ActionLine

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RPPTL Section Convention:

May 26 - 29, 2005
Estero, FL

Watch your mail, see page 36, or visit www.flabarrpptl.org

Five Title Insurance Concerns When Insuring Land Trusts

By Stacy O. Kalmanson, Esq., Landamerica Financial Group, Inc., Orlando, FL

Underwriters frequently see the proper and improper use of estate planning and business vehicles used to hold and transfer real property. One popular vehicle is the Florida land trust. On August 17, 1963, Florida adopted a statute for land trusts, Section 689.071, Florida Statutes. Since that time, the popularity of land trusts continues to grow. With a land trust, the trustee holds the legal title to the property and acts when directed by either the beneficiary or the person granted the power of direction. But for the statute, this type of trust would be considered a "dry" or "passive" trust. Normally, when title is held in a dry or passive trust, title actually vests in the beneficiary and a deed from the beneficiary would be required. However, Section 689.071, Fla. Stat., gives authority to the trustee named in the instrument to deal with the property without a deed from the beneficiary.

To create a valid land trust under Section 689.071, Fla. Stat., the following requirements must be met:

(1) The recorded instrument must transfer an interest in real property, including, but not limited to, a leasehold or a mortgage interest, to a person, corporation, bank, or trust company qualified to act as a fiduciary in Florida;

(2) The grantee in the recorded instrument must be designated "trustee" or "as trustee;"

(3) The recorded instrument must confer

See "Five Concerns," page 21

Chair's Message:

RPPTL – Hard at Work

By Laird A. Lile, Esq., Laird A. Lile, P.A., Naples, FL, Chair



"I find that the harder I work, the more luck I seem to have."
– Thomas Jefferson

Your Real Property, Probate and Trust Law Section is hard at work for our profession. How do I know? Well, my e-mail "in box" has included e-mails on all of the following subjects during the past few days.

Legislation. The Legislative Committee has geared up, working with our lobbyists Martha Edenfield and Marc Dunbar in Tallahassee and interfacing with other interest groups such as the Florida Association of Realtors, the Florida Bankers Association and the trade association for notaries. Sandy Diamond, the chair of our Legislative Committee, and Burt Bruton and Brian Felsoski, the Vice-Chairs of that committee, are coordinating the efforts necessary to encourage the legislature to enact our initiatives and, perhaps more importantly at times, to dissuade the enactment of ill conceived proposals.

Seminars. The number and velocity of seminars is at a near frenzied pace, as our Section

See "Hard at Work" page 3

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Hard at Work

from page 1

Administrator, Bonnie Elliott Bevis, knows too well. The Trust and Estate Symposium focusing on litigation and related issues, the Ins and Outs of Condominium and Community Associations, the 2005 Real Estate Certification Review Course, the 2005 Wills, Trusts and Estates Certification Review Course, and the first time ever Construction Law Certification Review Course, and Real Estate Transactions involving Land Trusts are all current seminars. Fletcher Belcher and Larry Miller, the vice chairs of the CLE Seminar Coordination committee, with the assistance of Lee Weintraub, chair of that committee, have worked hard on our CLE programs. Each of these seminars include numerous speakers and many are held at multiple locations.

"Big Bar" Relations. Section Chair-Elect Jay Zschau attended the Council of Section meeting and has participated in interaction with Board of Governor members regarding an important financial issue. Kelly Oversteet Johnson, Alan Bookman and Hank Coxe, the President, President-Elect and President-Elect Designate, respectively, of The Florida Bar, have been receptive to hearing from your Section leadership. Many Section officers and council members have been in dialogue with Board of Governor members to improve the level of communication and working relationships.

Website. The website is constantly being updated, under the leadership of Sam Boone and Michael Gelfand, and with the assistance of our website vendors.

Amicus Activity. Your Section's participation in select court cases, as a friend of the court, continues as an important part of our activities. Bob Goldman and John Little lead the efforts in analyzing the cases, advising Section leadership, and representing your Section at the District Court level and at the Florida Supreme Court.

Publications. The *ActionLine* publication is timely, chock full of content and well laid out, under the watchful eye of Dresden Brunner and her assistant editors Pat Hancock, Keith Kromash, Rachel Peterkin, and Jo Claire Spear. In addition, Bob Swaine and Pam Stuart assist with coverage of Section activities in the Florida Bar *News*, while Rick Gans and Bill Sklar are reviewing and editing submissions for the Florida Bar *Journal*.

Section Convention 2005. The Convention Coordinators, Peggy Rolando and Christian O'Ryan, have been meeting and planning a busy, educational and fun time for us at this year's Section Convention. Join us over Memorial Day weekend of 2005 (May 26 through 29) at the Hyatt at Coconut Point in Estero, just north of Naples.

Many Other Activities. A natural consequence of making a list is that something important will inevitably left out. That outcome certainly has occurred here. Much else is happening and many, many volunteers are working hard every day for your Section. To all of you, our thanks.

These Section activities would not and could not occur without thousands of hours by volunteers such as you. Your Section must be very lucky, for it is, indeed, hard at work.



Sixteen Section Members Achieve Fifty Year Mark

Sixteen current members of the Real Property, Probate and Trust Law Section were admitted to The Florida Bar in 1955. In this, the Section's Fiftieth Anniversary Year, we recognize those current Section members who have also provided fifty years of service.

- Thomas E. Bissonnette of Odessa, Florida
- A.B. Blackburn, Jr. of Jacksonville, Florida
- David G. Bowman with Bowman, George, Scheb Toale & Robinson of Sarasota, Florida
- John L. Burns with Burns & Severson, P.A. of West Palm Beach, Florida
- Daniel Downey, Jr. of Palm Beach, Florida
- Robert B. Ely of Miami, Florida
- Sam J. Gabriel with Brian P. Gabriel, P.A. of Palm Beach Gardens, Florida
- Peter Guarisco of Tallahassee, Florida
- Lewis H. Hill, III with Foley & Lardner of Tampa, Florida
- Richard K. Kramer of Lake Worth, Florida
- Alan R. Lorber with Alan R. Lorber of North Miami Beach, Florida
- Sanford L. Muchnick of Hollywood, Florida
- W. Joseph Reynolds with Brett & Reynolds, P.A. of Dunellon, Florida
- Murray D. Shear with Broad and Cassel of Miami, Florida
- Harold A. Ward, III with Winderweedle Haines Et Al of Winter Park, Florida
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Federal Surplus Property for the Homeless: An Opportunity Advocates Should Not Miss

By Peter Sleasman, Esq., Southern Legal Counsel, Inc., Gainesville, FL, & Shelbi Day, Esq., Gainesville, FL

Submitted on behalf of the Affordable Housing Committee of the RPPTL Section

Introduction

In 1994, the Federal Government closed Homestead Air Force Base as part of the national base closure and reorganization effort. As a result of the Base Closure Community Redevelopment and Homeless Assistance Act of 1994 (BRAC), the Miami-Dade County Homeless Trust was able to acquire 84 acres of vacant land in a suburban area in Miami-Dade County. The Trust, along with several other local homelessness providers use this property free of charge to provide housing, transitional housing, healthcare, job training, and day care to more than 300 homeless individuals and families each day and over 2000 clients annually. There are plans to expand the services to include substance abuse programs and other social service programs. The conversion of unused military property to facilities and programs that assist the homeless was a success because of the cooperative effort of a coalition of homeless providers, local government, and the business community.

In 2001, the Federal Government listed a former navel housing complex in Pensacola, Florida, as federal surplus property. The property consisted of 198 duplex homes, which until approximately 2000 had been used as housing. It was declared surplus property when the Navy upgraded its minimum square footage requirements for family housing. The old, but sturdy, brick homes had been refurbished by the Navy in the late 1990s and were in good condition with relatively new appliances and fixtures. Pursuant to the requirements of the Stewart B. McKinney-Vento Homeless Assistance Act of 1987 (McKinney Act), the government made the property available to local homeless providers for use to assist the homeless. In response, several local and out-of-state homeless assistance organizations expressed an interest in the property. Yet, because these efforts were not planned, coordinated, or adequately funded, the providers' proposals quickly crumbled in the face of opposition by the local government and residents. None of the local homelessness organizations managed to even file a completed application. As a result, none of the 198 homes were utilized for the benefit of the approximately two thousand homeless people in Escambia County. Because no homeless providers claimed the property, it was turned over to the County, which demolished the homes to make way for a park.

While there were many factors that led to the differing results in the examples above, the two situations aptly illustrate some common themes in utilizing federal law to obtain federal surplus property. First, federal law can provide homeless providers with a once in a lifetime opportunity to obtain land, buildings, and other facilities to assist the homeless at a relatively modest cost. Second, in order for homeless organizations to do so, they must be able to plan quickly, coordinate with other organizations, and develop the resources necessary to carry out their proposed project. Although the obstacles can be great, the benefits, as shown by the Miami-Dade experience, can be immeasurable. This article aims to make homeless providers aware of existing opportunities under federal law by briefly explaining the basics of how non-profit organizations and state and local government agencies can obtain federal surplus property at no cost, to use for services and facilities to assist homeless individuals.

Surplus federal property is obtained under the McKinney Act and the BRAC. Since 1994, closed military bases are regulated by BRAC under a different process. An overview of both are provided below.

The McKinney Act

Under Title V of the McKinney Act, homeless service providers can obtain surplus property that has been deemed suitable for such use, at no cost to the organization. The types of federal property that are available under the Title V program are: housing, warehouses, child care centers, office buildings and vacant land. Once obtained, the property can be used for facilities such as: shelters, transitional housing, job training, mental health care, substance abuse treatment, child care, soup kitchens, food pantries, health care and administrative services. Unfortunately, under HHS policy, such property cannot be used for permanent housing.

In accordance with Title V, the General Services Administration (GSA) is responsible for canvassing to find unused federal property, and the Department of Housing and Urban Development (HUD) determines whether the property is suitable for

continued, next page



Children served by the Homeless Assistance Center on the former site of the Homestead Airbase.

For the homeless

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use to assist homeless individuals. The property is available on an "as-is" basis. Occasionally, however, HUD incorrectly designates such property as unsuitable for use for homeless services; thus, the National Law Center for Homelessness and Poverty (NLCHP) urges interested organizations to contact them in the event that there is unused federal property that has not been designated as suitable. Every Friday, HUD publishes a list of suitable federal surplus properties in the Federal Register, which may be found at local libraries or online at http://www.gpo.gov/su_docs, by calling the HUD Title V toll-free hotline at 1-800-927-7588, or by contacting the Property Disposal Division of the GSA at an area regional office. As a practical matter, in advance of official publication in the Federal Register, organizations that are interested in finding surplus property may be able to confirm suspicions that an existing piece of federal property will become available by contacting GSA or the property holding agency for the specific piece of property. As in the Pensacola case, such information is sometimes available prior to official listing.

Property listed in the Federal Register is "frozen" for 60 days and is only available to homeless providers during that time. During the 60-day period, organizations that are interested in applying for surplus property must submit a formal written expression of interest, called a notice of intent to apply for a property, to the United States Department of Health and Human Services (HHS). The notice of intent can be a single letter stating that the organization is a non-profit organization seeking to acquire the property under the McKinney Act for use to assist homeless people. Although notices of intent may be submitted after the 60-day period, HHS is only obligated to consider them if the property is still available.

Upon receipt of an organization's notice of intent for surplus property, HHS will send the organization an application and instruction packet. Organizations must submit the completed application to the Secretary of HHS no later than 90 days from the date on which HHS receives the organization's notice of intent. According to the NLCHP, applications, which can be extensive depending on the size of the proposed project, must include: (1) a description of the organization, including proof that it is a 501(c)(3) organization or a state or local government agency; (2) a description of the proposed program; and (3) proof of the organization's ability to finance the program. One factor that should not be overlooked is that surplus property may need renovations, the costs of which can be substantial. Significantly, where the available surplus property is large, organizations can partner with eligible agencies or organizations.

After investigating the feasibility of the proposal, HHS approves or denies the completed application within 25 days. According to HHS, if the application is approved, "[the property] must be placed into its intended use within 12 months of transfer, or within 16 months where construction or major renovation is contemplated." After approval, the organization or agency enters into either a long-term lease or transfer of deed with the landholding agency. After transfer, all non-profit organizations acquiring surplus property under Title V must submit a yearly report to HHS on their progress in implementing the program proposed in their application. Significantly, property that is obtained by a non-profit for homeless assistance cannot be sold or used for other purposes, and must be transferred back to the Federal Government when the proposed program ceases or the property is no longer needed. The organization may be responsible for costs associated with transfers, such as property insurance, surveys, appraisals, and closing costs.

BRAC: Base Closure Property

While military base closures were initially included under the McKinney Act, the BRAC removed base closures from the McKinney Act, but incorporated many of its requirements. When a military base is closing, the Department of Defense (DOD) is responsible for designating a Local Redevelopment Agency (LRA) to convert a closed military base to nonmilitary use. The LRA must publish information about base closures in both the local newspaper and the Federal Register. Organizations attempting to obtain base closure property for homeless assistance must apply directly to the LRA. To do so, organizations submit a notice of interest to the LRA for specific buildings and property within the set deadline–a date that is set three to six months after the LRA is "recognized" by the DOD or where it was previously recognized, three to six months after it was declared surplus property. The notice of interest must include the following information: an identification of the property, a description of the homeless assistance proposed, a demonstration of the need for the proposed program, the extent of coordination with other pro-

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viders in the area, a financial plan, the organizational or fiscal capacity of the applicant, and the estimated amount of time it will take for implementation of the proposed plan. Such plans should be considered in the broader context of the LRA's reuse plan.

While in some respects, the BRAC is more complicated than the McKinney Act, it allows for broader use of surplus property and is more flexible. Specifically, surplus property that is available under the BRAC can be used for temporary or permanent housing and its use is not limited to homeless people. Thus, facilities and services can be proposed that assist both homeless and low-income communities. In addition to obtaining the property directly, homeless providers may negotiate agreements to provide resources and assistance. For example, as was recently done in Philadelphia, money from the sale of a property may be put into a trust fund to provide services for homeless people. Moreover, while the McKinney Act leaves decisions up to the Federal Government, the BRAC localizes the decision-making process in many ways, giving the community a voice in the reuse plan.

Under BRAC, homeless providers are not given federal preference in obtaining surplus property. The LRA must only consider the needs of homeless people in determining the overall reuse plan for the base. However, the LRA must conduct outreach and consult with and assist representatives of homeless people in evaluating appropriate uses for the property at the base. In other words, the LRA must consult with representatives of homeless people in preparing a reuse plan. Because, Congress instructed HUD to consider the needs of both the homeless community and the community at large, it is important for homeless providers to include in its letter of interest information and data about the nature of the homeless population, the need for additional homeless facilities and programs, and how the proposed use will work with the other development proposals for the entire base. Once a reuse plan is developed, the LRA must provide the public with information and an opportunity to comment, then it submits the plan to HUD. HUD has 60 days to review the reuse plan and application. If HUD rejects a proposed reuse plan, it must notify the LRA of its decision and reasons therefor, and it has 90 days to resubmit a new plan. HUD has 30 days to review the revised reuse plan. Upon approval of a reuse plan, HUD notifies the DOD and then transfers the real and personal property in accordance with the plan. Similar to the McKinney Act, all transferred properties are free to homeless providers. However, once the proposed use of the property ceases, it must be transferred back to the government.

At this point in time, BRAC is particularly significant because there will be another round of military base closures in 2005. Approximately 25 percent of existing military bases will be closing at that time in an expedited process–all of the closures will take place within 18 to 24 months of the initial announcement. Additionally, closed and closing military installations represent the greatest single source of surplus federal assets available since the inception of the McKinney Act. As the NLCHP instructs, it is essential that homeless service providers who are interested in obtaining property under the BRAC plan in advance so that they can submit a timely notice of interest with the LRA. While this process affords a little more flexibility than the procedure under the McKinney Act, service providers will be up against local government and private organizations with interest in the property.

Unfortunately, there is no "official" way to find out in advance of official publication if a particular military base is slated for closure. NLCHP is monitoring the 2005 base closures in Congress and will provide interested groups with information about closures in their area as soon as possible. In addition, local newspapers may pick up advance information about a base rumored to be closing. Nevertheless, it is advisable that groups interested in acquiring base closure property treat any military base in their community as a possible closure and start to plan accordingly.

Conclusion

This article is merely an overview, and in many respects an oversimplification, of the McKinney Act and the BRAC, aimed at creating awareness of existing opportunities. While both Acts afford excellent opportunities for homeless providers to obtain federal surplus property, at no cost, for homeless related services, advanced planning and organization are key. To be sure, once surplus property is announced, time is limited and the application procedures under both Acts require the presentation of a feasible and necessary proposal. As such, we recommend that service providers who are interested in obtaining surplus property begin now in planning for the availability of surplus property and check the Federal Register regularly. Beyond that, providers may occasionally be able to identify the existence of federal surplus property that will come available in the future, prior to its official publication, simply by looking or listening for such information around the area. In the Pensacola case, for example, long before its publication in the Federal Register, it was common knowledge in the community that the homes would become surplus. If suspicions arise that a particular piece of property owned by the government may become "surplus," a call to HUD may confirm such suspicions by contacting HUD at: HUD Headquarters Office, Kathy Burruss, Office of Special

continued, next page



Camillus House — providing transitional housing for homeless families on the former Airbase.

For the Homeless
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Needs Assistance Programs, Office of Community Planning and Development, Department of Housing and Urban Development, Room 7262, 451 7th Street, SW, Washington, DC 20410. Tel: (202) 708-1234.

Both Southern Legal Counsel and the NLCHP are happy to provide legal counsel for a better understanding of what is required under each law.

Southern Legal Counsel, Inc., is a non-profit public interest law firm located in Gainesville, FL, that can provide legal assistance to organizations seeking to obtain available surplus property. Please contact Peter Sleasman at peter.sleasman@southernlegal.org or (352) 271-8890.

Peter Sleasman is an attorney at Southern Legal Counsel, specializing in civil rights and fair housing litigation. Shelbi Day is an attorney and Equal Justice Works Fellow at Southern Legal Counsel.

Most of the information used to compile this article came from publications issued by the NLCHP, located in Washington, D.C. The NLCHP monitors federal agency compliance with the McKinney Act and provides technical assistance to law firms and individuals seeking to obtain federal surplus property through the McKinney Act and the BRAC. For assistance or more information, contact Becky Troth, at rtroth@nlchp.org. Additional articles, reports, and information, including the NLCHP's new report entitled "Acquiring Federal Property to Serve Homeless People," can be accessed on their website http://www.nlchp.org/.

In compiling this article, we relied on the following materials:

United States Department of Health and Human Services, Brochure: How to Acquire Federal Surplus Real Property for Public Health Purposes (2001).

NLCHP, Securing Housing for Homeless Individuals: Options and Obstacles (April 2004)

NLCHP, Fact Sheet: Surplus Federal Property (March, 2003).http://www.nlchp.org

NLCHP, Acquiring Federal Property to Serve Homeless People (Draft October 2004).

Hallinan, Lauren and Catherine Bishop, Military Base Closures and Reuse Planning: Representing the Poor (National Clearinghouse for Legal Services, Inc 1995).

Section Member O'Malley Receives Award from Affordable Housing Coalition

ANDREW O'MALLEY, chair of the Pro Bono Committee of the Real Property, Probate& Trust Law Section of The Florida Bar, accepts an award from Jaimie Ross, President of the Florida Housing Coalition, at its statewide annual conference. Drew was instrumental in the creation of "Lawyers for Affordable Housing," a statewide project that matches volunteer attorneys with nonprofit affordable housing organizations. The Florida Housing Coalition presented this certificate of appreciation at its 17th Annual Statewide Conference on September 20th, in front of a crowd of over 500 people.



The **LAWYERS FOR AFFORDABLE HOUSING PROJECT** began in 2002 and is a joint effort between the Pro Bono Committee of the RPPTL Section and the Florida Housing Coalition. The Florida Housing Coalition is a statewide nonprofit that provides training and technical assistance to nonprofits throughout Florida with the development of affordable housing. These nonprofits are often in need of legal assistance for corporate, land use, and real property transactional issues. The collaboration between the Pro Bono Committee and the Florida Housing Coalition is providing invaluable assistance to the organizations that are serving Florida's low income families.

New Bar Certification in Construction Law

By Fred R. Dudley, Esq., Akerman Senterfitt, Tallahassee, FL, Member, Construction Law Committee

On May 20, 2004, the Florida Supreme Court approved[1] various changes to the Rules Regulating The Florida Bar, including the creation of new Rule 6.242, for the purpose of approving a new area of legal specialization: Board Certified Construction Law Lawyer.

Bar President Kelly Overstreet Johnson has appointed members to serve on the new Construction Law Certification Committee, which is being chaired by Kim Ashby (Orlando). The committee approved an initial application for this new area of certification, which was due for filing last November; approximately 140 applications were received, which are pending responses from references and review by the committee for approval to take a certification examination.

This new certification committee is also preparing a 6-hour certification examination, presently scheduled to be given in Tampa on May 21, 2005. In the meantime, RPPTL Section's Construction Committee Chair, Mike Sasso, has appointed Lee Weintraub (Ft. Lauderdale) and several other Section members, to organize, plan and conduct a CLE review course to prepare the initial applicants for this first examination. The review course will be conducted March 23 and 24 in Orlando; registration for this course is not limited only to certification applicants, but is open to any Bar member.

This is an exciting new step for our Section. This is also an important additional resource for the public to identify lawyers who have met established standards and who have made a commitment to improved quality and professionalism in the delivery of legal services in this area of law.

Endnotes:

[1] Opinion found at 875 So .2d 448.

[2] www.flabar.org for a copy of this new rule.

THE FLORIDA BAR CLE

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

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3:30 p.m. – 5:00 p.m.
Contract Negotiation, Preparation, and Document Review

March 24, 2005

8:30 a.m. – 10:30 a.m.
The Florida Construction Lien Law, Chapter 713
Section 255.05, Florida Statute
The Federal Miller Act, 40 U.S.C. §270
Lunch (on your own)
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Effective January 1, 2005

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LEGISLATIVE UPDATE

By Martha Edenfield, Esq., Pennington Law, Tallahassee, FL

The Legislative Session commences March 8, 2005 and lasts for 60 consecutive days, ending May 6, 2005.

There is considerable interest from legislators on all of the Section's legislative initiatives. The following is a synopsis of 2005 legislation initiated and supported by the Section:

Revocable Trust/Guardianship/ Court Monitor: Senate Bill 64 by Senator Campbell and House Bill 457 by Representative Bogdanoff include last year's Section initiative authorizing the guardian of property for an incapacitated person to contest to the validity of the trust before it comes irrevocable. **Senate Bill 64 and House Bill 457** also include the Section's initiative on Court Monitors. **Senate Bill 64** has passed the Senate Judiciary Committee and the Senate Banking and Insurance Committee. It has now passed all committees of reference in the Senate and has been placed on the calendar on Second reading. **House Bill 457** has passed the House Civil Justice Committee and is also referred to the Future of Florida's Families, Justice Appropriations and Justice Council. Because the Court Monitor legislation contains a public records exemption, the Florida Constitution requires that a separately filed public records exemption bill pass by 2/3rds majority of each House**. House Bill 947 by Representative Bogdanoff** is the public records exemption bill. At the sponsor's request, we are working with the First Amendment Foundation on the exemption. **Senate Bill 1810** is the companion bill to **HB 947**.


Sen. Campbell


Rep. Bogdanoff

Defined Benefits: Senate Bill 660 by Senator Carlton is the Section's initiative on protection of defined benefit assets that passed the Senate in the 2004 Session. **SB 660** has already passed the Judiciary Committee and has only one other committee of reference, Banking and Insurance. **HB 667 by Representative Altman** has been referred to the committees on Civil Justice; Economic Development, Trade and Banking; Insurance; and the Justice Council. **CFO Tom Gallagher** has added a provision in this bill to protect Hurricane Savings Accounts.


Sen. Carlton


Rep. Altman


Tom Gallagher

Deadperson's Statute: Revisions to the Deadperson's statute are still under discussion.

Disclaimer: SB 1368 by Senator Aronberg is the Florida Uniform Disclaimer of Property Interests Act. **Representative Kottkamp** is sponsoring the House bill. Based on the 1999 Uniform Disclaimer of Property Interests Act as promulgated by NCCUSL, this legislation repeals Florida's existing statutory disclaimer statutes (found in two chapters) and enacts the exclusive mechanism under Florida law in one chapter for disclaiming an interest in testamentary and non-testamentary property interests.


Sen. Aronberg

Article V/Guardian Advocates: Senator Smith will be filing the "glitch" bill to address Article V revisions. **Senators Smith, Webster** and **Crist** will be the key decision makers in the Senate as to how and if this issue of funding payment guardian advocates for indigents will be addressed in the 2005 Regular Session. **Representative Negron** is also working with the Section to resolve this issue.


Sen. Smith

Satisfaction of Judgments Liens: Senate Bill 370 by Senator Campbell and House Bill 427 by Representative Seiler is the judgment lien "glitch" bill that was filed in the 2004 Session as **SB 3012/HB 955**. The lead on this bill is the Business Law Section of The Florida Bar. The bills contain three additional RPPTL Section initiatives dealing with **satisfaction of judgments,** amending Section 55.141, the Section's initiative on **homestead protection**, amending Section 222.01, and amending Section 701.02, F.S., regarding **mortgage security interests**. **Senate Bill 370** has passed the Senate Judiciary Committee. **Senate Bill 370** is now in Judiciary Appropriations. **House Bill 427** has passed the Civil Justice Committee and has also been referred to the Justice Appropriations Committee and the Justice Council.


Rep. Seiler

Title Insurance Mortgage Release: House Bill 531 by Representative Hasner is the mortgage "self-help" bill. **House Bill 531** has been referred to the House Civil Justice Committee and Economic Development, Trade and Banking Commit-

continued, next page

Legislative Update
from preceding page


Sen. Hasner


Rep. Atwater


Rep. Traviesa

tee and the Justice Council. **Senate Bill 1258 by Senator Atwater** is the Senate companion and has been referred to Banking and Insurance and Judiciary. The Section worked with the sponsors and with the Florida Bankers Association to address all concerns.

Statutory Way of Necessity: House Bill 351 by Representative Traviesa is the Section's legislation on Statutory Way of Necessity. The bill has passed the House Civil Justice Committee and has also been referred to the House Local Government Council, the Justice Appropriations Committee and the Justice Council. **Senator Fasano** is sponsoring the Senate companion, **SB 1184**, which has been referred to the Committees on Judiciary and Community Affairs.


Sen. Fasano


Rep. Hukill

Trusts & Other Agency Relationships: SB 1688 by Senator Atwater and HB 897 by Representative Hukill address three areas of trust law that are of concern to bankers, accountants and attorneys who render trust services. The bills amend the Uniform Transfer on Death Security Registration Act to allow investment accounts at banks and trust companies to be held in joint accounts and other types of accounts with a survivorship feature, putting banks and trust companies on an equal footing with brokerage companies. The bills also grant trustees who are involved in court proceedings to pay their attorney fees from assets of the trust account without prior court approval and make several technical corrections to the UPIA.

These bills result from the collaborate effort of, and is supported by The Florida Bankers Association, The Real Property, Probate and Trust Law Section of the Florida Bar and The Florida Institute of Certified Public Accountants.

RE-FRULPA. (The Revised Florida Uniform Limited Partnership Act): The Revised Florida Uniform Limited Partnership Act bills, House Bill 595 by Representative Goodlette and Senate Bill 1056 by Senator Klein have been filed. The Section will be working with the Business Law Section and Tax Section to support and pass this legislation. **HB 595** has been referred to Economic Development, Trade and Banking; Civil Justice; Transportation and Economic Development and Appropriations; and Commerce Council. **SB 1056** has been referred to the Committee on Commerce and Consumer Services; Judiciary; Governmental Efficiency Appropriations.


Rep. Goodlette


Sen. Klein

Construction Contracting Revisions to HB 113 and SB 1016: HB 113 by Representative Dean and SB 1016 by Senator Argenziano make revisions to construction lien law provisions. The Section has proposed a series of amendments to clarify provisions in the bills. **HB113** has passed the Civil Justice Committee and has been referred to the Committees on Growth Management, Business Regulation and the Justice Council. **SB 1016** has been referred to the Committees on Regulated Industries, Judiciary, and Governmental Oversight.


Rep. Dean


Sen. Argenziano

Opportunity for Involvement: Pro Bono Committee

The Pro Bono Committee is seeking **real estate and probate attorneys** to participate in a newly created statewide Clear Title Project to represent Legal Aid clients. Representation will qualify for **reportable pro bono hours.** Please call either Andrew O'Malley 813-250-0577 or Adele I. Stone 954/925-5501 for further details and registration.

The Probate Team Seminar and Executive Council Meet in Downtown Tampa

October 28 – 31, 2004

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

Last year, Chair Laird Lile coordinated an Executive Council meeting with the annual Probate Team CLE seminar. The seminar and meetings were held at the Hyatt Regency in Tampa from Thursday, October 28 through Sunday, October 31, 2004.

The weekend was kicked off with a reception at the home of John and Kathy Neukamm on Thursday evening, October 28. On Friday and Saturday, The Probate Team presented its usual outstanding CLE seminar. For those not attending the seminar, committee meetings were held on Friday as well. After the seminar concluded on Saturday, the Real Property Roundtable and the Probate Roundtable Luncheons were held.

The Executive Council meeting was held on Saturday afternoon. At the meeting, Chair Laird Lile reported on the Family Law and PILS Sections' request for support of their efforts to repeal the prohibition against adoptions by homosexuals. Laird Lile invited John Morse, the Chair-Elect of the Family Law Section, to make a presentation on behalf of the Family Law and PILS Section. John Morse asked the RPPTL Section to recognize the Family Law and PILS Sections' right to lobby for such legislation despite the anticipated objections by The Florida Bar's Board of Governors. At the conclusion of John Morse's presentation, Laird Lile explained that the Executive Committee had concluded at a prior meeting that this matter should be decided by the Board of Governors, which is charged with determining whether an issue would likely be divisive.

A General Action Item addressed was an increase in the RPPTL Section's dues from $35/year to $50/year, effective July 1, 2005. Charlie Nash, on behalf of the Budget Committee, made an extensive presentation regarding the Committee's recommendation. The proposal passed unanimously.

John Little reported on behalf of the Amicus Coordination Committee of the favorable decision in the *Blanton* case, which adopted the RPPTL Section's position that the Marketable Record Title Act should not eliminate a statutory way of necessity. Numerous other committees provided reports to the Executive Council.

At the conclusion of the Executive Council meeting, the RPPTL-PAC met. Later Saturday evening, some Section members participated in the non-RPPTL sanctioned 20th Annual Guavaween event in Ybor City. The weekend concluded with a Farewell Breakfast on Sunday, October 31.

See more photos, next page



Tom Karr, Debbie Goodall, and Laura Stephenson attended the Welcome Reception at John and Kathy Neukamm's home on Thursday.

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Scenes from Tampa E.C. Meeting



Nancy Baumann, Shreve McNally and Mary Swaine enjoy the Thursday reception.



Some of the participants in the spouse/guest excursion.



Chair, Laird Lile, and his lovely wife, Laurie.



Rohan Kelley and Tae Bronner

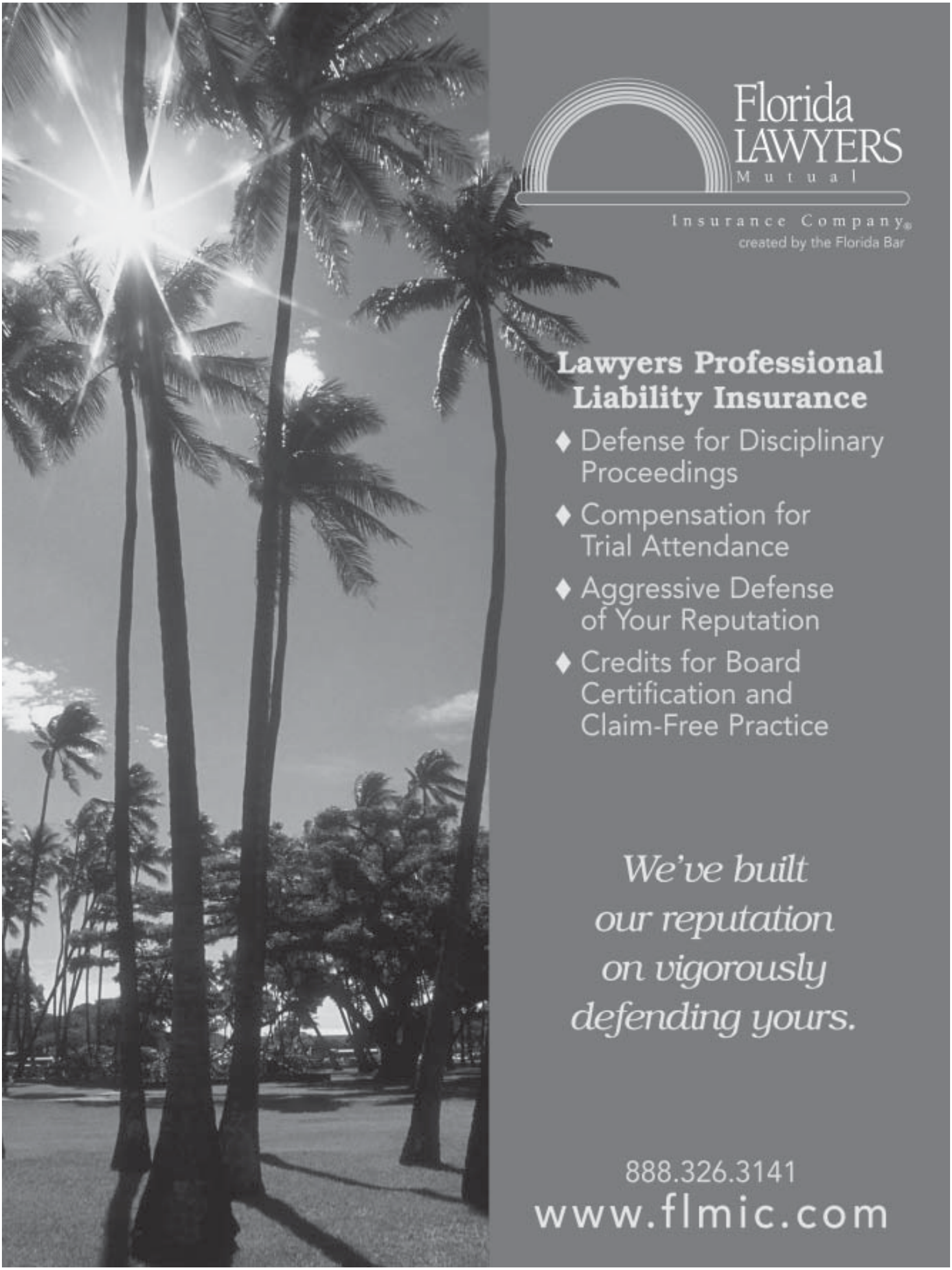


Attendees of the Friday evening dinner.



Post-Guavaween participants.

Photos by Michael Gelfand, John Neukamm and Silvia Rojas.


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RPPTL-PAC

Members of the Real Property Probate and Trust Law Section of The Florida Bar and other interested parties have created a Committee of Continuous Existence (RPPTL-PAC) to participate financially in the State elections process. Burt Burton (Chairman), Louis Guttmann (Vice Chairman), Sandra Diamond (Treasurer), Peter Dunbar (Secretary), Steve Hearn, Chip Waller, Jay Zschau, Robert Goldman, Bruce Stone, Melissa Murphy, Charlie Nash and Tom Smith are the current members of the PAC's Board of Directors. RPPTL-PAC is not formally associated with the Section, but the PAC membership believes the interests of the PAC are consistent with the goals and interests of the Section and the PAC officers and members encourage other Section members to join and participate.

RPPTL-PAC intends to meet quarterly in conjunction with meetings of the Section's Executive Council to review pending elections for state officials and members of the Florida Legislature. The PAC also intends to act on recommendations for support of candidates and to make contributions to candidates who support and understand the issues of the Section and its members.

Membership is extended to all who contribute to RPPTL-PAC consistent with the dues schedule listed below.

Each member is entitled to full participation regardless of the amount of the member's contribution. Contributions are not limited to individual checks, and firm and corporate contributions are acceptable. Once the annual contribution is received, the contribution is acknowledged, the contributor is added to the membership roster, and the member will receive all notices and other written communications for the PAC. **Checks should be made payable to "RPPTL-PAC"** and can be mailed or delivered to the PAC advisor, Marc Dunbar, at the following address:

Marc W. Dunbar
Pennington Law Firm
Post Office Box 10095
Tallahassee, Florida 32302-2095
(850) 222-3533

Member's Name: _____

Firm Name: _____

Address: _____

City _____ State _____ Zip Code:

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❑ Gold Member	$2,000
❑ Platinum Member	$5,000
❑ Double Platinum	$10,000

Custodial Accounts – The Good, the Bad and the Ugly

by Keith S. Kromash, Esq. Nash & Kromash, LLP Melbourne, FL

Many of our clients with young children save for their children's future by utilizing Florida's Uniform Transfers to Minors Act and custodial accounts because such accounts are both easy and inexpensive to set up. However, custodial accounts have both tax and non-tax implications, and it is important to advise our clients of these implications. Moreover, while custodial accounts may be appropriate in some situations, there are some disadvantages with respect to such accounts. This article will explain what custodial accounts are and discuss the advantages and disadvantages of custodial accounts. This article will also explore some strategies to "undo" preexisting custodial accounts.

What is the UTMA?

As a matter of law, minors are not legally permitted to enter into contracts, to own assets or to transfer assets. Therefore, in the 1950's, states began to adopt uniform laws that permitted adults to legally conduct commercial transactions on behalf of minors. One such law was known as the Uniform Gifts to Minors Act (otherwise known as the "UGMA"). The UGMA was created by a group of lawyers, judges and law professors known as the National Conference of Commissioners on Uniform State Laws, and it was up to each state to adopt the UGMA. Although the UGMA was eventually adopted by all 50 states, it was not completely "uniform" as some of the provisions varied among the states. Moreover, the UGMA was also rather narrow in scope because it only permitted the transfer of cash and securities, and the only permissible transfers were gifts.

In order to expand the narrow scope of the UGMA, the Uniform Transfers to Minors Act (otherwise known as the "UTMA") was created to replace the UGMA. As with the UGMA, the UTMA is also not "uniform" because each state that has adopted it has its own variation. Nevertheless, the UTMA expands the types of property that may be transferred to minors (such as cash, securities, partnership interests or real estate), and it also permits other types of transfers besides gifts (such as bequests, the exercise of powers of appointment or beneficiary designations of nonprobate assets). Florida has adopted the UTMA, and it is known as the "Florida Uniform Transfers to Minors Act." It is found in Sections 710.101 through 710.126, Florida Statutes.

Custodial Accounts under the UTMA

The UTMA permits the transfer of various assets to minor children. One of the ways to do this is by creating custodial accounts. Essentially, in a custodial account, a *custodian* manages the property for the benefit of the minor until the minor reaches a certain age. Section 710.123(1), Florida Statutes addresses the termination of the custodianship and requires the custodian to transfer the custodial property to the minor when he or she reaches the age of 21 for transfers by irrevocable gift to, or the irrevocable exercise of a power of appointment in favor of, a custodian for the benefit of a minor. The custodian is also required to transfer the custodial property to the minor at age 21 for transfers authorized by will or trust. Pursuant to §710.123(2), the custodian is required to transfer the custodial property to the minor when he or she reaches the age of 18 for other transfers by a fiduciary not authorized by a will or a trust. The custodian is also required to transfer the custodial property to the minor at age 18 for transfers by an obligor.

Pursuant to §710.111, Florida Statutes, a custodial account is created by paying or delivering money to a broker or a financial institution for credit to an account in the custodian's name followed by the words "as custodian for (name of minor) under the Florida Uniform Transfers to Minors Act." In creating custodial accounts, it is important to remember that the property held in the custodial account is owned by the minor child and not by the custodian. Section 710.114, Florida Statutes sets out strict limits as to how a custodian is to manage the property. Under this Section, the custodian is also required to keep the minor's property separate and distinct from all other property in a manner sufficient to identify it clearly as custodial property of the minor, and the custodian is required to keep records of all transactions with respect to custodial property, including information necessary for the preparation of the minor's tax returns. In managing the minor's assets, however, pursuant to §710.115, Florida Statutes, the custodian has all the rights, powers and authority over custodial property that unmarried adult owners have over their own property.

Advantages of Custodial Accounts

One of the major advantages of creating custodial accounts under the UTMA is the ease and low cost. Such accounts are ideal if one has a genuine desire to make financial gifts of relatively small amounts to a minor child. Moreover, custodial accounts qualify for the federal gift tax annual exclusion.

Disadvantages of Custodial Accounts

The following are some of the disadvantages associated with custodial accounts:

1. **Gifts are Irrevocable.** Once assets are transferred to a custodial account, they become the property of the minor. The assets cannot be taken back even with the consent of the minor because minor children are generally deemed not to be competent to give valid consent with respect to such issues.
2. **Property Must be Turned Over to the Child at Age 21.** In most instances, when the minor turns

continued, next page

Custodial Accounts
from preceding page

age 21, the custodian must turn the assets over to the child. This is so even if the child has a substance abuse problem, is unable to manage money or will use the money for some type of inappropriate activity.

3. **Financial Aid Implications**. Assets held in a custodial account may limit a child's access to financial aid for college. Basically, assets owned by a child (including assets in a custodial account for the benefit of the child) are given more weight than the parent's assets in determining eligibility for financial aid.
4. **Custodial Accounts are for One Child Only.** If a parent has set up multiple custodial accounts for each of his or her children, and if one of the accounts has performed better than the other accounts, the parent will be unable to "equalize" the accounts because transfers from one custodial account to another custodial account are prohibited. Hence, if a parent desires to treat all of his or her children equally, custodial accounts will not necessarily achieve this goal.
5. **Federal Estate Tax Consequences.** Although transfers to custodial accounts are deemed completed gifts for federal gift tax purposes, if an individual serves as the custodian of an account to which he or she transferred assets, those assets will be taxed as part of that individual's gross estate for federal estate tax purposes if that individual dies while the custodial account is in effect.
6. **Income Tax Consequences.** Although income earned by a custodial account must be reported by the minor, custodial accounts will not always operate to shift income producing assets to a child who is in a lower marginal income tax bracket. The reason for this is that the "kiddie tax" eliminates most of the benefits from shifting income to children under the age of 14.
7. **Death of the Minor.** If the child dies while the custodial account is still in effect, the custodial property will pass according to the laws of intestacy. Although this may be consistent with what the parent would desire, there is no flexibility built in if this unfortunate possibility occurs.

As evident by the above list, there are many disadvantages associated with custodial accounts. Based upon these disadvantages, custodial accounts, are, in most instances, not ideal for transferring significant assets to a minor. Rather, in situations where one wishes to transfer large sums of money to a minor, it may be better to create a trust for the minor's benefit.

Strategies to "Undo" Preexisting Custodial Accounts

Frequently, parents establish a custodial account for a child with the intention of helping him or her upon reaching the age of 21. The account may now have considerable assets, and as the child approaches the age of majority, the parent may have second thoughts about turning such a large sum of money over to the child. Is there anything that can be done?

One thing that can be done is that the parent can simply reclaim title to the child's assets. This approach, however, may result in civil or even *criminal* liability. The reason for this is that, as discussed above, transfers to the child's custodial account are irrevocable, and as such, the assets are the property of the minor child. As custodian, the parent is only authorized to manage the assets on the child's behalf, and reclaiming the assets in the child's custodial account may be deemed theft. Moreover, if the parent reclaims title to the assets in the child's custodial account in an effort to qualify the child for financial aid, the parent may be guilty of financial aid fraud. In short, custodians should be very wary of reclaiming the child's assets especially if the account was set up by a person other than the custodian (from a grandparent, for example) or if the assets are to be removed shortly before applying for financial aid.

Another solution is to deplete the account by using the assets on the child's behalf before he or she turns 21. This may be possible because under the UTMA, the custodian may use "for the minor's benefit, so much of the custodial property as the custodian considers advisable for the use and benefit of the minor...." §710.116(1), Florida Statutes. For example, the parent could use the funds to send the child to camp or even on a trip to Europe. The parent could then take the money that would have otherwise been used to pay for the child's camp or trip to Europe and put that money in trust for the child's benefit. In effect, the parent will have legally shifted

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money out of the child's custodial account into a trust. Be aware, however, that in employing this strategy, if the parent is the custodian of their own child's account, the parent should be very careful in making expenditures from the child's custodial account for the child's benefit for which the parent is legally obligated. Some courts have held that these expenditures are prohibited even though the language of the UTMA seems to permit such expenditures. Therefore, to be very conservative, parents should not use assets from their child's custodial account to pay for that child's food, clothing or medical bills.

Yet another solution is for the parent to ask the child to transfer the funds from the custodial account to a trust when he or she turns 21. The child is, of course, under no obligation to accede to the parent's wishes, so this strategy may or may not work depending upon the parent's relationship with the child. However, it is always possible for the parent to tell the child that unless he or she does as the parent requests, the child will forfeit additional financial support from the parent or even a future inheritance.

Finally, another solution would be for the parent to create a limited partnership or a limited liability company (LLC) and to fund it with the parent's own assets. Then, the parent could invest the child's custodial account assets in the limited partnership or the LLC. The limited partnership or LLC should be set up with the parent as the managing partner or managing member, and all other members or partners should have no unilateral liquidation or withdrawal rights. When the child attains the age of 21, he or she will be the outright owner of a limited partnership or LLC interest. However, the child will have no control over the partnership or LLC assets. Rather, he or she will only be entitled to pro rata distributions from the limited partnership or LLC, and the parent will control distributions.

Conclusion

Custodial accounts created pursuant to Florida's Uniform Transfers to Minors Act can be a very useful financial and estate planning technique for parents who wish to set aside money for their children. However, custodial accounts may be entirely inappropriate for a variety of reasons. Moreover, although gifts to custodial accounts are irrevocable, viable strategies exist to "undo" custodial accounts before a minor reaches the age of majority. These strategies may be of use for those of us with clients who have created custodial accounts and who are now concerned about turning over the custodial assets to the child upon reaching the age of majority.

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Do you or your company offer a product or service that may be useful to the members of the Real Property, Probate & Trust Law Section of The Florida Bar or their clients? Do you want to target your marketing efforts to the more than 8,000 attorneys who practice Florida real estate, probate and estate planning law within and outside the State of Florida? If so, an advertisement in *ActionLine* might be the perfect vehicle to reach your target audience. *ActionLine* accepts paid advertising from outside vendors; full-page, half-page and quarter-page advertising space is now available. If you are interested, please contact Rachel Peterkin at 863-499-8571 or *rachel.peterkin@publix.com* for advertising guidelines and rates.

Nominees for Section Officers: 2005-2006

The Section's Long-Range Planning Committee reports for publication the following slate of officers to be voted on at the Election Meeting during the Friday Luncheon (May 27) at the Section's Convention in Estero, Florida:

Chair – Julius J. Zschau

Chair-Elect – Rohan Kelley

Probate and Trust Law Division Director – Sandra F. Diamond

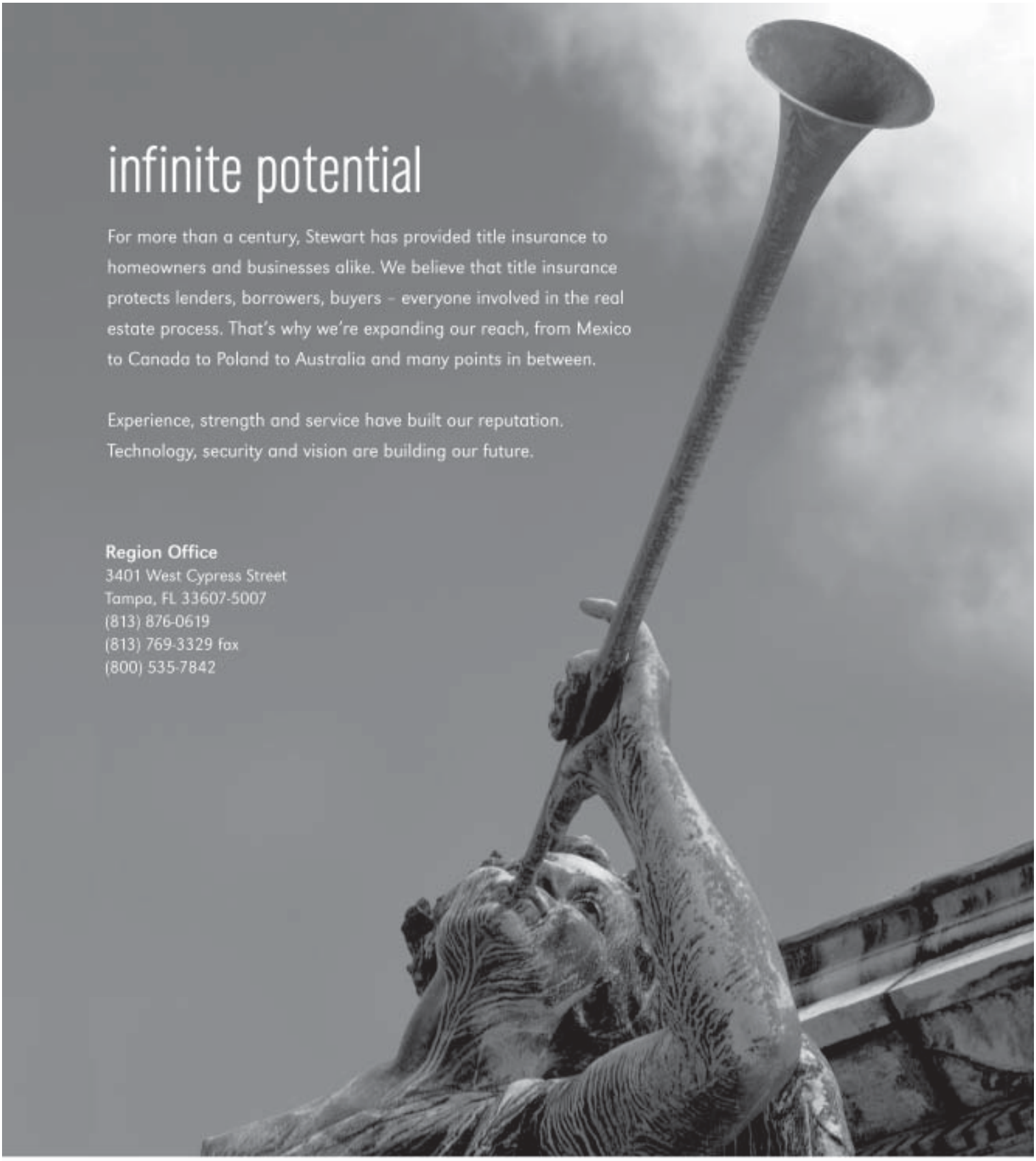
Real Property Division Director – Melissa J. Murphy

Circuit Representatives Director – George J. Meyer

Secretary – Fletcher Belcher

Treasurer – John B. Neukamm

Circuit Representatives and out-of-state representatives will also be voted upon at the Election meeting. The nominated Out-of-State Representatives are John E. Fitzgerald, Michael P. Stafford and Pamela B. Stewart.


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on the trustee "the power and authority either to protect, conserve and to sell, or to lease, or to encumber, or otherwise to manage and dispose of the real property;" or use similar language; and

(4) The land trust agreement should not be recorded.

This article addresses five common title concerns when insuring land trusts.

I. Failure to Designate the Grantee as the Trustee of a Named Trust

Section 689.071, Fla. Stat., only requires the designation of the grantee in the recorded instrument as "trustee" or "as trustee". Although no Florida case appears to address this issue, a practitioner should ensure that the trust is also properly identified in the recorded document to prevent the possibility of the conveyance being governed by the provisions of Section 689.07, Fla. Stat. (instead of Section 689.071, Fla. Stat.), which may produce unintended results. Section 689.071(7), Fla. Stat., states that "this act does not apply to any deed, mortgage or other instrument to which [Section 689.07, Fla. Stat.] applies." Additionally, Florida Uniform Title Standard 13.1 states "[t]he words 'trustee' or 'as trustee' following the name of a grantee, transferee, assignee, or mortgagee do not, of themselves, constitute notice of a trust where the instrument contains no other reference to a trust and no such trust appears of record." For title insurance purposes, a deed vesting title in "Todd Tharp, as trustee" will generally be viewed as if Todd owns fee simple title to the property individually with full rights of ownership and free of any trust. Practically speaking, if Todd dies and no trust is identified, Todd's estate will need to be probated. Thus, it is recommended that the trust also be identified in every land trust deed. For example, a properly prepared grantee clause in a land trust deed should read: "Todd Tharp, as trustee of the Tharp Land Trust dated February 14, 2005."

II. Production of a Passive Land Trust Agreement Prior to Closing

From a title insurance perspective, if a passive trust is produced prior to closing, then deeds from the beneficiaries may be required. Since beneficiaries of land trusts typically rely on the use of a land trust to keep their interests private, requiring deeds is usually not appreciated by the client/beneficiary. Once a land trust agreement is produced, neither the practitioner nor the title company can pick and choose what provisions to apply or to ignore. A 1996 bankruptcy case asked the question, "May a Debtor eat smorgasbord or must the Debtor coming to the bankruptcy table eat the entire meal?" *See In re Planas*, 199 B.R. 211, 212 (S.D. Fla. 1996). The *Planas* court conducted its analysis and concluded that the "[d]ebtor may not pick the olive and the cherry and then leave the spinach." *Id*. This same analysis applies to when land trust agreements are produced. If the provisions of the trust indicate that the trustee cannot act without the direction of the beneficiaries, then the practitioner cannot ignore those provisions (those provisions, according to the *Planas* court, must be the spinach). In addition, judgment searches against the beneficiaries are also advisable and may be required. Whether or not deeds from the beneficiaries will be required is usually determined on a case by case basis – mainly, it will depend on the extent to which the trust is passive. However, if the practitioner is aware of this issue, it can be avoided.

III. Misuse of Corrective Instruments

Corrective instruments are necessary to remedy errors or mistakes in legal descriptions, execution of instruments or in other situations where a failure of title occurs. However, corrective instruments are not appropriate to fix all errors. One common error in connection with land trust deeds involves the practitioner's failure to insert the proper powers for the trustee of the land trust. If no trustee powers are contained in the land trust deed, then the requirements set forth in Section 689.071(1), Fla. Stat., are not met. The land trust agreement must be produced for review. It will need to be determined whether the trust agreement expressly states that the trustee has the power, for example, to convey or mortgage, the property. It should be noted that the trustee's authority may be implied based on the duties the trustee is required to perform pursuant to the terms of the trust agreement. In the event that the land trust agreement is passive, deeds from the beneficiaries will be required in addition to the deed from the trustee. Generally, a corrective instrument to the trustee containing the requisite powers will be insufficient to grant the trustee powers under Section 689.071(1), Fla. Stat. By way of illustration, Connie Conveyance transferred property to Carl Comprador, as trustee of the Big Land Trust in 1998. The land trust deed did not contain the requisite powers set forth in Section 689.071, Fla. Stat. Hannah Helper advised Abel Attorney to prepare a corrective deed to fix the problem. Hannah's advice is not helpful to Abel because if a deed is recorded transferring title to the trustee that does not contain powers set forth in Section 689.071, Fla. Stat., then the title insurance company will not rely on a corrective deed to the trustee containing the requisite Section 689.071, Fla. Stat., powers. Just because the trustee may have the requisite powers, does not mean that the practitioner can retroactively add the Section 689.071, Fla. Stat., powers on the deed. To convey or mortgage the trust res, a copy of the land trust agreement will need to be produced and reviewed. If no land trust agreement exists, then the trustee's powers will have to be judicially determined.

IV. Misguided Reliance on Powers of Attorney for a Trustee

A trustee owes certain fiduciary duties to the beneficiaries of a trust. Unless specifically authorized in a trust, general (non-durable) powers of attorney are inappropriate to use on behalf of a trustee. If the trust document specifically authorizes the trustee to delegate his/her trustee duties using a general (non-durable) power of attorney, then the transaction will likely be insurable. *See*

continued, next page

Five Concerns

from preceding page

Mann v. Cooke, 624 So. 2d 785 (Fla. 1st DCA 1993). Because land trust agreements should not be recorded, it is unlikely that a power of attorney can be properly utilized. Caution must also be exercised with respect to the type of power of attorney presented. Pursuant to Florida's durable power of attorney statute (Section 709.08(7)(b)6., Fla. Stat.), an attorney-in-fact is prohibited from exercising powers and authority granted to a fiduciary (i.e., the principal as trustee). So, in the event that an attorney-in-fact executes a mortgage, deed or other instrument via a durable power of attorney on the trustee's behalf, such document will be uninsurable.

It is important to note that Section 737.402(2)(y), Fla. Stat., provides the trustee the authority to employ one or more agents to perform any act of administration, whether or not discretionary. Nonetheless, it will be left to the title examiner/underwriter's judgment whether the act performed is consistent with administration or may involve discretion. Thus, your title insurer will likely not rely totally on Section 737.402(2), Fla. Stat. For example, Tom Trustee has decided that he is going to sell property held in the Tierra Development Trust. Tom executes the sales contract to sell the property to Bob Buyer. However, due to an illness in his family, Tom will be unable to attend the closing. Tom asks Albert Agent to attend the closing on his behalf and execute the deed. In this situation, the act of Albert Agent signing the deed would not involve any decision-making aspects, it is purely a ministerial act. Thus, an insurer may insure a deed or mortgage executed on behalf of the trustee by virtue of a duly recorded general (non-durable) power of attorney so long as the sales contract or loan commitment, signed by the trustee (himself or herself) is attached to the recorded power of attorney and the mortgage or conveyance complies with the terms of the contract or loan commitment.

V. Lapse In Title Insurance Coverage

The issue of title insurance for a trust typically arises when a property owner elects to transfer a certain parcel of land into a trust. Even if the owner currently has an owner's policy of title insurance, that policy will not automatically transfer to the trustee of the trust. Under the ALTA Owner's Policy (10-17-92) with Florida Modifications, "insured" is typically defined as "the insured named in Schedule A, and subject to any rights or defenses the Company would have had against the named insured, those who succeed to the interest of the named insured by operation of law as distinguished from purchase including, but not limited to, heirs, distributes, devisees, survivors, personal representatives, next of kin, or corporate or fiduciary successors." It should be noted that a transfer to the trustee of a land trust, for example, is a voluntary transfer, not a transfer by operation of law.

If the named insured conveys property into a trust by a warranty deed, then title insurance coverage continues only to the extent that there is warranty liability within the scope of the title insurance policy. For example, Ollie Owner obtained an owner's policy on a parcel of land in Orange County, Florida. Ollie conveyed the subject parcel to Barbara Buyer via a warranty deed. Barbara purchased title insurance. Two years later, Barbara conveyed the property via warranty deed to Thom Trustee, Trustee of the Barbara Buyer Land Trust and did not purchase a new title insurance policy. When Thom Trustee attempted to sell the property to Paula Purchaser, the title examiner uncovered a defect in the chain of title. Thom Trustee claimed that a title claim existed because the title was unmarketable. In this situation, although warranty liability exists under the warranty deeds, no title claim under the title policy can be maintained because policy coverage did not extend to Thom Trustee, Trustee of the Barbara Buyer Land Trust.

Another disadvantage could occur if an insured conveys to his/her trust and subsequently dies. In that situation, the insured's heirs may not have title insurance coverage pursuant to the terms of the title insurance policy. To proactively avoid a lapse in coverage, an insured owner wishing to have title coverage when the property is transferred to the trustee of the owner's trust should consider purchasing a new title insurance policy.

Conclusion

This article highlights five of the many complexities that may arise when insuring transactions involving land trusts. It is not intended to address individual scenarios and is intended to be illustrative rather than exhaustive. For specific guidance involving real estate conveyances involving a land trust, it is recommended that the practitioner contact their underwriting attorney.

ActionLine Publication Schedule

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

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

***ActionLine* Issue**	**Publication Deadline**
Summer 2005	April 30, 2005
Fall 2005	July 31, 2005
Winter 2005	October 31, 2005

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

Out-of-State Executive Council Meeting, December 1 - 5, 2004

Colonial RPPTL

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

Laird and Laurie Lile coordinated a wonderful trip to Williamsburg, VA for the Section's annual out-of-state Executive Council meeting, December 1-5, 2004. The fun started on Wednesday night in the historic Williamsburg Inn when Captain John Lilly, himself, made an "appearance" at the evening's reception. After regaling tales of his seafaring adventures, the good Captain pledged his gentile hospitality to our comfortable stay and promised us an exciting weekend. He was true to his word.

On Thursday, December 2, some of the group set off for a tour of Bassett Hall, the former home of John D. Rockefeller, Jr., and of the Williamsburg Winery, which boasts some of the oldest vines in the country. Some of the group presented the CLE seminar, "Florida Law in Williamsburg" to interested Virginia practitioners. The seminar focused on the Virginia lawyer who wants to know more about the basics of Florida real property, probate and trust law. Florida Bar President, Kelly Overstreet Johnson, spoke about the ethics in advertising. The Section thanks all of the speakers for their time and professional contribution.



"Thomas Jefferson" (left) returns for the Saturday night dinner and meets Langdon Lile (center), Laurie, Laird, and Allie Lile.

After the CLE seminar and tours concluded, the group met for a Fine Colonial Reception and Dinner at the Williamsburg Lodge. During dinner, the venerable George Wythe "appeared" for conversation. Mr. Wythe was a very highly regarded scholar and lawyer in Colonial Virginia and was the first professor of law in the United States. After dinner, Laird and Laurie arranged for a private tour of the Capitol building, complete with a lively discussion in chambers, a puppet show and traditional colonial dancing.

Friday began with the usual Roundtable Breakfast format, but quickly changed into an interactive history lesson when Thomas Jefferson "arrived". Mr. Jefferson explained his studies into Natural Law and conducted a brainstorming session about what type of government the colonies should establish upon their coming independence. Mr. Jefferson explained the then-known types of government, including the pure democratic form utilized in Greek city-states, but went further to question whether a representative form of government, federal in nature, would best suit the fledgling country.

With our new found appreciation of Natural Law and governmental ideologies, the Executive Council convened its meeting at the National Center for State Courts. The NCSC was founded at the urging of then

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One man's interpretation of Thomas Jefferson.

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Colonial Williamsburg

from preceding page

Chief Justice Warren E. Burger. At the Council meeting, the potential repeal of the deadperson's statute, statutory ways of necessity and the issue of funding and reimbursement to The Florida Bar were the main items of business. Kelly Overstreet Johnson requested Section members to express to her their personal reactions concerning the PILS and Family Law Sections' request concerning their efforts to overturn the prohibition against adoptions by homosexuals. During the meeting, Past-Chair, Walter Beales, who presently practices law in Virginia, was asked to make a presentation contrasting Virginia's probate procedures with Florida's probate procedures. Walter Beales then provided a very interesting and informative explanation of Virginia's probate administration system to the Section members and, at the conclusion of that presentation, he volunteered to mail a summary of such procedures to Council members who would be interested in learning more about Virginia's probate laws.

After the meeting, the group was impressed with a Courtroom 21 presentation at the Marshall-Wythe School of Law at the College of William and Mary. A special thank you goes to Laird's former Business School professor, Hank Mallue, who was instrumental in arranging for the NCSC and Courtroom 21 opportunities. Although Hank Mallue is a professor at William and Mary and resides in Williamsburg, he is also a member of The Florida Bar and a member of the Section.



"Thomas Jefferson" visited the RPPTL

As night grew upon us, we gathered for a reception at the Chiswell Gardens where warm apple cider and Crescents of Warmth (elevated fire baskets) kept the chill off. A fife and drum corps marched into the reception and processed us to dinner Friday evening at James' Shield tavern, where we dined on truly remarkable fried chicken before embarking on a Myths, Ghosts and Legends tour.

Saturday's activities included a tour of Colonial Williamsburg and an elegant reception and multiple course dinner with holiday music by the Williamsburg Singers. As with breakfast on Friday morning, Thomas Jefferson "appeared" and spoke about the numerous changes that had occurred in our country since we last met. He discussed the concept of life, liberty and pursuit of property or the pursuit of happiness. An article discussing further The Pursuit of Happiness is reprinted in this issue, with permission from the author. Demonstrating that he was a man of many talents, Mr. Jefferson introduced each wine pairing, proposing a most appropriate toast with each new wine and declaring each fit for our consumption. A wonderful cap to a exciting weekend.



A fife and drum corp leads the march.



Enjoying a time-period type dinner.



Perfectly Lovely: Some of the guests show off their holiday wreaths.

Historical visit in Colonial Williamsburg



The first appearance of "Thomas Jefferson", one of many period personalities or characters joining the group.



Kelly Overstreet Johnson, current president of The Florida Bar, Drew O'Malley, and Andrew Detrick in Colonial Williamsburg.



With a tour guide.



Walter Beales (left) with Section Chair, Laird Lile (right), and Laird's wife, Laurie.



The Executive Council meeting.



The courtroom "tour".

Photos by Michael Gelfand, John Neukamm and Silvia Rojas.

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

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

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The Pursuit of Happiness? What Does *That* Mean?

by Jack Lynch

Originally published in Colonial Williamsburg Journal, *Winter 2005; reprinted herein with permmission.* *Copyright held by Jack Lynch.*

A MONTH OR SO after the ink on the Declaration of Independence was dry, in August 1776, an anonymous English contributor to the *Scots Magazine* asked: "Did ever mortal alive hear of taking a pursuit of happiness from a man? What they can possibly mean by these words, I own is beyond my comprehension." Why the government should guarantee a right to the pursuit of happiness, he said, was as difficult a question as the Riddle of the Sphinx, and therefore "must be left for the solution of some un-born Oedipus."

It was one of the first reactions to the Declaration to appear in print, and in the 228 years since, things haven't gotten much clearer. Many of the once-radical statements in the Declaration now seem commonplace, even self-evident. But the meaning of at least one of the rights it propounded remains a puzzle. What could Thomas Jefferson and the other founders have meant when they included "the pursuit of happiness" in a list of fundamental rights?

The words have become what the historian Pauline Maier calls American Scripture:

> We hold these truths to be self-evident. That all men are created equal, that they are endowed by their creator with certain unalienable rights; that among these are life, liberty & the pursuit of happiness. ...

We can try to make sense of these words by tracing them from the Declaration to its sources. "Life, liberty & the pursuit of happiness" echoes the phrase "Life, liberty, and property," which had a long tradition. It appears in the works of the seventeenth-century English philosopher John Locke, one of the first to describe a system of natural human rights, and by 1776 his list of rights was so familiar that it was almost a cliche. For decades the Whigs in England had used it as a slogan, and it became a rallying cry among the Americans as they began agitating for independence. On January 25, 1773, for instance, the Massachusetts Council decreed that "life, liberty, property, and the disposal of that property, with our own consent, are natural rights," and the first Continental Congress resolved in October 1774 that the colonists were "entitled to life, liberty & property." There were variations of the principle, such as when a Boston Committee of Correspondence wrote in the summer of 1774 that "we are entitled to life liberty and the means of Sustenance."

This Lockean list is easy enough to understand, at least in broad outline. The rights to life and liberty go back at least to Magna Carta in 1215, and it's not hard to imagine how a government might protect a right to property. Jefferson, though, didn't call for protecting property. He replaced the familiar word "property" with the mysterious phrase "the pursuit of happiness," which has puzzled commentators ever since.

THAT PHRASE WAS NOT entirely new. In 1936, archivist Herbert L. Ganter noted similar expressions in more than a dozen English and American writers, and later scholars have spotted more possible sources. But the first to put it in a list of rights was apparently George Mason, whose Virginia Declaration of Rights was written two months before the national Declaration of Independence, though with Jefferson's advice. In that influential document Mason offered his own list of guaranteed rights:

> That all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.

In Mason's formulation we still have a right to "the means of acquiring and possessing property," the familiar Lockean notion. But he adds the right of "pursuing and obtaining happiness and safety."

Notice that in America's Declaration, as opposed to Virginia's, we have no right to happiness itself—Jefferson did not use the word "obtaining"—only the right to "the pursuit of happiness." That makes sense: no government could guarantee every citizen's happiness. But is the right to "the pursuit of happiness" the same as the right to pursue happiness, to chase after it? Is it merely the right to hedonism? People have tried to justify all sorts of selfish behavior by referring to this passage in the Declaration. Some historians, however, have suggested that this obvious modem interpretation of the words wasn't their original meaning. And the key to the mystery seems to lie in eighteenth-century conceptions of happiness.

UNLIKE LIFE, liberty, and property, a Whiggish mantra, happiness was not associated with any political party. In fact, the idea was at the center of much eighteenth-century moral and political thought. In 1725, for example, Francis Hutcheson wrote that the goal of every state was "the greatest happiness for the greatest number." In 1774, James Wilson wrote that "the happiness of the society is the first law of every government." Jefferson knew Wilson's work well, and may have had this line in mind when he wrote to General Kosdusko in 1810, "The freedom and happiness of man... are the sole objects of all legitimate government." In a work of moral philosophy from 1759, Soame Jenyns went so far as to write that "happiness is the only thing of real value in existence." These are grand claims for what seems a fairly mundane idea. What did they mean by it?

They certainly did not mean selfish pleasure. True happiness, according to Enlightenment moral theory, depends on recognizing humanity's social nature. "The surest way to pro-

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mote his private happiness," wrote Hutcheson, is for a man "to do publicly useful actions." Jefferson was even more forceful in a letter to Amos Cook in 1816: "Without virtue, happiness cannot be." The pursuit of happiness is therefore not only a right; it brings with it a corresponding responsibility.

Earlier writers gave little thought to happiness, at least in its earthly form. Before Enlightenment ideals had wide currency, most Christian thinkers were convinced happiness could be found only in the next world: we endure a life of suffering on earth in return for our eventual reward in heaven. The eighteenth century's happiness, on the other hand, was not otherworldly, but firmly rooted in the here and now. And as interest in happiness shifted from souls to citizens, it began to become a legitimate matter for statecraft. Good laws can make people happier as Jefferson wrote in his Diffusion of Knowledge Bill in 1779, "That people will be happiest whose laws are best, and are best administered."

There is no such thing, though, as being completely happy. The first definition of happiness in Samuel Johnson's mid-eighteenth-century *Dictionary of the English Language* gives us an idea of what the word meant to contemporary readers: "Felicity; state in which the desires are satisfied." In that definition lies a paradox: Most of the new breed of British philosophers were convinced that the desires can never be satisfied. Thomas Hobbes, for example, considered happiness not a state of being but a condition we're always striving toward. He denied that it is possible ever to be completely happy: "The Felicity of this life," he wrote in *The Leviathan*, "consisteth not in the repose of a mind satisfied." Happiness is instead an endless striving: "Felicity is a state of continuall progresse of the desire, from one object to another." Human beings are driven by "a perpetuall and restlesse desire" for happiness "that ceaseth onely in Death." We hear echoes of this idea in countless commentators during the next century. Jefferson himself wrote to John Page in 1763 that "perfect happiness, I believe, was never intended by the Deity to be the lot of one of His creatures in this world; but... He has very much put in our power the nearness of our approaches to it."

IF WE UNDERSTAND happiness not as a state we can attain but as a target perpetually out of reach, then the pursuit of happiness becomes an endless quest. As Johnson defines it, the verb "to pursue" means not "to attain" but "to endeavour to attain," always with the sense that it remains beyond our grasp. And this reminds us of another meaning of pursuit: not a chase, but, in the words of the modem *Oxford English Dictionary*, "The action of following or engaging in something, as a profession, business, recreation, etc.; that which one engages in or follows." This sense goes back to the early sixteenth century, and Jefferson certainly knew it. He used this meaning in a letter of July 19,1778:

> Are those powers then, which being intended for the erudition of the world are, like air and light, the world's common property, to be taken from their proper pursuit to do the commonplace drudgery of governing a single state?

He used it again in a letter of September 30,1785, when he wrote of

> the tranquil, permanent felicity with which domestic society in America, blesses most of its inhabitants; leaving them to follow steadily those pursuits which health and reason approve, and rendering truly delicious the intervals of those pursuits.

If the Declaration's "pursuit" means something like a "profession," this reading suggests a right not to some temporary pleasure, but to a life dedicated to happiness. "The pursuit of happiness" is the work of a lifetime. As the critic Adam Potkay put it in a recent study of happiness in two eighteenth-century writers, "Happiness is a pursuit, or 'progress'."

Some eighteenth-century thinkers went further, considering the pursuit of happiness not as something we can choose to engage in, but as the basic condition of being human. Such philosophers said that we naturally pursue happiness according to the same natural laws that cause heavy objects to fall toward the earth. A political theorist, Peter Paxton, put it that way in 1703: "The pursuit of happiness is as inseparable from the nature of man as the tendency toward its own center is to unthinking matter." In his careful dose reading of the text of the Declaration, *Inventing America*, Carry Wills uses another metaphor of physical necessity: "Jefferson talks of man as 'following after' happiness by more than vague yearning—indeed, by a uniform necessity of his nature, something as regular as a magnetic needle's turn to the North." The pursuit of happiness is at the core of what it means to be human: we are hardwired to seek happiness. It is our most basic pursuit, the one that lies behind and motivates all the others.

AT LEAST ONE QUESTION remains: If a life devoted to happiness is inevitable, why protect it as a right? Because, Wills says, by recognizing the pursuit of happiness as a fundamental law of human nature, we can understand and therefore direct that pursuit. We naturally seek happiness, but others can interfere with our search. A proper knowledge of human nature lets us escape that interference. "Only when one recognizes the law of man's nature as his right," Wills writes, "does one remove the obstacles and let him move free, knowing this is consonant with the order of nature."

The pursuit of happiness, then, is no mere chase after pleasure. It's something fundamental, the basis for many of the other rights in the Declaration. Public virtue is the source of personal happiness, and the lifelong pursuit of happiness is therefore the best means to public good. In Jefferson's conception, it is impossible to separate the public from the private: The only orthodox object of the institution of government," he wrote in 1812, "is to secure the greatest degree of happiness possible to the general mass of those associated under it." Happiness, as Wills put it, "supplies us with the ground of human right and the goal of human virtue. It is the basic drive of the self, and the only means given for transcending the self." The right to the pursuit of happiness is the right to fulfill our human nature. It is the right to take control of this inevitable pursuit, to direct it as we see fit.

Whether the skeptical contributor to the *Scots Magazine* would have understood this in 1776 is unclear.

The whole idea of human rights was still new, and happiness is one of the most complex notions in Enlightenment philosophy. For all its complication and ambiguity, though, happiness was to be taken very seriously. Far from being a trivial chase after temporary pleasures, the right to the pursuit of happiness was for Jefferson one of the keys to a virtuous society.

Jack Lynch, *author of T*he Age of Elizabeth in the Age of Johnson *(Cambridge University Press, 2003), is associate professor of English at Rutgers University in Newark, New Jersey. He contributed to the spring 2004 journal a story on the uses of George Mason's bill of rights.*

Suggestions for further reading:

• Carl L Becker, *The Declaration of Independence: A Study in the History of Political Ideas, 2nd* ed. (New York,-l948).
• Edward Dumbauld, *The Declaration of Independence and What It Means Today* (Norman, OK, 1950).
• Herbert L. Ganter, "Jefferson's 'Pursuit of Happiness' and Some Forgotten Men," *William & Mary Quarterly* 16 no. 3 (July 1936): 422-34; no. 4 (Oct. 1936): 558-88
• Pauline Maier, *American Scripture: Making the Declaration of Independence* (New York, 1997).
• Adam Potkay, *The Passion for Happiness: Samuel Johnson and David Hume* (Ithaca, NY, 2000).
• Carry Wills, *Inventing America: Jefferson's Declaration of Independence* (Garden City, NY, 1978).

Editor's Note: *Appreciation is expressed to Bob Swaine for his efforts in obtaining permission for the reprinting of this article.*

In Memoriam

The Executive Council of the Real Property, Probate and Trust Law Section Mourns the Loss of Harrison K. Chauncey, Jr. (Harry) and J. David Liebman (David), well-respected, committed colleagues whose long-time service on the Executive Council was Significant and Valued. Their Memory will Subsist, in the Hearts of Us All.



Harrison K. Chauncey, Jr.
Date of Death: December 24, 2004
Contributions in the name of
Harrison Chauncey
may be made to Hospice of
Palm Beach County,
or Duke University Medical Center,
Durham, NC.



J. David Liebman
Date of Death: January 16, 2005
Contributions in the name
of J. David Liebman
may be made to
the Laura Liebman Memorial
Scholarship at FIU.

Probate & Guardianship Case Summaries

By Keith S. Kromash, Esq., Nash & Kromash, LLP, Melbourne, FL

The ward's granddaughter filed a motion to disqualify the attorney who was representing the ward's daughter in her attempt to locate additional assets belonging to the ward and other related matters. The District Court of Appeal reversed the trial court, and held that there was no conflict of interest warranting disqualification.
Herschowsky v. Guardianship of Herschowsky, 890 So. 2d 1246 (Fla. 4 DCA 2005)

In a guardianship proceeding, the granddaughter of the ward filed, as an interested person, a motion to disqualify the attorney for the daughter of the ward insofar as the daughter, through her attorney, was seeking to locate additional assets belonging to the ward and other related matters. The trial court heard argument on the motion and announced that the daughter's attorney's appearance was unnecessary, unwarranted and "certainly not in the best interest of the ward." In a written order of disqualification which followed, the court stated that it was granting the granddaughter's motion because the daughter's attorney had previously represented the ward and prepared the ward's durable power of attorney and last will and testament.

The Fourth DCA held that the trial court abused its discretion which rose to the level of a departure from the essential requirements of the law. By focusing on a "best interests" analysis, the trial court focused on the wrong legal standard.

Under Rule 4-1.9, Rules Regulating the Florida Bar, in order for there to be a conflict of interest, there must be a finding of both prior representation and a finding that the prior representation in the subsequent proceeding was on a matter adverse to the ward's interest. Prior representation alone does not create a conflict of interest. In this case, since there was no finding that the prior representation was adverse to the ward's interests, the trial court departed from the essential requirements of the law. As such, the Fourth DCA quashed the lower court's order of disqualification

In a case challenging the probate of a Florida will, the District Court of Appeal held that the beneficiary was properly served with a notice of administration, that the beneficiary was estopped from challenging venue and that the principle of priority did not require a stay of the Florida proceedings.
Parker v. Estate of Bealer, 890 So. 2d 508 (Fla. 4 DCA 2005)

The decedent moved from Maryland to Florida in 1999 so that his granddaughter could care for him. At this time, the decedent executed a Florida will declaring himself to be a Florida resident. Also at this time, the decedent's daughter and other children were involved in significant intra-family litigation in Maryland regarding businesses that the decedent had started and developed, including claims against the decedent. Maryland attorney Roy Niedermayer represented the daughter in this litigation.

Attorney Niedermayer sent correspondence to the decedent's attorney directing that there be no direct communication with the daughter on matters involving the litigation and that all communications regarding the litigation should go through him. The decedent died in early 2003 with the family conflict still raging. The attorney for the estate sent a notice of administration to the daughter at her home address. It went unclaimed. Therefore, the attorney for the estate re-sent the notice of administration to Attorney Niedermayer, addressing him as the daughter's attorney. A signed certified receipt was returned. At no time did Attorney Niedermayer inform the estate's attorney that he did not represent the daughter.

Meanwhile, the daughter attempted to probate the decedent's will in Maryland claiming that the decedent was a Maryland resident despite the fact that the decedent had lived in Florida for three years prior to his death. The Maryland court did not admit the will to probate and did not act on the matter for over a year. To prevent the Florida proceedings from being challenged, in August 2003, the personal representative of the estate filed a petition to establish venue in the Florida proceeding.

The daughter then filed an objection and a counter-petition requesting that Florida stay its proceedings in favor of the Maryland proceedings. When the estate claimed that the daughter was time-barred from objecting to venue, she claimed that she had never been properly served in the action. A hearing was held on the venue question. The court determined that formal notice on Attorney Niedermayer satisfied the requirements of Florida Probate Rule 5.040(a)(3)(A)(I) and that venue was appropriate in Florida. The court also refused to stay the proceedings in favor of the Maryland proceedings.

On appeal, the Fourth DCA ruled that under §731.301(1)(a), Florida Statutes, which addresses notice, notice to an attorney means notice to an attorney who has entered an appearance of record in the estate. However, the Fourth DCA also noted that it had previously excepted a circumstance where the interested person or creditor has made a request for his or her attorney to receive notices from the estate. In this case, the daughter made a specific request for estate papers to be sent to Attorney Niedermayer. As such, the Fourth DCA found that this operated as a specific request that notice be sent to the attorney.

The Fourth DCA also held that the daughter was estopped from denying that Niedermayer was her attorney for purposes of receiving the notice of administration. The facts of this case established the elements of es-

toppel – namely, (1) words and admissions, or conduct, acts, and acquiescence, or all combined, causing another person to believe in the existence of a certain state of things; (2) in which the person so speaking, admitting, acting, and acquiescing did so willfully, culpably, or negligently; and (3) by which such other person is or may be induced to act so as to change his own previous position injuriously.

Finally, the Fourth DCA rejected the daughter's contention that principles of priority require Florida to stay its proceedings until Maryland determines the issue of domicile.

As a will contestant presented a *prima facie* case that decedent lacked testamentary capacity, the trial court could not grant the estate's motion for involuntary dismissal.
McCabe v. Hanley, 886 So. 2d 1053 (Fla. 4 DCA 2004)

In a will contest case, the decedent's son claimed that the will was invalid because the decedent lacked testamentary capacity. This was a case in which the decedent did not have contact with his son until very late in his life, and the contact that he did have was cut off shortly before his death. The decedent's son, who, of course, was not a beneficiary under the will, filed a petition to revoke probate of the will, challenging the will on the ground that the decedent was subject to an insane delusion involving a natural object of his bounty, i.e., his son. The son claimed that the decedent was physically weak and mentally tired, and he adhered to the delusion that he had no children in the face of evidence to the contrary.

Among the son's witnesses at trial was a an expert psychiatric witness who testified that, to a reasonable degree of psychiatric certainty, the decedent suffered from a long-standing fixed false belief, an insane delusion, that overrode his capacity to recognize his son. On cross examination, the expert witness was "severely discredited."

At the close of the son's case, the estate moved for involuntary dismissal and to strike the testimony of the expert witness. The court granted the estate's motion, in part, because the court would have stricken the expert's testimony if it had been requested pre-trial because it was not predicated on adequate and complete facts and was unsupported by any reasonable interpretation of the facts. On appeal, the Fourth DCA "reluctantly" reversed because the son presented a *prima facie* case that the decedent suffered from an insane delusion as to the natural objects of his bounty and thus lacked testamentary capacity to execute his will and codicils. The Fourth DCA noted that even in a non-jury case, the trial court was not free to weigh the credibility of the evidence on a motion for voluntary dismissal.

On certiorari review, the District Court of Appeal held that law firm had conflict of interest that warranted disqualification.
Morse v. Clark, 890 So. 2d 496 (Fla. 5 DCA 2005)

Harvey E. Morse, P.A. (Morse), an assignee of various intestate heirs of John Vallega, the decedent, sought certiorari review of the trial court's order which denied its motion to disqualify the law firm of Smith, Hood, Perkins, Loucks, Stout, Bigman, Lane & Brock, P.A. (Smith Hood) from representing Clark, the Trustee of the John Vallega Trust, in a probate proceeding involving the decedent's estate.

In this case, Smith Hood previously represented Morse in unrelated matters, and was continuing to do so when it undertook representation of Clark. Smith Hood then filed a motion in the probate action seeking reimbursement of estate taxes paid by the trust, which if granted, would reduce Morse's share of the intestate estate.

The trial court ruled in part as follows: Before a client's former attorney will be disqualified from representing a party whose interests are adverse to the former client's, the former client must show that the matters embraced in the pending suit are substantially related to the matters or cause of action wherein the attorney previously represented him, the former client. In making this ruling, the trial judge relied on Rule 4-1.9(a), Rules Regulating the Florida Bar.

However, in reversing the lower court, the 5th DCA noted that Rule 4-1.7(a), Rules Regulating the Florida Bar, which imposes a much stricter disqualification standard for

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an existing client than a former client. Rule 4-1.7(a) does not distinguish between matters related or unrelated. Here, it is Smith Hood's duty in representing Clark, to uphold the validity of the inter vivos trust, and to augment its assets. These positions are clearly adverse to Morse's and the intestate heirs' interests, in the probate proceeding. The 5th DCA also rejected Smith Hood's argument that Morse does not have a direct interest in the probate matter because of his contingent interest as an assignee. An assignee of an intestate heir of an estate steps into the shoes of the intestate heir and may appear as a party in interest in a probate proceeding.

On issue of first impression, trial court improperly determined that husband's ownership interest in four residential condominium units exceeded one-half acre limitation under state constitution.

Braswell v. Braswell, 890 So. 2d 379 (Fla. 3d DCA 2004)

In a case of first impression, the Third DCA was asked to construe the constitutional homestead exemption in the context of a condominium. In this marital dissolution case, the husband appealed an order that denied his motion to dissolve an injunction based upon his claim of homestead on four residential condominium units. This appeal came about as a result of a mediated martial settlement agreement in favor of the wife for $18 million. The husband's assets included four residential penthouse condominium units grouped into a single-level condominium located at 1500 Ocean Drive, Miami Beach, Florida. The condominium documents declared that the husband had a 6.7034% interest in the common and limited common elements of the property.

The husband claimed that the condominium units constituted homestead property and were exempt from levy and forced sale by creditors pursuant to Article X §4(a) of the Florida Constitution. The wife argued that the condominium exceeded the one-half acre limitation imposed by the Constitution on homesteads located within a municipality.

The court's computation (the sum of the square footage of the husband's ownership in the common and limited common elements and with the square footage of the husband's condominium units) resulted in ownership of 29,496 square feet (0.677 acre) for homestead purposes.

The Third DCA reversed and found that the trial court erred because in calculating the square footage of the homestead, the court measured each floor of space in multi-level housing and added it to the square footage of land, thereby depriving the owner of his constitutional protection against forced sales.

In a concurring opinion, Judge Fletcher set out exactly how the application of the one-half acre limitation should be applied to condominiums.

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Hurricane Relief — A True Story

"The sincere gratitude she expressed to me was one of the best 'legal fees' I have received."

Last Fall, the RPPTL Section was asked to assist with relief efforts for victims of the 2004 hurricanes. Additionally, some of the Section members themselves were seriously impacted by Hurricanes Charley, Frances, Ivan and Jeanne. Below is a story of one Section member who volunteered to help through The Florida Bar's Hurricane Assistance Program. ***John B. Neukamm*** *of Mechanik, Nuccio, Williams, Hearne & Webster, PA in Tampa, Florida tells of his experience in his own words. Thanks, John, for helping.*

Shortly after volunteering to assist victims of the hurricanes that ravaged Florida in August and September 2004, I received a referral from The Florida Bar. My client, "Ms. M," is a very nice woman who used to live alone in an RV Park in Frostproof. Unfortunately, Frostproof wasn't "hurricane-proof." Hurricane Charley entered Florida at Cayo Costa (near Ft. Myers) and headed northeast, and Hurricane Frances entered Florida at Hutchinson Island (near Palm Beach) and headed northwest. Frost-proof is located near the "X" where the two storms intersected.

Ms. M leased a lot in an RV park from a Frostproof RV Park owner. Her RV was totally destroyed by two pine trees which were toppled by Hurricane Charley, and Hurricane Frances scattered what few belongings she had left. Ms. M had previously complained to the RV park manager that the two trees and some adjacent trees were "full of bugs" and had expressed concern that the trees might fall on her RV. The RV park owner removed some (but not all) of the trees prior to the storm; the manager explained that the $250 cost to remove each of the remaining trees was too much. As a result of the total destruction of Ms. M's RV, she had to fully satisfy the mortgage encumbering her RV, and a portion of that mortgage payment was not covered by insurance. In addition, when she approached the RV park manager to request a termination of the lease, he insisted that she continue to pay her monthly rent. She had previously pre-paid the last 4 months of rent payments, and she timely paid her August and September rental payments even though she had not had use of the RV lot since August 13th. After Hurricane Charley hit, there was no utility service provided to her Lot, and, on September 7, she learned that the manager deserted the RV park prior to the arrival of Hurricane Frances.

After researching the issue of an owner's liability for damage caused by trees located on its property, confirmation that Ms. M's insurance carrier did not intend to pursue the RV park owner and discussions with Jon Damonte, who chairs our Section's Mobile Homes and RV Parks Committee, I notified the RV park owner of the termination of Ms. M's lease and demanded a refund of her post-August 13th rental payments, a refund of her four months of prepaid rent, the reimbursement of the mortgage payment which was not covered by her insurance and a written confirmation regarding the termination of her lease. Fortunately, the RV park owner engaged competent counsel, and, after some additional correspondence and discussions, the park owner fully complied with our demands.

I'm pleased to report that Ms. M, who left Florida for several months after the hurricanes, has returned to our state. However, she has decided that she no longer wishes to live in an RV or mobile home, and she currently resides in an apartment in Lake Wales. Furthermore, she reported that the RV park has hired a new manager and no longer requires four months of advance rental payments.

From my perspective, the program made it very easy to provide assistance to Ms. M. I received a "welcome" email from the coordinator of the program soon after I volunteered, and Ms. M. was referred to me several days later. At that time, I received a memo with intake and contact information, and, after that, I handled the case in the same manner I handled other client matters (except for billings, an initial report confirming my agreement to undertake the representation and a short report confirming the completion of the representation). I was pleased to provide assistance to Ms. M; the sincere gratitude she expressed to me was one of the best "legal fees" I have received.

If anyone else has a hurricane-related story, please share it with us by e-mailing it to Dresden Brunner at Dresden@comcast.net.

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Report of Florida Landlord/Tenant Cases

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

Notice Must Be Sufficiently Specific

In *Jones Walker Palm Gardens Associates Joint Venture v. Jackson*[1], the plaintiff had served the tenant with a notice of lease termination, which notice indicated that the lease was being terminated due to "poor housekeeping".

The Court held that the plaintiff's notice failed to provide adequate factual specificity and detail with respect to the nature of the tenant's alleged non-compliance. Pursuant to Section 83.56(2)(a) of the Florida Statutes, the Court stated, to terminate a tenancy for noncompliance, the landlord must "deliver a written notice specifying the noncompliance." Plaintiff's notice failed to provide the defendant with sufficient information to enable her to prepare her defenses in an eviction action – such specificity might include dates and precise nature of the "poor housekeeping".

In addition, the notice failed to provide the tenant with a seven (7)-day period in which to cure the noncompliance prior to the landlord's termination of the lease.

Since proper notice to the tenant is a predicate to maintaining an action for eviction and the notice delivered to the defendant was defective, the lease was not properly terminated and the plaintiff had no cause of action for eviction.

In addition, because the lease was subsidized by HUD, the plaintiff was required to commence its eviction action within forty-five (45) days of the non-compliance alleged in the plaintiff's written notice terminating the lease. Having failed to do so, the plaintiff waived its right to terminate the tenant's HUD subsidized agreement.

Rent, Only Rent...Really

In *Forsythe v. Roth*[2], the Court held that the three-day notice served by the plaintiff was defective on its face because it demanded a $25.00 late charge in addition to rent.

Under Section 83.56(3) of the Florida Statutes, the Court stated, unless there is a written lease agreement and that lease agreement specifically defines late charges as rent or additional rent, they may not be demanded in a Three-Day Notice.

Prior to filing the Complaint for eviction, the plaintiff was required to first, serve a valid Three-Day Notice; and second, terminate the tenant's lease. Had the plaintiff done so, the tenant would have been required to post the rent into the Court Registry in order to avoid a default judgment.

Since at the time that the plaintiff commenced the action for eviction, plaintiff had not served a proper Three-Day Notice and properly terminated the lease, the tenant was not required to make a rent deposit with the Court Registry.

Since the plaintiff was required to serve a Three-Day Notice that strictly complied with the statutory requirements of Section 83.56(3) of the Florida Statutes and failed to do so, the plaintiff could not serve a new three-day notice and file an amended complaint in the action. Since less than all the requisite elements of the cause of action for tenant eviction were in existence when the Complaint was filed, the Court dismissed the action without leave to amend.

Do Not Accept Partial Payments

In *Goodson v. Rickie Castro & Nick*,[3] the plaintiff accepted a partial payment of rent and thereafter served the tenant with a Notice to Vacate. The Court stated that Section 83.56(5) of the Florida Statutes provides that if the landlord accepts rent with actual knowledge of noncompliance, the landlord waives the right to terminate the lease or bring action based on the noncompliance.

Partial payment of rent is an act of noncompliance, the Court held. In addition, at the time the partial payment was accepted, the plaintiff had actual knowledge that the tenant was in noncompliance with the terms of the lease. Consequently, the Court held, the complaint failed to state a cause of action because the plaintiff had waived the right to commence an action based on the noncompliance.

In addition, the Notice to Vacate was fatally defective because it was dated August 13, 2004 and demanded payment of rent or possession within three days from the date of the delivery of the notice; here, on or before August 18, 2004. However, the address for the landlord in the Notice to Vacate was a post office box; consequently, the Court held, five days should have been added to the date of performance since the tenant could not deliver to a post office box address.

Since the Notice to Vacate was defective, it could not operate to terminate the tenant's lease. If the lease was not properly terminated prior to the filing of the eviction action, no such cause of action existed and no judgment could be entered in the landlord's favor.

Finally, the Notice to Vacate indicated that the tenant had always paid rent late. The Court, relying on prior case law, held that where there was a pattern of accepting late payments, the plaintiff was under an "affirmative duty to place the tenant on advance notice that untimely payments would no longer be accepted." There was no indication in the instant case that the plaintiff ever notified the tenant that late payments would no longer be accepted and the Court dismissed the action without leave to amend.

No Good Deed...

In *Lakes of Welleby v. Reynolds*[4], the landlord had served a Three-Day Notice on the tenant. Thereafter, the landlord elected to give the tenant an additional period of time to pay the rent after initially serving the Three-Day Notice and served an additional Three-Day Notice.

Unfortunately, the plaintiff filed the eviction action prior to the expiration of three-day-waiting period applicable to the second Three-Day Notice. Consequently, the Court was required to dismiss the action.

How Shall I Count the Days...

In *Royal Orleans LLC v. Montgomery*,[5] the plaintiff served a notice

continued, next page

dated September 1, 2004 and included a demand for September rent. The Court held that the September rent was not in default because the first day that demand for rent owed in September could be made was September 2. Consequently, plaintiff's Three-Day Notice given on September 1, 2004 was premature.

However, the Court held, even if the plaintiff had given the Three-Day Notice on September 2, 2004, it would have been fatally defective on its face as it demanded payment or possession on September 7, 2004. The Court stated that Friday, September 3, 2004, would be day number one. Saturday and Sunday are excluded as weekend days. Monday, September 6, 2004 was excluded as a legal holiday (Labor Day) for which the clerk's office was closed. September 7 would have only been the second day with the plaintiff filing its eviction action prematurely on September 8.

Alternatively, the Court stated, Section 83.56(3) of the Florida Statutes defines legal holidays as Court observed holidays or when the clerk's office is closed. If the notice was served on September 1, 2004, the clerk's office was closed on September 2nd and 3rd due to the hurricane, September 4th and 5th were excluded as weekend days, September 6 was excluded as Labor Day leaving September 7 as day number one with a premature filing on September 8, 2004.

Consequently, either way, the defendant's motion to dismiss without leave to amend was granted since the rental agreement was not terminated prior to filing the eviction complaint.

Endnotes:

[1] 12 Fla. L. Weekly Supp. 182b (County Court, Lee County, November 4, 2004.)
[2] 12 Fla. L. Weekly Supp. 173b (County Court, Broward County, September 13, 2004.)
[3] 11 Fla. L. Weekly Supp. 74 (County Court, Columbia County, October 13, 2004.)
[4] 11 Fla. L. Weekly Supp. 102a (County Court, Broward County, October 20, 2004.)
[5] 11 Fla. L. Weekly Supp. 100 (County Court, Broward County, September 20, 2004.)

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.*

Save the Date!
Estero RPPTL Convention Coming SOON!

The **2005 RPPTL Section Convention** is around the corner— May 26 to 29— in Estero. Our Convention Dynamic Duo, **Peggy Rolando** and **Christian O'Ryan,** have been hard at work planning a wonderful time for us. A brief outline of the schedule follows:

Thursday, May 26:

Committee meetings. (Some Committee meetings might occur on Wednesday, depending upon the demand and scheduling.)

Friday, May 27:

CLE Seminars and **Officer Election at lunch.** Peggy and Christian are putting together a block buster lineup of **real property seminar topics.** Fletch Belcher is coordinating the **probate and trust topics,** which will include an sneak preview of the direction of the Trust Code Revision Committee's work product perhaps even with our Scrivener, **Professor David Powell,** participating. The band, **"Road Kill,"** with our Section's own Burt Bruton and crew will be the after dinner entertainment.

Saturday, May 28:

Executive Council meeting in the morning with a **reception** in the evening.

Sunday, May 29:

Breakfast and **Farewell.** But don't leave on Sunday! It's a holiday weekend, so stick around and enjoy Memorial Day in Southwest Florida.

HOTEL: The **hotel information** can be found at http://coconutpoint.hyatt.com/property/index.jhtml. If you have not already made hotel reservations, you should do so soon. The hotel information is:

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Real Property Case Summaries

By Stephen Edward Silkowski, Esq., Jacksonville, Florida

Mineral-exploration activity might indicate a party's property right or interest that is an exception to MRTA.

Noblin V. Harbor Hills Development, L.P., 2005 Fla. App. LEXIS 186 (Fla. 5th DCA January 14, 2005).

In 1948, the Raineys executed a deed that conveyed one-half of the oil and mineral rights on the subject property to Huey. Specifically, this deed provided in pertinent part that Rainey conveyed to Huey "one-half of the mineral and oil rights, including the right to exploit the same . . . ."

In 1950, the Raineys conveyed the subject property to Collins and several other grantees by a deed that made no mention of the previously conveyed oil and mineral interest to Huey. This deed constituted the root of title to their property under MRTA. Harbor Hills acquired title to the subject property and subsequently conveyed a portion of the property to certain grantees, who in turn conveyed the property to Schell.

Harbor Hills initiated a suit, later joined by Schell as a party plaintiff, to quiet title to the subject property against a number of defendants, including Boyles, who was an heir of Huey. After Boyles died, her heir, Noblin, became a party defendant. Although Harbor Hills and Schell did not contest Noblin's ownership of one-half of the oil and mineral rights, they did file a motion for summary judgment asserting that Noblin did not have an easement interest in the property or, alternatively, that any easement previously created had been extinguished under MRTA.

In order to determine whether Noblin, as successor in interest to Huey and heir of Boyles, had an easement, the court analyzed the pertinent provisions of the 1948 deed from the Raineys to Huey. When the Raineys executed the deed, they included the following provision to describe the interest conveyed to Huey: "One-half of the mineral and oil rights, including the right to exploit the same . . . ." The provision "right to exploit the same" conveys an easement that allows her the right to enter the property to search for and extract one-half of the oil and minerals located thereon. The plain meaning of "exploit" is generally to employ to the greatest extent possible, i.e., "to put to productive use." Accepting Noblin's uncontested ownership of the one-half oil and mineral rights in the subject property, then the logical productive use of this interest would be to search for and extract the oil and minerals for consumer or other use. Hence, it appears to us that the intent of the parties in accordance with the plain meaning of the language employed in the deed, which is what a court must consider to discern the meaning of the pertinent provisions in the deed, was to convey an easement to Huey for ingress and egress onto the subject property to search for and remove one-half of the oil and mineral deposits located thereon. This interpretation comported with the general rule that the court next discussed regarding the creation of an implied easement when a grant of oil and mineral rights is contained in an instrument of conveyance.

The general rule alluded to provides that a reservation or grant of oil and mineral rights reflects an intent on the part of the parties to sever the surface estate from the underlying mineral estate and create two separate estates. This is the view adopted by the courts in many other jurisdictions. The Florida Supreme Court has recognized that when the surface estate and the mineral estate are severed, the mineral estate is dominant over the surface estate, allowing the mineral estate owner the right of ingress and egress over the surface estate to explore, locate, and remove the minerals. The court here concluded that even if "the right to exploit" provision was not included in the 1948 deed from Rainey to Huey, an implied easement was granted to Huey for the purpose of exploration and extraction of the oil and minerals located on the surface estate.

Having determined that Noblin, as successor in interest to Huey, had an easement for ingress and egress in the surface estate owned by Harbor Hills and Schell, the court next determined whether that easement was extinguishable under MRTA. An expressed or implied easement for ingress and egress to explore for and extract oil and minerals from the surface estate is an interest that may be extinguished by MRTA, provided the other requirements of MRTA are met.

Because the prior deed from Rainey to Huey creating the easement for ingress and egress predates the root of title, it might have been extinguished by MRTA unless an exception applied. It is important to emphasize that the trial court's order only held that the easement was extinguished by MRTA, not the actual oil and mineral rights owned by Noblin. The exceptions to MRTA that might have been pertinent to the instant case are found in section 712.03(1), Florida Statutes, relating to easements disclosed in the muniments of title and section 712.03(5), Florida Statutes, relating to prior use of the easement by Noblin and her predecessors in title. The exception under section 712.03(1) preserves "estates or interests, easements and use restrictions disclosed by and defects inherent in the muniments of title on which an estate is based beginning with the root of title . . . ." §712.03(1), Fla. Stat. This exception has been narrowly construed by the courts, which limit its application to easements or interests disclosed on the face of an instrument. The 1950 root of title from Rainey to Collins does not mention the prior grant of oil and mineral rights or any easement associated therewith. Noblin contended that a 1980 deed from SunBelt Investments to Ojay Corporation that references the 1948 deed from Rainey to Huey by official record book and page number sufficiently complied with the

exception. The partial summary judgment showed that the trial court did not resolve this particular issue. Because this issue raised questions of law and fact that needed to be resolved by the trial court, the partial summary judgment rendered in favor of Harbor Hills and Schell was reversed.

Noblin argued that the use exception found in section 712.03(5), Florida Statutes, applied to salvage her easement. This statute provides in pertinent part that excepted from extinguishment under MRTA are "recorded or unrecorded easements or rights, interests or servitude in the nature of easements . . . so long as the same are used and the use of any part thereof shall except from the operation hereof the right to the entire use thereof." §712.03(5), Fla. Stat. Noblin presented affidavits from several witnesses that indicated the easement was in fact used on many occasions by Huey and that clay, sand, limestone, and other minerals were extracted from the property. Harbor Hills and Schell made two arguments in opposition to Noblin's use exception. First, they argued that the affidavits presented by Noblin consisted of conclusory and hearsay statements and did not provide information regarding the particular uses of the easement with any specificity. Second, they contended that clay, sand, and limestone are not minerals, and in support of that argument they cited section 689.20, Florida Statutes, enacted in 1959, which provides that "whenever the word 'minerals' is hereafter used in any deed, lease, or other contract in writing, said word or term shall not include any of the following: topsoil, muck, peat, humus, sand, and common clay, unless expressly provided in said deed, lease, or other contract in writing." Noblin contended that this law, unchanged since its enactment, expressly provided for prospective application and, therefore, it was inapplicable given the fact that the 1948 deed creating the easement was executed and recorded before the statute was enacted.

As to the first argument, because the easement allows for exploration and extraction, the court concluded that when the evidence presented by Noblin is viewed in the proper light, questions of fact existed regarding the use of the property by Huey to explore for minerals on the surface estate. As to the second argument, notwithstanding the provisions of section 689.20, the court agreed with Harbor Hills and Schell that clay, sand, topsoil, and limestone may not be minerals within the meaning of the 1948 deed from Rainey to Huey. Nevertheless, the court concluded that factual issues remained regarding what "other minerals" may have been extracted in the past from the surface estate by Huey or his successors in interest.

To summarize, the court found that Noblin had an easement for ingress and egress to explore for and extract one-half of the oil and mineral deposits on the subject property. This easement might have been extinguished under MRTA; material issues of law and fact, however, existed regarding the two exceptions under MRTA previously discussed that preclude entry of summary judgment. Therefore, the partial summary judgment rendered in favor of Harbor Hills and Schell was reversed.

When a party claims a right of occupancy under a purchase and sales contract, an evidentiary hearing is required to determine the basis for the party's right of occupancy before a trial court may order eviction.
Grimm v. Huckabee, 2005 Fla. App. LEXIS 510 (Fla. 1st DCA January 24, 2005).

Appellants argued that the trial court erred in evicting them from their dwelling pursuant to summary proceedings when they were occupying the dwelling under a contract for purchase and sale with an agreement that provided for a right of occupancy by them pending closing. They entered into a residential sale and purchase contract with appellee. By amendment to the contract, the parties created an agreement pursuant to which appellants took occupancy of the dwelling until closing, in return for the payment of $850 per month rent. Later, by quit claim deed, appellee transferred title to the property to Parker, appellee's step-daughter. Prior to the scheduled date of closing under the purchase and sale contract with appellants, appellants notified all three appellees, Parker included, in writing that appellants were ready and willing to close and also set a time for closing at the office of appellants' attorney. Appellees did not appear at the scheduled closing and the purchase and sale was not consummated.

Appellants continued to occupy the dwelling, but initially did not pay rent, taking the position that they were under no obligation to do so since appellees had breached their obligations under the purchase and sale contract. Parker filed an eviction action and appellants filed an action in circuit court against all three appellees seeking specific performance of the contract for sale and a demand for mediation and arbitration pursuant to the contract. Upon motion, the two proceedings were consolidated.

Parker filed a motion for default

continued, next page

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judgment for possession of property, arguing that she was entitled to immediate possession because appellants had failed to pay past due rent or holdover rent. The trial court entered an order finding that the appellants were "currently in possession of the property pursuant to a contract for purchase and sale of the property which contains an occupancy agreement," but ordering payment of past due rent and double holdover rent pursuant to section 83.06(1), Florida Statutes. Pursuant to the court's order, appellants deposited monies into the registry of the court. Later, asserting that appellants were late in paying the holdover rent, Parker filed a motion for default judgment of possession of property under section 83.60, which the trial court granted on March 15. On March 19, the appellants filed a motion for clarification of the order for payment into the registry of the court, requesting the trial court to establish a date certain for payment of rent, since neither the original occupancy agreement nor the order requiring payment into the court registry provided for a definitive payment date. On March 22, appellants filed a motion to set aside the default judgment, including their request for an evidentiary hearing, and to quash the writ of possession. The trial court denied those motions. A writ of possession was issued and served upon appellants and they were removed from the property. This appeal ensued.

On appeal, appellants argued that, because they were occupying the dwelling under a contract for sale, the Residential Landlord and Tenant Act could not be invoked to evict them from the subject property. Further, they submitted, under the facts here, it was error to require them to pay money into the registry of the court, to require them to pay double holdover rent, or to evict them, given the dispute as to whether the March rent was paid late.

In 1955, the supreme court explained that to obtain double rent as a statutory penalty, an occupant "holding over must have been willful and without color of title, and . . . if the holding over is under a bona fide claim of right based upon reasonable grounds, the occupant cannot be held liable for the penalty."

Upon very similar facts, the Fourth District Court of Appeal has held that it was error for a trial court to require occupants to deposit rent into the court registry in an eviction proceeding without holding an evidentiary hearing to determine whether they were tenants or occupied the property under a residential sales contract. Section 83.60(2), Florida Statutes, requires payment of rent into the registry of the court in residential landlord tenant disputes under Part II of Chapter 83. Section 83.60, however, does not apply when the occupancy is under a contract for sale of a dwelling unit. The occupants there claimed that this provision was inapplicable because they were not tenants under the statute. Rather, their claim was based on their rights under a contract for sale. The resolution of this factual dispute would determine whether section 83.60 would be applicable. Because such a determination would be dispositive, the Fourth DCA held that the trial court was required to conduct an evidentiary hearing before determining whether the occupants were required to pay money into the court registry. Because the trial court had failed to conduct such a hearing, the DCA there found that the trial court had erred in imposing such a requirement, erred in entering the default judgment, and thereupon reversed the entry of the final default judgment.

Here, because appellants were claiming a right of occupancy under a purchase and sales contract, an evidentiary hearing was required to determine the basis for appellants' right of occupancy before the trial court ordered eviction.

Regarding filled lands over which the State exercised sovereignty before 1993, statute prioritizes title in the colorable-title landowner over the adjacent uplands holder.

River Place Condominium Association at Ellenton, Inc. v. Benzing, 2005 Fla. App. LEXIS 19516; 30 (Fla. 2nd DCA December 22, 2004).

River Place sought review of the final summary judgment determining that the Benzings are the proper owners of lands formerly submerged beneath the Manatee River and subsequently exposed by dredge and fill activities ("the filled lands"). River Place argued that it is the proper owner under section 253.12(9), Florida Statutes (2003), because it is the record owner of the property immediately upland of the filled lands. In the alternative, River Place argued that section 253.12(9) is unconstitutional because it violates article X, section 11 of the Florida Constitution. The Benzings argued that they are the proper owners under section 253.12(9) because they are the record title holders of the filled lands. The appellate court concluded that the trial court had correctly determined that the Benzings are the record title holders of the filled lands and therefore the proper owners under section 253.12(9). The court also concluded that section 253.12(9) is constitutional.

In 1951, the legislature vested title to all lands submerged beneath tidal waters in the State Board of Trustees. The filled lands in this case were submerged beneath the waters of the Manatee River at this time and became sovereign lands. In 1993, the legislature divested the State of its ownership of lands filled before July 1, 1975. Section 253.12(9), Florida Statues, transferred title on July 1, 1993, from the State to either "the landowner having record or other title" to the filled lands, or to the landowner who owned the lands immediately upland from the filled lands. The court here interpreted this statute to give priority to the landowner with record or other title because that option is listed first in the statute.

River Place acknowledged the existence of the recorded deeds, but argued that those deeds did not legally convey record title to the filled lands because the State never conveyed the sovereign lands into private ownership. Thus, River Place argued that NA Development, a party in the Benzings' chain of title, was not a "landowner having record or other title" under section 253.12(9), and that title to the filled lands vested with the record upland owner upon the enactment of section 253.12(9).

It is undisputed that NA Development's recorded quit claim deed did not establish it as the true legal owner of the filled lands prior to the enactment of section 253.12(9) on July 1, 1993. The issue

before the court was whether NA Development's quit claim deed became effective with the enactment of section 253.12(9). The deed to NA Development was prepared and filed in good faith. It was not an attempt simply to steal land from the State.

Section 253.12(9) divested the State of its ownership of lands filled before July 1, 1975, and vested ownership in "landowners having record or other title." The effect of section 253.12(9) was to vest legal title on July 1, 1993, in parties who had only a colorable claim to filled lands by virtue of existing, but defective "record or other" titles. Section 253.12(9) would be meaningless if it were limited to parties who were properly deeded the filled lands from the State, because ownership would already be vested in those parties. Additionally, the statute exempts record title owners "who filled or caused to be filled the state-owned lands." This exemption would be illogical if the statute were limited to parties who were deeded filled lands from the State, because the State would be prohibiting title to vest in those in whom title had already vested.

The clear purpose of section 253.12(9) is to remove clouds on the title to lands filled before July 1, 1975. Thus "landowners having record or other title" cannot be limited to those parties who do not have a cloud over their title to lands filled before July 1, 1975. In this case, NA Development's quit claim deed became effective with the enactment of section 253.12(9). As NA Development's successor in interest, the Benzings therefore are the proper owners of the filled lands under section 253.12(9).

River Place's alternative argument was that section 253.12(9) is unconstitutional because it violates article X, section 11 of the Florida Constitution. Article X, section 11 provides that the State owns title to lands under navigable waters and that it holds these lands "in trust for all the people." "Sale of such lands may be authorized by law, but only when in the public interest." River Place argued that section 253.12(9) gives land away without compensation and that this statute violates the requirement for a "sale" in the constitution.

Section 253.12(9) was enacted because the lands involved were of marginal value to the State and would be more valuable if placed on the tax rolls. In most cases, the legal costs associated with a sale of these lands would have exceeded the value of the lands. The court construed the constitution to allow a "sale" in which the State does not receive immediate monetary compensation. In this regard, the court expressly declared the statute valid and construed the Florida constitution to do so.

Clear language on plat reserving land for future road use does not reserve mere reversionary interest therein. Ambiguity between easement and dedication language precludes summary judgment.
Black v. Orange County, 888 So. 2d 156 (Fla. 5th DCA 2004)

Landowners filed a complaint alleging a claim for inverse condemnation. The complaint alleged that each of the Landowners owned real property in Orange County that abutted the then existing right-of-way of Hiawassee Road. The subdivision plat contained a notation over the east sixty feet of the plats that stated: "60 FT EASEMENT RESERVED FOR FUTURE ROAD WITH 110' SETBACK". The complaint averred that the notation did not convey title nor serve as a dedication of right-of-way to the County and, therefore, the County owed the Landowner compensation because the County had taken that 60-foot strip for the purpose of widening Hiawassee Road.

The plat, in addition to the notation "60 FOOT EASEMENT RESERVED FOR FUTURE ROADWAY WITH 110' SETBACK," also contained the following language:

> "DEDICATION... The undersigned... owner... does hereby dedicate... the streets and easements shown hereon to the perpetual use of the public"

The County sought judicial notice of seven plats in Orange County dating from the 1970's that employed the term "easement reserved".

The origin of the term "reserved" as used in the plat was not to reserve a reversion pursuant to Chapter 59-1658, Laws of Florida, as the language on the plat clearly indicates that the land itself was being reserved, rather than a reversion. Furthermore, the phrase "reserved for future road" is ambiguous. Similarly, ambiguity existed as to the relationship between the specific language of the easement reserved and the general dedication language. Accordingly, entry of summary judgment had been improper.

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♦ FRIDAY, APRIL 8, 2005

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

8:25 a.m. – 8:30 a.m.
Introduction
James A. Herb, Boca Raton, Program Chair
David G. Armstrong, Boynton Beach, Program Vice-Chair

8:30 a.m. – 9:10 a.m.
Elective Share and Other Spousal Entitlements
Computation of Elective Share, What Assets are Included in the Elective Share,Procedure for Making the Election
William T. Hennessey, Palm Beach

9:10 a.m. – 9:50 a.m.

Principal and Income Act
Trustee's Power to Adjust; Total Return Unitrusts
James I. Ridley, Fort Lauderdale

9:50 a.m. – 10:30 a.m.
Professional Responsibility: Ethics; and Attorney Malpractice Liability in Estate Planning and Fiduciary Administration
Charles I. Nash, Melbourne

10:30 a.m. – 10:45 a.m.
Break

10:45 a.m. – 11:25 a.m.
Joint Tenancies, Tenancies by the Entireties, and Totten Trusts
Gifting Principals and Applicable Presumptions; Case Law Discussion; Applicable Statutes as Relates to Bank Accounts
James A. Herb, Boca Raton

11:25 a.m. – 12:00 p.m.
Trust Administration; Wills v. Living Trusts
Brian J. Felcoski, Coral Gables

12:00 p.m. – 1:00 p.m.
Lunch (included in registration)

1:00 p.m. – 4:30 p.m.
Taxes, Part 1
Tax presentations, parts 1 and 2, cover: federal gift tax; special valuation rules; federal estate tax; using the marital deduction; generation-skipping transfer tax; planning for the GST tax; estates and ordinary trusts (income taxation); grantor and controlled trusts; postmortem tax planning; special estate planning topics
Professor David F. Powell, Tallahassee

♦ SATURDAY, APRIL 9, 2005

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

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

1:00 p.m. – 1:50 p.m.
Homestead
Requirements; Devise; Protected Homestead; Exemptions From Creditors; and Sale
Tae Kelley Bronner, Tampa

1:50 p.m. – 2:40 p.m.
Intestacy, Fiduciary Qualification and Creditor Claims
Jani Maurer, Boca Raton

2:40 p.m. – 2:55 p.m.
Break

2:55 p.m. – 4:00 p.m.
Probate Litigation, Topics Including:
Revocation of Probate, Voiding of Trusts; Carpenter Presumptions; Tortious Interference with Expected Gift or Bequest; Contract to Make a Will; Florida Deadman's Statute
Steven L. Hearn, Tampa

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

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Ethics	1.0 hour

Certification Program:

Tax	15.5 hours
Wills, Trusts & Estates	15.5 hours

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♦ ♦ ♦ REAL ESTATE ♦ ♦ ♦

♦ FRIDAY, APRIL 8, 2005

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

8:25 a.m. – 8:30 a.m.
Introduction
Homer Duvall, St. Petersburg, Program Chair
Robert G. Stern, Tampa, Program Vice-Chair

8:30 a.m. – 9:05 a.m.
Florida Homestead
Homer Duvall, St. Petersburg

9:05 a.m. – 9:45 a.m.
Case Law and Statutory Update
Eugene E. Shuey, West Palm Beach

9:45 a.m. – 10:20 a.m.
Construction Liens
Charles Cacciabeve, Orlando

10:20 a.m. – 10:35 a.m.
Break

10:35 a.m. – 11:10 a.m.
Environmental Issues
Roger Schwenke, Tampa

11:10 a.m. – 11:45 a.m.
Title Insurance—Affirmative Coverages
Alan K. McCall, Winter Park

11:45 a.m. – 1:00 p.m.
Lunch (included in registration)
Real Property Ethical Considerations
Adele I. Stone, Fort Lauderdale

1:00 p.m. – 1:30 p.m.
Commercial and Residential Landlord/ Tenant Issues
David Weisman, Hollywood

1:30 p.m. – 2:00 p.m.
Public Lands and Water Boundary Issues
Alan B. Fields, Naples

2:00 p.m. – 2:30 p.m.
Marketable Record Title Act
Clifford Rainey, Orlando

2:30 p.m. – 3:00 p.m.
Foreclosures
Alfred LaSorte, West Palm Beach

3:00 p.m. – 3:15 p.m.
Break

3:15 p.m. – 3:45 p.m.
FAR/BAR Contracts & Disclosure Requirements
G. Thomas Ball, Orlando

3:45 p.m. – 4:25 p.m.
Condominiums and Condominium Associations
William P. Sklar, West Palm Beach

4:25 p.m. – 5:00 p.m.
Homeowners Associations
Michael J. Gelfand, West Palm Beach

♦ SATURDAY, APRIL 9, 2005

8:25 a.m. – 8:30 a.m.
Opening Remarks

8:30 a.m. – 9:00 a.m.
Documentary Stamp Taxes
E. Burt Bruton, Jr., Miami

9:00 a.m. – 9:30 a.m.
Surveys and Legal Descriptions
Edward Hamann, Orlando

9:30 a.m. – 10:00 a.m.
Tenancies and Conveyancing Issues
Robert M. Schwartz, Delray Beach

10:00 a.m. – 10:15 a.m.
Break

10:15 a.m. – 10:50 a.m.
Business Entities
Barry B. Ansbacher, Jacksonville

10:50 a.m. – 11:25 a.m.
Zoning and Permitting
Richard Davis, Tampa

11:25 a.m. – 12:00 p.m.
Bankruptcy Issues
Marsha Rydberg, Tampa

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

1:00 p.m. – 1:30 p.m.
Tax Liens and Tax Titles
Robert Stern, Tampa

1:30 p.m. – 2:10 p.m.
Real Estate Finance Notes & Mortgages–Rent Assignments & Receivership
David R. Brittain, Tampa

2:10 p.m. – 2:45 p.m.
Real Estate Opinion Letters
John B. Neukamm, Tampa

2:45 p.m. – 3:00 p.m.
Break

3:00 p.m. – 3:30 p.m.
Land Trusts
Andrew M. O'Malley, Tampa

3:30 p.m. – 4:00 p.m.
Judgments & Judgment Liens
Patricia J. Hancock, Maitland

EDUCATION CREDIT

CLER Program

General ..... 16.0 hours
Ethics ..... 0.5 hours

Certification Program:

Real Estate ..... 16.0 hours

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Questions regarding the exam may be directed to the CLER Department at 850/561-5600, ext. 5842.

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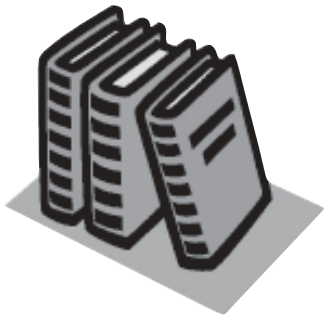
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Users Guide, a Hypertext Treatise on estate planning; a Tax Library containing relevant sections of the IRC and Regulations, CLE Library; containing CLE articles authored by some of the state's leading practitioners. Including the new probate codes,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

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

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

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To view **oral arguments made before the Florida Supreme Court,** see Gavel to Gavel at http://wfsu.org/gavel2gavel.

—Martha Edenfield, Esq.

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PROBATE & TRUST SEMINAR at the RPPTL 2005 SECTION CONVENTION. Friday, May 27, in Estero (near Naples). The probate and trust portion of the CLE seminar at the Section's Convention will be a particularly important program. It will feature a debut of the **proposed new trust code,** with a 2 hour presentation by Professor David Powell, Brian Felcoski, Laird Lile, and other Trust Code Revision Committee members (and distribution of the entire code text). The seminar will also include presentations concerning the **anticipated major overhaul of the Bankruptcy Code** by Barry Nelson and Richard Amari; pending legislation on **court monitors in guardianships** by David Brennan; pending legislation on **contesting revocable trusts** by Fletch Belcher; **delegation and use of agents by fiduciaries** by Jack Falk; a **federal tax update** by Don Scarlett; and a **mini-case law update** by Steve Hearn. Probate and trust practitioners can't afford to miss this program! Mark your calendars **now** and make plans to attend.

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

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