ActionLine

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



Florida's Principal and Income Act Gets a Refresh

Void Deeds And Marriages: Challenging a Deed and a Marriage on the Basis of Lack of Capacity or Undue Influence

The Corporate Transparency Act: An Overview And A Look At Its Implications For Trusts

Vol. XXXXVI, No. 1 www.rpptl.org Summer 2024

Pooled Special Needs Trusts



SHIELDING THE FINANCIAL FUTURE OF INDIVIDUALS WITH DISABILITIES

GUARDIAN TRUST
EST. 2002

- Affordable Fees
- Pooled Trustee Services
- Protect Public Benefits Eligibility
- No Minimum Trust Deposits or Balances
- Professional and Compassionate Service

727-210-1185 | 901 CHESTNUT STREET, SUITE C, CLEARWATER, FL 33756
www.GuardianTrusts.org

By John Moran, Esq., Section Chair 2024-2025



For those of us who regularly attend Section meetings, when we hear the word "hospitality," it conjures an image of the late-night drinks and large chocolate chip cookies served in our after-dinner hospitality suite. At least, that's what comes to mind for me. Recently, however, I learned about Will Guidara's book, Unreasonable Hospitality, and my notion of hospitality is forever altered.

Will Guidara is best known for being General Manager of Eleven Madison Park, a New York restaurant that eventually earned three Michelin stars and title of "best restaurant" in the world. He is also a co-producer and writer for the television series The Bear ("Yes, Chef!"). When I picked up his book, I expected an industry insider's story, with a dash of non-specific life advice thrown in for good measure. It was, however, much more than that. Don't get me wrong, Guidara has an entertaining story, but more importantly, he advocates for the practice of "unreasonable hospitality," which is an approach to forming and strengthening relationships through intentional moments of genuine connection and kindness. The message deeply impacted my view of how a leader should treat people and strive to make them feel welcome. Although Guidara's ethos is multi-faceted, a few elements are particularly applicable to the Section's Mission.

First, creating meaningful human connections is at the heart of unreasonable hospitality. Guidara emphasizes the impact that genuine relationships can have in our personal and professional lives. Whether it's a simple gesture of kindness, a thoughtful conversation, or a willingness to help a colleague in need, these connections can leave a lasting impression. Over time, these moments, no matter how small, have a ripple effect and foster an environment where individuals feel a powerful sense of support and belonging. Small actions make a difference; or, as Guidara recounts, "raindrops make oceans."

Our Section thrives on the bonds we form, which, in turn, promote collegiality and collaboration. It's no accident that Objective Number One in the Section's recently updated Strategic Plan is to connect and engage by fostering, "an environment where lawyers practicing in real property, probate, trust, and related fields of law are encouraged to collaborate, build relationships, and develop as professionals." Between the Section's quality educational programs, legislative advocacy, and pro bono service projects, there is no question the Section does amazing work. However, for many of us, the most tangible takeaways are the relationships we forge. My own journey within the Section has led to some of my most cherished friendships, and I cannot count the number of times my colleagues from the Section have stepped up to help me.

It is more than just networking, though. These connections transcend business development and are central to the Section's Mission, "to serve as Florida's preeminent and trusted resource and authority on real property, probate, trust, and related fields of law for the benefit of the public and legal community." Having close connections within our Section enhances our work by fostering respectful dialog about complex and often emotionally charged topics. Guidara observes that "relationships are simple," but "simple is hard." He also advises that, "you're not always going to agree with everything you hear, but you've got

continued, page 13

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.

John C. Moran
Chair

Wm. Cary Wright
Chair-Elect, General Standing Division

Angela McClendon Adams
Secretary

S. Dresden Brunner
Treasurer

Wilhelmina F. Kightlinger
Director, At-Large Members

John Scuderi
Director, Probate & Trust Law Division

Steven H. Mezer
Director, Real Property Division

S. Katherine Frazier
Immediate Past Chair

Erin Farrington Finlen
Co-Chair, (PT), Co-Editor-in-Chief

Michelle Hinden
Co-Chair, (RP), Co-Editor-in-Chief

Alexander Douglas
Co-Vice Chair, Probate and Trust

Seth Kaplan
Co-Vice Chair, Probate and Trust

Daniel C. McDermott
Co-Vice Chair, Probate and Trust - Editor
Fellows Coordinator

Paul Edwards Roman
Co-Vice Chair, Ethics/Professionalism – Editor

Gregg I. Strock
Co-Vice Chair, Real Property

Salomé Bascunan
Editor - Fellows Coordinator

Editors-At-Large
Ryan Doddridge, New Port Richey
Mitchell A. Hipsman, Miami
Laura Fannin Jacqmein, Jacksonville
Amber Jade F. Johnson, Maitland
Michael G. Rothfeldt, Tampa
Angela K. Santos, Boca Raton

Copy Editor/Publications and Advertising Coordinator

Laura Pichard-Murphy, Tallahassee
Design/Layout

Cover photo - Bonita Springs, Florida
by Silvia Rojas

Statements or expressions of opinion or comments appearing herein are those of the editors or contributors and not The Florida Bar or the Section.

IN THIS ISSUE:

Chair's Column 3
Letter From The Co-Editors-In-Chief 5
Florida's Principal and Income Act Gets a Refresh 6
Void Deeds And Marriages: Challenging a Deed and a Marriage on the Basis of Lack of Capacity or Undue Influence 14
The Corporate Transparency Act: An Overview And A Look At Its Implications For Trusts 22
Political Roundup: Changes From The 2024 Regular Legislative Session 28
Spotlight On Katherine Frazier 35
Executive Council Meeting June 1, 2024 36
Roundtable: Real Property Division 38
Roundtable: Probate and Trust Division 42
Practice Corner: Real Property Division - Property Tax Increases in Florida and the Importance of Homestead Exemption 44
Practice Corner: Probate And Trust Division - The Benefits of E-Wills for Clients and Lawyers 46
Probate Case Summaries 48
Real Property Case Summaries 50
RPPTL Sponsors 54
Actionline Bulletin Board 56

Get Included In ***ActionLine!***

Readers are invited to submit material for publication concerning real estate, probate, estate planning, estate and gift tax, guardianship, and Section members' accomplishments.

ARTICLES: Forward any proposed article or news of note to Erin Farrington Finlen at erin@estatelaw.com. and Michelle Hinden at Mhinden@nishadkhanlaw.com. Deadlines for all submissions are as follows:

VOLUME NO.	ISSUE	DEADLINE
1	Fall	July 15
2	Winter	October 15
3	Spring	January 15
4	Summer	April 15

ADVERTISING: For information on advertising, please contact Erin Farrington Finlen at erin@estatelaw.com or Michelle Hinden at Mhinden@nishadkhanlaw.com.

PHOTO SUBMISSIONS: If you have a photo that you'd like to have considered for the cover, please send it to the photo editor, Erin Farrington Finlen at erin@estatelaw.com or Michelle Hinden at Mhinden@nishadkhanlaw.com.

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

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. As you may already know, Katherine Frazier has passed the torch to our new Section Chair, John Moran, so we encourage you to read a deserving tribute to Katherine Frazier in this issue, so that you can learn more about her successful year during her time as the Chair of the Section. We would like to thank Katherine Frazier for all of her hard work in leading the Section for the 2023-2024 Bar year. We hope you enjoy the back row, Katherine!

We also wish to congratulate incoming Chair, John Moran. We look forward to a successful 2024-2025 Bar year under your leadership. In his Chair's Column, Chair, John Moran, focuses on fostering meaningful relationships within the Section through unreasonable hospitality.

We love the informative article on page 6 by author Sasha A. Klein on Florida's Income and Principal Act, which gives readers an in-depth look at the updates made to the Act.

We also have a very relevant article on page 14, by author, Stephanie L. Cook, on Void Deeds and Marriages, which takes a deep dive into analyzing an heir's ability to challenge a marriage and deed on the basis of lack of capacity or undue influence. The article provides useful examples and case law to help put things in perspective.

The article by author, Christopher K. Batts, on the Corporate Transparency Act, provides readers with an overview of the Act's implications for Trusts, and helps shed some light on the matters a practitioner should consider when determining whether beneficial ownership information about a trustee, a beneficiary, or settlor of a trust, should be reported to FinCEN.

Another helpful article is found on page 28, by Peter M. Dunbar, which provides an overview of the changes made during the 2024 Regular Session of the Florida Legislature. This article provides information on each of the bills that were signed into law over the last year, which relate to real estate law and wills, trusts and estate law matters.

I encourage all of you to please consider attending the Section's upcoming board certification CLE program. On March 6th through 8th, the Section will be presenting the Construction Law Certification Review Course, at the JW Marriott Orlando, Grand Lakes. Consider signing up for or purchasing any of the Section's Board Certification Review Courses, if you are preparing to sit for the Board Certification Exam, or if you are just looking for a refresher in your preferred field of law. Even if you decide not to sit for any of the Board Certification Exams this year, the information you will get from attending any of these CLE courses will be worthwhile.

We also urge you to look at the photo centerspread of the Section's Executive Council Meeting that took place in Bonita Springs, Florida.

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

Best,

Michelle and Erin

Florida's Principal and Income Act Gets a Refresh

By Sasha A. Klein, Esq. of PwC US, Palm Beach Gardens, Florida
and Alexander M. Parthemer, Esq., Jones Foster P.A., West Palm Beach, Florida

Florida's principal and income act receives an update! Introducing the Florida Uniform Fiduciary Income and Principal Act ("FIPA" or the "Act").[1] FIPA modernizes Florida's previous act from 2002, known as the Florida Uniform Principal and Income Act ("FUPIA"). Located at Chapter 738, Florida Statutes, FIPA governs how receipts and disbursements are allocated between income and principal for trusts and estates when the governing document does not specify the pertinent information. FIPA integrates language from the Uniform Law Commissioners ("ULC")[2] 2018 Uniform Act, where practical, while maintaining key public policy choices that remain relevant for Florida. Given the extended duration of trusts and the increasingly blurred distinction between income and principal resulting from flexible drafting and the modern portfolio theory, these allocation rules needed a refreshing.

A theme woven throughout the fabric of FIPA is flexibility. This flexibility is designed to facilitate the administration of trusts and estates and to provide predictability to beneficiaries. Although the Act should be reviewed in its entirety, this article highlights ten of the more significant changes made.

Legislative Background

In 1997, the ULC published the Uniform Principal and Income Act (the "1997 Uniform Act").[3] The 1997 Uniform Act was adopted – with modifications – in Florida in 2002, and was named the Florida Uniform Principal and Income Act. For over two decades, the 2002 Act has effectively benefitted our state. Over the years, Florida has enacted a few minor modifications to it, with the adoption of unitrust rules arguably the most significant.[4] In 2018, the ULC published an update, titled the Uniform Fiduciary Income and Principal Act (the "2018 Uniform Act"). The Section formed a committee to review the 2018 Uniform Act and decided it was time to update FUPIA. The new Florida act, FIPA, adopts the 2018 Uniform Act as the default structure, but retains the meaningful modifications unique and still relevant to Florida.[5] Passed in 2024 and largely effective as of January 1, 2025, FIPA marks Florida as the eighth state to adopt this model legislation. This move not only improves Florida's attractiveness for trust administration but also addresses some of the challenging issues within the current law.

"Being good is easy, what is difficult is being just."
— Victor Hugo

A fiduciary must act impartially among beneficiaries, unless the governing document specifies otherwise. Additionally, fiduciary actions taken under FIPA are presumed to be fair and reasonable.[6] This presumption supports the fiduciary and highlights FIPA's goal of ensuring fairness in fiduciary behavior.

continued, page 7

10 KEY CHANGES

Definitions

FIPA revises Fla. Stat. § 738.102 (2024) to modify existing definitions and to provide some new definitions. Below are some of the definitions that were changed in a substantive way and a few new definitions. Worth noting first, the definitions of "accounting period," "income," "mandatory income interest," and "person" remain unchanged, while definitions for new terms, including "court," "estate," "personal representative," and "record," were added without impacting current policy.

Definitions that were changed:

- *Beneficiary* - is redefined to distinguish between current income beneficiaries and current remainder beneficiaries and includes individuals holding life estates or term interests.
- *Fiduciary* – is expanded to encompass not just the personal representative and trustee, as defined by current law, but also those with a power to direct, those acting under a fiduciary's delegation, and those holding property for a successor beneficiary who may be impacted by principal or income allocations.
- *Income interest* - is now defined as a right of a current income beneficiary, which includes a current beneficiary's use of property held by a fiduciary.
- *Net income* - is expanded to encompass its application to a unitrust and adjustments from income to principal.
- *Principal* – is redefined from referring to that which is distributed to a remainder beneficiary to encompass that which is held for distribution to, for the productions of income for, or for us by, a current or successor beneficiary.

Definitions that were added:

- *Distribution* - a payment or a transfer by a fiduciary to a beneficiary, in the beneficiary's capacity as a beneficiary, without consideration other than the beneficiary's right to receive the payment or the transfer under the terms of the trust, will, life estate, or term interest.
- *Independent person* - a person that is not:
  - For a trust, a qualified beneficiary; a settlor; an individual whose legal obligation to support a beneficiary may be satisfied by a trust distribution; or any trustee whom an interested distributee may remove and replace with a related or a subordinate party.
  - For an estate, a beneficiary; a spouse, parent, brother, sister, or issue of specified persons; a corporation, partnership, limited liability company, or other entity in which specified persons have voting control; or an employee of a specified person.
- *Personal representative* - an executor, administrator, successor personal representative, special administrator, or person that performs, substantially, the same function with respect to an estate under the law governing the person's status.
- *Record* - information that is inscribed on a tangible medium or stored in an electronic or other medium and is retrievable in perceivable form.
- *Special tax benefit* - the annual gift tax exclusion,[7] qualified subchapter S status,[8] federal marital tax deduction,[9] and generation-skipping transfer tax exemption.[10]
- *Successive interest* - the interest of a successor beneficiary.
- *Trust* - an express trust, whether private or charitable, with additions to the trust, wherever and however created, and a trust created or determined by judgment or decree under which the trust is to be administered in the manner of an express trust.
- *Trustee* - a person, other than a personal representative, that owns or holds property for the benefit of a beneficiary.

Governing Law

Consistent with the 2018 Uniform Act, FIPA adds a governing law provision that specifies that the fiduciary is governed by FIPA if Florida is either: (1) the principal place of administration of a trust or estate or (2) the situs of property not held in trust or an estate.[11] Thus, the Act would apply to a trust established outside of Florida but later managed in Florida, for instance, if the trustee relocates there with the trust assets. Additionally, it covers all administrations starting from January 1, 2025.[12] This is consistent with Sections 107 and 108 of the Uniform Trust Code and Section 3 of the Uniform Directed Trust Act. Like those acts, this rule may be superseded by a provision in the terms of the trust.

Power to Adjust

FIPA's core idea is that a trustee, knowledgeable in trust management and evolving impartiality standards, should be able to set reasonable standards for adjusting income and principal as needed. Originally in Section 104 of the 1997 Uniform Act, this power has been expanded and relocated to Section 203 of the 2018 Uniform Act. The main change is removing the requirement to link trust distributions to the concept of "income," which frequently led to inconsistent economic results. This change allows trusts greater flexibility in managing income and principal with fewer restrictions.

FIPA in addition to reclassifying from Fla. Stat. § 738.104 (2002) to Fla. Stat. § 738.203 (2024), to align with the numbering of the 2018 Uniform Act, makes several changes, specifically:

continued, page 8

- Expands the scope of this section from trustees to all fiduciaries.
- Relocates the conditions limiting when a fiduciary may adjust between principal and income to a different section, making such conditions applicable to all fiduciary decisions.
- Replaces the standard of "impossibility" with a standard of "assistance," thereby authorizing a fiduciary to exercise the adjustment power if the fiduciary determines that doing so will assist the fiduciary in administering the trust or estate impartially.
- Clarifies that the exercise of the adjustment power may apply to the immediately preceding period, current period, and one or more subsequent periods.
- Adds new accountability procedures, including a requirement that the exercise of the adjustment power be included in the annual accounting report or communicated at least, annually, to the trust's qualified beneficiaries.
- Authorizes the appointment of a co-fiduciary to exercise the adjustment power under specified circumstances.
- Includes a presumption that a release or delegation of the adjustment power is a release or delegation of the entire power, and that such a release or delegation is permanent.

Unitrusts

Similar to the Power to Adjust, unitrusts provide Trustees with considerable flexibility. Instead of adhering to traditional income and principal allocations, they prioritize the fair market value of the trust's assets, focusing on overall portfolio performance rather than the type of return generated. For the purposes of income distributions, the unitrust amount is treated as the trust's net income.

Originally, introduced in 2002 under FUPIA Fla. Stat. § 738.1041 (2002), unitrusts have become more commonplace, and FIPA replaces the lengthy section of Fla. Stat. § 738.1041 by dividing it into a series of smaller, more discrete sections, found in Fla. Stat. §§ 738.301-738.310 (2024). This adjustment also aligns with the numbering of the 2018 Uniform Act. These provisions apply to (1) income trusts (unless the trust instrument expressly prohibits application), (2) express unitrusts (other than Charitable Remainder Unitrusts), and (3) previously converted unitrusts. Upon notice to beneficiaries, Fla. Stat. § 738.303(1) (2024) permits a trustee to convert an income trust to a unitrust, change the percentage of the unitrust rate or method used to calculate the unitrust amount, and convert a unitrust to an income trust.[13] Court approval is not required, though the fiduciary may request a protective order before converting to or from a unitrust.[14]

The Act maintains existing Florida law that the Unitrust Rate must be within the federal tax safe harbor of at least three percent (3%) and not more than five percent (5%).[15] Although the Act permits a trust settlor to deliberately veer from the 3-5% safe harbor, it's crucial to exercise significant caution when planning beyond this limit.

Fla. Stat. § 738.310(1)(a) offers one of the main changes from FUPIA, providing the trustee with a new tax ordering rule to ascertain the federal income tax attributes of the unitrust amount, if the trust is a converted unitrust under Fla. Stat. § 738.303(1)(a) or prior law.[16] Under the new tax ordering rule, unitrust distributions consist of (1) net accounting income, (2) ordinary income not allocable to net accounting income, (3) short-term capital gains, (4) long-term capital gains, and (5) principal.[17]

FIPA makes several other changes to current law:

- Separates provisions relating to unitrusts into distinct sections, making such provisions more visible.
- Specifies that these sections apply to estates only where a trust is a beneficiary of an estate.
- Adds definitions applicable to a unitrust, including "applicable value," "express unitrust," "net fair market value of a trust," "unitrust," "unitrust policy," and "unitrust rate."
- Ensures that the unitrust provisions remain within the safe harbor standards of the Treasury Regulations (as they are under current law), but allows for future modification of the relevant provision should the Treasury relax those standards.
- Modernizes but does not substantially alter: provisions relating to a fiduciary's authority and duties as they relate to unitrusts; the method for determining the unitrust rate; and the method for determining an asset's fair market value for the purpose of determining the unitrust amount.

Receipts from Entities

FIPA updates the guidelines for distributions from entities by amending Fla. Stat. § 738.401. The existing law favors objective calculations over fiduciary discretion.

As we move from FUPIA to FIPA, notable changes include:

- Limiting the lookback period to three accounting periods (current and prior two periods, or duration of time held by the fiduciary, if less) to simplify trust administration. Previously, there was an unlimited lookback period.[18]
- Restructuring the law to more closely match 2018 Uniform Act's overall organization and terminology (e.g., "partial liquidations" are now called "capital distributions").
- Amending or adding definitions, including "capital distribution," "entity," and "entity distribution," to clarify certain concepts incorporated into this section.

Allocations Deferred Compensation Accounts, Annuities, and Similar Arrangements

FIPA renumbers the section of law addressing receipts

continued, page 9

from deferred compensation accounts, annuities, and similar arrangements from Fla. Stat. § 738.602 (2002) to Fla. Stat. § 738.409 (2024). Currently, the "income of the fund" is calculated in a specific way, and this amount is compared to the actual payments received from the fund; the smaller of these amounts is then allocated to income, with the balance allocated to principal.

FIPA modifies this section by:

- Changing the phrase "income of the fund" to the more customary "internal income."
- Specifically authorizing fiduciaries to transfer assets from principal to income as necessary to fully fund the internal income of the fund and distribute such income to the beneficiary.
- Adding an accounting period concept to balance the allocation of intra-period receipts between principal and income.

A special provision for Marital Trusts allows the beneficiary to request the fiduciary to withdraw any remaining internal income that has not been paid out, and in such cases, the fiduciary shall transfer that amount from principal to income and distribute it as income. For all other trusts that have one or more beneficiaries entitled to receive all the current net income, if the internal income surpasses the payment made from a separate fund to the fiduciary, the fiduciary will reallocate the trust's principal to income by the amount of that excess and distribute the same.

Other Financial Instruments or Arrangements

FIPA introduces Fla. Stat. § 738. 416 (2024), to be a "catch all" provision for the allocation of receipts and disbursements related to financial instruments not explicitly addressed in FIPA. The rule allocates ninety percent (90%) to principal and ten percent (10%) to income, aligning it with the standard for derivatives, options, and asset-backed securities.

Transfers from Income to Principal for Depreciation

FIPA modifies Fla. Stat. § 738.503, currently allowing fiduciaries to allocate a reasonable amount of the net cash receipts from a principal asset from income to principal, considering depreciation to such principal, with certain limitations. FIPA largely maintains the existing law, but introduces three significant exceptions:

- Eliminates the safe harbor that previously assumed any amount of depreciation taken for an asset was reasonable.
- Substitutes the term "fixed asset" with "tangible asset" to align with updates made in other sections of FIPA.
- Excludes depreciation for assets treated as liquidating assets.

Income Taxes

FIPA renumbers Fla. Stat. § 738.705 (2002) to Fla. Stat. § 738.506 (2024), a provision which requires a fiduciary to disburse from income those amounts allocated to income, and from principal those amounts allocated to principal. Current law also specifies that the same allocation rules apply



continued, page 10

for a trust's or estate's share of an entity's taxable income, except that principal should be used for amounts exceeding total entity receipts. In addition, a fiduciary must also adjust income or principal receipts, pursuant to a specified formula, to the extent the trust's or estate's income taxes are reduced, *but not eliminated*, due to a deduction for payments made by a beneficiary.[19]

FIPA substantially retains the current law but makes a few changes. The most significant being it adds a provision allowing a fiduciary to reimburse the "owner" of a grantor trust for income taxes paid. It also removes the formula outlining the amount distributable to a beneficiary and removes the phrase *but not eliminated*, as it created confusion.

Carrying Value

Florida continues to use "carrying value" for asset valuation without requiring frequent appraisals. The Uniform Act relies on "fair market value" or avoids valuing the asset at all by using a statutorily defined 90%/10% split between principal and income. While FIPA may also use the 90%/10% split for certain receipts/disbursements (Derivatives, Options, and Asset-Backed Securities), Florida policy prefers using the less burdensome carrying value.[20] The 2002 Uniform Act relies on the fiduciaries' estimate of fair market value. FIPA's use of carrying value as defined in the Act simplifies calculations and reduces challenges to fiduciary results.[21] Carrying value may be adjusted with proper disclosure to reflect changes in carrying value applied in a consistent manner; however, FIPA urges caution against arbitrary adjustments.

Conclusion

FIPA modernizes Florida's law and provides clear, updated guidelines to streamline the administration of trusts and estates in the modern era. It (1) allows for total-return investing under the "modern portfolio theory," (2) provides for the conversion of an older trust into a unitrust, (3) provides flexibility for more individualized estate planning, and (4) provides a governing law provision to reduce jurisdictional disputes. The key theme throughout FIPA is flexibility, more in alignment with the 2018 Uniform Act and other state laws, while retaining Florida specific key public policy provisions.

Mapping Chart[22]

FIPA	FUPIA	Titles - FIPA
738.101	738.101	Short title
738.102	738.102	Definitions
738.103		Scope
738.104		Governing law
738.201	738.103	Fiduciary duties; general principles
738.202	738.105	Judicial review of exercise of discretionary power; request for instruction
738.203	738.104	Fiduciary's power to adjust
738.301	738.1041	Definitions
738.302	738.1041	Application; duties and remedies
738.303	738.1041	Authority of fiduciary
738.304	738.1041	Notice
738.305	738.1041	Unitrust policy
738.306	738.1041	Unitrust rate
738.307	738.1041	Applicable value
738.308	738.1041	Period
738.309	738.1041	Express Unitrust
738.310	738.1041	Other rules
738.401	738.401	Character of receipts from entity

continued, page 11

738.402	738.402	Distribution from trust or estate
738.403	738.403	Business and other activities conducted by fiduciary
738.404	738.501	Principal receipts
738.405	738.502	Rental property
738.406	738.503	Receipt on obligation to be paid in money
738.407	738.504	Insurance policy or contract
738.408	738.601	Insubstantial allocation not required
738.409	738.602	Deferred Compensation, annuity, or similar payment
738.410	738.603	Liquidating asset
738.411	738.604	Minerals, water, and other natural resources
738.412	738.605	Timber
738.413	738.606	Marital deduction property not productive of income
738.414	738.607	Derivatives or options
738.415	738.608	Asset-backed securities
738.416		Other financial instrument or arrangement
738.501	738.701	Disbursement from income
738.502	738.702	Disbursement from principal
738.503	738.703	Transfers from income to principal for depreciation
738.504		Reimbursement of income from principal
738.505	738.704	Reimbursement of principal from income
738.506	738.705	Income taxes
738.507	738.706	Adjustment between principal and income because of taxes
738.508	738.801	Apportionment of property expenses between tenant and remainderman
738.601	738.201	Determination and distribution of net income
738.602	738.202	Distribution to successor beneficiary
738.701	738.301	When right to income begins and ends
738.702	738.302	Apportionment of receipts and disbursements when decedent dies or income interest begins
738.703	738.303	Apportionment when income interest ends
738.801	738.802	Uniformity of application and construction
738.802		Relation to electronic signatures in global and national commerce act
738.803	738.803	Severability
738.804	738.804	Application

continued, page 12

The authors take sole responsibility for the views expressed herein and these views do not necessarily reflect the views of the authors' employers or any other organization, group or individual.


S. KLEIN

Sasha Klein *is a tax partner in PwC's Private practice serving as the Co-Chair of the PwC Trust & Estate Academy and specializing in ultra-high net worth consulting services with a particular emphasis on business owning families, cross border UHNW clients, and family offices, as well as other UHNW clients in the asset and wealth management practice. She provides strategic advice on private trust companies, qualified small business stock (QSBS), transfer taxes, asset protection, succession planning and comprehensive wealth planning. Clientele include some of the wealthiest in the world, often billionaire households, owners of professional sports teams and many proprietors of renowned family-operated brands. Additionally, Sasha is an author, lecturer, and community leader. She lectures nationally and is a published author on a range of estate planning, wealth management and tax law topics. She is also very involved in national and state bar and bankers' associations, as well as volunteering and supporting several civic and charitable organizations with the goal of bettering the community in which we live, including serving as Chair of the Board of Trustees for her children's private school. Sasha received her Juris Doctorate from Vanderbilt Law School and her Masters in Tax law (LL.M.) from the University of Florida Law School. She has been awarded Best Lawyers in America (top 1%) among many other professional honors. She also holds an Accredited Estate Planner Designation (AEP) and is a Fellow of the American Bar Foundation.*


A. PARTHEMER

Alexander M. Parthemer, LL.M.*, a member of Jones Foster's Private Wealth, Wills, Trusts & Estates and Corporate & Tax teams, focuses his practice in the areas of estate planning, probate and trust administration, tax planning, business planning, and transactional corporate law. Alex is an active member of the Real Property, Probate & Trust Law Section of the Florida Bar and the Tax Section of the Florida Bar. He holds a Master of Laws degree (LL.M.) in Taxation from the Graduate Tax Program at the University of Florida.*

Endnotes

1 The Act (HB 1093), as approved, can be found at https://laws.flrules.org/node/9592 (last visited 10/11/2024).

2 The Uniform Law Commission (ULC, also known as the National Conference of Commissioners on Uniform State Laws, or NCCUSL), established in 1892, provides states with non-partisan legislation that brings clarity and stability to critical areas of state statutory law. The ULC has worked for the uniformity of state laws since 1892. It is a non-profit unincorporated association, comprised of state commissions on uniform laws from each state, the District of Columbia, the Commonwealth of Puerto Rico, and the U.S. Virgin Islands. https://www.uniformlaws.org/aboutulc/overview.

3 The 1997 Uniform Act, as amended, can be found at https://www.uniformlaws.org/committees/community-home/librarydocuments?LibraryKey=8471fb91-472d-4fb3-8788-f8696395996c (last visited 6/29/24).

4 Other specific Florida provisions in addition to unitrust rules include: rules regarding life estates, and distributions from entities, references to Florida's elective share regime, and inclusion of carrying value in certain calculations. There remain important aspects of Florida law and are retained in FIPA.

5 Although one of the authors served on the Committee, opinions express herein are those of the authors and not the Committee, other members of the Committee, the Section or the Florida Bar Association.

6 Fla. Stat. § 738.201(2) (2024)

7 The Internal Revenue Service allows individuals to give away up to a specific amount of assets each year tax-free under the annual gift tax exclusion. Jean Gordon Carter and Janice L. Davies, Gift Tax, the Annual Exclusion and Estate Planning, https://www.actec.org/resource-center/video/gift-tax-the-annual-exclusion-and-estate-planning/(last visited September. 25, 2024)

8 A trust with qualified subchapter S status is eligible to own stock in an S corporation. A settlor can use this type of trust to make a gift of all or a part of the S corporation stock and retain voting power while the beneficiary receives the income and the tax bur den. Rebecca C. Bowen, Trusts as Eligible Shareholders of an S Corporation, https://www.t-mlaw.com/commentary/trusts-as-eligibleshareholders-of-an-s-corporation/(last visited September 25, 2024)

9 The Internal Revenue Service allows a spouse to leave property of unlimited value to his or her surviving spouse tax-free. Such assets may be distributed by a direct transfer from the decedent to the surviving spouse or by an indirect transfer to a qualifying trust for the surviving spouse's benefit. Peter B. von Stein, Basic Estate Tax Planning for Married Couples: Opportunities for Use of Estate Tax Exemptions, https://www.wardandsmith.com/articles/basic-estate-tax-planning-married-couples-use-estate-tax-exemptions (last visited Sept. 25, 2024).

10 The generation-skipping transfer tax is a federal tax on a gift or an inheritance that prevents the donor from avoiding estate taxes by skipping over children in favor of grandchildren. However, the Internal Revenue Service allows a person to give up to a certain amount to a qualified recipient to avoid this tax. Troy Segal, what is the Generation-Skipping Transfer Tax, Investopedia (Feb. 7, 2023), https://www.investopedia.com/terms/g/generation-skipping-transfer-tax.asp (last visited Sept. 25, 2024).

11 Renumbered Fla. Stat. § 738.104 (2024).

12 Fla. Stat. § 738.804.

13 Fla. Stat. § 738.303(1)-(4).

14 Fla. Stat. § 738.303(1); FIPA §738.202(4).

15 FIPA §§738.306; Treas. Reg. §1.643(b)-1.

16 Fla. Stat. § 738.310.

17 Fla. Stat. § 738.310(1)(a)(2024)

18 Florida's "lookback period" applies a portion of certain large receipts to income, at a rate of three percent per year.

19 Fla. Stat. § 738.705(4) (2002)

20 "Carrying Value" refers to the fair market value of an asset on the date of receipt by the fiduciary. In the case of revocable trusts within the meaning of Fla. Stat. § 733.707(3), the fair market value on the date of the settlor's death is the carrying value. For assets acquired during the administration of the estate or trust, the carrying value is equal to the acquisition costs of the asset.

21 Under Fla. Stat. § 738.102(4) (2024), when there is a change in fiduciary, the successor fiduciary may elect to adjust the carrying value of all assets to the fair market value of the assets on the date the successor takes office; provided, the first accounting filed after the election must reflect the updated carrying values. Note, this is also permitted in the case of the resignation or removal of one fiduciary when more than one fiduciary is acting, the remaining fiduciary (or fiduciaries) may elect to adjust the carrying value as of the date of resignation or removal.

22 Excerpt from the Florida Bar Journal Article, ***Florida Adopts Uniform Income and Principal Act***, Jolyon Acosta and Keith Braun, Florida Bar Journal, August 2024.

to start by listening." When we have genuine connections, it is much easier to listen to our colleagues and exhibit empathy for their views, even when we disagree. Stated another way, real relationships lead to mutual respect, and mutual respect leads to decorum in our important debates and deliberations. We are stronger and more effective when we care about each other.

Another aspect of unreasonable hospitality is creating a culture of hospitality through personalization and empowerment. Looking at the Section's Strategic Plan, the most analogous strategies the Section has adopted focus on providing opportunities for active participation, professional development, and paths to leadership within the Section. So, how do we create this culture?

For those of us who have attended Section meetings for many years, the mechanics of how everything works seems straightforward. We go to committee meetings and dinners on Thursday and Friday, and then we have our Executive Council meeting on Saturday morning. Easy, right? But if you reflect on your early days, you may remember what it felt like to attend your first committee meeting or reception. You probably had no idea what was going on, and it is entirely possible that you did not know anyone at your dinner table. Even though I had amazing mentors showing me the ropes, I still recall trying to figure out exactly what the Executive Council is and does.

So, when you attend meetings and look around the room, take a moment to appreciate the relationships you have, but do not stop there. Personally extend the hospitality branch to those who have arrived more recently. Further, for those in leadership positions, actively identify and cultivate opportunities for newer members to participate in the work of the Section. It could be asking someone to take the minutes of your committee meeting (that's how I got my start), to work on a white paper, or to present a case law update. It could be anything.

For those newcomers looking to participate and eventually lead, there are two pieces of advice to be gleaned from Unreasonable Hospitality. First, Guidara says, "knowing less is often an opportunity to do more." In other words, do not let concerns about not knowing how everything works stop you from engaging. Even with great mentors, it takes time to figure things out. The second bit of advice speaks to those who may have reservations about taking the step to actively volunteer or participate. To this Guidara says, "nobody knows what they're doing before they do it." I think he's right.

Creating meaningful relationships and fostering a culture of hospitality will not happen automatically. To achieve these goals, we need to be intentional. Guidara says, we need to "work with purpose, on purpose." The idea of hospitality has been on my mind all year, and I've been very intentional in my choices about making people feel welcome and encouraging connections. At the end of the day, however, unreasonable hospitality is a group project. By prioritizing our relationships and empowering each other, together we can elevate the Section to new heights. I look forward to seeing many of you at our upcoming events and to experiencing the spirit of unreasonable hospitality together.

PARTNERING FOR A STRONGER LEGAL COMMUNITY

WE STAND WITH

the Real Property, Probate & Trust Law Section of the Florida Bar

in its unwavering commitment to integrity, professionalism and public service.

J.P.Morgan PRIVATE BANK

INVESTMENT PRODUCTS: • NOT FDIC INSURED • NO BANK GUARANTEE • MAY LOSE VALUE

© 2024 JPMorgan Chase & Co. All rights reserved.

VOID DEEDS AND MARRIAGES:

Challenging a Deed and a Marriage on the Basis of Lack of Capacity or Undue Influence

By Stephanie L. Cook, Esq., Shuffield & Lowman, Orlando, Florida

Litigators who handle contested guardianship, probate, and trust cases are likely familiar with Harry's story. Harry's wife of fifty years died, and he was grief-stricken and lonely. Harry was in his late 80s and had two children. While in the grocery store one day, he bumped into Jane, and she asked him to dinner. Jane was 45 years younger than Harry and allegedly fell madly in love with him after just a few weeks of dating. From that date forward, they were inseparable. Harry's children became very concerned as Harry had been declining cognitively since before his beloved wife passed away. Harry had a long, successful career and accumulated significant wealth. Just weeks after meeting, Jane moved into Harry's house, was added as a joint owner to the house by virtue of a quitclaim deed, and took over his finances. Soon thereafter, they married. Harry's children sought to establish a guardianship for Harry's protection, and to invalidate the marriage and to set aside the deed. However, before that could happen, Harry passed away. This article will analyze Harry's children's ability to challenge the deed and the marriage on the basis of lack of capacity or undue influence both before and after Harry's passing.



continued, page 15

Deed Challenges

Challenging a Deed for Lack of Capacity

In 1891, the Florida Supreme Court, in *Waterman v. Higgins,* 28 Fla. 660 (Fla. 1891), set forth the standard for determining mental incompetence as it relates to the execution of a deed or a contract. The primary question is whether the grantor had sufficient intelligence to understand fully the nature and effect of the transaction, and the burden is on the plaintiff to prove, by a preponderance of the evidence, that the grantor was mentally incompetent at the time of the transaction.[1] A deed will only be void if the contestant can prove that the mind of the grantor was so affected as to render the grantor incapable of comprehending the nature and effect of the transaction.[2]

To determine whether Harry was incapable of comprehending the nature and the effect of the deed, a court would consider a wide variety of factors including, but not limited to: (1) his medical and psychiatric history and diagnosis; (2) his behavior and conduct at the time of the transaction; and (3) the circumstances surrounding the transaction, such as the absence of independent advice, the existence of a confidential or a fiduciary relationship, undue influence, and departure from the normal manner of similar transactions.[3] A trial court must consider the complexity and the fairness of the transaction; and the more complex and unfair a transaction is, the more likely a determination of incapacity will be found. In evaluating the credibility of a witness to a particular transaction, the factfinder may consider any benefit the witness received from the transaction.[4]

Harry's children could have brought the deed challenge for lack of capacity during Harry's lifetime using a power of attorney if the language of the power of attorney granted such authority. Alternatively, if a guardian had been appointed for Harry, then Harry's guardian could have brought the challenge with guardianship court approval.[5] After Harry's death, the challenge would be brought as a declaratory judgment action to set aside the deed for lack of capacity.

Challenging a Deed Based on Undue Influence

Harry's children can also challenge the deed on the grounds of undue influence, which should be pled in the alternative to a challenge for lack of capacity. The necessity to plead such an undue influence claim in the alternative is based on the premise that in order for a grantor to be capable of being unduly influenced, the grantor must have had some level of capacity to begin with, albeit oftentimes diminished.[6] The considerations referenced above regarding the grantor's diminished capacity and medical history are relevant to the grantor's susceptibility to being unduly influenced. It is common for the undue influencer to isolate the grantor before and after the procurement of the contested document. The witnesses to the deed are often randomly selected, may be difficult to locate, and may not have a great recollection of events. Furthermore, the interaction with the witnesses to the deed is often brief, so they are not aware of the pressure placed on the grantor signing the deed.

In order for Harry's children to set aside a deed for undue influence, they must demonstrate that the deed resulted from "over-persuasion, duress, force, coercion, or artful or fraudulent contrivances to such a degree that there is a destruction of free agency and willpower."[7] Given the often secret nature of undue influence and, therefore, the difficulty in discovering direct evidence thereof, Florida law developed factors that a court considers in applying a presumption that a transaction was procured by undue influence and a resulting shifting in the traditional burden of proof.[8]

Overview of the Presumption of Undue Influence and the Shifting Burden of Proof

Understanding the history of the undue influence presumption and the shifting burden of proof can be challenging and, sometimes, confusing. The seminal case of *In re Estate of Carpenter,* 253 So. 2d 697 (Fla. 1971), established that a rebuttable presumption of undue influence may arise under certain circumstances, if the contestant can establish that the substantial beneficiary of the transaction: (1) held a confidential relationship with the decedent, and (2) was active in the procurement of the contested document.[9] If these factors are established, a presumption of undue influence arises. In *Cripe v. Atlantic First National Bank of Daytona Beach,* 422 So. 2d 820 (Fla. 1982), the Florida Supreme Court adopted the *Carpenter* rule regarding the presumption of undue influence as it relates to *inter vivos* transfers, and *Thomas v. Lampkin,* 470 So. 2d 37, 39 (Fla. 5th DCA 1985) applied the presumption set forth in Carpenter to a deed contest.[10]

Though widely cited for establishing the factors that give rise to the presumption of undue influence, *Carpenter* also determined the procedural effect of the presumption. The *Carpenter* court ruled that, once the presumption was established, the alleged undue influencer then had the relatively weak burden of simply coming up with a reasonable explanation for his or her involvement in the procurement of the document. If the undue influencer was able to do so, the presumption was rebutted, and the burden of proof remained with the plaintiff to prove undue influence by a preponderance of evidence. This was a reversal of the Florida Supreme Court's ruling from thirty years prior in the case of *In re Estate of Aldrich,* 148 Fla. 121 (1941), wherein the Court held that the presumption actually shifted the burden of proof in will contests. In other words, *Carpenter* ruled that the presumption shifted only the burden of producing evidence. In 1976, the Florida Legislature enacted the Florida Evidence

continued, page 16

Code, which became effective on July 1, 1979.[11] Since then, courts have been divided over whether the Evidence Code legislatively overruled *Carpenter* by making the presumption of undue influence shift the burden of proof.[12]

In 2002, the Florida Legislature attempted to clarify this issue and amended Fla. Stat. § 733.107 to add a new subsection (2), which provided that: "[t]he presumption of undue influence implements public policy against abuse of fiduciary or confidential relationships and is, therefore, a presumption shifting the burden of proof under ss. 90.301-90.304."[13] As amended in 2002, the statute superseded *Carpenter* and *Cripe* to the extent that those cases prohibited a shifting of the burden of proof in undue influence cases.[14] Thereafter, when the presumption of undue influence arose, Florida statutory law required that the burden of proof shifted to the alleged wrongdoer to prove there was no undue influence. While the addition to Fla. Stat. § 733.107 is contained in the Florida Probate Code, the plain language was not limited to wills. While most practitioners understood that the burden shifting applied to trust contests, the trust code did not contain a similar provision. As to other testamentary transfers, such as *inter vivos* gifts, there was no Florida statutory authority specifically addressing the presumption as it related to these types of transfers, despite courts applying the presumption to such transactions.

In 2014, the Florida Legislature again amended § 733.107(2) to definitively clarify that the burden-shifting nature of the presumption of undue influence applies to all transactions or events to which the presumption of undue influence applies — *"[i]n any transaction or event to which the presumption of undue influence applies,* the presumption implements public policy against abuse of fiduciary or confidential relationships and is, therefore, a presumption shifting the burden of proof under ss. 90.301-90.304."[15] [Emphasis Added] Thus, the revised Fla. Stat. § 733.107(2) makes it clear that once the presumption arises in a case challenging a deed (or any other document), the burden of proof is on the defendant throughout the remainder of the proceedings to prove there was no undue influence.

Notably, in the Final Bill Analysis, the Florida Legislature provided the following explanation for the 2014 amendment:

> [t]he presumption of undue influence in will contests is a policy-based presumption that shifts the burden of proof. Courts have recognized that the burden-shifting nature of the presumption of undue influence is applicable whenever that presumption is established. However, because the burden shifting presumption is located in the Florida Probate Code, it could be argued that it only applies in will contests. The current statute does not apply to other undue influence proceedings, including trust contests and challenges to the validity of inter vivos transactions…The bill…amends s. 733.107(2), F.S., to provide that a presumption of undue influence, once it arises, applies to all testamentary challenges **including trust contests and challenges to inter vivos gifts. (emphasis added).**[16]

Despite the clarification in the statute, some courts have still struggled to understand its application, particularly in the context of a deed contest. Perhaps that is because, in the context of a deed, practitioners do not think to look to the Probate Code. Additionally, although Chapter 689, Florida Statutes, which addresses deeds, contemplates a challenge to the validity or enforceability of a deed based on undue influence in Fla. Stat. § 689.01(3), that section does not cross-reference Fla. Stat. § 733.107(2), regarding the presumption or shifting the burden of proof.[17] Most courts have expressly acknowledged that *Carpenter and Cripe* were superseded by the 2002 and 2014 revisions to Fla. Stat. § 733.107(2) insofar as the burden-shifting effect of the presumption of undue influence.[18] However, two cases since the enactment of revised Fla. Stat. § 733.107(2) seem to have improperly applied the burden-shifting set forth in the statute.[19]

In *Drapp v. McDaniel,* Edward McDaniel ("McDaniel") brought an action against Tania Drapp and Michael Streiff (collectively, "Defendants") to invalidate multiple deeds transferring McDaniel's interest in property. The trial court entered a final judgment in favor of McDaniel and declared the contested deeds void.[20] On appeal, the appellate court held that the trial court failed to apply the correct legal standard in determining that the deed was invalid and wrongfully placed the burden of proof on the Defendants. Citing *Ballard v. Ballard,* 549 So. 2d 1176, 1177-78 (Fla. 2d DCA 1989) and *Carpenter,* the appellate court incorrectly stated that McDaniel bore the burden of proof throughout the proceedings and that the trial court improperly placed the burden on Defendants when the trial court found that Defendants, "failed to present any credible explanation or reason why McDaniel would voluntarily and knowingly transfer his interest in the properties."[21] The court went on to state that, notwithstanding the trial court's error in assigning the burden of proof, the evidence was insufficient to establish undue influence, as the Defendants' explanation for the involvement in McDaniel's affairs was reasonable and satisfactorily rebutted the presumption of undue influence.[22] The *Drapp* decision, although authored in 2019, did not cite Fla. Stat. § 733.107(2), and incorrectly states that McDaniel bore the burden of proof throughout the proceeding, without regard to the clear application of the relatively new revision to the Evidence Code.[23] In fact, *Drapp* fails to discuss in any way the application of a presumption of undue influence and cites only cases that pre-date the legislative clarifications of the Evidence Code.

continued, page18



MPI, a prestigious national consulting firm founded in 1939, specializes in business valuation, forensic accounting, litigation support and corporate advisory work. MPI also provides fairness opinions and advisory services. MPI's litigation support services assist attorneys involved in marital disputes and other corporate litigation.

Our skills, experience and interdisciplinary expertise will deliver the benefits of our accumulated wealth of knowledge, professional and personal relationships, and industry trust and confidence.

Roy H. Meyers, CFA, ASA
1000 Lenox Drive, 3rd Floor
Lawrenceville, New Jersey 08648
609-955-5743 | rmeyers@mpival.com

To learn how MPI can help you meet your clients' needs, visit **www.mpival.com**.

Chicago - New York - Philadelphia - Princeton - San Francisco - Seattle - Westport www.mpival.com

Thus, if Harry's children can establish the presumption of undue influence as it relates to the deed from Harry to Jane, pursuant to Fla. Stat. § 733.107(2), the burden of proof properly shifts to Jane to prove by a preponderance of the evidence the non-existence of undue influence.[24]

Elements that the Contestant Must Show to Give Rise to a Presumption of Undue Influence

Confidential Relationship

The term "confidential relationship" encompasses a broad range of technical, fiduciary, and informal relationships where one person trusts in and relies upon another. It is a very fact-specific inquiry.[25] Examples of a confidential relationship have been found to include formal relationships, such as a principal and agent pursuant to a power of attorney or healthcare surrogate designation, and employer-employee relationships, particularly in the healthcare context, such as caretakers, assistants and aides. It has even been found that an attorney and his secretary maintained a confidential relationship.[26] Courts have been especially quick to find a confidential relationship where the grantor and grantee lived together, the grantor and grantee are related by blood, and the grantor has become dependent on the grantee for his or her well-being.

Harry's children will likely be able to meet this element as Jane moved in with Harry and was acting as his girlfriend and caretaker. Harry depended on her for his basic needs and daily activities. A party's dependent condition is relevant to the issue of undue influence only after a confidential relationship exists, but dependency alone does not establish a confidential relationship. Furthermore, there are exceptions to the application of the presumption of undue influence as it relates to certain relationships. The presumption of undue influence does not apply to a spouse helping a spouse or dutiful children assisting their declining parent.[27] Thus, for the presumption of undue influence to apply to Harry's children's challenge to the deed based on undue influence, they will first have to set aside Harry's marriage to Jane.

Active Procurement

To give rise to the presumption, the grantee must also have been active in the procurement of the deed. In *Carpenter,* the Florida Supreme Court laid out the following nonexclusive list of factors that, if present, will constitute active procurement: (1) the presence of the grantee at the execution of the instrument in question or on the occasions where the grantee expressed desire to devise or convey, (2) the grantee's recommendation of an attorney to prepare the instrument in question, (3) the grantee's knowledge of the instrument's contents prior to its execution or the occasions where the grantee expressed desire to devise or convey, (4) the grantee's giving of instructions to the drafting attorney, and (5) the grantee's securing of witnesses and safekeeping of documents after execution.[28]

Following *Carpenter,* additional considerations were added to the list of factors in determining active procurement, including: (1) isolation of the grantor by the grantee and disparagement of family members, (2) mental inequality between the decedent and the grantee, and (3) the reasonableness of the will or trust provisions or the conveyance.[29] Whether or not Jane was active in procuring the deed is a fact-intensive inquiry and will require discovery to gather the evidence needed to give rise to the presumption.

Even when the presumption of undue influence does not arise, the court may still reach a finding of undue influence if the court finds that the contestant established undue influence by the greater weight of the evidence.[30]

Marriage Challenges

Under Florida law, as a surviving spouse, Jane will be entitled to a number of significant financial benefits by virtue of having been married to Harry at the time of his death, regardless of the estate planning efforts in place at the time. Thus, in order for Harry's children to prohibit Jane from benefiting from those spousal benefits, they will need to be successful in challenging the marriage itself, either before or after Harry's death, based on Harry's lack of capacity to enter into the marriage and/or based on Jane's undue influence.

Invalid marriages are void or voidable, depending on the circumstances, and it is important to understand the distinction between those standards. A void marriage is generally one that is incapable of ratification or is prohibited by statute. When a marriage is deemed void, "the effect … so far as [it] concerns the conferring of legal rights upon the parties, is as though no marriage had ever taken place."[31] "Due to the harshness of declaring a marriage void, few circumstances have been identified as requiring such a result."[32] A lack of mental capacity will render a marriage void. Other examples of circumstances that result in a void marriage include bigamy, incest, and common law marriage. The invalidity of a void marriage may be raised in any court, between any parties, and either during the lifetime of the parties to the marriage *or* after their deaths.[33]

In contrast, a marriage is considered voidable when it is possible for the parties to subsequently ratify it when a disabling or voiding impediment that was unknown to both parties at the time the invalid marriage was originally contracted has been removed.[34] "In other words, it is possible for a voidable marriage to ripen into a valid marriage if it is ratified by the parties."[35] Voidable marriages are considered valid for all purposes unless they are avoided.[36]

continued, page 19

Challenging a Marriage for Lack of Capacity

The analysis regarding whether Harry had the capacity to marry is similar to the inquiry as to whether he had the capacity to execute the deed. The analysis of a person's capacity to execute a deed is equally applicable in the context of whether a marriage is void on the grounds of mental incompetence.[37]

> To constitute a valid marriage, the marital contract must be voluntarily entered into in good faith for the purposes actuating such contracts, the parties must be legally eligible to make the contract, and their status must be such that the union will not be contrary to public policy or obnoxious to the prevailing social mores.[38]

"A marriage may be rendered invalid either by statute or circumstance."[39]

Harry's children could seek Harry's divorce from Jane during Harry's lifetime on the basis that the marriage was void due to Harry's incapacity at the time of marriage pursuant to a power of attorney or upon the appointment of a guardian for Harry. Importantly, Fla. Stat. § 61.052(1)(b), requires that the dissolution of marriage cannot be granted unless the party alleged to have lacked capacity has been adjudicated to lack capacity for a preceding period of three years. An annulment, however, can be granted on a shorter timeline. For example, in *Whitehead v. Whitehead*, shortly after a petition for incapacity was filed by a family member, Sharon Whitehead, married the alleged incapacitated person, Delmas B. Whitehead (the "Ward"). Upon the guardian's petition to annul the marriage, one of the examining committee members testified that he did not believe that the Ward had the capacity to marry at that time. The court found that the Ward lacked the necessary mental capacity to contract for the bonds of marriage and, thus, the marriage was voidable and could be annulled. A marriage can be annulled if it can be established that at the time of the marriage, the innocent party lacked the mental capacity to contract.[40]

Challenging a Marriage Based on Undue Influence

Prior to 2010, Florida law provided that an invalid marriage that was merely voidable, such as one procured by fraud, duress, or undue influence, could not be attacked after the death of one of the parties to the marriage.[41] In 2010, the Florida Legislature enacted Fla. Stat. § 732.805, creating a cause of action authorizing challenges to a voidable marriage after the death of one of the parties to the marriage contract.

continued, page 20



It should be noted this statutory provision does not void the marriage but rather restricts certain enumerated rights and benefits which would flow to the surviving spouse solely by virtue of the marriage if the surviving spouse of a decedent is found to have procured the marriage to the decedent by fraud, duress, or undue influence. This includes rights and benefits under the Florida Probate Code, under a bond, life insurance policy, or other contractual arrangement, under a will, trust, or power of appointment, and any immunity from the presumption of undue influence that a surviving spouse may have under state law.[42]

While Florida is said to have a strong public policy in favor of protecting a decedent's surviving spouse, the enactment of a statute, such as Fla. Stat. § 732.805, which permits potential heirs to challenge a marriage after death, implicitly reflects that Florida's public policy is not furthered in such instances where marriage is procured by fraud, duress, or undue influence.

Fla. Stat. § 732.805, provides that the contestant has the burden of establishing undue influence by a preponderance of the evidence. If the ratification of the marriage is raised as a defense, the surviving spouse will have the burden of establishing said defense by a preponderance of the evidence. Furthermore, a challenge to a surviving spouse's marriage under Fla. Stat. § 732.805, may be maintained as a defense, objection, or cause of action by any interested person after the death of the decedent in any proceeding in which the fact of marriage may be directly or indirectly material. Fla. Stat. § 732.805, created a four-year statute of limitations running from the date of the decedent's death to file a claim alleging that the marriage was procured by fraud, duress or undue influence.

As for the presumption of undue influence and the burden of proof in an action challenging a marriage under § 732.805, as stated above, the presumption of undue influence does not apply in contests involving a spouse.[43] While there are no cases discussing the presumption in a challenge to marriage under Fla. Stat. § 732.805, there is an argument the presumption should be available if the factors giving rise to the presumption are met, because at the time of the alleged undue influence the parties were not married. Conversely, one could argue that the presumption is not available as the parties were married when the purported spouse passed away and the challenge to the marriage was asserted. However, pursuant to Fla. Stat.§ 732.805(1)(d), if the challenge to the marriage is successful and the marriage is found to have been procured by undue influence, then any immunity from the presumption of undue influence that a surviving spouse may have under state law would not apply. Thus, if Harry's marriage is set aside prior to a contest related to a deed, then the presumption could arise if the elements of the presumption are satisfied. If a court finds that a marriage was procured by undue influence, then the court must distribute the estate's property as if the surviving spouse had predeceased the decedent. Fla. Stat. § 732.805(5), also provides that the court shall award taxable costs as in chancery actions, including attorney's fees.

Conclusion

Harry's children have numerous avenues to challenge both the validity of the deed and the purported marriage to Jane both before and after Harry's death as set forth above. Whether or not Harry's children are able to get the benefit of the presumption of undue influence will be critical as it relates to the deed. It will be interesting to see cases interpreting § 732.805(1)(d) and whether courts permit a presumption of undue influence to apply in a statutory challenge to the marriage on the basis of undue influence.



S. COOK

Stephanie Cook *is a partner with Shuffield Lowman and handles a wide variety of fiduciary litigation matters, including probate and trust litigation and contested guardianship cases. She earned her J.D. degree from Barry University School of Law in 2007, graduating Valedictorian of her law class. She holds a B.A. degree from Mississippi College.*

Stephanie is admitted to the Florida Bar, and she is also admitted to practice in the federal court before the U.S. District Court for the Middle District of Florida. She was named a Thomson Reuters Super Lawyers Rising Star from 2015-2017 and a Florida Super Lawyer from 2019- 2022 by a selection process that rates attorneys based upon a comprehensive three-part review process and is limited to no more than five percent of Florida's attorneys. She was also nominated for Florida Trend Magazine's Legal Elite in 2017, and 2019, 2020, 2021, 2022, and 2023.

Endnotes

1 *Saliba v. James,* 143 Fla. 404, 411 (Fla. 1940).

2 *Id.*

3 See, e.g., *Id.* at 411-14; *Long v. Moore,* 626 So. 2d 1387, 1389 (Fla. 1st DCA 1993).

4 *Clarke v. Hartt,* 47 So. 819, 819 (Fla. 1908).

5 Fla. Stat. § 744.441(11).

6 See, e.g., *Gardiner v. Goertner*, 110 Fla. 377, 385 (1932) ("While it follows from this doctrine (and it has been so held), that 'an attack on a will on the ground of undue influence concedes the existence of testamentary capacity,' …it is always proper to inquire into the mental and physical condition of a testator at the time of the execution of his will."); *Hamilton v. Morgan*, 93 Fla. 311, 318 (1927) ("It has been held that an attack on a will on the ground of undue influence concedes the existence of testamentary capacity."); *Bartsch v. Estate of Wirth*, 136 So. 2d 648, 651 (Fla. 3d DCA 1962) ("[A] contention of undue influence concedes the existence of testamentary capacity."); *but see In re Estate of Brannan*, 213 So. 2d 725, 726-27 (Fla. 4th DCA 1968) ("An attack on a will on the ground of undue influence ordinarily concedes the existence of testamentary capacity, since a lack of capacity would make inquiry into undue influence unnecessary. However, though a will may be invalidated through the existence of undue influence alone, a will is sometimes contested on the grounds of both testamentary incapacity and undue influence in procuring its execution. Where it is so attacked, the judgment of the probate court may be that the will is the result of undue influence exerted on a mind not possessed

continued, page 21

of testamentary capacity at the time it was executed.").

7 *Jordan v. Noll,* 423 So. 2d 368, 370 (Fla. 1st DCA 1982) (citing *Williamson v. Kirby,* 379 So. 2d 693, 697 (Fla. 2d DCA 1980)).

8 See *In re Estate of Carpenter*, 253 So. 2d 697 (Fla. 1971).

9 *Thomas v. Lampkin,* 470 So. 2d 37, 39 (Fla. 5th DCA 1985); *Ballard v. Ballard*, 549 So. 2d 1176, 1177-78 (Fla. 2d DCA 1989).

10 See also *Ballard v. Ballard*, 549 So. 2d 1176 (Fla. 2d DCA 1989).

11 See § 1, ch. 76-237, Laws of Fla. (1976).

12 See, e.g., *In re Estate of Brock*, 692 So.2d 907 (Fla. 1st DCA 1996); *Gorman v Harrison*, 559 So.2d 643 (Fla. 3d DCA 1990); Thomas for *Fennell v. Lampkin*, 470 So.2d 37 (Fla. 5th DCA 1985); *In re Estate of Davis*, 462 So.2d 12 (Fla. 4th DCA 1984) ("Davis II"); *In re Estate of Davis*, 428 So.2d 774 (Fla. 4th DCA 1983) ("Davis I"); *Jordan v. Noll,* 423 So.2d 368 (Fla. 1st DCA 1983).

13 § 5, ch. 02-82, Laws of Fla. (2002).

14 See *Hack v. Janes,* 878 So. 2d 440, 443-44 (Fla. 5th DCA 2004) (explaining the Fla. Stat. § 733.107(2) provision and the difference between vanishing presumptions, which merely affect the burden of production of evidence, and public policy-related presumptions that provide for shifting of the burden of proof).

15 § 3, ch. 14-127, Laws of Fla. (2014).

16 H.R. Comm. on Judiciary, Subcomm. on Civ. Just., HB 757 (2014) Final Bill Analysis 2 (Jun. 27, 2014), https://flsenate.gov/Session/Bill/2014/757/Analyses/h0757z1.CJS.PDF.

17 The language in that section addressing undue influence in the deed context was added pursuant to amendment in 2019, which is after the legislature's 2014 amendment of Fla. Stat. § 733.107(2).

18 See, e.g., *Hannibal v. Navarro,* 317 So. 3d 1179 (Fla. 3d DCA 2021); Hack v. Janes, 878 So. 2d 440 (Fla. 5th DCA 2004).

19 See *Swiss v. Flanagan,* 329 So. 3d 199 (Fla. 3d DCA 2021) and *Drapp v. McDaniel*, 306 So. 3d 1280 (Fla. 2d DCA 2020).

20 *Drapp v. McDaniel*, 306 So. 3d 1280 (Fla. 2d DCA 2020).

21 *Id.* at 1283.

22 *Id.* at 1283-84.

23 See also *Swiss v. Flanagan,* 329 So. 3d 199, 200 (Fla. 3d DCA 2021) (improperly failing to shift burden of proof).

24 *Hack*, 878 So. 2d at 443; Fla. Stat. § 733.107(2).

25 *Allen v. Gore*, 387 So. 2d 535, 538 (Fla. 4th DCA 1980).

26 *Thomas v. Lampkin*, 470 So. 2d 37, 39 n.2 (Fla. 5th DCA 1985).

27 *Carter v. Carter*, 526 So. 2d 141, 143 (Fla. 1st DCA 1988); Estate of *Kester v. Rocco*, 117 So. 3d 1196, 1200 (Fla. 1st DCA 2013).

28 See *Carpenter*, 253 So. 2d at 702; Jordan, 423 So. 2d at 369 n.1 (applying Carpenter to whether a deed was procured by undue influence and noting that "Carpenter involved the execution of a will, but later cases have applied the same principles to inter vivos gifts").

29 *Swiss*, 329 So. 3d at 203 (compiling cases and acknowledging the additional factors); *In re Estate of Winslow*, 147 So. 2d 613, 616 (Fla. 2d DCA 1962).

30 *Williamson*, 379 So. 2d at 695.

31 *Kuehmsted v. Turnwall*, 138 So. 775, 777 (Fla. 1932).

32 *Smith v. Smith*, 224 So. 3d 740, 746 (Fla. 2017).

33 *Arnelle v. Fisher*, 647 So. 2d 1047, 1048 (Fla. 5th DCA 1994) (citing Kuehmsted, 138 So. at 777).

34 *Jones v. Jones,* 161 So. 836, 838 (1935).

35 *Smith*, 224 So. 3d at 746.

36 *Id.*; Kuehmsted, 138 So. at 777.

37 *Kuehmsted*, 138 So. at 777.

38 *Smith*, 224 So. 3d at 746 (quoting *Goldman v. Dithrich*, 179 So. 715, 717 (1938)).

39 *Id.*

40 *Whitehead v. Whitehead*, 2017-CA-356, 2018 Fla. Cir. LEXIS 5886, *15-*16 (Circuit Ct., 1st JC, Clay Cty. Jul. 24, 2018).

41 *Kuehmsted*, 138 So. at 777; *Arnelle*, 647 So. 2d at 1048; *In re Estate of Ruff*, 32 So. 2d 840 (Fla. 1947); *Cooper v. Cooper,* 163 So. 35 (Fla. 1935).

42 Fla. Stat. § 732.805(1)(a)-(d).

43 *Tarsagian v. Watt,* 402 So. 2d 471 (Fla. 3d DCA 1981).

First American Title™

Work with a team that puts you first!



First American Title delivers the products and services agents need to provide protection and peace of mind to their customers.



Len Prescott
Senior Division Counsel
Director of Underwriting, Agency Division
Direct Line: 305-908-6252
Cell: 305-900-8427
Email: lprescott@firstam.com



Jennifer Jones Bloodworth, Esq.
National Commercial Underwriting Counsel
First American Title Insurance Company
Mobile: 407-790-2057
Email: jbloodworth@firstam.com



Bill Boyce
Florida State Counsel
Office: (727) 549-3312
Cell: (727) 501-3454
Email: wboyce@firstam.com

First American Title Insurance Company makes no express or implied warranty respecting the information presented and assumes no responsibility for errors or omissions. First American, the eagle logo, First American Title and firstam.com are registered trademarks or trademarks of First American Financial Corporation and/or its affiliates. SMS-AQU: 01/2025

Visit Our Website
www.firstam.com

THE CORPORATE TRANSPARENCY ACT:
An Overview And A Look At Its Implications For Trusts

By Christopher K. Batts, Esq.
Shuffield, Lowman & Wilson, P.A., Orlando, Florida

The Corporate Transparency Act ("CTA") contains the most comprehensive federal reporting requirements for small businesses in the history of the United States. At its core, the CTA requires certain companies to report information about themselves and certain individuals to the Financial Crimes Enforcement Network ("FinCEN"). The ultimate result is a database maintained by the federal government containing an unprecedented amount of information about individuals associated with small businesses and other entities. The idea is that the database will help law enforcement track down people involved in money laundering, channeling money to terrorists, and other illicit activities. With the potential for civil and criminal penalties, including daily fines and imprisonment for up to 2 years,[1] the CTA reporting requirements should not be taken lightly.

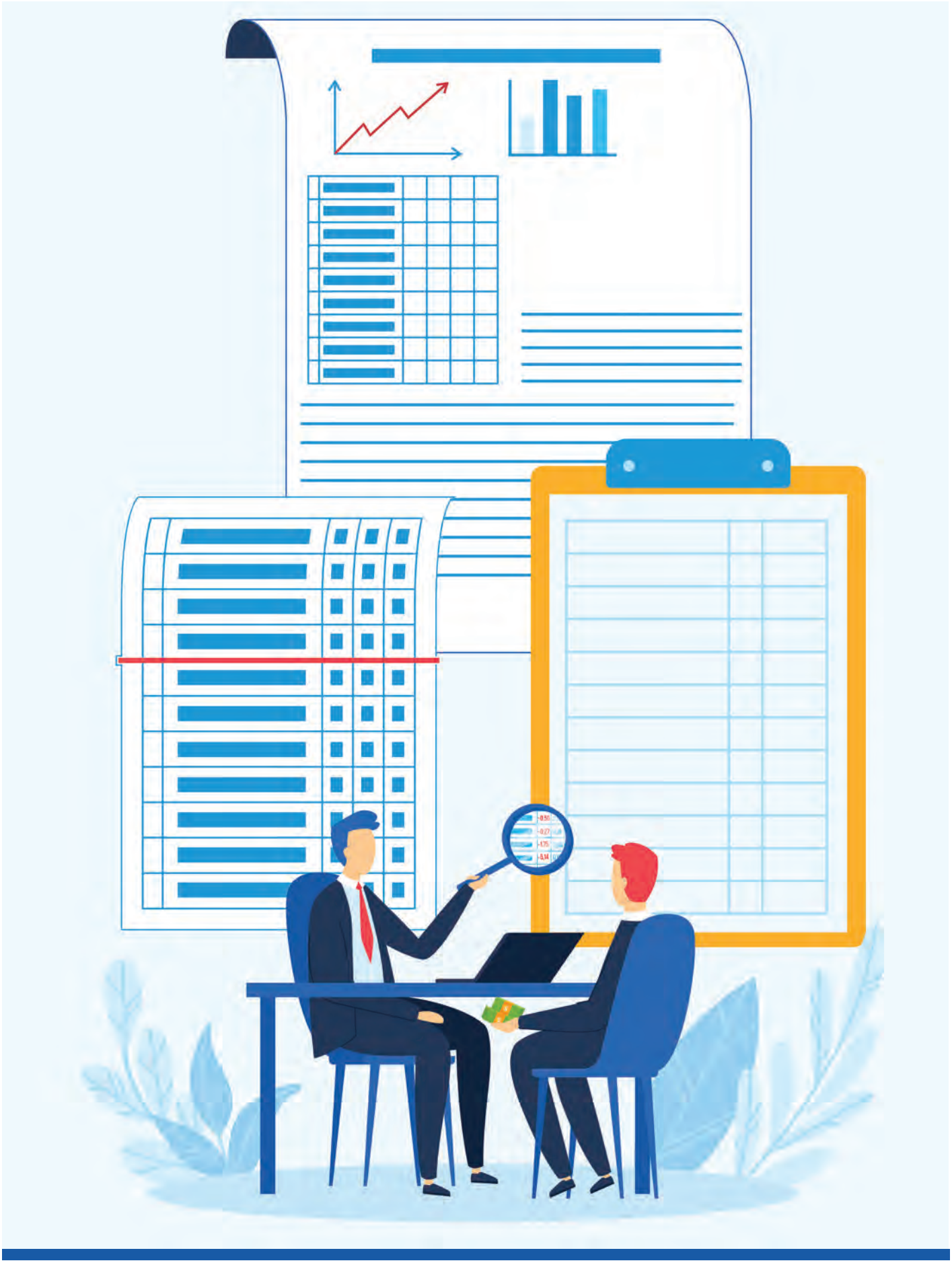
Section members should be aware of the CTA because of its broad implications, including implications for trusts. Depending on a few factors, the CTA can require reporting information about a trustee, beneficiary, or settlor of a trust, where the trust has some interest in or control over a business. The purpose of this article is to help guide you through the analysis of whether an individual's so-called "beneficial ownership information" needs to be reported under the CTA.

Before diving into the specifics, it is worth noting that, as of February 18, 2025, the CTA and its reporting requirement are once again in effect.[2] This is a result of the lower courts following the recent U.S. Supreme Court opinion in *McHenry v. Tex. Top Cop Shop, Inc.*, in which the Supreme Court granted an application to stay a nationwide injunction.[3] This U.S. Supreme Court opinion offered some finality after a tumultuous series of injunctions and stays, but litigation is ongoing. Practitioners should stay informed regarding the status of the CTA given its broad scope. For now, the CTA is alive and well.[4]

With that in mind, we now begin our analysis. Beneficial ownership information ("BOI") about an individual must be reported if that individual is a "beneficial owner" of a "reporting company."[5] These two defined terms, "beneficial owner" and "reporting company," are typically the most important factors in any CTA analysis. A CTA analysis should start with the "reporting company" question before moving to the "beneficial owner" question. From a practical perspective, it is typically much easier and quicker to determine if a company is a "reporting company" than it is to determine if an individual is a "beneficial owner" of a company. Companies often fall into one of the various exemptions from the "reporting company" definition, ending the CTA analysis altogether.

Accordingly, when analyzing whether to report information about someone, including a trustee, beneficiary, or settlor of a trust, one should determine (1) whether the entity in question is a "reporting company," and, if so, (2) whether the individual, including a trustee, beneficiary, or settlor, is a "beneficial owner" of the reporting company. If the reporting requirement does apply, then you will need to know (3) what information must be reported, (4) the deadline for reporting BOI, and (5) how to report BOI to FinCEN.

continued, page 24



1 Is The Entity In Question A "Reporting Company?"

The threshold inquiry is whether the entity in question is a "reporting company." To be a "reporting company" there must be some requirement that an entity file a document with a secretary of state or similar office.[6] For example, an LLC is typically formed by filing articles of organization with a secretary of state, and a corporation is typically formed by filing articles of incorporation. Notably, the formation of a trust typically does not involve filing a document with a secretary of state or similar office. This is important because almost all trusts fall entirely outside of the definition of "reporting company." The more common situation triggering the reporting requirement is where a trust holds an ownership interest in an entity that is a "reporting company."

Assuming the entity is captured by the initially broad definition of a "reporting company," one should then determine if any exemptions are available. There are 23 exemptions.[7] If an exemption applies, then no BOI report is required for that company. One source in particular for determining whether an exemption applies is FinCEN's Small Entity Compliance Guide, which provides a handy checklist you can walk through for each exemption to see if it applies.[8]

There are a few exemptions in particular that you should keep in mind. One is the exemption available for large operating companies.[9] This exemption is available if the entity employs more than 20 full time employees in the U.S., has an operating presence at a physical office in the U.S., and had more than $5M in gross receipts or sales in the prior year as reflected on the company's tax return.[10] Another is the exemption for 501(c)(3) organizations.[11] There is also an exemption available for charitable trusts and split interest trusts described in I.R.C. § 4947(a)(1) and (2).[12] Subsidiaries of certain exempt entities are also exempt.[13]

If captured under the initial broad definition and no exemption is available, then the entity is a reporting company.

2 Is The Individual A "Beneficial Owner" Of The Reporting Company?

If the entity in question is a reporting company, then the company is required to file a BOI report including information about "beneficial owners" of the company.[14] There are two ways someone qualifies as a beneficial owner: (A) they, directly or indirectly, own or control at least 25% of the "ownership interests" of the company or (B) they, directly or indirectly, have "substantial control" over the company.[15]

Determining whether someone owns or controls at least 25% of the ownership interests of the company is typically a straightforward inquiry. There are a couple of key issues to be aware of, however. First, the term "ownership interest" is defined broadly and includes profit interests, certain put and call options[16], convertible debt, and any other method of establishing ownership.[17] It is important to keep in mind that this ownership inquiry is separate from the "substantial control" inquiry. There is no requirement that the person have voting rights or any other actual power in the company. This is purely a question of percentage ownership. Second, the words "owning or controlling" have unique implications for trusts and estates, the assets of which include ownership interests in a reporting company. A trustee will be deemed to own or control ownership interests held in a trust if the trustee has the authority to dispose of trust assets.[18] A beneficiary will be deemed to own or control ownership interests held in a trust if the beneficiary either is "the sole permissible recipient of income and principal from the trust" or they have "the right to demand a distribution of or withdraw substantially all of the assets from the trust."[19] Finally, a grantor or settlor will be deemed to own or control ownership interests held in a trust if the grantor or settlor has the right to revoke the trust or withdraw the assets of the trust.[20] The final rule is silent on whether the right to swap assets in an irrevocable grantor trust counts as the right to withdraw assets, but, until we have further clarity, it is probably safest to assume that a swap power counts as a right to withdraw. Interestingly, there is no provision in the final rule regarding whether an executor of an estate will be deemed to own or control ownership interests, even though an executor might have similar influence or control over assets in the estate. While far from certain, it might be that FinCEN's position is that information about an executor does not need to be reported.[21] That being said, until we have clarity on this issue, it would be safest to assume that an executor could be deemed to own or control ownership interests in the estate.

Accordingly, there are some fringe situations where someone could be classified as a beneficial owner without it being obvious that they own or control 25% of the ownership interests. By way of example, assume that a trust holds convertible debt. Also assume that, although not immediately convertible, the debt could be converted in a few years into non-voting stock amounting to an estimated 30% of the total outstanding stock of a reporting company. Is the beneficiary of this trust a "beneficial owner" of the reporting company? If the beneficiary is the sole permissible recipient of income and principal or has the right to demand a distribution of or withdraw substantially all of the assets from the trust, then yes.[22] Seemingly tenuous connections to control like this, where an individual is a beneficiary of a trust that holds debt with only the future potential to be converted into non-voting equity, could easily be overlooked when thinking about reporting requirements under the CTA. Situations like this are

continued, page 25

interesting because someone that has no current equity or control of a company can be deemed a beneficial owner of the company.

The other way one might be a beneficial owner is they exercise "substantial control" over the company.[23] There are four groups of criteria in this inquiry. An individual will be deemed to have "substantial control" if (1) they are a senior officer of the company, (2) they have authority to appoint or remove senior officers or a majority of the company's board, (3) they make or have influence over important decisions of the company, or (4) they have "any other form of substantial control over the reporting company."[24] FinCEN's Small Entity Compliance Guide is also helpful here.[25] This inquiry will typically be straightforward. Someone either is or is not a CEO, CFO, board member, or otherwise. The fringe situations to be aware of are those involving indirect control. For example, a trustee of a trust will be deemed to exercise substantial control where the assets held in trust allow the trustee to control the company through a majority of voting equity, by appointing a board member, or otherwise allowing the trustee some form of control or influence.[26]

There are a few exceptions to the definition of "beneficial owner" that estate planning professionals should be aware of. First, if the person that would otherwise be a beneficial owner is a minor under the law of the jurisdiction under which the reporting company was created, then the company can report information about the minor's parent or guardian instead of the minor.[27] The report must indicate that the parent's or guardian's information is reported instead of the minor's[28], and, once the minor reaches the age of majority, the company has 30 days to file an updated report.[29]

Another notable exception is where someone only has a future interest in the company through a right of inheritance.[30] While this is technically an exception to the definition of "beneficial owner," it seemingly only applies to the issue of ownership interests and not to substantial control.[31] In other words, the individual could still qualify as a beneficial owner if, for example, they are a board member with no current ownership interests and only a right of inheritance of ownership interests. Where one beneficial owner dies and a new beneficial owner needs to be reported because they have inherited ownership interests, the updated report must be filed within 30 days after the date on which the estate of the deceased owner is settled.[32]

There are a few other exceptions provided in the statute, and FinCEN's Small Entity Compliance Guide has helpful checklists for determining whether these exceptions apply.[33] One quick note on the exception for nominees, intermediaries, custodians, or agents: it seems like FinCEN is interpreting this exception narrowly.[34] The examples that FinCEN envisions this exception applying to are tax and legal professionals representing a reporting company[35], so it seems unlikely this exception will be extended to capture other forms of agency that might arise in estate planning or other contexts.

If an individual is a beneficial owner of a reporting company, then their information will need to be included in the reporting company's BOI report.[36]



What Information Must Be Reported?

A BOI report must include certain information about the reporting company itself, its beneficial owners, and, potentially, its "company applicants."[37] Whether an individual qualifies as a "company applicant" and whether any company applicant information is required in a company's BOI report is outside of the scope of this article; however, the Small Entity Compliance Guide has helpful information on this.[38]

A BOI report must include the following information about the reporting company:

A. its full legal name;
B. any trade names, fictitious names, or "doing business as" names;
C. if a domestic reporting company, the street address of its principal place of business;
D. if a foreign reporting company, the street address of the primary U.S. location where it conducts business;
E. the State or Tribal jurisdiction under which the company was created or, if a foreign reporting company, first registered to do business; and
F. its Taxpayer Identification Number (TIN) or, if a foreign reporting company that has not been issued a TIN, a taxpayer identification number issued by a foreign jurisdiction and the name of the foreign jurisdiction.39

For each beneficial owner of a reporting company, the BOI report must include the following:

A. the individual's full legal name;
B. the individual's date of birth;
C. the individual's residential address (not the business address);
D. either the individual's passport number, current and valid government-issued identification number, driver's license number, or, if they do not have any of those, foreign passport number; and
E. a photo or scanned copy of the document containing the passport, identification, or driver's license number.[40]

If required, the information about company applicants is mostly the same as the information required of beneficial owners, the only difference being whether their business or residential address is required.[41]

continued, page 26

This list can seem onerous, particularly to those business owners and investors that prefer anonymity. It might provide some comfort to your clients to let them know that the information will not be available to the general public and can only be accessed by certain government entities and financial institutions.[42]

4 (4) What Are The Timing Requirements For Filing A BOI Report?

Due to the recent litigation, FinCEN has extended the deadline for most reporting companies to March 21, 2025.[43] FinCEN has indicated that it might further revise deadlines in order to mitigate the burden on small businesses.[44] Congress is also actively considering legislation that would further extend the reporting deadline for most companies.[45] Additionally, Florida practitioners should note that disaster relief extensions relating to hurricanes might also be available.[46] The following timing requirements are based only on the CTA as originally written, without extensions; however, the earliest possible deadline for most companies will be March 21, 2025.

If a reporting company was created or registered on or between January 1, 2024, and December 31, 2024, then it must file within 90 days after the date of creation or registration.[47] If a reporting company is created or registered on or after January 1, 2025, then it must file within 30 days after the date of creation or registration.[48]

As described above, certain changes like a minor beneficial owner reaching the age of majority and an individual becoming a beneficial owner through inheritance require companies to file updated reports within 30 days.[49] A change of name, address, or identifying number on the passport, driver's license, or other identification document provided with respect to a beneficial owner also triggers the requirement for an updated report within 30 days.[50] Additionally, if a reporting company files a BOI report but then later qualifies for an exemption (for example, by growing and meeting the large operating company criteria), then the company has 30 days to file an updated report stating that it is now exempt.[51]

5 (5) How Do You File BOI Reports?

To file a BOI report yourself, go to https://boiefiling.fincen.gov. This will provide the option to download a fillable PDF or submit the information through an online form. Use the fillable PDF so you can save your progress. If you use the online form, you cannot save your work and come back to it later.[52] Whichever method you use, you will have the option to download and one may save a confirmation that the report was filed and a transcript showing the information submitted.[53] Filing an updated or corrected report is the same. You simply select the applicable option at the beginning of the BOI report. For those who prefer to outsource these filings, various law firms and vendors offer this service.

Conclusion

The CTA is, at least for the moment, alive and well. It is critically important to stay informed of further legal developments and potential deadline extensions. The number of companies caught in the definition of "reporting company" is estimated to be more than 32 million.[54] With potential civil and criminal penalties, including daily fines and imprisonment for up to 2 years[55], these reporting requirements should not be taken lightly. With such wide reach, including the potential to capture trustees, beneficiaries, and settlors, in the definition of "beneficial owner," and with the potential for serious penalties, every attorney should at least have a baseline understanding of the CTA's reporting requirements.


C. BATTS

Christopher Batts' *practice area focuses on corporate law, mergers and acquisitions, and intellectual property. Chris represents a variety of businesses and individuals, providing counsel in areas such as corporate formation and structure, Corporate Transparency Act ("CTA") compliance, and drafting and negotiating commercial contracts. Chris regularly represents businesses of various sizes through merger, acquisition, and sale transactions. He earned his J.D., magna cum laude, from the The Ohio State University's Moritz College of Law where he was inducted as a member of the Order of the Coif legal honor society. Chris practices in Orlando, Florida at Shuffield, Lowman & Wilson, P.A.*

Endnotes

1 31 U.S.C. § 5336(h)(3)(A) (2024).

2 *See Smith, et al. v. U.S. Dep't of the Treasury, et al.*, 6:24-cv-00336 (E.D. Tex. Feb. 17, 2025) (granting motion to stay nationwide injunction because of the recent U.S. Supreme Court decision in *McHenry v. Tex. Top Cop Shop, Inc.*, No. 24A653, 220 L.Ed.2d 427 (U.S. Jan. 23, 2025)).

3 *McHenry v. Tex. Top Cop Shop, Inc.*, No. 24A653, 220 L.Ed.2d 427 (U.S. Jan. 23, 2025).

4 It should be noted, however, that there are some exceptions for entities that are parties to ongoing litigation. For example, the injunction still applies in *Nat'l Small Bus. United v. Yellen*, meaning that all entities that were members of the National Small Business Association ("NSBA") as of March 1, 2024, which includes more than 65,000 entities, do not currently have to file reports. *Nat'l Small Bus. United v. Yellen* 2024 U.S. Dist. LEXIS 36205, at *4 (N.D. Ala. Mar. 1, 2024), *appeal docketed*, No. 24 10736 (11th Cir. Mar. 11, 2024).

5 31 C.F.R. § 1010.380(b)(1)(ii) (2022). For certain entities, information will also need to be submitted for "company applicants." *Id.* The concept of company applicants is, for the sake of brevity, outside of the scope of this article. For a simple overview of company applicants, I recommend reviewing U.S. Treasury Fin. Crimes Enf't Network, Small Entity Compliance Guide, at 33–36 (Version 1.1, 2023) [hereinafter *Small Entity Compliance Guide*].

6 *See* 31 C.F.R. § 1010.380(c)(1) (2022) (defining "reporting company," "domestic reporting company," and "foreign reporting company").

7 31 C.F.R. § 1010.380(c)(2) (2022).

continued, page 27

8 *Small Entity Compliance Guide*, *supra* note 5, at 4–14.

9 *See* 31 C.F.R. § 1010.380(c)(2)(xxi) (2022).

10 *Id.*

11 31 C.F.R. § 1010.380(c)(2)(xix)(A) (2022).

12 31 C.F.R. § 1010.380(c)(2)(xix)(C) (2022).

13 31 C.F.R. § 1010.380(c)(2)(xxii) (2022).

14 31 C.F.R. § 1010.380(b)(1)(i)–(ii) (2022). Information will also need to be included about the reporting company and, potentially, company applicants of the reporting company. *Id.*

15 31 C.F.R. § 1010.380(d) (2022). I also recommend reviewing the checklists provided in the *Small Entity Compliance Guide*, *supra* note 5, at 20, 22. These checklists are helpful tools for methodically determining which individuals qualify as "beneficial owners."

16 Notably, this does not include put and call options created and held by third parties that the company does not know about. 31 C.F.R. § 1010.380(d)(2)(i)(D) (2022).

17 31 C.F.R. § 1010.380(d)(2)(i) (2022).

18 31 C.F.R. § 1010.380(d)(2)(ii)(C)(1) (2022).

19 31 C.F.R. § 1010.380(d)(2)(ii)(C)(2) (2022).

20 31 C.F.R. § 1010.380(d)(2)(ii)(C)(3) (2022).

21 *See* Beneficial Ownership Information Reporting Requirements, 86 Fed. Reg. 69920, 69943 (proposed Dec. 8, 2021) (to be codified at 31 C.F.R. pt. 1010) (suggesting that tying the 30-day reporting requirement to the date the estate of a deceased beneficial owner is settled will reduce the number of updates to BOI reports). Presumably, reducing the number of updates to BOI reports would be a result of not having to report information about an executor or potential beneficiaries of an estate.

22 *See* 31 C.F.R. § 1010.380(d)(2)(ii)(C)(2) (2022); Beneficial Ownership Information Reporting Requirements, 87 Fed. Reg. 59498, 59530-31 (Sept. 30, 2022) (to be codified at 31 C.F.R. pt. 1010) (declining to exclude convertible instruments from the definition of "ownership interests").

23 31 C.F.R. § 1010.380(d)(1) (2022).

24 *See* 31 C.F.R. § 1010.380(d)(1)(i) (2022).

25 *Small Entity Compliance Guide*, *supra* note 5, at 17 (showing the four major groups of criteria with detailed explanations of each group).

26 31 C.F.R. § 1010.380(d)(2) (2022).

27 31 C.F.R. § 1010.380(d)(3)(i) (2022).

28 31 C.F.R. § 1010.380(b)(2)(ii) (2022).

29 31 C.F.R. § 1010.380(a)(2)(i), (iv) (2022).

30 31 C.F.R. § 1010.380(d)(3)(iv) (2022).

31 *See* Beneficial Ownership Information Reporting Requirements, 87 Fed. Reg. 59498, 59534 (Sept. 30, 2022) (to be codified at 31 C.F.R. pt. 1010) (describing that someone does not have an ownership interest through a right of inheritance until the inheritance actually occurs).

32 31 C.F.R. § 1010.380(a)(2)(i), (iii) (2022).

33 *Small Entity Compliance Guide*, *supra* note 5, at 29-31.

34 *See* Beneficial Ownership Information Reporting Requirements, 87 Fed. Reg. 59498, 59527 (Sept. 30, 2022) (to be codified at 31 C.F.R. pt. 1010).

35 *Id.*

36 31 C.F.R. § 1010.380(b)(1)(ii) (2022).

37 31 C.F.R. § 1010.380(b)(1)(i)–(ii) (2022). For a helpful checklist of information that must be reported about reporting companies, beneficial owners, and company applicants, see *Small Entity Compliance Guide*, *supra* note 5, at 38.

38 *Small Entity Compliance Guide*, *supra* note 5, at 33-36.

39 31 C.F.R. § 1010.380(b)(1)(i) (2022).

40 31 C.F.R. § 1010.380(b)(1)(ii) (2022).

41 *See* 31 C.F.R. § 1010.380(b)(1)(ii) (2022).

42 Beneficial Ownership Information Access and Safeguards, and Use of FinCEN Identifiers for Entities, 87 Fed. Reg. 77404, 77406 (proposed Dec. 16, 2022) (to be codified at 31 C.F.R. pt. 1010).

43 FinCEN Notice: FinCEN Extends Beneficial Ownership Information Reporting Deadline by 30 Days; Announces Intention to Revise Reporting Rule, FIN-2025-CTA1, U.S. Treasury Fin. Crimes Enf't Network (last updated Feb. 19, 2025), https://www.fincen.gov/sites/default/files/shared/FinCEN-BOI-Notice-Deadline-Extension-508FINAL.pdf.

44 *Id.*

45 *See* H.R. 736, 119th Cong. (2025).

46 Whether a disaster relief extension is available is beyond the scope of this article, but more information can be found at https://fincen.gov/boi.

47 Beneficial Ownership Information Reporting Deadline Extension for Reporting Companies Created or Registered in 2024, 88 Fed. Reg. 83499, 83500 (Nov. 30, 2023) (to be codified at 31 C.F.R. pt. 1010). The date of creation or registration is the earlier of the date the company receives actual notice and the date the public receives notice that the company is created or registered. 31 C.F.R. § 1010.380(a)(i)–(ii) (2022).

48 Beneficial Ownership Information Reporting Deadline Extension for Reporting Companies Created or Registered in 2024, 88 Fed. Reg. 83499, 83500 (Nov. 30, 2023) (to be codified at 31 C.F.R. pt. 1010).

49 31 C.F.R. § 1010.380(a)(2)(i), (iii)–(iv) (2022).

50 31 C.F.R. § 1010.380(a)(2)(i), (v) (2022).

51 31 C.F.R. § 1010.380(a)(2)(i), (iii) (2022).

52 U.S. Treasury Fin. Crimes Enf't Network, Step-by-Step Instructions: Beneficial Owner Information Report (BOIR) Online Filing Method 2 (last visited Apr. 12, 2024), https://boiefiling.fincen.gov/resources/BOIR_E-File_Online_Step-by-Step_Instructions.pdf.

53 *Id.* at 22; U.S. Treasury Fin. Crimes Enf't Network, Step-by-Step Instructions: Beneficial Owner Information Report (BOIR) PDF Filing Method 20 (last visited Apr. 12, 2024), https://boiefiling.fincen.gov/resources/BOIR_E-File_PDF_Step-by-Step_Instructions.pdf.

54 Beneficial Ownership Information Reporting Requirements, 87 Fed. Reg. 59498, 59589 (Sept. 30, 2022) (to be codified at 31 C.F.R. pt. 1010).

55 31 U.S.C. § 5336(h)(3)(A) (2024).

If you're an attorney navigating the Red Zone* and feeling unsure about your plan for retirement, we can help you gain clarity and confidence.

- Financial and tax planning guidance since 1985
- CERTIFIED FINANCIAL PLANNER® since 1988
- Accredited Investment Fiduciary Analyst®
- Independent and objective, no ties to Wall Street
- Fee-based fiduciary guidance
- Attorney client references available upon request

Red Zone - the period encompassing the 10-15 years immediately preceding your hopeful retirement date



ATHANASSIE CAPITAL PARTNERS
TAX & WEALTH STRATEGISTS

Steve Athanassie, CFP®, AIFA®

Office: (813) 387-6820
Cell: (813) 296-2208
steve@teamacpartners.com

3030 N Rocky Point Drive W
Suite 700
Tampa, FL 33607

Investment advice offered through IFP Advisors, LLC, a registered investment adviser. IFP and Athanassie Capital Partners are not affiliated.

Political Roundup:
Changes From The 2024 Regular Legislative Session

By Peter M. Dunbar, Esq., Jones Walker LLP, Tallahassee, Florida[1]

The 2024 Regular Session of the Florida Legislature produced a variety of changes that will affect the practice areas of RPPTL Section members. The Section is particularly appreciative of the Members of the House and Senate that sponsored Section initiatives, and these Members are acknowledged below with the legislation that passed during the Session.

In a quick overview of the legislation considered in the 2024 Regular Session, more than 1,900 individual pieces of sponsored legislation were introduced in the House or Senate; there were 45 formal floor sessions; and in the end, 325 bills made it all the way through the Legislature. Of those measures that made it to the Governor's desk, only 14 were vetoed.

All of the measures monitored by the Section from this past Session appear in chronological order by bill number, and each is followed with a brief summary of the bill text along with the applicable Chapter Law citation for each initiative. The effective date for each of the changes varies, and at the end of each summary, the date that the new law took effect or will take effect is also noted. The final status and full text of each enrolled bill, including the legislative staff reports and Chapter Law citation, are available on the legislative web sites (www.leg.state.fl.us; www.flsenate.gov; www.myfloridahouse.com).



I. SECTION INITIATIVES AND TECHNICAL ASSISTANCE

Supportive Decision-Making: HB 73 by Representative Tant and Senator Simon requires a court to consider the needs and abilities of persons with developmental disabilities when determining guardianship; authorizes "supported decision-making agreements" granting an agent to receive information and communicate on the principal's behalf; and permits an examining committee member to allow a person to communicate with an incapacitated person. HB 73 was approved by the Governor and took effect on July 1, 2024. **(Chapter 2024-242, *Laws of Florida*.)**

Hurricane Protections in HOAs: CS/HB 293 by Representative Sirois and Senator Ingoglia requires homeowners' associations to adopt hurricane protection specifications; and prohibits associations from denying an owner the ability to install or replace certain hurricane protections, including storm shutters, metal roofs, erosion controls and other hurricane protection products. CS/HB 293 was approved by the Governor and took effect on May 28, 2024. **(Chapter 2024-205, *Laws of Florida*.)**

Property Rights and Adverse Possession: CS/CS/HB 621 by Representative Steele revises the provisions concerning unlawful detention by a transient occupant of residential property; requires written evidence to support a right of occupancy of real property; and prohibits the use of a false document purporting to be a valid lease, deed or other instrument conveying real property. The Section provided technical assistance with provisions in the legislation. CS/CS/HB 621 was approved by the Governor and took effect on July 1, 2024. **(Chapter 2024-44, *Laws of Florida*.)**

Easements on Real Property: HB 799 by Representative Robinson and Senator Yarborough contains the Section's initiative to authorize an owner of real property to create easements, servitudes, and other interests in the owner's real property. The legislation further provides that it is the intent to respect transactions that occurred prior to the effective date of the passage and the parties' reliance on easements, servitudes and other interest created by those transactions. HB 799 was approved by the Governor and took effect on June 26, 2024. **(Chapter 2024-268, *Laws of Florida*.)**

Wills and Estates: CS/HB 923 by Representative Fabricio and Senator Powell amends Fla. Stat. § 28.223, to require the recording of additional probate documents related to real property so that proper heirs can be identified in the chain of title. The legislation also includes the *Johnson v. Townsend* fix to the Florida Uniform Disposition of Community Property Rights at Death Act to reduce the risk of unintended forfeitures of property rights. CS/HB 923 was approved by the Governor and took effect June 13, 2024. **(Chapter 2024-238, *Laws of Florida*.)**

Unclaimed Property—DFS: CS/CS/CS/HB 989 by Representative LaMarca contains the Department of Financial Services package. Among its provisions, it revises the applicability of certain provisions in the unclaimed property statute to unclaimed small estate accounts, and the Section provided technical assistance on these provisions in the legislation. CS/CS/CS/HB 989 was approved by the Governor and took effect on May 2, 2024. **(Chapter 2024-140, *Laws of Florida*.)**

Community Associations: CS/CS/CS/HB 1021 by Representative Lopez is a follow up to the legislation that addressed the building collapse in Surfside. Additionally, the legislation includes new standards for common area maintenance; expands the enforcement jurisdiction for the Division of Condominiums; defers reserve funding for uninhabitable condominiums; requires structural integrity reserve studies ("SIRS ") to be made available to unit owners and requires notice of completion of the SIRS to be filed with the Division of Condominiums; requires completion of Division certified education by board members; imposes new penalties for voter fraud; imposes new meeting notice requirements; and requires new records access options, including a requirement that associations managing 25 or more units maintain an accessible website. The legislation also revises the definition of "condominium property" and creates Fla. Stat. § 718.407, providing the permissible criteria for condominiums to be created in a multi-parcel building. The Section provided technical assistance on the legislation. CS/CS/CS/HB 1021 was approved by the Governor and took effect on July 1, 2024. **(Chapter 2024-244, *Laws of Florida*.)**

Florida Uniform Income and Principal Act: CS/HB 1093 by Representative Caruso and Senator Berman updates Chapter 738, Fla.Stat., the Florida Uniform Principal and Income Act, to follow the new Uniform Fiduciary Income and Principal Act in order to achieve greater consistency among state laws. The legislation includes some modifications to reflect Florida public policy choices. CS/HB 1093 was approved by the Governor and took effect on January 1, 2025. **(Chapter 2024-216, *Laws of Florida*.)**

Delivery of Notices—Return Receipt: SB 7020 by the Senate Judiciary Committee and Representative Altman is the Section's initiative to clarify the statutory definition of "registered mail" includes certified mail with return receipt requested; and provides that any delivery service by the US Postal Service, or a national oversight courier service company appropriately qualifies. SB 7020 was approved by the Governor and took effect on May 6, 2024. **(Chapter 2024-147, *Laws of Florida*.)**

continued, page 30

Mental Health and Substance Abuse: CS/CS/HB 7021 by the House Committee on Children, Families & Seniors and Representative Maney is comprehensive in scope and makes modifications to the Baker Act; to the statutory processes for mental health examinations and treatment; and makes significant changes to the Marchman Act and the statutory processes for substance abuse examinations and treatment. The Section expressed technical concerns and provided technical assistance on the pending legislation. CS/CS/HB 7021 was approved by the Governor and took effect on July 1, 2024. **(Chapter 2024-245, *Laws of Florida*.)**

II. INITIATIVES OF INTEREST

Homeowners Association—Document Copies: HB 59 by Representative Arrington amends Fla. Stat. § 720.303, to require a homeowners' association to provide digital copies of the community's covenants and rules to every new member of the association; and provide all members amendments to the covenants and rules. HB 59 was approved by the Governor and took effect on July 1, 2024. **(Chapter 2024-202, *Laws of Florida*.)**

Homeowners Associations—Prevailing Party Fees: SB 74 by Senator Mayfield is a Revisers bill and among the corrections in the legislation, Section 58 of the bill deletes the incorrect cross-reference in paragraph (d) of Fla. Stat. § 720.305(1). SB 74 was approved by the Governor and took effect on May 7, 2024. **(Chapter 2024-2, *Laws of Florida*.)**

Homeowners Associations—Revitalization: SB 82 by Senator Mayfield is a Revisers bill and among its provisions, the legislation clarifies that proposed revived governing documents are filed with the Department of Commerce. SB 82 was approved by the Governor and took effect on May 7, 2024. **(Chapter 2024-6, *Laws of Florida*.)**

Records Exemption—County and City Attorneys: CS/HB 103 by Representative Arrington adds city and county attorneys and their dependents to the public records exemption for their personal information and resident addresses currently extended to judges and state attorneys under the provisions of Fla. Stat. § 119.071, CS/HB 103 was approved by the Governor and took effect on July 1, 2024. **(Chapter 2024-235, *Laws of Florida*.)**

Tax Deed Sales: HB 113 by Representative Maney removes the $10 processing fee for partial payments of ad valorem taxes and revises the calculated interest for tax deed applications. HB 113 was approved by the Governor and took effect on July 1, 2024. **(Chapter 2024-91, *Laws of Florida*.)**

Motor Vehicles Exempt From Legal Process: SB 158 by Senator Polsky increases the value of motor vehicles exempt form legal process from $1,000 to $5,000. SB 158 was approved by the Governor and took effect on July 1, 2024. **(Chapter 2024-110, *Laws of Florida*.)**

Florida Building Code: CS/CS/CS/HB 267 by Representative Esposito revises the Florida Building Code and among its provisions it eliminates the requirement for sealed drawings by a design professional for the replacement of windows and doors under certain conditions; and requires local governments to respond to building permit applications within 30 days for structures of less than 7,500 square feet and within 60 days for structures of 7,500 square feet or more. CS/CS/CS/HB 267 was approved by the Governor and took effect on January 1, 2025. **(Chapter 2024-191, *Laws of Florida*.)**

Parking: CS/CS/HB 271 by Representative Lopez and Senator Garcia provides requirements for signage for motor vehicle parking facilities on private property and provides enforcement procedures for violations of parking rules and charges. CS/CS/HB 271 was approved by the Governor and took effect on July 1, 2024. **(Chapter 2024-64, *Laws of Florida*.)**

Vacation Rentals: CS/SB 280 by Senator DiCeglie places limitations on the local regulation of short-term vacation rentals but does permit occupancy limitations and provides the opportunity to revoke or refuse to renew registrations. The legislation provides for the regulation at the Division of Hotels & Restaurants at Department of Business & Professional Regulation and provides for the regulation of vacation rental platforms at the Division of Hotels & Restaurants. The legislation specifically does not preempt or supersede community covenants. **CS/SB 280 has passed the Legislature but was VETOED by the Governor.**

Public Records Exemptions: CS/CS/HB 285 by Representative Hunschofsky provides a public records exemption for all electronic email addresses, telephone numbers, personal and business names, and parcel identification numbers submitted to the clerk or the property appraiser for the purpose of registering for a recording notification service. CS/CS/HB 285 was approved by the Governor and took effect on May 6, 2024. **(Chapter 2024-149, *Laws of Florida*.)**

Affordable Housing: CS/CS/SB 328 by Senator Calatayud revises the "Live Local" affordable housing initiative enacted in 2023. Among its provisions, the legislation prohibits local governments from restricting the floor area ratio in certain developments; revises the definition of "highest current allowed density" in residential developments; revises the height limitations of residential structures adjacent to single-family developments; provides reduced parking requirements in certain proposed developments within one-half mile of a major transportation hub; and grants ad valorem tax exemptions in defined circumstances. CS/CS/SB 328 was approved by the Governor and took effect on May 16, 2024. **(Chapter 2024-188, *Laws of Florida*.)**

continued, page 31

Political Roundup: Changes From The Regular Legislative Session, from page 30

Timeshare Properties: CS/HB 429 by Representative Robinson broadens certain powers of the board of administration governing timeshare properties. It transfers the appointment of Commissioners of Deeds from the Governor to the Secretary of State. The legislation also provides that the managing entity of a timeshare project has the authority to take action against occupants who are in violation of the timeshare instrument, in possession of controlled substances, engaging in conduct that disturbs the peace, or engaging in conduct that is life threatening to the life and safety of others. CS/HB 429 was approved by the Governor and took effect on July 1, 2024. **(Chapter 2024-259, *Laws of Florida*.)**

Impact Fees and Mobility Funding Systems: CS/HB 479 by Representative Robinson revises the provisions in Chapter 163, Fla.Stat., and provides for alternative funding for transportation systems; prohibits a local government from imposing funding responsibility for existing systems; requires local governments to execute interlocal agreements if a developer is charged fees for transportation impacts; and revises the requirements for the calculation of impact fees. CS/HB 479 was approved by the Governor and took effect on October 1, 2024. **(Chapter 2024-266, *Laws of Florida*.)**

Conveyance of Marital Assets: HB 521 by Representative Koster revises the criteria for the equitable distribution of marital assets and among its provisions, it provides that an interspousal gift of real property may not be made in the absence of a writing that complies with Fla. Stat. § 689.01, HB 521 was approved by the Governor and took effect on July 1, 2024. **(Chapter 2024-237, *Laws of Florida*.)**

Protection of Specified Adults: CS/CS/SB 556 by Senator Rouson authorizes financial institutions to delay disbursements and transaction under certain circumstances to avoid financial exploitation of vulnerable persons under certain specified circumstances. CS/CS/SB 556 was approved by the Governor and took effect on January 1, 2025. **(Chapter 2024-200, *Laws of Florida*.)**

Mobile Home Park Tenancies: CS/CS/CS/HB 613 by Representative Stark revises and expands the dispute resolution procedures for issues between mobile homeowners and mobile home park owners and provides access for live-in health care aides to the mobile home park and the homes in the park. CS/CS/CS/HB 613 was approved by the Governor and took effect on July 1, 2024. **(Chapter 2024-123, *Laws of Florida*.)**

continued, page 32



Mandatory Builder Warranties: CS/CS/HB 623 by Representative Steele requires the builder of a single-family, duplex, triplex, or quadruplex residential dwelling to warrant all construction defects of equipment, material, or workmanship furnished by the builder or any subcontractor or supplier resulting in a material violation of the Florida Building Code for a period of one year. CS/CS/HB 623 was approved by the Governor and is effective July 1, 2025. **(Chapter 2024-95, *Laws of Florida*.)**

Attorney Fees in Property Rights Disputes: SB 702 by Senator Martin requires a court to award reasonable fees and costs to the prevailing parting in disputes regarding property rights. "Property rights" are defined to include, but not be limited to, use rights, ingress and egress rights, and those rights incident to land bordering upon navigable waters as described in Fla. Stat. § 253.141, SB 702 was approved by the Governor and took effect on June 13, 2024. **(Chapter 2024-232, *Laws of Florida*.)**

Services Provided by DHSMV: CS/CS/SB 736 by Senator Trumbull and Representative Maney is the annual legislative package of the Department of Highway Safety and Motor Vehicles, and it will provide that certain affidavits constitute proof of ownership and the right of possession for mobile homes and motor vehicles of prior owners who died testate. The Section provided technical comments to the sponsor regarding submission of appropriate affidavits. Section 1 of the bill amends Fla. Stat. § 319.28 (1)(c), to provide that if the previous owner died testate, application for a certificate of title may be made by affidavit attested by a Florida-licensed attorney in good standing with The Florida Bar. CS/CS/SB 736 was approved by the Governor and except as otherwise provided, it took effect on July 1, 2024. **(Chapter 2024-272, *Laws of Florida*.)**

Funding Improvements to Real Property: CS/CS/SB 770 by Senator Martin creates Fla. Stat. § 163.081, to authorize a local government to create a financing program for qualifying improvements to residential and commercial properties that repair, replace, or enhance the resiliency of the property to water damage; qualifying improvements converting onsite sewage systems to central systems; and qualifying improvements to enhance energy efficiency. CS/CS/SB 770 was approved by the Governor and took effect on July 1, 2024. **(Chapter 2024-273, *Laws of Florida*.)**

Residential Building Permits: CS/CS/CS/SB 812 by Senator Ingoglia creates Fla. Stat. § 177.073, that will require cities with a population of 10,000 and counties with a population of 75,000 residents or more and 25 acres or more of contiguous land that the local government has designated in the local government's comprehensive plan and future land use map as land that is agricultural or to be developed for residential purposes to create an expedited process for the recording of subdivision plats and the issuance of residential building permits before a final plat is recorded. CS/CS/CS/SB 812 was approved by the Governor and took effect on May 29, 2024. **(Chapter 2024-210, *Laws of Florida*.)**

Consumer Protection—Notice of Claim: CS/CS/HB 939 by Representative Griffitts provides a series of consumer protection related initiatives, and among the provisions, Section 8 of the legislation provides that a notice of claim for loss assessment coverage under Fla. Stat. § 627.714, must be provided to the insurer within 90 days after a condominium association levies an assessment resulting from a covered loss. CS/CS/HB 939 was approved by the Governor and took effect on July 1, 2024. **(Chapter 2024-139, *Laws of Florida*.)**

Records Exemption—Clerks of Circuit Court: CS/HB 983 by Representative Daley adds clerks of the circuit court, deputy clerks of the circuit court, circuit court personnel, and their dependents to the public records exemption for their personal information and resident addresses currently extended to judges and state attorneys under the provisions of Fla. Stat. § 119.071, CS/HB 983 was approved by the Governor and took effect on July 1, 2024. **(Chapter 2024-239, *Laws of Florida*.)**

Condominium Pilot Program: CS/CS/CS/HB 1029 by Representative Lopez creates "My Safe Florida Condominium Pilot Program" within the Department of Financial Services. The legislation implements a state-funded inspection program to determine mitigation measures that will reduce the property's vulnerability to hurricane damage and provide for mitigation grants to retrofit the condominium property. CS/CS/CS/HB 1029 was approved by the Governor and took effect on July 1, 2024. **(Chapter 2024-108, *Laws of Florida*.)**

Real Property Sale—Flood Risk Disclosure: CS/CS/HB 1049 by Representative Hunschofsky and Senator Bradley will create a new disclosure requirement prior to executing a contract for sale. The disclosure must be in writing, and it must state whether the property has suffered damage from temporary or permanent flooding from inland or tidal waters, rainfall, or rapid accumulation from any established source. CS/CS/HB 1049 was approved by the Governor and took effect on October 1, 2024. **(Chapter 2024-215, *Laws of Florida*.)**

Homestead Verification: CS/HB 1161 by Representative Arrington requires the Department of Revenue to provide a form for county property appraisers that be used to tentatively verify the eligibility of a veteran or surviving spouse to qualify for exemptions under Fla. Stat. §§ 196.081, 196.082 and 196.091, once they have purchased homestead property. CS/HB 1161 was approved by the Governor and took effect on July 1, 2024. **(Chapter 2024-217, *Laws of Florida*.)**

Homeowners' Associations: CS/CS/HB 1203 by Representative Esposito will impose educational requirements for directors of mandatory homeowners' associations; impose

continued, page 33

penalties for improper use of debit cards, kickbacks, engaging in voter fraud and the denial of records access to owners; create a 7-year standard for records retention; and require websites for associations with 100 parcels or more. Among its provisions, the legislation also provides a requirement that the association provide amounts due from a parcel owner upon request; places limitations on review and approval of certain structures by an architectural review authority not visible for adjacent properties; revises the association's fining process; limits the association's ability to regulate parking; and imposes new requirements on information to be provided by community association managers. CS/CS/HB 1203 was approved by the Governor and took effect on July 1, 2024. **(Chapter 2024-221, *Laws of Florida*.)**

Residential Tenancies: CS/HB 1305 by Representative Maggard amends Fla. Stat. § 83.43, and creates a definition for "Florida financial institution" that expands authorized depositories to include credit unions, saving or thrift institutions, and savings banks whose deposits are insured by the FDIC or the NCUSI Fund. CS/HB 1305 was approved by the Governor and took effect on May 17, 2024. **(Chapter 2024-199, *Laws of Florida*.)**

Covenant Revitalization—Department of Commerce: CS/CS/SB 1420 by Senator Burgess is a department package consisting of changes at the Department of Commerce, and Section 13 of the legislation modifies the language in Fla. Stat. § 720.406, regarding the meeting procedures when homeowners' association covenants are being revitalized. CS/CS/SB 1420 was approved by the Governor and except as otherwise provided, it took effect on July 1, 2024. **(Chapter 2024-234, *Laws of Florida*.)**

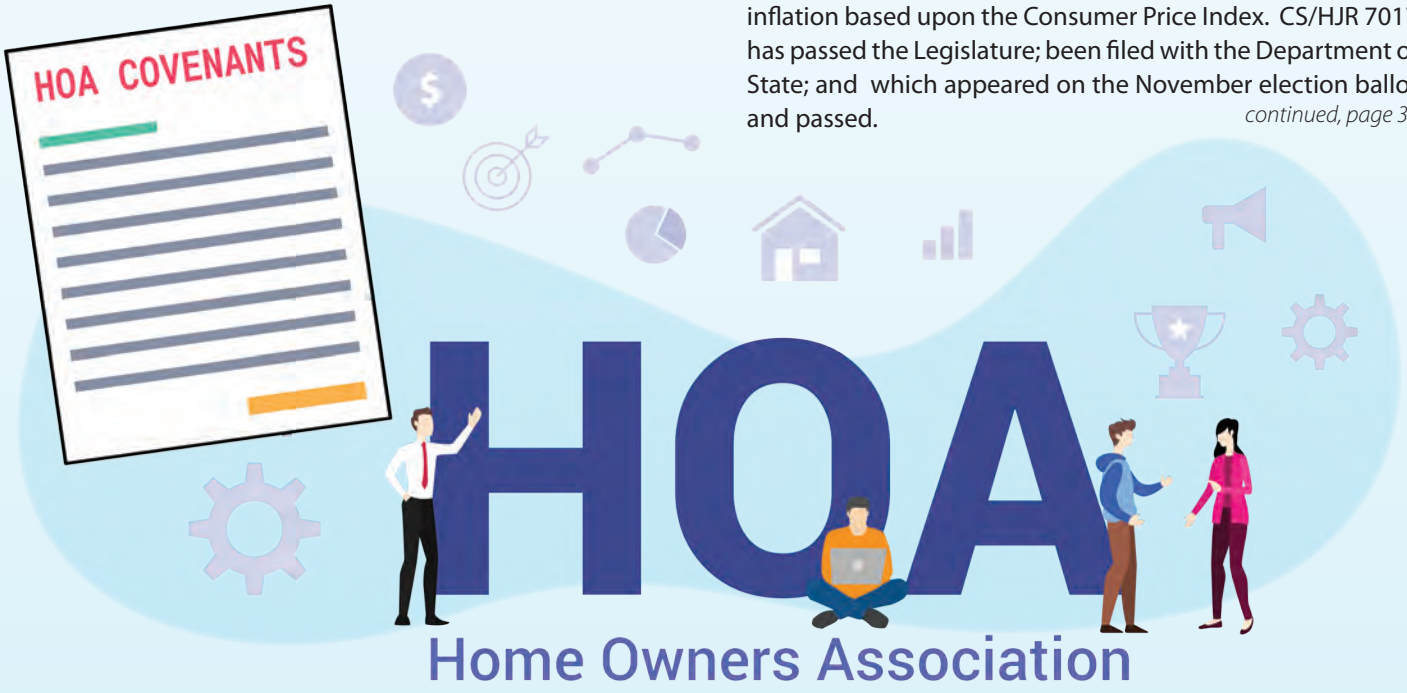
Nonconforming and Unsafe Structures: CS/SB 1526 by Senator Avila prohibits a local government from prohibiting, restricting, or preventing the demolition of structures which are, in whole or in part, seaward of the coastal construction line and are non-conforming structure or determined to be unsafe by a local building official. The legislation does provide specific exceptions to the legislation, and it also provides restrictions and criteria on replacement structures. CS/SB 1526 was approved by the Governor and took effect on March 22, 2024. **(Chapter 2024-21, *Laws of Florida*.)**

Energy Resources—HOA Covenants: CS/CS/HB 1645 by Representative Payne and the House Commerce Committee provides for the installation of "resiliency facilities," and Section 19 of the legislation prospectively provides that community association covenants may not preclude the types of fuel sources that serve customers in the community, including natural gas utilities and liquefied petroleum gas dispensers. The section also provides that the community covenants may not preclude appliances using those energy sources. CS/CS/HB 1645 was approved by the Governor and took effect on July 1, 2024. **(Chapter 2024-186, *Laws of Florida*.)**

Special Districts: CS/CS/HB 7013 by the House Committee on Local Administration, Federal Affairs & Special Districts revises the criteria for creation, reauthorization, dissolution and performance reviews for special districts. CS/CS/HB 7013 was approved by the Governor and took effect on July 1, 2024. **(Chapter 2024-136, *Laws of Florida*.)**

Annual Adjustment to Homestead Exemption Value: CS/HJR 7017 by House State Affairs Committee is a proposed constitutional amendment that will require an annual adjustment to the value of certain Homestead Exemptions for inflation based upon the Consumer Price Index. CS/HJR 7017 has passed the Legislature; been filed with the Department of State; and which appeared on the November election ballot and passed.

continued, page 34



Annual Adjustment to Homestead Exemption Value: CS/HB 7019 is the implementing legislation that will take effect since the constitutional amendment was approved by voters. This legislation sets forth the timeframe and procedure related to the annual adjustment to homestead exemption values. CS/HB 7019 was approved by the Governor and if approved by voters, and took effect on January 1, 2025. (**Chapter 2024-261, *Laws of Florida.)***

Ad Valorem Taxes: CS/HB 7073 by the House Ways and Means Committee is the Session's annual tax package. Among its provision, the legislation amends the homestead "clerical mistake or omission" provisions in Fla. Stat. §§ 193.155, 193.703, 196.011, 196.075, and 196.161. The legislation also requires a person receiving an erroneous homestead exemption must voluntarily notify the property appraiser of the mistake *before* the property appraiser notifies the person of the mistake to avoid the collection of back taxes. CS/HB 7073 was approved by the Governor and except as otherwise provided, it took effect on July 1, 2024. **(Chapter 2024-158, *Laws of Florida*.)**



P. DUNBAR

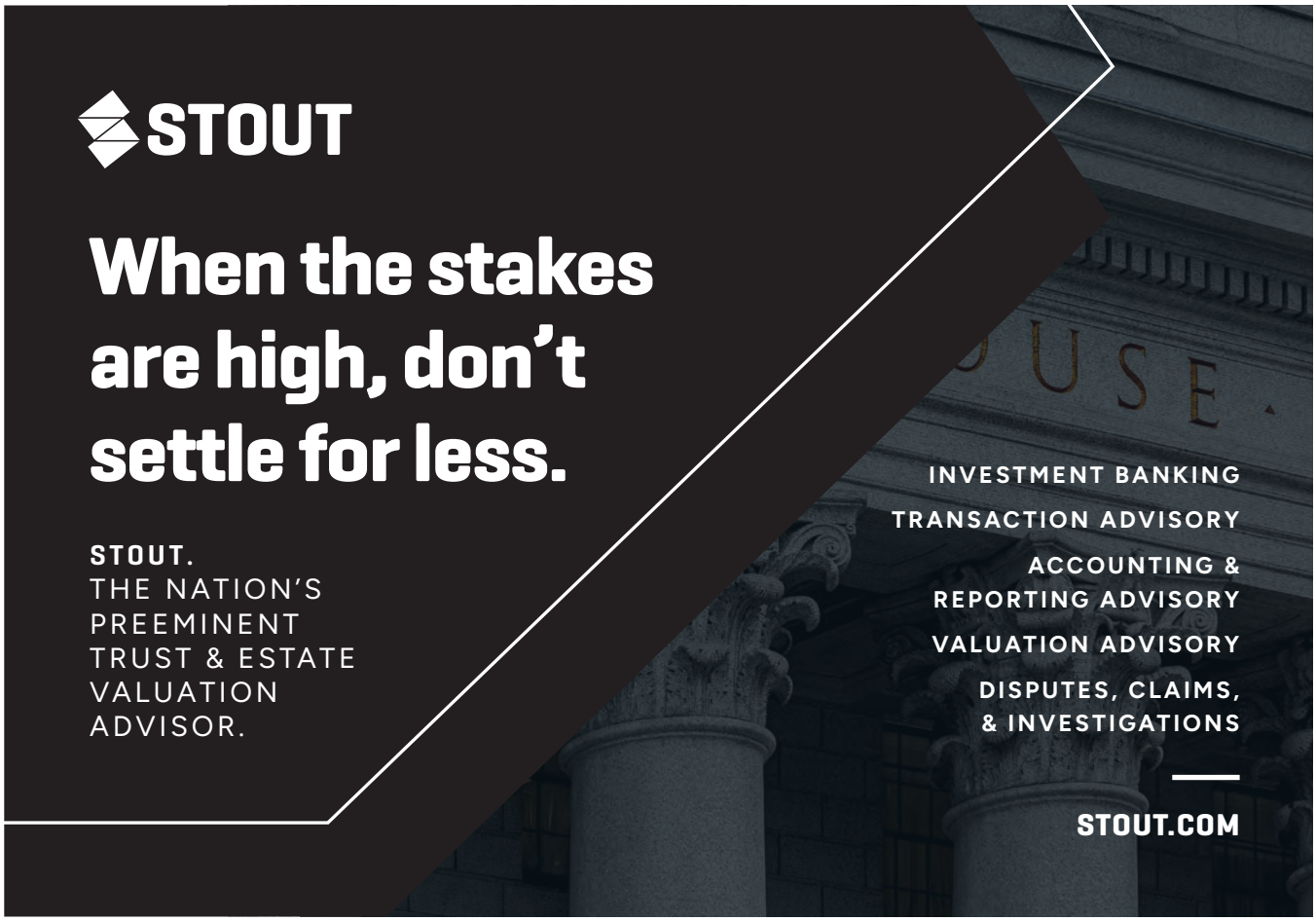
Pete Dunbar *concentrates his practice on governmental, administrative, and real property law. A former chairman and two-term member of the Florida Ethics Commission, Pete also served on the inaugural committee for the Condominium and Planned Development Law Certification for the Florida Bar.*

Outside his legal practice, Pete has served as an adjunct professor at Florida State University School of Law and is a volunteer and coach for the Special Olympics. He has been selected by his peers as a member of Florida Trend's Florida Legal Elite Hall of Fame and is board certified in condominium and planned development law.

** The author acknowledges assistance in preparing this article from Riley Cornell, Legislative Fellow, 2L from Florida State University College of Law.*

Endnote

1 The author acknowledges assistance in preparing this article from Riley Cornell, Legislative Fellow, 2L from Florida State University College of Law.



Spotlight On Katherine Frazier

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

The 2023-2024 Chair of the Real Property, Probate and Trust Law Section of The Florida Bar was Katherine Frazier. Katherine is a 1992 graduate of the University of Florida Levin College of Law, a shareholder in the firm of Hill Ward Henderson in their Tampa office, and she has been involved with the Section since 2004. Katherine is from the "dirt" side of RPPTL.



Katherine's first involvement with the Section was as Vice Chair of the Land Trust and REITS Committee. After that, Katherine was hooked, especially under the guidance of numerous people who are mainstays of the Section. In 2013, Katherine plunged head-on into being a member of the Executive Committee of the Section. Katherine's introduction to the Executive Committee began as Treasurer. She inherited this position at a time of transition with the Bar relative to Section funding, so she really was subject to baptism by fire. She served as Treasurer for two years, then Secretary, then Director of the At-Large Members, then Legislation Committee Co-Chair, and then Real Property Division Director. Katherine comments that it was a great experience to see what all the different positions are like in the Executive Committee, and she enjoyed all of them.

In the course of our interview, Katherine repeatedly mentioned her feelings of honor and privilege of serving the Section and that the Section is fortunate to have such a great group of people who listen and help each other. In her position as Chair, Katherine acknowledges advice and support from many former Section Chairs.

In discussing her year as Chair, Katherine opined that the most challenging part of the process was planning the meetings, putting all the pieces together, and scheduling the many and varied committee meetings. In this aspect of her job, Katherine credited our wonderful administrators, Hilary Stephens and Jeremy Citron.

In offering advice for future Section members who want to be involved, she said, "Raise your hand! Volunteer, and once you get involved, keep going as involvement in this Section is a great way to learn and develop lasting friendships."

Katherine credits her amazing husband, John Harrison, with her ability to be successful this past year and says she never could have done it without him. Katherine and her husband are a team, and not only does he supply support, but he provides great advice.

The Real Property, Probate and Trust Law Section of The Florida Bar owes a great debt of gratitude to Katherine Frazier for her many, many hours devoted to her position as Chair of the Section for the 2023-2024 term. Welcome to the back row Katherine, and your well-deserved position of honor among the Section Chairs that have preceded you.

Executive Council Meeting

HYATT REGENCY COCONUT POINT RESORT AND SPA

Bonita Springs Florida

MAY 30 - JUNE 1, 2024















Photos by Silvia Rojas.
















PARIS
FNF





Roundtable

Highlights of the Meeting of the RPPTL Section

REAL PROPERTY DIVISION

SATURDAY, JUNE 1, 2024

Hyatt Regency Coconut Point Resort and Spa | Bonita Springs, 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, W. Cary Wright, called the meeting to order at 8:10 a.m.

Sponsor Announcement. Cynthia Manfredi was recognized and spoke on behalf of the sponsor, Fidelity National Financial Title Group.

Summary of Previous Meeting. The Director noted that the summary of the Saturday, February 24, 2024, meeting at the Ritz Carlton Grande Lakes, Orlando, Florida was in the agenda and thanked Colleen Sachs and her team for their work in preparing it.

Recognition of Florida Realtor- Attorney Joint Committee 50-year Anniversary — Colleen Sachs

Colleen explained that Steve Henderson prepares the Florida Realtors-Florida Bar Contract for Purchase and Sale of Real Property preparation manual, and it is published by Attorneys' Title Fund Services, LLC. The manual currently covers Version 6 of the contract. Steve gave permission for the committee to distribute these manuals to the Division. Colleen read aloud the proclamation signed by Katherine Frazier. All present and past committee members stood, and the room recognized their hard work. Colleen introduced Fred Jones, past member, and current historian.

Fred Jones expressed the importance of the committee and his gratitude for the support of The Bar and the support of Florida Realtors in the pursuit of professionalism. The contract began as a one-page document in 1973; in the 1990s is when it went from a 2-page document to 4-page fold-out on short paper to now 14 pages, but the value of the vetted contract was tried and proven for both buyer and seller. He gave a shout-out to the 13 Realtor Members and specifically Janet Valentine of Florida Realtors, as well as the 13 attorney members.

Action 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

Marty Schwartz has been working on this project for a long time. The present Chapter 718 was adopted in 1976 and didn't really distinguish residential from commercial, except part 5 and part 6. In 2014, Chapter 718 was modified to more fully provide for the different needs of a commercial condominium. Marty detailed changes to eight areas of Chapter 718, to include amendment of declaration; correction of error or omission in declaration; bylaws; termination of condominium; sales or reservation deposits prior to closing; warranties; transfer of association control; claims of defect by association; agreements entered into by the association; amendment of declaration; and correction of error or omission in declaration by circuit court.

Shawn Brown made a motion to table the proposal; Steven Mezer seconded it. A vote was called, and several voted in favor, but the motion failed.

The motion to approve the proposal received a proper second and passed by a majority vote.

Florida Realtors – Florida Bar Joint Committee — Greg Orepeza, Chair; Julie Horstkamp and Colleen Sachs, Co-Chairs of the Contract Subcommittee

Proposal dealing with Closing Services Fees. Erin Miller presented proposed changes to paragraph 9 of the FRBAR As-Is Contract. She explained the need for the changes. There is a long-standing question as to whether closing services fees can be charged to both parties in the contract. Practices

continued, page 39

around the state differ by region. Concerns were raised by title agents after the filing of class action suits. After much debate, the Realtor-Attorney Joint Committee proposed a change, which was approved by the committee by a vote of 18-2. "Closing services" is removed from the definition of Title Evidence. "Closing services," as separately defined, was placed in a separate area of the contract as a separate line under both seller fees and buyer fees. In the check-box sections, amendments were made consistent with clarifying that each party pays their own closing services fee. Kristin Jaiven made the motion to approve, there was a second and the motion passed unanimously. Michael Gelfand gave a heads-up that we have to move to suspend the rules regarding publication when we move to Executive Counsel to vote.

Information Items

Real Property Litigation — Shawn G. Brown and Manual Farach, Co-Chairs; Amber Ashton and Amanda Kison, Co-Vice-Chairs

Proposal to support legislation to give clearer guidance on the difference between personal and real covenants by providing a fixed analytical framework to be used by parties and the courts, including amendments to Fla. Stat. §§689.011 and 720.301(4).

Brian Hoffman presented. The legislation initially in the agenda was to provide a solution to the Hayslip decision to define "touch and concern" rather than "touch and involve" the land. The legislation was not to say arbitration should not be a covenant. It was an effort to clarify the parameters of what is or is not enforceable. This legislation is being tabled because a certified question has been submitted, and an Amicus on that question is more appropriate than moving forward with this legislation. The certified question to be addressed is to resolve what a real covenant is versus what a personal covenant is.

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

Proposal to Revise Director Election and Recall Procedures in Community Associations – Revising Fla. Stat. §§718.112(2)(L)(P), 718.1255(4), (6)-(8), 718.128, 719.106(A)(2), (F) & (O), 719.129, 720.302, 720.303(10), 720.306(8)-(10) and 720.311.

Allison Hertz gave a summary of this proposal for Condo/HOA/Co-Op election and recall procedures. It is necessitated by the bad behavior of association boards – particularly the Hammocks. The proposal's intent is to get consistency with elections on par with the condo approach and to provide some needed finality to the election and recall process. Highlights of the proposal are to codify the absentee ballot system of the condo approach to the HOA section rather than the proxy approach and require recalls via court decision to be through a summary process; for HOAs, it is proposed that the division monitor the election. Additionally, it would establish standards for when ballots get thrown out, eliminating the ability to recall at a special meeting, and instead, requiring written agreement; allow rulemaking; allow recall to be removed from arbitration and go straight to court so we can move these things along faster and improve owner control of community.

Real Estate Leasing — Christopher Sajdera, Chair; Kristen Javier and Ryan McConnell, Co-Vice Chairs

Kristen Jaiven and Michelle Hinden presented the proposed leases.

Supreme Court Leases — Proposed change to lease versions approved in 2021 By the Executive Counsel.

Residential Lease — Apartment Multi-Family Rental Housing (a/k/a/ Condominium Version)

Residential Lease — Single Family House or Duplex (a/k/a Single Family Version)

Kristin thanked those who contributed to the project. Michelle Hinden explained that these forms have been worked on since about 2018; approval by the Executive Council was in 2021; The Florida Supreme Court has had them but did not act, and during that time, the changes to the condo statute triggered a request to revisit the leases to ensure consistency with revised statutes. There are some concerns with respect to tenants' rights/access to records exceeding statutory rights, so the revised language is intended to simplify and clarify. Tenants need rights to access rules so they can comply, but the tenants' rights must be within the statutory authority. Florida Realtors have reviewed the new forms, and it is proposed to obtain approval by the Executive Council at The Breakers.

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

Revisions to Florida's Statutes of Limitations and Repose for Actions Founded Upon an Improvement to Real Property – Fla. Stat. § 95.11(3)(b).

Sanjay Kurian stated this will reduce the 10-year Statute of Repose to 7 years. There is no plan to change the Fla. Stat. § 718.104 tolling, even though it may create a conflict with the Statute of Limitations. The earliest event starts the clock running. It will address gaps, such as when the statute of repose begins on horizontal construction. Depending on the type of improvement, there may be no CO or a temporary CO. He does not believe there is anything controversial. Lee Weintraub added that this legislation is supported by the Section, and there will be a process to tweak it before the vote at The Breakers.

Real Property Law Publications — Michelle Hinden, Co-Chair

Need RP Division submissions for *ActionLine* – Please contact Michelle G. Hinden at mhinden@nishadkhanlaw.com for more information.

continued, page 40

Legislative Update

No report.

CLE Committee

No report.

Ad Hoc Civil Rules – Florida Supreme Court Opinion — Michael Harget

Michael Harget said that as to the rules of civil procedure, we got everything we asked for. A four-page educational plan will roll out now, beginning at The Breakers, followed by a 4–6-hour CLE in August and symposiums. There will also be immediate follow-up on how courts are handling the change. A proposed comment was made since there is a chance for confusion in that the Supreme Court did not tell people to follow federal jurisprudence when doing discovery.

FTC Proposed Non-compete Rule – Chamber of Commerce v. FTC — Shawn Brown

Shawn Brown said that FTC, by a 3-2 vote, barred the non-compete agreement. The Chamber of Commerce filed suit.

Committee Reports – No report from any committee.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

New Business

Amber Ashton called for comments about the uniform law commission proposal that the law of the land where the person died would apply to all real estate owned in any state. There are concerns about the definition of "domiciled."

Adjournment. The meeting was adjourned at 9:28 a.m.

Valuations You Can Trust

- Estate and Gift Tax Planning & Reporting
- Income Tax Compliance
- Financial Planning & Compliance
- Litigation Support
- Business and Succession Planning

VSI
Valuation Services, Inc.

For more information contact:
Jeff Bae, Managing Director
jeff@valuationservice.com
Office: 571.447.5402
valuationservice.com

WASHINGTON, DC | NEW YORK, NY | MIAMI, FL

Zimmerman Kiser Sutcliffe

Welcomes David and Sancha Brennan:

A New Era of Collaboration Begins

Zimmerman Kiser Sutcliffe (ZKS) is pleased to announce that attorneys David C. Brennan and Sancha K. Brennan, along with Florida Registered Paralegal Leigh A. Brennan, will be joining ZKS's Trusts and Estates team. They specialize in estate, trust, guardianship, real property, and small business law. Their extensive experience and expertise will significantly enhance our firm's capabilities.

This strategic partnership enables us to broaden our service offerings and better support our clients. With a shared commitment to excellence, we are prepared to deliver expanded expertise across various legal domains.

As we unite, our focus on providing personalized and effective legal solutions remains paramount. We are excited to leverage our combined resources to serve you more effectively.

We invite you to stay tuned for further updates as we embark on this promising journey.

Zimmerman Kiser Sutcliffe
– Your Trusted Partner in Legal Excellence

For inquiries, please visit our website at www.zkslaw.com

ROUNDTABLE

Highlights of the Meeting of the RPPTL Section

PROBATE AND TRUST DIVISION

SATURDAY, JUNE 1, 2024

Hyatt Regency Coconut Point Resort and Spa
Bonita Springs, Florida

Prepared by John C.W. Cherneski, Esq., Jacksonville, Florida
and Sara A. Harmon, Esq., Boca Raton, 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 8:01 a.m.

Sponsor Announcement. The Division Director thanked the sponsors, Stout Risius Ross, LLC ("Stout") and Guardian Trust Foundation, Inc. ("Guardian Trust"). Garry Marshall was present on behalf of Stout. Travis D. Finchum, Esq., was present on behalf of Guardian Trust.

Division Director Announcements. The Division Director made an announcement regarding an electronic voting method anticipated to be used during the Executive Council meeting. The Division Director also shared an update regarding the NextGen Bar Exam and Florida Bar Exam. Trusts and estates will potentially be a testing subject on the NextGen Bar Exam through 2028, and is being evaluated for inclusion in the foundational concepts and principles. The Division Director also reported that the Executive Committee submitted a letter to the Florida Board of Bar Examiners supporting the retention of trusts and estates as a testing subject for the Florida Bar.

Member Announcements. Richard Caskey shared an update concerning amendments to the Florida Rules of Civil Procedure; specifically, effective January 1, 2025, Rule 1.280(c)(1) will provide that "[p]arties may obtain discovery that is relevant…and proportional to the needs of the case…" Rich led a discussion about whether the Section should submit a comment to the Florida Supreme Court addressing whether Florida should adopt the federal standard for proportionality for Rule 1.280 like the reference to the federal summary judgment standard and *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986) in Rule 1.510.

Action Items

Trust Law Committee — David Akins, Chair

Ademption by Satisfaction

David presented a motion to be made at the Executive Committee meeting to support legislation providing the circumstances under which ademption by satisfaction applies to revocable trusts. The proposed legislation creates a section in the Florida Trust Code that is comparable to Fla. Stat. § 732.609 – Ademption by satisfaction. A discussion was held regarding whether the proposed statute should include the word "lifetime" in subsection (1)(c) like subsection (1)(a) of same. At the Executive Committee, David presented the motion with an amendment to subsections (1)(a) and (b) to replace "lifetime gift" and "gift" with "gift or distribution" to be consistent with the language in subsection (1)(c). This action item was passed at the Executive Council meeting on Saturday, June 1, 2024 and will be part of the 2025 legislative initiatives.

Definition for "Willful Misconduct" in the Florida Uniform Directed Trust Act (FUDTA)

David also presented a proposed addition to FUDTA to include a definition for "willful misconduct" in Fla. Stat. § 736.0103. The proposed change included a definition for "willful misconduct" and "wrongdoing." A discussion was held regarding the effective date for the change and whether the proposed definition is a change in the existing law. This action item was not passed at the Executive Council meeting on Saturday, June 1, 2024.

Asset Protection Committee — Richard Gans, Co-Chair

Rick shared an update on proposed legislation to enact Fla. Stat. § 736.05057 - Transfer of tenants by the entirety property to trust. The proposed legislation would allow spouses to maintain tenancies by the entirety ("TBE") creditor protections for TBE property transferred to a joint revocable trust that meets the requirements of the statute. Rick reminded Section members that the proposed statute will be presented at the Executive Council meeting. This action item was not passed at the Executive Council meeting on Saturday, June 1, 2024.

continued, page 43

Information Items

Florida Realtor-Attorney Joint Committee — Melissa Murphy

Melissa presented proposed revisions to the Florida Bar standard real estate sale contract being presented at the Executive Council meeting on Saturday, June 1, 2024. The proposed revisions to the contract address whether the closing agent can charge closing services to both the buyer and the seller. The proposed language provides that, if appropriate, the closing agent can charge closing services to both the buyer and seller. The change also provides that the buyer or seller may contract with someone else, other than the closing agent, to provide these services. At the Executive Council meeting, the committee presented a motion to waive the rules concerning timing for presenting these changes for Executive Council approval. The motion to waive the rules passed. The motion to approve the proposed changes to the standard contract also passed at the Executive Council meeting on Saturday, June 1, 2024.

Ad Hoc Committee on Jurisdiction and Service of Process Committee — Barry Spivey, Chair

Barry presented an informational item supporting revisions clarifying the procedure for acceptance by a designated representative and the authority and fiduciary status of such representatives. The proposed changes include: 1) adding a subsection to Fla. Stat. § 736.0301 providing that an order binding a person authorized to represent the interests of another is binding on the person whose interest is represented; 2) amending Fla. Stat. § 736.0302(2) to clarify that the authority of a taker in default to exercise a power of appointment is subject to the power holder's primary authority; 3) substantially rewording Fla. Stat. § 736.0306(1) to define a designated representative and clarify that representation in judicial proceedings, mediations, and arbitrations is included; and subsection (2) to provide that acceptance means acceptance on behalf of all beneficiaries for whom the designation applies, unless the trust instrument provides otherwise; 4) adding a paragraph to Fla. Stat. § 736.0813(1) to impose a duty on a trustee to provide a copy of the trust instrument to a nominated designated representative upon reasonable request; and 5) providing an effective date.

Probate and Trust Litigation Committee — R. Lee McElroy, Chair

Lee presented an informational item supporting legislation creating a summary process allowing trustee discharge in non-adversarial trust administrations without the need for judicial process. The bill will create a new section to the Trust Code, Fla. Stat. § 736.10085 and adopt a negative consent process allowing certain trustees to utilize a summary process for discharge. The proposed statute will contain a 60-day negative consent notice that requires a beneficiary who objects to the discharge to do so in writing or be deemed to consent to the discharge. If any beneficiary makes a written objection, the trustee may not utilize the summary procedure and is required to follow Florida's existing laws concerning discharge.

Trust Law Committee — David Akins, Chair

David presented an information item supporting revisions to Florida's decanting statute, § 736.04117. The proposed changes will clarify that the authorized trustee of the first (original) trust will not be treated as the settlor of the second (new) trust when applying Fla. Stat. § 736.04117 to the second trust. The proposed language for this issue is adopted from the Uniform Trust Decanting Act. The amendment will also expressly state that the trustee's power under Fla. Stat. § 736.04117 can be exercised by modifying the terms of the first (original) trust and clarify that the notice of a proposed decanting is not a trust disclosure document. Finally, the proposed amendment will clarify that Fla. Stat. § 736.04117 applies to any trust governed by Florida law or that has its principal place of administration in Florida.

Estate and Trust Tax Planning — Richard Sherill, Chair

Travis Hayes presented an informational item supporting a clarification bill to the Florida Community Property Trust Act (Fla. Stat. §§ 736.1501, et seq.) to address language in the definitional section of the Act which was inadvertently included during the bill drafting process for the original Act (Fla. Stat. § 736.1502(1)). The proposed legislation will also clarify that the Act applies to express trusts created, amended, restated or modified after July 1, 2021 (Fla. Stat. § 736.1502(2)), and clarify that the transfer of homestead property to a Florida Community Property Trust is not a change in ownership for purposes of Chapter 193 and does not trigger a reassessment of the value of the property (new Fla. Stat. § 736.151(3)).

Committee Reports

Attorney/Trust Officer Liaison Conference — Mitchell A. Hipsman, Chair

Mitch reminded Section members about the upcoming Attorney/ Trust Officer Conference at The Breakers August 15-17 and encouraged members to attend.

Charitable Planning and Exempt Organizations Committee — Denise Cazobon, Chair

Denise shared an update regarding a project updating Chapter 617 (Corporations Not for Profit). Denise's committee is working with the Business Law Section on this project and should have a proposed draft of legislation to present at The Breakers meeting in July.

IRA, Insurance and Employee Benefits — Rebecca Bell, Co-Vice-Chair

Rebecca provided an update regarding the committee's CLE series and the next installment. She thanked the CLE speakers and encouraged section members to attend.

Adjournment. Meeting was adjourned at 9:15 a.m.

Property Tax Increases in Florida and the Importance of Homestead Exemption

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

Taxpayers are seeking explanations for the increase in property taxes across Florida. Florida has been attractive to many people due to a variety of factors, including, but not limited to, warm climate, which is a major attraction for individuals looking to escape colder regions; beaches and access to water-based activities; a booming tourism industry offering ample job opportunities; rich culture diversity; a wide range of housing and lifestyle choices; family friendly attractions; high quality education and healthcare; and most of all, no state income tax. However, understanding the dynamics behind the increase in property taxes, the importance of filing for homestead exemption, and the implications of the Save Our Homes law and Florida Constitution law rights becomes crucial for property owners, particularly those owning properties as joint tenants with the right of survivorship.

Understanding the Drastic Increase in Property Taxes

Florida has witnessed a significant influx of new residents and investors, driving up property values. This surge, coupled with booming real estate markets, has led to increased property assessments, subsequently elevating tax liabilities for homeowners. Moreover, local government expenses for infrastructure, education, and other public services have escalated, further necessitating higher property tax rates to meet these fiscal demands.

The Homestead Exemption: A Financial Lifeline

The homestead exemption is a legal provision that offers homeowners a way to reduce the taxable value of their primary residence. Homestead exemption does not apply to second homes, rental properties, and investment properties. Due to property taxes escalating, the homestead exemption is a vital tool for reducing the tax burden on homeowners who qualify. This exemption allows property owners to exempt a portion of their home's value from taxation, thereby lowering their overall tax bill. For instance, Florida law permits a $25,000 exemption on the assessed value of a property and an additional $25,000 exemption for all levies other than school district levies on the assessed value between $50,000 and $75,000; however, the additional $25,000 exemption is subject to annual adjustment for inflation on January 1st of each year.

The Critical Role of the Save Our Homes Cap

The Save Our Homes ("SOH") Assessment Limitation and Portability Transfer amendment, to the Florida Constitution, further protects homeowners. Article VII, §4(d)(1) of the Florida Constitution provides:

> (d) All persons entitled to a homestead exemption under Section 6 of this Article shall have their homestead assessed at just value as of January 1 of the year following the effective date of this amendment. This assessment shall change only as provided in this subsection.
>
> (1) Assessments subject to this subsection shall be changed annually on January 1st of each year; but those changes in assessments shall not exceed the lower of the following:
>
> a. Three percent (3%) of the assessment for the prior year.
>
> b. The percent change in the Consumer Price Index for all urban consumers, U.S. City Average, all items 1967=100, or successor reports for the preceding calendar year as initially reported by the United States Department of Labor, Bureau of Labor Statistics.

continued, page 45



SOH assessment shields homeowners from unpredictable increases in property tax bills. Over time, the difference between the market value and the capped assessed value can be substantial, leading to long-term property tax savings for homeowners. Furthermore, homeowners are less likely to be taxed out of their homes due to rising values in the area, promoting stability in communities.

In addition to the assessment limitation, SOH has a portability component. The portability component allows a homeowner to move from one primary residence to another and retain the tax savings they have accumulated under SOH. This portability can result in significant tax savings for the homeowner at their new primary residence.

Joint Tenancy and Homestead Exemption Applications

A crucial aspect often overlooked by co-owners of property is the application process for homestead exemption in cases of joint tenancy. In Florida, if a property is owned as joint tenants with the right of survivorship, it is imperative that both co-owners complete the application for the homestead exemption. This requirement ensures that if one owner dies, the surviving owner will continue to receive the benefits of the exemption. Failure to do so may potentially lead to higher property taxes.

As property taxes continue to rise in Florida, understanding and utilizing available legal provisions like the homestead exemption and the Save Our Homes cap becomes increasingly important. These tools not only offer immediate financial relief, but also provide long-term protection against unpredictable tax increases. For joint tenants, attentiveness to the application process is essential to ensure full benefits for both tenants. By staying informed and proactive, Florida homeowners can navigate the challenges of rising property taxes and safeguard their financial interests.



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.*

PRACTICE CORNER

Probate And Trust Division

The Benefits of E-Wills for Clients and Lawyers

Prepared by John C.W. Cherneski,
Milam Howard Nicandri & Gillam, P.A. Jacksonville

The use of technology in the practice of law is increasing every day. Lawyers practicing in a post-COVID world routinely meet with clients, take depositions, attend mediations, and appear in court via audio-video communication technology. In many instances, the use of technology is making legal services more cost-effective, accessible for clients, and expanding the geographic area where a lawyer can efficiently serve clients.

In 2019, before the COVID pandemic forced lawyers to change how they use technology, the Florida Legislature made significant changes to Chapters 117 and 732 allowing for online notarization and recognition of electronic wills. These changes became effective on January 1, 2020. In addition to Florida, eleven other states plus the District of Columbia allow electronic wills.[1] Yet, despite electronic wills now being recognized in Florida, their use remains relatively uncommon.

An electronic will is a convenient and efficient option for clients that need flexibility or may not be able to travel to their lawyers' office. The testator and witnesses are not required to physically be in each other's presence, nor are they required to physically be located in Florida when an e-will is signed.2 A will is considered to be executed in the witnesses' "presence" if the witness participates via audio-video communication technology, is signing as part of the online notarization session, and hears the signer make a statement acknowledging that he or she has signed the will.[3]

Online notarization of a will also results in video evidence that may be helpful in defending or prosecuting a will challenge. A notary performing an online notarization is required to maintain an electronic journal of online notarization sessions which includes the audio-video recording of the session.[4] During the online notarization session, the notary must ask the testator to identify his or her spouse, if any, identify anyone who assisted the testator in accessing the video conference, identify anyone who assisted in preparing the will, state where the testator is currently located, and identify anyone who is in the room with him or her.[5] Once the signing is complete, the executed will and the recording of the online notarization session must be maintained by a qualified custodian for the will.[6] The recording of the online notarization session can be subpoenaed from the remote online notarization service[7] or the qualified custodian for the will if necessary.

If your office does not offer online notarization services, there are numerous entities advertising remote online notarization services in Florida. In addition, the Secretary of State maintains a database of all registered remote online notarization service providers which can be found here: https://online-notary.sunbiz.org/ServiceProviders. Similarly, if your firm does not meet the statutory requirements to serve as a qualified custodian for an electronic will,[8] there are entities offering this service for a fee in Florida.

continued, page 47

Not only can an electronic will be a convenient way for busy or out of town clients to finalize their estate planning, but the audio-video recording that is created and maintained as a by-product of the online notarization session can be helpful evidence to present in a will challenge. As society at large continues to utilize technology to improve the delivery of services across a broad spectrum of industries, lawyers have a professional responsibility to understand the benefits and risks associated with the use of technology to properly represent clients.[9] Familiarizing yourself with Florida's procedures for an e-will and recommending them to clients where appropriate is one of the ways Florida lawyers can fulfill this duty.


J. CHERNESKI

John C. W. Cherneski *has been practicing law since 2010 and is admitted to both The Florida Bar and 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 Electronic Wills Chart, Practical Law Checklist w-025-0731 (Westlaw).

2 Fla. Stat. §§ 117.209(3), 117.285(1), and 732.522(2).

3 Fla. Stat. § 732.522(2)(a) – (d). The witnesses must also be supervised by a notary public and the signing and witnessing must meet the requirements of Fla. Stat. § 117.285. *Id.*

4 Fla. Stat. § 117.245.

5 Fla. Stat. § 117.285(5)(d). These questions are required for any online notarization session where the witness is also appearing by audio-video communication. In addition, a remote online notarization service is required to obtain answers to the following questions from a testator: 1) whether the testator is under the influence of any substances that impair his or her decision making ability, 2) whether the testator has a physical or mental condition that impairs his or her ability to perform normal activities of daily living, 3) and whether the testator requires assistance with daily care. Fla. Stat. § 117.285(5)(a). If the testator answers yes to any of these questions, the witnesses must be physically present with the testator at the time of signing. Fla. Stat. § 117.285(5)(b).

6 Fla. Stat. §§ 117.245(4) and 732.524(2)(a)3.

7 Fla. Stat. § 117.255(2)(f).

8 Fla. Stat. § 732.524.

9 *See* the Comments to Rule 4-1.1 Competence, Rules of Professional Conduct.



Probate Case Summaries

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

The Florida Supreme Court answered a certified question concerning whether a posthumously conceived child is "provided for" under the terms of a decedent's will in accordance with Florida law.

Steele v. Commissioner of Social Security, 49 Fla. L. Weekly S41 (Fla. Feb. 15, 2024)

Mr. and Mrs. Steel, a married couple living in Florida, used in vitro fertilization (IVF) to conceive a child. Mr. Steele subsequently submitted additional sperm samples to the IVF clinic. Mr. Steele later made a will and passed away a year and a half later. Mr. Steele's will devised his property to his wife, or if his wife predeceased him, to his children "then living". The will defined Mr. Steele's family as his wife, living children, and any later-born or adopted children. After Mr. Steele's death, Mrs. Steele conceived another child known as P.S.S. using the sperm samples previously deposited by Mr. Steele. After the birth of P.S.S., Mrs. Steele sought survivor benefits from the Social Security Administration (SSA) on the basis that P.S.S. was a child of Mr. Steele. The SSA denied the application on the basis that P.S.S. did not qualify as a child of Mr. Steele.

Mrs. Steele sued the SSA in federal district court, and upon losing, appealed to the Eleventh Circuit. The Eleventh Circuit determined this to be a case of first impression and certified the following two questions to the Supreme Court: (1) Under Florida law, is P.S.S. "provided for" in the decedent's will within the meaning of Fla. Stat. § 742.17(4)?; (2) If the answer is yes, does Florida authorize a posthumously conceived child who is provided for in the decedent's will to inherit intestate the decedent's property?

The court only answered the first certified question, asserting that their interpretation of the phrase "provided for" in Fla. Stat. §742.17(4) is dispositive.

In answering the first question, the Court looked to the language of Fla. Stat. § 742.17(4), which reads, "A child conceived from the eggs of or sperm of a person or persons who died before the transfer of their eggs, sperm or preembryos to a woman's body shall not be eligible for a claim against the decedent's estate unless the child has been provided for by the decedent's will." The Court reasoned that to provide for someone encompasses contemplation of the recipient, and to provide for a posthumously conceived child, the testator would have had to contemplate a child potentially being conceived after his death.

Here, the Court determined that Mr. Steele's will did not provide for P.S.S. because it did not contemplate the possibility of a posthumously conceived child, and that the reference to an afterborn child refers to a child conceived before the death of the decedent but after creation of the will. The Court returned the case to the Eleventh Circuit for further proceedings.

The trial court abused its discretion by failing to conduct an evidentiary hearing before deciding the reasonableness of fees in connection with incapacity and guardianship proceedings in violation of due process.

Fuller v. Torcise, 49 Fla. L. Weekly D78 (Fla. 3rd DCA Jan. 3, 2024)

This appeal relates to a fee dispute between two siblings, Sandra Fuller and Steve Torcise, regarding guardianship proceedings involving their mother, Joyce Torcise. After two years of proceedings involving a health care surrogate dispute, a settlement was reached and an agreed order was entered.

The trial court bifurcated the issue of entitlement to fees and costs from the amount of such fees and costs. The trial court determined that both parties were entitled to fees, but must mediate as to the amount. No agreement as to the amount of fees could be reached and, as such, Sandra requested an evidentiary hearing to determine the amount and reasonableness of fees to be awarded. The trial court subsequently issued multiple orders stating that an evidentiary hearing was to be held, and scheduled an evidentiary hearing.

Each party submitted evidence, and the trial court requested that each party submit a proposed order. Despite the order that an evidentiary hearing was to be held, the trial court adopted Steve's order without actually holding an evidentiary hearing, granting him over $800,000 in fees.

The appellate court reversed, finding that Sandra preserved her right to an evidentiary hearing and that the trial court abused its discretion by failing to conduct an evidentiary hearing before deciding the reasonableness of fees.

The probate court erred in calculating damages in a case involving breach of fiduciary duty where a successor trustee of a trust was residing in trust property. The court also erred in directing that rental income from the same trust property be equally divided amongst parties who did not possess an equal interest in the property. The probate court did not err in finding that the Defendant breached her fiduciary duty.

Kersey v. Abraham, 49 Fla. L. Weekly D111 (Fla. 6th DCA Jan. 5, 2024)

This case involves real property held in Decedent's trust. Decedent had two children, Becky Kersey and Kenneth

continued, page 49

Abraham. Decedent's trust directed that the five-acre parcel owned by her trust and consisting of a main house and a guest house, be distributed two-thirds to Becky and one-third to Kenneth, outright and free of trust. The trust also appointed Becky as the sole successor trustee of the trust.

Subsequent to Decedent's death, Becky did not distribute the trust property and it remained titled in the name of the trust. There were ongoing disagreements as to the value of the trust property and discussions regarding Becky's intention to buy out Kenneth's interest, as he did not wish to be a co-owner or reside in the property himself. During this time, Becky sold her own home and moved into the main house on the property. The guest house remained rented out to Decedent's niece in continuation of an ongoing agreement that preceded Decedent's death.

Kenneth brought suit against Becky for breach of fiduciary duty and demanded an accounting. Becky stepped down as trustee, agreed to account, and an independent trustee was appointed. The independent trustee did not present Becky with a lease or a demand for rents, nor did he demand that she vacate the property. The probate court found that Becky breached her fiduciary duty and ordered her to pay rent for the period during which she occupied the property. The trial court further ordered that the rents from the property were to be divided equally between Becky and Kenneth.

The appellate court affirmed the portion of the order requiring Becky to pay to the trust the rental income from the guest house, but reversed as to the portion directing the parties to share equally in the rental income because Becky had a two-third interest and Kenneth a one-third interest. The appellate court further reversed as to the damages calculated in the form of rent that Becky owed to the trust for her own occupation of the property because the claim was for damages owed as a result of breach of fiduciary duty, and not one based on unpaid rent. The appellate court found that this amount should be limited to the time that she was serving as trustee, as she no longer owed a fiduciary duty once she stepped down.


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.*



Real Property Case Summaries

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

Appellant, a commercial condominium tenant (Tenant), sued its Landlord and the Purchaser of Tenant's condominium unit over the Landlord's failure to abide by a right of first refusal that was included in the Tenant's lease. The Tenant claimed that it was entitled to specific performance for its right of first refusal that was contained in its lease. Tenant also sought rescission of the condominium sale because the sale violated its right of first refusal. Landlord and the purchaser moved for summary judgment, based on the premise that the Tenant had not shown that it was ready, willing, and able to complete the purchase. The trial court agreed with Landlord and Purchaser and granted summary judgment. The appellate court reversed, as neither Landlord nor Purchaser provided Tenant with the purchase price and terms of their sale of the unit. Thus, Tenant was not required to prove itself ready, willing, and able to comply with an undisclosed purchase agreement.

Blind Monk, LLC v. Uso Norge Whitney, LLC and 410 Evernia Street Partners, LLC, 368 So.3d 980 (Fla. 4th DCA 2023).

Tenant, Blind Monk LLC (the "Tenant"), operated a wine bar in a commercial unit within Landlord's condominium building. Tenant's lease included a right of first refusal so Tenant would have the option to purchase the unit if Landlord decided to sell at a later date. In 2016, Landlord's realtor provided notice to Tenant's President that Landlord was offering all units for sale to tenants. Tenant expressed interested in purchasing the unit pursuant to its right of first refusal. Shortly thereafter, Landlord's realtor informed Tenant that Landlord was suspending retail sales and instead going to undertake a bulk sale.

In this case, the Landlord proceeded with a bulk sale of the condominium units, including the Tenant's unit to a purchaser (the "Purchaser") without disclosing any additional information regarding the offer to the Tenant. The Tenant learned about the sale when it received a notice directing all future rent payments to Purchaser. Tenant filed a complaint seeking rescission of the contract, cancellation of the deed, specific performance, and claiming tortious interference with a contract.

The Purchaser moved for summary judgment on the rescission claim, asserting that the Tenant had not shown it was ready, willing, and able to purchase the unit. The Tenant argued that it could not prove readiness, willingness, and ability to purchase the unit without knowing the purchase price, and further that it could not secure traditional financial commitments without knowing the undisclosed purchase price. The trial court granted the motion for summary judgment.

On appeal, the court held that the trial court erred in granting summary judgment. It cited precedents (Denco I, Denco II, and Whyhopen) establishing that when a bulk sale involves a right of first refusal, the owner must disclose the purchase price and terms to the holder of the right of first refusal. The court emphasized that the Tenant had no duty to act without knowledge of the purchase price and terms and rejected the Purchaser's argument that the Tenant needed to prove readiness, willingness, and ability before the purchase price was disclosed.

The appellate court reversed the trial court's decision to grant summary judgment in favor of the Purchaser on the rescission claim. The court emphasized that the Tenant, under its right of first refusal, had the contractual right to be informed of the purchase price and terms of the agreement between Landlord and Purchaser before deciding whether or not to exercise its right of first refusal. The court rejected the Purchaser's argument that the Tenant had to prove readiness, willingness, and ability before knowing the undisclosed purchase price.

The appellate court directed the trial court to conduct further proceedings to determine the purchase price and terms of the sale for the unit in accordance with the agreement between the Landlord and the Purchaser's purchase and sale agreement. Once the purchase price and terms were determined, the Tenant would have thirty days to decide whether to exercise its right of first refusal and purchase the property at those terms. The appellate court suggested that the trial court might defer consideration of the rescission claim until after the Tenant made a decision regarding the exercise of its right of first refusal. The case was remanded for further proceedings consistent with the opinion.

Appellant, Sarasota Tennis Club Holdings, LLC (the "Tennis Club"), sued Country Club of Sarasota Homeowners Association, and board members for their tortious interference with the sale of the property, as well as violations of the Florida Deceptive and Unfair Trade Practices Act and a breach of a maintenance agreement and drainage agreement between the parties. Over the course of several years, Country Club of Sarasota Homeowners Association (the "HOA") took actions that violated the agreements between the parties and may have impacted Sarasota Tennis Club Holdings' ability to sell their property. The court found that even though neither purchaser solely blamed the actions of the HOA for their failure to purchase, the standard only required it to be a substantial factor. The court also held that the Tennis Club

continued, page 51

failed to provide any evidence that the HOA breached the drainage or maintenance agreements between the parties.

Sarasota Tennis Club Holdings, LLC v. Country Club of Sarasota Homeowners Ass'n, 378 So.3d 1263 (Fla. 2d DCA 2024).

In this case the primary issue arose out of a contractual dispute involving a maintenance agreement and a drainage agreement between the Tennis Club and the HOA. The resulting litigation involved the HOA's right of first refusal, which was contained within a maintenance agreement which stated that the Tennis Club agreed to limit its activities on its property to those normally associated with a tennis club. The maintenance agreement also granted the HOA a right of first refusal to purchase the Tennis Club's property, which reads, "[t]he Homeowners Association has the right of first refusal to permit the Homeowners Association to purchase the Tennis Club property at some point in the future should the Tennis Club elect to sell or file for bankruptcy." They also entered into a the drainage agreement, whereby the Tennis Club's predecessor and the HOA agreed in pertinent part, that, "the HOA] acknowledges that BAY VENTURE [the Tennis Club's predecessor], its successor or assigns may petition Sarasota County to rezone the tennis and clubhouse facilities area... [The HOA] hereby agrees that it shall not challenge a petition for such rezoning on any drainage-related issue."

In 2016, the HOA filed a civil action against the Tennis Club, alleging that the Tennis Club had breached both agreements and sought both injunctive and monetary relief. During the course of the litigation the Tennis Club attempted to sell the property and entered into a purchase and sale agreement with Taylor Morrison Homes.

At the time, the HOA was provided with the option to exercise their right of first refusal; however, the HOA initially waived its right of first refusal through a letter provided by the attorney for the HOA. In the meantime, board members of the HOA engaged in undisclosed discussions to explore the HOA's acquisition of the property. The board members, upon learning of an extension to the contract between the Tennis Club and Taylor Morrison, made a claim that their right of first refusal was restarted and that the board was reviewing the deed restrictions to determine if they would be waived, when no such deed restrictions existed. Ultimately, Taylor Morrison terminated its agreement with the Tennis Club, in part because of the "outstanding issue" between the Tennis Club and the HOA.

continued, page 52



Following this, the Tennis Club negotiated a second agreement to sell the property. Shortly after notifying the HOA of this new agreement, the HOA convened a special meeting. In communicating with the residents of the Country Club of Sarasota, the HOA misstated the scope of development being proposed and that the HOA's right of first refusal encompassed the entire Tennis Club Property (when, in fact, that was not how the purchase and sale agreement was structured). Ultimately, the second purchaser also terminated their contract in anticipation of continued litigation with the HOA. Following the termination, the HOA approached the Tennis Club about purchasing the Tennis Club's property at a lower price than the second agreement for sale and purchase that had been presented to them.

In 2019, the Tennis Club sought rezoning, prompting communications between HOA members and an adjacent property owner regarding potential negative effects. The rezoning application was eventually withdrawn as a result of the communications between the parties.

In response to these events, the Tennis Club filed a complaint in November 2019, asserting claims of tortious interference (count I), violations of the Florida Deceptive and Unfair Trade Practices Act (FDUTPA) (count II), breach of the 1992 maintenance agreement (count III), and seeking declaratory judgment on attorney's fees (count IV).

As to count I, the court concluded that the Tennis Club's evidence was insufficient to show that the failure of either purchaser to close on their respective contracts with the Tennis Club was due to the defendants' actions. Similarly, the court found there was insufficient evidence of causation to prove a violation of FDUTPA. As to count III, the court determined that the Tennis Club failed to provide evidence that the HOA had committed a breach of the 1992 maintenance agreement. Finally, the court concluded there was no justiciable controversy before the court that warranted declaratory relief.

The Tennis Club then timely appealed the circuit court's summary judgment, and the appellate court conducted a de novo review, citing Cole v. Plantation Palms Homeowners Ass'n and the new 2021 amendment to the summary judgment standard. Under this standard, summary judgment is appropriate if there is no genuine dispute on material facts, and the moving party is entitled to judgment as a matter of law. The appellate court found that the HOA and the board members did not meet their initial burden regarding the first count of the Tennis Club's complaint, which alleged tortious interference.

The appellate court outlined the elements of a tortious interference claim and noted that the first two elements were not seriously disputed. However, the third element, involving intentional and unjustified interference, was contested, with evidence of alleged misrepresentations, concealment, misleading communications, and overt conduct.

Regarding the fourth element, causation, the appellate court found material facts in dispute, especially concerning the reason for the termination of both purchase agreements. The appellate court disagreed with the circuit court's view that there was no issue of disputed fact about causation because neither party entirely blamed the defendants; however, the court emphasized that the plaintiff need not show the defendant's action as the sole cause and that a defendant's breach must be a "substantial factor" in causing the injury.

For count III, the appellate court found material facts in dispute as to the board members' email to the Tennis Club's neighbor could be evidence supporting the claim that the HOA breached the 1992 maintenance agreement. The court affirmed the summary judgment for the Tennis Club's FDUTPA claim, citing that intentional breach of contract, without an adverse public impact, may not support a cause of action under FDUTPA. The appellate court affirmed count IV for declaratory relief without further comment.



TITLE RESOURCES GROUP

THE UNDERWRITER BUILT FOR THE REAL ESTATE INDUSTRY

Legal Experts. Business Friendly. Customer Focused.

www.TRGUW.com

Join the growing number of Florida Bar members who have dedicated themselves to a heightened level of excellence!



Elevate Your Legal Career with Board Certification

The best time to pursue board certification is NOW.

www.floridabar.org/certification **LEARN MORE**

RPPTL SPONSORS

The Florida Bar's Real Property, Probate and Trust Law Section is grateful to all of its sponsors who faithfully support the good work of the Section. In addition to recognizing them in each issue of ActionLine as we do, we want to offer information to you in the event you wish to speak with a sponsor about the services it provides. Below are the names of the sponsors and their contact information. Again, thank you, sponsors, for supporting RPPTL!

PLATINUM SPONSORS		
COMPANY	CONTACT NAME	EMAIL
Old Republic	Jim Russick	jrussick@oldrepublictitle.com
The Fund	Melissa Murphy	mmurphy@thefund.com
RealAdvice	Todd Jones	Todd.jones@realadvice.com
APP SPONSOR		
WFG National Title Insurance	Joseph J. Tschida	jtschida@wfgnationaltitle.com
GOLD SPONSORS		
CATIC	Deb Boyd	dboyd@catic.com
Coral Gables Trust	John Harris	Jharris@cgtrust.com
FNF Family of Companies - Florida	Karla Staker	Karla.Staker@fnf.com
First American Title Insurance Co.	Len Prescott	lprescott@firstam.com
Guardian Trust	Travis Finchum	travis@specialneedslawyers.com
JP Morgan Private Bank	Carlos Batlle	carlos.a.batlle@jpmorgan.com
Stewart Title	David Shanks	David.shanks@stewart.com
Stout	Garry Marshall	gmarshall@stout.com
Westcor Land Title Insurance Co.	Laura Licastro	Laura.LiCastro@WLTIC.com
SILVER SPONSORS		
Leap Legal Software	John Celmer	john.celmer@leap.us
Management Planning, Inc.	Roy Meyers	rmeyers@mpival.com
Provise	Steve Athanassie	athanassie@provise.com
Title Resources	Lee Offir	Lee.offir@titleresources.com
Valuation Services Inc.	Jeff Bae	Jeff@Valuationservice.com
WealthCounsel	Rachel Gifford	rachel.gifford@wealthcounsel.com
BRONZE SPONSORS		
Amerant Bank	Madelayne Cordero	MCordero@AmerantBank.com
BNY Mellon Wealth Management	Rafaela Vianna	Rafaela.vianna@bnymellon
Business Valuation Analysts	Tim Bronza	TBronza@bvanalysts.com
Cumberland Trust	Bob Carville	bcarville@cumberlandtrust.com
Grove Bank and Trust	Marta Goldberg	MGoldberg@grovebankandtrust.com
LEGISLATIVE UPDATE SPONSOR		
The Fund	Melissa Murphy	mmurphy@thefund.com

Are Your Forms Current?

We can help! Florida Lawyers Support Services, Inc. is a non-profit organization created by past chairs of the Real Property Section to market the forms needed by Real Property, Probate and Trust Law attorneys.

Our forms are prepared by the Forms Committee of the RPPTL Section of The Florida Bar and approved by both The Florida Bar and Florida Realtors.

FLSSI
FLORIDA LAWYERS SUPPORT SERVICES, INC
FLSSI
Florida Lawyers Support Services, Inc.

Order the most up-to-date forms today at **FLSSI.org**

Probate and Guardianship Forms

- Forms carry the Supreme Court required 3" x 3" blank square for Court Clerk's use.
- Probate Judges prefer the use of current FLSSI forms.

Florida Real Estate Residential Contracts and Riders

Florida Lawyers Support Services, Inc.
Post Office Box 195909
Winter Springs, Florida 32719
407.515.1501 • FLSSI.org

The Florida Bar
651 East Jefferson Street
Tallahassee, FL 32399-2300

PRSRT-STD
U.S. POSTAGE
PAID
TALLAHASSEE, FL
Permit No. 43

Scan here for instant access to the Section website.

ACTIONLINE BULLETIN BOARD

UPCOMING CLE OPPORTUNITIES

Check our website at ***RPPTL.org*** for a list of OnDemand products available at a discount to Section members.

Advanced Construction Law Institute 2025 CLI is the preeminent annual legal conference for practitioners of construction law and related fields. Centrally located to maximize attendance, construction lawyers, industry consultants and sponsors from around the state gather annually to learn advanced legal issues and techniques and meet likeminded practitioners. The yearly conference starts with a welcome reception open to all attendees, followed by a day and a half of accredited seminar hours (including a lunchtime presentation), presentation of awards to recognize outstanding contributors in the field of construction law, and additional opportunities to meet advanced construction law practitioners. The seminars cover hot topics confronting construction law practitioners, legislative and legal updates, and practice pointers to help maintain the high standards of legal administration in this complex area of law.	**March 6-8, 2025** **Orlando, FL**
Death, Taxes, and Asset Protection Planning: Because 'Hide It Under Your Mattress' Isn't a Legal Strategy The Florida Rules of Civil Procedure are about to get the most substantive overhaul in a generation. Are you truly ready and understand what these amendments will do and how they will impact your cases, including the ones you have pending right now? Do not be unprepared when these amendments take effect. The courts will be ready on January 1, 2025 and to make sure your answer to the judge is "I didn't know," you need to watch this program.	**April 03, 2025** **Webinar**