ActionLine

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Let's Make a (CPI Adjusted) Deal: *Will it be Clause #1, Clause # 2, or Clause #3?*

By David C. Peters, Hill, Ward & Henderson, P.A., Tampa, Florida

Consumer Price Index ("CPI") adjustments are routine features of a host of transactional documents. Despite that, many practitioners have drafted (or reviewed) CPI adjustment language believing that it accomplishes one (reasonable) thing, when in fact it accomplishes another (egregious or disastrous) thing altogether. Many Florida transactional lawyers who have been around long enough and have paid close enough attention can tell you (as I was told by one such lawyer) that Florida courts have interpreted some CPI adjustment clauses in ways that have had unexpected and harmful results for some parties, and that accordingly practitioners need be very cautious and precise in the way they draft such clauses. A seminal illustration is provided by *Crown Management Corp. v. Goodman*, 452 So. 2d 49 (Fla. 2d DCA 1984), appeal after remand, 474 So. 2d 1209 (Fla. 2d DCA 1984). The parties were in dispute about the correct interpretation of a rent escalation clause in their lease agreement. Two sentences, one immediately after the other, addressed the adjustment:

See "Let's Make a Deal" page 7

Parked the Homestead in a Land Trust? – May Need to Open the Door to Get it Moving Again

By Silvia B. Rojas, Sr. Underwriting Counsel, The Fund, Miami, Florida

Every now and then you run across a trustee of a land trust holding title to homestead property. This gives you an opportunity to ponder, "Should a homestead be placed in a land trust? " At first glance, this seems like a great combination: the privacy of a land trust under F.S. 689.071, the homestead protections afforded by Art. X, Sec. 4 of the Florida Constitution and the homestead tax advantages under Art. VII, Sec. 6 of the Florida Constitution. That is, until the time comes to sell or mortgage the property, the protection of heirs or spouses becomes an issue, or creditors come knocking. The land trustee is then faced with an oxymoron, i.e. a real potential for an open secret.

The land trust statute, F.S. 689.071, works like a balancing scale and it requires secrecy for its application. Title held by a trustee of a land trust can provide protection to the beneficiaries from discovery of their names and the content of their underlying trust agreement. Third parties are protected from liability for failure to review the underlying trust agreement for limitations to the trustee's powers and authorities. The secret that the land trust deed guards is that the underlying trust being referred to in the land trust deed, in most cases, is either a passive trust or

See "Homestead," page 25

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See brochure, pages 32-33.

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See brochure, pages 30-31.

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Real Property Problems Study

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Basic Estate Planning— Communication with Prospective Clients

By Herbert Elliott, Esq., Tarpon Springs, Florida

***Editor's Note**: The author has graciously agreed to allow other practitioners to use some, or all, of this article in their practices as a memo or a letter to clients, without the need to obtain permission from the author. Of course, the information should be modified to apply to each particular situation.*

Few decisions in life are as distasteful, yet as important, as planning for its end. Those who do such planning save their heirs much anguish and frustration, and often a great deal of money. This article attempts to explain in broad terms various estate planning vehicles for the elderly, such as living wills, durable powers of attorney, federal estate and gift taxation, the probate system, avoiding probate, Medicaid eligibility, and guardianship.

Probate

The probate system has a bad reputation, as something always to be avoided. Like most institutions, the probate system is sometimes wrongfully criticized by those who are misinformed. Probate is the process by which a decedent's bills are paid and property held in the decedent's name alone are transferred by court authorization, in accordance with the decedent's will, if there was one, or by general law if no will is found. Contrary to what some people think, if you don't have a will, the State does not "take" your property. Rather, State law just writes a will for you, based upon what is generally accepted in our society as the standard will. However, if your titled assets are transferred properly prior to death, there is no need for judicial involvement. That is the purpose in "avoiding probate," but there are pitfalls to be avoided. By "adding names" to property during one's lifetime, it may be difficult to have the property returned to, or conveyed by, the donor, or to the donors intended beneficiaries.

The most common types of probate in Florida are formal administration and summary administration. Summary administration applies to probate assets less than $75,000 in total value, excluding the value of the homestead; attorney's fees and court costs would amount to between $_____. The process takes approximately two weeks from beginning to end. Formal administration takes around five months, in large part because of the three-month period for claims to be filed against the estate. Attorney fees for formal administration are specifically set forth in the Florida Statutes.

There are many ways of avoiding probate of one's assets. The major ones are a living trust, putting property in joint ownership with a survivorship interest, such as life estates on real property, or joint tenancy with right of survivorship for real property, bank accounts, stocks and bonds. Again, beware of pitfalls. Even though one plans to avoid probate, however, it is still an excellent idea to have a current Florida will, to cover assets which inadvertently or unavoidably were not transferred into the name of the trustee, remainderman, or joint tenant. If even one titled asset is in the decedent's name alone at death, probate would still be necessary in order for title of that asset to be transferred. Although out-of-state wills are generally valid in Florida, it is time consuming and therefore expensive to go out-of-state to find the witnesses to those wills. Life insurance proceeds also pass outside of the probate system, unless your estate is a beneficiary of the policy. You can expect to spend between $_____ for two reciprocal husband and wife simple wills, and more for more complicated wills, testamentary trusts, or a separate contract between spouses that the will shall not be revoked or modified after the death of the first spouse.

One can avoid the probate of real property by signing and delivering a deed to the grantee, or to an escrow agent. You can keep the full homestead exemption by reserving a life estate, with the remainder to whomever you choose. Retaining an "enhanced life estate" enables you to sell the property without getting formal approval of the remaindermen. You can place an automobile in joint names, and do the same with bank accounts and stocks and bonds. You should use the magic phrase "joint tenancy with right of survivorship" in order to do so. Legal assistance is strongly advised; please don't do it yourself.

Medicaid Planning

Medicare pays less than two percent of all nursing home bills. Medicare will pay only for skilled care in a Medicare approved skilled nursing facility which follows a period of hospitalization of at least 3 days. Medicare will not cover merely custodial care. Even when all the requirements are met, Medicare will pay the entire nursing home bill only for the first 20 days. It will pay part of the bill for an additional 80 days, with the client or his family paying co-insurance amounts. After 100 days, Medicare provides no assistance. There are a number of long-term nursing home health care policies available, which differ significantly in terms of eligibility and benefits. Medicaid is a federally-funded program, administered through the several states, which will pay nursing home expenses to those who qualify.

Very generally speaking, in order to qualify, income eligibility and resource eligibility must be established. For income, the applicant cannot earn more than $1,600 per month. With respect to assets, the applicant is allowed to keep a home (regardless of value), personal effects, $87,000 cash, if married, (otherwise $2,000), a car, annuities, business property, life insurance, and certain other assets. Property divested within 36 months (60 months if to or from a trust) prior to application is included in the determination of eligibility, although you may transfer up to $3,300 each month without affecting eligibility. The regulations are both confusing and illogical, and elder law specialists should be consulted long before nursing home care is required.

continued, next page

Basic Estate Planning
from preceding page

Living Wills

One has the right to compel the termination of life support systems, if one is terminally ill, so long as that intention is expressed properly, preferably in writing. A living will may be obtained at your attorney's office for a nominal charge, or from most local physicians or hospitals.

Durable Powers of Attorney/Health Surrogates

A power of attorney is a vehicle whereby one may authorize another person to act in one's behalf. By placing certain language in the power of attorney, the document becomes a "durable power of attorney", and thereby one may authorize any person to act on one's behalf, even though one is disabled. By signing a durable power of attorney, one can avoid or at least minimize the risk of a guardian being appointed. A separate Health Care Surrogate form is usually used to authorize routine medical care.

Guardianship

Florida has a large number of senior citizens, with no local family for support. If one has not executed a Durable Power of Attorney while one is still competent, upon being declared incompetent by a judge, the judge would also appoint a guardian to take care of one's person or one's property, or both. Because of past abuses of the system, the legislature has imposed a great deal of restraint on guardianships to the point where the cure, in my opinion, is often worse than the disease. That is, fees and expenses in guardianship, and the red tape involved, prevent many incapacitated people, who would otherwise need a guardian, from getting the benefits thereof.

Record Keeping

One often overlooked aspect of dealing with elderly clients is the lack of accurate records kept by the client. It is important to give a list of your assets (including secret hiding places), your important papers, your debtors and creditors, life insurance policies, death benefits, funeral arrangements, to your loved ones, your banker, your attorney, (this is redundant if you love your attorney) or some other trusted person who is likely to survive you. Otherwise, assets may be thrown away, go unclaimed and wind up in the State treasury, or be converted by those who may not be authorized. If you have worked hard for your assets, then you should see the need to preserve what you have left for your friends, family, charities, or whomsoever you have intended to receive the benefits of your bounty.

Federal Estate and Gift Taxes

A federal estate tax return is due when one has an estate in excess of $1,500,000. However, if you give everything to your surviving spouse, there is no federal estate tax on the estate of the first spouse to die. By proper planning, by will or by trust, each spouse can transfer $1,500,000 free of estate tax. The $1,500,000 amount gradually increases to $3,500,000 in 2009. The federal estate tax rate goes from 20% to 47% of taxable values as of 2005 and is gradually changing until 2010. All assets are included (real estate, bank accounts, auto and life insurance proceeds, cars, boats, stocks, bonds, mutual funds, C.D.'s for example), even if title passes outside of the probate system. One of the many benefits of living in Florida is that there is no additional Florida inheritance tax.

The annual federal gift tax exclusion allows one to give $11,000 per calendar year (adjusted for inflation) per recipient, free of estate, gift, and income tax. By giving during your lifetime, you would also be able to see how your descendants use your property, help them with proper management, share the joy and appreciation they may have, and give them an opportunity to extend their appreciation to you. By the way, think about sharing your bounty with local charities or institutions which helped you get where you are today.

Trusts

The trust is an enormously flexible vehicle for all kinds of legal maneuvers. In the typical "revocable living trust", the settlor (one who makes a trust) appoints himself as trustee until his death, disability, or resignation, and then appoints a successor trustee or trustees to manage trust property and dispose of it by giving the settlor the use of the property during his period of disability, and then distributing it to the settlor's successor beneficiaries. Some non-tax benefits include:

1. avoidance of probate delays and expenses;
2. opportunity for professional asset management;
3. permit distribution over time (probate without a testamentary trust requires immediate distribution to all adults);
4. minimize risk of multiple inheritance taxes by having the real estate and personal property held in one Florida trust;

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5. prompt transfer of management of assets at disability;
6. avoidance of publicity;
7. insulation from pleas for money ("Fred, I'd lend you the money, but it's tied up in trust");
8. avoidance of mental blocks about signing wills;
9. avoidance of guardianship;
10. reduce the likelihood of will contests;
11. restrict the wasting of assets by spendthrift beneficiaries and their creditors; and
12. avoidance of surviving spouse deviating from predeceased spouse's estate plan.

Average attorney's fees for the preparation of simple living trusts usually are between $_____, depending on complexity. On occasion, the goal of avoiding probate is accomplished by a method simpler and less expensive than a living trust. After the trust declaration is executed, you still must transfer the assets into the name of the trustee. Again, by transferring the asset during one's lifetime, to a trustee (even oneself as trustee) one avoids probate of that asset. Many people prepare elaborate living trusts, but improperly fund the trust by failing to put all appropriate assets into the name of the trustee, thereby not implementing what was intended.

A corporate trustee would probably charge around one percent of principal per year as the trustee's fee. Corporate trustees are held to a higher standard of care than an individual trustee, and for many reasons, the peace of mind created with a professional, independent, impartial, experienced, fully insured, fully regulated corporate trustee may be well worth the expense. For example, suppose your child is trustee for the benefit of your grandchild. If the trustee does not invest the money wisely, is the grandchild really going to sue the parent for negligence or breach of fiduciary duty?

This article is written with the hope that you will contact your attorney, accountant, and other advisers, to discuss these matters in more detail. Estate planning is a constantly changing field, rife with loopholes and potholes. Please understand that the scope of this article is general in nature, and should not be used as a basis to plan your estate matters without professional assistance. Each of us is unique, and the use of "do-it-yourself" estate planning or the use of a "will kit" is not much different from "do-it-yourself" hospital surgery.

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Let's Make a Deal!

from page 1

> • The rental payments "shall be adjusted ... by multiplying the rental payments set forth in the Lease or established by the latest review . . . by the percentage increase, if any, in the level of the Official Consumer Price Index."
>
> • "Each one point increase in the index shall represent a one percent increase in the lease rentals."

Thirteen years into their ninety-nine year lease with the lessor, the lessee realized that the increase was being calculated based on each index point counting as a percentage point. The lessee had understood that the increase would be measured by the actual percentage increase in the CPI. They believed, therefore, that since the inception of the lease, they had overpaid by a total of $111,619.08 (which, for your information, would be $213,712.44 in today's CPI adjusted dollars). They filed suit seeking a declaratory judgment confirming that their interpretation of the clause was accurate. After disposing of the argument that the parties were mutually mistaken, the court allowed parol evidence of which clause controlled due to the finding that the clauses taken together created a latent ambiguity. The court held that the latter clause controlled interpretation of the first. The obvious lesson? Again, take great care in drafting CPI adjustment clauses.

Though this is old news for many practitioners, recent experience indicates that the lessons need to be revisited. Recently, we have had the privilege of reviewing two kinds of documents wherein CPI adjustment language appeared and was relevant to our analysis: 1) a Lease Agreement wherein a CPI adjustment is relied upon to calculate the rental rate upon renewal, and 2) an Option Agreement (allowing for a potentially significant period of time between execution and exercise of the Option) wherein a CPI adjustment is relied upon to calculate the purchase price, dependent upon the time of exercise of the Option. These case studies and clauses are offered below to help you realize how a CPI adjustment should NOT be drafted (or approved). Assuming you want to incorporate a percentage increase of some amount tied to the CPI, tips on drafting language to successfully accomplish that will also be provided.

Now, in "Let's Make a Deal" terms (receiving gratuitous yet vaguely appropriate reference here as my wife's all time favorite game show), as Monty Hall might say, behind only one of these choices is a fabulous prize. So let's put on our lawyer costumes, go down to the Let's Make a Deal TV Studio, and let Monty ask us, "Which clause do you think works? Which are you going to choose for your client? Will it be Clause #1, Clause #2, or Clause #3? Remember, behind one of these choices is a fabulous prize!"

Clause #1: Problems Caused by Referring to the Wrong Dates

. . . is a lease wherein your client (the lessee) is willing to consent to an annual cost of living increase in rent. Here is the provision lessor's counsel offers you:

> "The annual base rent during the second Lease Year (a "Lease Year" being defined as each successive year-long period occurring after the Commencement Date of this Lease Agreement) and each succeeding Lease Year thereafter shall be increased by an amount equal to the percentage increase, if any, in the Consumer Price Index (as hereinafter defined) between the date which is sixty (60) days prior to the Commencement Date and the date which is sixty (60) days prior to the first day of each of such subsequent Lease Years."

Should you say "yes" to this deal and choose Clause #1 for your lessee client? Indeed, this clause was presented to us by a lessee who thought their annual rental rate was going to be adjusted corresponding to the annual percentage increase in CPI. Perhaps, at first reading, you thought the same. Depending on how the drafters defined "Commencement Date," and how they related the Commencement Date to the "Lease Year," you might be right to accept this deal. But in this context, conceding this provision would be wrong. In this lease, Commencement Date was defined as the (fixed) date on which the lease first commenced (let's say, for example, January 1, 2001). You can see from the above that Commencement Date is not redefined so as to tie that concept to the Lease Year—it remains January 1, 2001. Accordingly, the increase for each successive lease year was calculated with reference to January 1, 2001. The percentage increase is not an annual increase per the terms above, but the percentage that the CPI has increased for each new lease year from January 1, 2001. Obviously, as a rule, that increase will be greater than what a true annual increase would reflect. The longer the lease and the more valuable the property, the greater the negative financial consequences for your lessee who is subject to terms like these.

So, if you chose Clause #1, in Let's Make a Deal terms, you may as well imagine the door opening and Carol Merrill standing there with an antique, broken down car. Not the fabulous prize; instead, you're stuck (at best) with a pile of old parts you've now got to find a way to salvage. Or, perhaps you can put it up on blocks in the back yard in the hope that no one will notice. Proposed Fix: To turn this clause into the deal your client expects, you could change the standard to which the CPI increase is tied: the amount by which the annual base rent is increased is measured instead by the CPI "between the date which is sixty (60) days prior to the commencement date of each of such subsequent Lease Years and the date which is sixty (60) days prior to the first day of each of such subsequent Lease Years." Further, to prevent any confusion in terms, the initial January 1, 2001 "Commencement Date" could be redefined as "Initial Commencement Date."

Clause #2: Problems Caused by Referring to the Wrong Amounts

. . . is an option wherein your client (the buyer/optionee) is willing to consent to an annual cost of living increase in the purchase price if they don't exercise the option and purchase by a certain date (we'll use December 31, 2000). Here is the provision he says the seller/optionor has drafted in light of your client's willingness. Assume, as you review this, that the "Initial Purchase Price" has been defined elsewhere as 25 million dollars. The following clause addresses the CPI increase in the event

continued, next page

they do not exercise the option by December 31, 2000:

> "[T]he purchase price . . . shall be . . . a collective sum equal to the Initial Purchase Price plus the amount determined by multiplying the Initial Purchase Price (i.e. $25,000,000) by a fraction, the numerator of which is the Consumer Price Index number published for the calendar month that ended immediately before the date on which the closing of the purchase of the Premises and the Additional Properties occurs and the denominator of which is the Consumer Price Index number published for December 31, 2000."

Should you say "yes" to this deal on behalf of your client? Somebody said yes to this deal on behalf of our client. This clause was presented to us by a client who thought they were entering into a ten year option to purchase a certain parcel of real estate for several million dollars, to be adjusted annually for the percentage increase in CPI. A number of years after they entered into the option and had a fresh set of eyes reviewing it with a view to exercising it, they became very concerned that what they got was an option that would never be less than double that amount. Indeed, every time you do the calculation as provided by the formula, your exercise price will never be less than double the initial price. For example, if closing occurred on February 28, 2005, you would take the Initial Purchase Price ($25 million), and add to it the sum of the Initial Purchase Price ($25 million) times 191.8 (the CPI published for 02/05) divided by 174.0 (the CPI published for 12/31/00) (which sum is $27,557,471.26), which equals $52,557,471.26.

Needless to say, then, if you chose Clause #2, once again in Let's Make a Deal terms, the door just opened and your prize is . . . a camel chewing on the cud of professional liability. Congratulations—somebody might take you for a ride on that camel, and in any case, you're going to have some huge messes to clean up. And you'd better hope the camel doesn't spit that cud at you.

Note that the clause was drafted and reviewed by a distinguished and well credentialed lawyer practicing in another state, proving only that we all ought to be very careful when drafting CPI adjustment clauses. These mistakes are not only for the inexperienced or careless, but can creep up on even the most sophisticated draftsperson. If the problems noted above are obvious to you, well, good for you and your clients. May they always be so obvious.

Our client believed that the party extending the option shared in the mistake, and in his integrity, might amend the language to reflect the true intent of their arrangement. At the same time, given a certain level of animus between the parties that existed, they were concerned the seller might abandon his integrity and try to stick it to them. While in some circumstances (possibly like these) there may be valid arguments for reformation of the instrument based upon mutual mistake, fraud, or ambiguity, our client surely wished they never needed to ready themselves with these. Instead, they wished that their original counsel had selected . . .

Clause #3

Let's try a relatively quick and easy fix to Clause #2, which actually effectuates the intent of the parties. It is a simple matter of deleting the duplicative reference to the Initial Purchase Price:

> "[T]he purchase price . . . shall be . . . the Initial Purchase Price (i.e. $25,000,000) multiplied by a fraction, the numerator of which is the Consumer Price Index number published for the calendar month that ended immediately before the date on which the closing of the purchase of the Premises and the Additional Properties occurs and the denominator of which is the Consumer Price Index number published for December 31, 2000."

There it is: nice and tidy, and it works like the parties expected it would. For future reference, when called upon to verify the CPI calculation on any deal, to avoid problems caused by referring to the wrong dates, amounts, or by misunderstanding the CPI generally, watch for:

1) the dates providing the period of time upon which the CPI adjustment will be based (if your client wants an annual CPI increase, make sure they are getting an annual CPI increase),
2) the price acting as the basis for the increase (keep it simple; generally your adjusted price will be the original price times the percentage increase in the CPI for the period of time on which the increase will be based), and
3) proper usage of the CPI (point increases in the CPI are not equivalent to percentage points, for example).

There is likely no better, simpler, and straightforward piece of advice here than this: when you are drafting or reviewing a CPI adjustment formula, pick a couple of different round numbers (like $1,000.00, $100,000.00, etc., as appropriate to the scope of the deal on which you are working) in addition to the numbers provided by the instrument itself, and run them through the formula. Do not take for granted that the CPI adjustment works the way you think it should, even (and perhaps especially) if you are drafting it. Every time we have been presented with a CPI calculation related problem, the problem has been readily identified simply by running the numbers. This is an easy way to overcome your own drafting/reviewing blind spots and those of others.

Would you have chosen Clause #3? If so, congratulations! You've won a fabulous prize! You avoided malpractice and angry clients! Your clients are satisfied and getting the deal they expected! Keep on defining your terms carefully and understanding the workings of the CPI and Monty will never be a match for you.[1]

Endnotes:

[1] The dates and amounts used above have been changed to protect the identities of the parties.

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Executive Council Meeting

Tallahassee, February 10-13, 2005

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

Those who attended the Executive Council Meeting in Tallahassee got to experience (and enjoy) sites special to our state's Capital City. The Section's Chair, Laird Lile, made this a unique meeting, with events held at the Supreme Court building, the State Capitol, and FSU's University Center at Doak Campbell Stadium, to name a few.

On Thursday, February 10, the meeting weekend began with a reception at the home of one of the Section's lobbyists, Pete Dunbar, and his wife, Susan. Committees met all day Friday, February 11 in different meeting rooms in the State Capitol. These committees included Website, Charitable Organizations and Planning, Affordable Housing, Title Insurance, Guardianship Law, Probate Law, Trust Law, Probate Litigation, Real Property Problems Study, and Circuit Representatives. The meetings broke for a luncheon at the Florida State University Center at Doak Campbell Stadium.

While Section members were meeting on Friday, the spouse/guest excursion was a trip to nearby Thomasville in South Georgia. The group toured Pebble Hill Plantation, a former antebellum cotton plantation which grew into a premier hunting plantation following the Civil War. Then, the group had lunch at an enchanting café in downtown Thomasville. The city's brick-paved streets lend an old world feel to the shopping district.

The Friday evening event was full of adventure. A reception was held in the rotunda of the Florida Supreme Court building, where the attendees were allowed to tour the courtroom and the law library. Dinner was held at the Challenger Learning Center / IMAX Theater. Following dinner, there were two private showings in the IMAX Theater: "Space Station" and "Astronomical and Digital Light Show".

The Executive Council Meeting on Saturday, February 12, was held in the Florida House of Representatives Chamber at The Capitol. The meeting began with a video presentation explaining the scenes depicted in the paintings by Christopher M. Still that cover the Chamber walls. Lisa Garcia, PR Coordinator for The Florida Bar Board of Legal Specialization and Education, made a presentation seeking board certified lawyers for media relations. Treasurer, Charlie Nash, presented a financial summary. The Website-Information Technology Committee received approval to expend funds to develop the RPPTL Section List Serve. The Budgets for the 2005-2006 year were approved with discussion. The Executive Committee's opposition to SB 298, Journal of Notarial Acts, was ratified with discussion regarding notarial bond. The Construction Law Committee requested, and received, ratification of the Executive Committee's approval of revisions to HB 113 governing bonds pursuant to Florida's construction lien law and to propose legislation with respect to conditional payment bonds. The Title Insurance Committee requested, and received, approval of proposed statutory revisions to various Florida Statutes which would allow title insurers to issue UCC insurance addressing the existence, attachment, perfection and priority of security interests in personal property.

After the Executive Council meeting adjourned, the group had lunch at the Governor's Club. The spouse / guest excursion on Saturday morning was to the Phipps Jewelry Store and Horse Farm. Gavin and Lisa Phipps are renowned artisans whose jewelry is well known in Palm Beach and New York City. The jewelry store is on a portion of the Phipps property called The Farm. The Farm contains horse stables utilized during the internationally known Red Hills Horse Trials.

Saturday concluded with a reception and dinner at Albert's Provence French restaurant. On Sunday, the meeting weekend concluded with the Farewell Breakfast.

See meeting photos on pages 12 & 13.

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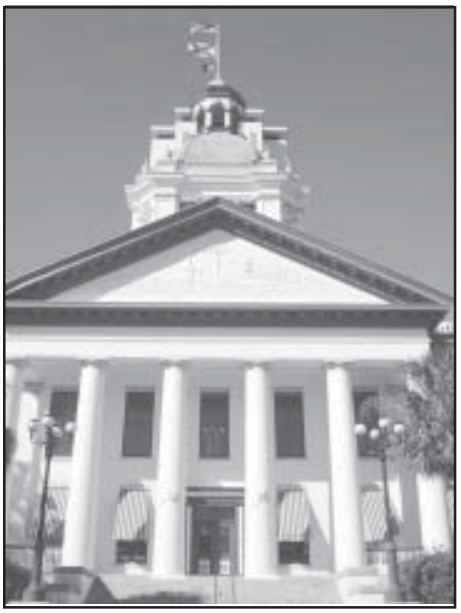
Committee meetings on Friday.



The Old Florida Capitol Building



Chair Laird Lile and his wife, Laurie, enjoy the Tallahassee meeting weekend.



Enjoying the Thursday evening reception are (left to right): Section Chair, Laird Lile, Florida Supreme Court Justice Kenneth Bell, Chuck Erhardt, Representative Dudley Goodlette, Chief Financial Officer Tom Gallagher, and Section Lobbyist Pete Dunbar.



The Executive Council saw the sights of Tallahassee. Shown here: the Florida Vietnam Veteran's Memorial and the Old Capitol building.



Some of the Friday lunch attendees show their school allegance.

Photos by John Neukamm.



The Friday reception was held in the rotunda of the Florida Supreme Court building.



Waiting for the IMAX movie to begin.



Saturday lunch at the Governor's Club.



The Executive Council meeting was held Saturday in the House of Representatives' Chamber.



The Executive Council meeting.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Does a Cure Exist for Repeated Florida Documentary Stamp Taxes in Syndicated Tenants In Common Deals?

By John C. Connery, Jr., Hill, Ward & Henderson, P.A., Tampa, Florida1

Introduction

Like-kind exchanges of real property remain an important tax-planning tool for taxpayers and practitioners. A taxpayer exchanging one real estate parcel for "like kind" property worth at least as much as the relinquished parcel generally does not recognize gain or loss on the exchange for income tax purposes. This works well when real estate values are increasing at reasonable rates. But in the last couple of years, real estate values have soared to heights reminiscent of dot-com stocks' market capitalizations in the late 1990s. This is especially true in many areas in Florida. As a result of a relatively poor performing stock market, low interest rates and investors' substantial returns on relinquished real properties, the demand for, and values of, replacement properties are exceedingly high.

To mitigate its economic risk and reduce its cost to acquire a replacement property, a taxpayer may desire to own a single property with other owners. To satisfy the like-kind exchange tax rules, each owner must be treated as owning an interest in real property for federal income tax purposes. Provided the taxpayer and its co-owner(s) are not treated as partners of a partnership for federal income tax purposes, the taxpayer's acquisition of a tenancy in common ("TIC") interest in real property can qualify as eligible replacement property in a like-kind exchange. Guidance on whether co-ownership of rental real estate is a partnership for federal income tax purposes is found in, among other sources, Revenue Procedure 2002-22, 2002-14 IRB 733 ("Revenue Procedure 2002-22"). Revenue Procedure 2002-22 sets forth the requirements that must be satisfied in order for a taxpayer to secure a private letter ruling from the Internal Revenue Service ("IRS").

Since the IRS issued Revenue Procedure 2002-22, a small, but growing, industry of TIC sponsors (each a "Sponsor" and, collectively, "Sponsors") has developed to meet the desire for exchanging taxpayers to acquire quality replacement properties without significantly increasing their economic risk, while still satisfying the temporal requirements of Section 1031 of the Internal Revenue Code of 1986, as amended (the "Code"). Sponsors maintain an inventory of TIC interests in rental real estate for sale principally to "accredited" investors, who desire to own passively rental real property. Typical inventory properties include net leased retail properties, commercial properties and office properties.

This article presents the issue of repeated Florida documentary stamp taxes incurred in the sale of the Sponsor's Florida real estate inventory and evaluates three alternative proposals to address the issue. The reader is cautioned that the issue addressed in this article is only one of several issues that must be analyzed in syndicated TIC deals. Other issues include financing, real estate, securities and other tax issues.

Syndicated TIC Deals

The two basic structures for syndicated TIC deals are the master lease structure and property management structure. Under the master lease structure, the TIC investors collectively lease the entire property pursuant to a triple net master lease to an affiliate of the Sponsor, which, in turn, subleases all or a portion of the property to one or more tenants. The Sponsor profits from excess rents, measured as the difference between rents received from tenant(s) and rent due to the TIC investors under the master lease.

Under the property management structure, the TIC investors engage a manager, typically an affiliate of the Sponsor, to manage the property and the TIC investors lease the property directly to one or more tenants. In this arrangement, the manager (*i.e.*, Sponsor) profits from the difference between the amount paid by the TIC investors under the property management agreement and the amount, if any, paid by the manager (*i.e.*, Sponsor) to a third party property manager performing additional property management services.

Under both structures, the Sponsor identifies and contracts to purchase rental real property (the "Subject Property"), all or substantially all of which is then leased by one or more quality tenants. During its inspection period, the Sponsor secures a commitment for acquisition financing and provides all material information concerning the Subject Property and ownership structure to prospective TIC investors. Acquisition financing, which may be nonrecourse, may be secured from banks, conduits and insurance companies. Typically, each TIC investor acquires its TIC interest in the Subject Property through a bankruptcy remote single purpose entity (an "SPE"), which is jointly and severally liable with the other SPEs for the "bad boy" carveouts set forth in nonrecourse financing documents. The TIC investors acquire their respective TIC interests from the Sponsor by paying cash and assuming the debt secured by the Subject Property.

On the acquisition of the Subject Property, the Sponsor may close with one or more TIC investors. The Sponsor will retain TIC interests not acquired by TIC investors at the closing. Concurrently with the first TIC investor(s) acquiring a TIC interest in the Subject Property, the TIC investor(s) and Sponsor will enter into a Tenancy in Common Agreement setting forth the owners' respective rights and obligations with respect to the Subject Property and their TIC interests, and, depending on the TIC structure, a property management agreement or master lease agreement with an affiliate of the

continued, next page

Sponsor. These agreements are amended to include TIC investors later acquiring TIC interests. To minimize tax risk, the transaction documents are drafted, to the extent possible, to comply with IRS guidelines as set forth in Revenue Procedure 2002-22. If the Subject Property is subject to debt, it is highly unlikely that the arrangement will satisfy all of the guidelines in Revenue Procedure 2002-22. However, while technical compliance with each of the guidelines may not be possible, most tax practitioners are able to get comfortable with the arrangement by analyzing all applicable law, which in certain respects may be more generous to taxpayers than the IRS's ruling guidelines in Revenue Procedure 2002-22.

After the Subject Property is acquired, the Sponsor will attempt to locate additional TIC investors to acquire the TIC interests owned by the Sponsor, subject to compliance with the lender's limitations on the Sponsor's sale of the retained TIC interests. For Sponsors acquiring an interest in the Subject Property, under the IRS guidelines, the Sponsor's activities will be imputed to the other TIC investors if the Sponsor retains an interest in the Subject Property for more than six (6) months. In any event, without advance planning, the Sponsor's sale of TIC interests in Florida real property to TIC investors in one or more sales after its acquisition of the Subject Property triggers repeated Florida documentary stamp taxes.

Florida Documentary Stamp Tax in Debt-Financed Real Estate Transactions

The State of Florida imposes a documentary stamp tax in the amount of $.35 per $100 or fraction thereof of indebtedness evidenced by a promissory note secured by a mortgage on Florida real property (the "Florida Indebtedness Tax"). The State of Florida also imposes a documentary stamp tax on the transfer of Florida real property in the amount of $.70 per $100 or fraction thereof of the amount paid to acquire the real property (the "Florida Deed Tax"). In addition, a nonrecurring intangibles tax at the rate of $.20 per $100 of indebtedness is imposed on the value of a promissory note secured by a mortgage on Florida real property (the "Nonrecurring Intangible Tax").

Example: Properties R Us, Inc., a Sponsor, purchases Florida real estate for $25,000,000, paying $5,000,000 of its cash and borrowing $20,000,000 from a bank. Florida documentary stamp taxes in an aggregate amount of $245,000 (the sum of (i) $70,000 Florida Indebtedness Tax and (ii) $175,000 Florida Deed Tax) are due on Properties R Us, Inc.'s purchase of the property. In addition, a $40,000 Nonrecurring Intangible Tax is due.

For Sponsors holding TIC interests in Florida real property in inventory pending a sale to one or more TIC investors, significant Florida documentary stamp taxes are imposed on each sale of a TIC interest to a TIC investor. Continuing with the example above, if the Sponsor sold a fifteen percent (15%) TIC interest in the Subject Property on the day after closing on the Subject Property, the Florida Indebtedness Tax alone would be $70,000, because the tax will be calculated on the full amount of the debt. This is the same amount of tax paid the day before when the Sponsor acquired the Subject Property and will be paid again each time the Sponsor sells a TIC interest regardless of the proportion of the Subject Property sold. Only a reduction in the outstanding principal amount of the loan will reduce the Florida Indebtedness Tax.

In addition, the Florida Deed Tax would be due on the consideration paid by the TIC investor for the TIC interest which, based on oral discussions with the Florida Department of Revenue, would be determined based on the sum of the cash consideration paid by the TIC investor to the Sponsor and the TIC investor's pro rata share of the assumed debt. The Nonrecurring Intangible Tax, however, would not be due on subsequent sales.

After hearing your sheepish explanation of the repeated Florida documentary stamp taxes in its sales of TIC interests and after offering a few choice words to the Florida Department of Revenue on the inequity of repeated taxes, your client may ask you to review its subscription agreements to determine whether the Sponsor or the TIC investor is liable for these taxes. Is there a way to avoid this conversation and additional work that follows?

Delaware Statutory Trust and Revenue Ruling 2004-86

The issue, then, is whether a Sponsor selling TIC interests in Florida real property can eliminate repeated Florida documentary stamp taxes arising from its sale of the TIC interests without jeopardizing the TIC investor's tax-free like-kind exchange. The first proposal is for the

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Sponsor to place title to the Florida real estate with a Delaware statutory trust ("DST") and to sell certificated interests in the DST to TIC investors. In addition to potentially mitigating the issue addressed in this article, the DST structure would enable the Sponsor to secure superior financing terms, increase the number of owners in the property (although conduit lenders often restrict the number of TIC investors well below the number of owners permitted in the IRS guidelines) and significantly reduce transaction expenses resulting from each TIC investor forming its own SPE to hold its TIC interest.

In Revenue Ruling 2004-86, 2004-33 I.R.B. 91 ("Revenue Ruling 2004-86") the IRS held that a taxpayer may exchange real property for an interest in a DST owning "like kind" real estate for purposes of Section 1031 of the Code so long as the other requirements of Section 1031 of the Code are satisfied. In addition, under this arrangement, neither the TIC investor nor its SPE would assume the loan because the borrower under the loan would continue to be the DST. Accordingly, the Florida Indebtedness Tax would not apply to the Sponsor's sale, although the Florida Department of Revenue would likely assert that the Florida Deed Tax is due.

The IRS's ruling in Revenue Ruling 2004-86 is based solely on the assumed facts, some of which do not reflect commercial realities. Accordingly, because of the limited applicability of the ruling beyond the specific structure set forth in Revenue Ruling 2004-86 and the possibility that the Florida Deed Tax would be due on the TIC investor's purchase of the DST certificate, we do not anticipate widespread use of the DST in Florida TIC deals.

Guaranty in Lieu of Assumption

Because the execution or recordation in Florida of an assumption agreement triggers the Florida Indebtedness Tax on the amount of the assumed obligation, which is the total outstanding principal amount if the TIC investor or its SPE is jointly and severally liable under the promissory note, the TIC investor and Sponsor may try to negotiate with the lender for the SPE to guaranty the debt in lieu of assuming it. To put the bank in the same economic position, the SPE would offer to pledge the acquired TIC interest to secure its guaranty. The Florida Indebtedness Tax would not be due on the SPE's guaranty or the recordation of the mortgage securing the SPE's guaranty, provided that full Florida documentary stamp taxes were paid on the underlying loan to the Sponsor and/or other SPEs.

In our experience, this approach is often not acceptable to lenders, with a particular disfavor by conduit lenders. In any event, while this approach would eliminate the Florida Indebtedness Tax, the Florida Deed Tax would still be due, which alone may be substantial.

The Cure: An LLC or, maybe, many LLCs

Our search for the cure for repeated Florida documentary stamp taxes incurred as the Sponsor liquidates its Florida TIC interests leads us next to the ubiquitous limited liability company ("LLC"). Under this approach, the Sponsor would not sell TIC interests in the Subject Property or certificated interests in a DST. Instead the Sponsor would sell membership interests in an LLC to TIC Investors. Under current law, the sale of a membership interest in an LLC is not subject to the Florida Deed Tax even when the LLC's sole asset is Florida real property. Additionally, assuming the TIC investor does not assume the outstanding debt encumbering the Subject Property (and there is no reason for the TIC investor to do so), the Florida Indebtedness Tax would not be due on the sale of an LLC membership interest. Finally, if the LLC is a single member limited liability company ("SMLLC"), it would be disregarded for federal income tax purposes. Therefore, if the TIC investor acquires all of the membership interests of a SMLLC owning a TIC interest in the Subject Property, for federal income tax purposes, the TIC investor would be treated as acquiring the TIC interest in the Subject Property and the Sponsor would be treated as selling the TIC interest. In order words, the SMLLC is disregarded as an entity separate from its owner for purposes of the Florida Indebtedness Tax and federal income tax, but it is respected as a separate entity for purposes of the Florida Deed Tax.

What if the Sponsor wants to sell TIC interests to more than one TIC investor? It appears that the extent to which this structure may be duplicated to accommodate multiple sales of TIC interests in a single Subject Property is limited only by the resources of the Sponsor (there will be costs incurred in forming and maintaining the SMLLCs) and creativity of the Sponsor and its advisors, subject, of course, to lender tolerance. A Sponsor might form several SMLLCs (each initially owned by the Sponsor) to acquire the Subject Property. The Sponsor would later sell membership interests in SMLLCs in lieu of TIC interests. Setting aside for the moment reluctance by an investor to acquire existing SMLLCs, the TIC investor will favor this structure over a direct purchase of the TIC interests, because it would reduce the time and money it incurs in forming its own SMLLC to acquire the TIC interest and negotiating the assumption agreement with the lender. Any reluctance to purchase membership interests in a SMLLC in lieu of the TIC interest should be overcome with appropriate disclosure and representations and warranties with respect to the SMLLC from the Sponsor.

Example: Properties R Us, Inc. forms five (5) SMLLCs to acquire a five-story office building in Tampa, Florida. The SMLLCs are jointly and severally liable under a promissory note executed in favor of the bank providing acquisition financing. The bank loan documents require that the member of each SMLLC guarantees a proportionate part of the debt measured by the member's indirect ownership of the property. Each SMLLC will own a twenty percent (20%) undivided TIC interest in the real estate. Soon after the closing, Properties R Us, Inc. identifies five (5) TIC investors, each of whom acquires all of the membership interests of one of the Sponsor's SMLLCs. Neither the Florida Indebtedness Tax nor Florida Deed Tax is due on Properties R Us, Inc.'s sale of membership interests in the SMLLCs to the TIC investors. For federal income tax purposes the TIC investors are treated as acquiring, and the Sponsor is treated as selling, an undivided TIC interest in the office building.

As the approach evolves, we are reminded that neither we nor our client Sponsors are omniscient, and,

continued, next page

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RPPTL POLITICAL ACTION COMMITTEE

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, Telephone: (850) 222-3533

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❑ Double Platinum	$10,000

therefore, we may not be able to anticipate at the initial closing what percentage of the deal each subsequent TIC investor will want to acquire. Why not, then, form five (5) SMLLCs, each having a different percentage ownership in the property, providing a fast-food-like approach to selling TIC interests, where the Sponsor offers small, medium, large or supersized TIC interests.

Could we custom design SMLLCs to accommodate an investor who eschews fast-food restaurants? Perhaps instead of five (5) SMLLCs, the Sponsor could form thirty-five (35) SMLLCs, each owning a TIC interest in the Subject Property ranging from one percent (1%) to five percent (5%). The Sponsor could then fill a much wider range of orders, on demand, by simply merging two or more SMLLCs to create a SMLLC owning the desired TIC interest. Under current law, the merger of two or more SMLLCs would not trigger the Florida Indebtedness Tax or Florida Deed Tax.

Is there a limit to this planning? Yes, under the IRS's ruling guidelines no more than thirty-five (35) TIC investors are permitted, the Sponsor's lender may also want to limit the number of borrowers and forming and maintaining many SMLLCs would get expensive.

Conclusion

Without advance planning, a Sponsor's sale of its Florida real estate TIC interest inventory will result in repeated Florida documentary stamp taxes, which in each transaction may be substantial. Although a DST or guaranty in lieu of an assumption by the TIC investor or SPE would eliminate the Florida Indebtedness Tax, both suffer from similar incurable ills—the Florida Deed Tax and limited applicability. Using multiple SMLLCs, however, may eliminate repeated Florida Indebtedness Tax and Florida Deed Tax, with no affect on the TIC investor's like-kind exchange or the Sponsor's income tax consequences.

Endnote:

[1] The author thanks Thomas N. Henderson, III and R. James Robbins, Jr. for their assistance in the development and improvement of this article. Any errors in this article are the sole responsibility of the author.

International Investing in a New Age

By Dennis E. Michels, CFP, Robert W. Baird & Co. Inc., Orlando, FL

Economists and financiers have for decades advised investors to diversify beyond their homelands. Not only are the number of investment opportunities greatly expanded by doing so, but there are risk-reducing diversification benefits to be had by investing in markets with less than perfect correlation of returns with the US market. Nonetheless, most investors remain biased to their home markets. In light of the great global transformations taking place today, such a limited perspective could be a mistake.

The benefits of international diversification stem from two related sources: change in the correlation structure between markets and changes in the opportunity set of available investments. Today, growth in international trade volumes, increasing market access, and the rapid emergence of certain developing economies have created a huge and growing opportunity set for global investors. At the end of 2004, the US share of world equity market capitalization was 45%, down from two-thirds in 1970. In other words, over half of the world's equity investment opportunities lie ***outside*** US borders. At the same time, the correlation of equity returns, or the extent to which pairs of markets move together, is much lower than many investors may have thought. Outward-looking investors thus benefit from both greater opportunity and lower ***correlation***.

Correlation is a measure of association between two variables- in this case, market returns for pairs of equity markets. It measures how strongly the variables change with each other, and ranges between- 1 and 1. If two variables tend to move up or down together, they are said to be positively correlated. If they tend to move in opposite directions, they are said to be negatively correlated.

One of the great transformations now taking place is the phenomenal growth and growing global importance of China and India. Trade volume in China, for example, grew to a record $1.1 trillion in 2004, accounting for 12% of the total world increase in trade. In India, foreign direct investment increased 54% year-on-year in January to September 2004 to reach 3$bn. Hundreds of millions of Chinese and Indians are making their way into the global middle class. Viewed as an "investment bloc" of its own, China and India could grow annually between 7% and 10% for the next couple of decades- significantly boosting growth in the world economy in the process.

This is not the only global transformation now taking place. The European Union continues to expand and integrate, and is becoming another investment bloc. Japan has recovered its equilibrium and is beginning to forge a new relationship with its neighbor, China. Russia and its neighbors are emerging as a new central Asian market. As these transformations occur, driven by independent, home-grown phenomena, two things will happen. The dominance of the US will recede. In fact, the US may lose some of its appeal to foreign investors as it digs its way out of trillions of dollars of foreign debt. And the correlation of global equity market returns will decline. An expanding opportunity set combined with lower correlation of return is the best-case scenario for global asset allocators.

International investors could benefit from currency movement over the next few years as well. The US dollar has depreciated over 20% against a trade-weighted basket of currencies over the past two years. Most economists agree that the dollar has a lot farther to fall, due to the massive US current account deficit, which equates to trillions of dollars of outstanding debt to foreigners. Despite the decline in the dollar to date, the current account deficit rose to a record $164.7 billion the third quarter of 2004. The larger the deficit, the more dollars have to be converted to foreign currency to pay for imports. To compensate for the gap and maintain the value of the dollar, the US needs to attract from overseas $1.8 billion a day, or $55 billion a month, based on Bloomberg calculations. Otherwise, the dollar will have to fall. For US-based international investors, a falling US dollar adds to returns on investment.

International stocks appear attractive on valuations and dividend yields as well. Using the ratio of a company's price to its "cash earnings" per share, international stocks trade at a discount to comparable U.S valuations, and the average international stock yields 2.4% versus the average US yield of about 1.7%.

It is easier than ever to take advantage of opportunities overseas. There are host of investment vehicles which to choose. Some of the most accessible vehicles to invest internationally are described below.

Mutual Funds

International funds come in all shapes and sizes these days. You can choose a general international fund, an emerging markets fund, or a fund that invests in a specific region that is interesting. The main attraction of an actively managed fund is that managers can uncover gems that you're not likely to stumble across yourself, and are not likely to trade on US exchanges.

Exchange Traded Funds

ETFs are designed to mimic the index returns of markets around the world. These funds are a low-cost means to invest in a particular country or region in which you are interested, expecting to earn the return of the broad market, adjusted for exchange rate fluctuations. ETFs trade on US exchanges in US dollars.

American Depository Receipts

ADRs are shares of foreign companies that are converted into US dollars and trade on US exchanges. All dividends and distributions are paid in US dollars. ADR price movements will reflect the price movements in the foreign shares as well as currency fluctuations. With ADRs you gain international exposure and you can buy and sell shares just like any US stock.

Solomon, one of the wisest and wealthiest men to ever live, said it well: "Divide your portion to seven, or even to eight, for you do not know what misfortune may occur on the earth." In other words, diversification is the wisdom of the ages.

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Probate & Guardianship Case Summaries

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

The Second District Court of Appeal has ruled that the constitutional protection of homestead takes precedence over the abatement statute, certifying conflict with the decision of the Fourth District Court of Appeal in *Warburton v. McKean*, 877 So. 2d 50 (Fla. 4 DCA 2004) and certifying the issue to Florida Supreme Court as an issue of great public importance.

In re Estate of Mahaney, 30 Fla. L. Weekly D1052 (2 DCA April 22, 2005)

The decedent died without a surviving spouse or any children. Her will provided that "the rest, residue and remainder" of her estate be distributed as follows: $30,000 to her grandniece, and the "remaining residual estate" to her nephew. At her death, the decedent owned a single-family home. No other property of value passed under her will.

The trial court admitted the decedent's will to probate, entered an Order Determining Homestead Status of Real Property, concluded that the homestead passed to the nephew free from claims of creditors, and held that the homestead, therefore, was not available to satisfy the general devise to the grandniece. The grandniece appealed.

The Second DCA, affirmed the trial court and confirmed the principles that (1) a homestead may be devised by the residuary clause of a will and (2) that although a homestead is devised by will, it is not an asset in the hands of the personal representative available to satisfy creditors unless it passes to a person who is not an heir of the decedent. The Second DCA concluded that since the nephew was an heir of the decedent, the property was never an asset of the estate.

The grandniece argued that if the homestead was not used to satisfy the devise to her, then the decedent's intent as evidenced by the decedent's "stated priorities in the will" would be ignored. After discussing the abatement rules, the Second DCA rejected the grandniece's argument, holding that the constitutional protection of homestead takes precedence over the abatement statute.

Without discussing *Warburton v. McKean*, 877 So.2d 50 (Fla. 4 DCA 2004), the Second DCA certified conflict with the decision of the Fourth DCA in *Warburton* and also certified the following question to the Florida Supreme Court as one of great importance as had been done by the Fourth DCA in *Warburton*: WHERE A DECEDENT IS NOT SURVIVED BY A SPOUSE OR ANY MINOR CHILDREN, DOES DECEDENT'S HOMESTEAD PROPERTY, WHEN NOT SPECIFICALLY DEVISED, PASS TO GENERAL DEVISEES BEFORE RESIDUARY DEVISEES IN ACCORDANCE WITH SECTION 733.805, FLORIDA STATUTES?

Reporter's Note: In *Warburton v. McKean*, 877 So.2d 50 (Fla. 4 DCA 2004), the Fourth DCA held that protected homestead devised by the residuary clause of a decedent's will could be used to satisfy a general devise when there were insufficient probate assets to satisfy the general devise. The Fourth DCA in *Warburton* concluded that the abatement statute trumps the constitutional rules governing homestead in those circumstances. The Florida Supreme Court heard oral argument in *Warburton* on February 8, 2005. As of the date of submission of these case summaries, the Supreme Court had not issued its decision.

As was the case in *Warbuton*, in the *Mahaney* case, the decedent's homestead was freely devisable, the homestead passed by the residuary clause to a person who would be an heir under the intestacy statute so that the homestead was protected homestead, and there were insufficient probate assets to satisfy a general devise. (The Second DCA noted in a footnote that since both devises were referred to in the will as part of the residuary, that might raise a question as to the technical classification of the grandniece's devise. However, the Second DCA said that the issue would not be addressed because (1) the parties had not raised the issue, and (2) in view of its holding, it didn't appear that the answer would change the result).

The Court of Appeals found that (1) where attorney provided uncontested evidence that supported his claim for fees for extraordinary services, the trial court did not have discretion to deny attorney additional reasonable fees under Section 733.6171(4), Florida Statutes, (2) the trial court erred in denying payment of expert's fees from the estate pursuant to Section 733.6175(4), Florida Statutes and in failing to determine a reasonable fee, and (3) the court improperly denied reimbursement for costs of mailing notices to creditors by registered mail.

Baumann v. Estate of Stanford Blum, 30 Fla. L. Weekly D842 (Fla. 2 DCA March 30, 2005)

Decedent left his entire estate to his friend, Emily. Emily's son, who was her attorney-in-fact, asked Attorney Philip Bauman to file a petition for Attorney Baumann's appointment as personal representative. The petition was filed and granted, and Attorney Baumann served as attorney for the personal representative. When he filed the petition for discharge and final accounting and a supplement to the petition for discharge and supplemental final accounting, Emily's son filed objections. The trial court referred the matter to a general master and adopted the general master's report and recommendations. In so doing, the trial court denied Attorney Baumann's claims for fees for extraordinary services, expert's fees, and reimbursement for the costs of mailing notices

continued, next page

to creditors by registered mail. Attorney Baumann appealed.

The Second DCA reversed and remanded. Section 733.6171(4), Florida Statutes says that an attorney shall be allowed additional fees for extraordinary services. The Second DCA concluded that since Attorney Baumann provided uncontested evidence that supported his claim for fees for extraordinary services, the trial court did not have discretion to deny additional reasonable attorney's fees under Section 733.6171(4), Florida Statutes. In addition, Section 733.6175(4), Florida Statutes provides that expert witness fees shall be paid from the estate. The Second DCA held that "this is not a discretionary matter" and that the trial court erred by not ordering that the testifying expert's fees be paid from the estate and by failing to determine a reasonable fee. Furthermore, the Second DCA concluded that Attorney Baumann was entitled to be reimbursed for his expenses for registered mail as to which no objection was filed. The Second DCA noted that there is no "statutory prohibition against" the use of registered mail. The fact that formal notice was not required did not preclude service by a method provided for the service of formal notice.

The District Court of Appeal concluded that the probate court did not abuse its discretion by not dismissing or staying an adversary proceeding pending the outcome of a later filed general jurisdiction civil case.
Kutlesic v. Estate of Mervel, 30 Fla. L. Weekly D753 (Fla. 3 DCA March 16, 2005)

Gianina Kutlesic lived with the decedent, Bernard Mervel, from June 1998 until decedent's death on October 15, 1999. Kutlesic filed a claim in the estate proceeding alleging that Bernard Mervel promised to leave her his entire estate, including his condominium. She also filed a claim seeking compensation based on the decedent's alleged promise that she would be compensated as the sole beneficiary under his will. The estate objected to these claims.

Kutlesic then filed a separate civil action claiming breach of contract, quantum meruit, express trust, and resulting trust, alleging in that action that the decedent promised to leave her his entire estate if they lived together for the rest of his life. The trial court in the general civil case dismissed three of the claims with prejudice, finding that the claims were barred by the statute of frauds. That left only the quantum meruit claim.

Kutlesic appealed the dismissal of the three claims. The Third DCA dismissed the appeal as non-final in nature since those claims were "factually intertwined" with the quantum meruit claim.

The estate then filed a declaration of adversary proceeding and a motion to compel Kutlesic to return tangible personal property to the estate and to vacate the decedent's condominium. Kutlesic moved for dismissal or stay of the adversary proceeding contending that it would be improper for the probate court to proceed with that action while the quantum meruit civil case was pending (and the appeal of the other claims remained unresolved). The probate court denied the motion to dismiss or stay the adversary proceedings, and after an evidentiary hearing, ordered Kutlesic to vacate the condominium, taking with her only her own personal property. Kutlesic vacated the condominium and appealed the probate court's decision, alleging lack of jurisdiction.

The Third DCA affirmed the order of the probate court, rejecting the lack of jurisdiction argument. The Third DCA found that the probate court did not abuse its discretion by failing to defer to the general jurisdiction civil case. For one thing, the estate was opened in October 1999. The civil case was filed in 2000. Furthermore, the Third DCA noted that the quantum meruit claim was not being prosecuted. Kutlesic filed a prose voluntary dismissal of the quantum meruit claim, and "then attempted" to again appeal the earlier dismissal of the other three counts in the general jurisdiction civil case, which appeal had also been dismissed by the Third DCA.

The decedent's siblings and his surviving spouse were fighting over where the decedent should be buried. The District Court of Appeal, in what it called "an issue of first impression in Florida," concluded that a testamentary direction as to the disposition of a testator's body is not conclusive and can be overcome by clear and convincing evidence that the decedent intended another disposition.
Cohen v. Guardianship of Cohen, 30 Fla. L. Weekly D664 (Fla. 4 DCA March 9, 2005)

The decedent's brother and sister were fighting with the decedent's wife over where the decedent was to be buried. The brother and sister wanted the decedent to be buried in New York in the family plot in accordance with the statement contained in the decedent's 1992 will executed in New York before the decedent and his wife moved to Florida. The decedent's wife and others, including the decedent's daughter and the doctor that examined him in the course of incapacity proceedings, testified that the decedent had expressed his desire to be buried in Florida with his wife of forty years.

The trial court was faced with the issue of whether a decedent's testamentary burial instructions may be disregarded when the decedent made oral statements subsequent to the execution of the will regarding his desire as to final resting arrangements that differed from those contained in the will. The trial court determined that there was an ambiguity in the decedent's will and therefore considered extrinsic evidence in reaching its conclusion that the decedent's intention was to be buried in Florida where his wife would ultimately be buried, as expressed orally subsequent to the execution of the will. The decedent's brother and sister appealed.

The Fourth DCA agreed with the result reached by the trial court, but apparently did not believe that it was necessary to have found an ambiguity in the will under these circumstances. The Fourth DCA stated that it was presented with "an issue of first impression in Florida." After reviewing Florida law and the decisions of other states, the Fourth DCA stated that there is no property right in the body of a deceased, and as such, a direction in a will regarding the disposition of one's body is not of a nature that would require revocation in the same manner as would be required by statute for a change in

the testamentary disposition of property. The Fourth DCA concluded that a testamentary disposition of a decedent's body, not being a disposition of property, "does not have the same force and effect as do provisions directing the disposition of property." The Fourth DCA noted, however, that where there is an express provision in a will regarding the disposition of one's body, courts of other states have required clear and convincing proof of a different desire. That being the case, the Fourth DCA held that a testamentary direction as to the disposition of a testator's body "is not conclusive of the testator's intent if it can be shown by clear and convincing evidence that he intended another disposition for his body."

The Fourth DCA noted that it is not the function of the appellate court to substitute its judgment for that of the trial court by reevaluating the evidence, the trial court having heard and considered the credibility of the evidence. The fact that the standard that must be met in order to disregard the express terms of the will is "a clear and convincing evidence standard" did not alter the appellate court's task on review.

The Fourth DCA affirmed the decision of the trial court and concluded its decision with the following remarks: "It is a sorrowful matter to have relatives disputing in court over the remains of the deceased. In this case in particular, there is no solution that will bring peace to all of the parties. We express our sympathies to both sides in their loss, which must be magnified by these proceedings.... We are confident that the experienced trial judge exercised his power with due regard for the serious and emotional issues presented."

The trial court entered a civil contempt order against a former personal representative for failure to return estate property. Since the contempt order did not include a finding that the decedent's mother, the former personal representative, had the "present ability" to comply with the contempt order, the District Court of Appeal reversed the trial court and remanded for further proceedings to determine the former personal representative's ability (1) to retrieve the property that had been sold to pay funeral expenses or (2) to pay the estate the fair market value of any property that she could not retrieve.

Jensen v. Estate of Gambidilla, 30 Fla. L. Weekly D578 (Fla. 4 DCA March 2, 2005)

The decedent's mother was appointed personal representative of her daughter's intestate estate. While serving as personal representative, and while accompanied by a law enforcement officer, she retrieved the decedent's personal property from the decedent's home which the decedent shared with her boyfriend. The decedent's mother then returned to her own home in New Jersey.

After the decedent's mother returned to New Jersey, the decedent's boyfriend found a will that named him personal representative and primary beneficiary. He obtained orders (1) removing the decedent's mother as personal representative, (2) requiring the dece-dent's mother to return all of the estate's property within fifteen days, (3) admitting the will to probate, and (4) appointing the boyfriend as personal representative.

When the decedent's mother did not return the property in accordance with the order, the boyfriend moved to hold the decedent's mother in contempt. The decedent's mother, now a former personal representative, represented herself by telephone at the first contempt hearing. The court again ordered that she return the property. She returned all of the estate property ordered to be returned except for (1) the decedent's pet cat, (2) $3,000 that the boyfriend alleged the decedent's mother had taken from the home, (3) two guns, (4) eleven pieces of art, and (5) a compressor.

The boyfriend filed a second motion to hold the decedent's mother in contempt. The mother was represented by an attorney at the hearing on the second contempt motion, but she did not attend the hearing. The attorney explained that the cat ran away, the decedent's mother did not take $3,000, the guns were being returned, and the rest of the items that had not been returned had been sold to pay for the decedent's funeral expenses while the decedent's mother was serving as personal representative. The decedent's mother submitted an affidavit that itemized the property that had been sold and stated that she had no more property of the decedent or of the decedent's boyfriend.

The trial court held the decedent's mother in contempt, ordered that she be immediately incarcerated, and issued a writ of bodily attachment that could be cancelled if she either returned the missing property or paid $5,000. The decedent's mother appealed the civil contempt order.

The Fourth DCA reversed the trial court's civil contempt order because the order did not include a finding that the decedent's mother "had the present ability to comply with the order." In the opinion, the Fourth DCA also pointed out that it has previously held that the court order must also contain a finding that the contemnor willfully refused to comply.

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

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Fall 2005	July 31, 2005
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requires consents and/or direction from the beneficiaries or a percentage of the beneficiaries for the trustee to act. A prerequisite to not tipping the balance is the continued secrecy of the nature of the underlying trust, terms of the trust and nature of the interests held by the beneficiaries of the trust. The statute fills in the gaps by providing and/or implying that the beneficiaries' interests constitute *personal property interests* and that the trustee has full power and authority to act on their behalf, regardless of the unknown provisions in the underlying trust agreement.

Ideally, a land trust deed should indicate the name of the trustee and successor trustee, the name of the underlying trust and date on which it was executed. It should detail as many powers and authorities as will be required for any subsequent transactions. To prevent review of the underlying trust, the "when and how" a successor trustee takes over should be detailed to leave no room for doubt. The settlor, trustee and beneficiaries should be cautioned to not reveal the contents of the trust or do any act which would imply that there are any provisions in the underlying trust agreement dissimilar from those in the land trust deed.

Homestead works in the open. The person claiming the homestead status does this by some type of proclamation. To protect homeowners from creditors and family members from becoming homeless through unilateral acts of the titleholder spouse, the Florida Constitution in Article X, Sec. 4, defines the parameters of the protections afforded the homeowner and family members. The homestead is limited to the residence of the owner or the owner's family. An equitable title in the real property with right of possession can be sufficient to be afforded the homestead protection. See *Bessemer Properties, Inc. v. Gamble*, 27 So.2d 832 (Fla. 1946). Art. VII, Sec. 6 of the Florida Constitution further requires that the person claiming the homestead tax exemption have the legal or equitable title to the real estate. A right of possession and use of real property is part of the bundle of rights of a fee simple owner. Even a beneficial interest for life is sufficient under Section 196.041(2), Fla. Stat., to be declared an equitable title in real estate for purposes of obtaining the homestead tax exemption. By claiming a homestead or a homestead tax exemption, the ownership interest shifts from a *personal property interest in the trust* to an *equitable title in the real estate.* Therefore, asserting a homestead upon the land trust property is an act that implies that the underlying trust agreement has dissimilar provisions. The homestead status being a matter of public notice, may lift the veil of protection regarding the terms of the underlying trust agreement because the trust set forth under the land trust deed may no longer fall within the parameters of the land trust statute. However, there may be remedial alternatives to a complete discovery of the underlying trust agreement depending on the particular circumstances. There are three sets of parties that exist in all land trusts. The actions to be taken to clear title may vary depending on which one of them asserts a homestead.

Homestead of the settlor. When a previous owner of the land trust property or the person whose name appears on the named land trust, e.g. Thomas Clarke, as trustee of the *John Everett* land trust dated May 2, 1999, continues to reside on the land trust property, it is indicative that the same person is also the settlor of the trust and could even be a beneficiary of the trust. For purposes of spousal joinder, the underlying trust agreement would not need to be reviewed

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Cut-off date: 03/20/2006.

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Section Convention at Hilton Walt Disney World Resort
800-445-8667, Room Rate $165
Cut-off date: 04/23/2006

to ascertain that the trust is irrevocable and free from the settlor's direction. However, by virtue of the settlor's possession of the land trust property, the signature of the settlor and settlor's spouse would be necessary upon any disposition of a right, title or interest in the property. If the settlor dies, further inquiry regarding a surviving spouse or minor children would be necessary. In accordance with *In Re Estate of Johnson*, 397 So.2d 970 (Fla. 4th DCA 1981), "you cannot do indirectly what you cannot do directly." Neither a will nor a trust that is either revocable or passive can obviate the protections afforded to a spouse or minor child under the homestead laws. Also see F.S. 732.4015(2). If survived by a spouse or minor child, a requirement should be made for review of the underlying trust agreement to prove that the trust is irrevocable and free from the settlor's direction. If not survived by a spouse or minor child, an affidavit from a knowledgeable third party to that effect should obviate the need to review the underlying trust agreement. A name search should be done on a known settlor residing on the trust property. If a judgment is recorded against the settlor, a non-identify affidavit may avert review of the underlying trust agreement. However, if a creditor seeks to enforce a judgment or other general lien against the land trust property, both the enforcement of the judgment and the defense of homestead would require a further review of the underlying trust agreement to ascertain what interests, if any, the settlor retained.

Homestead of the trustee. A land trustee under the provisions of F.S. 689.071 is vested with "full rights of ownership of the real property, or interest therein." Parties dealing with the trustee can rely on those powers regardless of the unknown provisions in the underlying trust. Because the trustee is vested with the full legal and equitable title to the real property, beneficiaries are, by implication, precluded from having anything but a personal property interest under the trust. Though land trustees do not have to be natural persons, land trustees who are natural persons residing on homestead property are bound by the provisions concerning homesteads. A land trustee's residence could be claimed as a homestead due to the nature of the ownership interest, i.e. full rights of ownership. Conveyances from the land trustee residing on homestead property would require joinder of spouse whether or not the trustee is also a beneficiary of the underlying land trust. If this is done there is no need to review the underlying trust agreement. The death of such land trustee could raise questions of inheritance regarding the homestead property if survived by a spouse or minor child which would require discovery of the trust. If not survived by a spouse or minor child, an affidavit from a knowledgeable third party should obviate review of the underlying trust. The premise for review of the trust would be that the trustee was also either a settlor or a beneficiary of the trust. A review of the underlying trust agreement, which upon actual knowledge of its contents would supercede the provisions of the recorded land trust deed, would substantiate or invalidate that premise. Name searches for judgment and other liens would have to be run regarding the trustee and, where applicable, a defense that the property is homestead could be made.

Homestead of the beneficiary. One of the cardinal sins of a beneficiary of a land trust is to come out of hiding. The land trust statute protects third parties dealing with the trustee against any right, title or interest retained by the beneficiaries of the underlying trust. The caveat here is that the beneficiaries are not to act in any manner that would directly or indirectly neutralize the shield afforded by the statute. A person, whether named or not named as beneficiary on the land trust deed, who, for example, (1) obtains a homestead tax exemption on the subject real property, (2) assigns on record his beneficial interest in the subject real property, or (3) manages the real property while alluding to have some right, title or interest in the real property, is calling attention to the possibility that the provisions of the land trust deed are superceded by some underlying trust document. Any of those acts would be sufficient to require discovery of the trust as they run afoul of the land trust statute which provides that the beneficiary has only a personal property interest in the land trust. Once the provisions of the underlying trust are known, additional requirements for deeds by the beneficiaries, joinder of spouses, probate and clearance of judgments and other general liens may need to be made depending on the provisions of the underlying trust agreement.

The balance between the protections afforded by the land trust statute is a delicate one. If property is placed in a land trust, the settlor, land trustee and beneficiaries should not veer from the parts that they must play in accordance with the provisions of the land trust statute. If any party dealing with the trustee chances upon any action incongruent with that statute, such as an assertion of homestead, this may result in either discovery of the trust with its attendant requirements or at least exculpatory affidavits. There are many variations to the situations listed above and just as many ways to resolve issues created by them. It is more important to identify the issues than knowing how to resolve them. Reference materials abound once the issues are identified. When issuing a title insurance policy in a situation where the homestead status has collided with the protections afforded by the land trust statute and you are in a quandary, contact your friendly underwriting counsel for alternative solutions.

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TOTAL **$_____**

Firm:_____

Attn: _____ **Attorney #:** _____

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Phone: (____) _____ **Fax: (____)** _____

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

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Card Number **Exp. Date** **Signature of Cardholder Required**

Duty of Good Faith Owed as to Lease Assignment

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

In *Pusser's Inc. v. THI Oceanfront L.P.*[1], the plaintiff had entered into an agreement to sell its restaurant and bar to a third party (the "Shore Restaurant Group") and sought the defendant's approval of the assignment of the lease. The defendant had orally approved the assignment to the Shore Restaurant Group and its intended modifications.

Thereafter, the defendant wrote that they had agreed to the lease assignment but conditioned it upon the plaintiff paying the defendant $300,000 and Shore Restaurant Group paying an additional security of $130,000 as well as a $200,000 increase in rent over the term of the lease.

As a consequence of the defendant's demands, the deal between the plaintiff and Shore Restaurant Group was terminated since there was no profitable reason to proceed.

The plaintiff commenced an action for, *inter alia*, breach of contract after the defendant-landlord refused to consent to the assignment of the commercial lease to a third party. The defendant answered that under the terms of the lease, it had "sole and absolute discretion" to determine whether any assignment of the lease was acceptable and whether new terms were required. The plaintiff did not disagree but argued that the defendant had a statutory duty to act reasonably and in good faith in considering the request for assignment and, based upon that statutory duty, sought partial summary judgment as to defendant's liability as a matter of law.

The Court agreed with the plaintiff that there are statutory and case-law proscribed duties which are placed upon the defendant in reviewing a request for assignment of lease. Such a request must be considered with good faith and if not it can be held as a breach of lease.

Despite the duty to act in good faith, the Court determined that there were issues of fact that prevented the award of summary judgment to the plaintiff on the issue of liability and that under the lease presented, the defendant did have deference in its decision to approve or disapprove the assignment.

Abatement Until Assessment and Payment

In *Forsythe v. Roth*[2], the plaintiff filed an eviction claim against the defendant on August 25 based on a Three-Day Notice which demanded $1,400 plus late charges for the unpaid rent since July 20. On September 20, the plaintiff's counsel filed a Notice of Voluntary Dismissal. On September 14, counsel for defendant filed a Motion to Tax Costs Including Attorneys' Fees and Defendant's Motion to Abate any new tenant eviction action based upon or including the same claim.

Defendant's counsel faxed the foregoing motion papers to plaintiff's counsel together with a letter advising that he would seek sanctions should plaintiff's counsel or his client institute a new suit for tenant eviction based on or including the same claim.

The Court pointed out that Rule 1.420(d) provides for the awarding of costs if a party who has once dismissed a claim in any court of this state commences another action based upon or including the same claim previously dismissed and also provides for a stay of the proceedings in the new action until the party seeking the affirmative relief has complied with the order.

Since a secondary action commenced by the plaintiff was based upon or included the same claim, the Court abated the second action until costs, including attorneys' fees, were assessed and paid.

"Including" Versus "And" – Not Just Semantical

In *Haige v. Schueder*[3], Schueder filed an eviction complaint against Haige. Haige filed an answer with affirmative defenses and a motion to dismiss. Prior to the hearing on the motion to dismiss, Haige moved out of the property resulting in Shueder filing a Notice of Voluntary Dismissal.

Thereafter, Haige filed a Motion to Tax Costs and Attorney's Fees and the trial court awarded costs but declined to award attorney's fees finding that attorney's fees could not be considered "costs" since no judgment was entered. The sole issue for the appellate court was whether the trial court erred, as a matter of law, in finding that attorney's fees were not an element of costs since a judgment or decree was not entered.

The Court pointed out that Haige was not a "prevailing party" in the proceedings below so he could not recover costs under F.S. §83.59(4). Rather, Haige could only recover attorney's fees as an element of costs pursuant to Florida Rule of Civil Procedure, Rule 1.420(d), which provides that "[c]osts in any action dismissed under this rule shall be assessed and judgment for costs entered in that action."

The trial court had denied the attorney's fees application based on the language of Fla. Sta. §83.48, which states, "[i]n any civil action brought to enforce the provisions of the rental agreement or this part, the party in whose favor a judgment or decree has been rendered may recover costs, including attorney's fees, from the non-prevailing party." Because no judgment or decree had been rendered in Haige's favor, the trial court refused to award attorney's fees.

However, the Court held, since Fla. Sta. §83.48 defined the term "costs" to *include* attorneys fees, under Florida Rule of Civil Procedure, Rule 1.420(d), the trial court had no discretion but to award fees and Haige was entitled to recover his attorney's fees because Fla. Sta. §83.48 defined costs to include fees even though no judgment had been rendered in his favor.

The Court pointed out that the use of the word "including" versus the word "and" was pivotal in the analysis inasmuch as previous cases made it clear that where a statute provided for the recovery of "attorney's fees *and* court costs", the statute had not defined costs to include attorney's fees.

Residential Eviction? Comply With the FDCPA

In *Sailboat Bend Properties, LLC v. Wyant*[4], the plaintiff had commenced a residential eviction proceeding. The defendant filed his Motion to Dismiss Plaintiff's Complaint for tenant eviction without leave to amend and a Motion for Judgment on the Pleadings.

The defendant's Motion was granted because the Three-Day Notice not only demanded rent not yet due but also violated the Federal and State Fair Debt Collection Practices Act by failing to give the thirty (30)-day validation period.

By virtue of the fatally defective Three-Day Notice, the plaintiff had failed to terminate the defendant's rental agreement and, accordingly, the plaintiff had no cause of action at the time of the filing. Since an essential element of plaintiff's cause of action was missing at the time of filing, the defendant was not required to pay rent into the Court Registry.

Innovation Is Key to Success

In *Salic v. Padilla*[5], counsel for the defendant tenant had the tenant sign a retainer agreement which contained an assignment of attorney's fees and authorized the Court to award the attorney's fees directly in the name of the defendant's counsel should the tenant prevail in the eviction action.

The Court approved the practice "as its promotes access to the Courts", awarded defendant's counsel his fees, which fees were to be recovered by him from the plaintiff, and granted defendant's counsel execution therefor.

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

Endnotes:

[1] 12 Fla. L. Weekly Supp. 360b (Fla. 17th Cir. Dec. 15, 2004).
[2] 12 Fla. L. Weekly Supp. 175a (Fla. 17th Cir. Sept. 23, 2004).
[3] 12 Fla. L. Weekly Supp. 196a (Fla. 6th Cir. Aug. 28, 2004).
[4] 12 Fla. L. Weekly Supp 258a (Fla. 17th Cir. Oct. 2, 2004).
[5] 12 Fla. L. Weekly Supp. 259a (Fla. 17th Cir. Oct. 20, 2004).



THE FLORIDA BAR CLE

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

Powers of Attorney, Living Wills and More

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Course No. 0320R

8:30 a.m. – 8:55 a.m. **Late Registration**

8:55 a.m. – 9:00 a.m.
Welcome
Donald R. Peyton, Program Chair, New Port Richey

9:00 a.m. – 9:35 a.m.
Overview of Less Restrictive Alternatives
Michael L. Foreman, Sarasota

9:35 a.m. – 10:10 a.m.
Estate Planning and Gifting Under Powers of Attorney
Glenn M. Mednick, Boca Raton

10:10 a.m. – 10:45 a.m.
Evidentiary Issues: Powers of Attorney, Guardianships, and Living Wills
Steven L. Hearn, Tampa

10:45 a.m. – 10:55 a.m. **Break**

10:55 a.m. – 11:30 a.m.
Durable Powers of Attorney: Drafting 101
Richard E. Warner, Marathon

11:30 a.m. – 12:05 p.m.
Alternatives to Guardianship – Litigation
David R. Carlisle, Miami

12:05 p.m. – 1:15 p.m.
Lunch (included in the registration fee for the Miami and Tampa presentations)

1:15 p.m. – 1:50 p.m.
Comprehensive Update on Living Wills
Steven E. Quinnell, Pensacola

1:50 p.m. – 2:40 p.m.
No Advance Directive – Now What? (panel discussion)
Hon. George W. Greer, Clearwater
Tami Conetta, Sarasota
Enrique Zamora, Coconut Grove

2:40 p.m. – 3:15 p.m.
Fiduciary Duty and Self Dealing
William Fletcher Belcher, St. Petersburg

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25th Annual Legislative and Recent Case Law Update

Course Number 0257R

August 19, 2005 • Ritz Carlton • Palm Beach

One Location – Limited Space

8:00 a.m. – 8:30 a.m.
Late Registration

8:30 a.m. – 8:35 a.m.
Introduction
Jay Zschau, Clearwater

8:35 a.m. – 9:05 a.m.
Legislative Potpourri
Peter Dunbar, Tallahassee

9:05 a.m. – 9:20 a.m.
Judgments and UCC Assignments - Changes Under SB370
Barry Ansbacher, Jacksonville

9:20 a.m. – 9:40 a.m.
Disclaimers: New Chapter 739
Richard Gans, Sarasota

9:40 a.m. – 9:55 a.m.
Statutory Way of Necessity
Rod Neuman, Tampa

9:55 a.m. – 10:10 a.m.
Changes to Trust Code
Don Tescher, Boca Raton

10:10 a.m. – 10:25 a.m.
Break

10:25 a.m. – 10:45 a.m.
Commercial Real Estate Lien
Burt Bruton, Miami

10:45 a.m. – 11:00 a.m.
IRA and Qualified Plan Update
Kristen Lynch, Boca Raton

11:00 a.m. – 11:05 a.m.
College Savings Saved: Thanks Florida Legislature
Charles Ian Nash, Melbourne

11:05 a.m. – 12:00 p.m.
2005 Bankruptcy Act - Panel Discussion
Charles Ian Nash, Melbourne
Marsha Rydberg, Tampa
Barry Nelson, North Miami Beach

12:00 p.m. – 1:15 p.m.
Lunch and Awards Ceremony

1:15 p.m. – 1:35 p.m.
Title Insurance Update
Norwood Gay, Orlando

1:35 p.m. – 1:55 p.m.
Demise of the Dead Man's Statute
Jack Falk, Coral Gables

1:55 p.m. – 2:15 p.m.
Mortgage Releases
Wayne Sobien, Winter Park

2:15 p.m. – 2:35 p.m.
Limited Partnerships and Business Entities
Greg Marks, Miami

2:35 p.m. – 2:50 p.m.
Construction Law
Fred Dudley, Tallahassee

2:50 p.m. – 3:05 p.m.
Break

3:05 p.m. – 3:20 p.m.
Bert Harris Turns 10
Susan Spurgeon, Tampa

3:20 p.m. – 3:40 p.m.
HOA and Condominiums
Michael Gelfand, West Palm Beach

3:40 p.m. – 4:05 p.m.
Update on Real Estate Cases
Pat Hancock, Maitland

4:05 p.m. – 4:35 p.m.
Update on Probate and Trust Law Cases
David Brennan, Orlando

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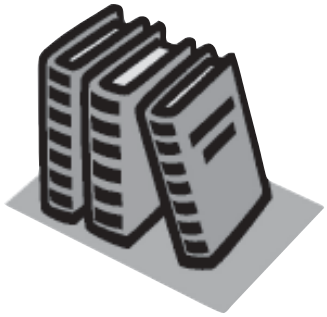

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— Pat Hancock

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