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Tortoise Island and Easements by Implication in Florida

By Richard E. Danley, Jr., Esq., Lowndes, Drosdick, Doster, Kantor & Reed, P.A., Orlando, Florida

Easements by implication have long been recognized within and outside of Florida. However, ever since the decision by the Florida Supreme Court in *Tortoise Island Communities, Inc. v. Moorings Ass'n, Inc.*, 489 So. 2d 22, (Fla. 1986) ("*Tortoise Island*") there is strong disagreement as to whether an easement by implication can still be created in Florida (absent (1) qualifying under §704.01, Fla.Stat. [way of necessity] or (2) qualifying pursuant to a written agreement meeting the requirements of §689.01, Fla.Stat. [written instrument signed in the presence of two subscribing witnesses] and §725.01, Fla.Stat. ["Statute of Frauds"]). If *Tortoise Island* is read to limit the law of implied easements in Florida to §704.01, Fla.Stat. or to require some form of express, written grant complying with §689.01, Fla.Stat. and §725.01, Fla.Stat. to create any implied easement, then, for the most part, there is no doctrine of implied easements remaining in Florida. This article does not seek to settle this dispute nor answer definitively what is the ultimate meaning or holding of *Tortoise Island*, but it does seek to understand *Tortoise Island* and to offer some reasons why *Tortoise Island* may not cut off implied easements as completely as the language of that case might otherwise imply. It also attempts to explore irrevocable licenses as a partial substitute or equivalent for an implied easement.

Prior Case Law for Implied Easements in Florida.

Dinkins v. Julian, 122 So. 2d 620 (Fla. 2d DCA 1960) ("*Dinkins*") recognized the ability under Florida law to create an implied easement. *Dinkins* set out the general rules for

See "Tortoise Island," page 3

Chair's Message:

Nice Job, RPPTLs!

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



Thank you for the opportunity to chair the largest and most active section of The Florida Bar. The Real Property, Probate and Trust Law Section has a long rich heritage, and it has been truly an honor for me to carry the banner this year. This seat offers one the clearest view first hand of the work accomplished by all those who actively participate through the Executive Council and its committees. Ours is a big section that flourishes through the work of many. It is this group which I thank for making this year a successful one for our Section. To my fellow officers, all our committee chairs and vice-chairs, and everyone who has participated in a Council meeting, a committee meeting or activity, or as a speaker at a CLE program: Thank You!

Special thanks go to those who undertake the responsibility for areas of critical importance to our Section. The work of these individuals is often times behind the scenes. Our

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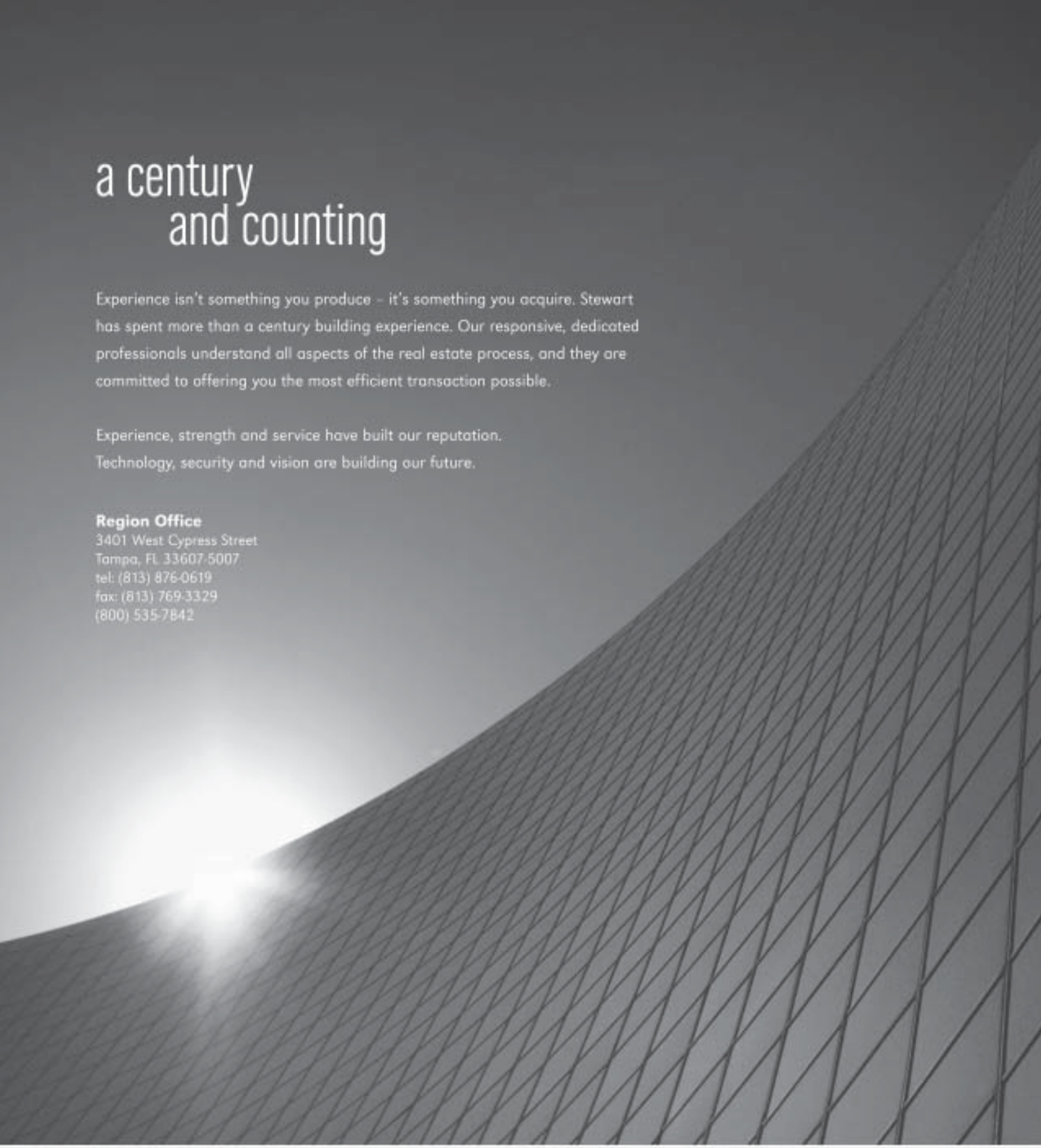

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creating any easement and then specifically an implied easement in Florida. *Dinkins* points out (at page 622) that in Florida easements are created in one of three ways. "They are created by express grant, by prescription, or by implication." Because the easement in question in *Dinkins* did not satisfy the requirements for a prescriptive easement and was not an express grant, the court examined the basis for establishing an easement by implication. The *Dinkins* Court then referred to and quoted Thompson on Real Property, §392 as follows: "The rule is general that, where a owner conveys part of his land, he impliedly grants all those apparent or visible easements upon the part (of the land) retained, which were at the time used by the grantor for the benefit of the part conveyed and which are reasonably necessary for the use of that part. Thus, where an owner of two adjoining residences on the same tract of land sold one of them, it was held that the purchaser took the part sold with all the benefits and burdens appearing at the time of the sale to belong as between it and the land retained.*** The reason of the rule, in case of an easement implied on account of strict necessity, is that the grantor shall not be permitted to derogate from his grant by denying the grantee the means by which it is to be enjoyed." The rule has a logical and practical basis and has generally been followed in most jurisdictions.

To effect the creation of such an implied easement, the *Dinkins* Court pointed out that the implied easement is determined or gathered from the circumstances surrounding the conveyance; and this is taken to mean that whatever is obviously and visibly in use on the property as an incident or an appurtenance at the time of conveyance passes by implication when the land is sold. A rebuttable presumption exists that the parties contracted with reference to the visual condition of the property at the time of the sale and intended the property to be sold with the visible easements. *Dinkins* at 623. In addition, the *Dinkins* Court said that for the implied easement to exist there must have been an original unity of title between the two pieces of property and the use for which the easement is to be implied must have been in place for a significant period of time (indicating the permanency of the easement before the severance of title between the two parcels took place). The *Dinkins* Court then concluded that the applicable easement present under the facts of *Dinkins* did not meet the standards for an implied easement and refused to grant any easement in that case.

The requirements for an implied easement in Florida were further set out in *Williams Island Country Club, Inc. v. San Simeon At The California Club, Ltd.*, 454 So. 2d 23 (Fla. 3d DCA 1984) ("*Williams Island*"). *Williams Island* involved two pieces of land owned by the same developer/owner. The owner of the Williams Island County Club developed a condominium and resort development with an adjoining 18 hole golf course. It then sold off additional land which was part of the original property for further resort development ("San Simeon Tract"). Access to the San Simeon Tract was over an approximately 100 by 200 foot plot of land ("Entrance Parcel") conveyed as part of the overall San Simeon Tract and across which the golf-cart path between the 13th hole and the 14th green of the William Island Country Club had to cross. The written contract governing the sale of the San Simeon Tract stated that, when sold, the grantee would grant the owners of the Williams Island Country Club certain reasonable easements for golf carts and maintenance purposes. However, no specific easements were described in the contract or shown on the master plan attached to it and no actual grant of easement was ever granted or recorded for the golf-cart path across the Entrance Parcel. The Williams Island Country Club was thereafter sold by the original developer. The purchaser of the San Simeon Tract also subsequently sold that property to other owners. At the time the purchaser of the San Simeon Tract purchased the property, they were reminded about the need for the imposition of a golf-cart easement between the 13th hole and the 14th green of the golf course across the Entrance Parcel. Following the purchase of the San Simeon Tract, the new owners of the San Simeon Tract were unable to reach agreement with the owners of the Williams Island Country Club for the proposed easement. The owners of the San Simeon Tract then bulldozed the cart path and blocked access at any point over the entry strip preventing use of the cart path.

The *Williams Island* Court found that an easement, such as a golf-cart path, may be created by implication. The court stated (at page 25):

> When land is owned originally by the same owner, and part of the land is used for the benefit of another part, such use is termed a "quasi-easement," and it may become an implied easement when either part is severed from the other. The easement may be created by implied reservation, as in this case, when the servient tenement is sold to a third party, or by implied grant, when the dominant tenement is sold.
>
> Where, during the unity of title, an apparently permanent and obvious servitude is imposed on one part of an estate in favor of another part, which servitude is in use at the time of severance and is necessary for the reasonable enjoyment of the other part, on a severance of the ownership a grant of the right to continue such use arises by implication of law. Similarly, where the owner of property, one part of which has been subjected to such a use for the benefit of another part, sells both parts to difference purchasers, the respective portions granted are subject to or benefited by, as the case may be, an easement corresponding to such use.

In establishing the requirements for imposing at law an implied easement, the *Williams Island* Court set out three standards. First, the use of the land for the easement must be apparent or visible, or reasonably discoverable at the time the unity of title was severed. Second, the use must be such that a permanent use was intended. Third, the easement must be reasonably necessary for the use and benefit of the dominant tenement. Strict necessity, however, need not be shown pursuant to the holding by the *Williams Island* Court. The court then found that an implied easement in favor of the Williams Island Country Club was established at law suf-

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ficient to create an easement across the Entrance Parcel for access between the 13th hole and 14th green of the golf course.

Tortoise Island and Reversal of Prior Case Law

The *Tortoise Island* case put the law of the implied easements for the State of Florida into serious question. The original case was *Moorings Ass'n, Inc. v. Tortoise Island Communities, Inc.*, 460 So. 2d 961 (Fla.5th DCA 1984) ("*Moorings*") which was then overruled and quashed by the Florida Supreme Court in *Tortoise Island*. In its brief opinion the Florida Supreme Court stated that:

> The issue of law is whether an easement by implication from a preexisting use requires an absolute necessity or only a reasonable necessity such as will contribute to the convenient enjoyment of property. The court below held that a reasonable necessity was sufficient. In a well reasoned dissent, Judge Cowart maintained that such easement required an absolute necessity. We agree with Judge Cowart's reasoning and adopt it as our own.

The *Moorings* involved two pieces of land originally owned by the same developer. The developer developed a residential subdivision known as the Moorings which abutted an access canal which accessed the Banana River ("The Great Canal"). The Great Canal was separated from the Banana River by an island called Tortoise Island. The Banana River could be accessed via The Great Canal but not immediately from the Moorings development. To enhance the Moorings development the developer promised purchasers of its residential lots that it would cut a smaller canal giving more direct access across Tortoise Island from The Great Canal to the Banana River. In 1967 such cut was made creating the "Moorings Cut Canal" (herein so called). Since that time the cut was used by most Moorings residences who owned boats for ingress and egress to the Banana River. However, only thirteen of the residential lots were ever granted individual easement rights to use the Moorings Cut Canal. No general grant of easement was ever imposed in favor of all lot owners of the residential lots in the Moorings.

Tortoise Island was eventually sold to and developed by Tortoise Island Communities. At the time of the purchase the new owner was fully aware of the existence of the Moorings Cut Canal and its continuous use by the Moorings residents. In July 1982 the owners of Tortoise Island filled in portions of the Moorings Cut Canal, preventing use of the same for direct access by the Moorings residents to the Banana River. The *Moorings* Court concluded that there was an easement by implication and that the residents of the Moorings had a right to the continued use of the Moorings Cut Canal. The express grants of easement to use the Moorings Cut Canal by the thirteen (13) lot owners was not an issue nor addressed in the case.

The *Moorings* Court reviewed the standards for an implied easement in Florida and the basis for such an implied easement. The court stated (at page 963) that: "An implied easement is based on the concept that whenever a grantor conveys property, he includes or intends to include in the conveyance whatever is necessary for its beneficial use and enjoyment." The court then points out that an implied easement may generally arise from (i) an implied grant or reservation in a deed, (ii) a conveyance calling for a way as a boundary, or (iii) a conveyance with reference to a specific plat or map showing streets or rights of way (effectively the Tortoise Island test). The court then pointed out that these are not the only ways an implied easement may arise. "There are three essential elements for the creation of an easement by implication: (1) unity of title between the dominant and servient estate and a subsequent separation; (2) necessity that, before the separation takes place, the use which gives rise to the easement shall have been so long continued and obvious or manifest as to show that it was meant to be permanent; and (3) necessity that the easement be essential to the beneficial enjoyment of the land granted or retained." The *Moorings* Court then reviewed the standards for an implied easement under several Florida cases including *Williams Island* and *Dinkins*. The court stated that: "The doctrine of implied easement contemplates that when a landowner conveys part of his land, he impliedly grants all apparent or visible easements upon the part retained which were at that time used by the grantor for the benefit of the land conveyed and which were reasonably necessary for use of the land conveyed." *Moorings* at 963. Citing *Dinkins* and its reliance on Thompson on Real Property, the *Moorings* Court (at page 964) concluded that for there to be an implied grant that: "there must have been a separation of title and a use, before separation took place, which continued long enough to show that the use was meant to be permanent." The *Moorings* Court went on to conclude that an easement by implication from a preexisting use does not require an absolute but only a reasonable necessity contributing to the convenience and enjoyment of the property. The *Moorings* Court expressly rejected the idea that an absolute necessity, as required for a way of necessity under Florida Statutes §704.01 is necessary for an implied easement. At page 965 the *Moorings* Court expressly stated: "so it is held that the necessity in establishing an easement by implication is one of reasonableness while the necessity in creating an "easement of necessity" is absolute. An easement by necessity is not dependent upon the previous existence of quasi easements but is implied because the land could not otherwise be utilized. And so the "necessity" doctrine in implied easements has been denied." It is on this point that the Supreme Court of Florida expressly overruled and quashed the *Moorings* decision.

The Cowart Dissent

Judge Cowart wrote a strong dissenting opinion to the *Moorings* decision. In that dissent Judge Cowart restated the three (3) basic ways by which an easement may be created in Florida: (1) by grant, (2) by prescription, or (3) by implication. In dealing with these, Judge Cowart noted that because an easement is an interest in land, it must be created and conveyed with the formalities required by law, unless there is an exception granted at law, for which he stated that there are only two (2)

exceptions. He stated (at page 969) that "Basically this statement means that no easement can be created or transferred except by a written instrument signed in the presence of two subscribing witnesses by the party creating, granting or conveying the easement (Citations omitted). Also, any agreement or compromise constituting a contract for the sale of an easement or some memorandum thereof must be in writing and signed by the party to be charged to be legally enforceable." In the view of Judge Cowart, no easement can arise and be validly conveyed or enforceable unless the grant conveying the easement complies with the foregoing requirements. Otherwise the easement is invalid, unless it satisfies one of the following two exceptions.

One exception is an easement by prescription. Judge Cowart stated that easements created by prescription are created by operation of law as a result of statutes of limitation barring legal remedies for and relief from the wrongful user of land and is similar to the concept of adverse possession, which Judge Cowart pointed out is the analogical basis for "adverse use" upon which rests the doctrine of prescriptive rights.

Judge Cowart then addresses the second exception, easements created by implication. Departing from prior Florida case law, he stated (at 969-970) that the effect of the above statutes (the Statute of Frauds, §725.01, Fla.Stat. and the requirement for a writing signed in the presence of two subscribing witnesses, §689.01, Fla. Stat.) requires that ownership rights in land (including easements) and contracts for the creation or transfer of such land interests, may not be legally created by implication arising from facts independent of a writing.

> Since an express promise to convey an interest in land is unenforceable if it is oral, obviously promises which are merely implied in fact from words and deeds, being oral and not in writing, are also within the prohibition of the Statute of Frauds and constitute unenforceable agreements. Therefore, as to interests in land, including easements, and promises of grants and conveyances thereof, there are no enforceable contracts implied in facts not involving a writing, and any such writing giving rise to such rights, expressly or by implication, must comply with the Statute of Frauds.
>
> THE GENERAL RULE OF PROPERTY LAW AS TO EASEMENTS CREATED BY IMPLICATION: Primarily because of the Statute of Frauds, the general rule of law is that no easement or other interest in land can be granted or reserved by implication.
>
> THE TWO POSSIBLE EXCEPTIONS: There are two and only two, possible exceptions to the statement that because of the effect of the Statute of Frauds, easements cannot be granted or conveyed by implication. These exceptions are consistent with the reason for the rule and it is only with reference to one or the other or both of these exceptions that it can be correctly stated that an easement may be created by implication.

According to Judge Cowart the two exceptions are: (1) easements by implication from a duly executed writing that complies with the Statute of Frauds but otherwise fails on its face to create the respective easement; and (2) a way of necessity created as a matter of law pursuant to Florida Statutes §704.01(1) and (2).

Judge Cowart stated that a grant of easement may be created by implication when the terms of a duly ex-

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TORTOISE ISLAND
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ecuted deed or other conveyancing instrument are ambiguous and a court, in construing the ambiguous writing, by inference determines that the writing creates an easement. He points out that this usually occurs when a deed describes a lot by reference to a plat and the court construes the deed to conclude an easement in favor of the grantee as shown on the plat. In Judge Cowart's view: "In this situation the deed or other written documents satisfies the statutes (§689.01 and §725.01, Florida Statutes) and the easement is merely created by implication from the writing and the intention of the parties to the writing is of judicial concern in construing the writing." In construing the second exception to the statutory requirements, Judge Cowart referenced the implied grant common law way of necessity now codified at §704.01(1), and the statutory way of necessity codified at §704.01(2), Florida Statutes. Judge Cowart pointed out that the reason the way of necessity works and can stand as an exception to the Statute of Frauds and Florida's conveyancing statutes is: "The common law raised up or implied as a matter of law a promise on the part of the seller to give a right-of-way of necessity to the buyer over and across Parcel B" (the land conveyed away and which requires access over and across the seller's remaining property in order to access the property sold and identified as Parcel B by Judge Cowart). In Judge Cowart's view the reason this works to override the Statute of Frauds and the Florida conveyancing statutes is that it arises not based on the actual promises or actions of the parties but arises rather by operation of law from the facts and the absence of any actual promise. As such, the way of necessity is imposed by the courts based on the facts and not the promises (or intentions) of the parties. While not discussed by Judge Cowart, the same is true for the implied easements imposed at law under the analysis of both *Dinkins* and *Williams Island*. In each case the easement was created by the facts or failed because the facts did meet the requirements to impose the easement at law. The intention of the parties was not material in either case other than to potentially rebut the presumption that the visible easements necessary to the use and enjoyment of the land were not intended to be conveyed as part of the sale of the land.

The Supreme Court of Florida in *Tortoise Island* rejected the concept in *Moorings* that an easement by implication from a preexisting use requires only a reasonable necessity as opposed to requiring an absolute necessity to create such an easement. As quoted above, the Supreme Court then stated "In a well reasoned dissent, Judge Cowart maintained that such easement required an absolute necessity. We agree with Judge Cowart's reasoning and adopt it as our own."

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It is unclear if Judge Cowart and/or the Florida Supreme Court regarded *Moorings* (1) as a way of necessity case and were merely stressing that no way of necessity may be imposed under Florida law except in compliance with the statutory requirements of §704.01, Fla.Stat., and such cases always require an "absolute" necessity be present in order to create a way of necessity easement; or (2) as a true implied easement case and that in Florida no implied easement may ever be created except as otherwise stated in Judge Cowart's dissent in *Moorings*. On its face Judge Cowart's opinion seems clear that it is limiting all implied easements, except for (a) a way of necessity under §704.01 or (b) a court construing deeds or other written conveyances referencing recorded plats or other written documents; and absent facts supporting (a) or (b) above, no easements may be created in Florida without a writing complying with the Statute of Frauds, §725.01 Fla.Stat. Certainly subsequent case law and courts seem to read *Tortoise Island* as severely limiting any ability by the courts to create an implied easement [see *Tatum v Dance*, 605 So. 2d 110 (Fla. 5th DCA 1992) which is the appellate decision for the *Dance* case, as discussed below ("*Tatum v. Dance*") and *Dupont v. Whiteside*, 721 So. 2d 1259 (Fla. 5th DCA 1998) ("*Dupont*"). What is uncertain is whether Judge Cowart and/or the Supreme Court (in adopting Judge Cowart's opinion) clearly intended to throw out all prior case law on implied easements or were merely requiring an absolute as opposed to a reasonable necessity in the creation of any way of necessity. There are strong reasons to believe that *Tortoise Island* should not kill the entire body of law involving implied easements in Florida. This was well stated by Judge Sharp in his dissent in *Martin v. Kavanagh*, 773 So. 2d 1250, 1250-1255, (Fla. 5th DCA 2000) at 1253-1254:

> Implied and reserve easements which arise from "quasi-easements" are [a] well-accepted and established method of approving an easement at common law, in this country. Such an easement arises when the owner of real property uses a portion of that property to benefit another part of the property in such a dedicated way it becomes a "quasi-easement" over the used part (the servient estate), in favor of the part served (the dominant estate). No actual easement arises at that point because the ownership of the fee is in one person or entity. But when the owner conveys part of the property to another, the law implies that the parties intended the easement was either granted (if the dominant estate is sold) or reserved (if the servient estate is sold). The law's recognition of the creation of such an easement is based on the implied intent of the parties. *See* Arthur Gaudio, *The American Law of Real Property* § 6.02 [5](b)(1994); *11* Thompson on Real Property § 351 (1980).
>
> In order to prove the establishment of such an easement, the claimant must prove three things:
>
> (1) that the dominant and servient estates were once united in a single ownership;
>
> (2) that prior to severance, the common owner used part of the land as a quasi-servient estate, and part as a quasi-dominant estate. The use of the claimed easement (in this case a road easement for ingress and egress) must have been apparent and continuous, over part of the property to benefit another part. Its use must be regular, rather than casual and temporary;
>
> (3) the easement must have been necessary for the beneficial use of the dominant parcel. But the degree of necessity needed to establish this prong, traditionally, was not strict necessity, which virtually requires the land be landlocked and totally inaccessible, as is required to establish an easement by (way of) necessity.

Judge Sharp then references the *Tortoise Island* case and how, in his view, it has been misinterpreted. At 1254 Judge Sharp states:

> As one authority pointed out, the Florida Supreme Court simply adopted Judge Cowart's dissenting opinion, without any discussion or explanation, and thus it is somewhat unclear what was meant. It appears most logical that both the Florida Supreme Court and Judge Cowart viewed the facts in *Tortoise Island* as an easement of [way of] necessity case, but did not reject the well-established body of law concerning implied and reserved easements. Had they done so, they would have collapsed a well-established body of common law and folded it into the concept of easements by a necessity -- which is quite a different breed of cat.

Whether Judge Sharp will prove to be correct and the body of law incorporating implied easements is still alive and available for use in Florida will only be determined by a future case on the right facts before the Florida Supreme Court. But Judge Sharp's dissent evidences that the issue can still be argued in good faith and is not yet definitively decided and the law on implied easements is not yet wholly decided nor wholly dead.

See "Tortoise Island," page 32

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Ocala, Florida – Horse Country

Executive Council Meeting, January 22-25, 2004

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

The RPPTL Section held an Executive Council Meeting in Ocala, Florida on Saturday, January 24, 2004. In a show of force, Chairman, Louis Guttmann, arranged for a Judo squad to "practice" in the adjoining room. Extraneous conversation was held to a minimum during the meeting for fear of Louis' wrath.

While Louis ran the meeting with an iron fist, he benevolently arranged for a unique tour of the horse country. On Thursday evening, January 22, the attendees enjoyed a reception and exhibit-viewing at the Appleton Museum. Meetings were held all day Friday, January 23. A series of presentations were made to the Section Committee Chairs regarding how their committees could assist with Section matters such as *The Florida Bar Journal*'s column, the Legislative Committee, or *ActionLine*. Friday afternoon featured a seminar about the revised Section website and how it is being created to be user-friendly for communication within the Section. Specifically, a goal is for the Committees to communicate with its members, to post meeting minutes, and to keep Section members informed. Friday concluded with evening festivities of an authentic cowboy reception, with dinner and music by Executive Council member Burt Bruton and his renowned band *Roadkill*.

After the Executive Council Meeting, Saturday's highlight was a visit to Adena Springs Farm South, which, everyone learned, is the largest thoroughbred horse farm in Ocala. In appreciation for the Farm's hospitality to the Section, a resolution was adopted and is reprinted herein. A dinner was held on the Farm on a hillside overlooking the race track that is under construction. Saturday evening was capped off with a wine-tasting event presented by a Guild Certified Sommelier, Reid V. Rapport, and was a great choice to end a successful weekend of Executive Council and committee meetings.

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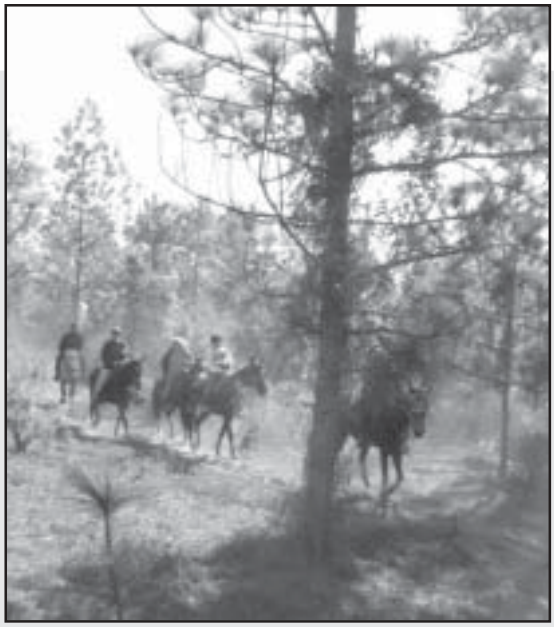
Louis and Paula Guttmann outside the Appleton Museum of Art on Thursday night.



Trail riding for families and guests.

Photos courtesy of John Neukamm and Sylvia Rojas.

More photos, pages 11 & 12...

Resolution

Of the Executive Council for the Real Property, Probate & Trust Law Section Of the Florida Bar Expressing Appreciation to

Adena Springs Farms

Whereas, the Real Property, Property, Probate & Trust Law Section of the Florida Bar (the "RPPTL Section") consists of approximately 8,000 Florida attorneys who practice law in substantive areas involving real estate, estate planning, probate and guardianship law; and

Whereas, 127 members of the RPPTL Section's Executive Council and their guests met in Ocala from January 22 – 25, 2004, to review and discuss matters of interest to the RPPTL Section; and

Whereas, the members of the RPPTL Section are impressed that, with 450 horse farms, Ocala ranks third in the world in the breeding and raising of thoroughbred horses, a business that represents a significant aspect of Florida's rich and diverse economy ; and

Whereas, Adena Springs Farm is the largest thoroughbred horse farm in the Ocala area, consisting of over 2,150 acres of gorgeous farm land in the heart of horse county, a state-of-the-art stallion complex, a number of other barns housing and servicing foals, weanlings, yearlings, and mares, training tracks and a racetrack which is currently under construction; and

Whereas, during the course of the RPPTL Section's business meeting in Ocala, the owners and employees of Adena Springs Farm graciously extended their hospitality to the members of the Executive Council and their guests on January 24th by providing an informative, educational and thoroughly enjoyable tour of the Farm, its facilities and, most importantly, its horses; and

Whereas, the day concluded with a wonderful picnic on a knoll overlooking the future Adena Springs Farm racetrack; and

Whereas, the RPPTL Section members and their guests who were fortunate enough to enjoy the tour came away with a greater appreciation of the positive impact that the thoroughbred business provides to the Ocala area and the State of Florida; and

Whereas, the tour leaders, Greg Burchell, the Yearling Manager, and his wife, Beth Burchell, the Equine Administrator, conveyed their passion for and extensive knowledge of thoroughbred horses to the RPPTL Section members who toured the Adena Springs Farm.

Now, Therefore, be it resolved that the Executive Council of the RPPTL Section of the Florida Bar extends its deepest appreciation and thanks to Adena Springs Farm and its owner, Frank Stonach, its General Manager, Mark Roberts, and its staff and employees, and, in particular, Greg and Beth Burchell, for demonstrating true Southern hospitality to the members and guests who enjoyed their visit to the Farm.

Unanimously Adopted by the Executive Committee of the Florida Bar's Real Property, Probate & Trust Law Section's Executive Council this 2nd day of February, 2004.

_____

Louis B. Guttmann, III, Chair

Executive Council "Adventures in Horse Country!"



Amanda Neukamm pets a mare at Adena Springs Farm.



Brainstorming during the Friday meetings.



Louis and Paula Guttmann and Susan Spurgeon are dressed for the cowboy evening on Friday.



Burt Bruton leading his band, Roadkill, on Friday night.



Saturday, after touring Adena Springs Farm, the group dined on the Farm's hillside overlooking the race track that was under construction.



Louis Guttmann, chair, and his wife, Paula, thank the hosts from Adena Springs Farm South, Greg Burchell and his wife, Beth Burchell, as well as the sponsors for the event, AmSouth Bank and George Lange and Kerry Edwards.



The Executive Council meeting.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Florida Landlord/Tenant Law Update

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

No Deposit, No Defense

The rule is clear that a landlord may maintain a non-payment, eviction action against a tenant after (i) serving a Three-Day Notice that complies with the statutory requirements of §83.56(3) of the Florida Statutes; and (ii) properly terminating the tenant's rental agreement prior to the filing of the eviction complaint – these are essential elements of the plaintiff'scase and "[a] statutory cause of action cannot be commenced until the Plaintiff has complied with all conditions precedent."[1] Assuming the foregoing has properly been accomplished, if the tenant raises a defense *other than payment*, the tenant *must* deposit the rent into the Court Registry or the landlord is entitled to a default judgment pursuant to §83.60(2) of the Florida Statutes.

But what if the tenant doesn't accomplish the deposit?

In *Smalls v Joseph*[2], the tenant appealed from the County Court's entry of a default judgment in favor of the landlord. The issue for the Appellate Court turned on whether, having failed to deposit the outstanding rent with the Court after being ordered to do so, the tenant had waived her defense of defective notice of termination. Remember, a defective notice of termination would mean that the plaintiff did not have a valid cause of action on the facts existing at the time the action was commenced, and the defect cannot be corrected in the same case.

The Appellate Court relying on case law held that a court, when faced with a tenant who fails to deposit after being order to do so, *must* grant the landlord possession despite a defective notice.

Unfortunately for Smalls, not only was the default judgment affirmed, but the landlord, as a prevailing party pursuant to Section 83.48, Florida Statutes, and Rule 9.400, Florida Rules of Appellate Procedure, was entitled to attorneys' fees and costs, for which the case was remanded to the lower court for a determination.

Notices, Notices, Notices – It's In The Details...

Proving, once again, that commencement of a landlord/tenant proceeding is not for the faint of heart, the following illustrate how the details can bury you.

In *Kopkin v. McIlhenney*[3], the County Court held that the Three-Day Notice attached to the Complaint was fatally defective because the Three-Day Notice (i) demanded payment or possession on a legal holiday and only gave the tenants two business days to pay or vacate; and (ii) sought money other than rent (late fees not deemed to be rent in the written lease agreement) and money in excess of the rent owed at the time of service. *See also, Devine v. Morales*, 11 Fla. L. Weekly Supp. 356a (Fla. 17th Jud. Cir. 2004).

Since the Three-Day Notice was defective, the plaintiff had not properly terminated the tenant's rental agreement prior to filing the complaint, and consequently, the Court held that no deposit of rent was required of the tenant.

The Court (i) granted the tenant's motion to dismiss with prejudice and without leave to amend since the predicate notice could not be amended; and (ii) retained jurisdiction for the determination of the tenant's counsels' fees and costs.

In *Sawhney Brothers, Inc. v. Norris*[4], the same result was had after the plaintiff filed the Complaint for eviction prematurely. As with any non-payment proceeding, termination of the rental agreement was a condition precedent to filing the lawsuit. The plaintiff had given the Three-Day Notice on December 1 demanding December rent. However, the Court stated that December rent could not have been in default until December 2 at the earliest. Consequently, the plaintiff's Three-Day Notice could not have been given until December 2; with the running of three-days, exclusive of the date of service, the plaintiff could not have filed its Complaint until *after* December 5.

Unfortunately, the plaintiff filed its Complaint *on* December 5 thereby giving the tenant less than three days in which to pay or vacate the premises; precondition not met, the plaintiff had no grounds for the suit and the tenant's motion to dismiss without leave to amend was granted. *See also, Allen v. Smith*, 11 Fla. L. Weekly Supp. 357a (Fla. 17th Jud. Cir. 2004).

In *Jackson v. Miner*[5], the Complaint was dismissed with prejudice because the plaintiff's Three-Day Notice was dated November 25 and contained a deadline date of November 28. The plaintiff had failed to exclude the date of service and the court's legal holidays of November 27 and November 28 when calculating the deadline for paying or vacating the premises. The same error was made in *Milton v. Bryant*[6], when the plaintiff failed to note that Yom Kippur was a holiday recognized by the court. As a consequence, a full three days to pay or vacate was not given to the tenant.

In *Martinez v. Walterson*[7], the Court held that the plaintiff's Three-Day Notice was defective for (i) demanding an erroneous amount of rent; (ii) failing to state a date certain for when the rent must be paid; and (iii) failing to include the landlord's address and telephone number. The tenant's motion to dismiss for failure to state a cause of action was granted.

Don't Forget Five-Day Mailing Period for P.O. Box

In *Le v. Green*[8], the plaintiff's Three-Day Notice, fatally defective for a number of reasons, listed the landlord's address as a post office box without giving the tenant an additional five days for mailing of the payment since it is physically impossible to deliver rent to a post office box – it must be mailed.

The Court dismissed without leave to amend and retained jurisdiction to award the tenant's counsel costs and attorneys' fees of and from the plaintiff as a prevailing party.

Calling It a Landlord/Tenant Proceeding Doesn't Make It So

In *Wilson v. Davis*[9], the plaintiff commenced a summary proceeding to gain possession of property occu-

pied by the defendants under a written agreement for deed. The agreement provided that the title to the property would be transferred to the defendants after full payment of the agreed amount.

The Court held that such an arrangement was specifically excluded from the application of the Florida Residential Landlord and Tenant Act and that, regardless of the provisions of the agreement calling for reversion to the plaintiff and forfeiture of monies previously paid by the defendants, the agreement was, in fact, a mortgage and was subject to the same rules of foreclosure as mortgages generally. As a consequence the plaintiffs were only entitled to the remedies available to a mortgagee and not entitled to possession free of the equitable ownership interests of the defendants including the right of redemption.

Non-attorney Property Manager Misstep

Regency Arms, Ltd. v. Edelen[10], involved the termination of a tenant's lease by the service of a Seven-Day Notice of Termination of Lease for non-compliance. The Complaint had been completed, signed and filed by the plaintiff's non-attorney property manager.

In the first instance, the Court held that the lease had not been properly terminated because the Seven-Day Notice of Termination failed to (i) state the time, date or location of the alleged non-compliance; (ii) failed to describe the facts and circumstances constituting the non-compliance; and (iii) failed to specify the term of the lease agreement or the provision of the Florida Residential Landlord and Tenant Act which the defendant's son was alleged to have violated. Rather, the Seven Day Notice of Termination merely stated that the tenancy was being terminated because of "the illegal charges against son, Jerrod."

Finally, the Court held that the non-attorney property manager had engaged in the unlawful practice of law when she completed, signed and filed the Complaint because (i) the grounds for the eviction were other than non-payment; (ii) the plaintiff had not given the property manager written authorization to handle uncontested evictions; and (iii) because the action before the Court was contested.

Based on a Florida Bar Advisory Opinion, the Court stated that non-attorney property managers were *only* permitted to handle *uncontested, non-payment* residential evictions for which the plaintiff had given the property manager prior written authorization to pursue. Such was not the case here, and the Court dismissed the Complaint with prejudice.

Endnotes:

[1] *Ferry-Morse Seed Co. v. Hitchcock*, 426 S.2d 958, 961 (Fla. 1983).
[2] 11 Fla. L. Weekly Supp. 92f (Fla. 11th Jud. Cir. 2003).
[3] 11 Fla. L. Weekly Supp. 150a (Fla. 17th Jud. Cir. 2003).
[4] 11 Fla. L. Weekly Supp. 151a (Fla. 17th Jud. Cir. 2003).
[5] 11 Fla. L. Weekly Supp. 156a (Fla. 17th Jud. Cir. 2003).
[6] 11 Fla. L. Weekly Supp. 156c (Fla. 17th Jud. Cir. 2003).
[7] 11 Fla. L. Weekly Supp. 155b (Fla. 20th Jud. Cir. 2003).
[8] 11 Fla. L. Weekly Supp. 358a (Fla. 17th Jud. Cir. 2004).
[9] 11 Fla. L. Weekly Supp. 235b (Fla. 1st Jud. Cir. 2003).
[10] 11 Fla. L. Weekly Supp. 335a (Fla. 1st Jud. Cir. 2004).

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Aloha, Kona, Hawaii!

Executive Council Meeting, February 17-21, 2004

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

The Section held its annual out-of-state trip in Kona, Hawaii this year from February 17-21, 2004. Chairman Louis Guttmann arranged for a whirlwind tour of the Big Island, which included waterfalls, black sand beaches, coffee plantations, volcanoes, rain forests, sugarcane fields, and endless miles of tranquil ocean views. As for the festivities, the group enjoyed a traditional Hawaiian luau, lunch at the Volcano House in the National Park and a valley waterfall adventure hike.

The Executive Council meeting was held Saturday morning, February 21. Agenda items included approval of a service contract for the Section website; approval of filing an amicus brief in the *Warburton* case; action on an amendment to Section 718.112(2)(f)(4) regarding reserve funding; and action on revised standards for legal opinions in real estate secured transactions. In addition, the group enjoyed a Symposium on Hawaiian Law moderated by the Honorable Justice Kenneth Bell. The Section extends its thanks to Justice Bell for his continued support and participation in its activities.

For additional information on the Section's upcoming events, please visit www.flabarrpptl.org.

Thank you, Sponsors!

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View of lava rock in Kona, Hawaii from the Marriott hotel.

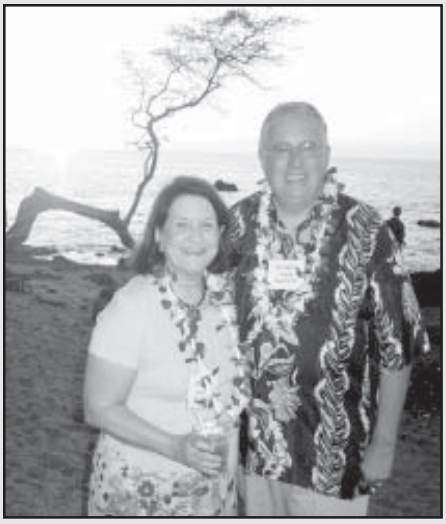


The CLE panelists for the Hawaiian Land Court presentation.



A hula class

Photos courtesy of John Neukamm and Sylvia Rojas.



Sandra and Frank Diamond on Sunday.



Louis and Paula Guttmann before a beautiful Hawaiian sunset.



Justice Kenneth Bell and his wife Vicky celebrate a belated 20th wedding anniversary.



Nancy and Allen Schofield enjoy the welcome buffet.



The Zschau Family.



Some of the Section members who enjoyed the Luau.



Luau dancers provided entertainment



A diving crew of Section members.



Bonnie Bevis diving.



Tom and Jennie Smith, Jeff Sauer, and Louis Guttmann at Kilauea Caldera.



The Nanue Falls



The Happy (RPPTL) Hikers: Bevis', Sauers, and Neukamms.



The Sparks family says "Aloha" and heads home.

The RPPTL Law School Liaison Committee

Section has Meetings with Law School Students

In order to further educate and hopefully interest future Florida lawyers to join the Real Property, Probate Trust Law Section of The Florida Bar, the RPPTL Law School Liaison Committee organized and held student meetings at eight Florida law schools this school year. The student meetings, held October 2003 through March 2004, were attended by more than 340 law school students. The RPPTL Law School Liaison student meetings introduced law school students to newly practicing real property, probate, and trust law attorneys, giving students the chance to learn about the transition from law school to law practice.

The open meetings allowed young attorney panelists, who have been practicing law for five or fewer years, to answer students' questions ranging from how to distinguish one's cover letter to how many hours of work students can expect in their first year of practice. Besides answering student questions, the attorney panelists also warned law students against typical first year of practice pit-falls and bantered back and forth amongst themselves regarding their areas of practice. The panelists' diverse backgrounds gave students humorous and informative insight into life after law school.

Florida State University School of Law students got to learn about another transition as well: the one from real estate lawyer to Supreme Court Justice. The key presenter at the Florida State University School of Law was the newest Florida Supreme Court Justice, **Kenneth B. Bell,** who spoke at the invitation of RPPTL Section Liaison Coordinator, Fred Dudley. Justice Bell also discussed the value of title insurance and his own role as a real estate attorney with First American Title Insurance Company.

Tampa attorney, **Phillip A. Baumann,** is the Chair of the RPPTL Section's Law School Liaison Committee. "These meetings were especially successful this year due to the animated support of all those involved," said Baumann. "We thank the law school administrators, who helped advertise and promote the events and are also grateful to the coordinators and panelists who organized and presented the meetings," he said.

The following are the names of attorney coordinators and panelists, all of whom enthusiastically presented the 2003 – 2004 RPPTL Law School Liaison effort:

Attorneys' Names	Schools of Law	Role
Adams, Christine T.	Florida Coastal	presenter
Bell, Kenneth B.	Florida State University	presenter
Bruce, Derek	Barry University & Florida A&M Univ.	presenter
Burke, Anna Mae	Nova Southeastern University	presenter
Burket, Dale	Florida A&M University	presenter
Byrnes Jr., David	Barry University & Florida A&M Univ.	presenter
Campo, John	University of Florida	presenter
Chung-de Cambre, Rhonda	University of Florida & Univ. of Miami	coordinator
Copeland, Dan M.	Florida Coastal	presenter
Craig II, James M.	Florida Coastal	presenter
Dudley, Fred	Florida State University	coordinator
Dwyer, Marc E.	Florida Coastal	presenter
Eaton, Jennifer	University of Miami	presenter
Faehner, Michael	University of Florida	presenter
Foster, Joanne	University of Miami	presenter
Franco, Larry	Nova Southeastern University	presenter
Godat, Mickey	Barry University & Florida A&M Univ.	presenter
Griffen, Jennifer L.	Stetson University	presenter
Jones, Teri M.	Barry University & Florida Coastal School of Law	coordinator
Jorge, Michelle	University of Miami	presenter
Joyner, Odessia	Florida A&M University	presenter
Kalmanson, Stacy Ossin	Florida A&M University	coordinator
Kelly III, James Burnett	University of Florida	presenter
Kirwin, Michael	Florida A&M University	presenter
La Joie, John	Florida State University	presenter
Lash, Robert	University of Florida	presenter
Lent, Christine E.	Stetson University	presenter
McCoskey, Gregory	Stetson University	coordinator
Mendez, Celia	Barry University & Florida A&M Univ.	presenter
October, Zinelle	Barry University	presenter
Ourednik IV, Karel	Florida Coastal	presenter
Parker, Jessica M.	Barry University	presenter
Pinnock, Duane	University of Miami	presenter
Rawls, Rodney	University of Miami	presenter
Reynolds, Heather M.	Florida Coastal	presenter
Richardson, Philip Wade	Barry University	presenter
Rieman, Alexandra	Nova Southeastern University	coordinator
Russo Hanley, Lydia	Florida Coastal	presenter
Seagle, Joseph E.	Barry University	presenter
Socarras, Raul	Barry University	presenter
Townsend, Nathan	Florida A&M University	presenter
Vasti, Peter J.	Stetson University	presenter
Walker, Glorimil R.	University of Florida	presenter

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, Inc.(FLSSI) to RPPTL Section members. (These forms will be reviewed/revised annually.)

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Disclaimer Reform Is on the Way

By Richard R. Gans, Esq., Fergeson, Skipper, Shaw, Keysen, Buron & Tirabissi, P.A., Sarasota, Florida

For the past two years, the Estate and Trust Tax Planning Committee (the "Committee") of the RPTTL Section has been hard at work. After careful study, many lively discussions, and an attention to detail and nuance that has at times bordered on the obsessive, the Committee has proposed legislation that, if enacted into law, will substantially update Florida's statutory disclaimer law. The RPPTL Section adopted the proposed statute at its Executive Council meeting on May 29, 2004 in Key West.

The Big Picture: Why and How?

It is time for a change. With the exception of provisions added in 2001 targeted towards disclaimers of tenants by the entireties property, current Florida Statutes Section 689.21 has not been substantively modified since 1973. (When a statute contains references to dower and a wife's ability to disclaim without her husband's consent – as Section 689.21 does – it's a sure sign that change is overdue.) Apart from a small tweak in the area of disclaimers from insolvent beneficiaries, there have been no substantive modifications to Section 732.801 since 1977.

Florida's current disclaimer statutes are codified in two separate chapters. Florida Statutes Section 732.801 applies if the disclaimer is of an interest under a will or a trust under a will, or of an interest descending by intestacy; Section 689.21 applies if the interest to be disclaimed is under an inter vivos trust or is an interest in jointly-held property. The proposed legislation would unify the disclaimer rules in new Chapter 739 of the Florida Statutes, which will apply regardless of the nature of the property interest to be disclaimed (i.e., testamentary or non-testamentary). New Chapter 739 would be called the "Florida Uniform Disclaimer of Property Interests Act" (the "Act").

The proposed legislation is based on the Uniform Disclaimer of Property Interests Act (the "UDPIA") promulgated by the National Conference of Commissioners on Uniform State Laws ("NCCUSL") in 1999. Florida has a tradition of basing its disclaimer statutes on NCCUSL acts. Current Section 689.21 is based on the Uniform Disclaimer of Transfers Under Nontestamentary Instruments Act, and Section 732.801 is based on the Uniform Disclaimer of Transfers by Will, Intestacy or Appointment Act.

The UDPIA unifies and improves upon the prior uniform acts upon which Florida's existing statutes are based. As seems traditional in Florida's adoption of NCCUSL acts, the Committee has adopted most, but not all, of the provisions of the UDPIA.

A Narrower Focus: How Would the Act Change Existing Florida Law?

In many ways, the Act will not change the way in which Florida disclaimers are planned for and carried out. However, in a few important instances, the Act will work substantial changes to Florida's disclaimer laws.

Both of Florida's current disclaimer statutes do not abridge the right of a disclaimant to make a disclaimer or renunciation under any other law, i.e., the common law. The incorporation of the common law into Florida's disclaimer regime introduces uncertainty. To get an idea of just how much uncertainty there might be, consider Section 2.01 of the Florida Statutes, which declares the common law and statutes of England up to July 4, 1776, to be in force in Florida to the extent not inconsistent with other Florida laws.

What if the disposition of a disclaimed property interest were different under the common law than the applicable Florida statute? If the disclaimant has a choice as to which body of law is to govern her disclaimer, does that invalidate the disclaimer for federal tax purposes? After all, Internal Revenue Code Section 2518 requires that the disclaimed interest pass without any direction from the disclaimant.

Problem (hypothetical though it may be) solved: The Act would be the *exclusive* avenue for disclaimers or renunciations. This will make the procedures for and consequences of disclaimers more predictable. It will also mean the end of the useful life of the largely non-existent body of Florida cases on common-law renunciations: the author is aware of only one such case (*In re Slawson's Estate*, 41 So. 2d 324 (Florida 1949)).

The Act contains no time limit for disclaiming. This increases the opportunities for the use of disclaimers in situations where taxes are not of paramount importance. Concern has been raised that the lack of a time limit is a trap for unwary practitioners attempting to make tax-qualified disclaimers. Florida practitioners have already been living with this trap for many years: a disclaimer under current Section 689.21 made within 11 months and 29 days after the triggering event is valid under that Section, but it may not be a valid disclaimer for federal tax purposes.

The Act permits fiduciaries to disclaim assets or fiduciary powers; however, absent explicit authorization in the governing instrument, prior court approval is required. Current Sections 689.21 and 732.801 do not permit fiduciary disclaimers; only a "beneficiary" may disclaim under the existing statutes. Permitting fiduciary disclaimers will be helpful in cases where the disclaimed power would, if held by the fiduciary, disqualify a gift for preferential tax treatment (i.e., the estate tax marital deduction).

The Act contains provisions that would make it easier to make disclaimers on behalf of minor or incapacitated beneficiaries. Judicial approval is still required in most cases, but the Act permits courts to give greater weight to the totality of the circumstances in which the disclaimer arises. This, in turn, makes it more practical to effect disclaimers where they are needed to accomplish tax savings objectives in the interests of all of the beneficiaries as a group. In one instance, judicial approval would not be required in order to effect a disclaimer for a minor beneficiary: if there is no court-appointed guardian, the minor's natural parent may disclaim an interest that the minor would otherwise receive solely by reason of another disclaimer (but only if the disclaimed interest does

continued, next page

DISCLAIMER REFORM
from page 21

not pass to the natural parent).

What happens, under Florida's current statutes, if an attempted disclaimer fails; for example, because the disclaimant has previously accepted the benefits of the property sought to be disclaimed? Neither Section 689.21 nor Section 732.801 is clear as to the consequences of an attempted disclaimer under such circumstances. Will the disclaimer simply be ignored, or will it be given effect as a transfer of the property by gift by the disclaimant to the persons who receive the "disclaimed" property? The Act provides clearly that the attempted disclaimer is ineffective, and that the property subject to the failed disclaimer remains in the hands of the would-be disclaimant.

The Act provides that disclaimers need not be recorded to be effective; this removes a procedural hurdle that could prove troublesome where a tax-motivated disclaimer is sought to be made at the latest possible time. Disclaimers under the Act must simply be delivered to the person who, depending upon the interest to be disclaimed, must dispose of the disclaimed interest. Practitioners accustomed to mailing deadline-sensitive documents to the IRS will know well how to prove the fact of delivery. And, those obligated to dispose of the disclaimed interest will generally have a fiduciary duty to act in strict reliance on the disclaimer.

Although an unrecorded disclaimer of an interest in real estate will be effective as between the disclaimant and those who receive the disclaimed interest, it will, of course, not be binding on strangers to the transaction unless it is recorded, and the Act explicitly so provides. To facilitate the ability to record a disclaimer if desired, the Act continues current Florida law to the effect that a disclaimer must be executed with the formalities required of a deed to be recorded in this state.

Finally, the Act contains detailed guidance, not present in Florida's current disclaimer statutes, on disclaimers by holders, objects and takers in default of general and non-general powers of appointment, and on disclaimers by surviving owners of joint tenancy property.

Conclusion

The Committee believes the Act is a leap forward in Florida's disclaimer law. The Act lends increased flexibility to the disclaimer technique and, while the federal tax rules governing disclaimers are still the same, flexibility is increasingly desirable in the context of continuing uncertainty in federal transfer tax laws. The Act clarifies some areas of uncertainty present in Florida's existing disclaimer statutes and provides new and explicit guidance on several important points. And now for the really interesting part: getting this thing enacted into law.

Lawyers Not Required to Comply with Consumer Privacy Notification Requirements of the Gramm-Leach-Bliley Act

Adapted from an Open Letter from American Bar Association President, Dennis W. Archer

The American Bar Association obtained a critical victory over the Federal Trade Commission's interpretation of the Gramm-Leach-Bliley Act's privacy provisions.

On April 30, 2004, Judge Reggie Walton of the U.S. District Court for the District of Columbia issued an order in a suit instituted by the American Bar Association ("ABA") against the Federal Trade Commission ("FTC"). The case brought by the ABA challenged the FTC's decision that the privacy provisions of the Gramm-Leach-Bliley Act apply to attorneys. In his order, which also applies to a similar suit filed by the New York State Bar Association, Judge Walton says that the FTC's decision to subject attorneys to the Act was beyond its statutory authority and constituted arbitrary and capricious agency action.

Consequently, while Judge Walton's order is in effect the FTC will not enforce the Act against attorneys engaged in the practice of law; and attorneys who in the course of their law practices choose not to comply with the privacy provisions of the Gramm-Leach-Bliley Act need not fear enforcement actions or investigations by the FTC. To view a copy of this decision please go to http://www.abanet.org/poladv/glbfactsheet.html.

The ABA had challenged the FTC's interpretation of congressional intent in the application of Title V of the Gramm-Leach-Bliley Act. The Commission had sought to apply the written privacy notice and the record keeping provisions applicable to banks and financial institutions to attorneys engaged in the practice of law, despite complaints from the ABA, the NYSBA and other state and local bar associations that state level enforceable mandatory rules of professional conduct protected client confidentiality better. Had the FTC's interpretation of the Gramm-Leach-Bliley Act not been challenged, the result would have meant expense, waste and confusion for clients and attorneys.

This victory was a victory of the whole organized bar. More than 26 bar associations joined the suits; these included bars as diverse as the Pennsylvania Bar Association and the Beverly Hills Bar Association, who signed on as amici to the ABA suit. Bar associations contacted the FTC prior to our filing suit and contacted their Congressional delegation afterwards. The efforts continue and the ABA appreciates the support of all in this endeavor.

This effort does not end here. After entry of a judgment by the district court, the FTC will have 60 days to decide whether to appeal Judge Walton's decision, and Congress is considering whether to amend the Act, as well. The ABA will continue to pursue a just result for the sake of attorneys and our clients, and the ABA hopes you will continue to work with it.

Attention: New Ad Hoc HIPAA Study Committee Being Formed

A new Probate Division special committee is being created — to be known as the Ad Hoc HIPAA study committee. The initial duration of the committee is 6 months — which may be extended if necessary. Sam Boone will chair the committee. Sam will appoint a vice chair or two.

Members from certain existing Section committees are requested to serve on the HIPAA committee, such as the Power of Attorney and Advance Directive Law, Probate Law and Procedure, Trust Law, Probate Litigation, and Guardianship Law and Procedure committees. One goal is to explore any implications HIPAA may have regarding discoverability of medical records for decedents and incapacitated persons. Additionally, Elder Law Section members are invited to join this committee. Any RPPTL Section member is also encouraged to assist the committee.

The new committee's charge is to study HIPAA and its implications to various areas of our practice. Obvious issues include

(a) implementing trustee substitution provisions by getting a doctor to certify that a serving trustee is not capable of continuing to perform the duties;

(b) Health Care Surrogates gaining access to medical records to make health care decisions;

(c) obtaining medical information to implement life support termination;

(d) production and discovery of medical records; and

(e) drafting implications. There are certainly many more implications and issues which the committee will identify and resolve.

Additionally, the committee is requested to recommend sample language to deal with or overcome the statutory impediments. Once completed, this will be posted on the Section's website.

The committee is also encouraged to recommend any necessary legislation — state or federal, keeping in mind issues of preemption.

A final report, together with the suggested forms, will be published in *ActionLine*. If the committee believes it to be useful, a seminar may be planned to present the committee's work.

Anyone interested in participating in this new committee should contact Sam Boone at 352/374-8308 or sboone@boonelaw.com.

Advertise in *ActionLine* !!

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ActionLine Publication Schedule

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

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

***ActionLine* Issue**	**Publication Deadline**
Fall 2004	July 31, 2004
Winter 2004	October 31, 2004

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

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

JACQUELYN SLOMKA, PhD, RN
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Withholding nutrition at the end of life: Clinical and ethical issues

ABSTRACT

Tube feeding in terminally ill patients has become routine. Indeed, many physicians question the ethics and legality of withdrawal of nutrition and hydration—even in patients whose prospects of recovery are bleak. To avoid unnecessary pain and suffering, patients, physicians, and family members need to discuss the patient's desires, carefully weigh the benefits and burdens of tube feeding, and examine their own beliefs and biases.

KEY POINTS

Withholding or withdrawing medically provided nutrition and hydration from patients is often disturbing for both physicians and family members.

Enteral and parenteral nutrition and hydration are medical treatments that can be withheld or withdrawn under appropriate medical and ethical circumstances.

Forgoing nutrition and hydration near the end of life leads to greater patient comfort in many instances.

The withholding or withdrawal of nutrition and hydration are distinct from physician-assisted suicide and euthanasia.

Focusing on the disease process rather than on starvation and dehydration as the cause of death may help the family and the physician provide optimal end-of-life care.

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YOUR PATIENT, who had a massive myocardial infarction 3 months ago, has end-stage congestive heart failure, chronic renal insufficiency, and severe anoxic encephalopathy. He is in a nursing home and receives nutrition and hydration through a gastrostomy tube.

He has recurrent pneumonia, and you are about to start intravenous antibiotics and transfer him to a hospital. However, in your clinical judgment, he would not survive intensive care if his respiratory function were to deteriorate.

The patient's wife says, "My husband wouldn't want all this. He never wanted to be in a nursing home. Can't you just let him die in peace?" After further discussion, you agree that hospice care is medically and ethically appropriate. Your instructions to the hospice nurses include "do not resuscitate" and "comfort measures only" orders.

A nurse asks if nutrition should be withdrawn. You are uncomfortable with discontinuing a feeding tube, so you informally consult several of your colleagues. Some would stop the tube feeding, some would not, and some think the patient's wife should decide.

RELUCTANCE TO WITHHOLD NUTRITION

When a person cannot eat because he or she is ill, a clinical decision must be made about providing nutrition and hydration through intravenous hydration and a feeding tube or total parenteral nutrition. As in the clinical use of any medical device or treatment, this decision should be based on medical need and the burdens and benefits of the treatment.

Physicians generally do not have a problem with starting such treatment, but withholding or withdrawing it at the end of life

often is disturbing for both physicians and family members. Although physicians have become more skilled at medical-ethical decisions to withhold or withdraw treatments such as cardiopulmonary resuscitation, kidney dialysis, and mechanical ventilation, forgoing nutrition and hydration remains problematic.

Decisions to forgo nutrition and hydration are not always based on a careful weighing of the advantages and disadvantages. One study[1] showed that physicians were reluctant to stop nutrition and hydration even when the burdens of treatment outweighed the benefits. Another study[2,3] demonstrated that physicians have biases about which treatments should be forgone at the end of life and are reluctant to withdraw nutrition and hydration.

This reluctance persists even though professional organizations have repeatedly stated that artificially provided nutrition and hydration are medical treatments that can be withheld or withdrawn under appropriate medical and ethical circumstances. For example, the American College of Physicians states in its ethics manual, "Artificial administration of nutrition and fluids is a life-prolonging treatment. As such, it is subject to the same principles for decisions as other treatments."[4]

The American Medical Association (AMA) has stated that "Life-sustaining treatment may include, but is not limited to, mechanical ventilation, renal dialysis, chemotherapy, antibiotics, and artificial nutrition and hydration."[5] Recently, a consensus panel of the American College of Physicians and the American Society of Internal Medicine refuted the belief that forgoing nutrition and hydration at the end of life is illegal.[6]

Nevertheless, some physicians consider medically provided nutrition and hydration a basic human need, and they fear subjecting the patient to a painful death through starvation and dehydration.

The practice of evidence-based medicine requires that clinical decisions be made on the basis of clinical research.[7] Recently, the routine use of feeding tubes in patients with severe dementia has been questioned because evidence of their effectiveness in achieving medical and social goals is lacking.[8]

A literature review by Finucane and colleagues[9] showed that the usual reasons for tube feeding patients with dementia (ie, to improve survival and prevent aspiration pneumonia, malnutrition, pressure ulcers, and infection) are not supported by empirical data.

NOT THE SAME AS FOOD AND DRINK

Is withholding or withdrawing artificial nutrition and hydration the same as denying food and drink? Are nutrition and hydration basic care that is morally required by basic standards of human decency?

Certainly, like breathing and waste elimination, nutrition and hydration are basic human needs. However, discontinuing a ventilator or kidney dialysis somehow seems different than withdrawing a feeding tube, perhaps because of the tendency to attach meanings to images of various medical treatments.

These images may be dismissed as mere symbolism, but they are extremely important. For example, a red cross represents a humanitarian organization, but a cross burning on a lawn conjures a very different meaning.

Food and drink have many social meanings; most social gatherings, from a cup of coffee with a friend to a wedding reception, involve food and drink. Giving someone food and drink is equated with nurturing and caring. Over time, the image of nutrition and hydration has become conflated with the image of food and drink.

The routine use of feeding tubes is being questioned

However, providing nutrition and hydration is not synonymous with feeding someone—or with eating. People eat in a socially normative way (ie, through the mouth) and with socially normative tools (eg, knives, forks, chopsticks). Medically provided nutrition and hydration is not socially normative. In fact, until fairly recently, the use of a feeding tube was called "forced feeding."

The possibility that an alert, oriented person may need a feeding tube for nutrition (eg, in the case of abnormal esophageal motility) underscores the need to assess social burdens and benefits. For example, will medically provided nutrition and hydration enhance or decrease the patient's ability to connect socially with others?

Often, a technology developed for a specific medical problem becomes widely and

inappropriately used outside of the intended setting. For example, cardiopulmonary resuscitation (CPR) was originally developed to treat sudden, reversible cardiac arrest due to electrocution, drowning, or surgical anesthesia problems in otherwise healthy persons.[10] Over the years, CPR became so widespread that it was attempted in nearly every patient who died. Empirical research in the 1980s eventually demonstrated that CPR was ineffective in many medical conditions, such as end-stage cancer or multiple organ failure.[11]

Similarly, medically provided nutrition and hydration were developed for patients who for some, usually temporary, reason cannot eat and drink. However, feeding tubes became widely used in patients unlikely to recover (eg, who had a massive stroke or severe brain damage due to anoxia or head trauma).

Social forces, such as the growth of the nursing home industry in the 1960s and 1970s and improvement of technology in the 1980s, probably provided financial incentives and a moral imperative to maintain patients in these chronic, debilitated states. For example, the number of gastrostomies in hospitalized patients 65 years or older in the United States doubled from 1988 to 1995.[12]

The use of a feeding tube used to be called "forced feeding"

In the lexicon of the clinical environment, medically provided nutrition and hydration became synonymous with "feeding," a term with a heavy symbolic load.

■ TUBE FEEDING IS NOT INNOCUOUS

Medically provided nutrition and hydration is not necessarily innocuous. Potential side effects of tube feeding include diarrhea, nausea, vomiting, esophageal perforation, and infiltration of formula into the lung.[9] An intravenous infusion can cause infection, phlebitis, and electrolyte imbalances. In a dying patient with inadequate or absent renal function, supplying intravenous fluids may precipitate peripheral or pulmonary edema and increase the need for suctioning.[13]

Decisions about nutrition and hydration should be based primarily on the potential burdens vs the potential benefits[9] and the potential effects on the patient's goals and outcomes. Goals of care may change during the course of illness; the physician needs to negotiate goals and priorities of care with the patient or surrogate on a continuing basis.[14]

■ LEGAL CONSIDERATIONS

All states now have advance directive laws that enable patients to state their wishes about life-sustaining treatment before they become cognitively incapacitated. However, these laws may not address nutrition and hydration. Further, relatively few patients have executed an advance directive such as a living will or durable power of attorney for health care. Because laws vary from state to state, physicians need to become familiar with state laws and address legal concerns with hospital legal counsel.

The US Supreme Court, in its Nancy Cruzan decision,[15] reiterated that nutrition and hydration are medical treatments and as such can be legally withheld or withdrawn under appropriate medical and ethical circumstances.

What are these 'appropriate medical and ethical circumstances'?

The forgoing of life-supporting treatments, including nutrition and hydration, involves several considerations:

- **What is the patient's medical prognosis?** Is the patient likely to recover with medical support, or will he or she die in spite of it?
- **If the patient has a chance of survival, will the quality of life be acceptable to him or her?** If the patient is unable to speak, his or her viewpoint must be surmised by the physician and the patient's family.
- **Do the potential benefits of the treatment outweigh the potential discomforts, pain, and suffering?** Physicians, patients, and family members may differ in their assessment of burdens and benefits. Because the patient is the one to experience the effects of treatment, his or her viewpoint usually is accorded more weight in decision-making.
- **What are the patient's wishes in regard to the use of life-sustaining treatment?** If the patient is unable to express his or her values, is a family member or patient-chosen proxy able to do so for the patient?

DOES IT HURT TO STARVE?

Many people assume that death from starvation or dehydration is painful. However, numerous case reports demonstrate that forgoing nutrition and hydration near the end of life leads to greater patient comfort, while providing it may increase edema, secretions, and dyspnea.[16,17] Ellershaw et al[18] showed that dry mouth, thirst, and increased secretions in dying patients were unrelated to their level of hydration.

Patients dying without nutrition and hydration may be adequately hydrated but experience symptoms due to other factors, such as drug side effects[18] or mouth-breathing.[19] Another study of terminally ill cancer patients who declined food and drink showed that these patients generally did not experience hunger or thirst. Those who did needed only small amounts of food or liquid, while those who ate to please their families experienced nausea and abdominal discomfort.[20]

Thirst and dry mouth can be alleviated through good nursing care (eg, offering ice chips; keeping the lips, nose, and eyes moist; providing good mouth care; using analgesia when appropriate).[21,22] Anecdotal evidence has shown that ill persons often do not feel hungry. The effects of ketosis and the body's release of endogenous opioids during starvation are thought to block pain and discomfort.[16,23]

IS IT 'KILLING'?

The forgoing of life-supporting therapy has been legally distinct from homicide since the 1976 Karen Ann Quinlan ruling,[24] in which the New Jersey Supreme Court allowed the withdrawal of a ventilator, which was expected to lead to the patient's death.

In the language of ethics, withholding and withdrawing life-sustaining treatment are morally distinct from physician-assisted suicide and euthanasia.[25] In physician-assisted suicide, a physician enables a patient to actively end his or her own life (eg, by writing a prescription for a large number of barbiturates); in the United States, this is legal only in Oregon. In euthanasia, a physician intentionally directly causes the patient's death (eg, by injecting a bolus of potassium); euthanasia is illegal in the United States.

Physicians who are opposed to physician-assisted suicide and euthanasia are morally able to provide patients with adequate pain relief at the end of life through the "principle of double effect," in which providing the patient with adequate pain relief may unintentionally hasten the patient's death.[26]

In forgoing a life-sustaining therapy such as nutrition and hydration, the patient's underlying disease causes death because the patient cannot live without the treatment.

Some may view these distinctions as semantics or symbolism, but as we noted earlier, the meanings we attach to things are very important. In a practical sense, if every discontinuation of life-supporting treatment were viewed as "killing," physicians would be reluctant to start potentially effective treatments and unwilling to stop ineffective ones.[10]

CAN FAMILY MEMBERS DECIDE?

Most patients and families do not have the medical knowledge and clinical experience to make medical decisions by themselves and therefore need the physician's guidance. In the case previously discussed, letting the patient's wife decide could be viewed as an abdication of physician responsibility because it assumes that the wife has knowledge and clinical experience equal to the physician's. However, the wife may be in the best position to know her husband's treatment preferences.

Clinical judgment should take priority in decisions about tube feeding

Together, the medical team and the family can consolidate their knowledge to set goals of care for the patient. Neither a loving family nor a caring physician wants to feel responsible for a patient's death. Shared decision-making means taking shared responsibility for decisions. Focusing on the disease process as the cause of death, as well as on realistic goals of comfort care, may help the family and the physician provide optimal end-of-life care.

PRINCIPLES FOR DECISION-MAKING

How should physicians handle situations such as the one described in the case at the beginning of this article?

- **Physicians need to further educate themselves** about the clinical burdens and benefits of feeding tubes and the symbolic power often attributed to this treatment. Journal articles and ethics textbooks are primary sources of information. The sharing of evidence-based knowledge with colleagues and students is important because physicians who are unclear about the clinical and ethical issues surrounding tube feeding are not able to effectively advise patients and families.
- **Clinical judgment should take priority** in decision-making. Specifically, what potential benefits or harm may result from this treatment, and how does it fit in with the overall goals of care?
- **Physicians and nurses need to consider their use of language** in speaking with patients and families. In patients with neurologic devastation and multiple medical problems, team members may view further aggressive treatment as futile. However, family members may interpret the word "futile" to mean that the physician does not think their loved one is worthy of care. Similarly, the term "withdrawal of care" may conjure concerns that the physician will stop caring and abandon their loved one.

In their program "Education for Physicians on End-of-Life Care," the AMA recommends using language that emphasizes the goals of care (ie, "I will focus my efforts on treating your symptoms," or "We will concentrate on improving the quality of your life.")[14]

In the case of forgoing nutrition and hydration, the term "feeding tube" is misleading because the patient is not being fed in the normal social manner. A more descriptive and less emotionally laden term such as "gastric tube" or "stomach tube" could be used.[27]

SUMMARY

The provision or discontinuation of nutrition and hydration at the end of life is a clinical decision that is complicated by the images associated with this technology. However, the process of decision-making is the same as that involved in the provision or discontinuation of any other kind of life-supporting treatment.

Basing their decisions on clinical evidence, physicians are beginning to reconsider routine tube feeding in patients with end-stage dementia.[8,9] Such reconsideration may eventually lead to better care for all patients at the end of life. ■

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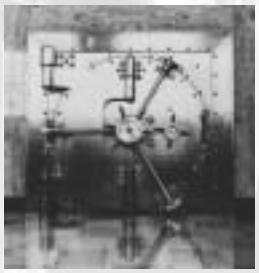

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Real Property Case Summaries

By Stephen Edward Silkowski, Esq., Jacksonville, Florida

Homestead status is preserved when family unit temporarily flees to avoid legal problems, but intends to return and maintain permanent abode there.

Novoa v. Amerisource Corp., 860 So. 2d 506 (Fla. 3rd DCA 2003).

Novoa testified that he was in Costa Rica pending resolution of his legal problems, and that he intended to return to the property as homestead when these problems abated. A homestead is abandoned by taking up a permanent abode at a distant place. Whether there has been an abandonment of a homestead should be determined by a consideration of all the pertinent facts and circumstances of each case. Involuntary absence from homestead, caused by legal problems of the owner, are insufficient to constitute abandonment of the homestead. The status of homestead is preserved when the family unit is temporarily removed from the homestead, but the homestead remains the permanent abode to which the family unit intends to return.

Wrongful eviction plaintiff, in order to recover damages for complete loss of his business, must prove that the loss of his ability to conduct his business was a natural, direct, and necessary consequence of the landlord's locking him out of the leased premises and denying him access to his tools and equipment.

Rost v. Bowling, 861 So. 2d 1246 (Fla. 2nd DCA 2003).

In June, 1998, the tenant rented commercial property from the landlord and operated an automotive repair business on the leased premises. In November 1998, after the tenant fell behind in paying rent, the landlord barred the tenant from the premises without notice or initiating eviction proceedings. After about two weeks, he allowed the tenant to enter the premises to remove some tools and equipment. The parties proceeded to trial on the tenant's claims for wrongful eviction and conversion, as well as the landlord's counterclaim for unpaid rent. The trial court concluded that the tenant did not prove his claims for conversion or punitive damages.

On appeal, the landlord argued that the evidence did not support the trial court's conclusion that the tenant had lost the ability to conduct his business as a result of the wrongful eviction and, therefore, that the trial court had erred in awarding to the tenant the value of the business. Additionally, the landlord argued that the value of the tenant's business was not the proper measure of damages to be awarded for the wrongful eviction. The appellate court agreed.

In a claim for wrongful eviction, a tenant may recover general damages, consisting of the difference between the market value of the leasehold and the rent payable, as well as lost profits that can be determined with a reasonable degree of certainty. In addition, a tenant may be able to recover damages for losses that are the natural, direct, and necessary consequences of the breach when they are capable of being estimated by reliable data, and are such as should reasonably have been contemplated by the parties. Plaintiffs in wrongful eviction actions have been permitted to recover special damages, such as the cost of improvements to the leased property or the cost of renting substitute property. Here, the tenant acknowledged that he located another building where he could conduct his business. He asserted, however, that he lost the ability to conduct his business at any location because the landlord had converted his tools and equipment and wrongfully evicted him by locking him out of the leased premises. The trial court specifically rejected the tenant's conversion claim, and that determination was not challenged on appeal. Therefore, in order to affirm the award of damages, the record would have had to demonstrate that the tenant's loss of his ability to conduct an automotive repair business was a natural, direct, and necessary consequence of the landlord's locking him out of the leased premises and denying him access to his tools and equipment for two weeks. The key to the tenant's claim that he could not conduct his business elsewhere was the conversion claim, which he lost. The tenant did not otherwise present evidence that the landlord's conduct resulted in the total destruction of his business. The record further reflected that the tenant only sought to prove the value of his business, and he did not present evidence of other potentially recoverable damages such as lost profits, the difference between the market value of the leasehold and the rent, the cost of renting substitute property, or the cost and feasibility of obtaining replacement tools and equipment due to the lockout.

Failure of sale-contract contingency beyond purchaser's control is ground for return of deposit.

Waksman Enterprises, Inc., v. Oregon Properties, Inc., 862 So. 2d 35 (Fla. 2nd DCA 2003)

Seller sought a declaratory judgment that it was entitled to retain $50,000 in deposits that buyer had paid after a real estate sale involving one of several parcels failed to close. The contract provided for three categories of deposits: (1) a "deposit" of $10,000, payable upon the contract's execution; (2) an "additional deposit" of $20,000, payable after a 90-day inspection period expired; and (3) deposits of $10,000, each payable for three optional 30-day extensions of the closing date. Buyer terminated the contract when its option to purchase one of the parcels expired, while seller alleged that this termination after expiration of the inspection period entitled it to the entire deposit. The appellate court held, however, that the facts showed that a building permit condition in the contract was not satisfied, and the buyer thus had been entitled to terminate the contract. Specific directions in the contract take prece-

dence over the general, and it is reasonable to conclude that the initial deposit would be returned to the buyer if a contingency failed for reasons beyond its control. Accordingly, the contract language here was not ambiguous, as its "nonrefundable" language and its refund provision could be reconciled. Once the inspection period was over, the deposits were nonrefundable if the seller failed to close, except that the initial "deposit" and "additional deposit" would be returned if the seller terminated the contract because specified conditions, including the building permit requirement, were not satisfied. The other deposits were not refundable for any reason. Therefore, seller had the right to retain $20,000 of the deposits, and buyer had the right to the refund of $30,000 of the deposits.

Non-condominium townhouse homeowners' association's responsibility for maintenance of walls of units pertained only to the outer surfaces of those walls. *Klak v. Eagles' Reserve Homeowners' Ass'n.*, 862 So. 2d 947 (Fla. 2nd DCA 2004).

The core of the declaration of covenants and restrictions provision at issue in this townhouse, non-condominium case stated that "the [homeowners'] association shall have the right and obligation to maintain the exterior of the Dwelling Units." This case turned on the meaning of the phrase, "the exterior of the Dwelling Units." The trial court had determined that "the term 'exterior of the Dwelling Units' includes everything from the interior coat of paint to the outside of the buildings." Based on this interpretation of the declaration, the trial court determined that the association had the responsibility to repair and reconstruct defective exterior walls of the units.

Because interpretation of a contract, and, by extension, the declaration, is a question of law, the appellate court applied a de novo standard of review and concluded that the trial court's interpretation of the text of the declaration was unreasonable and erroneous, because in interpreting the declaration, the trial court neglected to give effect to the commonly understood meaning of the word "exterior." Words in a contract must be given their plain and ordinary meaning. The primary definition of the noun," exterior", is "the outer surface or part". Accordingly, the plain meaning of the phrase "the exterior of the Dwelling Units" is the outer surface of the dwelling units. That is a far different meaning than "everything from the interior coat of paint to the outside of the buildings"- the meaning that the trial court assigned to the phrase. The trial court had read the declaration as though it had made reference to the exterior walls of the dwelling units, but the declaration contained no such reference or anything equivalent to such a reference. The words of the declaration did not justify treating it as though it were a condominium, which was the practical effect of the trial court's ruling.

In addition to the plain meaning of the term "exterior," the consistent tenor of the entire maintenance provision of the declaration pointed to the conclusion that the association's responsibility for the maintenance of the walls of the units pertained only to the outer surfaces of those walls. The reference to "painting exterior building surfaces" is a clear indication that the scope of the association's responsibilities did not extend as far as the trial court would have it.

The specific reference to "repairing, replacing, and caring for roofs, gutters, downspouts" does nothing to undermine our interpretation of the general language providing for the maintenance of the exterior of the units. The language of the declaration makes clear the duty of the association with respect to replacing the roofs of the units. The specific language in the declaration on that point — together with the absence of similar language with respect to the repair and replacement of defective walls of the units — reinforced the appellate court's conclusion that the trial court's interpretation of the declaration was erroneous.

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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, FL
Group Rate: $159/night
Reservation Cut-Off Date: May 2, 2005
Reservations: 1-800-233-1234 or 239-444-1234

Irrevocable Licenses in Florida

As a related principal of law and one producing many of the same identical effects as an implied easement, Florida does recognize the establishment of an irrevocable license under common law principles of equity. It has been said that whenever the Lord closes a door, He opens a window. Without meaning to imply any religious importance to the *Tortoise Island* decision, if the Florida Supreme Court closed a door on implied easements with *Tortoise Island*, it certainly opened a window of opportunity thereafter with its reaffirmation of the doctrine of an irrevocable license in its decision in the *Dance* case as set forth below. An irrevocable license offers many (but not all) of the same results as an implied easement without the same limitations imposed by the *Tortoise Island* case.

Florida historically has recognized the establishment of an equitable use in land through an irrevocable license. In *Dotson v. Wolfe*, 391 So. 2d 757 (Fla. 5th DCA 1980) ("*Dotson*"), the appellate court, in discussing the difference between a license and an easement, pointed out that an easement is an interest in land and often permanent. The *Dotson* Court stated at 759 that "*** a license is merely a personal right to use the property of another for a specific purpose, is not an interest in land and therefore, may not be assigned or conveyed (citations omitted). As a personal right a license may be revoked at will by the licensor (citations omitted). There is a split among the jurisdictions as to whether a license may ever become irrevocable (citations omitted). Florida has sided with those jurisdictions which have allowed a license to become irrevocable to escape an inequitable situation which might be created by the requirements of the Statute of Frauds, or where money has been spent in reliance on a license (citations omitted)."

The *Tatum v. Dance* Court further recognized this distinction between an easement and a license and viewed the irrevocable license as not being subject to the doctrines of merger and foreclosure, inasmuch as it is a personal right arising in equity and not an interest in land. The court also pointed out that the license (since it is personal) may not be assigned or conveyed but may become irrevocable where the licensee, in reliance on the license, has expended substantial sums on improvements. "Equity will estop the licensor from exercising his right to revoke the license." *Tatum v. Dance* at 112. Both the *Tatum v. Dance* Court and the Supreme Court in affirming *Dance* noted, however, that the irrevocable license cannot become an easement. While the irrevocable license may be the functional equivalent of an easement by estoppel, they are not the same thing and the license (the court felt) should be limited to the time and scope necessary to protect the reliance and investment of the licensee under equitable principles. See *Tatum v. Dance* at 112.

Tatum v. Dance was affirmed by the Florida Supreme Court in *Dance v. Tatum*, 629 So. 2d 127 (Fla. 1993) ("*Dance*"). In *Dance*, the Florida Supreme Court affirmed the existence of an irrevocable license and expressly held that such license is not limited by the Statute of Frauds or its holding in the *Tortoise Island* case. In *Dance* the Supreme Court stated that a license is normally revocable at will and arises when permission is granted to use property for a particular purpose or in a certain manner. However, the court said the rule permitting revocation at will by the grantor of the license, does not apply when permission is granted and in reliance thereon the permitee has extended large sums of money or incurred obligations for the property's improvement. *Dance* at 128-129.

In *Dance* the court held that a property owner was entitled to an irrevocable license for drainage onto adjoining land. Evidence supported that the licensee, in reliance on an oral grant of a drainage license, expended a substantial sum of money to build and maintain a car dealership on his parcel with a drainage system into an existing borrow pit located on the licensor's adjacent parcel. Dance purchased his property for a car dealership from Rapp and Broleman ("Dance Parcel"). Without obtaining from his seller a written drainage easement, Dance designed a drainage system for the purchased property that drained into the seller's adjoining property ("Adjoining Property") using the existing borrow pit. Rapp and Broleman then sold the Adjoining Property to Tatum. Tatum subsequently sold the Adjoining Property to Dance, such that Dance held title to all the property originally owned by Rapp and Broleman. Dance then defaulted under the mortgage for the Adjoining Property and Tatum foreclosed and sought to terminate Dance's drainage onto the Adjoining Property (arguing both merger of title in Dance and foreclosure as grounds for termination).

The issue before the court was whether an irrevocable license still exists in Florida. The answer was in the affirmative. The court also limited *Albrecht v. Drake Lumber Co.*, 67 Fla. 310, 65 So. 98 (1914) which said that an irrevocable license becomes an easement (which the Supreme Court held in *Dance* to be incorrect and that an irrevocable license never ripens into an easement). In *Dance* the court held that the licensor loses the right to terminate the license at will once the permittee has expended large sums or incurred heavy obligations for the property in reliance on the license. The court further held that a purchaser of the burdened property who takes title with notice (including constructive notice of a visible use) is burdened with the license and is not in a position to object to its presence or sue for damages. Finally, the court found that Florida recognizes the distinctive natures of an irrevocable license and an easement, that an irrevocable license is consistent with its decision in *Tortoise Island* and so limited the *Albrecht* case to the extent it conflicts with *Tortoise Island* (such that a irrevocable license cannot mature into an easement). *Dance* at 129. The court also let stand the limitation that the license was personal to Dance and could not be transferred to a successor in title.

The value of an irrevocable license was further demonstrated in *Dupont*. *Dupont* involved the sale by the Whitesides of 32 acres of the Whiteside's property to the Duponts for construction of a home ("Dupont Property"). The Dupont Property fronted on both the St. Johns River and a public road. However, the area between the public road and the area fronting on the St. Johns River is largely wetlands and swamp which is subject to permitting and control by

the St. Johns Water Management District.

The Dupont family elected to build their home on the portion of their property fronting on the St. Johns River. The only practical access was over a road into the Whiteside home and property. Mr. Whiteside gave permission for the Duponts to use this road as a license but then revoked the license after 14 years of use. No easement was demanded by the Duponts to purchase the Dupont Property from Whiteside other than oral permission to use the road. The *Dupont* Court held that, as the result of *Tortoise Island*, they could not (1) find an easement by way of necessity under §704.01 because the necessity was not "absolute" since there was access to a public road (although as the dissent effectively points out construction of a road with fill over the wetlands was not a realistic option) and (2) could not find an easement by implication, the court finding an oral promise cannot form the basis for an enforceable easement because of the Statute of Frauds pursuant to the reasoning in *Tortoise Island*. *Dupont* at 1263. The court then pointed out a license "*** confers no interest in the land but merely gives one the authority to do a particular act on another's land; it may be created orally." *Dupont* at 1263. The appeals court then remanded the case to the trial court to determine if an irrevocable license existed in favor of Dupont based on the expenditure by the Duponts of a large sum to construct their home.

While an irrevocable license is clearly not an easement and likely cannot be transferred, it is an important tool because: (1) it may be granted orally and is not subject to the Statute of Frauds, (2) it is not subject to extinguishment by merger, (3) it may permit a necessary use which would otherwise be lost if the language of *Tortoise Island* is applied, and (4) it enhances the arguments of each side in trying to resolve any easement dispute.

Conclusion

The above discussion on implied easements and irrevocable licenses provides the background for such relief as is available under Florida law in the event a client finds that it is being denied access or other use necessary to its property and for which the client lacks an express grant of easement or fails to qualify for a way of necessity under §704.01, Fla.Stat. The principles set forth above are narrow in their scope but where the facts and equities are present, may be sufficient to bring the parties to an acceptable compromise or provide relief in the right situation. Nonetheless, it should always be remembered that the best solution is never an implied easement nor an irrevocable license, but rather a well drafted, express grant created at the time the use arises that imposes the intended and desired use contemplated by the grantor and the grantee.



Probate, Guardianship & Trust Case Summaries

by Shane Kelley, Esq., The Kelley Law Firm, Ft. Lauderdale, Florida and
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Court appointed appellate attorney for ward was entitled to an award of appellate fees and costs from the guardianship estate despite losing on appeal where attorney did not exceed scope of his appointment.
In re Guardianship of Thelma King, 862 So.2d 869 (Fla. 2nd DCA 2003); 29 FLW D22.

Attorney James Essenson was appointed as Thelma King's (the "Ward") attorney in an incapacity proceeding. Following the trial court's finding of incapacity, Essenson filed a motion seeking to be appointed as the Ward's court appointed appellate counsel. The trial court granted Essenson's motion and he prosecuted the Ward's appeal. The appellate court per curium affirmed the trial court's order. Essenson then petitioned the trial court for payment of attorney's fees and costs from the guardianship estate. The trial court denied Essenson's petition, finding that the appeal did not benefit the guardianship estate and were not in the Ward's "best interests."

The appellate court reversed, finding that court appointed attorneys are normally only denied fees and costs where their services exceed the scope of their appointment. Here, the appellate court found that Essenson's services did not exceed the scope of his appointment and he was entitled to an award of appellate fees and costs notwithstanding the denial of the appeal.

Revised elective share statute applies to decedents dying after October 1, 2001, and assets of Decedent's revocable living trust who died prior to October 1, 2001 were not subject to the elective share claim of surviving spouse.
Estate of Blanche A. Heid v. Edward J. Heid, III, et. al., 863 So.2d 1259 (Fla. 5th DCA 2004); 29 FLW D198.

Edward J. Heid (the "decedent") died on December 18, 1999. The personal representative of the surviving spouse (who died during the pendency of the litigation) filed an elective share claim against the trustee of the decedent's revocable living trust alleging that the assets in that trust were subject to the expanded elective share, F.S. §732.207 (2001). The trial court dismissed the action with prejudice, finding that the expanded elective share statute only applied to decedents dying after October 1, 2001, and because the decedent died before the effective date of the expanded elective share statute the prior statute controlled. Under the prior statute, assets in a revocable trust were not subject to the elective share.

The appellate court affirmed, confirming that the expanded elective share statute only applies to decedents dying after October 1, 2001. See F.S. §732.2155(1) (2000), which specifically provides, "Sections 732.201 - 732.2155 are effective on October 1, 1999, for all decedents dying *on or after October 1, 2001. The law in effect prior to October, 1, 1999, applies to decedents dying before October 1, 2001*."

Guardianship laws do not apply to an unborn child and trial court properly denied applicant's petition for appointment as guardian of an unborn child whose mother was incapacitated.
In re Guardianship of J.D.S. v. Department of Children and Families, 864 So.2d 534 (Fla. 5th DCA 2004); 29 FLW D198.

The Dept. of Children and Family Services (the "Department") filed a petition seeking emergency adult protective services for J.D.S. The petition stated that J.D.S. was pregnant due to a sexual battery which occurred in a group home and that she needed protective services. The petition described J.D.S. as a 22 year-old woman suffering from severe mental retardation, cerebral palsy, autism, and a seizure disorder which rendered her totally unable to care for herself. The petition also alleged that she was taking numerous medications, which were potentially detrimental to the unborn child. The Department subsequently amended the petition seeking the appointment of a guardian for the unborn child as well, alleging that the interests of J.D.S. and any guardian subsequently appointed for her were potentially in conflict with the interests of the unborn child.

The circuit court ordered protective services for J.D.S., and on the same day, Emelia Belford instituted formal guardianship proceedings under Chapter 744 of the Florida Statutes seeking to have J.D.S. declared totally incapacitated and requesting appointment as J.D.S.'s plenary guardian. Jennifer Wixtrom then filed a petition to be appointed guardian of J.D.S.'s unborn child, alleging the appointment was necessary because J.D.S. lacked the mental capacity to provide proper prenatal care and to make the necessary decisions for the protection and benefit of the unborn child. At the hearing, the circuit court ruled that it is improper to appoint a "guardian ad litem" for a fetus (citing *In re T.W.*, 551 So.2d 1186, 1190 (Fla. 1989)), that an unborn child is not a "person" within the meaning of the relevant statutes and that Chapter 744 does not provide for the appointment of a guardian of an unborn child. The circuit court found J.D.S. to be totally incapacitated and appointed Belford as plenary guardian. After the circuit court denied Wixtrom's motion for rehearing, Wixtrom filed an appeal.

Although the matter was moot by the time the appellate decision was rendered due to the birth of J.D.S.'s child shortly after oral argument, the appellate court decided the case on its merits because the Court considered the issue to be one of great pub-

lic importance and capable of reoccurring. The appellate court first noted that Chapter 744 defines the terms "guardian" and "ward," but fails to define the term "fetus." Additionally, the term "fetus" is not used in Chapter 744, and no section of Chapter 744 provided for the appointment of a guardian for a "fetus." The appellate court concluded that the absence of a provision for fetuses means that the protection of the guardianship statute does not extend to unborn children. The case goes on to discuss the status of a fetus as a "person" under current Florida and Federal law concluding that a fetus is not a "person" under the law and is not entitled to protection under the guardianship statute. This case contains a well written concurring opinion and a well written dissenting opinion, and this author commends a thorough reading of the entire case which will undoubtedly have an impact well outside the guardianship arena.

Pursuant to Article V, Section 20 of the Florida Constitution and F.S. §26.012(2)(b), the circuit court has exclusive jurisdiction over probate proceedings and purported license permitting Indian tribe to use property as tribal lands did not divest probate court of jurisdiction over the administration of property in question as part of a decedent's estate.

Petties Osceola, Sr. v. the Estate of Mary T. Osceola, 870 So.2d174 (Fla. 3rd DCA 2004); 29 FLW D327.

The circuit court reopened the decedent's estate pursuant an order of the appellate court following an appeal in *Osceola v. Osceola*, 744 So.2d 1251 (Fla. 3rd DCA 1999). The decedent's children then filed a motion to dismiss the administration for lack of subject matter jurisdiction. The motion to dismiss alleged that although the property in question belonged to the State of Florida, the Seminole Indians had been granted a license to use the property as tribal lands and that the purported license agreement divested the circuit court of any jurisdiction over the probate litigation. The trial court granted the children's motion to dismiss finding that the circuit court lacked subject matter jurisdiction over the property in question. The decedent's husband, appellant, appealed the ruling arguing that even if a license existed, the license was subject to the laws of the State of Florida and cannot abrogate the circuit court's jurisdiction over the probate administration of the property in question.

Without finding the need to determine the validity of the license agreement, the appellate court reversed finding that the language in the purported license did nothing to divest the circuit court of jurisdiction. To the contrary, the limiting language contained in the license itself sought to preserve the jurisdiction of the State of Florida over the property and only allowed the Seminole Indians to use and occupy the property, "*consistent with all limitations set forth, not in conflict with laws of the United States and the State of Florida*."

The three month statute of limitations contained in F.S. §733.212 does not apply to bar the removal of a personal representative who was never legally qualified to serve under F.S. §733.212.

Angelus v. Pass, 868 So.2d 571 (Fla. 3rd DCA 2004); 29 FLW D374.

Henry Pass ("Pass") was nominated as a co-personal representative in the decedent's will. Shortly after the decedent's death, Pass filed a petition for administration seeking appointment as the personal representative of the decedent's estate and alleged in the petition that while he was not a resident of Florida, he was the nephew of the decedent. The trial court entered an order appointing Pass as the personal representative of the decedent's estate. Pass promptly served the decedent's daughter, Adriaan Angelus ("Angelus"), with Notice of Administration. Fifteen months after Pass' appointment as personal representative, Angelus filed a motion to strike the letters of administration and petition to remove Pass as personal representative alleging that Pass was prohibited from serving as personal representative of a Florida estate under F.S. §733.304. Section 733.304 provides that a nonresident cannot qualify as personal representative of a Florida estate unless they are a "spouse or a brother, sister, uncle, aunt, nephew, or niece of the decedent, or someone related by lineal consanguinity." Angelus alleged that Pass did not have a blood relationship to the decedent despite his misrepresentations to the contrary. Pass admitted he was not a blood relative of the decedent. However, he claimed that the petition should be dismissed because it had not been filed within the three month time period contained in F.S. §733.212. Section 733.212 provides in relevant part that any person on whom a Notice of Administration is served has three months from the date of service to object to the qualifications of the personal representative or those objections are forever barred.

The trial court agreed with Pass and dismissed the motion/petition as untimely and barred by the provisions of F.S. §733.212. The appellate court reversed, holding that the time limitations contained in F.S. §733.212 cannot be applied to prevent a legally unqualified personal representative from avoiding the express requirements of F.S. §733.304. To do so would render F.S. §733.212 as well as Fla.Prob.R 5.310 (which requires a personal representative who is not qualified to act at the time of appointment or subsequently becomes unqualified to notify the interested persons, who may then petition for removal) meaningless and would shift the burden of discovery of the applicants misrepresentations to the court and interested persons. "Simply, Section 733.212(3) does not provide the trial court with discretion to allow a legally unqualified person the privilege to serve as personal representative."

Trial court erred in dismissing with prejudice, due to lack of standing, a petition for revocation of letters of administration and petition for administration of prior will which was filed by the attorney for the beneficiary under the prior will. Fair reading of petition demonstrated that attorney was not proceeding for his own personal interest, but as the representative of beneficiary named in prior will and petition demonstrated proper standing in named beneficiary.

Magnolia Manor, Inc. v Siegel, , 866 So.2d 142 (Fla. 5th DCA 2004); 29 FLW D409.

In an earlier appeal in this estate proceeding, the appellate court reversed a finding that the decedent

continued, next page

died intestate and directed that the sole beneficiary of the decedent's 1978 will, Magnolia Manor, Inc., be given notice of the estate proceedings and given an opportunity to offer the 1978 will for probate (*First Union Nat'l Bank of Fla., N.A. v Estate of Byron B. Mizell*, 807 So.2d 78 (Fla. 5th DCA 2001)). After receiving notice, Magnolia Manor's attorney, Kenneth L. Mann, filed a petition to revoke letters of administration and sought to have the 1978 will admitted to probate. Mann named himself as "petitioner" and stated that Magnolia Manor had designated him as the successor personal representative. The trial court dismissed the petition with prejudice, holding that Mann lacked the standing to file the petition.

The appellate court reversed, holding that a fair reading of the petition demonstrated that Mann was not proceeding on his own behalf, but as a representative of Magnolia Manor. The petition claimed no personal standing on behalf of Mann but did demonstrate adequate standing on behalf of Magnolia Manor.

Beneficiary's proportional shares of testamentary trust vested instantly upon her attaining ages required for fractional distributions of trust corpus and trustee was required to distribute two-thirds of trust corpus to beneficiary's estate notwithstanding the death of beneficiary prior to actual funding of the testamentary trust; The law favors early vesting, and funding is a ministerial act which does not affect the time of vesting.
Lumbert v. Estate of Carter, 867 So.2d 1175 (Fla. 5th DCA 2004); 29 FLW D509.

The decedent's will directed that her entire estate was to be distributed to a testamentary trust for the benefit of her daughter, Lisa. Lisa was to receive distributions of principal from the trust as she attained certain ages: one-third at age 35; one-half at age 40; and the remainder at age 45. If Lisa did not survive to receive complete distribution of the trust assets, the balance of the trust was to be distributed to her lineal descendants, per stirpes, if any, and if none, to the decedent's brothers and sisters. Lisa survived the decedent by fourteen months having attained the age of 41. Lisa was not survived by descendants.

At the time of Lisa's death, the trust had only been partially funded with the majority of the estate in the process of administration. The trial court found that the proper beneficiaries of the remaining trust assets were the decedent's brothers and sisters and that Lisa's estate was not entitled to distribution of two-thirds of the trust assets even though she had attained the required age to receive these distributions of trust principal prior to death. The trial court found that Article IV E of the decedent's will was controlling, which provided in relevant part, "If my daughter shall die, after this trust has been established for her benefit and before the entire principal of her fund has been distributed to her in fee, then in such event the Trustee shall distribute this trust fund (or the remainder thereof held in trust) ... unto her lineal descendants, per stirpes, or if none, unto my brothers and sisters ... ."

The appellate court reversed, holding that such a reading of the will defeated two prior provisions of the will. Specifically, Article IV D provided, "If my daughter shall have attained any of such respective ages at the time when such trust fund is directed to be set aside for her, the Trustee shall distribute to my daughter such part of or parts or all, as the case may be, of such trust fund (instead of holding same in trust) as are directed to be distributed to her upon attaining such respective ages." Recognizing that the law favors early vesting of estates unless the decedent expresses a clear intention otherwise, the appellate court found the only event or conditions required for vesting was Lisa's attainment of the benchmark ages as to her proportional shares. There was no requirement in the will or trust that the funds to which she was entitled actually be distributed to her before her death or that the trust had to be fully funded. "Such an interpretation would place too much power in a trustee or personal representative to alter the rights of beneficiaries simply by delaying testamentary trust distributions, or funding of testamentary trusts." The appellate court found that funding of the trust was merely a ministerial act which did not affect the vesting of Lisa's right to the proportional shares of trust principal upon attaining the ages of 35 and 40. Accordingly, Lisa's estate was entitled distribution of approximately two-thirds of the trust principal with the remaining one-third passing to the decedent's brothers and sisters.

Surviving spouse who conditionally waived her right to elective share and sought removal of personal representatives was entitled to discovery of financial information and rule requiring delay of discovery in accounting actions had no application; Trial court's order compelling production of financial information cannot be the object of a writ of certiorari because there was no irreparable harm.
Donald Sauey and Norman O. Sauey, Jr., as personal representatives of the Estate of Norman O. Sauey, Sr. v. Beverly Sauey, 869 So.2d 664 (Fla. 4th DCA 2004); 29 FLW D809.

Surviving spouse who had conditionally waived her right to an elective share sought discovery of financial information from the estate alleging it was necessary to make an informed decision on whether to exercise her statutory right to an elective share and relevant to her petition for removal of the co-personal representatives (the decedent's sons). The co-personal representatives objected to the production of the financial information arguing that the discovery was premature because it was requested prior to the trial court determining the issue of entitlement to an elective share. The trial court overruled the objections of the co-personal representatives and entered an order compelling them to produce the financial information. The co-personal representatives filed a writ of certiorari with the appellate court.

The appellate court denied the writ, citing the general rule that "[W]here materials sought by a party 'would appear to be relevant to the subject matter of the pending action,' the information is fully discoverable." The co-personal representatives relied upon the case of *Picerene Development Corp. Of Florida v. Tasca &*

Rotelli, 635 So.2d 149 (Fla. 4th DCA 1944) to support their argument that the surviving spouse's discovery was premature. *Picerene* applied the rule that limits discovery in accounting actions until the court determines that a fiduciary relationship exists and that the party seeking discovery is actually entitled to an accounting. The appellate court refused to extend that rule to elective share cases where the discovery is relevant to the decision whether or not to seek an elective share. Unlike accounting cases where the existence of a fiduciary relationship may be in question, here there is no dispute as to the surviving spouse's status as a surviving spouse. The only dispute is her entitlement to the elective share due to the existence of the antenuptial agreement conditionally waiving the right. The appellate court also held that the order compelling production of the relevant financial information was not the proper object of a petition for writ of certiorari because there was no irreparable harm.

Beneficiary waived objection to circuit court's lack of personal jurisdiction by filing a response to a petition for administration and seeking discovery prior to an assertion of lack of personal jurisdiction and the probate court had authority to order return of bearer bonds taken from decedent's safe deposit box after decedent's death.
Markowitz v. Merson, 869 So.2d 728 (Fla. 4th DCA 2004); 29 FLW D872.

Appellant, a beneficiary under a will, was served with formal notice of a petition for administration. Appellant filed a response to the petition and took discovery prior to an assertion that the probate court lacked personal jurisdiction. The probate court denied Appellant's challenge to the personal jurisdiction of the probate court and ordered her to return bearer bonds which she removed from the decedent's safe deposit box subsequent to his death.

The appellate court affirmed the probate court, finding that Appellant waived any objection to the probate court's lack of personal jurisdiction by filing a response to the petition and seeking discovery prior to the assertion of lack of personal jurisdiction. Furthermore, the appellate court found that the probate court has inherent authority to protect and preserve the assets of an estate and that entry of an order directing the return of bearer bonds removed from the decedent's safe deposit box following his death was proper.

Arbitration clause contained in account agreement between Morgan Stanley DW Inc. and Trustees of a QTIP trust did not bind income beneficiary of QTIP Trust in suit against Morgan Stanley for mismanagement of trust assets.
Morgan Stanley DW Inc. and Jeffrey Jon v. Janet C. Halliday, _____ So.2d _____ (Fla. 4th DCA 2004); 29 FLW D944. *Opinion not yet released for publication and is subject to revision.*

Lifetime income beneficiary of a QTIP Trust sued in circuit court the Trustees and Morgan Stanley DW Inc. for mismanagement of the trust assets. Morgan Stanley filed a motion to compel arbitration alleging that the arbitration clause contained in the account agreement entered into between the Trustees and Morgan Stanley bound the income beneficiary. Morgan Stanley argued that the income beneficiary was either a third-party beneficiary of the agreement and therefore bound or alternatively that the Trustees were her agents when they entered into the agreement and that the income beneficiary was somehow bound under an agency theory. The circuit court rejected these transparent arguments and found that the income beneficiary was not bound by the arbitration clause. The fact that the Trust account had a title containing "FBO" income beneficiary as well as the fact that the income beneficiary had a separate individual account and had signed a similar account agreement with Morgan Stanley in her individual capacity were both irrelevant. The appellate court had little trouble affirming the circuit court finding, "Given the principal that a party can be forced to arbitrate only those matters one has specifically agreed to arbitrate, courts should avoid engaging in interpretation of the agreements of other parties in order to require non-parties to arbitrate." *Citing First Option of Chicago Inc. v. Kaplan*, 514 U.S. 938, 945, 115 S.Ct. 1920, 131 L.Ed.2d 985 (1995).

MESSAGE FROM THE CHAIR

from page 1

frontline of communication is this publication, *ActionLine*, and Dresden Brunner, Pat Hancock, and Keith Kromash provide the committee leadership to keep us connected to all our members which is so essential. As we noted at the beginning of the year, our Website, under the direction of Sam Boone and Silvia Rojas, is undergoing a major makeover in terms of functionality and design which will enhance the work and flow of information by and among our members. We eagerly look forward to beginning the hands-on use of the site.

Without fail, each year our legislative program is extensive, and we are looked to as a source of objective input by the legislature. This climate for success has been created by our Legislative Review Committee under the direction of Sandy Diamond and Burt Bruton and in close coordination with our lobbying team of Pete Dunbar, Martha Edenfield and Marc Dunbar. I would also like to note the work of Bob Goldman and John Little thorough our Amicus Coordination Committee and Julie Williamson under our Public Awareness efforts.

Lastly, but of greatest importance, our Section's coordinator Bonnie Bevis is the best. She is the bridge that connects each year to the prior year. She sees that the essential administration of our Section continues year to year smoothly and consistently. This year has been no exception. Well done Bonnie!

We look forward to another year of good work under the leadership of incoming chair, Laird Lile. All Section members are encouraged to be involved in the Section. Thank you again for allowing me to serve the Section as Chair.

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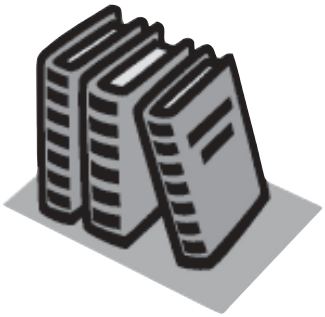

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What's new in the 2004 edition:

Users Guide, a Hypertext Treatise on estate planning; a Tax Library containing relevant sections of the IRC and Regulations, CLE Library; containing CLE articles authored by some of the state's leading practitioners. Including the new probate codes, complete coverage of EGTRRA. New charitable Remainder Trust Model Forms, along with the IRS annotations and laternate provisions.

The 2004 edition of the program no longer requires Hyper shelf. This change has decreased program size and increased program speed. Also the 2004 edition Express utility has been enhanced to include quick access to the many examples in the main treatise. It also provides quick and easy access to the EPTC Plus+ Update Wizard which automatically checks for program updates and enhancements on the EPTC online website. *www.dpowell.com.*

The User's Guide volume in the program contains a guided tour that will help you learn how best to use the EPTC Plus+ Reference System.

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'WHERE'S MY REFUND?' is a fast, easy way to check on IRS refunds. The "Where's My Refund?" service is accessible from the IRS.gov home page. Instructions guide individual taxpayers through a process that asks for three pieces of information from their returns: Social Security Number, filing status and refund amount. Once the information is submitted, "Where's My Refund?" notifies the taxpayer whether the return was received and is being processed, and, if processed, the expected mailing date or direct-deposit date for the refund. The service will also notify a taxpayer if a refund has been returned to the IRS as undeliverable. In cases where a refund is delayed because of a math error or other issue, "Where's My Refund?" will advise the taxpayer on steps he or she can take to resolve the problem.

— Dresden Brunner

Florida Senate Bill 2962, a massive funding bill for the court systems in Florida, increases recording fees on all items described in §28.222 by $4.00 a page: $10.00 for first page and $8.50 a page thereafter. This begins June 1, 2004. Governor Jeb Bush signed the Bill on May 28, 2004. There is an exception for judgments and Notices of Lis Pendens.

— Louis Guttmann

SENATE BILL 2962 will impose an additional service charge on formal administrations, summary administrations, ancillary administrations and guardianships. Also, the bill has clarified the imposition of the reopening fee of $50.00 in most civil actions. Certain matters are exempt from the $50.00 fee, such as distribution of personal property without administration, any probate case prior to the discharge of the personal representative, and any guardianship pleading prior to discharge.

— Dresden Brunner

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

WEBSITE UPDATE
The Section's redesigned website is unveiled on June 15 at:
www.flabarrpptl.org

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