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Are Beneficiaries of a Revocable Inter Vivos Trust Also Beneficiaries of the Grantor's Estate? Sometimes!

by Charles Ian Nash, Esq., Frese Nash & Hansen, P.A., Melbourne, Florida

Many practitioners assume that, when a decedent's revocable *inter vivos* trust ("RIVT") is the residuary beneficiary under the provisions of the decedent's will (commonly referred to as a "pour-over will"), the trustee of the RIVT, in his/her/its capacity as such, is the beneficiary of the decedent's estate. This assumption appeared to have been borne out by the definition of "beneficiary" in Section 731.201(2), Florida Statutes. Additional support is contained in the definition of "devisee" in Section 732.201(9) and the Representation Statute concerning orders binding a trustee, in Section 731.303(1)(b)(2), Florida Statutes. The result of treating the trustee of the decedent's RIVT, rather than the beneficiary of the RIVT, as the beneficiary of the decedent's estate, is that only the trustee of the RIVT would receive a copy of the Notice of Administration, a copy of the estate inventory, copies of estate accountings, various notices that may be required to be provided to the beneficiaries of the decedent's estate, and a copy of the Petition for Discharge. Certainly the trustee of the decedent's RIVT would usually be the proper party to represent the interests of the beneficiaries of the RIVT, as supported by the doctrine of virtual representation codified in Section 731.303(1)(b)(2), Florida Statutes. But what if each trustee of the RIVT is also a personal representative of the estate? Wouldn't that be the proverbial fox guarding the henhouse?

Prior to the enactment of Chapter 2003-154, Laws of Florida (Senate Bill 2700) by the Florida Legislature as signed into law by Governor Jeb Bush on June 12, 2003, Section 731.201(2), Florida Statutes, defined "beneficiary" in pertinent part as ". . . . In the case of

See "Sometimes," page 3

Chair's Message:

Communication Among Section Members is Focus for This Year

By Louis B. Guttmann III, Attorneys' Title Insurance Fund, Inc., Orlando, Florida

Thank you for the honor to serve as your Section's Chair. It is indeed a privilege to hold this office. Together we will do our utmost to continue to develop and to build upon the traditions of our Section.

Late last year, Section leaders conducted a strategic planning meeting to review where we are and where we wanted to go. It was obvious to us that the Section is very healthy. Not so obvious was the realization that the Section's success is built upon and dependent upon our ability to be leaders of constructive change and to remain current. The better the communication within our Section is the easier change and development take place. Communication includes our ability to perceive the issues, develop solutions and imple-

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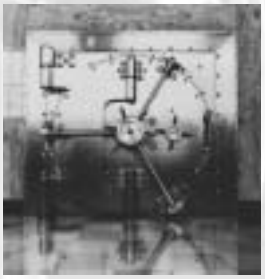

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SOMETIMES
from page 1

a devise to an existing trust or trustee, or to a trust or trustee described by will, in the absence of a conflict of interest of the trust, the trustee is a beneficiary of the estate." Moreover, Section 731.303(1)(b)(2), Florida Statutes provided as follows:

> To the extent that there is no conflict of interest between them or among the persons represented:
>
> ****
>
> 2. Orders binding a trustee bind beneficiaries of the trust in proceedings to probate a will, in establishing or adding to a trust, in reviewing the acts or account of a prior fiduciary, and in proceedings involving creditors or other third parties.

Most attorneys experienced in the area of the administration of estates and trusts would not require any additional guidance from the Florida Legislature to conclude that when each trustee of the decedent's RIVT (or a testamentary trust created in the decedent's will) is also a personal representative of the estate, a conflict of interest would exist without needing any additional facts. Unfortunately, some attorneys fail to interpret the provisions of Sections 731.201(2) and 731.303(1)(b)(2), of the Florida Statutes in such a manner.

In order to clarify the provisions of Sections 731.201(2) and 731.303 (1)(b)(2), Florida Statutes, relative to this issue, Section 731.201(2) was amended to provide as follows:

> "Beneficiary" means heir at law in an intestate estate and devisee in a testate estate. The term "beneficiary" does not apply to an heir at law or a devisee after that person's interest in the estate has been satisfied. In the case of a devise to an existing trust or trustee, or to a trust or trustee described by will, the trustee is a beneficiary of the estate. Except as otherwise provided in this subsection, the beneficiary of the trust is not a beneficiary of the estate of which that trust or the trustee of that trust is a beneficiary. However, if each trustee is also a personal representative of the estate, the beneficiary or beneficiaries of the trust as defined in s. 737.303(4)(b) shall be regarded as a beneficiary of the estate.

Section 731.303(1)(b)(2) was amended to provide as follows:

> Orders binding a trustee bind beneficiaries of the trust in proceedings to probate a will, in establishing or adding to a trust, in reviewing the acts or accounts of a prior fiduciary, and in proceedings involving creditors or other third parties. However, for purposes of this section, a conflict of interest shall be deemed to exist when each trustee of a trust that is a beneficiary of the estate is also a personal representative of the estate.

Chapter 2003-154, Laws of Florida, also modified the provisions of Section 731.201(9), Florida Statutes pertaining to the definition of a devisee. Section 731.201(9) now provides as follows:

> "Devisee" means a person designated in a will or trust to receive a devise. Except as otherwise provided in this subsection, in the case of a devise to an existing trust or trustee, or to a trust or trustee of a trust described by will, the trust or trustee, rather than the beneficiaries of the trust, is the devisee. However, if each trustee is also a personal representative of the estate, the beneficiary or beneficiaries of the trust as defined in s. 737.303(4)(b) shall be regarded as a devisee.

Chapter 2003-154, Laws of Florida, makes revisions to the provisions of Section 733.212, Florida Statutes, pertaining to a person upon whom Notice of Administration is required to be served. Section 733.212(1)(c), Florida Statutes, now reads as follows:

> The trustee of any trust described in s. 733.707(3) and each beneficiary of the trust as defined in s. 7373.303(4)(b), if each trustee is also a personal representative of the estate; and

Note that the beneficiary or beneficiaries of the trust as defined in Section 737.303(4)(b), Florida Statutes, are defined as follows:

> For purposes of this section, the term "beneficiary" means:
>
> 1. All current income or principal beneficiaries, whether discretionary or mandatory; and
>
> 2. All reasonably ascertainable remainder beneficiaries who would take if all income interests immediately terminated.

In summary, if you are representing the personal representative of an estate where a trust, whether a revocable inter vivos trust established by the decedent or a testamentary trust established in the decedent's will, is a beneficiary of the decedent's estate, and each trustee of any such trust is also a personal representative of the estate, the beneficiaries of such trust (as defined in Section 737.303(4)(b), Florida Statutes) are to be treated as beneficiaries of the probate estate. This means that various notices and other documents that are required to be served upon estate beneficiaries will also need to be served upon the beneficiaries of such trust if you have not already been following this procedure based on the wording of Sections 732.201(2) and 731.303(1)(b)(2), Florida Statutes, prior the enactment of Chapter 2003-154, Laws of Florida. Moreover, probate paralegals would benefit from being informed of these changes and requirements in the Florida Probate Code.



Aloha, Section Members!

We're going to HAWAII!!

See page 7 for details.

Cats Are Cats and Dogs Are Dogs But Neither Is A Fish or a Bird

By Marc J. Randazza, Esq., Becker & Poliakoff, P.A., Ft. Myers, Florida

"Neither a cat nor a dog is a fish or a bird" is the latest pearl of wisdom handed down by the Fourth District Court of Appeal in the case *Prisco v. Forrest Villas Condominium Apartments, Inc.*, 28 FLA.L.WEEKLY D1065a (Fla. 4th DCA 2003). In this case, Forrest Villas Condominium filed a complaint against Loretta Prisco seeking to enjoin her from keeping dogs in violation of the Condominium Association's pet restrictions. Apparently Prisco's dogs had a habit of loud barking, and a neighbor complained to the Board. The Board demanded that Prisco remove the dogs but she refused and the Board filed suit. As part of her defense, Prisco filed the affidavit of her neighbor, Patricia Devon, who stated that she has had a cat at her residence for eight of the last nine years, and the very Board member who complained against Prisco gave her permission to keep it. In addition, there was evidence offered that cats were common in Forrest Villas. Prisco argued that forcing her to get rid of her dogs was selective enforcement when cats were so prevalent.

The trial court, following well-established tendencies in the arbitration decisions, held that "cats are not the same as dogs, and the condominium allowing a cat on the premises [is] not equal to disallowing a dog" because "dogs clearly bark, cats do not, dogs need to be walked outside of their home, cats do not." The court acknowledged that the restrictions allow only fish and birds and no other animal of any kind, but agreed with prior arbitration decisions in that cats and dogs are not similarly alike.

On appeal, the Fourth District Court of Appeals disagreed with the arbitrators and the lower court and stated that "the restriction was clear and unambiguous. The restriction provided that other than fish and birds, no pets whatsoever" shall be allowed. "The fact that cats are different from dogs makes no difference. What does matter is that neither a cat nor a dog is a fish or a bird, so both should be prohibited." Since the clear purpose of the restriction was to prohibit all types of pets except fish and birds, permitting cats while excluding dogs amounted to selective enforcement of the restriction and summary judgment in favor of the Condominium Board was reversed.

This decision overrules the prevailing view of many arbitrators that "cats and dogs are fundamentally different pets for purposes of the selective enforcement analysis." See, e.g., *Palm Beach Hampton Condo. Ass'n, Inc.*, Arb. Case No. 99-0942 (Jan. 2000). Under the *Prisco* decision, boards may no longer exercise their business judgment to enforce no pet rules against one class of animals and not against another, as arbitrators have often permitted. See, e.g., *Naples Four Winds, Inc. v. Twiddy*, Arb. Case No. 93-0069 (Sep. 1993); *Windward Isle Homeowners, Inc. v. Birchler*, Arb. Case No. 95-0424 (Jan. 1997); *Beaches of Longboat Key v. Goldreyer*, Arb. Case No. 96-0158 (Mar. 1997; *Lyme Bay Colony Condo. Ass'n, Inc. v. Forget*, Arb. Case No. 97-1884 (Oct. 1998). Accordingly, it appears that, at least with regard to cats vs. dogs, it is no longer within an Association's business judgment to "refrain from enforcing a restriction against an insignificant violation as contrasted to a significant violation." If a board does so, it risks rendering the underlying rule wholly unenforceable.

This decision should also prompt Association boards to review the existing pet restrictions in the governing documents, and seek counsel from the Association's attorney as to whether revision of same is advisable.

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Burt Bruton Receives Annual Service Award

by Jo Claire Spear, Esq., Jo Claire Spear, P.A., St. Petersburg, Florida



Burt Bruton (right) graciously accepts the Distinguished Service Award from Steve Hearn. (Photo by Michael Gelfand).

This year, at the May 2003 RPPTL Annual Convention, the Section presented Burt Bruton with the Annual Service Award. The Annual Service Award pays tribute to a Section member who has rendered dedicated and significantly outstanding service to the Section and its varied programs throughout the current year. In selecting the recipient of this annual award, the Section considers both the character and magnitude of the service furnished by the nominee, with particular emphasis given to the benefits that accrue to the Section and Florida lawyers as a result of such service.

Burt is a shareholder and practices in the real estate department of Greenberg, Traurig, P.A. in Miami. He is a member of several Section committees, including the Legislative Review Committee, the Mortgage Law Committee, the Legal Opinions Committee, and the Land Trust Committee. He also authored the documentary stamp tax chapter recently published in the Florida Bar Practice Manual on Florida Real Property Complex Transactions, 3rd ed.

Commenting on Burt's selection this year, Laird Lile states, "Burt has been a work horse on legislative issues for longer than I can remember. He is quick to offer to review proposed or pending legislation, always willing to work with legislative staff on solving problems, and very effective in negotiating with other interest groups to resolve differences. Burt has excelled in the traditional areas of service, and his participation with the Section goes where few others have dared to tread: Burt's parodies for lawyers and his rock and roll performances are a Section highlight."

Thank you Burt for all your efforts on behalf of the Section, and as Laird would say, "Rock on!"

E-filing Committee Report: Still Growing

Submitted by Charlie Robinson, Esq., Committee Chair

The story of our demise in the previous *ActionLin*e is greatly exaggerated. In spite of huge budgetary issues facing the court system, electronic filing is a trend that will continue to grow. We have a draft contract with Todd Vincent, the consultant approved by the RPPTL Section. We have several counties anxious to serve as "Guinea Pigs" for probate and guardianship e-filing demonstration projects.

E-filing has been adopted in other state and federal courts. E-filing will happen in Florida and will be useful for probate and guardianship practice. Our effort must be coordinated with a number of players, including but not limited to The Florida Association of Court Clerks, Florida Court Administrator's Office, and the Board of Governors of The Florida Bar.

The committee members are Judge Mel Grossman, Keela Samis, Special Master in the 6th Circuit, Bruce Stone as Vice Chair and Charlie Robinson serving as chair. The effort was ably chaired by Rohan Kelley for several years and Rohan maintains his interest in the project.

Disclosure Summary on Residential Property

(Effective July 1, 2003)

By William J. Haley, Esq., Brannon, Brown, Haley, Robinson and Bullock, Lake City, Florida

Effective July 1, 2003, Senate Bill 1220, which amended Section 689.26 Florida Statutes, requires a revised Homeowners' Association/Community Disclosure be given to purchasers of real estate. It is the belief of many attorneys that the Disclosure must be given on Contracts for all property, both residential and commercial, although it was more than likely intended to cover only property with a Homeowner's Association. The Florida Association of Realtors (FAR) is advising its members that it is only required for property that has covenants and restrictions; however, it is the opinion of a number of attorneys that it is not worth taking the chance so they will recommend the inclusion of the Disclosure at the time of signing the Contract. The problem comes about as the Amendment to the Statute says it covers all transactions in a "community," but "community" is not defined. Although the Disclosure mentions Homeowner's Associations, it does not cross reference Chapter 720, Florida Statutes, that regulates Homeowner's Associations.

The Statute, as amended, specifically excludes Condominiums, Cooperatives, Timeshares, and Mobile Home Parks.

Should the Disclosure **not** be given at the time of the signing of the Contract, the Statute gives the Buyer the right to void the Contract within three days of receiving the Disclosure, or, up to the time of closing, whichever is less.

The Disclosure proposed for FAR/BAR contracts is as follows:

See form, next page

HOMEOWNERS' ASSOCIATION/COMMUNITY DISCLOSURE

BUYER'S INITIALS—SELLER'S INITIALS: If to be made a part of the Contract.
( ) ( ) - - ( ) ( )

IF THE DISCLOSURE SUMMARY REQUIRED BY SECTION 689.26, FLORIDA STATUTES, HAS NOT BEEN PROVIDED TO THE PROSPECTIVE PURCHASER BEFORE EXECUTING THIS CONTRACT FOR SALE, THIS CONTRACT IS VOIDABLE BY BUYER BY DELIVERING TO SELLER OR SELLER'S AGENT WRITTEN NOTICE OF THE BUYER'S INTENTION TO CANCEL WITHIN 3 DAYS AFTER RECEIPT OF THE DISCLOSURE SUMMARY OR PRIOR TO CLOSING, WHICHEVER OCCURS FIRST. ANY PURPORTED WAIVER OF THIS VOIDABILITY RIGHT HAS NO EFFECT. BUYER'S RIGHT TO VOID THIS CONTRACT SHALL TERMINATE AT CLOSING.

BUYER SHOULD NOT EXECUTE THIS CONTRACT UNTIL BUYER HAS RECEIVED AND READ THIS DISCLOSURE.

DISCLOSURE SUMMARY FOR _____
(Name of Community)

1. AS A BUYER OF PROPERTY IN THIS COMMUNITY, YOU ☐ WILL ☐ WILL NOT BE OBLIGATED TO BE A MEMBER OF A HOMEOWNERS' ASSOCIATION ("ASSOCIATION").
2. THERE HAVE BEEN OR WILL BE RECORDED RESTRICTIVE COVENANT ("COVENANTS") GOVERNING THE USE AND OCCUPANCY OF PROPERTIES IN THIS COMMUNITY.
3. YOU ☐ WILL ☐ WILL NOT BE OBLIGATED TO PAY ASSESSMENTS TO THE ASSOCIATION. YOU ☐ WILL ☐ WILL NOT BE OBLIGATED TO PAY SPECIAL ASSESSMENTS TO THE RESPECTIVE MUNICIPALITY, COUNTY, OR SPECIAL DISTRICT. ALL ASSESSMENTS ARE SUBJECT TO PERIODIC CHANGE.
4. YOUR FAILURE TO PAY SPECIAL ASSESSMENTS OR ASSESSMENTS LEVIED BY A MANDATORY HOMEOWNERS' ASSOCIATION COULD RESULT IN A LIEN ON YOUR PROPERTY.
5. THERE ☐ IS ☐ IS NOT AN OBLIGATION TO PAY RENT OR LAND USE FEES FOR RECREATIONAL OR OTHER COMMONLY USED FACILITIES AS AN OBLIGATION OF MEMBERSHIP IN THE HOMEOWNERS' ASSOCIATION. (If such obligation exists, then the amount of the current obligation is $_____.)
6. THE COVENANTS ☐ CAN ☐ CANNOT BE AMENDED WITHOUT THE APPROVAL OF THE ASSOCIATION MEMBERSHIP OR, IF NO MANDATORY ASSOCIATION EXISTS, PARCEL OWNERS.
7. THE STATEMENTS CONTAINED IN THIS DISCLOSURE FORM ARE ONLY SUMMARY IN NATURE, AND, AS A PROSPECTIVE PURCHASER, YOU SHOULD REFER TO THE COVENANTS AND THE ASSOCIATION GOVERNING DOCUMENTS BEFORE PURCHASING PROPERTY.
8. THESE DOCUMENTS ARE MATTERS OF PUBLIC RECORD AND CAN BE OBTAINED FROM THE RECORD OFFICE IN THE COUNTY WHERE THE PROPERTY IS LOCATED.

_____ _____
DATE BUYER

_____ _____
DATE BUYER

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Get Excited – We're Going to *HAWAII!*

February 17 - 21, 2004

By Jo Claire Spear, Esq., Jo Claire Spear, P.A., St. Petersburg, Florida



Aloha Section Members! We invite you to escape to the "The Big Island" for the Executive Council Meeting February 17-21, 2004. Our headquarters is the beautiful Waikoloa Beach Marriott, situated on the spectacular Kohala coast in Kona, Hawaii. Active volcanoes, snow capped mountains, black sand and white sand beaches are waiting to greet you. The climate in February is fabulous.

The Big Island offers a variety of scenic contrasts and climates. Majestic volcanoes rise from the ocean floor to a height of 13,000 feet. The jagged black volcanic rock covers parts of the island and provides stark beauty. Spectacular waterfalls cascade down sheer cliffs. High mountain rain forests contrast with desert terrain. Deep lush valleys, coffee plantations, and green sugar cane fields form a backdrop to long stretches of rugged sea cliffs, as acres of rolling grasslands drop into brilliant blue seas. Unique shops entertain, and waterfront restaurants feature Pacific/Asian cuisine. Golfing or ocean sports your idea of fun? It's all here! Snorkeling, scuba, kayaking, and deep-sea fishing.

If you learn just two words in Hawaiian, learn these: Aloha and Mahalo. These are among the most sacred and powerful words in Hawaiian culture. These words have mana (meaning spiritual or divine power). Aloha (hello) means "the presence of (divine) breath". Mahalo (thank you) means "may you be in (divine) breath". To understand these words though, they must be experienced. So, pack your bags and join us for a remote island adventure. For further information on the Waikoloa Beach Marriott, go to *waikoloabeach marriott.com.* Call 800/922-5533 to make your room reservations by January 17, 2004.



The first event of the trip for the RPPTL Section Members will be a reception on Tuesday evening (February 17). We will conclude the business portion of the trip with the Executive Council Meeting on Saturday morning (February 21), concluding with lunch.

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Intent Doesn't Matter?!

By Robert Goldman, Esq., Goldman, Felcoski & Stone, Naples, Florida

Your *amicus* committee co-chairs, John Wesley Little III and yours truly have been engaged in a *Through The Looking Glass*-esque adventure of late that mandates your attention. Many of you no doubt believe that if you deeded real estate to Don Blackacre, as trustee of the Blackacre Family Trust dated July 4, 2003, and, within the deed, identified the trustee's powers to manage the property, you have successfully transferred the real estate to the trust described in the deed. To be sure, that is what the grantor intended. And, we've all lived under the cardinal rule that the grantor's intent, like the settlor's intent, is, well, everything.

A recent decision of the United States District Court for the Southern District of Florida, however, teaches that in the scenario I described above, intent is irrelevant and Don Blackacre has just been given fee simple interest in the deeded real estate. This is so according to his honor because section 689.07(1), Florida Statutes, mandates that result. Now, I know what you're thinking, but I'm not making this up… really! The case is DOUGLAS K. RABORN, as beneficiary of Raborn Farm Trust Agreement dated January 25, 1991; RICHARD B. RABORN, as Trustee of Raborn Farm Trust Agreement dated January 25, 1991, and as beneficiary of Raborn Farm Trust Agreement dated January 25, 1991; and ROBIN RABORN PALLANTE, individually and as beneficiary of Raborn Farm Trust Agreement dated January 25, 1991, v. DEBORAH C. MENOTTE, Trustee in Bankruptcy for DOUGLAS K. RABORN, appellate case number CASE NO.: 03-12512D (11th Cir.), lower tribunal number 02-80488-HURLEY.

As I was writing this little ditty about the case, the clerk from the United States Court of Appeals for the Eleventh Circuit rang me to advise that the appellate court has dismissed the appeal (Mr. Little and I wondered whether the order on appeal was "final" for appellate purposes and now we know). This news of course came just days after Mr. Little and I polished our amicus brief and forwarded to the court. When the clerk called she asked me what I'd like her to do with the briefs in light of the dismissal. Tempted as I was to offer a detailed, graphic response, I controlled myself…

As your amicus committee we are done with this matter, for now. But you have to live with this madness in your practices. For that reason, consider the following excerpts from our brief:

Argument

This case turns on the proper interpretation of section 689.07(1), Florida Statutes. Section 689.07(1) provides as follows:

> (1) Every deed or conveyance of real estate heretofore or hereafter made or executed, in which the words "trustee" or "as trustee" are added to the name of the grantee, and in which no beneficiaries are named nor the nature and purposes of the trust, if any, are set forth, shall grant and is hereby declared to have granted a fee simple estate with full power and authority in and to the grantee in such deed to sell, convey, and grant and encumber both the legal and beneficial interest in the real estate conveyed, unless a contrary intention shall appear in the deed or conveyance; provided, that there shall not appear of record among the public records of the county in which the real property is situate at the time of recording of such deed or conveyance, a declaration of trust by the grantee so described declaring the purposes of such trust, if any, declaring that the real estate is held other than for the benefit of the grantee.

When construing a state's statute, the Court employs that state's case law interpreting the statute and the laws of statutory construction of that state. *See Artistic Entertainment, Inc., v. City of Warner Robins*, 331 F.3d 1196 (11th Cir. 2003. Florida requires that courts interpret section 689.07 in a manner consistent with its purpose. *See Smalbein v. Volusia County School Board*, 801 So. 2d 169 (Fla. 5th DCA 2001. Courts are not to construe the statute absurdly or in a manner that leads to harsh results. *See City of St. Petersburg v. Siebold*, 48 So. 2d 291, 294 (Fla. 1950) (*en banc). And*, courts are to interpret the statute in a manner that gives meaning to all phrases used in the law, without construing words within a section in isolation from one another. *See Hechtman v. Nations Title Insurance of New York*, 840 So. 2d 993, 996 (Fla. 2003); *Jones v. ETS of New Orleans, Inc.*, 793 So. 2d 912, 914-15 (Fla. 2001)

As for the purpose of section 689.07, this Court should follow the Supreme Court of Florida, which has opined on this subject. *Jones v. ETS of New Orleans* 793 So. 2d at 914. Interpreting a substantially identical predecessor version of this law, the court said the statute "…was intended to prevent … any fraud being perpetrated upon all who might subsequently rely upon the record when dealing with the grantee." *Arundel Debenture Corporation v. Le Blond*, 190 So. 765, 767 (Fla. 1939). The statute avoids clouding title for third parties who deal only with the trustee. *See Adams v. Adams*, 567 So. 2d 8 (Fla. 4th DCA 1990)

Employing Florida's tools of statutory construction, for the statute to apply, there must be a third party who, as a result of a dearth of information, cannot recognize with any certainty that the grantee is holding real estate in trust and that his or her interest is limited to exercising certain powers and duties. The statute indicates that if the trust document is recorded *or* if the beneficiaries are listed in the deed to the trustee *or* if the nature and purpose of the trust are described in the deed, then the third party is deemed to recognize the trust relationship and the trustee/grantee will not be treated as a fee simple owner of the deeded property.

The law further provides that the trustee/grantee will not be treated as a fee simple owner of the deeded property if the language of the deed or conveyance indicates a contrary intent.

Ironically, the district court's effort

to strictly interpret section 689.07 (1), Florida Statutes, actually stands the law on its head. Indeed, the district court held that "the intent of grantors is entirely irrelevant." A copy of the order is included in the appendix to this brief at tab A. In fact, the law says otherwise as we have just noted above. Further, as a matter of Florida common law, not inconsistent with the statute, the settlor/grantor's intent is crucial to any analysis of trust and deed issues. *Pierson v. Bill*, 182 So. 631 (Fla. 1938); *Knauer v. Barnett*, 360 So. 2d 399, 405 (Fla. 1978); *L'Argent v. Barnett Bank, N.A.*, 730 So. 2d 395, 397 (Fla. 2d DCA 1999)1

The interpretation of a deed, like other contracts, is something this Court may review *de novo*. *See Reynolds v. Roberts*, 202 F.3d 1303, 1313 (11th Cir. 2000); *Wilson v. Rex Quality Corporation*, 839 So. 2d 928, 930 (Fla. 2d DCA 2003). An analysis of the deed that is the subject of this appeal reveals the manifest intent of the grantor to deed the real estate in trust, to a particular trust identified quite specifically in the deed, along with language regarding the nature of the trust and the trustee's powers and interest as trustee. Anyone reading the deed in a reasonable manner cannot possibly conclude that the grantor intended to transfer a fee simple interest in the grantee. A copy of the deed is included in the appendix to this brief at tab B.

To be sure, the district court's erroneous ruling is not without precedent, but it is without support in Florida law. The decisions that seem to support the district court's ruling are *Schiavone v. Dye*, 209 B.R. 751 (S.D. Fla. 1997) and *In Re Crabtree*, 871 F.2d 36 (6th Cir. 1989). These decisions, like the decision below, seem to ignore the significance of the grantor's intent as expressed in the deed unless that intent is precisely expressed through a listing of beneficiaries, a statement of the nature and purpose of the trust, or by recording of the trust. Despite the statutory language to the contrary, intent of the grantor otherwise expressed in the deed appeared to be irrelevant in those cases, as it was below in this case.[2]

The statutory construction used by these courts not only fails to interpret the statute as a whole, it leads to absurd and harsh results and is wholly inconsistent with the purpose of the law and Florida practice. Indeed, Florida practitioners heretofore understood that identifying the trust in the deed was sufficient to avoid the "fee-simple" default conveyance to the trustee:

> Under F.S. 689.07, a conveyance of real property to a person as "trustee" without a trust date or without a trust identifier is presumed to create a fee simple title in the named person as if the words "as trustee" were not present.

Administration of Trusts in Florida, Chapter 14, Title Problems and Issues § 14.11 (3rd ed. 2001). And, concerns about fraud on third persons, which is what the Legislature intended to avoid through 689.07, do not exist in the present case. The identity of the trust in this case and the power of the trustee were anything but a secret upon the recordation of the deed at issue.

It is also no surprise that the trust document was not recorded. The hallmark of trust documents is their private and confidential nature. Rare indeed is the case where an instrument of trust is recorded in the public records. Perhaps more rare is to find a deed which exposes the names of the beneficiaries to the public, or, for that matter, to the beneficiaries themselves. Again, the idea is repugnant to the private nature of the trusts. *See* Fleece, Joseph W. and Kelly, Karen M., *Basic Estate Planning In Florida*, "Funding The Living Trust", §9.11 (Fla. Bar 2000) ("One of the perceived advantages of a living trust is that it preserves the privacy of the grantor in the ultimate disposition of the trust assets. …Because one of the functions of a living trust is to keep the grantor's affairs private, the recording of the trust instrument in the public records is not a desirable event.")

The district court's decision, if upheld, would have a major impact in probate as well. If property deeded to a trustee in the form used in this case is to be included in the trustee's personal bankruptcy estate, then it would seem that the property should



also be included in the trustee's probate estate. Property held in many trusts with deeds similar to these will need to be included in the estates of dead trustees for estate tax purposes. In addition, once the property is included in the dead trustee's estate, the property is subject to the dead trustee's creditors. Imagine all of the closed estates that will have to be reopened to address this "newly discovered" property.

The district court's ruling could also have a drastic impact on corporate trustees. If property deeded to a trustee in the form used in this case is to be included in the trustee's personal bankruptcy estate, then it would seem that the property should also be included in the corporate trustee's financial statements. If the district court's ruling is correct, publicly traded corporate trustees doing business in Florida may have to go back and restate their financial statements to include those assets.

These results are uniformly inconsistent with the settlor/grantor's intent. When the settlor/grantor transferred property to a trust, he or she intended to ultimately transfer the trust estate to his or her beneficiaries, not in fee to the trustee or the trustee's creditors. And the right of a settlor/grantor to transfer his or her property as he or she desires is an extremely valuable property right recognized by the Supreme Court of the United States in *Hodel v. Irving*, 481 U.S. 704, 715 (1987) and in article I, section 2, Florida Constitution, as interpreted by the Supreme Court of Florida in *Shriners Hospitals For Crippled Children v. Zrillic*, 563 So. 2d 64, 67 (Fla. 1990).

Conclusion

In *Schiavone*, the district court concluded its erroneous decision with an apology for the harsh result it reached. The apology should be rejected in favor of a correct interpretation of 689.07 that is grounded on a reading of the statute as a whole, does not extend beyond the letter or purpose of the statute, and reverses the decision below.

Should you find yourself on the other side of this argument, to my knowledge, the greatest support for the district court's ruling comes from the mouth of Humpty Dumpty in chapter 6 of *Through The Looking Glass*:

> 'When I use a word,' Humpty Dumpty said, in rather a scornful tone, 'it means just what I choose it to mean — neither more nor less.'

Endnotes:

[1] Statutes should be construed to harmonize with the common law, unless a contrary intent is clearly expressed in the statute. *See Hollar v. International Bankers Insurance Company*, 572 So. 2d 937, 939 (Fla. 3d DCA 1991).

[2] The *Schiavone* and *Crabtree* decisions do not indicate if they too had the substantial identification of the trust and other expressions of intent to convey to a trust that appear in the deed in this case. *Schiavone* certainly suggests that very little language regarding the trust and the trustee's power was included in the quit claim deed that was the subject of that case. 209 B.R. at 753.

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Card Number **Exp. Date** **Signature of Cardholder Required**

Investor Psychology 101

By Dennis E. Michels, CFP, Robert W. Baird & Co, Orlando, Florida

Everyone knows that the goal of investing is to buy low and sell high. And most people are aware that the twin emotions of fear and greed usually undermine that goal. If the obstacles are so clear, why is it still so much easier to buy when stocks are expensive than when they are on sale? Extensive proof exists that people are very willing to pile money into stocks when their prices are skyrocketing and pull money out of stocks after they've tanked. Just look at the massive inflows in the first nine months of 1987, and during 1998 and 1999. And with U.S. stocks already down sharply from their 2000 peaks, investors last year pulled over $100 billion out of equity mutual funds, the most in history.[1]

In his remarkably prescient book, "Investing Madness: How Psychology Affects Your Investing...and What to Do About It," Washington State University finance professor John R. Nofsinger notes that several factors make the "buy low, sell high" strategy so easy to believe in, yet so difficult to execute. Nofsinger theorizes that investors are willing to buy high because of what he calls the "house money" effect, which kicks in after soaring prices have generated hefty profits. Apparently, people are inclined to take on more risk when using capital gains than when investing earned income. Conversely, investors avoid buying low because of the "snake bite" effect, which Nofsinger classifies as a risk-averse state of mind that turns people unduly cautious after they have undergone a bad experience. Writes Nofsinger: "The psychological bias of seeking (or ignoring) risk of the house-money effect contributes to creating a price bubble. The psychological bias of avoiding risk in the snake-bite effect leads to driving prices too low." [2]

Could this bizarre behavior be traced back to some survival imperative of prehistoric man? In his book, "The Intelligent Asset Allocator," author William J. Bernstein traces the problem back to ancient survival imperatives. "Human beings experience risk in the short term," notes Bernstein. "In the state of nature, our ancestors' ability to focus on the risks of the moment had much greater survival value than a long-term strategic analytic ability. Unfortunately, a visceral obsession with the here and now is of rather less value in modern society, particularly in the world of investing."[3]

There will be bear markets. That's a fact of life. One question is: What do we do about it?

The most important step in dealing with bear markets is to put the risks of stock ownership in perspective. Yes, stocks are undoubtedly risky, but only if you define risk as the chance of suffering a large ***short-term*** loss. But for long-term investors, the "risk" of owning stocks lessens as the holding period increases. The real risk in stocks is not owning them, because they are one of the best methods available to protect your purchasing power against the corrosive effects of inflation.

For investors with long-term time horizons, the early months of 2003 may have been a good time to consider raising allocations to the U.S. equity market. Last year, the Dow Jones Industrial Average declined by the largest amount in a quarter-century.[4] In fact, stocks now have fallen three years in a row for the first time since the Depression-racked 1930s.[5] Since March 2000, the aggregate value of the U .S. stock market has fallen by about $7 trillion.[6] As of December 2002, the benchmark S&P 500 still resided fully 41 percent below its March 2000 peak.[7].

Understandably, the relentless multi-year decline has made some Americans leery of dipping their toes back into the financial waters. But to the extent that buying low and selling high depends upon eliminating emotion from the decision-making process, hiring proven investment professionals might help. It has been this author's experience that investors who go it alone usually act upon emotion and take action that is the opposite of their best interest. For example, while some investors remain skeptical, in the 2nd quarter of this year, the Dow was up 13.12%, the S&P 500 was up 15.39 (with dividends) and the NASDAQ was up a red-hot 22.55%. The individual investor still controls the amount of money flowing in or out of professionally managed accounts, but determinations regarding asset allocation and security selection within those accounts reside with the professional manager.

How can estate-planning attorneys assist their clients with important investment decisions?

1. When the estate-planning attorney is counseling a client during the attorney-client or attorney-trustee relationship, it is recommended that the client be apprised that a "second opinion" on their investment portfolio is important. Clients who do not seek second opinions may be running afoul of the requirements of prudent stewardship of the assets under their control. Many attorneys keep a list of three or four qualified financial professionals at hand that they make available to their clients for this "second opinion". Most attorneys prefer to refer their clients to fee-based financial planners because they realize that the interests of fee-based advisors and their clients are not in conflict.

2. The estate planning attorney and the client can work closely with a CFP in several essential ways:

- Identifying financial issues, goals and opportunities.
- Developing financial strategies including an investment policy statement.
- Implementing solutions.
- Monitoring and reviewing results. Wealth management is an ongoing process based on the economic environment and changes in lifestyle, family and business situations and goals.

It is only natural to be concerned when markets are under duress. It is also only natural to have trouble seeing the longer-term picture, especially given our ancestral tendency to focus on near-term risk. In that regard, it is instructive that Yale University professor of economics Irving

continued, next page

Fisher once noted "Stocks have reached what looks like a permanently high plateau."[8] Fisher's comments reportedly were made a few days before the 1929 stock market crash, and turned out to be correct — for a while. Yet despite the Great Depression, numerous recessions and more bear markets than investors care to remember, stock prices today are still roughly 29-fold higher[9] than when they hit that "permanently high plateau" in the waning days of the Roaring Twenties.

The moral of the story: Buying low and selling high might not be natural, but it is well worth the effort.

Dennis E. Michels, *a Certified Financial Planner practitioner, is a Financial Advisor at the Orlando office of Robert W. Baird & Co. He has more than 15 years of financial services industry experience and can be reached at (407) 481-8286 or (888) 792-0038.*

Footnotes:

1 *The Wall Street Journal.* December 26, 2002. Page D1.
2 "Investment Madness: How Psychology Affects Your Investing...and What to Do About it." John R. Notsinger. Prentice Hall; 2001. Page 63.
3 "The Intelligent Asset Allocator." William J. Bernstein. McGraw-Hill; 2001. Page 141.
4 *Newsweek.* January 27, 1997. Page 86.
5 *The Wall Street Journal.* January 3, 2003. Page C1.
6 *The Wall Street Journal.* January 3, 2003. Page C1.
7 *The Wall Street Journal.* January 3, 2003. Page R1.
8 The Economist December 21, 2002, page 145
9 Standard & Poor's.

Richard C. Milstein Receives UM Lawyers In Leadership Award

By Jo Claire Spear, Esq., Jo Claire Spear, P.A., St. Petersburg, Florida


R. MILSTEIN

The University of Miami Law School's Center for Ethics and Public Service has announced the selection of Richard C. Milstein, JD '73 as the recipient of its annual "Lawyers in Leadership Award". At a ceremony this past year at the University, the Ethics Center honored Richard, who is well known for his professional leadership, civic and cultural activities, and advocacy on behalf of others.

Founded in 1996, the Center is an interdisciplinary project that focuses on teaching the values of ethical judgment, professional responsibility, and public service in the practice of law. The Lawyers in Leadership series provides opportunities for law students and others to learn about prominent community leaders and to participate with them in informal discussions about their lives and careers. During this process, law students can glean useful advice as they embark on their own careers.

In reminiscing about his career path, Richard states that his practice originally focused on corporate litigation, primarily in the federal arena. During his associate years, however, he was "by chance" selected to handle a guardianship. Given his performance on the first case, and his interest in this area of law, the court began appointing him to handle other guardianship cases. Richard found a good fit in litigating probate, guardianship and trust issues, and then eventually elder care issues and dissolution of marriage. He says he enjoys his "people practice".

Richard's resume is a testimony to his devotion to helping others and his high ethical standards. He has been widely recognized for his community service and professionalism, being the recipient of the Tobias Simon Pro Bono Service Award (selected by the Florida Supreme Court in 1996), the John Minor Wisdom Professionalism Award in 1997, the Florida Bar President's Pro Bono Award in 1997, and the University of Miami Law School's Outstanding Alumnus award in 1999. The Dade County Bar Association has also designated an award in Richard's honor – the "Richard C. Milstein Award of Excellence". Most recently, in 2003, Richard was selected as the Professional Advisor of the Year from Leave a Legacy, a community-based program that promotes charitable giving.

Richard is a shareholder with Akerman Senterfitt's Miami office. He is a published author and a frequent speaker in the areas of professionalism, guardianship, ethics and elder law issues and litigation. The following highlights just a few of Richard's Bar activities: Chair of The Florida Bar Elder Law Section 1996-97, Chair of the Council of Sections 2003-04, President of the Dade County Bar Association 1988-89, ABA House of Delegates 1990-93, Director of the Young Lawyers Section of the Dade County Bar 1979-81, member of the American College of Trust and Estate Counsel 1993 to present.

When asked about role models who shaped his own career, Richard responds, "My role models are many in the making but the primary one is my parents. I grew up in very humble circumstances and my father died when I was just a teenager. With whatever occurred in our lives, I was told and more importantly shown that we could assist others. In my career, I was fortunate enough to work with people who worked hard for the profession and the community — Bill Colson, Bill Hicks, Peter Nimkoff, Arthur August, Frank Pohlig, Joe Gassen, and Louis Jepeway, Sr. and Jr., and others."

Commenting on the Lawyers in Leadership Award, Richard states, "It was a great honor to be selected by the Ethics Center, particularly by the students, to represent the alumni with regard to the profession, the high standard of ethics, and the maintenance of pro bono activities while in private practice." He encourages young lawyers to "Be yourselves. Read and do things outside of the law to be well rounded. Give to your community and the Bar, it comes back to benefit you in many ways that you may not anticipate." Whether young or . . . not so young, surely each of us is motivated to contribute more to our community and the Bar by Richard's exemplary career

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Respectfully submitted,
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Outgoing Section Chair, Steve Hearn, Led the Way

By Louis B. Guttmann III, Attorneys' Title Insurance Fund, Inc., Orlando, Florida, Chair

When I think back upon this past Section year and the many accomplishments of the RPPTL Section under Steve Hearn's leadership as chair, a number of things come to mind.

First, Steve's effective leadership style is a thing to behold. Steve instills confidence in us with his positive vision for the future of our profession as Real Property, Probate and Trust Law practitioners. Steve's positive approach to the many difficulties and challenges is one of his strongest assets. When faced with these challenges, Steve evaluates where we are, where we need to go and then proceeds without delay to the tasks that need to be accomplished. He combines this clear vision and ability to take action with another attribute that we all find so admirable in a leader. That is, he uses a healthy sense of humor to keep problems in perspective. Section members have enjoyed Steve's keen wit and his ability to turn a phrase and bring a smile. Never was this admirable quality more in the forefront than during this past year as Steve led the Section through many demanding discussions, tasks and efforts.

Second (as all great leaders do), Steve was able to focus our attention on both the big picture and on what our individual roles and responsibilities should be for the future of our profession. Steve reminded us that all too often, transactional attorneys (that's us), have to be reminded that we need to be engaged in the issues and problems that face our profession. Like every great coach, Steve also reminded us that there are many things we can achieve for the betterment of our practice by becoming engaged, by making our views known and by looking for opportunities to shape the decision process that will address these issues. This is just the sort of a vision that an effective leader conveys, and Steve did this superbly.



Steve and Suzanne Hearn at the RPPTL Convention Friday night black tie dinner. Photo by John Neukamm

Third, Steve and his wife, Suzanne, showed us in inumerable instances that there is no shame in having fun and enjoying your many friends within the Section, while at the same time, working hard to accomplish many things. Just look at the sites of our meetings. Steve and Suzanne took the opportunity to reacquaint us with the old Florida and the glitz of the new. Our trip to St. Augustine had such an old world feel to it, and it reacquainted us with Florida's rich history. South Florida got to see our faces on two occasions both in Boca Raton and Key Biscayne. While enjoying the glitz of South Beach, Steve took the opportunity to celebrate the 50 year anniversary as a member of The Florida Bar of our former Chair, Wilson Smith. Celebrating such milestones contributes to cementing that family feeling we have within our Section. And, of course, Steve and Suzanne showed Section members how to relax the Northern California way by arranging a wonderful out-of-state meeting in Healdsburg. It was such a beautiful springtime to be there with the mustard blooms and cherry blossoms and with the grape vines still in their winter slumber. The Section's annual convention at the Vinoy in St. Petersburg provided elegant surroundings. Dispelling the myth that there are no winners at the "game of chance"… there we were "dressed up and looking good"…toasting to our legislative accomplishments of the past year. Under Steve's great leadership, the Section was definitely a winner.

The proof is in the pudding. Steve effectively led us to dialogue within The Florida Bar on the issues of dignity in the law and Article V funding. Additionally, under Steve's direction, the Section's successful legislative initiatives included: amending the Marketable Record Title Act to facilitate homeowner associations; extension of deed restrictions; clearly defining the vested rights of homeowner association members; a number of changes to the laws governing condominiums, cooperatives and mandatory homeowner associations; legislation clarifying the dedication of public rights in publicly maintained roadways; an initiative concerning the uniform principal and income act; and changes to the guardianship law; plus additional initiatives in the areas of probate and trust laws.

On behalf of the entire RPPTL Section, thank you Steve and Suzanne for a dynamic and fun year.

RPPTL-PAC: A Political Action Committee

By Laird A. Lile, Esq., Chair of RPPTL-PAC, Naples, Florida

In July 2001, a group of lawyers believed that a collective, concerted effort should be made toward influencing legislation related to Florida real property, probate and trust law. That group created a political action committee, RPPTL-PAC. This group of lawyers consisted of Louis Guttmann, Sandra Diamond, Tom Smith, Steve Hearn, Chip Waller and me. RPPTL-PAC is not formally associated with the RPPTL Section, but the PAC membership believes the interests of the PAC are consistent with the goals and interests of the Section.

RPPTL-PAC meets in conjunction with meetings of the Section's Executive Council to review the pending elections for state officials and members of the Florida Legislature. The PAC also acts on recommendations for support of candidates and makes contributions to candidates who support and understand the issues of the Section and its members.

The current officers of the PAC are: Laird A. Lile, Chair; Louis B. Guttmann, Vice-Chair; and Sandra F. Diamond, Secretary and Treasurer. The current directors consist of the three officers and Steven L. Hearn, G. Thomas Smith, Julius Zschau, Roland D. Waller, Bruce Stone, Burt Bruton, and Robert W. Goldman.

To date during 2003, the PAC has over 60 members. During our short history, we have collected over $70,000 in revenues. Because we have no employees, rent, or related overhead, nearly all of those funds have been available to contribute to campaign funds to influence elections in the State of Florida.

Membership is extended to all who contribute to RPPTL-PAC. We believe that any person who is committed to real property, probate and trust law issues in Florida should be a member of RPPTL-PAC. Even though we all have many demands placed upon us and although we recognize that there are a bevy of good causes chasing our financial resources, we seek your support of RPPTL-PAC.



The RPPTL-PAC meeting in St. Petersburg after the Executive Council Meeting.



Pam Stuart received her RPPTL-PAC sticker from Laird Lile after joining the PAC.

While no single member of the RPPTL-PAC will necessarily agree with every contribution made to political campaigns, the Board believes that the collective judgment and contributions from this organization will optimize the effectiveness in the political process. We want your participation in this process. Each member is entitled to full participation regardless of the amount of the member's contribution.

If you are already a member of the RPPTL-PAC for 2003, *we thank you!* To all others, please join RPPTL-PAC by completing and returning the form found on page 18.

Be Part of the Process!
Join the RPPTL-PAC

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Louis Guttmann, Vice Chair
Sandy Diamond, Secretary/Treasurer

G. Thomas Smith, Director
Steven L. Hearn, Director
Roland "Chip" Waller, Director
Bruce Stone, Director
Burt Bruton, Director
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RPPTL Annual Convention Held in St. Petersburg

By Robert S. Swaine, Esq., Swaine, Harris & Sheehan, P.A., Sebring, Florida

Under its Chair, Steve Hearn, the Real Property, Probate & Trust Law Section held its Annual Convention and general membership meeting in St. Petersburg, Florida, on May 22 through 25, 2003. The convention coordinator was George Meyer, and seminars in both Real Property and Probate and Trust Law were held. The Real Property Seminar, organized by Pat Jones, Included topics on eminent domain, mortgage law, land trusts, bankruptcy, financing vehicles for housing projects, surveying laws and licensing laws for architects, engineers and contractors. The Probate and Trust Law Seminar, organized by Jim Herb, included topics on special needs trusts, durable powers of attorney, the Save our Homes Constitutional Amendment, asset preservation, estate tax matters and family limited partnerships. Each seminar also featured an in-depth ethics presentation.

The Section was honored to have the Honorable Kenneth B. Bell, Justice of the Supreme Court of Florida, in attendance. Justice Bell was the Keynote Speaker for the RPPTL Section luncheon on Friday and gave a thorough analysis of court-funding issues. RPPTL extends its thanks to Justice Bell for his insight and participation.

Elections were held during the Friday luncheon, and the following officers were elected:

Chair
Louis B. Guttman, III
Chair-Elect
Laird A. Lile
Probate and Trust Division Director
Rohan Kelley
Real Property Division Director
Julius J. Zschau
Circuit Representatives Director
George J. Meyer
Secretary
John B. Neukamm
Treasurer
Melissa J. Murphy

The various RPPTL committees met throughout the weekend. Anyone interested in more information on the committees should contact either Jay Zschau, Director of the Real Property Division, at 727-447-9553; or Rohan Kelley, Director of the Probate and Trust Division, at 954-563-1400.

For the name of your nearest circuit representative or for more general information on the Section, please visit the RPPTL website at *www.flabarrpptl.org*.

Convention photos on pages 20-22.

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Scenes from the RPPTL Annual Convention

St. Petersburg, May 22 - 25, 2003



Book signing by author, Tim Dorsey.



John Arthur Jones conveying his appreciation for the William S. Belcher Professionalism Award.



Steve Hearn congratulates John Arthur Jones.



Florida Supreme Court Justice Kenneth Bell speaking at the Convention luncheon.



John Arthur Jones and those special guests who attended the luncheon to help honor him.

Photos courtesty of Michael Gelfand and John Neukamm



Formal dinner guests



Morgan Weintraub and her little guest at the Friday dinner.



George and Pat Meyer at the Friday night black tie dinner.



"Casino Night" was the entertainment after the dinner.

Photos courtesty of Michael Gelfand and John Neukamm



The Executive Council Meeting.



Outdoor delight at dinner hosted by Fletch Belcher and his wife, Gayla, at their home.



Our gracious hosts, Gayla and Fletch Belcher.



John and Walker Brunner enjoying a guest event–swimming!



Justice Kenneth Bell, Sylvia Rojas and Pete Dunbar at the Roundtable Breakfast.

Photos courtesty of Michael Gelfand and John Neukamm

Amendment Solves Mobile Home Title Problem

By Jonathan James Damonte, Jonathan James Damonte, Chartered, Largo, Florida
Vice-Chair, Mobile Home & RV Law Committee

On July 11, 2003, the Governor signed into law CS/CS/SB 2550 (HB 1431) creating Section 319.261, Florida Statutes, which provides for a method permanently retiring a mobile home title once the mobile home is permanently affixed to land owned by the mobile home owner and for which a RP-1 real property tag has been issued. The statute was passed in order to satisfy the requirements of Fannie Mae and Freddie Mac, both of which had threatened to stop insuring loans on mobile homes in Florida due to problems with mobile home title transfers. The new statute became effective upon being signed by the Governor.

Florida was one of only seven states that did not have a statutory method of retiring mobile home titles once a mobile home was affixed to land. The Federal National Mortgage Association (Fannie Mae) announced last Fall that it would cease insuring loans on mobile homes due to what it considered excess losses resulting from the failure of lenders to properly securitize mobile home titles and the failure of secondary lenders to properly assign and transfer liens on mobile home titles.

The new statute provides that a mobile home title may be retired if (i) the mobile home has been affixed to real property owned by the mobile home owner, (ii) a real property tag has been obtained by filing a Florida Department of Highway Safety and Motor Vehicles (DHSMV) form DR-402A and affixing the black RP-1 sticker to the mobile home, (iii) a copy of the title has been recorded in the public records of the county in which the home is located, and (iv) the original title has been surrendered to the DHSMV.

The DHSMV has issued Technical Advisory T03-05 that implements the new statute and details the procedures for compliance. A new form, DHSMV 82109 Application for Retirement of a Mobile Home Certificate of Title has been created and is available for downloading from the DHSMV website at *http://casey.hsmv.state.fl.us/Intranet/dmv/Forms/BTR/82109.pdf*. The form lists all required documentation that must be recorded with the Clerk of Court in the county in which the property (mobile home and real property) is located before making application to the DHSMV for retirement of the certificate of title. The DHSMV is preparing a new DMV Procedure TL-39 Application for Retirement of a Mobile Home Certificate of Title or Reinstatement of a Retired Mobile Home Certificate of Title, which will be available soon.

For purposes of issuing title insurance on mobile homes affixed to real property owned by the mobile home owner, the vehicle identification number of the mobile home should be included with the legal description on the deed, the mortgage, and on Schedule A of the title insurance commitment and policy. An ALTA 7 endorsement may be issued with the policy. The Attorney's Title Insurance Fund, Inc. is expected to issue a revised Title Note 25.02.06 later this year.

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IRS Finalizes New FIRTPA Withholding Regulations

TINS Required After November 3; Mandatory Change In Non-foreign Affidavits; Like-kind Exchanges Restricted

By Jonathan H. (Jason) Warner, Esq., Miami, Florida

On August 4, 2003, the Internal Revenue Service issued final regulations requiring taxpayer identification numbers (TINs) from all parties at the time of filing any form, notice or election under Code Sections 897 or 1445. Effective for transfers after November 3, 2003, these new regulations may cause serious difficulties for real estate transactions involving a foreign seller because even the IRS has acknowledged that the current International Taxpayer Identification Number (ITIN) process needs improvement. The final regulations adopt the July 26, 2002 Proposed Regulations without material change.

Effective September 4, 2003, non-foreign certification forms for entities must include a statement that the entity is not a disregarded entity. A disregarded entity's owner, if eligible, must give the non-foreign certification. Practitioners will have to amend their forms to accommodate these new requirements.

The final regulations also provide that, effective September 4, 2003, the nonrecognition notice procedure cannot be used in a deferred like-kind exchange, leaving the withholding certificate procedure as the only available mechanism for a foreign transferor to avoid withholding. Apparently, some practitioners have been utilizing the nonrecognition notice procedure for deferred like-kind exchanges even though this procedure left the transferee at risk of FIRPTA non-compliance because the transferee could not be certain at the time of the initial transfer that the deferred exchange would qualify as totally free of tax.

Background

Code Section 897 was enacted as the Foreign Investment in Real Property Tax Act of 1980 (FIRPTA), and for the first time, generally imposed U.S. federal income tax on dispositions of U.S. real estate interests (USRPIs) by foreign persons. After the Department of Treasury was rebuffed in its attempts to enact a rigorous withholding system to enforce FIRPTA, the Florida Bar Tax Section proposed a moderate, rational withholding system that enabled real estate transactions to proceed relatively unimpeded. Enacted as Code Section 1445 by the Tax Reform Act of 1984, that proposal's innovative withholding procedures now are replicated in other federal tax withholding areas.

When a foreign person disposes of a USRPI, the transferee must withhold ten percent of the amount realized by the transferor at closing and remit the withheld amount to the IRS within 20 days after the transfer. To avoid excess withholding when the required amount exceeds the tax actually due, the transferor may file an application for withholding certificate (Form 8288-B, generally) with the IRS prior to closing. If at closing the transferor provides the transferee a notice that the transferor has applied for a withholding certificate, the transferee retains the withheld amount (generally in an escrow arrangement with counsel) pending receipt of the IRS approval or denial of the application. The IRS is supposed to act on withholding certificate applications within 90 days of receipt, but that seems to have become a mere aspiration.

If the IRS approves a lesser amount of withholding, the transferee remits that lesser amount (if any) to the IRS with Form 8288 (including Form 8288-A) within 20 days after receipt of the IRS response and refunds the balance of the withheld amount to the transferor. The IRS stamps a copy of Form 8288-A and mails it to the transferor for inclusion in the transferor's U.S. federal income tax return reporting the sale.

These forms and other notices and elections relevant to FIRPTA withholding already call for the TIN of the transferor and transferee. However, if the transferor or a foreign transferee did not already have a TIN, the prior regulations and forms accepted "Applied For" in lieu of the TIN and the transferor's TIN was not required to be provided until the transferor filed its U.S. federal income tax return reporting the disposition of the real property interest.

New Regulations Accelerate Requirement to Provide TINs

The regulations under Code Sections 6109, 1445 and 897 have been amended to require a foreign person to provide a TIN at the time of filing any return, statement or other document required by the regulations under Code Sections 897 or 1445 for a disposition of a USRPI occurring after November 3, 2003. If the transferor's TIN is not timely provided, the transferee still must report the withholding on Form 8288 and remit, but the transferor cannot obtain a credit or refund of tax on the basis of a Form 8288-A that does not include the transferor's identifying number. The Explanation of Revisions (the "Explanation") states that the IRS will consider as incomplete and will not process a withholding certificate application or any other notice or election under Code Sections 897 or 1445 that lacks either party's TIN. The amended regulations state that an application for withholding certificate *will be denied* if not complete.

The IRS notes in the Explanation that it believes that the revised regulations do not impose a new obligation on a foreign person but rather accelerate the current requirement to provide a TIN in connection with the transferor's tax return reporting the disposition, or a transferee's withholding return in connection with the acquisition, of the USRPI. Accelerating the requirement for TINs better allows the IRS to iden-

continued, next page

tify foreign taxpayers and to more easily match applications, withholding tax returns, notices and elections with the transferor's income tax return.

Potential Adverse Impact on Real Estate Closings

Foreign persons involved in buying or selling USRPIs often are unaware until immediately before closing of the FIRPTA withholding requirement or the requirement to provide a TIN. In the author's experience, Florida real estate contract forms frequently do not provide a foreign party with adequate notice of these procedures and FIRPTA compliance rarely is considered at the time of contract. A sample Addendum follows this Article.

The current delays and difficulties in obtaining an ITIN for a foreign person will preclude filing a withholding certificate application for many foreign transferors unless initiated at the time of contract, and perhaps not even that lead-time is adequate based on recent anecdotal evidence. Unless the ITIN procedure is improved or alternative procedures developed, it may be necessary to advise foreign clients who own or who may wish to buy U.S. real estate to obtain ITINS in advance even if not otherwise needed.

Absent a swift and sure procedure for foreign parties to obtain an ITIN, the new requirement may delay or disrupt real estate closings. Some foreign transferors may suffer excess withholding at closing, perhaps even having to put up additional cash when the net proceeds are less than ten percent of the purchase price. The transferor cannot utilize even the early refund application procedure until TINs are available for both transferor and transferee.

The new TIN requirement also applies to Code Section 1445(e) transactions. The requirement to furnish an ITIN should be less disruptive when only related parties are involved in these kinds of transactions, but time constraints might pose an occasional problem.

Difficulties in Acquiring TINs

In the Explanation, the IRS expressed its belief that in many cases, the foreign taxpayer already will have a TIN due to having filed a U.S. tax return. Other than for rental property, that belief seems somewhat dubious. The IRS also expressed the belief that foreign corporations can obtain employee identification numbers (EINs) without delay through existing procedures, but there remains a serious question whether Form SS-4 requires the principal officer of an applicant U.S. or foreign corporation to have a TIN. The reverse of Form SS-4 says the officer TIN requirement is optional for a foreign corporation seeking an EIN to comply with U.S. withholding requirements (perhaps limited to those currently listed on the Form, not including FIRPTA), but the instructions to Form SS-4 state that the officer TIN is mandatory. At least in the past, it has been difficult to get SS-4s processed by some Service Centers if the officer EIN was not stated.

The Explanation notes that the IRS is exploring options to address concerns about the time it takes nonresident aliens to obtain ITINs, and specifically is considering processing applications for withholding certificates in conjunction with TIN applications. The Instructions to Form W-7 suggests that it takes 4-6 weeks after filing to obtain an ITIN, but anecdotal evidence suggests that the process is slower and more difficult even when an "acceptance agent" is used rather than mailing the Form W-7 to the IRS or visiting a domestic IRS Taxpayer Assistance Center or a foreign IRS office (not all of which accept these forms). It would not be surprising if the November 3 effective date is delayed further to allow time to implement a better system.

Other Problem Areas with TINs.

The amended regulations fail to provide a procedure for foreign persons to use to supply their TIN to the other party. It may be assumed, but it should have been explicitly stated, that the TIN may be provided on Form W8-BEN.

The amended regulations also fail to provide any sanction or relief for circumstances where one party fails to provide its TIN in a timely manner. For example, if a transferee refuses to provide its TIN to the transferor in time to allow the transferor to file for a withholding certificate before closing, the transferor might suffer excess withholding and substantial delay in obtaining a refund, in some cases having to provide additional cash at closing if the net proceeds are less than the required withholding. One might imagine a transferee using excess withholding as leverage to force concessions from a transferor.

A transferee, of course, will need its TIN by the 20th day following closing to avoid Code Section 6651 penalties for late remittance of the withheld amount and late filing of Form 8288. If the transferor is unable or refuses to supply its TIN, the transferee should file these Forms (including Form 8288-A) and remit the withheld amount without the transferor's TIN, even though the forms will not be processed. But it is not clear that so filing exempts an innocent transferee from all penalties for not obtaining the transferor's TIN. The regulations should explicitly state that, if the transferee has requested the TIN but the transferor does not timely supply it, the transferee would not be subject to any penalties for filing Form 8288 without the transferor's TIN. This would be consistent with Reg. Section 1.6045-4(l)(2), concerning a settlement agent's request for TINs to be supplied on Form 1099. Potentially applicable penalties include those under Code Section 6721 for failure to file a correct information return; Section 6722 for failure to furnish a correct statement; Section 6723 for failure to comply with other information reporting requirements (including the requirement to furnish a TIN); and Section 7203 for willful failure to supply information (including a TIN). Perhaps practitioners should consider inserting in the real estate contract sanctions to be imposed if a party does not provide its TIN when required.

Important Address Changes

The amended regulations update a number of address specifications in the prior regulations. Most Code Section 897 filings previously directed to the Foreign Operations District in Washington, D.C. now go to the Small Business/Self Employed Division in Lanham, Maryland, or to the Philadelphia Service Center at the FIRPTA unit's address. For Code Section 1445 purposes, written communications to the Philadelphia Service

Center now go to the address of the FIRPTA unit, and the address for filing Forms 8288 and 8288-A and remitting is changed from the Philadelphia Service Center to the address specified in Form 8288, currently the FIRPTA unit.

Disregarded Entities; Time to Revise Non-Foreign Affidavits for Entities

Effective September 4, 2003, a disregarded entity owning a USRPI will not be treated as the transferor under Code Section 1445. Consequently, a U.S. disregarded entity cannot provide a certificate of non-foreign status, and the entity's owner must give the non-foreign certificate if eligible to do so. Non-foreign certifications for entities will be required to state that the entity is not a disregarded entity. A revised sample statement is provided in the regulations, and a copy of that sample language is provided below.

A potential problem with the provision of the non-foreign certification by the owner of a disregarded entity is that the withholding agent might balk at accepting the certificate from a person who has no legal status in the transaction despite the regulatory requirement that the owner give the certificate. Unfortunately, the regulations did not include an affirmative statement entitling the withholding agent to rely on the owner's certification and TIN. Practitioners might revise their non-foreign certificate form to state that the person providing the certification is the owner of the disregarded entity and that the notice is provided on behalf of the transferor pursuant to the amended regulations.

Another potential problem is that many disregarded entities have TINs different from that of the owner. Using the owner's TIN for FIRPTA purposes is inconsistent with the requirement of Form 1099-S under Reg. Section 1.6045-4 that the disregarded entity's TIN be used. The Service should address this inconsistency.

Deferred Section 1031 Exchanges Restricted after September 4

The final regulations adopt the IRS position that the expedited nonrecognition notice procedure of Reg. Section 1.1445-2(d)(2) does not apply to a deferred Code Section 1031 like-kind exchange because the transferee cannot be sure at the time of closing that the transaction eventually will qualify for nonrecognition treatment under Section 1031 (for example, if the 45-day identification time limit or the180-day transfer limit is not met) or that it will qualify as entirely tax-free (for example, if boot is received by the foreign transferor). Instead, to avoid putting up cash equal to ten percent of the amount realized and seeking a refund, the transferor can apply for a withholding certificate. Although not specifically addressed by Reg. Section 1.1445-3, the IRS long has accepted withholding certificate applications for deferred like-kind exchanges, and this procedure now is incorporated into the regulations.

Apparently, the IRS has accepted nonrecognition notices in connection with deferred exchanges for years without objection. Proponents of this simpler mechanism for deferred exchanges argued that the IRS should adopt a notice of intent approach similar to that used under Temp. Reg. Section 1.1445-9T(b)(6) (prior to the repeal of Code Section 1034) for replacement of a principal residence.

In connection with formal adoption of the withholding certificate procedure for deferred like-kind exchanges, it is unclear how the IRS will apply the provisions of amended Reg. Section 1.1445-3(b)(2) if the requirement to identify "all the parties" to the transaction extends to the transferor of the replacement property. Often, the identity of such transferor is not established at the time of the initial transfer in a Code Section 1031 deferred exchange. Furthermore, Reg. Section 1.1445-3(b)(6) seems to contemplate only a cash escrow of the withholding tax. This is inconsistent with prior IRS practice in accepting withholding certificate applications for deferred Section 1031 exchange with alternative security such as an irrevocable letter of credit in accordance with Rev. Proc. 2000-35, section 6. Requiring a transferor to obtain and place in an extended escrow additional cash equal to ten percent of the exchange value is an unnecessary hardship. But, considering the Preamble to the Proposed Regulations, it seems likely that the IRS does not intend that these technical issues should hamper withholding certificate applications for deferred like-kind exchanges.

Code Section 121 Transactions

New Reg. Section 1.1445-3(b)(5) details how a withholding certificate may be sought if the nonresident alien occupied the property as his or her personal residence for the requisite time.

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See Addendum, next page

Executive Council Meetings 2003-04

November 6 - 9, 2003

Executive Council Meeting
Hilton Garden Inn, Pensacola
Group Rate: $99/night
Reservation Cut-Off Date:
October 13, 2003
Reservation Numbers: 800/Hiltons
or direct 866/916-2999

January 22 - 25, 2004

Executive Council Meeting
Hilton, Ocala
Group Rate: $92/night
Reservation Cut-Off Date:
January 2, 2004
Reservation Numbers:
352/854-1400 or 877/602-4023

February 17 - 21, 2004

Executive Council Meeting
Waikola Beach Marriott
Kona Hawaii
Group Rate: $170/night
Reservation Cut-Off Date:
January 18, 2004
Reservation numbers:
800/922-5533 or 800/228-9290

May 27 - 31, 2004

RPPTL Convention/Executive Council Meeting
Hilton Resort & Marina, Key West
Group Rate: $175/night

ADDENDUM

THIS ADDENDUM is being executed simultaneously with, in consideration of, and as part of the foregoing Contract for Sale and Purchase by and between _____ as Seller, and _____ as Buyer dated __, 2003. The parties hereby agree as follows:

The parties shall comply with the provisions of Internal Revenue Code Section 1445 and applicable Treasury Regulations issued thereunder. If the Seller is a U.S. person for Internal Revenue Code Section 1445 purposes, then on demand of the Buyer and prior to closing the Seller shall provide the Buyer with a certificate of non-foreign status in the manner provided in Treasury Regulations Section 1.1445-2. If the Seller provides the Buyer with such certificate, and if the Buyer is otherwise permitted to rely on such certificate under those Regulations, the Buyer shall not withhold under Internal Revenue Code Section 1445.

If the Seller is a 'foreign person' as defined by the Internal Revenue Code, the Buyer generally is required to withhold 10% of the gross sales price from the Seller at closing and to pay the withheld amount over to the Internal Revenue Service (IRS) unless an applicable exemption from withholding or a limitation on the amount to be withheld is available. To the extent that the cash to be paid over to the Seller at closing is insufficient to cover the Buyer's withholding obligation, the Seller shall provide to the Buyer at closing cash equal to such excess for purposes of making such withholding payment. If the Seller's federal income tax on the gain is less than the applicable withholding amount, the Seller may make advance application to the IRS for reduced withholding and, if granted, the Buyer shall withhold only the authorized reduced amount. If such ruling has not been received by closing, the parties at closing shall enter into an escrow agreement reasonably satisfactory to the Buyer and Seller pending receipt of the ruling, provided that at closing the Seller shall have the obligation to provide to the escrow agent from the closing proceeds (or from the Seller's other resources if necessary) cash equal to the maximum required withholding, with any excess withholding being refundable to the Seller upon receipt of a favorable ruling from the IRS.

Buyer and Seller understand that the IRS requires the Buyer and the Seller to have a U.S. federal taxpayer identification number and to supply that number on the foregoing forms. A foreign individual may acquire an International Taxpayer Identification Number for this purpose. Since it may take several weeks to receive the number after application and the IRS will not process these forms without the actual number, a party lacking a TIN is advised to apply immediately.

IN WITNESS WHEREOF, the parties have executed and delivered this Addendum simultaneously with the execution of the above-referenced Contract for Sale and Purchase.

Seller:
_____ Seller's TIN:_____

Buyer:
_____ Buyer's TIN:_____

Section 1445 of the Internal Revenue Code provides that a transferee of a U.S. real property interest must withhold tax if the transferor is a foreign person. For U.S. tax purposes (including section 1445), the owner of a disregarded entity (which has legal title to a U.S. real property interest under local law) will be the transferor of the property and not the disregarded entity. To inform the transferee that withholding of tax is not required upon the disposition of a U.S. real property interest by [name of transferor], the undersigned hereby certifies the following on behalf of [name of the transferor]

1. [Name of transferor] is not a foreign corporation, foreign partnership, foreign trust, or foreign estate (as those terms are defined in the Internal Revenue Code and Income Tax Regulations);

2. [Name of transferor] is not a disregarded entity as defined in §1.1445-2(b)(2)(iii);

3. [Name of transferor]'s U.S. employer identification number is _____; and

4. [Name of transferor]'s office address is _____.

[Name of transferor] understands that this certification may be disclosed to the Internal Revenue Service by transferee and that any false statement contained herein could be punished by fine, imprisonment, or both.

Under penalties of perjury I declare that I have examined this certification and to the best of my knowledge and belief it is true, correct, and complete, and I further declare that I have authority to sign this document on behalf of [name of transferor].

[Signature(s) and date]

[Title(s)]

Real Property Case Summaries

by Stephen Edward Silkowski, Esq., Jacksonville

A landowner whose property is being condemned pursuant to the Community Redevelopment Act may challenge the designation of a blighted area during an eminent domain proceeding, even though the landowner is a purchaser and another landowner within the area previously litigated the issue.
Rukab v. City of Jacksonville Beach, 811 So. 2d 727 (Fla.1st DCA 2002)

In the trial court, the City had argued that the only issue before the court in the eminent domain proceeding was just compensation, since the court could take judicial notice that a takings order involving six other property owners in the redevelopment area decided all other issues. The Rukabs contended that the City still had to establish public purpose and necessity.

The condemnor's burden in an eminent domain proceeding under the Community Redevelopment Act of 1969 is, in the first instance, to show a reasonable necessity for the condemnation. Once such a reasonable necessity is shown, the exercise of the condemning authority's discretion should not be disturbed in the absence of illegality, bad faith or gross abuse of discretion. Although it will not be presumed that a condemning authority abused its discretion or acted illegally or in bad faith in making its finding of reasonable necessity in a resolution of taking, such authority, in order to meet its burden, must put on some evidence of reasonable necessity for the taking. Once this is shown, however, the landowner must then either concede the existence of a necessity or be prepared to show bad faith or abuse of discretion as an affirmative defense.

The only public purpose supporting the taking of the Rukabs' land is the designation of blight over the entire area. Eminent domain cannot be used arbitrarily and unreasonably. Although a city may designate an area as a slum, such designation does not make it one.

A city council, in making its decision to establish a redevelopment area and following procedures authorized by state law, essentially performs a legislative, rather than quasi-judicial function. Therefore, a "fairly debatable" standard applies to review of its action. The city's decision must be sustained unless clearly erroneous. Once a reasonable necessity is shown, the exercise of the condemning authority's discretion should not be disturbed absent bad faith or gross abuse of discretion.

The Community Redevelopment Act contains no reference to a procedure whereby a person can challenge a "blight" designation, and there is no requirement in statute or case law that such challenge is required either at the time of the designation or upon adoption or modification of the Redevelopment Plan. The City, however, must only show that blight existed at the time of the resolution and not that it existed at the time of the subsequent taking.

The previous circuit court decision, through res judicata, collateral estoppel, or stare decisis, was not legally binding on the Rukabs, and they are not somehow precluded from asserting their constitutional rights within the eminent domain proceeding because they bought the property subject to the previous determination of blight. In *Palazzolo v. Rhode Island*, 533 U.S. 606, 121 S.Ct. 2448, 150 L.Ed.2d 592 (2001), the United States Supreme Court determined that purchasers of property subject to state regulation were not precluded from raising a claim of a regulatory taking even if they were aware of the regulation at the time they purchased the property. A State would be allowed otherwise, in effect, to put an expiration date on the Takings Clause.

The designation of the area as "blighted" was not confiscatory in nature, nor was adoption of the Redevelopment Plan. Therefore, the first opportunity to challenge the propriety of the taking was during this eminent domain proceeding. Thus, even if there were other opportunities for challenging the designation, a property owner must still be afforded the opportunity for a full hearing in the eminent domain action. During this action, the City must meet the burden of showing public purpose and necessity.

The term "groceries," as used in lease provisions, included non-food items such as soap, matches, and paper napkins. Calculation of selling space under lease provision that limited variety store display of groceries to 500 square feet of selling space included both footprint of fixtures and proportionate aisle space.
Winn-Dixie Stores, Inc. v. 99 Cent Stuff-Trail Plaza, LLC, 811 So. 2d 719, (Fla. 3rd DCA, 2002).

Winn-Dixie operated a supermarket in a shopping center. The lease granted Winn-Dixie an exclusivity provision, restricting its landlord from permitting other tenants to sell groceries in floor-space areas greater than 500 square feet. Winn-Dixie's landlord then leased approximately 22,000 square feet to 99 Cent Stuff for the operation of a "megastore.", and it began selling products that, according to Winn-Dixie, violated the lease provisions.

The commonly recognized definition of the term "groceries" includes more than just food. While it may not be easy to pinpoint each item to be considered groceries, that was no reason to ignore a clear and obvious element of the contracts at issue. The supermarket negotiated its lease with the promise that another purveyor of items like soap, matches, paper napkins, and such, would be quite limited in its ability to compete. It has the right to enjoy the benefits of its agreement. Similarly, one can only assume that the 99 Cent Store

continued, next page

negotiated its lease with the promise that its sale of items such as soap, matches, paper napkins would be severely limited. To permit the unfettered sale of those items limited by the terms its lease would create a windfall for that store.

Likewise, the leases at issue provided that the prohibited items would occupy no more than 500 square feet of selling space. Limiting the amount of sales area to just the "footprint" of the actual fixtures is not a reasonable construction of the clause at issue. Shoppers do not arrive by chopper, sending ropes down to hoist up their purchases. Shoppers make their choices while standing in aisles, and the 500 square feet provided for in the leases at issue obviously contemplated customers viewing and purchasing products from such aisles.

Contractor's final affidavit was valid and sufficient on its face, even though affidavit stated that it was "acknowledged" before notary, and notary did not cross out alternative language indicating that affiant did not take oath, where the clear intent was to comply with lien law and where affiant testified that she swore to contents.
Bell v. Renar Development Co., 811 So.2d 780 (Fla. 4th DCA 2002).

Renar, a general contractor, completed construction of a new home for the Bells, and then filed a claim of lien for the balance claimed under the construction contract, forwarding a contractor's final affidavit stating that all lienors had been paid in full. Instead of stating that the affidavit was sworn to before the notary, the affidavit uses the term "acknowledged".

Nevertheless, the document was sufficient for purposes of the lien law because it was clearly intended as a final contractor's affidavit. It was entitled, "Final Contractor's Affidavit;" it confirmed that the "affiant" had personally appeared and "deposes;" it stated that the affiant had "personal knowledge" of all facts contained in the document; it referred to the contract and declared that all lienors had been paid in full except for the balance owed to Renar; it stated that the affidavit was made for the purpose of inducing the Bells and their lender to make full and final payment to Renar in compliance with §713.06, Fla. Stat.; and, finally, it was signed by the maker as an "Affiant." Although the sentence that affiant "did (did not) take an oath" is patently ambiguous, it is obvious that the notary simply failed to cross out the inapplicable language. As to this, there was testimony by the affiant, albeit disputed, that she swore to its truth.

Subsequent purchasers could not be precluded from participating in second quiet title proceeding on the ground that they had failed to respond to the first quiet title petition that the court had denied. Subsequent purchasers did not waive any due process argument based on lack of service of second quiet title petition by appearing at the hearing on the second petition.
Hinton v. Gold, 813 So.2d 1057 (Fla.4th DCA 2002).

Lerner contracted to purchase the subject property from Scott, the son of the deceased owner of record who had died two years earlier. That contract was recorded in the public records. When Scott failed to open an estate, Lerner petitioned for, and was granted, appointment of a curator. Pursuant to a title search, the curator discovered that Scott had conveyed the property to the Hintons by quit-claim deed less than two months after the Lerner contract. The curator then filed a petition, in the probate division of the circuit court, against the Hintons and Scott to quiet title, to declare the Hinton deed invalid, and for specific performance of the Lerner contract. Although the Hintons did not serve a responsive pleading, the curator's petition was denied without prejudice. After denial of the quiet title petition, an order was entered in the probate proceeding finding that the property was homestead and had passed, as homestead, to Scott upon his mother's death.

Three months later, a second petition to quiet title was brought in the curatorship proceeding bearing the same style and case number as the earlier petition. The second petition, however, was not brought by the curator, but by the attorney ad litem who had been appointed for Scott, who could not be located. The Hintons were never served with notice of the second petition. They did, however, receive notice of a final hearing to quiet title at which they appeared in person with their attorney. When the Hintons' attorney began questioning Lerner, the only witness who testified at the hearing, the trial court ruled that the Hintons lacked standing and could not participate in the hearing because they had failed to respond to the first petition to quiet title that had been denied. Without an opposing claim to the property, the trial judge granted the petition to quiet title in Lerner, and ordered specific performance of his contract with Scott. The District Court concluded that the trial court's action in precluding the Hintons from participating, notwithstanding the fact that no default was entered in either proceeding, was an abuse of discretion.

Apparently, the trial court quieted title in Lerner under an assumption that there had previously been a default. Under §65.061(4), Fla. Stat. (1999), governing quieting title following a default, the court need not consider whether the party in default had a valid claim. While the Hintons may have been subject to a default by failing to respond to the first petition to quiet title, there was no evidence in the record that a default was entered. A notice of appearance was filed by the Hintons' counsel in the first proceeding. The trial court had simply denied Lerner's first petition outright, albeit without prejudice, after the appearance of the Hintons' counsel, but the record was silent as to why the first petition was denied. The District Court did not address whether the quiet title petition was properly initiated by the curator or the attorney ad litem where the property, as homestead, had passed directly to Scott, as this issue had not been raised in the trial court.

Absent a default, a court will not quiet title to property unless the record clearly demonstrates the right to title in the claimant and the invalidity of the contesting claim or potential claim. Here, the trial judge quieted title in Lerner even though Lerner did not put forth such evidence because the trial court pro-

ceeded as though a default had been entered against the Hintons. The partial testimony by Lerner was not sufficient to demonstrate that he possessed valid title and the Hintons did not.

Lerner maintained that, because the Hintons were served on the curator's initial petition to quiet title, there was no need to serve or give formal notice of the second petition. Lerner also asserted on appeal that the trial court, in any event, was ruling on the basis of the first petition, not the second petition, notwithstanding the court's written final order, entered months earlier, denying the first petition.

Although personal jurisdiction is not required for actions quasi in rem, such as an action to quiet title, a court obtains jurisdiction quasi in rem only after the plaintiff complies with the requirements of due process, namely that the defendant be given fair notice and a reasonable opportunity to be heard before a judgment is rendered. The District Court rejected the contention that the Hintons waived any due process argument by appearing at the hearing on the second petition, as their appearance became meaningless when the Hintons and their counsel were not permitted to participate. A party cannot, on the one hand, be held to have waived his objection to the form of notice by appearing, and, on the other, be prevented from participating on grounds he lacked standing. Fundamental to the concept of due process is the right to be heard that assures a full hearing, the right to introduce evidence at a meaningful time and in a meaningful manner, and judicial findings based upon that evidence. Therefore, if the Hintons waived objections to service and notice defects by participating in the hearing without protest, such a waiver should not have stripped them of their right to defend their interest in the subject property.

Whether a fraudulent-misrepresentation cause of action exists regarding public-record information is a question of fact.
M/I Schottenstein Homes, Inc. v. Azam, 813 So.2d 91 (Fla. 2002)

Homeowners sued developer for fraud, alleging that developer falsely represented that a nearby parcel of land was permanent "natural preserve" when developer knew that county had planned to build a school there. Such plan was on file at the county offices, and the seller actually knew of this plan.

The policy behind applicable supreme court holdings is to prohibit one who purposely uses false information to induce another into a transaction from profiting from such wrongdoing. The question of whether a cause of action for fraudulent misrepresentation exists in the instant case was one of fact that could not have been resolved based exclusively upon the parties' pleadings.

In pursuing this case-by-case consideration of the facts, courts should be mindful of the type of information that the purchaser asserts was fraudulently misrepresented. The question is whether the recipient of the misrepresentation is justified in relying upon its truth, for if the recipient knows that the statement is false or its falsity is obvious to him, then his reliance is improper, and there can be no cause of action for fraudulent misrepresentation. Thus, this factual examination is a consideration of the totality of the circumstances surrounding the type of information, the nature of the communication between the parties, and the parties' relative positions.

Knowledge, however, of clearly revealed information from recorded documents contained in the records constituting a parcel's chain of title is properly imputed to a purchasing party based upon the fact that an examination of these documents prior to a transfer is entirely expected. For this reason, it may often be the case that where fraud regarding information contained in and clearly revealed through a parcel's chain of title is alleged, reliance is not justified and a cause of action will not exist. Where the parties' pleadings render evident that reliance on the purchaser's part was not justified as a matter of law, a trial court may rule as a matter of law that no cause of action exists. Parcel surveys and drawings are not always a part of real estate closings, nor are they recorded in the usual transaction. Thus, these documents may not be part of the chain of title for the majority of real property parcels, and the trial court must always evaluate the facts of the situation before it, resolving the issues in a case-by-case fashion.

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County zoning code section setting forth criteria for grant or denial of application of unusual uses, including telecommunications monopole, was unconstitutional where section that contained list of uses conditioned on approval after public hearing did not provide definite, objective criteria to guide zoning boards in making decisions to grant or deny applications, thereby empowering boards to arbitrarily deny provision of wireless services.
Miami-Dade County v. Omnipoint Holdings, Inc., 811 So.2d 767 (Fla. 3rd DCA 2002)

The County zoning code unusual-uses section contained a lengthy list of uses that were conditioned on approval after public hearing. Among those uses was Omnipoint's requested telecommunications monopole. The code section that purported to create criteria that must be met for approval of unusual uses provided in pertinent part, "exceptions,...in the opinion of the Community Zoning Appeals Board [CZAB], [which] would not have an unfavorable effect on the economy of [the]...County, would not generate or result in excessive noise or traffic, cause undue or excessive burden on public facilities..., tend to create a fire or other equally or greater dangerous hazards, or provoke excessive overcrowding or concentration of people...when considering the necessity for and reasonableness of such... exception... in relation to the present and future development of the area... and the compatibility of the...exception...with such area and its development".

The court found this language to be legally deficient because it lacks objective criteria for the County's zoning boards to use in their decision-making process. That public hearing requirement granted too much discretion to the CZAB. The procedure for public hearings allowed the CZAB to accept or reject an application based on vague and subjective criteria. The standards for granting or denying an application were not precise or objective. Indeed, they were almost entirely subjective. Considerations of the public interest or incompatibility with surrounding land area are precisely the subjective and vague criteria that courts have rejected.

Consistently Florida courts have declared ordinances unconstitutional that lack objective standards to guide zoning and other quasi-judicial boards in making their decisions. As the County code does not provide definite, objective criteria to guide the County's zoning boards in making their decisions, it is unconstitutional. Sufficient guidelines are required that:

1. persons are able to determine their rights and duties;
2. the decisions recognizing such rights will not be left to arbitrary administrative determination;
3. all applicants will be treated equally; and
4. meaningful judicial review is available.

The County's unconstitutional hearing criteria also had the effect of prohibiting the provision of personal wire services, in violation of the Federal Telecommunications Act.

County and DCA's determination that 88.9% met comprehensive plan's requirement that "approximately 90%" of land area be maintained in agricultural, conservation and open spaces was entitled to deference, where interpretation was reasonable and evidence supported DCA's order.
Sumter Citizens against Irresponsible Development v. Department of Community Affairs, 813 So.2d 299 (Fla. 5th DCA 2002).

On appeal was a self-styled grassroots organization's challenge of a final order of the Department rejecting a challenge to the decision of the County to amend its Future Land Use map to redesignate 4,677 acres from Agricultural to Planned Unit Development. There was competent evidence to support the factual findings underlying the final order and the court was unable to say that the interpretation by the Department and the County of the provisions of the County's Comprehensive Plan was erroneous. The question whether 88.9% meets the Comprehensive Plan's requirement that "approximately 90%" of the land area be maintained in land uses such as agricultural, conservation and open spaces was a matter where the County and the Department's interpretation would be entitled to deference.

Question presented by action to enforce easement was not whether strip mall with dominant estate was entirely deprived of ingress and egress pursuant to easement, but whether there was any interference of right to free passage over easement to degree and amount that parties and successors in title contemplated. Easement in favor of strip mall that provided for ingress and egress to and from road over, across, and upon all of neighboring property unambiguously provided that it was dominant over entire parcel, and, thus, erection of billboard could not reduce or infringe the easement.
Sand Lake Shoppes Family Ltd. Partnership v. Sand Lake Courtyards, L.C., 816 So.2d 143 (Fla. 5th DCA 2002)

Shoppes, a retail strip mall, acquired an easement for ingress and egress over a parcel of land that Courtyards owned. Courtyards then erected a billboard that stood squarely on Shoppes' easement. As a result of the billboard erection, Shoppes was substantially limited in its ingress and egress of the easement, substantially reduced in its road use, and subjected to potential tort liability for injuries attributable to the billboard.

The question was not whether Shoppes was entirely deprived of ingress and egress, but whether there was any interference of its right to free passage over the easement to the degree and amount that the parties originally contemplated. Where there is an express grant of easement, the proper construction of the grant involves looking at what the original parties and their successors in title intended, as manifested by the circumstances, and the actions and statements of the people involved.

The court's initial concern should be to construe whether the grant of an easement is for the width described or for the description of the property over which there is a right to ingress and egress; or, put another

continued, next page

way, whether the right of ingress and egress coterminous with the area set aside for the easement, or something less than that area. If the court determines that the right of ingress and egress is coterminous with the area of the easement, then there can be no encroachments into the area.

In the instant case, the court found the easement unambiguous. The language "... vehicular and pedestrian ingress and egress to and from [the] road over, across, and upon all of the parcel" clearly indicated that Shoppes' easement was dominant over the entire parcel and, as such, could not be reduced and infringed by the erection of the billboard.

Where express terms of lease provided lessor with right to unilaterally cancel the lease for any reason, without prior notice to lessee, lessor's cancellation was effective when lessor signed termination notice; also, where lease required lessee to exercise purchase option within 15 days of lessor's notice of intent to sell, lessee's attempt to exercise option was ineffective when delivered subsequent to such 15-day period.

Churchill Development, Inc. v. Prime Outdoor Group, L.L.C., 816 So.2d 764 (Fla. 2nd DCA 2002)

In 1998, Whiteco entered into a lease agreement with Liu for an easement on Liu's property that would allow Whiteco to erect and maintain a billboard. Prime is the successor in interest to Whiteco in that agreement. In 2000, Churchill negotiated to purchase that parcel of Liu's property where the billboard had been erected. At the real estate closing on August 11, 2000, Churchill advised Liu that it did not want the billboard to remain on the property. Liu then signed a letter that was mailed to Prime, advising Prime that he was exercising certain rights under the addendum to the lease and was canceling the agreement. The closing was finalized the next day, August 12; Prime did not receive the letter, however, until August 14.

On September 25, Prime sent a letter to Liu and Churchill purporting to exercise its rights under the lease to purchase a perpetual easement on the property. Enclosed in the letter was an unsigned check payable to Churchill in the amount of the purchase price as established by the lease agreement. Churchill disregarded this letter. When Prime subsequently refused to remove the billboard, Churchill brought an action for unlawful detention of the property. Prime filed a counterpetition seeking specific performance.

The express terms of the lease addendum provided Liu the right to unilaterally cancel the agreement for any reason. The addendum required neither prior notice nor imposed a duty to negotiate a resolution. To read such requirements into this provision would alter the express terms of the addendum.

Liu was, without question, the owner/lessor at the time he signed the termination letter. The terms of the addendum required no prior notice of the cancellation, and the same was effective upon Liu's execution of the letter advising that he had exercised his rights. Accordingly, Liu had effectively canceled the lease agreement on August 11 as provided by the terms of the addendum. Prime therefore had no further rights under the lease agreement.

In addition, Prime did not effectively exercise its right to purchase the perpetual easement under the agreement. The lease provided that once the lessor decided to sell the property, he had to give the lessee notice, and the lessee had to exercise that option within fifteen days. Since Prime's attempted exercise was made more than fifteen days after receiving notice, the attempt was a nullity.

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Probate, Guardianship & Trust Case Summaries

by Shane Kelley, Esq., The Kelley Law Firm, Ft. Lauderdale, Florida and
Sean Kelley, Esq., Sean W. Kelley, P.L., Key West, Florida

Partial revocation of a will requires strict compliance with statutory requirements for execution of a will.
Cioeta v. Estate of Jerome Linet, 850 So. 2d 562 (Fla. 4th DCA 2003); 28 FLW D1286.

The Decedent executed his Last Will and Testament appointing Louis Claps, Maurice Lopatin and Anthony Cioeta as joint personal representatives. Subsequently, the Decedent executed a First Codicil to his Will adding Chase Manhattan Bank of Florida, N.A. as an additional joint personal representative. Upon the Decedent's death, Claps and Cioeta filed a Petition for Administration seeking appointment as joint personal representatives. The Decedent's two children, Harry and Rhoda Linet, the sole beneficiaries of the estate, objected to the Petition based on a copy of the First Codicil to the Will on which the names of Maurice Lopatin, Anthony Cioeta and Chase Manhattan Bank were lined through. Next to the stricken names in the left hand margin appeared the word "deleted," the date "6-21-96"and the Decedent's signature. There were no witnesses to the signature, and the Decedent's signature was not at the end of the document.

The probate court admitted the Will and First Codicil to probate, as altered, and appointed Claps and the Decedent's two children as joint personal representatives, but the court denied Cioeta's appointment. Cioeta appealed arguing that the partial revocation of the Decedent's First Codicil was ineffective because it did not strictly comply with Florida's statutes governing the revocation of a will. The Fourth District Court of Appeal agreed, holding that if a decedent fails to observe the formalities for the execution of a will as specified in Section 732.502, Florida Statutes, his or her attempted partial revocation of a will or codicil is invalid, and the will or codicil as originally written must be admitted to probate.

The appropriate standard of review of a trial court's order denying relief from a judgment is abuse of discretion.
In re Guardianship of Theresa Maria Schiavo, Incapacitated. Robert Schindler and Mary Schindler, Appellants, v. Michael Schiavo, as Guardian of the person of Theresa Marie Schiavo, Appellee, 851 So. 2d 182 (Fla. 2nd DCA 2003); 28 FLW D1347.

In a compassionate and very well written opinion, the Second District Court of Appeal affirmed the guardianship court's denial of Appellants' Motion Seeking Relief From a Prior Judgment. The prior judgment at issue ordered the guardian to withdraw life prolonging procedures. This was the fourth time over a span of ten years that the Second District Court of Appeal has reviewed this matter, and a recitation of the procedural history and facts would be impractical in this forum. Practitioners in this area may wish to review *Schiavo I, Schiavo II, Schiavo III* as well as this opinion (*Schiavo IV*).

Although the full opinion describes some of the procedural history, the Second District Court of Appeal limited its legal findings in this appeal to a review of the guardianship court's Order Denying Appellants' Motion Seeking Relief From a Prior Judgment. A trial court has broad discretion to grant relief from a prior judgment. The proper standard of review of a trial court's denial of a motion seeking relief from a prior judgment is abuse of discretion. After finding that the guardianship court followed its instructions in *Schiavo III* by conducting a thorough hearing and drafting an extensive order, the Second District Court of Appeal concluded that the guardianship court did not abuse its discretion when it denied the motion.

Primarily because of the finality of the guardianship court's decision for their daughter, the Appellants urged the court to conduct a de novo review of the extensive evidence presented at the trial level. After determining that it was simply not proper for an appellate court to review such a fact-intensive determination de novo, the court concluded in what seems to be a plea for the cessation of further litigation, "if we were called upon to review the guardianship court's decision de novo, we would still affirm it."

Letter from Decedent to Appellant indicating Decedent's intent to sell her condominium to Appellee for $100 upon her death was not a valid option contract because it was not executed with the formalities of a will.
Angelus v. Pass, 847 So. 2d 553 (Fla. 3rd DCA 2003); 28 FLW D1165.

Ruth Snyder wrote a letter to her nephew-in-law, the Appellee Henry Pass, informing him that she had written a will. The letter indicated that she had not included her condominium in the will and further stated, "If I am still here when I die I would like to sell it to you and Eileen [Ms. Snyder's niece and Henry's wife] for $100." Upon Ruth Synder's death, the Appellee, treating the letter as an option to purchase the condominium, tendered $100.00 and made a claim against the estate. Upon the Appellant's objection to the claim, the trial court found that the writing was an enforceable option contract which was supported by sufficient consideration. The Third District Court of Appeal reversed, finding that the trial court's ruling sanctioned a "testamentary transfer of property that does not comply with the require-

continued, next page

ments of a will."

Nephew of Decedent who was named as the beneficiary in a later Will was an "interested person" entitled to notice of the Petition for Discharge and the probate court can reopen an estate for fraud committed by the personal representative, even after an Order of Discharge has been entered.
Dean v. Bentley, 848 So. 2d 487 (Fla. 5th DCA 2003); 28 FLW D1555.

The Decedent died on June 8, 2000, and the probate court admitted the Decedent's 1974 Will to probate which left everything to the Decedent's step-grandson, Mario Williams. The court appointed attorney Jonathan Dean as personal representative of the estate. On November 20, 2000, attorney Dean became aware of a subsequent Will prepared in 1999 which left the Decedent's entire estate to the Appellee, Jackie Bentley. Bentley deposited the 1999 Will with the clerk of court on December 1, 2000, and a copy was provided to attorney Dean. Subsequently, attorney Dean filed a Petition for Discharge wherein he failed to mention the 1999 Will and wherein he stated that other than Mario Williams, there were no other interested parties. The probate court entered an Order of Discharge in February of 2001. On May 3, 2001, Bentley filed a Petition to Reopen the Estate and for Revocation of Probate alleging that the personal representative committed fraud due to his knowledge of Bentley and the 1999 Will. The trial court reopened the estate and revoked the probate of the 1974 Will finding that Bentley was an "interested person" entitled to notice of the Petition for Discharge and that attorney Dean was obligated to make the court specifically aware of Bentley and the 1999 Will.

Attorney Dean and Mario Williams appealed the trial court's ruling, arguing that a Petition for Revocation of Probate must be brought before the entry of an Order of Discharge. The Fifth District Court of Appeal affirmed the lower court's ruling, finding that an estate can be reopened due to fraud even after the entry of an Order of Discharge and that attorney Dean not only violated the duties of a personal representative, but he also violated the oath of an attorney not to mislead the judge or jury by any artifice or false statement of fact or law. The court directed the trial court's attention to Canon 3 D(2), Florida Code of Judicial Conduct, which requires a judge to take appropriate action when a judge "receives information or has actual knowledge that a substantial likelihood exists that a lawyer has committed a violation of the Rules Regulating the Florida Bar...."

Award of attorney fees must be supported by substantial competent evidence and contain express findings regarding the number of hours reasonably expended and a reasonable hourly rate; Appellant's failure to object at fee hearing to appellee's lack of an expert witness failed to preserve issue for appellate review.
Simhoni v. Chambliss, 843 So. 2d 1036 (Fla. 4th DCA 2003); 28 FLW D1139.

The trial court awarded an attorney for the Ward $17,865.00 in fees for her representation of the Ward in a guardianship. The order did not make specific findings regarding the number of hours spent by the attorney or a reasonable hourly rate. The Fourth District Court of Appeal reversed the order holding that an award of attorney's fees must be supported by substantial competent evidence and must contain express findings of the number of hours reasonably spent by the attorney and a reasonable hourly rate. The court also found that since the Appellant did not object to the Appellee's failure to call an expert at the fees hearing, the Appellant failed to preserve that issue for appellate review.

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Probate & Trust Litigation Committee Meeting Minutes – Abbreviated

May 22, 2003

The original committee minutes have been abbreviated for space purposes to highlight only the major issues discussed.

The Probate & Trust Litigation Committee meeting was held at Renaissance Vinoy Resort & Golf Club, St. Petersburg, Florida on Thursday, May 22, 2003, William Fletcher Belcher, Chair.

Call to Order. The meeting of the Committee was called to order by William Fletcher Belcher, Chair at approximately 3:10 p.m.

Contestability of Revocable Trusts. The Committee reaffirmed the consensus which it had previously reached at its Key Biscayne meeting on September 21, 2002, and its St. Augustine meeting on November 23, 2002, that the proposed legislation to permit challenges to revocable trusts under certain circumstances should limit standing to make such challenges to a guardian of the property and include companion changes to Chapter 744 to insure that its "less restrictive alternatives" provisions will not defeat the appointment of a guardian in cases where there is a genuine issue concerning the validity of the durable power of attorney, trust or trust amendment.

There was considerable discussion regarding the text of Agenda Revised Item 3 (which included comments by Bob Goldman, Steve Hearn, Jack Falk, Barry Spivey, David Carlisle and Glenn Mednick), particularly with regard to: (i) how the issue of the validity of the durable power of attorney, trust or trust amendment should be raised; (ii) whether that issue should be resolved in the incapacity or guardianship proceeding, or in another forum, and (iii) whether the raising of an issue concerning the validity of the "less restrictive alternative" instrument should create a presumption that no alternative to guardianship will sufficiently address the problems of the ward. It was felt that the creation of such a presumption was not advisable because it would lead to considerable confusion as to the effect of that presumption, including the manner and forum in which it would be utilized and rebutted. Barry Spivey suggested that the court in the incapacity or guardianship proceeding should not consider a "questioned" instrument as a "less restrictive alternative" until a guardian has been appointed and the issue of the validity of the instrument has been determined in another proceeding.

Although it was the consensus of the Committee that the raising of an issue as to the validity of the durable power of attorney, trust or trust amendment should procedurally preclude the use of that instrument as a less restrictive alternative to defeat the appointment of a guardian, the Committee did not believe that it was wise to reach that result through the use of an evidentiary presumption. It was the further consensus of the Committee that the proposed changes to Chapter 744 should be revised and considered at the July meeting at The Breakers.

Letter from David R. Carlisle Concerning *In Re Estate of Thompson*. David Carlisle explained his concern regarding the recent opinion of the First District Court of Appeal in *In Re Estate of Thompson*, 825 So.2d 941 (Fla. 1st DCA 2002). That case concerns the complexities involved in the application of the offer of judgment rule (Rule 1.442) in cases where the offer is made to or by a decedent in litigation prior to his death, or made to or by the decedent's Estate, including the interrelationship between the offer of judgment rule and Probate Code provisions regarding creditor's claims. It was the consensus of the Committee that the *Thompson* case did not require any Committee action at this time.

Broad Gifting Powers Contained in Durable Powers of Attorney. The Chair expressed concern that many abuses are occurring when attorneys-in-fact use broad gifting powers to make large gifts to themselves or others. It was the consensus of the Committee that these situations are intensely fact-specific

continued, next page

ActionLine Publication Schedule

ActionLine is in constant need of brief, newsworthy articles, and readers are invited to submit material for publication. Please forward any proposed articles concerning **real estate, estate planning, probate, or articles of general interest** to Dresden Brunner, Steel Hector & Davis, 3003 Tamiami Trail N., Suite 300, Naples, FL 34103. Please include a hard copy of the proposed article, along with a computer diskette containing the article in Word 6.0 or 7.0 format. Alternatively, articles may be E-mailed to *dbrunner@steelhector.com.* Articles NOT submitted on disk may delay publication. Please do NOT include graphics on the disks, unless they are illustrative charts or graphs. Prospective authors may call Dresden Brunner at (239) 430-1800 to obtain additional publication guidelines.

The publication deadlines for upcoming issues of *ActionLine* are as follows:

***ActionLine* Issue**	**Publication Deadline**
Winter 2003	October 31, 2003
Spring 2004	January 31, 2004
Summer 2004	April 30, 2004
Fall 2004	July 31, 2004
Winter 2004	October 31, 2004

Persons with comments or suggestions for improvement of *ActionLine* may send them to the above address.

MINUTES
from preceding page

and can be satisfactorily dealt with under established fiduciary principles. Comments by John Grimsley and Barry Spivey emphasized that the attorney-in-fact is a fiduciary with fiduciary duties, including the duties of good faith, loyalty and to act in the interest of the principal, and that the attorney-in-fact's exercise of a gift power is analogous to a discretionary trust in which the discretion must be exercised by the fiduciary in good faith and in the interest of the principal or beneficiary. It was also noted that §709.08(8) provides that an attorney-in-fact is a fiduciary who must observe the standards of care applicable to trustees. Accordingly, it was the further consensus of the Committee that no proposed legislation or other action was needed at this time.

Deadperson's Statute. Bill Hennessey was unable to attend this meeting, but advised the Chair that he would report on and move his project forward at the July meeting at The Breakers. It was the consensus of the Committee at the St. Augustine meeting on November 23, 2002, that the Deadperson's Statute should not be repealed unless it is replaced with some other mechanism which addresses the underlying policy of the statute, and that the following mechanisms would not be acceptable substitutes (1) giving the court discretion on whether or not to permit the testimony; and (2) requiring corroboration as a predicate to admissibility of the testimony.

Attorney-Client Privilege of the Fiduciary. Jack Falk gave a brief report on the status of this project and indicated that he would soon be recommending whether there is a need for legislation on this issue, and if so, the proposed concepts or alternatives for such legislation.

Adjournment. The meeting was adjourned at approximately 4:50 p.m.

CHAIR'S MESSAGE
from page 1

ment those solutions. It includes both the everyday work we do within our Section committees and the ongoing education of our membership to issues and other developments. Education in its broadest sense: CLE; national, state and local legal issues affecting us; and our responsibility for dignity in the law.

During this coming year, we will be focusing on enhancement of our communication tools across the Section. Some of these efforts have already begun. Foremost in this category is the undertaking to completely revamp and modernize our Section's web site (*www.flabarrpptl.org*). The technical aspects of this effort amount to a major monetary commitment of your Section's funds. The Section's Web Site Information and Technology Committee led by Sam Boone and Silvia Rojas will oversee this effort. The technical changes within the web site are just the beginning. Later in the year, we will be asking all of our committees and members of the Section to make use of these tools to effectively handle the work of the Section and convey information to and from our members.

Looking back to our Section's genesis and development, we see that identification and solutions to problems of our constituent practitioners on a statewide basis was an early focus. Routinely over the years, we work diligently on both substantive and procedural improvements to our Probate Law. Regarding real estate, one of the first projects of our Section was the development of the Uniform Title Standards. As you are all aware, our Title Standards provide the standards for determination of marketability in the residential setting on a daily basis. We are now in the beginning stages of updating all of our Title Standards; due to the scope of this project, it will be a multi-year process. Our Title Issues and Standards Committee, led by Pat Jones, Bob Graham and Steve Reynolds, are already hard at work and would be more than happy to have your input and help in this important project.

Our Section's publication, *ActionLine*, continues to be an effective communication tool provided to our members. Under the helm of Dresden Brunner, it improves with each issue. It conveys information about the work of the Section and it conveys opportunities for you to be involved in Section initiatives. *ActionLine*'s continued success depends upon our sharing our knowledge and talents with others.

By the time this article is published, we will have conducted our Legislative Update Seminar at The Breakers in Palm Beach. Celebrating its 23rd year, this seminar has a rich history and many of the presentations of the Legislative Update Seminar have been held at The Breakers. We have continuously sought ways to improve upon this seminar, including an experiment a few years ago with a statewide live satellite presentation. That form of presentation proved to be ineffective, but it serves as a good example of the challenge to look for ways to improve and grow that keeps your Section going. It is through such experimentation and acceptance of change that growth occurs. This year we are looking for ways to more effectively incorporate PowerPoint presentations within all of our seminars and we look to the future to find ways to use our web site and other tools to further enhance seminars and all of our continuing educational programs.

Through the balance of the year, please take the opportunity to join us by participation in a committee or committees within the Section, or taking part in an Executive Council meeting. We have scheduled our meetings to cover our state from stem to stern with a meeting in Pensacola, my home town, and the convention in Key West. We have also planned a stop in Florida's horse country, the capital of which is Ocala. Our out-of-state meeting will be a trip to the only state which was formerly a kingdom, Hawaii. I look forward to the opportunity to see you during the course of this year and to hear your perspectives for the continued growth of our Section.

2001 New & Revised Real Property Forms

Print and fill in the forms right from your computer.
Formatted for WordPerfect or MS Word

The Law Office Economics Committee of the Real Property, Probate & Trust Law Section of The Florida Bar has completed the arduous task of completing suggested forms with comments for the Real Property Practitioner. The forms (cd) are available through Florida Lawyers Support Services, Inc.(FLSSI) to RPPTL Section members.
(These forms will now be reviewed/revised annually.)

Mortgage Notes Deeds Affidavit Easements Construction Liens & Judgements

NOTE: FAR/BAR CONTRACT IS NOT INCLUDED.

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Condominium and Planned Development Committee Minutes – Abbreviated

May 22, 2003

The original committee minutes have been abbreviated for space purposes to highlight only the major issues discussed.

The Condominium and Planned Unit Development Committee meeting was held on May 22, 2003 at the Renaissance Vinoy Resort & Golf Club, St. Petersburg, Florida. Co-chairs Michael J. Gelfand and Robert M. Schwartz chaired the meeting.

The meeting was called to order at 1:30 p.m. by Mr. Schwartz. Mr. Gelfand introduced Peter Dunbar, lobbyist for the Section. Mr. Dunbar presented a status report of the legislation considered by the 2002-2003 legislative session. Mr. Dunbar reviewed the following:

CS/HB 861 (Vested Rights, MRTA and Homeowners' Association Powers): The bill contains two of the Section's legislative initiatives, amending the Marketable Record Title Act to permit the extension of deed restrictions upon an extraordinary vote of the association board of directors and defining more clearly the "vested rights" of homeowners' association members. The bill also expands the powers of the homeowners' association to permit them to represent members in disputes concerning matters of common interest.

CS/HB 1719 (Construction Lien Law): The bill revises Florida's Construction Lien Law providing modified notice provisions for property owners and lenders, revising procedures for the final payment to the contractor, and revising the statement that must be provided to the owner of real property by the authority issuing the building permit.

CS/HB 1721 (Tax Deeds on Property Contiguous to Subdivision Lands): The bill requires the tax collector to notify the record owner of contiguous property in a subdivision when application is made for a tax deed on submerged land or common elements of the subdivision. If there are no bidders for the certificates on such properties and the county does not elect to purchase the land, the county must notify the contiguous property that the land is available for taxes. The bill also provides that ad valorem and non ad valorem assessments shall be made against the lots in a subdivision and not against the subdivision property as a whole.

CS/SB 260 (Condominiums–Display of Armed Services Flags): The bill modifies Section 718.113 of the Condominium Act to permit unit owners to display in a respectful manner Armed Services Flags not to exceed 4 ½ feet by 6 feet on designated holidays.

SB 482 (Landlord and Tenant–Termination): The bill revises the provisions relating to the termination of residential tenancies with a specific duration by creating a new section 83.575. The bill also provides that no landlord shall discriminate against a member of the United States Armed Forces in offering a dwelling unit for rent or in any of the terms of the rental agreement.

SB 524 (Rules of Evidence): The bill makes modifications to rules of evidence in Chapter 90 providing that objections to admitting or excluding evidence do not have to be renewed to preserve the claim on appeal; providing for notice and the opportunity to challenge when evidence is being provided by certification; and providing for the admissibility of evidence or records maintained in a foreign country.

CS/CS/CS/SB 592 (Condominiums and Homeowners' Association): This is the comprehensive bill dealing with most of this Session's changes to the laws governing condominiums, cooperatives, and mandatory homeowners' associations. This bill includes provisions to authorize the optional "electronic transmission" of meeting notices in condominiums, cooperatives and mandatory homeowners' associations; the Section's initiative to permit the domestication of foreign not for profit corporations; clarification of the insurance requirements for condominium associations; authorization for condominium and cooperative associations to charge for requested information and assessment certificates issued to a prospective purchaser or lienholder; and authorization for condominium and cooperative associations to waive the retrofit requirement of fire sprinklers upon a two thirds vote of the membership.

CS/SB 676 (Continuously Maintained Roadways): Section 54 of this bill is the Section's initiative permitting a roadway to be considered a dedicated public right of way when it has been continuously maintained by a county, municipality or the Department of Transportation for seven consecutive years.

Mr. Gelfand discussed the following recent cases of interest:

Yacht Club Southeastern, Inc. v. Sunset Harbour North Condominium Ass'n., Inc., 843 So.2d 917 (Fla. 3rd DCA 2003). Developer was entitled to disclose mutually privileged mediation communications to unit owners, as real parties in interest.

Four Jay's Construction, Inc. v. Marina at Bluffs Condominium Ass'n., Inc., 846 So.2d 555 (Fla. 4th DCA 2003). Construction contractor which built balconies for condominium units brought breach of contract action against condominium unit owners as a class, naming the condominium association in its representative capacity. Held: the contractor properly brought breach of contract action against the condominium unit owners as a class. Contractor granted leave to amend to clarify remedy sought. Question certified to Supreme Court whether FRCP1.221 authorized plaintiff to sue individual owners of units as a class by suing association as representative as distinguished from simply suing Association as contracting party.

Berger v. Riverwind Parking, LLP, 842 So.2d 918 (Fla. 5th DCA 2003). Landowners brought action against owner of parking lot of apartment complex seeking to enforce restrictions in subdivision that limited certain lots to residential use only. Summary judgment granted by trial court. Landowners appealed. Held: marketable record title act applied to extinguish subdivision restrictions which were over 30 years old and recorded prior to root of title. To be a "title transfer" under exception to MRTA, title transaction which had been recorded subsequent to effective date of root of title, the instrument must not only effect title, but must also be within the chain of title of the property involved. Mortgages, judgment liens, etc. which appear in chain of title after the root of title are not extinguished by MRTA.

Padow v. Knollwood Club Ass'n. Inc., 839 So.2d 744 (Fla. 4th DCA 2003). Condominium association filed suit against unit owner for unpaid assessments. Unit owner paid association $2,000 and association voluntarily dismissed suit. Unit owner filed motion to tax attorney's fees and costs claiming status as prevailing party. Motion denied. Unit owner appealed. Held: condominium unit owner not prevailing party within meaning of statute authorizing award of costs. Affirmed.

Michnal v. Palm Coast Development, Inc., 842 So.2d 927 (Fla. 4th DCA 2003). Contractor brought action for breach of contract and to foreclose mechanic's lien against homeowner. Judgment for the plaintiff for $80,654.40 awarded in jury trial on breach of contract. Bench trial on lien foreclosure claim resulted in attorney's fee with a multiplier of $317,128.19. Construction company's failure to maintain license did not render lien unenforceable. Court found that the July 21 fax from contractor to homeowner constituted "furnishing" of a "service" for the purposes of the 90-day limitation. Court reversed as to application of the multiplier.

Deep South Systems, Inc. v. Heath, 843 So.2d 378 (Fla. 2d DCA 2003). Roofer brought action against contractor alleging contractor failed to pay full amount due under series of contracts. Summary judgment granted in favor of roofer. Contractor appealed. Held: contracts not enforceable where roofer is not licensed contractor. Reversed.

Larson v. Eagles Nest Homeowners Association, 843 So.2d 1016 (Fla. 5th DCA 2003). Homeowners association brought lien foreclosure against homeowners. Trial court entered summary judgment in favor of association. Homeowner appealed. Issue of fact or law was raised in homeowner's affidavits regarding propriety of assessments that were not dispelled by association, thereby precluding summary judgment. Reversed.

Sunset Harbour North Condominium Association v. Bedzow, 842 So.2d 200 (Fla. 3d DCA 2003). Condominium association brought action against director of condominium developer claiming racketeering by disseminating misleading advertisements. Summary judgment granted in favor of director. Association appealed. Held: director not participating in marketing the condominiums was not personally liable.

Pond Apple Place III Condominium Association, Inc. v. Russo, 841 So.2d 526 (Fla. 4th DCA 2003). Condominium association brought action against unit owners seeking enforcement of pet restriction. Trial court dismissed as time barred. Association appealed. Held: 5 year statute of limitations for suits seeking injunctive relief governed action. Reversed.

Prisco v. Forest Villas Condominium Apartments, Inc. 847 So.2d 1012 (Fla.4th DCA 2003). Condominium association brought action for injunction barring resident from keeping dog on premises. Owner asserted selective enforcement. Trial court granted summary judgment for association on issue of selective enforcement. After trial, judgment entered in favor of condominium association. Resident appealed. Held: Resident was entitled to raise defense of selective enforcement at trial. Restriction provided that pets shall be permitted only in the portions of the public condominium area as may be designated by the association from time to time. Pets shall be limited to not more than one common, domestic, household pet. The board acknowledged that dogs were currently permitted so long as they shall live. Then upon their demise, these animals may not be replaced. With the exception of those dogs, no pet of any kind whatsoever, except fish and/or birds were permitted within the condominium. Unit owner produced evidence of an owner who had two cats and another owner who had seen cats in the windows and on the balconies of many units and that there were at least 5 or 6 cats whose presence in the apartments was open and notorious. With regard to the board allowing cats, the trial court found that there was no selective enforcement because cats are not the same as dogs. The appellate court disagreed and found that the restriction is clear and unambiguous and provided that "other than fish and birds no pets whatsoever" shall be allowed. The fact that cats are different from dogs makes no difference. The court noted also that by entering into an agreed judgment by which another owner was allowed to keep a dog, the board was selectively and arbitrarily enforcing the pet restriction because the evidence clearly showed that the dog was not lawfully upon the premises.

Next meeting. The next meeting of the committee will be held on Thursday, July 31, 2003, at 2:00 p.m. at the Breaker's Resort, Palm Beach, Florida. The location and time coincides with the section's summer meeting.

Adjournment. The meeting was adjourned at 4:40 p.m.

Check Out *YOUR* RPPTL Section Website: *www.flabarrpptl.org*

ACTIONLINE BULLETIN BOARD

HUD'S New Requirements on Flips. HUD has issued a final rule intended to prohibit "flipping in HUD's Single Family Mortgage Insurance Program." Basically, if the re-sale of real property is within 90 days of the seller's acquisition, the property is not eligible for FHA mortgage insurance. Restrictions on other time periods are addressed in the rule. The final rule was published May 1, 2003, in *The Federal Register,* taking effect June 1, 2003. HUD issued "Mortgagee Letter 2003-07" on May 22, 2003 to All Approved Mortgagees and FHA Roster Appraisers providing a synopsis of the final rule. Contact your title insurance underwriter or mortgagee clients for further details of this final rule and their criteria for compliance.

— Patricia J. Hancock

2003 SECTION-SUPPORTED LEGISLATION IN REVIEW. Read about the 2003 Florida legislative changes relevant to RPPTL Section Members in the special, electronic Legislative E-Issue of *ActionLine,* posted on the Section's website: *www.flabarrpptl.org.*

– S. Dresden Brunner

CORRECT E-MAIL ADDRESS? In order to receive Section information that is emailed to members from time to time, make sure The Florida Bar membership records contain your current email address.

ATTENTION: MEMBERS OF THE JUDICIARY. The ActionLine Committee extends an invitation to the State Judiciary to submit procedural requests, practice tips, reminders, or information of general interest for publication in the Bulletin Board. We'd love to hear from you!

HOMEOWNERS' ASSOCIATION/COMMUNITY DISCLOSURE FORM. A proposed Homeowners' Association/Community Disclosure form, revised pursuant to the recently amended Section 689.26 Florida Statutes, is reprinted herein.

– S. Dresden Brunner

This space is dedicated to providing space and opportunity to readers to share practice tips and brief items of general interest to the RPPTL reader. Contributions may be submitted to Jo Claire Spear by fax or email: Fax: (727)576-6407; email: Joclairespearpa@aol.com. *Each item should be limited to 100 words or less and should contain your name.*

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