ActionLine

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After-*Craft*: Federal Tax Liens and TBE Property

By Patricia J. Hancock, Esq., Fidelity National Title Insurance Company, Maitland, Florida

Since the U.S. Supreme Court's ruling in *United States v. Craft*, 535 U.S. 274 (2002), a federal income tax lien recorded against one spouse, in some situations, can no longer be disregarded in a real estate transaction involving real property owned as tenants by the entirety. The *Craft* case caused a monumental upset to the real estate industry's previous custom of obtaining a continuous marriage affidavit for the appropriate time involved in order to forego the requirement of a satisfaction of an IRS tax lien against only one spouse when the property was owned as tenants by the entirety.

Many real restate professionals have fretted over how the IRS would now handle IRS liens against only one spouse. Would the IRS attempt a retroactive enforcement of liens? This query has been somewhat answered in IRS Notice 2003-60, a copy of which may be obtained from the American Land Title Association website, *www.alta.org*.

The Notice bulletin states that the IRS "will, under certain circumstances, not apply *Craft*, with respect to certain interests created before *Craft*, to the detriment of third parties who may have already reasonably relied on the belief that state law prevents the attachment of the federal tax lien." The IRS "will not assert the federal tax lien rights where doing so may disturb the settled expectations" of

See "After Craft," page 3

Chair's Message:

Invitation: Become Actively Involved in *Your* Section

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



Thank you for being a member of the Real Property, Probate and Trust Law Section. Your Section is dedicated to developing and enhancing these areas of your legal practice. Your dues help to fund Section operations. **You** are the Real Property, Probate and Trust Law Section. We also need your creativity and active involvement to continue to shape, react to, and manage the changes which are occurring in our practices.

This is an open invitation to all Section members to consider and reach out for a more active involvement in our Section's activities. As you see chronicled in the *ActionLine* issues, your Section's work is divided among 18 General Standing committees, 21 Real Property Division committees, and 16 Probate and Trust Law Division committees. For anyone not currently participating directly in the work of your Section and who wants to become actively involved, there are opportuni-

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AFTER *CRAFT*

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those persons who may have been under the belief that a federal tax lien against one spouse would not attach to entireties property — provided, that the entireties interest was created before the *Craft* case. The ruling in *Craft* was issued on April 17, 2002.

Example Applications Pre-*Craft* Ruling:

Transfers:

The IRS will consider on a case-by-case basis, situations where the entirety property has been transferred by donation rather than sale. For example, the IRS may assert the federal tax lien against property that was once entirety property, but conveyed by the spouses to their family trust. But, it is not likely that the IRS will assert a tax lien against the property where the spouses transferred their entirety property to a charitable organization.

Divorce:

If the entireties property is awarded to the non-tax-lien liable spouse during the dissolution of the parties' marriage, and the award occurred prior to the *Craft* ruling, then the IRS will not seek to enforce the tax lien against that property. However, "[T]his will not apply if the Service determines that, notwithstanding the divorce, the transfer was fraudulent."

Example Applications After- *Craft* Ruling:

Transfer:

If the entirety property is sold or transferred after the ruling in *Craft*, then the property is subject to the federal tax lien in the hands of the transferee to the extent of one-half of the transferee's interest.

Divorce:

If the entireties property is awarded to the non-liable spouse after the Craft ruling, the non-liable spouse takes the property encumbered with the tax lien.

Death:

If the tax-lien-debtor spouse dies, the "entirety" aspect of entireties property is extinguished by operation of law, so that there is no longer an interest of the debtor to which the federal tax lien would attach. Therefore, when the debtor spouse dies, "the surviving non-liable spouse takes the property unencumbered by the federal tax lien." However, if the "entirety" aspect had been terminated prior to the death, then the federal tax lien would attach.

But, if the non-liable spouse dies first, the "entirety" aspect is terminated by operation of law, and the surviving debtor spouse is then vested with the whole title to the property, encumbered by the federal tax lien.

Example Situations Regarding Mortgaged Entirety Property

Mortgaged After the Recording of the Tax Lien:

If the entirety property is mortgaged after the recording of a federal tax lien, and the non-liable spouse dies before the debtor spouse, the tax lien attaches and is senior to the lender's interest. (Note: The Notice bulletin does not discuss the purchase-money mortgage theory. So, it is believed that a tax lien will continue to not be senior to a true purchase money mortgage as has been the premise in the past.) But, if the debtor spouse dies first, then the debtor spouse's interest in the property is extinguished by operation of law, and likewise the federal tax lien is extinguished.

If the mortgaged property is transferred pursuant to a divorce decree to a third party or either spouse, then the "federal tax lien generally will have priority with respect to a one-half interest in the property over the lender's subsequent security interest."

Certificates of Discharge:

The IRS will consider issuing a certificate of discharge if the holder of a senior mortgage is foreclosing, rather than joining the United States in a judicial foreclosure proceeding. The value and equity in the property will be factors.

Certificate of Subordination:

"If the requested subordination of the federal tax lien is for the purpose of securing a loan to refinance a senior loan, the Service will generally issue the subordination if the terms of the refinance loan, as compared to the terms of the loan secured by the senior loan, ultimately will enhance the tax payer's equity or facilitate the collection of the tax from other property or income of the taxpayer."

*The principal author of the Notice bulletin is **Deborah Grogan** of the Office of Associate Chief Counsel (Procedure and Administration). All quoted portions of this article are taken from the Notice bulletin. For further information regarding the Notice bulletin, please contact the Procedure and Administration division of the IRS. Consultation with a tax professional is also encouraged inasmuch as this article is merely to inform the reader of the existence of the Notice and not meant to be all-encompassing legal analysis of the determinations of the IRS.*

CHAIR'S MESSAGE

from page 1

ties for you to take part in the work of our committees. With the enhancements that we are in the process of developing to the web site, the work of our committees will be facilitated, enhanced, and made easier.

If you have an interest in directly working for the betterment of your Section, please contact any of the Section officers (listed in the *ActionLine* masthead) or committee chairs (listed on the website (*www. flabarrpptl.org*) under "Executive Council" and then "General Standing Committees") and advise them of your interest. As I have found over the past many years, active involvement in your Section makes you a better lawyer and assists in the positive development of these areas of law. Your active participation makes a difference!

Hidden Gem in Tax Act Benefits Corporations Holding Appreciated Real Estate

By E. John Wagner, II, Esq., Williams, Parker, Harrison, Dietz & Getzen, Sarasota, Florida

Every tax act has a few hidden surprises. The Jobs and Growth Tax Relief Reconciliation Act of 2003, signed into law on May 28, 2003, is no exception. While the Act's dividend and capital gains tax rate reductions have many obvious benefits, the rate changes also created a hidden gem for owners of "C corporations" holding highly appreciated real estate.

All corporations are taxed as C corporations unless they file an election with the IRS to be taxed as S corporations. In general, S corporations do not pay income tax. Instead, their shareholders pay one level of tax on the corporation's income as it is earned. In contrast, C corporation income is taxed twice– once at the corporate level when the income is earned and a second time at the shareholder level when the remaining income is distributed.

Prior to 1986, C corporations could be liquidated without triggering the second level of tax. As a result, many investors and families put appreciating real estate into these corporations with the expectation that they could gain asset protection from a corporate shield without suffering a negative income tax impact. Unfortunately, in 1986, the law changed to make it impossible to liquidate a C corporation tax free. After the change in the law, converting these C corporations into S corporations became the only escape from the onerous double taxation of gains.

Because S corporations generally only pay one level of income tax and are eligible for lower capital gains tax rates, the effective tax rate on capital gains from real estate sales by S corporations is much lower than sales by C corporations. The difference in the effective tax rates can be as much as 34%. This means that the shareholders of an S corporation selling property for a $1 million long-term capital gain may net $340,000 more after taxes than the shareholders of a C corporation selling exactly the same property for exactly the same gain.

Unfortunately, for two reasons converting a C corporation into an S corporation is not always a perfect solution. The first is that the full benefits of the conversion cannot be realized for 10 years. S corporations that used to be C corporations must still pay corporate tax on at least some of their gains until the 10th anniversary of their conversion. The second reason is that these corporations generally must pay taxable dividends near the time of the conversion in an amount equal to their retained "book" earnings. This combination of an up-front tax cost and a distant tax benefit has deterred some taxpayers from making the conversion even though the net present value of converting is significant.

The Act makes the conversion of a C corporation into an S corporation more desirable by reducing that up-front tax cost without reducing the future tax benefit. Now, the dividends paid at the time of conversion will be taxed at 15% instead of regular income tax rates that reached 38.6%, reducing the up-front tax cost by over 60%. For some clients, converting a C corporation into an S corporation could save thousands, or even millions, of dollars.

The interaction of these variables can be complicated, but the decision-making process can be simplified with the proper tools. It is possible to model the tax costs and benefits of converting a C corporation into an S corporation under the new Act. The model can be manipulated to consider different scenarios and also can provide net present value calculations to simplify decision-making. In most cases, it is not necessary to restructure the corporation itself to convert a C corporation into an S corporation. In all situations, the client's individual circumstances should be evaluated to determine whether a conversion is worthwhile.

Executive Council Meetings 2004

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

New Lien Rights On Decedent's Protected Homestead: Do Not Be Caught Off Guard

(Applies To Estates Of Decedents Dying After June 12, 2003)

By Debra L. Boje, Esq., Ruden, McClosky, Smith, Schuster & Russell, P.A., Tampa, Florida

In 2001, several revisions were made to the Florida Probate Code. One of those revisions was to Florida Statutes, Section 733.608. The 2001 revision allowed the personal representative, in certain instances, to take control and to expend probate funds to preserve, insure and protect the decedent's protected homestead during the estate administration. The 2001 revision, however, did not (i) provide guidance as to how the personal representative went about taking control over the protected homestead; (ii) protect the personal representative in the event he or she did not take control over the protected homestead; and (iii) provide a mechanism for the personal representative to recoup monies spent on the protected homestead. The latter left many personal representatives who did take control of the protected homestead and expended estate funds in the position of having to justify to creditors and residuary beneficiaries who did not receive the protected homestead, why their funds were expended for the benefit of others. The 2003 revision to §733.608 hopes to solve all three of the foregoing problems.

When does the Personal Representative have the right to take control of Protected Homestead?

The first revision that was made to Section §733.608(2) was to change the term "in possession of" to "occupied by". The statute now makes it clear that if the decedent's protected homestead is not being occupied by a person who would appear to be entitled to receive all or a portion of the property following the decedent's death, that the personal representative has the right, but not the obligation to take control of the property.

What if the Personal Representative Chooses not to take control of the Property?.

Recognizing that some personal representatives may not want the added burden or responsibility of taking control of the protected homestead §733.608(11) was added to the Statutes. This provision relieves the personal representative from liability when he or she decides not to take possession of the protected homestead and details what happens if the court later determines that the property was not the protected homestead of the decedent.

How are funds expended on the Protected Homestead, Recouped or Abandoned by the Personal Representative?

The remaining revisions to §733.608 establish the mechanism whereby a lien on the property is created, paid off, terminated and in certain circumstances abandoned. If the personal representative has expended or is obligated to expend estate funds to preserve, maintain, insure or protect the protected homestead, the personal representative is entitled to a lien on the protected homestead. §733.608(3). The lien includes attorney's fees and costs incurred for the benefit of the protected homestead. §733.608(3). Section 733.608(4) sets forth the elements that must be contained in the notice of lien. The statute requires that a copy of the notice of lien must be served by formal notice on each person appearing to have an interest in the protected homestead and filed in the probate proceeding.

Before or after the lien is filed any interested person may petition the court to adjudicate the amount of the debt. The procedure for adjudicating the amount of the lien is set forth in §733.608(3)(a). The petition must be served by formal notice on the persons appearing to have an interest in the protected homestead.

Section 733.608(3)(b) provides that the personal representative may enforce payment of the debt by (i) foreclosure of the lien (§733.608(7) provides that this is done in the same manner as foreclosing a mortgage); (ii) by a pro rata offset of the debt against any other property in the personal representative's possession that otherwise would be distributed to a beneficiary with an interest in the protected homestead; or (iii) offset against the revenues from the protected homestead. This subsection

continued, next page

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CAUGHT OFF GUARD
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also makes it clear that the ultimate recipients of the protected homestead are not personally liable for the debt.

Section 733.608(5) provides that the lien terminates upon the earliest of (i) the recording of a satisfaction or release of lien; (ii) discharge of the personal representative; (iii) one year after the lien is recorded unless a proceeding is brought prior to the one year period to determine the amount of the debt or enforce the lien; or (iv) entry of an order releasing the lien.

An interested person may make a written request for an estoppel letter from the personal representative setting forth the unpaid balance of the debt. §733.608(6). The personal representative has fourteen (14) days from receipt of the letter to provide the information. §733.608(6).

If the personal representative receives complete payment of the debt, the personal representative must record a satisfaction of lien within thirty (30) days of payment. §733.608 (6). If a judicial proceeding is necessary to compel the filing of a satisfaction §733.608(6) allows the prevailing party attorney's fees and costs.

Section 733.608(9) provides that by order of the court the personal representative may be relieved of the duty to collect the debt if (i) the estimated court costs and attorney's fees to collect the debt will approximate or exceed the amount of the recovery, or (ii) it is impractical to enforce collection in view of the improbability of collection.

In order to accommodate the sale of the protected homestead secured by a lien, the proceeds from the sale may be placed in a restricted account or in escrow pending the determination and payment of the lien. §733.608(12). The transfer of the lien can be accomplished by the written consent of the personal representative and the apparent owners of the property or by court order. §733.608(12).

This Statute applies to all estates of decedents dying after the date on which the act became law: June 12, 2003. Before allowing a personal representative to expend funds for the benefit of a protected homestead, a careful reading of §733.608 is strongly advised. Do not be caught off guard.



Aloha, Section Members!

We're going to HAWAII!!

See page 21 for details.

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Honoring a Section Hero, Lawrence F. Beyer

By John B. Neukamm, Esq., Mechanik, Nuccio, Williams, et al., Tampa, Florida



LARRY BEYER

At its Annual Legislative Update in Palm Beach, the Real Property, Probate & Trust Law Section formally honored Lawrence F. Beyer, a deceased member of the Section, for his contributions to the legal community, as well as to his local community and nation. On August 1, 2003, our Section Chair, Louis B. Guttmann, III, presented Larry's widow, Barbara, and two of their three children, Jeanne and Greg, with a framed copy of a Resolution that was adopted by the Section's Executive Council during its Annual Convention on May 24, 2003. As Lou noted, when making the presentation, Larry was a respected and deeply loved member of the Real Property, Probate & Trust Law Section of The Florida Bar, who died after a courageous battle with cancer on November 16, 2002.

Prior to his death, Larry worked in the Boca Raton offices of the Hodgson Russ law firm. As a Board Certified Wills, Trusts and Estates lawyer, he handled both estate planning and litigation matters. Larry served as a member of the Board of Directors of the Palm Beach County Estate Planning Council, as the Chair of the Palm Beach County Probate Law and Probate Rules Committees, as a long-standing and very active member of the Florida Bar's Probate Rules Committee, and as a Circuit Representative to The Florida Bar's Real Property, Probate & Trust Law Section for the Fifteenth Judicial Circuit. Larry was the first attorney to receive the Lifetime Achievement Award from the South Palm Beach County Bar Association.

In addition to his stellar legal career, Larry served his country with distinction in both the United States Air Force and in United States Army. While modest, he was a genuine American hero. As a helicopter pilot during the Vietnam War, Larry earned a Silver Star and a Purple Heart for his bravery in rescuing his pinned copilot from his burning helicopter after they were shot down in 1966, despite his own burns and broken back. The citation also recognized Larry's gallantry in connection with the subsequent successful rescue efforts. He retired from the military in 1983 as a Lt. Colonel, after which he began a successful second career as an attorney.

Larry was also active in civic affairs. As an Eagle Scout and the father of an Eagle Scout, he contributed extensively to his local community, through coaching youth baseball and soccer, service on the Board and volunteer efforts at His Caring Place and other faith-based ministries, service as a member of the Board of Trustees of the Boca Raton Historical Society, service as a member of the Board of Directors of the Florida Philharmonic and service on many other boards in his local community. His community service and leadership was recognized by an awards ceremony shortly before his death by the Mayor of the City of Lighthouse Point.

In making the presentation, Lou explained that the Real Property, Probate & Trust Law Section of The Florida Bar wished to recognize the extraordinary dedication and service that Larry provided not only to the Section, to his local Bar Association and The Florida Bar, but also to his nation and community. During the course of the emotional evening, Lou assured Barbara, Jeanne and Greg that Larry will be sorely missed.



Barbara Beyer expresses her appreciation to the Section for its kind words and recognition of her late husband, Larry Beyer.



Mrs. Beyer and two of her children, Jeanne and Greg, hold the framed copy of the Section's Resolution honoring Larry Beyer.

Resolution

Of the Executive Council for the Real Property, Probate & Trust Law Section of the Florida Bar Recognizing the Service and Contributions of *Lawrence F. Beyer* To the Council, Section, The Florida Bar and the Community

Whereas, Lawrence F. (Larry) Beyer, a respected and deeply loved member of the Real Property, Probate & Trust Law Section of The Florida Bar, died after a courageous battle with cancer on November 16, 2002; and

Whereas, Larry served his country with distinction in the United States Air Force as a B-47 and B-52 flight crew member attached to the Strategic Air Command during the Cuban Missile Crisis; and

Whereas, Larry subsequently transferred to the United States Army and became a decorated helicopter pilot, earning a Silver Star and a Purple Heart for his bravery in rescuing his pinned co-pilot from his burning helicopter, despite his own burns and broken back, and for his gallantry in connection with subsequent successful rescue efforts, after they were shot down in Viet Nam in 1966; and

Whereas, after retiring from the military in 1983 as a Lt. Colonel, Larry began a second career as an attorney with the Buffalo, New York office of the Hodgson Russ law firm; and

Whereas, shortly thereafter, Larry was transferred to the firm's Ft. Lauderdale and, later, to the firm's Boca Raton offices, where he became a talented Board Certified specialist in wills, trusts and estates law, handling both planning and litigation matters; and

Whereas, Larry served as a member of the Board of Directors of the Palm Beach County Estate Planning Council, as the Chair of the Palm Beach County Probate Law and Probate Rules Committees, as a long-standing and very active member of the Florida Bar's Probate Rules Committee, as a Circuit Representative to The Florida Bar's Real Property, Probate & Trust Law Section for the Fifteenth Judicial Circuit and as a valued member of the Section's Executive Council; and

Whereas, Larry was the first attorney to receive the Lifetime Achievement Award from the South Palm Beach County Bar Association; and

Whereas, Larry was an Eagle Scout and the father of an Eagle Scout, and his extensive contributions to his local community, through coaching youth baseball and soccer, his service on the Board and volunteer efforts at His Caring Place and other faith-based ministries, his service as a member of the Board of Trustees of the Boca Raton Historical Society, his service as a member of the Board of Directors of the Florida Philharmonic and his service on many other boards in his local community, was recognized by an awards ceremony shortly before his death by the Mayor of the City of Lighthouse Point; and

Whereas, the Executive Council of the Real Property, Probate & Trust Law Section of The Florida Bar recognizes the extraordinary dedication and service that Larry has provided to his nation, his community, his local Bar Association and The Florida Bar, including the Real Property, Probate & Trust Law Section, during his lifetime and acknowledges that he will be sorely missed.

Now, Therefore, be it resolved by the Executive Council of the Real Property, Probate & Trust Law Section of the Florida Bar that the loss of Lawrence F. Beyer is mourned, that his distinguished service and contributions are respected, appreciated and acknowledged, and that his rich contributions to the practice of law, particularly to the practice of wills, trusts and estates law, will be remembered forever.

Unanimously Adopted by the Executive Council of the Real Property, Probate & Trust Law Section of The Florida Bar this 24th day of May, 2003.

Steven L. Hearn, Chair

RPPTL Website Redesign

By Sam W. Boone, Esq., Sam W. Boone, Jr., P.A., Gainesville, Florida

The Website - Information Technology Committee of the RPPTL Section has engaged the services of the Legal Technology Institute of the Frederick G. Levin College of Law (LTI) to assist the Section on revamping its internet presence.

The new website redesign, a major project of Section Chair Louis Guttmann, will afford Section members increased communication and interaction at all levels. Each substantive Committee of the Section, as well as those committees of its two divisions, will have its own portion of the website to use to communicate with its members and the membership of the Section in general. The new Web interface promises to significantly reduce the technological knowledge required to extend and maintain communication among members of the Section.

The Section's committees will designate content coordinators who, at the direction of the committee chair, will provide:

- Purpose of the Committee
- Committee Officers
- Meeting Information
- Agendas
- Minutes of Meetings
- Membership
- Projects and Notices

A workshop for content coordinators and committee chairs will be held at the Section's January Executive Council meeting in Ocala. Website - Information Technology Committee Vice-chair and Content Coordinator, Silvia Rojas, together with representatives from LTI, will show attendees how to access the new website and make efficient use of the new site's database driven design.

This Section now provides electronic copies of *ActionLine* online. The redesign will include a search feature for searching issues of *ActionLine* for particular articles. When combined with the increasing use of email "listserves" by the committees of the Section, this new site design will enhance access to, and the flow of information among members of the Executive Council and the Section at large. This will provide additional benefits for Section members.

Keep your eye on the website: *www.flabarrpptl.org!*





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Proposed Exception to Existing Prohibition Against Contesting Revocable Trusts

By Wm. Fletcher Belcher, Esq., St. Petersburg, Florida

Florida Statute Section 737.2065 expressly prohibits the bringing of any action to contest the validity of all or any part of a trust until the trust becomes irrevocable. This provision was first enacted in 1992 (F.S. §737.206) in conjunction with similar legislation (F.S. §732.518) prohibiting the commencement of will contests before the death of the testator.

Although revocable trusts are properly regarded as will substitutes, they are very different from wills in the sense that they frequently provide a framework for the investment, management, expenditure and distribution of the grantor's assets during his or her life. Accordingly, an invalid revocable trust which has been funded and is governing the administration of the grantor's assets has a potential to cause harm to the grantor during his or her life that a will simply does not have. Grantors who are not incapacitated are able to protect themselves from such circumstances by exercising their continuing power to revoke or amend the trust instrument. However, grantors who are presently incapacitated cannot effectively use their reserved power to revoke or amend the instrument to protect themselves from this risk of harm. Accordingly, there is a need to protect incapacitated persons from such loss or damage by creating a narrow exception to the existing statutory prohibition against contesting trusts before they become irrevocable.

On November 8, 2003, the Executive Council of the RPPTL Section addressed this problem by adopting a resolution supporting proposed amendments to Chapters 737 and 744, Florida Statutes. The proposed legislation, which was developed by the Section's Probate & Trust Litigation Committee and approved by that Committee and the Guardianship Law Committee, would change the law by creating a narrow exception to the existing prohibition of Section 737.2065 against bringing any action to contest the validity of all or any part of a trust until it becomes irrevocable. However, the proposed exception would permit such contests to be brought only by a court-appointed guardian of the person of an incapacitated ward, and only in cases where the guardianship court has made a finding that bringing a contest appears to be in the ward's best interests during his or her probable lifetime.

The proposed legislation implicitly recognizes that an invalid revocable trust or invalid durable power of attorney may be an impediment to the appointment of a guardian of the property for an incapacitated grantor because of provisions contained in two statutes: Section 744.344(2), Florida Statutes, "The order appointing a guardian . . . must be the least restrictive appropriate alternative . . . ." and Section 744.331(6)(b), Florida Statutes, "In any order declaring a person incapacitated the court must find that alternatives to guardianship were considered and that no alternative to guardianship will sufficiently address the problems of the ward." Also implicitly recognized is that neither the incapacity proceeding nor the appointment of a guardian should be burdened or delayed by litigation concerning the validity of a trust instrument or durable power of attorney. In fact, existing Section 737.2065 may even prohibit such litigation.

The proposed legislation overcomes these obstacles by permitting the court to proceed with the appointment of a guardian notwithstanding the existence of a revocable trust or durable power of attorney in those cases where an interested person files a verified statement that he or she has a good faith belief that the trust instrument or durable power of attorney is invalid, and states a reasonable factual basis for that belief.

The proposed legislation also: (i) insures that a guardian of the property will not bring an action to contest the ward's revocable trust instrument unless the court in the guardianship proceeding first finds that the action appears to be in the ward's best interests during his or her probable lifetime; and (ii) establishes a framework for the court to properly respond to a situation where it has appointed a guardian in the face of a questioned revocable trust, but has denied the guardian's request for authority to bring an action to contest the ward's trust instrument, by reviewing the extent of the need, if any, for the continuation of the guardianship. The proposed legislation is intended to permit challenges to revocable trust instruments for the protection of the ward during his or her life. It is not intended to permit premature challenges to the ward's testamentary plan during his or her life by disgruntled heirs or beneficiaries.

In summary, the proposed legislation protects incapacitated persons from loss or damage caused by the ongoing administration of a revocable trust or trust amendment which is invalid due to fraud (i.e., forgery, undue influence, etc.), duress, mistake, or lack of capacity at the time of execution, by creating a narrow exception to the existing statutory prohibition against contesting trusts before they become irrevocable.

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

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_____ Sale of Buyer's Property
_____ Kick Out Clause
_____ Seller Financing
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_____ Existing Tenant (s)
_____ Pre-Occupancy by Buyer
_____ Post-Occupancy by Seller
_____ Rezoning Contingency
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Order Sub-Total $_____
Shipping $ 8.00
Sales Tax 7.5% _____
Total _____

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Attn: _____ **Attorney #:**_____

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Please charge my ❑Visa or ❑Master Card; Amount to be charged $_____
(Sorry no American Express)

_____ ____/____ _____
Card Number **Exp. Date** **Signature of Cardholder Required**

23rd Annual Legislative and Recent Case Law Update and Executive Council Meeting

The Breakers, July 31 – August 3, 2003

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

The Real Property, Probate and Trust Law Section of The Florida Bar held its annual Legislative and Case Law Update at The Breakers Resort in Palm Beach, Florida on August 1, 2003. The meeting was held under Section Chair, Louis Guttmann's guidance and covered recent legislation and case law in the areas of homestead, guardianship, construction, business, tax, foreclosure, trust, condominium, creditor's rights, and probate law. There were approximately 375 attendees and the Section thanks its program co-chairs: Peggy Rolando and Laura Sundberg; and its program co-vice chairs: Silvia Rojas and Debbie Packer Goodall for their efforts in coordinating this successful event.

In addition to these members' contributions, the Section was again pleased to have the Florida Supreme Court Justice, Honorable Kenneth Bell in attendance and thanks Justice Bell for his participation and insight. Representative Dudley Goodlette joined Justice Bell and answered questions from the audience on a range of topics, including the Article V Court-funding issue.

The Section extends its sincere thanks to state Representatives Dudley Goodlette, Jeff Kottkamp, Andy Gardiner, Ron Reagan, Gus Bilirakis, Carole Green, Heather Fiorentino, and Jack Seiler; as well as to state Senators Skip Campbell, Jeff Atwater, Mike Fasano, Steve Geller, Dan Webster, Jim Sebesta, Burt Saunders and Alex Villalobos for their conscientious efforts in securing valuable legislation in the Real Property, Probate and Trust law arena. The State of Florida has and will continue to benefit from their advancement of sound public policy.

In connection with the CLE seminar, the Executive Council met on August 2 and related meetings were held July 31 through August 3. For additional information on the Section's upcoming events, please visit *www.flabarrpptl.org.*



Attendees of the Thursday evening Welcome Reception listen as Section Chair, Louis Guttmann welcomes everyone to The Breakers.

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Legislative Update and Recent Case Law Review and Executive Council Meeting



Florida Supreme Court Justice Kenneth Bell and Representative Dudley Goodlette gave an Ethics presentation, moderated by Louis Guttmann (not pictured), during the seminar.



Judge Hugh Hayes (right) and his wife Nancy are welcomed by Laird and (son) Langdon Lile.



Joel Sharp and Dan Adams enjoy the Welcome Reception.



The 23rd Annual Legislative Update and Recent Case Law Review was well-attended.

Legislative Update and Recent Case Law Review and Executive Council Meeting



Eric Bronner and daughters.



The Real Property Roundtable Breakfast.



The Section Executive Council Meeting.


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Comment Regarding "Other Than Money" for Separate Writing

By Rohan Kelley, Esq., The Kelley Law Firm, Ft. Lauderdale, Florida

I (indirectly) received an inquiry regarding the meaning of certain changes made in the 2001 legislative session to Section 732.515, Florida Statute, "Separate writing identifying devises of tangible property." The inquirer noted that the phrase "other than money," had been deleted from the description of property that could be devised in a "written statement or list" and asked if money could now be devised in that manner.

Prior to the 2001 amendment, Section 732.515 read in part: "A will may refer to a written statement or list to dispose of items of *tangible* personal property . . . *other than money* and property used in trade or business." That sentence was rewritten to read: "A written statement or list referred to in the decedent's will shall dispose of items of tangible personal property, other than property used in trade or business . . . ."

I chaired the RPPTL Section's Probate Law Committee for the several years that it worked on a comprehensive revision of the Florida Probate Code which was passed by the legislature in 2001. All of the sections of that code were reviewed and many were changed. Some of the changes were substantive, but many were only grammatical in order to make the statutes read easier. The questioned section, 732.515, was Section 48 of committee substitute for House Bill 137, codified as Ch. 2001-226 Laws of Florida. House Bill 137 was sponsored by Representative Dudley Goodlette, a practicing attorney and a friend of our Section.

The compelling purpose for the substantive amendment to this statute was reflected in the Probate Law Committee comment which was provided to legislative drafting, as follows: "The added clause clarifies that mention of the separate writing in the will is essential and not merely permissive. The permissive mischief arises from the frequent use of the word "may" which is deleted from the opening phrase by this amendment." The balance of the changes were perceived as merely grammatical, except the last sentence of the section which was added during the legislative process and was not proposed by the Probate Law Committee. [This has nothing to do with the question raised here.]

Classification of the questioned change as one intended only to be grammatical is further indicated by the fact that the recommendation of the subcommittee of the Probate Law Committee which was assigned to review this statute did not modify the phrase, "other than money and property used in a trade or business". Rather it was the style and oversight committee of the Probate Law Committee which "restyled" the statute, including the substantive changes suggested by the subcommittee.

An understanding of the process followed to generate these changes will be helpful. Various subcommittees of the Probate Law Committee were assigned specific sections of the Probate Code to review. After all of the subcommittees had written the substantive changes to their assigned sections, the entire package was assembled and passed to a "style and oversight committee" to review the grammar and phraseology and improve on that, if possible. This committee was comprised of John Arthur Jones, John G. Grimsley, Rohan Kelley, Wilson Smith, Bruce Stone and Craig Shaw, a lawyer and editor with The Florida Bar's CLE publications.

This committee edited the entire statutory package, which was then reported in final back to the Probate Law Committee, then to the Executive Council of the Section, then to The Florida Bar Board of Governors, then to Representative Goodlette, our legislative sponsor, who introduced it.

The style and oversight committee considered that it is clear under the law of Florida that "money" is not tangible personal property. Therefore a statutory reference to ". . . items of tangible personal property, . . . *other than money* and property used in a trade or business" was incorrect grammatically. We believed that allowing that phraseology to continue in the statute, might allow one to argue that money, specie, WAS tangible personal property under Florida law, because 732.515 said it was.

The reference to "money" was editorially stricken at that point, and the reference to property used in a trade or business was relocated in the statute. There was no intention to permit a separate written list to devise money and deletion of the reference to "money" should not be interpreted to accomplish that. That statute provides, now more clearly, that it may only devise "tangible personal property."

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**
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.

Revisiting the GRAT

By S. Dresden Brunner, Esq., Steel, Hector & Davis, Naples, Florida

Given the low Section 7520 rates that we have seen, a Grantor Retained Annuity Trust ("GRAT") is an estate planning technique that is being revisited. This article is a general review of some of the details of GRATs. If a GRAT is structured to "zero out" the gift, the client transfers any return on the transferred asset that exceeds the applicable Section 7520 rate—without any gift or estate tax implications! If the investment advisors who are predicting an economic recovery over the next several years are correct, there is a high probability of the asset outperforming the Section 7520 rate. GRATs can involve insignificant or no gift tax and offer estate tax savings for clients who die in any year in which the estate tax is in effect. Although clients may be tempted to postpone lifetime gifts, so long as estate-tax repeal is possible, GRATS can transfer the wealth with minimal costs and with more certainty of estate tax avoidance so long as the grantor survives the term.

What is a Grantor Retained Annuity Trust (GRAT)?

A Grantor Retained Annuity Trust ("GRAT") is a trust that pays the grantor (or certain family members) a periodic annuity payment for a specified term of years.[1] If the grantor is living at the end of the term, any property remaining in the GRAT after the final annuity payment is made will pass to the remainder beneficiaries (usually the grantor's children). This trust is irrevocable.

What is the Annuity Amount?

The annuity amount payable to the grantor is described as a stated dollar amount, a fixed fraction or percentage.[2] A fraction or percentage interest of the initial fair market value of the assets transferred to the GRAT is preferred, particularly if there is uncertainty in the valuation of the transferred assets. If valuation discounts are utilized, for example, and the value later changes, using a percentage provides certainty in determining the amount of the gift at the funding of the trust. The Regulations explicitly authorize a formula definition of the retained annuity. Regs. §25.2702-3(b)(1)(ii)(B).

How Does A GRAT Transfer Wealth?

The IRS sets a rate of return each month, known as the Section 7520 rate.[3] Under §7520, the value of an annuity or remainder interest is determined by using certain tables and an interest rate equal to 120% of the federal mid-term rate in effect for the month in which the transfer occurs.[4] That month's rate will apply regardless of the length of the GRAT term. This rate determines the gift tax value of the assets that will ultimately be passed to the GRAT's remainder beneficiaries. The value of the gift is calculated by subtracting the present value of the retained annuity interest from the value of the property transferred to the GRAT.[5] Therefore, the smaller the value of the gift for Federal gift tax purposes, the more beneficial the GRAT technique.

If the GRAT's rate of return is greater than the §7520 rate during the trust term, then the assets remaining in the trust will be greater than the amount the IRS estimated. This excess will pass tax free to the remainder beneficiaries. A grantor typically will fund a GRAT with assets that are likely to increase in value at a rate greater than the applicable §7520 rate. It is worth pointing out that not all of the appreciation on the initially transferred assets will pass to the beneficiaries. A portion of the appreciating assets are returned to the grantor in the form of annuity payments; the appreciation generated on the returned assets after a payment is in the grantor's estate.[6]

If, however, the rate of return is less than the §7520 rate, all of the trust property will be distributed to the grantor in annuity payments and nothing will be left to pass to the remainder beneficiaries. The grantor will be in the same position as if he or she had not created the GRAT, except for the cost of creating the GRAT (e.g. legal fees, appraisal costs, etc.) and any gift tax paid upon its funding.

How Long Should the GRAT Term Be?

Generally, the term can be for any number of years. A term as short as two years is acceptable.[7] Whether to have a term that is less than two years is open to some debate. In choosing the term, the client's life expectancy should be considered. The grantor's actual life span must exceed the GRAT term. The stock market should also be considered when choosing a length of term. The practitioner should consider whether to use a series of short-term GRATs as opposed to a single long-term GRAT.

What Type of Client Should Consider a GRAT?

A client who wants or needs a steady stream of income from a high-yielding and rapidly-appreciating asset should consider a GRAT. The client can gift substantially all[8] of the appreciation in excess of the rate of return, if any, in a rapidly-appreciating asset to his or her children with minimal gift or estate tax.

What Are the Tax Consequences of a GRAT?

1. Gift Tax: The transfer of assets into a GRAT is a taxable gift. The value of the grantor's retained annuity interest is valued under §7520. Generally, the value of the gift will be the fair market value of the entire property less the present value of the retained annuity interest. Some gift tax may be due upon the funding of the GRAT, for which utilization of available gift tax applicable exclusion amount would be required. Until recently, the IRS valued an annuity for a term of years as if it were for the shorter of the term or the grantor's life because the grantor may die during the term.[9] As a result of the *Walton* case (discussed infra), how-

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ever, the IRS will now value the annuity for the full term and the grantor is expected to receive all of the annuity payments. Thus, there is minimal or no gift tax and, therefore, minimal or no use of the grantor's available gift tax applicable exclusion amount.

2. Estate Tax: If the grantor survives the term, there are no estate tax consequences to the grantor.

If the grantor dies during the term of the trust, however, some portion or all of the GRAT assets will be included in the grantor's gross estate. The IRS takes the position that full inclusion of the assets is required under Code Sections 2036 and 2039.[10] There is authority for the position that, under Section 2036, the value of the assets includable is only the amount necessary to yield the annuity for the remaining term.[11] As a practical matter, full inclusion usually will be required for short-term GRATs and for longer-term GRATs as well when the §7520 rate at the grantor's death approximates the rate when the GRAT was created.[12] This expectation is because the GRAT assets have to appreciate greatly to result in inclusion of only the amount that would generate income necessary to pay the annuity amount and that is also less than all of the trust assets.[13]

3. Income Tax: A GRAT is a grantor trust for income taxation purposes. All of the taxable income of the GRAT (including taxed capital gains) is taxable to the grantor. Therefore, the GRAT does not also use its assets to pay income tax. When the annuity is paid to the grantor, it may be satisfied in kind, so there should be no adverse income tax ramifications with this type of funding.

The IRS could argue that the income tax payment by the grantor constitutes an additional gift to the GRAT. See PLR 9444033 (Aug. 5, 1994) and PLR 9543049 (Aug. 3, 1995). Some practitioners may include a reimbursement provision to reimburse the grantor for income taxes incurred on income remaining in the trust (i.e. the non-annuity income). Others have suggested making the provision at the trustee's discretion that could terminate when the annuity term ends in order to avoid inclusion in the grantor's gross estate under Section 2036. Additionally, the payment could be authorized but not required to be made to the taxing authorities, instead of to the grantor. Some practitioners believe the risk of the IRS' argument of additional gifts appears minimal.

"Zeroed Out" GRATs / the *Walton* Case

A "zeroed out" GRAT is a GRAT in which the value of the grantor's retained annuity interest equals the value of the assets transferred into the GRAT. As a result, the remainder interest for the beneficiaries is zero and, therefore, the value of the taxable gift is zero. This technique was affirmed by the Tax Court case, *Walton v. Commissioner*.[14] In *Walton*, the court's decision stands that if a trust specifies a term for years, it will be valued as a simple term of years, not scaled back to the shorter of a term of years or the grantor's life.[15] Thus, the grantor is expected to receive all of the annuity payments, and there is no gift tax. The IRS has acquiesced to the Tax Court's decision in *Walton* and said that it will revise the gift tax regulations accordingly. Notice 2003-72, 2003-44 IRB (Oct. 15, 2003).

To create a zeroed out GRAT, the annuity payments must be calculated to equal the value of the transferred assets. In other words, the present value of the annuity must equal the value of the property transferred so that, in theory, the annuity payments will transfer all of the assets back to the grantor by the end of the term. If the grantor dies during the annuity term, the remaining annuity payments should likely continue to the grantor's estate. If the payments revert back to the grantor, *Walton* may not apply, and if the payment is otherwise directed to be paid to the grantor's revocable trust, it is not certain that *Walton* will apply. The safe approach would be to make the annuity payments payable to the grantor's estate.

For instance, in November 2003, a client could fund a two-year term GRAT with $1 million under the Section 7520 rate of 4.0%. If the GRAT is "zeroed out", there will be no gift or gift tax. Thus, the client will receive the entire $1 million plus 4.0% incrementally over the two-year term, while giving the remainder beneficiaries any appreciation (assuming the rate of return exceeds 4.0%). The only cost incurred by the client should be legal fees and perhaps valuation fees.

In light of the current ceiling on the gift tax applicable exclusion amount, a zeroed out GRAT is a favorable wealth transfer technique because it uses virtually none of a client's gift tax exclusion amount to transfer any return in excess of the low §7520 rate. If the estate tax is repealed, the client will have not utilized his or her exemption needlessly. If the estate tax is not repealed and the GRAT is successful, the grantor will have transferred excess assets from his or her estate free of gift or estate tax.

With low interest rates and now with the *Walton* decision and the IRS' acquiescence, wealthy clients have a low-cost, low (or no)-gift tax, and potentially no estate tax technique by which they may transfer appreciation to their children. Provided the client survives the term of years and the rate of return on the trust assets exceeds the applicable Section 7520 rate, a "zeroed out" Grantor Retained Annuity Trust (GRAT) is a very effective tax planning strategy. The GRAT is also favorable because it uses a minimal amount, if any, of the client's gift tax applicable exclusion amount—which amount will not increase under the 2001 tax act.

Endnotes:

[1] *See* IRC §2702(b)(1). Section 2702 provides special valuation rules for transfers of split-interest gifts to family members through trusts.
[2] Regs. §25.2702-3(b)(1)(ii).
[3] Defined in IRC Section 7520.
[4] The §7520 rate for November 2003 was 4.0%. The §7520 rate reached a historical low of 3.0% in July 2003.
[5] The grantor's retained interest must be a "qualified interest", as defined by Section 2702(b), in order for the value of the annuity to be subtracted from the value of all of the property transferred to the GRAT.
[6] "Planning Despite Potential Repeal" by Pamela R. Champine, *Trust & Estates*, April 2003, p. 27, 28.
[7] *See* PLR 9239015 (June 25, 1992).
[8] See text accompanying footnote 6, supra.
[9] Reg. §25.2702-3(e), Example 5.
[10] FSA 200036012 (Sept. 11, 2000) and TAM 200210009 (Mar. 8, 2002).
[11] Rev. Rul. 82-105, 1982-1 C.B. 133.
[12] Champine at p. 30.
[13] "GRAT Strategies– Ringing the Bell at the County Fair" by Steve R. Akers and Andrew M. Parker, Bessemer Trust Co., N.A., 2003, at fn. 8.
[14] 115 T.C. 589 (2000).
[15] Rejecting Example 5, Regs. §25.2702-3(e).

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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.

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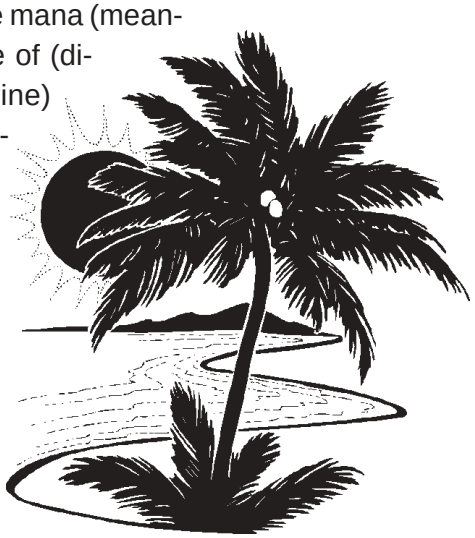

The first event of the trip for the RPPTL Section Members will be a reception on Tuesday evening (February 17). We will conclude the business portion of the trip with the Executive Council Meeting on Saturday morning (February 21), concluding with lunch.

Circuit Representatives Meeting Minutes — Abbreviated

August 2, 2003

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

The meeting was called to order by the Director of Circuit Representatives, George Meyer, at about 12:10 p.m. and was adjourned approximately 1 hour later.

The following items were discussed during the meeting:

1. Attendees were asked to assist in identifying new Circuit Representatives, especially with respect to the 5, 7, 8, 14 and 16 Circuits. Any suggestions or recommendations for new Circuit Representatives should be forwarded to George Meyer at *gmeyer@carltonfields.com*.
2. The Circuit Representatives were asked to email a note to George Meyer as to whether or not they are currently using any type of listserve to contact the Section members in their respective Circuits. In order to help facilitate communications between the various Circuit Representatives and the Section members in their respective Circuits, a goal has been set to establish for each Circuit an up-to-date listserve of all Section members within that Circuit. Also, in the emails to be sent to George Meyer by each Circuit Representative, they should note whether their particular Circuit has a local Real Property, Probate and Trust Law Committee or similar local bar related group. The Section wishes to explore ways of improving its liaison with such local groups.
3. Pete Dunbar reported upon the various legislators who were of particular help to the Section's legislative agenda this past year. The Circuit Representatives from each of those legislator's districts are asked to (i) send or otherwise contact those legislators to thank them for their assistance this past year and (ii) contact the Section members in their Circuit and urge them to send similar thank you communications to those legislators.
4. There was a general discussion led by Pete Dunbar on how the Section and its members could promote judicial candidates with a transactional (i.e., real property, probate and trust law) background. As such potential candidates are identified, Circuit Representatives may be called upon to help facilitate and promote grass roots support for such candidates within their respective Circuits. Such support may include sending letters of recommendation to the Governor's General Council.
5. With respect to the issue that was raised during the Executive Council meeting concerning the $50 fee being charged by several county Clerks each time a petition is filed in a guardianship proceeding, the Circuit Representatives were asked to report back to Sandra Diamond or Debra Boje any similar activity or other additional fees being charged by the Clerk's office in their respective Circuits.
6. Circuit Representatives were urged to join the RPPTL - PAC and to urge the Section members in their respective Circuits to do likewise.
7. The Circuit Representatives were urged to support the candidacy of Alan Bookman who is running for president elect of The Florida Bar. It was noted that Mr. Bookman is a long time member of the Section. Though Mr. Bookman is running unopposed at this time, that may change at any time and therefore the Circuit Representatives were asked to contact the Section members in their respective Circuits to promote awareness and support among the Section members for Mr. Bookman's candidacy. Also, if any Circuit Representative hears of any possible candidate who is considering running for this position, please contact Mr. Bookman or pass such information on to George Meyer.

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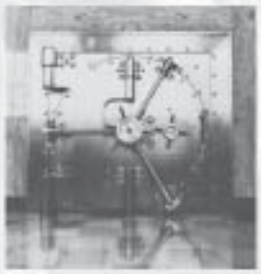

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Section's 2003 Legislative Awards

By Peter Dunbar, Esq., Pennington Moore, et al., Tallahassee, Florida

The annual "Legislator of the Year Awards" of the Real Property Probate and Trust Law Section for distinguished legislative service during the 2003 Regular Legislative Session have been presented to **Senator Skip Campbell, Representative Jeff Kottkamp and Representative Dudley Goodlette**. All three legislators were recognized for their important contributions to the Section's successful 2003 Session initiatives, and Section members extend their sincere appreciation for the work and accomplishments of these three Members of the Legislature.



Senator Campbell was the sponsor of the RPPTL's omnibus Probate and Trust bill in the Senate. As a member of the Senate Judiciary Committee, he also helped with the passage of the Section's initiative to revise MRTA and to clarify the vested rights provisions of Chapter 720, Florida Statutes. In addition to membership on the Judiciary Committee, Senator Campbell serves on the Senate Committees on Banking and Insurance, Children and Families, Comprehensive Planning, Everglades Oversight, and Finance and Taxation where he is the Chairman. He is a Ft. Lauderdale attorney, a former member of the Board of Governors of The Florida Bar, and was first elected to the Senate in 1996. It is the second time that Senator Campbell has received he Section's Award for distinguished service.



Representative Kottkamp was the prime sponsor of the RPPTL's omnibus Probate and Trust bill in the House, and as Chairman of the House Judiciary Committee, he played a key role in the passage of several other 2003 initiatives of the Section. Representative Kottkamp is an attorney for Cape Coral serving in his second term in the House. He is a graduate of Florida State University and the University of Florida College of Law. In addition to chairing the Judiciary Committee, Representative Kottkamp serves on the House Committee on Procedures, the Committee on State Administration (Vice Chair), the Subcommittee on Judicial Appropriations and the Subcommittee on Rules. He is also the Deputy Majority Leader of the House.



Representative Dudley Goodlette was the prime sponsor of the comprehensive rewrite of Florida Corporations Act, and a major contributor to the successful passage of the Section's guardianship initiatives and the probate and trust code revisions. It is Representative Goodlette's fifth consecutive Award from the Section, and he is currently serving in his third term in the House. Representative Goodlette is from Naples, and he is a member the Governing Council of the RPPTL Section and a former member the Board of Governors of The Florida Bar. He is a member the House standing Committee on Procedures, a member of the Subcommittee on Rules, and he currently chairs the powerful House Policy Committee.



Sandra Diamond (left) and Pete Dunbar (not pictured) presented one of the Section's Legislator of the Year Awards to Representative Dudley Goodlette.

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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

Probate court's judgment that trust amendment and will were obtained by undue influence were reversed because the record did not clearly establish that the free use and exercise of the testator's sound mind in executing her will and trust amendment was prevented by undue influence despite the existence of *Carpenter* inferences. *Derovanesian v. Derovanesian, et al.*, 857 So.2d 240(Fla. 3d DCA 2003); 28 FLW D1994.

The Appellant appealed a judgment of the probate court which invalidated a trust amendment and pour over will of the decedent because the probate court found that they were the product of undue influence asserted by the Appellant upon the decedent. The Third DCA reversed the judgment of the probate court indicating that the "record does not, as is required to set aside a properly executed will, make it 'clearly [appear] that the free use and exercise of the testator's sound mind in executing [her] will was in fact prevented by deception, undue influence, or other means.'" The Third DCA reversed the probate court even though there were multiple *Carpenter* inferences present. The Third DCA stated that there was no "direct evidence" of undue influence.

Contractual provision providing attorneys fees for enforcement of the contract did not override F.S. 733.705(1) which provides no plaintiff shall be entitled to attorneys fees if they bring an action against a personal representative within 5 months of first publication of the notice to creditors on any claim to which the personal representative has not filed an objection. *Estate of Nadya G. Cadden, et al., v. Schickendanz, et al.*, 855 So.2d 651 (Fla. 3d DCA 2003); 28 FLW D2007.

The Appellees were given a right of first refusal on a piece of property owned by the decedent prior to his death. The decedent entered into a contract to sell the property to a third party without offering the Appellees the right of first refusal. The decedent died and the sale of the property was subsequently closed by the estate. The Appellees filed a claim in the estate and immediately filed an independent action for specific performance and damages against the decedent's estate. The Appellees prevailed on their civil action and then obtained an order awarding them fees and costs for the litigation pursuant to the terms of the contract. The estate appealed the order awarding fees and costs based on F.S. 733.705(1) because the Appellees had filed their civil action within five months of the first publication of the notice to creditors and prior to an objection to their claim by the estate. The Appellees argued that F.S. 733.705(1) should not apply to override a contractual right to fees and costs, but the Fourth DCA disagreed and reversed the award of fees and costs indicating that the plain language of F.S. 733.705(1) provided no such exception.

Probate court was justified in ordering a guardian to obtain canceled checks from the bank at her own expense as a guardian is required to obtain a canceled check for all expenditures made on behalf of the ward pursuant to F.S. 744.3678(3). *Keithly v. Vance, et al*, 854 So.2d 854 (Fla. 2d DCA 2003); 28 FLW D2233.

The Appellant appealed an order of the probate court directing her to obtain copies of canceled checks written from a guardianship account during the time the Appellant had served as guardian. The cost of obtaining the cancelled checks was $3,300.00, and the probate court ordered Appellant to pay the cost personally because F.S. 744.3678(3) requires a guardian to obtain a canceled check for all expenditures and disbursements made on behalf of the Ward. The Second DCA affirmed the trial court's ruling noting that the Appellant was a professional guardian who should have been aware of the requirement. The Second DCA also noted that the bank would have returned the checks concurrently with the monthly account statements for a fee of $2 per month if the Appellant had requested that service.

Due process requirements apply to probate proceedings. *Leslie v. Leslie, et al.*, 2003 WL 22717555 (Fla. 4th DCA Nov. 19, 2003)

Probate court's order denying an inmate's motion to transport was reversed and remanded for further proceedings where a beneficiary under the Decedent's will who was incarcerated was denied his request for transportation to present testimony at the hearing. The Fourth DCA indicated that even if a court considers all of the necessary factors and properly determines that an inmate should not be transported to personally attend a hearing, " . . . the availability of alternative means of accommodations should have been considered to enable Appellant to have a meaningful opportunity to be heard." Those alternatives include deposition, affidavit or a telephonic appearance at the hearing.

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Real Property Case Summaries

by Stephen Edward Silkowski, Esq., Jacksonville

Lease liquidated-damages provision must contain unequivocal language indicating what damages would be paid if a breach occurs, and it must also depend upon a subsequent breach of the lease. Tenant's exercise of option to renew lease does not constitute waiver of right to seek damages for breach of initial lease. Tenant is entitled to prejudgment interest from date landlord began demanding full amount of rent in alleged violation of lease. *Glover Distributing Co., Inc., v. F.T.D.K., Inc.*, 816 So.2d 1207 (Fla. 5th DCA 2002).

Glover leased a gasoline station to F.T.D.K. pursuant to a lease that ran for a period of three years, from July 1996 through June 1999. Paragraph twenty of the parties' lease agreement was entitled "Redevelopment Rider" and provided Glover with the right to modify the existing building and improvements during the term of the lease. The rider further gave F.T.D.K. a waiver in rent during the period of construction in the event such redevelopment occurred and, in exchange, prohibited F.T.D.K. from recovering business loss damages incurred during such construction.

The lease also included a separate "Improvement Addendum" that outlined details of a specific agreement by Glover to improve the property during F.T.D.K.'s three-year leasehold. The agreement provided that until such construction was commenced, F.T.D.K. was only required to pay Glover half of its usual rent amount and during construction, no rent would be due. The Improvement Addendum also offered F.T.D.K. the option of renewing the lease for an additional three-year period. It also contained the following anti-waiver provision:

> No action or lack of action, unless specifically noted herein, on the part of Lessee will be construed as an implied waiver or abridgment.

During F.T.D.K.'s initial three-year leasehold, Glover failed to make any improvements to the property notwithstanding the terms of the Improvement Addendum and F.T.D.K.'s request and demands related thereto. During that same three year time period, F.T.D.K. paid Glover the reduced rental rate. Near the end of the leasehold period, F.T.D.K. exercised its option and renewed the lease for an additional three years. F.T.D.K. subsequently initiated this lawsuit, alleging that Glover had breached the initial lease agreement by failing to timely complete the improvements outlined in the Improvement Addendum.

After the complaint was filed, Glover commenced construction of the improvements. F.T.D.K.'s rent was completely abated from September 1999 to January 2000, at which time Glover determined that the construction was completed. Starting February 2000, Glover demanded payment of the full rent amount; F.T.D.K. protested, however, claiming that all of the improvements had not been completed. Upon further demand, F.T.D.K. remitted full payment of its rent starting February 2000, but did so under protest. F.T.D.K. then amended its complaint to include a claim for the amount it contended it had overpaid for rent starting in February of 2000.

Glover filed an answer denying liability and asserting several affirmative defenses, including waiver and estoppel based upon F.T.D.K.'s acceptance of the benefit of paying a reduced rental rate during the initial three-year leasehold while failing to demand timely performance of the work required under the Improvement Addendum. Glover also asserted that F.T.D.K. had failed to mitigate its damages by not completing the improvements itself. Upon trial, the jury returned a special verdict finding that Glover breached the lease agreement, but that F.T.D.K. failed to mitigate its damages. The jury awarded F.T.D.K. damages for lost profits and rent overpayment. While the appeal was pending, F.T.D.K. filed a motion requesting that the appellate court relinquish jurisdiction over the case to the trial court for the purpose of entering an award of prejudgment interest. This court granted that motion and, upon remand, the trial court entered a supplemental final judgment awarding F.T.D.K. prejudgment interest. Glover filed a separate notice of appeal from that order. The two appeals were thereafter consolidated by the appellate court.

First, Glover contended that the trial court erred in refusing to permit it to assert the defense that, under the terms of the parties' contract, F.T.D.K. was not entitled to recover business-loss damages. Glover based its argument upon the contention that language set forth in the Improvement Addendum essentially constituted a liquidated damage clause, thereby prohibiting the recovery of additional business loss damages. The court rejected this argument as meritless. Parties to a contract can stipulate in advance to an amount to be paid or retained as liquidated damages in the event a breach of the contract occurs. Where the parties to a contract have agreed to the consequences of a breach, the agreement will control, provided the remedy is mutual, unequivocal, and reasonable. Here, the provision was not an enforceable liquidated damage provision because it did not contain unequivocal language indicating what damages would be paid if a breach of the contract occurred. Instead, the provision simply set forth the consideration given by Glover to F.T.D.K. in exchange for F.T.D.K.'s agreement to execute the lease pending construction of the agreed upon improvements. Since the provision was applicable from the initiation of the lease, and not dependant upon a subsequent breach of the contract, it

continued, next page

could not constitute a liquidated damage provision.

Glover also argued that, by renewing its lease, F.T.D.K. waived its right to object to Glover's failure to complete the improvements during the initial leasehold. The court, however, found no error. F.T.D.K.'s renewal of its lease, in accordance with its right to do so under the terms of the initial lease agreement, was merely a renewal of all of the terms set forth in the original lease.

Glover's final claim is that the trial court reversibly erred in granting F.T.D.K.'s request for prejudgment interest because the jury's award of damages was unliquidated until the date the verdict was entered. The court disagreed. Two prerequisites are required for entry of an award of prejudgment interest: (1) out-of-pocket pecuniary loss; and (2) a fixed date of that loss. F.T.D.K. filed its motion seeking prejudgment interest contending that, in awarding lost profits, the jury determined that the losses were incurred as of February, 2000. Glover conceded that any lost profits suffered by F.T.D.K. would have had to have been suffered no later than February of 2000. As such, F.T.D.K.'s damages were liquidated at least as of that date and thus the trial court properly awarded pre-judgment interest as of that date.

Contractor must deliver payment affidavit to homeowner at least five days prior to filing claim of lien foreclosure original complaint.
Privas v. Brisson Custom Homes, Inc., 817 So.2d 983 (4th DCA 2002).

Brisson Custom Homes, the contractor, sought to foreclose a construction lien. The contractor alleged that it had performed improvements to the property pursuant to a contract. The homeowners paid most of the contract price, but $149,396.06 remained outstanding. The relevant dates are these:

July 6, 1995— contractor records claim of lien with the clerk of court for $129,390.06.

April 9, 1996— contractor amends claim of lien to reflect $149,396.06.

May 13, 1996— contractor files complaint.

Sept. 3, 1996— contractor's affidavit dated and notarized.

Sept. 6, 1996— contractor amends complaint.

A lawsuit to foreclose on a construction lien must be commenced within one year after the original claim of lien is filed. § 713.22, Fla. Stat. (2001). The contractor complied with this provision, but it failed to comply with its prerequisite: section 716.06(3)(d) requires the contractor to provide the owner with an affidavit indicating that all lienors have been paid in full or showing the name of each lienor who has not been paid in full. To have perfected its lien, the contractor was required to serve its affidavit on the homeowner five days prior to filing his complaint. The complaint had to be filed within one year of the original filing date of the claim of lien. In this case, the claim of lien was filed on July 6, 1995. The affidavit therefore had to be delivered five days prior to filing an amended complaint before July 6, 1996. While the contractor filed its original complaint on May 13, 1996, within the one-year statute of limitations period, no affidavit had been delivered to the homeowner.

By the time the contractor filed its amended complaint on September 6, 1996, the one-year statutory time period had elapsed. By failing to timely comply with the statutory prerequisite of delivering the affidavit to the homeowner five days prior to filing a complaint within the one-year

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statutory time frame, the contractor was then "foreclosed" from foreclosing on its claim of lien.

Failure to consider alternative to vertical ham-radio antennae, first proposed by expert at trial, did not render prior denial of application unreasonable. Homeowners' antennae were not grandfathered in, despite fact that control of association passed from developer to group of homeowners after antennae were first erected. Expert's agreed-to proposal offered at trial is to be construed as formal application for antennae installation.

Emerald Estates Comm. Ass'n., Inc. v. Gorodetzer, 819 So. 2d 190 (Fla. 4th DCA 2002).

The Gorodetzers purchased their home in Emerald Estates directly from the developer in September of 1995 and proceeded to erect four ham radio antennas in their backyard sometime before June 1996. The antennae ranged in height from thirteen to twenty-three feet; the tallest antenna extended approximately two and one-half feet above the roofline of their house.

The community of Emerald Estates was governed by a Declaration of Restrictions and Covenants. The Declaration was in effect at the time the Gorodetzers purchased their home; the homeowners' Association was controlled by the developer at that time. The Declaration provided for the creation of an Architectural Control Committee ("ACC"), a permanent committee of the homeowners' Association. Per the Declaration, homeowners were required to obtain approval of the ACC prior to erecting any antenna. The Declaration evinced an intent to create a general plan and scheme of development of high quality within Emerald Estates; as such, the ACC was empowered to approve or disapprove all architectural, landscaping and location of any proposed improvements within the community in order to maintain harmony of exterior design and conformity among surrounding structures and topography.

On April 21, 1998, control of the homeowners' Association was turned over from the developer to the homeowners. Shortly thereafter, the homeowner-controlled Association sent the Gorodetzers a letter notifying them that their antennae were interfering with T.V. reception in the community and, more importantly, had been installed without architectural approval. The letter requested the immediate removal of the antennae. This initial request was not responded to which caused the Association to send the Gorodetzers two follow-up letters. The third letter threatened a daily fine of $25 if the antennae were not removed within a week's time. The antennae were removed. The Gorodetzers notified the Association of their desire to "appeal" the Board's decision. The Board responded with an invitation for the Gorodetzers to file a formal application regarding their plans to (re)install their radio antennae. The Board's letter requested the Gorodetzers supply certain details such as the placement, location, size, and permanence of the proposed antennas. The Gorodetzers filed an application; the Board responded by sending a temporary denial letter which posited a few additional questions regarding the antennae and which requested Mr. Gorodetzer's presence at the Board's June 17, 2001 meeting. Mr. Gorodetzer, accompanied by his attorney, attended the Board meeting. A few weeks later he received a letter from the Board denying his application. The Gorodetzers subsequently filed a declaratory action in circuit court, accusing the Association of unreasonably rejecting their application to re-erect their four antennas and requesting the court to enter judgment declaring their right to erect ham radio antennas on their property.

The case proceeded to trial. Mr. Gorodetzer readily admitted he had never filed a formal written application prior to originally erecting the antennae in September of 1995. He stated, however, that he had asked the developer's salesperson if erecting ham radio antennas would be "okay", to which the salesperson responded it would "not be a problem." Representatives of the Board reiterated that Mr. Gorodetzer had never filed a proper application any time prior to the Board's 1999 invitation to do so. The Association also introduced the expert testimony of electric engineer Boyell, who had been retained by the Association in the course of litigation in February 2001. His tasks were to provide an opinion regarding possible interference concerns and to propose aesthetic alternatives to the permanent vertical antennae proposed which the Gorodetzers sought to erect. Boyell drafted a proposal which was introduced at trial, calling for one or two thin suspended wire antennae that would extend from the roof of the house to the Gorodetzer's back fence. Because these wires were thin, they would require no mounting structure and would be imperceptible. Both Mr. Gorodetzer and representatives of the Board testified Boyell's proposal was an acceptable compromise.

Restrictions found within a Declaration are afforded a strong presumption of validity, and a reasonable unambiguous restriction will be enforced according to the intent of the parties as expressed by the clear and ordinary meaning of its terms, and only where intent cannot be ascertained will the covenant not be enforced. Furthermore, the court found that the discretion and power of the ACC was in no way circumscribed to the exclusive consideration of objective criteria. Its review of the pertinent covenants in pari materi imparted a clear intent on behalf of the Association that they, through the ACC, reserved control over the architectural design and aesthetics of the community.

Where an Association has reserved plenary discretion to evaluate applications on aesthetic grounds, as has the ACC here, such discretion still must be exercised reasonably. A party challenging the enforcement of an otherwise valid restrictive covenant has the burden to prove defensive matters that preclude enforcement, such as the enforcing authority acted in an unreasonable or arbitrary manner. The court found that the Board's failure to consider a non-existent solution, that which Boyell offered at trial, did not constitute unreasonable behavior. The Gorodetzers' had the burden of establishing that the Board acted in an unreasonable or arbitrary manner. Yet the Gorodetzers did next to nothing to advance their cause. In effect, they approached the Board with a "take it

or leave it" proposal. Mister Gorodetzer stated that he was unaware of any alternatives to his vertical antennae and summarily dismissed the Board's aesthetic concerns that he claimed he did not understand. Additionally, representatives for the Board testified that the Board had been concerned regarding possible interference that could be caused by the Gorodetzers' antennas to which Mr. Gorodetzer's cursory assurances failed to provide sufficient "comfort." Simply, the Board expressed concerns regarding aesthetics and matters of interference in relation to the Gorodetzers' application that the Gorodetzers failed to adequately address at the pertinent time, i.e., when the application was pending.

Furthermore, the original antennas had not been "grandfathered" by April of 1998 and were not in effect acting as an estoppel preventing the homeowner-controlled Association from enforcing the restrictive covenant against antennas. First and foremost, the Declaration contains an express anti-waiver provision stating that (1) homeowners shall not be required to alter previously approved and constructed improvements, and (2) failure by the Association to enforce any restriction shall in no event be deemed a waiver of the right to do so thereafter. This provision, found within the Declaration, was afforded a strong presumption of validity.

When control of the Association had been turned over to the homeowners in April of 1998, the Gorodetzers' antennas had not been previously approved; the Gorodetzers had never even filed a formal application, a necessary prerequisite for approval as laid out in the Declaration. Mister Gorodetzer admitted reading the pertinent "documents" before purchasing the home in Emerald Estates. His mere act of asking a salesperson whether antennas would be "okay", and receiving a verbal response that it would "not be a problem," clearly fell short of the formal written approval process outlined in the Declaration. The fact the Association was controlled by the developer at that time provided the Gorodetzers no shelter from the formal written application procedures outlined in the Declaration. The Gorodetzers needed to file a written application and needed to receive written approval by the Association in whatever form it existed, i.e., the developer or its agents, in order to establish "previous approval" that would act as an estoppel on the Association. Similarly, there was no long-continued waiver or acquiescence by the Association in relation to the Gorodetzers' violation of the restrictive covenant where the Association notified the Gorodetzers of their violation and requested removal of the antennas immediately upon the homeowners' ascension to power.

Like the lower court, the appellate panel appreciated the lack of dissension regarding Boyell's suspension-wire proposal and directed the Board to consider Boyell's proposal in accord with the guidelines outlined in the governing Declaration and Community Standards. Boyell's proposal would be treated as a properly-filed formal application, filed on the Gorodetzers' behalf. If the Board, acting upon the ACC's formal recommendation, would approve of Boyell's proposal, the matter would be resolved, and no further intervention by the judiciary would be needed. On the other hand, if the Board were to deny the proposal, then the lower court would determine whether that denial was unreasonable or arbitrary. In that instance, and that instance only, the lower court would determine, and award, appropriate prevailing party attorneys' fees as provided in the Declaration.

Issue of grantor's intent regarding deed delivery is one of fact, subject on appeal to the competent substantial evidence test.
James v. Mabie, 819 So.2d 795 (Fla. 1st DCA 2002)

Whether a deed has been delivered and is therefore effective to transfer ownership of real property to the grantee depends on the grantor's intent. A decision regarding the intent of the grantor is one of fact, and issues of fact are reviewable on appeal by the competent substantial evidence test, in which the appellate court must affirm the decision of the trial court if it is supported by competent substantial evidence.

Presence of washer, dryer, and sign indicating who to call for repairs does not impose upon a prospective purchaser the duty to inquire about an unrecorded coin-laundry leasehold.
Pepe Coin Laundries, Inc. v. Catovest Intern., Inc., 820 So.2d 947 (Fla. 3rd DCA 2002).

According to statute, "No ... lease for a term of one year or longer shall be good and effectual in law or equity against creditors or subsequent purchasers for a valuable consideration and without notice, unless the same be recorded according to law". The lease in this case was not recorded and Catovest did not have actual notice of the existence of a laundry space lease.

Pepe argued that Catovest had implied notice of the lease. In order to charge a person with notice of information which might have been learned by inquiry, the circumstances must be such as should reasonably suggest inquiry. The presence of one washer and dryer, with a small sign stating whom to call for repairs, was not enough to impute implied notice of a lease to Catovest.

Legal and equitable titles are not close enough to merge an easement's dominant and servi-

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ent estates.
Tyler v. Price, 821 So.2d 1121 (Fla. 4th DCA 2002).

Under the doctrine of merger, an easement is extinguished when the dominant and servient estates come under the ownership of one party. Certain requirements must be met to find merger. First, there must be unity of ownership of the dominant and servient estates. The ownership of the two estates must be co-extensive and equal in validity, quality, and all other circumstances of right. This rule has been construed to mean that in order to extinguish a right-of-way, there must be unity of ownership between the servient estate and every dominant state. . Additionally, unity of title has been defined as unity of valid title, title in the name of the same person, and, of course, simultaneous ownership.

In this case, the servient estate is Parcel B. Parcel A is a dominant estate, but so is the trapezoid. The road on the 25 foot easement extends to the trapezoid, and without it, the trapezoid has no access to the public road. Therefore, in order for the merger of title doctrine to extinguish the 25 foot easement on Parcel B, title to Parcel A, Parcel B, and the trapezoid all must be in the same person, must be valid, and must be of the same quality.

Passerrelli obtained title to both Parcels A and B, but not to the trapezoid. The Snyders still retained legal title to that parcel. The trial court determined, however, that because of the 1962 agreement, title to the trapezoid should have been transferred to Maria Price (Passerrelli's predecessor). Therefore, according to the court, equitable title was in Passerrelli, extinguishing the easement. The question for the appellate court was whether the equitable title in the trapezoid was of the same validity and quality as the legal title Passerrelli had in Parcels A and B so as to fulfill the requirements of the merger doctrine. The appellate court held that it was not of the same character. An equitable title is a right or interest in land, that, not having the properties of a legal estate, but being merely a right of which courts of equity will take notice, requires the aid of such court to make it available. Equitable title has also been defined to be a right, imperfect at law, but which may be perfected by the aid of a court of chancery by compelling parties to do that which in good faith they are bound to do, or removing obstacles interposed in bad faith to the prejudice of another.

An equitable estate, therefore, requires the intervention of a court of equity in order to establish that right. Thus, it does not have the same quality or validity as legal title until so decreed by the court. At the time Passerrelli acquired title to Parcels A and B, he would have only an imperfect title to the trapezoid area, assuming the Snyders had the obligation to transfer the title to the Prices. The legal and equitable titles were separate and of different quality. As a consequence, no merger of titles occurred, and the easement on Parcel B was not extinguished. Therefore, the appellate court directed that judgment be entered in favor of the Tylers, declaring the continued existence of the 25 foot easement and their right to use it.

As to the prescriptive easement theory, the Tylers could not show twenty years of continuous use of the parcel. While they purchased the property in 1975, the year and a half possession by Passerrelli broke the continuity of the Tylers' use of the property. There was no evidence offered at trial that Passerrelli had used the trapezoid area, and therefore, continuous use for twenty years by the Tylers and his predecessor was not shown.

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Estate and Trust Tax Planning Committee Minutes — Abbreviated

October 24, 2003

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

The Estate and Trust Tax Planning Committee (the "Committee") held its meeting on October 24, 2003, at the Orlando Airport Hyatt Hotel.

The first order of business discussed was the proposed documentary stamp tax statutory amendment. A subcommittee of the Committee, consisting of Henry Cohen, Russ Hale and Tim Flanagan, had drafted a proposed amendment to the documentary stamp tax in response to the Third District Court of Appeals Case *Crescent Miami Center, LLC vs. Department of Revenue.* Russ Hale attended the committee meeting to present and discuss the subcommittee's proposed statute.

A lengthy discussion took place about whether or not the additions to Section 5 should stay and whether or not Section 10 should be revised. Russ Hale reported that the Department of Revenue had not been consulted on this proposed statute. Ultimately a motion was made, seconded and passed to send two proposals to the Executive Council at the Pensacola meeting in November.

The first proposal would amend Section (5)(a) of Section 201.02 to read as follows:

(5)(a) For purposes of this Subsection:

1. An "entity" is a corporation, partnership or limited liability company organized under the laws of this state or any other state or country.
2. A "contribution: is a conveyance of real property to an entity as a contribution to the capital of the entity or in return for an interest therein.
3. A "distribution" is a conveyance of real property from an entity as a distribution with respect to an interest in the entity or in exchange for an interest therein.

(b) For purposes of this Section, a contribution by a person to an entity in which the person holds an interest, and a distribution from an entity to a person who holds an interest in the entity shall be taxable only to the extent of:

1. Any indebtedness against the real property including any mortgage, purchase money mortgage, lien, or other encumbrance on the real property.
2. The portion of the value of the real property exceeding indebtedness that bears the same proportion that the interest in the entity of the person making the contribution or receiving the distribution at the time of the transfer differs from the person's interest in the real property; and
3. Any consideration other than a contribution, distribution or indebtedness.

The second proposal was to include paragraph (c) of that same proposal. Paragraph (c) would read as follows:

(c)1. Paragraph (b) of this subsection (5) shall not apply to any distribution of real property received as a contribution to any entity within three years of the contribution to the extent that the persons receiving the distribution differ from the contributing person.

2. For purposes of this paragraph (c), a contributing person is the person who contributed the real property to the entity and any person who received their interest in the entity from the person who contributed the real property to the entity by gift, devise, inheritance, capital contribution or dividend.

The motion passed and both options will be presented to the Executive Council at the Pensacola meeting.

The next item of business was the discussion of the disclaimer statute. Chair Charlie Nash thanked Rick Gans for his tremendous work that he had done in putting this draft of the statute together with the able assistance of the members of his subcommittee. A lively discussion of the disclaimer statute ensued for the better part of the next three hours. A good portion of that discussion centered on the issue of whether or not the disclaimer should be recorded in all instances, or whether it should only be recorded in those instances involving the disclaimer of a real property interest. As the draft had been submitted, it only required recording when disclaiming a real property interest. Following the Uniform Act, it did not require recording in other instances.

Jerry Wolf led a discussion concerning the potential for abuse and discussed his concerns about how one would ever know when in fact a disclaimer had taken place. Other parts of the disclaimer draft were also discussed. As the afternoon wore on, it became obvious to Charlie Nash that there was still a lot of discussion to take place. The Committee discussed the comments of the Tax Section, which was represented by Robert F. Williams, and apparently satisfied the Tax Section's concerns. The comments of Ed Koren were not addressed as the Committee ran out of time and energy.

Chair Charlie Nash decided that it would be best to postpone the attempt to present this to the Executive Council at the Pensacola meeting and instead looks to have it ready for next year. It is his desire to discuss this again in detail at the Ocala meeting. It is the Chair's intention to have a Committee meeting in the morning of Friday, January 23, 2004, at the Ocala Hilton at an exact time yet to be determined.

There being no further business the meeting was adjourned by the Chair at approximately 2:45 p.m.

Respectfully submitted,
Guy S. Emerich

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