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

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By John Moran, Esq., Section Chair 2024-2025
The Magician's Mindset - Seeing Beyond the Obvious

At our recent RPPTL Section meeting in Amelia Island, we were treated to a captivating performance by Kostya Kimlat, known as the "Business Magician." I've been a fan of magic since childhood, and I recall being mesmerized watching David Copperfield make the Statue of Liberty disappear on television in 1983. Years later, I worked behind the counter at a magic shop and even performed at birthday parties with my pet dove, Pegasus. It's been exciting to see magic make a comeback in recent years with shows like Penn and Teller's "Fool Us" and Justin Willman's "Magic for Humans." Although I've had a lifelong appreciation for the art, as I watched Kostya Kimlat masterfully direct attention and create moments of wonder, I realized that his craft offers valuable lessons for us as legal professionals and RPPTL Section members. Indeed, Kimlat himself speaks to business audiences about the psychology behind magic's most powerful principles and teaches them to "Think Like a Magician."

Magic, at its core, is about perception and misdirection. The magician succeeds by understanding how the human mind processes information and by skillfully guiding our attention. In many ways, this mirrors what we do as attorneys, where we analyze complex situations, identify crucial details others might overlook, and present information strategically to illuminate the best path forward for our clients. Just as the audience experiences wonder in a magic performance when reality defies expectations, we too understand that legal matters are rarely as straightforward as they initially appear.

Dr. Peter Lamont, a Professor of Psychology at the University of Edinburgh, explores this concept in his book "Radical Thinking: How to See the Bigger Picture." Lamont, a former professional magician, delves deeply into the limitations of human observation and interpretation, and argues that our perception of the world is inherently constrained by a "limited window" through which we view our surroundings. This window is shaped by what we notice and how we interpret these observations, which are heavily influenced by our expectations and the context in which we find ourselves. Lamont illustrates this concept by drawing parallels to the fictional detective Sherlock Holmes, who is known for his extraordinary powers of observation, often pointing out details that others fail to notice. Sherlock Holmes famously remarked, "You see but you do not observe." Lamont uses this example to highlight a critical distinction: seeing versus observing. While we may see many things in our environment, we often fail to observe them in a meaningful way. This failure is not a flaw but a natural limitation of human cognition.

Lamont emphasizes that our brains are not designed to notice everything. Instead, we filter out what seems irrelevant and focus on what appears to be important in any given moment. This selective attention is a survival mechanism, allowing us to navigate a complex world without being overwhelmed by sensory information. However, it also means that we miss a lot of what is happening around us. For instance, Lamont points out that we might read a sentence without noticing the number of words it contains, simply because that detail seems irrelevant to our understanding of the text. Lamont argues that recognizing our cognitive limitations is crucial for seeing the bigger picture.

This is where the "Magician's Mindset" comes into play. Magicians excel at exploiting our natural tendencies to focus on what seems relevant while missing what's actually happening. They direct our attention deliberately, showing us this so we do not notice that. Just as magicians use misdirection to control what their audience notices, professionals must be aware of how their focus and assumptions shape their understanding of complex situations. By acknowledging that we cannot observe everything and that our interpretations are subjective, we can become more open to alternative perspectives and solutions.

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Jeremy 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



E. FINLEN



M. HINDEN

Greetings readers! First, I would like to thank you all for giving us patience while we catch up with our back issues, we have had a change over with our publication support staff and we are actively working to be current within the next couple of months. Winter 2025 will be coming soon!

We have some great content for you this time around. First up, is a "Silence is not Golden" by Ashley Ivanov, Esq., discussing notarizing documents for people who don't speak English. As well as "I Want Your House" by William Slicker, Esq. about the new legislation regarding squatters. "The State of the Law of Technology Usage in Florida Community Associations" by Rebecca Newman Casamayor, Esq., and Aaron White, Esq., about electronic voting for community associations. Another great read is a deep dive into a Chief Counsel Advice Memorandum 202352018 about Grantor Trust Reimbursement Clauses by Daniel Tullidge, Esq., and lastly a little history about the Real Property, Probate, and Trust Law Section's beginnings from our History Committee by Michael P. Stafford, Esq.

Check out our website at www.rpptl.com for all of the great upcoming seminars that the section has been hosting. We have our annual meeting coming up in Orlando in June and as always, we have the Legislative Update and Attorney, Trust Officer Conference at The Breakers later this summer. Take care and we will see you soon!

Thanks,

Erin and Michelle

Chair's Column: The Magicians Mindset - Seeing Beyond the Obvious, from page 3

Moreover, the distinction between passive seeing and active observation is crucial in our profession. The practice of law demands that we develop the ability to see beyond our initial perceptions. For example, when reviewing a complex estate plan, drafting a real estate contract, or analyzing a trust document, we must consider not just what's in front of us, but what might be missing. We need to ask ourselves: What am I not seeing? What assumptions am I making? What alternative interpretations exist?

This is where the magic of collaboration within the RPPTL Section becomes invaluable. By questioning initial perceptions and seeking diverse perspectives and expertise, we can expand our window to the world and uncover more comprehensive and innovative solutions. Your insight on a probate issue may reveal something I missed; my experience with a particular property transaction might illuminate an angle you had not considered. Together, we see more than any of us could individually.

As we navigate our professional responsibilities, I encourage each of us to adopt elements of the Magician's Mindset:

Question your initial perceptions. The first way you interpret a situation or document may not be the only or best way.

Seek alternative perspectives. Consult with colleagues, explore different viewpoints, and consider how various stakeholders might view the same issue.

Direct your attention deliberately. Choose consciously where to focus your analytical energy rather than allowing yourself to be led by what seems immediately relevant.

Embrace the power of collaboration. Engage actively with fellow RPPTL Section members, sharing insights and learning from their expertise.

The value of "seeing the bigger picture" cannot be overstated in our profession. It allows us to provide more comprehensive counsel, develop more creative solutions, and better serve our clients and communities. In this spirit, I invite all of us to continue supporting one another in expanding our perspectives and challenging our assumptions. The real magic happens not in what we initially see, but in what we discover through more deliberate observation.

The Florida Notary Statute

Silence Is Not Golden

By Ashley Ivanov, Florida, Esq., The Law Office of Ashley Ivanov, P.A., Lithia Florida



The plain language of a statute ideally should be specific and clear enough to demonstrate what is proscribed versus allowed conduct. Unfortunately, not all statutes fall into this category.

Last year this author had a potential situation about notarizing a document for a person who did not speak English. Anticipating the difficulty of the situation, this author checked Florida law for guidance, and confirmed Fla. Stat. § 117.107(6) (the "Statute") states that "[a] notary public may not take the acknowledgement of a person who does not speak or understand the English language, unless the nature and effect of the instrument to be notarized is translated into a language which the person does understand."[1]

While the Statute may seem straightforward at first glance, a closer look demonstrates that its silence is not golden as to multiple issues, a few of which are mentioned here. First, the Statute is silent as to whether a notary public may use a translator/interpreter to translate the document for the signatory. The Statute's use of the term "translated" refers to the written instrument to be notarized but does not expressly state whether the notary public may use a translator while performing the notarial act. Second, the Statute is silent as to "oath" thereby leading this author to question what the permitted process is for a notary public taking the oath of a person who does not speak or understand the English language.

Not finding the plain language of the Statute to give guidance, this author contacted the National Notary Association ("NNA"). The NNA informed her that a translator/interpreter is not allowed under the Statute and that a notary public who speaks the same language as the person whose acknowledgement is to be taken must be used.

The NNA publishes a Notary Public Code of Professional Responsibility (the "Code of Conduct"), available on the NNA website.[2] The Code of Conduct provides general rules of responsible conduct for notary publics to use across the United States. Guiding Principle III (III-C-4 Direct Communication Essential)[3] from the Code of Conduct states that

> [t]he Notary shall not perform a notarial act if the principal or witness identifying the principal, if any, cannot directly communicate with the Notary in the same language, regardless of the presence of a third-party interpreter or translator, unless authorized by law.[4]

Thus, the NNA's position is that the Statute does not allow a notary public to utilize a translator or interpreter because such is not authorized under the Statute.

Since a translator is not permitted under the Statute according to the NNA, this author decided to decline the notarizations for the reasons listed above, and as it turns out the author did not ultimately notarize any documents for the person. Nevertheless, it made the author aware of the need for specificity and clarity in the Statute. There may be Florida notary publics who are unaware of the NNA's Code of Conduct and may believe that a translator may be used, since the Statute does not expressly prohibit the use of a translator, which raises the question of whether the Statute is vague.

The Florida Supreme Court laid out a test for determining if a statute is vague in *State v. Hamilton,*[5] which stated that "[t]he accepted test for vagueness is whether the statute is specific and clear enough to put persons of common intelligence and understanding on notice of the proscribed conduct."[6]

If a notary's use of a translator under the Statute when performing the notarial act is the proscribed conduct, which according to the NNA's Code of Conduct is prohibited conduct as not being authorized by law, then is the Statute specific and clear enough to a person of common intelligence and understanding that a notary public may not use a translator when performing the notarial act?

If the answer to the preceding question is no, then the Statute should be amended to be made specific and clear as to the proscribed conduct, and to go a step further, the Statute should also be amended to be specific and clear as to what conduct is allowed. For example, the amended law could expressly state that a notary public may communicate indirectly with the individual for whom the notarial act is being done through the use of a translator who will communicate directly with the notary public and the individual in languages understandable to the translator.[7] The amended law could also state that a notary public may communicate directly with the individual for whom the notary public is performing the notarial act in a language understandable to both the individual and notary public; after all, this is what the NNA considers allowable under the Statute and expressly stating such in the Statute is important for clarity.[8]

Additional questions may also need to be addressed to not only provide clarity in the Statute, but specificity as well. Some of these questions include the following:

Should there be qualification requirements for the translator? If so, what qualifications should be required? Does the translator need to be a natural person? With the rising use of Artificial Intelligence and online translation platforms, it is important to be specific and clear in the Statute as to whether a natural person is required. Should there be a requirement for the notary public to put the translator under oath prior to the translator performing the translation for the notarial act? Should there be liability protections, expressly stated in the Statute, protecting notary publics from liability in matters involving errors in the translator's interpretation? How should the notary public's use of a translator be documented (in the notarial certificate and/or in the notary's record book) and should there be a 10-year record retention requirement for the notary public, as required under the Statute (For example, "[a] notary public must maintain the proof of direction and authorization to sign on behalf of the person with a disability for 10 years from the date of the notarial act."[9])? Should the law be amended to include "oath" as well? For example, the Statute includes "oath" in expressly prohibiting a notary public from taking the acknowledgement or oath of a person whom the notary public actually knows to have been adjudicated mentally incapacitated by a court of competent jurisdiction.[10] Further issues to be considered when amending the Statute include, for example, addressing translations for the deaf and blind.

There are at least two states in the United States that have laws that expressly allow the notary public to use a translator:

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"Do you speak Spanish?"

“No habla español”

"Parlez-vous français?"

“No anglais”

Parle anglais



Arizona and Colorado. The Arizona statute is brief while the Colorado statute is more detailed, addressing liability protection for a notary public when there are errors in the translation, etc. Both states' laws on this issue are important for guidance as to amending the statute to make it specific and clear.

Notary publics and legal professionals need guidance and clarity now, especially as the number of foreign-speaking individuals continues to increase in the State of Florida. According to the United States Census Bureau population characteristics for Florida, 21.1 percent of the Florida population consists of foreign-born persons.[11] There are only three other states in the United States that have higher foreign born persons percentages: California, New Jersey, and New York.[12] Florida has, at least, 29.9 percent of persons age five and older who speak a language other than English at home.[13] Legal professionals, notary publics, and those in the banking and title-related industries will likely experience, at some point in time, a request to notarize an instrument for an individual who does not speak or understand the English language.

A future litigated case should not be the catalyst for amending the Statute. Silence in a statute is not golden for those seeking clarity and specificity.


A. IVANOV

Ashley Ivanov *was admitted to practice law in 2010 in Maryland and was admitted in 2015 to practice law in Florida. Ashley is the owner of her law practice, The Law Office of Ashley Ivanov, P.A. in Hillsborough County, Florida. Ashley focuses her practice on estate planning, probate, and guardian advocacy. She enjoys helping her clients plan for the future, save costs, and rest with peace of mind. Servant leadership is important to Ashley. She is a co-chair of the Hillsborough County Bar Association's Community Services Committee, member of the Fishhawk-Riverview Rotary, and volunteers with her family's church.*

Endnotes

1 Fla. Stat. § 117.107(6) (2024).

2 www.nationalnotary.org.

3 NNA Code of Conduct Guiding Principle III-C-4 Direct Communication Essential, page 23 of the Code of Conduct, available at https://www.nationalnotary.org/knowledge-center/news/notary-public-code-of-professional-responsibility.

4 Notary Public Code of Professional Responsibility (2020), pages 23-24, published by the National Notary Association, available at https://www.nationalnotary.org/knowledge-center/news/notary-public-code-of-professional-responsibility.

5 *State v. Hamilton*, 388 So.2d 561, 562 (Fla. 1980).

6 *Hamilton*, 388 So.2d at 562 (citing to *Sandstrom v. Leader*, 370 So.2d 3 (Fla. 1979).

7 See AZ Statute 41-253 (F)(2) (Requirements for certain notarial acts) at https://www.azleg.gov/ars/41/00253.htm.

8 *Id.* at (F)(1).

9 Fla. Stat. § 117.05(14)(d) (2024).

10 See Fla. Stat. § 117.107(4) (2024).

11 U.S. Census Bureau QuickFacts for Florida, American Community Survey and Puerto Rico Community Survey, 5-Year Estimates, www.census.gov.

12 *Id.* (Foreign born persons, percent 2018-2022, chart) at www.census.gov.

13 *Id.* (Language other than English spoken at home, percent of persons age 5 years+, 2018-2022, chart) at www.census.gov.



TRADING VACANT SPACES:

Private Tenant Financial Uncertainty or State Tenant Sovereign Immunity?

By Arthur J. Menor, Esq., Shutts & Bowen LLP, West Palm Beach, Florida [1]

Fla. Stat. § 255.2502 states in part: "No executive branch department or agency, public officer or employee shall enter into any contract on behalf of the state, which contract binds both the state or its executive agencies to the lease, rental, lease-purchase, purchase, or sale-leaseback of office space, real property or improvements to real property for a period in excess of one fiscal year, including any and all renewal periods and including all leases which constitute a series of leases unless the following statement is included in the contract: 'The State of Florida's performance and obligation to pay under this contract is contingent upon an annual appropriation by the Legislature.'"[2] This statute can lead to unforeseen consequences and can jeopardize the enforceability of a lease between a landlord and a state agency tenant.

Leasing commercial property to a state agency may seem like a financially secure transaction on its surface, given the financial wherewithal of the state, but the operation of Fla. Stat. § 255.2502, can lead to unforeseen consequences and can put the enforceability of the lease in jeopardy. The "contingent upon an annual appropriation" provision in this Florida Statute effectively makes a seemingly long-term lease a year-to-year lease. Given the typical high upfront costs paid by a landlord to obtain a commercial lease (brokerage commissions, free rent, tenant improvement allowance or landlord work, or both), a period significantly longer than one year is needed to recoup these costs. Sometimes landlords and state agencies try to get creative and draft around the "contingent upon an annual appropriation" provision; however, as set forth below, there is great risk in doing so. The result? Commercial Lease Law Insider says, "Government agencies might be able to walk away from their financial obligations under the lease. And because future expenditures are determined by politics, your lease agreement becomes subject to unpredictable political factors."[3]

For an illustration of this issue in action, look no further than the First DCA's opinion in *Tallahassee Corp. Ctr., LLC v. Fla. Dep't of Mgmt. Servs*.[4] In *Tallahassee Corp. Ctr., LLC*, state agencies leased space in the landlord's Tallahassee office building. The tenants initially occupied the space but later moved out and stopped paying rent.

The lease did include the "contingent upon an annual appropriation" language from Fla. Stat. § 255.2502 quoted above. It was undisputed that the legislature did not defund the lease obligations, but the parties had included an addendum to the lease that stated:

> In the event an annual appropriation is not made by the Legislature as contemplated in the first sentence of this Article, Lessee, on 30 days' written notice to Lessor, may defer payment of rent on such portion of the premises as to which an annual appropriation is not made by the Legislature (the "Defunded Space"). All rent so deferred and not paid currently (the "Deferred Rent") shall accrue and bear interest at the Prime Rate from time to time plus 400 basis points.[5]

The state argued that the inclusion of this addendum rendered the lease null and void, based on another portion of Fla. Stat. § 255.2502, which says that the "contingent upon an annual appropriation" statement "shall not be amended, supplemented, or waived… Any contract in violation of this section shall be null and void."[6] Both the trial and appellate courts agreed with the state's position and ruled that the lease was null and void.

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The court went on to say that, "[t]he State's sovereign immunity protects it from liability under a void contract."[7] The court was not convinced by equitable arguments either, stating, "[i]n another context, not involving State tenants and not directly controlled by statute, those [equitable] arguments might prevail. But it remains true and undisputed that the leases at issue plainly violated section 255.2502."[8]

Clearly, leasing to state agency tenants did not turn out to be the safe bet that the Tallahassee Corporate Center landlord had envisioned. The attempt to draft around Fla. Stat. § 255.2502 failed spectacularly.

Although beyond the scope of this article, similar considerations apply in leases with the federal government or with the local Florida governments. The specifics may vary, but in general, leases with all forms of governmental entities are subject to annual appropriations. As stated in the Commercial Lease Law Insider article, "[g]overnment agencies need money from the legislature, along with permission to spend the funding they're appropriated."[9]

The savvy landlord must carefully weigh the benefits and drawbacks of contracting with a governmental tenant, especially when considering the usual need to enter into a long-term lease. Because of the upfront costs paid by a landlord in connection with a commercial lease, including leasing broker commissions to both the landlord's and tenant's brokers, and commonly negotiated landlord concessions like tenant improvement allowances, free rent, and the cost of landlord work, the landlord must, before ever receiving a rent payment, pay out of pocket amounts, which are often in excess of one year's rent. Therefore, landlords need to enter into a lease for multiple years (generally 10 years or more) to recoup these upfront costs by amortizing them into a long-term rental income stream. However, when contracting with a governmental tenant, the landlord is essentially entering into a year-to-year lease contingent upon the legislative body's passing of the budget associated with the tenant agency's rental obligations. Accordingly, landlords may feel more inclined to forego the added security of a state agency tenant and instead lease their space to a private commercial tenant, even if the private sector tenant's credit is inferior to that of the government entity tenant.



A. MENOR

Arthur J. Menor *is a Partner in the West Palm Beach office of Shutts & Bowen LLP. He earned his undergraduate and J.D. degrees from the University of Florida. Mr. Menor is a Florida Bar Board Certified Real Estate Lawyer and a fellow in the American College of Real Estate Lawyers. He is a current Vice Chair of the Legislation Committee and is a past Chair of the Real Estate Leasing, Commercial Real Estate, and Real Property Problems Study Committees of the Section.*

Endnotes

1 The author acknowledges the assistance provided by Anne Romero and Max Razavi.

2 Fla. Stat. §255.2502 (2024).

3 *Lease Debt Liability Clauses May Not Bind Government Tenants*, Commercial Lease Law Insider 6 (Jan. 2023).

4 *Tallahassee Corp. Ctr., LLC v. Fla. Dep't of Mgmt. Servs.*, 351 So. 3d 661, 661 (Fla. 1st DCA 2022).

5 *Id.*, at 662.

6 Fla. Stat. §255.2502 (2024).

7 *Tallahassee Corp. Ctr., LLC*, 351 So. 3d at 662.

8 *Id.*

9 *Lease Debt Liability Clauses May Not Bind Government Tenants*, Commercial Lease Law Insider 6 (Jan. 2023).



I Want YOUR House



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

Historically, landowners were expected to put their property to productive use. Neglected or abandoned land could become a burden not only for the owner but also for the government and the neighboring property owners. To address this issue, the concept of adverse possession emerged as a solution. The earliest codification of this concept can be traced back to the Code of Hammurabi around 2000 B.C.[1]

Adverse possession as we understand it today in the United States has its roots in English common law. In 1275, the Statute of Westminster established an 86-year statute of limitations for adverse possession claims. By 1623, this limitation was shortened to 20 years, and in 1874, it was further reduced to just 12 years.[2]

The first known instance of legally proscribed adverse possession in the United States occurred through a statute enacted in North Carolina in 1715.[3] Many early American statutes mirrored the 20-year period established by English common law.[4]

As the United States expanded westward, adverse possession played a role in taking land from Native Americans and Mexicans. While the practice served a purpose in the past, the term "adverse possession" has evolved over time.[5] At some point, "adverse possession" became associated with "squatting" — the act of occupying property without any legal claim or title to such property.

Squatting has grown into a significant issue across the country. For example, in Atlanta, Georgia, over 1,200 homes have been taken over by squatters. In one case, squatters even opened an illegal strip club in a house they had occupied.[6] In New York, an owner was arrested for changing the locks on squatters, while a woman was tragically murdered by teen squatters in her mother's condo.[7] In California, squatters move into homes listed for sale or book a stay at vacation rentals and then refuse to leave.[8] One man in California has made a business of squatting on squatters in order to drive them out.[9] Additionally, social media platforms like TikTok now have videos advising illegal immigrants on how to invoke squatter rights.[10]

In response to the growing problem of squatting, several states have enacted laws to facilitate the eviction of squatters. States like Alabama, Georgia, New York, and Florida have passed legislation addressing the issue.[11]

Florida was the first state to introduce legislation aimed at making it easier to remove squatters. As of July 1, 2024, property owners in Florida can request law enforcement to remove a squatter immediately under the following conditions:

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(1) The individual has unlawfully entered and remains on the property;

(2) The individual has been directed to leave the property by the owner; and

(3) The individual is not a current or former tenant in a legal dispute.[12]

However, if the squatter was permitted by the owner to enter upon the property — for example, as a relative or a partner of a tenant — the new statute does not apply, and the owner must file a complaint for unlawful detainer. If the individual claims ownership of the property, the owner would need to initiate an ejectment action.

Hopefully, this recent legislation will help by reducing the time and expenses involved with removing the squatter from the owner's property. As squatting continues to be a growing issue, more states are likely to follow Florida's lead by enacting similar legislation.



W. SLICKER

William Slicker, Esq. *has built his practice on a commitment to a high level of personal service and attention over the past 35 years in the Tampa Bay area. His practice areas include Bankruptcy Law, Family and Divorce Law, Estate Planning and Administration and Guardianship.*

Endnotes

1 Hiatt, Jennifer, Adverse to Change: A Modern Look at Adverse Possession, Center for Rural Affairs, January, 2019.

2 Hiatt, *supra*

3 Hiatt, *supra*

4 Hiatt, *supra*

5 McMacon, Ryan, Its Time to End Squatters Rights, Mieses Wire, March 29, 2024.

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State of the Law on Technology Usage in Florida Community Associations

By Rebecca Newman Casamayor, Esq., Haber Law, LLP, Miami, Florida, and Aaron A. White, Esq., Dunlap and Shipman, Santa Rosa Beach, Florida

It is no secret that many aspects of our society have leaned into the idea of connecting "remotely" or "virtually" rather than in person, even though social distancing concerns have largely subsided after the COVID-19 pandemic. Community associations are no exception, and recent statutory changes continue to reflect that. This article will cover some of the common uses and emerging trends of technology in the community association environment along with some potential legislative updates to allow community associations to further benefit from available technology.

Electronic Voting

In 2015, electronic voting was authorized with the passage of Fla. Stat. § 720.317 (homeowners' associations); and Fla. Stat. § 718.128 and Fla. Admin. Code R. 61B-23-00211 (condominium associations). Since that time, many community associations throughout the State of Florida have taken advantage of these statutes to increase owner participation in voting.

While electronic voting is available to all homeowners' associations and condominium associations, the board of directors of the applicable association must pass a resolution adopting electronic voting before the process can be used.[1] The meeting at which the resolution is adopted must be noticed at least 14 days in advance by mail (or email to those consenting to electronic notice) and posted on property.[2] Neither statute dictates that a particular software be used, but whichever software is chosen must meet certain requirements, which include: 1) the ability to authenticate the unit owner's identity; 2) the ability to authenticate the validity of each electronic vote to ensure that the vote is not altered in transit; and 3) the ability to transmit a receipt from the online voting system to each unit owner who casts an electronic vote.[3] Once electronic voting is authorized and appropriate software is selected, the owners must opt in in writing.[4]

While many associations would prefer that all owners vote in this manner once adopted, it is important to remember that electronic voting is optional. For those that have not opted in, voting should be handled in the same manner as previously handled. Board members often do not understand the distinction between electronic voting and electronic notice. A member can consent to electronic notice without opting in to electronic voting.[5] This is because the consent to electronic notice only relates to how the member receives his or her official notices and materials. For those that do not opt in, they should receive their information in the manner they have elected to, either by mail or email, with condominium balloting being sent by hard copy to all.

Last year's legislative session (see HB 1021 and HB 1203) resulted in some relatively minor changes to the electronic voting statutes that should be considered. The statutes governing electronic voting in condominiums and homeowners' associations were amended in the last legislative session to add that consent to electronic voting can also be provided "electronically" ("in writing" was the sole method in the prior version[6]). In the condominium context, Fla. Stat. § 718.128 was also amended to include the following new language, "If the board authorizes online voting, the board must honor a unit owner's request to vote electronically at all subsequent elections, unless such unit owner opts out of online voting."[7]

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Remote Meetings

The COVID 19 pandemic gave rise to the question many of us would hear hundreds of times - can we have a completely remote meeting? Guidance from the Florida Department of Business and Professional Regulation (DBPR) during the early days of the pandemic was that it would be acceptable (at least for condominiums) to exercise the emergency powers contained in Fla. Stat. § 718.1265, which included holding remote meetings.[8] Most community association practitioners advised homeowners' associations that they, too, could do so given the various restrictions on in-person gatherings that existed throughout the State. However, many communities became accustomed to these entirely remote meetings and desired to continue to conduct the meetings remotely even after the state of emergency was lifted, restrictions on gathering were removed, and life largely went back to normal.

This begs the question whether communities can continue entirely remote meetings, where not even a manager is on-site. Most practitioners now advise against this practice for both condominiums and homeowners' associations based upon review of the applicable statutes. For example, Fla. Stat. § 718.1112(2)(b)5 specifically provides that board and committee members may participate in meetings by telephone or video conferencing but a "speaker must be used so that the conversation of such members may be heard by the board or committee members attending in person as well as any unit owners present at a meeting." This clearly indicates that entirely remote meetings were not contemplated. Likewise, in the homeowners' association context, Fla. Stat. § 720.303(2)(a) also provides context indicating that remote only meetings are not allowed where it says a "meeting of the board must be held at a location that is accessible to a physically handicapped person who has a right to attend the meeting." Lastly, the inclusion of the right to hold remote meetings within the various emergency powers granted to associations pursuant to Flat. Stat. § 718.1265 and § 720.316 for condominiums and for homeowners' associations, respectively, further reinforces this point. As such, until the legislature takes action in this area, something the authors are hopeful will occur in the near future, entirely remote meetings should be avoided absent an event that justifies use of the association's emergency powers.

Recording Meetings

Fla. Stat. §§ 718.112(2)(c), 718.112(2)(d)(8), and 720.306(10) provide that owners have the right to record board and member meetings, subject to certain rules that may be placed by the association, or by the DBPR when it comes to condominiums.[9] As to condominiums, Fla. Admin. Code R. 61B-23.002(10) provides specific restrictions on the type of recording equipment that may be used, and also provides condominium associations with the ability to make rules regarding advance notice, assembly, placement, and use of equipment prior to and during the meeting. Finally, in addition to these statutory and administrative provisions, many associations have provisions in their bylaws allowing owners to record meetings subject to some rules and limitations.

In addition to owner rights to record meetings, the board or committee hosting the meeting may, but is not required, to record the meeting to ensure accuracy of the minutes.[10] Interestingly, Fla. Admin. Code R. 61B-23.002(7) adds another layer to this scenario by providing that audio and video recordings made by or at the direction of the board or

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committee shall be maintained as official records until the minutes of the meeting recorded are approved. Once the minutes have been approved, the recording may be discarded. It is important to note that if an owner requests access to the recording in the interim, after the meeting has been recorded, but before the minutes were approved and the recording discarded, the recording is accessible as an official record.[11]

Associations should be cognizant of how they implement practices involving recording of meetings. For instance, accusations of inconsistency or even bias in the management of records could arise if an association chooses to record some, but not all, meetings, or to selectively keep certain recordings after the minutes are approved and delete others. Therefore, to avoid potential disputes and ensure transparency and fairness, associations should ideally adhere to a consistent policy regarding whether they will record meetings and how they will treat that recording once the minutes are approved.

E-Signatures

Due to the COVID-19 pandemic, most businesses now have some level of remote operation, thereby increasing the demand for electronic signatures. The legal validity of electronic signatures is governed by state law, and most states, Florida included, have chosen to adopt the Uniform Electronic Transactions Act (UETA). Under the UETA, which was codified as Fla. Stat. Chapter 668, electronic signatures carry the same legal weight as their handwritten counterparts. Further, Fla. Stat. § 668.50(7)(b) states a contract's legal validity or enforceability cannot be denied solely on the grounds that an electronic record was employed in its creation.

Generally speaking, the practice employed when utilizing proxy voting involves the owner physically signing the proxy and returning it to the association via mail, e-mail, or hand delivery. However, with many owners traveling or even just unavailable due to busy schedules, the question arises of whether it is possible for proxies to be executed via platforms like DocuSign or similar e-signature tools. The answer is more complicated than one may think. Nothing in Chapters 718 or 720 specifically prohibits e-signatures for proxies, but there are multiple DBPR rulings prohibiting electronic signatures on recall ballots. In *Shores of Panama Resort Community Association, Inc., v. Unit Owners Voting for Recall*,[12] unit owners' signatures were filled out with a cursive font with the label "DocuSigned" above the signature, but the arbitrator declared the electronic signatures did not constitute a signature for the purposes of the ballot. The same conclusion, albeit with a different variation, was echoed in *The Palms of Destin Resort and Conference Center Condominium Association, Inc. v. Unit Owners Voting For Recall*.[13] While these decisions provide guidance as to the validity of electronic signatures on recall ballots, the question of whether e-signed proxies are permitted for community associations still remains in limbo. This is certainly an item ripe for some simple legislation to resolve the issue.

Remote online notarizations also introduce a new set of challenges. Previously, Florida law mandated that notaries, signers, and witnesses be in the same physical location during the execution of a document. However, under Fla. Stat. § 117.021, it is now permissible for "any document requiring notarization [to] be notarized electronically." This is not as straightforward as it sounds because to validate an electronic

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notarization, there are very detailed prerequisites. The notary must register with the Division of Corporations, undergo a training course, and enlist with a third-party provider that offers electronic notarization services.[14] Notaries in Florida who are physically present in the state are authorized to conduct notarizations online, irrespective of the location of the principal and witnesses.[15] However, when the notarial act necessitates the principal's presence before the notary, the notarization must occur "by means of audio-video communication".[16] Regardless of the physical location of the principal or any witnesses, the legitimacy of an online notarization is still governed by Florida law. In conclusion, while online notarizations offer greater flexibility, they also require adherence to specific procedures and regulations to ensure their validity.

Overview of Recent Legislative Changes Regarding Technology

Since 2017, Florida condominiums with more than 150 units have been required to maintain a website with a secure portal for residents to access association and community-specific documents.[17] Now, with the recent passing of House Bill 1021, condominium associations with only 25 units must do the same, dropping down from the previous threshold of 150 units.[18] This specific provision of House Bill 1021 becomes effective January 1, 2026.[19]

Similarly, pursuant to passed House Bill 1203, effective January 1, 2025, homeowners' associations with 100 or more parcels must post digital copies of certain official records on their websites or make those documents available through an application that can be downloaded on a mobile device.[20]

So, what must an association post on its website? Generally, the websites must have copies of the association's governing documents, contracts and agreements binding the association, meeting notices and agendas, budgets and financials, director certifications, etc.[21]

Another recent legislative update pertains to owner access to condominium official records. Pursuant to House Bill 1021, an association's obligation to provide access to official records may now be fulfilled if the records that are being requested are already provided on an association's website, or if such records available for download through an application on a mobile device.[22]

While many lament the continued expansion of the electronic age we are all practicing in, it is clearly here to stay. Learning to use it properly will greatly benefit our clients, and it also has many obvious benefits for the practitioner. We expect that technology in this space will continue to develop and are hopeful that legislation will continue to evolve to allow us all to make the most of it.


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Endnotes

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20 H.B. 1203 (2024).
21 The full list of documents required to be posted on the association's website can be found at Fla. Stat. §§ 718.111(12)(g) and 720.303(4)(b).
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GRANTOR TRUST REIMBURSEMENT CLAUSES: A Cause For Concern Following Chief Counsel Advice Memorandum 202352018

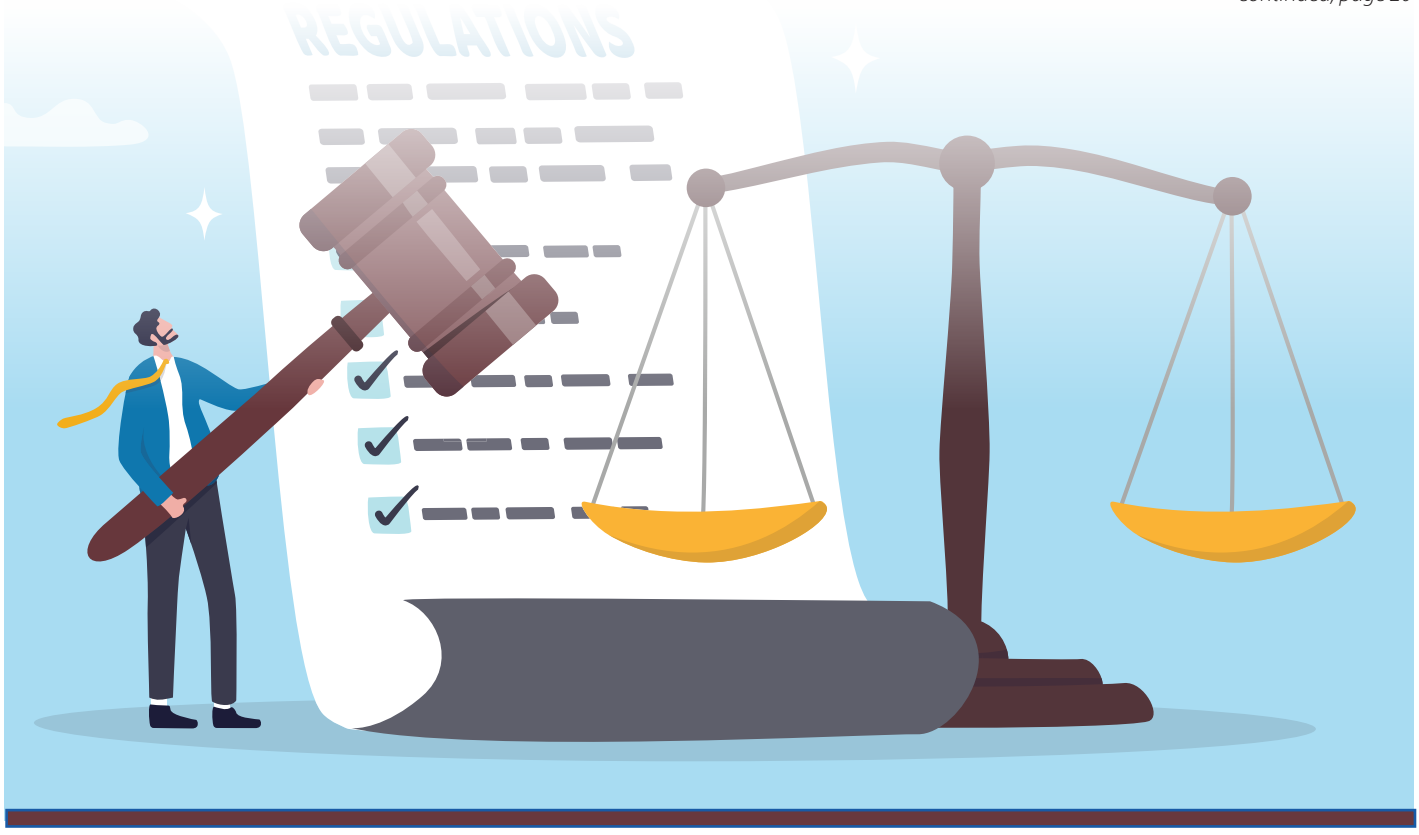
By Daniel L. Tullidge, Esq., Fergeson Skipper, P.A., Sarasota, Florida

On December 29, 2023, the Internal Revenue Service (the "Service") issued Chief Counsel Advice Memorandum 202352018 (the "CCA"). In less than four short pages, the Service raised more questions than it answered and cast a shadow of doubt upon the landscape of trust modification as it relates to grantor trusts. The alarm bells went off and the wild speculation, not unjustified, began. We know that grantor trusts have been in the crosshairs of the U.S. Department of Treasury Greenbook[1] for some years. This has led some to wonder whether this may be the first salvo in an all-out attack against grantor trusts. Given the recent political shift, the immediate concern has lessened, but this issue cannot be disregarded as the political landscape ebbs and flows.

The Grantor Trust Rules

Before reviewing the details of the CCA and its deviation from the Service's prior position, it is important to lay some groundwork. Sections 671 through 679 of the Internal Revenue Code of 1986, as amended (the "Code") are the governing provisions for so-called "grantor trusts" (a term not used in the Code), under which an individual, typically the person who created the trust, is treated as the owner of the trust for income tax purposes. The trust is in essence disregarded for income tax purposes and the income, deductions, and credits flow directly to the grantor. Revocable trusts fall within this category;[2] however, irrevocable trusts can also be grantor trusts if the grantor retains certain specified powers. As a common example, if the grantor of an irrevocable trust retains the power to reacquire trust assets for personal assets of equivalent value, often referred to as a swap power, the grantor will be the deemed owner for income tax purposes.[3]

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Congress enacted the grantor trust rules as a series of measures designed to prevent wealthy taxpayers from shifting income to beneficiaries in lower income tax brackets while maintaining a high level of control over the management of trust assets.[4] Now that income tax rates allocable to trusts have increased to essentially match those of a wealthy grantor, the intentional triggering of the grantor trust rules has become a common staple of transfer tax planning. Allowing the grantor to bear income tax associated with assets that were gifted to an irrevocable trust amplifies the wealth transfer. The gifted assets can continue to grow, free of any income tax burden that would otherwise diminish the trust, while the payment of income tax by the grantor directly from the grantor's personal assets is not considered an additional taxable gift.[5]

While this technique is quite effectively and commonly employed, the income tax burden to the grantor can sometimes become unmanageable from a cash flow or other practical standpoint. There may be a particularly large recognition event in a given year or perhaps the planning as a whole has been too successful, such that the grantor's personal assets are not sufficient to support the grantor's lifestyle and the ongoing tax liability generated by the trust. Drafters have a solution for this known as a grantor trust reimbursement clause. Reimbursement clauses have permitted the trustee to distribute trust assets to the grantor in satisfaction of income tax liability incurred on behalf of the trust without creating adverse transfer tax consequences.

Grantor Trust Reimbursement Clauses

The touchstone for grantor trust reimbursement clauses is Revenue Ruling 2004-64. In that Revenue Ruling, the Service blessed these provisions subject to a few caveats.

If the trust includes a mandatory reimbursement clause, whereby the trustee is required to reimburse the grantor, then it runs afoul of Code Section 2036(a)(1) as the grantor "retained the right to have trust property expended in discharge of A's [the "grantor's"] legal obligation."[6] This would of course trigger inclusion of the trust assets in the grantor's gross estate for federal estate tax purposes and defeat the planning objective, which is to efficiently transfer wealth to the next generation.

Discretionary reimbursement clauses, by contrast, are acceptable provided: (1) the trustee is an independent trustee within the meaning of Code Section 672(c); (2) there is no understanding, express or implied, between the grantor and the trustee regarding the exercise of that discretion; (3) the grantor does not have the power to remove the trustee and name himself or herself as trustee; and (4) local law does not subject the trust assets to claims by the grantor's creditors.[7]

The Chief Counsel Advice Memorandum

The groundwork has been laid, and now we can turn to the Service's troubling upset of what many of us have considered standard fare. The facts of the CCA are relatively innocuous.

In Year 1, A creates an irrevocable trust for the benefit of A's Child and Child's descendants. The trustee is an independent trustee within the meaning of Code Section 672(c) and may, in the trustee's absolute discretion, distribute income and principal to or for the benefit of Child. Upon Child's death, the remaining trust assets are distributed to Child's descendants, per stirpes. A has retained an unspecified power, perhaps a swap power, causing A to be the deemed owner under Code Section 671. Neither the trust agreement nor state law permit the trustee to reimburse A for income tax liability attributable to inclusion of the trust's income in A's taxable income. In Year 2 the trustee seeks and obtains a judicial modification of the trust agreement, with the consent of Child (Child has no descendants in Year 2), to introduce a discretionary grantor trust reimbursement clause.

There does not seem to be anything amiss with the above set of facts. The reimbursement clause presumably complies with Revenue Ruling 2004-64. The only deviation is that the grantor trust reimbursement clause was introduced via judicial modification. However, the Service had previously approved this type of transaction in PLR 201647001 noting that modification of a trust to add a discretionary trustee power to reimburse the grantor for income tax burdens is administrative in nature and does not result in a change of beneficial interests.

The shock of the CCA was that the Service outright rejected the conclusions of PLR 201647001 as no longer reflective of the Service's position. According to the CCA, the introduction of the grantor trust reimbursement clause resulted in a change of beneficial interest and a gift had occurred. Child and Child's issue made a gift of a portion of their respective interests in the trust income and principal to A who acquired a beneficial interest in the trust. For good measure, the Service stated that its position would remain unchanged if the judicial modification had been accomplished solely by the trustee and passive "non-objection" on the part of the trust beneficiaries. In its analysis, the Service also distinguished Revenue Ruling 2004-64 as the hypotheticals approved in that ruling related to reimbursement clauses that were baked into the trust agreement from inception rather than introduced by subsequent modification.

As noted above, grantor trust reimbursement clauses have become standard fare in estate planning, and the introduction of these clauses to irrevocable trusts when they are not otherwise present is also common. Introduction of reimbursement clauses may be accomplished in any

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number of ways, including, judicial modification, non-judicial modification, decanting, the exercise of a power of appointment, or through the actions of a trust protector or some other third party with quasi-fiduciary authority over trust assets. The CCA has caused such a stir as it has introduced the proverbial "trap for the unwary" into any procedure seeking modification of an irrevocable trust.

Valuation Issues

One of the many troubling open-ended questions is valuation. If the beneficiaries have made a gift back to the grantor, how do we value it? The grantor has acquired the right to discretionary distributions of income and principal for tax reimbursement. Complexity is a generous label to apply to the process of valuing such an interest. Unascertainable would be more accurate. The grantor's newly acquired interest is discretionary by its nature. Whether the trustee will exercise that discretion in subsequent years and the extent to which it is exercised place wide limits on value. Some potential factors could include: (1) anticipated future income tax rates and brackets of the grantor; (2) the life expectancy of the grantor; and (3) the income producing character of trust assets and the likelihood that the trustee would sell or retain those assets in the future. While we have established principles for determining life expectancy, the other factors are highly speculative.

Assuming an appraiser would undertake the task and a value could be reasonably obtained and defended, how is that value allocated among the potential classes of beneficiaries? The facts of the CCA included a single beneficiary but most irrevocable trusts have a broader class of potential beneficiaries. The CCA does not address whether this would be limited to current permissible distributees of trust income and principal, a broader category such as the concept of qualified beneficiaries,[8] or potentially even remote and contingent beneficiaries.

The detailed mechanics of valuation were not addressed in the CCA. However, the Service did seem to anticipate our complaints as to valuation, noting rather severely that gift tax cannot be escaped on the basis that the value of the gift is difficult to calculate.

Perhaps more troubling, the memorandum cites Treasury Regulation Section 25.2511-1(e) providing that if the "interest is not susceptible of measurement on the basis of generally accepted valuation principles, the gift tax is applicable to the entire value of the property subject to the gift." That draconian citation hints to a result not dissimilar to the application of Code Section 2519 to a surviving spouse's disposition of their qualifying income interest, or part of a qualifying income interest, in a QTIP trust which triggers a taxable gift equal to the entire value of the trust. In other words, if the value cannot be determined, then the value assigned to the beneficiaries' gift is the entire value of the trust.

Applying The Logic To Other Scenarios

The CCA imposed a gift on introduction of a grantor trust reimbursement clause via judicial modification, but other scenarios could likewise result in a gift under the logic of the CCA. It is not uncommon to see provisions that allow a trust protector to introduce reimbursement powers. If the power is not present from inception, the trust agreement may expressly permit the trust protector to introduce that power in future tax years. Decanting is another popular technique to clean up the administrative provisions of a trust which may very well include introduction of grantor trust reimbursement clauses. Do these scenarios likewise result in a gift by the trust beneficiaries?

Decanting or modification by a trust protector can often be taken by the fiduciaries independently of the trust beneficiaries. As the action being taken is outside of the beneficiaries' control, it would seem difficult to suggest that a gift has occurred. While donative intent is not a perquisite for taxable gifts[9] there still must be some connection between the donor and donee. But as the CCA noted "non-objection" by the beneficiaries would not void the gift. This leads to a query as to the scope of "non-objection." Was notice of the proposed action required to be given to the beneficiaries? If the beneficiaries receive such a notice are they required to vigorously defend the proposed action in order to preserve their interests in the trust and prevent trust assets from flowing back to the grantor in satisfaction of income tax liability? It would seem excessive to require a bona fide dispute between the beneficiaries and the trustee in these scenarios in order to prevent application of the gift tax regime, but the CCA does not provide enough guidance to entirely foreclose the concern.

Stepping aside from speculative application, it is also worth noting the potentially absurd results that flow from the logic of the CCA. We know that payment of the income tax liability of the trust by the grantor is not a gift from the grantor to the beneficiaries per Revenue Ruling 2004-64. If that is not a gift, then how could the return of that benefit to the grantor be deemed a gift by the beneficiaries? Second, the retained powers that cause a trust to be considered a grantor trust are subject to release by the grantor. The grantor can release the power (e.g., swap power) which causes the trust to be responsible for the income tax liability. The release of a power would have the same economic impact on the beneficiaries as the introduction and subsequent exercise of a grantor trust reimbursement clause (i.e., the trust and the beneficiaries would bear the tax burden rather than the grantor), yet it would clearly not be a gift as it is completely independent of any action by the beneficiaries whether they object or otherwise and originates solely by the grantor's action. The

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only economic difference between the release of grantor trust powers and the introduction of a reimbursement clause is that the latter is potentially more beneficial to the beneficiaries. The release of grantor trust powers is a permanent solution, while the introduction of a reimbursement clause leaves open the possibility that the grantor will again pick up the income tax bill in future years. Perhaps the disconnect here flows from the CCA being issued in response to a specific and egregious situation, where we don't have all the background, rather than a careful attempt by the Service to upend the world of grantor trusts. Bad facts make bad law as the saying goes.[10]

Calmer Perspectives and Potential Safeguards

One view of the CCA, as noted in the introduction, is that the Service is chipping away at the world of grantor trusts. If it is not an outright attack, it may well lead to an environment of uncertainty where practitioners and taxpayers are overly cautious and unwilling to act. That may be the correct perspective. We have no special insight into the workings of the Internal Revenue Service. However, a calmer perspective, presented by Ron Aucutt,[11] raises the important point that Chief Counsel Advice Memorandums are not official precedent. Furthermore, these memorandums are often issued in response to a specific audit that is likely headed towards litigation. We do not know the background of the CCA apart from the sterile set of facts presented in the memorandum. There may be a backstory to which we are not privy. Again, bad facts tend to make bad law. It is quite possible that the tone and aggressive nature of the CCA was a strategic decision by the Service to support the strongest possible outcome in ongoing litigation and is not part of a broader strategy to deflate the use of grantor trusts.[12]

A potential safeguard is also available from the CCA itself. A very important factual point in the CCA was that grantor reimbursement was not permitted by the trust agreement nor state law. That would imply that if state law did permit reimbursement to the grantor then no gift would have occurred as the grantor already had the default right to reimbursement. There are currently six jurisdictions that allow for grantor trust reimbursement as a default power under their respective trust codes. Those are California,[13] Delaware,[14] Florida,[15] Indiana,[16] New Hampshire,[17] and New York.[18] If the trust in question has its situs or principal place of administration in one of those jurisdictions then that should be a distinguishing factor from the CCA. It is also a welcome relief to the drafter who did not include a reimbursement clause in the initial trust agreement.

If the trust in question is not governed and administered under the laws of one of the above jurisdictions could the situs be shifted to a friendly jurisdiction prior to the modification or default exercise of the power under the laws of the new situs? Perhaps. Typically, a shift in situs requires notice to be given to the beneficiaries.[19] If the beneficiaries do not vigorously object to the situs shift it may viewed as tantamount to "non-objection" or acquiescence in the arrangement that is sufficient to trigger a gift under the logic of the CCA.

The clear answers we would like are not here yet, but thankfully for those of us that practice in Florida we do at least have some safeguards which may tip the scale in our favor when it comes to advising clients on the potential risks of trust modification.


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Endnotes

1 See General Explanations of the Administration's Fiscal Year 2024 Revenue Proposals, Department of the Treasury March 9, 2023 (available at: https://home.treasury.gov/policy-issues/tax-policy/revenue-proposals).

2 IRC § 676.

3 IRC § 675(4).

4 See e.g., H.R. Rep. No. 83-1337, at 4089 (1954), reprinted in 1954 U.S.C.C.A.N. 4017, at 4089.

5 See Rev. Rul. 2004-64 ("When the grantor of a trust, who is treated as the owner of the trust under subpart E, pays the income tax attributable to the inclusion of the trust's income in the grantor's taxable income, the grantor is not treated as making a gift of the amount of the tax to the trust beneficiaries").

6 Rev. Rul. 2004-64.

7 Florida law specifically provides creditor protection to grantors of trusts with reimbursement clauses. Fla. Stat. § 736.0505(1)(c) (2024).

8 Fla. Stat. § 736.0103(19) (2024).

9 See Treas. Reg. § 25.2511-1(g)(1) ("Donative intent on the part of the transferor is not an essential element in the application of the gift tax to the transfer.").

10 See Reimbursement of Grantor for Income Tax Paid on a Grantor Trust's Income, Capital Letter No. 61, January 19, 2024, Ronald D. Aucutt (available at: actec.org/capital-letter/reimbursement-of-grantor-for-income-tax-paid-on-a-grantor-trusts-income/).

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19 See e.g., Fla. Stat. § 736.0108(6) (2024).

HISTORY COMMITTEE CORNER

REPTILES?? We Weren't Always Known as Reptiles!

By Michael P. Stafford, Esq., Farrell Fritz, P.C., Juno Beach, Florida

The Real Property Probate and Trust Law Section of The Florida Bar, or RPPTL, has been affectionately referred to as "the Reptiles" for more than 30 years by those who know us, both within The Florida Bar and the public at large. But our origins were humbler than that!

As a matter of fact, there wasn't even any reference to probate law when the Section was formed 71 years ago in 1954. Our Section was one of the first to be authorized by The Florida Bar, which was established by the Florida Supreme Court in 1950 to regulate the practice for all Florida practitioners, who numbered only about 3,700 at the time. Currently, the State has more than 114,000 licensed practitioners, with nearly 12,000 being dues-paying members of the Section, making us by far the largest of The Bar's 21 Sections.

In the early 1950s, it was the real property lawyers of the State who petitioned the Board of Governors (BOG) to form a Section, primarily to help bring order out of the chaos that had befallen the State regarding real estate titles, a chaos brought about by the Depression and the severe hurricanes that had ravaged the State in the 1930s and 40s. The Petition to the BOG was unanimously approved at the BOG meeting in St. Petersburg in April of 1954, in a resolution authorizing the creation of a "Section on Real Property Law." In two subsequent 1954 meetings, the Board approved the new Section's by-laws, and then named Paul Game of Tampa as the Section's first Chair. At the time, the "Big Bar" had a "Uniform Title Standards Committee" whose work was reviewed by the "Junior Bar" Section (later known as the Young Lawyers Division). Shortly after the Section was up and running, the BOG, at its February 1955 meeting, officially transferred review of the Uniform Title Standards Committee's work product to the Section. The Section's efforts to adopt new statewide Title Standards, and later to pass legislation, aptly called the Marketable Record Title Act, represented some of the first major successes of the Section. It wasn't long afterward, at its March 1956 meeting in Jacksonville, that the BOG approved the merging of the Section with the BOG's existing Committee on Probate Law to form a new Section to be known as the "Section on Real Property Probate and Trust Law." After approval of the Section's updated by-laws in May 1956, the Section was officially formed. The rest, as they say, is history…..and it's still being written every day!

So, you ask: how did our Section's lofty-sounding R-P-P-T-L name ever descend into the slithery, slimy swamp and earn the affectionate moniker "REPTILES"?

Stay tuned !!!



M. STAFFORD

Michael P. Stafford focuses his practice on trusts and estates, commercial real estate and estate planning and administration both in New York and Florida. A frequent lecturer at continuing legal education (CLE) programs in both states, Mike's extensive Florida practice and his involvement in Florida Bar activities make him unique among New York State lawyers.

Executive Council Meeting & Legislative Update

THE BREAKERS | PALM BEACH, FLORIDA

JULY 24 – 27, 2024















Photos by Lauren Danilchenko; John Neukamm, Silvia Rojas, Melissa Scaletta, and Jacqueline Marzan.

















Roundtable

Highlights of the Meeting of the RPPTL Section

REAL PROPERTY DIVISION

SATURDAY, JULY 27, 2024

The Breakers, Palm Beach, Florida

Prepared by Colleen Coffield Sachs, Esq., Santa Rosa Beach, Florida,
Rebecca Wood, Gainesville, Florida, and
Klarika Caplano, St. Petersburg, Florida

Thank you to the FNF Family of Companies for
Sponsoring the Real Property Division Roundtable



The Director of the Real Property Law Division, Steven H. Mezer, called the meeting to order at 8 a.m.

Sponsor Announcement. Karla Staker expressed delight with the opportunity to be the roundtable sponsor. She introduced Craig Jontz, the manager of Florida Operations for the FNF Family of companies.

Recognition and Introductions. Jason Ellison introduced Air Force officer James Klinedinst, who discussed the SCRA.

Steve Mezer asked committees to update their websites and to consider having interim meetings via Zoom since they often don't have the time to finish all their business at the in-person meetings.

Information Items

Florida Realtors - Florida Bar Joint Committee - FR/Bar Joint Committee — Greg Orepeza, Chair; Howard Elfman, Co-Chair; Julie Horstkamp and Colleen Sachs, Co-Chairs Contract Subcommittee:

Colleen Sachs discussed required statutory changes to the Condominium Rider. Fla. Stat. § 718.504(1)(a), Annual Financial Statement and Annual Budget. Fla. Stat. § 718.407, condominiums created within a portion of a building or within a multiple parcel building. A paragraph 11 was added.

RP Litigation — Shawn Brown, Manny Farach

Shawn Brown discussed how the litigation world is changing in every aspect. Trials will now be within 12 to 18 months.

There was a discussion that the Florida Supreme Court is hearing a case concerning the economic loss rule. Consensus on the issue is being sought. Every committee is to submit the name of one person competent to discuss the economic loss rule and decide whether to write an Amicus and what our position should be. Before a Task Force is created, the issues must be better identified.

RP Problems Study — Susan Spurgeon

Susan Spurgeon indicated that the committee is considering an amicus brief in RJ's International Trading, LLC. It was approved at the committee meeting. There was a motion by the committee that the Section file an Amicus Brief to help the court define what a covenant that runs with the land is. There will be a workgroup. That motion passed unanimously.

Action Items

Florida Realtors - Florida Bar Joint Committee — Greg Orepeza, Chair; Howard Elfman, Co-Chair; Julie Horstkamp and Colleen Sachs, Co-Chairs Contract Subcommittee.

Immediate deletion of reference to the MLS made necessary by the NAR Settlement. Boards of Realtors throughout the state are discontinuing including information concerning broker compensation on the MLS pursuant to a settlement by NAR. Because of this, all references to offers of compensation made on the MLS need to be removed from the contract.

There was a motion to delete the words "MLS or other." The motion passed unanimously without discussion.

Condominium and Plan Development — Alexander B. Drobrev and Allison Hertz, Co-Chairs and Jordan Haynes and Joel McTague, Vice-Chairs.

Allison Hertz discussed a proposal to revise director election and recall process in community associations, revising Fla. Stat. §§ 718.112(2)(L)(P), 718.1255(4), (6) – (8), 718.128, 719.106(A)(2), (F) & (O), 719.129, 720.302, 720.303(10), 720.306(8) – (10) and 720.311.

The trend in the legislature seems to be to criminalize the conduct of board members. While bad actors should be punished, constituents should be allowed to elect and remove board members with finality and expeditiously. The effort is

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to harmonize HOA law with condo law. The current procedure is convoluted. The proposal allows elections to happen, which often can't happen in HOA when no quorum comes up. There needs to be a more efficient method to get rid of problematic directors. There also needs to be finality. Finally, DocuSign would also be permitted in certain situations.

After discussion, the proposal passed.

Real Estate Leasing — Christopher A. Sajdera, Chair and Ryan J. McConnell, Vice Chair.

Michelle Hinden and Kristen Javien first started in 2018, and the leases were approved in 2021. A transition caused the leases to be lost in the shuffle. Legislative changes were adopted and triggered a complete rework. They worked with FL Realtors, Condo Committee, and Housing Umbrella Group to be sure required disclosures did not exceed statutory authority. Since the Bonita Springs meeting, two small changes were made – changed nomenclature to be consistent with statutory language and added "as amended" to statutory references. This will be an Action Item at Coral Gables.

Construction Law — Sanjay Kurian, Chair, Bruce D. Partington, Jason Quintero and Brett Henson, Co-Vice Chairs.

Bruce Partington discussed revisions to Florida's Statutes of Limitation in response for actions founded upon improvement to real property – Fla. Stat. § 95.11(3)(b).

The 2023 legislation amended the statute of repose to 7 years from 10. The construction law committee offered input, which wasn't taken. Need preambular findings and to clarify "clock starter" events so that we can determine when a project is considered abandoned. A proposed bill was circulated and approved by the construction law committee. The committee's recommendation is to move forward. There were no questions or discussion. No second was needed. The proposal passed.

Publications Committee

RP Division submissions for ActionLine are needed. Please contact Michelle Hinden at mhinden@nishadkhanlaw.com for more information.

Committee Reports

Construction Law Institute — Bradley R. Weiss, Chair; Trevor B. Arnold, and Haley R. Maple, Co-Vice Chairs

Next year's CLI is March 6-8, and this year, it netted 150,000.00.

Real Property Litigation — Manuel ("Manny") Farach and Shawn G. Brown, Co-Chairs; Amanda B. Kison, and Lindsay Moczynski, Co-Vice Chairs

A temporary injunction was granted to subordinate MV Realty claims.

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



ROUNDTABLE

Highlights of the Meeting of the RPPTL Section

PROBATE AND TRUST DIVISION

SATURDAY, JULY 27, 2024

The Breakers, Palm Beach, Florida

Prepared by Sara A. Harmon, Esq., Boca Raton, Florida and John C.W. Cherneski, Esq., Jacksonville, Florida

Thank you to the Roundtable Sponsors:
Stout Risius Ross, LLC and Guardian Trust Foundation, Inc.



The Director of the Probate and Trust Law Division, Jon Scuderi, called the meeting to order at 8:03 a.m.

Sponsor Announcement. The Division Director thanked the sponsors, Stout Risius Ross, LLC ("Stout") and Guardian Trust Foundation, Inc. ("Guardian Trust").

Division Director Announcements. The Division Director reminded the section that there is a short turnaround time between The Breakers meeting and the Coral Gables meeting, and people who have information items that they hope to be action items at the Coral Gables meeting need to get those to Jon by August 16th. The Division Director informed the division that the Coral Gables Roundtable meeting will be joint between the Probate and Trust Division and the Real Property Division.

Action Items

The Jurisdiction Committee action item was pulled. There are three remaining action items for the meeting.

Probate and Trust Litigation Committee – R. Lee McElroy, Chair. Lee presented an action item to support legislation creating a short-form statutory discharge of a trustee in a non-adversarial trust administration, without the need for judicial process. There are no changes to the white paper or the proposed statute from the materials.

Trust Law Committee –David Akins, Chair. David discussed the second action item, which was approved by the trust law committee in 2023 and was an information item in Bonita Springs. The proposed motion is to support revision of Fla. Stat. § 736.04117 to clarify that the authorized trustee of the first trust will not be treated as the settlor of the second trust when applying Fla. Stat. § 736.04117 to the second trust; to expressly state that the trustee's power under the statute can be exercised by modifying the terms of the first trust; to clarify that the notice of a proposed decanting is not a trust disclosure document; to clarify that the statute applies to all trusts governed by Florida law or that have a principal place of administration in Florida, (b) find the legislative position is within the purview of the RPPTL Section, and (c) expend funds in support of the proposed legislative position. There was a proposed change to one sentence of the proposed language for the statute that will be presented at the Executive Council meeting. The motion with the revised language passed at the Executive Council meeting.

Estate and Trust Tax Planning Committee – Richard N. Sherrill, Chair. Travis Hayes presented slight changes to the Florida Community Property Trust Act. The motion is one to (a) support revisions to the Florida Community Property Trust Act (Fla. Stat. § 736.1501, et al. to fix language in the definitional section of the Act which was inadvertently included during the bill drafting process for the original Act and reads that property included in a community property trust shall be "deemed" to be community property, where it should read that property in a community property trust shall be community property. The motion also seeks to clarify that the Act applies to express trusts created, amended, restated or modified after July 1, 2021 (Fla. Stat. § 736.1502(2)); and to clarify that the transfer of homestead property to a Florida Community Property Trust is not a change in ownership for purposes of Chapter 193 and does not trigger a reassessment of the value of the property (new Fla. Stat. § 736.151(3)), (b) find the legislative position is within the purview of the RPPTL Section, and (c) expend funds in support of the proposed legislative position.

Laird Lile raised a question on why the question of a change in ownership not being subject to reassessment is being dealt with in Fla. Stat. § 736 instead of Chapter 193. The answer was that there is already a reference to this in another part of Chapter 193 that deals with the "Save Our Homes" cap, and the decision was made to deal with it in this section because

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this section deals with related provisions and there is already a reference back to Chapter 193.

At the Executive Council meeting there was a motion to revise the language which failed. The original motion passed.

Information Item

Guardianship, Power of Attorney and Advanced Directives Committee – Elizabeth Hughes, Chair. Elizabeth appeared to present an information item to support legislation that would clearly define the authority of the court to remove a professional guardian when the professional guardian's registration has been suspended or revoked by the Office of Public and Professional Guardians (OPPG). Currently Fla. Stat. § 744.20041 allows the OPPG to suspend or revoke a professional guardian's license for a variety of reasons. There is presently no rule or statute on point as to what the court should do if they receive a notice of suspension or revocation. The committee added proposed language to 744.474 that allows the court discretion to remove the guardian under these circumstances. The intention is to make it clear that when the court receives a notice of suspension or revocation of the professional guardian's license that they have the ability to look at the case holistically and make a determination as to whether or not to remove the guardian. This project that originated under Stacy Rubel and Caitlin Powell.

Guardianship, Power of Attorney and Advanced Directives Committee – Elizabeth Hughes, Chair. Stephanie Cook appeared to present an information item to support legislation that allows a petitioner to voluntarily dismiss a petition to determine incapacity prior to entry of an order determining that an alleged incapacitated person is incapacitated with respect to any right. There is confusion as to the case law regarding whether someone can voluntarily dismiss a petition for incapacity before adjudication due to inconsistent rulings. The subcommittee seeks to provide clarification and determined after much discussion that it is appropriate for the petition to be dismissed, but that it must be done prior to adjudication. This conclusion also requires a change to the Emergency Temporary Guardianship statute because this would need to be wound down as well.

Probate and Trust Litigation Committee – R. Lee McElroy, Chair. Lee presented an information item seeking to support legislation that would bar the ability of a successor fiduciary to bring a claim or action against a former trustee when the beneficiaries are barred from bringing such claim or action. The statute would clarify that if all beneficiaries have released the former trustee, the successor trustee could not bring an action against the former trustee. A question was raised as to whether this would apply if the statute of limitations had run, the outcome would be the same, the successor trustee cannot bring an action.

Committee Reports

Attorney/Trust Officer Liaison Conference — Eammon W. Gunther and Mitchell A. Hipsman, Co-Chairs; Stacey L. Cole, Michael Rubenstein, Gail G. Fagan, Kimberly Bald, and Sean Lebowitz, Co-Vice Chairs. Deborah Boje appeared to make an announcement that the dates for ATO are August 14th – 16th encouraged people to register and announced the new "Ask an Expert" segment of the conference.

Ad Hoc Study Committee on Due Process, Jurisdiction & Service of Process — Barry F. Spivey, Chair; Sean W. Kelley and Shelly Wald Harris, Co-Vice Chairs. Barry appeared to ask the division to more closely look at issues when they are an information item prior to becoming an action item. They are going to take more time to debate the issue of representation by a designated representative. The current statute does not make it clear whether the designated representative is a fiduciary or not. They are looking to make the designated representative a fiduciary by default, but there is disagreement in the committee about this. The current proposal that is in the agenda will not be taken up at this point. They are going to take the issue to the Trust Law Committee and the Probate and Trust Litigation Committee for further input.

Conclusion. The division director concluded by announcing that Committee Chairs and Vice Chairs will have part two of the committee leadership training at the Coral Gables meeting. This will be the legislative component of the training. Sancha Brennan appeared to thank Nick Curley who is rolling off of the Legislative Committee this year and thank him for his work, and welcome Stephanie Cook who is joining this year. Sancha reminded the division to bring legislative items to the committee when they are ready to be advanced. Coral Gables is the last meeting where approved legislation will be advanced in the 2025 Legislative Session.

Adjournment. Meeting was adjourned at 8:35 a.m.

Navigating Joint Tenancy with Right of Survivorship in Florida

By Danielle N. Clark, Esq., Clark Law Office, PLLC, Fort Myers, Florida

Owning real property as joint tenants with the right of survivorship (JTWROS) offers several advantages, including the seamless transfer of ownership upon the death of one tenant; however, it also presents unique risks, especially when one owner wants to take out a mortgage on the property. This article will explore the implications and potential pitfalls for the non-borrowing owner in such a scenario.

Understanding Joint Tenancy with Right of Survivorship

Joint tenancy with the right of survivorship is a form of co-ownership where each tenant has an equal share in the property. Upon the death of one joint tenant, their share automatically transfers to the surviving tenant(s), bypassing probate. This arrangement is often favored for its simplicity and efficiency in transferring property upon death where the tenants are not married to one another.

The Risks of Mortgaging a Jointly Held Property

When one joint tenant decides to take out a mortgage on the property, it can have significant consequences for the tenant(s) not taking out the loan. Here are some key risks to consider:

1. Encumbrance of the Entire Property

In most jurisdictions, a mortgage on a jointly held property encumbers the entire property, not just the share of the borrowing tenant. This means that if the borrowing tenant defaults on the loan, the lender can initiate foreclosure proceedings against the whole property. Consequently, the non-borrowing owner risks losing their interest in the property due to circumstances beyond their control.

2. Credit Implications

Although the mortgage is taken out by only one of the joint tenants, the presence of the loan can affect the creditworthiness of the property itself. If the borrowing owner defaults, it can lead to a foreclosure that appears on the property's history, potentially complicating future refinancing or sale efforts by any tenant if the property is saved from foreclosure.

3. Survivorship Rights

The right of survivorship means that if one joint tenant dies, their share passes directly to the surviving tenant(s). However, if the borrowing tenant dies before repaying the mortgage, the surviving tenant(s) will inherit, not only the deceased's share, but also the outstanding debt associated with the mortgage. This could place an unexpected financial burden on the surviving tenant(s), who may have to satisfy the debt or face foreclosure.

4. Impact on Property Value

A mortgage can impact the value of the property. If a potential buyer is attempting to assume the mortgage on the property, the potential buyer may be deterred by the existence of a mortgage, especially if the terms are unfavorable. Additionally, the property may be harder to sell if it is under the threat of foreclosure due to the borrowing tenant's financial difficulties.

Mitigating the Risks

While the risks are substantial, there are steps that joint tenants can take to mitigate those risks:

1. Clear Communication and Agreement

Before taking out a mortgage, joint tenants should have a thorough discussion and reach a mutual agreement. It's crucial

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to understand each other's financial situations and intentions regarding the property.

2. Legal Protections

Consulting with a real estate attorney can provide valuable insights into structuring the mortgage in a way that minimizes risks. For example, the non-borrowing tenant might require the borrowing tenant to take out mortgage insurance to protect against default.

3. Alternative Arrangements

Exploring alternative financing options that do not involve encumbering the jointly held property can be beneficial. For instance, the borrowing tenant might secure a personal loan or refinance other assets instead.

4. Written Agreement

Drafting a written agreement that outlines the responsibilities of each tenant, and which addresses default or death, can provide clarity and protect the interests of both parties. This agreement can specify how the mortgage will be satisfied and the steps to be taken in case of foreclosure.

While owning property as joint tenants with the right of survivorship offers advantages, it also comes with significant risks when one tenant decides to take out a mortgage. The non-borrowing tenant faces potential encumbrance of the entire property, credit implications, impact on survivorship rights, and potential devaluation of the property. To mitigate these risks, clear communication, legal protections, exploring alternative financing options, and drafting a written agreement are essential. By taking these precautions, joint tenants can better safeguard their interests and navigate the complexities of property co-ownership.



D. CLARK

***Danielle N. Clark, Esq.**, is Founder and Managing Attorney of Clark Law Office. Danielle focuses her practice on estate planning, probate and trust administration, guardianship, and real estate law, including landlord-tenant matters. Danielle earned her BBA in Human Resource Management from Florida International University. She continued her education at Nova Southeastern University, earning an MBA, then earning her Juris Doctor from Ave Maria School of Law. In addition to membership in the RPPTL Section, Danielle is a member of the Solo and Small Firms Section and the Elder Law Section. The Florida Bar President, Scott Westheimer, appointed Danielle to the Certified Legal Education Committee.*



Real Property Case Summaries

Prepared by Natasha Selvaraj, Esq., Berlin Patten Ebling, PLLC, Sarasota, Florida

Appellant is a single member LLC, that was dormant for several years prior to the initiation of this action. Bharat Patel ("Bharat") is the single member. Appellee, "Daksha," is cousin of the Appellant's wife and married to Raju. In 2004, Appellant issued an apparent loan without a written contract in the amount of $850,000 to Raju, following a dinner attended by both couples. The funds were used to purchase a motel that Raju owned individually prior to his passing. Upon Raju's passing, the motel passed to his wife. The issue at hand is whether Daksha, his widow, was responsible for repayment of the alleged loan. Appellant was unable to provide any evidence that Daksha was involved in the oral agreement, and there was no evidence of any communication between the parties that would indicate that Daksha was obligated to the loan or repayment of the alleged loan. The trial court granted Daksha's motion for summary judgment. The fifth DCA affirmed that decision, since the evidence would not allow a reasonable jury to find for the Appellant on any of its claims.

RITI FINANCIAL, LLC, v. DAKSHA BEN PATEL, Case No. 5D2023-1109 (Fla. 5th DCA 2024).

Between 2005 and 2009, Raju made purported interest payments on the loan, but stopped making payments in 2009. Raju passed away in 2013, and no claims related to the purported loan were made against his estate, which was closed in 2014.

Daksha, through probate, became the owner of the motel, and subsequently sold it in 2017. Years later, in 2019, Appellant sued Daksha for accounts stated, breach of contract, breach of fiduciary duty, fraud and unjust enrichment. These claims were based on Appellant's claim that there was an oral contract between Appellant, Raju and Daksha, along with a claim that Daksha had assured Bharat that she would repay the loan after Raju's passing.

In her depositions, Daksha disclaimed any involvement in the transaction. In Bharat's deposition, he conceded that he could not say whether Daksha joined in the alleged oral contract in 2004. Further, the funds were sent to an account solely in Raju's name, no date of repayment had ever been established between Bharat and Raju, payments when received were only received from Raju individually and logged in Bharat's hand written ledger as made by Raju. Bharat further testified that any promises to repay the loan from Daksha were made to Bharat's wife, who was never an employee, officer, manager or director of the company.

The trial court granted Daksha's motion for summary judgment. Appellant brought this action believing that the summary judgment was improper. The trial court found that there is no genuine dispute that Daksha was not a party to the 2004 oral loan agreement, and that she did not communicate with Appellant about the agreement. The fifth DCA agreed with those findings. Based on the record, the court of appeals found that no reasonable jury could find that Daksha and Appellant mutually assented to "a certain and definite proposition" for the acceptance of the loan and its eventual repayment. Further,

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Daksha and Bharat, never communicated about the loan at any time. Given the absence of contact, the court of appeals held that no reasonable jury could find that Daksha had made any actionable statements or assumed liability for the loan or incurred any liability to Appellant, an inactive LLC. The court of appeals affirmed the summary judgment for Daksha since the evidence would not allow a reasonable jury to find for the Appellant on any of its claims.

Appellant and Appellees, James E. Lee, II, and Paige J. Lee, had entered into a contract for the purchase of real estate. The contract failed to list an escrow agent, and instead, listed it as "TBD by Seller" as the intention was for the Seller to select and pay for the closing agent. Prior to designating an escrow agent or the Buyer making their deposit, the Seller attempted to terminate the contract. The issue at hand was whether the Buyer materially breached the contract by failing to make their deposit timely, or whether the Seller materially breached the contract by failing to designate the escrow agent. The Buyer brought an action for specific performance as well as lost profits and rent. The trial court found that the failure to make the deposit was a material breach by the Buyer, and therefore, they were not entitled to specific performance. On appeal, the court ruled that the Appellee's own admissions that the failure to designate an escrow agent is material confirms that they materially breached the contract. The case was remanded to the lower court to determine the appropriate remedy.

Linda O'Donnell v. James E. Lee, II and Paige J. Lee, Case No. 1D2022-0193 (Fla. 1st DCA 2024).

On April 19, 2021, the parties executed the "AS IS" Residential Contract for Sale and Purchase for the property owned by the Lees. The contract provided that an initial deposit of $10,000 was due within three days of execution. The contract authorized specific performance in the event of default by the Sellers. It also authorized prevailing party attorney's fees.

The contract stated that the escrow funds would be delivered to an escrow agent "TBD by Seller." The contract was prepared by Jeff Galloway ("Galloway"), the real estate broker for the transaction at issue. Galloway explained at trial that he listed the escrow agent as "TBD by Seller" because in the offer the Buyer was asking the Seller to select and pay for the title search and title insurance, and they did not know who the Seller would want to use. The Lees affirmed that they alone had the authority to identify the escrow agent. Barbara Iman ("Iman"), the Lees' business manager, provided the Buyer with the "fully executed contract" and stated that she would provide the name of the title agent so that the Buyer could make the deposit. Iman never followed up with the Buyer to identify the escrow agent.

Meanwhile, the Lees had learned that insurance was going to cover a lot of their medical bills, and as such, they no longer needed to sell the property. Based upon this finding, on April 22, 2021, the Appellees signed a notice of termination letter, in which they stated that the proposed deal will not close due to the family's personal and medical issues. The letter did not mention the Buyer's failure to place funds in escrow. On April 23rd, James Lee sent an email to Galloway with the letter attached. When Galloway spoke with the Buyer over the phone about the termination letter, Galloway confirmed they still did not know who the escrow agent was and directed the money to be sent to Kristy Banks ("Banks"). Iman, just before 10 am on April 23rd, asked Banks to set up a file and provide wire instructions to Galloway, who made the wire transfer for the deposit later that day.

On December 9, 2021, the lower court conducted a one day bench trail, during which, the Buyer asserted that the Lees breached their contractual obligation to identify the escrow agent, which thereby prevented the Buyer from being able to make her deposit on time. The Lees argued that the Buyer's failure to place the funds in escrow was a material breach of the contract. Their argument was that the first breach was the Buyer's and that justified their termination of the contract. The Lees further argued that it was Galloway's fault that no escrow agent was identified in the contract. The lower court denied the Buyer's request for specific performance because the Buyer failed to comply with her contractual obligation to make the deposit when required by the contract.

The first DCA held that the trial court committed reversible error when it determined that the Buyer, not the Lees breached the contract. This was based on the Lees admission that the identification of an escrow agent was a material fact, that they alone were responsible for identifying the escrow agent and that they failed to identify an escrow agent. The court determined that the Lees were bound by their admission that they committed a material breach of contract, and therefore, only a question of law remained. The first DCA ruled that on remand, the lower court could decide the appropriate remedy.


N. SELVARAJ

Natasha Selvaraj *is a Partner and Shareholder at Berlin Patten Ebling, PLLC. Natasha earned her degree in Business Management from the University of Western Ontario in London, Canada, and her Juris Doctor from the Fredric G. Levin College of Law at the University of Florida. Natasha's practice focuses on commercial and residential real estate transactions, real estate closings, contract and lease preparation, as well as condominium development and developer representation. Natasha is President of the Young Lawyers Division, a member of the Sarasota County Bar Association, and a member of the Realtor Association of Sarasota and Manatee (RASM).*

Probate Case Summaries

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

Beneficiary of testamentary trust was interested person as defined in Fla. Stat. § 731.201(23) and had standing to file an objection to personal representative's petition for discharge and a petition for surcharge.

Carmel v. Fleischer, 49 Fla. L. Weekly D1339 (Fla. 4th DCA June 20, 2024)

The decedent, Herbert Carmel, died in 2017 and was survived by three children, the appellant, Mark Carmel ("Mark"), and his two brothers, Randall Carmel and Allen Lamburg. Shortly before his death, the decedent executed a codicil to his will directing Mark's share of the estate to be held in trust and for Randall and Allen to serve as trustees. Mark initiated estate litigation claiming that the codicil was the result of undue influence. The parties reached a settlement agreement concerning the codicil, which included appointing the appellee, Norman Fleischer, Esq., as the personal representative of the estate. Litigation concerning the settlement agreement continued between the brothers, but ultimately, the trust for Mark's share of the estate remained in place.

In 2019, Mark received a trustee's waiver of an accounting for the estate. Mark objected to the waiver and demanded an inventory and accounting for the estate and his trust. In January 2023, the personal representative filed a final accounting and petition for discharge. The personal representative's petition acknowledged Mark's filings, but stated that Mark lacked standing. The personal representative alleged that Mark was not an interested person for the discharge proceedings because Mark was only a qualified beneficiary of the testamentary trust and the personal representative was not a trustee of the trust.

Mark filed an objection to the personal representative's petition for discharge based on the personal representative's purported failure to serve the petition and the final accounting on Mark. Mark also filed a surcharge petition alleging improper administration, improper assessment of estate administration expenses against the trust, and failure to fund the trust with the proper amount. The personal representative filed a motion to strike Mark's surcharge petition arguing that Mark lacked standing because he was not a beneficiary of the estate but rather a beneficiary of the testamentary trust.

The trial court granted the motion to strike the petition for surcharge. The trial court held that, because Mark is the beneficiary of the testamentary trust, the trustees are the real parties in interest concerning the share of the estate distributed to Mark's trust. The trial court also granted the personal representative's petition for discharge. Mark's appeal followed.

> The Florida Probate Code defines "Interested person" as "any person who may reasonably be expected to be affected by the outcome of a particular proceeding… The meaning, as it relates to particular persons, may vary from time to time and must be determined according to the particular purpose of, and matter involved in, any proceedings."[1]

In deciding whether Mark was an interested person in the discharge proceedings, the appellate court relied on *Richardson v. Richardson*, 524 So. 2d 1126 (Fla. 5th DCA 1988) and *In re Estate of Watkins*, 572 So. 2d 1014 (Fla. 4th DCA 1991), which both held that a contingent beneficiary of a trust was an interested person in the probate proceedings.

The personal representative argued that *Buerki v. Lochner*, 570 So. 2d 1061 (Fla. 2d DCA 1990) and *Roller v. Collins*, 373 So. 3d 35 (Fla. 5th DCA 2023) stand for the proposition that Mark did not have standing in the probate case. The appellate court distinguished these cases on the basis that they stood for the proposition that the trustee, not a beneficiary of a trust, is the party with standing to bring an action on behalf of the trust. The appellate court distinguished this case from *Buerki* and *Roller* on the basis that Mark was not seeking to bring an action, but rather asserting standing to object to the petition for discharge.[2]

On appeal, the personal representative also argued that Fla. Stat. § 731.303, which states that a trustee may bind a beneficiary of a trust, supported the trial court's ruling. However, the appellate court held that a conflict existed between Randall—a trustee—and Mark. Accordingly, the appellate court held that orders binding the trustee in this case could not bind Mark as beneficiary.

The appellate court reversed the order of discharge and remanded for further proceedings.

Summary judgment affirmed in quiet title action where homestead property was conveyed to surviving spouse through a revocable living trust and not a separate deed.

Fuentes v. Link, 49 Fla. L. Weekly D1319 (Fla. 3d DCA June 19, 2024)

The decedent, Douglas A. Link, died intestate on July 21, 2020. He was survived by his daughter the appellant, Donna Fuentes ("Donna"), and his spouse the appellee, Irene Link ("Irene").

Although the decedent died intestate, he did execute a revocable living trust for the benefit of his spouse, Irene. Irene

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was listed as both the trustee and the beneficiary of the trust. The trust provided that Irene would manage the property during the decedent's lifetime and the property would be distributed to her upon the decedent's death. The decedent, Irene, and two witnesses signed the trust; however, the trust was not recorded until after the decedent's death.

Donna petitioned to quiet title to the real property alleging that the trust agreement was not a valid conveyance. Donna claimed a share of the property as an intestate heir.[3] The parties filed cross motions for summary judgment. The trial court found in favor of Irene and held that the trust agreement effectively functioned as a deed containing all the required elements for a valid conveyance. The trial court's decision was based on *Flynn v. VanDevere*, 502 So. 2d 454, 456 (Fla. 3d DCA 1986) and Fla. Stat. § 689.01(1).

The appellate court analyzed Fla. Stat. § 689.01(1)[4] and the requirements to convey real property. The appellate court held that as long as the conveyance complied with the statute, there was no requirement that the document be labeled a "deed".

Donna argued that because the trust was revocable and not recorded during the decedent's lifetime, an issue of fact regarding the decedent's intent to convey the property existed. The appellate court rejected that argument and held that those facts alone did not create an issue of material fact relating to intent, conveyance, or delivery. The appellate court affirmed summary judgment in favor of the surviving spouse, Irene.

Written declaration naming preneed guardian created a rebuttal presumption that the designated person was entitled to serve as guardian even, though the ward produced a subsequent declaration naming someone else. The second declaration was signed after the order determining that the ward had limited capacity, but before the hearing appointing guardian and determining which of the ward's rights were removed.

Silva v. Silva, 49 Fla. L. Weekly D1280 (Fla. 3d DCA June 12, 2024)

In this guardianship case, Dr. Orlando G. Silva ("Dr. Silva") appealed an order appointing his son, Jorge E. Silva ("Jorge"), to serve as his guardian.[5] In the Summer of 2016, Dr. Silva executed a declaration of preneed guardian naming Jorge as his plenary guardian. In October 2022, Dr. Silva's sons, Jorge and Carlos filed a petition for emergency temporary guardianship. On November 3, 2022, the court appointed Jorge as Dr. Silva's emergency temporary guardian and appointed an examining committee.

Following their examinations, all three members of the examining committee concluded that a limited guardianship was proper, but disagreed regarding the scope of rights to be removed. On January 12, 2023, the court held a hearing to determine incapacity. At that hearing, Dr. Silva's attorney stipulated to a limited capacity determination but requested an evidentiary hearing concerning the selection of a permanent guardian and the extent of the rights to be removed. The court entered an order following the January 12, 2023 hearing finding, by clear and convincing evidence, that Dr. Silva was partially incapacitated. The parties proceeded to a two-day evidentiary hearing. At that hearing, Dr. Silva produced a newly executed declaration of preneed guardian dated February 8, 2023. The February 2023 declaration revoked his prior designation of Jorge and named a professional guardian instead.

The appellate court began its analysis by examining Fla. Stat. § 744.3045 and the rebuttal presumption created in favor of appointing the named guardian.[6] The appellate court held that Dr. Silva's second declaration post-dated the trial court's limited capacity determination in January 2023. Therefore, the appellate court held that, at the time Dr. Silva signed the second declaration, he was no longer a "competent adult" as required by Fla. Stat. § 744.3045(1). The appellate court held that the second declaration was a post need designation, and therefore, was outside the ambit of the preneed guardian statute. The appellate court affirmed the trial court's appointment of Jorge as Dr. Silva's guardian.

At the hearing, the trial court also admitted the examining committee member reports into evidence over a timely hearsay objection and without expert testimony or any proffered hearsay exception. The trial court relied upon the reports to determine the scope of the removed rights. The appellate court reversed and remanded that portion of the trial court's order.

Delaware Attorney General has standing under the common law special interest doctrine to sue to enforce the terms of a Florida charitable trust. The special interest doctrine was not eliminated by subsequent amendments to the Florida Trust Code.

Jennings v. Durden, 49 Fla. L. Weekly D1154 (Fla. 5th DCA May 31, 2024)

This case concerns a charitable trust created by Alfred I. duPont's will and the Nemours Foundation, which was created from the trust's funds. Mr. duPont's will directed money to be set aside in a charitable trust to provide medical care for children and the elderly. His will and trust documents direct that the children and elderly of Delaware are to receive priority before expending trust funds for children or elderly residing elsewhere.

Over time, disagreements arose regarding whether residents of Delaware were being given the proper priority for the charitable payments. Ultimately, this resulted in litigation which led to *State of Delaware Ex Rel. Gebelein v. Florida First National Bank of Jacksonville*, 381 So. 2d 1075 (Fla. 1st DCA 1979). In *Gebelein* the trial court dismissed the Delaware Attorney General's complaint on the basis that the Delaware

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Attorney General lacked standing to bring the action. On appeal, the First DCA held that the Delaware Attorney General had standing because of that state's special interest as a representative of the Delaware residents. Following the *Gebelein* decision, that litigation resumed but was ultimately resolved through the trial court adopting a "Stipulation and Agreement" signed by the parties (the "Agreement"). Pursuant to the Agreement, the trustees agreed that "at no time will more than fifty percent (50%) annually of the funds distributed by the trust to Nemours be spent outside the State of Delaware" (the "50% Requirement").

In the present case, the Delaware Attorney General alleged that the trustees were not honoring the 50% Requirement. The Delaware Attorney General filed a two-count complaint. Count I, a breach of contract claim, alleged that the Nemours Foundation and the trustees breached the Agreement by failing to adhere to the 50% Requirement. Count II was pleaded as a breach of trust claim against the trustees only and premised on the same facts. In the trial court, the Nemours Foundation and the trustees successfully moved to dismiss Count I, while arguing that the Agreement was not enforceable as a contract because it was only a stipulation for entry of a judgment. Citing to *Gebelein,* the trial court denied the motions to dismiss Count II.

Following discovery, the trustees moved for summary judgment arguing, once again, that the Delaware Attorney General lacked standing. Nemours joined in the trustee's motion for summary judgment. A successor to the trial judge that previously denied the motions to dismiss Count II, granted the motions for summary judgment, and ultimately entered final judgment in favor of appellees and against the Delaware Attorney General.

The appellate court first analyzed the trial court's dismissal of Count I, the breach of contract claim. The appellate court reversed the trial court's dismissal and remanded for further proceedings on the basis that Florida recognizes settlement agreements that resolve litigation as enforceable contracts. The appellate court rejected the trustees' argument that the Agreement was intended, not as a stand-alone contract, but only as a stipulation for entry of judgment.

Concerning the breach of trust claim, appellees argued that the Nemours Foundation is the only qualified beneficiary and thus the party entitled to sue the trust. The appellees also argued that the Attorney General of Florida is the proper party to protect the rights of a qualified beneficiary of a charitable trust with its principal place of administration in Florida pursuant to Fla. Stat. § 736.0110(3). Finally, the appellees argued that the *Gebelein* case should not be followed because it could not be reconciled with the 2007 and 2017 amendments to the Florida Trust Code, and that the common law special interest exception for a charitable trust recognized in *Gebelein* was limited to that one case.[7]

On review, the appellate court held that the special interest doctrine[8] set forth in *Gebelein* supplements the statutory list of persons with standing to sue a charitable trust and provides a sound, legal basis for the Delaware Attorney General to have standing to bring the claims. The appellate court held that the post-Gebelein amendments to the Florida Trust Code do not address or eliminate the special interest doctrine, and therefore, did not impact the Delaware Attorney General's standing to bring the claims. The appellate court reversed summary judgment and remanded the case.

Trial court erred in holding that a single member limited liability company's assets were estate assets. Death of the sole member did not immediately dissolve single member LLC.

In re the Estate of Catherine Ezeamama Chibugo, 49 Fla. L. Weekly D920 (Fla. 3d DCA May 1, 2024)

The personal representative appealed a probate court order determining that real property held by a single member limited liability company was an estate asset. At the time of her death, the decedent was the sole member of the limited liability company. After the decedent's death, a creditor filed a statement of claim in the estate for the outstanding balance on a note and mortgage for property owned by the LLC. The personal representative filed a motion to determine estate assets and sought a ruling that the real property was not an estate asset. The creditor did not object to, or oppose, the personal representative's motion. However, the probate court determined that the company immediately dissolved upon the decedent's death, and therefore, the company's assets were estate assets.

In reviewing the probate court's decision, the appellate court analyzed *Gettinger v. Gettinger*, 165 So. 2d 757, 757 (Fla. 1964), which held that the "affairs of a corporation even though substantially owned by a decedent cannot be administered by the decedent's executor or assets of the decedent's estate." Next, the appellate court analyzed the statutory process for dissociation and dissolution set forth in Chapter 605, Florida Statutes. Fla. Stat. § 605.0602(7)(a) (2023) provides that "[a] person is dissociated as a member if…[t]he individual dies…" Pursuant to Fla. Stat. § 605.0701(3) (2023) a limited liability company is not automatically dissolved until ninety consecutive days during which the company has no members. At that point, the company is dissolved and its activities and affairs must be wound up.

The appellate court held that the probate court erred as a matter of law and reversed and remanded because the order was entered before the ninety-day event causing dissolution and no articles of dissolution had been filed. Accordingly, the company continued to exist and the company assets were not estate assets.

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Trustee may not appear pro se on behalf of a trust.

Darst v. Westcoast Group Enterprises, LLC, 49 Fla. L. Weekly D357 (Fla. 2d DCA February 14, 2024)

Mr. Darst, the trustee of the G.A. Darst Equity Trust appealed the trial court's final summary judgment entered in favor of the appellee. However, the appellate court did not reach the merits of Mr. Darst's appeal. The appeal was dismissed because Mr. Darst appeared pro se in his capacity as a trustee. Citing *EHQF Tr. v. S & A Capital Partners, Inc.*, 947 So. 2d 606 (Fla. 4th DCA 2007), the appellate court dismissed the appeal because a trustee may not appear pro se on behalf of a trust. The rationale for a non-lawyer trustee not being allowed to represent himself is that "the trustee represents the interests of others and [the trustee] would therefore be engaged in the unauthorized practice of law." Accordingly, the appeal was dismissed.



J. CHERNESKI

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Endnotes

1 Fla. Stat. § 731.201(23) (2022).

2 The appellate court also held that Mark had standing to file the petition for surcharge.

3 Irene is not Donna's mother.

4 "No estate or interest of freehold…shall be created, made, granted, transferred, or released in any manor other than by instrument in writing, signed in the presence of two subscribing witnesses…unless by will and testament, or other testamentary appointment, duly made according to the law…"

5 Dr. Silva also appealed the court's order determining limited incapacity; however, that portion of the appeal was dismissed for lack of a jurisdiction because it was not timely.

6 Fla. Stat. § 744.3045(4).

7 In their motions for summary judgment, the appellees argued, and the trial court ruled, that suit could be brought against a charitable trust only by: 1) qualified beneficiaries of the charitable trust; 2) its trustees; 3) the settlor; and 4) Florida's Attorney General.

8 A special interest is "an interest beyond that general interest possessed by the public at large…" Gebelein, 381 So. 2d at 1077-1078.



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