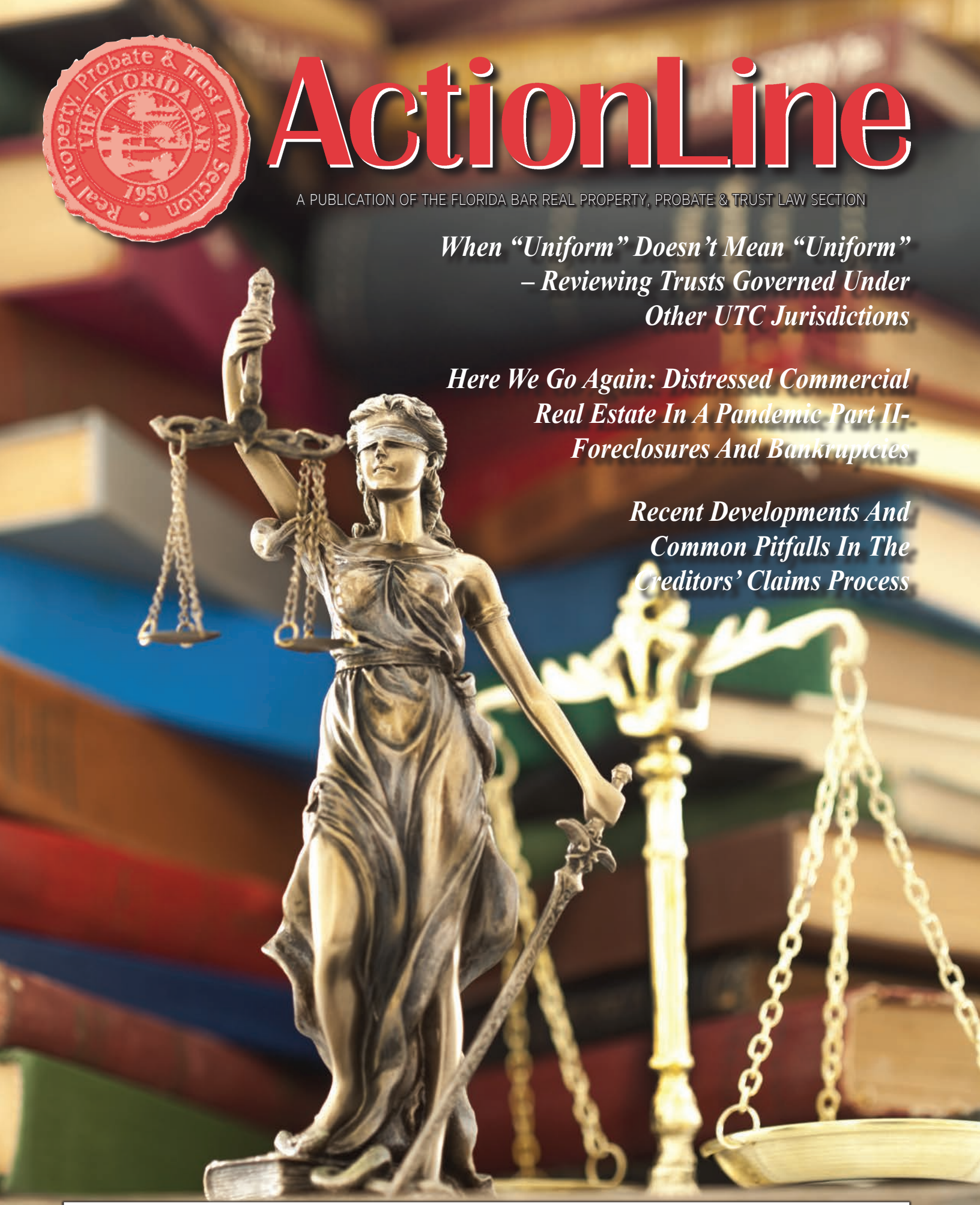
ActionLine

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

When "Uniform" Doesn't Mean "Uniform" – Reviewing Trusts Governed Under Other UTC Jurisdictions

Here We Go Again: Distressed Commercial Real Estate In A Pandemic Part II- Foreclosures And Bankruptcies

Recent Developments And Common Pitfalls In The Creditors' Claims Process



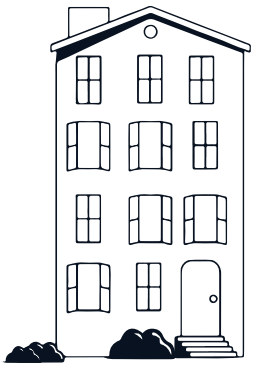
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An Open Invitation to Our Members

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

Dear Friends,

At over 11,000 members, the RPPTL Section is one of the largest and most active Sections of The Florida Bar. In any organization of this size, it can be daunting to get a foothold. Indeed, with literally dozens of different substantive real estate, probate, trust, and guardianship related committees, along with a wide range of general standing committees, it is hard to know where to even begin. I'd like to personally encourage you to get started. With two more sets of committee meetings slated for this Bar year, including this year's Convention at the JW Marriott in Marco Island, there is no better time than the present to begin charting your course as a Section member. The incomparable Yogi Berra once said, "if you don't know where you are going, you'll end up someplace else." To that I say, truer words have never been spoken. In this article, I'll try to peel back the veil on the structure of the Section and its leadership and provide some pointers on ways to get involved and make the most of your Section membership.

It is often said that the lifeblood of our Section is its substantive committees. The Section committees are generally divided into three divisions: the Probate and Trust Division (Sarah Butters, Tallahassee, as Division Director), the Real Estate Division (S. Katherine Frazier, Tampa, Division Director), and the General Standing Division (Robert Swaine, Sebring, Division Director and Chair-Elect). The Probate and Trust Division (affectionately known to us RPPTLs as the "Death" side) has 19 different substantive committees touching on virtually every conceivable area of the estates, trusts, and guardianship planning, administration, and litigation practice. The Real Property Division (the "Dirt" side) has 18 of its own committees addressing issues such as title insurance and standards, construction law, residential real estate, commercial real estate, leasing, development and land use, and real estate litigation. If you are new to the Section, or just looking to get more involved, I would strongly suggest that you consider attending our Death or Dirt committee meetings to get a better idea of what we do. Substantive Committee meetings are generally open to guests and typically consist of an education component as well as discussion of legislative initiatives of interest to our practice. The committee chairs are always looking for volunteers to assist on committee projects, present on CLE topics, and write articles for our Section publications. I promise… it won't take long for an issue of interest to pop up for you which will provide an opportunity to get involved. About 20 years ago, I volunteered to head up a discreet project for RPPTL's Probate and Trust Litigation Committee: I was hooked for life!

The General Standing Committees of the RPPTL Section generally assist with internal Section business and matters of interest to both the Death and Dirt sides of the aisle. This is where you'll find our Membership & Inclusion Committee which focuses on enhancing Section benefits and interaction as well as fostering diversity, and our Law School Programming Committee which works directly with law students and encourages participation in our practice areas. From a substantive law perspective, General Standing is also home to committees which cross practice areas such as Professionalism and Ethics and Homestead Study, and Disaster and Emergency Preparedness. The General Standing Committees are good places for you to

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Get Included In ***ActionLine!***

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

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

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

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

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

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

give back to the Section and get involved behind the scenes in its operations.

In sum, the committee meeting format is vitally important because most RPPTL initiatives originate in committee and are refined, debated, and vetted at length in our meetings. The committees also provide opportunities to share ideas and fellowship with top lawyers throughout the state. The bottom line is that if you have an interest in the law, which I know that every one of you does, we can find a good home for you in one of our many committees. A complete list of our committees can be found under the "Committees" Tab at www.rpptl.org.

Of course, the bonus is that our substantive committee meetings are generally held four times a year on the Thursday and Friday before our Executive Council meetings at wonderful resort locations throughout the state. The meetings generally include planned receptions, dinners, and social events for our members during the evenings. If you would like to attend a meeting in person, you can find registration information for the upcoming meetings on our RPPTL website under the "Executive Council" Tab at www.rpptl.org. Again, all RPPTL members are invited and encouraged to attend our meetings and events.

Another good way to get involved in the Section is by interacting within your circuits. The RPPTL Section elects At-Large Members ("ALMs") from around the state to serve on our Executive Council as your local liaisons on Section business. The ALMs represent the Section throughout the state, participate on the Section's committees, keep current on issues of concern to the members, and communicate regularly with the members. It is through the ALMs that the work of the RPPTL Executive Council is disseminated to the entire Section. You should be receiving regular reports from the Lead ALM in your area or circuit. Many of the ALMs have been organizing regional events with a social and continuing legal education component. Those local meetings provide a great opportunity to network with referral sources and practitioners in your area. Applications to become an ALM on the Executive Council are generally accepted and due in December of each year. The Long-Range Planning Committee, consisting of Past Section Chairs, proposes a slate of nominees for ALMs prior to the annual election held in conjunction with the RPPTL Convention each year. More information on the ALMs and the volunteer projects being coordinated through our ALMs can be found under the "Committees" Tab at www.rpptl,org.

The Executive Council is generally the governing body of the Section. Our Committee chairs and vice chairs are members of the Executive Council, together with our Past Chairs, Liaisons, At-Large Members, and Section Officers. The best way to work your way onto the Council is through becoming an active Section member through committee participation and leadership. The Section is always looking for strong and thoughtful volunteers, and our leadership is encouraged to recognize up-and-coming lawyers for future positions.

Of course, you don't have to be actively involved in our committees to contribute. The Section is also soliciting substantive articles for publication in ActionLine and The Florida Bar Journal. If you have a topic idea or have written a piece that you believe should be published, I encourage you to reach out to our editors. There are many opportunities throughout the year to get published. Information on submitting articles can be found under "About Us/ActionLine" at www.rpptl.org.

So, there you have it…my short summary on just a few ways to get involved and make the most of your Section membership. It all begins with "just give it a try." Look, I realize that it may be intimidating to navigate your way through a new group. It certainly was for me. However, the friendships I have made here have been lifelong and the knowledge I have gained has far outweighed my personal contributions. I am confident we have a home for you in the RPPTL Section. I look forward to meeting you at one of our upcoming meetings.

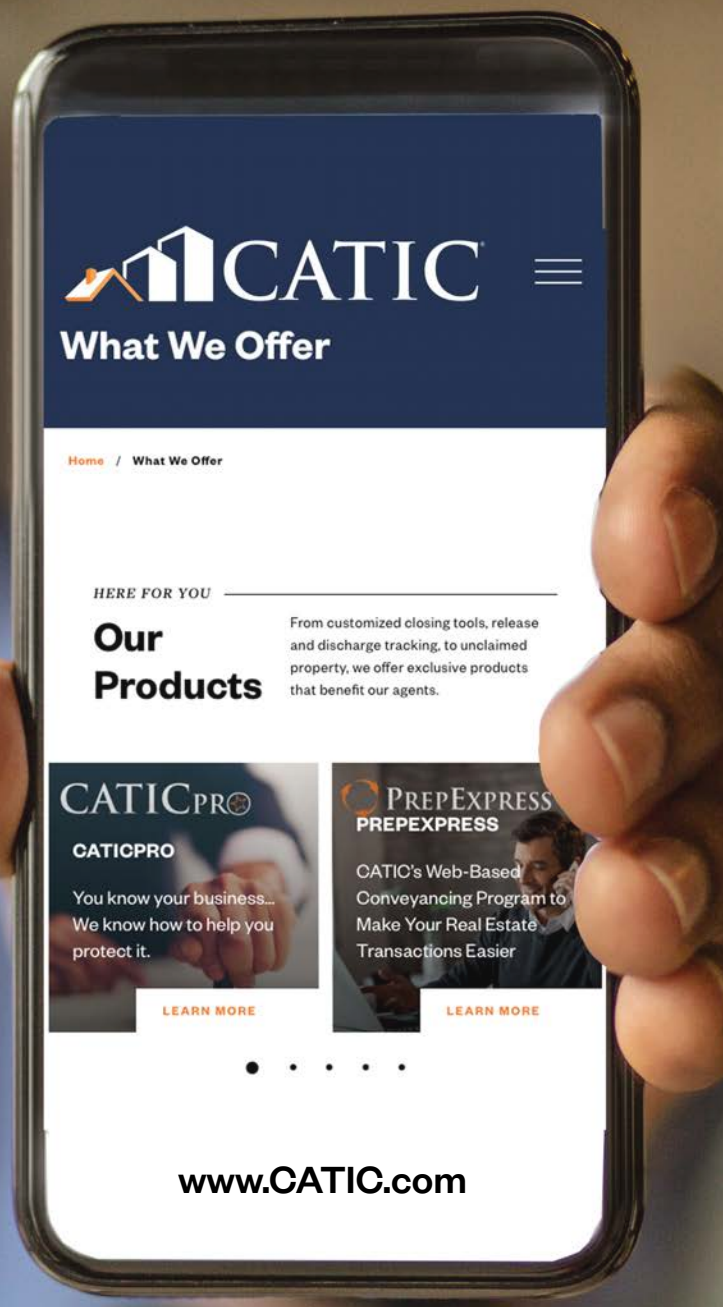
Stay safe!

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

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

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J. BASKIES



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Letter From The Co-Editors-In-Chief

We believe you will find this Spring 2021 issue of *your* magazine insightful and practical. As always, it is the content that drives the publication. On these pages you will find useful material and information that you will be able to refer to in your day-to-day practice. The Practice Corner articles and Case Summaries are proof of that point. In many ways, *ActionLine* reflects our COVID-19 impacted world. This time last year, you would not have been reading about Zoom calls, hybrid meetings, or viewing an image of the now ubiquitous COVID-19 molecule (like the one on Page 8) or the Hollywood Squares type photo on Page 27. As has been the case for the past year, this issue contains substantive articles dealing with the influence the pandemic has had on our clients and our practices. One example is the excellent piece by Ashley McRae and Manny Farach.

Political Roundup is always one of our favorite parts of *ActionLine*. French Brown addresses the new normal for the Florida legislature. His preview of the current Session is certainly timely.

The admonition of Section Chair, William Hennessey, to stay safe and get involved are words to live by! In these times of ongoing uncertainty, the roadmap to Section involvement that is set forth in the Chair's Column is spot on! Becoming an active participant now will enable you to hit the ground running when we are able to embrace colleagues at meetings with a hug or handshake rather than waving across the room while wearing a mask and social distancing. We look forward to a time when "you are on mute" is not stated because we are back to experiencing the friendships and fellowships Section membership brings—in person!

COVID-19 has caused many of us to simplify and re-prioritize our lives. We focus on efficiencies and outcomes. This issue of *ActionLine* is no different. We admit, in some ways this issue of the magazine seems even more scholarly than usual. We are not going to start competing with Law Reviews but content IS king! The topics covered herein are weighty….notwithstanding the Anna Nicole Smith reference on Page 43!

Macro trends seem to favor continued growth for the Sunshine State. George Karibjanian provides sage advice and in-depth, practical guidance to those working with new-to-Florida clients with estates and trusts needs.

An extremely sad and tragic reality of the times is that many of us have lost family members, friends and loved ones as a result of COVID-19. That fact caused us to read the article by Theo Kypreos through a different lens. Harkening back to the advice of our Section Chair, many of us recall when Theo was a Section Fellow. As is the case with respect to so many of our former Fellows, Theo has been providing meaningful and valued service to the Section for years.

The Section's At Large Members (ALMs) have been making us proud! We commend them and recommend you read about the Frontline Heroes Project beginning on Page 26. Our ALMs have truly been doing the work of the angels!

Reptiles continue to provide pro bono service in innovative and collaborative ways.

Until our next issue…stay safe…and get involved!

Here We Go Again: Distressed Commercial Real Estate In A Pandemic PART II-Foreclosures And Bankruptcies

By E. Ashley McRae, Esq., Old Republic National Title Ins. Co., Tampa and Manuel Farach, Esq., Mrachek Law, West Palm Beach, Florida

As the coronavirus pandemic continues wreaking havoc on the economy, more commercial real estate loans are expected to be in default. In Part I of this article, we reviewed due diligence, loan extensions, workout agreements, deeds in lieu of foreclosure, and title considerations in workouts. This is the second part of a two-part article designed to assist in brushing up on the skills we learned during the Great Recession, and in this part, we focus on the steps to take once foreclosure becomes inevitable.

Foreclosures

Lis Pendens

As a result of the changes to Fla. Stat. § 48.23, lis pendens are not expected to be problematic during any forthcoming real estate recession. Specifically, Fla. Stat. § 48.23(1)(b)(2) now allows a party who acquires property upon which a lis pendens has expired (or has been discharged) to acquire the property free and clear of claims as if the lis pendens had not been recorded in the first place. This has avoided the problem we often saw during the last recession of shell companies entering into purchase contracts and engaging in litigation, including appellate proceedings, that could last for years and tie up the property with no downside to the shell company. The amended statute section allows the property to be transferred once the lis pendens expires or has been discharged without fear that the transaction will be overturned.

Importance of Title Searches in the Foreclosure Process

When a client sends a file for possible foreclosure, the practitioner should immediately order a title search. Title companies can provide what is known as a foreclosure commitment which outlines the requirements necessary for the title insurance underwriter to issue an owner's policy upon foreclosure. The commitment will identify any junior lienors and interested parties that should be named and served in the foreclosure process. Once the lis pendens for the foreclosure is recorded, a title update should be requested through the recording date of the lis pendens. The update will identify any additional interests or liens which arose in the gap, i.e., the date between the initial search and recording of the lis pendens. Should the update disclose new lien interests, the complaint should be amended to name those additional parties in the lawsuit. Failure to do so can result in the certificate of title holder taking subject to such interests and requiring re-foreclosure. Also, it is good practice to confirm that the legal descriptions in the vesting deed into the borrower, foreclosure title search, and mortgage all match exactly. If there are discrepancies, an action to reform the mortgage or some other corrective title action may be necessary.

Uniform Commercial Real Estate Receivership Act

The Uniform Commercial Real Estate Receivership Act, which can now be found in newly created Fla. Stat. Ch.714, became law in Florida on July 1, 2020. The Act was based on a model act prepared in 2015 by the National Conference of Commissioners of Uniform State Laws. The Business Law Section of the Florida Bar worked with other sections of the Florida Bar (including the RPPTL Section) for the past several years to bring the law to fruition. We can expect to see the Act used in the near future, and practitioners should be aware of its provisions and operation.

A receiver is a person appointed by a court to take possession of the property of another person and to care for and possibly operate the property during the litigation. This remedy is typically requested in a commercial foreclosure situation by a mortgage lender where the borrower has defaulted on a loan and continues to collect rent or fails to take care of the property. Florida has long recognized the appointment of a receiver as a remedy in a commercial foreclosure action. However, prior

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to the Act, there was no statute addressing the procedures or a receiver's powers, resulting in uncertainty for litigants and a lack of uniformity in receiverships created throughout the state. Instead, the court (or the parties) in each case crafted an order appointing a receiver and identifying the powers of the receiver. The Act addresses these concerns, bringing stability and uniformity to this area of the law.

It is important to understand the Act applies solely to non-homestead real estate. It does not apply to homestead property, which is sacrosanct in Florida. As to non-homestead property, a receiver can be appointed prior to a judgment and even without notice if certain requirements are met. Under the Act and unless limited by court order, a receiver has broad powers including the authority to manage and protect the receivership property as well as to operate a business constituting the receivership property. This would allow the receiver to sell or lease the property or even incur unsecured debt and pay expenses provided such actions are in the ordinary course of business. So, for example, if the receivership property is a restaurant, the receiver could continue to make sure the restaurant continued to operate by paying vendors and employees, ordering food and supplies, etc. The Act also requires the owner of the receivership property to cooperate by turning over control and producing records. Failure of the owner to cooperate and comply with the Act can result in civil contempt sanctions.

While watered down from the original Model Act, one of the more controversial provisions of the Act allows a receiver, in limited situations and upon court approval, to sell the receivership property outside the ordinary course of business prior to entry of a judgment against the owner. Fla. Stat. § 714.16(2020) first requires notice to all parties, including all lienholders. In order to allow the sale, *either*: (a) the owner must consent to the sale in writing and that consent is set forth in the motion to allow said sale; *or* (b) the owner fails to object to the sale after the receiver has provided reasonable advance written notice of the proposed sale and the receiver demonstrates in the motion that the proposed sale is necessary to "prevent waste, loss or substantial diminution in value, dissipation, or impairment of the property or its revenue-producing potential…."

In addition, the Act takes several plays out of bankruptcy court rules and laws. The Act expands the state court's power in that the court can order that a sale of the receivership property be free and clear of any liens on the property at the time of the sale, essentially foreclosing out lienholders as to the real property and instead attaching their liens to the proceeds of the sale. The liens attach to the sales proceeds with the same "validity, perfection and priority" the liens had on the property prior to the sale. The Act has also accounted for appeals of such sale orders in that it provides that reversal or modification of any order approving sale does not affect the validity of the sale to a person that acquired the property in good faith. A receiver appointed can also accept or reject an executory contract (such as commercial leases) with court approval. The Act also allows for acceptance or rejection of commercial leases where the owner is the landlord, if certain conditions are met. We expect the Act to take on a significant role when there is an uptick in commercial foreclosures.

Junior Liens

Junior liens can be problematic in workouts. As we saw, junior liens can be the reason that a deed in lieu cannot be effectuated as a workout. Since senior lienholders are not entitled to share in surplus foreclosure funds of a junior lienor, a foreclosure case instituted by a junior lienholder can create problems during a senior lender's foreclosure. While junior lienors cannot raise the defense of lack of standing against the foreclosing lender, they can raise many other defenses and slow down or stall the senior lender's foreclosure case. One problem that escapes attention is that junior lienors must be properly served and properly foreclosed out otherwise their interests survive the foreclosure. And of course, junior lienors retain the statutory right of redemption and may redeem the foreclosure judgment themselves. Having junior lienors on a property creates an environment that makes either foreclosure or a workout more complex.

Common Problems and Solutions in Commercial Foreclosures

Commercial mortgage foreclosures are similar to residential mortgage foreclosures but typically have more moving parts and are thus more complex. As outlined above, junior lienors can be problematic and commercial foreclosures typically contain more junior lienors due to the higher loan amounts and the nature of a commercial business having more monetary relationships. On a larger scale, the loans may be commercial mortgage-backed securities (CMBS) or real estate investment trust (REIT) loans which create an additional level of complexity.

First among these additional problems is the type of lending entity. CMBS or REIT driven loans typically have a servicer and a special servicer which becomes involved only when the loan goes into default. While portfolio lenders may have latitude to negotiate either a foreclosure or a workout, a secondary market lender may be severely restricted in the actions it can take or may want to take. Negotiating with a special servicer can be problematic, but can be done if one focuses on the return the special service is paying its bondholders and the risks it faces.

Commercial mortgage foreclosures contain a second issue, also not well understood, regarding the industry into which the loan was made. Location is everything in real estate, but in commercial loans, so is the industry. A loan made to a borrower in an industry that is faring well during the pandemic will

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be treated differently than a loan made to a borrower in an industry that is struggling. Understanding the location and the industry for the distressed loan will give insight into the pressures and opportunities faced by the lenders and borrower on that loan.

Should the Foreclosing Lender Get a Title Policy after Taking Title in Foreclosure?

Often, a lender which takes title following a foreclosure does not want to spend money on an owner's policy and instead decides to rely on its loan policy. A practitioner should be sure to educate its lender client as to why it should consider getting an owner's policy. The loan policy only provides coverage up to the lesser of the balance of the loan and the policy limits. Most loans are 75 to 80 percent loan to value, so a lender relying solely on its loan policy is underinsured once it takes title should there be a claim. Second and perhaps more importantly, the loan policy only covers matters as of the effective date of the policy, which date is typically when the loan was made or endorsed due to a modification. If an issue arises with the foreclosure, the loan policy will not protect the lender for any loss. An owner's policy will insure that the foreclosure was done properly and title is vested in the lender or its assignee.

Bankruptcies

The end result of many failed workouts is bankruptcy. Many readers are familiar with the different chapters of the bankruptcy code that can apply to real estate, including Chapter 7 (liquidation), Chapter 11 (reorganization), and Chapter 13 (wage earner's plan). Most are not, however, familiar with the recently enacted Subchapter V of Chapter 11.

Subchapter V is called the Small Business Reorganization Act and became effective on February 19, 2020. There had been complaints about Chapter 11 reorganizations being too expensive, too time consuming, and not effective enough for small businesses. Subchapter V attempts to take care of these issues. As initially passed, Subchapter V required the debtor be a person or entity engaged in commercial or business activity with aggregate secured and unsecured debts of $2,725,625 or less. This amount was raised, however, by the CARES Act to $7,500,000 or less for a one-year period.

Subchapter V, including the one-year bump in filing limits, has been very attractive to small businesses. While maintaining the single real estate asset limitations of the bankruptcy code, Subchapter V severely reduces the operational requirements on debtors, eliminates creditor's committees, appoints a Small Business Trustee (similar to a Chapter 13 trustee) to help oversee the case, requires status hearings within 60 days and a plan to be filed within 90 days, eliminates the requirement of filing a disclosure statement, and allows only the debtor to file a plan of reorganization. Additionally, the cram-down provisions of the Bankruptcy Code are severely watered-down in Subchapter V in that no consenting class is required and the absolute priority rule is removed. In other words, Subchapter V makes a small business reorganization much simpler and much faster.

continued, page 11



Title Considerations in Sales Out of Chapter 11 and Subchapter V Bankruptcies

The sale of commercial real estate is a common issue in Chapter 11 bankruptcies and can come in several forms;

1. after notice and a hearing;
2. in the ordinary course;
3. pursuant to a Chapter 11 Plan or
4. pursuant to an order approving compromise or settlement.

Attorneys are often asked to issue title policies insuring title of a buyer in all of these situations, so it is important to know what a title underwriter will generally require to insure such transactions so that the practitioner can be thinking ahead.

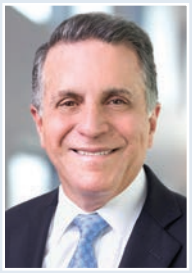
To avoid a closing delay, a practitioner should consider providing the underwriter with a draft of the plan, settlement agreement, and motion and order to sell, as applicable. It is of utmost importance that the applicable documents contain the legal description and clearly spell out the terms and conditions of the sale. Once of record, certified copies of those documents must be recorded in the public records of the county in which the property is located. An underwriter may also require proof of service of such motions and hearings on all interested parties.

There are two key deadliness that the practitioner should be aware of. First, there is a 14-day appeal period in which any appeal from such order must be filed. Also, if the debtor files a motion seeking to sell the property free and clear of liens, such sale is stayed until the expiration of 14 days after entry of such order unless the court order states otherwise. Therefore, a title policy should not be issued until both the stay period and appeal period have expired. Lastly, and in the event of an appeal of a sale order, most title underwriters will not rely on 11 U.S.C. §363(m) (reversal or modification of the sale of property on appeal does not affect the validity of sale) to issue a title policy. Practitioners should check with their individual underwriters for specific guidance.

Conclusion

Our path forward at this time seems murky in many respects, but practitioners should be comforted knowing that many of the principles from and lessons learned during the last real estate recession will probably apply again. Considering a real estate workout to be a different form of a deal and working and preparing as if it were another deal including retaining and working with real estate professionals, will produce better results for clients during this uncertain period.

Manuel Farach *is a shareholder in Mrachek Law in West Palm Beach, Florida. Mr. Farach is board-certified by The Florida Bar in Real Estate Law, Business Litigation and Appellate Law and past Chair of the Florida Supreme Court Committee on Standard Jury Instructions for Contract Cases. He currently sits on the Executive Councils of the Real Property, Business Law and ADR Sections of the Florida Bar, and serves as the Chair of the ABA's Real Property Litigation Group and as Vice-Chair of ACREL's Bankruptcy and Creditor's Rights Committee. He is the author of Florida Real Estate Law, the real estate treatise in West's Florida Practice Series.*



M. FARACH

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.*



A. MCRAE

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

Endnotes

1 Fla. Stat. §714.01(16) (2020).
2 Fla. Stat. §714.03 (2020).
3 Fla. Stat. §714.12(1) (2020).
4 Fla. Stat. §714.13 (2020).
5 Fla. Stat. §714.12(2) (2020).
6 Fla. Stat. §714.16(2) (2020).
7 Fla. Stat. §714.16(4) (2020).
8 Id.
9 Fla. Stat. §714.16(6) (2020).
10 Fla. Stat. §714.17 (2020).
11 Fla. Stat. §714.17(8) (2020).
12 *See Garcia v. Stewart*, 906 So. 2d 1117, 1121 (Fla. 4th DCA 2005) ("Because senior lienors' rights are unaffected by foreclosure, holders of liens which are senior in priority have no right to share in a surplus produced by the foreclosure of a junior mortgage").
13 *Ballantrae Homeowners Ass'n, Inc. v. Federal Nat. Mortg. Ass'n*, 203 So. 3d 938 (Fla. 2d DCA 2016) ("It is well settled that when a junior lienor is omitted as a party to a foreclosure action brought by a senior mortgage holder, 'the lien of the junior mortgagee is unaffected by the judgment.'"
14 The authors recognize that filing bankruptcy and "cleansing" the property through 11 U.S.C. § 363 can be the goal of sophisticated workouts, especially "prepackaged workouts," but discussion of these more sophisticated topics is beyond the scope of this article.
15 Coronavirus Aid, Relief, and Economic Security Act (CARES Act) found at https://www.congress.gov/bill/116th-congress/house-bill/748/text.
16 11 U.S.C. §363(b).
17 11 U.S.C. §1123(a)(5).
18 Bankruptcy Rule 9019; 11 U.S.C. §1123(b)(3)(A).
19 Bankruptcy Rule 8002.
20 Bankruptcy Rule 6004(h).

When "Uniform" Doesn't Mean "Uniform" – Reviewing Trusts Governed Under Other UTC Jurisdictions

By George D. Karibjanian, Esq., Franklin Karibjanian & Law PLLC, Boca Raton, Florida

Florida's population continues to grow. In 2019, Florida gained 368,300 new residents for a 1.8% increase in its population from 2018.[1] This migration includes wealthier individuals who wish to escape the colder weather for Florida's warmer climate and enjoy Florida's favorable state and local income taxation (or lack thereof). While this influx of potential clients can be a boon to Florida estate planning practitioners, the estate planning for such individuals may involve more than merely updating a will or revocable trust. Many clients will have, as part of their plans, irrevocable trusts that were created as part of gifting or wealth reduction strategies. For example, the close of 2020 and the threat of a retroactively reduced applicable exclusion amount in 2021 caused many individuals to create irrevocable trusts to utilize the 2020 applicable exclusion amount.

In reviewing the existing estate plan of a "new-to-Florida" client, the Florida attorney will also review any such trusts. The issue facing the Florida attorney is that those trusts will likely not be governed under Florida law, which presents a problem if the client asks the attorney questions about required actions under the trust's governing law. Fortunately for the attorney, considering that 35 of the 51 jurisdictions in the United States – including Florida – have adopted the Uniform Trust Code (the "UTC"), the attorney will feel comfortable in understanding the administration issues if the trust's governing law is a UTC jurisdiction. However, it is highly likely that the other jurisdiction's version of the UTC will differ in certain respects from Florida's version. The purpose of this article is to educate practitioners as to some of the more notable differences between Florida's version of the UTC and other jurisdictions' versions of the UTC so that such practitioners will be able to better understand the technical aspects of administering such trusts.

It is duly noted that, unless the Florida attorney is licensed to practice law in the jurisdiction governing any such trust, the Florida attorney cannot opine on the laws of such other jurisdiction as this may be considered to be the unauthorized practice of law without a license; however, it is imperative that the Florida attorney understand the differences so that the Florida attorney can seek out local counsel and be knowledgeable as to recommended courses of action.

"Uniform" Doesn't Always Mean "Uniform"

Rare is the jurisdiction that adopts a set of uniform laws without altering certain provisions to fit within the jurisdiction's existing laws. For example, consider the following statement with respect to Florida's changes in 2013 to its laws governing limited liability companies:

> The revised act is based on the Revised Uniform Limited Liability Company Act of 2006, as amended in 2011 (RULLCA), promulgated by the Uniform Law Commission (ULC). The revised act diverges from or supplements RULLCA in many significant respects, such as when the drafting committee believed that adopting the uniform language would be too abrupt a departure from existing law or conflict with department filing procedures, or the committee determined that RULLCA language was not appropriate.[2]

Differences in adoption are not limited to specific state provisions. In certain sections, the UTC gives different alternatives for adoption. For example, in UTC §105 (which sets forth the mandatory provisions that cannot be overridden by a trust agreement), the adoption of UTC §§105(b)(8) and (b)(9) regarding certain notices is stated as "optional." The 2004 Amendment to the official Uniform Law Commission comments to UTC §105 explains the options as follows:

> … These subsections have generated more discussion in jurisdictions considering enactment of the UTC than have any other provisions of the Code. A majority of the enacting jurisdictions have modified these provisions but not in a consistent way. This lack of agreement and resulting variety of approaches is expected to continue

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> as additional states enact the Code. … Placing these sections in brackets signals that uniformity is not expected. States may elect to enact these provisions without change, delete these provisions, or enact them with modifications.

Thus, just because a Florida attorney has working knowledge of the Florida version of the UTC does not necessarily mean that the attorney will be *de facto* knowledgeable about how a trust is governed under another jurisdiction's version of the UTC.

Comparing Florida to the DMV

The following is intended to highlight some of the notable differences between the Florida Trust Code and other jurisdictions' versions of the UTC. Based on the author's multi-regional practice, comparisons are illustrated between Florida and the "DMV" jurisdictions, *i.e.*, the District of Columbia ("D.C."), Maryland and Virginia.[3] However, the reader should be aware that other UTC jurisdictions may adopt the same variations as the Florida version.

Required Notices under §813

When an irrevocable trust is created, or when a revocable trust becomes irrevocable, certain notices are required to be sent under Fla. Stat. §736.0813 (the "813 Requirements")(2020).

Under Fla. Stat. §736.0813(1)(a) (2020), for a new irrevocable trust, the trustee is required, within 60 days of the acceptance of the trust, to provide notice to the qualified beneficiaries of the acceptance and the trustee's name, address and telephone number (the "Acceptance Requirements"). In addition, when a revocable trust becomes irrevocable, Fla. Stat. §736.0813(1)(b) (2020) requires the trustee, within 60 days of the irrevocability, to provide notice of the trust's existence, the identity of the settlor, the right to request a copy of the trust instrument and the right to accountings (the "Revocable-to-Irrevocable Requirements"). In both the Acceptance Requirements and the Revocable-to-Irrevocable Requirements, the trustee must also notice the qualified beneficiaries that the fiduciary lawyer-client privilege in Fla. Stat. §90.5021 (2020) applies with respect to the trustee and any attorney employed by the trustee (the "Privilege Requirement").

The first noticeable difference between Florida and most other UTC jurisdictions is that an "accounting" is not called an "accounting"; most other UTC jurisdictions use the UTC term "report."

As for the notice requirements, in Maryland, the Acceptance Requirements are the same as in Florida, but the Revocable-to-Irrevocable Requirements differ in that the 60-day requirement is increased to 90 days.[4]

In both Maryland and D.C., no mandatory notice provisions apply with respect to any qualified beneficiary who has not attained age 25.[5]

In D.C. (D.C. Code §19-1308.13(b)(4)) and Virginia (Va. Code §64.2-775.B.4), an additional 813 Requirement is created in that the trustee is required to notify the qualified beneficiaries in advance of any change in the method or rate of the trustee's compensation.[6]

Finally, none of Maryland, Virginia or D.C. contain the Privilege Requirement.

Accounting Requirement

Under Fla. Stat. §736.0813(1)(d), the trustee is required to provide a trust accounting to each qualified beneficiary at least annually, upon the change of trustee, or upon the termination of the trust. Pursuant to Fla. Stat. §736.0105(2)(r), this duty is mandatory and cannot be overridden in the trust instrument.

The same, however, is not true in Virginia, as under Va. Code §64.2-703.B.6, the only mandatory provision under Va. Code §64.2-775 (the Virginia equivalent of UTC §813) is the power of the court to require, dispense with, or modify or terminate a bond. This means that a Virginia trust can waive the trustee's mandatory duty to provide annual reports to the qualified beneficiaries.

In Maryland, under Md. Code, Est. & Tr., §14.5-813(c), the trustee has no mandatory duty to provide a report to the qualified beneficiaries. Rather, the obligation to report only exists if a report is requested by a qualified beneficiary (in which case it is a mandatory requirement pursuant to Md. Code, Est. & Tr., §14.5-105(11)(ii)). Thus, if no qualified beneficiaries request a report, the trustee is not required to provide one.

Trustees' Compensation

In Fla. Stat. §736.0708(1) (2020), the general rule in Florida is that if the trust does not specify the method for determining the trustee's compensation, the trustee is entitled to "reasonable compensation." While Virginia and D.C. adhere to the "reasonable compensation" approach, Maryland enacted a sliding scale schedule based on the value of the trust at the end of the prior year.[7] Under certain conditions, a trustee may opt to charge a fee based on a previously submitted fee schedule.[8]

Attorney's Fees in Trust Actions

If a trust matter ends up before a court, Fla. Stat. §736.1004(1)(a)(2020) grants the court discretion to award taxable costs as in chancery actions, including attorney fees and guardian ad litem fees.

While Virginia and D.C. have statutes based on UTC §1004 and which are similar to Fla. Stat. §736.1004 (2020), Maryland intentionally did not include any attorney fee provisions. According to a 2016 analysis published by Baker, Donelson Bearman, Caldwell & Berkowitz PC:

> Attorney's Fees and Costs. Section 14.5-904 is reserved. The Maryland Association for Justice deleted UTC Section 1004, permitting the court to award costs and

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expenses, including reasonable attorney's fees, to any party, to be paid by another party or from the trust that is the subject of the controversy.[9]

Unless and until UTC §1004 is adopted by the Maryland Legislature, the lack of statutory guidance results in courts having to follow the Maryland common law as to such fees and costs.

Representation through Power of Appointment

Under Fla. Stat. §736.0302(1)(2020), unless the holder of a power of appointment is the sole trustee of a trust, the power holder may represent and bind the takers in default of the exercise of the power. This provision encompasses both general and special powers of appointment, as well as inter-vivos and testamentary powers of appointment. For example, for purposes of the annual accounting requirement under Fla. Stat. §736.0813(2)(d) (2020), suppose that under a particular trust A is the current beneficiary and T is the sole trustee. Upon A's death, A is granted a power of appointment to appoint the remainder among A's descendants, *per stirpes*. Currently, A has three children, B, C and D, all of whom are adults. Because A is not the sole trustee, T may account solely to A, who, pursuant to Fla. Stat. §736.0302(1) (2020), may bind and represent B, C and D. This would apply even if A were a co-trustee with T.

In Virginia such representation may only occur if the power is a general testamentary power of appointment.[10] In D.C. and Maryland, such representation may occur if the power is either a general power of appointment or a "broad" special power of appointment, meaning that the power is exercisable in favor of all persons other than the power holder, the power holder's estate, the power holder's creditors and the creditors of the power holder's estate.[11]

Designated Representatives

When Florida adopted its version of the UTC, it created a unique approach to representation by including the "Designated Representative" provisions of Fla. Stat. §736.0306 (2020). A Florida trust can provide that either a person named in the trust instrument, or a person appointed pursuant to a trust provision granting such appointment authority to any person other than a trustee, can act as the "Designated Representative" for a beneficiary – regardless of the age of the beneficiary – to receive all required notices on behalf of the beneficiary. Further, the Designated Representative is not liable to the beneficiary so long as the Designated Representative's actions are in "good faith." In a sense, Fla. Stat. §736.0306 (2020) is the Florida response to not adopting the "under 25" notice provisions from the UTC that were adopted in Maryland and D.C.

Effective in 2017, Maryland adopted a "Designated Representative" statute as Md. Code, Est. & Tr., §14.5-306. Virginia and D.C. have not enacted any Designated Representative provisions.

Grantor Trust Reimbursement

In Fla. Stat. §736.08145(1)(2020), the trustee of a trust that is a "grantor trust" for Federal income tax purposes is authorized to reimburse the grantor for any income taxes paid by the grantor on account of the grantor's inclusion of the trust's income on the grantor's individual income tax return (a "Tax Reimbursement Provision"). This statute applies regardless of whether the trust specifically provides for such reimbursement. Similarly, Fla. Stat. §736.0505(1)(c)(2020) provides that any such payments (whether statutorily or as authorized by the trust) are not subject to any claims of the grantor's creditors (the "Creditors Claim Provision"). The Creditors Claim Provision is a particularly important provision, for if the grantor's creditors could reach any such payments, an argument could be made that the grantor has retained a general power of appointment and the trust would be includible in the grantor's gross estate for Federal estate tax purposes (the "Gross Estate"). Although there are no cases or rulings advocating this position, the fear is that if the grantor's creditors can reach such payments, then a portion of the trust is deemed to be available for the payment to the grantor's creditors or the creditors of the grantor's estate, both of which could be interpreted as fitting within the definition of a "general power of appointment" and thus includible in the grantor's Gross Estate under §2041 of the Internal Revenue Code of 1986, as amended (the "Code").

Neither Virginia nor Maryland have adopted the Tax Reimbursement Provision (which is not uncommon considering that the provision is relatively new and has only been adopted by a few states), but both have codified the Creditors Claim Provision as Va. Code §64.2-747.A.2 and Md. Code, Est. & Tr., §14.5-1003(a)(1), respectively.

D.C. has not adopted either provision. If a particular trust is governed under D.C. law and contains a Tax Reimbursement Provision, it is unclear whether any such reimbursements are protected from the grantor's creditors.

Inter-Vivos QTIP Trust "Quasi-DAPT" Provision

A common technique in wealth transfers is the use of the "inter-vivos QTIP trust."[12] Often, the trusts are created so that, if the donor spouse survives the donee spouse, a resulting trust is created for the benefit of the donor spouse (referred to as a "Retained Back End Interest"). At first glance, it would appear that in creating this type of trust, the donor will have retained an interest that could cause the entire trust to be included in the donor spouse's Gross Estate, thereby negating the gifting benefit during the donor spouse's lifetime. However, Treas. Reg. §25.2523(f)-1(f) Examples 10 and 11 specifically provide that such provisions do not cause Gross Estate inclusion to the donor spouse under §§2036 or 2038 of the Code.

This, however, does not, create complete security for the

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donor spouse. Unless a state has specifically legislated otherwise, a settlor cannot create an irrevocable trust with a Retained Back End Interest and have the property in the trust avoid the settlor's creditors. Applying the same logic as discussed above with respect to the reimbursement to the settlor of income taxes from a grantor trust, if the settlor's creditors can reach a trust, query whether §2041 of the Code would be applicable.

To overcome this potential Gross Estate inclusion issue, many states have adopted a specific creditor exclusion. Florida's provision is found in Fla. Stat. §736.0505(3)(2020), and, under these specific facts, the statute states that for state law purposes, the donee spouse is deemed to be the settlor of the trust giving the donor spouse the Retained Back End Interest. Assuming that the trust contains a spendthrift clause, the Retained Back End Interest is protected from the donor spouse's creditors under Fla. Stat. §736.0501(2020) and any argument for Gross Estate inclusion under §2041 of the Code is negated.

Both Virginia and Maryland offer similar protection for inter-vivos QTIP trusts.[13] D.C., however, has no statute. Therefore, if an inter-vivos QTIP trust is governed under D.C. law and contains a Retained Back End Interest, it is not certain that the Retained Back End Interest in the donor spouse will avoid inclusion in the donor's Gross Estate.

Decanting

A familiar technique among Florida practitioners is to "decant" a trust to a new trust in order to modify certain provisions. Decanting, however, is not a universal concept among the states. Consider the irony in that California, which is the most populated state, only adopted the Uniform Trust Decanting Act to be effective beginning in 2019. Further, as of 2020, only 32 of the 51 jurisdictions in the United States have decanting statutes either proposed or adopted.[14]

Under Florida law, there are two ways to decant – under Fla. Stat. §736.04117(2020), and also under the common law by following the holding in *Phipps v. Palm Beach Trust Co*.[15] These, however, only apply to Florida trusts. With trusts governed under the laws of another jurisdiction, even if the receiving trust (referred to in Fla. Stat. §736.04117(2)(a)(2020) as the "second trust") is to be governed under Florida law, the distributing trust (referred to in Fla. Stat §736.04117(2)(a)(2020) as the "first trust") must be decanted pursuant to the governing law of the distributing trust.

Virginia has adopted the Uniform Trust Decanting Act as Va. Code §§64.2-779.1 through 64.2-779.25.

D.C. and Maryland, however, have not adopted any decanting statutes, and there are no cases on point in either jurisdiction that authorize decanting. Unless the governing law of any D.C. or Maryland trust is permitted to be changed to a decanting state, it is not certain that such trust can be decanted.[16]

Rule Against Perpetuities

In 2001, with the adoption of Fla. Stat. §689.225(f) (2020), Florida increased the duration for its rule against perpetuities ("RAP") from 90 years to 360 years. Other states have also changed their RAP to longer terms,[17] and many have eliminated the RAP altogether, whether globally for all trusts or by voluntary waiver.[18]

Each of Virginia, Maryland and D.C. allow for the waiver of the RAP.

Va. Code §55.1-127.A.8. allows for the waiver if the trust specifically provides that the provisions of Va. Code §55.1-124 (*i.e.*, the Virginia general RAP of 90 years) does not apply, but the waiver only applies to personal property; real property is still subject to the standard 90-year term.

Maryland, which follows the common law RAP of "lives in being plus 21 years," allows for a waiver in Md. Code, Est. & Tr., §11-102(b)(5). While the Maryland waiver does not require a specific statutory reference, it does require an affirmative statement that the RAP is not to apply to the trust.

Finally, D.C. allows a waiver of the RAP, under which D.C. Code §19-904(a)(10) follows the Virginia approach and requires that the waiver state that the provisions of Chapter 9 of Title 19 of the D.C. Code do not apply.

It is important to note that so long as a trust that validly waives the RAP (or, pursuant to state law, has no RAP) remains governed under the laws of the original jurisdiction, and that the trust specifically states that such jurisdiction's laws will apply, the RAP will remain waived even if the settlor subsequently resides or the trust becomes primarily administered in Florida. However, if, for any reason, it is decided to change the governing law from such other jurisdiction to Florida, or if a change of governing law is, for any reason, inferred, the change to Florida law will result in a reduction of the RAP. In other words, it is not possible to change the governing law to Florida and maintain the unlimited RAP.

Trustee/Beneficiary and the Authority to Distribute Principal

Most estate planning practitioners are aware that a beneficiary acting as a trustee of a third-party trust (a "trustee/beneficiary") cannot broadly distribute income or principal to herself or himself (referred to as a "Broad Invasion Standard"). The ability to do so would be considered to be a general power of appointment and create a transfer tax under either §2514 or §2041 of the Code. For this reason, practitioners will often limit the Trustee/Beneficiary's distribution authority to health, education, maintenance or support purposes (referred to as a "HEMS Standard"), as such a limitation causes the power to be outside of such Code provisions. While many practitioners

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are aware that the Florida Trust Code contains a provision to prevent this from occurring, they may not be aware that Florida's provision differs from the provision contained in many other states' versions of same statute.

Fla. Stat. §736.0814(2)(a)(2020) provides, in pertinent part: " … a person who is a [Trustee/Beneficiary] may not … [m]ake discretionary distributions of either principal or income to or for the benefit of that trustee, except to provide for that trustee's health, education, maintenance, or support as described under [§2514 and §2041 of the Code]." Contrast this to Md. Code, Est. & Tr., §14.5-814(a)(1), which provides, in pertinent part: "None of the following powers conferred on a trustee by the governing instrument may be exercised by that trustee, (1) The power to make discretionary distributions of either principal or income to, or for the benefit of, the trustee in the individual capacity of the trustee, unless limited by [a HEMS Standard], as defined in [§2514 and §2041 of the Code]."

Many practitioners will likely only see what they want to see – that these statutes are the same. They are not. This distinction requires a very close analysis of the statue. In other words, as the late University of Florida Law Prof. James J. Freeland would say, "[carefully] read from the Good Book!"

Under the Maryland statute, it is not clear whether a Trustee/Beneficiary can distribute income and principal to herself or himself if the trust only contains a Broad Invasion Standard. The drafting of the statute seems to imply that a Trustee/Beneficiary can only distribute income and principal to herself if the standard in the document is a HEMS Standard. The Florida statute, however, does not require that the standard in the document be limited to a HEMS Standard; rather, the Florida Statute acts as an "overlay" over a Broad Invasion Standard so that even if the only applicable standard in the trust is a Broad Invasion Standard, the Trustee/Beneficiary may still distribute funds to herself or himself, so long as the distributions are for HEMS Standard purposes. The use of the word "unless" in the Maryland statute is troublesome; if the statute were intended to be an "overlay," it would have read more like Florida's statute or like the UTC version of §814, which states, "a person other than a settlor who is a beneficiary and trustee of a trust that confers on the trustee a power to make discretionary distributions to or for the trustee's personal benefit *may exercise the power only in accordance with an ascertainable standard*." (Emphasis added.)

Virginia follows the Florida and UTC "overlay" approach,[19] whereas the D.C. approach is nearly identical to that of Maryland.[20]

Revocable Trusts and Potential Loss of Tenancy-by-the-Entireties Status

With a "new-to-Florida" client, one of the first decisions that the Florida estate planner will make is to either restate the client's revocable trust or, at a minimum, prepare a simple amendment to such trust, so that such trust is governed under Florida law. The changing of the governing law, however, may have potential repercussions with respect to certain property transferred to the trust.

With respect to joint ownership of property, in certain states (including Florida), if title is owned jointly by spouses, it may be owned as "tenants-by-the-entirety" ("TBE"). TBE status not only provides for the passage of title to the surviving spouse by operation of law, but the property is also protected from the claims of the creditors of either spouse (the only creditors who can reach TBE property are the common creditors of both spouses if the claims arose from the same transaction).

With respect to revocable trusts, under Florida law, any real property (other than homestead) owned by an individual's revocable trust is subject to the claims of the individual's creditors. Thus, if spouses own TBE property and thereafter deed undivided interests in said property to each of their respective revocable trusts, TBE status is lost and title is held by each trust as a tenant-in-common. As most real estate lawyers would explain, TBE status was lost upon the transfer because the "unity of marriage" – an essential element in creating TBE status when the property is acquired – no longer exists.

If, however, the trusts are governed under either Virginia or Maryland law, TBE status may not be lost. Both Virginia and Maryland, in Va. Code §55.1-136.C. and Md. Code, Est. & Tr., §14.5-511, respectively, allow for "TBE Trusts," in which the individuals owned tenancy-by-the-entireties ("TBE") property and deeded such property into their respective revocable trusts. Under these statutes, the "unity of marriage" has been statutorily abrogated and is deemed to exist even though title is owned by separate revocable trusts. The advantage of having TBE property in a TBE Trust is that, in the event of a simultaneous death, no probate administration is required for such property.

If the governing law of the trust is changed to Florida, since Florida does not recognize TBE Trusts, the TBE protection afforded to the property will be lost.

What if the Trustee Moves to Florida and Changes the Governing Law?

The above provisions presuppose that the client, but not the trust, moves to Florida. What happens, though, if the trustee also moves to Florida? For example, a married individual may create a trust for the benefit of her or his descendants, and name her or his spouse as the trustee of the trust. If the individual and the spouse move to Florida, what happens with the trust?

Unless the trust lacks a "governing law" provision, the governing law of a trust is not changed simply by the move of the trustee to another jurisdiction. For example, Md. Code,

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Est. & Tr., §14.5-107 provides that the meaning and effect of the terms of a trust are determined by, (1) the law of the jurisdiction designated in the terms unless the designation of that jurisdiction's law is contrary to a strong public policy of the jurisdiction having the most significant relationship to the matter at issue, or (2) in the absence of a controlling designation in the terms of the trust, the law of the jurisdiction having the most significant relationship to the matter at issue.

Many trusts will contain a governing law provision that allows the trustee or the trust protector to change the governing law (preferably with a specific statement that any such change may be done non-judicially). Should this occur, the administration provisions of the trust must be carefully reviewed, as certain trust provisions may be ineffectual. For example, if a Virginia trust is moved to Florida, the trustee should review the trust's accounting and notice provisions carefully, in that a trust provision that purports to waive the trustee's duty to notice and account to the qualified beneficiaries that is valid under Virginia law will be invalid in Florida. Further, as stated above, a waiver of the RAP will have no legal effect in Florida and, once the trust becomes governed under Florida law, the trust will be required to terminate within the 360-year[21] RAP under Fla. Stat. §689.225(2)(f)(2020).[22] There may, however, be some benefits. If the trust is a Maryland trust, allows for a Trustee/Beneficiary, but has only a Broad Invasion Standard, changing the governing law to Florida will allow the Trustee/Beneficiary to distribute trust property to herself or himself for HEMS Standard purposes.

Conclusion

The above are just some of the notable differences between the Florida Trust Code and the UTC provisions of other jurisdictions. One of the important aspects to note is that, while most of the differences affect the administrative provisions of a trust, some of the differences, such as the RAP and the discretionary standard applicable to a Trustee/Beneficiary, may affect the substantive or dispositive trust provisions. If nothing else, what should be gained from this article is that careful thought and attention must be given to the particular laws governing any non-Florida trust, for even though Florida has adopted the UTC, "uniform" does not necessarily mean "uniform."


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Endnotes

1 Florida Department of Transportation, *2019 Florida Population Growth – A Technical Memorandum from DFOT Forecasting and Trends Office*, September 2020, p.1.

2 Louis T. M. Conti and Gregory M. Marks, *Florida's New Revised LLC Act, Part I*, 87 Fla. Bar J. No. 8, p.52 (September/October 2013).

3 In presenting this comparison, a full explanation of why some of the differences exist and the effect of a change or omission (such as in Maryland with the failure to adopt the attorney's fee statute in UTC §1004) is beyond the scope of this article.

4 Md. Code, Est. & Tr., §14.5-813(b)(2).

5 Md. Code, Est. & Tr., §14.5-105(11), D.C. Code §19-1301.05(b)(8).

6 D.C. Code §19-1308.13(b)(4), Va. Code §64.2-775.B.4.

7 Md. Code, Est. & Tr., §14.5-708(c).

8 *Id*.

9 John P. Edgar, *Comparison of Maryland Trust Act to Prior Maryland Law and the Uniform Trust Code*, https://www.bakerdonelson.com/comparison-of-maryland-trust-act-to-prior-maryland-law-and-the-uniform-trust-code (Updated 2016).

10 Va. Code §64.2-715.

11 D.C. Code §19-1303.02, Md. Code, Est. & Tr., §14.5-302. It is interesting to note that the title to D.C. Code §19-1303.02 was taken from the title of UTC §302 and is incorrect – the title of the statute is "Representation by holder of general testamentary power of appointment," but, as set forth above, the power need not be a general power of appointment and nor is there a requirement that the power must be a testamentary power.

12 For example, *see* Richard S. Franklin, *Lifetime QTIPs – Why They Should be Ubiquitous in Estate Planning*," 50 Univ. of Miami Law Center on Estate Planning, ¶1600 (2016).

13 Va. Code §64.2-747.B.3, Md. Code, Est. & Tr., §14.5-1003(a)(2).

14 M. Patricia Culler, *State Decanting Statutes Passed or* Proposed, American College of Trust and Estate Counsel, https://www.actec.org/assets/1/6/Culler-Decanting-Statutes-Passed-or-Proposed.pdf

15 *Phipps v. Palm Beach Trust Co.*, 142 Fla. 782, 196 So. 299 (1940)

16 No statement is made as to whether D.C. or Maryland will respect a trust's "private decanting clause." Many trusts will contain a provision granting the trustee discretion to distribute trust principal to another trust for the benefit of the same beneficiaries. Such a clause purports to allow for a private decant outside of the applicable state statute or in lieu of a state statute.

17 For example, *see* Colo. Rev. Stat. §15-11-1102.5, which was modified in 2006 to provide for a maximum term of 1,000 years.

18 Examples of states that have completely abrogated the RAP are Delaware (as to personal property in 25 Del. C. §503) and New Jersey (N.J. Rev. Stat. §46:2F-9).

19 Va. Code §64.2-776.

20 D.C. Code §19-1308.14 and §21-1722(b)(1).

21 90 years if the trust was created before 2001.

22 The inverse is also true, in that the trust must always adopt the shorter of the applicable RAPs. Suppose that a trust is governed by the laws of a jurisdiction in which the either the common-law RAP (i.e., lives in being plus 21 years) or the general rule under the Uniform Rule Against Perpetuities Act (which can last up to 90 years) is in effect. If the governing law of the trust is changed to Florida, the Florida 360 year RAP does not apply; rather, the shorter term from the original jurisdiction will continue to apply.

Recent Developments And Common Pitfalls In The Creditors' Claims Process

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I. Introduction To The Creditors' Claims Process

When a Florida resident dies with outstanding debt or obligations, the Florida Probate Code establishes a detailed creditors' claims process which allows creditors to recover funds from a decedent's estate. This process includes specific timelines and procedures creditors must follow closely to ensure their claims against an estate are valid and enforceable. In certain instances, the procedures set forth in the Florida Probate Code interact with the Florida Rules of Civil Procedure. As such, this article analyzes the recent developments and common pitfalls with respect to the creditors' claims process, specifically including the importance of timely filing a claim against a decedent's estate and satisfying the independent action requirement.

II. The Importance Of Timely Filing A Claim Against The Estate

A. Untimely Claims are Barred

After the death of an individual, the personal representative of the estate must promptly publish a notice to creditors.[1] The notice informs creditors they have to file claims against the estate with the court within certain time periods, or else the creditors' claims will be forever barred.[2] Fla. Stat. § 733.702(1) (2020) provides no claim is binding upon the estate unless filed on or before the later of 3 months after the first publication of notice to creditors or 30 days after the date of service on the creditor. This statute was brought to the forefront of creditor claims issues by the Fourth District Court of Appeal's 2016 decision in *United Bank v. Estate of Frazee*.[3] Historically, courts like *Frazee* have strictly construed the 30-day deadline under Fla. Stat. § 733.702(1) (2020) to bar the claims of creditors attempting to file a claim after the deadline has expired.[4]

While this result may seem harsh, the Florida Probate Code provides for an extension of time to file a claim on three grounds. Specifically, Fla. Stat. § 733.702(3) (2020) provides an extension may be granted on the grounds of (1) fraud, (2) estoppel, or (3) insufficient notice of the claims period.[5] However, as set forth herein, demonstrating the existence of any one of these three grounds may prove to be an uphill battle.

1. Estoppel as a Ground for Extension

A personal representative will be estopped from denying an untimely claim if a claimant can prove its reliance on "a false representation or concealment of material facts."[6] "In the probate context, estoppel also requires a showing of affirmative deception."[7] The elements of estoppel must be proved by clear and convincing evidence.[8]

The Florida Probate Code, and the cases discussed herein, distinguish between a personal representative's acknowledgement of a debt owed by the decedent, on one hand, and "false representation" or "affirmative deception" regarding the estate's intent to pay the debt, on the other hand. Fla. Stat. § 733.702(1) (2020) expressly provides an untimely claim is barred "even though the personal representative has recognized the claim or demand by paying a part of it or interest on it or otherwise."

In *Harbour House Properties v. Estate of Stone*, the decedent leased an apartment from Harbour House Properties during her life, but she died before the expiration of the lease term.[9] Before the claims period expired, the personal representative brought the rent payments current and entered into an agreement with Harbour House to abide by the terms of the original lease.[10] However, after the claims period expired, the personal representative stopped making rent payments as they became due.[11] Harbour House filed a claim against the estate, arguing "the personal representative had lulled him into a false sense of security and should therefore be estopped to claim a bar."[12] The court granted the personal representative's motion to strike the claim as untimely.[13]

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On appeal, the Fourth District observed, under Fla. Stat. § 733.702, "recognition or payment of a claim by a personal representative, standing alone, will not excuse the untimely filing of a claim."[14] However, the court remanded for an evidentiary hearing, concluding "the conduct of the personal representative was such that [Harbour House] "manifestly was entitled to an evidentiary hearing to determine whether the acts, representations, and conduct of the personal representative and his agent had lulled [Harbour House] into a false sense of security concerning the need for the presentation of a claim and whether the personal representative ought therefore be estopped to deny the presentation of the claim."[15] The court additionally noted the personal representative and Harbour House had entered into a "reletting agreement," and therefore, "the personal representative recognized that the lease was a viable and continuing debt, as opposed to merely recognizing it as a preexisting obligation."[16]

Accordingly, an estate may be estopped from denying an untimely claim if the claimant can prove (a) an affirmative deception by the personal representative, *Castro v. East Pass Enterprises, Inc.*,[17] and (b) the estate's recognition of the debt as viable and continuing, as opposed to preexisting, *Harbour House*.[18]

2. Insufficient Notice of the Claims Period as a Ground for Extension

The personal representative does not have a duty to advise a potential creditor of the deadline to file a claim beyond the statutory requirement of publishing and serving the Notice to Creditors. Instead, the burden is on the potential creditor to ascertain the claim deadline and timely file a claim against the estate.

In *Castro*,[19] an action was pending against the decedent at the time of his death.[20] Because of the ongoing litigation, the creditor believed it did not need to file a separate claim in probate court to secure its claims against the decedent's estate.[21] Consequently, the creditor failed to timely file a claim against the estate.[22] The creditor petitioned for an extension of time to file a claim pursuant to Fla. Stat. § 733.702(3), and alleged the personal representative had concealed the statutory requirement to file a claim in probate court.[23] The court denied the request for extension, reasoning as follows:

> The "material fact" allegedly concealed was the legal requirement to file a statement of claim in the probate division. This requirement is found in the probate code and case law and, as such, was not entirely in [the personal representative's] control. *Because both parties had the same means of ascertaining the truth as to whether a claim must be filed in probate court, there can be no estoppel.(citation omitted)* This is true even though the alleged estoppel was based on omission. *(citation omitted) No party can claim ignorance of the law.*[24] *(citation omitted)*

3. Fraud as a Ground for Extension

An extension of time to file a claim may also be granted on a showing of fraud on the part of the personal representative.[25] The elements for actionable fraud are

1. a false statement concerning a material fact;
2. knowledge by the person making the statement that the representation is false;
3. the intent by the person making the statement that the representation will induce another to act on it; and
4. reliance on the representation to the injury of the other party.[26]

Notably, because estoppel requires a showing of "affirmative deception" in the probate context, allegations of estoppel and fraud will likely arise from the same facts.

B. Good Cause" is Not a Ground for Extension

Long gone are the days when an extension to file a claim may be granted on the basis of "good cause." Under the current version of Fla. Stat. § 733.702(3) (2020), good cause is not a ground for extension. In *Scutieri v. Estate of Revitz*,[27] the court found there was good cause to grant the claimant an extension of time because there was no prejudice to the estate, personal representative, beneficiaries, or anyone else, and the delay was not excessive.[28] A claimant may be tempted to rely on *Scutieri* for a good cause argument. However, the *Scutieri* decision was based on the 1987 version of Fla. Stat. § 733.702 (2020), which did not set forth the specific grounds for an extension. Good cause is not a basis for seeking an extension under the existing statute.

C. Mistake is Not a Ground for Extension

The Fourth District's decision in *United Bank v. Estate of Frazee*,[29] indicates mistake is not a ground for extension of time to file a claim against the estate under Fla. Stat. § 733.702(3) (2020). In *Frazee*, a non-Florida attorney attempted to file two claims against an estate in Florida prior to the claims deadline, but mistakenly filed the claims as a paper filing, and as a result, missed the deadline for e-filing the claims.[30] The Fourth District explained, notwithstanding the attorney's attempt to timely file the claims, which were ultimately filed one week late, the claims were barred because there "were no circumstances meriting an extension" of time under Fla. Stat. § 733.702(3).[31]

The *Frazee* decision is noteworthy because it means even where the potential claimant knows of the deadline to file a claim, and actually attempts to timely file a claim, the claim may still be barred as untimely.[32]

III. The Independent Action Requirement & Death During Litigation

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After a claimant files a statement of claim against the decedent's estate, the personal representative may object to the claim.[33] If the personal representative objects to the claim, the claimant has 30 days from the date of service of the objection within which to bring an independent action upon the claim.[34] Accordingly, questions may arise in the context of independent actions when the decedent is already a party to a civil action at the time of death.

Fla. Stat. § 733.705(5) (2020) provides a claimant "is limited to a period of *30 days* from the date of service of an objection within which to bring an independent action upon the claim."[35] The statute does not address the procedure for when an action against the decedent is already pending at the time of his or her death. Is the claimant required to file a new action, or is it sufficient that an action is already pending? Should the claimant file notice of the pending action in the estate proceeding?

This matter is further complicated by the fact the plaintiff will also want to substitute the estate for the defendant in the civil action. The Florida Rules of Civil Procedure contain separate substitution requirements in the event of the death of a party to a lawsuit, which conceivably could conflict with the 30-day deadline under Fla. Stat. § 733.705 (2020). How should courts address the inconsistency between the Probate Code and the Florida Rules of Civil Procedure? Which provision should prevail in the event of a conflict?

A. A Pending Action Satisfies Fla. Stat. § 733.705 (2020).

It is now widely accepted a pending action to which the decedent is a party can meet the independent action requirement of Fla. Stat. § 733.705 (2020).[36]

B. An Action in a Foreign Jurisdiction Satisfies Fla. Stat. § 733.705 (2020).

Likewise, a pending proceeding in a U.S. jurisdiction, other than Florida, satisfies the independent action requirement of Fla. Stat. § 733.705 (2020). In Poulsen v. First National Bank of Palm Beach,[37] the court observed the "mere fortuitous happening that one of the personal representatives of the defendant estate should be a national bank with its principal offices in Palm Beach County, Florida, ought not, standing alone, prevent the timely filed action in the Wyoming state court from being a full and adequate compliance with the time limitations of Section 733.705(3)(2020)."[38]

Finally, under certain circumstances, an action in a jurisdiction outside of the U.S. is sufficient to meet the requirement of Fla. Stat. § 733.705(2020). In In re Estate of Brown,[39] the claimant's counterclaim in Bermuda was sufficient where the decedent chose that jurisdiction and the personal representative substituted himself for the decedent in the Bermuda proceeding.[40]

With that issue more or less resolved, the next question is whether a claimant is required to file something in the estate proceeding, not only to alert the estate of the pending action

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(if the estate does not know already), but to also comply with the 30-day deadline to file an independent action under Fla. Stat. § 733.705 (2020).

C. Substitution of the Personal Representative is Required

1. Florida Rule of Civil Procedure 1.260(a)

Before addressing what exactly a claimant needs to do to meet the deadline in the *probate proceeding*, it is useful to understand the requirements for substituting the decedent's estate in the *civil proceeding*. Florida Rule of Civil Procedure 1.260(a), which governs substitution in the event of the death of a party, provides:

> The motion for substitution may be made by any party or by the successors or representatives of the deceased party and, together with the notice of hearing, shall be served on all parties as provided in Florida Rule of Judicial Administration 2.516 and upon persons not parties in the manner provided for the service of a summons. *Unless the motion for substitution is made within 90 days after the death is suggested* upon the record by service of a statement of the fact of the death in the manner provided for the service of the motion, the action shall be dismissed as to the deceased party. (Emphasis added).

"The rule is in its present form precisely so that the process of substitution of a new party for a party who dies while litigation is pending will not cause otherwise meritorious actions to be lost. The rule is supposed to dispel rigidity, create flexibility and be given liberal effect."[41] Most recently, the court in *Stern v. Horwitz*,[42] reaffirmed "the plain language of the rule indicates that dismissal is triggered only when the motion for substitution is not filed or served within the ninety-day period."[43] Accordingly, under Rule 1.260, the plaintiff has *90 days* to file a motion for substitution of the estate, *from the date the death is suggested on the record* by any person.

2. Filing of Motion for Substitution & Suggestion of Death is the "Equivalent" of Filing an Independent Action

Returning to the probate proceeding, is it sufficient an action against the decedent is pending on their date of death, or is something more required to meet the independent action requirement of Fla. Stat. § 733.705 (2020)?

In *Cloer v. Shawver*,[44] the court addressed this very issue under a prior version of the claims statute. In Cloer, an action was brought prior to the death of the defendant.[45] Following the defendant's death, the claimant filed a motion for substitution within the time period for filing an independent action.[46] The court substituted the defendant's estate as the party defendant; however, the personal representative for the estate was not served with the motion for substitution until after the period for filing an independent action expired.[47]

On appeal, the court framed the issue as "whether the filing by plaintiff of the motion for substitution of parties constituted a bringing of 'appropriate suit, action or proceedings' as contemplated by [section 733.18, Fla. Stat.]," or whether the statute requires "that service of the motion for substitution of parties be accomplished upon the [personal representative] within the two months period."[48] The court held "where a suit is pending prior to the death of the defendant, the filing of the suggestion of death and the motion for substituting the representatives of the estate as party defendants is equivalent to the filing of a complaint against the estate."[49] Thus, the filing of the suggestion of death and the motion for substitution within 30 days of the estate's objection to the claim satisfies the independent action requirement of Fla. Stat. § 733.705 (2020). This works because, if the plaintiff is going to pursue their lawsuit, then he or she needs to substitute the estate regardless.

The personal representative for the estate does not need to actually be substituted within the 30-day period. Rather, it is sufficient the motion to substitute and suggestion of death are filed. (Note, in Cloer, the court actually substituted the personal representative within 30 days.) Also, as it stands, nothing is required to be filed in the probate proceeding. The Cloer decision also assumes the plaintiff is always the party filing the suggestion of death in the civil action. In some cases where the court applied Rule 1.260, the estate was required to file a suggestion of death as a matter of due process.[50]

3. Potential Conflict Between Fla. Stat. § 733.705 (2020) and Florida Rule of Civil Procedure 1.260(a)

A potential complication may arise when a creditor is simultaneously faced with the 30-day deadline in which to "file" an independent action under Fla. Stat. § 733.705 (2020), and the 90-day period in which to file a motion to substitute a party for the decedent under Rule 1.260(a). Consider this example:

> The decedent was the defendant in a pending civil action at the time of his death. The plaintiff in the civil action (who is now a potential creditor of the estate), learns of the defendant's death, and promptly files a claim against the newly opened estate.
>
> One week later, the personal representative files a timely objection to the claim. Now, the plaintiff has only 30 days to file an independent action (i.e., a motion for substitution & suggestion of death) pursuant to Fla. Stat. § 733.705 (2020) and Cloer. However, the plaintiff likely, still has considerably more time remaining to substitute the personal representative for the estate in the civil action under Rule 1.260.

In this example, is the 90-day period to file the motion for substitution in the civil action shortened to 30 days to comply

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with Fla. Stat. § 733.705 (2020)? Under Rule 1.260, the 90-day period does not even begin to run until a suggestion of death is filed in the civil proceeding. Under Cloer, notwithstanding the 90-day under Rule 1.260(a), the suggestion of death and motion for substitution must be filed in the civil case prior to the expiration of the 30-day period under Fla. Stat. § 733.705 (2020).

Based on the foregoing, best practices call for the filing of a motion for substitution of the personal representative of the decedent's estate within 30 days of an objection. This result is problematic because, based on Cloer, in every civil action where the estate has to be substituted as a defendant in order for the action to proceed, the 90-day time period under Rule 1.260 is effectively superseded by the Probate Code. Fortunately, the chances of this situation actually arising are low because estates usually take longer to open, and it usually takes the personal representative longer to get around to objecting, by which time the 90-day period should be well under way.

D. The Personal Representative Should Object to a Claim Even When an Independent Action Has Already Been Filed

Fla. Stat. § 733.705(2) (2020), provides, in relevant part, the personal representative of the estate must file an objection within the later of four months of publication of notice to creditors or 30 days of the timely filing of a claim.

At least one case suggests it is unnecessary for the personal representative to object to a claim when an independent action is pending. In *In re Klotz' Estate*,[51] the claimant brought a civil action against the personal representative of the defendant's estate, and four days later, filed a timely statement of claim against the estate.[52] The personal representative did not file an objection to the claim, but filed an answer in the civil action.[53] The court explained "[t]he purpose of an objection . . . is to shorten the time within which a proceeding must be commenced."[54] The court reasoned "the requirement that [the personal representative] file an objection was an empty exercise and would accomplish nothing because the suit which the objection would precipitate was already in progress."[55]

Notwithstanding the holding in Klotz' Estate, the personal representative for the estate should object to the claim if there is an appropriate basis to do so. As set forth above, the objection triggers the claimant's 30-day deadline to file a motion to substitute the personal representative in the civil action (after which the claim is barred). Moreover, the objection puts the claimant on notice the claim is disputed by the personal representative. Finally, Fla. Stat. § 733.705 (2020), provides the "failure to serve a copy of the objection constitutes an abandonment of the objection." Thus, the reliability of the Klotz' Estate decision is questionable. The personal representative should always file an objection to a claim if there is a basis to do so.

IV. The Personal Representative's Duty To Conduct A Diligent Search For Reasonably Ascertainable Creditors

By way of background, Fla. Stat. § 733.2121(3)(a) (2020), provides the personal representative for an estate "shall promptly make a diligent search to determine the names and addresses of creditors of the decedent who are reasonably ascertainable, even if the claims are unmatured, contingent, or unliquidated." "[I]t is not just the claimant's identity but its 'claim' that must be reasonably ascertainable."[56] "When the identity of a creditor is known or reasonably ascertainable, due process requires that the creditor be given notice of the commencement of probate proceedings by mail or by such other means as is certain to ensure actual notice."[57] Under Florida law, "a reasonably ascertainable creditor is one who can be determined by the personal representative through a diligent search."[58] What constitutes a "diligent search" for reasonably ascertainable creditors is the subject of much consternation and debate.

In *Strulowitz*, a prospective creditor sought an extension to file an untimely claim based on a settlement agreement entered into by the decedent.[59] According to the creditor, a search of the decedent's financial records, including his check book, bank statements, and check stubs would have revealed payments to the creditor on a quarterly basis during the six years prior to the date of death.[60] The personal representative responded he had searched the decedent's files, bills, and correspondence, as well as the check book for the year preceding the decedent's death. Further, "he [the personal representative] had not received any bills, letters, payment books, phone calls, or correspondence of any kind concerning an outstanding debt."[61] Following an evidentiary hearing, the trial court found the creditor was reasonably ascertainable and granted its request for extension of time to file a claim.[62]

In affirming, the Fourth District concluded "reasonable people could differ as to what constitutes a reasonable search and what entails impractical or extraordinary effort."[63] The court reasoned, had the personal representative looked through the decedent's check book, identified a pattern of checks to the creditor, and questioned the amounts, he might have identified the creditor.[64] The court additionally noted "the absence of any written rules or guidelines on specific steps that an estate administrator must take during the course of a diligent search."[65] The court opined that "it would be helpful if the [Florida Bar] considered proposing or extending existing rules to give estate administrators and trustees more direction in their diligent searches for creditors."[66] In a 2014 amicus

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curiae brief, the RPPTL Section of the Florida Bar recognized the *Strulowitz* court's call for guidance, explaining:

> We made a reasonable, but not exhaustive, search of cases, statutes, rules and treatises and found nothing the Section might offer that would serve as a useful rule for practitioners and all other Floridians beyond what we already have, but the Section will continue to consider the issue.[67]

In *Soriano v. Estate of Manes*,[68] the Third District drew a distinction between a "reasonably ascertainable creditor" and a mere "conjectural creditor."[69] There, a prospective creditor alleged she had an unsecured claim against the decedent's estate "based upon an imminent private tort action" arising from a criminal battery allegedly committed by the decedent.[70] She did not file a claim until four months after the notice to creditors was published, but she argued the claim should be treated as timely because she was a reasonably ascertainable creditor entitled to be served with the notice to creditors.[71] The trial court held, although both the prospective creditor and the decedent had retained counsel in the criminal case, there was no evidence an actual or potential civil claim would be filed.[72] Thus, the prospective creditor was not reasonably ascertainable.[73]

In affirming, the Third District explained the personal representative's efforts simply must be *reasonable under the circumstances*:

> [A]ll the [personal representative] need do is make "reasonably diligent efforts" to uncover the identities of creditors, and not everyone who may conceivably have a claim is properly considered a creditor entitled to actual notice. It is reasonable to dispense with actual notice to those with mere "conjectural" claims.[74]

As a mere "conjectural" creditor, the prospective creditor's untimely claim was barred pursuant to Fla. Stat. § 733.702(1). The determinative factors in Soriano were (a) there was no evidence the personal representative had actual knowledge of the civil claim, and (b) there was no indication a more diligent search would have revealed the existence of the claim.[75]

More recently, in *Cantero v. Estate of Caswell*,[76] the Third District once again held an alleged creditor of the estate was not reasonably ascertainable and struck his claim as untimely. In *Cantero*, the decedent died owning a piece of real property.[77] The personal representative properly published a Notice to Creditors and upon expiration of the 30-day deadline, no creditor claims were filed.[78] After the personal representative filed a Verified Statement as to creditors, which averred no creditors, the court ordered the property to be sold.[79] Approximately four months after expiration of the creditor claim period, the alleged creditor, Mr. Cantero, filed a Statement of Claim alleging he was entitled to all of the property's sale proceeds.[80]

At an evidentiary hearing held by the trial court, the personal representative testified he "diligently searched the property" and did not find any paperwork regarding Mr. Cantero's alleged interest in the property.[81] The personal representative testified he had only two conversations with Mr. Cantero.[82] During both conversations with the personal representative, Mr. Cantero never mentioned he had an interest in the property.[83] Furthermore, Mr. Cantero also contacted the personal representative's attorney and failed to mention he had an interest in the property.[84] Instead, Mr. Cantero testified he was in a romantic relationship with the decedent when they decided to purchase the property.[85] Mr. Cantero admitted there were no documents in the decedent's possession supporting his claim, but he "paid all the monies to purchase the property and continued to pay the mortgage premiums while he resided there."[86] He testified he paid the down payment and had an oral agreement with the decedent that upon her death, the property would be transferred to him.[87] Ultimately, the trial court found Mr. Cantero's testimony was not credible.[88]

On appeal, the Third District stated Mr. Cantero's "basic inquiry" (i.e., his telephone calls to the personal representative and attorney) were not sufficient to put the personal representative on notice of his alleged interest in the property.[89] The court distinguished the case from *In re Estate of Ortolano*,[90] where it was undisputed the personal representative knew there was pending litigation against the decedent, and *Simpson v. Estate of Simpson*,[91] where the testimony established the personal representative had actual knowledge of the creditor's claim because she made statements about the creditor's stock interest.[92] Therefore, at most, Mr. Cantero was a "conjectural" creditor of the estate as seen in *Soriano*.[93]

Admittedly, from the perspective of advising the personal representative, it is difficult to distill the holdings of *Strulowitz*, *Soriano*, and *Cantero* into a formula for conducting a diligent search for reasonably ascertainable creditors. At a minimum the cases indicate the personal representative should be cognizant of, and promptly investigate, any patterns of payment by the decedent in the year before the date of death.

V. The Application Of *Jones V. Golden* To Known Or Reasonably Ascertainable Creditors

Fla. Stat. § 733.702(1) (2020), provides, in part, that "[n]o claim or demand against the decedent's estate . . . is binding on the estate . . . unless filed in the probate proceeding on or before the later of the date that is 3 months after the time of the first publication of the notice to creditors or, as to any creditor required to be served with a copy of the notice to creditors, 30 days after the date of service on the creditor."

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In *Jones v. Golden*,[94] the Florida Supreme Court accepted jurisdiction to review the Fourth District's decision in *Golden v. Jones*,[95] and considered the following: whether the claim of a known or reasonably ascertainable creditor who is not served with notice to creditors is barred under Fla. Stat. § 733.702(1), if not filed within three months after the first publication of the notice to creditors (absent an extension), or whether the claim is timely if filed within two years of the decedent's death under Fla. Stat. § 733.710.[96]

In *Golden v. Jones*, the Fourth District held "that if a known or reasonably ascertainable creditor is never served with a copy of the notice to creditors, the statute of limitations set forth in section 733.702(1), Florida Statutes, never begins to run and the creditor's claim is timely if it is filed within two years of the decedent's death."[97] The Fourth District certified conflict with the First District's decision in *Morgenthau v. Andzel*,[98] and the Second District's decision in *Lubee v. Adams*,[99] which held "even a reasonably ascertainable creditor who was not served with a notice to creditors is required to file a claim within the publication period of three months unless the creditor files a motion for an extension of time under section 733.702(3) within the two-year repose period of section 733.710."[100]

The Florida Supreme Court approved the Fourth District's decision in *Golden* and disapproved *Morgenthau* and *Lubee*, holding "the claim of a known or reasonably ascertainable creditor who was never served with a copy of the notice to creditors is timely if filed within two years of the decedent's death."[101] Therefore, "if a known or reasonably ascertainable creditor is not served with a copy of the notice, section 733.702(1) does not govern the timeliness of that creditor's claims."[102] The Court also recognized notice is a constitutional requirement:

> A personal representative is therefore constitutionally obligated to provide actual notice to known or reasonably ascertainable creditors and if the personal representative fails to provide that notice, the creditors' claims cannot be barred except under section 733.710. The Fourth District's decision in Golden properly recognizes the duty of the personal representative to provide notice to known and reasonably ascertainable creditors and the requirement of actual notice to satisfy due process as to those creditors.[103]

There are two key takeaways from the *Jones v. Golden* decision. First, the decision means a reasonably ascertainable creditor not served with notice to creditors has two years from the decedent's date of death to file a claim against the estate. Second, the decision reinforces the rule, all creditor claims—whether reasonably ascertainable or not—are barred after two years from the decedent's date of death.[104]

VI. CONCLUSION

As set forth above, the Florida Probate Code establishes the process by which creditors may recover funds from a decedent's estate. Creditors must pay close attention to the specific timelines and procedures and adhere to them, in order to ensure their claims against an estate are valid and enforceable. In doing so, creditors need to be cognizant of the common pitfalls during this process, including the importance of timely filing a claim against the estate, satisfying the independent action requirement, and understanding how the Florida Probate Code interacts with the Florida Rules of Civil Procedure. Personal representatives also have to pay close attention to the specific timelines and procedures in the creditors' claims process, including timely filing an objection to a statement of claim and satisfying their duty to conduct a diligent search for reasonably ascertainable creditors.



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Endnotes

1 Fla. Stat. § 733.2121 (2020); *see also* Fla. Stat. § 733.701 (2020).

2 Fla. Stat. § 733.2121 (2020).

3 197 So. 3d 1190 (Fla. 4th DCA 2016).

4 *See, e.g.*, Herman v. Bennett, 278 So. 3d 178, 181 (Fla. 1st DCA 2019) (holding the three-month limitations period set forth under § 733.702(1) begins to run on the day of first publication and not the day after, thus rendering the claimant's claim untimely); Johnson v. Townsend, 259 So. 3d 851, 858-69 (Fla. 4th DCA 2018) ("Because the wife's community property interest was a 'claim' … the wife had three months after the time she published the notice to creditors to file her claim according to section 733.702(1)."); Spohr v. Berryman, 589 So. 2d 225, 226-27 (Fla. 1991) ("The first publication of the notice of administration … occurred on January 9, 1987. Under section 733.702 . . . , this meant that claims against the estate had to be filed by no later than April 9, 1978").

5 *See* May v. Ill. Nat'l Ins. Co., 771 So. 2d 1143, 1154 (Fla. 2000) ("[T]he sole possibility for recovery against the estate is for the probate court to grant an extension of time for the filing of a claim on the grounds of fraud, estoppel, or insufficient notice").

6 Castro v. East Past Enterprises, 881 So. 2d 699, 700 (Fla. 1st DCA 2004).

7 *Id.*

8 *Id.*

9 443 So. 2d 136, 137 (Fla. 3d DCA 1983).

10 *Id.*

11 *Id.*

12 *Id.*

13 *Id.*

14 *Id.* at 137.

15 *Id.* at 138.

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16 *Id.* at 137-38. *But see* Am. & Foreign Ins. Co. v. Dimson, 645 So. 2d 45, 48 (Fla. 4th DCA 1994) ("Correspondence concerning the substitution of the estate in the litigation does not constitute estoppel on the part of the estate so as to excuse the failure to file a timely claim").

17 881 So. 2d 699, 700 (Fla. 1st DCA 2004).

18 443 So. 2d at 137-38.

19 881 So. 2d 699, 699 (Fla. 1st DCA 2004).

20 *Id.*

21 *Id.*

22 *Id.*

23 *Id.*

24 *Id. (emphasis added).*

25 *See* Campbell v. Estate of Schleusener, 504 So. 2d 417, 417-18 (Fla. 4th DCA 1987) (evidentiary hearing required on the creditor's petition to file untimely claim against the estate where creditor's rationale for late filing of claim hinged on the question of fraud and estoppel).

26 *See* Parham v. Fla. Health Scis. Ctr., Inc., 35 So. 3d 920, 928 (Fla. 2d DCA 2010); *see also* Adams v. Hackensack Trust Co., 22 So. 2d 392 (Fla. 1945).

27 510 So. 2d 1003 (Fla. 3d DCA 1987).

28 *Id.* at 46.

29 197 So. 3d 1190 (Fla. 4th DCA 2016).

30 *Id.* at 1191.

31 *Id.*

32 *See id.*

33 *See* Fla. Stat. § 733.705(2) (2020).

34 *See id.* § 733.705(5).

35 *Id.* (emphasis added).

36 *See* Lewsadder v. Estate of Lewsadder, 757 So. 2d 1221, 1224 (Fla. 4th DCA 2000) ("[A]n action pending against a defendant at the time of the defendant's death will suffice to satisfy the "independent action" provision of the statute when there has been a substitution of the personal representative of the decedent's estate, either by timely filed motion for substitution, or by the personal representative's voluntary substitution").

37 407 So. 2d 338 (Fla. 4th DCA 1981).

38 *Id.* at 340; *see also* S. J. Landau Corp. v. Estate of Riesner, 372 So. 2d 1134 (Fla. 2d DCA 1979) (Florida estate and New York action); Shessel v. Estate of Calhoun, 573 So. 2d 962 (Fla. 3d DCA 1991) (Florida estate and action filed in federal court); *Lewsladder*, 757 So. 2d at 1224 (application for arbitration of claim satisfied independent action requirement where the claim arose out of agreement providing for mandatory arbitration).

39 421 So. 2d 752 (Fla. 4th DCA 1982).

40 *Id.* at 753.

41 Metcalfe v. Lee, 952 So. 2d 624, 629 (Fla. 4th DCA 2007).

42 249 So. 3d 688 (Fla. 2d DCA 2018).

43 *Id.* at 690.

44 177 So. 2d 691 (Fla. 1st DCA 1965).

45 *Id.* at 694.

46 *Id.*

47 *Id.*

48 *Id.*

49 *Id.* (emphasis added); *see also* Kornblum v. Heflin, 183 So. 2d 843, 845 (Fla. 2d DCA 1966) ("[F]iling of a motion to substitute a personal representative as a party defendant is also the equivalent to filing suit against an estate within the meaning of § 733.16(1)(a)"); Lewsdadder v. Estate of Lewsdadder, 757 So. 2d 1221, 1224 (Fla. 4th DCA 2000) ("[C]ourts have held that an action pending against a defendant at the time of the defendant's death will suffice to satisfy the 'independent action' provision of the statute when there has been a substitution of the personal representative of the decedent's estate, either by timely filed motion for substitution, or by the personal representative's voluntary substitution.") (internal citations omitted).

50 *See e.g.*, In Re Estate of Ortolano, 766 So. 2d 330 (Fla. 4th DCA 2000) (failure of personal representative to file a suggestion of death or otherwise notify prospective creditor of decedent's death until after claims period expired estopped the estate from asserting the creditor's claim was untimely filed); *see also* Davis v. Evans, 132 So. 2d 476 (Fla. 1st DCA 1961) (misrepresentation where the personal representative never informed the plaintiff in the civil action of the decedent's death, and as a result, the plaintiff missed the deadline to file a claim).

51 394 So. 2d 509 (Fla. 5th DCA 1981).

52 *Id.* at 510.

53 *Id.*

54 *Id.*

55 *Id.*

56 Simpson v. Estate of Simpson, 922 So. 2d 1027, 1029 (Fla. 5th DCA 2006).

57 Strulowitz v. Cadle Co., II, Inc., 839 So. 2d 876, 880 (Fla. 4th DCA 2003).

58 *Id.* at 879.

59 *Id.* at 877.

60 *Id.* at 880

61 *Id.* at 878.

62 *Id.* at 879

63 *Id.* at 881.

64 *Id.*

65 *Id.*

66 *Id.* at n.3.

67 Brief for the Real Property, Probate and Trust Law Section of The Florida Bar as Amicus Curiae, Jones v. Golden, 176 So. 3d 242 (Fla. 2015) (No. SC13-2536), 2014 WL 6803947.

68 177 So. 3d 677 (Fla. 3d DCA 2015).

69 *Id.* at 678.

70 *Id.*

71 *Id.*

72 *Id.* at 680-81.

73 *Id.* at 681.

74 *Id.* (brackets and ellipses omitted) (citing Tulsa Professional Collection Servs., Inc. v. Pope, 485 U.S. 478 (1988)).

75 *Id.*

76 305 So. 3d 37 (Fla. 3d DCA 2019).

77 *Id.* at 38.

78 *Id.*

79 *Id.*

80 *Id.*

81 *Id.*

82 *Id.*

83 *Id.*

84 *Id.* at 39.

85 *Id.*

86 *Id.*

87 *Id.*

88 *Id.* (emphasis added).

89 *Id.* at 39-40.

90 766 So. 2d 330 (Fla. 4th DCA 2000).

91 922 So. 2d 1027 (Fla. 5th DCA 2006).

92 *Cantero*, 305 So. 3d at 40.

93 *Id.*

94 176 So. 3d 242 (Fla. 2015).

95 126 So. 3d 390 (Fla. 4th DCA 2013).

96 *Jones*, 176 So. 3d at 243 (emphasis added) (jurisdiction pursuant to Art. V, § 3(b)(4), Fla. Const.).

97 *Golden*, 126 So. 3d at 390 (emphasis added).

98 26 So. 3d 628 (Fla. 1st DCA 2009).

99 77 So. 3d 882 (Fla. 2d DCA 2012).

100 *Golden*, 126. So. 3d at 393 (emphasis added).

101 *Jones*, 176 So. 3d at 248.

102 *Id.*

103 *Id.* at 249 (emphasis added).

104 *See* Lerma-Fusco v. Smith, 220 So. 3d 562, 564 (Fla. 5th DCA 2017) (section 733.710, Florida Statutes, is a jurisdictional statute of nonclaim which cannot be extended, and thus, claims against an estate are limited to two years after the death of a decedent).

SECTION SPOTLIGHT

Frontline Heroes Project Update JANUARY 2021

By Johnathan Butler, Lead At Large Member (ALM),
Florida Bar Real Property Probate & Trust Law (RPPTL) Section

At the time of this writing, vaccines are slowly rolling out to health care workers, essential frontline heroes and Florida citizens age 65 and older. The Florida Bar RPPTL Section in the 13th and 6th Circuits continues to partner closely with Bay Area Legal Services (BALS) here in Tampa Bay, connecting volunteer attorneys with clients. During the clinics, clients receive complimentary Health Care Surrogate Designations and Living Wills. Recently, our Frontline Heroes Project (FHP) committee worked closely with BALS technology specialist David Gray to offer online appointment scheduling. We know frontline workers are busy serving the public, and time is limited. The online appointment scheduling allows clients to schedule their session from the convenience of their office, home or smartphone. The clinics are held monthly – usually on the last Thursday from 12:00pm - 4:00pm. We have expanded the sessions to include 5:00pm - 7:00pm for those clients and attorneys who prefer evening sessions. Clients participate in a Zoom virtual video conference held privately with the volunteer attorney in breakout rooms with sessions lasting one hour each. Bay Area Legal Services Family Forms Clinic Coordinator and FHP manager, David Gomez, confirms the appointments with the clients and attorneys, sends out the Zoom links and the advanced directives, and keeps the sessions running very smoothly. David also coordinates any necessary training/coaching with the volunteer attorneys. We could not do it without David, plus Jena Hudson, BALS Pro Bono Manager of the Volunteer Lawyers Program, and Nery Alonso, BALS Staff Attorney of the Volunteer Lawyers Program. Also, we want to thank 6th Circuit RPPTL Lead ALM Rebecca Bell for recruiting volunteer attorneys and participating in our weekly team calls. Rebecca helps our team spread the word throughout the region. Rebecca provides important guidance, knowledge and support to the entire team in the FHP -- it truly takes team work to make the dream work.

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As volunteer attorney Heather Frymark, who practices with the Bell Law Firm in Clearwater, stated: "It was a wonderful experience. I was aware of Bay Area Legal Services at Stetson Law School when I was in law school. One of the requirements is accomplishing a pro bono case. It was instilled in me and an important part of being an attorney. It was good practice for the bar exam and to just give back. In private practice today, I seek out opportunities to help people in the community. I am an estate planning attorney and it is no sweat off my back." When asked if she would volunteer in future FHP cases, Frymark immediately stated: "I would be happy to do so. Thanks for the opportunity."

In November 2020, David conducted an interview with Heather on WEDU Public Television in Tampa Bay during Tampa Bay Philanthropy Week, highlighting pro bono projects, volunteer initiatives and philanthropic efforts throughout the Tampa Bay region. Below is the link for David's conversation with Heather about the FHP program:

https://www.linkedin.com/feed/update/urn%3Ali%3AugcPost%3A6731650458315718657/?actorCompanyId=3008575

Volunteer attorney Ashley Ivanov, with the law firm of Ashley Ivanov, P.A. in Hillsborough County/Tampa, provided the following comment about the FHP program:

> Winston Churchill reportedly said, 'We make a living by what we get. We make a life by what we give.'
>
> I am grateful to serve essential workers through the Frontline Heroes Program by helping with the preparation of their living wills and health care surrogate designations. I view this as one of the least ways I can meaningfully give back and show gratitude to our essential workers. Thanks to the Bay Area Legal Services, Volunteer Lawyers Program, and the Florida Bar Real Property, Probate, and Trust Law Section for organizing the Frontline Heroes Program. It is not one person who makes this program a success - it is a "team," where together (t) everyone (e) achieves (a) more (m).

The FHP clinics expanded in November and December 2020 to include Hillsborough County Courthouse staff in Tampa. Our courthouse workers are doing the very best they can to serve the public and maintain all safety measures. Plus, the FHP team is reaching public school teachers, administrators and staff who are on the frontlines working with students. Teachers connect by Zoom video with our FHP volunteer attorneys to get the advanced directives. Regular reports via email and text are provided to public school parents advising them of when a student or staff member has been impacted by a positive COVID test. Given the circumstances, teachers and staff take all precautions to protect themselves, their families and the students while providing the best quality education possible.

We are now recruiting volunteers with the Government Lawyers Section of the Hillsborough County Bar Association in Tampa to help us in future monthly clinics. For more information on the program and to schedule appointments online, please visit: https://bals.org/clinics/frontline-heroes-project. You are also welcome to email us at fhp@bals.org.



POLITICAL ROUNDUP

2021 Session Preview

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

For better or for worse, the *new normal* for Florida's annual legislative session appears to be that there is no more *normal*. In the recent history, each year seems to be shaped by a unique issue or issues that, many times are concealed at the beginning of the Session, then become all-consuming by the end of the short Session. Some examples include Hurricane Irma, which was the most destructive storm to hit Florida and force the evacuation of 6.5 million residents; the tragic events at Marjory Stoneman Douglas High School; and of course, the COVID-19 pandemic.

In every odd numbered year, such as 2021, the Florida Constitution requires the Legislature to meet for its annual 60-day Regular Session starting the first Tuesday after the first Monday in March.[1] This year the Regular Session begins March 2nd. This makes the scheduled end of the Regular Session April 30th; however, in recent years, the Legislature has more often than not needed at least a few extra days to complete its business.

Each year the Legislature has only one Constitutional mandate – to pass a balanced budget for the upcoming State fiscal year. Additionally, the Constitution requires this balanced budget be provided to members of the House, Senate, and public for a 72-hour period before any vote may be cast on the bills. Since 2015, five out of the six Sessions have required either additional extended days or a completely separate special session to finalize and approve the budget.

A Historical Look – The *New* Normal

In 2015, a budget impasse between the Senate and House regarding Medicaid expansion resulted in the House shocking many by adjourning and leaving Tallahassee on the 57th day of the Session. This action forced the Senate to either approve or kill all House legislative proposals in the possession of the Senate. Ultimately, the Legislature passed the budget in June 2015.

In 2017, the Legislature was able to pass significant legislation during the Regular Session, including building a reservoir to store, clean and send Lake Okeechobee water to the Everglades and incentivizing well-performing charter schools to expand into neighborhoods where traditional public schools have failed for years. Unfortunately, they were not able to pass a budget within the 60-days, instead the Legislature had to come back to finish its budget writing duties in June 2017.

Many things were going smoothly during the first-half of the 2018 Regular Session. The even-year Session started in January and was scheduled to conclude on March 9, 2018. Then on February 14th, the horrific events at Marjory Stoneman Douglas High School in Parkland occurred. The focus of Governor Scott and all Legislative members sharply shifted to find ways to attempt to address this dreadful loss of life. When the shooting occurred in mid-February, the Legislature was already deep into the budget writing process. As one could imagine, the shifted emphasis on school safety, student mental health, and some gun control measures resulted in needing additional time to complete and approve a budget that Session. Ultimately, the Legislature got to work quickly and only needed two extra days to pass the budget.

The 2019 Regular Session had fewer interruptions with surprise issues, but the Legislature still required an extra day to approve the budget due to the 72-hour Constitutional cooling-off period.

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It's hard to believe, as we near one-year anniversary of the nation shutting down due to the COVID-19 pandemic, that the severity of the COVID-19 crisis was unknown for nearly all of the 2020 Regular Session. The Legislature had prepared a budget, which was changed in the final week of Session to add millions of dollars for COVID-19 response. These budget additions required the Legislature to once again extend the Session by a few days to approve the budget. The main difference this year was that just two days before the legislators came back to Tallahassee to approve that budget, Governor DeSantis was closing bars and nightclubs and limiting access to retailers, restaurants, and beaches. Ultimately, the Governor vetoed over one billion dollars from the pre-pandemic budget crafted by Legislators. All of this occurred while $1.9 billion in state general revenue funds, previously projected to be collected in March through June 2020, evaporated as a result of the State's economic shut down to curb the spread of the virus.

The Theme of the 2021 Session – Responsible Budgeting

As the virus was spreading across the Nation late last summer, Florida economists were meeting to estimate the budget impact the pandemic would have on the State's current and future budgets. Their initial forecast estimated the state would lose $5.4 billion over two years compared to projected pre-pandemic revenues. This significant estimated reduction reflected a nearly 10% loss of revenues in current state fiscal year 2020-2021 and a 5.6% loss of revenue in the upcoming 2021-2022 state fiscal year, which Legislators will be writing the budget for this Session. This August revenue estimate set the stage for a difficult budget year unlike anything the Florida Legislature has seen since the Great Recession.

Thankfully, however, it appears the pandemic induced recession may have a sharper recovery than the burst of the housing bubble in 2008. Since October 2020, Florida's actual collections of general tax revenue have exceeded the *pre-*pandemic economic forecast. These collections prompted the state economists to reduce the previously projected $5.4 billion loss over two years to $3.3 billion in mid-December. While this updated financial outlook certainly moves the budget in the right direction, the forecast still shows the state likely has a more difficult than normal budget to craft during the 2021 Session.

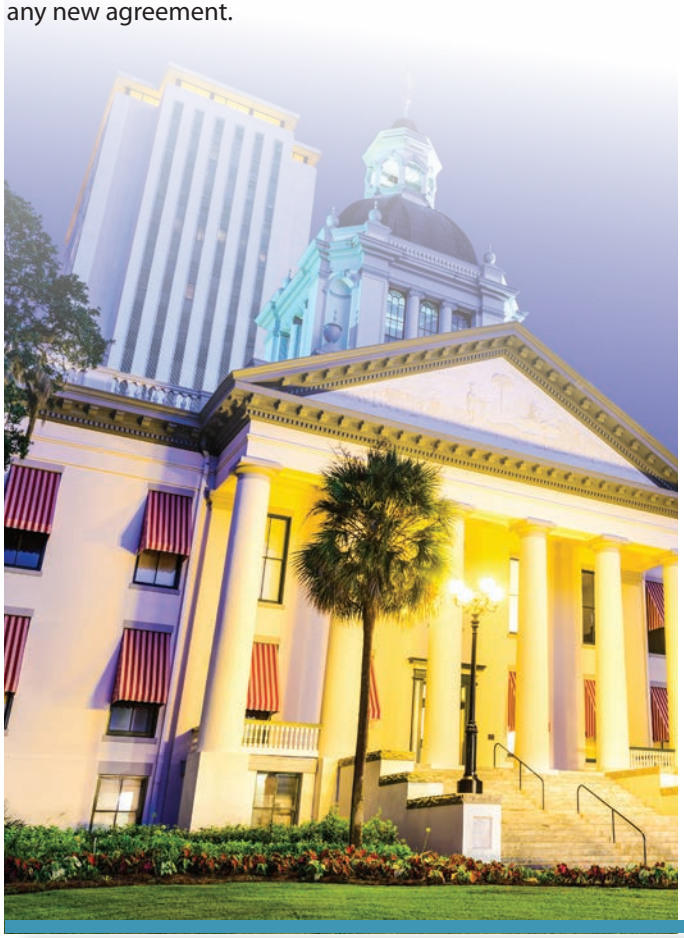
Additionally, the actual December 2020 revenue collections exceeded all expectations. Just weeks after the latest updated economic forecast was finalized, the State collected nearly $340 million more than it had just projected for that month. These December collections also exceeded the pre-pandemic estimates by more than $150 million, which represent the best performing month since the pandemic began.

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Even though actual revenue collections are outpacing prior projections, Legislative leaders will certainly continue to be laser focused on crafting and passing a balanced 2021 budget during these challenging times. In early February, Senate leaders announced that all entities automatically receiving recurring state funds in the base budget must defend those projects to make sure the Legislature is continuing to fulfill the purpose of those projects and benefitting the citizens of the State of Florida. This policy echoes the philosophy of Legislative leadership to not only produce a balanced budget for the 2021-22 state fiscal year, but responsibly plan for the future. After all, it's likely the conservative budgeting approach before the pandemic, which helped Florida through these difficult budgetary times without necessitating the need to dip into the State's reserve funds.[2]

In addition to reviewing all recurring projects in the base budget and limiting 2021 funding projects, the Legislature is also considering a few ways to raise revenues to fill the shortfalls. In April 2019, the Seminole Tribe stopped sharing gaming revenues with the State due to legal challenges. Prior to that time, the Tribe paid the State between $120 and $330 million annually under the Gaming Compact Agreement. Many have speculated that a new agreement with the Tribe could be an easy way for the State Legislature to partially fill the budget gap, but at this time no details have been released regarding any new agreement.



This year, the Senate President has also made the collection of online sales taxes a priority. These revenues are otherwise lawfully due when any Floridian purchases an item without paying the sales tax to a vendor. Currently, consumers in Florida are required to submit quarterly returns to the Florida Department of Revenue to directly pay these "use" taxes; however, consumers rarely pay the tax. In the wake of a 2018 decision,[3] the US Supreme Court upended fifty years of legal precedent requiring companies to have a physical presence in a state before being subject to the state's tax collection and remittance laws. Since that decision, forty-three of forty-five states that impose a sales tax have passed legislation to collect sales taxes from remote sellers exceeding certain economic thresholds. Florida and Missouri would be the final two states to act. Last year, the state economists estimated that Florida could collect more than $600 million in revenue annually if it were to pass remote seller and marketplace provider legislation. These are revenues that are lawfully due, but go uncollected as they have been the responsibility of the consumer.

One area of the budget likely to shine this year is Florida's environmental spending. In 2014, Florida voters approved an amendment to the State Constitution that would automatically redirect one-third of all documentary stamp tax revenues to the Land Acquisition Trust Fund to be used for various environmental projects as determined by the Legislature. Thanks in part to both Florida's strong residential real estate sales during the pandemic and extremely low interest rates resulting in a significant number of refinancing loans, Florida's documentary stamp taxes are projected to soar to more than $3 billion annually. This means the 2021 Legislature must distribute more than $1.1 billion in environmental related funds in the upcoming budget.

Leadership Priorities in 2021

One constant in every Session is that the Governor, Senate President, and Speaker of the House of Representatives all have priorities. The 2021 Session is no different. All three leaders have publicly supported bills to protect Florida businesses, educational institutions, government entities, and religious organizations from civil liability associated with COVID-19 related claims (Senate Bill 72 & House Bill 7); to protect Florida's health care industry from civil liability associated with COVID-19 related claims (House Health & Human Services Committee Proposed Committee Bill 1); to combat certain acts of public disorder and riots (Senate Bill 484 & House Bill 1); and to prohibit a state agency or a local governmental entity from purchasing products produced in China or services provided by Facebook, Twitter, Amazon, Apple, or Alphabet (Senate Bill 810 & House Bill 439).

Out of these bills, only the COVID-19 civil liability protections

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for non-healthcare entities has made significant progress through the House and Senate committee process at the time of writing this article. The general civil liability protection bills would require plaintiffs plead his or her complaint with particularity; submit, at the time of filing suit, a physician's affidavit confirming the physician's belief that the plaintiff's COVID-19-related injury occurred because of the defendant's conduct; and prove, by clear and convincing evidence, that the defendant was at least grossly negligent. Additionally, the bill provides that the business, educational institution, governmental entity, or religious organization is immune from civil liability if the entity uses a good faith effort to substantially comply with applicable government-issued COVID-19 guidance or health standards.

In addition, the Senate President has highlighted a number of proposals moving through that Chamber including expanding Florida's K-12 scholarship programs related to student eligibility and parental choice for students with unique abilities and students from lower income families (Senate Bill 48); repealing Florida's current Motor Vehicle No-Fault Law, which requires drivers to carry personal injury protection coverage, instead requiring that drivers carry bodily injury liability coverage (Senate Bill 54), and closing Florida's defined benefit retirement system to new employees hired after July 1, 2022 (Senate Bill 84).

The Speaker of the House of Representatives appears to be weaving a theme of governmental accountability throughout the main bills moving through that Chamber. The Speaker created a standalone Pandemics and Public Emergencies Committee to take a deep dive into COVID-19 related response and sea level rise concerns. During the early interim committee weeks, 2021 House committees regularly reviewed the effectiveness of legislation passed in recent years, which generally does not occur. The House has also investigated research institutions and the potentially excessive compensation paid to non-profit executives.

Regardless of the ultimate outcome of the 2021 Regular Session, the only certainty is that there appears to be no more *normal*. Instead, each Legislative session will continue to have its own unique challenges and opportunities to further shape the future of the State.



F. BROWN

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

Endnotes

1 In even numbered years, the 60-day Regular Session starts in January and is scheduled to finish in March.

2 Additionally, Florida received $5.8 billion in COVID relief funds from the Federal Government under the CARES Act. These funds were deposited into the State's general revenue fund and have been used by Governor DeSantis to fund COVID related services.

3 *South Dakota v. Wayfair, Inc.*, Dkt. No. 17-494 (US, 6/21/18).

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Roundtable

Highlights of the Meeting of the RPPTL Section

REAL PROPERTY DIVISION

Saturday, December 5, 2020 • 8:00 - 9:30 a.m.

Hybrid Meeting Disney Yacht Club/Virtual, Florida

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

Thank you to Roundtable Sponsor: Fidelity National Title Insurance

Welcome – S. Katherine Frazier, Division Director welcomed everyone to the meeting, which began at 8:08 a.m.

Sponsor Recognition - The Director introduced Karla Staker of Fidelity National Title Group, and thanked Fidelity for sponsoring the Real Property Division Roundtable.

Highlights of Virtual Roundtable Meeting (August 22, 2020) There was a motion to approve the summary of the August 22, 2020 meeting. The motion was seconded and passed.

Action Items:

Title Issues and Standards Committee – Rebecca L. A. Wood, Chair. Rebecca L. A. Wood reported that the Committee has approved 9 Easement Standards, which, once approved, the Committee intends to publish as Section 22 of the Title Standards. She explained that after the Committee approved the proposed Title Standards, they were circulated to other Committees for comment. The Committee received several comments. Based on the comments received, Title Standard 22.18 was revised to address intent regarding extinguishment by merger of title. A change was made to Title Standard 22.18 and the proposed Standards were circulated for comments at the August meeting. Also, Title Standard 22.6 was expanded upon to address that an appurtenant easement runs with the land even if not mentioned in a subsequent fee. On behalf of the Committee, Rebecca moved for approval of the proposed new Chapter 22 - Easements for the Uniform Standard Title Standards. The motion was seconded and passed.

Real Property Finance & Lending Committee – Richard S. McIver, Chair. Richard S. McIver reported on the proposed amendments to 697.07 and 702.10, F.S., regarding assignment of rents and orders to make any rental payments during pending foreclosures. The proposed amendment would make 3rd party purchasers who buy properties subject to mortgages, subject to any assignment of rents provision that is in the mortgage for which the property is subject to. There was a comment that the Committee worked on this proposal from the point of view of multiple committees and stakeholders. Rich explained that the assignment of rents statute permits a lender to apply to the court to order the mortgagor to make the rental payments during foreclosure. However, there have been some recent court decisions, which have held that 3rd parties who purchase property subject to a mortgage, are not subject to the assignment of rents provision in the applicable mortgage because the language of the statute identifies the party responsible as the mortgagor and not the owner. There is an association carve out that requires the association to apply the rents to past or future assessments. The impetus for this proposal was the *Green Emerald Homes v. Equity Trust* case. It is necessary to understand that this will not save you if you have a poorly drawn assignment of rents provision. The assignment of rents provision must contain the words "and assigns." There was a question whether the court would have jurisdiction to take away rent money from a non-party. Rich indicated that it would not. There was a suggestion that the white paper include clarification concerning jurisdiction.

There was a motion by the committee to support the legislation. The motion carried.

Information Items:

Condominium and Planned Development Committee – William P. Sklar and Joseph E. Adams, Co-Chairs. William P. Sklar reported on the emergency powers legislation. He explained that the emergency powers legislation gives Board of Directors, Homeowners Associations, and Condominium Associations the right to exercise powers in light of a pandemic or virus since this situation is not contemplated in the statutes. There is a pending Senate draft that has been submitted. The Committee is providing comments on the entire bill and intends to continue to monitor it and provide additional input. Joe Adams has been designated the point person who is working with Pete Dunbar as to the bill. The topic of immunity of associations has been removed from that draft.

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Real Estate Leasing Committee -– Brenda B. Ezell, Chair. Brenda B. Ezell reported that the Committee has been working on the revisions to the Lease Forms for the past two years. The Committee has vetted comments from the Florida Realtors and the Florida Housing Umbrella Group. Brenda thanked Kristen Jaiven and Michelle Hinden for all of the heavy lifting and then gave the floor to Kristen. Kristen Jaiven reported that many substantive comments were received during the August Meeting. The Committee made revisions based on the comments and then the revised leases were distributed to several major groups, with additional comments being received. The most current version is based on comments received from the August Meeting, the Florida Housing Umbrella Group, and Florida Realtors. The 4 substantive issues that currently remain are: (1) the provision of association governing documents to the tenant, which are currently consulting with the Condo Committee on; (2) the ability for a tenant to request a reasonable accommodation under the FHA; (3) Major Repairs vs. Elective Repairs; and (4) One Year Term Lease verses Renewal of the Lease. The Committee anticipates having another draft for review in February.

Update on Proposed Changes to Florida Remote Online Notarization Laws - FLTA - Melissa Murphy, Liaisons with FLTA, Co-Chair. Melissa Murphy presented. Since the last meeting she has received suggestions that are being considered. There have been no substantive concerns raised. She reached out to several RON service providers to get feedback. It has been a good enhancement of the relationship between Florida, the Section, FLTA, and the RON service providers. The committee feels the changes improve the law. Based on the feedback FLTA is optimistic about the bill in the upcoming legislative session.

Working Group on Public Record Redactions Update – Brian W. Hoffman, Title Insurance and Title Insurance Liaison, Chair. Brian Hoffman reported regarding the redaction bill that went through last year. He explained that Senator Passidomo has put together a task force on the issues arising from the statute with the primary members of the task force being from the Sheriff's and the Clerk's offices. Brian also reported that Lee Weintraub is putting together a Subcommittee in the Construction Law Committee. Brian is confident there will be a solution, but not as to when that will be.

The Florida Bar Florida Realtor – Attorney Joint Committee – Fred Jones. Fred Jones reported that the FR/Bar Committee has been working on revising the contracts for the past three years and anticipates a final version in 2021. The RREIL Committee discussed the proposed changes and provided many good comments.

The primary proposed changes are:

(1) The assignability provision is revised to provide a default that the Contract is nonassignable if no selection is made.

(2) The Financing Contingency is revised to provide a two-prong test: (i) Borrower has to get financing based on the terms proposed in the Contract, and (ii) Lender has to have the appraisal completed during the timeframe designated in the Contract. The decision in the LaFont case was considered.

(3) The Calculation of Time provision was revised to be based on a 24-hour day as opposed to a 5 p.m. cutoff.

(4) The Force Majeure provision is structured to clarify when the event of force majeure would take place.

(5) The notice definition was revised to replace "electronic media" with "e-mail."

Fred Jones asked any attorneys who do residential work to review and to provide him with feedback on the proposed changes.

CLE Report – Wilhelmina F. Kightlinger, CLE, Co-Chair. The Director announced that this report will be made at the Executive Council Meeting.

Legislation Committee Report – William Cary Wright, Legislation Committee, Co-Chair. The Director announced that this report will be made at the Executive Council Meeting.

Committee Liaisons/Web Pages – The Committee Chair's Annual Report 2020-2021. The Director noted that Committee Chair Annual Reports are due December 21, 2020. Committee chairs are also reminded to keep their committee web pages current.

Committee Reports (time permitting)

Attorney Banker Conference – E. Ashley McRae, Chair; Kristopher E. Fernandez, R. James Robbins, Jr. and Salome J. Zikakis, Co-Vice Chairs. E. Ashley McRae reported that there was a conference call in November to start garnering support from Bankers to hold an in person Conference in February 2022. She explained that there is a preference to do the meeting in person because it would interfere with the ability for attendees to network.

Commercial Real Estate – Jennifer J. Bloodworth, Chair; E. Ashley McRae, Eleanor W. Taft and Martin A. Schwartz, Co-Vice Chairs. Jennifer J. Bloodworth reported the Committee had a great meeting. She explained the Committee had a CLE during the Meeting covering sales on Chapter 11 bankruptcies and also general information on Chapter 5 Bankruptcies. She stated she intended to post the presentation on the listserv. Jennifer further reported that at the February Meeting, they plan on putting together a presentation which focuses on conflicts of interest in the commercial setting. Lastly, she

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commented that their Committee was also interested in exploring force majeure issues.

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 on a hurricane protection legislation revision package for 2022 addressing resiliency and shutters. The Committee is working on a webinar series that will take place in March 2021.

Condominium and Planned Development Law Certification Review Course – Jane L. Cornett, Chair; Christene M. Ertl, Vice Chair. Jane Cornett reported that the Committee is set for the review course, which will be virtual this year.

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. Melinda S. Gentile reported that the Committee is planning on having a hybrid/virtual meeting and that their Committee is currently working with CLI. Speakers are lined up they are looking forward to a great course.

Construction Law Institute – Jason J. Quintero, Chair; Deborah B. Mastin and Brad R. Weiss, Co-Vice Chairs. Jason J. Quintero, reported that CLI is currently planning on having a hybrid/virtual meeting and planning is underway.

Development & Land Use Planning – Julia L. Jennison and Colleen C. Sachs, Co-Chairs; Jin Liu and Lisa B. Van Dien, Co-Vice Chairs. Colleen Sachs presented. The Committee had an information filled meeting that included a case law update by Colleen Sachs, a legislative update by Cari Roth, and two great presentations. One presentation was by Aaron Dunlap of Carlton Fields on Emergency Orders During Covid. The other was a presentation on the future of Flood Insurance and Risk Rating by Anne Pollack of Fletcher, Fisher, Pollack. There is a plan to follow up with a webinar on the topic.

Insurance & Surety – Michael G. Meyer, Chair; Katherine L. Heckert and Mariela M. Malfeld, Co-Vice Chairs. Michael G. Meyer presented. The Committee tries to hold CLE presentations and meetings the third Monday of every month. They also want to hold CLE sessions at Executive Committee meetings. Many speakers are national, and now able to give presentations via Zoom.

Liaisons with FLTA – Alan K. McCall and Melissa Jay Murphy, Co-Chairs; Alan B. Fields and James C. Russick, Co-Vice Chairs. Melissa Jay Murphy reported that in addition to the report on the RON bill, FLTA just had an excellent annual convention in November, which was conducted virtually. She commended the current president, Len Prescott, who made sure the convention was successful. FLTA is doing a good job representing the industry and paying attention to what's going on in Tallahassee. Allen McCall commented they did talk about the proposed Transfer on Death Legislation but the FLTA has no opinion on that proposal at this point.

Real Estate Certification Review Course – Manuel Farach, Chair; Lynwood F. Arnold, Jr., Martin S. Awerbach, Lloyd Granet, Brian W. Hoffman and Laura M. Licastro, Co-Vice Chairs. Manuel Farach, Chair reported that the course may be in a live, hybrid or Zoom setting, no decision has been made yet. He further reported that the course is currently scheduled for April 9-10, 2021. He reported that the Committee had not yet received the surveys from the exam but that the Committee did receive comments from examinee Jason Ellison who passed the exam. Five of 24 test takers passed.

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

Real Property Finance & Lending – Richard S. McIver, Chair; Jason M. Ellison and Deborah B. Boyd, Co-Vice Chairs. Richard S. McIver presented. The Committee approved the supplemental legal opinion guidance because of changes to the business statute. The revision is anticipated this spring. Rich also reported on upcoming CLE.

Real Property Litigation – Michael V. Hargett, Chair; Amber E. Ashton, Manuel Farach and Christopher W. Smart, Co-Vice Chairs. Michael V. Hargett reported the Committee had an excellent and lengthy joint meeting with Real Estate Finance. The Committee had a one-hour CLE explaining code liens versus special assessments. There was a robust discussion on the new business law change at the Committee meeting.

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 a joint meeting took place with the Leasing Committee. There was a presentation on Emotional Support Animals in the Leasing and the Associations Sectors. The Committee is focusing on the Transfer upon Death topic.

Residential Real Estate and Industry Liaison – Nicole M. Villarroel, Chair; Louis E. "Trey" Goldman and James A. Marx, Co-Vice Chairs. Nicole presented. There was a discussion of the changes in the FR/Bar Contracts. John Redding discussed the class action on settlement fees in Buyer pick and pay counties.

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 the Committee had lively debates regarding the redaction statute, the lawsuits arising

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from the charging of settlement fees to cash buyers and the Transfer upon Death topic. Brian also solicited that if anyone has any title insurance realm questions or comments to please contact him.

Title Issues and Standards – Rebecca L.A. Wood, Chair, Robert M. Graham, Brian W. Hoffman and Karla J. Staker, Co-Vice Chairs. Rebecca mentioned that Bob Graham is soliciting input whether there is enough interest in working on a proposed amendment to 689.15 to codify Simon v. Koplin dealing with right of survivorship even if there are not unities of title.

The Director introduced Board of Governor Representative Steve Davis, who spoke briefly to thank the division for letting him be here this morning. He commented on the success of the hybrid meeting model and indicated that The Florida Bar would adopt that model.

The Director recognized first year Fellows Erin Miller Myers and Terrence Harvey, and second year Fellow Michelle Hinden. Board of Governor Representative and Section member Lorna Brown Burton introduced herself.

Len Prescott, president of the FLTA, appreciated the collaboration of the Section with FLTA.

The meetting was adjourned at 9:24 a.m.

RPPTL GENERAL SPONSORS

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

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Westcor Land Title Insurance Company	Sabine Seidel	866-629-5842
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Roundtable

Highlights of the Meeting of the RPPTL Section

PROBATE AND TRUST DIVISION

Saturday, December 5, 2020

Hybrid Meeting Disney Yacht Club/Virtual, Florida

Prepared by Eamonn Gunther, Esq., Boca Raton, Florida, Joseph M. Percopo, Orlando, Florida, and Antonio P. Romano, Palm Beach Gardens, Florida

Thank you to the Roundtable Sponsors:

Stout

Sarah Butters, Director of the Probate and Trust Division, called the meeting to order at 8:12 a.m. The meeting was the Section's first hybrid meeting, with participants invited to attend via Zoom or in person at the Disney Yacht Club in Orlando, Florida.

Introduction of Current and New Section Fellows

Current Fellows (2019-2021):

Anthony Romano, Palm Beach Gardens

Joseph Percopo, Orlando

New Fellows (2020-2022):

Nicole Bell – St. Pete

Lilleth Bailey – Ft. Lauderdale

Interim Action of the Executive Committee – Sarah Butters. The Asset Protection Committee's proposed changes to Chapter 222 to clarify the impact of an assignment or pledge on certain exempt property (the fix to *Kearney v. Kearney,* 129 So. 2d 381 (Fla. 1st DCA 2014)) has been approved by the Executive Committee (the "Kearney fix").

Legislative Committee Report – John Moran, Co-Chair. The RPPTL Section has several proposed legislative initiatives for 2021, including: a robust Estate and Trust bill that will likely address the uniform directed trust act, community property trust act, trustee employee liability concept, *Goodstein* fix (revisions to Chapter 69), *Gordon* fix (devises to former spouses), and homestead and trust proposals; a separate electronic wills glitch bill; *Kearney* fix; and guardianship bill rewrite.

CLE Report – Sancha Brennan, Co-Chair. Reported that there were 179 attendees at the last virtual Probate Law CLE program coordinated by Travis Hayes. Due that program's success, the intent is to continue to use the virtual format and potentially use it for the next charitable law symposium, and upcoming estate & trust symposium. If you are interested in participating or presenting a RPPTL CLE, please contact Sancha Brennan, Co-Chair of the CLE Committee. A list of the upcoming CLEs is as follows:

Date of Presentation	Crs. #	Title	Location
2/12/2021	4362	Condo Law Certification Review	Virtual Replay
3/1/2021	4446	Advanced Construction Law Certification Review	Video Available on Demand
3/18/2021	4027	(Condo Series 1) RPPTL Audio Webcast - When is a Condominium Common Element not a Common Element: The IconBrickell Analysis	Audio Webcast
3/23/2021	4029	RPPTL Audio Webcast - CLC CLE on Florida's new summary judgment standard.	Audio Webcast
3/31/2021	4028	RPPTL Audio Webcast: Everything You Need to Know About the Small Business Reorganization Act and Sales of Assets and the Assignment and Assumption of Leases and Contracts in Chapter 11 Proceedings.	Audio Webcast

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4/15/2021	4023	(Condo Series 2) RPPTL Audio Webcast: Covid-19 and Community Associations: A Pandemic Enters its Terrible Twos Addressing Burgeoning Pandemic Related Issues & Ethical Obligations for Attorneys	Audio Webcast
4/1/2021	4448	Leasing Seminar	Virtual Replay
5/7/2021	4363	Trust & Estate Symposium	Virtual Replay
4/9/2021	4073	Real Property Certification Review	Video Available on Demand
4/9/2021	4074	Wills Trusts and Estates Certification Review	Video Available on Demand
5/12/2021	4030	CYBER -Stalking CLE	Audio Webcast
5/20-22/2021	4447	Construction Law Institute	JW Marriott Grand Lakes, Orlando
6/4/2021	TBD	Convention CLE	Marco Island Marriott

There were no Probate Division Action Items or Informational Items on this meeting's Executive Council agenda.

General Standing Committees Reports:

Homestead Issues Study – Jeffrey S. Goethe Co-Chair. Reported that Silvia Rojas has a subcommittee that has been working on a Revocable Transfer on Death (RTOD) Deed act. The RTOD act would be an option in addition to the enhanced life estate deed (aka lady bird deed) that allows for transfer of real property on death. Notably, in its current form the RTOD deed requires the acceptance of the designated beneficiary, as well as provide creditors a period to make claims against the property. The intent behind the act is to provide a statutory method of transfer of real property on death for those not comfortable with the lady bird deed. The draft of this act is still in its initial stages.

Information Technology & Communication – Michael A. Sneeringer, Co-Vice Chair. Reported that work is being done to enhance the RPPTL website concerning committee content, agenda items and projects that are currently in progress, as well as a description of the committee (the objective or role of the committee), method to join the committee, and information about upcoming meetings.

Model and Uniform Acts – Patrick Duffey, Co-Chair. Reported that the Committee is monitoring the Uniform Laws Commission's proposed model and uniform acts so as to be prepared should legislation be proposed by another section or legislative sponsor. The Committee is currently reviewing model acts that are in various stages of drafting, including crowdsource funding and the economic rights of unmarried co-habitants. Additionally, the Committee is monitoring the drafting of a model act addressing conflicts in trust administration. The Committee is looking for new members to form small groups that will prepare a portfolio of whitepapers analyzing existing model & uniform acts within the Section's purview.

PT Division Committees:

Ad Hoc ART Committee – Alyse Comiter, Chair. For those interested in joining please email Alyse to get involved.

Ad Hoc Florida Business Corporations Committee – Brian Sparks, Chair. No new report. This committee's work is finished and will be dissolved this year.

Ad Hoc Guardianship Law Revision Committee – David Brennan, Nicklaus Curley, and Stacy Rubel, Co-Chairs. The re-write of the Guardianship Statutes is complete and the plan is to move this forward legislatively although it is not likely to make the 2021-2022 legislative session.

Ad Hoc Electronic Wills Committee – Angela Adams, Chair. Currently reviewing FLTA's proposed bill that would substantively revise various e-notary provisions. The bill provides three points of clarification, as well as a significant change requiring the audio video recording to be held by an established service provider and not the notary. The Committee also has its own, separate e-wills glitch bill, that is designed to fix mistakes and errors in the 2019 legislation but does not propose any substantive changes.

Ad Hoc Study Professional Fiduciary Licensing Committee – Angela Adams, Chair. The committee aims to create a statutory requirement that professional fiduciaries who are compensated be licensed (including guardians, POA, and designees). Family members and trust companies (with trust powers) would be exempt from this licensing requirement.

Ad Hoc Study Estate Planning Conflict of Interest Committee – William Hennessey, Chair; Paul Roman, Vice-Chair. No Report. This Committee's work is complete and will likely be dissolved this year.

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Ad Hoc Study Due Process, Jurisdiction & Service of Process Committee – Barry Spivey, Chair; Sean Kelley and Christopher Wintter, Co-Vice Chairs. No report.

Asset Protection – Brian Malec, Chair. The Committee is working on changes to Chapter 222 to address the fix to *Kearney v. Kearney,* 129 So. 2d 381 (Fla. 1st DCA 2014) to prevent general blanket asset pledges from including certain otherwise exempt assets (like a 401(k) or IRA). Brian reports that the Committee plans to include the Kearney fix as a 2021 legislative action. Rick Gaines also reported leading a subcommittee on tenants by the entirety trusts. The intent of the TBE trust is to allow a married couple to realize and/or maintain TBE status on assets transferred to the TBE trust. While there has been debate as to whether this is possible under current law, a recent middle district bankruptcy case (*IN RE Givans,* 2020 WL 5833180 (signed Sep. 30, 2020) held that upon a transfer into the trust the unity of marriage is lost and therefore TBE ownership is not possible.

Attorney/Trust Officer Liaison Conference – Mitchell Hipsman, Co-Vice Chair. The conference is still planned for August 19-21, 2021 at The Breakers, Palm Beach. Committee is in the process of contacting the speakers and sponsors who were originally slated to participate in the 2020 Conference to participate in the 2021 Conference.

Charitable Planning and Exempt Organizations Committee – Seth Kaplan, Chair. Seth discussed the Charitable Symposium Conference and the positive reviews it received. The goal for next symposium is for the Conference to be a half day event aiming to cover a broad spectrum of charitable planning topics relevant to estate planners.

Elective Share Review Committee – Jenna Rubin, Chair; Cristina Papanikos and Lauren Detzel, Co-Vice-Chairs. No report.

Estate and Trust Tax Planning – Robert Lancaster, Chair. Rob reported on the success of the Committee's five hour CLE. The Committee continues to work on IRS guidance regarding obtaining IRS closing letters, a CLE presentation on estate planning strategies under the Biden administration, and a white paper regarding the transfer of interests at death.

Guardianship, Power of Attorney and Advanced Directives – Nicklaus Curley, Chair. No report.

IRA, Insurance and Employee Benefits – Alfred Stashis, Co-Chair. Reported that the *In re Lerbakken* (949 F.3d 432 (8th Cir. 2020) fix for IRAs transferred incident to divorce, should be moving forward in a separate bill in the upcoming legislative sessions, and ACTEC has sent three letters to the IRS seeking further guidance on the SECURE act.

Liaisons with ACTEC – Elaine Bucher, Shane Kelley, Charles Nash, Bruce Stone, Diana Zeydel and Tami Conetta. No Report.

Liaisons with Elder Law Section – Travis Finchum and Marjorie Wolasky. No Report

Liaisons with Tax Section – Lauren Detzel, William Lane, and Brian Sparks. No Report.

Liaison with Professional Fiduciary Council – Darby Jones. Darby reported initial success with the Professional Fiduciary Council with much interest in membership from professional fiduciaries, professional guardians, law firms, and other organizations. The goal of the Council is to produce a list of qualified professional fiduciaries as a resource to attorneys and individuals. The Council aims to provide training and education to individuals, with a focus on ethical hotspots to avoid and how to be a more effective fiduciary.

Principal and Income – Edward Koren and Pamela Price, Co-Chairs; Joloyon Acosta and Keith Braun, Co-Vice Chairs. The Committee finished in depth reviews of all of the Uniform Fiduciary Income and Principal Act ("UFIPA"). The intention is to adopt the UFIPA with only necessary changes for Florida purposes. The Committee is working jointly with Florida Bankers and FICPA on a white paper and a draft version of the Florida Act.

Probate and Trust Litigation – Rich Caskey, Chair; Angela Adams, James George and Lee McElroy, Co-Vice Chairs. No report.

Probate Law and Procedure – Travis Hayes, Chair. Travis reported on a successful and well attended CLE program, and a special thanks to all the speakers, organizers, and sponsors. The Committee is looking into the priority of payment of expenses of administration for Class 1 creditors under Florida Statute § 733.707. A subcommittee will be looking into the Uniform Community Property act in light of the *Johnson v. Townsend*, 259 so.3d 851 (4th DCA 2018), ruling where the court held that any claim for a one-half interest in community property must be claimed within 2 years of date of death. Additionally, the ACTEC Foundation has sponsored a project led by UF COL Prof. Wright to study changes to Florida's intestacy statutes to include considerations relating to blended families (i.e. stepchildren) in estates. A new subcommittee was formed and tasked with following Prof. Wright's progress in her study.

Trust Law – Matthew Triggs, Chair; Jennifer Robinson, David Akins, Jenna Rubin, and Mary Karr, Co-Vice Chairs. No report.

Wills, Trusts and Estates Certification Review Course – Jeffrey Goethe, Chair. The Will Trust certification course will continue to be held on April 9, 2021 in the virtual format.

Adjournment. The next Probate and Trust Division Roundtable meeting will be held at in a similar hybrid virtual/in-person format at the Hammock Beach Resort, Palm Coast, Florida on April 24, 2021.



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Residential Real Estate Transactions – The Engagement Letter Revisited

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

In the summer of 2016, *ActionLine* published *The Engagement Letter and the Residential Real Estate Attorney* by Attorney Scott A. Marcus. At that time, a subcommittee of the Residential Real Estate & Industry Liaison (RREIL) Committee had prepared a sample engagement letter for section members to use as a starting point for their residential real estate transactions. The article explained the necessity of the engagement letter as a tool for explaining the scope of services provided to the client in a real estate transaction and the benefits of working with competent real estate counsel. In an era when clients and referral sources are comparing costs online and shopping around for title services, we should revisit the engagement letter as a mechanism for providing transparency in fees and closing costs. Providing a letter to the client at the beginning of the transaction will set the client expectations, avoid "sticker shock" at the closing table, and could potentially stave off post-closing legal action regarding closing costs collected or the scope of services provided during the transaction.

Whether it is an engagement letter from a law firm or non-representation/fee disclosure letter from an attorney-owned title company, the initial letter to the client should include the costs for closing services, primary title services, and the title search, as these are defined in the Florida Statutes.[1] These costs include the settlement fee, title search fee, title premium, and could also include fees due to third-parties such as municipal lien search providers, condominium or homeowners' associations, mobile notaries, and remote online notarization vendors. Paragraph 9 of the Florida Realtors/Florida Bar Contract[2] addresses which party pays closing costs, fees, and charges, but it may not address all the costs and expenses that may arise during the transaction. If there are services provided by the law firm or title company that are not spelled out in the Contract, the additional fees or services should be included in the initial letter. For example, if the property is in a municipality where there is an up-front fee for permit searches or zoning/setback letters, the client letter should indicate whether the law firm or title company will perform these searches and outline the additional costs/reimbursements, if not included in the settlement fee. The letter can also be a convenient way to include disclosures regarding any affiliated businesses.

What Should be Included in the Law Firm Engagement Letter?

The law firm engagement letter should identify the client and property address and outline the scope of representation for the transaction. Just as important is the disclaimer that legal matters *outside* the defined scope of representation would need to be addressed in a separate engagement letter or referred to outside counsel.

The law firm engagement letter sets forth how and when the attorney fees are collected. Unless the client provides a fee retainer for out-of-pocket expenses such as estoppels, the engagement letter should also include language requiring the client to reimburse the law firm for these items at closing or if the deal falls through.

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What Should be Included in the Non-Representation/Fee Disclosure Letter?

The non-representation letter should inform the party of the closing agent's role in the transaction. Since a title company cannot provide legal advice to a party to a real estate closing, the non-representation/fee disclosure letter should include a disclosure that the title company is not a law firm or accounting firm and does not provide legal representation or tax advice to the parties. If the transaction is in a jurisdiction where the seller chooses the closing agent and pays for title insurance, the closing agent should disclose what fees they charge to a buyer who is obtaining a loan, such as the loan settlement fee, lender's title policy premium, and costs of endorsements required by the lender. The closing agent may also wish to disclose whether they will be obtaining a permit search for the property, since permit issues are not title issues, and depending on what is customary in the region, some buyers (and referral sources) expect the title company to perform a permit search, no matter who selects the closing agent.

Conclusion

Providing engagement letters or non-representation letters regarding the role of the closing agent and their associated fees can enhance transparency in the real estate transaction and ensure a smooth transaction.



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. Stat. § 627.7711.

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

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Generation ME: Planning for Millennials

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

Born between 1981 and 1996, Millennials (ages 24-39) have developed a reputation of being lazy and selfish, but often open-minded.[1] Millennials are different from other generations because they were born with rapidly developing technology and tend to question the world around them, and planning may require a different strategy than other generations. They are not the generation to do hard labor, but they will find the most efficient means to get a job done - or they will quit that job and find another one.

DIY-ers. Millennials were raised with the internet, so why pay for an attorney when you can create a "do-it-yourself" Will online? With information on the internet about "avoiding probate," why pay legal fees? Planning with a Millennial may be more difficult because they do not see its value and they have differing goals; they care more about charitable giving, planning for minor children, or blended family planning, and not so much about federal estate taxes.

Planning with their Parents. Millennials are beginning to experience firsthand the pitfalls for lack of planning with their own families. Some are being dragged into conversations with their parents who are starting their own estate planning. I suggest my clients include their children on our correspondence from the start. I also offer family meetings to discuss the high-level goals of their parents' estate plan, which ensures a lifelong relationship with my client, as well as gaining the trust of the next generation.

Debt Planning. Millennials entered the workforce around 2008 when the US had one of its greatest recessions.[2] Strapped with student loan debt, they took unconventional career paths or returned to school because they could not find a job. By continuing their education, they deferred the payment of their student loans; however, with a limited opportunities, they also gained credit card debt. As planners, we should provide resources to point those indebted clients in the right direction, such as involving a budget advisor or CPA.

Business Owners. Unable to find a job due to the recession, Millennials had to get creative to find an income. They found ways to sell services or products online, and they use social media for inexpensive marketing. Planning with business owners leads the estate planning conversation down a path towards business growth, taxes, and succession planning.

Blended families. Many Millennials were raised in a blended family, so they have biological families, but also half-siblings, stepparents, and stepsiblings. They have individuals that may be included (or excluded) in their estate plans, and it is important they understand the significance of *not* planning. For example, an estranged parent may be entitled to fifty percent of their intestate probate estate.

Digital assets. Everything they do is online: banking, investing, e-mail, etc., their whole life can be accessed by an iPhone. Most people forget how their loved ones will locate their assets if they passed away suddenly. Moreover, they may have cash in online payment applications, such as PayPal or Venmo, and even cryptocurrencies like Bitcoin where it is nearly impossible to access a "wallet" without the passcodes.

Millennials have begun getting married, having kids, and starting their careers. Presently, estate planning is not going to be a top priority, but it is very important that they begin their journey by debunking online misinformation, that we understand their goals, and begin to foster long-term relationships with them about estate planning.


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.*

Endnotes

1 Time Magazine, May 20, 2013 issue, Article: "The ME ME ME Generation" by Joel Stein.

2 https://www.forbes.com/sites/kristinstoller/2018/10/11/10-years-later-4-millennials-describe-how-the-great-recession-shaped-their-lives/?sh=249a036131b9 Forbes, "10 years Later: 4 Millennials Described How the Great Recession Shaped Their Lives" by Kristin Stoller, October 11, 2018.

Probate Case Summaries

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

Where there is a dispute between family members regarding the disposition of a decedent's remains, Florida common law applies, not Fla. Stat. §497.005(43).

Giat v. SCI Funeral Servs. of Fla., LLC, 308 So. 3d 642 (Fla. 4th DCA 2020)

This case deals with the determination of what law controls when there is a dispute between family members regarding the disposition of a loved one's remains. Nissan Giat, the decedent, died in a plane crash on August 28, 2020. Yocheved Davidoff Giat, the decedent's wife, and Menorah Gardens Funeral Home made arrangements to have the decedent's body cremated. On September 2, 2020, the decedent's son, Lee Giat, filed an emergency motion to enjoin Menorah Gardens from cremating the decedent's remains. In his motion, Lee argued that the decedent's wish was to be buried in accordance with Orthodox Jewish law and custom, which disallows cremation. In her response, Yocheved argued that the decedent was not religious and expressed to her that he wished to be cremated so that his ashes could remain with her in their home. At the hearing, Lee requested that the court set an evidentiary hearing to determine the decedent's intent. He further argued that Fla. Stat. § 497.005(43) (2020), which defines who is a "legally authorized person" to arrange for cremation, should not apply. The trial court ruled that Fla. Stat. § 497.005(43) applied and therefore the surviving spouse's intent for disposing of the decedent's remains was controlling because she had a higher priority over the son to be the legally authorized person. The court denied the son's request for an evidentiary hearing.

On appeal, Lee argued that the trial court misapplied Fla. Stat. § 497.005(43) to this dispute. He argued the statute does not apply to disputes between family members regarding the manner in which a decedent's remains are disposed of. Instead, Lee argued that common law should control, which requires a factual determination of a decedent's intent.

In its analysis, the Fourth District Court of Appeal stated that the focus of Chapter 497 was the relationship between funeral homes and the persons who seek their services. Specifically, Fla. Stat. § 497.005(43) (2020) was not to be used when deciding the *manner* of disposition of a decedent's remains where there is a dispute between family members. Rather, the statute governs who has the authority to arrange for such disposition. The Fourth District pointed to Fla. Stat. § 497.383(2) (2020), which states that "[a]ny ambiguity or dispute concerning the right of any legally authorized person to provide authorization under this chapter or the validity of any documentation purporting to grant that authorization shall be resolved by a court of competent jurisdiction." This statute further supports the position that common law controls family disputes over the disposition of remains.

Consequently, in turning to the determination of the decedent's intent, the Fourth District looked to its previous holding in *Cohen v. Guardianship of Cohen*,[1] where it held that a testamentary disposition is not conclusive of the decedent's intent if it can be shown by clear and convincing evidence that the decedent intended another disposition for his body. The Fourth District reasoned that if a testamentary disposition could be overcome by clear and convincing evidence, in the absence of a testamentary declaration, the decedent's intent becomes a question of fact for the trial court. The court also cited to its previous holding in *Arthur v. Milstein,*[2] where it considered similar facts to the instant case. In *Arthur*, the court determined that the disposition of Anna Nicole Smith's remains should be controlled by common law and not by Fla. Stat. § 497.005(37) (2006), which is now Fla. Stat. § 497.005(43) because the dispute was between private parties with respect to the decedent's wishes and did not involve funeral home liability.

Therefore, where a decedent leaves no written directions for the disposition of his or her body, the court must determine what the decedent's wishes would have been. In *Arthur*, the trial court found that Anna Nicole Smith's wish was to be buried with her son. Consequently, in this case, the Fourth District reversed and remanded to the lower court with instructions to determine what the decedent's wishes were regarding the disposition of his remains.

A unilateral mistake resulting from an inexcusable lack of care in calculating the amount of a claim is not a legitimate basis for a court to set aside a satisfaction and release of claim.

Mellini v. Paulucci, 45 Fla. L. Weekly D2843, 2020 WL 7410293 (Fla. 5th DCA December 18, 2020)

This case addresses whether there was an excusable lack of due care, which would render the rescission of a satisfaction and release of claim permissible under Florida law. The decedent's daughter, Gina Paulucci, entered into a settlement

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agreement with her father, Jeno Paulucci, before his death, which resolved many years of litigation between them. As part of the settlement, Gina agreed to sell a property to Jeno for $12 million. Following an initial payment of $2 million at the closing, Jeno executed a promissory note, which provided that he would pay the remaining $10 million in three annual payments of $1 million at an interest rate of six percent. It was also agreed that Jeno was to pay Gina the remaining amount plus interest on September 9, 2011. Gina and Jeno also entered into a second agreement where Gina agreed to pay Jeno $2.9 million, and she executed a promissory note in Jeno's favor. Both agreed that Jeno had the right to offset the amount Gina owed to him against the money he owed Gina under the $10 million note.

Jeno made the payments pursuant to the agreement for three years. However, when the September 9, 2011 balloon payment was coming due, Jeno could not pay due to his failing health and financial issues. Both parties agreed to postpone the payment for sixty days. On November 24, 2011, Jeno died. Jeno's estate was subsequently opened, and Gina, through her attorneys, filed a statement of claim, which stated that at the time of Jeno's death, the remaining balance due to Gina was $7 million plus interest.

In response, counsel for the initial personal representative sent Gina a check for $4,677,594.52, which he stated represented a satisfaction of Gina's claim because the estate exercised its right to offset the amount Gina owed the decedent. On January 16, 2013, Gina, following her attorneys' advice, executed the satisfaction and release of the claim and sent the personal representative the original $10 million promissory note marked as "paid in full." In turn, the personal representative sent to Gina her promissory note for $2.9 million, also marked as "paid in full." Eighteen months later, Gina's accountant discovered an error in the calculation of the amount of the statement of claim that was filed in Jeno's estate. The statement of claim did not take into account that the payments Jeno made in $1 million installments were first to be applied to the accrued interest and then towards the reduction of the principal. Consequently, the accountant calculated that the principal balance that Jeno owed Gina on the note at the time of his death was $8,726,560, not $7 million. Through her attorneys, Gina petitioned the trial court to amend her claim, under Fla. Stat. § 733.704 (2011), and Florida Probate Rule 5.490(e), to include the additional $1,726, 560 plus interest that was owed to her. The probate court granted Gina's petition to amend her claim over the personal representative's objection and then directed the personal representative to pay the amount listed in the amended claim. The estate's other beneficiaries filed an appeal, and the Fifth District remanded the case back to the probate court "to determine whether there [wa]s a legitimate basis to set aside the release at issue," *Selton v. Paulucci.*[3]

The probate court held an evidentiary hearing and found that the unilateral mistake committed by Gina's attorneys was not the result of an inexcusable lack of due care and allowed for the satisfaction and release of claim to be rescinded. On appeal, the successor personal representative and the other beneficiaries and interested persons (collectively, the "Appellants") appealed. They argued that the unilateral mistakes were due to Gina's attorney's inexcusable lack of due care. As a result, Appellants contended that no legitimate basis was presented for the trial court to rescind the satisfaction and release. In the Fifth District's review of the undisputed facts revealed at the probate court's evidentiary hearing, the Fifth District highlighted that Gina's attorneys did not review the terms of the mediated settlement agreement or the promissory note that Jeno executed before they prepared the statement of claim. The Fifth District also highlighted that upon receiving the payment from the personal representative in settlement of the claim, Gina's attorneys did not review the settlement to make sure that the amount represented a satisfaction of Gina's claim before advising her to sign the satisfaction and release of the claim and return the note marked as "paid in full."

Based on these facts, the Fifth District disagreed with the trial court's legal conclusion that Gina's attorneys' actions did not constitute an inexcusable lack of due care. It opined that the terms of the promissory note were not complicated, and the attorneys' failure to review the note and mediated settlement agreement could not be deemed a clerical or minor error. Consequently, the appellate court held that Gina failed to establish a legitimate basis to set aside the satisfaction and release of her claim.

In a suit seeking to invalidate a deed on the grounds of undue influence or lack of capacity, it is the burden of the party seeking to invalidate the deed to prove the grantor lacked capacity or was unduly influenced at the time of the execution of the deed, even when that party is the grantor himself.

Drapp v. McDaniel, 306 So. 3d 1280 (Fla. 2d DCA 2020)

The case concerns the validity of three contested deeds. While facing the imminent sale of two properties due to the failure to pay county property taxes, owner Edward McDaniel elicited the assistance of his daughter, Nichole Drapp and Michael Streiff. Together, Drapp and Streiff paid the three years of owed taxes in May 2016. Following the payment of the taxes, McDaniel agreed to execute the contested deeds. The first deed, the McDaniel-Drapp deed, was a quitclaim deed dated September 21, 2016, that deeded both properties to Drapp. The second deed was executed on January 13, 2017, by Drapp, as attorney-in-fact for McDaniel, and it transferred one of the properties to Streiff. The third deed was also executed by Drapp on February 22, 2017, as attorney-in-fact for McDaniel, and it deeded the second property to Streiff. The power of attorney

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used by Drapp, however, was revoked before the execution of the second and third deeds. On February 25, 2017, Drapp and Streiff executed deeds quitclaiming both properties to South Florida Lending Corporation.

In April 2017, McDaniel initiated a lawsuit seeking declaratory relief and a judicial determination as to whether any of the deeds were valid. In his amended complaint, he argued that the McDaniel-Drapp deed was invalid because he, as the grantor, lacked the requisite capacity to execute the deed because he had no recollection of executing it while heavily medicated due to a severe illness, and that he was under duress and was unduly influenced by Drapp to execute the deed. In January 2019, South Florida Lending petitioned for and was granted the ability to intervene. After a hearing, the court entered a final judgment in favor of McDaniel and invalidated all three deeds. Drapp, Streiff, and South Florida Lending (collectively "Appellants") appealed the trial court's decision concerning the McDaniel-Drapp deed. On appeal, Appellants argued that the trial court misapplied the legal standard to invalidate the deed because the court placed the burden of proof on the wrong party by requiring Drapp and Streiff to give a credible explanation for why McDaniel would have signed the deed. They argued that even though McDaniel was the Grantor, because he was the party seeking to invalidate the deed he signed, he should have the burden to prove his claims of lack of capacity or undue influence.

Addressing Appellants' arguments, the Second District relied on the holding in *Parks v. Harden,*[4] which stated that the party seeking to invalidate a deed has the burden to prove that the grantor lacked capacity when the deed was executed. Then, the Second District noted that the trial court failed to abide by this holding as it required Drapp and Streiff, as the Grantees, to present a credible explanation of why McDaniel would knowingly transfer his interest in the property. It also noted that the trial court made no findings of fact that evidenced undue influence or supported McDaniel's claims that he was under duress or coercion. Finally, the Second District opined that McDaniel did not present sufficient evidence that he lacked the mental capacity to execute the McDaniel-Drapp deed. Consequently, the Second District reversed the final judgment and held that the trial court erred in declaring the McDaniel-Drapp deed void.


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 *Cohen v. Guardianship of Cohen*, 896 So.2d 954 (Fla. 4th DCA 2005).
2 *Arthur v. Milstein,* 949 So.2d 1163 (Fla. 4th DCA 2007).
3 *Selton v. Paulucci* 192 So.3d 1257, 1258 (Fla. 5th DCA 2016).
4 *Parks v. Harden,* 130 So.2d 626, 628 (Fla. 2d DCA 1961).

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Real Property Case Summaries

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A legal presumption favoring an easement appurtenant will prevail over easements in gross when the language of the agreement is unambiguous, and the totality of circumstances reveal that the easement was never to be construed as personal.-

Devino v. 2436 East Las Olas, LLC, 2020 Fla. App. LEXIS 15798 (Fla. 4th DCA 2020)

This case is an appeal by appellants, Kenneth Devino and 2436 East las Olas Blvd. Stores, LLC ("Devino") from a final declaratory judgement which determined that an easement created over Devino's property was an easement appurtenant in favor of appellee, 2436 East Las Olas, LLC ("ELO"). Devino alleged that based on the original agreement that an easement in gross was created between the original landowners and terminated with the death of the beneficiary.

The action arose in 2013 when Devino placed an obstruction in the driveway, blocking access to ELO's property from another roadway.[1] When the obstruction was removed, Devino placed another obstruction in its place, prompting ELO to file suit for injunction to prevent Devino from blocking the driveway and declaratory relief to determine that the easement is an easement appurtenant running with the land.[2]

The 1948 recorded agreement between the original landowner/grantor, L.B. Jackson & Co. and beneficiary/grantee, Howard M. Hook stated:

It is understood and agreed that the right-of-way easement shall be for driveway purposes only to be mutually used as a joint driveway of each of the parties and that by mutual consent to be executed in writing with the same formalities as this instrument the said easement may be cancelled. [3]

Hook and his wife owned the adjacent parcel, which benefitted from the easement, as it created a driveway from their property across Jackson's land to a main roadway. Hook died in 1971 and the property owned by the Hooks were transferred several times until the ELO's ownership in 2013. The Jackson property was also transferred several times until Devino's ownership in 1983. The transfers of ownership for both properties were subject the existing easements of record.

The Fourth District court of Appeals citied *Palm Beach County v. Cove Club Investors,*[4] in explaining the difference between an easement in gross and an easement appurtenant and established the general principle that the law favors easements appurtenant.[5] The court stated that easements in gross are not preferred by the courts, however, and an easement will never be presumed personal when it may fairly be construed as appurtenant to some other estate.[6] Where doubt exists as to its real nature, an easement is presumed to be appurtenant and not in gross.[7] According to the court, both the language of the easement along with the surrounding circumstances, and the reproach that an easement will never be construed as personal when it can be construed as appurtenant to some other estate, the easement was clearly appurtenant.

The court analyzed the language of the agreement which included the term indenture, realizing that an indenture reflects an interest in real property.[8] The court further declared that the easement was an appurtenant based on the following facts:

1. the easement benefited the parcel owned by Hook and provided access for the parcel to the roadway;
2. the agreement was executed with the same formalities as a deed—included witnesses, notarization and recording;
3. the agreement indicates that it is not terminable except by a written agreement executed by both parties with the same formalities; and
4. no evidence that either party intended for the easement to be personal and terminable upon death of either party.

The court rejected the cases Devino relied upon as distinguishable stating in those cases the language in the agreements were dissimilar to that of the instant case.[9] Devino cited *Burdine v. Sewell,*[10] however, the court noted that the agreement in *Burdine* was not a deed but rather an agreement granting "reciprocal personal privileges to the parties," and further stated that the "so long as" language implied a limitation on the duration of the passageway.[11] The court found that there was no similar language in the agreement between Jackson and Hook and emphasized that agreement could not be unilaterally terminated. The court also debunked Devino's alternative argument that Hook's spouse, who was an owner of the dominant parcel, was not included on the original easement deed, stating that the fact a spouse is not

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named is not conclusive of the type of easement created. The court concluded that there is no authority indicating such a requirement is needed to create an easement appurtenant and reaffirmed the trial court's ruling.

The government must show an essential nexus and rough proportionality between the monetary exactions and the effects of a private landowner's improvements in order to claim use of its propriety power.

Murphy Auto Group Inc. v. Florida Department of Transportation, 2020 Fla. App. LEXIS 16584 (Fla. 2d DCA 2020)

Appellant sought review of final summary judgment in favor Appellee in an inverse condemnation action. Appellant argued that Appellee's imposed conditions amounted to a taking rather than a legitimate exercise of its regulatory power because the required improvements were not proportional to Appellant's project.[12] The trial court agreed with the Appellee's argument that it was exercising its propriety rights as owner of the roadway rather than its police powers and found claim for damages was barred by sovereign immunity.

The Second District court of Appeal reviewed *Nollan v. California Coastal Commission,*[13] to address the constitutionality of the government's power to deny development permits and the power to condition construction upon some concession by the owner.[14] The court also noted that prohibition designed to accomplish that purpose would be a legitimate exercise of the regulatory power rather than a taking, but that in order for it to be constitutional that alternative must be an essential nexus to the justification for the prohibition.[15] The court also reviewed *Dolan v. City of Tigard*,[16] in finding that there must be an essential nexus between the permit condition and the legitimate state interest behind it and if it exists, the court must apply "rough proportionality" test to make a determination of whether exactions are proper.

The court relied upon *Koontz v. St. Johns River Water Management District*,[17] in determining that the Appellee's action amounted to a taking. In *Koontz* and the instant case, the government first proposed that the landowner dedicate a portion of the property in order to obtain the permit. When the landowner refused, the government demanded the landowner spend money to improve government owned land as a condition to obtain the permit. The court concluded that Appellee's action amounted to a land use exaction because it burdened Appellant's right to develop its commercial property. The court reversed the trial court's ruling for failure to apply the correct legal standard in determining whether there was an essential nexus and rough proportionality between the monetary exactions and the effects of Appellant's development project.

When property is held as tenancy by the entireties, only a judgment creditor of both the husband and wife, jointly, may attach the tenancy by the entireties property.

Williams v. M & R Construction of North Florida, Inc., 2020 Fla. App. LEXIS 14312 (Fla. 1st DCA 2020)

Following a judgment in the amount of $15,000.00 entered against Appellant, Karia Ann Williams, as the sole judgment debtor, the judgment creditor in the case sought writ of execution on real property and personal property owned by Appellant and husband, Mark Williams. In a prior case dating back to 2013, a judgment was entered against Mark Williams, as the sole judgment debtor. The judgment creditor in that prior case also sought a writ of execution of both real property and personal property owned by Mark Williams and Appellant as tenants by the entireties.

Appellees contested the subject personal property was owned as tenants by the entirety, however, the trial court found that there is a presumption that a married couple holds personal property as tenants by the entireties.[18] Appellant filed an emergency motion challenging the writ of execution as unenforceable against property owned jointly. The trial court denied the emergency motion and Appellant challenged the denial.

The First District court of Appeals reasoned that normally real and personal property are subject to levy and sale under execution to satisfy a judgment.[19] The court cited *Beal Bank, SSB v. Almand & Assocs.,*[20] in reasoning that it is established law that when property is held as tenancy by the entireties, only the creditors of both the husband and wife, jointly, may attach the tenancy by the entireties property; the property is not divisible on behalf of one spouse alone and cannot be reached to satisfy the obligation of only one spouse.[21] The court reasoned that the term jointly, as used in *Beal Bank*, did not mean that individual judgment creditors of either spouse could act in concert to levy on entirety property, but rather a creditor seeking to levy on entirety property must obtain a judgment against both spouses for a joint debt.[22] The court reversed the trial court's ruling finding that under Florida law one spouse may not transfer or encumber property held in a tenancy by the entireties without consent of the other. [23] The fact that the other spouse is also individually indebted to a different creditor does not establish a joint debt.



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*

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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 *Devino*, 2020 Fla. App. LEXIS at 2.

2 *Id.*

3 *Id.* at 1.

4 *Palm Beach County v. Cove Club Investors* 734 So.2d 379 (Fla. 1999).

5 The court notes that "Whether an easement in a given case is appurtenant or in gross depends mainly on the nature of the right and the intention of the parties creating it. Similarly stated, whether an easement is appurtenant or in gross is to be determined by the intent of the parties as gathered from the language employed, considered in the light of surrounding circumstances… [It] is to be determined by a fair interpretation of the grant or reservation creating the easement, aided, if necessary, by the situation of the property and the surrounding circumstances. *Devino*, 2020 Fla. App. LEXIS at 3 (quoting *Palm Beach County*, 734 So. 2d 379, 383 (Fla. 1999)).

6 *Id.* at 4.

7 *Id.*

8 *Id.* (quoting Fla. Stat. § 689.02 (2019)).

9 *Id.* at 5.

10 *Burdine v. Sewell,* 92 Fla. 375, 109 So. 648 (Fla. 1926).

11 *Devino*, 2020 Fla. App. LEXIS at 5 (quoting *Burdine v. Sewell*, 109 So. 648, 654).

12 Appellant's claims arose from the conditions Appellee placed on the issuance of a drainage connection permit needed for Appellant to connect its commercial property to US HWY 27.

13 *Nollan v. California Coastal Commission,* 483 US 825 (1987).

14 *Murphy*, 2020 Fla. App. LEXIS 16584 at 4.

15 *Id.* at 5.

16 *Dolan v. City of Tigard*, 512 US 374 (1994).

17 *Koontz v. St. Johns River Water Management District*, 570 US 595 (2013).

18 *Williams,* 2020 Fl. App. LEXIS at footnote 2 (citing *Beal Bank, SSB v. Almand and Assocs*., 780 So. 2d 45, 57 (Fla. 2001).

19 *Id.* at 2 (citing Fla. Stat. § 56.061 (2019)).

20 *Beal Bank, SSB v. Almand & Assocs.,* 780 So. 2d 45, 53 (Fla. 2001).

21 *Williams,* 2020 Fl. App. LEXIS at 2.

22 *Id.* at 3.

23 *Id.* citing *In re Willoughby*, 212 BR 1011, 1015 (Bankr. MD Fla. 1997).

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