

ActionLine

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

The Practical And Ethical Implications Of ChatGPT And Generative Artificial Intelligence For RPPTL Practitioners

Florida's Mortgage Payoff Legislation: "Conditional" Payoffs Expressly Prohibited

Tax Planning for 2026: Are Your Married Clients Being Properly Advised on the Risk of Divorce?

Not Just Any Appraisal Will Do

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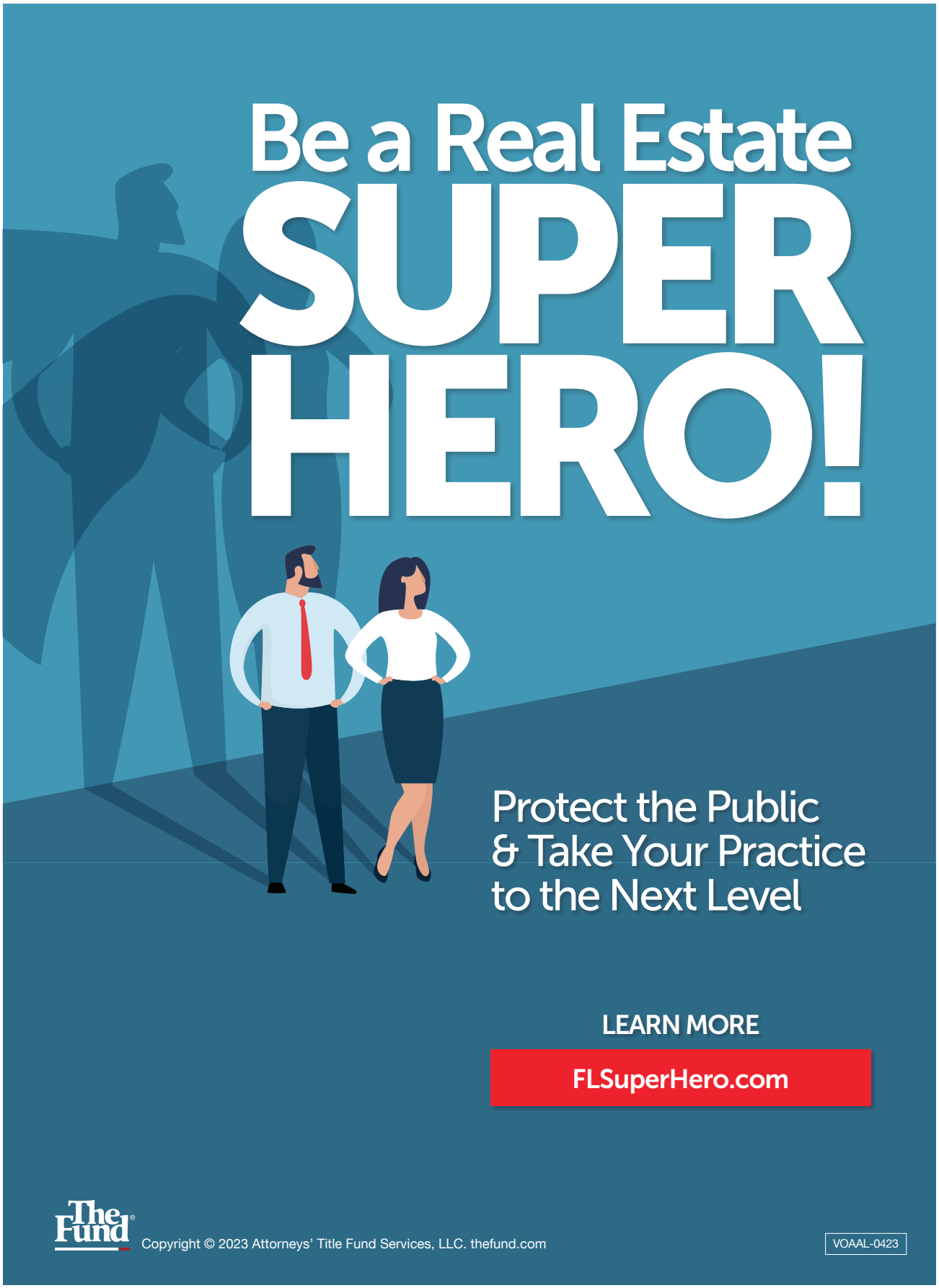
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ALMs Highlights

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

Many of you may see "ALMs" meetings on our schedule and are not familiar with the ALMs – who are they and what do they do? "ALMs" is short for "At Large Members." It is through the ALMs that the work of the Executive Council is disseminated to the entire Section. They participate in Section committees, work and communicate with Section members in their home Circuit, and work on their own projects. One of the most notable ALMs projects is "No Place Like Home," a pro-bono assistance and training project, spearheaded by Bay Area Legal Services, to assist low-income homeowners in Florida in clearing title issues *before* disaster strikes, so that they can file insurance or federal assistance claims after a natural disaster.

A new ALMs project is assisting the Public Interest Heirs' Property Attorney Group, a state coalition of legal aid services, which addresses heirs' property ownership issues primarily though the legal representation of individual clients in need. The group focuses its efforts on the most vulnerable members of our communities, which include low-income, elderly and disabled individuals, as well as domestic violence victims and veterans. The programs provide an array of legal services, including clearing title to heirs' property, preparation of wills and property deeds, and other estate planning services for current homeowners to help them avoid the creation of heirs' property.

ALMs serve as liaisons between the Executive Council and its Section members who may not be active with the Executive Council. Lead ALMs send communications to Section members regarding upcoming Section meetings, CLEs and activities. ALMs participate in local bar associations and often host networking events, happy hours, and programming for the local bar community, including law students. Some examples of the projects that the ALMs have participated in are:

- ALMs in the 6th Circuit host a quarterly Bench and Bar breakfast
- 9th Circuit ALMs hosted a successful happy hour networking event for local Bar members
- ALMs in the 13th and the 6th Circuits co-host an annual case law update
- 16th Circuit ALMs host a Probate Case Managers Information Conference
- ALMs in the 8th Circuit hosted a panel for law students at the University of Florida

In addition to the above projects, ALMs provide assistance to their local communities. Some examples of assistance that the ALMs have offered include:

- ALMs in the 16th Circuit have a program to assist practitioners serving the less fortunate citizens who must rely on pro bono or very inexpensive legal services
- 15th Circuit ALMs are working with Chief Judge Kelley and the Legal Aid Society of Palm Beach County to organize pro-bono assistance for unrepresented guardians who need help with resolving Orders to Show Cause or who simply need guidance

ALMs answer the call when the Section receives requests for pro bono assistance or questions from Section members. ALMs volunteer as mentors and participate in mock interviews. ALMs host receptions for first-time attendees, law students and Section Fellows at our Executive Council meetings. ALMs are eager to serve and are a great way to get engaged in the Section!

Applications to become an ALM on the Executive Council are generally accepted and due in December of each year. The Long-Range Planning Committee, consisting of past Section Chairs, proposes a slate of nominees for ALMs prior to the annual election held in conjunction with the RPPTL convention each year. If you are interested in serving, please consider attending our upcoming committee meetings posted on the website. Also, more information on the ALMs and their projects can be found under the "Committees" tab on our Section's website at www.rpptl.org.

Contributor's Note: I would like to acknowledge the assistance of Wilhelmina Kightlinger in her role as Director of the RPPTL Section At Large Members committee for her contribution to this article.

This magazine is prepared and published by The Real Property, Probate and Trust Law Section of The Florida Bar as a service to the membership.

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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 fellow readers, we are happy to be back with another edition of ActionLine, and we hope you enjoy reading this issue. In her Chair's Column, Chair, **Katherine Frazier**, recognizes all of the notable projects that the At Large Members have contributed to the members of the Section. She also encourages Section members who are interested in serving the Section to consider applying.

We love the informative article on page 6 by author **J. Grier Pressly, III**. Given the emergence of Artificial Intelligence, and the fact that this explosive new technology is here to stay, his article on the practical and ethical implications of ChatGPT and Generative Artificial Intelligence is a must to read. Many of the examples he provides in his article on how this new technology implicates a number of existing ethical rules in Florida are very helpful!

We also have a very relevant article on page 11, by authors **Rebecca L.A. Wood and Richard S. McIver**, that takes a deep dive into Florida's Mortgage Payoff Legislation, and measures that were taken by the Florida Legislature, to combat the title industry's problem with conditional mortgage payoff statements.

The article by authors **Andrew J. Krause, David A. Ruben and J.P. Bratcher**, on page 15, sheds some light on the division of assets upon a divorce, and provides some practical information on how to address the risk of divorce for clients creating Spousal Lifetime Access Trusts. The helpful tips provided on page 17 will be useful for many practitioners.

Another practical article is found on page 20. Authors **Rachel E. Fisch and Stephen King**, provide some useful tips on what to look for when you are looking to hire a valuation expert to prepare a purchase price allocation report in commercial real estate transactions. They provide some useful pointers on page 22 on what a real estate practitioner should look for in a best-in-class purchase price allocation report.

We urge you to look at the photo centerspread on pages 24 and 25 of the Section's Executive Council Meeting that took place in Orlando, Florida.

Lastly, we would like to express our sincerest gratitude to our Section's sponsors, as we would not be able to provide a top-notch magazine without you. Thank you!

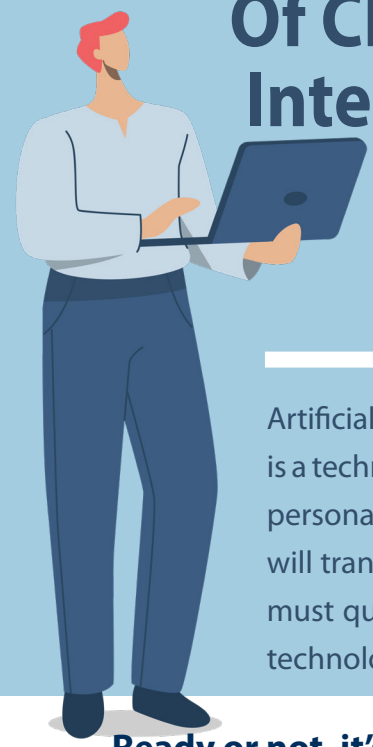
Best,

Michelle and Erin

Correction: In the Fall 2023 ActionLine article profiling Section Award recipients, Jeffrey S. Goethe was recognized for receiving the Robert C. Scott Award. Mr. Goethe is an income partner with Barnes Walker, Goethe, Perron, Shea & Robinson, PLLC. He was incorrectly described as a shareholder.

The Practical And Ethical Implications Of ChatGPT And Generative Artificial Intelligence For RPPTL Practitioners

By J. Grier Pressly, III, Esq.,
Pressly, Pressly, Randolph & Pressly, P.A., Palm Beach, Florida



Artificial Intelligence is the latest disruptive technology forcing its way into the legal profession. It is a technology that no less than Bill Gates has described as, "as fundamental as the creation of the personal computer, the internet, and the mobile phone," and that Goldman Sachs has predicted will transform the legal profession more than all other industries but one. As practitioners, we must quickly get our arms around the practical and ethical implications of this explosive new technology, starting with ChatGPT and other forms of generative AI.

Ready or not, it's here, and it's capable!

To illustrate its popularity and how pervasive its use already, ChatGPT achieved 100 million monthly active users in just two months' time. In comparison, it took Instagram 2.5 years and Uber six years to achieve that same number of active users. What are the capabilities of generative AI in the law? It was recently reported on CNN that ChatGPT-4 passed every subject on the Uniform Bar Exam and performed better than 90% of human test takers. There have been other anecdotal reports that ChatGPT-4 was given a law school final exam and easily passed the exam. In addition to ChatGPT (developed by Open AI), here are other examples of generative AI programs that are coming soon or already in use today by practitioners: Gemini (developed by Google), Copilot (developed by Microsoft), Harvey (based on ChatGPT and custom built for large law firms), Westlaw AI Assisted Research & CoCounsel Core, and Lexis+AI. LexisNexis has reportedly invested over $1.6 billion in the creation of its AI platform and is advertising that large law firms have shown a 30 – 40% time savings in their work product – which became widely available to most practitioners in October, 2023. How is generative AI already being used in the legal profession? Contract and document analysis, preliminary drafting of contracts and motions, basic drafts of client communications, legal research, and generating deposition questions, to name just a few tasks accomplished using generative AI.

When it comes to the practice of law, not all generative AI platforms are created equal

As a general rule, those generative AI programs that are built specifically for lawyers and that are trained on exclusively legal content will be far more reliable products for the legal profession than those platforms that are not specifically designed with the practice of law in mind. Practitioners must recognize that not all generative AI programs are reliable for use by lawyers, at least without serious independent verification of the generated content. Lawyers need look no further than the cautionary tale of the New York attorney who was sanctioned by the court for filing a ChatGPT-generated brief that included fabricated case cites. Closer to home, a Florida lawyer was recently suspended by the Middle District of Florida for one year for filing pleadings based on fabricated cases. Because of the technology's vulnerability to "hallucinatory" content, a number of judges around the country have entered standing orders requiring lawyers practicing in their divisions to certify in writing that they did not use artificial intelligence in the preparation of their filings, or if they did, to certify that a human checked the content for accuracy using print reporters or traditional legal databases.

With the potential to positively transform our law practices, generative AI also presents new ethical dilemmas for practitioners

The ethical implications of deploying generative AI in the practice of law are profound. Because generative AI technology is so new to the legal profession, we are just now beginning to see guidance from the ABA[1] and The Florida

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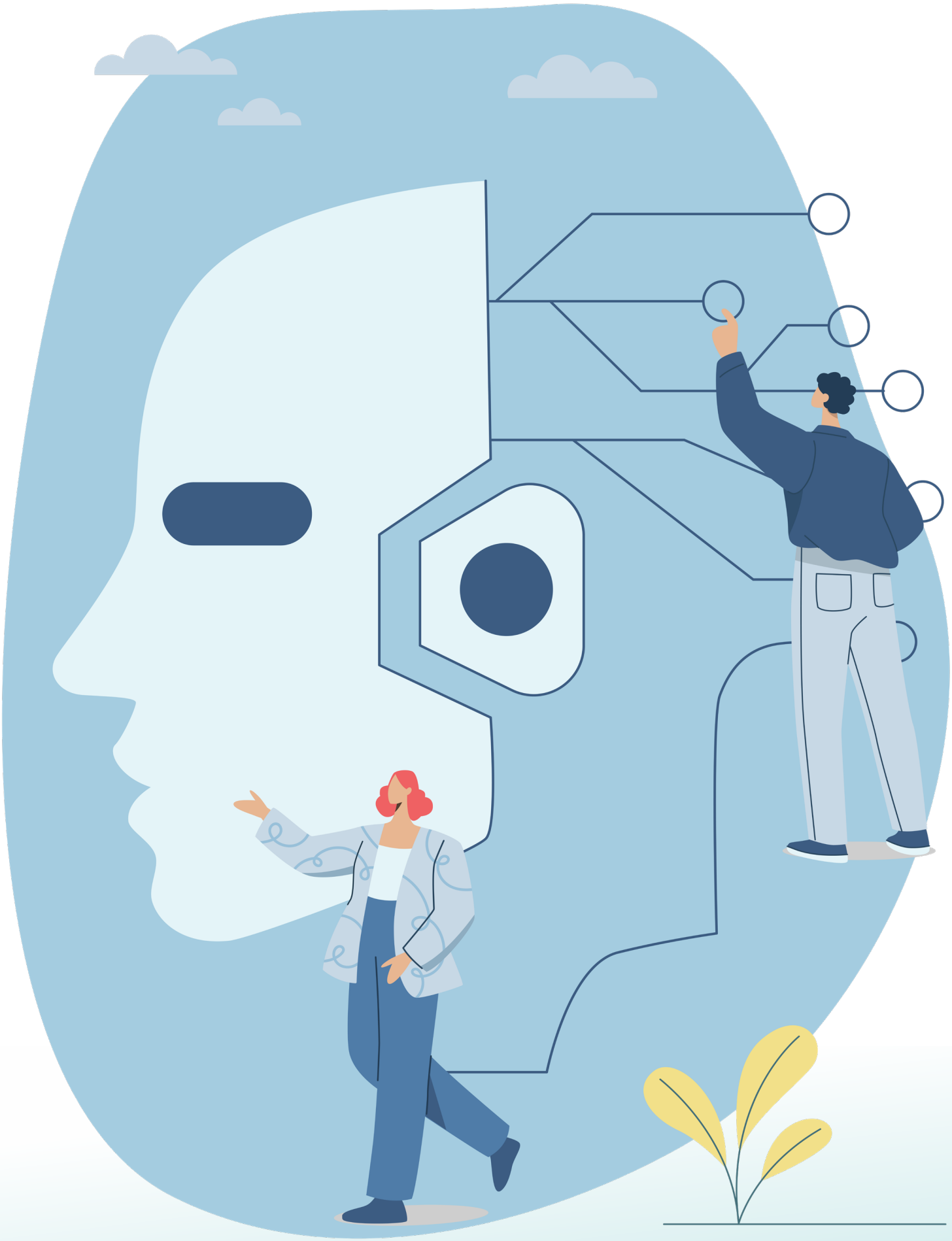

Bar. In fact, it is probably a fair criticism to say that the legal profession has traditionally lagged behind in regulating lawyer use of technology. Kudos to past Florida Bar President Scott Westheimer, who made AI education a priority during his term, and as a result Florida is leading in this area. Mr. Westheimer formed a special committee to develop a formal ethics opinion, which was released this January, months ahead of the ABA formal opinion.

Where does a lawyer's use of generative AI intersect with the Florida Rules of Professional Conduct?

A good starting point is Opinion 24-1[2], which focuses its analysis on four primary areas: client confidentiality, lawyer competence and proper oversight of generative AI technology, legal fees and costs, and lawyer advertising. Let's review the Florida Rules of Professional Conduct that could be implicated by lawyer use of generative AI.

Rule 4-1.1. Competence – "A lawyer must provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."[3] From the Comment to Rule 4-1.1.: "… To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in law and its practice, engage in continuing study and education, including an understanding of the benefits and risks associated with the use of technology…"(emphasis added).

When it comes to the use of generative AI technology, and its proclivity for incredibly rapid advances, technological competence under Rule 4-1.1. will be a constantly rising bar for practitioners. There have been incidents of lawyer discipline for failure to competently use or adapt to technology, in cases involving electronic filing, electronic discovery, and social media.[4] And moving beyond lawyer competence in the disciplinary context to lawyer competence in the malpractice liability context, what position can we expect our malpractice carriers to take on the use of ChatGPT and generative AI in our law practice? There have been anecdotal reports that at least one large insurance carrier sent its law firm clients a bulletin warning against the use of ChatGPT for substantive client legal work. There is also scuttlebutt that generative AI could conceivably impact our malpractice premiums in the near future.

Rule 4-1.5. Fees and Costs for Legal Services – "… (b)(1) Factors to be considered as guides in determining a reasonable fee include: … (G) the experience, reputation, diligence, and ability of the lawyer or lawyers performing the service and the skill, expertise, or efficiency of effort reflected in the actual providing of such services…" (emphasis added).

Recall the LexisNexis report that its AI product saves up to 40% of lawyer time. As generative AI continues to advance and improve in its reliability, there may come a point in time soon when lawyers will be ethically expected to utilize generative AI to reduce the cost of handling cases for their clients.

Rule 4-1.6. Confidentiality of Information – "(a) … A lawyer must not reveal information relating to the representation of a client except [for limited purposes stated in the rule]. … (e) … A lawyer must make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client…." A proposed amendment to the rule Comment, pending before the Florida Supreme Court, would caution lawyers to "be aware that generative artificial intelligence may create risks to the lawyer's duty of confidentiality."

There are a number of existing Florida ethics opinions regarding confidentiality and a lawyer's use of emergent technologies, in cases involving electronic file storage and cloud computing services, client metadata, and encryption of client communications.[5] To make matters worse, a lawyer who violates client confidentiality can also face malpractice exposure,[6] not to mention the possibility of inadvertently waiving attorney-client privilege. In the context of our confidentiality rule, legal commentators have opined that inputting client data into a system like ChatGPT is like posting it on the Internet for the world to see. So practitioners should be extremely judicious when inputting information in generative AI platforms. Several of the generative AI platforms, including ChatGPT, will allow the user to make a particular search private by deploying its privacy settings.

Rule 4-3.3. Candor Toward The Tribunal – "A lawyer shall not knowingly … make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer.…"

Beware of "hallucinating" generative AI programs that produce inaccurate or manufactured case cites!

Rule 4-5.3. Responsibilities Regarding Nonlawyer Assistants – In essence, this rule obligates the lawyer to review and be responsible for the work product of a nonlawyer. From the Rule Comment: "… When using [nonlawyer] services outside the firm, a lawyer must make reasonable efforts to ensure that the services are provided in a manner that is compatible with the lawyer's professional obligations." The Florida Supreme Court has reminded us that an attorney's nonlawyer personnel are agents of the attorney, and the attorney is responsible for seeing that the agent's actions do not violate the Rules of Professional Conduct.[7]

Here is the lawyer's quandary today: It is one thing to supervise your nonlawyer staff members, but how do you adequately supervise a chatbot when using generative AI

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technology? Furthermore, there may be UPL concerns, at least when using ChatGPT and other AI programs that are not tailored for lawyer use and are not trained exclusively on proven legal content. If you have asked ChatGPT through the use of clever prompts to prepare a warranty deed or to draft standard provisions in a Will, you may have received a response that borders on the unlicensed practice of law.[8]

Rule 4-8.4. Misconduct – "A lawyer shall not … engage in conduct involving dishonesty, fraud, deceit, or misrepresentation."

The potential concern with the misconduct rule and the use of a generative AI would be plagiarism or copyright violations, because the argument could be made that generative AI programs are plagiarizing the work of others without appropriate or accurate attribution. At least one Florida lawyer has been disciplined with a suspension for engaging in plagiarism.[9]

Rule 4-5.1. Responsibilities of Partners, Managers, and Supervisory Lawyers – "… (a) Duties Concerning Adherence to Rules of Professional Conduct. A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers therein conform to the Rules of Professional Conduct."

Remember that your young associates grew up on avant-garde technologies and began using them with little hesitation and with a lot of blind trust. We need to be certain that our firm colleagues , in particular the young lawyers , do not plunge into the use of generative AI without exercising appropriate caution.

How to mitigate the ethical risks of using generative AI in your law practice

Consider what reasonable measures you should put in place to ensure that you and your law firm colleagues are using AI in an ethical manner.

1. **Educate yourself** – How is AI being used in the practice of law, and what reliable platforms are available for lawyer use?
2. **Evaluate the benefits** – What aspects of AI can I prudently take advantage of and incorporate into my practice to add value to my clients and make me a more efficient lawyer?
3. **Evaluate the risks** – Where are the dangers and imprudence of using AI in my law practice? What are the current shortcomings of the technology? Always understand that AI tools are not a substitute for human judgment and creativity. Always treat every bit of information that you input into an AI program as if it could go viral on the Internet.
4. **Educate your firm colleagues** – Make sure that everyone in your firm who touches the representation of your clients (lawyers and nonlawyers alike) are similarly educated on the issues posed by AI and share your same prudent evaluations when it comes to the use of generative AI.

An AI expert's forecast for the legal industry

Lawyers should heed the following advice from Eric Brybjolfsson, Director of Stanford University's Digital Economy Lab and Senior Fellow at the Stanford Institute of Human-Centered AI, "Most of the U.S. economy is knowledge and information work, and that's who's going to be most squarely affected by [artificial intelligence]. I would put people like lawyers right at the top of the list … But I like to use the word "affected," not "replaced," because I think if done right, it's not going to be AI replacing lawyers; it's going to be lawyers working with AI replacing lawyers who don't work with AI."


G. PRESSLY

J. Grier Pressly, III *is a shareholder with Pressly, Pressly, Randolph & Pressly, P.A. in Palm Beach where his practice focuses on estate and trust litigation, fiduciary litigation, estate and trust administration, and guardianship litigation. Grier is active in the Real Property, Probate and Trust Law Section of The Florida Bar where he is a member of the Section's Executive Council and serves as Vice Chair of the Probate Law and Procedure Committee. Grier is an ACTEC Fellow and is a former Chair of the Probate Rules Committee of The Florida Bar. Grier regularly authors and lectures on estate, trust and guardianship litigation topics.*

Endnotes

1 See *ABA issues first ethics guidance on a lawyer's use of AI tools. https://www.americanbar.org/news/abanews/aba-news-archives/2024/07/aba-issues-first-ethics-guidance-ai-tools/ (last visited August 18, 2024).*

2 https://www.floridabar.org/etopinions/opinion-24-1/

3 As the Florida Supreme Court has pronounced, "The single most important concern in the Court's defining and regulating the practice of law is the protection of the public from incompetent, unethical, or irresponsible representation." *The Florida Bar v. Moses, 380 So.2d 412, 417 (Fla. 1980).*

4 See *In re Harris, 180 P.3d 558 (Kan. 2008); Johnson v. McCullough, 306 S.W. 3d 551 (Mo. 2010); US v. Montague, 2016 WL11621620 (W.D.N.Y. 2016); ABA Journal (Mar. 19, 2014 Ed.).*

5 See Florida Bar Ethics Opinions 12-3 (2013), 06-1 (2006), 06-2 (2006), 10-2 (2010), and 00-4 (2000).

6 "Mere inclusion of attorney's duty of confidentiality in Rules of Professional Responsibility does not prevent breach of this duty from being enforced as a tort and legal malpractice." See *Elkind v. Bennett, 958 So.2d 1088 (Fla. 4th DCA 2007).*

7 *The Florida Bar v. Rogowski, 399 So.2d 1390 (Fla. 1981).*

8 See *The Florida Bar v. Irizarry, 268 So.2d 377 (Fla. 1972). The preparation of a warranty deed is prohibited to real estate brokers and all others except attorneys.*

9 See *The Florida Bar v. Gonzalez, SC08-434 (Fla. 2008).*

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Florida's Mortgage Payoff Legislation:

"CONDITIONAL" PAYOFFS EXPRESSLY PROHIBITED

By Rebecca L.A. Wood, BCS, Alliant National Title Insurance Company, Gainesville, Florida, and Richard S. McIver, BCS, Kass Shuler, P.A., Tampa, Florida

With the passage of SB 708, changes to Florida's payoff statute became effective October 1, 2023.[1] The purpose of the law was aptly stated by the Florida Legislature in the text of the law: "The Legislature finds that the timeliness and accuracy of an estoppel letter is critical because the parties to a real estate transaction must rely on the estoppel letter to establish the loan payoff amount necessary to release the mortgage, which in turn will allow the owner to confer clean title to a buyer or to refinance the property."[2]

The legislation contains specific procedures for requesting a payoff statement from a creditor, as well as for the creditor sending the payoff to the requestor. The payoff statute applies to both judgment lienors and mortgagees, but this article discusses the legislation as a response to the title insurance industry's problem with conditional mortgage payoff statements and the title claims arising from rejected mortgage payoff remittances. The mortgage release certificate statute amended by the bill[3] does not apply to judgment liens, and is not heavily relied upon in the context of mortgage liens, and thus, is beyond the scope of this article.

Unconditional payoff statements: The legislature has adopted the position that, when asked to provide a statement for the purposes of paying off and satisfying a mortgage, the mortgagee may not, "qualify, reserve the right to change, or condition or disclaim the reliance of others on the information provided in an estoppel letter . . . ."[4] Any attempt to limit the ability to rely on the statement by inclusion of that or similar language is "void and unenforceable."[5] The mortgagee is allowed to correct a payoff letter, but any correction must be completed and delivered by 3pm in the recipient's time zone at least one business day prior to payment being issued in reliance on the previous estoppel letter.[6] The law now provides that a mortgagee must accept and not return the payment, apply the payment to the mortgage balance, and release the mortgage lien, if payment was remitted in reliance on an erroneous estoppel letter that was not timely corrected.[7] The mortgagee is entitled to enforce payment of any deficiency from the person liable for payment, but the real property is no longer available for foreclosure, and of course, the mortgagor retains the right to bring appropriate defenses to any action to enforce the deficiency.[8] However, if the mortgagor has received a bankruptcy discharge, is deceased, or is otherwise unable to pay the deficiency, the mortgagee will bear the loss.

There is an exception to the prohibition against conditional language. The exception applies to mortgages for which a notice of lis pendens in a foreclosure action or a suggestion of bankruptcy has been properly filed and recorded.[9] It has always been the case that paying off a mortgage during the pendency of a foreclosure action requires special caution, and bankruptcy concerns impact all aspects of any closing touched by them. While notices of lis pendens are typically recorded, suggestions of bankruptcy may not be.

Requesting Payoffs: To avail oneself to the protections under the statute, the request for the payoff estoppel letter must come from a person entitled to it, and the request must be made in an authorized way. Three classes of people may make the request: the mortgagor, the current owner, and an authorized agent of the mortgagor or the current owner.[10] In any case of the request being made by a person other than the mortgagor, the mortgagee must notify the mortgagor of the request.[11] While the mortgagor is usually also the current owner, that is not always the case. The current owner is also entitled to make the request, but if that owner is not also the mortgagor, then the current owner must provide a copy of

continued, page 12

the title muniment showing that the current owner owns the property.[12] Finally, a fiduciary or trustee acting for the record title owner may make the request, in which case, the document evidencing their lawful authority must be provided.[13] It is under this category that most title transaction closing offices will fall, and the instrument evidencing their authority is an authorization to release information, because the law states, "Notwithstanding s. 655.059, a mortgagee or mortgage servicer may provide the financial information required under this subsection to a person authorized under this subsection to request the financial information."[14]

The statute provides that the payoff request must be made in writing, but do not fear an undue burden. This is not expected to bring an end to automated payoff lines, because the law states, a "written request for an estoppel letter under paragraph (a) must be sent to the mortgagee or mortgage servicer by first-class mail, postage prepaid; by common carrier delivery service; or by e-mail, facsimile, or other electronic means at the address made available by the mortgagee or mortgage servicer for such purpose ***or through an automated system provided by the mortgagee or mortgage servicer for requesting an estoppel letter***" (emphasis added).[15] Similarly, in addressing the mortgagee's obligation to respond, use of the automated system is expressly authorized.[16]

Responding to Payoff Requests: The time for response has been shortened from 14 to 10 days after receipt of the request.[17] The request is considered received five days after being deposited with the United States Postal Service; upon delivery by a common carrier delivery service; or the day the request is sent by electronic means or through the mortgagee an automated system provided for requesting an estoppel letter.[18] Note, however, if any of those days fall on a weekend or a state or federally recognized holiday, it is considered timely received on the next business day.[19]

The estoppel letter must include a statement of the total unpaid balance and per diem interest and, except as stated above, must not contain conditional language.[20] The unpaid balance is the total of the loan due under or secured by the mortgage as of the date specified in the estoppel letter, including an itemization of the principal, interest, and any other charges comprising the unpaid balance.[21] The per diem interest is the interest accruing on a per-day basis for the unpaid balance from and after the date specified in the estoppel letter, if applicable.[22]

The statute allows delivery of the estoppel letter by various means, including through the automated system provided for this purpose, so the author's opinion is that the automated system will remain the primary method of request and delivery. In connection with the system, delivery may be by mail, facsimile, or other electronic means, as directed in the request. Other methods of delivery all seem to come with potential burdens. First-class mail, postage prepaid is allowable, but offers no way of tracking the letter. Facsimile is still allowed, as that technology is frequently used in conjunction with automated systems provided for this purpose. In allowing for other methods of delivery, including postage-prepaid first-class mail, the statute specifically provides that the mortgagee shall not be required to pay for a common carrier delivery service.[23]

While conditional language is otherwise expressly prohibited, a corrective payoff statement is binding to override the original estoppel letter if it is delivered in compliance with the statute. If the person who requested the original estoppel letter receives a corrected estoppel letter by 3 p.m. in such person's time zone at least one business day before a payment is issued in reliance on the previous estoppel letter, the corrected estoppel letter supersedes all prior estoppel letters.[24] Even in the event of an error in issuing the original, a correction is not binding if the person who requested the estoppel letter did not timely receive the corrected statement. In the absence of timely notice of correction, the mortgagee or mortgage servicer may not deny the accuracy of the erroneous statement as against any person who relied upon it.[25]

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Processing Payoffs: When a payment is received at the location and in the manner specified in the estoppel letter, the mortgagee or mortgage servicer must accept the payment received in reliance on the estoppel letter and must promptly apply the payment to the unpaid balance of the loan secured by the mortgage.[26] A short payment may not be refused; the amount received must be applied to reduce the unpaid principal balance of the loan due under the mortgage.[27] Even in cases where the payment is not sufficient to fully pay, within 60 days of the payment, paid pursuant to an estoppel letter, the mortgagee or its servicer shall execute a written instrument acknowledging release of the mortgage, shall send the recordable instrument to the proper county for recording, and then shall send the recorded release to the mortgagor or the record title owner of the property.[28]

In the event of a short payment, the mortgagee is obligated to release of the lien, but retains the right to pursue collection of any shortfall against the mortgagor.[29] If a mortgagee pursues the mortgagor, personally, mortgagors have the right to bring appropriate defenses to that action. In the case of such a dispute, the prevailing party is entitled to reasonable attorneys' fees and costs in certain civil actions.[30]

The legislation also amends the Mortgage Release Certificate law, conforming it to changes made by the act.[31] As a reminder, this statute allows for the recording of a Certificate of Release by the title insurer who remitted payment based on a valid estoppel letter. This statute has not been heavily relied upon in the past, and there is no expectation of any increased reliance on such a certificate for insuring purposes as a result of the changes to the law.

The problem of unreliable mortgage payoff letters significantly impacted the residential real estate industry. Several members of the Real Property Probate and Trust Law Section's Executive Council are to thank for their initiative and their determination in passing this legislative response to the problem. The provisions requiring short payments to be accepted and liens to be released allow record titles to be further transferred, without regard to the mortgagee enforcing any unpaid amounts on an unsecured basis. Kudos to the advocacy of our Section's leadership.


R. McIVER

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Rebecca earned her J.D. from the University of Florida in 2010, where she was a member of the Florida Law Review and graduated cum laude. She earned her undergraduate degree in Business Administration from King College in Bristol, TN in 1988.

Endnotes

1 Fla. Stat. §§ 701.04 – 701.041 (2023)
2 (Section 3, Chapter 2023-135 Laws of Florida)
3 Fla. Stat. § 701.041 (2023)
4 Fla. Stat. § 701.04(1)(c)1 (2023)
5 Fla. Stat. § 701.04(1)(c)1 (2023)
6 Fla. Stat. § 701.04(1)(c)2 (2023)
7 Fla. Stat. § 701.04(e) (2023)
8 Fla. Stat. § 701.04(1)(c)3 (2023)
9 Fla. Stat. § 701.04(1)(c)1 (2023)
10 Fla. Stat. § 701.04(1)(a) (2023)
11 Fla. Stat. § 701.04(1)(a) (2023)
12 Fla. Stat. § 701.04(1)(a) (2023)
13 Fla. Stat. § 701.04(1)(a) (2023)
14 Fla. Stat. § 701.04(1)(g) (2023)
15 Fla. Stat. § 701.04(1)(f)1 (2023)
16 Fla. Stat. § 701.04(1)(f)2 (2023)
17 Fla. Stat. § 701.04(1)(a) (2023)
18 Fla. Stat. § 701.04(1)(f)1 (2023)
19 Fla. Stat. § 701.04(1)(f)1 (2023)
20 Fla. Stat. § 701.04(1)(b) (2023)
21 Fla. Stat. § 701.04(1)(b)1 (2023)
22 Fla. Stat. § 701.04(1)(b)2 (2023)
23 Fla. Stat. § 701.04(1)(f)2 (2023)
24 Fla. Stat. § 701.04(1)(c)2 (2023)
25 Fla. Stat. § 701.04(1)(c)3 (2023)
26 Fla. Stat. § 701.04(1)(e) (2023)
27 Fla. Stat. § 701.04(1)(e) (2023)
28 Fla. Stat. § 701.04(2)(a) (2023)
29 Fla. Stat. § 701.04(2)(b) (2023)
30 Fla. Stat. § 701.04(2)(a) (2023)
31 Fla. Stat. § 701.041 (2023)

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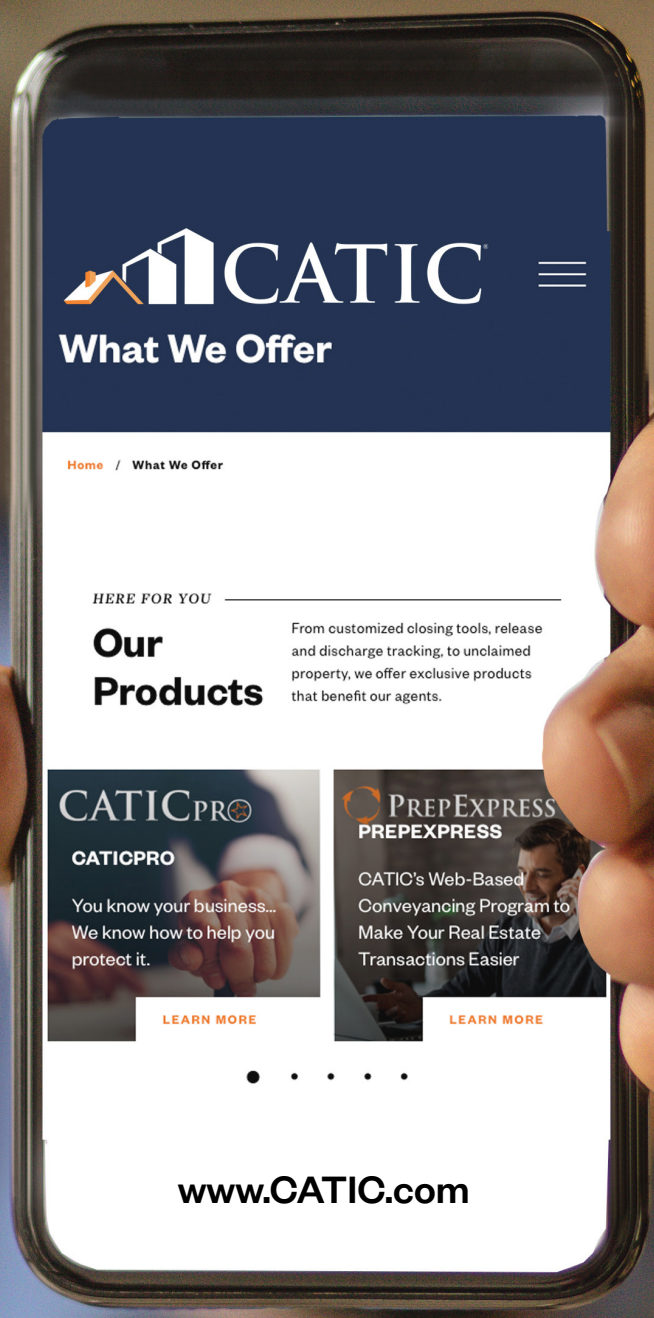

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Tax Planning for 2026: Are Your Married Clients Being Properly Advised on the Risk of Divorce?

By Andrew J. Krause, David A. Ruben and J.P. Bratcher, GrayRobinson, Naples, Florida

"Half of all marriages end in divorce
- and then there are the really unhappy ones."
—Joan Rivers

You're a diligent estate planning attorney and you take pride in making sure your clients have the appropriate tax planning in place. Recently, this has taken the form of preparing for the sunset of the historically high lifetime estate and gift tax exemption scheduled to occur on January 1, 2026 (the "Sunset").[1] You've broached this topic early so your high-net-worth clients aren't scrambling at the end of 2025. As for your high-net-worth married clients, many have already created one or more Spousal Lifetime Access Trusts ("SLATs") and many more will do so in the next two years.[2] If 2025 comes and goes and Congress fails to pass any legislation to prevent the Sunset, many high-net-worth married couples who had a big estate tax issue to worry about in 2025 will now have a much bigger estate tax issue to worry about - but not <u>your</u> high-net-worth married clients! Due to your attentiveness, the vast majority of your clients listened to your advice. Nice work! You've just saved these clients and their families millions of dollars in transfer taxes, but what will happen if one of your clients who has created a SLAT gets divorced? If this is something you haven't spent a lot of time thinking about (and you are not alone), read on . . .



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Overview of Florida Law Regarding the Division of Assets Upon Divorce

Statutory Goal: Equitable Division

Florida has set forth a statutory scheme in Fla. Stat. §61.075 to guide courts in the division of assets and liabilities upon divorce. Generally, the Statute operates by specifying which assets and liabilities are classified as marital versus nonmarital, and directs courts to start with the premise that marital assets and liabilities should be divided equally unless there is justification to do otherwise.[3]

Under Fla. Stat. §61.075(6)(a)(1), "marital assets" are defined as:

- assets acquired during the marriage by either or both spouses;[4]
- the enhancement in value of nonmarital assets from the efforts of either party during the marriage or from a contribution to or expenditure thereon of marital funds;[5]
- gifts from one spouse to the other during the marriage;[6] and
- all benefits, rights and funds accrued during the marriage in retirement, pension, profit-sharing, annuity, deferred compensation, and insurance plans and programs.[7]

Additionally, the statute creates a rebuttable presumption that all assets acquired during the marriage are marital assets if not specifically established as nonmarital assets.[8]

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Under Fla. Stat. §61.075(6)(b), "nonmarital assets" are defined as:

- assets acquired by either party prior to marriage (and assets acquired in exchange for such assets);[9]
- assets acquired separately by either party by noninterspousal gift, bequest, devise, or descent (and assets acquired in exchange for such assets);[10]
- all income derived from nonmarital assets during the marriage unless the income was treated, used, or relied upon by the parties as a marital asset;[11] and
- assets excluded from marital assets by valid written agreement of the parties (and assets acquired in exchange for such assets).[12]

What Effect Does Divorce Have on a SLAT?

So what effect will divorce have on a SLAT? If a SLAT has been created for both spouses (of course on a non-reciprocal basis), Florida law can result in unwanted and unexpected results. If a SLAT has been created for only one spouse, Florida law can be downright brutal (certainly from the perspective of the settlor spouse).

For years, the Florida Statutes have included safeguards for many estate planning documents that, in general, treat an ex-spouse as pre-deceased upon divorce. This is the case for wills,[13] powers of attorney,[14] heath care advanced directives[15] and *revocable* trusts.[16] However, there is no such corresponding provision for *irrevocable* trusts (and a SLAT by definition is irrevocable). As such, Florida courts that have analyzed the effect of divorce on an irrevocable trust have generally relied on the four corners of an unambiguous trust agreement to discern the settlor's intent from the plain meaning of the terms used therein.[17] In other words, if a SLAT does not contain provisions to alter its terms upon divorce, the settlor can be stuck with an irrevocable trust for the benefit of an ex-spouse under which that ex-spouse may be the sole trustee.

As to how SLAT assets are classified for the purposes of equitable distribution upon divorce, Florida courts have held that such assets are nonmarital assets, reasoning that: (i) an irrevocable trust is "an entity distinct from the Former Husband and the Former Wife,"[18] and (ii) as such, the assets owned by the irrevocable trust are, "[a]kin to assets owned by a corporation, limited liability company, or partnership . . . [which is] ordinarily third-party property which **cannot be divided upon divorce**."[19] In *Nelson v. Nelson*, the court found this to be the case *notwithstanding* the fact that under the terms of the SLAT before the court (which was created by the ex-husband), the ex-wife was both the trustee and the beneficiary.[20] In determining which assets are marital vs. nonmarital, courts have also looked to whether this is addressed in the plain language of a nuptial agreement.[21]

How to Address the Risk of Divorce for Clients Creating SLATs

An estate planning attorney counseling a client with regard to the creation of a SLAT should consider a number of steps to address the risk of divorce to protect both the client and the drafting attorney.

Put it in Writing

As a practical matter, it is prudent for any estate planning attorney counseling a client regarding the creation of a SLAT to:

1. broach the topic of divorce;
2. explain the implications and risks;
3. present the client with various options to address the issue;
4. document the client's wishes in this regard; and
5. perhaps most importantly, do all of the above in writing (e.g., discuss the issue with the client by email or give the client a memorandum explaining the issue and have the client sign a document acknowledging receipt).

Many of us represent clients who have been married for fifty years or more, who might chuckle at the prospect of divorce (most of us have heard a client say "that would never happen!"), and who may very well decline any and all recommended remedial measures to address the risk of divorce with regard to a SLAT. However, if this same dismissive client creates a SLAT and later gets divorced, you will be thankful you have clear documentation in your records of the discussion described in this paragraph.

Include Remedial Provisions in the SLAT

One remedial measure is to include language in the trust agreement to "take out" the beneficiary spouse in the event of divorce. For example, the trust agreement could list "my spouse" as one of the permissible beneficiaries, but define "my spouse" as the individual to whom the settlor is then-married at any point in time. Alternatively, the trust agreement could include a clause that treats the beneficiary spouse as having pre-deceased the settlor for all purposes in the event of divorce (or perhaps in the event either spouse files for divorce). In the event of divorce, both clauses remove an ex-spouse as a SLAT beneficiary, and the latter also removes an ex-spouse as the SLAT trustee.

In some instances, such as when the client relies on a postnuptial agreement, the ex-spouse may remain as a SLAT beneficiary post-divorce. One issue to consider here is the income tax implications for the settlor spouse. SLATs are often structured to be grantor trusts, resulting in the settlor being treated as "owner" of the trust assets for income tax purposes.[22]

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However, a SLAT settlor may not want to pay the income taxes for the trust post-divorce. As such, it is prudent to include some mechanism in the SLAT to allow for a change in the grantor trust status, as needed.

Postnuptial Agreement

The above remedial measures may in some cases be sufficient, and in some cases may be the client's preference, to address the risk of divorce in a SLAT. Another option is to have the clients sign a postnuptial agreement in which the spouses agree as to the treatment of the SLAT assets in the event of divorce.

While a full-blown postnuptial agreement would be effective for this purpose and is worth suggesting, as a practical matter it might not be realistic to expect every client considering a SLAT to do this. A more palatable alternative for many clients is a postnuptial agreement limited in scope to addressing the treatment of the SLAT assets in the event of divorce.

In either version, the parties could agree, for example, that in the event of divorce the then-current fair market value of SLAT assets: (i) shall be treated as a marital asset for the purpose of equitable division; and (ii) will be treated as an allocation and offset against the share created for the SLAT beneficiary-spouse. This language may be appropriate where a SLAT names the spouse as both the sole beneficiary and sole trustee.

CONCLUSION

Estate planning attorneys simply cannot ignore the likelihood, risk and implications of divorce when counseling clients regarding the creation of a SLAT.


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Endnotes

1 The Tax Cuts and Jobs Act passed in 2017 provided for a basic exclusion amount ("BAE") for each individual of $10,000,000, which is then adjusted annually for inflation (retroactively to 2010). This essentially doubled the then-current BAE. However, the act included a sunset provision providing that on January 1, 2026 the BAE will revert to pre-Tax Cuts and Jobs Act amounts (essentially, cutting the BAE in half). This Sunset will occur unless Congress passes legislation to extend or otherwise revise the BAE.

2 There are a variety of tax planning techniques commonly used by estate planning attorneys to help clients plan for the Sunset including transfers to irrevocable trusts for children, annual exclusion gifting and transfer to SLATs. This article will focus on the latter, which at least for married clients, will likely be the most commonly-used tax planning technique to address the Sunset. While a detailed dive into SLATs is beyond the scope of this article, a SLAT is simply an inter-vivos irrevocable trust created by a married individual for the benefit of his or her spouse (and sometimes descendants). A common goal of a SLAT is for the settlor spouse to: (i) fully use some or all of his or her remaining lifetime exemption (often with the goal of using such exemption if there is a risk that it may be taken away); (ii) ensure that the trust assets (including future appreciation) are not subject to transfer taxes; (iii) retain certain types of indirect access to trust assets; and (iv) in many cases, take advantage of discounted values when funding this type of trust.

3 Fla. Stat. §61.075(1).

4 Fla. Stat. §61.075(6)(a)(1)(a).

5 Fla. Stat. §61.075(6)(a)(1)(b).

6 Fla. Stat. §61.075(6)(a)(1)(d).

7 Fla. Stat. §61.075(6)(a)(1)(e).

8 Fla. Stat. §61.075(8).

9 Fla. Stat. §61.075(6)(b)(1).

10 Fla. Stat. §61.075(6)(b)(2).

11 Fla. Stat. §61.075(6)(b)(3).

12 Fla. Stat. §61.075(6)(b)(4).

13 Fla. Stat. §732.507(2).

14 Fla. Stat. §709.2109(2)(b).

15 Fla. Stat. §765.104(2).

16 Fla. Stat. §736.1105(2).

17 See *Nelson v. Nelson,* 206 So. 3d 818, 819 (Fla. 2d DCA 2016), *Hansen v. Boethe,* 10 So. 3d 213, 214 (Fla. 2d DCA 2009).

18 *Nelson v. Nelson,* 206 So. 3d 818, 820 (Fla. 2d DCA 2016).

19 *Id.* at 822 (emphasis added), citing Brett R. Turn, Equitable Distribution of Property § 6:94 (3d ed. 2005).

20 Nelson at 820.

21 See *Hahamovitch v. Hahamovitch,* 174 So. 3d 983, 986-87 (Fla. 2015).

22 IRC § 671. A trust is a grantor trust if the terms of such trust trigger one of the rules contained in IRC §§ 673 – 679.

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Not Just Any Appraisal Will Do

By Rachel E. Fisch, CPA/ABV, MRICS and Stephen King, MAI, MRICS
RealAdvice, Tampa, Florida

When serving clients in matters in which significant real property is being conveyed, asset valuation frequently requires determination by properly licensed professionals. When the real property is commercial (income-producing), an additional, and frequently overlooked, valuation skillset is required. Thus, professional competency becomes paramount.

While it is always important to research service providers before engaging anyone's services, researching the quality of their services is even more important when relying on providers for their professional advice in matters of finance and business. Before the advent of the internet, professional service reviews were primarily communicated by word of mouth. So, while the internet has simplified the process of finding credentialed professionals, how does one determine if the valuation expert found to allocate the purchase price on a commercial real estate transaction is providing the best possible service?

This article provides specific insight on how to determine if the valuation expert that you hire to prepare a purchase price allocation report for commercial real estate is rendering the most defensible opinion report available. Simply put, it is of paramount importance that a state-of-the-art report will be prepared and signed by a multi-disciplinary team of experts both in real estate *and* in business valuation.

What is a Purchase Price Allocation?

It might help if we first take a step back and define our terms. The Financial Accounting Standards Board (FASB) defines a business combination as a transaction or a process in which two or more separate businesses or entities come together to form a single entity. These combinations are, typically, undertaken for various strategic, financial, or operational reasons and can take several forms, including mergers, acquisitions, consolidations, or joint ventures.

Purchase Price Allocation (PPA) is described as the process of taking the total consideration paid in a business combination and dividing it, but that's not technically correct. The PPA process involves identifying both the assets, including intangible assets, and also the liabilities acquired and determining each one's fair value.

> Fair Value, or Fair Value Measurement is not the same as Fair Market Value. FASB 805-10-20 defines fair value as "the price that would be received to sell an asset or paid to transfer a liability in an orderly transaction between market participants at the measurement date."

Fair Market Value, on the other hand, is defined by the Internal Revenue Service in Revenue Ruling 59-60 as, "the price at which the property would change hands between a willing buyer and a willing seller when the former is not under any compulsion to buy and the latter is not under any compulsion to sell, both parties having reasonable knowledge of relevant facts."

Why would we need to determine Fair Value? A PPA is relevant in the acquisition of commercial real estate because the buyer acquires a going concern, a business operating on and in a parcel of real estate. In 49 states (excluding Mississippi), intangible assets are not taxable when conveyed as part of commercial real estate. That said, invariably, there are intangible assets associated with commercial real estate, such as workforce (payroll), intellectual property, unamortized lease

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costs, and tenant relationships. These intangible assets are often significant components of the purchase price of what is commonly thought of as only real property.

A Little History

How did the process of allocating purchase prices come into being? Before June 2001, a business combination could be accounted by using either the "purchase method" or the "pooling of interests method." However, application of these two methods could result in very different financial statements for the same transaction. In 2001, for increased transparency, the Financial Accounting Standards Board (FASB) released Statement of Financial Accounting Standards (SFAS) Nos. 141 and 142. These standards required that business combinations be accounted for using the purchase method. The increased transparency is for all users of the financial statements, which includes investors, stockholders, lenders, and others. A revision was issued in December 2007 for additional clarification. In 2009, these standards were codified in ASC 805.

Applying the "pooling of interests method," the balance sheets (assets and liabilities) of the two companies being combined were simply added together, item by item. Any premium paid over the historic cost of the assets was not reflected in the financial statements. Shareholders did not have a clear understanding of the value of the business being purchased. With the introduction of these standards, businesses were required to identify the fair value of the assets obtained and the liabilities assumed in a business combination, including intangible assets and goodwill. An allocation of the purchase price is now required.

What Should I Look for in a Best-in-Class Report?

If a service provider offers to perform a PPA for a commercial real estate transaction, ask to see a sample or a redacted report already produced by that service provider. Review it to determine if it meets the standards that govern both the

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process and the methods used to determine the fair value of intangible assets, such as those that follow.

The report should disclose appropriate assumptions and limiting conditions and that the analysis was performed subject to these factors and constraints. They are common in valuation engagements and are often listed in an appendix. These disclosures should clearly delineate the information relied upon and should specify what the valuation does and does not claim to do.

An overall description should be included in the introduction or the overview of the report. It should include a clear definition of the valuation assignment, as well as the following:

- The identification of the subject property by address, parcel identification number, or coordinates.
- The purpose of the assignment, with an explanation of why the valuation specialist was retained. This should be clear and provide that its findings are not to be used for any other purpose.
- The valuation or measurement date, i.e., the PPA for a commercial real estate transaction is the closing date.
- The standard of value. This will generally be fair value as defined in ASC 820 or a legally mandated standard required in the situs jurisdiction.

Restrictions on the use of the report for the intended purpose should be noted early in the narrative. Valuation of the intangible assets is performed for the purpose articulated in the report. Using it for fundraising, lending, or any other purpose would likely be inappropriate. Such uses would require additional or different analyses.

The valuation date is specific to the PPA and could vary depending on the purpose of the report. If a valuation is performed when there is an acquisition or exchange of commercial real estate, then the date should be on or near the date of the acquisition. A PPA could also be performed when the county assessor reassesses the property. A reassessment is based on a hypothetical transaction. For this situation, the appraisal valuation date would be the date of reassessment.

Best practices for a PPA report include a list of source documents the analyst appraiser(s) relied on to complete the analysis. The reliance on variable data sources should be clear, indicating whether it is derived from empirical data, assumptions, or the analysis(es) of the appraiser(s). If a multidisciplinary approach is used, the analysis will be performed by more than one appraiser.

Financial performance and cash flows are relevant to the valuation of intangible assets and substantiate the plans for the acquiring company. Whether the financial information relied upon was or was not audited, reviewed, compiled, or attested to by the valuation analysts, this should be stated in the report. The financial data relied on should be provided, in detail or summary form, in the body or an exhibit to the report.

A PPA report will contain the representations and qualifications of the valuation analyst(s). It summarizes the factors that guided their work during the analysis. It contains

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the explanation of the authoritative guidance used for the analysis and the report.

So, how does counsel determine which valuation experts are best equipped to prepare the report described above? Such an analysis must be performed by multidisciplinary experts in both real estate (i.e., an MAI designated appraiser or equivalent) and a business valuation (i.e., an ABV designated appraiser or equivalent), using the PairedExpert™ approach or an equivalent technique. Ideally these experts will have vast experience in their respective fields of expertise, separate from providing opinions on a commercial real estate PPA.

Best-in-class reports present multiple valuation approaches and methodologies properly considered and used as stated within the narrative. The techniques used to value the assets must be professionally accepted in each of the fields (business valuation and real estate appraisal). Methods used to determine the fair value of intangibles assets will be in alignment with accounting rules and standards. The conclusions rendered must be internally consistent, mutually supportive, and cross-tested.

How Do I Know If the PPA Report I Have is Preeminent?

A state-of-the-art report will contain a narrative that explains the valuation issues relevant to the specific conveyance. The writing will be in clear, professional language and will reflect the economic reality of the acquisition or the disposition. Technical terms are defined. This is critical as different states, the Internal Revenue Service, and even various accounting bases contain more than one definition for the same term. Clearly defined terms eliminate any possibility of confusion.

Because PPAs are developed for the purpose of determining the price that would be paid for component assets by market participants, the documents and factors used to determine fair value must be those that are available to them. The analysis will exclude strategic factors from the appraiser's analysis and report findings.

The reader of the report should have a clear understanding of each intangible asset valued, its relevant technical guidance, and how it contributes to the commercial real estate's going concern value.

The report should contain a summary of the transaction and convey that the valuation specialist has knowledge of the deal terms and the impact of those terms on value(s). Terms that carry significant value implications should be discussed in the report.

In its closing, a preeminent report will provide an explanation of the overall reasonableness of the allocations. It will present both a qualitative assessment and a quantitative analysis. It will also present how the valuation of each asset in the allocation supports the total value of the commercial real estate as a going concern.

A preeminent report appropriately describes the opinion(s) of value of the appraiser(s) for all identified assets and liabilities. These should be opinions of the legally appropriate values at issue. Appraisers do not determine values; the market does that. Appraisers opine.

The report should not imply a false level of precision; appraiser(s) should apply a consistent level of mathematical rounding throughout the analysis and within the report. Each method or value indication will be consistent for each asset and liability as well as the final conclusion.

Conclusion

A best-in-class and state-of-the-art purchase price allocation report for a commercial real estate conveyance will properly address all of the variables discussed above and will be prepared and signed as a single report by a multi-disciplinary team of experts in both real estate and business valuation. This is why the PairedExpert™ approach by RealAdvice will always provide you with a best-in-class report.



R. FINCH

Rachel Finch *has been a CPA for over twenty years with a focus on business valuation, consulting, and forensic accounting. She has handled over 200 forensic and valuation matters, including Ponzi schemes and embezzlement cases. She has testified over 20 times without being appealed, being recognized as an expert in numerous court jurisdictions for her analytical and valuation skills.*

A member of two different motorcycle crews (Stilettos on Steel and Diva Angels), Rachel is also an adventurer.

She is a Senior Managing Director in charge of business valuation at RealAdvice. She is an expert in the valuation of intangible business assets.



S. KING

Stephen King *has been appraising commercial real estate for over 20 years, conducting valuation assignments on property types that include multi-family, hospitality, industrial, office, retail and student housing. He is a Member of the Appraisal Institute, one of the highest distinctions in the industry, as well as a Member of the Royal Institution of Chartered Surveyors.*

Stephen has over 10 years of experience as a Special Magistrate, conducting and making recommended decisions in hundreds of Value Adjustment Board hearings, all of which were upheld.

He is an Executive Managing Director at RealAdvice where he is in charge of property valuation and oversees the production team. He's a state-certified general appraiser in Florida and in nearly 40 states around the country.

Executive Council Meeting

FEBRUARY 22 - 24, 2024

The Ritz-Carlton Orlando, Grande Lakes













Photos by Silvia Rojas and Michael Gelfand.


The Real Property, Probate and Trust Law Section
RPPTL.ORG










REALADVICE







Roundtable

Highlights of the Meeting of the RPPTL Section

REAL PROPERTY DIVISION

SATURDAY, FEBRUARY 24, 2024

Ritz Carlton Grande Lakes, Orlando, Florida

Prepared by Colleen Sachs, Esq., Pensacola, Florida,
Rebecca Wood, Esq., Orlando, Florida, and
Klarika Caplano, Esq., St. Petersburg, Florida

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



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

Sponsor Announcement. Karla J. Staker was recognized and spoke on behalf of the sponsor, Fidelity National Financial Title Group.

Action Items

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

The Committee brought three action items and requested that the Section adopt a legislative position on each. All three received appropriate motion and second, and all three passed unanimously.

The first was on the expansion of "Alternative Funding Methods." The position was to support legislation allowing any association that must obtain a Structural Integrity Reserve Study (SIRS) to utilize an alternative funding method which: (i) may reasonably be expected to fully satisfy the association's reserve funding obligations; and (ii) is approved by the Division.

The second involved the Code of Borrowing Authority. The position was to support legislation authorizing associations to borrow money or levy special assessments, notwithstanding, any requirement for membership approval in furtherance of the association's performance of necessary maintenance, repairs and replacements, including capital replacements. This legislation would give associations the authority to special assess or borrow money for necessary expenses involving health, safety, or welfare, and to make it void as against public policy to restrict the above.

The third was to codify *In re Petition for Declaratory Statement, Walter Grover, Unit Owner, Portofino Condominium Apartments* and the Financing of Special Assessments. The position supports legislation permitting unit owners to "finance" special assessments in the form of a payment plan with interest.

An emergency off-agenda Information & Action Item was presented by Melissa Murphy and Melissa Scaletta. They are on an ALTA Committee charged with responding to the proposed FinCEN rule that would apply to the entire United States without any dollar limit threshold. The rule would cover gifts or other gratuitous transfers as well as trusts, and vacant land is included. Due to time constraints, at Executive Council, a motion will be made to waive the rules and to allow a vote on a motion to authorize the Executive Committee to approve a letter protesting the proposed rule in favor of something that creates less of a burden on the industry, while still facilitating the public policy of deterring money laundering.

Information Items

Condo and Planned Development — Alexander B. Dobrev and Allison Hertz, Co-Chairs, Russell M. Robbins, Vice-Chair

Proposed Revisions to Parts I — III of Chapter 718 Regarding Nonresidential Condominiums. It was discussed that the statutes needed adjustment because non-residential condos are not the same as residential. It was requested that any technical concerns on the language be brought to Alex and Allison. The goals are to allow for easier modification of the configurations of units in a commercial condo; to better provide that nonresidential condominium associations can use different election procedures; to provide for different termination procedures for nonresidential condominiums; and to exempt nonresidential condominiums or 10 units or fewer from the mandatory turnover of associations to unit owners.

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Publications Committee

Michelle Hinden expressed thanks for the contributions received and the support she has received. She invited individuals to reach out if they have interest in contributing to the publication.

CLE Committee

Brenda Ezell, CLE Committee Co-Chair, reported that the Committee has 21 courses already scheduled for the rest of this year, and the Committee has 43 programs available in it 24/7 catalog.

Consolidation of Circuit Courts

Shawn Brown reported that the Florida Supreme Court took the task force's recommendations against consolidating, so none of our Circuits are getting consolidated; things will remain the same.

Ad Hoc Civil Rules

Michael Harget reported that the Florida Supreme Court will take oral arguments on the comments it received on March 7th at 9 am.

Committee Reports

Ad Hoc Hayslip — Brian W. Hoffman, Chair; Russell M. Robbins and James ("Jim") C. Russick, Co-Vice Chairs

This is going to be handled by Problems Studies going forward.

Historically, the elements of a covenant running with the land required "touch and concern;" the Hayslip case used "touch and involve," which is broader. The real question is whether a mandatory arbitration clause should run with the land.

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

No report

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

The Attorney Banker Conference is going to be great. It will be on April 12th at the Tampa Aquarium. The cost of the event is $275 for attorneys and $175 for lenders, which includes breakfast, lunch, and a happy hour. A request was made for people to reach out to lender clients to get them to participate.

Commercial Real Estate — E. Ashley McRae, Chair; Alexandra D. Gabel, Annabella Barboza, and Erin M. Miller, Co-Vice Chairs

The Commercial Real Estate Committee had a great CLE on representations and warranty insurance.

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

Expect another information item in June about HOA elections and recalls in terms of condos, co-ops, and HOAs. There has been a lot of controversy out there about bad boards, and boards and owners who feel like they can't get rid of their bad boards. They hope to move toward absentee ballots rather than proxies. They are also trying to reign in the perpetuation of recall and election litigation and get some finality to these disputes in a more efficient manner. They partnered with the Real Estate Financing and Lending Committee in January to do a CLE on association borrowing after Surfside, which is now available. They are also partnering with the Real Estate Litigation Committee on the derivative action, which will be on March 6.

Condominium and Planned Development Law Certification Review Course — Christine M. Ertl, Chair; Alessandra Stivelman, Vice Chair

The course was presented on February 2nd and 3rd at the Tampa Marriott. Attendance was very good. The course provided 14 credit hours, and it should be available for the aftermarket very soon, so for anybody else seeking certification this year, it's a great way to get 14 credits. Preparation for next year is underway.

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

The Committee meets the second Monday of each month. Recent topics included contract drafting, construction damages, and professionalism and ethics. Those interested can email Sanjay Kurian for log in information.

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

The course will be March 21st and 22nd. It is a great CLE filled with information even if you are not taking the test.

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

The CLI course will start with a golf tournament, followed by 13 1/2 credit hours over the next day and a half. Attendees will hear from judges, industry consultants and the best construction lawyers.

Development & Land Use Planning — Lisa B. Van Dien, Chair; Jin Liu, Vice Chair

There was an excellent presentation on special districts and CDDs. Ann Pollack spoke on the Live Local Act. The Committee is working on programming for the convention.

Insurance & Surety — Adele I. Stone and Debbie S. Crockett, Co-Chairs; Anne Q. Pollack, Vice Chair

French Brown presented a legislative update on insurance matters. The application to add Insurance to the Board Certification program has not yet been submitted, but has 254 signatures.

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

At Lobby Days, 35 to 40 FLTA members were able to meet legislators one-on-one to discuss issues. FLTA has become very active in the cyber security world and regularly has webinars on that subject. Brian Hoffman, as Agent Section chair, and Melissa Murphy, as Underwriting Section chair, play critical roles in FLTA leadership.

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

ACREL is in the process of candidate selection and there are candidates from the Section.

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

The annual meeting of ACCL is to be held this week.

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

Trey Goldman thanked Renee Rutan and the Real Estate Councils as the condominium terrain continues to unfold. They are discussing a lunch and learn with Realtors around the state to provide them with a checklist for the dos and don'ts for listing and selling a condominium.

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

There have been many changes in the course this year. An academy is scheduled for early March.

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

The Committee is finalizing plans for CLEs and other projects for 2024 and 2025.

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

Salome Zikakis presented on seller financing. An announcement was made to be on the lookout for requests from the Committee concerning that legislative action.

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

The Committee had a great discussion on Hayslip and moving that forward. They have numerous CLEs scheduled for the rest of the year. They include Digital Professionalism on April 8th, Partition on April 2nd; Charging Liens on June 19th; July 10th being on pre-suit considerations; August 14th being motion practice discovery Summary Judgment; and September 18th being Non-jury Trials. The Committee will also have its litigation symposium at the beginning of November.

Real Property Problems Study — Susan K. Spurgeon Chair; Brian W. Hoffman and Amber E. Ashton, Co-Vice Chairs

Not called upon to report

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

The Committee discussed recent case law and Senate Bill 264, as well as an update on FinCEN.

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

An announcement was made about FinCEN GTO expansion. Shawn Brown presented on code enforcement liens. A request was made for anyone who sees a transaction involving an attorney opinion letter to let Len Prescott or Melissa Murphy know about it.

Title Issues and Standards — Rebecca L.A. Wood and Amanda K. Hersem, Co-Chairs; Robert ("Bob") M. Graham, Karla J. Staker and Melissa Scaletta, Co-Vice Chairs

The Committee has four very diligent subcommittees working and will have some CLEs and ActionLine articles soon. Laura Licastro is working on a mobile home CLE scheduled for April 18th.

Adjournment. Meeting was adjourned at 9:30 a.m.

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ROUNDTABLE

Highlights of the Meeting of the RPPTL Section

PROBATE AND TRUST DIVISION

SATURDAY, FEBRUARY 24, 2024

Ritz Carlton Grande Lakes, Orlando, Florida

Prepared by Sara A. Harmon, Esq., Delray Beach, 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 8:07 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 committee chairs and Section members about requirements for presenting an action item at the upcoming RPPTL annual convention in May: the white paper, the legislative bill, and the legislative position form, all of which need to be sent to the legislation committee. The Division Director requested that this be completed soon.

Off-Agenda Announcements.

Melissa Murphy from the Real Property side appeared at the meeting to discuss new proposed Financial Crimes Enforcement Network (FinCEN) regulations with the Probate side. The real property side is going to request that action be taken at the Executive Council meeting today. Since 2016, FinCEN has required that certain residential real estate transactions be reported to them. This has previously been limited to the buyer, when the buyer was an entity (trusts are excluded), who paid cash, the property is residential (vacant lots are excluded). There is presently a sales price threshold of $300,000. FinCEN intends to expand this reporting requirement nationwide, with no dollar threshold. The real property side is concerned as this would appear to cover transfers that are gifts, and other types of gratuitous transfers. Additionally, trusts would no longer be excluded from reporting, and information on the transferor/seller would now be required in addition to information on the buyer, with fewer exclusions. The expanded rule would significantly increase reporting obligations on real property practitioners as well as estate planning practitioners. The real property side proposes that RPPTL submit a comment letter to FinCEN with suggestions and comments to make compliance with the rule more reasonable and manageable, as well as more commercially appropriate. FinCEN's proposed effective date is 1/1/26. The American Land Title Association (ALTA) has already formed a work group to develop a comment letter and compile education resources. The Real Property side will be seeking approval from the Executive Council to submit a comment to FinCEN.

Action Items

There were no action items discussed or voted on at this meeting.

Information Item

Trust Law Committee — David Akins, Chair. David shared the first information item, which involves a project that came up several years ago to compare the probate and trust code, see where there are differences and determine if any action should be taken to add to the Trust Code. There are two things that have come forward from the project thus far: (1) Ademption by satisfaction. This could potentially be an action item at an upcoming meeting. This is covered in the Probate Code but not in the Trust Code. The subcommittee finds that it comes up routinely enough in practice that it should be addressed in the Trust Code. This has been vetted and approved in the Trust Law, Probate Law and Procedure, and Probate Litigation committees; and (2) Add a definition of willful misconduct to the definition section of the Florida Trust Code that would apply only for purposes of Part XIV, the Directed Trust Act. There is a trend for states that have adopted the directed trust act

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to insert this definition due to fear that there will be different applications across different courts. There was discussion and commentary regarding the specific language for the definition, specifically, a concern was brought up that the new definition could raise the bar on willful misconduct to require an element of malice or fraud.

Probate Law and Procedure Committee — Theodore Kypreos, Chair. Stacey Prince-Troutman appeared to discuss the NextGen bar exam, which will be an information item at the Executive Council meeting today, and an action item at the Annual Convention. In 2018, a task force was put together to evaluate whether the current bar exam adequately assessed the skills and capabilities of new attorneys. The task force determined that it did not and proposed a new form of an exam called NextGen Exam. It will test eight topics. States can opt into NextGen in July 2026. Originally family law was excluded as a subject to be tested, but through advocacy, the topic was added and will be added as a topic to be included in July 2028. As it currently stands, trusts and estates will not be tested as part of the NextGen exam. Richard Ganz submitted a letter to The Florida Bar in support of the Florida Board of Bar Examiners retaining trust and estates as a topic to be tested. The proposed action for the Executive Council is whether we should authorize leadership to advocate for retention of trusts and estates as a topic for the bar exam. The Florida Board of Bar Examiners stated they would retain the current exam with trusts and estates as a topic for the July 2026 testing, so this is not an immediate concern, but it is a long term concern if Florida opts into the NextGen exam. Richard Ganz appeared for further discussion of the form letter that can be submitted to the Board of Governors which can be found on our website.

Committee Reports

Charitable Planning and Exempt Organizations Committee — Denise Cazobon, Chair. Denise Cazobon appeared to discuss the general education aspects of the committee meetings. The past meeting was heavily focused on Donor Advised Funds. Denise also discussed members of the committee that are working with the Business Law Section on a taskforce to update Florida Chapter 617 Not for Profit Act.

Introductions. The Division Director asked if any Fellows were present and wanting to introduce themselves. Sandra Boisand, Sara Harmon, and Jeanette Mora introduced themselves as Fellows.

New Business. "Checklist Law" and issues surrounding probate checklists required by the Courts were brought up as a potential future action item. Probate checklists are different in every county. Request for the Section to consider setting up a liaison with the judges to increase uniformity with the checklists and to clean the checklists up. The Probate Rules committee is going to consider adopting checklists as a project.

Adjournment. Meeting was adjourned at 8:43 a.m.



Mandatory Beneficial Ownership Reporting Is Now Effective For Most Domestic Entities – What Does This Mean For Your Clients?

By Sara A. Harmon, Esq., Redgrave & Rosenthal, LLP, Delray Beach, Florida

If you are one of the many estate planning attorneys that engage in business formation and planning on behalf of your clients, you may already be aware of a new reporting requirement for U.S. business entities that became effective on January 1, 2024. The Financial Crimes Enforcement Network (FinCEN) under the U.S. Department of Treasury passed the Corporate Transparency Act (CTA), which came into effect January 1st of this year. The CTA contains a beneficial ownership information (BOI) reporting rule, which requires domestic corporations, partnerships, and other entities to report identifying information about the individuals who directly or indirectly own or control a company.[1]

The stated purpose of FinCEN and the mandatory BOI is, "to safeguard the financial system from illicit use, combat money laundering and its related crimes including terrorism, and promote national security through the strategic use of financial authorities and the collection, analysis, and dissemination of financial intelligence."[2] Most domestic entities registered with any state will be required to report under the new rule. There are a few exemptions to the mandatory reporting requirements, mainly, publicly traded companies, banks and depositories, credit unions, and insurance companies, etc.

Businesses created prior to January 1, 2024, will have until January 1, 2025 to comply with the filing requirement. New entities created between January 1, 2024 – December 31, 2024, will have a period of 90 days to comply with the filing requirement. New entities formed on or after January 1, 2025, will have 30 days from the effective date of creation of the entity to file a report.

FinCEN will permit federal, state, local, and tribal officials who submit a request through a U.S. federal government agency, to obtain reported BOI for authorized activities related to national security, intelligence, and law enforcement.[3] Notably, financial institutions will have access to BOI in certain circumstances, with the consent of the reporting company.[4]

Presently, the beneficial ownership information report can only be completed and submitted online. The U.S. Department of Treasury estimates that it will take around 20 minutes to file a report for each entity required. The report need not be updated unless there is a change in the beneficial ownership of the entity subsequent to the initial filing of the report. There are no fees associated with the filing of a report, but there are significant potential consequences for noncompliance or untimely compliance, including, criminal and civil penalties of $500 per day and up to $10,000 and/or up to two years of imprisonment.[5] While the report does not require the assistance of an attorney, and an attorney is not obligated to file the report on behalf of a client, it is likely that business owners will contact their estate planning attorneys for information and assistance with the reports. Anyone authorized by the company may file the report on behalf of the company.



S. HARMON

Sara Harmon *is an associate attorney with the law firm of Redgrave & Rosenthal where she focuses her practice on comprehensive estate planning strategies and asset protection. Sara earned her B.A. from the University of Georgia and her Juris Doctor from Loyola University New Orleans, with a concentration in tax law and international trade law. She currently serves on the on the Guardianship Committee for the Legislative Section of The Real Property, Probate and Trust Law Section of The Florida Bar, and serves on the board of directors for the South Palm Beach County Bar Association Young Lawyers Section.*

Endnotes

1 31 U.S.C. 5336.

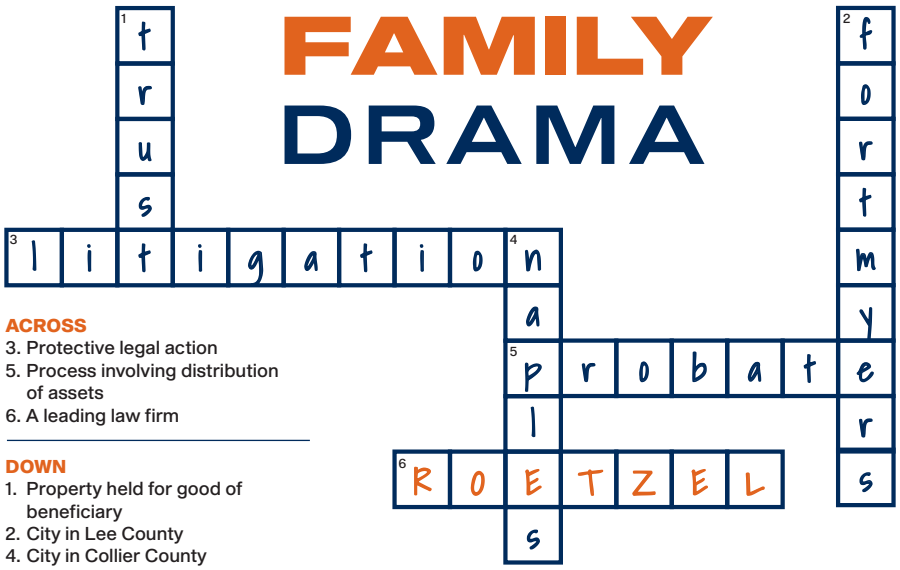
2 https://www.fincen.gov/news/news-releases/fincen-issues-final-rule-regarding-access-beneficial-ownership-information.

3 31 U.S.C. 5336(c)(2)(B).

4 *Id.*

5 31 U.S.C. 5336(h)(3).

FAMILY DRAMA



ACROSS
3. Protective legal action
5. Process involving distribution of assets
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2. City in Lee County
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ActionLine Call for Articles



ActionLine is seeking articles that:

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

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

Deadlines for all submissions are as follows:

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

Post Closing Occupancy In A Real Estate Transaction: Drafting The Appropriate Clauses

By Natasha Selvaraj, Esq., Berlin Patten Ebling, PLLC, Sarasota, Florida

Rider U, titled, "POST-CLOSING OCCUPANCY BY SELLER," is commonly used in conjunction with both the FR/BAR "AS IS" Contract for Purchase and Sale and the FR/BAR Residential Contract for Purchase and Sale and allows the seller to remain in the property after the closing date. The Rider outlines some critical data for the creation of a "lease, occupancy agreement, or similar" document (the "Post Closing Agreement"), and absent a mutually agreed upon written lease in the timeframe agreed upon by the parties (typically 10 days prior to closing) either party can terminate the purchase contract. While the rider provides a starting point to the parties' agreement, there are several clauses that are typically included in a lease type agreement that are not addressed at all.

The default language of the rider states, "that Seller's maintenance obligation under Paragraph 11 shall continue after Closing until possession is delivered to Buyer; however, Seller's repair, replacement, treatment, and remedy obligations under Paragraph 12 shall not be extended beyond Closing."This language creates a maintenance obligation that is patently different than what a buyer or a seller may expect in a more traditional residential lease setting, where the owner of the property is typically responsible for repair obligations. The maintenance requirement, outlined in Paragraph 11 of both of the FR/BAR Residential Contracts, places the obligation of the continued maintenance and the delivery of the property in the condition that it was, at the time of the effective date of the purchase contract, on the seller. This obligation is extended by the Rider until the time that the seller provides possession of the property to the buyer. Often times, this does not accurately reflect the intention of both of the parties, and therefore, further negotiation as to the terms may be necessary.

Some other important factors to consider when creating your Post Closing Agreement are: (1) insurance; and (2) security deposits. The Rider does not address either. It is important to note that, after closing, since the seller will no longer own the property, the seller's homeowner's insurance policy will no longer insure the property. Based on the foregoing, the buyer should consider whether he or she would want the seller to maintain a renter's insurance policy for the duration of the seller's occupancy of the property, and the buyer should also ensure that the buyer's homeowner's insurance is adequately set up to ensure coverage during the period of the seller's occupancy. The buyer should also consider whether he or she wants a security deposit from the seller to cover any incidental damage to the property, while keeping in mind that the buyer will need to hold funds, in accordance with Florida's laws regarding security deposits, and not all buyers may want to go through that process for an occupancy period that may be as short as a couple of days.

As you cans see, it is imperative to ensure that there is a mutual agreement, between the parties, to the terms of the Post Closing Agreement, and that these terms are negotiated early to allow time for the drafting of the Rider or the Post Closing Agreement to ensure that your client is protected and that this "simple" agreement is not the reason your purchase contract does not make it to closing.



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).*

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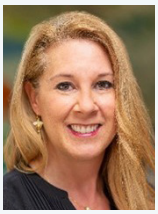

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Real Property Case Summaries

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

The Third District Court of Appeal determined that the trial court's mistaken reference to a rule governing nonresidential tenancies, resulting in the belief that it lacked discretion to modify the deadline for a residential tenant to deposit rent into the court registry, was harmless.

Stoppa v. Infinity The Oaks, LLC, 3D23-1101, 2024 WL 1080076 (Fla. Dist. Ct. App. Mar. 13, 2024).

Anamarie Stoppa, the appellant and defendant in the original case, appealed Judge Stephanie Sliver's ruling in Miami-Dade County to strike her Answer and enter a Judgment of Possession in favor of the landlord.

Infinity The Oaks LLC (the "Landlord") filed a residential eviction action against Anamarie Stoppa (the "Tenant") for failure to pay April rent. Tenant filed an Answer and a Motion to Determine Rent, arguing for a reduction due to alleged premises maintenance issues. The trial court ordered the Tenant to pay rent into the court registry by 10:00 a.m., on June 6, 2023, but the Tenant missed the deadline by approximately two and one-half hours. Landlord then filed a Motion for a Default Judgment, which the trial court granted on June 8, 2023.

The trial court's judgment stated that it lacked discretion due to the Tenant missing the rent deposit deadline. It cited Section 83.232(5), Florida Statutes, pertaining to ***nonresidential tenancies***, which provides:

> *Failure of the tenant to pay the rent into the court registry pursuant to court order shall be deemed an absolute waiver of the tenant's defenses. In such case, the landlord is entitled to an immediate default for possession without further notice or hearing thereon.*

The judgment granted Landlord's default motion based on this interpretation; however, the legislative language applicable to residential tenancy eviction proceedings does not mandate such a default judgment.

The appellate court clarified that, absent specific statutory provisions, trial courts generally have discretion to modify deadlines. Florida Rule of Civil Procedure 1.090(b)(1) grants trial courts this authority, based on cause shown, as follows:

> *In General. When an act is required or allowed to be done at or within a specified time by order of court, by these rules, or by notice given thereunder, for cause shown the court at any time* ***in its discretion****… (emphasis added)*

Ultimately, the appellate court affirmed the trial court's decision.

The Second District Court of Appeal affirmed the trial court's decision to enter a partial Summary Judgment, as a matter of law, on behalf of Deutsche Bank.

Capalongo v. Deutsche Bank Nat'l Tr. Co. as trustee for Morgan Stanley Cap. 1 Inc. Tr. 2006-HE2, Mortg. Pass-Through Certificates, Series 2006-HE2, No. 2D22-3750, 2024 WL 1288281 (Fla. Dist. Ct. App. Mar. 27, 2024).

Margaret Capalongo (the "Wife") and Robert Capalongo (the "Husband"; the Wife and the Husband, collectively, the "Appellants") appealed a Final Judgment of Foreclosure, in favor of Deutsche Bank National Trust Company ("Deutsche Bank"), after a nonjury trial. While the judgment was affirmed, the focus of the appeal was on the validity of the Husband's waiver of his homestead rights in the property.

The Appellants purchased their home, jointly, in 2000. In 2005, the Wife sought to refinance the home, and she obtained a mortgage loan from WMC Mortgage Corp. As part of the refinancing terms, the Husband was required to transfer his interest in the property to the Wife, via a warranty deed, and was required to sign a waiver of his homestead rights. On December 23, 2005, the Husband executed the warranty deed, transferring the property solely to Wife's name. A waiver titled "Borrower Spouse," was attached to this deed, and in the waiver, the Husband explicitly waived any current or any potential interest in the property, including homestead rights, the waiver stated as follows:

> BORROWER(S)' SPOUSE(S): The undersigned hereby joins in this Security Instrument for the sole purpose of subordinating, conveying and/or waiving any current or potential interest in the Property. By signing below, the undersigned subordinates, conveys, and/or waives any and all rights, interest or claims in the Property, including, but not limiting to, homestead, dower, marital or joint-occupancy rights. No personal liability under the Note is hereby incurred by the undersigned joining spouse(s).

In January 2012, Wife defaulted on the mortgage payments, leading to Deutsche Bank acquiring the mortgage in March 2012 and initiating foreclosure proceedings in November 2016. The Appellants raised several defenses, including, the Husband's claim to homestead rights in the property due to not joining in or executing the mortgage; however, the trial court granted partial Summary Judgment, in favor of Deutsche Bank, ruling that the Husband had validly joined in the mortgage and waived his homestead rights.

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The Appellants appealed, arguing that the trial court erred in granting a Partial Summary Judgment, contending that the Husband's waiver was invalid because it was not physically attached to the mortgage. They asserted that a waiver must be affixed to the mortgage to be effective; however, the appellate court disagreed, emphasizing that Florida law does not impose such a requirement. The court highlighted that the waiver expressly referenced the mortgage, and that there were no constitutional restrictions on how a spouse may join a mortgage to waive homestead rights.

The appellate court affirmed the judgment, underscoring that the undisputed facts showed the Husband's intent to waive his homestead rights by executing the waiver and the deed on the same day that the Wife executed the mortgage. The sequential recording of documents further supported the Husband's unequivocal intent to waive his homestead rights in the property, thereby entitling Deutsche Bank to a partial Summary Judgment as a matter of law.

The Foreclosure Judgment was upheld by the appellate court, emphasizing the validity of the Husband's waiver of homestead rights, which was deemed effective, despite not being physically attached to the mortgage.

The Fourth District Court of Appeal held that: (1) Jasco was an indispensable party to the foreclosure action because it was the property owner when the Bank filed its foreclosure action; (2) Jasco remained an indispensable party to the foreclosure action because its successor-in-interest was a third-party purchaser; and (3) the Bank's decision to exclude Jasco as a party to the foreclosure action invalidated the resulting foreclosure judgment.

U.S. Bancorp v. Taharra Assets 5545, Inc., 378 So.3d 630 (Fla. Dist. Ct. App. 2024).[1]

In the case of appellant, U.S. Bancorp (the "Bank"), versus the appellee, Taharra Assets 5545, Inc. ("Taharra"), the central dispute revolves around the ownership of a property following a foreclosure proceeding. The Bank contends that it holds superior title to the property due to a foreclosure action it initiated against Jasco Construction Company ("Jasco"), whereas Taharra asserts its claim to the property based on acquiring title from Jasco, subsequent to the Bank's foreclosure filing. The crux of the disagreement lies in whether dropping Jasco from the foreclosure suit impacts Taharra's interest in the property.

The background of the case unveils a convoluted series of events stemming from the embezzlement of funds by borrowers, Dorman and Laura Henry, who secured a mortgage from the Bank using these ill-gotten gains. Jasco, upon discovering the fraudulent acquisition of the property, successfully sued the Henrys for constructive trust and filed a lis pendens against the property. After the Henrys stopped making monthly mortgage payments, the Bank filed a foreclosure action and recorded its own lis pendens. After the recording of the Bank's lis pendens, the trial court in the constructive trust suit found that Jasco was the rightful property owner and awarded Jasco title in fee simple. The property was then transferred by Jasco to Taharra.

In the legal analysis, the court deliberated on the sequence of events and the implications for each party's claim to the property. It determined that Jasco's status as the property owner, when the foreclosure lis pendens was filed rendered it an indispensable party to the foreclosure proceedings. Despite Jasco's later transfer of its interest to Taharra, the court held that Jasco's indispensability remained intact, which thereby impacted Taharra's involvement in the foreclosure suit. The court further elucidated that the Bank's foreclosure judgment was void due to the absence of Jasco as an indispensable party, which allowed Taharra to successfully quiet title to the property; however, the court emphasized that this void judgment did not extinguish the Bank's mortgage, leaving it as an encumbrance on the property. Consequently, the judgment was affirmed, but with a caveat that the Bank retained the right to enforce its mortgage through subsequent legal action.

In conclusion, the court affirmed the trial court's judgment, in favor of Taharra, and recognized its rights to the property acquired from Jasco. Nonetheless, it underscored the Bank's ongoing entitlement to enforce its mortgage, thereby leaving the door open for further legal proceedings. The decision provided clarity on the ownership dispute, while acknowledging the complexities surrounding mortgage enforcement in light of void foreclosure judgments.


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.

Endnotes

1 This opinion is subject to revision or withdrawal.

Probate Case Summaries

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

Amendments made to revocable trust were invalid because settlor failed to deliver trust amendments to co-trustee and, therefore, did not substantially comply with the method set forth in his trust for amending same.

Grassfield v. Grassfield, 48 Fla. L. Weekly D2317 (Fla. 2d DCA Dec. 13, 2023)

Grassfield is a case of first impression concerning the interpretation of "substantial compliance" under Fla. Stat. § 736.0602(3)(a). The Second District Court of Appeals held that compliance with some, but not all of a settlor's stated requirements for amending his trust did not constitute "substantial compliance" under Fla. Stat. § 736.0602(3)(a).

In 2003, Bruce Grassfield (the "Settlor") created a revocable trust originally naming himself and his financial advisor as co-trustees. In 2016, the trust was amended to name his son Paul Grassfield as a co-trustee in place of the financial advisor. The method for amending the trust was not modified in the 2016 amendment. The trust prescribed the following method for amendment:

> The Donor reserves the power, at any time, or from time to time, to alter, amend, restate, terminate or revoke, in whole or in part, the terms and provisions of this Trust, and the Trust hereby created, by an instrument, in writing, signed by the Donor, acknowledged before a Notary Public, and delivered to the Trustee during the Donor's lifetime.

In August 2018, the Settlor executed a "Restatement of the Bruce A. Grassfield 2003 Revocable Trust," which was followed by two more amendments in January and in May 2019. The 2018 restatement removed Paul as a co-trustee, leaving the Settlor as the sole trustee of the trust. The 2018 restatement also named Violette Lashauri-Wofsey, whom the Settlor later married and became Violetta Grassfield, as the primary beneficiary of the trust. The 2019 amendments transferred additional assets to Violetta, named Violetta as successor trustee, and ultimately directed trust assets to pour back into the Settlor's estate upon his death to be distributed pursuant to a last will and testament that named Violetta the sole beneficiary of the estate.

Neither the 2018 restatement, the January 2019 amendment, nor the May 2019 amendment were delivered to Paul during the Settlor's lifetime. The parties did not dispute that the first three requirements (written instruments signed by the Settlor and acknowledged by a notary) were satisfied.

Paul filed a civil action seeking to invalidate the 2018 restatement and both 2019 amendments. In response, Violetta argued that Fla. Stat. § 736.0602(3)(a) only requires "substantial compliance" and that the Settlor substantially complied with the method for amendment, despite the lack of delivery to Paul. Paul moved for summary judgment and the trial court ruled in his favor. Violetta appealed the decision to the Second District Court of Appeal.

The appellate court noted that substantial compliance is not defined in the Florida Trust Code. In determining whether the Settlor substantially complied with the method for amendment in his trust, the appellate court looked to the language of the trust itself, the requirement to construe the trust as a whole, and the comments to the Uniform Trust Code.

The appellate court held that the plain language of the trust required compliance with all four elements of the method for amendment. The appellate court rejected Violetta's argument that delivery of the amendments to Paul as co-trustee was a non-essential requirement. In reaching its decision, the appellate court relied on the 2016 trust language requiring there to always be at least two trustees, requiring unanimity among the trustees to act, and using the conjunctive "and" in the list of requirements to amend the trust.

The appellate court held that delivery of the amendments to Paul during the Settlor's lifetime was not optional, and that substantial compliance with the Settlor's prescribed method for amending the trust was lacking. The appellate court affirmed the final judgment invalidating the 2018 restatement and 2019 amendments to the trust.

Portion of summary judgment order removing personal representative and trustee was final, appealable order, but portions of the order granting summary judgment in favor of plaintiff and determining entitlement to attorneys' fees, but reserving on the issue of damages and amount of fees was nonfinal and nonappealable. Competent, substantial evidence supported trial court's order removing personal representative and trustee based on her multiple violations of fiduciary duty and the failure to administer the estate and trust.

Gnaegy v. Morris, 48 Fla. L. Weekly D2331 (Fla. 3d DCA Dec. 13, 2023)

Appellant and appellee are sisters and the decedent's daughters. Appellant was named as the personal representative and trustee of the decedent's estate and revocable trust, respectively. Appellant obtained letters of administration and an order admitting the decedent's will to probate, which required her to take numerous actions including filing an estate

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inventory, closing the estate within 12 months, and placing liquid estate assets in a court-designated depository.

Appellee filed an adversary proceeding alleging that appellant breached her fiduciary duties as personal representative and trustee and sought a trust accounting, removal of appellant as personal representative and trustee, and damages. The appellate court noted that appellant's failure to comply with the letters of administration and the orders in the probate case was largely undisputed. Instead, appellant argued in the trial court and on appeal that she could not be found liable for damages because she relied on the advice of counsel.[1]

Appellee moved for summary judgment on all counts. The trial court granted summary judgment on appellee's count to remove appellant as personal representative for "'multiple violations of her fiduciary duties as Personal Representative, each and all of which are causes for removal under Fla. Stat. § 733.504…'" The trial court enumerated specific examples of the appellant's actions that justified her removal, including:

- Failure to comply with the letters of administration and order appointing personal representative by placing liquid estate assets in a court depository;
- Failing to collect or investigate a loan due to the decedent from a corporation in which appellant was a shareholder and director;
- Continuing to incur charges on the decedent's credit card and failing to file appropriate tax returns for the decedent and estate from 2017 to 2021; and
- A conflict of interest that existed due to appellant's status as a shareholder and director in the corporation that owed funds to decedent in which decedent had a 50% ownership interest. Appellant would benefit if the funds were not repaid to the estate or the decedent's ownership interest was not determined.

In addition, the trial court removed the appellant as trustee "because she breached 'various duties [she] owes to the beneficiaries of the Trust'" and because her removal served the best interest of the beneficiaries. The appellate court noted the following reasons supporting appellant's removal as trustee:

- Failure to provide notice of acceptance of the trust;
- Failure to file tax returns for the trust;
- Failure to provide any trust accountings;
- Failure to provide the trust beneficiaries with relevant information about the assets and the liabilities of the trust and particulars relating to trust administration;
- Failure to distribute trust income or principal to the beneficiaries;
- Failure to invest the trust assets pursuant to the prudent investor rule; and
- Failure to administer the trust in the beneficiaries' interests and by the express terms of the trust in failing to distribute assets outright to the beneficiaries.

The trial court granted summary judgment for the appellee on her remaining claims, but reserved ruling on the amount of appellee's damages. The trial court also ruled that appellee was entitled to attorneys' fees and costs, but reserved on the amount of same.

On appeal, the appellee argued that the appeal was premature because the summary judgment order was nonfinal and nonappealable. The Third District Court of Appeals held that the aspect of the order removing appellant as personal representative of the estate and trustee of the trust was final and appealable pursuant to Florida Rule of Appellate Procedure 9.170(b).[2] The appellate court found ample competent, substantial evidence in the record to support the trial court's removal of appellant as personal representative and trustee and affirmed that portion of the order on appeal.

The appellate court held that the remaining aspects of the order, granting summary judgment for appellee on her claims against appellant, but reserving on the issue of damages, and granting entitlement to attorneys' fees and costs, but reserving on amounts, were nonfinal and nonappealable and dismissed the remainder of the appeal.

Petitioner lacked standing to petition to reopen estate on the basis that personal representative committed fraud on court by failing to disclose existence of a prior will because petitioner was not an interested party under the will.

Chauncy v. Gorden, 48 Fla. L. Weekly D2129 (Fla. 5th DCA Nov. 3, 2023)

The decedent, Addison McNairy (the "Decedent"), died on August 31, 2018. Appellant, Steven Chauncy ("Chauncy"), filed a petition to probate a will purportedly executed by the Decedent in 2007. Shortly after Chauncy filed his petition, the appellee, Dennis Gorden ("Gorden"), filed a petition to probate a 2018 will executed by the Decedent. Both parties filed challenges and objections to the other's will and the court held an evidentiary hearing. Following the hearing, the court admitted the 2018 will to probate and appointed Gorden the personal representative of the estate.

Gorden successfully administered the estate and the probate court granted his petition for discharge in July 2022. Three months after Gorden was discharged, Chauncy filed a petition to re-open the estate on the grounds that Gorden committed fraud on the court because he did not disclose the existence of a 1998 will.

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The 1998 will identifies the decedent's beneficiaries as follows:

> I do hereby give all my estate to the following named 2 person/persons or the survivor of them in equal shares:
>
> Nelegene Morgan
>
> John V. McNairy

Both Nelegene Morgan and John V. McNairy predeceased the Decedent. Chauncy alleged that he was the son and sole heir of Nelegene Morgan.

Gorden moved to dismiss the petition on the basis that Chauncy lacked standing because he was not an interested party under the 1998 will. The trial court agreed with Gorden and ruled that "survivor" referred to the survivor of the two persons identified in the will and not the heirs of those persons. The trial court dismissed Chauncy's petition with prejudice.

The appellate court held that "survivor" should be given its common meaning. Citing *Porter v. Est. of Myrick,* 522 So.2d 99 (Fla 3d DCA 1971) and *In re Gallop's Est*., 248 So.2d 686 (Fla. 4th DCA 1971), the court held that "survivor" should be given its literal interpretation of one who outlives another, is limited to the individuals of a class, and does not include their children. The appellate court agreed with the trial court's interpretation of the will and affirmed the dismissal based on Chauncy's lack of standing. Because the appellate court agreed that Chauncy lacked standing, the opinion does not address the claims of fraud.

The probate court denied the personal representative due process by closing the estate and revoking letters of administration without notice.

McGhee v. Estate of McGhee, 373 So. 3d 417 (Fla. 2d DCA 2023)

The decedent died intestate in March 2017. He was survived by his son, Rayfield M. McGhee, Jr., and his granddaughter, Morgan Gabrielle McGhee Wangia. Both heirs petitioned for administration and after two years of litigation, the court appointed Mr. McGhee, Jr., the personal representative of his father's estate. For the next two years, the personal representative filed various motions and petitions pursuing the administration of the estate.

In June 2021, the court issued an order to show cause for failure to complete procedural steps; specifically, the court identified an overdue final accounting, petition for discharge, and order for discharge. The show cause order set a hearing date but did not mention dismissal or closing of the case.

Prior to the hearing, the personal representative filed a motion to extend time to close the estate and filed other petitions and discovery requests. In August 2021, the parties attended a show cause hearing. Following the hearing, the court entered an order that only said, "90 day extension, if not resolved set hearing." Following that hearing, the personal representative filed notices of intent to serve non-party subpoenas and filed a petition to determine homestead. In November 2021, the personal representative filed another motion to extend the time to close the estate.

In March 2022, the trial court entered another order to show cause for failure to complete procedural requirements. The second show cause order identified the same filings related to discharge and closing of the estate as the first show cause order. Again, the show cause order did not mention dismissal or closing of the case. The week before the second show cause hearing, the personal representative filed a response to the show cause order identifying the pending matters preventing the estate from being closed.

At the second show cause hearing in April 2022, Ms. Wangia opposed the personal representative's extension of time and requested the personal representative's removal. However, Ms. Wangia did not request that the case be dismissed. At the hearing, the court *sua sponte* struck all motions filed more than 30 days prior on the basis that the court's policies and procedures required any motions to be heard within 30 days of filing. The court then stated that it was administratively dismissing the case and revoking the letters of administration.

On appeal, the Second District Court of Appeals held that a trial court lacks jurisdiction to hear and determine matters that are not the subject of proper pleading and notice. Ruling on such matters violates a party's due process rights. The appellate court held that the personal representative's due process rights were violated here because there was no notice that the action was subject to dismissal before the court dismissed the case. The order of dismissal was reversed and the case remanded.

A trust can be an accommodation party and seek reimbursement from the accommodated party pursuant to Fla. Stat. § 673.4191. However, the trustee, not a beneficiary, is the real party in interest who has standing to pursue that claim absent a common law exception to the rule.

Roller v. Collins, 373 So. 3d 35 (Fla. 5th DCA 2023)

In 2013, James G. Collins created a revocable living trust. In 2018, James, individually and as trustee of his trust, and his wife Judith Collins took out a loan from Northern Trust Company for $1,288,000.00. James pledged trust owned securities accounts as collateral for the loan. According to the appellants' amended complaint, the loan proceeds were used for the personal benefit of James and Judith. The appellants alleged that the bulk, if not all, of the loan proceeds were used for the betterment and maintenance of James' and Judith's home. In 2019, James died, and Judith became the sole, legal title owner of the home, which was not a trust asset.

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Following James' death, Northern Trust declared the loan to be in default for failure to make monthly payments and demanded the total outstanding balance of $980,340.78. The successor trustee, Cypress Trust Company, liquidated the securities in the pledged accounts and satisfied the amounts owed on the loan. Cypress Trust did not seek any funds from Judith nor were any estate assets used to satisfy the loan.

Appellants, who are beneficiaries of the trust, filed a complaint against Judith seeking reimbursement. Their initial complaint was dismissed without prejudice and they filed an amended complaint against Judith and Cypress Trust; Judith moved to dismiss the amended complaint on the bases that Fla. Stat. § 673.4191 only applies to natural persons, and is inapplicable to trusts, and that the appellants lacked standing to sue on behalf of the trust. Judith argued that Cypress Trust, as trustee was the only proper party with standing to bring the claim for reimbursement. The trial court agreed with Judith and ruled that the trust was not an accommodation party and even if Fla. Stat. § 673.4191 did apply, the trustee, not the beneficiaries, would have standing to seek reimbursement from Judith.

An accommodation party is a party who signs an "instrument for the purpose of incurring liability on the instrument without being a direct beneficiary of the value given for the instrument."[3] The party who receives the benefit is the accommodated party.[4] "[A]n accommodation party who pays the instrument is entitled to reimbursement from the accommodated party and is entitled to enforce the instrument against the accommodated party."[5]

The appellate court noted that while Chapter 673 Florida Statutes does not define the term "person" or "party" to include a trust, Section 671.201, Florida Statutes (2021) contains general definitions that apply to Chapter 673, Florida Statutes. Section 671.201(29), Florida Statutes defines a "party" as a "person who has engaged in a transaction or made an agreement subject to this code." Section 671.201(30), Florida Statutes defines the term "person" and includes a trust in the enumerated list of entities that are considered persons.

The appellate court found that the appellants sufficiently alleged that the loan was for James' and Judith's benefit, and that Judith would be an accommodated party within the meaning of the statute. By pledging trust assets as collateral for the loan, James obligated the trust to repay the loan. The amended complaint also alleged that the trust did not receive a benefit from the loan. The appellate court held that the trust could qualify as an accommodation party and had the right to recover funds from Judith.

However, the appellate court also analyzed whether appellants, as beneficiaries of the trust, had standing to bring the claim. The court noted that to have standing, not only must the "sufficient stake" definition[6] be met, but the claim must be brought by someone who the law recognizes as the real party in interest. Citing *Buerki v. Lochner*, 570 So.2d 1061 (Fla. 2d DCA 1990), *First Union Nat'l Bank v. Jones*, 768 So.2d 1213, 1215 (Fla. 4th DCA 2000), and Cady Huss & Elizabeth Hughes, *The Real Party in Interest: Trustees*, Actionline Vol. 20, no. 2 (Winter 2018–2019), the court explained that generally the trustee, not a beneficiary, is the real party in interest with authority to bring an action on behalf of the trust. The court also examined the text of Florida Rule of Civil Procedure 1.210(a) and the requirement that "every action be prosecuted in the name of the real party in interest."

The court acknowledged that there are recognized exceptions to the general rule that only a trustee can bring an action on behalf of the trust or its beneficiaries, such as a conflict of interest between the trustee and a beneficiary; however, the appellants failed to argue on appeal that a common law exception existed. The appellate court agreed with the trial court's ruling that the appellants did not establish standing to bring the action and affirmed the order dismissing the amended complaint.


J. CHERNESKI

John C. W. Cherneski *has been practicing law since 2010 and is admitted to both The Florida Bar and the State Bar of Georgia. He practices with the law firm of Milam Howard Nicandri & Gillam, P.A., in Jacksonville, Florida, and focuses primarily on probate and trust litigation, business litigation, and landlord/tenant disputes. Mr. Cherneski completed his undergraduate studies at Liberty University and earned his Juris Doctor from Florida Coastal School of Law.*

Endnotes

1 The opinion does not discuss appellant's defense, presumably because it relates to the portion of the appeal that was dismissed for lack of jurisdiction.

2 "…appeals of orders rendered in probate and guardianship cases shall be limited to orders that finally determine a right or obligation of an interested person as defined in the Florida Probate Code. Orders that finally determine a right or obligation include, but are not limited to, orders that: …(6) remove or refuse to remove a fiduciary;"

3 Fla. Stat. § 673.4191(1) (2021).

4 *Id.*

5 Fla. Stat. § 673.4191(5) (2021).

6 "Generally, one has standing when he has a sufficient interest at stake in the controversy which will be affected by the outcome of the litigation." *Wheeler v. Powers*, 972 So. 2d 285, 288 (Fla. 5th DCA 2008).

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