ActionLine

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Homesteads & Hurricanes: What's New With the Save Our Homes Cap?

By Guy S. Emerich, Esq., Punta Gorda, FL

The Save Our Homes Cap (SOH) found in Article VII, Section 4(c) of the Florida Constitution and implemented by Section 193.155, Florida Statutes almost caused more victims of the 2004 Florida Hurricane season. Thanks to a recent change to Section 193.155, Florida Statutes, the homeowners in Florida have been granted some relief from the impact of last year's hurricane season as they rebuild their damaged homesteads. Other SOH developments worthy of note are also discussed in this article.

The Basics of the SOH Cap[1]

In 1992 the Florida voters approved Constitutional Amendment Number 10 aimed at limiting the amount of the increases to the annual valuation of one's Florida homestead for ad valorem tax purposes. Article VII, Sections 4(c)(1)a and 4(c)(1)b of the Florida Constitution limits the amount of increase in the assessed valuation of a homestead to the lower of three percent (3%) of the prior year's assessment or the percent change in the Consumer Price Index (CPI) for all urban consumers (U.S. City Average all items 1967=100, or successor reports for the preceding calendar year as initially reported by U.S. Department of Labor, Bureau of Labor Statistics).[2] Since January 1, 1994 when all property was assessed at just value, the CPI has only sur-

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Message from the Chair:

The Year Ahead

By Julius J. Zschau, Pennington, Moore, Wilkinson, Bell & Dunbar, P.A., Chair



The attainments of our Section in the past year, which was the 50th Anniversary, will be difficult to equal let alone top, but we have a very strong group of council members and officers who I believe will make possible another outstanding year. Service to our members is without question the most important aspect of what we do in the Real Property Probate and Trust Law Section. I hope to focus on providing more seminars relevant to day-to-day practice, to improve our website, to continue the outstanding efforts of our legislative program, to better our publications and to bring in more members to share in the benefits which our Section provides. In that connection, I would ask all of you to reach out to others who practice in the area of real property, probate and trust law, and those whose practices are impacted by our disciplines and ask them to join our Section.

George Meyer, Director of the Circuit Representatives, has taken on, as part of his goals, the recruitment of new members through the Circuit Representatives. Past Chairs, Mike Swaine whose background is in real property, and Steven Hearn whose background is in

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The U.S. Supreme Court's New Take on Public Use Worries Private Property Owners

By Molly Felmet Williams, Esq., Brigham Moore, West Palm Beach, FL

The United States Supreme Court decision in *Kelo v. New London* triggered an unusual wave of bipartisan criticism and pop culture comment.[1] This article provides a brief summary of *Kelo* and an overview of the national reaction to assist Florida practitioners in answering their clients' questions regarding *Kelo*'s impact upon their property holdings.

Kelo v. New London

Kelo presented the Supreme Court with the opportunity to address the national trend of local governments using eminent domain to assemble properties for developments which promise to bring a greater tax base and a newer face to aging cities. The City of New London, confronted with high unemployment and dwindling city dwellers, wished to raze the owners' waterfront homes in favor of a "small urban village" complete with a waterfront conference hotel, restaurants, shops, and marinas. The location was chosen not because of any inherent problem with the owners' properties but because the City hoped to capitalize on a new Pfizer pharmaceutical facility nearby.

The Supreme Court deemed this practice to pass Fifth Amendment muster. A narrow Supreme Court majority bowed to the City's legislative determination that New London needed a boost, approving this use of eminent domain to satisfy the Fifth Amendment's public use requirement. The Court declined to "second-guess" the City's judgment as to the lands needed to complete the project and couched its opinion as approving a carefully considered development plan for an economically distressed city. However, the *Kelo* majority emphasized that the Fifth Amendment precludes taking one person's property for the sole purpose of transferring it to another. The Court distinguished the *Kelo* development as a city-driven renewal plan rather than a plan to benefit a particular developer by noting that the City had planned most of the development prior to soliciting applications for a developer. Justice Kennedy, concurring, warned courts to scrutinize takings where there is a clear showing that the intent is to favor a particular private party with only pretextual public justifications.

The dissenting opinions by Justices O'Connor and Thomas argued that the majority had robbed the public use clause of its meaning by allowing a condemnor to simply prefer a more productive private use. Justice O'Connor penned, "Nothing is to prevent the State from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping mall, or any farm with a factory." She also criticized the majority for failing to recognize that an improper transfer would be difficult to divine from a cold record. Chief Justice Rehnquist and Justices Scalia and Thomas joined O'Connor's dissent. Justice Thomas wrote separately to lament that those without political clout would suffer the most from this new brand of public use and to advocate returning the Fifth Amendment's "public use" requirement to the meaning of actual public use.

Judicial Responses to Kelo

Clients may be assured that *Kelo* does not signal the courts to play dead in the face of unjust property transfers. As if foreseeing the public outcry following its decision, the Court welcomed the states to provide more protection for private property owners through either state constitutional provisions or statutory protection. The *Kelo* majority cited *County of Wayne v. Hathcock* as an example, wherein the Michigan Supreme Court overturned nearly 20 years of its precedent to find that takings solely for economic redevelopment violated the Michigan state constitution.[2] In *Hathcock*, Wayne County sought to assemble property for an office park which experts testified would create 30,000 jobs and add $350 million in county tax revenue. Nevertheless, the Michigan Supreme Court held that allowing a private enterprise's greater economic contribution to justify a taking would "render impotent" Michigan's constitutional limitations on the power of eminent domain.

Another more intermediate example of judicial protection is the Arizona Supreme Court's heightened scrutiny for economic development takings.[3] The Arizona test emphasizes the public character of the proposed project and forbids takings where the anticipated public benefits do not outweigh the private nature of the intended use. In Florida, our Supreme Court has said that the public interest must dominate any private gain when land is sought for such a project. [4] Hopefully, the state courts will heed Justice Kennedy's warning and refine their takings jurisprudence in light of *Kelo*.

Legislative Response to *Kelo*

The upcoming year will bring a flurry of legislative efforts attempting to offset *Kelo*. Within days of the opinion, the U.S. Congressional House of Representatives passed a resolution expressing "grave disapproval" of *Kelo*. [5] The Resolution passed 365 votes to 33. Federal legislation is underway proposing to withhold federal expenditures to local governments who use eminent domain as a tool to assemble properties for economic redevelopment.[6]

At the state level, more than 13 states, including Florida, have introduced legislation regarding economic redevelopment takings since *Kelo*. Florida House Representative Everett Rice has introduced a bill to amend the Florida constitution to ban economic redevelopment takings altogether.[7] Florida House Speaker Allen Bense has appointed a House Select Committee to Protect Private Property Rights to review Florida's Constitution, statutes, rules and ordinances to recommend changes to prevent a *Kelo* from happening in Florida.

Kelo is far from the last word in the nation's struggle to define what

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Message From the Chair
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probate and trust law, have agreed to assist George and the Circuit Representatives in moving this program forward. If any Section member has suggestions or referrals for new members, contact your Circuit Representative with your information. We need and appreciate your support.

Most of all, I encourage all Section members to become actively involved in the Section and its activities. That involvement can take many forms. One way to become involved is to become a member of a committee and to participate in it. We have eighteen **General Standing Committees** (such as Legislative Review, many liaison committees with groups such as the ABA, Department of Revenue, the Judiciary, law schools, and the Florida Bankers, and Sponsorship), twenty-one **Real Property Committees** (such as Condominium and Planned Development, FAR/BAR, Real Property Litigation, and Mortgages and Other Encumbrances) and sixteen **Probate and Trust Law Committees** (such as Estate and Trust Tax Planning, IRA and Employee Benefits, Charitable Planning, Probate and Trust Litigation and Trust Law).

If committee work does not interest you, volunteer to speak at one of our CLE Programs. If you have ideas for new programs or areas where the Section can serve the bar and the public better, let us know. Your attendance at Section CLE Programs not only helps you gain updated knowledge about our profession, it also helps the Section to carry out its mission of service to real property, probate and trust lawyers by bringing income to the Section.

You can find out about all of our committees and their activities on the Section website (www.flabar rpptl.org). You can also find who the people are to contact if you wish to become involved. We have many challenges and opportunities facing us in the coming year such as; changes to RESPA; a new trust law code, changes to the Patriot Act, and new legislative initiatives in the Florida Legislature. All of us who serve on the Executive Council of your Section want and need your participation. I look forward to a great and productive year for the Section. Thanks to all for the opportunity to serve as Chair.

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Kelo v. New London
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public uses justify the taking of private property. Clients and their attorneys who wish to weigh in on the national debate should make their views known to their legislators as the dialogue spurred by *Kelo* continues.

Endnotes:

1. *Kelo v. New London*, 125 S. Ct. 2655 (2005).
2. *County of Wayne v. Hathcock*, 471 Mich. 445 (2004).
3. *Bailey v. Myers*, 76 P.3d 898 (Ariz. 2003).
4 *Baycol, Inc. v. Downtown Dev. Authority*, 315 So. 2d 451 (1975).
5. H. Res. 340, 109th Cong., 1st Sess. (2005).
6. Strengthening the Ownership of Private Property Act of 2005, H.R. 3405, 109th Cong., 1st Sess. (2005); Private Property Rights Protection Act of 2005, H. R. 3135, 109th Cong., 1st Sess. (2005).
6. HJR 31 (Fla. 2006).

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Thanks to Laird and Laurie Lile

By Julius J. Zschau, Pennington, Moore, Wilkinson, Bell & Dunbar, P.A., Chair

As we begin a new Bar year, I would like to reflect on 2004-2005 under the leadership of our Immediate Past Chair, Laird Lile. Laird continued the exemplary leadership that he has provided the Section over the many years that he has served it and has shown himself to be a man unafraid of challenges and ready to deal with new opportunities that present themselves to the Section. He has been tireless in his efforts on behalf of the Section with The Florida Bar to work out issues regarding budgetary matters. At the same time, he has been on top of all of our internal efforts to better the Section and to provide better services to our members.

The number and quality of our CLE programs continued to improve under his leadership; the website has been constantly updated and improved; our Section has been active in providing Amicus Briefs; our publications continue to improve; and his year was capped with an absolutely outstanding Section convention in Bonita Springs. Add to all that, the great venues for our Executive Council Meetings, especially organizing our Executive Council Meeting in the House Chamber of the Florida Legislature. There are so many other outstanding achievements that have taken place during the past Section year that they would be virtually impossible to fully enumerate.



Laird and Laurie Lile enjoy the Williamsburg out-of-state meeting.

As Laird noted at the conclusion of the Convention, his wife, Laurie, deserves much of the credit for his successes over the last year. She worked tirelessly in assisting Laird in planning our Section's meetings and events during the past year. On behalf of the Section, thank you Laird Lile and Laurie Lile for your extraordinary efforts on behalf of all of us. Fortunately for us, Laird will continue to provide his knowledge and experience to the Section as he completes another year in Section leadership as Immediate Past Chair.

Meet Terry Hill

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

We welcome the new Program Administrator for the RPPTL Section. **Terry L. Hill** is an employee of The Florida Bar, and one of Terry's responsibilities is to assist the Section in its administrative tasks. Terry helps with organizing Section meetings and seminars, compiling materials for the Executive Council meetings, coordinating many details to keep the Section activities running (such as coordinating the printing and mailing of *ActionLine*), and serves as a go-to person for many RPPTL Section members. Terry brings a lot of energy to this position and an education which includes a recent law degree from FSU. He is also a Navy veteran. Terry's phone number is 850/561-5619 and his email address is thill@flabar.org.



Terry Hill (left) is welcomed at the Convention. Also pictured are Pat Hancock, Yvonne Sherron of The Florida Bar, and Stuart Altman.

While Terry was still getting his feet wet, Yvonne D. Sherron, the Director of the Bar's Professional Development Department, worked with the Section through the summer. We thank Yvonne for the great job she did (and is still doing) in stepping in while Terry becomes familiar with the Bar and our Section.

The Section's former administrator, Bonnie Elliott Bevis, took a position as a "Site-Selection Specialist" after serving as the Section's Program Administrator for 18 years. Bonnie stated that "the RPPTL Section will forever occupy a special place in my heart." We wish Bonnie much success and thank her for the many years she helped the Section.

RPPTL MENU SEMINARS

HUNGRY FOR KNOWLEDGE?
CLE DEFICIENCY IN YOUR DIET?

Powers of Attorney, Living Wills & More

Miami (September 15) and Tampa (September 16)
Program Chair: Don Peyton, New Port Richey

Featuring state-of-the-art forms and thoughtful presentations on the practical consequences of having, or not having, a living will; the use of powers of attorney in connection with gifting, trusts, estate planning and guardianships; and the role of the attorney-in-fact as a fiduciary.

Real Property Litigation and Landlord/Tenant

Miami (October 20) and Tampa (October 21)

See brochure, pages 29-30.

Trust Law – "How to Draft Trusts in 2005: Yes, You Still Have a Job"

Miami (November 3) and Tampa (November 4)
Program Chair: Bob Arlen, Delray Beach

Emphasis on practical "how to do it" drafting, including special considerations when drafting for homestead assets, trustee's power to adjust, total return unitrusts, special trustees, trust protectors, and removal and replacement of trustees, with case and statutory law update.

Real Property Problems Study

Tampa (January 2006) - Tentative

Your 2006 Trust & Estate Symposium

Miami (February 8, 2006) and Tampa (February 9, 2006)
Program Chair: Jack Falk, Coral Gables

Acclaimed annual program produced by the Probate & Trust Litigation Committee.

Annual Section Awards Presented at Convention in Bonita Springs

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

The RPPTL Section is able to accomplish its numerous goals and functions as one of the most successful sections of The Florida Bar due to the dedicated work of it members. At the Section's Annual Convention in Bonita Springs this year, Laird Lile, outgoing Section Chair, announced four awards to honor Section Members.



Roger Isphording (left) accepts the Robert Scott Memorial Award.

Roger O. Isphording received the **Robert C. Scott Memorial Award** for his devoted and valuable service to the Section. This award was established in 1985 in memory of Bob Scott, who was the past chair of the Section. The award is presented to Section members who best exemplified Bob's devotion and continued service to the Section and its membership. "The prestigious Robert C. Scott Award is enhanced even more by this year's recipient, Roger Isphording. Since his term as chair of the Section fifteen years ago, Roger has continued to be active and supportive of many aspects of the Section's efforts," says Laird Lile. Roger joins the very distinguished group of prior recipients of this award, which includes last year's recipient, Tom Smith. Roger was Section Chair in 1990-1991 and is a Board Certified attorney in Tax and in Wills, Trusts & Estates. He practices in Venice, Florida.



Peggy Rolando received the Section's Annual Service Award, presented by Laird Lile.

Peggy A. Rolando received the Section's **Annual Service Award** for her significant effort in sponsorships and organizing Section conventions. The Section presents an Annual Service Award to a Section member who has rendered dedicated and significantly outstanding service to the Section and its varied programs throughout the current year. In selecting the recipient of this annual award, the Section considers both the character and magnitude of the service furnished by the nominee throughout the year and particular emphasis is given to the benefits which accrue to the Section and the lawyers of Florida as a result of such service. "Peggy Rolando has been a real 'go to' person for the Section's leadership. Her work on sponsorships and conventions is legendary," said Laird Lile. Peggy is a real estate attorney in Miami, Florida and practices with the firm of Shutts & Bowen. She is Board Certified in Real Estate.

Robert W. Goldman received the **William S. Belcher Lifetime Professionalism Award** for his exemplary professionalism. This award was established in 2003 in memory of Bill Belcher, whose professional, civic, charitable, and personal conduct always reflected the highest standards of professionalism and devotion to his profession as an attorney. This award is presented, at the discretion of the Section, to an Executive Council member in recognition of his or her lifetime contributions to the Section, the Executive Council, Florida attorneys, and the public in promoting the highest standards of ethics and professionalism. Laird Lile states that "Bob is terrific example of the ideals for which the Bill Belcher Award was established." Bob Goldman was Section Chair in 1996-1997 and practices in Naples, Florida with the firm of Goldman, Felcoski & Stone.



Bob Goldman (left) was honored with the William S. Belcher Lifetime Professionalism Award, as presented by Laird Lile.

In addition, **J. Craig Shaw,** who is employed by The Florida Bar, was recognized for his years of commitment to the members of the Section with a plaque and a standing ovation. "Craig Shaw has been a longtime supporter of the Section's good work, always in the background and typically playing supporting roles. This token of appreciation from the Section provides an opportunity to shine the light on Craig and thank him for all that he does for us," explains Laird Lile.

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



Tami Conetta (center) and Laird Lile present a plaque to J. Craig Shaw (left).

Is Probate Necessary for the Exercise of a Testamentary Power of Appointment ?

By Richard S. Franklin, Pillsbury Winthrop Shaw Pittman, Washington, D.C.

Is probate a necessary prerequisite to the exercise of a testamentary power of appointment being operative? Yes it is, most informed trust and estate lawyers would answer. For example, section 18.2 of The Restatement (Second) of Property: Donative Transfers provides:

> There are formalities required by law for the transfer of owned property. These formalities, generally speaking, are designed to assure that the transferor intended to make the described transfer. The donee of a power should be required to meet the same formalities for the same reason with respect to a transfer by the means of the exercise of a power.

Section 733.103, Florida Statutes also implies this answer. Subsection (1) of this statute provides that a Will shall be ineffective to prove title until admitted to probate. Subsection (2) provides that in any "collateral action or proceeding relating to devised property, the probate of a will in Florida shall be conclusive of its due execution; that it was executed by a competent testator, free of fraud, duress, mistake, and undue influence; and that the will was unrevoked on the testator's death."

Three different courts in the country have recently addressed this question. In two of the three cases, *Meyer v. Meyer*, 987 P.2d 822 (Ariz. Ct. of App. 1999) and *Lumbard v. Farmers State Bank*, 812 N.E.2d 196 (Ind. Ct. of App. 2004), the courts held that probate of a Will is not necessary to give effect to the exercise of a testamentary power of appointment. These courts recognized the reality that the testator or testatrix who wishes to exercises a testamentary power of appointment does so by including the exercising language in his or her Will. That is all the testator or testatrix can do to effect his or her intent. The testator or testatrix cannot probate his or her own Will or control all the circumstances that may affect its probate. To these courts, not giving effect to the exercise because the probate administration did not occur, or did not occur within a specific timeframe, is too harsh a result when weighed against not fulfilling the clear intent of the testator or testatrix.

The *Meyer* Court, the first court to address the issue in a published opinion, reviewed a case in which the exercise of the power had to be by Will admitted to probate within three months of death. The testator exercised the power in favor of the Cleveland Clinic, but the Will was not admitted to probate within 3 months of his death. The *Meyer* Court relied upon the authority of Arizona's version of Section 101 of the Uniform Nonprobate Transfers on Death Act, which provides that the beneficiary of a nonprobate asset can be named in a Will and is effective upon death without the need for probate. [In case you are wondering, Florida has not adopted this section of this uniform act.] The *Meyer* Court also relied upon the equitable principle captured in Section 18.2 of The Restatement (Second) of Property, which provides that an appointment shall be effective if the exercise of the appointment approximates the manner intended and if the appointee is a charity.

The *Lumbard* Court addressed a situation in which the testatrix exercised certain powers of appointment in her Will. Based on the advice of counsel, the trustees of the trusts did not probate the Will. The attorney later second guessed himself, but by that time, under Indiana law, they were precluded from probating the Will. The takers in default of the appointment argued that the Will "either meets the legislative requirements [for probate] or it is void." The *Lumbard* Court reasoned:

> The document [the Will] expresses Grandmother's desire that Daughter receive "all of said property" in the Vivian Trust. Moreover, we are convinced by the reason of the *Meyer* court that the purported will—though not probated *as a will*—may be used to determine whether a power of appointment was exercised. In sum, Grandmother did all she could do while alive to express her intent to exercise her power of appointment over the Vivian Trust. The fact that the trustee's attorney correctly construed Grandmother's actions initially [that probate is not necessary] but then second-guessed himself does not affect Grandmother's expression of her intent.

In the third case, *Scott v. Scott*, 77 P.3d 906 (Col. Ct. of App. 2003), the court reviewed a testator's attempted exercise of a testamentary power of appointment by a codicil that lacked the formalities required for a codicil. The lower court refused to admit the codicil to probate. The Colorado Court of Appeals held that a testamentary power of appointment must be exercised by an instrument satisfying the statutes relating to wills and that instrument must be probated for the exercise to be operative. Construing the same provision of the Uniform Nonprobate Transfers on Death Act that the *Meyer* Court used as favorable authority, the *Scott* Court said:

> In our view, the statute is not intended to expand the means by which a testamentary power of appointment may be exercised, nor does it obviate the requirement that a testamentary instrument be probated. The statute merely makes it clear that the exercise of a power of appointment in a will does not make the transfer testamentary, nor does it make the transferred asset a part of the probate estate.

The *Scott* Court's analysis of the section 101 of the Uniform Nonprobate Transfers on Death Act is consistent with the purpose of the act. The comment to section 101 provides that "[t]he sole purpose of this section is to prevent the transfers authorized here from being treated as testamentary." Even so, it does not necessarily follow that the Will must be probated to give effect to the exercise of a tes-

tamentary power of appointment. Rather, it simply means that relying upon this provision as authority for avoiding probate in these cases makes for a strained argument. The problem in the *Scott* situation is that the attempted exercise of the power of appointment was pursuant to a codicil that did not comply with the requisite formalities to be admissible to probate.

With the proliferation of powers of appointments and with the growing trend to entirely avoid the probate process, the *Meyer* and *Lumbard* Courts may be the forefront of a new movement. The drafters of the Uniform Probate Act and Uniform Nonprobate Transfers on Death Act both recognized that "the benign experience with such familiar will substitutes as the revocable inter vivos trust, the multiple-party bank account, and United States government bonds payable on death to named beneficiaries all demonstrated that the evils envisioned if the statute of wills were not rigidly enforced simply do not materialize." Uniform Nonprobate Transfers on Death Act, § 101 (Comment). If the testamentary power of appointment is exercised in a Will that is executed with the required formalities, the danger of fraud should be minimized, even if the Will is not probated.

If you are interested in avoiding probate in the exercise of powers of appointments, consider granting powers of appointments that may be exercised in nontestamentary instruments. Alternatively, consider authorizing the exercise by Will, but specifically permitting the Will to be effective for purpose of exercising the power of appointment without probate. For example, the language governing the exercise of the power of appointment might provide:

> It shall be presumed that any power of appointment was not exercised by the donee of the power if the Trustee has not received notice of the valid exercise of the power prior to the 90th day after the donee's death. A testamentary power of appointment may be validly exercised by a will or codicil whether or not admitted to probate provided that the will or codicil is executed with the formalities required of a will. The Trustee shall not be liable for making an erroneous determination of whether the power of appointment was exercised, provided the Trustee acted in good faith, or for making distributions to the takers in default of the exercise of the power of appointment if this presumption applies. The Trustee's determination of whether a power of appointment was validly exercised shall not prejudice the rights of any beneficiary to recover from a person who receives a distribution from the trust either as an appointee under a power of appointment or as a taker in default.

Richard S. Franklin *is counsel in Pillsbury Winthrop Shaw Pittman's individual client services group in Washington, DC. Mr. Franklin is a fellow in the American College of Trust and Estate Counsel and a Florida Bar Board Certified Wills, Trusts and Estates Lawyer. He is admitted to practice in Florida and the District of Columbia.*

The signing of the commercial real estate commission law (HB 1457)



On June 20, 2005, Burt Bruton and Louis Guttmann represented the RPPTL Section. Shown at the signing, left to right — Rep. Don Brown, Russell Grooms, Burt Bruton, Guy Trusty, Jim Morgan, Trey Goldman, Senator Bill Posey, Steve Moreira, Governor Jeb Bush, Frank Kowalski, Mike Dooley, Chuck Bonfiglio, Wendell Davis, Louis Guttmann, John Sebree, and Rocky Rodriguez. Photo by the Governor's office.


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Community Land Trusts: Creating Permanent Affordable Homeownership in High Cost Areas

**By Jaimie Ross, Esq., 1000 Friends of Florida,
Chair, Affordable Housing Committee, RPPTL Section.**

The median price of existing homes throughout Florida has increased by almost 80% over the last five years. In the coastal areas we have seen land and house prices double and triple. Yet over that same five year period, the average income in Florida has risen by less than 10%.[1]

The enormous gap between the income of Florida's workforce and the cost of homes causes local governments and affordable housing developers, as well as the private and public employment sector to look for new tools to meet the housing needs of Florida's lower paid workforce. Communities throughout Florida are losing essential workforce such as teachers and emergency workers and some are finding it difficult to attract desirable industries as prospective employers discover that their workforce will be unable to afford local home prices.

Community Land Trusts

The tool that an increasing number of higher cost communities are looking to is "community land trusts".[2] Community land trusts bear no relation to Florida Land Trusts (Chapter 689, Florida Statutes) in which land may be held in trust for the benefit of another. Indeed, there is no statutory construct for community land trusts, although there is a federal definition found in the1992 Cranston- Gonzales Act.[3] Generally, a community land trust will be a Community Housing Development Organization (CHDO), with the specific purpose of acquiring parcels of land to hold in perpetuity, transferring ownership of the structural improvements subject to the terms of the long term ground lease which provides a preemptive option to purchase back the improvement at a price determined by formula that is designed to ensure perpetual affordability for low and moderate income families.

A community land trust refers to the vehicle of separating land from building (house) for the purpose of transferring title to the house without selling the land. It also denotes the nonprofit organization that holds title to the land and manages the ground leases on community land trust properties.

There are two primary purposes for using a community land trust (CLT):

1. to make homeownership more affordable; and
2. to keep the home affordable forever.

Homeownership becomes more affordable because the transfer of title to the homeowner does not include fee simple interest in the land; the sales price is based on the value of the improvements, without the value of the land. The land is owned by a 501(c)(3) corporation which provides a 99 year (renewable) ground lease to the homeowner.

The ground lease has a resale provision which ensures the property will be affordable in perpetuity. The owner of the home is not permitted to sell the home on the open market.[4] The home must be sold to an income eligible buyer at an affordable price. The resale provision will typically provide a reasonable return to the homeowner: a price that includes whatever monies the homeowner paid to buy the home as well as appreciation based on a formula in the ground lease. The appreciation will usually be far less than standard market appreciation. The resale provision will also typically provide a right of first refusal in favor of the CLT.

From the standpoint of the buyer, the CLT home provides homeownership in a market where the alternative is to rent or move away. From the standpoint of local government, funders providing subsidy, and affordable housing advocates in general, the CLT provides a way of creating permanent housing stock with a single subsidy. From the standpoint of the employment sector, the CLT provides a stock of employee housing.

Without the use of a community land trust, affordable housing is typically created through financial subsidy either to the developer for construction or to the homebuyer for down payment and closing cost assistance, or to both the developer and the purchaser. When the affordable home is sold the government or other subsidy provider may recapture the subsidy to assist another first time home buyer. But due to the extraordinary appreciation in market prices, the recaptured subsidy falls far short of the amount needed to get a new buyer into a home. The community land trust vehicle is a remedy for this losing proposition of ever increasing need for higher and higher subsidies.

Severing the home from the land

Separating improvements from the land (where the owners of the buildings have a long term leasehold estate in the land) is not an unknown concept in Florida in the context of sophisticated commercial transactions. But the concept is a new one in the arena of homeownership in Florida. Typically, in a homeownership transaction, it is customary for title to improvements to transfer via a deed transferring fee simple interest in the land. The initial question then, is what instrument is best used to transfer title to improvements severed from the land. Is it appropriate to transfer title to improvements through a bill of sale, or through a deed?

The intent of creating affordable homeownership opportunities through the community land trust vehicle is to provide as much indicia of fee simple homeownership to the purchaser as possible. The homebuyer expects to enjoy the mortgage interest deduction on federal income taxes as well as the Florida ad valorem homestead

continued, next page

exemption. The ground lease also provides that the homeowner has no right to remove the home from the land. In accordance with the rules for determining whether a building is personalty or realty as set forth by the Florida Supreme Court in *Stiles v. Gordon Land Company* and *Commercial Finance Company v. Brooksville Hotel*, it is most appropriate to use a deed rather than a bill of sale.[5]

Ad valorem taxes

There are several questions to be addressed in regard to ad valorem taxation in Florida. The community land trust model envisions that the land will have one assessment and the improvements will have another. The first question is will the 501(c)(3) that owns the land be exempt from ad valorem taxes pursuant to Section 196.1978, Florida Statutes. It appears the answer to that question will be "no". Although the Community Land Trust ostensibly meets the criteria of Section 196.1978, Florida Statutes, as a 501 (c)(3) providing housing to income qualified individuals, the CLT will most likely not be exempt from ad valorem taxes on the land. This is because the homeowner has a 99 year leasehold interest in the land, which the courts have held to be the functional equivalent of ownership.[6] Fortunately, pursuant to a similar line of reasoning, as well as Section 222.05, Florida Statutes, the homeowner will enjoy homestead exemption on its leasehold property.



But how will the value of the home be assessed? This is the thorniest issue for community land trust homeowners. The fair market value of the community land trust home should clearly consider the resale formula which substantially restricts the value of the home upon sale by the owner. The owner has bought the house subject to the terms of the resale restriction and is therefore unable to sell the community land trust home for a price similar to the selling price of an identical home next door, not subject to a resale restriction. While it makes a great deal of legal and common sense for appraisers to reduce the assessed value of the home based on the resale restriction, it is likely that some county appraisers will, and some appraisers will not. Without legal clarity on this issue, it would be prudent for the community land trust homebuyer to prepare for the possibility of receiving a property tax bill based on the value of a house perhaps two or three times greater than the sales price the homebuyer could realize under the terms of the resale restriction. Because of this uncertainty in the law and the detrimental effect of an assessment that is not adjusted based on the resale restriction, this is an area that may ultimately need to be addressed in the law.

Legal Manual for Community Land Trusts

The Institute for Community Economics is widely accepted to be the founder of the community land trust model. The Institute for Community Economics (ICE), is a national nonprofit organization, headquartered in Springfield, Massachusetts. The Institute for Community Economics produced the seminal guide for community land trusts in 2002, *The Community Land Trust Legal Manual, a Handbook for Community Land Trusts and Their Attorneys*.[7] Counsel for a community land trust, the homebuyers of community land trust property, or community land trust lenders would greatly benefit from having a copy of the manual. The ICE Legal Manual covers such topics as designing a resale formula, designing a ground lease, financing homes on CLT land, and enforceability of the CLT's preemptive right.

Because state laws differ in regard to corporate, real property, and tax issues, the ICE Legal Manual is best supplemented with Florida specific information. To this end, the Affordable Housing Committee of the Real Property Probate& Trust Law Section of The Florida Bar is presently developing a Florida Legal Manual for Community Land Trusts to supplement the ICE Legal Manual. It will address the topics discussed above as well as a variety of other Florida specific issues. One area of focus in the Florida Legal Manual will be the heightened need for legal counsel to represent the interests of the community land trust homebuyer in this novel form of homeownership and one that, although clearly designed to benefit the community land trust homebuyer, comes with unfamiliar restrictions on a homebuyer's right to sell at any price on the open market. The Affordable Housing Committee of the RPPTL Section is pleased to report that the Pro Bono Committee and the Affordable Housing Committee of the RPPTL Section are already working together to facilitate representation of community land trust homebuyers.

Endnotes:

1 Florida Sales Report released each year by the Florida Association of Realtors and the University of Florida Real Estate Research Center.

2 Community Land Trusts have already been established in Key West, the Middle Keys, and in the city of Winter Park. CLTs are in the process of being established in Sarasota County, Martin County, and Lee County, and a number of communities in the Panhandle.

3 *See* Section 233 of the Cranston-Gonzales National Affordable Housing Act (42 U.S.C. 12773).

4 Typically, a ground lease will provide that the home may be sold on the open market, if the CLT fails to exercise its right of first refusal and the owner has tried to sell the home unsuccessfully for a certain period of time, such as 120 days.

5 *See Stiles v. Gordon Land Company*, 44 So. 2d 417 (Fla. 1950), "agreements for the sale of buildings already erected upon land rest in part, if not altogether, upon the individual facts". The facts to be considered, according to the Court in *Commercial Finance Company v. Brooksville Hotel* , 123 So. 814 (Fla. 1923)are actual annexation to the realty; appropriateness to the use or purpose of the realty to which it is connected; and the intention of the party making the annexation that it shall be a permanent accession to the freehold.

6 *See Mikos v. King's Gate Club, Inc*, 426 So.2d 74 (Fla.2nd DCA, 1983); *Leon Co. Educational Facilities v. Hartsfield*, 698 So. 2d 526 (Fla.1997).

7 The ICE Legal Manual is available from the Institute of Community Economics, 57 School Street, Springfield, MA 01105-1331 www.iceclt.org

Asset Protection Planning for Florida Residents Under the New Bankruptcy Act

By Jeffrey H. Skatoff, Esq., Jeffrey Skatoff, PA, Boca Raton, FL

The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (the "Act"), signed into law by President George W. Bush on April 20, 2005, has narrow but potentially significant impacts on asset protection planning for Florida residents. Under the pre-Act Bankruptcy Code, debtors in bankruptcy were allowed their unlimited state exemptions to keep significant assets out of the bankruptcy estate, and therefore exempt from the claims of creditors. These state exemptions are normally far more generous than the federal exemptions, none more so than Florida's. Several of the Act's provisions, however, restrict the ability of a debtor to take advantage of the state exemptions. Asset protection planning counsel for Florida residents need to be well versed in the Act in order to provide complete and competent representation.

This article:

- explains several of the Act's provisions that impact asset protection;
- reviews in some detail three popular asset protection techniques—homestead, life insurance and annuities, and tenancy by the entirety planning;
- discusses how the Act's changes impact those planning techniques; and
- offers a brief overview of involuntary individual bankruptcy, a rare procedure that could become more common for creditors seeking to deny debtors the benefit of their state exemptions.

The Act's Time-Based Restriction on State Exemptions

In bankruptcy, a debtor is permitted to keep assets out of the bankruptcy estate under either the state or federal exemptions, depending on the state of the debtor's residence.[1] The federal exemptions are modest, and include, for example, the ability to exempt up to $18,450 in a homestead, $9,850 in household goods, $2,950 in a motor vehicle, and $1,225 in jewelry.[2]

A state is permitted to opt out of the federal exemption system and require its residents to use the state exemptions.[3] Florida, like most states, has opted out of the federal exemption system and, instead, requires its residents to use the Florida exemption system.[4] Florida's exemptions are quite generous and include unlimited exemptions for a homestead, the cash surrender value of life insurance and annuities.[5]

The Act makes two significant changes to the Bankruptcy Code for residents of "opt out" states, such as Florida. The first is an increase in state residency required before the state's exemptions can be used in bankruptcy, from 180 days to 730 days (approximately two years).[6] If a debtor cannot satisfy this residency requirement, the location where the debtor resided during the 180 days prior to the 730 day-period shall govern the debtor's exemptions. If a debtor has no such place, the federal exemptions may be used instead.[7] This provision is effective for bankruptcy petitions filed on or after October 17, 2005.8

The other significant change to the state exemptions is a set of restrictions on the protection of homesteads in bankruptcy. The most important of these requires that the homestead, including previously held homesteads within the same state, be held for 1215 days (approximately three years and four months) prior to the bankruptcy filing, or be limited to $125,000:

> (p)(1) [A]s a result of electing under subsection (b)(3)(A) to exempt property under State or local law, a debtor may not exempt any amount of interest that was acquired by the debtor during the 1215-day period preceding the date of the filing of the petition that exceeds in the aggregate $125,000 in value in –
>
> ****
>
> (D) real or personal property that the debtor or a dependent of the debtor claims as a homestead.
>
> ****
>
> (2)(B) For purposes of paragraph (1), any amount of such interest does not include any interest transferred from a debtor's previous principal residence (which was acquired prior to the beginning of such 1215-day period) into the debtor's current principal residence, if the debtor's previous and current residences are located in the same State.

This provision has some ambiguity because there is no guidance in determining how to measure the "amount of interest that was acquired during the 1215-day period." For a debtor who paid cash for the homestead more than three years and four months prior to the filing, the entire homestead is clearly protected. What about improvements made during the 1215-day period? If the protection of improvements is limited to $125,000, is that $125,000 measured based on either the cost of the improvements or the value at the time of the bankruptcy filing? What about debt repayment? Are mortgage principal payments made within the 1215-day period on a homestead acquired more than 1215 days before the bankruptcy filing fully protected or limited to $125,000?

Another ambiguity, particularly relevant in Florida, where people often keep a second residence, is whether a homestead is protected if acquired prior to the 1215-day window, but only became the debtor's primary residence, and thus the Florida homestead, within the 1215-day exclusion period.

Finally, the language of subsection (p)(1) indicates that it is effective as a "result of electing under subsection (b)(3)(A) to exempt property under State or local law." Most states, such as Florida, do not allow an "election," but instead require its residents to use the state exemptions. At least one bankruptcy court, in Arizona, an opt-out state like Florida, has held that subsection 522(p)(1) does not apply to

continued, next page

an opt-out state's residents. *In Re McNabb*, 2005 WL 1525101 (Bankr. D.Ariz.). Whether this provision was intended to exclude from coverage residents from opt-out states, which are the majority of states, is uncertain, given the absence of any meaningful legislative history.9

The Act also creates an expanded fraudulent conveyance provision specific to homesteads. Any homestead acquired with nonexempt property during the ten-year period before the bankruptcy filing that was made with the intent to hinder, delay, or defraud creditors is not protected by a state homestead exemption.10

The Act also singles out a group of debtors seen as particularly undeserving of homestead protection, by restricting the homestead to a $125,000 cap for debtors who have (i) been convicted of a felony which demonstrates bankruptcy abuse, (ii) incurred a debt arising from a violation of federal or state securities laws, (iii) incurred a debt from a RICO civil remedy, or (iv) incurred a debt resulting from any criminal act, intentional tort, or willful or reckless misconduct that caused serious physical injury or death to another individual during the last five years.11 Curiously, this section of the Act contains a provision allowing more of the homestead to be kept by the debtor if "reasonably necessary for the support of the debtor and any dependent of the debtor."12

The homestead provisions of the Act are effective for bankruptcy petitions filed after April 20, 2005.13

Florida Homestead Overview

Article X, Section 4 of the Florida constitution provides that a homestead, limited to one-half acre within a municipality or 160 acres outside a municipality, is exempt from forced sale, except for property taxes, mortgage default, mechanics liens, and similar claims.

The Florida homestead has withstood many challenges, the latest and most significant in *Havoco v. Hill*, 790 So.2d 1018 (Fla. 2001). Mr. Hill, a resident of Tennessee, was found liable in a jury trial for a multi-million dollar verdict for breach of contract and several business-related torts. Eleven days after the entry of the judgment, Mr. Hill purchased for cash a large homestead in Florida and changed his residence to Florida. Mr. Hill later filed for bankruptcy and sought to have his new residence in Florida exempt from the bankruptcy estate as protected Florida homestead. In response to a certified request from the United States Court of Appeals for the Eleventh Circuit, the Florida Supreme Court held that the Florida Homestead, given its constitutional genesis, is not subject to curtailment by legislative enactment such as the fraudulent conveyance statutes. The Court summed up its holding as follows.

> [A] homestead acquired by a debtor with the specific intent to hinder, delay, or defraud creditors is not excepted from the protection of article X, section 4 [of the Florida Constitution].

The Act's Restriction on Florida Homestead

For new or existing Florida residents, by far the most significant part of the Act is a new holding period required before a Florida Homestead can be protected in bankruptcy. Any interest acquired in, or value added to, a homestead within the 1215 day period before the filing of a bankruptcy petition cannot be protected by Florida's homestead exemption in an amount over $125,000. No intent to defeat creditors is required – all homesteads acquired within the window will be limited. Longstanding Florida residents with existing homesteads, however, will not be affected by this change.

The Act also takes aim at the ability of debtors to acquire homesteads for the purpose of defeating creditors, for those homesteads acquired outside the 1215 day window. The Code's new Section 522(o) operates as a 10-year federal fraudulent conveyance statute to remove the exemption from homesteads acquired to defeat creditors if acquired up to 10 years prior to the bankruptcy filing. *Havoco* offers no protection in bankruptcy now.

Life Insurance and Annuities Overview

The cash surrender value of an insurance policy insuring the life of a Florida resident is not subject to creditor claims.14 Also note that the death benefit from life insurance is protected from claims so long as the death benefit passes to a beneficiary and not the decedent's estate.

The proceeds of an annuity contract issued to a resident of Florida are not subject to the claims of credi-



The signing of the repeal of the Deadperson's Statute. From Left to Right - Martha Edenfield (lobbyist for the Section) , Rep. Anitere Flores, R-Miami, (the sponsor of the bill), Governor Jeb Bush, Ashley Aronowitz (law clerk with Pennington law firm and 2nd year law student at UF), and Nelson Diaz (associate with the Pennington law firm and lobbyist for the Secton).

tors. The operation of this exemption is best illustrated by *Goldenberg v. Sawczak*, 791 So.2d 1978 (Fla. 2001). Dr. Goldenberg placed several million dollars into an annuity, commenced practicing medicine without insurance, then committed a serious act of malpractice a few years later, and finally declared bankruptcy during the malpractice trial. The Eleventh Circuit certified the question of whether the surrender value of the annuity is exempt, rather than just the "proceeds" as is written in the text of the statute, Section 222.14, Florida Statutes. The Florida Supreme Court, in a unanimous decision, held that the surrender value of an annuity contract is exempt if subject to a contractual surrender penalty, thereby shielding from the malpractice victim Dr. Goldenberg's largest asset.

Florida has adopted the Florida Asset Conversion Statute, which provides that any conversion of an asset from a nonexempt form to an exempt form, if done to delay, hinder, or defraud the creditor, may be set aside. Section 722.30, Florida Statutes. "However, where the creditor is not in existence at the time of the conveyance, there must be evidence establishing actual fraudulent intent by one who seeks to have the transaction set aside." *Eurovest, LTD. v. Segall*, 528 So.2d 482, 483-84 (Fla. 3d DCA 1988). Therefore, absent a prior intent to commit a tort or engage in some other behavior leading to a future judgment, putting assets into life insurance or an annuity prior to the action leading to the judgment should protect those assets from characterization as a fraudulent conveyance. A debtor should not count on being able to shield assets through the insurance or annuity exemption once a claim against the debtor is known, however.

The Act's Impact on Life Insurance and Annuities

The Act places no new specific restrictions on the ability of a debtor to protect the cash surrender value of a life insurance contract or an annuity. The only restriction is the new 730-day residency requirement before the state's exemptions can be claimed.

Therefore, if a debtor has been a Florida resident for more than 730 days at the time of the bankruptcy filing, the annuity and life insurance exemption continues to be a viable asset protection device, assuming that no fraudulent conversion can be established.

Tenancy by the Entireties Overview

Tenancy by the entireties has been an excellent form of asset protection for many years. Florida broadly recognizes the ability of spouses to hold title to real property and financial accounts as tenants by the entireties. Property held as a tenancy by the entireties must possess six characteristics: (1) unity of possession (joint ownership and control); (2) unity of

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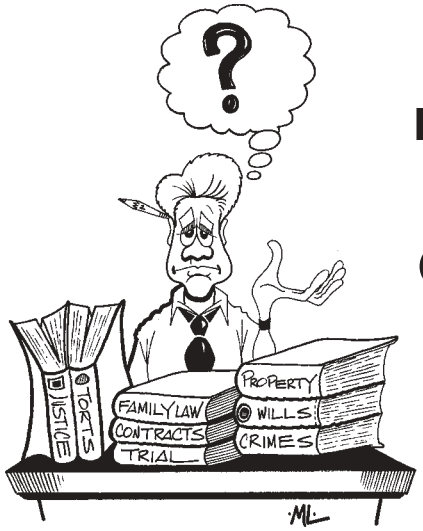

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interest (the interests must be identical); (3) unity of title (the interests must have originated in the same instrument); (4) unity of time (the interests must have commenced simultaneously); (5) survivorship; and (6) unity of marriage (the parties must be married at the time the property became titled in their joint names). *Beal Bank, SSB v. Almand and Associates, Etc.*, 780 So2d. 45 (Fla. 2001).

Under settled Florida law, when property is held as a tenancy by the entireties, only the creditors of both the husband and wife, jointly, may attach the tenancy by the entireties property; the property is not divisible on behalf of one spouse alone, and therefore it cannot be reached to satisfy the obligation of only one spouse. *Beal Bank*.

As a means of asset protection, tenancy by the entireties has three concerns. First, the person must be married and desire to hold the assets with the person's spouse. Second, even if the person is willing to hold title with the spouse, the tenancy can be defeated if (i) the debt is in both parties' names, (ii) the parties divorce, or (iii) one of the parties dies. Third, tenancy by the entireties offers no protection if created as a result of a fraudulent conveyance. See, e.g., *Hurlbert v. Shackleton* (Fla 1DCA 1990) 560 So.2d 1276.

The United States Court of Appeals for the Eleventh Circuit, in *In Re Sinnreich*, 391 F.3d 1295 (11th Cir. 2004), recently affirmed that tenancy by the entireties property is protected in bankruptcy against all creditors except the Internal Revenue Service.

The Act's Treatment of Tenancy by the Entireties

The Act makes no change to the treatment of tenancy by the entireties property in bankruptcy. Section 522(b)(2)(B) of the Bankruptcy Code exempts from the bankruptcy estate any interest in property in which the debtor had, immediately before the commencement of the case, an interest as a tenant by the entirety to the extent such interest is exempt from process under applicable non-bankruptcy law. The Act's 730-day residency period for taking advantage of a state's exemptions does not apply to tenancy by the entireties property.

For recent Florida residents who are married, tenancy by the entireties property has become a much more important asset protection tool.

Combining Homestead and Tenancy by the Entireties

For married persons, holding title to a homestead as tenants by the entireties completely sidesteps the restrictions created by the Bankruptcy Act, because tenancy by the entireties property is exempt without being subject to the new Bankruptcy Act's residency and acquisition waiting periods.

If a new Florida resident or an existing Florida resident acquires a new Florida primary residence as tenancy by the entireties, the property is exempt from creditors, in and out of bankruptcy, from the date of acquisition, assuming that no fraudulent conveyance can be established. For the debtor, the hope is that the property can be held long enough so that by the time the tenancy by the entireties expires, due to death of one spouse or divorce, the 1215-day waiting period to protect a newly acquired homestead



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will have run its course, allowing a successful bankruptcy filing or otherwise allowing the homestead to be protected.

Involuntary Bankruptcy: An Old Tool With New Life

Given the pro-creditor changes made to the Bankruptcy Code by the Act, many debtors will find that the state law exemptions outside of bankruptcy are preferable, especially those debtors with significant exempt assets that could be lost in bankruptcy under the changes made by the Act. Once the applicable waiting periods have passed (730 days of residence for state exemptions and 1215 days for new or improved homesteads), a voluntary bankruptcy may only then be desirable.

Involuntary bankruptcy has historically been a seldom used tool against individual debtors given the state exemptions that such debtors would likely claim.

An involuntary bankruptcy petition under Section 303(b) of the Code can be filed by:

> (i) three or more creditors holding liquidated, undisputed claims which aggregate at least $12,300 more than the value of any collateral securing the claims;
>
> (ii) one or more creditors holding liquidated, undisputed claims equaling at least $12,300 if fewer than 12 non-employee and non-insider creditors exist;
>
> (iii) any general partners in a partnership; or
>
> (iv) a foreign representative of the estate in a foreign proceeding regarding the debtor.

The effect of the Act is to create a window during which a creditor could force a debtor into involuntary bankruptcy and cause the debtor to lose the state exemptions. A bankruptcy petition filed prior to the end of the 730-day period within which the person became a Florida resident would eliminate the debtor's ability to use Florida's generous exemptions. A bankruptcy petition filed prior to the end of the 1215-day period from when the person acquired the homestead would eliminate the protection of the homestead in excess of $125,000. Tenancy by the entireties assets would be protected in an involuntary bankruptcy regardless of waiting periods, assuming that no fraudulent conveyance could be proven.

An involuntary bankruptcy can also allow a creditor to pull a homestead into the bankruptcy estate if acquired through a fraudulent conversion, given that the *Havoco* case will no longer be applicable in bankruptcy.

Even without filing an involuntary bankruptcy petition, creditors will now have new negotiating leverage with debtors who are subject to losing their exemptions. By threatening bankruptcy, creditors should be able to extract additional sums from debtors holding assets that would be lost in an involuntary bankruptcy filing.

Summary

For existing Florida residents, the primary effect of the Act will be to restrict the Homestead exemption to $125,000 unless acquired at least 1215 days prior to the bankruptcy filing. The 730-day residency waiting period to claim the other Florida exemptions is only a restriction for recent Florida residents. Both of these time-based restrictions can be overcome by holding assets as tenancy by the entireties. If tenancy by the entireties is not a suitable solution, more complex remedies should be explored.

Endnotes:

1 11 U.S.C. §522(b)(2). All references to the Bankruptcy Code and Title XI of the United States Code are as amended by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, unless otherwise indicated.
2 11 U.S.C. §522(d).
3 11 U.S.C. §522(b)(2).
4 Section 222.20, Florida Statutes.
5 Section 222.14, Florida Statutes; Article X, Section 4, Florida Constitution.
6 11 U.S.C. §522(b)(3)(A).
7 11 U.S.C. §522(b)(3).
8 Title XV, Section 1501(a) of the Act.
9 For asset protection planning purposes, this article assumes that the 1215-day restriction does (or will, as a result of a potential technical correction bill) apply to the residents of an opt-out state such as Florida.
10 11 U.S.C. §522(o).
11 11 U.S.C. §522(q)(1).
12 11 U.S.C. §522(q)(2).
13 Tile XV, Section 1501(b)(2) of the Act.
14 Section 222.14, Florida Statutes.

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FAMILY FUN: 2005 Section Convention

Bonita Springs, May 26 – May 29, 2005

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

The RPPTL Section held its 2005 Convention at the Hyatt Regency Resort and Spa in Bonita Springs, Florida from May 26 through May 29. Numerous Section committees met on Thursday, May 26, to conduct their business, yet perhaps none as spirited as the Probate and Trust Litigation Committee's debate on attorney-client privilege issues that arise between beneficiaries of a trust and the fiduciaries that manage that trust.

Laird and Laurie Lile arranged for a welcome reception that evening on the pool deck, which had a pitching wedge driving range for those tempted at the challenge of hitting the island green. Suffice it to say no PGA Tour exemptions were handed out that night.

On Friday, May 27, the Section offered two CLE seminars: a probate & trust law seminar and a real estate seminar. The probate & trust law seminar covered some new laws and also included a panel discussion on the proposed new Trust Code. The real estate seminar included a discussion of hot topics and trends in real estate and practice ideas for consideration by the real estate practitioner. Both seminars combined for the final topic: a panel discussion of the impact of the Bankruptcy Code Reform on probate, trust and real estate practitioners. The Section thanks the organizers and speakers for their time and professional insight.



The Executive Council meeting.

The Friday evening affairs began with a reception and dinner, with the presentation of Section awards. Outgoing chair, Laird Lile, thanked all of the Section officers for their work during his tenure as chair. Laird and Laurie Lile drove off into the sunset to the tune of "Mustang Sally" played by the Section's very own resident-musician, Burt Bruton, and the rock and roll band, *Roadkill*. Incoming chair, Jay Zschau, thanked Laird and Laurie Lile for their tireless efforts in leading this Section during its 50th Anniversary Year.

Saturday, May 28, began with the roundtable breakfasts followed by the executive council meeting. As a result of recommendations from the Section's strategic planning meeting, the format for the meetings was different. The roundtables met for two hours and during that time the division directors received the reports from the division's committees. Then, the executive council met and discussed numerous issues, including the Bar's financial relationship with the Section. The division directors' reports at the council meting included a summary of the significant divisional committee reports. This change in format was done to try to optimize the time together. Later Saturday night, there was a private tour of a very private collection of unique automobiles. There were expertly guided tours of automobiles with a remarkable variety of manufacturers, including Ferrari, Porsche, Mercedes, Cadillac, Alfa Romeo, Ford, Pierce-Arrow and Duesenberg.

Sunday, the group was split: some stayed to enjoy the hotel's amenities for the balance of the long weekend, and some left to return home. While there was a split whether or not to return home on Sunday, the attendees were in agreement that the Annual Convention was a great success and congratulate Laird and Laurie Lile for a wonderful and memorable year.

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A Good Time Was Had by All in Bonita Springs



One of the children's activities on Thursday evening.



A Naples crowd at the Friday reception.



Laurie Lile and children, Langdon and Allie.



Jeff and Brenda Sauer at the Thursday evening reception.



One of our newest RPPTL Section members.



Dancing to the music of the "Roadkill" band.



A view from the hotel: Hyatt Regency Coconut Point Resort & Spa.

Photos by John Neukamm

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Report of Florida Landlord/Tenant Cases

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

Vacating Premises Will Not Render Complaint Moot

In *Gallahan v. Mair*[1], the landlord had delivered two separate notices: a notice attached to the complaint dated January 4, 2005 requesting that the defendants vacate the premises by January 8, 2005, and a second notice undated but stated on its face that "you have 3 days to pay or you will be evicted within 5 days by the law – just so you know. You have until 1/17/05 to vacate the premises or they will put you out".

The defendants argued that the Court lacked jurisdiction because a proper three-day notice was a condition precedent for an eviction complaint and that the two notices were conflicting and confusing and were defective as a matter of law and failed to meet the statutory requirements of Section 83.56(3) of the Florida Statutes.

The plaintiff argued that the notices did not conflict and that it didn't matter whether they did or not because the defendants had already vacated the premises. The plaintiff argued, consequently, that the Court could simply proceed to the second count regarding money damages and never address the eviction issue.

The Court, however, disagreed and held that a precondition for an action for possession is service of a proper notice terminating the tenancy. If the plaintiff, in such an action, fails to invoke the court's jurisdiction, in the first instance, by service of a proper three-day notice, less than all the requisite elements of a cause of action exist *at the time the complaint is filed* and the complaint must be dismissed without leave to amend.

Since the complaint should never have been filed in the first instance, the Court was not able to proceed to the plaintiff's money damages claim. Notwithstanding, the Court retained jurisdiction to award attorneys fees and costs.

When Will Default NOT Entitle You to a Clerk's Default?

In *Veco Investment, LLC v. Young Oil Company, Inc.*,[2] Veco Investments, LLC ("Veco") entered into a gas station lease and petroleum purchase agreement with Young Oil Company, Inc. ("Young"). After a dispute, Young filed an eviction action and Veco did not file a timely answer. Young then moved for a clerk's default without notice to Veco on March 23, 2004 and the clerk entered the default.

Veco moved to vacate the default on the grounds that notice of the application of the default was required under Fla.R.Civ.Pro. 1.500. The trial court denied the motion to set aside default and entered final judgment on April 6, 2004. Veco appealed.

Young's complaint contained a series of exhibits documenting communication with Veco and its representative Sidney Brodie, a former attorney. It was clear from the communication that Young understood Brodie to be acting on the defendant's behalf with Young copying Brodie on much of the correspondence. At no time did Young object to communicating with Brodie. In addition, there was evidence of extensive communication back and forth in an attempt to resolve the outstanding issues including tender of settlement checks to Young by Veco.

Young's position was that communications from Brodie did not amount to "paper from the defendant". Notwithstanding, the Court held, Young's decision to copy Brodie on every letter regarding the eviction evidenced that it was communicating with Brodie on behalf of the defendant. The fact that Young had received settlement checks on behalf of Veco and had received letters by Veco's acknowledged representative triggered the requirement of notice to the defendant prior to seeking the default.

The Court reviewed cases in which the defendant had defaulted but the court had determined that some action resulted in notice being required to the defendant prior to default: (i) out of state counsel, not admitted to

continued, next page



In conjunction with the Annual Convention in Bonita Springs, the Condominium and Planned Development Committee recognized the long service of **Robert M. Schwartz** (left) with an ovation and a certificate of appreciation presented by Committee chair Michael J. Gelfand (right).

the Florida Bar, sent a letter requesting information about the lawsuit; (ii) counsel's letter advising he had not yet been retained; and (iii) a letter signed by a paralegal of a law firm. Each of the foregoing actions were held sufficient to require notice prior to entry of default.

Further, in the instant case, the Court held that issues of meritorious defense and excusable neglect were irrelevant where notice prior to default was required to have been given since the default was procedurally defective.

The default was vacated, the case reversed and remanded with directions to accept the defendant's answer and proceed on the merits.

All Elements of a Cause of Action Must Exist at the Time of Filing

In *Triangle Management & Investment Corp. v. Luke*,[3] the defendant made a motion to dismiss the plaintiff's complaint for eviction. In finding for the defendant, the Court addressed a number of issues.

First, the court noted that the Three-Day Notice attached to the complaint was given on Thursday, April 7, 2005 and demanded payment "on or before the 11th day of April, 2005". April 8, day one, was a Friday. April 9 and April 10, Saturday and Sunday were excluded as weekend days. Since demand was for April 11 – the second day – insufficient notice was given.

Second, the plaintiff was a corporation and a corporation may not represent itself in a contested eviction action.

Third, since less than all the requisite elements of the cause of action for tenant eviction were in existence when the Complaint was filed the Court dismissed without leave to amend. The statutory right of an action for possession only accrues, the Court pointed out, upon the termination of the tenancy. The right to file an amended complaint relates back to the date of the original complaint. If the cause of action did not exist at the time of the initial filing an amended complaint cannot be filed. So no post-suit Three-Day Notice can be served and then if the defendant does not comply, the landlord terminate the tenancy and file an amended complaint since all of the elements of the action did not exist at the time of the initial filing.

It then follows that if an essential element of the plaintiff's action is missing at the time of the filing, the tenant need not make a deposit of rent into the Court Registry. Since, in the instant action, the Three-Day Notice was fatally defective, and, therefore, the plaintiff failed to terminate the rental agreement prior to filing the Complaint with the Court, the defendant was not required to make a deposit with the Court.

Since the Three-Day Notice was defective and plaintiff's failure to terminate the rental agreement prior to filing the Complaint for tenant eviction, the Complaint was dismissed without leave to amend.

In *Custom Homes of South Florida (sic) Custom Homes of South Florida, Inc. v. Atterbury*,[4] the defendant moved to dismiss and the Court granted the defendant's motion based on the following:

The Three-Day Notice attached to the Complaint was fatally defective because it was on the letterhead of Custom Homes of New England and listed their address as being in Massachusetts. At the bottom of the page the notice indicated that it was being given by Custom Homes of South Florida but their address was located in Delray Beach, Palm Beach County, Florida. Because the landlord was located in a different city and county than the leased premises, the Court held, the tenant should have been given the opportunity to mail the rent or keys. The tenant should not have been required to drive to Delray Beach, Florida or South Easton, Massachusetts to make delivery. Consequently, the Court held, the notice should have given the tenant five (5) days to perform rather than three (3) days.

In addition, the Three-Day Notice was defective because it sought bounced check fees and bounced check fees are not rent and may not be demanded in a Three-Day Notice unless there is a written lease agreement which defines such fees as "rent" or "additional rent".

Since the plaintiff failed to terminate the rental agreement, plaintiff had no right to file the Complaint and the tenant was not required to make a deposit into the Court Registry.

***Editor's Note**: The cases reported in this article are only intended to advise of recent court decisions, the majority of which are lower court cases. Readers are encouraged to conduct complete research with respect to any issue discussed herein.*

Endnotes:

1 12 Fla. L. Weekly Supp. 668b (Fla. 7th Judicial Circuit 2005).
2 12 Fla. L. Weekly Supp. 530b (Fla. 11th Judicial Circuit (Appellate) 2004).
3 12 Fla. L. Weekly Supp. 794b (Fla. 17th Judicial Circuit 2005).
4 12 Fla. L. Weekly Supp. 796 (Fla 17th Judicial Circuit 2005).



Thank You, Bonnie Elliott Bevis!

The Long Range Planning Committee of the RPPTL Section, which is comprised of past chairs of the Section, presented Bonnie Elliott Bevis with an appreciation gift. The plaque reads as follows: "The Long Range Planning Committee of the Real Property, Probate and Trust Law Section of The Florida Bar recognizes Bonnie Elliot Bevis for her devoted and invaluable services to the Section from 1987 to 2005." Bonnie was the Program Administrator for the Section for over 17 years.

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LEGISLATIVE UPDATE

By Peter M. Dunbar, Esq., RPPTL Legislative Counsel

Legislative Changes From the 2005 Regular Session


PETE DUNBAR

The 2005 Regular Session of the Legislature produced more than two dozen changes that affect the practice areas of RPPTL Section members, many of which were a part of the Section's legislative package. Most of the changes were part of the CLE program at the Section's Annual Legislative Update, and a brief summary of all of the relevant changes is found below. The appropriate Session Law reference numbers follow the summary on each legislative measure.

The full text of each enrolled bill, as well as applicable legislative staff reports for each measure are available on the Legislature's website (www.leg.state.fl.us). The summary of each measure that passed follows below in numerical bill order. RPPTL Section-sponsored bills are noted along with the bill sponsors who introduced and handled the legislation during the session deliberations.

CS/HB 75 (Title Insurance): The bill revises the definition of title insurance and provides that the definition extends to owners of property, secured parties and the priority of secured interests in real property under the Uniform Commercial Code. It further provides for the Office of Insurance Regulation to approve forms and establish rates for the title insurance coverage by January 1, 2006. **(*Chapter 2005-153, Laws of Florida*.)**

CS/CS/HB 113 (Construction ContractingBBonds and Liens) by Representative Dean and Senator Argenziano: The bill is a **Section-supported initiative**, and it makes changes to Chapters 489 concerning payment bonds on public contracts, prohibiting restrictions on certain classes of persons and increasing penalties for non-compliance. It also makes changes to the Chapter 713 concerning disclosure requirements, the mechanics for filing a claim of lien, and the enforceability of liens. **(*Chapter 2005-227, Laws of Florida*.)**

HB 291 (Condominiums): The bill adds subsections (6) and (7) to Section 718.301, providing that the developer is responsible for actions taken by directors of the condominium association appointed by the developer and requiring that warranty claims made against the developer for construction defects must be examined and certified by a licensed professional. **(*Chapter 2005-192, Laws of Florida*.)**

HB 331 (Inland Canals and Waterways): The bill exempts informational markers for inland lakes and canal, including markers for boat ramps, swimming restrictions, underwater hazards and public health notices, from the permitting requirements of Section 327.40. **(*Chapter 2005-217, Laws of Florida*.)**

CS/CS/SB 370 (Satisfaction of Judgments) by Senator Campbell and Representative Seiler: The bill is a comprehensive rewrite of the provisions of Chapter 55, relating to the satisfaction of judgments, and it includes **3 of the Section's initiatives**. The initiatives include:

1. A provision amending Section 55.141 relating the satisfaction of foreign judgments;
2. An amendment to Section 222.01 concerning homestead protection; and
3. A change to Section 701.02 regarding mortgage security interests.

(*Chapter 2005-241, Laws of Florida.*)

CS/HB 523 ("Dead Person's" Statute – Repeal) by Representative Flores and Senator Campbell: The bill is the **Section initiative** that repeals the "Dead Person's" statute and provides for an hearsay exception permitting the testimony of interested persons regarding oral communications such persons had with an individual now deceased or mentally incompetent person. **(*Chapter 2005-46, Laws of Florida*.)**

CS/HB 531 (Mortgages – Certificates of Release) by Representative Hasner and Senator Atwater: The bill is a **Section initiative** that authorizes title insurance agents to serves as agents of mortgagors or mortgage servicers for purposes of issuing certificates of release for mortgaged property. The bill establishes the procedures to be followed, the content of the certificate of release, and the liability of title insurance agents engaged in the authorized activity. **(*Chapter 2005-122, Laws of Florida*.)**

CS/SB 550 (Homestead Exemption – Veterans): The legislation provides an additional $5,000 homestead exemption for disabled veterans and their surviving spouses. The act takes effect on July 1, 2005, and qualifying individuals will be eligible for the additional exemption in 2006. **(*Chapter 2005-42, Laws of Florida*.)**

CS/HB 565 (Mobile Homes): The bill revises the Florida Mobile Home Act to clarify that the information concerning comparable parks that is to be exchanged at the time that an increase in park rents is proposed by the park owner is intended to be used in settlement discussions and not in civil or administrative enforcement actions. The bill also provides that a mobile home owner is not entitled to compensation from the Relocation Trust fund if there is an eviction action pending against the homeowner. **(*Chapter 2005-79, Laws of Florida*.)**

CS/CS/HB 625 (Abandonment of Roads): The bill is primarily technical in nature and moves the procedures to be used by cities and coun-

continued, next page

ties for abandoning subdivisions roads to Chapter 336 as a new Section 336.125. **(*Chapter 2005-34, Laws of Florida*.)**

CS/CS/SB 652 (Public Construction Bonds): This bill revises the format for public construction bonds and clarifies the procedures to be followed for any claimant against the bond. The bill also provides that public construction bonds are deemed to be statutory bonds, thereby eliminating the ability for the bonds to be converted to common law bonds. **(*Chapter 2005-218, Laws of Florida*.)**

CS/SB 660 (Assets Held in Benefit Plans) Senator Carlton and Representative Altman: The bill is a **Section initiative** and provides statutory protection from creditors for those assets held in health savings accounts, medical savings accounts, education savings accounts, retirement "benefit plans," and other plans maintained in accordance pre-approval procedures of the Internal Revenue Service. It also contains a state foundation for "hurricane savings accounts" advocated by the Chief Financial Officer. **(*Chapter 2005-101, Laws of Florida*.)**

CS/HB 897 (Trust Powers) by Representative Hukill and Senator Atwater: The bill, an initiative of the Florida Bankers Association, concerns the exercise of trust powers, and it expands the definition of "security account," provides for the resignation of a trustee, and authorizes the trustee to employ persons to assist with the trustee's duty and pay for the costs of employment. The Uniform Principle and Income Act is also amended by a portion of the bill and was jointly supported by the **RPPTL Section**, the FBA and the Florida Institute of Certified Public Accountants. It provides a revised definition for "unitrust amount;" provides a definition for "undistributed income;" provides for the appointment of a "disinterested trustee" in appropriate circumstances; sets special rules for money or properties received by certain targeted entities; and makes other changes to the Uniform Principle and Income Act. **(*Chapter 2005-85, Laws of Florida*.)**

CS/HB 955 ("Working Water Fronts"): The bill creates a new Water Front Florida Program to provide incentives that preserve waterfront property for its traditional uses, including marinas, boat ramps, facilities for commercial fishing and access by the public. The legislation requires that coastal counties add this land use component to their future land use plans; provides incentives for the priority use of sovereign submerged lands; and it provides tax incentives for the redevelopment of waterfront property for these intended uses. **(*Chapter 2005-157, Laws of Florida*.)**

CS/SB 1056 (Business Entities): The bill is a comprehensive revision relating to artificial business entities. It provides for the conversion of domestic corporations to other entities; establishes the procedures for the conversion; makes similar provisions for the conversion of limited liability companies and partnerships; it makes changes and revisions in the law governing limited partnerships and mandates limited partnerships to maintain certain required information; it provides for certificates of merger and conversion of partnerships; and makes revisions to the Electronic Signatures Act. **(*Chapter 2005-267, Laws of Florida*.)**

CS/SB 1184 (Statutory Way of Necessity) by Senator Fasano and Representative Traviesa: The bill is a **Section initiative** and provides for a statutory way of necessity to permit access to landlocked property not accessible through common law ways of necessity, regardless of the property's location, use or intended use. The bill also provides for

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a reversion to existing law if the provisions of the bill are found to be unconstitutional by a court and that finding is subsequently upheld on appeal. **(*Chapter 2005-214, Laws of Florida.*)**

CS/SB 1368 (Disclaimer) by Senator Aronberg and Representative Kottkamp: This bill is a **Section initiative** and creates the Florida Uniform Disclaimer of Property Interests Act. It prescribes the general provisions for a person to disclaim an interest in property, including an interest in property jointly held. The bill also provides for other appropriate procedures for disclaimer of interests in various types of property. **(*Chapter 2005-108, Laws of Florida.*)**

CS/CS/HB 1459 (Real Estate Brokers' Liens) by Representative Brown and Senator Posey: The bill is the **Section initiative** that was worked out with the Florida Association of Realtors to create the "Commercial Real Estate Sales Commission Lien Act." It is the product of the joint RPPTL/FAR working group; it accommodates the concerns expressed by Governor Bush in his 2004 veto message; and it creates a lien on the sales proceeds from a commercial real estate transaction under the terms provided in the legislation. **(*Chapter 2005-275, Laws of Florida.*)**

CS/SB 1486 (Property Insurance – Condominium and Home Owner's Policies and Sinkhole Disclosures): CS/SB 1486 is the comprehensive property insurance package from the 2005 Session, and it contains several items of interest to Section members that include the following:

1. **Section 11** of the bill provides for a new comprehensive coverage checklist for property and casualty insurance policies that are offered to homeowners, mobile home owners, and condominium unit owners.
2. **Section 13** of the bill authorizes new hurricane deductible options for the master policies offered to condominium associations. The options must now include deductibles for each storm or for each annual hurricane season.
3. **Section 15** of the bill extends the statutory mediation option for disputed residential insurance claims to disputed claims under condominium master association property and casualty insurance policies.
4. **Section 21** of the bill provides that any insurer paying a claim for sinkhole loss is required to file a copy of the sinkhole report and certification required under the bill with the county property appraiser, together with the parcel identification number for the property. The section also makes it mandatory for the seller of real property upon which a claim for sinkhole loss has been made to make disclosure of the claim whether or not the insurance proceeds were used to repair the sinkhole damages. **(*Chapter 2005-111, Laws of Florida.*)**

CS/CS/HB 1527 (Unclaimed Property): The bill makes revisions to Chapter 717, F.S. governing the dis-

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position of unclaimed property by the state. Most of the changes deal with the forms and procedures for those who deal routinely with the Bureau of Unclaimed property on behalf of heirs, but the bill also permits live testimony to establish entitlement and permits an attorney or CPA to assist a person seeking to establish entitlement of unclaimed property held by the Bureau. **(*Chapter 2005-163, Laws of Florida*.)**

HB 1813 (Estate Taxes): This measure is a comprehensive bill revising portions of the Florida tax code. Among its provisions, the bill allows an estate that is not required to file a federal tax return, regardless of the decedent's date of death, to file an affidavit with the Clerk of the Court, attesting that no Florida estate tax is due. **(*Chapter 2005-280, Laws of Florida*.)**

CS/CS/SB 1912 (Out-of-State Title Insurance Agents): This bill is a comprehensive measure regulating insurance agents and insurance agencies. Section 30 of the bill permits the Department of Financial Services to issue licenses to non-resident title insurance agents under the same procedures as the licensure of non-resident general lines insurance agents. **(*Chapter 2005-257, Laws of Florida*.)**

CS/CS/HB 1935 (Article V "Glitch" Bill – Liens for Public Defender Services): The legislation makes revisions to various chapters of the statutes governing the state's court system. Two items may be of interest to Section practitioners. In **Section 3** of the bill, a non-indigent parent or legal guardian of a person seeking the assistance of a public defender is required to furnish the legal services for the minor or tax-dependent adult. If the services are not provided and a public defender is appointed as a result of the parent's or guardian's failure to provide the legal services, the costs for the services are required to be assessed against the non-indigent person and assessment becomes a lien upon the assets of the non-indigent person. In **Section 5** of the bill, a person receiving the services of a public defender must be assessed for the services of the public defender and related costs, and the assessed fee becomes a lien upon the property of the person receiving the services. **(*Chapter 2005-236, Laws of Florida*.)**

CS/SB 2348 (Intangible Tax Rate) by Senator Haridopolos: The bill is a **Section-supported initiative** that reduces the annual tax rate of the intangible personal property tax to 0.5 mill on each dollar value of taxable property. The change is effective as of January 1, 2006. **(*Chapter 2005-270, Laws of Florida*.)**

CS/SB 2412 (Viatical Settlement Investments): The bill is an initiative of Chief Financial Officer Tom Gallagher that provides for the comprehensive regulation of viatical settlement investments. It establishes the investments as securities under Chapter 517; it defines prohibited business practices for dealers and associated persons engaged in the sale of such investments; it restricts the offering of viatical settlement investment products; and it regulates the manner in which life expectancy is estimated for viatical investments. **(*Chapter 2005-237, Laws of Florida*.)**

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A Practical Approach to Drafting Joint Trusts
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Drafting Trusts for the Snowbird
Joshua Rubenstein, New York

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Current Issues in Drafting Charitable Trusts
Barbara Landau, Fort Lauderdale

2:45 p.m. – 3:00 p.m.
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Probate & Guardianship Case Summaries

By Barbara Landau, Esq., Nova Southeastern University, Fort Lauderdale, FL

The Second District Court of Appeals concluded that probate court's order determining entitlement of surviving spouse to elective share was a nonfinal, nonappealable order. Appeal should not have been taken until after entry of an order determining amount of the elective share and contribution, rather than after order determining right to elective share. *Dempsey v. Dempsey*, 899 So.2d 1272 (Fla. 2d DCA 2005)

No provision was made for the surviving spouse in the decedent's will. The surviving spouse filed a timely election to take elective share and the personal representative objected. After a hearing on entitlement, the probate court held that the surviving spouse was entitled to the elective share. The personal representative appealed.

On appeal, the personal representative argued that the elective share statute is unconstitutional. The Second DCA did not address the constitutionality issue. Instead, the Court concluded that it did not have jurisdiction because the order on appeal was nonfinal and nonappealable. Florida Rule of Appellate Procedure 9.110(a)(2) allows appellate review of probate orders that "finally determine a right or obligation of an interested person."

The Second DCA noted that the Florida Probate Rule 5.360 creates a "two-step" procedure with respect to elective share proceedings. The first step is the determination of whether or not the person is entitled to the elective share. The second step is the determination of the assets included in the elective estate and the amount of the elective estate, the assets to be distributed in satisfaction of the elective share, and if, and from whom, contribution may be necessary to satisfy the elective share.

The Second DCA stated that a party's right to appeal does not arise until "there is a termination of judicial labor on the issue involved as to that party. *Walters v. Edwards*, 700 2d 434, 435 n.1 (Fla. 4th DCA)." The Second DCA held that in the case of the elective share, "judicial labor has not come to an end with respect to the rights and obligations of the Personal Representative" until the second step is completed.

In reaching its decision to dismiss the personal representative's appeal, the Second DCA drew an analogy to multi-step proceedings under prior law elections to take dower. In that context, the Fourth DCA, in *In re Estate of Rogers*, 199 So.2d 741 (Fla. 4th DCA 1967), held that orders prior to a final judgment of dower were administrative and procedural, including an earlier order determining the surviving spouse's right to dower.

The Fifth District Court of Appeals rejects trustee's attempt to disqualify beneficiary's new counsel who replaced beneficiary's original counsel after they were disqualified. Disqualification of counsel is an "extraordinary" and "in a civil case is an immensely unusual remedy" to be used "in limited circumstances" and "sparingly," and the beneficiary would be irreparably harmed by depriving her of counsel familiar with the case. *Whitener v. First Union Nat'l Bank of Fla.*, 901 So.2d 366 (Fla. 5th DCA 2005)

In the first incarnation of this breach of trust matter, *First Union Nat'l Bank of Fla. v. Whitener*, 715 So.2d 979 (Fla. 5th DCA 1998) (*Whitener I*), the Fifth DCA granted the trustee's petition for a writ of certiorari that sought review of the trial court's order releasing certain documents to Whitener, a beneficiary of a trust created by her father. The Fifth DCA ruled in favor of the trustee, holding that the documents were privileged even though they had been released to the beneficiary's lawyer by the trial court. The Fifth DCA directed the trial court to minimize the prejudice caused by the mistaken release of the documents. The remedy fashioned for that inadvertence was the disqualification of Whitener's original trial counsel so that Whitener would not have an unfair advantage. Whitener filed a writ of certiorari, and the Fifth DCA affirmed the disqualification of counsel. *Whitener v. First Union Nat'l Bank of Fla.*, 783 So.2d 287 (Fla. 5th DCA 2001).

In the meantime, a parallel case was being litigated by the other trust beneficiary, Whitener's stepmother, against the trustee. *First Union National Bank v. Turney*, 824 So.2d 172 (Fla. 1st DCA 2001). In that breach of trust action, the First DCA held that the trust beneficiary could obtain the same documents from the trustee that the Fifth DCA had ruled were privileged in *Whitener I*, notwithstanding the attorney-client privilege. The First DCA found that the documents fell within the crime-fraud exception to the attorney-client privilege.

Whitener then hired the attorneys who represented her stepmother in *Turney*, and the trustee sought disqualification of the new attorneys because the attorneys had seen the same documents that were held to be privileged in *Whitener I*. However, by this time, the *Turney* case had been decided and the documents in question were public record.

The Fifth DCA observed that "[d]isqualification of a party's chosen counsel is an extraordinary remedy and should be granted sparingly" and that "[t]he disqualification of a party's attorney in a civil case is an immensely unusual remedy, one that must be employed only in limited circumstances."

The doctrine of dependent relative revocation did not apply to

continued, next page

revive a clause of an earlier will where decedent properly exercised a power of appointment when later will, in which the testamentary general power of appointment was not properly exercised, was itself validly executed and expressly revoked prior wills. *Rosoff v. Harding*, 901 So.2d 1006 (Fla. 4th DCA 2005)

The donor of the power of appointment (the "settlor") established a trust for his sister, the testator in this case. The settlor gave the testator a testamentary general power of appointment over trust assets "provided always that in any such exercise of her power of appointment that is executed within eighteen months (18 months) of her demise, shall be invalid unless the same shall have been prepared and executed in the presence of such officers of my Corporate Trustee as may be delegated to perform in that capacity." Under the terms of the trust, there were three takers in default of the exercise of the power, but only one, Harding, survived the testator.

The testator properly exercised the power in her 1982 will, her 1983 codicil, and her 1991 will. Each of these documents had attached to it a signed statement to the effect that it was prepared and executed in the presence of the settlor's corporate trustee. In 2000, the Testator, who was then 95 years old, executed a third will that revoked all prior wills and codicils and exercised the general power of appointment in favor of her revocable trust. She died within 18 months of making her third will. The third will was not executed in the presence of the settlor's corporate trustee.

Harding, the taker in default under the settlor's trust, filed a petition objecting to the distribution of the assets of the testator's revocable trust, which included the appointed assets, challenging the validity of the exercise of the power of appointment because the testator died within eighteen months of the execution of the will, and the will was not prepared and executed in the presence of the corporate trustee. Rosoff, the appointee under the testator's prior documents, sought to apply the principle of "dependent relative revocation." The trial court ruled in favor of Harding, the taker in default. Rosoff appealed, relying on the doctrine of dependent relative revocation.

The Fourth DCA, quoting *Stewart v. Johnson*, 142 Fla. 425, 194 So. 869 (1940), stated that dependent relative revocation "means that where testator makes a new will revoking a former valid one, and it later appears that the new one is invalid, the old will may be re-established on the ground that the revocation was dependent on the validity of the new one, testator preferring the old will to intestacy. Redfearn's Wills and Administration of Estates in Florida, sec 89, page 121."

The Fourth DCA concluded that the principle was not applicable in this case. The testator's last will was "a completely valid will with an express revocation clause."

In addition to the fact that the 2000 will was not invalid, the Fourth DCA noted that there was nothing in the testator's will or revocable trust that showed that it was the testator's intent that should the exercise of the power fail, she would prefer the exercise in the prior will over the passing of the property as provided by the settlor. Furthermore, the testator's "entire estate planning scheme was substantially changed with the creation of the revocable trust and the last will."

The testamentary general power of appointment was ineffectively exercised, and the judgment of the trial court in favor of Harding was affirmed.

Although trust, by its terms, terminated at the settlor's death, there is a winding-up period, and while a beneficiary of a trust might have been able to complain that the winding-up period was taking too long, a third party being sued during this period could not, even where the suit was instituted after the settlor's death. *McMullin v. Beaver*, 30 Fla. L. Weekly D1385 (Fla. 4th DCA June 1, 2005)

After the settlor of a trust died, the successor trustee instituted an action seeking to enforce a contract to which the trust owned the rights. The trial court awarded summary judgment in favor of the parties against whom the trustee sought to enforce the contract. The trial court concluded that since the trust provided that the trust would terminate on the settlor's death, the successor trustee lacked standing to bring the action.

The Fourth DCA reversed, citing Section 737.402, Florida Statutes which gives a trustee "the power to prosecute actions, claims or proceedings for the protection of trust assets

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until final distribution of trust assets," and recognizing the need for time to wind-up the trust. The Fourth DCA held that even if a beneficiary may complain that the winding-up of the trust is taking too long, a third party being sued by the trustee may not.

Choice of law provision in trust agreement did not control with respect to issue of place of administration of trust. Principal place of administration of the trust was Massachusetts where trust records were kept, and breach of trust action could not be brought in Florida over the objection of an interested party if all parties could be bound by litigation in Massachusetts. *Perry v. Agnew*, 30 Fla. L. Weekly D1487 (Fla. 2nd DCA June 15, 2005)

The three beneficiaries of a trust filed suit in Florida against the trustee alleging breach of fiduciary duties and seeking an accounting. The trust agreement contained a choice of law clause that provided that the trust was to be governed by Florida law. The trustee moved to dismiss, alleging improper venue because the trust was administered in Massachusetts, all trust records were in Massachusetts, and therefore, the principal place of administration of the trust was Massachusetts. The beneficiaries argued that the choice of law provision governed. The trial court denied the trustee's motion to dismiss, and the trustee appealed.

The Second DCA held that Section 737.203, Florida Statutes, controls. Pursuant to Section 737.203, Florida Statutes, if a party objects, then trust proceedings, including proceedings that may be brought under Section 737.201(1), Florida Statutes, involving trustees, may not be entertained where the trust's principal place of administration is not Florida "unless all interested parties could not be bound by litigation in the courts of the state where the trust...has its principal place of business." Section 737.101(1), Florida Statutes, says that unless the trust provides otherwise, "the principal place of administration of the trust is the trustee's usual place of business where the records pertaining to the trust are kept...."

The Second DCA concluded that

continued, next page

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the choice of law clause was not the equivalent of designating Florida as the principal place of the trust's administration. Since Florida was not the principal place of administration, Section 737.203, Florida Statutes, controlled. The question then was whether all parties could be bound by litigation in Massachusetts. Therefore, the Second DCA remanded the matter to the trial court for a determination of that issue. If the trial court decides that all parties could be bound by litigation in Massachusetts, then the case will have to be stayed or dismissed in accordance with the requirements of Section 737.203, Florida Statutes.

The Fifth District Court of Appeals held that service of formal notice upon a minor who has never been married must be made in accordance with the requirements of Sections 48.041 and 48.031, Florida Statutes, since a minor is not an "incapacitated" person or "any other individual" within the meaning of Probate Rule 5.040(a)(3)(A). *Cason v. Hammock* 30 Fla. L. Weekly D1591a (Fla. 5th DCA June 24, 2005)

Three years prior to her death, the decedent deeded her waterfront home to Hammock "who had provided various services" to the decedent for a few years before decedent's death. In addition, the decedent left almost her entire estate to Hammock and only a specific devise of $5,000 to her sole remaining relative, her granddaughter. The decedent was the granddaughter's paternal grandmother. Hammock was also appointed as Personal Representative.

Sometime after the decedent's death, when the granddaughter's maternal grandfather learned about the deed, he filed a complaint on behalf of his granddaughter to set aside the deed alleging duress, undue influence and coercion. When he learned that a probate proceeding had been commenced, he filed a petition of behalf of his granddaughter for revocation of probate claiming lack of testamentary capacity, undue influence and coercion. The proceedings were consolidated, and the grandfather, on behalf of his granddaughter, filed a Petition to Remove Personal Representative, alleging conflict of interest. The probate court denied both petitions on the grounds that the petitions were not filed within three months of the date of service of the Notice of Administration. The grandfather appealed both rulings.

The Fifth DCA noted that "the record shows that Hammock mailed the Notice of Administration by certified mail return receipt requested and the return receipt was signed by the babysitter." The Notice of Administration was mailed to the granddaughter at the residence of the babysitter where the granddaughter was residing.

Hammock argued that service was effective under either of two of the provisions of Florida Probate Rule 5.040(a)(3)(A). First, she argued that the service was proper under Florida Probate Rule 5.040(a)(3)(A)(iii) which provides for service upon an "incapacitated person" by serving the incapacitated person and the legal guardian, if there is one, or if none, then the person having the care and custody of the incapacitated person. The Fifth DCA held that a minor is not an "incapacitated person" under the definitions of incapacitated persons and minors contained in the Florida guardianship statute. Specifically, Section 744.102(11), Florida Statutes, defines "incapacitated person" as one who has been judicially determined to lack the capacity to manage some of his or her affairs. Section 744.102(12), Florida Statutes, defines a minor as a person under the age of 18. Hammock then argued that service was proper under Florida Probate Rule 5.040(a)(3)(A)(iv). That subsection permits service of formal notice "on any other individual to the individual's usual place of abode or to the place where the individual regularly conducts business." The Fifth Circuit held that such service would not satisfy the "due process rights of minors" who might not understand the significance of the notice. In addition, as a matter of statutory construction, the Fifth DCA concluded that because of the reference to a place of business, the provision refers to adults, not minors.

Since neither of those provisions applied, service was required to be made under Florida Probate Rule 5.040(a)(3)(C), that is, "as otherwise provided by Florida law for service of process." Therefore, Sections 48.041 and 48.031, Florida Statutes, govern the manner of service of the Notice of Administration on a minor who has never been married. Section 48.041, Florida Statutes, requires service on a parent, guardian, or legal guardian in the manner provided in Section 48.031. The Fifth DCA analyzed the requirements for service under Section 48.031, Florida Statutes. Among those requirements is that the person to whom the petition is delivered be informed of the contents. Not only was the babysitter not the guardian or legal guardian of the minor, the babysitter was not informed of the contents of the letter. Since the letter was mailed, no one delivered the Notice of Administration. Therefore, the babysitter could not have been informed of the letter's contents. The Fifth DCA held that strict compliance with the substituted service statute is required and concluded that the granddaughter was not formally served with the Notice of Administration. Therefore, the Petitions for Removal of Personal Representative and for Revocation of Probate were timely filed.

The trial court also ruled that the granddaughter's guardian lacked standing to seek removal because the granddaughter was not an interested party since there were sufficient funds to pay her devise. The Fifth DCA disagreed, holding that a person is an interested party until such person actually receives complete distribution and actually takes possession.

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Real Property Case Summaries

By Alison Chastain, Esq., LandAmerica Financial, Miami, FL

Castigliano v. O'Connor, 2005 WL 1459197 (Fla.App. 3 Dist.)

In reversing the lower court's judgment granting specific performance of contract for purchase of a condominium, the Third District Court of Appeal held that "as specific performance is an equitable remedy, the purchasers should be prepared to show that it will not be unjust or oppressive on the seller to have the contract enforced." After executing the contract for purchase, the parties were informed by the title company that there were three additional mortgages against the property, of which neither party was aware. Neither party disputed that the mortgages were fraudulently procured and placed against the property by the seller's investment advisor, without the seller's knowledge.

The contract obligated the seller to make a "diligent effort" to cure title effects. The parties agreed to enter into a month to month "Residential Lease-Purchase Agreement" that made reference to the sales contract. This new agreement was executed to allow the seller time to clear the mortgages and permit the parties to close on the original contract. The lease agreement provided that each monthly rent payment would be held in escrow and applied to the purchase price of the condominium. The agreement also provided that either party could cancel it with 30 days written notice. The seller's attempts to clear the mortgages were unsuccessful, and the seller attempted to terminate the lease agreement and filed an action to evict the purchasers.

As payments were not being made on the fraudulently procured mortgages, they were soon foreclosed. The purchasers bought foreclosure judgments on two of those mortgages. All rights, title and interest in the final judgments of foreclosure were assigned to the purchasers. The trial court found that the purchasers tendered the amount due, were able to pay the balance, and were excused from performance by the seller's conduct. The court also found that the seller had failed to use his best efforts (as modified by the lease agreement) to clear title defects before terminating the contract and that, by allowing the purchasers to remain in possession of the property after the 45 day termination deadline of the sales contract, they waived that deadline. The trial court found that the equities were with the purchasers, as they agreed to pay the purchase price. The trial court further granted a rent credit to the purchasers for $1000 a month.

> "Specific performance shall only be granted when 1) the plaintiff is clearly entitled to it, 2) there is no adequate remedy at law, and 3) the judge believes that justice requires it."
>
> *Mrahunec v. Faust*, 121 A.2d 878, 880 (Pa. 1956)

The courts relied on *Blackmon v. Hill*, 427 So.2d 228, in which the court held "the purchasers, in order to invoke the remedy of specific performance, must meet the legal requirements of showing 'by clear, definite and certain proof' that the seller failed to exercise reasonable diligence in clearing the title defects." The appellate court could not find that the purchasers either met their required burden of proving that the seller failed to make a diligent effort to cure the title defects, or that the seller failed to exercise good faith to close on the contract. "Reasonable diligence only requires the seller to act in good faith and appropriately in view of the circumstances; it does not require the seller to make extraordinary efforts or expenditures . . . Determining what constitutes reasonable diligence is a mixed question of law and fact requiring a fact-specific inquiry into each particular case." (Id. 230)

The court reiterated that as specific performance is an equitable remedy, the purchasers should be prepared to show that it will not be unjust or oppressive on the seller to have the contract enforced. The sellers presented an expert witness that advised that the seller would have had to pay $51,772.56 in order to close at the initial scheduled closing. The court ultimately found that under the facts of this case the purchasers could not satisfy the requisite burden and reversed the trial court's finding for specific performance and rent credit.

Ward v. Brown, 2005 WL 1412363 (Fla.App. 1 Dist.)

The First Distrct Court of Appeal affirmed the trial court's ruling that appellants were equitable owners of the property improvements placed on their leaseholds at Navarre Beach in Santa Rosa County because they had sufficient rights and duties regarding the property. Appellants contended that their leasehold interests are exempt from ad valorem property taxes pursuant to F.S. 196.199.

The land underlying the appellants' improvements was conveyed by the United States to Escambia County, who then later leased the land to Santa Rosa County for 99 years with automatic renewals for additional 99 year periods. The court found that the Appellants "have the right to use or rent the improvements, encumber their interests, transfer their property rights, and realize any appreciation in value from sale of rental income. They must insure and maintain the improvements are responsible for the payment of any taxes." Thus, the court concluded that the appellants are the equitable owners of the property.

The court was not persuaded by the appellants' argument that FS 196.199(7) provides a safe harbor from being taxed as equitable owners. F.S. 196.199(7) provides, "Property which is originally leased for 100 years or more, exclusive of renewal options, or property which is financed, acquired, or maintained utilizing in whole or in part funds ac-

continued, next page

quired through the issuance of bonds pursuant to parts II, III, and V of chapter 159, shall be deemed to be owned for purposes of this section." The court specifically points out that the Florida Constitution "expressly contemplates equitable ownership for leases with initial terms of 99 years by providing homestead exemptions for leaseholds in excess of 98 years. See article VII, s. 6(a), Fla. Const."

The dissenting opinion points out that the majority opinion's argument that the duration of the leases is such that the lessee can be deemed the owner of the fee interest overlooks the significance of chapter 80-368, sec 2 at 1500, Laws of Florida. The original deed from the United States to Escambia County contained restrictions stating that the land be retained by Escambia County and used by it for such purposes it deems to be in the public interests and that it shall be always be subject to regulation by the county whether leased or not leased, but never to be otherwise disposed of or conveyed by it. The dissenting opinion noted that "the original deed restriction - and perhaps the Supremacy Clause – as well as Florida law over the last twenty-five years make unmistakably clear that the land, owned after all by the sovereign is not to be taxed."

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Real Property, Probate & Trust Law Section

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Section Reimb of Loss	-8,687	0
Audiotape - Section S	32,064	28,000
Videotapes	3,058	4,200
Course Materials	0	0
Mat Sales - Sect. Shr	1,043	800
Newsletter Sub.	0	0
Actionline Subscript	5,875	300
Spouse Program	560	10,000
Exhibit Fees	8,375	4,000
Sponsorships	166,416	135,000
Allowances	-19	-200
Investment Allocation	16,081	7,051
Reimb Member Mtg Tra	84,310	62,000
Reimb Council Recrea	3,375	4,500
Other Income	**347,558**	**294,449**
TOTAL REVENUE	**$ 497,875**	**$613,761**
EXPENSES		
Employee Travel	2,983	6,675
Postage	6,203	7,500
Printing	662	3,000
Officers Office Exp	1,000	300
Newsletter	24,398	25,000
Supplies	415	500
Photocopying	2,642	500
Officer Conference	562	1,200
Scrivener	10,523	7,000
Meeting Travel Expense	171,206	140,000
CLE Speaker Expense	2,147	3,000
Committee Expenses	28,985	32,000
Public Info & Website	0	2,500
Realtor Relations	150	4,000
Spouse Program	100	0
Board or Council Meeting	29,244	38,000
Strategic Planning Meeting	11,072	5,000
Council Meeting Recreati	20,910	20,000
Hospitality Suite	15,000	20,000
Spouse Functions	10,000	10,000
Council Members Hand	1,475	2,000
Awards	5,394	4,000
Law School Liaison	2,917	1,000
Website	14,919	50,000
Legislative Consulta	60,000	65,000
Legis Cons Ofc Exp	1,276	0
Legislative Travel	5,506	9,000
Memorial Tributes	477	500
Council of Sections	300	300
Operating Reserve	0	45,848
Miscellaneous	231	500
Speakers Expense	2,299	0
Total Operating Expenses	432,996	0
TOTAL EXPENSES	**$432,996**	**$504,323**
Net Operations	**64,879**	**504,323**
Fund Balance	**231,827**	**$109,438**
TOTAL CURRENT Fund BALANCE	**$296,706**	**$210,166**

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passed 3% in the years 1997 (3.30%); 2001 (3.40%) and 2005 (3.30%).[3] Thus, notwithstanding the recent rapid increases in the true fair market value of Florida properties, especially waterfront properties, the increases in assessed values of Florida homesteads in 2005 were limited to three percent (3%). A representative showing of increases in real property values (residential real estate is not broken out) from 2003 to 2004 demonstrates just how dramatic the increases in real property values have been and, therefore, how significant the SOH Cap is to Florida taxpayers.[4]

County	*Percent Increase 2003-2004*
Alachua	16.19
Brevard	17.79
Broward	14.49
Charlotte	19.46
Dade	19.38
Flagler	27.66
Gulf	25.73
Okeechobee	46.68

Hurricanes and the SOH Cap

The onslaught of the 2004 hurricanes has found many Floridians rebuilding, replacing and substantially improving their ravaged homes. The SOH Cap Implementation Statute, Section193.155(4)(b), Florida Statutes, in turn, created a problem for many homeowners whose homesteads were damaged or destroyed by one or more of the 2004 hurricanes. Section 193.155(4)(a), Florida Statutes states that changes, additions or improvements shall be assessed at *just* value (emphasis added) as of January 1 after the work is substantially completed. Section 193.155(4)(b), Florida Statutes states that

> Changes, additions, or improvements do not include replacement of a portion of real property damaged or destroyed by misfortune or calamity when the just value of the damaged or destroyed portion as replaced is not more than 125 percent of the just value of the damaged or destroyed portion. The value of any replaced real property, or portion thereof, which is in excess of 125 percent of the just value of the damaged or destroyed property shall be deemed to be a change, addition, or improvement.

Thus, any substantial changes or improvements exceeding 125 percent of just value of the damaged or destroyed property as a result of the hurricanes would be a change and therefore not covered by the SOH Cap.

The Florida legislature addressed this problem with the passage of SB 1194 on May 4, 2005 which amends Section 193.155(4), Florida Statutes. This amendment states that, notwithstanding the existing language of Section 193.155(4), Florida Statutes, if there are changes, additions or improvements to homestead property which was rendered uninhabitable by one or more of the named storms of 2004, then the assessment for just value is limited to the square footage that exceeds 110% of the homestead's total square footage. Repairs must be completed by January 1, 2008. Thus regardless of how much value has been added to one's homestead, the SOH Cap stays in place as long as the new square footage does not exceed 110% of the existing square footage. Additionally, if a home has square footage of 1,350 square feet or less, then it is not considered a change, addition or improvement if rebuilt up to 1,500 square feet. The law is retroactive to January 1, 2005.

Disclosure Requirements

A new homeowner who buys a home thinking that his real property taxes may be a certain amount based on the existing tax bill at the time of closing may be in for a shock when he gets his first bill. To prevent this kind of problem, the 2004 legislature passed Section 689.261, Florida Statutes. Effective January 1, 2005, Section 689.261, Florida Statutes requires that a prospective purchaser of residential property be presented with a disclosure summary at or before the execution of the contract for sale. The form must be substantially similar to this:

> **Property Tax Disclosure Summary.** BUYER SHOULD NOT RELY ON THE SELLER'S CURRENT PROPERTY TAXES AS THE AMOUNT OF PROPERTY TAXES THAT THE BUYER MAY BE OBLIGATED TO PAY IN THE YEAR SUBSEQUENT TO PURCHASE. A CHANGE IN OWNERSHIP OR PROPERTY IMPROVEMENTS TRIGGERS REASSESSMENTS OF THE PROPERTY THAT COULD RESULT IN HIGHER PROPERTY TAXES. IF YOU HAVE ANY QUESTIONS CONCERNING VALUATION, CONTACT THE COUNTY PROPERTY APPRAISER'S OFFICE FOR INFORMATION.

If it is not in the contract, then the summary must be provided by the seller although, in that event, the contract must refer to and incorporate by reference the Disclosure Summary. In addition, the contract must include, in prominent language, a statement that the potential purchaser should not sign the contract until he has read the Disclosure Summary.

Homestead Exemption, A Prerequesite to Get the SOH Cap

Although it may seem incomprehensible that a homeowner who qualifies for the exemption would not obtain a homestead exemption, that is what happened in *Zingale v. Powell*[5]. A Florida Supreme Court case decided in September of 2004, *Zingale* addressed the issue of whether a homeowner was still entitled to the benefit of the SOH Cap even though he qualified for, but had never applied for, the homestead exemption. When the Zingales' home assessed value went from $2.3 million to almost $3.9 million resulting in an increase of almost $40,000 in real property taxes, they cried "uncle" and sought to have the SOH Cap applied to limit the increase in their assessment in the years 2000 to 2001 even though the Zingales had not applied for the exemption until 2001. Justice Pariente, in a decision which reversed the Fourth District Court of Appeal, found that the lower court's decision was contrary to Section 193.155(6), Florida Statutes which implements the constitutional cap. Section 193.155(6), Florida Statutes states that "only property that receives a homestead exemption is subject to this Section." Thus, with no existing homestead exemption having been granted, the Zingales could not claim an SOH Cap for the previous

year. So, yes, they get their SOH Cap now but with a different baseline year that now includes all the appreciation from previous years.[6]

Adding or Subtracting Equals Trouble!

Section 193.155(3), Florida Statutes provides for a new assessment when there has been a change in ownership with certain exceptions which are beyond the scope of this article.[7] Two Attorney General opinions bring into clear focus the seemingly innocuous matters of adding or removing a name from a deed.

In AGO 2001-31, a tax assessor inquired as to whether the addition of a co-owner to a deed would cause the assessed value to be returned to its just value in its entirety or whether fifty percent of the property would retain its SOH Cap. The Attorney General opined that such a change in ownership did not fall within one of the exceptions, and, thus, the change in ownership required the entire property to be reassessed at just value. The reverse also holds true, *i.e.* the removal of a co-owner from a deed. In AGO 2002-28 the question was whether the removal of a co-owner from title caused the property to be reassessed at just value. Again, finding no exception to be applicable, the Attorney General answered the question in the affirmative stating that the removal of a name required the property to be reassessed as of the next January 1 at just value.[8]

Conclusion

As real property prices continue to skyrocket in Florida, the SOH Cap becomes ever more important. Tax winds blow hard – don't let your clients lose their Caps!

Endnotes:

1 For a more extensive discussion of the SOH Cap *See* "Protecting and Preserving the Save Our Homes Cap," the Florida Bar Journal/ October 2003 by Richard S. Franklin and Roi E. Baugher III.

2 Article VII, Section 4(c) of the Florida Constitution reads as follows:

All persons entitled to a homestead exemption under Section 6 of this Article shall have their homestead assessed at just value as of January 1 of the year following the effective date of this amendment. This assessment shall change only as provided herein.

(1) Assessments subject to this provision shall be changed annually on January 1st of each year; but those changes in assessments shall not exceed the lower of the following:

a. Three percent (3%) of the assessment for the prior year.

b. The percent change in the Consumer Price Index for all urban consumers, U.S. City Average, all items 1967=100, or successor reports for the preceding calendar year as initially reported by the United States Department of Labor, Bureau of Labor Statistics.

3 *See* Florida Department of Revenue (*www.dor.state.fl.us.)* website under State of Florida, Department of Revenue, Save Our Homes for a list of the Save Our Homes annual increases.

4 *See* Florida Property Valuations & Tax Data, December 2004, State of Florida Department of Revenue at *www.dor.state.fl.us.*

5 885 So. 2d 277 (Fla. 2004).

6 As a matter of interest the Zingales moved into their house in 1990 and would have qualified for the baseline year of 1994 when the SOH Cap went into effect, but they did not apply for the homestead exemption until 2001. Obviously, the Zingales had a high threshold of tax pain tolerance!

7 Section 193.155, Florida Statutes provides in general four exceptions to the loss upon transfer rule. Those exceptions are: (a) the same person is entitled to the homestead exemption as was previously entitled *and* the transfer was to correct an error *or* the transfer is between legal and equitable title; (b) the transfer is between husband and wife which includes a transfer to a surviving spouse or due to a divorce; (c) the transfer is due to operation of the homestead laws for descent and distribution; or (d) transfer on death is to a permanent resident who is a legal or natural dependent of the deceased.

8 As a matter of general interest, the Attorney General has ruled that a general partner in a foreign limited liability company is not entitled to get a homestead exemption. *See* AGO 2004-45.

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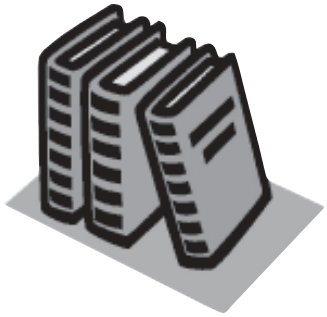

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