ActionLine

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



Post Facto Commerical Lease Default

I Quit: Trustee Resignation Rules Clarified

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Focus On CLE

By Sarah S. Butters, Section Chair, 2022-2023

First, let me begin this Column by saying that I am honored to serve as the Chair of the Section for the 2022-2023 Bar year. I don't know how I got here, but I am humbled by the Section's trust in me. I am keenly aware, however, that any successful year depends on the support and dedication of so many hard-working individuals. Section leaders lend their time and talents for the good of the profession, oftentimes at great economic sacrifice. Personally, I rely heavily on the Executive Committee for their leadership and advice, so thank you to **Katherine Frazier, John Moran, Cary Wright, Steve Mezer, Sancha Brennan, Jon Scuderi, Wilhelmina Kightlinger, Larry Miller, Angela Adams** and **Lee Weintraub**. And thank you to the numerous Past Chairs who have supported me over the years and answered my ridiculous calls, texts and questions about nothing and everything, especially **Bob Swaine, Bill Hennessey,** and **Rob Freedman.** And a special thank you to my longtime friends and lifetime mentors **Deb Goodall** and **Ed Koren** (both Past Chairs themselves) for encouraging me to get involved in RPPTL leadership many years ago**.**

I intend to use my Chair's Columns to focus on all the amazing things the Section does for its members and the profession, so the most appropriate place to start would be with CLE. The CLE programs produced by RPPTL's various committees are the lifeblood of the Section. In addition to providing an incredible service to our members, the revenue from CLE also subsidizes the costs of our Section events. It provides a steady stream of support for our strategic and innovative initiatives like the Fellows scholarship program, law school outreach programs, and publications like *ActionLine*.

Attendance at RPPTL audio webcasts and in-person seminars continue at record levels. But that should come as no surprise given the quality of the programming being produced. The sheer volume of CLEs produced is also impressive! Seventeen CLEs were offered in just the first two quarters of 2022. CLE opportunities for the remainder of the year also remain robust, with many free opportunities for Section members as well. We could not do this without our section administrators, **Diana Kellogg** and **Hilary Stephens**, as well as all our members who volunteer their time and expertise in the preparation of quality materials and lectures.

On behalf of the RPPTL Executive Committee and the CLE Committee, thank you to all our amazing speakers and program chairs who volunteer to make these RPPTL programs a huge success!

Interested in attending an upcoming CLE? Please click on the QR code for the upcoming courses.

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IN THIS ISSUE:

Chair's Column 3

Letter From The Co-Editors-In-Chief 5

Post Facto Commercial Lease Default 6

I Quit: Trustee Resignation Rules Clarified 10

Critical Drafting Considerations For Operating Agreements And How To Avoid Or Limit Liability Between And Among Members Of An LLC 12

CPM Scheduling Made Easy 16

Marketable Record Title Act Uniform Title Standards Get A Makeover 20

Friends Of The Section 2022 Legislative Session 24

Changes From The 2022 Regular Legislative Session 28

Executive Council Meeting July 21 – 23, 2022 32

Roundtable: Probate and Trust Division 34

Roundtable: Real Property Division 36

Helping to Alleviate Condominium Unit Owner Reservations About New Statutory Reserve Requirements 39

The Impact Of Local Rules And Requirements On Probate 41

Section Spotlight: Annual Section Awards 42

Membership & Inclusion Committee's Minority Lawyers Seminar Series Underway 44

A Tribute To Robert S. Swaine 45

Probate Case Summaries 46

Real Property Case Summaries 48

Cooley Law School Presentation: Title 101 From Contract To Close 49

Actionline Bulletin Board 52

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

ARTICLES: Forward any proposed article or news of note to Erin Farrington Finlen at erin@estatelaw.com. Deadlines for all submissions are as follows:

VOLUME NO.	ISSUE	DEADLINE
1	Fall	July 15
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GENERAL INQUIRIES: For inquiries about the RPPTL Section, contact Hilary Stephens at The Florida Bar at 850-561-3155, or at HStephens@floridabar.org.

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

Letter From The Co-Editors-In-Chief

Out with the old, in with the new!

Bob Swaine has passed the gavel to the Section's new Chair, **Sarah Butters**. Read a worthy tribute to Bob on page 45 and learn why his productive tenure was historic. In her Chair's Column, Sarah provides insight into her leadership team and the Section's priorities for the coming Bar Year. Get ready for more world-class CLEs that will give you a competitive advantage and keep you abreast of the critical issues in your legal practice!

This is the first issue of *ActionLine* in years that does not directly involve **Jeff Baskies** having pulled the laboring oar. Our gratitude goes out to Jeff for his selfless service to this magazine. Fortunately, he remains active in the Section. **Erin Farrington Finlen** is the new Co-Editor-In Chief and she is already leaving her mark. She has energy, enthusiasm and ideas galore. She plans to continue bringing amazing content to our members, not just through this publication but through other creative distribution avenues as well. Stay tuned (and start thinking about podcasts!)

Jason Ellison has written a great article that begins on page 6. Do not be put off by the title "Post Facto Commercial Lease Default." Read his introduction and you will likely be hooked. To borrow from a line from his piece, "buckle up for the road ahead."

One of the great benefits of reading *ActionLine* is obtaining timely, practical and cutting-edge information. For example, **Patrick J. Lannon** and **Mary Karr** explain how previously unclear Trustee resignation rules were addressed legislatively. Those clarifications took effect on July 1, 2022. In addition, **Laura Licastro** and **Melissa Scaletta** explain the makeover of the Marketable Records Title Act Uniform Standards. As Melissa and Laura inform us, the most recent statutory changes to MRTA came about just this year.

A theme of sorts in this issue is the impact the Section has in influencing legislation relevant to our members. You would be shocked at the amount of time dedicated by fellow "Reptiles" to legislative matters. We are blessed to have many Section members serving in the Florida Legislature. **Martha Edenfield** writes about "Friends of the Section." **Peter M. Dunbar** provides an at-a-glance summary of highlights from the 2022 Regular Legislative Session. Even if you are not a political junkie, if you are a homeowner you will be interested in CS/SB 518 dealing with tree removal.

Another extremely practical article that may just save you from having to call your litigation partner is found on page 12. **Paul O. Lopez** and **Brittany Hynes** set forth detailed but easy-to-follow and implement suggestions in "Critical Drafting Considerations for Operating Agreements." Our guess is that you will never again form a limited liability company with two or more members without preparing an operating agreement.

Mark Young explains the "critical path" and how to avoid (or at least mitigate) construction delay claims. As Mark explains, construction has been described as organized chaos. Amen! Fortunately, the Section has an extremely active **Construction Law Committee**, hosts vital CLEs and has construction experts willing to write articles for the rest of us.

We love the biographical sketches of the authors who have contributed to this issue. Read them. Seriously! These bios will help you get to know your colleagues better…and may just assist you in making a referral or seeking guidance from an authority on a particular topic. We have some truly fascinating and accomplished authors.

The **Section Spotlight** on pages 42 and 43 will introduce you to many of the Section's most active, productive and service-oriented members. Their well-deserved recognition is but a small down payment on the debt of gratitude they are due for their contributions. The **Roundtable Reports** provide a summary of what is going on within the Divisions and their Committees. The Roundtable Reports are a great way to stay on top of opportunities for involvement. For example, on page 34 you may read about pro bono opportunities via the Section's **At-Large Members**.

The aptly named **Practice Corner** articles (found on pages 39-41) are intended to provide practitioners with information that will be useful in their practices. In this issue, **Shayla J. Mount** writes about the unanimously adopted Senate Bill 4D that passed in the aftermath of the Surfside tragedy. Her piece addresses the concerns of condominium unit owners in response to the new statutory reserve requirements.

The Probate and Trust Division Practice Corner article by **Taniquea Reid-Wolliston** provides an update on the impact of local rules and requirements on probate. Those on the "death" side of the Section will want to read Taniquea's article on page 41.

ALL ARE WELCOME IN THE SECTION! As evidenced by the 48 new Section members who joined as a result of the **Membership & Inclusion Committee's** Minority Lawyers Seminar Series, the Section is a very welcoming group. We are honored that over 20 minority bar associations across Florida were represented at the seminar described by **Annabella Barboza** and **Lilleth Bailey** on page 44.

Finally, **thank you** to our Section sponsors, those who advertise in this magazine and you---our colleagues, Section members, contributors and readers. We would not be in the position of producing a top-notch magazine without each and every one of you.



M. BEDKE



E. FINLEN

Post Facto Commercial Lease Default

By Jason Ellison, Esq., Ellison | Lazenby, St. Petersburg, Florida

INTRODUCTION

"I was just sued for eviction," a client tells you one afternoon. You tell her that you will be happy to assist and ask how many months' rent they are behind. "Zero," the client replies. Perplexed, you ask: "Then, what's the problem?" The client replies: "Rents have increased three-fold in the shopping center and the landlord is trying to force me out." "Anything else," you ask, knowing that there must be a legal basis to file an eviction. "Oh yeah," the client replies, "three years ago, we split our business into two separate legal entities and so, technically, we have been operating a second business in the space ever since." The two businesses have the same principals, the same storefront, and the client has been doing this for a few years—even before the current landlord purchased the shopping center. The client tells you that she even had the oral permission of the prior landlord, with whom the client originally signed the lease, to operate both businesses in the space. You begin your research.

Non-Monetary Defaults & the Boilerplate Lease Terms

Reviewing the lease, which was drafted by a top-notch real estate lawyer, you find a few applicable lease provisions. First, a section of the lease provides that the Tenant may not assign or transfer the lease, or sublet the premises or any part thereof, or grant any license to use the premises, without the written consent of the Landlord. No written consent to sublease or assign exists in your case, and Florida law has upheld such lease provisions before.[1] Importantly, the lease also provides that the acceptance of rent from any other person would not be deemed to be a waiver of this non-assignment provision of the lease. Based on *Leeds Shoes, Inc.*,[2] which contained a very similar provision, you feel that your client may have a potential issue.

But Did the Predecessor Landlord Waive This Default?

The prior landlord knew about the additional entity operating in the space and turned a blind eye while the tenant shared the space with this new entity. More than a blind acquiescence, the prior landlord purportedly *consented* to this arrangement. While there was no *written* consent of the prior landlord to this arrangement, you think that this action could amount to a "waiver" of this default. Then, two other lease provisions catch your eye.

First, the astute real estate lawyer that drafted this lease remembered to include an "entireties provision" in the lease. It provides that the lease includes the "entire agreement between the parties" and may only be modified "in a writing signed by all parties." Courts consistently reject efforts of parties to re-write contract provisions with oral agreements that conflict with the written document.[3] Since you have no writing altering the number of tenants in the space, and the original lease contains a provision that prohibits subleasing or licensing to any other person, the entireties provision may protect the landlord from arguments that the lease was modified by the parties before or after its execution to allow for the additional party in possession.

continued, page 7

Your lease also contains an anti-waiver provision. Anti-waiver provisions are consistently enforced in Florida.[4] More than just a one-liner that expressly limits a prior waiver from being deemed a waiver of a future default, your anti-waiver provision prohibits the enforcement of a waiver unless the same is in writing and signed by the landlord.[5] Your anti-waiver provision also states that a waiver cannot be implied by delay or any act of omission.[6] Therefore, the failure of the prior landlord to enforce the lease, whether by turning a blind eye to the prior default or by orally agreeing to the arrangement, may not be a defense to a future default.

Courts Still Consider Equity

In interpreting contracts like the commercial lease at hand, courts are required to construe the whole instrument, not merely look to lines "here and there."[7] Following that principle, a court should therefore look throughout the lease to determine if the parties intended to make the lease, and more particularly the provision concerning subletting and licensing, the final expression of the parties' intent. Moreover, the lease should be construed against the backdrop of the anti-waiver provision and whether a party could waive a default at one point in time and later elect to enforce that default in the future. If the court concludes this to be the parties' intent, it may very well enforce these lease provisions.[8]

continued, page 8



The court, however, will also not allow such lease provisions to work a fraud against one party.[9] For instance, where prior to purchasing a commercial property, a landlord discovered a modification of the lease which arises from the conduct of the parties, then the landlord is prohibited from using an integration clause to enforce the written terms of the lease to force a tenant to pay additional rent owed under the lease.[10] The facts and circumstances surrounding the oral modification, promises made in furtherance of the same, and reliance on the oral modification create factual issues that could avoid summary judgment.[11] However, the actions taken in reliance upon an oral modification cannot be matters which were necessary for a party to otherwise perform under the original lease agreement.[12] Therefore, the payment of rent, or doing things which the tenant is otherwise obligated to do, cannot form the basis of reliance to support the exception that the oral agreement was accepted and acted upon in such a manner as would work a fraud on either party to refuse to enforce it.

In another case involving the fraud exception, *Husky Rose, Inc.*, the landlord sought to enforce an anti-waiver provision with an integration clause.[13] The lease required the tenant to maintain a fire insurance policy, but the tenant failed to do so with the oral consent of the landlord.[14] Following a fire which destroyed the restaurant, the landlord filed suit for breach of contract for failure to provide insurance coverage, citing to the lease's anti-waiver provision. The *Husky Rose* court reaffirmed the principle that "under certain circumstances, written contracts can be modified by a subsequent oral agreement of the parties even though the written contract purports to prohibit such modification," with one such circumstance being where it would be a fraud on one party to refuse to perform the oral modification.[15]

In reversing summary judgment and directing the trial court to conduct proceedings on the material issues of fact as to whether a waiver occurred under these circumstances, the appellate court did not blindly apply a strict application of the integration clause and the anti-waiver provisions of the lease. Instead, in the case at bar, which involved a post facto declaration of default after a fire burned down the building, the court recognized such circumstances to be the type that would justify the application of this limited exception. A circumstance where a tenant would not have the opportunity to cure the default following a landlord's election to start enforcing such provision seems to be an inequitable result that the court would not allow. Conversely, one could argue that provided the tenant is able to cure and adhere to the written terms of the lease before a default is declared, the exception may not apply.

Conclusion

At first glance, boilerplate provisions used by a good transactional attorney seem to hold the key to whether you will prevail in your eviction action. Notwithstanding the excellent draftsmanship of this hypothetical lease, the issue of whether the tenant will be evicted is less than clear and likely turns on key facts about the consent of the prior landlord, the knowledge of the new landlord, the actions taken by the tenant in furtherance of the purported oral modification, and whether the tenant had an opportunity to cure (and whether requiring the tenant to revert to the original lease terms would work a fraud on the tenant), among other factors. You tell your client to buckle up for the road ahead as you believe defenses may exist, that summary judgment may not be available, and this eviction action is not going to end quickly.

Jason M. Ellison *is a board-certified real estate attorney with a practice focus on litigation. He is licensed to practice in all state courts in the State of Florida and the United States District Courts for the Northern, Middle, and Southern Districts of Florida. Ellison earned his bachelor's degree from Stetson University in Deland, Florida, and his Juris Doctorate from Stetson University, College of Law. Ellison serves on the Executive Council of The Florida Bar's Real Property, Probate, and Trust Law Section where he has served as chair and vice-chair of several committees since 2013.*

Endnotes

1 *Leeds Shoes, Inc. v. Wally*, 309 So. 2d 249, 249 (Fla. 4th Dist. 1975).

2 *Id.*

3 *Parkleigh House, Inc. v. Wahl*, 97 So. 2d 714, 714–715 (Fla. 3d DCA 1957).

4 *Rybovich Boat Works, Inc. v. Atkins,* 587 So. 2d 519 (Fla. 4th DCA 1991), *rev. denied*, 599 So. 2d 654 (Fla. 1992).

5 *Id.* (Holding neither the parties' conduct nor written amendments to contract resulted in a waiver of the contract's "time is of the essence" provision where the contract contained a specific anti-waiver provision requiring a writing signed by the party against whom the waiver is asserted.)

6 *Nat'l Home Communities, LLC v. Friends of Sunshine Key, Inc.*, 874 So. 2d 631, 634 (Fla. 3d DCA 2004).

7 *Roundtree v. Smith*, 448 So. 2d 1252, 1253 (Fla. 4th DCA 1984) (quoting *Berwick Corp. v. Kleinginna Investment Corp.*, 143 So. 2d 684, 688 (Fla. 3d DCA 1962)).

8 *Blow v. Colonial Oil Co.*, 225 So. 2d 167, 169 (Fla. 1st DCA 1969) ("Leases should be construed to give effect to the intention of the parties.").

9 *Professional Ins. Corp. v. Cahill*, 90 So. 2d 916, 918 (Fla. 1956) ("A written contract or agreement may be altered or modified by an oral agreement if the latter has been accepted and acted upon by the parties in such a manner as would work a fraud on either party to refuse to enforce it.").

10 *Hallandale Plaza, LLC v. New Tropical Car Wash, LLC*, 2022 WL 697797 (Fla. 4th DCA 2022).

11 *W.W. Contracting, Inc. v. Harrison*, 779 So. 2d 528, 529 (Fla. 2d DCA 2000).

12 *Jupiter Square S.C. Assocs., Inc. v. Tomary, Inc.*, 571 So. 2d 538 (Fla. 4th DCA 1990).

13 *Husky Rose Inc. v. Allstate Ins. Co.*, 19 So. 3d 1085 (Fla 4th DCA. 2009).

14 *Id*. at 1087.

15 *Id*. at 1088–1089. The second exception identified by the *Husky Rose* court is where "subsequent conduct of the parties indicates the acceptance of the oral modification." Id. at 1089 (citing *Pan Am. Eng'g Co. v. Poncho's Constr. Co.*, 387 So. 2d 1052, 1053 (Fla. 5th DCA 1980)).



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I QUIT:

Trustee Resignation Rules Clarified

By Patrick J. Lannon, Esq., Shutts & Bowen, LLP, Miami, Florida
and Mary Karr, Esq., Gunster, Miami, Florida

While some trustees may continue to serve until death or trust termination, many find themselves wishing to pass the baton while the trust administration is ongoing. In the case of a trust instrument that is silent or imposes undue restrictions on resignation, resigning trustees will be relieved to learn that Florida law has long given a trustee the right to resign "(a) [u]pon at least 30 days' notice to the qualified beneficiaries, the settlor, if living, and all the cotrustees; or (b) with the approval of the court."[1] The trustee's right to resign is a mandatory rule.[2] The legislative history provides the "trustee's right to resign is a mandatory provision and may not be denied or curtailed in the trust instrument."[3]

The mandatory nature of the right to resign prevented settlors from imposing unreasonable restrictions on the trustee's ability to resign, but did it also operate to create mandatory obligations for a trustee who would otherwise prefer to quit according to a less burdensome procedure outlined by the trust instrument? If a settlor wanted to make it easier to for a trustee to resign, and if the trustee wanted to quit according to the settlor's terms, was the trustee nevertheless required to comply with extra restrictions the settlor did not even wish to impose? Prior to July 1, 2022, it was unclear whether a trustee could ever resign as permitted in the trust instrument with *less than* 30 days' notice, or without notifying all of the qualified beneficiaries, each living settlor, and all cotrustees.

Assuming a cotrustee or successor trustee is in place to continue the trust administration,[4] a resigning trustee may prefer to avoid such extensive notice requirements and/or have a shorter notice period or even immediate effect to a resignation. The mandatory nature of the resignation right was interpreted by many to foreclose reduced notice or a shorter notice period, irrespective of the language of the trust instrument. To avoid uncertain liability, many trustees continued in their role for 30 days after notice of resignation even when all interested persons were in agreement as to the resignation. Such extended service denies quick closure to a trustee who no longer wants to serve (for example, due to conflict with the settlor or a beneficiary).

Effective July 1, 2022, Fla. Stat. § 736.0705(1) was amended to read in full as follows:

> (1) A trustee may resign in any of the following ways: (a) In accordance with the procedure set forth in the trust instrument and upon notice to the cotrustees or, if none, the successor trustee who has accepted the appointment, or, if none, to the person or persons who have the authority to appoint a successor trustee; or (b) Upon at least 30 days' notice to the qualified beneficiaries, the settlor, if living, and all the cotrustees; or (c) With the approval of the court.

With the addition of new subsection (1)(a) of the statute, a settlor can now customize a trust instrument as to the formalities necessary for a trustee to resign, including eliminating the notice period, as long as at least one of the listed persons (or entities) receives notice. Importantly, this additional flexibility only applies if the trust instrument provides a mechanism for a trustee to resign that has fewer procedural requirements than subsection (1)(b) of the statute. To take advantage of the new language, a trust instrument might provide, for example:

> Any Trustee can resign by giving written notice to the person or persons who then have the right under Article ___ to name a successor Trustee and to each

continued, page 11

other Trustee then serving or, if none, the successor Trustee who has accepted appointment (collectively, the "Notice Recipients"). If a successor Trustee is required under Article ___, the resignation will not be effective until a successor Trustee has accepted appointment. If a successor Trustee is required and none has accepted appointment within 30 days after the notice of resignation, the resigning Trustee may petition a court with jurisdiction over the trust to appoint a successor Trustee. If no successor Trustee is required then such resignation shall be effective upon receipt by the last of the Notice Recipients to receive notice.

While a trust instrument might allow a trustee to resign without notice to qualified beneficiaries, trustees should think twice about foregoing the protections of obtaining a release of liability from qualified beneficiaries.[5] Without an effective release of liability, a beneficiary may challenge the trustee's actions long after resignation. A trustee of an irrevocable trust is still required to deliver a trust accounting upon change of the trustee,[6] and a successor trustee may take steps to avoid liability for actions taken by the prior trustee by seeking beneficiary waivers or releases,[7] so any attempt by the resigning trustee to keep the resignation quick and easy might instead result in calling the beneficiary's attention to the resigning trustee's actions.

Putting aside the question of whether a trustee should avail itself of the flexibility offered by a trust instrument, the newly expanded opportunity to describe the trust resignation rules should not be ignored when preparing new trust instruments or advising resigning trustees as to their resignation options.

Mary Karr *is a shareholder in the Private Wealth Services group in Gunster's Miami office. She has extensive experience in domestic and international estate planning, probate and trust administration, trust and estate litigation and tax controversy.*

Mary represents high net worth individuals in all aspects of estate planning, including tax planning, gift giving, all types of trusts, family limited partnerships, charitable planning, charitable foundation and other transactions. She also has extensive experience with judicial and non-judicial trust modifications, trust reformations, trust decanting transactions, all aspects of complicated trust administrations, will contests and disputed guardianship matters.



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Endnotes

1 Fla. Stat. § 736.0705(1) (as effective prior to July 1, 2022).

2 "736.0105. Default and mandatory rules.... (2) The terms of a trust prevail over any provision of this code except … (o) … the right of a trustee under s.736.0705 to resign a trusteeship."

3 See Fla. Staff Analysis, S.B. 1170, 3/21/2006.

4 Unless a court otherwise orders or a cotrustee remains in office, Fla. Stat. § 736.0707 continues the powers and duties of a resigning trustee until the trust property is delivered to a successor trustee or other person entitled to the property.

5 Fla. Stat. § 736.1012.

6 Fla. Stat. § 736.0813(1)(d). Note that a qualified beneficiary may waive the duty to account, Fla. Stat. § 736.0813(2), but without an accounting or other disclosure the trustee foregoes the shortened statute of limitations under Fla. Stat. § 736.1008(2).

7 Fla. Stat. § 736.08125.



Critical Drafting Considerations For Operating Agreements And How To Avoid Or Limit Liability Between And Among Members Of An LLC

By Paul O. Lopez, Esq. Tripp Scott, P.A., Fort Lauderdale, Florida and
Brittany Hynes, Esq., Tripp Scott, P.A., Fort Lauderdale, Florida

Limited Liability Companies ("LLCs") are by far the most common business structure, including for businesses involved with real estate. Typically, those interested in buying, selling, or renting commercial and/or residential property will opt to create an LLC. There are many benefits to creating an LLC for real estate ventures, with the first being the liability shield afforded by LLCs against a business owner's personal assets. Another attractive facet of forming an LLC is to avoid double taxation because LLCs are generally subject to "pass-through" taxation, in which a business's taxes pass through to the tax returns of the individual owners. Finally, the flexibility of forming and operating an LLC contributes to the business structure's mass popularity in the United States.

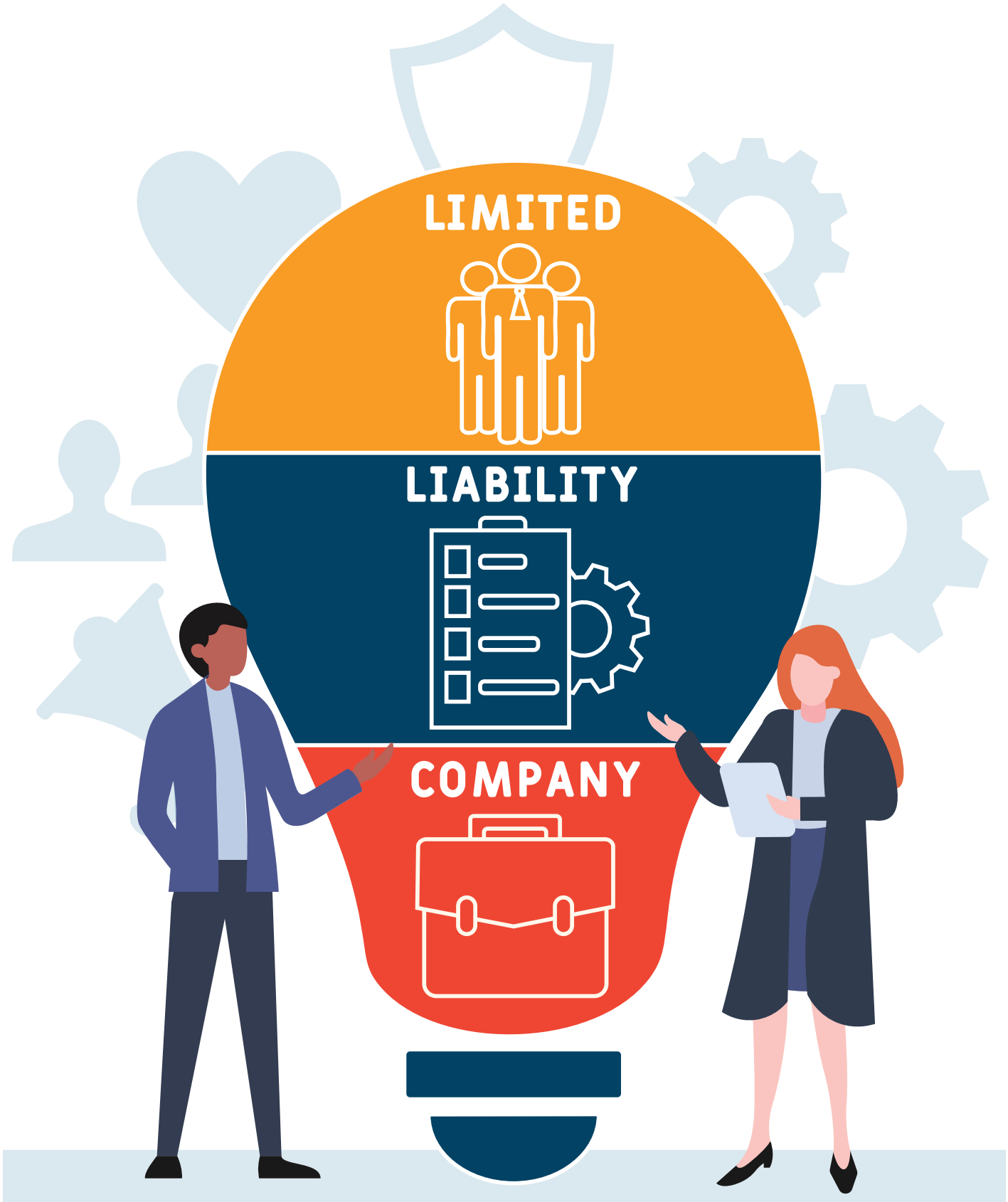
Very few formalities are required to start and operate an LLC. After forming an LLC in Florida, the only requirement is to file Articles of Organization for the LLC with the Department of State. That said, it is a widespread and good practice for LLCs to also prepare written operating agreements which are used to define how an LLC will function as a business entity and who is responsible for managing the LLC. An LLC that does not have an operating agreement will be relegated to the governance provided by the Florida Revised Limited Liability Company Act (the "Revised LLC Act"), but the Revised LLC Act often leaves much to be desired. However, for LLCs that wish to create operating agreements, there are important considerations discussed below that drafters must keep in mind.

While LLCs afford many benefits, disputes will inevitably arise between the owners of the LLC. One of the key issues that arise in these types of disputes is determining who is in control based on their percentage of ownership and/or who is authorized to make key decisions on behalf of the LLC. Litigation between members in an LLC can be complicated, as most disputes over money or control usually are. When a minority group of LLC members believes that such members are entitled to profits and/or that the majority in control is mismanaging the company, these situations often lead to litigation.

When litigation ensues, there are two basic types of actions a dissatisfied member might bring. The first can be a direct action to assert a member's own injury caused by a manager, another member, or the LLC.[1] The second type is a derivative action to assert an injury to, and on behalf of, the LLC.[2] Whether a lawsuit is a direct action or derivative action can have significant impacts on recovery and can also have an impact on the litigation strategy. When an aggrieved member sues directly, that means that the aggrieved member brought an action against another member, individually, thereby creating exposure to that other member. When an aggrieved member successfully sues derivatively, however, the claims are brought for the benefit of the company and not the aggrieved member. Notably, while aggrieved members, from a leverage standpoint, typically prefer to sue other members directly, Florida law generally strictly circumscribes the instances when members can assert direct claims against other members.[3]

The leading Florida case distinguishing between direct and derivative actions in LLCs is *Dinuro Investments, LLC v. Camacho*.[4] The Third District Court of Appeal explained in pertinent part:

continued, page 13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> "Whether a particular action may be brought as a direct suit or must be maintained as a derivative suit can be a confusing inquiry. After all, a member or shareholder with a personal stake in a company or corporation necessarily sustains a loss when the company loses value, and determining which types of loss are directly compensable by direct suit requires fine lines to be drawn. These distinctions are even more difficult to draw for closely held corporations and LLCs, which typically have fewer individuals that possess an ownership interest, because claims of mismanagement or self-dealing become a zero-sum game in which one party profits from the company's loss, while the other is harmed due to the company's reduced value."[5]

Following a sweeping analysis of "nearly fifty years of apparently divergent case law," the Third District Court of Appeal promulgated a two-prong test for member(s) to satisfy to bring a direct action.[6] The test requires (1) the direct harm to the member does not flow subsequently from initial harm to the company, and (2) the injury to the member be special in that it is separate and distinct from other members.[7] However, those that are unable to satisfy the two-prong test are not out of luck as Florida recognizes an exception to the rule.[8] The exception to the rule applies when "there is a separate duty owed by the defendant(s) to the individual plaintiff under contractual or statutory mandates."[9] Accordingly, to bring a direct claim against their company, a plaintiff must either show (1) direct harm and special injury, or (2) contractual or statutory exceptions.[10]

The exception to the two-prong test may appropriately be referred to as the "duty owed" test.[11] Specifically, the duty owed test "examines the statutory and contractual terms to determine whether the duty at issue was owed to the individual member . . . by a particular manager or member, or whether those duties were owed to the company generally."[12] While there are few Florida statutes that specify who owes particular duties to whom in a company, the duty owed approach to drafting an operating agreement allows for the greatest freedom to contract.[13] That being said, without the foresight to include particular duties owed by managers or members in a company, such language may inadvertently be left out of an operating agreement. Without outlining the duties owed in an operating agreement, concurrent with the scarcity of statutes addressing the issue, whether to proceed with a direct or derivative claim may not be clear.

While an operating agreement is a vitally important tool for governing parties' rights in an LLC, one can intentionally or inadvertently contract away the right to enforce an operating agreement, as enforcement is not a mandatory rule.[14] Nevertheless, a member's right to bring a direct action, including one to enforce any rights enumerated in an operating agreement, cannot be unreasonably restricted.[15] In *Ferk Family, LP v. Frank,* the Third District Court of Appeal decided whether the plaintiff had properly brought a direct action for breach of contract against the other members of an LLC.[16] In *Ferk Family*, the plaintiff brought an action for an injury arising from a breach of an operating agreement.[17] *Ordinarily, this type of action would be derivative* because the injury derived through the LLC.

However, the operating agreement in *Ferk Family* importantly contained a provision stating "nothing herein contained is intended to, nor shall it limit or affect, any other rights in equity or any rights at law or by statute or otherwise of any Member aggrieved as against the other Members, for breach or threatened breach of any provision thereof . . . ."[18] The Third District Court of Appeal held that the plaintiff had the authority to sue directly because this provision fulfilled the duty owed test and provided a sufficient foundation to sustain a direct action.[19] As such, the plaintiff would be able to recover from the other members directly, rather than the reduced recovery it would have received had it brought a derivative action.

Thus, what *Ferk Family* tells us and confirms is that the plain language of the Revised LLC Act affords members the right to sue another member directly where the operating agreement so provides.[20] In other words, under Florida law, an LLC's operating agreement can provide a method for an aggrieved member to sue another member directly, even when a court would traditionally deem such a claim as derivative on behalf of the LLC. Given the foregoing, it is vitally important to have an operating agreement to govern the parties' rights in an LLC. However, it is equally important to pay close attention to key drafting considerations, including when and how members can sue one another in connection with the company's management. Failing to do so could create significant exposure between and among members that otherwise would not exist.

continued, page 15


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Endnotes

1 Fla. Stat. § 605.0801 (2018).
2 Fla. Stat. § 605.0802 (2013).
3 Fla. Stat. § 605.0801(2).
4 *Dinuro Investments v. Camacho*, 141 So. 3d 731 (Fla. 3d DCA 2014).
5 *Id.* at 735.
6 *Id.* at 739.
7 *Id.* at 739-40.
8 *Id.* at 740.
9 *Id.*
10 *Id.*
11 *Id.* at 736.
12 *Id.*
13 *Id.* at 738.
14 Fla. Stat. § 605.0105(3) (2019).
15 *Ferk Family, LP v. Frank*, 240 So. 3d 826, 838–39 (Fla. 3d DCA 2018).
16 *Id.* at 836.
17 *Id.* at 830.
18 *Id.* at 837.
19 *Id.* at 839.
20 *Id.*

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CPM Scheduling Made Easy

By Mark Young, Esq., Kubicki Draper P.A., West Palm Beach, Florida

Critical Path Method Scheduling ("CPM Scheduling") is the preferred scheduling method on most modern construction projects and is critically important in many construction delay claims. The average Florida lawyer is probably more familiar with the CPM logic than they realize. The author was taught to perform CPM scheduling calculations by hand in a civil engineering program. Performing hand calculations of CPM Scheduling ensures a thorough understanding of the underlying principles of this type of scheduling.

The Magic of CPM Scheduling – Building A "Two Hour" House

The advent of CPM Scheduling leads to increasingly shorter and shorter time periods for constructing single-family houses. In 2005, a house was built in 2 hours, 52 minutes, and 29 seconds and was dubbed the "two-hour house." Each task within the project schedule was sequenced and accelerated to complete construction of the two-hour house. Without utilizing CPM Scheduling, a two-hour house would not be possible. A video highlighting the achievement is available on YouTube by searching for "two-hour house."[1]

The Analogy to GPS Navigation

If you drive a car, you probably have used a GPS-based navigation system. GPS is Global Position Satellite navigation. You input your destination, and the GPS navigation system calculates the route and estimates arrival time. The algorithm used by the GPS navigation system is analogous to CPM Scheduling logic. The GPS navigation system will determine the time duration to drive on a series of roads to get to your ultimate destination. The GPS navigation system will continuously analyze the chosen path and adjust to alternate paths if there are delays and another path becomes the quickest way to travel. Similarly, a CPM Schedule will determine the time duration for various tasks, with each task interlocked with logic in sequential completion to determine which tasks to perform to most quickly complete the project. This fastest route for CPM Scheduling is called the critical path. The primary difference between CPM Scheduling and GPS navigation is that while a GPS navigation system will choose the quickest path to the destination, a CPM Schedule requires all tasks to be completed. In other words, a GPS Navigation system will not require a driver to drive all potential roads to a destination, just the quickest.

How long should it take to drive from West Palm Beach to Miami?

For example, I need to drive from my office in West Palm Beach, Florida, to the courthouse in downtown Miami for a 9:00 a.m. hearing. My GPS navigation system estimates the travel

continued, page 17

time as 1.5 hours when I input the information at 8:00 p.m. the night before the hearing. This calculation is based on the traffic at 8 p.m. Based on this 1.5-hour drive time estimate, I should be able to leave my office in West Palm Beach at 7:00 a.m. and get to the Miami courthouse thirty minutes before the 9:00 a.m. hearing, but Miami traffic is unpredictable. Due to traffic, the drive originally estimated to take 1.5 hours may take up to 3.0 hours. Does this mean that I was negligent in my driving? No, of course not. Does it mean the GPS navigation system is broken? No. The original travel estimate was a planning tool, not a determining factor on whether I was negligent or whether the navigational system was faulty.

Similarly, CPM Scheduling is a planning and management tool in the construction industry for allocating resources to the tasks on the critical path. The critical path is the task that affects the final project delivery time. Knowing the critical path allows the project manager to allocate additional construction resources and ultimately shorten the time to complete the project. These additional resources will likely increase the cost but can compress the schedule to complete a project on time.

Similar to a CPM Schedule, the GPS navigation system will recalculate arrival times based on current events. An accident on the Florida Turnpike will show as a traffic delay, and a quicker route may be proposed. (We will return to this comparison after discussing a historical introduction to construction scheduling.)

History of Construction Scheduling

In the 1990s, CPM Schedules gained popularity in construction coinciding with the availability of personal computers. Prior to CPM Scheduling, GANTT schedules were primarily used. GANTT schedules are a type of bar chart that was prevalent in construction scheduling until the 1990s. GANTT schedules are a series of horizontal lines that represent how long a particular construction task may take. The problem with GANTT schedules is that there is no logic linking the construction tasks, so changes in the schedule to one task do not show the effect on other tasks.

CPM Scheduling

The innovation of CPM Scheduling is the interlocking of sequencing of tasks. Using the example of building a new home on a property with an existing building, an appropriate demolition permit must be obtained before demolishing the old structure. A delay in obtaining the demolition permit or demolishing the existing structure would delay the entire project. After demolishing the old structure, excavation of the footings is the next step that must occur. Each of these steps must be completed in sequence and any delays will affect the overall schedule for the project. A CPM Schedule incorporates this logic into the schedule, so any delays in a critical path item will delay the entire schedule.

Fig. 1 is a simplified GANTT schedule for demolition of an existing house and building the new foundation. There are five tasks: 1) demolish existing structure; 2) excavate foundation; 3) install plumbing in foundation; 4) install electrical in foundation; and 5) place the concrete in the foundation.

The sequence of construction tasks in this example are straightforward. First, the existing structure must be demolished. Second, the excavation for the foundation must be performed. These two tasks are not interchangeable, as demolition must be followed by excavation. The installation of electrical and plumbing is interchangeable in sequence and could potentially be performed at the same time. However, these two tasks can only be performed after excavating the foundation; and only after the electrical and plumbing are completed, can the concrete be poured to form the foundation. The schedule does not have built-in logic to interlock the construction tasks, so a delay in one task immediately affects the overall schedule.

	WEEK 1	WEEK 2	WEEK 3	WEEK 4	WEEK 5
Demolish existing structure					
Excavate foundation					
Install plumbing in foundation					
Install electrical in foundation					
Place concrete in foundation					

continued, page 18

Once the exterior shell of the building is completed, several trades can work simultaneously. The exterior shell typically includes the exterior walls and roof components. Completing the shell allows the contractor to schedule multiple trades, such as plumbers, electricians and window installers to work simultaneously on the job site.

CPM Scheduling Is a Tool

Construction has been described as organized chaos. CPM Scheduling is a tool for managing that chaos. CPM Scheduling is both a planning tool and a management tool. When bidding a project, an estimator should imagine how the project will be built to estimate the amount of time needed to complete the project. In an ideal world, a rough CPM Schedule should be created when a contractor bids on a project so that the contractor has a realistic estimate of the time to complete the project.

If the contractor is the successful bidder and is awarded the project, the project manager should create a CPM Schedule to estimate the time to build the project. The CPM Schedule is critical for sequencing the construction tasks to logically build the project.

Importance of the Critical Path

A CPM Schedule is not only a planning tool for sequencing of construction tasks. It also aids in the active management of a construction project. The critical path allows a project manager to focus resources on tasks that will affect the timely completion of the project. In an ideal world, the CPM Schedule should be updated periodically to reflect delays in the project because the critical path will change if certain tasks are delayed. In some circumstances, multiple critical paths may develop, and a delay in any of these critical paths could delay the entire project. This requires a responsible project manager to periodically update the CPM Schedule. In a mega project, such as $400 million or larger, a contractor may consider employing a full-time scheduler to assist the project manager in managing the project.

Attacking and Defending a CPM Schedule

An initial CPM Schedule is like a GPS navigational system that calculates the time based on getting all green lights when driving from West Palm Beach to downtown Miami. A CPM Schedule is not necessarily an accurate prediction of the actual time to complete a project. In some sense, a CPM Schedule is akin to a litigation budget that a law firm provides a client – based on an assessment at a particular point in time with certain assumptions.

Prejudicial

A CPM Schedule could be prejudicial in some circumstances. For instance, a plaintiff's attorney could prepare a computer animation of the as-planned construction schedule to the as-built construction schedule. In most circumstances, such a computer animation would be prejudicial and should be excluded. A jury may not understand that a CPM Schedule is a planning tool, not necessarily a realistic estimation of time to complete a construction project.

Delay Claim – No Original Schedule

To use a CPM Schedule in a delay claim, the as-built schedule should be compared to a realistic as-planned CPM Schedule. If the original schedule no longer exists or cannot be reliably re-constituted, the CPM Schedule may be excluded by a court.

GIGO – Garbage In, Garbage Out

The common accounting term "GIGO" is short for garbage in, garbage out. For example, accounting statements are only as reliable as the data used to create them. The same can be said about CPM Schedules. CPM Schedules are dependent on the person creating the schedule and logically sequencing the construction tasks in the proper order. If not, it is garbage in, garbage out.

Conclusion

The average reader probably knew more about CPM Scheduling than they realized before reading this article. The GPS navigation system calculates a series of nodes and estimates the travel time between nodes, similar to CPM Scheduling. As delays occur, the GPS system continually evaluates for a faster way to reach the final destination. Similarly, CPM Scheduling constantly evaluates the critical path as delays occur. CPM Scheduling and GPS navigation differ because CPM Scheduling requires all construction tasks to be performed. In contrast, GPS navigation simply finds the quickest route. Not all roads must be driven. This knowledge may help in a construction delay claim.



M. YOUNG

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Endnotes

1 https://youtu.be/YsFiU2-_T_4

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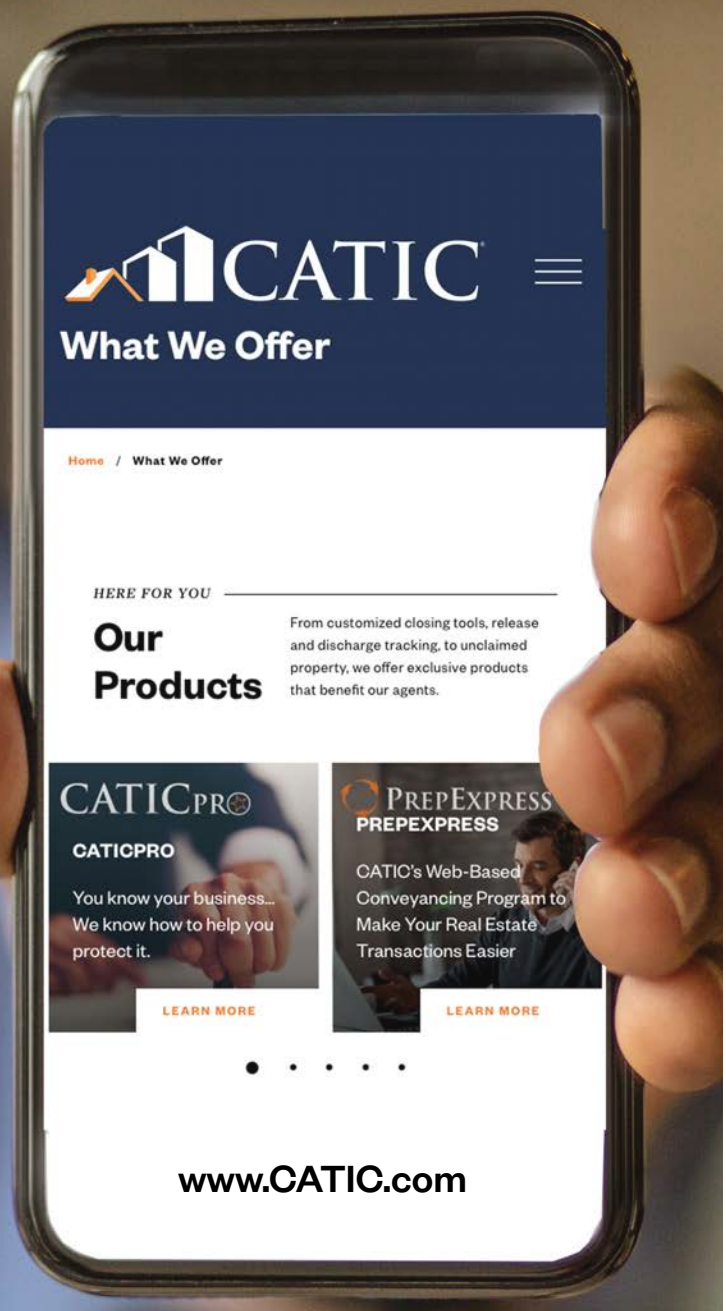

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Marketable Record Title Act Uniform Title Standards Get A Makeover

By Laura Licastro, Westcor Land Title Insurance Company, Maitland, Florida, and Melissa Scaletta, Attorneys' Title Fund Services, LLC, Orlando, Florida

As part of its continuing review of the Uniform Title Standards ("Standards"), the Title Issues and Standards Committee ("Committee") recently completed a revision of Chapter 17 of the Uniform Title Standards on Marketable Record Title Act ("MRTA"). The subcommittee that researched changes in the law affecting MRTA and drafted the revised Standards was led by Melissa Scaletta and included Christopher Smart, Laura Licastro, Sanjiv Patel, and Cynthia Manfredi. They were assisted by recent Florida State University Law School graduate Alexandra Fox. Several members of the Committee also contributed to the final revision of Chapter 17. The subcommittee presented a seminar introducing the proposed changes at the Section's February 2022 meeting in Tallahassee

The changes incorporated several cases involving MRTA decided since Chapter 17 received its last major update. These include cases interpreting the meaning of the term "general reference" in Fla. Stat. § 712.03(1), determining the form of rights-of-way includable in Fla. Stat. § 712.03(5); adding an exception for restrictive covenants recorded in compliance with government-imposed conditions of land use approval; shedding light on what it means to "possess" real property for purposes of Fla. Stat. § 712.03(3); and clarifying the attorneys' fee provision of Fla. Stat. § 712.08.

In 2015, the Fifth District Court of Appeal decided *Barney v. Silver Lakes Acres Property.*[1] In that case, the court held that a deed reciting that the property was "subject to" the obligations of the lot owners to a specifically named owners association was not a "general reference" to the association's restrictive covenants, notwithstanding the absence of the specific book and page of record of the restrictions, thereby bringing the restrictions within the exception of Fla. Stat. § 712.03(1)).

The Florida Supreme Court reviewed three conflicting decisions - whether the exception to MRTA in Fla. Stat. § 712.03(5) for rights-of-way in use applied to rights-of-way held in fee. The case, *FDOT v. Clipper Bay Investments, LLC,*[2] resolved inconsistencies between *FDOT v. Dardashti,* [3] *Water Control District of South Brevard v. Davidson,*[4] and *DOT v. Mid-Peninsula Realty Inv. Group, LLC,*[5] by holding that rights-of-way held in fee, in addition to rights-of-way created by easement, fall within the exception.

In one of the more impactful decisions involving MRTA, the Third District Court of Appeal in *Save Calusa Trust v. St. Andrews Holdings, Ltd.,*[6] created an exception for restrictive covenants recorded in compliance with government-imposed conditions of land use approval. Since most recorded restrictive covenants do not contain provisions indicating whether they were adopted in order to comply with approval conditions for development of the affected land, this case

continued, page 21

caused concern for many practitioners relying upon MRTA to extinguish covenants.

The exception in Fla. Stat. § 712.03(3) for persons in possession was the subject of two recent cases. In *DOT v. Mid-Peninsula Realty Inv. Group, LLC*,[7] the Department of Transportation completed a taking which gave it "full and complete ownership" of the property in question but then only occasionally accessed the land to get to an adjacent parcel it also owned. Mid-Peninsula acquired title to the same property through a wild deed recorded three years after the Order of Taking and sought to quiet title against DOT. The trial and appellate courts both agreed that DOT's limited use of the land did not qualify as "possession" for MRTA purposes.

The First District Court of Appeal also addressed the issue of possession in *Dorsey v. Robinson*.[8] In *Dorsey*, the dispute over possession involved whether the mere placement of a mobile home on real property constituted possession when the mobile home remained unoccupied for years. The court said, consistent with the direction that MRTA is to be construed liberally, that possession required power and control over the land as opposed to mere ownership.

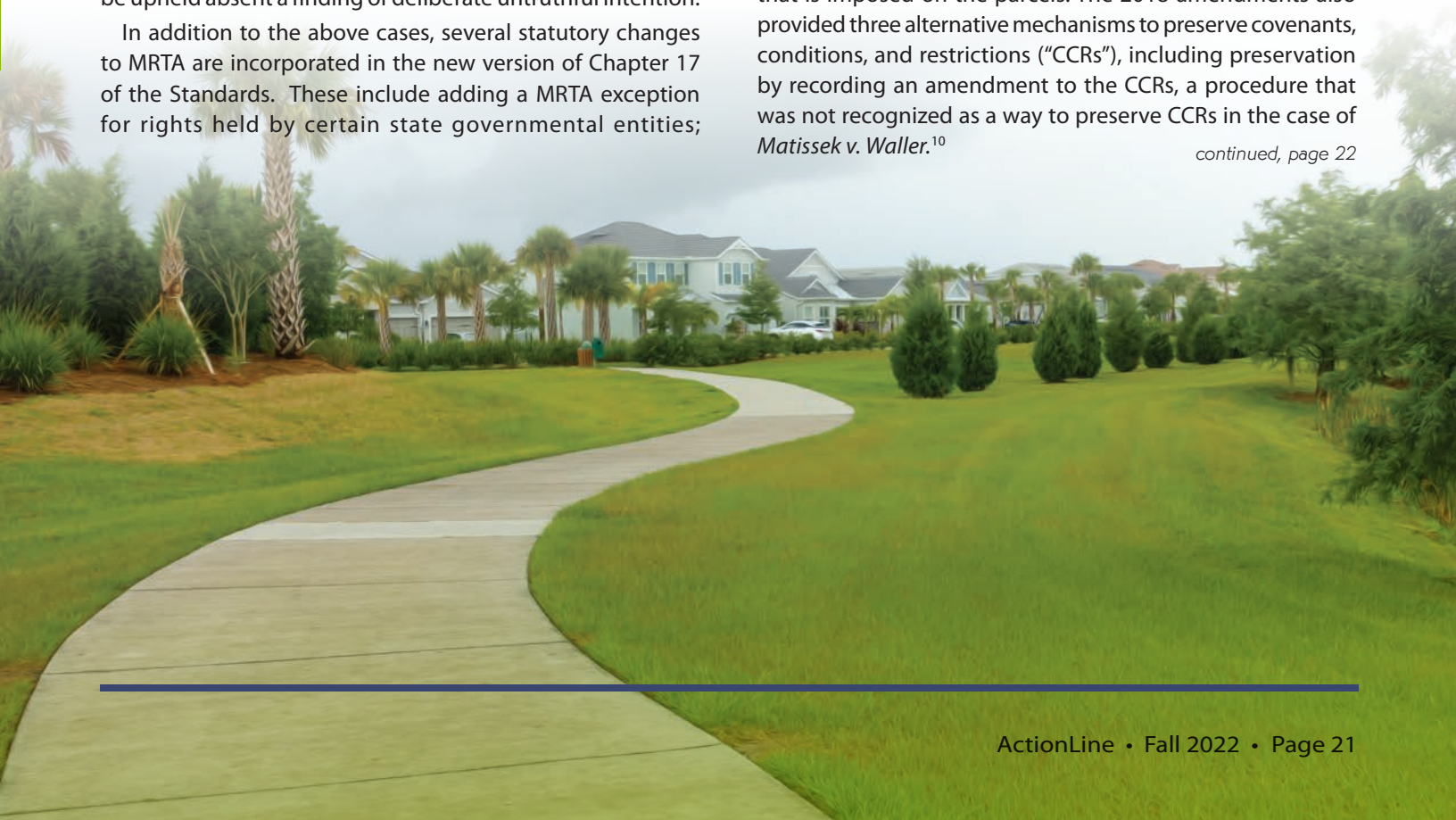
The issue of attorneys' fee awards in MRTA under Fla. Stat. § 712.08 was addressed in *Sand Hill Homeowners Ass'n v. Busch*.[9] Attorneys' fees may be awarded where a person is found to have filed a preservation notice that contains a "false or fictitious claim." The question in *Sand Hill* was whether the party seeking an award of attorneys' fees had to prove that the filer knew the claims were false at the time of recording. The court concluded that an award of attorney's fees could be upheld absent a finding of deliberate untruthful intention.

In addition to the above cases, several statutory changes to MRTA are incorporated in the new version of Chapter 17 of the Standards. These include adding a MRTA exception for rights held by certain state governmental entities; expanding covenant preservation and revitalization; defining discriminatory restrictions and declaring them unenforceable; and, most recently, clarifying several MRTA provisions to reverse the effect of the *Save Calusa Trust and Barney v. Silver Lakes Acres Property* decisions discussed above.

In 2010, the legislature added a new subsection 9 to the list of exceptions to MRTA in Fla. Stat. § 712.03. This subsection states that "[a]ny right, title or interest held by the Board of Trustees of the Internal Improvement Trust Fund, and water management district created under chapter 373, or the United States" shall not be extinguished by MRTA. While Fla. Stat. § 712.04 generally provided that MRTA did not apply to "any right, title, or interest of the United States, Florida, or any of its officers, boards, commissions, or other agencies reserved in the patent or deed by which the United States," prior to this change there was only a specific exception in Fla. Stat. § 712.03(7) for the State of Florida's title to sovereignty lands beneath tidal waters.

Expansion of covenant preservation and revitalization by homeowners associations ("HOAs") and property owners associations ("POAs") came in 2018 with amendments to Fla. Stat. § 712.05 (preservation) and Fla. Stat. § 720.403-407 (revitalization). A POA is more broadly defined than an HOA. It is a corporation or other entity responsible for the operation of property in which the voting membership is made up of the owners of the property or their agents, or a combination thereof, and in which membership is a mandatory condition of property ownership, or an association of parcel owners which is authorized to enforce a community covenant or restriction that is imposed on the parcels. The 2018 amendments also provided three alternative mechanisms to preserve covenants, conditions, and restrictions ("CCRs"), including preservation by recording an amendment to the CCRs, a procedure that was not recognized as a way to preserve CCRs in the case of *Matissek v. Waller*.[10]

continued, page 22



Amendments to MRTA enacted in 2020 added a new Fla. Stat. § 712.065. MRTA now defines a discriminatory restriction as one that limits ownership, occupancy or use of real property based on a natural person's characteristic protected by the laws of the United States or the State of Florida. These discriminatory restrictions are now declared legally unenforceable and severed from any recorded title transaction. Similarly, the recording of any notice to preserve such restrictions does not re-impose them. A recorded amendment to covenants or restrictions that removes a discriminatory restriction but changes no other provision does not constitute a title transaction occurring after the root of title that would cause the thirty-year timeframe for elimination of the restrictions to start over.

The most recent statutory change to MRTA came just this year when the legislature passed a bill addressing the preservation issues created by *Save Calusa Trust*. The amendment added the term "covenants and restrictions" to the specific list of interests that may be extinguished by MRTA. It also clarified that covenants and restrictions imposed in connection with a zoning requirement, building development permit, or other regulatory land use approval may be extinguished by MRTA provided there is not a statement on the face of the first page of the recorded instrument that it was accepted in connection with any such action. Parties holding an interest not extinguished before July 1, 2022, must file a notice pursuant to Fla. Stat. § 712.06 by July 1, 2023, to preserve such interest. Any county must file its notice by July 1, 2025.

That amendment also closed the judicial loophole created by the *Barney v. Silver Lakes* case by replacing the term "general reference" in Fla. Stat. § 712.03(1) with only two specific situations where a muniment of title will be preserved. The first is where the interest is referred to in the legal description of the muniment or by plat name or recording information. The second is where there is an affirmative statement in the muniment that preservation of the interest is intended.

These amendments to Fla. Stat. § 712.03 and § 712.04 state they are remedial in nature and are intended to clarify existing law. The changes apply to all estates, interests, claims, covenants, restrictions, and charges, whether imposed or accepted before, on or after the 2022 amendment.

The Committee is continuing its mission of updating the Standards regularly in accordance with new case law and statutory changes. Proposed revisions to several chapters of the Standards, including ones on bankruptcy, plats, and trusts, will be presented for approval by the Executive Council in the near future. In addition, the Committee strives to promote the use of the Standards by practitioners through the presentation of continuing legal education both live and in webinar format. The Committee is currently co-chaired by Rebecca Wood (RWood@thefund.com) and Amanda Hersem (AHersem@wfgnationaltitle.com), who are assisted by co-vice-chairs Melissa Scaletta (MScaletta@thefund.com), Karla Staker (Karla.Staker@fnf.com), and Robert Graham (RGraham@gunster.com). If you are interested in joining the Committee, please contact one of the co-chairs or co-vice-chairs.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Endnotes

1 *Barney v. Silver Lakes Acres Property,* 159 So. 3d 181 (Fla. 5th DCA 2015).

2 *FDOT v. Clipper Bay Investments, LLC, 160 So. 3d 858 (2015*).

3 *FDOT v. Dardashti*, 605 So. 2d 120 (Fla. 4th DCA 1992).

4 *Water Control District of South Brevard v. Davidson*, 638 So. 2d 521 (Fla. 5th DCA 1994).

5 *DOT v. Mid-Peninsula Realty Inv. Group, LLC*, 162 So. 3d 218 (Fla. 2nd DCA 2015).

6 *Save Calusa Trust v. St. Andrews Holdings, Ltd.*, 193 So. 3d 910 (Fla. 3d DCA 2016).

7 *DOT v. Mid-Peninsula Realty Inv. Group, LLC*, 171 So. 3d 771 (Fla. 2d DCA 2015).

8 *Dorsey v. Robinson*, 270 So. 3d 462 (Fla. 1st DCA 2019).

9 *Sand Hill Homeowners Ass'n v. Busch, 210, So. 3d 706 (Fla. 5th DCA 2017).*

10 *Matissek v. Waller*, 51 So. 3d 625 (Fla. 2d DCA 2011).

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Friends Of The Section

2022 Legislative Session

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

During each Legislative Session, several key members of the Florida Legislature provide leadership in support of the Section in their various roles as committee chairs, bill sponsors, amendments sponsors and advocates in debate. Some of the legislators who made significant contributions to the Section's success in the 2022 Legislative Session are acknowledged below, along with brief biographical profiles and lists of their committee memberships. As we all work hard on behalf of the Section to achieve our legislative goals, we are reminded that only sitting members of the Florida Legislature can sponsor and vote on bills. We thank these outstanding legislators for their dedication to the Section and we owe our 2022 Session legislative successes to them.



Speaker Chris Sprowls

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



Senator Kathleen Passidomo

As the Chair of the powerful Rules Committee of the Florida Senate and throughout her legislative service, Senator Kathleen Passidomo has played a key part in facilitating the passage of numerous Section initiatives and assuring that the Section's proposed legislative initiatives received successful consideration in the Florida Senate. She played a pivotal role in the passage of condominium safety legislation. Senator Passidomo previously served in the Florida House of Representatives from 2010-2016 and was elected to the Florida Senate in 2016 representing Collier County, Hendry County and part of Lee County. In addition to being the Rules Committee Chair, Senator Passidomo has been named the Senate President for the 2022-2024 term. Senator Passidomo also serves as a member of the Appropriations Committee, the Banking and Insurance Committee, the Regulated Industries Committee, the Education Committee and the Joint Legislative Budget Commission. She is a partner in the law firm of Kelly, Passidomo and Alba, LLP in Naples with a practice in real estate law, corporate law and business law. She is a Section member and is a Florida Bar Board Certified Real Estate Lawyer.



Representative Paul Renner

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



Representative Wyman Duggan

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

continued, page 25

challenges. Rep. Duggan is a graduate of the U.S. Marine Corps Officer Candidate School - Second Lieutenant, USMCR.



Senator Bobby Powell

Senator Bobby Powell sponsored the Section's Estates and Trusts Bill, Senate Bill 1502. Senator Powell currently serves on the full Appropriations Committee, the Rules Committee, the Commerce & Tourism Committee, the Health Policy Committee, and the Criminal Justice Committee, and serves as the Alternating Chair of the Joint Committee on Public Counsel Oversight. Senator Powell is an Urban Design planning and project manager and a member of the American Institute of Certified Planners and the American Planning Association. Representing part of Palm Beach County, Senator Powell was first elected to the Florida House of Representatives in 2012 where he served four years prior to being elected to the Florida Senate in 2016. Senator Powell has sponsored one or more bills every year for the Section since becoming a member of the Florida Legislature.



Representative Thad Altman

Representative Thad Altman sponsored the House version of Senate Bill 1502 the Section's Estates and Trusts legislation. He is the chair of the Children, Families & Seniors Subcommittee and serves as a member of the Ways & Means Committee, the Health & Human Services Committee, the State Affairs Committee, and the Health Care Appropriations Subcommittee. Representative Altman is the President of The Astronauts Memorial Foundation at the John F. Kennedy Space Center. Representative Altman served as a House member from 2003 through 2008 and as a Florida Senator from 2008 through 2016 until he was termed-out of office. He was elected to the House of Representatives again in 2016 and has been reelected subsequently. Throughout his many years of legislative service representing part of Brevard County in both the House and the Senate, Representative Altman has been a tremendous and consistent friend to the Section.



Senator Lori Berman

Senator Lori Berman sponsored the Section's initiative on Secured Transactions (Waivers of Exemptions of Applicable Assets), Senate Bill 406 - The Kearney Fix. Senator Berman represents part of Palm Beach County since being elected to the Senate in April 2018 in a special election. She previously served four terms in the House of Representatives. Senator Berman serves as a member of the Appropriations Subcommittee on Agriculture, Environment & General Government, the Education Committee, the Finance & Tax Committee, the Ethics & Elections Committee, and the Transportation Committee. Senator Berman is an attorney and a Section member practicing in the areas of commercial litigation, regulatory real estate law and estate planning. Senator Berman has her LLM in Estate Planning. Since her election to the Florida House of Representatives in 2012, Senator Berman has been a loyal supporter of the Section, sponsoring and working on numerous important Section initiatives.



Representative Ben Diamond

Representative Ben Diamond worked closely with the Section in the passage of the legislative initiative on Construction Liens and Bonds. Representative Diamond was elected to the House of Representatives in 2016 and has been reelected subsequently. Representative Diamond has worked in support of numerous Section positions and initiatives as the Minority Ranking Member on the House Civil Justice & Property Rights Subcommittee. He also serves as a member of the Judiciary Committee, the Appropriations Committee, the Rules Committee, and the Environment, Agriculture & Flooding Subcommittee. Representative Diamond is a partner in the Diamond Law Firm, P.A., in St. Petersburg, focusing his practice on estate planning, probate administration and litigation involving wills, trusts and guardianships. Representative Diamond serves on the Executive Council of the Section and has received the Section's "Rising Star" Award for his leadership and service. Throughout his years of legislative service, Representative Diamond has been actively involved in the passage of numerous Section legislative initiatives and advocacy of Section positions.



Representative William C. "Will" Robinson, Jr.

Representative Will Robinson sponsored House Bill 451, the Section's legislative initiative on Sufficiency of Description of Security Interests (The Kearney Fix). Representative Robinson is the Chair of the Professions & Public Health Subcommittee and also serves on the Health & Human Services Committee, the Select Committee on Gaming, the Insurance & Banking Subcommittee, the Regulatory Reform Subcommittee, and the Health Care Appropriations Subcommittee. He was first elected to the House in 2018 representing parts of Manatee and Sarasota counties. Representative Robinson is a Board Certified Real Estate lawyer with Blalock Walters, P.A. in Bradenton and a RPPTL Section member.

continued, page 26



Senator Tina Polsky

Senator Tina Polsky sponsored the Section initiative on IRA Transfers in Divorce, Senate Bill 968. Senator Polsky is a full-time Florida Certified Civil Circuit Mediator, and a Certified Appellate Mediator, for all areas of litigation. She was first elected to the House of Representatives in 2018 and then elected to the Senate in 2020, representing parts of Broward and Palm Beach counties. Senator Polsky serves on the Judiciary Committee, the Ethics and Elections Committee, The Education Committee, The Agriculture Committee, the Community Affairs Committee, and the Appropriations Subcommittee on Education.



Representative Fentrice Driskell

Representative Fentrice Driskell sponsored the House version of the Section's IRA Transfers in Divorce bill, Senate Bill 968. She was elected to the Florida House in 2018 representing part of Hillsborough County. Representative Driskell is the Minority Ranking Member on the House Judiciary Committee and serves on the Appropriations Committee, the Insurance & Banking Subcommittee, the Pandemics & Public Emergencies Committee, and the Redistricting Committee. Representative Driskell was unanimously elected as the Leader of the House Democratic Caucus. She is an AV Preeminent-rated attorney with Carlton Fields in Tampa with significant experience in commercial litigation and bankruptcy matters. A Section member, she has sponsored many important legislative initiatives on behalf of the Section.



Representative Kaylee Tuck

Representative Kaylee Tuck sponsored the House version of the Section's successful legislation on the Marketable Record Title Act, Senate Bill 1380. Representative Tuck is a Real Estate and Land Use & Environmental Law Attorney with Henderson Franklin and a member of the Section. She was elected to the House in 2020 representing all of Glades, Highlands, Okeechobee counties and part of St. Lucie County. Representative Tuck serves as the Vice Chair of the Congressional Redistricting Subcommittee and as a member of the full Redistricting Committee. She also serves on the Professions & Public Health Subcommittee, the Secondary Education & Career Development Subcommittee, the Education & Employment Committee, the Higher Education Appropriations Subcommittee, and the Criminal Justice & Public Safety Subcommittee.



Senator Jennifer Bradley

Senator Jennifer Bradley sponsored the Section's initiative on Construction Liens and Bonds and the initiative on the Service of Process on Unknown Persons. Senator Bradley is an attorney and a member of the Florida Bar. She was elected to the Senate in 2020 representing Baker, Bradford, Clay, Columbia, Dixie, Gilchrist, Lafayette, Levy, Suwannee, Union and part of Marion counites. Senator Bradley is the chair of the Community Affairs Committee and the Vice Chair of the Agriculture Committee. She serves on the Judiciary Committee, the Ethics and Elections Committee, the Education Committee, and the Appropriations Subcommittee on Agriculture, Environment and General Government. She also serves as a member of the Joint Legislative Auditing Committee and the Joint Select Committee on Collective Bargaining.



Senator Ana Maria Rodriguez

Senator Ana Maria Rodriguez sponsored Senate Bill 1380, the Section's successful legislative initiative amending the Marketable Record Title Act. Senator Rodriguez was first elected to the House of Representatives in 2018 and then to the Senate in 2020. Prior to that, she was a City of Doral Councilwoman from 2010-2018, serving as Vice Mayor from 2017-2018. She is the Senior Vice President of Miami Realtors. She is the Chair of the Senate Finance and Tax Committee and the Vice Chair of the Appropriations Subcommittee on Health and Human Services. She also serves on the Transportation Committee, the Agriculture Committee, the Reapportionment Committee, the Miliary and Veterans Affairs, Space and Domestic Security Committee, and the Appropriations Subcommittee on Criminal and Civil Justice.



Representative Erin Grall

In her role as House Judiciary Committee Chair, Representative Erin Grall facilitated the scheduling and passage of the Section's many legislative initiatives and defended against adverse legislation. Representative Grall also serves on the Appropriations Committee, the Redistricting Committee, and the Public Integrity & Elections Committee. Representative Grall was first elected to the House in 2016 representing Indian River County and part of St. Lucie County and reelected subsequently. An attorney and member of the Florida Bar, she is a partner in the Grall Law Group in Vero Beach.

continued, page 27



Representative Traci Koster

Representative Traci Koster worked closely with the Section on very significant issues and stepped up to help the Section throughout the Session. Representative Koster was elected to the House in 2020 representing parts of Pinellas and Hillsborough counties. She sits on the Health & Human Services Committee, the Public Integrity & Elections Committee, the Finance & Facilities Subcommittee, the Insurance & Banking Subcommittee, and the Justice Appropriations Subcommittee. She serves as the Vice Chair of the Early Learning & Elementary Education Subcommittee. Representative Koster practices Marital & Family Law at Koster Legal and is a member of the Section.



Representative Toby Overdorf

Representative Toby Overdorf was the prime House sponsor of the Section's successful Construction Liens and Bonds legislative initiative. Representative Overdorf is a Professional Environmental Scientist and Vice President of Engineering Design and Construction, Inc. He was first elected to the Florida House of Representatives in 2018, representing parts of Martin and St. Lucie counties. He serves on the Rules Committee, the State Affairs Committee, the Local Administration & Veterans Affairs Subcommittee, the Joint Committee on Public Counsel Oversight, the Environment, Agriculture & Flooding Subcommittee, the State Administration & Technology Appropriations Subcommittee, and the Regulatory Reform Subcommittee.



M. EDENFIELD

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



Changes From The 2022 Regular Legislative Session

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

The 2022 Regular Session and Special Session 4D of the Legislature produced a variety of changes affecting the practice areas of RPPTL Section members, many of which were a part of the Section's legislative package. The Section is particularly appreciative of the Members of the House and Senate sponsoring initiatives this year, and these Members are acknowledged below with the legislation that passed during this Session.

All of the bills from this year's Sessions appear in chronological order by bill number with a summary along with the applicable Chapter Law citation for each initiative. The effective date for each of the changes varies, and at the end of each summary, the date the new law took effect is also noted. Three of the measures passed by the Legislature were vetoed by the Governor, and those vetoes are noted and the measures did not become law. The final status and full text of each enrolled bill, including the legislative staff reports and Chapter Law citation, are available on the legislative websites (www.leg.state.fl.us; www.flsenate.gov; www.myfloridahouse.com).



I. SECTION INITIATIVES AND TECHNICAL ASSISTANCE

Construction Liens: SB 352 by Senator Hooper and Representative Bell amends section 713.135 and revises the threshold for determining when the repair or replacement of an existing heating or air-conditioning system is exempt from a specified notice of commencement and applicability of lien requirements from the local authority issuing building permits. SB 352 has passed the Legislature, been approved by the Governor, and took effect on July 1, 2022. **(Chapter 2022-120, *Laws of Florida*.)**

Secured Transactions: SB 406 by Senator Berman and Representative Robinson provides a legislative fix to the holding in *Kearney Constr. Co., LLC v. Travelers Cas. & Sur.Co of Am.*, 2019 WL 5957361 (11th Cir. 2019) by clarifying a security agreement to pledge exempt assets must specifically identify the pledged asset under the Florida Uniform Commercial Code to constitute a valid and intentional assignment, pledge, or waiver. SB 406 has passed the Legislature. **(Vetoed by the Governor.)**

continued, page 29

IRA in Divorce: SB 968 by Senator Polsky and Representative Driskell is the Section initiative amending Fla. Stat. § 222.21 (2) (c) (2022), to clarify the interest of an ex-spouse in an IRA received in a transfer incident to divorce is exempt from the claims of the creditors of a transferee spouse. SB 968 has passed the Legislature, been approved by the Governor, and took effect on June 3, 2022. **(Chapter 2022-167, *Laws of Florida*.)**

Service of Process: CS/CS/SB 1062 by Senator Bradley and Representative Beltran contains The Florida Bar's Business Law Section initiative initiative revising the provisions relating to procedures for service upon various types of business entities. It revises procedures relating to service outside the state and in foreign countries, and it provides required pre-suit notice before filing a medical negligence complaint. The Section's initiative relating to the service of process for removal of unknown parties in possession of real property is also included in the bill. CS/CS/SB 1062 has passed the Legislature, been approved by the Governor, and will take effect on January 2, 2023, except as otherwise provided in the bill text. **(Chapter 2022-190 *Laws of Florida*.)**

Trust Proceedings: CS/SB 1304 by Senator Gruters will make the identities of beneficiaries and specified individuals confidential, and it will make certain documents in trust proceedings involving a family trust company or a foreign family trust company confidential and exempt from public records. CS/SB 1304 has passed the Legislature, been approved by the Governor, and took effect on July 1, 2022. **(Chapter 2022-211, *Laws of Florida*.)**

Guardianship: CS/CS/CS/HB 1349 by Representative Chaney specifies circumstances in which the Office of Public and Professional Guardians may ensure compliance by professional guardians. The legislation also requires guardianship reporting; an initial guardianship plan; a verified inventory or an annual report; and the requirement for submission of information to the clerk of court. The legislation also provides the operation of the new database may not commence operations before July 1, 2023. CS/HB 1349 has passed the Legislature, been approved by the Governor, and took effect on July 1, 2022. **(Chapter 2022-218, *Laws of Florida*.)**

Trusts: CS/SB 1368 by Senator Gruters revises provisions of the Florida Trust Code. The revisions include the rule against perpetuities, trustee duties, methods of notice, representation by parents, non-charitable trusts, trust accounting, and trust reimbursements. CS/SB 1368 has passed the Legislature, been approved by the Governor, and took effect on July 1, 2022. **(Chapter 2022-96, *Laws of Florida*.)**

MRTA: CS/SB 1380 by Senator A.M. Rodriguez and Representative Tuck includes the Section's initiatives to revise the Marketable Record Title Act to resolve the issue in the recent Supreme Court ruling in *Save Calusa Trust v. St. Andrews Holdings,* and the legislation clarifies how restrictions and easements are extended and preserved under the Marketable Record Title Act. CS/SB 1380 has passed the Legislature, been approved by the Governor, and took effect on June 7, 2022. **(Chapter 2022-171, *Laws of Florida*.)**

Estates and Trusts: CS/SB 1502 by Senator Powell and Representative Altman includes the Section's initiative providing for actions by a claimant pending against a decedent at the time of death to satisfy the requirement for bringing an independent action. The legislation also includes the Section's initiative providing for additional options for the resignation by a trustee under s. 736.0705; and it authorizes the use of spousal lifetime access trusts in Florida. CS/SB 1502 has passed the Legislature, been approved by the Governor, and took effect on July 1, 2022. **(Chapter 2022-101, *Laws of Florida*.)**

Condominium Inspections: SB 4-D by Senator Boyd creates mandatory "milestone inspection" reports for multifamily residential condominium and cooperative buildings, of more than 3 stories, that have reached the age of 30 years (with reinspection every 10 years thereafter); and if the building is within 3 miles of a coastline, the inspection report is required when the building reaches 20 years of age (with reinspection every 7 years thereafter). Among its provisions, it will require the inspection reports to be done by a licensed engineer or architect. The report will be provided to local building officials and unit owners, and the report will become a mandatory part of the association's official records and available to prospective purchasers. The legislation also requires reserve studies and provides a new listing of components requiring funding. SB 4-D has passed the Legislature, been approved by the Governor, and took effect on May 26, 2022. **(Chapter 2022-269, *Laws of Florida*.)**

II. INITIATIVES OF INTEREST

Motor Vehicle Bankruptcy Exemption: CS/HB 265 by Representative Gottlieb increases a debtor's exemption in bankruptcy proceedings for a single motor vehicle from a value of $1,000 to a value of $5,000 effective July 1, 2022. CS/HB 265 passed the Legislature. **(Vetoed by the Governor.)**

Building Regulations: CS/CS/HB 423 by Representative LaMarca revises local building regulations and among its provisions, section three provides a local ordinance may not prohibit a private property owner from demolishing his or her residential structure located in a coastal high hazard area or flood zone if the floor elevation is at or below the base flood elevation. The legislation also limits a building department to no more than three requests for additional information on a pending building permit application. CS/CS/HB 423 has passed the Legislature, been approved by the Governor, and took effect on July 1, 2022. **(Chapter 2022-136, *Laws of Florida*.)**

continued, page 30

Condominium and Homeowners Associations—Flags: CS/SB 438 by Senator Burgess and Representative Sirois recognizes the new United States Space Force branch of the service in various parts of the Florida Statutes. Among the provisions are amendments to Chapter 718 and Chapter 720 to permit parcel owners in condominiums and mandatory homeowners associations to fly flags recognizing the new service branch on designated holidays. The legislation also permits members of the United States Space Force to cancel a real estate contract under the circumstances set forth in Fla. Stat. § 689.27 (2) (2022). CS/SB 438 has passed the Legislature, been approved by the Governor, and took effect on July 1, 2022. **(Chapter 2022-183, *Laws of Florida*.)**

Tree Removal: CS/SB 518 by Senator Brodeur permits a property owner to prune, trim or remove a tree posing an unacceptable risk to persons or property without notice to, or permits from, a local government. CS/SB 518 has passed the Legislature, been approved by the Governor, and took effect on July 1, 2022. **(Chapter 2022-121, *Laws of Florida*.)**

Local Business Protection Act: CS/SB 620 by Senator Hutson creates a right of action and procedures for a business owner to seek damages from a municipality or county when a local ordinance is enacted causing a reduction of business profits of at least 15% on a per location basis of the business operating in the local jurisdiction**.** CS/SB 620 has passed the Legislature. **(Vetoed by the Governor.)**

Judicial Notice: CS/CS/SB 634 by Senator Bradley authorizes Florida courts to take judicial notice of widely accepted mapping services, global satellite imaging services, and internet mapping tools upon the request of a party. CS/CS/SB 634 has passed the Legislature, been approved by the Governor, and took effect on July 1, 2022. **(Chapter 2022-100, *Laws of Florida*.)**

Inventory of Critical Wetlands: CS/CS/SB 882 by Senator Brodeur will require District Water Management Plans of water management districts to include an inventory of critical wetlands to be acquired with funds from the Land Acquisition Trust Fund, and that will require notice to the owner of the property it is being listed in the Plan. It will also permit an owner to remove the property from the Plan by providing notice to the water management district. CS/CS/SB 882 has passed the Legislature, been approved by the Governor, and took effect on July 1, 2022. **(Chapter 2022-76, *Laws of Florida*.)**

Tenant Safety: CS/SB 898 by Senator Stewart will require landlords of non-transient or transient apartments to require employees of the landlord to undergo background screening; it will permit landlords to deny employment to a person with certain criminal histories; and it will revise notice requirements to tenants prior to an employee entering a home or an apartment for purposes of making repairs. CS/SB 898 has passed the Legislature, been approved by the Governor, and took effect on July 1, 2022. (**Chapter 2022-222, *Laws of Florida*.)**

Contaminants on Agricultural Lands: CS/HB 909 by Representative Payne provides the Secretary of the Department of Environmental Protection will have exclusive jurisdiction to set the standards for evaluating the presence of contaminants on agricultural lands, and it preempts regulation of contaminants on agricultural lands by local pollution control programs. CS/HB 909 has passed the Legislature, been approved by the Governor, and took effect on July 1, 2022. **(Chapter 2022-127, *Laws of Florida*.)**

Mixed-Use Residential Development: CS/CS/HB 962 by Senator Bradley authorizes mixed-use residential development on real property zoned for commercial or industrial use by a county or municipality provided at least 10% of the residential portion of the project consists of affordable housing units. CS/CS/HB 962 has passed the Legislature, been approved by the Governor, and took effect on June 8, 2022. **(Chapter 2022-176, *Laws of Florida*.)**

Water Quality Enhancement Areas: CS/CS/CS/HB 965 by Representative Truenow provides for water quality enhancement areas and enhancement credits to be permitted by the Department of Environmental Protection to ensure long-term pollutant reduction and to provide permanent water quality enhancement. Section 2 of the bill amends Fla. Stat. § 403.892 (2022), to include the eligibility of up to 25 multifamily dwelling units to be eligible to be serviced by a dedicated graywater collection system. CS/CS/CS/HB 965 has passed the Legislature, been approved by the Governor, and took effect on July 1, 2022. **(Chapter 2022-215, *Laws of Florida*.)**

Golf Course Best Management Practices: CS/CS/CS HB 967 by Representative Truenow creates a new certification program for best management practices for the application of fertilizer on golf courses. The legislation further provides if the certification is obtained, the golf course will be exempt from the regulation by local water and fertilizer blackout programs. CS/CS/SB 967 has passed the Legislature, been approved by the Governor, and took effect on July 1, 2022. **(Chapter 2022-202, *Laws of Florida*.)**

Agritourism: SB 1186 by Senator Albritton expands the rights of agricultural landowners to maintain their agricultural classification for ad valorem tax purposes and also construct, alter and maintain farm buildings and other structures on the property that are an integral part of the agritourism activities conducted on the property. CS/SB 1186 has passed the Legislature, been approved by the Governor, and took effect on July 1, 2022. **(Chapter 2022-77, *Laws of Florida*.)**

continued, page 31

Mental Health and Substance Abuse: CS/CS/SB 1262 by Senator Burgess makes several changes to the procedures surrounding voluntary and involuntary examinations of individuals under the Baker Act and the Marchman Act. The legislation prohibits restrictions on visitors, phone calls, and written correspondence for Baker Act patients unless specific conditions for the restrictions are met. It requires law enforcement officials to search certain electronic databases for Emergency Contact Information (ECI) of patients being transported to receiving facilities. It also expands the entities who can access the ECI to include receiving facilities, hospitals, and licensed detoxification facilities. CS/CS/SB 1262 passed the Legislature, has been approved by the Governor, and took effect on July 1, 2022. **(Chapter 2022-36, *Laws of Florida*.)**

Picketing in Residential Areas: CS/HB 1571 by Representative Maggard prohibits picketing or protesting in or before a residential dwelling with the intent to harass or disturb persons occupying the residential dwelling. The legislation also provides for notice requirements by law enforcement and penalties if the instructions by law enforcement are not complied with. CS/HB 1571 has passed the Legislature, been approved by the Governor, and will take effect on October 1, 2022. **(Chapter 2022-118, *Laws of Florida*.)**

Involuntary Admission of a Minor: CS/SB 1844 by Senator Bean revises provisions relating to the admission of minors to a facility for examination and treatment. It requires law enforcement officers transporting individuals for involuntary treatment to consider a person's mental and behavioral state, and it provides restraint of an individual is to be in the least restrictive manner possible. CS/SB 1844 has passed the Legislature, been approved by the Governor, and took effect on July 1, 2022. **(Chapter 2022-44, *Laws of Florida*.)**

Public and Professional Guardians: SB 7010 by the Senate Committee on Children, Families, and Elder Affairs will make permanent the confidentiality and public record exemption for complaints filed and subsequent investigations involving public and professional guardians by the Department of Elder Affairs. SB 7010 has passed the Legislature, been approved by the Governor, and will take effect on October 1, 2022. **(Chapter 2022-45, *Laws of Florida*.)**

Judicial Branch—6th DCA: HB 7027 by the House Judiciary implements the Supreme Court's recommendation for the creation of the Sixth District Court of Appeals. HB 7027 has passed the Legislature, been approved by the Governor, and took effect on June 2, 2022, except as otherwise provided in the bill text. **(Chapter 2022-163, *Laws of Florida*.)**

Legal Notices: CS/HB 7049 by the House State Affairs Committee revises requirements for publishing legal notices. It revises the criteria for newspapers eligible to publish the notices, and it permits the publication of notices and advertisements on governmental websites in defined circumstances. CS/HB 7049 has passed the Legislature, been approved by the Governor, and took effect on July 1, 2022. **(Chapter 2022-103, *Laws of Florida*.)**

Taxation: CS/HB 7071 by the House Appropriations Committee is the annual Session tax package. Among its provisions are the annual tax-free holiday categories; agricultural ad valorem tax considerations for aquaculture products; ad valorem tax considerations for qualifying affordable housing; ad valorem tax refunds for uninhabitable residential improvements resulting from a "catastrophic" event; and abatement of ad valorem taxes resulting from an unforeseen and sudden collapse of residential improvements. CS/HB 7071 has passed the Legislature, been approved by the Governor, and took effect on July 1, 2022. **(Chapter 2022-97, *Laws of Florida*.)**

Property Tax Exemptions: CS/CS/HJR 1 by the House State Affairs Committee is a proposed constitutional amendment granting additional homestead exemption on an assessed valuation of greater than $100,000 and up to $150,000 for the following property owners: a classroom teacher, a law enforcement officer, a correctional officer, a firefighter, an emergency medical technician, a paramedic, child welfare services professional, or an active-duty military service member. **CS/CS/HJR 1 has passed the Legislature and will appear on the 2022 General Election ballot for voter approval.**


P. DUNBAR

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

Executive Council Meeting

JULY 21 – 23, 2022

The Breakers • Palm Beach, Florida



Diana Kellogg and Hilary Stephens





Taniquea Reid-Wolliston and family



Alison Wright, Salome Zikakis, and Cary Wright



John and Kathy Neukamm





Sarah Butters and her mother, Jana Critchfield





Jeff Baskies and Sancha K. Brennan

Photos by Sancha K. Brennan, Michael J. Gelfand, John Neukamm and Silvia Rojas.



Law students attending welcome reception





Bob Swaine

View Photo Albums at www.rpptl.org



Ice Cream Social at The Breakers



John Neukamm and Mike Bedke

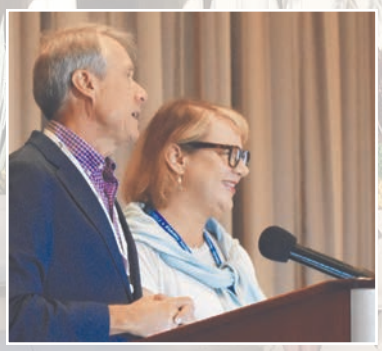




Past Chairs David Brennan, Bill Hennessey, and Bob Swaine



Rohan Kelley, Jeff Baskies and Tae Kelley Bronner





Tanique Lee, Roland Medina-Sanchez, Laird Lile, Phillip Bauman and Michael J. Gelfand





ROUNDTABLE

Highlights of the Meeting of the RPPTL Section
PROBATE AND TRUST DIVISION
SATURDAY, JUNE 4, 2022
Hawks Cay Resort • Duck Key, Florida
Prepared by Nicole Bell Cleland, Esq., St. Petersburg, Florida

Thank you to the Roundtable Sponsors:
Guardian Trust and Stout

The Director of the Probate and Trust Law Division, John Moran, called the meeting to order at 9:05 a.m.

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

Action Items

Legislation Committee – Lawrence Miller, Co-Chair:

At the recommendation of the Legislation Committee of the RPPTL Section, Lawrence Miller will look to present a vote by the Executive Council to renew the Section's standing legislative positions, as submitted to the Section's Executive Council at its meeting on June 4, 2022.

Information Items

Probate Law and Procedure Committee – M. Travis Hayes, Chair:

The "*Johnson v. Townsend*" legislation is proposed legislation that clarifies existing Florida law by making targeted modifications to certain provisions of the Florida Probate Code governing creditors' claims, and the related definition of the term "claim," to conform with the existing provisions of the Florida Uniform Disposition of Community Property Rights at Death Act. There was discussion on the content of the proposed bill and what portions of the probate code it addresses. Many members provided comment for the committee to further consider.

Joint Proposal - Estate and Trust Planning Committee (Robert Lancaster, Chair) & Probate Law and Procedure Committee (Travis Hayes, Chair):

The joint committees are working on proposed legislation amending Fla. Stat. § 198.41 to suspend those provisions which govern the imposition, reporting, and collection of the Florida Estate Tax.

General Standing Committee Report

CLE Report – Sancha Brennan, Co-Chair:

Sancha reported that Lilleth Bailey and Annabella Barboza put on a free CLE program that was intended to include and reach minority members of The Florida Bar. The CLE had a successful turnout and resulted in 48 new RPPTL members. J. Richard Caskey also hosted a Trust and Estate Symposium on July 8, 2022. The Attorney Trust Officer Liaison Conference is next, at The Breakers in Palm Beach, August 18-20.

Committee Reports

At-Large Members Report (ALMS) – Sean Kelley:

At the upcoming ALMS meeting at The Breakers in Palm Beach, the At-Large Members of the RPPTL Executive Council will look to assign pro bono cases from various legal aid services from around the State of Florida to members of Executive Council having experience on the particular legal issues of each pro bono case. Florida Legal Aid offices are in need of attorneys wanting to take on pro bono matters to assist in moving some of their older and priority cases forward.

Adjournment. The meeting was adjourned at 10:29 a.m.

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Roundtable

Highlights of the Meeting of the RPPTL Section
REAL PROPERTY DIVISION

SATURDAY, JUNE 4, 2022

Hawks Cay Resort • Duck Key, Florida
Prepared by Colleen Sachs, Esq., Pensacola, Florida
and Jin Liu, Esq.,Tampa, Florida

Thank you to the Roundtable Sponsors: Fidelity National Title Group



The Director of the Real Property Law Division, Katherine Frazier, called the meeting to order at 9:05 a.m. and welcomed everyone attending in person and via Zoom.

Sponsor Announcement. The Director thanked Fidelity National Title Group, represented by Karla Staker, for its sponsorship of the meeting.

The summary of the April 1, 2022, meeting in Tallahassee was approved.

Action Item

Title Issues and Standards Committee

Rebecca L.A. Wood, Chair, reported on the approval of revisions to Chapter 17 – Marketable Record Title Act (MRTA) of the Uniform Title Standards, which is on the Executive Council Agenda pp. 88 - 118. This matter will be deferred to The Breakers' meeting.

Information Items

Real Property Finance and Lending Committee

Jason Ellison reported on the proposed legislation revising Fla. Stat. § 714.16, to address several practical issues with the Uniform Commercial Receivership Act ("UCRERA") including providing for right of redemption, customary closing costs, and other changes which will cause receivership sales to be marketable and insurable. See Executive Council Agenda pp. 119 – 152.

Jason thanked Jim Russick and FLTA for refining the product. The appellate issue cannot be fixed legislatively and permanently alone. That will go to the Rules Committee. Jason highlighted the following changes in the Glitch Bill: in the event, there is an order setting aside a Receivership, it will not affect the validity of an Order Approving the sale of property under Section 714.16, or a final judgment; a lis pendens is now required to be filed in connection with a receivership sale; recording the Motion and Order to Sell Receivership Property will provide constructive notice to unrecorded or unknown lienholders and interest holders; discharge of the lis pendens will be upon recording a deed following a receiver's sale; right of redemption will be a statutory 30 days; the appellate issue is a need for finality in foreclosure, not setting aside a title transfer to a bona fide purchaser. This will be an action item at The Breakers.

Katherine thanked everyone for coordinating on this important effort.

Real Estate Leasing Committee

Kristen Jaiven reported on consideration of opposing legislation authorizing the use of security deposit replacement products (a/k/a fees in lieu of security deposits) unless such legislation includes consumer protection provisions to safeguard tenants from predatory practices. See Executive Council Agenda pp. 153 – 160.

There were concerns about how it would interact with the Landlord Tenant Act. It may not be defined as a security deposit and may not have those protections. The leasing committee has voted to oppose the bill unless the consumer protection items can be addressed. If the tenant pays something, they must get a product. They will bring this back at TheBreakers. French Brown indicated the vendor will likely bring this back, so we need to be ready. There was a great deal of unexpected interest last session. Katherine said we are laying some groundwork now to build some flexibility.

Real Property Litigation Committee

Michael V. Hargett, Chair of the Real Property Litigation Committee, reported on consideration of legislation expanding the finality of foreclosure judgments provided by Fla. Stat. § 702.036, to include liens other than mortgage foreclosures, such as community association liens and construction liens. For background of this legislation, about 10 years ago, when we were coming out of the foreclosure crisis, we tried to resolve the finality of the foreclosure judgments by codifying it in Fla. Stat. § 702.036.

Additionally, it will provide prevailing party attorneys' fees in post-foreclosure litigation for redress of wrongful foreclosure judgments brought by junior lienholders improperly foreclosing

continued, page 37

senior liens. This legislation restores the legitimate business expectations of the citizens of the State of Florida who were upset by *Wells Fargo Bank, N.A. v. Tan*., 320 So. 3d 782 (Fla. 4th DCA 2021). See Executive Council Agenda pp. 161 – 171.

Insurance and Surety Committee

Katherine introduced Katherine "Katie" L. Heckert, Co-Chair of the Insurance and Surety Committee, who reported on the proposed Insurance Coverage Law board certification. The Committee will seek RPPTL support. She thanked Michael Meyer, her Co-Chair, and her incoming Co-Chair Debbie Crockett. Katie said the scope is broad and they are identifying other committees and other sections of the Bar who may be interested in this. Title insurance is not covered by this. The goal is to have more than 100 Florida Bar members certified in the next three years to bring credibility to this area.

Bill Sklar suggested the committee reach out to the Trial Section, Business Section, and both the plaintiffs and defendants Bar on this initiative. Chip Waller commended Katie and her Committee for taking care of this issue for the entire Bar.

Publications Committee Report

The committee needs Real Property Division submissions for *ActionLine*. Please contact Mike Bedke at michael.bedke@dlapiper.com for more information. Katherine asked committee chairs and vice chairs to get members to work on producing real property content as topics come up at meetings.

Legislation Committee Report

Katherine Frazier gave kudos to Wilhelmina Kightlinger, Co-Chair of the Legislation Committee, and her whole committee for their work, which is both incessant and important. Willie said they are reviewing our legislative positions, which sunset in two years unless we renew them. The Bar has asked for those positions be reviewed. This represented several months of hard work with our lobbyists and substantive committee chairs.

Some of our fellows agreed to work with the Legislation Committee to have all of our legislative positions on the Section website with links to the white papers.

CLE Committee Report. Lee A. Weintraub, Co-Chair of the CLE Committee, reported that he would save his report for the EC meeting. Briefly, the CLE agenda attached to the EC agenda is not complete as of the date hereof because on June 22, 2022, there will be a CLE on transactions involving foreign parties.

They will have a mandatory training session for substantive committee chairs in September or October on Zoom. Stay tuned on dates.

For all committees, Lee will meet with the chairs for 15 minutes at The Breakers to talk about CLE topics and get them calendared.

Lee also noted another trend is to come back to do live presentations, so while we will continue to do virtual CLEs, we will start to do live ones.

Committee Reports

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

Ashley reported. They went virtual, which is difficult because the idea is networking. There were over 300 people online. Salome will be handling this next year. They need help from South Florida bankers and South Florida lawyers who work with bankers. The conference next year will be live and held in Fort Lauderdale.

Commercial Real Estate — Jennifer J. Bloodworth, Chair; E. Ashley McRae, Eleanor W. Taft and Alexandra D. Gabel, Co-Vice Chairs

No report.

Condominium and Planned Development — Joseph E. Adams and Margaret "Peggy" A. Rolando, Co-Chairs; Alexander B. Dobrev and Allison L. Hertz, Co-Vice Chairs

Peggy reported the legislators adopted legislation that dealt with many issues of the Surfside collapse.

Bill Sklar reported four areas needed to be addressed: transparency, reserves, inspection, and maintenance. Milestone inspections were adopted, 25 years within three miles of the coast, 30 otherwise. All major areas were addressed by the legislation and first time in the history of 60 years of Florida condominium law, there is a comprehensive life safety legislation. Bill thanked Allison Hertz, Alex Dobrev, and other task force members. Bill is very proud of the labor of the task force. Bill confirmed there is no opt-out and no waiver of reserves.

Condominium and Planned Development Law Certification Review Course — Jane L. Cornett and Christine M. Ertl, Co-Chairs; Allison L. Hertz, Vice Chair

Jane reported they had a great seminar in February and will return next year. A speaker search is underway.

Construction Law — Reese J. Henderson, Jr., Chair; Sanjay Kurian, Bruce D. Partington and Elizabeth B. Ferguson, Co-Vice Chairs

Sanjay reported they had two CLEs in May. The first one was on construction contract drafting. The second one was a joint meeting with the Insurance & Surety Committee on manipulating shingles to fake hurricane damages. They continue to produce CLEs every month with 50 to 60 members attending each time. He thanked Katie Heckert for her great work.

continued, page 38

Construction Law Certification Review Course — Elizabeth B. Ferguson, Chair; Gregg E. Hutt and Scott P. Pence, Co-Vice Chairs

No report.

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

Brad reported they had a great record-setting conference in March, which included a virtual component.. The conference produced over $300,000 in revenue and over $80,000 of net income for the Section. They are planning the next event already, which will include a golf tournament.

Development & Land Use Planning — Colleen C. Sachs, Chair; Jin Liu and Lisa B. Van Dien, Co-Vice Chairs

Colleen reported there will be a presentation on vertical subdivision at The Breakers.

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

Katherine Heckert reported they are also working on monthly meetings, with CLEs every other month.

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

Melissa reported they have been working on UCRERA. Mortgage payoff reform will come back. Potential legislation on HOA and condo estoppel reform. Over the course of last year, they also developed a cyber fraud awareness presentation monthly. She commended FLTA for supporting it. They also started a new series of networking around the state for current and future FLTA members. Melissa encourages real estate attorneys to join FLTA, the industry rep in Tallahassee. Finally, FLTA is continuing consistent work with the regulators to get the updated CPL and policy forms approved, so that we can start using them.

Real Estate Certification Review Course — Manuel Farach, Chair; Martin S. Awerbach, Lloyd Granet, Laura M. Licastro and Jason M. Ellison, Co-Vice Chairs

Jason reported the seminar went very well. They are in the process of reviewing the surveys from the seminar. Kudos to Manny Farach for his good work. Lloyd will take over next year.

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

Brenda B. Ezell gave a committee work report: the bill passed regarding service on unknown persons. The committee will have an advance leasing symposium and Brenda recognized the speakers.

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

Richard reported they had a great meeting yesterday, where they had the Hillsborough County Appraiser come to discuss. They spent the second half talking about UCRERA.

Real Property Litigation — Michael V. Hargett, Chair; Amber E. Ashton, Manuel Farach and Sean G. Brown, Co-Vice Chairs

Sean reported legal aid has given a list of priority matters. Sean will be attending each committee at The Breakers to place a couple of cases. They had a great committee meeting with case of the quarter presentation by Manny. Discussed rules of civil procedure. Judicial management has time to respond to the comments.

Real Property Problems Study — Anne Q. Pollack, Chair; Susan K. Spurgeon, Adele I. Stone and Brian W. Hoffman, Co-Vice Chairs

Anne reported. She discussed proposed legislation dealing with statutes that require certified mail return receipt after the USPS eliminated it as an option. Peggy Williams started a discussion on possible solutions to sales fraud where someone is pretending to be the owner of a property and selling it.

Residential Real Estate and Industry Liaison — Nicole M. Villarroel, Chair; Louis E. "Trey" Goldman, III, James A. Marx and Kristen K. Jaiven, Co-Vice Chairs

Nicole reported they had a great meeting and will have a CLE coming up. They will put together a committee to update the Bar pamphlet on buying a home.

Title Insurance and Title Insurance Liaison — Brian W. Hoffman, Chair; Leonard F. Prescott, IV, Jeremy T. Cranford, Christopher W. Smart and Michelle G. Hinden, Co-Vice Chairs

Brian reported they had a great meeting. The promotion fee for an exclusive listing agreement is uniformly not looked at favorably by the committee. Len discussed FNMA sales guide on virtual currency. The recent decision in *Wolfe* suggested that if you send an email with an embedded link of title documents, it may not be considered an effective delivery.

Title Issues and Standards — Rebecca L.A. Wood, Chair; Robert M. Graham, Karla J. Staker and Amanda K. Hersem, Co-Vice Chairs

Rebecca congratulated Amanda on becoming chair and Melissa on becoming vice-chair. She said there is more work coming up.

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

Bill announced that Jin Liu was elected to ACREL.

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

Nothing to Report.

Adjournment. Meeting was adjourned at 11:17 a.m.

PRACTICE CORNER

Real Property Division

Helping To Alleviate Condominium Unit Owner Reservations About New Statutory Reserve Requirements

By: Shayla J. Mount, Esq., Arias, Bosinger, Real Estate and Association Attorneys, Winter Park, Florida

The unanimous passage by the Florida Senate of Senate Bill-4D was met with jeers, cheers and fears to some degree by nearly every Floridian who owns, manages, insures or advises a condominium property in the state. Among the most anticipated of the statutory changes to Chapter 718, Florida Statutes (The Condominium Act) in the aftermath of the Champlain Towers South Surfside tragedy is the new requirement in Fla. Stat. § 718.112 that certain condominium associations (those existing on or before 7/1/2022 and pertaining to improvements three stories or higher) obtain every 10 years a "structural integrity reserve study" (SIRS) for specified components of the condominium property, including but not limited to the condominium floor, foundation, fireproofing and fire protection systems, plumbing, electrical systems and windows. In conjunction with the requirement to obtain the structural integrity reserve study is the new limitation on condominium unit owners' ability to waive the funding of reserves through unit owner assessments for the association's future repairs and replacements of each component identified in the structural reserve study.

In theory, and except for several new budget line items, these requirements should not present a *drastic* change for those condominium associations that have been diligent in remaining compliant with the previous statutory requirement that unless expressly waived by membership vote, the association adopts annually a budget including "fully funded" reserve accounts for various common elements, namely the roof, exterior, asphalt paving, and any other items with a deferred maintenance or replacement cost of $10,000 or greater. Given the current inflationary climate, a large percentage of condominium associations have found it increasingly difficult to maintain a reasonable yearly assessment to cover even the day-to-day operational needs, much less the reserves for unknown future repairs. Many, if not most, condominium unit owners will be forced to pay special assessments in the coming years to compensate for years of underfunding. This increased financial burden on owners will further restrict access to housing in a state that welcomed 2.7 million new residents in the last decade, according to the 2020 US Census, and is estimated to add almost 1,000 new Floridians per day.

Affected condominium associations will have until December 31, 2024, to comply with the new SIRS requirements; but should immediately begin having the necessary conversations with unit owners, managers, counsel and other vendors to avoid the consequences of non-compliance by the deadline

continued, page 40

(including but not limited to the inability to obtain association insurance and individual board member liability for breach of fiduciary duty). Below are helpful considerations for boards of affected condominiums and association counsel advising them regarding the impending changes.

A. Immediately identify and determine the availability of necessary vendors, including reserve study analysts and licensed engineers or architects, and whether there are restrictions or provisions in the governing documents regulating the association's hiring of such professionals.

Because the new requirements will impact many condominium associations throughout the state, it will soon become increasingly difficult for associations to find qualified, competent local engineers or architects to complete the necessary inspections underlying the SIRS along with the reserve analysts to prepare the actual reserve study. Pursuant to Fla. Stat. § 718.3026(2), there is no statutory requirement that a condominium association competitively bid contracts for services by accountants, architects or engineers. (Note: Reserve study advisors and analysts are not a category of professionals specifically exempt from the statutory reserves competitive bidding provision contained in Fla. Stat. § 718.3026(1), which requires the association competitively bid any contract for the purchase, lease, or renting of materials or equipment or, for the provision of services which requires payment by the association exceeding five percent of the total annual budget of the association, including reserves.) The association counsel should also review the association's governing documents (namely the Declaration and Bylaws) to identify whether there are any competitive bidding requirements imposed upon the association.

B. Remember To Consider Statutory Conflict of Interest Disclosure Requirements Before Entering into Contracts.

For those boards with the great fortune of having a director or officer qualified to provide relevant services (or who has a family member or spouse who can), the board needs to comply with the statutory disclosure requirements. Fla. Stat. § 617.0832 and § 718.3027 regulate any transaction or activity between the association and the current directors and officers of the board (or the relatives of the directors or officers) that "may reasonably be construed to be a conflict of interest". Fla. Stat. § 718.3027(1) provides there is a "rebuttable presumption" that a conflict of interest exists if any of the following occurs without prior notice:

(a) A director or an officer, or a relative of a director or an officer, enters into a contract for goods or services with the association.

(b) A director or an officer, or a relative of a director or an officer, holds an interest in a corporation, limited liability corporation, partnership, limited liability partnership, or other business entity that conducts business with the association or proposes to enter into a contract or other transaction with the association.

It is important to note that Fla. Stat. § 718.3027(1) does not prohibit or prevent the association from entering into transactions with the directors and officers of the board (or their relatives or affiliated companies). However, it contains specific disclosure requirements and allows the membership to vote to cancel the board-approved contract at the members' next regular or special meeting after the contract is executed.

C. Identify Association Authority to Obtain a Loan or Other Financing for Reserves.

The Condominium Act is silent as to a condominium association board's authority to obtain a loan or other financing on behalf of the association in order to meet its reserve funding obligations. Fla. Stat. § 617.0302(7), of the Not-For-Profit Act, generally authorizes not-for-profit boards established in the state, which includes most condominium associations, to *"[m]ake contracts and guaranties, incur liabilities, borrow money at such rates of interest as the corporation may determine, issue its notes, bonds, and other obligations, and secure its obligations by mortgage and pledge of all or any of its property, franchises, or income*." Accordingly, a condominium association may have the option to consider obtaining financing to assist with meeting its reserve funding obligations unless there is a specific provision or restriction in the association's governing documents prohibiting the association from doing so. In nearly all cases, association counsel will be required to provide an opinion of counsel letter to the financing institution confirming the association's authority to enter into the transaction pursuant to law and the association's governing documents.


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.*

PRACTICE CORNER

Probate And Trust Division

The Impact Of Local Rules And Requirements On Probate

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

As practitioners we all know, or will readily be reminded by, the status orders or memos sent by the probate case managers or judges, that probate is a product of Florida statutes. However, it is also important to know that local rules and court practices will greatly determine whether our probate cases and actions for disposition of personal property without administration will be successfully resolved.

Local rules and requirements differ greatly across the counties in Florida. Moreover, local rules and requirements certainly have a large impact on how the cases move through the courts. For example, Palm Beach, Broward, and Miami-Dade counties require an Affidavit of Heirs to be filed in intestate matters. However, St. Lucie County does not uniformly have such requirement. In matters involving disposition of personal property without administration, counties throughout Florida also differ in how these cases are handled.

Fla. Stat. § 735.301 and Florida Probate Rule 5.420 handle disposition of personal property without administration, which can only be used in small estates handling statutorily and constitutionally exempt property and nonexempt personal property. More specifically, Fla. Stat. § 735.301(1) states that "[n]o administration shall be required or formal proceedings instituted upon the estate of a decedent leaving only personal property exempt under the provisions of Fla. Stat. § 732.402, personal property exempt from the claims of creditors under the Constitution of Florida, and nonexempt personal property the value of which does not exceed the sum of the amount of preferred funeral expenses and reasonable and necessary medical and hospital expenses of the last 60 days of the last illness."

In this simple proceeding, the interested party need not file a petition, as an "informal application by affidavit, letter, or otherwise" may be used. Fla. Stat. § 735.301(2).

Although this type of matter appears statutorily simple to handle, the pro-se interested person or the handling attorney must take care to file and provide the non-statutory information, documentation, and proof required by the different counties. In Pasco County, you are required to file a copy of paid or unpaid funeral bill, a copy of paid or unpaid medical and hospital bills for the last 60 days of decedent's life including bills for compensation paid to persons attending the decedent, and information to substantiate or verify the assets such as insurance policies, stock certificates, most recent bank statements, savings passbooks, and statements from nursing home showing funds held in an escrow account. In Martin County, among the required documents one may need to provide are a copy of the statement from the funeral home showing by whom the bill was paid, signed and notarized consents from all heirs, if any, and copies of the bank statements, stock certificates, insurance checks, and policy value information forms of the decedent. Yet still, in Palm Beach County one will be required to file an affidavit of heirship, a copy of the paid funeral bill or signed affidavit from funeral home detailing bill and payment, and the amount of reasonable and necessary medical and hospital expenses for the last 60 days of the last illness, together with accompanying statements or payment receipts. Additionally, it may not be uncommon for someone to receive an order from the court denying a petition for disposition of personal property without administration on the basis that the personal property at issue exceeds the statutorily reimbursable aggregate of $6,000 for funeral expenses and the reimbursable paid medical and hospital expenses of the last 60 days of illness.

These requirements exist, despite the fact that the applicable Florida statute does not require the medical and hospital expenses of the last 60 days of the last illness to be paid, does not require any affidavit of heirs, nor the consent of heirs.

So, while our bar license will equally allow all lawyers to practice in trial courts throughout Florida, it is the knowledge of the nuances in the local county rules and requirements that will make us successful in our practice.



T. REID-WOLLISTON

Taniquea Reid *has been practicing law since 2011. Her office is located in Royal Palm Beach, Florida. 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.*

SECTION SPOTLIGHT

Annual Section Awards

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

As is the custom of the Real Property, Probate and Trust Law Section of The Florida Bar, a number of recognitions and awards were presented at the annual meeting. The purpose of these awards is to recognize outstanding members of the Section and their contributions to the Section.



The **ROBERT C. SCOTT MEMORIAL AWARD** was presented to **Fred W. Jones**. Fred was admitted to the practice of law in 1974, almost fifty years ago. Fred has been board certified in Real Estate since 2002 and is a graduate of the University of Florida College of Law. The ROBERT C. SCOTT MEMORIAL AWARD was established in recognition of Mr. Scott's many years of untiring, devoted and valuable service to the Section. This award is not given annually but is granted when the occasion requires, to a Section member who has exemplified the devotion and continuing service of Robert C. Scott to the Section and its membership. Fred has been contributing to the Section for many, many years and those many years of service were recognized.

The **JOHN ARTHUR JONES ANNUAL SERVICE AWARD** was given to two members of the Section. The award went to **Michael V. Hargett and Cady L. Huss**. Michael is a 2007 graduate of the University of Florida College of Law and was admitted to The Florida Bar the same year. He is a shareholder in the firm of Barnett Kirkwood Koche Long & Foster and practices in Tampa. Michael is board certified in Real Estate. Cady Huss is a 2010 graduate of Florida State University College of Law and practices in the firm of Cady Huss, P.A. 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, during the current year. In selecting the recipients of this award, the Section considers both the character and magnitude of the services furnished by the nominees throughout the year, with particular emphasis on the benefits which accrue to the Section and the lawyers of Florida as a result of such services.





continued, page 43



The **WILLIAM S. BELCHER LIFETIME PROFESSIONALISM AWARD**, as its name indicates, is recognition for a career of service. This year, the award was presented to **William P. Sklar.** This award was established in 2003 and goes to an Executive Council member in recognition of his or her lifetime contributions to the Section, the Executive Council, Florida attorneys, and the public in promoting the highest standards of ethics and professionalism. Bill Sklar has been an outstanding and incredibly involved member of the Section for many, many years. Bill is a 1980 graduate of the University of Miami School of Law and is board certified in both Real Estate and Condominium and Planned Development law. Bill is a partner in the firm of Carlton Fields, P.A., and practices in Tallahassee.

The **RISING STAR AWARD** recognizes members of the Real Property, Probate and Trust Law Section of The Florida Bar who demonstrate the potential for future Section leadership through active participation in Section committees and projects. It is awarded annually to a member of each of the Real Property and Probate Divisions of the Section who has made significant contributions. The RISING STAR AWARDS for 2022 were presented to **Elizabeth M. MacDonald Hughes and Kristen N. King Jaiven**. Liz is a 2012 graduate of the University of Miami College of Law and practices in the Miami office of Akerman LLP. Kristen King Jaiven is a 2013 graduate of the St. Thomas University School of Law and practices in Fort Lauderdale in her firm, Kristen King Jaiven, Lawyer, PLLC.







The **AT-LARGE MEMBER OF THE YEAR** is **Arlene Udick**. It is interesting to note that the recipient of this award is chosen by her peers who are also At-Large Members of the Executive Council. The AT-LARGE MEMBER OF THE YEAR AWARD recognizes an outstanding At-Large Member who has provided the highest level of service in assisting the Section with its needs. Arlene is a 1985 University of New Hampshire School of Law graduate, but it wasn't until 2006 that Arlene saw the light and came to Florida and was admitted to The Florida Bar. Arlene is in private practice in the Law Office of Arlene C. Udick located in Lady Lake, Florida.

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 committees of the Section. The recipient of the award this year is **Phillip A. Baumann**. Phillip practices in the Tampa area in the firm of BaumannKangas Estate Law. Phillip is a 1978 George Washington University Law School graduate and was admitted to practice in Florida the same year.

Congratulations to all the award winners. They are all Section members who have contributed their time, energy and expertise to the advancement of the practice of law and the protection of the citizens of the State of Florida.



Membership & Inclusion Committee's Minority Lawyers Seminar Series Underway

By Annabella Barboza, Esq., and Lilleth Bailey, Esq.

The Section continues to work hard to increase diversity in membership and participation within Section. The Membership & Inclusion Committee (MIC) launched its inaugural Minority Lawyers Seminar Series program with a CLE seminar entitled "Nuts and Bolts of a Probate Practice." Held on Saturday, May 14, 2022, the seminar was attended via Zoom by 147 members of over 20 minority bar associations[1] across the State of Florida.

Program Chairs Annabella Barboza and Lilleth Bailey led the seminar led the seminar with a powerful speakers lineup that kept the attendees engaged for a full day of presentations. Speakers included Debra Boje, Rohan Kelley, Tattiana Brenes-Stahl, Marve Ann Alaimo, Jami Coleman, Jorja Williams, Colleen Sachs, and Judge Mark Speiser and Judge Kenneth Gillespie. The feedback from both attendees and speakers has been overwhelmingly positive. The MIC offered the seminar as a service project to promote diversity in our legal practice. As a result, this seminar generated 48 new Section members.



The MIC was inspired to offer this CLE Seminar Series following the success of the seminar "How to Set Up a Successful Estate Planning Practice," held pre-pandemic in January 2020. Rohan Kelley organized the seminar with Judge Kenneth Gillespie and Judge Mark Speiser, and the T.J. Reddick Bar Association. Attendees included members of minority bar associations from Broward and Miami-Dade counties. With Rohan Kelley's guidance, in May 2021, the MIC hosted the same seminar via Zoom as part of the first Minority Lawyers Seminar Series. The virtual platform for the 2021 seminar allowed for the expansion of attendees to include statewide minority bar organizations. The strong attendance and positive feedback from all participants encouraged the MIC to continue the project.

The Minority Lawyers Seminar Series program is a great instrument to attract diverse lawyers to the Section's areas of practice and to promote diversity within the profession. The MIC's Minority Lawyers Seminar Series Subcommittee plans the third CLE seminar (covering real estate topics) to launch in 2023, followed by the fourth CLE seminar (covering guardianship topics) in 2024.

The Program Chairs want to thank Sancha Brennan, Lee Weintraub, Tae Bronner, and Alex Hamrick (CLE Committee) for their guidance in this CLE project and Dresden Brunner, MIC Chair, for her support. Special thanks to all the seminar speakers and to the members of the Minority Lawyers Seminar Series Subcommittee (Antonio Romano, Marlene Watson, Ashley Gantt) for their tireless work and contributions to making this seminar a success.

1 Asian Pacific American Bar Association, Broward County Hispanic Bar Association, Caribbean Bar Association, Colombian American Bar Association, Cuban American Bar Association, D.W. Perkins Bar Association, Dominican American Bar Association, F. Malcolm Cunningham, Sr. Bar Association, Florida Association of LGBT Lawyers, Florida Hispanic Bar Association, Fred G. Minnis, Sr. Bar Association, Gay & Lesbian Lawyers Network, George Edgecomb Bar Association, Gwen S. Cherry Black Women Lawyers Association, Haitian Lawyers Association, Hispanic National Bar Association, Palm Beach County Bar Association, Puerto Rican Bar Association, South Asian Bar Association, T.J. Reddick Bar Association, Tampa Hispanic Bar Association, Virgil Hawkins Bar Association, Wilkie D. Ferguson Jr. Bar Association.

A Tribute To Robert S. Swaine

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

Robert S. Swaine, known to all as "Bob," served as the Chair of the Real Property, Probate and Trust Law Section of The Florida Bar for the 2021-2022 term.



Bob came to the legal profession by a rather interesting, and perhaps unexpected, path. He graduated from Florida State University with a bachelor's degree in psychology. After graduation, Bob was chosen by Rotary International to be a rotary ambassadorial scholar, and he was shipped off to Melbourne, Australia to experience the culture and diversity of life. It was only after this very interesting time in his life that Bob attended and graduated cum laude from Florida State University College of Law in 2001, and then was admitted to the practice of law in September 2001.

Bob practices with the firm of Swaine, Harris & Wohl in Sebring, Florida. He is a native of Sebring and our very first "legacy" Chair of the Section in that his father, J. Michael Swaine, was the Section Chair in 2001-2002. He started in Real Property Probate and Trust Law activities at a very young age because he accompanied his parents to RPPTL meetings and events since his dad was an active member pretty much all of Bob's life. He stated that he grew up with the Section, so it seemed like a natural fit to become involved and eventually become Chair.

Bob was started on activities with RPPTL at the encouragement by Laird Lile who convinced him to become involved in the Probate Litigation Committee. His early involvement in the Section also included The Florida Bar News Committee, which he served on as a committee of one and was successful in seeing the demise of that committee.

Having observed the frantic pace and heavy load carried by former Chairs of the Section, Bob was well prepared for his role and reports that there weren't many surprises in serving as Chair for 2021-2022, other than the loss of our then-Executive Director, Mary Ann Obos. Fortunately, Bob reports the Section is now provided with wonderful guidance by our new Program Administrator, Diana Kellogg, and our very experienced Program Coordinator, Hilary Stephens. When asked about problems and challenges during the year, he stated that dealing with the five different destinations where meetings were held, all of which were short on staff, made it very challenging to get information and ensure everything was in place so that all the Executive Council members could have a wonderful experience at each meeting.

Upon inquiry about the good parts of serving as the Chair, which of course is such a demanding position, Bob cited to the opportunity to observe the contributions of so many Florida attorney Section members who are so willing to jump in when any problem arises or produce results through the many committees that provide such a great benefit to the people of the state of Florida. He said it was fun to watch folks go into action, such as when the Ad Hoc group had to jump into the fray concerning proposed changes to the Rules of Civil Procedure.

When asked if there was any advice for future Chairs of the Section, Bob recommended getting started before they think they need to because so many of the locations where meetings will be held offer a lot of complex challenges. As for recommendations or suggestions for future Executive Committee Members, his suggestion is that they take some time to step back and think about the "big picture" relative to policy issues. The Chair and the members of the Executive Committee can get so overwhelmed by current problems which spring up all the time and at the last minute that it is easy to lose sight of the major goals for the Executive Council.

Concerning accomplishments of the year as Chair, Bob expressed satisfaction at being afforded the opportunity to have meetings at locations where members' families and children could be included and have so much fun.

Bob reports that one of the great advantages of membership in the Section is having colleagues all over the state that one can consult whenever a new or novel issue challenges you in your individual practice. He opined that Section members who do not attend committee meetings are really missing out on the collegial aspect of Section membership.

Bob expressed immense appreciation for his wonderful wife, Jody, and all the time and energy that she, too, has expended in involvement in Section activities and supporting him as the Chair of the Section.

The Chair of RPPTL is an enormous undertaking that utilizes a huge amount of the Chair's time. Everyone in the Section owes a huge debt of gratitude to Bob Swaine for all the time, energy and guidance he has provided this past year. Welcome, Bob, to your very much-deserved seat in the back row.

Probate Case Summaries

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

Probate court abused its discretion in allowing a judgment creditor with a recorded lien on an estate priority over other creditors. The lien did not encumber specific property but allowed attachment on any real property. Giving the judgment creditor priority over other creditors who had priority under Florida law would have drained the estate of assets.

Jones v. McKinney, 47 Fla. L. Weekly D899 (Fla. 2d DCA 2022)

The decedent committed civil theft against Adelaide Tunnell prior to her death, and Tunnell filed a statement of claim against the decedent's estate. She filed a separate lawsuit against the estate when her statement of claim was objected to by the personal representative. Tunnell prevailed in her lawsuit and received a $2.2 million judgment against the estate as a result. She recorded the judgment in Charlotte county, where the decedent owned a home.

When the personal representative attempted to sell the home, Tunnell requested the court to allow execution on the lien on the home. The estate argued that Tunnell was a class 8 creditor and should not jump ahead of other creditors. Tunnell's request was granted and Tunnell was permitted to execute on the lien pursuant to Fla. Stat. § 733.706. After analyzing the plain language of Fla. Stat. § 733.706, the appellate court noted that the judgment became a lien on any property, not specific property, and recognized that approving the execution would disrupt the administration of the estate by draining the estate of assets. Accordingly, the appellate court held that Tunnell's judgment did not fall within an exception to Florida law allowing an exception from claim priority.

The probate court abused its discretion in granting an award of attorney's fees for counsel retained by beneficiaries of an estate for the purpose of probate litigation because it failed to articulate its findings on the *Rowe* factors.

Matthiesen v. Estate of Laurisse Masri, 47 Fla. L. Weekly D1043 (Fla. 3d DCA 2022)

Matthiesen was appointed as the personal representative of her mother's estate. Her brothers hired an attorney to challenge some of her actions as personal representative. The case continued for five years. Matthiesen petitioned for fees as the personal representative and both of her brothers objected, citing her repeated breaches of duty as personal representative that necessitated the hiring of counsel.

Counsel for the brothers petitioned for attorney's fees and expenses. The trial court denied Matthiesen's petition for fees and granted the fees and expenses of the brothers' attorneys, allocating some of the fees against Matthiesen's portion of the estate. On appeal, the denial of Matthiesen's fees was affirmed. However, the appellate court reversed the award of the brothers' attorney's fees because the trial court did not "articulate the requisite findings under *Florida Patient's Compensation Fund v. Rowe*, 472 So. 2d 1145, 1151 (Fla. 1985)."

The trial court erred in applying the defense of change in position when it was not affirmatively pled. The trial court reached an incorrect result in allowing a paramour to keep property that was owned as tenants by the entirety because she knew the property she received was marital property.

Wallace v. Torres-Rodriguez, 47 Fla. L. Weekly D1047 (Fla. 3d DCA 2022)

Milton Wallace and his wife retained an attorney wherein the parties entered a marital agreement and a joint irrevocable trust. All property owned by the parties was owned as tenants by the entirety except for Wallace's Individual Retirement Account. Upon the death of Milton's wife, Milton disclosed to his son, the trustee, that he engaged in a 14-year affair and had transferred numerous properties to his paramour:

(1) A $105,000 condominium

(2) $2,000,000 in cash

(3) Stocks worth $1,200,000 on Deposit at Fidelity

(4) 2,000 shares of Exxon Mobile Stock

(5) A $220,000 condominium

(6) Merrill Lynch Securities Account

(7) $975,000 in cash and a $510,000 condominium

(8) $14,000 in cash

At her deposition, the paramour asserted her right against self-incrimination and refused to testify. At the bench trial, the trustee was able to show that Milton had used tenancy by the entireties assets to purchase assets and make gifts. The paramour admitted that she did not pay anything or give any consideration for the assets. She did not raise the affirmative defense of "change in position."

continued, page 47

The trial court recalled the paramour to testify about her change in position and awarded the paramour three out of the seven assets as it found that she had foregone employment and education opportunities because of the gifts. Both the paramour and Milton testified that his wife knew about the transfers and consented to them, which the court found self-serving and hard to believe. A gift tax return had been filed with Wallace and his wife's tax returns, but the gift tax return was not signed by the wife.

On appeal, the appellate court found that the trial court erred in allowing the paramour to be recalled to testify about a "change in position" defense, which she did not raise, and thereby resulted in a waiver of that defense. The appellate court ordered all assets be disgorged by the paramour since she knew she was receiving marital property.

Trial court erred in denying a rehearing on an order appointing a guardian of the property of a person due to the ward's death, if the guardian handled the ward's property or engaged in any transactions.

Guibord v. Guardianship of Ford, 47 Fla. L. Weekly D1083 (Fla. 4th DCA 2022)

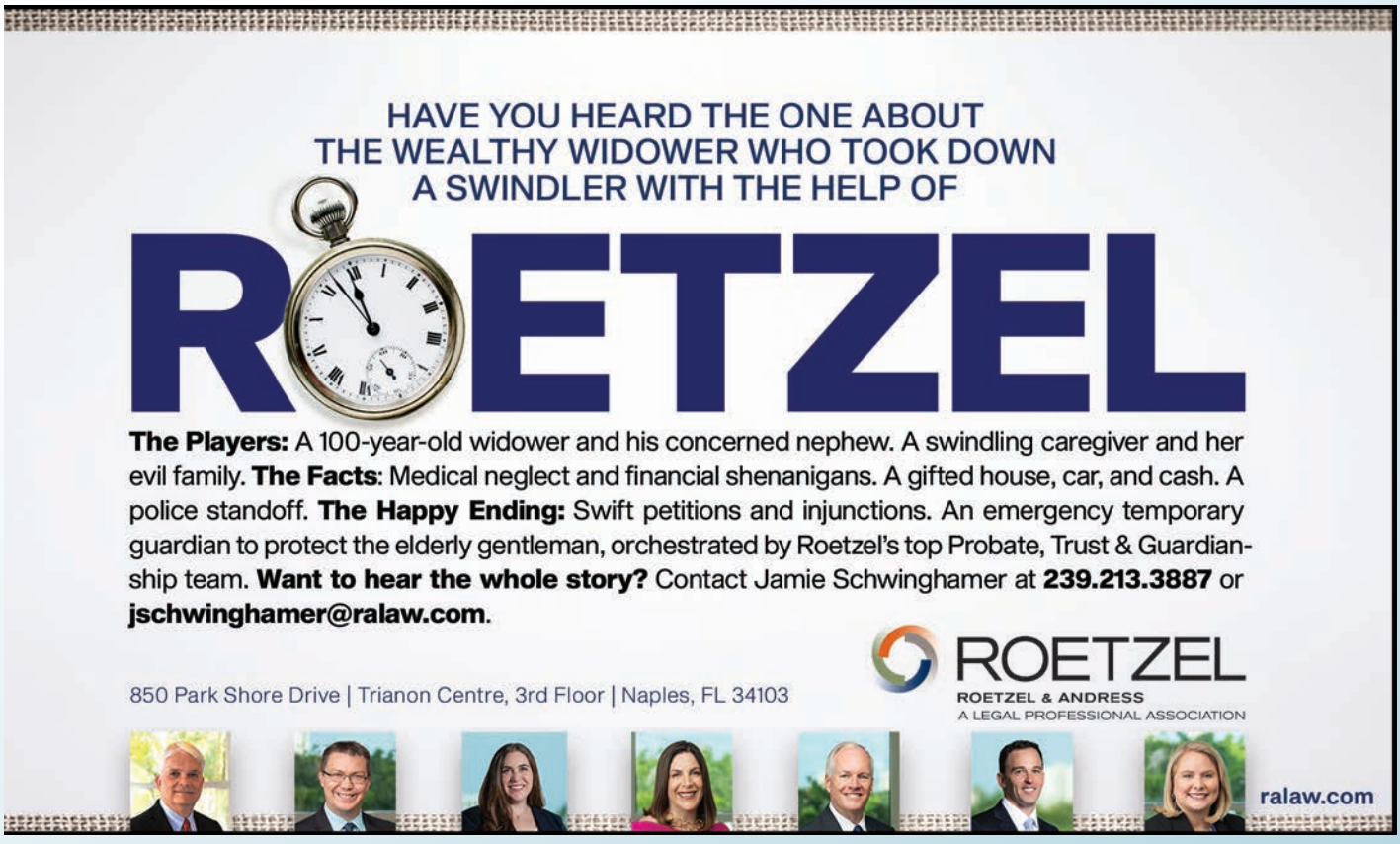
The trial court appointed a guardian of the ward and memorialized its findings of fact and conclusions of law in a 48-page order. The appellant filed a motion for rehearing, alleging newly discovered evidence showed that the appointed guardian physically abused the ward. Prior to the court issuing a ruling, the ward died. The trial court denied the motion for rehearing as moot.

The appellate court reversed, reminding "guardianship judges that the death of the ward renders a motion for rehearing moot as to the incapacity determination and the appointment of the guardian of the person," but that it does not render a motion for rehearing as moot if "the guardian of the property handled the ward's property for a period of time or engaged in any transactions affecting the ward's property to a significant degree." *Guibord v. Guardianship of Ford*, 47 Fla. L. Weekly D1083, 1084 (Fla. 4th DCA 2022).


A. CUMMINS

***Amanda C. Cummins** has a bachelors degree in history from Florida State University and a Juris Doctor 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.*

Amanda currently works as a solo practitioner handling probate, estate planning, veterans, and disability law cases. In 2019, she received an LL.M. in Elder Law from Stetson University College of Law.



Real Property Case Summaries

By Melissa M. Hernandez, Esq. Overstreet Law, P.A., Kissimmee, Florida

Real estate agency and agents do not have a statutory duty to investigate unknown defects to property.

Allison Lynn Busuttil v. Certified Home Inspections, LLC, a Florida limited liability company, John Michael McDonald, and Vanguard Realty, Inc. d/b/a Coldwell Banker Vanguard Realty, and Bobbie Jean Demunck, No.1D20-2758 (Fla. 1st DCA, 2021)

This dispute arises from the sale of a residential property. Busuttil filed a complaint against Vanguard Realty, Inc., the real estate brokerage, and Bobbie Demunck, the listing real estate agent, who represented John McDonald, the property owner (collectively "Appellees"). Prior to the sale of the property, McDonald represented that the roof on the home was one year old and came with a transferrable warranty. Certified Home Inspections, LLC performed an inspection and did not observe any issues with the roof. Nonetheless, seven months after the purchase, Busuttil discovered substantial water damage to the ceiling and walls in the rear of the house and a roof leak that was determined to be from an addition to the house that was constructed without permits. Busuttil filed an initial complaint, an amended complaint and a second amended complaint bringing claims of negligence, negligent misrepresentation and negligent supply of information against Appellees.

The trial court found that Florida Statutes Chapter 475 does not impose a duty upon a real estate agent/broker to perform the type of search or inspection or to determine the existence of any latent condition affecting real property that materially affects the value of such property, where the existence of such condition was not actually known or readily observable to a buyer. Further, the trial court dismissed the complaint because Busuttil did not plead any specific facts that would support the conclusion that McDonald had knowledge of any alleged defects. Busuttil then filed an appeal alleging that Fla. Stat. § 475.278(3)(a)7, imposed a duty on Appellees to use skill, care, and diligence in the transaction, which includes the duty to investigate encumbrances on a listed property, potential defects, finding permits, code violations and disclosing these to the potential buyer in real estate transactions.

The First District Court of Appeals affirmed the trial court's dismissal of the complaint and found that there is no textual support in Fla. Stat. § 475.278 that purports additional duties to research and investigate. Citing Fla. Stat. § 475.278 (3)(a) 9, the court held real estate agents have a statutory duty to "[d]isclos[e] all known facts that materially affect the value of residential real property and are not readily observable." (emphasis added). The court opined that a court's function is to interpret statutes as they are written and are without power to construe an unambiguous statute in a way which would extend, modify or limit its express terms or its reasonable and obvious implications, citing *Holly v. Auld*, 450 So. 2d 217, 219 (Fla. 1984). The court declared that if the Legislature intended to include a duty to investigate properties for unknown facts that materially affect the value of the property, it could have done so.

An administratively dissolved corporation has standing to pursue a foreclosure action.

Arthur J. Morburger v. Yellow Funding Corp., et al., 3D21-318 and 3D21-881 (Fla. 3d DCA 2021)

In this case, Yellow Funding Corp. issued a loan to Morburger to purchase a condominium evidenced by a promissory note in the amount of $300,000 and secured by a mortgage encumbering the property. When Morburger failed to make loan payments in October 2018 and pay real estate taxes, Yellow Funding Corp. issued a notice of default and acceleration of the loan. Morburger failed to pay the amount due, so Yellow Funding Corp. filed suit to foreclose the mortgage and collect on the note. Subsequently, the trial court entered a Final Summary Judgment of Foreclosure against Morburger.

Morburger filed appeals objecting to the foreclosure and to a post-judgment order overruling objections to the foreclosure sale. Morburger argued Yellow Funding Corp. did not have the authority to pursue foreclosure under Fla. Stat. § 607.1405 (2019) because the company was administratively dissolved as a corporation for failing to file an annual report.

The Third District Court of Appeals consolidated the appeals and rejected Morburger's argument. The court cited *Hock v. Triad Guaranty Ins. Corp.*, 292 So. 3d 37, 39 (Fla. 2d DCA 2020) and held that Fla. Stat. § 607.1405 "does not preclude a corporation that has been administratively dissolved for failing to file an annual report from prosecuting or defending against an action in order to wind up its business affairs." In Hock, the court reasoned that under Fla. Stat. § 607.1405, a dissolved corporation may collect its assets and do "every other act necessary to wind up and liquidate its business and affairs." Consequently, the court affirmed the trial court's decision in favor of Yellow Funding Corp. and directed the Clerk of the Court to issue a certificate of title.

continued, page 49

Money Damages may not be awarded in an action for partition where only partition is sought and the partition sale resulted in zero proceeds.

Megan Leigh Morrison v. Timothy D. Smolarick, No. 2D20-2693 (1st DCA 2022)

Morrison and Smolarick were in a romantic relationship and owned a home as joint tenants with right of survivorship. After the relationship ended, Smolarick vacated the property and continued to pay all mortgage payments, all real estate taxes, and all costs maintaining the property.

Smolarick filed a complaint for partition and in accordance with Fla. Stat. § 64.061(4), asked the court to hold the proceeds in escrow pending a judicial determination of the interest of the parties to the proceeds. The trial court granted Smolarick's motion for a private sale of the property and appointed a special master to facilitate the sale with each party responsible for payment of 50% of any fees required by the Special Master.

The property was sold at a price below the amount owed on the mortgage resulting in zero net profit from the sale. Following the sale, Smolarick petitioned the court for a trial to seek an award of damages against Morrison for half of the purported monies he spent on the property, for mortgage payments and the costs of improvements. A trial was held, and the trial court entered a money judgment in favor of Smolarick and ordered Morrison to pay $3,191.42, representing reimbursable expenses to satisfy the mortgage, and pay closing costs and the special master's fee. When Morrison failed to pay, a separate non-jury trial was held for the accounting phase of the partition action. The court ordered Morrison to pay Smolarick the sum of $26,154.41 for mortgage payments, insurance, taxes, and necessary repairs as reimbursable expenses related to the property. Subsequently, Morrison appealed the trial court's decision arguing that Smolarick is not entitled to recover monetary damages in a partition action against a co-owner because the partition statute does not authorize it.

The Second District Court of Appeals found in favor of Morrison, reversed the trial court's order in favor of Smolarick, and remanded to the trial court to vacate the judgment. The court held that a partition action commences a legal proceeding to divide cotenants' interest in a real property, citing *Condrey v. Condrey*, 92 So. 2d 423, 426 (Fla.1957). In accordance with Fla. Stat. § 64.061(4) and 64.071(1), the proceeds of a sale are divided among the parties in proportion to their interest. Thus, after the sale, "the court impounds the funds consisting of the proceeds of sale and conducts proceedings to establish the credits due to the parties," citing *McFall v. Trubey*, 992 So. 2d 867, 870 (Fla. 2d DCA 2008). Consequently, the amounts sought after the sale are not "damages" but "credits" to be awarded in the allocation of the funds. Therefore, neither Chapter 64 of the Florida Statutes nor the case law authorizes the entry of a money judgment for money damages in lieu of a credit against the proceeds of the sale.



M. HERNANDEZ

Melissa M. Hernandez *is a transactional attorney located in Kissimmee, Florida with Overstreet Law whose practice areas focus on real estate, land use and zoning, probate, wills and trusts and Medicaid planning. Melissa previously served as an Assistant County Attorney in Seminole County. She has experience and knowledge in the areas of state and local government law, real property, contracts, animal law, and sports tourism. She served as counsel to the Board of Adjustment, Animal Control Board, Parks and Preservation Advisory Committee and Historical Commission.*



Left to right: Johnathan Butler, Professor Florise Neville-Ewell, John Redding, and Amanda Hersem.

Cooley Law School Presentation:

Title 101 From Contract To Close

By John Redding, Esq. and Johnathan Butler, Esq.

On June 29, 2022, more than 30 Cooley law students participated in a luncheon presentation on the real estate contract-to-closing process. Cooley Professor Amy Bandow welcomed the group, and 13th Circuit Lead At-Large Member Johnathan Butler introduced the panelists: Attorney John Redding (program moderator and 13th Circuit At-Large Member), Amanda Hersem, Underwriting Counsel for WFG National Title Insurance Company, and Lori Finnegan, a Real Estate Broker with Finnegan Real Estate Services. Many attendees had completed their first-year property course and actively engaged with panelists on the topic, even continuing the discussion after the event. Plans are underway to conduct the seminar at other Florida law schools.

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

this issue **Shayla J. Mount** writes about the unanimously adopted Senate Bill 4D that passed in the aftermath of the Surfside tragedy. Her piece addresses the concerns of condominium unit owners in response to the new statutory reserve requirements. She notes that many condominium unit owners will face special assessments in the coming years to compensate for years of underfunding. Shayla also points out the new legislation's impact on further restricting access to housing in the state.

The Probate and Trust Division Practice Corner article by **Taniquea Reid-Wolliston** provides an update on the impact of local rules and requirements on probate. Those on the «death» side of the Section will want to read Taniquea›s article on page 41.

ALL ARE WELCOME IN THE SECTION! As evidenced by the 48 new Section members who joined as a result of the **Membership & Inclusion Committee's** Minority Lawyers Seminar Series, the Section is a very welcoming group. We are honored that over 20 minority bar associations across Florida were represented at the seminar described by **Annabella Barboza** and **Lilleth Bailey** on page 44.

Finally, thank you to our Section sponsors, those who advertise in this magazine and you---our colleagues, Section members, contributors and readers. We have a lot of people who devote their time and money in supporting this publication and we would not be in the position of producing a top-notch magazine without each and every one of you.