ActionLine

A publication of The Florida Bar's Real Property, Probate & Trust Law Section

www. flabarrpptl.org

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Merger of Attorneys' Fees Provision in Real Estate Sale & Purchase Contracts

by Shelly J. Stirrat, Esq.
Fox, Wackeen, Dungey, Seeley, Sweet, Beard & Sobel, L.L.P.

Some practitioners have raised concern that the recently issued opinion of *Stevens v. Zakrzewski*, 826 So. 2d 520 (Fla. 4th DCA 2002), created a new precedent that the doctrine of merger now applied to prevailing attorneys' fees provisions in real estate sale and purchase contracts. Historically, it has been held that the prevailing attorneys' fees provision in a real estate sale and purchase agreement does not merge into the warranty deed. *See Burkett v. Rice*, 542 So. 2d 480 (Fla. 2d DCA 1989) (holding that because a prevailing attorneys' fees provision is a "collateral agreement not usually included in terms of a deed," the doctrine of merger does not apply).[1]

A thorough reading of *Stevens* reveals that the case was not decided by the doctrine of merger; rather, the case was one of strict contract construction. In *Stevens*, the buyer contracted to purchase a parcel of real property from the seller. After the closing, the buyer discovered a harmful environmental condition and sued the seller for breach of the sale and purchase agreement. The agreement had stated that the seller was not aware of any prior existing environmental conditions. The sale and purchase agreement also contained a prevailing attorneys' fees provision. The circuit court entered judgment for the buyer and also awarded the buyer attorneys' fees.

The sole issue on appeal was the award of fees. The Fourth District Court of Appeal reversed the award. Paragraph 34 of the sale and purchase agreement was an express merger clause which stated, "SURVIVAL OF

See "Attorneys' Fees," page 3

Old Republic Announces Scholarship in Memory of John Starr Thornton, Jr.

(August 15, 1938 – January 22, 2002)

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

. . . Home is the sailor, home from the sea
and the hunter home from the hill.
– Robert Louis Stevenson

John Starr Thornton, Jr. was a remarkable person. Those he touched in his life and work know this. They remember John as loving husband, father, friend, and parishioner; the seeker, the expert, the sportsman, and always a gentlemen. John lived life with a passion for knowledge and adventure. With generous heart, he shared his knowledge with colleagues in The Florida Bar, the Florida Land Title Association ("FLTA"), and title agents who had the good fortune of calling him for counsel. John Starr Thornton, Jr., at age 63, is gone much too soon.

The RPPTL Section published a resolution

See "Scholarship," page 4

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ActionLine in 2003: WIRED

With the New Year comes a new look for *ActionLine*. Did you know that the Real Property Probate and Trust Law Section of The Florida Bar had its own seal? The seal is the prominent graphic on the Section's website (*www.flabarrpptl.org*) and *ActionLine* is getting a fresh look with the seal too.

Also planned for *ActionLine* this year is a paperless issue. As technology is advancing and permeating our practices, *ActionLine* wants to stay up with the "times". A special issue is expected later in the year to highlight the Section's 2003 legislative actions, such as what Section-supported legislation was introduced, what legislation passed, and what legislation did not.

It is anticipated that the link to this *ActionLine* issue will be emailed to the Section members. Using Adobe Acrobat, you can view (and print) *ActionLine*. In order to be included, The Florida Bar must have your correct contact information. To update your information to include your current email address, go to "Member Services" on The Florida Bar website (*www.flabar.org*). On that page, use the Membership Records Change of Address Form to make the necessary additions or changes. It's easy!

If you have additional ideas on how ActionLine can help you in your practice, send your suggestions to the Editor-in-chief, S. Dresden Brunner, at *DBrunner@steelhector.com*.



ATTORNEYS' FEES
from page 1

COVENANTS AND SPECIAL COVENANTS: No provision, covenant or warranty of this Contract shall survive the closing except as expressly provided herein." In conformity, paragraph 38, addressing latent defects, contained such an express survivability provision: "the covenants in this paragraph shall survive the closing." Similarly, the provisions on "environmental condition" and proration of taxes contained the requisite survivability language. On the other hand, the prevailing attorneys' fees paragraph contained no such express provision.

The court cited the well established rule of law that every provision in a contact should be given its plain meaning and effect. With that rule in mind, the agreement plainly did not provide that the attorneys' fees provision would survive closing because it did not contain the agreed upon requisite survivability language in comparison to other paragraphs in the agreement. The court rejected the applicability of the doctrine of merger. The court explained that the outcome in the case "must be controlled by the parties' agreement."

As this analysis of the opinion shows, when a sale and purchase agreement contains an express merger provision, the common law doctrine of merger will not apply. *Accord Lassiter v. Kaufman*, 581 So. 2d 147, 148-49 (Fla. 1991)(holding that the doctrine of merger did not apply because the parties had expressed an intent for the provision to merger). In such a case, even if a collateral provision, a prevailing attorneys' fees provision will not survive the closing of the contract unless the provision contains the requisite survivability language.

Unlike prior opinions, the *Stevens* court did not concentrate on the language "arising out of the contract" included in the prevailing attorneys' fees provision.[2] *Compare Kelly v. Tworoger*, 705 So. 2d 670, 672 (Fla. 4th DCA 1998)(holding that purchaser's latent defect suit fell within purchase agreement's attorneys' fee provision because the action "arises out" of the pre-closing agreement); *see also Richard v. Triester*, 409 So. 2d 101, 103 (Fla. 3d DCA 1982)(holding that an action to recover an overpayment at closing is plainly "litigation arising out of the contract" falling within the language of the purchase agreement's attorney's fees provision). The *Stevens* court instead focused on the word "no" in the expressed merger clause: "no" provision, covenant or warranty shall survive the closing except as provided. With this plain language, the attorneys' fees provision did not survive the closing because the parties had agreed upon how to make provisions survive closing and failed to state that the attorneys' fees provision would survive.

Many law firms use the October 2001 version of the standard FAR/BAR Contract for Sale and Purchase. That form does not contain an express merger provision. Without such an express merger provision, a court would likely conclude that *Stevens* is distinguishable and the historical holding of *Burkett* applicable. On the other hand, if a law firm uses another form for real estate sale and purchase contracts, which does contain an express merger clause, then it needs to insert in the prevailing attorneys' fees clause the required survival language to comply with *Stevens*.

Endnotes:

[1] *See Fleischer v. Hi-Rise Homes, Inc.*, 536 So. 2d 1105, 1106-07 (Fla. 4th DCA 1988)(stating that the doctrine of merger "is basically confined to the sufficiency of the deed itself and does not touch other aspects of the original sales agreement. Those later aspects are generally referred to in the cases as 'collateral matters' which are not affected by the doctrine of merger." (quoting *Hutchens Bros. v. Brownsberger*, 624 S.W.2d 538, 540 (Mo. Ct. App. 1981))); *Milu, Inc. v. Duke*, 204 So. 2d 31, 33 (Fla. 3d DCA 1967)(explaining that the doctrine of merger "does not apply to those provisions of the antecedent contract which the parties do not intend to be incorporated in the deed, or which are not necessarily performed or satisfied by the execution and delivery of the stipulated conveyance").

[2] The provision in full states, "ATTORNEY FEES AND COSTS: In connection with any arbitration or litigation arising out of this Contract, the prevailing party to the arbitration and/or litigation, whether Buyer, Seller or Brokers, shall be entitled to recover all costs incurred including attorneys's fees and legal assistant fees for services rendered in connection therewith, including appellate proceedings and post judgment proceedings."

SCHOLARSHIP
from page 1

in memory of John's life and contributions in a prior *ActionLine*; but many felt compelled to do more. Last year, Old Republic National Title Insurance Company announced it would sponsor a college scholarship in John's name. In addition, members of this Section wanted to publish a tribute to John's life and work.

John was born and raised in Birmingham, Alabama. His father started his own title insurance business, Land Title Company, in Birmingham when John was aged 12. John's early work in the industry involved photographing title documents and developing the films. He met his wife, Dorothy, in high school. Although Dorothy's mother and father had a rule, ". . . no dating until you're 16", John convinced Dorothy's parents to lower the bar a bit to 15. At 19, she and John were married, while John was in law school. Together, they raised and educated five children, the youngest of which is now in her medical residency.

Dorothy's father was a criminal defense lawyer. Growing up in the South during periods of violent civil unrest was particularly difficult for families that provided any legal help to a criminal defendant of color. Dorothy still recalls the burning crosses on their front yard. When she and John spoke of marriage, they spoke of relocation – of moving from the racial unrest. From an early age, neither Dorothy nor John liked the treatment of minorities in the South.

John graduated from Birmingham Southern College. He obtained his law degree from University of Alabama at Tuscaloosa, at the time of the Vietnam draft. John applied for an Air Force commission, which came in just three days before he was to be inducted into the Army. John served in the Air Force for nine years on active duty. His tours of duty included bases in Oregon, Colorado Springs, and Madrid, Spain. His last assignment was at MacDill Air Force Base in Tampa, where he remained a reservist.

Upon John's discharge from active duty, he started his civilian career with American Title in Miami in 1970, but his family wanted to be


JOHN THORNTON

closer to the MacDill community. In 1971-72, they relocated to Clearwater where he opened an office for American Title. Shortly thereafter, he left and began his career at Ticor and Chicago Title Insurance.

John was not all work and no play, however. With great enthusiasm, he pursued reading, sports, and riding his Harley — always at maximum speed! John would take his 21' Columbia out for a sail into the Gulf or push his roller blades to the limit. He and Dorothy would ski the Rockies or drive and hike through New England to play amidst the fall foliage.

John and Dorothy were also active in the Seminole United Methodist Church, where Dorothy continues to be involved in the food program and homeless shelter at the Methodist Children's Home. John served as a lay leader and as trustee. He led a building drive to raise funds to construct handicap-accessible modifications and to build a new wing to join two of the existing Church buildings. The Church intends to name the new wing in John's memory.[1]

John worked in the title insurance industry for 31 years, retiring as Vice President and Regional Counsel for Chicago Title Insurance Company in its Tampa office. He retired from the Air Force reserves as Lieutenant Colonel.

When John was diagnosed with colon cancer, the prognosis was poor. John courageously pressed on. He survived for five years after the diagnosis, a period of time that Dorothy states was . . . a miracle. Although in pain and fighting nausea from the chemotherapy, John would go to work or bring the work home. Dorothy states, "John would work no matter how bad he felt." Known for his willingness to share his knowledge and expertise, Dorothy recalls, "John would talk to anybody, anytime. He was extremely gracious to people. Even in a crunch, he would take the time to help so the deal could go through." Sometimes, those calls would be received on Christmas or New Year's Eves. John, nonetheless, listened attentively and counseled every caller.

Of John's betterment of the title industry, Floyd Krause, President of North American Title Insurance Corp. states, "John always seemed to be at the forefront of new issues being put to the industry by our customers. If I ever had a question he was always willing to share a thought on it or a case on point or some obscure idea he may have had on the topic . . . and he took great pleasure in being with employees and agents." Of John's intellect and character, Joe A. Reinhardt, Vice President and Regional Counsel for Chicago Title Insurance Company, states, "John was the professor of Florida title insurance and the epitome of a Southern Gentlemen." James C. Russick, Assistant Vice President/State Underwriting Counsel for Old Republic National Title Insurance Company and a fellow Air Force reservist, reminisces, "John was a dear friend to all of us and one of the most intellectually gifted individuals I have ever had the honor and pleasure of knowing."

Old Republic Title Insurance Company established a college scholarship in John's name as a result of FLTA members' desire to honor John and his work. Old Republic will sponsor the $1,000 annual scholarship for five years and FLTA will administer the program. Applicants of the scholarship must be a student working for a FLTA member or a FLTA member's child. For further information on the scholarship program, contact Lee Huszagh, Executive Director of FLTA at 1-800-552-1065.

Jim Russick summarizes the way many feel about John: "We will always remember John for his expressions, for his smile, for his spirit, for his friendship, for his advice, for his example, and as one of the most caring individuals of everything that was dear to him: his family, his faith, his friends, and his profession."

As stated by Joe Reinhardt, "John set the benchmark for the next generation of title professionals. We miss him very much."

[1]. Anyone wishing to contribute to the building fund in John's memory may send a check to Seminole United Methodist, Building Fund, 5400 Seminole Blvd. Seminole, FL 33772.

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Condominium & Planned Development Committee Minutes — Abbreviated

The Florida Bar, Friday, October 25, 2002

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

The Florida Bar Condominium and Planned Development Committee meeting was held at the Hilton Miami Airport, Florida, on Friday, October 25, 2002 at 12:45 p.m.

SEMINAR. The Committee discussed plans for a basic or intermediate continuing legal education seminar to occur in the first quarter of 2004 at possibly the Orlando Airport Hotel. Topics would include elections and document drafting.

FUTURE ACTION ISSUES:

1. Association Borrowing - Robert Taylor.
2. Condominium Within Condominium and Other Developer Issues - Chuck Brecker.
3. Ability to Lien Condominium Units For Repair Costs - Steven Falk.
4. Arbitration Decisions Internet Access - Tyler Powell.
5. Insurance - Robert M. Schwartz.
6. Mixed Uses - Doris Goldstein, as a subpart of the Brecker developer effort.
7. Platting As Conveyance - Robert Friedman.
8. Hotel Condominium - will be part of Mr. Brecker's developer efforts, if the division delegates Janice Sue Richardson as a liaison if the Division permits.
9. Estoppel Letter Fees - John Geiger.

Items for which there was no immediate consensus to take action and for which no action is planned are as follows: cellular towers; setting number of directors; amendments; and chapter 720 amendments.

The Committee thanked Mr. Mark B. Schorr for his persistence and drafting efforts on the vested rights, §720.306, legislation which the RPPTL Section is reporting to the main Bar, and Ms. Rachel Peterkin for her continuing efforts on the Marketable Record Title Act, language which will be reviewed in St. Augustine. There were great thanks to Mr. William Sklar for his efforts in crafting a very successful Institute provoking thoughts and issues for us to ponder.

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CLE Corner

By Pat Jones, CLE Coordinator, Real Property Law Division, and Jim Herb, CLE Coordinator, Probate and Trust Law Division

Greetings to all from your CLE representatives! For some years now, Jim and I have done our share of arm-twisting and cajoling of Section members to chair a seminar program committee or to be a speaker on a program. We thought it was time to let you know who we are, how the Section's CLE program operates, and most importantly, to let you know that we are here to be a resource to you as you participate in the Section's all-important seminar program. Check your *ActionLines* throughout the year for information on upcoming programs, ideas for future programs and tips to those of you who expect to chair a program committee or give a presentation. And be sure to check the end of this column for this month's tip on how to obtain CLE credits for your substantive meetings, such as Section committee meetings or even your firm's in-house meetings.

One of the most important missions of the RPPTL Section is to meet the professional educational needs of the members of the Section as well as members of the Bar at large. One way we do this is by providing timely and informative seminars on the substantive matters of law that impact the areas of practice of the Section's members. We are always striving to find ways to improve the quality of our programs, and in order to do this, we need to work closely with you—our program chairs, speakers, and consumers of our product.

How are programs developed?

Organizing seminars requires a great deal of advance planning. Jim and I submit a list of proposed seminars with desired dates to The Florida Bar at least one year in advance of the dates we request. This is necessary so that budgets can be developed and the Section's seminars can be coordinated with the Bar's Master CLE Calendar. Jim and I try to schedule between three and four seminars per division, per year. In doing so, we must avoid conflicts with the Section's other activities, such as the Certification Review courses, the annual Convention, the Legislative Update, and the FLEA seminars, to name a few. Having to plan so far in advance, it is difficult to be attuned to developing issues, hot topics, and the like, which is why we rely on you, our members and potential program chairs, to generate ideas and suggestions for timely program topics.

Florida Bar CLE Program Workshop

Which brings me to the main point of this issue's CLE Corner. The Florida Bar's CLE Committee is staging a special two-day workshop for attorneys who want to learn how to be more effective Florida CLE program participants, using the latest ideas in communication techniques and technology. If you expect to chair or to serve on a seminar committee or write materials for or speak at a seminar program (which should include everyone), this workshop is a unique opportunity for you to update your skills.

The program is scheduled for April 25 – 27, 2003 at Casa Monica in historic St. Augustine. It will cover the three main topics of Quality (topic and speaker selection, speaker development); Innovation (delivering online, video streaming, DVD and telephone seminars, workshop and mock trial formats); and Logistics (working with deadlines, budgets, selecting locations and dates, marketing). I would encourage all of you who expect to be involved in the RPPTL Section's seminar program to attend. Registration information as well as pleas for your attendance will follow by mail.

CLE Tip – Getting CLE Credit for Meetings

Did you know that many of the committee meetings you attend as section members qualify for CLE credit? For example, the Roundtable discussions held by the Real Property and by the Probate and Trust Law Divisions at Executive Council meetings can qualify for CLE credit, as can many meetings of committees dealing with various substantive areas of the law. Also, consider applying for CLE credit for your firm's in-house meetings at which its attorneys are being instructed on substantive matters.

- **To Qualify -** the program should have significant intellectual or practical content and have as its primary objective to increase or maintain the participants' professional competence as lawyers.
- **Number of credit hours** – a 50-minute program qualifies for 1 credit hour.
- **First, Submit an Application for Accreditation**. The form and the instructions are on The Florida Bar's website (*www.flabar.org*). From the web site, click on "Bar Forms and Applications," then click on "CLER Credit Application," then click on "Course Accreditation Instructions and Application." Follow the instructions. You will need to submit an outline that fully describes the course content, indicates the time devoted to each topic, and provides each speaker's name and credentials.
- **Fee** – there is no evaluation fee if the sponsoring entity is not charging for the program. There are rush fees and late fees that may apply.
- **Approval** – the sponsoring entity may not have received approval for CLE credit before the program event. In that case, the sponsoring entity should maintain an accurate list of attorneys attending and their Florida Bar member numbers, so that applications for individual credit can be submitted when approval is received.

See you in St. Augustine!

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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.)

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Additionally, FLSSI is now licensing software vendors* to use the official Section forms, which license mandates that the software will prohibit any changes to the text of the form using our font. This gives Probate Judges confidence in the integrity of the forms.

You should be aware that software programs are now available that are advertised as official "Florida Bar" forms. These are not the current forms sponsored by the Real Property, Probate and Trust Law Section and prepared by the Section's specialists. As with all products that you purchase, satisfy yourself that you are obtaining the best product available and, in this instance, also satisfy yourself that you are obtaining the input of the best legal talent available. I would submit that this talent is and has been found in the Forms Committee of the Real Property, Probate and Trust Law Section.

Respectfully submitted,
Roger O. Isphording, President,
Florida Lawyers Support Services, Inc.

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Real Property Case Summaries

by Stephen Edward Silkowski, Esq., Jacksonville

Foreclosure statute of limitations period on a recorded mortgage that incorporates by reference the terms of an unrecorded promissory note is twenty years from the mortgage date.
Layton v. Bay Lake LP, 818 So. 2d 552, (Fla. 2nd DCA 2002).

Layton was the holder of an unrecorded promissory note, executed by Bay Lake in 1989, with a specified maturity date in 1992. The note was secured by a recorded mortgage on real property. The mortgage document, however, contained no maturity date. When Layton filed her foreclosure action in 1999, nearly ten years after the note was executed, the trial court determined that the five-year statute of limitations contained in section 95.281, Florida Statutes (1989), applied to bar Layton's action. The District Court of Appeal disagreed.

Section 95.281 specifies that a lien of a mortgage terminates five years after the date of maturity of the obligation if the date of maturity is "ascertainable from the record of it." That same statute, however, provides that a lien of mortgage expires twenty years after the date of the mortgage if the maturity date is not "ascertainable from the record of it". Although the recorded mortgage did not contain a maturity date, it specifically referenced the unrecorded note. Bay Lake argued that since the terms of the note were incorporated by reference into the mortgage, the date of maturity was ascertainable. The statute, however, specifically states that the date must not only be ascertainable, but "ascertainable from the record of it". In other words, the maturity date must be ascertainable by one who reads the county records. Since the note itself was not recorded, and the recorded mortgage did not provide the maturity date, the maturity date was not ascertainable of record. The court ruled that the applicable statute of limitations was twenty years.

Homeowners' association, when foreclosing lien, bears burden of proving the satisfaction of all conditions precedent to bringing action when homeowner specifically denies them.
Berg v. Bridle Path Homeowners Association, Inc., 809 So. 2d 32 (Fla. 4th DCA 2002).

When Berg, the owner of two lots in the Bridle Path subdivision, failed to pay the assessments made upon her lots for several years, the Bridle Path Homeowners Association filed suit to foreclose assessment liens recorded against the property. Berg answered the complaint, asserting that the liens were improper because the Association had failed to comply with certain requirements of the community's governing documents in making the assessments. Because the trial judge had incorrectly placed the burden of proof on Berg to establish that the Association failed to comply with the recorded covenants and by-laws in imposing the assessments and liens, the District Court of Appeal reversed.

The lots are subject to a Declaration of Covenants, Conditions, and Restrictions, authorizing the Homeowners Association to make and collect assessments for common expenses. Pursuant to these regulations, the Board of Directors is required to adopt the budget for the Association and determine the appropriate homeowner assessment to meet that budget. Fourteen days prior to any meeting at which the budget for the Association is to be considered, the board is required to give notice to all members of the Association.

The Association filed a lien foreclosure suit against Berg, alleging that she had failed to pay the assessments levied against her lots. Berg defended the lawsuit contending: (1) that the property manager, and not the Board, had determined the budget, which was inconsistent with the by-laws; (2) that there was no evidence that board meetings were ever held where the budgets, including the lot assessments, were adopted; (3) that there was no evidence that the Bergs received their notices of the annual meetings; (4) that there was no evidence that notices of the annual meetings were posted on the property; and (5) that minutes of the meetings were not kept in accordance with the by-laws and state law. In other words, Berg alleged that the Association had not complied with its own declarations and by-laws in making the assessment.

The trial judge had ruled that Berg did not prove her "defenses" that the Association had failed to comply with the recorded covenants, by-laws, and the Florida Statutes "by the greater weight of the evidence."

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The trial court had thereby erroneously shifted the burden of proof. The Association relied on Florida Rule of Civil Procedure 1.120 to argue that it was not required to plead its "capacity" to sue as a "legal organization" nor was it required to plead, except in a general way, that all "conditions precedent" had been performed. Here, the Association's reliance on Rule 1.120 was misplaced. While Rule 1.120 relaxes certain pleading requirements, it does not relieve the plaintiff from having to prove every element of its entitlement to a judgment against the defendant once the defendant makes a specific denial of a particular element of the claim. See Fla. R. Civ. P. 1.120(a), (c).

Although framed as an affirmative defense, Berg essentially denied that the Association had properly levied the assessments pursuant to the Declarations of Covenants, Conditions, and Restrictions. This denial squarely placed the burden on the Association to prove its case against Berg by the preponderance of the evidence. The plaintiff is required to prove every material allegation of its complaint that is denied by the party defending against the claim.

Accordingly, the court held that in order to prevail on a suit to foreclose an assessment lien, a homeowners association is obligated to show that it has properly levied the assessment in accordance with the community's declaration of restrictive covenants and by-laws when the defendant challenges the lack of compliance "specifically and with particularity." See Fla. R. Civ. P. 1.120(c) (stating in part that "[a] denial of performance or occurrence [of conditions precedent] shall be made specifically and with particularity"). It was thus error for the trial court to require that Berg prove by the greater weight of the evidence that the Association did not comply with the governing documents and Florida law in levying the assessments.

Broker may record lis pendens in order to protect an adjudicated right to payment of commission when judgment does not clearly provide constructive notice of that right.

Alamagan Corp. v. The Daniels Group, Inc., 809 So. 2d 22 (Fla. 3rd DCA 2002).

Two real estate brokers, Daniels and Tecton, obtained a final judgment against a buyer of a 2.25 acre site on South Miami Avenue. The final judgment provided that the brokers were entitled to a 6% commission from the buyer upon the sale of the property. The buyer and seller thereafter amended the sales contract to allow the buyer to take title to the property via the purchase of all outstanding stock in the seller corporation. The sale was completed by stock transfer in June of 1999. Within six weeks of the stock transfer, after the buyer repeatedly failed to respond to inquiries regarding the status of closing, Daniels filed a motion seeking to enforce the terms of the final judgment and recorded a notice of lis pendens against the property with the final judgment attached thereto. Approximately three months after the stock transfer was consummated and after Daniels had filed her motion, the buyer paid Tecton one-half of the commission, but failed to pay the balance of the commission to Daniels, in direct violation of the trial court's final judgment.

The buyer filed a complaint against Daniels with the Florida Department of Business and Professional Regulation alleging that Daniels improperly recorded the lis pendens. The buyer also moved to dissolve the lis pendens in the pending state court case, but that motion was never set for hearing. Following an administrative hearing, the DBPR dismissed the regulatory pro-

continued...

Honoring Larry Beyer. . .



The Section mourns the loss of its friend and long time Executive Council member, **Larry Beyer.**

Larry passed away November 16, 2002 after battling cancer. Among other committees, Larry was on the Probate Law Committee and the Probate Rules Committee. "He approached his Section work with a great mixture of excellent legal insight combined with a wonderful sense of humor and joy of life," said Steve Hearn, Section Chair. We all will miss Larry and extend our sympathies to his wife, Barbara. The Section is preparing a resolution to honor Larry's life and contribution to the Section. If you would like to provide information for the Resolution, please contact John Neukamm, Esq. at 813/276-1920 or *jbn@floridalandlaw.com.*

Nominees for 2003 - 2004 Section Officers

The Section's Long-Range Planning Committee met on February 7th and reports for publication the following slate of officers to be voted on at the Election Meeting which is a part of the RPPTL Convention to be held May 22 - 25, 2003.

Chair-Elect ..... *Laird A. Lile*
Probate and Trust Law Division Director ..... *Rohan Kelly*
Real Property Law Division Director ..... *Julius J. Zschau*
Circuit Representatives Director ..... *George J. Meyer*
Secretary ..... *John B. Neukamm*
Treasurer ..... *Melissa Jay Murphy*

Also voted on at the Election Meeting will be the Section's Out-of-State Representatives and the Circuit Representatives. Make plans to attend your Section Convention.

ceeding in Daniels' favor.

In January of 2000, the buyer filed a separate lawsuit against Daniels alleging slander of title, and Daniels filed a motion to extend the lis pendens for an additional year. The buyer argued that a real estate broker can not use a lis pendens to collect a real estate commission. The court granted Daniels' request for a one year extension of the lis pendens, and the buyer appealed.

The court examined the 1985 amendments to Section 475.42, Florida Statutes, which provide that a broker or salesperson may record a judgment rendered by a Florida court, or place a lien on a property where expressly permitted by contractual agreement. The court reasoned that these legislative amendments were intended to protect brokers from parties seeking to avoid the payment of real estate commission after the broker had obtained a judgment. In this case, allowing the recording of a judgment but not the filing of a lis pendens would be contradictory to the legislative intent of section 475.42. The buyer's acquisition of title through the seller's stock transfer was not a matter of public record. Moreover, a potential purchaser would not be on notice of the broker's claims by the recordation of this final judgment. One of the judgment creditors had also recorded a satisfaction of judgment upon receipt of payment. Thus, the record could easily result in confusion to a potential purchaser of lender. The court concluded that Daniels' recording of the lis pendens and final judgment was the only step she could take to preserve her rights pending judicial action on the motions to compel the buyer's compliance with the final judgment.

A lis pendens serves the twofold purpose: (1) to protect subsequent purchasers or encumbrancers of the subject property from becoming embroiled in the pending dispute over the property, and (2) to protect the plaintiff from intervening liens that could impair any property rights claims and also from possible extinguishment of the plaintiff's unrecorded equitable claim.

In this case, the final judgment inextricably intertwines the broker's right to a commission to the disposition of the property. The buyer failed to pay Daniels the adjudicated sum due, litigated the lis pendens issue at length, and also listed the property for re-sale in the summer of 2000. The trial court's extension of the lis pendens was affirmed as necessary to protect the broker's judgment.

Finally, as an equitable matter, upon appellant's concern that the lis pendens was "open ended," the trial court limited the lis pendens to $300,000 (a sum equal to the commission due, plus interest, costs and attorneys' fees). Thus, in order to discharge or satisfy the lis pendens, all buyer needed to do was pay the money, as ordered by the court. The appellate court found this portion of the trial court's order to be not only prudent but just.

Fixed-price option contained in lease is not an unreasonalbe restraint on alienation if limited in duration, with a reasonable effect on the improvement and marketability of the property.
Kelley v. Burnsed, 805 So. 2d 1101 (Fla. 1st DCA 2002).

In 1974, appellant/lessee entered into a lease and fixed price option with two co-lessors. The option provided appellant with the right to purchase the leased property and an adjoining parcel of lake-front property (a total of approximately .75 acres) for a purchase price of $10,000. Appellant was entitled to exercise the purchase option only if he out-lived the two co-lessors and lessor's sister (herein collectively referred to as the "optionors"). In addition, the option was exercisable during the appellant's lifetime (and it appears from the concluding words of the court opinion that this option was also exercisable by appellant's heirs within the three-month period following appellant's death) (herein, the "option period").

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The lease/option agreement required the appellant to pay taxes on any improvements he made to the property. It also entitled the lessors to cancel the lease/option if they elected to sell the 33.9-acre tract of land that included the leased premises. If the lessors sold the land, however, the appellant was entitled to remove any improvements he had made, or alternatively, the lessors would buy the improvements at a price determined by a formula included in the agreement. This option as to removal or sale of the improvements was exercisable by the appellant's heirs within the three-month period following appellant's death. Significantly, the lease expressly provided that the heirs and assigns of all the parties would be bound by the agreement's terms.

Upon the demise of all optionors, the appellant gave notice of his intent to purchase the property and tendered the stated purchase price. Burnsed, the personal representative of one co-lessor and the sole beneficiary of the remainder interest in the property, terminated the lease/option and refused to convey the property. The appellant filed a notice of claim in the co-lessor's probate proceedings and filed a complaint against Burnsed, individually and as personal representative, seeking specific performance. Burnsed defended on the grounds that the lease was canceled, the option to purchase was void upon the deaths of the co-lessors, the lease itself was void as an unreasonable restraint on alienation, and challenged the consideration paid as "completely unreasonable". Burnsed also claimed slander of title, and sought to remove clouds on title and recover attorneys' fees and costs. The trial court granted Burnsed's motion for summary judgment.

The appellate court reversed. It found that the appellant had timely exercised the purchase option and tendered the purchase price. The court opined that the death of a party to a lease/option agreement does not necessarily terminate the agreement. It stated that the demarcation between purely personal contracts ended by a party's death and those that the personal representative can complete can be determined in many cases only from the circumstances, and the law presumes that a contracting party intends to bind personal representatives unless the contract is in some way personal to him or her, or unless the language shows such a presumption to be unreasonable. The agreement in the case at issue was not such a "personal" contract, and stated that it bound the heirs and assigns of the parties.

The court opined that the test of "reasonableness" should be applied to a restraint on alienation. The validity or invalidity of a restraint depends upon its long-term effect on the improvement and marketability of the property, and once this effect is determined, common sense should dictate whether it is reasonable or unreasonable.

An option of unlimited duration for a fixed price that fails to account for any appreciation in fair market value clearly discourages any improvements on the land by the existing property owner because he can never recover the value of the improvements should the optionee exercise the option. It is important, however, to distinguish that type of option from the dependent fixed price option contained in the subject lease. In the latter instance, the option was not a restraint upon alienation, because it was of limited duration and it encouraged the lessee to make improvements to the property at his cost which would inure to him and/or his heirs at no increase in price upon exercise of the option. The agreement also allowed the optionors to sell the property as part of a larger parcel (thereby canceling the lease) at any time before the option was exercised. In issuing its ruling, the Burnsed court relied heavily on the principle that the rule against unreasonable restraints on the use of property concerns restraints of such duration that they prevent the free alienation of property, and the principal focus is the duration of the restraint.

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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

Award of attorney's fees to defendant in will contest was inappropriate under F.S. section 57.105 where facts were sufficient to establish a presumption of undue influence when the claim was initiated.
Greenberg v. Van Dam, (Fla. 3rd DCA 2002); 27 FLW D2435.

Barry Greenberg (the decedent's son) filed a petition to revoke probate alleging the decedent lacked testamentary capacity and was unduly influence by Evelyn Van Dam (the decedent' daughter). The trial court granted Van Dam's motion for summary judgment concluding that the decedent had testamentary capacity and Greenberg was unable to present a scintilla of evidence in support of undue influence. Van Dam then filed a motion for attorney's fees pursuant to F.S. section 57.105 which was granted. The District Court reversed finding that there was a presumption of undue influence at the onset of the litigation. Therefore, the claim, when initially presented, was supported by material facts and section 57.105 was inapplicable.

Probate court had jurisdiction to order attorney for personal representative to account for and return fees received in sale of non-probate condominium.
Morrison v. Estate of DeMarco, 833 So.2d 180 (Fla. 4th DCA 2002); 27 FLW D2586.

The personal representative filed a petition seeking authorization for the sale of the decedent's condominium, which was granted. The appellant, as attorney for the personal representative, then filed a petition requesting the court to authorize distribution of the sale proceeds in the manner desired by the personal representative. In the petition, appellant asserted that the personal representative was the sole beneficiary of the estate and that the condominium was homestead property which passed outside of the estate. The court entered an order directing that the sale proceeds be distributed "in the manner directed by the beneficiary James Joseph DeMarco." Upon closing, appellant received $23,500 in "notary fees" from the sale proceeds.

Shortly thereafter a dispute arose between the personal representative and appellant and new counsel was substituted for appellant. New counsel promptly filed a motion requesting an accounting for the $23,500 and for other estate assets in appellant's possession. The court granted the motion and ordered appellant to file an accounting within 21 days or face sanctions. Appellant failed to file the required accounting and the probate court held her in contempt, ordered her to return all fees received from the estate and required her to file the accounting.

Appellant appealed the contempt order arguing that the trial court had no jurisdiction to require an accounting for the proceeds she received from the sale of the condominium because it was homestead and therefore a non-probate asset. The District Court found that the probate court had jurisdiction to require appellant to account for those proceeds because they were really payment for other services performed by appellant in connection with her representation of the estate and appellant had failed to demonstrate that those fees were unrelated to the probate of the estate.

Standard of review regarding trial court's determination that a creditor was known or reasonably ascertainable entitled to actual notice is abuse of discretion.
Miller v. Baer (Fla. 4th DCA 2003); 27 FLW D2623.

Citibank loaned money to a general partnership. The decedent, Elaine Benedict Baer, signed the loan documents as one of the general partners and as an individual guarantor. Subsequent to the decedent's death, Joyce Mussano was appointed personal representative and published Notice of Administration. In addition to publication of the Notice of Administration, former F.S. 733.212(4)(a) required the personal representative to conduct a diligent search to determine the identity of all creditors who are reasonably ascertainable and serve those creditors with a copy of the notice of administration.

Citibank was never served with a copy of the Notice of Administration and failed to file a claim within the three month creditor period. Almost two years after the decedent's death, Citibank filed a petition for an extension of time to file its claim alleging insufficient notice of the claims period. After an evidentiary hearing, the trial court granted the extension and allowed Citibank to file its claim based on a finding that Citibank was a known or reasonably ascertainable creditor who was entitled to actual notice of the administration.

The appellants appealed the ruling contending that the lower court erred in determining that Citibank was an ascertainable creditor. The District Court held that the proper standard of review is whether the trial court abused its discretion. Based upon their review of the record, there was substantial competent evidence to support the finding of the trial court and there was not an abuse of discretion.

Order of probate court which denied personal representative and his attorney extraordinary fees was supported by substantial competent evidence; Attorney for personal representative

was not entitled to statutory fee provided by F.S. section 733.6171 for preparation of federal estate tax return where return was prepared jointly by attorney and CPA; Personal Representative not entitled to attorney's fees incurred during the appeal where probate court found the extraordinary fees requested to be substantially unreasonable; however, personal representative is entitled to attorney's fees incurred in defending the cross-appeal by beneficiaries.

Venis v. Greenspan, 833 So.2d 208 (Fla. 4th DCA 2003); 28 FLW D48.

After a contentious fee dispute, the probate court awarded the personal representative and his counsel the statutory percentage fees provided by F.S. sections 733.617 and 733.6171, but denied the personal representative and his counsel extraordinary fees for certain services performed in the administration of the estate. These services included satisfying a claim against the estate, resolving a claim of the estate in a bankruptcy proceeding, selling the decedent's horses, managing and leasing two warehouses owned by the decedent and carrying out a charitable pledge. The probate court found that given the size of the estate ($8.3 million) these services were not extraordinary and that the requested extraordinary fees were "substantially unreasonable." Furthermore, the probate court also denied the attorney for the personal representative the statutory fee for preparation of the federal estate tax return provided by F.S. section 733.6171(4)(e) because the attorney prepared the return jointly with the personal representative who is a CPA. The court ruled that the attorney and CPA were instead entitled to hourly compensation for preparation of the return. The personal representative appealed the order arguing that the fee awarded to him and his counsel was insufficient and the beneficiaries cross-appealed arguing the fee was too large.

The District Court affirmed the trial court's order finding that there was substantial competent evidence to support both the award of statutory fees and the denial of any extraordinary fees. The trial court's ruling which denied the attorney fees for preparation of the federal estate tax return pursuant for F.S. section 733.6171(4)(e) was also affirmed. Florida Statue section 733.6171(4)(e) provides for a presumptively reasonable fee of one-half of one percent of the gross estate if the "return is prepared by the attorney." The return was prepared jointly by the attorney and the personal representative, who is a CPA, and they were planning to split the statutory fee. The District Court concluded, ". . . counsel was not entitled to the statutory percentage fee because counsel had not prepared the return as contemplated by the statute and the fee agreement," but found that fees could be awarded on an hourly basis.

After the conclusion of the fee dispute, the probate court awarded the personal representative some of the attorney's fees he incurred. However, the probate court denied an award of attorney's fees for services rendered in connection with his claim for extraordinary services finding that the request was substantially unreasonable. On appeal, the personal representative moved for an award of attorney's fees incurred in connection with the appeal pursuant to F.S. 733.6171(8). The District Court denied the request, ruling that because the trial court's ruling was affirmed, the estate should not have to bear the impact of the fees. The District Court did, however, award the personal representative his attorney's fees incurred in connection with the cross-appeal by the beneficiaries.

Order directing Trustee to distribute trust assets was not a "judgment solely for the payment of money" and was not enforceable by writ of execution and trial court abused its discretion by holding Trustee in contempt for failure to distribute assets where Trustee began process of making final distribution by furnishing the beneficiaries with an accounting and filing an action for judicial approval of the accounting. Additionally, F.S. section 737.208 (2002) is procedural in nature and can be applied retroactively.

Merrill Lynch Trust Company v. Alzheimer's Lifeliners Association, Inc., et. al., 832 So.2d 948 (Fla. 2nd DCA 2003); 28 FLW D143.

An action was brought by both Merrill Lynch, as Trustee, and Alzheimer's Lifeliners Association ("Alzheimer's") and The Arthritis Foundation ("Arthritis"), as charitable remainder beneficiaries, to determine the proper beneficiaries of the Ruth M. Trout Charitable Remainder Unitrust ("the Trust"). On January 28, 2000, the probate court granted Alzheimer's motion for summary judgment finding that an attempted amendment to the Trust removing Alzheimer's and Arthritis as beneficiaries was void. The summary judgment ordered the Trustee to "make distribution to the Beneficiaries in accordance with the Trust."

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

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

The Trustee appealed and requested a stay of the summary judgment pending the appeal. The Trustee's request for a stay was denied and this denial was not appealed. The District Court affirmed the summary judgment and issued its mandate on July 9, 2001.

On August 10, 2001, the Trustee furnished the beneficiaries with an accounting and sent agreements for the beneficiaries to sign consenting to the accounting and releasing Merrill Lynch from fiduciary liability. The beneficiaries refused to sign the agreements. In October 2001 the beneficiaries filed motions for a writ of execution and for contempt against the Trustee for failure to distribute the Trust in accordance with the Summary Judgment. The Trustee then filed an independent action seeking judicial approval of the accounting.

The probate court granted the motion for the writ of execution, finding the summary judgment was a money judgment and also found the Trustee in contempt "because it intentionally failed to distribute the Trust to the beneficiaries in accordance with the judgment and it had the ability to do so." The Trustee appealed both findings arguing that the summary judgment was not a money judgment subject to execution and that the order was not definite enough to put the Trustee on notice that it was required to make an immediate distribution.

On appeal, the District Court agreed and found that the summary judgment was not a judgment solely for the payment of money and was therefore not enforceable by a writ of execution. Rather the summary judgment was a judgment for the performance of a specific act and was enforceable by contempt.

The District Court also found that F.S. section 732.208 (2002), which went into effect on January 1, 2001, is procedural rather than substantive, and can be applied retroactively. That statute controls the distribution of trust assets while a proceeding to determine beneficiaries is pending. The statute was applied retroactively in this case and the Trustee had no duty to distribute the Trust assets until the mandate of the District Court issued on July 9, 2001.

The only issue remaining was whether the probate court abused its discretion in finding the Trustee in contempt for failing to distribute the Trust assets as of July 9, 2001, when the mandate of the District Court issued. The District Court held that the probate judge abused his discretion by holding the Trustee in contempt because it was clear from the Trustee's actions that it immediately began the process for distribution of the Trust as mandated by Florida law. In this case, upon the issuance of the mandate, the Trustee prepared and served an accounting as required by F.S. section 737.303(4)(a). After the beneficiaries received the accounting they had six months to bring an action objecting to the accounting, or alternatively, consent to the accounting. F.S. section 737.307. The Trustee also has the option of requesting a judicial approval of the accounting, as was done in this case. The District Court found it to be imprudent for the Trustee to distribute the Trust assets until final resolution of the accounting because an objection by one of the beneficiaries would result in litigation over trust assets which had already been distributed. In footnote 3, the District Court pointed out that The Florida Bar recommends that a trustee wait six months to distribute a trust if the beneficiaries refuse to sign a consent.

Bar Leaders Meeting Scheduled for July

The 2003 Bar Leaders Workshop will be held July 25-26 in St. Petersburg at the Renaissance Vinoy Resort & Golf Club. The annual workshop for voluntary bar association officers and staff gives participants an opportunity to network and discuss problems faced by the attorneys who volunteer as members of the association in their local communities.

The conference, which moves around the state each year, is being co-hosted by three Southwest Florida voluntary bar associations - Clearwater, Hillsborough and St. Petersburg bar associations. The Jacksonville Bar Association was recently host to more than 100 bar leaders who traveled to Ponte Vedra Beach in July.

For more information, contact:
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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 (941) 430-1800 to obtain additional publication guidelines.

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

***Actionline* Issue**	**Publication Deadline**
Summer 2003	April 30, 2003
Fall 2003	July 31, 2003
Winter 2003	October 31, 2003

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

Citing David A. Armstrong, *Administration of Trusts in Florida*, § 5.5 (The Florida Bar CLE., Lexis Publishing 3rd ed. 2001).

If a caveat is filed prior to admission of a will to probate, a petitioner is required to serve formal notice of the petition for administration on the caveator and the validity of the will must be resolved before admission of the will to probate and the issuance of letter of administration.
In re the Estate of Hartman, (Fla. 2nd DCA 2003); 28 FLW D146.

After the decedent's death, Appellants filed caveats pursuant to Florida Probate Rule 5.260(f). Subsequent to the filing of the caveats, Heather Eberhardt filed a Petition for Administration seeking admission of the decedent's February 2001 will to probate. Eberhardt failed to serve Appellants with formal notice of the Petition. Appellants then filed objections to Eberhardt's Petition and filed competing Petitions for Administration. The probate court admitted the February 2001 will to probate and issued letters of administration to Eberhardt without determining the validity of the will or addressing the objections and counter-petitions.

The District Court reversed the order admitting will and revoked the letters of administration finding that when a caveat is filed pursuant to Rule 5.260(f) the optional procedure provided by F.S. section 733.2123 becomes mandatory and a petitioner must serve formal notice of his or her petition for administration on the caveator. Once the procedure found in section 733.2123 is invoked, the court cannot admit a will to probate or issue letters of administration until a determination had been made regarding the validity of the will.

Action to enforce provision in divorce agreement requiring decedent to leave two-thirds of his estate to his children did not accrue until his death and elective share was timely filed by surviving spouse even though it was filed later than 4 month statutory period because the objection to the claim filed by children was "a proceeding" affecting the estate which extended the time to file an election. Furthermore, the spouse's elective share takes precedence over the children's claim as creditors because they cannot receive a remedy superior to that which they would have received if the decedent had complied with his obligations under the divorce agreement.
In re Estate of Tensfeldt (Fla. 2nd DCA 2003); 28 FLW D225.

The decedent and his first spouse were divorced in Wisconsin in 1974. The judgment of divorce incorporated a settlement agreement (referred to below as the "divorce agreement") which provided that the decedent agreed to leave not less than two-thirds of his "gross estate" to his three children (referred to below as "the children") in his will. The children were expressly identified as third party beneficiaries of the divorce agreement. The decedent subsequently remarried and moved to Florida. In 1992, the decedent executed a new will which failed to comply with the requirements of the divorce agreement.

The decedent died in April 2000 and the 1992 will was submitted for probate in June 2000. Notice of Administration was published August 30, 2000. On November 20, 2000, the children filed a claim in the estate for the amounts owed under the divorce agreement. On December 5, 2000 the surviving spouse objected to the claim. On January 3, 2001 the children timely filed an independent civil action containing three separate counts. The first count alleged breach of contract to make a will, the second count sought enforcement of the foreign divorce decree and the third count sought a constructive trust over assets the surviving spouse received as joint property. The surviving spouse filed a motion for summary judgment alleging that the children's cause of action accrued when the decedent executed the nonconforming will in 1992 and was barred by the 5 year statute of limitations and alternatively, that the divorce agreement had merged into the divorce decree and any action under the divorce agreement was barred by the twenty-six year old judgment, which in turn was barred by the statute of limitations. The probate court granted the surviving

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Executive Council Meetings – 2003-04

May 22-25, 2003
Section Convention/Executive Council Meeting
Renaissance Vinoy Resort & Golf Club, St. Petersburg, FL
Group Rate: $165/night
Reservation Cut-Off Date: April 22, 2003
Reservation Number: 800/228-9290

July 31 - August 3, 2003
Legislative Update/Executive Council Meeting
The Breakers, Palm Beach
Group Rate: $140/night
Reservation Cut-Off Date: June 30, 2003
Reservation Number: 1-800-833-3141

November 13 - 17, 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

May 27 - 31, 2004
RPPTL Convention/Executive Council Meeting
Hilton Resort & Marina, Key West
Group Rate: $175/night

spouse's motion for summary judgment without explanation and dismissed the proceeding.

During the pendency of these proceedings, the surviving spouse filed an election to take elective share on February 7, 2001. The children objected arguing that the election was not timely. The probate court determined that the elective share was timely under former F.S. section 732.212 because the estate's objection to the claim was "a proceeding" which affected the extent of the estate subject to the election and therefore extended the time for filing the election. Since the probate court had already dismissed the children's adversary proceeding, the court calculated the spouse's elective share without regard to the claim and entered an order authorizing a partial disbursement.

The children appealed both the order dismissing the adversary action on their claim and the order calculating and authorizing disbursement of the elective share. With regard to the dismissal of the adversary action, the District Court reversed, holding that the cause of action for breach of contract to make a will did not accrue until the decedent's death and was not barred by the statute of limitations. The District Court also dismissed the surviving spouse's contention that the divorce agreement was merged into the foreign judgment. First, the children were not parties to the action and merger does not affect the interests of third party beneficiaries. *Citing Diamond R. Fertilizer Co., Inc. V. Lake Packing P'ship*, 743 So.2d 547 (Fla. 5th DCA 1999). Second, the divorce agreement specifically stated that the contract would not be merged into the final judgment, but would survive the decree. The District Court did hold that Count II of the adversary action was properly dismissed because the twenty-six year old foreign judgment, which was never domesticated in Florida, was barred by the statute of limitations. In footnote 6 to the opinion, however, the District Court questions whether the traditional principals applied to bar money judgments should apply to judgments with executory provisions, but felt it was bound by existing precedent on this issue.

The District Court then turned its attention to the elective share issue. The Court's analysis was preceded by the recognition that the statute in question (former section 732.212) was recently amended and that this decision would have limited precedential value. Former F.S. section 732.212 provided that an election to take elective share must be filed within 4 months from the date of first publication of the Notice of Administration. The election in this case was clearly outside this limit. The statute goes on to provide, however, ". . . if a proceeding occurs involving the construction, admission to probate, or validity of the will or on any other matter affecting the estate whereby the complete extent of the estate subject to the elective share may be in doubt, the surviving spouse shall have 40 days from the date of termination of all the proceedings in which to elect." The children argued that since they did not file their independent action on their claim until after the 4 month period had expired, this exception was not applicable and the election was untimely. Thus, the issue to be resolved by the District Court was when a "proceeding occurs" under former section 732.212. Noting that they found no case directly on point, the District Court affirmed the ruling of the probate court holding that the probate court had the authority in this case to decide that the proceeding occurred at the time the estate filed the objection to the children's claim.

Although the District Court found the children could proceed with their action for breach of contract, the decision did not require reversal of the order calculating and authorizing partial disbursement of the elective share. The children could not elevate their claim for breach of contract to the status of a creditor's claim which would take precedence over the elective share. *Citing* F.S. section 733.707 (2000) and the Florida Supreme Court's decision in *Via*, 656 So.2d 460. "Had the children been properly listed as beneficiaries in the will, Constance's elective share would have taken precedence over their bequest. The children are not entitled to receive, as creditors, a remedy superior to that which they would have received if their father had complied with the 1974 agreement." The surviving spouse has filed a motion for rehearing as to the breach of contract issue.

Thanks for Your Help!

LAWYERS FOR AFFORDABLE HOUSING, a collaborative project of the Real Property, Probate and Trust Law Section of The Florida Bar and the Florida Housing Coalition, would like to thank the following attorneys who offered pro bono assistance during 2002 to qualifying non-profit organizations that build or renovate affordable housing:

Bruce I. Wiener	Tallahassee
Del G. Potter	Mount Dora
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William L. Thompson	Orange Park
W. Christopher Hart	Destin
Richard H. Tami	Orlando
John A. Noland	Ft. Myers
Robert C. Brighton	Ft Lauderdale

If you would like to join the panel of attorneys for the project, or wish to obtain information concerning the project, please contact Andrew M. O'Malley (813/250-0577) or Chris O'Ryan (813/639-9699).

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THE FLORIDA BAR CLE

The Florida Bar Continuing Legal Education Committee and the Real Property, Probate and Trust Law Section present

Overview of Real Property Litigation Issues

COURSE CLASSIFICATION: INTERMEDIATE LEVEL

Live Presentations: March 6, 2003 - Ft. Lauderdale
March 7, 2003 - Tampa

Video Replays (8 locations): March 20, 2003 - April 3, 2003

Course No. 5254R

8:00 a.m. – 8:30 a.m.
Late Registration

8:30 a.m. – 8:40 a.m.
Introduction

8:40 a.m. – 9:15 a.m.
Litigating Disputes in Residential Real Estate Contracts
Eugene Earl Shuey, West Palm Beach

9:15 a.m. – 9:45 a.m.
Mortgage Foreclosure & Bankruptcy
Clay Schnitker, Madison

9:45 a.m. – 10:25 a.m.
Evidentiary Issues in Real Estate Litigation
Al LaSorte, West Palm Beach

10:25 a.m. – 10:35 a.m.
Break

10:35 a.m. – 11:15 a.m.
Litigating Boundary Line Dispute
Lawrence J. Miller, Boca Raton

11:15 a.m. – 12:00 noon
Alternate Dispute Resolution
Mike Gelfand, West Palm Beach

12:00 noon – 12:30 p.m.
Johnson v. Davis Revisited
Mel Brinson, Fort Myers
Manuel Farach, West Palm Beach

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Business Litigation: 2.0 hours
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BEB: Course No. 5254R

LOCATIONS (CHECK ONE):

- ❑ **Ft. Lauderdale*** - March 6, 2003**
  (223) Marriott Hotel & Marina
- ❑ **Tampa** - March 7, 2003**
  (043) Marriott Westshore
- ❑ **Orlando* - March 20, 2003**
  (071) Radisson Plaza Downtown Hotel
- ❑ **Jacksonville* - March 21, 2003**
  (154) Omni Hotel
- ❑ **West Palm Beach* - March 26, 2003**
  (232) Palm Beach County Bar Assoc.
- ❑ **Tallahassee* - March 27, 2003**
  (054) The Florida Bar Annex
- ❑ **Sarasota* - March 28, 2003**
  (042) Hyatt Hotel
- ❑ **Ft. Myers* - March 28, 2003**
  (170) Holiday Inn Riverwalk
- ❑ **Miami* - April 2, 2003**
  (024) Hyatt Regency Downtown
- ❑ **Pensacola* - April 3, 2003**
  (040) Escambia/Santa Rosa Bar Assoc.

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- ❑ Persons attending under the policy of fee waivers: $0
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THE FLORIDA BAR CLE

The Florida Bar Continuing Legal Education Committee and the Real Property, Probate and Trust Law Section present

Representing the State Licensed Builder

COURSE CLASSIFICATION: ADVANCED LEVEL

Live Presentations: March 27, 2003 - Ft. Lauderdale
March 28, 2003 - Tampa

Course No. 5256R

This seminar will focus on advanced Florida construction law issues everyone will experience, from contractors owners, architects, engineers, subcontractors, sureties, and other members of the construction industry, to lawyers, and judges. The program will be presented by a faculty of experienced lawyers and an architect highly recognized for their special expertise in Florida construction law. The seminar will feature traditional elements, such as a legislative update, case law update, and the status of the Florida Uniform Building Code. There will also be thought provoking and important discussions about topics not commonly presented in a seminar format, such as DBPR and licensing issues. Additionally, our seminar will explore views from the Owner, Building Authority, and Design team. The seminar will further discuss litigation strategies particular to construction law. Regardless of whether you represent owners, contractors, subcontractors, sureties, lenders, designers or any other player in the construction industry, there will be a broad range of topics which are sure to impact your practice area.

8:00 a.m. – 8:30 a.m.
Late Registration

8:30 a.m. – 8:45 a.m.
Welcome and Announcements
Fred R. Dudley, Tallahassee, and Michelle A. Reddin, Orlando

8:45 a.m. – 9:35 a.m.
View from the Agency: State Licensing Requirements and Unlicenced Activities
Hardy Roberts, Tallahassee, DBPR General Counsel

9:35 a.m. – 10:30 a.m.
View from the Construction Board: Disciplinary Proceedings
G.W. Harrell, Tallahassee, DBPR Regulation Counsel

10:30 a.m. – 10:45 a.m.
Break

10:45 a.m. – 11:30 a.m.
Legislative and Case Law Update
Larry Lieby, Ft. Lauderdale

11:30 a.m. – 12:15 p.m.
View from the Owner: Contract Provisions
Lee Weintraub, Ft. Lauderdale and Howard J. Hollander, Miami

12:15 p.m. – 1:30 p.m.
Lunch (on your own)

1:30 p.m. – 2:20 p.m.
View from the Building Authority: Uniform Building Code: An Update
Fred R. Dudley, Tallahassee

2:20 p.m. – 3:00 p.m.
View from the Design Team
David Anderson, AIA, Tampa

3:00 p.m. – 3:15 p.m.
Break

3:15 p.m. – 4:15 p.m.
View from the Courtroom: Litigation Strategies — A Panel Discussion
Kim Ashby, Orlando, Mike Sasso, Orlando, Stephen Rakusin, Ft. Lauderdale and Bruce Partington, Pensacola

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BEB: Course No. 5256R

LOCATIONS (CHECK ONE):

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  (223) Marriott Marina
- ❑ **Tampa** - March 28, 2003**
  (049) Tampa Airport Marriott

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- ❑ Full-time law college faculty or full-time law student: $72.50
- ❑ Persons attending under the policy of fee waivers: $0
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Certification Review Courses

April 4-5, 2003 • Hyatt Regency Airport • Orlando

2003 Wills, Trusts & Estates Certification Review

2003 Real Estate Certification Review

Wills, Trusts & Estates

n Friday, April 4, 2003

8:00 a.m. – 8:25 a.m.
Late Registration

8:25 a.m. – 8:30 a.m.
Introduction
– Nelson C. Keshen, Miami, Program Chair
– David G. Armstrong, Delray Beach, Program Vice-Chair

8:30 a.m. – 9:15 a.m.
Elective Share and Other Spousal Entitlements
Computation of Elective Share, What Assets are Included in the Elective Share; Procedure for Making the Election
– Phillip A. Baumann, Tampa

9:15 a.m. – 10:05 a.m.
Principal and Income Act:
Trustee's Power to Adjust; Total Return Unitrusts
– James Iverson Ridley, Fort Lauderdale

10:05 a.m. – 10:30 a.m. **Break**

10:30 a.m. – 11:20 a.m.
Joint Tenancies, Tenancies by the Entireties, and Totten Trusts
Gifting Principals and Applicable Presumptions; Case Law Discussion; Applicable Statutes as Relates to Bank Accounts
– William Fletcher Belcher, St. Petersburg

11:20 a.m. – 12:10 p.m.
Trust Administration; Wills v. Living Trusts
– Brian J. Felcoski, Coral Gables

12:10 p.m. – 1:20 p.m. **Lunch (included in registration fee)**

1:20 p.m. – 4:35 p.m.
Taxes, Part 1
Tax presentations, Parts 1 & 2, cover: federal gift tax, special valuation rules; federal estate tax; using the marital deduction; generation-skipping transfer tax; planning for the GST tax; estates and ordinary trusts (income taxation); grantor and controlled trusts; postmortem tax planning; special estate planning topics
– Professor David F. Powell, Tallahassee

n Saturday, April 5, 2003

8:30 a.m. – 12:00 noon
Taxes, Part 2
– Professor David F. Powell, Tallahassee

12:00 noon – 1:00 p.m.
Lunch (on your own)

1:00 p.m. – 2:00 p.m.
Taxes, Part 2- Continued
– Professor David F. Powell, Tallahassee

2:00 p.m. – 3:15 p.m.
Probate Litigation
Revocation of Probate, Voiding of Trusts; *Carpenter* Presumptions; Tortious Interference with Expected Gift or Bequest; Contract to Make a Will; Florida Deadman's Statute; and Right To Jury Trial
– William T. Hennessey, Palm Beach

3:15 p.m. – 3:30 p.m.
Break

3:30 p.m. – 4:15 p.m.
Homestead
Requirements; Devise; Protected Homestead; Exemptions From Creditors; and Sale
– Clifford W. Rainey, Sr., Senior Underwriting Counsel, Attorneys' Title Insurance Fund, Inc.

4:15 p.m. – 5:00 p.m.
Estate Administration Overview
– Nelson C. Keshen, Miami

Course materials will include Professor Powell's updated, refined and extensively indexed 250-plus page outline, including questions and answers.

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Ethics: 0.0 hours

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Real Estate

n Friday, April 4, 2003

8:00 a.m. – 8:40 a.m.
Late Registration

8:40 a.m. – 8:45 a.m.
Opening remarks
– Silvia B. Rojas, Miami, Program Chair
– Victoria H. Carter, Orlando, Program Vice Chair
– Robert G. Stern, Tampa, Program Vice Chair

8:45 a.m. – 9:15 a.m.
Bankruptcy
– Alberto C. Gomez-Vidal, Miami

9:15 a.m. – 10:00 a.m.
Real Property Law and Litigation: Recent Cases and Statutory Revisions
– Eugene E. Shuey, West Palm Beach

10:00 a.m. – 10:30 a.m.
Environmental Issues in Real Property and Lending Transactions
– Roger Dean Schwenke, Tampa

10:30 a.m. – 10:45 a.m. **Break**

10:45 a.m. – 11:30 a.m.
Title Insurance: Affirmative Coverage – Standard Exceptions
– Mary O'Donnell, Casselberry

11:30 a.m. – 12:00 noon
Judgments and Judgment Liens
– Patricia J.Hancock , Orlando

12:00 noon – 1:15 p.m.
Lunch (included in registration fee)
Who Wants to be an Ethical Attorney
– Homer Duvall, III, St. Petersburg

1:15 p.m. – 1:45 p.m.
Public Lands and Watercourses
– Louis B. Guttmann III, Orlando

1:45 p.m. – 2:15 p.m.
MRTA
– Alan B. Fields, Naples

2:15 p.m. – 2:45 p.m.
Tax Liens and Tax Titles
– Robert G. Stern, Tampa

2:45 p.m. – 3:00 p.m. **Break**

3:00 p.m. – 3:45 p.m.
FAR/BAR Contract & Broker Duties/Disclosures: Agency Disclosure
– G. Thomas Ball, Orlando

3:45 p.m. – 4:15 p.m.
Real Estate Finance Notes & Mortgages – Rent Assignments & Receivership
– David R. Brittain, Tampa

4:15 p.m. – 5:15 p.m.
Condominiums and Homeowners Association Law: Homeowners Associations – Condominium Associations – Developer Liability - Liens
– William P. Sklar, West Palm Beach

n Saturday, April 5, 2003

8:25 a.m. – 8:30 a.m.
Opening Remarks

8:30 a.m. – 9:15 a.m.
Survey Law, Legal Descriptions & Easements
– Richard Walter Taylor, DeLand

9:15 a.m. – 10:00 a.m.
Closings: Closing Statements – Closing Costs – Documentary Stamps- Interest-Taxes
– Roland D. Waller, New Port Richey

10:00 a.m. – 10:15 a.m. **Break**

10:15 a.m. – 11:00 a.m.
Conveyancing and Joint Ownership
– Robert M. Schwartz, Delray Beach

11:00 a.m. – 11:45 a.m.
Business Entities
– Jeffrey T. Sauer, Pensacola

11:45 a.m. – 12:15 p.m.
Zoning and Permitting
– Richard E. Davis, Tampa

12:15 p.m. – 1:30 p.m.
Lunch (on your own)

1:30 p.m. – 2:15 p.m.
Construction Liens
– George J. Meyer, Tampa

2:15 p.m. – 3:00 p.m.
Foreclosure
– David H. Simmons, Orlando

3:00 p.m. – 3:15 p.m. **Break**

3:15 p.m. – 4:00 p.m.
Land Trusts
– Andrew M. O'Malley

4:00 p.m. – 5:00 p.m.
Landlord/Tenant: Commercial/Residential
– Lawrence J. Miller

Education Credit

Certification Program:

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General: 16.0 hours
Ethics: .50 hour

Credit may be applied to more than one of the programs above but cannot exceed the maximum for any given program. Please keep a record of credit hours earned. RETURN YOUR COMPLETED CLER AFFIDAVIT PRIOR TO CLER REPORTING DATE (see Bar *News* label). (Rule Regulating The Florida Bar 6-10.5).

General Course Information

- Audiotape available for purchase. No videotape.
- Coursebook included in registration fee.
- To purchase course book separately, use Registration Form.
- Friday lunch included in the registration fee. Saturday lunch "on your own."

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These courses will not necessarily prepare you for the Real Estate Certification Examination or the Wills, Trusts & Estates Certification Examination. The individuals involved in the preparation of the Certification Examinations have not contributed to the programs. The Real Estate Certification exam will be in Tampa on May 16, 2003. The Wills, Trusts & Estates Certification exam will be in Tampa on May 16, 2003. Questions regarding the exam may be directed to the CLER Department at (850) 561-5600, ext. 5842.

Hotel Reservation Information

A block of rooms has been reserved at the Hyatt Regency Airport in Orlando for the attendees of the review courses. To qualify for The Florida Bar group rate of $155/night, please call the Hyatt Regency Airport in Orlando directly BEFORE THE RESERVATION CUT-OFF DATE OF MARCH 14, 2003. The number for the Hyatt Regency Orlando International Airport is 800/233-1234 or direct at 407/825-1234.

REFUND POLICY: Requests for refunds must be in writing and postmarked no later than two business days following the course presentation date. A $15 cancellation fee will be retained. No refunds will be given after that time. Registrants who do not notify the Bar by 5:00 p.m. on March 28, 2003 that they will be unable to attend the course, will have an additional $30 retained to cover the cost of the Friday lunch. Registration fees are non-transferrable.

RPPTL Section
■ Certification Review Courses ■

Registration Form

TO REGISTER OR ORDER AUDIOTAPES/BOOKS, MAIL THIS FORM (OR A COPY) TO The Florida Bar, CLE Programs, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300 with a check in the appropriate amount payable to The Florida Bar or credit card information filled in below. If you have questions, call 850/561-5831. ON SITE REGISTRATION, ADD $15. **On-site registration is by check only.**

Name _____ Florida Bar # _____

Address _____

City/State/Zip _____

(BEB)

METHOD OF PAYMENT: ❑ Check Enclosed (Payable to The Florida Bar)
❑ Credit Card
(Advance Registration Only Faxed to 850-561-5816.)
❑ MASTERCARD / ❑ VISA

Name of Cardholder _____

Card No. _____

Expiration Date: ____/____ Signature _____
(MO. / YR.)

Register me for the course I have indicated below: (234)

❑ 2003 **Wills, Trusts and Estates** Certification Review Course: $220
(Course No. 5354R)

❑ 2003 **Real Estate** Certification Review Course: $220
(Course No. 5353R)



❑ Please check here if you have a disability that may require special attention or services. To ensure availability of appropriate accommodations, attach a general description of your needs. We will contact you for further coordination.

Course books included in registration fee.
To order books or audiotapes separately, please check below:

Certification/CLER credit is not awarded for the purchase of the course book only.

❑ **Course book** for 2003 Wills, Trusts and Estates Certification Review Course: $50, plus tax **(RP038)**

❑ **Course book** for 2003 Real Estate Certification Review Course: $50, plus tax **(RP040)**

❑ **Audiotape (includes course book)** for 2003 Wills, Trusts and Estates Certification Review Course: $220, plus tax **(RP039)**

❑ **Audiotape (includes course book)** for 2003 Real Estate Certification Review Course: $220, plus tax **(RP037)**

ACTIONLINE BULLETIN BOARD

REVISED FORM DR-308. The revised Form DR-308, Request and Certificate for Waiver and Release of Estate Tax Lien (rev 08/02) has been republished and the revised Form DR-308 is now on the Florida Department Of Revenue website: http://www.myflorida.com/dor/forms/2002/DR-308.pdf. The revised Form DR-308 now has the financial information on page 3, so that when page 1 is recorded, the financial information remains private. The instructions are incorporated into the form on page 4.

— RPPTL Section Website, Liaisons: Department Of Revenue Committee

POSSIBLE BACK-ASSESSMENT OF FEES IN PORT ST. LUCIE – Class action lawsuit was filed in 1997 against the City of Port St. Lucie regarding its method of collecting storm-water utility fees. The Plaintiff class alleged that it was unfair for the City to charge vacant lot owners the same amount as improved lot owners. A final judgment for approximately $14M has been entered against the City. It is unclear as to whether the City will try to recoup the loss by imposing retroactive assessments against property owners. *Zlinkoff v. City of Port St. Lucie,* 821 So.2d 1130 (Fla. 4th DCA Jun. 19, 2002), *clarified* 27 Fla. L. Weekly D 1742 (Jul. 31, 2002)

— Patricia J. Hancock

JUDGMENT RATE OF INTEREST SET AT 6% FOR 2003. The newly formed Florida Department of Financial Services ("DFS") has announced the year 2003 rate of interest that shall be payable on judgments or decrees, or on contracts which fail to specify a rate. The year 2003 rate is 6% per annum or .0001644 per day. (Beginning January 7, 2003, DFS has the duties and responsibilities arising from the consolidation of the offices of the State Treasurer and the Comptroller.)

— *See www.dbf.state.fl.us/interest.html.*

REVISED DOC STAMP TAX FORM DR-228. Form DR-228 was revised October, 2002. This form is used by non-registered taxpayers (persons who average less than five taxable documentary stamp tax transactions per month, for unrecorded documents). The new format is available for download at *www.myflorida.com/dor/forms*. The Department of Revenue requests that any DR-228 tax returns with a revision date prior to 10/02 be discarded.

— *The Florida Bar News,* Jan. 15, 2003 (Vol. 30, No. 2), at 3.

DOC STAMPS ON ORIGINAL STOCK ISSUANCE. For those who form corporations, to act as general partners in family limited partnerships, as one example, the law imposing a documentary stamp tax on each original issue of certificates of stock or shares issued in Florida was repealed in the 2002 legislation, effective May 1, 2002. F.S. § 201.05, Law § 60, 2002-218.

— 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: J*oclairespearpa@aol.com*. Each item should be limited to 100 words or less and should contain your name.*

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