ActionLine

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

www. flabarrpptl.org

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Funding a Credit Shelter Trust with a Testamentary General Power of Appointment — Too Good To be True?

By Craig Mundy, Esq., Lakeland, Florida

As the applicable exclusion amount increases over the next several years, and since it may not be practicable for both spouses to own assets greater than or equal to the applicable exclusion amount, it may be difficult to create plans for such clients that maximize federal estate tax savings irrespective of the order of death. One technique that has been proposed to address this conundrum would seem to permit the spouse with the smaller estate to fund a Credit Shelter Trust for the benefit of the spouse with the larger estate with assets titled in the name of the spouse with the larger estate![1] The IRS, in Private Letter Ruling 200403094, has seemingly blessed such a technique. In light of this Private Letter Ruling, is this a technique that estate planners should be suggesting to their clients? Or is this too good to be true? This article will address this estate planning technique, Private Letter Ruling 200403094, and the potential problems with this estate planning technique.

In a nutshell, the technique is as follows: The spouse with the smaller estate, the wife for example, is given a general power of appointment over assets in the other spouse's revocable trust. The power is exercisable in favor of the wife's estate effective only if she predeceases her husband, the spouse with the larger estate. The wife would only be able to appoint an amount equal to the applicable exclusion amount less the value of the assets in her gross estate. Additionally, the spouse with the smaller estate will, through his or her last will and testament, be able to fully fund a Credit Shelter Trust for the benefit of

See "Too Good?" page 4

Chair's Message:

Section Celebrates 50th Anniversary

By Laird A. Lile, Chair, Laird A. Lile, P.A., Naples, Florida



Thank you for the opportunity to stand at the rudder of this great ship, your Section, for the 2004 - 2005 year. I am particularly pleased to be in this position while your Section celebrates its 50th year of existence. Those who have come before have had vision and wisdom that I am sure is beyond that which I will ever achieve. Those who serve with me as officers exhibit a devotion and commitment to your Section that assures us we will be well guided in the future.

We are proud to have recently passed the 9,000 mark in terms of Section membership. Our Executive Council, by far the largest of any in The Florida Bar, is over 200 in number. We are growing in terms of substantive legal areas. The services provided to Section members such as legislative activity, seminars and programs and an active elec-

See "50th Anniversary," page 4


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Hurricane Assistance Requested of RPPTL Section Members

The Real Property, Probate and Trust Law Section has been asked by Governor Bush's office to assist with a specific aspect of the relief efforts for victims of recent hurricanes. The State of Florida is working closely with FEMA and volunteer organizations to provide temporary shelter to these victims. A number of property owners (including multifamily owners) have come forward, offering their properties as temporary shelters under certain terms and conditions. We are trying to identify more like-minded individual and corporate citizens who are willing to step forward in these efforts.

The Governor's office has asked that we encourage all of our members to contact your clients and others who you know who own property in or within 50 miles outside of counties hit by recent hurricanes to request them to participate in these efforts. Once you have identified a possible participant in this program, please pass their contact information along to Jim Hampton, who can best be reached at jim.hampton@dca.state.fl.us.

Time is of the essence on this part of the relief efforts. The Governor and his staff appreciate your efforts and any assistance that you can identify.

Hurricane Assistance

Thank you for being a member of the Real Property, Probate and Trust Law Section. Your Section leadership has been communicating with Kelly Overstreet Johnson, the President of The Florida Bar, and representatives of the Young Lawyers Division regarding providing assistance to victims of recent hurricanes. The YLD is coordinating those efforts, as indicated in a recent email that you should have received as a member of The Florida Bar.

We know that many of the issues faced by hurricane victims will involve issues of real property, probate, trust and related issues. In that regard, I am making a special request that our Section members participate with this effort. To volunteer, please provide the following information by email to Austin Newberry who is the coordinator for the YLD at TFB. Austin's email address is anewberry@flabar.org.

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___ Others (Specify) _____

Thank you, again, for being a member of the Real Property, Probate and Trust Law Section of The Florida Bar, and for your assistance in this regard.

— Laird A. Lile, Chair

Mail this form to: Austin Newberry, The Florida Bar, 651 E. Jefferson Street, Tallahassee, FL 32399-2300, **or e-mail:** anewberry@flabar.org.

TOO GOOD?

from page 1

the spouse with the larger estate.

In Private Letter Ruling 200403094, the taxpayer used this technique. Husband executed and funded a revocable trust with his own assets. Husband's Trust provided that at Wife's death, if Husband was still living, Wife would have a testamentary general power of appointment to appoint part of the assets in Husband's Trust having a value equal to (1) Wife's remaining applicable exclusion amount less (2) the value of Wife's taxable estate determined by excluding the amount of the assets subject to the power. Wife executed a Will that exercises the testamentary general power of appointment in favor of her estate. Wife's Will provided that the assets subject to the general power of appointment end up in a Credit Shelter Trust for the benefit of Husband and Wife's descendants. The Credit Shelter Trust provides that Husband will receive income and principal that the Trustees deem necessary or advisable for Husband's health, education, support and maintenance.

The Internal Revenue Service ruled as follows:

1) Husband's contribution of assets to his Revocable Trust do not constitute a gift.
2) If Wife predeceases Husband, the trust property over which Wife has a testamentary general power of appointment would be includable in Wife's gross estate under Section 2041.[2]
3) If Wife exercises her testamentary general power of appointment there is a gift by Husband to Wife that qualifies for the gift tax marital deduction under Section 2523.
4) Assets that originated from Husband's Revocable Trust that pass to Wife's estate and eventually to the Credit Shelter Trust for the benefit of Husband and Wife's descendants do not constitute a gift from Husband to Wife's descendants.
5) Assets in the Credit Shelter Trust for the benefit of Husband and Wife's descendants will not be included in Husband's gross estate under either Section 2036 or 2041.

At first, it appears that there is now an easy solution to maximize estate tax savings for married clients where one spouse has significantly more assets than the other spouse. However, there are many issues that must be considered by the client and the estate planner before such a plan should be implemented.

First, planners must remember, and clients should be advised, that a Private Letter Ruling may not be used as precedent. Additionally, Private Letter Ruling 200403094 fails to address how a gift that is only effective upon death can be a lifetime marital gift. It would appear that the gift would be to the Wife's estate, or even worse, to the Credit Shelter Trust. If this is the case, then the gift would be incomplete because the Husband has a special power of appointment under the terms of the Credit Shelter Trust. The assets also would be included in the Husband's gross estate under Section 2036 and/or 2038. If the Wife is given an inter vivos general power of appointment that she could exercise immediately prior to her death to avoid the gift on death argument, there is a risk that Husband may die first. If that happens, the Wife would be treated as having made a gift to the Husband's estate, and the same issues arise on the Wife's side. From a practical standpoint, in either case, inter vivos or testamentary general power of appointment, the assets subject to appointment cannot be determined until after the death of the Wife.

There is also an issue of whether a step-up in basis for the assets that originated from the Husband's Trust and ended up in the Credit Shelter Trust should be allowed. In Private Letter Ruling 200210051 and Private Letter Ruling 200101021, rulings involving joint trusts, the step-up in basis was disallowed pursuant to Section 1014(e).

Finally, there are practical issues in addition to the legal issues stated above that must be considered before recommending such a plan. First, what if the spouse that is given a testamentary general power of appointment fails to exercise the power as anticipated? Second, what if the spouse possessing the power exercises the power as anticipated but at the time of death has an estate that is subject to the claims of many creditors? Third, the possibility of divorce would have to be addressed if the planner is going to recommend that the majority of a couple's assets remain in one spouse's name. Fourth, the issue of liability must be considered. That is, what is the likelihood that the spouse owning the majority of the assets will be sued?

Although the technique described in Private Letter Ruling 200403094 has appeal, the prudent planner should proceed cautiously, and he or she should definitely advise his or her clients in writing of all of the risks associated with such a plan.

Endnotes:

1. *See* Len Cason, "Maximum Funding of Credit Shelter Trust with Non-IRA Assets," 29 ETPL 282 (June 2002); Len Cason, "IRS Ruling Approves 'Poorer Spouse Funding Technique,'" 31 ETPL 234 (May 2004).
2. Unless otherwise noted, all section references are to the Internal Revenue Code of 1986, as amended.

50TH ANNIVERSARY

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tronic delivery system of information (both lists and website) are significant and without parallel.

At the same time, we face challenges. Fiscal challenges will likely result in a recommended increase of Section dues during this year. Legislative challenges can be expected during the 2005 session. Challenges to our physical safety are on my mind, as I write this message with the weather channel in the background. For the second time in a three week period, our state anticipates a significant hurricane which will undoubtedly impact our Section members. We will respond to, and meet, these challenges. The seas may be rough at times but with your involvement and participation we will not only survive but we will be stronger for having made the voyage.

Let me hear from you with ideas, comments, suggestions and the like. LLile@LairdALile.com.

The Florida Bar

651 East Jefferson Street
Tallahassee, Florida 32399-2300

John F. Harkness, Jr.
Executive Director

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May 25, 2004

Mr. Louis B. Guttmann III
Chair, Real Property, Probate & Trust Law Section
P.O. Box 628600
Orlando, Florida 32862-8600

Re:. ActionLine Article, "A Primer on Florida Attorneys' Ethical Obligation to Avoid Assisting in the Unlicensed Practice of Law - Florida Staff Opinion 24894"

Dear Mr. Guttmann:

I read with interest the article, "A Primer on Florida Attorneys' Ethical Obligation to Avoid Assisting in the Unlicensed Practice of Law - Florida Staff Opinion 24894" published in the Spring 2004 issue of the ActionLine.

Florida Staff Opinion 24894 was written in response to a specific set of facts presented by an inquiring attorney about that attorneys' own conduct and is not necessarily applicable to anyone other than the specific inquiring attorney based on the facts presented. The ActionLine article presented additional facts and scenarios not presented in the staff opinion. The article expressed only the opinion of the author and not necessarily that of The Florida Bar.

The article was reviewed and discussed by the Standing Committee on the Unlicensed Practice of Law. To the extent the article implies that a Florida attorney is always prohibited from speaking to an out-of-state attorney, the article is incorrect and overbroad. There are many situations where a Florida attorney may communicate with a member of another state bar on Florida matters. For example, out-of-state attorneys may consult with a Florida attorney on Florida law as it relates to a real estate transaction for the purpose of giving that information to their client or incorporating that information into an opinion for their client. Such communication is not prohibited. Nor is the Florida attorney prohibited from reviewing the documents as stated in the article. As noted in the article, Florida attorneys are often asked to review estate planning documents drafted by out-of-state attorneys. This review is not improper and is in fact encouraged. Florida attorneys with specific questions about their own prospective conduct may contact the Ethics Hotline at (800)235-8619 for guidance.

I would appreciate it if you could publish this response on the section's list serve and also in the next issue of the ActionLine. Thank you for your consideration.

Sincerely,

Mary Ellen Bateman
Division Director
Ethics, UPL, and Professionalism

Supreme Court of Florida

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May 13, 2004

CLE

Mr. Louis B. Guttman, III
Chair, Real Property, Probate
and Trust Law Section
P .O. Box 628600
Orlando, Florida 32862-8600

Dear Mr. Guttman:

It is with deep gratitude and appreciation that I thank you for all that you have done to bring the State Courts System through one of the most difficult challenges we have faced in recent history. Your many hours of hard work and dedicated service, and your loyalty and unwavering commitment to protecting and preserving Florida's trial courts were crucial to the success of Revision 7. Thanks to you, our courts will continue to fulfill the right of access to justice enshrined in our Constitution.

Congratulations on a job well done! It could not have been done without you.

Sincerely,

Harry Lee Anstead

HLA: mb

Annual Convention and Awards Presentation in Key West, May 27-30, 2004

Section Lands on the Conch Republic

By Robert S. Swaine, Esq., Swaine, Harris & Sheehan, P.A., Sebring, Florida and S. Dresden Brunner, Esq., Naples, Florida

The RPPTL Section met in Key West from May 27-30 this year for its Annual Convention and Executive Council Meeting, with waterfront accommodations on Mallory Square. The Convention began with Section committee meetings on Thursday, May 27 and a Welcome Reception and a guided tour by Dr. Lawrence Korb of Truman's Little White House. Dr. Korb is the former Assistant Secretary of Defense under President Reagan.

The Convention Co-Chairs, George J. Meyer and Silvia B. Rojas, planned an outstanding program this year. On Friday, May 28, a CLE Seminar was held that discussed a potpourri of issues for the RPPTL lawyer in the morning session and addressed technology (e.g. the internet and power point) in the afternoon session. At the Section's luncheon and annual election meeting, the keynote speaker was Charles J. Kovaleski, President of the American Land Title Association. The new officers for the 2004-2005 year were elected. The Section is honored to have these officers:

Laird A. Lile – Chair

Julius J. Zschau – Chair-Elect

Rohan Kelley – Probate and Trust Law Division Director

Melissa Jay Murphy – Real Property Division Director

John Neukamm – Secretary

Charles Ian Nash – Treasurer

George Meyer – Circuit Representatives Director

The Circuit Representatives for the 2004 – 2005 year are listed on subsequent pages, along with the Section's Executive Committee members.

On Friday evening the reception, dinner and awards ceremony was held at the Hilton's pier. Outgoing Chair, Louis B. Guttmann, presented gifts of appreciation to the outgoing officers and also presented several Section awards. The Section is able to accomplish its numerous goals and functions as one of the most successful sections of The Florida Bar due to the dedicated work of it members. **G. Thomas Smith** received the **Robert C. Scott Memorial Award** for his devoted and valuable service to the Section. **Sam W. Boone, Jr.** and **Sylvia B. Rojas** received the Section's **Annual Service Award** for their significant effort in promoting the Section's activities. **William E. Sherman** received the **William S. Belcher Lifetime Professionalism Award** for his exemplary professionalism. Incoming Chair, Laird A. Lile, honored Louis and Paula Guttmann for their faithful and outstanding leadership of the Section during the 2003-2004 year.

The special spouse/guest activities on Friday included a tour of the Mel Fisher Maritime Museum, featuring history and artifacts from hurricanes and shipwrecks dating from the late 15th century. Lunch was served at El Meson de Pepe located in Cayo Hueso y Habana.

Saturday, May 29, began with the Probate Roundtable and Real Property Roundtable Breakfasts. The Executive Council Meeting was held thereafter, and the Council approved the proposed Florida Uniform Disclaimer of Property Interests Act. The new Disclaimer Act creates a consolidated chapter for disclaimers of testamentary and nontestamentary property interests, repealing Sections 689.21 and 732.801 of the Florida Statutes. Additionally, the Council approved the proposed amendment to Section 222.21(21)(a), Florida Statute, to strengthen exemption from creditor's claims for IRA's and employee benefits funds or accounts exempt from taxation under the Internal Revenue Code of 1986. The Council ratified the Section's Executive Committee's approval of the budget amendments.

The afternoon offered a special Conch Train tour of hot historic Key West and, even hotter, Historic Key West Cemetery. The tour stopped at Ernest Hemmingway's house and gardens, inhabited by 60+ cats. The day concluded with an outdoor reception and dinner at Audubon House. The Convention ended on Sunday, May 30, with a breakfast buffet on the Hilton's Sunset Deck.

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RPPTL Section Retreats to Key West in May



The Annual Convention was held at the Key West Hilton on May 27-30.



Pat Hancock and Alan McCall enjoy the Thursday reception.



The leaders of the Junkanoo Parade from the hotel to the Little White House on Thursday.



The Thursday night reception at Truman's Little White House.



Louis and Paula Guttmann are the outgoing Chair and First Lady.



Dr. Lawrence Korb gave the group the background on President Truman, particularly from the standpoint of foreign policy issues.

Photos by JOHN NEUKAMM, MICHAEL GELFAND, AND SILVIA ROJAS.

RPPTL Section Retreats to Key West in May





Louis Guttmann was honored on Friday as the outgoing Section Chair. The Section expressed its appreciation to Paula Guttmann too.



Morgan Weintraub makes a guest appearance with The Landsharks on Friday night.



Wilson Smith enjoys the Saturday lunch on the pier.



Charles J. Kovaleski, ALTA President, spoke at the Friday luncheon.



Guests at the dinner and awards ceremony on Friday night.

Photos by JOHN NEUKAMM, MICHAEL GELFAND, AND SILVIA ROJAS.

RPPTL Section Retreats to Key West in May



Executive Council members at Saturday's meeting.



A meeting in Key West would not be complete without seeing Ernest Hemingway's House (and its famous polydactyl "Hemingway" cats).



Left: Dinner guests at the Audubon House on Saturday night.



Right: Beverly and David Brittain enjoy the Friday night dinner and sunset.

Photos by JOHN NEUKAMM, MICHAEL GELFAND, AND SILVIA ROJAS.

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Do you or your company offer a product or service that may be useful to the members of the Real Property, Probate & Trust Law Section of The Florida Bar or their clients? Do you want to target your marketing efforts to the more than 8,000 attorneys who practice Florida real estate, probate and estate planning law within and outside the State of Florida? If so, an advertisement in *ActionLine* might be the perfect vehicle to reach your target audience. *ActionLine* accepts paid advertising from outside vendors; full-page, half-page and quarter-page advertising space is now available. If you are interested, please contact George J. Meyer at (813) 223-7000 or *gmeyer@carltonfields.com* for advertising guidelines and rates.

Fifty years of Service
1954 - 2004

Annual Section Awards Presented at Convention in Key West

By S. Dresden Brunner, Esq., Naples, Florida

The Section is able to accomplish its numerous goals and functions as one of the most successful sections of The Florida Bar due to the dedicated work of it members. At the RPPTL Section Annual Convention and Executive Council Meeting in Key West from May 27-30, Louis Guttmann, Chair, announced three awards to honor Section Members.

G. Thomas Smith received the **Robert C. Scott Memorial Award** for his devoted and valuable service to the Section. This award was established in 1985 in memory of Bob Scott, who was the past chair of the Section. The award is presented to Section members who best exemplify Bob's devotion and continued service to the Section and its membership. "Tom embodies the long-term commitment and dedication to the Section that this award recognizes," says incoming Section Chair, Laird Lile. Tom joined the very distinguished group of prior recipients of this award, which includes Bruce Stone and John Starr Thornton, Jr. Tom was Section Chair in 1999-2000 and is a Board Certified attorney in Real Estate. He practices in Pensacola, Florida with the law firm of Smith, Sauer & Demaria.

Louis Guttmann, outgoing Section Chair, says that Tom exemplifies many of the qualities admired so much in Bob Scott. He also says, "Tom has the same love for and close involvement with so many Section activities. He has helped formulate Section goals through active participation in a number of our strategic planning sessions, including chairing that effort. Internationally, he brought us to détente with the civil law system by involving us with the French Notaries in both educational and social settings. He has hosted the Section's Executive Council at his home on two occasions treating us to his home cooking Cajun style and leading us in song at his piano. He has been a strong and successful advocate for filling judicial openings with attorneys who have an understanding and appreciation for the role of the transactional lawyer and the issues they face. In short, over many years Tom has been an energetic, creative, forward thinking Section member who always looks for new ways to advance the practices of Section members."



Louis Guttmann (right) presents the Annual Service Award to Sam Boone.

John Neukamm, Section Secretary, states that the members of the RPPTL Section love Tom because Tom loves this Section. John continues, "Tom is genuinely interested in and devoted to the Section, its members and the practice of real estate law– almost as much as he is devoted to his charming wife, Jennie. In addition to being a brilliant attorney, he is also a caring and generous man. He has not only shared his knowledge with Section members about complicated legal issues; he has also shared his wisdom about the importance of maintaining a balanced life."

Sam W. Boone, Jr. and **Sylvia B. Rojas** received the Section's **Annual Service Award** for their significant effort in promoting the Section's activities. The Section presents an Annual Service Award to a Section member who has rendered dedicated and significantly outstanding service to the Section and its varied programs throughout the current year. In selecting the recipient of this annual award, the Section considers both the character and magnitude of the service furnished by the nominee throughout the year and particular emphasis is given to the benefits which accrue to the Section and the lawyers of Florida as a result of such service. Sam is a sole practitioner in Gainesville, Florida. Silvia is a Board Certified attorney in Real Estate and practices in Miami,

continued, next page



Louis Guttmann presents to Silvia Rojas the Annual Service Award.



Tom Smith received the Robert Scott Memorial Award.

AWARDS
from preceding page

Florida with Attorneys' Title Insurance Fund.

John Neukamm recognizes Silvia as the Section's "go-to" member. "If the Section needs a dedicated member to complete a task, we can count on Silvia to accomplish that task and exceed all expectations. She is a warm and caring person who has successfully managed to juggle her responsibilities to her two sons, her job and her many Committee assignments within the Section," says John.

Both Sam and Silvia have worked tirelessly over the past two years to bring about the complete re-vamping of the use of the internet, both with lists and the website, for the section. Louis Guttmann comments that the complexity and long work hours necessary to accomplish this new vision for the Website have been enormous and all Section Members will be served for many years to come by the benefits derived form this Herculean effort. "The Section is fortunate to have such talented and dedicated members," Louis says.

Laird Lile agrees, "The leadership of Sam and Silvia in developing and implementing the means for providing timely and relevant information to the Section members will be a critical component of our success for years to come."

William E. Sherman received the **William S. Belcher Lifetime Professionalism Award** for his exemplary professionalism. This award was established in 2003 in memory of Bill Belcher, whose professional, civic, charitable, and personal conduct always reflected the highest standards of professionalism and devotion to his profession as an attorney. This award is presented, at the discretion of the Section, to an Executive Council member in recognition of his or her lifetime contributions to the Section, the Executive Council, Florida attorneys, and the public in promoting the highest standards of ethics and professionalism. The award was presented to Bill Sherman at the meetings in Palm Beach, as he was not able to attend the Convention. Bill Sherman was Section Chair in 1984-1985 and is a Board Certified Attorney in Wills, Trusts and Estates. He practices in Deland, Florida with the firm of Landis, Graham, French, P.A.

"The Bill Belcher Award represents an acknowledgement not only of the highest individually demonstrated ethical standards but also the unique ability to mentor and instill those same high standards in others," said Louis Guttmann. "None better has achieved this feat than this year's recipient, Bill Sherman. Bill in his many years of Section involvement has never been too busy to take the time to mentor and coach our developing members. Bill has always taken the time to share his wisdom and offer words of encouragement. It is that type of guidance that is so critical to maintaining the highest standards for our Section. Bill is truly gifted is his insight to difficult issues and generous in his desire to assist in the growth of his fellow practitioners," recognizes Louis.

One of the Section members remembers Bill's taking the time to mentor and coach developing members. Laird Lile says, "As a young lawyer (many years ago), I was introduced to a then recent past chair of the Section, Bill Sherman. Bill immediately encouraged me, a brand new lawyer, to become involved in the profession by service through the Section. For that, and many other words of wisdom during the past 20 years, I am indebted to Bill Sherman and am pleased that the Section could recognize his contributions to our profession with this award."

Congratulations to all of the award recipients and thanks from the entire Section for your dedicated work.

2004 - 2005 Executive Council Meetings

October 28 - 31, 2004

FLEA Seminar / Executive Council Meeting
Hyatt Regency, Tampa
Group Rate: $159/single, $169/double/ $179/triple/$189/quadruple
Reservation Cut-Off Date: September 30, 2004
Reservations: 1-800-233-1234 or 813-225-1234

December 1 - 5, 2004

Executive Council Meeting
Colonial Williamsburg, Williamsburg, VA
Group Rate: $115/$125/night Woodlands Hotel;
$199 Lodge Deluxe; $399 Williamsburg Inn
Reservation Cut-Off Date: November 5, 2004
Reservations: 1-800-261-9530

February 10 - 13, 2005

Exceutive Council Meeting
The Doubletree Hotel/Governor's Inn, Tallahassee
Room Rates TBD

May 26 - 29, 2005

Convention / Executive Council Meeting
Hyatt Regency Coconut Point Estero
Group Rate: $159/night
Reservation Cut-Off Date: May 2, 2005
Reservations: 1-800-233-1234 or 239-444-1234

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Current State of the IRS Concerning Foreign Sellers and Tax Identification Numbers

By Thomas C. Roberge, CPA, IRS Certified Acceptance Agent, St. Petersburg, Florida

Hopefully, I can share some insight in handling frustrations you may be experiencing with the IRS in obtaining Individual Taxpayer Identification Numbers (ITIN's) for your foreign national clients and processing the 10% FIRPTA withholding for foreign sellers of U.S. real estate.

Individual Taxpayer Identification Numbers

Presently, one submits IRS tax form W-7 (Rev. December 17, 2003), Application for IRS Individual Taxpayer Identification Number, and certain documentation to the IRS when requesting a taxpayer identification number.

Many of you think that the only time you can obtain a tax ID number in a real estate related transaction is when the foreign national files an income tax return. This is not true! The most common situations for which you can obtain a tax ID number for real estate transactions are when:

- The 10% is remitted to the IRS with Forms 8288 and 8288-A;
- Application is made for relief from the 10% FIRPTA withholding on Form 8288B;
- One needs a tax ID number to avoid the 30% withholding tax on rental income by his or her rental agent; and,
- The foreign national files his or her U.S. income tax return.

The easiest and safest time for a foreign seller to obtain a tax ID number is when the 10% is withheld and remitted to the IRS at closing. There are special procedures in place to achieve this. The reason this is the best time for the foreign seller to apply is because this is the greatest chance the foreign seller will have to get the 10% credited to his or her account with the IRS rather than having it put in the general account of the IRS in Philadelphia where it really can get lost at tax return filing time. If a foreign seller does not already have a tax ID number by closing, then they should definitely apply for one at closing to avoid potentially serious delays in obtaining their refund later.

It is strongly recommended that one use an IRS Certified Acceptance Agent such as our firm when applying for a tax ID number for a foreign national. Such person can certify the appropriate documents needed and deal directly with the IRS when there are problems in obtaining the number.

The present error rate by the IRS personnel in processing applications for tax ID numbers is considerable. This has resulted in numerous problems to foreign nationals, ranging from obtaining a refund from the 10% FIRPTA withholding to avoiding the 30% withholding tax on rental income. The IRS is aware of this problem and is presently considering alternatives. However, it is not known when this situation inside the IRS will be satisfactorily resolved.

For the meantime, it is best to utilize the services of an IRS Certified Acceptance Agent. The IRS contracts these people for the specific purpose of processing Forms W-7's and making the necessary certifications. Using these individuals will make life much easier when things go wrong – and they will – in the application process.

Foreign Sellers

Foreign sellers are subject to an estimated tax withholding of 10% of the gross sales price. This 10% withholding is credited against the seller's final tax liability for the year of sale and results in a refund if the tax is less or a balance due for the difference if it is more. There are limited exceptions to this rule.

A foreign seller must have a tax ID number to apply for relief from the 10% withholding in situations when the tax is less. This application for relief is made by filing Form 8288-B (Rev. January 2004), Application for Withholding Certificate for Dispositions by Foreign Persons of U.S. Real Property Interests.

Both the seller and buyer must have a tax ID number when the application is submitted or, if not, they can only file an application if it is accompanied by a Form W-7 described above, which contains the proper certification and documentation. There are special procedures for this situation since the applications must be filed differently than in the typical situation when both seller and buyer have tax ID numbers.

It usually is not a problem if the seller does not have a tax ID number to obtain the necessary information since the seller is motivated, and he or she wants his or her money early. The problem with the existing system is when the buyer is foreign and does not have or need a tax ID number in the near future. Under the present rules, the IRS will not issue a withholding certificate if the buyer does not also apply for a tax ID number with the 8288-B application.

We have had long discussions with personnel in the FIRPTA Unit on this issue. Presently, they are not willing to relax these rules. In other words, unless the buyer cooperates, the 10% will have to be withheld, sent in and the seller will have to wait until the following year to file an income tax return to obtain a refund.

Conclusion

The IRS is presently evaluating alternatives for better handling the problems they are experiencing with the tax ID numbering systems and procedures for foreign nationals and for more efficiently handling 10% FIRPTA withholding issues. The problems they are experiencing are the result of not having a sufficient number of qualified personnel. There are some well-qualified personnel – but they are too few. Until this situation is corrected, it is definitely in your and your client's interests to utilize the services of a tax professional who specializes and has extensive experience in dealing with foreign nationals.

RPPTL-PAC Endorsements

RPPTL-PAC, the political action committee for contributing members of the Real Property, Probate and Trust Law Section, is an active participant in the 2004 State Legislative races. All 120 seats in the Florida House of Representative and 22 seats in the Florida Senate are up for election in 2004. The Primary Elections were held on August 31, 2004, and the General Elections are scheduled for November 2, 2004. Through the primary elections, the PAC had a 98% success rate of picking winners. RPPTL-PAC has endorsed and contributed to the election campaigns of the candidates for the State House and Senate shown below:

Candidates Elected
Candidates That Won Their Primary and Face General Election Opposition

Senator: Evelyn Lynn (District 7)
Senator: Dennis Jones (District 13)
Senator: Carey Baker (District 20)
Senator: Mike Bennett (District 21)
Senator: Steve Geller (District 31)
Senator: Burt Saunders (District 37)
Representative: Mark Mahon (District 16)
Representative: Joe Pickens (District 21)
Representative: Larry Cretul (District 22)
Representative: Sandy Adams (District 33)
Representative: Sheri McInvale (District 36)
Representative: David Simmons (District 37)
Representative: Andy Gardiner (District 40)
Representative: Gus Bilirakis (District 48)
Representative: Ken Littlefield (District 61)
Representative: Dennis Ross (District 63)
Representative: Ron Reagan (District 67)
Representative: Bruce Kyle (District 73)
Representative: Jeff Kottkamp (District 74)
Representative: Dudley Goodlette (District 76)
Representative: Joe Negron (District 82)
Representative: Mary Brandenburg (District 89)
Representative: Ellyn Bogdanoff (District 91)
Representative: Jack Seiler (District 92)
Representative: Mike Davis (District 101)
Representative: Dan Gelber (District 106)
Representative: Gus Barreiro (District 107)
Representative: Phil Brutus (District 108)
Representative: David Rivera (District 112)
Representative: Edward Bullard (District 118)
Senator: Larcenia Bullard (District 39)
Representative: David Coley (District 7)
Representative: Mitch Needelman (District 31)
Representative: Bob Allen (District 32)
Representative: David Mealor (District 34)
Representative: Bruce Antone (District 39)
Representative: Kevin Ambler (District 47)
Representative: Trey Traviesa (District 56)
Representative: Denise Grimsley (District 77)
Representative: Gayle Harrell (District 81)
Representative: Priscilla Taylor (District 84)
Representative: Chris Smith (District 93)
Representative: Matt Meadows (District 94)
Representative: Wilbert "Tee" Holloway (District 103)
Representative: Dorothy Bendross-Mindingall (District 109)
Representative: Carlos Lopez-Cantera (District 113)
Representative: Anitere Flores (District 114)

Candidates That Lost Their Primary Election

Senator: Geraldine Thompson (District 19)
Representative: John Stewart (District 46)

Candidates With Only General Elections

Senator: Nancy Argenziano (District 3)
Senator: Steve Wise (District 5)
Senator: Mike Fasano (District 11)
Senator: Paula Dockery (District 15)
Senator: J. D. Alexander (District 17)
Senator: Lisa Carlton (District 23)
Senator: Bill Posey (District 24)
Senator: Jeff Atwater (District 25)
Senator: Dave Aronberg (District 27)
Senator: Nan Rich (District 34)
Representative: Holly Benson (District 3)
Representative: Loranne Ausley (District 9)
Representative: Dwight Stansel (District 11)
Representative: Don Davis (District 18)
Representative: Ed Jennings (District 23)
Representative: Pat Patterson (District 26)
Representative: Dorothy Hukill (District 28)
Representative: Thad Altman (District 30)
Representative: Dean Cannon (District 35)
Representative: Randy Johnson (District 41)
Representative: Charles Dean (District 43)
Representative: Dave Russell (District 44)
Representative: Tom Anderson (District 45)
Representative: John Quinones (District 49)
Representative: Leslie Waters (District 51)
Representative: Frank Farkas (District 52)
Representative: Bob Henriquez (District 58)
Representative: John Stargell (District 64)
Representative: Marty Bowen (District 65)
Representative: Carl Domino (District 83)
Representative: Shelley Vana (District 85)
Representative: Anne Gannon (District 86)
Representative: Adam Hasner (District 87)
Representative: Marco Rubio (District 111)

Florida Landlord/Tenant Update

By Barbara M. Pizzolato, Esq., Barbara M. Pizzolato, P.A., Fort Myers, Florida

Money, Money, Money, Moneeeyyy... Payment into Registry... Claim Non-Compliance ... Make Deposit

In *Barfield v. Busby*,[1] Ms. Busby had filed for a non-payment eviction against the Barfields. Each of the Barfields filed a separate Answer, Affirmative Defense, Motion to Dismiss and Counterclaim. Neither Barfield deposited rent into the Court Registry nor did they file a Motion to Determine Rent to be deposited therein.

Ms. Busby filed a Motion for a Court's Default. Final Judgment of Possession was entered as well as a Writ of Possession. The Barfield's appealed.

The Barfields argued that since they served a notice of material noncompliance pursuant to Section 83.51(1), Florida Statutes, they had presented a complete defense to an eviction for non-payment of rent and that no money was required to be deposited in the Court Registry.

The Appellate Court pointed out that Section 83.60, Florida Statutes, clearly states that serving a notice under Section 83.51(1) is a defense to an action for non-payment of rent only if the tenant deposits rent because the basis for the defense is other than payment.

The Barfield's also alleged that the three-day notice conflicted with the complaint as to the amount of the rent due and therefore the action for eviction should have been dismissed. The Appellate Court stated that Section 83.60(2) provided relief in such a circumstance: filing of a motion to determine the amount of rent due within five days of service of the summons. Since the Barfields failed to file such a motion, entry of final judgment for possession was proper and the Appellate Court affirmed.

Deposit Requires Valid Three-Day Notice

In *Scott v. Gurrera*,[2] on appeal the Court vacated a default judgment for failure to deposit rent into the court registry because the Landlord had served a fatally defective Three-Day Notice. The Court reiterated that a statutory prerequisite to the commencement of a tenant eviction for non-payment of rent is that the landlord *must* first give a valid Three-Day Notice to the tenant. Nor can a new Three-Day Notice and amended complaint revive the landlord's claim.

Without a valid Three-Day Notice, the landlord never properly terminated the rental agreement and the statutory right of an action for possession never accrued.

The Appellee/Plaintiff was required to pay the Appellant/Defendant's counsel's attorney fee.

No Deposit Required Pending Motions

In *Ardelean v. Vinyard*,[3] the defendant had made a Motion to Dismiss Plaintiff's Complaint with Leave to Amend and a Motion for Judgment on the Pleadings based upon defendant's allegation that the Plaintiff prematurely filed the eviction action prior to terminating the defendant's rental agreement. Consequently, the defendant alleged, the plaintiff had no right to commence the eviction proceeding.

The Court held that until the Court heard and ruled on the defendant's motions, there was no requirement for the defendant to post rent into the court registry nor could a default judgment be entered against the defendant for failure to post rent into the court registry since the requirement to post rent only applies if the landlord has lawfully terminated the rental agreement.

Defective Three-Day Notice

In *Bilby v. Randall*,[4] the Three-Day Notice given by the landlord was given on February 10, 2004 and demanded payment or possession on or before February 10, 2004 – giving tenant *zero* days to pay or vacate.

Since on the face of the Complaint and exhibits annexed thereto, it was clear that the landlord had failed to lawfully terminate the rental agreement, the Court held, the Court had no authority to require that the tenant post rent and/or enter a default judgment for the tenant's failure to do so. Indeed, the Court stated, an essential element of the plaintiff's case failed; namely, that the rental agreement had been terminated. Since less than all the requisite elements of the cause of action for tenant eviction were in existence when the Complaint was filed, the Complaint was dismissed with prejudice and without leave to amend. *See, also, O'Connor v. Shebes*, 11 Fla. L. Weekly Supp. 752b (Fla. 17th Jud. Cir. 2004)(premature filing after giving zero days to vacate).

How Defective Can a Three-Day Notice Be?... Get This

In *Meyers v. Kessel*,[5] the defendant made a Motion to Dismiss Plaintiff's Complaint for Tenant Eviction Without Leave to Amend and a Motion for Judgment on the Pleadings based on plaintiff's failure to effectively terminate the rental agreement.

Upon reviewing the Plaintiff's Complaint, the Court held that it failed to state a cause of action for tenant eviction because the Three-Day Notice (a) gave the tenant until February 24, 2004 to pay or vacate but the plaintiff prematurely filed his Complaint on February 24, 2004; (b) wrongfully notified the tenant to vacate, quit and deliver the premises "you hold as our tenant"; and (c) it wrongfully notified the defendant that he could reinstate his tenancy – thereby acknowledging that at the time plaintiff gave the notice, he had wrongfully terminated defendant's rental agreement or there would be no tenancy to reinstate. Finally, the Three-Day Notice acknowledged that rent was paid monthly and there is no such thing as a Three-day Notice; to terminate a month-to-month tenancy, a proper Fifteen-Day Notice must be given.

Due to the fatally defective Three-Day Notice, and plaintiff's failure to terminate the rental agreement prior to filing the Complaint for eviction, an essential element of plaintiff's cause of action was missing and, therefore, there was no requirement for the tenant to deposit rent into the

Court Registry.

Since less than all the requisite elements of the cause of action for tenant eviction were in existence when the Complaint was filed, the Court dismissed the Complaint with prejudice and without leave to amend. Once again, the Court pointed out that a *statutory cause of action cannot be commenced until the plaintiff has complied with all conditions precedent.*

In *LeMesurier v. Lathan*,[6] the defendant made a Motion to Dismiss Plaintiff's Complaint for Tenant Eviction Without Leave to Amend and Motion for Judgment on the Pleadings.

The Court reviewed the Three-Day Notice attached to the Complaint and held that it was fatally defective, failed to terminate the rental agreement, and plaintiff had no cause of action because: (a) it demanded both money other than rent and money in excess of the rent owed by demanding security, which security is not rent and not permitted to be demanded in a Three-Day Notice; (b) it failed to state who the landlord was; and (c) it demanded payment or possession on a day that the Clerk's office was closed. *See, also, Harobor Inn of Coral Springs Assocs. Ltd. v Piccirillo*, 11 Fla. L. Weekly Supp. 753 (Fla. 17th Jud. Cir. 2004)(Three-Day Notice demanded payment on legal holiday – Clerk's office was closed).

Further, the Three-Day Notice was signed by KV, as authorized agent for an unstated landlord; the Complaint was filed by and signed by LH. Consequently, the Court reasoned, if KV was the authorized agent of the plaintiff, then LH had no standing to file the action. If LH was the authorized agent of the plaintiff, then neither had given the tenant a pre-suit notice as required by Chapter 83 of the Florida Statutes. Due to the defective Three-Day Notice, no deposit of rent into the Court Registry was required.

In addition, the plaintiff alleged in the Complaint that the oral agreement expired by timely notice given of such termination. The Court pointed out that a month-to-month tenancy *may only* be terminated by the giving of a *fifteen-day notice* given in advance of the end of the monthly rental period for which the oral month-to-month tenancy would be terminated on the last day of the month at midnight. The Court dismissed the Complaint with prejudice without leave to amend.

In *Barber v. Fain*,[7] the plaintiff's non-renewal notice clearly stated that the tenant was to vacate on or before May 14, 2004. The earliest that the tenant could have terminated would have been 12:01 A.M. on May 15, 2004 and the earliest that plaintiff could have commenced the eviction action would have been May 17, 2004.

Notwithstanding, the plaintiff prematurely commenced the eviction action *on* May 14, 2004 only giving the tenants until May 13, 2004 to vacate prior to wrongfully terminating their rental agreement. Case dismissed with prejudice without leave to amend.

In *Holness v. Freeman / Weeks,*[8] the Court was faced with the premature commencement of an action since the Three-Day Notice sought payment or possession on or before April 27, 2004 and the plaintiff commenced on April 26, 2004. That not being bad enough, the plaintiff gave the defendant a *post-suit notice*. Clearly, the post-suit notice rendered the pre-suit Three-Day Notice a nullity and *automatically* entitled the defendant to a final judgment *as a matter of law.*

Just Rent. Really, Just Rent

It cannot be too strongly stated: a Three-Day Notice may only demand RENT – nothing else. In *Stotsky Holdings, LLC v. Simmons*,[9] the Court dismissed the action because the Three-Day Notice demanded late charges as well as security. In *O'Connor v. Shebes*,[10] the Court dismissed because the Three-Day Notice demanded arrears for utility bills.

Out of State Means Eight

The Court in *O'Connor v. Shebes*[11] also reiterated the rule that when the landlord's address is in a different city and state, the tenant is entitled to mail the rent or keys to the landlord's address. Accordingly, pursuant to Rule 1.090(e) of the Florida Rules of Civil Procedure and Florida Case Law, the defendant was entitled to *eight (8) days* to pay or vacate rather than three (3) days and any Three-Day Notice giving less than eight is fatally defective.

Endnotes:

1 11 Fla. L. Weekly Supp. 396 (Fla. 9th Jud. Cir (Appellate) 2004).
2 11 Fla. L. Weekly Supp. 480 (Fla. 17th Jud. Cir. 2004).
3 11 Fla. L. Weekly Supp. 481a (Fla. 17th Jud. Cir. 2004).
4 11 Fla. L. Weekly Supp. 481b (Fla. 17th Jud. Cir. 2004).
5 11 Fla. L. Weekly Supp. 482 (Fla. 17th Jud. Cir. 2004).
6 11 Fla. L. Weekly Supp. 750b (Fla. 17th Jud. Cir. 2004).
7 11 Fla. L. Weekly Supp. 751 (Fla. 17th Jud. Cir. 2004).
8 11 Fla. L. Weekly Supp. 756c (Fla. 17th Jud. Cir. 2004).
9 11 Fla. L. Weekly Supp. 752a (Fla. 17th Jud. Cir. 2004).
10 11 Fla. L. Weekly Supp. 752b (Fla. 17th Jud. Cir. 2004).
11 11 Fla. L. Weekly Supp. 752b (Fla. 17th Jud. Cir. 2004).

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Legislative Report:

Preliminary Numerical Index Summary of 2004 Legislative Issues, July 13, 2004

By Peter M. Dunbar, Martha J. Edenfield and Marc W. Dunbar, RPPTL Legislative Counsel

The 2004 Regular Session of the Legislature produced a variety of changes that will affect the practice areas of RPPTL Section members, many of which were a part of the Section's legislative package. With the Session recently concluded, only one of the measures has been acted on by the Governor. The balance of legislation will now make its way to the Governor's desk for final action which will take until the middle of June. The full text of each enrolled bill and its status with the Governor's Office is available on the legislative website (www.leg.state.fl.us). A summary of each measure that passed follows below in numerical bill order.

CS/CS/SB 162 (Local Government Development Orders): The bill creates §163.3167 providing that a local government development order may not be invalidated after the initial appeal period has expired based upon a deficiency in the approval standards. **(*Chapter 2004-37, Laws of Florida.*)**

HB 325 (Mobile Homes-Relocation Trust Fund): The bill makes a technical change to clarify that payments by the park owner when the use of the mobile home park are changed are to be made to Mobile Home Relocation Corporation. **(*Chapter 2004-13, Laws of Florida.*)**

CS/CS/HB 461 (Commercial Broker's Lien): The bill provides for a broker's lien for commissions and other fees in commercial real estate transactions. **(*Vetoed by the Governor.*)**

HB 511 (Neighborhood Crime Watch Programs): The bill recognizes neighborhood crime watch programs and creates penalties for persons who harass, intimidate or threaten participants in the program. **(*Chapter 2004-18, Laws of Florida.*)**

HB 529 (Conveyance of Real Property): The bill was supported as a Section initiative, and it clarifies section 689.07, confirming the generally accepted and broadly relied upon interpretation that conveyance of real property by a person identified as a trustee conveys the property held in trust if the trust or the date of the trust is identified. **(*Chapter 2004-19, Laws of Florida.*)**

HB 539 (Developments of Regional Impact): The bill clarifies the guidelines in a multiuse development of regional impact and modifies the extension of time provisions governing areawide DRIs. **(*Chapter 2004-10, Laws of Florida.*)**

CS/CS/CS/CS/SB 700 (Baker Act-Involuntary Placement): The bill makes a series of changes to the Baker Act and creates new procedures for involuntary out-patient placement of patients. **(*Chapter 2004-385, Laws of Florida.*)**

CS/CS/SB 712 (Eminent Domain-Records Confidentiality): The bill provides confidentiality for property owner business documents and records in eminent domain proceedings involving business damages. **(*Chapter 2004-46, Laws of Florida.*)**

HB 1009 (Landlord/Tenant-Display of U.S. Flag): The bill adds §§83.67 (4) to provide that a landlord may not prohibit a tenant from displaying a United States flag that does not exceed 4½ feet by 6 feet in a respectful manner. **(*Chapter 2004-236, Laws of Florida.*)**

CS/CS/CS/SB 1184 (Community Associations): The bill is a comprehensive package of changes to condominium and homeowners' associations laws. Many of the changes also appear in **CS/CS/CS/SB 2984**, which is the later enacted version of the legislation.

CS/CS/CS/SB 2984 controls the inconsistencies in the two bills, particularly the effective date, and Sections 1 through 16 of **CS/CS/CS/SB 2984** take effect immediately. Both bills contain two Section initiatives (correction to the reserve waiver provision for limited common elements and the revision to the disclosure requirements in residential real estate closings). By section, **CS/CS/CS/SB 1184** does the following **(*Chapter 2004-345, Laws of Florida.*)**:

Section 1 amends §§718.111 (12) and provides immunity from liability to the association for information provided to a prospective purchaser or lienholder if the person providing the information did so in good faith.

Section 2 amends §§720.303 (2) and requires at least 14-day written notice to all association members when an assessment will be levied or when rules regulating use of property in the community are being adopted, amended or revoked.

Section 3 amends §§768.1325 (3) and (4) and provides immunity from liability when a condominium or homeowners' association provides an automated external defibrillator device for its members and guests and provides for proper maintenance and training. It also provides that an insurer may not require the association to purchase medical malpractice insurance for maintaining the defibrillator.

Section 4 amends §§718.112 (1) and (2) by clarifying the voting requirements when waiving reserves (RPPTL initiative) and clarifies the voting procedures when an association seeks to waive the installation of fire sprinklers.

Section 5 creates s. 718.5015 reestablishing the Advisory Council on Condominiums.

Section 6 creates the office of Condominium Ombudsman.

Section 7 provides for the powers

and duties of the Ombudsman.

Section 8 provides for the office location of the ombudsman.

Section 9 amends §§719.1055 and clarifies the voting procedures when an association seeks to waive the installation of fire sprinklers in a cooperative

Section 10 amends ss 718.503 (2) and reinstates the requirement for the delivery of the Frequently Asked Question and Answer Sheet when a condominium unit is resold.

Section 11 creates new §§720.401 (1) and (2) and establishes the public policy foundation and the purpose for the revival of the community covenants.

Section 12 creates new §§718.402 (1) and (2) providing that all communities that were previously governed by covenants which have now expired are eligible to use the process to revive the documents.

Section 13 creates new §§718.403 (1) through (6) establishing the process for providing notice to the residents, confirming the contents of the governing documents, and providing for a vote of the community.

Section 14 creates new §§718.404 (1) and (2) and provides that if a majority of the residents approve of the revival of the covenants, then a filing with the Department of Community Affairs will be made to confirm that the revival process has been correctly completed.

Section 15 creates new §§718.405 (1) through (5) and provides that once approved by the Department of Community Affairs, the covenants will be recorded with the Clerk of the Court, and that the covenants will be revived upon the recording.

Section 16 amends §§720.301 (5), (8) and (10) clarifying the membership definition in Chapter 720 and providing for consistent definitions for the new consumer protections in the bill.

Section 17 amends §§720.302 (2) and (3) to provide implementing authority for alternative dispute resolutions in mandatory homeowners' associations.

Section 18 amends §§720.303 (1), (2), (5), (7), (8) and (10) restricting small communities in enforcing amended restrictions; granting owners the right to attend and speak at board meetings; requiring notice of meetings where a special assessment will be considered; expanding the rights of owners to have access and copy association records; providing for annual financial reports; prohibiting the developer's use of association funds to defend civil or criminal actions; and providing for recall of members of the board of directors.

Section 19 amends §§720.304 (2), (4), (5) and (6) permitting parcel owners to fly service flags and the flag of Florida; prohibiting SLAPP suits against homeowners; permitting owners to construct access ramps for residents with disabilities; and permitting owner to display a sign of a security service.

Section 20 amends §§720.305 (2) providing that a fine by the board of directors cannot be a lien.

Section 21 creates new §§720. 3055 providing for bidding of association contracts.

Section 22 amends §§720.306 (5), (6) and (9) providing for 14-day notice for members meetings; granting the right to speak at all members meetings; and providing that election disputes must be submitted to arbitration.

Section 23 amends §§720.311 (1) and (2) providing for alternative dispute resolution procedures for disputes in mandatory homeowners' associations.

Section 24 creates §§718.110 (13) to provide that when amendments are made to rental restrictions in a condominium, the change does not apply to owners who do not approve the change until their units are sold.

Sections 25 through 27 create §§720.601 and 720.3086 and are the Section initiatives to clarify the required resale disclosures in mandatory homeowners' associations.

Section 28 creates §§720.602 (1) and (2) that prohibit the publication of false and misleading information by the developer of a mandatory homeowners subdivision.

Section 29 amends §§34.01 and extends county court jurisdiction to disputes in mandatory home-

continued, next page

FLSSI on the Move

The Florida Lawyers Support Services, Inc., (FLSSI) has moved its offices to **Orlando, Florida.** According to its governing board, FLSSI made the move to Orlando with convenience in mind. The new central Florida location is expected to facilitate Board member participation as they work harder to improve forms in the information age of e-sign as well as improving access and involvement among those FLSSI serves. For your convenience, FLSSI can be reached as follows:

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Orlando, Florida 32856-8157
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owners' associations.

Section 30 amends §§316.00825 to make a technical conforming change to the new definitions in the bill.

Section 31 amends §§558.002 (2) to make a technical conforming change to the new definitions in the bill.

Section 32 provides for naming of the new parts of the Chapter governing homeowners' associations.

Section 33 amends §§190.012 and provides for the enforcement of rules and covenants within a CDD under limited circumstances.

Section 34 amends §§190.046 (2) and (9) and provides that all financial obligations must be satisfied before a CDD is terminated.

Section 35 amends §§190.006 (1), (2) and (3) to provide for modified election procedures when homeowners are taking control of the board of directors of a CDD.

Section 36 amends §§718.5012 to provide for new election monitoring procedures under the office of the Condominium Ombudsman.

CS/SB 1208 (Timeshare Estates-Personal Property): The bill adds provisions to the Florida Timeshare Act to permit the timesharing of personal property, including ships, vessels, houseboats and recreational vehicles. ***(Chapter 2004-279, Laws of Florida.)***

CS/SB 1226 (Long Term Care Services): The bill is a comprehensive rewrite of the programs for long term care services and for long term care planning and intergovernmental partnerships. ***(Chapter 2004-386, Laws of Florida.)***

CS/CS/SB 1456 (Dedicated Roadways): The bill is the Session's comprehensive transportation bill. Section 14 of the bill makes minor revisions to ss 95.361 (2) and (5) to exempt electric utility easements from the roadways that are continuously maintained by state, county or municipal governments. ***(Chapter 2004-366, Laws of Florida.)***

CS/CS/SB 1712 (Agricultural Lands-Change in Land Use): The bill deals with several agricultural land planning issues. It creates a cause of action under the Bert Harris Private Property Rights Act when down-zoning occurs, it provides special protection for "agricultural enclaves," and permits agricultural uses under a lease to continue for the balance of the lease term when the property is sold. ***(Vetoed by the Governor.)***

SB 1728 (Condominiums-Waiver of Handrail Installation): The bill permits a senior adult condominium community to vote to waive the installation of guard rails. ***(Chapter 2004-80, Laws of Florida.)***

CS/SB 1782 (Office of the Statewide Guardian): The bill deals primarily with the Office of Statewide Guardian. Sections 7 through 9 of the bill amend §§393.063 (25), 393.12 (2),

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744.102 (10) to provide for a guardian advocate for a person with developmental disabilities. Section 11 creates 744.3085 and provides that a guardian advocate may be appointed for a person with developmental disabilities without an adjudication of incapacity. **(*Chapter 2004-260, Laws of Florida*.)**

HB 1853 (Citrus Canker): The bill modifies the notice procedures in the Citrus Canker Eradication Program and reduces the compensation for homeowners from $100 per tree to $55 per tree. **(*Chapter 2004-254, Laws of Florida*.)**

HB 1899 (Construction Defects-Pre-suit Procedures): This bill revises the pre-suit procedures for construction defect claims on residential real properties. The bill was a Section initiative from the Construction Law Committee. **(*Chapter 2004-342, Laws of Florida*.)**

CS/SB 1970 (Mediation): The bill creates the Mediation Confidentiality and Privilege Act. **(*Chapter 2004-291, Laws of Florida*.)**

CS/SB 2188 (Land Planning and Redevelopment): The act revises procedures for rural land stewardship; encourages urban infill and transfer of development rights in the comprehensive planning process; creates an optional definition for "accessory dwelling unit" to encourage affordable housing; and expands the water supply planning component of local government comp plans. **(*Chapter 2004-381, Laws of Florida*.)**

CS/SB 2444 (Ad Valorem Taxes-Disclosure): Section 5 of the ad valorem tax bill creates new Section 689.261, F.S., requiring the delivery of an ad valorem tax disclosure summary in all residential real estate closings. The new disclosure takes effect on January 1, 2005. **(*Chapter 2004-349, Laws of Florida*.)**

HB 2484 (Citrus Canker): The bill creates a new agricultural warrant procedure under the Citrus Canker Eradication Program for the removal of diseased citrus trees. **(*Chapter 2004-52, Laws of Florida*.)**

CS/SB 2666 (Landlord/Tenant): The bill amends Section 83.575, F.S., requiring written notice by the landlord of fees and penalties for early termination of a lease for a specific duration. **(*Chapter 2004-375, Laws of Florida*.)**

CS/SB 2696 (Public Construction Projects-OCIPs): The bill restricts public agency owner-controlled insurance programs in construction projects and requires liability insurers to offer coverage from liability arising out of current or contemplated OCIP programs. **(*Chapter 2004-377, Laws of Florida*.)**

CS/CS/SB 2962 (Article V Revisors Bill-Timeshare Foreclosure Procedures): The bill makes final revisions to the Constitutional amendment revising Florida's court system. Among the changes in the bill are the following changes that relate to Section matters:

Section 15 increases the recording fees for most instruments in §§28.222 by $4.00 per page.

Section 17 of the bill, the service charge on petitions seeking summary administration, guardianship, curatorship, and conservatorship is increased from $2.50 to $4.00.

Section 19 exempts filing fees in probate and guardianship proceedings prior to discharge.

Section 44 increases court-ordered mediation fees to $40 and $80 per person based upon level of annual income.

Section 74 contains the Section's initiative simplifying the foreclosure of timeshare estates.

Sections 77 and 78 provide for the waiver of inventory verification and annual financial accountings in guardianship when there are insufficient funds. **(*Chapter 2004-265, Laws of Florida*.)**

CS/CS/SB 2984 (Community Associations, Condominiums and Revival of Covenants): This bill contains many of the same provisions that are found in **CS/CS/CS/SB 1184** except for those in Sections 5 through 8 and Section 36 of that bill. It also includes an amendment to §§718.103 (16) exempting governments who lease property from the definition of developer that is not included in **CS/CS/CS/SB 1184**.

Section 1 creates §§718.110 (13) to provide that when amendments are made to rental restrictions in a condominium, the change does not apply to owners who do not approve the change until their units are sold.

Section 2 amends §§718.111 (12) and provides immunity from liability to the association for information provided to a prospective purchaser or lienholder if the person providing the information did so in good faith and amends §§720.303 (2) and requires at least 14-day written notice to all association members when an assessment will be levied or when rules regulating use of property in the community are being adopted, amended or revoked.

Section 3 amends §§768,1325 (3) and (4) and provides immunity from liability when a condominium or homeowners' association provides an automated external defibrillator device for its members and guests and provides for proper maintenance and training. It also provides that an insurer may not require the association to purchase medical malpractice insurance for maintaining the defibrillator.

Section 4 amends §§718.112 (1) and (2) by clarifying the voting requirements when waiving reserves and clarifies the voting procedures when an association seeks to waive the installation of fire sprinklers.

Section 5 amends §§719.1055 and clarifies the voting procedures when an association seeks to waive the installation of fire sprinklers in a cooperative.

Section 6 amends §§718.503 (2) and reinstates the requirement for the delivery of the Frequently Asked Question and Answer Sheet when a condominium unit is resold.

Section 7 creates new §§720.403 (1) and (2) and establishes the public policy foundation and the purpose for the revival of the community covenants.

Section 8 creates new §§720.404 (1) and (2) providing that all communities that were previously governed by covenants which have now expired are eligible to use the process to revive the documents.

Section 9 creates new §§720.405

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(1) through (6) establishing the process for providing notice to the residents, confirming the contents of the governing documents, and providing for a vote of the community.

Section 10 creates new §§720.406 (1) and (2) and provides that if a majority of the residents approve of the revival of the covenants, then a filing with the Department of Community Affairs will be made to confirm that the revival process has been correctly completed.

Section 11 creates new §§720.407 (1) through (5) and provides that once approved by the Department of Community Affairs, the covenants will be recorded with the Clerk of the Court, and that the covenants will be revived upon the recording.

Section 12 modifies §§718.103 and excludes a city or county leasing property from the definition of developer.

Section 13 amends §§720.301 (5), (7) and (10) clarifying the membership definition in Chapter 720 and providing for consistent definitions for the new consumer protections in the bill.

Section 14 amends §§720.302 (2) to provide implementing authority for alternative dispute resolutions in mandatory homeowners' associations.

Section 15 amends §§720.303 (1), (2), (4), (5), (7), (8) and (10) restricting small communities for enforcing amended restrictions; granting owners the right to attend and speak at board meetings; requiring notice of meetings where a special assessment will be considered; expanding the rights of owners to have access and copy association records; providing for annual financial reports; prohibiting the developer's use of association funds to defend civil or criminal actions; and providing for recall of members of the board of directors.



Section 16 amends §§720.304 (2), (4), (5) and (6) permitting parcel owners to fly service flags and the flag of Florida; prohibiting SLAPP suits against home owners; permitting owners to construct access ramps for residents with disabilities; and permitting owner to display a sign of a security service.

Section 17 amends §§720.305 (2) providing that a fine by the board of directors cannot be a lien.

Section 18 creates new §§720.3055 providing for bidding of association contracts.

Section 19 amends §§720.306 (5), (6) and (9) providing for 14-day notice for members meetings; granting the right to speak at all members meetings; and providing that election disputes must be submitted to arbitration.

Section 20 amends §§720.311 (1) and (2) providing for alternative dispute resolution procedures for disputes in mandatory homeowners' associations.

Section 21 and 23 create §§720.401 and 720.3086 to clarify the required resale disclosures in mandatory homeowners' associations.

Section 24 creates §§720.402 (1) and (2) that prohibit the publication by false and misleading information by the developer of a mandatory homeowners subdivision.

Section 25 amends §§34.01 and extends county court jurisdiction to disputes in mandatory homeowners' associations.

Section 26 amends §§316.00825 to make a technical conforming changes to the new definitions in the bill.

Section 27 amends §§558.002 (2) to make a technical conforming changes to the new definitions in the bill.

Section 28 provides for the organizational structure and the naming of the new parts of Chapter 720 governing homeowners' associations.

Section 29 provides a severability clause for the legislation.

Section 30 amends §§190.012 and provides for the enforcement of rules and covenants within a CDD under limited circumstances.

Section 31 amends §§190.046 (2) and (9) and provides that all financial obligations must be satisfied before a CDD is terminated.

Section 32 amends §§190.006 (1), (2) and (3) to provide for modified election procedures when homeowners are taking control of the board of directors of a CDD.

Section 33 provides an effective date for the bill. Sections 1 through 16 effect on October 1, 2004 and the remainder to of the bill takes effect upon becoming law. ***(Chapter 2004-353, Laws of Florida.)***

CS/CS/SB 2994 (Mobile Home Parks, Unclaimed Property, Holocaust Survivors and Annuity Sales): The bill is a comprehensive package dealing with the Department of Financial Services. It also contains four sections of interest to Section members.

Section 13 of the bill amends §§501.212 (4) to exempt causes of action pertaining to certain commercial real estate (primarily mobile home parks) from the Deceptive and Unfair Practices Act.

Sections 110 through 144 make revisions to Florida's Unclaimed Property Act.

Section 145 of the bill was added by an amendment by Senator Klein creating §§732.103 (6) to allow heirs of a victim of the Holocaust to claim assets in an intestate estate though lineal descendants extend back to the level of great grandparents.

Section 146 creates new §§627.4554 to provide protections and disclosure for "senior consumers" purchasing annuity products. ***(Chapter 2004-390, Laws of Florida.)***

Community Association Law: Mutating Entities?

By Michael Gelfand, Esq., Gelfand & Arpe, P.A., West Palm Beach, Florida

X-Men to the rescue? Just like the mutating children's action figures which are sweeping the nation's toy shelves, the State Legislature's effort to mutate community associations swept the Florida House and Florida Senate.

Whether a developer, director or property owner, it was a trying year for all involved in community association governance. The Legislature seemed to shift attention from the "big picture" to the minutia of specific constituency concerns. The result may have overridden institutional welfare and the needs of Florida citizens.

After the last significant overhaul of the community association laws in 1992, the Legislature consciously avoided significant further changes. In 1992, the Legislature recognized significant differences between condominium and homeowner associations.

In condominiums, owners live close together. They rely upon each other for structural needs. This reliance requires a balance between the administrative cost of transparent decision making and economies of scale.

Conversely, homeowners' association communities are less compact. With owners not as reliant on each other, homeowners were left to experiment with self governance.

Well, welcome to a new millennium! In response to a series of special committee meetings noted primarily for the repeat attendance of a few complaining homeowners, the Legislature addressed specific issues such as open meeting requirements and accountability. Notably lacking in two huge bills was a clear policy regarding the role of community associations.

Without a clear policy and with an increasingly hostile attitude towards those who volunteer for the thankless job of unpaid association director, the Legislature is in danger of killing Florida's economic engine. The success of community associations is a foundation for Florida's economy.

The assertion that community association success is crucial to Florida should not be surprising. After all, where are most residences built? Housing is not built one home at a time. Except in those minute areas of seven and eight figure trophy homeland, almost all residential housing is being built in subdivisions and condominiums governed by community associations regulated by Chapter 718 and Chapter 720.

By law, association communities are governed by not-for-profit corporations which depend upon volunteers. If community members do not volunteer, then directors will not be appointed. Pursuant to the Homeowner Association Laws and the Condominium Act, Sections 720.206(4) and 718,1124, Florida Statutes, without sufficient volunteers, receivers must be appointed to operate the communities.

Recognizing that volunteers must be sought, the Legislature has made the "job" of being a volunteer association director seemingly unbearable. Consider the task of volunteer directors who are mandated to adopt a budget; however, new laws mandate that directors must listen to every homeowner who desires to speak for a minimum of three minutes each. In now what is a modestly sized community, 500 homes, if only half the members attend a budget meeting, and only half of those attending desire to exercise this new right, then the meeting will last for over five hours, not counting the call to order or any discussion by the directors themselves on the budget!

Consider that associations are formed to enforce covenants because the state, counties and towns do not desire to undertake code enforcement. Nevertheless, individual legislators castigate volunteer directors for their efforts. With a visceral distrust of the association volunteers, the Legislature removed what has been the most effective intermediate enforcement tool, the ability to enforce fines through liens.

Interestingly for a self-proclaimed conservative body, the Legislature has shown a significant distrust of the individual citizen to make correct decisions. The number of mandatory pre-contract re-sale disclosure requirements made guppy reproduction look seemingly slow. Proposals for mandatory disclosures of airport sites and railroad locations made it appear that the 1920's swamp sale victims were more sophisticated than today's homebuyers. Legislatures have no faith in buyers to accept responsibility for the buyer's most significant investment, their new home.

This is not to condemn the entire Legislature for the folly of a few. As the RPPTL Section recognized at its Legislative Update seminar, a number of legislators rose to the occasion. As we look to the 2005 legislative session, the Condominium and Plan Development Committee will be examining efforts supported by all community association constituencies, developers, associations and unit owners to help ensure that the golden goose of Florida is not smothered because of a few bad instances or those who want to look at the goose but do not want to hear it.

This is an appropriate opportunity to review the legislation that affects South Florida Community Associations. Because the overwhelming number of communities are homeowner or condominium developments, changes to the cooperative act or mobile home act are not addressed in this article.

The Governor signed into law both Senate Bill 1184 as Florida Laws 2004-345 and Senate Bill 2984 as Florida Laws 2004-353. The two laws created a significant but hopefully short lived debate. Though both bills were substantially similar, there were certain significant differences, especially concerning the effective date of certain changes. Some changes became effective upon an Act becoming law and others were effective October 1, 2005.

Because the laws were passed by the Legislature on the same day there was controversy over which law's effective date would prevail. As

continued, next page

October 1, 2005 will have been, or will shortly be upon us, hopefully the effect of this debate will be moot; however, it appears that the greater weight of authority provides that Senate Bill 1184, Florida Law 2004-343 prevails because it was the latter adopted enactment. *See Palm Beach County Canvassing Board v. Harris*, 772 So. 2d 1273 (Fla. 2000); *McKendry v. State*, 641 So. 2d 45 (Fla. 1994).

Certain items of note to the practitioner are increased disclosure requirements and meeting procedures. In addition, issues regarding the Marketable Record Title Act and construction disputes were addressed. Summarized by impact upon community association the laws provide as follows:

Condominiums

Developer. Section 718.103(16) provides that when acting as a lessor, the state, counties and municipalities are exempt from the definition of a developer.

Amendments. Section 718.110(13) limits the right of unit owners to amend restrictions, providing that an amendment restricting unit owners' rental rights applies only to unit owners who consent to the amendment and unit owners who purchase their units after the effective date of that amendment.

Disclosure Liability. Section 718.111(12) provides immunity from liability for certain information provided by associations to prospective purchasers or lienholders if the information is provided in good faith with an express disclaimer.

Fire Sprinklers. Section 718.112(2) revises notification and voting procedures for membership votes to forego installation of the fire sprinkler system in common areas of a condominium.

Advisory Council. Section 718.5015 creates the Advisory Council on Condominiums consisting of seven appointed members.

Ombudsman. Sections 718.5011 through 718.5014 creates an Office of the Condominium Ombudsman located within the Division of Florida Land Sales, Condominiums, and Mobile Homes Trust Fund in Leon County.

Q & A. Section 718.503(2) requires selling unit owners to provide prospective purchasers with the Frequently Asked Questions and Answers Document.

Homeowners' Associations

Arbitration. Section 720.302 reaffirms that it is not in the best interest of members to have a state regulatory agency, provides for alternative dispute resolution procedures for disputes involving elections, and recalls and pre-suit mediation of other disputes involving covenant enforcement.

Organization. Section 720.303(1) permits members to speak at and to place issues on the agenda of directors' meetings, regulates meetings including adding meeting notice materials to be maintained as records; provides for inspection of records; and adds procedures for recall of directors. Section 720.303(2) requires at least fourteen days notice to association members before certain assessment or rule changes may be considered at a meeting.

Rights of Owners. Section 720.304 proscribes member's rights to fly flags; prohibits SLAPP lawsuits; allows members to construct a ramp for medical necessity or disability, and allows members to display security services signs.

Fines. Section 720.305(2) prohibits a fine from becoming a lien against a home.

Contracts. Section 720.3055 mandates bidding for certain products and services. This provision is effective immediately.

Members' Meetings. Section 720.306 requires detailed notice of members' meetings, allows members to speak at all members' meetings; and provides that election disputes be submitted to mandatory binding arbitration.

Mediation. Section 720.311 expands requirements and guidelines for alternative dispute resolution, providing requirements for mediation and arbitration. The Act requires mediation of disputes between a mandatory homeowners' association and an owner regarding use of or changes to the parcel or the common areas and other covenant enforcement disputes prior to filing suit in civil court.

Marketable Record Title Act. Sections 720.401 through 720.405 responds to problems created in communities over thirty years old when the Marketable Title Record Act extinguished covenants, including Association lien rights. The law provides criteria for eligibility, an organizing committee to provide notice to the members and to provide for the vote of the members, filing requirements, directing the Department of Community Affairs to determine within sixty days whether a revived declaration complies with the Act, authorizing an organizing committee to record the documents after receiving approval from the Department and providing copy of recorded documents to all members.

Disclosure Summary. Section 720.601 modifies the Question and Answer disclosure form prospective purchasers must be provided before executing the contract for sale. This provision is effective immediately.

Misleading Information. Section 720.602 provides remedies for publication of false and misleading information by the developer of a homeowners' subdivision.

Financial Report. Section 720.3086 provides for financial reports of certain subdivision developers of recreational facilities.

Jurisdiction. Section 34.01 provides county courts concurrent jurisdiction with the circuit courts over disputes occurring in homeowners' associations. This provision is effective immediately.

General Provisions

Elections. Section 190.006 specifies procedures for selecting a chair at the initial landowners' meeting, requirements for proxy voting and outlines election procedures.

Deed Restrictions. Section 190.012(4) provides enforcement of deed restrictions by Community Development Districts for property where there is no homeowners' association having enforcement powers.

Termination. Section 190.046 provides for termination of a Community Development District when it has no outstanding financial obligations and no operating or maintenance responsibilities. This provision is effective immediately.

Defibrillators. Section 768.1325 (3) immunizes associations that provide automated defibrillator devices and prohibits insurers from requiring associations to purchase medical malpractice coverage as a condition of issuing other coverage or excluding from coverage damages resulting from the use of a defibrillator under a general liability policy issued to the association.

In addition to the two Acts summarized above, the Governor signed into law several other bills which will have an impact on Florida community associations. These laws are as follows:

Waiver of Handrail Installation. Florida Laws 2004-80 (SB 1728). Condominium unit owners in communities for older aged persons may opt out of retrofitting requirements regarding handrails and guardrails. This waiver does not apply to high-rise buildings.

Construction Defects. Florida Laws 2004-342 (HB 1899). Prospective purchasers are required to provide certain notice and information before filing actions alleging construction defects.

Estate and Trust Tax Planning Committee Minutes — Abbreviated

May 27, 2004, Key West, Florida

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

The meeting of the Estate and Trust Tax Planning Committee (the "Committee") of the Real Property, Probate and Trust Law Section of the Florida Bar was held on Thursday, May 27, 2004, at the Hilton Resort Marina, Key West, Florida.

Seminar Update:

Rick Gans and **Jerry Wolf** will be serving as Co-Chairmen of the upcoming seminar to be put on by the Committee in December 2004. A number of topics and speakers are presently being lined up, and so far, **Howard Payne, Lou Nostro, Rex Moule, Kristen Lynch** and **Guy Emerich** have agreed to be speakers. One of the goals is to increase the attendance at the seminar and the co-chairs will look for ways to enhance notification to members of the Bar.

Proposed Legislation on Chapter 739 (Disclaimer Statute):

In what turned out to be the final discussions on the proposed extensive revision to the Disclaimer Statutes, the Committee voted to send to the Executive Council the draft of the Disclaimer Statute to be known as Chapter 739 as presented to the Committee by Rick Gans. Lively discussion continued with regard to the requirement of whether or not it would be necessary to record the disclaimer. A vote was taken and passed overwhelmingly to send the proposed statute to the Executive Council for discussion at the Saturday meeting. **Charlie Nash** and the entire Committee thanked Rick Gans for his tremendous work in bringing this together.

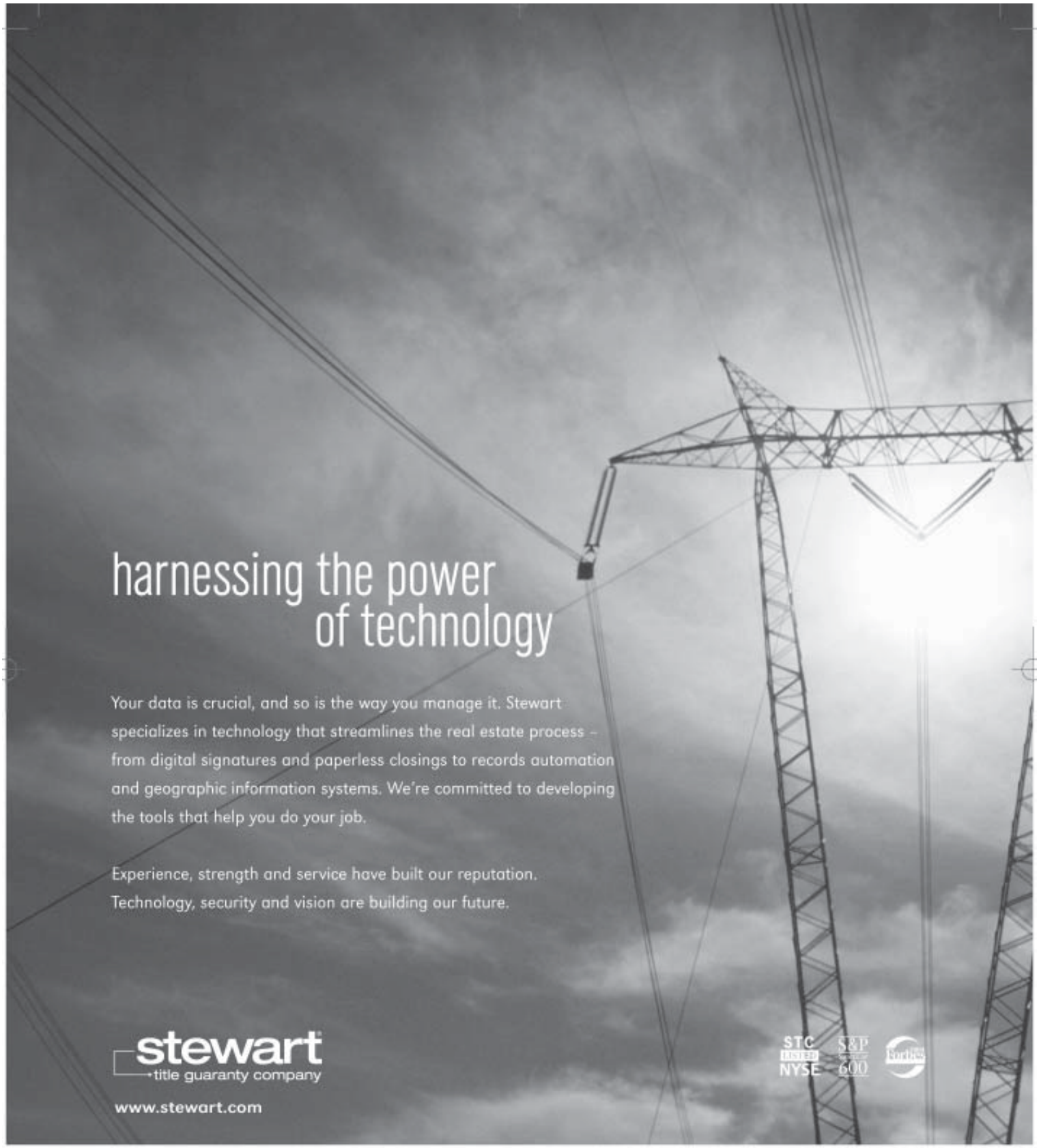
Proposed Legislation Section 222.21:

Richard Amari discussed the proposed Section 222.21 change and referenced an issue that had been brought up by Kristen Lynch dealing with the elective share as it pertains to the IRA. The proposal that was to go before the Executive Council before the discussion potentially created a problem as the claim of the surviving spouse under the elective share to the IRA might cause the surviving spouse to be considered a creditor and thus unable to enforce their rights because of Section 222.21(2)(d). Additional language was added to the proposal accepting the claims of a surviving spouse under subsection (d).

This was Charlie Nash's last meeting as Chairman. He will now become the Treasurer of the RPPTL Section. The Committee thanked Charlie for his hard work and excellent leadership over the past few years. Guy Emerich will now be assuming the position of Chairman with Rick Gans and Jerry Wolf serving as Co-Vice-Chairman.

There being no further business, the meeting was adjourned at 5:00 p.m.

Respectfully submitted,
Guy S. Emerich, Chairman



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IRA & Employee Benefits Committee Minutes—Abbreviated

May 27, 2004, Key West, Florida

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

A meeting of the members of the IRA & Employee Benefits Committee, a committee of the Probate and Trust Law Division of the Real Property, Probate & Trust Law Section of The Florida Bar, was held on May 27, 2004 in Key West, Florida. The meeting was held at the Hilton Resort and Marina, commencing at 1:00 p.m. **Richard Amari** acted as secretary for the meeting. At the meeting, the following matters were considered:

Richard Amari explained the changes to the proposed amendment to F.S. §222.21. The prior draft adopted the approach of pending federal bankruptcy legislation by providing a rebutable presumption that pre-approved plans and accounts are presumed tax exempt (and thus creditor exempt), a presumption that could be overcome by clear and convincing evidence. A discussion had ensued at the Ocala meeting which questioned the wisdom of allowing creditors to rebut the presumption. After discussion, the committee decided that the best approach is that adopted by *In the Matter of William Youngblood*, 29 F. 3d .225 (5th Cir 1994). The *Youngblood* decision ruled the bankruptcy court must defer to the IRS on the issue of determining tax qualified status. Unfortunately, the Florida courts have refused to follow *Youngblood*. Following the *Youngblood* approach, the revised proposal exempts all plans and accounts that have been pre-approved by the IRS, unless there has been a subsequent determination that the plan or account has lost its tax exempt status in a proceeding that has become final and non-appealable. The proposal retains the treatment previously adopted for plans or accounts that are not pre-approved. For any such plan, a person claiming exemption must prove by a preponderance of the evidence that the plan or account substantially complies with the Internal Revenue Code requirements for tax exemption, or if it fails to comply, it would have but for the wrongful or negligent conduct of some person other than the person claiming creditor exemption. There were also a few changes to the title and paragraphs (b), (d) and (e) to address comments at the Ocala meeting and to maintain consistency.

Kris Lynch presented a discussion of IRAs under Florida's elective share statute. Among the issues discussed is that a spouse who has obtained an order determining award of elective share and contribution might be considered a creditor of a beneficiary otherwise entitled to receive a decedent's IRA. If the surviving spouse entitled to contribution of the IRA from the beneficiary is considered a creditor of the beneficiary, the spouse may be precluded from collecting the elective share award due to F.S. §222.21. The Committee decided the conflict between the elective share statute and the exemption statute should be resolved by modifying the Committee's proposal for amendment to F.S. §222.21 by amending paragraph (2)(d) of that section to clarify that a fund or account is not exempt under that section from claims of a surviving spouse pursuant to an order determining amount of elective share and contribution pursuant to F.S. §732.201, *et. seq.* Kris also gave several other insightful examples of potential problems with IRAs under Florida's elective share statute.

Pete Dunbar reported on the results of the Section's legislative efforts for the 2004 session. Among the proposals that did not make it were the proposals from the IRA & Employee Benefits Committee, Estate and Trust Tax Planning Committee and Guardianship Law and Procedure Committee relating to education saving accounts, employee benefit plans, and provisions relating to minors' custodial accounts, found in SB 1486 by Senator Carlton and HB 607 by Representative Altman.

Under "New Business," the Committee considered the impact of divorce on IRAs and Employee Benefit plans. Although under Florida law a divorced spouse of a decedent is treated as having predeceased the decedent for purposes of construing trust and will provisions, there are no similar provisions that treat a divorced spouse of a decedent as having predeceased the decedent for purpose of IRA and employee benefit plan beneficiary designations. This presents a trap for the unwary and has led to much litigation. **Richard Gans** recalled that the State of Washington has legislation addressing this issue. The committee decided to study this issue further. Kris Lynch will work with Richard Gans and **Linda Griffin** to provide recommendations addressing this issue.

The Committee discussed the need to obtain new members to assist the Committee in its mission. At recent meetings, attendance has been low. The Chair will make a plea at the Executive Council meeting for members to cull their ranks in search of new blood. Each of the committee members should likewise look for qualified candidates to draft.

There being no further business, the meeting was adjourned at approximately 3:00 p.m.

— Respectfully Submitted by Richard S. Amari, Esq.

2001 Revised Real Property Forms

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

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Executive Council Adopts Proposal To Strengthen Asset Protection for Retirement Assets

By Richard S. Amari, Esq., Cocoa, Florida

At its meeting in Ocala, Florida on January 22, 2004, the Executive Council of the Real Property, Probate and Trust Law Section voted to support a proposed bill to amend Florida Statute Section 222.21. The proposal is intended to strengthen the exemption from creditors claims provided by that statute for individual retirement accounts and employee benefit fund accounts exempt from taxation under the Internal Revenue Code of 1986, as amended ("Code'). The proposal was brought to the Executive Council by its IRA and Employee Benefits Committee ("Committee"). The statutory amendments recommended by the Committee were the culmination of the Committee's review of the current status of exposure of retirement assets to creditors' claims.

The question of whether assets in an employee benefit plan are exempt from creditors' claims requires consideration of state spendthrift laws, Federal bankruptcy laws and Federal spendthrift laws. In Florida, the issue of creditors' claims exemption of individual retirement accounts and tax-exempt, or "qualified," plans will be controlled by Florida Statute Section 222.21(2)(a), the Federal spendthrift provisions found in Part 2 of Title I of the Employee Retirement Income Security Act ("ERISA") and the exclusionary and exemption provisions found in Sections 541(c) and 522(b)of the Bankruptcy Code.

Florida Statute Section 222.21(2)(a) currently exempts from creditors' claims any money or other assets payable to a participant or beneficiary from, or any interest of any participant or beneficiary in, a retirement or profit sharing plan that is qualified under Sections 401(a), 403(a), 403(b), 408, 408A or 409 of the Code. A plan that is "qualified" under any of these Code sections is exempt from Federal income taxation.

Section 541(c)(2) of the Bankruptcy Code excludes from the debtor's bankruptcy estate any beneficial interest of a debtor in a trust that is subject to a restriction or transfer enforceable under "applicable non-bankruptcy law." Under Section 522(b) of the Bankruptcy Code, a debtor may elect to apply the exemptions found in Florida Statute Section 222.21(2)(a) to exempt the retirement assets described in the Florida statue in the bankruptcy estate. In the landmark decision of *Patterson v. Shumate*, 504 U.S. 753 (1992), cert. denied, 505 U.S. 1239 (1992), the Supreme Court ruled that the antialienation provisions of Part 2 of Title I of ERISA contain a restriction on transfers enforceable under applicable non-bankruptcy law within the meaning of Section 541(c)(2) of the Bankruptcy Code. Thus, the *Shumate* decision has determined that an "ERISA Qualified" plan is excluded from the debtor's estate under Section 541(c)(2). In reaching this decision, however, the Supreme Court failed to define "ERISA-qualified," a term that is not otherwise defined in the Internal Revenue Code or the Bankruptcy Code.

Post-*Shumate* decisions have adopted two divergent views of what is meant by ERISA-qualified. One line of cases has held that the term means a plan that (1) is covered by Part 2 of Title I of ERISA, and (2) contains the required non-alienation clause. See *In re Hanes*, 162 B.R. 733 (Bankr. E.D. Va. 1994); *SEC v. Johnston*, 922 F.Supp. 1220 (E.D. Mich. 1996); *In re Craig*, 204 B.R. 756 (Bankr. B.N.P. 1997); *In re Bennett*, 185 B.R. 4 (Bankr. E.D. NY 1995). The second line, which has been adopted by the Florida courts, holds that for a plan to be "ERISA-qualified" it must (1) be subject to Part 2 of Title I of ERISA, (2) contain the required antialienation clause, and (3) be tax qualified under §401(a) of the Code. See *In re Harris*, 188 B.R. 144 (Bankr. M.D. Fla. 1995); *In re Fernandez*, 236 B.R. 483 (Bankr. M.D. Fla. 1999).

As a result of the definition of "ERISA-qualified" adopted by the Florida courts, most cases that have considered whether a plan is excluded under Bankruptcy Code Section 542(c)(2) have looked at the issue of whether the plan is "tax qualified." Because exemption under Florida Statute Section 222.21(2)(a) likewise depends on a plan's tax exemption, the issue is the same for exemption under the statute. The resulting case law has found the courts, creditors and debtors arguing over whether a plan was tax qualified from the beginning, or even if so, whether it may have lost its qualified status due to a documentation failure or operational failure.

Typically, a qualified plan is maintained in accordance with a model or prototype plan, trust or agreement approved by the Internal Revenue Service or has received a favorable determination letter under Section 7805 of the Code which determines the plan has met the qualification requirements which are a necessary prerequisite to the plan's exemption from taxation. Tax qualification for employee benefit plans is an incredibly complex subject dealt with by the Code. It is an area subject to constant change. The IRS can "disqualify" a plan retroactively to the year in which the plan fails to meet a qualification requirement. A plan may be disqualified for failure to contain a required provision, failure to timely adopt an amendment required by new legislation, failure to comply with a plan provision, and for misuse or mismanagement of plan funds.

Due in large part to the harsh effects of plan disqualification, Congress provided different relief mechanisms for employers to avoid the undesirable results of failing to maintain or operate a plan in accordance with the Code. A comprehensive system of correction programs, known as "Employee Plans Compliance Resolution System," provides a graduated series of fees and sanctions to provide employers with an incentive to make prompt corrections and to provide a

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consistent and uniform administration of sanctions. Loss of tax-exempt status is the most severe sanction and is saved for the most egregious violations.

The question of whether tax qualification status may be tested in the forum in which the exemption from creditors' claims is being tested has also resulted in two divergent lines of authority. The Fifth Circuit in *In the Matter of William Youngblood*, 29 F.3d. 225 (5th Cir. 1994), ruled that the bankruptcy court must defer to the IRS on the issue of determining tax qualification. Despite the complexities and difficulties of this subject matter, and ignoring the Comprehensive Employee Plan Compliance Resolution System put in place to avoid the harsh results of plan disqualification, the Florida courts have rejected the *Youngblood* approach and have allowed the creditors to attack the tax-qualified status of a plan that has never been disqualified by the IRS. See *In re Harris*, 188 B.R. 44 (Bankr. M.D. Fla. 1995); *In re Sutton*, 272 B.R. 802 (Bankr. M.D. Fla. 2002).

As a result of the post-*Shumate* case law in Florida, many employee benefit plans considered protected by most planners can be challenged de novo, even if the plan has received a favorable determination letter, resulting in a loss of exemption from creditors' claims. In large part this is due to the willingness of the Bankruptcy Court in Florida to entertain claims that retirement assets have lost exemption from creditors claims because of a document or operational failure which has caused the plan under which the assets are held to lose its tax qualified status.

Another problem area deals with plans that are not covered by Part 2 of Title I of ERISA. ERISA was enacted in 1974 to regulate employee welfare benefit plans and employee pension benefit plans. ERISA was enacted in four titles. Title I provides for substantive rules for protection of employee benefit rights through provisions for reporting and disclosure, participation and vesting, funding, fiduciary responsibility and administration and enforcement. Title II provides for amendments to the Code that establish the qualification rules for tax-favored treatment. Title III deals with jurisdiction, administration and enforcement. Title IV creates plan termination insurance requirements. Most employee benefit plans established or maintained by an employer are subject to, or "overed by," all of Title I of ERISA. Individual retirement accounts and most simplified employee plans are not covered at all by Title I of ERISA. Certain employee benefit plans, such as top hat plans and funded excess benefit plans, are covered by some, but not all, of Title I of ERISA. Plans maintained by sole proprietors and partnerships for their owners and plans maintained by corporations for their shareholders, although not covered by Part 2 of Title I of ERISA, may arguably be covered by Part 5 of Title I of ERISA. This issue has caused much confusion among the courts that have questioned it. As will be discussed below, the question of which part or parts of ERISA may cover a plan has been a determinative factor in several courts' decisions regarding whether a plan's assets are exempt from creditors' claims.

As previously stated, plans that cover only owners or owners and their spouses are administratively excluded from the coverage of Part 2 of Title 1 of ERISA. Because these plans are not covered by Part 2 of Title I of ERISA, they are not protected from creditors' claims by rea-

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son of the spendthrift provisions of that part of ERISA. In other words, they fail the "ERISA-qualified" requirement of *Shumate* for exclusion under §541(c)(2) of the Bankruptcy Code. This being the case, however, §522(b) of the Bankruptcy Code should pick up the §222.21(2)(a) exemption to provide an exemption for these assets in the debtor's bankruptcy estate. A literal reading of §222.21(2)(a) merely requires the plan to be qualified under §401(a) (or one of the other cited Code sections). The fact that the plan is not "ERISA-qualified" is not a statutory prerequisite to exemption under §222.21(2)(a). Although at least one Florida case correctly ruled on this issue, see *In re Luttge*, 204 B.R. 259 (Bankr. S.D. Fla. 1997), several others get it wrong by denying exemption under §222.21(2)(a) for plans not covered by Part 2 of Title I of ERISA. See, e.g., *In re Harris*, 188 B.R. 444 (Bankr. M.D. Fla. 1995) and *In re Fernandez*, 236 B.R. 483 (Bankr. M.D. Fla. 1999).

It has been argued that plans covered by Part 5 of Title I of ERISA but not covered by Part 2 of Title I (e.g., plans that cover only owners) cannot be protected by state "shield laws," such as Section 222.21(2)(a), because the state shield laws are preempted by Part 5 of Title I. Although this argument has been accepted by the Sixth and Ninth Circuits, the Eleventh Circuit has flatly rejected this proposition holding Section 222.21 (2)(a) is not preempted by ERISA. See *In re Schlein*, 8 F.3rd 745 (11th Cir. 1993). Unless and until this ruling is overturned by the Supreme Court, Section 222.21(2)(a) should continue to protect "tax qualified" plans that are not "ERISA qualified."

Another development affecting the efficacy of measures designed to protect retirement assets from creditors' claims relates to pending bankruptcy reform legislation. HR 975, the Omnibus Bankruptcy Reform Bill, is a bankruptcy reform proposal. On January 28, 2004, the U.S. House Republicans successfully substituted HR 975 into S. 1920 (a measure which temporarily extends Chapter 12 of Title 11). HR 975 contains new bankruptcy exemptions for retirement assets designed to address post-*Shumate* case law that has weakened the protection of retirement assets from creditors' claims. HR 975 has failed in the prior three congresses, and with the approaching election, the likelihood of successful bankruptcy reform is questionable.

In light of recent case law which has watered the protection afforded retirement assets by Florida Statute Section 222.21, the Committee adopted a proposal to amend that statute to shore up its intended protective measures. The proposals incorporate concepts introduced by HR 975 to protect retirement assets, although the Committee deemed some departure from the approach of HR 975 was warranted. The balance of this article addresses the changes to Florida Statute Section 222.21 approved by the Executive Council.

The term "owner" is added to the terms "participant" and "beneficiary" to clarify that the owner of a tax-exempt account is protected. This change is necessary because an owner of an individual retirement account is technically neither a beneficiary nor a participant of the account, and arguably is not protected by the current statutory language.

Funds or accounts exempt from taxation under Code Sections 414, 457 and 501(a) are added to the list of accounts funds or accounts which are exempt from creditors' claims under the statue. These would include governmental and church plans. This addition makes the list of Code sections which will qualify an account or fund as tax exempt, and thus creditor exempt under Section 222.21(2)(a), consistent with new bankruptcy exemptions that would be added by HR 975.

The terms "fund or account" and "exempt from taxation" are substituted for terms "retirement or profit sharing plan" and "qualified." These changes will adopt language consistent with changes proposed by HR 975 and will avoid the use of terms (i.e., "qualified") that have caused disagreement among the courts.

Any fund or account that is maintained in accordance with a model or prototype plan, trust or agreement approved by the IRS or that has received a favorable determination under Section 7805 of the Code shall be considered exempt from taxation unless a prior determination to the contrary has been made by a court of competent jurisdiction or the Internal Revenue Service in a proceeding which has become final and non-appealable.

Similarly, a fund or account which is not maintained in accordance with a model or prototype plan, trust or agreement approved by the Internal Revenue Service or that has not re-

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ActionLine Publication Schedule

ActionLine is in constant need of brief, newsworthy articles, and readers are invited to submit material for publication. Please forward any proposed articles concerning **real estate, estate planning, probate, or articles of general interest** to Dresden Brunner at dresden@comcast.net. The article shold be in Word format. Please do NOT include graphics in the article, unless they are illustrative charts or graphs. Prospective authors may call Dresden Brunner at (239) 580-8104 to obtain additional publication guidelines.

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Winter 2004	October 31, 2004
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Fall 2005	July 31, 2005

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

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ceived a favorable determination letter under Section 7805 of the Code shall nevertheless be considered tax exempt if:

1. no prior determination to the contrary has been made by a court of competent jurisdiction or the Internal Revenue Service in a proceeding which has become final and non-appealable; and

2. the fund or account is in substantial compliance with the applicable Code requirements; or

3. the fund or account fails to be in substantial compliance with the applicable requirements of the Code, and the owner, beneficiary or participant is not materially responsible for that failure.

This change rejects the *Harris* line of cases and adopts the *Youngblood* approach by leaving jurisdiction for determining tax compliance with the Internal Revenue Service and the Tax Courts unless the presumption can be rebutted by clear and convincing evidence.

The proposal is intended to clarify the current intent of the statute, as construed by *In re Luttge*, that "tax-qualification" alone is sufficient to qualify for creditor exemption and it is not necessary for the fund or account to be "ERISA qualified" to be exempt from creditors' claims under the statute.

Finally, the proposal incorporates a provision in HR 975 to provide that money or assets exempt under Florida Statute Section 222.21(2)(a) will not lose exemption by reason of a direct transfer or rollover to another exempt plan or a distribution, so long as such money or assets are not co-mingled with other money or assets that are not exempt from creditors' claims under Section 222.21(2)(a).

Many, if not most, individuals are under the misguided belief that their retirement assets are absolutely protected from creditors' claims. Recent court decisions have created a huge crack in the door through which creditors may now insert a foot. Currently, a creditor may argue that a debtor's retirement assets are not exempt under Florida Statute Section 222.21, and thus not exempt under Bankruptcy Code Section 522(b), by reason of certain document or plan operational failures that have caused the plan to lose its tax qualified status. The Florida Courts have rejected *Youngblood*, which had correctly decided that tax qualified status is best left to the IRS and Tax Court for determination. The proposal supported by the Executive Council to amend Florida Statute Section 222.21 will shore up the protection of retirement assets originally intended by Florida Statute Section 222.21.(2)(a).



Probate, Guardianship & Trust Case Summaries

By J. Stephen Tracy, Esq., Jupiter Florida

Contingent remaindermen constitute "interested persons" and have standing for legal issues concerning residuary trust. It is error to appoint individual trustee when the plain language of the will requires corporate Trustee.
Barley v. *Barcus*, 29 Fla. L. Weekly D1351, 2004 WL 1224704 (Fla. 5th DCA June 4, 2004)

Decedent left a substantial estate. His Last Will and Testament named Mary Barley as the Personal Representative. The will established a marital trust containing ninety percent of the estate assets, excluding personal property, and a residuary trust for the benefit of the decedent's three adult children from another marriage. The residuary trust was to be divided into three equal shares, a separate trust for each child, naming Mary Barley and Bessemer Trust Company as co-trustees with the provision that if Mary Barley outlived the children and their children, then their trust would revert to Mary Barley. Mary Barley and Bessemer declined to serve as co-trustees as the trust was unfunded. The children arranged an individual trustee without objection from Mary Barley. Four years later, the residuary trust came into money as a result of the settlement of a lawsuit. The children asked the court to appoint a successor individual trustee and the trial court did so over Ms. Barley's objection.

The appellate court construed §731.201(21), Florida Statutes and found Mary Barley to be an interested person as the Personal Representative of the estate and went on to find her an interested person individually because of her interest as a contingent remainderper-son of the residuary trust. Further, the appellate court found that the plain language of the trust required a corporate trustee and thus the trial court could not appoint an individual successor trustee.

Guardianship court did not have authority to order successor trustee of ward's revocable trust to pay trust assets to ward's creditors prior to paying expenses for administration of trust following ward's death.
In re Guardianship of Mary Gneiser, 873 So. 2d 573 (Fla. 2d DCA 2004)

Following the Ward's death, the Trustee of the Ward's Revocable Trust (the "Trust") received the lower court's approval to pay the Ward's burial expenses from the Trust's assets held by the Trustee's attorney. The Trustee also sought approval of the lower court to pay the balance of trust assets ($3,591.99) for attorney's fees and costs of the Trust. Upon the Guardian's objection, the lower court ordered payment of the Trust's assets to satisfy various personal liabilities of the Ward.

The appellate court found that §737.3061(1), Florida Statutes prohibited the guardianship court from entering an order directing the Trustee to pay trust assets to satisfy claims of the Guardian and the Ward's other creditors where those claims were based upon the individual liability of the Ward. Following the death of the Ward, §737.3061(1) requires that creditors of the Ward proceed against the Ward's estate and that no action may be legally brought against the Trust. The statutory right to demand funds from a decedent's revocable trust is granted to the personal representative of the estate. In this case, no probate was filed, and there is no personal representative who would have the statutory authority.

Trial court prohibited from ruling on personal representative's petition for discharge while appeal is pending from trial court's order denying motion to revoke personal representative and for appointment of successor personal representative.
Carraway v. Carraway, 29 Fla. L. Weekly D1371, 2004 WL 1237199 (Fla. 1st DCA June 7, 2004)

While the appeal of the lower court's order denying a petition to remove the personal representative was pending, the personal representative petitioned for discharge. A beneficiary of the estate therefore filed a petition for writ of prohibition in the appellate court to prevent the lower court from ruling on the personal representative's petition for discharge. The appellate court held that if the lower court permitted the discharge, §733.901(2) Florida Statutes would bar a subsequent action against the personal representative. This would, in turn, impinge on the power and authority of the appellate court to decide the issue presented to it on appeal. As such, the appellate court granted the petition for writ of prohibition.

Where decedent died testate, was not survived by a spouse or any minor children, and where there were not enough assets in the estate to satisfy either the estate's liabilities or the cash bequests in decedent's will, decedent's homestead property should have gone to satisfy will's general bequests of cash before residuary bequests. Freely devisable homestead property, under certain circumstances, need not pass outside the probate estate. Question certified to the Florida Supreme Court.
Warburton v. Mckean, 29 Fla. L. Weekly D1411, 2004 WL 1257519 (Fla. 4th DCA June 9, 2004)

The decedent's will provided for two general devises of approximately $170,000 with the remainder to the decedent's four half-brothers. The estate's only substantial asset was the decedent's homestead property. The lower court held that the homestead should pass to the four half-brothers because the decedent's will did not specify that the homestead was to be sold to satisfy prior devises. As such, the lower court held that the home-

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stead was not part of the probate estate, and, therefore, it was not subject to sale to fund the general devises.

The appellate court reversed, holding that since the decedent was not survived by a spouse or a minor child, the homestead could be freely devised. The cash devises should have been satisfied before any distributions were made to the residuary beneficiaries. The fact that half-brothers could have received "protected homestead" as per *Snyder v. Davis*, 699 So. 2d 999 (Fla. 1997) was deemed to be irrelevant.

The following question was certified to the Florida Supreme Court:

> WHERE A DECEDENT IS NOT SURVIVED BY A SPOUSE OR ANY MINOR CHILDREN, DOES DECEDENT'S HOMESTEAD PROPERTY, WHEN NOT SPECIFICALLY DEVISED, PASS TO GENERAL DEVISEES BEFORE RESIDUARY DEVISEES IN ACCORDANCE WITH SECTION 733.805, FLORIDA STATUTES?

Decedent's will exceeded power of appointment by creating a testamentary trust which expanded the group of beneficiaries. Decedent's spouse had called out his eight children by name and permitted Decedent to "have the limited power to appoint to my children, all or any part of the trust at the time of my spouse's death. . . ." The trial court correctly approved the gift being unequal among the children and correctly severed the interests Decedent gave to grandchildren.
Vetrick v. Keating, 29 Fla. L. Weekly D1409, 2004 WL 1254356 (Fla. 4th DCA June 9, 2004)

The decedent exercised a limited power of appointment over a portion of her predeceased husband's trust. As part of the power of appointment, the decedent left a portion of her husband's trust to one of her daughters (Judith), in trust; appointed a trustee and successor trustees; gave the trustee the discretion to distribute Judith's share to Judith's descendants; and directed that upon Judith's death, the remainder of Judith's share be distributed to Judith's descendants, *per stripes*.

Judith argued that the decedent did not comply with the power of appointment when she appointed successor trustees to administer Judith's share and improperly broadened the class of beneficiaries by giving remainder shares to Judith's children. The trial court found that the decedent's creation of a trust for the benefit of Judith was proper, but that she exceeded the power of appointment by including Judith's children as beneficiaries. The trial court also determined that the inclusion of Judith's children was not an essential factor in the decedent's scheme of disposition and could easily be severed. The trial court ordered that the appointment to Judith's children be severed and any remaining interest upon Judith's death revert back to the decedent's husband's trust. The trial court entered an order of summary judgment consistent with the above.

The appellate court affirmed in all respects, citing to Section 23.1 of the Restatement (Second) of Properties and *Old Colony Trust Co. v. Richardson*, 297 Mass. 257, 7 N.E.2d 432 (1937).

Amendment to §733.107, Florida Statutes requires shifting of burden of proof after presumption of undue influence arises in a will construction case, superseding decisions in *In re Carpenter's Estate* and *Cripe v. Atlantic First National Bank* to the extent that they prohibit a shifting of the burden of proof. The quantum of proof is a preponderance of the evidence.
Hack v. Janes, 29 Fla. L. Weekly D1652, 2004 WL 1584910 (Fla. 5th DCA July 16, 2004)

The Fifth DCA held that the 2002 amendment to section 733.107, adding subsection 2, was intended to incorporate sections 90.301 through 90.304 of the Florida Evidence Code and requires a shifting of the burden of *proof* after the presumption of undue influence arises in a will contest. The new statute supersedes *In re Carpenter's Estate*, 253 So. 2d 697 (Fla. 1971) and *Cripe v. Atlantic First National Bank*, 422 So. 2d 820 (Fla.1982) to the extent that they prohibit a shifting of the burden of proof in presumption of undue influence in cases.

Because §733.107(2) specifically mandates that the presumption shifts the burden of proof under Sections 90.301 through 90.304 when a presumption of undue influence arises, as it did here, Janes, the alleged wrongdoer, bore the burden of proving, by a preponderance of the evidence, that there was no undue influence. Nonetheless, *Carpenter* and *Cripe* live on, at least in part. Those portions of *Carpenter* and *Cripe* that prescribe the legal effect of the presumption of undue influence are superseded by the new statute. Those portions of *Carpenter* and *Cripe* that explain the circumstances giving rise to the presumption of undue influence are not superseded by statute.

Interpreting §732.108(2) Florida Statutes, if evidence of paternity is presented to the court, summary judgment is inappropriate until the adjudication of paternity which may be completed in the probate proceedings. Proof needs to be clear and convincing.
Fagan v. Cramer, 29 Fla. L. Weekly D1728a, 2004 WL 1672412 (Fla. 4th DCA July 28, 2004)

In asserting that she was entitled to inherit the decedent's entire estate, Mary Fagan claimed that she was the only lineal descendant of the decedent, Ruth Emma Lee, because she is the out of wedlock daughter of the decedent's deceased brother. Finding that Fagan had not offered sufficient evidence to comply with section 732.108(2), Florida Statutes, and that her affidavits did not create a material issue of law or fact, the trial court granted summary judgment against her. The appellate court reversed, noting that Fagan presented evidence that Lee's brother was her natural father creating an issue of material fact which the trial court needed to resolve prior to issuing summary judgment.

Trust with testamentary aspects may be reformed after death of settlor for unilateral drafting mistake regardless of whether the trust was revocable or irrevocable in nature. Absent reformation, the disputed gift fails for lack of a person to enforce the trust.
Davis v. Rex, 29 Fla. L. Weekly D1452, 2004 WL 1335911 (Fla. 4th DCA June 16, 2004).

A trust was created that provided

that, upon the death of Grantor and Grantor's spouse, the assets should be paid to the two sons of Grantor, one third immediately, and each of the remaining two thirds five and ten years thereafter. Further, the trust provided that if either son died prior to a distribution, that share shall be distributed to the then living issue of said deceased son. The trust was silent on the payment should a son die without issue. Charities claiming under one son who died without any children sued to take his share.

The lower court found the trust to be unambiguous and that there was no showing of mistake to support reformation. Thus, the lower court entered summary judgment in favor of the deceased son's estate. The appellate court reversed because testimony and pleadings showed a scriveners error and the intent of the Grantor of keeping the assets in the bloodline. This created an issue of triable fact, and summary judgment should not have been granted.

Absent the lower court's finding in favor of reformation, the Court instructed that the trust be interpreted in accordance with *McLemore v. McLemore*, 675 So. 2d 202 (Fla. 1st DCA 1996) and *Kunce v. Robinson*, 469 So. 2d 874, 877 (Fla. 3d DCA 1985). If the designation of beneficiaries is deemed too indefinite for enforcement of the provisions of a trust, the usual result is that the trust is void. Where, as here, it is compatible with the Grantor's intent, it may be possible to sever the uncertain provision from an accompanying enforceable one so that the remaining provision, and the trust as a whole, may be preserved.

Attorney client privilege is held by the Trustee of trust over attorneys employed by the trust to the exclusion of the beneficiary in the ordinary course of litigation between the trustee and the beneficiary.

Jacob v. Barton, 29 Fla. L. Weekly D1723a, 2004 WL 1666065 (Fla. 2d DCA July 28, 2004)

The Trustee employed an attorney to file an action to construe a trust. A beneficiary counterclaimed to remove the Trustee claiming mismanagement and that the Trustee was seeking personal gain over her fiduciary responsibilities. The beneficiary sought production of the attorney's billing records and the Trustee refused. The lower court ordered that the records be produced.

On appeal, the appellate court held that it is improper for the lower court to order production of the documents at this time. There has been no privilege log filed, the records have not been the subject of in camera review and a lawyer retained by a trust is ordinarily held to represent the trustee, not the beneficiary, even though fees are paid with trust funds. The court noted that this is not an action to recover money for the trust, as is an action for an accounting, which has a history of permitting the discovery of attorney billing records.

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Executive Committee

CHAIR
Laird Andrew Lile
Laird Andrew Lile, P.A.
250 Bahia Pt.
Naples, FL 34103-3511
(239)649-7778
FAX: (239)649-7780
LLile@LairdALile.com

CHAIR-ELECT
Julius James Zschau
Pennington Moore Wilkinson Bell, et al
133 N. Fort Harrison Ave.
Clearwater, FL 33755-4020
(727)449-9553
FAX: (727)447-3158
jayz@penningtonlaw.com

PROBATE AND TRUST LAW DIVISION DIRECTOR
Rohan Kelley
Holland & Knight
1 E. Broward Blvd., Ste. 1300
Fort Lauderdale, FL 33301-1804
(954)468-7852
FAX: (954)462-2030
rohan.kelley@hklaw.com

REAL PROPERTY LAW DIVISION DIRECTOR
Melissa Jay Murphy
Salter, Feiber, Yenser, Murphy & Hutson, P.A.
P.O. Box 357399
Gainesville, FL 32635-7399
(352)376-8201
FAX: (352)376-0648
melissam@salterlaw.net

CIRCUIT REPRESENTATIVES DIRECTOR
George Joseph Meyer
Carlton Fields, P.A.
P.O. Box 3239
Tampa, FL 33601-3239
(813)229-4328
FAX: (813)229-4133
gmeyer@carltonfields.com

SECRETARY
John B. Neukamm
Mechanik Nuccio
101 E. Kennedy Blvd., Ste. 3140
Tampa, FL 33602-5151
(813)276-1920
FAX: (813)276-1560
jbn@floridalandlaw.com

TREASURER
Charles Ian Nash
Frese Nash & Hansen, P.A.
930 S. Harbor City Blvd., Ste. 505
Melbourne, FL 32901-1967
(321)984-3300
FAX: (321)951-3741
cinashlaw@aol.com

LEGISLATION CHAIR
Sandra Fascell Diamond
Williamson, Diamond & Caton, P.A.
9075 Seminole Blvd.
Seminole, FL 33772-3150
(727)398-3600
FAX: (727)393-5458
sdiamond@wdclaw.com

SEMINAR COORDINATOR
Lee Alan Weintraub
Becker & Poliakoff, P.A.
3111 Stirling Rd.
Fort Lauderdale, FL 33312-6566
(954)985-4147
FAX: (954)985-4176
lweintraub@becker-poliakoff.com

IMMEDIATE PAST CHAIR
Louis B. Guttmann III
P.O. Box 628600
Orlando, FL 32862-8600
(800)432-9594
FAX: (407)855-5852
lguttmann@thefund.com

Liaison to the Board of Governors:
Gwynne A. Young, Tampa – (813)229-4333

Program Administrator: Bonnie Elliott Bevis
The Florida Bar
651 E. Jefferson Street
Tallahassee, FL 32399-2300
(850)561-5619
FAX: (850)561-5825
bbevis@flabar.org

Circuit Representatives

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Hodgson Russ, LLP
1801 N. Military Trl., Ste. 200
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(561)862-4139
Email: proman@hodgsonruss.com

Judicial Liaisons
Morris Silberman
1700 N. Tampa St., Ste. 300
Tampa, FL 33602-2648
(813)272-3430
Email: silberma@flcourts.org

Maria M. Korvick
310 Dade Co. Cthse.
73 W. Flagler St.
Miami, FL 33130-1731
(305)349-7086
Email: mkorvick@jud11.flcourts.org

First Circuit
Alan Bart Bookman
P.O. Drawer 1271
30 S. Spring St.
Pensacola, FL 32501-5612
(850)433-6581
Fax: (850)434-7163
Email: abb@esclaw.com

Patricia Colleen Coffield
Coffield & Associates, P.A.
1719 S. County Hwy. 393
Santa Rosa Beach, FL 32459-4219
(850)622-1141
Fax: (850)622-1144
Email: coffieldpc@aol.com

W. Christopher Hart
34990 Emerald Coast Pkwy., Ste. 301
Destin, FL 32541-8417
(850)650-3304
Fax: (850)650-3305
Email: chart@cphlaw.com

Second Circuit
Frederick Raymond Dudley
Akerman Senterfitt
106 E. College Ave., Ste. 1200
Tallahassee, FL 32301-7741
(850)224-9634
Fax: (850)222-0103
Email: fdudley@akerman.com

Peter M. Dunbar
Pennington
P.O. Box 10095
Tallahassee, FL 32302-2095
(850)222-3533
Fax: (850)222-2126
Email: pete@penningtonlaw.com

Victor Lee Huszagh
Florida Land Title Assoc., Inc
249 E. Virginia St.
Tallahassee, FL 32301-1263
(850)681-6422
Fax: (850)681-6271
Email: leeh@flta.org

Third Circuit
William James Haley
Brannon, Brown, Haley
P.O. Box 1029
Lake City, FL 32056-1029
(386)752-3213
Fax: (386)755-4524
Email: wjh@bbattorneys.com

Guy W. Norris
Norris & Johnson, P.A.
P.O. Box 2349
Lake City, FL 32056-2349
(386)752-7240
Fax: (386)752-1577
Email: norrisgw@bellsouth.net

Clay Alan Schnitker
Davis, Schnitker, Reeves & Browning, P.A.
P.O. Box 652
Madison, FL 32341-0652
(850)973-4186
Fax: (850)973-8564
Email: cschnitker@earthlink.net

Michael S. Smith
Smith, Smith & Moore, P.A.
P.O. Box 579
Perry, FL 32348-0579
(850)584-3812
Fax: (850)584-7148
Email: mikesmith@gtcom.net

Fourth Circuit
Barry Barnett Ansbacher
1301 Riverplace Blvd., Ste. 2450
Jacksonville, FL 32207-9047
(904)396-8050
Fax: (904)396-8076
Email: bba@ansbacher.net

William Raymond Blackard, Jr.
100-C Wharfside Way
Jacksonville, FL 32207-8155
(904)354-4400
Fax: (904)354-5552
Email: wrbjr@blackardlaw.com

Ralph R. Crabtree
Building A., Ste. 200
8777 San Jose Blvd.
Jacksonville, FL 32217-4213
(904)732-9701
Fax: (904)732-9702
Email: rrc@crabtreefirm.com

Michael W. Fisher
Fisher, Tousey, Leas & Ball
1 Independent Dr., Ste. 2600
Jacksonville, FL 32202-5020
(904)356-2600

Kevin Patrick Flood
2163 College St.
Jacksonville, FL 32204-3705
(904)874-7838
Fax: (904)633-9470
Email: kpflood@floodlaw.com

Fifth Circuit
Johnnye Ladine Friedrich
Haag, Friedrich & Blume, P.A.
452 Pleasant Grove Rd.
Inverness, FL 34452-5746
(352)726-0901
Fax: (352)726-3345
Email: jlf1@tampabay.rr.com

Denise A. Lyn
121 N. Apopka Ave.
Inverness, FL 34450-4237
(352)726-9400
Fax: (352)726-9441
Email: dlyn@tampabay.rr.com

Sixth Circuit
Robert Nicholas Altman
5628 Main St.
New Port Richey, FL 34652-2636
(727)848-8435
Fax: (727)847-2750
Email: altmanlaw@sanctum.com

Joseph W. Fleece III
Baskin Fleece
13577 Feather Sound Dr., Ste. 550
Clearwater, FL 33762-5527
(727)572-4545
Fax: (727)572-4646
Email: jfleece@baskinfleece.com

Joseph W. Fleece, Jr.
Holland & Knight, LLP
200 Central Ave., Ste. 1600
Saint Petersburg, FL 33701-3326
(727)824-6169
Fax: (727)822-8048
Email: jofleece@hklaw.com

Linda S. Griffin
Linda Suzzanne Griffin, P.A.
1455 Court St.
Clearwater, FL 33756-6161
(727)449-9800
Fax: (727)446-2748
Email: lawyergrif@aol.com

Donald Ray Peyton
7317 Little Rd.
New Port Richey, FL 34654-5519
(727)848-5997
Fax: (727)848-4072
Email: peytonlaw@yahoo.com

Marilyn Mewha Polson
Fisher & Sauls
P.O. Box 387
Saint Petersburg, FL 33731-0387
(727)822-2033
Fax: (727)822-1633
Email: mpolson@fishersauls.com

Robert H. Willis
Skelton, Willis, Bennett, Wallac
259 3rd St. N.
Saint Petersburg, FL 33701-3818
(727)822-3907
Fax: (727)896-4100
Email: rhwsr@swbwlaw.com

Seventh Circuit
Edwin Channing Coolidge, Jr.
Landi S. Graham French, P.A.
P.O. Box 48
Deland, FL 32721-0048
(386)734-3451
Fax: (386)736-1350
Email: ccoolidge@landispa.com

Eighth Circuit
John Frederick Roscow IV
Carpenter & Roscow, P.A.
5608 N.W. 43rd St.
Gainesville, FL 32653-3332
(352)376-5242
Fax: (352)375-0690
Email: roscow@raclaw.net

Ninth Circuit
David James Akins
Holland & Knight, LLP
P.O. Box 1526
Orlando, FL 32802-1526
(407)425-8500
Fax: (407)244-5288
Email: david.akins@hklaw.com

Victoria Hunt Carter
Legal Department
8803 Vistana Centre Dr.
Orlando, FL 32821-6354
(407)239-3778
Fax: (407)239-3016
Email: vicky.carter@starwoodvo.com

Russell W. Divine
Divine & Estes, P.A.
P.O. Box 3629
Orlando, FL 32802-3629
(407)426-9500
Fax: (407)426-8030
Email: rwdivine@divineestes.com

Frederick Wayne Jones
Graham Builder Jones, et al
369 N. New York Ave., Ste. 300
Winter Park, FL 32789-3124
(407)647-4455
Fax: (407)740-7063
Email: fjones@grahambuilder.com

Stacy Ossin Kalmanson
Land America Financial Group, Inc.
201 S. Orange Ave., Ste. 1350
Orlando, FL 32801-3417
(407)481-8181
Fax: (407)481-0864
Email: skalmanson@landam.com

Randy James Schwartz
Florida Assoc of Realtors
P.O. Box 725025
Orlando, FL 32872-5025
(407)438-1400
Fax: (407)438-1411
Email: randys@far.org

Charles D. Wilder
1131 Symonds Ave.
Winter Park, FL 32789-3707
(407)644-2216
Fax: (407)644-2194
Email: cwilder@wilder-law.com

Tenth Circuit
Gregory R. Deal
1525 S. Florida Ave., Ste. 2
Lakeland, FL 33803-2294
(863)603-0424
Fax: (863)603-0520
Email: gdeal@gate.net

J Ross Macbeth
2543 U.S. Highway 27 S.
Sebring, FL 33870-2125
(863)385-7600
Fax: (863)385-7911
Email:
lawofficeofjrossmacbeth@earthlink.net

Craig A. Mundy
4927 Southfork Dr.
Lakeland, FL 33813-2043
(863)647-3778
Fax: (863)647-4580
Email: craig@southforkgroup.com

Sandra Graham Sheets
92 Lake Wire Dr.
P.O. Box 32092
Lakeland, FL 33802-2092
(863)682-1161
Email: sandra.sheets@hklaw.com

Eleventh Circuit
Carlos Alberto Batlle
Steel, Hector & Davis, LLP
200 S. Biscayne Blvd., Ste. 4000
Miami, FL 33131-2362
(305)577-2921
Fax: (305)577-7001
Email: cb@steelhector.com

Frederick Claiborne Craig, Jr.
Steel, Hector & Davis, LLP
200 S. Biscayne Blvd., Ste. 4000
Miami, FL 33131-2362
(305)577-2936
Email: clay.craig@steelhector.com

Thomas M. Karr
Steel, Hector & Davis, LLP
200 S. Biscayne Blvd., Ste. 4000
Miami, FL 33131-2362
(305)577-2862
Fax: (305)577-7001
Email: tmk@steelhector.com

Nelson Clive Keshen
Two Datran Center
9130 S. Dadeland Blvd., Ste. 1511
Miami, FL 33156-7851
(305)670-7010
Fax: (305)670-6203
Email: nelson@keshenlaw.com

Maria Marinello Korvick
310 Dade Co. Cthse
73 W. Flagler St.
Miami, FL 33130-1731
(305)349-7086
Fax: (305)349-7090
Email: mkorvick@jud11.flcourts.org

Louis Nostro, Jr.
Shutts & Bowen, LLP
201 S. Biscayne Blvd., Ste. 1500
Miami, FL 33131-4328
(305)358-6300
Fax: (305)347-7864
Email: lnostro@shutts-law.com

Wilson Smith
Steel, Hector & Davis, LLP
200 S. Biscayne Blvd., Fl. 40
Miami, FL 33131-2310
(305)577-7033
Fax: (305)374-4617
Email: ws@steelhector.com

Donald Wayne Stobs, Jr.
9505 N.E. 5th Ave.
Miami, FL 33138-2728
(305)751-8556
Fax: (305)751-9983
Email: dstobs2@bellsouth.net

Diana S.C. Zeydel
Greenberg Traurig, P.A.
1221 Brickell Ave.
Miami, FL 33131-3224
(305)579-0575
Fax: (305)579-0717
Email: zeydeld@gtlaw.com

Twelfth Circuit
Michael Loren Foreman
Icard Merrill Cullis, et al
P.O. Box 4195
Sarasota, FL 34230-4195
(941)953-8106
Fax: (941)366-6384
Email: mforeman@icardmerrill.com

James M. Nixon II
4905 Manatee Ave. W.
Bradenton, FL 34209-3855
(941)792-0203
Fax: (941)795-1391
Email: jmnixon@nixonlawfirm.com

L. Howard Payne
Kirk Pinkerton
720 S. Orange Ave.
Sarasota, FL 34236-7718
(941)364-2480
Fax: (941)364-2490
Email: howardpayne@kirkpinkerton.com

Percy Allen Schofield
1429 60th Ave. W., Ste. 300
Bradenton, FL 34207-4614
(941)755-2674
Fax: (941)756-0981
Email: lawpas@aol.com

David Mark Silberstein
720 S. Orange Ave.
P.O. Box 3798
Sarasota, FL 34230-3798
(941)364-2400
Fax: (941)364-2490
Email: silberstein@kirkpinkerton.com

Thirteenth Circuit
Lynwood F. Arnold, Jr.
McWhirter Reeves, et al
P.O. Box 3350
Tampa, FL 33601-3350
(813)224-0866
Email: larnold@mac-law.com

Thomas Nathan Henderson III
Hill, Ward & Henderson, P.A.
101 E. Kennedy Blvd., Ste. 3700
Tampa, FL 33602-5195
(813)221-3900
Fax: (813)221-2900
Email: thenderson@hwhlaw.com

George Joseph Meyer
Carlton Fields, P.A.
P.O. Box 3239
Tampa, FL 33601-3239
(813)229-4328
Fax: (813)229-4133
Email: gmeyer@carltonfields.com

William R. Platt
600 S. Magnolia Ave., Ste. 125
Tampa, FL 33606-2751
(813)259-9604
Fax: (813)251-1927
Email: w.platt2@verizon.net

Morris Silberman
1700 N. Tampa St., Ste. 300
Tampa, FL 33602-2648
(813)272-3430
Fax: (813)229-6534
Email: silberma@flcourts.org

Melissa Miller Thalji
Fowler, White, Boggs, Banker, P.A.
P.O. Box 1438
Tampa, FL 33601-1438
(813)228-7411
Fax: (813)229-8313
Email: mthalji@fowlerwhite.com

Gwynne Alice Young
Carlton Fields, P.A.
P.O. Box 3239
Tampa, FL 33601-3239
(813)229-4333
Fax: (813)229-4133
Email: gyoung@carltonfields.com

Fourteenth Circuit
Henry Alan Thompson
Harrison Sale McCloy, et al
P.O. Box 1579
Panama City, FL 32402-1579
(850)769-3434
Email: athompson@harrisonsale.com

Fifteenth Circuit
John Robert Banister
John R. Banister, P.A.
1555 Palm Beach Lakes Blvd., Ste. 416
West Palm Beach, FL 33401-2332
(561)681-9656
Fax: (561)472-6172
Email: jbanister@universallandtitle.com

Glenn Myles Mednick
Herb & Mednick, P.A.
2200 N.W. Corporate Blvd., Ste. 315
Boca Raton, FL 33431-7307
(561)982-9930
Fax: (561)982-9934
Email: gmmprobate@aol.com

Paul Edward Roman
Hodgson Russ, LLP
1801 N. Military Trl., Ste. 200
Boca Raton, FL 33431-1810
(561)862-4139
Fax: (561)394-3862
Email: proman@hodgsonruss.com

Sixteenth Circuit
Thomas Dickinson Wright
P.O. Box 500309
Marathon, FL 33050-0309
(305)743-8118
Fax: (305)743-8198
Email: twlaw@bellsouth.net

Seventeenth Circuit
Daniel Lee Adams
600 Petunia Dr.
Plantation, FL 33317-1926
(954)582-3914
Fax: (954)587-7107
Email: dadams@thefund.com

Robert Brian Judd
500 E. Broward Blvd., Ste. 1400
Fort Lauderdale, FL 33394-3076
(954)462-2000
Fax: (954)523-1722
Email: rjudd@gunster.com

Michelle Gena Trca
Michelle G. Trca, P.A.
1133 S.E. 4th Ave.
Fort Lauderdale, FL 33316-1119
(954)467-6711
Fax: (954)467-1511
Email: michelletrca@bellsouth.net

Eighteenth Circuit
Jerry W. Allender
118 Country Club Dr.
Titusville, FL 32780-8607
(321)269-1511
Fax: (321)264-2725
Email: jallender@allenderlaw.com

Lawrence W. Carroll, Jr.
706 Turnbull Ave., Ste. 202
Altamonte Springs, FL 32701-6476
(407)260-5588
Fax: (407)260-5197
Email: larrylaw4@juno.com

Rex Everet Moule, Jr.
601 E. Strawbridge Ave.
Melbourne, FL 32901-4733
(321)723-3700
Fax: (321)723-8489
Email: rmoule@moulelaw.com

Robert William Wattwood
O'Brien Riemenschneider, et al
1686 W. Hibiscus Blvd.
Melbourne, FL 32901-2631
(321)728-2800
Fax: (321)728-0002
Email: rwattwood@orkl.com

Nineteenth Circuit
Richard J. Dungey
Fox, Wackeen, Dungey, Seeley, Sweet, Beard & Sobel
P.O. Box 6
Stuart, FL 34995-0006
(772)287-4444
Fax: (772)283-4637
Email: rdungey@foxwackeen.com

Thomas Henry Thurlow III
Thurlow & Thurlow, P.A.
P.O. Box 106
Stuart, FL 34995-0106
(772)287-0980
Fax: (772)220-0815
Email: todd@thurlowpa.com

Twentieth Circuit
Alan Beaumont Fields
3030 Horseshoe Dr. S., Ste. 200
Naples, FL 34104-6139
(239)430-5000
Fax: (630)839-1078
Email: abfields@mindspring.com

Charles R. Gehrke
Wollman, Gehrke & Solomon, P.A.
3501 Bonita Bay Blvd., Ste. 3
Bonita Springs, FL 34134-1624
(239)947-8811
Fax: (239)947-8025
Email: cgehrke@wga-law.com

George W. Lange, Jr.
Amsouth Bank
4851 Tamiami Trl. N., Ste. 101
Naples, FL 34103-3098
(239)434-1116
Fax: (239)434-2578
Email: george.lange@amsouth.com

William Michael Pearson
Grant Fridkin Pearson, et al
5551 Ridgewood Dr., Ste. 501
Naples, FL 34108-2719
(239)514-1000
Fax: (239)594-7313
Email: wpearson@gfpac.com

Dennis R. White
4501 Tamiami Trl. N., Ste. 210
Naples, FL 34103-3018
(239)261-4700
Fax: (239)261-4721
Email: drw@whitelaw.com

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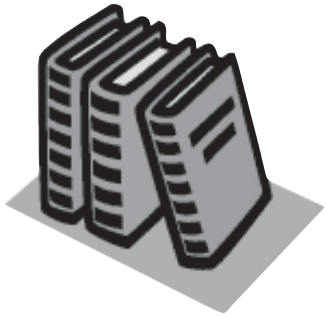

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Linda Cook - ext. 5735
lcook@flabar.org
* Criminal Trial (2nd Cycle)
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Cherie Morgan - ext. 5693
cmorgan@flabar.org
* Civil Trial (1st Cycle)
* Elder (1st)

Carol Vaught - ext. 5738
cvaught@flabar.org
* Appellate Practice (1st)
* Business Litigation (2nd)
* International (1st)
* Real Estate (2nd)

Lindsay Worsham - ext. 5690
lacuff@flabar.org
* Admiralty & Maritime (1st)
* City, County & Local Gov't (2nd)
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* Tax (1st)

Michelle Francis - ext. 5737
mfrancis@flabar.org
* Labor & Employment (1st)
* Workers' Compensation (2nd)

Kathryn Cope - ext. 5736
kcope@flabar.org
* Marital & Family (1st)
* Immigration & Nationality (1st)
* Wills, Trusts & Estates (2nd)

Mustafa Mahdi - ext. 5768
mmahdi@flabar.org
* Aviation (1st)
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Application Filing Periods Each Year:
1st Cycle: July 1 - August 31
2nd Cycle: September 1 - October 31

Exam Dates Each Year (Day to be Announced):
1st Cycle: March
2nd Cycle: May

Rev. 09/04

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2004-2005
RPPTL Section Budget

The following budget was approved by the Executive Council in February of 2004 and by The Board of Governors in April of 2004. The Section has approved a line item to pay speaker(s) expense(s) in excess of $50 per day as allowed by CLE policy but there has been no maximum specified at this time. All travel and office expense payments are in accordance with Standing Board Policy 5.23. Travel expenses for other than Bar members or Bar staff may be made if in accordance with 5.23(5)(h), a copy of which is available from Bar headquarters upon request. Costs of the chair's suite at the Bar Annual Meeting are paid by the Section. This includes costs associated with its use as a hospitality suite.

REVENUE:	
CLE Seminars	27,105
Videotape Sales	5,000
Audiotape Sales	25,000
Book/Material Sales	1,000
Sponsorship	135,000
Investment Income	11,000
Reimb. Member Mtg. Trvl.	82,400
Reimb. Council Recreation	4,500
Reimb. Spouse Function	10,000
Returns	(200)
Actionline Subs & Ads	2,000
Legislative Update	48,500
Attorney Trust Liaison Conference	75,500
Wills, Trusts & Estates Cert. Rev. Course	44,000
Real Estate Cert. Rev. Course	34,000
Section Convention	47,000
Exhibitors	4,000
Net Dues	145,450

EXPENSES:	
Staff Travel	3,667
Postage	8,000
Printing	3,000
Officer/Council Ofc. Exp.	1,000
Newsletter	25,000
Supplies	400
Photocopying	500
Law School Liaison	1,000
Meeting Travel Expense	140,000
CLE Speaker Expense	2,000
Committee Expense	32,000
Board or Council Mtgs	35,000
Executive Council Directory	2,000
Awards	5,000
Website	50,000
Legislative Counsel - Fee	65,000
Legislative Counsel - Expenses	5,000
Legislative Travel	6,500
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Realtor Relations	8,500
Council Mtg. Recreation	20,000
Public Information	2,500
Hospitality Suite	15,000
Spouse Functions	10,000
Memorial Tributes	500
Scrivener	9,000
Council of Sections	300
Operating Reserve	45,312
Miscellaneous	500
Officers Office Expense	1,000
Legislative Update	57,236
Attorney Trust Liaison Conference	124,907
Wills, Trusts & Estates Cert. Rev. Course	31,269
Real Estate Cert. Rev. Course	31,769
Section Convention	70,222
NET OPERATIONS	**(112,115)**
BEG. FUND BALANCE	**230,116**
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ACTIONLINE BULLETIN BOARD

TAX AND ESTATE PLANNING CLE. The Estate and Trust Tax Planning Committee will be presenting a CLE Program on a wide variety of tax and estate planning topics on November 4, 2004 in Fort Lauderdale and November 5, 2004 in Tampa. More details to come. Please mark your calendars!

EFFECTIVE JULY 1, 2004, the Orange County Clerk of Court imposes a charge of $6 for **depositing a Will** for safekeeping.

WEBSITE UPDATED! The Section's redesigned website was unveiled on June 15 at: **www.flabarrpptl.org**

Have you SEEN it?

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

HURRICANE RELIEF REQUEST. Governor Jeb Bush's office has asked The Real Property, Probate and Trust Law Section to assist with a specific aspect of the relief efforts for victims of recent hurricanes. See inside for details.

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