

ActionLine

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

Arbitration Agreements In Residential Construction Contracts

Secure 2.0: What You Need To Know

Reserving Judgment: New Requirements May Have Unintended Outcomes For Condominium Board Members

Do You Need Client Consent To Disclose Estate Plan Documents?

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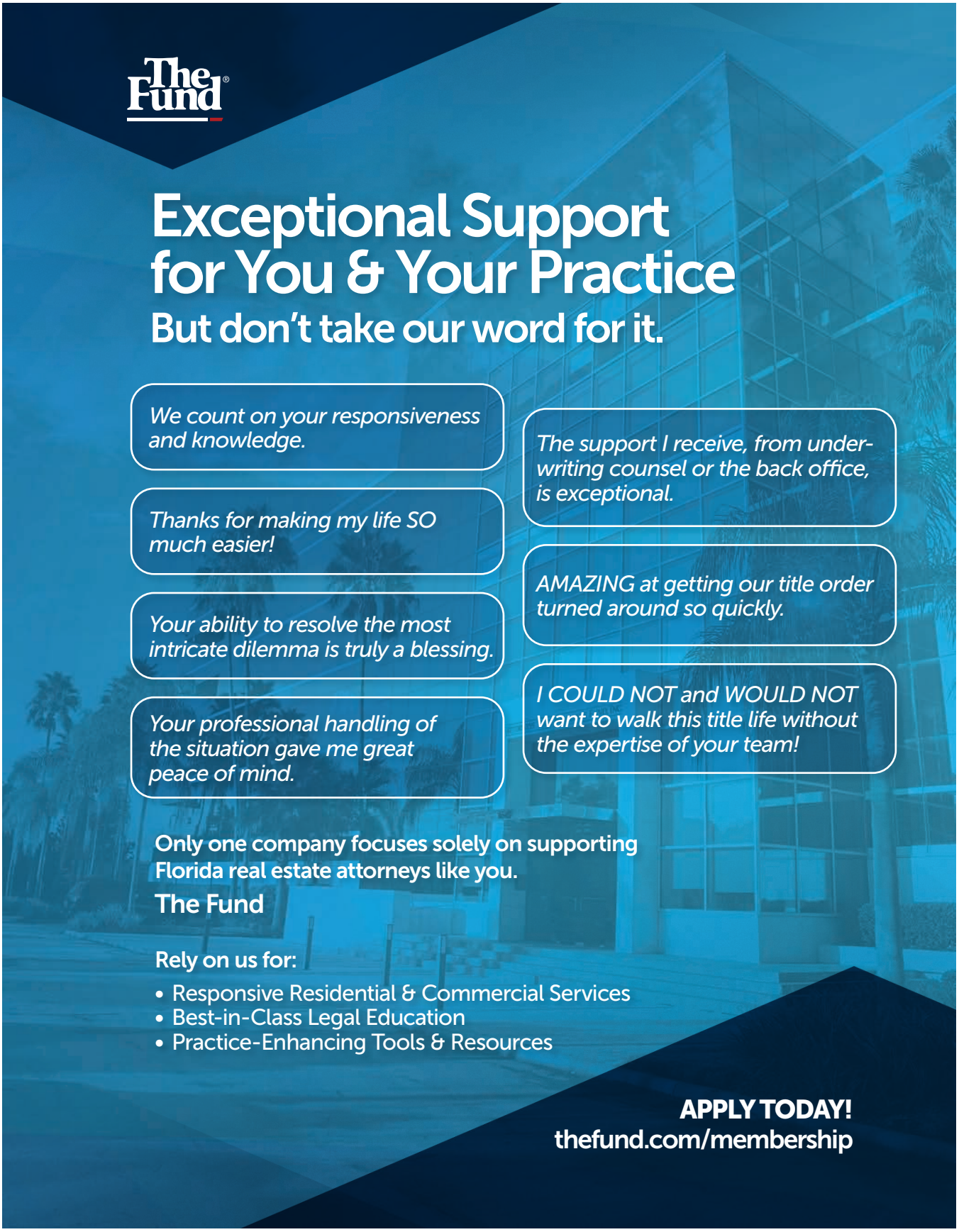

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Focus on Section Meetings

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

In this edition of the Chair's Column, I would like to focus on Section meetings and the benefits bestowed on those who invest their time and talents in our committee work. The Section has nearly 12,000 members and we try to reach each of them annually through publications, Zoom and in-person meetings, CLEs, and subject-matter-specific conferences. Section in-person meetings occur five times annually, with four in-state and one out-of-state meetings, but there is a host of ways to become involved in the Section that do not require physical attendance.

This year, all in-state Section meetings have been or will be held in a hybrid format with in-person and virtual attendees able to interact seamlessly. This platform is unique to the RPPTL Section and has helped Section outreach to new members, as it provides access to meetings without the time and cost associated with travel to in-person meetings. **As a result, the Section has grown by nearly 700 new members since we began Zoom or hybrid meetings in the Spring of 2020.** These new attendees are engaged and regularly contribute their ideas, experiences and knowledge to our committees. It is exciting to see the reach we have achieved and the new faces that attend our meetings.

The Section has an Executive Council that meets in conjunction with our Section committees. Currently, the Executive Council consists of over 289 actively engaged members, all of whom are either leaders or active contributors to the Section's committees and programs.

The Section committees are generally divided into three divisions: the General Standing Division (**S. Katherine Frazier**, Tampa, Division Director and Chair-Elect); the Real Estate Division (**Wm. Cary Wright**, Tampa, Division Director) and the Probate and Trust Division (**John Moran**, West Palm Beach, Division Director).

The Section is robust and busy with committees that produce quality educational programs, hearty debates, and legislative proposals. By way of background, the Probate and Trust Division has 14 different substantive committees touching on virtually every conceivable area of the estates, trusts, and guardianship planning, administration, and litigation practice. The Real Property Division has 18 of its own committees addressing issues such as title insurance and standards, construction law, residential real estate, commercial real estate, leasing, development and land use, and real estate litigation. The General Standing Committees of the RPPTL Section generally assist with internal Section business and matters of interest to both sides of the aisle. In addition, the Section has designated liaisons who interact with over 21 related organizations and Florida Bar Sections to enhance coordination with key real property, probate, and trust organizations.

RPPTL Section Committees are open to all Florida Bar members and consist of an education component as well as discussions of legislative initiatives. The committee meeting format is vitally important because most RPPTL initiatives originate in committee and are refined, debated, and vetted at length in our meetings. The committees also provide opportunities to share ideas and engage with expert lawyers statewide.

Another key benefit of the Section's meetings is fellowship. Enjoying a face-to-face meal with a colleague from across the state or opposing counsel who you have only met via e-mail has a tangible impact on both the profession and professionalism. Engaging with Section colleagues outside of the courtroom, meeting their kids and spouses, and discussing hobbies or favorite vacation spots transform casual business relationships into lasting friendships. **Investing the time to attend Section meetings is a valuable investment in your career and an invaluable investment in the legal community.**

If you are considering attending a Section meeting either remotely or in person, you can find the meeting schedules at the www.RPPTL.org site (schedules are posted about a month before each meeting). The Section's Membership and Inclusion Committee can assist with new attendee orientations. **We hope to see you soon!**

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

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

Greetings Fellow Readers!

Happy Spring to all. In this edition we have a variety of informative articles for you, but a little housekeeping first.

The Real Property, Probate and Trust Law Section will host our annual meeting at the Opal Grand Resort in Delray Beach, Florida from May 31- June 4. If you are interested in attending the meeting live or via Zoom, please see our website for more information. On top of planning a meeting chock full of information, networking and family fun (read - there will be a mechanical bull!), the tireless and hard-working planning committee has also assembled a half-day CLE, Homestead Tricks and Traps, on June 1—a program that can benefit both new and seasoned members. We have other great and timely CLEs listed on the back cover of this issue. Please scan the QR code or go to our website for more information. Thanks to all of those involved who continue to give their time and knowledge for the benefit of our Section and its members.

The coming of the annual meeting also means that this will be the last Section meeting for Section Chair, **Sarah Butters**. It takes significant time and hard work to serve in this, sometimes, thankless position. We would like to thank Sarah for her sacrifice and guidance in leading the Section in the past year! Welcome to the back row, Sarah.

On to our issue. Want to learn more about The Professional Fiduciary Council? We have you covered. Please see page 6 for **Hung V. Nguyen's** conversation with **Darby Jones**, founder and President of the Executive Board, about what this organization offers and its accomplishments since its 2020 inception. On page 10, **Brett M. Henson** addresses recent case law and other vital information about the enforceability and scope of arbitration provisions in residential construction agreements. We have a very relevant article about disclosure of estate planning documents on page 14 by **James W. Martin**. What do you do when your client's family calls and asks for their family member's documents? On page 18, **Lauren J. Danilchenko** shares tips for closing a deal with a hard money lender.

Need an update about the SECURE Act? (I know I regularly do). We have a summary of what you need to know on page 20 by **Denise B. Cazobon and Alfred J. Stashis, Jr.** Next on deck is an article about the new requirements under Florida Statutes §§ 718.112(2)(h) and 553.899 and the outcomes for condominium board members on page 24 by **Shayla J. Mount**. **French Brown** summarizes the Leadership Priorities on the 2023 Legislative Session on page 28. Don't miss our always informative Practice Corner discussions on pages 40 and 42, and our Case Summaries starting on page 46 by our first year RPPTL Fellows.

Lastly, I would like to end with a heartfelt thanks to my counterpart and Co-Chair, **Michael Bedke**. This will be his last official issue as Co-Editor-in-Chief of *ActionLine*. He has spent years devoting his time and effort to ActionLine and his contributions have played a large part in its continued success. Mike's enthusiasm, wit and hard work have made working with him a true joy. Thank you for everything, Mike!



M. BEDKE



E. FINLEN

The Professional Fiduciary Council:
A Conversation With Darby Jones, Esq., Founder And President of the Executive Board

By Hung V. Nguyen, Esq., The Nguyen Law Firm, Coral Gables, Florida

Has it only been three years? The Professional Fiduciary Council of Florida launched in January 2020, only months before the worldwide pandemic. I recently had the pleasure to sit down with founder and President of the Board of Directors, Darby Jones, to learn more about the organization, why it is needed, what it can offer, and the breadth of things it has accomplished so far.

Question:

Darby, there is some buzz around the fiduciary world regarding the Professional Fiduciary Council of Florida ("Council"). What is the Council?

Answer:

The Professional Fiduciary Council of Florida, or Council, was established to serve as a resource for locating vetted, educated, experienced, and insured individuals to serve in the important roles of healthcare surrogate, agent under a power of attorney, personal representative, trustee, professional guardian, and other fiduciary positions. Our membership includes attorneys, professional fiduciaries, certified public accountants, trust officers, and professional guardians.

Q: ***Why was the Council needed?***

A: *ActionLine* readers probably have experienced naming a healthcare surrogate or agent under a power of attorney, or naming a personal representative when developing a client's estate plan, when no one is readily available, qualified or convenient to fulfill those duties.

A possible reason why many people resist getting an estate plan in place is because they have no one to name in their documents to act as their fiduciary. Those who do move forward often end up naming ill-prepared or less-than-adequate friends or family members. More often than we like, this causes significant harm to the client and their family and can lead down a path of exploitation, neglect, and abuse. To address the urgent need for competent individuals to serve in these roles and protect people of all ages, a diverse group of leaders from the legal, financial, legislative, and advocacy communities came together to create the Professional Fiduciary Council of Florida.

The Council now has a statewide searchable directory of qualified fiduciaries and affiliates. Our growing membership has a commitment to the highest level of fiduciary service and each member meets the stringent requirements of this Council, which include standards for education, experience, professional liability insurance, and verified references.

The Council has two primary missions. One is to identify qualified individuals who are available to serve as fiduciaries (including as court-appointed guardians) who have demonstrated a commitment to a high level of fiduciary service. The second is to provide practical, real, and useful support, education, and training for those serving in these roles.

Q: ***Tell me why I or anyone else should become a member of the Council. What are the benefits of membership? How does the Council benefit its members and the public?***

A: Anyone who serves in any fiduciary capacity or represents fiduciaries, such as a trustee, personal representative, agent, healthcare surrogate, or professional guardian, should become a member. Membership provides a platform for the fiduciary and the practitioner to be seen, educated, and vetted – achieving what we hope is the gold standard in an otherwise standardless market. Membership provides confidence and consistency for those shopping for a professional fiduciary, because the consumer can be assured that members have been referred, have had their background checked, and are insured. Membership also provides networking opportunities for fiduciaries and affiliates.

Members enjoy free monthly webinars called, "Fiduciary Fridays." These webinars have gained statewide recognition as the go-to for unique, targeted and practical education

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about the fiduciary industry. These webinars are open to the public and free to members. Past presenters and topics have included Mark Parthemer, speaking on the duty to protect assets; Nick Curley, who provided case law and legislative updates; William Hennessey, who spoke on the ethics of serving as a fiduciary; and Gentry Byrnes's primer for fiduciaries entitled "Oh the Paperwork!"

In addition, the Council holds the Annual Florida Fiduciary Conference. This year, the conference was held live in St. Petersburg and via webcast on March 10, 2023. The conference is open to anyone, including those interested in learning more about how to become a fiduciary or law firms interested in adding fiduciary services to their practice. The conference showcases well-known experts and speakers and covers topics that everyone working in the fiduciary industry needs to know, including fiduciary responsibilities, relevant laws, and ethics, as well as day-to-day issues and practical solutions to those issues.

The members (fiduciaries and affiliates) are listed on a statewide directory located on our website https://professionalfiduciarycouncil.org/. There also is a members-only email listserv to provide interaction, mentoring and networking among the membership.

The Council's membership of qualified fiduciaries provides a solid, trustworthy option for clients and, over time, will undoubtedly reduce the occurrence of exploitation, abuse, and neglect through the misuse of powers of attorneys and trusts in the wrong hands.

Q: ***What does it cost to be a member?***

A: There are three types of membership from $275 to $350 per year, which, in addition to other benefits, includes 10 hours of CLE, CEU, and CTFA educational credits for members.

Q: ***Are there different membership levels? What is the difference?***

A: There are three membership categories: First, there is the Individual Professional Fiduciary membership for those individuals serving as trustee, agent under a power of attorney, healthcare surrogate, professional guardian, personal representative, or other fiduciary role. This membership is $350 per year. Second, there is an Affiliate membership for those who provide supporting services and are interested in and support the activities of the Council, such as attorneys, accountants, certified care managers, bonding agencies, trust companies, academia, governmental agencies, and more. Third, the Council offers a Provisional membership for those individuals working toward meeting the criteria of Individual Professional Fiduciary. Provisional status is offered for two years.

Q: ***What types of people join the Council?***

A: The types of people who join the Council are professionals who wish to provide excellent services and who consistently try to improve the delivery of those services. In addition to individual professional fiduciaries, our membership includes attorneys, trust officers, paralegals, accountants, professional guardians, and others who serve in these roles. Finally, we have a wide variety of affiliate members, including bonding agencies, certified care management, senior move managers, and more.

Q: ***I am a trusts and estates lawyer. How can a person like me benefit from the Council even if they are not a member?***

A: The Council provides trusts and estates lawyers with a resource for finding individuals who will potentially fill the most important roles in your client's life by having the responsibility over their finances, well-being, social environment, and medical care while ensuring your client will age in a safe and confident setting. Trusts and estates lawyers are at the front lines of preparing individuals for the rest of their lives. Estate planning is more than just documents; it is setting in place a system to protect clients upon incapacity, vulnerability, or protection from others while moving through the aging process. The Council encourages all lawyers to reach out to a member of the Council and allow them to meet your clients and provide that much-needed assurance that "they will not be alone" and that there will always be someone there to protect them and coordinate the right services during their most vulnerable years.

Q: ***What kind of vetting does the Council do for its members? How does the public know it can trust the organization?***

A: The Council maintains the quality of its membership by conducting extensive vetting of its applicants, including verification of professional liability insurance, confirmation of experience and educational background, and review of at least three verified professional references that the individual is qualified to act as a professional fiduciary. The Council is careful to review each application by committee. For Individual Professional Fiduciary membership, three referrals, specifically for the applicant's fiduciary services, are required and reviewed. Affiliates must provide a referral from someone who has already attained membership, ensuring that we are confident in their integrity and reputation for membership. Additionally, we confirm that the applicant carries professional liability insurance.

The public can trust this organization because its purpose is to improve the lives of the public. While our organization

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increases the overall credibility of the profession and enhances the services of the Individual Professional Fiduciary, ultimately the benefits trickle down to the wards, clients, and the public.

As the vetting process improves the overall services of professional fiduciaries, it also ensures there will also be fewer mistakes and abuses and less litigation. We believe bad actors will be easier to spot and exploitation will be reduced, creating a safer environment for our vulnerable population.

Q: ***Are you saying that people can be a full-time fiduciary? Is that a real job?***

A: Absolutely. However, it is not an obvious "real job." After many years as a corporate trustee in Maryland, I moved back to Florida to care for my father, John Arthur Jones. While searching for my next career, I worked briefly at a law firm focusing on elder law and discovered guardianships, which appeared to be very similar to old-fashioned trust officer work. I became a professional guardian and was quickly requested to take on additional roles as successor trustee, personal representative, healthcare surrogate, agent under a power of attorney, and more. Before I knew it, I was hiring support staff and a bookkeeper to keep up with the demand. It is a wildly gratifying career to know you are making true impacts in peoples' lives and serving in such important and personal roles for those who have no one else.

It's more than a real job; it's an adventure. I am a problem solver, a social worker, a consultant, a coordinator, and an administrator. I often call myself a professional mother. No other career wears as many hats on any given day as a professional fiduciary. Professional fiduciaries are heroes to the individual clients and the community they serve.

Q: ***How do you know so much about the Council? What is your role with the Council?***

A: After starting my business as a professional fiduciary, it became very clear that there is a dire and urgent need for more people doing this important work, but there is no clear path or applicable training to this end. There is no degree or course curriculum for fiduciary services, trust officers, or healthcare surrogates. I also became increasingly concerned with the persistent and pervasive incompetence of people (and family members) who had been named in these roles and who end up stealing, harming, and neglecting the very people they were appointed to protect. I reached out to others in The Florida Bar's RPPTL Section, trust companies, law firms, and guardians, and there was a groundswell of support to create a solution. It took many years of work on behalf of many people to create the Council. I am proud to say that I am the founding board member and currently serve as the president of the executive board.

Q: ***Who else are some of the founding members?***

A: Other founding board members include RPPTL Section Chair Sarah Butters, Laird Lile, Representative Ben Diamond, Angela Adams, Ken Burke, Senator Kathleen Passidomo, the Honorable Michelle Morley, Nicklaus Curley, and many more. However, we must acknowledge our founding underwriters, without whom this Council would not have gotten off to such a great start. Thanks to the enthusiasm and vision of Holland & Knight; Laird Lile, PA; Gunster, PA; and the AARP of Florida, we can confidently move forward to provide the gold standard of fiduciary services in Florida.

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Q: ***The Council is a baby when it comes to organizations. What are some of its accomplishments?***

A: In three short years, we have gained a reputation for stellar, top-notch, meaningful, and valuable education and training through our Fiduciary Fridays and our Annual Florida Fiduciary Conference. The Office of Public and Professional Guardians ("OPPG") is a big supporter of our webinars, and we also have many supporters in The Florida Bar RPPTL Section as well as the Elder Law Section. We also provide continuing education credits to lawyers and other fiduciaries.

Our membership has grown steadily and carefully to maintain the quality and reputation we aspire to achieve. Our membership includes professional fiduciaries, trust officers, elder law and estate planning attorneys, accountants, professional guardians and more.

Q: ***So, what are some of the Council's current projects?***

A: In addition to the development of interesting and meaningful Fiduciary Fridays webinar content and our upcoming Annual Florida Fiduciary Conference, we are working closely with the RPPTL Guardianship, Power of Attorney, and Advanced Directives Committee to examine solutions to the current statute defining "qualified agents." Our committees are working hard to continue getting the word out about the Council by speaking at estate planning councils, bar associations, and other organizations involved in the fiduciary industry.

Q: ***That's quite impressive. I cannot wait to see what the Council does in the future. What challenges do you foresee for the Council going forward?***

A: As a non-profit organization, it is a challenge to advertise this Council and its benefits effectively. We have many hardworking board members and a part-time administrator putting in many, many hours to bring this Council to the forefront of the legal community. This article is a very important opportunity for us to share this resource with members of The Florida Bar. We are eager to speak to organizations or associations about this Council and welcome any invitations.

There are four important concepts that we hope will spark new ideas or paths in Florida:

- Utilize the Council as a resource for your estate planning clients in need of an independent fiduciary to serve in various situations, including as personal representative, agent under a power of attorney, healthcare surrogate, trustee, or professional guardian.
- Consider being a member of the Council because lawyers make the best fiduciaries.
- Consider adding fiduciary services to your law practice, so your clients have a trusted and known relationship for future needs and assistance.
- Utilize the Council's educational tools to train yourself, your staff, or your clients who may be named as fiduciaries for their friends and family members. Our webinars and annual conference are open to the public. A law firm may consider offering access to these opportunities as a marketing tool or staff training.

Q: ***Where do you see the Council in five years? What about 10 years?***

A: The vision for the Council is to become a recognized force while serving thousands of people daily with the professionalism, empathy, and loyalty everyone deserves. We hope recognized leaders in estate planning, elder law, guardianship, the judiciary, and the public will come to know about the Council.

We are only one of three states in the country addressing the need for elevated professional fiduciaries in the eyes of the public and others to combat exploitation, abuse, and neglect of our citizens.

Darby Jones

In five years, we hope to have a robust and full membership spreading throughout the state. In 10 years, we hope to have a fiduciary curriculum in the state university system, have made improvements to the statutory framework governing fiduciaries, and see a dramatic increase in the safety, protection, and well-being of our population.



H. NGUYEN

Hung V. Nguyen, *The Nguyen Law Firm, Coral Gables, Florida, specializes in probate, trust & guardianship litigation and administration, and commercial litigation. He received his B.S. degree from the University of Texas, Austin, and his Juris Doctor with honors from The University of Miami School of Law. Hung serves on the RPPTL Executive Council, was the former chair of the Guardianship, Power of Attorney, and Advance Directives Committee, and has been an active member of the Probate Rules Committee. He is certified by the Florida Supreme Court as a mediator and is a fellow of the American College of Trust and Estate Counsel (ACTEC).*

Arbitration Agreements In Residential Construction Contracts

By Brett M. Henson, Esq., Shumaker, Loop & Kendrick, LLP, Sarasota, Florida

Since July 2019, Florida has seen an influx of over 550,000 new residents, driven in large part by economic migration from other states.[1] This population growth has been accompanied, at least until the third quarter of 2022, with a steady rise in new residential construction. With this increase in residential inventory comes an increase in potential construction disputes.

An essential dispute resolution feature of many residential construction contracts is the agreement to arbitrate. Appellate courts frequently rule on issues surrounding the enforceability of arbitration agreements, since parties are entitled to appellate review of an order determining entitlement to arbitrate.[2] This article will provide a survey of recent case law regarding the enforceability and scope of arbitration provisions found in residential construction agreements, along with practical considerations for drafting such provisions.

Who Decides Arbitrability?

Florida's Revised Arbitration Code grants to courts the authority to determine the threshold issue of arbitrability, which focuses on whether an agreement to arbitrate exists, and if one does, whether the dispute is subject to the arbitration agreement.[3] In the recent 2022 case *Airbnb, Inc. v. Doe*, the Florida Supreme Court clarified the manner in which parties may delegate issues of arbitrability to the arbitrator.[4] The Court's decision in *Airbnb* affirmed the holding in *Reunion W. Dev. Partners, LLLP*, that parties to a residential construction agreement may demonstrate their "clear and […] unmistakable intent" to delegate decisions regarding arbitrability to the arbitrator by incorporating the Construction Industry Rules of the American Arbitration Association ("AAA") by reference.[5] Both the *Airbnb* and *Reunion W. Dev. Partners, LLLP* decisions turned on the fact that the referenced AAA rules provided that "[t]he arbitrator shall have the power to rule on his or her own jurisdiction," to include "objections with respect to the existence, scope, or validity of the arbitration agreement."[6]

Should the Court (or Arbitrator) Compel Arbitration?

A court (or arbitrator) is required to consider three elements in deciding whether parties have a valid agreement to arbitrate a dispute: (1) whether a valid written agreement to arbitrate exists; (2) whether an arbitrable issue exists; and (3) whether the right to arbitration has been waived.[7] Within the context of residential construction disputes, these issues often turn on whether the parties – even in the absence of privity – will be found to have agreed to arbitrate, whether the claims at issue are included within the scope of the arbitration agreement, and whether there has been a waiver of the right to arbitrate, by either pre- or post-suit conduct.

Do the Parties have an Arbitration Agreement?

Builders or developers remain exposed to latent construction defect claims for a period of up to 10 years based on Florida's statute of repose.[8] Construction defect claims may not arise until after the initial purchaser of a home or condominium unit has sold their unit to a subsequent purchaser. Thus, the issue of privity necessarily impacts the analysis of whether a valid agreement to arbitrate exists.

Since 2013, Florida courts have recognized that a community association is obligated to arbitrate construction defect claims associated with the common elements, if its members would otherwise be obligated to arbitrate such claims pursuant to their purchase agreement or limited warranty with the builder or developer.[9] Courts have done so on the basis that an association is assigned the right to bring such claims by their members, which are derivative of their members' interests, who are the "real part[ies] in interest."[10] However, an association is not obligated to arbitrate construction defect disputes if it solely owns the property at issue, absent a separate arbitration agreement with the builder or developer (e.g., one contained within the declaration).[11]

Florida courts have also considered the issue of whether an arbitration agreement between a builder or developer and an original purchaser binds a subsequent purchaser. Courts

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have recognized that builders or developers may include third-party beneficiary language within their original arbitration agreement and limited warranty, which can bind subsequent purchasers.[12] However, an assignment of a limited warranty, standing alone, may be insufficient to bind subsequent purchasers to an arbitration agreement. In *Oakmont Custom Homes, LLC v. Billings as Tr. of Jennifer A. Billings Revocable Living Tr. Dated 5/22/2007*, the original home purchaser's building agreement contained an agreement to arbitrate.[13] While the original purchaser assigned its limited warranty with the builder to the subsequent purchaser at closing, it did so without providing a copy of the building agreement that contained the arbitration agreement. The subsequent purchaser sued the builder for negligence and violation of the Florida Building Code but did not bring a claim under the limited warranty, nor did it seek to enforce any rights under the original building agreement. As such, the court held that the subsequent purchaser was not bound to arbitrate its claims.

A builder or developer can avoid disputes over whether a subsequent purchaser qualifies as an assignee or third-party beneficiary to an arbitration agreement by making the agreement to arbitrate a covenant that runs with the land. In *Hayslip v. U.S. Home Corp.*, the Florida Supreme Court concluded that agreements to arbitrate qualify as real covenants that run with the land, rather than personal covenants, which only bind parties in privity.[14] The subsequent purchasers in *Hayslip* sued the builder for defective stucco installation in violation of the Florida Building Code. The builder's deed to the original owner contained several covenants and restrictions, which expressed an intention to bind both original and subsequent purchasers and required arbitration of disputes involving the home. The subsequent purchasers received a deed at closing that was expressly subject to these covenants and restrictions.



On appeal, the Court analyzed whether the arbitration agreement touched and concerned the land to determine if it qualified as a real covenant that could run with the land and bind subsequent purchasers. It held that it did because the covenant affected the occupation and enjoyment of the home. Specifically, the agreement to arbitrate dictated the means for resolving construction defect-related disputes, the outcome of which purportedly benefited the subsequent purchasers.

Courts have also considered the effectiveness of an arbitration provision contained within a condominium declaration. In *Len-CG S., LLC v. Champions Club Condo Ass'n*, the declaration required that all claims arising from design or construction of the units, limited common elements, or common elements be submitted "to mediation and, if not settled during mediation, to binding arbitration."[15] The declaration further provided that each unit owner, "and other person acquiring any right, title or interest in or to any" unit, in addition to the association, was bound by the arbitration agreement by accepting their respective property interest. The court held that the association was required to arbitrate its claims for construction defects in the units and common elements based on these provisions.

In sum, *Hayslip* and *LEN-CG S., LLC* represent a trend in Florida law that allows inclusion of arbitration agreements, whether in a deed or declaration, in instruments that run with the land to bind subsequent purchasers without regard for privity with the builder or developer.

What Claims are Subject to the Arbitration Agreement?

In addition to a valid agreement between the parties, courts must examine whether the claims at issue are included within the scope of the agreement. Generally, an agreement to arbitrate can be narrow or broad in scope.[16] A narrow arbitration provision only requires arbitration "when a litigant's claims have a direct relationship with the terms and provisions contained in the contract."[17] In contrast, a broad arbitration provision usually requires arbitration for claims or controversies "arising out of or relating to" the subject contract.[18] Courts will compel arbitration of claims under such provisions that have a "significant relationship" or "contractual nexus" to the contract.[19] This nexus is present where a "disputed issue requires either reference to, or construction of, a portion of the contract," or "if it emanates from an inimitable duty created by the parties' unique contractual relationship."[20]

A broadly worded arbitration provision in a residential construction contract will typically encompass claims for negligent construction, violation of the Florida Building Code, and violation of the Florida Deceptive and Unfair Trade Practices Act.[21] Similarly, claims for fraud, fraudulent inducement, and intentional infliction of emotional distress

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may bear a contractual nexus to a construction contract.[22] In one instance, a homeowner's federal civil rights claims for alleged racially motivated construction delays were found to be subject to a broadly worded arbitration provision, where resolution of the delay claim required reference to the construction agreement.[23]

In contrast, the Florida Supreme Court has recognized that a contractual nexus is absent where the claim arises from "a duty otherwise imposed by law or in recognition of public policy."[24] In *Seifert*, the Court was unwilling to require arbitration of a home purchaser's wrongful death claim against the builder, which arose from carbon monoxide poisoning due to a faulty HVAC system constructed by the builder. The Court reached this decision, in part, because the builder's alleged duty arose "under the general common law owed not only to the contracting parties but also to third parties and the public."[25] However, *Seifert* left open the possibility that such claims might be subject to arbitration, if expressly referenced in the arbitration agreement.[26]

Since *Seifert*, the Fourth District Court of Appeal has provided further guidance on the precise language required to make personal injury claims subject to arbitration. In *Dewees v. Johnson*, the home purchase agreement purportedly required arbitration for a purchaser's tort and personal injury claims.[27] The purchaser brought a claim for premises liability following personal injuries sustained during a bicycle accident on a sidewalk within the neighborhood. The plaintiff-purchaser alleged in its complaint that the developer breached its non-delegable duties to maintain premises and warn against dangerous conditions. However, the court concluded that resolution of these claims did not "refer to or implicate contractual duties created or governed by the Purchase Contract or [the] Warranty."[28] As such these claims, which arose under the general common law, bore no significant relationship to the home purchase agreement, and were not subject to arbitration.

The Fourth District Court of Appeal has recently clarified that *Dewees* does not categorically prohibit a builder or developer from including personal injury claims in its arbitration agreement. In *Lennar Homes, LLC v. Wilkinsky*, the court distinguished the arbitration agreement in *Dewees* as ambiguous, and found that where an arbitration agreement "expressly provide[s] that it applie[s] to personal injury claims 'in the community,'" personal injury claims are subject to arbitration without regard to the significant relationship test.[29]

Does a Limited Warranty Operate to Exclude Claims from Arbitration?

The terms of a limited warranty and arbitration agreement, when read together, may operate to exclude claims for Florida Building Code violations. In *Nunez v. Westfield Homes of Fla., Inc.*, the builder offered a limited warranty to repair stucco cracks exceeding 1/8," but did not include coverage for missing weep screeds or other drainage devices.[30] Similarly, in *Wiener v. Taylor Morrison Servs., Inc.*, the homebuilder offered a ten-year structural warranty, which excluded the stucco system from warranted load-bearing structural elements.[31] In both *Nunez* and *Wiener*, the owners brought claims for defective stucco installation based upon violations of the Florida Building Code, rather than the limited warranty.[32] Both courts held that neither owner was obligated to arbitrate its claims because the arbitration agreement in both contracts only required arbitration of disputes arising from their limited warranties.[33]

A builder or developer cannot avoid this scenario by attempting to contractually prohibit claims for violations of the Florida Building Code. In *Anderson v. Taylor Morrison of Fla., Inc.*, the builder included a provision in which the owner purportedly agreed that the builder's limited warranty was the exclusive remedy for defect claims, and waived all other claims outside of the warranty.[34] Like the owners in *Nunez* and *Westfield*, the owners claimed that the builder defectively installed stucco in violation of the Florida Building Code, and that these claims fell outside the limited warranty's scope.[35] The court held that the arbitration agreement, which purported to preclude claims falling outside the limited warranty, was unenforceable for public policy reasons, because it denied the owners relief under Fla. Stat. § 553.84, thereby defeating the remedial purposes of the statute.

Has a Party Waived the Right to Arbitrate?

Even if the parties have a valid agreement to arbitrate their disputed issues, a party may waive the right to arbitrate if it has knowledge of that right and demonstrates an intention to do so.[36] Courts have held that a party's failure to comply with pre-suit dispute resolution procedures, including submission of claims to an initial decision maker, and a timely pre-suit mediation and arbitration demand, can constitute a waiver.[37]

Courts have also held that waiver can occur based upon the parties' filing of a lawsuit, answer, or affirmative defenses without seeking arbitration, moving for summary judgment, or potentially engaging in discovery related to the merits of the lawsuit.[38] Even where a party-defendant seeks to compel arbitration in response to a lawsuit, it must provide an adequate record in support of the motion, or it risks waiving its right to arbitrate. In *Mattamy Fla. LLC v. Rsrv. At Loch Lake Homeowners Ass'n, Inc.*, the association filed suit for construction defects within the community premised, in part, on breaches of express warranties, without attaching any supporting documentation.[39] In seeking to compel arbitration, the homebuilder submitted an exemplar copy of a purchase agreement and limited warranty, but failed to submit any material to demonstrate whether or how each homeowner was a party to these agreements.[40] The court

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held that by failing to do so, the homebuilder did not meet its burden of demonstrating the existence of a valid arbitration agreement as between the parties, such that it would not compel arbitration.[41]

Practical Considerations

There are a number of practical drafting considerations that can be gleaned from the foregoing cases. First, while parties may delegate the issue of arbitrability to the arbitrator, they should confirm that the chosen arbitral tribunal rules permit delegation, or alternatively, include express language in their agreement to arbitrate to this effect.

Second, if a builder or developer wants to ensure that construction defect claims brought by a community association are subject to arbitration, it should consider including an agreement to arbitrate such disputes within the declaration of condominium or the covenants and restrictions. By doing so, it can avoid later disputes over whether subsequent purchasers, who were not parties to the initial purchase agreement or limited warranty, are bound by the arbitration provision. Relatedly, by including the agreement to arbitrate as a deed covenant or declaration provision, a builder or developer can ensure that subsequent purchasers are obligated to arbitrate their disputes until expiration of the statute of repose for construction disputes, irrespective of privity.

Finally, a builder or developer should ensure that it encompasses all desired claims within the scope of its arbitration agreement. For personal injury claims, the agreement should contain language that applies to claims "within the community." A builder or developer should further clarify that its arbitration agreement is not limited to disputes arising out of the limited warranty, since such warranties likely do not cover every potential violation of the Florida Building Code. Finally, because a builder or developer cannot waive its exposure to statutory violations of the Florida Building Code, it should also consider including a broad-form arbitration clause (i.e., "arising out of or related to" language) to ensure such claims are subject to arbitration.


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Endnotes

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5 *Reunion W. Dev. Partners, LLLP v. Guimaraes*, 221 So. 3d 1278, 1279-1280 (Fla. 5th DCA 2017).

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7 *Seifert v. U.S. Home Corp.*, 750 So.2d 633, 636 (Fla. 1999).

8 Fla. Stat. § 95.11(3)(c) (2022).

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11 *Id.*

12 *Pulte Home Corp. v. Bay At Cypress Creek Homeowners' Ass'n, Inc.*, 118 So. 3d 957, 958 (Fla. 2d DCA 2013).

13 *Oakmont Custom Homes, LLC v. Billings as Tr. of Jennifer A. Billings Revocable Living Tr. Dated 5/22/2007*, 310 So. 3d 59, 59–60 (Fla. 4th DCA 2021).

14 *Hayslip v. U.S. Home Corp.*, 336 So. 3d 207, 210 (Fla. 2022), reh'g denied, 2022 WL 829064 (Fla. Mar. 21, 2022).

15 *Len-CG S. LLC v. Champions Club Condo Ass'n*, 336 So. 3d 1245, 1247 (Fla. 5th DCA 2022).

16 *Vanacore Constr., Inc. v. Osborn*, 260 So. 3d 527, 530 (Fla. 5th DCA 2018) (citing *Jackson v. Shakespeare Found., Inc.*, 108 So.3d 587, 593 (Fla. 2013)).

17 *Id.*

18 *Id.*

19 *Id.*

20 *Id.*

21 *Id*. at 532.

22 *Kaplan v. Kimball Hill Homes Florida, Inc.*, 915 So. 2d 755, 759-760 (Fla. 2d DCA 2005).

23 *Phillips v. Lyons Heritage Tampa, LLC*, 341 So. 3d 1171, 1176–77 (Fla. 2d DCA 2022), review denied sub nom. *Phillips v. Lyons Heritage of Tampa, LLC*, 2022 WL 4939287 (Fla. Oct. 4, 2022).

24 *Seifert*, 750 So. 2d at 640.

25 *Id.*

26 *Id.* at 641.

27 *Dewees v. Johnson*, 329 So. 3d 765, 770 (Fla. 4th DCA 2021).

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29 *Lennar Homes, LLC v. Wilkinsky*, 45 Fla. L. Weekly D94a (Fla. 4th DCA Jan. 4, 2023) (*emphasis in the original*).

30 *Nunez v. Westfield Homes of Fla., Inc.*, 925 So. 2d 1108, 1110 (Fla. 2d DCA 2006).

31 *Wiener v. Taylor Morrison Servs., Inc.*, 285 So. 3d 391, 392 (Fla. 1st DCA 2019).

32 *Nunez*, 925 So. 2d at 1109; *Wiener,* 285 So. 3d at 392.

33 *Nunez,* 925 So. 2d at 1110; *Wiener,* 285 So. 3d at 393.

34 *Anderson v. Taylor Morrison of Fla., Inc.*, 223 So. 3d 1088, 1090–91 (Fla. 2d DCA 2017).

35 *Id.* at 1090.

36 *Infinity Design Builders, Inc. v. Hutchinson*, 964 So. 2d 752 (Fla. 5th DCA 2007).

37 *Leder v. Imburgia Constr. Servs., Inc.*, 325 So. 3d 256, 258 (Fla. 3d DCA 2021).

38 *Id.* at 259; *Green Tree Servicing, LLC v. McLeod*, 15 So. 3d 682, 695 (Fla. 2d DCA 2009).

39 *Mattamy Fla. LLC v. Rsrv. at Loch Lake Homeowners Ass'n, Inc.*, 341 So. 3d 372, 373 (Fla. 5th DCA 2022).

40 *Id.*

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Do You Need Client Consent To Disclose Estate Plan Documents?

By James W. Martin, Esq., James W. Martin, P.A., St. Petersburg, Florida

You get a phone call. It's your client's nephew. He says your client is in the hospital, and she is gravely ill. He asks for copies of your client's estate planning documents — the will, revocable living trust, durable power of attorney, living will, designation of health care surrogate, and preneed declaration of guardian. He says your client always told him to call you if this happens. Can you give them to him?

This raises a number of questions. Is the caller really your client's nephew? You can check your file to see if his name and contact information matches what your client told you when you drafted the estate plan documents. Is your client really ill and hospitalized? You can phone, text, and email your client to find out. If your client is there and able to communicate with you, your client can authorize you to disclose the documents, or not. But what if your client does not reply or is not conscious? What do you do then? Can you even confirm to the nephew that your client was, indeed, your client and that you prepared estate planning documents?

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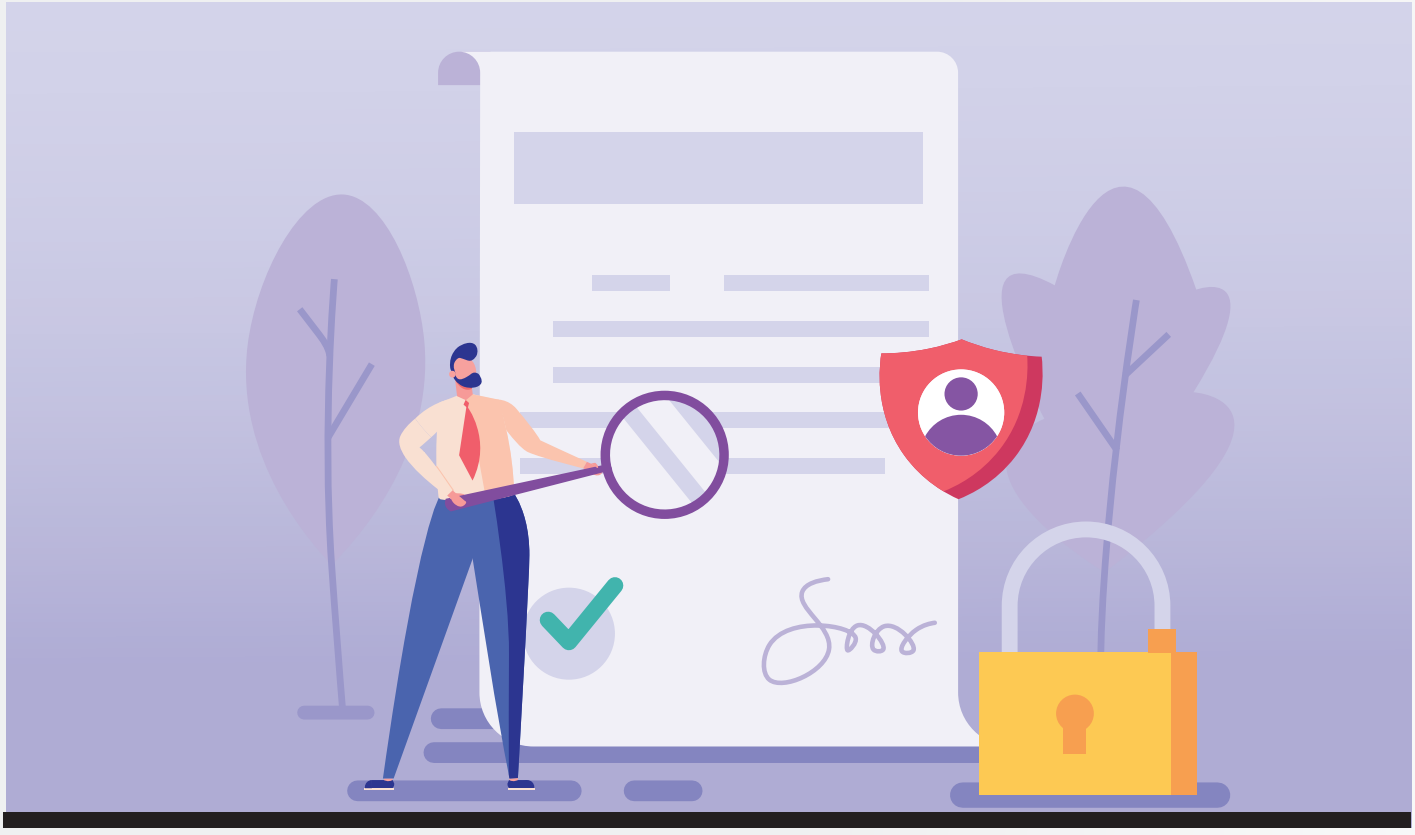

Let's look at Rule of Professional Conduct 4-1.6 (Confidentiality of Information), Rules Regulating The Florida Bar: "A lawyer must not reveal information relating to representation of a client except as stated in subdivisions (b), (c), and (d), unless the client gives informed consent." This makes it clear that if you reach the client and the client consents, then you may disclose the documents.

But if the client is gravely ill in the hospital and unable to give informed consent, are you allowed to provide copies of the documents under one of the exceptions to the rule? The first exception is "to prevent a client from committing a crime" so that is unlikely to apply to a client in her condition. The second exception is "to prevent a death or substantial bodily harm to another" so that might apply if your client's living will expressly states that she wanted all medical means used to prolong her life, but that is not the typical situation.

Five of the remaining six exceptions would not seem to apply: defending the lawyer in a controversy with the client, defending a charge or claim against the lawyer, responding in a proceeding concerning the lawyer's representation of the client, complying with Bar rules, or detecting or resolving lawyer conflicts of interest.

The only remaining exception that might allow you to provide copies of the documents without the client's consent is "to serve the client's interest unless it is information the client specifically requires not to be disclosed." Would it be in the client's interest to provide copies of her documents to her nephew? In some cases it might, and in other cases it might not. Are you willing to risk an ethical violation and make that determination on your own?

Rule 4-1.6 goes on to say, "When disclosure is mandated or permitted, the lawyer must disclose no more information than is required to meet the requirements or accomplish the purposes of this rule." If you decided to make the determination on your own, then this raises another question. Which documents will you disclose? In some cases, it might be in the client's interest to provide copies of the durable power of attorney, living will, and designation of health care surrogate, but it might not be in her interest to provide a copy of the will because the nephew might not be named in the will and might find that to be a problem in need of a solution. The revocable living trust is interesting because it is both a document in effect during life, such as the power of attorney, but it is also a testamentary document, such as the will, so it presents a more complex problem in determining how to respond to the nephew's request for copies of his aunt's documents.

There is another rule that might help: Rule 4-1.14 (Client with Diminished Capacity). This rule includes this wording:

> However, when the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, such as consulting with individuals or entities that have the

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> ability to act to protect the client…When taking protective action under this rule, the lawyer is impliedly authorized under the rule on confidentiality of information to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

So, this might be a basis for disclosing documents without client consent, but some of the above questions remain along with a new question: what constitutes diminished capacity? Does the lawyer need to visit the client to make this determination? Or engage an expert to do so? Again, are you willing to take that risk?

The Comment to Rule 4-1.14 understates the lawyer's predicament: "At the very least, the lawyer should determine whether it is likely the person or entity consulted with will act adversely to the client's interests before discussing matters related to the client. The lawyer's position in these cases is an unavoidably difficult one."

Perhaps a better solution is to ask your client at the time of estate planning whether she wants to include in her estate planning documents an informed consent document for your client to sign (along with the will, trust, durable power of attorney, living will, designation of health care surrogate, and preneed declaration of guardian) authorizing you to disclose these documents in the future to certain people. Doing this might give you a legal ethics foundation to do what your client wants you to do: disclose the documents. Many of the difficult questions would remain if a request to disclose arises, but at least you would have a document stating your client's consent.

The consent could be worded as simply as this:

> *I,_____ ("Client") hereby consent to my attorney _____ ("Attorney") providing copies and PDFs of my estate plan documents, including but not limited to any and all wills, codicils, trusts, amendments, restatements, powers of attorney, living wills, designations of health care surrogates, preneed declarations of guardian, beneficiary designations, and other estate planning documents, to any or all of my spouse _____, my children _____, and the persons named in those documents as beneficiary, trustee, trust director, personal representative, agent, surrogate, or guardian, or as alternate or successor to any of them, and to my physicians, hospitals, and other health care providers, and hereby consent to Attorney providing to such persons any and all other information and documents regarding my assets and estate plan that Attorney may have.*
>
> *Date:_____, 20____*
> *Signature of Client:_____*

Let me illustrate using the With Me or Without Me process portrayed by Tom Cruise and Cameron Diaz in the movie *Knight and Day*:

Without Consent: You send copies of your sick client's estate plan documents to her nephew. Six months later your client recovers. She then fires you and reports you to the Bar for violating confidentiality rules.

With Consent: You send copies of your sick client's estate plan documents to her nephew. Six months later your client recovers. She recalls your discussing this possibility at the time of signing the documents, and she thanks you. Or she still fires you and reports you to the Bar for violating confidentiality rules, but you send the Bar the consent to disclosure signed by the client when the documents were signed as proof of your compliance.

Ah, you say, but what if the now-former client and the Bar say that the consent was signed ten years ago, has no specified term and was not intended to last forever but only for a reasonable period of time? So, we add this sentence to the consent before it is signed:

> This consent is intended to be a continuing consent that is effective immediately upon being signed by me and shall be effective during my lifetime and after my death so that Attorney is authorized to make these disclosures at any time and from time to time before and after my death.

But now the former client and the Bar say that certainly the client should have had the right to cancel the consent at any time rather than have it last forever. So, we add this sentence to our consent template: "However, I reserve the right to cancel this consent at any time by written notice delivered to Attorney, in which case the cancellation shall be effective prospectively after it is delivered but it shall not be retroactive."

And what if they say the consent only applied when you were the client's attorney, and it has been ten years since you closed your file? So, we add this sentence to the consent form: "This consent is also intended to survive the attorney-client relationship so that Attorney is authorized to make these disclosures while the attorney-client relationship between me and Attorney exists and also after it ends."

And yet now they say that the consent dealt with the confidentiality rule but not with the attorney-client privilege. So, we add this sentence to the consent template: "I hereby waive the attorney-client privilege and work product doctrine to the extent, if any, that doing so is necessary for this consent to be effective."

Perhaps those changes to our consent template will reduce the risk of an ethical violation, but what if your client signs your consent to disclose documents template, then ten years later gets sick, goes to the hospital, gets put into an induced coma, and then the nephew calls asking you to disclose the documents. You assess the situation and decide against disclosure because something does not feel quite right. Or you just plain don't want to get involved since you closed the file

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ten years ago and do not even know if more recent documents prepared by another attorney were signed by the client after she signed the ones you drafted. Does the consent template your client signed obligate you to disclose the documents? So, we add this sentence to the template: "This consent does not obligate Attorney to make any disclosures at all, but it authorizes Attorney to do so in Attorney's sole and absolute discretion."

There is one final sentence to add to this version of the new consent template form. We don't want the nephew to claim that the fact of providing copies of his aunt's estate plan documents created a new attorney-client relationship between you and the nephew. So we add this: "The use of this consent by Attorney does not, by itself, create an attorney-client relationship between Attorney and the persons to whom Attorney discloses information or documents."

And what form would be complete without boilerplate? We want to keep the form to one page so we don't want a lot of boilerplate. Looking over all the possibilities, we decide on just this one: "A photocopy, scanned image, or PDF of this consent shall be sufficient for all purposes."

This concludes our exercise in drafting a consent to disclose estate plan documents. The same could be done for any legal document, but the facts calling for this are more likely to arise in estate planning than in any other practice area because that's when clients get sick and, unfortunately, die. Is the consent form necessary? That is your decision. This is just a starting point.

Here is the completed consent to disclose estate planning documents described in the foregoing article, with two witness lines added for good measure:

CONSENT TO DISCLOSURE

I, _____("Client") hereby consent to my attorney _____ ("Attorney") providing copies and PDFs of my estate plan documents, including but not limited to any and all wills, codicils, trusts, amendments, restatements, powers of attorney, living wills, designations of health care surrogates, declarations of preneed guardian, beneficiary designations, and other estate planning documents, to any or all of my spouse _____, my children _____, and the persons named in those documents as beneficiary, trustee, trust director, personal representative, agent, surrogate, or guardian, or as alternate or successor to any of them, and to my physicians, hospitals, and other health care providers, and hereby consent to Attorney providing to such persons any and all other information and documents regarding my assets and estate plan that Attorney may have.

This consent is intended to be a continuing consent that is effective immediately upon being signed by me and shall be effective during my lifetime and after my death so that Attorney is authorized to make these disclosures at any time and from time to time before and after my death.

However, I reserve the right to cancel this consent at any time by written notice delivered to Attorney, in which case the cancellation shall be effective prospectively after it is delivered but it shall not be retroactive.

This consent is also intended to survive the attorney-client relationship so that Attorney is authorized to make these disclosures while the attorney-client relationship between me and Attorney exists and also after it ends.

I hereby waive the attorney-client privilege to the extent, if any, that doing so is necessary for this consent to be effective.

This consent does not obligate Attorney to make any disclosures at all, but it authorizes Attorney to do so in Attorney's sole and absolute discretion.

The use of this consent by Attorney does not, by itself, create an attorney-client relationship between Attorney and the persons to whom Attorney discloses information or documents.

A photocopy, scanned image or PDF of this consent shall be sufficient for all purposes.

Date: _____

Client Name_____
Client Signature: _____

Witness Name:_____
Witness Signature: _____

Witness Name:_____
Witness Signature: _____


J. MARTIN

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Closing A Deal With A Hard Money Lender?

Five Key Points Before You Close.

By Lauren J. Danilchenko, Esq., Fund That Flip, Inc., Jacksonville, Florida

Hard money loans are non-conforming, short-term loans that are secured by commercial or investment real property. These short-term bridge loans are often used to finance new construction builds or property rehabs. As the Federal Reserve stays the course on interest rate hikes, hard money lenders are taking the softest hit among mortgage lenders.[1] What does this mean for your practice? It means that you are seeing more title requests from hard money lenders in a market favorable to fix-and-flip investors. Here are five key points you need to know before you close a hard money loan transaction.

Standard Exceptions are Not Accepted on the Loan Policy.

Hard money lenders will not accept a loan policy with standard gap, survey, and mechanic's lien exceptions. This can be especially tricky if the buyer has a hard closing date and a survey needs to be ordered, or if the construction loan is a refinance. For a purchase transaction, promptly work with the buyer to order a survey, if needed, to avoid a delayed closing. For a refinance, because mechanic's liens attach at the date the notice of commencement is recorded, not from the date the claimant records the claim of lien, refinances can come with increased risk to the lender's lien priority.[2] Determine if a notice of commencement has been filed, and if so, whether construction has begun. If a lien search reveals a notice of commencement, then a notice of termination must be recorded before recording the lender's security instruments.[3] If the owner is mid-construction, then order a survey to remove the standard survey exception on the loan policy.

Hard Money Lenders Require that there is No Arbitration Clause and that the ALTA 8.1 and ALTA 9 Endorsements Appear on the Final Loan Policy.

Upon furnishing a title commitment to a hard money lender, you may be surprised to see a demand to remove the arbitration clause on the loan policy. In Florida, arbitration is voluntary and must be agreed upon by both parties.[4] As such, any request from a lender to remove the arbitration clause of a loan policy can be dealt with by informing the lender that arbitration is voluntary.

The ALTA 8.1 Environmental Protection Lien Endorsement provides the lender affirmative coverage against any damage or loss due to environmental protection liens recorded at the effective date of the loan policy.[5] Before issuing the ALTA 8.1, verify that there is no record notice of an environmental protection lien in the lien search and title examination.

The ALTA 9-06 Restrictions, Encroachments, Mineral Endorsement (with Florida Modifications) provides the lender with affirmative coverage against any damage or loss arising from restrictions and encroachments that could extinguish, divest, subordinate, or impair the validity or priority of the insured mortgage.[6] Prior to issuing the ALTA 9-06 endorsement, you should obtain an owner's affidavit, a survey if necessary, and any other documentation required by the title underwriter.

Hard Money Lenders Require a Pro-Forma Policy or a Marked-Up Commitment Prior to Closing.

Hard money lenders want a pro-forma policy or marked-up commitment in the loan origination file to evidence the insurer's understanding of the lender's request to remove the standard exceptions from the loan policy and to issue the ALTA 9-06 and ALTA 8.1 endorsements. A pro-forma is a draft loan policy issued by the title insurer. Condition 8 of the 2016 and 2021 ALTA Commitment for Title Insurance states that "[a] pro-forma policy neither reflects the status of Title at the time that the pro-forma policy is delivered to a Proposed Insured, nor is it a commitment to insure."[7] A marked-up commitment shows the Schedule B, Part I Requirements and Schedule B, Part II Exceptions deleted and attaches the requested endorsements as agreed by the insurer and the lender.

Recordable Instruments in a Hard Money Lender Transaction.

Hard money lenders require that the security instruments and fixture filing are recorded in the county where the subject property is located. The security instruments consist of the

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commercial mortgage, assignment of leases and rents, and security agreement. The UCC financing statement is recorded in the clerk of the circuit court in the county where the real property is located only.[8]

Date Downs are Required for Tranche Construction Loans Before Each Construction Draw.

Commercial construction loan proceeds are not always issued in their entirety at closing. When the proceeds of a commercial construction loan will be issued in multiple draws to the borrower over the course of the loan's performance, the loan is a tranche loan. The title commitment to issue a loan policy for a tranche loan should include the pending disbursement clause as an exception in Schedule B, Part II. The pending disbursement clause reads as follows:

> Liability under the policy to be issued is limited to the amount of the proceeds of the mortgage identified in Schedule A hereof actually disbursed in good faith without knowledge of any objection to the title.[9]

Hard money lenders request that a title date down is pulled before issuing a construction draw to the borrower to verify the priority of the insured mortgage. Thus, the ALTA Settlement Statement should collect a fee for the date downs.

Hard money loans require special attention. For the successful hard money loan transaction, be aware of the standard exceptions that should not appear on the loan policy, the ALTA 8.1 and ALTA 9-06 Endorsements required by the lender, the lender's need for a marked-up commitment or a pro-forma policy, the lender's recordable instruments, and the collection for date downs on the ALTA Settlement Statement for a tranche construction loan. By following these key points, you can ensure a successful closing and repeat business from the hard money lender.



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Lauren J. Danilchenko *is the Florida Closing Attorney at Fund That Flip, Inc. in Jacksonville, Florida. She serves on RPPTL's Title Issues & Standards Committee and on The Florida Bar's Standing Committee on Professionalism.*

Endnotes

1 Hard money lenders are private entities that control their own interest rates. The interest rate hikes by the Federal Reserve do not directly affect the interest rates of hard money lenders. Michael Ligon, *What Is 'Hard Money' In Real Estate Investing, And How Does It Work?* (May 12, 2021) https://www.forbes.com/sites/forbesbusinesscouncil/2021/05/12/what-is-hard-money-in-real-estate-investing-and-how-does-it-work/?sh=1147d5933d79

2 Fla. Stat. § 713.07(2) (2022).

3 Fla. Stat. § 713.132 (2022).

4 Fla. Stat. § 44.104 (2022).

5 Endorsements can be viewed on the American Land Title Association's Policy Forms website at https://www.alta.org/policy-forms/

6 J. Bushnell Neilson, *Title and Escrow Claims Guide 9-110* (2020).

7 Policy forms can be viewed on the American Land Title Association's Policy Forms website at https://www.alta.org/policy-forms/

8 Article 9 of the Uniform Commercial Code defines a fixture as "goods that have become so related to particular real property that an interest in them arises under real property law." U.C.C. Rev. § 9-102(a)(41) (amended 2010). Article 9 provides that a fixture filing should be filed in the county recorder where the real property is located to perfect the lien. U.C.C. Rev. § 9-501(a)(1)(B) (amended 2010). Florida adopted the model Uniform Commercial Code and states that the fixture filing should be recorded in the office of the clerk of the circuit court where the real property is located. Fla. Stat. § 679.5011(1)(a)(2).

9 Attorneys' Title Fund Services, LLC, Fund Title Notes TN 22.04.03 (2021).



SECURE 2.0: What You Need To Know

By Denise B. Cazobon, Esq., and Alfred J. Stashis, Jr. , Esq.,
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Signed into law on December 29, 2022, the SECURE 2.0 Act expands on the changes adopted by the SECURE Act passed in 2019 and contains new provisions impacting retirees and individuals saving for retirement. This article highlights some of the key provisions of SECURE 2.0 for advisors and their clients.

Increase in Age for Required Beginning Date. Under the 2019 SECURE Act, the age for commencing required minimum distributions (RMDs) was increased from age 70-1/2 to age 72. Under SECURE 2.0, the age for commencing RMDs increased again from age 72 to age 73, effective as of January 1, 2023. That age will further increase to age 75 as of January 1, 2033. Taxpayers born between 1951 and 1959 will need to begin minimum distributions at age 73. Taxpayers born in 1960 or later will need to begin minimum distributions at age 75.[2] [CAA § 107]

Increase in Catch Up Limit for Qualified Plans. In 2023, taxpayers aged 50 or older may make a regular annual contribution of up to $22,500 to their employer-sponsored 401(k), 403(b) or 457(b) plan, along with an additional annual "catch-up" contribution of up to $7,500. As of January 1, 2025, SECURE 2.0 provides that individuals ages 60 to 63 may make an **additional** bonus "catch-up" contribution of up to $10,000 per year to their employer plans.[3] These increased contribution amounts are indexed for inflation.[4] For higher income earners, catch-up contributions must be made on after-tax basis to a Roth account. [CAA § 109]

Indexing the IRA Catch-Up Limit. As with their employer plans, IRA owners over age 50 may make a regular annual contribution up to $6,500 to their IRA account, as well as an additional "catch-up" contribution of up to $1,000 per year. Beginning on January 1, 2024, the $1,000 catch-up contribution limit will be indexed for inflation annually.[5] [CAA § 108]

Changes to Penalties for Failed RMDs. Previously, if a taxpayer failed to take his or her RMD in a tax year, he or she was subject to a 50% excise tax on the difference between the RMD amount and the amount actually distributed. This excise tax is in addition to the income tax assessed on the RMD amount. Effective January 1, 2023, SECURE 2.0 reduces that tax from 50% to 25%, and further reduces that tax to 10% in the case of a timely correction.[6] In order to have a timely correction, the remaining RMD amount must be distributed before the earlier of (i) the mailing date of a notice of deficiency, (ii) the date the 25% excise tax is assessed, or (iii) the end of the second taxable year after the tax was imposed.[7] [CAA § 302] Historically, the IRS has been generous in waiving the 50% excise tax on missed RMDs. It may be that such routine waivers become less common with the lower rates now in effect.

Elimination of RMDs for Qualified Roth Plans. Under current law, qualified Roth contribution plans [such as a Roth 401(k) or 403(b)] and Roth IRAs are subject to different RMD rules during the taxpayer's lifetime. Specifically, while a taxpayer's Roth IRA does not have any RMDs during his or her lifetime, the same taxpayer's Roth 401(k) or 403(b) plan does. As a result, a taxpayer looking to avoid RMDs during his or her lifetime would need to roll his or her Roth employer plan assets over to a Roth IRA. Beginning on January 1, 2024, however, that problem disappears, as SECURE 2.0 eliminates the pre-death RMD requirement for qualified Roth contribution plans during the taxpayer's lifetime.[8] This provision does not apply to distributions required for years prior to 2024 but which could be taken after January 1, 2024. [CAA § 325].

Rollovers from Section 529 Plan Funds to Roth IRAs. Presently, excess funds in a 529 plan distributed but not used for qualified education expenses are subject to income tax on earnings within the plan as well as a 10% penalty. Effective January 1, 2024, SECURE 2.0 allows for a direct trustee-to-trustee transfer of unused funds in a 529 plan to a Roth IRA maintained for the 529 plan beneficiary, subject to a lifetime limit of $35,000 per 529 plan beneficiary.[9] The 529 plan must have been maintained for at least 15 years prior to the rollover, and the total rollover amount may not consist of any funds contributed within 5 years of the rollover.[10] Also, no more than

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$6,500 may be rolled over in any one year (i.e., the IRA annual contribution limit), reduced by any regular IRA contributions.[11] [CAA § 126]

Employer Contribution Matching for Student Loan Payments. Many taxpayers are unable to save for retirement because they are burdened with substantial student loan obligations. Effective as of January 1, 2024, SECURE 2.0 allows employers sponsoring 401(k), 403(b), 457(b), and SIMPLE IRA plans to treat an employee's student loan payments as employee retirement plan contributions for purposes of qualifying for the employer match.[12] Plan administrators may rely on the employee's certification of the amount paid towards student loans.[13] [CAA § 110]

Indexing of the Qualified Charitable Distribution Amount. Presently, a taxpayer may satisfy all or part of his or her RMD through a qualified charitable distribution (QCD) made to one or more qualified charities from his or her IRA. The amount of the QCD, capped at $100,000 annually, is excluded from the participant's gross income for the year of the distribution. SECURE 2.0 provides that the $100,000 annual QCD limit will be indexed for inflation beginning on January 1, 2024.[14] [CAA § 307]

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Election to Fund Charitable Remainder Trust or Charitable Gift Annuity. Effective January 1, 2023, SECURE 2.0 allows for a one-time-only election to distribute up to $50,000 (adjusted for inflation) from an IRA to fund a charitable remainder trust (CRT) or a charitable gift annuity.[15] This amount counts toward the taxpayer's QCD limit for the year. The income interest from the CRT or gift annuity must be payable to the taxpayer or the taxpayer's spouse.[16] [CAA §307] It is anticipated that these provisions may be of very limited utility, with the gift annuity likely to be the more popular option given the complexity and costs associated with administering a CRT.

Provisions Impacting Participants Residing in a Federally Declared Disaster Area. Historically the government has authorized, on an event-by-event basis, taxpayers suffering from disasters to access their traditional retirement accounts without imposition of the 10% early withdrawal penalty applicable to distributions made before age 59-1/2. SECURE 2.0 authorizes a "qualified disaster recovery distribution," which is any distribution made within 180 days of a qualified disaster to an individual whose principal place of abode is located within the qualified disaster area and who has sustained an economic loss by reason of such qualified disaster.[17] Such individuals may withdraw up to a lifetime total of $22,000 for such qualified disaster recovery distributions.[18]

The act provides that, unless the taxpayer elects otherwise, he or she shall recognize the income from any disaster amounts withdrawn ratably over three tax years, beginning with the year the distribution is received.[19] SECURE 2.0 also affords a mechanism for taxpayers receiving disaster distributions to repay those amounts within three years from the date of distribution.[20]

Taxpayers residing in federally declared disaster areas may also borrow up to $100,000 from their qualified plan (an increase from the $50,000 general borrowing limit). [21] [CAA § 331].

Distributions for Emergency Expense Withdrawals. Effective January 1, 2024, taxpayers may withdraw from a traditional retirement account (IRA, 401(k), 403(b), 457 plan) for a personal or family emergency without triggering the 10% early withdrawal penalty. Plan administrators may rely on the taxpayer's self-certification. [22] The total amount that may be withdrawn is limited to the lesser of (i) $1,000 or (ii) the non-forfeitable account balance in excess of $1,000, and the amount withdrawn may be repaid within three years.[23] The taxpayer is limited to one such emergency distribution every three years unless the previous distribution is repaid.[24] [CAA § 115].

Exceptions to the 10% Early Withdrawal Tax for Terminal Illness and Victims of Domestic Abuse. SECURE 2.0 creates additional exceptions to the 10% early withdrawal penalty for taxpayers who have a terminal illness or are victims of domestic abuse.[25]

Terminal Illness. The new exception for terminal illness applies as of January 1, 2023. In order to qualify for the exception, the "terminally ill individual" must have been certified by a physician as having an illness or physical condition that can reasonably be expected to result in death within 84 months of the certification date.[26] Amounts withdrawn may be repaid within three years of receipt.[27] [CAA § 326]

Domestic Abuse. The new exception for victims of domestic abuse applies as of January 1, 2024.[28] This exception allows taxpayers to self-certify that they experienced domestic abuse and to withdraw up to the lessor of (i) $10,000 (indexed for inflation) or (ii) 50% of the account value.[29] Withdrawals may be made within a 1 year period after the abuse, and the participant may repay the amount withdrawn within three years of receipt.[30] [CAA § 314]

Elimination of Excise Tax on Corrective Distributions of Excess Contributions. Current law requires a corrective distribution if the participant contributes too much to an IRA. The corrective distribution includes not only the excess contribution but also any earnings on that excess contribution. Effective starting in 2024, SECURE 2.0 adds an exception to the 10% early withdrawal tax for these corrective distributions. [31] [CAA § 333]

In recent years we have seen significant changes to the law governing IRAs and employer retirement plans. SECURE 2.0 continues that trend. Most of SECURE 2.0's changes appear to be aimed at encouraging individuals to save for their retirement and increasing the chances that those dedicated retirement funds will last longer, especially by relaxing some restrictions on access to those funds and by reducing the penalties for mistakes made. As nearly all of our clients (and all of us) have one or more retirement accounts, it is important to stay up to date with these changes.



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Endnotes

1 SECURE 2.0 was signed into law as part of the Consolidated Appropriations Act, 2023 ("CAA").
2 IRC § 401(a)(9)(C)(i)(I) and (v).
3 IRC § 414(v)(2)(B)(i) and (E).
4 IRC § 414(v)(2)(C).
5 IRC § 219(b)(5)(iii).
6 IRC § 4974(a) and (e).
7 IRC § 4974(e)(2).
8 IRC § 402A(d)(5).
9 IRC § 529(c)(3)(E).
10 IRC § 529(c)(3)(E).
11 IRC § 408A(e)(1).
12 IRC § 401(m).
13 IRC § 401(m)(13)(C).
14 IRC § 408(d)(8)(G).
15 IRC § 408(d)(8)(F).
16 IRC § 408(d)(8)(F)(iv).
17 IRC § 72(t)(2)(M) and (11).
18 IRC § 72(t)(11)(B).
19 IRC § 72(t)(11)(D).
20 IRC § 72(t)(11)(C).
21 IRC § 72(p)(6)(A).
22 IRC § 72(t)(2)(I).
23 IRC § 72(t)(2)(I)(iii).
24 IRC § 72(t)(2)(I)(vii).
25 IRC § 72(t)(2)(K) and (L).
26 IRC § 72(t)(2)(L).
27 IRC § 72(t)(2)(L)(iv).
28 IRC § 72(t)(2)(K).
29 IRC § 72(t)(2)(K)(ii) and (vii).
30 IRC § 72(t)(2)(K)(v).
31 IRC § 72(t)(2)(A)(ix).

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Reserving Judgment:

New Requirements May Have Unintended Outcomes For Condominium Board Members.

By Shayla J. Mount, Esq., Arias Bosinger, Orlando, Florida, 2nd Year RPPTL Real Property Fellow

The passage of SB-4D in 2022 amended Fla. Stat. § 718.112(2)(h) and Fla. Stat. § 553.899, to require certain condominium associations to perform a milestone inspection of the structural components and overall structural integrity of the condominium building. SB-4D also amended Fla. Stat. § 718.112(2)(g) to require a structural integrity reserve study (SIRS) be completed for certain condominium buildings at least every 10 years. In conjunction with these new requirements, the Condominium Act, Chapter 718 of the Florida Statutes, now provides that a failure by the association to complete the milestone inspection or the SIRS is a breach of an officer's or director's fiduciary relationship to the unit owners under Fla. Stat. § 718.111(1) (2022). The potential imposition of statutory liability for board members under these circumstances will have immediate and devastating consequences for condominium associations and their boards. These concerns include an increase in insurance claims against condominium associations and their directors exacerbating the lack of affordable insurance for condominiums, discouraging member participation on the board for fear of liability exposure, and a general erosion of deference and respect between unit owners and board members. This article will address, in detail, some of the concerns associated with the new statutory liability provisions, the unintended consequences of these provisions and potential legislative fixes to the same.



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General Concerns with the New Statutory Liability Provisions

In many instances, a condominium association member's decision to serve on the board of directors begins reluctantly and out of a sense of necessity. Often, a member's first and only interaction with the association's board of directors is after receipt of a demand letter to enforce the covenants or to collect past due assessments; invariably leading the member to form an initial and long-lasting adversarial impression of the association and its board members. Other times, a member may feel compelled into leadership after a perceived failing by the board members to fulfill their potential fiduciary duties to the members by failing to maintain the common elements. In almost all instances, once a member has been elected or appointed to the board of directors for the first time, the individual becomes immediately aware that the individual costs and potential liability exposure associated with board membership can quickly overshadow any benefit the individual hoped to contribute to the community through their service on the board.

New inspection and reserve requirements for condominium associations will inevitably force the board to adopt significant increases to the budget and to specially assess unit owners, many of whom are on fixed budgets which they subsidize with government or family assistance or by renting the unit (assuming leasing is even allowed by the condominium declaration). In 2023, condominium boards will be faced with the unavoidable decision to increase budgets to hire professionals to complete the new milestone inspection and any repairs that are identified and must be completed pursuant to that inspection. Simultaneously, certain condominium boards must also begin funding current (and brand new) reserve accounts which were never previously funded by the association. Couple the new inspection and reserve requirements with the unavailability and unaffordability of property insurance for both condominium associations and individual unit owners, and the board is undoubtedly left between a rock and hard place—with a statutory obligation or potential fiduciary duty to effectively squeeze blood from a turnip.

Ambiguities as to "fiduciary duty" and the application of Fla. Stat. § 553.899(3) (2022).

The procedural and substantive ambiguities associated with the new statutory requirements imposed by SB-4D will create further confusion among the membership as to the fiduciary relationship between the directors and the unit owners; not to mention confusion among the directors and officers as to their exact responsibilities as a fiduciary.

Fla. Stat. § 718.112(2)(g)4 (2022) states:

> 4. If an association fails to complete a structural integrity reserve study pursuant to this paragraph, such failure is a breach of an officer's and director's fiduciary relationship to the unit owners under s. 718.111(1).

Fla. Stat. § 718.112(2)(h) (2022) states:

> (h) Mandatory milestone inspections.—If an association is required to have a milestone inspection performed pursuant to s. 553.899, the association must arrange for the milestone inspection to be performed and is responsible for ensuring compliance with the requirements of s. 553.899. The association is responsible for all costs associated with the inspection. If the officers or directors of an association willfully and knowingly fail to have a milestone inspection performed pursuant to s. 553.899, such failure is a breach of the officers' and directors' fiduciary relationship to the unit owners under s. 718.111(1)(a).

As an initial matter, Fla. Stat. § 718.111(1) (2022) merely states that the officers and directors of the association have a fiduciary relationship to the unit owner without specifying the scope of the fiduciary relationship or the duties and tasks the relationship entails. In other words, this section affirmatively establishes the fiduciary relationship, but does not provide any guidance as to the standard or tasks a director must complete in order to fulfill his or her fiduciary duty. Furthermore, this section fails to provide any penalties or consequences when a breach is alleged to have occurred. Compare, for example, Fla. Stat. § 468.4334 (2022), which outlines a community association manager's "duty to act as an agent on behalf of association." Similar to the individual volunteer director and officers of the board, the community association manager (CAM) is also delegated certain authority and responsibility to act on behalf of the association and its members. Fla. Stat. § 468.4334(1)(a) does not use the phrase "fiduciary duty" to refer to the relationship between the CAM and the unit owners; however, it codifies, the professional standards which the manager must uphold when dealing with and on behalf of the association:

> A community association manager and a community association management firm shall discharge duties performed on behalf of the association as authorized by this chapter loyally, skillfully, and diligently; dealing honestly and fairly; in good faith; with care and full disclosure to the community association; accounting for all funds; and not charging unreasonable or excessive fees.

The above-referenced language provides some standard by which a manager's actions as an association agent can be assessed. This type of language is lacking in the Condominium Act, which instead of providing a standard, now imposes strict liability upon individual directors and officers for the failure to

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comply with new milestone inspection and SIRS requirements. This is particularly problematic for two reasons. The first is that there is still substantial ambiguity as to which condominium associations must comply with the milestone inspection requirements. Fla. Stat. § 553.899(3) requires a condominium to perform a milestone inspection on each building that is three stories or more in height by December 31 of the year in which the building reaches 30 years of age, based on the date the certificate of occupancy for the building was issued, and every 10 years thereafter (the standard for buildings within three miles of the coastline is 25 years and then every 10 years thereafter). Exempted from this requirement is any "single-family, two-family, or three-family dwelling with three or fewer habitable stories above ground." Without additional guidance within the statute defining terms such as "coastline"[1] and "habitable stories above ground,"[2] many condominium boards (including their manager and legal counsel) are left to interpret what the legislature intended by these phrases and more importantly, whether their condominium association must comply in the first place.

The second major concern with this language is that as a practical matter, there is very little an individual director or officer can do to ensure the completion (and subsequent timely reporting) of the milestone inspection report on behalf of the association. Fla. Stat. § 553.899(3) only affirmatively requires the condominium association "arrange" for the milestone inspection and pay for the costs of the same, which must be completed by either a licensed engineer or architect who then must submit the report directly to local enforcement. Fla. Stat. § 553.899(6) specifically states:

> Within 180 days after receiving the written notice under subsection (5), the condominium association or cooperative association must complete phase one of the milestone inspection. For purposes of this section, completion of phase one of the milestone inspection means the licensed engineer or architect who performed the phase one inspection submitted the inspection report by e-mail, United States Postal Service, or commercial delivery service to the local enforcement.

In practice, other than the initial vote to secure the engineer or architect to perform the milestone inspection, an individual director or officer has little control over the completion or timely submission of the report by the vendor to the local enforcement. For example, it is unclear whether a director may be found in breach of their fiduciary duty if the association is unable to retain a qualified professional within 180 days of receipt of the notice from local enforcement to complete the inspection. This is a real concern given the limited number of licensed engineers or architects within the state with the capacity, expertise, and willingness to perform these milestone inspections—to say nothing of the actual costs and expenses of the inspection. Will a director be held in breach if the association cannot pay for the inspection because there is not enough in its operating account to pay for the inspection and/or the board must obtain membership approval prior to specially assessing the membership to pay for the inspection? What if the vendor completes but fails to timely submit the report to local enforcement? To deem an individual director or officer to have breached their fiduciary duty under these circumstances seems both unfair and misdirected.

Unintended Effects on Condominium Associations

The devastating financial and emotional aftermath of the Surfside Champlain Towers South collapse combined with the enormous amount of property damage sustained during last year's hurricane season has resulted in a scramble among condominium associations and their service providers to pick up the pieces, literally and figuratively. To that end, during a special session of the legislature on December 16, 2022, Senate Bills 2A and 4A were passed to alleviate the concerns with affordability and accessibility of property insurance in the State. The changes include reducing the time an insurance carrier has to pay or deny a claim and to conduct an inspection or investigation. It also introduces a new optional state reinsurance plan and prohibits one-way attorney fee provisions in the event of litigation between the insurer and the insured. Notwithstanding these laudable efforts, many condominium associations will still either be unable to identify an insurance carrier or afford the increased premium amount. And while increasingly anxious condominium board members seek adequate and affordable insurance coverage to protect themselves and the condominium property in the coming year, the membership will also be seeking an alternative source of income to pay the association's expenses in a way that will avoid an immediate increase in assessments. For these members, the association's insurance carrier becomes the perceived source of the association's "deep pockets," and the individual directors, mere casualties, in the scramble to find financing to operate the association.

Inevitably, the new uncertainty and fear created by the new language will have a chilling effect on the willingness of members to nominate themselves for board membership and will also discourage meaningful consideration and debate among board members during the process for obtaining and implementing milestone inspection and reserve studies. For example, a board member might be less likely to raise a legitimate question or concern regarding a particular vendor or proposal to conduct a milestone inspection, for fear that by raising the issue it will be seen as a breach of the director's fiduciary duty. Potential directors who may otherwise have the willingness and professional expertise to assist with the association's operations by serving on the board may be further

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discouraged from service because the statute is completely silent as to the penalty for a breach of fiduciary duty under these circumstances. Thus, a director is clueless as to what actions will be considered a breach and the consequences of that potential breach.

Business Judgment Rule

The new language deeming a director in breach of their fiduciary duty for an association's failure to complete the milestone inspection and SIRS report is inconsistent with established common law which affords a certain level of deference to the decisions of condominium directors in the operation of the condominium. In the seminal case, *Sonny Boy, L.LC. v. Asnani*, 879 So.2d 25, 27 (Fla. 5th DCA 2004), the Fifth District Court of Appeals re-affirmed the common law business judgment rule as it applies to decisions made by a condominium association's board of directors. The court reaffirmed the long-established rule that "absent fraud, self-dealing and betrayal of trust, directors of condominium associations are not personally liable for the decisions they make in their capacity as directors of condominium associations."[3]

As noted above, the failure to complete a milestone inspection or SIRS report will rarely, if ever, be the result of action or inaction by any individual director or officer since the completion of these reports are handled by the selected vendor. In accordance with the long-established business judgment rule, board members should be entitled to rely on the insight and work of their vendors without fear of personal liability for the action or inaction of their vendors. The new language in Fla. Stat. §§ 718.112(2)(g)4. and 718.112(2)(h), would effectively preclude the application of the business judgment rule when it comes to the milestone inspection and SIRs report and would leave individual directors and officers to fend for themselves when confronted with related claims.

Potential Solutions

During the upcoming session, the legislature should revisit the current milestone inspection scheme and consider the following:

- Clarify the standards and definition for "fiduciary duty" within the Condominium Act generally, and provide more specifically, what actions will be considered a violation of a director's fiduciary duty as it relates to the completion of the milestone inspection and SIRS.
- Prescribe to the Department of Business and Professional Regulation ("DBPR") primary jurisdiction for violations under this provision to discourage expensive litigation and excessive insurance claims.
- Require participation of pre-suit alternative dispute resolution (mediation or arbitration) between unit owners and board members prior to litigation for allegations of breach of fiduciary duty under this provision.
- Include a rebuttable presumption standard similar to the standard applicable to an association's failure to timely comply with an official records request in Fla. Stat. § 718.111(12)(c)1. A rebuttable presumption standard would afford an opportunity for the director or officer to challenge the allegation of breach.
- Include penalties that will automatically remove the individual from their director or officer position but will preclude the imposition of personal liability.

Such alternatives will maintain the goal of prioritizing the issue of health and safety among board members while also protecting those who are willing (or forced) to serve on the board of directors.


S. MOUNT

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Endnotes

1 The exact coastline for a condominium building may be difficult to determine and may also be subject to change over time due to environmental factors like storm-induced erosion.

2 It is unclear whether a habitable story is one that is developed and deemed habitable per the Florida Building Code or whether it would also include stories that have been converted into a habitable space or attic spaces used to store mechanical or electrical equipment, for example. It is also unclear whether this requirement applies to villas or townhouses with 3 or less habitable stories.

3 *See Perlow v. Goldberg,* 700 So.2d 148 (Fla. 3d DCA 1997) (finding directors of condominium associations not individually liable for actions and governance of a condominium association); *Taylor v. Wellington Station Condominium Association, Inc.*, 633 So.2d 43 (Fla. 5th DCA 1994) (finding that in general, corporate directors and officers cannot be personally liable for corporate acts absent actual wrongdoing in the form of fraud, self-dealing or unjust enrichment to trigger individual liability).

Political Roundup:
Leadership Priorities Of The 2023 Session

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

As discussed in the 2022 Election Debriefing in ActionLine's Winter 2023 issue, Florida's solid red shift resulted in Republicans controlling the Governor's office, all three Cabinet offices, and winning supermajorities in the Senate and House of Representatives. This level of control is likely to result in the passage of a significant amount of legislation important to the Governor, Cabinet officials, President of the Senate and Speaker of the House. This article outlines a number of the priorities publicly discussed by those key individuals leading up to the 2023 Session.

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Governor DeSantis

At the time this article was written, the Governor had called the Legislature to act in two special sessions. The first, in December 2022, dealt with hurricane relief, toll road relief, and insurance reform. The second held in early February 2023, tackled issues such as additional emergency response grants, the transportation of unauthorized aliens, rights and compensation of college athletes, independent special districts, and the creation of the Office of Statewide Prosecution.

Related to hurricane relief, the legislation approved during the first special session provided a partial property tax refund for residential property owners whose real property was destroyed or rendered uninhabitable for at least thirty days by Hurricane Ian or Hurricane Nicole. The partial refund of taxes is based on the number of days the home was uninhabitable. To qualify for a refund, the property owners must first fully and timely pay their property taxes. Note, the deadlines for payment of property taxes and discount periods for payment prior to the delinquency date were also extended for those whose real property was destroyed or rendered uninhabitable by either storm.

Also related to hurricane relief, the bills approved in the first and second special sessions provided funding for FEMA local matches ($350M); a Hurricane Housing Recovery Program ($60M); a Rental Recovery Loan Program ($90M); beach erosion projects ($100M); Department of Environmental Protection hurricane reimbursement grants ($50M).

The insurance reform legislation approved during the special session was designed to be a comprehensive bill increasing policyholders' access to quality, affordable private market property insurance. The bill also requires insurers to promptly communicate, investigate and pay valid claims. The legislation seeks to reduce anticipated shortages in the reinsurance market through a new optional state reinsurance program and reduce excessive litigation by eliminating one-way attorney fees for property insurance. Additionally, the bill seeks to strengthen the regulatory authority of the Office of Insurance Regulation over property insurers.

The Governor rolled out his proposed 2023-2024 budget in early February 2023. The DeSantis budget recommended record tax relief for Florida families, including permanent sales tax cuts to keep more money in consumers' pockets. The proposed budget includes $1.5 billion in tax cuts. Most of the savings are derived from permanent and temporary sales tax exemptions. Also included are extended sales tax holidays for back-to-school shopping, disaster preparedness, and Freedom Summer (which covers certain outdoor recreation purchases, such as the first $100 of the sales price of sunglasses, the first $200 of the sales price of tents, and the first $500 of the sales price of kayaks or canoes, as well as tickets for events, museums, the arts, and more).

The Governor's proposed budget requests an additional $200 million for teacher salary increase, for total funding of $1 billion. The proposed budget utilizes some of Florida's reserves to make significant investments in infrastructure. The proposed budget includes the resources and financing required for a new initiative to address the challenge of congestion on Florida's highways and roads, which is the inevitable result of our state's historic growth. The Moving Florida Forward Initiative will accelerate the development and completion of twenty priority transportation projects over the next four years that will provide additional highway and road capacity to address the needs of Florida's ever-growing economy and population. This initiative invests $4 billion of state general revenue, which will be leveraged for a total investment of $7 billion. Lastly, the proposed budget includes $614 million for Everglades restoration projects.

Senate President Passidomo

Senate President Kathleen Passidomo (Naples) is both a practicing attorney and a member of the Real Property, Probate, and Trust Law Section. In late January, President Passidomo unveiled a workforce housing strategy entitled "Live Local." This strategy is designed to increase the availability of attainable housing options for Florida workers who seek to live in the communities they serve and will result in substantial changes to legal and funding challenges associated with these affordable housing developments.

The Senate President's legislation seeks to address the lack of housing options, whether multifamily or single family, by designating state funds to these developments. The bill does this by continuing to fund both the State Housing Initiatives Partnership (SHIP) and State Apartment Incentive Loan (SAIL) programs at historically high levels. The bill maintains statutory language passed in 2021 that prohibits sweeping these housing funds to the state's general revenue fund. Based on the current documentary stamp tax forecasts, next year the SHIP program will be appropriated a total of $252 million, and the SAIL program will be appropriated a total of $259 million.

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In addition, the proposal will also provide down-payment assistance to more first-time homebuyers, military families, and veterans, and provide incentives that encourage innovative multifamily rental solutions for workers, families, seniors, and youth aging out of foster care.

The legislation increases the annual amount of available community contribution tax credits to $25 million (from $14.5 million), in an attempt to further encourage Florida businesses to make donations towards community development and housing projects for low-income individuals. The bill creates a limited sales tax exemption for building materials for developments financed through the Florida House Finance Corporation (FHFC). The legislation creates new tax incentives for any Florida corporate income taxpayer to redirect those taxes specifically to FHFC in the furtherance of affordable housing. The bill directs additional funds to be used for projects focusing on mixed-use, urban infill, or developments near military installations in our state.

The bill offers incentives for the construction of new projects near existing workforce housing units in an attempt to facilitate the rehabilitation of older rental units. To complete this goal, the proposal reduces certain regulations for multifamily or mixed-use residential projects that reserve at least 40% of the residential units for households earning up to 120% AMI ($94,000 or less for a family of four) for at least 30 years. The bill disallows local governments from requiring a zoning change to accommodate such residential use. Height and density restrictions are relaxed and are based on the maximum limits of nearby developments. The bill requires local governments to maintain a public written policy outlining procedures for expediting permits and development orders for affordable housing projects. The legislation requires local governments to publish an online inventory of local government-owned property that may be suitable for development of affordable housing, making the information more accessible and encouraging local governments to consider using the suitable property for affordable housing. Lastly, the bill forbids rent control under all circumstances.

House Speaker Renner

House Speaker Paul Renner (Palm Coast) is also an attorney and member of the Real Property, Probate, and Trust Law Section. Speaker Renner has unveiled a broad range of priorities and interests for his term leading the Florida House of Representatives. One of Speaker Renner's key legislative initiatives for 2023 is to usher in a new era of customizable school choice for parents and students. In noting that parents expect schools to keep their children safe, respect their values, and teach the reading, math and general knowledge that kids need to succeed in life, Speaker Renner's priority is to prepare every Florida child for adulthood with a world-class education by continuing to reward the best teachers and staff, respecting parental rights, and expanding educational freedom.

Speaker Renner is committed to expanding the impact of the state's successful Florida Tax Credit Scholarship (FTC), the Family Empowerment Scholarship for students attending private school (FESEO), and the Family Empowerment Scholarship for students with disabilities (FES-UA). The bill seeks to accomplish this by expanding eligibility to any student that is a resident of Florida and is eligible to enroll in kindergarten through grade 12 in a public school. Under the bill, each parent of an eligible student will receive an empowerment savings account to take education dollars earmarked for their child in the public education system and choose among a variety of options to customize their child's K-12 education.

It is Speaker Renner's position that "Floridians shouldn't need a government permission slip to exercise their constitutional rights" to carry concealed weapons. He has unveiled legislation for the 2023 Regular Session to eliminate the need for a concealed weapons license (CWL) in the state of Florida. "Constitutional carry" will allow Floridians who are currently qualified to obtain and maintain a concealed weapons license to carry a concealed handgun or weapon without the administrative license. A person carrying a concealed weapon without a license will still be required to obey existing laws prohibiting carrying in such places as schools, athletic events, and correctional facilities. The bill neither affects laws relating to the purchase of a firearm; nor does the bill affect a private property owner's current rights to allow or restrict firearms under the law.

Conclusion

As every legislative session presents its own unique set of opportunities and challenges, the 2023 Sessions will be no different. With supermajority control at each level and historic budget surpluses, Republicans will likely have more opportunities than challenges this year. Regardless, 2023 will likely result in numerous legislative changes affecting Section members.


F. BROWN

French Brown *is a shareholder with Dean Mead in Tallahassee, Florida. He has a dozen years of experience specializing in Florida's state and local taxation. He formerly held leadership positions at the Florida Department of Revenue.*


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Christopher Smart



Sia Baker-Barnes and Jorga Williams



Kit Van Pelt, Elizabeth Hughes and Denise Cazobon



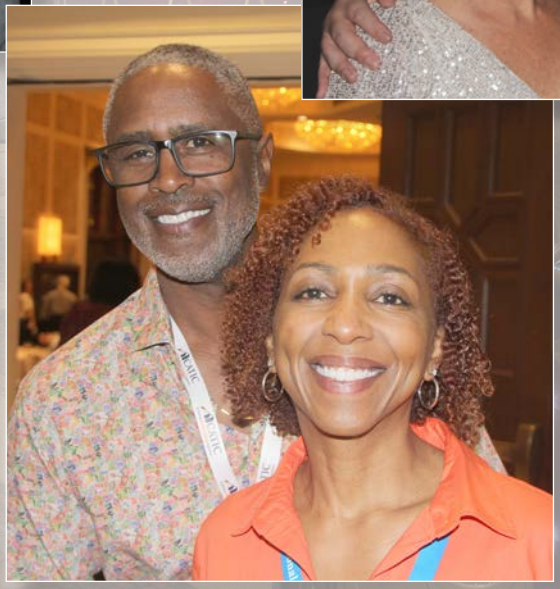
Sandy Diamond and Steve Mezer



Sarah Butters and Mike Poche



Gary Lesser and Laird Lile



Terrell and Brenda Ezell



John Harrison and Katherine Frazier





Jin Liu with one of her twin sons, Thomas Lai and their buddy (and Rachel Lunsford's son) Grady.



Sancha Brennan



Camille Bailey, Amanda Cummins and Lilleth Bailey



Kristen King Jaiven and Eric Jaiven with son Julian.



Bridget Friedberg



Maureen Douglas, Alex Douglas and Darby Jones



Larry Miller



Diana Kellogg and Hilary Stephens

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

Roundtable



Highlights of the Meeting of the RPPTL Section
REAL PROPERTY DIVISION

SATURDAY, DECEMBER 10, 2022

Four Seasons • Orlando, Florida
Prepared by Colleen Sachs, Pensacola, Florida,
Michelle Hinden, Orlando, Florida, and Jin Liu, Tampa, Florida

Thank you to the Roundtable Sponsor:
Fidelity National Title Group

The Director of the Real Property Law Division, Wm. Cary Wright, called the meeting to order at 7:35 a.m.

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

Recognition and Introductions. The Director welcomed guests and attendees.

There was a motion to approve the highlights of the July 23, 2022, meeting. The motion was seconded and passed.

Action Item

Florida Realtor-Attorney Joint Committee — Colleen Sachs

Collen Sachs made a Motion to approve 2022 revisions to The Comprehensive Rider to the Residential Contract For Sale and Purchase Rider A. Condominium Rider FR/BAR forms submitted by the Florida Realtor-Attorney Joint Committee.

Chip Waller and James Marx requested a friendly amendment concerning the language "buyer who has entered into this contract is entitled" and to amend it to delete "who has entered into this contract" and keep only the word "Buyer." Colleen Sachs responded that this friendly amendment was acceptable.

Motion was seconded and passed.

Information Items.

Insurance and Surety Committee — Katie Heckert, Chair and Debbie Crocket, Vice Chair.

Katie Heckert and Debbie Crocket reported on their efforts to create a board certification program in the Insurance area of law. Debbie Crocket reported that the certification will be called the "Insurance Coverage Law" board certification. She further reported the committee has obtained letters of support from various Bar organizations, and they are now contacting outside organizations, various standing committees, the Board of Governors and the Board of Legal Specialization & Education (BLSE). The subcommittee has created proposed drafts for the Minimum Standards, Application and other forms/documents. BLSE will receive the completed application by July 1, 2023, according to their estimated timeline.

A member asked why Wm. Cary Wright was not involved in promoting the board certification program initiative and they responded that Wm. Cary Wright has been kept updated. Wm. Cary Wright added they have invested considerable time and have been very thorough. He congratulated them for their efforts.

Publications Committee

The committee needs Real Property Division submissions for ActionLine. Those interested can contact Mike Bedke at michael.bedke_@usdlapiper.com for more information.

Michelle Hinden encouraged anyone interested in drafting an article for ActionLine to please see her so she can provide information and explain the process.

Legislation Committee Report — Wilhelmina Kightlinger, Legislation Committee, Co-Chair.

Wilhelmina Kightlinger reported that after the first of the year, many committee chairs will receive emails soliciting subject matter experts to provide comments on proposed legislation. She reminded everyone that these requests are time-sensitive. Wilhelmina also requested that we start identifying the subject matter experts and have them prepared and on standby. She asked committee chairs to contact her or her vice chairs if they are contemplating proposed 2024 legislation so the Legislation Committee can add the proposed legislation initiatives to upcoming meeting Agendas as an Information Item and an Action Item.

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

Lee A. Weintraub reported that marketing initiatives will be discussed at the Executive Council. He further reported that the CLE calendar is full, with a great deal of high-quality

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CLE product. He thanked everyone for their efforts, noting that this is the biggest revenue generator for the Section. He acknowledged Manny Farach and Shawn Brown, as they are taking the initiative to create a one-day Real Property Litigation symposium at the Portofino Bay at Universal. He reported that it will follow the Construction Law Institute program format.

Committee Reports

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

James C. Russick reported that the Florida Land Title Association (FLTA) has taken a written position against the Uniform Commercial Real Estate Receivership Act (UCRERA), pointing out specific issues. He further reported that the committee had worked on the MV Realty 40-year listing agreements issue. He would encourage the Section members to pass the proposed draft of the legislation to other members for comment. The committee looks forward to hearing those comments and will continue to work on this legislation.

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

James C. Russick reported that the Florida Land Title Association (FLTA) has taken a written position against the Uniform Commercial Real Estate Receivership Act (UCRERA), pointing out specific issues. They have been trying to refine the language and believe FLTA will continue to try and push through changes to the appellate rule. to support this. Manny Farach further commented that there are some changes to the statutory language, such as a bond being posted versus a bond not being posted. He further reported the committee has to resolve the final issues with the FLTA, and the Business Law Section is on board.

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

Salome J. Zikakis reported that she is excited about the upcoming 2023 event. It will be an all-day in-person event at the Funky Buddha Brewery. She commented that it has been a few years since we have had this event. The general format includes a morning session with three presentations, lunch, and an afternoon breakout roundtable session with six to seven different topics including the impacts to insurance in connection with the Surfside collapse, what people need to know about construction law, and the business side of commercial real estate lenders from the big bank and the community bank perspective. The committee needs more people involved in the project, she said, including South Florida lawyers and lenders. Anyone in those areas who is interested should contact Wilhelmina Kightlinger.

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

No report.

Communications — Michael V. Hargett, Chair; Laura Sundberg, Vice Chair

Laura Sundberg reported that this is a new committee. A marketing firm is being hired to better communicate with the public about the Section. The committee anticipates that each substantive committee will have initiatives that can utilize this committee or the marketing firm on issues regardless of whether they are legislative or non-legislative. This year, she will be the liaison for all committees. She ran through the protocols: the committee will have to identify the scope and impact, provide a white paper or explanatory statement, and provide a point of contact for the marketing firm, a subject matter expert, a drafter for any future communications, and a spokesperson. From there, the Communications Committee will review the information, then present proposals to the Executive Council for the budget approval. An example of how this may be used is the guardianship initiative or the work the Condo Committee did after the Surfside disaster. The Committee will use this to educate the public about the good work the Section is doing to shape the Florida law.

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

Allison L. Hertz reported that the committee had a lively meeting. She reported the committee discussed the FLTA *Hayslip* proposal in terms of its policy and technical language. The overall feeling was that it was too broad, and they would like to speak with the ad hoc committee about their concerns. Committee members are working with the Business Law Section on changes to Chapter 607 of the Florida Statutes because of its impact on community associations. She commented this was a 2024 initiative, but the committee is concerned it may be pushed to earlier and will continue to monitor. They are also looking to present a CLE on tech issues affecting associations. The Condominium Board Certification Review course is being planned, and she encouraged eligible members to apply.

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

Christine M. Ertl reported that they are in crunch time for the course. She noted the course is scheduled for February 3-4, and have changed things up by adding presentations on topics such as turnover class. She reminded many who are currently certified that their recertification is coming up and encouraged them to attend the course to ensure they receive their CLE credits. She also encouraged those who practice in this area to attend the CLE as a refresher.

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

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Sanjay Kurian reported that the committee currently has about 550 members and 17 subcommittees and meets monthly. He also commented the committee conducts many CLE programs and acknowledged Katie Heckert and Jade Davis for their efforts, as they have done a fabulous job.

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

Scott P. Pence reported that they have confirmation from all speakers. The review course is scheduled for March 16-18, concurrent with the Construction Law Institute.

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

Brad R. Weiss reported that planning is underway for the Construction Law Institute scheduled for March 16 - 18 at the JW Marriott, in Orlando. The CLI will kick off with a golf tournament, a welcome reception, and CLE presentations. He noted that the event is already trending ahead of last year for sponsor revenues. He also commented that the event will touch on many hot construction law topics.

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

Colleen Sachs reported that the committee had a joint meeting with the Commercial Real Estate Committee about golf course redevelopment. The commitee also plans to present on additional programs, such as the development of marinas and the redevelopment of mobile home parks.

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

Nothing to report, as their main initiative right now is the Board Certification program, which was discussed at the beginning of the meeting.

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 their committee is in good shape. The course was held March 31-April 1 in Tampa. He further reported planning has begun for the 2024 course.

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

Christopher A. Sajdera reported that the committee had an informative meeting on rent control measures in the format of a CLE program presented by Jeremy Cranford. He commented that the committee is now organizing a subcommittee on the topic.

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

Jason M. Ellison reported that they had a good meeting. He reported that the committee is reviewing many of the statutes that the other committees are discussing, as well as the impact on borrowers. This includes Series LLCs. He commented that Jin Liu's CLE presentation was phenomenal. He reported that the committee has two other CLE programs planned, including one on lending after the Surfside tragedy. A second program will address the negotiation of construction loans and the third parties involved in the construction loan process.

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 discussion led by Amanda Kison on a recent case coming out of 2nd DCA regarding mediations and how they work. He also reported on the real property litigation symposium and explained that the committee wants to make sure this is to be geared to litigators and transactional attorneys so that anyone attending can see the process in litigation as well as how to keep their clients out of court. He explained that they want to be able to offer help to the transactional side and the litigation side, so everyone has an idea of how the process works.

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

Anne Q. Pollack reported the committee discussed topics other committees are discussing including, the revocable transfer on death deeds, mobile home title proposed changes, *Johnson v. Davis,* and when rights can be waived. She further reported that the committee is working on initiatives for litigation bullies and is always looking for interesting problems to work on.

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

Kristen Jaiven reported that Rich McIver did a case law update on a recent Ritz Carlton case. Colleen Sachs reported on the changes to the FR/Bar Condo Rider. Trey Goldman gave an update on the insurance bills.

Title Insurance and Title Insurance 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 discussed proposed legislation. One proposal spearheaded by Len Prescott is on Fl. Stat. 28.223, concerning recording certain probate documents so you can have the heir information without having the probate documents. Len Prescott also spoke on the proposed series LLC Act and provided statistics on series LLC deed conveyances in 2003 and in 2022. He commented that an ad hoc committee has been created to address this, and that the Section has until December 16, 2022, to provide the Business Law Section with constructive comments on this proposed legislation.

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Chris Smart also reported that another right-to-sell bill is being proposed for 2023, addressing the *Hayslip* and the MV Realty situations. He also reported that the proposed legislation for the revocable on death deed statute is moving forward and that the committee is going to revise the white paper as there have been comments provided on the probate side. He also reported that James C. Russick presented on the new 2021 ALTA forms and the changes made to those forms. Len Prescott gave an update on the attorney opinion letter matter and said some lenders are starting to hire and seek attorneys for attorney opinion letters.

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 L.A. Wood commented that she appreciates that the committee was contacted for input on the series LLC legislation. She commented that when the committee does in-person meetings it tries to bring a CLE presentation. The remainder of the committee work is accomplished at their monthly meetings.

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

Bill Sklar reported that Manny Farach has been named to the Board of Governors of ACREL. Bill Sklar has been named Secretary of ACREL, which means that in four years he will become Chair of ACREL.

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

George Meyer reported that he is still on the Board of Governors of ACCL.

Florida Realtors Liaison — Trey Goldman

Trey Goldman reported on the property insurance bills that were dropped by the legislators the night before the meeting. He believes the proposals are very comprehensive. Trey Goldman also reported on the rent control ordinance in Orange County. The court struck down the ballot initiative, but at that time, the question was already printed on the ballots. Voters passed the rent control law, but that vote does not count. There may be more litigation on the issue.

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

James C. Russick reported that they are again working on a mortgage payoff bill similar to the bill that almost passed last year. They appreciate the support of the Section on this initiative.

New Business.

James A. Marx spoke on the proposed series LLC Act. He said it is being overseen by a Business Law Section task force, the same group that changed chapters 608 and 605. He explained that the biggest concern is the authority issue. He reported that the materials have been circulated to several committees. He encourages Section members to review the white paper, which explains the differences between the Delaware Series LLC Act and the proposed legislation. Len Prescott commented that most series LLCs are unregistered in Florida. James A. Marx commented that the Section has until December 16 to provide comments to the Business Law Section on this proposed legislation.

Adjournment. Meeting was adjourned.

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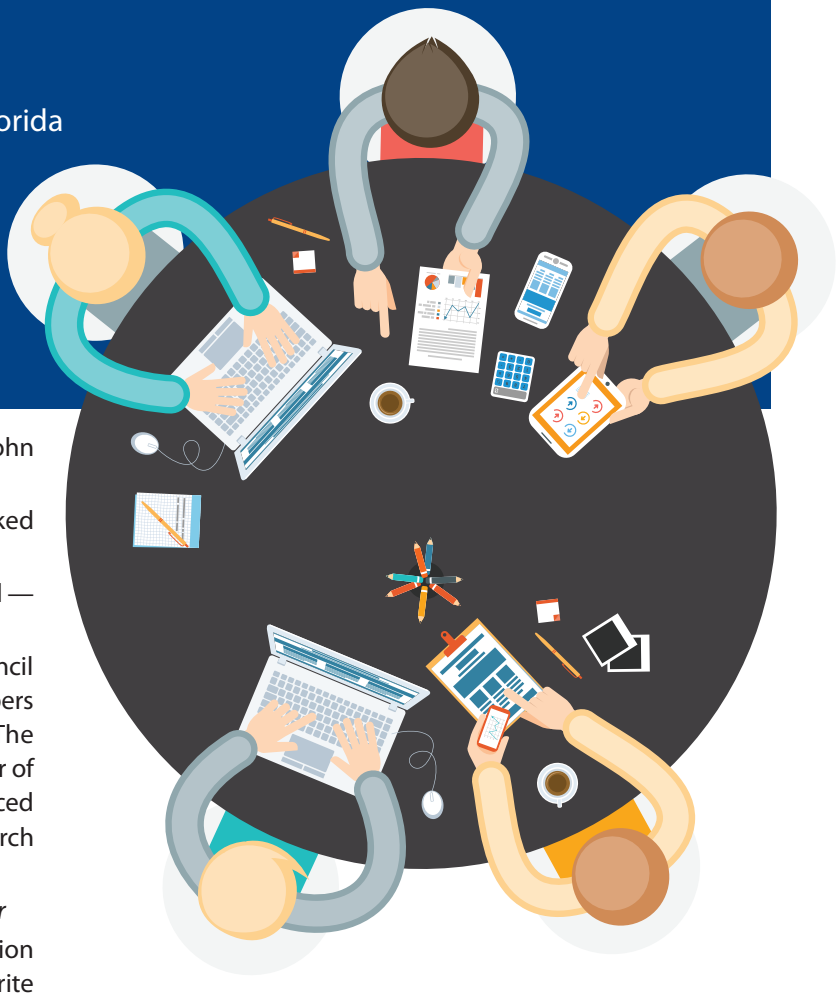
ROUNDTABLE

Highlights of the Meeting of the RPPTL Section
PROBATE AND TRUST DIVISION

SATURDAY, DECEMBER 10, 2022

Four Seasons • Orlando, 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 7:40 a.m.

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

Report of Liaison with Professional Fiduciary Council — Darby Jones, President of the Executive Board:

Darby Jones made a special announcement that the council membership is growing and invited and encouraged members to visit the website (professionalfiduciarycouncil.org). The website is open to anyone, and one need not be a member of the council to view the site contents. Darby also announced the Fourth Annual Florida Fiduciary Conference held on March 10, 2023, in St. Petersburg, Florida.

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

Larry Miller provided an update announcing that Section proposals for this coming legislative session include a rewrite of the Guardianship Code Ch. 745 as approved by the Board of Governors. There may be issues to address in connection with the Guardianship Code based upon the continued objective of the Uniform Adult Guardianship Jurisdiction Act. There is anticipated to be some discussion on these initiatives at the committee level and at Executive Council upcoming meetings.

Larry also provided an update on the legislative pipeline: (1) A complete rewrite of the Baker Act and Marchman Act; (2) Guardianship Visitation – this was requested by legislators as a suggested worthy issue to review. The bill would likely address how visitation can be restricted, i.e., could visitation be restricted with respect to the ward? (3) Multiple Series LLCs; (4) Revocable Transfer on Death Deeds (RTODD) are in process to be teed up in 2023; (5) Principal and Income Act rewrite; and (6) a new Education Proxy clarification proposal that was recently introduced.

CLE Report — Angela Adams, *Co-Chair*

Angela highlighted and congratulated the speakers at the one-day Probate Law CLE which attracted a record 376 attendees online and a good turnout in personal attendance. Upcoming CLEs include: (1) the Litigation and Trust Law Symposium in January; (2) the Estate and Trust Tax Planning committee and Asset Protection joint program in February; (3) the Estate and Trust Certification Review in March; and (4) the Corporate Transparency Act CLE on March 6, 2023.

Communications Committee Report — Laura Sundberg, *Vice Chair*

Laura Sundberg provided an update on the new Communications Committee. The committee has engaged the services of an outside marketing firm with the initiative of reaching the legal, public, and legislative communities

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regarding the substantive work of the Section and how the work and networking events can be of benefit to Florida Bar members, the public and the legislative community. Laura will be the liaison between the marketing firm and the Section.

The marketing firm is creating a "micro" website for RPPTL that will serve as a public facing site. It is anticipated that the microsite will serve as a platform for RPPTL members to publish articles, blogs and other content relating to the work of the Section that is useful to the public. Please contact Laura Sundburg if you have any questions or wish to pass on any ideas for this initiative.

Report of Principal and Income Committee — Potential Changes to Fla. Stat., Ch. 738 (Principal and Income Act)— Ed Koren (*Co-Chair*), Pam Price (*Co-Chair*), Jolyon Acosta (*Co-Vice Chair*), Keith Braun (*Co-Vice Chair*)

Ed Koren and Jolyon Acosta provided an in-depth. presentation on the official roll-out of the proposed revisions to Fla. Stat., Ch. 738 (adopting many aspects of the Uniform Principal and Income Act). Ed highlighted the evolution of 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), with the goals of these new revisions modernizing the rules to provide greater flexibility in the administration of estates and trusts.

The proposed revisions were spearheaded by trust and estate practitioners, Bankers, CPAs and Tax Section members with the goal of adopting UFIPA to promote uniformity with other states, but to also retain Florida specific provisions with sound public policy. The rule of thumb was to default to UFIPA, unless there was a material Florida-specific reason to retain existing law.

Any questions or comments should be addressed to the RPPTL Principal and Income Committee.

Adjournment. Meeting was adjourned at 8:47 a.m.

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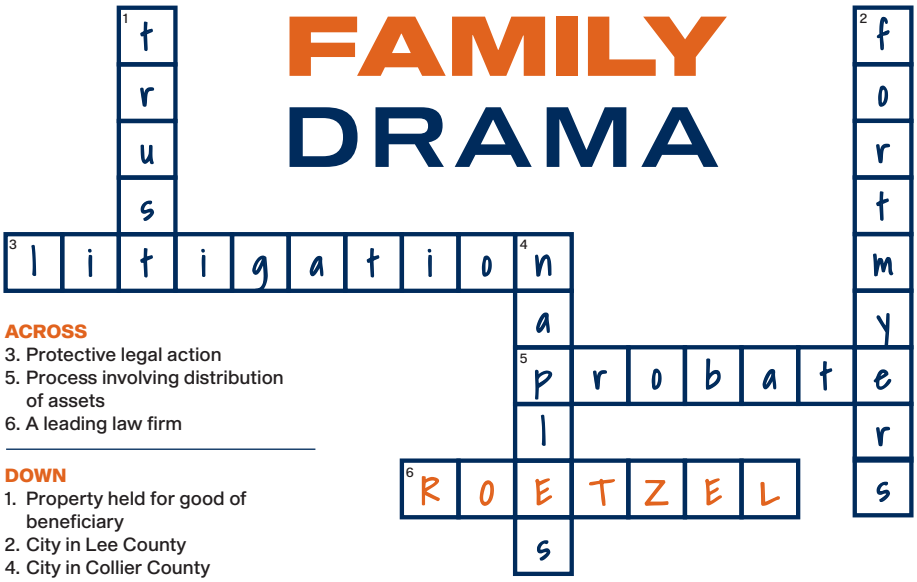

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PRACTICE CORNER

Probate And Trust Division

Garn-St Germain and Exceptions To Due-On-Sales Clauses

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

We are often asked, "What happens to the mortgage?" owned by a decedent during a probate administration proceeding or when conveying mortgaged real property.

Most mortgages have a due-on-sale clause, also known as an acceleration clause, which gives the lender the right to ask for payment in full if the owner sells the home without paying off the loan. Federal regulation 12 C.F.R. 591.2 provides that the due-on-sale clause is triggered by: ". . . transfers of real property subject to a real property loan by assumptions, installment land sales contracts, wraparound loans, contracts for deeds, transfers subject to the mortgage or similar lien, and other like transfers." Unless prohibited by federal law, the lender can call in the loan any time it feels that it is in its best interest.

This clause has several exceptions, most of which may involve written notice to the lender in advance. The Garn-St Germain Depository Institutions Act of 1982 (penned by Utah Senator Jake Garn and Rhode Island Congressman Fernand St Germain) at 12 U.S.C. Code § 1701j-3 (Preemption of Due-On-Sale Prohibitions) provides several exceptions that prohibit a lender from accelerating a note under a due-on-sale clause for the following conditions:

1) **creating a junior lien in the property, if there is no change in the right to occupy the property;**
2) **creating a purchase-money security interest for household appliances;**
3) **a transfer by devise, descent or operation of law on the death of a joint tenant or tenant by the entirety;**
4) **leasing the property for no more than 3 years, provided the lease does not include a purchase option;**
5) **a transfer to a relative resulting from the death of a borrower;**
6) **a transfer where the spouse or children of the borrower become an owner of the property;**
7) **a transfer as a result of a decree of a dissolution of marriage, legal separation agreement, or from an incidental property settlement agreement, by which the spouse of the borrower becomes an owner of the property;**
8) **a transfer to an inter-vivos trust as long as the borrower is and remains a beneficiary and the right to occupy the property does not change;**
9) **any other transfer or disposition described in Federal Home Loan Bank Board.**

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In the case of living trusts and land trusts, for example, the Garn-St Germain Act exempts these from the due-on-sale provisions. Here, the trustee will hold title to the property, and the lender cannot enforce the due-on-sales clause if the borrower is the trust beneficiary. But the lender must be furnished with a copy of the trust document upon request. In the case of title placed into a land trust, the due-on-sale clause will not be in violation so long as there is no change in occupancy. Lenders will generally notice a real estate transfer in various ways including if there is a change of name on the deed, if there is a different name on the check received for payment, or if there is a change in the hazard insurance beneficiary. Also note that Garn-St Germain applies only to residential property. Although on its face, the statutory text seems to imply that one need not live in the property, and it can be up to a five-unit apartment complex and still qualify.

For many trust-based estate plans, compliance can be achieved because many of our clients own only a single-family home that they intend to continue to occupy after the transfer to an inter vivos trust for their benefit. However, when a property contains five or more units (e.g., apartment buildings) or when title to the mortgaged property is transferred to an LLC or other ownership vehicle, no protections are afforded by the Garn-St Germain Act. These types of transfers may trigger a due-on-sale clause, and caution is strongly urged. One solution is to obtain lender approval in writing before executing a transfer not explicitly covered by the exemptions in the Garn-St Germain Act. For example, many lenders may permit the transfer of property into an LLC provided that the original borrowers remain liable for the mortgage if the LLC defaults on the payments or if the LLC has its own good credit history. A note of caution in making such contact is that the lender may refuse to grant permission or fail to respond, and now the matter has been brought to the lender's attention. As a practical matter, lenders probably do not actively patrol land records for transfers that may trigger the due-on-sale clause. By contrast, in a rising interest rate environment, lenders may become more aggressive. The lender may call a low-interest rate loan, which will likely require refinancing or obtaining a new loan, at much higher interest rates to the lender's benefit. While caution is always warranted, extra caution should be taken where Garn-St Germain Act protections are not obvious, especially when interest rates appear to be rising.

Amongst these considerations, practitioners should also consider the potential impact of such transfers on title insurance and homeowner's liability insurance. In general, it is always wise to contact insurance providers to ensure continuity of coverage. Other considerations include the impact of the transfer on homestead exemptions and property taxes if any.

An interesting side note: Rep. St Germain never used the period after "St" because he said he was not a saint and had no pretensions to the title. For this reason, while the period regularly creeps into his name, the period was intentionally omitted.



J. MORA

Jeanette Mora *has been practicing law since 2019. Ms. Mora specializes in probate and guardianship law with Family First Firm in Orlando, Florida. She 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 Co-Chair of the Orange County Bar Association Elder Law Committee and the Estate, Guardianship, and Trust Steering Committee.*



Expanding On Existing Easements: Legal And Financial Considerations When Advising Clients

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

From using an easement for motor vehicle traffic, when it was only intended for foot traffic, to expanding existing utility easements to support broadband services, there are legal and financial considerations that accompany such additional burdens on easements. Although some additional burdens on easements appear to be more of natural progressions in use or technology that should be covered under the terms of the easement, additional burdens on easements are disallowed without permission or supplementary consideration.

Generally, "an easement, like any other contract, when unambiguous, is to be construed in accordance with its plain meaning."[1] In *City of Orlando v. MSD-Mattie, L.L.C.*, the City of Orlando owned an easement for overhead electrical transmission lines and was denied permission to lease the additional capacity of the fiber optic cables it already ran along the easement for internal communications. The appellate court found that "the use therein of the phrase 'necessary communication' eliminates even a scintilla of doubt about what was intended here. Clearly, the use of the easement for the provision of general telecommunications is not contemplated under its plain language." The appellate court concluded that "[t]he scope of an easement is defined by what is granted, not by what is excluded, and all rights not granted are retained by the grantor."

However, there is a carve out in the law that allows for minimal expansion of the dominant estate. The Florida Supreme Court has held that, "the burden of a right of way upon the servient estate must not be increased to any greater extent than reasonably necessary and contemplated at the time of initial acquisition."[2] This concept, often referred to as a secondary easement, allows the owner of the dominant estate to do, "what is reasonably necessary for the full enjoyment of the easement itself . . . [but] the right is limited and must be exercised in such reasonable manner as *not injuriously to increase the burden upon the servient tenement* . . ."[3] Essentially, "a dominant estate easement owner is entitled to prepare, improve, maintain, or repair the easement in order to facilitate its use."[4]

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Use of an easement for an excluded purpose, beyond a secondary easement, as previously discussed, can lead to costly repercussions, including class action lawsuits. Two such class action suits out of Florida are *Seven Hills, Inc. v. Bentley*[5] and *Devon-Aire Villas Homeowners Ass'n, No. 4, Inc. v. Americable Assocs., Ltd.*[6] In *Seven Hills, Inc.*, the appellate court affirmed the trial court's certification of class after various landowners of the servient estates brought action against the utility company for exceeding "the scope of its written easements . . . by installing fiber optic communications lines on its easements and by permitting other entities to use the communications capacity." In *Devon-Aire Villas Homeowners Ass'n*, the appellate court reversed the trial court's order granting summary judgment in favor of a cable television company's expansion of a "public utility" easement by adding lines for cable television. The district court found that cable television was not a "public utility," as contemplated by the original language of the easement and found that entry upon the appellant's land was a trespass.

For those practitioners who support clients who need to expand upon the dominant estate in a way that is not contemplated by the original language of the easement, it is imperative that clients are guided through the process of entering into formal agreements with the owner of the servient estate prior to expansion. The amended easement should explicitly allow for the additional burden on the easement. More likely than not, the agreement will need to be accompanied by additional consideration because the client is getting an added benefit from the easement that was not originally contemplated when the easement was created. With these considerations in mind, costly litigation can, hopefully, be avoided.



J. PIECZYNSKI

Janaye Garrett Pieczynski *is an associate with Ausley McMullen in Tallahassee, Florida, where she focuses her practice in real estate, land use, and trusts and estates. She received her Juris Doctor and Environmental Law Certificate from Florida State University College of Law and her B.S. from the University of Central Florida.*

Endnotes

1 *City of Orlando v. MSD-Mattie, L.L.C.*, 895 So.2d 1127, 1129 (Fla. 5th DCA Feb. 4, 2005) (citing *Walters v. McCall*, 450 So.2d 1139, 1142 (Fla. 1st DCA Apr. 18, 1984)).

2 *Crutchfield v. F.A. Sebring Realty Co.*, 69 So.2d 328, 330 (Fla. Jan. 8, 1954).

3 28 C.J.S., Easements, § 76(b), page 754 (Emphasis supplied).

4 *Lanier v. Jones*, 619 So.2d 387, 388 (Fla. 5th DCA May 28, 1993).

5 *Seven Hills, Inc. v. Bentley*, 848 So.2d 345 (Fla. 1st DCA Feb. 12, 2003).

6 *Devon-Aire Villas Homeowners Ass'n, No. 4, Inc. v. Americable Assocs., Ltd.*, 490 So.2d 60 (Fla. 3d DCA Dec. 17, 1985).

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SECTION SPOTLIGHT

RPPTL Members Among Honorees, Including Top Honor, At Annual Pro Bono Service Awards

Seven Section members were recognized among the 21 honorees at the Annual Pro Bono Service Awards held January 26, 2023. **Timothy Allen Moran** of Oviedo, Florida, was presented with the 2023 Tobias Simon Pro Bono Service Award, the Florida Supreme Court's highest pro bono award. Moran has been a volunteer with Community Legal Services for more than a decade. Since 2009, he has dedicated more than 1,500 hours to more than 500 low-income cases. Moran also educates the extended legal community to expand pro bono reach and leverage legal aid resources. Community Legal Services has created a new award in his honor: the Timothy A. Moran Champion of Justice Award. The award recognizes young attorneys who follow in Moran's example.

Six Section members were presented with The Florida Bar's President's Award, recognizing an outstanding attorney from each of the state's 20 judicial circuits and an outstanding attorney among the out-of-state Florida Bar members.

Jennifer Gutai Comella (First Judicial Circuit**)**

Comella has dedicated countless hours advocating for Florida's most vulnerable children as part of Guardian ad Litem's (GAL) multidisciplinary team. She is also a longtime mentor with Florida Association of Women Lawyers in Love with GAL, the Guardian ad Litem office's mentoring initiative. Comella is an associate attorney in the Destin office of Hand Arendall Harrison Sale.

Guy W. Norris (Third Judicial Circuit)

Guy W. Norris has been a pro bono volunteer with Three Rivers Legal Services (TRLS) since 1994 providing direct legal services to TRLS clients with probate, estate planning, and guardianship matters. He proactively seeks pro bono cases, having worked on more than twenty cases with TRLS over the years. Norris is the managing shareholder of Norris & Norris, P.A., in Lake City.

Melissa K. Hancock (Fifth Judicial Circuit)

Since 2017, Hancock has donated more than 100 hours of legal assistance to over 30 clients as a pro bono volunteer with Community Legal Services (CLS). She was also instrumental in the development of CLS's First Friday Forms Review Clinic. Hancock is the Founding Attorney at the Law Office of Melissa K. Hancock P.A., in Ocala, Florida.

Paul A. Martin (Seventh Judicial Circuit)

Since October 2019, Paul A. Martin has been a pro bono volunteer attorney with the Community Legal Services (CLS) team. At the height of the pandemic, Martin donated over 150 hours of assistance and prepared over seventy estate planning documents for CLS clients. He has been instrumental in helping CLS and Flagler County Bar establish a family and housing law after-hours legal advice clinic. After more than 25 years of service in the United States Army, he and a fellow veteran and classmate founded the Cooley Veterans Corps and the Veterans Legal Assistance program. In 2020, Martin was awarded the CLS Flagler County Pro Bono Attorney of the year for his contributions to CLS and its clients. His firm, Paul A. Martin, P.A., is located in Ormond Beach, Florida.

Jan Bendik (Eighth Judicial Circuit)

Jan Bendik has served 12 years on the board for the Eighth Judicial Circuit Bar Association (EJCBA) where he has been instrumental in establishing The Florida Bar Eighth Circuit Pro Bono Committee. Under Bendik's leadership, the EJCBA Pro Bono Committee spearheads driver's license reinstatement clinics. Bendik is also a participant in EJCBA's Ask-a-Lawyer program, which sends volunteer lawyers to locations around the circuit at least one weekend a month. Bendik is a practicing attorney in Gainesville, Florida.

Harley Herman (Thirteenth Judicial Circuit)

Harley Herman began his pro bono volunteerism at the University of Florida's Civil Legal Clinic when he was a law student. Among the highlights of Herman's service is his commitment to mentoring young lawyers, serving as a panel member of The Florida Bar's Lawyers Helping Lawyers program since 1990, and his efforts made on behalf of attorney Virgil Hawkins. Herman has also worked with Volunteer Lawyers Program of Bay Area Legal Services (VLP) since 2008, where he has donated nearly 1,000 hours, 500 of which he donated in 2021 and 2022. Herman was also the driving force behind the VLP's award-winning Frontline Heroes Pro Bono Project. Harley Herman is Founder/Owner of the Law Office of Herman & Herman in Plant City, Florida.

Steven D. Rubin (Fifteenth Judicial Circuit)

Steven D. Rubin, in his 40-plus year legal career, has taken on many notable pro bono cases, most of which have been through the Palm Beach County Legal Aid Society where he has donated hundreds of hours over the years. Rubin is a Florida Bar Foundation Fellow and former chair of The Florida Bar Board of Legal Specialization and Education (BLSE). Rubin was honored by the Legal Aid Society with the "And Justice for All" award. The Law Offices of Steven D. Rubin is located in Boca Raton, Florida.

The above are excerpts from the January 25, 2023, Florida Bar News article: "*Twenty-One Lawyers to Receive Florida Bar Pro Bono Service Awards Tomorrow in Supreme Court Ceremony*."

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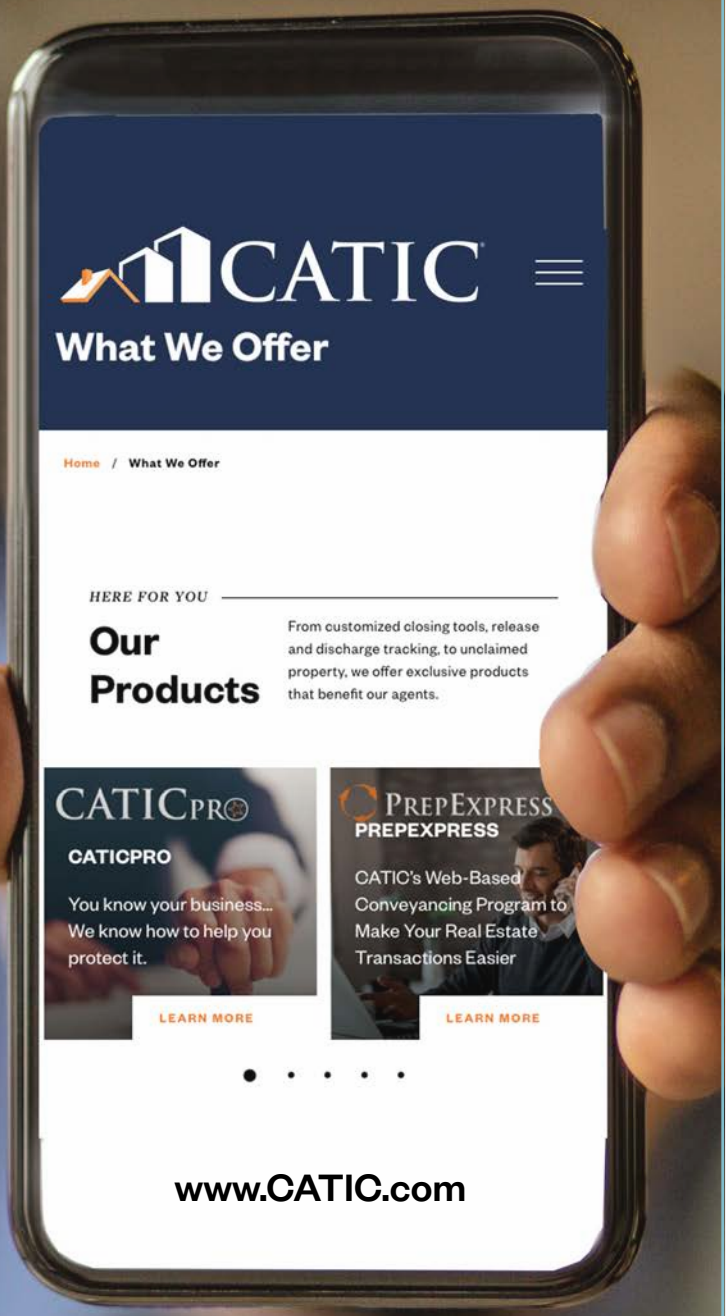

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Real Property Case Summaries

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

***Davis v. Verandah at Lake Grady Homeowners Ass'n, Inc.*, 2023 WL 175419 (Fla. 2d DCA Jan. 13, 2023)**

The appellate court found in favor of an association against certain property owners seeking to disencumber themselves from its covenants and restrictions.

The appellate court upheld the trial court's entry of summary judgment in favor of Verandah at Lake Grady Homeowner's Association, Inc., (the "Association") against property owners, Daniel W. Davis and Melinda M. Davis (the "Davises"), seeking to disencumber themselves from the covenants and restrictions.

> In the absence of fraud or mistake, and in the absence of collateral contractual provisions or agreements which are not intended to be merged in the deed, the acceptance of a deed tendered in performance of an agreement to convey merges the written or oral agreement to convey in the deed, the agreement to convey being discharged or modified as indicated by the deed, and thereafter the deed regulates the rights and liabilities of the parties, and evidence of contemporaneous or antecedent agreements between the parties is inadmissible to vary or contradict the terms of the deed.[1]

Similarly, but more simply stated, Florida courts have repeatedly stated that the merger rule provides, "that preliminary agreements and understandings relative to the sale of property usually merge in the deed executed pursuant thereto,"[2] and "acceptance of a deed tendered in performance of a contract to convey merges or extinguishes the covenants and stipulations contained in the contract."[3]

In 2007, the plat for the Verandah at Lake Grady subdivision was recorded by the developer. In 2008, the developer advertised the sale of the property online, identifying it as a deed-restricted community. In February 2008, the appellants, the Davises, contacted the developer to inquire about purchasing a lot in the subdivision. The developer confirmed that the community would be deed-restricted. The Davises requested the restrictions and received a form copy of the Covenants, Conditions, and Restrictions ("CCRs") that the developer intended to execute and record. The next month, the Davises signed a homeowner's association summary disclosure acknowledging that they received the CCRs, that all property owners would be obligated to be a member of the Association, and that all lots would be subject to the CCRs. Notably, the Association's summary disclosure indicated that, "there have been or will be recorded restrictive covenants governing the use and occupancy of properties in this community." The Davises also received a land sale contract for the property, which expressly noted that the property was subject to the same CCRs.

In May 2008, prior to closing, the title agent noticed that the CCRs had not been recorded. In response, the developer informed her that the CCRs would be recorded and showed her the Association disclosure signed and acknowledged by the Davises. The title agent confirmed with the Davises that they had received the CCRs for the community and asked the Davises whether they wanted to postpone the closing until the CCRs were recorded. The Davises declined and proceeded to close on the sale of the lot, expressly agreeing that the developer would record the CCRs after the closing.

Upon closing the sale, the Davises received a warranty deed that represented that the property was conveyed, "subject to covenants, restrictions, easements of record and taxes for the current year." The CCRs were recorded after the sale on May 22, 2008, encumbering all properties, including the Davises' lot. The Davises joined the Association, paid their assessments, and lived on their property for ten years without challenging the CCRs' application or attachment to their property.

In 2013, when the developer sold lots to another builder, the new builder asked the developer to revise the CCRs to conform to the restrictions that the builder applied to other subdivisions. The developer agreed. Before filing the revised CCRs, the developer sent the Davises a copy of the proposed amendments to the CCRs, with a proposed joinder and consent for their signature. The Davises responded that the developer could amend the CCRs, without their consent, and they told the developer that they would not sign the joinder as they intended to preserve "[their] rights under the restrictions [they previously] executed," when the Davises purchased the property.

In 2018, when the Davises decided to sell their lot, they asked the Association to remove the CCRs from their lot, asserting, for the first time, that the lack of recordation prior to sale invalidated the CCRs with respect to their lot. The Association rejected their request and argued that the Davises had actual and constructive notice of the CCRs before they purchased the lot and the Davises agreed to be members of the Association. The Davises responded by filing a complaint asserting two causes of action: (1) a declaratory judgment declaring that the CCRs were unenforceable against their lot, and (2) a quiet title action obtaining title free and clear of any restrictions. The Association filed a counterclaim seeking to enforce the restrictions.

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Both parties filed competing motions for summary judgment. The Davises argued that, pursuant to the merger doctrine, any previous discussion, negotiations, or agreements about the state of title merged into the deed and that the deed language—which said that they purchased the property free from encumbrances, except those that were "of record"—controlled over the sales contract. The trial court denied the Davises' motion and granted the Association's motion, determining that the Davises agreed that their property was bound by the CCRs at the closing and that the merger doctrine did not apply because, "[t]he language of the deed indicate[d] the parties' intent for the CCRs", which the Davises received, reviewed, and acknowledged, to bind the Davises' property. The appeal followed.

The court found that the Davises did not come to the table with clean hands because they failed to acknowledge that the 2008 deed conveying the property to them clearly indicated that the property would be burdened by the CCRs. Further, the appellants testified that, before purchasing their lot, they acknowledged that the subdivision was to be deed-restricted and that their property had CCRs attached to it. They also admitted to receiving the CCRs, unsigned, and acknowledged receipt of the Association disclosure form stating their lot was subject to the CCRs. The court also noted that the developer never misled the Davises into thinking that the CCRs were recorded before closing. Therefore, although the Davises argued for the merger rule to apply to block enforcement of restrictive covenants contained in a purchase contract but not contained in a subsequent deed, the appellate court disagreed. The court stated, "our guiding principle is the intent of the parties."[4] Instead of allowing the Davises to sell their lot free and clear of any encumbrances, the court refused and found, based on the facts in this case, that the merger rule did not apply. The deed clearly indicated the property was bound by CCRs and the fact that the CCRs were recorded after the sale is immaterial, because the parties intended for the lot to be encumbered by the CCRs that were to be recorded. Further, the Davises did not cite any precedent that requires CCRs to be recorded prior to the sale in order to bind the parties.[5]



***7 at Blue Lagoon (1), LLC v. Blue Lagoon Condo. Ass'n, Inc.*, 2023 WL 27677 (Fla. 3d DCA Jan. 4, 2023)**

The trial court erred in interpreting the term "interference" in isolation to refer to traffic delays, as opposed to obstructions to access. Appellate court reversed the final judgment and remanded with instructions to enter judgment in favor of the appellants.

Appellants engage in developing property near Miami International Airport. On their property, is a non-exclusive easement that runs across it and provides the adjacent property, the appellee association, access to a public street. When interpreting the injunction enforcing the easement (the "Agreed Permanent Injunction"), the trial court interpreted the injunction to preclude the appellant's proposed development because it would "interfere" with the association's easement rights by increasing traffic. The appellate court found that the trial court's interpretation overlooked the contextually appropriate, ordinary meaning of the injunction and reversed.

The easement at issue was created in 1986, before the appellee's condominium had been built, as a condition of a bank loan, which granted a temporary, nonexclusive easement for the purpose of pedestrian and vehicular ingress and egress and for installation and maintenance of public utilities, whether underground, surface level or above surface level, and for all other lawful purposes, in and upon, over, across, under and above a 40-foot strip of land lying within appellant's property. The easement also provided that if the grantor defaults, the easement becomes permanent. The grantor defaulted in April 1993, the bank foreclosed, and the dominant estate was sold to the Blue Lagoon Airport Club Apartments (the "Airport Club"), the association's predecessor.

Years later, the Airport Club sought injunctive relief against appellants, who dumped piles of soil and rocks on the easement to prevent access to and development of the Airport Club Property. The trial court granted a temporary injunction in favor of the Airport Club, finding that appellants had impermissibly obstructed access to the easement. The Airport Club and appellants eventually agreed to a final judgment entering the Agreed Permanent Injunction, which granted the same relief as the temporary injunction.

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> The [Weiss] Defendants ... are hereby enjoined and prohibited from interfering with [the Airport Club's] right of ingress and egress to and from the property. The [Airport Club] shall be entitled to take all appropriate steps to obtain access including, but not limited to removing any obstructions, fences, structures and obstacles in order to gain access to their property.

In July 2018, the association brought the underlying action against appellants seeking declaratory relief as to the rights and obligations of the parties under both the easement and the Agreed Permanent Injunction. In its complaint, the association argued that the increased traffic resulting from development of appellant's property would violate its rights under the easement and the Agreed Permanent Injunction.

In June 2020, the trial court granted partial summary judgment, in favor of appellants, concluding as a matter of law that appellant's development plans, "do not violate the plain terms of the easement, which preclude [appellants] from placing any structure or improvement of any kind in or upon or over the 40-foot easement area. The updated plans would leave the easement area unobstructed and the [a]ssociation would have access to it." Although the Agreed Permanent Injunction enforced the terms of the easement, the trial court declined to grant summary judgment with respect to the Agreed Permanent Injunction finding, "a genuine issue of material fact as to whether the traffic caused by updated plans would interfere with the [a]ssociation's right of ingress and egress to and from the [a]ssociation's property."

A bench trial on the interpretation of the Agreed Permanent Injunction was held with the trial court granting final judgment in favor of the association. The court focused on the word "interfering" in the Agreed Permanent Injunction by stating that the servient estate was, "hereby enjoined and prohibited from *interfering* with [the dominant estate's] right of ingress and egress to and from the property …" The court observed that "interfering" was not defined in the Agreed Permanent Injunction, and therefore, relied on a broad definition in Black's Law Dictionary, which, according to the trial court's order, "defines 'interference' as 'the act or process of obstructing normal operations' or secondarily, as 'an obstruction or hindrance.'" The court concluded that under this definition, "[c]ausing significant traffic delays constitutes interference ..."

Appellants argued that the trial court erred in focusing, exclusively, on a dictionary definition of "interfering" instead of considering the context of the Agreed Permanent Injunction as a whole. The appellate court agreed. Referring to Scalia and Garner's approach on textual interpretation, the court emphasized caution against a common pitfall when using dictionary definitions, "[b]ecause common words typically have more than one meaning, you must use the context in which a given word appears to determine its aptest, most likely sense."[6] The court provided that it is a fundamental principle of textual interpretation, "(and, indeed, of language itself) that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used."[7]

In applying the facts at hand, the court stated that it was undisputed that the Agreed Permanent Injunction interpreted and enforced the easement. The Agreed Permanent Injunction explicitly references and includes the easement as an attachment. Therefore, because the Agreed Permanent Injunction enforces the easement, the court noted that must be interpreted in that context.[8] The court also found that the facts surrounding entry of the Agreed Permanent Injunction and the entire text of the Agreed Permanent Injunction did not support the trial court's broad definition of "interference." The court found the best interpretation of the term "interfering" is not simply anything that hinders, but rather some form of obstruction to access. In applying its interpretation without an allegation of obstruction to access, the court advised that it did not need to consider the court's factual findings regarding increased traffic because the Agreed Permanent Injunction plainly does not deal with traffic delays.

Therefore, the court held that the trial court erred in interpreting the term "interference" as a traffic delay instead of obstructions to access.



J. DAVIS

Jade Davis *is an associate with Hall Booth Smith, P.C., in Tampa, Florida. Jade focuses her practice on real estate, business, construction-related litigation, and cybersecurity prevention and response in the manufacturing, real estate, corporate, technology, and public sectors. She received her Juris Doctor with honors from Stetson University College of Law and her B.S. from Florida State University.*

Endnotes

1 Restatement of Contracts §§ 240(1)(b), 413 (1932).

2 *Milu, Inc. v. Duke*, 204 So.2d 31, 33 (Fla. 3d DCA Nov. 21, 1967); *see also Morton v. Attorneys' Title Ins. Fund, Inc.*, 32 So.3d 68, 72 n.3 (Fla. 2d DCA July 10, 2009).

3 *Id.*

4 *Harkless v. Laubhan*, 219 So.3d 900, 905 (Fla. 2d DCA Dec. 21, 2016) (citing *Jenkins v. Eckerd Corp.*, 913 So.2d 43, 53 (Fla. 1st DCA Sept. 28, 2005)).

5 See *Romak v. Naples Mobile Ests. Cmty. Ass'n*, 373 So.2d 693, 695 (Fla. 2d DCA July 6, 1979); see also *Cf. Fraser v. Schoenfeld*, 364 So.2d 533, 534 (Fla. 3d DCA Nov. 21, 1978) ("[W]here, as here, the purchaser has knowledge of claimed violations and, thereafter, closes the deal, he is precluded by the doctrine of merger from a subsequent suit on a covenant contained in the contract of sale.").

6 Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 418 (Thomson/West 2012).

7 Advisory Opinion to Governor re Implementation of Amendment 4, The Voting Restoration Amendment, 288 So.3d 1070, 1079 (Fla. Jan. 16, 2020) (quoting *Textron Lycoming Reciprocating Engine Div., Avco Corp. v. United Auto., Aerospace, Agric. Implement Workers of Am., Int'l Union*, 523 U.S. 653, 657, 118 S.Ct. 1626, 140 L.Ed.2d 863 (May 18, 1998)).

8 *See Saucer v. Efstathion*, 160 Fla. 292, 34 So.2d 435, 436 (Fla. Mar. 23, 1948) ("[J]udgments and decrees are to be construed with reference to the subject matter before the Court pronouncing them.").

Probate Case Summaries

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

The probate court did not abuse its discretion in granting an order regarding visitation between father and ward in response to the guardian refusing to allow the father to communicate or visit with the ward. The ward's ability to expressly communicate his wishes regarding visitation with family and friends is impacted by his autism spectrum disorder.

Foster v. Guardianship of Cayman Foster, 48 Fla. L. Weekly D81 (Fla. 4d DCA 2023)

The ward, Cayman Foster, is a developmentally disabled adult diagnosed with autism spectrum disorder. After a highly contentious divorce between the ward's parents, the ward's mother, Terri L. Foster, petitioned the court and was appointed as the ward's guardian. Due to his autism, the ward's communication abilities are limited such that he is largely unable to engage in reciprocal or sustained conversations. The ward's autism impacts his ability to expressly communicate his wishes regarding the level of contact which he desires to maintain with family and friends.

As guardian, Foster refused to allow the ward's father to communicate or visit with the ward. The father filed a petition for judicial review pursuant to Fla. Stat. § 744.3715 (2016), which provides as follows:

(1) At any time, any interested person, including the ward, may petition the court for review alleging that the guardian… is denying visitation between the ward and his or her relatives in violation of Fla. Stat. § 744.361(13), or is not acting in the best interest of the ward. The petition for review must state the nature of the objection to the guardian's action or proposed action. Upon the filing of any such petition, the court shall review the petition and act upon it expeditiously.

The father argued that the guardian had denied him visitation in violation of Fla. Stat. § 744.361(13)(b), which requires a guardian to "[a]llow the ward to maintain contact with family and friends unless the guardian believes that such contact may cause harm to the ward." The guardian answered, denying the father's allegations.

The trial court conducted several days of evidentiary hearings to determine the ward's wishes. Several of the ward's teachers and former therapists testified that the ward could appropriately verbalize his desires, and they all testified that the ward did not want to see his father. The court then paused the hearings and ordered that the ward be examined by a qualified and licensed speech and language pathologist who could determine whether "no" meant "no" when the ward stated he did not want to visit with his father. The court then appointed a speech pathologist who determined that the ward did in fact want to visit with the father, and the evidentiary hearings then resumed with the testimony.

The trial court ultimately granted the father's petition, supported by the speech pathologist's conclusion that the ward wanted to visit with his father, and established a procedure for visitation. The order established weekly meetings for one hour, with the ward's former therapists and teachers being among the designated witnesses.

The trial court order required that if the witnesses thought the meetings were detrimental to the ward, they shall contact the court appointed speech pathologist, who "as the neutral and detached individual appointed by this Court, shall decide whether the meetings stop, move forward, or require different approaches or ideas." This appeal ensued, and both the guardian and the ward contend that the court had no authority to order visitation between the ward and the father.

The appellate court noted that in *Shugar v. Shugar*, 924 So. 2d 941, 942 (Fla. 1st DCA 2006), the trial court determined that the guardian ad litem appointed for the benefit of the parties' minor son had the authority to make all decisions regarding visitation. The First District found that under Fla. Stat. § 61.13, a trial court was required to determine custody and visitation in a divorce proceeding. *Id.* at 942. In granting the petition and remanding, the court concluded, "[c]ourts may not delegate their statutory authority to determine visitation to GALs, attorneys, or experts." *Id.* (citations omitted).

In this case, like *Shugar*, the appellate court maintained that when a guardian denies visitation to the ward's relatives, the trial court must determine visitation pursuant to Fla. Stat. § 744.3715. Upon the filing of a petition for judicial review under Fla. Stat. § 744.3715, the guardian's exercise of authority over visitation pursuant to Fla. Stat. § 744.3715(13) must ultimately yield to the court's determination, which was the case here.

The appellate court affirmed the trial court decision, with one justice concurring in part and dissenting in part with this opinion.

Contrary to the trial court's decision, the statutes do not confer the power to determine visitation to a third party, in this case a speech pathologist. The determination as to visitation rests with the trial court, with discretion as to the weight of advice from experts and monitors. As such, while the appellate court affirmed the probate court's authority to order

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the father's visitation with the ward, the dissenting opinion rejected the trial court's delegation of authority to the speech pathologist to determine whether or not visits continue.

The probate court abused its discretion in denying the appointment of the person nominated in the decedent's will as personal representative based on what the probate court perceived as the nominee's conflict of interest.

Araguel v. Bryan and Francis, as Curator of the Estate of Jane Kaigler Araguel, 47 Fla. L. Weekly D1517 (Fla. 1d DCA 2022)

Appellant, Patrick J. Araguel, III, filed a petition for administration of the last will and testament of his mother, Jane Kaigler Araguel. The decedent nominated Jerry D. Sanders for appointment as the personal representative in her will, and in Araguel's petition he requested that Jerry D. Sanders be appointed according to the will. Appellee, Lesley Ladon Bryan, the decedent's other son, filed an objection to Sanders' appointment as personal representative of the decedent's estate.

After holding a hearing on the objection, the trial court entered an order denying the appointment of Sanders as personal representative, although Sanders was statutorily qualified to serve under the Florida Probate Code. The trial court determined that there were "tangible and substantial reasons" to believe that damage [would] accrue to the estate if Jerry D. Sanders were appointed Personal Representative in this case, based upon the following:

> (1) Sanders would be a material witness regarding whether certain property was an estate asset based on a conversation Sanders had with the decedent; and
>
> (2) Sanders knew that Appellant had used an invalid durable power of attorney, which did not have the required number of witness signatures, to handle the decedent's affairs.

This appeal ensued in response.

Pursuant to Fla. Stat. § 733.301(1)(a), (2020), the personal representative nominated by the will has first preference of appointment. The appellate court referenced *Werner v. Estate of McCloskey*, 943 So. 2d 1007 (Fla. 1st DCA 2006), which highlights Fla. Stat. § 733.301(1)(a) and Fla. Stat. § 733.303(1) as the applicable Florida Statutes which "together set out the qualifications required of one who wishes to serve as a personal representative." Fla. Stat. § 733.302 requires that the person be "sui juris" and "a resident of Florida at the time of the death of the person whose estate is to be administered." Fla. Stat. § 733.303(1) sets out the restrictions for those seeking to serve as personal representative as follows, including that one who "[h]as been convicted of a felony," or "[i]s mentally or physically unable to perform the duties," or "[i]s under the age of 18 years" is not qualified to serve.

The appellate court noted the distinctions between a testate estate versus an intestate estate with regard to the nomination and appointment of a personal representative. The distinction between a personal representative named in a will and a personal representative appointed by the court is significant because the personal representative derives his powers from the appointment by the testator and not from appointment by the court. *Cf. Comerford v. Cherry*, 100 So. 2d 385 (Fla. 1958) (testamentary guardian derives his powers from appointment by testator, not from appointment by court). The trial court has greater discretion in the appointment of a personal representative in an intestate estate, which differs from the court's reliance upon the nominated personal representative in the decedent's will.

The appellate court found that the trial court erred in not appointing Sanders as personal representative based on what the trial court perceived as Sanders' conflict of interest where Sanders was statutorily qualified to serve. The appellate court noted that there was no evidence presented that demonstrated and warranted the trial court's suggestion that appellant suffered from any of the deficiencies referenced in the statute. The appellate court concluded that the trial court was without discretion to deny the appointment of the person nominated in the decedent's will as personal representative. Accordingly, the court reversed and remanded with directions that Jerry D. Sanders be appointed as the personal representative of the decedent's estate.



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.*

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