from page 48

to attend any of the in-person meetings during Bill's tenure (Jackson Hole, WY, Disney's Yacht Club, Hammock Beach Resort & Marco Island) then you know that Bill was highly successful and delivered many good times.

Concerning advice for future Chairs of the Section, Bill counseled "Trust the folks who are around you, including other members of the Executive Committee, Committee Chairs, Committee members and staff." Bill observed that all these good folks are hard workers and keenly interested in advancing the goals of the Section.

Bill observed that over the course of his legal career, he has devoted a lot of time and energy to Section work but insists that the Section has more than repaid him for that investment in knowledge of the law as well as the opportunities to meet great friends and colleagues.

Bill also expressed thanks to his wife and best friend, Cathy. Bill exclaimed that Cathy is a "remarkable person," who has been "incredibly supportive" in helping him to balance work, life and RPPTL.

As Section Members, we all owe an immense debt of gratitude to Bill for his devotion, time and leadership to the Section in an unusual and difficult year. I think we can all count this year as a great success in increased participation at Section meetings, offering so many opportunities in professional growth for so many attorneys. Thanks, Bill, for all your hard work and welcome to your well-earned seat in the back row.

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

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Recent Change to Florida's Summary Judgment Standard, Rule 1.510

By Terrence L. Harvey, Esq., The Harvey Firm, PLLC, Jacksonville, Florida

The Supreme Court of Florida has implemented a new standard for summary judgment. The Supreme Court has stated that the new standard provided for in Fla. R. Civ. Pro. 1.510 shall be construed and applied in accordance with the federal summary judgment standard.[1] The Supreme Court outlined key changes between the old standard and the new standard.

Summary Judgment versus Directed Verdict

The new rule 1.510 will be fundamentally similar with the directed verdict standard. Both the summary judgment and directed verdict standards focus on whether the evidence presents a sufficient disagreement to require submission to a jury and under both standards the substantiative evidentiary burden of proof that the respective parties must meet at trial is the only touchstone that accurately measures whether a genuine issue of material fact exists to be tried.

Burden of Proof to Win Summary Judgment

The Supreme Court established that the moving party does not bear the burden of persuasion at trial and can obtain summary judgment without disproving the other party's case. Such a party can satisfy its initial burden of production in one of two ways: (1) produce evidence that the non-moving party lacks the evidence to prove the alleged issue in controversy; or (2) the party moving for summary judgment need not set forth evidence when the non-movant bears the burden of persuasion at trial.[2]

Genuine Issue of Material Fact Test

The Supreme Court explained that the extremely expansive old standard allowed any evidence that appeared to create an issue of fact, whether credible or not, substantial or inconsequential, to stop the inquiry and prevent summary judgment because the slightest doubt had been raised.[3] However, the newly implemented federal standard boils down to whether a reasonable jury could return a verdict for the non-moving party given the evidence presented.[4] The Court cited *Anderson* in finding that, "if the evidence is merely colorable, or is not significantly probative, summary judgment may be granted."[5] The Court goes on to explain that the non-moving party is required to do more than "simply show that there is some metaphysical doubt as to the material facts."[6] And if the parties in the case tell different stories and the facts appear contrary to the record that no jury could believe it, a court is not to adopt those contradictory facts for the purposes of ruling on a motion for summary judgment.[7] Essentially, the new standard broadens the court's ability to weigh the current evidence in the record in order to determine whether a jury, if given said evidence, can find for the non-moving party.

The new standard is meant to secure the just, speedy, and inexpensive determination of every action and to ensure that only genuine disputed facts of issue make it to trial. The new rule became effective on May 1, 2021.


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 Supreme Court of Florida, No. SC20-1490 (2020).

2 See *Bedford v. Doe*, 880 F.3d 993, 996-97 (8th Cir. 2018) and *Wease v. Ocwen Loan Servicing, L.L.C.*, 915 F.3d 987, 997 (5th Cir. 2019).

3 Quoting *Bruce J. Berman & Peter D. Webster, Berman's Florida Civil Procedure,* §1.510:5 (2020 ed.).

4 *Anderson* v. *Liberty Lobby, Inc.*, 477 US 242, 248 (1986).

5 *Id.* at 249-50.

6 Quoting *Matsushita v. Zenith Radio Corp.*, 475 US 574, 586 (1986).

7 Quoting *Scott v. Harris*, 550 US 372, 380 (2007).

Petitioning Pitfalls

By Lilleth Bailey, Esq., Probate Division, Broward County Courthouse, Fort Lauderdale, Florida

When preparing and filing a Petition for Administration, choosing the right personal representative is not the only thing you have to worry about. Being aware of issues regarding standing can help you avoid an early rejection of your petition.

The Predicament

As a Staff Attorney in the Probate Division, I frequently come across uninterested persons filing Petitions for Administration. Pursuant to Fla. Stat. § 733.202 (2021), "[a]ny *interested person* may petition for administration" (emphasis added). Therefore, uninterested persons lack the standing to petition for administration.

Fla. Stat. § 731.201(23)(2021), defines an interested person as:

> …any person who may reasonably be expected to be affected by the outcome of the particular proceeding involved. In any proceeding affecting the estate or the rights of a beneficiary in the estate, the personal representative of the estate shall be deemed to be an interested person. In any proceeding affecting the expenses of the administration and obligations of a decedent's estate, or any claims described in s. 733.702(1), the trustee of a trust described in s. 733.707(3) is an interested person in the administration of the grantor's estate. The term does not include a beneficiary who has received complete distribution. The 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.

Fla. Stat. § 731.201(23)

In addition to the definition set out in the statute, case law further extends the definition of an interested person to include creditors.[1] Consequently, before filing a Petition for Administration, the petitioner must first determine whether they fit under the statutory definition of an interested person or the case law's extension of that definition.

Point of Clarification

It is important to point out the difference between having standing to file a Petition for Administration and being eligible to serve as a personal representative. Part III of chapter 733, Florida Statutes, discusses the eligibility to serve as a personal representative. Specifically, Fla. Stat. § 733.302 (2021), states, "[s]ubject to the limitations in this part, any person who is sui juris and is a resident of Florida at the time of the death of the person whose estate is to be administered is qualified to act as personal representative in Florida." The chapter provides further requirements regarding the selection of a personal representative.[2] Consequently, a petitioner can be uninterested and still be eligible to serve as a personal representative.

Possible Solutions

1) An uninterested person may file a Petition for Administration with an interested co-petitioner.
2) If an uninterested person is the sole petitioner, an interested person can execute a joinder to the Petition for Administration. It is important to note that having the interested person consent to the petition is not enough as it still does not address or remedy the standing issue.
3) An interested person can file the Petition for Administration and select the eligible uninterested person as the personal representative within the petition.


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 Montgomery v. Cribb*, 484 So. 2d 73, 75 (Fla. 2d DCA 1986); *In re Raymond's Estate*, 237 So. 2d 84, 85 (Fla. 1st DCA 1970).

2 *See* Fla. Stat. §§ 733.301, 733.303, and 733.304 (2021).

Probate Case Summaries

Prepared by Nicole Bell Cleland, Esq.,
Legacy Protection Lawyers, LLP, St. Petersburg, Florida

Even if acknowledgment of paternity had been satisfied under Section 732.108(2), it is time-barred under Section 95.11(3)(b).

White v. Marks, 46 Fla. L. Weekly D747 (Fla. 5th DCA, April 1, 2021)

Mr. Marks died testate leaving his estate to Joseph White and Darla Hall, but included a provision in his Will stating, "I have also intentionally made no provision under this will for my adopted daughter Samantha Nicole Marks, although it is my desire that Joseph White make appropriate provisions for her."

Ms. Marks petitioned for revocation of probate and for intestate administration claiming she was a legal heir to the estate and undue influence. Ms. Marks stated she was the daughter of Mr. Marks although she was not his biological child, nor adopted by Mr. Marks. She alleged Mr. Marks had acknowledged his paternity in writing by agreeing to be listed on her birth certificate (Mr. Marks started dating Ms. Marks' mother while she was pregnant and their relationship lasted only 3 years, and they never married). Other than when she was an infant, Mr. Marks and Ms. Marks met on only two occasions, and Mr. Marks never financially assisted Ms. Marks.

Ms. Marks moved for summary judgment on her claim that she had standing to contest the Will. Ms. Marks relied on the appearance of his name on her birth certificate, the "adopted daughter" reference in Mr. Marks' Will, and a notation in Mr. Marks' pocket planner. Appellants argued the statute of limitations barred her claim and she therefore lacked standing, and the written documents relied upon were insufficient to acknowledge paternity.

The Appellate Court determined it had jurisdiction to review the appeal because the summary judgment order was a determination of heirship under Fla. Probate Rule 9.170(b)(5). The Court also determined it could review the statute of limitations affirmative defense because it was part and parcel of the heirship determination.

The 5th DCA agreed with the Appellants Ms. Marks was time-barred from establishing Mr. Marks' paternity. Under Section 95.11(3)(b), there is a four-year statute of limitations beginning when an individual reaches the age of majority, to "any action relating to determination of paternity." The 5th DCA cited several other cases agreeing that the statute of limitations applies to actions in probate brought under Section 732.108(2)(a) and (b), but there was no case directly relating to the statute of limitations under 732.108(2)(c), which is the section Ms. Marks' was relying on. However, in *King v. Est. of Anderson,*[1] the 5th DCA did not differentiate between sections 732.108(2)(a), (b), or (c) when determining the time-bar issue of an illegitimate heir, so the court agreed here.

Moreover, the 5th DCA said even if Ms. Marks' claim was not time-barred, her claims did not satisfy the requirements for paternity acknowledgment under Section 732.108(2)(c). Mr. Marks had not signed her birth certificate, nor did the notations in Mr. Marks' Will or pocket planner qualify as his written acknowledgment of paternity. It is undisputed Ms. Marks was not the decedent's biological daughter or adopted daughter. The court found Mr. Marks' notation in his planner and provision in his Will was merely descriptive, rather than a direct acknowledgment of paternity.

The 5th DCA reversed the trial court's grant of summary judgment, and the case was remanded.

When a Personal Representative obtains a prevailing party appellate fee award against one party, the Personal Representative may recover the prevailing party appellate fee from all estate beneficiaries.

Ervin v. Smith, 312 So. 3d 995 (1st DCA 2021)

Mother to three children, Nath updated her estate plans leaving all her assets to her son, Subrata Bobby Nath, in September 2009. Three weeks after her new estate plans were updated, Nath died in an accident with the son driving the vehicle. In February 2011, two of Nath's daughters filed a petition to probate their mother's estate believing she had died intestate. Nath's son then petitioned to have the Will admitted to probate and was appointed Personal Representative of their mother's estate. The daughters then sought removal of the son and filed a petition to set aside probate of the Will, and a complaint contesting the validity of Nath's trust. The court did remove the son and appointed Robert Ervin, Jr., as the Personal Representative.

In March 2013, the Personal Representative initiated a legal action against the son for neglect and exploitation of Nath. On January 22, 2014, the parties entered a "Mediation Settlement Agreement," where it settled which assets each beneficiary was to receive from the estate. It also included a provision each party shall be responsible for 1/3 of Robert Ervin, Jr.'s fees and costs for his role as Personal Representative. The agreement

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also included a prevailing party attorneys' fees provision.

On July 9, 2015, the son appealed an order from the trial court to enforce the mediated settlement agreement. In response to the appeal, the Personal Representative (Erwin) and the daughters both sought a prevailing party attorney fee award against the son. The court affirmed the order and granted the Personal Representative and daughters' motions for attorney's fees, with a remanding to the lower court to determine the amount of the fee award. The trial court awarded appellate attorney's fees of $29,081.25 against the son, but the daughters did not seek an assessment of their attorney fee award against the son.

On April 16, 2019, the Personal Representative filed a petition for discharge, and sought payment against all 3 beneficiaries ($29,984.56 each), which included the award of appellate fees against the son for $29,081.25. The daughters asserted the Personal Representative's fees were "duplicated intentionally" and recovery of the trial court award of $29,081.25 against the daughters would be "double recovery." The trial court entered an Order on Petition for Discharge and Objections and sustained the objection as to the payment of the Personal Representative's appellate fee under the mediated settlement agreement. The trial court then reduced the amount due from each beneficiary to $20,290.81. The trial court denied the Personal Representative's motion for rehearing on this issue—it was appealed, and a cross-appeal followed.

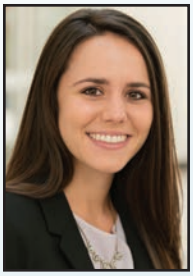
The 1st DCA addressed two specific issues on appeal. The first issue is asserted by the Personal Representative stating the trial court erred in stating he was collaterally estopped from seeking payment of his appellate fee due to the prevailing party appellate fee against the son. "Collateral estoppel is applicable where a subsequent cause of action between the same parties is upon a different claim or demand from the first cause of action," in which case "the judgement of the prior action estops the parties from litigating in the second suit issues or questions common to both causes of action which were actually adjudicated in the prior litigation."[2] In this prior proceeding, the trial court was tasked with determining the amount of the prevailing party's appellate fee against the son. Now, the Personal Representative's assertion his unpaid fees from each of the three beneficiaries under a different provision of the mediated settlement agreement were not previously adjudicated because it was not a critical or necessary part of the prior proceeding. The 1st DCA agreed.

The second issue is an equitable argument where the daughters assert several claims against the Personal Representative stating he failed to fulfill his duties and should not be able to recover against the daughters accordingly. The 1st DCA disagreed and determined there was no equitable basis to deny appellate fees to the Personal Representative. The 1st DCA reversed the trial court's order and remanded with directions to the trial court to authorize the personal representative to recover appellate fees from all three beneficiaries. Cross-appeal affirmed.

Endnotes

1 King v. Estate of Anderson, 519 So. 2d 68, 68 (Fla. 5th DCA 1988).

2 Smith v. Perry, 635 So. 2d 1019, 1020 (Fla. 1st DCA 1994).



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.*

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Real Property Case Summaries

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

In a quiet title action where the Plaintiff establishes a prima facie case that a deed was invalid on its face, the trial court cannot grant an involuntary dismissal.

George Anderson Training & Consulting, Inc. v. Miller Bey Paralegal & Fin., LLC, 313 So.3d 214 (Fla. 2d DCA 2021)

In the Second District Court of Appeals ("Second DCA"), appellants George Anderson Training and Consulting, Inc., a Florida corporation ("Anderson Inc."), and George C Anderson ("Anderson") appeal an order granting a motion for a directed verdict following a bench trial in a quiet title action. In a non-jury trial, the directed verdict is treated as an involuntary dismissal.

In 2001, Anderson Inc. purchased certain real property in Pinellas County ("Property"). On December 21, 2004, Gladys Maria Otero, then Vice President and 5% shareholder of Anderson Inc., executed and recorded a quitclaim deed as President of Anderson Inc. conveying the Property to Anderson. On the same day, a quitclaim deed was executed conveying the Property from Anderson to Ms. Otero, but the deed was not recorded until January 7, 2009. Anderson asserted that Ms. Otero did not have the authority to execute the first deed, and that his signature was forged on the second deed.

Ms. Otero filed bankruptcy in 2010, and although Anderson filed a claim in the bankruptcy court, Ms. Otero conveyed the Property by special warranty deed to Miller Bey Paralegal & Financing, LLC, a Florida limited liability company ("Miller Bey") on September 11, 2015. Anderson filed a quiet title action on June 3, 2016, and although Anderson filed a motion for summary judgment, the motion was not considered or heard, and the matter went to a bench trial. Miller Bey moved for a directed verdict, and the trial court entered its order that Anderson failed to meet its evidentiary burdens and that title remained vested in Miller Bey.

The Second DCA treats the directed verdict as an order granting the motion for involuntary dismissal and reviews as an adjudication on the merits. For Anderson to state a claim to quiet title, he must allege that he has title to the Property, that there is a cloud on the title, and that Miller Bey's claim to the title is invalid.

Upon review of the various conveyances regarding the Property, the Second DCA focused on two deeds executed in 2004 and one deed executed in 2015. The first 2004 deed was executed by Ms. Otero as President of Anderson Inc. to Anderson, but Anderson claimed that Ms. Otero was not President of the corporation and had no authority to convey an interest in the Property. The Second DCA cited Fla. Stat. § 692.01 and emphasized that a corporation could convey an interest in real property without the authorization by the board of directors "only if the instrument is 'sealed with the common or corporate seal.'" Since the deed executed by Ms. Otero was not sealed, she could not sign the deed as grantor without corporate authorization, and the deed was invalid on its face.

Anderson claimed that his alleged signature on the second 2004 deed, attempting to convey the Property from Anderson to Ms. Otero, was forged. The burden of proof is by a preponderance or greater weight of the evidence, and the testimony of the purported grantor that his or her signature was placed without his or her knowledge or consent is sufficient to meet this burden. Anderson testified that his signature was forged, that he was not in Florida at the time the deed was executed, and that he would not sign his name with a "C." as his middle initial, since his middle name is "C" and not an abbreviation. The Second DCA indicated that Anderson met the evidentiary burden that this deed was forged.

The Second DCA also concluded that the 2015 deed from Ms. Otero was invalid on its face and failed to convey any legal interest in the Property to Miller Bey. Section 689.01(1) of the Florida Statutes requires a deed to convey real property to be executed in the presence of two witnesses, and the signatures must be witnessed and verified by a notary. Frank Miller signed the deed as both grantor and witness. He could not sign the deed as grantor since was not an owner of the property and should not have signed the deed as witness since a grantee may not sign as witness to a deed. Marlene O. Duncan also signed as a witness and notarized her own signature, despite the prohibition of such act under Fla. Stat. § 117.05(1). Finally, Ms. Otero signed the deed as grantor, but she could not have conveyed any property since (if it was her property) it would have been part of her bankruptcy estate.

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A landlord is entitled to obtain rental monies from the Court Registry by filing a motion, without filing a pleading containing a cause of action directed at obtaining the funds.

Lenmar Realty, LLC v. Sun Elec. Works, Inc., 317 So.3d 125 (Fla. 4th DCA 2021)

During a non-residential lease dispute with landlord Lenmar Realty, LLC ("Lenmar"), tenant Sun Electric Works, Inc. ("Sun Electric") moved to deposit rent funds into the Court Registry while the trial court reviewed its claims of breach of contract, declaratory judgment, and constructive eviction. In a related case, Reliable Power Systems, Inc. ("Reliable Power"), who occupied one of the units leased by Sun Electric, was sued by Lenmar for non-residential tenant eviction. In the consolidated case, the trial court ruled in favor of Lenmar against Sun Electric and in favor of Reliable Power against Lenmar. Lenmar twice filed motions to disburse the rents deposited in the Court Registry and compel payment of the balance of rent, which motions were denied because there was no counterclaim or pleaded affirmative relief by Lenmar. The trial court ordered the return of the rental payments to Sun Electric, although Sun Electric had not pleaded for the return of the rental payments.

The Fourth District Court of Appeals ("Fourth DCA") reversed the portion of the final judgment as to the disbursement of the deposited rent since the rent deposits were ancillary to the asserted claims of possession of real property. Under the Rules of Civil Procedure, a litigant may bring a motion setting "forth the relief or order sought."[1] Section 83.232(1) of the Florida Statutes allows a landlord to apply to the court for disbursement of funds in the Court Registry.[2] Once the trial court had ruled in Lenmar's favor on Sun Electric's cause of action, the funds should have been disbursed to Lenmar. The Fourth DCA affirmed in part and reversed and remanded part of the final judgment for the funds in the Court Registry to be released to Lenmar.

No documentary stamp tax refund due when consideration for real property not separated from other business assets purchased at the same time.

1701 Collins Miami Owner, LLC v. Dep't of Revenue, 321 So. 3d 875 (Fla. 1st DCA 2021)

In 2015, Appellant sold a hotel business consisting of real property, tangible personal property, and intangible property under a contract price of $125,000,000.00 ("Purchase Price"). Documentary stamp taxes on the deed were paid to the Department of Revenue ("Department") based on the Purchase Price, and Appellant filed an application to the Department for a partial refund of the taxes paid. In 2018, Appellant procured a Deal Price Analysis ("DPA") showing the value of the real property as $77,873,500.00 ("DPA Valuation"), and the balance of the Purchase Price was allocated to the tangible and intangible property. The Department denied the refund. Appellant petitioned for a chapter 120 administrative hearing, and the Administrative Law Judge ("ALJ") recommended the refund of the overpayment based on the DPA. The Department rejected the ALJ's recommendation, and the First District Court of Appeals ("First DCA") reviewed de novo.

The First DCA reviewed Fla. Stat. § 201.02 and discussed the definition of consideration as the "bargained-for product of mutual assent between contracting parties, given in exchange for promised performance."[3] In order for Appellant to prove that they were entitled to a refund, the Appellant was required to prove that the parties agreed upon the DPA Valuation of the real property. The First DCA emphasized that the parties had bargained for the Purchase Price of $125,000,000.00, but that the parties had not agreed on a separate allocation of the consideration for the real property. The First DCA affirmed the Department's decision to deny the refund request by the Appellant.


E. MILLER-MEYERS

Erin Miller-Meyers *practices real estate law and presents educational events for real estate agents in Southwest Florida. 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. R. Civ. P. 1.100(b).

2 Fla. Stat. § 83.232(1).

3 *1701 Collins Miami Owner, LLC v. Dep't of Revenue*, 321 So.3d 875, 880 (Fla. 1st DCA 2021) (citing ALJ).

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

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