ActionLine

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



Understanding Senate Bill 264 And The New Rules For Land Ownership By Foreign Principals

Florida Bar Ethics Opinion OKs Lawyers' Use Of Generative AI, But With Cautions

What Estate Planners Need To Know About 501(c)(4)s

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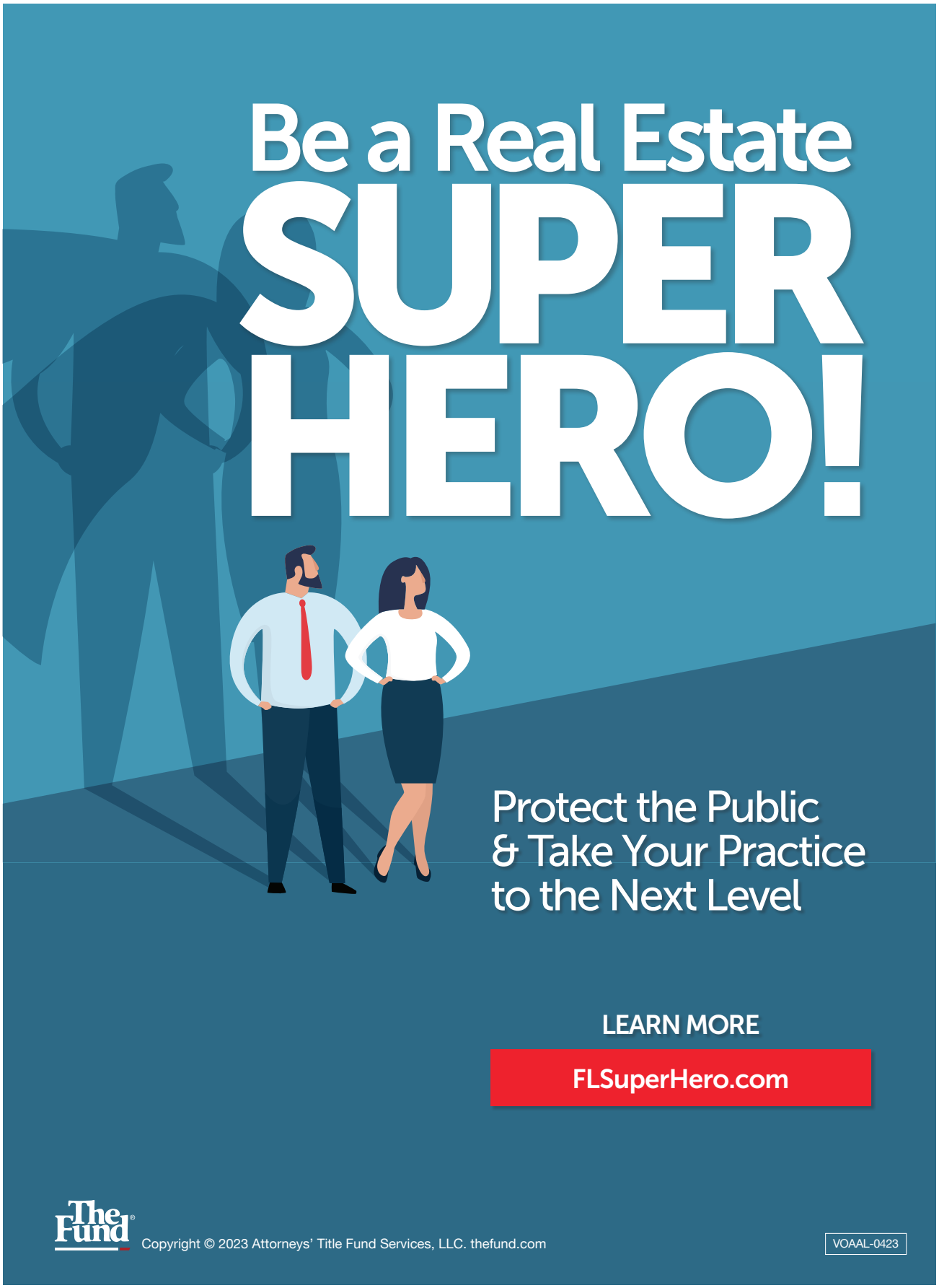
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A Legacy Nurturing Law Students:

Honoring Phil Baumann And The Law School Outreach Committee

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

The Florida Bar's Real Property, Probate and Trust Law ("RPPTL") Section is proud to have the Law School Outreach Committee. For years, this committee has been a vital platform for law students to learn from practicing attorneys, providing hands-on experience and a path to becoming full-fledged RPPTL Section members. One individual in particular, Attorney Phil Baumann, stands out for his remarkable contributions to this initiative.

The Law School Outreach Committee's roots date back to, at least, 2003, with liaisons championing the RPPTL Section's mission at Florida law schools. Phil Baumann served as a liaison in 2003, planting the early seeds of this endeavor. Over a decade later, a sub-committee emerged, focusing on law student involvement under the Membership and Inclusion Committee. The 2018-2019 fiscal year marked the birth of the RPPTL Section's law school initiative, now known as the Law School Outreach Committee, and much of its success can be attributed to **Phil Baumann**.

Phil Baumann joined the RPPTL Section around 1989 or 1990. He was a dedicated member of the RPPTL Section and served on the Executive Council. He was also a former Elder Law Section Chair. Beyond his legal career, Phil was a respected staff sergeant in the U.S. Air Force, a testament to his commitment to service. He extended this dedication to his family and to various professional and charitable organizations in the Tampa Bay area and beyond.



PHIL BAUMANN

One of Phil's most significant contributions was his mentorship of law students and young attorneys. He provided guidance, insight, and a friendly face to those venturing into the complex realm of RPPTL. As the Principal of BaumannKangas Estate Law, he managed a substantial workload, but always made time to help aspiring legal professionals understand what it means to be a member of the legal community. Phil, alongside Guy Emerich, formed a dynamic duo in mentoring and in conducting student interviews. They traveled to countless campuses, ensuring students were well-prepared for interviews and resume submissions.

Phil's dedication to mentorship and inclusion earned him the prestigious Lynwood F. Arnold, Jr. Memorial Award for 2021-2022. This award recognizes individuals who, like the award's namesake, work towards increasing minority membership, mentoring law students and new attorneys, or promoting pro bono legal services. He was the second person to receive this award.

The RPPTL Section's commitment to law students and young attorneys has shown remarkable progress over the years. Phil Baumann played a pivotal role in this development, leaving an indelible mark on the Law School Outreach Committee. He exemplified the spirit of selfless service and mentorship, by contributing significantly to this committee.

Phil Baumann's legacy in the RPPTL Section, especially through the Law School Outreach Committee, is one that deserves recognition and honor. His dedication to mentorship, inclusion, and the betterment of the legal profession has had a lasting impact on both the RPPTL Section and the wider legal community. Phil Baumann's contributions serve as a blueprint for future generations, reminding us of the importance of selflessness and support in our professional journeys.

If you would like to join the Law School Outreach Committee and to continue the RPPTL Section's mission, please see the link below for instructions. We welcome your participation!

https://www.rpptl.org/DrawOnePage.aspx?PageID=9

***Contributor's Note**: I would like to acknowledge the assistance of Kymberlee Curry Smith in her role as Chair of the RPPTL Section Law School Outreach Committee for her contributions to this article.*

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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:

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

Letter From The Co-Editors-In-Chief



E. FINLEN



M. HINDEN

Greetings Everyone,

I recommend you regularly check out the ***Upcoming CLE*** page on the Section's website to learn of the new CLE offerings for a variety of subjects. We appreciate all the hard work that goes into to offering education on timely, substantive matters that benefits us all. Note that all CLEs are available on demand if you miss them. On the death side, we have the Litigation & Trust Symposium in Tampa on April 11 and the Annual Guardianship Seminar on April 12. Estate planners should check out the IRA beneficiary designation series presented by the highly knowledgeable members of the IRA, Insurance & Employee Benefits Committee (which, in my humble opinion, is one of the most interesting committees in the Section).

On the dirt side, there are on-demand review courses that were offered last month for several of the certification exams, the Partition of Property CLE was on April 2 and on April 8th there will be a Fair Debt Litigation CLE. Our Annual Convention will be at the Hyatt Bonita Springs from May 30 through June 1. The convention is the ideal time to dip your toe in and explore how to get involved in the Section. I highly recommend registering online and checking out the meetings via Zoom. All are welcome!

For the articles we have on hand this issue, **Jeffrey J. Spina-Jennings** tells us all about 501(c)(4) organizations; **Paul Roman** reports on The Florida Bar's ethics opinion about AI (and is slightly sneaky about it); **David E. Wolff** addresses a very timely topic about the benefits of Nonjudicial Settlement Agreements in conjunction with a Trustee's duty to diversify and duty of impartiality; **Michael Rothman** does a deep dive on Senate Bill 264 and the new rules for land ownership by foreign principles; **David Brennan,** the resident Section historian, talks about his new project, and finally we have TWO articles about the Section's Fellows Program, the first is an open letter discussing the Fellows program in general and the second is an article by **Kristen King Jaiven** discussing how the **Fellows Program** elevated her from a RPPTL wallflower to a RPPTL leader. This program is an excellent opportunity for those young attorneys who want to become involved in the substantive work of the Section, to receive training as a future Section leader, and to receive mentorship from Section members. This program helps subsidize the cost of in-person meeting attendance, which the program requires. Those who are interested, please apply – it is a great opportunity.

Thank you, gracious readers, for your interest and we look forward to seeing everyone at the annual meeting!

Sincerely,
Erin and Michelle

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

What Estate Planners Need To Know About 501(c)(4)s

By Jeffrey J. Spina-Jennings, Esq., Gould Cooksey Fennell, PLLC, Vero Beach, Florida

As a result of the recent restructuring of Patagonia utilizing a social welfare organization ("501(c)(4)") there is a revitalization of discussions regarding whether a 501(c)(4) may be an appropriate structure to carry out a client's charitable objectives. News reports have tended to place emphasis on a 501(c)(4)'s ability to engage in political activities and lobby. While lobbying is a unique characteristic that should be noted, estate planners should be familiar with other aspects of a 501(c)(4). This article will provide a primer that contextualizes those aspects of a 501(c)(4) compared to another commonly used structure, the private foundation.[1]

What is a 501(c)(4)?

As defined by the Code[2], a 501(c)(4) is an organization[3] which is operated exclusively for: (i) the promotion of social welfare, or (ii) a local association of employees, the membership of which is limited to the employees of a designated person or persons in a particular municipality, and the net earnings of which are devoted exclusively to charitable, educational, or recreational purposes.[4] At a minimum, an estate planner would need to be familiar with the "social welfare" operational requirement as that is the most appropriate way in which our clients would achieve 501(c)(4) status for an entity.

What does it mean for an organization to be operated for the promotion of social welfare? According to the Regulations, the determination is based on whether the organization is being operated for the "common good and general welfare of the people of the community" or "for the purposes of bringing about civic betterments and social improvements."[5] This is very fact specific, but for illustrative purposes, if the client desires to engage in the same activities as a private foundation it would likewise qualify as a 501(c)(4). Two things that clearly do not qualify as "social welfare" as stated by the Regulations are: (i) direct or indirect participation or intervention in political campaigns, or (ii) operation as a social club for the benefit, pleasure, or recreation of its members.[6]

How to Apply for Tax Exempt Status as a 501(c)(4)?

Estate planners should be familiar with the requirement of a private foundation to file a Form 1023 within twenty-seven (27) months from the date of its formation in order to obtain tax-exempt status from inception.[7] This is all conditioned on the IRS'[8] approval of such tax-exempt status. The steps to operate as a 501(c)(4) are relatively simple in comparison, as the organization is solely required to notify the IRS of its intent to operate as a 501(c)(4).[9] To comply with this requirement, a Form 8976 must be filed electronically within sixty (60) days of the organization's formation. The IRS will return an acknowledgement that it received the Form 8976.

A 501(c)(4) can request formal recognition of status through the optional filing of a Form 1024-A. The benefits of filing a Form 1024-A would include public recognition of 501(c)(4) status and potential exemption from state taxes. Florida, for instance, would require a determination letter if applying for exemption from sales and use taxes.

What is the Deductibility of a Transfer to a 501(c)(4) for Income Tax, Gift Tax, and Estate Tax Purposes?

Unlike a private foundation, contributions to a 501(c)(4) cannot be deducted for federal income tax purposes.[10] This is often an important consideration for an estate planner when determining the charitable structure that would best serve a client's charitable goals during his or her lifetime. For transfers at death, it is commonly known that a federal estate tax deduction is available for contributions to private foundations; however, no such deduction is available for contributions to a 501(c)(4).[11] Notwithstanding the above, a contribution to a 501(c)(4) is not treated as a gift for federal gift tax purposes, which was intended to eliminate any potential ambiguity in the gift tax realm.[12] For the reasons stated above, if a 501(c)(4) is the desired charitable structure for a client, it is advised that any transfers to such 501(c)(4) be done prior to a client's death.

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What Level of Public Disclosure is a 501(c)(4) Subjected To?

Client privacy is an important aspect when it comes to private foundations. A private foundation, generally, is subject to high levels of public disclosure, which includes public access to its required annual Form 990 or Form 990-EZ and its application for exempt status. For a 501(c)(4) is, however, the required notice of intent to operate through the filing of a Form 8976 is not available to the public. A 501(c)(4) is, however, still required to file an annual Form 990 or Form 990-EZ, which is available for public inspection. In addition to Form 990, the 501(c)(4) will also need to keep its Form 1024-A available for public inspection if it filed such Form 1024-A.

Important to note for client privacy purposes, a 501(c)(4) is not required to disclose the names of its donors.[13] However, depending on what state the 501(c)(4) operates, such information may be requested by such state, but public disclosure of donor information is still a grey area which is arguably invalid on federal or state constitutional grounds.[14] Florida does not currently expand any required federal disclosures, which may mean there is a desire by the Florida legislature to further protect donor privacy in Florida.

What Taxes Apply to a 501(c)(4)?

One of the main concerns estate planners will discuss with their clients prior to forming a private foundation is the imposition of excise taxes under Code Sections 4941 through 4945. As a reminder for those familiar, the acts that trigger an excise tax include: (i) taxes on the private foundation's net investment income,[15] (ii) prohibitions on self-dealing transactions,[16] (iii) failure to make the required five percent (5%) qualifying distributions to charities,[17] (iv) prohibition on excess business holdings,[18] (v) prohibition on holding jeopardizing investments,[19] and (vi) taxable expenditures,[20] none of which apply to a 501(c)(4).[21]

Despite the non-application of the above excise taxes, a 501(c)(4) is not completely exempt from all forms of taxation. Importantly, the unrelated business income tax still applies to a 501(c)(4), and therefore, a 501(c)(4) should be mindful of whether an income raising activity would trigger the application of these rules.[22] Furthermore, taxes on excess benefit transactions where the 501(c)(4) provides an economic benefit, either directly or indirectly, to any disqualified person will apply if the value of the economic benefit exceeds the value of the consideration received.[23]

The last tax that may apply to a 501(c)(4) is situational and dependent on whether political expenditures are made by the 501(c)(4), namely the tax imposed under Code Section 527(f). If Code Section 527(f) applies to the 501(c)(4), such tax will generally be calculated based on the lesser of: (i) the organization's net investment income for the taxable year, or (ii) the aggregate amount expended for an "exempt function." An "exempt function" generally includes influencing or attempting to influence the selection, nomination, election, or appointment of an individual into a political office or political organization.[24] The determination of whether something is

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expended for an "exempt function" is extremely fact dependent and any political expenditures should be carefully reviewed to determine whether a potential expenditure falls within the purview of this tax.

Is Compensation Allowed to a Related Party?

A common benefit enjoyed by private foundations is the ability to pay reasonable compensation to employees and board members, even if they are related to a substantial contributor. If the private foundation pays compensation that is deemed "unreasonable" to certain related parties the consequences are severe.[25]

In the case of a 501(c)(4), compensation is permitted to a related party, however, as mentioned earlier in this article, the excess benefit transaction rules still apply to a 501(c)(4), and thus, a determination of "reasonable compensation" by the 501(c)(4) when making payments to a related party is still needed.[26] A situation that may commonly arise for an estate planner is where a client creates a 501(c)(4) with his or her children or grandchildren on the board of directors and such child or grandchild draws a salary. It is, therefore, still recommended that the same steps that would be undertaken to show reasonable compensation for a private foundation be followed when determining compensation by a 501(c)(4) to a related party to avoid a tax on potential excess benefit transactions.

How Much Lobbying Can a 501(c)(4) Engage In?

It is widely known that a private foundation is prohibited from making direct or indirect political expenditures. An estate planner may have a client who desires to make political expenditures to further his or her charitable goals. This can be accomplished with a 501(c)(4) where lobbying is permitted in an unlimited amount, provided such lobbying is directly related to the exempt purpose, and so long as such activity is not for private gain.[27]

Political campaign activities are more restricted if such political campaigning prevents the organization from being "primarily engaged" in social welfare work.[28] One of the most high profile instances of a 501(c)(4) engaging in political campaigning relates to Citizens United's political activities and the subsequent approval by the Supreme Court of such activities, which resulted in a more widespread use of 501(c)(4)s being established for political purposes.[29] While a 501(c)(4) can engage in such activities in order to determine the form and method of political expenditures, federal and state election laws should be carefully reviewed.

There is no safe harbor or test to determine how much political campaigning disqualifies a 501(c)(4). In theory, forty nine percent (49%) is as far as an organization may go; however, much like Icarus, a 501(c)(4) may get burned. Forty percent (40%) is generally floated around as a safer recommendation.

Can a 501(c)(4) Be Used To Remove Assets From A Client's Taxable Estate?

While a transfer to a 501(c)(4) is not treated as a taxable gift, assets that are directed from a client to a 501(c)(4) from his or her estate will receive no offsetting estate tax deduction. Therefore, attempting to transfer assets to a 501(c)(4) at a client's death would be inefficient from a tax perspective. Utilizing the tax-free transfer during a client's life, it is possible to remove assets from a client's taxable estate prior to such client's death. An estate planner should be cautious in how the transfer and the 501(c)(4) are structured as there are several ways in which the IRS could attempt to claw assets from a 501(c)(4) into a client's taxable estate. As will be discussed below, the most problematic provisions an estate planner should be concerned over are the usual suspects, which include Code Sections 2035 (transfers within three years of death), 2036 (retained interests) and 2038 (revocable transfers).

A major inclusion risk that should be considered is whether the client has a retained interest in the assets held by the 501(c)(4) under Code Section 2036. The IRS has held previously that assets transferred to a private foundation could be includible in a taxpayer's gross estate because of a retained right as a director, or officer with a similar position of authority, who can direct the disposition of the private foundation's funds for charitable purposes.[30] While in the private foundation context there would be an offsetting charitable deduction, there is no such deduction for transfers to a 501(c)(4). A similar approach could likely be utilized through Code Section 2038. Therefore, estate planners should exercise caution when planning the organizational structure of the 501(c)(4) and should consider potential avenues of inclusion to prevent the potentially disastrous result of inadvertently increasing a client's taxable estate without any offsetting deduction. Ideally, an independent board of directors or trustee would provide oversight and control over the organizational structure or ability to direct assets to remove potential inclusion issues under Code Sections 2036 or 2038.

Assuming the concerns regarding Code Sections 2036 and 2038 are addressed, estate planners are all too familiar with the risk of inclusion for assets transferred or strings released within three years of death. This includes transfers or strings released over assets that were otherwise includable under Code Sections 2036, 2037, 2038, or 2042.[31] Notably, if the client's position as director or trustee of the 501(c)(4) would have caused inclusion, a resignation of such position would result in the client needing to survive three years past the date of such relinquishment. Therefore, it is important for the estate planner drafting the 501(c)(4) or transferring assets to an established 501(c)(4) to keep potential inclusion issues in mind, especially in light of the disallowance of an estate tax deduction.

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Can An Operating Business Be Transferred to A 501(c)(4)?

Unlike a private foundation, a 501(c)(4) can hold an operating business as an underlying asset without any risk of subjecting it to a tax on excess business holdings.[32] It is important to note that the 501(c)(4) should be careful with its business holdings to prevent inuring to the benefit of a private person. That being the case, it may be an efficient structure to utilize the earnings of the underlying operating entity to potentially generate tax-free income (subject to the rules relating to unrelated trade or business income that may apply) which further benefits a client's charitable goals. Further, the underlying business can later be sold without incurring tax, providing an efficient exit strategy for a client. It is important to note that a transfer of an operating business into a 501(c)(4) should not be done in anticipation of a sale of such business to prevent application of the assignment of income doctrine.

Can a Private Foundation Be Converted to a 501(c)(4)?

Assuming a client already has a private foundation established they may inquire as to whether his or her existing private foundation can be converted into a 501(c)(4). A private foundation is unable to convert to a 501(c)(4) without first dissolving.[33] Furthermore, a dissolution transfer to a 501(c)(4) will trigger a tax to the private foundation making such dissolution distribution.[34] Therefore, if a client has a private foundation currently and is contemplating a 501(c)(4) he or she would need to consider establishing a new organization that would qualify as a 501(c)(4) and contributing additional assets to such organization from his or her personal accounts.

Conclusion

In certain instances, a 501(c)(4) is a tool that may provide an opportunity to facilitate a client's charitable goals. Likely, this structure is the most appealing to high-net-worth clients where an income tax deduction may not necessarily be crucial, or to clients who have operating businesses they would like to divest from and utilize the earnings of such business to further their charitable goals. Below is a chart summarizing several of the important distinctions between a private foundation and a 501(c)(4).[35]

Consideration	Private Foundation	501(c)(4)
How to Apply for Status	Form 1023	Form 8976 (Form 1024-A is optional)
Public Disclosure	Form 1023 Form 990/Form 990-EZ	Form 990/Form 990-EZ Form 1024-A (if filed)
Self-Dealing Rule	Applies	Does Not apply
Net Investment Income Tax	Applies	Does Not Apply
Required Distribution Rule	Applies	Does Not Apply
Jeopardizing Investment Rule	Applies	Does Not Apply
Taxable Expenditure Rule	Applies	Does Not Apply
Unrelated Business Income Tax	Applies	Applies
Excess Benefit Transaction Tax	Applies	Applies
Code Section 527(f) Tax	Does Not Apply	Can Apply (depending on political expenditures)
Compensation to Related Party	Permitted (subject to self-dealing rules and excess benefit rules)	Permitted (subject to excess benefit rules)
Lobbying	Not Permitted	Permitted (unlimited amount if linked to exempt function)
Political Expenditures	Not Permitted	Permitted (must not be the primary activities of the 501(c)(4))
Income Tax Deduction	Yes (subject to certain limitations)	No
Estate Tax Deduction	Yes	No
Gift Tax Deduction	Yes	Excluded from Gift Tax
Holding an Operating Business	Not Permitted (subject to extremely limited Newman's Own exception)	Permitted


J. SPINA-JENNINGS

Jeffrey Spina-Jennings *is an attorney with Gould Cooksey Fennell, PLLC, located in Vero Beach, Florida. He is a member of the firm's Estate Planning and Tax Group. He focuses his practice on charitable planning matters, including the formation of private foundations and private operating foundations, assisting public charities with the formation and administration of supporting organizations structured to facilitate the operations of such public charities, as well as all other aspects of tax-exempt entity tax compliance and governance matters. He obtained his Master of Law degree in Taxation and his Juris Doctor degree from the University of Florida Levin College of Law.*

Endnotes

1 All references to "private foundation" have the same meaning as defined in IRC Section 509.

2 For purposes of this Article references to the "Code" refers to the Internal Revenue Code of 1986 and all references to the "Regulations" refers to regulations promulgated by the United States Treasury interpreting the Code.

3 For purposes of this Article "organization" refers to any organizational structure, including a trust or corporation which can qualify as a tax exempt entity under IRC Section 501(c)(4).

4 IRC Section 501(c)(4).

5 Treas. Reg. Section 1.501(c)(4)-1(a)(2)(i) (2023).

6 Treas. Reg. Section 1.501(c)(4)-1(a)(2)(ii) (2023).

7 IRC Section 508 (2023).

8 All references to "IRS" refer to the Internal Revenue Service.

9 IRC Section 506 (2023).

10 IRC Section 170 (2023).

11 IRC Section 2055(a)(2) (2023).

12 IRC Section 2501(a)(6) (2023).

13 *See*, Treas. Reg. Section 1.6033-2(a)(2)(ii)(F) (Disclosure of donor information for contributions greater than $5,000 is generally only required of a 501(c)(3)).

14 *See Ams. for Prosperity Found. v. Bonta*, 141 S. Ct. 2373 (2021) (overturning a Ninth Circuit decision and holding California's disclosure requirements regarding donors was facially invalid on First Amendment grounds).

15 IRC Section 4940 (2023).

16 IRC Section 4941 (2023).

17 IRC Section 4942 (2023).

18 IRC Section 4943 (2023).

19 IRC Section 4944 (2023).

20 IRC Section 4945 (2023).

21 All taxes mentioned in endnotes 16 through 20 only apply to "private foundations."

22 IRC Section 511 (2023).

23 IRC Section 4958 (2023).

24 IRC Section 527(e)(2) (2023).

25 *See* IRC Section 4941 and the accompanying regulations.

26 *See* IRC Section 4958 and the accompanying regulations.

27 *See* Treas. Reg. Section 1.501(c)(4)-1(a)(2)(ii), Rev. Rul. 67-293, 1967-2 C.B. 185, and Rev. Rul. 71-530, 1971-2 C.B. 237.

28 Treas. Reg. Section 1.501(c)(4)-1(a)(2)(ii) (2023).

29 *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010).

30 Rev. Rul. 72-552, 1972-2 C.B. 215; IRC Section 2036(a)(2) (2023).

31 IRC Section 2035(b) (2023).

32 Generally, IRC Section 4943 prohibits a private foundation from holding an operating business. IRC Section 4943(g) known as the "Newman's Own" exception does allow for a private foundation to hold a one hundred percent (100%) interest in an operating business provided the donor and all related parties completely relinquish all interests over such operating business. The Newman's Own exception is very restrictive and not commonly utilized by private foundations.

33 *See Generally*, Rev. Proc. 2017-5 Setting Procedures for Certain Determination Letters on Exempt Status Under Section 501(c)(3).

34 IRC Section 507 (2023).

35 The foregoing materials are for solely educational purposes and do not constitute U.S. tax or other legal advice. The laws discussed herein are complex, and an appropriate course of action is dependent upon all applicable laws, rules and regulations as well as the pertinent facts and circumstances. Any person interested in forming a 501(c)(4) or private foundation, or making charitable gifts to a 501(c)(4) or private foundation, should consult with his or her professional advisors.

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Florida Bar Ethics Opinion OKs Lawyers' Use Of Generative AI, But With Cautions

By Paul Roman, Esq., roman | northwood pllc, Boca Raton, Florida

Generative artificial intelligence ("AI") is a type of technology that can produce original content such as text, images, music, or code based on data inputs and prompts. Generative AI has been advancing rapidly in recent years, with programs such as ChatGPT-3 and Copilot demonstrating impressive capabilities of generating realistic and coherent texts on various topics.

But what are the ethical implications of using generative AI in the practice of law? Can lawyers rely on these programs to assist them with legal research, drafting, communication, or marketing? How can lawyers ensure that they are fulfilling their professional obligations of competence, diligence, confidentiality, honesty, and loyalty when using generative AI?

These are some of the questions that The Florida Bar addressed in its latest ethics opinion, Opinion 24-1[1], issued on January 19, 2024. The opinion, which is advisory and not binding, provides guidance to Florida Bar members regarding some of the ethical issues and challenges that may arise from lawyers' use of generative AI in the practice of law.

The Opinion's Main Points

The opinion begins by acknowledging that generative AI is a new and evolving technology that may offer significant benefits to lawyers and clients, such as enhancing efficiency, accuracy, creativity, and accessibility of legal services. However, the opinion also cautions that generative AI poses potential risks and challenges to lawyers' ethical obligations, such as protecting the confidentiality of client information, providing accurate and competent services, avoiding improper billing practices, and complying with applicable restrictions on lawyer advertising.

The opinion then discusses some of the specific ethical rules and principles that lawyers should consider when using generative AI, and offers some practical tips and best practices to help lawyers navigate the ethical use of generative AI. The opinion covers the following topics:

Confidentiality of Client Information: The opinion emphasizes that lawyers have a duty to protect the confidentiality of client information when using generative AI, and that lawyers should research the program's policies on data retention, data sharing, and self-learning before using it. The opinion also advises lawyers to obtain informed

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consent from clients before using generative AI that may involve disclosing client information to third parties, and to use encryption, passwords, and other security measures to safeguard client data. The opinion further suggests that lawyers should develop policies and practices to monitor and audit the use of generative AI to ensure that client information is not compromised or misused.

Competence and Diligence: The opinion stresses that lawyers have a duty to provide competent and diligent representation to their clients, and that lawyers should not delegate their professional judgment or responsibility to generative AI. The opinion also warns that lawyers should not rely solely on generative AI to perform legal tasks, but should verify and supervise the program's output to ensure that it is accurate, complete, and consistent with the lawyer's ethical obligations. The opinion additionally recommends that lawyers should educate themselves about the risks and benefits of generative AI, and maintain technological competence to evaluate and use new technologies appropriately.

Billing Practices: The opinion reminds lawyers that they have a duty to charge reasonable fees for their services, and that lawyers should not engage in improper billing practices when using generative AI. The opinion also clarifies that lawyers should not double bill for the same work performed by generative AI and the lawyer, and that lawyers should disclose to clients the use and cost of generative AI in their fee agreements and invoices. The opinion further advises that lawyers should exercise professional judgment and discretion when determining the appropriate fee for the use of generative AI, and should consider factors such as the value, complexity, and novelty of the work, the time and labor involved, and the results obtained.

Advertising and Communication: The opinion notes that lawyers have a duty to comply with the rules and regulations governing lawyer advertising and communication, and that lawyers should not make false or misleading statements about their use of generative AI. The opinion also specifies that generative AI chatbots that communicate with clients, or third parties must comply with the restrictions on lawyer advertising, and must include a disclaimer indicating that the chatbot is an AI program and not a lawyer or employee of the law firm. The opinion further cautions that lawyers should not use generative AI to solicit or contact prospective clients in violation of the rules on direct contact and solicitation.

The Opinion's Significance and Impact

The opinion is significant because it is one of the first and most comprehensive ethics opinions in the country to address lawyers' use of generative AI in the practice of law. The opinion is also timely because it responds to the growing interest and demand for generative AI among lawyers and clients, especially in the wake of the release of ChatGPT-3 and Copilot in late 2022.

The opinion is likely to have a positive impact on the legal profession and the public, as it provides valuable guidance and clarity to lawyers who want to use generative AI ethically and responsibly. The opinion also encourages lawyers to embrace innovation and technology, while reminding them of their core ethical values and obligations. The opinion may also serve as a model and a reference for other jurisdictions and organizations that are considering issuing similar ethics opinions or regulations on generative AI.

The opinion, however, is not without limitations and challenges. The opinion is not binding, and does not address all the possible ethical scenarios and questions that may arise from lawyers' use of generative AI. The opinion is also based on the current state of generative AI technology, and may become outdated or irrelevant as generative AI evolves and improves. The opinion also acknowledges that generative AI is a complex and dynamic technology that may pose unforeseen and unintended consequences that are beyond the control or anticipation of lawyers.

Therefore, the opinion concludes by urging lawyers to exercise caution and care when using generative AI, and to continue to develop competency in the use of new technologies, such as AI, and the risks and benefits inherent in those technologies. The opinion also invites lawyers to seek further guidance from The Florida Bar or the Committee on Professional Ethics if they have any questions or concerns about the ethical use of generative AI in the practice of law.

Fooled ya! The foregoing summary of Opinion 24-1 was generated by a chatbot, in response to the query, "Write a 1200-word article for a legal magazine that summarizes Florida Bar Ethics Opinion 24-1."[1] Still think this is a topic you can ignore? Stay tuned for further treatment of the ethical issues and practical uses of generative AI in future issues, *ActionLine* — written by real lawyers! In the meantime, no summary of Opinion 24-1 can substitute for actually reading the opinion itself.


P. ROMAN

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Endnotes

1 *Sit usor caveat*: In response to the same query, a different chatbot produced an article which dealt exclusively with participation in non-lawyer referral services, a topic not even mentioned in Opinion 24-1. See "Competence and Diligence" above.

The Practical Uses Of Nonjudicial Settlement Agreements In The Context Of A Trustee's Duty To Diversify And Duty Of Impartiality

By David E. Wolff, Esq., Wolff Law, P.A., Hallandale Beach, Florida

As early as 1957, a Harvard Law Journal article acknowledged a "widely recognized" need for periodically determining and protecting against trustee liability.[1]

Beginning in the late 1980s, work on the Restatement Third began, which ultimately permitted trustees to diminish their liability by indemnification agreement."[2] In 1992, ACTEC assembled a "Trust Task Force" to draft a "turnkey" trust statute that could be used in other states that addressed nonjudicial dispute resolution agreements.[3] Drafting of the Uniform Trust Code (UTC) began at the national level shortly thereafter in 1994.[4] The public policy consideration underlying the implementation of the UTC was that it "strives to keep administration of trusts outside of the courts."[5]

Since the 1970s, corporate fiduciaries have utilized and relied on Waiver, Release, and Indemnification Agreements (a form of nonjudicial settlement agreement (NJSA)) as standard custom and practice in the administration of private trusts. NJSAs are valid, binding, and reasonably relied upon by national banks engaged in fiduciary services in addressing potential liability associated with discretionary trustee decisions, including distributions.

The UTC was the first effort by the National Conference of Commissioners on Uniform State Laws to provide the states with a comprehensive model for codifying their law on trusts. The drafting committee was assisted by numerous advisors and groups, including the American Bar Association and its Section of Real Property Probate and Trust Law (three advisors), the American College of Trust and Estate Counsel ("ACTEC"), the American Bankers Association, and the California and Colorado State Bars. To gather as much input as possible, the drafting of the UTC was deliberately not placed on the fast track but spanned a period of six (6) years. The final text of the UTC was approved by the Commissioners in August 2000, and by the American Bar Association's House of Delegates at its mid-year meeting in February 2001. In summary, from 2002 to present, thirty-six (36) states have enacted the UTC, including Florida in 2006.

The UTC recognizes that a court may intervene in the administration of a trust but encourages resolution of disputes by nonjudicial means.[6] Generally, fiduciaries are normally granted broad latitude in rendering discretionary decisions, and courts typically only review such discretionary decisions for an abuse of discretion.[7] According to the UTC, a NJSA can contain *any term or condition* that a court properly could approve.[8] This standard is less stringent than one requiring that a NJSA contain terms and conditions that the court would have approved, but it still opens the possibility that the parties may achieve more nonjudicially than had they gone to court.[9]

UTC Section 111 broadly enables certain "interested persons"[10] to enter into a binding NJSA with respect to "any matter" involving a trust, provided the NJSA doesn't violate a material purpose of the trust.[11] UTC Section 111 includes a *non-exclusive* list of six (6) matters that an NJSA can address. Of importance is item 6, "limit trustee liability for an action relating to the trust." To understand the theory behind a NJSA, its helpful to first look at the very nature of trusts and trustees. A trust is a fiduciary relationship that involves the transfer of legal title to property to a trustee that possesses powers and fiduciary duties and performs them in accordance with the

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governing instrument in the best interest of the beneficiaries.[12] A NJSA offers a complete set of tools to effectively bifurcate specific areas of trust administration.

Practical Uses of NJSAs

A NJSA can be used to settle bona fide disputes or to accomplish more strategic objectives. The following are several examples of strategic applications of NJSAs without court intervention:

- A NJSA can eliminate significant impediments, such as the trustee's concern over liability when exercising discretion without changing, altering, or modifying the trust agreement.
- A NJSA can be used to limit liability when a trust holds a concentrated position in a single asset, such as stock, closely-held business interests, or real estate. The NJSA can enable a family or trustee to continue to hold an asset and eliminate a conflict with traditional duties, such as the duty to diversify.
- A NJSA can expressly authorize and direct a trustee to retain or dispose of a particular asset.
- A NJSA can completely restrict the trustee from exercising any powers related to the disposition, exchange, change in character, lending, borrowing, pledging, mortgaging, leasing, granting options, insuring, abandoning or in any other way relating to the investment of management of the asset for a period of time or until some triggering event.
- A NJSA may further specify that the trustee shall have no liability for any action or omission in connection with a specific asset to the fullest extent permitted under applicable law.
- A NJSA can be used to authorize a trustee to hold a portion of a trust fund in a limited liability company for tax purposes, to direct a trustee to open or fund a discretionary investment or account, to delegate a discretionary or ministerial function.
- A NJSA may also eliminate some tax concerns associated with trust modification or with the creation of a new trust.

Currently, thirty-one (31) states and the District of Columbia have adopted a NJSA statute. In sum, NJSAs are "faster, less expensive, and more predictable than obtaining judicial approval for discretionary actions or modifications of the governing instrument."[13]

Florida's NJSA Statute

In a 2023 Special Session, the Florida Legislature passed Florida NJSA, which includes six (6) specifically enumerated matters that may be resolved by NJSA: (a) the interpretation or construction of the terms of the trust; (b) the approval of a trustee's report or accounting; (c) the direction to a trustee to refrain from performing a particular act or the grant to a trustee of any necessary or desirable power; (d) the resignation or appointment of a trustee and the determination of a trustee's compensation; (e) the transfer of a trust's principal place of administration; and (f) the liability of a trustee for an action relating to the trust.[14]

Consistent with a public policy of keeping administration outside of the courts, corporate fiduciaries have long used NJSAs as a means of seeking approval for trustee discretionary decision making. NJSAs can also enable a trustee to continue to hold an asset – such as a family business or unique tangible property – eliminating the traditional duty to diversify.[15] Florida law has now caught up with the practices that corporate fiduciaries were already utilizing in administering trusts.

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The Duty of Impartiality and NJSAs

Fiduciaries must choose among investments objectives that differ in their risk and return characteristics, with optimal investment risk and return choices that afford consideration to the income beneficiary's interest in maximizing income over the beneficiary expected time horizon and the remainder beneficiary's respective interest in principal preservation. First, the fiduciary selects the investment objective based on the terms and purpose of the trust, then determines the risk profile based on the purpose of the trust and the circumstances and time horizon of the beneficiaries. Next, the fiduciary formulates an asset allocation that meets the investment objective and risk tolerance and then implements that asset allocation (*e.g.,* selection of securities in equities, fixed income, alternative investments, and cash).

A trustee who directs third parties to select investments and manage the trust portfolio is charged with supervising the investments in a manner that does not favor one beneficiary at the expense of others. The requirement that trustees discharge their responsibilities with impartial regard for the interests of all trust beneficiaries is one of the fundamental requirements of trustees imposed by the common law and enshrined in state statutes. A trustee must be impartial when dealing with those with conflicting equitable interests.[16] A trustee cannot favor one beneficiary over another, unless authorized to do so by the governing instrument.[17] Even when so authorized, the trustee's discretionary acts favoring one beneficiary over another must be in furtherance of the intentions of the settlor, not in furtherance of the trustee's own biases and predilections.[18] The trustee runs a major risk of breaching the duty of impartiality in the context of the competing interests of income beneficiaries and remainder beneficiaries.[19]

Under an Equitable Adjustment ("EA") method, the trustee has the ability to reallocate the portfolio's returns if the trustee

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believes that the initial allocation improperly favors one class of beneficiary over another.[20] This may be accomplished utilizing a NJSA.[21] For instance, if the trustee's investment decisions yield an inappropriately low amount of income for the income beneficiary, the trustee could distribute a portion of the principal to the income beneficiary to compensate for the shortfall.[22]

Florida's Unitrust Statute

Alternatively, a trustee could fulfill the fiduciary duty of impartiality by utilizing a NJSA approving the conversion of an income trust to a total return unitrust.[23] A unitrust is a trust that instead of paying all of its income to the income beneficiary, pays a percentage of its net asset value annually. Under the Unitrust Conversion ("UC") allocation approach, all investment earnings for an accounting period, whether they be in the form of dividends, interest, capital appreciation, etc., are assigned to principal and are then partially distributed as income for that period to income beneficiaries in accordance with a set formula.[24] The formula for determining amounts to be distributed as income to income beneficiaries could be either a fixed percentage of the principal, or a variable rate like the inflation rate plus a certain percent. The UC method represents a slightly more structured and objective apportionment procedure as allocation to beneficiaries are based upon a fixed percentage of the total trust assets.[25] The UC method of allocation also provides much greater limits on trustee allocation discretion as the trustee bound by a specific allocation formula, and thereby limits the potential for the exercise of erroneous, imprudent, or negligent judgment.[26]

Conclusion

As the Federal Reserve has increased interest rates, trustees, under modern portfolio theory, must reevaluate the needs of income beneficiaries and diversify between fixed income securities and equities. A NJSA can provide a cost-effective means of accomplishing this goal. NJSAs are valid, binding, and reasonably relied upon by corporate and individual trustees in addressing and releasing potential liability associated with discretionary trustee decisions. NJSAs can serve as a practical and effective means of ratifying reallocations and conversions of trust portfolios consistent with the fiduciary duty of impartiality.


D. WOLFF

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Endnotes

1 Westfall, D. (1957). Nonjudicial Settlement of Trustees' Accounts. Harvard Law Review, 71(1), 40–76.

2 Restatement (Third) of Trusts, § 38 Comment on Subsection (1) f.

3 Bruce P. Flynn, Richard A. Klobucher, Douglas C. Lawrence, and Kenneth L. Schubert, Jr., *Nonjudicial Dispute Resolution Agreements in Trusts and Estates – The Washington Experience and Proposed Act*, 20 ACTEC Notes 138 (1994-1995).

4 David English (2002). *The Kansas Uniform Trust Code*. 51 U. Kan. L. Rev. 311 (2002). After approximately seven (7) years of work in preparing the draft, the Uniform Law Commissioners approved the UTC on August 3, 2000.

5 David M. English, *The Uniform Trust Code (2000): Significant Provisions and Policy Issues*, 67 Mo. L. Rev. 143, page 158 (2002).

6 David M. English, *The Uniform Trust Code (2000): Significant Provisions and Policy Issues*, 67 Mo. L. Rev. 143 (2002); The Proposed Pennsylvania Uniform Trust Act, Report of the Advisory Committee on Decedents' Estates Laws, JOINT STATE GOVERNMENT COMMISSION, General Assembly of the Commonwealth of Pennsylvania, Comment to Section 111 (Nonjudicial Settlement Agreements), page 214 (2003).

7 *See* Section 187 of the Restatement of Trusts listing the various reasons a trustee can be held to have abused its discretion.

8 UTC § 111(c).

9 David M. English, *The Uniform Trust Code (2000): Significant Provisions and Policy Issues*, 67 Mo. L. Rev. 143 (2002), page 161.

10 Because of the great variety of matters to which a nonjudicial settlement may be applied, this section does not attempt to precisely define the "interested persons" whose consent is required to obtain a binding settlement as provided in subsection (a).

11 The UTC does not define what constitutes a "material purpose" of a trust.

12 *See* Restatement (Second) of Trusts (Restatement Second), Section 2.

13 Todd A. Flubacher & Kenneth F. Hunt, The Non-Judicial Settlement Agreement Wrapper, Trust & Estates Journal, December 2013, page 4.

14 Fla. Stat. § 736.0111 (4) (a)-(f).

15 "It is a well-established rule in the law of trusts that a beneficiary may, by his [or her] consent, acquiescence, or ratification, be estopped to complain of a breach of trust by the trustee." P.M. Dwyer, *Annotation, Effect of Beneficiary's Consent to, Acquiescence in, or Ratification of, Improper Investments or Loans (Including Failure to Invest) by Trustee or Other Fiduciary*, 128 A.L.R. 4, pt. II(a) (1940) (citing George G. Bogert et al., The Law of Trusts and Trustees §§ 941-944).

16 4 Scott & Ascher § 20.1 (Impartiality Between Successive Beneficiaries); 2A Scott on Trusts §183, Restatement (Third) of Trusts §79 cmt. b.

17 3 Scott & Ascher § 17.15; 2A Scott on Trusts Section 183.

18 Restatement (Third) of Trusts § 79 cmt. b.

19 4 Scott & Ascher § 20.1 (Impartiality Between Successive Beneficiaries).

20 John H. Langbein, *The Uniform Prudent Investor Act and the Future of Trust Investing,* 81 IOWA L. REV. 669 (1996).

21 Fla. Stat. § 736.0111(4)(c) (2023)

22 John H. Langbein, *The Uniform Prudent Investor Act and the Future of Trust Investing,* 81 IOWA L. REV. 669 (1996).

23 Fla. Stat. § 738.1041 (2023)

24 John H. Langbein, *The Uniform Prudent Investor Act and the Future of Trust Investing,* 81 IOWA L. REV. 669 (1996).

25 Alyssa A. DiRusso & Kathleen M. Sablone, *Statutory Techniques for Balancing Financial Interests of Trust Beneficiaries,* 39 U.S.F. L. REV. 261, 282 (2005).

26 *See* Lyman W. Welch, *Brave New World of Total Return Laws*, 141 TR. & EST. 24, 27-28 (June 2002).

Understanding Senate Bill 264 And The New Rules For Land Ownership By Foreign Principals

By Michael Rothman, Esq., The Fund, Orlando, Florida

In the past year, legislation restricting Chinese and other foreign investment in U.S. property has been introduced in all 50 states, with 37 enacting bills, including Senate Bill 264 filed in Florida.[1] Effective July 1, 2023, and enacted as Fla. Stat., Part III, §§ 692.201-205, the law targets those defined as "foreign principals" domiciled in seven "foreign countries of concern" from acquiring agricultural lands and real property within certain distances of military installations and critical infrastructure facilities in Florida. While an exception was written into the law allowing some foreign principals to purchase one residential property, even that carve-out comes with qualifiers. For Florida real estate practitioners, the law presents significant challenges, including how to counsel clients who are foreign principals about the new rules imposed on them.

I. "Foreign Principals" Defined.

Senate Bill 264 restricts the acquisition of certain Florida real property by foreign principals. Foreign principals are those who are not citizens or lawful permanent residents of the United States and are *domiciled* in these foreign countries of concern: the People's Republic of China, the Russian Federation, the Islamic Republic of Iran, the Democratic People's Republic of Korea, the Republic of Cuba, the Venezuelan Regime of Nicolás Maduro, or the Syrian Arab Republic, including any agency or other entity of significant control of such foreign country of concern.[2] Foreign principals are defined to include the government, or any official of the government, or a political party or member of any political party of a foreign country of concern, or a partnership, association, corporation, organization, or other combination of persons organized under the laws of, or having its principal place of business in, a foreign country of concern, or a subsidiary of such entity.[3] Foreign principals are also defined as any one or more of the persons or entities above-mentioned having a *controlling interest* in any legal entity formed for the purpose of owning real property in Florida.[4] The new law emphasizes that it is the foreign principal's *place of domicile*, not citizenship, that controls. For example, a British citizen domiciled in Hong Kong is subject to the law, whereas a Russian citizen domiciled in Canada is not.

The Florida Department of Agriculture and Consumer Services (FDACS) is statutorily charged with adopting rules implementing the laws dealing specifically with agricultural lands and has issued a set of proposed rules, which were not in effect as of the end of 2023.[5] The Florida Department of Commerce (FDOC) is charged with adopting rules implementing the laws involving all other Florida real property and it issued final rules with an effective date of January 4, 2024.[6] In their proposed and final rulemaking, both agencies have made clear that individuals approved by the federal government to participate in the EB-5 Program are excluded from the definition of foreign principal.[7]

A. What is a "controlling Interest in real property"?

The term "controlling interest" is not defined in Senate Bill 264, which otherwise defines "foreign principals," "foreign country of

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concern" and other terms. However, Section 1 of Senate Bill 264, enacted as Fla. Stat. § 287.138 (2023), and affecting governmental entities contracting with entities of foreign countries of concern, defines "controlling interest" as possession of the power to direct the management or policies of a company. Persons and entities having the right to vote 25 percent or more of the voting interests of the company or who are entitled to 25 percent or more of its profits are presumed to possess a controlling interest. FDOC subsequently adopted this definition in its final rule and FDACS proposes the same.[8]

The rulemaking agencies have also offered similar but not identical definitions of what it means to have a "controlling interest in real property" and a "controlling interest in agricultural property." Both consider the foreign principal's right to develop or improve the realty and to attach fixed or immovable structures on it, whether the rights are exercised or shared concurrently with any other person, and regardless of whether the underlying real property is subject to an easement or other encumbrance. Notably, FDOC excludes interests in leases from its definition.[9]

B. Are those domiciled in Taiwan deemed foreign principals?

Including China as a country of foreign concern raises questions relating to real property purchasers domiciled in Taiwan. The U.S. government continues to adhere to the "One China" policy, acknowledging the Chinese position that there is but one China and Taiwan is part of China. Yet, Taiwan is considered a separate country for purposes of U.S. immigration laws.[10] Until future judicial or legislative action resolves the question, practitioners are left with no clear guidance on the status of buyers domiciled in Taiwan.

C. Are all persons domiciled in Venezuela considered foreign principals?

Rather than being plainly identified as "Venezuela," Senate Bill 264 identifies "the Venezuelan Regime of Nicolás Maduro" as a foreign country of concern, raising doubt as to what was intended thereby and whether the new law covers all persons and entities domiciled in Venezuela. No clear guidance is afforded in Senate Bill 264. It is worth noting, however, that other federal regulations dealing with the treatment of foreign adversaries take pains to differentiate between the Maduro government and its Venezuelan people.[11]

II. Affected Lands.

Senate Bill 264 prohibits a foreign principal from having a direct or indirect controlling interest in agricultural land or acquiring by purchase, grant, devise, or descent any such interest in agricultural land, except a *de minimus indirect interest*.[12] Subject to limited exceptions, a foreign principal may also not directly or indirectly own, or have a controlling interest in, or acquire by purchase, grant, devise, or descent, any interest, except a de minimus indirect interest, in real property on or within 10 miles of any *military installation* or *critical infrastructure facility*, as the law defines those terms.[13] If the real property is not agricultural land and lies outside the territorial limitation, a foreign principal – other than one associated with China – is not restricted from acquiring it. Foreign principals associated with China are singled out in the law. They are expressly precluded from purchasing or acquiring any interest, except a de minimus indirect interest, in any real property, regardless of location, subject to the limited exceptions discussed below.[14]

A. What is meant by a "de minimus indirect interest" and to "indirectly own" real property?

A foreign principal's land ownership is deemed a de minimus indirect interest if it derives from owning registered equities in a publicly traded company owning the land and the foreign principal's interest in the company is (a) less than five percent of any class of registered securities or less than five percent in the aggregate in multiple classes of registered securities, or (b) a noncontrolling interest, as that term is defined in Fla. Stat. § 287.138(1)(a) (2023), in an entity controlled by a company that is both registered with the U.S. Securities and Exchange Commission as an investment advisor under the Investment Advisers Act of 1940 and is not a foreign entity.[15] In its rules, FDOC has expanded the definition of a de minimus indirect interest to include a foreign principal's passive ownership in an entity, i.e., the foreign principal does not possess the power to direct or cause the direction of the management of the entity concerning the interest in the real property.[16] In its rules, FDOC defines the term "indirectly own" to mean the foreign principal has an interest in an entity with legal or equitable title to the realty, or the foreign principal has an interest in the realty, but another individual or entity holds the legal or equitable title. The rules proposed by FDACS contain a similar definition.[17]

B. The limited exceptions defined.

There are two narrow exceptions to the prohibitions against foreign principals purchasing affected lands.

First, the law does not apply to real property recognized, acknowledged, or allowed by the Federal Government for diplomatic purposes.[18]

Second, for all foreign principals, including those associated with China, there exists the commonly referred to "limited residence exception." This exception allows for a *natural* person to purchase one residential property up to 2 acres in size if: (a) the parcel is not on or within 5 miles of any military

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installation, (b) the person has a current verified U.S. visa that is not limited to authorizing tourist-based travel or holds official documentation confirming that the person has been granted asylum in the U.S., and such visa or documentation authorizes the person to be legally present in Florida, and (c) the purchase is in the name of the person holding the visa or official documentation.[19]

C. Practical concerns pertaining to affected lands.

i) Is a map available evidencing the location of military installations and critical infrastructure facilities?

Upon passage of Senate Bill 264, real estate practitioners immediately inquired whether an official, state-sanctioned map delineating the locations of military installations and critical infrastructure installations existed in Florida - only to learn that none existed. In late 2023, FDOC offered a search engine allowing persons to enter a street address to determine whether it meets new registration requirements imposed on foreign principals. At its introduction, the search engine did not consistently identify all addresses and may be of limited utility for foreign principals seeking to avail themselves of the limited residence exception. The search engine is found here: https://floridacommerce.my.site.com/SecureFlorida/s/

ii) What is a "non-tourist visa"?

Recall that under certain conditions a natural foreign principal holding a non-tourist visa may purchase a single residence. The term "non-tourist visa" is not defined in Senate Bill 264 or under federal immigration law, and neither the Department of State nor the Department of Homeland Security websites clarify the matter. That leaves practitioners to consider whether foreign principals in Florida under work or student visas may qualify for the one residence exception.

To further complicate matters, practitioners must consider how the concept of a foreign principal's domicile applies here. In Florida, non-permanent residents do not qualify for homestead benefits because they legally can't form the intent to create a permanent residence.[20] Thus, from the perspective of a seasoned Florida real estate attorney, foreign persons residing in the state under a temporary visa are typically considered to be domiciled elsewhere. Therefore, upon a first reading of Senate Bill 264, it stood to reason that all foreign nationals hailing from Venezuela, China, Russia, et al. must be deemed foreign principals if they lacked permanent residency status (or had been granted asylum) in Florida.

However, the state has offered a different concept of domicile.[21] While Senate Bill 264 does not define domicile, the rules offered by FDOC and FDACS define it to mean the place where the individual is physically present and intends to remain permanently or indefinitely.[22] Whether this meaning of domicile was truly intended by the Florida Legislature when it passed Senate Bill 264 remains unclear. It begs the question of why the law would carve out a limited exception for certain non-tourist visa holders to buy a single residence if all non-tourist visa holders can evade the precepts of the law by claiming an intent to remain in Florida permanently or indefinitely.

iii) Can a foreign principal owning affected land as of July 1, 2023, acquire additional land?

Senate Bill 264 contemplates that foreign principals will be record owners of or have controlling interests in affected lands as of the new law's effective date, July 1, 2023, and may wish to acquire or to otherwise come into ownership of additional property after such date. The law also accounts for the possibility that a foreign principal may acquire an interest in affected lands through means other than a traditional purchase and sale, e.g., through inheritance or foreclosure. To these concerns, Senate Bill 264 provides that if, as of July 1, 2023, a foreign principal owns any interest in affected land, the foreign principal may continue to own such land, but may not purchase or otherwise acquire by grant, devise, or descent any additional affected land.[23] However, if a foreign principal acquires affected land via devise and descent, the enforcement of a security interest or the collection of debts, Senate Bill 264 allows for the acquisition, but requires that the foreign principal divest itself of such property within three years of the acquisition.[24]

D. Senate Bill 264 and the Buyer's Affidavit Requirement.

Senate Bill 264 compels Florida buyers of real property located on or within 10 miles of any military installation or critical infrastructure structure to execute and deliver a new form of affidavit "at the time of purchase" attesting under penalty of perjury that they are not a foreign principal, or that they are a foreign principal, but are nevertheless authorized to purchase the subject property, in compliance with the law.[25] In response, shortly after passage of the law the standard FR/BAR residential contracts were updated to require this new form of buyer's affidavit.[26] Importantly for the title and settlement service industry, Senate Bill 264 provides that failing to obtain or maintain the affidavit does not affect the title or its insurability or subject the closing agent to civil or criminal liability, absent the closing agent's actual knowledge, that the transaction violates the new law.[27] Nevertheless, practice dictates that a prudent closing agent obtain the buyer's affidavit in all cases. The implementing rules even create a rebuttable presumption that a closing agent who relies upon and maintains the affidavit had no actual knowledge the transaction violated the law.[28]

Senate Bill 264 directs the Florida Real Estate Commission (FREC) to adopt rules implementing the form of affidavit and related procedures.[29] FREC has published a rather straightforward form of affidavit, one for individual buyers, another for entity purchasers, by which the affiant provides a legal description of the land being acquired, a statement that the affiant has been given the opportunity to consult with an

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Senate Bill 264 and its implementing regulations have substantially impacted the manner in which Florida real property is sold. For the first time in recent history, a segment of the buying public is prohibited from purchasing certain Florida realty, and others must register their interests with the state.



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attorney, an acknowledgement that the representations made in the affidavit will be relied upon to establish compliance with the law, the option of initialing that affiant is/is not a foreign principal, and that affiant is in compliance with the law. [29A] The form of affidavit is found here: https://www.flrules.org/gateway/ruleNo.asp?id=61J2-10.200. Unfortunately for the practitioner, FREC's form of affidavit requires that the affiant's signature be notarized, having rejected calls allowing for an unnotarized attestation under penalty of perjury. For cash buyers, this may be the only instrument requiring notarization. Closing agents are also recommended to obtain the affidavit from all buyers, even those known to the closing agent as U.S. citizens, and to share a copy of the affidavit with the seller. The seller will likely have no familiarity with the buyer's citizenship or domiciliary status but is still exposed to potential criminal liability for selling property in violation of the new law. The implementing rules afford sellers the same favorable presumption as closing agents when relying on the buyer's affidavit.[30]

E. Registration Requirements Under Senate Bill 264.

A significant feature of Senate Bill 264 and the implementing rules are requirements for foreign principals to register their interests in affected lands with the state. Specifically, the new law and regulations compel foreign principals to register under these circumstances:

Foreign principals owning affected lands as of July 1, 2023. Foreign principals owning agricultural lands as of July 1, 2023, were required to register with FDACS by January 1, 2024.[31] Foreign principals owning real property on or within 10 miles of a military installation or critical infrastructure property were required to register their ownership with FDOC by December 31, 2023.[32]

China-affiliated foreign principals owning real property in Florida as of July 1, 2023. These foreign principals were required to register with FDACS by January 1, 2024, and with FDOC by December 31, 2023, regardless of the type or location.

Foreign principals who acquired affected lands between July 1, 2023, and the effective date of the rules regulating registration. These foreign principals were required to register within 30 days after the registration rules issued by FDOC and FDACS went into effect.[33]

Foreign principals that come into ownership of affected lands after July 1, 2023, by way of devise, descent, enforcement of security interests, or the collection of debts. Registration is required within 30 days after the property is owned or acquired.[34]

Foreign principals that acquire affected lands by having qualified for the "limted residence exception." Registration is required within 30 days after the property is owned or acquired.[35]

Foreign principals who obtain equitable title by executing a real estate contract. FDOC rules contemplate that if the contract closing date is within 90 days, the foreign principal must register its legal interest within 30 days of acquiring legal title. If a foreign principal obtains equitable title by executing a real estate contract without the obligation of closing within 90 days, registration is required within 120 days of acquiring equitable title.[36]

Registration is deemed late 30 days after its due date. Late registrations may be subject to fines and penalties.[37]

Foreign principals are also required to update their registrations. This will occur when a foreign principal sells the land or no longer owns any interest in the land, the property is no longer classified agricultural, or is no longer on or within 10 miles of any military installation or critical infrastructure facility in Florida, or in the event the foreign principal no longer meets the statutory definition of a foreign principal.[38]

The FDOC registration website is at https://floridacommerce.my.site.com/SecureFlorida/s/

The FDACS registration website is at https://fpregistration.fdacs.gov/

F. Fines and Penalties; Lien Rights Granted.

Senate Bill 264 and the implementing rules impose steep penalties for violations, including stiff fines, criminal charges, lien rights in favor of the state, and for the forfeiture of lands.

The most severe charges are reserved for violations pertaining to the purchase of real property by China-affiliated foreign principals. Violations of this section constitute a third-degree felony.[39] Sellers who knowingly sell real property to China-affiliated foreign principals commit a first-degree misdemeanor.[40] All other foreign principals found to violate the law may be liable for a misdemeanor of the second degree. Those who knowingly sell to them are similarly liable.[41]

Lands and interests in real property found to have been acquired in violation of Senate Bill 264 are subject to forfeiture to the state. State agencies are granted enforcement mechanisms, including the right to initiate a civil action for forfeiture in the circuit court in which the land lies, with a lis pendens issued in accordance with Fla. Stat. § 48.23, and final judgment of forfeiture relating back to the date of the lis pendens. The rights of bona fide lienholders are legally protected. Procedures are set out for the disposition of proceeds upon sale by the state of the forfeited lands.[42]

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Finally, fines and associated lien rights are afforded to the state against foreign principals that fail to timely register as required by Senate Bill 264 and the implementing rules. The regulating departments may impose a $1,000 fine against the foreign principal each day a registration is late. A notice of violation and a right to a hearing may be afforded to a foreign principal found in violation of the registration requirements prior to any final agency action. The departments may place a lien against the unregistered lands for the unpaid balance of any penalties assessed.[43]

III. Conclusion

Senate Bill 264 is not without its critics. Some fear it will decrease foreign investment in Florida. Others have attacked its constitutionality on equal protection grounds and over concerns it may violate fair housing laws. The degree to which it can and will be enforced remains to be seen. What is certain, however, is that Senate Bill 264 and its implementing regulations have substantially impacted the manner in which Florida real property is sold. For the first time in recent history, a segment of the buying public is prohibited from purchasing certain Florida realty, and others must register their interests with the state. While just how much of a game-changer it is remains to be seen, Senate Bill 264 has, without a doubt changed the game's rules.

Postscript

Late in the 2024 Florida legislative session, just as this article went to press, amendments to Senate Bill 814 were introduced that, if passed and became law, would substantially impact key aspects of the law. Among other things, the bill tweaked the definition of "foreign principal," introduced a definition of "controlling interest," would permit foreign principals to have a controlling interest in lands acquired primarily for the development and sale of residential properties, and would loosen restriction on China-aligned foreign principals.


M. ROTHMAN

***Michahael Rothman**, Senior Manager, Legal Education Department, The Fund, Orlando, Florida, oversees production and delivery of the company's accredited legal education. He pays particular attention to issues that matter to Fund Members, including the impact of new laws and regulations, cybersecurity, and digital closings, and regularly presents on these and other topics to Fund Members and industry participants. Prior to joining The Fund, Michael was partner at Rothman & Tobin, P.A. in Miami. He is a graduate of the University at Albany and the University of Miami School of Law.*

Endnotes

1 Patrick Gleason, *States Limit Chinese Investment, Take Care to Avoid Unintended Effects*, Forbes (Nov. 20, 2023).

2 Fla. Stat. § 692.201(3) (2023).

3 Fla. Stat. § 692.201(4)(a-c) (2023).

4 Fla. Stat. § 692.201(4)(e) (2023).

5 Fla. Stat. § 692.202(9) (2023); Fla. Admin. Code R. 5J-27.001-.006 (proposed).

6 Fla. Stat. § 692.203(10) (2023); Fla. Admin. Code R. 73C-60.001-.007 (2024).

7 Fla. Admin. Code R. 73C-60.001(8) (2024); Fla. Admin Code R. 5J-27.001(2) (proposed).

8 Fla. Admin. Code R. 73C-60.001(2) (2024); Fla. Admin. Code R. 5J-27.001(2) (proposed).

9 Fla. Admin. Code R. 73C-60.001(3) (2024); Fla. Admin. Code R. 5J-27.001(3) (proposed).

10 22 U.S.C. § 3303 (2018).

11 See e.g., 48 C.F.R. § 225.7020-2 (2022).

12 Fla. Stat. § 692.202(1) (2023).

13 Fla. Stat. § 692.203(1) (2023).

14 Fla. Stat. § 692.204(1) (2023).

15 Fla. Stat. §§ 692.202(1) and 692.203(1) (2023).

16 Fla. Admin. Code R. 73C-60.001(4)(b) (2024).

17 Fla. Admin. Code R. 73C-60.001(9) (2024); Fla. Admin. Code R. 5J-27.001(8) (proposed).

18 Fla. Stat. § 692.205 (2023).

19 Fla. Stat. § 692.203(4) (2023).

20 *Juarrero v. McNayr*, 157 So.2d 79 (Fla. 1963).

21 See, Defendant's Memorandum in Opposition to Plaintiffs' Motion for Preliminary Injunction, pp.7-11, filed July 3, 2023, *Shen v. Wilton Simpson, et al.*, Case No. 4:23-cv-208-AW-MAF (N.D. Fla).

22 Fla. Admin. Code R. 73C-60.001(7) (2024); Fla. Admin. Code R. 5J-27.001(7) (proposed).

23 Fla. Stat. §§ 692.202(2) and 692.203(2) (2023).

24 Fla. Stat. §§ 692.202(4) and 692.203(5) (2023).

25 Fla. Stat. §§ 692.202(5)(a) and 692.203(6)(a) (2023).

26 FR/BAR 6x (2023).

27 Fla. Sta. §§ 692.202(5)(b) and 692.203(6)(b) (2023).

28 Fla. Admin. Code R. 73C-60.007(1) (2024); Fla. Admin. Code R. 5J-27.006(1) (proposed).

29 Fla. Stat. §§ 692.202(5)(c) and 692.203(6)(c) (2023).

29A Fla. Admin. Code R. 61J2-10.200.

30 Fla. Admin. Code R. 73C-60.007(2) (2024); Fla. Admin. Code R. 5J-27.006(2) (proposed).

31 Fla. Stat. § 692.202(3) (2023).

32 Fla. Stat. § 692.203(3) (2023).

33 Fla. Admin. Code R. 73C-60.003(4)(b) (2024); Fla. Admin. Code R. 5J-27.003(2)(b) (proposed).

34 Fla. Admin. Code R. 73C-60.003(4)(a) (2024); Fla. Admin. Code R. 5J-27.003(2)(a) (proposed).

35 Fla. Admin. Code R. 73C-60.003(3)(a) (2024).

36 Fla. Admin. Code R. 73C-60.003(5) (2024).

37 Fla. Admin. Code R. 73C-60.003(4)(d) (2024); Fla. Admin. Code R. 5J-27.003(2)(d) (proposed).

38 Fla. Admin. Code R. 73C-60.003(7) (2024); Fla. Admin. Code R. 5J-27.003(4) (proposed).

39 Fla. Stat. § 692.204(8) (2023).

40 Fla. Stat. § 692.204(9) (2023).

41 Fla. Stat. §. 692.203(8 & 9) (2023).

42 Fla. Stat §§ 692.202(6) and 692.203(7) (2023).

43 Fla. Admin. Code R. 73-60.005 and .006 (2024); Fla. Admin. Code R. 5J-27.004 and .005 (proposed).

Introducing The Real Property, Probate and Trust Law Section History Committee

By David Brennan, Esq., The Brennan Law Firm, Orlando, Florida

Section Chair Katherine Frasier has created a History Committee to collect, preserve and unroll the history of the Real Property, Probate and Trust Law Section — and our Section has a lot of history! Formed in 1954, the Section has more than two generations of continuous service to probate, trust, and real property attorneys, and the Bar, generally.

The RPPTL Section's proud history is worth remembering, recording and telling. Starting now and going forward (backward), the Committee will explore the records and stories of the people, the activities and the accomplishments that define the Section. This work will include recovery, study and archiving of Section records and an outreach to our members to increase awareness of where we came from. We will be gathering hard facts and interesting stories about our work, accomplishments and the off-duty activities that, together, define the Section and set us apart as an institution.

From time to time, the Section has recorded "up to now" segments of our history. Examples include Chairmen 1954 - 1984 Thirty Years of Service, The Florida Bar RPPTL Section - The First 50 Years, and RPPTL 60th Anniversary. There will be more.

The History Committee's goal is to expand the methods of historical reporting, beyond compilations every few years. Thus, this ActionLine column and other contemplated initiatives. We shall report events as they happened and, like history generally, much of the reportage will be true.

In coming months, in ActionLine and otherwise, our committee will provide:

1. Reports on significant legislation fostered by the Section, such as the Marketable Record Title Act, the Florida Probate Code, the Florida Trust Code and others.
2. Biographical sketches of past Section Chairs and activities initiated and conducted during their years.
3. Biographies of other prominent Section members such as Sam Smith, John Thornton, Mandell Glicksberg, Judge Harold Clark and others. (You don't know these names? That is ok; you are exactly our target audience.)
4. Hard-hitting reportage of real Section activities outside of formal meetings. Section members' remembrances will be solicited to insure accurate reporting of such romps, frolics and tragedies, such as:
    A. The infamous Breakers croquet tournament - in which the Executive Council players were not, technically, thrown off the hotel's formal croquet pitch.
    B. The epic watermelon eating contest in which the Probate Division, by perfectly legal (well ...) tactics, beat the Real Property Division.
    C. The mysterious passing of Ed the raccoon.

We will document: the reign of the RPPTL Ayatollah; the Executive Council meeting at the Playboy Club; softball in Crystal River; the hollow square; creation of the Council of Section (yes, that was our work); the origin of the Roundtables; and the Section awards and their recipients.

Topics and materials are solicited. The Committee looks forward to having investigative reporters, raconteurs, archivists and a tribe of elders to inform us and to codify our oral traditions.

Welcome aboard as we, collectively, ride on into the past!!
David Brennan, RPPTL Section Historian

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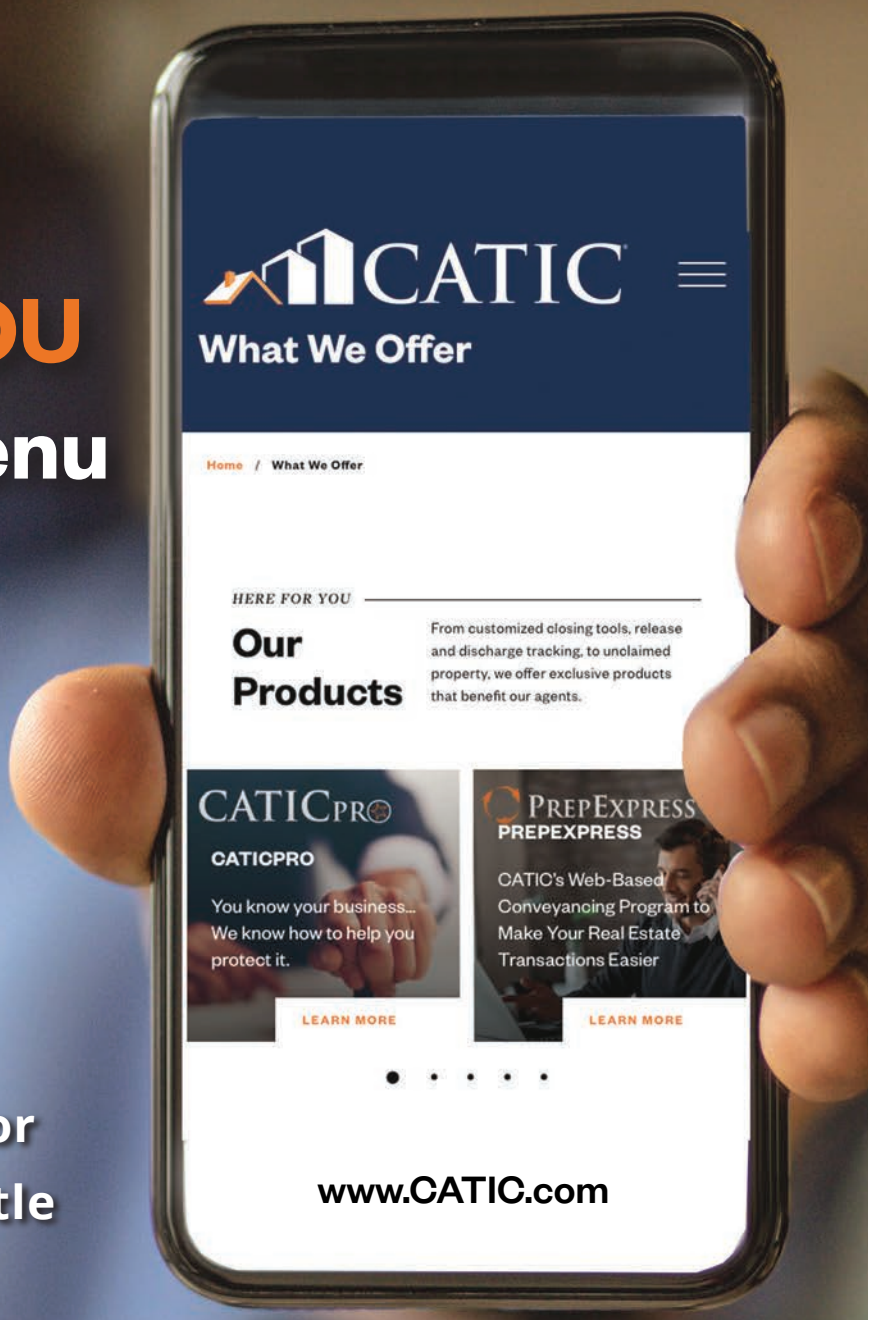

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Executive Council Meeting

NOVEMBER 8 – 12, 2023

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Photos by John Neukamm and Silvia Rojas.
















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Fellows Program Open To All Young RPPTL Attorneys

The Real Property, Probate and Trust Law Section of The Florida Bar is now accepting applications for its Fellowship Program. The Fellowship Program was created in 2009 and was modeled after the successful Fellowship Program of the American Bar Association. In its inaugural year, the program received over 80 applicants for four positions. Attorneys admitted to the Bar for 12 or fewer years and who wish to experience this exceptional leadership training opportunity are encouraged to apply for one of the available four slots by **April 30, 2024.**

The mission of the Fellows Program is to attract and retain young lawyers to the RPPTL Section. One method of achieving this goal is by providing subsidized Fellowships to qualified individuals interested in becoming active in the substantive work of the Section. Selected Fellows will be actively involved within the Section, receive leadership training, and work closely with leading attorneys in their field. We desire that, through this program, the Section will cultivate and develop future leaders to continue the strong presence of the RPPTL Section as a leader in The Florida Bar.

The Fellows Program is open to all lawyers who are members of the RPPTL Section and either (a) have been admitted to the Bar for fewer than 12 years, or (b) are younger than 36 years old. This program will award a maximum of four Fellowships per year. Applicants should demonstrate that a substantial portion of their practice is focused on Real Property, Probate or Trust law.

Fellowships are provided for a two-year term. The RPPTL Section has over 50 active committees and an Executive Council with more than 225 active members. The Executive Council (and the Section committees) meet on a quarterly basis, beginning in June each year, at locations throughout Florida. The quarterly meetings usually run from Thursday through Saturday, and include, substantive work and social events for networking. Each Fellow will receive a subsidy of up to $3,000 annually (not to exceed actual out-of-pocket expenses) to help defray the expense of attending RPPTL Section meetings. Each Fellow will also be assigned a social mentor, who is a member of the Executive Council, to assist the Fellow in maximizing his or her experience as a Fellow and attending RPPTL social events. In addition, each Fellow will be assigned a committee mentor to assist the Fellow's active involvement in the committee that most closely fits the Fellow's practice area with the goal of maximizing his or her professional development through the program. In return for the RPPTL Section commitments, a Fellow must attend at least two Executive Council meetings per year, attend and serve as an active member of the Membership and Inclusion Committee, and be an active member of at least one substantive committee. As an active committee member, the Fellow will be required to complete one substantive work project on behalf of the committee on an annual basis. This project may include writing an article in his or her area of expertise for *ActionLine*, chairing a subcommittee, or drafting proposed legislation on behalf of the committee. To ensure these requirements are fulfilled, each Fellow must submit a work plan to the Fellowship committee by October of each year, which outlines the substantive work project they have chosen, and a report at the end of each year.

At the end of the Fellowship term, we are confident all Fellows will find the program enhanced their personal and professional development. We also sincerely hope that all Fellows will continue to be actively involved in the RPPTL Section committees and work towards becoming members of the Executive Council.



The Fellows application is available through the RPPTL Section website at www.RPPTL.org (See Committees>Fellows).

All applications should be submitted to RPPTLfellow@flabar.org or by mail to RPPTL Fellowship Program, ATTN: Hilary Stephens, The Florida Bar, 651 E. Jefferson Street, Tallahassee, FL 32399-2300. Please contact the Fellows Committee Co-Chairs, Bridget Friedman and Terrence Harvey, if you need more information: bfriedman@ff-attorneys.com or tharvey@coj.net.

Roundtable

Highlights of the Meeting of the RPPTL Section

REAL PROPERTY DIVISION

SATURDAY, NOVEMBER 11, 2023

JW Marriott Tampa Water Street - Tampa, Florida

Prepared by Colleen Sachs, Esq., Pensacola, Florida
and Rebecca Wood, Esq., Orlando, Florida

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



The Director of the Real Property Law Division, Wm. Cary Wright called the meeting to order at 8:10 a.m.

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

Recognition and Introductions. Susan Spurgeon led a tribute to honor our veterans.

Action Items. There were no Action Items at this meeting.

Information Items

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

Allison Hertz presented on the expansion of "Alternative Funding Methods," supporting legislation allowing any association that must obtain SIRS to utilize an alternative funding method, which: (i) may reasonably be expected to fully satisfy the association's reserve funding obligations, and (ii) is approved by the Division. These are recommendations and initiatives coming out of the SB-4D task force. Additional legislation this year clarified some of the issues, but was limited. The chair of the task force was Curtis Hamlin. If there are questions, contact Allison Hertz.

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

Allison also presented on the Code of Borrowing Authority, supporting legislation authorizing associations to borrow money or levy special assessments, notwithstanding any requirement for membership approval, in furtherance of the association's performance of necessary maintenance, repairs, and replacements, including capital replacements.

There is no express statutory authority to authorize associations to borrow. Many declarations limit special assessments and borrowing without a certain approval percentage. This will allow the boards of directors to provide for the funding and keep owners who do not want to pay money from stopping maintenance.

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

A final presentation from the Condo and Planned Development Committee was on Codification of *In re Petition for Declaratory Statement, Walter Grover, Unit Owner, Portofino Condominium Apartments* and the Financing of Special Assessments, supporting legislation permitting unit owners to finance special assessments in the form of a payment plan with interest. This will allow association owners to finance special assessments over time with interest and to avoid possible foreclosure for nonpayment of assessments.

Publications Committee

Michelle Hinden said that new submissions on RP Division topics are needed for ActionLine. They are also in search of individuals to edit articles. Please contact Michelle if you can assist with either of these items.

Legislation Committee

Steven H. Mezer, Legislation Committee, Co-Chair

Steve Mezer reported that the legislative session has begun in earnest—legislative liaisons for a committee work with the vice-chairs. Pete Dunbar noted it is critical to get answers back quickly, in some cases, within a matter of hours. Anyone responding should provide an accurate summary of technical issues with the bill. Political discourse is not in order. The response needs to be clear, intelligent, and ready to be forwarded immediately to the legislator asking for a review. There are bill drafting manuals in the House and the Senate.

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If the language changes because of the bill drafting manual, it is sent out to ensure it does not change how the bill works. The best way to notify the legislator(s) of changes to be made is to handwrite them instead of using tracked changes. This is because of the closed system in the legislature.

Susan Spurgeon presented on the easements across one's own land legislation. We want to move both an amicus and the bill forward simultaneously. She said to remember that it is not about the merger doctrine. She distinguished between the merger doctrine and an easement over one's own land. We are not trying to disturb the doctrine of merger. This is about the creation of an easement. There is hope that the weight of the Section with filing a Notice of Intent to Take Jurisdiction will be helpful. We can do that as soon as there is a case number. It is not appropriate for us to file a brief in support.

CLE Committee Report

Brenda Ezell, CLE Committee, Co-Chair

Brenda Ezell reported that Jeremy Citron is the new CLE Coordinator.

Committee Reports

Ad Hoc Hayslip — Brian W. Hoffman, Chair; Russell M. Robbins and James ("Jim") C. Russick, Co-Vice Chairs. No report.

Ad Hoc UCRERA — Manuel ("Manny") Farach, Chair; Jason M. Ellison and James ("Jim") C. Russick, Co-Vice Chairs. No report.

Attorney Banker Conference — Salome J. Zikakis, Chair; Kristopher E. Fernandez, Co-Vice Chairs; R. James ("Jim") Robbins, Jr., Co-Vice Chairs. Salome Zikakis reported that the next ABC will be in Tampa. The morning will have three or four sessions. There will be panel discussions. They are looking for lenders to attend and for speakers.

Commercial Real Estate — E. Ashley McRae, Chair; Alexandra D. Gabel, Annabella Barboza, and Erin M. Miller, Co-Vice Chairs. Ashley McRae reported that the committee had a great presentation on CFIUS. There are also good webinars coming up, including one on surveys.

Condominium and Planned Development — Alexander B. Dobrev and Allison L. Hertz, Co-Chairs; and Russell M. Robbins, Vice Chair. Alex Dobrev reported that the committee had a productive meeting, with the secretary of DBPR attending. They are currently working on several efforts on the residential and the non-residential sides.

Condominium and Planned Development Law Certification Review Course — Christine M. Ertl, Chair; Alessandra Stivelman, Vice Chair. Christine Ertl reported that this is the last meeting before the course. The test is in March. The course will be in Tampa at the Marriott Airport, February 2-3, 2024.

Construction Law — Sanjay Kurian, Chair; Bruce D. Partington and Elizabeth B. Ferguson, Co-Vice Chairs. Sanjay Kurian reported. There have been three CLEs since The Breakers meeting: the Legislative Update had 86 attendees, a litigation CLE had 98 attendees; and the committee had a joint meeting with the insurance committee. The committee has 550 members with many subcommittees. The Pro Bono subcommittee is the newest addition.

Construction Law Certification Review Course — Gregg E. Hutt, Chair; Scott P. Pence and Jason J. Quintero, Co-Vice Chairs. No report.

Construction Law Institute — Bradley R. Weiss, Chair; Trevor B. Arnold, and Haley R. Maple, Co-Vice Chairs. Brad Weiss reported. CLI is planned for March in Orlando and will include CLE credits.

Development & Land Use Planning — Lisa B. Van Dien, Chair; Jin Liu, Vice Chair. Lisa Van Dien reported. The meeting included an interesting presentation from Brad Cook from Water Street. Leadership is trying to grow the committee and to include a local element. The next meeting will have a presentation on CDD 101. A lunch and learn CLE on the Live Local Act is scheduled for January 17, 2024.

Insurance & Surety — Adele I. Stone and Debbie S. Crockett, Co-Chairs; Anne Q. Pollack, Vice Chair. Adele Stone reported. They are working hard to make the committee relevant to everyone. Zoom meetings will be held between the regular meetings. French Brown is giving a presentation in January. There will be a follow-up meeting after the legislative session. A presentation on D&O insurance is coming up. Insurance Law certification is in the works.

Liaisons with FLTA — Alan K. McCall, Melissa Jay Murphy, Alan B. Fields, and James ("Jim") C. Russick No report.

Liaison with American College of Real Estate Lawyers (ACREL) — Martin A. Schwartz and William ("Bill") P. Sklar No report.

Liaison with American College of Construction Lawyers (ACCL) — George J. Meyer. No report.

Liaison with Florida Realtors — Louis "Trey" E. Goldman. No report.

Real Estate Certification Review Course — Lloyd Granet, Chair; Martin ("Marty") S. Awerbach, Laura M. Licastro and Jason M. Ellison, Co-Vice Chairs. No report.

Real Estate Leasing — Christopher ("Chris") A. Sajdera, Chair; Kristen K. Jaiven and Ryan J. McConnell, Co-Vice Chairs. Chris Sajdera reported. The Fund made a presentation on Fla. Stat. § 713.10. The committee is planning CLE presentations and is updating its leasing forms.

continued, page 32

Real Property Finance & Lending - Jason M. Ellison, Chair; Deborah B. Boyd and Jin Liu, Co-Vice Chairs. Jason Ellison reported on a non-judicial foreclosure case that provided that a tax deed does not eliminate the interests of the United States and that a judicial sale is required. Upcoming presentations will include lending after Surfside, and professionalism in remote proceedings.

Real Property Litigation - Manuel ("Manny") Farach and Shawn G. Brown, Co-Chairs; Amanda B. Kison and Terrance L. Harvey, Co-Vice Chairs. There was a presentation on heirs property. The committee reviewed the Supreme Court's ongoing efforts regarding civil procedure. A new subcommittee chaired by Brian Hoffman will continue to address Hayslip. There will be presentations on partition, derivative actions, and charging liens.

Real Property Problems Study - Susan K. Spurgeon, Chair; Brian W. Hoffman and Amber E. Ashton, Co-Vice Chairs. The committee discussed pending legislation about the United States Postal Service discontinuing proof of delivery green cards and has provided comments to others on many legislative proposals.

Residential Real Estate and Industry Liaison - Nicole M. Villarroel and Kristen K. Jaiven, Co-Chairs; James ("Jamie") A. Marx, and Richard ("Rich") S. McIver, Co-Vice Chairs. The committee reported on the expansion of FinCEN and new FREC forms related to foreign buyers. Class action commission fee cases were also discussed. A RESPA seminar was held in October.

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. The committee had a joint meeting with title issues and standards. Old Republic was thanked for its sponsorship.

Title Issues and Standards - Rebecca L.A. Wood and Amanda K. Hersem, Co-Chairs; Robert ("Bob") M. Graham, Karla J. Staker, and Melissa Scaletta, Co-Vice Chairs. The committee had a CLE on ethics. Westcor was thanked for its sponsorship.

Old Business

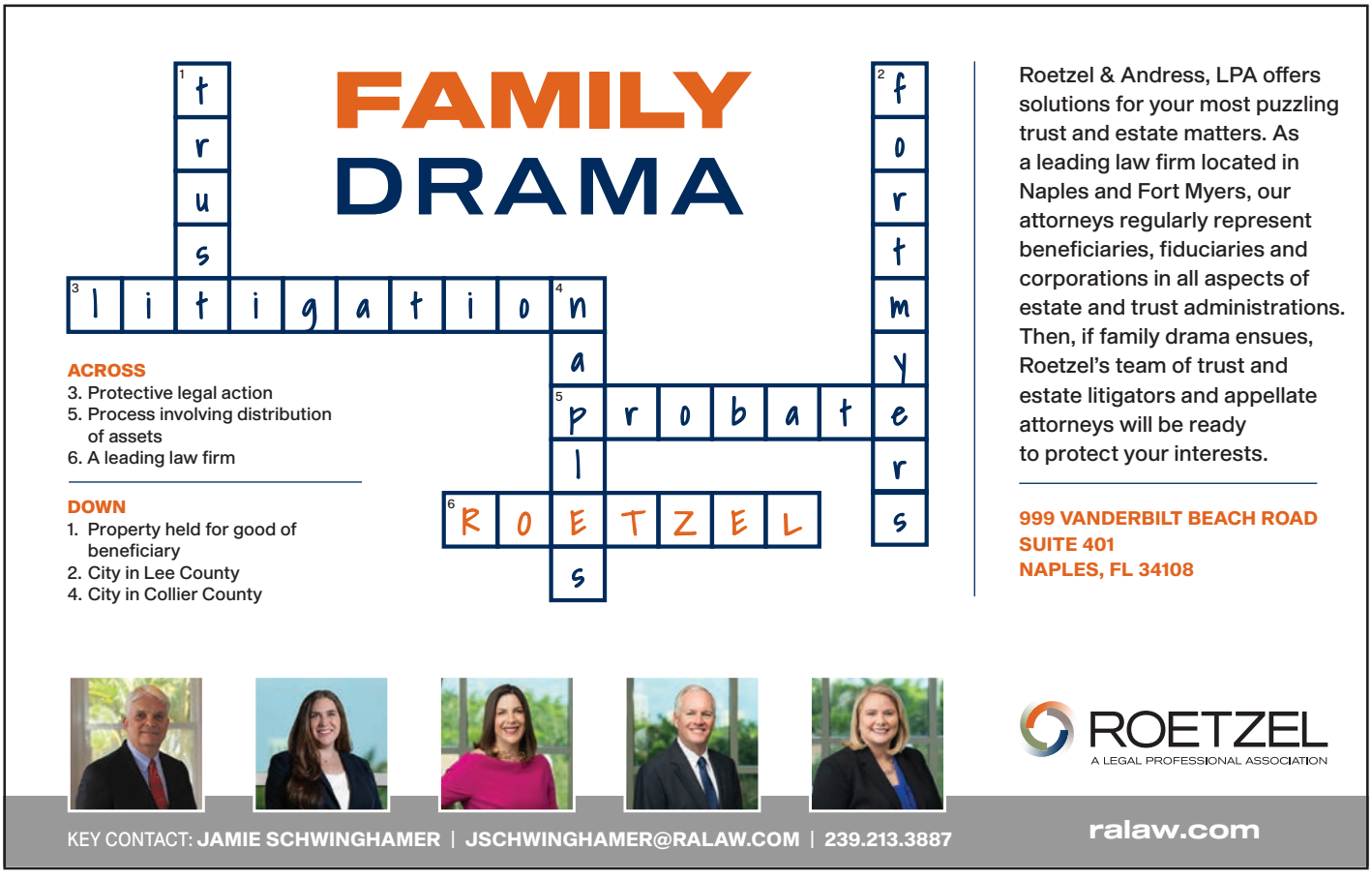
Chip Waller reported on MV Realty and its filing for bankruptcy protection. Bankruptcy does not preempt state action.

New Business

Shawn Brown reported on the consolidation of circuit courts.

Adjournment

The meeting was adjourned at 9:07 a.m.



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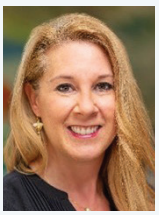

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ROUNDTABLE

Highlights of the Meeting of the RPPTL Section

PROBATE AND TRUST DIVISION

SATURDAY, NOVEMBER 11, 2023

JW Marriott Tampa Water Street - Tampa, 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 and Guardian Trust Foundation, Inc.



The Director of the Probate and Trust Law Division, Jon Scuderi, called the meeting to order at 8:17 a.m.

Sponsor Announcement. The Division Director thanked the sponsors Stout and Guardian Trust Foundation, Inc. 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 reminded the committee chairs about timing for presenting committee issues as action items. The Division Director also asked committee chairs to provide their annual reports by December to assist with evaluating future leadership decisions in January/ February. The Division Director reminded Section members to review the general standing action items and supplemental materials in advance of the Executive Council meeting. Sarah Butters shared an update about the National College of Probate Judges meeting November 15 – 18, 2023 in Tampa.

Recognition. The Division Director recognized and congratulated Cady Huss and Elizabeth Hughes for their Actionline article **The Real Party in Interest: Trustees**, Actionline Vol. 20, no. 2 (Winter 2018–2019) being cited by the Fifth District Court of Appeal in *Roller v. Collins*, 48 Fla. L. Weekly D2040 (Fla. 5th DCA Oct. 20, 2023).

Action Items

Ad Hoc Rules Revision Committee- Michael V. Hargett, Co-Chair: Mike gave an update about the proposed Section comment regarding changes to Rules 1.200, 1.201, 1.280, 1.440, and 1.460 of the Florida Rules of Civil Procedure. The Ad Hoc Civil Rules Committee recommended that the Section file a comment supporting the recommendation from the Civil Procedure Rules Committee for The Florida Bar to adopt the proposed rule changes set forth in Track "A." The proposed changes specifically exempt actions or proceedings initiated under Chapters 731- 736, 738, and 744, Florida Statutes, from Rule 1.200. Case Management; Pretrial Procedure. The Ad Hoc Civil Rules Committee proposed asking for a 180-day deadline for implementation to allow for time to educate Section members regarding the rule changes. This action item was passed at the Executive Council meeting on Saturday, November 11, 2024, with an amendment to extend the requested time for implementation from 180 days to one year.

Ad Hoc Guardianship Law Revision Committee – Stacy B. Rubel, Co-Chair: Stacey shared an update about the Ad Hoc Guardianship Law Revision Committee's recommendation concerning 2024 Senate Bill 48 ("Karilyn's Law"). Stacey shared some of the highlights of Karilyn's Law, including, issues regarding visitation with a ward, pre-death will and trust contests, requirements to empanel a jury for certain guardianship proceedings, access to a ward's constitutionally

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protected, private information, mandatory re-evaluation of a ward's need for guardianship every three years, and procedures related to same. The Ad Hoc Guardianship Law Revision Committee discussed the motion to be presented at the Executive Council meeting. The proposed motion supports legislation that provides for continued visitation rights with a ward when such contact is not potentially harmful to the ward and opposes legislation that allows for jury trials for Chapter 744 proceedings and pre-death will and trust contests; opposes requiring re-evaluation of wards without filing a suggestion of capacity or upon the exercise of the court's discretion; opposes requiring reassignment of a guardianship proceeding to another judge without a substantive basis; and opposes a blanket requirement to provide access to guardianship inventories, accountings, or other financial information of the ward to family members related by blood, marriage, or adoption. In addition, the recommended motion requests a decision that the legislative positions are within the purview of the Section and requests expending funds in support of the legislative positions. This action item was passed at the Executive Council meeting on Saturday, November 11, 2024, and will be part of the 2024 legislative initiatives.

Legislative Update.

Legislation Committee – Sancha K. Brennan, Co-Chair. Sancha shared an update about bill drafting for revisions to the Florida Uniform Principal and Income Act (Chapter 738, Florida Statutes). The committee is working to secure sponsors in the House and Senate to introduce the bill. Sancha also shared an update about The *Johnson v. Townsend Fix* legislation (Fla. Stat. §§ 732.216 – 732.228). The committee is working on securing sponsors for the proposed legislation. Sancha shared an update on 2024 Senate Bill 48 ("Karilyn's Law") and the action item for the Executive Council meeting opposing and supporting, in part, Karilyn's Law. Sancha shared updates about 2024 House Bill 73 (supported Decisionmaking Authority) and 2024 House Bill 219 (Patient-directed Doctor's Orders). Sancha reminded the members that the Section's positions concerning the bills are posted on the Legislation Committee's webpage and thanked Nick Curley and Tae Bronner for their help with these bills. The committee is working on bills related to service of process and adverse possession. Sancha thanked Co-Vice Chairs Travis Hayes, Nick Curley, and Ben Diamond for their assistance.

Information Item

Asset Protection Committee – Richard Gans, Vice-Chair. Rick shared an update about proposed legislation to enact Fla. Stat. § 736.05057 - transfer of tenants by the entirety property to trust. The legislation will 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 shared that a transfer pursuant to the proposed statute will not convert property to TBE property, but rather provides that existing TBE property transferred to a joint trust described in the statute will continue to enjoy the same exemption status as before the transfer.

Committee Reports

Report of Liaison with ACTEC, Tami Conetta: Tami shared an update concerning the National Conference of Bar Examiners' ("NCBE") decision to remove Trusts and Estates from the Multistate Essay Exam, effective July 2026, and omission of the subject from the NextGen bar exam. Tami shared that ACTEC (American College of Trust and Estate Council) and the ABA (American Bar Association) are starting a campaign to ask the NCBE to reconsider this decision. ACTEC is looking for support from The Florida Bar and the RPPTL Section and asked members to write the NCBE and the Florida Board of Bar Examiners in support of including the topics.

Report of Liaison with Professional Fiduciary Council, Darby Jones: Darby reported the addition of two new advisory board members, Alex Douglas and Rich Caskey, and shared an update about the Council's efforts to create curriculum and educational information for fiduciaries. Darby shared the Council's plans to hold its 5th annual conference on May 2-3, 2024 in Clearwater.

Ad Hoc Committee on Electronic Wills, Ricky Hearn, Chair: Ricky shared a report about recent contact with a group proposing adoption in Florida of a Uniform Act in place of Florida's Electronic Wills Act (Fla. Stat. §§ 732.521 – 732.525). The committee is evaluating the proposal.

Charitable Planning and Exempt Organizations Committee, Denise Cazobon, Chair: The committee is forming a study group to evaluate Patagonia Planning and Stewardship Trusts to consider whether Florida should adopt a similar statute.

Wills, Trusts and Estates Certification Review Course, Rachel Lunsford, Chair: Rachel shared an update about the 2024 Wills, Trusts and Estates Certification Review Course. This year's course will be held earlier than previous years. The course will be February 2-3, 2024, in Tampa, and will feature new presentations.

The Florida Bar Journal/ News Editorial Board. A representative from The Florida Bar Journal/ News Editorial Board invited Section members to submit substantive RPPTL articles to The Florida Bar Journal for publication and CLE credit.

Adjournment. Meeting was adjourned at 9:00 a.m.

Challenging a Power of Attorney in Guardianship Proceedings

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

Your client just called or emailed to ask you about the Power of Attorney Revocation she received from her father. An estranged grandchild has come back into Dad's life and convinced him to revoke his existing power of attorney and to execute a new power of attorney designating his "favorite" grandchild as his agent. Dad's underlying condition, which required your client to act on his behalf initially, has only worsened over the last five years. "What can I do?" she asks.

Unfortunately, this can be a common fact pattern in contested guardianship cases. While your client's father may lack the capacity to manage his property and meet essential requirements for his health and safety, a guardianship is only warranted when no less restrictive alternative (such as a durable power of attorney or trust) is available and appropriate.[1]

The Florida Guardianship Law and Florida Probate Rules have a mechanism in place to address scenarios where a purportedly "less restrictive alternative" to guardianship is not valid. Fla. Stat. § 744.331(6)(f) (2023), permits an interested person to file a verified statement challenging the alternative to guardianship. The verified statement must: 1) state a good-faith belief that the trust, trust amendment, or durable power of attorney is invalid, and 2) set forth a reasonable factual basis for the belief. If the verified statement meets these two requirements, the alternative, "shall not be deemed to be an alternative to the appointment of a guardian."[2] The corresponding Florida Probate Rule for the verified statement is Rule 5.550(c).

Procedurally, the verified statement is most important when the court is entering its order determining incapacity. However, your client may have concerns about a new agent's actions in the time between the filing of a petition to determine incapacity and an order being entered. Fla. Stat. § 709.2109(3) (2023), provides that a power of attorney is suspended if any person files a petition to determine incapacity of the principal; however, an exception exists if the agent is the principal's parent, spouse, child, or grandchild. In those instances, the power of attorney can only be suspended if a verified motion is filed pursuant to section Fla. Stat. § 744.3203 (2023).

The motion can be based upon any of the following grounds: (a) the agent's decisions are inconsistent with the principal's known desires, (b) the power of attorney is invalid, (c) the agent has failed (or cannot) exercise her duties, (d) the agent has abused herpowers, or (e) the principal's property is in danger of being wasted, misappropriated or lost.[3] The verified motion must identify the grounds for suspension and set forth the factual basis to justify the suspension.[4] If the agent files a response to the motion, the court is required to schedule an expedited hearing.[5]

The verified statement is a necessary tool for any lawyer encountering a power of attorney, trust, or trust amendment that is believed to be invalid. The verified motion to suspend a power of attorney can also help protect an alleged incapacitated person before the court enters an order determining incapacity.


J. CHERNESKI

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

Endnotes

1 Fla. Stat. § 744.331(6)(b) (2023); Florida Courts, https://www.flcourts.gov/Resources-Services/Office-of-Family-Courts/Family-Court-in-Florida/Guardianship (last visited Oct. 5, 2023).

2 Fla. Stat. § 744.331(6)(f) (2023).

3 Fla. Stat. § 744.3203(1)(a) - (e) (2023).

4 Fla. Stat. § 744.3203(2) (2023).

5 Fla. Stat. § 744.3203(3) (2023).

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Protecting Your Real Estate Transactions From Fraud

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

Summary: Fraud in real estate transactions is a serious issue that can have both legal and financial implications for all parties involved. Real estate attorneys in Florida must remain vigilant and proactive in identifying and addressing fraud to safeguard the interests of their clients and the integrity of their practice.

The manner in which real estate transactions are impacted by fraud are constantly evolving, and as technology evolves, the complexity of the fraud that impacts real estate transactions continues to develop. The real estate industry is now seeing an increase in fraudulent transactions where either a transfer is attempted to be completed by a fraudster impersonating the owner, or by someone who previously impersonated an owner to gain title to the property, which is then conveyed to an unsuspecting buyer.

The Florida Bar has rules that govern an attorney's professional responsibility. The Consumer Financial Protection Bureau (CFPB) and the American Land Title Association (ALTA) provide additional rules and safe guards for all closing agents. At a base level, regardless of whether you are acting solely as a closing agent or as an attorney for a party to a real estate transaction, there is an obligation to meet best practices and industry standards for due diligence and transmission of information. In the event of fraud, the liability will ultimately depend on the specific circumstances of the situation, including the actions and representations made by the impersonator, the extent of due diligence conducted by the attorney, and any red flags that should have alerted the closing agent or the attorney to potential fraud. The best way to protect yourself is to ensure you employ strategies within your practice to mitigate your exposure and minimize the opportunity for you or your clients to become victims of fraud.

In the course of vacant land transactions, typically with unencumbered property, fraudsters attempting to impersonate the real seller are usually caught when requests are made for identification or appearance in person to execute closing documents. Florida has been a second home destination for people across the country and the world for decades, and as such, it is not unusual to have driver's licenses from various states or foreign passports presented as identification. A closing attorney should ensure they are reviewing documents for validity and increasing their caution when a seller isn't able to provide identification or becomes evasive when information is requested. Remote closings are also not uncommon as a matter of course, but red flags would be sellers who insist on using their own notary, or documents being notarized or overnighted from an unexpected location.

Creating clear procedures for obtaining wire information from clients that is consistently used and easy for the client to follow ensures you obtain quality information and can trigger a follow up in a situation where fraud or a phishing scam is suspected. Taking steps to ensure you are diligent in your review of information received during the course of a real estate transaction can ensure costly mistakes are minimized.



N. SELVARAJ

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

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!

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FELLOWS FLASHBACK

Life After the RPPTL Fellows Program

By Kristen King Jaiven, Esq., Kristen King Jaiven, Lawyer, PLLC, Fort Lauderdale, Florida

I attended my first Real Property, Probate and Trust Law Section (RPPTL) meeting in November 2014, at the suggestion of a friend who was, at the time, a RPPTL Fellow. I was a new lawyer working in commercial leasing, but I really wanted to work in environmental law. My friend suggested I attend the next RPPTL meeting and lean a little more into the idea of practicing in real estate law. I attended the next meeting in Naples and the rest is history!

For the next several years I was a RPPTL observer: a wallflower at events and a lurker in meetings. Nonetheless, I loved RPPTL. I always learned something and occasionally participated in a discussion or volunteered for a task. The RPPTL Fellows Program provided an avenue to increase my participation in ways I did not anticipate. The Fellows Program elevated my RPPTL experience by helping me build connections to the people that make RPPTL amazing, and by providing me with the confidence to participate in RPPTL's substantive initiatives.

Off the Wall and Into The Fray

RPPTL can be an intimidating bunch of very smart people, even for the most outgoing of lawyers. But as a Fellow, you cannot hide. You will wear a badge, and everyone will introduce themselves (or ask you to do something. *See next section*). The connections are invaluable and run both professional and personal. As I write this, I am sending a text to a RPPTL attorney asking a civil procedure question. Before the end of the week, I will probably text a RPPTL friend a funny meme. RPPTL leaders will often say Section members are lifelong friends, and it is true. Colleagues and friends – what a combination.

Participating Versus Observing

The Fellows Program also offers endless opportunities to write articles, present on CLEs, and participate in projects. The Program provides a host of individuals to support you as you dive into the work of the Section. This support helps you build confidence as you increase your substantive contributions to the important work produced by RPPTL. The Fellows Program also helps you to understand the Section's structure and process, which are at times, not readily observable to a general member.

In many ways, I started my real RPPTL experience, not at my first meeting in 2014, but after graduating from the Fellows Program. Since concluding the Program, I have become a member of the Executive Council and the Co-Chair of the Residential Real Estate and Industry Liaison Committee. I now participate in numerous Section projects from working on legislative initiatives to organizing and presenting CLEs. The work does not end after finishing the Program, but neither does the professional and personal growth. There is always more to learn and more ways to participate and contribute to the work of the Section.



K. KING-JAIVEN

***Kristen King Jaiven, Esq.**, focuses her practice on the representation of small businesses, including real estate brokerages and other related business ventures. Kristen earned her Juris Doctor from St. Thomas University School of Law and earned her Master of Laws degree from Vermont Law School. Kristen currently represents the 4th Appellate District on the Florida Realtor-Attorney Joint Committee and serves as a Co-Chair of the RPPTL Residential Real Estate and Industry Liaison Committee and is Co-Vice Chair of the RPPTL Real Estate Leasing Committee. She also serves on The Florida Bar Consumer Protection Law Committee. Kristen was a Real Property Fellow in the 2019-2021 RPPTL Fellows class.*



Real Property Case Summaries

Prepared by Danielle N. Clark Of Clark Law Office, PLLC, Fort Myers, Florida

The Sixth District Court of Appeal found the trial court erred in its finding of equity and, entering a mandatory injunction on behalf of the Appellee.

McConico v. Morgan's Mill Prop. Owners Ass'n, Inc., 6D23-1213, 2023 WL 5491858 (Fla. App. 6 Dist. Aug. 25, 2023)

The Appellant, Tammie McConico, was the defendant in the underlying action and appealed the final judgment granting injunctive relief in favor of Appellee, Morgan's Mill Property Owner's Association, Inc., which required the Appellant to complete specific maintenance and repairs to the exterior of her home and property.

In 2013, the Appellee filed the underlying action to enforce its recorded Declaration of Conditions, Covenants, Easements, and Restrictions ("Declaration") and the Property Owner's Association Board of Directors' Rules and Procedures ("Rules") against the Appellant. The Appellant owns a home in the subdivision known as Morgan's Mill. The Declaration and Rules necessitate that each homeowner owns and is responsible for maintaining their home and lot. This includes maintaining the exterior of their residences and lots in a "neat and attractive" manner.

The Appellee claimed, and the lower court ultimately found that the Appellant "failed to maintain her lawn and landscaping, exterior of her home[,] and her driveway as required by Section 5.6 of the Declaration and Rules 1, 2, and 7.1 of [Appellee's] Rules.[1]

Prior to the entry of the final judgment, the Appellee amended its complaint to seek a mandatory injunction to require the Appellant to fix her home or to allow the Appellee to enter the Appellant's home to perform the necessary maintenance. The Appellant moved to dismiss the amended complaint for failure to state a cause of action because the Declaration provides an adequate remedy at law. The lower court denied the motion to dismiss and entered the final judgment.

In an action for law or in equity or both, Fla. Stat. § 720.305(1), authorizes a mandatory injunction when a clear legal right has been violated, irreparable harm is threatened, and a lack of an adequate remedy at law exists.[2]

In this case, the Appellee did not attempt to exercise its right to enter the Appellant's home. Therefore, Appellee was not prevented from entering the Appellant's home, and equity at law was left outstanding. The district court reversed the Final Judgment, and remanded for entry of a dismissal order after finding the motion to dismiss should have been granted.

The Fourth District Court of Appeals found that the county court did not make an error when entering final judgment foreclosing homeowner's association lien and awarding attorney's fee and costs to the homeowner's association.

Belkova v. Deer Run Prop. Owners' Ass'n, Inc., 4D22-72, 2023 WL 5423523 (Fla. 4th DCA Aug. 23, 2023)

Ms. Lilia Belkova, individually and as successor trustee of the Land Trust Agreement, NO:072003 DATED 2/9/04, ("Appellant") filed an appeal against Deer Run Property Owners' Association, Inc., et al., ("Appellees"). In 2017, Appellees filed, in county court, a foreclosure action against Appellant: (1) to foreclose a claim of lien for assessments, on her homestead property, in agreement with Fla. Stat. § 720.3085 (2016); and (2) a count for damages seeking to recover delinquent assessments, since November 2012 for $3,857.07, plus interest, late charges, costs, and attorney's fees.

During this underlying action, the Appellant filed two bankruptcy cases, which ultimately were dismissed. Prior to the filing of this underlying action, the Appellant filed a bankruptcy case that was also dismissed with prejudice. The Appellant had four main arguments, which were: (1) the county court did not have jurisdiction to foreclose the lien on the property; (2) the county court's monetary judgment exceeded its jurisdictional limits; (3) the county court was not permitted to award the Association's attorney's fees for work performed in the bankruptcy court to return the Association's foreclosure action to county court; and the (4) the county court abused its discretion in refusing to continue the summary judgment hearing.

The county court did not have jurisdiction to foreclose the lien on the property and the county court's monetary judgment exceeded its jurisdictional limits.

The Appellant argued that the county court did not have subject matter jurisdiction to foreclose on the Appellee's lien because the property was homestead, and the judgment exceeded its jurisdictional limits. Lien foreclosure actions may be filed in either circuit court or county court. County courts handled all matters, in equity, that did not exceed the $15,000 monetary jurisdictional amount (for actions filed on or after January 1, 2020, the monetary jurisdictional amount increased), except as restricted by the State Constitution or the laws of Florida.[3]

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Circuit courts handled all matters, in equity, that included all monetary jurisdictional amounts, but have exclusive jurisdiction in lien foreclosures that involve the determination of homestead exemption claims. The homestead exemption is a legal provision in Florida that protects a homeowner's primary residence from certain types of creditors, including those seeking foreclosure against a property due to liens or debts. In this case, the Appellee's lien foreclosure did not involve a determination of the homestead exemption because a forced sale of a homestead property may occur "for payments of taxes and assessments thereon."[4] The Appellee's foreclosure complaint included claims for lien assessments[5] and damages seeking to recover delinquent assessments from November 2013, which did not exceed the jurisdictional amount.

The district court found the Appellee's action to foreclose on an assessment lien was proper for the Appellant's homestead property because the lien was not exempt from foreclosure. In addition, the amount in controversy was under $15,000, exclusive of interest, cost, and attorney's fees. Thus, the county court had subject matter jurisdiction over the lien foreclosure action.

The county court was permitted to award the Association's attorney's fees for work performed in the bankruptcy court to return the Association's foreclosure action to county court.

The Appellant argued that the county court lacked jurisdiction to award Appellee's attorney's fees for work performed in bankruptcy court. The district court looked at several cases, including *Dvorak v. First Family Bank*, 639 So 2d 1076 (Fla. 5th DCA 1994) and *Florida Federal Savings & Loan Ass'n v Sanchez*, 553 So.2d 1254, 1255 (Fla. 3d DCA 1989).

The district court distinguished *Dvorak* from this case. The court made a distinction and found the Federal law preempting state law on attorney's fees awards. In *Dvorak*, the property was involved in a state foreclosure action that was stayed by the filing of a Chapter 11 bankruptcy petition. Thereafter, the bankruptcy trustee conveyed the property to the bank for $6,000. The bank was considered an oversecured creditor and the bankruptcy court continued to have jurisdiction to award attorney's fees and costs. In this case, no preemption exists, the Appellee is not an oversecured creditor, the bankruptcy case was dismissed, and the property was not the subject of the bankruptcy case. The district court affirmed the county court's award of the attorney's fees and costs for the attorney's effort to lift the stay on the property and to return the case to the county court for disposition.

In *Sanchez,* the facts were similar to this case. The state court entered a final summary judgment in the foreclosure action after the dismissal of the bankruptcy petition. The Third District found that a creditor must seek attorney's fees in bankruptcy court. *Sanchez* relied on the ruling in *In re Boffey*, 14 B.R. 2,3 (S.D. Fla. 1981), which determined that the mortgaged property was not sold in the state foreclosure sale but was liquidated by the bankruptcy trustee. Accordingly, *Boffey*'s precise holding is not as broad as the Third District extended it. The district court certified conflict with *Sanchez*' case, and in this case, found that the award of attorney's fees and costs as appropriate.

County court abused its discretion in refusing to continue the summary judgment hearing. Appellant argued that the county court abused its discretion in refusing to continue the summary judgment hearing due to the Appellant suffering injuries horseback riding. The district court looked at these three factors to determine whether there was an abuse of discretion: (1) whether the denial of the continuance created an injustice for the movant; (2) whether the cause of the request for continuance was unforeseeable by the movant and not the result of dilatory practices; and (3) whether the opposing party would suffer any prejudice or inconvenience as a result of a continuance.[6] In this case, the district court found: (1) the denial of the continuance did not create an injustice for the Appellant because she was on notice for at least a year and was granted additional time to respond to the Appellee's motions; (2) that even though the recent medical injuries had honestly occurred, the Appellant had a history of "intent" to delay proceedings and ruling on motions as a result of dilatory practices; and (3) a further continuance would not only result in prejudice to the Appellee, but it had already done so. Thus, The District found that the county court did not abuse its discretion.

Overall, the district court affirmed the Final Judgment of Foreclosure.


D. CLARK

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

Endnotes

1 *McConico v. Morgan's Mill Prop. Owners Ass'n, Inc., 6D23-1213, 2023 WL 5491858, at *2 (Fla. App. 6 Dist. Aug. 25, 2023).*

2 *Amelio v. Marilyn Pines Unit II Condo. Ass'n, 173 So.3d 1037, 1039 (Fla. 2d DCA 2015) (citing Shaw v. Tampa Elec. Co., 949 So.2d 1066, 1069 (Fla. 2d DCA 2007)).*

3 Fla. Stat. Ann. § 34.01, (2016).

4 Fla. Stat. Ann. § 222.10 (2016).

5 Fla. Stat. Ann. § 720.3085 (2016).

6 *Fleming v. Fleming, 710 So.2d 601, 603* (Fla. 4th DCA 1998).

Probate Case Summaries

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

The probate court erred in denying a claimant's motion for satisfaction of a claim based on grounds that the issues were previously litigated and dismissed for failure to prosecute. The prior litigation was not an adjudication on the merits of the claims that would preclude the claims inprobate. Additionally, the probate court further erred by finding that the claims were not claims against the estate.

Ford v. In Re Estate of Ford, 48 Fla. L. Weekly D1622 (Fla. 3d DCA 2023)

Billy Ford, son of decedent Beatrice Ford, filed a Motion for Satisfaction of Claim in his late mother's estate regarding the ownership of four parcels of real property. Prior to Beatrice's death, she filed an ejectment suit against Billy, and Billy responded by filing a countersuit for quiet title or declaratory relief. Before the issues could be litigated, Beatrice passed away and the case was dismissed without prejudice for failure to prosecute. The parcels of real property are the subject of the claim that Billy is seeking satisfaction of in his mother's estate.

The probate court cited to this prior dismissal as one of the reasons for denying the Motion for Satisfaction of Claim. However, because the case was not adjudicated on the merits and did not qualify as a res judicata ruling, the appellate court found that the denial of the claims on this basis is erroneous and that the claim is not precluded from being filed in the probate.

The probate court further found that the claim was not a claim against the estate due to Billy's Statement of Claim seeking return of the properties under equitable relief. On appeal, Billy cited to *Arwood v. Sloan*, 560 So.2d 1251 (Fla. 3rd DCA 1990), for the proposition that probate claims can involve issues of disputed ownership in real property. In *Arwood*, "Plaintiff filed a claim against Decedent's probate estate, claiming that the real property, funds in the bank, and other assets in Decedent's name, were his sole property, and that title to the same had been placed in Decedent's name for his convenience."[1] Billy also cited to *Sanchez v. Sanchez De Davila*, 547 So.2d 943 (Fla.3d DCA 1989), in which the parties claimed injunctive relief to enjoin distribution of funds.[2] In *Sanchez*, the probate claim involved the question of ownership of approximately $2,000,000 held in trust bank accounts.[3]

The appellate court found the denial of the motion in error because Billy's claim for equitable relief, which involved an ownership dispute as to the four real properties, is not outside the scope of a claim against an estate.

The probate court erred by entering an order permitting the personal representative to distribute an estate to three relatives who are not in a class of persons recognized as heirs of a decedent's intestate estate under Florida law.

State v. Estate of Kyle William Bruening, 48 Fla. L. Weekly D1867 (Fla. 4th DCA 2023)

The decedent died intestate leaving behind no children, parents, grandparents, aunts, or uncles. The decedent was survived by second cousins, who shared common great-grandparents with the decedent but who did not share any other familial relation. Katherine Mills, a distant cousin of the decedent, filed an affidavit of heirs claiming to be a second cousin. Mills subsequently filed a petition for administration asserting that she and two other second cousins once removed should inherit as beneficiaries of the estate.

The probate court erroneously determined that, because the relatives were descended from the decedent's great-grandparents, they were heirs eligible to inherit under Fla. Stat. § 732.103. But for the existence of statutory heirs, the decedent's estate would escheat to the state of Florida, accordingly, the state appealed the decision of the probate court.

The appellate court interpreted the plain language and requirements of Fla. Stat. § 732.103 and reversed the ruling of the probate court, clarifying that second cousins are not in a class of heirs who take as beneficiaries of an intestate decedent's estate.

The trial court erred in finding that the surviving spouse of Decedent did not waive her right to serve as personal representative based on a antenuptial agreement that contained a specific waiver of "the right to act as personal representative." The surviving spouse incorrectly argued that her right to serve as personal representative was revived by a later clause in the agreement. The subsequent clause provided the spouse with a right to take under the intestate estate of the Decedent, but did not resuscitate her right to serve as personal representative.

Hughes v. Angelo, 48 Fla. L. Weekly D1892 (Fla. 6th DCA 2023)

The Decedent and his spouse entered into an antenuptial agreement in which each party agreed to waive and release all rights at law or in equity in the other's property or estate, except as otherwise provided in the agreement. The waiver specifically included the right to serve as personal

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representative. The Decedent subsequently died intestate, and his spouse petitioned the court for appointment as personal representative of his estate.

Decedent's children objected to the appointment of the surviving spouse based on the waiver in the antenuptial agreement. The trial court erroneously found that a later provision of the antenuptial agreement revived the surviving spouse's right to serve as personal representative. The trial court relied on a later provision of the agreement, which allowed for the surviving spouse to take as an intestate heir of the Decedent's estate, but provided no further relief for the surviving spouse from the prior waivers.

The appellate court reversed, finding that the probate court read the subsequent provision giving the surviving spouse the right to take as an intestate heir too broadly, and found no conflict with the waiver of the surviving spouse to serve as personal representative.

The trial court properly denied a trustee's motion to amend a complaint seeking to join herself in additional capacities when the causes of action arose from the same occurrence.

Djurasevic v. Thompson, 48 Fla. L. Weekly D1560 (Fla. 3d DCA 2023)

The surviving trustee of Decedent's trust sued to foreclose on a residence where the mortgage and a promissory note were allegedly assigned to the trust. The residents of the property argued that the note and mortgage were assigned to the Decedent, individually, and that the trustee lacked standing to file suit. The trustee subsequently filed a motion to amend her complaint, seeking to join herself in her individual capacity as well as in her capacity as personal representative of Decedent's estate.

The appellate court affirmed the decision of the trial court, citing the established rule of law in Florida that the right to relief differs, even where causes of action may result from the same transaction or occurrence. *Metro. Dade Cnty. V. Hicks, 323 So.2d 591* (Fla. 3d DCA 1975). The trustee argued that she should be able to elect the capacity in which the suit is filed; however, the appellate court denied this based upon the trustee's motion to amend to join the suit in additional capacities, several years after filing suit solely as trustee.

The trial court did not err when granting an order of summary judgment in an action by a claimant seeking to have an asset of the Decedent declared an estate asset based upon an earlier oral agreement, because the claim was barred by a statute of limitations.

Montalvo v. Rovirosa, 48 Fla. L. Weekly D1749 (Fla. 3rd DCA 2023)

A claimant sought to have a company belonging to the Decedent declared an asset of the Decedent's estate based upon an alleged oral agreement that took place years prior to the death of Decedent. The sons of the Decedent objected to the action, arguing that the claim was barred by the applicable four-year statute of limitations.

The appellant asserts that the trial court erred in granting the motion for summary judgment because there were remaining issues of material fact, and that the statute of limitations defense was improperly pled. Here, the appellate court reviewed the record and determined that the motion for summary judgement was properly granted, citing to earlier case law that defines genuine disputes of material fact as, "those in which 'the evidence is such that a reasonable jury could return a verdict for the nonmoving party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted.'"[4] Accordingly, having reviewed the trial court record and finding no error in the trial court's order, the appellate court affirmed.


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Endnotes

1 *Id.* at 1251.

2 *Id.* at 944.

3 *Id.*

4 *See In re Amendments To Florida Rule of Civil Procedure 1.510*, 309 So.3d 192, 194 (Fla. 2020).

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