

ActionLine

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

Don't Lose Your Wallet! Five Things To Know About Estate Planning with Cryptocurrency

Examining A Recent Case on Fee Sharing

A Primer On ESG For Real Estate Practitioners

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What Do I Get Out Of The RPPTL Section?

By Robert Swaine, Section Chair, 2021-2022

As of the writing of this article, Spring has flown by and Summer will soon be upon us. The good news is our Annual Convention and our Breakers meetings are just around the corner. These meetings serve as great opportunities for fellowship and summertime family fun. It was my privilege to grow up in the Section and I look forward to seeing some of our current members' children as members of the Section in years to come. My father was Chair of the Section in 2001-2002. 9/11 occurred in the week leading up to one of his Executive Council meetings. Thinking back on that, I am grateful that my biggest inconvenience was inclement weather. To the many Section members and friends who mentored and encouraged me along the way, I thank you. It has been an honor to serve as Chair of our Section.

During my term as Chair, it has become clear to me that one of the great benefits of the Section is the review and comment provided by volunteer members who devote significant time and effort to study important issues facing our citizens. That was the case with our Condominium Law and Policy Life Safety Task Force's review and recommendation of condominium law changes to avoid another tragic building collapse, and our Professionalism & Ethics Committee's review of the proposal authored by the Florida Supreme Court's Special Committee to Improve the Delivery of Legal Service. A more recent example is the Ad Hoc Civil Rules committee created by our Chair-Elect, **Sarah Butters**. Those volunteers reviewed the Final Report of the Judicial Management Council Workgroup on Improved Resolution of Civil Cases. That Final Report included rule amendments that would drastically change the practice and process of state court civil litigation. The Ad Hoc committee was chaired by **Shawn Brown** and its members were **Rich Caskey, Cady Huss, Mike Hargett, Bruce Partington,** and **Eric Virgil**. That committee considered the impact of the changes on the existing probate statutes and on different types of litigation, including certain types of routinely uncontested matters. Their summary and analysis stimulated significant debate on the issues at our Executive Council meeting in Tallahassee. The committee took the insight provided by many of our members and drafted an articulate response which the Executive Committee approved and was filed with the Florida Supreme Court for its consideration.

It takes time and effort of our whole group to accomplish all that RPPTL does. Just remember: RPPTL is a team sport, but it is not a spectator sport!

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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Get Included In ***ActionLine!***

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

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

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

ADVERTISING: For information on advertising, please contact Colleen Schuster at c_schuster@comcast.net.

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GENERAL INQUIRIES: For inquiries about the RPPTL Section, contact Hilary Stephens at The Florida Bar at 850-561-3155, or at HStephens@floridabar.org.

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

Letter From The Co-Editors-In-Chief

The Summer 2022 issue is the "last call" for the duo of **Jeffrey Baskies** and **Michael Bedke**. Jeff Baskies is rotating off *ActionLine* as of the next issue, but the magazine is in great hands with Mike Bedke and new co-editor-in-chief, **Erin Farrington Finlen**. Jeff's vision and leadership will be missed, but the Section magazine won't miss a beat. As a "final hurrah", both Jeff Baskies and Mike Bedke have authored content featured in this issue.

As the co-editors-in-chief these past few years, we have not only been privileged to provide valuable Section-created content to you, but we have also truly enjoyed working together and growing our friendship. Section service takes time and effort, but Section work is also very rewarding, both professionally and personally. We recommend you all find more ways to volunteer.

If you are looking for ways to become more active, look no further than the magazine you are reading. *ActionLine* is such an important part of the Section and is consistently ranked the highest Section benefit in member surveys. This full-color magazine allows Section members from throughout the state and from all manners of practice to showcase their knowledge and skills.

Take this Summer 2022 issue for example. There is an article discussing a very timely topic (Surfside's repercussions on residential resales) submitted by former RPPTL Section chair (and frequent *ActionLine* photo contributor), **Michael Gelfand** (who practices in a boutique firm in West Palm Beach). Then there is an article submitted by **Shaina Kamen**, an attorney with the very large law firm of Holland & Knight, representing its Miami and New York City offices. Co-editor-in-chief, **Jeff Baskies**, along with attorney **Allison Neumann** (of the Katz Baskies & Wolf boutique law firm in Boca Raton) provide an article exploring a recent 4th DCA decision on fee sharing, right at the intersection of the Florida Probate Rules, the Florida Probate Code and the Florida Rules of Professional Conduct. **Bill Slicker** checks in with an article on common law marriage, from his solo practice in St. Petersburg. **Jolyon Acosta** of Tampa's Bush Ross firm provides a detailed discussion of issues under the principal and income act relating to receipts from entities. **Betsy Pennewill**, corporate counsel for the Community Foundation of Sarasota County wrote a wonderful article on the growth of Donor Advised Funds. Co-editor-in-chief, **Mike Bedke** provides a primer on ESG (with the huge global law firm of DLA Piper) for real estate practitioners. **Martha Edenfield**, part of our Section legislative advisors (the lobbying team at Dean Mead), provides a wonderful overview of working on Section legislative initiatives. The legislative team at Dean Mead always provides fascinating content to our readership in each issue. And then we have the regular section content: the roundtable highlights, practice corners and case law updates, authored by Section members in solo practices and larger firms from Orlando, Pensacola, St. Petersburg, Kissimmee, and Royal Palm Beach.

The point of all that is to show how *ActionLine* is supported so broadly and diversely by the Section. If you are interested in getting published in *ActionLine*, please review the writers' guidelines on the RPPTL Section website and reach out to us with ideas. If you would like to become an editor at large, please reach out as well. *ActionLine* can always use more help.

As the duo of Baskies and Bedke ride off into the sunset (due to Baskies rotating out as an *ActionLine* chair), we wish to thank so many people. Thanks to all of you who have provided content for *ActionLine*. Thanks to all of you who have paid to advertise in *ActionLine*, and thus supported and sustained it. Thanks to all of you who have volunteered as a part of our fantastic staff (whether you were listed on the masthead or not); we most definitely could not have done it without the talented pool of editors. Huge thanks to our publication coordinators, first **Janie Green** and now **Colleen Schuster**, and to RPPTL Section leaders for creating (and funding) this new position. Thank you to someone who perhaps too-often goes unnoticed (if she's doing her job well) – **Laura Pichard-Murphy** - our hard-working design and layout coordinator. Thanks to everyone who shared photographs with *ActionLine* and the photographers who generously volunteer their time to provide a valuable Section service. Thanks to the Section fellows for all the content you create. Thank you sincerely to all those editors, writers, publishers, and former chairs of *ActionLine* who came before us and made the publication the valuable Section content it is today. Thanks to all the Section chairs and to all of the Section leadership who support and sustain *ActionLine*. Finally, thanks to all of you Section members who have hopefully enjoyed reading each issue. We wish you farewell and send a special thank you to you all.

Cheers!!!

Jeff Baskies and Mike Bedke



J. BASKIES



M. BEDKE



Surfside's Repercussions Swamp Residential Resales?

Following The Money As Lending Restrictions Lead To Reforms

By Michael J. Gelfand, Esq., Gelfand & Apre, P.A., West Palm Beach, Florida

Who would have seen it coming? Who would have expected it to come from the bankers! So swiftly! And where are the legislators and regulators?

For decades, many communities kicked the cost of deferred maintenance down the road. Why don't Florida retirees buy green bananas? Because they may not be around when the bananas ripen.

Similarly, Florida community association parcel owners routinely vote against funding deferred maintenance reserves. They speculate that they will sell or die before such maintenance becomes absolutely necessary.

This myopic view led to unreasonable delays in tackling critical projects. This spawns a nasty cycle: greater wear and tear, more damage, and higher expenses.

Out of the tragedy of the Champlain Tower South Condominium ("CTS") collapse, a new awareness of the real cost of property ownership has arisen.

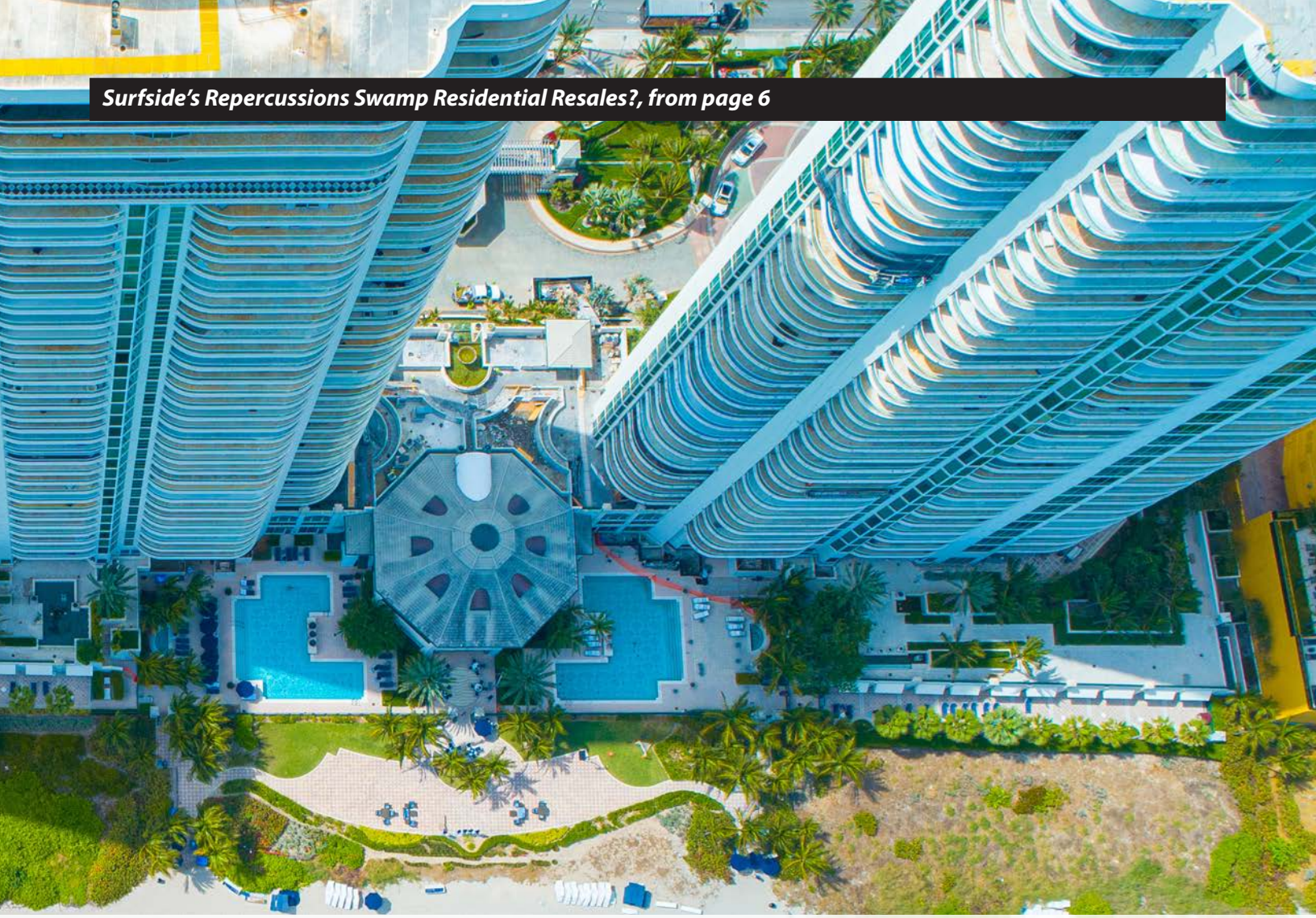
While the quest for the exact cause of the structural collapse may occupy engineers and architects for quite some time, The Florida Bar's Condominium Life Safety Task force, on which this author had the honor to participate, recognized many flaws in the 'accepted' manner of community administration and issued a report on October 12, 2021. The Task Force's recommendations are backed by detailed findings, addressing inspection, reporting and funding of deferred maintenance.

There has been little debate or controversy concerning the Task Force's mostly common-sense findings.

Strangely, instead of addressing the Task Force Report, especially with the increasing age of Florida's housing stock, action implementing the recommendations has been muted. Prompt and vigorous State action (and debate) was anticipated this year to protect the financial and physical safety of Florida residents, but has not been forthcoming

Instead, with the Florida Legislature's abdication of its role, the private sector started to fill the void with a vengeance. Lenders, in particular, are scrambling to protect their loan security.

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How is this playing out? Mortgage loan underwriting! Not a subject that traditionally held rapt attention, thresholds for loan approval are evolving dramatically.

Until recently, residential lenders' analyses focused on borrowers' financial profile. Property appraisals were required, but once loan to value was established via appraisals predicated on cold comparative sales data, little attention was given to the condition of the collateral. Perhaps it was (mistakenly) assumed that the property's fitness was considered when comparative market value was established.

Borrowing from the commercial property mortgage market, residential mortgage lenders increasingly demand disclosures as to structural soundness, and the financial ability to pay for deferred maintenance and replacement. Lenders now want confirmation that the property securing a loan is actually structurally sound, and that the community association has the funds to timely complete proper maintenance. Lenders expressly acknowledge that this new attention is a result of the CTS Condominium collapse.

There is more than a ripple effect. As loans are denied due to new guidelines, underfunded budgets and reserve waivers may signal caution. An important consequence is compelling association boards to put an increased focus on budget funding and planning.

Continued ignorance of a building's needs has a practical impact. If a buyer cannot obtain a loan because of a building's poor condition, the buyer may go elsewhere, driving prices down even in this runaway market. If a building has a reputation of insufficient reserves and poor maintenance, then brokers may steer prospective buyers, even cash buyers, away, depressing prices further.

Owners will demand their association boards of directors to correct the situation. This brings us full circle as owners calculate the genuine cost of deferring maintenance and waiving reserves. The true cost of homeownership may be a stark wake-up call!

An unanticipated consequence will be the termination of condominiums. It will just not be cost-effective to compensate for long-overdue maintenance. Sky rocketing insurance premiums will add fuel to terminations' fiery consumption.

While the immediate focus is on condominium and cooperative projects, expect homeowners' associations that maintain homes' structures, roofs, or walls, to be swept up into the new underwriting wave.

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How does this wave hit? Mortgage lenders are starting to require detailed information. Banks will expect associations to complete a "Questionnaire" documenting a community's maintenance and reserve status, as well as other criteria. If owners continue to stymie proper funding and timely maintenance, then there will be swift economic impacts.

Transactional counsel are urged to prepare for a deluge of information requests from banks that may initially overwhelm management and volunteer administrators. These requests may seem an unbearable imposition upon associations and their volunteers, especially where constituted so as to impose liability upon those generating responses and some seeking legal analysis.

The Federal Home Loan Mortgage Corporation, also known as Freddie Mac, issued a Bulletin with the captivating title "Temporary Condominium and Cooperative Project Requirements and Topic 5600 Reorganization." The requirements apply to all condominiums with five units or more, even if the condominium is otherwise exempt from review.

A few cautions at the outset: The new regulations are national in scope. Of course, Freddie Mac does not buy all mortgages, but it has an impact far beyond its purview.

This shift in the underwriting landscape may compel Florida condominium associations to aggressively plan and schedule long-term maintenance because waiting may cut off Freddie Mac underwritten mortgage financing to a community!

- Units in condominiums with critical repair needs are not Freddie Mac eligible.
  - Even if administration is diligent and the work has started.
  - Even if the work is fully funded by the Association!
- Lenders may require an engineer's report as proof of completion.
- Special assessments are to be evaluated by underwriters including to determine if the funds are for critical repairs.

A questionnaire is created

- Five pages to be completed by the association or management.
- Requires interpretation of governing documents.
- Requires disclosure of all litigation.
- Requires evaluation of:
  - Unit uses;
  - Multi-unit owners; and
  - Insurance.

Though stated as "temporary," there is no end date as of print deadline. The devil is in the details, so here are the definitions for the broad categories of information sought:

Critical Repairs

Repairs and replacements that significantly impact the safety, soundness, structural integrity, or habitability of the project's building(s) and/or that impact unit values, financial viability, or marketability of the project. These repairs and replacements include:

- All life safety hazards;
- Violations of any federal, state, or local law, ordinance or code relating to zoning, subdivision and use, building, housing accessibility, health matters or fire safety;
- Material deficiencies; and
- Significant deferred maintenance.

Material Deficiencies

Unresolved problems that cannot reasonably be addressed by normal operation or routine maintenance and which include:

- Deficiencies which, if left uncorrected, have the potential to result in or contribute to critical element or system failure within one year;
- Deficiencies that will likely result in a significant escalation of remedial cost related to any material building components that are approaching, have reached, or exceeded their typical expected useful life or whose remaining useful life should not be relied upon in view of actual or effective age, abuse, excessive wear and tear, poor maintenance and exposure to the elements; and,
- Any mold, water intrusions or potentially damaging leaks to the project's building(s).

Significant Deferred Maintenance

The postponement of normal maintenance, which cannot reasonably be resolved by normal operations or routine maintenance, and which may result in any of the following:

- Advanced physical deterioration;
- Lack of full operation or efficiency;
- Increased operating costs; and,
- Decline in property value.

These definitions may cause pain!

The Bulletin highlights "reminders" of the need for reserves. Reserve studies are required to justify short funding of any anticipated material need.

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Anticipate disputes over whether something is a routine repair or a critical repair, the requirements to complete the form and who pays for the completion.

Guard against having the questionnaire completed with guesses and incomplete information. You know who will be blamed when there is a problem! Note that in some circumstances, lenders will accept information from other sources, such as an appraiser.

If you have not seen the forms or the bulletins, here are the links to Regulation material:
https://guide.freddiemac.com/app/guide/bulletin/2021-38?utm_source=eloqua&utm_medium=email&utm_campaign=2021-12-15_POLICY_Guide-Policy

To the new Questionnaire:
https://sf.freddiemac.com/content/_assets/resources/pdf/forms/condo_questionnaire_form_full.pdf

Fannie Mae is also weighing in, for example with Lender Letter (LL-2021-14):
https://singlefamily.fanniemae.com/media/29411/display

Start planning! Now!!


M. GELFAND

***Michael J. Gelfand**, dual Florida Bar Board Certified, in Real Estate Law and in Condominium and Planned Development Law, a Certified Circuit/County Civil Court Mediator, Arbitrator, and Parliamentarian emphasizes a community association law practice with Gelfand & Arpe, P.A., West Palm Beach.*

Michael serves on The Florida Bar's Board of Governors, chaired the Bar's Professional Ethics Committee, served on the Condominium Law and Policy Life Safety Advisory Task Force, and chaired the Real Property, Probate and Trust Law Section, the Condominium and Planned Development Committee, and the City of Boca Raton's Builders Board of Adjustment and Appeals.

Editor's Note: *After the submission deadline and three Florida Legislative Special Sessions, in the Fourth Special Session, Senate Bill 4-D was adopted and signed into law. The Bill primarily regulates inspections and reserves, not changing the substance of this article which addresses residential loan underwriting. The Bill will be the subject of a special presentation at the Section's July Legislative Update Seminar, including the article's author and other Task Force members.*
The condominium photo used with this article is a stock photo and not the Champlain Towers.



Don't Lose Your Wallet!

Five Things To Know About Estate Planning With Cryptocurrency

By Shaina Kamen, Esq., Holland & Knight LLP, Miami, Florida, and New York, New York

With more than 15 percent of adult Americans (approximately 40 million people) investing in, trading, and using cryptocurrencies, cryptocurrency is no longer a niche alternative investment solely for those in the know.[1] As cryptocurrency has entered the mainstream, existing financial institutions and new-to-market custodians provide consumers opportunities to invest in this emerging asset class.



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As interest in this asset class grows, planners should consider how these assets can be accessed and disposed of in the event of the holder's incapacity or death. In a typical estate administration, a court appoints the nominated Personal Representative, who is tasked with marshaling decedent's assets. The Personal Representative can identify the decedent's assets by reviewing account statements for known accounts or, if unknown, by providing the decedent's Social Security number to the financial institution and asking that accounts associated with the number be identified. Once the Personal Representative locates the account, the Personal Representative presents Letters of Administration to the institution. The financial institution distributes the assets, whether cash or marketable securities, in accordance with instructions provided by the fiduciary. If instead, the account has a payable on death beneficiary designation, the beneficiary can go directly to the institution with a copy of the death certificate to collect the contents of the account.

In contrast, cryptocurrency holdings, often cloaked in anonymity, can be difficult to identify and collect. Cryptocurrency transactions are recorded on the blockchain, which is effectively a database of transactions available for public view. Individual transactions are secured on the blockchain through a digital verification process. These public and private keys are often stored in "wallets," which can be "hot," "cold," "digital," or otherwise. Cryptocurrency may also be held in an exchange or by certain financial institutions.

Depending upon how the cryptocurrency is held, distribution upon the holder's death may not necessarily proceed in such an orderly manner. Although cryptocurrency held by a financial institution may be accessed by a fiduciary in the same manner as cash or securities, cryptocurrency held in a "wallet" cannot be accessed without overcoming the account's security. For this reason, cryptocurrency poses a significant risk of becoming lost or inaccessible upon the death of the account holder, even for the sophisticated investor. For example, an heir to the fortune of a large international financial institution died without leaving his fiduciaries or heirs access to an estimated $500 million in cryptocurrency. Without reference to cryptocurrency in the planning documents and "cold wallets," or wallets not connected to the internet, stored throughout the country, the process reportedly significantly hampered the administration of the estate.

As cryptocurrency becomes more mainstream, planners should take an active role in facilitating planning with this asset. A discussion of some basic planning considerations for cryptocurrency follows.

Identify Digital Assets.

It is critical to address cryptocurrency, non-fungible tokens (NFTs), and other digital assets as part of the estate planning engagement. Because individuals often store cryptocurrencies in a digital wallet secured and accessed only through a private key, there is no personal identifying information associated with the asset. If the assets are not specifically disclosed or known, the assets may simply die with the decedent. Moreover, if the password is held by a family member or friend, the asset may not be disposed of in accordance with the decedent's estate plan. Planners should ask their clients if they hold cryptocurrency, how and where these assets are held, and how to access the assets. Not only will this aid the Personal Representative or Trustee to identify and marshal these assets after the death of the decedent, but information about these assets may need to be disclosed in court filings, such as estate inventories, or reported on federal estate tax returns and related filings.[2]

Because cryptocurrency poses unique issues in an administration, identifying cryptocurrency as an asset also provides an opportunity for the planner to tailor the plan to facilitate the administration and management of these assets, discussed in greater detail below.

Facilitate Fiduciary's Access in the Event of Incapacity or Death.

During the client's lifetime, the private key controls the ability to transfer cryptocurrency secured by the blockchain. After death, the fiduciary must have access to the private key. If the key is lost, there is no way to recover it to gain access.

In the absence of planning, there is little infrastructure in place to facilitate the orderly transition or succession of cryptocurrency in an estate administration. While a majority of states, including Florida, have adopted an iteration of the Revised Uniform Fiduciary Access to Digital Assets Act (RUFADAA) – in Florida, the Florida Fiduciary Access to Digital Assets Act – to address access to digital assets following the death of the account holder, most cryptocurrency does not fall within the definition of a "digital asset." Although RUFADAA may provide a fiduciary with access to an account custodian, under current law fiduciaries may be without recourse if access to blockchain holdings held directly is lost at the decedent's death.

The estate plan should provide a mechanism for a secure transfer of the private key to fiduciaries or beneficiaries. Although solutions will emerge as cryptocurrency becomes more mainstream, current thoughts include providing instructions to the fiduciary, to be held in escrow until the incapacity or death of the client, or even a "switch" that transfers the cryptocurrency upon the occurrence of a designated event such as death.

Consider Fiduciary Selection.

Because cryptocurrency is a highly volatile asset with distinct

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security considerations, the client should give consideration to fiduciary selection where it is anticipated that cryptocurrency will be a future asset of an estate or trust. For example, a surviving spouse who is inexperienced in this area may not be the best choice to manage such assets. Moreover, the nominated fiduciary could also be uncomfortable with administering an asset of this nature and decline to serve altogether. For this reason, depending on the magnitude of the cryptocurrency holdings, the client may wish to name one or more individuals to specifically manage these assets along the lines of a "special holdings" personal representative or trustee.

Estate Planning with Digital Assets

- ✓ **Identify all digital assets**
- ✓ **Facilitate fiduciary's access in the event of incapacity or death**
- ✓ **Consider fiduciary selection**
- ✓ **Address cryptocurrency in planning documents**
- ✓ **Don't "discount" lifetime strategies**

Further, a fiduciary bears responsibility for managing and investing the assets of an estate or trust. Cryptocurrency, which poses a significant risk, may be outside the realm of an investment under the Florida Prudent Investor Rule. The planning documents should address and minimize the fiduciary's personal liability associated with retaining these holdings, including specific authority to retain or sell these assets and guidance as to its continued management and investment. If specific authority is not included in the planning documents, the fiduciary may be required to sell the assets to comply with fiduciary duties owed to the beneficiaries. Different strategies may be pursued if the asset is to be held short-term or for a longer duration as part of a dynasty trust.

Address Cryptocurrency in Planning Documents.

Clients should disclose cryptocurrency in the estate planning documents and specifically address the disposition of these assets to make sure that the assets are disposed of to minimize roadblocks in administration. For example, assignments of cryptocurrency to revocable trusts should be documented to avoid complexities in dealing with cryptocurrency as a probate asset in states such as Florida, where the use of restricted depositories may be common.

For clients who intend to hold this asset class in the long term, the planner should be sure to include specific instructions in the planning documents. For example, cryptocurrency, a highly volatile investment, may not be a desirable asset of a marital trust for the benefit of the surviving spouse if the estate also includes more stable income-producing assets to use for this purpose.

Don't Discount Lifetime Strategies.

Finally, individuals who wish to avail themselves of the benefit of the sky-high federal and gift tax exemptions (currently $12.06 million per individual as of January 1, 2022) may wish to engage in lifetime planning strategies, such as transfers to grantor trusts, with these assets. Cryptocurrency held in structures such as limited liability companies (LLCs), which may bolster creditor protection, are ideal candidates for transfer because it is far easier to transfer the entity interest rather than the underlying asset. Transfers of interests in an entity may be subject to valuation discounts for minority interests or lack of marketability upon transfer to family wealth planning structures. Because of the potential for appreciation, these special assets may be good candidates for transfers to dynastic trusts.

Planners should discuss with clients the short- and long-term goals of owning these assets and tailor planning accordingly. Cryptocurrency is subject to federal tax on capital gains and net investment income tax. State tax considerations may apply as well. For clients with significant holdings, some consideration should be given to domicile planning to a more tax-favorable jurisdiction ahead of any anticipated liquidity events.



S. KAMEN

***Shaina Kamen** is a partner at Holland & Knight LLP. Ms. Kamen graduated from Syracuse University College of Law and received her L.L.M in Taxation from Georgetown University Law Center. Ms. Kamen is a member of The Florida Bar and a Fellow of the American College of Trust and Estate Counsel (ACTEC). She is also admitted to practice law in New York.*

Endnotes

1 https://www.whitehouse.gov/briefing-room/statements-releases/2022/03/09/fact-sheet-president-biden-to-sign-executive-order-on-ensuring-responsible-innovation-in-digital-assets/ (last visited May 6, 2022)

2 The IRS treats cryptocurrency as property for federal tax purposes. Cryptocurrency, therefore, should be subject to a step-up in basis at the death of its owner.

RPPTL GENERAL SPONSORS

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

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Examining A Recent Case On Fee Sharing:

Estate Of Pounds V. Miller & Jacobs, P.A.

By Allison S. Neumann and Jeffrey A. Baskies, Katz Baskies & Wolf PLLC, Boca Raton, Florida

The recent 4th DCA decision in *Estate of Pounds v. Miller & Jacobs, P.A.*[1] examines the interesting and complicated intersection of the Florida Probate Rules, the Florida Probate Code, and the Florida Rules of Professional Conduct as they relate to (i) the preference in the appointment of a personal representative of an estate, (ii) the relation-back doctrine, particularly with respect to contingency fee agreements, and (iii) entitlement to a personal representative fee for participating in the pursuit of a wrongful death claim.

Background Rules: Prior Law and Perspective:

Preference of Appointment of Personal Representative:

Fla. Stat. § 733.301 (2021) provides the statutory authority regarding who is entitled to preference in the appointment of a personal representative of an estate. Fla. Stat. § 733.301(1)(b) (2021) specifically relates to the appointment of a personal representative of an intestate estate and provides the following order of preference:

- The surviving spouse.
- The person selected by the majority in interest of the heirs.
- The heir nearest in degree. If more than one applies, the court may select the one best qualified.

Fla. Stat. § 733.301(2) (2021) further provides, "[a] guardian of the property of a ward who if competent would be entitled to appointment as, or to select, the personal representative may exercise the right to select the personal representative."

It is important to note a "guardian of the property of a ward" is not the same as a "natural guardian."[2]

As the court held in *In re Estate of Fisher:* "Except to the extent provided in Section 744.301, Florida Statutes, a natural guardian is entitled to the charge only of the person, not of the estate of the ward."[3] The court in *Fisher* found the unmarried mother of the decedent's minor child was not entitled to exercise the right to select a personal representative as provided in Fla. Stat. § 733.301(2) (1985) because she was merely the child's natural guardian and had not been appointed as the child's guardian of the property.[4]

Further, Florida Probate Rule 5.201(b) provides "[b]efore letters shall be issued to any person who is not entitled to preference, formal notice must be served on all known persons qualified to act as personal representative and entitled to preference equal to or greater than the applicant, unless those entitled to preference waive it in writing."

Contingency Fee Agreements in Probate Cases:

In a majority of probate matters, the duties and powers of a personal representative commence upon the appointment of the personal representative. But what happens in the event an individual acts on behalf of an estate, although she has not yet been appointed as the personal representative? In that case, the "relation-back" doctrine has developed to ratify the acts of the personal representative prior to appointment. Fla. Stat. § 733.601 (2021) codifies the relation-back doctrine and provides:

> The powers of a personal representative relate back in time to give acts by the person appointed, occurring before appointment and beneficial to the estate, the same effect as those occurring after appointment. A personal representative may ratify and accept acts on behalf of the estate done by others when the acts would have been proper for a personal representative.

One of the general powers granted to the personal representative of an estate under Fla. Stat. § 733.612 (2021) is the power to "[p]rosecute or defend claims or proceedings in any jurisdiction for the protection of the estate, of the decedent's property, and of the personal representative."[5] In addition, Fla. Stat. § 733.612(19) (2021) grants the personal representative the power to "[e]mploy persons, including, but not limited to, attorneys…." In certain cases, of course, it is beneficial for the personal representative to hire an attorney to represent the estate in a contingency fee agreement.

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The Florida Bar's Rules of Professional Conduct 4.1-5(f)(2) requires every attorney who enters into a contingency fee agreement "do so only where the fee arrangement is reduced to a written contract, signed by the client, and by a lawyer for the lawyer or for the law firm representing the client." The Rule further provides "[n]o lawyer or firm may participate in the fee without the consent of the client in writing."[6]

Rule of Professional Conduct 4.1-5(f)(2) poses issues when an individual is attempting to hire an attorney to represent an estate before the appointment of a personal representative; however, there is some case law on point.

In *Cooper v. Ford & Sinclair P.A.*, the court affirmed an award of a contingency fee to attorneys who successfully settled a wrongful death claim on behalf of the decedent's estate when the individual who hired the attorneys was not yet appointed as the personal representative of the estate, and such individual was later removed as personal representative of an estate.[7] The court in *Cooper* stated:

> The Coopers argue that the contingency fee agreement violates rule 4.1-5(f) because Kelly signed it before she was appointed as [personal representative ("P.R.")] and, moreover, Kelly should never have been appointed P.R. The Coopers conclude that since they were the sole beneficiaries of the decedent's estate, they were the only parties entitled to a P.R. appointment and, since they did not sign the contingency fee agreement, Kelly and her attorneys violated rule 4.1-5(f) and should not be awarded contingent fees. The Coopers cite no authority to support their position that the contingency fee is invalid under rule 4.1-5(f) because Kelly signed the contract before she was appointed P.R. and we cannot find any support for that conclusion.[8]

The court concluded the decision to void the contingency fee agreement is permissive, not mandatory, and depends on whether the estate benefitted from the actions.[9] The court reasoned the estate benefitted from the $100,000 settlement obtained by the attorneys hired by Kelly, especially since it was clearly demonstrated both Kelly and the attorneys had a mutual understanding the client was the decedent's estate, the estate would receive any award from the suit, and Kelly hired the attorneys in her capacity as the prospective personal representative of the estate.[10]

The *Cooper* court further reasoned the *Cooper* case was distinguishable from other cases in which an attorney who has entered into a written contingency fee agreement is discharged for cause because there was no attempt to discharge the attorneys hired by Kelly until after they negotiated the settlement. Therefore, the contingency had already occurred.[11]

So, what happens when an individual hires an attorney to represent an estate in a contingency fee agreement, and such individual is never appointed as the personal representative of the estate? It appears in the event, where a contingency fee agreement does not comply with Florida Bar's Rules of Professional Conduct (i.e., because the individual who hired the attorney does not have authority to act on behalf of the client – e.g., the estate), the agreement is unenforceable. However, in that case, even though an attorney may not be able to receive a contingent fee due to an unenforceable agreement, the attorney would still be entitled to the reasonable value of his or her services on the basis of quantum meruit.[12]

Personal Representative Fees:

Fla. Stat. § 733.617 (2021) codifies the rules regarding compensation of personal representatives under Florida law. Fla. Stat. § 733.617(1) (2021) provides, in part, "[a] personal representative shall be entitled to a commission payable from the estate assets without court order as compensation for ordinary services." Fla. Stat. § 733.617(1) (2021) goes on to state "[t]he commission shall be based on the compensable value of the estate, which is the inventory value of the probate estate assets and the income earned by the estate during administration." Fla. Stat. § 733.617(2) (2021) then provides a formula for determining a commission for ordinary services is "presumed to be reasonable compensation for a personal representative in formal administration," which is calculated as a percentage of the value of the estate. The commission is calculated as follows:

- ***3 percent for the first $1 million ($30,000),***
- ***2.5 percent above $1 million and not exceeding $5 million ($100,000),***
- ***2 percent above $5 million and not exceeding $10 million ($100,000), and***
- ***1.5 percent above $10 million.***

By way of example, if the estate of a decedent domiciled in Palm Beach County was valued at $15 million, the presumptively reasonable personal representative's fee would be $305,000 in commissions, calculated as follows. On the first $10 million, the personal representative commission equals $230,000. On the amount above $10 million (in this example, the $5 million above $10 million), the personal representative receives a commission equal to 1.5% of the value, or $75,000. Added together, those two amounts equal $305,000.

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Facts of the *Pounds* Case:

On July 17, 2020, Reontre'yh Pounds (the "Decedent") died in a motor vehicle accident survived by his minor child, the biological mother of the minor child, D'Vaunyia Greenland ("Greenland"), and his mother, Tijuana Pounds ("Pounds"). The Decedent died intestate and had no surviving spouse.

Pounds hired Miller & Jacobs, P.A. ("Miller & Jacobs") to prosecute a wrongful death claim on behalf of the Estate eleven days after the Decedent's death.

Two days later, Greenland hired the Law Office of Mallorye Cunningham, P.A. ("Cunningham") to prosecute a wrongful death claim on behalf of the estate.

Miller & Jacobs recovered a total of $145,000 in settlement proceeds on behalf of the estate in mid-September 2020. On September 28, 2020, Greenland (represented by Cunningham) filed a petition for administration of the Estate, alleging no person had equal or higher preference than Greenland to be appointed as Personal Representative. The trial court issued letters of administration and appointed Greenland as Personal Representative.

Two days after Greenland was appointed as Personal Representative of the estate, Cunningham sent a demand letter to Miller & Jacobs, claiming (1) Miller & Jacobs lacked the legal authority to represent the Estate because the Personal Representative of the Estate did not sign a written contingency agreement for the firm's services, and (2) any settlement proceeds collected by Miller & Jacobs from the insurance companies were obtained by negligent misrepresentation. Cunningham demanded Miller & Jacobs release the entire $145,000 in settlement proceeds, which Miller & Jacobs rejected.

Greenland, as Personal Representative of the Estate, petitioned the circuit court for an order requiring Miller & Jacobs to either relinquish the settlement proceeds to the Estate or to deposit the funds into the court registry. Greenland asserted in her petition, Miller & Jacobs should not participate in any legal fees as she, the Personal Representative of the Estate, never signed a contingency agreement with the firm to represent the Estate. Greenland alleged Pounds entered into a contingency agreement with Miller & Jacobs without her knowledge or consent.

Pounds responded in opposition to Greenland's petition and moved for a determination of Miller & Jacob's entitlement to attorney's fees and costs. Pounds alleged she had the requisite intent to serve as the Personal Representative of the Estate when she executed the contingency agreement with Miller & Jacobs. Pounds argued (1) as a prospective Personal Representative she could execute a contingency agreement on behalf of the Estate prior to being appointed as the Personal Representative as long as the Estate would be the sole beneficiary of the settlement obtained by the law firm, and (2) it would be unjust enrichment to award Cunningham a contingency fee because the settlement proceeds were obtained through the efforts of Miller & Jacobs.

In addition, Pounds moved to set aside Greenland's appointment as Personal Representative and to revoke the letters of administration issued by the court. Pounds alleged she informed Greenland of her desire to serve as Personal Representative of the Estate, and Greenland petitioned the court for appointment as Personal Representative without providing any notice to her.

The court denied Pound's motion without prejudice because formal notice was not provided to Greenland. Pounds then moved to revoke Greenland's appointment and to appoint Pounds as Personal Representative of the Estate. Pounds alleged in her motion she was the best-suited person to serve as Personal Representative of the Estate and she was afforded preference in appointment of a Personal Representative, as Greenland was not appointed as the guardian of the property of the minor child. Per the court order, that motion was still pending in the circuit court as of the date of the opinion (January 5, 2022).

The circuit court held a non-evidentiary hearing on Greenland's petition for the relinquishment of the settlement proceeds. Both sides presented different versions of whether Greenland consented to Miller & Jacob's entry into the case. Greenland did acknowledge a guardianship had not been established for the property of the minor child. Following the hearing, the trial court entered an order denying in part Greenland's petition for the relinquishment of the settlement proceeds. The court found Miller & Jacobs was operating in good faith and was lawfully retained by Pounds, who intended to serve as Personal Representative of the estate, pursuant to a contingency fee agreement. The court further found Miller & Jacobs secured a $145,000 benefit for the Estate before the court's appointment of a Personal Representative for the Estate. The court determined (1) Miller & Jacobs was entitled to a contingency fee of $48,285 because the requirements of the contingency contract upon which the representation was based had all been met, and (2) Pounds was entitled to 3% of the net benefit of the settlement proceeds for her participation in securing a benefit to the Estate prior to the court's appointment of a Personal Representative.

Issues Examined on Appeal:

The following issues were considered and examined in the appeal.

Was Greenland's Appointment as Personal Representative Valid?

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The crux of the validity of Greenland's appointment as Personal Representative of the Estate was whether Greenland had preference to serve as Personal Representative over Pound. In this case, it was undisputed the Decedent's minor child was the sole heir of the Estate. It was also undisputed Greenland was the natural guardian of the minor child, but she was never appointed as guardian of the property of the child.

Therefore, the court held Greenland was not entitled to exercise the right to select a Personal Representative of the Estate on behalf of the minor child as provided in Fla. Stat. § 733.301(2) (2021), and neither Greenland nor Pounds was entitled to any statutory preference to serve as Personal Representative.

Was Miller & Jacobs' Contingency Fee Agreement Valid?

Relying on *Cooper* and Fla. Stat. § 733.601 (2021), the appellate court stated for a contingency fee agreement with a client to pursue a wrongful death claim before an estate has been opened to be valid, the agreement must either be (1) signed by a person who later becomes the personal representative of the estate, or (2) ratified by the personal representative if the agreement was executed by someone else.

In this case, the issue of whether the contingency fee agreement was valid depended on the lower court's ruling on Pounds' motion to revoke the letters of administration.

On the one hand, if the lower court granted the motion and appointed Pounds as the Personal Representative of the Estate, then Miller & Jacobs would be entitled to enforce the contingency fee agreement.

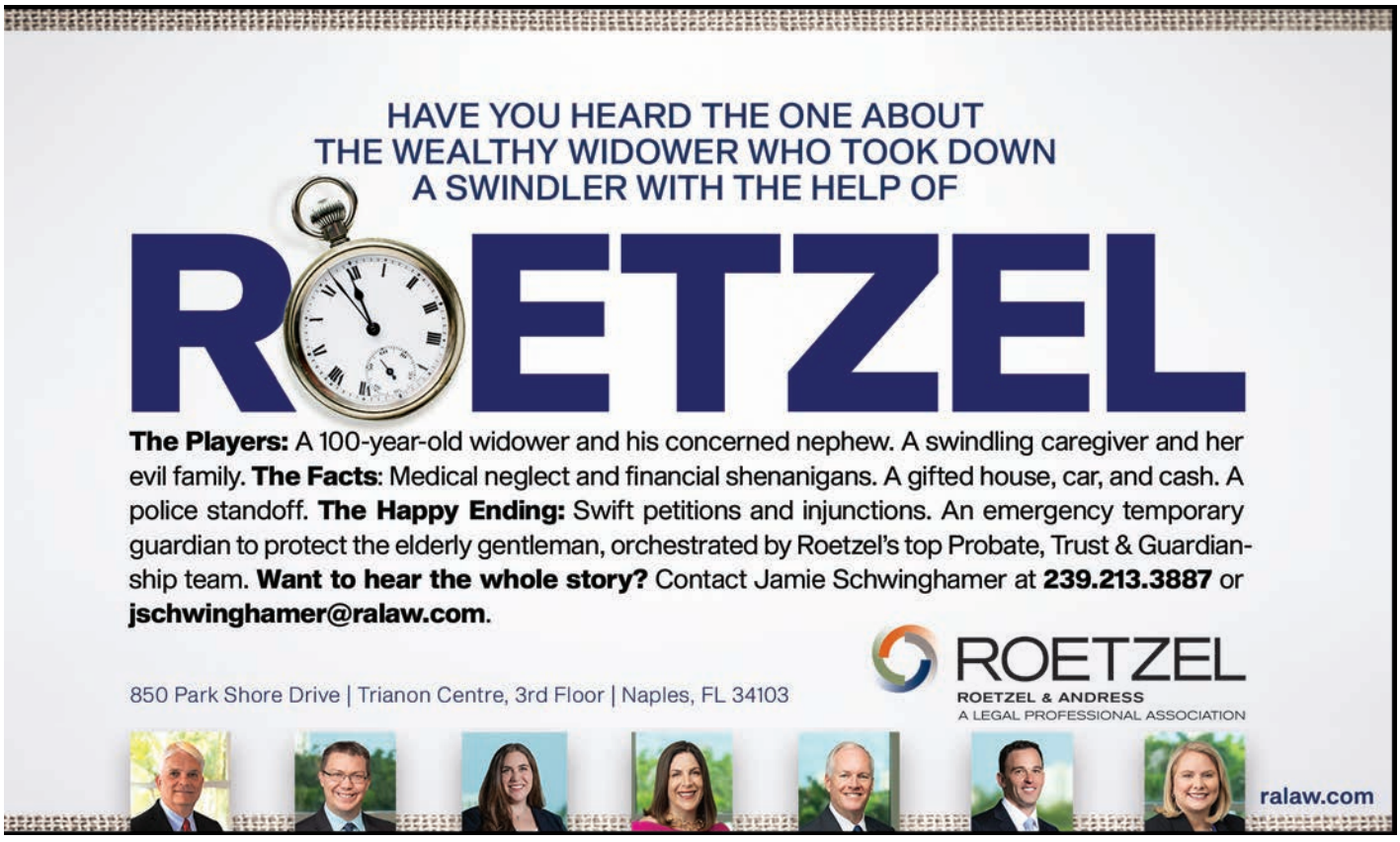
On the other hand, if the lower court denied the motion and Greenland remained the Personal Representative of the Estate, Greenland would need to ratify the contingency agreement for it to be valid. If Greenland remained the Personal Representative and did not ratify the contingency agreement, Miller & Jacobs would still be entitled to collect a quantum meruit fee for the reasonable value of its services in securing the wrongful death settlements on behalf of the Estate, but would not be entitled to a contingency fee.

The court declined to determine whether Cunningham was entitled to any attorney's fees in connection with the wrongful death claim as there was no evidentiary hearing addressing Cunningham's efforts towards the recovery of the settlement proceeds and the circuit court did not rule on the issue.

Was the Award of a Personal Representative Fee to Pound Valid?

The appellate court also found the trial court erred in awarding a personal representative fee to Pounds when she never served as the Personal Representative of the Estate. The court stated "[t]here is no statutory authority for awarding a personal representative fee to someone who has not served as personal representative."[13] The court distinguished *Cooper* from the facts presented in *Estate of Pounds v. Miller & Jacobs,*

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P.A. because while both Kelly (in the *Cooper* case) and Pounds (in the *Pounds* case) procured a benefit to the estate by pursuing a wrongful death claim, Kelly (in the *Cooper* case) served as the personal representative for a period of time while Pounds (in the *Pounds* case) did not.

Therefore, the appellate court found based on the current posture of the case it was premature for the trial court to award Pounds a personal representative fee. If the trial court granted Pounds' motion and if she is appointed as the Personal Representative of the Estate, then she presumptively would be entitled to a personal representative fee.

Conclusion:

There are a few important takeaways from the *Pounds* case.

First, it is important to remember per Fla. Stat. § 733.301(2) (2021), a natural guardian of a minor child is not entitled to exercise the right to select a Personal Representative of the Estate on behalf of the minor child unless the natural guardian has also been appointed as the guardian of the property for such minor child.

Second, it is also important to note entering into a contingency fee agreement with an estate prior to the appointment of a Personal Representative is a risky proposition. Per the holding, a contingency fee agreement may be executed on behalf of the estate before the estate is opened and such agreement may still be considered valid if the agreement is: (1) signed by a person who later becomes the personal representative of the estate, or (2) ratified by the personal representative if the agreement was executed by someone else. However, an attorney entering into a contingent fee agreement with someone who is not yet appointed as the Personal Representative generates the unique risk the person signing will not actually be appointed and the appointed Personal Representative will not ratify the agreement.

In the event that the signer of a contingency fee agreement is not appointed and the personal representative does not ratify the contingency fee agreement (executed by someone not appointed), the attorney or firm may still be entitled to a quantum meruit fee for the reasonable value of its services. However, it is presumed most contingent fee attorneys will prefer to avoid having to fight for a quantum meruit award.

Third, the *Pounds* case presents a reminder for an individual to be awarded a personal representative fee for procuring a benefit to the estate, the individual must actually be appointed as the personal representative of the estate for some period of time.



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Endnotes

1 *Estate of Pounds v. Miller & Jacobs, P.A*, 2022 WL 39211 (Fla. 4th DCA January 05, 2022 Slip Copy).
2 *See In re Estate of Fisher*, 503 So. 2d 962, 964 (Fla. 1st DCA 1987).
3 *Id.*
4 *Id.*
5 Fla. Stat. § 733.612(20) (2021).
6 R. Regulating Fla. Bar 4.1-5(f)(2).
7 *Cooper v. Ford & Sinclair P.A.*, 888 So. 2d 683, 684-90 (Fla. 4th DCA 2004).
8 *Id.* at 689-90.
9 *Id.* at 690.
10 *Id.*
11 *Id.*
12 *Chandris, S.A. v. Yanakakis*, 668 So. 2d 180, 186 n.4 (Fla. 1995).
13 *Pounds* at 9.



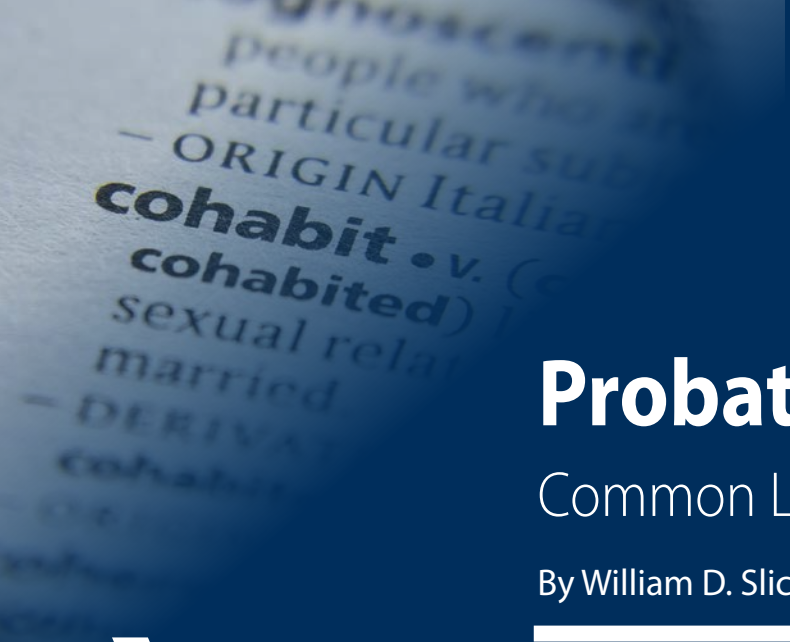
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Probate Blindside:

Common Law Marriage Redux

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

In June, 2021, the Uniform Law Commission published a draft for a Uniform-Cohabitants' Economic Remedies Act which adopts liberal recovery rights for cohabitants. It allows for recovery on written contracts, oral contracts, implied contracts, and other equitable actions for both division of assets and palimony.[1] These claims may be made against the other party or the other party's estate.[2] This may be great news for a younger woman who has entered into a cohabitation relationship and spent a number of years taking care of the household and raising the children outside of marriage. However, this proposed act is a disaster for older citizens who have lived through a divorce or two, or outlived one or two spouses.

These older citizens are intentionally not entering into marriage so that they can preserve their assets for their children or other relatives. This Act would have the effect of imposing on a senior citizen, in contravention to what their likely wishes are, what amounts to a Cohabitation Agreement obligating a party to give one-half of their assets to the other cohabitant (and maybe palimony as well) if they separate, and what amounts to a Last Will & Testament that gives the cohabitant one half of a party's assets on death. This is bringing back common law marriage without calling it that. But, to paraphrase the Bard, a common law marriage by any other name is still a common law marriage.[3]

In those jurisdictions where it is still recognized, a common law marriage, as distinguished from a ceremonial marriage, can be established in various ways. The best evidence is the testimony of the contracting parties, or those present when the couple said they were marrying. But the marriage can also be established by proof of cohabitation and general repute among the neighbors and acquaintances with whom the parties associated. It must have been more than a mere sojourn or living together for a short time.[4]

Although we trace much of our common law to England, we did not acquire the concept of common law marriage from there.[5] It appears that the first case of common law marriage has been traced to an 1809 New York case.[6]

It has been stated that the reason for recognizing common law marriages grew out of the early "spareness of settlements, difficulty of travel, inaccessibility of ministers or officers given the right to perform the ceremony, and unfamiliarity, through

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illiteracy."[7] However, as those conditions disappeared with the growth of cities, the development of improved roads, more county seats and churches, and a school education available to all, many states stopped recognizing common law marriages. In addition, the courts became concerned about fraud and perjury.[8] By 1966, only 20 states recognized common law marriages.[9] By 2021, that number had decreased to seven.[10] In the absence of an agreement providing otherwise, neither party to a common law marriage, by reason of cohabitation alone, acquires any rights in the property of the other party.[11]

While the number of common law marriages decreased, the number of marriage dissolutions increased and more people opted to just cohabitate. Since 2007, the number of cohabitating adults aged 50 or older has grown by 75 percent.[12] Those aged 50 or older who have been through a divorce make up 55 percent of those cohabitating.[13]

While this cohabitating trend has been going on, most courts have been moving in a direction that allows for the splitting of assets or the granting of palimony between cohabitating parties (to date, Florida does not recognize palimony[14]). Some state courts have allowed a co-habitant to recover on an oral contract.[15] Others have allowed recovery on an implied contract based on surrounding circumstances such as the length of the time that the parties lived together and each parties' contribution to the relationship.[16] Some have gone even further and have allowed recovery, not only on an oral contract or on an implied contract, but have also allowed recovery on equitable doctrines such as unjust enrichment, quantum meruit, constructive trust, or donative intent.[17] Florida is one such state.[18]

On the other hand, some courts have not allowed any recovery at all on the premise that allowing an action between unmarried cohabitants is either against public policy or basically reinstitutes common law marriage.[19] This concern about reinstituting common law marriage was also put forth by one of the early commentators.[20]

In light of this, and of the work of the Uniform Law Commission, it may be that the best service that an attorney can provide a client who is considering cohabitation is to bring out a pre-marital agreement and change the wording to pre-cohabitation agreement. Anywhere in the agreement that references a future marriage, should be changed to 'future co-habitation'. Anywhere the agreement talks about dissolution of marriage, it should be changed to termination of the co-habitation. Otherwise, one may think he or she is avoiding a marriage, only to find out, when the relationship fails, that they are, for many purposes, in one after all.

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Endnotes

1 "Palimony" is a term coined by actor attorney Marvin Mitchelson to describe his client's case against actor Lee Marvin in 1977.

2 National Conference of Commissioners on Uniform State Laws, Uniform Cohabitants' Economic Remedies Act Draft June 14, 2021.

3 Or as the poet James Whitcomb Riley put it, "When I see a bird that walks like a duck and swims like a duck and quacks like a duck, I call that bird a duck."

4 *LeBlanc v. Yawn*, 99 Fla. 328, 126 So. 789 (1930).

5 *In Re Estate of Soeder*, 7 Ohio App 271 (1966).

6 *Fenton v. Reed*, 4 Johns (N.Y.) 52 (1809).

7 *McClish v. Rankin*, 153 Fla. 324, 14 So. 2d 714 (1943) citing *McChesney v. Johnson*, 79 SW 2d 658 (1934).

8 *Anderson v. Anderson*, 235 Ind. 113, 131 NE 2d 301 (1956).

9 In re Estate of Soeder, 7 Ohio App 271 (1966).

10 Worldpopulationreview.com/state-rankings/common-law-marriage-states.

11 *Cargill v. Hancock*, 92 Idaho 460 (444 P. 2d 421 (1968); *Humphries v. Rineland*, 67 Wash 2d 376, 407 P. 2d 967 (1965); *Smith v. Smith,* 255 Wis. 96, 38 NW 12 (1949); *Stevens v. Anderson*, 75 Ariz. 331, 256 P. 2d 715 (1953); *Vallera v. Vallera*, 21 Cal. 2d 681, 134 P. 2d 761 (1943).

12 Pewresearch.org, number of U.S. adults cohabitating with a partner continues to rise, especially among those 50 and older.

13 *Ibid.*

14 *Taylor v. Davis*, 524 So. 3d 570 (Fla. 1st DCA 2021).

15 *Levar v. Elkins*, 604 P. 2d 602 (Alaska 1980); *Cook v. Cook*, 142 Ariz. 571, 691 P. 2d 664 (Alaska 1984); *Armao v. McKenney*, 218 So. 3d 481 (Fla. 4th DCA 2017); *Donovan v. Scuderi*, 51 Md. App. 217, 443 A. 2d 121 (1982); *Margolies v. Hopkins*, 401 Mass. 88, 514 A. 2d 1079 (1987); Tyranski v. Piggins, 44 Mich. App. 570, 205 N.W. 2d 595 (1973); Kinkenon v. Hue, 207 Neb. 698, 301 N.W. 2d 77 (1981); Tapley v. Tapley, 122 N.H. 727, 449 A. 2d 1218 (1982); *Koziowski v. Koziowski*, 80 N.J. 378, 403 A. 2d 902 (1979); Dominguez v. Cruz, 95 N.M. 1, 617 P. 2d 1322 (1980); *Latham v. Latham*, 274 Ore 421, 547 P. 2d 144 (1976); *Mullen v. Suchko*, 278 Pa. Super. 499, 421 A. 2d 310 (1980); *Kinnison v. Kinnison*, 627 P. 2d 594 W.Y.O. (1981).

16 *Bishop v. Clark*, 54 P. 3d 804 (Alaska 2002); *Boland v. Catalano*, 202 Conn. 333 521 A. 2d 142 (1987); *Hay v. Hay,* 100 Nev. 198, 678 P. 2d 672 (1984); *In Re Estate of Thorton,* 81 Wash. 2d 72, 499 P. 2d 864 (1972); *In Matter Of Estate of Steffes*, 95 Wis. 2d 490, 290 N.W. 2d 697 (1980); *Watts v. Watts*, 137 Wis. 2d 506, 405 N.W. 2d 305 (1987).

17 *Bramlett v. Selman*, 268 Ark. 457, 597 S.W. 2d 80 (1980); *Marvin v. Marvin*, 18 Cal. 3, 660, 134 Cal. Rptr 815, 557 P. 2d 106 (1976); *Salzman v. Bachrach*, 996 P. 2d 1263 (Colo. 2000); *Mason v. Rostad*, 476 A. 2d 662 (D.C. App. 1984); *Dietrich v. Winters*, 798 So. 2d 864 (Fla. 4th DCA 2001); *Glasgo v. Glasgo*, 410 NE 2d 1325 (Ind. App. 1980); *Carlson v. Olson*, 256 N.W. 2d 249 Minn 1977; *Doe v. Burkland*, 808 A. 2d 1090 (RI 2002); *Omer v. Omer*, 11 Wash. App. 386, 523 P. 2d 957 (1974); *Hofstead v. Christie*, 240 P. 3d 816 (Wyo. 2010).

18 *Dietrich v. Winters*, *supra*.

19 *Rehak v. Mathis*, 239 Ga. 541, 238 SE 2d 81 (1997); *Blumenthal v. Brewer*, 2016 Il. 118781, 2010 Ill. Dec. 289, 69 N.E. 3d 834 (2016); *Hewitt v. Hewitt*, 77 Ill. 2d 49, 31 Ill. Dec. 827, 394 N.E. 2d 1204 (1979); *McCall v. Frampton*, 99 Misc. 2d 159, 415 N.Y.S. 2d 752 (1979); *Seward v. Mentrap*, 87 Ohio App. 3d 601, 622 N.E. 2d 756 (1993).

20 Clark *The New Marriage* 12 Willamette L. J. 441 (1976).

Fiduciary Receipts from Entities: Key Principal and Income Rules and Practical Considerations

By Jolyon D. Acosta, Esq., Bush Ross, P.A., Tampa, Florida

Entities play an important part in a comprehensive estate plan. While corporations and other entities have long been used to consolidate capital and engage in commerce, the frequency and use of such entities has grown in helping families manage more complex asset portfolios. It is now common for entities to own valuable property, consolidate and maintain control of family businesses, segregate potential liabilities, and provide vehicles to facilitate novel transactions.[1] Fiduciary arrangements, generally estates and trusts, commonly hold interests in entities. The rules governing distributions that a fiduciary receives from an entity—and, in particular the principal and income allocation rules—are important, as they often determine "who gets what" from the fiduciary.[2] The income and principal allocation rules are either set forth in the terms of the governing instrument[3] or, perhaps more commonly, in the underlying state law income and principal act.[4] The rules governing a fiduciary's receipt from an entity overlay the basic principles of income and principal and may alter the ultimate distributions to the beneficiaries.

A different result may occur if, as opposed to indirect ownership in an entity, a fiduciary owns an asset or conducts a business directly. A fiduciary directly owning an asset or conducting a business may account separately for the activity and pass the results along to the income and principal beneficiaries.[5] For example, consider a trust that owns an apartment complex and engages in rental activities. The trustee may choose to account for the complex as a separate business, match income and expenses, retain a reasonable reserve for depreciation, and then allocate the results to the income and principal beneficiaries. If the apartments are, however, owned by an entity such as an LLC, the apartments may be subject to additional entity-specific rules. For example, if the entity makes no actual distributions there will be no allocations to income which complicates the fiduciary's obligation to be impartial to both the income and principal beneficiaries.

Nonetheless, there are various reasons to favor a fiduciary's indirect ownership of assets through entities. Such reasons include limiting liabilities associated with the underlying activity, allowing more flexible ownership structures,[6] and reaping the economic and tax benefits of long-term preservation of capital (for example, a long-term generation-skipping transfer (GST) tax-exempt trust favoring retention of principal to maximize the benefit of a prior allocation of GST tax exemption). The benefits are more obvious for long-term discretionary trusts where the income and principal beneficiaries may be the same individuals (which is a growing trend in modern estate planning).[7] Fiduciaries and beneficiaries have tools at their disposal to utilize the benefits of entities while at the same time respecting the underlying economic arrangement and balance between the income and principal beneficiaries.

UPIA and Florida Law

The Uniform Principal and Income Act (UPIA, referred to in this article as the 1997 Uniform Act), continues to govern in the majority of U.S. jurisdictions, including Florida. As is the case with most jurisdictions, Florida's version of the 1997 Uniform Act contains some revisions. Section 401 of the 1997 Uniform Act addresses the character of receipts from entities. The general rule under the 1997 Uniform Act provides that all money received from an entity is allocated to income.[8] However, there are various exceptions to this rule. Money received in a non-pro rata redemption of all or part of the fiduciary's interest in the entity is allocated entirely to principal.[9] This exception makes sense, as the fiduciary's financial position has remained constant - the only change that has occurred is the line items on the trust's balance sheet (cash received in exchange for membership units). Money received in a partial liquidation, which is similar to a redemption, is also allocated entirely to principal.[10] Money received from a regulated investment company or real estate investment trust (RICs and REITs) is bifurcated; the capital gain dividend portion being allocated to principal, with the remainder allocated to income.[11]

The Florida Act, although modeled after the 1997 Uniform Act, materially deviates with respect to entity distributions, bifurcating certain partial liquidations, and eliminating the bifurcation for RICs and REITs. Under the Florida Act, a receipt from an entity exceeding the twenty percent (20%) gross asset value threshold test (and therefore qualifying as a receipt in partial liquidation) is split between income (as to a cumulative three percent (3%) annual return) and principal (as to the remaining money received).[12] This mathematical calculation provides the fiduciary with some objective guideposts and attempts to balance the interests of the income and principal beneficiaries as compared to the 1997 Uniform

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Act's general "all to principal" approach. Florida recognizes that a partial liquidation may be comprised of some retained but undistributed earnings. The rule attempts to true up the income beneficiaries. However, Florida's approach is somewhat synthetic and rigid, and external concepts may be necessary and appropriate to allocate more (or less) of a receipt to the income beneficiary. While the 1997 Uniform Act considered the tax treatment of RICs and REITs, the Florida Act focuses more on the economic substance of the return of capital, foregoes the bifurcation, and allocates all money received constituting capital gain within the entity to principal.[13]

The Florida Act includes special rules not contemplated in the 1997 Uniform Act which may override the rules set forth above. Large distributions from public entities are specifically addressed, and similar to partial liquidations of private entities, use a cumulative three percent (3%) annual return concept to allocate a portion of the receipt to income and the remainder to principal.[14] However, instead of using the private company gross asset value threshold test, for public entities a ten percent (10%) of the fiduciary's interest in the entity threshold is used, as such value will be available from various sources tracking public markets.[15] Further, perhaps to curb the risk of a private trustee manipulating the entity rules, the Florida Act includes special rules for individual private trustees holding significant interests in investment entities.[16] "Private trustee" and "investment entity" are terms defined in the Florida Act.[17] Under this framework, a three-year lookback is applied to current year receipts from an entity, and the fiduciary must consider the underlying business activities, as if the entity did not exist, to determine the entity's appropriate allocations between income and principal. Thus, Florida currently recognizes that in certain instances traditional income and principal allocation rules should be applied and entity ownership should be ignored.

UFIPA

The Uniform Law Commission published the Uniform Fiduciary Income and Principal Act in 2018, commonly referred to as "UFIPA" (the "2018 Uniform Act").[18] As of March 2022, the 2018 Uniform Act has been enacted in five states.[19] Florida may, in the future, pursue enactment. The 2018 Uniform Act was drafted to adapt to the changing design of trusts; including longer-term and fully discretionary trusts.[20] The 2018 Uniform Act deviates substantially from both the 1997 Uniform Act and the Florida Act. It retains the general rule that money is income, and follows the 1997 Uniform Act rules regarding RICs and REITs.[21] However, it forgoes the strict twenty percent (20%) mathematical tests in determining partial distributions and instead adopts a broader facts and circumstances analysis, applied by the fiduciary in its discretion, to determine if, and the manner in which, a partial liquidation (termed a capital distribution in the 2018 Uniform Act) should be allocated between income and principal.[22] The 2018 Uniform Act's focus on discretion and flexibility is in line with the goals of providing a more flexible framework to allow the fiduciary to exercise judgment in balancing the interests of the beneficiaries within the entity receipt rules.[23] Like the 1997 Uniform Act, the 2018 Uniform Act does not specifically address distributions from public entities or private trustees holding significant interests in investment entities (although its rules are likely broad enough to address these occurrences).

Practical Considerations

Fiduciaries and beneficiaries should work together to manage the entity ownership rules. As set forth above, the Florida Act includes special rules to attempt to better allocate receipts from entities to the income and principal beneficiaries. However, for various reasons such allocations may not be sufficient. Recall that income allocations require an actual distribution of money (i.e., cash) from the entity. Further, Florida's cumulative three percent (3%) annual return for partial liquidations may be insufficient given recent market returns. Entities retaining earnings for reserves, long-term investments, or various other needs may disadvantage the income beneficiaries. The income and principal rules include various options for the parties to consider.

The 1997 Uniform Act introduced the power to adjust, whereby the fiduciary may adjust between income and principal to better balance the interests of the beneficiaries.[24] For example, if a three percent (3%) annual return is an insufficient allocation to income, the fiduciary may consider using the power to adjust to shift principal to income to increase the income return to an appropriate level. Practically, it may be difficult for a fiduciary to exercise the power to adjust under the 1997 Uniform Act or the Florida Act. Both Acts impose a strict standard that the fiduciary cannot otherwise comply with its duty of impartiality. The 2018 Uniform Act significantly broadens the fiduciary's ability to exercise the power to adjust, providing greater flexibility to the fiduciary.[25]

The Florida Act also provides specific rules allowing conversion to a unitrust.[26] Upon proper compliance with the terms of the statute, the fiduciary may convert to a unitrust generating an annual income allocation of three percent (3%) to five percent (5%), even if the governing instrument is silent as to the implementation of a unitrust. In certain circumstances, the income or remainder beneficiaries may petition the court to convert to a unitrust.[27] This is another instance where Florida's specific rules promote the balance between the income and principal beneficiaries. While the 1997 Uniform Act did not include a unitrust concept, the 2018 Uniform Act does, suggesting greater acceptance of the unitrust concept.[28]

In addition to substantive law, the parties may be tempted to manage the facts of a situation to generate a specific result. While not always nefarious, if not accompanied by

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independent economic considerations the parties should use great caution. For example, a fiduciary could attempt to plan around Florida's safeguards by carefully managing the twenty percent (20%) gross asset value test, perhaps favoring the income beneficiary if such test continues to fall short of the twenty percent (20%) threshold (in which case none of the distribution would be in partial liquidation and the default rule of "all to income" would control). Alternatively, the parties could use an independent trustee to nullify the private trustee/investment entity look-through rules, avoiding allocations to income and favoring the principal beneficiaries.

A common scenario for abuse is an entity retaining earnings and refraining from making cash distributions to its owners. As there are no cash distributions, there will be no income allocations, and the principal beneficiaries may receive an outsized benefit. An aggrieved income beneficiary may need to look outside the income and principal rules to increase the income allocation.[29] If the income beneficiary owns a direct interest in the entity, he or she may consider asserting rights as an owner under the applicable operating agreement or underlying state law.[30] Such beneficiary may need to focus on the fiduciary duties imposed upon the entity's officers.[31] A beneficiary not holding a direct interest may be forced to pursue a multi-layered fiduciary claim; for example, attempting to motivate a trustee to assert its rights as an owner of the entity to promote cash distributions, which can then be allocated (in whole or in part) to income depending on the structure of the distribution.

Conclusion

Entities are an important component of a comprehensive estate plan. With their many benefits, entities also involve additional considerations of fiduciary ownership and the manner in which distributions should be allocated between the income and principal beneficiaries. By understanding the entity rules well, the fiduciary and the beneficiaries can work together to avoid unintended results and improve the fiduciary's administration of its assets.



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Endnotes

1 Berdychowski, Bernadette, *This Tampa Bay Home is Being Sold as an NFT*, Tampa Bay Times, (Feb. 7, 2017), https://www.tampabay.com/news/real-estate/2022/02/04/this-tampa-bay-home-is-being-sold-as-an-nft/.

2 Traditionally the term "principal and income" has been used. However, the 2018 Uniform Act (defined below) uses the term "income and principal," placing "income" first. 2018 Uniform Act, p. 4. For consistency in this article, future references use the term "income and principal."

3 *See, e.g.*, Fla. Stat. § 738.804 (2021).

4 As used in this article, "1997 Uniform Act" or "UPIA" refers to the Uniform Principal and Income Act, drafted by the National Conference of Commissioners of Uniform State Laws in 1997 and last amended or revised in 2008. "Florida Act" refers to the Florida Uniform Principal and Income Act (Fla. Ch. 738 (2001)). "2018 Uniform Act" or "UFIPA" refers to the Uniform Fiduciary Income and Principal Act, drafted by the National Conference of Commissioners of Uniform State Laws in 2018.

5 Fla. Stat. § 738.403 (2021).

6 For example, consider the apartment complex referenced above; its ownership and control via an LLC may allow various preferences and rights among the owners that would be difficult to implement without the use of an entity.

7 2018 Uniform Act, p. 1.

8 1997 Uniform Act § 401(b); Fla. Stat. § 738.401(2).

9 1997 Uniform Act § 401(c)(2). Florida follows the same rule. Fla. Stat. § 738.401(3)(b) (2021).

10 1997 Uniform Act § 401(c)(3).

11 1997 Uniform Act § 401(c)(4).

12 The income allocation may be greater than the three percent return in the event of a flow-through entity. For flow-through entities, the income allocation is the greater of the three percent annual return or the fiduciary's share of the entity's flow-through income. Fla. Stat. § 738.401(6)(b) (2021). The flow-through income concept is also present in the 1997 Uniform Act. 1997 Uniform Act § 401(e).

13 Fla. Stat. § 738.401(3)(d) (2021).

14 Fla. Stat. § 738.401(3)(e) (2021).

15 *Id.*

16 Fla. Stat. § 738.401(7) (2021).

17 *Id.*

18 For additional information on UFIPA, see its landing page on the Uniform Law Commission website, https://www.uniformlaws.org/committees/community-home?CommunityKey=1105f9bb-eb93-4d4d-a1ab-a535ef73de0c.

19 As of March 2022, UFIPA has been enacted in Utah, Washington, Kansas, Colorado, Arkansas, and Virginia. It has also been introduced in Virginia, Tennessee, Missouri, and California. *Id.*

20 2018 Uniform Act, p. 1.

21 2018 Uniform Act § 401(c)(1), (d)(4).

22 2018 Uniform Act § 401(e).

23 2018 Uniform Act, p. 53.

24 1997 Uniform Act § 104; Fla. Stat. § 738.104 (2021).

25 2018 Uniform Act § 203.

26 Fla. Stat. § 738.1041 (2021).

27 Fla. Stat. § 738.1041(8) (2021).

28 2018 Uniform Act §§ 301-309.

29 Practically, it may be difficult for the beneficiaries to learn of an entity's success, as the fiduciary's standard accounting disclosures may include only the entity's carrying value, which may be dated. The fiduciary may want to consider periodically obtaining an appraisal of its interest in the entity and provide it to the beneficiaries, in particular if there has been significant growth in the entity's value. Carol A. Cantrell and F. Gordon Spoor, Fiduciary Accounting Answer Book, Q3:12 (2019 Edition).

30 *See, e.g.*, under the Florida Revised Limited Liability Company Act, Fla. Stat. § 605.0410(2), (3) (2021).

31 Fla. Stat. § 605.04091 (2021).

Donor-Advised Funds – The Fastest Growing Charitable Vehicle

By Betsy Pennewill, General Counsel,
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Selecting the appropriate charitable estate plan for your client is as important as choosing the charitable causes and organizations they wish to support. Private foundations are popular among affluent donors and are powerful philanthropic vehicles; however, they have administrative burdens that are costly and are time-consuming to maintain. Donor-advised funds (DAFs) offer certain benefits not available to private foundations. They are simple to establish. Contributions to DAFs are offered more generous income tax deductions than gifts to private foundations.[1] There is no excise tax imposed on the investment income of a DAF, and donors may retain anonymity concerning both contributions and grant-making. Like private foundations, DAFs promote and sustain inter-generational giving amongst families. While each year private foundations are required to grant out five percent (5%) of the fair market value of their assets,[2] DAFs have no regulatory payout requirements, which allows donors to be strategic in long-term grant-making.

DAFs are currently the fastest-growing charitable vehicle in the U.S., with more than one million individual donor-advised fund accounts in existence today.[3] Charitable contributions to donor-advised funds were at an all-time high in 2020, totaling $47.85 billion, a 20.6% increase from 2019 value of $39.96 billion.[4] DAFs are popular because they encourage charitable giving and help build philanthropy among communities big, small, rural, and urban across the country. DAFs enable donors of all financial means to expand their giving capacity and sophistication in philanthropy over time.

A donor-advised fund is a fund or account, owned and controlled by a sponsoring organization, and is separately identified by reference to contributions of a donor or donors who retain advisory rights over the account.[5] To qualify as a DAF, a donor or their designee must have or must reasonably expect to have advisory privileges regarding the distribution or investment of the assets held in the DAF by reason of the donor's status as a donor.[6] The sponsoring organization, a 501(c)(3) tax-exempt organization generally engaged in grant-making activities, maintains a separate account balance for each DAF and donors receive the highest income tax deduction offered to public charities for contributions made to a DAF.[7] It is a simple charitable vehicle with low costs and minimal administrative burdens to maintain.

History

DAFs have been in existence since the 1930s, when the first donor-advised fund is reported to have been created at the New York Community Trust around 1931.[8] However, DAFs were not recognized formally by the Internal Revenue Code until the Pension Protection Act of 2006.[9] Community Foundations were the first charitable organizations to sponsor DAFs, to encourage donors to engage in philanthropy to benefit their local communities. Community Foundations qualify as publicly supported charities under IRC Sections 509(a)(1) and 170(b)(1)(A)(vi)[10] and have long-term goals of engaging with many respective donors to carry out the charitable interests of the donors. Community foundations have deep roots in the communities they serve and have staff who help donors and their professional advisors realize the maximum tax benefits

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allowed by law and measure the impact from the donors grant-making.

In the 1990s, for-profit financial investment firms began establishing affiliated nonprofit organizations to hold DAF accounts under their corporate umbrella. These commercial DAFs hire the affiliated for-profit investment firm to manage the investment of the assets held in the donor-advised fund accounts for a fee. The for-profit investment firms keep the assets under management by acting as the investment advisors to the DAF accounts. Fidelity Investments Charitable Gift Fund was listed as the largest nonprofit organization and largest DAF sponsor with $10.7 billion in assets in 2020.[11] Today DAFs exist at different types of charitable sponsors, such as universities, hospitals, and faith-based organizations, in addition to community foundations, and charities affiliated with corporate entities.

Legislative Regulations on DAFs

Presently there are few legislative regulations for DAFs. Donors may not receive more than an incidental benefit from grants made from a DAF [12] and DAF grants or funds cannot provide the donor or directors with an excess benefit as defined under IRC 4958.[13] Examples of incidental and excess benefits are shared below. These restrictions apply to the donor, an advisor to the DAF, family member of the donor, or an entity to which the donor holds a 35% or more ownership interest in the entity.[14]

Further, donors must give up complete control of the assets contributed to the DAF by making an irrevocable gift to the DAF account and may not hold any material restrictions with regard to grant-making from the DAF.[15] For instance, the donors cannot include a restriction on the gift retaining legal control over the investment or grant-making activity of the DAF. Donors may retain advisory privileges with respect to grant distributions from assets in the DAF account.[16] If permitted by the sponsoring organization, a donor may appoint successor advisors to advise grants from the DAF and may select an independent investment advisor to manage the assets held in the DAF in accordance with the sponsoring organization's investment policy. The independent investment advisory firm will keep the assets under management on behalf of the sponsoring organization that legally owns the DAF account.

A donor may not use their DAF to subsidize a ticket for them to attend an event, gala, or dinner of a charity or to subsidize the deductible portion of a membership fee charged by the charity.[17] These would be considered more than incidental benefits as explained above. Any grant, loan, compensation, or similar payment from a DAF to a person who with respect to such fund is a donor, advisor to the fund, or person related to a donor or advisor is automatically treated as an excess benefit transaction under IRC 4958, with the entire amount

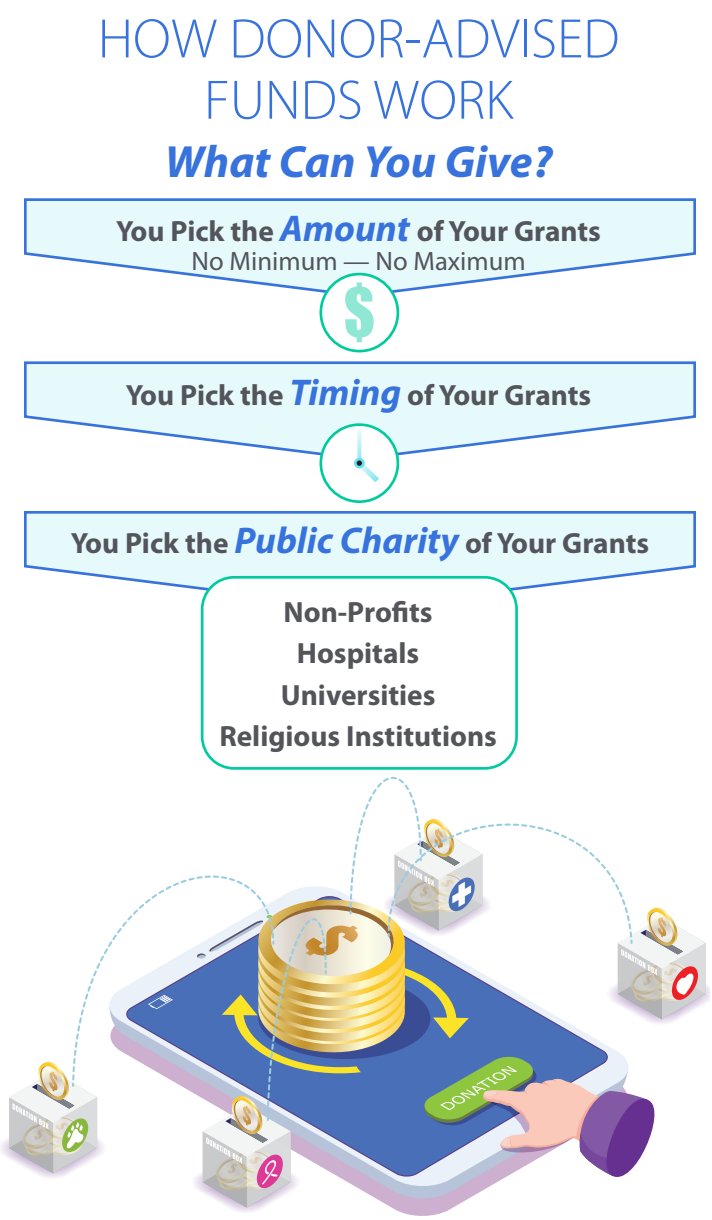
Donor-Advised Funds (DAFs) Offer Certain Benefits Not Available to Private Foundations:

- *They are simple and cost-effective to establish.*
- *Contributions to DAFs are offered more generous income tax deductions than gifts to private foundations.*
- *There is no excise tax imposed on the investment income of a DAF*
- *Donors may retain anonymity concerning both contributions and grant-making with a DAF.*
- *While each year private foundations are required to grant out five percent (5%) of the fair market value of their assets, DAFs have no regulatory payout requirements, which allows donors to be strategic in long-term grant-making.*

Disadvantages of DAFs Compared to Private Foundations

- *No fees or expenses may be taken or assessed against the DAF fund account by grant advisors of the DAF.*
- *DAF accounts are generally subject to the sponsoring organization's Investment Policy for investment management of the DAF's assets.*

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paid to any such person treated as the amount of the excess benefit.[18] Sponsoring organizations should not hire investment firms where a donor or related party works or has ownership in such firm to manage the assets in the DAF.[19]

Criticism of DAFs

Over the years, DAFs have been criticized for having few regulations[20] and as a result, critics have influenced lawmakers to exempt DAFs from certain charitable incentives. For example, The Pension Protection Act of 2006[21] provided for the qualified charitable distribution (QCD) as a temporary provision which allowed donors who are 70 ½ and older to distribute up to $100,000 to any public charity from the donor's individual retirement account (IRA) in lieu of taking an equal amount as their required minimum distribution for the tax year. Yet the Act had qualifying language which prohibited a QCD or IRA rollover gift from being distributed to a DAF. While QCDs were finally made permanent under The PATH Act of 2015,[22] the qualifying language remained. Other temporary charitable incentive laws passed over the years also copied the qualifying language and excluded the charitable incentives from being gifted to a DAF.[23] This is confusing to donors who wish to make QCD distributions to their DAFs for further strategic grant-making decisions.

Critics question whether DAFs serve as instruments to reduce taxes for the wealthy and are used to house charitable dollars which have no regulations to require that the money is granted out.[24] In 2021, the Accelerating Charitable Efforts Act (ACE Act) bill[25], was co-sponsored by both the Senate and the House of Representatives. The ACE Act proposes to modify existing regulations relating to DAFs by requiring, among other things, a payout rate for certain DAFs similar to the required payout rate for private foundations,[26] and a termination requirement on certain qualified DAFs.[27]

While the criticism of DAFs seems to be rooted in a positive goal to ensure charitable organizations receive funding as quickly as possible, sponsoring organizations of DAFs are concerned the ACE Act and other reform legislation will reduce philanthropic giving and the flow of charitable dollars and will restrict the ability of generous donors to respond quickly to crises such as the COVID-19 pandemic and future economic downturns.[28] Even though the needs right now are visible and urgent, communities need a healthy mix of funds to address current and future challenges.

Long-term challenges, such as creating accessible affordable housing, education across generations, and equitable health care resources for all residents, require a committed and patient approach to grant-making. Endowed DAFs and DAFs held for more than three years allow donors to build up DAF assets which are critical to our communities. Long-term DAFs provide capital to address emerging community needs and multiply the volume and impact of the original donation. It is shortsighted to assume future generations of donors will be there to address long-term issues.[29]

Many disagree there is truly a problem which exists among DAFs. In 2011, the Department of the Treasury Report to Congress on DAFs[30] determined it could not recommend further regulations for DAFs concerning a mandated distribution payout rate. Further, the National Philanthropic Trust 2021 Donor Advised Fund Report[31] found DAF donors, responding to the COVID pandemic crisis, granted out at record levels in 2019 and 2020.[32] Grants from DAFs to public charities totaled $34.67 billion in 2020, representing 27% increase from $27.29 billion in 2019, and the overall DAF payout rate was 23.8%, a record payout rate which is substantially higher compared to the mandated private foundation payout rate.[33]

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The report also found that while private foundations hold nearly seven times the assets held by DAFs, grants from DAFs to public charities in 2020, equated to 54.5% of the estimated $63.60 billion granted out by private foundations.

Secondly, many are concerned whether the proposed flow of grants from DAFs subject to forced grant-making will not adequately address the inequities in our communities. Sponsoring organizations of DAFs are concerned that the "regulated" donors will revert to granting to long-term, institutional nonprofit organizations when forced to make larger grants and the time for strategizing has been shortened. Grass-root organizations will likely suffer if DAFs are further regulated because donors prefer to use DAF grant-making to support grass-root organizations in order to have strategic oversight by the sponsoring organization concerning the use and measured impact of the grant dollars.

Community foundations, the sponsoring organizations first to create DAFs, self-regulate under the National Standards for U.S. Community Foundations.[34] To be accredited through National Standards for U.S. Community Foundations, a community foundation must have certain board-approved policies and procedures which direct their day-to-day operations to foster excellence in community philanthropy. A community foundation must have an inactive donor-advised fund policy to ensure DAFs are not sitting dormant for more than a certain number of years and provide variance power to the foundation's board of directors to make grants from a dormant DAF.

DAFs are flexible grant-making tools which can react quickly to changes in community needs for relief and recovery efforts, and collectively serve as a perpetual resource to support communities in times of crisis. DAFs build upon the common good across communities and leverage community leadership through private philanthropy. Communities need a healthy mix of short-term and long-term DAFs to address current and future challenges. Legislative reform could restrict the ability for generous donors to respond quickly to future crises and economic downturns.

Endnotes

1 See I.R.C. § 170 which sets forth rules for determining the amount that may be deducted for contributions of certain types of property.

2 The qualifying distribution rules are set forth in I.R.C. § 4942 and accompanying regulations. Certain taxes and administrative expenses can be counted toward meeting the 5% payout requirement.

3 National Philanthropic Trust 2021 Donor Advised Fund Report.

4 *Id*.

5 I.R.C. § 4966(d)(2).

6 *Id.*

7 I.R.C. § 170.

8 See Department of the Treasury Report to Congress on Supporting Organizations and Donor Advised Funds, December 2011 citing Victoria B. Bjorkland, "the Emergence of the Donor-Advised Fund," 3 Paul Streckfus' EO Tax J. 15 (May 1998).

9 Pension Protection Act of 2006, Publ. L. No. 109-280 (2006).

10 I.R.C.§ 509 (a)(1) and I.R.C. § 170(b)(1)(A).

11 The Chronicle of Philanthropy, Giving to Top Charities Rose Nearly 3.7% in 2020, Driven by Big Gifts From the Wealthy, Nov. 2, 2021.

12 I.R.C. § 4967(a)(1).

13 I.R.C. § 4958(a)(1).

14 I.R.C. § 4958(f)(1).

15 I.R.C. § 4966(d)(2) (A)(iii) and (B)(ii)(II).

16 I.R.C. § 4966(d)(2)(iii).

17 IRS Notice 2017-73, Section 3.

18 I.R.C. § 4958(c)(1)(2).

19 I.R.C. § 4958(f)(8).

20 Reich, David, *A Charitable Sleight of Hand*, Boston College Law School Online Magazine, Winter 2017, https://lawmagazine.bc.edu/2017/01/a-charitable-sleight-of-hand/; Theis, Michael, *New Report Says Charities Lost $300 Billion in 5 Years in Part Because Donors Stashed Money in Advised Funds, The Chronicle of Philanthropy*, May 4, 2021, https://www.philanthropy.com/article/new-report-says-charities-lost-300-billion-in-5-years-in-part-because-donors-stashed-money-in-advised-funds.

21 Pension Protection Act of 2006, Publ. L. No. 109-280 (2006).

22 Protecting Americans from Tax Hikes (PATH) Act of 2015, Division Q of Pub. L. No. 114-113.

23 Coronavirus Aid, Relief and Economic Security (CARES) Act of 2020, Pub. L. No. 116-136. During the COVID-19 pandemic, the CARES Act (expired 12/31/2021) provided certain charitable incentives to encourage donors to make charitable cash gifts to nonprofit organizations, however excluded DAFs from these charitable incentives. An individual could claim an above the line universal charitable deduction in the amount of $300, provided a cash gift was made to a public charity, other than a DAF.

24 See Reich; *supra* note 20.

25 H.R. 6595/S. 1981, 117th Congress (2021).

26 I.R.C. § 4942.

27 *Id.*

28 Enright, Kathleen, *Donor-Advised Funds Are Essential to Democratizing Philanthropy*, January 11, 2022, https://www.philanthropy.com/article/donor-advised-funds-are-essential-to-democratizing-philanthropy.

29 *Id.*

30 See Department of the Treasury Report to Congress on Supporting Organizations and Donor Advised Funds, December 2011, available at http://frwebgate.access.gpo.gov/cgibin/getdoc.cgi?dbname=109_cong_public_laws&docid=f:publ280.109.pdf.

31 See National Philanthropic Trust 2021 Donor Advised Fund Report, available at https://www.nptrust.org/reports/daf-report.

32 *Id.*

33 *Id.*

34 National Standards for U.S. Community Foundations, Council of Foundations, available at https://cof.org/program/national-standards-us-community-foundations®.



B. PENNEWILL

Betsy Pennewill, Esq. *is the General Counsel at the Community Foundation of Sarasota County. She received her law degree magna cum laude from Stetson University College of Law in 1998. Betsy is a member of The Florida Bar and its Real Property, Probate and Trust Law Section; the Manatee County Bar Association; the Sarasota County Bar Association, the Estate Planning Council of Manatee County, the Southwest Florida Estate Planning Council, and Charitable Gift Planning Council (Chair 2020). She also serves on the Public Policy Committees for Philanthropy Southeast and Florida Philanthropic Network.*

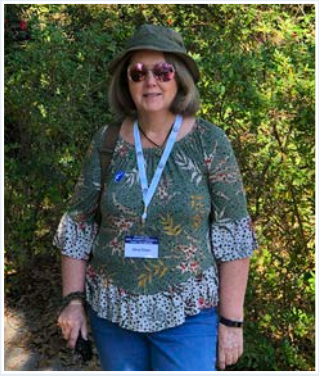
Executive Council Meeting
MARCH 3 – 5, 2022
Hotel Bennett • Charleston, South Carolina



RPPTLs on the loose!



Charleston waterfront by Mike Swaine.



Silvia Rojas enjoying nature.



Kathy Hennessey and Section Chair Bob Swaine.



Beautiful Charleston scenery.



Bill Hennessey, Hilary Stephens and Diana Kellogg.



These guys never made it to a meeting!



More RPPTLs exploring the town.



Hotel Bennett

View Photo Albums at www.rpptl.org

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



Section officers with Laurel M. Lee, Secretary of State of Florida

Executive Council Meeting

MARCH 31 – APRIL 2, 2022

AC Hotel by Marriott Tallahassee • Tallahassee, Florida



Vietnam Memorial and Florida Capitol



Larry Miller and Stacy Rubel



Burt Bruton and Rob Lancaster at happy hour



Johnathan Butler and Fletcher Belcher, Past Chair of the Section



An impromptu RTOD ad hoc meeting – Steve Kotler, Chris Smart and Felicia Cuebas



Tina Matte, Laird Lile and Sandy Diamond



The Swaine family – playing in the band



Kathy Hennessey and Irene Heckert



Alex Douglas, Ricky Hearn and Jason Ellison



Sancha Brennan and Mary Ann Obos

A Primer on ESG for Real Estate Practitioners

By Michael Bedke, Esq., DLA Piper LLP (US), Miami, Florida

References to ESG are increasingly appearing in articles and headlines, especially in the corporate context. Still, it seems relatively few real estate lawyers have a meaningful grasp of the topic. However, your clients, thought leaders (like the Urban Land Institute and Harvard University) and industry leaders are writing and talking about the issue. If they are that focused on ESG, you should begin following ESG issues too.

ESG stands for "Environmental-Social-Governance". Many real estate lawyers question whether ESG is relevant to them and their clients. Further, most real estate lawyers who are aware of ESG issues are primarily focused on the "E"- the environmental. Some practitioners believe they are on top of the issue because they order Phase 1 environmental reports as part of their routine due diligence. The issues go much deeper. That said, this article will focus mainly on environmental issues, leaving a discussion of the "S" and the "G" for another day (or issue of ActionLine).

As a primer, this piece features the author's top six ESG takeaways for real estate practitioners.

1 ESG is Not a Fad

Many people wonder whether ESG is just a fad. It is not.

If you ask your corporate real estate clients about ESG they will likely tell you it is a major topic in their C-suites. Many of them are developing strategies and even entire departments around ESG. The issue is not going away. In fact, the U.S. Securities and Exchange Commission recently released proposed ESG disclosure rules for publicly traded companies.

Additionally, many international companies are addressing ESG issues in foreign markets, many of which have ESG-related mandates. These go beyond performing minimal environmental due diligence and disclosing energy use. Mandates incentivize, if not require, a move towards decarbonization. In the United States, governmental authorities often adopt a carrot and stick approach. For example, a company may be penalized or fined for failures to achieve certain environmental-related goals. On the other hand, a client may be given tax breaks or additional development density for reducing greenhouse gas emissions.

State and local governments are getting involved. By way of example, California is considering the Climate Corporate Accountability Act. Such legislation would require domestic companies doing business in California and generating at least $1 billion of gross revenue annually to disclose greenhouse gas emissions to the Secretary of State.

Get ready for a new normal.

2 The "E" is the Current Focus…and it is Evolving

While the main ESG focus, at the moment, concerns climate change and weather events (flooding, wildfires, hurricanes, etc.), the "S" and the "G" are coming. The "E" may be thought of as "planet centric," whereas the "S" and the "G" tend to be more "people-centric." While many think of the social and governance aspects of ESG as pertaining to diversity, equity, inclusion and belonging, they involve more than that. Expect to hear more about "impact investing" and "social investing." In many markets, impact investing has tended to mainly involve affordable and workforce housing. Prepare to see more requirements as to diversity among board members and more of an investment in making the as-built environment more user-friendly for the people working in the space.

Not very long ago the "E" primarily pertained to ordering Phase 1 reports and considering whether a building should be LEED certified. Next came an underwriting of risks associated with both long-term climate change and short-term catastrophic weather events. Now (as part of the "S" and "G") we see an increased sensitivity to the as-built world's impact not just on the planet but on the occupants of the building. This has resulted in WELL Building Standards and Fitwel certified projects (and studies providing evidence that such spaces increase the productivity of the employees.)

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Traditionally, when looking at the "E" as part of due diligence, parties were looking at physical risks (casualty events) and insurance was the standard solution. Increasingly, transition risks and political risks are now being considered. Transition risks are those associated with societal and regulatory changes as we transition to a more carbon-neutral economy and respond to social justice-related issues.

One recent example includes construction of an Amazon headquarters building in South Africa. Construction was stopped after it had commenced. The construction was halted when a judge ruled the indigenous people of the area had not been sufficiently consulted about the project. Another example is that data centers (long heralded for the creation of high tech/high wage jobs) have recently been contested in some areas on the basis of the tremendous amount of energy they use.

It is time to review and update your due diligence checklists to consider these types of issues and challenges! The times, they are a-changing.

3 Greenwashing

One of the fears attorneys have had is that their clients will face litigation based on claims of greenwashing. Companies have worried that their attempts at good deeds (such as reducing their carbon footprint) may get them punished (if they fail to achieve their goals).

While the sentiment of most regulators seemed to be to incentive progress rather than require perfection, the newly proposed SEC Rules have been criticized for creating an environment that is ripe for litigation. What's more, it seems likely that claims of greenwashing will go far beyond lawsuits against companies for grossly overstating progress on greenhouse gas emissions.

Talk to your litigation partners and friends and prepare for lawsuits involving investors suing rating agencies, lenders and borrowers going to court over defaults arising from changes in pricing, interest rates, methodologies (which are far from being standardized, currently) and other relevant issues that have (to date) generally not been well-thought-out or documented to alleviate ambiguity. By way of example, two global investment companies have recently been criticized for being over-exposed with respect to Ukrainian and Russian energy-related bonds.

4 Data Sharing

Many of the ESG mandates and reporting requirements require detailed information. Consider the ripple effect of this. Is such data currently available? Is it subject to non-disclosure agreements or confidentiality provisions? Can one force a third party (such as a utility provider) to provide such information? Who bears the cost? Who is responsible if there is an error? What if standards change over time? Is the intent for thresholds to be a snap-shot in time or are they expected to evolve as new technologies are developed? When it comes to data sharing give thought to: who collects; who shares; who reports; who pays; and, who is at risk?

5 Appropriate Remedies

It is time to dust off your agreements and look at them through a new lens, especially with respect to remedies and damages. Take a lease, for example. Merely having the right to evict a tenant for non-compliance with environmental requirements may not provide a sufficient remedy. What if the breach causes the landlord to forfeit its green tax incentives or lose its LEED or WELL certification (which may be an inducement requirement for other tenants)? What if the breach results in the landlord's lender increasing the interest rate? Consider the impact on self-help rights where it may be impractical if not impossible for a tenant to step in and address a landlord's breach. The bottom line is that ESG issues are going to require us to undertake a review of our boilerplate language and standard form/template documents.

6 U.S. Securities and Exchange Commission

After much discussion and with some fanfare, the Securities and Exchange Commission finally released its proposed environmental disclosure rule for public company reporting. To be clear, we are in the comment phase and as of this writing, the rules have not yet been officially adopted. That said, the proposed rules address the reporting/disclosure of: greenhouse gas emissions; plans for governing and managing climate-related risks; material impacts on the business, strategy and outlook; financial statement metrics; and, information about climate-related goals and transition plans. While the proposed rules are directed at publicly-traded companies, the impacts will be widespread. One commentator recently stated, "Even if CRE (commercial real estate) businesses aren't under SEC disclosure requirements, they may be doing business with companies that are, and that's going to hurt."

As the comment period winds down and rules take effect, look for future ActionLine articles and Section CLE programs to keep you up to date and in the know!



M. BEDKE

***Mike Bedke** is a partner with DLA Piper in Tampa, Florida. He represents clients in all aspects of real estate and commercial financing work including institutional lenders, investors, national developers and technology companies. He has been at the forefront of this area through his advocacy of high-speed rail, light rail, commuter rail, transportation-oriented development, his work on inland port projects, his lecturing on green leases and the WELL building standard and in his* role *as general counsel to Earth Charter US.*

Working With The RPPTL Legislative Consultants: *AN OVERVIEW*

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

RPPTL Section committee chairs and members may find themselves working on issues of interest that ultimately are approved as part of the Section's legislative initiatives. With that approval comes the likelihood of being requested to work with the Section's Legislative Consultant team as a subject matter expert to help explain complex legal concepts and to provide expert input on the issues. The Section's Legislative Consultants tend to speak in shorthand assuming that everyone in the Section understands our "Legislative Speak." While there are far too many mysteries surrounding the legislative process than can ever be fully explained in this article, here are some observations and explanations that may be helpful to Section members if and when they are called upon to work with the Legislative Consultants on behalf of the Section. Many of the below definitions, along with many other useful definitions, can be found on the FAQ page of the Florida Senate and the Florida House of Representatives Legislative Glossary.

RPPTL Section White Papers

The importance of the Section white papers cannot be overstated. Well-written white papers are absolutely crucial to legislative success. Bills don't get heard until the staff report on the legislation is complete and white papers aid in the writing of the staff analysis. White papers should include history and background, impacts of the legislation, and the reason for the Section's advocacy in the area. The Section's legislative initiatives are problem-solving initiatives; and the problem, solution and public policy behind the initiative all need to be made clear. Legislative Consultants will widely distribute the white paper to Legislative staff and bill sponsors. The Legislative Consultants will also use the white paper to draft "Talk Sheets" and "Talk Points" to explain the overview and background; why and how this issue is a problem; and how the Section's initiative solves the problem. It is important that the Legislative Consultants be provided the cases, treatises, articles, opinion letters, federal regulations, tax letters, and any background information cited in the white paper, no matter how remote or arcane.

Bill Titles and the Single-subject Rule

Section 6, Article III of the State Constitution requires that: "Every law shall embrace but one subject and matter properly connected therewith, and the subject shall be briefly expressed in the title." The title is the portion of the bill which describes the subject of the bill and should briefly express the subject of the proposed legislation so that the mere reading of it will indicate the nature of the details which are embodied in the act. The specificity or lack thereof of a title should be carefully considered. A general and broad title facilitates possible future amendment of the bill, which may be desirable or not. A narrow title may be used as a tool to maintain tight control of the legislation. Whether narrow or broad, the title must give notice sufficient to reasonably lead an interested person to inquire as to the contents of the bill.

Strike-thru (overstriking) and Underline Format

Required by the rules of both houses of the legislature, underlining and overstriking indicate changes being made to the text of existing law or an existing constitutional provision. Underlined text is new language, and overstriking indicates text being removed from existing law.

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Effective Dates

When considering Section legislative initiatives and ultimately drafting proposed legislation for the Section, it is important to pay attention to the impact of the effective date. Per the House Guidelines for Drafting Legislation, it is generally desirable to defer the effective date of an act to a date some months subsequent to its enactment unless there are compelling reasons for an earlier or immediate effective date. If the effective date is too soon after the passage of the bill, it will occur prior to the publication and distribution of the act and may result in confusion. While there are currently not any "standard" effective dates, in the past October 1, December 31, and July 1 have been considered standard and continue to be the most often used effective dates. Bills that are remedial in nature to correct errors or oversights in existing law should, in nearly all cases, take effect upon becoming a law. Bills that may require the promulgation of court rules should be delayed long enough for the development and implementation of the rules. Additional considerations should include the necessity for multiple effective dates within omnibus bills and retroactive effective dates, if appropriate.

Bill Drafting

Bill Drafting is the unit of each chamber that provides legislative drafting services for all members and committees. Proposed legislation must be submitted by a member of the legislature to Bill Drafting. A bill draft is a legislative proposal that has been written at the request of a legislator or a legislative committee by the bill drafting services of the House or the Senate. The House and the Senate each have Guidelines for Drafting Legislation or Bill Drafting Manuals that provide the requirements, including samples, for acceptable drafting formats for proposed legislation. Frustratingly, the House and the Senate differ on some drafting requirements, which arguably may impact the substantive effect of the legislation, including the direction on how to distinguish between "shall" and "may."

Speaking of "shall" and "may"

Per the House of Representatives Guidelines for Drafting Legislation: "Shall" imposes an enforceable duty and is generally mandatory. Don't use "will" when you mean "shall." "May" authorizes or grants permission and is usually permissive. Use "may not" instead of "shall not" to preclude discretion or deny authority.

Differences between "identical," "similar," and "compare"

Bills introduced in the House and Senate that are identical or substantially similar in wording are considered "companion bills." The use of companion bills permits their concurrent analysis and deliberation by both houses. Companion bills are not required by rule or the constitution, but usually, you cannot succeed without them. Companion bills that are identical word-for-word, not including titles, are marked "identical" in bill history. Companion bills are marked "similar" in bill history if they are substantially similar in text or have substantial portions of text that are identical or largely the same. If one word is different, the bills are "similar." Companion bills with selected provisions that are similar in text are marked "compare" in bill history.

House Bills (HB), Senate Bills (SB), and Committee Substitutes (CS)

Bills are assigned numbers as they are filed for ease of reference. It is helpful to know that House bills are assigned odd numbers and are prefixed with "H" or "HB." Senate bills are assigned even numbers and are prefixed with "S" or "SB". "C" or "CS" denote a committee substitute, which is a substitute bill proposed by committee for a bill considered and amended by that committee. Each committee to which a bill is referred may adopt a committee substitute for that bill. If the previous committee of reference adopted a committee substitute for the bill, the next committee may adopt a committee substitute for that committee substitute. A committee substitute may also sometimes combine multiple bills.

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Bill Filing

When a bill is filed, it may be referred to several committees for action. Through the committee process, legislation is discussed and debated. Amendments to make changes to the legislation may be considered. Members of the public will be given the opportunity to speak on the bill. Members of the committee may ask questions and debate on the bill prior to ultimately voting on the bill. Committees can approve the bill, amend the bill or defeat the bill. If a bill is defeated in a committee, it is in most circumstances dead for the rest of the session.

Bills may only be filed by members of the House and Senate. No matter how much work the Section has put into a legislative position, once the bill is filed and numbered, the name of the legislator sponsoring the bill goes on the bill and they are responsible for the legislation. The "Section's bill" is not in reality the Section's bill at all from that point on, but instead belongs to the sponsor whose name is on it.

Talk Sheets

From the information in the white paper and legislative request form, the Legislative Consultants will eliminate legal jargon and distill the issue into the most important aspects that can communicate the need for the legislation into a one-page "Talk Sheet" that will be hand-delivered or e-mailed to each legislator on every committee that will hear the legislation prior to the bill being heard. Talk sheets often include information on the background and overview of the subject matter of the legislation, an explanation of the current situation/problem, and how the legislation provides a solution to the problem. The point of a Talk Sheet is to be as clear and concise as possible while still sufficiently explaining the legislation and requesting the legislator's support.

Talk Points

The purpose of providing "Talk Points" is to help the sponsors explain the legislation quickly when the legislation is being heard in a committee meeting. The Legislative Consultants will work with the Section experts to encapsulate the description of the legislation into a few sentences that can be read in two minutes or less. These "Talk Points" will be provided to the sponsors of the legislation for their use to quickly and accurately explain the legislation in committee meetings and ultimately on the floor of the chambers.

Briefing Legislators

Section subject matter experts may be asked to speak with a legislator to answer any questions and provide explanations in more detail. There is no substitute for candor and truthfulness. Legislative advocacy is an information business, and you will want to always be considered a reliable resource on behalf of the Section. A breach in credibility can never be fully rehabilitated and can often become the issue in a debate that would otherwise be conducted on the merits.

Many times, legislators and staff members have expertise that other members rely upon and they have expertise related to the Section's issues. It is important to know the opposition side as well as you know your own. Legislators will often ask for all sides of an issue and expect you to provide that information. This will help to prepare members for the debate, and it is sometimes an intentional test of credibility. Issues should never be taken personally as it forces a loss of objectivity and limits the ability to engage in dialogue in search of middle ground in a complex process.

However, there may be times when you may be speaking with people who may not be at all familiar with an issue. Those times may require extra patience and restraint to provide an understandable explanation without insulting the intelligence of the audience. Most legislators and staff view matters in the context of an objective observer. Emotional pleas are rarely effective with legislators.

Legislative Staff

Members function with their staff as an integral part of their daily activities, and the staff is often more important to accomplishing the legislative goals than the members themselves. Meetings with legislative staff are as important as meeting with the legislator and should be treated with equal respect.

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Committee Staff

Committee staff are extremely professional and knowledgeable in their committee subject matter areas. Many are long-term staff members that have served for decades and can be very influential in how legislation is prioritized and handled. This is has become even more evident as elected members have term limits, while committee staff do not.

Committee Hearings

Bills are usually referred to between two and four committees (most often to three) in each chamber for action by those committees. The committee chair is able to choose what bills will be considered in a committee hearing. Not all bills will receive a committee hearing. The Legislative Consultants work with the committee chairs and committee staff to request that Section initiatives be placed on the committee agenda at each committee of referral.

Appearing Before Legislative Committees

Speaking in committee should be done thoughtfully as there is a specific need for your presence as a Section expert at the meeting. As the RPPTL Section expert, you will be asked to turn in an appearance card in advance for two reasons: (1) so you will not be overlooked when the testimony is called for; and (2) to record the position of support or of opposition on the record. The sponsor will present the bill with an explanation of the need for the bill and what the bill accomplishes. The committee members will be given the opportunity to ask the sponsor questions. The committee will also give any members of the public an opportunity to speak on the legislation, at which time the Section expert and other members of the public will be recognized to speak. When appearing before the committee, all remarks are to be addressed to the presiding committee chair. Remarks should be succinct and directed specifically to address support or opposition to the legislation. The Legislative Consultants will coach Section experts on key points that need to be made. They will also help you find the correct meeting room within the Capitol Complex.

Waiving time to speak is an accepted custom and routinely done by the Legislative Consultants if we know that the vote will be favorable to our position, and the appearance card simply becomes part of the permanent legislative records.

TP

TP is short for Temporarily Postponed and indicates postponing of consideration of a bill or other legislative matter appearing on an agenda or calendar. A bill that is TP'd may or may not be placed for consideration on a future agenda.

Waive the Rules

House and Senate Rules may be waived in order to accomplish legislative priorities or efficiencies. Waiving the rules requires a two-thirds vote of the members present and voting to aside certain rules in order to take certain action.

Special Order Calendar

The Special Order Calendar is a list of bills determined to be of high priority and scheduled for consideration in a specific sequence during a floor session on a particular day. Getting a bill placed on the Special Order Calendar is not a guarantee of passage, but it is usually a necessary step to obtain passage of the legislation.

Messages

When a bill is "in messages" it has been passed by one legislative chamber and is en route to or residing in the other chamber for consideration.

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Engrossed Bills and Enrolled Bills

An engrossed bill is a bill that has been amended. A bill may be engrossed many times. An enrolled bill is a bill that has passed both houses of the legislature in identical form and has been converted into an act for presentation to the Governor or Secretary of State.

Deadline for the Governor to Act on Legislation

While the legislature is in session, the constitution allows a 7-day period following presentation of a bill to the Governor within which to sign or veto the bill. If the legislature adjourns *sine die* before an act is presented to the Governor or while an act is in the Governor's possession, the Governor has 15 days from the date of presentation in which to take action. While this rarely happens, if the Governor does not take action on the bill within the required times, the bill will become law without the Governor's signature. There is no requirement governing the timing of when the bills must be presented to the Governor.

The Legislative Process

It helps to recognize that the legislative process is a world of "gray," and issues are rarely black or white–few issues come to the legislature that don't have advocates with good arguments on both sides of the policy debate. It is the nature of the process to bring consensus and compromise from the diverse backgrounds of 160 different policy makers elected from a wide range of constituencies.

It is very hard to pass a bill. Out of the 3685 bills that were filed in the 2022 Legislative Session, only 285 bills — less than 8% — ultimately passed both chambers. It is much easier to stall or derail a bill than it is to obtain passage of a bill.

With that in mind, the Section is well advised to be open to options and alternatives that accomplish policy objectives while accommodating the concerns of others. It is a consistent and long-standing protocol of the process that parties are expected to try and work out differences before forcing a vote in committee or on the floor.

Listen to your Legislative Consultants

The Section's Legislative Consultant Team has over 100 years of combined experience and has represented the RPPTL Section since 1999. We know the formal adopted Rules of the process, as well as the informal rules of engagement. The easiest and best way to demystify the legislative process is to listen to the Section's Legislative Consultants and let us guide you.



M. EDENFIELD

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

Sources:

Lobbying and Ethics in the Legislature by Peter Dunbar
Guidelines for Drafting Legislation by House Bill Drafting Service, Florida House of Representatives
Legislative Glossary, Florida House of Representatives
FAQ, The Florida Senate

Roundtable

Highlights of the Meeting of the RPPTL Section

REAL PROPERTY DIVISION

Friday, April 1, 2022 • AC Hotel, Tallahassee, Florida
Prepared by Colleen Sachs, Esq., Pensacola, Florida
Michelle Hinden Esq., Orlando, Florida

Thank you to the Roundtable Sponsors: Fidelity National Title Group

The Director of the Real Property Law Division, Katherine Frazier, called the meeting to order at 3:33 p.m.

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

Recognition and Introductions. The Director welcomed guests and attendees. She introduced Diana Kellogg as the new Section administrator. She also thanked Alex Dobrev for monitoring the Zoom chat during the meeting.

The summary of the November 5, 2021 meeting in Fort Myers was approved.

Ad Hoc Civil Rules Committee.

Action Item

Title Issues and Standards Committee — Rebecca L.A. Wood, Chair

Rebecca Wood reported that Section Member Cynthia Raleigh identified that Section 1.1 of the Uniform Title Standards had an erroneous statutory reference. Rebecca further reported that the committee made the corrections and that the corrections have already been voted upon and approved by the committee. She also commented that the committee confirmed whether the Probate side would have any objection to the changes and the Probate side did not object to the proposed corrections. Rebecca wished to thank Section Member Cynthia Raleigh for identifying the citation error. Rebecca reported that she was seeking approval for this correction from the Real Property Division today.

The Director made a motion to support the correction of the citation error in Section 1.1 of the Uniform Title Standards. No discussion took place concerning the motion, which passed unanimously.

Information Items.

A. Title Issues and Standards Committee— Rebecca L.A. Wood, Chair

Rebecca Wood reported that several amendments were made to the Uniform Title Standards concerning the Marketable Record Title Act (MRTA). She further reported that the proposed amendments have since been submitted and approved by the Title Issues and Standards Committee. The proposed amendments were then circulated to the other committees for comments, and no comments were received. After the MRTA legislation was proposed, a redline version was circulated showing changes to the proposed standards to conform to the law. Rebecca also reported that Melissa Scaletta chaired the subcommittee that was charged with revising the MRTA section of the Uniform Title Standards. She requested Melissa provide an overview of revising the proposed amendments.

Melissa Scaletta reported on the changes and noted that a copy of the Executive Summary and the proposed revised Standards were available on the agenda for the Executive Council meeting. She also reported that finalized copies would be made available at the Duck Key meeting in June. Melissa reported that, since the last update to the MRTA chapter, there have been four legislative revisions as well as four cases that have been released which affect the Standards concerning MRTA. Melissa explained that the current proposed Standards will resolve the issues which arose based on legislative revisions and the cases concerning MRTA. Melissa then reviewed the four cases, which are Save Calusa Trust v. St Andrews Holdings Ltd., Barney v. Silver Lakes Acres Property, Florida Department of Transportation v. Clipper Bay Investments, and Sandhill Homeowners Association. She also reviewed the four legislative changes to the MRTA Statute, which were passed in 2010, 2018, 2020 and 2022.

S. Katherine Frazier recommended anyone in the Real Property Division who has questions concerning the proposed revisions should speak with Melissa and Rebecca.

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

The Director announced a decision was made to defer discussion on UCRERA until the next Executive Council meeting, and she urged the Division to read the proposed UCRERA glitch bill, since there are additional ongoing discussions.

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Legislative Update — Wilhemina Kightlinger, Legislation Committee, Co-Chair

Nothing to Report.

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

Lee A. Weintraub reported that the Section was planning to redefine CLEs. He further reported that the Section had another very successful CLE season this year. He explained that the CLEs have been well received and that our Section has had great aftermarket sales. He commented that everyone in the meeting is part of the Section's success. He explained the Section plans to standardize the CLE process even further. Silvia Rojas plans to create a checklist to give to future CLE program chairs. He explained that CLE deadlines will be standardized. He also reported the Section intends to add this information to the web page. The Section has mass marketing efforts it is planning to roll out for its on-demand library. He also explained that the Section will create a two-minute video that it intends to play at the beginning of every future webinar. He also reported that the Section is seeking approval for a CLE retreat. He concluded that the Section intends to discuss its CLE ideas in the fall for the upcoming year.

Committee Reports.

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

Ashley reported that the committee had its first webinar for this event, and it went well. She further reported that the webinar had over 180 people that tuned in. She announced that the committee intends to do another CLE on April 6th, which will be free. She explained that bankers and attorneys are invited to attend. The CLE will discuss the Surfside tragedy with a panel comprised of an attorney, a banker and an insurance adjuster.

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 fraud in the commercial arena. She explained that fraud is rampant in the Real Estate world. She reported that the committee had a panel, which included Len Prescott, Ashley McRae and Jim Russick. She further reported that they will be joining another committee to present a CLE on the UCRERA glitch bill.

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 the committee had the opportunity to meet with the Secretary of the Department of Business and Professional Regulation, the Director of the Division of Florida Condominiums, Timeshares and Mobile Homes, as well as the Deputy Director and the Bureau Chief of Enforcement. She explained that their guests spoke on proposed rulemaking, on enforcement and on complaints. She reported the committee had a very positive session and that the committee intends to continue to collaborate with the Division with the goal of creating a relationship in which the Division could look to the Section for insight and feedback before taking any regulatory action. She concluded that the Division was grateful to have the opportunity to meet with the committee face to face.

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

Jane reported that the committee presented its seminar in February and the event went extremely well. She thanked the speakers and commented that they all did a great job. She concluded that the committee is currently getting ready for next year's Certification Review Course.

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

Nothing to Report.

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

Scott Pence reported that the committee just completed a very successful review course in conjunction with the Construction Law Institute. He reported that the event had about 40 attendees and it was a 2 1/2-day seminar. He thanked Hilary Stephens for all of her help and for making the event seamless. He concluded that the committee was waiting on the comments from the surveys that were completed, then the committee intends to review and start preparing for next year.

Lee Weintraub commented that he was proud of the program Scott and his team put together. He commented that more people showed up than ever before, with 10 participating remotely and the rest in person. He also commented that the program had more exhibitor sponsors than ever before, about 40.

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

Nothing to Report.

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

Colleen reported that the committee had a fantastic informational meeting today. She reported that Marco Paredes, Partner at Stearns Weaver Miller, provided an update on development-related bills passed by the legislature. Lindsay

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Whelan, Partner at Kutak Rock, provided a primer on CDDs and HOAs and how each mechanism is used to facilitate development. Alex Reed, Director of Florida's Office of Resilience and Coastal Protection, discussed the state's Resilient Florida Program.

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

Katherine Heckert introduced herself as the incoming Chair of the committee. She reported that the committee had a great meeting. She further reported that there are three things that the committee is working on. The first concerns the insurance crises in Florida. She explained that Surfside's collapse is creating an even harder condominium market because insurance companies are leaving Florida and the legislature did not pass any bills to help with these problems, so the committee is planning to create a legislative subcommittee. The second concerns incoming Co-Chair Debbie Crocket, who is an insurance expert working on creating a Board Certification Area for Insurance & Surety, and they intend to look to the Section to get this off the ground. She also reported that the committee would like to further develop/address insurance topics with other committees in the Section such as Leasing or Condominium and Planned Development.

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

Melissa Murphy reported that FLTA is just emerging from the legislative session. She reported the FLTA is continuing its strong efforts to get its ALTA and Policy Forms approved by the Office of Insurance Regulation. They are also working on Closing Protection Letters. She explained the FLTA is working toward a Claims Roundtable in June that will not be open to general participation. She further reported the FLTA will work on proposed legislation for 2023, which will include a bill concerning Estoppel Certificates since this is a topic of concern for Senator Passidomo.

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 committee is booked for this coming April 8th and 9th. He thanked several members who helped with planning the Review Course. He also gave recognition to the speakers who volunteered to present in the Review Course.

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

Kristen Jaiven reported that a legislative update was presented to the committee. She further reported that the committee conducted a full review of the ordinance that recently passed in Miami Dade County concerning leases. She further reported the committee also went over the Security Deposit Bill that recently failed, and the committee took a vote on how to address the security deposit statutes going forward.

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

Richard McIver reported the committee had a discussion concerning the UCRERA glitch bill. He further reported that the committee discussed the Homeowner's Assistance Fund. He further reported that the committee discussed the proposed Interest Rate Bill which would replace the LIBOR Rate and how that is going to work for those currently using the LIBOR Rate. He concluded the upcoming UCRERA CLE is scheduled for May 11th.

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

Shawn Brown reported that the committee had a vote on a potential legislative change to address Section 702.036, Florida Statutes, which came about from the Wells Fargo case, including an attorney's fee provision. Sean concluded that this will be presented in Duck Key as an informational item.

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 Ellie Taft gave an update on the proposed legislation to address the postal service's changes concerning no longer using the return receipt requests. She explained there is a plan to address it by changing the definition. She further reported that the committee received an update on MRTA from Chris Smart.

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

James Marx reported the meeting was well attended. He reported that Trey Goldman gave a legislative overview of which bills were approved, which bills were not approved, and what to expect in the future. He also reported that Kristen Jaiven discussed the issue of people trying to get around the appraisal language in the FR/Bar Contract by removing the appraisal language. He explained there was some discussion on this in the committee concerning what and what not to do, which was helpful. He also reported the committee discussed the Freddie Mac and Fannie Mae condo questionnaire that came into effect in February 2022, as it has affected residential real estate. Lastly, he explained he has been involved in a Business Law Section Task Force working on a Series LLC similar to Delaware's. He commented that Lou Conti requested he ask the RPPTL Section if anyone in the Section had experience with these types of LLCs to please let him know, and to also extend an invite to anyone who would be interested in participating.

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Roundtable

Highlights of the Meeting of the RPPTL Section

PROBATE AND TRUST DIVISION

Friday, April 1, 2022

Turnbull Center, Tallahassee, Florida

Prepared by Nicole Bell Cleland, Esq., St. Petersburg, Florida

Thank you to the Roundtable Sponsors: Guardian Trust and Stout

The Director of the Probate and Trust Law Division, John Moran, called the meeting to order at 3:40 pm.

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

Action Item - Ad Hoc Committee on Electronic Wills — Angela M. Adams:

Angela Adams reported on a proposed Executive Council Action Item coming from the Ad Hoc Committee on Electronic Wills. The proposal would amend§117.201, Fla. Stat., to create a definition of "witness" (when used as a noun) for purposes of remote online notarization and witnessing of electronic documents.

Legislation Committee Report — Larry Miller:

SB 406 by Sen. Berman and Rep. Robinson provided a legislative fix to the "Kearney" case by clarifying that a security agreement to pledge exempt assets must specifically identify the pledged asset under the Florida Uniform Commercial Code in order to constitute a valid and intentional assignment, pledge, or waiver. It is a retroactive application. SB 406 has passed the Legislature and is pending approval by the Governor.

SB 968 by Sen. Polsky and Rep. Driskell is the Section initiative that amends ss. 222.21(2)(c), Fla. Stat. to clarify that the interest of an ex-spouse in an IRA that is received in a transfer incident to divorce is exempt from the claims of the transferee spouse's creditors. SB 968 has passed the Legislature and is pending approval by the Governor.

CS/SB 1502 by Sen. Powell and Rep. Altman include the Section's initiative for legislation that provides for the procedures that satisfy the requirement for bringing an independent action in connection with a creditor claim against a decedent. The legislation also includes the Section's initiative providing for additional options for the resignation by a trustee under s. 736.0705; and it authorizes the use of spousal lifetime access trusts in Florida. CS/SB 1502 has passed the Legislature and is pending approval by the Governor.

CS/CS/CS/HB 1349 by Rep. Chaney specifies circumstances where under which the Office of Public and Professional Guardians may ensure compliance by professional guardians. Although not a Section initiative, it was supported by the Section. The legislation also requires guardianship reporting, an initial guardianship plan, a verified inventory or an annual report, and the requirement to submit information to the Clerk of Court. The operation of the database does not come into effect until July 1, 2023. CS/CS/CS/HB 1349 has passed the Legislature and is pending approval by the Governor.

CS/SB 1304 by Sen. Gruters addresses identities of beneficiaries, the rule against perpetuities, trustee duties, methods of notice, representation by parents, non-charitable trusts, trust accounting and trust reimbursements. CS/SB 1304 has passed the Legislature and is pending approval by the Governor.

CS/CS/SB 1262 by Sen. Burgess makes several changes to procedures surrounding voluntary and involuntary examinations of individuals under the Baker and Marchman Acts. CS/CS/SB 1262 has passed the Legislature and is pending approval by the Governor.

CS/SB 1844 by Sen. Bean revises provisions relating to the admission of minors to a facility for examination and treatment; requires officers transporting individuals for involuntary treatment to consider a person's mental and behaviorialbehavioral state; and provides that restraint of an individual is to be in the least restrictive manner possible. CS/SB 1844 has passed the Legislature and is pending approval by the Governor.

Update on the Judicial Management Council's Workgroup on Improved Resolution of Civil Cases – Mike Hargett on behalf of the RPPTL Ad Hoc Civil Rules Committee

Mike Hargett reported on the RPPTL Section's review of the Judicial Management Council's Workgroup on Improved Resolution of Civil Cases. The Workgroup's project is part of the long-term 2016 – 2021 strategic plan that was started as a

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Roundtable: Probate and Trust, from page 42

work group in 2019 by the Judicial Management Council. The Workgroup has two main goals: (1) ensure the fair and timely resolution of all cases through effective case management, and (2) utilize caseload and other workload information to manage resources and promote accountability. The Workgroup was given five charges: (i) review the civil case management, (ii) review initiatives in other states, (iii) look closely at how the cases are handled in the federal courts, (iv) take a careful look at whether the laws and rules sufficiently address or deter lawyer's languishing cases, and (v) make recommendations. Implementation started in March 2021, and an interim report has been issued (330 pages in length). Mike shared some details and recommendations provided in the report.

The RPPTL Section has established an Ad Hoc Committee to Review the Workgroup's report and proposals. The Committee was divided into 6 different workgroups so that each RPPTL committee member can dissect their section in detail.

Adjournment. The meeting was adjourned at 4:55 pm.

Roundtable: Real Property, from page 41

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 the committee had a good discussion on the Hayslip case. He reported the committee decided to form a subcommittee to investigate possible legislative solutions. He reported that the committee discussed the proposed FR/BAR Amendment, that there has been a lot of dialogue with the joint committee, and the joint committee has formed a subcommittee to address it. Brian commented he is optimistic they will find a solution.

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 discussed MRTA and that the committee presented a CLE on the proposed revisions to the MRTA chapter of the Uniform Title Standards. She concluded by thanking her committee officers for all of their contributions as well as Amanda Hersem for helping with the minutes and other administrative matters. Lastly, she explained that the committee tries to meet monthly so that they can coordinate preparing CLEs for upcoming meetings.

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.

Adjournment. The meeting was adjourned.

It never hurts to have trust on your side.

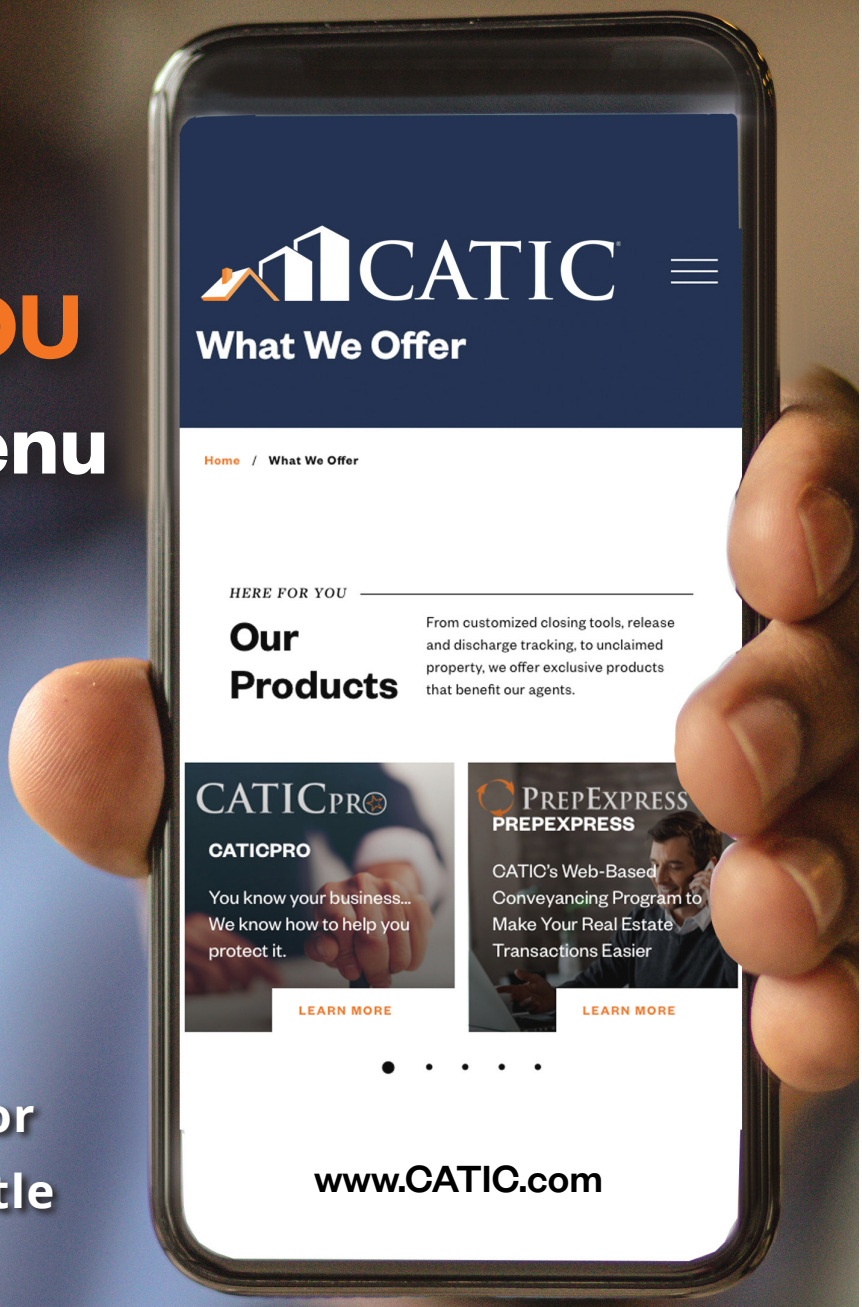
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PRACTICE CORNER

Probate And Trust Division

The Impact Of Intestacy On Children Of Modern Families

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

It's no secret that the average American family is ever-evolving. Whether parents are married or not, living together or separate, or living in multi-generational homes, the impact of a parent's or guardian's death on a child casts a wide shadow. As estate planners, we see too often the negative impact of intestacy on surviving children.

Pursuant to Fla. Stat. § 744.301, a parent or natural guardian of a minor child can receive up to $15,000 without appointment, authority or bond on behalf of a minor child. The surviving guardian often faces incredible frustration with the administration of an intestate estate that has assets surpassing $15,000. This can easily happen if a decedent has a life insurance policy, regardless of whether the decedent has designated beneficiaries.

Many people never get around to putting an estate plan in place. As practitioners, we see many intestate summary administrations. What starts out as a relatively simple administration can turn into a nightmare for the surviving parent who now has to submit and pay for fingerprints, a background check, a bond, guardianship petition, annual accountings, etc.

Below are two simple recommendations to alert parents and guardians about this important issue:

Make a checklist to hand out to potential clients

Anyone can utilize websites to create marketing materials. Ordering brochures, bookmarks, or postcards is easy and the turnaround time can be less than a week. Having family emergency plan checklists pre-printed on materials with your logo and contact information is a great way to market your practice and provide useful tips to help individuals make small changes to their lives that can pay dividends in the long run. Recommending pay-on-death or beneficiary-designated bank accounts, life insurance policies, and employer-sponsored benefit plans is a small step anyone can take that does not require an attorney. If an individual has more than $15,000 in assets that would pass to a minor child, recommending a testamentary trust would save the necessity for a guardian, which can save thousands of dollars in the long run. The individual who takes your product may also remember you when it comes time to get his or her affairs in order.

Offer your services at local schools

Many schools would be more than happy to hand out free school supplies to students. Getting important family planning information out can be as simple as ordering bookmarks, pencils, pens, and notebooks with your business information on them and putting a family checklist in the materials. A family checklist can include suggestions to help parents plan for emergencies rather than simply focusing on the death of a parent or loved one. An example for a checklist can be found at the end of this article.

Attorneys can work with school psychologists, social workers, guidance counselors, and the PTA to give a free emergency family planning informational session to parents. We can teach families about powers of attorney, pre-need designation of guardians, and estate planning. Ensuring families know what steps they can take to prepare for emergencies before hiring an attorney also makes our jobs easier on the back end. Despite the reach of social media and the internet, nothing can quite compare to or replace a warm, human interaction.

These are just a few suggestions to help get out the word that guardianship of a minor's property is made to protect the child, not to make the adult's life easier.



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.

PRACTICE CORNER

Real Property Division

Preparing Deeds and Depending on the General Power of Attorney

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

Real estate practitioners engaged to prepare a deed to convey an interest in real property must ensure that a deed is properly executed and recorded. Fla. Stat. § 689.01(1) (2021) requires a deed be in writing, signed by the party conveying the interest, in the presence of two subscribing witnesses. The party conveying the interest is referred to as the Grantor and the party receiving the interest is referred to as the Grantee.

To record, Fla. Stat. § 695.26 (2021) requires that the deed contain certain elements: (1) the name and address of the person preparing the deed; (2) the Grantor's name and address; (3) the Grantee's name and address; (4) the signature of the Grantor; (5) two witnesses for each signature; and (6) a notary acknowledgment.

To satisfy one of the essential elements for execution and recordation, practitioners must ascertain if the Grantor has the authority to convey the interest in real property. For example, in *June Sand Co. v. Devon Corporation*, the court held that the conveyance of a quit claim deed was invalid because the Grantors did not have the authority to convey since the property reverted to the State for nonpayment of taxes.

Occasionally, the client may present a General Power of Attorney (POA) as evidence of their authority to engage the practitioner to prepare the deed. However, the practitioner should not blindly rely on the POA. Fla. Stat. § 709.2201 (2021) provides that "an agent may only exercise authority specifically granted to the agent in the power of attorney." Therefore, the POA should specify that the client has the *specific authority* to convey real property.

If the Grantor is a Florida limited liability company, then Fla. Stat. § 605.0109 (2021) states the company may "grant, hold, or exercise a power of attorney, including an irrevocable power of attorney." If the POA does not specifically state the client has the power to convey real property, then the practitioner may look to the Articles of Organization, Operating Agreement and subsequent Resolutions for evidence of that authority.


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.*

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Real Property Case Summaries

Prepared by Shayla Johnson Mount, Esq., Overstreet Law, P.A., Kissimmee, Florida

J.L. Property Owners Association, Inc. v. Schnurr, 2022 WL 39421 (Fla. 4th DCA, January 5, 2022).

Developer was not a Fabre defendant and had no potential liability in negligence claim by bicyclist against master homeowners association involving an accident with a bollard installed on association common area promenade where turnover to the Association had occurred more than twenty years prior to the accident and the bollard was considered a "latent defect" which the Association had a reasonable opportunity to discover and correct.

Trial court erred by not granting a new trial where Association did not agree to remittitur and Plaintiff's counsel did not have authority to accept pending offer of remittitur days after Plaintiff's death.

Case Summary

This case involved an action for negligence and loss of consortium brought by a husband and wife (Schnurrs) against Jonathan's Landing Property Owners Association (JLPOA) for life-threatening injuries sustained by the husband after his bicycle collided with a beige-painted bollard installed adjacent to the common area promenade. The bollard was installed as a post in the ground used to block roadway traffic from turning into the promenade; however, the evidence was unclear as to when exactly the bollards were installed. (The bollard did not appear on the original development design and there was conflicting testimony suggesting that the bollards may have been installed around 1984 or 1985 when the clubhouse construction was completed or, alternatively, sometime between 1998 and 2004). The governing documents (Declaration and Articles of Incorporation) for the Association required the Association to maintain the promenade area; pursuant to said duties, the Association had painted the bollards beige, as opposed to a more conspicuous, high contrast yellow, so that they would blend into the surrounding background. There were no other warnings or other pavement markings installed around the bollards to alert pedestrians of their presence as they approached the promenade. Additionally, the bollards were installed without a permit and contrary to building codes and guidelines.

Upon a motion by the Schnurrs, the trial court precluded the addition of the Developer as a Fabre defendant on the jury form finding the Developer did not have a duty to maintain the promenade area at the time of the accident. After a jury trial, the jury trial found the Association negligent for failing to warn the Schnurrs of a dangerous latent condition; although it was not negligent in failing to maintain the promenade in a reasonably safe condition. Accordingly, the jury awarded Mr. Schnurr total damages in the amount of $41,050,000, and assigned fault to the Association at 45%, to Mr. Schnurr at 50%, and the Golf Club at 5%.

Thereafter, the Association filed for remittitur for the amount of future medical expenses, or alternatively, for the court to order a new trial. At a hearing on the Association's motion, the Schnurrs stated that they would accept the amount for future medical expenses, failing to disclose at the time that Mr. Schnurr had died five days prior to the hearing. After it was discovered that Mr. Schnurr was deceased, the Association requested a new trial or for the Court to amend the amount for future damages to zero in light of Mr. Schnurr's death. The trial court denied the motion, remitting $5,782,811 for future medical expenses. At a subsequent hearing, the trial court held that Mr. Schnurr's death was not something to be considered as it was limited to the evidence presented at trial.

Developer Not a Fabre Defendant

On appeal, the Fourth District affirmed the trial court's ruling that the Association had not met its burden of proving the Developer's fault contributed to the accident in order to include it as a non-party on the jury verdict form. The Developer, which had ceased to exist in 2009, had granted the Association an easement in the promenade in 1992 and had turned the Association over to the owners in 1995, 21 years prior to the accident which occurred in 2016.

Applying the definition articulated in *Royal Palm Hotel Prop., LLC v. Deutsche Lufthansa Akitiengesellschaft, Inc.*,[1] the appellate court found that the Developer did not fit the definition of a Fabre defendant who is a nonparty, defendant whom a party defendant asserts is wholly or partially responsible for the negligence alleged. The appellate court applied established case law that a premises liability claim is a negligence claim with the added elements of possession/control of the premises, and notice of the dangerous condition.[2] In the instant case, the Developer could not be liable to the extent that it did not have actual possession or control of the promenade at the time of the accident, nor did it have any specific duty to maintain the promenade at the time of the accident. The court also noted that given the more than 20 years since turnover from the Developer, the Association had a reasonable opportunity to discover the condition and take precautions. The court stated:

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> "Certainly under the circumstances of this case, JLPOA had more than reasonable opportunity to discover the condition of the bollards and take necessary precautions. Instead, the evidence at trial documented that JLPOA painted the bollards beige, which had the effect of blending the bollards into the surrounding. Rather than ameliorating the danger, JLPOA appeared to make it worse."[3]

Accordingly, and because the Developer had not acted to actively conceal the condition, the Association was liable for discovering the condition and taking the adequate precautions.

Association Entitled to Request New Trial on Future Medical Expenses

As to the issue of remittitur, the appellate court found that the trial court erred by denying the Association's motion for a new trial on future medical expenses pursuant to Fla. Stat. § 768.74 (4) (2019). The trial court found that there was no meeting of the minds once the Association withdrew its request to remit the award after finding out that Plaintiff's counsel did not have the authority to accept the remittitur after Mr. Schnurr's death. The appellate court specifically held that the trial court did not follow the plain language of Fla. Stat. § 768.74 (4) (2019), which required the court to set aside the remittitur and grant a new trial, where there is no meeting of the minds.[4]

In this case, counsel for Mr. Schnurr did not have the capacity to accept the remittitur at the hearing on behalf of his deceased client (or any future executor yet appointed.) As an aside, the court also noted counsel's duty of candor which obligated him to notify the court of any development which might affect the outcome of the litigation, which necessarily included Mr. Schnurr's death.

Accordingly, the trial court's judgment was affirmed in part and reversed in part. The case was remanded for further proceedings.

Trident Asset Management, LLC v. 2050 Condotel Inn Condominium Association, Inc., 2022 WL 332495 (Fla. 5th DCA 2022).

Liability of first mortgagee to pay past-due assessment to Association pursuant to "safe harbor" provisions of Condominium Act obligates the mortgagee to pay 1% of the total original mortgage debt, and does not require the amount be calculated on a per-unit basis.

Case Summary

In this condominium lien foreclosure action, the condominium association brought an action against the owner of 58 condominium units that it acquired through a deed-in-lieu of foreclosure. Prior to the bank's ownership, the owner of each of the units had fallen delinquent on condominium assessments. The Association argued that the language of Fla. Stat. § 718.116 (1) (b) (2018), required the owner to pay $3,000 **per unit** or a total of $168,000, which amount reflected 1% of the mortgage debt per unit. In response, the bank argued that the statutory language limited its liability to $3,000 in total, which was 1% of the total original mortgage debt for the units.

The trial court agreed with the Association, finding the owner was required to pay $3,000 per unit instead of $3,000 in total for past due assessments. On appeal, the Fifth District reversed the trial court's order holding that "[h]ad the Legislature intended that 'one percent of the original mortgage debt' be calculated on a 'per unit' basis, it would have included that language in section 718.116 (1) (b).1.b., as it had in section 718.116(1)(b).a."[5]

The appellate court affirmed the judgment in favor of the Association but reversed the amount of the award and remanded to the trial court to award the Association $3,000.


S. MOUNT

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

Endnotes

1 133 So. 3d 1108, 1110 n.1 (Fla. 3d DCA 2014).

2 *Citing Oliver v. Winn-Dixie Stores, Inc.*, 291 So. 3d 126, 128 (Fla. 4th DCA 2020).

3 *J.L. Property Owners Association, Inc. v. Schnurr*, at pg. 5.

4 *Citing Evans v. Calmar S.S. Co.*, 534 F. 2d 519, 522 (2d Cir. 1976); *Cheverie v. Geisser*, 783 So. 2d 1115, 1118 (Fla. 4th DCA 2001).

5 Relying on *Fla. Carry, Inc. v. Univ. of N. Fla.*, 133 So. 3d 966, 971 (Fla. 1st DCA 2013) ("Where the legislature include wording in one section of a statute and not in another, it is presumed it have been intentionally excluded.").

SECTION SPOTLIGHT



University of Florida RELA Club

The University of Florida Levin College of Law recently launched a student Real Estate Law Association. Known as RELA, the group seeks a strong partnership with the RPPTL Section. As liaison to UF for the Section's Law School Programming Committee, Rebecca Wood, Senior Underwriting Counsel at The Fund, arranged for RPPTL sponsorship of the new association's inaugural event. The event featured a panel discussion with real estate attorneys via Zoom addressing questions from the 50 attending students. Congratulations, RELA! (Pictured are RELA's executive board.)



Save the Date



8:00 a.m. – 5:00 p.m.

Virtual or In-Person

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Probate Case Summaries

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

The strategic use of judicial notice to dismiss a lawsuit against a personal representative that is barred by statute and res judicata.

Hannan v. Doyle 47 Fla. L. Weekly D589a (Fla. 3d DCA March 9, 2022)

Patrick Hannan, who was a beneficiary of his grandmother's estate, filed a lawsuit against Gail Doyle, based on her role as the personal representative in the Estate of Janet E. Hannan proceeding. Mr. Hannan's lawsuit alleged that Ms. Doyle breached an oral agreement and her fiduciary duties as the personal representative, by failing to pay him $16,000.00 from the probate estate.

While Mr. Hannan may have a valid basis for his lawsuit, the merits of the case were not addressed by the lower court, as it was barred by both statute and the doctrine of res judicata. The applicable statute, Fla. Stat § Section 733.901, Fla. Stat. (2020) states in partas follows: "(1) After administration has been completed, the personal representative shall be discharged. (2) The discharge of the personal representative shall release the personal representative and shall bar any action against the personal representative, as such or individually, and the surety." It appears to be well settled, that, except in cases that involve procedural irregularities or facts constituting fraud or bad faith, no lawsuit can be brought against a personal representative in his/her capacity as personal representative or individually after discharge.

Notwithstanding the applicable doctrine and statute that are dispositive in this matter, the really interesting nature of this case, is the fact that the lower court was able to keenly apply the use of judicial notice during a motion to dismiss to expeditiously resolve this matter.

On appeal, the Third District court Court of Appeals reaffirmed that when, on the face of a complaint, it is apparent that doctrines like res judicata and collateral estoppel can be asserted, the court can take judicial notice of a closed proceeding and use it even when ruling on a motion to dismiss.

A reminder that proceeds from the sale of homestead are treated differently when it comes to paying fees and expenses related to the Decedent's estate administration and trust administration.

J. Scott Lanford, the named trustee of the Kirk Family Foundation Charitable Trust, filed an appeal after the trial court entered an order awarding payment of fees to Robin Phemister and her attorney for administration of the Estate of Mary Lee Dillard, in which Ms. Phemister was the personal representative and for administration of the trust as the court appointed trustee.

The Decedent left personal property to her sister, Billie Jo Schell. The Decedent left the residuary of her estate and the homestead to her testamentary trust, of which Ms. Schell was the primary beneficiary and the Kirk Family Foundation Charitable Trust was the contingent remainder beneficiary.

The probate court entered an order determining homestead and finding "that constitutional homestead protections inured to Phemister, as testamentary trustee, for Schell's benefit." Subsequently, the homestead was sold, and the proceeds were held in escrow.

Ms. Schell died in 2018, so the proceeds from the sale of the homestead and the residuary of the Decedent's estate went into the Kirk Family Foundation Charitable Trust.

In ruling on Ms. Phemister's subsequent motions for fees as the personal representative and trustee, as well her attorney's fees for legal representation in both capacities, the probate court ultimately granted the motions.

On appeal, however, the Fifth District Court determined that although basis of the appeal was the proceeds from the sale of the homestead, the different nature of the proceedings - estate administration vs. trust administration - warrant different treatments.

Specifically, the appellate court relied upon the probate court's order determining homestead status and the constitutional benefits to Ms. Schell, to render its ruling that, because the homestead passed outside of probate and was exempt from creditors' claims and administrative expenses, the personal representation and her attorney cannot receive payment for services rendered in the probate administration. The Court court went on to note that "a general directive in a testamentary instrument — such as Decedent's will — to pay 'debts, claims, or expenses; does not subject protected homestead to estate obligations or administrative estate expenses."

The appellate court arrived at the opposite ruling when it considered the motions for fees and expenses to Ms. Phemister as the trustee and her attorney's fees in this regard. The Court court referenced Sections Fla. Stat. §§ 736.0816 (15) and (20) (2021), Fla. Stat. § (2021), Section 736.0708 (1) Fla. Stat. (2021), Fla. Stat. § 736.05053 (4), Fla. Stat. (2021), Fla. Stat. § Section 736.0709 (1), Fla. Stat. (2021), and Fla. Stat. § Section 736.1005 (1), Fla. Stat. (2021) as the applicable Florida statutes that allow a trustee to receive payment for services rendered for the benefit of a testamentary trust, expenses, trust administration costs, and the trustee's attorney's fees.

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Once the proceeds became an asset of the trust, the trustee was well within her right to seek payment for her services as trustee, costs for trust administration, and payment of her reasonable attorney's fees incurred.

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.*



T. REID-WOLLISTON

What's Happening Within The Section...

Executive Council Meeting and Legislative Update

JULY 21 – 23, 2022

The Breakers • Palm Beach, Florida

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

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



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