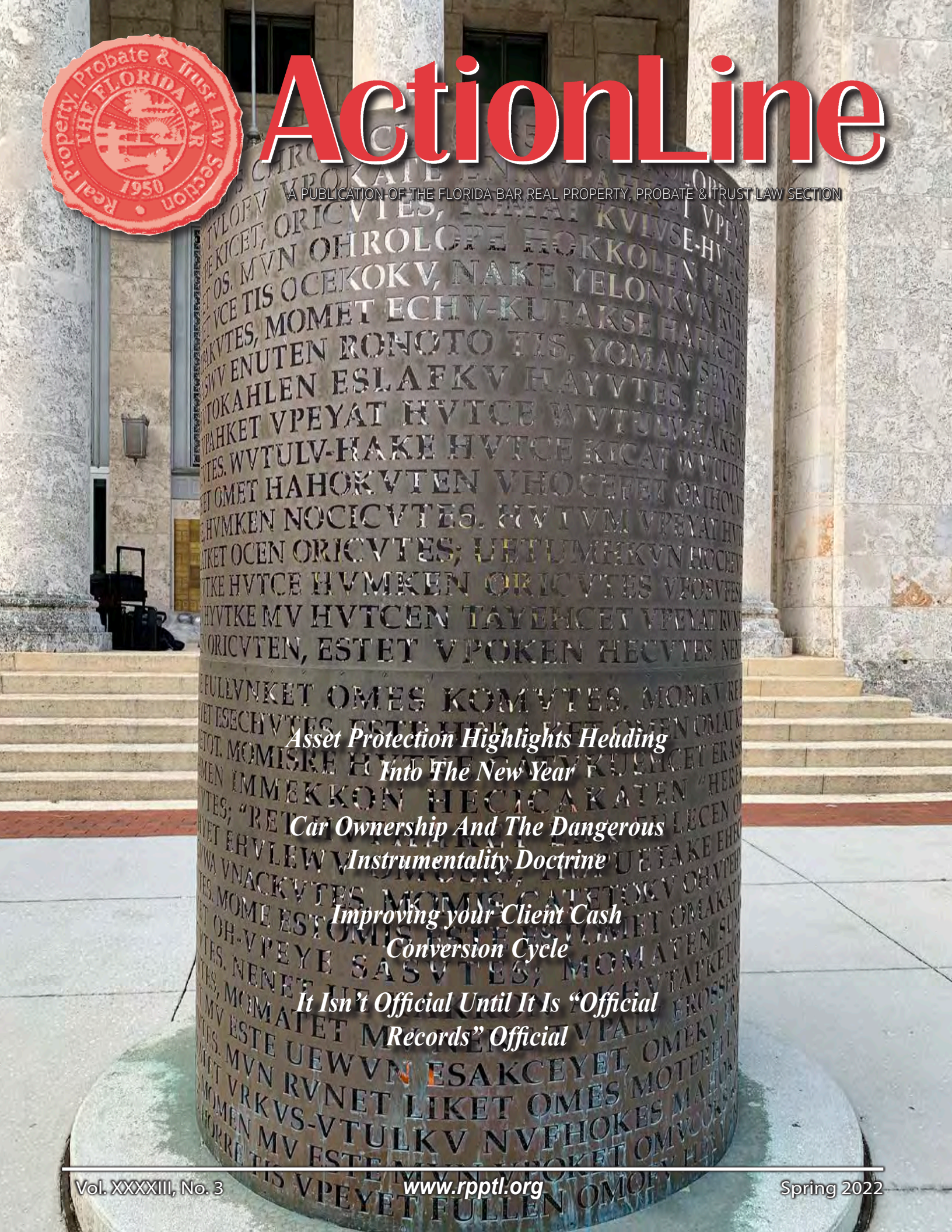

ActionLine

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

Asset Protection Highlights Heading Into The New Year

Car Ownership And The Dangerous Instrumentality Doctrine

Improving your Client Cash Conversion Cycle

It Isn't Official Until It Is "Official Records" Official

Vol. XXXXIII, No. 3 www.rpptl.org Spring 2022

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What Do I Get Out Of The RPPTL Section?

By Robert Swaine, Section Chair, 2021-2022

With the start of the new year, we welcomed **Diana Kellogg** to the RPPTL family as our new Section Administrator. **Hilary Stephens** continues as our Program Coordinator and has helped Diana transition into her new role. In the time I have known them, Diana and Hilary have shown themselves to be both intelligent and hard-working and we are fortunate to have their assistance.

By the time you read this, we will have held the Spring Executive Council meeting and numerous committee meetings in Tallahassee. Many of you will have met or communicated with **Diana Kellogg** by then, but I would venture that most of our Section membership does not know the many other Florida Bar staff that assist Diana and Hilary behind the scenes.

In the Bar's Professional Development department, **Jeremy Citron** works to help set up RPPTL events and CLE programs and **Angela Antonucci** and **Donna Pinson** provide general administrative support, including compiling seminar course materials for our CLE programs. **Clay Shaw** and **Donna Richardson** in the Bar's Office Systems department provide graphic and arts support when requested from Diana or Hilary. **Beth Anne** in the Meetings & Convention department assists with the review and processing of RPPTL meeting contracts. **Lani Fraser** in the Programs Division oversees the 24/7 online and downloadable CLE programming in the 24/7 CLE catalog for the Section. As many of you know, the Section's successful CLE programming helps to boost the bottom line of both the Section and the Bar.

Speaking of money, the Finance & Accounting department is overseen by **Marcy Jackson** which processes section memberships, the many in person Section events, CLE seminar registrations, CD/DVD sales and maintains our financials. Members of the Bar management team including **Josh Doyle, Terry Hill, Marcy Jackson, Gypsy Bailey**, and **Chase Early** work on the gamut of contract review, policy review, legislative position requests, Section, and staffing assistance and support.

If you were in Tallahassee for the RPPTL meetings, I hope you had a chance to meet these Bar staff members.



Hilary Stephens, RPPTL Program Coordinator and Diana Kellogg, RPPTL Program Administrator at the recent Executive Council Meeting in Tallahassee.

This magazine is prepared and published by the Real Property, Probate & Trust Law Section of The Florida Bar as a service to the membership.

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IN THIS ISSUE:

Chair's Column: What Do I Get Out Of The RPPTL Section? 3
Letter From The Co-Editors-In-Chief 5
Asset Protection Highlights Heading Into The New Year 6
It Isn't Official Until It Is "Official Records" Official 10
RPPTL General Sponsors 15
Car Ownership And The Dangerous Instrumentality Doctrine 17
Improving Your Client Cash Conversion Cycle 22
The Search For A Dementia Medication 26
Florida Bar Tech Helpline Ready To Assist Members With Routine Needs 28
RPPTL Section Executive Council Meeting Photos 30
Section Spotlight
RPPTL Members Presentation At Ave Maria College Of Law 32
RPPTL Members Testify Before Florida Senate Judiciary Committee 32
Political Roundup: 2022 Session 34
Roundtable: Real Property Division 39
What's Happening Within The Section 42
Roundtable: Probate and Trust Division 43
Florida Bar CLE Opportunities 44
Practice Corner: Tips For Successfully Navigating Probate: Know The Rules And The Systems 45
Practice Corner: Real Property Division - Who's Charging Whom? – Considerations For Property Owners And Community Associations Regarding The Installation And Operation Of Electronic Vehicle Charging Stations 46
Real Property Case Summaries 48
Probate Case Summaries 50
ActionLine Bulletin Board 56

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

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

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



J. BASKIES



M. BEDKE

Letter From The Co-Editors-In-Chief

Spring is in the air. With it, notwithstanding the tragedies occurring on the world stage today, we remain optimistic and look forward to a tremendous balance of the Bar year. Thank you to all who contributed to this issue.

This issue marks the turning of a page. **Colleen Schuster** has taken over the position of Publications Coordinator/Copy Editor from **Janellen Green**. After years of working together, we will miss "Janie" who dedicated herself to ActionLine and made it a stellar magazine. That said, we are beyond thrilled to now be working with Colleen. Consistent with Spring, she has brought a fresh look to how we do things. Please say "hello" to Colleen when you get the chance.

Bob Swaine's Chair's Column provides appropriate recognition of the Section's other hardworking staff, several of whom are new. Please let them know we, as Section members, appreciate their efforts and contributions. Bob's article gives you a good idea as to who does what, and the resources available to assist members.

Speaking of assisting members, check out the article on page 28! The Florida Bar Tech Helpline is a superb addition to the Member Benefits lineup. The folks working the Helpline are there to provide assistance with a myriad of tech-related questions and problems. Read the article and learn how to take advantage of a benefit that provides value for your dues dollars. Note the list of additional Member Benefits on page 42 of this magazine. Also, beginning on page 22, **Jordan DeLoach Hulburt** and **Carla DeLoach** have provided a benefit to our readers via their advice on improving your client conversion cycle. Their practical and actionable suggestions apply and have merit whether you are a solo practitioner or work in Big Law. Your 3L professor of Law Firm Economics would be proud.

Top-notch CLE is another great product/service that the Section offers. You may learn about available and upcoming Section CLEs by glancing at page 44 and page 56. A review of page 33 will give you the information you need in order to plan for one of our favorite annual CLE programs---the Section's Legislative & Case Law Update Seminar at The Breakers. There is not a more informative summation of recent cases and new legislation that is critical to real estate, probate and trust law practitioners. In the meantime, we recommend a review of **French Brown**'s "Political Roundup." It will give an insider's view of the most recent Session of the Florida Legislature, especially with respect to the state budget and redistricting plan.

At ActionLine, we pride ourselves on printing the always practical content you provide. We often find ourselves returning to read an article from a prior issue. Don't be surprised if you find yourself marking some articles from this issue. For example, any member who is a parent of a young driver should be sure to read the "Car Ownership and the Dangerous Instrumentality" piece by **Joseph Percopo**. (In our home it led to a lot of discussion and a few calls to insurance carriers.) And, with gas prices skyrocketing, there is immediate relevance to the Practice Corner article on page 46 addressing considerations for property owners and community associations regarding the installation and operation of electronic vehicle charging stations.

A worthy read is the Asset Protection article beginning on page 6. It will be of interest to those of you serving in the role of lender's counsel. We were hooked, three lines into the article, by the reference to the "Cowboy Cocktail." Was it coincidental that the Probate Case Summaries on page 50 included a reference to the "tipsy coachman" doctrine!?

Another portion of the Probate Case Summaries (on page 51) mentions an appeal based on an assertion of a claim being "time-barred," while an excellent article by **Klarika Caplano** and **Lindsay Moczynski** (beginning on page 10) stresses the importance of timing in the context of certain filings and the recording process. It just may surprise (and possibly frighten) you. Perhaps you will enjoy this issue of ActionLine while sitting in your hot tub time machine or doing the time warp---again! (Those references may be lost on our less age-challenged readers…go ask your older colleagues...or run a Google search.)

Seriously, we hope (and believe) you will find this issue of ActionLine entertaining and enlightening. For that, thank those selfless authors and contributors who have made this issue worthy of your time and attention.

Asset Protection Highlights Heading Into The New Year

By Jerome L. Wolf, Esq. and Timothy H. Wolf, Esq.
Katz Baskies & Wolf PLLC, Boca Raton, Florida

I. The Corporate Transparency Act

On December 20, 2021, The Washington Post published an exposé written by Debbie Cenziper and Will Fitzgibbon entitled *The 'Cowboy Cocktail': How Wyoming Became One of the World's Top Tax Havens.*

At the heart of the Cowboy Cocktail is a self-settled spendthrift trust that protects the grantor from creditors and limits tax exposure to the grantor and the grantor's heirs. Wyoming recognizes private trust companies that are often unregulated and exempt from periodic reporting and state scrutiny, and are often owned by the family for whose benefit the trust was created. The trust forms a limited liability company to own the assets comprising the principal of the trust, which has no duty to reveal or file the identities of the owners or managers, thus adding another level of concealment to the ownership and management of the wealth.

The Cowboy Cocktail set up in Wyoming—or other states commonly referred to as DAPT ("Domestic Asset Protection Trust") states—provides an environment where money can be moved into the United States and invested and spent with a level of anonymity not found in most other offshore tax havens. In fact, since 2014 most of the major countries, other than the United States, have adopted the "Common Reporting Standards" that require member jurisdictions to obtain information from their financial institutions and automatically exchange that information with the other jurisdictions on an annual basis. The CRS set out the financial account information to be exchanged, the financial institutions required to report, the different types of accounts and taxpayers covered, and the common due diligence (also known as "know your client") procedures to be followed by financial institutions.

In contrast, regulators in the U.S. are kept in the dark by the state's own privacy laws. Accordingly, as of January 1, 2021, the Corporate Transparency Act became law and requires certain business entities to file, in the absence of an exemption, information on their "beneficial owners" with the Financial Crimes Enforcement Network (FinCEN) of the U.S. Department of Treasury. Although this information will not be publicly available, FinCEN is authorized to disclose the information (i) to U.S. federal law enforcement agencies, (ii) with court approval, to certain other enforcement agencies, (iii) to non-U.S. law enforcement agencies, prosecutors or judges upon request of a U.S. federal enforcement agency, and (iv) with consent of the business entity, to financial institutions and their regulators.

Unlike prior drafts of the legislation that provided for the regulation of formation agents, the CTA requires reporting by a "reporting company" and a "beneficial owner."

A "reporting company" includes a corporation, limited liability company, or other similar entity that is created by the filing of a document with the secretary of state or similar office under the law of the state, or formed under the laws of a foreign country and registered to do business in the United States. A "beneficial owner" includes an individual who, directly or indirectly, through any contract, arrangement, understanding, relationship, or otherwise (i) exercises substantial control over the entity; or (ii) owns or controls not less than 25% of the ownership interest of the entity.

Although the term "reporting company" does not include general partnerships (which are formed by agreements among partners), and "donative trusts," which are traditional estate planning and property owning vehicles and are not required to register with any state or territory, the Proposed Regulations for Trusts released by Congress's Joint Committee on Taxation in December, 2021, specifies that an individual may own or control ownership interests by way of the individual's position as a grantor, a beneficiary, or other individual with authority to dispose of trust assets.

The CTA represents a significant development in the responsibility for collecting and reporting beneficial ownership information. Any person violating the requirements of the CTA is liable for civil penalties of not more than $500 for each day the violation continues, and criminal penalties of up to two years imprisonment and fines of up to $10,000.

II. The New Cook Islands International Relationship Property Trusts Act of 2021

On December 1, 2021, the Cook Islands Parliament passed the International Relationship Property Trusts Act of 2021 (IRPT Act). The IRPT Act was developed in response to the

continued, page 7

courts' ambiguous treatment of prenuptial and postnuptial agreements and the settlement of marital property. There is considerable uncertainty over what is required to ensure the agreements remain intact when scrutinized by the courts.

The IRPT Act is based upon the principle that if the settlors who are in a relationship agree to put assets into such a trust, and later separate, the relationship property with which the trust is funded will be held intact and continue to be managed for the settlors as agreed under the terms of the trust.

To qualify as an international relationship property trust under the IRPT Act, the following must be shown:

a. The settlors are in a relationship with each other at the time the trust is settled.
b. Each party contributes his or her property to the trust.
c. Each party has received separate and independent legal advice concerning their relationship and the rights, duties and obligations under the trust instrument.
d. The trust instrument complies with the terms of the IRPT Act.
e. The trust is registered under the IRPT Act.

III. Alabama May Be Number 2 in the CFP but is Number 20 in the DAPT

The 2021 Second Special Session of the Alabama Legislature enacted Alabama Code Title 19, Section 19, commonly referred to as the "Qualified Dispositions in Trusts Act," thereby making Alabama the 20th state in the Union to adopt self-settled spendthrift trust legislation, and becoming another DAPT state.

Although the new statute is similar to the legislation enacted by several other states over the past few years, there are a couple of points worth focusing on.

1) One of the concerns raised over DAPTs is that a lender could underwrite a loan in reliance of the guarantor's strong financial statement. Immediately after the loan closes, however, the guarantor could make a qualified disposition of his assets into a newly recognized trust. Once the two-year statute of limitations expires on any claim of fraudulent conveyance, the assets remain protected from the claims of the guarantor's creditors. Alabama's statute provides protection to lenders by including a provision under which a written agreement between a transferor and a creditor may provide that the transferor will have a continuing or periodic obligation to disclose to the creditor any qualified dispositions, or a qualified disposition requires the prior written approval of the creditor. If a transfer that would otherwise be a qualified disposition violates such an agreement with the creditor, then, with respect to that creditor only, the transfer is not a qualified disposition and the new act does not affect the rights of the creditor.
2) Alabama adopted the Uniform Voidable Transactions Act (UVTA) Ala. Code 1975, Section 8-9B-1, et seq. There has been much controversy over the UVTA – not so much over the actual provisions of the Act, but the Commentaries that were made part of the Act and intended to interpret the provisions of the

continued, page 8



Act. Comment 8 of the Uniform Act provides that any transfer to a self-settled spendthrift trust is deemed a fraudulent transfer. However, Alabama Code Section 8-9B-5, entitled "Transfer voidable as to present or future creditor" specifically provides in Alabama Comment 2., "The following hypotheticals in Comment 8 of the Uniform Act related to self-settled spendthrift trust *shall be disregarded.*" [Emphasis added.]

IV. Lawyer's Exposure to Civil Liability for Assisting a Debtor Post-Claim

The question of whether there is a cause of action for aiding and abetting a fraudulent transfer when the alleged aider-abettor is not a transferee was addressed by the Florida Supreme Court in Freeman v. First Union National Bank, 865 So. 2d 1272 (Fla. 2004). This decision settles the legal issue that lawyers, accountants, and others whose client is, or may become, a debtor cannot be held liable for simply aiding and abetting their client's asset transfers under Florida's Uniform Fraudulent Transfer Act (Chapter 726, Florida Statues). The Court reaffirmed the proposition that a fraudulent conveyance action is not an action against the debtor for failure to pay an amount owing from a prior judgment and does not warrant an additional judgment against the same debtor because of the fraudulent transfer. A fraudulent conveyance action is not a lawsuit against a transferor/debtor, but it is an action against the property or the transferee holding the property. Thus, Freeman defines an action under Florida's Uniform Fraudulent Transfer Act as a creditor's equity remedy whereby transfers that were intended to defraud creditors could be set aside.

However, on June 15, 2021, the U.S. District Court for the Southern District of Iowa addressed the issue of whether a creditor may maintain a cause of action for damages against the debtor's attorney and bankers, who furthered the debtor's fraud and enabled the debtor's efforts to frustrate the creditor's collection efforts (*Kruse v. Repp*, Case No. 4:19-cv-00106-SMR-SBJ). In Kruse, the debtor filed a claim against the debtor's attorneys and bankers under the Iowa Uniform Fraudulent Transfer Act (IUFTA) and RICO (Racketeering Influenced and Corrupt Organizations Act), and for tortious interference.

With respect to the claim brought under IUFTA, the court ruled that by clear and convincing evidence, the strategies implemented (formation of an LLC and funded with real estate two months before the case went to trial) by the attorney and bankers were done with the specific intent to shield the debtor's assets and prevent the creditor from levying her judgment lien against the debtor's property. Of note is the statement, "Noting that although such business formation and asset organization practices are a common and often legitimate way to secure personal retirement and guarantee an inheritance for one's children, the facts established estate planning was not [the debtor's] intent."

With respect to the RICO Claim, the court held:

> [I]t shows the Attorney Defendants knew from the inception of their attorney-client relationship not only that [debtor] was weeks away from incurring a significant liability for personal injuries that he had admitted to causing, but also that [debtor] had previously made (improper) efforts to hide his assets from collection. They nevertheless prepared legal documents transferring his property to a corporate form that posed significant barriers to any recovery by [creditor] … and defended the legality of the conveyances in court. In both cases, the facts are sufficient for a reasonable jury to find Defendants tacitly agreed to participate in [debtor's] scheme to defraud (creditor] *and conspired to further the purpose of a RICO enterprise.*" [Emphasis added.]

Finally, although the Iowa Supreme Court has not considered whether a civil action may be brought for tortious interference in the context of a defrauded judgment creditor, after reviewing Iowa case law the District Court predicted the Iowa Supreme Court would recognize a cause of action under a theory of general tortious interference based on the conclusion that extending tort liability in these circumstances comports with Iowa law and no other alternative remedy exists to adequately address the plaintiff's harm.

Is Florida the next jurisdiction that will use civil RICO claims against attorneys alleged to be aiders and abettors of debtors? Will a charge of tortious interference become a weapon to be used against financial professionals who assist debtors with post-claim planning?

Stay tuned!



J. WOLF



T. WOLF

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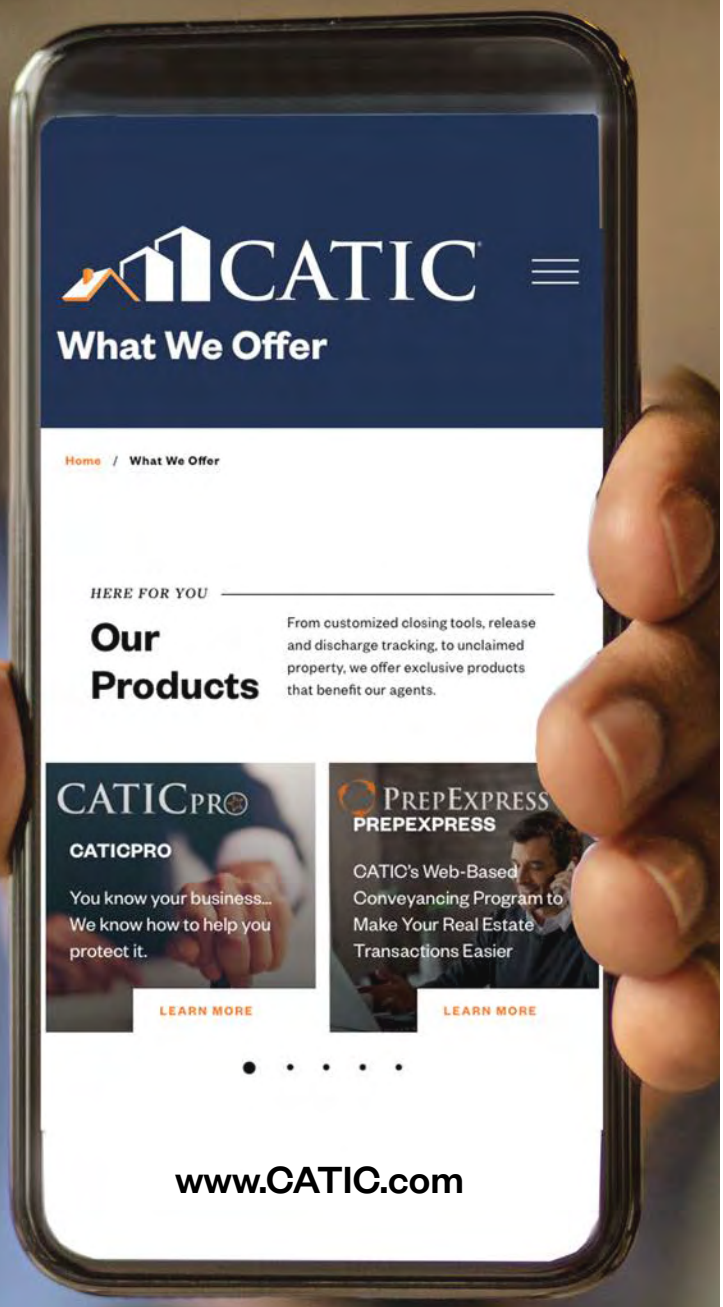

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It Isn't Official Until It Is "Official Records" Official

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Gen Xers like to joke a person's change in relationship status isn't official until it is "Facebook Official," meaning it only really counts once it has been made public on that social media platform. This same theory applies to documents contained within the Official Records of each county of this state. While the main purpose of a county's Official Records is to give notice of certain things to the public, the actual date of recording of an instrument submitted is important; it can dictate whether a person or entity has an enforceable Claim of Lien or whether they will be limited to obtaining a potentially uncollectable judgment for unpaid services rendered or materials supplied. There are many other instruments of arguably greater importance than the example provided above, and because of this, there are statutes specifically addressing the duties of the clerk of the circuit court concerning recording instruments and when an instrument becomes part of the Official Record.

Fla. Stat. § 28.222 (2021) bestows on the clerk of the circuit court the responsibility of "recorder of all instruments" for the county.[1] The only counties which are exceptions to this are Orange County[2] and Broward County.[3,4] The statute further dictates that the clerk of the circuit court shall record an enumerated list of certain types of instruments presented, upon payment of legally prescribed service charges.[5] According to Fla. Stat. § 695.11 (1997), an instrument is "Official Records Official" (accepted and recorded) at the time the clerk of the circuit court affixes to it the official register number, whether that be a Book/Page or Instrument number.[6]

Recording instruments, commonly also referred to as documents, in the Official Records is a regularly occurring event for those of us on the dirt side of the Real Property, Probate, and Trust Law Section. When a client calls you complaining about not being paid for labor or materials they provided for the benefit of a property, the first question out of your mouth back to the client should start with the word "when." "When did you last furnish the labor/materials?" You want to know the "when" because you know how important it is to get a Claim of Lien recorded within that 90-day timeframe. Upon learning that your client is within the window, you have the client execute the Claim of Lien and you submit it for recording.

Now, if we are being honest with ourselves, we can admit that submitting the Claim of Lien for recording usually does not happen until pretty close to that 90th day due to a variety of factors that tend to center around the client. Regardless, you send the Claim of Lien with payment for the service charges to the clerk for recording in the Official Record. Maybe you calendar a reminder to follow up and ensure the document was recorded or maybe you like to live life on a wing and a prayer. Whichever your pleasure, what happens when you submit a document for recording in what you believed to be a timely manner only to find out that it was not recorded on time? Do you call the clerk's office and cause a ruckus? Do you call your malpractice carrier? The answer to this question is the standard "it depends."

Phillips v. Pritchett Trucking, Inc.

On October 6, 2021, the First District Court of Appeal made a ruling in *Phillips v. Pritchett Trucking, Inc.*[7] that led to a lively discussion during the Real Property Problems Study Committee meeting in Ft. Myers this past fall. The result of the discussion was, in addition to the creation of this article, the realization that there are common misconceptions as to when a document should be and when it actually is considered to be officially recorded. Yes, we all can read and understand the statutes, but case law only comes about because of an issue that arises over the application of a law or rule to a set of facts.

continued, page 11

The court in *Phillips* affirmed a final judgment of the circuit court granting mandamus and declaratory relief to Pritchett Trucking, Inc. ("Pritchett"), due to the failure of the Clerk of Court of Duval County ("Duval Clerk") to timely carry out its statutory duty of recording an instrument upon presentation with payment of the service charges. In this case, Pritchett mailed its Claim of Lien and payment to the Duval Clerk by certified mail. The Duval Clerk received the Claim of Lien three business days before the 90-day deadline. The Claim of Lien was not recorded until seven days after it was received by the Duval Clerk. For those of you who went to law school because math was not your strongest subject, this means that the Claim of Lien was recorded four days after the 90-day deadline. Undoubtedly wanting to retain their secured interest, Pritchett sought the issuance of a writ of mandamus, compelling the Duval Clerk to record the Claim of Lien to reflect recordation as of the date it was received, and a declaratory judgment regarding the recording date.

The Duval Clerk appealed the lower court's ruling and argued that a document is not accepted and deemed recorded until the clerk affixes the register number to the document, pursuant to Fla. Stat. § 695.11 (1997). Pritchett advanced its argument under Fla. Stat. § 28.222 (2021), focusing on the words "shall" and "upon payment" and contending that those words mean that a clerk is required to record a document at the time payment is made. The lower court, citing a 2004 United States Court of Appeals for Veterans Claims opinion[8] which cited Webster's College Dictionary, defined "upon" as any of the following variations: at a prescribed point in time; incidental to a specified point in time or order of action; or on the occasion of, at the time of, or immediately thereafter. The First District Court of Appeals agreed with the lower court's definition, but unfortunately it did not provide a measurable or permissive definition of the amount of time that may elapse, if any, between a clerk's receipt of a document with payment and a register number being affixed. The court's failure to expand on this and instead to simply affirm the final judgment which deemed the Claim of Lien officially recorded as of the date of receipt naturally leads one to believe that a clerk must affix a register number on the same day a document is received with payment by their office. For many counties, especially traditionally higher volume ones, this seems impractical at best.

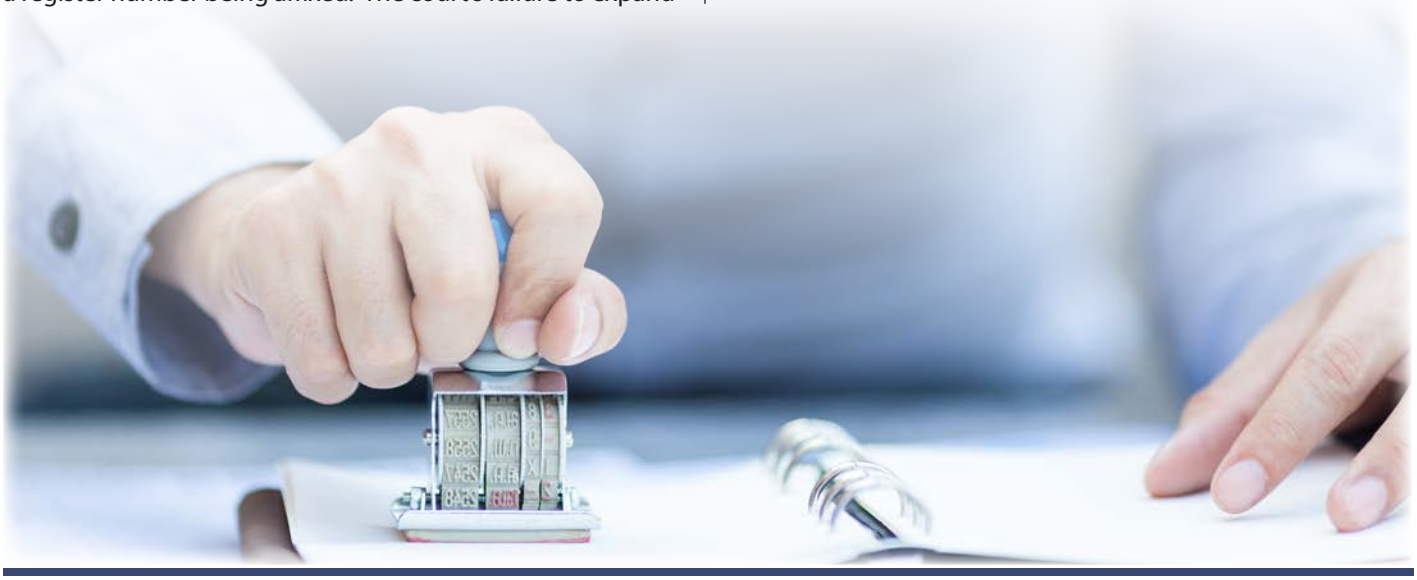
Methods of Submission And Time Until Recorded

It should go without saying that the amount of time it takes for a document to be recorded and made part of the Official Records varies by county and by method of submission. Each county has the authority to dictate its own processes and procedures for completing any required duties.

Again, if we are being honest, never in the history of ever – or at least in the last 20 years – has there been an expectation that a document would make it into the Official Records the same day that the friendly postal service worker delivers it as part of multiple buckets of mail to a clerk's office. Regardless of whether a document is sent via USPS first-class, priority, or priority express mail (with or without the addition of the certified mail option for tracking purposes) or 3-day, 1-day, or overnight delivery through a private shipping carrier like UPS, FedEx, or DHL, all of those mailed documents end up in the same pile when delivered and they are processed in the order received. In the past, it could take anywhere from weeks to well over a month before a mailed-in document became part of the Official Records.

Since the inception of e-recording in Florida in 2007[9], and really within the last seven to ten years when certain e-recording vendors were being designated by clerks' offices to better facilitate the recording process electronically, the reasonable expectation through the majority of the state is that mailed-in documents will be recorded within a day or two, or up to a week at the very most, after receipt, depending on the county.

continued, page 12



If ever there is concern over having a document recorded within a short or strict deadline, there has always been the option for same-day recording. It just requires physically going to the clerk's office, pulling a number, waiting your turn, and having a deputy clerk complete the recording in your presence.

Many clerks' offices also have overnight and regular business hours drop boxes that are checked multiple times a day with those documents typically being recorded the same day if placed in the regular hours drop box, or the next business day if placed in the overnight drop box.

The infinitely more convenient happy medium between mailing and walking in a document to be recorded is the ever-popular e-recording option. The majority of Florida's 67 counties offer the e-recording option[10]; only nine do not[11]. This option quickly became beloved because, most obviously, it cuts out the lag time of the mailing process. Additionally, it enables you to keep (wo)manpower in the office to complete tasks that would otherwise not get done if that person was instead sitting in the clerk's office every few days with a stack of documents to be recorded patiently waiting for their number to be called. Using this option, however, does not guarantee that a document will be recorded on the day it is uploaded to the platform. For the most part, documents are recorded by a clerk's office anywhere from a few hours to two days after submission. One of the most popular approved e-recording vendors, Simplifile, provides the average turnaround time for each county on the platform before you finally submit the document electronically for recording.

Upon Payment

Other than going to the clerk's office in person and waiting for a document to be recorded, or in the off chance that a document submitted by any other method is recorded that same day, it seems like no method of delivery can comply with the expectation set by the court in *Phillips*. Afterall, how can there be compliance with this standard if not recorded the same day?

It may surprise you to learn that e-recording can be considered technically compliant with, or at least not violative of, the statutory requirement as interpreted by the court in *Phillips*. This is because payment to the county is not made until after the document is recorded. The document gets recorded by the clerk's office and the recorded image is sent back to the vendor. It is at this point that the service charges are paid. Through this process, the clerk's office is essentially recording on credit.

Why is this allowed for an electronically submitted document when a paper document submission would be refused recordation without payment? The reason is you are required to provide information to allow for payment to be securely processed via electronic funds transfer or Automated Clearing House (ACH) when you establish your account with the vendor, ensuring payment to the clerk upon confirmation of the final amount due. When a document is uploaded to the vendor's platform with the required information, a preliminary payment amount is provided by the vendor based on that information, but the final amount due to the clerk could increase or decrease once reviewed by the clerk's office. As these vendors are selected and approved individually by each county that utilizes their services, you can bet your first-born child that if payment of the service charges ever became an issue, that vendor would no longer find itself on the approved list.

Clerk Positions And What They Want You To Know

As any good amateur investigative journalist would do, contact was made with a handful of county recording department representatives within the state in preparation of this article. Hard-hitting questions were eloquently asked and demanded to be answered! Actually, as should be expected by anyone who has had to reach out to any of these offices for information or assistance in the past, those we spoke to were exceedingly helpful and more than willing to answer the multitude of questions that were asked of them.

To start, there was a general acknowledgment that if same-day recording was truly the only way to be considered compliant with the statute, then they did not currently have the capacity to be compliant. Of the counties we spoke with, a possible exception to this statement is Lee County. The Honorable Kevin Karner, Clerk of the Circuit Court and Comptroller, advised that Lee County generally records documents received during business hours via all available methods the same day, though they cannot guarantee that will always happen each time.

Bill Burgess, Senior Manager, and Hector Esteves, Assistant Manager, of the Recording Services Department of the Pinellas County Clerk's Office explained that there was a phone meeting with a group of clerks who regularly work on best practices for clerks' offices throughout the state for the purpose of making all counties aware of the *Phillips* case so that they could look at their respective processes to determine compliance. The Pinellas County Clerk's Office, where a document received by drop box, mail, or electronically is generally recorded within two business days, provided the case to their legal department. At this time, that office has no plans to make any changes to their current recording process.

The Orange County Comptroller's Office has not changed its procedures as a result of the case either. As it related to documents submitted to that office for recording, David Rooney, Assistant Comptroller of the Records Administration Division, said "[w]e continually strive to keep our backlog to a minimum but the volume does vary significantly while our staffing remains consistent." He also mentioned that, when that office was presented with a scenario similar to that in *Phillips*

continued, page 13

It Isn't Official Until It Is "Official Records" Official, from page 12

E-filing by County and Vendor

COUNTY	SIMPLIFILE	EPN	CSC	EDOC SOLUTIONS	RECORDNATION
Alachua	✔	✔	✔	✔	✔
Baker	✔	✔			
Bay	✔		✔	✔	✔
Bradford			✔		✔
Brevard	✔	✔	✔	✔	✔
Broward	✔	✔	✔	✔	✔
Calhoun	✔		✔		✔
Charlotte	✔	✔	✔	✔	✔
Citrus	✔	✔	✔	✔	✔
Clay	✔	✔	✔	✔	✔
Collier	✔		✔		✔
Columbia	✔		✔		✔
Desoto	✔		✔		✔
Dixie					
Duval	✔	✔	✔	✔	✔
Escambia	✔	✔	✔	✔	✔
Flagler	✔	✔	✔	✔	✔
Franklin	✔		✔		✔
Gadsden					
Gilchrist	✔		✔		✔
Glades					
Gulf	✔		✔		✔
Hamilton			✔		✔
Hardee	✔	✔	✔		✔
Hendry	✔		✔		✔
Hernando	✔	✔	✔	✔	✔
Highlands	✔	✔	✔	✔	✔
Hillsborough	✔	✔	✔	✔	✔
Holmes	✔				
Indian River	✔	✔	✔	✔	✔
Jackson	✔		✔		
Jefferson	✔		✔		✔
Lafayette	✔				
Lake	✔	✔	✔	✔	✔
Lee	✔	✔	✔	✔	✔
Leon	✔	✔	✔	✔	✔
Levy					
Liberty					
Madison					
Manatee	✔	✔			✔
Marion	✔	✔	✔	✔	✔
Martin	✔	✔	✔	✔	✔
Miami-Dade	✔	✔	✔	✔	✔
Monroe	✔	✔	✔		✔
Nassau	✔		✔	✔	✔
Okaloosa	✔	✔	✔	✔	✔
Okeechobee	✔	✔	✔		✔
Orange	✔	✔	✔	✔	✔
Osceola	✔	✔	✔	✔	✔
Palm Beach	✔	✔	✔	✔	✔
Pasco	✔	✔	✔		✔
Pinellas	✔	✔	✔	✔	✔
Polk	✔		✔	✔	✔
Putnam	✔		✔		✔
Santa Rosa	✔	✔	✔	✔	✔
Sarasota	✔	✔	✔	✔	✔
Seminole	✔	✔	✔	✔	✔
St. Johns	✔	✔	✔	✔	✔
St. Lucie	✔	✔	✔	✔	✔
Sumter					
Suwannee	✔	✔	✔	✔	✔
Taylor					
Union					
Volusia	✔	✔	✔	✔	✔
Wakulla	✔	✔	✔		✔
Walton	✔	✔	✔	✔	✔
Washington	✔		✔		✔

continued, page 14

in the past, they were "able to satisfy any delay in processing with a recorded affidavit from [their office] stating when the document was received in [their] office."

All three offices had a common message for attorneys and their staff. The message can be best expressed by the title of MTV's 2012 Song of the Year recorded by Canadian singer-songwriter Carly Rae Jepsen – "Call Me Maybe".

There's no doubt that we live in a digital age where technology has influenced many of today's practitioners and their internal office procedures to default to utilization of online searches, e-mail, and website-based chat features to ascertain sought-after information. What we seem to forget is that nothing about the recording process is automated in the sense that a computer is receiving and approving documents to be made part of the Official Records in lieu of a human. There is a real, live deputy clerk on the other side of your submission, whether paper or electronic. Most deputy clerks are top-notch customer service representatives in addition to their many other talents that enable them to effectively do their job. They want nothing more than for matters they are involved with to run smoothly, if for no other reason than to avoid a lawsuit like the one in the *Phillips* case.

Practice Pointers

From a practical standpoint, if you will be taking on the responsibility of ensuring timely recordation of a document, you should start by reviewing the procedures and timelines provided on the websites of each county you work in. If you have questions, as stated above, contact the clerk's office by phone or go in-person to speak with someone.

Additionally, make it a priority to analyze your client's recording needs as soon as they come to you. Calendar the proper deadlines, evaluate your options for recording, and confirm your client has the funds for the option you are considering. Each recording submission method comes with a cost, whether it be a postage stamp for mailing, a vendor payment for an e-recording site, or a person's time for driving to and waiting at a clerk's office.

In the end, it really cannot be stated any better than it already is, and for many years has been, on the Pinellas County Clerk's Office website: "You are solely responsible for ensuring the timeliness of a recording for any legal purpose. […] If your recording is time-sensitive, you may wish to consider recording your document in person at the Clerk's Recording Services Department during normal business hours."[12]



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Endnotes

1 Fla. Stat. § 28.222(1) (2021).

2 Comptroller Special Act 72-461 Laws of Florida allows for Orange County to divide the duties of the clerk of the circuit court, assigning the duty of county recorder to the county comptroller.

3 Broward County Charter, art. IV, § 4.03(C) transferred to the county's Department of Finance all fiscal functions and duties prescribed by the Laws of Florida for the office of Clerk of the Circuit Court which relate to the duties as custodian of all recordation of public documents.

4 For purposes of this article, the clerk's office will be referred to generally as the recorder of instruments for all counties.

5 Fla. Stat. § 28.222(3) (2021).

6 Fla. Stat. § 695.11 (1997).

7 *Phillips v. Pritchett Trucking, Inc.*, 46 Fla. L. Weekly D2206 (Fla. 1st DCA 2021).

8 *Pelegrini v. Principi*, 18 Vet. App. 112 (2004).

9 Fla. Stat. § 675.27 (2007).

10 The chart listing each county and their respective approved third-party e-recording vendors is not exhaustive or all-inclusive of all vendors but does contain the most frequently utilized vendors. The lists were either obtained from a vendor's website or a vendor's representative by e-mail.

11 Dixie, Gadsden, Glades, Levy, Liberty, Madison, Sumter, Taylor, and Union counties.

12 https://www.mypinellasclerk.org/Home/Recording-Services#56478-erecording

Is your E-MAIL ADDRESS current?

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Car Ownership And The Dangerous Instrumentality Doctrine

By Joseph M. Percopo, Esq., LL.M.; Orlando, Florida

Unbeknownst to most Florida drivers, their automobile is their most dangerous and biggest potential personal liability. The commercials, billboards, and radio stations are abounding with advertisements offering assistance and suggesting large financial recovery for anyone injured in an automobile accident. Therefore, it should come as no surprise that if a driver is at fault for a car accident, a legal demand letter is very likely to follow. However, it is not just the driver who should expect to receive a demand letter but so should the legal owner of the vehicle. This proposition comes as a surprise to many because generally it is the person who acted negligently (the driver, in this case) that would be the party responsible for damages. So why then is a vehicle owner who was not driving also potentially liable for the injuries that occurred with their vehicle? And what, if anything, can be done to minimize liability to the owner?

The Dangerous Instrumentality Doctrine

In 1920, the Florida Supreme Court adopted the application of the "dangerous instrumentality doctrine" to automobiles.[1] The doctrine causes the imposition of "strict vicarious liability upon the owner of a motor vehicle who voluntarily entrusts that motor vehicle to an individual whose negligent operation causes damage to another."[2] The application and breadth of the doctrine has continued to evolve over the years through both the courts[3] and the legislature.[4] The evolution has created liability limitations[5] and exceptions to the "strict vicarious liability" doctrine that would otherwise apply. Fla. Stat. § 324.021(9)(b)(3) (2021), limits the liability of a natural owner under the dangerous instrumentality doctrine up to "$100,000 per person and up to $300,000 per incident for bodily injury and up to $50,0000 for property damage." However, if the driver is uninsured or has a policy with "limits less than $500,000 combined property damage and bodily injury liability, the owner shall be liable for up to an additional $500,000" reduced by amounts recovered from the driver and driver's insurer, if any.[6] Since the doctrine is premised on an owner[7] allowing, whether expressed or implied,[8] another to use the automobile, he or she is not subject to liability if the automobile is stolen or used without permission.[9] Additionally, the "shop rule" exception provides that an owner is not liable for the negligent driving of a repair shop employee[10] or a valet driver.[11]

Minor Drivers

In order for a minor, who is not yet 18 years old, to drive, a parent, guardian, or other responsible person must sign a Parental Consent for a Driver Application of a Minor form[12] whereby he or she agrees to the obligations imposed by Fla. Stat. § 322.09 (2021).[13] Once the aforementioned application is signed, "[a]ny negligence or willful misconduct of a minor under the age of 18 years when driving…shall be imputed to the person who has signed the application of such minor"[14] regardless of whether or not the signer owns the automobile. The signer will be "jointly and severally liable with such minor for any damages caused by such negligence or willful misconduct,"[15] and therefore, be unable to avail himself or herself of the liability limitations of Fla. Stat. § 324.021(9)(b)(3)

continued, page 19



(2021). A parent or guardian who revokes the minor's driving privileges[16] or does not sign the application for the minor, generally, is not liable for the negligence of a minor driver under Fla. Stat. § 322.09 (2021).[17] Additionally, when a minor reaches the age of majority, the liability imposed by Fla. Stat. § 322.09 (2021) ends;[18] however, a parent may still be liable under the dangerous instrumentality doctrine and/or for negligent entrustment.

Negligent Entrustment

The owner of a automobile has a "nondelegable obligation to ensure that a vehicle is operated properly."[19] Thus, Florida recognizes a cause of action for the negligent entrustment of an automobile[20] which allows an injured party to bring an action against someone who entrusts another with an automobile when the "entrustor knew or should have known some reason why entrusting the [automobile] to another was foolish or negligent"[21] and the "harm was or should have been foreseeable" to the entrustor.[22] It is important to note that Fla. Stat. § 324.021(9)(b)(3) (2021), does not limit liability for negligent entrustment.[23]

Protecting Yourself (and Your Family)

The first step is to audit the ownership of all your automobiles, including those you or your spouse may not drive but helped someone else acquire. It is important to examine the title of each vehicle to be absolutely certain as to ownership. Since the dangerous instrumentality doctrine creates immediate liability risk to anyone on the title, if you are not the primary driver of the automobile then your name should be removed from the title.[24] This is true even of married couples. In fact, an automobile titled in the names of both spouses that causes injury not only exposes the assets of each individual spouse but also those joint marital assets that may have otherwise been protected due to tenants by the entirety ownership.[25]

The second step is to review your insurance. The amount of coverage, including uninsured motorist insurance, is a personal choice, as is whether to also carry an umbrella policy. The liability limitations of Fla. Stat. § 324.021(9)(b)(3) (2021) apply only when you are not the driver and you have not negligently entrusted the vehicle to another person. Therefore, at a minimum, you will want to have coverage for the $850,000 statutory maximum personal liability[26] that can arise from allowing another to use your vehicle. This level of coverage can be accomplished wholly through automobile insurance or a combination of automobile insurance and umbrella policy coverage. Keep in mind that if you are the negligent actor or negligently entrust another to use your automobile, there is no liability limitation. Thus, the more coverage and the bigger your umbrella policy the safer you will be and the more soundly you will be able to sleep at night. Additionally, it is worth noting that even if a family retitles all the cars into individual names, they can still continue to be on a group policy. A group policy does not cause liability like the automobile title. However, be wary of insurance coverage gaps. For example, if a child does not live with you and is not listed as an insured on your policy, then you may be liable for the child's negligence and your insurance may not provide coverage. Consider also, even if a child has his or her own insurance policy, you may still be personally liable for damages he or she causes in the excess of his or her policy limits, and your insurance may not provide any coverage.[27] Therefore, consider consulting with an insurance expert to help evaluate your insurance needs and planning for potential insurance coverage gaps.

The third step is to seriously consider who you are going to let drive. Be cautious not to allow someone who is unlicensed, uninsured, intoxicated, incompetent, inexperienced, unfit, foolish, reckless, or dangerous to drive your automobile, otherwise you are exposing yourself to unlimited personal liability via negligent entrustment. With regards to a minor, if you are going to allow him or her to drive, remember that someone is going to have to sign and agree to unlimited liability for the acts of that minor driver. The parent or guardian with the least assets at risk[28] should be the one who signs the parental consent form. Additionally, the parent or guardian who did not sign the parental consent form should be sure that his or her name is not on the title to any automobile that the minor may be driving. By taking this approach, if the minor driver causes an accident, only one spouse faces liability and fewer assets will be exposed to creditors beyond insurance.[29] While the liability from the parental consent terminates when a minor reaches age 18, car title liability does not; therefore, it is critical that any parent whose name is on the title remove his or her name and place title solely in the now "legal adult" child's name.

Lastly, be smart and be safe.



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continued, page 20

Endnotes

1 *Southern Cotton Oil Co. v. Anderson*, 80 Fla. 41 (Fla. 1920).

2 *Estate of Villanueva ex rel. Villanueva v. Youngblood*, 927 So. 2d 955 (Fla. 2d DCA 2006). See also *Mathews v. Lawnlite Co.*, 88 So. 2d 299 ("Dangerous instrumentalities have been defined as those which by nature are reasonably certain to place life and limb in peril when negligently constructed, such as airplanes, automobiles, guns and the like"); *Meister v. Fisher*, 462 So. 2d 1071 (Fla. 1985)("a golf cart when negligently operated on a golf course, has the same ability to cause serious injury as does any motor vehicle operated on a public highway"). Note: boats (including jet skis and other watercraft but excluding seaplanes) are considered dangerous instruments, but liability is governed by Fla. Stat. § 327.32, and an owner, absent negligent entrustment, is liable only if he or she is physically present when the negligence occurs.

3 See *Lambert v. Emerson*, 304 So.3d 364, 368-369 (Fla. 2d DCA 2020) (provides a concise summary of some of the key cases which have attempted to define the dangerous instrumentality doctrine's boundaries).

4 *Lambert v. Emerson*, 304 So.3d 364, 370 (Fla. 2d DCA 2020) ("public policy parameters… Fla. Stat. § 324.021 (1955) was enacted…[defining] the owner of an automobile to include the legal title holder and lessees. By amendment in 1986, however, the legislature eliminated long-term automobile lessors from liability under the dangerous instrumentality doctrine…[t]hen in 1999, the legislature capped the extent of vicarious liability for bodily injury and property damage for [short-term] lessors… and for owners who are natural persons.")

5 Fla. Stat. § 324(9)(b)(1) (2021) (lessors in excess of one year are not deemed an owner provided the lessee carries insurance not less than $100,000 per person and $300,000 per incident of bodily injury and $50,000 property damage); Fla. Stat. § 324.021(9)(b)(2) (2021) (lessors of 1 year or less shall be deemed an owner for only up to "$100,000 per person and up to $300,000 per incident for bodily injury and up to $50,000 for property damage" as well as up to an additional $500,000 if the lessee is uninsured or has a policy with less than $500,000, reduced by amounts recovered by the lessee, driver, and insurance); see also the Graves Amendment, 49 U.S.C. § 30106 (2021), "a federal tort reform statute which purports to shield rental car companies from certain vicarious liability suits." *Garcia v. Vanguard Car Rental USA, Inc.*, 540 F.3d 1242 (11th Cir. 2008).

6 Fla. Stat. § 324.021(9)(b)(3) (2021).

7 *Rondell v. Romano*, 331 So.3d 879 (2d DCA 2022)("the initial analytical step imposed by [the dangerous instrumentality] doctrine is to focus upon the identity of the owner, as the nondelegable obligation rests upon that determination. To qualify as an owner, the law requires a party to possess an identifiable property interest in the subject vehicle").

8 *Depriest v. Greeson*, 213 So.3d 1022 (Fla. 1st DCA 2017). See also *Ray v. Earl*, 277 So. 2d 73 (Fla. 2d DCA 1973) (Consent may be implied if not expressly withdrawn or limited, and such consent may therefore extend to a second driver who was permitted to drive by the original driver who received permission to use the automobile).

9 *Susco Car Rental Sys. v. Leonard*, 112 So. 2d 832 (Fla. 1959); *Hertz Corp v. Jackson*, 617 So. 2d 1051 (Fla. 1993).

10 See *Castillo v. Bickley*, 363 So. 2d 792 (Fla. 1978); *Roberts v. United States Fidelity & Guar. Co.*, 498 So. 2d 1037 (Fla. 1st DCA 1986). However, this exception does not apply when a service person is picking up or returning the owner's car because the action is authorized by the owner. See *Michalek v. Shumate*, 524 So. 2d 426 (Fla. 1988); *Grilli v. LeBo Properties Corp.*, 553 So.2d 352 (Fla. 2d DCA 1989); see also *Romer v. Fields Motorcars of Florida, Inc.*, 2022 WL 479071 (5th DCA 2022)(court found that dealership providing a customer a loaner was not protected by the Graves Amendment since a bailment is not a lease or a rental agreement).

11 *Fahey v. Raftery*, 353 So. 2d 903 (Fla. 4th DCA 1977).

12 https://www.flhsmv.gov/pdf/forms/71142.pdf.

13 Fla. Stat. § 322.09(1)(a) (2021).

14 Fla. Stat. § 322.09(2) (2021); however, liability is limited to "actual damages caused by [a] minor, but not for exemplary damages that are assessed as punishment." *Hartford Acc. and Indem. Co. v. Ocha*, 472 So. 2d 1338, 1342 (Fla. 4th DCA 1985).

15 Fla. Stat. § 322.09(2) (2021) (emphasis added).

16 Fla. Stat. § 322.10 (2021) (a "person who has signed the application of a minor for a driver license may thereafter file with the department a verified written request" to cancel the minor's license and relieve himself or herself of the liability imposed under Fla. Stat. § 322.09).

17 *Aurbach v. Gallina*, 753 So. 2d 60, 65 (Fla. 2000) (the statutory vicarious liability of Fla. Stat. § 322.09 applies only to the "parent who signs the driver's license application for a minor child"); See also *Lambert v. Emerson*, 304 So.3d 364 (Fla. 4th DCA 2020)(a bailee may not be "vicarious[ly] liable under the dangerous instrumentality doctrine [if] the undisputed title owner, has also been found vicariously liable for what is, essentially, the same entrustment of the same vehicle"); review granted, No. SC20-1311, 2021 WL 1661247 (Fla. Apr. 28, 2021) (the 4th DCA certified the following question to the Florida Supreme Court: "Under the dangerous instrumentality doctrine, can one family member who is a bailee of a car be held vicariously liable when the cars acknowledged title owner is another family member who is also vicariously liable under the doctrine?").

18 *Aurbach v. Gallina*, 735 So. 2d, 60, 65 (Fla. 2000).

19 *Hertz Corp. V. Jackson*, 617 So. 2d 1051, 1053 (Fla. 1993).

20 *Kitchen v. K-Mart Corp.*, 697 So. 2d 1200, 1208 (Fla. 1997).

21 *Mullins v. Harrell*, 490 So. 2d 1338, 1340 (Fla. 5th DCA 1986).

22 *Williams v. Bumpass*, 568 So. 2d 979 (Fla. 5th DCA 1990).

23 Creditor Protection for Florida Physicians at 64 (Alan Gassman, Haddon Hall Publishing, LLP 2012).

24 A frequent concern is whether not having both names on the car will necessitate a probate. The Florida DMV has a process whereby title of a vehicle may be transferred without probate as permitted by Fla. Stat. § 319.28(1)(2021).

25 Tenants by the entirety ownership in Florida is a special form of ownership which treats "married couples as one unit – each spouse having an undivided interest in the property." Joseph M. Percopo, The Impact of Co-Ownership on Florida Homestead, Fla. B.J. 32, 35 (May 2012). Therefore, assets of a martial unit are not available to individual creditors of either spouse. However, if an injured party has an action against both spouses, then otherwise non-exempt tenants by the entirety assets may be exposed to such creditor's claim.

26 $300,000 per incident + $50,000 property damage + $500,000 additional economic damages = $850,000.

27 The liability in this case arises because in most cases the child has his or her own insurance policy since it is less expensive then being included on a parent's policy (which typically has higher coverage). This usually coincides with the parents maintaining their policy without including their child as an additional insured (to keep costs down), which means the parents' insurance policy will not provide protection for negligence of the child driver. Therefore, a parent may have traded up front insurance cost savings for a personal liability insurance coverage gap.

28 Meaning the parent or guardian who has the fewest non-exempt assets exposed to creditors. For example, a parent with a very large 401(k) but no other assets in their name individually is well suited to sign because his or her retirement account is an exempt asset and he or she would have no other non-exempt assets available for creditors to attack. Fla. Stat. § 222.21 (2021).

29 Fewer assets are exposed because the injured party is unable to make claims against tenants by the entirety assets, as well as those assets owned individually by the spouse that is not on the title and did not sign the parental consent form.

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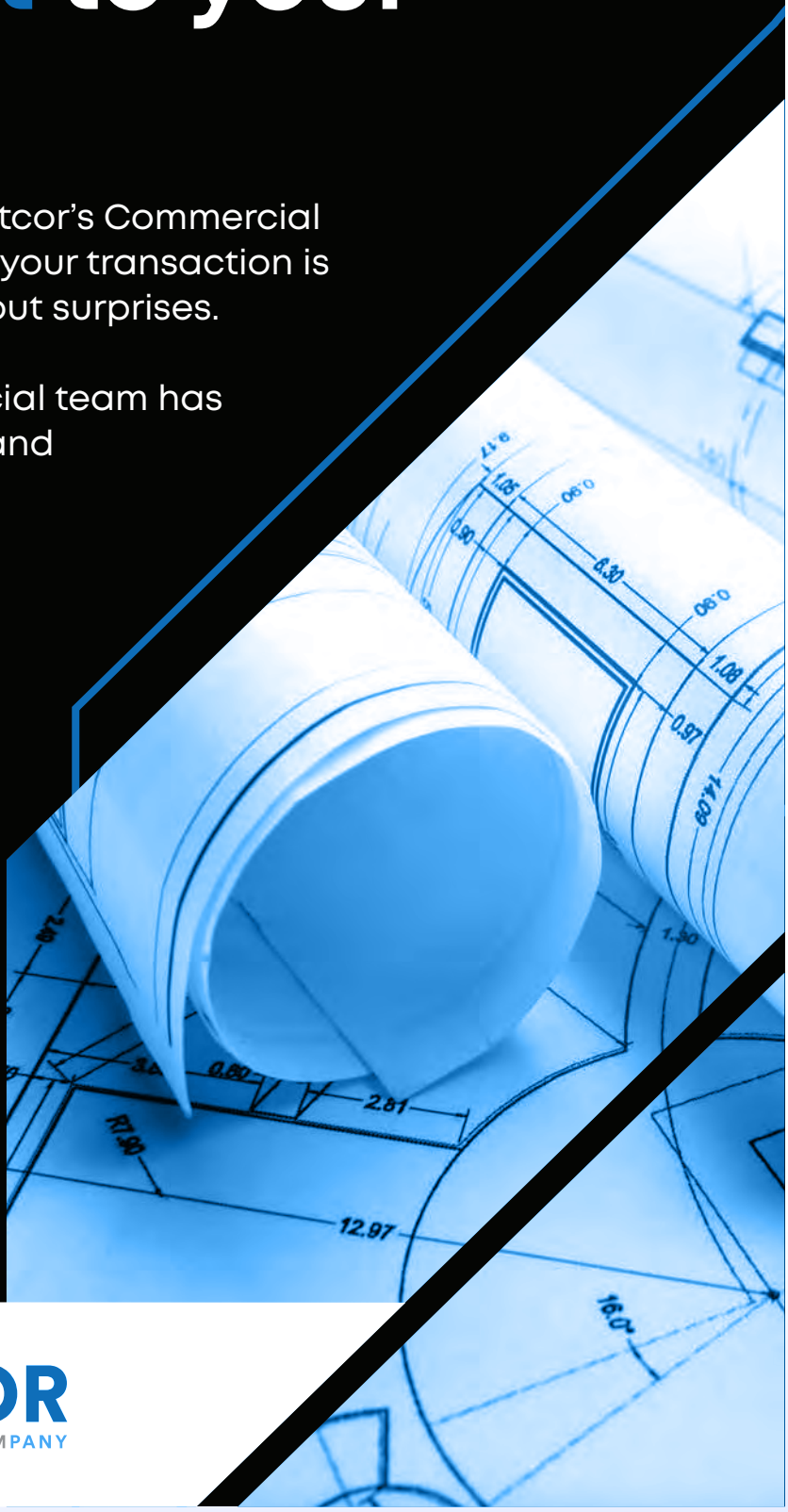

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Improving Your Client Cash Conversion Cycle

By Jordan DeLoach Hurlburt, Esq., & Carla A. DeLoach, Esq., DeLoach P.L., Orlando, Florida

A law firm's "cash conversion cycle" or "net operating cycle" is one indicator of its overall health. Many law firms fail, languish, or simply do not achieve growth potential because of insufficient and irregular cashflow. Do you know how long it takes your law firm or department to receive a dollar in return for a dollar it spent? What can your law firm or department do to shorten that cycle? The traditional legal industry has largely accepted the realities of a sluggish cash conversion cycle. However, as the industry evolves and is commoditized (in part), it simply cannot accept this burden as costs increase.

The Cash Conversion Cycle. The cash conversion cycle measures the time from paying suppliers for inventory to collecting the cash from the sale of such inventory. In a law firm setting, the cash conversion cycle measures the time lapse between dollars expended on operations (rent, salaries, health insurance, CLE, client events) and receipt of payment for the legal services provided. In other words, it is a measure of how long dollars are "locked up" in production before materializing into cash receipts for such production. For example, we will explore a typical cash conversion cycle of a discrete case:

- Firm makes initial contact with client and meeting is held to determine representation.
- Information is obtained as needed for the representation.
- Attorney and team expend hours on client matter.
- Work product is finalized and presented.
- Invoice is produced and presented.
- Client remits monies in payment for work product.

On a macro basis, the cash conversion cycle of a law firm or department is the average period for all such cycles or cases, as described above. As a general rule, the shorter the cycle, the better.

Why It Matters. The cash conversion cycle is an indicator of an organization's overall health because it dictates the organization's ability to meet operational demands (rent, salaries, health insurance, CLE, client events). It can also be reflective of:

- the nature and quality of the client base;
- the nature and quality of the service providers (as well as their efficiency); and
- the nature and quality of the supporting departments in a law firm (accounting, administrative) and their respective processes.

Opportunities to Reduce the Cash Conversion Cycle. How do you reduce your law firm's or department's cash conversion cycle? Our law firm has studied the causes of a lengthy cash cycle and has taken numerous steps to shorten it. We believe some, if not all, of the steps below will impact your law firm or department in the campaign to reduce its cash conversion cycle.

- **Be selective and intentional in the onboarding and discharging of clients.**
  - Ensure you have distilled the notion of the "right client" for your law firm or department and don't compromise. One definition of the "right client" is someone who wants advice, is responsive (which allows you to do your job) and pays a fair fee timely. The definition of the "right client" evolves (and should be refined) as law firms and careers develop and advance. Regardless of where your firm, department, or you are on the spectrum of evolution, the delivery of consistent, quality work product permits one to be more selective and to narrow their client base to those target clients.
  - On the flip side, discharge clients who do not pay on time. No one enjoys discharging clients. However, it is necessary to discharge a client when that client is a "repeat offender" as it relates to timely fee payment. The number of clients discharged is directly correlated to one's onboarding scrutiny.
- **Request full advance retainers.**
  - In instances when the amount of the fee is certain, request a full advance retainer. If your law firm does not already do so, instituting such a change can be a process and may come with some trepidation. Will my clients be "ok" with this? Will this prompt additional conversations or push back? Although some clients may push back, generally this approach is met with little resistance. Such resistance, however, can come from a host of sources. Other resistance may be a leading indicator of the client's willingness to pay a fair fee timely. In this case, the client's profile should be assessed, and suitability should be confirmed. Some resistance is doubtless connected to the length of time

continued, page 23

between the payment of the full advance retainer and when the services are rendered. An attorney should anticipate problems when service delivery is outside of the client's reasonable expectations, as set by the service provider.

- In instances when the amount of the fee is uncertain (such as when a project will be billed hourly), request an advance retainer and a replenishment of that retainer at each monthly billing period. Do not be bashful! Be sure the amount of the advance retainer is connected to the anticipated monthly services. Review your invoices for readability and ensure your accounting team is armed to communicate and clarify the nature of the billing.
- The above protocols should be properly reflected in your engagement letters or legal representation agreements. Consider engaging counsel to review your agreements to ensure they comply with the ethical rules. The ethical rules in these areas are nuanced and should be considered carefully. In addition, ensure your accounting team is processing such payments appropriately.

- **Inspect your workflow and case management.** Commit to continually evaluating your workflow and case management. Clients should receive a clear timeline and receive counsel and work product that meets objectives — all in an environment of high team member visibility. Consider your approach to internal communication and client deliverables:
  - Review your note-taking protocol. Consider participation by a "scribe" who is able to promptly deliver draft meeting notes to the attorney.
  - Provide predictable dissemination of meeting notes to all affected team members. Ensure "to dos" are clearly delegated to specific team members, with deadlines.
  - Review protocols for preparing engagement letters or legal representation agreements. Can they be simplified? Can the task be delegated (in whole or in part)? Have you considered electronic signature internally and by the client?
  - Set internal protocols for delivering updates to the client. Delegate such updates so the client is aware of status without placing the entire burden of communication on the attorney.

continued, page 24



- Review protocol for tasks triggered by document delivery or counsel (including, but not limited to, requests for feedback and requests for appointments) and consider whether some of the process could be automated as part of the overall case plan.

- **Enable online bill pay and various payment options.** Market conditions and realities have promoted a transition to automated bill pay. The benefits are multi-faceted (but are not limited to):
  - opportunity for clients to pay 24 hours a day, 7 days a week;
  - reduced time spent by the law firm's accounting department (accepting client calls and inquiries related to bill pay);
  - generation of payment confirmations and receipts to both the client and the law firm at the time the invoice is processed by the client online; and
  - a reduction in accounts receivable.

In addition to online bill pay, consider the host of payment methods, such as checks, e-checks, credit cards, and ACH.

- **Consider implementing a Zero AR Agreement. A "Zero A/R Agreement":**
  - is a contractual arrangement for processing the client's credit card at a certain date (e.g. date of delivery of the client invoice + certain number of days);
  - which contains a client payment method (typically credit card) that is maintained (or kept on file) by the law firm.

Practically, the "Zero A/R Agreement" provides a guarantee for payment and limits accounts receivable. The agreement is not without ethical considerations. We urge the reader to retain counsel who can advise about the specific terms of your agreement to ensure its terms comply with the ethical rules.

- **Track Your Metrics.**
  - Real-time (daily reports) should be produced for the following:
    - » accounts receivable (including categories of <30 days and >30 days);
    - » accounts payable;
    - » cash; and
    - » WIP ("work-in-progress").

Depending on the size of the law firm or department and its current protocol, such frequent reports may seem burdensome. Within reason, however, the inability to deliver the reports can be a lagging indicator of other internal weaknesses: sluggish timekeeper reporting, disorganized bill production, and poor or underutilized software.

- Real-time data must be accessible and specific team members must own the processes. The following metrics are used and communicated at our firm as follows:
  - » In a daily firm meeting, a member of the accounting team announces the global WIP and the related

continued, page 25



percent to goal. This means that all members of the firm know the daily and monthly goal and where the firm sits at that moment.

  - » In a weekly accounting report, a member of the accounting team provides the weekly cash received, A/R, and A/P, including a list of specific matters which may require action or other follow-up by an attorney.
  - » Finally, our CPA and a member of our accounting team coordinate to produce a monthly profit and loss statement, as well as commentary about revenue and expense trends by category. This is produced within 15-30 days following the end of the preceding month.

- Tracking and communicating real-time data permits firm managers to assess risk, meet firm obligations, assess productivity of service providers, inspect efficiency of bill production, and determine timeliness of payment from clients. While none of the data contains the whole story, monitoring it fastidiously facilitates better business decisions, increasing profit and reducing waste.

- **Process bills faster.** Law firms are notorious for slow invoice delivery. It is not uncommon to hear about a rash of time entries (by timekeepers) and client invoice deliveries just before the close of the year. Then (and ironically) attorneys often become more aggressive about collection, particularly when bonus or other end-year compensation is connected to it. As a general rule, the longer the period between the deliverable and invoice presentation, the less likely the collection. Further, the longer an invoice is delinquent the less likely the collection. Such delays also put the service provider at a disadvantage, with less awareness of the detail of the services provided. Consider the following adjustments to improve the delivery (by manner and timing) of invoices:
  - Set deadlines for timekeepers' time submittal. Consider a deadline of 7:00 a.m. the following business day. Permit your accounting team to aggressively follow up when timekeepers are delinquent. Not only will this permit your accounting department to ultimately perform its tasks, the time entries and invoices will be improved (resulting from invoice preparation more proximate to the services provided).
  - Set internal deadlines for your accounting team to produce and deliver invoices, issue trust checks to the firm, and deliver detailed billing figures for the prior month to the firms' CPA for review. If these deadlines are consistently missed, consider the source of the delinquency. Are attorneys returning pre-bills timely? Should your approach to billing certain clients be adjusted? Are you understaffed?
  - Organize the monthly tasks of your accounting team in consideration of billing. For example, schedule recurring tasks which are not related to client billing for a time in the month which is not dedicated to client billing.
  - Establish black-out days for PTO so that vacations are not taken and firm-wide meetings are not scheduled around the time of client billing.

Other, less practical tips for reducing the cash conversion cycle include income tax set asides, aggressive debt management, core capital targets, and issuance of dividends. However, the connection of those items to the cycle is more involved (and perhaps philosophical) and is thus beyond the scope of this article.

The cash conversion cycle of any firm or department is unique and is based on the nature of the legal work, clients, and organization size. But in spite of differences between firms and departments, there is always universal room for improvement. If you monitor and manage the cash conversion cycle, it will impact the bottom line and reduce the stress of managing a law practice—both to individual service providers and to the firm or department.


C. DELOACH

Carla DeLoach *is a partner in the Orlando firm, DeLoach, P.L. She graduated cum laude from Stetson University College of Law, 1998; and holds an LL.M. in Taxation from the University of Florida Levin College, 2003. Her practice emphasis includes estate planning, succession planning, and probate and trust administration. She is Certified AV Preeminent with Martindale-Hubbell and a graduate of the Florida Fellows Institute of the American College of Trust and Estate Counsel's inaugural class. She has spoken for the University of Florida Levin College of Law, Orlando Christian Foundation, Orange County Bar, and National Association for the Blind, among others.*


J. DELOACH

Jordan DeLoach Hurlburt *is a partner in the Orlando firm, DeLoach, P.L. She graduated magna cum laude from the University of Florida Levin College, 2008; and holds an LL.M. in Taxation from New York University, 2009. Her practice emphasis consists of estate planning, probate and trust administration, and succession planning. Jordan is Board Certified in Wills, Trusts and Estates by The Florida Bar Board of Legal Specialization, 2017; and a graduate of the Florida Fellows Institute of the American College of Trust and Estate Counsel's inaugural class. She has spoken for the Central Florida Bankruptcy Law Association, among others.*

The Search For A Dementia Medication

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

People with dementia can display a variety of behavioral disturbances. These include restlessness, agitation, aggression, delusions, hallucinations, paranoia, wandering, depression, loss of the ability to inhibit inappropriate behavior, and trouble sleeping.[1] These disturbances commonly peak in the afternoon or evening which is referred to as "sundowning."[2]

It can be frustrating for a nursing home employee to deal with a combative resident or a resident who yells all day long. For years, nursing homes used antipsychotic medications to control patients with dementia. In some nursing homes, nearly half of all residents were receiving these medications. Beginning in the 1970s, people started voicing concerns about the overuse of these medications.[3]

In 1987, President Ronald Reagan signed The Nursing Home Reform Act banning the use of drugs serving the interest of the nursing home or its staff rather than the interest of the patient.[4]

The American Psychiatric Association Practice Guidelines on the Use of Antipsychotics to Treat Agitation or Psychosis in Patients with Dementia states the use of antipsychotics may be appropriate but only after eliminating or addressing other medical, physical, social, or environmental factors.[5] A good format for evaluating the patient is the DICE approach.[6]

However, long-term care advocates and others have reported that the use of such drugs was not being used only as a last resort, after ruling out other factors that may be causing the patient distress. Instead, they are being used almost by default for the convenience of the facility to control hard-to-manage-people.[7] This is sometimes referred to as a chemical restraint.[8] Florida law does not allow such a restraint except in limited circumstances.

Studies have been conducted which show that adverse effects, including death, from the use of antipsychotics in dementia patients is higher than previously thought.[9] For Haldol (haloperidol), based on the studies showing a greater risk of death, the government required a Black Box, warning it doubled the death rate and was not approved for treatment of patients with dementia.[10]

In 2012, the Center for Medicare and Medicaid Services started the National Partnership to Improve Dementia Care in Nursing Homes and began requiring nursing homes to report the use of antipsychotics on their residents.[11] However, there was a loophole. The use of antipsychotics for schizophrenia, Tourette's Syndrome, and Huntington's disease did not have to be reported. So, while the official reported use of antipsychotics has shown a 15 percent decrease, an investigation and report by the New York Times reached a different conclusion.[12]

According to the New York Times, since 2012, when the reporting requirement was imposed, the number of residents diagnosed with schizophrenia has risen by 70 percent. Today, one in nine residents is diagnosed as schizophrenic, while in the general population, schizophrenia affects roughly one in 150 people.[13]

The *New York Times* looked into several inspector general reports involving unsupported diagnoses. It found Hialeah Shores Nursing and Rehabilitation Center in Miami, a five-star facility, had reported prescribing antipsychotics to about 10 percent of its long-term residents. However, the actual number was 31 percent.[14] At another facility, Daybreak Venture's Countryside Nursing and Rehabilitation, 39 percent of the residents were receiving antipsychotic drugs in 2018. However, the official figure was zero.[15]

As the government tried to rein in the use of antipsychotics for dementia patients, some facilities turned to Depakote, which is used to treat bipolar disorder and seizures. It is not approved by the U.S. Food and Drug Administration for treating dementia[16]; therefore, it has the advantage of being a medication flying under the radar in terms of nursing home regulations.[17]

There are some medications approved for treatment of Alzheimer's disease. A list of those medications can be found at the Alzheimer's Association's website.[18]

Alzheimer's disease and other dementia remain frustrating conditions for nursing home employers and other caretakers to deal with. If you are the attorney for the guardian of such a patient, it might be prudent to make sure the guardian is monitoring the drugs the patient is receiving to make sure the drugs are benefiting the patient and not turning the patient into a zombie.

continued, page 27



W. SLICKER

William D. Slicker, Esq. *is a solo practitioner at William D. Slicker, PA, St. Petersburg, Florida. He served as a law clerk to the Honorable Steven H. Grimes at Florida's Second District Court of Appeal and as a law clerk to the Honorable Warren H. Cobb at Florida's Fifth District Court of Appeal. He has received the Florida Bar President's Pro Bono Award for the Sixth Circuit, the Ms. JD Incredible Men Award, the St. Petersburg Bar Foundation's Heroes Among Us Award, the Community Law Program Volunteer of the Year Award, and the Florida Coalition Against Domestic Violence Lighting the Way Award.*

Endnotes

1 https://www.uptodate.com/contents/management-of-neuropsychiatric-symptoms-of-dementia?search=management-of-neuropsychiatric-systems-of-dementia&source=search_result&selectedTitle=3~150&usage_type=default&display_rank=3

https://www.choosingwisely.org/patient/resources

2 https://www.uptodate.com/contents/management-of-neuropsychiatric-symptoms-of-dementia?search=management-of-neuropsychiatric-systems-of-dementia&source=search_result&selectedTitle=3~150&usage_type=default&display_rank=3

3 https://www.fmda.org/Journal/jama_Gurwitz_2017_vp_170088.pdf

4 45 U.S. Code ss. 1395i-3

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7 https://www.hrw.org/report/2018/02/05/they-want-docile/how-nursing-homes-united-states-overmedicate-people-dementia

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16 https://www.verywellhealth.com/valproate-depakote-behavioral-symptoms-alzheimers-98266

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Florida Bar Tech Helpline Ready To Assist Members With Routine Needs

By Mark D. Killian Editor, The Florida Bar News

A non-emergency Florida Bar Tech Helpline has been added to the Member Benefits lineup to offer routine remote services, including basic troubleshooting, operating system support, and technical setup for home and remote offices.

> "We are very excited that the Tech Helpline is going to go live as a member benefit," Board Technology Committee Chair Paige Greenlee said at the Bar's recent Winter Meeting.

The Board Technology Committee began researching the concept of a Tech Helpline while it was working with the COVID-19 Pandemic Recovery Task Force on a variety of projects to help members cope with the health crisis and subsequent economic disruption. The Tech Helpline passed a three-month "beta test" with flying colors this past summer.

> "Overwhelmingly, this project is something that our members really, really appreciated," Greenlee said at the time. "Members begged for it in the comments to the survey."

Greenlee said the service will primarily be promoted to solo and small-firm practitioners who are less likely to be able to afford their own IT service but is available to all Florida Bar members in good standing that need non-emergency, remote computer, software, and related technology support.

> "With the large percentage of Bar members that we have who are solo and small firm practitioners, this free helpline is just really a completely invaluable resource, and I am super excited we are able to continue it," Greenlee said, noting the feedback from the beta test was 100% positive.

The helpline is operated by LawTech Partners, owned by Adriana Linares, a skilled trainer and technology specialist who understands the needs of law firm users and their profession-specific confidentiality requirements.

> "Florida lawyers should know this in an important service for solo and small-firm practitioners who do not have the luxury of an IT person," Linares said. "It is for those who really don't have anyone else to call to assist them with their basic technology questions."

As an example, Linares recently assisted a Juno Beach lawyer who hung his own shingle and had no idea where to start when it came to technology.

> "His basic questions were what technologies do I need? How do I save my files without having to do a physical backup?" Linares said. "He is a great success story because in an hour and a half worth of time — three appointments — he really felt much more comfortable about the administrative and technical part of his practice."

The lawyer dropped her a note: "Even though there are still some things you recommended that I need to address/follow up on, I honestly don't know how I would have gotten through it without your guidance."

He knows how to practice law, Linares said, "he just had no idea where to start with technology."

The service may be accessed at LawTech Partners then follow the prompts.

Members seeking assistance from the Tech Helpline will be required to acknowledge that The Florida Bar is providing access to the service as a member benefit, but the service and support is being performed solely by LawTech Partners, and members using the service are responsible for their own due diligence and safeguarding of client information.

Members should understand that this is not an emergency service. Emergency issues related to court filings with immediate deadlines, or technical emergencies, will not be addressed. Members should not contact the Tech Helpline for emergency software issues, hardware or device failures, interruptions of service, or a loss of power or internet services (they should contact the related service provider).

continued, page 29

- Members will need to provide contact information, including their Florida Bar number, and will sign an online waiver and release before the consultation begins. They will provide a clear, specific description of the problem or request, including any error messages received as well as a description of the device (desktop or laptop, printer, scanner/copier, etc.).
- Members will have to acknowledge that by contacting the Tech Helpline, as the attorney, they have the ultimate responsibility to take reasonable steps to protect client confidentiality and ensure that other issues (like those that might arise under Rule 4-5.3, Rules Regulating The Florida Bar) are not created. Before a remote session begins, members should ensure that any confidential information, data, or images are not visible to LawTech Partners. Members also have sole responsibility to ensure compliance with all HIPPA-related laws or statutes.

"They make an appointment, they get an invite, we do it by Zoom. I look at their screen with them, I can control it if I need to, and that's it," Linares said.

The service is typically available Monday through Friday, 9 to 5, but hours of operation are subject to change. Any modifications to the schedule or planned downtime will be posted to the Tech Helpline webpage.

Requests will be processed in the order they are received.

Linares said the Tech Helpline should be able to address and support most of the typical software, applications, services, and hardware used by law firms.

> "I have a lot of Mac users, so the Macs are definitely making their way into the practice," she said. "I get a lot of questions about Office 365 and optimizing its use, which I think is really smart because Office 365 is what I jokingly but seriously refer to as 'a gift from Microsoft to all small business owners."

Other services include but are not limited to:

- Technical Support
- Basic troubleshooting
- Basic connectivity support
- Operating system support for Windows, MacOS
- Mobile devices and apps
- Support and troubleshooting for home offices, road warriors, and remote offices
- Basic support for common website builders (WordPress, Google Sites, Wix, SquareSpace etc.)
- Assistance with technical set up and issues with audio and visual configuration for remote meetings
- Application support, including core business applications, such as Microsoft Office, document storage, syncing and management services, such as Dropbox and ShareFile, PDF manipulation tools
- Common internet browsers
- Microsoft Word: Formatting, page numbering, working with documents from outside sources, creating a table of authorities or a table of contents, formatting questions, and other issues
- Microsoft Excel: Printing spreadsheets, creating formulas, using templates
- Microsoft Outlook, Google Calendar: managing meetings, efficiency tips, creating email groups, sharing calendars
- Microsoft PowerPoint creating presentations, editing existing presentations, basic questions regarding use of PowerPoint in the courtroom or remote hearings
- Microsoft Teams: basic training and set up
- Adobe Acrobat or Nuance PDF Pro: converting PDFs to Word, Bates stamping, redacting, manipulating PDF files

The following types of issues will not be addressed (this is not an all-inclusive list), and LawTech Partners may refuse service at any time.

- Infrastructure hardware: servers, firewalls, telephone systems, fax machines, networked printers, and scanners
- High-level technology issues, such as ransomware attacks, malware or antivirus issues, hardware failures (servers, hard drives, etc.)
- LawTech Partners may attempt to solve basic questions for legal-specific services but will also point members to call upon those who provide their own support to customers (Rocket Matter, Clio, Thompson Reuters, Lexis, Fastcase)
- Practice management questions may be diverted to LegalFuel practice management advisors.

This story originally appeared in The Florida Bar News.



Executive Council Meeting
November 3 – November 7, 2021
Luminary Hotel & Co.
Fort Myers, FL



Samuel Raymond and Melissa Scaletta



Sheri and Rob Freedman, Past Section Chair



Past Section Chair Roland "Chip" Waller



Hilary Stephens, Madelaine Swaine, and Sancha Brennan at the registration desk.



Luminary Hotel & Co.

Photos by Michael J. Gelfand, Silvia Rojas, John Neukamm, Michael Swaine and Cary Wright.



Jeff Goethe at the lectern in Ft. Myers



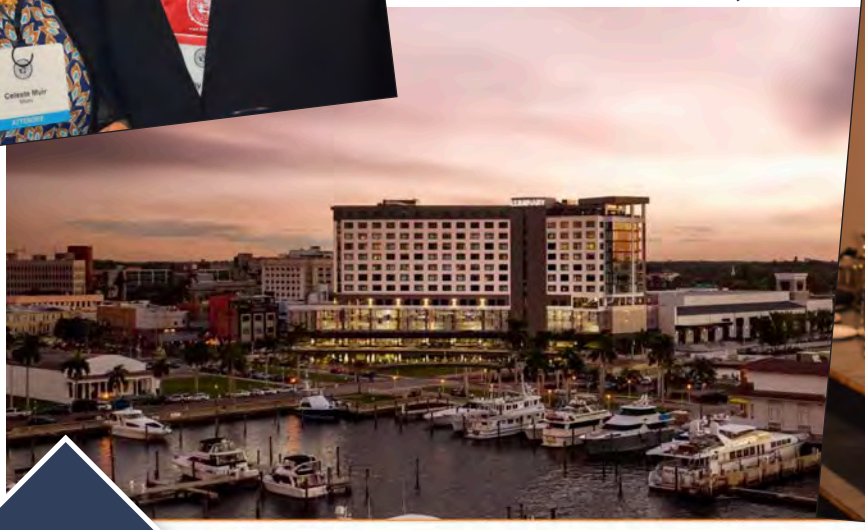
RPPTL's favorite band, Roadkill.



The Honorable Celeste Muir and Toby Muir



Past Chair of the Section, Michael J. Gelfand, who apparently is still a "student" of life.



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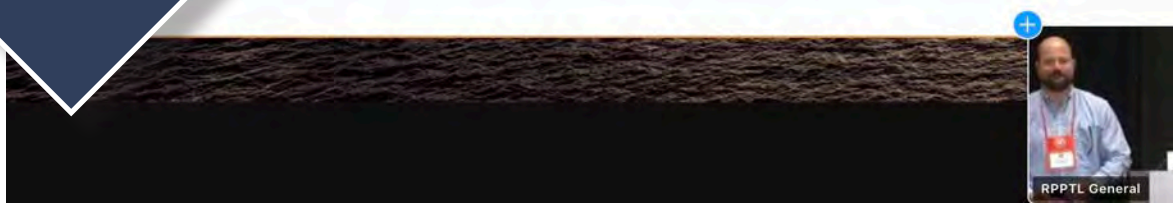

Section Chair, Bob Swaine

SECTION SPOTLIGHT



RPPTL Section Members Testify Before Florida Senate Judiciary Committee

Elizabeth Hughes and Martha Edenfield represented the RPPTL Section on Monday January 24, 2022 in Tallahassee. Liz testified at the senate judiciary committee meeting on behalf of RPPTL in opposition of the uniform guardianship jurisdiction act. Subsequently, they worked more generally throughout the day for the Section explaining RPPTL's position on the bill.

Martha Edenfield and Elizabeth Hughes in Tallahassee, January 24, 2022.

RPPTL Members Presentation At Ave Maria College Of Law

On Tuesday February 1, 2022, Lisa Van Dien, Denise Cazobon, Robert Lancaster (panelists) and Michael Sneeringer (moderator) presented a lunch question and answer panel for the students at Ave Maria School of Law. The panelists shared their experiences as attorneys in Southwest Florida, including: thoughts on the job market, thoughts on quality of life practicing in their respective areas, information on RPPTL and perspectives on whether to get an LL.M. or not. The event was well attended and the students got a lot of information.





Denise Cazobon, Robert Lancaster, Lisa Van Dien and Moderator Michael Sneeringer.

Save the Date



8:00 a.m. – 5:00 p.m.

Virtual or In-Person

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POLITICAL ROUNDUP

2022 Session

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



Florida's 2022 Regular Legislative Session concluded on March 14th after a short extension was required to vote on the state budget. Similar to the 2021 Regular Session, Governor DeSantis, Senate President Wilton Simpson, and House Speaker Chris Sprowls were all successful in securing key policy and budgetary priorities. However, these three did not always agree during the Session, the most substantial example of which is likely the Governor's public disapproval of the Legislatively approved Congressional maps. This once in a decade reapportionment process coupled with a budget surplus never seen in recent history combined to make the 2022 Regular Legislative Session one not likely to ever be repeated, further solidifying the annual mantra "every Session is unique."

Governor DeSantis will have the opportunity to sign legislation addressing many of his pre-Session goals including increasing funding for law enforcement officers, record funding for education at a per-student level and teacher bonuses, increasing immigration enforcement, and the protection of educational rights. House Speaker Sprowls "left it all on the field" and scored lasting impactful policies for the state including continuing to prepare Florida for resiliency against sea-level rise, improving the ability for children to read, building stronger families and creating an initiative to spur responsible fatherhood, and protecting parental and grandparental rights. Senate President Simpson scored pay increases for state employees, substantial environmental funding, additional support for foster families, and legislation creating a cause of action for an established business to recover loss of business damages from a county or municipality whose regulatory action has caused a significant impact on the business.

The State Budget

The Legislative budget writers started the Session with an additional $11.3 billion in general revenue available to be spent, due mainly to better-than-anticipated sales tax collections. This substantial beginning balance helped lead to the passage of a record-setting $112.1 billion budget[1] for the 2022-2023 state fiscal year beginning July 1st, while maintaining budgeted reserves of $8.9 billion in the event of a rainy day. Near the end of Session, the Senate Appropriations Chairwoman explained that sometimes the process of balancing a budget is harder when more money is available; but ultimately, the Legislature nearly unanimously approved a responsible budget funding key state needs with recurring state funds and utilizing nonrecurring federal pandemic funds to make strategic investments in Florida's infrastructure.

A few of the 2022-2023 state budget highlights include:

- Ensuring Floridians who work for, or contract with, the state earn at least $15 per hour;
- Providing a 5.38 percent pay raise for all state employees and a 10 percent pay raise for county and circuit court judges;
- $2.3 billion for Everglades restoration and protection of Florida's water resources, plus $468 million for the acquisition of conservation lands;
- $2.2 billion for the Medicaid program to serve more than 5 million beneficiaries;
- $1.1 billion in tax savings for Floridians over two years due to the passage of multiple sales tax holidays, new temporary sales tax relief for up to a year or longer on certain items such as baby diapers and clothing, and a shortened one-month version of the Governor's requested five-month fuel tax holiday; and
- More than $300 million for affordable housing, with $100 million to focus on down payment assistance for our hometown heroes – teachers, health care workers, and law enforcement.

Florida's Constitution requires that the Legislature annually pass a balanced budget. The Constitution also requires a 72-hour public review period between the time the budget-related bills are furnished to the members and the time that a vote may be held. See Section 19.(3)(d) of Article III of the Florida Constitution. This also means those budget-related pieces of legislation cannot be changed once furnished. During the 2022 Regular Session, these budget-related bills were not furnished until March 10th necessitating a three-day

continued, page 36



extension of the Session from Friday, March 11th until Monday, March 14th. Normally, passage of an annual budget is the only Constitutional duty of the Legislature, but not this year…

Redistricting

Once a decade after the National census, the Florida Constitution mandates the Legislature to reapportion legislative district boundaries for the Florida Senate, Florida House of Representatives, and US House of Representatives. From 2010 to 2020, Florida's population grew from 18.8 million to 21.5 million, resulting in Florida gaining one U.S. Congressional seat for a total of 28 after the 2022 general election.

There are many unique legal issues surrounding this reapportionment process. First, the Florida Constitution requires that a) districts shall not be drawn with the intent to favor or disfavor a political party or incumbent; b) districts shall not be drawn with the intent or result of denying or abridging the equal opportunity of racial or language minorities; c) districts shall not be drawn with the intent to diminish minorities' ability to elect a representative of their choice; and d) districts must consist of contiguous territory. While these tests focus on the both the result of the map or the intent of the Legislature, the Florida Supreme Court previously opined how it would determine the Legislature's intent: "the inquiry for intent to favor or disfavor an incumbent focuses on the shape of the district in relation to the incumbent's legal residence, as well as other objective evidence of intent," such as "the maneuvering of district lines in order to avoid pitting incumbents against one another in new districts or the drawing of a new district so as to retain a large percentage of the incumbent's former district." In re Senate Joint Resolution of Apportionment 1176, 83 So. 3d 597 (Fla. 2012). Once these "tier 1" standards are met, the Florida Constitution next requires that districts be drawn a) as nearly equal in population as is practicable; b) compactly as measured visually and mathematically; and c) where feasible, to utilize existing political and geographical boundaries such as county boundaries, city boundaries, rivers, interstates, and state roads.

During the 2022 Regular Session, the Senate Reapportionment Committee and House Redistricting Committee, and their associated state and congressional subcommittees, met multiple times to review the distinctive map-drawing process from legal and technical levels. For State Legislative purposes, the House selected to draw only its own map, and the Senate selected to draw only its own map. The Florida Senate map pits eight incumbent Senators seeking reelection who currently live in districts with Senate colleagues. The Florida House map places nineteen incumbent Representatives seeking reelection who currently live in districts with House colleagues.

An independent analysis of the House and Senate maps to compare how the proposed districts voted for President Donald J. Trump in the 2020 general election suggested that both sets of maps would produce fewer "Trump-winning" districts than the number of seats currently held by Republicans in the respective Chamber. For example, an analysis of the Senate map suggested that 23 of the 40 districts had a plurality or majority that voted for President Trump in 2020. Currently, there are 24 Republican Senators and 15 Democrats with one

continued, page 37

vacancy in a Democrat-leaning seat. For the House, an analysis suggested the new map would result in 71 "Trump" districts compared to 49 "Biden" districts. Currently, the makeup of the House of Representatives is 78 Republicans to 41 Democrats.

The House and Senate finalized their State Legislative maps on February 3rd, and the maps were promptly submitted for Florida Supreme Court review. See Case No. SC22-131. For the first time under the current Constitution, no petitions were filed challenging the maps. This resulted in the Florida Supreme Court Justices deciding to cancel oral arguments and base its opinions solely on the filings from the Legislature. The Court issued its opinion upholding the State Legislative maps on March 3rd. The Court's opinion recognized "by [ ] mathematical measures, the Legislature's 2022 districts overall are more compact than the districts in the existing, benchmark plan." However, the Court noted the lack of opposition stating "[w]ithout a presentation from adverse parties, we hesitate to comment on how meaningful those improvements are."

However, some additional controversy may surround Florida's Congressional maps, plural. These maps were a joint product of the House and Senate, which the Governor does not agree. The Legislature chose to approve two maps, a primary plan and a secondary plan in the event Congressional District 5 in the primary plan was ever invalidated. The primary plan apportions Congressional District 5 east to west from Jacksonville to Tallahassee, similar to its current boundaries. The secondary plan confines Congressional District 5 to Jacksonville / Duval County. While these Legislative bills were being considered on the House Floor, the Governor publicly tweeted that "I will veto the congressional reapportionment plan currently being debated by the House. DOA." And unlike the Florida Senate and Florida House maps, which are submitted directly to the Florida Supreme Court without the Governor's approval, Governor DeSantis does have the ability to veto the Legislature's Congressional map. If that veto were to occur, it would set up a number of interesting procedural considerations for the approval of a map. Regardless of the outcome of redistricting in 2022, the fascinating process of drawing representative boundaries and following the legal procedures is one that any Floridian can participate in every decade.



F. BROWN

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

Endnotes

1 The previous record-setting amount was the $101.5 billion budget passed during the 2021 Regular Session.

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Roundtable

Highlights of the Meeting of the RPPTL Section

REAL PROPERTY DIVISION

Friday, November 5, 2021

Luminary Hotel & Co., Fort Myers, Florida

Prepared by Colleen Sachs, Esq., Pensacola, Florida
Jin Liu, Esq., Tampa, Florida
Michelle Hinden Esq., Orlando, Florida

Thank you to the Roundtable Sponsors: Fidelity National Title Group

The Director of the Real Property Law Division, S. Katherine Frazier, called the meeting to order at 3:32 p.m.

Sponsor Announcement.

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

Recognition and Introductions.

Welcome and introductions were provided by S. Katherine Frazier who introduced herself and welcomed all attendees of the meeting. Welcoming remarks were provided to members, law students, fellows and guests of the Meeting.

Lorna Brown Burton was introduced as the Pro Bono Liaison for RPPTL and she reported that she is currently running for President Elect of the Florida Bar.

Highlights of Hybrid Marco Island Meeting.

There was a motion to approve the highlights of the July 25, 2021 Real Property Roundtable meeting. The motion passed and Colleen Sachs, Michelle Hinden and Jin Liu were thanked for their work in compiling the roundtable meeting highlights.

Action Items.

Real Estate Leasing Committee — Brenda B. Ezell and Christopher A. Sajdera, Co-Chairs

Brenda reported that a Subcommittee has worked on a Bill that has been vetted by a potential Bill Sponsor, which would allow for service of process on unknown parties. In the Subcommittee's initial draft, the minimum required attempts at notices was initially set at two attempts; however, when the Subcommittee received the proposed Bill from the Bill Sponsor notice had been expanded from two to three attempts, which was a concern since this change would provide greater rights to a squatter as opposed to a tenant. The Subcommittee elected to change the minimum number of attempts for notice back to two and resubmit. When the proposed Bill was returned to the Subcommittee, the request for the change to two required attempts had been accepted. Additionally, the Subcommittee added a definition for the term "business hours" within the proposed Bill.

The Director made a motion to support the proposed legislation proposing to create Fla. Stat. § 49.072, establishing a process to serve unknown parties in possession of real property, subject to the addition of the language which includes the addition of the definition of "business hours."

The motion passed unanimously.

Information Items.

Real Property Finance and Lending Committee — Richard S. McIver, Chair

Kip Thornton reported that the Supplement to the Third-Party Legal Opinion Customary Practice in Florida report was adopted at the Breakers' meeting and approved by the Section at that time. He further reported that it has been approved by the Business Law Committee. He reported that the Supplement can now be found online.

CLE Committee Report — Lee A. Weintraub, CLE Committee, Co-Chair

Lee A. Weintraub thanked all of the substantive committee chairs for their work on coming up with CLE programs for 2022. He reported that the Committee has an amazing slate of CLEs for the Section in the upcoming six months.

He commented that over the past several years, the trend for the Committees has been to present CLEs during Committee meetings. He explained that the Section would prefer to market, tape and sell the CLEs to the Section Members to generate additional revenue for the Section. The rule of the Section is that CLEs during Committee meetings may not be charged for. The proposed solution was for the speakers to present during the Committee meeting then to do a second CLE afterwards to be recorded; however, some speakers do not want to give the presentation more than once. Lee proposed that if there are any key CLEs that may bring about

continued, page 40

marketability to the Section, the Section would have that speaker recorded, in advance, the presentation would then play during the meeting and the speaker can attend the meeting and answer any questions that the Committee members may have. He further explained that the Section is leaning towards a trial run. Chip Waller commented that he did not agree with the proposal and explained he did not want to listen to a taped presentation, but instead to have the speaker present so that the Committee members have the opportunity to interact with the speaker. Adele Stone commented that she agreed with both, she said she doesn't want to watch a tape, and she asked why we could not just tape the presentation, but not the question and answer session afterward. Silvia Rojas commented that the idea is to put the presenter on tape, with the presenter at the meeting so that the presenter can answer any questions from the Committee members. She also commented that the concern with taping at the meeting is that there is a potential for issues to arise during the meeting, such as equipment and noise. Many Members did not agree with the proposal, and the proposal was not accepted.

Legislative Report — Wilhelmina Kightlinger, Legislation Committee Co-Chair

Wilhelmina Kightlinger reported that the Mobile Homes Bill Proposal is a Business Law Section proposal, and the Section will continue to discuss with the Business Law Section. She reported that several proposals are being worked on currently.

She reminded Committee members to make sure they get on the Legislation Committee webpage, ensure that the forms are being used on the webpage and that if there are questions on completing the forms, to please let her know. She explained that she will be updating the forms on the webpage once The Bar makes a decision on the forms. She asked to please let her know of any proposals for the next legislative session. Lastly, she reminded the committee chairs that if they have not yet appointed legislative liaisons yet to please let her know.

Wilhelmina Kightlinger explained that Deb Boyd is going to discuss the topic in her committee report so that the Section could take the temperature on the topic. She further explained that the Section is not taking an official legislative position on this right now, because it is not ripe for that. She explained that after all of the comments are provided, she intends to take these comments back to the Business Law Section and go from there. It is currently being worked on.

The Director reported that this has been discussed at the Executive Council level but they are waiting until they have all information before they decide which position to take. There was discussion as to the timetable due to the length of time before the next meeting. The Director reported that the Executives have made emergency decisions, if needed, and they will do so, if needed. She took note of comments that this should be voted on now.

Committee Reports

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

E. Ashley McRae reported that the Committee decided not to present the Attorney Banker Conference live because of the current COVID situation. The concern was that there may be several cancellations, and they did not want to book a venue when there is a potential for a cancellation of a live event. Instead, the Committee is going to do a Lenders' Lunch and Learn series by Zoom. She further reported that the second series that the Committee was trying to put together was a presentation of the Surfside condo tragedy and how Lenders are handling loans on condominiums. The Committee also has a Lawyers Series starting in February, which will be presented every couple of months. She further explained that many of these topics presented on will be teasers for the live event in 2023 as they intend to push a 2023 live event.

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

Jennifer Bloodworth reported that the Committee had a great meeting on discussing step in rights, which was led by Adele Stone and Scott Pence. She mentioned that the Committee is open to more suggestions or ideas people may have. She concluded that the Committee is looking to add a CLE to one of their upcoming meetings.

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 Rolando reported that the Committee met at the University of Miami Condo Institute about a month ago and had a lively meeting. She explained that Bill Sklar gave a preview of the task force report issued on October 12th and that the Members will have a discussion of the report during the Executive Council meeting.

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

Jane Cornett reported that the Committee is all set for February 25, 2022 and that the Course will be presented in Hybrid format (in person and via Zoom). The live event will be held at the Hyatt at the Orlando airport.

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

No report.

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

continued, page 41

No report.

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

Jason J. Quintero reported on the program scheduled for March 10-12, 2022. He explained that there will be some discussion on Surfside as well as various construction law topics. He further reported that there is golf scheduled on March 10 and programming scheduled on March 11-12. He asked that the members please save the date and he encouraged members to contact the Committee with any questions or ideas.

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

Colleen C. Sachs reported that the committee had a great meeting, with a presentation on a proposed change to the platting statute dealing with replats, which was well received. She further reported on a presentation with a developer panel, which helped the members who attended get into the mind of a developer. The Director noted the quality of the presentation and thanked Lisa Van Dien for putting it together.

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

Michael Meyer reported that there is a CLE coming up on November 15th on insurance coverage exclusions.

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

Allan McCall reported that the FLTA Convention starts Monday and goes on through Wednesday. He further reported that there are over 400 registrants who plan to attend. Additionally, Len Prescott will be succeeded as president by Marty Solomon.

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

Manuel Farach reported that the Review Course is scheduled for April 8-9 at the Orlando Regency Hyatt Airport Hotel. He further reported that the exam is scheduled for May 12, 2022, which will give the examinees some time to prepare. He reported that he is currently working with the speakers and that materials are due at the end of January 2022.

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

Brenda Ezell reported that the Committee had a great meeting. It presented a talk led by Kristopher Fernandez on COVID related issues. She further reported that the Committee is currently working on its Leasing Symposium and a Task Force has been created to draft a Landlord and Tenant Bill of Rights. Kristen Jaiven reported that the Task Force Subcommittee was asked by Miami Dade Commissioner Regalado to create a Landlord Tenant Bill of Rights in Miami. She explained that the Commissioner has obtained funding to create a new department in Miami Dade, which would work solely on landlord tenant issues. The first step is to review a proposed draft of a bill of rights for tenants provided by the Miami-Dade Workers Center, which will be reviewed by the Subcommittee in the upcoming weeks. She concluded that the Section wants this initiative to be a statewide focus, and not just limited to Miami-Dade County.

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

Richard McIver reported that the Committee had a good meeting. The Committee discussed the glitch bill for the Commercial Real Estate Receivership Act, which was led by Jason Ellison, and which was approved. He explained that the next steps are to bring it to a future Roundtable as an Action Item for next year. He further explained that the Committee talked about a one-page notice for debt collectors to use, which would provide a safe harbor to the debt collector. Lastly, the Committee had a presentation by Dave Britton on the expiration of the LIBOR coming up and the new rates to utilize after its expiration.

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

Michael Hargett reported that 3 hot topics were discussed during the Committee Meeting, including a case that clearly established aiding and abetting a breach of fiduciary duty obligation as actionable in Florida. There is concern that the decision could impact lenders in Florida. The Committee has proposed legislation in the works to establish a fee award against a third-party that accidentally forecloses on a property (e.g., a condo association).

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

Anne Pollack reported that the Committee had a great meeting. One issue discussed was the U.S. Postal Service and its removal of the return receipt process. She explained that the Committee was looking into how to update the statutes for this. She reported that Chris Smart spoke regarding a recent Miami-Dade County case he handled concerning an easement. The Court held was void ab initio because the developer was the sole owner of all of the property when the declaration was created and a sole owner cannot grant itself a dominant and servient estate. She reported that Deb Boyd gave a great presentation on judgment liens/certificates of title for mobile homes. Additionally, the Committee discussed a recent case where a claim of lien was timely submitted for recording to the clerk, but the clerk did not timely record the claim of lien and the deadline to file for the claim of lien passed, but it has since been reversed.

continued, page 42

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

Kristen Jaiven reported that the Committee had a joint meeting with the Title Issues and Standards Committee during which the Seminole County Property Appraiser spoke. She also reported that the Committee has posted its updated FR/Bar forms on the website, and the forms are dated October 2021 on the webpage. She also reported that the CLE recently presented by RPPTL on the new forms should be available on demand soon, if not already.

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 Hoffman reported that it was a great meeting and that the Committee covered many topics. The Committee discussed a proposed FR/Bar Contract Amendment to address the closing agent fee. He also reported that the Committee is developing an Endorsement series, which is scheduled to start next year.

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

Rebecca Wood reported that the Committee had a joint meeting with the RREIL Committee. She reported that the Property Appraiser was introduced to the Committee through a referral from Bridget Friedman and she thanked Bridget for making the introduction. Rebecca explained that the Property Appraiser offered various solutions to certain issues discussed, which was very helpful.

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

Nothing to report.

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

Nothing to report.

Additional Report

With extra time remaining, Deb Boyd was asked to give a report on the proposed Mobile Homes Bill. She reported that the Business Law Section has proposed a Bill which would permit creditors to attach judgment liens to certificates of title to mobile homes. The purpose of the Subcommittee was to address the confusion regarding mobile homes being considered personal property but sometimes taxed as real property. She explained that buyers have encountered issues with tracking down sellers to obtain a certificate of title to their mobile home if not transferred properly at closing. She explained that innocent buyers don't realize that mobile homes need to be transferred with the DMV. The concern is for creditors of the seller attaching judgment/liens to the certificate of title since it is still in the seller's name and not in the buyer's name. She explained that there are some concerns that this measure would jeopardize the homestead protection of the mobile home owners. It was explained that the Section unanimously opposes this proposed Bill, but the Section is still working with the Business Law Section in trying to resolve. Additionally, Pete Dunbar and Wilhelmina Kightlinger are actively watching this and intend to further approach the Business Law Section in getting this removed, but if not, the Section understands each Committee's position on this issue.

Adjournment. Meeting was adjourned at 4:23 p.m.

What's Happening Within The Section...

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

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

Executive Council Meeting & AnnualConvention
JUNE 1 – JUNE 5, 2022
Hawks Cay Resort
Duck Key, Florida

Executive Council Meeting and Legislative Update
JULY 21 – 23, 2022
The Breakers
Palm Beach, Florida

Roundtable

Highlights of the Meeting of the RPPTL Section

PROBATE AND TRUST DIVISION

Saturday, November 5, 2021

Luminary Hotel & Co., Fort Myers, Florida

Prepared by Lilleth Bailey, Esq., Fort Lauderdale, 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 3:30 pm.

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

Legislation Committee Report

Legislative Committee — Larry Miller, Chair: Larry Miller highlighted the Probate & Trust Division's anticipated proposed legislation for 2022. The first proposed legislation is IRA in Divorce - 2020 HB 811, 2021 HB 253. This bill clarifies existing Florida law that the interest of an ex-spouse in an IRA received in a tax-qualified transfer incident to divorce is exempt from the claims of the transferee spouse's creditors. The second proposed legislation is the "Kearney Fix" (2021 HB 715) which amends the Uniform Commercial Code to provide that a security agreement purporting to pledge a specified exempt asset must specifically identify the asset for the pledge to be valid. This is a clarification of existing law (SB 406 by Sen. Berman, Rep. Robinson to sponsor again). The third proposed legislation codifies existing case law to clarify when a pending lawsuit or legal proceeding against a decedent is deemed an independent action.

Larry Miller also discussed what the Section anticipates will be proposed legislation revising numerous portions of the Trust Code. Changes may include the following: CS/HB 1001 by Representative Beltran and CS/SB 1368 by Senator Gruters are companion bills that revise provisions of the Florida Trust Code including the rule against perpetuities, trustee duties, methods of notice, representation by parents, non-charitable trusts, trust accounting and trust reimbursements.

Stacy B. Rubel, Chair of the Guardianship, Power of Attorney and Advanced Directives Committee, informed the Roundtable about the discussion held at their committee meeting regarding the Uniform Guardianship Jurisdiction Act. In this legislative session, the Elder Law Section seeks the RPPTL Section's support of the Uniform Guardianship Jurisdiction Act. The RPPTL Section's original position was against the proposed Act based on inconsistencies that have not been resolved. The topic was debated between committee members and the Elder Law Section representatives. A vote was held, and the committee members voted that the Section would not change its position and support the Uniform Guardianship Jurisdiction Act.

CLE Report

Sancha Brennan, Co-Chair of the CLE Committee, gave the report. RPPTL has rolled out a QR code that can be read with a smartphone and provides a direct link to the Section's CLE catalog. The code has and will be appearing in various communications and publications. Additionally, the CLE calendar is full until June.

Action Items

Probate Law & Procedure Committee — Travis Hayes, Chair: The action item proposes an amendment to Fla. Stat. § 736.0705 to clarify that a trust instrument may, subject to minimum notice requirements, provide an additional method by which a trustee may resign. It is anticipated that this will be a piece of legislation advanced at this legislative session. There was a committee motion to support proposed amendments to section Fla. Stat. § 736.0705(1) to provide an additional method by which a trustee may resign; and making clear that the options set forth in the statute are alternatives, each of which may operate exclusive of the others.

Information Item

Ad Hoc Committee on Electronic Wills — Angela M. Adams, Chair:

There was a discussion whether or not to support proposed legislation which would amend Fla. Stat. §117.201 to create a definition of "witness" (when used as a noun) for purposes of remote online notarization and witnessing of electronic documents. This will be discussed further at future meetings.

Adjournment. The meeting was adjourned at 4:30 pm.

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PRACTICE CORNER

Probate And Trust Division

Tips For Successfully Navigating Probate:
Know The Rules And The Systems

By Taniquea Reid, Esq., Royal Palm Beach, Florida

While at first glance probate administration may seem less complicated than other areas of law, such as intellectual property, medical malpractice, or taxation, it is extremely important for the practicing attorney to not only have a working knowledge of the probate rules, but also the process of how to successfully move a case through the court system from beginning to end.

You Have to Know the Rules to Play the Game

Unlike other areas of civil law litigation, "probate" is a creature of statute. Specifically, it is well settled that,

> "The Florida Probate Code constitutes a unified statutory scheme intended to govern all probate matters – Section § 7.102 (2007), expressly states that the probate code "is intended as unified coverage of its subject matter."
> § 731.102, (2007) Florida Statutes.
> *Hill v. Davis*, 70 So.3d 572, 577 (Fla. 2011).

Probate administrations are governed by the statutes and the rules. An attorney or pro se party cannot plead or litigate common law doctrines or principles. The statutes provide the law, and the rules provide the procedures under which the statutes are applied. As such, both attorneys and pro se litigants must know and follow the probate statutes and rules to successfully proceed with probate administration and litigation.

The probate statutes and rules include definitions that govern who may proceed with a probate action, the types of actions to be pursued, timelines, and even dictate the processes and procedures needed to conclude the probate action. For example, although Florida does not recognize common-law marriage and only recognizes legally binding and valid marriages, in family law, under certain circumstances, one may commence an action on the basis of the existence of a "putative spouse." The same liberties cannot be taken in probate, as the Florida Probate Code does not currently include the term "putative spouse." As rigid as this may seem, from start to finish, all actions in probate must be grounded in the applicable statutes and rules.

Know the Systems of Probate

Just as it is important to have good systems in place in your law firm to maximize your workflow, billing, client generation and retention, it is important to know, and correctly utilize, the probate court systems to keep your case moving efficiently. Currently, some key parties are the Probate Case Manager, Judicial Assistant, Deputy Clerks/Auditors.

Case Managers - the Case Manager's primary function is to help keep cases moving through the probate process. The role of the Case Manager includes tracking whether the pleadings and other filings comply with the applicable statutes or rules. The Case Manager also must confirm whether such pleadings comply with local rules. Typically, the Case Manager reviews the filed pleadings (which, with e-filing, are uploaded to the court's server). If a pleading or filing is non-compliant, a letter or other correspondence documenting the deficiency and requesting compliance will be sent to the filer.

Judicial Assistants - the Judicial Assistant helps with getting certain matters scheduled for special set hearings before the judge and is the person to whom court-approved correspondence, pleadings, exhibits, and inquiries are emailed.

Deputy Clerk/Auditor - the Deputy Clerk/Auditor checks the accountings filed in the case to ensure the accounting is correct and that the supporting proofs, such as bank statements and receipts, are attached.

The best and most efficient way for any practitioner – from the seasoned probate attorney to the novice litigant – to practice probate administration is to learn and keep abreast of the statutes and rules governing probate, the local rules, and to use the personnel in the probate system appropriately.


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.*

Who's Charging Whom?

Considerations For Property Owners And Community Associations Regarding The Installation And Operation Of Electronic Vehicle Charging Stations

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

Two years ago, the Florida Legislature adopted Fla. Stat. § 339.287 (2020), which establishes the state's plan, through the Department of Transportation, to coordinate, develop and recommend a "master plan" for developing a state-wide electronic vehicle charging infrastructure along the state highway system. Two years before that, Fla. Stat. § 718.113(8) (2018) of the Condominium Act was adopted to essentially guarantee a unit owner's right to install an electric vehicle ("EV") charging station within the owner's limited common element parking area. As the introduction of EV-friendly legislation at the federal and state levels has gradually increased over the last several years, so has the presence of EV vehicles on Florida roads and parking lots (not to mention Tesla's market capitalization at an astounding $800 billion…almost 4 times that of Toyota and 7 times that of Volkswagen at the start of 2022). At present, Florida law now includes provisions specifically restricting the imposition of certain insurance charges on EVs and the parking of non-EVs in areas reserved for plug-in vehicle charging. Given the foregoing, property owners and community association boards should become familiar with the statutory rights and obligations associated with electronic vehicle ownership, generally, and how the use and installation of electronic vehicle charging equipment specifically impacts individual owners and communities at large.

Considerations for Condominium and Homeowner Association Boards

Chapter 720, Florida Statutes (Homeowners Association Act or "HOA Act"), is silent as to a homeowner's statutory right to install and utilize an electric vehicle charging station or a natural gas fuel station within an owner's individual lot boundaries. While the installation of such improvements within lots is less of a concern for homeowner associations comprised primarily of single-family homes, the proposed installation and utilization of this technology by an owner living within an attached townhome HOA community may impact the exterior appearance and use and operation of the association's common area. Because there is currently no statutory guidance for homeowner association boards regarding this issue within Chapter 720, Florida Statutes, it is important for an HOA board to review with association counsel its "governing documents" (Declaration, Articles, Bylaws) to determine if there are any restrictions or provisions addressing an owner's exterior changes or improvements on lots and the association's authority to approve or deny the same. Association counsel might also review the governing documents to determine if the board has architectural rule-making authority to adopt rules and regulations that would specifically apply to the installation

continued, page 47



Correction: In the Winter 2021 issue, the case cited in *First Equitable Realty III, Ltd. v. Grandview Palace Condominium Ass'n* should have read 329 So. 3d 167 instead of 246 So. 3d 445. Both cases involved the same parties, however in different litigation.

of EV or natural gas equipment on the exterior of lots. In light of the trend toward the increased and unrestricted use of these technologies, any such rules should generally allow installation subject to any conditions which directly relate to the protection and preservation of the association's property.

Fla. Stat. § 718.113(8) (2021) codifies within the Florida Condominium Act the state's policy toward encouraging the installation and implementation of "clean energy," generally, and electronic vehicle technology, specifically. Fla. Stat. § 718.113(8)(a) (2021) provides that a condominium association may not prohibit or enforce its restrictions or rules in such a way to prohibit a unit owner from installing an electric vehicle charging station or a natural gas fuel station within that owner's limited common element or exclusively-designated parking area. Moreover, Fla. Stat. § 718.113(8)(i) (2021) grants to each condominium unit owner a statutory implied easement across the common elements of the condominium property for the purpose of installing and utilizing an electric vehicle charging station or natural gas fuel station. As a practical matter, this means that regardless of any express restriction or limitation on a unit owner's right to use the condominium common elements or limited common elements as provided in the association governing documents, the board must allow a unit owner, upon request and at his or her own expense, to install and utilize an electric vehicle charging station or natural gas fuel station within the owner's limited common element or exclusively-designated parking area. (Notably, this provision refers only to the right of a "unit owner" to install and operate an electric vehicle charging station or natural gas fuel station and does not expressly extend to the right of a "tenant" or "occupant" to do so.) Accordingly, when faced with any such request from a unit owner, the association's board should generally grant the request as long as the proposed installation complies with federal, state and local regulations and will not damage the condominium property. The board must also consider how and if the proposed installation will affect the rights and property of other owners and/or parties with easement rights throughout the condominium property (i.e., public utilities, telecommunications providers, etc.). Ultimately, even though the unit owner is responsible for the maintenance and operation of the owner's specific EV or natural gas installation, the association still has the responsibility to ensure the overall protection and operation of the common elements. As most recently amended, Fla. Stat. § 718.113(9) (2021) expressly authorizes a condominium board to make available, install or operate its own electric vehicle charging station or natural gas fuel station on the common elements or association property and to establish charges or the "manner of payment" for unit owners, residents and guests using such stations. The provision of a common element charging station on the condominium property made available for general use would mitigate the need and desire for unit owners to install their own stations, decreasing the impact of increased usage on the electric grid serving the community.

Considerations for Condominium Unit Owners and Homeowners

While Fla. Stat. § 718.113(8)(a) (2021) forbids a condominium association from prohibiting a unit owner's installation of an electric vehicle charging station or a natural gas fuel station within that owner's limited common element or exclusively-designated parking area, the Condominium Act requires that the unit owner be responsible for all costs and expenses associated with the installation, operation and maintenance of the station. Owners are also required to obtain and maintain hazard and liability insurance on the station and related equipment and are expressly prohibited from causing irreparable damage to the condominium property.

To the extent a community association's governing documents require association approval prior to any exterior change on the unit or lot, an owner may still need to apply for and receive association approval prior to any installation (in addition to any applicable local government approval and permitting process). Unit owners and homeowners must also be aware of how their installation may impact easement areas that are located within or adjacent to the lot. The installation of EV technology is an improvement on the lot for which subsequent lot owners would be responsible unless the installation is removed prior to the conveyance. Accordingly, prospective purchasers should be cognizant of any such installation on or appurtenant to the lot or unit being considered for purchase and their obligations under Florida law or the governing documents of the applicable community association requiring the owner to maintain the charging station.


S. MOUNT

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Real Property Case Summaries

Prepared 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 (Appellant) filed a complaint against Vanguard Realty, the real estate agency, and Bobbie Demunck, the real estate agent, who represented John McDonald, the property owner (Appellees). Prior to the purchase, McDonald represented that the roof on the home was one year old and came with a transferrable warranty. Certified Home Inspections, LLC 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 Chapter 475, Florida Statutes, 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 and 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 Chapter 475.278, Florida Statutes, that purports additional duties to research and investigate. Citing Fla. Stat. § 475.278(3)(a)9, the court held that 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.



continued, page 49

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 in exchange for a promissory note in the amount of $300,000 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 a postjudgment 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 Section 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.

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 (Fla. 1st DCA 2022)

Morrison (Appellant) and Smolarick (Appellee) 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 percent 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, Solarick 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. The trial court went forward with a trial and entered a money judgment in favor of Smolarick and ordered Morrison to pay $3,191.42 representing reimbursable expenses to satisfy the mortgage, pay closing costs and pay 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 Solarick 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 and reversed the trial court's order in favor of Smolarick and remand for the trial court to vacate that judgment. The court held that a partition action commences a legal proceeding to divide co-tenants' interest in a real property, citing *Condrey v. Condrey*, 92 So. 2d 423, 426 (Fla. 1957). In accordance with Fla. Stat. § 364.061(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 fund 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 fund. Therefore, neither Chapter 64 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.*

Probate Case Summaries

Prepared by Amanda C. Cummins, Esq., AC Cummins Law, St. Petersburg, Florida

Probate court erred in finding that wife's signature on a prenuptial agreement the day before her out-of-state wedding to the decedent waived her right to inherit homestead property in Florida that was specifically and unambiguously excluded from the agreement.

Williams-Paris v. Joseph, 46 Fla. L. Weekly D2476a (Fla. 4th DCA 2021)

Appellant lived with the decedent in his home for approximately five years prior to their marriage and continued to reside in the house afterwards. The decedent only discussed getting a prenup one time approximately a year before the wedding. The decedent was 83 years old and the appellant was 58 years old at the time of the marriage. The decedent wanted the wedding on Martha's Vineyard in Massachusetts. The couple arranged the wedding and had the wedding planned within one month.

While in Massachusetts on the day of the wedding, the decedent woke the appellant around 7:00 in the morning and demanded that unless the appellant found a prenup online and signed it, he would not marry her. The appellant reluctantly agreed since guests had already arrived from out of state and the entire ceremony was planned. The two filled out an online questionnaire, which populated a form agreement, and the decedent drove the appellant to a notary for signature. This occurred prior to the wedding ceremony which was held at 4:00 that same afternoon.

Four years after the marriage, the decedent died intestate. The appellant filed for probate and petitioned the court to invalidate the prenuptial agreement ("based on fraud, deceit, duress, coercion, misrepresentation, and overreaching" as well as unreasonableness and her unilateral mistake), determine homestead (so that she could elect a one-half interest), and award her the intestate share and elective share of the estate. She also petitioned for a determination of whether the agreement should be construed under Massachusetts law or Florida law. The adult children of the decedent moved for summary judgment and asserted several counterarguments. The trial court granted the children's motion for summary judgment on all of the grounds challenging the validity of the agreement, except mistake, and denied the appellant's petition

continued, page 51



(except for her mistake argument) and determined that Florida law applied to the issue of the validity of the agreement.

The appellate court engaged in a two-part analysis: (1) choice of law and (2) interpretation of the prenuptial agreement. The choice of law was important because while Florida does not require full disclosure of assets for the validity of the post-mortem aspects of a prenup, Massachusetts does, and there allegedly had been no such disclosure by the decedent. The court stated that choice of law rules differ depending on the area of law involved. In this case, the trial court correctly concluded that Florida typically follows the rule of lex loci contractus, which holds that the law of the situs where the contract was executed should control. However, Florida courts may depart from this rule "where necessary to protect its Florida's citizens or to enforce some paramount rules of public policy." Although the trial court did not apply this test, the appellate court (without mentioning the "tipsy coachman" doctrine) affirmed the trial court's holding that Florida law applied since the correct result was achieved.

Applying the line of reasoning that Florida considers the protection of homestead property a paramount rule of public policy and that policy applies to surviving spouses and heirs, the court affirmed the finding of the trial court that Florida law applied since "(1) the Wife and the Children, one of whom is a Florida resident, both stood to benefit from the decedent's homestead; (2) Florida has a strong public policy for homestead protection; and (3) Florida has specific statutes addressing the requirements for waiver of homestead protection."

The court then turned to the issue of interpreting the agreement. In one clause, the agreement specifically excluded the alleged homestead property from the agreement ("the residence…shall not be affected by this Agreement"). However, the agreement later stated that each party waives their right to claim any part of the real or personal property of the other spouse, including homestead, upon the death of the other.

In conclusion, the appellate court found (1) that the trial court correctly determined that Florida law applied in determining the validity of the agreement, and (2) that the homestead property was specifically and unambiguously excluded from the premarital agreement.

The probate court did not abuse its discretion in denying a motion for temporary injunction by the personal representative, who sought to recover a painting from an auction house that she asserted was an estate asset. The painting was a perfected inter-vivos gift to the decedent's children.

Namon v. Elder, 46 Fla. L. Weekly D2507a (Fla. 3d DCA 2021)

The decedent owned a painting titled *Portrait of Lucy Valentine* which was on loan to the Portland Museum of Art in Portland, Maine. The painting had considerable value. The decedent's will left the majority of his estate to his wife, Barbara, who was also the personal representative of his estate. The will provided for a nominal sum to be divided equally among the decedent's three biological children and one stepdaughter. One of the children contested the validity of the will.

While the validity issue was pending, the siblings corresponded with the Portland Museum and arranged for the painting to be transported to Sotheby's for auction. Barbara filed for an emergency injunction to prevent the sale of the painting, asserting that the painting was an estate asset and should be relocated to South Florida. The trial court denied Barbara's request and ordered that the painting stay in the possession of Sotheby's. She appealed, arguing that the children's assertion that the painting was a gift was time barred by Florida Statutes § 733.710 (2021).

The appellate court looked to two statutory provisions: Fla. Stat. § 733.702 and Fla. Stat. § 733.710. First, Fla. Stat. § 733.702 applies to all claims for personal property in the possession of the personal representative and time bars any claims that are not filed within three months after the first publication of the notice to creditors or thirty days after service on the creditor. Second, Fla. Stat. § 733.710 provides an "outer limit" for claims of two years after the decedent's death. The children asserted ownership of this painting within the two-year time period after their father's death. The appellate court reasoned that determining whether the painting was a perfected inter vivos gift could not be determined at this stage and the statute of nonclaim has no application on Barbara's attempt to "claw back a lifetime gift."

In conclusion, the appellate court affirmed the decision of the trial court to deny the petition for injunction and determined that the competing claims of ownership of the painting should be determined in subsequent proceedings.

The trial court departed from the essential requirements of law by denying an alleged incapacitated person's motion to substitute appointed counsel for counsel of his choosing. The removal of the right to contract of an alleged incapacitated person does not remove the right to choose counsel prior to a determination of incapacity.

Foster v. Radulovich, 46 Fla. L. Weekly D2677a (Fla. 2d DCA 2021)

The Department of Children and Families (DCF) filed a petition for a plenary guardianship over the person and property of an alleged incapacitated person, Foster. The court appointed counsel to represent Foster at the hearing on DCF's motion. At the hearing, which Foster did not attend, appointed counsel and DCF stipulated to the appointment of Radulovich as emergency temporary guardian over Foster's property, including the right to contract. The letters of guardianship were set to expire on September 20, 2021.

continued, page 52

After the hearing, Attorney Denman petitioned for appointment as Foster's counsel for the guardianship proceedings. DCF and Radulovich objected, arguing that Foster's right to contract had been removed. At a hearing on the motion, Foster testified that he wanted Denman as his counsel. Prior to the court's ruling, Foster filed a motion to substitute his appointed counsel with Denman. The day after the letters of guardianship expired, Denman filed a notice of appearance for Foster. The court had not yet ruled on Foster's motion to substitute counsel. The trial court then entered an emergency temporary guardianship, nunc pro tunc to September 20, 2021, denied Foster's motion for substitution of counsel, and struck Denman's notice of appearance. Foster petitioned for a writ of mandamus to quash the trial court's order.

The appellate court looked to Fla. Stat. § 744.331(2)(b), which allows an alleged incapacitated person to substitute appointed counsel with counsel of choice prior to a determination of incapacity. Although Fla. Stat. § 744.3031(1) removes the right of a Ward to contract, it does not preclude the ability of an alleged incapacitated person's right to hire counsel.

Prior to the appellate court's decision being entered, Foster was found to be incapacitated. As a result, both parties sought clarification from the appellate court, which stated "because he was entitled to counsel of his choice during the incapacity proceedings that followed the erroneous denial of his motion for substitution of counsel, he is entitled to have those matters adjudicated while represented by his lawyer of choice upon remand."

Trial court did not abuse its discretion in (1) finding that the decedent revoked a 2015 trust two days after creating it, (2) removing individuals appointed as personal representative and successor personal representative under an earlier will which was being contested, and (3) precluding the appointment of the same personal representative and successor personal representative during the pendency of the will contest.

Boyles v. Jimenez, 46 Fla. L. Weekly D2614d (Fla. 4th DCA 2021)

The testatrix hired Boyles to draft a will and trust, in which she named Boyles as the trustee and personal representative and Boyles' wife, Cooney, who is also a lawyer, as successor trustee and personal representative. The testatrix executed the will and trust on October 9, 2015. Two days later, the testatrix revoked the 2015 trust by a letter that was signed in the presence of two witnesses and notarized. In April 2016, pursuant to the terms of the 2015 trust, the testatrix provided notice to Boyles that she revoked the 2015 trust and that he and Cooney had been replaced by her new counsel, Jimenez.

Boyles responded by requesting the testatrix contact his office. The testatrix never responded. Boyles was suspended from the practice of law on April 23, 2016. The testatrix executed a new will in March 2017, which revoked all prior wills and codicils, and a new trust. She named Jimenez as trustee.

The testatrix died in August 2017. Boyles filed a petition for administration, seeking appointment as the personal representative. He did not contact the beneficiaries prior to doing so. The trial court issued letters of administration. Cooney represented Boyles as the personal representative and trustee.

The terms of the 2015 will included three beneficiaries: (1) an unrelated person receiving $25,000, (2) the testatrix's brother receiving eight percent of the remainder of the estate, and (3) the testatrix's niece receiving the remaining 92 percent. The terms of the 2017 will included three gifts: (1) a gift of $290,000 split between the testatrix's five caregivers, (2) two percent of the remainder to the testatrix's brother, and (3) 98 percent of the remainder to the testatrix's niece. Neither the brother no the niece contested the validity or terms of the 2017 will.

Jimenez and the niece filed an objection to Boyle's appointment, filed the 2017 will with a petition for administration, requested Jimenez be appointed the personal representative, and argued for the removal of Boyles as the trustee since the 2015 trust had been revoked. Boyles and Cooney alleged the testatrix's 2017 will was invalid due to undue influence and incapacity. Jimenez and the niece argued that Boyles was unfit to serve as the personal representative since he had been suspended from the practice of law. The trial court agreed and removed Boyles as the personal representative and also found that the 2015 trust had been revoked. Cooney filed a petition for administration of the 2015 will and sought appointment as the personal representative.

The appellate court analyzed three issues: (1) removal of Boyles as the trustee, (2) substitution of an administrator ad litem in the will contest following Boyles' removal, and (3) refusal to appoint Boyles or Cooney as the personal representative. The appellate court found that even if the 2015 trust had not been revoked, the terms of the trust itself allowed removal of a trustee by a consent of the majority of the beneficiaries. Here, the brother and niece of the testatrix supported the removal of Boyles.

Boyles had been suspended from the practice of law because he had filed numerous petitions for administration of estates in which he had no contact with or permission from beneficiaries to do so. The trial court did not abuse its discretion in finding Boyles unfit, removing him as personal representative, and preventing him from being party to the will contest. The trial court found that Cooney's appointment as personal representative would impede the administration of the estate, and as such, correctly prevented her from being party to the will contest.

continued, page 53

Finally, the appellate court noted that the trial court had correctly revoked the letters of administration, which were issued prior to the trial court learning of the 2017 will. The trial court did not abuse its discretion in excluding Boyles and Cooney from the challenge to the 2017 will and trust.

The trial court erred in denying the surviving spouse's objection to administration expenses when she had already received her final distribution. The surviving spouse was the sole beneficiary of the residuary trust, and as such, was an interested party with standing to object to expenses of administration.

Duff-Esformes v. Mukamel, 46 Fla. L. Weekly D2508a (Fla. 3d 2021)

The decedent's estate had two beneficiaries: Duff-Esformes, the surviving spouse, and the Nathan J. Esformes Living Trust. Duff-Esformes was the sole beneficiary of the trust. The trial court entered an agreed order of final distribution, with $50,000 as reserve for additional administration expenses. Later, the personal representatives filed a petition for additional expenses, to which the surviving spouse objected. The personal representatives alleged the surviving spouse lacked standing since she had already received her final distribution. The trial court agreed, denied her objections and entered an order granting the payment of the fees and expenses.

The appellate court looked to Fla. Stat. § 733.6171(5), which allows any interested person standing to object to administration expenses. It defines an interested person as "any person who may reasonably be expected to be affected by the outcome of the particular proceeding involved." Fla. Stat. § 733.6171(5) (2021). Given the surviving spouse's position as the sole beneficiary of the residuary trust, she had standing to contest the expenses that would diminish the residuary trust. The trial court's decision was reversed and the case was remanded to consider the objections.


A. CUMMINS

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

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

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