ActionLine

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



Rule 4-1.14: Diminished Capacity Resolving Diminished Clarity

Local Government Land Use Restrictions: Mandating Ordinances

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Vol. XXXXIV, No. 2 www.rpptl.org Winter 2023



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Focus On: The Section's Assistance To The Legislative And Judiciary Branches

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

As I stated in my first Chair's Column, I intend to use these columns to focus on the amazing things the Section does for its members and the profession. In my opinion, our single greatest strength is our members' collective knowledge, expertise and willingness to lend those talents to their community. This column will focus on the Section's work to assist the Legislative and Judicial branches in analyzing real property, probate, and trust law issues and providing that expertise to solve current issues.

Each year, the RPPTL's Legislation Committee brings forth thoughtful, well-vetted proposals to make Florida law current, clear, and equitable. Every proposal that the Section brings to the Florida Legislature has been analyzed and debated by numerous committees, hundreds of members and eventually the entire Executive Council. That collective effort results in well-written legislation, well-reasoned white papers, and sound policy recommendations. The Section's reputation relies on these efforts, and we are often regarded as the foremost experts in our field.

Thanks are due to all those who contribute to those efforts, including **Larry Miller** and **Wilhelmina Kightlinger,** who currently co-chair our Legislative Committee, as well as countless prior chairs, vice chairs and committee liaisons who respond promptly and substantially to calls from our Legislators and their staff. Most significantly, the Section is thankful for the wisdom and expertise of our long-time Legislative Advisors **Pete Dunbar, Martha Edenfield, French Brown and Marc Dunbar. Their guidance has helped us build the outstanding reputation we all enjoy today.**

Similarly, our efforts in assisting the Judiciary have been substantial. The Section's Amicus Committee has earned a well-deserved reputation for quality analysis and is often called on by the Courts to assist with novel or contradictory legal issues. Staffed by some of the greatest minds in our business, **Robert W. Goldman, Kenneth B. Bell, Gerald B. Cope, and John W. Little III**, the Amicus Committee's greatest attribute is perhaps their restraint. The Committee's approach to requests for assistance is singularly focused on being a "friend of the court." To that goal, the Committee prepares thoughtful, well-reasoned analyses for the Court on issues that the Section is uniquely qualified to answer given their expertise. Most recently, the Amicus Committee assisted the Florida Supreme Court in filing an amicus brief in *Hayslip v. U.S. Homes Corp* (SC19-1371) and the Fifth District Court of Appeals in the *Gursky v. Armer* (5D-21-1488) case.

The Section also responds to the Judiciary in other ways, including providing commentary to proposed judicial rule revisions. Most recently, the Section rapidly responded to the Florida Supreme Court's Judicial Management Council Workgroup on Improved Resolution of Civil Cases (the "FSC Workgroup"). Through a newly formed Ad Hoc Civil Rules Revision Committee, the Section reviewed the proposed rule revisions and compiled comprehensive comments to those portions of the FSC Workgroup's Report that would affect real property, probate and trust practitioners. The Ad Hoc Civil Rules Revision Committee was led by **Michael Hargett** and **Shawn Brown**, and heavily assisted by **Cady Huss**, Chair of the Probate Rules Committee, **Rich Caskey**, Chair of the Probate Litigation Committee, **Eric Virgil, Bruce Partington**, and so many others. Each Committee member deserves our gratitude for the time-consuming, thoughtful response they collectively prepared. Those efforts were appreciated, and as a result, the FSC Workgroup adopted most of the Section's comments and revisions. The Section and the Judiciary are best served when working together to make the Courts more efficient and the Section should be proud of its contributions in that regard.

Each Section member contributing to our legislative and judicial efforts should be proud of their important work to improve the profession. On behalf of the RPPTL Executive Committee, we thank you for making the Section look good in every endeavor.

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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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:

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

Letter From The Co-Editors-In-Chief

We believe you will find this issue of ActionLine to be relevant and practical as you embark on 2023 (and your billable hours are back to ZERO). This issue will undoubtedly help jump-start your productivity, motivation and notion of service.

Section Chair **Sarah Butters** highlights the Section's work in serving the public as a resource to the Legislature and the Judiciary by providing subject matter expertise to solve current issues. Solving problems is what lawyers (and "Reptiles") do! It is in our DNA. Sarah references the **Section's Amicus Committee** and its assistance to the Florida Supreme Court in filing an amicus brief in *Hayslip v. U.S. Homes Corp.* In proofing ActionLine, we used information contained herein in our day-to-day practice and for the benefit of our clients. As Sarah notes, the Section's greatest strength is the collective knowledge and expertise of our members and their willingness to lend those talents to our communities.

Being a good storyteller is not limited to our brethren who are litigators. **Justin Shifrin's** article concerning Rule 4-1.14 dealing with diminished capacity is a "must read." Even dirt lawyers will be captivated after reading the first two paragraphs on Page 6. And, Justin's explanation of the major revisions to the Rule enacted by the Florida Supreme Court less than a year ago is proof positive of the premise of Sarah Butter's Chair's Column. The revisions began as an initiative of the Section.

Section members dealing with stringent groundwater or soil cleanup target levels will want to read the article by **Macie Codina** and **Ralph DeMeo**. The article explains issues to be analyzed and considered when dealing with restrictive covenants and mandatory ordinances. The article begins on Page 10 and recognizes the underlying policy of protecting public health and the environment.

We all know the importance of adhering to the letter of the law and technicalities. This point is made by **Denise Cazobon**, **Kelly Hellmuth** and **Alyssa Wan** in their piece discussing recent Internal Revenue Service cases denying taxpayers significant charitable deductions based on technical failures, notwithstanding there being no dispute that the gift was made. Generally speaking, substantial compliance is not sufficient. So, as was famously stated in the TV show "Hill Street Blues": "Let's be careful out there!" (Yes, one of us just dated ourselves.)

Considering that Florida has the fourth highest divorce rate in the country, you will want to read about The Lerbakken Fix, as written by **Alisha Heedy** and **Alfred Stashis**. The article explains the recent amendments to Florida law clarifying that an interest in an IRA transferred incident to divorce remains exempt from claims of creditors of the transferee spouse.

Two of the most impressive and inspiring works of the Section pertain to its response to the Surfside/Champlain Tower tragedy and to Hurricane Ian. You will be proud and moved by the selfless work by Section members. We believe you will find **Mark Young**'s Post Surfside article on Page 20 interesting and informative, as the issue of structural integrity in condominiums is here to stay.

Steve Mezer's description of Section members mobilizing to help the public and their colleagues in response to Hurricane Ian should fill you with pride. The relationships between the Section and various legal aid providers and Legal Services Corporation grantees have always been very strong. We do not believe any Section has done more to address the unmet legal needs of disaster victims in Florida. Keep up the good work and please consider assisting if an At-Large Member (ALM) contacts you.

Turn to Page 23 for an explanation by **Theo Kypreos**, a former Section Fellow, as to who has standing to sue a trustee and the distinction in the context between a revocable trust and an irrevocable trust.

While we are mentioning Fellows, turn to Page 32 to meet the new **Section Fellows**. They are an impressive group, for sure. Their backgrounds are extraordinary. We are fortunate to have them involved in the Section. Please help us welcome them into the fold.

Political Roundup is always a favorite. **French Brown** and **Anna Lusk** have put together an incredible debrief of the November election. With Section members at the highest levels of the Legislature, the Section will undoubtedly be asked to assist during the upcoming session.

We want to thank all our contributors for the timely and informative content. Please keep it coming. We cannot do this without you! That being said, we would like to mention one of our contributors who will be profiled in our next issue, **Professional Fiduciary Council of Florida**. They will be hosting their Fourth Annual Florida Fiduciary Conference on March 10th. Please see our back cover for more information.

Until next time….



M. BEDKE



E. FINLEN

Rule 4-1.14: Diminished Capacity Resolving Diminished Clarity

By Justin A. Shifrin, Esq., Gunster, Yoakley & Stewart, P.A., West Palm Beach, Florida

Picture this: you are an estate planning attorney in South Florida. It is a great place to hang your shingle because Florida has the highest percentage of senior citizens of any state in the nation, and many of them have settled here. On a Friday afternoon, you receive a call from Anita Yomoney, who introduces herself as the new girlfriend of your 87-year-old client, John Smith. You have represented and drafted various estate planning documents for John Smith over the past 10 years. The last time you saw John was in person three years ago and his estate was valued at over $15 million. Anita says that John would like to meet with you to update his estate plan. As any ethical estate planner would do, you tell Anita that you are happy to assist but you would need to meet directly with John Smith to receive the directions from him.

The day of the appointment arrives, and John Smith walks into your office accompanied by Anita. You tell Anita to wait in the lobby. John looks much older than when you last saw him and is much harder to understand. You ask him about Anita, his children, and how life has been since you last met. John says he met Anita on a dating app and that his children haven't called him in over two years. He mentions that he has repeatedly tried to reach out to his children, but each time he dials their respective phone numbers, he receives a message that the number has been disconnected. When you ask him about his assets, he explains that he believes he has about $3 million left because of the market's volatility and the time he has spent in the casino. John says he would like to leave everything in his estate to Anita and disinherit his children. He mentions that Anita will leave him unless he provides for her in his estate plan. Your RPPTL spider senses begin to tingle, and a slight sweat begins to form on your brow. Oh boy…what do you do now?

Until May 2, 2022, lawyers in your position might have struggled to determine whether they would be required under the Rules Regulating The Florida Bar to seek a determination of incapacity or the appointment of a guardian or take other "protective action" with respect to John Smith. Under the former version of Rule 4-1.14(b), effective January 1, 1993, to May 2, 2022, "A lawyer may seek the appointment of a guardian or take other protective action with respect to a client *only* when the lawyer *reasonably believes* that the client cannot adequately act in the client's own interest."[1] (Emphasis added.) Nevertheless, despite the "only" and "reasonably necessary" language found in the former version of Rule 4-1.14(b), the Comment to former Rule 4-1.14 seemed to posit a more affirmative obligation on the part of the lawyer, stating "If the [client] has no guardian or legal representative, the lawyer often must act as de facto guardian. … If a legal representative has not been appointed, the lawyer should see to such an appointment where it would serve the client's best interests."[2]

On the other hand, petitioning for a determination of incapacity or guardianship could conflict with your fiduciary duty to John Smith and your prohibition against sharing confidential information, and could ultimately cost you your license.[3] It was especially unclear to what extent you could communicate with John's children under these circumstances, as lawyers in Florida are prohibited from disclosing confidential information unless authorized to do so.[4] What if Anita has been blocking the children's phone calls and phone numbers? What if Anita has been feeding false information to John about his children? Although Comment 5 of the ABA Model Rule 1.14 suggests that a lawyer is implicitly authorized to communicate with family members when the lawyer "reasonably believes that a client is at risk of substantial physical, financial, or other harm unless action is taken, and that a normal client-lawyer relationship cannot be maintained,"[5] Florida's former version of Rule 4-1.14 and its Comment did not contain similar language and differed in many respects from the ABA Model Rule 1.14.

On March 3, 2022, the Florida Supreme Court enacted major revisions to Rule 4-1.14 and its comment to bring the rule more in line with ABA Model Rule 1.14.[6] These revisions began as an RPPTL Section initiative focused on providing better clarity on what a lawyer *may* or *must* do when the lawyer believes a client has diminished capacity. The most significant changes that lawyers should note are an entirely revised subsection (b), entitled "Protective Action," and the addition of a new subsection (c), entitled "Confidentiality."[7] In addition, the revised Comment to Rule 4-1.14 provides enhanced clarity for lawyers who remain unsure about their obligations under the revised Rule. The Comment contains subheadings that correspond with the Rule's "Protective Action" and "Confidentiality" subsections, (b) and (c), respectively, and a separate subheading discussing considerations when a lawyer

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decides to provide "Emergency legal assistance." By bringing the Florida Rule more in line with the ABA Model Rule, the Florida Supreme Court enabled practitioners to rely more decisively on the commentary provided in by the Model Rule in addition to the new commentary provided by the Florida Rule.

Revised subsection (b) makes it clear that "[a] lawyer is not required to seek a determination of incapacity or the appointment of a guardian or take other protective action with respect to a client."[8] This resolves any doubt as to whether a lawyer is jeopardizing his or her license for deciding not to petition for a determination of incapacity when presented with the client scenario detailed above. Nevertheless, subsection (b) *authorizes* a lawyer to take "reasonably necessary protective action" when the lawyer believes the client has "diminished capacity, is at a risk of substantial physical, financial, or other harm unless action is taken " and the client " cannot adequately act in the client's own interest."[9] In addition to the well-known and controversial solution of seeking the appointment of a guardian, subsection (b) provides a less controversial alternative, which is merely to "[consult] with individuals or entities that have the ability to act to protect the client." Much in line with the public policies surrounding Chapter 744, subsection (b) reminds practitioners that "reasonable efforts" must be made "to exhaust all other available remedies to protect the client before seeking removal of any of the client's rights or the appointment of a guardian."[10]

Would conferring with John's children or the "individuals or entities that have the ability to act to protect the client" run afoul of your duty of confidentiality under Rule 4-1.6 ? Revised subsection (c) of Rule 4-1.14 makes it clear that the lawyer is impliedly authorized under Rule 4-1.6 to reveal information about the client in connection with taking protective action under subsection (b), as long as information is revealed only to the extent reasonably necessary to protect the client's interests.[11] The revised Comment to Rule 4-1.14 goes so far as to confirm that the presence and assistance of family members or other persons necessary to assist in the representation of a client further the rendition of legal services to the client and do not waive the attorney-client privilege. However, except for taking protective action authorized under subsection (b), the lawyer must look to the client to make decisions on the client's behalf and should still be mindful of protecting the privilege when taking protective action. This is particularly important if the persons or entities with whom the lawyer consults could end up acting adversely to the client's interests. The Comment provides that, "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."[12] The lawyer may not represent a third party in seeking to have a court appoint a guardian for the client.[13] Practice note: consider making a note to your file why you chose to speak with the selected persons or entities and their relationship to the client.



What about being a "de facto guardian" (as mentioned in the old Comment) for your client? And what does that even mean? Does a "de facto guardian" lawyer have separate fiduciary duties to the client apart from those included or implied by your initial scope of representation? No need to fear: that sentence in the Comment has been deleted. Specifically, the Comment now provides suggestions and examples of how an attorney may take protective action and emphasizes other alternatives to seeking a guardianship. It even references the "substituted judgment" and "best interests" standards found in Chapter 744 and that the protective action selected will often be governed by one of those standards.[14]

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Lastly, how do you even determine whether John Smith has diminished capacity for you to take action under the Rule? Is it enough that he has admitted to gambling away a significant amount of money and that Anita might be taking advantage of him? Is the old adage "where there's smoke, there's fire" appropriate here? ABA Opinion 96-404[15] states:

A client who is making decisions that the lawyer considers to be ill-considered is not necessarily unable to act in his own interest, and the lawyer should not seek protective action merely to protect the client from what the lawyer believes are errors in judgment. … Substituting the lawyer's own judgment for what is in the client's best interest robs the client of autonomy and is inconsistent with the principles of the "normal relationship."

Luckily, the revised Comment provides some factors you may incorporate into your determination of John's capacity, such as: "the client's ability to articulate reasoning leading to a decision; variability of state of mind and ability to appreciate consequences of a decision; the substantive fairness of a decision; and the consistency of a decision with the known long-term commitments and values of the client."[16] Lawyers should also feel free to consult any commentaries that interpret the now similar MRPC 1.14.[17] For instance, the ACTEC Commentaries to MRPC 1.14 provide helpful guidance in deciding whether protective action is warranted:

> In determining whether to act and in determining what action to take on behalf of a client, the lawyer should consider the impact a particular course of action could have on the client, including the client's right to privacy and the client's physical, mental and emotional well-being. … For the purposes of this rule, the risk of harm to a client and the amount of harm that a client might suffer should both be determined according to a different scale than if the client were fully capable. In particular, the client's diminished capacity increases the risk of harm and the possibility that any particular harm would be substantial. If the risk and substantiality of potential harm to a client are uncertain, a lawyer may make reasonably appropriate disclosures of otherwise confidential information and take reasonably appropriate protective actions. In determining the risk and substantiality of harm and deciding what action to take, a lawyer should consider any wishes or directions that were clearly expressed by the client when he or she had full capacity. Normally, a lawyer should be permitted to take actions on behalf of a client with apparently diminished capacity that the lawyer reasonably believes are in the best interests of the client.[18]

The new Florida Rule 4-1.14 conforms almost entirely to the model rule[19] and should ultimately give Florida lawyers more confidence in their reliance on MRPC 1.14's longstanding commentaries.

Florida lawyers may take refuge in the clarifications provided by the revised Rule 4-1.14. They may rest assured that their licenses are not on the line for taking or not taking protective action for clients who possibly suffer from diminished capacity.


J. SHIFRIN

Justin A. Shifrin *is an associate in Gunster's Private Wealth Services practice group, focusing on probate, trust, and guardianship litigation. Licensed as a Certified Public Accountant in Florida, Justin practiced as an assurance associate with PricewaterhouseCoopers, LLP before attending law school. He attended the University of Florida, where he received his B.S. degree in Accounting, his Master's degree in Accounting, and his Juris Doctor degree with concentrations in tax law, trusts and estates, and fiduciary administration. He is a member of the Tax, Business Law, and Real Property Probate & Trust Law sections of The Florida Bar as well as the American Institute of Certified Public Accountants.*

Endnotes

1 Emma Rubin, *Elderly Population in U.S. by State*, Consumer (February 17, 2022), https://www.consumeraffairs.com/homeowners/elderly-population-by-state.html.

2 R. Regulating Fla. Bar 4-1.14 (effective January 1, 1993, to March 3, 2022).

3 *See* In re Eugster, 166 Wn. 2d 293 (Wash. 2009).

4 R. Regulating Fla. Bar 4-1.6

5 *See* Model Rules of Prof'l Conduct r. 1.14, cmt. (Am. Bar Ass'n 1980).

6 *See* In Re: Amendments To The Rules Regulating The Florida Bar – Biennial Petition, Case No. SC20-1467.

7 R. Regulating Fla. Bar 4-1.14 (2022).

8 *Id.*

9 *Id.*

10 *See* Fla. Stat. § 744.334(1) (2022).

11 R. Regulating Fla. Bar 4-1.14 (2022).

12 *Id.*

13 ABA Comm'n on Ethics & Prof'l Responsibility, Formal Op. 96-404 (1996) ("However, Rule 1.14 does not otherwise derogate from the lawyer's responsibilities to his client, and certainly does not abrogate the lawyer-client relationship. In particular, it does not authorize a lawyer to represent a third party in seeking to have a court appoint a guardian for his client. Such a representation would necessarily have to be regarded as "adverse" to the client and prohibited by Rule 1.7(a)… .")

14 Compare Fla. Stat. § 744.441, (2022) and In re Guardianship of Bohac, 380 So. 2d 550 (Fla 2d DCA 1980) with Fla. Stat. §§ 744.312(1) and 744.361 (2022).

15 ABA Comm'n on Ethics & Prof'l Responsibility, Formal Op. 96-404 (1996).

16 R. Regulating Fla. Bar 4-1.14 (2022).

17 *See generally* Model Rules of Prof'l Conduct r. 1.14 (Am. Bar Ass'n1980).

18 ACTEC Commentary on MRPC 1.14 (5th Ed. 2016).

19 The reader should note that the Florida Rule does differ in some respects from the model rule, but the new Florida rule arguably provides elevated guidance to the practitioner.


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Local Government Land Use Restrictions: Mandating Ordinances

By Macie J.H. Codina, Esq., Guilday Law, Tallahassee, Florida
and Ralph A. DeMeo, Esq., Guilday Law, Tallahassee, Florida

As Florida continues to grow and more agricultural and urban properties are opened up for development, developers frequently encounter contamination from commercial, industrial, and agricultural activities. These contaminants frequently include petroleum hydrocarbons, heavy metals, such as lead and arsenic, and pesticides. Due to the often exorbitant costs of assessment and remediation of these contaminants, the Florida Legislature has enacted laws that enable the Florida Department of Environmental Protection (FDEP) to approve alternatives to stringent groundwater or soil cleanup target levels based on "Risk Based Corrective Action," which relies upon risk assessment principles to determine whether particular contaminants pose a risk to human health or to the environment, based on criteria, such as, duration and frequency of exposure, concentrations, toxicity of the contaminants, and other factors.[1]

In cases where the responsible or interested party can demonstrate that the risk is within acceptable parameters, state and local governments allow contamination to remain in the environment, typically conditioned on placing a Declaration of Restrictive Covenant (DRC) against the affected property on the public record prohibiting certain activities that may interface with the contamination, such as, prohibitions against drilling potable or irrigation wells, disturbing soils, or digging ponds or other surface water features. The recording of a DRC against an affected property provides notice to interested persons through the public record and informs them of the presence of contamination in various environmental medias. Usually these DRCs are tied to "Institutional" or in some cases "Engineering" Controls restricting the use of the property.

Institutional Controls (IC) are restrictions "on use or access to a site to eliminate or minimize exposure to petroleum products' chemicals of concern, drycleaning solvents, or other contaminants."[2] Examples of such ICs are deed restrictions, restrictive covenants, conservation easements, as well as local ordinances, permits, delineated areas, comprehensive land use plans and management, and government consent orders.[3] While restrictive covenants have been routinely used as ICs, the FDEP has promulgated a guidance document which provides criteria for the use of ICs. This guidance document is known as the "Institutional Controls Procedures Guidance" (ICPG). While traditionally ICs have been "guaranteed" by DRCs, in the past few years, FDEP has allowed these ICs to take the form of mandatory local government ordinances, in lieu of restrictive covenants, for sites or areas controlled by the local government. The most common example of a mandatory ordinance is the requirement that all potable or even irrigation wells be connected to a municipal public water supply system. This ensures that no private wells are drilled into a contaminated aquifer. Some of these ICs also prohibit excavation into contaminated soil or sediments.

Historically, restrictive covenants have been used to create servitudes that run with the land and that bind the heirs and assigns of future covenanting parties. By running with the land, restrictive covenants create an interest in the property itself, and affect the use and enjoyment of the affected premises for generations to come. While the use of restrictive covenants has long been a helpful tool for Homeowners Associations to regulate housing aesthetics, the use of restrictive covenants have also recently become a helpful tool to restrict the use of contaminated land. DRCs, also known as land use restrictions, prohibit certain "residential uses" on sites where soil samples do not meet the default direct exposure residential Soil Cleanup Target Levels (SCTLs).[4] By attaching a DRC to polluted land, the state can prevent future owners and lessees from disrupting pollution found in and below the surface of the affected land while still enjoying the use of the surface of the land.[5] By preventing landowners from disrupting contaminated soil or

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tapping into polluted water sources, land can be transferred to new owners without fear of future contamination and pollution exposure.

While restrictive covenants are helpful for avoiding contact and thereby risk of exposure to contamination, restrictive covenants indicating contamination of the affected property often have a chilling effect on potential buyers, lenders, and investors. While the properties and their values are not necessarily materially altered by the contamination where it is shown that there is no completed pathway of exposure, the fear of possible future contamination and potential liability often deters buyers and others from purchasing land with these restrictive covenants. On the other hand, although such restrictive covenants may deter buyers, they are also extremely

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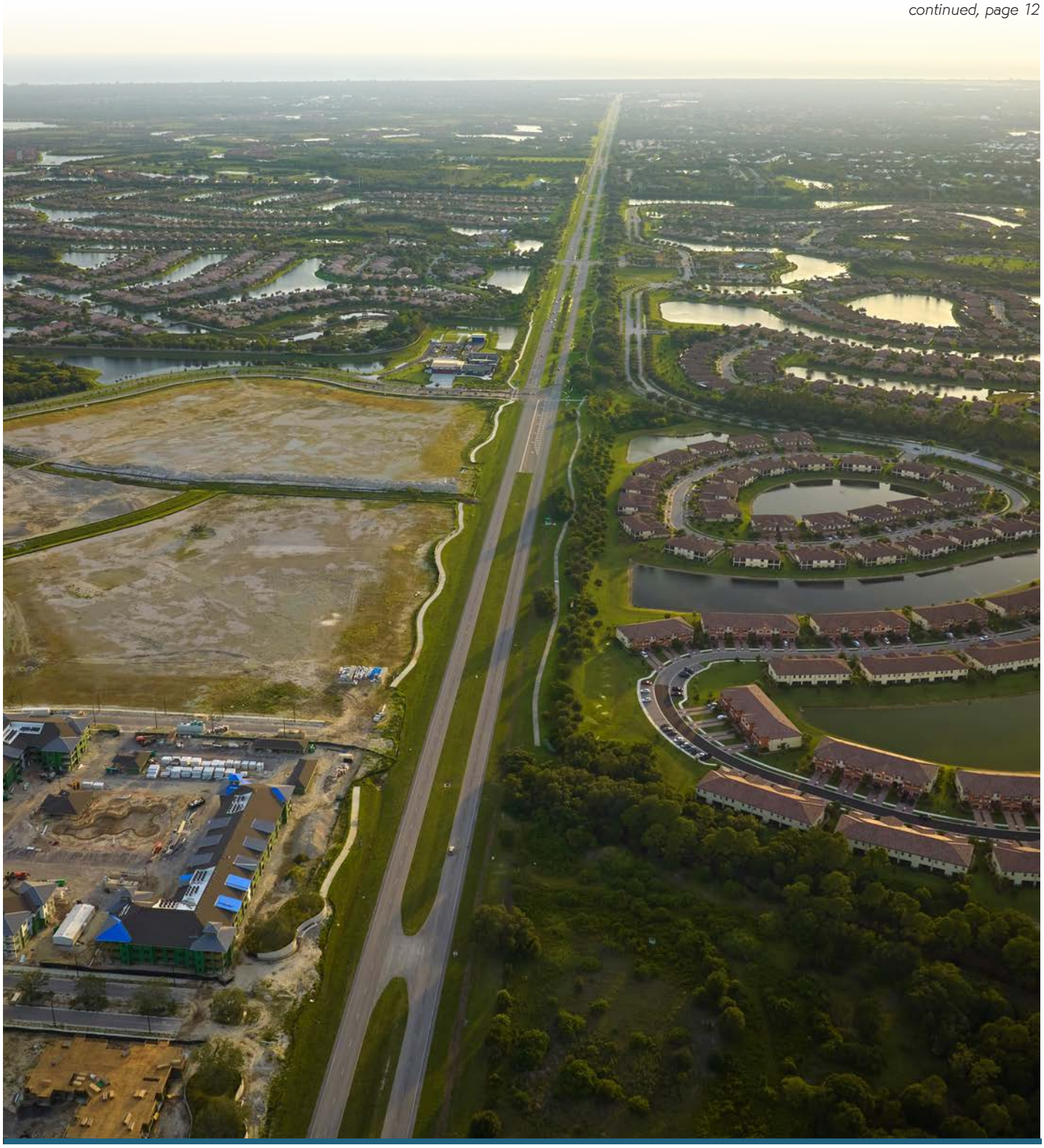

effective at deterring landowners from being exposed to, releasing, or disturbing contamination. By violating a restrictive covenant, the violator assumes responsibility for cleanup of the disturbed media, which could result in liability to the state and to third parties for the cost of cleanup.

Currently, the ICPG states that industry controls, other than DRCs, should only be used to address contamination in groundwater. As for soil contamination, FDEP believes DRCs are "the only type of control that effectively ensures that the type of land use remains in perpetuity, or that an engineering control remains in place and is properly maintained to permanently cover the area of soil contamination."[6] An Engineering Control is the placement of clean soil, impervious surfaces, such as, concrete or asphalt, a building's foundation, or other barriers that prevent exposure to the contaminated soil.

One alternative to restrictive covenants as ICs are mandatory ordinances. Mandatory ordinances can prevent the disruption of contamination across a general area as opposed to a specific parcel of land. Through mandatory ordinances, local governments can require properties to connect to existing systems that supply potable water as opposed to digging a well, which may allow contaminated waters to flow to the surface.[7] Historically, many of the mandatory ordinances were adopted pursuant to Fla. Stat. § 162.03 (1985), requiring local governments to adopt Land Development Regulations. Like restrictive covenants, local mandatory ordinances are also revocable by the local government, which is one reason why the FDEP favors DRCs. According to FDEP, "This type of control runs with the land in perpetuity due to statutory exclusion from the Marketable Records Title Act (MRTA)." Not only do mandatory ordinances have limited use, the FDEP also, typically, requires significantly more documentation to establish mandatory ordinances as ICs. Nevertheless, landowners, developers, and the real estate industry prefer the use of mandatory ordinances over restrictive covenants because mandatory ordinances do not cloud property titles and have less of a chilling effect on land transactions. Although mandatory ordinances will still likely be found by property buyers through the exercise of reasonable due diligence or through the use of all appropriate inquiries, mandatory ordinances are less likely to scare prospective buyers away, as mandatory ordinances are not necessarily specific to the individual property, and often times, do not explicitly state that the land is contaminated. While mandatory ordinances have less of a "chilling effect" than restrictive covenants, FDEP is concerned that mandatory ordinances are not enough to notify property owners and to prevent contamination.

Recently, the FDEP has begun to consider changes to the ICPG, which would make the approval of mandatory ordinances by the FDEP more difficult to obtain. This push by the FDEP is to promote the use of restrictive covenants over the use of mandatory ordinances as industry controls. FDEP is proposing a very complicated and onerous test for its acceptance of these mandatory ordinances, which many real estate interests believe represents an unnecessary overreach by the FDEP, as the current ICPG allows for these as alternatives to the traditional DRC; these mandatory ordinances are in effect the "functional equivalent" of the DRC.

Those supporting mandatory ordinances over DRCs argue that DRCs do not prevent wells from being installed while mandatory ordinances explicitly prevent wells from being dug on contaminated property. Not only do DRCs offer less prevention, but they are also less enforceable as the breach of any covenants are not violations of law. Violations of DRCs allow FDEP to remediate exposure pathways and to rescind the conditional site rehabilitation closure order; however, FDEP, likely, will not discover the violation for several years, if ever, until a review of the property is performed. On the other hand, violations of mandatory ordinances are much more likely to be identified through land development or code enforcement processes.

First, FDEP has started to consider substantially increasing requirements to reasonably assure that mandatory ordinances do not conflict with any other law by requiring the responsible party to produce a conflict check that confirms that the mandatory ordinance does not conflict with other county or municipal ordinances as well as with any special acts or any legislation. Opponents of this approach argue that FDEP should not presume that local ordinances were not properly adopted, as local governments are competent and have already identified potential conflicts. In support of this opposition, Fla. Stat. § 166.041 (2022) already establishes a uniform procedure for adopting ordinances. Furthermore, there are no current special acts or any legislation that conflict with an ordinance requiring mandatory connection.

FDEP has also suggested that local government ordinances are not legally sufficient to regulate the consumptive use of water. While the "exclusive authority" to regulate consumptive use of water is vested in FDEP and the Water Management Districts under Part II of the Florida Water Resources Act of 1972, local governments are not completely preempted from regulating wells. While local governments still need delegated authority to prevent landowners from installing a well, Florida Building Code (2020), which local governments are required to implement,[8] more specifically, Chapters 602.2 and 602.3 affirmatively require potable public water supply connections when available. Furthermore, home rule powers and the legislative intent and authority given to local governments to protect human health and natural resources support the mandatory ordinances.[9]

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FDEP is also considering imposing stricter reporting requirements by requiring that mandatory ordinances be properly codified or recorded, suggesting that publishing provisions on Municode or any local government website are not sufficient, not accurate, or not updated.

FDEP has further indicated that mandatory ordinances must contain a means of enforcement; however, mandatory ordinances, themselves, already provide a means of enforcement. Fla. Stat. § 162.30 (2022), entitled "Civil Actions to Enforce County and Municipal Ordinances," provides:

> In addition to other provisions of law authorizing the enforcement of county and municipal codes and ordinances, a county or municipality may enforce any violation of a county or municipal code or ordinance by filing a civil action in the same manner as instituting a civil action.

Furthermore, proposed changes for a site to be subject to a mandatory ordinance require the person responsible for site rehabilitation to verify that the site is within the jurisdiction of the governing body issuing the ordinance to verify that the site is within the specified distance of the public water supply system, to also contact the governing body and to provide proof to the governing body to verify that the site is not and has not applied for a variance for the mandatory ordinance. While the first two requirements are reasonable, those in opposition to the changes argue that the variance requirement is overkill. A code variance is usually only granted when the applicant can show that the enforcement of the code would create an undue hardship and extraordinary circumstances require a variation from the code. Given the purpose of mandatory ordinances, it is unreasonable to suspect that an applicant would apply for a variance to allow them to install a potable well to capture contaminated groundwater. Again, the potential changes to the ICPG will not operate to prevent contamination, rather, they will act as hurdles to prevent mandatory ordinances that already prevent contamination and have the public health in mind.

Lastly, FDEP is considering changes to the ICPG that require all property owners to be made aware of any mandatory ordinances, regardless of whether an IC is recorded. Furthermore, a county or a municipal official must acknowledge the FDEP's decision to use mandatory ordinances as a form of non-recorded control for contamination for each and every site, simulating the chilling-effect of restrictive covenants. While it is reasonable to provide notice of any mandatory ordinances, it is difficult to require a local official to acknowledge the FDEP's decision on a site-specific basis as no such obligation exists in statute or by regulation and it is FDEPs responsibility, and not the local government's responsibility, to make the determination that the proposed industry control is protective.

Given the uncertainty surrounding approved industry controls, land use and environmental attorneys have begun to advise clients to take advantage of "delineated areas" as industry controls. Pursuant to the Florida Administrative Code, delineated areas are surface areas where "groundwater contamination is known to exist, or which encompasses vulnerable areas or areas in which the Department provides a subsidy for restoration or replacement of contaminated drinking water supplies."[10] Water Management Districts use delineated areas to make informed decisions on when and where to issue well and consumptive use permits.[11] Currently, delineated areas are not widely used and are mostly limited to historic Ethylene Dibromide and Superfund/CERCLA sites as these sites have already been adopted by rule; however, there is great potential in using delineated areas as industry controls, and such use is encouraged as a result of recent developments discussed above.[12]

Robust analysis and discussion of restrictive covenants and restrictive covenant alternatives, such as mandatory ordinances, are critical as Florida continues developing properties and contaminated properties are increasingly identified. These controls, designed ultimately to protect public health and the environment, should remain available options for any land use project.

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Endnotes

1 *See* Fla. Admin. Code Chapter 62-780 (2022); Fla. Stat. § 376 (2022).
2 Fla. Stat. § 376.301 (2022).
3 ICPG Section A.
4 ICPG Section B.5.
5 *Id.*
6 ICPG Section C.1.
7 ICPG Attachment 38: Institutional Controls Quick Reference Table.
8 Fla. Stat. Chapter 553 (2022).
9 Fla. Stat. § 163.3161(4) (2022).
10 Fla. Admin. Code r. 62-524.200(2).
11 ICPG Attachment 38.
12 *Id.*

Recent Cases Deny Charitable Income Tax Deductions: CWA Revisited

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In recent cases, the Internal Revenue Service ("IRS") denied taxpayers several significant charitable deductions, even where there is no dispute that a gift was made to a charitable organization, on a technicality — the failure to substantiate such gifts with a contemporaneous written acknowledgment that meets all of the requirements set forth in the Internal Revenue Code ("Code") and Treasury Regulations. The courts do not have equitable jurisdiction to otherwise uphold the deduction and accordingly have ruled in favor of the IRS in these cases. This article reviews the requirements for a contemporaneous written acknowledgment regarding certain types of donations and discusses recent case law where such requirements were not satisfied.

Contemporaneous written acknowledgment requirement

Code § 170(f)(8) provides that no charitable deduction shall be allowed for income tax purposes under Code § 170(a) for any contribution of $250 or more unless the taxpayer substantiates the contribution by obtaining a contemporaneous written acknowledgment ("CWA") of the contribution from the donee organization.[1]

To be considered a CWA, the written acknowledgment must contain the following information: (1) the amount of cash and description (but not value) of any property other than cash contributed; (2) a statement of whether the donee organization provided any goods or services in consideration, in whole or in part, for such contribution; and (3) a description and good faith estimate of the value of any goods or services provided by the donee organization.[2] For religious charities providing goods or services that consist solely of intangible religious benefits, the written acknowledgment must also contain a statement to that effect. For gifts to a donor advised fund, there is an additional requirement that the written acknowledgment from the sponsoring organization contain a statement that such organization has exclusive legal control over the assets contributed.[3]

To be considered contemporaneous, the taxpayer must obtain the written acknowledgment on or before the earlier of (a) the date on which the taxpayer files a return for the taxable year in which the contribution is made or (b) the due date (including extensions) for filing such return.[4] A correction to an insufficient CWA may be rejected as untimely for failing to meet the contemporaneous requirement.[5]

The Treasury Regulations provide additional guidance on the substantiation requirements for claiming a charitable deduction, including records to be maintained by the taxpayer and the return requirements.[6]

Strict compliance doctrine v. substantial compliance doctrine

Compliance with the substantiation rules set forth in the Code and Treasury Regulations is a prerequisite to the taxpayer being entitled to claim an income tax charitable deduction for contributions made by the taxpayer. Thus, if the taxpayer does not obtain the required CWA, the taxpayer is not entitled to an income tax charitable

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deduction for the contribution. Denial of the entire income tax charitable deduction for a substantial gift to charity could be devastating to the taxpayer who made the gift.

The Tax Court has previously considered the satisfaction of the above requirements set forth under Code § 170(f) with respect to the CWA to be mandatory and not permitted substantial compliance.[7] However, the Tax Court has occasionally also held that substantial compliance with the substantiation requirements *may* be sufficient in certain instances where the taxpayer failed to comply with requirements imposed solely by the Treasury Regulations and substantially complied with the requirements in the Code.[8]

Recent cases denying charitable deductions due to defects with the CWA

Recent cases demonstrate the success of the IRS in denying a taxpayer's income tax charitable deduction because of the technical failure to comply with the CWA rules.

In *Albrecht v. Commissioner*,[9] the taxpayer was denied the income tax charitable deduction due to insufficient documentation. The taxpayer had donated a collection of Native American jewelry and artifacts to a museum and timely executed a Deed of Gift, which described the donated property and also stated that "'all rights, titles and interests held by the

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donor in the property are included in the donation, *unless otherwise stated in the Gift Agreement*.'"[10] The Deed of Gift did not state whether or not the museum had provided any goods or services in consideration for the donation as required by Code § 170(f)(8)(B)(ii), and a Gift Agreement was not included with the Deed of Gift.[11] The museum provided no other written documentation to the taxpayer.

The IRS argued that the documentation did not comply with Code § 170(f)(8)(B) because it did not include the required consideration statement and it also did not state it represented the entire agreement between the parties. Rather, the Deed of Gift referenced a Gift Agreement that never surfaced.[12] In the absence of a direct statement that no goods or services were provided, the Tax Court reviewed the Deed of Gift as to whether the document:

(i) effectively states whether any goods or services were provided in the exchange;

(ii) states the donation is an unconditional gift;

(iii) recites no consideration received in the exchange; and

(iv) contains a provision stating that the deed is the entire agreement of the parties.[13]

Recognizing that the Deed of Gift did state that the donation was unconditional, it failed on all other factors. Specifically, the reference to the Gift Agreement was a key problem because it indicated that the terms of the donation were subject to a separate agreement, which was never provided. While the "unless otherwise stated in the Gift Agreement" statement may have seemed like harmless, boilerplate language, the Tax Court gave it substantial – and negative – weight, arguing that such language left open the possibility of a side agreement between the taxpayer and museum that included additional, superseding terms. Therefore, even though the Tax Court stated the taxpayer may have made a "good faith attempt" to comply, "[s]ubstantial compliance does not satisfy the requirements of Code § 170(f)(8)(B)."[14] Accordingly, the claimed income tax charitable deduction was denied.

Taxpayers have not had better luck convincing district courts that CWA requirements required by the Code can be satisfied by substantial compliance. In *Keefer v. U.S.*,[15] the District Court for the Northern District of Texas denied the taxpayers an income tax charitable deduction for their donation to a donor advised fund ("DAF") in part by relying on the analysis of a Tax Court Memorandum case. The taxpayers donated a 4 percent interest in a partnership operating a hotel to a DAF claiming an income tax charitable deduction in the amount of $1,257,000.[16] The IRS disallowed the deduction because the CWA did not demonstrate that the DAF had "exclusive legal control over the assets contributed" as required by Code § 170(f)(18)(B).[17] The taxpayers paid the additional tax and additions to tax and filed for a refund in the Northern District of Texas.

The taxpayers in *Keefer* showed that the DAF provided to the taxpayers a packet of materials relating to the establishment and operation of their DAF.[18] Those materials provided, in part, that the taxpayer was irrevocably transferring the gift of the partnership interest to the DAF *and* that the managers of the DAF (and not the taxpayer) "shall have the ultimate authority and control of all assets in the DAF, and the income derived therefrom."[19] The taxpayers signed the packet, subsequently executed an assignment transferring the partnership interest to the DAF, and then received a CWA from the DAF.[20] The CWA described the donated partnership interest and confirmed no goods or services were given in exchange for the donation,[21] but unlike the packet, the CWA had no statement that the DAF had exclusive legal control over the assets contributed.

The court's analysis in *Keefer* was methodical and began by defining the word "acknowledgment" by relying on *Bruce v. Commissioner,* which states that an "'acknowledgment' memorializes a gift that has been completed or is legally obligated to occur, not one that is merely contemplated or uncertain to occur."[22] Therefore, any documents provided to a taxpayer *before* the donation is made, or is legally obligated to be made, are not part of a CWA and cannot be used to supplement a CWA in order to show compliance with the Code.[23]

The Court held that the CWA failed to meet the requirement of Code § 170(f)(18)(B), because it did not state that the DAF had exclusive legal control of the assets, and the packet given to and signed by the taxpayers was not part of the CWA. Upon signing the packet, the taxpayers had not yet made the gift and were under no legal obligation to do so, notwithstanding the statement in the packet that the taxpayers were irrevocably making a gift. The Court reached this result because other provisions in the packet stated that the taxpayers intended to make a gift and if the gift was not made, the taxpayers were responsible for legal fees in establishing the DAF.[24] Therefore, the packet was not an acknowledgment because the gift had not yet occurred or was legally obligated to occur. Additionally, statements in the packet could not supplement the CWA because there was no language in the CWA to provide a basis to incorporate the terms of the packet.[25] Accordingly, the taxpayer did not satisfy the requirement of obtaining a CWA, and the deduction was denied.

Conclusion

Any donor or advisor working with a donor must take steps to ensure that the IRS cannot deny a deduction for a legitimate charitable gift. Recent cases highlight the importance of the CWA and the harsh consequences to a donor for failing to comply with all the substantiation requirements outlined in the Code and Treasury Regulations. Because of the complexity

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of the substantiation rules with which donors may be required to strictly comply, donors and their advisors should review these rules each time in connection with any charitable gift.

Each document memorializing the gift should be reviewed carefully to ensure all of the requirements for substantiating the contribution are satisfied, and no provisions should be disregarded as mere boilerplate language, including any provisions that reference or incorporate other documents (or fail to do so) as part of the agreement with the charity. Where possible, all of the terms and conditions of the charitable gift should be included in one document. In the case of a donor making contributions from a business entity, it is also important for the donor's advisor to confirm that the CWA is addressed to the correct taxpayer. If the return will be prepared by another party, the donor's tax counsel should be given the opportunity to review all documents, including the return and exhibits, prior to filing and ensure that the taxpayer has obtained a CWA and, if required, a qualified appraisal.

The rules imposed by the Code and Treasury Regulations are clear, and no donor should be faced with the prospect of a full denial of an income tax charitable deduction in return for a legitimate gift to charity.



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Endnotes

1 I.R.C. § 170(f)(8)(A). For gifts under $250 made in cash, a taxpayer must have a bank record of the contribution or a written communication from the charity showing the charity's name, the date and location of the gift, and the amount of the gift. Code § 170(f) also requires a qualified appraisal for any gift of property (other than publicly-traded securities) valued over $5,000 and, furthermore, contains a number of special rules applying to specific types of contributed property, including but not limited to artwork, qualified conservation easements, inventory from a business, or a used motor vehicle, boat or airplane, all of which are outside the scope of this article. When advising clients regarding charitable contributions, advisors should review Code § 170 in its entirety to determine whether any of the special rules may apply to a particular transaction.

2 I.R.C. § 170(f)(8)(B).

3 I.R.C. § 170(f)(18).

4 I.R.C. § 170(f)(8)(C).

5 *See Durden v. Commissioner*, TC Memo 2012-140 (May 17, 2012) (correction letter obtained by the taxpayer including all required language was untimely and did not satisfy Code § 170(f)(8), and the deduction was disallowed).

6 Treas. Reg. §1.170A-13.

7 *Albrecht v. Commissioner,* T.C. Memo 2022-53 (May 25, 2022), *citing 15 W. 17th St. LLC v. Commissioner, 147 T.C. 557, 562 (2016). See also Durden v. Commissioner*, T.C. Memo 2012-140 (May 17, 2012); *Mohamed v. Commissioner*, T.C. Memo 2012-152 (May 29, 2012); *Rothman v. Commissioner*, T.C. Memo 2012-163 (June 11, 2012).

8 *See*, e.g., *Bond v. Commissioner*, 100 T.C. 32, 41-42 (1993) (holding that taxpayers failed to attach an appraisal summary to the tax return as required by the Treasury Regulations, but they substantially complied with Code § 170 where almost all of the required information was found on the attached Form 8283); *Consol. Investors Grp. v. Commissioner*, T.C. Memo. 2010-158 (July 22, 2010) (holding that taxpayer failed to strictly comply with Treasury Regulations under Code § 170 but substantially complied and therefore was entitled to take the charitable deduction).

9 T.C. Memo 2022-53 (May 25, 2022).

10 *Id.* at 2.

11 *Id.*

12 *Id.*

13 *Id.* at 4.

14 *Id.* at 5.

15 130 AFTR 2d 2022-5022 (N.D. Tx., July 6, 2022) (Motion for reconsideration denied, *Keefer v. U.S.*, 130 AFTR 2d 2022-5406 (N.D. Tx., August 10, 2022)

16 *Id*. at 2022-5003, 2022-5005.

17 *Id*. at 2022-5005.

18 *Id.* at 2022-5004.

19 *Id*. at 2022-5004.

20 *Id*. at 2022-5013, 5015.

21 *Id*. at 2022-5015.

22 *Id.* at 2022-5012. The *Keefer* court cites to *Bruce v. Comm'r*, 2011 WL 2600906 [2011 RIA TC Memo 2011-153] at *5 (June 29, 2011). The complete name is *E. Bruce and Denise A. Agness DiDonato, et ux. v. Comm'r*, TC Memo 2011-153 (June 29, 2011).

23 *Keefer*, 130 AFTR 2d at 2022-5013, 5014.

24 *Id*. at 2022-5013.

25 *Id*. at 2022-5015 and corresponding fn 9. The court rejected the argument by the IRS that a merger clause was required to incorporate terms of the packet into the CWA but left open the possibility that under certain facts, a merger clause could be relevant.

The Lerbakken Fix:
Individual Retirement Accounts Transferred Incident To Divorce Are Exempt From Creditor Claims

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Retirement Accounts and Creditor Exemptions in Florida

Fla. Stat. § 222.21(2)(c) was recently amended to clarify that an interest in an individual retirement account (IRA) transferred incident to divorce remains exempt from the claims of creditors of the transferee spouse.

Florida debtors are protected from creditor claims through various exemptions provided in the Florida Statutes and Constitution. Fla. Stat. § 222.21 provides that certain tax-exempt funds or accounts are exempt from claims of creditors of IRA owners, beneficiaries, and participants. To qualify for this exemption, the fund or account must be a tax-exempt retirement account qualified under Internal Revenue Code §§ 401(a), 403(a), 403(b), 408, 408A, 409, 414, 457(b), or 501(a).[1] This exemption survives a transfer of the account if the transfer is excluded from gross income under the Internal Revenue Code, such as a trustee-to-trustee transfer or an eligible rollover.

Example 1. Death of Account Owner: For example, imagine that A owns a traditional IRA and names B, A's spouse, as 100 percent primary beneficiary. During A's lifetime, the funds in A's traditional IRA are exempt from claims of A's creditors pursuant to Fla. Stat. § 222.21(2)(a). At A's death, B elects to roll over A's traditional IRA into B's own traditional IRA. After the spousal rollover, the inherited assets in B's traditional IRA continue to be exempt from the claims of B's creditors, pursuant to Fla. Stat. § 222.21(2)(c).

Example 2. Divorce of Account Owner: Now let's say that C and D are married, and C owns a traditional IRA account. C and D later divorce. Under the terms of their property settlement agreement, C is required to transfer C's traditional IRA to D. The funds in C's traditional IRA are exempt from C's creditors pursuant to Fla. Stat. § 222.21(2)(a). If D opens a new traditional IRA account to receive the assets in a trustee-to-trustee transfer, would the funds in D's newly created traditional IRA account likewise be exempt from D's creditors?

Many practitioners reasoned that D's account would be exempt from D's creditors under Fla. Stat. § 222.21. But while Fla. Stat. § 222.21(2)(d) clearly exempts interests in retirement plans subject to ERISA[2] (such as a 401(k) plan) received by a non-participant former spouse from the claims of the non-participant former spouse's creditors pursuant to a "qualified domestic relations order" described in IRC §414(p), the statute was less precise as to whether an interest in an IRA (a non-ERISA retirement account) transferred incident to divorce was exempt from the claims of creditors of the recipient spouse.

Further doubt was cast by several recent court decisions. In *In re Lerbakken*,[3] the United States Bankruptcy Panel for the Eighth Circuit concluded that the interest in the debtor ex-wife's IRA transferred to her Minnesota citizen ex-husband pursuant to their property settlement in divorce was not exempt from the claims of the husband's creditors in bankruptcy. The husband claimed his interest in the IRA to be exempt under the federal bankruptcy exemptions. The bankruptcy court rejected that argument, relying on the US Supreme Court decision in *Clark v. Rameker*,[4] to find that husband's interest in his ex-wife's IRA (the funds had not yet been transferred from the wife's IRA) were not "his" retirement funds.

In re Lerbakken and *Rameker* are not directly relevant to those of us who live and practice in Florida because Florida, unlike Minnesota or Illinois, allows its residents to "opt out" of the federal bankruptcy exemptions in favor of our more generous state exemption statutes, such as Fla. Stat. § 222.21. And as noted above, the exemption under our Florida statute applies to IRA account owners, beneficiaries, and participants. But what about transferee ex-spouses? Their status as owners, beneficiaries, or participants was less clear.

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Because our statute did not explicitly address the exempt treatment of IRAs transferred incident to divorce, at least one Florida Bankruptcy court, citing *In re Lerbakken*, questioned the exempt status of an IRA transferred to a Florida citizen spouse incident to divorce.[5] In *In re Glass*, the United States Bankruptcy Court for the Middle District of Florida noted the uncertainty of whether an IRA transferred incident to divorce proceedings remains exempt from claims of creditors of the transferee former spouse. The Bankruptcy Court noted that there existed a "matter of great importance" as to whether an IRA awarded incident to divorce proceedings remains exempt in bankruptcy proceedings, that there was no controlling precedent in the Eleventh Circuit regarding this issue, and that conflicting precedent existed in other jurisdictions. Fortunately or unfortunately, the case was settled and dismissed before this question could be specifically addressed.

Concerned that a Florida court might hold that an individual retirement account transferred incident to divorce is not exempt under Fla. Stat. § 222.21(2)(c), the IRA, Insurance, & Employee Benefits Committee and the Asset Protection Committee of the RPPTL Section of The Florida Bar proposed legislation to amend Fla. Stat. § 222.21(2)(c) to expressly clarify the exemption. Companion bills, House Bill 649 (Rep. Driskell) and Senate Bill 968 (Sen. Polsky), unanimously passed out of committee and out of each legislative chamber during the 2022 session and were signed into law by the Governor on June 6, 2022.



Fla. Stat. § 222.21(2)(c) (2022) now provides that "[a]n interest in any fund or account awarded or received in a transfer incident to divorce described in [IRC §] 408(d)(6) . . .is exempt upon the interest being awarded or received and continues to be exempt thereafter."[6] Further, the statute as amended applies retroactively because it clarifies existing law and is remedial.[7] Florida practitioners can now rest easy knowing that an interest in an IRA, like a 401(k), received in a transfer incident to divorce, remains exempt from the claims of creditors of the recipient spouse.


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Endnotes

1 Fla. Stat. § 222.21(2)(a) (2022). Additional requirements include maintaining the fund or account in accordance with the plan or governing instrument that has been preapproved or determined by the Internal Revenue Service as exempt from taxation, or if a plan or governing instrument is not approved or determined as exempt from taxation, then a debtor must prove by a preponderance of evidence that the fund or account is in substantial compliance or would have been in substantial compliance with the requirements for tax exemption under IRC §§ 401(a), 403(a), 403(b), 408, 408A, 409, 414, 457(b), or 501(a) of the Code. Fla. Stat. § 222.21(2)(a).

2 The Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 829 (codified as amended at 29 U.S.C. §§ 1001-1461 and in scattered sections of 5, 18, and 26 U.S.C.).

3 *In re Lerbakken*, 590 B.R. 895, 896 (B.A.P. 8th Cir. 2018).

4 *Clark v. Rameker*, 573 U.S. 122 (2014).

5 See *In re Glass*, 613 B.R. 33 (U.S. Bankr. Ct. M.D. Fla. 2020).

6 Chapter No. 2022-167. IRC § 408(d)(6) provides that "the transfer of an individual's interest in an individual retirement account or an individual retirement annuity to his spouse or former spouse under a divorce or separation instrument described in clause (i) of [IRC §] 121(d)(3)(C) is not to be considered a taxable transfer made by such individual notwithstanding any other provision of this subtitle, and such interest at the time of the transfer is to be treated as an individual retirement account of such spouse, and not of such individual. Thereafter such account or annuity for purposes of this subtitle is to be treated as maintained for the benefit of such spouse."

7 The Florida Senate, Bill Analysis and Fiscal Impact Statement, Professional Staff of the Committee on Rules, Senate Bill 968, 2022, available at https://www.flsenate.gov/Session/Bill/2022/968/Analyses/2022s00968.rc.PDF.

Post Surfside: Technologies For Extending The Useful Life Of Concrete Buildings

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

Innovations can emerge from disasters. The Champlain Tower building collapse in Surfside, Florida on June 24, 2021, was a tragedy, but new laws and new technologies for maintaining concrete buildings emerged thereafter. The newly enacted Fla. Stat. § 553.899, which requires statewide inspections of all residential buildings that are three stories or taller, is one of those innovations. These inspections are now required 30 years after initial completion, or 25 years if the building is within three miles of the ocean, and every 10 years thereafter. This article will introduce attorneys to some of the technologies available to prolong the useful life of concrete buildings. A preferred way of looking at the building's longevity is similar to how one approaches a person's health: early treatment of an illness often creates a better long-term outcome. Similarly, early intervention can greatly prolong a building's useful life. Technologies long used in preserving steel naval ships and buried steel pipelines, such as sacrificial anodes and cathodic protection, can be used to prolong the life of concrete buildings.

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I. Paradigm Shift – The Building is Sick and Needs Treatment

A new way of looking at the situation is viewing the building as being sick and in need of treatment. In humans, it is well known that early intervention in diagnosing cancer will increase the likelihood of successful treatment. For most cancers in humans, Stage 1 cancer has a much greater chance of successful treatment than Stage 4 cancer. Similarly, early treatment of the building's illness can increase the chance of successful treatment. Each building has a potential safe service life; early intervention can extend that service life. Waiting until there is substantial visible concrete spalling damage is like waiting until the cancer has progressed into Stage 4 cancer before seeking treatment. Concrete spalling can at times occur when the steel rebar has corroded and expanded to cause the exterior of the concrete to show damage. Early intervention in concrete building preservation may produce a better outcome and lower long-term costs.

II. Three Enemies of Steel Reinforced Concrete

Reinforced concrete is concrete with a reinforcing material inside the concrete, which is typically steel reinforcement. Concrete is strong in compression, but weak in tension. Steel is strong in tension, but weak in compression. Reinforced concrete marries the best qualities of both steel and concrete to make this building material widely used throughout the world.

Presuming steel is used as a reinforcing material, there are three compounds that can significantly accelerate the degradation of reinforced concrete: 1) water (excessive), 2) salt, and 3) carbon. Steel is an iron alloy made from elemental iron (Fe). Concrete requires water for proper curing and with proper hydration will continue to harden over the life of the concrete. Water in the oxidation context means "excessive water." The oxidation of steel returns the steel to its natural state as iron oxide (FeO2). Iron oxide (FeO2) is the natural state of iron; what we commonly call "rust." Water can react with carbon to form carbonic acid, which will oxidize steel and degrade the concrete. Hydrogen sulfide naturally occurs from decaying organic matter found in wastewater sanitary sewers and has the strong smell of rotten eggs. Hydrogen sulfide can react with water to form sulfuric acid, which is very corrosive to reinforced concrete. When concrete pipes are used for wastewater sewers, the formation of hydrogen sulfide is a concern.

III. Conventional Methods of Corrosion Control

Conventional methods of corrosion control include: patch & repair, coating, and concrete admixtures.

A. Patch & Repair

Patch & repair is one of the oldest repair methods, which involves removing small portions of the affected concrete and attempting to patch the work to keep out water. This is relatively low cost but also a relatively low return on investment.

B. Coating

The application of coatings is another very old repair method. This can be a simple coat of latex paint or high-quality epoxy-based paint that is placed on the surface of the concrete. The coating has several benefits, such as relatively low cost, and it can keep out new corrosion-causing agents, such as water or salt. The downsides of coatings are that the coating can trap existing corrosion elements in the concrete so that the existing contaminants continue to corrode the concrete and the steel reinforcing members. The coatings can also chip and allow water and other contaminants to get past the coating.

C. Concrete Admixtures

Concrete admixtures are used to improve the behavior of concrete under certain conditions. Concrete admixtures can minimize corrosion of rebar by inhibiting chloride corrosion and carbonic corrosion. The costs can be expensive because it must be done during the initial construction.

IV. Newer Technologies Using Sacrificial Anodes and Impressed Electrical Current

Corrosion-inhibiting technology, including impressed electrical current and sacrificial anodes, used to protect steel naval ships and steel pipelines can also be applied to protect concrete buildings. These technologies include impressed electrical current and sacrificial anodes. These technologies could be incorporated into the design of new buildings at a lower cost than retrofitting years later.

V. Sacrificial Anodes

Sacrificial anodes are material that will corrode at a faster rate than the steel rebar. Zinc is commonly used as a sacrificial anode. An electrical power source is connected to both the steel rebar and the sacrificial corrosion inhibitor material, called an anode. The power source applies a consistent, low-voltage power to the rebar so that the rebar is a cathode. The electrical current ensures the cathodic protection of the rebar by electrically forcing corrosion to occur at the inhibitor material, rather than the rebar. An impressed electrical current can ensure that the corrosion occurs at the sacrificial cathodic inhibitor material. Testing may be necessary to ensure that no rebar is isolated from the rest of the rebar network so that all of the rebar has cathodic protection. For instance, in a residential tower, some of the concrete balconies' steel reinforcement may not be tied to the main rebar structural frame and may not have cathodic protection.

This corrosion inhibitor technology is a similar technology to how steel naval ships place zinc anodes on ships as sacrificial material to protect the steel ship hull from corrosion. In doing so, the corrosion-inhibited material reacts with and neutralizes substances that would have corroded the steel rebar.

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The sacrificial anode can take many forms. Corrosion inhibitors can be sprayed onto concrete. A zinc alloy can be superheated to form a liquid and then sprayed onto the concrete structure. The zinc alloy in its molten form becomes similar to spray paint. The sacrificial anode can be in the form of a metal mesh that can be wrapped around a concrete column to provide cathodic protection to the column.

Another technology uses titanium as an anode to apply electrical current. The titanium anode has a long service life because titanium is very corrosion-resistant. A titanium wire or a titanium mesh can be used and connected to the negative charge of a power source, and the positive charge is connected to the rebar for cathodic protection. If a titanium wire is used, the titanium wire can be installed in a shallow cut in the concrete in close proximity to the rebar. If titanium mesh is used, the mesh can be covered under a thin concrete overlay.

VI. Conclusion

These are some of the newer technologies to help prolong the useful life of concrete buildings. Key takeaways: 1) early intervention can increase the chance of a positive outcome; 2) sacrificial anodes can be used to focus corrosion in the anode rather than the rebar; and 3) impressed electrical current can provide cathodic protection of rebar.



M. YOUNG

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Who Has Standing? A Trustee's Duty to Account

By Theodore S. Kypreos, Esq., Jones Foster P.A., West Palm Beach, Florida

When administering a trust, you must know to whom exactly a trustee owes his or her duties, to understand a trustee's exposure to liability for breach. The answer to this question hinges on two considerations: (1) whether a trust is revocable or irrevocable and (2) whether the settlor has capacity to revoke his trust. Florida law leaves enough ambiguity to warrant discussion of trustee's duties in each of these scenarios.

Revocability of Trusts

In Florida, unless the terms of a trust provide a trust is irrevocable, then the trust is revocable and may be revoked or amended by the settlor.[1] While a trust is revocable, "the duties of the trustee are owed *exclusively* to the settlor."[2] Thus, a beneficiary does not have standing to sue the trustee because the trustee's duties are owed exclusively to the settlor.[3] The rationale behind barring a beneficiary from suing while the settlor is alive is the settlor may choose to amend his or her trust and divest the beneficiary's interest at his or her discretion during his lifetime.[4]

As noted above, the distinction between revocable and irrevocable is critical because while a trust is revocable, the trustee has no duty to provide an accounting to anyone other than the settlor.[5] However, once a trust becomes irrevocable, the object of this duty shifts. A qualified beneficiary of an irrevocable trust may sue the trustee for "breach of a duty that the trustee owed to the settlor/beneficiary which was breached during the lifetime of the settlor and subsequently affects the interest of the vested beneficiary."[6] A trustee only has a duty to keep the qualified beneficiaries of the trust reasonably informed of the trust and its administration when the trust is irrevocable, not while the trust is revocable.[7] For example, trustees are required to provide a trust accounting to each qualified beneficiary at least annually, on termination of the trust, and on change of the trustee.[8] But, this duty to beneficiaries is only triggered with the irrevocability of the trust. Thus, a qualified beneficiary cannot sue the trustee for pre-death accountings, i.e., for the period during which the settlor was alive and the trust was revocable, absent any claim of breach of fiduciary duty by the trustee.[9]

In *Hilgendorf v. Estate of Coleman*, Florida's 4th District Court was asked to determine "whether an estate or beneficiary of a revocable trust created by the decedent may compel the trustee to render an accounting . . . made during the life of the decedent, where the trust did not require accountings, the settlor never requested accountings during her lifetime, and there is no showing of any breach of fiduciary duty on the part of the trustee."[10] The *Hilgendorf* court expressly held that absent any claim by a beneficiary that a trustee breached his or her fiduciary duty in carrying out the terms of the trust, "there is no authority to impose that duty [to account to the estate or beneficiary] retroactively after the settlor is deceased and the trust becomes irrevocable . . . ."[11] As such, the beneficiary was not entitled to any pre-death accountings and did not have standing to sue the trustee.

It is important to note the beneficiary in *Hilgendorf* did not sue for violation of a specific trust provision – she sought only a pre-death accounting not required by the terms of the trust or any statute.[12] Had the beneficiary sued the trustee for breach of a duty owed to the settlor or beneficiary during the settlor's lifetime and which subsequently affected the beneficiary's vested interest, she may have had standing. Once a trust becomes irrevocable, a qualified beneficiary does not have standing to sue the trustee for pre-death accountings or for a breach occurring while the trust was revocable *unless* the trustee breached a specific duty owed to the settlor or beneficiary which subsequently affected the beneficiary's vested interest.

Incapacity of the Settlor

Pursuant to Fla. Stat. § 736.0603(1) (2021), trustees owe duties to the settlor exclusively while the trust is revocable. In Florida, litigants often attempt to argue that § 736.0603 does not apply when the settlor becomes incapacitated, because the trust is technically no longer revocable once the settlor lacks capacity to revoke it. There are isolated instances of Florida courts "dancing" around the incapacity issue decades ago, but there is no clear case in Florida holding that § 736.0603(1) is inapplicable when a trust settlor becomes incapacitated. Suggesting a trust becomes irrevocable upon the settlor's incapacity is irreconcilable with established law in Florida recognizing the ability of testators to have lucid intervals amidst long-term incapacity.[13]

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Given the lack of Florida case law on the issue, an analysis of the Uniform Trust Code ("UTC") provides some insight into legislative intent, as the Florida Trust Code is modeled in part after the UTC. Specifically, Fla. Stat. § 736.0603 (2021) is modeled after UTC § 603. Pursuant to UTC § 603(b), "[t]o the extent a trust is revocable [and the settlor has the capacity to revoke the trust], the rights of the beneficiaries are subject to the control of, and the duties of the trustee are owed exclusively to, the settlor." Drafters added the brackets around the language referencing settlors' capacity after the 2004 amendment to UTC § 603. In comments, the drafters stated this portion was now optional for two reasons: First, in any given case, it may be difficult to determine "whether the settlor has become incapacitated and [if] the settlor's control of the beneficiary's rights have ceased." Second, the drafters were concerned UTC § 603 allowed for unequal treatment of revocable trusts and wills, because under § 603, a remainder beneficiary has a right to know about the trust upon the settlor's incapacity whereas in the case of a will, devisees have no right to know of dispositions made for their benefit until the testator's death. As a result, the drafters concluded uniformity among the states on this issue was not essential – leaving each state free to adopt their own definition of incapacity or to omit the language altogether. The comment to UTC § 603 states if a settlor loses capacity, subsection (b) no longer applies and thus, the beneficiaries are not subject to the settlor's control and are entitled to request information concerning the trust. Therefore, the UTC provides upon a settlor's incapacity, the trustee's duties extend past the settlor to the beneficiaries. However, the UTC language and comments themselves leave discretion to adopting states whether to include the bracketed language of UTC § 603.

Florida specifically omitted the bracketed language referencing a settlor's incapacity, suggesting the capacity issue is irrelevant in determining to whom the trustee owes a duty while the settlor is alive. Other states that adopted some form of the UTC took different approaches when enacting § 603. For example, Ohio's Revised Code Section 5806.03 (2008), while based on UTC § 603, was modified to read as follows: "[d]uring the lifetime of the settlor of a revocable trust, whether or not the settlor has capacity to revoke the trust, the rights of the beneficiaries are subject to the control of the settlor, and the duties of the trustee . . . are owed exclusively to the settlor."[14] Ohio's specific mention of the settlor's capacity in the statute removes any doubt as to whether trustees of revocable trusts owe duties exclusively to a settlor, even when that settlor is incapacitated.

The Nebraska Uniform Trust Code is likewise modeled after § 603 of the UTC, and, like the Florida Trust Code, does not include any language referencing a settlor's incapacity. The Nebraska legislature removed the bracketed language to confirm the duties of a trustee of a revocable trust are owed exclusively to the settlor regardless of incapacity.[15] Section 30-3855(b) of the Nebraska Uniform Trust Code now provides "[w]hile a trust is revocable, rights of the beneficiaries are subject to the control of, and the duties of the trustee are owed exclusively to, the settlor." Nebraska courts construe this statute to mean the capacity of a settlor is irrelevant to determining to whom a trustee's owes a duty.[16]

In *Manon v. Orr*, the Nebraska Supreme Court held a settlor's alleged incapacity did not affect the revocable status of his trust.[17] The court read the words of the statute with their ordinary meaning and found nothing in the plain language of § 30-3855(b)[18] to suggest the revocable status of a trust is affected by a settlor's alleged incapacity.[19] As a result, the court found the *Manon* plaintiffs lacked standing to bring an action challenging the settlor's sale of trust property because, at the time, they were contingent beneficiaries and only had a mere expectancy in the trust property.[20] The alleged incapacity of the settlor was immaterial because it did not change the fact that pursuant to § 30-3855(b), while the trust was revocable, the rights of the beneficiaries and duties of the trustee were owed exclusively to the settlor.

Despite arguable ambiguity in its statute, the case law is clear in Nebraska that while the settlor is alive and the trust is revocable, the trustee's duties are owed exclusively to the settlor regardless of whether the settlor is incapacitated.

In stark contrast to Florida, Ohio, and Nebraska's application of UTC § 603, Illinois chose to include the bracketed language. 760 ILCS 3/603(b) (2020) provides: "To the extent a trust is revocable by a settlor, *and the settlor personally has capacity to revoke the trust*, rights of the beneficiaries are subject to the control of, and the duties of the trustee are owed exclusively to, the settlor."[21] The logical rationale behind Florida's omission of the capacity restriction is our legislators did not intend for a settlor's capacity to influence whether a trust is considered revocable or irrevocable, and further, if beneficiaries have standing to enforce a trustee's duties.

Conclusion

States take differing approaches to determine to whom a trustee owes a duty when the settlor of a "revocable" trust loses capacity to revoke. Nebraska omitted the UTC's language referencing the settlor's incapacity, whereas Ohio law provides specifically a trustee's duties are owed exclusively to the settlor, irrespective of settlor's capacity. Although these approaches differ in form, both lead to the conclusion that regardless of a settlor's capacity to revoke, while a settlor is alive and the trust is revocable, the trustee does not owe any duties to the beneficiaries. Had Florida's lawmakers intended courts make a capacity determination prior to finding a trustee of a revocable trust owes a duty to beneficiaries, they could have codified this intent as Illinois did. Given Florida's purposeful omission

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of the UTC's bracketed language and viewed in the context of other states' interpretation of same, it follows that Florida law requires even upon a settlor's incapacity to revoke a trust, a trustee owes a duty to the settlor exclusively.


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Endnotes

1 Fla. Stat. § 736.0602(1) (2021).

2 Fla. Stat. § 736.0603(1) (2021) (emphasis added); *Brundage v. Bank of America*, 996 So. 2d 877, 882 (Fla. 4th DCA 2008); *Ullman v. Garcia*, 645 So. 2d 168, 169 (Fla. 3d DCA 1994).

3 *See also Smith v. Bank of Clearwater*, 479 So. 2d 755, 757 (Fla. 2d DCA 1985) (stating a contingent remainderman was not in a position to exercise any of the rights of a trust beneficiary while the settlor was alive, and the trust was revocable).

4 *See Brundage*, 996 So. 2d at 882; *Ullman*, 645 So. 2d at 169.

5 *See* Fla. Stat. § 736.0813(1)(d) (2021) (noting that a trustee's duties under this section only extend to an irrevocable trust); *Hilgendorf v. Estate of Coleman*, 201 So. 3d 1262, 1265 (Fla. 4th DCA 2016) ("[A] statutory duty to account to the qualified beneficiaries does not arise until a trust becomes irrevocable.").

6 *Brundage*, 996 So. 2d at 882. *See also Siegel v. Novak*, 920 So. 2d 89, 96 (Fla. 4th DCA 2006) (applying New York law and holding beneficiaries of a trust had standing to sue the trustee, once the trust became irrevocable, for breach of fiduciary duties that occurred while the trust was revocable).

7 Fla. Stat. § 736.0813 (2021).

8 *Id.* at Fla. Stat. § 736.0813(1)(d) (2021).

9 *See Hilgendorf v. Estate of Coleman,* 201 So. 3d 1262, 1265 (Fla. 4th DCA 2016) ("[A] statutory duty to account to the qualified beneficiaries does not arise until a trust becomes irrevocable.").

10 *Id.* at 1263.

11 *Id.* at 1265-66.

12 *Id.* at 1264.

13 *See Raimi v. Furlong*, 702 So. 2d 1273, 1286 (Fla. 3d DCA 1997).

14 *See also Puhl v. U.S. Bank, N.A.*, 34 N.E.3d 530, 535 (Ohio Ct. App. 2015) (stating during the lifetime of the settlor of a revocable trust, the duties of the trustee are owed exclusively to the settlor).

15 *Manon v. Orr*, 856 N.W.2d 106, 110 (Neb. 2014).

16 *Id. See also In re Trust of Margie E. Cook*, 28 Neb. App. 624, (Neb. Ct. App. 2020) (holding contingent beneficiaries lacked standing to challenge sale of property while trust was revocable, and the result would not change regardless of whether settlor had the requisite capacity to execute the trust).

17 *Manon*, 856 N.W.2d at 110.

18 Note: at the time this opinion was written in 2014, the applicable provision was § 30-3855(a), which has since been changed to § 30-3855(b).

19 *Id.* at 109-110.

20 *Id.* at 111.

21 760 Ill. Comp. Stat. Ann. 3/603 (2020), emphasis added.



Political Roundup: 2022 Election Debriefing

By French Brown, Esq., Dean Mead, Tallahassee, Florida
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On November 8, 2022, Florida's midterm voters showed just how red Florida has become. Every statewide race resulted in Republicans being elected by wide margins: Governor, U.S. Senator, Attorney General, Chief Financial Officer, and Commissioner of Agriculture. While many pundits closely following Florida politics expected wins, many were shocked regarding the substantial margins of victory. Following is a brief analysis of the election results and what they may mean for the political future of Florida.

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For decades before the pandemic, registered Democrats substantially outnumbered Republicans in the Sunshine State. In September 2018, registered Democrats (4.98 million) outnumbered Republicans (4.72 million). In those midterm elections, Governor DeSantis narrowly defeated Andrew Gillum by a slim margin of 32,463 votes. In September 2020, registered Democrats (5.31 million) still outnumbered Republicans (5.22 million). However, in late summer 2021, registered Republicans took the lead, driven both by a surge of newly-registered Republicans and by a decline of registered Democrats in the State. As of September 2022, registered Republicans outnumbered registered Democrats by nearly 300,000 (5.26 million to 4.97 million). In addition, Florida had nearly 4 million registered voters with no party affiliation at the time of the 2022 midterm election.

During this election, not only did Republicans hold the registered voter advantage, but they also secured substantial advantages over Democrats in both early voting and Election Day voting. In total, 1.17 million registered Republicans voted early compared to nearly 675,000 registered Democrats, an increase of nearly 73 percent. Registered Republicans outvoted registered Democrats by an additional ninety percent on Election Day (1.36 million Republicans to 716,000 Democrats). Registered Democrats secured the vote-by-mail advantage by nearly 200,000 votes, while failing to return 684,644 ballots requested (compared to 436,641 Republican vote-by-mail ballots requested and not returned). In all, registered Republican turnout in the midterm election was 67 percent, while registered Democrat turnout was 52 percent.

Governor DeSantis

Governor DeSantis defeated challenger Charlie Crist by nearly 20 points, securing 59.38 percent of the 7.76 million votes cast in that race. The largest surprises from this race were that DeSantis beat Crist in both Miami-Dade County and Palm Beach County, historically Democratic strongholds, by 80,643 and 15,972 votes, respectively. The last Republican to win Miami-Dade County was former Governor Jeb Bush.

DeSantis not only won Miami-Dade County, but he did so while securing the largest margin of any Republican governor candidate in at least four decades. DeSantis defeated Crist with more than 55 percent of the vote in Miami-Dade County, a 16-point improvement on his performance in the county in 2018. DeSantis won roughly 65 percent of the vote in majority Hispanic precincts, also a 16-point improvement. DeSantis' Miami-Dade County performance was a stunning reversal of his 2018 performance when he lost Miami-Dade by the largest deficit for a Republican in the county since Bob Martinez lost to Lawton Chiles in 1990. In the end, Governor DeSantis won every Florida county except Alachua, Broward, Gadsden, Leon, and Orange.

Florida Cabinet

Republicans also swept the three Cabinet races. Incumbent Attorney General Ashley Moody defeated Aramis Ayala, former State Attorney for the 19th Judicial Circuit (60.6 percent to 39.4 percent). Incumbent CFO Jimmy Patronis defeated former State House member Adam Hattersley (59.5 percent to 40.5 percent). Former Florida Senate President Wilton Simpson bested Naomi Blemuer to become the next Florida Commissioner of Agriculture (59.3 percent to 40.7 percent). Republican candidates won each race by a margin of 18 points or more.

Interestingly, Attorney General Ashley Moody ultimately secured more votes during the midterm election than Governor Ron DeSantis. Ashley Moody secured 4,646,062 votes compared to Ron DeSantis' 4,608,988 votes. This occurred even though nearly 100,000 fewer voters cast ballots in the Attorney General's race (7,667,707 votes cast in the Attorney General's race compared to 7,761,704 votes cast in the Governor's race).

U.S. Senate

Florida voters sent Marco Rubio back to the U.S. Senate by a more than 16-point margin over former U.S. House member Val Demings (57.7 percent to 41.3 percent). Rubio received 4,469,769 votes cast, which was nearly 140,000 fewer votes than DeSantis. While Rubio won Miami-Dade County by 67,404 votes, Val Demings won Palm Beach County by 1,894 votes.

Florida Supreme Court Justices and Appellate Court Judges

Voters retained all Florida Supreme Court Justices and Appellate Court Judges on the ballot during the midterm election. Between 6.7 and 6.8 million voters cast a vote on the questions to retain Justices Canady, Couriel, Grosshans, Labarga, and Polston. For each Justice, they received between 62 and 64 percent approval.

In most years, the public pays little attention to judicial retention questions. This midterm election, however, The Florida Bar sought the need to create a substantial public information campaign to inform voters regarding judicial retention questions on the ballot after the *Orlando Sentinel* and the *South Florida Sun Sentinel* editorial boards suggested in October that voters should reject Justices Canady, Couriel, Grosshans, and Polston. The Florida Bar's Guide For Florida Voters provided an easy-to-understand resource for the public explaining important topics, such as: why merit retention questions are on the ballot; why retention questions are "nonpartisan" elections; the qualifications to hold judicial office; and the terms for County Court, Circuit Court, Appellate Court, and Florida Supreme Court judges.

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Florida Senate

The incoming Florida Senate will have 28 Republican members and 12 Democrat members, creating a supermajority for Republicans (70 percent). The prior Florida Senate was comprised of 24 Republicans and 16 Democrats, with various vacancies throughout the period. Notable flipped seats include incumbent Loranne Ausley losing her North Florida Senate District to Republican Corey Simon, and incumbent Janet Cruz losing her Senate District, including parts of Hillsborough County, to Republican Jay Collins. In addition, newly elected Republican Alexis Calatayud won an open Miami-Dade County seat historically held by Democrats.

Senator Kathleen Passidomo will be the incoming Senate President for the 2023 and 2024 Legislative Sessions. Her district includes Collier and Hendry Counties and part of Lee County. She is a Board-Certified Real Estate attorney with Kelly, Passidomo & Alba, LLP in Naples and a member of the RPPTL Section.

Florida House of Representatives

The incoming Florida House of Representatives will have 85 Republican members and 35 Democrat members, creating a supermajority for Republicans (70.8 percent). The prior Florida House of Representatives was comprised of 77 Republicans and 43 Democrats, with various vacancies throughout the period.

Representative Paul Renner will be the incoming Speaker of the House of Representatives for the 2023 and 2024 Legislative Sessions. His district includes Flagler and parts of St. Johns Counties. He is also a real estate attorney and a commercial litigator with Nelson Mullins, based out of the Orlando office, and a member of the RPPTL Section.

In addition, the incoming Minority Leader of the House of Representatives is also an RPPTL Section member. Representative Fentrice Driskell will lead House Democrats for the 2023 and 2024 Legislative Sessions. Her district includes parts of Hillsborough County. She is a commercial litigator and a bankruptcy attorney with Carlton Fields in the Tampa office. She is also a member of the RPPTL Section.

Amendments

There were three proposed amendments to Florida's Constitution on the general election ballot. While each of the proposed amendments received over 50 percent voter support, they all fell short of the necessary 60 percent vote to be included in the Constitution.

Amendment 1 (57.26 percent approval)

The first Constitutional Amendment on the ballot related to property taxes. Because Florida's Constitution requires that all property be valued at its "just value," any exemption or limitation of property taxes must likewise be adopted into the State Constitution. If it had passed, Amendment 1 would have authorized the Legislature to prohibit the consideration of any change or improvement used to improve a residential property's resistance to flood damage. The failure of the amendment suggests that the applicable Property Appraiser may increase the taxable value of a property in the years after any resiliency-related improvements are substantially complete.

In 2008, Florida voters approved a Constitutional amendment to exclude the value of improvement used to improve a residential property's resistance to wind damage, such as installing hurricane straps or constructing with reinforced rafters and trusses. Amendment 1 before voters this midterm election would have extended that exclusion to improvements to mitigate flood damage. Since Amendment 1 failed, completing improvements designed to increase flood resistance might result in higher property taxes.

Amendment 2 (53.87 percent approval)

The second Constitution Amendment on the ballot would have abolished the Florida Constitution Revision Commission ("CRC"). The Florida CRC is a 37-member commission that reviews and proposes constitutional amendments directly to the ballot for a public vote every 20 years. The last CRC occurred in 2018 and, since Amendment 2 failed, the next will occur in 2038.

The proposed amendment did not affect the ability to amend the State Constitution through citizen initiative, constitutional convention, the Taxation and Budget Reform Commission, or legislative joint resolution. Similar to the CRC, the Taxation and Budget Reform Commission meets every 20 years, but this tax-and-budget-focused process occurs in alternate decades. The last Taxation and Budget Reform Commission occurred in 2008, and the next will occur in 2028.

Some members of the Florida Legislature began calling for the abolition of the CRC after 2018 when the appointed members of the most recent Commission "bundled" a series of unrelated proposals into seven ballot questions. Amendment 2's supporters argue that the CRC is one of the only methods of constitutional amendment that allow compounding—that is, placing unrelated propositions in one amendment for voters to vote up or down on. Some legislators argue that the CRC's bundling of proposals has contributed to Florida's Constitution nearly doubling in length. Amendment 2 supporters argue that the CRC lacks rules, has inexperienced members, and lacks accountability.

Some lawmakers opposing Amendment 2 and supporting the CRC point out that the majority of the 150 amendments added to the Florida Constitution in the last 50 years originated as a joint resolution of the Legislature, not with the CRC. Amendment 2 opponents believed that eliminating the CRC would remove a generational opportunity for citizens to update their Constitution. Regardless of your personal belief,

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the failure of Amendment 2 means that the CRC is here to stay until such time the question of repeal is put before voters again and approved.

Amendment 3 (58.67 percent approval)

The third and final Constitutional Amendment on the ballot would have authorized the Legislature, by general law, to grant an additional homestead tax exemption for certain essential workers. If it had been approved, classroom teachers, law enforcement officers, correctional officers, firefighters, emergency medical technicians, paramedics, child welfare services professionals, active-duty members of the U.S. Armed Forces, and Florida National Guard Members would have received an additional $50,000 reduction of the value of homestead property for non-school tax levies. Explained another way, the additional exemption would have reduced the value of those individuals' homestead by subtracting an additional $50,000 in value before calculating the annual county, municipal, and special district taxes, as applicable. If approved, this $50,000 would have been in addition to the $25,000 school tax reduction and existing $50,000 non-school tax reduction applying to all homesteads in the State. If approved, the qualifying individuals would have enjoyed a non-school tax value reduction of $100,000 per year. However, Amendment 3 fell short of the necessary 60 percent vote.

While no one can predict all of the ramifications and political implications of Florida's shift to red, it is certain that Florida will remain in the national focus for the next two years and beyond.



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.*



A. LUSK

***Anna Lusk**, Juris Doctor Candidate, is a third-year student at the Florida State University College of Law and law clerk at Dean Mead, Tallahassee, Florida. She is also a research assistant for the Florida State University College of Law Research Center.*

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Executive Council Meeting

SEPTEMBER 28 – OCTOBER 2, 2022

Opal Sands Harborside
Bar Harbor, Maine







Sarah Butters with Gadget Goodall and Past Chair Debbie Goodall



New RP Fellow Janaye Pieczynski and husband Patrick Pieczynski.





Past Chair Rob and Sheri Freedman

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



Sancha Brennan with son Jacob Whynot.



Kathy Hennessey, Chair Sarah Butters and Hilary Stephens.



Lee Weintraub sporting his lobster collar.





Anne Pollack cracking a fresh lobster.



Meet Your New RPPTL Fellows

By Daniel L. McDermott, Esq., Daniel McDermott, P.A., Fort Lauderdale, Florida

The July 2022 RPPTL Section Executive Council meetings in Palm Beach welcomed the start of the new RPPTL year, gave us a chance to re-connect with familiar faces, and also provided the first opportunity for many of us to meet our newest additions to the RPPTL family, the Fellows class of 2022-2023. As many Section members begin to return to "in person" meetings, this provides an excellent opportunity for all of us to welcome this outstanding crop of new Fellows and to help them get involved in the many Section projects and committees. While we will surely see these new Fellows at the RPPTL Section Executive Council meetings, we here at *ActionLine* would first like to introduce and welcome these outstanding first-year Fellows:

Sandy Boisrond, PT Division, Miami/Fort Lauderdale, Florida
https://www.sociatap.com/spectrumlaw

Jeanette Mora, PT Division, Celebration, Florida
https://www.legalteamusa.net/jeanette-mora/

Jade Davis, RP Division, Sarasota, Florida
https://www.shumaker.com/professionals/A-D/c-jade-davis

Janaye Pieczynski, RP Division, Tallahassee, Florida
https://www.ausley.com/attorneys/janaye-pieczynski

When you see these new Fellows out and about at upcoming meetings, take it upon yourself to introduce yourself, invite them to help with a Section or a committee project, invite them to attend the Section social events, and let's try to give all of our new Fellows a warm welcome to the RPPTL Section!

In order to help everyone get to know our new Fellows a little better, we humbly submit for your consideration some information about each of our new Fellows.

The Death Side:

Our Newest Probate and Trust Fellows

Sandra "Sandy" Boisrond, Esq.

Spectrum Law Firm
Miami, PLLC, Miami/Fort Lauderdale

First up of our new Fellows is Sandra "Sandy" Boisrond, Esq., who practices in South Florida and comes to us from the Probate and Trust side of the Section. Before starting out her legal career, Sandy earned her master's degree in business administration from Walden University in Minneapolis, Minnesota and her bachelor's degree in biology from the University of Miami in Coral Gables, Florida. After undergrad, Sandy worked as a community liaison and program coordinator for a nonprofit organization. Sandy also worked for seven years as a middle school teacher, where she taught science to sixth, seventh, and eighth graders in Broward County, Florida.

Sandy's work with the nonprofit organization gave her exposure to the legal profession and sparked an interest in one day becoming an attorney. Thus, after giving back to her community in her first career as a middle school teacher, Sandy returned to school and earned her Juris Doctor from WMU Cooley Law School in Auburn Hills, Michigan. Sandy says it was phenomenal to be back in the school setting after years in the workforce and her work experience gave her a real advantage in law school. During her time at WMU Cooley Law School, Sandy participated in the estate planning clinic as a student attorney, where she first developed an interest in supporting the needs of her community in the areas of estates and trusts.

After graduating from WMU Cooley Law School, Sandy was admitted to practice law in Florida in 2015. Shortly after entering the legal field Sandy had the good fortune of being introduced to the RPPTL community when a past Section chair invited her to attend an upcoming Section meeting in Palm Beach. Sandy accepted this invitation and the rest is history as Sandy has been coming to RPPTL Section meetings ever since. Sandy is passionate about supporting law students and new lawyers in their transition into practice and is an active member of the RPPTL Law School Programming Committee, serving as one of the Liaisons for St. Thomas and for Nova Southeastern law schools.

Sandy currently works as a solo practitioner handling estate planning, guardianship, and probate matters throughout South Florida. In addition to her legal work, Sandy serves on

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the Board of Directors of Monarch Health Services, a nonprofit organization in West Palm Beach, Florida. Sandy is also an autism advocate who works to promote autism acceptance and education in everyday life. Additionally, Sandy is passionate about promoting civility in the legal profession and is the co-author of a forthcoming book entitled, *"Civility Wins: Find Your Peace While Taming the Beast."*

If you haven't already met Sandy at a RPPTL meeting or in practice, you should make a point of introducing yourself and helping us welcome her to the RPPTL community.

Jeanette Mora, Esq.
Widerman Malek, PL,
Celebration, Florida

Next up on our list is the second of our new Probate and Trust Fellows, Jeanette Mora, Esq., who hails from Celebration, Florida. Jeanette was born and raised in New York City and is a first-generation descendant of parents from the Dominican Republic. Jeanette does not come from a family of lawyers; rather, Jeanette was the first person in her family to earn her master's degree and a Juris Doctor, which has inspired other family members to pursue higher education. Jeanette is thankful for the hard work of her parents, which has afforded her the opportunity to pursue her academic and professional endeavors.

Like our first new Probate and Trust Fellow, Jeanette also had a career outside the law before joining the legal profession. After earning her B.A. in economics from Stockton University and her M.A. in financial economics for public policy from American University, Jeanette had a distinguished career as a financial advisor. For over 20 years, Jeanette advised individuals, businesses, corporations, and non-profits on various financial and compliance matters in her prior career as a Certified Financial Planner and Wealth Management Advisor in the securities and financial services industry. Despite her successful career as a financial advisor, Jeanette always admired the legal profession and decided to return to school to attend Barry University School of Law. After completing her studies at Barry, all while working full time, Jeanette earned her Juris Doctor degree in 2018 and began practicing as an attorney.

After graduating from law school, Jeanette founded the Law Office of Jeanette Mora, P.A., where Jeanette's principal areas of practice included estate planning, probate and trust administration, guardianship, and special needs planning. After running her own firm for two years, Jeanette joined the Celebration office of Widerman Malek, PL. Jeanette brings a wealth of knowledge and experience, and advises and represents a broad range of clients with their planning needs. In her legal career Jeanette has represented personal representatives and trustees in the administration of estates and trusts, as well as guardians and guardian advocates in the care and management of their incapacitated or developmentally disabled loved ones. Jeanette has also represented surviving spouses, heirs and beneficiaries with respect to their rights in estate and trust matters.

Jeanette gained her first exposure to the RPPTL Section as a student member while working as a paralegal during law school. Since being admitted to practice, Jeanette has continued to regularly attend RPPTL meetings and began joining substantive committees. In addition to her busy legal practice, Jeanette is passionate about giving back to her community. Jeanette regularly volunteers her time as a Guardian Ad Litem Advocate, with the Legal Aid Society of the Orange County Bar Association, and Community Legal Services of Mid-Florida. In fact, Jeanette's pro bono contributions were recognized in 2021, when she was named Community Legal Services of Osceola County's Pro Bono Attorney of the Year.

If you haven't already met Jeanette at a RPPTL meeting or in practice, you should introduce yourself and help welcome her to the Section!

The Dirt Side:
Our Newest Real Property Fellows

Jade Davis, Esq.
Shumaker
Sarasota, Florida

Our first Fellow on the Real Property side is Jade Davis. Jade was born in California and moved to Orlando, Florida. An avid interest in real estate led her to earn her real estate license at the young age of 18.

Jade chose Florida State University for her undergraduate degree where she studied English, international affairs, and political science. Throughout college and several years after receiving her B.A., Jade was a commercial and luxury home real estate sales professional and operations officer for a multi-family development company. When the economy slowed and the real estate market took a downturn, Jade chose to turn her passion for research and writing toward law school. She received her Juris Doctor with honors from Stetson University in Gulfport.

Jade's focus is construction and real estate law. Her niche deepened and expanded by a chance opportunity at her first job that changed the course of her career when she assisted a senior partner on a cyber security case. This burgeoning field was fascinating to Jade, so she delved deep into the subject and further honed her skills making data privacy and cybersecurity her other main area of practice at Shumaker. She explains that there's immense satisfaction in counseling

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businesses about their privacy and security and remediating breaches. It was natural to tie the two practice areas together as there is ample opportunity for the construction industry to get up to speed on data privacy.

Jade grew up with a strong sense of giving back through time, talent and treasure. As busy as she is with her work and being a mom of two young children, she invests her time in projects close to her core values. One of her many volunteer roles is serving as vice chair of The Florida Bar's Standing Committee on its Diversity and Inclusion's Multicultural Subcommittee. Jade helped to organize and plan the Bar's Diversity and Inclusion Symposium held at the Winter Meeting in January 2023, bringing together legal leaders, members of the judiciary, and lawyers to broaden awareness about diversity in race, age, class, and gender.

Jade notes that the Fellows' program stipend allows her to travel to Section meetings and to meet more of the members, an invaluable experience so far.

Please take a moment and introduce yourself and welcome Jade to the RPPTL community when you see her at the next meeting if you haven't done so already.

Janaye Peiczynski, Esq.

Ausley McMullen
Tallahassee, Florida

Janaye was raised in the Central Florida town of Lake Mary. From an early age she set a goal to become a lawyer. Her undergraduate years were spent at the University of Central Florida, where she earned a Bachelor of Science degree in Legal Studies. At one point during college, Janaye wondered if she truly would like a legal career and decided to get a job at a law firm before committing to law school. With the help of the campus career center, she found a job with a personal injury firm and loved it, confirming her long-held dream.

Janaye chose Florida State University for law school where she was an Article Editor of the FSU Law Review and the secretary of the Environmental Law Society. During her first year of law school, she interned with the Florida Fish and Wildlife Conservation Commission, followed by an internship as a criminal appeals intern for the Florida Office of the Attorney General. During her second year of law school, Janaye clerked at Hopping Green & Sams and subsequently was a judicial extern at the First District Court of Appeal for the Honorable Stephanie W. Ray. In her third year of law school, Janaye was the Administrative Editor for the Journal of Land Use & Environmental Law. It was during her third year of law school that Janaye met her husband and decided to stay in Tallahassee. Upon graduation, Janaye clerked for the Honorable Scott D. Makar at the First District Court of Appeal.

At Ausley McMullen in Tallahassee, Janaye focuses her practice in the areas of real estate, land use, and trusts and estates. She supports the transactional shareholders with real estate and estate planning matters, working alongside Section Chair Sarah Butters. Last April, Janaye had the opportunity to present with Sarah at the Tallahassee Estate Planning Council. As for membership in the RPPTL Section, Janaye says the group has been warm and welcoming. She and her husband Patrick attended the Bar Harbor, Maine meetings last fall, giving them the opportunity to get to know the Section members and their families while enjoying meaningful conversations in the smaller group settings.

Like our other RP Fellow, Janaye is committed to public service and remains active in the Junior League of Tallahassee where she co-chaired one of the committees and participated in the most successful annual League event, offering children in need the chance to shop for school clothes. Janaye also gives her time to the Legal Services of North Florida as a Helpline volunteer attorney.

Please take a moment and introduce yourself and welcome Janaye to the RPPTL community when you see her at the next meeting if you haven't done so already.





ROUNDTABLE

Highlights of the Meeting of the RPPTL Section
PROBATE AND TRUST DIVISION
SATURDAY, JULY 23, 2022
The Breakers, Palm Beach, Florida
Prepared by Eamonn W. Gunther, Esq., Boca Raton, Florida

Thank you to the Roundtable Sponsors:
Guardian Trust and Stout

The Director of the Probate and Trust Law Division, John Moran, called the meeting to order at 8:30 a.m.

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

Legislative Committee Report – Larry Miller

2022 Probate, Trust and Guardianship Legislation Summary Report

1. Secured Transactions – "*Kearney* Fix" (SB 406 by Sen. Berman and Rep. Robinson)

- Clarifying by amendment that in order to constitute a valid assignment or pledge of exempt assets under the Florida Uniform Commercial Code (Fla. Stat. § 679.1081), a security agreement must specifically identify the pledged asset(s) (description of the mere type of collateral is insufficient). The amendment is remedial and retroactive.

Status: This passed the Legislature and was vetoed by the Governor on 6/24/2022.

2. IRA in Divorce (SB 968 by Sen. Polsky and Rep. Driskell)

- Providing that the interest of an ex-spouse in an IRA received in a transfer incident to divorce is exempt from the creditors of the transferee spouse by amending Fla. Stat. § 222.21(2)(c); continuing previously exempt status of IRA. The amendment is remedial in nature and will have retroactive application to each transfer of an IRA incident to a divorce.

Status: This passed the Legislature and was approved by the Governor on 6/3/2022.

3. Trusts and Family Trust Companies (CS/SB 1304 by Sen. Gruters)

- Changing the Rule Against Perpetuities for Florida trusts under Fla. Stat. § 689.225 from 360 years to 1000 years and under Fla. Stat. § 736.0409(1) from 21 years to 1000 years and reflecting same in Fla. Stat. § 736.04115(3)(b)1 and Fla. Stat. § 736.0412(4).
- Providing that for Chapter 662, Florida Statutes, Family or Foreign Family Trust Companies, serving as trustees, an accounting is only mandatory on change of trustee, termination of trust, demand by qualified beneficiaries or election by such trustee.
- Providing that upon its election to do so, a Family Trust Company or a Foreign Family Trust Company trustee may provide a financial statement in lieu of an accounting.
- Describing the information to be included in a financial statement and providing the opportunity for a beneficiary to request and receive the detailed information necessary for preparation of the financial statement.
- Providing that information and notice given by a Family Trust Company or a Foreign Family Trust Company trustee may be served or made available electronically but requiring a hyperlink or other digital location which enables the recipient to find the information and establishing when such electronic service is deemed sent.
- Clarifying that parents may "represent" their unborn children, or unborn descendants of such children and of any minor child or children of such minor child.
- Confirming that statutory provisions regarding certain "Grantor trust" reimbursements described in Fla. Stat. § 736.08145 apply only to trusts governed by Florida law or having a principal place of administration in Florida.

Status: This passed the Legislature and was approved by the Governor on 6/24/2022.

4. Confidentiality of Certain Trust Proceedings (CS/SB 1368 by Sen. Gruters)

- Rendering confidential and exempt the identity of beneficiaries and specified individuals, as well as certain documents in trust proceedings involving Chapter 662 Family Trust Companies and Foreign Family Trust Companies as a party. Providing that certain contents of

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such proceedings be made available by the clerk of courts to certain parties. Further allowing other documents or parts of such proceedings to be released to certain described persons/parties, upon showing to the court.

Status: This passed the Legislature and was approved by the Governor on 5/6/2022.

5. Guardianship Date Collection (CS/CS/CS/HB 1349 by Rep. Chaney)

- Enumerating specific circumstances in which the Office of Public and Professional Guardians may ensure compliance by professional guardians.
- Requiring the clerks of court and the Florida Clerks of Court Operations Corporation to establish a statewide database of guardianship information to facilitate court oversight.
- Limiting access to the information contained in the database.
- Directing the sharing of certain information contained in the database regarding professional guardian registration and discipline.
- Providing for the reporting of certain collected information to specified parties.

Status: This passed the Legislature and was approved by the Governor on 6/24/2022.

6. Estates and Trusts – Independent Actions, Spousal Lifetime Annuity Trusts and Trustee Resignations (CS/SB 1502 by Sen. Powell and Rep. Altman)

- Clarifying what proceedings by a claimant which are pending against a decedent at the time of death will satisfy the requirement for bringing an independent action.
- Providing for the use of spousal lifetime access trusts ("SLATS").
- Providing and clarifying the methods by which a trustee may resign under Fla. Stat. § 736.0705.

Status: This passed the Legislature and was approved by the Governor on 5/10/2022.

7. Mental Health and Substance Abuse (CS/CS/SB 1262 Sen. Burgess)

- Making several changes to procedures surrounding voluntary and involuntary examinations of individuals under the Baker and the Marchman Acts.
- Prohibiting certain restrictions on visitors, phone calls, and written correspondence for Baker Act patients.
- Requiring search by law enforcement agencies of certain emergency contact information.

Status: This passed the Legislature and was approved by the Governor on 4/6/2022.

8. Involuntary Admission of a Minor (CS/SB 1844 Sen. Bean)

- Revising provision relating to the admission of minors to a facility for examination and treatment.
- Requiring law enforcement officers transporting individuals for treatment to consider person's mental and behavioral state and requiring least restrictive restraint possible.

Status: This passed the Legislature and was approved by the Governor on 4/6/2022.

9. Public and Professional Guardians (CS/SB 7010 House State Affairs Committee)

- Making permanent certain confidentiality and public record exemptions for complaints filed and subsequent investigations involving public and professional guardians by Department of Elder Affairs.

Status: This passed the Legislature and was approved by the Governor on 4/6/2022.

10. Uniform Guardianship Act (HB 845 Rep. Koster and CS/CS/SB 1032 Sen. Burgess)

- Seeking to bring the Uniform Guardianship Act to Florida.
- Including certain jurisdictional provisions regarding where certain guardianship proceedings are to be brought/held and establishing a definition of "home" for such purposes.

Status: Did not pass in 2022

CLE Report – Angela Adams (Probate & Trust) and Lee A. Weintraub (Real Property), Co-Chairs

Upcoming Probate & Trust CLE Courses include: 2/9/23 –2/10/23 Estate & Tax and Asset Protection Joint CLE Video Webcast; 2/3/23–2/4/23; Wills, Trusts and Estates Certification Review Course (location TBD) 3/31/23–4/1/23; Attorney Bankers Conference Funky Buddha Brewery, Ft. Lauderdale 4/28/23; Annual Guardianship CLE Stetson Law School, Tampa.

Action Item

Estate and Trust Planning Committee – Richard Sherrill, Chair.

Probate Law and Procedure Committee – Theodore Kypreos, Chair

Proposed legislation amending Fla. Stat. § 198.41, to suspend those provisions which govern the imposition, reporting, and collection of the Florida Estate Tax, to support amendment to Fla. Stat. § 198.41, to suspend those provisions which govern the imposition, reporting, and collection of the Florida Estate Tax. An act to render Chapter 198, Florida Statutes, which imposes the Florida Estate Tax, ineffective for as long as there is no federal state death tax credit or federal generation-skipping transfer tax credit.

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Information Items

Probate Law and Procedure Committee – Theodore S. Kypreos, Chair; Benjamin F. Diamond, Stacey Prince Troutman and Grier Pressly, Co-Vice Chairs.

Travis Hayes and Juan Atunez reported: The *Johnson v. Townsend* legislation is proposed legislation that clarifies existing Florida law by making targeted modifications to certain provisions of the Florida Probate Code governing creditors' claims and the related definition of the term "claim," to conform with the existing provisions of the Florida Uniform Disposition of Community Property Rights at Death Act.

Principal and Income Act Committee – Edward F. Koren and Pamela O. Price, Co-Chairs, Jolyon D. Acosta and Keith B. Braun, Co-Vice Chairs

The proposed legislation updates Florida's Uniform Principal and Income Act, which is 20 years old. The legislation generally follows the new Uniform Fiduciary Income and Principal Act in order to achieve greater consistency among state laws, but includes certain modifications that reflect Florida public policy choices.

Ad Hoc Committee on Revocable Transfer on Death Deed Act

The proposed Revocable Transfer-on-Death Deed Act ("RTODD Act") seeks to provide certainty where an individual, for purposes of estate planning, seeks to transfer real property to another but retains control of the real property for life while the beneficiary of the property has only an expectancy interest which can be revoked by the transferor without the consent of the beneficiary. The RTODD Act is intended to bring uniformity and clarity to the transfer by providing clear definitions, authorities, limitations, and a form deed for the transfer by transferor, and authority for a disclaimer of the transfer by the beneficiary. The RTODD Act is another tool in estate planning and is especially useful when dealing with small estates. It provides an advantage for easily modifying estate plans in a statutorily clear way with regards to real property owned individually. This proposed legislation does not seek to replace the use of the enhanced life estate deed ("ELE deed"), but there is no statutory authority for the ELE deed in Florida, and a court decision could greatly change the interpretation given to the effect of an ELE deed. The RTODD Act is intended to provide a form and statutory guidance for a clear understanding of its use and effect.

Asset Protection Committee – Michael Sneeringer, Chair; Richard Gans and Justin M. Savioli, Co-Vice Chairs

Richard Gans reported on subcommittee work regarding potential legislation on transfer of Tenants by the Entirety Property to Trust: The intent of the Tenancy by the Entirety ("TBE") Trust is to allow a married couple to realize and/or maintain TBE status on assets transferred to the TBE trust.

Committee Reports

Trust Law – Matthew H. Triggs, Chair; David J. Akins, Jenna G. Rubin, Mary E. Karr and Jennifer J. Robinson, Co-Vice Chairs

Pending projects: modification and enhancement of Florida's Decanting Statute; Statutory Release Project, which involves consideration to join a growing trend with five other states that have passed a statute that can be best described as a "statutory release." The concept is where a trust terminates or a trustee resigns or is removed by the terms of the trust, there is an accelerated way by which the trustee can give full disclosure (i.e. an accounting) and notice to all beneficiaries of the terminating event, and then after a certain time period (45, 60 or 120 days depending on which state statute you look at), if there is no objection by a beneficiary, the trustee is released, to the same extent as if an order of discharge had been entered by a court; and the Lost Trust Project which came about when Rohan Kelley, after reading an article in ActionLine by William Slicker, suggested to Matthew Triggs that the Trust Law Committee research the law regarding the disposition of assets titled in the name of the trustee of a trust when the trust instrument cannot be located and consider whether a proposed statute should be drafted to address the issues presented by the situation.

Guardianship, Power of Attorney and Advanced Directives – Stacy B. Rubel, Chair; Elizabeth M. Hughes, Stephanie Cook, Caitlin Powell and Jacobeli Behar, Co-Vice Chairs.

The Committee continues to work with the Supreme Court Project on procedures and protocols to enhance and facilitate an orderly guardianship process. It also continues to work on existing projects, including dismissal of incapacity petitions; trustees accounting to guardians; guardian statutory proposal RPPTL is reviewing and commenting on regarding transfer in and transfer out guardianship, from/to Florida; and the Romano v. Olshen subcommittee, Fla. Stat. § 744.457.

Adjournment.

Roundtable

Highlights of the Meeting of the RPPTL Section
REAL PROPERTY DIVISION

SATURDAY, JULY 23, 2022

The Breakers • Palm Beach, Florida
Prepared by Colleen Sachs, Pensacola, Florida, Michelle Hinden, Orlando, Florida, and Jin Liu, Tampa, Florida

Thank you to the Roundtable Sponsors:
Fidelity National Title Group



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

Sponsor Announcement. The Director thanked Fidelity National Title Group for its sponsorship of the meeting. Karla Staker was present on behalf of Fidelity.

Recognition and Introductions. The Director welcomed guests and attendees. There was a motion to approve the June 4, 2022, meeting highlights. The motion was seconded and passed.

Action Item

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

Rebecca Wood reported that the Governor signed the MRTA bill. Rebecca motioned the Division to approve the revisions to Chapter 17 MRTA Uniform Title Standards. No discussion took place concerning the motion. The motion passed, unanimously.

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

There was discussion about opposing legislation authorizing the use of security deposit replacement products (a/k/a fees instead of security deposits) unless the bill contains consumer safeguard provisions that protect tenants from predatory practices.

.Kristen King Jaiven discussed the 2022 legislative session proposed bill, noting that while it did not pass, it would likely return in the 2023 session. The Real Estate Leasing Committee proposed that the Section oppose legislation regarding security deposits unless consumer protection provisions are included. Kristen explained that this proposed new legislation would permit tenants to purchase a security deposit replacement product as an alternative to a security deposit.

The floor opened for discussion, and Peggy Rolando asked if the committee had spoken with the company selling the alternative products. Kristen responded that the committee has not. According to French Brown, they shared the white paper but have not heard back. Wilhelmina Kightlinger commented that several legislative members have asked for assistance, as a bill will come up in the 2023 session. The Section is reviewing Texas's similar legislation, which includes consumer protection components.

Kristen Jaiven motioned to approve the opposition to legislation authorizing the use of security deposit replacement products unless the bill includes consumer protection provisions.

The motion passed unanimously.

Real Property Litigation Committee – Michael V. Hargett, Chair

Michael Hargett presented on legislation expanding the finality of foreclosure judgments provided by Fla. Stat. § 702.036 (2021) to include liens other than mortgage foreclosures, such as community association liens and construction liens, and to permit prevailing party attorneys' fees in post-foreclosure litigation for redress of wrongful foreclosure judgments brought by junior lienholders improperly foreclosing senior liens.

This legislation restores the legitimate business expectations of Florida citizens upset by *Wells Fargo Bank, N.A. v. Tan*., 320 So. 3d 782 (Fla. 4th DCA 2021). Michael noted that the legislative proposal was circulated to the Florida Banker's Association and a copy of the proposed legislation was provided as well as a white paper on the topic. The Florida Banker's Association responded that it fully supported the bill but has not had an opportunity to take a formal position on it.

Chip Waller had concerns that the Section would be spending considerable resources on what the Section perceives as a bad decision. He further commented that he thought we were going overboard on a bad decision.

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Michael responded that this decision was interpreted as a change in the status quo and that a senior lender should not have to respond to a subordinate lienholder. The case holds that if senior lenders do not appear, they lose their rights.

Michael Hargett motioned to propose legislation that expands the finality of foreclosure judgments provided by Fla. Stat. § 702.036 (2021) to include liens other than mortgage foreclosures, such as community association and construction liens. Additionally, to provide for prevailing party attorneys' fees in post-foreclosure litigation for redress of wrongful foreclosure.

The motion was seconded and passed.

Information Items.

Formation of Ad Hoc UCRERA Glitch Committee – Manuel Farach, Chair

Ad Hoc Committee members will work with industry stakeholders to develop legislation that addresses several practical issues with the Uniform Commercial Real Estate Receivership Act by revising Fla. Stat. § 714.16, including providing for right of redemption, customary closing costs, and other changes to make receivership sales marketable and insurable.

Manny reported that the UCRERA Glitch Bill is in neutral due to recent speed bumps. The committee has had sessions with RPPTL, the FLTA and the Business Law Section and is working on revising Fla. Stat. § 714.16 based on their perspective.

Ad Hoc Committee on Revocable Transfer on Death Deed Act – Chris Smart (RP) and Steve Kotler (PT), Co-Chairs

The proposed legislation is an estate planning tool that seeks to provide certainty for owners of real property who want to transfer their real property to another while retaining control of the real property during their life. The RTODD gives the grantee/beneficiary an expectancy interest that vests on the death of the grantor/transferor, but which may be revoked by the grantor/transferor without the consent of the grantee/beneficiary.

Chris Smart reported on the Ad Hoc Committee on the Revocable Transfer on Death Deed Act. He noted that there is a white paper on the topic that he encouraged the Division members to review. He also discussed the benefits of the Revocable Transfer on Death Deeds and explained that the statute's purpose is to bring clarity to this type of instrument. He further reported that the Ad Hoc Committee has received many comments from the Real Property and the Probate sides and intends to review and take these comments into account when revising the statute. Chris urged members to contact him or Steve Kotler with questions or comments. Chip Waller encouraged all members to read the white paper so that the Section could make an informed decision and to provide the opportunity to engage the members in a meaningful debate on the topic.

Publications Committee

RP Division submissions for *ActionLine* are needed. Please contact Mike Bedke at michael.bedke@dlapiper.com for more information.

Michelle Hinden reported that the committee had an informational session and used that time to explore ideas for the future, such as a possible podcast highlighting popular articles. She further commented that the committee was looking for articles, specifically real property, and to please get in touch with the committee if interested in contributing an article.

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

Wilhelmina Kightlinger thanked the Fellows for helping them search for all the white papers. She further commented that the committee would call on committee chairs and ask them to think about who their subject matter experts are and to be ready to respond when the committee calls. Lastly, she suggested that the other committees start thinking about 2024 potential legislation since the committee has already wrapped 2023.

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

Lee A. Weintraub commented that he has spoken with many over the past few days, specifically chairs and co-chairs and that he will reach out to others for CLEs. He commented that the committee did its best last year and wants to improve this year. He commented that the competition with the Section is big, and the Section needs to turn it on. He asked that each chair email him two topics in the next 30 days. Once received, the committee will assign a vice chair to work with each committee. Also, the committee wants to expand CLE sponsorship opportunities. Weintraub reminded the chair and co-chairs of the mandatory leadership training coming up on August 2 and 24.

Committee Reports

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

Salome J. Zikakis asked the committees to save April 21, 2023, for the all-day, in-person Attorney Banker Conference at the Funky Buddha Brewery and to share any lender connections in South Florida with her. The committee is pursuing networking opportunities between the lenders.

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

E. Ashley McRae reported that the committee presented a CLE on the new legislation in response to the Surfside tragedy and the new reserves requirement. There will be another CLE in December.

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

Allison L. Hertz, Co-Vice Chair, reported that at their committee meeting yesterday, they discussed and analyzed SB-4D, the safety bill. They formed two task forces: one to focus on technical and disclosure issues and to see where we can provide clarifications and recommendations. The other is the Division education task force, which will mainly focus on unit owner education on the new laws. They will collaborate with many other committees on these task force issues.

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

Jane L. Cornett reported that the day-and-a-half Condominium and Planned Development Law Certification Review Course is scheduled for February 3 and 4, 2023. Two sponsors have committed, including a banker.

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

Nothing to report.

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

Gregg E. Hutt reported that they have started planning for the Construction Law Certification Review Course.

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 annual March Construction Law Institute. Last year's CLI saw over 400 attendees and more than $90,000 in net profits. The CLI also works with many other areas, such as condo and insurance.

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

Colleen C. Sachs thanked Peggy Rolando, Martin Schwartz, and Alex Dobrev for presenting at yesterday's successful CLE on vertical subdivision. In December, there will be a golf course redevelopment CLE.

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

Debbie Crockett reported that they are tasked with reviving this committee, starting with regular monthly meetings, including CLEs.

They will try to expand the membership to include practitioners handling property claims for carriers and policyholders. *She invited more than 100 people to attend yesterday's meeting and gave a presentation on recent insurance statutory amendments and two new insurance laws.*

They will also plan to renew the *Insurance Matters* newspaper.

Debbie also has been focused on creating the insurance law coverage board certification.

She noted that the most significant opportunity for them is to follow up on upcoming legislation. Starting in 2018, in her opinion, new legislation has chipped away at some consumer protections and strengthened the rights of the insurers.

Lee Weintraub suggested to the other committees to think about topics that touch on insurance to identify synergy with the Insurance Committee.

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

Lloyd Granet reported that the review course is scheduled for March 2023 at the Tampa airport hotel. His goal for this year is to deliver the material earlier. The goal for next year is to create an academy to conduct a half-day test prep to raise passing scores.

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

Chris Sajdera reported that the leasing symposium will roll out next month. It will be eight hours of CLEs focusing on commercial leasing. The Fund wants to collaborate with the committee on a seminar addressing title issues relating to leases.

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

Jason M. Ellison reported that we will work through the issues relating to UCRERA and put together a good product. In addition, good CLE courses are coming up.

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

No report.

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

Anne Q. Pollack reported that the committee discussed potential issues with a waiver of *Johnson v. Davis* in the AS-IS Contract. She further noted that the committee discussed the 40-year broker lien issue. Lastly, she reported that Len Prescott gave a presentation on Fannie Mae's proposal to accept title opinions in lieu of title insurance.

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

Nicole M. Villarroel reported that they had a great CLE on sovereignty land issues. They are working on CLEs and working with the FR/Bar committee on the condo disclosure form.

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Post Storm Relief:
Recent Statutory Amendments Help Private Property Owners Understand Statutory Rights to Prune, Trim, and Remove Trees

By Jade Davis, Esq., Shumaker, Loop & Kendrick, LLP, Sarasota, Florida

Florida's trees provide shade, protect air and water quality, enhance shoreline resilience to storm impacts and provide food and shelter for species important to Florida's economy.[1] The state's interest in protecting our trees reverberates down to our local governments that have a united interest in preserving, protecting, and enhancing the state's tree canopy. However, each hurricane season tests a tree's perseverance and a homeowner's fear of fallen trees and damage.

Fla. Stat. § 163.045 (2019) expanded private property owner rights in maintaining and protecting property by prohibiting local entities from regulating tree pruning and removal. Legislators pressed for homeowner flexibility to quickly address immediate hazards caused by storm-damaged trees. The law prevented local governments from requiring applications, approvals, permits, fees, or mitigation directives for the pruning, trimming, or removal of a tree on residential property if the property owner obtained documentation that the tree presented a danger to persons or property from a certified arborist or a Florida licensed landscape architect.

However, the vague law garnered severe criticism, and litigation ensued. Chaos stemmed from diverse meanings for "documentation" and "danger"; developers circumventing green space and buffer creation; and community associations removing *dangerous* trees to protect association-maintained or owner-maintained water lines, roofs, windows, and structures. Further, absent community covenants requiring otherwise, associations and homeowners were not obligated to replace removals.

In *Vickery v. City of Pensacola*, 342 So.3d 249 (Fla. 1st DCA 2022), the City of Pensacola denied the Vickerys' request for a permit to remove an old oak tree. After denial, the Vickerys used Section 163.045 to remove the *dangerous* tree. In response, the City sought an injunction to save the tree arguing that the Vickerys' arborist's conclusions were insufficient, and the statute was ambiguously written. The trial court ruled in favor of the City, but the First DCA reversed the trial court's decision and dissolved the injunction, finding that the text, although vague, was not ambiguous.

The statute has now been amended to clarify terms and applicability. In response, local governments have issued policies to guide the statutory exemptions:

The property owner must possess "documentation" at the time of removal: "documentation" means a signed onsite assessment performed under the tree risk assessment procedures outlined in *Best Management Practices –Tree Risk Assessment*, Second Edition (2017) (the "TRA") by an arborist certified by the International Society of Arboriculture or a Florida licensed landscape architect; and

The documentation must establish that the tree poses an "unacceptable risk" to persons or property: a tree poses an "unacceptable risk" if removal is the only means of practically mitigating its risk below moderate, as determined by the TRA; and

The tree is located on "residential property," *not within a residential development.*

If the above requirements are met, local governments cannot require notice or a permit to prune, trim, or remove a tree. Ensure documentation is provided so the local government can determine whether the removal qualifies for an exemption to avoid a notice of violation.



J. DAVIS

***Jade Davis, Esq.**, is an associate with Shumaker in Sarasota, 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 *Florida's Iconic Trees*, Florida Department of Environmental Protection, https://floridadep.gov/Trees (accessed October 12, 2022).

PRACTICE CORNER

Probate And Trust Division

Guardianship Practice: Working With Autism Families

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

According to the Centers for Disease Control and Prevention, about 1 in 44 children have been identified with Autism Spectrum Disorder (ASD), a developmental disability which presents issues with social interaction, communication, and behavior. As the autistic child transitions to adulthood, the child's family will not only struggle to manage long-term care needs but will also have to prepare for the guardianship court process. Being aware of issues that commonly impact the autism community and the wide spectrum of conditions exhibited by those on the autism spectrum will help you effectively work through the guardianship process with your autism families.

At its core, the average person does not understand what autism is and is unaware of how autism presents in different individuals. These are important issues to understand in establishing a guardianship for an autistic adult. The limited representations of autism presented by organizations and the media often portray an autistic person as some sort of savant or intellectual marvel and fail to highlight the "spectrum" that is autism. As the auntie of an autistic teen, I frequently work with autism families in my guardianship practice, and witness a host of challenging issues that these families face, which impact their responsiveness to the court process.

Autism Basics

Autism is a condition that magnifies social, communication, and behavior issues. Many autistic individuals struggle with basic activities of daily living – brushing teeth, bathing, dressing, eating, etc. A number of autistic individuals suffer from communication restrictions, with many being limited in their verbal communication or non-speaking. Self-injuring behaviors, social anxiety disorders, mental health disorders, and many other co-existing conditions may also be issues that an autism family manages. The guardianship process provides a few avenues with the appropriate powers and responsibilities based upon the autistic adult's condition.

Autism and Guardian Advocacy

Depending on the level of independence of an autistic adult, the process of appointing a guardian advocate may be beneficial. Pursuant to Fla. Stat. § 393.12 (2022), "A circuit court *may appoint a guardian advocate*, without an adjudication of incapacity, *for a person with developmental disabilities*, if the person *lacks the decisionmaking ability to do some, but not all,* of the decisionmaking tasks necessary to care for his or her person or property or if the person has voluntarily petitioned for the appointment of a guardian advocate" (emphasis added). While this process does not generally require the family to hire an attorney, many autism families retain counsel because they already have a heavy load to manage with their loved one and may find the court process to be a bit daunting.

Autism and Guardianship of the Person, Property, or Both

Autistic adults who have more challenging behaviors and those who have limited communication or are non-speaking will often require a more restrictive form of guardianship. For autistics who may be able to work or attend school, with the necessary supports, a limited guardianship may suffice, but a plenary guardianship may provide some essential safeguards to protect the interests of the autistic adult.

Practice Tips

Less jargon, more clarity. Simplify your explanations of the guardianship process and be sure to break down your intake needs, court requirements, and ongoing reporting requirements early on in the process. The autism world is filled with jargon that these families have had to endure, so try to keep things basic and concise.

Time matters. Be sure to obtain copies of Individualized Educational Plans (IEPs), medical diagnosis information, and medical provider contact information during or immediately after intake. Creating checklists with timelines and ample time to meet court deadlines will give your autism families a less cumbersome process and allow you to avoid those dreaded "show cause" orders.

Be accommodating. Many autism families struggle with respite care due to their child's behaviors and an inability to find qualified caregivers. Offering flexible hours for client meetings, virtual meetings, or an environment that allows for accommodations to include their child can be extremely helpful. Having telephone or virtual meetings to complete required forms or sharing any community resources that you are aware of can be an added plus.

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Practice Corner: Probate And Trust Division, from page 42



S. BOISROND

***Sandy Boisrond** has been practicing law since 2015. She earned her Juris Doctor from Thomas M. Cooley Law School (Michigan) and completed her undergraduate studies at the University of Miami. 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.*

Roundtable: Real Property Division, from page 40

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 W. Smart reported that the new ALTA title policies are coming soon. Melissa Murphy reported that the policies have been approved and the effective date is October 3, 2022.

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 reported they meet monthly and try to have a CLE to appeal to the broader membership. This year they have a new co-chair and a new co-vice chair.

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

Nothing to report.

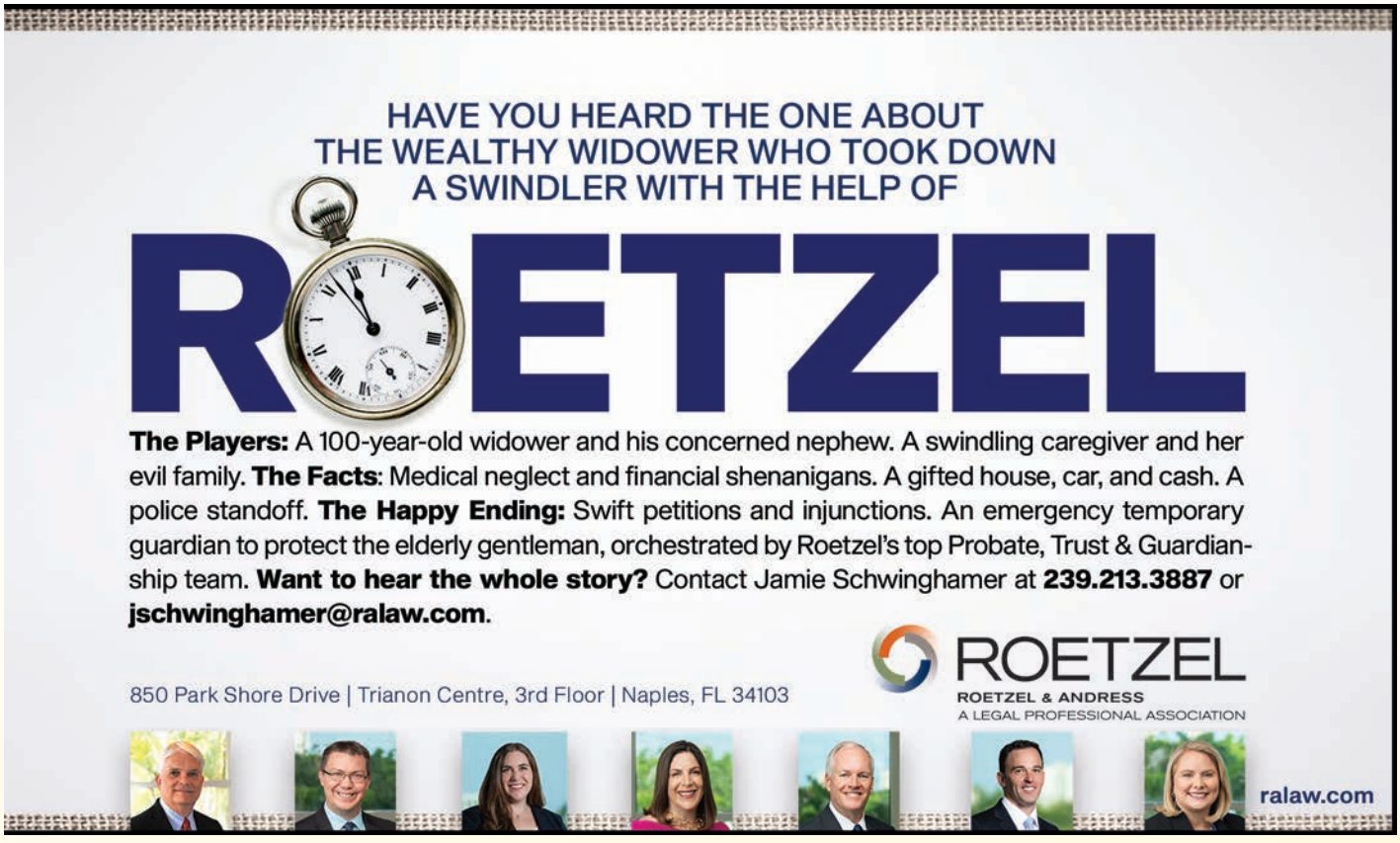
American College of Construction Lawyers (ACCL) Liaison – George J. Meyer

Nothing to report.

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

No report.

Adjournment. Meeting was adjourned.



SECTION SPOTLIGHT

Section Members Mobilize In Response To Hurricane Ian

By Steven H. Mezer, Esq., ALM Chair

As Hurricane Ian brought devastation to our neighbors in Southwest Florida, emails began to circulate from our At-Large Members (ALMs) communicating information regarding court closures, impacts upon individual law firms and inquiries on how we can best help those most severely impacted by Hurricane Ian. We focused our attention on the legal aid organizations in that area. By Saturday, thanks to an assist from **Laird Lile**, I spoke directly to **Carol O'Callaghan**, the **Deputy Executive Director of Legal Aid Service of Collier County**. To say that she was both relieved and encouraged to hear an offer of support from real estate and probate attorneys is more than an understatement. At that point, she knew that her clients would need our help, particularly when her "go-to" attorneys were likely also dealing with their own circumstances caused by Hurricane Ian. From then on, we kept in touch through emails. I relayed that information to our ALMs, who then dispersed it through their communication networks. We next learned of a Saturday, October 22, training class for volunteer attorneys held by Legal Aid Service of Collier County. Even though the training class was not necessarily geared towards our ALMs, since we have experience working with Legal Aid clientele, members of the ALMs who were immediately available to attend that class did so, while others were ready to step in seamlessly.

Our next communication was an indication from **Fernanda Guerrero, Pro Bono Coordinator**, of the exact needs of the Collier County Legal Aid Society: landlord/tenant, title issues, heirs issues, FEMA, consumer law, and predictably, probate expertise. We began to assemble a list of volunteers. Volunteers came from all parts of the state from both the Real Property Law Division and the Probate and Trust Law Division. To my surprise, one of the volunteers who contacted me was an attorney who was then in New Jersey. She is Florida Bar licensed and a Section member who learned of our efforts to locate volunteer attorneys through the lead ALM in Broward County. Her expertise is in business and tax law. In my next update from Legal Aid of Collier County, Ms. O'Callaghan indicated a need for an attorney knowledgeable in business law. And so, a match was made immediately, meeting an unexpected need. Since then, ALMs and RPPTL members have provided much-needed assistance to each of the legal aid organizations around the state.

It is also important to share with you that Section members **Jennifer Bloodworth, Lindsay Hall Harrison, David Shanks, Len Prescott, and Barry Scholnik** participated in the FLTA Charitable Action Foundation effort to assist Meals of Hope in generating 51,464 meals for hurricane victims in the Naples area in just two hours on October 18.

The needs of underserved Floridians impacted by Hurricanes Ian and Nicole will continue for months and perhaps years to come. If you have the time and the inclination to help others, please consider reaching out to any one of the numerous legal aid or pro bono organizations listed on the ALM's webpage.



Law School Programming Committee Shares Expertise With FIU College of Law Students

The Law School Programming Committee, co-chaired by Johnathan Butler and Kymberlee Curry Smith, appointed committee liaisons to provide educational and networking opportunities to Florida law school students. In October 2022, there were two in-person Lunch & Learn presentations at the Florida International University College of Law, each with a panel of four attorneys covering topics from both divisions of the RPPTL Section. On October 6, 2022, the topic was "Contract to Closing," which covered all steps of a residential closing, including real-life issues and practical solutions faced by real property practitioners. On October 27, 2022, there was a discussion on the various clients and matters handled by estates, trusts and guardianship attorneys. Thank you to Wirge "Marie" Elianor (L2), the FIU RPPTL Society President, for the invitation to speak at the college.

If you are interested in providing educational opportunities to the law students attending your Florida alma mater, please contact the liaison appointed for that particular law school. The names can be found on the Law School Programming Committee webpage.



RP presentation: L-R: Jamie Marx, Silvia Rojas (liaison and moderator), Ana Maria Angulo, FIU RPPTL Society President Wirge "Marie" Elianor, Deborah Martin, and Len Prescott



P&T presentation: L-R: FIU RPPTL Society President Wirge "Marie" Elianor, Jacobeli Behar, Silvia Rojas (liaison and moderator), Joshua Rosenberg, Marjorie Wolasky, and Joseph George

Probate Case Summaries

By Jeanette Mora, Esq., Widerman Malek, PL, Celebration, Florida

Probate court properly found that the partial marital settlement agreement did not contain any language which could constitute a waiver of spousal rights pursuant to Fla. Stat. § 732.702(1). The appellate court affirmed the probate court's order granting final summary judgment, which recognized the wife's intestate spousal rights and appointed the wife as personal representative of decedent's estate.

Merli v. Merli, 332 So.3d 1020 (Fla. 4th DCA 2022)

The decedent died intestate while his dissolution of marriage proceeding with the wife was still pending. Before his death, the decedent entered into a partial marital settlement agreement with the wife dividing certain marital assets and liabilities while excluding alimony and a portion of the decedent's pension benefits. The partial settlement agreement also provided for the sale of the marital home, but no agreement with respect to the spouses' change of ownership interest in the marital home. The order adopting the partial marital settlement agreement was entered in family court. However, at the time of the husband's death, the final judgment of dissolution of marriage had not been entered.

The decedent's brother petitioned the probate court to serve as personal representative of the decedent's estate, alleging standing as the decedent's heir-at-law. The decedent's brother requested the probate court to enforce the partial marital settlement agreement as binding and find that the marital home was owned as a tenancy in common between the decedent and his wife. The wife counter-petitioned to serve as personal representative on the basis that she had preference as the surviving spouse and sole beneficiary of the decedent's estate. The wife later moved for final summary judgment arguing that the marriage had not been dissolved and that the family court dismissed the dissolution proceeding upon the death of the husband.

The trial court granted the wife's summary judgment and appointed the wife as personal representative of the decedent's estate. The trial court also found that the partial marital settlement agreement did not contain any language which could constitute a waiver of spousal rights pursuant to Fla. Stat. § 732.702(1) (2019).

The decedent's brother appealed, relying on the phrase "complete property settlement" in Fla. Stat. § 732.702(1) ("…a complete property settlement entered into after, or in anticipation of, separation, dissolution of marriage, or divorce, is a waiver of all rights to elective share, intestate share, …and preference in appointment as personal representative of an intestate estate . . ."). The decedent's brother also relied upon *Snow v. Mathews*, 190 So. 2d 50 (Fla. 4th DCA 1966), arguing that the couple's "complete settlement" was evidence of spouse waiver.

The appellate court applied the plain language of Fla. Stat. § 732.702(1) and the partial settlement agreement and found that the neither the decedent nor the wife explicitly waived their right to an elective share, intestate share, pretermitted share, homestead property, family allowance, or preference as personal representative. The appellate court determined that *Snow* was misplaced because (1) the subject marital settlement was not a "complete settlement" as it did not clearly, specifically, and explicitly settle all matters of dispute between the parties; (2) *Snow* did not address a surviving spouse's waiver of intestate rights pursuant to Florida law; and (3) in *Snow*, the married couples separation agreement—which included their jointly owned property and the marital home—was detailed, specific, and explicitly provided, "'[U]pon the execution of this agreement each of the parties shall be tenants in common'…In the described properties, and the agreement shall be binding upon their heirs and personal representatives."

The appellate court also looked to *Marlow v. Brown*, 944 So. 2d 1036, 1039-40 (Fla. 4th DCA 2006) ("The dissolution of marriage action terminated with the death of the husband and the dissolution judge should have dismissed the case upon the wife's motion.") and reasoned that the dissolution here remained pending at the time of the decedent's death and that the family court properly dismissed the dissolution proceeding without entering a final judgment. As a result the appellate court concluded that (1) the marriage was terminated by death and not by final judgment, (2) the partial settlement agreement's terms did not amount to a binding final decree, and (3) nothing in the partial settlement agreement indicated an intent by the parties to waive their intestate rights.

Trial court erred in declining to appoint as personal representative testator's nominee who was qualified to serve under the probate code. The trial court was without discretion to deny the appointment of the nominee based on what the trial court perceived as the nominee's conflict of interest where the nominee was statutorily qualified to serve.

Araguel, III v. Estate of Jane Kaigler Araguel, 47 Fla . L. Weekly D1517a (Fla. 1st DCA 2022)

Araguel filed a petition for the administration of his mother's estate requesting that the nominee appointed as personal

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representative under his mother's will be appointed as personal representative. The decedent's other son filed an objection to the appointment of the nominee as personal representative.

The trial court denied the appointment of the nominee under the will as personal representative. Although finding that the nominee was qualified to serve under the Florida Probate Code, the court determined that there were "tangible and substantial reasons to believe that damage [would] accrue to the estate if [the nominee] were appointed as Personal Representative, because the facts presented displayed an adverse interest to the Estate." The court perceived that the nominee had a conflict of interest because the nominee would be a material witness regarding whether certain property was an estate asset based on a conversation the nominee had with the decedent; and that the nominee knew that the petitioner, Araguel, had an invalid durable power of attorney, lacking the requisite number of witnesses, to handle the decedent's affairs.

The appellate court reversed the trial court's order denying the appointment of the nominee under the decedent's will and reasoned that the trial court was without discretion to refuse to appoint the personal representative specified by the testator in the will unless the person was expressly disqualified under the statute or discretion was granted within the statute.

The appellate court concluded that the nominated personal representative was statutorily qualified to serve. The statutory requirements for serving as personal representative under Fla. Stat. § 733.302 required 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." The appellant satisfied these two requirements. Furthermore, the appellate court reasoned that there was no evidence that the nominated personal representative was not qualified for appointment under Fla. Stat. § 733.301(1) (i.e., never convicted of a felony, not mentally or physically unable to perform the duties, or under the age of 18), and, therefore, concluded that the trial court erred in not appointing the nominated personal representative based on what the court perceived as the nominated person's conflict of interest where the nominated personal representative under the will was statutorily qualified to serve.



J. MORA

***Jeanette Mora, Esq.**, is an associate at Widerman Malek, PL, Celebration, Florida. Jeanette's principal areas of practice are estate planning, probate and trust administration, guardianship, and special needs planning. Prior to law school, she spent 20 years as a Certified Financial Planner™ and Wealth Management Advisor in the securities and financial services industry. She received her Juris Doctor from Barry University School of Law, and an M.A. in Financial Economics for Public Policy at American University, and a B.A. in Economics from Stockton University.*

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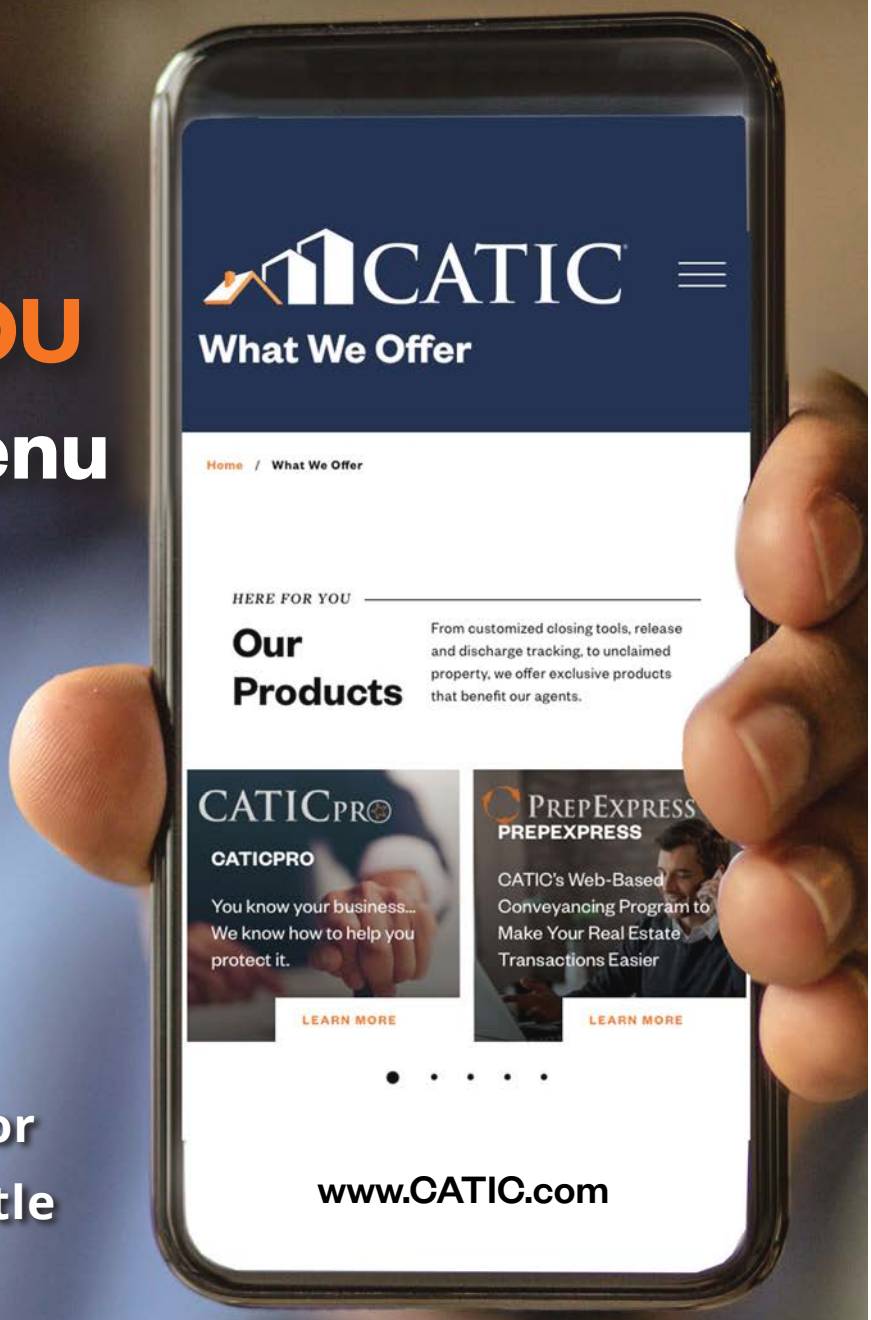

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Real Property Case Summaries

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

The Third District Court of Appeal affirmed the trial court's grant of Appellee's motion for prevailing party attorney's fees following Appellee's voluntary dismissal of its claim in the lower court.

***Collins Condominium Ass'n, Inc. v. Riveiro*, 47 Fla. L. Weekly D1741 (Fla. 3d DCA Aug. 17, 2022).**

The Appellant, Collins Condominium Association, Inc. ("Collins"), was the defendant below and appealed a final judgment and an entitlement fee order awarding prevailing party attorney's fee to the Appellee, Fernando Riveiro ("Riveiro"). Collins argued on appeal that because the complaint was voluntarily dismissed by Riveiro, it was actually the prevailing party and should be awarded prevailing party attorney's fees. Although the Third District Court of Appeal generally agreed that "a plaintiff's voluntary dismissal of a complaint normally will render a defendant the 'prevailing party' for the purposes of attorney's fee entitlement," the court found that the general rule was inapplicable in this case because Collins's actions lead to Riveiro's voluntary dismissal.

In the present case, Riveiro filed a complaint that sought to enjoin Collins from denying Riveiro's rightful request to install a safety barrier around the perimeter of his porch. Collins then installed alarms on the sliding glass doors of Riveiro's unit and Riveiro subsequently voluntarily dismissed the complaint. The trial court concluded that because Riveiro received the relief sought, and Collins's actions essentially mooted the litigation, Riveiro had substantially prevailed in litigation. The District Court found that the trial court did not abuse its discretion, thus affirming the lower court's fee order.

The trial court erred in granting summary judgment in favor of Appellee because a rational trier of fact could find against Waters Mark upon the presentation of Appellant's evidence.

***Brevard Cnty. v. Waters Mark Dev. Enters., LC*, 47 Fla. L. Weekly D1863 (Fla. 5th DCA Sept. 9, 2022).**

This case is regarding Appellant's, Brevard County, Florida ("County"), appeal of a summary judgment ruling in favor of Appellee, Waters Mark Development Enterprises, LC ("Waters Mark"). In 2006, Waters Mark purchased land in Brevard County ("Property") with the intent to develop a residential subdivision on 97 acres of the Property. The 97 acres would contain 90 residential units, which was permitted by the comprehensive future land use plan at the time. A year later, after failing to demonstrate that the development would not affect the surrounding wetlands, Waters Mark abandoned its first attempt to develop the Property.

Some years later, the County adopted Ordinance 09-21, which amended the comprehensive plan to allow one residence per 2.5 acres. Ordinance 09-21 affected Waters Mark's Property. About three years after Ordinance 09-21 was adopted, Waters Mark applied with the County to develop the Property with a residential subdivision consisting of 84 units on 97 acres of the Property. In response, the County sent Waters Mark a letter with several comments, including criticism of Waters Mark's proposed plan exceeding the allowable density according to the existing comprehensive plan. Instead of responding to the County's comments, Waters Mark sent pre-suit notice to the County. The notice claimed that the new density requirements placed an undue burden on an existing use of the Property in violation of the Bert Harris Act, also known as the Private Property Rights Protection Act.

Waters Mark filed its complaint and the County responded, in part, "that regardless of the residential density allowed, Waters Mark could not have developed its desired residential subdivision." Although this issue was the trial court's primary focus, it did not acknowledge the County's position in its order granting Waters Mark's motion for summary judgment.

The Fifth District Court of Appeal applied the federal summary judgment standard as adopted by the Florida Supreme Court in Florida Rule of Civil Procedure 1.510. The order granting summary judgment was reviewed de novo.

In its motion for summary judgment, Waters Mark's argument focused on the Bert Harris Act. The Bert Harris Act aims to provide compensation for landowners whose property has been affected by a governmental action but does not qualify as a taking of that property.[1] "To prevail under the Act, a property owner must prove that 'a specific action of a governmental entity has inordinately burdened an existing use of real property or a vested right to a specific use of real property.' Fla. Stat. § 70.001(2), (2012)." An "existing use" is a reasonably foreseeable use of land which is suitable for the subject property. However, the District Court noted that "a change in the land use which impacts an 'existing use' does not necessarily equal an 'inordinate burden.'"[2] An "inordinate burden" is defined by the Bert Harris Act as an action that has "limited the use of real property such that the property owner is permanently unable to attain the reasonable investment-backed expectation for the existing use of the real property."[3] Further, if the land cannot be developed for other reasons, the investment-backed expectation to develop the land is unreasonable.

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In the present case, the District Court found that the trial court erred in granting Waters Mark's motion for summary judgment because the County "came forward with sufficient evidence that Waters Mark's proposed development faced regulatory barriers, unrelated to the application of the Ordinance, which created a genuine issue of material fact as to whether the development could proceed as planned." The District Court reasoned that after reviewing the County's evidence, a rational trier of fact could find against Waters Mark on the issue of inordinate burden and liability under the Bert Harris Act. The District Court pointed out that the County's letter outlined multiple problems that Waters Mark failed to address before filing its claim against the County and noted that there could be "a genuine dispute of material fact as to whether other regulatory barriers, apart from the new density requirements, prevented the Property from being developed as intended." The District Court reversed the trial court's order and remanded the case for further proceedings.

The trial court erred in awarding Appellee the right to possess a doublewide trailer on the foreclosed property purchased by Appellant.

***Echo River Sanctuary, LLC v. 21st Mortgage Corp.*, 47 Fla. L. Weekly D1887 (Fla. 1st DCA Sept. 14, 2022).**

This case came to the First District Court of Appeal on a Motion for Rehearing/Rehearing En Banc. The District Court denied the motion for rehearing, rehearing en banc, and certification, but substituted its original opinion with a new opinion.

First Guaranty Bank and Trust Company of Jacksonville ("First Guaranty") held a mortgage on Curtis and Meri Harrell's 160-acre parcel of land in Live Oak. The mortgage included an after-acquired property clause, which encumbered the land and future fixtures and improvements, such as the Harrells' singlewide trailer on the property. The Harrells defaulted on their mortgage with First Guaranty, and First Guaranty initiated foreclosure proceedings in November of 2010. In November of 2011, during the foreclosure process, the Harrells purchased a doublewide mobile home to use as their new residence on the 160-acre lot. The purchase of the doublewide was financed with a loan from 21st Mortgage. The Harrells granted 21st Mortgage a security interest in the mobile home. Mr. Harrell filed a Chapter 7 bankruptcy petition in December of 2011, but the bankruptcy case was discharged and dismissed in June of 2014 after Mr. Harrell breached the terms of his settlement agreement.

First Guaranty's mortgage passed to CenterState Bank of Florida ("CenterState"). In December of 2017, a final judgment of foreclosure was entered and CenterState became the owner of the 160 acres. Echo River Sanctuary, LLC ("Echo River") then bought the property from CenterState in February of 2018. The Harrells defaulted on their mobile home loan from 21st Mortgage. After 21st Mortgage filed a replevin action to repossess the mobile home, Echo River asserted ownership of the mobile home, claiming that they are the owner of the mobile home because it is a fixture to the land. When 21st Mortgage amended its complaint to add a replevin claim against Echo River, "Echo River asserted that 21st Mortgage never perfected its mobile home lien and that 21st Mortgage acted with unclean hands in Mr. Harrell's bankruptcy case" when it misrepresented the value and equity of the doublewide trailer. Although the trial court originally granted summary judgment in favor of 21st Mortgage, the District Court reversed the summary judgment, "finding that there was a genuine issue of material fact as to whether Echo River was injured by 21st Mortgage's purported misconduct in the bankruptcy proceeding" and Echo River's alleged injury.

At the trial following the reversal from the District Court, a staff attorney for 21st Mortgage testified that 21st Mortgage had not perfected its security interest in the mobile home when the bankruptcy was filed in December of 2011. The witness further testified that 21st Mortgage did not notify the bankruptcy court that it had attempted to perfect its security interest on January 4, 2012, as reflected in two certificates of titles issued by the Department of Highway Safety and Motor Vehicles, after the bankruptcy was filed. Echo River's managing member testified that he went to the property prior to its acquisition and noted that the mobile home "bore a permanent real property sticker and had no license plate. The mobile home was affixed to the ground and had no wheels. It was connected to a septic system and utilities." Further, Suwanee County Tax Collector records showed that the home was classified as real property. CenterState would not issue a title warranty on the doublewide trailer but agreed to grant Echo River any rights it had in the mobile home.

The trial court subsequently entered judgment in favor of 21st Mortgage, and this appeal followed. The District Court reviewed the trial court's decision de novo.

Mr. Harrell filed a bankruptcy petition on December 11, 2011, which triggered "an automatic stay of all proceedings against a debtor effective the date the petition is filed, and actions taken in violation of the stay are void even if there is no actual notice of the stay."[4] The stay includes " any act to create, perfect, or enforce any lien against property of the estate."[5] The District Court found that because 21st Mortgage recorded the lien to perfect its interest on January 4, 2012, it could not enforce its lien on the mobile home against Echo River. Further, the District Court recognized that the after-acquired property clause contained in the mortgage is superior to an unperfected security interest in that same property. Because of the perceived permanence of the doublewide trailer and it being declared as the Harrells' homestead, it was considered a

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fixture to the property. Thus, the trial court erred in ruling that 21st Mortgage had a possessory interest that was superior to Echo River's interest in the doublewide trailer. Ultimately, the District Court remanded the case to the trial court for further proceedings consistent with its opinion.



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Endnotes

1 Fla. Stat. § 70.001(1), (2012).

2 *Karenza Apartments, LLP v. City of Miami*, 47 Fla. L. Weekly D1497, D1498 (Fla. 3d DCA July 13, 2022).

3 Fla. Stat. § 70.001(3)(e)1., (2012).

4 *Personalized Air Conditioning, Inc. v. C.M. Sys. of Pinellas Cnty. Inc.*, 522 So. 2d 465, 466 (Fla. 4th DCA 1988).

5 11 U.S.C. § 362(a)(4).

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