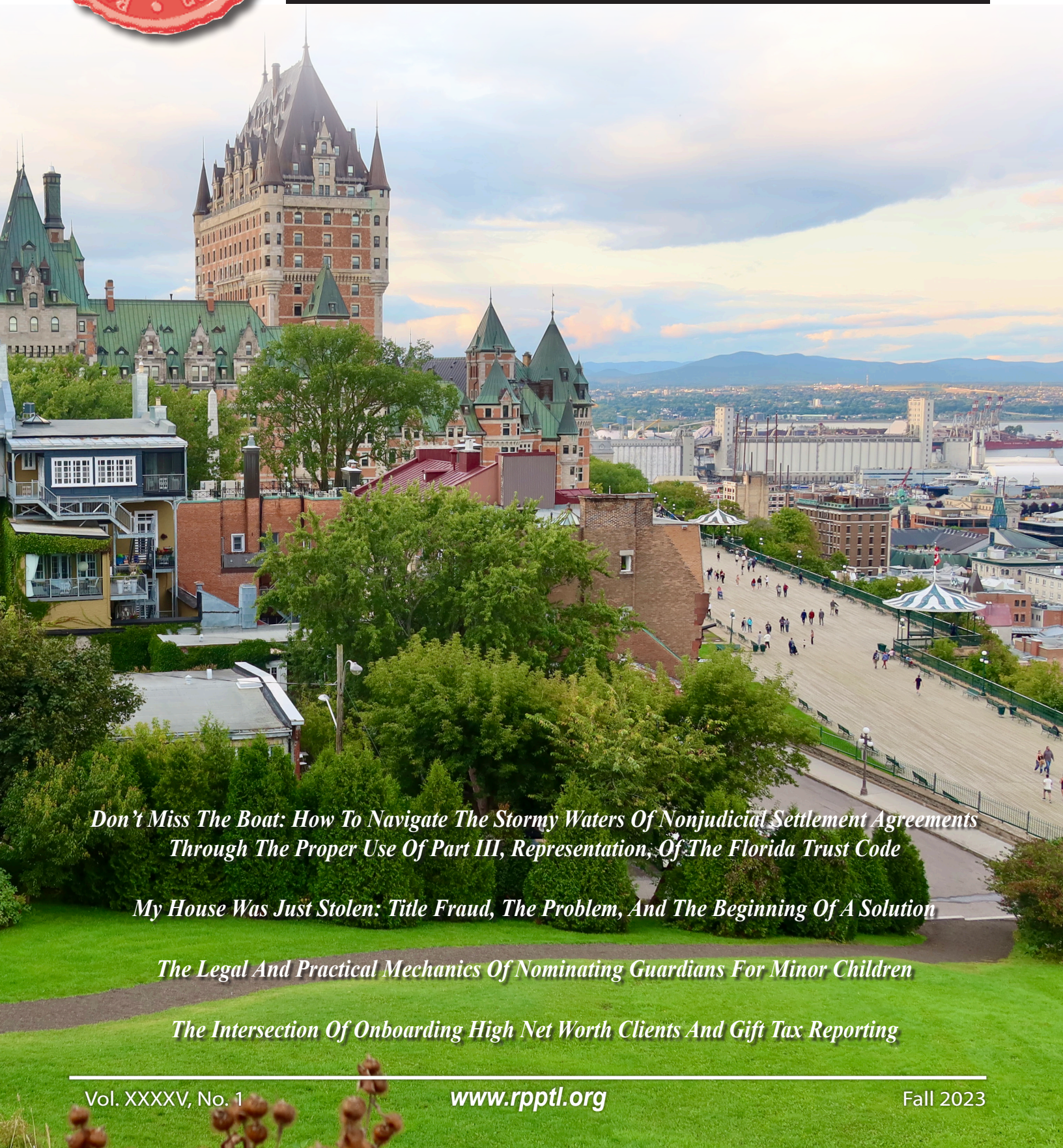
ActionLine

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



Don't Miss The Boat: How To Navigate The Stormy Waters Of Nonjudicial Settlement Agreements Through The Proper Use Of Part III, Representation, Of The Florida Trust Code

My House Was Just Stolen: Title Fraud, The Problem, And The Beginning Of A Solution

The Legal And Practical Mechanics Of Nominating Guardians For Minor Children

The Intersection Of Onboarding High Net Worth Clients And Gift Tax Reporting

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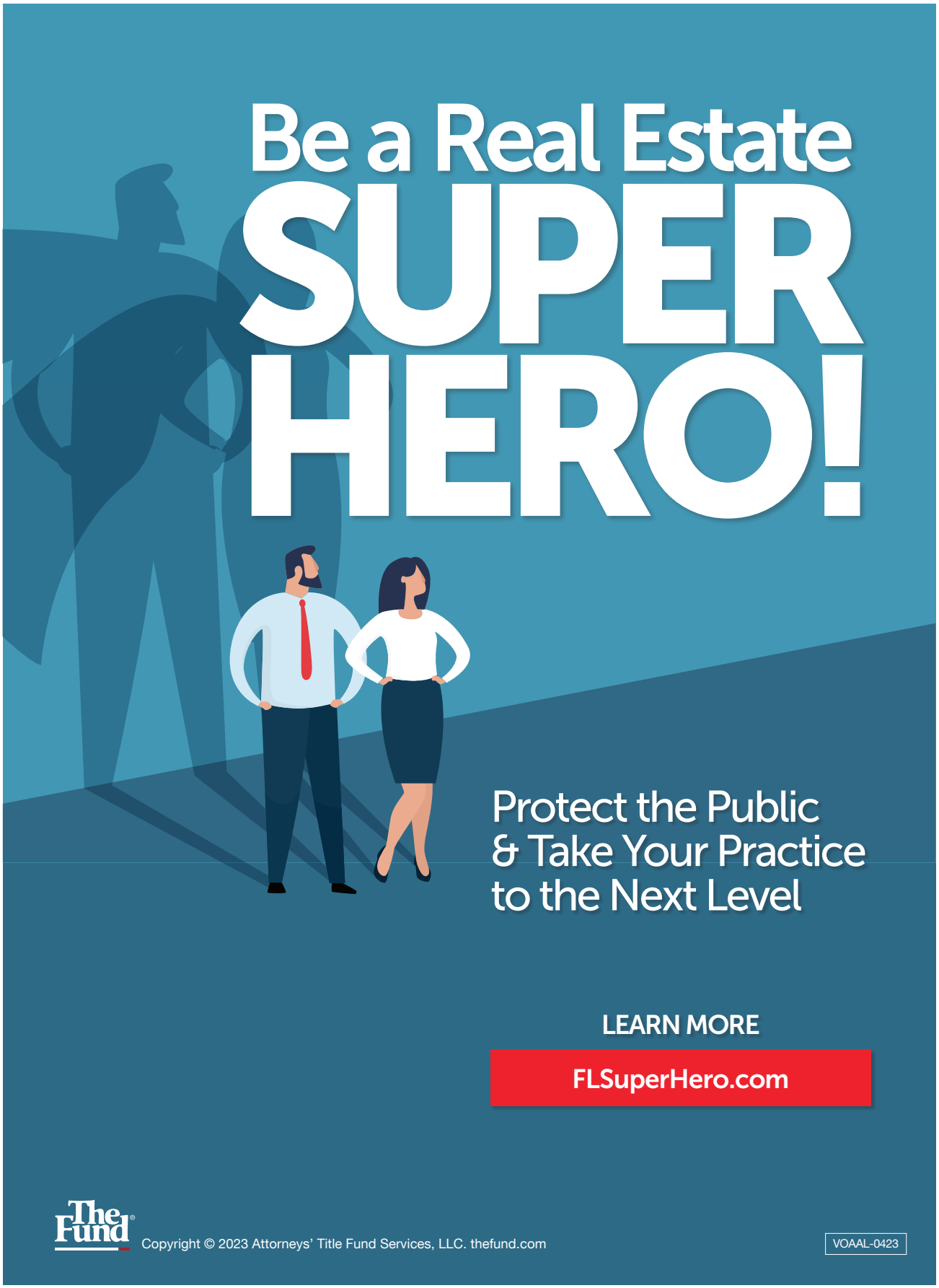
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Section Success Through Teamwork, Education and Engagement

By S. Katherine Frazier, Esq., Section Chair, 2023-2024

As I write my first ActionLine column after assuming the position of Chair for the Section for 2023-2024, I want to express how truly honored and humbled I am for this opportunity to serve as your Chair. Congratulations and thank you to Immediate Past Chair, ***Sarah Butters****, for an incredible 2022-2023 year! While Sarah has earned a well-deserved rest, we are grateful to know that we have not yet lost the benefit of her practical and thoughtful guidance.*

A key to the success of the Section is teamwork within the Executive Committee. In particular, I am thankful for the dedication and the leadership that the Executive Committee has shown for the first part of the year: **John Moran**, Chair-Elect; **Cary Wright**, Real Property Division Director; **Jon Scuderi**, Probate and Trust Law Division Director; **Lee Weintraub**, Secretary; **Dresden Brunner**, Treasurer; **Sancha Brennan** and **Steve Mezer**, Legislation Co-Chairs; **Brenda Ezell** and **Angela Adams**, CLE Coordination Co-Chairs; **Willie Kightlinger**, Director of At Large Members; and **Sarah Butters**, Immediate Past Chair. A big thank you to **Larry Miller** for all of his years of service on the Executive Committee and for his continuing service on the Executive Council. I am grateful to each and every one of these individuals for all that they have already done through 2023!

Further, the success of the Section is directly attributable to the active engagement of the Executive Council. A prime example of this is the 43rd Annual Legislative and Case Law Update that was held in July 2023 at The Breakers. The Legislative Update is held in conjunction with the Section's first Executive Council meeting of the new Bar year and is an educational showcase demonstrating the scope and breadth of the Section's involvement in legal issues. Many of our own Executive Council members were speakers at the Legislative Update. This year's event was Co-Chaired by **Salome Zikakis** and **Kit van Pelt** with assistance from out-going Co-Chair **Brenda Ezell**. They and their committee, consisting of Co-VIce Chairs **Gutman Skrande** and **Jennifer Tobin**, as well as **Terrence Harvey**, deserve congratulations for pulling together an incredible program, especially with all of the moving pieces of the late legislative session! The program included legislative updates on title fraud, lien law, elderly exploitation, HOA property owners' rights, Florida state estate tax and a property insurance market overview. I want to especially thank **Brenda Ezell,** whose term as a Chair of the Legislative Update Committee has now concluded, for her tireless dedication to the program over the years.

Programs like the Legislative Update educate us all! Please check out some of the Section's other CLE programs that help you learn, but also help all of the Section's efforts and outreach programs. The current CLE Coordination Co-Chairs are **Angela Adams** and **Brenda Ezell**. A big thank you in advance to all of our committees that provide the substance for these wonderful programs. It goes without saying that none of this could happen without **Hilary Stephens,** Program Administrator, and **Jeremy Citron**, Assistant Program Administrator/CLE Lead. Please click on this QR code for upcoming CLE courses. You will also get a worthwhile education at every single Executive Council meeting. Sometimes I learn more than I want to know at our Executive Council meetings! Being in-person at these meetings is an amazing opportunity to learn, connect, and engage with other lawyers in our field. If you are interested in learning more, please check out all of our committees and our calendar on our website at **www.RPPTL.org**. We would love to see you at some of our upcoming RPPTL committee meetings!

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 Erin Farrington Finlen at erin@estatelaw.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.

PHOTO SUBMISSIONS: If you have a photo that you'd like to have considered for the cover, please send it to the photo editor, Colleen Schuster, at c_schuster@comcast.net.

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

This issue marks a turning point in several respects. As my Co-Editor-in-Chief, Erin, announced in the last issue, we had a changing of the guard. **Mike Bedke** rotated off ActionLine, as of the last issue, and I have taken over as the new Co-Editor-in-Chief. We wish to thank **Mike Bedke** for all his noteworthy contributions to ActionLine over the years. In the many years that he has been with ActionLine, he has made an undeniable difference. ActionLine wouldn't be where it is today without him. Mike, you will surely be missed! As for me, I truly am honored to have been given the opportunity as incoming Co-Chair of ActionLine. I cannot stress enough how much it means to me.

Additionally, **Sarah Butters** has passed the torch to the new Section Chair, **Katherine Frazier**. Read a deserving tribute to **Sarah Butters** on page 33 and learn more about her successful year during her time as the Chair of the Section. We would like to thank **Sarah Butters** for all her hard work in leading the Section over the last Bar year. We hope you savor every minute in the back row, Sarah! We also wish to congratulate the incoming Chair, **Katherine Frazier**, and we look forward to an incredible 2023-2024 Bar Year under her leadership! In her Chair's Column, Chair, **Katherine Frazier**, expresses her gratitude to her leadership team for their dedication, and for all that they have done through 2023! She also encourages Section members to educate themselves by signing up for some of the Section's CLE programs.

We love the informative article on page 6 by author **Alexander S. Douglas**. His article on how to navigate nonjudicial settlement agreements through the proper use of Part III, Representation, in the Florida Trust Code, explains how to ensure that all interested parties are bound to a nonjudicial settlement agreement. Many of the examples he provides in his article are very helpful!

We also have a very relevant article on page 12, by author **Christopher W. Smart**, that takes a deep dive into HB 1419, and measures that were taken by the Florida Legislature, with technical assistance from the Section, to help combat title fraud.

The article by author **Monique Lavender Greenberg**, on page 15, provides some helpful practical information on nominating guardians for minor children in Florida. The sample declaration of preneed guardian she provides on page 17 will be useful for many practitioners.

Another practical article is found on page 18. Authors **Sarah H. Hayford, Carla A. DeLoach and Jordan Deloach Hurlburt** provide some useful tips on conducting a gift tax reporting audit when onboarding high net worth clients. The top 20 most common gift tax return mistakes they provide on page 21 alert the readers of common pitfalls to avoid when preparing gift tax returns.

We urge you to look at the photo centerspread on pages 26 and 27 of the Section's trip to beautiful Quebec City. It looks like everyone who went had a wonderful time!

On page 29, The Florida Bar President, **Scott Westheimer**, provides information on the Free Nota Trust Accounting Software, which is offered by The Florida Bar to all its members. This software is free and is designed specifically to help solo practitioners and small firms.

Turn to page 30 to meet the **Incoming RPPTL Fellows** for the 2023-2024 year. They are a remarkable group, and we look forward to seeing their involvement in the Section in the years to come.

Take a look at Section Spotlight on page 44, which recognizes certain outstanding members. Each and every one of these members has made many significant contributions to the Section and are worthy of our congratulations!

Lastly, we would like to thank our contributors for all their valuable content. We would not be able to provide a top-notch magazine without you. Thank you!

Best,
Michelle



E. FINLEN



M. HINDEN

Don't Miss The Boat: How To Navigate The Stormy Waters Of Nonjudicial Settlement Agreements Through The Proper Use Of Part III, *Representation*, Of The Florida Trust Code

By Alexander S. Douglas, II, Esq., ShuffieldLowman, Orlando, Florida

Part III, Representation, of the Florida Trust Code (the "Code") is one of the most important parts for practitioners when drafting nonjudicial settlement agreements involving a trust, or when bringing litigation involving the modification or termination of a trust. To ensure that an agreement is effective, it must bind all interested persons, including all qualified beneficiaries of a trust. If all interested persons and qualified beneficiaries affected by the nonjudicial settlement agreement are not parties to the agreement, such persons must be adequately represented by a person who is a party. Part III of the Code provides a party with the ability to bind such persons even though they do not sign the agreement. But there are shoals and rocks in these waters that must be avoided, or your agreement could sink. This article is a practical guide to successful navigation of the Representation part of the Code for your practice.

Nonjudicial settlement agreements, under Fla. Stat. § 736.0111 (2023), are probably the most useful tools a practitioner has to address a myriad of common trust issues, including interpretation of trusts, modification of trusts, termination of trusts, or practically any other matter that may cause concern for a trustee during a trust administration. Such agreements must include all persons "whose interest would be affected" and are valid only "to the extent the terms and conditions could be properly approved by the court."[1]

Before diving into Part III of the Code, a quick review of some key terms used to describe stakeholders under the Code will be helpful. A great way to conceptualize trust stakeholders is to think of concentric circles, like the solar system, with the outer circle of this group being "interested persons." Fla. Stat. § 731.201(23) (2023) defines an "interested person" as any person who "may reasonably be expected to be affected by the outcome of the particular proceeding involved."[2] The meaning, as it relates to particular persons, may vary from time to time and must be determined according to the particular purpose of, and matter involved in, any proceedings.

For example, if an irrevocable trust is being modified to change the contingent trustees named in the document, the contingent trustees being removed, who are not beneficiaries, are "interested persons" because their status is being affected.

The seminal case concerning interested persons is *Hayes v. Guardianship of Thompson*.[3] There, the Florida Supreme Court emphasizes the concept that who is an interested person may vary according to the circumstances of the case, rejecting the use of a bright line test to determine who is an interested person.[4]

Within the broadest group of "interested persons" are "beneficiaries." The Code defines a beneficiary as, "a person who has a present or future beneficial interest in a trust, vested

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or contingent, or who holds a power of appointment over trust property in a capacity other than that of trustee."[5] By way of example, an irrevocable trust provides that the trustee distribute income and principal for the lifetime of Paul. Upon Paul's death, the trust provides that the trust corpus be paid to Bill if he is living, but if he is not living, the remaining amounts shall be distributed to Bill's lineal descendants. In this example, Paul, Bill, and Bill's lineal descendants are all beneficiaries even though Bill's lineal descendants are contingent beneficiaries because they would not receive any funds upon Paul's death if Bill were still alive.

The last group in our concentric circles is probably the most important for nonjudicial settlement agreements—the "qualified beneficiary." The term "qualified beneficiary" encompasses only a limited subset of all trust beneficiaries. The definition of "qualified beneficiary" can be confusing, and even more so when applying it to real situations. Although it is best to study the definition outlined in Fla. Stat. § 736.0103(19) (2023), the following step-by-step analysis will help determine whether a beneficiary is a "qualified beneficiary":

- Based upon today's date, to which beneficiaries ***may*** the trustee distribute income and principal? *Those beneficiaries are qualified beneficiaries*.
- If today the beneficiaries to whom the trustee is permitted to distribute income or principal were to die, or if their interests were otherwise to terminate by the terms of the trust, which beneficiaries would be entitled to receive the remainder of the trust? *Those beneficiaries are qualified beneficiaries*.
- If the trust were to terminate today in accordance with its terms, to which beneficiaries would the trustee have to distribute the remaining trust corpus? *Those beneficiaries are qualified beneficiaries*.
- The same analysis above applies to whether a charitable organization has the rights of a qualified beneficiary if a charitable organization is substituted above for "beneficiary."[6]

One of the most helpful cases that discuss qualified beneficiaries is *Hadassah v. Melcer*. This case involved the issue of whether three charities named in an irrevocable trust were qualified beneficiaries. The current distributees of the irrevocable trust were three sisters. The trust was created in 1989 at the death of Sylvia Gelt. A credit shelter trust was created for Ms. Gelt's husband for his life, and after his death, was to be divided into three separate trusts for the benefit of the three sisters (the daughters of Mr. and Mrs. Gelt.) The trust instrument provided that upon the death of each daughter, the daughter's trust would terminate, and the balance of that trust would be redistributed to the trust(s) of the remaining living daughters. Upon the death of the last surviving daughter, the remaining principal and the undistributed income would go to the three named charities.

The trustee filed an action seeking to resign and named the three sisters and the three charities as party defendants. The sisters moved for summary judgment, arguing that the charities were not qualified beneficiaries. The trial court agreed, and the trustee appealed. The Fourth District Court of Appeals reversed, finding that the three charities were qualified beneficiaries.[7] The court pointed out that the statute defining "qualified beneficiary" required the *simultaneous* termination of the interests of the current distributees, not the *sequential* termination.[8] Therefore, properly interpreted, the statute required that the charities be regarded as qualified beneficiaries because if all of the daughters' interests terminated at the same time, the charities would take the remainder.[9]



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Representation Under the Florida Trust Code and Potentially Dangerous Waters

Now that we have reviewed the key categories of trust stakeholders that must be considered in nonjudicial settlement agreements, the next challenge is making sure that all interests are adequately represented in the agreement. Part III of the Code allows for the representation of persons in trust-related judicial actions and in nonjudicial agreements even though those persons are not actual parties to the judicial action or agreements. Many have referred to this concept as "virtual representation."[10] A key point under the Code is that actions taken by a person who is representing another person's interests *has the same binding effect as if the represented person actually took the action.* Furthermore, a trustee may give notice to the representative of a person, or the trustee may give notice directly to the person being represented, without liability.[11]

There are five types of representation under the Florida Trust Code:

- Representation by a fiduciary[12] (*e.g.*, trustee, guardian, or attorney-in-fact);
- Virtual[13] (such as an adult with "substantially identical interest" representing a minor, incapacitated person, unborn person, or a person whose location is unknown or not reasonably ascertainable);
- Court-appointed[14] (done by order of the court so that persons otherwise not represented will be represented);
- Powers of appointment[15] (holder of a general or special power of appointment binds those within the class of the power and takers in default of the power); and
- Settlor-designated representative[16] (where the settlor specifically names a representative in the trust document).

When navigating the representation part of the Code, one must be careful to know when a representative must be free of conflicts, and when conflicts do not matter. Overlooking this important part of the representation statute can make your nonjudicial settlement agreement ineffective. If a representative is precluded from representing a qualified beneficiary due to a conflict of interest, that qualified beneficiary may not be bound by the agreement, which may render the agreement invalid.

Conflicts of interest matter in the following three categories of representation: representation by fiduciaries and parents,[17] representation by persons having a substantially identical interest,[18] and representatives appointed by the court.[19]

Representation by Fiduciaries and Parents

So long as there is no conflict of interest, a fiduciary such as trustee, guardian of the property, personal representative of an estate, or attorney-in-fact with proper authority under the instrument may represent and bind another person under the Code.[20] A parent free of conflict may also bind the parent's unborn children or minor child (assuming that no guardian of the person has been appointed).[21] A good practice tip in any judicial action where the binding nature of a final judgment may turn upon a representative being free of conflict of interest is to have the court make a specific factual finding that the representatives have no conflicts of interest. Similarly, in nonjudicial settlement agreements, the drafter should include statements that the parties agree that the representatives are all free of conflict.

Identifying scenarios where conflicts can arise is important. The following is an example of a common factual scenario that demonstrates a conflict situation:

> Sally is the beneficiary of a trust set up by her deceased father. The trust mandates the use of a corporate fiduciary. The irrevocable trust provides Sally income for life, with principal distributions based upon HEMS. Sally has one minor child, Tim. When Sally dies, the remaining funds, if any, go to her lineal descendants. Sally now wants to seek a termination of the trust and a lump sum distribution to herself because of the cost of the trust administration and the "modest" amount of remaining funds—just under one million dollars. Can Sally represent and bind her minor child? Unborn children? No, because Sally has a conflict! Sally stands to benefit from the termination because she will receive the cash and will eliminate the possibility that her lineal descendants would receive any funds in trust upon her death. Someone other than Sally and free of conflict would have to represent the minor child and unborn children. But who?

Representation by Persons Having a Substantially Identical Interest

Unless otherwise represented, a minor, incapacitated, or unborn individual, or a person whose identity or location is unknown and not reasonably ascertainable, may be represented by and be bound by another person having a *substantially identical interest* to the particular question or dispute, but only to the extent there is no conflict of interest between the representative and the person represented.[22] This section of the Code authorizes what is commonly referred to as "virtual representation" of others. It is very important to note that there cannot be any "virtual" representation of a competent adult person whose location is known. Therefore, if there is a competent adult beneficiary whose location is

continued, page 9

known, such beneficiary cannot be "virtually" represented, notwithstanding that the beneficiary is difficult to deal with or will not consent to any action by a trustee, no matter how reasonable.

Like parents and fiduciaries, the person virtually representing another must be free of any conflict of interest, or there is a risk that the representation will not be effective and the final judgment or nonjudicial settlement agreement will not be binding on the represented party. The following example illustrates a scenario where a virtual representation is permitted and where it is not due to a conflict:

Using the same "Sally" factual pattern above, assume that Sally has an adult son, Tom, who is also a remainder beneficiary of Sally's trust, along with Sally's minor child, Tim. Can Tom represent and bind the interest of his minor brother, Tim, in dissolving the trust? Yes, because Tom is an adult with substantially identical interests as Tim and is free of conflict. What about other unborn heirs? Likely, yes, so long as Tom is free of a conflict of interest.

What if Sally promised to pay Tom $10,000 to agree to the trust termination? No—Tom would have a conflict!

What if Tim and Tom were both *adult* children, but Tim lives in England and is difficult to reach, but his location is known. Could Tom represent Tim in dissolving the trust? No— Tim is not a minor; his identity and location are known. Tom cannot virtually represent him.

Appointment of a Representative

If you are in doubt as to whether a person acting as a representative has a substantially identical interest, or whether there is a conflict, and there is no one else available that is free of conflict that could act as a representative, the safest course of action is to ask the court to appoint a representative pursuant to Fla. Stat. § 736.0305 (2023). A court may appoint a representative free of conflict to represent those persons whose interests are not represented or where the representation may be inadequate, including appointing a representative for a minor, incapacitated, or unborn individual or persons whose identity or location is unknown.[23] For example, a parent, even though free of conflict to represent his or her minor child, may not possess the mental acuity or other skills necessary to give consent on an issue that would affect the minor child's beneficial interest. In such a situation, the court, finding the representation inadequate, can appoint a representative for the child.

However, the Code makes clear that a court-appointed representative may bind another whether or not there is a pending judicial proceeding. So, if a court appoints a representative for a beneficiary, the fact that the court action has terminated does not prevent the representative from continuing to bind the beneficiary as the trust administration continues. Where a judicial action is pending, seeking the appointment of a representative is easily done by motion. If there is no pending judicial action, a complaint must be filed to ask the court specifically to appoint a representative.

Representation by Holder of Power of Appointment

Likely the most powerful tool under Part III of the Code is representation by a *holder of a power of appointment* because where the power of appointment representation statute applies, conflicts of interest by the holder of power of appointment **do not matter.** The holder of the power of appointment binds those subject to his or her power. The exception to this rule is where the holder of the power of appointment is also the sole trustee or where the holder acts in bad faith or through fraud. In such circumstances, the holder of the power of appointment cannot bind those persons subject to his or her exercise of the power.

An example of how the holder of a power of appointment can bind those subject to his or her power is the case of *Ammeen v. Sjogren*.[24] The *Ammeen* case walks through the statute authorizing representation by the holder of a power of appointment and explains its application and effect in practice. In the *Ammeen* case, the settlor set up an irrevocable trust for her daughter. The daughter had the power to appoint the remaining trust corpus through her will to any of her lineal descendants. In default of the daughter's effective appointment, the remaining trust corpus would pass in trust to the daughter's husband, if he survived and they were married and living together. If not, or upon the husband's subsequent death, the remaining trust corpus would pass to the daughter's lineal descendants. The daughter and her husband divorced in 2008. In 2009, the daughter consented to the trustee of her trust distributing its corpus to her brother and the settlor to resolve family litigation and to receive an interest in another asset.

The daughter died in 2015 without a will. In 2016, the ex-husband, as guardian of her two minor children, initiated an action against the daughter's trustee for breach of fiduciary duty, arguing that the two minor children were beneficiaries of the trust and that the prior consent by their mother to dissolve the trust was invalid. The court disagreed, finding that the two minor children were only permissible appointees of their mother's power of appointment and were not beneficiaries.[25]

The court noted that the trust document gave the trustee the power to terminate the trust, and if that happened, the daughter's lineal descendants were not guaranteed to get anything.[26] The minor children were only "permissible appointees, not beneficiaries, while the [daughter] was alive."[27] Accordingly, the daughter's consent to terminate the trust was valid and binding on her children).[28]

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The court also rejected the ex-husband's argument that the daughter's exercise of her power of appointment was done in bad faith; therefore, negating the effectiveness of the representation.[29] The court rejected this argument, citing that there was no evidence of bad faith by the daughter.

Designated Representatives

The final category of representation under the Code is *designated representatives*, which are persons selected by the settlor to represent a beneficiary's interests.[30] Like holders of powers of appointment, settlor-designated representatives are not limited by conflicts of interest. Fla. Stat. § 736.0306 (2023), provides a mechanism whereby a settlor can designate a person to receive notices and accountings on behalf of and bind the beneficiary. This mechanism can be particularly useful in situations where a settlor intentionally wants to limit the information that a beneficiary will receive about a trust. For instance, a settlor may wish to minimize the chances that his or her adult grandchildren may learn of the value of a trust set up for them. The settlor may be concerned that if the grandchildren learn about the significant funds put in trust for them, the grandchildren will lose their motivation to be productive citizens. Accordingly, the settlor may designate the grandchildren's parent as the designated representative to receive notices and accountings. The designated representative is not a fiduciary and is not liable to the beneficiary whose interest he or she binds, so long as such actions or omissions are in good faith. Additionally, a designated representative is not prevented from binding a beneficiary or receiving notices for a beneficiary, even where the designated representative has a conflict of interest with the beneficiary being represented. However, a trustee is prohibited from also acting as a designated representative.

Conclusion

When drafting a nonjudicial settlement agreement or a complaint in trust litigation, it is critical that practitioners properly identify all "interested persons," including "qualified beneficiaries" of a trust, so that all appropriate parties are bound by the agreement or any final judgment entered in the judicial action. When stakeholders include minor children, incapacitated individuals, unborn individuals, and parties whose interests are subject to a power of appointment, the Part III, *Representation*, provisions of the Florida Trust Code may be a useful tool to streamline judicial proceedings and nonjudicial resolutions of trust issues. Practitioners who are well-versed in the Representation provisions of the Florida Trust Code will have an understanding of how to avoid conflicts of interest to give their clients better protection by making it more likely that their nonjudicial settlement agreements and final judgments in trust-related judicial actions will be binding on all appropriate parties. Like good sailors reviewing their charts before finalizing their plans, make sure you know the limitations of Part III and avoid the dangers of conflicts of interests. May all of your stormy cases lead to the calm seas of nonjudicial settlement agreements through the proper use of Part III, *Representation*, of the Florida Trust Code.


A. DOUGLAS

***Alexander Douglas**'s practice area focuses on probate, trust, and guardianship litigation. He frequently speaks on probate, trust, and guardianship law and actively participates in the RPPTL Section as a member of the Executive Council. Alex is also an active member of the Orange County Bar's Estate, Trust, and Guardianship Committee, where he has served as past chair and on the Steering Committee. In addition to The Florida Bar, Alex is also admitted to practice in federal court before the U.S. District Court for the Middle District of Florida, the Southern District of Florida, and the Eleventh Circuit Court of Appeals. He earned his J.D. degree, with honors, from the Florida State University College of Law. He holds a B.A. degree, with honors, from Washington University in St. Louis, Missouri.*

Endnotes

1 Fla. Stat. § 736.0111(3) (2023).
2 Fla. Stat. § 731.201(23) (2023).
3 *Hayes v. Guardianship of Thompson*, 952 So. 2d 498 (Fla. 2006).
4 *Id*.
5 Fla. Stat. § 736.0103(4) (2023).
6 Fla. Stat. § 736.0110 (1) (2023).
7 *Hadassah v. Melcer* (4th DCA 2019), 268 So. 3d at 760.
8 *Id*.
9 *Id*.
10 It would appear Florida's statute would pass constitutional muster. *See Taylor v. Sturgell*, 553 U.S. 880 (2008).
11 Fla. Stat. § 736.0301(4) (2023).
12 Fla. Stat. § 736.0303 (2023).
13 Fla. Stat. § 736.0304 (2023).
14 Fla. Stat. § 736.0305 (2023).
15 Fla. Stat. § 736.0305 (2023).
16 Fla. Stat. § 736.0306 (2023).
17 Fla. Stat. § 736.0303 (2023).
18 Fla. Stat. § 736.0304 (2023).
19 Fla. Stat. § 736.0305 (2023).
20 Fla. Stat. § 736.0303(1)-(4) (2023).
21 Fla. Stat. § 736.303(5) (2023).
22 Fla. Stat. § 736.0304 (2023).
23 Fla. Stat. § 736.0305 (2023).
24 *Ammeen v. Sjogren* , 313 So.3d at 157 (Fla 1st DCA 2021).
25 *Id at 160.*
26 *Id.*
27 *Id.*
28 *Id.*
29 Fla. Stat. § 736.0302(1) (2023).
30 Fla. Stat. § 736.0306 (2023).

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My House Was Just Stolen: Title Fraud, The Problem, And The Beginning Of A Solution

By Christopher W. Smart, Esq., Carlton Fields, Tampa, Florida

The problem of title fraud is likely much older than Florida itself, but the case law gives us many examples of such fraud in this state going back well over a hundred years.[1] While it takes many forms, one common scheme involves a form of identity theft where the fraudster creates and records a deed to take title to real property out of the true owner and place it in the name of a straw person or an entity, and then uses that title to defraud a bona fide purchaser or lender out of their money. Once the transaction has occurred, the fraudster and the money are usually gone with the wind, leaving the bona fide parties to the transaction to figure things out. Occasionally, however, the goal of title fraud is to actually steal and keep title to and possession of the real property, particularly where the true owners are deceased, elderly, or impoverished.[2] In recent years, the advent of electronic documents, the widespread use of the internet, and technology such as e-recording, have made title fraud easier and, as a result, accelerated its spread.[3]

In response to this acceleration, the Florida Legislature,[4] with technical assistance from the Section, adopted HB 1419, the real property fraud bill, which was approved by the Florida Governor on June 14, 2023, to provide additional tools for detecting title fraud earlier and thereby preventing the fraud altogether or mitigating some of its harm, as well as to create a pilot program to study potential solutions to title fraud. Fraud and theft are, of course, already illegal and title fraud falls squarely under a number of Florida statutes.[5] There are also certain minimum criteria that must be met in order to be able to record a deed.[6] However, such requirements can be falsified, and, as long as a deed appears regular on its face, the clerks of court are currently statutorily required to record it.[7]

The real property fraud bill, which became effective July 1, 2023, contains a five-pronged approach to combating title fraud: (i) a state-wide recording notification system, (ii) an expedited quiet title action process, (iii) a statutory form of quit claim deed, (iv) a post-office address requirement for witnesses, and (v) a pilot identity verification program for those recording instruments in Lee County.

The first prong of the bill is the newly created Fla. Stat. § 28.47, which requires the clerks of court to create a free recording notification service that allows anyone to register at least five monitored identities.[8] Once someone is registered, the clerk of court is required to notify the registrant within 24 hours of a recording of any land record (deed, mortgage, or other document purporting to convey or encumber the real property) involving a monitored identity. The notice must contain: (i) the monitored identity, (ii) the recording date of the land record, (iii) the official record book and page or instrument number for the land record, (iv) instructions for searching for and viewing the land record, and (v) a phone number for questions regarding the notification.

By giving a property owner early notice of the recording of a land record, this new statute will help prevent title fraud or at least mitigate its impact. Title fraud typically occurs in two steps. The first is putting a title into the name of a straw person or entity. The second is a mortgage or sale transaction, which

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generates the proceeds that the fraudster is after. There is usually some delay between steps one and two of the process. Thus, if a property owner becomes aware of the recording of an unauthorized land record, it can give that individual the opportunity to notify law enforcement and to take other steps to thwart the fraud before the fraudster has the time to finish step two.

The bill's second prong provides a simplified summary procedure pursuant to which an owner can quiet title to real property on an expedited basis. Thus, if an owner learns of the recording of an unauthorized land record pursuant to the new notification service or otherwise, the owner can quickly file suit and finish an action quieting title in the true owner's name in a relatively short period. Chapter 65 of the Florida Statutes, has long provided for actions to quiet title to real property, but the newly created Fla. Stat. § 65.091 follows the summary procedures outlined in Fla. Stat. § 51.011, which, among other things, requires a response within five days of service of process instead of the typical 20 days. This prong also required the clerks of court to provide a simplified form of complaint, and, with the assistance of the Section, a form quiet title complaint, together with helpful instructions, was

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produced.[9] Pro se plaintiffs, as well as practitioners and their clients, would do well to also file a notice of lis pendens in the official records of the county of their summary quiet title proceeding to put any potential purchasers or mortgage lenders on notice of the disputed title.

The next two prongs add information to recorded instruments that may help deter title fraud in the first place or may help detect the fraud or the parties responsible for the fraud. The third prong statutorily prescribes the form of quit claim deed pursuant to Fla. Stat. § 698.025. While the form of a warranty deed has long been provided by statute, the form of a quit claim deed has not.[10] The fourth prong, which amends existing Fla. Stat. § 695.26, requires a post-office address for each witness to be legibly printed on a deed.

The final prong of the bill may ultimately prove the most effective in the long run. It establishes a two-year "Title Fraud Prevention Through Identity Verification Pilot Program" in Lee County. Pursuant to the pilot program, a Lee County Clerk participating in the pilot program must require from all persons presenting a deed or other instrument purporting to convey an interest in real property to produce a government-issued photographic identification, whether in person or through an electronic recording service. The clerk is then required to record the name and address of the person together with the recording information of the instrument recorded. That information will be available for public inspection, pursuant to Florida's Sunshine Law, but may not necessarily be available on the clerk's public website. If the person refuses to provide the identification, the clerk may refuse to record the instrument. The pilot program sunsets on July 1, 2025, and the clerk is to produce a report to the Governor by December 31, 2025, detailing the number of persons who presented deeds for recording, any feedback received, whether the program identified any fraudsters, and which includes a recommendation as to whether the program works and should be implemented state-wide.

The pilot program may ultimately be the most successful of all of the tools presented by the new law in preventing title fraud in the first place. While it is possible, of course, that fraudsters may be able to create a fraudulent government-issued photographic identification, the additional time and expense it would take to do that will present a significant additional hurdle for anyone contemplating title fraud.

In sum, Florida's new real property fraud prevention laws provide incremental tools in the fight against fraud that should help reduce title fraud by creating additional hurdles for fraudsters and should make it easier to detect title fraud earlier and thus prevent the fraud altogether or mitigate its harm. The author also looks forward to hearing the results of the new pilot program and writing a sequel to this *ActionLine* article.

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C. SMART

Endnotes

1 *See, e.g., Threadgill v. State*, 77 So. 880 (Fla. 1918) (reversing on evidentiary grounds the conviction or Percy Threadgill for uttering a forged deed, where he admitted to have gotten the deed from the owner without consideration and to have mortgaged property he did not own with the intention of giving back the property and paying off the mortgage). In *Heisley v. First Bond & Mortgage Co.*, 138 So. 81 (Fla. 1931), the Florida Supreme Court addressed a priority dispute in the aftermath of the fraud perpetrated by C.A. Roberts who had forged a deed to real property to himself and then executed several hundred thousand dollars' worth of mortgages against the property.

2 *3 Suspects Arrested in $12M Real Estate Property Theft Ring in Broward County, Officials Say* (March 14, 2023), *https://www.cbsnews.com/miami/news/3-suspects-arrested-in-12m-real-estate-property-theft-ring-in-broward-county/* (last visited September 24, 2023).

3 *See* Mike DeForest, *Property Fraud Victims Battle Each Other Over Rights to Home*, Click Orlando (March 6, 2023), https://www.clickorlando.com/news/investigators/2023/03/06/property-fraud-victims-battle-each-other-over-rights-to-home/ (last visited September 24, 2023); Mike DeForest, *'Be Aware:' Identity Thief Uses Fraudulent Deed to Take Orange County Man's Property*, Click Orlando (May 16, 2022), https://www.clickorlando.com/news/investigators/2022/05/16/be-aware-identity-thief-uses-fraudulent-deed-to-take-orange-county-mans-property/ (last visited September 24, 2023).

4 Great credit is due to Representative William Cloud Robinson, Jr., the Judiciary Committee, and the Civil Justice Subcommittee for advancing the bill.

5 For example, recording a false document is a third-degree felony pursuant to Fla. Stat. §§ 775.082, 775.083, and 817.535(2)(b). Identity theft is also a violation of Fla. Stat. §775.082(2)(a). It is also important to note that Fla. Stat. § 817.535(8) creates a civil cause of action against the person who files or directs to be filed a false instrument. Identity theft is also a violation of Fla. Stat. § 775.082(2)(a).

6 Fla. Stat. § 695.03 ("To entitle any instrument concerning real property to be recorded, the execution must be acknowledged[,]""proved by a subscribing witness[,]" and "authenticated . . ."); Fla. Stat. § 695.26 (enumerating the requirements for recording any instruments affecting real property).

7 Fla. Stat. § 28.222 ("(3) The clerk of the circuit court shall record . . . . upon payment of the service charges prescribed by law: . . . (a) Deeds . . .").

8 While for-profit companies such as Aura, Home Title Lock, and Deed Shield offer title monitoring services and may offer additional benefits such as access to title restoration professionals, those services frequently cost $20 or more a month, and Florida's new recording notification service is free.

9 Many thanks are due to Manny Farach and Shawn G. Brown for their efforts in drafting the form quiet title complaint and instructions.

10 Fla. Stat. § 695.02 (2023).

The Legal And Practical Mechanics Of Nominating Guardians For Minor Children In Florida

By Monique Lavender Greenberg, Esq.,
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The need to protect one's children is often the driving force behind why parents initiate estate planning. While attorneys usually prioritize asset protection, tax strategies, and distribution standards when drafting an estate plan, most parents first focus on the quintessential question of, "Who will care for my kids when I am gone?"

This article will explore the legal and practical mechanics of nominating guardians of minor children in Florida, including, how to designate a preneed guardian for minors, the deference the court must give to a nomination in a declaration of preneed guardian versus a nomination in a will, practical considerations when nominated guardians are not local, best practices on whether to nominate an individual or a married couple, and whether the guardian should be the same person named as the trustee of the ward's assets held in trust.

Florida law allows parents to nominate a guardian for their minor children in a declaration of preneed guardian.[1] The declaration must be signed by the declarant(s) in the presence of two witnesses and must include the child's full name and birth date as they appear on the birth certificate.[2]

The nomination of a preneed guardian in the declaration creates a rebuttable presumption that the individual is entitled to serve as guardian.[3] However, the court may refuse to appoint the designated preneed guardian if they are found to be unqualified.[4] The declaration of preneed guardian is a powerful tool. It allows the nominated guardian to assume their role immediately and without court action upon the surviving parent's death or upon the adjudication of the surviving parent's incapacity.[5] However, the designated guardian must petition the court to confirm their appointment within twenty days of assuming their duties as guardian.[6]

While a testator may nominate a guardian of a minor child in a will, this nomination is not given the same deference as a nomination in a declaration of preneed guardian. As discussed, a declaration of preneed guardian creates a rebuttable presumption that the designated guardian is entitled to serve and the court is required to appoint the designated guardian, "unless the court determines that appointing such a person is contrary to the best interests of the ward."[7] In contrast, the court is only required to "consider" an individual nominated in a will to serve as the guardian of a minor. [8] If a minor child is in need of a guardian, and there is no declaration of preneed guardian, the court will consider the best interests of the child and will give preference to someone related by blood or marriage.[9] Additional factors conferring preference are whether the potential guardian, "[h]as educational, professional, or business experience relevant to the nature of the services sought to be provided; [h]as the capacity to manage the financial resources involved; or [h]as the ability to meet the requirements of the law and the unique needs of the individual case."[10] The court is required to consider the preference of the Ward if they are at least 14 years old and should consider the wishes of the Ward's next of kin if the Ward is not able to express a preference.[11]

As a practical consideration, estate planning attorneys should ascertain whether the client's preferred guardians would be able to immediately take custody of minor children in the case of an emergency. If the preferred guardians do not reside within a short drive, the author often will include a nomination of a local temporary guardian authorized to briefly assume the role of a guardian until the designated guardian can travel to be with the minor(s). There is no direct authorization for this under the statute, but at the same time, this type of nomination is not disallowed. Including this language will likely allow a trusted individual to care for the minor children until the nominated guardian can arrive, which would prevent custody of the children from being assumed by a government entity in an already traumatic situation.

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Before automatically accepting the names of preferred guardians for minors, an attorney should delve into details. Planners are encouraged to ask about the citizenship or the immigration status of the nominated guardians. If the guardians are not U.S. citizens, clarify: (1) are the parents comfortable with the child living in that person's home country; (2) will there be immigration roadblocks involved if the nominated guardian needs to travel to the U.S.; or (3) will there be immigration issues if the child needs to move to the nominated guardian's country of residence.

Another technical issue often overlooked is the nomination of married couples to serve jointly. When a client wants to name two individuals to serve jointly, the attorney should ask additional questions. In many situations, one of the desired guardians is a relative or a close friend (the "close connection") and the other person is the close connection's spouse. The attorney should clarify whether the spouse should be the guardian if the close connection is not alive or if the couple is divorced. If the answer is no, the best practice is to only nominate the individual with the close connection.

Parents of minor children should also be encouraged to name alternate guardians, even when they are confident their first choice will be able to serve.

Many parents initially wish to nominate one person to serve as both the trustee of a minor's assets and as the guardian of the minor children. At first glance, this sounds like a smart plan, as one person can handle everything related to the children's care and finances. However, in practice, the nomination of a dual guardian/trustee eliminates some of the checks and balances that preserve the children's rights and protect minor beneficiaries. In Florida, a trustee is required to prepare an accounting for the beneficiaries, at least, annually.[12] The duty to account cannot be waived in a trust,[13] but it can be waived by a beneficiary in writing.[14] Unless the trust instrument designates another person to receive annual accountings and trust notices,[15] the parent or guardian is the legal representative of the minor child with respect to the trust and is entitled to receive a copy of all trust accountings and notices. Preparing an annual accounting is a time-consuming and laborious task and, if a trustee is required to prepare one to submit to themselves, the accounting may be forgotten entirely. If there is no annual accounting prepared or if the guardian waives an accounting, there is no formal record of how trust funds were spent. This can result in young adults having no records to verify how their assets were spent during their minority and can lead to distrust and conflict between the adult child and the guardian/trustee. In most cases, clients should be encouraged to consider nominating different people for these roles. Bifurcating control of trust assets and physical custody creates a system of checks and balances and encourages the trustee to maintain accurate and thorough records.

As there is no statutory form for a declaration of preneed guardian, a sample is provided below.



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Declaration of Preneed Guardian for the Minor Children of _____ and _____

We, _____ and _____, of _____, Florida, are the natural guardians of the following child(ren):

_____, born _____; and

_____, born _____.

In the event of our death or incapacity where neither of us can care for our minor children, we hereby state our preference in the matter of a Guardian of our minor children, including any children born after the signing of this document.

Under the provisions of section 744.3046 of the Florida Statutes, we hereby make this declaration in front of two attesting witnesses, naming as Preneed Guardian(s) _____. In the event that _____ is/are unable or unwilling to serve, then we name _____ to serve as Preneed Guardian(s). If both _____ and _____ are unable or unwilling to serve, then we name as Preneed Guardian(s) _____.

If my named guardians are unable to immediately take custody of my children, I nominate _____ whose telephone number is _____ as temporary guardian(s) until a named guardian can take custody of my children.

We are aware that the court is not bound to appoint the above-named Preneed Guardians if the presumption as to their qualifications to serve as Guardian is rebutted by clear and convincing evidence.

We have signed this Declaration in the presence of the below-listed witnesses on this _____.

The declarants are known to us, we witnessed the Declarants signing on the above date, and we signed this instrument in the presence of the Declarants and each other, believing the Declarants to be of sound mind.

WITNESS #1

Signature _____

Printed Name _____

Address _____

WITNESS #2

Signature _____

Printed Name _____

Address _____



M. GREENBERG

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Endnotes

1 Fla. Stat. § 744.3046 (2023).

2 Fla. Stat. § 744.3046(2) (2023). The statute also states that the child's social security number must be included in the document; however, this is a significant security risk. To date, no case law reflects a finding that a declaration of preneed guardian was invalid because a social security number was not listed. *Id.*

3 Fla. Stat. § 744.3046(4) (2023).

4 *Id.*

5 Fla. Stat. § 744.3046(5) (2023).

6 Fla. Stat. § 744.3046(7) (2023).

7 Fla. Stat. § 744.312(1) (2023).

8 Fla. Stat. § 744.312(3)(c) (2023).

9 Fla. Stat. § 744.312(2)(a) (2023).

10 Fla. Stat. § 744.312(2)(b)-(d) (2023).

11 Fla. Stat. § 744.312(3) (2023).

12 Fla. Stat. § 736.0813 (2023).

13 Fla. Stat. § 736.0105(2) (2023).

14 Fla. Stat. § 736.0813(2) (2023).

15 *See* Fla. Stat. § 736.0306(1) (2023).

The Intersection Of Onboarding High Net Worth Clients And Gift Tax Reporting

Gift Tax Return Reviews: Tips, Traps and Opportunities

By Sarah H. Hayford, Esq., Carla A. DeLoach, Esq., and
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Estate planning attorneys sometimes mistakenly view their practice as a series of ad hoc deliverables. The price for doing so is to ignore critical client reference materials, which inform the representation as it matures. These materials create a narrative and guideposts for future deliverables and transactions. To be cost effective and useful, such materials demand a combination of process and substance. Within this article, the authors:

- Describe how the onboarding of high net worth clients intersects with gift tax reporting.
- Address certain technical problems observed through gift tax reporting reviews (which in this article will be called "audits").
- Summarize an approach, marrying process with substance, to create and use a comprehensive Gift Tax Reporting Summary, Annual Gift Summaries, and preparation and delivery of well-drafted Gift Tax Returns (Form 709s).

Onboarding High Net Worth Clients

The client onboarding process involves a review of family dynamics, goals, assets, the existing estate plan (and business plan, where applicable), and gifts (both past and anticipated). In a sense, onboarding is the attorney's assessment of the existing plan's integrity. Thorough onboarding is critical to comprehensive estate planning for a high net worth client. This translates into two realties:

No ad hoc planning request should be undertaken without first completing an onboarding assessment.

Onboarding includes several assessment projects or phases, which improve the attorney's understanding of a client's overall situation and permit the attorney to observe a client's commitment to comprehensive planning.

Onboarding Review. An effective Onboarding Review reveals what is fixed (for example, prior gifts, certain irrevocable trusts, etc.) and what is not necessarily fixed (for example, the last will and testament, trusts, entity governing agreements, etc.). An effective Onboarding Review ultimately include: the preparation of a comprehensive asset list/financial statement; the preparation of a primary plan summary (overviewing central dispositive documents, including, but not limited to, the client's durable power of attorney, designation of healthcare surrogate, living will, last will and testament, and revocable trust); the preparation of an ancillary plan summary (for irrevocable trusts); and an audit of gift tax reporting, as well as anticipated future gifts. This article limits its focus to the gift tax reporting audit portion of the Onboarding Review.

The Gift Tax Reporting Audit. An effective gift tax reporting audit includes a review of all filed gift tax returns, as well as all gifts, which may not have otherwise been reported. This audit involves the following:

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TAX

- *identifying the use of the unified credit by taxable year (noting any discrepancy between spouses, where applicable);*
- *identifying the use of GST exemption by taxable year (again, noting any discrepancy between spouses, where applicable)—whether by affirmative allocation, automatic allocation on a filed return, or automatic allocation without a filed return;*
- *reviewing all I.R.C. § 2632 elections to determine consistency among spousal returns and successive gifts to the same trust over multiple years;*
- *confirming donors for gifts to ensure correlation with identified trust(s);*
- *analyzing the use of the gift tax exclusions with use of GST exemption to ensure proper application of the gift tax annual exclusion and the GST annual exclusion; and*
- *calculating the inclusion ratio for all irrevocable trusts.*

Without completing a gift tax reporting audit as part of the overall Onboarding Review, the attorney cannot develop the estate plan with confidence of transfer tax outcomes. Undoubtedly, this approach is tedious and certain clients may not have the patience for, or see the value in, such an approach (or the historical reference guide which results). In this way, thorough onboarding (including the gift tax reporting audit) alerts the attorney to the need for *off*boarding before the attorney gets in too deep.

While onboarding high net worth clients over the years and conducting a host of gift tax reporting audits, the authors have observed a series of "common" mistakes within the gift tax returns reviewed. The Top 20 of such common mistakes is included as Exhibit B to alert the reader of these pitfalls.

The Gift Tax Reporting Deliverable. The results of the gift tax reporting audit are then summarized in a "Gift Tax Reporting Summary," where recommendations are provided on adjustments to filed gift tax returns and to any new returns, which *should* be filed for additional years. The Summary outlines the reporting and includes observations requiring action. While the Summary contains technical references, it also contains practical commentary, often pointing the client to audit risk, the application of the statute of limitations (if any), over-reporting, etc.

Post-Onboarding - Ongoing Gift Tax Reporting

A complete picture of a client's planning (including the gift tax reporting audit) confirms the viability of continued representation. Assuming that reality, the attorney should ensure that gift tax reporting, which occurs on the attorney's watch, promotes accuracy and plan integrity (and ultimately aligns with and is incorporated into the comprehensive Gift Tax Reporting Summary). This mandates that the attorney take three steps on an annual *recurring* basis:

- *Prepare an Annual Gift Summary, contemporaneously referencing all gifts made in a given year. This includes reaching out to the client to ensure that the attorney is aware of all gifts, including, those that were not facilitated through the attorney's office.*
- *Finalize the Annual Gift Summary for all gifts made in a given year (See Exhibit A).*
- *Obtain details required to tie up loose ends associated with the gift(s).*

The Annual Gift Summary. The Annual Gift Summary includes all salient details of a gift or a transfer, including: the donee, the description of the gift, the date, the fair market value of the gift, and the basis of the gift (See Exhibit A - Sample Annual Gift Summary). Using this Annual Gift Summary (and reference guide) is part of an overall process designed to maintain quality control, but the Annual Gift Summary is also technical. Specifically, it is used to ask critical questions, including:

- *Is gift-splitting permitted? Is it advantageous?*
- *Will there be GST tax implications?*
- *Is the trust a "GST Trust"?*
- *How has the trust been treated historically, for purposes of the GST tax?*
- *Will a QTIP election be made?*
- *Have hanging powers (if any) been identified and calculated?*
- *Has eligibility for gift tax annual exclusions and GST tax annual exclusion, respectively, been confirmed?*

Along with the Gift Tax Reporting Summary, each Annual Gift Summary becomes a fixture (in terms of a later client reference source), which promotes plan integrity.

In closing, gift tax reporting for high net worth clients is not ad hoc data processing and should not be entertained outside of comprehensive onboarding, which includes an audit of a client's gift tax reporting and planning. To be most effective, an attorney must be dedicated to the maintenance of a thorough reference, and the client must see the value proposition of such a reference. Assuming both, representation beyond assessment is not only viable, but is also ripe for comprehensive planning opportunities. The approach may appear burdensome, but the intersection of process and substance is necessary to ensure the quality of all planning deliverables, as well as the critical client reference materials that inform the same.

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Exhibit A

SAMPLE ANNUAL GIFT SUMMARY

Year:_____

Gift No. 1 – Donor	
Donee/Relationship to Donor/TIN/Address	
Description of Gift	
Date of Gift	
FMV of Gift	
Basis in Gift	
Eligible for Gift Annual Exclusion (w/ explanation)?	
Eligible for GST Annual Exclusion (w/ explanation)?	
Gift Splitting (w/ explanation)?	
GST (w/ explanation)?	
2632 Election (w/ explanation)?	
QTIP Election (w/ explanation)?	
Hanging Power Analysis:	

Gift No. 2 - Donor	
Donee/Relationship to Donor/TIN/Address	
Description of Gift	
Date of Gift	
FMV of Gift	
Basis in Gift	
Eligible for Gift Annual Exclusion (w/ explanation)?	
Eligible for GST Annual Exclusion (w/ explanation)?	
Gift Splitting (w/ explanation)?	
GST (w/ explanation)?	
2632 Election (w/ explanation)?	
QTIP Election (w/ explanation)?	
Hanging Power Analysis:	
Cumulative Gifts Per Beneficiary	

Exhibit B

Top Twenty Most Common Gift Tax Return Mistakes

1. The return preparer fails to read the current gift tax return instructions before return preparation begins. The IRS makes form changes and provides new guidance in the instructions. These can be missed if the return preparer does not read the current instructions.
2. The return preparer fails to consider the reasons why filing a return for a client may be beneficial even if not required. Are there opportunities related to the allocation of GST exemption and mixed inclusion ratios? Is there a termination of an ETIP period?[1] Should elections be made related to the automatic allocations under I.R.C. § 2632 to avoid future returns? Was there a sale of a hard-to-value asset?
3. The return preparer's misunderstanding of gifts can lead to incorrect reporting. Bad information from the client, as well as an attorney's failure to ask questions (Who made the transfer? What was transferred? When was it transferred?), can create inconsistencies and unexpected tax consequences.
4. The return preparer fails to file substantiating documentation with the return to meet the adequate disclosure rules.[2]
5. The return preparer assumes that all gifts qualify for the annual exclusion without analyzing whether the gift is a gift of a present interest.[3]
6. The return preparer assumes gifts eligible for the gift tax annual exclusion also qualify for the GST annual exclusion, ultimately resulting in the misapplication of the GST annual exclusion and the under-allocation of GST exemption.
7. The return preparer fails to review the withdrawal right provisions of the governing trust agreement, including any hanging powers, resulting in erroneous reporting.
8. The return preparer fails to analyze the potential effect of a spousal withdrawal right.[4]
9. The return preparer fails to consider whether any of the donees are skip persons, particularly if a donee is not a family member (where the donee's age determines his or her skip status).
10. The return preparer fails to make allocations of GST exemption to trusts that have potential to generate generation-skipping transfers. Late allocations can be costly.[5]

11. The return preparer allocates a fixed dollar amount of GST exemption to a gift of a hard-to-value asset, instead of making the allocation by way of a formula designed to produce a zero GST inclusion ratio. The latter approach stabilizes the inclusion ratio, whether or not an audit results in a change in valuation.

12. The return preparer relies on formula allocations produced by the gift tax return program that is being used, instead of analyzing what formula allocation would produce the optimum results.

13. The return preparer fails to specify the order in which GST exemption is to be allocated.

14. The return preparer allocates GST exemption to a trust that has an ETIP.[6]

15. The return preparer fails to track automatic allocations of GST exemption and to account for such allocations on any required gift tax return, which can result in an underreporting of GST exemption previously allocated.

16. The return preparer fails to check the box to spread a gift to a 529 account over 5 years.

17. The return preparer fails to track the gifts to 529 accounts being spread over 5 years and overstates the annual exclusion that is available for the recipient in years 2-5.

18. A spouse fails to sign the gift tax return of the other spouse in the box consenting to split gifts.

19. The return preparer "picks and chooses" the gifts they want the client to split.

20. The return preparer fails to split gifts made during a deceased spouse's lifetime, wasting the deceased spouse's lifetime exemption.


S. HAYFORD

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C. DELOACH

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


J. HURLBURT

Jordan DeLoach Hurlburt *is a partner in the Orlando firm DeLoach, P.L. She graduated magna cum laude from the University of Florida Levin College and holds an LL.M. in Taxation from New York University. Her practice emphasis includes estate planning, probate and trust administration, and succession planning. Jordan is board-certified in Wills, Trusts and Estates by The Florida Bar Board of Legal Specialization and is a graduate of the Florida Fellows Institute of the American College of Trust and Estate Counsel's inaugural class. She has co-authored various articles featured in ActionLine on practice management. She has also spoken for the Florida Tax Institute, Orange County Bar, and Central Florida Bankruptcy Law Association, among others.*

Endnotes

1 I.R.C. § 2642(f)(3) (1988).

2 Absent fraud, bad faith, willful attempts to evade tax, and failure to report, adequately disclosed gifts are subject to a 3 year statute of limitations from the date of the filing (Treas. Reg. § 301.6501(c)-1). The adequate disclosure rules should be followed carefully and considered with each reported gift.

3 For example: consider indirect contributions to business organizations. For a transfer to a corporation: *Stinson Estate v. United States*, No. 3:97-CV-455RM (N.D. Ind. Oct. 2, 1998), aff'd, 214 F.3d 846 (7th Cir. 2000). For a transfer to a partnership: *Shepherd v. Commissioner*, 115 T.C. 376, 115 T.C. No. 30 (2000), aff'd, 283 F.3d 1258 (11th Cir. 2002).

4 When an individual (including a spouse), is given certain withdrawal rights over trust assets, such withdrawal rights may be includible in the individual's (including a spouse's) estate. I.R.C. § 2514(c). An ETIP arises to the extent transferred assets would be includible in the transferor or transferor's spouse's estate. Treas. Reg. § 26.2632-1(c)(2) Allocations of GST exemption made during an ETIP are effective upon the conclusion of that ETIP. Treas. Reg. § 26.2632-1(c)(1)(iii). See Treas. Reg. § 26.2632-1(c)(2)(ii)(B) for a "safe harbor"—consider the same in future drafting!

5 Treas. Reg. § 26.2632-1(b)(4)(ii)(A)(1).

6 GST exemption allocations made during an ETIP are effective upon the conclusion of that ETIP. Treas. Reg. § 26.2632-1(c)(1)(ii).

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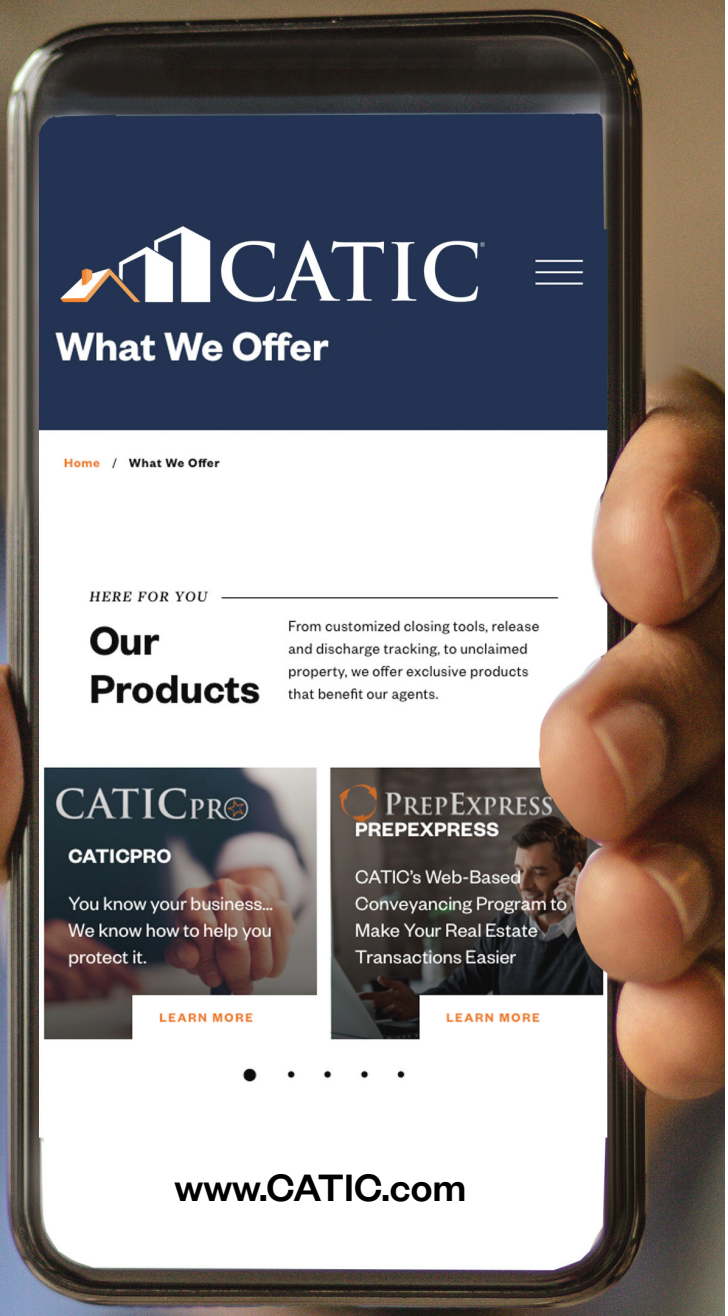

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Membership & Inclusion Committee
Minority Lawyers Seminar Series: Recap Of Year Three

By Annabella Barboza, Esq., Barboza Law & Associates, P.A., Plantation, Florida and
Lillith Bailey, Esq., SJF Law Group, Plantation, Florida

The Membership & Inclusion Committee (MIC), through its Minority Lawyers Seminar Series Program, presented an all-day CLE seminar entitled, "Nuts and Bolts of Real Estate Closings" on Saturday, May 13, 2023.

The Program Co-Chairs, Annabella Barboza and Lilleth Bailey, selected a panel of impressive speakers — eighty percent of them board-certified real estate attorneys -- who enthusiastically dedicated their time and their talents to this service project. The speakers were: Perla Calas (Miami Lakes), Klarika Caplano (St. Petersburg), Brenda Ezell (Jacksonville), Michael Gelfand (West Palm Beach), Michelle Gomez Hinden (Orlando), Kristen Jaiven (Fort Lauderdale), Nishad Khan (Orlando), Raul Perez-Ballaga (Coral Gables), Silvia Rojas (Miami), Christopher Sajdera (Boca Raton), and Salome Zikakis (Fort Lauderdale). Each panelist showcased the knowledge of their respective areas, including practical tips on real estate contracts, title insurance, digital closings, landlord/tenant issues, FIRPTA, closing procedures and ethical considerations. Handouts and other helpful written materials were also distributed. The seminar drew over one hundred participants, mostly members of minority voluntary bar associations across Florida, and saw an impressive twenty-seven new Section members.

This seminar marks the third consecutive year that the MIC has offered a free eight-hour CLE program as a service project to promote diversity within the Section's practice areas. The program's steering committee works diligently to select a panel of seasoned and diverse lawyers as presenters for seminars on estate planning, probate, real estate, and guardianship. The steering committee plans the content and promotes the workshop with the assistance of minority voluntary bar associations statewide.

The Minority Lawyers Seminar Series Program is an effective way to attract diverse lawyers to the Section's areas of practice and to promote diversity within the Section. The positive feedback received from both participants and speakers boosts MIC's efforts to continue offering this special program annually. We invite you to get involved in the 2024 seminar on guardianship.

Special thanks to all speakers and to the members of the steering committee**, Colleen Sachs, Celeste H. Muir, Silvia Rojas, Marlene Watson,** and **Terence Harvey**, for their dedication to making this seminar an enormous success.

Thomas M. Cooley Law School Outreach Event:
Renting With Confidence: Tips For Tenants And Landlords

By Johnathan Butler, Esq., Fidelis Capital Partners, Tampa, Florida
Jacob Goss, Cooley Law School RPPTL President, Tampa, Florida

Can my landlord enter my apartment without my permission or proper notice? When can landlords keep my security deposit? What happens to my existing lease when the property is sold? Cooley Law students in Tampa posed these and other important questions over a lunch hour outreach event last July at Cooley Law School. RPPTL Executive Council members, Attorney Kris Fernandez and Attorney John Redding, took turns answering questions based on their experience representing landlords, tenants and other parties in these matters. After a warm introduction from Cooley's RPPTL President, Jacob Goss, RPPTL member, Johnathan Butler, introduced the panel and moderated the session covering more than twenty-five questions submitted for the event.

Attendees enjoyed engaging with the speakers after the event and appreciated the RPPTL tote bags and pens given to attendees. The law students were invited to participate in future events, including, campus mock interviews and career coaching with local 13th Circuit At Large Members (ALMs). In addition, students were informed of the Breakers RPPTL meetings and the Legislative Update. Cooley students were also encouraged to register and attend the RPPTL Tampa committee meetings to meet with Section members.

Cooley students expressed interest in a return of the program "Title 101: From Contract to Close" last held in June 2022.

Filing No Longer Required For Florida Department Of Revenue Forms DR-312 or DR-313

Previously an *Affidavit of No Florida Estate Tax Due*, Form DR-312 or, if an estate tax return Form 706 was required to be filed, Form DR-313, *Affidavit of No Florida Estate Tax Due When Federal Return is Required* was filed as a part of the estate administration when no Florida estate tax was payable by the estate. The filing of either of these forms was "admissible in evidence to show nonliability for [estate] tax." F.S. 198.32(2). This statute was amended effective, July 1, 2023, by Chapter 2023-207 Law of Florida, and now for all probate proceedings pending on July 1, 2023 (unless they were commenced on or before December 31, 2004), and all such proceedings commenced on or after July 1, 2023, no Florida lien exists for estate tax and neither Form DR-312 nor DR-313 is required by statute to be filed. No Florida estate tax or generation skipping tax is required to be paid by a Florida estate for Florida decedents dying after December 31, 2004.

Even though these forms are no longer required to be filed by law (and clerks may or may not decline to file them), it is likely that title companies will require some form of verification whether a decedent's estate is required to file a United States Estate Tax return, and if so, that either (1) no federal tax is due on that return, (2) a release of the United States Estate Tax lien has been obtained, or (3) the tax due has been paid in full. As to whether the estate is required to file a United States Estate Tax return, an affidavit from a knowledgeable reliable person may be the requirement.

By Rohan Kelley, Esq., The Kelley Law Firm
rohan@estatelaw.com
Go first class or your heirs will!

ActionLine Call for Articles

ActionLine is seeking articles that:



- *Address timely topics in real estate, probate, trust and guardianship law; or share Section member activities or news.*
- *Consist of 1,000-3,000 words (one to four printed pages).*
- *Contain endnote references with links as appropriate.*
- *Engage and inform readers.*

Forward any proposed article overview or news of note to Erin Farrington Finlen at erin@estatelaw.com and Michelle Hinden at mhinden@nishadkhanlaw.com.

Deadlines for all submissions are as follows:

Volume Number	Issue	Deadline
1	Fall	July 15
2	Winter	October 15
3	Spring	January 15
4	Summer	April 15

Executive Council Meeting

SEPTEMBER 20-24, 2023

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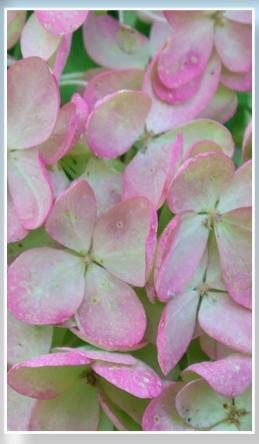





























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Free Nota Trust Accounting Resource From The Florida Bar

By Scott Westheimer, President, The Florida Bar

One of my goals this year is to ensure the Bar is more proactive in protecting the public and helping its members stay out of our discipline system. This means investing in and empowering our more than 112,000 members by supporting them in meaningful, practical ways. This includes assisting the over 11,000 RPPTL members.

One huge piece of this puzzle is simplifying fiscal management for lawyers. Bar members, including myself, take great pride in how we manage our finances. We want more than anything to adhere to Bar rules and to avoid mistakes involved with financial mismanagement. We all want to stay out of the Bar's disciplinary system. I can think of no better way to do this than by providing effective — and cost free — trust accounting software.

I am excited to say that Florida is the first state in the country to provide free trust accounting software for all its members in good standing with the Nota financial management platform. This new (and free) member benefit is designed to help lawyers more easily manage their trust accounts while complying with Florida Bar rules. This is especially crucial for RPPTL members that can have a high volume of trust account transactions. Our goal as a Bar is to give our members a tool that is the newest in cutting-edge technology, that's seamless, that will work with your financial institution, that can be used as a standalone, cloud-based software for their trust accounting, and that will make it as easy as possible for our members to comply with our trust rules. Nota does all of this and more.

As we all know, trust account maintenance and compliance is critically important. Nota's fiscal management platform will help our members manage their trust accounts and avoid costly mistakes by providing a simplified and efficient trust accounting platform that reconciles accounts. Nota provides attorneys with total visibility into their bank accounts along with full integration into law firm workflows, helps streamline the exacting management of client IOTA accounts, and integrates easily with major practice management, legal payment, and accounting platforms.

If used properly, Nota will enable Bar members to monitor multiple trust accounts with digital sub-accounts; to complete mandated triple reconciliations and to receive alerts to perform mandated reconciliations on a timely basis; to meet record retention requirements by uploading and storing check images and bank statements on the platform; to facilitate compliance with record retention requirements for transactions and reports; to receive alerts for outstanding checks over a certain number of days; and to receive client matter red flags when there appears to be an issue with an account.

Bar disciplinary records reveal why I have long considered a free and easily accessible trust accounting solution a priority. Year in and year out, trust accounting violations top the list of reasons lawyers find themselves in trouble with the Bar. The disciplinary system receives at least one non-sufficient funds notification per day due to poor trust accounting practices. Simply put, the Bar must take more initiative in protecting the public and in helping our members in this area of practice management. With Nota, we hope to eliminate these unforced errors.

Bar Programs Division Director, Terry Hill, and the Bar's team of auditors and counsel have been hard at work meeting with Nota to help design a product that complies with Bar rules. The result was the design of a trust accounting software solution that can be used with most banks' (including yours) online banking platforms or as a standalone trust accounting solution not tied to any online banking platform.

Nota has developed an onboard process that helps the attorney get his or her accounts added to the software, helps the attorney navigate the dashboard and troubleshoots that attorney's processes, so that the transition is seamless and easy. Nota also offers integrations with other Florida Bar member benefits, such as the Clio management system.

Designed specifically to help solo practitioners and small firms, Nota helps simplify trust accounting and minimize financial risk with real-time, bank-verified reconciliation of your accounts. Core to the platform are the banking integration, transaction management, three-way reconciliation, and record keeping services you need to remain IOTA compliant.

This is helpful for all of our attorneys, but with solo and small firms encompassing 70% of our members, it is especially helpful for them, who oftentimes are the ones doing all of their own bookkeeping and trust accounting work. Nota will help our members easily manage the complex and onerous process of trust reconciliation so they can focus on what's important — their clients.

With Nota, Florida lawyers now have cost-free access to the latest in trust accounting technology and to a provider who can help them focus on the growth and continued success of their practices.

Please register now at http://www.trustnota.com/TheFloridaBar. You can also listen to a LegalFuel podcast on the new benefit or watch this educational video for CLE credit: Managing Client Trust Accounts and Ensuring Compliance, that details common pitfalls with trust accounting and how to better streamline your trust accounting processes.

Scott Westheimer is the 2023-2024 President of The Florida Bar.

Meet Your Incoming RPPTL Fellows

By Daniel L. McDermott, Daniel McDermott, P.A., Fort Lauderdale, Florida (P&T)

The July 2023, RPPTL Section Executive Council meetings in Palm Beach welcomed the start of the new RPPTL year, provided for an always memorable trip to the Breakers, and also provided the first opportunity for many of us to meet the newest Fellows in the Fellows class of 2023-2024. We here at *ActionLine* would like to welcome this highly skilled, motivated, and hard-working group of lawyers from around the state and introduce them to the Section:

John C. W. Cherneski, PT Division, Jacksonville, Florida

Sarah Harmon, PT Division, Delray Beach/Boca Raton, Florida

Danielle Clark, RP Division, Fort Myers, Florida

Natasha Selvaraj, RP Division, Sarasota and Lakewood Ranch, Florida

In addition to giving a warm RPPTL welcome to these incoming Fellows, please keep in mind what a wonderful resource they may provide to your committee, sub-committee, or other Section projects. Look for their Practice Corner and Case Summary articles in the next issue of *ActionLine*.

Meet Our Newest Probate and Trust Fellows



John C. W. Cherneski, Esq., Milam Howard Nicandri & Gillam, P.A., Jacksonville, Florida

John C. W. Cherneski is based out of Jacksonville, Florida, and practices with the law firm of Milam Howard Nicandri & Gillam, P.A. John is admitted to both The Florida Bar and the State Bar of Georgia, and focuses primarily on probate and trust litigation, business litigation, and landlord/tenant disputes. Before starting his legal career, John graduated from Liberty University, in Lynchburg Virginia, with a degree in English, and he earned his Juris Doctor at Florida Coastal School of Law in Jacksonville, Florida. John currently serves as the Chair of the Florida Bar's Unlicensed Practice of Law Committee for the 4th Judicial Circuit and is a member of the Grievance Committee for the Fourth Judicial Circuit. He is also active in his local community and has previously served on the board of directors for his church, Aspire Church San Marco, and is presently on the board of directors for The Preschool in San Marco.

Meet Your Incoming RPPTL Fellows, from page 30



Sara A. Harmon, Esq., Redgrave & Rosenthal, Delray Beach/Boca Raton, Florida. Our second incoming Probate and Trust Fellow is Palm Beach County native Sara A. Harmon, who practices with the law firm of Redgrave & Rosenthal. Sara earned her B.A. from the University of Georgia and her J.D. from Loyola University New Orleans, with a concentration in tax law and international trade law. Sara works in Redgrave & Rosenthal's Planning Group where she focuses her practice on comprehensive estate planning strategies and asset protection. Prior to joining her current firm, Sara gained valuable hands-on experience representing clients in complicated trust and estate litigation matters, trust and estate administration, and guardianship matters.

Sara is an active member of the Florida legal community and currently serves on the board of directors for the South Palm Beach County Bar Association Young Lawyers Section. Sara is also an active member of the Greater Boca Raton Estate Planning Council. When Sara is not practicing the law, she loves spending time outdoors paddle boarding and surfing, among other activities.

Meet Our Newest Real Property Fellows



Danielle N. Clark, Esq., Founder and Managing Attorney of Clark Law Office, PLLC, Fort Myers, Florida. Danielle focuses her practice on estate planning, probate and trust administration, guardianship, and real estate law, including landlord-tenant matters. Danielle earned her BBA in Human Resource Management from Florida International University. She continued her education at Nova Southeastern University, earning an MBA, then earning her J.D. from Ave Maria School of Law. The Florida Bar President, Scott Westheimer, appointed Danielle to the Certified Legal Education Committee. In addition to membership in the RPPTL Section, Danielle is a member of the Solo and Small Firms section, and the Elder Law section. Danielle has a strong commitment to community involvement and is a member of the Fort Myers Alumnae Chapter of the Delta Sigma Theta Sorority, where she Chairs the Social Action Committee. She also holds the position of Vice Chair of the Progressive Women of Southwest Florida. Overall, Danielle's involvement in various professional organizations and her selection for leadership and fellowship programs highlight her commitment to her legal practice and ongoing professional development within the Southwest Florida community.



Natasha Selvaraj, Esq., Berlin Patten Ebling, PLLC, Sarasota, Florida. Our second Real Property Fellow Natasha Selvaraj is a Partner and Shareholder at Berlin Patten Ebling, PLLC. Raised in Toronto, Natasha earned her degree in Business Management from the University of Western Ontario in London, Canada. Natasha earned her Juris Doctor from the Fredric G. Levin College of Law at the University of Florida, before moving to Sarasota with her husband, Warren. Natasha's practice focuses on commercial and residential real estate transactions, real estate closings, contract and lease preparation, as well as condominium development and developer representation. Natasha is President of the Young Lawyers Division, a member of the Sarasota County Bar Association, and a member of the Realtor Association of Sarasota and Manatee (RASM). Natasha is also active in many organizations in the Sarasota community. She is President Elect of the Young Lawyers Division of the Sarasota County Bar Association, a member of the Young Professionals Network committee, a member of the RASM Realtors Charitable Foundation committee, and Secretary of the Board for the Junior League of Sarasota. When not working Natasha enjoys reading, travelling and enjoying the Florida sunshine.

RPPTL SPONSORS

The Florida Bar's Real Property, Probate and Trust Law Section 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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A Tribute To Sarah S. Butters

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

Sarah S. Butters served as the Chair of the Real Property, Probate and Trust Law Section of The Florida Bar for the 2022-2023 term.

Sarah came to the legal profession on a rather interesting, and somewhat unexpected, path. Sarah graduated from Florida State University in 1993 with a bachelor's in criminology. She then left the state for the frozen north, also known as Philadelphia, where she worked as a criminal investigator for the Federal Public Defender's Office. After about five years of working for lawyers, she decided to become one and returned to Florida to attend Florida State University College of Law. It is interesting to note that our 2021-2022 Section Chair, Bob Swaine, was her law school colleague and was the roommate of the First Dude, Mike Poche. It was Bob and his dad, Michael Swaine, that we have to thank for Sarah being introduced to RPPTL. During their time as students at FSU College of Law, Bob had the opportunity to invite Sarah to a RPPTL meeting that took place in Tallahassee under the guidance of our former Chair, Michael Swaine. So, Sarah was off to a good start with an early introduction to RPPTL as law student.

Sarah started her practice in South Florida with Holland & Knight, and Sarah relates that her firm supported involvement in RPPTL activities. Mentored by former Chairs, Ed Koren and Debbie Goodall, Sarah was encouraged to get involved in the Section as a baby lawyer. Sarah reports that the firm culture encouraged her to become involved in RPPTL as a third- or fourth-year lawyer, and she started that experience with the Probate Law Committee.

Sarah reports that her history with RPPTL never included chairing of major committees, but rather, she was a "worker bee" on many different committees, such as Probate Law, Legislation (due to her proximity to the Capitol) and other probate and trust committees. Sarah describes herself as, "always a bridesmaid; never a bride" when it came to RPPTL service, in that she never served as a Chair of any committee, but rather was a Vice Chair of many committees. However, she relates that the issues presented in a wide variety of committees were always so interesting and so challenging that she was prepared to volunteer, at any time, and jump in. Sarah believes that her invitation to become part of the Executive Committee of the Section was due to the fact that she was always volunteering and had a reputation for being responsive and dependable. Sarah says, "I got noticed because I was always raising my hand and following through."

Sarah expressed appreciation for the fact that her year as Chair was, in many ways, uneventful since there was no pandemic, legislative catastrophe, or other major event to disrupt Section activities. Sarah expressed appreciation for the fact that the Real Property, Probate and Trust Law Section is growing, while many other sections of The Bar are not having that same good fortune. Sarah believes that allowing people to attend remotely has greatly broadened our reach to new members and has enhanced participation by our existing Section members.

When asked about the challenges of serving as the Chair, Sarah reported that it has become increasingly difficult to meet the expectations of the members and provide Section meetings that are affordable, but meet a very high standard. This has been a huge challenge in the face of rapidly rising costs and a growing membership. Sarah expressed great gratitude to our sponsors, as it would be impossible to meet everyone's expectations without their flexibility and financial assistance.

Sarah also expressed appreciation for a successful year and gave much of the credit to Diana Kellogg and Hilary Stephens who she described as "a dynamic duo." Sarah said she was able to put complete faith and trust in Diana and Hillary early on, and that they did a phenomenal job in the face of Bar staff shortages, rising hotel costs and a demanding membership. Sarah also credited the convention planners, Tae Bronner, Deb Boje and Yoshi Smith, with planning a fantastic convention, indicating that it is Tae, Deb and Yoshi that we have to "thank (or blame?)" for the mechanical bull and the country line dancers. While Sarah has moved to the exalted position of Immediate Past Chair, she expressed her well wishes for the very best year to Katherine, our new Chair.

Serving as the Chair of RPPTL is an enormous undertaking, which utilizes a huge amount of the Chair's time. Everyone in the Section owes an immense debt of gratitude to Sarah Butters for all the time, energy and guidance she has provided this past year. Welcome, Sarah, to your very much deserved seat in the back row.

Roundtable

Highlights of the Meeting of the RPPTL Section

REAL PROPERTY DIVISION

SATURDAY, JUNE 3, 2023

Opal Grand Resort and Spa • Delray Beach, Florida
Prepared by Colleen Sachs, Esq., Santa Rosa Beach, Florida, and Michelle Hinden, Esq., Orlando, Florida

Thank you to the Fidelity National Financial Title Group for Sponsoring the Real Property Division Roundtable



The Director of the Real Property Law Division, Wm. Cary Wright called the meeting to order at 8:00 a.m.

Sponsor Announcement. Director Wm. Cary Wright took a moment to recognize Fidelity National Financial Group, represented at the meeting by Karla Staker, the Sponsor of the Real Property Division Roundtable Breakfast, and thank it for sponsoring the event.

Prior Meeting Summary. The Director thanked Colleen Sachs, Michelle Hinden, and Jin Liu for preparing the summary of the meeting at Sandestin. The summary remained the same.

Action Item

Title Insurance and Title Insurance Industry Liaison – Chris Smart, Chair; Jeremy Cranford, Len Prescott, and Michelle Hinden, Co-Vice Chairs.

Chair Chris Smart spoke on a proposed amendment to Fla. Stat. § 28.223, that would require the clerks to record certain additional documents in the official records concerning probate proceedings to ensure the availability of necessary information about deceased individuals contained in the land records maintained by the clerks so that proper heirs can be identified in the chain of title and protect the public interest of certainty in the ownership of real property. He further reported that the proposed amendment would add probate documents, such as orders and petitions, to the list of items already permitted for recording as referenced in the statute. Finally, he commented that the proposed legislation was also sent to the clerks of court for review. No comments were available from the clerks of court at the time of the meeting. It was moved and seconded that Fla. Stat. § 28.223, governing clerks of the circuit courts, be amended to ensure the availability of necessary information about deceased individuals contained in the land records maintained by the clerks so that proper heirs can be identified in the chain of title and protect the public interest of certainty in the ownership of real property. The proposed amendment passed unanimously.

Information Items

Title Issues and Standards – Rebecca Wood and Amanda Hersem, Co-Chairs; Karla Staker, Bob Graham, and Melissa Scaletta, Co-Vice Chairs

Rebecca Wood reported that the committee has an initiative to amend Standard 00 due to its use of masculine terms in the Standard. She commented that the committee has decided to remove the masculine terms from the Standard for inclusivity reasons.

Real Property Problems Study – Anne Pollack, Chair; Brian Hoffman, Susan Spurgeon, and Reese Henderson, Co-Vice Chairs

Anne Pollack and Amber Ashton reported that the postal service has eliminated the green card for certified mailings. Some post offices still use them, but not all do. They want to amend Fla. Stat. § 1.101, to provide other options, such as electronic signature confirmation.

Florida Realtors and Attorneys Joint Committee

Colleen Sachs, Co-Chair of the contract subcommittee

Colleen Sachs reported that because of the passage of Senate Bill 264 concerning restrictions on certain foreign principals owning certain property, changes are needed to the FR Bar residential contract forms. The legislation goes into effect July 1, 2023. She commented that the proposed changes will be in a box above the signature lines and will provide a disclosure of the statute and that an affidavit must be provided that complies with the statute's requirements.

Easements

Susan Spurgeon spoke on easements and how recent case law found that under the application of the merger doctrine, an easement or a declaration of easements may be invalidated as void ab initio if there is common ownership of the dominant and servient estates. This ruling affects

continued, page 35

declarations, subdivision easements, cross-parking easements, and other recorded documents. Susan is forming a group to create proposed legislation to address this issue.

Publications Committee

Mike Bedke and Michelle Hinden are looking for authors for articles for Actionline. Those interested are encouraged to contact Mike or Michelle so they can provide information concerning the process.

CLE Committee

Lee A. Weintraub, CLE Committee, Co-Chair

Lee Weintraub thanked everyone for attending the Chair and the Vice Chair training session. He commented that the Section had many CLE programs during the spring, and programs are now needed for the fall. He also congratulated Brenda Ezell on being appointed incoming chair of the committee.

Committee Reports

Ad Hoc *Hayslip* – Brian W. Hoffman, Chair; Michael V. Hargett and James C. Russick, Co-Vice Chairs

Brian Hoffman reported that the committee is contemplating changing its name to equitable servitudes. He commented that the committee would bring the issues from the *Hayslip* decision to the Problem Studies committee to get a wider perspective on the Section's position and work to find a solution, which is the committee's goal.

Ad Hoc UCRERA – Manuel Farach, Chair; Jason M. Ellison and James C. Russick, Co-Vice Chairs

Manny Farach reported that issues involving proposed UCRERA legislation will likely reappear. He commented that he has spoken with Chris Smart and that the committee is ready to go when needed. He commented that the committee should know by the end of June whether they will need to proceed.

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

Salome Zikakis reported that the conference was a success. She commented that initially, it appeared that turnout would be very low. But by the time of the conference, the turnout was good. She reported that the committee is looking for people in the South Florida area to help with next year's event. She commented that this conference will be a great event in the future; it has been in the past and will get even better.

Commercial Real Estate – E. Ashley McRae, Chair; Alexandra D. Gabel and Brian Hoffman, Co-Vice Chairs

Ashely McRae reported that the committee had a great presentation on boilerplate legal provisions. She said that for their next meeting, they plan to present on cannabis in real estate.

Condominium and Planned Development – Alexander B. Dobrev and Allison L. Hertz, Co-Chairs; and Russell Robbins, Vice Chair

Allison Hertz reported that the committee had a packed meeting. They discussed the *AFP 103 Corp.* easement case extensively. She also said Alex had a group present on the various condominium and development issues. She further reported that the committee also reviewed some potential legislative issues as it deals with building safety and reserve and that the committee hopes to develop some solutions for these issues in the future.

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

Christine Ertl reported that the committee held its course in February with about 60 attendees: 20 in person and 40 online. She further noted that the committee wants to change the venue for next year.

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

Sanjay reported that the committee did not have a meeting but will have a joint meeting with the Insurance Committee at the next Executive Council Meeting. He also said the committee held three CLEs, one each in March, April, and May. He further commented that the March CLE had about 90 attendees and that the May CLE was put together by one of the subcommittees.

Construction Law Institute – Brad R. Weiss, Chair; Deborah B. Mastin and Trevor Arnold, Co-Vice Chairs

Brad Weiss reported that they had their event on March 16th-18th at the JW Marriot in Orlando, and they generated over $100,000 in revenue. They hope that the course's revenues will continue to increase by offering the CLE online.

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

Colleen Sachs reported that the Committee continued its excellent CLEs with Platting 101 and 102, presented by Samantha Decker. Cannabis is the topic for the CLE for The Breakers that will be held with the Commercial Real Estate and Real Estate Leasing Committees.

Insurance & Surety – Katherine L. Heckert, Chair; Debbie Crockett, Vice Chair

No report.

Liaisons with FLTA – Alan K. McCall, Melissa Jay Murphy, Alan B. Fields, and James C. Russick

No report.

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Liaison with American College of Real Estate Lawyers (ACREL) – Martin A. Schwartz and William P. Sklar

It was reported that Alex Dobrev and Len Prescott were added as members of ACREL.

Liaison with American College of Construction Lawyers (ACCL) – George J. Meyer

No report.

Liaison with Florida Realtors – Louis E. "Trey" Goldman

No report.

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

Lloyd Granet reported that the committee had its seminar, which went very well. They received positive feedback. He commented that the committee is starting to work on the Course for next year.

Real Estate Leasing – Christopher A. Sajdera, Chair; Kristen K. Jaiven and Ryan McConnell, Co-Vice Chairs

Chris Sajdera reported that the Committee had a wonderful CLE event and that he also wanted to thank The Fund for its sponsorship of the Committee. He commented that, for the past year, the Fund has been giving 5-minute presentations on leasing solutions, which have been helpful for the committee members, and it is hoped this will continue.

Real Property Finance & Lending – Jason M. Ellison, Chair; Deborah B. Boyd and Jin Liu, Co-Vice Chairs

Jason Ellison reported that the committee has a construction lending CLE in the fall. It is scheduled for August 23rd. Peggy Rolando leads it, and it will be a 1.5-hour CLE. He further reported that the committee did have a CLE for its meeting in Delray, which was on pledging assets in the digital world. He commented that it was a great presentation.

Real Property Litigation – Manuel Farach, Chair; Amber E. Ashton, Shawn G. Brown, and Amanda Kison, Co-Vice Chairs

Manny Farach reported that the committee had a great CLE presentation for the litigation symposium. The event had Chris Smart, Brian Hoffman, and up-and-coming stars like Jeremy Cranford. He wanted to thank his Vice Chairs and congratulate Shawn Brown, who will co-chair Real Property Litigation next year.

Real Property Problems Study – Anne Q. Pollack, Chair; Susan K. Spurgeon, Brian W. Hoffman, and Reese Henderson, Co-Vice Chairs

Anne Pollack reported that the committee had some interesting issues come up and that the committee is seeing other committees referring problems to this committee, which is welcome.

Residential Real Estate and Industry Liaison – Nicole M. Villarroel and Kristen K. Jaiven, Co-Chairs; James A. Marx and Rich McIver, Co-Vice Chairs

Kristin Jaiven reported that the committee had a great meeting. She said they borrowed one of the presentations from the attorney banking conference and had a legislation update. She noted that there are two issues the committee was addressing. One is spousal joinder, and the other is whether the homestead portability cap needs to be raised. The committee decided to refer those issues to Problem Studies.

Title Insurance and Title Insurance Industry Liaison – Chris W. Smart, Chair; Leonard F. Prescott, IV, Jeremy T. Cranford, and Michelle G. Hinden, Co-Vice Chairs

Chris Smart reported that the committee had a very good meeting. He noted that it summarized all of the legislation that passed and did not pass this year. He commented that one item that didn't pass was the Series LLC bill being pushed by the Business Law Section. He commented that this bill is already getting pushed for next year, and asked everyone to please review information provided on the Series LLC bill and give comments to Jaime Marx or Jim Russick. He further commented that another bill that did not pass was one that would have changed the title insurance risk premium rate from a promulgated rate to a file and use rate. He commented that the committee opposed this but did not have a white paper. A white paper has now been written addressing this topic.

Title Issues and Standards – Rebecca L.A. Wood and Amanda K. Hersem, Co-Chairs; Robert M. Graham, Karla Staker, and Melissa Scaletta, Co-Vice Chairs

Rebecca Wood reported that the Committee had a fantastic CLE at this meeting and has others planned for next year. She commented that she wanted to plug the committee's CLE at the Breakers on mobile homes. The CLE will be a panel that includes a mobile home transfer vendor and a lawyer who handles mobile home title-cure litigation. This program is designed to make handling these matters easier. This will be a joint meeting with RREILS and Problem Studies.

Old Business

The Director reminded everyone about the upcoming Quebec trip in the fall.

Michael Gelfand commented on the change in the Florida Bar Rules regarding IOTA accounts and the interest generated from those for The Florida Bar Foundation so that the State of Florida is ensuring there is access to courts.

Manny Farach congratulated Lee Weintraub on doing a great job handling CLEs this past year, and he recognized Brenda Ezell as the incoming CLE chair.

Adjournment. The meeting was adjourned at 9:22 a.m.

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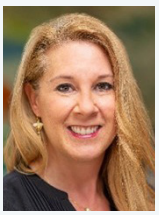

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ROUNDTABLE

Highlights of the Meeting of the RPPTL Section

PROBATE AND TRUST DIVISION

SATURDAY, JUNE 3, 2023

Opal Grand Resort • Delray Beach, Florida
Prepared by Jeanette Mora, Esq., Orlando, Florida

Thank you to the Roundtable Sponsors:
Stout and Guardian Trust



The Director of the Probate and Trust Law Division, John Moran, called the meeting to order at 8:00 a.m.

Sponsor Announcement. The Division Director, John Moran, announced this would be his last meeting as the Division Director and announced the successor, Jon Scuderi. The Division Director thanked the sponsors, Stout Risius Ross, Inc. and Guardian Trust.

Special Announcement. John Moran welcomed Amber Ashton to provide an update from the Real Property division. Amber announced that due to the U.S. Postal Service eventually eliminating green card returns, (they may still be in use in some markets but not in use in other markets) the Real Property division intends to propose legislation whereby the definition under Fla. Stat. § 1.101, of "returned receipt requested', will be replaced by "electronic signature confirmation" (anything containing the description—"return receipt requested shall include any electronic signature confirmation process adopted by the United States Postal Service or national overnight courier"). Amber emphasized that the current law is "actual notice" and the change attempts to make it easier for practitioners to prove actual notice with electronic confirmation as satisfactory proof of service under the statute.

Legislative Committee Report – Larry Miller, *Co-Chair*

Larry Miller provided an update on four key pending legislative items: (1) *Remote Notarization* - Legislation to clarify the definition of witness in remote notarization is ready for the governor's signature; (2) *Estate Taxes* - the proposed amendment to Chapter 198 has passed providing that if there is no applicable federal estate tax/estate death tax credit then the statute does not apply; (3) The *Kearney* case fix passed and is ready for the governor's signature; and (4) *Withholding or Withdrawing Life Prolonging Procedures* – proposed legislation that clarifies procedures that states if advanced directives are registered properly with the court and the advanced directive contains the appropriate language to authorize an advanced directive appointee or holder to make life prolonging or withholding decisions, they may proceed without obtaining court approval on that basis.

Report of Liaison with Florida State Guardianship Association – Stephanie Cook

Stephanie Cook provided an update on the Florida State Guardians Association's focus on improved training requirements of the Office of Public and Professional Guardians for guardians, including a new requirement to complete 30 hours of continuing education every two years.

Introduction of New General Standing Committee – John Moran

John Moran discussed a few of the newer general standing committees: (1) Ad Hoc Bylaws; (2) Ad Hoc RTODD (Revocable Transfer on Death Deeds); and (3) Ad Hoc Civil Rules Revisions.

Report of Principal and Income Committee – Edward Koren & Pamela Price, *Co-Chairs*, Jolyon Acosta, *Co-Vice Chair*, Keith Braun, *Co-Vice Chair*

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Keith Braun discussed proposed revisions to Fla. Stat., Ch. 738, the Florida Uniform Principal and Income Act. Keith provided a brief background of the evolution of the Uniform Law (Revised Uniform Principal and Income Act (1997); the Florida Uniform Principal and Income Act (2002); and the National Conference of Commissioners on Uniform State Laws (NCCUSL) Uniform Fiduciary Income and Principal Act (UFIPA) and its goals of providing greater flexibility in the administration of estates and trusts and modernizing rules for longer-term and for total discretionary trusts.

Keith noted the active involvement and consideration of comments of key stakeholders from RPPTL, the Tax Section, the Florida Bankers Association, and the Florida Institute of CPAs. The goals of the committee were to: (1) adopt UFIPA, where appropriate, to promote uniformity and support stakeholders working in multiple states; and (2) retain certain Florida specific provisions, where appropriate, for historical consistency, public policy, etc. The committee also made an effort to fit UFIPA's statutory layout into Fla. Stat., Ch. 738 more closely to make it easier for attorneys and others to find certain sections.

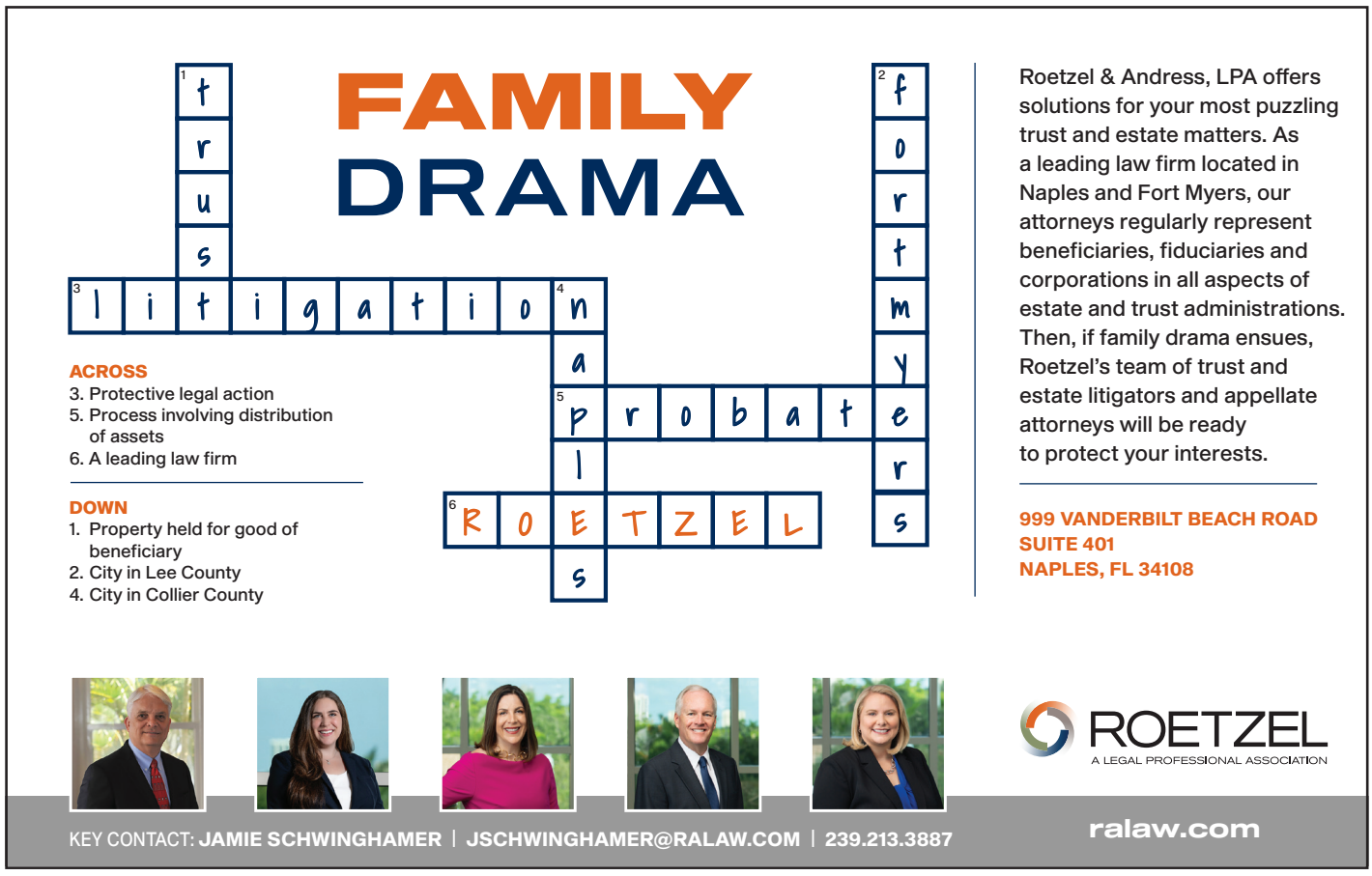
Jolyn Acosta discussed the nuts and bolts of the deviations from UFIPA, changes to current law, and the mapping structure of the new Florida law to UFIPA.

Probate Law and Procedure Committee – Theodore Kypreos, *Chair*, Benjamin F. Diamond, *Co-Vice Chair*, Stacey Prince-Troutman, *Co-Vice Chair*, and J. Grier Pressly, III, *Co-Vice Chair*

The *Johnson v. Townsend* fix proposes legislation to clarify Florida law by statutorily exempting certain title disputes from Florida's probate creditor claims procedure; creating a new dispute resolution mechanism and two-year statute of repose designed for such title disputes; and making narrowly focused modifications to the Florida Probate Code to reduce the risk of unintended forfeitures of certain property rights. Juan Antunez, Chair of the drafting subcommittee emphasized protecting the testamentary intent of married couples relocating from community property jurisdictions to Florida.

Any questions or comments may be emailed to Theodore Kypreos.

Adjournment. Meeting was adjourned at 10:00 a.m.



Understanding Florida's Elective Share

Prepared by Jeanette Mora, Esq., Family First Firm, Orlando, Florida

In Florida, as in many other states, there are laws in place to protect surviving spouses and to ensure they receive a fair share of the deceased partner's estate. One such legal provision is known as Florida's Elective Share.

Florida's Elective Share is a legal mechanism that allows surviving spouses to claim a certain portion of their deceased spouse's estate, even if they were not included in the deceased spouse's will or testamentary plan. The purpose of this provision is to prevent a spouse from being completely disinherited and to ensure that they receive a fair share of the assets accumulated during the marriage.

The rationale behind Florida's Elective Share is to provide financial protection for the surviving spouse, especially in situations where they might have been excluded from the will intentionally or unintentionally. This provision recognizes the contributions and sacrifices made by the surviving spouse during the marriage and seeks to mitigate the potential adverse effects of being disinherited.

How Does Florida's Elective Share Work?

Under Florida law, the elective share amount is 30% of the deceased spouse's elective estate. But not so fast, the calculation for the purposes of determining the elective share are not quite straightforward. The following assets are included in the decedent's elective estate[1]:

1. The decedent's probate estate;
2. The decedent's interest in protected homestead;
3. Joint bank accounts, pay-on-death accounts, Totten trusts, and similar account types;
4. Property held in joint tenancy with right of survivorship and tenancy by entireties;
5. Revocable trusts (and other revocable transfers);
6. Irrevocable transfers by the decedent;
7. Transfers with retained right to discretionary principal distributions;
8. Irrevocable transfers not subject to Elective Share;
9. Net cash surrender value of life insurance policy immediately before death;
10. Pensions and retirement plans;
11. Transfers made within one year of the decedent's death; and
12. Irrevocable transfers to Elective Share Trust.

The statute specifically excludes the following from the elective estate:

1. Pre-1999 irrevocable transfers;
2. Transfers of property for which the decedent received adequate consideration;
3. Transfers of property made by the decedent with the decedent's spouse's consent;
4. Life insurance proceeds in excess of its cash surrender value;
5. The decedent's one-half (1/2) of any community property;
6. Property held in a qualifying special needs trust for a disabled surviving spouse;
7. Property where the decedent possessed a general power of appointment;
8. Homestead property if the decedent died before July 1, 2017; and
9. Homestead property after, July 1, 2017, if the surviving spouse validly waived his or her homestead rights.

Order of Priority in Satisfying the Elective Estate

If the assets passing to the surviving spouse are not sufficient to satisfy the elective share, the remaining balance

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is apportioned as follows: First, from the decedent's probate estate and any revocable trusts created by the decedent. Second, property held in joint bank accounts, pay-on-death, transfer-on-death, joint tenancy with right of survivorship and tenancy by the entireties, direct beneficiaries of insurance or retirement plans, and real property transferred by the decedent during life. Third, all other property interests, except protected charitable interests.

If these assets are not sufficient to satisfy the remaining elective share amount, the remaining balance is satisfied from property held in trust in which the spouse has an interest but is not considered an elective share trust or a special needs trust. Any remaining unsatisfied balance is satisfied from recipients of protected charitable lead interests.

Florida's elective share is not automatic. The surviving spouse must make an election to claim the elective share within a specific timeframe, typically within six months of receiving notice of the administration of the deceased spouse's estate. Failing to make the election within the prescribed timeframe may result in the forfeiture of the elective share rights. Fla. Prob. R. 5.360 outlines the procedural steps to determine entitlement to the elective share.[2]

Creditors

The surviving spouse's elective share takes priority over beneficiaries under the decedent's will or revocable trust as well as administration costs; however, it does not take priority over the claims of the decedent's creditors. Debts of the decedent will reduce the value of the aggregate assets included in the elective share and the surviving spouse will receive the smaller "net" elective estate. Creditors must be satisfied before distributions to any beneficiary, including the surviving spouse.

Implications for Estate Planning

Understanding Florida's Elective Share is crucial when engaging in estate planning. It serves as a reminder that spouses have certain rights that cannot be easily disregarded through testamentary documents alone. When considering estate planning strategies, it is crucial to be aware of the potential impact of the elective share on the distribution of assets.

To mitigate potential conflicts and ensure that the distribution of assets aligns with one's intentions, clients may consider various estate planning techniques. These may include prenuptial or postnuptial agreements, trust planning, and other strategies that provide flexibility while protecting the interests of both spouses.

Endnotes

1 Fla. Stat. § 732.2035 (2022).

2 Fla. Prob. R. 5.360.



J. MORA

Jeanette Mora *has been practicing law since 2019. Her office is located in Orlando, Florida. Ms. Mora focuses primarily on probate, guardianship, and estate planning. Ms. Mora completed her undergraduate studies at Stockton State University, obtained her graduate degree at the American University and graduated from the Dwayne Andreas Barry University School of Law with honors. Ms. Mora serves as Chair of the Orange County Bar Association Elder Law Committee and Co-Chair of the Orange County Bar Association Estate, Guardianship, and Trust Law Committee.*



Welcome Jeremy Citron Assistant Program Administrator

Jeremy has been an employee with The Florida Bar for over sixteen years working alongside the Section Administrators in the Professional Development department. Jeremy joins the RPPTL Section as the Assistant Section Administrator where he'll use his expertise in CLE and Meeting registration development to lead all RPPTL CLE programming. In addition to Professional Development, he also served as liaison to the Animal Law Section, the Environmental and Land Use Law Section and the Military Affairs Committee. Be sure to look for Jeremy alongside Hilary Stephens, our Section's Administrator, behind the registration desk at nearly every RPPTL event.

PRACTICE CORNER

Real Property Division

New Legislation Permitting Landlords To Accept "A Fee In Lieu Of A Security Deposit"

Janaye Pieczynski, Esq., Ausley & McMullen, P.A., Tallahassee, Florida

Although a residential rent control initiative did not pass during the 2023 legislative session, Florida cities still have the power to impose temporary controls on a city-by-city basis. However, this does not help a growing population of Floridians who are priced out of initially getting into affordable places to live due to the initial security deposit most landlords require of new tenants.



In Florida, there is no limit to what a landlord can charge for a security deposit. However, there are strict rules that a landlord must comply with if he or she intend to collect security deposits from a tenant. Fla. Stat. § 83.49 (2023) governs the collection and the return of a security deposit. In relevant part, Fla. Stat. § 83.49(3)(a), states the following:

> Upon the vacating of the premises for termination of the lease, if the landlord does not intend to impose a claim on the security deposit, the landlord shall have 15 days to return the security deposit together with interest if otherwise required, or the landlord shall have 30 days to give the tenant written notice by certified mail to the tenant's last known mailing address of his or her intention to impose a claim on the deposit and the reason for imposing the claim. . . . If the landlord fails to give the required notice within the 30-day period, he or she forfeits the right to impose a claim upon the security deposit and may not seek a setoff against the deposit but may file an action for damages after return of the deposit.

To help tenants afford to move into a new home, a bill offering an alternative to the traditional security deposit structure found its way to the Governor's desk in spring of 2023 in Florida House Bill No. 133. Having taken effect July 1, 2023, new Fla. Stat. § 83.491, allows a landlord to, "offer a tenant the option to pay a fee in lieu of a security deposit." However, the fee is nonrefundable under the new law.[1] New Fla. Stat. § 83.491(2)(a) states the following:

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> If a tenant agrees to pay a fee in lieu of a security deposit, the landlord must notify the tenant within 30 days after the conclusion of the tenancy if there are any costs or fees due resulting from unpaid rent, fees, or other obligations under the rental agreement, including, but not limited to, costs required for repairing damage to the premises beyond normal wear and tear.

Naysayers of the bill argue that it could give landlords even more power over tenants who are already at an economic disadvantage. Given that this bill did not include a cap for how much a landlord could charge as a fee in lieu of a security deposit, a tenant runs the risk of paying exorbitant fees that he or she will never get back and will not apply to "repairing damage to the premises beyond normal wear and tear." What appears to be an incentive for landlords to accept this optional payment method, could result in a windfall for landlords across the state. Further, a tenant could end up in an even worse position if a landlord determines that there are damages that need to be repaired and demands payment that would have originally come out of the security deposit. A tenant could potentially be in the position where they still struggle to afford the total payments.

Attorneys who work with landlords and tenants of residential properties should familiarize themselves with this new law. Landlords do not have to offer this alternative fee option and can still require tenants to pay a traditional security deposit. Additionally, if a tenant decides to pay a fee in lieu of a security deposit, "the written agreement may be terminated at any time as long as the tenant pays the amount of the security deposit specified in the rental agreement."[2]

Time will tell if this new law creates a win-win situation for both landlords and tenants, but at least the legislature is continuing to make moves to satisfy the growing need for solutions to common problems that Florida residents face when finding a place to rent in the state.



J. PIECZYNSKI

Janaye G. Pieczynski *is a transactional attorney located in Tallahassee, Florida, with Ausley & McMullen, P.A. Her practice areas focus on real estate, land use and zoning, estate planning and administration, and corporate law. Janaye previously served as the senior law clerk to the Honorable Scott D. Makar of the Florida First District Court of Appeal. Janaye holds a bachelor's degree in legal studies from the University of Central Florida and a Juris Doctor from Florida State University College of Law.*

Endnotes

1 Fla. Stat. § 83.491(3)(f) (2023).

2 Fla. Stat. § 83.491(4)(a)(4) (2023).



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SECTION SPOTLIGHT

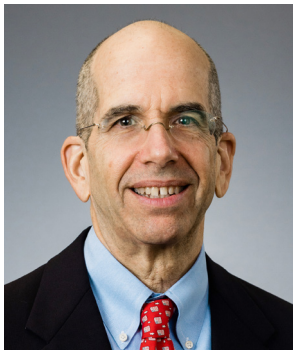
Annual Section Awards

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

As is the custom of the Real Property, Probate and Trust Law Section of The Florida Bar, a number of recognitions and awards were presented at the 2023 Annual Meeting. The purpose of these awards is to recognize outstanding members of the Section and their contributions to the Section over the past year.



The **ROBERT C. SCOTT MEMORIAL AWARD** was presented to **Jeff Goethe**. Jeff is a shareholder in Barnes, Walker, Goethe, Perron, Shea & Robinson, PLLC, practicing in Bradenton, Florida. Jeff's practice is in the area of wills, estates and trusts, and he is board certified in that practice. Jeff grew up in the Bradenton area, although he attended the University of Tennessee College of Law where he graduated in 1990. The ROBERT C. SCOTT MEMORIAL AWARD was established in recognition of Mr. Scott's many years of untiring devotion and valuable service to the Section. This Award may not be given annually but is granted when the occasion requires a Section member who has exemplified the dedication and continuing service of Robert C. Scott to the Section and its membership.





The **JOHN ARTHUR JONES ANNUAL SERVICE AWARD** was presented to two Section members: **Andrew Sasso** and **Christopher Smart**. Andrew is a 1984 graduate of Stetson University. Andrew is of counsel to Macfarland, Ferguson & McMullen, where he practices probate, guardianship and trust administration. Chris Smart is a real property trial attorney with Carlton Fields in Tampa. Chris is the current chair of the RPPTL Section's Title Insurance and Title Liaison Committee and a former longtime chair and continuing active member of the Title Issues and Standards Committee. The JOHN ARTHUR JONES ANNUAL SERVICE AWARD is presented to the Section members who have rendered dedicated and significantly outstanding service to the Section and its varied programs during the current year. In selecting the recipients of this Award, the Section considers both the character and magnitude of the services furnished by the nominees throughout the year, with particular emphasis on the benefits which accrue to the Section and the lawyers of Florida as a result of such services.



The **WILLIAM S. BELCHER LIFETIME PROFESSIONALISM AWARD**, as its name indicates, is recognition for a career of service. This year, the Award was presented to **Tae Bronner**. The Award was established in 2003 and goes to an Executive Council member in recognition of their lifetime contributions to the Section, the Executive Council, Florida attorneys, and the public in promoting the highest standards of ethics and professionalism. Tae Bronner is a sole practitioner in Tampa. Tae is a probate and trust litigator. She has a University of Florida bachelor's degree from 1991 and graduated from Stetson Law School in 1994. Tae can also be found hiding out in Oro Valley, Arizona.





The **RISING STAR AWARD** recognizes members of the Real Property, Probate and Trust Law Section of The Florida Bar who demonstrate the potential for future Section leadership through their active participation in Section committees and projects. It is awarded annually to a member of each of the Real Property and Probate Divisions of the Section who has made significant contributions. The RISING STAR AWARDS for 2023 were presented to **Allison Hertz** and **Jolyon Acosta**. Allison practices in Palm Beach County with the Kaye Bender Rembaum P.L. firm. Allison is board certified in condominium and planned development law. Allison is a 2007 graduate of Nova Southeastern University Shepard Broad College of Law, and she is a native of Palm Beach County. Jolyon Acosta is with the Bush Ross, P.A. firm in Tampa, where he is a shareholder. He is a graduate of the University of Florida Fredric G. Levin College of Law in 2006 and received his LLM in taxation from the same school in 2007. Jolyon is also a CPA with a Bachelor of Science degree in accounting recieved in 1997 from Florida State University, and in 1988, he received a master's degree in accounting from Virginia Tech. Jolyon is board certified in wills, estates and trusts.



The **AT LARGE MEMBER OF THE YEAR** is **Colleen Sachs**. It is interesting to note that the At-Large Member of the Year was chosen by her peers who are also Members at Large. The AT LARGE MEMBER OF THE YEAR AWARD recognizes an outstanding At-Large Member who has provided the highest level of service in assisting the Section with its needs. Colleen is a 1988 graduate of the University of Mississippi School of Law and was admitted in Florida in 1992. Colleen practices with Attorneys' Title Fund Services in the Santa Rosa Beach and in the Pensacola area of North Florida.



The **LYNWOOD F. ARNOLD, JR MEMORIAL AWARD** was established in 2020 by the Section to memorialize the memory and the extraordinary contributions of Lynwood Arnold to numerous committees of the Section. The recipient of the Award this year is **Guy Emerich**. Guy practices in Punta Gorda with the firm of Farr, Farr, Emerich, Hackett & Carr, P.A. Guy is a 1970 University of Florida College of Law graduate and also holds an LLM in estate planning from the University of Miami. Guy has been board certified in wills, estates and trusts since 1988.

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

Probate Case Summaries

By Sandy Boisrond, Esq., Spectrum Law Firm, Miami, PLLC, Miami/Fort Lauderdale, Florida

After all petitions were voluntarily dismissed without prejudice, the trial court exceeded its jurisdiction in entering a written order memorializing its prior orally announced ruling concerning the appointment of a guardian of the person of a minor ward.

Grommers v Correa PLA, et. al., 48 Fla. L. Weekly D1171b (Fla. 3d DCA 2023)

John Grommers filed a petition seeking to be appointed as guardian of the person of a minor ward. Following Grommers' petition, various motions were filed by Grommers and the Respondents. All of the motions were heard during a December 14, 2022, hearing at which the trial court orally announced its ruling. After the hearing, but before the trial court officially entered its order concerning the guardianship petition and the various motions, Grommers voluntarily dismissed, without prejudice, all of the petitions he filed in the guardianship case. The trial court then issued its written order, memorializing the previous orally announced ruling, on January 25, 2023.

The appellate court found that Grommers' voluntary dismissal effectively terminated his action, and the trial court was thereafter divested of jurisdiction to "memorialize" its December 22nd rulings in the January 25th order. In support of this decision, the appellate court cited *Two Islands Dev. Corp. v. Clarke*, 239 So.3d 115, 124-25 (Fla. 3d DCA 2018)(quoting *Kelly v. Colston*, 977 So. 2d 692, 694 (Fla. 1st DCA 2008)), which states, "As a general rule, the effect of a plaintiff's announcement of a voluntary dismissal is 'immediate, final, and irreversible . . . .' ".

The trial court's January 25th order was therefore quashed, and the guardianship proceedings continued with regard to the other parties.

The trial court erred in granting the trust's motion for summary judgment on its homestead defense because the trust no longer owned the property, which was deeded back to the debtor after the instant action was filed, and trial court did not find that property was either party's homestead at the time of the transfers.

Estate of Renato Pelleschi v. Anne Birnbaum and The Birnbaum Family Trust, 48 Fla. L. Weekly D1125b (Fla. 6d DCA 2023)

Appellants, Ana Maria Pelleschi and Brigitte Pelleschi, as personal representatives of the Estate of Renato Pelleschi, filed suit against Anna Pocci a/k/a Anne Birnbaum, individually and as trustee of The Birnbaum Family Trust dated September 6, 2019. Renato Pelleschi was married to Luana Mannucci, and after Mannucci died in Italy, Birnbaum and her brother, Francesco Pocci, submitted a will that devised Mannucci's entire estate to them. Renato Pelleschi, as surviving spouse, petitioned an Italian court to declare him the sole heir of his deceased wife's estate. The Italian court found that a will that was submitted to the Italian court had been forged and ordered Birnbaum and Pocci to return the property or its equivalent to Pelleschi.

Upon Renato Pelleschi's death, Ana Maria Pelleschi and Brigitte Pelleschi became the personal representatives of the Estate and the successors in interest to the Italian judgment. The Estate filed suit against Birnbaum and the Trust under Florida's Uniform Fraudulent Transfer Act (FUFTA) via two separate Florida actions, to: 1) domesticate the Italian judgment, and 2) collect on the judgment. Under both claims, the Estate alleged Birnbaum had fraudulently transferred the property to the Trust in October 2019 to avoid paying the Italian judgment.

The property was transferred by Birnbaum to the Trust in October 2019, then transferred from the Trust back to Birnbaum in October 2020. In defense, Birnbaum and the Trust argued that the property was Birnbaum's homestead, and therefore, exempt from the Estate's claims and sought summary judgment on the matter. The trial court granted summary judgement on the homestead defense. While the trial court found that the property was Birnbaum's homestead in November 2020, it did not, however, find that the property was either party's Homestead in October 2019 or October 2020.

The appellate court found that the Trust did not own the property, and the trial court erred when it determined the Trust was entitled to a homestead defense. The appellate court therefore reversed, in part and remanded, in part, for further proceedings against the Trust.

The trial court abused its discretion when the Ward's attorney was not afforded due process due to the trial court's failure to conduct a hearing before awarding attorney's fees in a reduced amount and failure to make adequate findings supporting the reduction in fees pursuant to Fla. Stat. § 744.108.

Fletcher, Jr. v. Cynthia Lee Bennett as Guardian of Joseph Martini, an incapacitated person, 48 Fla. L. Weekly D1266a (Fla 2d DCA 2023)

Appellant, H. Kyle Fletcher, Jr., was the attorney for Cynthia Lee Bennett, the guardian of the Ward, Joseph Martini. Fletcher

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filed a petition for attorney fees for work performed in the guardianship proceedings from April 2021 through October 2021, in which he requested $10,530.00 and reimbursement for expenses. In February 2022, without hearing, the trial court entered an order awarding the attorney's fees in the amount of $6,311.23 and denied the request for expenses.

The order for attorney's fees set the reasonable hourly rate at $375 per hour and $175 per hour, respectively, for attorney work and paralegal work. The court's order failed to include a determination as to the compensable number of hours for which fees would be awarded, failed to provide justification for the denial of some fee requests, and concluded that there were duplicate entries, which were the work of the guardian and not the attorney, and vice versa. The circuit court also concluded that the Ward was not responsible for fees related to the Second Suggestion of Capacity hearing, which was purportedly requested by Fletcher but not prosecuted.

With regard to the trial court's failure to hold a hearing before reducing fees, the appellate court cited *Shappell v. Guardianship of Naybar,* 876 So.2d 690, 692 (Fla. 2d DCA 2004), noting that the courts, "frequently dispose of uncontested petitions for compensation and expenses in guardianship matters informally without conducting a hearing." In *Shappell,* the court explained that, "even in the absence of a challenge by an interested party to a guardian's petition for fees, the circuit court should not reduce the amount of compensation requested by the guardian without first providing the guardian with an opportunity to be heard on the petition." The appellate court noted that the same applies for attorneys in guardianship proceedings and, had a hearing been conducted, Fletcher might have been able to explain the entries or provide evidence related to the entries that the trial court found problematic.

In response to the trial court's inadequacy of findings in the order reducing fees and denying expenses, the appellate court cited Fla. Stat. § 744.108, which provides:

744.108 Guardian and attorney fees and expenses

(1) A guardian, or an attorney who has rendered services to the ward or to the guardian on the ward's behalf, is entitled to a reasonable fee for services rendered and reimbursement for costs incurred on behalf of the ward.

(2) When fees for a guardian or an attorney are submitted to the court for determination, the court shall consider the following criteria:

(a) The time and labor required;

(b) The novelty and difficulty of the questions involved and the skill required to perform the services properly;

(c) The likelihood that the acceptance of the particular employment will preclude other employment of the person;

(d) The fee customarily charged in the locality for similar services;

(e) The nature and value of the incapacitated person's property, the amount of income earned by the estate, and the responsibilities and potential liabilities assumed by the person;

(f) The results obtained;

(g) The time limits imposed by the circumstances;

(h) The nature and length of the relationship with the incapacitated person; and

(i) The experience, reputation, diligence, and ability of the person performing the service.

The appellate court cited *Meyer v. Watras*, 223 So.3d 1010, 1013 (Fla. 4th DCA 2017), which states, "A circuit court need not explicitly reference the statute as long as the circuit court provides a sufficient explanation for the reduction in a fee request." The *Meyer* opinion notes, "at a minimum, [the circuit court] must provide sufficient factual findings regarding the compensable number of hours and the reasonable hourly rate on which the fee award was based."

The appellate court detailed the trial court's denial of some fee requests and noted that the trial court failed to provide specificity regarding its issues with the requests as follows: 1) It is unknown how the trial court reached its conclusions regarding alleged duplicate entries; 2) There is no clarification as to what work the trial court deemed paralegal work versus attorney work; 3) There is no clarity as to what fee entries were noncompensable for the reasons the trial court stated; and 4) The trial court failed to provide any detail about the denial of entries for a Second Suggestion of Capacity hearing that the Attorney failed to prosecute.

Accordingly, the appellate court found that the trial court violated Fletcher's due process rights by failing to conduct a hearing before awarding fees in the reduced amount and reversed and remanded this matter for further proceedings.


S. BOISROND

Sandy Boisrond *has been practicing law since 2015. She earned her J.D. from Thomas M. Cooley Law School (Michigan) and completed her undergraduate studies at the University of Miami (Florida). She currently works as a solo practitioner handling estate planning, guardianship, and probate matters. Before law, she was a public-school teacher and worked for a nonprofit organization. Sandy is an Autism Advocate and hosts a variety of educational programs year-round. She is also an active member of the RPPTL Law School Programming Committee, serving as one of the Liaisons for St. Thomas and Nova Southeastern law schools.*

Real Property Case Summaries

Prepared by Jade Davis, Esq., Hall Booth Smith, P.C., Tampa, Florida

Perry v. Turner, 2023 WL 4277448 (Fla. 2d DCA 2023)

Former girlfriend filed an action to evict former boyfriend from home and former boyfriend filed a counterclaim asserting equitable causes of action that sought to recoup properties former girlfriend had purchased with his money. The Twelfth Judicial Circuit Court entered judgment in favor of former girlfriend on former boyfriend's counterclaim. Former boyfriend appealed.

Holding: The Second DCA affirmed the trial court by holding that the doctrines of unclean hands and *in pari delicto* precluded former boyfriend from recouping properties former girlfriend purchased with former boyfriend's money. The court noted that this case fell squarely within the principle and purpose of *in pari delicto* and refused to reverse since both parties knowingly and willfully participated in wrongdoing.

Reasoning: The court based its decision on the, "the general rule that when one purchases property and causes the title to be taken by another for the purpose of thwarting his creditors, a court of equity will not aid him in extricating himself from the situation he has created."[1] The court stated that the rule still applies and has not been changed.[2]

Facts

Richard Perry ("Perry") and Donna Turner ("Turner") never married, but dated for more than a decade. During the relationship, Perry transferred considerable sums of money to Turner's bank account, which she used to purchase multiple rental and other properties in her name or in a business entity of which Turner was the sole shareholder. By design to evade creditors, Perry's name was not on the property records. Perry also made significant cash transfers to Turner, during their relationship, which Turner held in a safe deposit box or somewhere other than an established financial institution.[3]

The parties' relationship ended in 2019 and issues arose, thereafter, when Turner sued Perry to evict him from the home where the two had resided, which was titled in Turner's name. Perry filed a counterclaim against Turner, asserting equitable causes of action through which he sought to recoup the properties Turner purchased with his money, and the other funds and assets he transferred to Turner while the two were dating. In support, Perry testified that the parties had an oral agreement whereby the properties and other assets would be held in Turner's name or possession, but they "would still be [his]" because he was the sole source of the funding.[4]



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In response, Turner asserted the defenses of unclean hands and *in pari delicto* to Perry's counterclaim arguing that these equitable doctrines barred Perry's equitable claims because he made the transfers to evade his creditors, including Perry's ex-wife. Turner presented evidence in support showing that Perry divorced his ex-wife in 2004 and since then had a court-ordered obligation to pay child support. Further, the amount of child support Perry owed his ex-wife under the order was, at least, partially dependent on the amount of Perry's income. So, in effect, the less income Perry reported, the less child support he owed to his ex-wife that pursued child support since their divorce.[5]

Trial Court

The trial court applied the doctrines of unclean hands and *in pari delicto,* after a three-day nonjury trial, and it entered final judgment for Turner on Perry's counterclaim. The trial court explained that it had, "little doubt that the bulk of the money transferred by Perry to Turner over the years was part of a continuing scheme by Perry to hide his money from his ex-wife and/or other creditors." The trial court likewise found that Turner, "was fully aware of Perry's plan and willfully and knowingly participated in his effort to conceal money and property." Accordingly, the trial court denied Perry any equitable relief.[6]

Appellate Court

On appeal, Perry argued that the evidence presented by Turner was legally insufficient for the trial court to apply the doctrines of unclean hands and *in pari delicto*. The Second DCA disagreed and led with, "It is a fundamental principle of equity that no one shall be permitted to profit from his own fraud or wrongdoing, and that one who seeks the aid of equity must do so with clean hands."[7]

The court continued by stating that the unclean hands doctrine, "may be asserted by a defendant who claims that the plaintiff acted toward a third party with unclean hands with respect to the matter in litigation."[8] Turner alleged that Perry acted toward his creditors—and particularly toward his ex-wife—with unclean hands as to the properties and assets Perry sought to recover in the litigation. Perry argued that Turner was required to present evidence.[9] The Second DCA disagreed with the case application of *Sponholtz* because this case, unlike *Sponholtz*, showed Perry transferred funds and assets to Turner to evade child support obligations. As to the *in pari delicto* defense, the court stated it, "refers to '[t]he principle that a plaintiff who has participated in wrongdoing may not recover damages resulting from the wrongdoing".[10] The court doubled down by stating that "courts should not lend their good offices to mediating disputes among wrongdoers . . . and [ ] that denying judicial relief to an admitted wrongdoer is an effective means of deterring illegality."[11]

Given that the parties schemed to conceal Perry's monies from Perry's ex-wife, the court provided that such agreement, whether express or implied, purports to relieve a father of his duty to support his children and offends public policy.[12] The court rejected Perry's argument that Turner had the duty to prove illegality not simply wrongful conduct for the doctrine of *in pari delicto* to apply. The court did not find anything in the case law or the doctrine's definition that requires evidence of illegality or criminality. In response, the court stated so and added that, "Florida courts have long held that an agreement offensive to public policy is void and unenforceable if the parties to such an agreement are *in pari delicto*."[13] The court concluded by stating that, "the law will leave the parties where it finds them, and relief will be refused in the courts because of public interest."[14] Thus, the court affirmed the trial court's refusal to "aid Perry in extricating himself from the situation he [ ] created."[15]

Morales v. Iqbal as Tr. of Grantor Tr. #660 U/A/D 07/07/2017, 362 So.3d 246, 247 (Fla. 4th DCA 2023)

Fourth DCA affirmed trial court holding that a trial court may award damages if it finds that a claim for specific performance for sale of real estate is not possible because the property has been sold to a third party on remand.

Facts

Alba Morales ("Morales") acquired a property through a quit claim deed from the original owners, the Cazorlas ("Original Owners").[16] Najeeb Iqbal ("Iqbal") then purchased the property, via quit claim deed, from Morales and paid $60,100.00.[17] The parties also signed an agreement, which provided that if a foreclosure was filed within three years of purchase by Iqbal, Morales would return the monies to Iqbal.[18] Within three years, a bank filed a foreclosure action against the Original Owners.[19] When Iqbal notified Morales and requested the return of funds, Morales refused, and the lawsuit for specific performance, breach of contract and unjust enrichment was filed.[20]

Trial Court

The trial court awarded summary judgment in favor of Iqbal. Morales responded objecting to the entry as Iqbal's motion did not comply with the 2021 amendments to the summary judgment rule (i.e., attaching record evidence to support the motion for summary judgment in addition to arguing inequitable outcomes on Iqbal's behalf). In granting the motion to summary judgment, the trial court reviewed the written contract attached to the Complaint and provided that it refused to re-write the contract between the parties to make it more equitable for Morales, despite the fact that Iqbal was allowed to keep rents collected during the time Iqbal owned the property and to obtain a return of the funds paid for the property if foreclosure was filed.

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The trial court ordered Morales to return the $60,100.00 to Iqbal; after receipt of payment, for Iqbal to transfer the property back to Morales; and miscellaneous items for post-judgment enforcement of the final judgment.

Appellate Court

Morales appealed the trial court's final summary judgment in favor of Iqbal. The Fourth DCA affirmed the final judgment but as to the specific performance count, the court advised that because the record reflects the property subject to the action was conveyed to a third party, the case was remanded to the trial court for a determination as to whether a decree of specific performance can be rendered in light of such conveyance.[21]

Supporting its decision with *National Industrial Bank of Miami v. Forbes*,[22] the court stated that if the trial court finds specific performance impossible, it is to conduct an evidentiary hearing on whether an award of damages under Iqbal's other claims is appropriate.[23] The court provided further support in *Forbes* by quoting, "Should the trial court find that it is impossible to grant the equitable relief requested [ ], the trial court shall be authorized to conduct an evidentiary hearing for the purpose of ascertaining and awarding damages incidental to the main relief sought"[24] and provided further support in *Camp v. Parks*,[25] which found that when specific performance was impossible, the order was, "reversed and the cause remanded with respectful instructions to allow plaintiff to seek money damages for breach of contract."[26]


J. DAVIS

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Endnotes

1 *Perry v. Turner*, 2023 WL 4277448, at *1 (Fla. 2d DCA June 30, 2023) (quoting *Scott v. Sites*, 41 So.2d 444, 445 (Fla. 1949)).
2 *Id.*
3 *Id.* at *2.
4 *Id.*
5 *Id.*
6 *Id.* at *1-2.
7 *Id.* (quoting *Leila Corp. of St. Pete v. Ossi*, 138 So.3d 470, 473 (Fla. 2d DCA 2014)).
8 *Id.*
9 See *Sponholtz v. Sponholtz*, 190 So.2d 572 (Fla. 1966).
10 *Earth Trades, Inc. v. T & G Corp.*, 108 So.3d 580, 583 (Fla. 2013) (alteration in original) (quoting Black's Law Dictionary 806 (8th ed. 2004)).
11 Turner, 2023 WL 4277448 at *2 (citations omitted).
12 *Id.* (citing *Lester v. Lester*, 736 So.2d 1257, 1259 (Fla. 4th DCA 1999)).
13 *Id.* (internal citations omitted).
14 *Id.*
15 *Id.*(internal citations omitted).
16 *Morales v. Iqbal* as Tr. of Grantor Tr. #660 U/A/D 07/07/2017, 362 So.3d 246, 247 (Fla. 4th DCA 2023).
17 *Id.* at 246.
18 *Id.*
19 *Id.*
20 *Id.*
21 *Id.*
22 *Nat'l Indus. Bank of Miami v. Forbes*, 270 So.2d 426, 426–27 (Fla. 4th DCA 1972).
23 *Morales*, 362 So. 3d at 246 (citing Forbes, 270 So.2d at 427).
24 *Id.* (quoting Forbes, 270 So.2d at 427).
25 *Camp v. Parks*, 314 So.2d 611, 616 (Fla. 4th DCA 1975).
26 *Morales*, 362 So.3d at 246.

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