

ActionLine

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

Guardianship, Visitation, Exploitation, And Elder Caring Coordination

Multifamily Telecommunication Contracts: The Who, Why, And How

Planning With Florida Community Property Trusts

Credit Bids In Bankruptcy Real Estate Sales With Multiple Creditors

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What do I get out of the RPPTL Section?

By Robert Swaine, Section Chair, 2021-2022

As of the writing of this article, Thanksgiving will soon be upon us. As I reflect on time spent with the RPPTL Section, I am thankful for all the hardworking volunteers working for the Section in so many different capacities. There is insufficient space to list all and thank them appropriately, but I would like to highlight two groups of individuals serving the Section and the broader public at large over the last few months.

The first is the Condominium Law and Policy Life Safety Advisory Task Force. In the days following the Champlain Towers South tragedy, the Task Force was formed by the leadership of the Condominium and Planned Development Committee. The Task Force's goal was to review Florida condominium law to see if changes should be recommended to minimize the likelihood of another tragedy like the Champlain Towers South Condominium collapse or similar tragedies in the future. The committee was chaired by William P. Sklar, its committee members included Joseph E. Adams, Margaret Rolando, Yvette Machado Blanch, Christopher Davies, Peter Dunbar, Michael Gelfand, and Jose "Joe" Rodriguez, and it was supported by Allison L. Hertz and Alexander Dobrev. In less than four months, the Task Force sought input from experts from a variety of fields, including qualified reserve analysts, structural engineers, insurance experts, local government building officials, and many others. The Task Force compiled all the information it received, coupled it with the Task Force members' expertise and experience, and prepared a detailed report of proposed changes that the Florida Legislature should consider. Whether or not the Legislature adopts any or all of the recommendations provided by the Task Force, their timely and thorough analysis is a resource for the Legislature and public at large.

The other notable group has been the Professional and Ethics Committee, chaired by Andrew B. Sasso. The members include Marve Ann M. Alaimo, Debra L. Boje, Alexander Dobrev, Michael Dribin, Erin Farrington Finlen, Michael J. Gelfand, Caitlein J. Jammo, Steven H. Mezer, Lawrence E. Miccolis, Hon. Mark A. Speiser and Paul E. Roman. The committee was tasked with reviewing the final report issued by the Florida Supreme Court's Special Committee to Improve the Delivery of Legal Services. Among other items, the final report proposed allowing paralegals to provide expanded legal services and non-lawyers to own minority positions in Florida law firms. The Professionalism and Ethics Committee reviewed the numerous studies and reports cited in the final report, which included studies from other states and countries considering the issues, analyzed those in light of Florida law and Florida demographics, and drafted an articulate response expressing numerous concerns and potential unintended consequences. The Executive Committee approved the response, and it was submitted to The Florida Bar for its consideration.

The Section is blessed with volunteers who devote significant time and effort to the study of important issues facing us today. This service deserves applause, and I encourage you to reach out and personally thank the members of these committees.

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



J. BASKIES



M. BEDKE

Letter From The Co-Editors-In-Chief

We hope you and yours enjoyed a joyous holiday season. It seems many Section members found themselves dealing an unusually hectic year-end, addressing client needs. Perhaps now you can relax with family and friends, catch your breath, kick-back with your favorite professional publication and plan for the year ahead. **Bob Swaine's** *Section Chair's Column* provides the casual reader and rank-and-file Section member with an overview of the work being done within the Section and the folks who are providing so much service. As Bob notes, "The Section is blessed with volunteers who devote significant time and effort to study important issues facing us today." These selfless colleagues would, welcome having you join them in helping the Section, clients and communities. Who knows? You may be a future recipient of an award and get featured in our *Section Spotlight*. One can't help but be impressed and motivated when reading about this year's recipients.

After holidays with family and friends, you may find **William Slicker's** article on Guardianship, Visitation, Exploitation, and Elder Caring Coordination to be a very good reference piece. The lessons to be learned from the article apply to many of our families and clients, not just celebrities or personalities. Any article that includes references to Peter Falk, Casey Kasem, Glenn Campbell and Mickey Rooney is worth reading! Consider this issue of *ActionLine* to be our long-distance dedication to you. (Our more senior Section members may pick up on that reference.)

We attempt to have *ActionLine* be a timely source of important and practical information, notwithstanding the fact ours is a quarterly publication. New legislation of relevance to Section members is discussed; see the articles on the Florida Uniform Directed Trust Act, the new Community Property Trust Act, and Senate Bill 50. Also, **Derek Carrillo** has written a wonderful primer on multifamily telecommunications contracts. Like so many *ActionLine* articles, this one will be flagged for use in the future. Quoting the Cable Guy and mentioning Mortal Kombat is sure to result in "eyes on pages" for this piece. Seriously, Derek explains both the legal and business aspects of negotiating telecom agreements with service providers for cable, internet and phone service at apartment projects. It may save you hours of research. The **new Florida Community Property Act** impacts real estate lawyers, and probate and trust lawyers. The impact on homestead issues, by way of example, are explained by **Anthony Guettler**. Read the article beginning on page 17 and we believe you will learn some important new information.

As the number of commercial cases being litigated increases again, and with many businesses still being impacted by COVID, the issue of credit bids in bankruptcy real estate sales is likely going to garner more attention. **Daniel Etlinger** and **Jennis Morse Etlinger** examine and explain some of the significant case law on point.

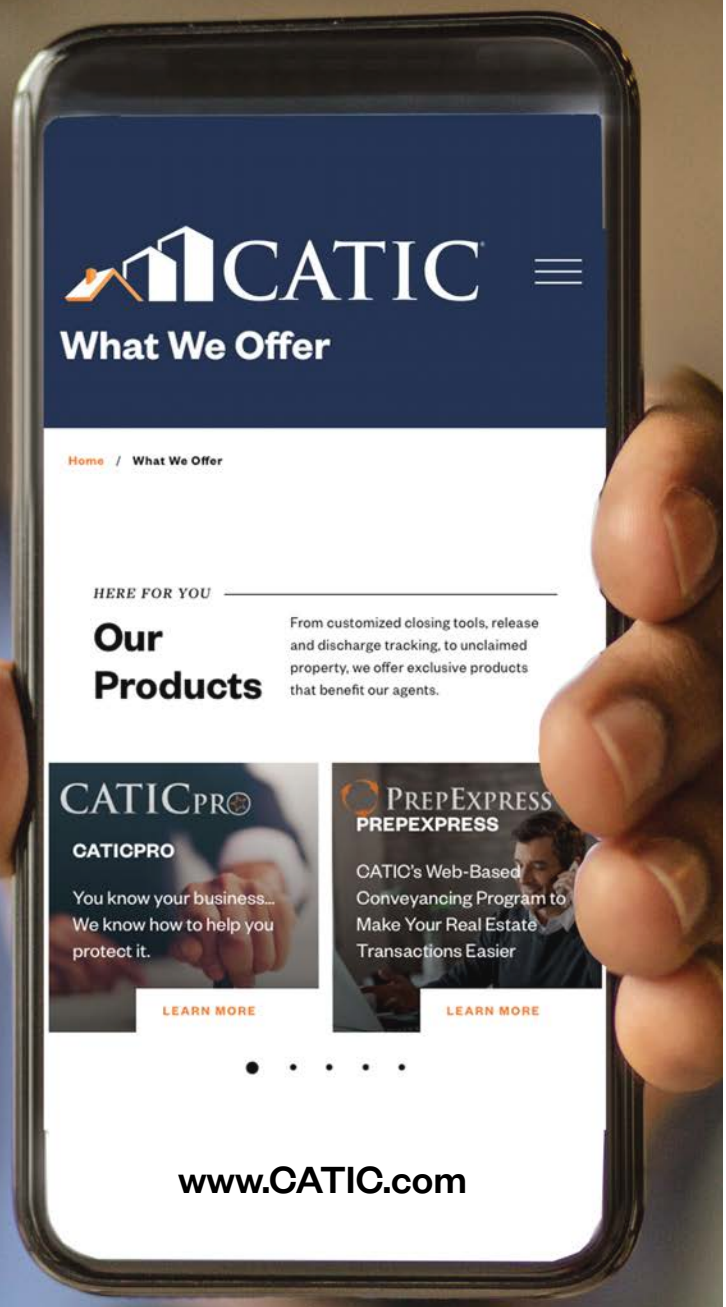
Florida is unique as it's the only state in the nation that still imposes a statewide sales tax on commercial rents. As explained in **Jeanette Moffa's** article, "Florida blindsides out-of-state business when assessing rental payments." A modicum of relief is coming. Read Jeanette's article and stay tuned! *Political Roundup* is one of our favorite features. **French Brown** provides a fascinating preview of the upcoming Session of the Florida Legislature. The interests of the Section will be well represented. The *Roundtable articles* provide a plethora of information of interest and show where Section members can get involved. The tragedy in Surfside was horrific. As is so often the case, the Section responded to the situation promptly, thoughtfully, and in a way that provided meaningful assistance. The work of the Section's Task Force was deliberate, informed and valuable in terms of improving public policy. We sincerely hope and believe that lives will be saved because of the work of the Section's Task Force.

We routinely find ourselves going back to pull a former *Practice Corner* article or look at the *Case Summaries* from an earlier issue of this publication. If you don't read anything else in this issue of *ActionLine*, you should read pages 46-51.

Finally, join us in wishing Janellen "Janie" Green well in her new endeavors. Janie has been the Publications Coordinator/Copy Editor of *ActionLine* for years. She is moving on but has left an indelible imprint on this magazine. She will be missed.

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Guardianship, Visitation, Exploitation, and Elder Caring Coordination

William D. Slicker, Esq., William D. Slicker, P.A., St. Petersburg, Florida

Summary: In guardianship cases, high-level conflicts among family members or between family members and guardians are difficult to resolve. Elder caring coordination is a possible intervention.

Family feud is not just a game show on TV.
It plays out in many guardianship cases.

In 2008, when actor Peter Falk suffered from Alzheimer's disease, his second wife isolated him from his other family members and friends. His daughter, Catherine Falk, fought back, and after an expensive court battle, she was granted the right to see her father. His daughter Jackie did not get to see her father for three years. This drove Catherine Falk to start the Catherine Falk Organization to fight against the isolation of Wards from their loved ones while in guardianships or conservatorships.[1]

The adult children of other entertainment personalities, such as Casey Kasem, Glen Campbell, and Mickey Rooney, faced the same issues. In 2013, Kerri Kasem fought against Casey Kasem's isolating wife. Kerri Kasem started the Kasem Cares Foundation and got California to pass the Kasem Cares Visitation Bill.[2]

In 2015, some of the children of Glen Campbell battled with their stepmother over access to their father. In 2016, Tennessee passed the Glen Campbell-Peter Falk Act that allows family and close friends contact with a Ward under a conservator's (or guardian's) care.[3]

After Mickey Rooney's death in 2014, it came out that he had been the victim of physical and financial abuse by his eighth wife. His daughter Kelly Rooney was not allowed to see him for two years before his death.[4] This resulted in Arizona passing the Mickey Rooney Act in 2016.[5]

The National Association to Stop Guardian Abuse was started about the same time as the Catherine Falk Foundation and the two organizations have teamed up to work together with a goal of getting the Peter Falk Right of Association Act and the Peter Falk Criminal Isolation of Elders Act introduced and passed in all states.[6] So far, about 20 states have passed some form of that legislation.[7] Florida's statute provides that a guardian shall "[a]llow the Ward to maintain contact with the family and friends unless the guardian believes that such contact may cause harm to the Ward."[8]

Due to this development of state laws, the Uniform Law Commission took up the issue and in 2017, the Commission approved a new model law on guardianship, called the Uniform Guardianship Conservatorship Act, which provides in part: Protection of the right of the individual to receive notice of the right to communicate, visit or interact with others, including in-person visits, phone calls, personal mail, electronic communications, and social media;[9] and Prohibition of the guardian from restricting visitation, unless (1) the restriction is authorized by court order, (2) there is a protective order or protective arrangement that limits contact, or (3) the guardian has good cause to believe the restriction is necessary because interactions with a specific person poses a risk of significant physical, psychological, or financial harm.[10]

Due to the high-profile celebrity cases, the American Bar Association also had its Commission on Law and Aging study the issue. In May of 2018, that ABA Commission issued its Legislative Fact Sheet in which it found:

Traditionally, a guardian has the power to encourage or limit important relationships and connections. Recently, national standards and state laws have charged guardians with encouraging and supporting visitation in accordance with a person's values and preferences. Still, a guardian may have to weigh the important benefits of visitation with the need to restrict contact due to family dysfunction, undue influence, neglect, abuse, and/or financial exploitation.[11]

The ABA Commission ended its Legislative Fact Sheet by noting that there was a new dispute resolution process called Eldercaring Coordination that might be useful "in resolving the

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increasingly common high conflict 'family feud' situations."[12]

The Eldercaring Coordination program was started in 2015 when the Association for Conflict Resolution's Task Force on Eldercaring Coordination adopted guidelines and started pilot programs in the following five states: Florida, Indiana, Idaho, Ohio, and Minnesota.[13] In Florida, the pilot programs were in the 5th, 7th, 9th, 12th, 13th, 15th, 17th, and 18th Circuits.[14]

Eldercaring Coordination has recognized different levels of conflict that may arise between various family members or between family members and a guardian. At one end of the spectrum are low-level conflicts in which people can sit across a table and discuss issues of care and safety of the Ward with the focus on what the Ward needs.[15] In the middle are medium-level conflicts where the people need the one-time meeting with a mediator to help resolve conflicts.[16] At the other end of the spectrum are the high-level conflicts when personalities, personal agendas, and constant blame makes mediation ineffective.[17] Some of the high-level conflict resolution meetings must be held in a courthouse in order to avoid physical violence.

High-level conflict situations are usually driven by long-term animosities that may go back to childhood fights among siblings or between children of a first marriage and their step-parent. The disputes may be over major issues such as who may have contact with an elderly person, or over minor issues such as whether a terminally ill person, who is diabetic, should be allowed to eat ice cream.[18]

According to post-process reporting, 100% of judges that responded indicated that eldercaring coordination was "very effective" as an intervention for high-level conflict guardianships.[19] Judge Michelle Morley, from Florida's Fifth Circuit, stated that in one case in which a gravely-ill senior was being denied medical treatment due to conflicting instructions from the senior's adult children to the doctors, the eldercaring coordinator helped the family reach an agreement on a care plan which literally saved the elder's life.[20]

The eldercaring coordinator task force is hoping to expand the program statewide. So, just as we now have parenting coordinators in family law cases, in which a parenting coordinator may meet several times with high-level conflict parents in an effort to work out timesharing issues, we may also have eldecaring coordinators in guardianship cases in the future, in which an eldercaring coordinator may meet multiple times with families that are suffering from high conflict among the family members or with the guardian to work out visitation or financial issues. Perhaps everyone should try to follow the advice from one of Glen Campbell's songs and "try a little kindness."[21]

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W. SLICKER

Endnotes

1 *See* Catherine Falk Organization, https://catherinefalkorganization.org/ ("Catherine Falk is actively seeking legislation across the United States while providing resources for those currently trying to get visitation rights for those denied to see an ailing parent.").

2 *See* Legislative Counsel's Digest and Bill Text for the Bill approved by California Governor on July 14, 2015 and filed with California Secretary of State July 14, 2015 at *California: Assembly Bill No. 1085, Chapter 92*, https://www.kasemcares.org/legislations#info-CA (last visited Aug. 25, 2021).

3 *See* Christina Vinson, *Glenn Campbell's Oldest Children Help Create Tennessee Law to Protect Visitation Rights*, the Boot (May 25, 2016) https://theboot.com/tennessee-campbell-falk-act/.

4 Gary Baum & Scott Feinberg, *Tears and Terror: The Disturbing Final Years of Mickey Rooney*, The Hollywood Reporter (Oct. 21, 2015) https://www.hollywoodreporter.com/movies/movie-features/mickey-rooneys-final-years-833325/.

5 *See* National Ass'n to Stop Guardian Abuse, *Legislative Action, May 2016: SB 1296 passes in Arizona and is signed into law by Governor Ducey*, https://stopguardianabuse.org/nasga-legislative-members/.

6 National Ass'n to Stop Guardian Abuse, https://stopguardianabuse.org/ (last visited Aug.27, 2021).

7 The 20 states include: Arizona, California, Connecticut, Florida, Hawaii, Illinois, Indiana, Iowa, Louisiana, Maine, Maryland, Nevada, New Jersey, New York, Rhode Island, South Dakota, Tennessee, Utah, Washington, Wisconsin, and the Virgin Islands. *See* Catherine Falk Organization, *supra* n. 1.

8 Fla. Stat. § 744.361(13)(b)(2020).

9 Unif. Guardianship, Conservatorship, and Other Prot. Arrangements Act § 311(b)(6) (Unif. Law Comm'n 2017).

10 Id. At §§ 311(b)(6) and 315(c).

11 Am. Bar Ass'n Comm'n on Law and Aging, *Legislative Fact Sheet: Guardianship and the Right to Visitation, Communication, and Interaction*, 2 (May 2018), https://www.americanbar.org/content/dam/aba/administrative /law_aging/2018-05-24-visitation-legislative-factsheet.pdf. .

12 Id. at 2.

13 The Fla. Bar, *'Eldercaring' Program Serves the Courts and Fla.'s Aging Citizens*, Fla. Bar News (Oct. 15, 2018) https://www.floridabar.org/the-florida-bar-news/eldercaring-program-serves-the-courts-and-floridas-aging-citizens/.

14 Id.

15 Eldercaring Coordination, *Eldercaring Coordination or Elder Mediation: What's the Difference?* https://static1.squarespace.com/static/5e7a0fdc29215474d078e3f2/t/5eeacb79c5458540f29e8a50/1592445817657/ELDER-CARING+COORDINATION+or+MEDIATION+5-20.pdf.

16 Id.

17 Id.

18 Jennifer Branch, Court Personnel Elder Justice Center Thirteenth Judicial Circuit Hillsborough County, relating a real life example during a Pinellas Guardianship Association webinar (May 12,2021).

19 Eldercaring Coordination, Resources, Research, *Post Process Data* (2020), https://www.eldercaringcoordination.com/research.

20 The Fla. Bar, *supra* note 13.

21 Glen Campbell, Try a Little Kindness (Capital Studios 1969).

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Navigating Multiple Fiduciaries: Florida Uniform Directed Trust Act And Co-Trustee Considerations

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It is common for settlors to name more than one trustee in a trust instrument, such as multiple children of the settlor, individual and corporate trustees, or a mix of family and non-family members. Reasons for naming multiple trustees can range from not hurting anyone's feelings (e.g., naming all children together) to ensuring compliance with the settlor's intent (e.g., provide neutral corporate trustee) to providing checks and balances (e.g., prevent misuse by a single trustee). However, naming multiple trustees can create a number of issues as well, especially when decisions are deadlocked, the trustees do not get along, or they refuse to communicate with each other. Sometimes in lieu of naming multiple trustees with the same authority, a settlor will provide certain trustees or non-trustee(s) the authority in the trust to make certain decisions relating to the trust administration. Historically, there has been very little statutory authority regarding trusts that grant a person other than a trustee (e.g. a trust director) a power over some aspect of the trust's administration.

This changed when on June 29, 2021, Governor DeSantis signed into law Senate Bill 1070 (the "Legislation") which, among other things, created the Florida Uniform Directed Trust Act (the "Act"). The Act, which took effect on July 1, 2021, highlights the requirements and regulations for trust directors, including clarifying the fiduciary nature of the role, the application to co-trustees, and the duties and liabilities of those making decisions and complying with decisions. It creates a new section of the Florida Trust Code, Part XIV, titled Directed Trusts. The Legislation also includes revisions to other parts of the Trust Code, as needed to coordinate with the new Part XIV. The Act applies only to decisions or actions occurring on or after July 1, 2021, even if the trust was created before that date.[1] For trusts where the principal place of administration is changed to Florida on or after July 1, 2021, the Act applies only to decisions or actions taken after the move.[2] This article features some of the most significant revisions to the Trust Code pursuant to the Legislation and the Act.

Many of the provisions in the Act can be overridden by the trust instrument itself,[3] so it is important to review the terms of any directed trust. There are also certain powers that are not considered powers of direction for purposes of the Act unless the terms of the trust expressly provide otherwise.[4] Examples of powers that are not powers of direction are a power of appointment and a power to appoint or remove a trustee.[5]

Definitions

Historically, many trusts used the term "trust protector" when referring to a third person's ability to make decisions on behalf of a trust. The Legislation adds multiple definitions including trust director, which is defined as "a person who has a power of direction under the trust terms to the extent exercisable while that person is not a trustee."[6] A "directed trustee" is a trustee subject to the direction of a trust director and a "directed trust" is any trust which includes a power of direction.[7] The Legislation also adds definitions for "power of direction" and "terms of a trust."[8]

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Powers

A trust director has the authority granted under the terms of the trust, as well any further power "appropriate to the exercise or nonexercise of a power" unless the trust indicates otherwise.[9] This includes the ability of the trust director to hire an attorney or others to assist in the performance of their duties, and to direct payment of fees and costs from the assets of the trust.[10] If there are multiple trust directors with the same powers, they must act by a majority.[11]

Duties and Liabilities

A trust director generally has the same fiduciary duty and liability as a trustee or co-trustee in a like position or under similar circumstances.[12] The trust can modify duties and liabilities to the same extent that a trust can modify the duties or liabilities of a trustee, and the trust can also impose an additional duty or liability.[13]

What liability, if any, do employees of a trustee have? In *Beaubien v. Cambridge Consolidated, LTD.*,[14] the court held that an individual acting on behalf of a corporate trustee may be personally liable for their actions, even if acting as an agent for the corporation. As a result, and after review of the law by the Real Property, Probate and Trust Law Section of The Florida Bar, the Legislation also specifies that any claim barred against a trustee or trust director due to a statute of limitation is also barred against the directors, officers, and employees acting for the trustee or trust director.[15]

A directed trustee must take reasonable action to comply with a direction, and is not liable for such reasonable action.[16] However, a directed trustee may not comply to the extent that by complying, the trustee would be engaging in willful misconduct.[17] Note that willful misconduct is not a defined term in the Florida Trust Code, though it was already the standard applicable to an excluded trustee's liability under the Trust Code prior to the enactment of the Act.[18] Additionally, before complying with a direction, a directed trustee must determine whether the exercise is within the scope of the power of direction.[19] However, an exercise is not outside the scope of a power merely because it constitutes or may constitute a breach of trust.[20] Also, consistent with trust director statutes, a settlor may impose additional duties and liabilities in the trust document.

Co-Trustees

When a trust names multiple trustees, the terms of the trust dictate the role of each trustee. When the trust is silent on whether unanimity is required for decisions, co-trustees may act by majority decision.[21] Additionally, if there is a trustee vacancy, the remaining trustees or majority of the remaining co-trustees may act for the trust.[22] A co-trustee may not delegate to another trustee the performance of a function the settlor reasonably expected the co-trustees to perform jointly.[23]

However, the settlor does not reasonably expect joint performance if the trust provides one or more co-trustees,



to the exclusion of other trustees, the power to direct or prevent specified actions of the trustees.[24] In this scenario, the excluded trustees generally have the same duty and liability as a directed trustee.[25] Similar to Florida Statutes prior to the Act, the trustee(s) with the power to direct are liable to the beneficiaries for exercise of the power as if the excluded trustee(s) were not in office.[26] The trustee(s) with power also have the exclusive obligation to account to and defend any action brought by the beneficiaries relating to the exercise.[27]

What about the liability of a co-trustee when decisions must be made together? In this scenario, each co-trustee must exercise reasonable care to prevent a co-trustee from committing a breach of trust or compel a co-trustee to redress a breach of trust.[28] Also, if a dissenting trustee joins at the direction of the majority, they will not be liable, as long as they notify their co-trustees of their dissent at or before the time of the action.[29]

Uncertainties

What if a trustee or a beneficiary is uncertain whether a trust director has accepted, or will accept the role? A written demand may be made on the designated trust director by a trustee, beneficiary, or even the settlor, to accept or confirm prior acceptance of the trust directorship in writing.[30] Within 60 days after receipt of the demand, the designated trust director must either accept, indicate prior acceptance, or decline, in writing, and deliver the writing to all trustees, qualified beneficiaries, and the settlor, if living.[31]

What if the trust director accepts and exercises a power but the trustee is uncertain about its duty to comply? A directed trustee that has reasonable doubt about its duty can apply to the court for instructions, with attorney fees and costs to be paid from the assets of the trust.[32]

Conclusion

The Legislation provides clarity to both those drafting and administering directed trusts. The determination of fiduciary duties is relevant to any litigation relating to a trust administration, particularly breach of trust cases. A key question is whether and when a decision-maker, whether a trustee or non-trustee, has a fiduciary duty to the beneficiaries. The answer is clarified by the Act. Drafting attorneys should be mindful of this when advising clients and choosing those with decision-making authority. Litigation attorneys also need to understand which decisions impose duties, and therefore, may result in litigation.


S. RUBEL

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Endnotes

1 Fla. Stat. § 736.1403(1)(a) (2021).
2 Fla. Stat. § 736.1403(1)(b) (2021).
3 Fla. Stat. § 736.0105 (2021).
4 Fla. Stat. § 736.1405 (2021).
5 Id.
6 Fla. Stat. § 736.0103(25) (2021).
7 Fla. Stat. § 736.0103(6)-(7) (2021).
8 Fla. Stat. § 736.0103(16) (2021), Fla. Stat. § 736.0103(24)(2021).
9 Fla. Stat. § 736.1406(2)-(3) (2021).
10 Real Property, Probate and Trust Law Section: Florida Uniform Directed Trust Act [White Paper].
11 Fla. Stat. § 736.1406(3)(b) (2021).
12 Fla. Stat. § 736.1408(1)(b) (2021).
13 Fla. Stat. § 736.1408(3) (2021).
14 652 So. 2d 936 (Fla. 5th DCA 1995).
15 Fla. Stat. § 736.1008(7) (2021).
16 Fla. Stat. § 736.1409(1) (2021).
17 Fla. Stat. § 736.1409(2) (2021).
18 Fla. Stat. § 736.0703(9) (2020). The RPPTL White Paper indicates that willful misconduct "should require the directed trustee's own intent to harm the trust or its beneficiaries[.]"
19 Fla. Stat. § 736.1409(3) (2021).
20 Fla. Stat. § 736.1408(3) (2021).
21 Fla. Stat. § 736.0703(1) (2021).
22 Fla. Stat. § 736.0703(2) (2021).
23 Fla. Stat. § 736.0703(5) (2021). There is an exception for investment functions pursuant to Fla. Stat. § 518.112 (2021).
24 Fla. Stat. § 736.1412 (2021).
25 Fla. Stat. § 736.1412(2) (2021).
26 Fla. Stat. § 736.1412(3) (2021).
27 Id.
28 Fla. Stat. § 736.0703(7) (2021).
29 Id.
30 Fla. Stat. § 736.1416(2) (2021).
31 Id.
32 Fla. Stat. § 736.1409(6) (2021).

Multifamily Telecommunication Contracts: The Who, Why, And How

By Derek A. Carrillo, Esq., The NRP Group, Tampa, Florida

"The future is now. Soon every American home will integrate their television, phone and computer....You can do your shopping at home, or play Mortal Kombat with a friend from Vietnam. There's no end to the possibilities."

— Chip Douglas, 'The Cable Guy'.[1]

Introduction

Boy, was Chip Douglas spot-on and way ahead of his time. Tenants who live in apartment complexes may wonder why they don't get to choose the cable, internet, and phone service providers ("Service Providers") for their unit. Who decides which Service Provider is available at the property? This article: (1) provides information to help attorneys understand Service Provider contracts for multiple dwelling units ("MDU"), and (2) addresses material terms and conditions of contracts between Service Providers and owners. This article will discuss only newly constructed MDUs, specifically apartment complexes. When an MDU owner ("Owner") is getting ready to build a new MDU, it will solicit request for proposals from Service Providers for cable, internet, and phone services ("Telecom Services") for the property. Some of the major MDU Service Providers include Charter Communications, AT&T, Verizon, Comcast, Frontier Communications, Lumen Technologies (formerly CenturyLink), and Cox Communications. The Service Providers will then submit proposals and the Owner will choose one or more Services Providers for the property. There are a few different types of agreements and services that an Owner can choose from based on the needs of the property.

Service Agreement Types

There are two main types of Service Provider agreements: the Nonexclusive Installation and Services Agreement ("NEMA") and the Exclusive Installation and Services Agreement ("EMA"). A third type of agreement (that is seldom used) is the Right of Access ("ROA") agreement.

NEMA. The NEMA is used when there will be more than one Service Provider at the property. As the name indicates, this type of agreement is nonexclusive, which means that each Service Provider has a right to,

1. construct and install its infrastructure for the Telecom Services,
2. access to the property to maintain its Telecom Services; and
3. market its Telecom Services to the tenants.

EMA. The EMA will be used when there is only one Service Provider at the property. The EMA grants to the single Service Provider the exclusive right to construct and install its infrastructure for Telecom Services and market its Telecom Services to the tenants. The EMA does not, however, provide the Service Provider with exclusive access to the property. In 2007, the Federal Communications Commission ("FCC") declared it unlawful under Section 628 of the Communications Act for a cable provider and an Owner to enter into such agreements.[2] In 2008, the FCC declared it unlawful under Section 201(b) of the Act for certain providers, including broadband internet providers, to enter into such agreements with Owners.[3] The FCC's decision was intended to prevent significant harm to competition and consumers by prohibiting exclusive access to the property in exchange for more favorable rates and terms for the Owner.

However, the FCC's decision is federal law and does not affect an Owner's rights under relevant state law as a private property owner to deny a particular Service Provider the right to access its property for the provision of Telecom Services. Several states have subsequently enacted mandatory access laws that grant Service Providers certain rights to enter private property without the property Owner's permission. Florida has a "mandatory access statute" but the law only applies to condominium properties and not any other MDU property.[4]

ROA. The ROA is used by some Service Providers who want access to the property only for installation of their infrastructure for future use. The Service Providers do not have any marketing rights under an ROA but the ROA will sometimes require the Service Provider to provide Telecom Services to the leasing office and/or amenity areas in exchange for access.

Types of Service Provided

There are two categories of service provided under these

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agreements: Non-Bulk Arrangements and Bulk Arrangements. A Non-Bulk Arrangement is more common. Non-Bulk allows the Service Provider to facilitate customer service, billing, and diagnostics directly with the tenants. Any issue with the Telecom Service is the responsibility of the Service Provider. The Service Provider sets the terms for the Telecom Services and the tenant can choose which service, if any, it wants.

On the other hand, in a Bulk Arrangement, the Service Provider makes Telecom Services available to the units at the property, and the Owner agrees to pay the Service Provider for these services. Instead of billing the tenant directly, the Service Provider bills the Owner each month and the Owner factors this cost into each unit's rent, either in the base rent or as a separate charge. Bulk Arrangements allow the Owner to get a significantly discounted rate for the Telecom Services and provide an opportunity for Owners to attract tenants by offering Telecom Services at a rate significantly lower than retail. The Bulk Arrangements usually provide the MDU with the Service Provider's basic Telecom Services, but the tenants also have the option of purchasing additional services, such as premium channels, directly from the Service Provider.

One downside of Bulk Arrangements for Owners is that if there is an issue with the Telecom Services, they must address it with both the tenants and the Service Providers. In essence, they become glorified middlemen in an effort to resolve issues between the two parties. Another issue with Bulk Arrangements is that the Owner is paying for the Telecom Services in every unit whether occupied or not, which can ultimately affect the profitability of the MDU. Some states are now encouraging Bulk Arrangements for MDUs in an effort to make Telecom Services more affordable and widely available to tenants irrespective of the difficulties they pose for Owners.

Pertinent Terms

Whether an Owner decides to do a NEMA or EMA ("Telecom Contract"), certain terms are always included.

Term. The Service Provider will incur significant costs in installing its infrastructure in an MDU, so it wants a longer term in order to recoup its investment costs. The majority of Telecom Contracts are for ten-year terms. Some have a shorter term ranging from 5-7 years, and some have terms as long as 12 years. All Telecom Contracts have automatic renewal provisions ranging from thirty days to two years. It is up to the Owner to let the contract automatically renew or to attempt to renegotiate more favorable terms.

Compensation. The Service Provider will compensate the Owner in one to three ways: A per unit fee ("Franchise Fee"), revenue sharing ("Rev Share"), and complimentary accounts.

Franchise Fees are the most lucrative for the Owners and because the fee is paid upfront, the most attractive. The amount of the Franchise Fee depends on the size of the MDU and whether or not it is a NEMA or EMA. More units in an MDU equates to a larger Franchise Fee. The typical Franchise Fee is around $150 per unit for a NEMA. For EMAs, the Franchise Fee can go as high as $300 per unit because the Service Provider has the exclusive right to market to tenants at the property. Service Providers with only an ROA will sometimes pay a Franchise Fee ranging from $25-50 even though they have no marketing rights. Franchise Fees are typically paid to the Owner when the MDU obtains its certificate of occupancy ("CO") for all the units. However, some Telecom Contracts will pay a portion

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of the Franchise Fee upon execution of the Telecom Contract with the balance paid after the CO is issued. Franchise Fees are sometimes not offered in connection with smaller unit MDUs, because the return on the Service Provider's capital cost is insufficient to justify paying such fees.

The second form of compensation to an Owner is Rev Share. Rev Share is the amount paid to an Owner based on the penetration rate and is a recurring monthly payment to the Owner. Penetration rate is the percentage of units using the Service Provider for Telecom Services. Typically, the Rev Share is a portion of the revenue the Service Provider earns based on the number of units using their Telecom Services. The penetration rate is calculated by dividing the number of units using the Service Provider by the total number of units, whether occupied or not. The Rev Share amounts can vary, but are typically tied to the penetration rate. Some use a sliding scale that increase as the penetration rate increases (*e.g.,* penetration rate: 0-30%; Rev Share: 3%); some use a dollar amount per unit that increase as penetration rate increases (*e.g.,* penetration rate: 0-30%; Rev Share: $5); and some use flat percentages no matter what the penetration rate is (*e.g.,* penetration rate: 0-100%; Rev Share: 10%). The Service Provider pays the Rev Share to the Owner within a certain number of days either at the end of the month or at the end of each quarter.

The last form of compensation to an Owner is not a payment per se. Service Providers will often offer complimentary accounts (i.e., free cable and internet) to Owners to use in their leasing offices and amenity areas. Complimentary accounts are not always offered to Owners, but they serve as a nice bonus in exchange for selecting a particular Service Provider at the property. The number of complimentary accounts vary by Service Provider and size of the MDU, and generally range from 1-3 accounts.

Installation; Wiring. One of the most important provisions in any Telecom Contract is installation and ownership of the wiring. There are three types of wiring: Service Provider Wiring, Home Run Wiring[5], and Cable Home Wiring[6].

Service Provider Wiring is wiring from the facilities' entry location of each building to the Demarcation Point[7]. The Demarcation Point is the point where the Service Provider's facilities[8] connect to the Home Run Wiring. The Service Provider will always own the Service Provider Wiring.

Home Run Wiring is the wiring from the Demarcation Point to the first splitter or multimedia panel (as applicable) within each unit. Depending on whether or not there is a NEMA or EMA, the Home Run wiring will be exclusive or non-exclusive to the Service Provider. Additionally, either the Owner or the Service Provider(s) will provide the Home Run Wiring and the Owner will always own the Home Run Wiring.

Cable Home Wiring is the internal wiring of any type (*e.g.,* CAT 5e, coax, etc.) from the Demarcation Point in each unit to other outlets in the unit that receive Telecom Services. The Owner will provide and own the Cable Home Wiring.

A major negotiation issue is which party will be responsible for the installation of the Home Run Wiring. As installation of wiring is a costly expense for Owners, they attempt to get the Service Provider to cover the costs of the install as part of the contract. If the Service Provider insists on Owner doing the install, the Owner can request a higher Franchise Fee in order to offset the costs.

Indemnification. Both Service Providers and Owners expect reciprocal indemnification. Indemnification typically includes claims for personal and property damage, personal injury, and death. Service Providers will generally not indemnify Owners for claims resulting from or third parties' acts or omissions, gross negligence or intentional misconduct. Conversely, Owners will indemnify Service Providers for covered liabilities, unless liabilities are due to Service Providers' or third parties' acts or omissions, gross negligence or intentional misconduct. Additionally, Owners' indemnification sometimes includes noncompliance with state/federal laws, breach of or nonperformance of the contract, and infringement on the Service Provider's intellectual property.

Assignment. All Telecom Contracts contain an assignment provision. Some Telecom Contacts require Service Provider consent to the Owner's assignment, some require prior notice of an assignment, and some require the Owner to cause the Assignee to expressly assume the Telecom Contract. Telecom Contracts that require the Owner to cause the Assignee to expressly assume the contract typically provide that if the Assignee refuses to assume, the Owner can terminate the Telecom Contract by paying a termination fee. The termination fee is usually based on the fees payable in the year in which the contract is terminated (in a typical Telecom Contract with a ten-year term, the termination fee would be much higher in year one when the fees are the highest than in year ten when the fees are the lowest).

Termination. All Telecom Contracts contain a termination provision and most specify what constitutes a default and include a notice and cure period. Typically, if a default by the Owner is not timely cured, the Service Provider may recover a termination fee as described above or pursue other applicable remedies at law and equity. Furthermore, all Telecom Contracts include a prevailing party attorneys' fees provision.

Grant of Easement. Some Service Providers require easements from public rights-of-way through the Owner's property to their equipment for access and utility purposes which provides to the Service Provider the right to keep its infrastructure in place should the Owner sell the property.

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Service Providers who do not require an easement will often obtain an access license which grants a right of access but is not recorded and will typically not bind a successor Owner.

While the above is not intended to address all terms and conditions found in a Telecom Contract, it is a good starting point for a practitioner negotiating a Telecom Agreement on behalf of an Owner. However, beware that the terms discussed in this article are constantly evolving and changing. For example, the FCC announced in September 2021 that it is seeking comments regarding Rev Share agreements, exclusive wiring, and EMAs between Owners and tenants in an effort to address competition among Service Providers.[9]

Conclusion

Whether its "Cable Guy!!!" or "You've got mail," Owners can provide Telecom Services to tenants in a variety of ways. Practitioners who represent Owners should be familiar with the types of Telecom Contracts and the services provided thereunder. Understanding industry basics and the concepts discussed in this article should enable practitioners to more effectively negotiate Telecom Contracts.


D. CARRILLO

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Endnotes

1 The Cable Guy. (Columbia Pictures 1996).

2 The FCC's 2007 decision is codified in 47 C.F.R. § 76.2000 (2008). Cable operators, satellite cable programming vendors in which a cable operator has an attributable interest, and satellite broadcast programming vendors, are all subject to the FCC's prohibition of exclusive access arrangements. *See* 47 C.F.R. § 76.2000(a) (2008). Division (b) of 47 C.F.R. § 76.2000 (2008) defines the types of buildings that are included (e.g., apartment and condominium buildings) in the FCC's definition of "MDU."

3 The FCC's 2008 decision is codified in 47 C.F.R. § 64.2500(b) (2008).

4 See Fla. Stat. § 718.232 (1981).

5 Official definition in 47 C.F.R. § 76.800 (1997).

6 Official definition in 47 C.F.R. § 76.5 (1972).

7 Id.

8 Facilities include all equipment and devices that are installed by the Service Provider to transmit Telecom Services from the public right-of-way to the Demarcation Points on the property, and may include, but not be limited to, above-ground and underground coaxial cables, fiber optic lines, internal wiring conduit, customer premises equipment such as converters/receivers/ set top boxes/ and modems, distribution cables, amplifiers, pedestals, lock boxes, passive and electronic devices and other equipment and any other facilities, equipment, or devices installed by the Service Provider and used by the Service Provider in the provision of Telecom Services, excluding the Home Run Wiring and Cable Home Wiring.

9 Federal Communications Commission, *FCC Seeks Comment on Broadband Access in Multi-Tenant Buildings* (Sept. 7, 2021), https://www.fcc.gov/document/fcc-seeks-comment-broadband-access-multi-tenant-buildings-0.



Planning With Florida Community Property Trusts

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Under Florida's new Community Property Trust Act ("the Act"), married couples may now establish community property in Florida. Although Florida is not a community property state, a married couple can create community property through a community property trust established under the Act ("CPT").[1] The ability to convert appreciated property to community property presents a significant income tax planning opportunity for married couples.

For example, suppose a married couple purchases property for $100 that is titled jointly with rights of survivorship. After the property has appreciated, one spouse dies when the fair market value of the property is $800. The basis of the deceased spouse's one-half of the property will be increased to $400, and the basis of the surviving spouse's one-half of the property will continue to be $50.[2] However, if that same property was considered community property for federal income tax purposes, the basis of the deceased spouse's one-half of the property will be increased to $400, and the basis in the surviving spouse's one-half of the property will also be increased to $400 (this is often referred to as the "Double Step-Up").[3]

An important purpose of the Act is to permit the establishment of community property within the meaning of IRC § 1014(b)(6), which would allow for the Double Step-Up.[4] Although there is authority to support the notion that community property established in a common law state under a community property trust will qualify for a basis adjustment under IRC § 1014(b)(6), it is possible the courts will not agree.[5] As with community property established in other common law states that have passed similar community property trust legislation (such as Alaska, Tennessee and South Dakota), it is unclear under current law whether property owned by a CPT will qualify as community property for federal income tax purposes.[6]

It is important to note that the same tax benefits can be achieved (and with more certainty) by titling the appreciated property in the name of the spouse with the shorter life expectancy; however, this is a difficult plan to successfully implement for several reasons. First, IRC § 1014(e) will prevent a step-up in basis if appreciated property was transferred to the deceased spouse within one year of death, and that same property is devised back to the transferor spouse. Second, a spouse may be hesitant to transfer all of his or her appreciated property to the other spouse (who would then be in complete control, could subject the property to creditor claims, etc.). Finally, the spouse with the shorter life expectancy may survive the other spouse.

Keep in mind that the basis adjustment rules under IRC § 1014 also apply to property with a basis greater than fair market value ("Loss Property"). For this reason, a CPT should not be used to maintain Loss Property. Finally, any spouses considering a CPT should be aware that the step-up in basis may be eliminated by a change in the law (which has been proposed by the current administration). If that were to occur, the primary benefit of a CPT would disappear.

Because of the potential income tax savings associated with the Double Step-Up, married couples with appreciated property will be considering whether to utilize a CPT in their estate planning. The purpose of this article is to discuss some of the issues that may be encountered in planning with a CPT, and to compare ownership of assets through a CPT to other forms of joint ownership.

Can a lawyer represent both spouses in establishing a CPT?

Yes, provided the lawyer complies with the rules of professional conduct (in particular, Rule 4-1.7). To determine whether the representation is permitted, a lawyer will need to understand the considerations involved for the spouses in

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establishing a CPT. Spouses entering into a CPT will be fixing (and possibly changing) their rights to property during the marriage, in the event of divorce, and at death. In establishing the trust agreement, the spouses will need to decide whether the trust is revocable or irrevocable.[7] Also, the spouses will need to address the issue of financial disclosure to prevent a successful challenge to the enforcement of a CPT.[8] Many of the considerations involved in establishing a CPT are similar to those associated with a post-nuptial agreement.

There is an inherent conflict of interest in representing both spouses in connection with a post-nuptial agreement (arguably, the same is true with a CPT). In fact, to establish a CPT, the following language must be inserted at the beginning of the trust agreement:

> *IF YOU HAVE ANY QUESTIONS ABOUT THIS TRUST AGREEMENT, YOU SHOULD SEEK COMPETENT AND INDEPENDENT LEGAL ADVICE. ALTHOUGH NOT A REQUIREMENT, IT IS STRONGLY ADVISABLE THAT EACH SPOUSE OBTAIN THEIR OWN SEPARATE LEGAL COUNSEL PRIOR TO THE EXECUTION OF THIS TRUST.*[9]

For these reasons, a lawyer representing both spouses in establishing a CPT should explain implications of the joint representation and risks involved, and then obtain each spouse's informed consent in writing.[10] Not only should these issues be addressed at the outset of the representation, but it may be prudent to revisit these issues with the spouses at the time of any funding, and in connection with any amendments to the trust agreement.

Can Florida homestead protections be maintained with a CPT?

Yes, any property owned by the CPT that would qualify as homestead if owned by the spouses directly will be treated as homestead for all purposes (including creditor protection, restrictions on devise, and ad valorem tax).[11] In planning with a CPT, it is important to keep in mind the Florida homestead devise limitations. For example, if the married couple has a minor child, and their homestead is owned by a CPT, the restrictions on devise will still apply.[12] On the death of the first spouse, the decedent's one-half interest in the homestead would not be subject to devise because of the minor child.[13] As a result, the surviving spouse would continue to own the surviving spouse's one-half of the homestead, and would receive a life estate in the decedent's one-half (which would be the same result if the homestead was owned by the spouses directly as tenants-in-common).[14]

To what extent can the assets of a CPT, other than Florida homestead, be protected from creditor claims?

For spouses who want to protect their assets from potential creditor claims, a CPT may not be the best option. Similar to property owned by the spouses as tenants-in-common, each spouse's one-half share of the CPT (other than Florida homestead property) will be available to satisfy a spouse's individual obligations.[15] In the case of an obligation incurred by both spouses, the entire CPT (again, other than Florida homestead) will be available to satisfy such claims.[16] Greater protection can be achieved by the spouses during their lifetime through joint ownership as tenants by the entireties

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("TBE"). TBE property may not be used to satisfy either spouse's individual debts (but may be used to satisfy joint liabilities).[17]

It may be possible to increase the level of asset protection that can be provided with a CPT by incorporating a limited liability company ("LLC"). For example, if spouses established a CPT with $800 of investment assets, a future creditor seeking to enforce a judgment against one spouse would be able to access $400 of such property. However, if the spouses established a CPT with their interest in a multi-member LLC with $800 of investment assets, the creditor may be limited to obtaining a charging order against that debtor-spouse's one-half interest in the LLC (provided it is then considered to be a multi-member LLC). Before deciding to maintain assets owned by the CPT in an LLC, the spouses would need to consider that the step-up in basis may be reduced if valuation discounts apply on the death of the first spouse. Additionally, if the LLC was taxed as partnership for federal income tax purposes, the spouses should be aware that the LLC could make a "754 election" on the death of the first spouse, which would allow the partnership to increase the inside bases of partnership assets pursuant to IRC § 743(b). Note also that funding an LLC with homestead property would cause the property to lose its protected status.[18]

What are the gift tax consequences of transferring property to a CPT?

Determining the gift tax consequences associated with the funding of a trust established by both spouses (such as a CPT) can be difficult. Some of the factors that must be considered include the methods for revoking the trust, withdrawal rights, the value and type of property contributed by the spouses to the trust, and whether any deemed gift qualifies for the gift tax marital deduction.[19] To minimize the extent of any unintended gifts at the time of funding a CPT, the following steps are advisable. First, each spouse should fund the CPT at the same time, with identical assets (or a joint interest in the same asset). This may require a spouse holding separate property to first retitle the property into joint ownership before contributing the property to a CPT. Any gift from one spouse to the other in connection with such retitling should qualify for the unlimited gift tax marital deduction (unless the deemed donee-spouse is not a U.S. citizen).[20] If the CPT is funded exclusively with community property which the spouses acquired while living in a community property jurisdiction, each spouse will be making identical contributions for gift tax purposes.[21] Second, each spouse could be permitted to unilaterally revoke his or her transfers to the CPT (which is essentially the default rule set forth in Fla Stat. § 736.0602(2)). If a spouse transferring property to a CPT cannot revoke the transfer (or withdraw the assets contributed to the CPT) without the consent of the other spouse, the transferor spouse may be making a gift (which may or may not qualify for the gift tax marital deduction).[22]

What are the gift tax consequences on the death of the first spouse?

Upon the death of one spouse, the surviving spouse will have the right to amend the CPT as to the surviving spouse's one-half share in the CPT.[23] As a result, there should be no gift by the surviving spouse with respect to the surviving spouse's one-half share of the CPT.[24] Also, the disposition of the property allocated to the deceased spouse's one-half share of the CPT should not result in a gift by the surviving spouse. However, if the deceased spouse's share of the CPT is not treated like community property for federal tax purposes, and the property was commingled and separate shares were not maintained, there may be a gift by the surviving spouse on the death of the first spouse (depending on the terms of the trust agreement), because the surviving spouse may be treated as the transferor of such property for federal gift tax purposes.[25]

Can real estate located outside of Florida be contributed to a CPT?

The short answer is yes. Pursuant to the Act, the spouses may agree on the "*rights and obligations in the property transferred to the trust, notwithstanding when and where the property is acquired or located.*"[26] However, it is unclear if real estate located outside of Florida will be treated as community property under the Act (especially in situations where the real estate is located in a non-community property jurisdiction).[27] Instead of direct ownership of non-Florida real estate by the CPT, spouses should consider transferring the non-Florida real estate to an LLC. This structure will increase the likelihood that the trust's interest in the LLC (which owns the real estate located outside of Florida) will be treated as community property under the Act.

Should a life insurance policy be owned by a CPT?

In most cases, a CPT will not be the best ownership vehicle for a life insurance policy. The primary reason for establishing a CPT is the Double Step-Up, which is unnecessary in the case of life insurance. Cash has a basis equal to its face value. A trust specifically designed to own life insurance policies should be used.

Will there be a Double Step-Up if appreciated property is contributed to a CPT within 1 year of the death?

It depends. The best way to illustrate the consequences of a deathbed conversion of separate property to community property is through an example. Assume a spouse owns separate property with a basis of $100. After the property has appreciated to $800, the spouse transfers the property to a CPT. Within a month after the transfer to the CPT, the other spouse dies while the fair market value of the property is $800. The surviving spouse's basis in his or her own one-half share of the CPT will be $400 (assuming the property is treated as community property for federal tax purposes). If the surviving spouse inherits the deceased spouse's one-half share of the

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CPT, however, the surviving spouse's basis in that inherited property will be $50. As a result, the surviving spouse would have a basis in the entire property of $450.[28] Note that if the deceased spouse's one-half share were devised to any person other than the surviving spouse, the basis in the deceased spouse's one-half share would have been $400. Also note that if the deceased spouse's one-half share was devised to a trust that includes the surviving spouse as a beneficiary, the rules under IRC §1014(e) may only apply to a portion of the property.[29]

What portion of the CPT is included in the estate of the first spouse to die?

Provided that the deceased spouse's interest in the CPT is treated as community property for federal tax purposes, one-half of the CPT should be included in the gross estate of the first spouse to die.[30] If the deceased spouse's interest in the CPT is not treated as community property for federal tax purposes, the results may be different.[31]

How will the value of the deceased spouse's one-half share of the CPT be determined on the death of the first spouse to die?

The special valuation rules that apply to qualified joint interests under IRC §2040 will not apply to the deceased spouse's one-half share of the CPT. Instead, the valuation rules that apply in the case of property included in a decedent's gross estate under IRC §2033 will be applicable.[32] As a result, if on the death of the first spouse to die, the decedent's one-half share of the CPT includes a fractional interest in property, valuation discounts may apply. The rules for determining the fair market value of the decedent's fractional interest in property distributed from the CPT will be very similar to the rules that apply in the case of property owned by spouses as tenants-in-common.[33]

In drafting the CPT, it is important to keep in mind that on the death of a spouse, "*one-half of the aggregate value*" of the CPT will be subject to testamentary disposition by the deceased spouse (and therefore, included in the deceased spouse's gross estate).[34] Under the Act, there is no requirement that a one-half interest in each asset owned by the CPT be distributed on the death of a spouse. Instead, "*the trustee has the power to distribute assets of the trust in divided or undivided interests and to adjust resulting differences in valuation,*" unless the trust agreement provides otherwise.[35] Because it is possible to fund each one-half share on a non-pro rata basis, the trustee may be able to avoid distributing fractional interests in property in cases where valuation discounts are undesirable.

What portion of a CPT assets can be devised to an irrevocable trust for the benefit of the surviving spouse on the death of the first spouse?

Establishing an irrevocable trust for the benefit of the surviving spouse can be beneficial. The deceased spouse's one-half of the CPT can be distributed to an irrevocable trust for the surviving spouse (either under the CPT document or a separate trust agreement) that (1) is protected from creditor claims and divorce from a subsequent spouse and (2) utilizes the deceased spouse's estate and generation-skipping transfer tax exemptions. The surviving spouse's one-half of the CPT will be subject to amendment by the surviving spouse, and, as a result, will (1) be included in the surviving spouse's gross estate, (2) be subject to a basis adjustment on the death of the surviving spouse, and (3) not be protected from the surviving spouse's creditor claims.[36]

* * *

Although there are tax and legal issues to be mindful of in establishing and funding a CPT, many married couples will be considering whether to utilize a CPT because of the significant potential income tax savings.


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Endnotes

1 *See* Fla. Stat. § 736.1502 (1) (2021); Fla. Stat. § 736.1505 (1) (2021).

2 *See* I.R.C. §2040(b); I.R.C. §1014(b)(9).

3 *See* I.R.C. §1014(a), (b)(1); I.R.C. §1014(b)(6).

4 Fla. Stat. § 736.1511 (2021).

5 Howard Zaritsky, *Tax Planning for Family Wealth Transfers At Death: Analysis With Forms – Zaritsky, Chapter 4: Planning With Jointly Owned Property and Joint Revocable Trusts*, 4.06[6][b] The Basis Advantage of Community Property and 4.07[7][b][ii] Application of basis rules for community property, Thomson Reuters/Tax & Accounting (2021). *See also*, Jonathan G. Blattmachr and Madeline J. Rivlin, *Searching for Basis in Estate Planning: Less Tax for Heirs*, Estate Planning Journal, August 2014, Thomson Reuters/Tax & Accounting (2021). See IRS Publication 555 (Rev. March 2020). *See also*, Jonathan G. Blattmachr, Howard M. Zaritsky and Mark L. Ascher, *Tax Planning with Consensual Community Property: Alaska's New Community Property Law*, 33 Real Prop. Prob. & Tr. J. 624-631 (Winter 1999).

6 *Id.*

7 Fla. Stat. § 736.1504 (1)(d) (2021).

8 Fla. Stat. § 736.1512 (2021).

9 Fla. Stat. § 736.1503(4) (2021).

10 Fla. Rules of Prof'l Conduct 4-1.7.

11 Fla. Stat. § 736.151 (2021).

12 *See Id.*

13 Fla. Stat. § 732.4015 (2021).

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14 Fla. Stat. § 732.401 (2021).

15 Fla. Stat. § 736.1506 (2021).

16 Id.

17 Beal Bank, SSB v. Almand & Associates, 780 So. 2d 45 (Fla. 2001); *First Nat'l Bank v. Hector Supply Co*., 254 So. 2d 777 (Fla. 1971).

18 Op. Att'y Gen. Fla. 2007-18 (2007).

19 Thomson Reuters, *Checklist of tax dangers in use of joint revocable living trusts*, 33,207 Planning Articles, Thomson Reuters/Tax & Accounting (2021). Thomson Reuters, *Funding of joint revocable living trust may give rise to immediate taxable gifts*, 33,208 Planning Articles, Thomson Reuters/Tax & Accounting (2021). Howard Zaritsky, *Tax Planning for Family Wealth Transfers At Death: Analysis With Forms – Zaritsky, Chapter 4: Planning With Jointly Owned Property and Joint Revocable Trusts*, 4.07[2][c], Avoiding Taxable Gift on Funding, Thomson Reuters/Tax & Accounting (2021).

20 I.R.C. § 2523(i).

21 Howard Zaritsky, *Tax Planning for Family Wealth Transfers At Death: Analysis With Forms – Zaritsky, Chapter 4: Planning With Jointly Owned Property and Joint Revocable Trusts*, 4.07[5][c], No Taxable Gift on Funding, Thomson Reuters/Tax & Accounting (2021).

22 Thomson Reuters, *Funding of joint revocable living trust may give rise to immediate taxable gifts*, 33,208 Planning Articles, Thomson Reuters/Tax & Accounting (2021). Thomson Reuters, *"Terminable" interests*, 48,409 Estate Planning Analysis, Thomson Reuters/Tax & Accounting (2021).

23 Fla. Stat. § 736.1504(2) (2021).

24 For discussion of the potential gift tax issues on the death of the first spouse to die in the case of a joint revocable trust, *see* Thomson Reuters, *Death of first spouse may result in taxable gift by surviving spouse*, 33,209 Planning Articles, Thomson Reuters/Tax & Accounting (2021). *See also*, Howard Zaritsky, *Tax Planning for Family Wealth Transfers At Death: Analysis With Forms – Zaritsky, Chapter 4: Planning With Jointly Owned Property and Joint Revocable Trusts*, 4.07[2][b][ii], Taxable gift when first spouse dies, Thomson Reuters/Tax & Accounting (2021).

25 Melinda S. Merk, *Joint Revocable Trusts for Married Couples Domiciled in Common-Law Property States*, 32 Real Prop. Prob. & Tr. J. 345, 358-9 (Summer 1997).

26 Fla. Stat. § 736.1504(1)(a) (2021).

27 Howard Zaritsky, *Tax Planning for Family Wealth Transfers At Death: Analysis With Forms – Zaritsky, Chapter 4: Planning With Jointly Owned Property and Joint Revocable Trusts*, 4.07[7][b][i], Choice of law issues, Thomson Reuters/Tax & Accounting (2021).

28 Thomson Reuters, *Basis considerations in transmuting separate property to community property,* 28,141 Estate Planning, Practice Aids & Special Studies, Thomson Reuters/Tax & Accounting (2021).

29 Westfall & Mair, *Estate Planning Law and Taxation – Westfall & Mair, Chapter 2: Basis and Valuation of Property*, 2.02[2][a], Denial of New Basis for Deathbed Transfers, Thomson Reuters/Tax & Accounting (2021).

30 I.R.C. § 2033.

31 Thomson Reuters, *How much of the trust is included in estate of first dying spouse-grantor?*, 33,210 Planning Articles, Thomson Reuters/Tax & Accounting (2021). Melinda S. Merk, *Joint Revocable Trusts for Married Couples Domiciled in Common-Law Property States*, 32 Real Prop. Prob. & Tr. J. 345, 358-9 (Summer 1997).

32 Thomson Reuters, *Discounts in determining the value, or estate tax purposes, of property held in joint tenancy,* 82,118.1 Estate Planning Analysis, Thomson Reuters/Tax & Accounting (2021).

33 For a discussion of the valuations standards that apply to the decedent's one-half share of community property, see Thomson Reuters, *Discounts in determining the value, or estate tax purposes, of property held in joint tenancy,* 82,118.1 Estate Planning Analysis, Thomson Reuters/Tax & Accounting (2021). See also Federal Tax Valuation - Bogdanski, *Concurrent Interests*, 5.01[2], Tenancy in Common and Community Property, Thomson Reuters/Tax & Accounting (2021).

34 Fla. Stat. § 736.1507 (2021).

35 *Id*.

36 Fla. Stat. § 736.1504(2) (2021).



Sayonara Stepped-Up Basis?

The Tax Policies Behind Why It Might Be Time For Stepped-up Basis To Step Aside

By Elizabeth M. Hughes, Esq., Akerman LLP, Miami, Florida

Proposed Changes to the Law

Has the death knell finally rung for stepped-up basis? Recently, Democratic Senators have come forward with a proposal to reform taxes at death. One of the proposed changes is that stepped-up basis amounts would be subject to an income tax at death in an attempt to close the "stepped-up basis loophole."

On March 29, 2021, United States Rep. Bill Pascrell, the Chairman of the House Ways and Means Subcommittee on Oversight, put forward H.R. 2286, also known as The Sensible Taxation and Equity Promotion (STEP) Act of 2021, proposed legislation that would tax capital gains when certain capital assets are transferred, specifically at the time of a gift of an asset or upon the decedent's death. The STEP Act is progressive in that it doesn't "outright eliminate stepped-up basis; rather, it turns death and gifts or transfers of property to a non-grantor trust into realization events, paired with an exclusion for up to $1 million of unrealized capital gains, along with an additional $500,000 exclusion for personal residences." Under the proposed legislation both gifts to charity and assets held in retirement accounts would be exempt. And in order to avoid double taxation, income taxes paid under the STEP Act would be deductible against any estate tax liability.

Then, on April 28, 2021, the Biden administration unveiled the American Families Plan which also prepared to eliminate the "step-up" in cost basis at death that's allowed under current law. Under the American Families Plan, "the donor or deceased owner" of an appreciated asset would realize "a capital gain" at the time of the transfer. Gain would be equal to the excess of an asset's fair market value on the date of the gift or death over the donor's or decedent's basis in that asset. The Treasury 'Green Book' states that "for purposes of the imposition of this tax on appreciated assets," transfers of property into, and distribution in kind from, a trust (including charitable split-interest trusts), partnership, or other noncorporate entity, other than a grantor trust that is deemed to be wholly owned and revocable by the donor, would be recognition events. Exclusions would apply to transfers to U.S. spouses and charities.

In order to appreciate the possible changes in the law, it's instructive to understand the current law and the tax policies behind the proposed changes in the pipeline. This article will discuss the policy reasons why the sun may be setting on stepped-up basis once and for all.

Current Law

Under current law, property that has appreciated can be gratuitously transferred at death without the realization of capital gains. Internal Revenue Code § 1014(a) provides that, "…the basis of property in the hands of a person acquiring the property from a decedent or to whom the property passed from a decedent shall, if not sold, exchanged, or otherwise disposed of before the decedent's death by such person, be… the fair market value of the property at the date of the decedent's death…." To think of this concept differently, property "acquired from a decedent," receives a stepped-up basis equal to the fair market value of the asset as of the decedent's date of passing. This means that the assets receive this "step-up" without tax recognition of any of the capital gain. Practically speaking, the current approach means permanent forgiveness of the "income tax liability on the appreciation in value of the property while it was owned by the decedent."

Consider the stepped-up basis regime as compared to lifetime transfers. If the decedent sold the shares during his lifetime, he would have incurred a capital gain tax liability. Under current law, if the decedent holds those same shares until his death and passes them on to a beneficiary, the capital gains are "extinguished at death." For lifetime gifts, a donor's income tax basis, for the asset he is gifting, is carried over to the donee. Then, the donee would not have to pay tax on the appreciation in value of the property until she sells the property – getting a deferral on the taxation of any capital gains until he disposes of the shares. By transferring low basis assets during his lifetime, the donor misses out on the free step-up in basis and as a result of this, some donors will defer making gifts of low basis assets and choose to pass them at death.

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Policy Support for Eliminating the Stepped-Up Basis Regime

The tax policies in contradiction of the current stepped-up basis regime are frequently debated and discussed among tax practitioners, tax policy analysts, and politicians. Often referred to as the "gaping loophole," "one of the most expensive gaps in the tax base," or other equally unenthusiastic epithets, many scholars point out the negative tax and economic consequences of this treatment. Some of the most frequently cited problems with allowing stepped up basis at death are: (a) that the current system does not accurately measure income and creates problems of horizontal and vertical equity; (b) stepped up basis contributes to the so-called "lock-in" effect; and (c) the step up in basis causes a loss of tax revenue. This article will take a deeper look at these three tax policy themes.

Inaccurate Measure of Tax and Fairness in the Tax System

The flaws of the current system have been described by tax analysts as, "measuring effective tax rates, without adding unrealized gains to the denominator, [which] significantly understates the actual effective tax burden on those who hold appreciated assets until death or transfer them to charity to avoid tax on gains. In fact, those who have great wealth may have little or no reason to sell appreciated property." Another criticism of the current system is that instead of paying more tax, the stepped up basis regime gives higher income taxpayers a route to actually pay less tax. Because many high-net-worth individuals own a higher percentage of capital assets with unrealized appreciation they end up receiving the greater benefit from the step up in basis at death.

Then there is the issue of the fairness of taxation. The idea that there should be a fairness or impartiality in our tax system brings about a discussion of horizontal equities. This concept analyzes whether the burdens of taxation are equitably distributed, "by focusing on income as the measure of equity." Many tax policy analysts consider the step-up in basis regime to violate the principle of horizontal equity because it treats similarly situated taxpayers differently depending on if they sell appreciated assets during their lifetime or transfer them upon death.

An October 2019 report from the American College of Trust and Estate Counsel (ACTEC) elaborates on the inequities of the stepped-up basis regime by citing language and rationales from the Treasury Department's previous proposals.

> Under present law, a person whose income consists of salaries, wages, dividends, or business profits is taxed at ordinary income rates on an annual basis. Special treatment is afforded to income from the sale of capital assets in that such income is taxed at a lower rate when the assets are sold. In both these situations, the estate which the taxpayer passes on to his wife and children at his death is accumulated after income taxes have been paid.

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However, a person who holds capital assets which have appreciated in value until death can avoid taxation of this income altogether. Moreover, the recipient of the property takes as his cost or basis the fair market value at the date of death so that the capital gain income represented by the appreciation in value is never taxed under the income tax. This means that a person who can afford to accumulate income in the form of unrealized capital gains can then pass on that accumulated wealth free of income tax – in contrast to the wage earner, salaried individual, or taxpayer who has sold capital assets, all of whom transfer their accumulated wealth after it is reduced by income taxes.

Beyond the inequities produced under the step up in basis system, there are other effects of the current law which impact taxpayer decision making and economic choices.

Lock-In Effect

The "lock-in" effect is described as the "immobilization of capital transfers until death, in order to take advantage of the step-up in basis for the purpose of avoiding capital gains taxation." Essentially, the assertion is that the step-up in basis at death impacts people's decision to sell or transfer an asset during his lifetime and serves as a restraint on the sale of any capital asset. And because of this lock-in effect, it causes taxpayers to hold onto less productive assets for tax reasons instead of selling them and holding more productive assets. This freezing of investment positions deprives the economy of the "fruits of an unencumbered flow of capital toward areas of enterprise promising larger rewards." All of this results in a distorted economic marketplace because the effect is to "influence the allocation of capital."

Loss of Tax Revenue

Under current law, property that passes to an heir or beneficiary when the owner of that property dies inevitably reduces over-all capital gains tax revenue because it receives the new stepped-up basis. The unrealized capital gain income that would have been produced had the person sold the property prior to his death is not included in the decedent's final income tax return. And the heir or beneficiary that receives the property takes it with the new basis – the fair market value of the property as of the decedent's date of death. "The appreciation *ipso facto* becomes capital and beyond the reach of the income tax. It has been estimated that unrealized capital gains represent 36% of the total value of all decedents' estates which escape taxation because of the step-up in basis." The Tax Policy Center estimates that the revenue-maximizing rate rises to 50% if stepped-up basis is repealed.

The Future without Stepped-up Basis

If the stepped-up basis regime produces such an unfair income tax loophole, why does it remain? One difficulty with replacing the current law is that past steps taken to remedy the problem have resulted in even more issues and complications than the root of the problem. Two prior attempts have been made to substitute stepped-up basis with a carryover basis – one in 1976 and one in the 2001 Act (which applied to decedents dying in 2010 by special election). These two attempts failed for various reasons, but namely failure to properly address details of implementation and onerous valuation calculation issues.

Beyond some legitimate concerns about constitutionality, the STEP Act has some beneficial aspects. But do these benefits sufficiently offset the more challenging aspects of the proposal? And is such a significant change likely to happen now given the current political climate? On the one hand, some tax practitioners note the positive aspects of the draft in that it appears to incorporate several recommendations from the American College of Trust and Estate Counsel, including an election to let taxpayers defer and pay the tax on unrealized gains over a 15-year period, and an estate tax inclusion period rule that would trigger tax on unrealized gains when the property of a grantor trust is no longer included in the decedent's estate for estate tax purposes. On the other hand, although the STEP Act structure seems simple, some characteristics hold it back. Any successful proposal, including the STEP Act or Biden's American Families Plan, would need to contain an exclusion for family farms or closely held businesses and should address specific relief for taxpayers who happen to die just before a decline in the market. Any change to the stepped-up basis regime would also need to take into account the estate tax threshold to avoid issues of double taxation. Currently, an estate has to be worth more than $11.7 million to trigger federal estate taxes. According to the Urban-Brookings Tax Policy Center, less than 0.1 percent of the people who died in the U.S. last year were expected to have an estate large enough to owe any estate tax. However, the issue should still be addressed.

Conclusion

It is estimated that more than a trillion dollars of lost revenue has resulted since the implementation of the stepped-up basis regime. Even given this loss of revenue and some broad political agreement on tax policy fundamentals, commentators still remark that the STEP Act's likelihood of enactment is unlikely and note that the $1 million threshold is simply too low. Certainly, proposals which are dependent on valuations of "hard-to-value assets" would be challenging to enforce. But in an ever-evolving political climate, when will the time finally come to put the brakes on one of the "most significant revenue drains in the Code?" Beyond lost revenue, a change to the death basis regime would provide for a more balanced economic tax system for Americans and would align the Code with existing fundamental tax policies and should be implemented.

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Endnotes

1 *See* Chamseddine, Senate Democrats Scheduled to Reform Taxes on Estates, *Tax Notes Federal,* Volume 171, April 5, 2021.

2 *Id* (citing to a statement from Maryland Democrat Chris Van Hollen).

3 *See* Van Hollen Leads Colleagues in Announcing New Legislation to Close the Stepped-Up Basis Loophole, *Proposal will tackle one of the biggest loopholes in the U.S. tax code, which subsidizes America's wealthiest heirs.* Senator Van Hollen (D-Maryland) also issued a discussion draft of the bill. Contact: Francesca Amodea (Van Hollen), Tax Notes, March 29, 2021.

4 Jonathan Curry, STEP Act Highlights Difficulty of Tackling Stepped-Up Basis, Tax Notes Federal, Volume 171, April 26, 2021.

5 *Id.*

6 *See* H.R. 2286; *see also*, Sensible Taxation and Equity Promotion (STEP) Act, Senators Chris Van Hollen, Cory Brooker, Bernie Sanders, Sheldon Whitehouse, and Elizabeth Warren.

7 Fact Sheet: The American Families Plan, available at:
https://www.whitehouse.gov/briefing-room/statements-releases/2021/04/28/fact-sheet-the-american-families-plan/

8 Deloitte. Tax News & Views. Capitol Hill briefing. May 29, 2021 available at https://www2.deloitte.com/content/dam/Deloitte/us/Documents/Tax/us-tax-taxnewsandviews-210529.pdf

9 American College of Trust and Estate Counsel, Capital Letter No. 52, Ronald D. Aucutt, June 4, 2021 available at https://www.actec.org/resources/capital-letter-no-52/

10 Department of the Treasury May 2021 General Explanations of the Administration's Fiscal Year 2022 Revenue Proposals at https://home.treasury.gov/system/files/131/General-Explanations-FY2022.pdf, p.62.

11 Deloitte. Tax News & Views. Capitol Hill briefing. May 29, 2021 available at https://www2.deloitte.com/content/dam/Deloitte/us/Documents/Tax/us-tax-taxnewsandviews-210529.pdf

12 IRC §1014(a).

13 IRC §1014(a)

14 *See* Amy E. Heller, Andrew D. O'Gwynn, Biden's Tax Proposals and Estate Planning, September 30, 2020, https://www.skadden.com/insights/publications/2020/09/quarterly-insights/bidens-tax-proposals-and-estate-planning.

15 *See* Nancy M. Annick, PLUGGING THE "GAPING LOOPHOLE" OF THE STEP-UP IN BASIS AT DEATH: A PROPOSAL TO APPLY CARRYOVER BASIS TO EXCESS PROPERTY, 8 Pitt. Tax. Rev. 75, Pittsburg Tax Review, Spring 2011; *see also* Nonna A. Noto, Cong. Research Serv., RL 32818, Estate Tax Legislation in the 109th Congress, at 10 (2005); *See* Karen C. Burke & Grayson M.P. McCouch, Death Without Taxes?, 20 Va. Tax Rev. 499, 513 (2001). *See also,* Federal Estate Tax Repeal and Carryover Basis: Is it Time to Worry Yet? California Advocates for Nursing Home Reform, http://www.canhr.org/publications/newsletters/netnews/feature_article/NN_2009Q4.htm

16 *Id.*

17 Report by the American College of Tax and Estate Counsel (ACTEC) Tax Policy Study Committee on Proposals to Tax the Deemed Realization of Gain on Gratuitous Transfers of Appreciated Property, October 2019, DOC # 3134277, available at ACTEC.org

18 I.R.C. § 1014(a); *Id.* Annick at 14.. *See also,* Calvin H. Johnson, The Elephant in the Parlor: Repeal of Step-Up in Basis at Death, 121 Tax Notes 1181, 1183 (2008).

19 13 Fla. Prac., Estate Planning § 31:39 (2020-2021 ed.) Step-up basis at death.

20 Grayson M.P. McCouch, *The Empty Promise of Estate Tax Repeal*, 28 Va. Tax Rev. 369, 382 (2008) (Indeed, one commentator has referred to the step-up in basis as the "angel-of-death loophole."). *See e.g.* Michael Kinsley, Angel-of-Death Loophole, The New Republic, July 13, 1987, at 4. *See generally,* Annick, *supra* note 19.

21 Lawrence Zelenak, Taxing Gains at Death, 46 Vand. L. Rev. 361, 365 (1993).

22 Grayson M.P. McCouch, *The Empty Promise of Estate Tax Repeal*, 28 Va. Tax Rev. 369, 382 (2008). *See generally,* Annick, *supra* note 19.

23 Daniel I. Halperin, No Basis Step-Up for Marketable Securities With No Tax at Death, 170 Tax Notes Fed. 1709 (Mar. 15, 2021).

24 *Id.*

25 *See generally,* Annick, *supra* note 19.

26 *See* Batchelder *supra* note 64.

27 *See* Louis Kaplow, *A Note on Horizontal Equity*, 1 Fla. Tax Rev. 191 (1992); *See generally* Paul R. McDaniel & James R. Repetti, Horizontal and Vertical Equity: The Musgrave/Kaplow Exchange, 1 Fla. Tax Rev. 607, 607 (1993); *See generally* Richard A. Musgrave, Horizontal Equity: A Further Note, 1 Fla. Tax Rev. 354 (1993).

28 *See* Anthony C. Infanti, Tax Equity, 55 Buff. L. Rev. 1191, 1195-96 (2008) (arguing that tax equity, with its focus on income, forecloses consideration of noneconomic concerns in tax policy debates). *See generally,* Annick, *supra* note 19.

29 *See generally,* Annick, *supra* note 19.

30 Report by the American College of Tax and Estate Counsel (ACTEC) Tax Policy Study Committee on Proposals to Tax the Deemed Realization of Gain on Gratuitous Transfers of Appreciated Property, October 2019, DOC # 3134277, available at ACTEC.org

31 *Id* citing to 1969 Proposal of the Treasury Department, pages 331 – 334.

32 Philip Heckerling, *The Death of the 'Stepped-Up' Basis at Death*, 37 S. Cal. L. Rev. 247 (1964); *See generally,* Annick, *supra* note 19.

33 *See* James M. Poterba and Scott Weisbenner, *The Distributional Burden of Taxing Estates and Unrealized Capital Gains at the Time of Death,* Issue date: July 2000. Available at https://www.nber.org/papers/w7811 (calling the step-up in basis a major factor underlying the lock-in effect); *See generally,* Annick, *supra* note 19.

34 *See* Heckerling *supra* note 56.; *See generally,* Annick, *supra* note 19.

35 ACTEC October 2019 submission *supra* note 54 (citing the 1969 Proposal of the Treasury Department).

36 *Id.*

37 *See generally,* Annick, *supra* note 19.

38 Lily L. Batchelder, *Taxing Privilege More Effectively: Replacing the Estate Tax with an Inheritance Tax*, at 20 (NYU Law and Economics Working Paper No. 07-25, 2007). *See also* Lily Batchelder, *What should Society Expect from Heirs? The Case for a Comprehensive Inheritance Tax,* 63 Tax L. Rev. 1 (2009).

39 Jonathan Curry, *STEP Act Highlights Difficulty of Tacking Stepped-Up Basis*, Tax Notes Federal, Volume 171, April 26, 2021 (Referencing Mitchell Gans' of Hofstra University's Maurice A. Deane School of Law discussion that imposing a deemed realization event on trusts every 21 years is essentially a mark-to-market regime in which no transfer has occurred, which raises a strong constitutionality question under *Eisner v. Macomber*, 252 U.S. 189 (1920), in which the Court took the position that a realization requirement was part of the 16th Amendment, and thus, Congress didn't have the power to tax unrealized gains.)

40 *Id.*

41 *See* Curry *supra* note 72.

42 Liz Weston, *Worry About the Right Thing with Estate Taxes*, Tampa Bay Times, March 12, 2021. Found at https://www.tampabay.com/news/business/2021/03/12/worry-about-the-right-thing-with-estate-taxes/

43 *See* Schmalbeck, *supra* note 20 ("In years past, wealth transfer taxes were promoted as a backstop of sorts that served to mitigate the revenue loss and unfairness created by the step-up in basis rule. Because transfer tax application is now extremely limited, that backstop is no longer reliably effective and the step-up in basis rule enable vast amounts of income to escape taxation completely.") *see also* Boris I. Bittker, Federal Taxation of Income, Estates, and Gifts 41-32 (2d ed. 1989).

44 *See* Schmalbeck *supra* note 20.

45 *Id.*

Credit Bids In Bankruptcy Real Estate Sales With Multiple Creditors

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Debtors often rely on 11 U.S.C. § 363 to effectuate a sale of real (and personal) property and will often work with the first priority lienholder as to its credit bid rights. Yet, the Bankruptcy Code does not even define or otherwise use the term "credit bid." Furthermore, the Bankruptcy Code does not expressly address the situation where more than one creditor may desire a credit bid. This article will examine the language found in § 363(k) itself, address some of the significant case law that has been developed on point, and review best practices should a debtor or creditor find itself in this situation.

The Language Of § 363(k)

The Bankruptcy Code provides:

> At a sale under subsection (b) of this section of property that is subject to a lien that secures an allowed claim, unless the court for cause orders otherwise the holder of such claim may bid at such sale, and, if the holder of such claim purchases such property, such holder may offset such claim against the purchase price of such property.[1]

Thus, what is commonly referred to as a credit bid is depicted by the Bankruptcy Code as an offset. The section addressing offsets contains six distinct clauses that must each be examined in turn.

First, while there is a reference to a § 363(b) sale, courts have applied this offset procedure to sales under § 1111(b) as well.[2] This is consistent with the legislative history, which states a "sale of property under section 363 *or under the plan* is excluded from treatment under section 1111(b) because of the secured party's right to bid in the full amount of his allowed claim at any sale of collateral under section 363(k) of the House amendment"[3] (emphasis added).

Second, the property must be "subject to a lien." Or put another way, "there is no comparable provision which would permit unsecured creditors to offset their claims."[4]

Third, the lien must secure an "allowed claim." An allowed claim is defined as a "claim or interest, proof of which is filed under section 501 of this title, is deemed allowed, unless a party in interest, including a creditor of a general partner in a partnership that is a debtor in a case under chapter 7 of this title objects."[5] When the validity of a claim is in doubt, some courts have conferred a temporary offset subject to immediate payment upon final adjudication disallowing a claim.[6] This recognizes the need for a bankruptcy judge to exercise discretion when faced with exigent circumstances to conduct a sale before final adjudication can be made, such as risk of dissipation or waste to the property.[7]

Fourth, a secured creditor's ability to credit bid is not absolute and a court may order otherwise for cause.[8] "The term 'cause' is not defined in the Bankruptcy Code and is left to the courts to determine on a case-by-case basis."[9] Some instances where a court has found cause include:

1. the credit bid would prejudice other secured parties holdings liens *pari passu* to that of the credit bidder;
2. the secured creditor acted in bad faith, engaged in wrongful conduct or colluded with the debtor-in-possession, trustee or any other third party; and
3. the debt should be recharacterized as equity or otherwise.

Fifth, the holder of the claim may bid at the sale. A holder may be a person, entity, estate, trust or governmental unit in whose name the claim resides.

Sixth, the lienholder may offset the claim against the purchase price. However, the lienholder may still be required to pay some closing costs in cash such as broker fees, filing fees, recording fees, taxes and title premiums.[10] As a final note, as with all statutory construction, this is a starting point and the precise language of a particular case's bid procedures, motions and orders should be examined for any further guidance.[11]

Multiple Credit Bidders

The analysis permutates further when there are multiple creditors seeking to credit bid at a sale. Several questions arise as to the real-world implications of this scenario. Specifically, may junior creditors submit credit bids, may a creditor authorize an agent to bid on its right, and should creditors enter into a written agreement?

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First, § 363(k) does not expressly limit its applicability to only the senior lien. By implication, junior creditors may credit bid. When doing so, "the credit bidding creditor must pay the mortgages and liens (if any) which have priority senior to its mortgage."[12] In practice a junior creditor may credit bid but will pay out of pocket any senior liens, thus somewhat obviating the benefits of credit bidding.[13] If the court has not made a final determination as to priority, then the junior creditor may be at risk to pay amounts in cash later.

Second, a court will interpret agreements pursuant to standard contractual constructs and may find that a creditor has delegated authority to credit bid to an agent.[14] One court found that a consortium of first lien lenders had relegated authority to a single administrative agent as opposed to separate credit bid rights.[15] Another court found that the syndicate of first lienholders could not specifically direct the trustee to credit bid or not to credit bid, as contractually they had determined it was within his sole discretion.[16]

Third, one promising solution is for the creditors to enter into an intercreditor agreement, whether embodied in the sale procedures motion or order itself or memorialized by a separate document. These agreements may help resolve a variety of issues in advance such as the priority scheme, bidding mechanisms, notice, and credit bid rights.[17]

Conclusion

A credit bid analysis is a three-step process. First, is the creditor even eligible to credit bid under § 363(k)? Second, does it make sense for the creditor to credit bid in the context of its own obligation? For instance, the Fifth Circuit concluded that the secured lender's credit bid equated to satisfaction of its debt in full and, by extension, had the unintended consequence of barring recovery from third-party guarantors.[18] Third, are there external considerations such as intercreditor agreements or other competing stakeholders in the collateral?

Regarding this final point, it is critical for the sale motion and order to set forth the credit bid instructions clearly and definitely. Failure to do so may result in challenges under § 363(k) "for cause." For instance, those who wish to credit bid may have to provide notice ahead of the sale; the sale should begin with oral and/or written instructions that there may be credit bids made at the sale; at each bid it should be announced whether it is for credit or money; and following the auction, any report or sale disclosures should clearly identify the credit bids. These are best practices to ensure that credit bids across multiple creditors are handled properly and the parties receive the best sale results possible.



D. ETLINGER

Daniel Etlinger is an attorney with the Tampa based firm Jennis Morse Etlinger. He focuses his practice on transactional representation particularly involving bankruptcy, business, financial services and property law. Dan sits on the board of the Tampa Bay Bankruptcy Bar Association and has earned Avvo's and Martindale's highest ratings, Superb and AV Preeminent, respectively. Dan received his J.D. and M.B.A. from the University of Pittsburgh, and, his B.A. from the University of Rochester. He is married to another attorney (Tabitha Etlinger at Bradley Arant) and has two children – Aurora and Orion – and two dogs – Fluffernutter and Scampers.

Endnotes

1 11 U.S.C. § 363(k).

2 *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 643-47 (2012).

3 *In re Realty Invest., Ltd. V*, 72 B.R. 143, 146 (Bankr. C.D. Cal. 1987) (quoting 124 Cong. Rec. H 11104 (Daily Ed. Step. 28, 1978)) (emphasis added).

4 *In re Moritz*, 162 B.R. 618, 619 (Bankr. M.D. Fla. 1994); *see also In re Hickey Properties,* 181 B.R. 171, 172-73 (Bankr. Ver. 1995) (holding that while the creditor had a blanket lien on all assets it did not have a lien on the equity interests being sold and therefore not entitled to the right of an offset).

5 11 U.S.C. § 502(a).

6 *See, e.g., In re St. Croix Hotel Corp.*, 44 B.R. 277, 278-80 (Distr. Ct. Virgin Islands 1984). Other practical solutions include escrowing the amount of the bid pending final adjudication, posting a bond, or providing an irrevocable letter of credit.

7 *In re Miami General Hospital, Inc.*, 81 B.R. 682, 687-89 (S.D. Fla. 1988).

8 *In re Olde Prairie Block, LLC*, 464 B.R. 337, 348 (Bankr. N.D. Ill. 2011).

9 *Id.*

10 *See, e.g., In re A 1 Plank & Scaffold Mgf.*, 437 B.R. 689 (Bankr. Kanas 2010) (holding the lienholder had to pay the broker's fees in cash pursuant to § 506(c)).

11 *See, e.g., In re Lahaina Venturers*, 41 B.R. 357, 357-58 (Bankr. Hawaii 1984) (requiring credit bidders to still tender a 5% deposit in cash before the sale).

12 *In re Daufuskie Island Props., LLC*, 441 B.R. 60, 64 (Bankr. S.C. 2010) (quoting "[i]n applying the Section 363(k) offset bid provision to the trustee's sale, a junior lienholder can offset bid its lien claim against the purchase price of the property only after all senior lien indebtedness on the particular property has been satisfied.").

13 *See also In re R.L. Adkins Corp.*, 784 F.3d 978, 981 (5th Cir. 2015) ("[Creditor] was in a situation like that of a third lien creditor on real property, who might theoretically credit bid at a foreclosure sale but is highly unlikely to do so because he would have to pay off the senior liens before he could take possession.") (concurring opinion); *In re Simpson Creek Dev.*, Case No. 90-03836-WTB, Slip Op. PP. 17, 24 (Bankr. S.C. 1991) ("In applying the Section 363(k) offset bid provision to the trustee's sale, a junior lienholder can offset bid its lien claim against the purchase price of the property only after all senior lien indebtedness on the particular property has been satisfied.").

14 *See e.g. In re Metaldyne Corp.*, 409 B.R. 671, 679 (Bankr. S.D. N.Y. 2009).

15 *In re GWLS Holdings, Inc.*, 2009 Bankr. Lexis 378 (Bankr. D. Del. 2009).

16 *In re Electroglas Inc.*, 2009 Bankr. Lexis 5527 (Bankr. D. Del. 2009).

17 *See, e.g., In re Boston Generating LLC*, 440 B.R. 302 (Bankr. S.D. N.Y. 2010).

18 *Fire Eagle L.L.C. v. Bischoff (In re Spillman Dev. Group, Ltd.)*, 710 F.3d 299 (5th Cir. 2013).

RPPTL Section Executive Council Meeting

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July 22-24, 2021









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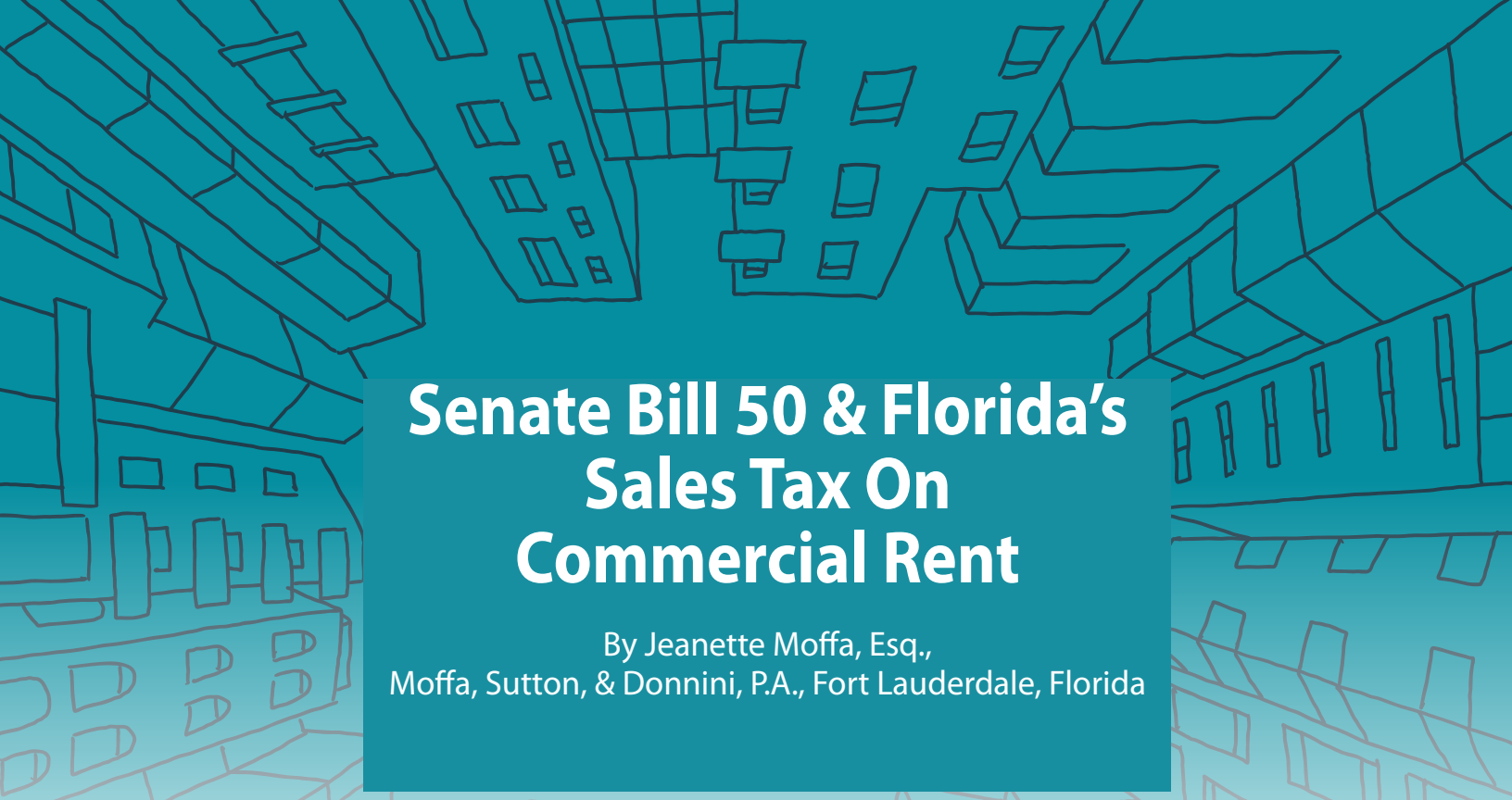








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Senate Bill 50 & Florida's Sales Tax On Commercial Rent

By Jeanette Moffa, Esq.,
Moffa, Sutton, & Donnini, P.A., Fort Lauderdale, Florida

With a worldwide pandemic at the forefront of our minds for almost two years now, it can be easy to miss recent sales tax legislation. Even in normal times, sales tax tends to sit warmly on the backburner. However, since 2018, sales tax jurisprudence has been revolutionizing in a delayed response to the rise of e-commerce. For over a decade, states had been losing revenue as residents shifted their purchases from the brick-and-mortar stores that were required to collect sales tax to the online retailers that did not collect sales tax. After the landmark case *South Dakota vs. Wayfair* authorized states to impose their sales taxes on remote businesses, states jumped at the opportunity to recapture that lost revenue. While most states immediately passed legislation within a year or two, Florida waited all the way until July 2021 to do so. But though the attention tends to focus exclusively on the imposition of sales tax nexus on remote sellers, there is one hidden promise contained within Senate Bill 50 – a sales tax reduction for commercial rent.

Florida's Sales Tax on Commercial Rent

Florida's imposition of sales tax on commercial rent is notorious. As the only state in the country to impose a statewide sales tax on such transactions, Florida blindsides out-of-state business when assessing rental payments. Fla. Stat. Section § 212.031(1)(a), provides that "every person is exercising a taxable privilege who engages in the business of renting, leasing, letting, or granting a license for the use of any real property…" Meanwhile, Rule 12A-1.070, Fla. Admin. Code provides the administrative rules associated with the tax.

While there are many businesses which own the real property upon which they operate, that is certainly not the norm. Furthermore, even in cases where businesses do own the real property upon which they operate, the real property is often held in a separate entity from the operating company for liability or other purposes. The Florida Department of Revenue takes the position that when one business operates in a location owned by another, the monies exchanged between them for rent is taxable no matter whether there is shared ownership of the entities.

Over a three-year sales tax audit period, an assessment of Florida state sales tax *plus* local surtax can add up on high commercial rental payments. Fortunately, while a big money-maker for the state, the unpopularity of the tax has resulted in its gradual reduction since 2018. Currently, the sales tax rate for commercial rentals is 5.5%.

Senate Bill 50

Florida's enactment of economic nexus and marketplace facilitator legislation has opened a new source of revenue for the state. Previously, Florida could only require businesses physically located in the state to register, collect, and remit

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sales tax. Now, an online business in California that ships directly to Florida customers will have to collect and remit tax on those sales as long as their activity in the state meets the established economic nexus threshold. While states vary, Florida has adopted the popular threshold of $100,000 within a calendar year. Therefore, small out-of-state businesses making sales into Florida below $100,000 per calendar year are exempt from collecting tax. Meanwhile, the law also imposes collection obligations on marketplace facilitators that meet the threshold, which means they will have to collect tax not only on their own direct sales, but also on behalf of the third parties who make sales through their platforms.

During the pandemic, an enormous number of Florida residents required unemployment assistance, depleting the Unemployment Compensation Trust Fund. Therefore, Senate Bill 50 aims to use the funds from remote sellers to replenish the fund. After a painful economic year for Florida residents, Florida is making up for the losses from out-of-state businesses. However, it will ultimately be the Florida consumer who is paying more tax (in fact, the tax they always should have been paying but likely never did).

If Florida residents are disappointed that they can no longer get away with making online purchases without being charged tax, they do have a light at the end of the tunnel. Once the Unemployment Compensation Trust Fund is replenished, the state sales tax on commercial rent will be reduced from 5.5% all the way down to 2%. The implementation of this reduction will occur on the first day of the second month after Florida's unemployment compensation trust fund has been replenished. Currently, the hopes are that this will occur in the next 18-36 months, so the tax reduction may be in our near future!

How does the Department assess sales tax on commercial rent?

Business A has been in operation since 2005 and exclusively sells downloadable software, which is not currently subject to Florida sales tax. As they have no taxable income, they decide not to register with the Florida Department of Revenue. Business A rents office space in a commercial plaza.

The Department of Revenue works with the local county property appraiser to identify the owner of the plaza. A Department of Revenue auditor compares the name of the owner of the commercial plaza with the names of the tenants operating in the plaza. As the names of the operating companies are not the same as the owner of the real property, the auditor issues audit notices to each tenant in the shopping plaza. Essentially, these audit notices say: show us that you pay sales tax on your rent to the landlord or send us a check for tax on your rental amount.

All the businesses in the plaza except for Business A are audited for a three-year period because they are already registered for sales tax purposes as they engage in taxable sales. However, as Business A has never registered with the Department, the auditor issues an audit notice that goes all the way back to the beginning of the business – in 2005! Imagine an assessment on commercial rent going back more than 15 years.

Meanwhile, Business B, the plaza's anchor tenant, is registered with the Department and so is audited for only a three-year period. Business B provides the auditor with their lease agreement, which provides that they will pay only $5,000 per month but will also pay the annual property taxes for the whole plaza on behalf of the landlord. The lease agreement properly states that sales tax is owed on all rent.

The auditor asks Business B for cancelled checks, and Business B happily provides proof that $5,000 in rent plus $350 in sales tax is paid each month. Business B is shocked when they receive an assessment in the mail for sales tax owed on the property tax payments made pursuant to their lease.

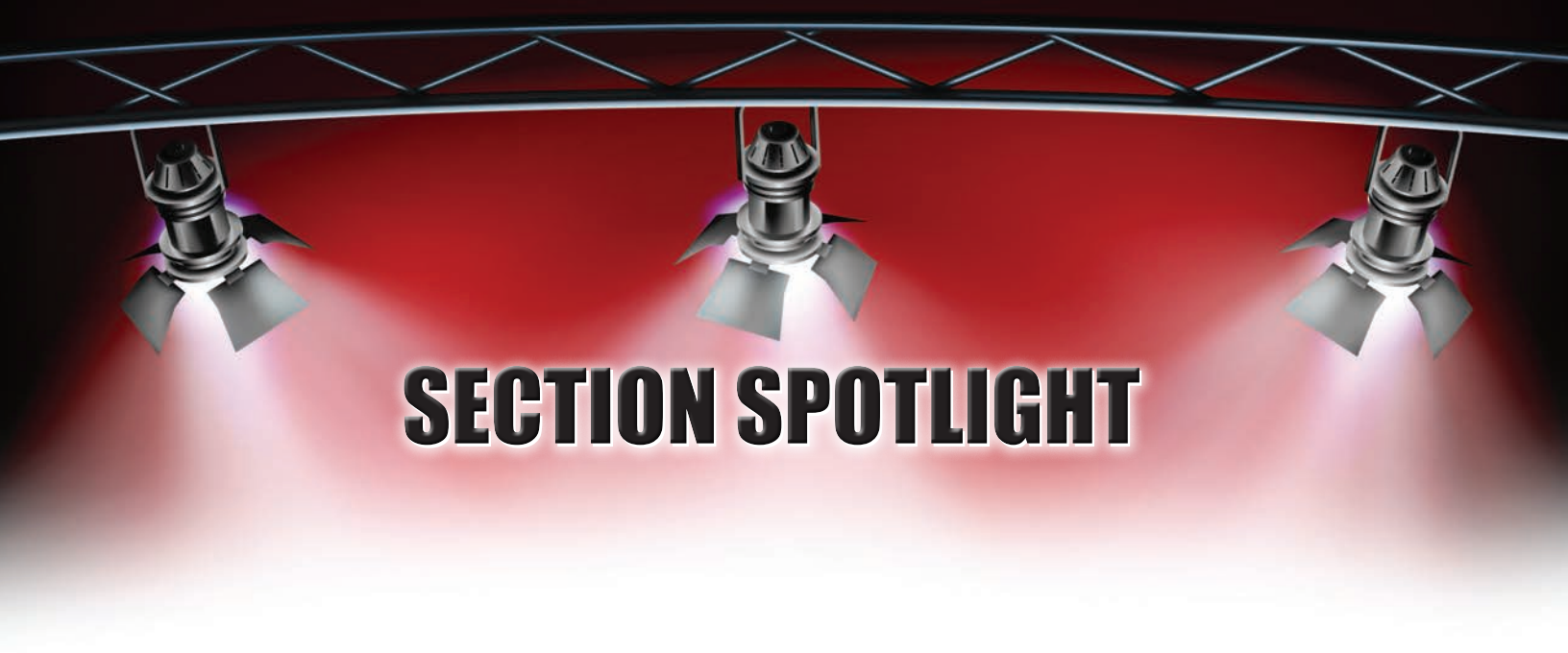
Business C is registered with the Department but has no lease agreement because Business C's owner is a friend of the landlord. Instead, Business C pays the landlord a nominal amount each month in cash and keeps no records of these payments. The auditor, with no records available, imputes rent at fair market value and mails the assessment to Business C.

Assessments of sales tax on commercial rent are extremely easy for the Department to make, especially with information sharing from local county property appraisers. As common as they are, taxpayers are still frequently blindsided by the assessments because the tax does not exist in other states. While it will be a great day for Florida taxpayers when the unemployment trust fund is replenished and the sales tax rate reduces to 2.0% for commercial rentals, the Department can still go back three years to assess tax at higher rates. Therefore, it is important for business owners to understand the extent of Florida's sales tax on commercial rent, the documentation required should they be audited, and the consequences of not being registered with the Department for rent purposes even when the business does not engage in taxable sales.



J. MOFFA

Jeanette Moffa *is an attorney in the Fort Lauderdale office of Moffa, Sutton, & Donnini, P.A. She focuses her practice in Florida state and local tax, with an emphasis on sales and use tax. Jeanette provides SALT planning and consulting as part of her practice, addressing issues such as nexus and taxability, including exemptions, inclusions, and exclusions of transactions from the tax base. In addition, she handles tax controversy, working with state and local agencies in resolution of assessment and refund cases.*



Annual Section Awards

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

Each year during the Annual Convention, the Executive Council of the Real Property, Probate and Trust Law Section recognizes outstanding contributions of Council members by presenting a number of awards. This year at the JW Marriott on Marco Island, eight (8) Section members were recognized for their outstanding achievements, based on recent contributions or, in the case of two of the awards, to acknowledge many years of service. ActionLine is pleased to recognize the Section awards and the council members who received these awards.

The JOHN ARTHUR JONES ANNUAL SERVICE AWARD is presented annually to one or two Section members who rendered dedicated and significantly outstanding service to the Section, and its varied programs, throughout the current year. In selecting the recipient of this annual award, the Section considers both the character and magnitude of the service furnished by the nominee throughout the year, and particular emphasis is given to the benefits which accrue to the Section and the lawyers of Florida as a result of such service. John Arthur Jones, past chair of the Section, embodied the outstanding service recognized by this Award. The name "John Arthur Jones" is synonymous with the term "Section Service."

This award went to Nicklaus Curley and Brian Hoffman. Nick, who was admitted to the Florida Bar in 2010 after graduating from Stetson University College of law, is a shareholder at the Gunster firm. Brian, a graduate of the University of Mississippi School of Law in 2002, practices in Pensacola with the firm of Carver, Darden, Koretzky, Tessier, Finn. Brian is Board Certified by the Florida Bar in Real Estate law and is a former Fellow of the Section (2012-2014 class).

The RISING STAR AWARD is given to members of the Real Property, Probate and Trust Law Section who demonstrate the potential for future Section leadership through their active participation on Section committees and projects. It may be awarded annually to a member of each of the Real Property and Probate Divisions of the Section who have made significant contributions to the Section.

The Rising Star Award was given to one "up and comer" on the dirt side and one on the death side.

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Jason Ellison was recognized for his contributions in Real Estate and Stacy Rubel for Probate and Trust. Jason practices in St. Petersburg with Ellison & Lazenby. Jason is a 2007 graduate of the Stetson University College of law and a graduate of The Florida Bar's Leadership Academy Fellows program (2014-2015 class). Jason is Board Certified by the Florida Bar in Real Estate law. Stacy, a 2010 University of Florida law graduate, and Section leadership fellow graduate (2015-2017 class), practices in Coral Gables with the Virgil Law Firm.

The AT LARGE MEMBER OF THE YEAR AWARD recognizes the "outstanding at-large member of the Executive Council who has provided the highest level of service in assisting the Section with its needs."

This award went to Rebecca Bell from Port Richey. Rebecca practices in the area of wills, estates and trusts. She is another Stetson University College of Law graduate (1999) and is Board Certified by The Florida Bar in Elder law. She practices with the Delzer, Coulter & Bell firm.

The ROBERT C. SCOTT MEMORIAL REWARD was established in 1985 by the Section to memorialize the memory and many extraordinary accomplishments of Robert C. Scott. At his death in 1982, Robert C. Scott was a dedicated member and Past Chair of the Section whose distinguished practice was primarily centered in Palm Beach County. His many contributions included development of the Florida Association of Realtors – The Florida Bar Accord and acceptance of the initial Realtors – Florida Bar approved Contract For Sale and Purchase of Real Estate. Even though he had completed his outstanding Chairmanship of the Section in 1973, Mr. Scott continued his tireless effort on behalf of the Section and the lawyers of Florida until his death, he was faithful in his attendance at Section meetings and participated in the Section programs, and he never overlooked the opportunity to advance the objectives of the Section. This Award is given in recognition of Mr. Scott's many years of untiring, devoted and valuable service to the Section. While not granted on an annual basis, the award will be granted when the occasion requires to those Section members who best exemplify the devotion and continued service of Robert C. Scott to the Section and its membership.

This year, Section member Howard Payne was recognized for his very many years of service. Howard is a 1959 graduate of Cornell University Law School and practices at the Payne Law Group in Sarasota. Howard is Board Certified by The Florida Bar in both Tax law and Wills, Trusts and Estates law.

The WILLIAM S. BELCHER LIFETIME PROFESSIONALISM AWARD was established in 2003. The award is presented, at the discretion of the Section, to an Executive Council member in recognition of lifetime contributions to the Section, the Executive Council, Florida attorneys, and the public in promoting the highest standards of ethics and professionalism. William S. "Bill" Belcher was a past chair of the Section and devoted many years of service to the Section and its members. He was highly respected for his expertise and knowledge of Florida probate law, and rather than keeping that knowledge and expertise to himself, he regularly shared his thoughts through seminar presentations and through his numerous publications. Bill's professional, civic, charitable, and personal conduct always reflected the highest standards of professionalism and devotion to his profession as an attorney. He graciously and voluntarily shared his knowledge, expertise, ethics, and professionalism with his fellow attorneys. Bill died in 1992. This award is granted to an Executive Council member who best exemplifies the qualities and virtues demonstrated by Bill Belcher during his lifetime of service to the profession.

S. Dresden Brunner, a 1997 graduate from the University of Dayton School of law, has long been a contributing member to the Section. For many years, Dresden was the Chair and Editor-In-Chief of *ActionLine*. The Section has previously recognized Dresden with both the Section's Rising Star Award and the Annual Service Award. Dresden says she was completely surprised by the award. Dresden went on to comment, "To be included with the prior recipients of this award is quite an honor, for I have known them all. I would like to have known Bill Belcher as well. Hopefully, this award will encourage all Section members to strive to emulate Bill Belcher's exemplary service to the profession and to engage others with courtesy, particularly in times when civil discourse may be abandoned." Dresden practices at Dresden Brunner Law in Naples.

The LYNWOOD F. ARNOLD, JR MEMORIAL AWARD was established in 2020 by the Section to memorialize the memory and extraordinary contributions of Lynwood Arnold to numerous general standing committees of the Section. Over many years of dedicated service, Lynwood was a champion for diversity initiatives and inclusivity in the Section. He worked tirelessly on Section mentoring projects for new lawyers and was instrumental in the establishment and success of the Section's Law School Programming and Mentoring Committee. Further, he was incredibly generous with his time and provided leadership at the ground level on many pro bono projects throughout the state. Lynwood's passion for service to his profession and community was contagious and served as model for others.

This year, Johnathan Butler was honored by the Lynwood F. Arnold Jr Memorial award as Johnathan has, in so many ways, picked up on projects that are part of Lynwood's legacy. Johnathan works as a V.P. and Senior Fiduciary Advisory Specialist in Tampa for Wells Fargo. He is a 2000 graduate of the University of Alabama School of Law.

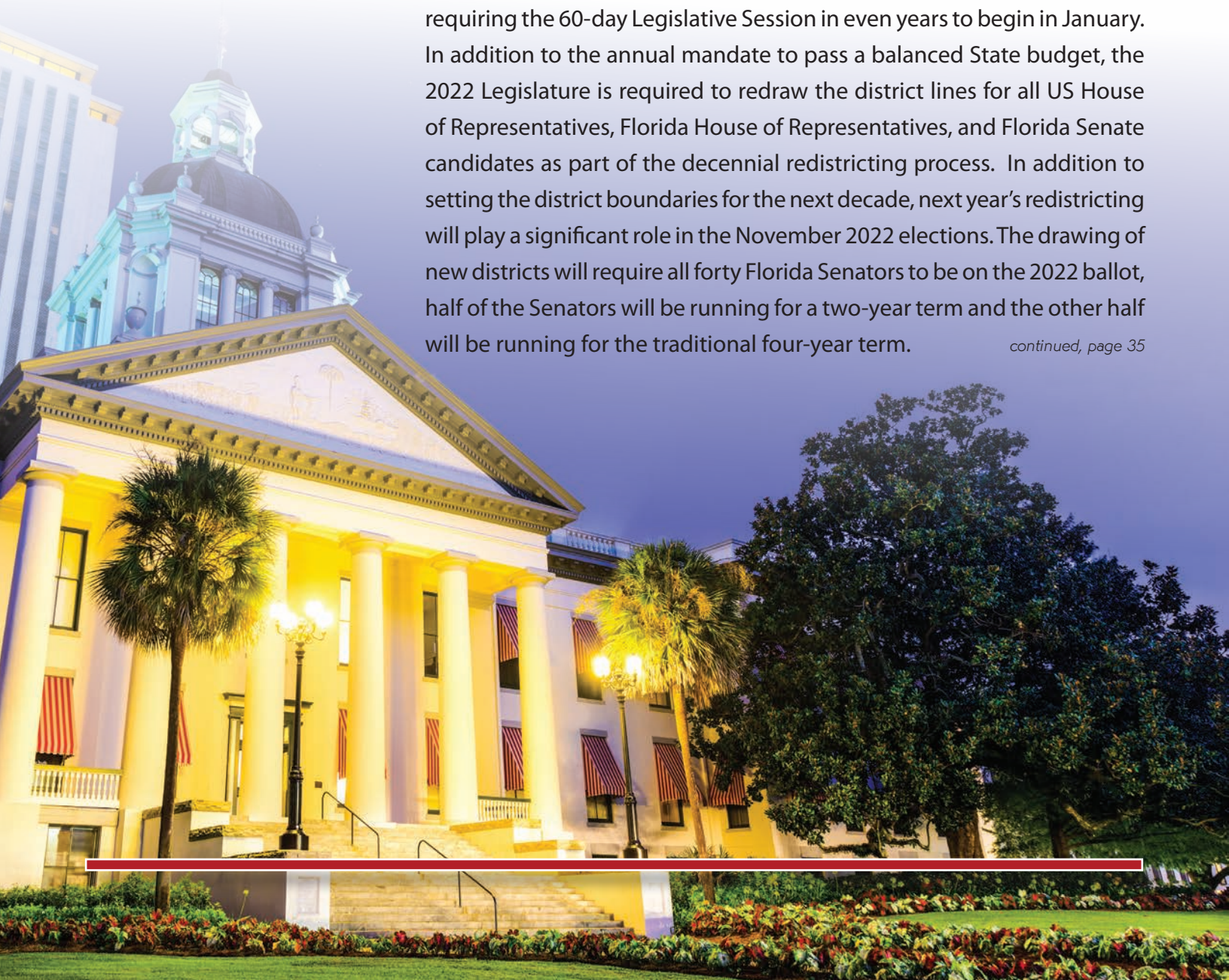
POLITICAL ROUNDUP

2022 Session Preview

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

As the calendar year 2021 draws to a close, the Florida political process focuses closely on 2022. The 2022 Regular Session will be early this year after Florida voters approved a Constitutional amendment in 2018 requiring the 60-day Legislative Session in even years to begin in January. In addition to the annual mandate to pass a balanced State budget, the 2022 Legislature is required to redraw the district lines for all US House of Representatives, Florida House of Representatives, and Florida Senate candidates as part of the decennial redistricting process. In addition to setting the district boundaries for the next decade, next year's redistricting will play a significant role in the November 2022 elections. The drawing of new districts will require all forty Florida Senators to be on the 2022 ballot, half of the Senators will be running for a two-year term and the other half will be running for the traditional four-year term.

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In addition, the 2022 November general election ballot also includes races for Florida's Governor, Attorney General, Chief Financial Officer, Commissioner of Agriculture, and the US Senate seat currently held by Marco Rubio. Some candidates for these statewide elections are already concentrating heavily on their 2022 campaigns.

Special Session Regarding Vaccine Mandates

On October 28, 2021, Florida Attorney General Moody filed a federal lawsuit challenging the federal government's requirement that employees of federal contractors be vaccinated against COVID-19 by December 8th. The lawsuit seeks preliminary and permanent injunctions against the federal mandate.

On October 29, 2021, Governor DeSantis called for the Florida Legislature to hold a Special Session aimed to provide protections for Floridians who have lost their jobs or are having their employment threatened due to vaccine mandates. "Your right to earn a living should not be contingent upon COVID shots," said Governor Ron DeSantis. This Special Session occurred November 15th through 19th, after the writing of this article.

The Governor's proclamation calling for the Special Session directed the Legislature to consider bills to:

- Protect current and prospective employees against unfair discrimination based on COVID-19 vaccination status and ensure robust enforcement for this protection;
- Ensure educational institutions and government entities are prohibited from unfairly discriminating against current and prospective employees, students, and residents based on COVID-19 vaccination status;
- Ensure employees improperly denied employment based on COVID-19 vaccination status can be eligible for reemployment benefits and, if needed, ensure employees injured by a COVID-19 vaccination taken pursuant to a company policy are covered by workers' compensation;
- Appropriate a sufficient amount of funds to investigate complaints regarding COVID-19 vaccination mandates and to take legal action against such mandates, including mandates imposed by the Federal Government;
- Clarify the Parents' Bill of Rights, Chapter 1014, Florida Statutes, vests the decision on masking with parents, not government entities, and that schools must comply with Department of Health rules governing student health, including rules ensuring healthy students can remain in school;
- Limit mandates by school districts on students or employees regarding COVID-19 and related mitigation measures;
- Provide adequate enforcement mechanisms to ensure Florida law is followed, and the rights of parents are honored;
- Direct the State to evaluate whether it should assert jurisdiction over occupational safety and health issues for government and private employees;
- Repeal the authority for the State Health Officer to order forced injections or vaccinations under Section 381.00315, Florida Statutes, originally enacted in 2002; and
- Create as necessary public records exemptions related to complaints and investigations described herein.

While it initially appeared the Governor may not have given advanced notice of the Special Session to Legislative leaders, the Florida Senate President and Speaker of the House quickly issued a joint statement supporting the Governor's proclamation. The joint statement provided:

> "Over the last two years, Floridians have watched the freedoms of our friends and relatives in other states get stripped away one at a time. We will not stand by as the Biden Administration imposes an illegal and unconstitutional nationwide vaccine mandate that robs the American people of the dignity of work."
>
> "Under the leadership of Governor DeSantis and the Florida Legislature, Florida has been a beacon of hope, and we intend to keep it that way. We look forward to working with Governor DeSantis and our colleagues to craft, debate, and pass thoughtful legislation that keeps Florida open for business and prioritizes people, parents, and businesses over government. "
>
> "During the special session, we will do everything within our power as a state to protect Floridians from the unconstitutional, un-American, and morally reprehensible overreaches on the part of the federal government."

At the time of writing this article, the details of the legislation to be considered during the Special Session had not been released. However, it's likely, according to the Governor's request, separate bills will be filed and considered focusing on prohibiting Florida's governmental entities from mandating the vaccination of public employees, prohibiting schools from mandating the masking of students, providing protections for individuals employed by private companies mandating vaccines; and potentially removing liability protections for such private companies mandating employee vaccines.

Redistricting

Every decade after the National census, the Florida Constitution directs the Legislature to redraw district boundaries for the Florida Senate, Florida House of Representatives, and US House of Representatives. In addition to passing a balanced

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Political Roundup: 2022 Session Preview, from page 35

state budget, redistricting will be the Legislature's second Constitutionally required action during the 2022 Regular Session starting January 11th. Legislative redistricting is designed to adjust the district boundaries to account for uneven growth rates in different parts of the state.

From 2010 to 2020, Florida grew from a population of 18.8 million to 21.5 million (growth of 2,736,877 residents). This population growth resulted in Florida adding one US Congressional seat for a total of 28 after the November 2022 elections.

Overall, the redistricting process is unique from both a procedural and legal standpoint. Any person may draw and submit their own proposed maps through the statewide website – floridaredistricting.gov. This website provides public access to the same data and applications used by the Legislature to adopt the new boundaries.

Legally, the Florida Constitution initially requires

1. districts shall not be drawn with the *intent* to favor or disfavor a political party or incumbent;
2. districts shall not be drawn with the *intent or result* of denying or abridging the equal opportunity of racial or language minorities;
3. districts shall not be drawn with the *intent* to diminish minorities' ability to elect a representative of their choice; and
4. districts must consist of contiguous territory.

In 2012, the Florida Supreme Court provided guidance regarding how it would determine the Legislature's intent: "the inquiry for intent to favor or disfavor an incumbent focuses on the shape of the district in relation to the incumbent's legal residence, as well as other objective evidence of intent," such as "the maneuvering of district lines in order to avoid pitting incumbents against one another in new districts or the drawing of a new district so as to retain a large percentage of the incumbent's former district." *In re Senate Joint Resolution of Apportionment 1176*, 83 So. 3d 597 (Fla. 2012). Once these tier 1 standards are met, the Florida Constitution, as amended in 2010, next requires districts be drawn

1. as nearly equal in population as is practicable;
2. compactly as measured visually and mathematically; and
3. where feasible, to utilize existing political and geographical boundaries such as county boundaries, city boundaries, rivers, interstates, and state roads.

Once the Legislature adopts new maps for the Florida Senate, Florida House, and US House by joint resolutions, then within fifteen days, the Florida Attorney General petitions the Florida Supreme Court to determine the validity of the plans. Then within thirty days, the Florida Supreme Court must enter its judgment. If the Florida Supreme Court rejects the plans, the Governor must reconvene the Legislature for a 15-day extraordinary session. If the Legislature does not adopt new plans during that timeframe, then the Florida Supreme Court makes the apportionment. If the Legislature adopts new plans during the extraordinary Session, which are later rejected by the Florida Supreme Court again, then the Florida Supreme Court makes the apportionment.

Regardless of the outcome of redistricting in 2022, the fascinating process of drawing representative boundaries and following the legal procedures is one any Floridian can participate in every decade.

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Budget

Going into the 2021 Regular Session, economists projected the State was facing a $5.4 billion general revenue shortfall for the two years July 2020 – June 2022 due to the pandemic. Thankfully, however, updated general revenue estimates in April and August resulted in a much brighter economic picture.

State economists now project general revenue collections in July 2020 – June 2022 will significantly exceed pre-COVID forecasts for the same periods. The result is a sharp "V" shaped recession with the most negative impacts occurring through March to June 2020. This forecast suggests Florida bounced back with a faster than expected reopening of the economy and a stronger than anticipated response to the federal stimulus packages.

Before the pandemic, Florida was expected to collect $34.4 billion in general revenue in 2020-2021 and $35.7 billion in 2021-2022. Instead, the state actually collected $36.3 billion in 2020-2021 (an increase of $1.8 billion or 15.7% growth over 2019-2020 collections) and is projected to collect $36.9 billion in 2021-2022 (an increase of $1.2 billion or 1.7% growth over 2020-2021 collections). Additionally, since the latest August forecast, actual revenue collections have outpaced that estimate by $770 million in August and September alone.

In addition to State revenue collections rebounding from the pandemic more quickly than anticipated, federal pandemic relief funds will also be available to the 2022 budget writers. The federal relief funds included $5.8B provided as part of the CARES Act and $9.8B provided as part of the American Rescue Plan. Of these federal amounts, not all was spent by the Legislature in the current State fiscal year. Ultimately, this better-than-expected revenue outlook should make it easier for the 2022 Legislature to pass a balanced and on-time budget, as the current estimates suggest the State should have $8 billion in unused general revenue at the end of the current fiscal year plus an additional $2.7 billion in projected reserve funds, which all or a portion thereof will be available for one-time use in next year's State budget.



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.*

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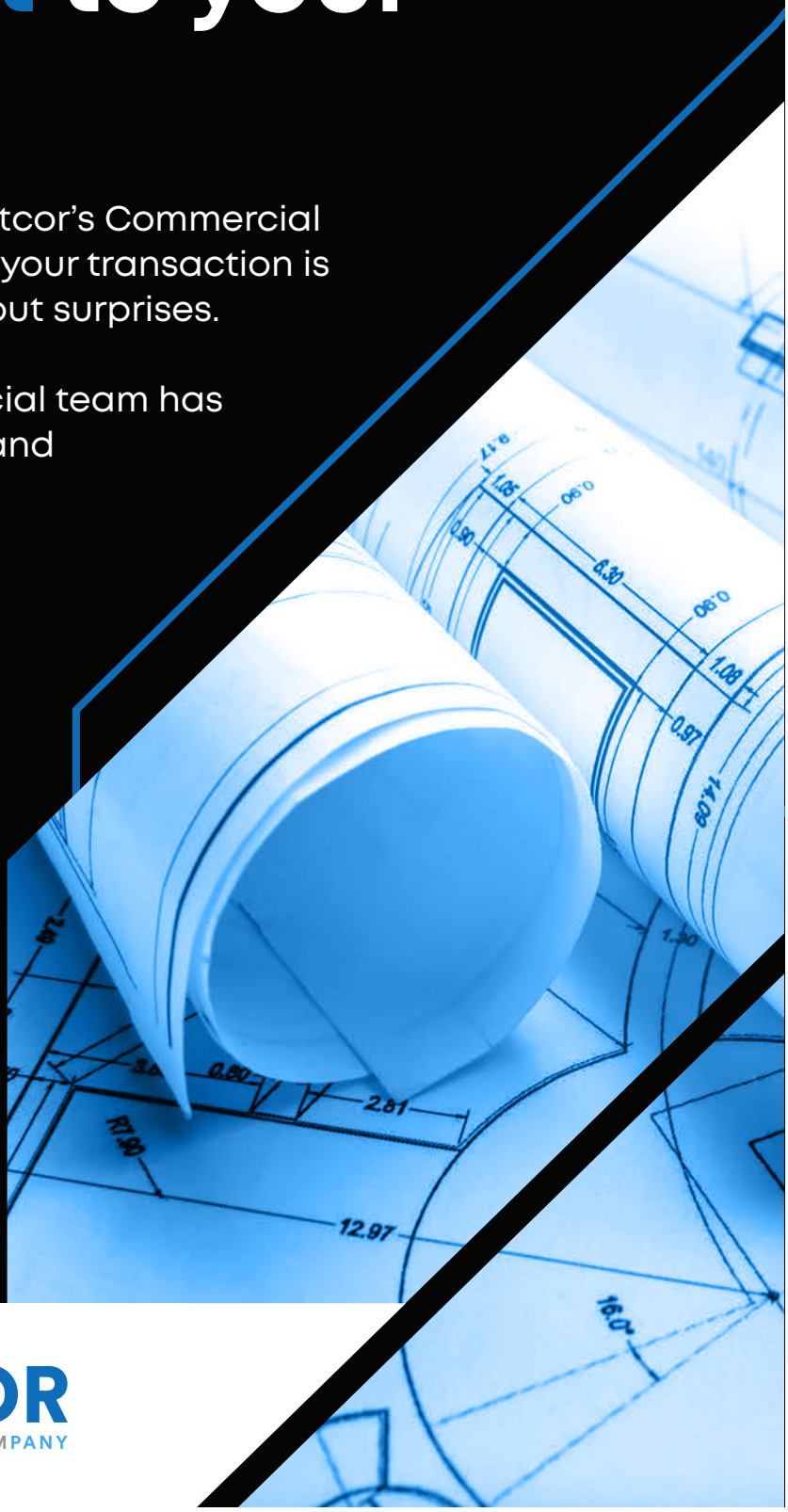
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Roundtable

Highlights of the Meeting of the RPPTL Section

REAL PROPERTY DIVISION

Saturday, July 24, 2021

The Breakers, Palm Beach, Florida

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

Thank you to the Roundtable Sponsors:

Fidelity National Title Group

The Director of the Real Property Law Division, S. Katherine Frazier, called the meeting to order at 8:30 a.m.

Sponsor Announcement.

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

Recognition and Introductions.

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

Highlights of Hybrid Marco Island Meeting.

There was a motion to approve the highlights of the June 5, 2021 Real Property Roundtable meeting. The motion passed and Colleen Sachs, Michelle Hinden, and Jin Liu were thanked for their work in compiling the roundtable meeting highlights.

Information Items:

CLE Report.

Lee A. Weintraub met most committee chairs to discuss ramping up CLE productions. Each substantive committee is expected to produce 2 CLEs per Bar year, which should be at intermediate level and advanced level. In addition, Lee is working on populating a database of entry level substantive material. Lee will continue to meet the rest of the substantive committee chairs.

Legislative Report.

Wilhelmina Kightlinger, as the new co-chair of the Legislation Committee, reported that if any committee is thinking of legislation, they should be proactive, and reach out to other sections and committees of similar interest. There will be a special 1-hour legislative training scheduled for September. Each committee should appoint a legislative liaison. January is the beginning of the new legislative session. Wilhelmina will start to request ideas soon.

Katherine emphasized that Wilhelmina needs each committee's help and reiterated the request for each committee to have a liaison for CLE, technology, publications, and legislation. We are ramping up the use of liaisons. Katherine is still missing names of liaisons from some committees, so she requested that information again.

Committee Reports:

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

Ashley McRae reported that this year's Attorney Banker Conference will be held on Friday, February 25, 2022. Ashley visited the venue for the upcoming Conference on Wednesday, and it will be a great venue. They have planned some very interesting subjects, including discussion on what will come out of the Surfside tragedy. She may ask for help with speaking and getting bankers to attend.

Commercial Real Estate –Jennifer J. Bloodworth, Chair; E. Ashley McRae, Eleanor W. Taft, and Martin A. Schwartz, Co-Vice Chairs:

Jennifer J. Bloodworth reported on a very good presentation at their meeting on Oil, Gas and Mineral rights ("OMG OGM"). The discussion did not center on title insurance issues, but more on practical tips on how to value and deal with properties that contain OGM rights. John Manes, President of Mineral Valuation Specialists, which is located in Arizona, was one of the panelists. John has done a lot of OGM valuation in Florida. Ellie Taft covered the "real life" analysis of how to approach OGM from the business perspective.

Jennifer also reported that the committee was looking at estoppel letters but now has backed off on that effort because Florida Land Title Association (FLTA) has run with that issue and is preparing proposed legislation.

Condominium and Planned Development – William P. Sklar and Joseph E. Adams, Co-Chairs; Shawn G. Brown and Sandra E. Krumbein, Co-Vice Chairs:

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Peggy A. Rolando reported that the committee recently conducted a survey with the help of Alex Dobrov, the committee's Co-Vice Chair and Shawn G. Brown. The Survey concerned the attitudes on the expansion of liening for fines. They found that the majority of the committee members are fine with the status quo. She admitted that the committee does need to clean up the applicable statute, but there was not an overwhelming push to lien for fines. She further reported that the committee is working on CLEs.

Peggy further reported that, in light of the tragedy in Surfside, the committee has been doing a lot of soul searching because the committee consists of attorneys who represent developers, community associations, condominium associations, co-ops, and HOAs. She stated that, early on, after the building collapse at Surfside, Joe Adams, Bill Sklar, and herself quickly decided that the committee needed to make sure that there was an informed, sensible, and rational response and that there was a means of collecting a lot of information and insights from the industry. The committee reached out to several parties and put together a task force so that it can gather information and act as a resource to the committee, the Florida legislature, the Governor, and the Division of Condominiums, Timeshares and Mobile Homes. The committee appointed Bill Sklar as the Chair of the Task Force. She further reported that, in addition to Bill Sklar, Joe Adams, and herself, the following persons were also appointed to the Task Force: Chris Davies, Joe Rodriguez, Yvette Blanch, and Michael Gelfand. She reported that the Task Force has had three meetings.

Bill Sklar reported that 30 days ago when the horrific Surfside tragedy occurred, it was the third worst building collapse tragedy in U.S. history as far as loss of life, with the first two being the Towers and Oklahoma City. The questions are: how did this happen and why did this happen? He explained that this Task Force is advisory in nature. The Task Force is not writing legislation. He further reported that the Task Force will not be investigating the building collapse— it is not qualified to do that. Further, this is not a knee jerk reaction. He reported that the Task Force has set a very aggressive schedule. The goal is to release the Task Force's reports in late September early October.

Bill Sklar emphasized that the Task Force is not rewriting the building codes in Florida, which is probably the second most stringent code in the U.S. (after California). The Task Force's investigation is to be fact and evidence based. The Governor and the leaders of the Florida legislature have requested this. The Task Force is looking at tough issues, such as issues of governance, issues of funding, and issues of human nature. The Task Force is taking, by invitation, information from experts in insurance, structural engineering, building officials, etc. The Task Force is looking at the 40-year recertification standard in only Miami Dade and Broward County and whether there should be a statewide standard. He commented that the Division of Condominiums, Timeshares and Mobile Homes has been very helpful. He commented that the Division delivered within 48 hours 2,300 pages of information, which the Task Force went through. These documents contained information on every condominium.

Bill commented that it is likely that the vast majority of these condominiums were well governed, well operated, and well maintained and that it works. He also commented that the Task Force also wants to be mindful that these board members are acting as volunteers. He posed the following questions: Why should they serve? Should it be in their discretion whether to invest in their building? Should it be in their discretion to determine reserves for this? He commented that the Task Force has met 3 times already and the Task Force continues to meet weekly. He commented that the Task Force is looking forward to reporting to everyone, including the Section, by the next Executive Council Meeting. Bill Sklar commented that he had to hand it to Peggy, Joe, Bob Swaine, the leadership of the Bar, and others for their immediate support. To the credit of this Section and to the credit of the Bar, the Task Force believes that, out of this horrific tragedy, something good has to come out of it for the protection and safety of life. He commented that no one should go to sleep at night wondering whether they are going to wake up because their building was not maintained—so we have to do what we can to ensure that this does not happen again.

Condominium and Planned Development Law Certification Review Course – Jane L. Cornett, Chair; Christene M. Ertl, Vice Chair:

Allison L. Hertz reported that the committee is excited to have its fourth course, which is great for a new certification area. She reported that the committee's next course will be in February 2022, and the committee is hoping it will be live in Orlando. She reported that the committee has some speakers lined up, and there will be some new speakers, such as recent test takers who would present on their experience. Also, the committee has updated its website.

Construction Law – Reese J. Henderson, Jr., Chair; Sanjay Kurian and Bruce D. Partington, Co-Vice Chairs:

Reese J. Henderson, Jr. reported that they had a good meeting and discussed changes in property insurance cases. Their committee membership continues to grow and is now up to 500 members. The committee has a monthly CLE meeting, which averages about 60 members on those calls. The committee has done two webinars last year, which were added to the Florida Bar database. If anyone is interested in the monthly CLE meetings, they can email Reese or his vice chairs.

Construction Law Certification Review Course – Melinda S. Gentile and Elizabeth B. Ferguson, Co-Chairs; Gregg E. Hutt and Scott P. Pence, Co-Vice Chairs:

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Mindy Gentile reported that they had a good course last year and are planning for next year.

Construction Law Institute – Jason J. Quintero, Chair; Deborah B. Mastin and Brad R. Weiss, Co-Vice Chairs:

Reese J. Henderson, Jr. reported that they had a good CLI this year, which marked the 15th annual institute. The 2020 CLI was the last in-person event of the entire Bar right before COVID hit. For this year, CLI was moved from March to May and it was held in a hybrid model. They are working on the final numbers but the institute was very well received. For anyone who is interested in construction law, this is a great review course. Reese acknowledged Jason J. Quintero and his committee for producing such great results under very difficult circumstance.

Development & Land Use Planning – Julia L. Jennison and Colleen C. Sachs, Co-Chairs; Jin Liu and Lisa B. Van Dien, Co-Vice Chairs:

Colleen C. Sachs reported that the Development & Land Use Planning Committee had a joint meeting with the Commercial Real Estate Committee on Thursday, in which a presentation on OGM was held. The committee has some great things planned for this coming year, which should be of interest to not only committee members but also people of other committees. Scheduled for the Ft. Meyers meeting is a presentation on large scale mixed used development. For the Tallahassee meeting, we will have a panel of regulatory agencies to discuss trends and cutting-edge development issues. For the Hawks Cay meeting, we will have a presentation on development of vertical subdivision.

Insurance & Surety – Michael G. Meyer, Chair; Katherine L. Heckert and Mariela M. Malfeld, Co-Vice Chairs:

Michael G. Meyer reported that they had a great joint meeting with the Construction Law Committee on Monday, July 19. The committee had a meeting almost every month of the Bar year except when there was a scheduling conflict. The committee plans to discuss insurance coverage and prior notice issues at their meeting next month.

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

Alan reported that Jim Russick asked that he remind everyone that the ALTA 2021 Forms are coming out. He further reported that, on Wednesday a subcommittee met on payoff statements. The problem is that the payoff statements do not state that they are going to release the mortgage. Also, what he learned was that, in some cases, the closing is held, the payoff amount is sent, the buyer gets keys to the house and moves in, and then the existing lender claims there was a balance not paid. The existing lender then refunds the whole mortgage payoff and then requires additional interest payments. He

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commented that the subcommittee is looking at a statute in Wisconsin that seems to be working very well. He further commented that they recently received a claim on this, so it is a real problem that needs to be addressed.

Real Estate Certification Review Course – Manuel Farach, Chair; Martin S. Awerbach, Lloyd Granet, Brian W. Hoffman, and Laura M. Licastro, Co-Vice Chairs:

Manuel Farach reported that the course was virtual this past year and the committee received some great remarks from the surveys. He further commented that this year, the committee had an afternoon where the speakers came back and summarized certain topics. This follow-up afternoon presentation went really well. They broke it up into two time spots. They are looking at next year, which will be live, and they are bringing back the popular speakers' dinner.

Real Estate Leasing – Brenda B. Ezell, Chair; Christopher A. Sajdera and Kristen K. Jaiven, Co-Vice Chairs:

Katherine congratulated Brenda Ezell on her contributions to the Legislative Update. Brenda thanked the speakers and commented that they were amazing. She thanked the speakers and all of the volunteers who served on the committee.

Brenda reported for the Leasing Committee that there was nothing to report, but that her Co-Chair, Christopher A. Sadjera, will be providing the report going forward.

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

Rich McIver reported that the committee had a great meeting on Thursday. They had a lively discussion on Uniform Commercial Real Estate Receivership Act (UCRERA), which took effect on July 1, 2020. Jason Ellison led the discussion. We had issues of provisions in the UCRERA allowing receivers to sell the property before judgment—is it an appealable order and is title insurable? The committee is still trying to work on that issue.

The committee also discussed the *Palmero* case. Bill McCaughan handled a case involving a reverse mortgage and an attempt to overturn an erroneous decision of a 3rd DCA case. Borrower died, which constituted a default on the note. Surviving spouse signed the mortgage but did not sign the note. Court held that in 120 years of history, in the event of a conflict between a note and a mortgage, the note controls. The committee also discussed a FDCPA case out of 11th Circuit, involving a collection company sending out notices held to be FDCPA violation. There may be ramification of mortgage companies sending security companies to lock doors.

Real Property Litigation – Michael V. Hargett, Chair; Amber E. Ashton, Manuel Farach and Christopher W. Smart, Co-Vice Chairs:

Michael V. Hargett reported that the committee spent 40 minutes discussing policy issues relating to whether senior lenders should be obligated to respond to foreclosures filed by junior lenders. Purchasers of the junior mortgage (a BFP) filed a foreclosure and senior lenders were properly joined. The question was whether senior lenders have to respond. The committee finished the discussion without deciding any legislative proposal. One issue to consider is how to tax junior lenders who filed lawsuits for reimbursement of senior lenders' costs.

The committee also had a discussion on the lis pendens statute, led by Amber E. Ashton, concerning insuring property when a lis pendens is terminated.

Another Subcommittee is focused on homestead issues. It stemmed from counties trying to increase tax revenue and using electronic search firms to search home ownership status of residents in other states. Because a Florida resident also owns a second home in another state, some counties now strip their Florida homestead benefits and even go back 10 years to take away homestead benefits.

The subcommittee focuses on collaborative law between real property and probate litigation. There is some momentum of this effort at the larger Florida Bar level. A key point to remember for this legislative session is case law interpretation of uniform law in other states—how broadly they take law firm disqualification in other states. Second, collaborative law is a contract measure to alternative dispute resolution. We are pushing the collaborative law group out of Chicago.

Real Property Problems Study – Lee A. Weintraub, Chair; Adele I. Stone, Susan K. Spurgeon and Anne Q. Pollack, Co-Vice Chairs:

Anne Q. Pollack reported that the committee looked at problems that do not fit in other committees' agendas. Examples of some issues the committee is working on include: Deb Boyle is working on mobile home title; Susan Spurgeon is working on litigation bully issues; Chris Smart is working on revocable transfer of deeds to help people who are in possession and pay taxes but do not have title. At the committee meeting, Amber Ashton discussed some new fraud schemes, such as fraudulent notary. Lastly, Ellie Taft realized that U.S. Post Office rules do not allow them to do return receipts, even though some offices still do that. There are a lot of statutes that require return process. We will take a look at this issue, so people can count on that.

Residential Real Estate and Industry Liaison – Nicole M. Villarroel, Chair; Louis E. "Trey" Goldman and James A. Marx, Co-Vice Chairs:

Nicole M. Villarroel reported that the committee held an early meeting on Thursday. Kristen Jaiven is the newest co-vice chair of the Committee. They discussed how title companies handle buyer-exclusive agreements. At the committee meeting, they had an open discussion on the Surfside tragedy and how it will affect the closing process and due diligence. They also had the

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mayor of Boca Raton to discuss their new proposed 30-year inspection requirement for Palm Beach. The committee will have a joint meeting with the Title Standards Committee and will have the Seminole County property appraiser speak.

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:

Leonard F. Prescott reported that the committee had a new slate of leaders as there were two new vice chairs, Christopher W. Smart and Michelle G. Hinden. He also introduced the committee's dedicated legislative liaison, James C. Russick. He reported that a portion of the committee meeting was a discussion regarding the FR/Bar Contract, which will be addressed at the Executive Council meeting. He elaborated that the Title Insurance Committee previously requested that paragraph 9 of the FR/Bar Contract address the issue of the payment and the charging of closing service fees. He commented that this is a problem out on the market, and so the Title Insurance Committee looks forward to working on this going forward. He reported that there is consideration of extending data calls from annually to every 5 years. He reported that the committee decided not to take any action on this proposal at this time. He also reported that the committee is looking at a legislative proposal, which would require clerks to record Petitions of Administration to avoid any issues with heirship property in connection with any title transactions which occur after the applicable probate records have been destroyed. He also reported that the committee discussed the tragedy of the Champlain Towers and how it could impact title.

Title Issues and Standards – Rebecca L.A. Wood, Chair, Robert M. Graham, Brian W. Hoffman and Karla J. Staker, Co-Vice Chairs:

Rebecca Wood reported that this is her second year serving as chair of the committee. She expressed her appreciation for all of her members' hard work. She introduced the returning co-vice chairs, the secretary, and all of the liaisons for the committee. She reported that the committee has four working subcommittees currently reviewing Title Standards for Plats, Trusts, Bankruptcy, and now MRTA. She reported that before the committee's next meeting, the committee was working on reviewing the Standard and thinking of potential CLE opportunities. She reported that the committee has one CLE on closing transactions when probate is an issue and they are also focusing on the Chapter 5 Title Standards. She reported that the committee has a lot of CLE credit opportunity at its meetings, including the last meeting, where Chris Smart presented, and in November, where the Property Appraiser for Seminole County will speak.

American College of Real Estate Lawyers (ACREL) Liaison – Martin A. Schwartz and William P. Sklar, Co-Chair:

Nothing to report.

American College of Construction Lawyers (ACCL) Liaison – George J. Meyer, Chair:

Nothing to report.

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

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Roundtable

Highlights of the Meeting of the RPPTL Section

PROBATE AND TRUST DIVISION

Saturday, July 24, 2021

The Breakers, Palm Beach, Florida

Prepared by Lilleth Bailey, Esq. Fort Lauderdale, Florida

Thank you to the Roundtable Sponsors: Guardian Trust and Stout Risius Ross Inc.

The Director of the Probate and Trust Law Division, John Moran, called the meeting to order at 8:30 am.

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

Legislation Committee Report

Legislative Committee – Larry Miller, Chair:

Larry Miller announced that Vice Chairs Nick Curley and James Grier Pressly Jr. would be assigned to different substantive committees to assist with legislation and drafting. The Legislative Session begins in January, and therefore the process is fast-tracked this year and will move quickly.

The two legislative positions that the Section is preparing to send to the Board of Governors and the Legislature are: (1) a proposed amendment to Fla. Stat. § 733.705(5) to codify case law regarding satisfying independent action requirements where the Personal Representative is timely substituted into a pending action and (2) a proposed amendment to Fla. Stat. § 201.02(4) (documentary stamp tax).

CLE Report

Sancha Brennan, Co-Chair of the CLE Committee, gave the report. It was a record-breaking year for CLEs because of the participating speakers. The Attorney Trust Officer Conference took place August 19-21, 2021, and had 256 in-person participants and 77 virtual participants. The Legislative Update this year had over 200 online participants. There is an online library that has programs and materials available. Charitable Law will be offering a webcast series.

Action Items

Probate Law & Procedure Committee – Travis Hayes, Chair:

The action item proposes an amendment to Fla. Stat. § 733.705(5) (Payment of and objection to claims) to codify existing case law such that the requirement to bring an independent action is satisfied if, within 30 days of the filing of an objection to the claim: a motion to substitute the fiduciary is filed in the pending action; an order substituting the fiduciary is entered in the pending action; such other procedure as may exist is initiated to substitute the fiduciary in the pending action, or the timely filing of an arbitration is made when the decedent has entered into an agreement during lifetime which provides for mandatory arbitration relating to the claim, or arbitration is required by the decedent's will or trust.

Estate & Trust Tax Planning Committee – Robert Lancaster, Chair:

Rob Lancaster and Denise Cazobon presented a motion to amend Fla. Stat. § 201.02(4) (documentary stamp tax) to create express statutory authority for existing Florida Administrative Code Rule 12B-4.013(28) regarding transfers of real property interests to or from trustees of written trusts under Chapter 689, including revocable trusts. The committee sought to find that such a legislative position is within the purview of the RPPTL Section; and whether to expend Section funds in support of the proposed legislative position.

Information Item

Trust Law Committee – Matt Triggs, Chair:

Matt Triggs proposed amendments to Fla. Stat. § 736.0705, Fla. Stat. to clarify that a trust instrument may, subject to minimum notice requirements, provide an additional method by which a trustee may resign.

Probate and Trust Division Committees:

Ad Hoc Electronic Wills Committee – Angela Adams, Chair:

Angela Adams reported on additional possible tweaks to Fla. Stat. § 117.201 regarding certain definitions as they relate to remote online notarization or witnessing. A straw poll was taken to determine who was in favor of pursuing the amendment. There was a 50/50 split, and the decision was to wait until the next probate roundtable to revisit the issue.

Ad Hoc ART Committee – Alyse Reiser Comiter, Chair; Jack A. Falk and Sean M. Lebowitz, Co-Vice Chairs:

The Committee did not meet as they previously approved

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their proposed legislation. They talked to the Estate and Trust Tax Law Committee and the Probate and Procedure Committee and got feedback. Their goal is to meet again and come back at the next meeting with an information item.

Ad Hoc Guardianship Law Revision Committee – Nicklaus J. Curley, Stacey B. Rubel, and David C. Brennan, Co-Chairs; Sancha Brennan, Vice Chair:

The Committee recently published an updated draft of the revised statutes incorporating the Elder Law comments and Bill Drafting comments.

Ad Hoc Study Professional Fiduciary Licensing Committee – Angela McClendon Adams, Chair; Yoshimi Smith, Vice Chair:

No Report.

Ad Hoc Study Due Process, Jurisdiction & Service of Process Committee – Barry F. Spivey, Chair; Sean W. Kelley and Shelly Wald Harris, Co-Vice Chairs:

No Report.

Asset Protection – Michael Sneeringer, Chair; Richard R. Gans and Justin Savioli, Co-Vice-Chairs:

No Report.

Attorney/Trust Officer Liaison Conference – Cady L. Huss, Chair; Tae Kelley Bronner, Stacey L. Cole, Michael Rubenstein, Gail G. Fagan, Mitchell A. Hipsman, and Eammon W. Gunther, Co-Vice Chairs:

Cady Huss reported about the ATO conference that took place August 19-21, 2021, at The Breakers, Palm Beach.

Charitable Planning and Exempt Organizations Committee – Seth Kaplan, Chair; Kelly Hellmuth and Denise S. Cazobon, Co-Vice-Chairs:

No Report.

Elective Share Review Committee – Jenna G. Rubin, Chair; Cristina Papanikos and Lauren Y. Detzel, Co-Vice-Chairs:

No Report.

Estate and Trust Tax Planning – Robert L. Lancaster, Chair; Richard N. Sherrill and Sasha Klein, Co-Vice Chairs:

No Report.

Guardianship, Power of Attorney and Advanced Directives – Stacy B. Rubel, Chair; Elizabeth M. Hughes, Caitlin Powell, and Jacobeli Behar, Co-Vice Chairs:

The Committee discussed the basis for the dismissal of an incapacity petition. There is a subcommittee assigned to addressing this issue.

IRA, Insurance and Employee Benefits – Alfred J. Stashis, Co-Chairs; Charles W. Callahan, III, and Rachel B. Oliver, Co-Vice-Chairs:

No Report.

Liaisons with ACTEC – Elaine M. Bucher, Tami F. Conetta, Thomas M. Karr, Shane Kelley, Charles I. Nash, L. Howard Payne and Diana S.C. Zeydel:

No Report.

Liaisons with Elder Law Section – Travis Finchum and Marjorie Wolasky:

No Report.

Liaisons with Tax Section – William R. Lane, Jr., Brian Malec, and Brian C. Sparks:

No Report.

Liaison with Professional Fiduciary Council – Darby Jones:

No Report.

Principal and Income – Edward F. Koren and Pamela O. Price, Co-Chairs, Jolyon Delphin Acosta, and Keith B. Braun, Co-Vice Chairs:

No Report.

Probate and Trust Litigation – J. Richard Caskey, Chair,Angela M. Adams, James R. George and R. Lee McElroy, IV, Co-Vice Chairs:

No Report.

Probate Law and Procedure – M. Travis Hayes, Chair; Benjamin F. Diamond, Christina Papanikos, Theodore S. Kypreos, and Cady Huss, Co-Vice Chairs:

No Report.

Trust Law – Matthew H. Triggs, Chair; David J. Akins, Jenna G. Rubin, Mary E. Karr, and Jennifer J. Robinson, Co-Vice Chairs:

No Report.

Wills, Trusts and Estates Certification Review Course – Rachel Lunsford, Chair; J. Allison Archbold, Eric Virgil, and Jerome L. Wolf, Co-Vice Chairs:

No Report.

Adjournment. The meeting was adjourned at 9:30 am.

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The Brownfields Program – A Practitioner's Summary For Rehabilitation, Economic Development And Liability Protection

By Melissa M. Hernandez, Esq., Assistant County Attorney, Seminole County, Florida

In 1997, the Florida Legislature enacted the Brownfields Redevelopment Act to assist owners of real property promote economic development and improve public health. The Brownfields program objectives include:

- Site rehabilitation;
- Job creation;
- Increased capital investment;
- Broadened tax base by raising property values; and
- Improvements in quality of life and the environment.

To date, 178 contaminated sites have been cleaned up. Any person, which includes individual owners, corporations, partnerships, limited liability companies, community-based organizations, and nonprofits, may participate in the Brownfields program to rehabilitate and redevelop their property. Eligible properties include brownfield sites and brownfield areas. A brownfield site is defined as real property, the expansion, redevelopment, or reuse of which may be complicated by *actual or perceived* environmental contamination. A brownfield area is defined as a contiguous area of one or more brownfield sites, some of which may not be contaminated.

To participate in the Brownfields program, the person must first direct their request to the local government with jurisdiction over the property. The person who owns or controls a potential brownfield site must establish all of the following:

- Agrees to rehabilitate and redevelop the brownfield site;
- Creates at least five new permanent full-time jobs not associated with the rehabilitation project's demolition or construction activities. This exception does not apply if a site will provide affordable housing or create recreational areas, conservation areas, or parks;
- Establishes a rehabilitation and redevelopment plan that is consistent with the local comprehensive plan and is a permittable use under the applicable local land development code;
- Provides notice to neighbors and nearby residents; and
- Has sufficient financial resources to implement and complete the rehabilitation and redevelopment agreement.

After the local government approves the brownfield designation, the person may execute a Brownfield Site Rehabilitation Agreement (BSRA) with the Florida Department of Environmental Protection (DEP). Once the BSRA is executed, the person, including any successors or assigns, receives liability protection for claims of property damage, including but not limited to, diminished value of real property, lost or delayed rent, sale, or use of real property. Liability protection is also available for lenders, which includes those serving as a trustee, personal representative, or in any other fiduciary capacity in connection with a loan. Additionally, to facilitate participation in the Brownfields program, state and local governments may offer financial and economic incentives. Practitioners representing owners of real property with actual or perceived contamination should counsel their clients of the Brownfields program objectives and liability protections available.

Endnotes

1 Fla. Stat. § 376.77-376.85 (2021).

2 Florida Brownfields Redevelopment Program, 2020-2021 Annual Report, Page 3 *available at* https://floridadep.gov/waste/waste-cleanup/documents/2020-21-florida-brownfields-program-annual-report.

3 Id.

4 Fla. Stat. § 376.80(1)(b)(2) (2021).

5 Fla. Stat. § 376.79(4) (2021).

6 Fla. Stat. § 376.79(5) (2021).

7 Fla. Stat. § 376.80(2)(c) (2021).

8 Fla. Stat. § 376.82(2) (2021).

9 Fla. Stat. § 376.82(4) (2021).



M. HERNANDEZ

Melissa Martinez Hernandez *is an Assistant County Attorney for Seminole County. She is a general practitioner that predominantly handles transactional work, which includes issues related to real property, land use, sports tourism, and related matters. She monitors the Florida Legislative Session to ensure the County's compliance with applicable laws and makes recommendations to repeal, amend or revise county ordinances and policies. She currently serves as counsel to the Board of Adjustment, Museum of Seminole County History, Library Advisory Board and the County's divisions of Natural Lands, Parks and Recreation.*

Maintaining an Attorney – Client Relationship Beyond The Signed Estate And Trust Plan

By Amanda C. Cummins, Esq., AC Cummins Law, St. Petersburg, Florida

Estate planning is mostly a transactional practice. You meet the client, you draft the plan, the plan is signed, and the client is on their way. Many years later, you may be contacted to handle the probate of that estate plan. If the plan is outdated, you are stuck probating the plan you drafted that doesn't do what the decedent originally intended. How can you create relationships extending beyond the initial plan so outdated plans do not end up as the plan submitted to probate?

Client Maintenance Plans

Some attorneys in the estate planning and elder law fields have experimented with client maintenance plans. Client maintenance plans are essentially a membership program clients can opt into which transforms the attorney-client relationship from transactional to relational. The client pays a fee, either quarterly or yearly, to have the attorney maintain the estate plan. This ensures the client's plan is successful rather than outdated at death. Since the client is paying for ongoing representation, they do not have to worry about receiving a bill each time they call the attorney to provide updated information.

Life events can dramatically change an individual or family's estate plan. Assets and family members can change. Ensuring assets are titled correctly is key to getting any estate plan to work. Client maintenance plans keep the relationship ongoing so any additional assets the client acquires will be reviewed by the attorney to ensure new assets are appropriately titled.

Inventory List – Making it Early and a Part of the Plan

Probably the most time-consuming aspect of probate and estate administration for the personal representative is compiling the inventory list. Some individuals do not have a list of their assets available for the personal representative. As more of our lives move from paper to the cloud, most of our information is stored electronically. This makes it even more difficult to track down all of a decedent's assets. Having the client take the extra steps to compile a list of their assets to include as an attachment to their estate plan can make this process much easier.

Assets that are not probated can be turned over to the State of Florida's unclaimed funds, which can be an annoying and difficult process to navigate. Having the list of assets, with account numbers and institutions, can be a huge benefit to the estate plan and reduce the chance of assets being left out of the probate process.

Good ole fashioned manners

One lesson my parents instilled in me was there is no substitute for good ole fashioned manners. Every birthday or holiday we received gifts was immediately followed by handwriting thank you notes before we could enjoy our gifts. Taking the time to write out a note rather than a phone call, text message, or email may be old-fashioned, but there is something to be said for experiencing a warm human interaction.

Remembering birthdays and anniversaries can also be a way to keep the attorney-client relationship alive after the plan is executed. Simply being present and remembering important milestones can make a client more willing to reach out to you for assistance in other matters, or refer you to friends and family.


A. CUMMINS

***Amanda C. Cummins** has a bachelors degree in history from Florida State University and her juris doctorate from FAMU College of Law. While in law school, she served as a research assistant to Professor Ronald C. Griffin and on the legal defense of Leonard Peltier. After law school, she served as a Judge Advocate in the United States Marine Corps. She worked in civil law, legal assistance, and as a prosecutor.*

She currently works as a solo practitioner handling probate, estate planning, veterans, and disability law cases. She graduated from Stetson with an LLM in Elder Law in 2019.

Real Property Case Summaries

Prepared by Shayla M. Johnson Mount, Esq., AriasBosinger, Winter Park, Florida

Publication of surveillance video to a third party is not a required element to establish the tort of invasion of privacy-intrusion upon seclusion.

Jackman v. Cebrink-Swartz, 313 So. 3d 942 (Fla. 2d DCA 2021).

This case involved a boundary dispute between neighbors who shared a common side border. Initially, the Jackmans and Swartzes had a common fence arrangement by which the Jackmans permitted the Swartzes to use their fence in order to contain the Swartzes' dogs in the backyard. Eventually, the relationship between the neighbors deteriorated resulting in the Jackmans revoking consent for the use of their fence. After continued disputes between the neighbors, the Jackmans installed another privacy fence enclosing their backyard. Shortly thereafter, the Swartzes installed a 20-ft high rooftop camera, capable of recording surveillance 24 hours a day, seven days a week, which was positioned to see over the Jackmans' privacy fence and into their lanai. The Jackmans subsequently filed suit seeking a preliminary temporary injunction and claiming invasion of privacy – intrusion upon seclusion, defamation, and malicious prosecution.

The Jackmans testified that they had a reasonable expectation of privacy in their enclosed backyard and within the inner parts of their home and that they were entitled to injunctive relief because the Swartzes rooftop camera was an intrusion upon seclusion. The Swartzes argued that the Jackmans were not entitled to injunctive relief because they had not established a substantial likelihood of success on the merits because they had not proven that the recordings from the camera were published to anyone. The trial court agreed with the Swartzes, focusing on the fact that the video footage was stored in the device and could not be retrieved, and the camera was not connected to a printer.

On appeal, the Second District Court of Appeals held that the trial court had erred by concluding that the Jackmans could not establish a likelihood of success on the merits on the basis that the videos had not been published to a third party because publication is not a required element for the tort of invasion of privacy-intrusion upon seclusion. The court defined intrusion upon seclusion as when a person "intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns ... if the intrusion would be highly offensive to a reasonable person."[1] The court noted that the Jackmans had a reasonable expectation of privacy within the curtilage of their home, especially where they had installed a privacy fence bearing "no trespassing" signs. Importantly, the court noted that there is a "material difference between occasionally viewing activities within a neighbor's backyard that are observable without peering over a privacy fence and erecting a camera to see over a privacy fence to thereafter surveil and record those activities on a consistent basis." The court reversed and remanded the trial court order denying the Jackmans' motion for preliminary temporary injunction.

A party claiming relief under Fla. Stat. § 70.001 ("Bert J. Harris, Jr. Private Property Rights Protection Act") must be the current legal title holder of the property claimed to be burdened.

Dean Wish, LLC v. Lee County, Florida, 2D19-4843 (Fla. 2d DCA 2021).

In 2016, Dean Wish, LLC ("Dean Wish") filed suit against Lee County ("County") under Fla. Stat. § 70.001 (2016) ("Bert J. Harris, Jr. Private Property Rights Protection Act" or "Act") alleging the County's amended Land Development Code resetting the density of lands owned by Dean Wish imposed an inordinate burden on its property. In the years prior to this lawsuit, the land had been owned personally by one of the founding partners of Dean Wish and other individuals and entities who had previously sued the County in 2006 alleging that the designation of the land as "Coastal Rural" imposed an inordinate burden on the approximately 55 parcels comprising the subject property. In 2010, all of the parcels were purchased by Dean Wish, which subsequently filed an application with the County requesting an administrative increase in the standard maximum density for the "Coastal Rural" lands included in the subject property (although Dean Wish's application also included lands which were not subject to the "Coastal Rural" designation). In 2015, the County indicated that it was not authorized to administratively approve the application and suggested that Dean Wish resubmit the application. In 2016, the County amended the density of the "Coastal Rural" lands although not at the density increase requested by Dean Wish. Dean Wish subsequently filed a lawsuit under the Act alleging a monetary loss of more than $9 million as a result of the amended plan.

Several months after filing the lawsuit, Dean Wish sold the property "as is" and in the sales contract, Dean Wish retained all rights to monetary relief in the pending lawsuit. Dean Wish

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also recorded a corrective warranty deed which conveyed title to the property subject to "any award or payment of compensation made by Lee County" in the pending lawsuit. After the sale, the County filed a motion for summary final judgment arguing that Dean Wish could not maintain the lawsuit because the Act required that Dean Wish maintain ownership of the property until the case concluded. The trial court granted the County's motion for final summary judgment noting that the Act utilized the present indefinite tense ("holds legal title") and thus the plain language of the Act required a claimant to be the current legal title holder of the subject property.

On appeal to the Second District Court of Appeals, Dean Wish argued that the plain language of the Act only required that the claimant own the subject property at the time the government imposed the burden on the property and that the trial court's interpretation of the Act resulted in a judicial taking and an unreasonable restraint on alienation. The court disagreed on all points, affirming the lower court ruling in favor of the County. First, the court noted that it was required to examine the plain language of the statute and where the language of the statute is clear and unambiguous the court was required to give the statute its plain and obvious meaning.[2] The court looked first to the definition of "property owner" in Fla. Stat. § 70.001(3)(f)(2016), which defined the term in the present indefinite tense as "the person who holds legal title to the real property that is the subject of and directly impacted by the action of the governmental entity." The court also looked to the prevailing party attorney fee provision in Fla. Stat. § 70.001(6)(2116), which specifically referenced the prevailing "property owner." Accordingly, Dean Wish, which divested itself of legal title during the pendency of the case could not be a claimant under the plain and ordinary language of the Act. As to Dean Wish's attempt to retain the right to monetary damages in the contract and corrective deed, the court held that Dean Wish's right to monetary damages did not equate to a retention of the legal title to the property for purposes of the Act.

Importantly, while the case was pending, the legislature approved several amendments to the Act, one of which added a new subsection which provided that a "[a] property owner entitled to relief under this section retains such entitlement to pursue the claim if the property owner filed a claim under subsection (4) but subsequently relinquishes title to the subject real property before the claim reaches a final resolution." Dean Wish argued that this particular amendment effectively clarified existing law to affirm its standing to bring the claim. The court disagreed stating that the 2021 amendment did not apply retroactively and because the Act's language was clear it was unnecessary to look at the 2021 amendment to discern legislative intent. Additionally, the 2021 amendment did not expressly state that it was intended to clarify existing law. Lastly, the court found that the recent controversy rule did not apply in this case because the pertinent parts of the Act had remained unchanged for twenty-six years.[3] Ultimately, the Second DCA certified as a question of great public importance the following: "Is the 2021 Amendment to Section 70.001(2) a clarification of existing law so that the plaintiff may maintain an action under the Bert Harris Act where the plaintiff owned the property when the plaintiff filed a claim under subsection (4) but was divested of ownership prior to trial?"

Condominium declaration provision endowing developer the right to reject future amendments in its sole opinion was valid.

First Equitable Realty III, Ltd. v. Grandview Palace Condominium Ass'n, 246 So. 3d 445 (Fla. 3d DCA 2021).

After turnover of the condominium association from First Equitable Realty III, Ltd. (the "Developer"), the Grandview Palace Condominium Association (the "Association") filed a declaratory action to determine the rights of the Developer and the Association based upon proposed amendments to the condominium declaration (the "Declaration") related to the limited common element laundry room facilities. The language of the original recorded Declaration designated the condominium laundry rooms as "Limited Common Elements" for which the Association was responsible for the expenses of maintenance and repair. The Developer owned units within the condominium and leased coin-operated appliances in the condominium's laundry room, from which it derived a profit from the residents on a pay-per-use basis. For a decade before turnover, the Association paid all utility expenses associated with the operation of the laundry rooms. After turnover, the Association proposed an amendment to the Declaration which provided that the Association would not be responsible for utility charges associated with the laundry rooms. The Declaration had previously been amended to prohibit any action by the Association that would be detrimental to the sale or lease of the units by the Developer without the written approval of the Developer. The Developer refused to agree to the Association's proposed amendment shifting the cost of the laundry room utility charges from the Association to the Developer; however, the Association adopted and recorded the amendment, notwithstanding the Developer's refusal to agree. The trial court granted summary judgment in favor of the Association and the Developer appealed.

In its analysis, the Third District Court of Appeals first relied on the long-standing principle that the condominium declaration was the condominium's contract which strictly governed the relationship between the Association and the owners and where the language of the declaration was clear and unambiguous the court was required to give effect to

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the declaration as it was written.[4] The court noted that the original Declaration designated the laundry rooms as "limited common elements," and that the operation and maintenance of the common elements and utilities for the condominium were common expenses to be absorbed by the Association. The court also noted that this was consistent with the Association's statutory responsibilities under the Condominium Act (Fla. Stat. Ch. 718) and that had the Association intended to shift the statutory expense allocation, it could have done so with clear language in the Declaration. The court did acknowledge the Association's argument that the shift in utility expenses from the Association would result in future owners paying less in assessments and thus would be beneficial instead of detrimental to future sales of units. However, the court considered the plain language of the first amendment to the Declaration which gave the Developer the unilateral right to determine harm in its "sole opinion," regardless of any other considerations. Accordingly, without the consent of the Developer, the Association's proposed amendment was invalid. The court affirmed in part, but reversed the trial court's determination that the Developer is responsible for the payment of utility expenses for the laundry room facilities.



S. MOUNT

Shayla M. Johnson Mount *is a community association attorney located in Orlando, Florida whose practice focuses on real property law, community association law, contracts, covenant enforcement and general corporate governance. Shayla has served as general counsel and advisor to condominium and homeowner associations throughout the state of Florida and has experience in collections and covenant enforcement litigation, DBPR arbitration and pre-suit mediation proceedings, contract drafting and negotiations, bulk telecommunications contract review and negotiations, governing document review and amendments, foreclosure litigation, association meeting guidance and attendance, MRTA and discriminatory covenants review, fair housing issues and association turnover assistance.*

Endnotes

1 See also Purrelli v. State Farm Fire & Cas. Co., 698 So. 2d 618, 620 (Fla. 2d DCA 1997).

2 Quoting Bair v. City of Clearwater, 196 So. 3d 577, 581 (Fla. 2d DCA 2016).

3 See State Farm Mut. Auto. Ins. v. Laforet, 658 So. 2d 55, 62 (Fla. 1995).

4 See Cohn v. Grand Condo. Ass'n, Inc., 62 So. 3d 1120, 1121 (Fla. 2011).

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Probate Case Summaries

Prepared by Taniquea Reid-Wolliston, Esq., Royal Palm Beach, Florida

Unlike cases involving the request for attorney's fees when litigating claims against an estate, probate courts have exclusive jurisdiction to award attorney's fees for services that benefit the estate, including services rendered during an appeal.

Townsend v. Mansfield 46 Fla. L. Weekly D2205a (Fla. 1st DCA October 6, 2021)

In the First District Court of Appeals, Appellant Faye Townsend, a fellow beneficiary of the estate, filed a frivolous appeal. Although the Court determined the Appellant did not raise any cognizable issues for the Court to rule on, it used the case to address the issue of whether an attorney can seek an award of attorney's fees for services provided during the appeal, where the case involves the provision of a benefit to the estate. The Court notes that the Florida Probate Code governs probate attorney's fees. More specifically, Fla. Stat. § 733.106 (2012) authorizes probate courts to award reasonable compensation to "[a]ny attorney who has rendered services to an estate." The Court went on to state that, as courts of equity, probate courts are also authorized to make discretionary allocations for fee award, and are empowered to direct the parts of the estate from which the fees are to be paid.

The First District Court emphasized Florida's long-standing precedence that even in cases of appeal, probate courts have exclusive jurisdiction to award attorney's fees as part of the settlement of the decedent's estate where the basis of the claim is a provision of a benefit to the estate. The exclusive jurisdiction of probate courts to award attorney's fees rests on claims involving a benefit of the estate, which is different than cases involving claims against the estate. Here, the Court ultimately denied the Appellees' motion for fees, but did so without prejudice to their right to petition the probate court for said fees.

When real property is owned by husband and wife, the deed does not have to state ownership is by tenancy in the entireties and does not have to state the parties are husband and wife, as tenancy by the entireties will be presumed absent express written language to the contrary.

Ramos v. In RE: The Estate of Eleida Ramos, 46 Fla. L. Weekly D2192a (Fla. 3d DCA, October 26, 2021)

Maritza Ramos, the personal representative of the estate of Pedro Ramos, appealed an order granting summary administration in favor of the estate of Eleida Ramos.

In May 2013, husband and wife, Eleida Ramos and Pedro Ramos, purchased their homestead. The Special Warranty Deed used, lists "Pedro Pablo Ramos and Eleida Ramos" as the grantees. The special warranty deed made no mention of them being husband and wife and did not include any reference of tenancy by the entireties.

The wife died in 2016, and the husband died in 2020. Kenia Exposito, Eleida Ramos' daughter from a previous marriage, filed for summary administration of her mother's estate and sought to obtain her mother's share of the homestead on the basis that, because the deed did not state ownership was tenancy by the entireties, it must be assumed to be tenancy in common. Ms. Exposito also included her mother's will from 2012, devising "my share of the primary residence to my daughter, Kenia Elena Exposito."

Ms. Ramos filed an objection, arguing that as the property was purchased by a married couple, the wife's undivided one-half interest passed to the husband at her death, and at the time of his subsequent death, the entire property now belongs to his estate.

Ultimately, the trial court granted Ms. Exposito's motion to strike Ms. Ramos' objection and entered summary judgment in favor of Ms. Exposito.

Using Florida's long-standing history of case precedence that owners do not need to be described as husband and wife in a deed or have their marital status stated on the deed to establish tenancy by the entireties, the Third District Court of Appeals reversed. The Court referenced Florida Supreme Court case *Beal Bank SSB v. Almand & Assocs.*, 780 So.2d 45, 54 (Fla. 2001), which holds that when a property is owned by a husband and wife, it is a "rule of construction that a tenancy by the entireties is created." The Court also went on to note that in the absence of any express language to the contrary, an estate by entireties is created when property is obtained by husband and wife.



T. REID-WOLLISTON

Taniquea Reid *has been practicing law since 2011. Her office is located in Royal Palm Beach, FL. Ms. Reid focuses primarily on homeowner's property damage claims and litigation, probate, wills, trusts, and estate planning, as well as elder law. Ms. Reid completed her undergraduate studies at Florida State University and graduated from St. Thomas University, School of Law with Cum Laude Honors. Ms. Reid serves on the Board of Directors of Florida Rural Legal Services and Palm Beach Heatwave, and is a former Board Member and Secretary of Savon Academy Stars in Royal Palm Beach.*

What's Happening Within The Section...

As one of the largest sections of The Florida Bar, the RPPTL Section provides numerous opportunities to meet and network with other attorneys who practice in real property and probate & trust areas of the law, whether through getting involved in one of the various RPPTL Section committees or attending a RPPTL Section sponsored CLE course. Members have access to a wealth of information on the RPPTL Section website, including up-to-date news and articles regarding case law and legislative changes, publications such as ActionLine, upcoming RPPTL Section sponsored CLE courses (see page 56), and a whole host of relevant links to other Real Property, Probate & Trust Law websites.

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

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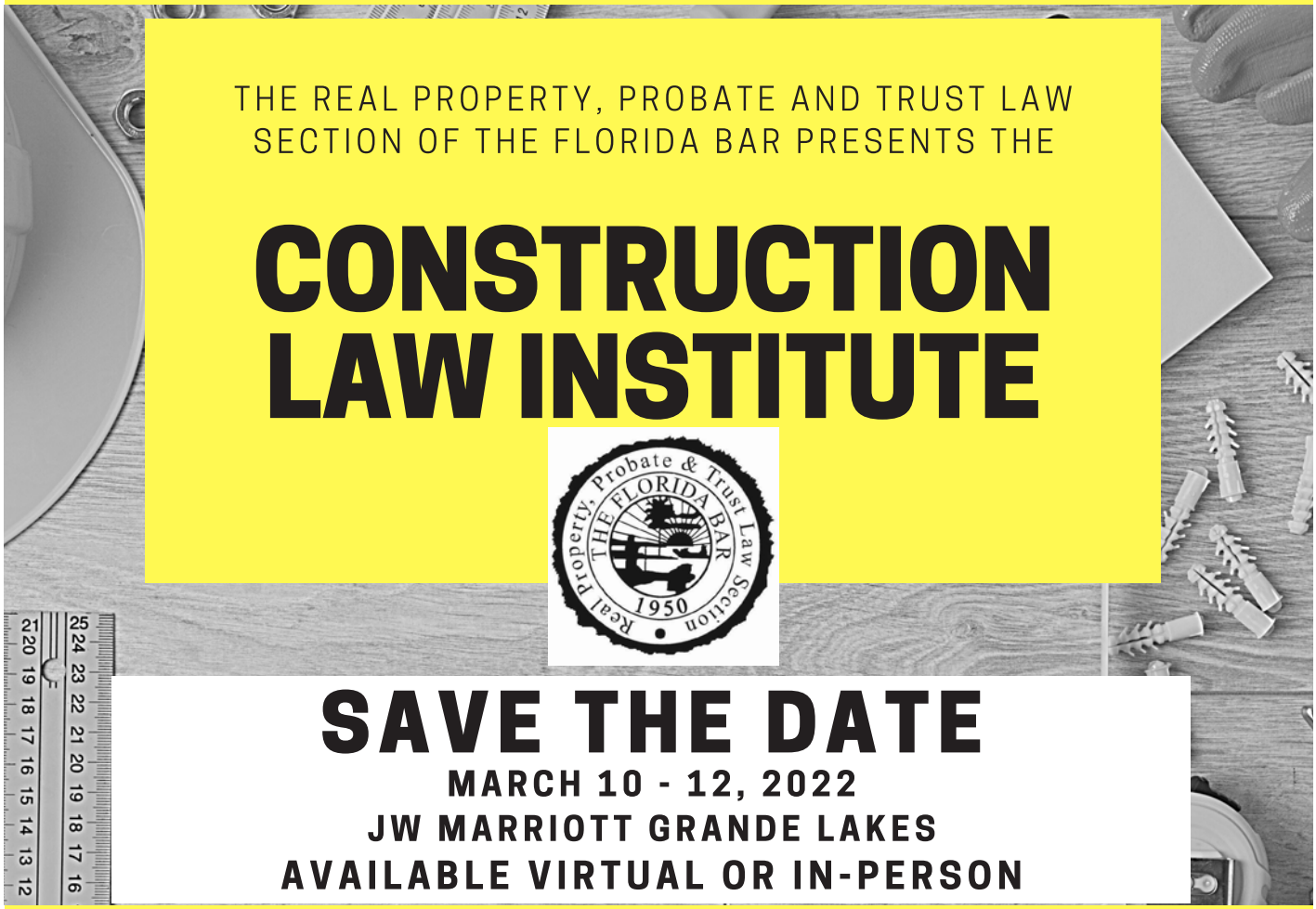
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